



**SUBMISSION TO THE PRESS FREEDOM COMMISSION ON MEDIA  
SELF-REGULATION IN SOUTH AFRICA**

**This report was compiled by a research team at the Department of Communication Science  
at the University of South Africa (UNISA)**

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## **SUBMISSION TO THE PRESS FREEDOM COMMISSION**

### **1. INTRODUCTION**

This research report has been compiled in response to the invitation for public comment, issued by the Press Freedom Commission on 12 October 2011, on the regulation of print media in South Africa (<http://www.pressfreedomcomm.org/>).

This report therefore details a number of suggested changes to the current press accountability mechanism of self-regulation, mostly pertaining to the Complaints Procedure of the Press Council of South Africa. This report was compiled with two main important points of reference, the first being the Review report released by the Press Council of South Africa in August 2011. The second is an inventory of foreign systems of press regulation and press freedom indexes (see Appendix C).

Much of the discussion in this report refers to Appendix C: inventory of foreign systems of press regulation and press freedom indexes. This inventory was compiled for this report, and assembled according to the information which is available online for each of the 50 foreign press councils or media regulatory bodies listed. Therefore, the information provided on this inventory is accurate only as far as the information provided online by these 50 foreign press regulatory bodies is accurate and up-to-date at this time. Where no information could be traced online with regard to the criteria listed on the inventory (particularly in the last column which deals with third party complaints) this is indicated clearly on the inventory (see Appendix C).

The research performed for this report, and our analysis thereof, indicates that the system of self-regulation in South Africa can still be improved, and this report suggests how this may be done. However, the research delivered in this report also indicates that press self-regulation is the most desirable system of press accountability for South Africa, in the interest of fostering a free press, and freedom of expression through the media. We therefore recommend that the current system of press self-regulation be retained.

This report includes a discussion of each of the recommended changes/improvements to this system of self-regulation in sections 2 – 6. Our concerns with the Press Freedom Commission's Final Terms of Reference document are discussed in section 7. This report concludes in section 8, with a list of recommendations stemming from the discussions and evidence delivered in sections 2 – 7.

## **2. THIRD PARTY COMPLAINTS**

**Julie Reid**

During the South African Press Council's process of review I took part in the public hearings held in February 2011, and thereafter made a written submission to the Press Council (Reid 2011b). The main emphasis of my recommendations to the Press Council was that the Press Council's Complaints Procedure should allow for third party complaints: these would be complaints from individuals or organisations who are not directly affected by the content of a press report, or who are not necessarily linked to the content of the report.

Currently the complaints procedure defines the complainant as follows:

“ ‘Complainant’ shall mean and include any person who or body of persons which lodges a complaint, provided that such person or body of persons has a direct, personal interest in the matter complained of. In exceptional circumstances, we will take complaints from third-party complainants when there is no risk that a person directly affected could complain to the courts after it has been dealt with in the Ombudsman's system” (Review. Press Council of South Africa 2011:77).

This section of this report will address the first sentence in the definition quoted above. The second sentence is discussed in the following section (section 3). This report recommends that third party complaints should be allowed by the Press Council of South Africa under any and all circumstances, and not only under exceptional circumstances or on an ad hoc basis. Furthermore, we recommend that the role of the Press Council and the possibility of laying third party complaints should be widely publicised and advertised, so that members of the public and readers may become aware of this new function of the Press Ombudsman.

### **2.1 Why are third party complaints not accepted by the Press Council?**

According to the Review released by the Press Council in August 2011, third party complaints will be accepted by the Press Council only when there is no risk that persons with a direct interest in the press report in question, could take the matter to the courts. The report states that rather than laying a complaint with the Press Council, concerned readers should instead contact the affected person and encourage him/her to submit a complaint to the Press Council.

“Currently third-party complaints are accepted when there is no risk that a person directly affected could take the complaint to the courts after it had been dealt with in the Ombudsman’s system. The relationship of the third-party to the matter is taken into account” (Review Press Council of South Africa 2011:56).

Effectively then, what this means is that in practice third party complaints are, in most cases, not allowed. The instances where a third party can complain where the above stipulations do not apply are likely to be extremely rare. Should a third party be concerned about a particular press report, it is unlikely that the report in question will not contain references to persons who have a direct interest in the matter reported. The possibility for third party complaints is thus nullified by this stipulation.

There is the argument that readers of newspapers can complain about the content of a press report to the editor of the newspaper in which the report appeared. This is true, but there is of course no guarantee that the editor will respond to a reader’s complaint, and the response to such complaints depends largely on the discretion of the editor. In cases where the editor does not respond, the concerned reader (third party) is left with no other recourse.

During the public hearings held in February 2011, and at the release of the Review report in August 2011, members of the Press Council stated that an additional motivation for the continued practice of the non-acceptance of third party complaints, was that it is not common practice in other Press Councils from around the globe. According to the Review report, the task team who conducted the review of the Press Council reviewed 100 press codes from other countries (Review Press Council of South Africa 2011:59). However, our research team has found that this is not necessarily correct.

To test the above-mentioned argument, we have compiled an inventory (Appendix C) of the media accountability mechanisms of 50 countries. These 50 countries were purposefully selected because of their high press freedom rating according to two widely used press freedom indexes, compiled annually by *Reporters Without Borders* and *Freedom House*. At the time of writing this report, *Reporters Without Borders* had not yet released its annual survey for the year 2011 (which is due to be released between December 2011 and January 2012), and therefore the 2010 survey and press

freedom index was used here. The 2011 *Freedom House World Press Freedom Map* was incorporated into our inventory.

We selected to compile an inventory of the top 50 countries which achieved the highest press freedom ratings because it stands to reason that as a democracy, these are the countries from which we may learn the most valuable lessons when reviewing our own media accountability mechanisms as well as acting in defence of our press freedom. These countries must be doing something right. Furthermore, often a country's press freedom rating will be largely decided according to the system of media regulation in that country.

*Reporters Without Borders* uses a five-scale rating as such: good situation, satisfactory situation, noticeable problems, difficult situation, very serious situation.

*Freedom House* uses a three-scale rating as such: free, partly free, not free.

*Reporters Without Borders* further rates countries according to a predetermined scoring system, and thereafter orders them according to this scoring, ranging from the country with the highest press freedom rating (Finland) to the lowest (Eritrea). The lower the scoring, the higher the press freedom rating. Whilst Finland achieves a scoring of 0,00, Eritrea achieves a scoring of 105,00. South Africa's position on this list is at number 38, the country achieved a score of 12,00 points, and was rated as a 'satisfactory situation'.

In the first column of the inventory that we compiled (Appendix C), the countries are listed in the order of the *Reporters Without Borders* scoring. In the second column of our inventory the *Freedom House* rating for each of these countries is listed. At first glance, one can notice that the two indexes are largely symmetrical to one another, and even though they have utilised slightly different rating systems, the results for many countries are similar.

There are only 16 countries which both *Reporters Without Borders* and *Freedom House* agree have an entirely free press. They are: Finland, Iceland, Netherlands, Norway, Sweden, Switzerland, Austria, New Zealand, Estonia, Ireland, Denmark, Lithuania, Belgium, Luxembourg, Malta, and Germany. Disappointingly, not a single African country scores an entirely free press rating on both of these press freedom indexes. Although Japan is placed at number 12 on the *Reporters Without Borders* list and on the inventory here, it does not achieve a score of entirely free. It is worth noting that Japan's press is regulated in part by the government.

We have found that out of the top 16 countries on this inventory 8 of them accept third party complaints. The complaints procedure of Austria did not stipulate whether or not third party complaints are accepted. Thus, 7 of the top 16 countries do not accept third party complaints.

The complaints procedure of the Finnish press code begins as follows: "A complaint may be filed by any individual requesting the investigation of a matter concerning breach of good professional practice or the freedom of speech and publication. The matter does not have to directly concern the person issuing the complaint" ([www.jsn.fi/en/complain\\_instructions](http://www.jsn.fi/en/complain_instructions)). Finland currently has the highest press freedom rating in the world.

The complaints procedure of the Swedish press code states: "Any interested members of the public can lodge a complaint with the PO against newspaper items they regard as a violation of good journalistic practice. But the person to whom the article relates must provide written consent if the complaint is to result in formal criticism of the newspaper" ([www.po.se/english/how-self-regulation-works](http://www.po.se/english/how-self-regulation-works)).

Therefore, we reject the argument that it is not standard international practice to allow for third party complaints to the Press Council. Not only is this argument false, but because third party complaints are allowed in a significant number of countries (50%) which have achieved amongst the highest press freedom ratings in the world, it may be argued that to allow third party complaints could after more detailed investigation, very well amount to best practice.

In 5 of the countries where third party complaints are allowed, the permission of the individual with a direct interest in the offending news article must be sought before the Press Council investigates the matter (these countries are Finland, Norway, Sweden, New Zealand and Ireland). I do not regard this to be an acceptable solution, and believe that there should be no limitations on third party complaints. However, this situation is still a marked improvement when measured against the current stipulations in the South African Press Complaints Procedure, which asks concerned readers to contact the directly affected party and encourage him/her to complain (if this route is followed, then the complaint, if it is laid, no longer qualifies as a third party complaint). The complaints procedures of Finland, Norway, Sweden and New Zealand allow for third party complaints where the consent of the effected individual has been granted: although I feel it is unnecessary to request the effected individual's consent, in this procedure third party complaints are nonetheless still allowed,

because the effected individual only needs to grant permission for the complaint to be laid, but is not asked to lay a complaint themselves. As long as this permission is granted, the third party can lay a complaint, which is not the case in South Africa.

I was not alone in my suggestion to the South African Press Council in February 2011, that third party complaints should be allowed. Pete Swanepoel said the following in his submission to the Press Council: “The Press Council has weakened itself in the past and needs to strengthen itself by: - Allowing anyone to be a complainant – the present restrictive description of who may complain serves to emasculate the council. At least a MUCH broader description is needed, in which people can complain IN PRINCIPLE and not only when they are “directly personally affected”... The Press Council has been aloof in the past and needs to strengthen itself by... allowing THE SA PUBLIC to in effect **become** SA’s “press ombudsman”” (Swanepoel 2011).

## **2.2 Why allow for third party complaints?**

Below I list some of the reasons why I believe it is fundamentally important for the South African Press Council to allow for third party complaints, and to promote the reader’s right to lay third party complaints.

First, this would certainly improve the quality of journalism, because immediately newspapers would become far more accountable to the public. The Press Council has been criticised because it operates in a reactive manner and only acts on the receipt of a complaint, instead of operating pro-actively and monitoring the press for cases of shoddy journalism. Of course, one cannot practically expect an institution the size of the Press Council to monitor hundreds of publications on a daily basis in an effective manner. However, why should the Press Council monitor the print media when thousands of readers are already doing so? Should readers be allowed to complain about instances of reporting which concern them, and should they be aware of their right to do so, then the Press Council would literally have an army of ‘monitors’ at its disposal. Added to that, journalists for their part, may be less likely to knowingly err under these circumstances. If a journalist is aware that not only can an individual directly linked to a particular story lay a complaint, but indeed any member of the public, diligence in journalistic responsibilities such as fact-checking are likely to be heightened. Thus, the journalistic profession would become more accountable to readers and to the public, inevitably raising the standards of journalism in South Africa.

Second, if the Press Council did allow third party complaints this would be more consistent with the complaints bodies that regulate other media. The Broadcasting Complaints Commission of South Africa (BCCSA) accepts third party complaints relating to the broadcasting sector, and in addition, the BCCSA advertises widely within broadcast media to inform the public of their right to complain when they feel that a broadcaster has contravened the code of conduct of the BCCSA. The Advertising Standards Authority (ASA) accepts third party complaints from anyone who is concerned about the content of an advertisement or an advertising campaign. The complaints procedure of the Advertising Standards Authority states, “Any person can lodge a complaint with the ASA regarding the content of an advertisement” ([http://www.asasa.org.za/Default.aspx?mnu\\_id=81](http://www.asasa.org.za/Default.aspx?mnu_id=81))

Recently, the Advertising Standards Authority ruled in favour of a complainant that felt that his values, as a Christian, were insulted by an AXE advertising campaign that represented beautiful women (angels) falling from heaven after a man sprayed himself with the deodorant (Down-to-earth Axe ad gets the chop for obtuse angel riff. 2011). As a Christian myself, I was not terribly offended by the AXE advertising campaign, but I could understand the argument of the complainant (Although in the interest of freedom of speech this particular decision by the ASA could be questioned in terms of where to draw the line when advertisements utilise popular religious mythology, but that is for another debate). My Christian sensibilities were far more affronted, however, the day I saw a picture on the front page of a major South African newspaper, depicting a prison warder and a police officer engaging in a sex act. I could not complain about this to the Press Council, in the way that a complaint was laid with the Advertising Standards Authority about the AXE advertisement, simply because the Press Council does not accept third party complaints. The press, it seems, can then literally get away with more than other media. In South Africa, advertisements cannot represent angels, but newspapers can depict sex. I made this same argument in my original submission to the South African Press Council in March 2011, where I sited another similar example (Reid 2011). Why is it, that as a South African media user, I can lay a complaint about what I see in an advertisement, what I hear on radio, or what I see on television, but NOT about what I read in the press?

Third, the Press Council should accept third party complaints as a rule because it has done so on isolated occasions in the past, and has stated that it may do so (under very particular circumstances) in the future. When the Press Council does select to accept a third party complaint, it is thereby contravening its own regulations. It is advisable, in this instance, to align the regulations with what is already taking place in practice. Not only will this prevent the Press Council from acting

inconsistently with its own complaints procedure, but it will be a positive move for all of the other reasons listed here.

Fourth: at the present time, some (though not all) of the newspapers which subscribe to the Press Code publish the logo of the Press Council, usually on the second page of the publication. A short paragraph appears beneath the Press Council's logo, which explains that should readers be concerned that the newspaper has contravened the Press Code, they should contact the Press Ombudsman. For example, this paragraph appeared beneath the Press Council's logo in the *Times* newspaper on 23 November 2011:

“The Times subscribes to the South African Press Code that prescribes news that is truthful, accurate, fair and balanced. If we don't live up to the code please contact the Press Ombudsman at 011-484-3618”.

Similar, to near identical, paragraphs appear beneath the Press Council's logo in a number of other newspapers, including the *Sunday Times* and the *Mail & Guardian*. These paragraphs, however, are misleading to the reader. They are obviously suggestive in their message that readers may complain about the content of a newspaper to the Press Ombudsman, when in reality this is not allowed. These brief descriptions, published along with the Press Council's logo, say nothing which alludes to the rule that only persons directly linked to newspaper reports may act as complainants. I do not doubt that this misleading of the public alongside the publication of the Press Council's logo was ever intentional, but it is inherently problematic and should be rectified urgently. I do not suggest that it be rectified by simply asking newspapers to omit or amend the paragraph printed beneath the Press Council's logo, but instead, the Complaints Procedure should be amended to allow for the type of complaints which are implied in the paragraphs printed below the logo.

Shaik was sentenced to 15 years' imprisonment, including for his



The *Mail & Guardian* subscribes to the South African Press Code that prescribes news that is truthful, accurate, fair and balanced. If we don't live up to the code, please contact the Press Ombudsman at Tel: 011 484 3612/8.

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**Figure 1:** *Mail & Guardian* (2011:2): the logo of the South African Press Council is printed on the second page of the newspaper, followed by a brief paragraph informing readers of their right to complain to the Press Ombudsman



**Figure 2:** *Sunday Times* (2011:2): the logo of the South African Press Council is printed on the second page of the newspaper, followed by a brief paragraph informing readers of their right to complain to the Press Ombudsman

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**Figure 3:** *The Times* (2011:2): the logo of the South African Press Council is printed on the second page of the newspaper, followed by a brief paragraph informing readers of their right to complain to the Press Ombudsman

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**Figure 4:** *Beeld* (2011:2): although the logo of the South African Press Council is not printed on the second page of the newspaper, a brief paragraph informing readers of their right to complain to the Press Ombudsman does appear

Fifthly, and perhaps most importantly: parliamentary discussions on a Media Appeals Tribunal loom, and are likely to take place in the course of 2012. The threat of statutory regulation of the press formed part of the motivation for the Press Council to undergo a process of review (Review. Press Council of South Africa 2011:3). The ANC's calls for a parliamentary investigation into a Media Appeals Tribunal also formed a large motivation for the formation of the Press Freedom Commission.<sup>1</sup> When discussions in parliament regarding a Media Appeals Tribunal take place, many of us who will make presentations there, will inevitably defend the South African Press Council and the system of press self-regulation as the most desirable press accountability mechanism. The inventory compiled for this report reflects clearly that in countries with the highest press freedom rating, press self-regulation is the preferred system of accountability, and this is no coincidence. However, in that parliamentary forum, how are we expected to argue in favour of the South African Press Council, if we cannot with a clear conscience give testimony that our Press Council is one which is prepared to listen to the people, to readers at large, and to the public? As it currently stands, the Press Council's only concern is for slighted persons, who are most often and most likely, public figures. That the complaints procedure excludes the 'man on the street' divorces the common reader from the process of press accountability. When we are arguing against the institution of a Media Appeals Tribunal, the non-allowance of third party complaints by the South African Press Council is simply not morally or ethically defensible.

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<sup>1</sup> The Press Freedom Commission has indicated that its establishment is not directly linked to the ANC's call for a Media Appeals Tribunal. On the Press Freedom Commission's website the following paragraph appears: "12) What is the link between the PFC and the ANC call for a media appeals tribunal? There is no direct link, except that the PFC arose from the work of the Press Council of SA, whose investigation had itself been triggered by the debate on the desirability of a statutory tribunal" ([www.pressfreedomcomm.org/about-us/](http://www.pressfreedomcomm.org/about-us/)). However, it is my personal view that it is unlikely that the Press Freedom Commission would have been constituted if not for the ANC's call for the investigation of a Media Appeals Tribunal. Logical progression also dictates that if the Press Freedom Commission's work is birthed out of the work done during the Press Council's review, and that review was conducted due to the ANC's call for a Media Appeals Tribunal, that the latter forms a catalyst for the institution of the Press Freedom Commission.

### 3. THE WAIVER AND THIRD PARTY COMPLAINTS

**Julie Reid**

What was previously referred to as the 'waiver', in the Press Council's complaints procedure, is now called the 'Complainants Declaration' (since the release of the August 2011 Review report). For brevity, this declaration will be referred to as the waiver for the purposes of this report.

This report recommends that the waiver be dropped from the Complaints Procedure of the South African Press Council.

First, it is necessary to return to the definition of the complainant, and now interrogate the second sentence in this definition:

Currently the complaints procedure defines the complainant as follows: " 'Complainant' shall mean and include any person who or body of persons which lodges a complaint, provided that such person or body of persons has a direct, personal interest in the matter complained of. **In exceptional circumstances, we will take complaints from third-party complainants when there is no risk that a person directly affected could complain to the courts after it has been dealt with in the Ombudsman's system**" (Review Press Council of South Africa 2011:77).

The first part of this report (section 2) lists overwhelming reasons for the Press Council to accept third party complaints. The definition above, however, reveals that the waiver is in fact preventing the adoption of third party complaints by the Press Council. The main purpose of the waiver, and justification for its continued inclusion in the complaints procedure, is to prevent complainants from approaching a court after the Press Council has already considered the complaint and ruled in favour of the publication. If third party complaints were to be allowed by the Press Council under any and all circumstances, this would have implications in terms of the waiver, because it would mean that not all aspects of the complaint are covered or protected by the waiver. While a third party may lay a complaint with the Press Council, the directly affected person may approach the courts with the same complaint. In this instance both the courts and the Press Council would be involved with investigating the same complaint. Although it is not stated as such in the Press Council's August 2011 Review report, it seems obvious that the waiver is getting in the way of third party complaints, and third party complaints cannot be considered by the Press Ombudsman because of the implications

that this would have on the waiver. Third party complaints then have been prevented in order to protect the procedural functioning of the waiver, since these two aspects of the complaints procedure (third party complaints and the waiver) cannot co-exist.

The solution for this conundrum is not to disallow third party complaints in order to protect the procedural functioning of the waiver. Instead, the waiver should be excluded from the complaints procedure in order to allow for third party complaints. The reasons listed for the inclusion of third party complaints in section 2 of this report, far exceed the value of the waiver. For example, how can one weigh up the aspects of (a) the value of making the Press Council accountable to all members of the public, and establishing it as a body which actually listens to the people, against (b) a waiver designed to prevent 'tribunal hopping'.

The Press Council has defended the continued inclusion of the waiver by stating that it prevents tribunal hopping. The Review report states: "The waiver is designed to avoid tribunal-hopping and to prevent a publication having to answer twice on the same complaint" and, "In the current system, the complainant is given a choice: use the press self-regulatory system or go the route of the courts or other tribunals" (Review. Press Council of South Africa 2011:40 & 50). This statement needs to be questioned. What "other tribunals" are being referred to here? Are there any other legitimate tribunals, other than the Press Council and the courts, which complainants could approach? The Press Council and the courts are the two most prominent and most likely avenues which complainants may take should they feel aggrieved by what has been published in the press. The waiver then only serves to prevent a complainant from approaching the courts should the complainant be dissatisfied with the outcomes of a Press Council ruling. Since this is the only function of the waiver, it should be asked whether it is really necessary for this purpose.

Should the waiver be dropped from the complaints procedure, the number of complainants who approach the courts after having followed the Press Council's processes is likely to be very low. One of the major advantages of the Press Council's process is that it takes place at no cost to the complainant, and more speedily than a court process. Most complainants are unlikely to wish to incur the costs of legal representation, and dedicate the time required for a full length court process. The waiver is being retained in the complaints procedure to guard against something which will take place in a very small number of instances, and at the expense of the wider media audience and users who may wish to lay third party complaints.

Excluding the waiver from the Press Council's complaints procedure would in no way diminish the importance and value of the Press Council (particularly if third party complaints are allowed). As mentioned, the processes of the Press Council are cheap and faster than the courts, meaning that if minor errors occur in the press, such matters can be resolved speedily and at no cost. Depending on the courts for such matters would be unreasonable. The courts, however, are already being used by complainants who feel aggrieved by how they have been represented in the press, but these complainants are, for the most part, high-ranking public figures who have serious complaints of a legal nature (for example, Jacob Zuma's suing of cartoonist Jonathan Shapiro, and Mac Maharaj's charges laid against the *Mail & Guardian* newspaper and two of its journalists). Simply, the courts are the realm of the 'big guys', while the Press Council naturally offers recourse to those who do not, for reasons of limited resources perhaps, have access to the courts. Both the Press Council and the courts have an important, though very different role, in contributing to the maintenance of high journalistic standards in South Africa. This distinction is already taking place naturally. It does not need to be superficially imposed by the adoption of the waiver in the complaints procedure.

Lastly, like the refusal to accept third party complaints, the inclusion of the waiver in the complaints procedure is simply not defensible enough, for the reasons listed above, especially within the context of parliamentary discussions on a Media Appeals Tribunal. The waiver has been a main complaint from the ANC when criticising the South African press self-regulatory system, although not for the reasons discussed here (ANC. National General Council Discussion Document. 2010). Should the waiver be dropped from the Press Council's Complaints procedure, this will not necessarily amount to pandering to the will of the ruling party, but it will be in the best interest of the strengthening of the press self-regulatory system.

Lastly, it is worth noting that out of the top 16 countries which achieve an entirely free press rating on the inventory compiled for this report (Appendix C), 14 of them do not include a waiver or ask complainants to waive their rights to approach the courts after the Press Council has made a ruling. The only two countries in the top 16 where a waiver is imposed are Austria and New Zealand.

In all 50 countries included on the inventory in Appendix C, only 6 countries impose a waiver in the complaints procedure of their press regulatory body. This means that out of the world's top 50 countries (in terms of free press ratings) only 12% impose a waiver on complainants. South Africa is one of these countries. If we exclude South Africa from this calculation it will mean that only 10% of

these top 50 countries impose the waiver. We must ask now, whether this figure of 10% really indicates best practice.

#### 4. THE EXTENSION OF THE JURISDICTION OF THE PRESS OMBUDSMAN TO ONLINE NEWS

**Gysbert Kirsten**

This overview is written keeping the Press Council of South Africa's review in mind, which was completed in August 2011. On page 43 of that review (Review. Press Council of South Africa: 43), it is stated that,

“the Team...accepted a submission that jurisdiction should be extended to the online publications associated with the publications listed in 1.4 of the Constitution”. The proposal being to include “online publications of members of print media South Africa and other publications that subscribe to the Press Code.”

This proposal albeit necessary and overdue, opens up a number of issues that seem to not have been taken into account when this decision for the proposed action was taken. There are a number of repercussions to extending the jurisdiction of the Press Council to online publications. We would like to raise some of these related matters here, for the consideration of the Press Freedom Commission and the Press Council.

These issues will be shortly highlighted in no specific order of preference:

1. The archival nature of online publications may lead to someone accessing articles/content that is deemed offensive, long after the initial date of publication. Such a person may want to institute a complaint long after the 14 days time limit set by the Press Council. Although the Press Ombudsman may use his/her own discretion to accept late complaints, this rule may inhibit some to seek justice.

Point 1.3 of the Press Code states: “A complaint shall be made as soon as possible, but not later than 14 days after the date of publication giving rise to the complaint” (Review. Press Council of South Africa: 77). But this 14 day cut-off time limit becomes unreasonable when considering online publications. For example, *The Media Self-Regulation Guidebook* (2008:90) sites an example from the Council for Journalism of Flanders/Belgium where a newspaper had published an article in which it stated that the complainant had been accused of sexual harassment. The newspaper had been mistaken, and thereafter published a correction in its next edition. However, the offending article was still available on the internet because it was stored in the newspaper's online archive, where all past editions

could be accessed and read. This was discovered two years after the original article was published. Particularly distressing to the complainant was that this article could be accessed by using a search engine such as Google, and he was under the impression that this resulted in him not getting a job which he applied for. This is one instance of why the 14 day time limit currently imposed by the South African Press Council is not suitable for online publications.

2. The issue of no third-party complaints are also of concern. Due to the international nature of the internet, readers may feel affronted due to articles, video-clips and interviews published on publications' websites. For instance, disturbing images of slain Col. Gaddafi may give some readers a case to complain, but due to "no third-party complaints", the issue will not be pursued.
3. Will the Council distinguish between the official publishers' content and user generated content? Due to the interactive nature of Web 2.0, the comment section after/below articles and the ability of users to post images, sound and video clips, may lead to some unethical and questionable content to be published. Who will be considered to be the responsible party if a complaint is laid? This has repercussions in terms of staff composition for online publications as "gate-keepers"/editors will have to continually monitor user generated content. In a reader's letter in Afrikaans weekly *Rapport* on 22 October 2011, a user lamented the fact that hate speech are at the order of the day in the comment section with no apparent responsibility being taken by the publication. The user places the responsibility squarely on the shoulders of *Media24*, going as far as to say that they (*Media24*) are therefore just as guilty of hate speech as the transgressors themselves by allowing swearing, death threats, slander and racist comments to flourish (Cloete 2011).

User generated comments, often in the comments section appearing below a news article or opinion piece, often transgress point 8.3 of the new press code: "Comment by the press shall be an honest expression of opinion, without malice or dishonest motives..." (Review. Press Code of South Africa: 86). Again, who is to be responsible for this contravention: the online publisher or the user? This matter requires interrogation.

4. Related to the issue of staff composition above: will the Press Council institute a specific dedicated section to look at online issues – due to the sometimes technological nature? Will

a separate body, perhaps associated with an organisation linked to online communities be formed? That may hold its own challenge in terms of overlapping jurisdiction and responsibilities. Furthermore, consideration should be given to the possibility that the extension of the Press Council's jurisdiction to online media may increase the number of complaints received by the Press Ombudsman's office by more than twofold. Has the Press Council set up any measures to deal with this influx of complaints?

5. Another matter concerns the question of apologies. Should the Press Council rule in favour of a complainant who submits a complaint against a particular news website, how will the apology be published on the website and how long will the apology be required to appear on the website? It may not be reasonable, because of the differing nature of online and print media, to expect the online publisher to print an apology of the same size as the offending article. So what measures will be put in place here?

Will the apology be linked to the original offending article? We recommend that, amongst other concerns, the original offending article should at least contain a link to the apology which should be clearly indicated. This is so that an internet user who reads the offending article at some future date, will be able to immediately see that an apology/correction has been published related to the article.

6. There is a vast amount of online publications (news sources, opinion pages, blogs) that has no "parent" printed issue/publication, or who are not a member of Print Media South Africa (PMSA). Will these publications, such as the news websites *Daily Maverick*, *bizcommunity.com*, or *www.iol.co.za*, be asked to voluntarily subscribe to the Press Council's Code, and thereby be subject to the jurisdiction of the Press Ombudsman? This would also need to be done in a way that is akin to the nature of online media so as to not limit freedom of expression.
7. Has the Press Council considered the Code of Conduct of the Internet Service Providers Association (ISPA) ([www.ispa.org.za](http://www.ispa.org.za)) or the Code of Conduct of the Digital Media and Marketing Association (DM&MA) ([www.dmma.co.za/about-us/code-of-conduct](http://www.dmma.co.za/about-us/code-of-conduct)) (formerly known as the Online Publishers Association). It should be noted here that both the Internet Service Providers Association (ISPA) and Digital Media and Marketing Association (DM&MA) accept third party complaints.

These two bodies should be considered by the Press Council for two reasons. First, to determine whether there would be any overlaps in jurisdiction between the Press Council and either of these two bodies, and how that may be dealt with. Second, to examine how these two bodies administer complaints which pertain to the digital media (as opposed to the printed press).

While we support the decision by the South African Press Council to extend its jurisdiction to online publications, we also request that the Press Freedom Commission and the Press Council consider the multitude of potential repercussions thereof, and enact a plan of action to manage these matters. The printed press and online publications are two very different media, and they should be considered as such. One cannot assume that the digital media can be regulated in precisely the same manner as the press.

## 5. A CONCERN FOR CONTEXT AND BEST PRACTICE IN MEDIA SELF-REGULATION

**Jabulani Nkuna**

We have noted with interest that the Press Freedom Commission plans to travel to four countries (Tanzania, India, Denmark and the United Kingdom) as part of its research activities in preparing its final report, due in March 2012. The Press Freedom Commission has not publically provided any information on how these four countries were selected to be part of this research, what criteria was used to select them, or how the analysis of the press regulatory mechanisms will contribute to the discussions surrounding press accountability mechanisms in South Africa. In light of this lack of insight into how these countries were selected to be part of this process, we would nonetheless like to raise the following concerns.

Only one of these countries appears on the list of 16 countries which currently have an entirely free press rating: Denmark (see Appendix C). However, it must be noted that Denmark is the only one of these 16 countries which practices statutory regulation of the press, making it an odd choice. (The Danish situation is discussed further in section 6 of this report).

None of the remaining three countries to be examined by the Press Freedom Commission score a entirely free press rating. The United Kingdom does not have an entirely free press rating and appears in 19<sup>th</sup> position on the inventory compiled for this report (Appendix C). Tanzania is placed at number 41 on this inventory. Namibia, Mali and Ghana are the three highest scoring African countries with regard to press freedom, and are placed at positions 22, 27 and 28 respectively. India is rated as experiencing noticeable problems with regard to press freedom, and is placed at number 122 out of 178 countries in the *Reporters Without Borders* 2010 report, while India is listed as partly free on the World Press Freedom Map (2011) released by *Freedom House*.

We have made the assumption that the Press Freedom Commission will examine the press accountability mechanisms of Tanzania, Denmark, the United Kingdom and India in order to assess whether any of the press regulation mechanisms or strategies of these countries will be applicable to a South African situation. With this in mind we would like to bring your attention to some research produced by Prof Guy Berger, formerly from Rhodes University's Department of Journalism and Media Studies, and now the Director for Freedom of Expression and Media Development at UNESCO.

In 2011, Berger wrote a journal research article entitled *Best practice in media self-regulation: A three-way test to avoid selective borrowing and ad hoc transplants*.<sup>2</sup> In this work, Berger (2011a) proposes a three-step guide for the selective borrowing of best practice from foreign countries with regard to press accountability mechanisms, and warns in particular against attempts to ‘transplant’ systems from one country to another, without taking the context of a particular country into consideration. We would like to bring Berger’s (2011a) research to the attention of the Press Freedom Commission, so that this research can be taken into account when the Commission conducts its analysis of foreign press accountability systems. What follows here then, is a very brief summary of Berger’s (2011a) research article.

The article is in response to the call made by ANC government to introduce statutory Media Appeals Tribunal (MAT) in a place of Press Council self-regulation. The ANC’s argument for proposing MAT was based on the fact that current self-regulations were very weak and slow in responsiveness. As a result, the ANC called on the South African Parliament to probe “what regulatory mechanisms can be put in place to ensure the effective balancing rights” (Berger 2011a:37). Berger (2011a:36) indicates that the calls for a MAT which were made by ANC were met with various defenders and reformers. Lumko Mtinde, who is a major proponent of a MAT, cited the Press Complaints Commission in the UK as the best model that press regulation in South Africa should follow. On the contrary, other proponents of a MAT suggested that the South African Broadcast regulation model should be applied to print. Nevertheless, Berger (2011a:38) argues that what is best for one society or criteria may not be best for another society or another criterion. Therefore, different factors need to be taken into consideration before replicating best practices from one context into another context.

According to Bartle and Vass in Berger (2011a:46) the advantage of self-regulation is that it promotes pride within the media industry whereas state regulation costs taxpayers money. However, the challenge for the self-regulation system is to discover the ‘best practice’ which will remain independent from economic interference (Berger 2011a:46). Therefore, Berger (2011a) proposes three broad theoretical approaches that constitute best practices of borrowing. The approaches are (a) ‘analysing purpose and fitness-for-purpose within the extant context’; (b) ‘developing general principles’; and (c) ‘being fit for purpose within the destination’ (Berger 2011a). The three broad criteria for ‘best practice’ are explained below.

- (a) analysing purpose and fitness-for-purpose within the extant context

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<sup>2</sup> Berger, G. 2011. Best practice in media self-regulation: A three-way test to avoid selective borrowing and ad hoc transplants. *Ecquid Novi African Journalism Studies* Vol 32(2): 36-57.

This approach suggests that ‘there is not a universally applicable model of press regulation’ (Berger, 2011a:42). The main assumption which underpins this approach is that if regulation system fails to make an impression in one society, then it is unlikely to serve as the best interest elsewhere (ibid). Therefore, the main purpose of these criteria is to evaluate if the experience could be deemed best practice in its own context by fulfilling its purpose. Furthermore, these criteria also assess whether the purpose of that particular regulation corresponds to the borrowers purposes (Berger 2011a:43). In the South African broadcasting regulations model, Berger (2011a) evaluates the experience of this model and to see if this can be replicated to the print model. The analysis indicates that the broadcast regulation represents a best fit for purpose on its own context (Berger 2011a:48). Another example evaluates the experience of Fiji where the statutory MAT was introduced to deal with media complaints for both print and broadcast. As a result, the MAT in Fiji did not materialise as this system did not suite the purpose of those who were in power. In India, for instance, the press council is a statutory body which is granted autonomy from government by the legislation. The body is funded largely by government and the remainder of funds are raised through newspaper levies. Therefore, the experience of India Press Council can be considered as fit-for-purpose in India’s environment (Berger 2011a:48-51).

(b) developing general principles

The second approach uses qualitative and quantitative method to establish what are the ideal principles for best practice in self-regulation; however these ideal principles are non-existence in a single society (Berger 2011a:43). The quantitative and qualitative methods of developing general principles are discussed below.

According to Berger (2011a:43) *quantitative* generalisation is the extent to which inferences are made based on numbers. For example, the *Hong Kong Law Reform Commission* used quantitative generation to suggest general law. In one of its surveys for instance – the number of countries in which self-regulation was introduced after threat of statutory regulation were identified as follows; Canada, Cyprus, Fiji, Germany, Israel, Kenya, Netherlands and New Zealand (Berger 2011a:43). Therefore, quantitative generalisation will suggest that self-regulation is mainly introduced after the threat of statutory regulation by the ruling government.

According to Berger (2011a:43) *qualitative* extrapolation aims at formulating laws of logics that guide all the systems of self-regulation. Zlatev in Berger (2011a:11) suggest that press councils from outside environments need to be studied in order to adopt general principles or structure of regulation. In using the qualitative approach, some writers such as Islam (2002), Kruger (2009), Hadland (2007), and Ronning (2002) were able to develop some ideal benchmarks in which self-regulation can be measured or compared.

According to Islam in Berger (2011a:44), successful press councils should be self-initiated or voluntary, supported by the industry, depend on the desire by media professionals to improve their work, balance media freedom and responsibility, and lastly, to maintain legitimacy. Kruger in Berger (2011a:43) identified the following as the ideal benchmarks of press regulation; 'legitimacy', 'involvement of relevant stakeholder groups', 'participatory establishment', 'sector wide', 'authoritative', 'effective', 'credible stature of staff', and 'independent'. Hadland (2007) also points that sustainable and credible non-statutory self-regulation should be made of the following; the council should be politically and economically independent, member newspapers should implement judgement and ruling, and that the public should be made aware of the procedures to lay complaints (Berger 2011a:44-45).

Lastly, Ronning in Berger (2011a:45) points out to three factors which the effectiveness of the press council can be judged: the council should ensure that its ethical guidelines protect the credibility of the press, government and individuals; the council should ensure that there is consistency and forcefulness in its application of ethical standards and lastly; the press should comply with the council's decisions. The combination of the criteria listed above forms a very good checklist when adopting an ideal practice in media self-regulation. *The African Commission on Human and Peoples Rights (ACHPR 2002)* has issued a declaration on *Principles of Freedom of Expression in Africa*. In ACHPR declaration, it was cited that 'effective self-regulation is the best system for promoting high standard in the media' (Berger 2011a:45-46).

(c) being fit-for-purpose within the destination context

According to Berger (2011a:47) the third approach for borrowing from diverse experiences places is an emphasis on the destination environment. Before replicating regulations, this approach takes into consideration the cultures, political economy, and social dynamics in the destination environment. Zlatev in (Berger 2011a:47) argues that the choice of most suitable regulation will "depend on the

democratic traditions, culture, media development, the stage of press freedom, geography and also the language should be taken into considerations”.

According to Berger’s (2011a:49) three-part test, borrowing from South African Broadcast model to print model will be quiet problematic since print does not use airwaves and therefore, does not require licensing. The other examples discussed the application of Fiji and India regulation experience into South African context using the three-part test. Berger (2011a:50) argues that Fiji experience of having one regulatory body representing both print and broadcast will not bear fruit if it can be applied to the South African context. The argument is that South African broadcast tradition is governed by the independent regulatory body since it uses public airwaves, therefore, it will look unconstitutional for the same body to regulate the press (Berger 2011a:50). On the other side, the Indian system of co-regulation appears somewhat irrelevant to South Africans context because the local political culture does not seem to respect the independence of regulatory body. Moreover, the regulatory body might not perform its duties accordingly since South Africa is characterised by under-funding (Berger 2011a:52).

In conclusion, this paper discusses three broad approaches that constitute the best practice of borrowings. The first approach evaluates if the experience could be deemed best practice in its own context by fulfilling its purpose and whether or not that purpose of that particular regulations corresponds to the borrowers’ purposes. The second approach uses the combination of quantitative and qualitative method in order to develop general principle of what underpins the best practice in self-regulation. And the third approach takes into consideration the cultures, political economy and the social dynamics in the destination environment. Three different case studies which include South African broadcast model, Fiji statutory MAT and also Indian co-regulation were examined and then applied into the context of South African press regulation.

## 6. GOING FORWARD TO A MEDIA APPEALS TRIBUNAL

Julie Reid

On calling for public comment on the South African system of press regulation, the Press Freedom Commission requested input specifically on the different types of regulation namely, self-regulation, independent regulation, co-regulation and statutory regulation. We believe that self-regulation is the most desirable form of regulation, and that it can be structured in a manner which will be suitable for South Africa.

There are many arguments in favour of adopting a self-regulatory system for the press, and a great deal of literature has been produced in this regard, all of which will not be summarised here. What speaks loudly, however, as a testament to the value of the self-regulatory system is the evidence revealed on the inventory of foreign systems of press regulation and press freedom indexes produced for this report (Appendix C).

As mentioned in section 2 of this report, there are only 16 countries which both *Reporters Without Borders* and *Freedom House* agree have an entirely free press. They are: Finland, Iceland, Netherlands, Norway, Sweden, Switzerland, Austria, New Zealand, Estonia, Ireland, Denmark, Lithuania, Belgium, Luxembourg, Malta, and Germany. Out of these 16 countries which have an entirely free press, 15 of them have adopted a system of press self-regulation.

The only exception in this group of countries is Denmark, which practices statutory regulation. According to the *Media self-regulation guidebook* (2008), the current Danish Press Council was established by the government after the self-regulatory system collapsed in 1992 due to financial disputes and a lack of support from media outlets. Although the Danish Press Council has been set up by the government it nonetheless regards itself as an independent body: "The Press Council is an independent, public tribunal which deals with complaints about the mass media" ([www.pressnaevnet.dk/Information-in-English.aspx](http://www.pressnaevnet.dk/Information-in-English.aspx)). Geoffrey Robertson (2011:4) states: "Though there is a country (Denmark) with high scores for press freedom and statutory regulation of the press, it is the exception".

Furthermore, out of the 50 countries which have recently achieved the highest press freedom ratings in the world, 35 of them practice self-regulation of the press.<sup>3</sup> This means that 70% of the top 50 countries with the highest press freedom rankings, practice self-regulation of the press.

It is no coincidence that countries which achieve high press freedom ratings also practice a system of self-regulation of the press. All arguments aside, these figures alone indicate that self-regulation is the most probable regulatory system under which freedom of the press, editorial independence, and freedom of expression can be protected and encouraged. We therefore strongly recommend that South Africa continues to practice the current system of press self-regulation.

That is not to say that South Africa's current system of self-regulation is perfect, or indeed, that the system of self-regulation itself is perfect. Indeed, this report includes a number of suggested changes to this system. Self-regulation, however, is the most desirable system of press accountability available to us at the current time, when considering the data revealed in the inventory (Appendix C) and with regard to ensuring the freedom of the press. A better system of press accountability may be developed in the future, through further social scientific research and public engagement, but we are not there yet. With the limited life-span of the Press Freedom Commission is it unlikely that this 'better system' will be discovered or developed during this process. Self-regulation is therefore the best press accountability mechanism which we have to choose from at this time. We therefore recommend that the Press Freedom Commission's final report, due in March 2012, should state clearly that self-regulation of the press is currently the most desirable press accountability mechanism for South Africa.

The South African Press Council has come under a great deal of criticism in recent years, first from the ruling ANC party, then from the public in the Press Council's year long process of review, and now during the Press Freedom Commission's process of review. I believe that various improvements could be made to the Press Council (outlined in this report) but I am also of the view that the South African Press Council is to be commended on two counts. First, it is a young institution with fairly limited resources and yet has performed its role quite reasonably within its limited mandate in recent years. Second, the Press Council should be commended for its willingness to conduct a review process of its own mechanisms, something which it plans to do on a regular basis (every five years) (Review. Press Council of South Africa 2011:3). That the Press Council is willing to engage with the

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<sup>3</sup> Jamaica currently has no press regulation system, but because this country is in the process of establishing a self-regulatory Press Council, we have included them in the number of countries which practices self-regulation of the press.

public on a regular basis, and be flexible enough to adopt and institute suggested changes, means that we have an institution which is in a constant process of improvement. We should not naively expect to always get it completely right the first time, which is why it is so important that the Press Council practices this process of regular review and why this process is so valuable.

If and/or when a parliamentary committee is established to investigate the possibility of a statutory body to regulate the press (Media Appeals Tribunal), the defence of the freedom of the press in South Africa, of freedom of expression in the press, of editorial independence, and of the system of self-regulation will amount to a defence of the South African Press Council. It is my hope that the Press Freedom Commission will work to make the Press Council as 'perfect' an institution as possible, so that when it is time to defend the Press Council in parliament, this will be unproblematic to do.

The seriousness of the current political climate and antagonistic attitudes towards the press in South Africa are highlighted in Appendix B of this report. Apart from discussions surrounding a Media Appeals Tribunal and the statutory regulation of the press, are a growing number of incidents of the intimidation of journalists, editors and newspapers/media outlets by the ANC, the government and the state security services, particularly the police. These factors again highlight the importance of the work of the Press Freedom Commission in improving the current system of self-regulation as a key part of the activity of defending press freedom in South Africa.

In October 2010 the Friedrich-Ebert-Stiftung (FES) and the Media Institute of Southern Africa (MISA) published a research report on the state of the South African media as part of the African media barometer project (African media barometer 2010). The first section of this report deals with freedom of expression, including the freedom of the media in South Africa. The report details the results obtained from 45 separate predetermined indicators according to a 5 point rating scale. For each indicator the 5 point rating scale appears as such:

1. Country does not meet the indicator
2. Country meets only a few aspects of indicator
3. Country meets some aspects of indicator
4. Country meets most aspects of indicator
5. Country meets all aspects of indicator

An average score was determined for each indicator and scored out of 5, where high scores indicate a positive situation and low scores indicate a negative situation.

There are 6 different indicators which were assessed in the African media barometer's review of South Africa (2010) which are of relevance to this report. From the scorings achieved on these indicators it seems clear that while media freedom and freedom of expression is (currently) legally protected in South Africa, these freedoms are not necessarily guarded or protected in practice.

Indicator, "1.1 Freedom of expression, including freedom of the media, is guaranteed in the constitution and supported by other pieces of legislation".

This indicator achieved the relatively high average score of 4.3 (out of a possible 5).

Indicator, "1.3 There are no laws restricting freedom of expression such as excessive official secret or libel acts, or laws that unreasonably interfere with the responsibilities of media.

This indicator also achieved a high average score of 4.0 (although, this score is likely to change should the Protection of State Information Bill be passed into law in South Africa).

The scores achieved on the two indicators above suggest that South African media practitioners are not hindered in their freedoms by laws. However, the indicators below cast a more worrying picture.

Indicator, "1.2 The right to freedom of expression is practised and citizens, including journalists, are asserting their rights without fear".

This indicator achieved an average score of 2.9.

Indicator, "1.4 Government makes every effort to honour regional and international instruments on freedom of expression and the media".

This indicator achieved an average score of 2.9.

Indicator, "1.8 Public information is easily accessible, guaranteed by law, to all citizens".

This indicator achieved an average score of 2.7. Although the Promotion of Access to Information Act (2002) gives effect to this right, the implementation of the act is troublesome. Government officials lack an understanding of the act, the provisions in the act are difficult for the ordinary person to read and understand, and government departments record-keeping systems are inadequate (African media barometer 2010:18). The process of applying for specific information is also cumbersome, and if the application is rejected the applicant must appeal through the expensive court system.

Indicator, “1.12 Media legislation evolves from meaningful consultations among state institutions, citizens and interest groups”.

This indicator achieved an average score of 2.5.

When examining the average scores of the above 6 indicators it becomes apparent that while freedom of expression and the freedom of the media (as well as freedom of access to information) is guaranteed by law in South Africa, these freedoms are limited in practice. What we have currently in South Africa then, is a ‘glass half-full’ scenario: although these freedoms are sometimes limited in practice, they are at least enshrined in our constitution and laws. Our current energies could productively be spent on investigating ways in which to improve the better implementation of laws which effect the rights of freedom of expression and open access to information.

Instead, in South Africa current debates are centred on proposals for new legislative measures which would inhibit freedom of expression and access to information. We face the prospect now of regressing from a ‘glass half-full’ scenario to a ‘glass completely-empty’. The Protection of State Information Bill (currently before the National Council of Provinces after having been passed by the National Assembly) will, if it becomes law, erode the gains made by the Promotion of Access to Information Bill, particularly if it is enacted without the inclusion of a public interest defence. The proposed Media Appeals Tribunal, if it is established, will see the media accountability mechanism of South Africa change from self-regulation to one of statutory regulation, or something of the sort. Since self-regulation is widely recognised as the most desirable media accountability mechanism with regard to safe-guarding the freedom of the press, and is the most widely practiced system throughout the world in countries which have the highest degree of press freedom (see Appendix C), the institution of a statutory regulatory body would signal a significant blow to press freedom in South Africa. It is disappointing that when our press freedom and freedom of expression is guaranteed by law, and limited only in practice, that we find ourselves concerned with preventing the institution of new laws which would erode these rights, instead of working to improve the implementation of the laws we currently have so that these freedoms can be realised in practice.

## **6. THE PRESS FREEDOM COMMISSION AND ITS FINAL TERMS OF REFERENCE**

**Julie Reid**

The bulk of this report has focussed on the content of the Report released by the South African Press Council in August 2011, and has addressed matters relating to the Press Council. I would, at this point however, like to raise one point with regard to the Press Freedom Commission itself. It is my sincere hope that the work of the Press Freedom Commission will contribute to dissuading the parliamentary committee responsible for investigating the possibility of a Media Appeals Tribunal from recommending that such a body be instituted. In order to do so, however, the Press Freedom Commission will be required to attest to the academic and scientific validity of its study/research.

With this in mind, the third page of the Press Freedom Commission's Final Terms of Reference document (dated 02 August 2011), is problematic. The first sentences reads: "Print Media SA (PMSA) and the SA National Editors Forum (SANEF)... believe that freedom of expression is best fostered through a system of media self regulation...".

Later, on the same page: "In support of our primary objective, the PFC will research the regulation of specifically print media, locally and globally. Self regulation, co-regulation, independent regulation and state regulation will be examined".

Unfortunately, from a social scientist's perspective and when considering valid research methodology, these two statements contradict one another, and suggest that the research methodology of the Press Freedom Commission is invalid. The first statement reveals an obvious bias for a particular type of regulation. The second statement indicates that four types of regulation will be investigated by the Commission. But with the understanding that self regulation is obviously favoured, one has to ask whether the investigation of the other three types of regulation will be offered unbiased scrutiny and/or consideration. This contradiction unwittingly reveals a research bias on the part of the Commission.

This may seem a pedantic point. But it will not take long for supporters of a Media Appeals Tribunal, especially the ANC, to pick up on this and exploit it to argue against the validity of the study produced by the Press Freedom Commission in March 2012. I suggest that you act now to rectify this, and be prepared to argue for the validity of your study.

## **7. CONCLUSION: SUMMARY OF RECOMMENDATIONS**

Keeping in mind the various arguments made throughout this report, what follows is a list of recommendations for action by the Press Freedom Commission.

### **We recommend that the Press Freedom Commission should:**

- ask the South African Press Council to change point 1.1 of its complaints procedure, and allow for third party complaints in any and all circumstances
- encourage the South African Press Council to advertise widely, and regularly, that third party complaints can be submitted to the Press Council
- ask the South African Press Council to omit the waiver, now called the Complainant's Declaration, from the Complaints Procedure
- recommend that the Press Council do additional research, and engage with relevant persons, with regard to the extension of the jurisdiction of the Press Council to online news, and formulate a plan to administer such complaints which are in keeping with the nature of online media
- consult Prof Guy Berger's (2011a) research and take this into consideration when performing an analysis of foreign press accountability systems
- state in the final report of the Press Freedom Commission that self-regulation of the press is currently the most desirable press accountability mechanism for South Africa
- revisit contradictory statements in the Final Terms of Reference document for the Press Freedom Commission

## **Appendix A**

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## **Appendix B**

### **RECENT DIFFICULTIES EXPERIENCED BY SOUTH AFRICAN JOURNALISTS AND NEWSPAPERS**

**This summary (appendix B) was compiled by Ruchelle Barker and Kelly Hawkins**

The summaries listed below are a small sample of recent cases where difficulties have been experienced by journalists in South Africa, in the course of doing their work. This list of summaries is by no means a complete list, but simply serves as an example of what is becoming a worrying trend in South Africa: the intimidation and threatening of journalists and newspapers by government and other organs of the state, such as the security services and particularly the police. These incidents raise alarms that media freedom in South Africa is under threat, and they serve to indicate an antagonistic stance on the part of the ANC and government toward the media. Such incidents also contribute to South Africa's disappointing press freedom rating on the *Reporters Without Borders* and *Freedom House* indexes.

#### **Jimmy Manyi - GCIS**

Jimmy Manyi, the government spokesman, stated that he will take control of the state's R1-billion advertising budget and spend it depending on how well the media tell the truth about service delivery (TimesLIVE, 2011b). Placement of ads would be influenced by the extent to which news media carried the government's message. This strategy has been highly criticised as an 'economic censorship' and a scheme to bribe media to write favourably about government (TimesLIVE, 2011b; News24, 2011e.).

Jimmy Manyi threatened to withdraw advertising from newspapers because journalists did not adequately report the government's success and instead reported on criticising the government. According to Mondli Makhanya, who owns The Herald and the Weekend Post, Manyi is threatening the newspapers because he does not want the media to report the truth about government corrupt actions.

#### **Hacking claims**

State security agencies have been intercepting telephonic conversations, text messages and e-mails. Intelligence Minister Tonnie Kasrils had her telephonic conversations taped by the police. These conversations were then analysed and then sent to her. Thus, Government agents are abusing their power by hacking into conversations without permission from a judge by law.

### **ANC's Julius Malema lashes out at a 'misbehaving' BBC journalist**

Julius Malema lashed out at John Fisher, a BBC journalist, during a press conference in 2010. The conflict began when Malema criticised Zimbabwe's prime minister, Morgan Tsvangirai, and his party that was linked to the Movement for Democratic Change (MDC) for using offices in Sandton, which is a wealthy suburb in Johannesburg. Fischer then interrupted Malema by stating that Malema lives in Sandton. Malema then kicked the journalist out of the press conference, and accused him of "white tendency" and called Mr Fisher a "bastard", "bloody agent" and a "small boy".

### **Daily Dispatch journalists threaten with arrest**

Two journalists from the Eastern Cape were accused of sending a threatening anonymous letter to Rural Development Minister Guile Nkwinti. The journalists, Daily Dispatch reporter, David Macgregor and, Port Alfred Talk of the Town editor, Jon Houzet, were assessed by two detectives from Pretoria. Once the letter had been sent to the police it was assumed that the letter was written due to a meeting about the alleged corruption in land reform in the area. During this meeting Houzet was manhandled by an ANC supporter.

Both journalists were then interviewed by Warrant Officer MD Dlamini and Sergeant AD van Tonder. The journalists stated that Dlamini dominated the proceedings and felt that the officers wanted a statement from them about what happened during the meeting. The officers started threatening the journalists saying that "what could happen in Mpumalanga would happen here" says Magregor and Houzet. Mondli Makhanya, chairman of the South African National Editors forum, said that the police violated an agreement that prior consultation between the government and Sanef is necessary before a court summons is issued for a journalist to give evidence.

### **South African court tries to mum Sunday Independent newspaper**

The Sunday Independent news paper was banned from publishing stories that relate to alleged Nepotism among top South African policemen, this was under direct influence of the ANC. The National commissioner and divisional commissioner of crime intelligence of the Republic of South Africa convinced the nation's high court on the 29<sup>th</sup> of October 2010 of these proceedings. The Sunday Independent was also asked to submit all documents that relate to police discrepancies.

### **In South Africa, journalists attacked during ANC protest**

Journalists were attacked by ANC supporters during an ANC protest. The ANC supporters were throwing bottles, stones and bricks at police and reporters. An Eyewitness News van window was damaged and equipment was stolen. Mellisa du Preez of Jacaranda FM and Andrea van Wyk from the Eye Witness News were verbally abused. Another Jacaranda Journalist was physically and sexually assaulted. Malema did protest to the ANC supports that if they attack the journalists, they will lose public sympathy. Malema did not however apologise for the actions of his supporters.

During Julius Malema's hearing on 30 August 2011, at least five journalists were thrown with rocks including a cameraman who was thrown on the head and two female journalists were verbally abused, shoved, and groped by Malema supporters (Business Day, 2011; TimesLIVE, 2011a). An Eyewitness News broadcast van's window was smashed and it was reported that expensive broadcasting equipment was stolen. No arrests were made on account of these series of assaults.

### **Sunday Times reporter, Mzilikazi wa Afrika**

Sunday Times reporter, Mzilikazi wa Afrika was arrested on 4 August 2010 for allegedly distributing a fraudulent letter of resignation from Mpumalanga Premier David Mabuza to President Jacob Zuma and was granted R5 000 bail on 6 August. The Sunday Times never published a story on the letter. Hawks spokesman, Musa Zondi justified the arrest by stating that they had 'prima facie evidence' against Wa Afrika, yet the case was post-poned for further investigation. The case was later thrown out of court as the prosecutor said that there was no case against him (TimesLIVE, 2010b). Wa Afrika was one of the journalists responsible for exposing then police commissioner General Bheki Cele and the multibillion-rand headquarters scandal and his arrest is believed to have been linked to a series of stories published on corruption in Mpumalanga (TimesLIVE, 2010a). Recently, it has been confirmed by the Inspector-General of Intelligence, Faith Radebe, that Wa Afrika's phones have been tapped as part of a "lawful investigative method" and there have been alleged death threats of Sunday Times journalists including Wa Afrika and investigative journalist Stephan Hofstatter (Mail & Guardian, 2011a & b; IOL News, 2011a).

### **Independent Newspaper's Parliament correspondent, Deon de Lange**

Parliament threatened to ban Independent Newspaper's Parliament correspondent, Deon de Lange's, stating that his parliamentary media accreditation might be revoked due to a story he wrote on the Protection of Information Bill quoting criticism from an ANC parliamentary official on

continued consideration of the bill (Mail & Guardian, 2011e). According to Parliament, De Lange was breaching protocol referring to a policy governing media relations (Eye Witness News, 2011a). This resulted in great controversy and debates among various media bodies as this policy, which was signed by Parliament's presiding officers in 2009, was unheard of and has never been seen by any media until the action against De Lange was taken. Currently, the policy, which states that journalists need to obtain permission before interviewing support staff from political parties, will be reconsidered pending review by Parliament and the South African National Editor's Forum (Sanef).

### **Police attacks on journalists**

A number of incidents have been recorded of illegal police attacks and arrests on photographers most notably an incident involving *Pretoria News* photographer Masi Losi. Losi was taking photos of police arresting a suspected thief outside the newspaper's office (News24, 2011a). Policemen tried to take his camera, grabbed him by the throat and threw him to the ground as he fought back against them. Other newspaper staff members dragged Losi into the building after which the police man demanded that they be allowed to enter the building and hand over the photographer and his camera. Later on, Lieutenant General Mzwandlile Petros ordered police not to arrest Losi and leave the premises, he also send a letter of apology. Losi laid a criminal charge, and it was reported that an internal inquiry into their actions was underway, yet they have not been arrested nor suspended. A meeting was later scheduled for the policemen to apologize to Losi, yet failed to arrive for the scheduled apology meeting (News24, 2011c).

In another incident on the same day, *Volksblad* photographer Theo Jephtha was attacked and arrested by police for taking photographs of a fight among schoolchildren while police nearby took no action. After the attack he was driven off by two police officers in Bloemfontein and was only released after senior police officers in the Free State were contacted (SowetanLIVE, 2011b). Both these cases are currently being investigated by the Independent Complaints Directorate (IOL, 2011c). The DA has also asked that a full investigation should be conducted into the treatment of journalists as "a growing problem" which has serious implications for freedom of press (Mail & Guardian, 2011f). Sanef have repeatedly complained to Police Minister Nathi Mthethwa and national police commissioner General Bheki Cele regarding dozens of other similar illegal arrests, however all these cases have been thrown out of court (Bizcommunity, 2011a; News24, 2011b).

### **The Mail & Guardian and Mac Maharaj**

On Friday, 21 November 2011, the Mail and Guardian was forced to pull its front-page story covering presidential spokesperson Mac Maharaj's possible involvement in a suspicious arms deal, after

warnings of criminal prosecution (The Guardian, 2011). The Mail and Guardian received a legal letter from Maharaj's lawyers the day before publication explicating that published details of a police investigation into a mid-1990s arms deal supposedly revealing that Maharaj lied when questioned under oath by the Scorpions, which led to convictions of other government officials for bribery, contravenes the National Prosecuting Authority Act (Mail and Guardian Online, 2011h; The Daily Maverick, 2011a). In response, the story was published with large blacked out sections of the article. On the Saturday, formal charges against the Mail and Guardian and two of its senior journalists were laid by Maharaj for their supposedly 'illegal' possession of documentation containing details of the secret Scorpions inquiry into Maharaj's financial conduct relating to South African's multibillion-rand arms procurement deals (IOL, 2011). According to the Act, disclosing any information given as part of a Section 28 interview is illegal, yet, being in possession of such information is not unlawful (Daily Maverick, 2011b). Maharaj has not yet denied that he did not lie while he was questioned under oath. Currently, the Mail and Guardian is "withholding publication pending an application to the national director of public prosecutions for permission to disclose the relevant material" (Mail and Guardian Online, 2011i). The charges were made just days before the voting of the Protection of State Information Bill was scheduled to take place.

**More information about the incidents and events listed above can be found at the following links:**

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## Appendix C:

### INVENTORY OF FOREIGN SYSTEMS OF PRESS REGULATION AND PRESS FREEDOM INDEXES

Ranking according to <i>Reporters Without Borders</i> Press Freedom Index in 2010	Freedom rating according to <i>Reporters Without Borders</i> Press Freedom Index in 2010 (good situation, satisfactory situation, noticeable problems, difficult situation, very serious situation)	Freedom rating according to <i>Freedom House</i> World Press Freedom Map in 2011 (free, partly free or not free)	System of press accountability	Waiver	Third party complaints	
<b>KEY</b>	<input type="checkbox"/> good situation <input type="checkbox"/> satisfactory situation <input type="checkbox"/> noticeable problems	<input type="checkbox"/> Free <input type="checkbox"/> Partly free	<input type="checkbox"/> Self-regulation <input type="checkbox"/> Non self-regulation	<input type="checkbox"/> No waiver is imposed <input type="checkbox"/> A waiver is imposed	<b>Third party complaints are:</b> <input type="checkbox"/> accepted <input type="checkbox"/> not accepted <input type="checkbox"/> not mentioned	
1.	<b>Finland</b>	Good situation	Free	Self-regulation	No appeal except if ruling was based on evidently wrong information or misapprehension. Will not consider an application which is currently before the courts or has been ruled on previously by the courts. But no mention is made of a waiver to prevent complainants from approaching the courts after the Press Council has	Accept third-party complaints (with consent)

					made a ruling.	
2.	<b>Iceland</b>	Good situation	Free	Self-regulation	Will not accept complaints about an item that is the subject of court action at the same time as the complaint. But no mention is made of a waiver to prevent complainants from approaching the courts after the Ethics Committee has made a ruling. The complainant must have previously sought redress from the newspaper. The complainant cannot appeal the Ethics Committee ruling. After the ruling, the Committee of the Union of Journalists may take further action in very serious situations.	Accepts complaints from any individual whose interests are at stake
3.	<b>Netherlands</b>	Good situation	Free	Self-regulation	No appeal, and no mention of a waiver	Only accepts complaints by parties directly affected
4.	<b>Norway</b>	Good situation	Free	Self-regulation	No waiver	Accepts third-party complaints (with consent)
5.	<b>Sweden</b>	Good situation	Free	Self-regulation	No waiver	Accepts third-party complaints (with consent)
6.	<b>Switzerland</b>	Good situation	Free	Self-regulation	No mention is made of a waiver.	Accepts third party complaints
7.	<b>Austria</b>	Good situation	Free	Self-regulation	Waiver imposed	Does not mention whether third party complaints are accepted.
8.	<b>New Zealand</b>	Good situation	Free	Self-regulation	Waiver imposed	Accepts third-party complaints (with

						consent)
9.	<b>Estonia</b>	Good situation	Free	Self-regulation	Will not consider an application which is currently before the courts, has been ruled on previously by the courts, or is under police investigations. But no mention is made of a waiver to prevent complainants from approaching the courts after the Press Council has made a ruling.	Only accepts complaints by parties directly affected.
10	<b>Ireland</b>	Good situation	Free	Self Regulation.	No Waiver, people can make their complaint online and it will be looked at depending it the applicant's complaint is accompanied by relevant information such as the provision of the Code of Practice that has been breached.	Accepts third-party complaints (with consent)
11	<b>Denmark</b>	Good situation	Free	Statutory Regulation	The public can make a complaint to the Press Council. The Council will decide if the complaint is necessary to take further to court. No waiver is imposed.	People, companies, association etc. who think they have got a cause of action (ie. Does not accept third party complaints)
12	<b>Japan</b>	Satisfactory situation	Free	Partly Governed / but stresses the importance of freedom of Press. They follow according to The Cannon of Journalism.	No Waiver, they are however very strict with their news coverage. They following according to The Cannon of Journalism	Does not state whether third party complaints are accepted
13	<b>Lithuania</b>	Good situation	Free	Self Regulation. Ethics Commission of Journalists will	Producers and disseminators of the public who disagree with the decisions made by the Commission may apply to court.	Accepts third part complaints.

				be self- governed. The commission shall be guided by the Republic of Lithuania.	No waiver.	
14	<b>Belgium</b>	Good situation	Free	Self Regulation. The Council for Journalism (RVDJ) is an independent body. They are strict with the type of news they cover.	No mention is made of a waiver. The secretary general (ombudsman) answers to the public when there is a complaint and tries to achieve an out of council settlement. Filing a complaint is free of charge and must be writing. More than one letter from at least two people is necessary to check the accuracy of the letters.	Only accepts complaints from persons or organisations directly involved in matter of complaint.
15	<b>Luxembourg</b>	Good situation	Free	Self Regulation. Encourages freedom of speech.	No mention is made of a waiver.	Accepts third part complaints.
16	<b>Malta</b>	Good situation	Free	Self Regulation. The media has freedom of press but follows according to a strict press club code of ethics.	No mention is made of a waiver.	Complainant may be any person who considers him/herself to be injured by the news report.
17	<b>Germany</b>	Good situation	Free	Self Regulation. The German Press Council has had freedom of press for a long time.	Complaints are made by the public to the German Press Council. Complaints are free. The Council mediates between the public and the media. No mention is made of a waiver.	Complaints are made by the public to the German Press Council. Only involves people who have been directly affected.

18	<b>Australia</b>	Satisfactory situation	Free	Some press are governed and others are voluntary self-regulation.	The council deals with complaints from the public if complaints deal with possible breached of the Statement of Principles. There is no waiver as such.	Complaints are made by those who are directly affected.
19	<b>United Kingdom</b>	Satisfactory situation	Free	Self-regulation	Will not accept complaint if complainant decides to take legal action – therefore, waiver is imposed.	Only accepts complaints by parties directly affected
20	<b>United States of America</b>	Satisfactory situation	Free	Self-regulatory (Consists of a network of regulatory bodies)	Not applicable	
21	<b>Canada</b>	Satisfactory situation	Free	Self-regulatory (Consists of a network of regulatory bodies)	Mostly imposes waivers – dependent on state (for example British Columbia Press Council)	Accepts third party complaints
22	<b>Namibia</b>	Satisfactory situation	Partly free	Self-regulatory	Waiver imposed – can appeal to the Media Appeals Chairperson	Third party complaints not accepted. Only individuals with direct interest in the issue
23	<b>Czech Republic</b>	Satisfactory situation	Free	A bit contradictory, Human Rights forum stresses freedom of press but the press is run by a very strict law which suppresses media freedom.	No mention is made of a waiver.	Does not state whether third party complaints are accepted

				The law restricts areas of investigation such as the police and crime. See <a href="http://www.prisonforjournalists.com">http://www.prisonforjournalists.com</a>		
24	<b>Hungary</b>	Satisfactory situation	Free	Co-regulation (media laws are imposed by government[since 1 Jan 2011] – recently many protest demanding freedom of press)	No mention is made of a waiver.	Does not mention third party (new media law allows individuals to take action against journalist and online content for non-criminal offences through co-regulation)
25	<b>Jamaica</b>	Satisfactory situation	Free	No regulation (in the process of establishing a self-regulatory system)	Not currently applicable	
26	<b>Cape Verde</b>	Satisfactory situation	Free	Statutory regulation (should be noted that the Constitution of Cape Verde provides for free expression and the government is said to uphold this right generally)	No mention is made of a waiver.	Does not mention whether third party complaints are accepted
27	<b>Ghana</b>	Satisfactory situation	Free	Self-regulatory	No mention is made of a waiver.	Only accepts complaints by

						individuals directly affected
28	<b>Mali</b>	Satisfactory situation	Free	Self- regulation; however there have been complaints where the journalists are severely violating laws and ethics.	No mention is made of a waiver.	Does not mention third party complaints.
29	<b>Costa Rica</b>	Satisfactory situation	Free	Statutory regulation (government argues that media is open to freedom of speech and communication)	No mention is made of a waiver.	Third party complaints not accepted
30	<b>Latvia</b>	Satisfactory situation	Free	Statutory regulation (The law on the press enshrines freedom of the press and bans censorship and monopolisation of the press and other mass information resources. It addresses the types of information that must not be published, retraction of false news, the confidentiality of sources of	No mention is made of a waiver.	Does not mention third party complaints

				information, the rights and obligations of journalists, etc.)		
31	<b>Trinidad and Tobago</b>	Satisfactory situation	Free	Co-regulation regulated (the nation's law guarantee press freedom and freedom of expression)	No information could be found on the complaints procedure for this country.	
32	<b>Poland</b>	Satisfactory situation	Free	Co-regulation regulation	No mention is made of a waiver.	Does not mention third party complaints
33	<b>Chile</b>	Satisfactory situation	Free	Self regulatory - strong media accountability system	No mention is made of a waiver.	Encourages third party complaints; the public is guaranteed the right to apply.
34	<b>Hong-Kong</b>	Satisfactory situation	Partly free	Self-regulatory	No mention is made of a waiver.	Does not explicitly mention third party complaints – handles intrusion of privacy complaints and complaints of a prurient, indecent and sensational nature
35	<b>Slovakia</b>	Satisfactory situation	Free	Self-regulatory	No mention is made of a waiver.	Does not mention third party complaints
36	<b>Suriname</b>	Satisfactory situation	Free	"Suriname has not developed a Media Accountability System (MAS). Journalistic Codes of Ethics, if existing, are not available online, and self-regulatory bodies, such as press		

				councils or media ombudsmen have not been created yet". ( <a href="http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/professional-journalistic-standards-and-code-of-ethics/south-america/republic-of-suriname">http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/professional-journalistic-standards-and-code-of-ethics/south-america/republic-of-suriname</a> )		
37	<b>Uruguay</b>	Satisfactory situation	Free	No official regulatory media body. No government censorship exists	Not applicable	
38	<b>South Africa</b>	Satisfactory situation	Partly free	Self-regulatory	Waiver imposed	Does not accept third party complaints
39	<b>Spain</b>	Satisfactory situation	Free	Self- Regulation. The Information Council of Catalonia is private and independent.	No mention is made of a waiver.	Accepts third party complaint from institutions and private individuals.
40	<b>Portugal</b>	Satisfactory situation	Free	Self-regulatory (independent constitutional body) Media regulation entity is a public agency independent from Government whose board members are elected by Parliament. Watches over the attempts of economic and	No mention is made of a waiver.	Does not mention third party complaints

				political power to influence and jeopardise media independence. Promote co-regulation and encourage self-regulation mechanisms		
41	<b>Tanzania</b>	Satisfactory situation	Partly free	The Media Council of Tanzania (MCT) is an independent, voluntary, non-statutory self regulatory body established by the media fraternity on June 30 <sup>th</sup> 1995	Does not impose a waiver.  "If the complainant is not satisfied with the Council settlement, he/she can resort to court action". <a href="http://mct.or.tz/mediacouncil/index.php?option=com_content&amp;view=article&amp;id=398&amp;Itemid=481">http://mct.or.tz/mediacouncil/index.php?option=com_content&amp;view=article&amp;id=398&amp;Itemid=481</a> )	Does not mention third party complaints
42	<b>Papua New Guinea</b>	Satisfactory situation	Free	Self-regulatory (aim is to protect against government intervention, provide a responsible, active and free media)	No mention is made of a waiver.	Does not mention third party complaints
43	<b>South Korea</b>	Satisfactory situation	Partly free	Self-regulatory however, if there is any violation of public interested the government will step in.	No mention is made of a waiver.	Accepts third party complaints
44	<b>France</b>	Satisfactory situation	Free	Seem to be in the process of fighting	Not applicable	Accepts third party complaints but only

				for self-regulatory system		through court – therefore not applicable to this study
45	<b>Cyprus</b>	Satisfactory situation	Free	Self-regulatory	Does not mention a waiver (at discretion of the commission to decide whether to deal with a complaint which is the subject matter of a procedure before a Court of Law)	Does not mention third party complaints (the Commission, on its own initiative, or after the lodging of a complaint may deal with allegations that material either published or broadcast, or any act or omission by anyone constitutes a violation or a threat against the code of practice)
46	<b>Slovenia</b>	Satisfactory situation	Free	Self-Regulatory. However, this has caused problems financially because they are not being funded by the government and there was a decline in quality.	No mention is made of a waiver.	Accepts third party complaints.
47	<b>Bosnia and Herzegovina</b>	Satisfactory situation	Partly free	Self-regulatory	The contact details of the publisher and editor is published with every publication. Thus, the public can complain directly to	Accepts third party complaints.

					the editor and publisher. No waiver is mentioned.	
48	<b>Taiwan</b>	Satisfactory situation	Free	Self-Regulatory	Does not mention a waiver. The public is allowed to call into the radio stations and express their views on national and international issues.	Does not mention whether third party complaints are accepted.
49	<b>Burkina Faso</b>	Satisfactory situation	Partly free	Authorities respect freedom of media. Self-censorship seems to be a concern as the revised Information Code allows for news outlets to be banned if accused of endangering national security or distributing false news.	No mention is made of a waiver.	Does not mention whether third party complaints are accepted.
50	<b>Italy</b>	Noticeable problems	Partly free	The press is partly governed; one newspaper that is independent however is the Corriere della Sera.	No mention is made of a waiver.	Does not mention whether third party complaints are accepted.

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