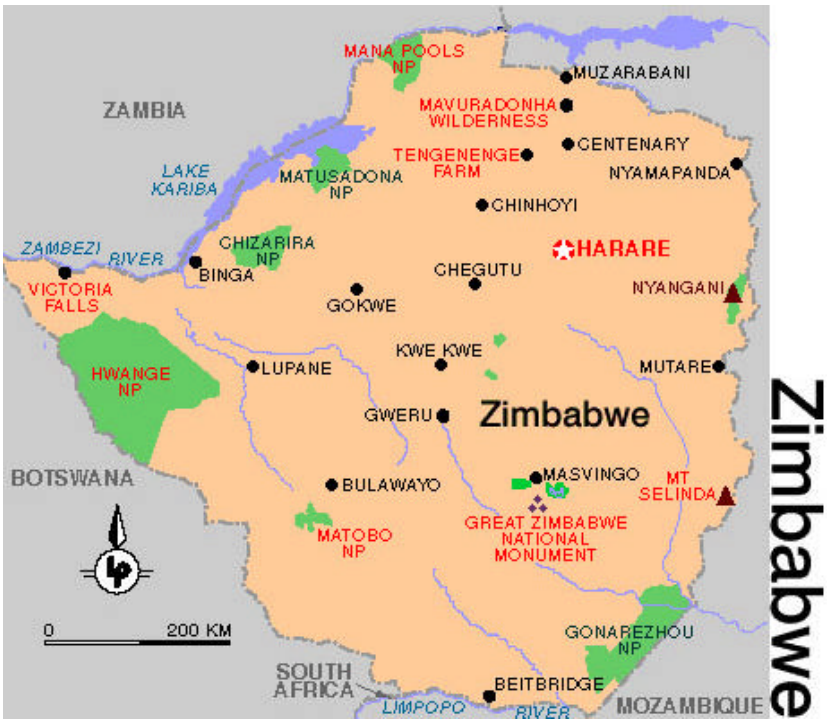
Suggested Changes to the Broadcast Services Act



Commissioned by MISA Zimbabwe from
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March 2002

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SUGGESTED CHANGES TO THE BROADCASTING SERVICES ACT

1.1 INTRODUCTION

This section analyzes each and every section of the Broadcasting Services Act and suggests possible changes. It must therefore be read in conjunction with the analysis of the Broadcasting Services Act. An ideal Broadcasting Services Act will fairly and objectively regulate the electromagnetic transmission of audio and video signals and the technical usage of the available frequency spectrum. It is suggested that much of what is contained in the Broadcasting Services Act should be deleted and not replaced. The powers granted to the Minister are unprecedented and uncharacteristic of a democracy. This paper does not seek to draft an alternative Broadcasting Services Act, but only seeks to expose the weaknesses and limitations of the Act and those material sections, which must be changed. Drafting an alternative Act requires time and expertise. The Attorney General's division is better suited to undertake this exercise. The sections will now be analysed.

1.2 THE TITLE

In order to emphasize the importance of the intended creation of an independent Broadcasting Authority, it is suggested that the title of the Act be changed to the Independent Broadcasting Services Authority Act. Shakespeare once wrote;

> *"'What's in a name? that which we call a rose*
> *By any other name would smell as sweet;"* [1]

True, but integrity and purposive adherence to national ideals and goals have been glaringly lacking in Zimbabwe. A change in the name of the Act while not obligatory is necessary in order to state in clear terms the objectives for which the Act was created. While it may smack of indolence and lack of capability, to copy statutes from other countries, it is comforting that in the region South Africa enacted the Independent

[1] Shakespeare's ROMEO AND JULIET, Act 2 Scene 2

Communications Authority of South Africa. Content is more important than title, but an appropriate title will not detract from the contents either. An appropriate title will state in no uncertain terms the purpose and intention of the Act. A change to the title of the Broadcasting Act is suggested.

1.3 PREAMBLE

In Zimbabwe, as indeed in other countries that utilize the Roman-Dutch legal system, the preamble is often used as an aid to interpretation. It is a commonly accepted principle of drafting that the preamble to the Act should be succinct in stating the precise objectives and the nature of the Broadcasting Authority that is sought to be achieved. The preamble makes no mention of the independence of the Authority. It is suggested that the preamble should read, in part:

> "An Act to provide for the <u>independence</u>, functions, powers and duties of the Broadcasting Authority of Zimbabwe...etc."

1. 5 DEFINITIONS

Save for a few objectionable clauses the definitions in section 2 of the Act are by and large tolerable and will be analyzed simultaneously, when relevant, with the more substantive sections of the Act.

1.6 ESTABLISHMENT AND FUNCTIONS OF BROADCASTING AUTHORITY OF ZIMBABWE – SECTION 3

This section creates and states the functions of the Authority. Instead of creating a body that actually regulates broadcasting, the section creates a powerless body whose sole reason for existence is to carry out ministerial commands[2].

In this section it is suggested that save for subsection (1), subsections (2) and where objectionable, subsection (3) should be deleted.

[2] Refer to section 3 (2) (a),(b)etc

Subsection (2) does not give the Authority any power to regulate the broadcasting industry, other than to play a secretarial role to the Minister. It is should be replaced with sections that give the authority power, particularly most of the powers that are given to the Minister himself. It is suggested that the Authority should be the licensing authority, have power, on certain, specific and objective reasons to amend, suspend, and cancel licences.

Section 3, subsection (2)(q) is particularly objectionable in that it reaffirms that the Authority is obliged to carry out all instructions that are issued by the Minister. In order to be independent it is imperative that the Authority should not be subject to the control of any person or body in the exercise of its functions and discretion and particularly not a government Minister who represents political partiality.

SECTION 4 AND 5

1.7 APPOINTMENT AND COMPOSITION OF BROADCASTING AUTHORITY OF ZIMBABWE BOARD

Save for subsection (1), it is suggested that all other subsections of section 4 and 5 should be deleted.

The institution that appoints members of the Board must be reviewed. The appointment of members of the Board by the Minister compromises the independence of the Board. Independence is important if the Board is expected to objectively carry out its functions in the interests of Zimbabweans.

It is suggested that if it is desired to retain the current powers granted to the Minister to appoint board members, the Minister's power must be limited to appointing persons from candidates shortlisted by a select committee of Parliament. The select committee of parliament will itself have been drawn from members of Parliament. The select committee maybe composed of other people, such as one or two senior judges, and two or so broadcasting experts.

Further the process of interviewing candidates must be open and transparent. It is suggested that the interviews must be open to the public.

Lessons maybe drawn from South Africa where the Independent Broadcasting Authority is comparatively and relatively immune from political control.[3]

In South Africa, the body that runs the Independent Broadcasting Authority is known as the Council. The National Assembly (South Africa's parliament) selects and shortlists the candidates for the Council. The President then appoints Council members from the group selected by the National Assembly. [4]

In Malawi the appointment process also relatively secures the independence of the Authority in that the President of Malawi is only entitled to appoint members of the Authority from a shortlist of names provided by the Public Appointments Committee. Executive involvement in the selection process of members of the Authority should therefore be limited to appointing candidates already chosen or choosing candidates from a short list prepared by an independent body.

In relation to Zimbabwe, it is suggested that the South-African example be followed. It is of particular importance that objective, impartial and independent regulation of electromagnetic broadcasting should be achieved. An expressive society is vital for political and economic stability and progress.

1.8 LICENSING AUTHORITY – SECTION 6

This section must be deleted. It makes the Minister the licensing authority, taking away from the Authority one of the most important powers that any broadcasting authority should exercise. This section is justification for the submission made elsewhere in this paper, that the regulating broadcasting body in Zimbabwe is not independent of political influence and control. A licensing Authority controls the exercise of the freedom of expression, in that it determines the nature of persons who obtain licences and the type

[3] Refer to the Independent Broadcasting Authority Act, 1993

[4] Refer to Section 4 thereof.

of programming. A body of persons representing various interests groups and organizations in society is likely to be independent and objective as opposed to one person. It is suggested that the licensing authority should be the Broadcasting Authority, and not the Minister.

Comparisons may be drawn with South Africa where the Council, the equivalent of the Broadcasting Board is the licensing authority.[5] The potential for political influence and control of the Council is very limited, in comparison to Zimbabwe.

1. 9 BROADCASTING AND SIGNAL CARRIER LICENSES – SECTION 7

This section requires that all persons intending to invest in the broadcasting sector should first obtain licenses. In principle there is nothing wrong at all with this section. It should, however be borne in mind that at the time this Act was promulgated there were several radio stations that were legally broadcasting. Among the radio stations were the Zimbabwe Broadcasting Corporation, Capital Radio (private) limited and several others. The Supreme Court in the case of Capital Radio stated that since it had struck down the monopoly of the Zimbabwe Broadcasting Corporation there was no legal enactment barring any person from broadcasting. Therefore those that began to broadcast during this period did so legally. To then outlaw the activities of these broadcasting stations while discriminately favoring the Zimbabwe Broadcasting Corporation without any justifiable reason, given or apparent, is unlawful. In the historical context of the Act, this section is of grave concern and would most likely be struck down as unconstitutional, if challenged. All persons that were prohibited from broadcasting and are not protected by section (7) may claim that their right to private ownership of property and to be heard before any act affecting the existence or extent of their civil rights is exercised were violated, in contravention of sections 16 and 18 (9) of the constitution respectively.

It is suggested that this section be amended to allow the Zimbabwe Broadcasting Corporation, Capital Radio and the few other stations that began radio broadcasts, to continue broadcasting unimpeded and deem them licensed for the limited broadcasts that they were carrying out

Subsection (2) and (3) as read with Section 9 prohibits broadcasters from possessing transmitting equipment. It has already been stated that this is unduly restrictive and unconstitutional. The restriction constitutes a violation of the right to freedom of expression.

It is suggested that the whole of section 7 should be deleted. The section should be replaced with a section that permits broadcasting licensees to record and transmit programs and at the same time allow those that do not have the resources to own expensive broadcasting equipment to obtain the use of other licensees signal transmitting equipment. Apart from being unlawful and impractical, it is does not make commercial sense to force all broadcasters to use one, or at most two signal carrying stations to broadcast programs.

South Africa's Independent Broadcasting Authority Act permits all licensed broadcasters to own signal carrying equipment[6].

Further, and in no way condoning or encouraging unlawful broadcasts, it does seem that the maximum fine of five million Zimbabwe dollars or two years imprisonment for broadcasting without a license is too harsh a sentence. It needs to be reduced, in order to be proportionate to the offence.

1. 10 PERSONS DISQUALIFIED TO BE LICENSED – SECTION 8

This section must be deleted in its entirety. It is wholly unconstitutional and unwarranted. Most of the persons disqualified by the Act from being granted licenses must be allowed to apply for licenses.

All citizens of Zimbabwe irrespective of where they were domiciled prior to applying for licences should be permitted to broadcast without hindrance. There is some merit in placing restrictions on Zimbabweans who no longer consider Zimbabwe to be their permanent home from controlling a broadcasting station. The blanket prohibition is unconstitutional. It cannot be justified on any of the recognised grounds set out in

[5] Section 39 of the Independent Broadcasting Act, 1993
[6] Section 33 of the Independent Broadcasting Act, 1993

section 20 of the constitution. To this extent it is suggested that the section should be amended, to permit all Zimbabweans currently and who will be ordinarily resident in Zimbabwe to own broadcasting stations.

Some amount of foreign shareholding in broadcasting companies must be allowed. A total ban on foreign investment into this field is unduly restrictive. It has already been stated that the broadcasting industry is virtually non-existent in Zimbabwe. A specified minority share holding should be permitted to foreigners. Such a pragmatic arrangement will facilitate access to finance and other necessary resources required in broadcasting.

In South Africa, foreigners are permitted to invest in broadcasting companies, with the simple restriction that they must not exercise control. Foreigners may not have financial interests or voting rights exceeding twenty percent.[7] It is important to note that South Africa which allows such an amount of foreign interest possess a formidable broadcasting industry, unsurpassed and unparalleled by any on the African continent. Zimbabwe's laws, in view of the archaic broadcasting system in existence, seem retrogressive in comparison.

The definition of controlling needs to be reworded. Control should only be factual or legal. The definition must not allow for the discretion of one person to decide what 'control' of a broadcasting station means. The definition allows the Minister to decide, entirely in his discretion and on his mere unsubstantiated suspicion that a broadcasting station should be closed because in his opinion, the broadcaster is under the control of another. Therefore it is suggested that subsections (3), (4) and (5) should be deleted.

Save for community broadcasting licences, there is no reason in principle, why, prior to being granted licences prospective broadcasters should be forced to have at least ten (10) persons as shareholders. The section will discourage investment into broadcasting, as corporate governance of a company with a compulsory minimum ten-person shareholding would be particularly difficult. In addition, this restriction on investment means that the people's right to exercise the right to freedom of expression is violated. The section therefore violates section 20 of the constitution.

In the same vein there is no reason in principle, why a company with one major, but not exclusive, shareholder should not on application be granted a licence.

No material objections arise from subsection (6) and (7).

1.11 RESTRICTIONS IN RELATION TO THE USE OF CERTAIN LICENSES – SECTION 9

This section limits the number of broadcasters. Apart from the Zimbabwe Broadcasting Corporation only one other licence to provide a national television broadcast can be granted. Further, and again apart from the Zimbabwe Broadcasting Corporation, only one other licence to provide a national radio broadcasting station maybe granted. Refer to section 9(1).

Section 9 (1) must be deleted. The limitation on the number of stations that can provide national free to air television and radio broadcasts is not supported by technical data available. It is suggested the Broadcasting Services Act should not restrict the number of stations that may be granted to licenses. This issue should be decided by the technical team that is set up by the Independent Broadcasting Board in carrying out its functions in terms of the Act.

Sections 9 (2) and (3) limits the number of signal carriers to two, i.e. the Zimbabwe Broadcasting Corporation and another licensee, yet to be licenced. These sections should also be deleted. There is no reason in principle why the number of signal carriers should be limited. Put differently there is no reason why broadcasters should not be allowed to broadcast their materials and programs. In South Africa, broadcasters are permitted to apply for signal transmitting licenses, simultaneously with their applications for broadcasting licenses.[8]

This section places an undue restriction on the transmission of programs and hence the right to freedom of expression, in violation of section 20 of the constitution. The

[7] Section 48 of the South African, Independent Broadcasting Act.
[8] Refer to section 33 (1) of the Independent Broadcasting Act.

restriction is not justifiable on any exceptions to the right to freedom of expression, contained in section 20 (2) of the constitution.

These sections unfairly and unnecessarily discriminate against private broadcasters. The Zimbabwe Broadcasting Corporation is the only one that may be both a signal carrier and a broadcaster solely enjoying the benefit of transmitting it's own programs. This restriction creates an unfair advantage in favor of the Zimbabwe Broadcasting Corporation, maintaining the monopoly that the Supreme Court struck down in the case of Capital Radio.[9] There are no suggested replacements for these sections.

1. 12 APPLICATION FOR LICENSE – SECTION 10

This section sets the procedure to be followed in making applications for licences. The section is wholly inappropriate, providing for issues that are not related in good faith to the licensing regulation of broadcasters.

The Authority should simply be granted the power to grant licenses and the intricacies of the actual process should be left to a statutory instrument. Should it be considered necessary to include the finer details of the actual license application process itself then the following issues should be considered as relevant:

i. The Authority should have the sole right to determine when to call for applications. There must be no interference or prompting from the Minister. In any event it has been suggested that a select committee of parliament should appoint the Authority. The Authority can therefore be answerable to this select committee of parliament. To this extent subsection (2) would have to be left intact, as it merely provides that statutory instruments may be promulgated to provide for the forms and fees to be paid on application;
ii. The interviewing of applicants must be public to allow for transparency; and
iii. The actual decision to license applicants must fall upon the Authority and not the Minister.

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[9] Capital Radio case (Supra)

Sections 41 and 42 of the South-African Independent Broadcasting Act provide for an expose of the licence application process as well as the holding of public interviews for the applicants. It is suggested that the public interviewing process be adopted.
Apart from Subsection (8) that is not materially objectionable the rest of the section ought to be deleted.

1.13 TERMS AND CONDITIONS OF LICENCE – SECTION 11

Due the fact that the electromagnetic spectrum is finite and represents a critical national resource for communication, it is indeed imperative and unavoidable that licences must be issued subject to terms and conditions. It is crucial, however that terms and conditions must be relevant and certain. Terms and conditions made to apply to one licensee, subjectively imposed by one person and which are not stated in any legal instrument are not only unconstitutional, but encourage corruption in addition to heavily discouraging investment into the broadcasting sector. It is important that the body imposing terms and conditions of licences must be impartial, fair and objective. These ideal norms require an apolitical body, not one individual, to adjudicate over the process.

Subsection (1) (a) is not objectionable and need not be amended.

Subsection (1) (b) is not objectionable, save that much of what is contained in the Fifth schedule is unconstitutional. Therefore while licenses should be granted subject to the Fifth schedule, this should be read to relate to an amended Fifth schedule. Proposed amendments to the Fifth Schedule will be dealt with below.

Subsection (1) (c) is another of the classical sections that gives the Minister draconian powers to grant licenses on such terms and conditions as he pleases. This subsection should be deleted and not replaced by any section that gives the Minister any such powers as are contained in the current Act.

Subsection (2) should also be repealed. It suffers from the same affliction as subsection (1) (c)

Subsection (3) is not objectionable. The subsection should however be read in conjunction with the criticism raised against the local content requirements.

Subsection (4) states that 10% of all broadcasts shall be in other languages indigenous to Zimbabwe apart from Shona and Ndebele. Read together with the Sixth Schedule, clause 2 thereof, all broadcasters are obliged within two years of being granted licences to adhere to the specified local content requirements. The local content requirements are restrictive. Zimbabwe does not have a viable broadcasting sector. This restriction seems directed at ensuring that very few people, if any actually invest resources into the sector, maintaining the Zimbabwe Broadcasting Corporation monopoly. It is suggested that this clause should be deleted. A technical assessment of the broadcasting industry must be carried out and thereafter, local content requirements may be imposed, by statutory instrument. The Act should only make reference to the power of the Authority to make licenses liable to local content requirements.

Subsection (5) should be deleted and not replaced with any section of similar import. The subsection gives the government a mandatory privilege of broadcasting free of charge, for a cumulative one hour per week, on private broadcasting stations. This is an unusual section that interferes unnecessarily with editorial independence and program content. No such section appears anywhere in any of the Broadcasting Acts in the region.

Subsection (6) is not objectionable. It does seem to be superfluous, as all persons in Zimbabwe are obliged to adhere to the provisions of the Copyright Act.

Subsection (7) need not be amended.

It is strongly recommended that subsection (8) be deleted. The subsection restricts the employment of technical personnel without the specific approval of the Minister of State for Information and Publicity in the President‘s Office. The subjective and discretionary power granted to the Minister is unprecedented and is open to abuse. All other commercial and industrial fields in Zimbabwe are able to employ foreigners once an application is made to the Ministry of Home Affairs and justification for seeking to employ a foreigner is established. This restriction violates section 20 of the constitution, in that it

unnecessarily interferes with the running of broadcasting stations, to their detriment. Needless to say the section also heavily discourages investment, due to the real possibility that the Minister may unreasonably decline permission to employ necessary personnel to work the stations established.

The section also prohibits Zimbabwean citizens who have not, or are not ordinarily resident in Zimbabwe from being employed in the broadcasting industry. This restriction is absurd and unconstitutional. There is absolutely no legal basis for prohibiting citizens from seeking employment in certain fields merely because in recent times of their lives they were resident outside the Zimbabwe. The restriction does not rationally distinguish between those that were outside the country for medical, educational, or employment or other reasons.

There is no need to amend subsection (9) and (10). They are not objectionable.

1.14 FORM AND PERIOD OF VALIDITY OF LICENCE – SECTION 12

It would be more appropriate if the whole of subsection (1) of section 12 were contained in a statutory instrument.

Subsection (2) and (3) of section 12 should be amended. They limit the tenure of licences to one year for a community broadcasting licence and two years for any other broadcasting licence.

It has already been stated that the ridiculously short licence periods are unconstitutional. The sections violate section 16 and 20 of the constitution, which protect the right to freedom of expression and right to property. The section also prevents any form of investment into broadcasting, protecting the monopoly of the Zimbabwe Broadcasting Corporation, which was struck down by the Supreme Court[10]. The Supreme Court in the cellular phone licensing saga of Econet, held that legal instruments that made it impossible for other competitors to invest and enter the commercial field, violated the

[10] Capital Radio case(supra)

right to freedom of expression. It is suggested that broadcasting licence tenures should be extended.

In South Africa the licence periods for common signal carrier is fifteen years and for other signal carriers, i.e. ordinary broadcasters, eight years.[11]Public and private broadcasting television licences are valid for eight years, while radio licences are valid for six years. Community licences for both television and radios are valid for four years. The South-African licence tenures are not the most liberal, but compare most favourably to the Zimbabwean situation.

Conservatively, it is suggested that Zimbabwe impose the South-African licence tenures as the basic minimum. Longer terms would however be more appropriate.

1.15 REGISTER OF LICENCES – SECTION 13

This section need not be amended. It simply provides that a register of licences granted must be kept.

1.16 RENEWAL OF LICENCE – SECTION 14

Save for subsection (3) the whole of section 14 is not objectionable. Subsection (3) states that an application for renewal may be made to the Minister in the same way as an application for a new licence. The section should be deleted because the application process is flawed and unconstitutional. Further the renewal process should impose less stringent conditions.

The subsection should therefore be amended.

[11] Refer to section 38 of the South-African Independent Broadcasting Authority Act

1. 17 AMENDMENT OF LICENCE – SECTION 15

It is suggested that the whole of this section should be repealed. The section grants the Minister the power to amend, in his discretion, any term or condition that applies to a licence. This section is objectionable because:

1. The power to amend is given to the Minister personally; and
2. Subsection (c) and (d) permits the exercise of unbridled discretion by the Minister in determining the terms and conditions which are to be amended.

It admits of no doubt that this section has the potential to be used to interfere with the nature of information broadcast, violating section 20 of the constitution. Further prospective investors are likely to be discouraged from investing as the conditions applicable to their licenses can be lightly changed at the instant of one person.

The power to amend licences should be granted to a body of persons to be exercised at the instance of the licensee or to correct a patent error on the licence. Any other amendment should be in terms of a set law, which law must be justifiable in terms of the Section 20 of the constitution.

In South Africa the Authority amends licences on very limited and strict grounds. These are:

i. in the interests of orderly frequency management, and for as long as this does not cause substantial prejudice to the licensee;
ii. to any extent as may be necessitated by any bilateral, multilateral or international agreement or convention relating to broadcasting; and
iii. if requested by the licensee.

These are indeed admirable amendment terms, from which Zimbabwe is advised to take a cue. It is suggested that the section should be amended and the South African legal position adopted.

1.18 SUSPENSION AND CANCELLATION OF LICENCES – SECTION 16

This section must be repealed. It is objectionable in that it gives the Minister power to suspend and cancel licences, after consulting the Authority. As per the above criticism, the power is objectionable because:

i. It is granted to the Minister to be exercised by him personally; and
ii. It allows for the use of unbridled ministerial discretion in determining the licences to be suspended and cancelled.

The power to suspend and cancel licences should be granted to the Board, only to be exercised objectively and for a specific breach of the Act or material condition of the licence. In addition, the power should only exercised by the Board after application and authorisation by the Administrative Court. In other words a licence should only be suspended or cancelled on the order of the administrative court.

The Board should draft regulations which allow it, in deserving cases to approach the Administrative Court on an urgent basis, to get an urgent order allowing it to suspend or cancel a licence. Any of the grounds stated in subsection (1) of section 16 may arguably be used as grounds for the suspension or cancellation of licences, appearing preferably in a statutory instrument.

Subsection (3), (4) and (5) should be repealed for the reasons stated above.

Subsection (6) which states that no licence would be operative during the period of it's suspension should be amended and made subject to the section that says that all suspensions and cancellations of licences will be granted on the order of the Administrative Court. The involvement of a court of law and trained judicial officers will grant the licensees some measure of security.

None of the oppressive sections appear in the South African Independent Broadcasting Authority Act.1993.

1. 19 LICENSEE TO INFORM AUTHORITY OF CHANGES – SECTION 17

Subsection (1) is not objectionable.

Subsection (2) should be repealed. The subsection states that a licensee is obliged to advise the Authority if any of the shareholders receive transfer of more than 10% of the shares in the company. The requirement that shareholders of broadcasting companies should not possess more than 10% shareholding has already been criticized above. This requirement is not relevant to the objective and fair regulation of broadcasting. It should be repealed.

1.20 TRANSFER OF LICENCES PROHIBITED – SECTION 18

This restriction on the transfer of licences is legitimate and laudable. There is no need to amend the section.

1.21 LIMITATION ON CONTROL – SECTION 19

Subsection (1) (a) and (b) of Section 19 should be amended. This subsection prohibits any licensee from owning, holding any securities or controlling any other broadcasting licensee or newspaper. The definition of control must be changed. This issue has already been raised above. Control has been defined to include perceived or suspected control. Its definition has not been restricted to legal control. This section has the potential of being used to close a broadcasting station on the unsubstantiated ground that it is being controlled by another, even in the absence of any tangible proof.

Further the principle that no broadcaster may have shares in another, irrespective of the amount is too restrictive and prohibits investment. It is suggested that the section should be amended to allow minority cross shareholding, for example a maximum minority shareholding of 10% to 20%.

In addition, prohibiting broadcasting licensees from the cross-ownership of newspapers seems unduly restrictive. It is suggested that the permitted maximum shareholding should be raised from 10% to say 40-50%.

1.22 POLITICAL PARTIES AND ORGANIZATIONS NOT TO CONTROL BROADCASTING SERVICES – SECTION 20

This section prohibits political parties and organizations from controlling broadcasting services. The section must be deleted.

This restriction was not made in good faith as ZANU PF has the privilege and overall control of the Zimbabwe Broadcasting Corporation and private broadcasters through the powers of the Minister.

In addition the definition of control that is contained in the Act needs to be amended along the lines that have been suggested above. The definition allows for the closure of a broadcasting station on the unsubstantiated allegation that a political party or organisation is controlling it.

The restriction does not seem to be legal, when Section 20 of the constitution is considered. If it is to be retained, then the control of ZANU PF on broadcasting should be completely banished from the Act. In addition, the restriction should only proscribe the granting of licenses to organisations of a party political nature[12].

1.23 LIMITATION ON CONTROL OF COMMERCIAL RADIO AND TELEVISION BROADCASTING LICENCES – SECTION 21

The fundamental problem with this restriction is the definition of control that has been referred to numerous times above. If the section is not repealed broadcasting stations can be closed on the unsubstantiated suspicion that another broadcaster controls them.

[12] Compare with the prohibition against granting political parties licenses contained in the South African, Independent Broadcasting Act, section 51 thereof.

Further it seems that there is need to need to assess the number of broadcasting stations that can be accommodated on the frequency spectrum and compare that with the number of applications for licences. It is only when this study is done that it will be possible to appropriately limit the number of licences that any one company may be granted. It is suggested that this section should be repealed and replaced by a section permitting the Authority to determine the number of licenses that can be granted to any one broadcasting company.

1.24 LIMITATION ON DIRECTORSHIPS – SECTION 22

This section places a limitation on directorships.

Subsection (1) and (3) prohibit a director of one broadcaster from being a director in another broadcasting company or for a newspaper. Though restrictive there does not seem to be anything particularly and materially offensive about this limitation. It does however impact negatively on the investment attractiveness of the Zimbabwe Broadcasting market.

Subsection (2) prohibits non Zimbabweans and Zimbabweans who are not ordinarily resident in the country from being directors of broadcasting companies. This subsection should be amended. The restriction on Zimbabweans who are not ordinarily, or who until the material date were not ordinarily resident in Zimbabwe is unconstitutional.

Further the restriction places unnecessary hurdles in the path of investment, and should be repealed.

Subsection (2) prohibits foreigners from being directors. This would have been acceptable if Zimbabwe's economy was strong and stable. Regrettably it is not! Since foreign investment into broadcasting is prohibited, access to foreign funding for investments would have been possible if foreigners who invested some money were allowed to become directors, or to send technical representatives as directors, as security for their investment. Practical and economic considerations call for the amendment of this section, taking into account Zimbabwe's peculiar history.

1.25 LICENSEES TO NOTIFY AUTHORITY OF DIRECTORS AND PERSONS CONTROLLING THE LICENSEE – SECTION 23

The requirement stated in this section that after every six months, every licensee must inform the Authority on the details of every director is unprecedented in the Zimbabwean commercial sector and is unduly oppressive, effectively affecting investment. This is not the only item that licensees need to advise the Authority or Minister regularly. Among others, this section gives the impression that the broadcasting industry is being watched and must be watched and investigated at every turn. It is suggested that this section should be repealed and substituted with one that simply obliges the licensee to inform the authority of any changes in its shareholding and directorship.

Further it is preferable if this section was made part of a statutory instrument as opposed to being part of an Act.

1.26 DEVELOPMENT OF CODES OF CONDUCT – SECTION 24

This section sets out the manner in which codes of conduct relating to broadcasting will be drafted and the matter to be contained therein. There does not seem to be anything particularly objectionable in this section, save the fact that the Authority is not independent and is therefore unlikely to be objective in developing codes of conduct regulating the industry. With the draconian powers of the Minister completely shorn and an independent Authority created, the Cupertino envisaged by the section is laudable. In that context the section may be maintained. However it would be better if the section was contained in a statutory instrument as it is neither substantive nor enabling.

It contains matter that *may be* developed into codes of conduct after consultations between the Authority and the broadcasters.

1.27 MINISTER TO DETERMINE PROGRAMME STANDARDS – SECTION 25

This section gives the Minister power to prescribe matters, which, in his wisdom must be contained in codes of conduct. The criticism of this section is the same as in all other sections that give the Minister power to interfere with broadcasting content and editorial independence.

The power granted to the Minister is capable of abuse, as a ministerial directive is law and binding. Board members are liable to dismissal, if they fail to carry out ministerial functions. It is suggested therefore, that this section must be repealed and not replaced.

1.28 APPROVAL OF TRANSMITTING STATIONS – SECTION 26

Subject to granting the Authority more power and taking away the powers of the Minister, the power and obligations given to the Authority in this section should be maintained. The section relates to the technical regulation of the type, installation, and sites of signal transmitting stations. In addition, it also regulates the allocation of frequencies. Being of a technical nature there is nothing wrong with the power that is granted to the Authority.

1.29 UNAUTHORISED USE AND POSSESSION OF SIGNAL TRANSMITTING EQUIPMENT – SECTION 27

This section prohibits the unauthorised possession, establishment and operation of broadcasting equipment. It only permits the Zimbabwe Broadcasting Corporation to enjoy the exclusive privilege of transmitting. One other signal carrier license, apart from that of the Zimbabwe Broadcasting Corporation may be granted to a private person at the instance of the Minister's secretarial board. This restriction on broadcasters, disallowing them from transmitting their own programmes is restrictive and hampers investment into the broadcasting industry. Apart for the above criticism, all of subsection (1) of section 27 may be left unamended.

Subsection (2) provides for a fine of one million Zimbabwe dollars or to a term of imprisonment of up to two years for anybody that uses, possesses or establishes a signal transmitting station without a license granted in terms of this Act. Both the fine and the prison term appear disproportionate to the nature of the offence, which more often than not is defined technically. The possession and use of equipment capable of transmitting electromagnetic signals of any nature, even the type that is used on farms or mines, e.g. radio communication equipment, can result in harsh penalties. Therefore the use of the latest equipment, in technology terms, which equipment the Authority has no knowledge of, or is yet to test may result in a technical breach of the section. The person using the equipment becomes liable to pay the fine or incarceration in prison. The nature of the offence does not call for this type of censure. It is suggested that the fine payable and term of imprisonment as an alternative be reduced significantly.

The section should be amended to clearly reflect that only a court and not the Authority has a right to fine or sentence a broadcasting company for breach of the section.

Subsections (3) and (4) requires that a court convicting an individual for violation of the section must declare forfeited to the State any equipment, which was the subject of the offence. These subsections are unconstitutional. The sections presuppose that any person that breaches the law did so with criminal intent. Further they take away and interfere with the discretion of the court in assessing an appropriate punishment.

Being a technical offence it is inappropriate to legislate for the forfeiture of broadcasting equipment. To give an example and by parity of reasoning. An individual that fails to license their vehicle on time commits a traffic offence by failing to stop at a robot controlled intersection of a road, then the vehicle using the logic of this Act must be forfeited to the State. It is suggested that this section should be repealed.

The power to stop or scramble unlawful broadcasts into or out of Zimbabwe granted to the Minister in terms of subsection (5) should be granted to the Authority. An amendment to this effect is therefore suggested.

1.30 BROADCASTING FUND - SECTIONS 28, 29, 30, 31, 32, 33, 34, AND 35

This part of the Act establishes the Broadcasting Fund. There is nothing wrong with objectives set out in the section. The viability of the scheme needs to be thoroughly assessed.

The Authority determines the use of the funds that are generated for the Broadcasting Fund, which in this case is a secretarial body that panders to the Minister calls. The Minister is a non-independent political appointee. Issue of abuse of the fund is cause for concern.

All broadcasters are obliged to pay a levy, including community broadcasters. This seems a self-defeating exercise. That the majority of Zimbabweans are poor cannot be disputed. To expect the same poor community to pay levies smacks of bad faith on the part of the government.

It would have been preferable if the Fund had been established by a separate Act of Parliament, and more thought was given to the practical aspects of viably administering the fund. The law governing the Fund in the Act is contained in seven sections, which do not even fill a page.

1.31 APPLICATION OF ACT TO PUBLIC BROADCASTERS – SECTION 36

This section is only material in that it states that BSA will only apply to the Zimbabwe Broadcasting Corporation when the Broadcasting Act is amended or repealed. Currently the Broadcasting Services Act does not govern the Zimbabwe Broadcasting Corporation.

1.32 LICENSING OF PUBLIC BROADCASTERS – SECTION 37

This section states that the Zimbabwe Broadcasting Corporation is deemed licenced, notwithstanding the provisions of the BSA. Prior to the enactment of the BSA the Zimbabwe Broadcasting Corporation was legally providing broadcasting services in terms of the Broadcasting Act. This section simply facilitates for the smooth transition from the monopoly enjoyed by the Zimbabwe Broadcasting Corporation to the competitive environment envisaged under the BSA. The section and perhaps deliberately omits those persons that were legally providing broadcasting services before they were unlawfully and rudely switched off air, by the government. Capital Radio is one such broadcasting company. It is suggested that the section be amended to permit all stations that began broadcasts between the time the Supreme Court set aside the monopoly of the Zimbabwe Broadcasting Corporation and the time they were switched off air, to broadcast.

1.33 ALLOCATION OF FREQUENCIES TO BROADCASTING CORPORATION – SECTION 38

Subject to the issues raised in relation to section 37 above, it is suggested that this section be left unamended. Those companies and persons that began to broadcast must also be allocated broadcasting frequencies.

1.34 PUBLIC SERVICES OBLIGATIONS OF LICENCES – SECTION 39

Due to the material nature of issues raised here, each subsection will be dealt with *in seriatim.*
Generally, the section states the broadcasting obligations of broadcasters in times of emergency and national events. What is an emergency? Put simply, an emergency is any event declared to be such by the Minister.

What is a national event? Ridiculous as it seem, but yes, a national event is any event declared to be such by the Minister!

In an emergency a broadcaster is obliged to provide facilities and information in order to enable a person to communicate with emergency organisations, such as the police, army, fire brigade, ambulance or emergency service.

This section should be replaced because it gives rise to ridiculous results. Before the Minister gazettes that an event is a national disaster, broadcasters are not obliged to provide assistance. In practice it takes days and not hours to pass an extra-ordinary gazette declaring an event to be a disaster. If a disaster has occurred, time as factor should be of essence and broadcasters should only be obliged to provide a service, if they should provide one in the first place, during the time when the State is yet to mobilise it's own emergency resources. Since an event can only in reality be declared an emergency a day or more later, the State should have by this time provided its own resources. If the State does not prioritise the provision of emergency resources, why should the private sector, which enters into business for profit and not for charity?

This public duty as it is called, has the effect of affecting investment. With an eccentric Minister, that which constitutes an emergency can be any event. The potential to disrupt business, with damaging effects is real.

The section should therefore be repealed.

Subsection (3) obliges all licensees, irrespective of their nature of broadcasting business to provide coverage of national events, once the Minister pronounces a particular event to be a national event. Objections to this section have been raised earlier. This subsection is open to abuse. It permits unreasonable intrusion into broadcasting content and compromises editorial independence. Needless to say, it also affects that which Zimbabwe needs most, investment. It seems that the government is doing its utmost best to discourage investment. For example a broadcaster, that exclusively broadcasts sport news, can be obliged to broadcast political news, such as the ZANU PF national congress, or war veterans' rallies on the land issue. It is suggested that the section should be deleted.

Subsection (4) obliges all broadcasters when providing an information service to provide a fair, balanced, accurate and balanced service. This section is open to abuse and is not necessary. It makes broadcasters liable to political accusations that they did not provide fair and balanced coverage and therefore liable to the suspension or cancellation of their licences. The requirement to provide fair, accurate and balanced coverage was deliberately put under the broadcasters public duty to provide compulsory coverage of national events. This obviously refers to political issues. Therefore the section seeks in reality to control the reporting of political matter by broadcasters. To that extent this section violates section 20 of the constitution. It is suggested that the section should be repealed.

Subsection (5) requires that a satellite broadcasting licensee should transmit (this must refer to emergencies only) an unencoded signal from a public broadcaster. This is unnecessary. It results in the imposition of programmes on the channels of people who chose to watch and listen to satellite broadcasts. This section compromises the principles of choice and diversity. It is suggested that the section should be repealed.

1.35 COMPLAINT PROCEDURE OF LICENSEES – SECTION 40

This section obliges broadcasters to create their own internal grievance handling procedures to allow consumers room to complain. There is nothing particularly objectionable about this requirement. Subsection (4) of section 40 is however objectionable in that it gives the Authority unbridled power (for the first time) to impose the form and manner in which the matter can be dealt with. This does not exclude the possibility of the Authority actually determining and apportioning blame and prescribing who should pay, what to whom. Simply put, determining a monetary penalty for the perceived wrongs of a broadcaster!

The section must be amended. In the event of an unresolved dispute, after the expiration of the prescribed 14 days, the Act should allow the Authority to arbitrate and conciliate, no more! In the event of the dispute being unresolved the parties should be allowed to refer their dispute to court or to an arbitrator, whose decisions must binding on the parties.

Save for the above comments, it is suggested that the section should substantively be allowed to remain without amendment.

1.36 BROADCASTING LICENSEES TO KEEP RECORD OF PROGRAMMES – SECTION 41

Subsection (a) obliges broadcasters to make and keep a record of all matter broadcast. There is no need to amend this subsection.

Subsection (b) is however, and with respect absurd. It requires all broadcasters to make copies of all programmes and donate these copies to the National Archives of Zimbabwe. This is a painfully expensive exercise, which most commercial, let alone community broadcasters, are unlikely to afford.

Further not all programmes broadcast are of national archive material. Therefore why should a copy of all programmes be made available to the department? Would it not have been more appropriate if the department were to request specific programmes?

Further the department is only entitled to receive copies of materials that have actually been broadcast. If the department requires a record of all the programmes broadcast then why does it not set up tape the programmes as they are being broadcast?

The requirement begs the question, why should the National Archives of Zimbabwe not pay for the programmes. The department will not only be receiving free programmes but free recording tapes in the process. The section acts to discourage investment into the sector, as cost of copying all broadcasts should be relatively expensive. At the same time the section violates section 20 of the constitution as it unnecessarily impedes the free exercise of the right to freedom of expression. It is suggested that the subsection should be repealed.

1. 37 INSPECTIONS – SECTION 42

This section allows the Authority to employ persons that it calls inspectors whose job it is to inspect, confiscate broadcasting matter and equipment. The contents of this section are abhorrent and should be repealed.

No issues arises from subsection (1) save to state that the inspectors are employed by the Authority, and therefore qualify to be called the Minister's sniffer dogs. The manner in which they are appointed compromises their objectivity and independence. Subject to the Minister's powers being repealed the section may be left unamended.

Subsection (2), (3), (4) and (5) permit the police and the appointed inspectors to demand the production of a license by any person that is obliged to possess a license in terms of the Act, within 14 days, if unable to produce a licence when called upon to do so. These subsections are not objectionable.

Subsection (6), (7) and (8)

This subsection permits the police and the inspectors, after obtaining the consent of the person in charge of broadcasting premises, or if they reasonably believe that an offence has been committed, they may enter any broadcasting station to ascertain if any offence in terms of the Act has been committed. This is normal. There is nothing averse in these powers. There is therefore no need to amend this section.

Subsection (9) and (10)

These subsections are cause for concern. They authorise the police and the inspectors to seize any broadcasting apparatus, station, which they have reasonable cause to believe is being operated in violation of the Act, including any broadcasting material, book, record or document which they have reasonable believe will afford evidence of the commission of an offence. Again the subsection contains, powers unprecedented.

This power granted to the police and the inspectorate is open to abuse. By simply exercising the powers contained in this Act no broadcasting station is safe. All are liable to closure and bankruptcy at the instance of one police officer or inspector, who believes that an offence has been committed. It is suggested that the police or inspectors should only be granted power to seize stations or material, after the grant of a High court order. The subsections violate section 20 and 16 of the constitution, as well as preventing investment into broadcasting. This is because there is no security of the investment as it is liable to seizure any time without warning or a court order. The dispute resolution mechanism provided in the Act is also ineffectual. The subsections should be amended on the grounds stated above.

Subsection (11) and (12)

No material issues arise from these subsections.

1.38 APPEALS – SECTION 43

This section sets out the appeal process that must be followed in case of a dispute with a decision of the Minister or the Authority. All appeals lie to the Administrative Court.

The Act does not provide for appeals against a decision of the Administrative Court. This must be taken to lie to the Supreme Court, in terms of the Administrative Court Act. Subsection (5) however states that a successful appeal against a rejection of an application for a new licence, or its renewal does not entitle the successful party to receive a licence but rather for a reconsideration of the application by the hapless Authority. An Authority that has already declined an application is already compromised (read biased). Subsection (5) is therefore objectionable.

Further the Administrative Court does not set aside *laws* that are considered unconstitutional or *ultra vires* the enabling Act. It can only set aside decisions which, it considers inappropriate. It is therefore not the preferred court of choice. The High Court would be preferable. The High Court has power to set aside laws and decisions that are *ultra vires* the enabling law; in as much as it has the power, though rarely exercised of

declaring that a law is unconstitutional. Subject to the above criticism, and save for subsection (5) the rest of the specific subsections of section 43 may be left intact.

1.39 APPROVAL OF TARIFFS BY THE AUTHORITY - SECTION 44

There is nothing particularly objectionable with this section.

1.40 EXEMPTION FROM LIABILITY FOR AUTHORITY – SECTION 45

The Authority is exempted from liability for its bona fide actions or omissions, or that of its Board members in the carrying out functions in terms of the Act. This section protects the Authority from legal suites arising from the incompetence, irrational acts or omissions, gross negligence, and even intentional, though bona fide acts of its members, irrespective of the loss occasioned to the broadcasters. This also includes losses that may be incurred by a broadcaster as a direct consequence of the actions of an inspector who seizes a station or important documents that cause loss to the broadcaster. The broadcaster will be unable to recoup any losses from the authority. This section should be amended to allow the authority to be sued. This will ensure that the members of the Authority are not reckless in carrying out their duties.

1.41 REGULATORY POWERS OF THE MINISTER – SECTION 46

The power to make regulations granted to the Minister in this section should only be exercised on the advice and recommendation of the Authority. The section should be amended to reflect this proposed change. The issues contained in subsection (2) of section 46 should therefore be considered and regulations proposed by the Authority, and not the Minister.

1.42 SAVINGS AND TRANSITIONAL PROVISIONS – SECTION 47

This section provides that all by-laws or notices, which were in force under the Broadcasting Act, shall continue to be in force. No issues material to this analysis arise from this section.

1.43 SECTION 48

This section simply amends the Broadcasting Act to provide for the de-monopolisation of the broadcasting industry, in line with the Supreme Court decision in the Capital Radio case. No material issues arise from the section.

1.44 FIRST SCHEDULE

The First Schedule contains the technical regulation powers of the Authority. No material issues arise save to re-emphasize that the powers of the Authority should not be made subordinate to those of the Minister.

Further clause (9) of the schedule should be repealed. This clause grants the Minister the power to over-ride any technical decisions of the Authority relating to the frequency spectrum and the allocation of frequencies. Being a politician the Minister must not have any such powers. The clause enables the Minister to abuse the system and allocate stronger and more frequencies to a public broadcaster, to the detriment of the private broadcaster.

1.45 SECOND SCHEDULE

This schedule simply grants ancillary powers to the Authority. Subject to the granting of more power to the Authority, in line with what has been stated above, the powers granted to the Authority here are not objectionable.

1.46 THIRD SCHEDULE

This schedule is of great concern and should be repealed and replaced. The Schedule sets out terms of office and conditions of service of the Broadcasting Authority Board.

Clause 1(1) states that a member will hold office for such period as the Minister may determine but no more than three years. In line with what has been stated above, the Minister must not be the appointing authority. This compromises the independence and objectivity of the Authority. The clause should be repealed. The same applies to clause

1(2) which simply permits a member of the Board to continue holding office at the expiration of his term of office until he has been re-appointed or a successor has been appointed, provided that such extension is not longer than six months

Clause 1(3) says that a member will hold office on such terms and conditions as the Minister may fix, to all members generally. For the reasons stated above this section must be repealed. The Minister must not be the one to decide the terms and conditions that are applicable to members of the Board. This responsibility must be left to the select committee of parliament, suggested above. It is important that this board be independent, in theory, public perception and in practice.

There must be a limit on the number of re-appointments. It is suggested that a Board member should not be eligible to re-appointment for more than two or three terms. Clause (4) should therefore be amended to reflect this change.

The restriction that a member's terms and conditions of office shall not be altered to his detriment during his tenure of office, contained in clause (4) is ineffectual. The Minister has in terms of clause (3) power to suspend and terminate a member's tenure of office, in his discretion.

1.47 PERSONS DISQUALIFIED FOR APPOINTMENT AS MEMBER – CLAUSE 2

The reference to the Minister's power to appoint members should be repealed. The restriction on the persons, who may not be appointed as members, should be maintained. There is nothing objectionable with the disqualification requirements.

CLAUSE 3

Save for clause 3 (b) the whole subsection is objectionable and should be amended. Any reference to the Minister should be deleted.

CLAUSE 4

The section authorises the Minister to suspend or terminate the services of a member. The parliamentary Select Committee should exercise the powers granted to the Minister, instead. The powers should therefore be repealed.

CLAUSE 5

The power to fill Board positions left vacant as a result of the death or voluntary resignation of a member should be given to the parliamentary Select Committee as suggested above, in relation to similar sections. It is suggested that the section should be amended.

CLAUSE 6

The power that is granted to the Minister to choose the Board chairperson is nefarious. It is strongly recommended that the clause should be amended giving this power to the Parliamentary Committee suggested above. It is essential that the Board must be free from all forms of political control. The Board should be independent, both in theory and in practice.

CLAUSE 7

Meetings of the Board must not be compromised by political interference. The Minister should not have the power to control, or dictate when and what is discussed at Board meetings. The Minister's power contained in this clause supports the argument that the Board is not politically independent and that it merely plays a secretarial role. In terms of the clause the Minister has power to order the holding of meetings and the issues to be discussed.

Clause 7 (4) prescribes that only issues raised by the Chairperson may be the subject of a special board meeting. The clause should be repealed. The Chairperson is a direct ministerial appointee and this power has the potential of being used to curtail free, critical and constructive discussion. The Board members must be allowed complete

freedom on the issues to be debated and on how to control the internal procedure of their meetings.

Sub -clauses (5), (6), (7), (8), (9), (10), and (11) need not be amended.

CLAUSE 8

Since the Board cannot be composed entirely of technical persons, it is laudable that the Act allows it to conscript onto its various committees, persons who will be able to provide it with technical knowledge. This clause should therefore be maintained.

CLAUSE 9

The remuneration of the Board members should not be determined by the Minister, let alone by a single person. It is suggested that the Parliamentary Select Committee should pay Board members.

CLAUSE 10

No amendment is proposed in relation to Clause 10.

CLAUSE 11

This clause should be repealed in its entirety. It is strangely worded and ambiguous. It deems lawful acts and decisions of an inquorate board or a board on which a disqualified person took part, with the Board obliged to ratify the act or decision. The clause does not render invalid, acts and decisions of an inquorate or wrongly constituted body until ratified. Rather it legally presumes that such acts and decisions are valid and the Board must ratify the decision as soon as it acquires knowledge of the existence of such a decision or act. If the meaning sought was that any such act or decision was not invalid as long as a duly constituted Board ratified the unlawful act or decision then, the section needs to be clearly reworded. In its present form the section should be repealed.

CLAUSE 12

Clause 12 (2) seems deliberately clumsily drafted. The implications of the sub-clause are perverse. It states that all minutes signed or purportedly signed by the Chairperson of the Board SHALL be accepted as *prima-facie* evidence of the meeting concerned. This seems to be the meaning of the sub-clause. Such would be offensive because it means that the rest of the Board members will not have a right to dispute, disagree or seek to correct misleading or incorrect reporting of previous meetings. This and other clauses referred to above make the Chairperson the only relevant person on the Board. Every other person is rendered irrelevant, as their contributions are immaterial and any objections are legally immaterial. Coupled with the fact that the Chairperson of the Board is a direct Ministerial appointee, this sub-clause allows the Minister to control the proceedings of the Board while splendidly pretending to the world that the Board is independent and that all decisions made would have been made by the Board. The sub-clause should therefore be expunged.

1.48 FOURTH SCHEDULE

CLAUSES 1-6

Financial and Miscellaneous Provisions Relating To Authority

Clauses 1 to 3 of this schedule are not objectionable. No amendment is suggested.

The audited financial statements of the Authority should be transmitted to the Parliamentary Select Committee for discussion and publication, to the relevant government ministries and the general public. The Minister must not be the only beneficiary of the financial information. It is suggested that the clause must be amended.

In addition the Minister must not be the one who determines the identity of the auditors that the Authority should use to audit it’s financial books. Surely this is a managerial function that the Board should exercise. If the Board’s discretion should be limited in this

regard perhaps because it is an institution that is publicly funded, then the Auditor-General should provide the service. The Board should however be allowed in addition, to utilise the services of private auditing firms. Clauses 4 to 6 should be repealed and replaced with, *inter-alia* the suggestions made above.

CLAUSE 7

This clause does not need any amendment.

CLAUSE 8

This clause requires the Board to provide the Minister with all financial and other reports, as he demands. The clause should be repealed. These powers should instead be granted to the Parliamentary Select Committee.

CLAUSE 9

It is suggested that the Board should be able to appoint a Chief Executive, to run the Affairs of the Authority. But the Board should not be compelled to consult the Minister, but rather the Parliamentary Select Committee, in liaison, perhaps with the Ministry of Finance. The Minister must not be involved in the day to day operations of the Board. This clause should be deleted and replaced by another tailored along the lines suggested above.

1. 49 FIFTH SCHEDULE

STANDARDS CONDITIONS OF LICENCES

This section contains clauses that are applicable to all licences, generally. It contains a definition's clause that will be analysed simultaneously with the substantive sections of the schedule. From the onset it is stated that the definition of "political" is offensive and should be repealed.

CLAUSE 2

Both sub-clauses under this clause legally oblige a broadcaster who broadcasts election matter during an election period to give other political parties equal and reasonable opportunity to broadcasts their election matter, for a fee. An election period is defined as the period thirty-three (33) days before the polling day and last day of polling. It is only during this period therefore that this restriction applies. A broadcaster is not compelled to broadcast political material of a political party merely because it would have broadcast matter from another political party. This restriction seems fair. It allows all political parties to have equal access to the media. It is suggested that the section be maintained.

CLAUSE 3

This clause is vaguely drafted and needs to be amended. The clause seems to suggest that if a broadcaster has a broadcasting licence which has a restricted transmitting area, if the licence area overlaps the area to which an election relates, or does not exclusively contain such an area, then during the relevant period the broadcaster is prohibited from broadcasting election advertisements. The relevant period has been defined to mean the period four (4) days before the polling day of an election and close of polling. Therefore broadcasters that have licences with an area restriction, to which an election is being conducted, such a broadcaster is not prohibited from transmitting election adverts. If the above is the meaning the section should be reworded. In any event the restriction against a particular set of broadcasters and not another does not seem to be justified. If election adverts are to be banned during certain periods of the election period, this must be stated clearly. This restriction is extremely difficult to justify. Prima facie this clause is unconstitutional. This restriction does not seem to serve any valid and legitimate purpose. It is surprising why so much emphasis is being put on political matter. The section must be amended so that it becomes more precise and clear. If the intention is to discriminately prohibit the broadcasting of election adverts, then the section is clearly unconstitutional and must not just be amended but must be repealed.

CLAUSE 4

Regrettably this is another vague and ambiguous section. It states that the Authority must cause a broadcaster who broadcasts political matter to publish " the required particulars" in relation to the matter broadcast. The required particulars are defined as:

(a) if the broadcasting was authorised by a political party:

i. The name of the political party;

ii. The town, city or suburb in which the principle office of the political party is situated; and

iii. The name of the natural person responsible for giving effect to the authorisation; and

(b) if the broadcasting of the political matter was authorised by a person other that a

- political party-

i. The name of the person who authorised the broadcasting of the political matter, and

ii. The town, city or suburb in which the person lives or, if the person is a corporation or association, in which the principle office of the person is situated;

And

(c) The name of every speaker who, either in person or by means of a recording device, delivers an address or makes a statement that forms part of that matter.

It is suggested that the section should be repealed.

The first problem is that the definition of control is vague, embarrassing and incapable of precise definition. It is defined as any political matter, including the policy launch of a political party. The question remains. What is political matter? It maybe that the section was left deliberately vague in order to cover any criticism of the government. The definition as read with the clause 4 of the Fifth Schedule restricts the free exercise of the right to freedom of expression, in violation of section 20 of the constitution.

Why should the author of political matter be identified? Why should the broadcaster be placed under the obligation to report to the Authority on every matter that the Authority considers political?

Most of current affairs programs broadcast, including news broadcasts will invariably comment on political matter. The section does not state the criteria to be used in determining political matter.
The obligation placed on broadcasters in terms of this section is not reasonably justifiable in a democratic society. The section must therefore be repealed.

CLAUSE 5

This clause places the same repressive requirements on broadcasters to keep a record of all news and current affairs broadcast. This requirement is not justifiable and should be deleted. A question may be asked. Why should political broadcasts be strictly monitored? The constant surveillance that political broadcasts are put under shows that the government is intent in ensuring that:

i. Those intent on investing and broadcasting news and other current affairs are discouraged, due to the myriad of restrictions which make the investment financially unviable; and
ii. that those that do invest self-censor their reporting, in order not to incense the government, failing which their broadcasting stations would be shut down.

The whole clause should there repealed.

CLAUSE 6

This section relates to restrictions placed on adverts relating to medicines, without approval from the Secretary for Health and Child Welfare or the Minister of State for Information and Publicity in the President's office. The Minister of State should not possess this power. The section must be repealed.

Another setback with the section is that it does oblige the Secretary for Health to respond to application to flight an advert within a specific time frame. This constitutes a major flaw with the clause.

CLAUSE 7

The clause reads; “No licensee shall broadcast any matter that contains any false or misleading news”.

If a broadcaster transmits false or misleading news, the common law of defamation adequately protects the affected individuals. Without this section the payment of hefty and punitive damages would punish a broadcaster who publishes false or misleading news. This restriction bolsters the government’s powers to close broadcasting stations for the publication of false or misleading news. Broadcasters will therefore find themselves in situations of double jeopardy, a civil action for damages and being shut down by the government. The section allows the government to involve itself in matters that are purely private and for which sufficient censure is provided by the law. Democratic governments do not close down broadcasting stations because they would have broadcast news considered to be false or misleading. The broadcasting of false news will constitute a violation of the Act, with the cancellation of the licence being a likely consequence. It is suggested that this section should be repealed. There is no doubt that it is unconstitutional.

CLAUSE 8

The restriction on the broadcasting of commercial adverts containing political matter is unreasonable and unconstitutional. The vague definition of political matter does not assist the situation. There is no reason in principle why a commercial broadcast should not contain political material. The section should be repealed.

CLAUSE 9

This section contains additional conditions that are applicable to commercial broadcasters. The restriction on the shareholding of broadcasters should be repealed in line with the suggestions made above. The requirement that no shareholder must hold more than 10% of the shares should be repealed as well the requirement that the whole of sub-clause (1)(a) of clause 9

Sub-clause (1) (b) obliges broadcasters to broadcast without charge any such items of national interest as determined by the Minister. This power compromises program content as well violating section 20 of the constitution. The section also discourages investment. It is suggested that the sub-clause should be repealed.

Sub-clause (1) (c) allows the Minister to take control over of broadcasting facilities in an emergency. The Minister determines events that constitute an emergency. This power has been criticised earlier. It is suggested that the section should be repealed.

Sub-clause (1) (d) is superfluous. There is no need to repeat in the Broadcasting Services Act, the legal restrictions that are contained in other Acts, such as the Censorship and Entertainment Control Act *(Chapter 10:04).* It *is* suggested that this section should be repealed.

Sub-clauses (1) (e), (f), and (g) are of no material consequence.

CLAUSE 10

This clause relates to community broadcasters. In terms of sub-clause (1) (a) community broadcasters are prohibited from broadcasting political matter. It has already been stated that this restriction was made in bad faith and at the same time being unconstitutional. In terms of the Act ZANU PF has access to all broadcasters, including community broadcasters. The restriction, in so far as it only affects opposition political parties, is discriminatory and bolsters the monopoly of the Zimbabwe Broadcasting Corporation. Further the restriction on the right to freedom of expression cannot be justified on any of

the constitutionally recognised restrictions. It is suggested that the section should be repealed. The rest of the section does not raise material matters of concern.

1.50 SIXTH SCHEDULE

This schedule contains the local content requirements, which have already been analysed above. The local content requirements should be relaxed. It is suggested that the section should be amended, to allow more time before the imposition of the local content requirements, with the precise quotas reduced.

CONCLUSION

The sad facts are self-apparent. Most of the clauses of the Act are:

i. badly and ineptly drafted;
ii. unconstitutional, in that they violate the right to freedom of expression as enshrined in section 20 of the Constitution; and
iii. many more are disagreeable in that while they are constitutional, they are unreasonably oppressive.

Arising from the above criticisms, it has been repeatedly suggested that most of the sections of the Broadcasting Services Act must be repealed. This is hardly surprising. The Broadcasting Services Act reads like security legislation and not legislation that creates a regulatory framework for the broadcasting services industry. There is no doubt that this legislation will give rise to a flurry of constitutional litigation in an effort to strike out the offending provisions of the Act. This is not desirable in a democracy. In most constitutional democracies parliament is not expected to place party politics above national issues and pass blatantly unconstitutional legislation.

In the interests of democracy, good governance and the economic development of Zimbabwe, it is suggested that there must be a concerted effort to challenge and seek the repeal of the Broadcasting Services Act.

The Minister of Information's power under the Act is offensive and must be repealed. The broadcasting authority board must be independent of the Minister and any other political control or influence.

The monopoly set by the Broadcasting Services Act in favour of the Zimbabwe Broadcasting Corporation must be removed.

Without a free and democratic electronic press there can be no real and sustainable democracy.