

Analysis of the
**BOTSWANA MEDIA PRACTITIONERS'
ASSOCIATION BILL, 2022**



PROMOTING **FREE EXPRESSION** IN SOUTHERN AFRICA

The background of the page is a blue-tinted image. The upper half shows the silhouettes of several people against a bright, cloudy sky. One person in the center has their arm raised, pointing a finger. Others are holding cameras and video equipment. The lower half of the image shows a large, messy stack of newspapers, with some headlines visible, such as 'BJP hit back', 'Dimapur rape', and 'KBK Infographics'.

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BACKGROUND

Botswana gazetted its Media Practitioners' Association Bill on 21 June 2022. From the memorandum, this Bill seeks to achieve the following objectives:

- To establish a Media Practitioners' Association in order to promote and protect the freedom and independence of the media.
- To ensure the maintenance of high professional standards by making provision for the establishment of the Complaints and Disciplinary Committee which will receive, investigate and deal with complaints involving the media.
- To provide for the registration of journalists and media enterprises and the professional bodies in the media fraternity

Of note is the fact that the Bill is repealing the existing Media Practitioners' Act thus also repealing the existing Media Council and replacing it with the Media Practitioners Association.

This law also establishes several institutions or structures in the regulation of the media and these include the Media Practitioners Board, The Ethics and Conduct Committee, The Complaints and Disciplinary Committee and also The Appeals Committee.

ANALYSIS OF THE PROPOSED LAW

To begin with, Clause 2 of the Bill is the Interpretation clause which defines several terms and of note are the following:

- **Journalism** is defined as the collecting, writing, editing and presenting of news or news articles in newspapers and magazines, radio and television broadcast including any other electronic means. This definition encompasses all forms of media including online media; hence the definition of a journalism includes online media or online publishing and blogging.
- **A journalist** is defined as any person who is recognised as such by the Association upon the fulfilment of any criterion as may be set out by the Association. The law is therefore leaving the definition of journalist open to interpretation by the Association. It is MISA's position that in defining who should be a journalist the Association should consult with media stakeholders.
- **Media** means the production of electronic and print media for circulation

to the public but does not include book publishing.

Clause 4 of the Bill provides for the functions of the Association which include its role to register in such a manner as may be prescribed, professional bodies responsible for the training of journalists and the certification of the competencies of journalists. The term professional body was defined as an organisation with members who practice a profession in which the organisation maintains an oversight of the knowledge, skills, conduct and practice of the media profession and includes:

- Botswana Editors Forum
- Media Institute of Southern Africa-Botswana Chapter
- Botswana Press Council
- Botswana Media and Allied Workers Union

The Association is also expected to ensure national security, public order and public health are safeguarded in accordance with applicable law. This provision is concerning as there is a potential that these principles will interfere with the functions of the Association.

It is common cause that aspects like national security and public order have been relied on to unjustifiably infringe on fundamental rights including access to information and media freedom.

Providing an obligation on the Association to safeguard national security and public disorder is therefore problematic. Such aspects should be appropriately addressed by applicable laws and not necessarily through the Media Practitioners' Association Bill.

It is plausible that in **Clause 6** of the Bill, the Association shall be independent and separate from the government and that it shall operate without any political interference or influence. Be that as it may be, it will be important to ensure that safeguards are put in place for the realisation of this clause, including that the Executive should not have any role to play in the appointment or dismissal of any of the position holders within the association's structures and committees.

This will also include that any appointments should be done through nominations and interviews open to the members of the association.

With regards to termination of membership, **Clause 8** of the Bill notes that one ceases to be a member upon failure to pay annual fees, violation of Code of Ethics, among others. With regards to these two issues, it is MISA's position that the annual fees should be reasonable and within the reach of many.

Further, where a member is alleged to have

violated the Code of Ethics, due process should be undertaken benchmarked on the principles of a fair hearing.

The Bill also provides for the appointment of the Executive Director, to be appointed with the approval of the Board who shall be on a fixed contract of not more than five (5) years and eligible for appointment to a second term of not more than five (5) years as well.

A Secretary of the Board will also be appointed, being a person suitably qualified to practice as a legal practitioner in the courts of Botswana.

The Board itself shall consist of nine members, elected at an annual general meeting of the association for a period not exceeding three years and shall include:

- A chairperson.
- A vice chairperson.
- One person from Botswana Editors Forum.
- One person from Botswana Press Council.
- One person from Media Institute of Southern Africa-Botswana Chapter.
- One person from Botswana Media and Allied Workers Union.
- A legal practitioner who is a member of the Law Society of Botswana.
- One person from a public university who teaches journalism, media and information studies.
- One person from a private university who teaches journalism, media and information studies.

Of note also is [Clause 26 \(4\)](#) which criminalises the failure by a member of the Board to disclose a conflict of interest, making such person liable to a fine of P5000,00 or one year imprisonment or both. It is important to minimise on the criminalisation particularly the possible threat of imprisonment. This clause should elaborate on several other mechanisms that can be utilised including a disciplinary hearing, suspension or dismissal from the Board should a member be found to have not disclosed a conflict of interest.

The Association shall have funds from members' voluntary contributions, fees and other monies paid for services rendered by the Association, income that the Association may receive from rentals or sale of its property, grants, gifts or donations from organisations.

The Association shall be expected to produce financial statements and engage auditors, approved by the Board. The auditors' report and audited accounts shall be presented by the Board at an

ordinary general meeting.

[Clause 35](#) then goes on to establish a Media Fund, and notes that they shall be paid into the Fund, such money, as may from time to time be received from the above sources. The Board will be responsible for the administration of the Fund. The establishment of a Fund is a progressive idea; however, the law is not clear with regards to the purposes for which the Fund will be used.

Such a Fund is important for the sustainability of the media industry which has been negatively impacted by the decline in advertising revenue due to the increased uptake of digital marketing and technology, loss of revenue due to COVID 19 pandemic and decline in demand, among others.

In that regard, the Bill should elaborate on the purposes for which the Fund shall be used as well as the potential beneficiaries of such a Fund. Further, the law should provide a clear percentage or amount which shall be set aside to be deposited into the Media Fund from the various sources of funds for the Association.

This provision is thus vague in that it just makes reference to 'such money' 'from time to time' without clarity on the specific timelines within which some funds should be invested into the fund for example on a quarterly basis. Such clarity could also include setting an obligation that a certain percentage of the funds received by the Association from its various sources as stipulated in [Clause 30](#).

On the definition of a journalist, the interpretation section left it open to interpretation by the Association.

Part VIII of the law on registration of journalists, and more specifically, [Clause 37](#) indicates that a person shall apply to be registered with a professional body using the prescribed form and upon payment of a prescribed fee if they are an employee of a media enterprise, the membership of which is recognised by the professional body as furnishing a sufficient guarantee of the recognised academic knowledge and practical experience in journalism.

Another category would be that the person has taken an oath as may be prescribed to uphold, respect and adhere to the Code of Ethics or that in the opinion of the professional body, that person is a fit and proper person to be registered as a journalist.

In light of this, the interpretation section should be amended to elaborate the aspects laid out in [Clause 37](#) as they already define the person who qualifies as a journalist or can be defined to be a journalist.

Be that as it may be, it should be noted that the entire Part VIII needs to be amended as it focuses on registration to a professional body and not

registration to the association. The professional bodies are independent institutions or organisations whose founding documents or constitutions are very clear with regards to who can and cannot be registered as a journalist. The focus of this Media Practitioners Bill should therefore be on registration with the Association, being the body established through this proposed law.

One of the Committees of the Association will be the Ethics and Conduct Committee which is responsible for the development of a Code of Ethics for journalists and media enterprises. It is progressive that the law provides that after developing or reviewing the Code, the Committee shall submit it to the annual general meeting of the Association. This is crucial as it will provide a consultative process in the development of the Code of Ethics and the involvement of the media industry and stakeholders in the process.

The Bill indicates that the Code of Ethics should include the following aspects:

- Duties and obligations of journalists and media enterprises.
- Protection of minors.
- Protection of persons suffering from a physical or mental disability.
- Advertising.
- Fair competition in the media industry.
- Protection of privacy of individuals.
- Unlawful publication of defamatory matter in accordance with the provisions of the penal Code.
- Continuous professional development of journalists.
- Sexual exploitation or abuse.
- Gender equality.
- Unbiased and fair treatment.

The key concern regarding the above aspects is the requirement to include unlawful publication of defamatory matter in accordance with the provisions of the Penal Code. The Botswana Penal Code in Section 192 provides for criminal defamation and in Section 195 provides for unlawful publication.

The Code notes that any publication of defamatory matter concerning a person is unlawful within the meaning of this division unless the matter is true and it was in the public interest or if it is privileged as elaborated further in the law.

Criminal sanctions are not necessary to the objective of the law of defamation, which seeks to promote the reporting of true and genuine information and seeks to compensate aggrieved or defamed persons. Civil penalties should be relied on for any defamatory matter.

The Code of Ethics should therefore not entrench

provisions of other laws that unjustifiably limit the right to media freedom and free expression.

In neighbouring Zimbabwe, the Constitutional Court in the matter of *Madanhire vs Attorney General, 2014*, declared that the offense of criminal defamation is unconstitutional and inconsistent with the protection of freedom of expression.

This position was reaffirmed by the Constitutional Court in the matter of *MISA Zimbabwe vs Ministry of Justice, 2016*, and declared that criminal penalties for defamation are a disproportionate and unnecessary interference with freedom of expression.

In light of such best practices in other jurisdictions, it would be prudent for the Code of Ethics to reiterate such provisions.

Further, the law also establishes the Complaints Committee which is responsible for mediation and adjudication of disputes on issues between the government and the media enterprises, the public and the media enterprises, a journalist and the public, or any other person, and also between or among media enterprises.

Clause 57 provides for the lodging of complaints and highlights that any aggrieved person may submit a written complaint to the Complaints Committee setting out the grounds for the complaint. The Bill is also progressive in that it makes provision for illiterate people, who are allowed to file their complaints orally and the Secretariat of the Complaints Committee shall record such complaint in writing.

The law should, however, also make elaborate provision for people with disabilities, who should equally be able to file complaints orally or with the assistance of a legal practitioner or any other person of their choice.

Further, the law should also allow for complaints to be filed in any of the official languages or in the native language of the complainant.

When the Complaints Committee has received a complaint, called for a hearing and have assessed both written and oral evidence brought before it, the Bill highlights that the Complaints Committee shall in considering a complaint brought before it, provide effective and efficient services and shall submit its decision to the parties as soon as is reasonably practicable.

It is important that this provision sets a timeline with regards to the number of days or weeks within which the decision should be made known to the parties as justice delayed is justice denied.

In terms of Clause 58, any person aggrieved with the decision of the Complaints Committee can file

an appeal with the Appeals Committee in writing, which appeal shall be filed within 30 days after the decision was made.

With regards to offences and penalties, the law notes that a prosecution for an offence under this Act shall not be instituted except with the consent of the Director of Public Prosecutions. Such offences as noted in Clause 60 include a failure or refusal to comply with a decision made in terms of the Act; obstruction or hindering any person in the exercise of their powers in terms of the Act and also furnishing information or making a statement to the Complaints Committee or the Appeals Committee knowing it to be false which a person knows to be false or misleading.

The Minister may, in consultation with the Association also make provisions or regulations related to any other matter intended to safeguard the interests of the public and promote professional standards in the media or any other issue necessary for facilitating the enforcement of the Act.

CONCLUSION

From the above analysis, it can be noted that there are progressive elements in this proposed piece of legislation. There are also gaps to be addressed for example with regards to membership fees, required qualifications for a person to be an Executive Director of the Association, the development of a Code of Ethics, the timelines and percentage of contribution to the Media Fund and also procedures for the determination of disputes.

It is prudent to flag that any fees for registration should not act as a deterrent for media practitioners and institutions to undertake their constitutional duties.

Further, decentralisation of the Association will also be key to facilitate the ease of registration by media practitioners throughout the different parts of the country including rural and marginalised communities.

Where efforts will be made to address some of the noted gaps, it will be critical for the Association to consult with its members.

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