



PO Box 1560, Parklands, 2121 • Tel +2711 788 1278 • Fax +2711 788 1289

info@mma.org.za • <http://www.mediamonitoringafrika.org>

Promoting human rights and democracy through the media since 1993

“Strengthening the Press Code”

1.1 This document forms part of the submission by Media Monitoring Africa following a call for submissions from the Press Council on its review focused on strengthening the Press Council system. MMA’s full submission addresses and makes recommendations toward the following other areas:

- **Lack of knowledge** both on the part of the general public and in the media itself regarding the Press Code and the operation of the self-regulatory system;
- **Force of Law and Waiver-** challenges arising out of the self-regulatory nature of the system – the legal enforceability of the decisions of the Ombudsman and the waiver;
- **Independence** of the Press Council, including the criteria for appointing the Press Ombudsman, public members of the Council and the absence of an open and transparent appointment process;
- **Finances-**Lack of clarity in relation to financial arrangements;
- **The relief available-** to successful complainants;
- **Issues of procedure-** ensuring informal, speedy, cost-effective, open and transparent processes;

2. About Media Monitoring Africa

2.1 MMA is grateful for the opportunity to make this submission and would further welcome the opportunity to orally present the issues raised.

2.2 Media Monitoring Africa (“MMA”, formerly the Media Monitoring Project) is a human-rights based NGO that has been promoting human rights and democracy through the media since 1993. Initially, MMA was formed with the purpose of monitoring the public broadcaster’s coverage of the first democratic elections.

2.3 MMA’s vision is for a responsible, quality media that enables an engaged and informed citizenry in Africa and across the world. It seeks to realise the following core objectives:

2.3.1 To be a leading media “watchdog” in Africa;

2.3.2 Improved news quality and ethics in reporting in Africa; and

2.3.3 Robust and effective communication legislation and media codes of conduct in Africa.

2.4 During its 17-year existence, MMA has conducted over 130 media monitoring projects, on a diverse range of media issues, including race (SAHRC, CSVN); Elections; Gender (GMBS, GMMP); Children (ECM); HIV (WITS, MAP). In addition, MMA has been involved in numerous policy submissions, since 1993, including to:

2.4.1 Parliamentary Committees;

2.4.2 Individual media (e.g. SABC Editorial Policies);

2.4.3 IBA and ICASA (e.g. Broadcasters Code of Conduct; SABC Licence Conditions;

Elections report; Disability code of conduct)

- 2.5 MMA's programme areas include the media's coverage of: children; democracy and governance; HIV and Aids; gender; media freedom and performance; race, xenophobia and ethnicity; policy submissions and other special projects
- 2.6 President Jacob Zuma recently referred to MMA in his closing NGC address: "the independent Media Monitoring Africa organization has also strongly criticized the quality of reporting in the media and has produced a useful analysis of this subject, while stating that they disagree with the ANC position. The media would do well to read the MMA report.". MMA recommends that this submission be read in conjunction with this state of the media report, which may be found in Appendix A, or at: http://www.mediamonitoringafrika.org/images/uploads/State_of_Media.pdf
- 2.7 MMA approaches all media policy and regulation within a human rights-based and public interest framework. Within this framework, MMA understands the importance of print media and its regulation and effectiveness not only to democracy, but also to realising citizens' Constitutional rights to receive and impart information and the right to freedom of the press. Print media and the Press Council is a core component of the media environment in South Africa. Therefore their effectiveness, in entrenching South Africa's democracy cannot be underestimated.

3. Introduction to MMA's submission

Values and concepts underlying MMA's submission

- 3.1 Clause 1.2 of the Press Council's Constitution sets out one of its aims and objectives as being:
- 3.2 To promote and to 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.
- 3.3 It is with this objective in mind that MMA's submission seeks to constructively contribute to the improvement of journalistic practice, ethics as well as excellence, and therefore responsible and accountable reporting in South Africa that is not hindered by the suppression of media freedom and the free flow of information.
- 3.4 While it is recognised that the Press Council is a voluntary, self-regulatory body, these submissions are informed by the view that such self-regulation should be undertaken with an emphasis on the values underlying the South African Constitution. This is important both as a matter of principle and for reasons of practicality:
- 3.4.1 In principle, the values of the Constitution represent the foundation of the social contract by which the citizens of South Africa have chosen to regulate their affairs. These values regulate not only the political relationship between the state and its subjects but, as the Constitution itself makes clear, also relationships amongst subjects, including those between individuals and corporations such as media outlets. Of particular importance in this regard is the principle that, like all rights in the Constitution, the right to freedom of expression is not absolute and that it must be appropriately balanced with other Constitutional rights.
- 3.4.2 From a practical perspective, the infusion of the self-regulatory system by

Constitutional values is important because, by definition, self-regulation takes place outside of the ordinary legal infrastructure provided by the courts which are bound to apply such values in reaching their decisions. Should a significant number of potential “users” of the Press Council’s self-regulatory system, or an important group of such users (such as the Government) form the view that it fails to adequately reflect the values of the Constitution, either substantively or procedurally, such users may be discouraged from viewing it as a viable alternative to the ordinary courts as a dispute resolution system.

- 3.5 More specifically, MMA’s submissions are informed by the following key values and concepts:
 - 3.5.1 MMA understands the importance of the print media sector to democracy, and its fundamental role in realising the media’s Constitutional right to freedom of the press, as well as citizen’s Constitutional right to receive and impart information.
 - 3.5.2 The public interest is supreme in all matters relating to South Africa’s media and regulatory systems. This means that the media and its regulation must serve the best interests of the people of South Africa and not only powerful interests in society, such as the government and commercial enterprise. MMA understands this notion of the public interest as requiring that print media content should represent and meet the needs of all South African citizens, not just a privileged few, for example those that rank higher on the LSM scale.
 - 3.5.3 The print media should meet the needs of all South Africans through diversity of content and issues, for example relating to: gender, children, minority, diversity, Hiv/Aids, Aids, sports, culture, employment issues, holding government to account and acting as a watchdog on behalf of citizens etc.
 - 3.5.4 Print media should provide, through its content, a public service necessary for the maintenance of a South African identity, universal access, equality, unity and diversity.
 - 3.5.5 There must be measures in place to sufficiently safeguard the regulator’s

independence in all aspects of its structure and influence, so that it is protected from undue interference from government and the media industry being regulated.

- 3.5.6 The regulator must not be representative solely of the media industry but rather ensure broad representation of all who have an interest in the media. Therefore the appointment process should not allow the media or government to exercise inordinate levels of power, as this could lead to the appointments being purely in favour of “political” or “media” interests rather than in the “public interest”.
- 3.5.7 Transparent, open, independent and participatory accountability mechanisms and appointment processes are critical in ensuring that the regulator is transparent to the public, it must not function “haphazardly” and “secretly” with a flagrant disregard for the public interest.
- 3.5.8 Given the significant role of the media in shaping the views and minds of people, regulatory mechanisms and enforcement, including penalties, must be proportional to the harm caused and level of irresponsible journalism.
- 3.5.9 Sufficient funding is fundamental to ensure credible, effective and efficient regulation. An under-funded and under capacitated regulator, leads to ineffectiveness.

4. Shortcomings in the current system

4.1 Strengthening the Press Code - the absence of overriding principles

4.1.1 The final aspect in which the existing self-regulatory system suffers from shortcomings is in relation to the substantive provisions of the Press Code.

4.1.2 MMA has identified that while the existing code is in line with several other codes around the world, there are several areas, which if improved, will make the South African Press Code an example of best practice. In our view, the following areas need to be addressed:

4.1.2.1 Overall framing of the code;

4.1.2.2 Minimising harm;

4.1.2.3 Children;

4.1.2.4 The public interest; and

4.1.2.5 Discouraging “brown envelope journalism”.

Overall Framing of the Code:

4.1.3 While our existing code is adequate there are some gaps which if filled would make our code an example of international best practice. There are two areas that should be addressed.

4.1.4 The first addresses the critique from the ANC that the media unduly emphasises, and in some cases prioritises the right to freedom of expression over the other rights continued in our Constitution. While inaccurate in general, a reading of the preamble of the Press Code gives credence to the critique as the only Constitutional provision mentioned is section 16. It is important that readers of the Code be aware that as much as it protects, promotes and entrenches the right

to freedom of expression the Press Council is also there to protect, respect and promote their human rights. Accordingly MMA recommends that the Preamble to the code should also refer to the founding values of South Africa's Constitution.

4.1.5 The second area relates to ethics. While the promotion and development of journalistic ethics is clearly stated in section 1 of the Constitution as being an objective of the Press Council, ordinary members of the public, (and even journalists) are more likely to read the Press Code itself than the Constitution.

4.1.6 It is correct that the Code does speak to many of the core ethical principles of journalism. In most cases, however, they are implicitly stated. In some instances (as in the case of minimizing harm) they are not stated at all. Accordingly it is imperative that founding ethical principles are included in the preamble to the Code. Not only will this help people understand the overall aims and intentions but it will also assist journalists and the Ombudsman in interpreting the Code.

4.1.7 In addition, the inclusion of the South African Constitutional values as well as core ethical principles will also help build credibility and undermine accusations of impartiality and lack of professionalism and integrity levelled against the Press Council.

Minimising Harm

4.1.8 The Press Code fails to give effect to the ethical concept of minimising harm. While relatively new in the media ethics domain, this principle is growing in stature as the power of the media and its concomitant responsibility is increasingly recognised. It is also clear that many of the concerns expressed regarding the media are based on its potential for harm.

4.1.9 The concept of minimising harm does not undermine in any way the ability to report better, it simply makes it clear that it is an imperative that the media should follow as and where appropriate, and as one of the principles that is taken into

consideration in adjudicating complaints.

- 4.1.10 The principle of accountability has been drawn from one utilised by Franz Kruger. This may seem obvious as this is what the Press Council does, but for people to have greater buy in and for the code to have greater application it is important that this principle is stated clearly in the code.

Children

- 4.1.11 South African media have been guilty of serious ethical and rights violations regarding children, a concern made worse by the fact that they are not adequately protected under the existing code. Please refer to Appendix D, Appendix E, Appendix F and Appendix G for examples and analysis of these children violation by the print media. Please visit MMA's website for more of these examples: www.mediamonitoringafrica.org.za.
- 4.1.12 The rights of children are afforded special significance in our Constitution through Section 28, as well as the numerous other special protections afforded to children in our laws and international obligations.
- 4.1.13 The absence of provisions in the Code dealing with children is a clear lacuna in the Press Code. The only mention of children relates to the publication of child pornography in clause 1.7.2, which simply states "Child pornography shall not be published."
- 4.1.14 The Press Code fails to impose specific ethical obligations in relation to children, such as those imposed by the Advertising Standards Authority. As children account for 39% of our population it is important that they also protected in the Code.
- 4.1.15 Reporting on children requires specialised skills and adherence to the highest ethical practice. For this reason, MMA runs an honours level course with Wits Journalism on reporting on children, and MMA has presented to SANEF, and SANEF has recommended Guidelines for reporting on children to all its

members.

- 4.1.16 The inclusion of a dedicated clause on children is essential because there is also potential for a new piece of legislation seeking to ban all forms of pornography - much of it done on the basis of protecting children's rights. MMA opposes this argument and will oppose the legislation as well – not because we support pornography, but because we have a view, (shared by many other progressive Children's Rights groups) of children's rights and freedom of expression that says that they should be integrated and operate together, rather than being used as a means to shut down and limit freedom of expression.

Public Interest

- 4.1.17 The concept of the “public interest” is central to a number of critical provisions in the Press Code:

1.9 News obtained by dishonest or unfair means, or the publication of which would involve a breach of confidence, should not be published unless a legitimate public interest dictates otherwise.

1.10 In both news and comment 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.

2.3 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.

- 4.1.18 Despite the importance of the “public interest” no definition is provided. It is therefore not clear from the code what would qualify as a laudable “public interest”. While it may be necessary to leave the definition vague in order to ensure that it can be appropriately applied in unforeseen circumstances, it does potentially expose the current self-regulatory system to significant criticism. While MMA is of the view that the public interest is a fluid and open ended term that should not be narrowly defined, it believes that it would be possible to provide some form of frame of reference to assist the public and the regulator in

determining what the concept may entail..

Brown envelope journalism

4.1.19 While well intentioned, the Press Code currently, and somewhat peculiarly, prohibits only payment for articles to criminals and convicted persons and their connections:

7. Payment for Articles:

No payment shall be made for feature articles to persons engaged in crime or other notorious misbehaviour, or to convicted persons or their associates, including family, friends, neighbours and colleagues, except where the material concerned ought to be published in the public interest and the payment is necessary for this to be done.

4.1.20 While MMA supports the underlying intention of this clause, we are also not sure why it only applies to feature articles. It is also awkwardly worded such that it appears to be saying that payment should not be made as a general rule except where there is a legitimate public interest override. MMA is also not clear as to the meaning of “notorious misbehaviour” Does this include the antics of someone like Paris Hilton and her drug busts, or Khanyi Mbau? Or would it be a breach of the clause if Andre Nel were to be paid by The Times for an exclusive feature interview?

4.1.21 In addition to the general payment issue, MMA submits that a similar clause is included focusing on payments to journalists, particularly with a view to further discouraging “brown envelope journalism”. This aspect would seem essential in the light of the recent scandal involving Ebrahim Rasool in the Western Cape.

6. Recommendations to address the shortcomings of the current system

6.1 Strengthening the Press Code- The absence of overriding principles

Overall framing of the Press Code

6.1.1 MMA recommends that the Press Code be amended to make specific reference to the founding values of the South African Constitution, including the values of

1(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;

1(b) Non-racialism and non-sexism

6.1.2 MMA further submits that the preamble of the Press Code make specific reference to the following guidelines of ethical reporting (they are taken from Bob Steele (1-3) from the Poynter Institute and Franz Kruger (4))

1. Seek Truth and Report it as Fully as Possible

- *Inform yourself continuously so you in turn can inform, engage, and educate the public in a clear and compelling way on significant issues.*
- *Be honest, fair, and courageous in gathering, reporting, and interpreting accurate information.*
- *Give voice to the voiceless.*
- *Hold the powerful accountable.*

2. Act Independently

- *Guard vigorously the essential stewardship role a free press plays in an open society.*
- *Seek out and disseminate competing perspectives without being unduly influenced by those who would use their power or position counter to the public interest.*
- *Remain free of associations and activities that may compromise your integrity or damage your credibility.*
- *Recognize that good ethical decisions require individual responsibility enriched by collaborative efforts.*

3. Minimize Harm

- *Be compassionate for those affected by your actions.*
- *Treat sources, subjects, and colleagues as human beings deserving of respect, not merely as means to your journalistic ends.*
- *Recognize that gathering and reporting information may cause harm or discomfort, but balance those negatives by choosing alternatives that maximize your goal of truth-telling.*

4. Accountability

- *Journalists should be prepared to explain and answer for their work*
- *Cooperation with self regulatory bodies*

Minimising Harm

6.1.3 MMA recommends that the Press Code gives context and effect to the concept

of minimising harm and that it be included as one of the core principles to be taken into consideration in adjudicating complaints. MMA submits that the preamble of the Press Code be amended accordingly to adequately reflect the ethical principle of minimising harm.

6.1.4 MMA also recommends that clause 1.10 also be amended to include the term “minimise harm.”

Children

6.1.5 MMA has sought legal advice on the viability, necessity and constitutionality of a clause of the Press Code focused on ensuring the best interest of the child are upheld.

6.1.6 Accordingly, MMA recommends that a section on children be included in the Press Code to deal with the ethical duties of reporting on matters involving children. This will bring the code more in line with the Constitution, and will also demonstrate that media clearly are seeking to protect the most vulnerable groups in society.

1. When reporting on and interviewing any child, the Press shall:

- 1.1 ensure that the best interests of the child are respected and protected;*
- 1.2 refrain from any conduct which causes the child mental or physical harm or infringes the child's right to human dignity or privacy;*
- 1.3 shall not identify any child by means of an image, the use of the child's name or otherwise where such identification is likely to undermine the child's right to dignity or privacy, without the informed consent of the parent/guardian of the child and, where the child is more than seven years old, the child concerned.*

2. In exceptional circumstances and where an overriding public interest demands that the child's identity be disclosed without such consent, the Press may depart from clause 1(c) above.

3. Where obtaining the consent of the child's parent or legal guardian under clause 1(c) above would itself infringe the child's right to privacy and/or dignity, the Press shall refrain from seeking to obtain such consent and the informed consent of the child shall be sufficient.”

6.1.7 In addition, MMA recommends that the Press Code should expressly (and apart from clause 1.8) include an absolute prohibition on the identification of child

victims (for example rape) and child witnesses of crime. Accordingly MMA recommends that the clause is amended to read:

“1.8 The identity of rape victims and victims of sexual violence shall not be published without the consent of the victim, save that the identity of a child shall never be disclosed.”

Public Interest

6.1.8 While it would be inappropriate to provide a definition of public interest, it would certainly benefit and help strengthen good journalism if it is to be clear that the public interest is different to what is of “interest to the public”. MMA recommends that the Preamble of the Press Code include the notion that “what is of interest of to the public, is not necessarily in the public interest”:

6.1.9 The principle already has a significant legal precedence as outlined below.

'(1) There is a wide difference between what is interesting to the public and what it is in the public interest to make known . . .

(2) The media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners; and they are peculiarly vulnerable to the error of confusing the public interest with their own interest. . . .'

[per Lord Griffiths in *Lion Laboratories Ltd v Evans and Others* [1984] 2 All ER 417 (CA), paraphrased by Corbett CJ in *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) at 464C]

Payment for articles and “brown envelope” journalism

6.1.10 MMA recommends that the clause on payment for articles is amended to reduce confusion.

6.1.11 MMA recommends that the prohibition on payment should be applicable to all journalistic pieces and not simply Feature articles. Further MMA recommends

that the scope of the clause is also amended to ensure that it is not so broad as to be virtually meaningless, but also not so narrow that it will have no application.

6.1.12 MMA further recommends that a new clause is drafted that can address payment of journalists which seeks to prohibit “brown envelope journalism”.

7. Conclusion

- 7.1 Although MMA supports the maintenance of a self-regulatory system, we have emphasized the importance of ensuring that such a system meets the standards that would promote good journalism and match the standards that journalists expect other to adhere to.
- 7.2 MMA believes that if the changes we have recommended are effected, not only will the Press Council be clearly independent, it will also realize its mandate of being an efficient, cost effective and informal body that addresses complaints against the media.
- 7.3 Finally MMA believes that if the changes recommended are made, the South African Press Council will be an example for developed democracies to follow and South Africa's reputation as being a world leader in innovation and leading human rights development will be enhanced.

Written by,



William Bird
Director
Media Monitoring Africa
Email: williamb@mma.org.za
Tel: 011 788 1278



Prinola Govenden
Researcher