



KICTANET'S DRAFT REPORT ON THE MEDIA COUNCIL BILL 2010 DISCUSSION

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The Kenya ICT Action Network (KICTANet) is a multi stakeholder network of members from civil society groups, private and public sectors, development partners and media. The network aims to act as a catalyst for reform in the ICT sector in support of the governments mission to enable Kenyans to gain maximum benefit from the opportunity offered by ICTs..

Introduction

The Media Bill 2010 was drafted as a basis for regulating journalists, promoting professional standards and regulating disputes by or against journalist and/or media enterprises. The Bill seeks to amend the existing Media Council Act of 2007 and overhaul the current Media Council of Kenya '*the Council*'. In addition, the Bill seeks to introduce amendments to the existing Act that are more in line with the constitutional provisions set out in Articles 33 and 34 of the Bill of Rights as well as chapter six of the Constitution.

The analysis of the Bill was done in a ten day session via the Kictanet mailing list where stakeholders from the various sectors including the media were given an opportunity to comment on the Bill and make any recommendations for proposed changes to the sections that they found unsatisfactory.

Analysis of the Bill

The analysis of the Bill has been done in a tabular form that sets out the specific section of the bill in the first column, the issues that people raised about that particular section and the recommended changes/issues for further discussion in the third column. The point of departure for this debate was that a policy must exist/be in place to guide this bill. **The policy was however not available and a main recommendation is to have a policy/ or an updated one in place as a necessity.**

It was also noted that the Media Council will have much greater powers than the ICCK due to being a Constitutional commission (and also as a right in the bill of rights)- e.g. can only be eliminated or its powers revised by a referendum. In line with other commissions in the Constitution, the Council should therefore take on the name **of The Media Commission.**

SECTION	ISSUES OF CONCERN	RECOMMENDATIONS/ISSUES FOR FURTHER DISCUSSION
<i>Preamble</i>	<ol style="list-style-type: none"> 1. Is the purpose satisfactory, or should it be enhanced to reflect the provisions in the constitution? 2. Is this proposed Media Council best placed to perform and fulfill this purpose? 3. Will the proposed Media Council enhance professionalism and growth of media in Kenya? 4. Is there a need for a Media Council or can journalists' self-regulate? 5. Do the functions of MCK and Broadcasting Content and Advisory Council (BCAC) overlap? 6. Would the purposes for which MCK and BCAC are being constituted, better be served by one general body to deal holistically with media issues? 	<ul style="list-style-type: none"> • There is no need for a statutory body to regulate the media, self-regulation is ideal. Alternately, there could be a number of small bodies regulating media professionals. • The purpose of the Act should read <i>'An Act of Parliament to provide for the realization of the right to freedom of expression and freedom of the media, in accordance with section 33 and 34 of the Constitution, for the establishment of the Media Commission of Kenya provided for in article 34 5 (c) of the Constitution of Kenya; to amend the media Act of 2007, and for setting the implementation of the professional standards for journalists and the media, and for connected purposes.</i> • The broadcasting industry should reject the state-controlled Broadcasting Content and Advisory Council and seize the opportunity offered by the Communications Act of 2009: It should set up its own regulatory body to enforce a code developed by the industry itself, in order to be exempted from the statutory regulations.
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<p><u>Part 1 Interpretation</u></p> <p>Definition of the word ‘Journalism’ is interpreted to mean <i>the collecting, writing, editing and presenting of news or news articles in newspapers and magazines, radio and television broadcasts, and in the internet.</i></p> <p>Definition of “Media” is interpreted to <i>include both electronic and print media engaged in any production for circulation..</i></p> <p>Definition of “Media Enterprise” <i>means an organization whose business involves the collection, processing and dissemination of news...through media.”</i></p>	<ul style="list-style-type: none"> • Does this definition include the online versions of news from different media houses? • Does this definition include online bloggers? • The definition of 'media' and 'media enterprises' in the act does not draw a definite distinction between the two 	<ul style="list-style-type: none"> • Is there a better way of phrasing the two so that it is clear to distinguish between content (media) and business (media enterprise)? • Also consider the definition of traditional-type media that also disseminate over the Internet to distinguish between them and bloggers. <p>The definition of media should read <i>'both electronic and print transmission of information for public consumption through TV, Newspaper, Magazines, Billboards etc.</i></p>
<p><u>Part 11 : Functions and Operations of the Council</u></p> <p>Sections 4(c), (e) and (i) which deal with the</p>	<ul style="list-style-type: none"> • The sections are repetitive and deal with substantially the same issue 	<ul style="list-style-type: none"> • The sections should be merged to read <i>'promote high professional and ethical standards among journalists and in the media as set out in this Act and any other relevant law'</i>

<p><u>Part 11 : Functions and Operations of the Council</u></p> <p>Sections 4(c), (e) and (i) which deal with the functions of the Council</p>	<ul style="list-style-type: none"> • The sections are repetitive and deal with substantially the same issue 	<ul style="list-style-type: none"> • The sections should be merged to read ‘<i>promote high professional and ethical standards among journalists and in the media as set out in this Act and any other relevant law</i>’
<p>In Section 4 (h), the Council will <i>make recommendations on the employment criteria for journalists.</i></p>	<ul style="list-style-type: none"> • How will this be done? • Is this not infringing on the freedom of expression? Does this mean that one cannot get employed unless the Council recommends the criteria for employment? 	<ul style="list-style-type: none"> • Under international law, it is not legitimate to impose conditions on who may be journalist so this section should be deleted
<p>In Section 4 (k) the Council will <i>compile and maintain a register of journalists, media enterprises and such other media enterprises and such other related registers as it may deem fit.</i></p>	<ul style="list-style-type: none"> • How will this register be compiled? And how often? • Does this then not call for accreditation of local journalists? 	<ul style="list-style-type: none"> • The idea of a register of journalists is impractical and there is no justifiable reason for doing it. • Another body like the KUJ should do the accreditation if it is really necessary.
<p>In Section 5 on operations of the Council the bill states: <i>The Council shall operate without any government, political, commercial or other bias or interference and shall</i></p>	<ul style="list-style-type: none"> • Can this be actualized when the Council is receiving funding from the government? 	<ul style="list-style-type: none"> • Needs further discussion.

<p>Section 6 states that the <i>Council shall comprise seven members, appointed in accordance with the provisions of this Act.</i></p>	<ul style="list-style-type: none"> • Should other professions be considered? • Is it necessary to actualize gender balance? • Out of the seven members, should there be a minimum number of media professionals represented in the Council? 	<ul style="list-style-type: none"> • Other fields such as policy, technology and business should be added • There is a need for clear affirmative action where a third of the seven should be women / men who meet those requirements. • At least five of the seven Council members should be drawn from the media. • <i>It is also important to note that the constitution caps the number of any members of the commission to 9</i>
<p>Section 7 (1) <i>A person is qualified for appointment...if such a person (c) have knowledge and experience of at least 10 years including past or continuing membership to industry or other professional body in matters relating to any of the fields-</i></p> <p><i>(d) Meets the requirements of chapter six of the Constitution</i></p> <p><i>(e) Has had a distinguished</i></p>	<ul style="list-style-type: none"> • Chapter six of the constitution is on leadership and integrity and relates to state officers. Is there an assumption then that the council members will be considered state officers? • It is difficult to measure/quantify a distinguished career 	<ul style="list-style-type: none"> • MCK Members may not be state officers but should prescribe to leadership and integrity principles as stated in chapter 6 of the Constitution. • The requirement for a distinguished career should be removed

<p><i>career in their respective fields.</i></p>		
<p>Section 7(1) (c)</p>	<ul style="list-style-type: none"> • Does the requirement for ten years experience lock out the youth from positions on the council? 	<ul style="list-style-type: none"> • This needs further discussion. It should be borne in mind that maybe this is a requirement for lawyers but may not be necessary for media.
<p>Section 7 (2): The Appointment of the Chairperson</p> <p><i>The chairperson of the Commission shall be a person who is qualified to hold the office of judge of the High Court under the Constitution</i></p>	<ul style="list-style-type: none"> • Should the Chair of a Media Council be drawn from the legal profession? • There is no provision for appointment of the chairperson 	<ul style="list-style-type: none"> • The reference to ‘Commission’ should reinforces that ‘Council’ should actually be a ‘Commission’. • This requirement of a high court judge is too exclusive and should be removed. The position of chair should be open to anyone sitting on the Council. • The Chairperson should be appointed by a majority vote of members of the council The Chair can be reappointed but this must be done through a re-election to avoid domination and 'over-stays'. • Election should be by secret ballot by the Council Members
<p>Section 8 (1) <i>The Chief Justice shall, within fourteen days of the commencement of this Act, and every time vacancies shall arise in the Council, by notice in the gazette declare such vacancies</i></p>	<ul style="list-style-type: none"> • Article 161 (2) of the Constitution states that the Chief Justice is the head of the judiciary. Should his duties also extend into the appointing authority for MCK? 	<ul style="list-style-type: none"> • The spirit here is clear, that it is to have an appointment process that is independent. However, it was agreed that this is not a role for the JSC. • Two divergent views emerged: <ol style="list-style-type: none"> 1) The role of notifying the public of any vacancies in the council should be played by the Cabinet

<p><i>in the Council and request for applications.</i></p> <p><i>(2) An application under subsection (1) shall be forwarded to the Judicial Service Commission within fourteen days...for purposes of considering applications, interviewing and short listing at least three persons qualified for appointment as chairperson and nine persons qualified for appointment as members</i></p>	<ul style="list-style-type: none"> • The mandate of the Judicial Service Commission (JSC) as stated in Article 172 of the Constitution is for the judiciary. Should JSC then extend its mandate to the Council when its mandate is so clearly stated in the Constitution? • What would be the alternative appointing authority/procedure? 	<p>Secretary.</p> <p>2) The appointment of MCK members should be done independently and be outside the control of the government to promote freedom of expression and prevent state actors from interfering with the independence of the media developing a formula for membership which ensures the representation of both the media and the public at large.</p> <ul style="list-style-type: none"> • The JSC should not be the body mandated to make appointments to the MCK. <p>So who should make the appointments? Needs further discussion.</p>
<p>Section 10 On requirements for appointment provides for eligibility for appointment to the Council which is (a) a person <i>is a holder of a degree..., has expertise in areas of media policy and law, media regulation, business practice and finance, journalism, the performing arts, entertainment, education, advertising practice or related social issues.</i></p>	<ul style="list-style-type: none"> • Is this section necessary considering issues of qualifications for appointment have already been dealt with in section 7 (on qualifications)? 	<ul style="list-style-type: none"> • Sections 7 and 10 should be merged as they deal with the same issues

<p>Sections 11(1)(c) and (e) refer to subjective grounds for removing members from the Council on the grounds of incapacity and lack of fitness</p>	<ul style="list-style-type: none"> • How will the decision(s) be made? 	<ul style="list-style-type: none"> • The decision should be made by a vote of 2/3 of the Council members and any member may bring a motion to remove another member on these grounds.
<p>Section 12 provides for the Council to receive 'reasonable' remuneration.</p>	<ul style="list-style-type: none"> • What is the meaning of reasonable? 	<ul style="list-style-type: none"> • Remuneration should be linked and harmonized to benefits provided in other existing positions of other Commissions.
<p>Section 19(d) provides for the Council to receive funds from levies and fees that it imposes</p>	<ul style="list-style-type: none"> • What principles will guide how much levies and fees the Council prescribes? 	<ul style="list-style-type: none"> • There should be a maximum on the amount of levies and fees the Council can impose.
<p>Section 19 (e)... the bill states that the Council shall receive...<i>donations, gifts and endowments from lawful organizations or sources which shall NOT be from foreign governments or foreign entities.</i> Further in (g) provides for <i>grants which shall NOT be from foreign governments or foreign entities.</i></p>	<ul style="list-style-type: none"> • What is the basis/aim of this law? • The current MCK has had collaborations with donors and embassies. Does this law have an implication on such collaborations? And if so, what's the way forward? • Is it realistic to expect the MCK NOT to receive grants and donations from foreign governments or foreign entities? 	<ul style="list-style-type: none"> • Section 19 (e) should be amended. The receipt of foreign funds alleviates the need for local support and enhances the role that the Council plays. As such, it should not be restricted from receiving grants or funds from foreign governments. • Section 19(e) can be amended to read '<i>...donations, gifts and endowments from lawful organizations or sources which sources shall include both local and foreign governments or entities</i>' • Section 19(g) should be deleted
<p>Section 23 provides for</p>		<ul style="list-style-type: none"> • The Council should also be required to give an

<p>annual accounts</p>		<p>annual report on its activities.</p>
<p>Section 24 provides for the establishment of a Complaints Commission which shall consist of five persons appointed by the Council, who shall not be members of the Council... <i>A chairperson who shall be a person who holds or has held a judicial office in Kenya or is an advocate of the High Court of not less than ten years.</i></p>	<ul style="list-style-type: none"> • Should the position of chair remain exclusive to advocates? • There is no provision for election of the Chair 	<ul style="list-style-type: none"> • The position of chair should not be exclusively for advocates and should be open to anyone eligible for appointment to the Commission • The Commission chair should be appointed by the Council
<p>Section 26 deals with Remuneration of members of the Complaints Commission</p>	<ul style="list-style-type: none"> • What will be deemed reasonable as far as remuneration is concerned? 	<ul style="list-style-type: none"> • Remuneration should be linked and harmonized to benefits provided in other existing positions of other Commissions.
<p>Section 27 (1) <i>'anyone who is 'aggrieved' may complain about any publication or conduct of a journalist.</i> The Commission will then reject or uphold such complaint.</p>	<ul style="list-style-type: none"> • It is not indicated the standards against which such a complaint should be judged. This effectively leaves it up to the unfettered discretion of the members of the Commission to decide and leaves journalists and the media open to being 	<ul style="list-style-type: none"> • Complaints should be judged against an established a code of conduct to be adopted by the Council, after consultation with interested stakeholders.

	held in breach of a standard that was never communicated to them	
Section 28 (2) <i>The Complaints Commission shall having heard the matter the subject of the complaint, make a report, issue any decision...and shall publish its findings...</i>	<ul style="list-style-type: none"> The article is silent on where these findings will be published. Where should they be published? 	<ul style="list-style-type: none"> Will publication on the Commissions website suffice?
In Section 28 (3) , it states: <i>The Complaints Commission shall communicate its decision to the parties concerned...</i>	<ul style="list-style-type: none"> Should the mode of communication be specified? 	<ul style="list-style-type: none"> All communication should be specified to be in writing.
Section 32 provides for publication of decisions... <i>Every decision made by the Council or Complaints Commission in a matter the subject of a dispute shall be published in the Gazette.</i>	<ul style="list-style-type: none"> Is this necessary that all decisions be on the gazette? Should other options be explored? 	<ul style="list-style-type: none"> It is not necessary to specify how the decision will be published and publication in the Gazette is too onerous and has negative cost implications. However, it is understood that publication in the gazette is to ensure formal legal publication of the decision. The main point is that they make it public so that those with an interest can follow-up. The gazette is not something that will usually be of very wide public interest. It is understood that decisions will at least be on the Council's website.
Section 34 provides for enforcement of decisions... <i>A</i>	<ul style="list-style-type: none"> Should the Complaints 	<ul style="list-style-type: none"> This section should be amended and the heading

<p><i>decision of the Complaints Commission, or the Council against which no appeal has been preferred within 30 days from the date on which the decision was made shall be adopted and enforced as an order of the High Court.</i></p>	<p>Commission have the powers of the High Court?</p>	<p>should be ‘<i>proof of documents</i>’ and it should read ‘<i>a document purporting to be a copy of any order of the Commission and certified by the Chairman to be a true copy thereof, shall in any legal proceedings be prima facie evidence of the order.</i></p>
<p>Section 36 deals with Information by the Media</p>	<ul style="list-style-type: none"> • It is not appropriate to require the media by law to inform the public (although this is of course a professional obligation). 	<ul style="list-style-type: none"> • These obligations should be part of a code of conduct, generated in close consultation with the media and other stakeholders, rather than directly in the law.
<p><u>The Code of Conduct and Practice of Journalism</u> covers all aspects for journalism from accuracy and fairness to hate speech journalism.</p>	<ul style="list-style-type: none"> • Different media houses have own codes of conduct. Should the MCK Code be made the minimum Code that each Media enterprise should subscribe to? And if so, in what ways would media houses be made to comply? 	<ul style="list-style-type: none"> • All media houses should subscribe to the MCK code. However, there was no consensus on how compliance would be realized. Needs further discussion.
<p>Clause 1(b) of the Code of Conduct on Accuracy and fairness states ‘...should be corrected promptly’</p>	<ul style="list-style-type: none"> • What is the meaning of prompt? a day, a week, a month? 	<ul style="list-style-type: none"> • A time limit should be specified.
	<ul style="list-style-type: none"> • Isn’t the requirement to 	<ul style="list-style-type: none"> • There must be a time limit specified for giving the

Clause 1(c) which deals with the publication of an apology	publish an apology contrary to the right to freedom of expression? <ul style="list-style-type: none"> • What is the time limit? 	apology.
Clause 3(a) on Integrity and Clause 7 on Confidentiality	<ul style="list-style-type: none"> • The two Clauses are contradictory 	<ul style="list-style-type: none"> • The Clauses need to be harmonized
Clause 8 on Misrepresentation & Clause 9 on obscenity taste and tone in reporting.	<ul style="list-style-type: none"> • How will public interest be determined? 	Needs further discussion.
Clause 12 on Recording Interviews and Telephone Conversations	<ul style="list-style-type: none"> • There is a need for clarity as far as investigative reporting is concerned. 	
Clause 16 on financial reporting	<ul style="list-style-type: none"> • Is this impractical and untenable? • How will compliance be monitored? • What was the aim of this Clause? 	<ul style="list-style-type: none"> • This Clause should be deleted
Clause 18 on Protection of Children and Clause 19 on Victims of Sexual Offences		<ul style="list-style-type: none"> • These Clauses should be amended to integrate the relevant provisions of the Children’s Act and the Sexual Offences Act
A transition clause??	<ul style="list-style-type: none"> • Do we need a transition clause to move the current 	<ul style="list-style-type: none"> • Need discussion and text for the clause.

	council to the envisaged Commission?	
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Miscellaneous Matters

- There should be provisions on how the decisions of the Commission will be taken i.e by majority vote of the members and that the decisions must be signed by each member in acceptance thereof.
- There should be provision as to where the Complaints Commission will have its seat
- There should also be a provision for the any member of the Complaints Commission to disclose their interest in any particular proceedings before the Commission
- A look at the Procedure of the Communications Appeals Tribunal as set out in the Second Schedule of the Kenya Communications Act would be helpful to see what aspects can be borrowed from there to be applied by the Complaints Commission