



**Commentary on the
Zimbabwe Media Commission Bill, 2019**

30 August 2019

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Introduction

The Zimbabwe government gazetted the Commentary on the Zimbabwe Media Commission Bill (hereinafter the Bill) on 9 August 2019. This relatively short Bill seeks to give effect to Sections 61, 248 and 249 of Zimbabwe's 2013 Constitution. Section 61 of the Constitution is on the right to freedom of expression and freedom of the media while Sections 248 and 249 set out the establishment, composition, and functions of the Zimbabwe Media Commission.

In addition to giving effect to the constitutional provisions set out above, the Bill also seeks to regularise the establishment of the Zimbabwe Media Commission. The Zimbabwe Media Commission was originally established in terms of the Access to Information and Protection of Privacy Act (hereinafter AIPPA) when the law was introduced in 2001. The composition and functions of the Zimbabwe Media Commission are set out in AIPPA.

Chapter 12 of the Constitution lists the Zimbabwe Media Commission as one of the country's independent Commissions set up to support democracy in Zimbabwe. Once passed into law, the current Bill will replace those parts of AIPPA that deal with the Zimbabwe Media Commission and its functions.

Summary of the Bill

Definition of terms

Section 2 of the Bill is the Interpretation clause which defines some of the terms used in the Bill. It is important to note that "media" is defined widely enough to include information disseminated by any media service to the public including information sent over *"the internet or any other electronic means."* Confusingly, a "media service" is defined as *"any public or private service for the provision of information to the general public through the media."* It remains to be seen whether this wide definition of media will include sharing of information on private platforms such as *Facebook Live, YouTube* and *Twitter's Periscope*.

Interestingly, the Bill does not define the term journalist; rather the Bill defines the term "media practitioner." A media practitioner is defined as *"a person engaged in the writing, editing or transmitting of news and information to the public, and includes broadcaster, a journalist, and an editor."* This wide definition is welcome and takes into account the fact that the media freedoms set out in Section 61 of the Constitution are not just reserved for

journalists, but for a broader group of people who work to gather information and share it as news in various formats on various platforms.

Functions of the Commission

Section 249 of the Constitution contains a comprehensive list of the Commission's functions, namely:

In addition to these constitutional functions, the Commission is assigned further functions in terms of Section 4 of the Bill which reads as follows:

(1) In addition to the functions set out in Section 249 of the Constitution, the Commission shall have the following function:

(a) to monitor and secure compliance with any—

(i) law which regulates media practitioners and media services including broadcasting, print and electronic media, in order to ensure respect for the rights protected by Section 61 of the Constitution;

(ii) international treaty to which Zimbabwe is a party with respect to the protection, promotion or advancing of people's rights in relation to the media in Zimbabwe;

(b) to collaborate and co-operate with other independent constitutional Commissions in supporting and entrenching human rights and democracy

Composition of the Commission

According to Section 248 (1) of the Constitution, the Commission shall comprise of one Chairperson and eight members or Commissioners. The President of Zimbabwe is responsible for the appointment of the Chairperson and the eight other Commissioners. The only caveat is that the President has to consult the Committee on Standing Rules and Orders when appointing the Chairperson of the Zimbabwe Media Commission. When selecting the eight other Commissioners, the President's choices are confined to lists of candidates received from the Committee on Standing Rules and Orders.

Section 3 of the Bill states that only the Chairperson shall be a fulltime employee of the Commission, the rest of the Commissioners will only serve on a part time basis. The last set of Commissioners appointed to the Zimbabwe Media Commission in terms of AIPPA also

served on a part time basis. The Bill does not make mention of the term limits that the members of the Commission will serve. Members of other Commissions, for example the Zimbabwe Human Rights Commission can only serve a maximum of two five-year terms.

In addition to the Chairperson and eight Commissioners, the Zimbabwe Media Commission may also hire secretariat staff which is led by a Secretary. The Commission may appoint a Secretary of the Commission after consultation with the Minister of Information, Publicity and Broadcasting Services and the Minister responsible for finance. According to Section 7 (3) of Bill, the Secretary will be responsible for the day-to-day administration and management of the affairs, staff, and property of the Commission.

The Bill provides for the hiring of experts whose expertise is necessary to the fulfilment of the Commission's mandate and functions. This is provided for in Section 7 (4). Fixed term contracts will set out the nature of the engagement of persons as either members of the Secretariat or as expert consultants.

Submission of complaints for investigation

Part III of the Bill outlines the Commission's powers to investigate and hold hearings on alleged and suspected media freedom violations. The power to investigate complaints of media freedom violations is found in Section 249 (1) (e) of the Constitution and effected by Section 8 of the Bill. Section 8(1) says the Commission may on its own or at the request of a member of the public, investigate any action that either constitutes or is likely to result in a violation of any of the rights set out in Section 61 of the Constitution. Section 8(2) requires members of the public to submit their complaints to the Commission in written form. However, the Commission may not refuse to receive or investigate a matter solely because the complaint is not submitted in the required format.

Any suitable person and not just the victim of an alleged media rights violation, may make complaints to the Commission. Section 8 (4) (a) states that complaints must be submitted within three years of the date the action complained of occurred. The Commission will not have the power to investigate or inquire on actions that occurred before the commencement of the Zimbabwe Media Commission law. It is important to note that in terms of Section 8 (4) (b), the Commission will not investigate matters where the action

complained of is the subject of ongoing court proceedings or the investigation by another independent Commission.

Conduct of investigations

Section 10 (3) grants the Commission the discretion to hold investigations, hearings, and inquiries in the form of closed or public proceedings. MISA Zimbabwe submits that there must be provision that ensures that investigations and proceedings that are of public interest be held in public or open platforms. This will help in the promotion of the knowledge of media freedoms and their importance in Zimbabwe.

During its investigations and inquiries, the Commission shall not be bound by the normal rules of evidence. This means that the Commission has the power to consider evidence that might not be admitted in a court of law. Section 10 (6) obliges the Commission to give the person or entity against which a complaint has been made adequate time to respond to the allegations.

There are problematic provisions relating to the conduct of investigations by the Commission. The first issue is found in Section 10 (3) which gives Commissioners powers listed in Sections 9 to 18 of the Commissions of Inquiry Act, 1941. This is exacerbated by Section 10 (4) which permits the participation of police in the investigation or inquiry process. Borrowing the Zimbabwe Media Commission's powers from the Commission of Inquiry and involving police in the process effectively converts the investigation from a civil procedure into a criminal procedure. This is problematic since Zimbabwe has a history of using various pieces of legislation to criminalise journalism.

The other contentious issue is contained in Section 10 (8) of the Bill which permits the Minister to bar the Commission from disclosing certain information that in the Minister's opinion is contrary to public interest or against national interests and security. In issuing such a prohibition, the Minister must be guided by the limitation clause as found in Section 86 (1) and (2) of the Constitution. However, this process is open to abuse especially in instances involving information that is not in government's interests.

Measures following investigation

Section 12 states that at the conclusion of an investigation or inquiry, the Commission must make an order or recommendations based on the findings of the investigation or inquiry.

The Commission must provide reasons that support the order or recommendations made. A report of the findings of the Commission must accompany the order or recommendations made by the Commission.

If at the conclusion of a hearing, the Commission comes up with recommendations, such recommendations must be included in the Commission's report of the matter. A copy of the report must be submitted to the Minister responsible for administering the Zimbabwe Media Commission law. Section 14 (3) states that the Commission has power to recommend the payment of compensation to any party prejudiced by a media rights violation. The Commission may also recommend that the complainant or victim seeks redress through the courts.

Section 13 deals with the enforcement of orders made by the Commission. According to Section 13 (1), persons and entities against whom an order is made must effect the order within 14 days of the order being made. If there is no action within 14 days from the time the order is given, the Commission may apply to the High Court for appropriate redress on the matter or submit a special report through the appropriate Minister, to Parliament. Interestingly, Section 15 (1) of the Bill empowers the Commission to institute court proceedings for the redress of media rights violations. In this role, the Commission may take part in legal proceedings, including legal proceedings against the State and other State entities.

Persons aggrieved by decisions made by the Commission may, in terms of Section 16 (1) of the Bill appeal the decision at the High Court within 30 days of the date of the order, recommendation, or finding.

Observations and Recommendations

Government has made a positive step in promulgating a law that clarifies the operational guidelines for the ZMC. This law is likely to make the Commission a more efficient and effective institution. However, in its present state and with the significant flaws that constitute parts of the Draft Bill, the proposed law could lead to the pollution of the operating environment of the media.

The current Bill makes two major omissions, the first on the relationship between the ZMC and any other self-regulatory mechanisms. The second omission is on the Zimbabwe Media Commissions responsibilities to promote access to information as set out in Sections 18 and 35 of the current Freedom of Information Bill.

The first omission relates to the possibility of a hybrid regulation of the media landscape as clearly set out in Section 249 (3) of the Constitution. The promulgation of a new media law in the form of a Zimbabwe Media Commission Act provides Zimbabwe with an opportunity to migrate from the current State Regulation/ Dual Regulation model to a co-regulatory regime whereby the internationally respected self-regulatory mechanism would be enhanced with the co-operation of the State.

Sections 18 and 35 of the Freedom of Information Bill currently identify the Zimbabwe Media Commission as the Commission responsible for the monitoring and exercise of the right to access information in Zimbabwe. The current version of the Zimbabwe Media Commission Bill is silent on how the Zimbabwe Media Commission will handle these additional functions assigned to it by the Freedom of Information Bill.

In addition to the above, MISA Zimbabwe makes the following further observations in the spirit of ensuring that the Bill is more closely aligned to the letter and spirit of Section 61, 248, and 249 of the Constitution.

- a. Sections of the Draft Bill that bestow wide discretionary powers on the Minister over the Commission should not be allowed to stand in the final Bill or Act. This setup significantly compromises or depletes the independence of the Commission (as such independence is envisaged in the Constitution).¹
- b. The Bill states that the Commission can initiate investigations on its own. This arguably, is open to abuse and theoretically promotes persecutory type investigations. It is more desirable that the primary basis for investigations to be the filing of a complaint by a specific identifiable complainant.

¹ For example:

- Section 7 of the Bill gives the Minister extensive powers in the appointment of Commission staff
- Section 21 of the Bill which gives the Minister extensive powers in the drafting and approval of Regulations

- c. In respect of Section 10 (1) of the Bill, the possibility of closed proceedings should be separated from the requirement for hearings to be public. The starting point should be that in the spirit of transparency and open democracy, proceedings of the Commission shall be public.
- d. In respect of Section 10 (2) of the Bill, it is not clear why the representative of entities in proceedings should be the principal officer. Consider adopting the approach taken for instance in the Criminal Procedure and Evidence Act where “a director or employee of [the pertinent] corporate body” would be a competent representative.
- e. Under Section 10 (3) of the Bill, sections 9 to 18 of the Commissions of Inquiry Act [Chapter 10:07] are infused into the Zimbabwe Media Commission Bill. The inclusion of these imported sections is problematic because:
 - i. Section 9 of the Commissions of Inquiry Act provides for the possibility of the exclusion of “any particular person or persons” from the Commission’s proceedings. This is a worryingly wide power that could easily be abused, and it violates the principles of natural justice that are enshrined in the Constitution, and
 - ii. Section 12 (c) provides for the swearing in of witnesses. However, the practice of swearing is unacceptable for some individuals on religions, ethical, intellectual, and other convictions, or beliefs.
 - iii. Section 13 of the Commissions of Inquiry Act also refers to the oath. In other jurisdictions the concept of “affirmation” as an alternative to oath taking is now common, and
 - iv. Section 14 (1) of the Commissions of Inquiry Act refers to “insults” on any Commissioner, but the ZMC Bill does not define the term. This term is too broad and must therefore be defined under the interpretation section of the ZMC Bill, if the importation of Section 14 of the Commissions of Inquiries Act is at all necessary.
 - v. Section 14 (1) of the Commissions of Inquiry Act also refers to “detention in custody until the rising of the commission.” All of this language sounds very drastic. Similarly, the possibility of “a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and

such imprisonment” under Section 14 (2) of the Commission of Inquiries Act is also clearly draconian.

- f. The possibility of police involvement in investigations of the Commission under Section 10 (4) of the ZMC Bill as well as Section 18 of the Commissions of Inquiry Act could be problematic because:
 - i. This suggests the criminalisation of communication activities, and
 - ii. It might compromise the independence (or even the reputation) of the Commission.
- g. That Section 16 of the ZMC Bill entrenches a right of Appeal is positive. It would be even better to have a schedule with attendant Appeal Rules to give full effect to relevant appeal-related constitutional rights.
- h. Part IV of the ZMC Bill omits provisions on the establishment of a Media Fund. AIPPA carries provisions for the establishment of such a Fund, and this must be maintained in the new law. The Commission must plough some of the funds it collects back into the media sector.
- i. The Declaration on Principles of Freedom of Expression in Africa (adopted by the African Commission on Human and People’s Rights in 2002) is instructive in respect to the issue of self-regulation. Article 9 (3) of the Declaration refers to effective self-regulation as the best system for upholding and promoting high standards in the media. This means Zimbabwe must take every step possible, including recognition of existing self-regulatory mechanisms in the proposed ZMC Bill.
- j. ZMC Bill lacks clarity on the relationship between the Voluntary Media Council or any other self-regulatory mechanism with the ZMC.