

MISA-Zimbabwe

MISA-Zimbabwe Submissions to the Parliamentary Portfolio Committee on Transport and Communications on the Access to Information and Protection of Privacy Act Amendment Bill.

Parliament of Zimbabwe, 2 December 2002, Harare, Zimbabwe

Introduction

MISA-Zimbabwe takes this opportunity to thank the Parliament of Zimbabwe especially Honorable members who constitute the Portfolio Committee on Transport and Communications for inviting us to make these submissions. We remember that last year; on 10 December we made our submissions on the same law, then a Bill, the Access to Information and Protection of Privacy Act (AIPPA). We raised many issues some of which are now being considered for change and some are being strengthened, albeit negatively.

In these submissions, the intention of MISA-Zimbabwe is to highlight provisions in the Access to Information and Protection of Privacy Bill, which we believe offend against various sections of the Constitution, most specifically sections 18(1) (the right to the protection of the law) and section 20 (the right to freedom of expression and to freely receive and impart information and ideas). Where drafting of certain clauses could be improved, this is also pointed out and suggestions are made.

It is hoped that such an analysis will assist by contributing to debate on the Bill by Honorable Members of Parliament, and within society at large, and by ensuring that this already contentious Access to Information and Protection of Privacy Act and possible amendments in terms of the Bill adhere to the existing laws of Zimbabwe and promote a spirit of unity and good will among the people of Zimbabwe.

Amendment of section 2 of Cap. 10:27

This section seeks to insert and amend various definitions in the Interpretation section of the main Act.¹

1. Change of Definition of “dissemination of information”

It is noted that there are proposals to change some definitions of the principal AIPPA. In terms of these changes, MISA-Zimbabwe notes that it is intended to remove the definition of *dissemination of mass media products* from section 62 of the Act and an attempt to separate ‘dissemination’ and ‘mass media products’ in the Bill and place them under section 2 of the Act. We therefore submit that the use of the word “includes” allows the adjudicating authorities too wide a discretion in deciding what else could possibly constitute dissemination at a later stage. This is unacceptable, as an affected person has the right to be certain as to what constitutes such action in order not to fall foul of the law. We submit that where the provisions of a law are so vague and uncertain that an individual is unable to regulate her/his conduct accordingly in order to escape

penalties – especially where such penalties are criminal - this would we believe, be considered to be unconstitutional.

2. Change of Definition of “Journalists”

The new definition would effectively read as follows: “journalist” means a person who gathers, collects, edits or prepares news stories and materials for any service that produces an advertisement, the total print or part of the total print of a separate issue of a regular newspaper, magazine or journal, bulletin or any other publication with a constant name, a separate issue of a teletext programme, the total data or part of the data of any electronically transmitted material, or audio or video recorded programme (whether or not it also disseminates them), whether as an employee of the service or as a freelancer. MISA-Zimbabwe submits that the definition remains vague and extremely open-ended, and an individual cannot easily establish whether s/he falls within the category. In addition a “freelancer” is not specifically defined. This ambiguity will have especially serious implications in relation to issues of accreditation. The possibilities of who should seek accreditation are rendered so wide as to be unenforceable, and if all the affected persons sought accreditation, then the Media and Information Commission (hereinafter referred to as “the Commission”) would be considering such applications until the turn of the new century. For example – in terms of this definition, a legal practitioner who contributes an article to a regular legal publication could have to seek accreditation before having her/his article published, as s/he could possibly be considered to be a freelancer (which remains undefined in the Bill). Likewise, the committee that collates articles to form one issue of the publication would have to accredit in order to continue producing it. A church group that brings out a regular publication of biblical articles for public distribution could potentially fall foul of the Act if it did not seek accreditation. A neighborhood watch group circulating a monthly newsletter written by members could also have to accredit. An individual who decides to set up a web-page giving information and stories about gardening could also be affected by the definition, as could a playwright who produces scripts which are subsequently performed by actors (also affected) in open air theatres. The list is endless. We note with concern as to how would the Media and Information Commission cope with the influx of applications for accreditation, and how could this be effectively monitored? There would be a need for a huge amount of personnel and expenditure of vast sums of money to try and cope with the administrative burden alone, and this does not even take into account all the other functions to which the Commission has to attend in terms of the existing section 39 of the Act. MISA-Zimbabwe believes that a person should be able to know by reading the definition whether s/he is targeted in order to take precautions not to fall foul of the law. We submit that this section is a contravention of section 20(1) of the Constitution of Zimbabwe, especially when consideration is taken of section 79 requiring accreditation of journalists, and it is submitted that it cannot be saved under section 20(2) as it does not fall within the limitations and is not reasonably justifiable in a democratic society. The definition needs to be reconsidered *in toto*.

3. Definition of a “mass medium” or “mass media”

MISA-Zimbabwe submits that there is no need for this definition to be included in the Act, as there is no reference anywhere within the Act to either “a mass medium” or to “mass media”. All references are to a “mass media service”, which is also defined in the Act. To retain the definition would only add to the uncertainty and create further confusion. It is therefore suggested that the definition is removed *in toto*.

Related to this we further submit that it is disappointing to note that “publish” or “publication” has not been defined in the Bill, especially where an offence exists for publication of false statements under section 80. Without such definition the original arguments about the vagueness of any such offence stands uncorrected. Vague law is bad law. We therefore recommend that the definition be considered for inclusion.

4. Definition of “mass media products” and “Mass Media Service”

We note that this definition seeks to subject extremely wide categories of information to scrutiny under the Act and again would lead to the same arguments about vagueness and unenforceability, especially when considered under persons required to seek accreditation. For example, ‘[A] n advertisement’ is so open-ended that it could be defined to include even private individuals who advertise the sale of a kettle in a mass-circulating newspaper like the Herald and the Daily News. Some of the terms within the definition themselves would need to be defined, for example ‘the total data or part of the data of any electronically transmitted material’. To what does this refer? Does it refer to television only or does it include e-mail messages (which would raise issues of protection of privacy rights) and web pages? And can web pages be subjected to such scrutiny when they can be visited and accessed worldwide? What about web pages not originating from Zimbabwe but which can be downloaded by a person in Zimbabwe – We raise the question as to whether the Media and Information Commission has the right (and jurisdiction) to police these and how can it be known who is on the internet, where and downloading what?

5. Amendment of section 25 of Cap. 10:27

MISA-Zimbabwe notes and see it as unacceptable that amendment (b) seeks the removal of the protection against the disclosure of a third party’s racial or ethnic origin is unacceptable as it currently stands in section (b). *Clause 4* of the Memorandum states that this has been done for the purpose of allowing, “bodies like the Reserve Bank [to gather] information about bank-lending patterns”, and allowing “the progress of indigenisation of the economy”. Whilst the intention may be noble and important – especially in terms of the latter objective - these terms as they stand are extremely vague, and the failure by the drafters to rather maintain the protection of a third party’s rights as regards race and ethnic origin and insert, instead, a proviso with specific exceptions has to be viewed with suspicion. Should the drafters wish to make such a limitation on a constitutional right, it should be framed in a manner, which complies with the requirements of any limitations to the right and prove that the limitation is reasonably justifiable in a democratic society. This has not been done. This proposed amendment we believe would firstly contravene section 18(1) of the Constitution of Zimbabwe, which states that every person is entitled

to the protection of the law. We believe and submit that an attempt to deny such protection through this amendment to those of a certain race or ethnic origin is a contravention of this constitutional safeguard. In addition, section 23 of the Constitution ensures that no law shall make any discriminatory provision, either of itself or in its effect, and that no person shall be treated in a discriminatory manner by any person acting “by virtue of any written law or in the performance of the functions of any public office or any public authority” where the result of that law or treatment would be to prejudice persons of a particular description by race, tribe, or place of origin. We submit that the amendment should therefore be removed from the Bill.

6. New section substituted for section 35 of Cap. 10:27

MISA-Zimbabwe notes that there are several problems arising in this intended substitution. Firstly, the title of the section is no longer accurate, as the provision not only relates to deliberate falsification of personal information, but also to information supplied where the person does not have reasonable grounds to believe that it is true. We submit that the title should therefore be corrected, and we suggest that the title be “Penalty for falsifying personal information”. Secondly, there is an intention to make the criminal penalties under the main Act applicable to all situations where a person is required to supply information under any enactment. MISA-Zimbabwe notes that each enactment in terms of Zimbabwean law has its own provisions and is covered, where necessary, by its own criminal sanctions. To attempt to alter this and make one law (not being the Constitution of Zimbabwe) applicable universally is an attempt to override other legislation. We therefore submit that the clause should therefore be altered to read “Any person who, when required in terms of this enactment... or to both such fine and imprisonment.

7. Amendment of section 40 of Cap. 10:2

MISA-Zimbabwe notes that this short proposed amendment is perhaps one of the most dangerous in this Bill. We note that it is not enough that the Media and Information Commission presently has all of its board members chosen by the Minister of Information and Publicity, after consultation with the President, and is therefore likely to be partisan and non-independent – especially where the Minister fixes the board’s period of appointment, their terms and conditions of engagement and their remuneration and allowances, and has the power to dismiss a member of the board for the vague “conduct that renders him unsuitable”. This denies the media profession the basic right to choose any representatives to sit on the body that will regulate media affairs. The profession **will** become the only professional body in Zimbabwe to be governed by a completely non-representative board at the discretion of an all-powerful Minister. This is not the case for any of the following: architects, land surveyors, legal practitioners, quantity surveyors, veterinary surgeons, engineers, medical and dental practitioners, pharmacists, and estate agents, *inter alia*. All such bodies have a majority of board members who are democratically elected by the profession itself. They are therefore capable, due to their skill and expertise, of dealing with issues affecting the profession, its regulation and the protection of their members’ rights. Members appointed by the Minister in most of these

cases are within the minority in such boards and cannot seriously influence the decisions of the Board. Questions were raised about the manner in which this Commission would be constituted even before the main Act was promulgated. There is an attempt here not only to ignore these concerns but also to instead blatantly try and legislate an assurance that there will be no need for any participation whatsoever by representatives of the profession. This leads to non-transparency and non-accountability by this Commission and must be opposed. MISA-Zimbabwe submits that not only should this intended amendment be removed from the Bill, but that the drafters should reconsider the Commission and how it is constituted, as a whole. The Act should, it is submitted, be revisited to include provisions ensuring a completely independent board, where the majority is drawn from the media profession, with perhaps one or two representatives from the government. The latter would primarily sit on the board to consider policy issues alone.

8. New sections inserted in Part IX of Cap. 10:2752A(1)(a)

MISA-Zimbabwe notes that this last provision is a catchall phrase, and is meaningless, vague and unenforceable. This grants the Commission new powers to decide upon, and issue orders relating to, a request for a review (either in relation to a decision to deny access to a record or for correction of personal information), an application for registration of a mass media service, whether to suspend or cancel a registration certificate, a demand for the correction of untruthful information and the manner in which the correction is to be made, or “any other matter in terms of this Act which it is required or empowered to determine”. We also note that section 52A(1)(b) of the Bill empowers the Media and Information Commission to make orders - “on its own initiative or at the request of any person” [own emphasis]. This would give the Commission increased powers to make orders (unilateral ones at times) relating to the policing of persons and mass media services falling within the confines of the Act and ensure that imposed duties are performed. The Commission therefore has sweeping and discretionary powers when it comes to enforcing certain duties under the Act, in the area of variation of time limits and fees, and interacting with public bodies to suppress or destroy personal information collected in contravention of the Act. It is recommended that the listed matters be subjected to the same process of “inquiry” – once this has been revised to make it constitutional and impartial – as those matters set out under the proposed section 52B(1).

9. Section 52B(2) – (8); powers of the Commission: Determinations and Enquiries

We note that under this section the Commission is still given discretion to adjudicate upon all questions of fact and law. It is a matter of that a Commission with no, or limited, knowledge of the law and legal remedies, arbitration techniques and other legal interpretation skills – can usurp the functions of a court of law.

We ask, honorable members, how can a Commission, which has adjudicated upon and turned down an application for registration impartially and effectively review its own decision? How can the Commission, which has decided to suspend a registration licence,

tell itself it was wrong or right to do so? The problems are apparent, and it defies logic that this is not patently clear to the drafters of the Bill.

Such a provision would make the Commission both a regulator and a policing body is also clearly in contravention of section 18(1) and (2) of the Constitution, as an individual or a body is denied the protection of the law in having the matter heard and adjudicated upon within a reasonable time by an independent and impartial court of law. In light of the confusion between an ‘inquiry’ and a ‘review’, one of two alterations is recommended. Either the word ‘inquiry’ in the Bill should be replaced by the word ‘review’, or else there should be a continued use of the word ‘inquiry’ and amending subsection (8) to read: “On completing an inquiry the Commission shall make a written determination of its findings and may, on the basis of those findings, make appropriate recommendations to the parties concerned in the matter and give a copy thereof to the Minister and any other party considered by the Commission to have an interest in the matter.” Subsection (9) will also then have to be amended to read, “Any person aggrieved by any determination or recommendation of the Commission ... may, within twenty-eight days after being notified of the determination or recommendation, appeal to the Administrative Court.”

MISA-Zimbabwe recommends that all the provisions under Part X of the main Act, and the proposed amendments to such sections, be revisited and revised. Any review process should be carried out by a *completely independent and non-partisan* board, which has within its ranks members of the legal profession, or those with experience in arbitration, and persons involved should have no conflict between involvement in regulating the media profession, and “policing” it as a review or disciplinary body, with the jurisdiction to make and enforce binding decisions on the parties concerned.

10. New section substituted for section 64 of Cap. 10:27

MISA-Zimbabwe applauds the Department of Information and Publicity for realizing belatedly the unconstitutionality of the current section 64. The Memorandum indicates that the substitution is sought in order to avoid “apparent conflict with the constitutional freedom of expression”. MISA-Zimbabwe notes that either a provision does or does not conflict with the constitutional guarantee of freedom of expression. There can be no “apparent” conflict. We therefore submit that there is no need for the substituted provision. The offences outlined in each of the subsections are adequately catered for within the confines of the common law offence of criminal defamation, as well as by means of civil law remedies. An aggrieved party can obtain adequate relief by suing **the** guilty party for damages where information has been falsified or fabricated intentionally, maliciously or fraudulently. In addition, the offence under subsection (d) is implied in law, and therefore does not need to be legislated. Attempts to criminalize behavior in which relief may be obtained in a punitive damages order rather than through unnecessarily harsh imprisonment terms would be adjudged to contravene the right to freedom of expression, and would not be capable of protection under the provisions of section 20(2) of the Constitution. It is therefore recommended that the section be removed in its entirety.

11. Amendment of section 65 of Cap. 10:27

We note that there has been an inclusion in subsection (2) of 65 to bar any mass media owner who is not qualified under the provisions of subsections (1) and (2) and who publishes a mass circulation newspaper from continuing to own such publication after 31 March 2003. This effectively gives such persons or companies a stipulated time limit within which they are to dispose of their shares to a qualified person. It is submitted that such a short period of notice would be insufficient to disinvest or restructure, and there is need to allow for a more reasonable time frame within which to regularize the shareholding. MISA-Zimbabwe recommends a time frame of a two-years transition period. We equally note that it is only mass media owners of *mass circulation newspapers* that are being targeted in this manner and are having their existing rights curtailed. In the absence of a specified reason to the contrary, which falls within the confines of section 20(2) and is reasonably justifiable in a democratic society this we believe is clearly discriminatory.

12. Amendment of section 66 of Cap. 10:27

We note that a new subsection (7) has been inserted to require that an application must be made every two years for the renewal of the registration certificate of a mass media service, and each time a fee must be paid. Effectively this means that the mass media service is never assured that it will be allowed to continue with its operations. In addition, any material changes in the particulars of the application (for example the shareholding, the work undertaken etc) necessitate the filing of a brand new application, not a mere renewal. MISA-Zimbabwe believes that in a business undertaking such as the one at hand, it is unlikely that huge investments will be undertaken where there is a constant risk either that the service will have its certificate suspended or cancelled, or not renewed. This can only be to the detriment of the free flow of information, perpetuating the unlawful restriction on freedom of expression rights. It is submitted that this requirement of registration should be revisited, and the section deleted.

13. New section substituted for section 68 of Cap. 10:27

This intended insertion deals with the groups exempted from registration. MISA-Zimbabwe notes that the proposed subsection exempting a representative office of a foreign mass media service is very misleading. It has already given such services a false sense of security that they, at least, will not be affected by strict registration requirements. However, if the clause is scrutinized more closely, it is clear that such a service can only operate in Zimbabwe *with the permission of the Commission*, and an application must be made for such permission, in terms of section 90. Effectively, therefore, representative offices of foreign mass media services are no better off than any other mass media service, and in fact the former are only granted permission to operate for twelve months at a time, and must then apply for renewal of permission, or fresh permission where there has been a material change in the original application. It is recommended that this

“exemption” is removed from the Bill so as not to mislead the affected persons any further.

Subsection (d) seeks to exempt from registration “any enterprise, association, institution or other person” that produces publications disseminated exclusively to members or employees of the organizations. The proposed proviso is superfluous, because the situations catered for therein are separate categories altogether, and also proviso (ii) is extremely vague, especially the reference to where a publication “exceeds a prescribed number”. WE ask honorable members, what is this prescribed number? Who is to decide on this figure for such organizations? We submit that this entire proviso should be struck out on the grounds of vagueness, and therefore unconstitutionality.

What needs to be asked is what if such an organization disseminates the publication to a closed list of subscribers as well as its members or employees? What if copies are placed in the reception area and are read by visitors who attend at the offices? Must such an organization then register to escape punishment under the Act? The Memorandum states that these organizations will be exempted “unless it is seen that they circulate their products to the general public”. Who will monitor this, and how? This is a clear attempt once again to prevent the free flow of information and ideas, and again blatantly makes inroads into section 20(1) of the Constitution.

14. Amendment of section 69 of Cap. 10:27

There is an intended amendment here to set out the reasons in terms of which the Commission may refuse to register a mass media service. The use of the discretionary word “**may**” is open to uncertainty and open-ended discretion on the part of the Commission, and it is recommended that it should be changed to “**shall**”.

We submit further that, subsections (2) and (3) be repealed and substituted with a provision allowing for an appeal only to the Administrative Court in the event of a negative decision by the Commission. We believe that is a contravention of section 18(1) of the Constitution, which ensures that every person is entitled to the protection of the law, up to the Supreme Court in Zimbabwe.

15. Amendment of section 78 of Cap. 10:27

We note that this part attempts to legislate what is called “journalistic privilege”, which we believe however exists under law and is a right guaranteed under section 20 of the Zimbabwe constitution. And secondly that all the activities listed from (a) **to (g)** of section 78 are privileges that can graciously be handed down – only to journalists, who further must be accredited by the Commission, and not “ordinary persons” – when it is every single person’s constitutional right in terms of section 20(1) to be able to carry impart and receive information without hindrance, so long as they comply with the limitations set out in section 20(2) of the Constitution.

MISA-Zimbabwe submits that a journalist's right under subsection (a) to gather, receive and disseminate information adds nothing to her/his rights as guaranteed under section 20 of the Constitution, and therefore the subsection should be removed.

We also note that Subsection (c) grants journalists the "privilege" of obtaining access to documents and materials as prescribed in the Act. Such rights are open to all persons who qualify under section 5 of the Act, and therefore this subsection is superfluous, states the obvious, and should be removed. The attempts to make it a "privilege" of journalists to make audio or video recordings or to take photographs, is again a contravention of section 20(1) of the Constitution, as are the rest of the subsections. The above mentioned "privileges" that is to take photographs and make video recordings are open to everyone in Zimbabwe to enjoy including Honorable Members here who are not journalists.

16. Amendment of section 79 of Cap. 10:27

We note that the reduction of the time period for which a foreign journalist can be accredited to a mere thirty days seriously impedes those who are stationed in Zimbabwe to cover long-term developments. It could be argued that for this reason, and the fact that the journalist would have to leave the country and then apply again for accreditation and await the approval of the Commission before re-entering Zimbabwe to continue such coverage, constitutes an impediment on the free flow of information. We also remind Honorable Members that the SADC Protocol on Information, Sport and Culture calls on countries to draw measures that allow the free movement of journalists in SADC. We believe that this section will not promote that spirit.

17. New section substituted for section 80 of Cap. 10:27

MISA-Zimbabwe notes that under section 80 of AIPPA, over 15 charges have been brought against journalists for writing and publishing "falsehoods" since 15 March 2002. The mere intention to repeal the existing section is a victory for all those who argued against its initial inclusion on the grounds that the provision was an unlawful infringement on the right to freedom of expression. It had become obvious during the prosecution of journalists under this section, that there was a danger of the existing section being found to impose strict liability on those who falsified or fabricated information, or who published falsehoods. In addition, the accused journalist was "deemed" to have committed the offence, thus presuming him to be guilty before her/his innocence could be proven (thereby contravening section 18(3)(a) of the Constitution and its presumption of innocence) and placing the onus of proof to the contrary on the accused and not on the State (which is clearly untenable in criminal matters).

This has been remedied to some extent by the insertion of new words to make it an offence to "intentionally or recklessly" falsify information, to "maliciously or fraudulently" fabricate information, or to publish a statement either knowing it to be false or without having reasonable grounds for believing it to be true, or recklessly or with malicious or fraudulent intent representing it as a true statement. The onus rests on the State to prove such intention, recklessness etc, which goes some way in attempting to

remedy this constitutional irregularity. It is submitted that the requirement of “malice” is superfluous, as it is effectively a need to prove the offence was committed intentionally. Such references should therefore be removed.

It is further submitted that the proposed amendment still falls far short of meeting the test of constitutionality in respect of freedom of expression. The section as it stands – in particular subsections (a) to (c) in the Bill - still imposes criminal liability even where the reputations, rights and freedoms of other persons have not been threatened or contravened, and it imposes liability irrespective of the impact of the false or fabricated information on the reputations, rights and freedoms of other persons. In other words, even where the false news does not harm any person and therefore there is no complainant, the journalist is still open to stiff criminal penalties. We ask how will this be enforceable and who is the wronged party?

It is clear that the only instances in which an offence can be said to exist are where the falsifications or fabrications can be argued to be an infringement of the interests set out under section 20(2) of the Constitution. In this case, narrowly interpreted, the authorities would be correct in imposing penalties. However, in any other case, there is no need to impose a criminal penalty, either because the false news did not affect or harm any person or interest and is therefore not actionable, or because if it did (for example alleged defamation) there are adequate penalties under the common law for wronged parties to claim for damages. In the failure of the authorities to make the above clear, it is submitted that this section is therefore still clearly unconstitutional and the section should be deleted *in toto*.

Thank you.

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