FURTHER COMMENTS AND RECOMMENDATIONS ON THE REVISED DRAFT NATIONAL BROADCASTING CODE

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INTRODUCTION

The Authority is to be congratulated for the consultation process in respect of the Draft Broadcast Code. We doubt that anyone will be able to say with any credibility that the Authority did not seek the views of stakeholders and seek to take these on board. We are also pleased that several of the comments and recommendations made by stakeholders led to meaningful revision of the original (July 2008) draft.[1]

However, we are of the view that the revised Draft still falls short of what is desirable and workable in the environment of Trinidad and Tobago and within the capabilities of the Authority for effective implementation and enforcement. Perusal of the Authority's responses to the comments and recommendations of stakeholders reveals what may be the source of the Authority's positioning on several of the recommendations, and why it seems to have had difficulty in changing its position. The source of the problem, we believe, is the Telecommunications Act itself. We have therefore addressed the Act and the interpretation placed on it by the Authority. In addition, we think it important to return to the fundamental Matters of Principle which are in our view not adequately addressed by the Authority in the Revised Draft Code. The other sections of these comments address the question of Accuracy, Balance and Objectivity, Elections Coverage and the Penalties which are proposed to be visited upon errant broadcasters by the Act and the Code.

THE TELECOMMUNICATIONS ACT

As the legislation which establishes the Authority and sets out its functions, the Authority seems to be unable to come to terms with the deficiencies of the Act itself which has caused it to take unfortunate positions on key aspects of the draft Broadcast Code.[2]

The Act was clearly intended to regulate the Telecommunications industry. Since (some) broadcasters make use of the spectrum to transmit, it was seen to be necessary to regulate the broadcasting industry. However, the Broadcast Code seeks to regulate *content* while the main provisions of the Act are concerned with telecommunications *per se*. The regulation of programming content is a vastly different matter from the regulation of the use of the spectrum, transmission equipment and related matters covered in the Telecommunications Act. Regulation

[1] We note however, that certain of our recommendations and comments were not treated with in the Authority's Annex: "Decisions on Recommendations".

[2] Or it may be that the Authority has perceived the deficiencies but has taken the position that it has to live with these. Either way the position is unfortunate.

of content touches on social, cultural, political and economic matters, far removed from engineering, long run average cost modeling and interconnection which are the main matters which pre-occupy telecommunications regulators. Moreover, they relate to and in some instances impinge on certain fundamental rights and freedoms of individuals. The skills and competencies needed for these two aspects of regulation are very different indeed.[3]

The objects of the Telecommunications Act are set out in Section 3, which is reproduced in full below:-

> **3.** The objects of the Act are to establish conditions for—
> *(a)* an open market for telecommunications services, including conditions for fair competition, at the national and international levels;
> *(b)* the facilitation of the orderly development of a telecommunications system that serves to safeguard, enrich and strengthen the national, social, cultural and economic wellbeing of the society;
> *(c*) promoting and protecting the interests of the public by—(i) promoting access to telecommunications services; (ii) ensuring that services are provided to persons able to meet the financial and technical obligations in relation to those services; (iii) providing for the protection of customers; (iv) promoting the interests of customers, purchasers and other users in respect of the quality and variety of telecommunications services and equipment supplied;
> *(d)* promoting universal access to telecommunications services for all persons in Trinidad and Tobago, to the extent that is reasonably practicable to provide such access;
> *(e)* facilitating the achievement of the objects referred to in paragraphs *(a*) and *(b)* in a manner consistent with Trinidad and Tobago's international commitments in relation to the liberalization of telecommunications;
> *(f)* promoting the telecommunications industry in Trinidad and Tobago by encouraging investment in, and the use of, infrastructure to provide telecommunications services; and
> ***(g)* to regulate broadcasting services consistently with the existing constitutional rights and freedoms contained in section 4 and 5 of the Constitution.**

The first point that we wish to emphasise is that 3(g) speaks to the *regulation* of broadcasting services, and importantly, in a manner consistent with existing constitutional rights and freedoms contained in sections 4 and 5 of the Constitution.

However, in several of its responses to comments and recommendations, the Authority seems to be asserting that "in regulating broadcasting services, the Authority is required to "*balance the rights of broadcasters against the rights of individuals under the Constitution*."(our emphasis). We do not agree with this assertion by the Authority. In our view, the function of the Authority in relation to broadcasting services is to enforce the rules promulgated by Parliament, not to

[3] The role of OfCom in regulating standards for broadcasting was preceded by the work of (1) the Independent Television Commission, (2) the Broadcasting Standards Commission and (3) the Radio Authority. OfCom has unified the roles and functions of these agencies and has been able to draw on their many years of experience in content regulation. In Trinidad and Tobago, comparable institutions did not exist. TATT has nothing in this regard on which to draw other than the experience of the Media Complaints Council.

'balance rights', a function which is performed by a court of law or other judicial authority. (We elaborate on this point later in our comments.)

Moreover in the revised draft, the Authority seems to arrogate even further duties in asserting that:

> "The Act requires that the Authority … guide the development of a broadcasting sector which is likely to safeguard, enrich and strengthen the national, social, cultural and economic well being of the society." (p.5)

However, those words are not found in section 3(g) where the broadcast sector is addressed, but rather in section 3(a) where the reference to these developmental goals is made in respect of the *telecommunications system.* The only function which the Act enjoins the Authority to perform in respect of the broadcasting industry is regulatory. The Authority seems to transpose the developmental role, which it clearly has been given in respect of telecommunications, to the broadcasting industry. It is true that the broadcasting industry uses the spectrum to deliver content, but the Authority seems to take the view that it is *required ipso facto* to venture far and wide into the nebulous and difficult areas of setting standards for programming and of content regulation. While this may ultimately be a matter of statutory interpretation (and we are certain that if the Authority pursues this line, there will be legal challenge), the more fundamental point is that certain issues cannot be effectively legislated, and it is probably naïve for anyone to think that moral, ethical and behavioral problems in any society can be resolved (solely) by regulation or legislative mandate.[4]

The Authority has made an interpretation of the Telecommunications Act in relation to its responsibilities in respect of the Broadcasting industry which is not justified by the words of the Act itself.

MATTERS OF PRINCIPLE

In our comments on the first draft we started with a section on 'Matters of Principle' on the basis that if the foundation of the Code is bad, then the entire edifice will be shaky and will ultimately collapse. The only comment which the Authority identifies from that section of our Comments stated that:-

> "A Broadcast Code, as a regulation under the Telecommunications Act, must acknowledge that there are other laws in the statute book, including the Constitution of the Republic of Trinidad and Tobago itself..."

The Authority's response to which is:- "The Broadcasting Code as a matter of law is subject to all laws and in particular the Constitution of the Republic of Trinidad and Tobago. This does not

[4] A case in point is the now infamous Integrity in Public Life Act, 2000 where the unobjectionable goal of integrity in public life has fallen victim to legislation which was poorly conceived, cynically passed, and has become an instrument of victimization of public officials, a compliance nightmare for public servants and directors of boards of state institutions, and scandal of the integrity commissioners themselves. And all of these odious consequences were foreseen (see Terrence Farrell ..)

need to be stated in order for it to be so." This response is really trite and misses the larger point which that section of our Comments sought to make. That point was that the OfCom Code, on which the TATT Code draws, is based on three clear principles:-

1. Freedom of expression as an essential right and any restriction on that right has to be ***justified as necessary*** in a democratic society on grounds of national security, territorial integrity, public safety, for the prevention of crime and disorder, the protection of health or morals or the reputation or rights of others. It is critically important to read this correctly. There is no notion here about 'balancing' of competing or conflicting rights. Rather the right of freedom of expression is paramount and any restriction must be ***justified as necessary***, i.e. the onus is on the person wanting to restrict to demonstrate that the right to freedom of expression must be restricted.

2. People have *choice* among a wide range and variety of media on an increasing range of media platforms. Therefore, one of the principles is that the citizen must become 'media literate', that is capable of understanding what the media delivers and choosing what is appropriate ***without the intervention of the state in that process***.

3. Self-regulation or co-regulation…based on the recognition that it is far better and more efficacious and economic to encourage the industry to regulate itself on the basis of a code of conduct than for a regulator to attempt to spot and react to every breach in the multi-channel and fast-paced world of broadcasting. Reactive regulation is likely to lead to inconsistent application of the rules and hence to unfair treatment of broadcasters. It may also open the process of regulation to political interference in the context of a Telecommunications Act in which power is already resident in the hands of the political directorate.[5]

This was the basis of our fundamental recommendation (***not treated by the Authority in the Annex***) that:-

> ***We would like to see the Code explicitly embrace the foundation principles of (1) freedom of expression as enshrined in the Constitution of Trinidad and Tobago (2) choice and media literacy on the part of an informed citizenry which does not require a 'Big Brother' state to control what news, information and entertainment they consume and (3) co-regulation, the Authority and the industry as partners in the development, practice and enforcement of the Code.***
>
> ***The Authority should embrace a view of the regulatory landscape for broadcasters which acknowledges the roles of:-***
>
> 1. ***Broadcasters themselves, engaged in self-regulation through internal codes of conduct***

[5] See the section below, "Is TATT Independent?"

2. ***The Media Complaints Council***
3. ***The Courts of Law, and of course***
4. ***TATT itself.***

The point which the Authority seemed to miss is that we are suggesting that the Code be located within (a) a set of laws already on the books, which address the protection of citizens who are aggrieved by the media or which require certain behaviours on the part of public authorities and private institutions alike, and (b) certain institutions and practices which can respond to complaints.

The Authority is clearly lukewarm about the Media Complaints Council noting in its somewhat perplexing response that:-

> It is arguable that including the Media Complaints Council in the Authority's decision making process would compromise the Authority's independence. It would also compromise the public trust that decisions are independent of the broadcasters, who are the persons against whom complaints are made. (p.148)

It is not at all clear just how the Authority's independence would be compromised by incorporating the MCC into the complaints adjudication process since the MCC is not made up of broadcasters or active media personalities.

> ***The Matters of Principle raised here are fundamental to the success of the Code and we strongly urge the Authority to revisit the issues raised here and modify its position accordingly.***

BALANCING RIGHTS

The Authority sees itself as balancing the 'conflicting rights and interests of stakeholders..' through the regulatory framework erected by the Code (p.5). The Authority avers:-

> "The Authority is responsible for 'regulating broadcasting services consistent with section 4 and 5 of the constitution'. This reference requires, inter alia, the balancing of rights of broadcasters and others to freedom of expression and the press, with the other rights of individuals under the Constitution where they conflict." (p.84)

At another point in the Annex, the Authority states:-

> "The ***media's*** right to freedom of expression is not absolute and exists in the context of other individual rights" (p.104) (our emphasis)

We submit that the Authority is placing itself on dangerous ground in taking this posture. This, for several reasons.

First, we can find no basis or authority for any such 'balancing' role for the Authority in the Telecommunications Act. In fact, Section 3(g) states that regulation of broadcasting services must be consistent with the Constitution. Full Stop! The 'requirement' to balance rights which the Authority infers from the bald and clear statement is Section 3(g) needs to be founded on something other than assertion. ***We need to understand what is the basis for the Authority's claim that it has been so charged by the Parliament of Trinidad and Tobago.***

Second, the right to freedom of expression is not (primarily) a right of media houses; it is the right of each and every citizen. Newspapers, television stations, radio and other platforms are simply the *means* of delivery of news, opinion and information of the individual citizens.[6]

Third, the OfCom Code on which the Authority draws extensively, if sometimes conveniently, makes no mention whatsoever of a 'balancing role'. What it does do, and wisely so, is to simply advert to the Human Rights Act and the European Convention. This is because OfCom is clear (as we are) that any 'balancing' is done by and in a court of law, and a regulatory authority is ***NOT*** a court of law.

Fourth, the Authority has manoeuvred itself into this untenable position because it seems to be reluctant to acknowledge and embrace as paramount the right of freedom of expression as enshrined in the Constitution, even though Section 3(g) points it clearly in that direction.[7] If it were to do so (as has OfCom and the UK Parliament using there the Human Rights Act of 1998 and Article 10 of the European Convention), it would be erecting a regulatory framework with freedom of expression as its foundation principle. Without a foundation principle, TATT is condemning itself to operating and interpreting rules on shifting sands, 'playing God' or 'playing judge' where it has no business doing so. The end result of that will be an endless stream of litigation by broadcasters and complainants alike.[8]

> **We strongly urge the Authority to abandon this notion of 'balancing conflicting rights'. It should hew closely to the language and the sense of the UK Code which has emerged from years of actual practice in an environment from which our own laws and jurisprudence have emerged. The Authority should speak about 'applying the rules' of the Broadcast Code. The rules themselves, developed after consultation with the industry itself, inherently will reflect some degree of 'balancing' and the Authority should go no further than that.**

[6] However, the rights of media houses are not to be understood as derived from individual rights but rather should be seen as an 'institutional right'. See for example, Eric Barendt, *Freedom of Expression*.

[7] To illustrate at page 68 of the Revised Draft Code in its 'decision' on the Radio Tambrin comment, the Authority allows itself to say that "The **Code** allows for a diversity of views to be aired via the media". This is not so at all. It is the **Constitution** which allows for a diversity of views to be aired via the media.

[8] It may well be that the Authority is blasé about litigation because at the end of the day it is the State that pays. Broadcasters cannot be equally blasé because litigation may be expensive and long-drawn out, and our businesses may suffer as a result. Engaging broadcasters in fruitless litigation is one way of seeking to control or muzzle the media, a stratagem to which our courts and judges must be alive.

ACCURACY, BALANCE AND OBJECTIVITY

At several points in the Annex to the Revised Draft Code, the Authority suggests that news reporting must be 'accurate'. It argues:-

> "The matters contained in the Code regarding news relate to accuracy, a matter which can generally be determined with adequate certainty. While editorial judgment is subjective, in the area of news it should not be permitted to interfere with accuracy. The Authority is not concerned with differences between news reports, it is concerned with inaccuracy."(p.69)

In the Rules section of the Code, the Authority has outlined ten (10) rules relating to News and Public Affairs with the objective –"To ***ensure*** that news and current affairs, in whatever form are reported with due accuracy, balance and due impartiality."

While 'accuracy' is a laudable and unobjectionable goal, embraced in OCM's own *Editorial Principles and Operational Guidelines*, media practitioners are painfully aware that accuracy is hardly a "matter which can generally be determined with adequate certainty." 'Facts' which fall into the category of 'adequate certainty' are often not newsworthy. It is a fact that the offices of the Democratic National Committee were broken into, but the real 'facts', pursued relentlessly by Woodward and Bernstein were the cover-up of the involvement of the then president of the United States in the break-in. It is 'editorial judgment' that there was a real news story beyond the mere fact of the break-in at the Watergate hotel that led to the truth, and the eventual impeachment of Nixon. It is a fact that the Challenger shuttle blew up. The real story is that NASA ignored warnings from the manufacturers and its own engineers that the temperature at launch was too cold and would have compromised the integrity of the O-ring seals on the solid booster rocket. Those facts emerged after a long investigation. We therefore do not understand the Authority's stricture that 'editorial judgment' must not 'interfere' with accuracy, as if 'facts' can ever be separated from the context in which they 'occur' or more accurately, are ***perceived***.

Another problem relates to semantics, the meaning given to words in different contexts and by different people in the same context. For the public health professional, the word 'epidemic' has a particular scientific meaning. For the layperson, it may mean simply that 'a lot of people are sick'. The media often reflects the language and meaning of the man in the street and not necessarily the language and meaning of the scientific community. Is it accurate to say that there is a 'dengue epidemic'? From the perspective of the public health professionals at the Ministry of Health, the answer is 'No', because the statistical data do not meet the scientific definition of an epidemic. That perspective may run counter to what the man in the street is experiencing and expressing via the media, and he or she may view the media's attempt to be 'accurate' as part of a cover-up of the 'truth'. On the other hand, the health professionals will suggest that the media is being 'inaccurate'.

The examples may be multiplied *ad nauseam*, but the fundamental issue is that editorial judgment is always applied to the 'facts' as presented to determine newsworthiness, whether there is some underlying 'real story' that is worth pursuing, or whether multiple meanings affect the interpretation of the reported events. This is not to excuse the fact that sometimes the media

gets it wrong. But it is to say that the Authority cannot simply enjoin the media to be 'accurate' without a full appreciation of the context and the judgment applied to the facts as presented.

In the interest of promoting balance and impartiality in News and Public Affairs content, the Authority offers a series of muddled guidelines that come dangerously close to putting itself into the News Director's chair.
The exhortation against editorial commentary in news broadcasts, for example, borders on the hackneyed and archaic. In some of the most distinguished news programmes in the world, the old standard of dry, bald facts presented without meaning has been replaced by news with attitude, based on analysis and, where warranted, on opinion. Taking the audience beyond the news and sifting meaning from mere facts is core to helping audiences understand what's happening around them. It is up to the media house to determine the style and personality of its News and Public Affairs Programming and to ensure that the country's laws and its own editorial policy guidelines are not breached in the process.

It is noteworthy that while the Authority reproduces exactly the definition of 'due impartiality' from the UK Code, it omits the critically important last sentence from the UK Code definition which states that: "**Context, as defined in Section Two: Harm and Offence of the Code, is important**." Indeed the emphasis placed on context in the UK Code is conspicuous by its absence in the Revised Draft Code proffered by the Authority.

We recommend that the Authority replace the entire section with the following:
Objective: In the area of news and current affairs, each broadcaster must furnish the Authority with a copy of its Editorial Policy and Operational Guidelines. This document must be made available to the public as the standard to which the broadcaster's News and Public Affairs programming will be held.

ELECTIONS COVERAGE

The Authority's objective in respect of elections coverage ['To ensure that ..broadcasters ..present a sufficient range of information, views and opinions in a balanced manner to enable viewers (and listeners) to make informed political decisions'.] contrasts sharply with the principle stated in the UK Code – "To ensure that the special impartiality requirements in the Communications Act 2003 and other legislation relating to broadcasting on elections and referendums, are applied at the time of elections and referendums." [9] The Authority's objective is maintained despite its acknowledgment that coverage of elections is entirely at the discretion of the broadcaster who has no obligation whatsoever to pay any attention to elections.

The Authority's objective thence leads it down a path which is wholly objectionable. It leads it for example, to relate the airtime given to political parties and persons contesting local and general elections to "the number of seats being contested by each party", a position which would require a broadcaster to give equal time to an established political party as to a fly-by-night

[9] It can be questioned whether or not viewers and listeners make 'political decisions' as distinct perhaps from electoral choices. In any event it is not the *responsibility* of the media to educate the electorate for which it should be held accountable by some government agency.

organisation which happens to field a candidate in each and every constituency. The Authority has not seen the importance of embracing the UK Code concept of a 'series of programmes' as an important consideration in assessing 'balance' or 'due impartiality'. It leads to the puzzling stricture in Rule 6.3 –"Broadcasters shall not use race, ethnicity or religious beliefs as a basis for denigration of persons' political affiliation."

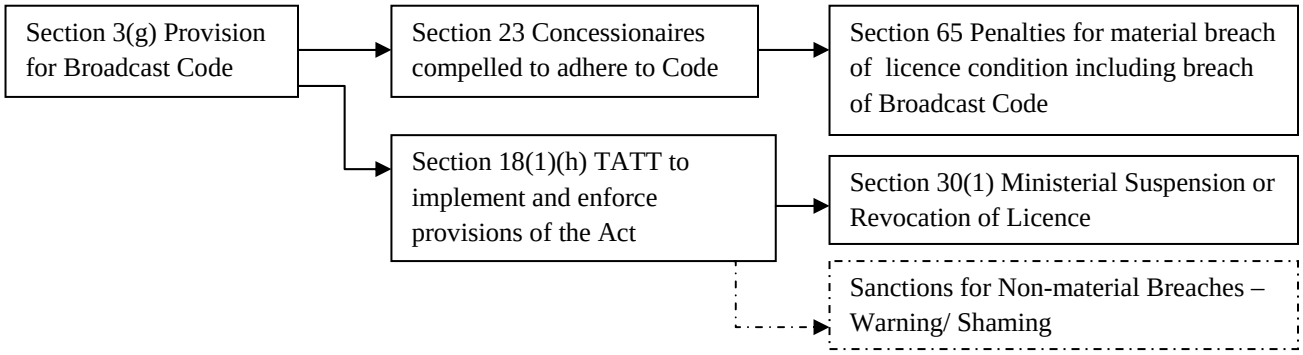
By contrast, the Authority's Revised Draft Code omits several of the quite useful rules on elections coverage which are to be found in the UK Code including the publication of opinion polls, candidates acting as news presenters, etc.

The Authority must revise its objectives in respect of Elections Coverage and adopt a position closer to that outlined in the UK Code.

PENALTIES

The Authority's position on the imposition of penalties for breaches of the Code is curious. Many of the comments it received on this score, including ours, were that the threat of imprisonment was wholly disproportionate to the nature of the breaches which might arise in respect of a Code.

It is clear from the Revised Draft Code that the Authority envisages a process for the imposition of sanctions which flows through two streams. The first stream is clear and supported by the provisions of the Act although there is a huge gap in the process envisaged. Here, the Code is a consistent with the provisions of the Act. Licensees must adhere to the provisions of the Act and Section 23 specifically mentions the Broadcast Code in that regard. The Act, at section 65, then indicates that a (material) breach will attract fine or imprisonment. (Although the Act refers to materiality several times, it does not define it, but it would make sense to suggest that the imposition of sanctions under the Act must not be based on the frivolous or the immaterial.)



The Authority seems to have discerned that this process alone would have left it bereft of the power to impose sanctions. All that it could do would be to make a finding of a material breach and then institute proceedings in court which would lead to the imposition of the section 65 penalties, or alternatively, make a recommendation to the Minister for suspension or for revocation of the licence of the offending broadcaster.

The Authority has therefore sought to hang its power to sanction on the peg of section 18(1)(h), which states that the Authority must "implement and enforce the provisions of the Act and the policies and regulations made hereunder." This is the second stream, and one which the Authority has chosen to construe in its own way as giving it the power to impose certain sanctions. However, suspension or revocation of a licence is clearly within the purview of the Minister and the only 'sanctions' which the Authority can impose are really 'warnings' and or 'shaming' the miscreant broadcaster. It is this lack of real power of the Authority which actually makes it more difficult for broadcasters in that the Authority will in all likelihood be inclined to hasten to the drastic steps of suspension or revocation.

An examination of Section 65 reveals the kinds of situations which may attract a fine of $250,000 or 5 years imprisonment. We maintain that there is no conceivable material breach by a broadcaster which should attract the imposition of these penalties. The Act needs to point to a more appropriate set of penalties for breaches of the Broadcast Code compared to the penalties set out in Section 65.

> **65.** A person who knowingly—
> *(a)* fails to comply with or acts in contravention of section 21(1), 33, 36(1), or 73;
> *(b)* commits a material breach of any condition contained in a concession or licence issued under this Act;
> *(c)* operates a station or uses any equipment in such a manner as to cause harmful interference to any telecommunications network or telecommunications or radiocommunication service;
> *(d)* obstructs or interferes with the sending, transmission, delivery or reception of any communication;
> *(e)* manufactures or sells any system, equipment, card, plate or other device whatsoever, or produces, sells, offers for sale or otherwise provides any account number, mobile identification number or personal identification number, for the purpose of fraudulent use of or access to any telecommunications service;
> *(f)* aids or abets any telecommunications network or telecommunications, broadcasting or radiocommunication service to operate contrary to its concession or licence, as the case may be;
> *(g)* fails to contribute to the funding of the services referred to in section 28 in accordance with the directions of the Authority, commits an offence and is liable on summary conviction to a fine of two hundred and fifty thousand dollars and to imprisonment for five years, and, in the case of a continuing offence, to a further fine of ten thousand dollars for each day that the offence continues after conviction.

We reiterate our position that the imposition of huge fines and imprisonment would be wholly disproportionate to the nature of the breaches which might arise under the Code.

IS TATT INDEPENDENT?

At several points in its responses, the Authority seems to bristle at the suggestion that some 'independent' body be involved the process of determining whether or not there has been a

breach of the Code and claims with some emphasis if not stridency, that "The Authority is an independent body". The industry, and many commentators, seem to see the Authority as a politically-appointed statutory body, and therefore not independent of the political directorate. It is difficult on a reading of the relevant sections of the Act to discern how the Authority comes to the view that it is independent. The following would seem to be relevant:-

- The Board is appointed by Cabinet
- The Authority makes recommendations to the Minister and advises the Minister on policy
- The Authority has no independent revenue-raising power
- The Minister may give written directions to the Authority on matters of public policy
- Concessions are granted or revoked by the Minister
- The Authority has no power to impose penalties.

In addition, in the realpolitik of Trinidad and Tobago today, it is very, very difficult to conceive of any statutory body taking a position or making a decision that goes against the government of the day. Our judiciary is independent constitutionally and may make decisions which go against the government. The central bank, the longest established and most experienced statutory regulatory body in the country, is 'quasi-independent' in that it may make policy without explicit reference to the government but the governor will go if there is a fundamental disagreement with the government's monetary policy and it receives a directive from the Minister of Finance in that regard.

It is perhaps better for the Authority to acknowledge its actual status as a statutory body and to open itself to working with a body like the Media Complaints Council in the process of determining whether breaches of the Code have occurred and the nature of the sanction or penalty which should be imposed. This is likely to lead to a process that is perceived by the industry to be more fair and will prevent the Authority from straying in a posture which could lead to abuse.

ADVERTISING AND COMMERCIAL CONSIDERATIONS

Rules 10.4 and 10.5 relating to health cures and educational courses must be removed. The onus should not be placed on the broadcaster to include disclaimers or to state whether or not the courses advertised are accredited. The Authority should instead look to advertisers to uphold advertising standards on these and other matters in the interest of consumers.
The requirement is particularly oppressive in placing broadcasters at a competitive disadvantage against print and other media platforms which do not have to abide by a Broadcast Code.

11 Religion
RECOMMENDATION
Omit completely. The matters that the Authority attempts to regulate under this heading are better left to the Editorial Policies and Operational Guidelines of the broadcaster.