

# Review

Press Council  
of South Africa  
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2nd Floor  
7 St David's Park  
St David's Place  
Parktown  
2193

Tel: 011 484 3612/8  
Fax: 011 484 3619

Email: [ombudsman@presscouncil.org.za](mailto:ombudsman@presscouncil.org.za)

Design by Shahn Irwin

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# Foreword

The review of the manner in which the South African Press Council conducts its self-regulatory processes and the operations of the Press Ombudsman and the Appeals Panel has been completed by the special task team set up by the Council. It has taken a year.

The review was undertaken partly because the five-year term of office of the present Council is coming to an end and it was felt that a review was timely and partly because of the criticisms directed at the conduct of the print media by the ruling African National Congress, government ministers and officials and some members of the public. The criticisms were at times accompanied by calls for stronger press regulation.

The review was comprehensive, dealing with the Council's Constitution, the South African Press Code and the procedures for laying complaints of ethical or other misconduct by newspapers and magazine and for dealing with them. It involved hearings in several cities throughout the country to enable interested parties and the public to put forward their views, research into foreign forms of press regulation and correspondence with foreign press regulation bodies as well as with regulatory bodies in other spheres of activity.

Most of the Task Team approached their task with an open mind seeking a process no matter how structured that would meet the need for dealing with complaints against newspapers and magazines while promoting excellence in journalistic practice and upholding independence, freedom of expression and freedom of the media. At least one member, such as myself, approached the task with a view that press self-regulation was a tried and tested method of attaining those objectives but opening my mind to the Council and the press, accommodating any other process that would achieve the objectives.

The result accommodates many of the proposals and suggestions made to the Task Team and will bring changes to the operation of the system, which, it is recommended, should retain self-regulation.

But the review is not complete. The Task Team operation was Stage One. This report of the Council's review is now being handed to the industry bodies making up the Press Council for their approval. These are: the South African National Editors Forum (Sanef), the Newspaper Association of SA, the Forum for Community Journalists, the Magazine Publishers' Association of SA and Association of Independent Publishers of SA.

These have already indicated that before giving the Council feedback, they will be taking the process to Stage Two, that is, handing the review to the independent Press Freedom Commission set up by Sanef and the publishers' body, Print Media South Africa. The PFC will examine it and conduct its own investigation and so produce what it deems the most desirable structure and process.

Stage Three will occur at the end of that lengthy procedure – six to eight months has been scheduled for it – when the PFC produces the South African

Press Freedom Report containing its recommendations for the regulation of the print media and the constituent associations give their feedback to the Council.

We believe the final outcome will result in a strong and effective Press Council acting as a watchdog over press misdemeanour, while contributing to excellence in the practice of journalism and upholding the freedom and independence of the press, all essential elements in promoting the concepts of democracy.

On behalf of the Council I thank the many people and institutions that have contributed to this review and its objectives.

Raymond Louw  
Chairperson of the Press Council of South Africa

# Executive summary

## Introduction

The Press Council of SA, in its current incarnation, is approaching the end of its first five-year term, and this is an appropriate time to review its workings. It is also in a situation where it must respond to political pressures - the ANC resolved at its Polokwane conference 2007 to investigate the desirability of creating a statutory Media Appeals Tribunal (MAT). This resolution was amended at the ANC's National General Council in Durban in September 2010 to a request to Parliament to investigate all forms of press regulation, with the intention of deciding which is best for South Africa.

In August 2010 the Press Council set up a Task Team to review press regulation in South Africa and to report back with recommendations. The Task Team's brief was to review the SA Press Code, the Constitution of the Press Council and the Complaints Procedures; to review the running of the current system; to review best practice around the world; and to invite suggestions from the public and other stakeholders.

The Task Team was mandated to use three criteria for evaluating proposals: Will the proposal lead to an improvement in the quality of journalism in South Africa? Will the proposal make our system more efficient and effective? Is the suggestion practical?

The Task Team received 58 written and oral submissions, including substantial submissions from academics and from organisations with large constituencies. The Task Team used print, radio, television and online adverts, news stories and columns to invite written and oral submissions from the public. It undertook public hearings in Johannesburg, Cape Town, Durban, Port Elizabeth and Bloemfontein. The Task Team also corresponded with press councils in other countries and the Broadcast Complaints Commission of SA. It conducted its own research into press councils around the world, and used research about press councils conducted by the New Zealand Press Council. It also evaluated statutory regulation and self-regulation, and researched self-regulatory bodies of other industries in South Africa.

The Task Team reported regularly to the Council and consequently this report sets out the Press Council's proposals for changes in its systems. The proposed updated Constitution, Complaints Procedures and Press Code, at-

tached to this report as Appendices, are presented here for consideration by the five associations constituting the Press Council. The report also motivates for the proposed changes.

## Proposed improvements

### Self-regulation or an alternative?

The first question the review had to tackle was whether South Africa should give up on self-regulation of the media. In Chapter Two, the Task Team reports that it considered statutory regulation, co-regulation, self-regulation and independent regulation.

The wide-ranging survey of media regulatory practices undertaken and outlined in Chapter Two convinced the Council that statutory regulation is not warranted in South Africa and that self-regulation remains the best option.

Statutory regulation tends to have arisen in particular historical contexts, usually when there was a relative lack of freedom of expression and/or a lack of consensus among the press themselves on ethical codes and their enforcement. Countries with strong traditions of freedom of expression and that also have optimum cooperation among the media practise self-regulation. Cooperation among the media ensures respect for and compliance with the decisions of the press council.

Chapter Two also explores the right to freedom of speech as enshrined in the South African Constitution, the limitations to freedom of expression, as well as the attitude of newspapers and magazines to regulation.

### A more proactive approach

In Chapter Three, the Press Council is proposing that it be restructured to include a Director, who will concentrate on public engagement around issues of standards and media freedom; a Public Advocate, who will assist members of the public to formulate their complaints, and assist them in negotiating for an early solution with the publication involved and may assist complainants during hearings; the Ombudsman, who will arbitrate matters that are not resolved through negotiation; and the Chair of Appeals, who will deal with appeals.

The new structure would facilitate a more proactive approach for the system.

The proposed structure creates a useful distinction between the Council's various functions: mediation, arbitration, appeals and public engagement. In the Public Advocate, it creates a position whose function is unambiguously on the side of the reading public.

The Task Team considered suggestions that the Council itself initiate com-



plaints when it observes media behaviour that is thought to be in breach of the Code. The Press Council, however, accepts the argument that initiating complaints would pose some challenges, not least that the Council would have to be both prosecutor and judge. It would also interfere with a person's right not to complain. And it would be impossible to act on every possible infringement.

However, the Public Advocate's role could go some way to remedying this. When s/he receives a complaint by a person not directly affected by the publication's story, he would advise the complainant to contact the person involved and inform them about the services offered by the Public Advocate and the self-regulatory system. In this way, the Public Advocate does not go out of his way to solicit complaints but helps complainants understand their options.

In exceptional cases, the Public Advocate can lay a complaint where there is an issue of great magnitude and where no clearly identifiable person or group is affected or if the potential complainants have no objection.

## Current shape and functioning of the Press Council

Parts of Chapter Three and all of Chapter Four outline the current state of the press self-regulatory mechanism that the Council is reviewing.

This section of the report covers press self-regulation in South Africa since it was first established in 1962 with the Press Board of Reference, through to its various permutations since then.

In its present form, the Press Council of SA was established on August 1, 2007. The new structure was prompted by a need to have greater public participation in press self-regulation.

The Press Council of SA – “a self-regulatory mechanism to provide impartial, expeditious and cost effective arbitration to settle complaints” - is a creation of the print media industry – the Newspaper Association of SA, the Magazine Publishers Association, the Association of Independent Publishers, the Forum of Community Journalists, and the SA National Editors' Forum. These associations represent at least 1 227 publications.

Currently, the system is confined to print media but the Council has now accepted a submission that the jurisdiction of the Ombudsman's Office should be extended to the online publications of the member publications of Print Media South Africa.

## Other key proposals

### Sanctions

The Council proposes the continued use of peer pressure and the publication of findings as the best forms of leverage in striving for the highest standards

as set out in the Press Code.

When the Ombudsman finds that a publication is a repeat offender, he or she should specifically point this out in the ruling.

If it occurred again, the Ombudsman to recommend that the Press Council convene a hearing to inquire into the repeated offences and ask the offender for an explanation and a plan to prevent the recidivism.

The wider public to be informed about the implications of an adverse ruling on an offending publication, primarily the damage to its reputation, the loss of valuable space to accommodate the apology and the ruling, the time and effort of the editorial staff responding to the complaint.

The Council agrees that sanctions should be placed in a hierarchy, ranging from those for minor breaches to the more serious.

The practice of matching the size and position of an apology and retraction to the gravity of the offence be continued and strengthened. Publications that are part of this system will also be urged to practise this when they discover mistakes before a complaint is laid with the Press Ombudsman's Office.

## **Waiver**

A number of submissions were made regarding the waiver, ranging from submissions that it was unnecessary or unconstitutional to those that said it was appropriate. However, legal opinion confirmed that our system was one of private arbitration and was regulated by law and by the Constitution.

The Press Council agreed that the waiver should be changed to a Complainant's Declaration, in which complainants acknowledge they have been informed of their right to go to court or other tribunal, but they choose instead to use the arbitration system provided by the Press Council.

Press Council publicity material should make complainants aware that they have the option to take the system's rulings to the High Court on review. The grounds on which the courts will review the decisions will also be clearly explained.

## **Code**

The Press Council embraced many of the suggested amendments to the Press Code and also perused 100 codes from around the world, including 25 from Africa.

The proposed amendments to the Press Code now include a new section focusing on the rights of children, guidelines on privacy, dignity and reputation, and a section on independence and avoiding conflicts of interest. The Press Council proposes that plagiarism should be expressly prohibited by the Code, and that guidelines for the use of confidential and anonymous sources be expanded. It also beefs up rules about discrimination and hate speech.

## Guidance notes

The Press Council accepts that the Ombudsman should issue guidance notes to editors when s/he picks up trends in complaints, for example on privacy or reporting on children.

The Press Council agrees that the Ombudsman's quarterly report to the SA National Editors Forum could be broadened to include a substantive look at the industry and comment on emerging trends. The reports should be produced professionally and published widely.

The Press Council agrees to produce an annual overview of the state of the print media, which would provide a useful tool to highlight and discuss issues in a proactive way. Universities will be engaged to help with research.

## Access

Although the complaints process is far more accessible than, for example, the courts, the Task Team considered ways in which to improve this for the public. The Council will pursue the following suggestions:

- advertise hearings and encourage public attendance so that interested parties can get a better understanding of the process, which would also be open to public scrutiny;
- encourage journalism students to attend hearings; and
- institute a toll free number to make it easier for complainants to get in touch with the council.

## Marketing

The Council should strengthen its marketing of the Ombudsman's system.

The Press Council should notify the wider media and public in advance of hearings to enable great public attendance.

In its publicity material, the Press Council should encourage concerned citizens to contact the affected person and inform him/her of the Council's arbitration services.

## Funding

Information about the source of funding for the Council should be publicised, including in the annual reports of the Council.

## Legal representation

The Press Council has decided that legal representation should not be allowed during hearings in order to keep the proceedings informal and inexpensive. Complainants and respondents are, however, able to take legal advice ahead

of the hearings and lawyers may assist them in drawing up their papers.

## **General**

The Ombudsman's Office should install an IT system to track statistics, particularly the turnaround time on complaints.

The Press Council believes firmly that that implementing the proposals above will lead to an improvement in the quality of journalism in South Africa and will make our adjudication system more efficient and effective.

# Introduction

The Press Council of South Africa (PCSA) has been in existence for a fairly short period in its current form, although the history of press self-regulation goes back to the early 1960s. The system has changed repeatedly over the decades, with the PCSA replacing the Press Ombudsman's Office in 2007. The new-look body is therefore approaching the end of its first five-year term, and it was decided last year that it was appropriate to review its workings. Such a review would assess the extent to which the current structures meet the primary aim of improving the standards of journalism, thus raising the quality and flow of information available to the public and thereby deepening democracy.<sup>1</sup>

The media environment is always affected by broader politics. Over the years, political debate and pressure have surrounded the media, standards of journalism and the instruments of self-regulation. The system has been adjusted in response to social and political change, both in South Africa and elsewhere. Some changes have been negative, as when the Council in a previous incarnation tightened sanctions in response to pressure from the apartheid government. Others have been positive, such as when changes were made to the Code and constitution to bring the system in line with the new and democratic constitutional order in 1997. Recently there have been calls from some within the ANC for a statutory Media Appeals Tribunal<sup>2</sup> and more recently still Parliament has been requested to investigate self-regulation, co-regulation or independent regulation of the press.<sup>3</sup>

The PCSA's decision to review its structures thus needs to be understood as prioritising its mandate to improve journalism alongside a recognition of the changing social context, calls for a statutory Media Appeals Tribunal and calls for Parliament to assess different press regulatory possibilities.

In assessing the extent to which self-regulation, co-regulation, independent

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- 1 For a full historical overview of press regulation in South Africa see: Berger, G. 2009. *The Struggle for Press Self-Regulation in Contemporary South Africa: Charting a Course Between an Industry Charade and a Government Doormat*, Paper presented to conference 'Communication and Media: Past, Present and Future,' 16-18 September, 2009. Oosthuizen, L.M. 2002. *Media Ethics in the South African Context: An Introduction and Overview*. Landsdowne: Juta.
  - 2 African National Congress (ANC). 2007. *52 National Conference: Resolutions: 126-131*. Accessed at <http://www.anc.org.za/show.php?id=2536>
  - 3 ANC. 2010. National General Council: 2010. Discussion Document. Media Diversity and Ownership.

regulation or a statutory Media Appeals Tribunal might improve and strengthen the kind of journalism needed to deepen South Africa's fledgling democracy, the PCSA noted the following criticisms against the current self-regulatory system that were spelled out in a discussion paper published before the ANC's National General Council in Durban:

- *“The mere fact that the press ombudsman is from the media ranks, a former journalist, and is not an independent person who looks at the media from the layman's perspective poses an inherent bias towards the media with all interpretations favourable to the institution and the other party just have (sic) to understand and accept the media way which is grossly unfair and unjust.”*<sup>4</sup>
- *“In order for a complaint to be accepted by the Press Ombudsman, the aggrieved party has to agree to waive his or her constitutional right to take the issue to the courts if he or she disagrees with the self-regulatory system's verdict.”*<sup>5</sup>
- *“Matters take long to clear the names of the alleged wrong doers by the media.”*<sup>6</sup>
- *“This is an expensive exercise for an ordinary citizen.”*<sup>7</sup>
- *“Many who find themselves ‘in the news’ are unhappy about the way their story has been presented or the way journalists have obtained information. Many laws restrict what can be published but not the behaviour of journalists, and there are few legal remedies for inaccurate reporting.”*<sup>8</sup>
- *“Legal aid is not available for libel cases, which are expensive. There is no statutory regulation of the press.”*<sup>9</sup>
- *It is “...an entirely voluntary system which does not have the force of law.”*<sup>10</sup>
- *In public debates members of the ANC's tripartite alliance also argued that the Ombudsman's Office was “toothless”.*<sup>11</sup>

## Task Team

In August 2010, the Press Council of South Africa thus set up a Task Team to review the current system of press self-regulation and make recommendations.<sup>12</sup>

The members of the team are **Bewyn Petersen**, deputy chairperson and public representative on the Council; **Moegsien Williams**, editor of *The Star* and representative of the Newspaper Association of SA on the Council; **Franz Krüger**, professor at the Wits University Journalism Programme and press rep-

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4 ANC .2010. para 98

5 ANC .2010. para 95

6 ANC .2010. para 102

7 ANC .2010. para 102

8 ANC .2010. para 93

9 ANC .2010. para 94

10 ANC .2010. para 96

11 Mail & Guardian Online. 2011. *Youth league slams ‘toothless press ombud’*. Accessed at <http://mg.co.za/article/2011-04-05-youth-league-slams-toothless-press-ombud/>

12 Press Council South Africa. 2010. Report for AGM held on August 19, 2010

representative on the Press Appeals Panel; **Simon Mantell**, businessman and a public representative on the PAP; **Peter Mann**, businessman and former journalist and press representative on the PAP; and **Susan Smuts**, legal editor of the *Sunday Times* and editor of the *Sunday Times* Zimbabwe edition.

Chairperson **Raymond Louw**, Ombudsman **Joe Thloloe** and Deputy Ombudsman **Johan Retief** were *ex officio* members.

The Task Team's brief was to:

- Review the Press Council's three basic documents – the Constitution, the SA Press Code and the Complaints Procedures – with the goal of improving the functioning of self-regulation in this country;
- Review the actual running of the current system;
- Review best practice around the world; and
- Invite suggestions from the public and other stakeholders and take these into account in its report and recommendations.<sup>13</sup>

The Press Council instructed the Task Team to use three criteria for evaluating all proposals:

- Will the proposal lead to an improvement in the quality of journalism in South Africa?
- Will the proposal make our system more efficient and effective?
- Is the proposal practical?

The Task Team used print, radio, television and online adverts, news stories and columns to invite written and oral submissions from the public and it is grateful that it received submissions from 53 organisations and individuals – 45 written and 13 oral. Some people and organisations gave us both written and oral submissions. The Task Team heard the oral submissions in Johannesburg, Cape Town, Durban, Port Elizabeth and Bloemfontein.

Many substantial submissions were received from organisations with big constituencies such as the Law Society of SA, the SA Jewish Board of Deputies, the Right2Know Campaign, the Muslim Judicial Council, the Film and Publications Board, Freedom Front Plus, the Centre for Constitutional Rights, the Institute for Accountability, and Media Monitoring Africa.

The ANC contributed via a letter in which it underlined its concerns over:

- *the continuous shabby journalism;*
- *declining of journalism standards;*
- *inaccurate, unfair and irresponsible reporting;*
- *the inadequate powers of the Press Ombudsman to deter and discourage this practice;*

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<sup>13</sup> Ibid

- *continuous noncompliance and adherence to the very existing Press Code; and*
- *lack of accountability from the media.*<sup>14</sup>

The ANC welcomed the decision to undertake the review and said it would await the outcomes with interest and establish whether these:

- *complement and strengthen self-regulation;*
- *enhance media credibility and accountability;*
- *discourage irresponsible reporting;*
- *promote high standards in the media;*
- *encourage professionalism; and*
- *strengthen our democracy.*<sup>15</sup>

The ANC said it would nevertheless go ahead and ask Parliament to investigate, through a public inquiry, the effectiveness of the existing self-regulatory mechanism.

The Press Council saw the debate generated by the proposed statutory MAT as a welcome contribution to its initiative to assess the best methods of promoting journalism that is ethical, professional, responsible and accountable, journalism that contributes to deepening and strengthening democracy. It also noted that through their support or lack thereof citizens are the final arbiters of which publications in our society thrive and which die.

## The review process

The Task Team looked at international practice and corresponded with the Press Complaints Commission (PCC) of the UK, the Danish Media Council, the Botswana Press Council, the Zambia Media Council, the Media Council of Zimbabwe and had inputs from the Broadcasting Complaints Commission of SA.

The research by the Task Team included studying self-regulation in industries in South Africa outside the press.<sup>16</sup> The Team obtained legal opinion on the Consumer Protection Act and how this could affect press self-regulation.<sup>17</sup>

The Task Team also sent out a questionnaire to a sample of the people who have complained to the Press Ombudsman's Office in the last three years. The number of people who responded was small, but the Team was inspired to build complainants' satisfaction surveys into the Press Council's future plans.

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14 Mthembu.2010. Letter to Ombudsman (18 November) pp 1

15 Ibid pp 2

16 Mackay.2011. Self-regulation: Across Industries in South Africa and International Press Councils. Johannesburg Press Council South Africa

17 Milo & Kader. 2011. Note on Industry Codes in terms of the Consumer Protection Act 68 of 2008 ("the Act"). Johannesburg. Webber Wentzel



The Task Team noted that South Africa is not unique in facing challenges to press freedom:

Writing from the UK, William Gore, the Press Complaints Commission's Public Affairs Director told the Task Team: *"It's true that the PCC has occasionally come in for a bit of criticism – but I suspect that is inevitable for any system of press self-regulation in the world. The fact is, it's not a perfect system, but it's better than any alternative!"*<sup>18</sup>

In December 2008, Botswana promulgated a Media Practitioners' Act in an effort to establish a statutory media council to replace the current voluntary one. The media are challenging this law in court.<sup>19</sup>

In July 2010, the Nigeria High Court knocked down an attempt by the government in that country to create a statutory Press Council to replace the voluntary one. The court stated: *"I must hold that the total effect of the Nigerian Press Council Act (the new law)... constitutes a bulwark against the free expression of opinion, ideas and views whether by individual journalists or by the press, and this in my view constitutes a gross violation of the right guaranteed under Section 39 of the constitution. "The Act has rather created an illicit ombudsman in the council, which will certainly be used to define and tailor the editorial directions and policies of the media. This is not the dream of our constitution makers."*<sup>20</sup>

The UK PCC has over the years grappled with successive governments' threats to create a statutory press council. In its February 2010 report at the end of "the longest, most complex and wide-ranging inquiry" the British Parliament's Select Committee on Culture, Media and Sport recalled some of the history:

*"Both the principle of press self-regulation and its practice by the PCC have always had critics and have often been matters for general concern. Indeed, in 1993 Sir David Calcutt, in a second report commissioned by the Government, concluded that self-regulation was not working and recommended that the Government should impose statutory regulation. This recommendation was not acted upon.*

*"This Committee and its predecessors have investigated these matters from time to time, most recently in our 2007 Report Self-regulation of the press, which concluded that self-regulation continued to be the best way to maintain press standards while ensuring freedom of the press.*

*"We do not believe that there is a case for a statutory regulator for the press, which would represent a very dangerous interference with the freedom of the*

18 Gore.2010. Email Correspondence between William Gore and Joe Thloloe. 23 August.

19 BizCommunity. 2009. Botswana: *Publishers challenge Media Practitioners Act in court*. Accessed at <http://www.bizcommunity.com/Article/29/15/35823.html>

20 Ibuot, U. 2010. Court voids Nigerian Press Council law. Lagos. Cover Stories and NBF Topics. 2010. *NPAN Commends Court's Nullification of Press Council Law*. Accessed at <http://www.nigerianbestforum.com/generaltopics/?p=54424>

*press. We continue to believe that statutory regulation of the press is a hallmark of authoritarianism and risks undermining democracy. We recommend that self-regulation should be retained for the press, while recognising that it must be seen to be effective if calls for statutory intervention are to be resisted.”*<sup>21</sup>

The Press Council’s review comes at a time when self-regulation has again come under the spotlight in Britain following the *News of the World*’s voice-mail hacking scandal. It is thus necessary to emphasise that the Ombudsman and the Press Appeals Panel in South Africa, like the PCC in the UK, do not have the investigative powers of the police. Their decisions are based on the probabilities after the complainant and the publication have given oral and written evidence.<sup>22</sup>

It now appears that in 2007, the executives of the *News of the World* and the police lied to the PCC and the Culture, Media and Sport Parliamentary Select Committee in the UK.

It is ironic that the same Parliament that was lied to is now turning against a fellow victim of the lies, the PCC, and accusing it of not being effective.

The Press Council has noted that in the controversy, the role of another publication, *The Guardian*, which tenaciously investigated the story of the hacking, has been forgotten in the rush to condemn the *News of the World*. The Press Council believes that praise should be given to those who produce good work and scorn poured on those who disgrace the industry.

In South Africa, it is unlikely that the Ombudsman’s office would entertain a complaint if the police or other agencies were already investigating it.

The phone hacking saga in Britain raises a fundamental question: can the effectiveness of the self-regulatory system be judged by the general standards of behaviour in the media? We deal with that question later in our report, but suffice it here to quote Germany’s Deutscher Presserat on its web site: “*It would be wrong to causally compare the deficits or lacking quality of journalistic reporting with any lack of quality in the self-regulation. After all, one does not measure the rate of crime according to the quality of its courts.*”<sup>23</sup>

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21 Second Report: Press Standards, Privacy and Libel (first volume)’. Accessed at <http://www.publications.parliament.uk/pa/cm/cmcomeds.htm>

22 Renn, M. 2011. Anatomy of a media scandal. Accessed at <http://www.journalism.co.za/anatomy-of-a-media-scandal.html>

23 Deutschen Presserats. 2011. The German Press Council. Accessed at <http://www.presserat.info/service/english/keyfacts-in-english.html>

## Chapter Two:

# Self-regulation or an alternative?

The first and most fundamental question confronting the Task Team was whether South Africa should give up on self-regulation by the media, in favour of an alternative model. As outlined more fully in Chapter 1, critics of the system have argued that it is ineffective and outdated, since the media have too much of a vested interest to act sufficiently strongly against offenders in their own ranks.

The Task Team sought initially to define the options available, and found a wide range of possibilities ranging from the US model, where there is an absence of industry-wide structures of accountability, right across to direct state control. Exploring non-media industries, the New Zealand Ministry of Consumer Affairs defined the following:

- Government regulation occurs when the government makes the rules.
- Co-regulation occurs when the rules that govern market behaviour are developed, administered and enforced by a combination of government agencies and people whose behaviour is to be governed.<sup>1</sup>
- Self-regulation occurs when the rules that govern market behaviour are developed, administered and enforced by the people whose behaviour is to be governed.

The Task Team used these definitions in looking at press regulation along the continuum:

- Statutory regulation is when the legislature makes laws relating to the standards of journalism and creates an institution with the powers to act against those that do not practise journalism according to those standards.
- Co-regulation is when the state and the press jointly agree on the standards and on what to do with journalists who will not comply. It would also refer to a permutation with public and press representation in the regulation of the press.
- Self-regulation is when the press takes full responsibility for the standards and the sanctions against those who do not live up to the standards. This may only involve individual journalists, editors and news organisations taking final responsibility for their action, as in the US, or it may involve the

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1 Barker I & Evan L. 2007. Report on the Review of the New Zealand Press Council. New Zealand. NPA, EPMU, MPA. pp 8.

establishment of industry-wide Press Councils such as exists in the UK, South Africa and many other countries.

- A final option raised in the SA debate is independent regulation, which would see a non-governmental institution unrelated to the media given the powers to regulate the media. One of the proposals in support of independent regulation describes it as being “run by retired judges, aided by civilians elected or appointed through transparent and fair processes that can be agreed (on)”<sup>2</sup>. Independent regulation is also mentioned in the ANC documents. It should be noted that these categories are not neatly delineated. There are many variants in use around the world.

## Statutory or non-statutory regulation?

The sharpest dividing line between the options on offer is that between systems in which the state has a hand, and those in which it stays out of the picture. Since the ANC proposal for a Media Appeals Tribunal established by Parliament would amount to state intervention in press regulation, this was obviously a most important question to consider.

### International practice

A review carried out by the New Zealand Press Council in 2007, similar to this one, found that the overwhelming majority – fully 86% - of press councils in its survey were non-statutory. In the others, state influence took a range of forms:

“A press council is set up by statute, or otherwise controlled by the government, in only 14% of the press councils for which there is information. In these, control is exercised over levels that include:

- funding – for example, the German Press Council receives approximately 30% of its funding from the government, but it is not a statutory body;
- power of appointment – for example, the Indian Government controls the appointment process to the Indian Press Council; and
- types of appointees – some press councils have government or parliamentary representatives on the council itself. Statutory councils are often set up with some independence from the Government, like the BSA (The New Zealand Broadcasting Standards Authority), which is a Crown entity. In some – for example, Sweden – freedom of speech is specified in legislation and implemented by an industry funded ombudsman and press council.”<sup>3</sup>

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2 BusinessDay. 2011. Media needs and independent fix: Why independent regulation may trump DIY. Editorial July 11. Johannesburg. Accessed at <http://www.businessday.co.za/articles/Content.aspx?id=148040>

3 Barker I & Evan L. 2007. pp 16

The Task Team looked in some detail at systems around the world, and it became clear that there are three critical influencers of media regulatory regimes:

- The historical context at the time the council was created;
- The degree to which freedom of expression is upheld in the country; and
- The level of cooperation among the media.

A trend emerged from the research: countries with strong traditions of freedom of expression and that also have optimum cooperation among the media practise self-regulation. Cooperation among the media ensures respect for and compliance with the decisions of the press council.

### The Indian example

An example of a statutory council is the Indian one, which was set up following a recommendation by a 1954 Press Commission. The statutory route was followed “on the ground that the Council should have legal authority to make inquiries as otherwise each member, as well as the Council as a whole, would be subject to the threat of legal action from those whom it sought to punish by exposure”.<sup>4</sup>

On its website, the Indian Press Council emphasises that it acts at arms-length from government and yet the chairman of the council is selected by a committee consisting of the chairman and the speaker respectively of the two houses of parliament and a person elected by the members of the council from among themselves. The politicians have the bigger say in the appointment of the chairman.

In addition, five members are from parliament, nominated by the speaker and the chairman respectively of the two houses of parliament; the press nominates its twenty representatives; and the University Grants Commission, the Bar Council of India and the Sahitya Academy, the Indian Academy of Letters, nominate one member each.

On the head count, the press still holds the majority in this council – 13 journalists and editors, one news agency representative and six from the management of publications - but this still works out to 14 editorial representatives against 15 non-editorial.

It was the legal context in which the Press Council of India was created that pushed it to the statutory route.

### The Danish example

Another example of the importance of these factors is Denmark.

A voluntary self-regulatory press council was first established in Denmark in 1964 by the association of newspaper publishers to monitor the coverage of criminal cases. The journalists did not support it. There were other attempts to set up a council but the wrangling between the publishers and the journalists’

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4 Press Council of India. 2011. Press Council of India History. Accessed at <http://presscouncil.nic.in/history.htm>

association continued and only a limited proportion of the media accepted its jurisdiction.<sup>5</sup>

The two parties disagreed on two issues: the journalists' association insisted on a code that included standards for the protection of the freedom of the press and it was unhappy that the publishers held the majority representation in the council.

A Media Liability Committee, chaired by a judge of the Supreme Court and composed of publishers' associations, a journalists' association, broadcasters and representatives from the government and the public published its report in 1990, leading to the Media Liability Act of 1991. This created the statutory basis for the current press council. Having all media under its jurisdiction enhanced its credibility.

Its independence is also assured in that the rulings of the council cannot be taken on appeal to an authority outside the council.

Journalists and editors are reported to have been unhappy with the outcome but they accepted the law because it at least guaranteed them freedom of expression.

The solution in Denmark was reached after years of wrangling among the media. It was an outcome suited to their circumstances, maintaining media freedom while extending participation.

### The examples of Zimbabwe and Botswana

Zimbabwe is an example of a country where the government has trampled on media freedom. In his book *Media Courts of Honour*, Franz Krüger, writes: "... the ironically named Access to Information and Protection of Privacy Act (Aippa) provides for the establishment of a Media and Information Commission (MIC) with wide powers to license news media and individual journalists, and has used these powers extensively to control the media."<sup>6</sup> The MIC has since been replaced by a new body, the Zimbabwe Media Commission, which has licensed a few independent newspapers.

The Voluntary Media Council of Zimbabwe (VMCZ) was established in 2007. Suffering from the great disadvantage that it lacks support from the dominant state media, the VMCZ has not been able to gain effective authority over journalistic standards in that country. It has adopted more of an activist role outside the newsroom rather than a complaints-handling body. The combination of a hostile political atmosphere and deep divisions among journalists has made it impossible to establish effective self-regulatory structures in our northern neighbour.

In December 2008, Botswana followed the Zimbabwean route when it

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5 The Danish Media Council. 2011. Sound Press Ethics. Accessed at <http://www.presse-naevnet.dk/Information-in-English/The-Press-Ethical-Rules.aspx>

6 Krüger.F. 2009. Media Courts of Honour: Self-regulatory Councils in Southern Africa and elsewhere. Windhoek. fesmedia Africa, Friedrich-Elbert-Stiftung

promulgated a Media Practitioners' Act in an effort to establish a statutory media council to replace the current voluntary one. It also provides for the registration of journalists and publications with heavy fines for offenders. The media are challenging this law in court.<sup>7</sup>

### And the SA example?

We may usefully apply the tests illustrated above – historical context, commitment to freedom of expression and media co-operation – to SA. As Prof Guy Berger has argued – and as we point out in the brief survey of some international examples above - it is necessary to consider the context within which a particular regulatory regime has arisen. Just because it is international practice does not mean it is good for South Africa.<sup>8</sup>

The context here is that South Africa was for decades ruled by an authoritarian and violent government. Millions, including journalists, were discriminated against, jailed, banned, and even killed brutally. Publications were shut down at the stroke of a pen. Now that we have become a democracy, many are now turning to their countrymen and saying, “We didn’t know this was happening and was being done in our name.” Freedom of speech is now entrenched as a core value in the Bill of Rights to ensure the country does not slip back to repression and controlled flow of information.

As for media co-operation, it is clear that the press in South Africa has with very few exceptions embraced the concept of self-regulation. Almost all publications in this country subscribe to the system. Those that do not are relatively small. In cases where the Ombudsman receives complaint against a non-member the editor is asked to submit to the process. So far only two publications - one in the North West province and the other in Ceres in the Western Cape - have refused to be subjected to the self-regulatory system.

In the four years that the new Press Council has been in existence, there were only two attempts to undermine the rulings of the Press Ombudsman’s Office, with one publication stalling on the publication of an apology and the other writing an editorial undermining the ruling of the Ombudsman’s Office. Both publications were brought back into line – the one publishing the apology and the other creating history by being the first newspaper in the country to retract an editorial comment.

These three parameters – historical context, commitment to freedom of expression and media co-operation – therefore favour non-statutory press regulation in SA.

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7 BizCommunity. 2009. Botswana: Publishers challenge Media Practitioners Act in court. Accessed at <http://www.bizcommunity.com/Article/29/15/35823.html>

8 Berger, G. 2010. Submission to the Task Team set up by the Press Council of SA, for its review of the Council’s constitution, the SA Press Code and its Complaints Procedures. Unpublished.

## International instruments and declarations

Overwhelmingly, international consensus is in favour of self-regulation. In May 2011, Unesco marked the 20th anniversary of its Windhoek Declaration, which outlined the importance of freedom of speech as a fundamental human right, with the Washington Declaration. This year's document links a call to governments to respect media freedom with a call to the media "to promote and strengthen forms of voluntary and independent self-regulation that enhance and support high-quality ethical journalism and build public trust".<sup>9</sup>

Closer to home, the African Union's "Statement of Principles on Freedom of Expression", which was accepted in Banjul in 2002, says: "Effective self-regulation is the best system for promoting high standards in the media."<sup>10</sup>

One of the most powerful journalists' associations in the world, the International Federation of Journalists, is also strongly opposed to statutory regulation. In its Declaration of Principles on the Conduct of Journalists it states: "Within the general law of each country the journalist shall recognise in professional matters the jurisdiction of colleagues only, to the exclusion of every kind of interference by government or others."<sup>11</sup>

In an authoritative booklet, *The Media Self-Regulation Guidebook*, Miklós Haraszti argues: "Can governmental regulations make the press more professional or ethical? No. True ethics standards can be created only by independent media professionals, and can be obeyed by them only voluntarily. Whether passed in good will or not, any attempt to impose standards on journalists by law will result in arbitrary limitation of their legitimate freedoms, and restriction of the free flow of information in society."<sup>12</sup>

In February 2010, the British Parliamentary Select Committee on Culture, Media and Sport reached the same conclusion: "We do not believe that there is a case for a statutory regulator for the press, which would represent a very dangerous interference with the freedom of the press. We continue to believe that statutory regulation of the press is a hallmark of authoritarianism and risks undermining democracy. We recommend that self-regulation should be retained for the press, while recognising that it must be seen to be effective if calls for statutory intervention are to be resisted."<sup>13</sup>

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9 UNESCO. 2011. The Washington Declaration: 21st Century: New Frontiers, New Barriers. Washington. UNESCO pp 3. Accessed at <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/WPFD/WPFD2011/Washington%20Declaration%202011.pdf>

10 AU. 2002. Statement of Principles on Freedom of Expression. Banjul. AU. Accessed at <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/WPFD/WPFD2011/Washington%20Declaration%202011.pdf>

11 International Federation of Journalists. 2003. Declaration of Principles on the Conduct of Journalists. Accessed at <http://www.ifj.org/en/articles/ifj-declaration-of-principles-on-the-conduct-of-journalists>

12 Haraszti, M. 2008. *The Media Self-Regulation Handbook*. Vienna, OSCE. pp 15

13 House of Commons Select Committee. *Second Report: Press Standards, Privacy and Libel (first volume)*. Accessed at <http://www.publications.parliament.uk/pa/cm/cmcmds.htm>



In the wake of the *News of the World scandal*, Full Fact, an independent British fact-checking organisation, has found that of the top 25 countries deemed to have greatest amount of press freedom, 21 have systems of self-regulation.<sup>14</sup>

It used the press freedom index compiled annually by Reporters Without Borders.

Two (Denmark and Hungary) have statutory regulation, and two (US and Jamaica) have no regulation at all.<sup>15</sup>

Jamaica is in the process of constructing a system of self-regulation.

Full Facts comments: “The only stable statutory press council on the list is that of Denmark.” Full Facts concludes that although Denmark has a high press freedom score alongside statutory regulation, “it is the exception.”

Hungary’s statutory system was created *after* the press freedom index was compiled.

We could add to the list, but these few examples from international bodies and major democracies make it clear what the consensus is.

## Freedom of speech and media regulation

The challenge for anybody designing a system of media regulation is to find a model that respects the fundamental democratic right and value of freedom of speech, a core value in South Africa’s new constitution, as much as elsewhere.

After 1994, freedom of expression, seen as a cornerstone of democracy, was enshrined in the country’s Bill of Rights: “Everyone has the right to freedom of expression – which includes freedom of the press and other media.”<sup>16</sup>

This phrasing suggests that press freedom is not a stand-alone right, but is part of everyone’s right to freedom of expression. It is not exclusive to professional journalists and media moguls.

Any person can scribble on a piece of paper, photocopy the scribbles and distribute them. It is part of his or her right to freedom of expression. If one limits the rights of a publication to freedom of expression, one would be limiting every other citizen’s right to freedom of expression. It is important to understand this in this age of bloggers and citizen journalists.

When the state gets involved in deciding what good journalism is, drawing up a code of practice and enforcing it, it would amount to taking the right to decide on what may or may not be published in a newspaper or magazine away from the newsroom and locating it in an external body. It would be limiting the right to press freedom.

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14 [http://fullfact.org/blog/statutory\\_press\\_regulation\\_Geoffrey\\_Robertson-2876](http://fullfact.org/blog/statutory_press_regulation_Geoffrey_Robertson-2876)

15 *ibid*

16 The South African Constitution. 1996. Chap 2, s16: Freedom of Expression. South Africa. SA Government Information

The Task Team is of the firm view that state involvement of any kind in press regulation is incompatible with the constitutional value of media freedom. This includes involvement by Parliament, which is just as much an arm of the state as the executive. Democracy is not just exercised through the ballot box, and the elected majority does not get to determine arrangements in all areas of public life.

## Limits and laws

Some critics present the system of self-regulation as one which leaves the media to do as they please. This is clearly false. There are limitations to freedom of expression spelled out in the Constitution and they apply to everyone, including journalists. Propaganda for war, incitement to imminent violence, or advocacy of hatred based on race, ethnicity, gender or religion and that constitutes incitement to cause harm are prohibited.<sup>17</sup>

There are other laws that limit press freedom. These include laws about trespassing, invasion of privacy, aspects of court reporting, as well as defamation law, which allows somebody who feels their reputation has been damaged by a newspaper, for instance, to seek redress in the courts. These laws accord with international practice and are designed to ensure that nobody infringes unlawfully on the rights of another.

A self-regulatory press council is intended as an additional arrangement, to deal with ethical lapses that are not the subject of legal restrictions.

The Task Team noted that Section 36 of the Constitution made allowance for legislation to limit the rights in the Bill of Rights:

*“The right in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –*

- *the nature of the right;*
- *the importance of the purpose of the limitation;*
- *the nature and extent of the limitation;*
- *the relation between the limitation and its purpose; and*
- *less restrictive means to achieve the purpose.”<sup>18</sup>*

The Press Council is convinced that any attempt to create a statutory Media Appeals Tribunal would not meet the test of Section 36 of the Constitution. It would be a throw-back to the 1980s when the press in South Africa was tightly controlled by the National Party government.

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<sup>17</sup> Ibid footnote 37

<sup>18</sup> Ibid s 36

## The value of judgment by peers

Central to the self-regulatory arrangements – and a cause of much scorn by its critics – is the fact that the authority of the council is moral, and its sanctions are limited. Later in this report we will consider whether there is value in introducing fines or other punishments. But at this point it is worth highlighting the weight attached to censure by one's peers. In a 1998 lecture, Lord Wakeham, at the time chair of the British Press Complaints Commission, said the code used by the PCC was “imbued with all the moral authority of a document written by editors themselves for editors”. He added that an adverse judgment “is an admission by an editor that he or she has broken the rules which he or she frames and agreed to abide by”.<sup>19</sup>

## Practical considerations

Lord Wakeham also highlighted a set of practical advantages to systems of non-statutory regulation. Chief among these is the fact that the system is cheap and quick, certainly compared to the courts. A matter may be resolved within weeks – even days – of the appearance of an article drawing a complaint. It can be resolved without expensive legal advice. The alternative of seeking relief from the courts remains available, via a defamation suit. But the outcome of a court case of this kind is very uncertain: a complainant may spend large amounts of money and considerable time in the attempt to clear his or her name – only to lose the case in the end. For somebody whose main concern is to rectify a story, the PCSA offers a good alternative to the formal legal system. Any statutory tribunal would simply become another court, subject to all the delays and disadvantages as other courts.

## No argument for statutory regulation

The discussion above has listed a number of arguments against state involvement in press regulation, from practical considerations to the point of principle that it would of necessity infringe on the right to freedom of speech upheld in the constitution. We have considered international practice, and how the factors that shape media regulatory regimes around the world play out in SA. This wide-ranging research shows that there is no convincing argument for the state to get involved in media regulation.

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<sup>19</sup> Wakeham, Lord. 1998. Can self-regulation achieve more than law? Wynne Baxter Godfrey Law Lecture delivered at the University of Sussex on 15 May.

## Non-statutory regulation and the Press Council of South Africa

The next major question that the Task Team had to answer was: What non-statutory route should South Africa follow? Where on the continuum should the PCSA locate itself? Should it be independent regulation, co-regulation, or unadulterated self-regulation?

### **Co-regulation, independent regulation or the US model?**

The Task Team felt that co-regulation faced exactly the same difficulties as statutory regulation. As defined above, it refers to a joint undertaking by the state and the media, and therefore implies state involvement. As argued above, we are opposed to any state role.

The US model, where each editor sets his or her standards and holds his or her staff accountable, does not seem to fit the traditions and practices of the SA media. Appointing a public editor, for example, at every newspaper would add costs that many publications may not be able to carry. It would also be giving up on industry-wide mechanisms and would be seen as the press reducing its accountability when things go wrong. It would amount to saying that instead of strengthening the system, we should do away with it.

Independent regulation would remove the task from both politicians and the media themselves. As attractive as the idea seems at first blush, the Task Team found the same problems with it as they found in statutory regulation: a huge part of editorial decision-making would be removed from the newsroom and located somewhere else. The independent arbiters would decide what good journalism was, draw up a code of practice and enforce it. In addition, a regulator must always have expertise in the area to be regulated. Constructing a regulator without drawing on people with media experience would cut the body off from a key source of that knowledge and insight.

### **Self-regulation in SA**

The Task Team, in the end, found that press self-regulation remains the best method of ensuring accountability. It should be borne in mind that the form adopted in SA is not true self-regulation in any event: there is strong public representation on the bodies of the PCSA. The following discussion will highlight some key elements of the shape self-regulation has taken in South Africa. More detail will be provided in Chapter 4.

Press self-regulation in South Africa has changed in form and nature since the Press Board of Reference was created by the Newspaper Press Union in 1962 in response to the Nationalist Party government's threats to impose statutory regulation. It later became the Media Council and then the Press

Ombudsman's Office before it was transformed again in 2007 into the current Press Council of South Africa.<sup>20</sup>

The PCSA is a creation of the print media industry – the Newspaper Association of South Africa, the Magazine Publishers Association, the Association of Independent Publishers, the Forum of Community Journalists and the South African National Editors' Forum. There are at least 1 227 publications in these associations – ranging from the large commercial newspapers and the community newspapers attached to them, to magazines, and independent community/grassroots publications.

The PCSA is constituted as “a self-regulatory mechanism to provide impartial, expeditious and cost-effective arbitration to settle complaints”<sup>21</sup> about the editorial content of newspapers and magazines.

Among the advocates of the statutory tribunal, there are those who envisage grafting a MAT on to the Press Council: they imagine it as a tribunal to hear appeals against the decisions of the Press Council system.

These advocates wrongly argue that the Press Council would be in the same position as the Broadcasting Complaints Commission of South Africa (BCCSA), whose decisions they, again wrongly, believe can be taken on appeal to the Independent Communications Authority South Africa (ICASA)

ICASA has permitted broadcasters to create their own voluntary self-regulatory mechanism in the form of the BCCSA. The BCCSA functions in exactly the same way as does the Press Council and its rulings cannot be taken on appeal to ICASA. They can be taken to the High Court on review.

## Private arbitration

The Complaints Procedures of the Press Council meet the criteria for “private arbitration” spelled out by Justice Kate O'Regan in a majority judgment in the Constitutional Court in 2009. In the case *Lufuno Mphaphuli Associates (Pty) Ltd v Andrews and Another* she defined private arbitration as “a process built on consent in that the parties agree that their dispute will be settled by an arbitrator”<sup>22</sup>. It is a non-state process.

Ordinary courts may therefore enforce the rulings of the Ombudsman and the Press Appeals Panel.

The decisions of the Press Appeals Panel can also be taken to the High Court on review if one of the parties to the dispute believes that the Ombudsman or a member of the panel has misconducted himself, has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded

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<sup>20</sup> Ibid footnote 1

<sup>21</sup> Press Council South Africa website <http://www.presscouncil.org.za/>

<sup>22</sup> O'Regan ADCJ. 2009. *Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC*. Case CCT 97/07 [2009] ZACC 6. Johannesburg. Constitutional Court of South Africa. Pp90

his or her powers; or an award has been improperly obtained.

The Task Team obtained a legal opinion that the procedures of the Press Council and the Ombudsman's Office fall within the judicial and constitutional framework of the country, which negates the ANC argument that our self-regulation is an entirely voluntary system which does not have the force of law.<sup>23</sup>

## Voluntary

What legitimises the Press Council and its Code now is that they are a voluntary choice by the editors and publishers and the people who use the Ombudsman's Office. The complainants voluntarily choose to use this mechanism instead of going to, for example, the Equality Court or the Human Rights Commission. These are the people who want to clear their names quickly, without having to spend a fortune in legal fees and waiting in the court rolls for years before their complaint is resolved.

It is a system of self-regulation with substantial input from readers through the public representatives on the Press Council and the Press Appeals Panel.

The current system also has the "independence" that critics are demanding. At the pinnacle of the arbitration process is a retired judge. Judge Zulman hears appeals with one public and one press representative. Numerically, the non-press members of the panel at this level are in a two-to-one majority.

The current system is therefore not self-regulation in the American style: it is self-regulation tempered with substantial input from outside the press.

## Statistics

There has been a steady increase in the number of people using the Press Ombudsman's Office since August 2007. By the middle of May this year the office had received 104 complaints; last year the 104th complaint was received on August 23. In 2010, the office dealt with 213 complaints.

The people who have used the system range from the office of the President to the ordinary man in the street.

An analysis of the decisions of the Ombudsman's office and of the Press Appeals Panel shows that around two-thirds of the complaints are upheld, indicating that there is no bias in favour of the media.<sup>24</sup>

## Effectiveness

The Task Team also took into account the words of the two people who con-

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23 Milo & Naidoo. 2011. Memorandum: Private Arbitration. Johannesburg. Webber Wentzel Attorneys

24 PCSA. 2010. *Internal analysis of decisions of the Ombudsman's office*. Unpublished.

ducted the New Zealand review, retired judge Sir Ian Baker and Prof Lewis Evans: “Whether or not there is a threat of government regulation, the design of a media regulatory body should place weight on the longer-term implications of the independence of the media as a critically important leg of the constitution of a democratic country, and on the importance of self-regulation in maintaining this position.”<sup>25</sup>

The Press Council is of the view that in the current constitutional regime that upholds freedom of expression and freedom of the press, the debate should be about its effectiveness. This is where we turn our attention next.

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<sup>25</sup> Ibid footnote 22 pp 10





## Chapter Three:

# A more proactive approach to raising standards

Much of the criticism of the media self-regulation system derives from a sense that it should prevent mistakes being made by journalists: it is a call for a more effective role in raising the standards of journalism. Whenever a newspaper makes a factual error or an error of judgment (or, as sometimes believed, acts out of malice, or with an improper commercial motive), this is laid at the door of self-regulation. The system is then said to be ineffective, because it failed to prevent such incidents.

The argument is sometimes linked to a view that the general standards of journalism are in decline. While much of this criticism over the past months has been politically expedient, it does point to a fundamental question: can the effectiveness of the self-regulatory system be judged by the general standards of behaviour in the media? In fact, how does one measure the effectiveness of self-regulation?

On the one hand, it is clearly wrong (and sometimes mischievous) to cite any problem that arises as evidence of the failure of the system. As Germany's Deutscher Presserat argues on its web site: "It would be wrong to causally compare the deficits or lacking quality of journalistic reporting with any lack of quality in the self-regulation. After all, one does not measure the rate of crime according to the quality of its courts."<sup>1</sup>

At the same time, it would be glib for the Press Council to wash its hands of all responsibility for general standards in the press. After all, one of its aims and objectives is to promote and to develop ethical practice in journalism.

Prof Guy Berger of Rhodes University writes: "Sustainable self-regulation in the longer term also depends on the system actually improving journalists' adherence to ethics – and through that, a strengthened press service to society."<sup>2</sup>

Our expectations of the Press Council should be tempered: it is simply one

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1 Der Deutschen Presserats. 2011. *The German Press Council*. Accessed at <http://www.presserat.info/service/english/keyfacts-in-english.html>

2 Berger, G. 2011. *How to Design a kick-butt media self-regulation system*. Accessed at <http://dailymaverick.co.za/opinionista/2011-02-23-how-to-design-a-kick-butt-media-self-regulation-system>

player among others, although its core concern with ethical standards gives it a central role. The Press Council does not alone carry responsibility for the shape of the media landscape and the behaviour of journalists in South Africa. The South African National Editors' Forum, industry bodies, employers, unions and a range of NGOs have influence on the media. If there are problems, the wider media community needs to take responsibility for them.

The French academic, Claude-Jean Bertrand, identified some 80 different Media Accountability Systems, ranging from internal memo to letters to the editor, from ethics audits to observation by outside critics.<sup>3</sup> Self-regulation begins with the ethical standards in the mind of the individual journalists, which set certain limits.

The Press Council should develop a more proactive role in raising standards of journalism. In the following, we will outline some of the ways in which this can be done.

In terms of its mandate, the first responsibility of the Press Council is to adopt a Press Code as a guide to excellent practice, and to act as its custodian.

**Proposal:** The Code should be reviewed every five years, or more often if conditions make it necessary, with inputs from the press and the public.

Another aim and objective of the Council is to establish and maintain a voluntary independent mechanism to deal with complaints on journalistic ethics from the public.

The Task Team proposes that the handling of complaints be used as another measure of the effectiveness of the self-regulatory system: the time taken to resolve disputes, the quality of the decisions, the public's awareness of the system, the understanding of the system and the Code in the newsrooms and journalism training institutions, complainants' satisfaction levels after use of the system, the extent to which journalists seek pre-publication advice from the Press Council.

**Proposal:** Annually, the Press Council should spell out its performance objectives and report on them at the end of that year. These objectives would cover the average time taken to resolve complaints, complainants' satisfaction levels with the service, and the number of training seminars in newsrooms and journalism training institutions.

**Proposal:** After each complaint has been resolved, the Ombudsman's Office should request the complainant to fill a questionnaire to assess the satisfaction level with the service, even if it might not be with the outcome. **Proposal:** The Council should conduct annual surveys to measure public awareness of the system.

**Proposal:** The Council's Information Technology system should be upgraded to one that can track complaints and produce various reports on

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3 Bertrand, C. 2003. *The Arsenal of Democracy: Media Accountability Systems*. New York: Hampton Press.

demand. The reports would, for example, relate to the most prevalent complaints, outcomes of complaints, trends in complaints, average time taken on complaints, etc.

## Complaints

As currently established, the Press Council is essentially a mechanism to deal with complaints, not to prevent them. That said, this activity is intended to have an impact on general standards by demonstrating limits and giving guidance to working journalists who may be confronted with difficult decisions.

Dealing with complaints should remain at the heart of the Council's role. But the Task Team felt that there was room for a more proactive approach, and that the Council should play a leadership role in addressing issues of journalistic standards.

## Public profile

First though is the question of the public profile of the Council. A number of submissions made the point that the Council needed to "market" itself better. Ironically, the public debate sparked by the ANC's criticism has certainly raised the Council's profile. In his submission, for instance, Reg Rumney writes: "... more could be done to 'market' the services [of the ombudsman's office]. ... A communication strategy needs to be devised."<sup>4</sup>

The lack of visibility is not unique to South Africa as Bertrand has observed. Obscurity is "the worst cause of failure ... the whole point of [press councils] is to get the public involved in supporting the independence and quality of media. Only the power of the general public, activated by media professionals, can successfully oppose illegitimate government or commercial interference."<sup>5</sup>

The Task Team concluded that the Press Council of South Africa can do more to ensure that the public is aware of its role and contribution and made the following proposals:

The Press Council should be more active in addressing issues of journalistic standards, but in such a way that does not undermine its role as an arbitrator between aggrieved readers and the press.

The proposed new structure, which includes the Director, the Public Advocate, and the Ombudsman, (see Chapter Five and Appendix 1) should go a long way towards achieving better visibility of the Council and its work.

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4 Rumney, R.W. 2010. *A Media Appeals Tribunal: Proposals, Perceptions, and Practicalities*. Unpublished. page 13

5 Bertrand, Claude-Jean. (1990). *Media accountability: the case for press councils*

## Initiating complaints

The Task team is of the opinion that the proposed Public Advocate should have the right to initiate complaints where there is a possible breach of the Code but where it is unlikely that a complaint will be forthcoming – a so-called “victimless complaint”.

**Proposal:** In its publicity material, the Press Council should encourage concerned citizens to contact the affected person and inform him or her of the Council’s arbitration services.

## Accessibility

The Task Team considered whether there were ways to make the complaints process more accessible to the public, and noted the fact that it already offered much easier access than, for instance, the courts. In terms of current practice, a complainant may simply send a letter or email, and staff are available to assist in formulating a complaint. We noted that hearings, where they become necessary, are open to the public.

Nevertheless, the Press Council could make the system even more user-friendly, and enable greater public attendance at hearings. This would make it possible for interested parties to understand better how the process works, and would open it up to greater outside scrutiny.

In addition, the Press Council should notify the wider media and public in advance of planned hearings to enable greater public attendance.

In cases attracting great public attention, this may require the use of larger venues, but universities or other institutions could be approached to make space available.

Journalism training programmes should be encouraged to bring their students to hearings from time to time.

The Task Team recommends that the Press Council should institute a toll free telephone number and publicise it widely to make it even easier for complainants to get in touch with the Council.

## Guidance notes

In the UK, the Press Complaints Commission from time to time issues “guidance notes” when it picks up a trend in the complaints it receives.<sup>6</sup> As a random example, the PCC in 2003 issued such a note on the subject of the reporting of refugees and asylum seekers, and it dealt with differences in ter-

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6 PCC. 2011. Guidance notes to editors. Accessed at <http://www.pcc.org.uk/advice/editorials.html>

minology, and reminded editors that it was not permissible to refer to people's race or national background unless it was strictly relevant.<sup>7</sup> Another note, in 2004, dealt with lottery winners, setting out how issues of privacy should be handled in the context of big lottery winners, particularly when they are vulnerable.<sup>8</sup>

The Press Code is necessarily a summary of general principles, but notes of this kind are useful mechanisms to address issues in more depth as they arise. The notes are intended to provide guidance, as the name suggests, to editors in the application of the code's fundamental approach.

The Task team recommended that the Press Council should adopt the practice of issuing "Guidance Notes" to spell out the application of the Code to particular situations.

## Reports

The Ombudsman already presents a quarterly report to the South African National Editors' Forum and the other associations that constitute the Press Council. The report summarises the complaints dealt with and the work of the council more generally. Some submissions argued for a monthly report, but the Task Team felt that quarterly reports were sufficient. However, the Task Team recommends that the reports should present a substantive look at the state of the industry, and that more should be made of them.

Annually, the Council should produce a complete overview of the state of the print media, as is done by both the New Zealand and Australian press councils. Such an annual report would become an authoritative statement on the state of the press and of journalism, and would provide an enormously useful tool to highlight and discuss issues in a proactive way. The report should focus on standards in particular, discussing in some detail the complaints dealt with and any trends picked up. It should also cover other developments of interest, such as the establishment of new titles. The release of this annual report should be made into a major event on the calendar, which would draw extensive interest and coverage. It should also be formally presented to Parliament's Communications Committee.

Council should engage with university departments to help with the necessary research.

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7 PCC.2003. Refugees and Asylum Seekers Guidance Notes. Accessed at <http://www.pcc.org.uk/news/index.html?article=OTE>

8 PCC. 2004. Lottery Guidance Notes. Accessed at <http://www.pcc.org.uk/news/index.html?article=ODk=>

## Marketing and outreach

The Council could do more to draw attention to its role. Many suggestions were proffered on this score, ranging from the production of a small Z-fold cards that can fit into journalists' wallets to an overhaul of the Council's web site. Rather than pick and choose from among the many useful suggestions made, it would be best to engage the suitable specialists to develop a marketing plan for the Council.

It should be noted that print media always have unsold inventory, and this space should be made available to the Council for marketing.

The use of social media should be considered.

The Council needs to produce a new set of well-designed documents that reach a range of audiences in a clear and targeted way. The Council's core documents, including the booklet, poster of the code and web site will, in any event, have to be reworked in light of the changes suggested by the Task Team. The opportunity should be used to rewrite the material in a user-friendly way. The material needs to make the argument for self-regulation forcefully and persuasively. For journalists, material with the code and related material must be easily accessible and appropriately packaged.

The Council's officials can and should participate extensively in media debates, thereby building its profile. This opportunity is already being used, particularly in the debate around self-regulation itself. The role could be built further, which means participating in public panel discussions and talk shows, writing for the media and much more.

Among the submissions was one that proposed an annual prestigious Press Council lecture.

The Task Team welcomed a suggestion that member publications should print details about the Code and how to complain on the back of every journalist's business card.

## *Chapter Four:*

# Current shape and functioning of the Press Council of SA

The Press Council of South Africa (PCSA) in its present form was established on August 1, 2007 to replace the then-10-year-old Press Ombudsman's Office.<sup>1</sup>

The new structure was prompted by a need to have greater public participation in the mechanism of press self-regulation.

## Constitution

### **Aims and Objectives**

The Council lists the following among its aims and objectives:

To promote and preserve the right of freedom of expression, including freedom of the press as guaranteed in Section 16 of the Constitution of the Republic of South Africa;

- To promote and develop excellence in journalistic practice and ethics and to promote the adoption of and adherence to those standards of practice and ethics by publications that are associated with it;
- To promote the concept of self-regulation and to set up the Office of the Press Ombudsman and the South African Press Appeals Panel; and
- To accept a Press Code of Conduct enforced by an independent non-statutory mediating and adjudicating structure aimed at introducing procedures for the expeditious and cost-effective adjudication, in the absence of a settlement, of complaints against publications published by members of Print Media South Africa and other publications that subscribe to the Code.

It is thus the umbrella body for press self-regulation in the country and the custodian of the South African Press Code.

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<sup>1</sup> PCSA. 2007. The Constitution of the Press Council of South Africa. Parktown. PCSA

## Representation

The Council consists of six press and six public representatives and is currently chaired by a press representative and has a public representative as deputy chairperson. The members serve for a term of five years and they are eligible for reappointment at the end of that term.

When voting does take place, only five of the public representatives are allowed to vote as against the six press representatives – and this is done to maintain the notion of the press regulating itself while taking into account the views of the public.

The press representatives are nominated by the associations that constituted the Council – the Newspaper Association of South Africa, one member; the Magazine Publishers Association, one; the Association of Independent Publishers, one; the Forum of Community Journalists, one; the South African National Editors' Forum, two. SANEF is holding the second seat until a credible journalists' association can claim it.

The six press representatives are required to be active in the editorial sections of their publications or to have wide experience in journalism.

## Appointments

The public representatives are appointed after applying in response to national advertisements. The constitution of the Press Council is silent on the criteria used for selecting them but those spelled out for the selection of the Press Appeals Panel members (see below) apply: “a keen interest in communication, social and political issues, and have a serious interest in the furtherance of the communicative value of the printed media as founded in the freedom of expression guarantee of the Constitution of the Republic”.

Applicants are assessed and interviewed by an Appointments Panel that is chaired by a retired judge appointed on the recommendations of the Chief Justice. The current chairperson, Judge Ralph Zulman, formerly of the Supreme Court of Appeal, was appointed after consultations with Chief Justice Pius Langa.

The judge sits with three members of the outgoing Council to look at the applications, draw up a shortlist, and interview the people on it.

This Appointments Panel also appoints the Ombudsman, the Deputy Ombudsman, the chairperson of the Press Appeals Panel and the public members of the Appeals Panel.

In line with self-regulatory practice, the Ombudsman should have “extensive editorial experience at a senior level” and “the capability to adjudicate matters independently and fairly” and “be committed to freedom of speech, the free flow of information and to the Press Code”. The same criteria apply to the Deputy Ombudsman.



## Funding

The associations that constitute the Council are also responsible for funding it – after it has prepared its annual budget.

The influence of the constituent bodies is exercised by appointing representatives to the Council. These representatives are appointed with a mandate to improve the quality of journalism.

## Complaints Procedures

The Council does not get involved in the mediation and arbitration between complainants and publications but assigns the task to the Press Ombudsman and the Press Appeals Panel. It does this in line with its mandate and it has adopted “a Press Code of Conduct enforced by an independent non-statutory mediating and adjudicating structure aimed at introducing procedures for the expeditious and cost-effective adjudication, in the absence of a settlement, of complaints against publications published by members of Print Media South Africa and other publications that subscribe to the press code”.<sup>2</sup>

All publications that subscribe to the system carry regular print advertisements informing their readership of the services of the Press Council.

The Ombudsman’s Office receives complaints against newspapers and magazines, attempts to mediate between the complainant and the publication and if that fails, moves to arbitration where it hears evidence from both parties and makes a ruling. If either party is unhappy with the ruling at this level, it may apply to the chairperson of the Appeals Panel for leave to appeal.

If the application is granted, then the chairperson of the Appeals Panel will sit with two members of the Appeals Panel, one press representative and one public, and hear the appeal. The decision of the panel is final.

The Press Council’s arbitration arm – the Ombudsman’s Office and the Press Appeals Panel - has the right to refuse to hear a matter if it so decides.

In general, complaints are heard only if they are brought by someone who is directly affected.

The publication or the complainant may take the matter to the High Court on review. As with all reviews, the court does not go into the merits of the case. It merely reviews the procedures and pronounces on these: has the Ombudsman or a member of the panel misconducted himself/herself, has he/she committed any gross irregularity in the conduct of the arbitration proceedings or has he/she exceeded his/her powers; or has the award been improperly obtained?

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2 PCSA. 2007. The Constitution of the Press Council of South Africa. Parktown. PCSA

## Process

In practice, this is how the process unfolds:

- When the Ombudsman's Office receives a complaint – by email, fax or snail mail – it acknowledges receipt in writing and sends a waiver form to the complainant to sign. The waiver is designed to avoid tribunal-hopping and to prevent a publication having to answer twice on the same complaint.
- The Ombudsman's Office starts processing the complaint only after it has received the signed waiver.
- The complaint is usually forwarded to the publication for its response. After the office receives the response from the newspaper or magazine, it is sent to the complainant for his or her response.
- The Ombudsman then decides either to mediate a settlement between the parties, rule on the basis of the papers submitted by the two parties, or to hold an arbitration hearing where both sides lead evidence and submit arguments.
- For a hearing, the Ombudsman sits with two members of the Appeals Panel – a public and a press representative. The hearings are informal even though some complainants bring lawyers to present their cases.
- If either party is unhappy with the ruling at this level, s/he may apply to the chairperson of the Appeals Panel for leave to appeal.
- If the application is granted, then the chairperson of the Appeals Panel will sit with two members of the Appeals Panel, one press representative and one public, and hear the appeal. The decision of the panel is final.
- The sanctions that the Ombudsman and the Appeals Panel may impose are to:
  - Caution or reprimand a publication;
  - Direct that a correction, retraction or explanation and, where appropriate, an apology and/or their findings be published in a manner that they may determine; or
  - Order that a complainant's reply be published.

## Chapter Five:

# The Constitution

## Name change?

The Task Team debated a submission that the name of the Press Council be changed to Press Accountability South Africa. The argument in support of the change was that the existing name is confusing because it is sometimes used to refer to the entire self-regulatory structure and at other times to refer to the 12 members of the Council.

The Team were unanimous that a name change would not clear the confusion. It would remain even after the name was changed to Press Accountability SA. Only improved marketing could clear the confusion.

The Team did, however, embrace the phrase “Press Accountability” because self-regulation is about adherence to high ethical standards and accountability. The Team suggested the phrase be developed with the help of a marketing consultant and incorporated into a tagline under the title Press Council of SA, for example, Ensuring Press Accountability.

**Proposal:** *The Press Council proposes that the current name should be retained.*

**Proposal:** *The Council agrees to work with a marketing expert to develop a tagline under the name Press Council of SA.*

## Establishment of the Press Council of South Africa

The Team noted that the Constitution starts with the Aims and Objectives of the Press Council when a much more logical flow would be to open with the establishment of the Council.

Among the elements missing in this section of the Constitution are a preamble foreshadowing the establishment of the Press Council with information on Press self-regulation; the place of Press self-regulation in the South African judicial system; press self-regulation conforming to Section 33 of the Arbitration Act; private arbitration as a waiver of Section 34 of the Constitution of South Africa; the manner in which arbitration is regulated by law and the Constitution of the country; and the legal differences between the Press Code and

other industry codes governed by the Consumer Protection Act. (Legal opinion obtained by the Task Team was that the Press Council was not obliged to submit the Press Code: “It is our view that it was not contemplated that the ambit of the Act would cover the editorial content of newspapers and other publications, and as such there is no parallel between a complainant - as defined in the Code – lodging a complaint in terms of the Code and a consumer lodging a complaint with the Commission in terms of the Act.”<sup>1</sup> ALSO: “...the implications of submitting the Code for review to the Commission – and Minister in terms of section 82(5) —may result in the Commission withdrawing all or part of the Code and its regulation may be tantamount to indirect censorship of the editorial content of a publication.”<sup>2</sup>)

A brief recap of self-regulation around the world could also be included in the preamble.

Among the instruments that should be acknowledged in the preamble are the Declaration of Principles on Freedom of Expression in Africa, 2002, (endorsed by South Africa), which states: “Effective self-regulation is the best system for promoting high standards in the media”;<sup>3</sup> and Section 16 of the Constitution of South Africa which upholds freedom of expression and freedom of the press.<sup>4</sup>

The preamble should also cover our role as “private arbitration” regulated by law and by the Constitution of the country, the way that Judge Kate O’Regan states: “the arbitration proceedings will still be regulated by law and... by the Constitution.”<sup>5</sup>

We also need to quote other industries and the SA Parliament as institutions that use self-regulation.

**Proposal:** *The reworked Constitution of the Press Council should start with a preamble that explains why the Press Council was established and should cover the areas in the discussion above.*

**Proposal:** *The Constitution should then move to the Establishment of the Press Council of SA.*

**Proposal:** *The Aims and Objectives section should follow the Establishment one and the item on promotion of freedom of expression should be moved to*

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1 Milo & Kader. 2011. *Note on Industry Codes in terms of the Consumer Protection Act 68 of 2008 (“the Act”)*. Johannesburg. Webber Wentzel

2 Ibid.

3 African Union. 2002. *Statement of Principles on Freedom of Expression*. Banjul. AU. Accessed at <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/WPFD/WPFD2011/Washington%20Declaration%202011.pdf>

4 The South African Constitution. 1996. Chap 2, s16: Freedom of Expression. South Africa. SA Government Information

5 ORegan ADCJ. 2009. *Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC*. Case CCT 97/07 [2009] ZACC 6. Johannesburg. Constitutional Court of South Africa

4th. Thus the promotion and development of excellence in journalistic practice and ethics should be moved to the top.

**Proposal:** The “journalistic practice and ethics” phrase in the Aims and Objectives should be amended to “journalistic ethics”. In the same way “standards of practice and ethics” should be amended to “standards of ethics”.

## Extended jurisdiction

The Team deliberated on the advisability of extending its jurisdiction to the internet and accepted a submission that jurisdiction should be extended to the online publications associated with the publications listed in 1.4 of the Constitution.

**Proposal:** The jurisdiction of the Press Council should be extended to online publications of the members of Print Media South Africa and other publications that subscribe to the Press Code.

## Alternatives

The Task Team received a submission that in 3.4 the Council should spell out the options that a complainant has if a publication that is not a member of the Press Council refuses to accept its jurisdiction.

In the nearly four years of the current Council, only two publications, one in the North West Province and the other in the Western Cape, have refused to accept this jurisdiction. Complainants may follow a number of routes provided for in South African law, but the Task Team felt the Press Council’s Constitution was not the appropriate place to spell these out.

**Proposal:** Section 3.4 should remain unchanged.

## Membership of the PCSA

### Independence of PCSA

The Task Team received several submissions on the independence of the Press Council and on the criteria used for the appointment of the public members.

Currently the print industry associations appoint the press representatives and an Appointments Panel headed by a retired judge appoints the public members.

The Team conceded that it is necessary to spell out that the Press Council is independent of the industry associations and that the press representatives commit themselves to pursuing the aims and objectives of the Council and

not the sectarian interests of the associations that nominated them.

In the same way, the Council needs to amend the Constitution to assert the independence of the public representatives: they should pursue the aims and objectives of the Press Council as set out in the Constitution and not push their sectarian interests within the Council.

**Proposal:** *A clause on the independence of Council members should be inserted in this section.*

## Criteria for selecting public representatives on Press Council

Several submissions pointed out an omission in the current Constitution: it does not spell out the criteria used to select public members of the Council.

**Proposal:** *The same qualifications as those for the public members in 10.2 – “a keen interest in communications, social and political issues and have a serious interest in the furtherance of the communicative value of the printed media as founded in the freedom of expression guarantee of the Constitution of the Republic” – should be inserted in Section 4. The Team noted that the phrasing of these sections could be improved.*

## Structure

A number of submissions recommended changes to the Press Council's structure. The proposals ranged from creating a board representing various communities in our society, ranging from churches and other religious communities to the Law Society.

The Team did not accept the proposal that various constituencies be represented on the Press Council, arguing that the present system was fair as it allowed all South Africans who were interested and had the qualifications to apply.

After considering all the suggestions the Team recommended that the structure of the Press Council should be adjusted to reflect a new, more proactive approach to improve the effectiveness of self-regulation. The key officials of the restructured Press Council should be:

- A Director, who will lead the Council on a full-time, professional basis, and who will concentrate on public engagement around issues of standards and media freedom. This post would need to be filled by an individual of the highest reputation and administrative skills, who could bring real gravitas to the post. Some submissions have called for an official to be appointed to take care of the outreach work – this suggestion takes the principle further, by placing this work in the hands of the Council's most senior official.

- A Public Advocate, who will be the first port of call for would-be complainants. The Public Advocate will assist members of the public to formulate their complaints, and will attempt to secure a solution through mediating between the complainant and the newspaper. If this does not succeed, the Public Advocate will refer the matter to the Ombudsman for arbitration. If a hearing is held, s/he will represent the complainant at the hearing and argue the matter on their behalf before the Ombudsman. This will go some distance to levelling the playing field, since complainants are often unfamiliar with the world of the media. This individual should ideally have both media and legal skills, with a finely tuned sense of public service and commitment.
- The Ombudsman, who should be knowledgeable about the inner workings of the media, will then concentrate on arbitrating matters that cannot be resolved at the earlier level of mediation.
- The Chair of Appeals, who should have impeccable legal credentials, will deal with any appeals, as at present.

This proposed structure creates a useful distinction between the Council's various functions: mediation, arbitration, appeals and public engagement. In the office of Public Advocate, it creates a position whose function is unambiguously on the side of the reading public. A precedent for the creation of a Public Advocate can be found in the Swedish system<sup>6</sup> and the highly successful Media Council of Tanzania, which is led by a full-time Executive Secretary who supervises its extensive projects. Complaints are dealt with separately by an "Ethics Committee" chaired by a retired judge.<sup>7</sup>

It may become necessary to appoint a deputy for any of these positions if the workload warrants it.

The Council would retain its current structure of 5 public and 6 press members – with a sixth public representative who votes if one of the other public members is absent – to exercise oversight functions, and contribute to raising the profile of the Ombudsman's Office through public-engagement activities.

**Proposal:** *The Council to be restructured along the lines outlined above.*

**Proposal:** *The Constitution should be redrafted to reflect the new positions and the qualifications for them.*

## Adjudication Panel

The current name of the Press Appeals Panel is at the core of some confusion

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6 Allmanhetens Pressombudsman. 2011. What are the Press Ombudsman and the Press Council? Accessed at <http://www.po.se/english>

7 Media Council of Tanzania. 2011. Complaints Procedure. Accessed at [http://mct.or.tz/mediacouncil/index.php?option=com\\_content&view=article&id=398&Itemid=481](http://mct.or.tz/mediacouncil/index.php?option=com_content&view=article&id=398&Itemid=481)

because the members sit at the first level of the complaints process and at the second, the appeals, level.

Currently the Appeals Panel is a pool from which the Ombudsman and the chairperson of the Appeals Panel draw members to help in hearing complaints and appeals. When the Ombudsman hears a complaint, he sits with a press representative and a public representative from the Appeals Panel. These two introduce themselves as members of the Appeals Panel and thus confuse the complainant, who correctly responds by saying that at this stage it should not be an appeal hearing.

The chairperson of the Appeals Panel also sits with two members of the Panel, but not the same ones who heard the complaint with the Ombudsman.

To clear this confusion the Team accepted proposals that the Appeals Panel be renamed and restructured.

**Proposal:** *The panel of 12 people – six public representatives and 6 press – should be retained and renamed Panel of Adjudicators.*

**Proposal:** *At the arbitration stage, the Ombudsman to chair an Arbitration Committee with two members –one public representative and the other press –drawn from the Panel of Adjudicators.*

**Proposal:** *At the appeal level, the Chair of Appeals will head the Appeals Committee and will sit with two members from the Panel of Adjudicators, but not the same pair who were involved in the Arbitration Committee.*

**Proposal:** *The chairperson of the Press Appeals Panel be renamed Chair of the Appeals.*

## Funding

The Team received a sizeable number of submissions on the financing of the Press Council, including a proposal that all newspapers and other cooperative media platforms (for example the news agency Sapa) should make individual annually assessed contributions to the budget.

However, the Team felt there was no need to change the current system in which the Press Council annually presents a budget to Print Media South Africa. Once there is agreement on the budget, the print media associations contribute to meeting it.

The current Constitution provides for arbitration if there is a dispute between the Press Council and the industry bodies over the budget.

The Team also noted that receiving the funding through Print Media South Africa creates a buffer between the Council and the individual newspapers and magazines that are part of the self-regulatory system. It is a system similar to the British Press Standards Board of Finance (Pressbof) that “is charged with raising a levy on the newspaper and periodical industries to fi-



nance the Press Complaints Commission”<sup>8</sup>

There were also submissions that the Press Council should spell out the sources of its funding.

**Proposal:** *The current system of funding should be retained.*

**Proposal:** *The sources of funding are spelled out in the Constitution but more needs to be done to publicise that information through, for example, including the financials in the annual reports of the Council.*

THE PROPOSED AMENDED CONSTITUTION IS ATTACHED TO THIS REPORT AS APPENDIX 1.

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8 PCC. 2011. *Press Standards Board of Finance*. Accessed at <http://www.pcc.org.uk/about/whoswho/pressbof.html>



## Chapter Six:

# Complaints Procedures

The Complaints Procedures elicited the most submissions from the public, largely because many believe that improvements here will lead to fewer errors in publications.

Most of the submissions related to:

- The waiver that complainants currently have to sign, declaring that they will not take the matter up with another tribunal after it has been finalised by the Ombudsman or the Press Appeals Panel; and
- The sanctions imposed by the system when publications are found to have erred.

## Waiver

The Press Council conducts itself in terms of Section 33 of the Arbitration Act of 1965.<sup>1</sup>

In the waiver form in place now the complainant accepts the decision of the Ombudsman, or, in the event of an appeal, the ruling of the Press Appeals Panel as final and binding and declares that she or he will not take the matter to another tribunal afterwards.

Submissions to the Task Team ranged from those that said the waiver was unnecessary to those that said it was unconstitutional.

To the ANC this waiver takes away the complainant's "constitutional right to take the issue to the courts if he or she disagrees with the self-regulatory system's verdict".<sup>2</sup>

We also received submissions that were in favour of the waiver.

The legal opinion the Team obtained confirmed that our system was one of private arbitration and was regulated by law and by the Constitution of the country.<sup>3</sup>

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1 O'Regan ADCJ. 2009. *Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC*. Case CCT 97/07 [2009] ZACC 6. Johannesburg. Constitutional Court of South Africa

2 ANC. 2010. National General Council: 2010. Discussion Document. Media Diversity and Ownership.

3 Milo & Naidoo. 2011. *Memorandum: Private Arbitration*. Johannesburg. Webber Wentzel Attorneys; and Zulman, RH (Judge). 2011. *Memorandum on Arbitration*. Johannesburg. 22 May.

The Constitutional Court has found that parties in a private arbitration “are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters.”

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. The allegation that the right to decide on the tribunal is taken away by the waiver is false.

The system has an appeal process from the Ombudsman to the Press Appeals Panel headed by a retired judge. Complainants and publications still have the further option of taking the rulings of the Press Appeals Panel on review to the High Court. This option has not been adequately explained in the current publicity material of the Press Council.

The Team considered the legislation that governs arbitration in South Africa and the Constitutional Court majority decision in *Lufuno Mphaphuli Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529 (CC)* and agreed that the waiver form be changed to a Complainant’s Declaration.<sup>4</sup>

In the declaration, the complainants will acknowledge that they are aware of their right to go to court or another tribunal but they choose to use the arbitration system provided by the Press Council.

This declaration takes into account the opinion of the Constitutional Court in *Mphaphuli* where Judge O’Regan states: “If we understand section 34 (of the Constitution) not to be directly applicable to private arbitration, the effect of a person choosing private arbitration for the resolution of a dispute is not that they have waived their rights under section 34. They have instead chosen not to exercise their right under section 34.”<sup>5</sup>

**Proposal:** *The waiver should be replaced by a Complainant’s Declaration.*

**Proposal:** *In its publicity material the Press Council should make complainants aware that they have the option to take the system’s rulings to the High Court on review. The grounds on which the courts will review the decisions should also be clearly explained in the material.*

The Task Team considered a submission that if the Ombudsman declines to accept a complaint the complainant should be released from the waiver and be allowed to go to another tribunal.

Current practice is that when the Ombudsman rejects a complaint, the complainant is specifically advised that if he or she does not agree with the decision, he or she may apply to the chairperson of the Press Appeals Panel, Judge Ralph Zulman, for leave to appeal. Because the complainant can appeal against the decision within the system, the team rejected this submission.

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4 ORegan ADCJ. 2009. *Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC*. Case CCT 97/07 [2009] ZACC 6. Johannesburg. Constitutional Court of South Africa

5 Ibid

Also rejected was the suggestion that we follow the New Zealand example, which prohibits the complainant from going to the courts only for as long as the Press Council was still handling the matter. The Team felt that if it restricted the waiver in this manner, publications would run the risk mentioned earlier of having to answer twice on the same complaint.

## Sanctions

This elicited the most heat and the largest number of submissions, from the proportionality of apologies to the offence to suggestions that we impose heavy fines against publications. Many, however, felt the current system was adequate.

As the Broadcast Complaints Commission of SA was touted as an example for the Ombudsman to follow, we had an hour-long interview with the chairperson of the BCCSA, Prof Kobus van Rooyen.

Some of the issues from the interview were:

- Personally, he believes fines should be left to the courts;
- The BCCSA has the powers to impose fines of up to R60 000;
- In 17 years and more than 16 000 complaints thus far, the BCCSA has imposed fines “maybe 45 times”, the largest being R30 000 twice levied on the SABC;
- Recently the BCCSA imposed a fine of R15 000 on a broadcaster who had repeated the offence for the seventh time; and
- The Canadian broadcast regulator told van Rooyen they had never heard of another broadcast regulator like the BCCSA imposing fines.

The evidence suggests that the BCCSA’s mandate to impose fines has not been a deterrent against breaches of its code. The repeat offender mentioned above and the large number of breaches over the years are sufficient evidence.

The literature from around the world points to the use of “moral suasion” rather than fines as a major tool to improve the quality of journalism, e.g. in the book *The Media Self-Regulation Guidebook*<sup>6</sup>, William Gore of the Press Complaints Commission of the UK writes:

*“Voluntary regulation is most effective when sanctions do not include financial penalties. Any system involving fines becomes more legalistic and confrontational, with lawyers arguing over the size of penalties to be levied.*

*“This dilutes all that makes self-regulatory bodies practical and useful. There is evidence that financial penalties are not an effective punishment for newspapers because the increased sales from an intrusive story can outweigh the subsequent fine. Moreover, the impact of fines will vary widely and unfairly, depending on the wealth of the newspaper involved.*

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6 Haraszti, M. 2008. *The Media Self-Regulation Handbook*. Vienna, OSCE

*“In any case, a self-regulatory body would have grave difficulty introducing fines or compensation unless it had a statutory basis – and that, of course, would conflict with the notion of the system being self-regulatory.”*

Gore argues:

*“The major sanction is the ‘critical adjudication’ which the offending media outlet is obliged, by voluntarily joining the system, to publish. This forces editors to admit to staff, peers and readers that they have made poor judgments and have failed to uphold standards they agreed to follow...”*

*“The UK Press Complaints Commission has found that a large majority of complaints are resolved amicably. This is because editors avoid having complaints upheld against them whenever they can – a sign of how effective the threat of a critical adjudication can be. The power of moral sanctions should not be underestimated.”<sup>7</sup>*

The Danish Press Council can refer an editor who refuses to comply with its decisions to the courts, which can impose a fine. This mechanism has, however, not been used since 1999 when an editor was fined DKK 5 000, about R6 000.<sup>8</sup>

The Indian Press Council declined when its government gave it the option to impose fines – it was established by statute – and it gives its reasons on its website:

*“A power to impose meaningful sanctions raises a number of issues, including, (a) the onus of proof; (b) the standard of proof; (c) the right to and cost of legal representation; and (d) whether review and/or appeal would be available. The effect of any or all of these issues may militate against the basic premise, that the Press Council’s provide a democratic and efficient and inexpensive facility for hearing of the complaints, and that the consequent inevitability would, in effect, become courts, exercising judicial power and well known problems of access, cost, formality and delay would equally apply, thus defeating the basic purpose of the Press Council.”*

In his input to the review, Wits University journalism teacher Prof Anton Harber argued that peer pressure and public embarrassment were the best forms of leverage.<sup>9</sup>

If there was a repeat offence, he said, the Ombudsman should point this

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7 Ibid

8 Kromann, N & Pearson, M. 2004. Criminal justice and the media in Denmark and Australia. Queensland. Bond University, pp 128.

And email from Sanne Godthaab Olesen of Danish Press Council to Joe Thloloe, May 16, 2011

9 Harber, A. 2011. Email Correspondence between Anton Harber and Johan Retief. 3 March.

out in his ruling and if it occurred again, the Council should have the power, on the Ombudsman's recommendation, to convene a hearing to inquire into the repeated offender and summon that offender to answer why this was happening and what steps would be taken to prevent a recurrence.

Harber proposed that only at that stage could a fine be imposed – perhaps even suspended to discourage further offences.

The Council accepted the sequence proposed by Harber, except for the fines.

Only two South African editors, Peter Bruce of BusinessDay and Anne Kruger of Paarl Post, have argued in favour of fines. Some people have told the Task Team it would do no harm to give the Council the powers to impose fines on paper and use those very sparingly.

After weighing the arguments above, the Press Council has decided against the powers to impose fines. The Press Council agrees with Gore when he says: "The power of moral sanctions should not be underestimated."<sup>10</sup>

The current sanctions force "editors to admit to staff, peers and readers that they have made poor judgments and have failed to uphold standards they agreed to follow" and eat away at their credibility, the stock-in-trade of the media.<sup>11</sup>

The Press Council acknowledges that the sanctions do have secondary effects:

- They take away valuable space, which translates into monetary loss, from an offending publication when it has to, for example, print a response by the complainant, the Ombudsman's ruling, a statement of the correct facts, etc. This space depends on the gravity of the offence.
- The time and effort of the staff allocated to respond to the complaint add to the publication's costs.
- Inside the newsroom, the journalists along the production line found by an internal inquiry to be responsible for the breach could face disciplinary action from their employers.

The complainant, on the other hand, is given a chance to clear his or name quickly and cost effectively.

The Council accepted the proposal that the Press Council should develop a hierarchy of sanctions, ranging from those for minor breaches to the more serious.

The Council accepted the proposal that the size and position of an apology and retraction should match the gravity of the offence and noted that it is the practice already. The Team also recommends that all publications that are part of this system should also practise this when they discover mistakes before a complaint is laid with the Press Ombudsman's office.

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<sup>10</sup> Haraszti, M. 2008. *The Media Self-Regulation Handbook*. Vienna, OSCE

<sup>11</sup> Ibid

**Proposal:** *The Press Council should continue to use peer pressure and publication of findings as the best forms of leverage in striving for the highest standards as set out in the Press Code.*

**Proposal:** *Where the Ombudsman finds a publication is a repeat offender, he or she should specifically point this out in his ruling. If it occurred again, the Ombudsman should recommend to the Press Council to convene a hearing to inquire into the repeated offences and ask the offender for an explanation and a plan to prevent the recidivism. The Council has to protect the integrity of the system.*

**Proposal:** *The Press Council to publicise the implications of an adverse ruling on the offending publication as enumerated above.*

**Proposal:** *The Press Council should develop a hierarchy of sanctions, ranging from those for minor breaches to the more serious.*

**Proposal:** *The practice of matching the size and position of an apology and retraction to the gravity of the offence be continued and strengthened. Publications that are part of this system should also practise this when they discover mistakes before a complaint is laid with the Press Ombudsman's office.*

**Proposal:** *If the time allocated for application for leave to appeal expires, within seven days the Ombudsman has to approve the text of the apology to be published. The editor then has to publish the apology in the very next edition after that approval.*

## **Disciplinary action**

The Task Team felt that it was outside the Ombudsman's mandate to order that publications take disciplinary action against journalists when they have fallen foul of the Code. It is the editor who is responsible for everything that is published in his or her newspaper or magazine.

## **Complaints Process**

The Press Council accepts the proposal for the following three- stage process:

### **Negotiation Stage**

All complaints will be received by Public Advocate, who will contact the complainant and explain the assistance that he or she will give to the complainant throughout the process.

The Public Advocate initially negotiates on behalf of the complainant for a speedy settlement with the publication.



## Arbitration Stage

If the complaint is not resolved at the Negotiation Stage, the Public Advocate refers the complaint to the Ombudsman for arbitration and also offers his services to the complainant for this stage. If he or she is requested to do so, the Public Advocate represents the complainant, helping him or her to formulate the complaint and argue the matter before the Ombudsman.

This will go some way to levelling the playing field, since complainants are often unfamiliar with the world of the media.

The Ombudsman will first attempt to reach a decision on his or her own from the papers submitted by the complainant and the response from the publication.

The Press Council does not accept the suggestion that the Ombudsman convene an Arbitration Committee to decide a matter on the papers as this would slow down the process even further. In any case, the complainant or the publication has the right to take the matter to the Chair of Appeals, who could rule that the Ombudsman have a full hearing.

If the Ombudsman finds he needs to hear evidence from the parties, he will convene an Arbitration Committee, including one public and one press representative, drawn from a Panel of Adjudicators, to sit with him and hear both sides. The committee will try to reach consensus but if that fails the majority decision will hold.

However, if the Ombudsman finds that s/he cannot decide a matter on the papers before him, but merely needs clarification on some aspects of a complaint and therefore sees no need for a formal hearing s/he may convene an informal hearing with the two parties.

## Appeals Stage

If either the complainant or the publication is unhappy with the ruling of the Arbitration Committee, they may apply to the Chair of Appeals for leave to appeal.

If the Chair of Appeals grants the leave, he or she will invite two members of the Panel of Adjudicators to sit with him in an Appeals Committee to hear it. The Appeals Committee will try to reach consensus but if that fails the majority decision will hold.

The decision of the Appeals Committee is final.

## Legal representation during process

Three strands of submissions emerged: that legal representation be allowed only at the appeals stage; that we do not have lawyers throughout the process; and that legal representation be permitted at all three stages.

The Team noted the growing “arms race” as complainants and newspapers escalated their legal representation and changed the system from being cost-

effective to being very expensive. It was also noted that lawyers tended to prolong what is intended to be a speedy resolution process.

The Press Council proposes that we go back to the original design of the system, informal and cost effective: it should not allow legal representation at any stage of the process. The Council cannot bar complainants and publications from consulting lawyers as they prepare their cases, but at the hearings, lawyers should not be allowed.

**Proposal:** *Legal representation during these three stages should not be permitted.*

## Review

In terms of arbitration legislation, any of the parties may ask the courts to set aside the ruling by the Appeals Committee on three grounds only: misconduct by members of the Committee; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained.<sup>12</sup>

The court will not go into the merits of the complaint but will merely examine the way the arbitration was conducted.

**Proposal:** *The Press Council should publicise the possibility of a judicial review and the grounds on which complainants may apply for the review of the findings of the Appeals Committee.*

## Third-party complaints

A strong lobby led by University of South Africa academic Julie Reid argued in their submissions that the Ombudsman should be mandated to accept third-party complaints. They said complaints should not be restricted to the person who “has a directly, personal interest” in the story.

This lobby argued that in that way the public could be the eyes and ears of the Ombudsman’s office and remove the need for an army of monitors to ensure that proactive action by the office is fair to all publications.

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 also taken into account. This will be clearly outlined in the complaints procedures.

The Team felt that the current system be maintained.

**Proposal:** *The Ombudsman’s office should continue the current practice on third- party complaints.*

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<sup>12</sup> ORegan ADCJ. 2009. *Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC*. Case CCT 97/07 [2009] ZACC 6. Johannesburg. Constitutional Court of South Africa

**Proposal:** *In its publicity material, the Press Council should encourage concerned citizens to contact the affected person and inform him or her of the Council's arbitration services.*

**Proposal:** *The Press Council to intensify its marketing of the Ombudsman's system.*

## Time limits

The Task Team received a fistful of proposals on time frames, many related to allowing complainants to lay their complaints up to three months after the offending article was published and others to speedier resolution of complaints.

In response to the proposal that we grant complainants longer than 14 days after publication to lay their complaints, the team pointed out that the current wording allowed the Ombudsman the discretion to accept late complaints if there were good and satisfactory explanations for the delay.

On speed, the team noted that turnaround times in our processes have improved tremendously since the appointment of a Deputy Ombudsman but recommended that the Ombudsman's Office track turnaround times.

The team recommended that an appropriate IT system that can produce the statistics be installed in the Ombudsman's Office.

The team also recommended that instead of the 14 days given to publications to respond to complaints, the time should be shortened to 7 working days unless there was a satisfactory reason for an extension. Notices of the complaints should be copied to the title editor and to the publisher so that they become aware of any delays from their publication.

**Proposal:** *Publications should respond to complaints within seven days of receiving them from the Ombudsman's Office unless there is a satisfactory reason for an extension of time.*

**Proposal:** *The current practice of giving complainants up to 14 days after the publication date should be retained. The Ombudsman's Office would still have the discretion to accept late complaints if there is a satisfactory explanation for the delay.*

**Proposal:** *The Ombudsman's Office should install an IT system to track statistics, particularly the turnaround times on complaints.*

THE PROPOSED AMENDED COMPLAINTS PROCEDURES IS ATTACHED AS APPENDIX 2.



## Chapter Seven:

# The South African Press Code

The Task Team took into account inputs from the public and perused 100 codes from around the world, significantly 25 from Africa, 22 from Europe, and 18 from Asia.

The Team took the present Code as the starting point and asked three questions: What to add? What to discard? And which editorial changes to make?

The answers led to changes in the structure of the Code.

### Preamble

In the current Code, the Council maintains that the press exists to serve society and that press freedom allows for an independent scrutiny to bear on the forces that shape society.

The Task Team recommended that the Council add to this the most basic of journalistic maxims, namely to strive for truth, to avoid unnecessary harm, and to act independently.

The Team recommended that the following be added to the preamble:

- The press exercises its freedom to ensure the free flow of information; ;
- Everyone has the duty to defend and further the right to freedom of expression, especially in recognition of the struggles that created it; and
- Journalists' work is guided at all times by the public interest.

### Five new sections

The present Code has eight sections; the proposed one consists of 13. Two are entirely new and three are in the present Code but need greater emphasis.

The Task Team proposes that the first new section should be headlined *Independence and Conflicts of Interest*. This section says that the press must not allow commercial, political, personal or other non-professional considerations to influence or slant reporting. These considerations include the taking of bribes, gifts or benefits that may influence coverage. It also says that the press must indicate clearly when an outside organisation has contributed to the cost of newsgathering. It also prescribes that editorial material must be kept distinct from advertising.

The Task Team believes this section reiterates that the independence of the press is not negotiable.

The Team proposes that the second new section be called *Dignity and Reputation*. This clause would say that the press must exercise “care and consideration in matters involving people’s dignity and reputation”. It fills a gap in the current Code that has been identified in the public contributions.

The Task Team proposes extending the injunction to act ethically to cover ethical behaviour in the gathering of news. The only reference to this in the current code says news obtained by dishonest or unfair means should not be published unless public interest dictates otherwise. The proposed change would put it in positive terms, saying that news should be obtained honestly and fairly – with the important addition that it should be done legally and that journalists should identify themselves as journalists (again unless public interest dictates otherwise).

*Privacy*, which is currently addressed under the heading *Reporting of News*, now becomes a new clause. The proposal is that the press should exercise care and consideration in matters involving the private lives and concerns of individuals and that the identity of rape victims and victims of sexual violence may not be published. Children are specifically added to this section.

*Children* should get special protection and the proposed Code addresses this. The present Code refers to children once only, where it states that child pornography shall not be published. The proposal maintains the prohibition on the use of child pornography, but it adds that care and consideration must be exercised when reporting on matters where children are involved. The proposal says if coverage might cause harm of any kind to a child, s/he should not be photographed or identified without the consent of a custodial parent (unless public interest dictates otherwise). The proposed new Code would prohibit the press from identifying children who have been victims of abuse or exploitation, or who have been charged or convicted of a crime.

## **Streamlining and strengthening current clauses**

The proposed Code adds to the clause on Reporting News by stating that if a publication is unable to get comment from the subject of serious critical reportage, it should include that information in the story. Plagiarism is also prohibited.

The present clause headlined *Confidential Sources* is also broadened. It now reads *Confidential and Anonymous Sources*. The status quo is that the press has an obligation to protect confidential sources of information. The Task Team recommended an addition – that care should be taken to corroborate information gained from such sources, and that the press may not publish information that constitutes a breach of confidence (unless public interest dictates otherwise).

It was important to add “anonymous sources” to this clause to ensure that this practice is used only when absolutely necessary.

The present section on *Payment for Articles* has been re-written: the pro-

posal is that chequebook journalism must be avoided, particularly where criminals are involved (unless public interest dictates otherwise).

## Unchanged

Sections of the Code that largely remain the same or where some slight editorial changes are proposed are: Discrimination and Hate Speech (the words “and other status” are added); Advocacy; Comment; Headlines, Posters, Pictures and Captions; and Violence.

## Not accepted

Many of the public inputs are already adequately covered in the current Code, but where a phrasing improved on it, the Task Team embraced the new phrasing. For example, some of the people and organisations that made submissions wanted the Council to add a long list of categories – religious communities, people with HIV and Aids, immigrants, etc. – to those already covered in the section on discrimination and hate speech.

The Task Team proposes that the inclusion of the phrase “*and other status*” in that clause would cover all victims of discrimination and hate.

Some proposals from the public were beyond the jurisdiction of the Press Council or would, in the opinion of the Task Team, limit freedom of expression. Examples of these are a proposal that the Code should prohibit the advertising of adult content and another that advertisements for films in newspapers must always include the age restrictions and consumer advice applicable to the film.

## A new Press Code

The public contributed hugely to the proposed new Code that in many ways significantly improves the current one, which already meets international standards.

The Press Council has accepted the Task Team’s recommendations and proposes that the associations that constitute the Press Council adopt it.

THE PROPOSED CODE IS ATTACHED TO THIS REPORT AS APPENDIX 3.





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## Appendix 1:

# Constitution

### Preamble

*Reaffirming* that freedom of expression, including freedom of the press, is a cornerstone of democracy;

*Acknowledging* that the South African Constitution guarantees freedom of expression and that South Africa is also party to the 2002 Declaration of Principles on Freedom of Expression in Africa, drawn up by the African Commission on Human and Peoples' Rights, which states: "Effective self-regulation is the best system for promoting high standards in the media"; and

*Noting* that the laws of the country allow for private arbitration of disputes – a speedy and cost-effective process;

We, the print media in South Africa, accept that self-regulation is a system that will uphold freedom of expression and the editorial independence of the press, and contribute to high journalistic standards.

We therefore establish a voluntary independent press self-regulatory system with the aims and objectives set out in this Constitution.

### 1. Establishment of the Press Council of South Africa

- 1.1. The South African press, through the founding industry and professional bodies named in paragraph 1.2, establishes the Press Council of South Africa ("PCSA" or "Council"), in order to achieve the aims and objectives set out in paragraph 2 of this Constitution.
- 1.2. The founding bodies are:
  - 1.2.1. Print Media South Africa (PMSA), which includes
    - 1.2.1.1. The Newspaper Association of South Africa (NASA);
    - 1.2.1.2. The Magazine Publishers Association of South Africa (MPASA);
    - 1.2.1.3. The Association of Independent Publishers (AIP);
  - 1.2.2. The Forum of Community Journalists (FCJ).
  - 1.2.3. The South African National Editors' Forum (SANEF), which also acts in trust for a journalists' association until such an association is formed.

- 1.3. The founding bodies named in 1.2 explicitly guarantee the independence of the PCSA, so that it can act without fear or favour in the interests of a free and ethical press, and in pursuit of the aims and objectives set out below.
- 1.4. Without derogating from the generality of paragraph 2.1, the PCSA, for the purposes of the proper exercise and performance of its powers, functions and duties under this Constitution, shall be capable in law of instituting or defending or opposing legal proceedings of whatever nature, and appointing staff, and purchasing or otherwise acquiring and holding and alienating or otherwise disposing of movable or immovable property or any other real right or interest, of entering into contracts and concluding agreements, and generally, of performing such other acts and doing such other things as juristic persons may by law perform and do, subject to the provisions of this Constitution.

## **2. Aims and objectives**

- 2.1 To promote and to develop ethical practice in journalism and to promote the adoption of and adherence to those standards by the South African press;
- 2.2 To adopt the SA Press Code as a guide to excellent practice, and to act as its custodian;
- 2.3 To establish and maintain a voluntary independent mechanism to deal with complaints on journalistic ethics from the public against member publications of PMSA and others who subscribe to the SA Press Code;
- 2.4 To promote and preserve the right of freedom of expression, including freedom of the press as guaranteed in Section 16 of the Constitution of the Republic of South Africa.
- 2.5 To promote the concept of press self-regulation, as well as public awareness of the existence of the PCSA's mediation and arbitration service to deal with complaints on journalistic practice;
- 2.6 To cooperate with other press councils and similar organisations in South Africa and abroad that have the same aims and objectives as the PCSA; and
- 2.7 To undertake such other tasks as are necessary to further the objectives of the Council.

## **3. Powers and functions**

- 3.1 To consider and decide upon any matter arising from this Constitution or the functioning of any office appointed in terms of this Constitution.
- 3.2 The Council shall perform all such acts and do all such things as are reasonably necessary for or ancillary, incidental or supplementary to the achievement, pursuit, furtherance or promotion of the objects and prin-

principles contained in this Constitution, the Code or Complaints Procedure or any function considered necessary by the Council.

- 3.3 The PCSA may set up a management or other sub-committees to deal with particular issues, as it sees fit.

## 4. Membership

The Council shall consist of:

- 4.1 Six members representing the public, appointed as set out in paragraph 5.1 below,
- 4.2 Six members representing the press, appointed as follows:
- 4.2.1 One member appointed by the Newspaper Association of South Africa (NASA);
- 4.2.2 One member appointed by the Magazine Publishers Association of South Africa (MPASA);
- 4.2.3 One member appointed by the Association of Independent Publishers (AIP); and
- 4.2.4 One member appointed by the Forum of Community Journalists (FCJ).
- 4.2.5 The South African National Editors' Forum (SANEF) shall appoint two members, and in the event of a journalists' association being formed, SANEF shall relinquish one seat to the journalists' association.
- 4.3 All members of the PCSA shall act in furtherance of the aims and objectives of the Council, and set aside all sectional interests, regardless of the organisation that appointed them.
- 4.4 The Council shall elect one of the press members as their chair.
- 4.5 In the event of a press vacancy occurring, the organisation whose representative has left shall appoint a replacement for the balance of the term.
- 4.6 In the event of a public vacancy occurring, the Appointments Panel shall appoint a replacement, preferably from the shortlist of candidates previously considered.
- 4.7 The Director, Press Ombudsman, Chair of Appeals and Public Advocate shall serve ex officio on the PCSA, without voting rights.
- 4.8 The chairperson, public and press members of the PCSA shall serve a term of five years.
- 4.9 To create a pattern whereby Council members do not all come to the end of their term at once, the chair, three press and three public members of the first PCSA to be established under this Constitution shall serve for six years, and the other members for four. All Council members may continue in office after the date of expiry of their term until a new incumbent is nominated but for not more than six months. There-

after, all terms will revert to five years. At its first regular meeting, the first PCSA shall decide who shall serve for four, and who shall serve for six years.

## **5. Structures and offices of the Press Council of South Africa**

The PCSA shall establish and maintain the following structures. The staff of the PCSA, no matter how appointed, shall be in the employ of the PCSA.

### **5.1 APPOINTMENTS PANEL**

- 5.1.1 The PCSA Appointments Panel exists for the purpose of appointing the chairperson and public members of the PCSA, as well as the Ombudsman, the Deputy Ombudsman, the Director, the Public Advocate and Chair of Appeals.
- 5.1.2 During the last year of the term of office of the PCSA chair, the Council shall request the Chief Justice of South Africa to appoint a judge to chair the Appointments Panel.
- 5.1.3 The sitting Council shall appoint two Council members to assist the Chairperson of the Appointments Panel.
- 5.1.4 The Appointments Panel shall have the right to co-opt no more than two additional members.
- 5.1.5 Appointments shall be made after public invitations for nomination have been advertised, a shortlist compiled and interviews conducted with shortlisted candidates.
- 5.1.6 The Appointments Panel will dissolve when it has completed its task.
- 5.1.7 In the event of a vacancy occurring for any reason, the Appointments Panel shall be requested to reconvene to select a replacement for the balance of the term, considering by preference, the previously shortlisted candidates.

### **5.2 THE DIRECTOR**

- 5.2.1 The PCSA shall appoint a Director, who will lead it on a full-time, professional basis, and who will concentrate on public engagement around issues of standards and media freedom.
- 5.2.2 On request from a newsroom, the Director will also look at standards in newsrooms.
- 5.2.3 The Director's post must be filled by an individual of the highest reputation and integrity.
- 5.2.4 The Director shall serve a renewable term of five years.

### **5.3 COMPLAINTS MECHANISM**

The PCSA shall establish a mechanism to deal with complaints against the press. The mechanism offers a non-statutory avenue for the mediation and arbitration of complaints against the press. The offices and



structures dealing with complaints shall act independently of the PCSA and the founding media organisations.

#### 5.3.1 JURISDICTION

The member publications of the associations listed in paragraph 1.2.1 above are subject to the Press Code, as amended from time to time by the PCSA, and to the jurisdiction of the PCSA's complaints mechanism.

5.3.1.1 The jurisdiction of the PCSA extends to the electronic media of member publications.

5.3.1.2 Where a complaint is made against a newspaper or magazine which is not a member of the associations listed in paragraph 1.2.1 above, the Public Advocate or Ombudsman shall approach such newspaper or magazine and inquire whether it accepts the jurisdiction of the PCSA for the settlement of the complaint.

5.3.1.3 In the event that the newspaper or magazine refuses to submit to the jurisdiction of the Ombudsman, he or she shall advise the complainant accordingly.

#### 5.4 PUBLIC ADVOCATE

5.4.1 The Public Advocate will assist members of the public to formulate their complaints.

5.4.2 The Public Advocate will be responsible for attempts to resolve complaints through mediation between the complainant and the publication in question.

5.4.3 If this does not succeed, the Public Advocate will refer the matter to the Ombudsman for arbitration.

5.4.4 If a hearing is held, s/he may represent the complainant at the hearing and argue the matter on their behalf before the Ombudsman.

5.4.5 This individual:

5.4.5.1 Should ideally have both media and legal skills, with a finely tuned sense of public service and commitment.

5.4.5.2 Be a citizen of and permanently resident in the Republic of South Africa;

5.4.5.3 Be a person who is committed to fairness, freedom of speech, the free flow of information and is committed to the Press Code of the PCSA.

5.4.5.4 Will serve a renewable term of five years.

#### 5.5 THE OMBUDSMAN

5.5.1 The Ombudsman shall arbitrate matters that cannot be resolved at the earlier level of mediation.

5.5.2 The Ombudsman may do so on the papers, without hearing evidence.

5.5.3 The Ombudsman may also conduct a hearing, for which s/he shall convene an "arbitration committee", in which s/he shall be joined

by one press and one public member of the Adjudication Panel.

5.5.4 A person employed by a publication which is the subject of the complaint, or with any other vested interest in the matter, may not serve on an “arbitration committee” to consider the matter.

5.5.5 The Ombudsman may also co-opt an additional assessor to assist with technically complex issues.

5.5.6 The Ombudsman shall:

5.5.6.1 Be a citizen of and permanently resident in South Africa;

5.5.6.2 Have extensive press editorial experience at a senior level;

5.5.6.3 Have the capability to adjudicate matters independently and fairly;

5.5.6.4 Be a person who is committed to fairness, freedom of speech, the free flow of information and is committed to the Press Code of the PCSA.

5.5.6.5 The Ombudsman’s term of office is five years and is renewable.

## 5.6 THE PANEL OF ADJUDICATORS

5.6.1 The PCSA shall appoint a Panel of Adjudicators composed of six public representatives and six press representatives.

5.6.2 Members of “arbitration committees” to hear a case with the Ombudsman shall be drawn from the Panel of Adjudicators, as set out in paragraph 5.5.3 above.

5.6.3 Members of “appeals committees” to hear an appeal with the Chair of Appeals shall also be drawn from the Panel of Adjudicators, as set out in paragraph 5.7.4 below.

5.6.4 Members of the Panel of Adjudicators who heard a case at the level of arbitration may not sit on the appeal in the same case.

5.6.5 The term of office of the Panel of Adjudicators shall be five years.

## 5.7 THE CHAIR OF APPEALS

5.7.1 Appeals against an arbitration ruling by the Ombudsman, acting with or without an “arbitration committee”, shall be dealt with by the Chair of Appeals.

5.7.2 Application for leave to appeal must be made to the Chair of Appeals, who may accept the application or refuse it.

5.7.3 The Chair of Appeals may decide an appeal on the papers, without hearing oral evidence or argument.

5.7.4 S/he may also convene an “appeals committee”, in which s/he shall be joined by one press and one public member of the Adjudication Panel.

5.7.5 A person employed by a publication which is the subject of the complaint, or with any other vested interest in the matter, may not serve on an “appeals committee” to consider the matter.

5.7.6 The “appeals committee” may consider the matter with or without hearing oral argument or evidence.

- 5.7.7 The Chair of Appeals should be a senior legal practitioner, preferably a retired judge.
- 5.7.8 The term of appointment shall be for five years and is part-time.
- 5.7.9 A member of the Panel of Adjudicators shall be appointed to act as Chair of Appeals when the Chair is not available.

## 6. Eligibility

- 6.1 Persons appointed to any post in the PCSA must be of high standing and integrity, with a strong interest in the press, and subscribe fully to principles of a free press and the Press Code.
- 6.2 Press members of the PCSA and the Panel of Adjudicators are required to be active in editorial work or reporting for a PMSA publication, or to have wide experience in this field.
- 6.3 The public members of the PCSA and the Panel of Adjudicators are required to have a keen interest in communications and the media and social and political issues and to be advocates of freedom of expression and the freedom of the press.
- 6.4 Other offices of the PCSA may not be held by anybody who:
  - 6.4.1 Has any financial interest in the media or is in the employ of the media;
  - 6.4.2 Occupies a seat in a local, provincial, national legislative body;
  - 6.4.3 Is an office-bearer of a political party or movement or is in the employ of the Public Service;
  - 6.4.4 Is an unrehabilitated insolvent;
  - 6.4.5 Was convicted of an offence after 1992, whether in South Africa or elsewhere, for which such person has been sentenced to imprisonment without the option of a fine.

## 7. Cessation of membership

A person shall cease to occupy an office of the PCSA if:

- 7.1 He or she resigns;
- 7.2 He or she becomes incapable for whatever reason of fulfilling his or her duties, provided that if a dispute arises between the incumbent and the PCSA in this connection, the matter will be resolved by an arbitrator appointed by the Chair of the Johannesburg Bar Council in a manner which he or she deems fair;
- 7.3 He or she is declared insolvent by a court or is found guilty of an offence listed in Schedule I or II of the Criminal Procedure Act 1977.
- 7.4 Any member who becomes ineligible to hold the post in terms of the criteria for appointment to the post shall automatically cease to be a member as from the date of such ineligibility.

- 7.5 The Council may, by a two-thirds majority at a general meeting, suspend or terminate the membership of any member if such a member has brought the good name of the PCSA into disrepute or if such member has omitted to attend two consecutive meetings in a year without good cause acceptable to the Council.
- 7.5.1 At least 21 days' prior written notice of such a meeting of the Council must be given to all members of the Council.
- 7.5.2 Such a resolution must be taken by a two-thirds majority of all the members of the Council and may be taken only at a meeting where at least two-thirds of the members are in attendance.

## **8. Finance**

- 8.1 The PCSA shall establish a Finance and Remuneration Committee to consider all financial issues and the fair and proper remuneration of its staff and the remuneration of public members. The Director of the PCSA shall be a member of this Committee.
- 8.2 The Finance and Remuneration Committee shall prepare an Annual Budget for submission to the PMSA.
- 8.3 The PMSA shall cover the reasonable costs of the PCSA.
- 8.4 If the PCSA and the PMSA cannot reach agreement on the annual budget, it shall be treated as a dispute and dealt with in terms of paragraph 11.
- 8.5 The Chair of Appeals will be remunerated by way of a retainer, a daily hearing fee plus costs.
- 8.6 Public members of the PCSA will be remunerated per meeting and their costs for attending meetings will be paid by the PCSA.
- 8.7 The remuneration for the public members and the Chairperson shall be determined by the PCSA at the beginning of its term and an annual increase of at least the official inflation rate (CPIX) shall also be determined at this stage.
- 8.8 Where members of the Adjudication Panel serve on an "arbitration committee" or an "appeals committee", their costs and a reasonable daily rate for attendance shall be paid by the PCSA.

## **9. Meetings**

- 9.1 The Council shall hold as many meetings per year as the Chairperson deems necessary, with a minimum of four meetings per year, or where three members require the Chairperson to hold a meeting on a specific matter, he or she shall do so within 21 days.
- 9.2 The quorum for a meeting shall be six members and resolutions shall be taken by majority vote except in so far as this Constitution requires otherwise. The Chairperson shall have a casting vote where the votes

are equal.

- 9.3 Meetings of the Council may be held in person or by telephone or video conference or other appropriate electronic communications system or a combination thereof: provided that proper notice of such a meeting was given to all members and a quorum is in attendance.
- 9.4 Minutes shall be kept of the proceedings of meetings.
- 9.5 Unless all the members agree, a Council meeting shall be held within seven days' written notice by the Chairperson.

## 10. Amendments

- 10.1 Any amendment to this Constitution, the Code or the Complaints Procedure shall require the approval of two-thirds of the members of the PCSA voting either personally or in absentia, with the concurrence of the founding bodies.
- 10.2 No amendment shall be effective unless at least 21 calendar days' written notice of a proposed amendment shall have been given to all members.
- 10.3 Votes submitted in absentia shall be in writing, signed by the relevant member and be recorded for or against the proposed amendment and no further amendments of the proposal may be made at such meeting unless a two-thirds majority of the Council is present at the meeting and votes for such further amendment.

## 11. Arbitration

- 11.1 In the event of any dispute within the PCSA or between the PCSA and its founding bodies which are not capable of resolution between the parties within a period of two months, the PCSA shall appoint an arbitrator to resolve the problem and where the parties cannot agree on the arbitrator the Chair of the Johannesburg Bar Council shall be approached to appoint an arbitrator.
- 11.2 Each association which has appointed a representative in terms of 4.2 of this Constitution shall bear the costs of its representative carrying out the bona fide functions.
- 11.3 The cost of the arbitrator shall be shared equally by the disputing parties except in the case where the arbitrator decides otherwise.
- 11.4 The decision of the arbitrator shall be final and binding.

## 12. Seat of the PCSA

- 12.1 The seat of the PCSA shall be in Johannesburg and meetings shall be held in Johannesburg unless the management decides otherwise.

### **13. Dissolution**

- 13.1 A resolution to dissolve the PCSA can only be passed at a special meeting called for this purpose, by a two-thirds majority of the members present, which two-thirds majority shall be not less than a simple majority of the total membership.
- 13.2 Not less than 21 days' notice shall be given of any such meeting and such notice shall give particulars of the purpose for which the meeting is called.
- 13.3 In the case of dissolution the assets will be handed back to the founding bodies.

## Appendix 2:

# Complaints Procedures

It shall be of the essence of the adjudication proceedings that:

- Complaints be considered and adjudicated upon within the shortest possible time after the publication of the matter giving rise to the complaint;
- Complaints be considered and adjudicated upon in an informal manner; and
- Whenever possible the Public Advocate, Ombudsman, the Appeals Committee and the parties will strive for a speedy and amicable settlement.

## 1. Complaints

- 1.1 “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 take the complaint to the courts after it has been dealt with in the Ombudsman’s system.
- 1.2 The “respondent” in respect of a complaint shall be the proprietor of the publication, which may delegate its editor or, in his or her absence, an assistant editor or other suitable editorial representative of the member concerned, to act and appear in its stead in respect of any complaints dealt with by the Public Advocate, Ombudsman or the Appeals Committee.
- 1.3 A complaint shall be made as soon as possible, but not later than 14 days after the date of the publication giving rise to the complaint. The Public Advocate, who throughout the process will advise and help the complainant, may on reasonable grounds accept late complaints if in his or her opinion there is good and satisfactory explanation for the delay.
- 1.4 The complaint shall be made to the Public Advocate either in person, by telephone or in writing. “Writing” shall include cable, telegram, telex, e-mail and fax messages. Where a complaint is made other than in writing it shall be confirmed forthwith in writing or the Public Advocate shall assist the complainant to do so. Upon the receipt of a complaint by the Public Advocate, the Public Advocate shall be entitled to request from the complainant a copy of the material published giving rise to the com-

plaint, and the complainant shall be obliged to forward such a copy to the Public Advocate forthwith.

1.5 **The Public Advocate shall not accept a complaint:**

- 1.5.1 Which is anonymous or which, in his or her opinion, is fraudulent, frivolous, malicious or vexatious and which prima facie falls outside the ambit of the Code;
- 1.5.2 Where the complainant declines to sign the Complainant's Declaration (Annexure A below) indicating his or her choice to use the private arbitration mechanism provided by the Press Council of South Africa (PCSA);
- 1.5.3 Which is directed at a newspaper or magazine outside the jurisdiction of the Ombudsman's office. Where the publication does not fall under the jurisdiction of the Ombudsman's office, the Public Advocate will approach the editor of the publication and request that they become part of the process.
- 1.6 Where the Public Advocate declines to accept a complaint on any of the grounds specified in rules 1.3 or 1.5 the complainant may, within seven days, with full reasons, request the Chair of Appeals to review the decision. In the event of the Chair of Appeals overruling the Public Advocate's decision, the matter shall proceed in terms of rule 2. The Deputy Ombudsman or another competent member of the Press Council will act as the Public Advocate in this event.

## **2. Negotiation Procedure by the Public Advocate**

- 2.1 Upon acceptance of a complaint by the Public Advocate, he or she shall immediately notify the respondent in writing of the complaint, giving sufficient details to enable the respondent to investigate the matter and respond within seven working days unless there is a satisfactory reason for the extension of the time.
- 2.2 The Public Advocate shall forthwith endeavour together with the complainant to achieve a settlement with the publication.
- 2.3 The Public Advocate shall hold discussions with the parties on an informal basis with the object of achieving a speedy settlement.
- 2.4 If the complaint is not settled within seven working days of receipt of the response, the Public Advocate shall refer the complaint to the Ombudsman for Arbitration.

## **3. Arbitration Proceedings by the Ombudsman**

- 3.1 The Ombudsman may, if it is reasonable not to hear the parties, decide the matter on the papers.
- 3.2 If the Ombudsman finds that s/he cannot decide a matter on the papers before him, but merely needs clarification on some aspects of a com-



plaint and therefore sees no need for a formal hearing s/he may convene an informal hearing with the two parties

- 3.3 Where the Ombudsman decides to hold a hearing, the Ombudsman shall convene an Arbitration Committee in which he or she is joined by a public and a press member drawn from a Panel of Adjudicators, to adjudicate the matter with him or her at the hearing.
- 3.4 If the complainant accepts the offer, the Public Advocate will represent the complainant at the hearing.
- 3.5 Decisions by the Arbitration Committee shall be by a majority vote.
- 3.5.1 Within 7 days of receipt of the decision, any one of the parties may apply for leave to appeal to the Chair of Appeals and the grounds of appeal shall be fully set out.
- 3.5.2 The application and grounds must be filed at the Ombudsman's office.
- 3.5.3 The Ombudsman shall inform the other party of the application for leave to appeal and shall advise the party that he or she may file a response to the application for leave to appeal within 7 days of receipt thereof.
- 3.6 If the Chair of Appeals is of the view that there are reasonable prospects that the Appeals Committee may come to a decision different from that of the Ombudsman or the Arbitration Committee, as the case may be, the Chair of Appeals shall grant leave to appeal.

#### **4. Adjudication by the Appeals Committee**

- 4.1 Where leave to appeal is granted in terms of rule 3.5, the Ombudsman shall place before the Appeals Committee all the documentation that he or she had before him or her and the Ombudsman shall also inform both parties of the date and venue of the hearing before the Appeals Committee.
- 4.2 The Chair of Appeals shall appoint one press member and one public member from Panel of Adjudicators, the persons appointed in terms of clause 5.6 of the Constitution, to hear the appeal with him.
- 4.3 The Chair of Appeals shall determine a date, time and venue for adjudication of the appeal, which shall be heard as soon as possible after receipt by him or her of the documents referred to in rule 4.1.
- 4.4 It shall not be obligatory for either party to appear personally before the Appeals Committee, but they are entitled to attend and to address the Appeals Committee which is, in any case, entitled to question them on the matter: provided that a respondent is not under a duty to disclose the identity of an informant.
- 4.5 The Chair of Appeals may request the parties to appear personally, with the Public Advocate looking after the interests of the complainant. The Chair of Appeals may advise parties that, in the circumstances, an ad-

verse inference may be drawn from failure to comply with such request without good cause.

- 4.6 If the Appeals Committee finds against a respondent who is present, the respondent shall be given an opportunity to address the Committee in mitigation of any order that may be made.
- 4.7 The hearings of the Arbitration and the Appeals Committees shall be open to the public unless the identity of a rape or sexual victim or a child or a victim of extortion is at issue.

## 5. Variation of Procedure

- 5.1 The Ombudsman or Chair of Appeals may, if satisfied that no injustice will result, and upon such conditions as he or she may impose:
  - 5.1.1 Extend any time period contemplated in these rules;
  - 5.1.2 At any stage require any allegation of fact to be verified on oath;
  - 5.1.3 Call upon the parties to a dispute to furnish such further information as he or she may consider necessary.

## 6. Findings of Ombudsman, Arbitration Committee or Appeals Committee

- 6.1 The **Ombudsman, Arbitration Committee or Appeals Committee** may uphold or dismiss a complaint or appeal, as the case may be.
- 6.2 If a finding is made against a member of PMSA or a publication that has voluntarily become subject to the jurisdiction of the **Ombudsman, Arbitration Committee or Appeals Committee**, the **Ombudsman, Arbitration Committee or Appeals Committee**, as the case may be, may make any one or more of the following orders against the proprietor of the publication:
  - 6.2.1 Caution or reprimand the publication;
  - 6.2.2 Direct that a correction, retraction or explanation and, where appropriate, an apology and/or the findings of the **Ombudsman, Arbitration Committee or Appeals Committee** be published by the respondent in such manner as may be determined by the **Ombudsman, Arbitration Committee or Appeals Committee**, as the case may be.
  - 6.2.3 Order that a complainant's reply to a published article, comment or letter be published by the publication;
  - 6.2.4 Make any supplementary or ancillary orders or issue directives that are considered necessary for carrying into effect the orders or directives made in terms of this clause and, more particularly, issue directives as to the publication of the findings of the **Ombudsman, Arbitration Committee or Appeals Committee**.

- 6.3 In the reasons for the decision and/or sanction the **Ombudsman, Arbitration Committee or Appeals Committee** is entitled to criticise the conduct of the complainant in relation to the complaint, where such criticism is warranted in the view of **Ombudsman, Arbitration Committee or Appeals Committee**.
- 6.4 The Ombudsman shall cause any findings, reasons for a finding and/or requirements of a Committee to be sent to the complainant and to the publication who shall comply with the **Ombudsman, Arbitration Committee or Appeals Committee** orders or directives, if any.
- 6.5 The Ombudsman shall keep on record all findings and reasons for findings by the **Ombudsman, Arbitration Committee or Appeals Committee**.
- 6.6 The records referred to in rule 6.5 shall be public documents except insofar as those documents are privileged in terms of the Promotion of Access to Information Act 2000 or identify a rape victim, a person who has been sexually assaulted or a child, or a victim of extortion.

## Annexure A

### Complainant's Declaration

I, (name of complainant), the undersigned, have been informed by the Press Council's Public Advocate of my rights under Section 34 of the Constitution of South Africa to have my dispute with ...X.publication... resolved before a court or another independent and impartial tribunal or forum provided by the State.

However, I hereby choose to submit my complaint and any dispute arising from it for adjudication to the SA Press Ombudsman ("the Ombudsman") subject to the SA Press Code and Complaints and Procedures of the Press Council of South Africa – a private arbitration mechanism for a speedy and cost-effective outcome.

I accept the decision of the Ombudsman, or in the event of an appeal, the decision of the Appeals Committee as final and binding.

I am also aware that if I am unhappy with the way the proceedings were conducted, I do have the right to apply to the courts for a review in terms of Section 33 of the Arbitration Act of 1965.

Signed:

Date:



## Appendix 3:

# The South African Press Code

### Preamble

The press exists to serve society. Its freedom provides for independent scrutiny of the forces that shape society, and is essential to realising the promise of democracy. It enables citizens to make informed judgments on the issues of the time, a role whose centrality is recognised in the South African Constitution. Section 16 of the Bill of Rights sets out that:

“Everyone has the right to freedom of expression, which includes:

- Freedom of the press and other media;
- Freedom to receive and impart information or ideas;
- Freedom of artistic creativity; and
- Academic freedom and freedom of scientific research.

“The right in subsection (1) does not extend to

- Propaganda for war;
- Incitement of imminent violence; or
- Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

The press holds these rights in trust for the country’s citizens; and it is subject to the same rights and duties as the individual. Everyone has the duty to defend and further these rights, in recognition of the struggles that created them: the media, the public and government, who all make up the democratic state.

Our work is guided at all times by the public interest, understood to describe information of legitimate interest or importance to citizens.

As journalists, we commit ourselves to the highest standards of excellence, to maintain credibility and keep the trust of our readers. This means striving for the maximum truth, avoiding unnecessary harm and acting independently.

We adopt the following Code:

### 1. Reporting of News

- 1.1 The press shall be obliged to report news truthfully, accurately and fairly.

- 1.2 News shall be presented in context and in a balanced manner, without any intentional or negligent departure from the facts whether by distortion, exaggeration or misrepresentation, material omissions, or summarisation.
- 1.3 Only what may reasonably be true, having regard to the sources of the news, may be presented as fact, and such facts shall be published fairly with due regard to context and importance. Where a report is not based on facts or is founded on opinions, allegation, rumour or supposition, it shall be presented in such manner as to indicate this clearly.
- 1.4 Where there is reason to doubt the accuracy of a report and it is practicable to verify the accuracy thereof, it shall be verified. Where it has not been practicable to verify the accuracy of a report, this shall be mentioned in such report.
- 1.5 A publication should seek the views of the subject of serious critical reportage in advance of publication; provided that this need not be done where the publication has reasonable grounds for believing that by doing so it would be prevented from publishing the report or where evidence might be destroyed or sources intimidated. If the publication is unable to obtain such comment, this shall be stated in the report.
- 1.6 A publication should make amends for publishing information or comment that is found to be inaccurate by printing, promptly and with appropriate prominence, a retraction, correction or explanation.
- 1.7 Reports, photographs or sketches relating to indecency or obscenity shall be presented with due sensitivity to the prevailing moral climate. A visual presentation of sexual conduct should not be published, unless public interest dictates otherwise.
- 1.8 Journalists shall not plagiarise.

## **2. Gathering of news**

- 2.1 News should be obtained legally, honestly and fairly unless public interest dictates otherwise.
- 2.2 Press representatives shall identify themselves as such, unless public interest dictates otherwise.

## **3. Independence and conflicts of interest**

- 3.1 The press shall not allow commercial, political, personal or other non-professional considerations to influence or slant reporting. Conflicts of interest must be avoided, as well as arrangements or practices that could lead audiences to doubt the press's independence and professionalism.
- 3.2 Journalists shall not accept a bribe, gift or any other benefit where this is intended or likely to influence coverage.

- 3.3 The press shall indicate clearly when an outside organisation has contributed to the cost of newsgathering.
- 3.4 Editorial material shall be kept clearly distinct from advertising.

#### **4. Privacy**

- 4.1 The press shall exercise exceptional care and consideration in matters involving the private lives and concerns of individuals, bearing in mind that any right to privacy may be overridden only by a legitimate public interest.
- 4.2 The identity of rape victims and victims of sexual violence shall not be published without the consent of the victim or in the case of children, without the consent of their legal guardians.
- 4.3 The HIV/AIDS status of people should not be disclosed without their consent, or in the case of children, without the consent of their legal guardians.

#### **5. Dignity and Reputation**

The press shall exercise exceptional care and consideration in matters involving dignity and reputation, bearing in mind that any right to privacy may be overridden only by a legitimate public interest.

#### **6. Discrimination and Hate Speech**

- 6.1 The press should avoid discriminatory or denigratory references to people's race, colour, ethnicity, religion, gender, sexual orientation or preference, physical or mental disability or illness, age, or other status except where it is strictly relevant to the matter reported.
- 6.2 The press should not refer to a person's race, colour, ethnicity, religion, gender, sexual orientation or preference, physical or mental disability or other status in a prejudicial or pejorative context except where it is strictly relevant to the matter reported.
- 6.3 The press has the right and indeed the duty to report and comment on all matters of legitimate public interest. This right and duty must, however, be balanced against the obligation not to publish material which amounts to hate speech.

#### **7. Advocacy**

A publication is justified in strongly advocating its own views on controversial topics provided that it treats its readers fairly by:

- 7.1 Making fact and opinion clearly distinguishable;

- 7.2 Not misrepresenting or suppressing relevant facts;
- 7.3 Not distorting the facts.

## **8. Comment**

- 8.1 The press shall be entitled to comment upon or criticise any actions or events of public interest provided such comments or criticisms are fairly and honestly made.
- 8.2 Comment by the press shall be presented in such manner that it appears clearly that it is comment, and shall be made on facts truly stated or fairly indicated and referred to.
- 8.3 Comment by the press shall be an honest expression of opinion, without malice or dishonest motives, and shall take fair account of all available facts which are material to the matter commented upon.

## **9. Children**

### **Definition of Child Pornography**

For purposes of this Code, “child pornography” shall mean: “Any image or any description of a person, real or simulated, who is or who is depicted or described as being, under the age of 18 years, engaged in sexual conduct; participating in or assisting another person to participate in sexual conduct; or showing or describing the body or parts of the body of the person in a manner or circumstances which, in context, amounts to sexual exploitation, or in a manner capable of being used for purposes of sexual exploitation.”

- 9.1 Child pornography shall not be published.
- 9.2 Exceptional care and consideration must be exercised when reporting on matters where children under the age of 18 are involved. If there is any chance that coverage might cause harm of any kind to a child, he or she should not be photographed or identified unless a custodial parent or similarly responsible adult consents or a public interest is evident.
- 9.3 The press shall not identify children who have been victims of abuse or exploitation, been charged or convicted of a crime.

## **10. Violence**

Due care and responsibility shall be exercised by the press with regard to the presentation of brutality, violence and atrocities.



## **11. Headlines, Posters, Pictures and Captions**

- 11.1 Headlines and captions to pictures shall give a reasonable reflection of the contents of the report or picture in question.
- 11.2 Posters shall not mislead the public and shall give a reasonable reflection of the contents of the reports in question.
- 11.3 Pictures shall not misrepresent or mislead nor be manipulated to do so.

## **12. Confidential and Anonymous sources**

- 12.1 The press has an obligation to protect confidential sources of information.
- 12.2 The press shall avoid the use of anonymous sources unless there is no other way to handle a story. Care should be taken to corroborate the information.
- 12.3 The press shall not publish information that constitutes a breach of confidence unless a legitimate public interest dictates otherwise.

## **13. Payment for Articles**

The press shall avoid chequebook journalism where informants are paid, particularly when criminals are involved, except where the material concerned ought to be published in the public interest and the payment is necessary for this to be done.



## Appendix 4:

# List of contributors

#	Organisation	Oral/Written
1	Abdullah, KZN	O
2	Akanyang Meremetsi (Tweet through Media Matters)	W
3	Andries Cornelissen, news editor e-tv	W
4	Anna Lerner (Tweet organised by Media Matters)	W
5	Anne Kruger, Editor, Paarl Post	W
6	Anonymous (via fax)	W
7	Anton Harber, University of the Witwatersrand	W
8	Barend Albert	W
9	Brendan Boyle, Parliamentary Bureau Chief, Sunday Times, The Times and TimesLIVE	W
10	Centre for Constitutional Rights (FW de Klerk Foundation)	W
11	CR Benson	W
12	David Robert Lewis (In his personal capacity and not on behalf of his organisation Alternative Media Forum)	W
13	Dr John Kiley	W
14	Editors of Independent Newspapers in KZN	W
15	Film and Publications Board	W
16	Freedom Front Plus (Anton Alberts)	W
17	FXI: Oral	O
18	FXI: Written	W
19	Gerrit Boonstra (ex-journalist)	W
20	Gill Moodie, freelance journalist Bizcommunity.com	W
21	Guy Berger	W
22	Guy Berger	O
23	Gwen Ansell (Media trainer)	W
24	Harvey Tyson (former editor of The Star)	W
25	Institute for Accountability in Southern Africa (Paul Hoffman SC)	W
26	Jane Duncan	W
27	John Kane-Berman (Chief Executive, Institute of Race Relations)	W
28	Julie Reid, Department of Communication Science, UNISA	O
29	Julie Reid, Department of Communication Science, UNISA	W

30	Jane Duncan: Oral	O
31	Keith Gottschalk, University of the Western Cape	W
32	Law Society of SA (Represents 20 000 attorneys and 5 000 candidate attorneys.)	W
33	Mark van der Velden (Editor of SAPA and member of Sanef)	W
34	Media Monitoring Africa	W
35	MMA Reviewed postion	O
36	MMA: Children	O
37	Muslim Judicial Council, represented by Nabeweya Malick	O
38	Muslim Man Joburg	O
39	Pete Swanepoel	W
40	Peter Rankin	W
41	Plaatjie Mashego, Unemployment Secretariat	W
42	Prof JD Froneman, School of Communications Studies, North West	O
43	Quraysh Patel	W
44	Ralf G Will, Swift Photo Tours Agency and representative of the Western Cape Soccer Players' Union	O
45	Reg Rumney	W
46	Right2Know Campaign (Murray Hunter)	W
47	Ryan Carty	W
48	SA Jewish Board of Deputies	W
49	Siki Dlanga – on behalf of Scripture Union, Christian youth and the broader church	W
50	Simanga Sibeko	O
51	Simone Puterman, Managing Editor: Bizcommunity.com	W
52	Steve Mathewson, deputy editor I-Net Bridge	W
53	Thabo Leshilo & Hoosen Kolia (In personal capacities and not on behalf of their employer Avusa)	W
54	Themba Sepotokele	W
55	Trudie Blanckenberg	W
56	Tshwane University of Technology (Compiled by lecturer in media law Fanie Groenewald)	W
57	Volksblad (Gert Coetzee)	O
58	Ziyad Motala (Professor of Law)	W

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