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Botswana



1 Introduction

The Republic of Botswana is a large country with a small population of approximately 2.3 million people.¹ The country was a British protectorate from 1885–1966 when it gained full independence from the United Kingdom. Botswana has maintained a multiparty democracy since independence and is generally considered a model of peace and democracy in southern Africa.

Despite its strong democratic credentials when it comes to political stability, there is little doubt that the media environment in Botswana is not in accordance with international standards for democratic media regulation. An old-style state broadcaster operates out of the president's office, and it is yet to be transformed into a public broadcaster. Legislation requires the registration of all media practitioners. The broadcasting regulator, Botswana Communications Regulatory Authority (Bocra) is not an independent body. Nevertheless, there is a level of media diversity in both the broadcasting and print media as well as online media.

Botswana, although sparsely populated, is one of the better-developed countries in the Southern African Development Community (SADC) with only 16.3% of the population living below the poverty line.² Nationally, 60% of the population has access to electricity; however, it is divided unequally between 77% of the population in urban and 37% in rural areas.³ Internet penetration in Botswana is currently recorded at 47.5% of the population with 35.3% having access to Facebook.⁴ Botswana has yet to finalise the switchover from analogue television transmission to digital terrestrial transmission (DTT), the analogue switch-off date (ASO date) has been projected for 2020 but is still to be confirmed.⁵ Interestingly, unlike the rest of the SADC region that selected DVB-T2 as the standard for DTT, Botswana has chosen to make use of the Japanese alternative, ISDB-T, as their standard for DTT.⁶ This chapter introduces working journalists and other media practitioners to the legal environment governing media operations in Botswana. The chapter is divided into five sections:

- ▶ Media and the constitution
- ▶ Media-related legislation
- ▶ Media-related regulations
- ▶ Media self-regulation
- ▶ Media-related case law

This chapter aims to equip the reader with an understanding of the main laws governing the media in Botswana. Critical weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Botswana, to enable the media to fulfil its role of providing the public with relevant news and information better, and to serve as a vehicle for government-citizen debate and discussion.

2 The media and the constitution

In this section, you will learn:

- ▷ the definition of a constitution
- ▷ what is meant by constitutional supremacy
- ▷ how a limitations clause operates
- ▷ which constitutional provisions protect the media
- ▷ which constitutional provisions might require caution from the media or might conflict with media interests
- ▷ what key institutions relevant to the media are established under the Botswana Constitution
- ▷ how rights are enforced under the constitution
- ▷ what is meant by the 'three branches of government' and 'separation of powers'
- ▷ whether there are any obvious weaknesses in the Botswana Constitution that ought to be strengthened to protect the media

2.1 Definition of a constitution

A constitution is a set of rules that are fundamental to the country, institution or organisation to which they relate. For example, you can have a constitution for a soccer club or a professional association, such as a press council. Such constitutions set out the rules by which members of the organisation agree to operate. However, constitutions can also govern much larger entities and entire nations.

The Botswana Constitution is notable because it has been in place since Botswana achieved independence in 1966. The constitutions of some other southern African countries were enacted much more recently as these countries embarked on democratic constitutional reforms only in the 1990s. The Botswana Constitution sets out the foundational rules of Botswana. These are the rules upon which the entire country operates.

2.2 Definition of constitutional supremacy

Constitutional supremacy means that the constitution takes precedence over all other law in a country, for example, legislation or case law. It is important to ensure that a constitution has legal supremacy. If a government passed a law that violated the constitution — was not in accordance with or conflicted with a constitutional provision — such law could be challenged in a court of law and could be overturned on the ground that it is unconstitutional.

The Constitution of Botswana does not make specific provision for constitutional supremacy; however, constitutional supremacy is implied in two important ways:

- ▶ In Chapter II, Protection of Fundamental Rights and Freedoms of the Individual, section 3 specifically provides that ‘the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms [listed in Chapter II] subject to such limitation of that protection as *are contained in those provisions*’ (emphasis added). The effect of this is that fundamental rights can only be limited to the extent that is allowed by the limitations contained in that chapter. This indicates that the constitution is the supreme law and that, with regard to fundamental rights and freedoms, no other law can limit rights beyond the limitations set out in the constitutional rights themselves.
- ▶ The Constitution of Botswana contains specific provisions regarding altering the constitution, which requires voting majorities and various other procedures (including a national plebiscite in respect of certain types of amendments) that are far more onerous than is required for the passage of mere legislation. Again, this points to the supremacy of the constitution.

2.3 Definition of a limitations clause

It is evident that rights are not absolute, as society would not be able to function. For example, if the right to freedom of movement were absolute, society would not be able to imprison convicted criminals. Similarly, if the right to freedom of expression were absolute, the state would not be able to protect its citizens from hate speech or false, defamatory statements made with reckless disregard for the truth. Governments require the ability to limit rights to serve important societal interests; however, owing to the supremacy of the constitution, this can be done only in accordance with the constitution.

The Constitution of Botswana makes provision for legal limitations on the exercise and protection of rights that are contained in Chapter II of the Constitution of Botswana, Protection of Fundamental Human Rights and Freedoms of the Individual. Section 3(1) specifically provides that the various rights provided for in Chapter II are subject to:

respect for the rights and freedoms of others and for the public interest, in each and all of the following, namely:

- (a) *life, liberty, the security of the person and the protection of the law*
- (b) *freedom of conscience, of expression and of assembly and association*
- (c) *protection for the privacy of his or her home and other property, and from deprivation of property without compensation.*

The provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

This is an interesting provision that requires some explanation.

- ▶ It is clear that the limitations of rights can be done on two main bases:
 - ▶ to protect the rights and freedoms of other individuals;
 - ▶ to protect the public interest.
- ▶ While limitations to protect the rights and freedoms of others are worded broadly, the following are critical justifications for limiting rights, life, liberty, the security of the person, freedom of conscience, expression, assembly and association and protection of privacy and property, including not being deprived of property without compensation.
- ▶ Limitations to protect the public interest are also worded broadly, but the following are, again, key justifications for limiting rights on the basis of public interest: life, liberty, the security of the person and protection of the law, freedom of conscience, expression, assembly and association and protection of privacy and property, including not being deprived of property without compensation.
- ▶ Section 3 of the Constitution of Botswana contains the general criteria for constitutional limitations, but it is not in itself a generally applicable limitations provision because it states that rights are: 'subject to such limitations of that protection as are contained in those provisions.' Thus, the actual limitations of rights and fundamental freedoms are set out in the provisions of the relevant right or fundamental freedom itself.

Consequently, it is apparent that the rights contained in Chapter II of the Constitution of Botswana are subject to the limitations that are contained within the provisions of the right itself. The limitations in respect of each right are dealt with below.

2.4 Constitutional provisions that protect the media

The Constitution of Botswana contains several important provisions in Chapter II, Protection of Fundamental Human Rights and Freedoms of the Individual, which directly protect the media, including publishers, broadcasters, journalists, editors and producers.

2.4.1 Freedom of expression

The most important provision that protects the media is section 12(1), Protection of Freedom of Expression, which states:

Except with his or her consent, no person shall be hindered in the enjoyment of his or her freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his or her correspondence.

This provision needs some explanation.

- ▶ The freedom applies to all persons, not just certain people, for example, citizens. Hence everybody (including both natural persons and juristic persons, such as companies) enjoys this fundamental right.
- ▶ The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many examples of this, including physical expression (such as mime or dance), photography or art.
- ▶ Section 12(1) specifies that the right to freedom of expression includes ‘freedom to hold opinions without interference,’ thereby protecting the right of the media to produce opinion pieces and commentary on important issues of the day.
- ▶ Section 12(1) specifies that the right to freedom of expression includes ‘freedom to receive ideas and information without interference’. This freedom of everyone to receive information is a fundamental aspect of freedom of expression, and this subsection effectively enshrines the right to the free flow of information. Thus, the information rights of audiences, for example, as well as the expression rights of the media are protected. This right is important because it also protects organisations that foster media development. These organisations facilitate public access to different sources and types of information, particularly in rural areas which traditionally have limited access to the media.
- ▶ Section 12(1) specifies that the right to freedom of expression includes ‘freedom to communicate ideas and information without interference (whether the communication is to the public generally or to any person or class of persons).’ This is a central provision because it protects the right to communicate

information and ideas to the public, a critically important role of the press, and the media more generally. Therefore, although the Constitution of Botswana does not specifically mention the press or the media, the freedom to perform that role, namely to communicate information to the public, is protected.

- ▶ Section 12(1) specifies that the right to freedom of expression includes ‘freedom from interference with his or her correspondence’. This protection of correspondence (which would presumably include letters, emails and WhatsApp messages or SMSes) is an important right for working journalists.

As discussed, constitutional rights are never absolute. Section 12(2) sets out the basis on which the right to freedom of expression detailed in section 12(1) may be limited.

Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits the right to freedom of expression will not violate section 12(1) of the constitution provided that it:

- ▶ is reasonably required in the interests of defence, public safety, public order, public morality, or public health;
- ▶ is reasonably required for:
 - ▶ the purposes of protecting:
 - › the reputations, rights and freedoms of other persons
 - › the private lives of persons concerned in legal proceedings
 - ▶ protecting information received in confidence
 - ▶ maintaining the authority and independence of the courts
 - ▶ regulating educational institutions in the interests of persons receiving instruction therein
 - ▶ regulating the technical administration or operation of telephony, telegraphy, posts, wireless, broadcasting or television
- ▶ imposes restrictions on public officers, employees of local government bodies or teachers
- ▶ is reasonably justifiable in a democratic society.

Although the limitation provisions in section 12(2) are lengthy (the provision is much longer than the right itself), it is generally (see exceptions immediately below) in accordance with internationally accepted standards. In this regard, it is important to note that the requirement that the limitation be ‘reasonably justifiable in a democratic society’ qualifies each of the separate grounds for limiting a right. Thus, any law that intends to limit a right on one of the stipulated grounds must also be reasonably justifiable in a democratic society. This is an objective test that a court can apply and is not dependent on a governmental official’s view on whether or not the limitation is justifiable.

Notwithstanding this, there are at least two provisions in the limitations set out in section 12(2) that stand out as not being internationally acceptable grounds for limiting expression, namely:

- ▶ the restriction imposed on public officers: Obviously, many public officials do have secrecy obligations, particularly in defence, intelligence and police posts. Nevertheless, the general ability of whistleblowers in the public service to bring illegal conduct, including corruption, to the attention of the media in the public interest is a critical part of a functioning democracy. Consequently, such limitations provisions could well have a chilling effect on public servants, unduly preventing the disclosure of official misconduct.
- ▶ the restrictions on educational institutions: The rationale behind this limitation is unclear. Academic freedom is often mentioned explicitly as a subset of the right to freedom of expression precisely due to the essential role that freedom of expression plays in the search for truth, one of the key rationales for protecting freedom of expression.

It should be noted that even though Botswana has introduced the Whistleblowing Act, Act 9 of 2016, many of these restrictions still apply. This is dealt with later in this chapter.

2.4.2 Privacy of home and other property

A second right that protects the media is contained in section 9(1) of the Constitution of Botswana. This right provides that 'Except with his or her own consent, no person shall be subjected to the search of his or her person or his or her property or the entry by others on his or her premises.' Being free from searches of notebooks, computer flash sticks, cameras and other tools of a journalist's trade, as well as the offices of media houses, is an important right, but it can be limited.

As discussed, constitutional rights are never absolute. Section 9(2) sets out the basis on which the right to protection for the privacy of home and other property set out in section 9(1) may be limited.

Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits the protection of privacy will not violate section 9(1) of the constitution, provided that it:

- ▶ is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources, for the purposes of any census or to secure the development or utilisation of any property for a purpose beneficial to the community
- ▶ is reasonably required to protect the rights or freedoms of others
- ▶ authorises a government (or parastatal company) officer to access the property and inspect premises or anything on the property for tax purposes, or to carry out work connected with any governmental (or parastatal) property on the premises

- ▶ authorises compliance with a court order
- ▶ is reasonably justifiable in a democratic society.

2.4.3 Deprivation of property

This right is linked to the right to protection of property and deals with property seizures. It is wordy and very legalistic, but section 8(1) of the Constitution of Botswana provides in its relevant part that:

No property of any description shall be compulsorily acquired, except where:

(a) the taking of possession is necessary or expedient —

(i) in the interests of defence, public safety, public order, public morality, public health, town and country planning or land settlement; and

(b) provision is made in the law —

(i) for the prompt payment of adequate compensation; and

(ii) securing to any person having an interest in ... the property a right of access to the High Court ... for ... a determination of ... the legality of the taking of possession ... of the property

It is evident from the provisions of section 8 that it is generally intended to allow for expropriation of land for purposes such as the exploitation of mineral rights, conservation, development and the like. However, strictly speaking, section 8(1) could be used by a journalist or media house to prevent the confiscation of media-related property, such as computers, cameras, notebooks and phones.

Note that sections 8(4)–(6) contain a range of limitations on the right. These are not particularly relevant to the media and are, therefore, not included here.

2.4.4 Freedom of conscience

Section 11(1) of the Constitution of Botswana provides in its relevant part that ‘Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought’. Freedom of thought is important for the media as it provides additional protection for commentary on issues of public importance.

As discussed previously, constitutional rights are never absolute. Section 11(2) sets out the basis on which the right to freedom of conscience detailed in section 11(1) may be limited. Although the wording is complicated and legalistic, the essence of these provisions is that a law which limits freedom of conscience will not violate section 11(1) of the constitution, provided that it:

- ▶ is in the interests of defence, public safety, public order, public morality or public health

- ▶ protects the rights of others
- ▶ is reasonably justifiable in a democratic society.

Freedom of assembly and association

A fifth protection is provided for in section 13(1) of the Constitution of Botswana, which provides that:

Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of assembly and association, that is to say, his or her right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his or her interests.

This right not only guarantees the rights of journalists to join trade unions, but also the rights of the press to form press associations and of entrepreneurs to form media houses and conduct media operations.

As discussed previously, constitutional rights are never absolute. Section 13(2) sets out the basis on which the right to freedom of association contained in section 13(1) may be limited. Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits freedom of assembly and association will not violate section 13(1) of the constitution, provided that it:

- ▶ is in the interests of defence, public safety, public order, public morality or public health
- ▶ protects the rights of others
- ▶ imposes restrictions on public officers
- ▶ makes provision for the registration of trade unions (including various conditions relating to issues such as membership and representation)
- ▶ is reasonably justifiable in a democratic society.

2.4.5 Protection of law

A sixth protection is provided in section 10(10) of the Constitution of Botswana, which provides that:

Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.

The formulation of this right to ‘open justice’ in the Constitution of Botswana is interesting because it effectively allows the parties to a case to agree to the proceedings not being public. This is an unusual formulation and detracts from the

openness of the proceedings because the right to a public trial is not just crucial for the protection of litigant, but also to secure public faith in the judiciary. In other words, the public (and, as part of that, the media) generally ought to have a right to attend judicial proceedings.

As discussed previously, constitutional rights are never absolute. Besides the limitation already contained in section 10(10) allowing the exclusion of the public by the parties involved in the litigation, section 10(11) provides that the above general right to open court hearings shall not prevent a court (or similar body) from limiting public access:

- ▶ to the extent that the court considers this necessary or expedient in circumstances where publicity would prejudice the interests of justice
- ▶ where this is empowered by the law in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of 18 years, or the protection of the private lives of persons involved in the proceedings.

2.5 Constitutional provisions that might require caution from the media or might conflict with media interests

Just as there are certain rights or freedoms that protect the media, other rights or freedoms can protect individuals and institutions from the media. It is important for journalists to understand which provisions in the constitution can be used against the media. The Constitution of Botswana does not, in fact, contain many provisions that are used against the media ordinarily, such as a right to dignity or privacy. However, there are provisions that allow for the derogation from fundamental rights and freedoms, as well as declarations relating to emergencies, which may affect the media.

It is important to note the provisions of sections 16 and 17 of Chapter II in the Constitution of Botswana, which deal respectively with derogations from fundamental rights and freedoms, and declarations relating to emergencies. In terms of section 17, the president may by proclamation published in the Gazette declare that a 'state of public emergency exists,' which declaration shall cease to have effect after:

- ▶ seven days (if parliament is sitting or has been summoned to meet within seven days); or
- ▶ twenty-one days in all other circumstances.

If the National Assembly approves the declaration, it will remain in force for six months (although this can be extended for up to six months at a time).

It is important to note that the emergency provisions in the Constitution of Botswana are not in accordance with international best practice standards. This is because there are no objective preconditions to such a declaration. In other words, there is nothing in the constitution which requires that a real threat to the public

must exist before the president can make a declaration of public emergency.

Importantly, section 16 of the Botswana Constitution specifically allows laws passed when Botswana is at war or under a state of emergency to derogate from the rights to personal liberty and equality. Note, however, that the right to freedom of expression cannot be derogated from, although the limitations already contained in the right allow for wide discretion to regulate the media in the interests of, for example, defence and public order.

2.6 Key institutions relevant to the media established under the Constitution of Botswana

As the Constitution of Botswana came into effect in the mid-1960s, it does not contain a number of institutions that are sometimes found in the constitutions of some other southern African countries, such as an ombudsman, a human rights commission or an independent broadcasting authority.

Nevertheless, there are two important institutions in relation to the media that are established under the constitution, namely, the judiciary and the Judicial Service Commission (JSC).

2.6.1 The judiciary

Chapter VI of the Constitution of Botswana, The Judicature, establishes two superior courts: the High Court and the Court of Appeal. In terms of section 95(1) of the constitution, the Botswana High Court shall have 'unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law'. Effectively, this ambit allows the High Court to enquire into any matter of law in Botswana.

Section 105(1) of the constitution provides that where a substantial question of law involving constitutional interpretation arises in any subordinate court (such as a magistrate's court), the question must be referred to the High Court.

Section 95(5) specifies that the High Court has jurisdiction to supervise any civil or criminal proceedings before any subordinate court or any court-martial and make such orders as it considers appropriate to ensure that justice is administered by such court.

Section 95(6) authorises the Chief Justice to make the practice and procedure rules of the High Court.

The Court of Appeal has a narrower jurisdiction, namely, powers conferred by the constitution or any other law.

Note that in terms of section 106 of the Constitution of Botswana, there is a right of appeal (other than in respect of frivolous or vexatious cases) to the Court of Appeal from any decision of the High Court involving constitutional interpretation, except concerning section 69(1) of the constitution, which gives the High Court the right to determine whether any person has been validly elected as a member or speaker of the National Assembly.

The judiciary or judicature is an essential institution for the media because the two rely on each other to support and strengthen democratic practices in a country. The judiciary needs the media to inform the public about its judgments and its role as one of the branches of government, and the media is essential to building public trust and respect for the judiciary, which is the foundation of the rule of law in society. The media needs the judiciary because of the courts' ability to protect the media from unlawful action by the state and from unfair damages claims by litigants.

In terms of sections 96, 99 and 100 of the Constitution of Botswana, the key judicial appointment procedures are as follows:

- ▶ the High Court is made up of the Chief Justice and judges of the High Court
- ▶ the Court of Appeal is made up of the President of the Court of Appeal, such number of justices of appeal as may be prescribed by parliament, as well as the Chief Justice and the other judges of the High Court. Furthermore, parliament can make provision for the office of the President of the Court of Appeal to be held by the Chief Justice of the High Court on an *ex officio* basis
- ▶ the Chief Justice of the High Court and the President of the Court of Appeal (unless that office is held by the Chief Justice) are appointed by the president acting alone
- ▶ the other judges of the High Court and the justices of appeal, if any, are appointed by the president acting per the advice of the JSC.

In terms of sections 97(2) and 101(2) of the Constitution of Botswana, a judge of the High Court and Court of Appeal can be removed from office only for inability to perform the functions of his or her office or for misbehaviour. The removal of any of these judges by the president requires a prior finding by a presidentially appointed tribunal recommending removal.

2.6.2 The Judicial Service Commission

The JSC is a constitutional body that is established to:

- ▶ participate in the appointment of judges to the High Court and justices to the Appeal Court
- ▶ be responsible for exercising disciplinary control (together with the president) over the registrars of the two superior courts, magistrates and members of courts, as prescribed by parliament in terms of section 104(2).

The JSC is relevant to the media because of its critical role in the judiciary, the proper functioning and independence of which are essential for democracy. In terms of section 103(1), the JSC is made up of the Chief Justice (the chairman), the president of the Court of Appeal or the most senior justice of the Court of Appeal (if the Chief Justice is the *ex officio* president of the Court of Appeal), the attorney-general, the chairman of the Public Service Commission, a member of the Law Society

nominated by the Law Society, and a person 'of integrity and experience not being a legal practitioner' appointed by the president.

Importantly, section 103(4) specifically protects the independence of the JSC by stating that it 'shall not be subject to the direction or control of any other person or authority in the exercise of its functions under this constitution.'

2.7 Enforcing rights under the constitution

A right is only as effective as its enforcement. All too often rights are enshrined in documents such as a constitution or a bill of rights, and yet remain empty of substance because they cannot be enforced.

Section 18 of the Constitution of Botswana, Enforcement of Protective Provisions, deals specifically with contraventions of the rights contained in sections 3–16 of Chapter II of the constitution. It allows a person to apply to the High Court when a provision of those sections of Chapter II 'has been, is being, or is likely to be' contravened.

Perhaps one of the most effective ways in which rights are protected under the constitution is by the provisions of the constitution that entrench the rights contained in Chapter II, 'Protection of Fundamental Rights and Freedoms of the Individual'. Section 89(3)(a) of the constitution requires that a constitutional amendment of Chapter II needs to be passed by a two-thirds majority of all members of the National Assembly. Furthermore, any amendment to the entrenchment provision (that is, of section 89 itself) requires the support of a majority vote of the entire electorate, in addition to it having been passed by parliament, before it can be sent to the president for his assent, in terms of section 89(3)(b). Effectively, this requires a national referendum on any such constitutional amendment.

2.8 The three branches of government and separation of powers

All too often, politicians, commentators and journalists use political terms such as branches of government and separation of powers; yet working journalists may not have a clear idea what these terms mean.

2.8.1 Branches of government

It is generally recognised that governmental power is exercised by three branches of government, namely the executive, the legislature and the judiciary.

The executive

Section 47(1) of the Constitution of Botswana provides that the executive power of Botswana shall vest in the president and shall be exercised by him or her directly or by officers subordinate to him or her.

Section 30 of the Constitution of Botswana provides that the President of the Republic of Botswana is the head of state. In terms of section 32(1) of the constitution, the president is elected whenever parliament is dissolved. The election procedure is set out in section 32. The president is the person who is supported by the majority of persons elected to parliament.

Section 44 of the Constitution of Botswana provides for a Cabinet consisting of the president, the vice-president and ministers. The main role of the Cabinet is to advise the president with respect to the policy of the government. The Cabinet is responsible to the National Assembly for all things by, or under, the authority of the president, vice-president or any minister in the executive, in terms of section 50 of the Constitution of Botswana.

The vice-president is appointed by the president from among the elected members of the National Assembly. This appointment must be endorsed by the members of the National Assembly, in terms of section 39(1) of the Constitution of Botswana. The role of the vice-president is to be the principal assistant to the president, in terms of section 49 of the Constitution of Botswana.

In terms of section 42(1) of the Constitution of Botswana, the other offices of ministers (and there must be no more than six of these or such other number as set by parliament) must be established by parliament or by the president (subject to the provisions of any act of parliament). In terms of section 42(2) of the Constitution of Botswana, the offices of an assistant minister (and there must be no more than three of these or such other number as set by parliament) must be established by parliament or by the president (subject to the provisions of any act of parliament).

The president generally makes appointments to the office of minister or assistant minister from among the members of the National Assembly. Note that up to four persons who are not members of the National Assembly may be appointed as a minister or assistant minister, but they must be qualified for election as such.

The legislature

In terms of section 86 of the Constitution of Botswana, legislative or law-making power in Botswana 'for the peace, order and good government of Botswana' is vested in parliament.

In terms of section 57 of the Constitution of Botswana, parliament consists of the president and the National Assembly. In terms of section 58(2), the National Assembly consists of 57 elected members and four specially elected members.

The process for the election of the four specially elected members is set out in the first schedule to the Constitution of Botswana:

- ▶ the president nominates four candidates for a special election, and any elected member of the National Assembly nominates four candidates for special election
- ▶ a list of candidates nominated by the president and elected members of the National Assembly is prepared

- ▶ each elected member of the National Assembly votes for four candidates. The ballot is secret, and no candidate may be voted for more than once
- ▶ the four candidates securing the highest number of votes are duly elected.

A similar procedure is followed for by-elections should a vacancy arise in the number of specially elected members.

Ordinary elected members of the National Assembly are elected in terms of a constituency system (see section 63 of the Botswana Constitution). In terms of section 64, the JSC appoints a delimitation commission after every census, or when parliament has changed the number of seats in the National Assembly, to determine the boundaries of each constituency. Section 65 of the Constitution of Botswana requires the boundaries of each constituency to be such that the number of inhabitants therein is nearly equal to the population quota (that is, the number obtained by dividing the inhabitants of Botswana by the number of constituencies). Although there are certain exceptions, the necessary requirements to be registered as a voter in terms of section 67 of the Botswana Constitution, are being at least 18 years of age and having citizenship and residence in Botswana.

The judiciary

The judicial power, as previously discussed, is vested in the courts. The role of the judiciary is to interpret the law and to adjudicate legal disputes in accordance with the law.

2.8.2 Separation of powers

It is important in a functioning democracy to divide governmental power between different organs of the state to guard against the centralisation of power, which may lead to abuse of power. This is known as the separation of powers doctrine. The aim is to separate the functions of the three branches of government, the executive, the legislature and the judiciary, so that no single branch is able to operate alone, assume complete state control and amass centralised power. While each branch performs several different functions, each also plays a watchdog role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and in accordance with the constitution.

2.9 Weaknesses in the constitution that ought to be strengthened to protect the media

There are several weaknesses in the Constitution of Botswana. If these provisions were strengthened, there would be specific benefits for the media in Botswana.

2.9.1 Remove internal limitations to certain rights

As discussed, the Constitution of Botswana makes provision for certain rights to be

subject to internal limitations, that is, the provision dealing with rights contains its own limitations clause, which sets out how government can limit the ambit of the right legitimately.

These internal limitations occur in several sections in Chapter II of the Constitution of Botswana. They deal specifically with the limitation or qualification of the particular right that is dealt with in that section. As discussed more fully above, the right to freedom of expression contains such an internal limitation. In other words, the section that contains the right also sets out the parameters or limitations allowable in respect of that right.

The rights contained in Chapter II of the Constitution of Botswana, Fundamental Human Rights and Freedoms, would be strengthened if they were subject to a single generally applicable limitations clause instead of each having its own internal limitations clause.

Such a general limitations clause would apply to all of the provisions of Chapter II of the Constitution of Botswana, that is, to the fundamental rights and freedoms. It would allow a government to pass laws limiting rights generally, provided this is done in accordance with the provisions of a limitations clause that applies equally to all rights. It makes the ambit of the rights and the grounds for limitation much clearer for the public because there would be no specific limitations provisions that apply to each right separately.

2.9.2 Provision for an independent broadcasting regulator and for a public broadcaster

Given the fact that the Constitution of Botswana came into effect in the mid-1960s, it is not surprising that it does not provide constitutional protection for an independent broadcasting regulator or for a public broadcaster. However, given the importance of both these institutions for ensuring access to news and information by the public, it is suggested that such amendments to the constitution would be in the public interest, and would serve to strengthen both the media and democracy more generally in Botswana.

3 The media and legislation

In this section, you will learn:

- ▷ what legislation is and how it comes into being
- ▷ legislation governing the publication of print media
- ▷ legislation governing the making of films
- ▷ legislation governing media practitioners
- ▷ legislation governing the broadcasting media generally
- ▷ legislation governing the state broadcasting sector
- ▷ legislation governing broadcasting signal distribution
- ▷ legislation that threatens a journalist’s duty to protect sources
- ▷ legislation that prohibits the publication of certain kinds of information
- ▷ legislation that prohibits the interception of communication
- ▷ legislation that specifically assists the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by parliament, which is the legislative authority. As we know, legislative authority in Botswana is vested in the parliament, which is made up of the president and the National Assembly. It is important to note, however, that in certain limited cases, legislation must also be referred to a body called *Ntlo ya Dikgosi*. In terms of section 88(2) of the Constitution of Botswana, the National Assembly may not proceed on any bill that would alter the provisions of the constitution or would have a bearing on traditional matters (including powers of chiefs and headmen, traditional courts, customary law or tribal organisation/property) unless a copy of the bill has been with *Ntlo ya Dikgosi* for at least 30 days.

In terms of section 77, the *Ntlo ya Dikgosi* comprises 33–35 members mostly made up of members selected by traditional authorities or appointees of the president.

As a general rule, the National Assembly and the president are ordinarily involved in passing legislation. There are detailed rules in sections 87–89 of the Constitution of Botswana, which set out the different law-making processes that apply to different types of legislation. Journalists and others in the media need to be aware that the Constitution of Botswana requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Constitution of Botswana, there are four kinds of legislation, each of which has particular procedures and/or rules applicable to it. These are:

- ▶ legislation that amends the constitution; the procedures and/or applicable rules are set out in section 89 of the constitution
- ▶ ordinary legislation; the procedures and/or applicable rules are set out in section 87 of the constitution
- ▶ legislation that deals with financial measures; the procedures and/or applicable rules are set out in section 88(1) of the constitution
- ▶ legislation that would affect traditional matters as set out in section 88(2) of the constitution.

3.1.2 The difference between a bill and an act

A bill is a piece of draft legislation that is debated and usually amended by parliament during the law-making process.

In terms of section 87(5) of the Constitution of Botswana, if a bill is passed by parliament in accordance with the various applicable procedures required for different types of bills, as set out above, it becomes an act once it is agreed to by the president. An act must be published in the Gazette and, in terms of section 87(6) of the Constitution of Botswana; it becomes law only when it is has been so published. Note, however, that it is possible for parliament to make retrospective laws in terms of section 87(6).

It is important to note that some of the laws governing certain media-related aspects came into force prior to the coming into effect of the 1966 Constitution of Botswana. As they were passed by the governing authority of the time and have yet to be repealed, they are still the law.

3.2 Legislation governing the publication of print media

Unfortunately, in terms of the Printed Publications Act, Act 15 of 1968, there are several constraints on the ability to operate as a print media publication in Botswana. In particular, Botswana requires the registration of newspapers (in some instances, even newspapers that are published outside Botswana), which is out of step with international best practice.

Even though these kinds of restrictions constitute bureaucratic and administrative requirements rather than outright restrictions, they effectively impinge on the public's right to know by setting barriers to print media operations.

There are certain critical requirements laid down by the Printed Publications Act in respect of a newspaper or other publications. The definition of a newspaper is extremely broad and includes:

any publication containing news, intelligence, reports of occurrences, or any remarks, observations or comments on such news or on any other matters of public interest or of a political nature in relation to Botswana, which is printed or published for sale or free distribution at regular or irregular intervals within Botswana.

The effect of this definition is that any publication which contains, for example, a report on any occurrence or any comment on matters of public interest or of a political nature that is intended for distribution to the public or any section of the public (even if such distribution is free or irregular) constitutes a newspaper for the Printed Publications Act. The important aspects of the Printed Publications Act are as follows:

3.2.1 Registration of newspaper

- ▶ Section 3 of the Printed Publications Act requires the minister responsible for the Printed Publications Act to appoint a registrar of newspapers by notice in the Gazette.
- ▶ Section 4 of the Printed Publications Act requires the registrar of newspapers to establish and maintain a register of newspapers.
- ▶ Section 5(5) of the Printed Publications Act makes it an offence to print or publish a newspaper without having registered the newspaper before printing and publication, and, if found guilty, the perpetrator will be liable to a fine, a period of imprisonment or both, in terms of section 13 of the Printed Publications Act.
- ▶ In terms of section 5(2) of the Printed Publications Act, the particulars required for registration are: the title of the newspaper, name and residential address of the editor, name and residential and business addresses of the proprietor (owner), publisher and printer. Furthermore, any change to a newspaper's title, editor or ownership interests must be lodged with the registrar of newspapers. Supplying false information or publishing a newspaper without having filed changes in the relevant registered information is an offence, and, if found guilty, the perpetrator will be liable to a fine, a period of imprisonment or both, in terms of section 13 of the Printed Publications Act.

3.2.2 Publication of details of the publisher

Besides the newspaper registration requirements set out above, section 6(1) of the Printed Publications Act also requires all publications (defined extremely broadly to the public or any section thereof in Botswana) to have printed on one of its

pages, in legible type, the name and addresses of the printer and publisher and the year of publication. Any person who prints a publication without complying with the requirements of section 6(1) is guilty of an offence and liable to a fine, a period of imprisonment or both, in terms of section 13 of the Printed Publications Act.

3.2.3 Duty to keep copies of publications and to produce them on demand

Section 7 of the Printed Publications Act requires the printer of any publication to keep a copy of the publication and to produce it on demand of a police officer with the rank of inspector or above. Again, any person who fails to comply with section 7 is guilty of an offence and is liable to a fine, a period of imprisonment or both, in terms of section 13 of the Printed Publications Act.

3.2.4 Foreign application of the Act

An interesting provision in the Printed Publications Act is section 9, which provides that if the minister is satisfied that any publication printed outside Botswana would constitute a newspaper if it had been printed and published in Botswana, and is of the opinion that the publication is intended primarily for circulation within Botswana, he may order the publication to be a newspaper under the Printed Publications Act, and 'thereupon the provisions of this Act shall apply to such publication', even though it is printed and published outside the country.

3.2.5 Seizures of publications

Section 11 authorises any police officer with the rank of inspector or above to seize any publication or newspaper which he or she 'reasonably suspects' has been published or printed in contravention of the Printed Publications Act. This section also empowers magistrates to issue search and seizure warrants for publications and newspapers printed in contravention of the Printed Publications Act.

3.2.6 Exemptions

Section 8 of the Printed Publications Act includes an interesting provision whereby the minister may, by order published in the Gazette, declare any newspaper to 'not be a newspaper' thus exempting that newspaper from the provisions of the Printed Publications Act. The minister may also exempt a person from any or all the provisions of the Printed Publications Act or declare that any provisions of the Printed Publications Act shall not apply to any newspaper or publication.

3.3 Legislation governing the making of films

Unfortunately, there are several constraints on the making of films in Botswana, something that obviously affects the visual media, such as television. Important aspects of the main piece of legislation governing film, namely the Cinematograph Act, Act 73 of 1970, are as follows:

- ▶ In terms of section 3 of the Cinematograph Act, no film for public exhibition or sale either inside or outside Botswana shall be made in Botswana, except

under and in accordance with a filming permit issued by the minister (presumably the minister responsible for the administration of the Cinematograph Act). If a film is made without such a permit, the person making the film (or the person(s) in control of or managing the affairs of a company, if the film is being made by a corporate entity) is guilty of an offence in terms of section 3, and, in terms of section 29, is liable to a fine, imprisonment or both. In addition, the court may order the confiscation and destruction of the film.

- ▶ Section 4 of the Cinematograph Act requires an application for a filming permit to be made in writing and to be accompanied with a full description of the scenes and the full text of the spoken parts (if any) of the entire film which is to be made, even if parts of the film are made outside Botswana. Note, however, that the minister may accept an application that is otherwise incomplete if the minister has been given such other information as he requires for the determination of the application.
- ▶ Section 5 of the Cinematograph Act empowers the minister to issue a filming permit subject to conditions. The minister may even order a person appointed by him to be present at the making of the film. Section 8(1) of the Cinematograph Act provides that any person appointed by the minister to be present at the making of a film has the authority to intervene and order the cessation of any scene which, in his opinion, endangers any person or property (other than the film producer's property), is cruel to animals or is being made in contravention of the conditions of a film permit. It should be noted that in terms of section 8(2) of the Cinematograph Act, should the person chosen by the minister intervene with the production of a film, that person is required to notify the minister of the intervention and the reasons therefor. The minister may either permit the making of the film be resumed or provide a hearing to the holder of the filming permit in relation to the intervention and then either allow the filming to resume on such conditions as the minister thinks appropriate or else refuse to allow the film making to be resumed. Should the making of a film be resumed without the consent of the minister all persons engaged in the making of the film, including the permit holder, are guilty of an offence in terms of section 8(4).
- ▶ Note, however, that section 9 of the Cinematograph Act empowers the minister to exempt any film or class of film from the above provisions of the Cinematograph Act.
- ▶ There are also several restrictions regarding the exhibition of films. These are dealt with elsewhere in this chapter.

3.4 Legislation governing media practitioners

3.4.1 Legislation that regulates media practitioners generally

A piece of legislation that was enacted in Botswana ostensibly to 'preserve the maintenance of high professional standards within the media' is the Media Practitioners

Act (MPA), Act 29 of 2008. Section 6 requires every resident media practitioner (defined in section 1 as ‘a person engaged in the writing, editing or transmitting of news and information to the public, and includes a broadcaster, a journalist, editor, or publisher of a publication and the manager or proprietor of a publication or broadcasting station’) to be registered and accredited by the executive committee of the Media Council established under the MPA. Failure to register is an offence punishable by a fine, imprisonment or both, in terms of section 7(5) of the MPA. There have been growing calls for the MPA to be repealed and at one point it appeared as if that had the support of the ruling party, but the vote to repeal the MPA in parliament split along party lines and the repeal motion was defeated.⁷

3.4.2 Institutions established under the MPA

The MPA establishes the Media Council and other subsidiary or related bodies:

- ▶ Section 3 establishes the Media Council, and, in terms of section 18, the governing body of the Media Council is its executive committee.
- ▶ Section 11 provides for the establishment of a complaints committee.
- ▶ Section 15 provides for the establishment of an appeals committee.

3.4.3 Functions of the institutions

The Media Council

In terms of section 5, the objects of the Media Council are to:

- ▶ preserve media freedom
- ▶ uphold standards of professional conduct and promote good ethical standards and discipline among media practitioners
- ▶ promote the observance of media ethics in accordance with the Media Council's code of ethics
- ▶ promote public awareness of the rights and responsibilities of the media
- ▶ establish links with similar organisations
- ▶ monitor activities of media practitioners
- ▶ receive complaints against media practitioners
- ▶ register and accredit media practitioners
- ▶ bring media practitioners and other media stakeholders together to exchange information
- ▶ issue accredited media practitioners with identity cards
- ▶ maintain a media register

- ▶ seek financial and other assistance for its operations
- ▶ sponsor and advise on the training of media practitioners
- ▶ undertake research into the performance of the media.

The Media Council is also required to issue a code of ethics, which is to include the following provisions, in terms of section 9 of the MPA:

- ▶ duties and obligations of media practitioners
- ▶ protection of minors
- ▶ protection of persons suffering from physical or mental disabilities
- ▶ advertising content
- ▶ fair competition in the media industry
- ▶ protection of privacy
- ▶ unlawful publication of defamatory matter.

Note that in terms of section 9(4) of the MPA, the minister must be provided with prior notice of any changes to the code of ethics.

Under section 10 of the MPA, a media outlet must provide a right of reply to any person against whom a statement has been published. The requested reply must be published:

- ▶ no later than two subsequent editions of the publication
- ▶ with the same prominence as the original statement.

The complaints committee

The main functions of the complaints committee are to:

- ▶ investigate and hear complaints against media practitioners regarding:
 - ▶ contraventions of the code of ethics, section 9(1) of the MPA
 - ▶ acts or omissions which have aggrieved any person, section 12 of the MPA.
- ▶ make rulings on the complaints, in terms of section 14 of the MPA, including:
 - ▶ dismissing the complaint
 - ▶ criticising the conduct of the media practitioner, where warranted
 - ▶ directing that a correction or apology be published
 - ▶ taking disciplinary action. In terms of section 14(2), this could include:
 - › a warning or a reprimand

- › a fine
- › suspension of registration for a specific period
- › removing the media practitioner's name from the register
- ▶ making any supplementary rulings.

The appeals committee

The primary function of the appeals committee is to hear appeals against the decisions of the complaints committee. According to section 15 of the MPA, it may dismiss, enhance, reduce, or vary a decision of the complaints committee. Note that in terms of section 15(6) of the MPA should there be a further appeal from the appeals committee to the High Court, this must be done within 30 days of the original ruling.

3.4.4 Establishment of the institutions

The Media Council

- ▶ The Media Council is a corporate body, in terms of section 3(2) of the MPA.
- ▶ Section 4 of the MPA provides that the Media Council 'shall operate without any political or other bias or interference; and shall be wholly independent and separate from the government, any political party or other body'.
- ▶ Section 5 of the MPA outlines the objectives and responsibilities of the Media Council. These have been dealt with above.
- ▶ Membership of the Media Council consists of 'all publishers of news and information, whether or not in the private or public sector,' in terms of section 7(1). Importantly, in terms of the definitions contained in section 1 of the MPA:
 - ▶ a publisher is 'a person responsible for a publication'
 - ▶ publication includes 'all print, broadcast and electronic information which is published'
 - ▶ published means 'issued for distribution, by sale or otherwise.'
- ▶ Furthermore, any person 'having a legitimate interest in the development of the local media industry' may apply for associate membership, in terms of section 7(3) of the MPA.

The executive committee of the Media Council

The executive committee is made up of a chairperson, a vice-chairperson, a treasurer and six additional members, elected at a general meeting of the members of the Media Council, in terms of subsections 18(1) and (2) of the MPA. It is important to note, however, that in terms of section 35 of the MPA, the minister may dissolve the executive committee if it fails to submit an annual report and, in terms of

section 36 of the MPA, may appoint an interim executive committee until such time as the Media Council elects a replacement executive committee.

The complaints committee

The complaints committee is made up of a chairperson and eight other members who have a serious interest in the furtherance of the communicative value of the media, but who do not have financial interests and are not employed in the media (section 11(1) of the MPA).

Unfortunately, this critically important body, which in name appears to be a sub-committee of the Media Council, is not appointed by the Media Council at all but rather solely by the minister responsible for the administration of the MPA.

The appeals committee

The appeals committee is made up of the chairperson, who is required to be a legal practitioner recommended by the Law Society of Botswana, a member of the public, and a representative of the media recommended by the Media Council (section 15(1) of the MPA). Again, this critically important body, which in name appears to be a subcommittee of the Media Council, is not appointed by the Media Council but rather solely by the minister, albeit on the recommendation of other bodies in respect of two of the three appointments.

3.4.5 Funding for the institutions

The Media Council

In terms of section 32(1) of the MPA, funds for the Media Council come from:

- ▶ members' voluntary contributions, bequests and subscription fees
- ▶ fees and other monies paid for services rendered by the Media Council
- ▶ monies from the rental or sale of any property by the Media Council
- ▶ grants, gifts or donations from lawful organisations or sources.

The executive committee

Allowances paid to members of the executive committee are paid from funds generated by the Media Council, in terms of section 22(1) of the MPA.

The complaints and appeals committees

Members of these committees are paid allowances determined by the minister and paid for from monies appropriated by the National Assembly (that is, out of the national budget), in terms of section 22(2) of the MPA.

3.4.6 Regulations made in terms of the MPA

The MPA makes provision for the making of regulations by the executive committee and the minister.

The executive committee

Regulations made by the executive committee in terms of section 37 of the MPA are binding on all members of the Media Council — that is, all media practitioners resident in Botswana. These regulations deal mainly with administrative issues, including:

- ▶ the manner of application for registration and accreditation of media practitioners
- ▶ the method of application for membership of the Executive Council.

The minister

In terms of section 38 of the MPA, the minister has broad regulation-making powers, including:

- ▶ dissolving the executive committee of the Media Council for failure to submit an annual report
- ▶ any matter intended to safeguard the interests of the public and promote professional standards in the media
- ▶ giving effect to the code of ethics issued by the Media Council
- ▶ any matter relating to the registration and accreditation of non-resident media practitioners (for example, members of the foreign press).

3.4.7 Amending the legislation to strengthen the media generally

The MPA is not in accordance with international best practice, and there are several problems with its provisions.

- ▶ The MPA is not a genuine industry self-regulatory body because membership of the Media Council is not voluntary but instead mandated under the MPA. Failure to be a member is a criminal offence that brings with it penalties, namely, a fine, imprisonment or both.
- ▶ From a media freedom perspective, the most important body that is established under the MPA is the complaints committee, which is clearly a governmental body appointed solely by the minister. This body is given enormous powers, including the power to prevent a journalist from practising his or her profession by being stripped of his or her accreditation with the Media Council. Having a governmental body in charge of the disciplinary affairs of journalists is contrary to the democratic principles of media regulation.

- ▶ The premise of the MPA is unjustifiable. Regulation of broadcasting is recognised as legitimate due to the technical nature of broadcasting. As such, licensing of frequencies must be coordinated, and stricter content regulation is in order due to the differences between the print media (where the intake of content requires action — reading on the part of the reader) and the broadcast media (where the impact is much more immediate and does not require the same intentional action on the part of the listener or viewer). Internationally, executive regulation of the conduct of the print media (as is effectively provided for in the MPA) is seen as not being consistent with a commitment to freedom of expression and, particularly, to a free press.

3.5 Legislation governing the broadcast media generally

3.5.1 Legislation regulating broadcasting generally

Broadcasting in Botswana is regulated in terms of the Communications Regulatory Authority Act, Act 19 of 2012 (CRAA) which established the Botswana Communications Regulatory Authority (Bocra) and in terms of the Broadcasting Act 1998, Act 6 of 1999. The Broadcasting Act established the National Broadcasting Board (NBB). The CRAA gives Bocra the powers and responsibilities previously assigned to the NBB under the Broadcasting Act, so the Broadcasting Act exists alongside the CRAA with Bocra fulfilling the regulatory functions of both Acts.

3.5.2 The Botswana Communications Regulatory Authority

In terms of section 3(2) of the CRAA, Bocra is defined as a body corporate with full capacity to sue or be sued in its own name, and to do all such things as bodies corporate may, by law, do and as may be for the exercise of its powers and the performance of its functions under the CRAA.

3.5.3 Appointment of Bocra board members

Section 2 of the CRAA, provides that the minister appoints the members of the Bocra board taking into account their academic qualifications, experience and expertise in information and communication technology, broadcasting, media, postal services, law, consumer protection, financial accounting, economics, general business management, information and technology policy or regulation.

Interestingly, the CRAA does not contain a definition for the term ‘the Minister’, but we assume it is a reference to the minister responsible for communications issues in Botswana.

Section 3 of the CRAA requires that the minister publishes in the Gazette, the name of each member and his or her period of appointment.

It is noteworthy that section 4 of the CRAA states that the minister shall appoint the chairperson of the board, and the members shall appoint the vice-chairperson from among their number. In terms of section 9, each member of Bocra shall hold office for a period not exceeding three years and may be eligible for re-appointment for one further term.

Section 10 of the CRAA outlines the grounds which disqualify a person from becoming a member of the Bocra board. These include:

- ▶ being an unrehabilitated bankrupt
- ▶ having been convicted of a criminal offence in Botswana within the ten years immediately preceding the date of his or her proposed appointment
- ▶ having been convicted of a criminal offence outside Botswana which, in Botswana, would have been a criminal offence within the ten years immediately preceding the date of his or her proposed appointment
- ▶ having worked as a chairperson of, or director or senior manager in, or provided full-time independent consulting services to any regulated supplier or any affiliate of that regulated supplier, whether situated within or outside Botswana within two years immediately preceding the date of his or her proposed appointment
- ▶ being the holder of any office in any party, movement, or organisation of a political nature in Botswana
- ▶ holding office in any district, city or town council or central government
- ▶ being an executive or non-executive chairperson, director or officer in a regulated supplier
- ▶ holding any controlling interest in any regulated supplier or being the holder of a licence issued by the authority, other than a licence required for his or her personal use
- ▶ having a direct or indirect financial interest in the industries regulated by Bocra either him or herself, or through a family member
- ▶ being a serving member of the judiciary in Botswana
- ▶ not being a citizen of Botswana
- ▶ being an employee of Bocra.

In terms of section 11 of the CRAA, a board member's office shall become vacant, upon that person:

- ▶ becoming disqualified in terms of section 10 to hold office as a board member
- ▶ being adjudged bankrupt or insolvent
- ▶ being absent from three consecutive board meetings, without the permission of the board or providing a reasonable excuse to the board, or is present at less than half of the board meetings in any one calendar year
- ▶ dying

- ▶ giving three months' written notice to the minister, of his or her intention to resign from office
- ▶ becoming mentally or physically incapable of performing his or her duties as a member provided that if there arises any doubt as to whether he or she is physically or mentally incapable, he or she shall either submit him or herself to a medical examination by two registered medical practitioners the board member does not know personally
- ▶ acting in any way to bring the name of Bocra into disrepute
- ▶ coming to the end of his or her term of office and, being eligible for re-appointment for a further term of office, he or she is not re-appointed
- ▶ failing to disclose any material fact that would have disqualified him or her from appointment
- ▶ ceasing to be a citizen of Botswana
- ▶ being found guilty of unprofessional conduct.

Section 18(1) stipulates that should a member present at a meeting of the board in which any matter with which he or she is directly or indirectly interested, in a private capacity, or is the subject of discussion that he or she should declare such interest, he or she shall not unless otherwise directed by the board, take any part in the discussion or voting on such matters. Section 18(2) states that a disclosure of interest made shall be recorded in the minutes of the meeting at which it is made. This may result in a requirement to resign in accordance with the provisions of section 18(2). When a member of the board vacates their office, the chairperson of the board must inform the minister in writing, and the minister shall appoint another member.

3.5.4 Main functions of Bocra

In terms of sections 5 and 6 of the CRAA, the functions of Bocra are to:

- ▶ provide effective regulation of regulated sectors which are broadcasting, telecommunications (including internet services) and postal services
- ▶ promote universal access to communication services
- ▶ impose levies on identified operators for funding universal access in the communications sector
- ▶ ensure enhanced performance in the communication sector
- ▶ ensure the provision of safe, reliable, efficient, and affordable services in the regulated sectors throughout Botswana
- ▶ protect and promote the interests of consumers, purchasers and other users of the services in the regulated sectors, particularly in respect of the prices

charged for, and the availability, quality and variety of services and products

- ▶ monitor the performance of the regulated sectors in relation to levels of investment, availability, quantity, quality and standards of services, competition, pricing, the costs of services, the efficiency of production and distribution of services and any other matters
- ▶ facilitate and encourage private sector investment and innovation in the regulated sectors
- ▶ enhance public knowledge, awareness and understanding of the regulated sectors
- ▶ foster the development of the supply of services and technology in each regulated sector
- ▶ process applications for and issue licences, permits, permissions, concessions and authorities for regulated sectors with prior notification to the minister
- ▶ impose administrative sanctions and issue and follow up enforcement procedures to ensure compliance with conditions of licences, permits, permissions, concessions, authorities and contracts
- ▶ promote efficiency and economic growth in the regulated sectors and disseminate information about matters relevant to its regulatory function
- ▶ hear complaints and disputes from consumers and regulated suppliers and resolve or facilitate their resolution
- ▶ ensure that the needs of low income, rural or disadvantaged groups of persons are accounted for by regulated suppliers
- ▶ maintain a register of licences, permits, permissions, concessions, authorities, contracts, and regulatory decisions which is available to the public and from which the public may obtain a copy of any entry for a prescribed fee
- ▶ make industry regulations for the better carrying out of its responsibilities under the act including:
 - ▶ codes and rules of conduct
 - ▶ records to be kept
 - ▶ complaint handling procedures
- ▶ advise the minister on matters relating to the regulated sectors and proposed policy and legislation for those sectors
- ▶ take regulatory decisions in an open, transparent, accountable, proportionate and objective manner and without preference
- ▶ promote and facilitate the convergence of technologies.

3.5.5 Funding for Bocra

Section 24 of the CRAA, stipulates that Bocra's funds shall consist of:

- ▶ fees levied in respect of the application for, and granting of, amongst things, licences, approvals and permissions, and annual or other periodic renewals
- ▶ annual fees, which shall be a percentage, determined by Bocra, of the net operating revenues of each licensee.

Section 24(2) of the CRAA states that Bocra shall not accept any grant, contribution, donation or endowment that is received from any regulated supplier or its associated companies or subsidiaries.

In terms of section 24(3) of the CRAA, funding received by Bocra from the National Assembly shall be in respect only of specific projects agreed between the National Assembly and Bocra and shall be by way of loan or grant for that project and before the receipt of any loan by Bocra, the rate of interest and the period of the loan shall be agreed between Bocra and the minister responsible for finance.

Section 24(4) of the CRAA requires that Bocra set out in detail in its annual report, the sources of its funds.

The effect of this is that Bocra is required to be self-financing.

3.5.6 The licensing regime for broadcasters in Botswana

Broadcasting licence requirement

Section 31(1) of the CRAA prohibits any person from carrying out any broadcasting or rebroadcasting activities except under, and in accordance with, a licence issued by Bocra. However, section 31(2) exempts state broadcasters from requiring a broadcasting licence.

In terms of section 31(5) anyone who does not comply with section 31(1) of the CRAA is guilty of an offence and, on conviction, shall be liable to a fine, imprisonment or both.

Categories of broadcasting licences

It should be noted that the categorisation of broadcasting licences is not included in the CRAA but is dealt with in the Broadcasting Act. Section 10(2) of the Broadcasting Act makes reference to three categories of broadcasting services:

- ▶ *Private*: This is defined in section 1 of the Broadcasting Act as 'a broadcasting service operated for profit and controlled by a person who is not a public or community broadcasting licensee.' Interestingly the CRAA also contains a definition of a commercial broadcasting service which, likewise, defines this as one operating for profit.

- ▶ *Community*: This is defined in section 1 of the Broadcasting Act as a broadcasting service which:
 - ▶ is fully controlled by a non-profit entity and carried on for non-profitable purposes
 - ▶ serves a particular community
 - ▶ encourages members of the community serviced by it, or persons associated with or promoting the interests of such community, to participate in the selection and provision of programmes to be broadcast
 - ▶ may be funded by donations, grants, sponsorship, advertising, or membership fees or by any combination of them.

It is also important to note that in section 1, the Broadcasting Act defines a community as including 'a geographically founded community' or 'any group of persons having a specific, ascertainable, common interest.' There is no mention of community broadcasting services in the CRAA.

- ▶ *Public*: This is defined in section 1 of the Broadcasting Act as 'a broadcasting service provided by any statutory body which is funded either wholly or partly through State revenues.' The CRAA does not mention public broadcasters and instead makes a single reference to a state broadcaster which is defined as a government department designated as a provider of broadcasting services, section 31(2).

Besides these three categories, there are other types of broadcasting licences or services, such as:

- ▶ a special event licence and a cable service, as provided for in broadcasting regulations which are dealt with elsewhere in this chapter
- ▶ a subscription management service which is defined in section 1 of the CRAA as 'a service operated to enable the consumption of a subscription broadcasting service.'

Broadcasting licensing process

Section 31(3) of the CRAA, states that an application for a broadcasting or re-broadcasting licence shall be made to Bocra in the prescribed manner. The process for applying for a broadcasting or re-broadcasting licence is outlined in the Broadcasting Act.

Rebroadcasting is common in Botswana and is a process of allowing the signals of a foreign broadcaster to be rebroadcast nationally. Another aspect of rebroadcasting, as the term is used in Botswana, is requiring qualifying commercial broadcasters or cable operators to carry the state broadcasting signals.

Section 10(2) of the Broadcasting Act authorises Bocra to establish different application and assessment procedures for the three types of broadcasting services, private, community and public. These procedures include invitations to tender,

and Bocra is required 'to the maximum extent possible, consistent with safety, efficiency and economy, [to] give preference to enterprises which are owned by citizens or in which citizens have significant shareholding.'

The broadcasting licensing process itself is fairly simple. In terms of section 12(2) of the Broadcasting Act, an application for a broadcasting or rebroadcasting service licence is made to Bocra and must include:

- ▶ the name of the service
- ▶ the name and place of residence of directors or producers of the service
- ▶ the name and place of business and residence of the owner
- ▶ the prescribed fee
- ▶ any other information which the secretariat may require or as may be prescribed.

In terms of section 32 of the CRAA, Bocra may issue a licence to the applicant if it is satisfied that the applicant has fulfilled all the requirements for granting a licence and subject to the availability of frequencies. However, section 6(2)(i) of the CRAA requires Bocra to give prior notification to the minister of any broadcasting-related licensing approval. Section 32(2) of the CRAA authorises Bocra to place restrictions and conditions on licences issued by them.

Section 87 of the CRAA requires that Bocra have the issuing of any licence published in the Gazette except for the granting of a radio frequency licence.

Section 34 of the CRAA provides that no licence granted by Bocra shall be transferred, assigned, or encumbered in any way without the prior approval of Bocra. An application for the transfer, assignment or encumbrance of a licence shall be made to Bocra in such form as the minister may prescribe. Any licensee who does not obtain the requisite prior approval commits an offence, the penalty for which is a fine.

Frequency spectrum licensing

Section 47 of the CRAA states that Bocra shall ensure the rational use of the radio frequency spectrum by establishing and maintaining a national radio frequency plan and ensuring that the needs of existing and new radio services are met. Bocra is also required to establish the necessary technical standards in relation to the radio frequency spectrum, allocate radio frequencies in a manner which will avoid harmful interference and ensure that an appropriate amount of radio frequency spectrum is available for the government as well as non-government use.

3.5.7 Responsibilities of broadcasters in Botswana

Adherence to licence conditions

Section 32(2) of the CRAA specifically provides that Bocra may impose such licence

conditions and restrictions it considers necessary. Section 94 of the CRAA, which deals with offences, does not make it an offence not to comply with licence conditions. However, section 6 of the CRAA provides that Bocra may revoke a licence or otherwise impose further conditions upon a licensee for a failure to comply with its licence conditions.

However, section 31(4)(d) also empowers the minister to set licence conditions in respect of the classification of broadcasting and subscription management service licences. It seems, therefore, that both the minister and Bocra can impose licence conditions. This is obviously a glaring overlap in regulatory responsibilities.

Respect copyright

Section 33 of the CRAA prohibits licensees from broadcasting:

- ▶ any material or programme of which he or she is not the copyright owner, unless, the permission of the copyright owner has been obtained
- ▶ any broadcasting signal received by him or her for the purpose of broadcast or re-broadcasting, unless he or she has, before the broadcast or rebroadcast, obtained the written permission of the copyright owner of the material, programme or broadcast or re-broadcasting signal to do so.

Reporting obligations

Section 35 of the CRAA requires that an application for approval be made to Bocra when:

- ▶ the name of any broadcasting or re-broadcasting service is changed
- ▶ any person acquires ownership of or any ownership interest in any broadcasting or re-broadcasting service
- ▶ a director, producer, or proprietor of any such broadcasting or re-broadcasting service is changed.

The CRA has the authority to approve or refuse the requested changes. Should the CRA refuse the change, it may also revoke the licence.

Record-keeping obligations

In terms of section 36 of the CRAA, a licensee shall keep and store sound and video recordings of all programmes broadcast or rebroadcast for a minimum period of three months after the date of transmission of the broadcast or rebroadcast, or for such further period as may be directed by Bocra. Such material must be produced on demand by Bocra.

Audience advisories

In terms of section 37 of the CRAA, when a programme to be broadcast or

rebroadcast is not suitable for children, the licensee must advise members of the public.

Adherence to broadcasting regulations

It is apparent that broadcasters will be subject to regulations made in terms of the Broadcasting Act or the CRAA (these are dealt with later in this chapter). Of particular note is section 21 of the Broadcasting Act which specifically provides that regulations may prescribe a code of practice must be observed by all licensees.

3.5.8 Revocation of a broadcasting licence

In terms of section 86(1) of the CRAA, any licensee who contravenes any provision of the CRAA, or fails to comply with any lawful direction or requirement made by Bocra under the provisions of the CRAA, or where Bocra is satisfied that the conditions of any licence are not being adhered to, may have their licence revoked, suspended or have additional conditions imposed. Any action taken by Bocra against a licensee must be published in the Gazette.

It should be noted that in terms of section 86(2) of the CRAA, Bocra may not take any action against a licensee without informing the licensee, in writing, and affording the licensee an opportunity to rectify the contravention or failure to adhere to the terms of the broadcasting licence. Alternatively, Bocra is required to give a licensee a period of not less than 14 days to respond to the notice and for the licensee to state why no action should be taken against them.

3.5.9 Is Bocra an independent regulator?

Bocra cannot be said to be independent. While the CRAA says in its preamble that it for an independent regulatory authority, it does not, in fact, create a body independent from its line ministry.

Effectively, Bocra operates as an arm of the minister in the following ways:

- ▶ all Bocra board members are appointed by the minister, as is the chairperson
- ▶ the respective powers of the minister and of Bocra are unclear and appear contradictory. For example, section 6(2)(r) of the CRAA provides that Bocra is empowered to make industry regulations regarding several issues, including code of conduct and complaints handling procedures and standards applicable to regulated services. However, section 94(1) of the CRAA provides that it is the Minister that is empowered to make regulations 'prescribing anything' under the CRAA 'which is to be prescribed or which is necessary or convenient to prescribe'. Consequently, it appears that general powers to make regulations are vested with the minister while Bocra's ability to make regulations is confined to specific instances itemised in the CRAA. Similar provisions are contained in the Broadcasting Act.
- ▶ The CRA is responsible for broadcast licensing. The minister is responsible for making regulations prescribing the annual fees for broadcasting licences, the

frequency aspects for each service, the limitations in respect to the power and other technical limitations of licence holders, the locations of transmitters and geographical areas in which broadcasters may operate and the classifications of broadcasting licences. This gives him or her a significant role in respect to various licensing and general regulatory aspects which is not in accordance with international best practice as it undermines the separation between the executive and the regulator.

Consequently, it is evident that the CRAA does not comply with international best practice in its provisions regarding broadcasting regulation.

3.5.10 Amending the legislation to strengthen the broadcast media generally

There are several problems with the legislative framework for the regulation of broadcasting generally:

- ▶ the overriding problem is that Bocra is not an independent regulator
- ▶ the Broadcasting Act and the CRAA ought to be amended to deal with the following issues:
 - ▶ Bocra members ought to be appointed by the president, acting on the advice of the National Assembly, after it has drawn up a list of recommended appointees. As part of this process, the National Assembly should call for public nominations and should conduct public interviews.
 - ▶ Bocra should be empowered to make its own regulations, including with respect to radio frequency allocations and assignments.
 - ▶ the minister's role ought to be limited to developing appropriate government policy. The minister should not be involved in matters that are part of the functionality of a regulator, for example, making regulations, particularly where these deal with licensing issues, such as the technical specifications of individual frequency assignments.
 - ▶ the mandate of Bocra ought to be changed to ensure that it acts in the public interest and, in respect of broadcasting, to ensure that the citizens of Botswana have access to a diverse range of high-quality public, commercial and community broadcasting services, as well as to ensure that freedom of expression is appropriately protected from commercial and governmental interference.

3.6 Key legislative provisions governing the state broadcasting sector

Unfortunately, Botswana does not have legislation creating a public broadcaster. Both Botswana TV and Botswana Radio are operated by the Department of Broadcasting Services, which falls under the Office of the President. Both services operate as arms of government. Given how they operate, these services are clearly

state broadcasters and cannot be said to be public broadcasters. It is important to note that the relevant licence conditions of Botswana TV and Botswana Radio do contain public service requirements; however, these are insufficient to change the fundamental nature of the services that remain state as opposed to public broadcasting services.

It should be noted that section 31 of the CRAA exempts state broadcasters from licencing requirements.

3.7 Key legislative provisions governing broadcasting signal distribution

In terms of section 47 of the CRAA, Bocra is responsible for ensuring the rational use of the radio frequency spectrum in Botswana by establishing and maintaining a national radio frequency plan. Bocra is also required to ensure the needs of existing and new radio services are met, monitor radio frequency occupancy and establish standards governing the use of radio frequency bands in accordance with international regulations. Bocra is also required to negotiate with other countries and international organisations in connection with radio frequency management and to establish necessary technical standards in relation to the radio frequency spectrum.

Bocra is also responsible for the licensing of the radio frequency spectrum; this includes setting conditions and tariffs for the allocation of radio frequencies to holders of telecommunications licences, allocating radio frequencies in a manner which will avoid harmful interference and ensuring that enough radio frequency is available for government and non-government use.

3.8 Legislation that threatens a journalist's duty to protect his or her sources

A journalist's sources are the lifeblood of his or her profession. Without trusted sources, a journalist cannot obtain information that is not already in the public domain. However, sources will often only be prepared to provide critical information if they are confident that their identities will remain confidential and will be respected and protected by a journalist. This is particularly true of whistleblowers, inside sources that can provide journalists with information regarding illegal activities, whether by company or government personnel. Consequently, democratic countries often provide special protection for journalists' sources. It is recognised that, without such protection, information that the public needs to know would probably not be given to journalists.

3.8.1 Criminal Procedure and Evidence Act, Act 52 of 1938

The Criminal Procedure and Evidence Act (CPEA) was enacted prior to Botswana's independence but has been amended numerous times since then. Several provisions of the CPEA might be used to compel a journalist to reveal confidential sources:

- ▶ Section 54 of the CPEA allows a judicial officer presiding in any criminal proceedings to issue an order directing a police officer to take possession of any book, document or thing which is required in evidence in the proceeding. Failure to comply with an order to hand over any book, document or thing is an offence punishable by fine or, if the fine is not paid, imprisonment.
- ▶ Section 214 of the CPEA provides that every person is compelled to give evidence in any criminal case in any court in Botswana or before a magistrate on a preparatory examination, except those who are expressly excluded (for example, lunatics, the insane or the spouse of an accused).
- ▶ Section 65 of the CPEA allows a public prosecutor or magistrate to require the clerk of the court to subpoena any person to attend a preparatory examination to give evidence or to produce any book or document. In this regard:
 - ▶ if any persons fail to obey the subpoena, then the magistrate in charge of the preparatory examination can issue a warrant for their arrest, in terms of section 66 of the CPEA
 - ▶ if a person refuses to answer any questions or produce any document at a preparatory examination, then the magistrate may order that the person be imprisoned for up to eight days at a time until the person consents to answer the question or produces the document, in terms of section 68 of the CPEA.
- ▶ Similarly, section 201 of the CPEA allows the court to subpoena any person to attend court to give evidence or to produce any book or document during the course of a criminal trial. In this regard, if a person refuses to answer any questions or produce any document at a trial, then the court may order that the person be imprisoned for up to eight days at a time until the person consents to answer the question or produce the document, in terms of section 202 of the CPEA.

It is, however, imperative to note the provisions of section 257 of the CPEA, which provide that no witness shall be compelled or permitted to give evidence in any criminal proceeding if, as a matter of public policy and concerning the public interest, such a case were being held in the Supreme Court of the Judicature in England and it was found that the evidence would be privileged from disclosure. This allows for reference to English legal practice on matters of public policy regarding compelling witnesses to give evidence.

3.8.2 Penal Code, Law 2 of 1964

The Penal Code was enacted before Botswana's independence but has been amended numerous times since then. Part II of the Penal Code sets out a list of crimes. Division II of Part II contains Offences Against the Administration of Lawful Authority, the second part of which is headed Offences Relating to the Administration of Justice. Section 123 of the Penal Code falls under that heading and deals with offences relating to judicial proceedings. In terms of section 123(1)(b), it is an offence to refuse to answer a question or produce a document if

one has been called upon to give evidence in a judicial proceeding. The penalty is imprisonment and, if this takes place before the court, an additional fine.

3.8.3 National Security Act, Act 11 of 1986

Section 13(1) of the National Security Act provides that where the director of public prosecutions is satisfied that there are reasonable grounds for suspecting that an offence under the National Security Act has been or is about to be committed and that a particular person can furnish information about the matter, he or she may require a named police officer to compel that person to give such information to the police officer in writing. Failure to disclose the information to the named police officer is an offence, and anyone found guilty of either failing to comply or giving false information is liable to a period of imprisonment (section 18).

3.8.4 Cybercrime and Computer Related Crimes Act, Act 22 of 2007

Section 22 of the Cybercrime Act empowers a police officer, or any person authorised by the commissioner of police or by the director of the Directorate on Corruption or Economic Crime, to apply in writing to a judicial officer for an order compelling, among other things, a person to submit specified data in that person's possession, which is stored on a computer or computer system.

Clearly, these provisions might well conflict with a journalist's ethical obligation to protect his or her sources. However, it is important to note that whether or not requiring a journalist to reveal a source is, in fact, an unconstitutional violation of the right to freedom of expression depends on the particular circumstances in each case, particularly on whether the information is available from any other source. Consequently, it is extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the constitution.

3.9 Generally applicable legislation that prohibits the publication of certain kinds of information

Several statutes contain provisions which, looked at closely, undermine the public's right to receive and the media's right to publish information. These statutes target or prohibit the publication of certain kinds of information, including:

- ▶ information relating to legal proceedings
- ▶ information relating to defence, security, prisons, the administration of justice, public safety, public order, sedition, 'alarming' information, defamation of foreign princes or insults to Botswana
- ▶ information which is obscene or contrary to public morality
- ▶ information which constitutes criminal defamation
- ▶ information which poses a danger to public health

- ▶ information which promotes hatred
- ▶ information which incites violence or disobedience of the law
- ▶ information which wrongfully induces a boycott
- ▶ information with intent to wound religious feelings
- ▶ information that relates to economic crime
- ▶ information by public officials, and
- ▶ information that the speaker of the National Assembly has ruled out of order.

3.9.1 Prohibition on the publication of information relating to legal proceedings

In terms of section 123(1)(e) of the Penal Code, Law 2 of 1964, it is an offence to publish a report of the evidence taken in any judicial proceeding which has been directed to be held in private. The penalty is imprisonment.

3.9.2 Prohibition on the publication of state security-related information

Penal Code, Law 2 of 1964

Division I of Part II of the Penal Code contains Offences Against Public Order, which is divided into three parts:

- ▶ treason and other crimes against state authority
- ▶ offences affecting relations with foreign states and external tranquillity
- ▶ unlawful societies and assemblies, riots and other offences against public tranquillity.

The prohibitions on publication relating to the above grounds are dealt with in turn.

Treason and other crimes against state authority

Prohibited publications

In terms of section 47(1) of the Penal Code, if the president believes that a publication is contrary to the public interest (defined in section 47(8) as including being in the interests of defence, public safety and public order), he may, in his absolute discretion, declare it to be a prohibited publication. Note that:

- ▶ the order must be published in the Gazette and such local newspapers as he considers necessary
- ▶ the order can declare the following to be prohibited publications:

- ▶ a particular publication
- ▶ a series of publications or
- ▶ all publications published by a particular person or association
- ▶ if the order specifies the name of a periodical publication, then all subsequent issues and any substitution thereof will also be prohibited publications (unless a contrary intention is expressly stated), section 47(2)
- ▶ if the order prohibits all the publications of any class published by a specified person, then the order applies to all publications published after the date of the order too, section 47(3)
- ▶ any person who prints, imports, publishes, sells, supplies, or even possesses a prohibited publication is guilty of an offence and is liable, on conviction, to imprisonment, section 48
- ▶ section 49 empowers any police or administrative officer to seize any prohibited publication.

An obvious problem with the provisions of section 47 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to defence, public safety or public order; the president merely has to believe this is the case before he makes an order prohibiting a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

Seditious publications

Section 51(1)(c) of the Penal Code provides, among other things, that any person who prints, publishes, sells or distributes a seditious publication is guilty of an offence and is liable to imprisonment. It should be noted that section 51(1)(d) provides that any person who imports a seditious publication is guilty of an offence 'unless he has no reason to believe that is seditious'. In terms of section 52(2) no person shall be prosecuted under section 51 of the Penal Code without the written consent of the Director of Public Prosecutions.

Furthermore, any seditious publication is to be forfeited to the state. Note that:

- ▶ In terms of section 50(1), a seditious intention is an intention, among others, to:
 - ▶ excite disaffection against the president or government of Botswana
 - ▶ excite the inhabitants of Botswana to procure the alteration, by illegal means, of any matter established by law
 - ▶ excite disaffection against the administration of justice in Botswana
 - ▶ promote feelings of ill-will or hostility between different classes of the population of Botswana

- ▶ raise discontent or disaffection among the inhabitants of Botswana.
- ▶ Section 50(1) also explicitly provides that a publication is not seditious by reason only that it intends to:
 - ▶ show the president has been misled or is mistaken in any of his measures
 - ▶ point out errors or defects in the government or Constitution of Botswana, or in the legislation or administration of justice in Botswana, with a view to remedying these
 - ▶ persuade the inhabitants of Botswana to attempt to procure changes by lawful means
 - ▶ point out, with a view to their removal, any matters which are producing feelings of ill-will between different classes in the population.

Alarming publications

Section 59(1) of the Penal Code provides, among other things, that any person who publishes any false statement, rumour or report that is likely to cause fear and alarm to the public or to disturb the public peace, is guilty of an offence. Note, however, that section 59(2) specifically provides a defence to this offence, namely, that before publication, the person took 'such measures to verify the accuracy of such statement, rumour or report as to lead him reasonably to believe that it was true'.

Defamation of foreign princes

Section 60 of the Penal Code falls under the heading Offences Affecting Relations with Foreign States and External Tranquillity. It makes it an offence to publish anything tending to degrade, revile, expose to hatred or contempt any foreign prince, potentate, ambassador or other foreign dignitary, with the intent to disturb the peace and friendship between Botswana and that person's country.

Insults to Botswana

Section 91 of the Penal Code falls under the heading Unlawful Societies, Unlawful Assemblies, Riots and Other Offences against Public Tranquillity. It makes it an offence to publish any writing with intent to insult, or bring into contempt or ridicule, the arms or ensigns armorial, the national flag, the standard of the president or the national anthem of Botswana. The penalty for this offence is a fine.

National Security Act, Act 11 of 1986

The National Security Act contains several provisions that not only prohibit the publication of certain information, but which could also hinder the media's ability to perform its news-gathering functions. In this regard:

Activities prejudicial to Botswana

Section 3 of the National Security Act sets out a list of activities that are prejudicial

to Botswana if they are for 'any purpose prejudicial to the safety or interests of Botswana'. The penalty for violating this provision is a term of imprisonment. The activities that are particularly relevant to the media include:

- ▶ being in, or in the vicinity of, a 'prohibited place'. Note that this means a place where any work of defence is taking place, or any place declared to be a prohibited place by the president
- ▶ making a sketch or note that might be useful to a foreign power or disaffected person (that is, someone carrying on 'seditious activity')
- ▶ obtaining or publishing any official secret codes, passwords, documents or information that might be useful to a foreign power or disaffected person (that is, someone carrying on 'seditious activity'), or
- ▶ hinders or interferes with, or does any act, which is likely to damage, hinder or interfere with any necessary service.

Wrongful communication of information

A list of prohibited communication-related issues is set out in section 4 of the National Security Act. The penalty for violating this provision is a term of imprisonment. The activities that are particularly relevant to the media include the following:

- ▶ Having in one's possession secret official codes, passwords, documents or information that relate to a prohibited place or which has been obtained in contravention of the National Security Act, and communicating the code, password, document or information to any unauthorised person or retaining it when having no right to do so, section 4(1). This pertains specifically to the:
 - ▶ use of information in his or her possession for the benefit of any foreign power or in any other manner or for any purpose prejudicial to the safety or interests of Botswana
 - ▶ communication of any code, password, sketch, plan, models, article, note, document or information to any person other than to whom he or she is authorised in the interest of Botswana
 - ▶ failure to take reasonable care of or endanger the safety of, the sketch, plan, model, article, note, document, official secret codes, password, or information
 - ▶ retention of the sketch, plan, model, note, document or article in his or her possession or control when they have no right to retain it or when it is contrary to their duty to retain it, or fails to comply with any lawful directions issued regarding its return or disposal.
- ▶ Having in one's possession secret official codes, passwords, documents or information that relate to munitions of war, and communicating same to any person for any purpose prejudicial to the safety or interests of Botswana, section 4(2).

- ▶ Receiving any official secret codes, passwords, documents or information knowing or having reasonable grounds to believe that the codes, passwords, documents or information have been communicated in contravention of the National Security Act, section 4(3).
- ▶ Communicating any information relating to the defence or security of Botswana to any person other than someone to whom he is authorised by an authorised officer to communicate it to or to whom it is, in the interests of Botswana, his duty to communicate it to, section 4(4).

Protection of classified information

Section 5 of the National Security Act prohibits the communication of any classified matter to any person other than someone to whom he is authorised by an authorised officer to communicate it to or to whom it is, in the interests of Botswana, his duty to communicate it to.

Intelligence and Security Service Act, Act 16 of 2007

Although not directed at the media itself, certain of the provisions of the Intelligence and Security Service Act relate to the unauthorised disclosure of intelligence-related information and could indirectly hamper the media's reporting ability. However, it is important to note that the provisions do comply with internationally accepted grounds for preventing the disclosure of security-related information:

- ▶ section 19 prohibits the disclosure by any intelligence or security service officer (or someone who has held such a position) of the identity of a confidential source of information to the Directorate of Intelligence and Security or someone who is involved in covert operational activities of the directorate.
- ▶ section 20 prohibits, among other things, the disclosure by an officer or a member of the support staff of the intelligence or security services of any information gained by virtue of his or her employment.
- ▶ failure to comply with sections 19 or 20 is an offence, and the penalty is a term of imprisonment.

3.9.3 Prohibition on the publication of information which is obscene or contrary to public morality

Penal Code, Law 2 of 1964

Expression contrary to public morality

Section 47 of the Penal Code states that if the president is of the opinion that a publication is contrary to the public interest of Botswana, he may at his absolute discretion declare it to be a prohibited publication. This section is relevant here as public morality is included in the definition of public interest as defined in section 47(8) of the Penal Code. Note that:

- ▶ the order must be published in the Gazette and such local newspapers as he or she considers necessary
- ▶ the order can declare the following to be prohibited publications:
 - ▶ a particular publication
 - ▶ a series of publications
 - ▶ all publications published by a particular person or association
- ▶ if the order specifies the name of a periodical publication, then all subsequent issues and any substitution thereof will also be prohibited publications (unless a contrary intention is expressly stated), section 47(2)
- ▶ if the order prohibits all the publications of any class published by a specified person, then the order applies to all publications published after the date of the order too, section 47(3)
- ▶ any person who prints, imports, publishes, sells, supplies or even possesses a prohibited publication is guilty of an offence and is liable, on conviction, to imprisonment, section 48
- ▶ section 49 empowers any police or administrative officer to seize any prohibited publication.

An obvious problem with the provisions of section 47 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to defence, public safety or public order; the president just has to believe this is the case before he makes an order prohibiting a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

Traffic in obscene publications

Division III of Part II of the Penal Code contains Offences Injurious to the Public in General, the fourth part of which is headed Nuisances and Offences against Health and Convenience. Section 178 of the Penal Code falls under that heading and deals with traffic in obscene publications. In terms of section 178(1)(a), it is an offence 'for the purpose of distribution' to produce or have in one's possession 'any one or more obscene writings, printed matter, photographs and, cinematograph films, intending to corrupt morals'. The penalty is a fine or imprisonment.

Cybercrime and Computer Related Crimes Act, Act 22 of 2007

Section 16 of the Cybercrime Act regulates the electronic traffic in pornographic and obscene material. In terms of section 16(2), any person who, among other things:

- ▶ publishes pornographic or obscene material through a computer or computer system

- ▶ possesses pornographic or obscene material in a computer or computer system or on a computer data storage medium
- ▶ accesses pornographic or obscene material through a computer or computer system

is guilty of an offence and the penalty is a fine, imprisonment or both. Note that in terms of section 16(3), where the material relates to child pornography, the penalty fines are higher and periods of imprisonment longer.

3.9.4 Prohibitions on the publication of information which constitutes criminal defamation

Part II, Division III of the Penal Code contains Offences Injurious to the Public in General, the fifth part of which is headed Defamation and makes criminal defamation an offence.

Definition of criminal defamation

Section 192 of the Penal Code provides for the offence of criminal defamation, which is, in the part that is relevant for the media, the unlawful publication by print or writing of any defamatory matter (defined in section 193 as matter 'likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation') concerning another person, with the intent to defame that person.

When is the publication of defamatory matter unlawful?

Section 195 provides that any publication of defamatory matter will be unlawful unless:

- ▶ the matter is true, and publication was in the public interest
- ▶ publication is privileged.

There are two types of privilege recognised under the Penal Code, absolute privilege and conditional privilege.

Absolute privilege

In terms of section 196 of the Penal Code, the publication of defamatory matter is privileged in the following cases:

- ▶ publications published under the authority of the president in any official document
- ▶ publications in the National Assembly or *Ntlo ya Dikgosi* by any member thereof
- ▶ publications by order of the National Assembly
- ▶ publications to and by a person having authority over an individual who is

subject to naval, military or air force discipline about that person's conduct

- ▶ publications arising from judicial proceedings
- ▶ fair reports of anything said, done or published in the National Assembly or the *Ntlo ya Dikgosi*
- ▶ if the publisher was legally bound to publish the matter.

Once the publication of defamatory matter is absolutely privileged, it is immaterial if the matter is false or published in bad faith.

Conditional privilege

In terms of section 197 of the Penal Code, the publication of defamatory matter is conditionally privileged provided:

- ▶ it is published in good faith
- ▶ the relationship between the parties by and to whom the publication is made is such that the persons publishing and receiving the matter are under a legal, moral or social duty to publish/receive same or have a legitimate personal interest in publishing/receiving same
- ▶ publication does not exceed, either in extent or subject matter, what is reasonably sufficient for the occasion.

In addition, the publication of defamatory matter is conditionally privileged if the matter published:

- ▶ is a fair and substantially accurate report of court proceedings which were not being held *in camera*
- ▶ is a copy or a fair abstract of any matter which has previously been published and which was absolutely privileged
- ▶ is an expression of opinion in good faith as to the conduct of a person of a judicial, official or other public capacity or as to his personal character, in so far as it appears in such content
- ▶ is an expression of opinion in good faith as to the conduct of a person as disclosed by evidence given in a public legal proceeding, or as to the conduct or character of any person as a party or witness in any such proceeding
- ▶ is an expression of opinion in good faith as to the merits of any book, writing, painting, speech or other work, performance or act published or publicly made or otherwise submitted by the person to the judgment of the public, or as to the character of the person in so far as it appears in such work
- ▶ is a censure passed by a person in good faith on the conduct or character of another person in any matter where he or she has authority over that person

- ▶ is a complaint or accusation about an individual's conduct or character made by a person of good faith to a person having authority over the individual and having authority to hear such complaints
- ▶ is in good faith for the protection of the rights or interests of the person
 - ▶ publishing it
 - ▶ to whom it was published.

Definition of good faith

In terms of section 198 of the Penal Code, a publication of defamatory matter will not be deemed to have been made in good faith if it appears that either:

- ▶ the publication was made with an intention to injure to a substantially greater degree than was necessary in the public interest, or for private interest in respect of which a conditional privilege is claimed, or
- ▶ the matter was untrue, and he or she did not believe it to be true (unless there was a duty to publish, irrespective of whether it was true or false).

However, in terms of section 199 of the Penal Code, there is a presumption of good faith if the defamatory matter was published on a privileged occasion unless the contrary is proved.

3.9.5 Prohibition on the publication of information which poses a danger to public health

Section 47 of the Penal Code (discussed above) states that if the president is of the opinion that a publication is contrary to the public interest of Botswana, he may at his absolute discretion declare it to be a prohibited publication. This section is relevant here as public health is included in the definition of public interest in section 47(8) of the Penal Code. Note that:

- ▶ the order must be published in the Gazette and such local newspapers as he or she considers necessary
- ▶ the order can declare the following to be prohibited publications:
 - ▶ a particular publication
 - ▶ a series of publications
 - ▶ all publications published by a particular person or association
- ▶ if the order specifies the name of a periodical publication, then all subsequent issues and any substitution thereof will also be prohibited publications (unless a contrary intention is expressly stated), section 47(2)
- ▶ if the order prohibits all the publications of any class published by a specified person, then the order applies to all publications published after the date of the order too, section 47(3)

- ▶ any person who prints, imports, publishes, sells, supplies or even possesses a prohibited publication is guilty of an offence and is liable, on conviction, to imprisonment for up to three years, section 48
- ▶ section 49 empowers any police or administrative officer to seize any prohibited publication.

An obvious problem with the provisions of section 47 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to defence, public safety or public order; the president merely has to believe this is the case before he makes an order prohibiting a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

3.9.6 Prohibition on the publication of information which promotes hatred

Part II, Division I of the Penal Code II contains Offences against Public Order, which is divided into three parts, one of which is Unlawful Societies, Unlawful Assemblies, Riots and Other Offences against Public Tranquillity. Section 92 of this part makes it an offence to publish any writing expressing ridicule or contempt for any person mainly because of their race, tribe, place of origin, colour or creed. The penalty is a fine.

3.9.7 Prohibition on the publication of information which incites violence or disobedience of the law

Part II, Division I of the Penal Code contains Offences against Public Order, which is divided into three parts, one of which is Unlawful Societies, Unlawful Assemblies, Riots and Other Offences against Public Tranquillity. Section 96 of this part makes it an offence to publish any words implying that it is desirable to:

- ▶ bring about the death or physical injury to any person or class, community or body of persons
- ▶ damage or destroy any property
- ▶ defeat by violence, or other unlawful means, the enforcement of any written law
- ▶ defy or disobey any written law or lawful authority.

The penalty is a period of imprisonment.

An obvious problem with the provisions of section 96 of the Penal Code is that they go far beyond internationally accepted grounds for prohibiting expression. This is particularly so with the prohibition against words implying that it is desirable to disobey written laws.

3.9.8 Prohibition on the publication of information which wrongfully induces a boycott

Part II, Division I of the Penal Code II contains Offences against Public Order, which is divided into three parts, one of which is Unlawful Societies, Unlawful Assemblies, Riots and Other Offences against Public Tranquillity. Section 98(2) of this part makes it an offence to further any designated boycott. Section 98(1) contains the provisions setting out what a designated boycott is. Essentially, it is one declared to be such by the president if he or she is satisfied that it is intended, among other things, to:

- ▶ excite disaffection against the government
- ▶ endanger public order
- ▶ jeopardise economic life
- ▶ raise discontent or disaffection among the inhabitants of Botswana
- ▶ engender feelings of hostility between different classes or races of the population.

The penalty is a period of imprisonment.

One problem with the provisions of section 98 of the Penal Code is that they go far beyond internationally accepted grounds for prohibiting expression. Most democracies accept that boycotts are, generally speaking, a legitimate form of non-violent direct protest action. It should not, therefore, be an offence for a publication to merely support a boycott.

Another problem with the provisions of section 98 of the Penal Code is that they are not objective. In other words, the boycott does not have to pose a genuine, realistic or objective threat to, for example, public order or to Botswana's economic life; the president just has to be satisfied that this is the case before he or she makes an order designating the boycott. This does not comply with internationally accepted standards for prohibiting the publication of information.

3.9.9 Prohibition on the publication of information which intends to wound religious feelings

Part II, Division III of the Penal Code contains Offences Injurious to the Public in General, the first part of which is headed Offences Relating to Religion. Section 140 of the Penal Code falls under that heading and deals with 'Writing or uttering words with intent to wound religious feelings.' In terms of section 140, it is an offence to '[write] any word' with 'the deliberate intention of wounding the religious feelings of any other person.' The penalty is a period of imprisonment.

3.9.10 Prohibition on the publication of information which relates to economic crime

Section 44 of the Corruption and Economic Crime Act, Act 13 of 1994, makes it an offence to publish, without lawful authority or reasonable excuse:

- ▶ the identity of any person who is the subject of an investigation in respect of an offence suspected to have been committed by that person under the Act
- ▶ any details of an investigation in respect of an offence under the Act.

The penalty on conviction is a fine, imprisonment, or both.

3.9.11 Prohibition on the publication of information by public officials

Section 34 of the Public Service Act, Act 30 of 1998, requires every public officer to comply with certain rules of conduct. Section 34 states that no public employee may, except with due authority, be interviewed on any matter relating to defence or the military or directly or indirectly reveal any information that has come to his or her knowledge, except in the proper discharge of his or her duties.

Section 63(1) of the Public Service Act prohibits any person from publishing or disclosing any information without written permission from the minister, except in the exercise of his or her duties. Any person who does disclose information without written permission is guilty of an offence, the penalty for which is a fine or imprisonment.

This extremely broad prohibition effectively renders the government unable to communicate with the media, except via official channels or spokespeople. The prohibition is rendered more draconian by the fact that failure to comply is an offence which carries a penalty of a fine or imprisonment, or both.

3.9.12 Prohibition on the publication of information which the speaker of the National Assembly has ruled out of order

Section 29 of the Powers and Privileges Proclamation 24 of 1961, provides that where the speaker of the National Assembly rules that any words used by a member are out of order, he or she may also order that such words, or any words from which they arose, or arising out of them, shall not be published in any matter. Publication thereof is an offence, and on conviction, the person concerned would be liable to a fine or imprisonment.

3.10 Legislation prohibiting interception of communication

The legality of intercepting communications is becoming an increasingly important issue for the media. This issue is governed by the Cybercrime and Computer Related Crimes Act, Act 22 of 2007.

Section 9 of the Cybercrime Act makes it an offence to intentionally (and without

lawful excuse or justification) intercept (defined as acquiring the content of any communication through the use of any device):

- ▶ any non-public transmission to, from or in a computer or computer system
- ▶ electro-magnetic emissions that are carrying data from a computer or computer system.

The penalty is a fine, imprisonment or both.

3.11 Legislation that specifically assists the media in performing its functions

In countries that are committed to democracy, governments pass legislation that specifically promotes accountability and transparency of both public and private institutions. Such statutes, while not specifically designed for use by the media, can and often are used by the media to uncover and publicise information in the public interest.

Botswana has yet to enact access to information legislation.

3.11.1 National Assembly (Powers and Privileges), Proclamation 24 of 1961

Section 25 of the Powers and Privileges Proclamation provides that in any proceedings instituted for publishing a report, summary or abstract of any proceedings in the National Assembly, the defence is that this was done in good faith and without malice. Although this provision is somewhat unclear, it allows the media to report (in good faith) on the activities of the National Assembly without fear of litigation as a result.

3.11.2 Whistleblowing Act, Act No. 9 of 2016

The Whistleblowing Act intends to provide for how a person may disclose conduct contrary to the public interest; to provide for the manner of reporting and investigating disclosures of impropriety; and the protection against victimisation of persons who make the disclosures.

Section 3 of the Whistleblowing Act sets out the type of information that secures whistleblower protection. This includes information that the whistleblower has reasonable cause to believe demonstrates that:

- ▶ a criminal or unlawful act has been, is being or is likely to be committed
- ▶ another person has failed, is failing or is likely to fail to comply with any obligation to which that person is subject
- ▶ a miscarriage of justice has occurred, is being or is likely to occur
- ▶ the health or safety of any person has been, is being or is likely to be endangered

- ▶ the environment has been, is being or is likely to be endangered
- ▶ the conduct of a person, public officer or not, could adversely affect, either directly or indirectly, the honest or impartial performance of official functions by a person, public officer or public body
- ▶ dishonesty or partiality on the part of a public officer in the performance of his functions
- ▶ conduct of a person or public body that amounts to a breach of public trust
- ▶ conduct of a public officer, or former public officer or public body that amounts to a misuse of information or material acquired in the course of the performance of public functions whether for the benefit of that person, public body or otherwise
- ▶ conduct of a person that amounts to maladministration
- ▶ conduct that would if proven, be a criminal offence, a disciplinary offence, a serious and substantial waste or abuse of financial or other public resources or assets or reasonable grounds for dismissal.

Section 4 of the Whistleblowing Act provides that disclosure of impropriety is protected if it is made in good faith, the whistleblower reasonably believes the disclosure is true, and the disclosure is made to an authorised person who is appointed, in terms of section 8 of the Whistleblowing Act, by the Directorate on Corruption and Economic Crime, the Auditor-General, the Directorate of Intelligence and Security, the Botswana Police Service, the Ombudsman, the Botswana Revenue Service, the Financial Intelligence Agency, the Competition Authority, the Botswana Defence Force and the Botswana Prisons Services. There is no provision for the press or media to be counted as an authorised person to whom disclosures can be made.

Section 5 of the Whistleblowing Act allows for the discontinuation of an investigation of a disclosure by a whistleblower by an authorised person if he is of the opinion that the disclosure was made maliciously, in bad faith or for an illegal purpose. In such cases, the disclosure is not protected under this Whistleblowing Act. Section 6 of the Whistleblowing Act states a disclosure made that questions the merits of government policy is not protected by the Whistleblowing Act.

Section 9 of the Whistleblowing Act outlines the procedure for making a disclosure, declaring that it can be made either orally or in writing. A disclosure of impropriety must contain a number of details which are set out in that section.

Section 14 of the Whistleblowing Act allows for the protection of whistleblowers. This section dictates that a whistleblower shall not be subjected to victimisation by his employer, fellow employees, or any other person. A whistleblower will be considered to have been victimised if:

- ▶ the whistleblower being an employee:
 - ▶ is dismissed or suspended

- ▶ has his or her post declared redundant
- ▶ is denied promotion
- ▶ is transferred
- ▶ is harassed or intimidated
- ▶ is threatened
- ▶ is discriminated against
- ▶ the whistleblower not being an employee is:
 - ▶ harassed
 - ▶ intimidated
 - ▶ discriminated against.

It should be noted that in section 4(3) of the Whistleblowing Act it is indicated that a whistleblower will not be considered having been subjected to victimisation should his or her employer and fellow employees, against whom the victimisation charge is levied, have the right under the law to take the action complained about and it is determined to be unrelated to the disclosure of the impropriety by the whistleblower.

Section 21 makes it an offence to victimise a whistleblower, and the penalty is a fine, imprisonment or both.

Section 15 of the Whistleblowing Act determines that a whistleblower shall not be liable to either civil or criminal proceedings in respect of the disclosure of impropriety.

Section 17 of the Whistleblowing Act states that a person who knowingly makes a disclosure that is false commits an offence. The penalty for this offence is a fine, imprisonment or both.

Section 18 of the Whistleblowing Act states that any person who unlawfully discloses, directly or indirectly, the identity of a whistleblower commits an offence. The penalty for this offence is a fine, imprisonment or both.

Section 19 of the Whistleblowing Act states that a whistleblower who, after making a disclosure of impropriety under this Act, discloses the same information to a third party, commits an offence. The penalty for this offence is a fine or a term of imprisonment or both. This is noteworthy because it criminalises a whistleblower going to the media even if no action is taken by the authorised person on the information provided by the whistleblower.

Section 22 of the Whistleblowing Act states that an authorised person who wilfully fails to take action on receipt of a disclosure made to him or her commits an offence. The penalty for this offence is a fine, imprisonment or both.

4 Regulations affecting the broadcast media

In this section, you will learn:

- ▷ what regulations are
- ▷ regulations governing broadcasting content
- ▷ other aspects of broadcasting-related regulations

4.1 What regulations are

Regulations are subordinate legislation. They are legal rules made in terms of a statute. Broadcasting regulations and rules are legal mechanisms for allowing a body other than parliament to make legally binding rules governing an industry or sector, without parliament having to pass a specific statute thereon. As is more fully set out elsewhere in this chapter, the empowering statute, the CRAA, empowers both Bocra and the minister to make regulations regarding broadcasting issues.

4.2 Regulations governing broadcasting content

4.2.1 The Broadcasting Regulations, promulgated on 29 October 2004 are contained in Chapter 72:04 — Broadcasting: Subsidiary Legislation (Broadcasting Regulations)

The Broadcasting Regulations contain several provisions setting out requirements to which broadcasting licensees in Botswana must adhere. Note that the regulations predate the CRAA as they were originally prescribed by the minister under the authority of the Broadcasting Act. The Broadcasting Regulations cover many issues, including in brief:

Advertising, sponsorships and infomercials

In terms of sections 5–8 of the Broadcasting Regulations, licensees are required to follow certain rules when broadcasting advertisements, sponsored programmes and infomercials.

Section 5 specifically focuses on ‘fairness in advertising’ and requires that any licensee that broadcasts advertising ensure that the advertisements are lawful, honest, decent and in conformity with the principles of fair competition in business. Licensees are specifically required to ensure that the advertisements they broadcast do not contain material that may mislead the public or unfairly attack

or discredit other advertisers. Licensees are forbidden from unfairly discriminating against, or in favour of, any advertiser.

In terms of section 6 of the Broadcasting Regulations, when scheduling advertisements, licensees are required to ensure the advertisements are suitable for children during times when children are expected to be watching or listening. Advertisements are required to be clearly distinguishable from broadcast programmes.

In terms of section 7 of the Broadcasting Regulations, licensees may not accept sponsorships for news programming but may accept sponsorships for weather, financial or traffic broadcasts. Licensees are required to ensure that sponsorship of an informative programme does not compromise its impartiality or accuracy. Licensees may not discriminate in favour of or against any particular sponsor. Sponsored programmes must be clearly acknowledged both before and after the programme, and any link between the commercial activities of the sponsor and the content of the broadcast must be made clear. It should be noted that section 7(5) of the Broadcasting Regulations prohibits licensees from broadcasting programming sponsored by a political party.

In terms of section 8 of the Broadcasting Regulations infomercials are prohibited from being broadcast:

- ▶ for more than three hours a day
- ▶ during prime time or
- ▶ during children's programming.

Infomercials must be distinguishable from other types of programming and licensees shall ensure that infomercials are lawful, honest, decent and in conformity with the principles of fair competition in business.

Local content

In terms of section 10(1) of the Broadcasting Regulations, except as otherwise stated in their licence conditions, licensees are required to air 20% local programmes for television broadcasts and 40% local programmes for radio broadcasts. Section 10(3) stipulates that except otherwise stated as a specific licence condition, local news is required to constitute the majority of a licensee's news broadcast.

Broadcasting standards

Section 11 of the Broadcasting Regulations prohibit licensees from broadcasting material that is offensive to good taste or decency, contains frequent use of offensive or blasphemous language, presents sexual matters in an explicit or offensive way, glorifies or depicts violence in an offensive manner or is likely to incite hatred or violence on account of race, ethnicity, nationality, gender, sexual preference, age, disability, religion or culture.

Protection of children

In terms of section 12 of the Broadcasting Regulations, licensees are required to ensure that due care is exercised to avoid broadcasting content that is harmful to children at times when children can be expected to be watching or listening.

Accurate, fair and impartial reporting

In terms of section 13 of the Broadcasting Regulations, licensees are required to report news and information that is accurate, fair and impartial.

In terms of section 14 of the Broadcasting Regulations, licensees shall not broadcast reports not based on fact unless this is clearly stated. Where the accuracy of a report is not possible to determine, this must be mentioned in the report and licensees may not broadcast any report in which there is sufficient doubt to its accuracy, and it is possible to verify accuracy prior to broadcast.

In cases where there has been a factual inaccuracy, section 15 of the Broadcasting Regulations requires the licensee to broadcast a correction without reservation as soon as possible after the error was committed and with the same degree of prominence and timing as the original report and shall include an apology.

Reporting on controversial issues

In terms of section 16 of the Broadcasting Regulations, when licensees broadcast reports on controversial issues, they are required to provide a wide range of views and opinions on the subject, either in the same programme or else in a series of programmes. Any person or organisation whose views have been criticised on controversial issues of politics, industrial or public importance, and who makes representations in a reasonable period to the licensee, must be offered the opportunity to reply by the licensee. The reply must be broadcast with the same degree of prominence and timing as the original report.

Conduct of interviews

In terms of section 17 of the Broadcasting Regulations, persons being interviewed must be advised of the subject of the interview and informed before the interview whether the interview is to be recorded or broadcast live. In cases where a minor is being interviewed, permission must be requested from the parent or guardian of the minor. Licensees must exercise sensitivity when conducting interviews with the bereaved and survivors or witnesses of trauma.

Comments

In terms of section 18 of the Broadcasting Regulations, any comments that are broadcast by a licensee, or by any person invited by a licensee, shall be presented in a manner that clearly indicates that it is a comment and that it is made on facts which are clearly stated.

Invasion of privacy

In terms of section 19 of the Broadcasting Regulations, licensees shall not broadcast any material which invades a person's privacy unless there is a justifiable reason, in the public interest, for doing so.

Consent to broadcast

In terms of section 20 of the Broadcasting Regulations, licensees shall not broadcast any information acquired from a person without that person's consent, unless the information so acquired is essential to establish the credibility and authority of a source, or where the information is clearly in the public interest.

Sexual offences

In terms of section 21 of the Broadcasting Regulations, licensees may not disclose, in a broadcast, the identity of a victim of a sexual offence unless such victim consents, in writing, to the disclosure of his or her identity, and may not disclose, in a broadcast, the identity of a minor where such minor is a victim of a sexual offence.

Licensees must avoid the use of unnecessary or repetitive detail when broadcasting the circumstances of a sexual offence.

Any person who fails to comply with or contravenes a provision of this regulation shall be guilty of an offence and liable to a fine, imprisonment or both.

Payment of criminals

In terms of section 22 of the Broadcasting Regulations, licensees may not pay any person involved in a crime, or any person who has been convicted of a criminal offence, to obtain information unless there is a compelling reason in the public interest to do so.

It is critical to note that sections 11 to 22 of the Broadcasting Regulations (dealt with above) deal with a range of programming restrictions and requirements that have been essentially replicated in later regulations containing the Broadcasters' Code of Practice which is dealt with below. However, the Broadcasters' Code of Practice applies only to commercial television and radio broadcasters, and so the above content-related requirements are important as they are the only mechanism for holding public/state and community broadcasters accountable for content-related issues.

Public notices of emergencies or public disaster announcements

In terms of section 23 of the Broadcasting Regulations, licensees shall provide public notice of emergency service or a public disaster announcement made by any Government department, free of charge.

Special event broadcast licence

In terms of section 24 of the Broadcastings Regulations, a person wishing to apply for a special event broadcasting licence must do so to Bocra at least ten working days before the event.

There are different fees payable, depending on whether the applicant is a profit- or non-profit-making entity.

External satellite feed

In terms of section 25 of the Broadcasting Regulations, licensees shall not carry out an external satellite feed without a special event broadcast licence. Licensees can apply for a special event broadcast licence to Bocra, in writing, to carry out an external satellite feed.

Application for special event broadcasting licences to carry out an external satellite feed must be accompanied by the name of the licensee and the type of external satellite feed which the licensee intends to carry out. Successful applicants will be required to pay a licence fee.

Where a licensee's application is rejected by Bocra, the licensee may appeal within 14 days to the minister who will decide on whether or not to grant such an application.

A foreign broadcaster which transmits audio and visual broadcasts via satellite or other remote transmission modes shall pay radio licence and service fees, which shall be determined on the basis of reciprocity of fees.

4.2.2 Broadcasters' Code of Practice (2018)

The Broadcasters' Code of Practice sets out the ethical and community standards to which licenced commercial television and sound broadcasters must adhere

The Broadcasters' Code of Practice is outlined in brief below:

Community Standards, section 1:

- ▶ The licensee shall not broadcast content which, measured by contemporary community standards:
 - ▶ offends against good taste or decency
 - ▶ contains the gratuitous use of offensive language, including blasphemy
 - ▶ presents sexual matters in an explicit and offensive manner
 - ▶ glorifies violence or presents violence in a gratuitous and offensive manner
 - ▶ is likely to incite crime or lead to disorder
 - ▶ is likely to incite or perpetuate hatred or vilify any person or section of

the community on account of race, ethnicity, nationality, gender, sexual preference, age, disability, religion, or culture.

Protection of Children, section 2:

When broadcasting programmes at times where a large number of children may be expected to be watching or listening, a licensee must exercise due care in avoiding content that may disturb or be harmful to children, this includes but is not limited to:

- ▶ offensive language
- ▶ explicit sexual or violent materials, including music with violent or sexually explicit lyrics.

In determining when a large number of children are part of the audience, the licensee shall take into account available audience research as well as the time of broadcast.

Fairness, Accuracy and Impartiality in News and Information Programmes, section 3:

Licensees shall report news and information accurately, fairly and impartially.

News and information shall be presented in the correct context and in a balanced manner without intentional or negligent departure from the facts, whether by:

- ▶ distortion, exaggeration, or misinterpretation
- ▶ material omissions
- ▶ summarising or editing.

The licensee may present as fact only matters which may reasonably be true, having regard to the source of the news or information, and facts shall be broadcast fairly with due regard to context and importance.

Where reports are not based on fact or are founded on opinions, suppositions, rumours or allegations, the licensee shall present it in such a manner as to indicate clearly that this is the case.

Where there is reason to doubt the correctness of a report and it is practicable to verify the correctness thereof, it shall be verified. Where such verification is not practical, the fact shall be mentioned in the report.

Corrections of factual errors shall be broadcast without reservation, as soon as it is reasonably possible after the error has been committed.

Corrections of errors shall be presented with such degree of prominence and timing as may be adequate and fair so as to easily attract attention and shall include an apology where appropriate.

Opinions must be clearly presented as such.

Reporting news and information programmes on controversial issues, section 4:

The licensee shall ensure that, in reporting on controversial issues of political, industrial, or public importance, an appropriate range of views is reported, either in a single programme or a series of programmes, which are as adjacent as reasonably possible.

When covering controversial issues of political, industrial or public importance during phone-in programmes, a licensee shall endeavour to ensure that a wide range of opinions is represented over a reasonable period

A person or organisation whose views have been criticised during a programme on a controversial issue of public importance shall be offered a reasonable opportunity by the licensee to reply to such criticism. Such a reply shall be:

- ▶ given a similar degree of importance
- ▶ broadcast during a similar timeslot as soon as reasonably possible after the original criticism.

For the purposes of this section ‘programme’ includes news bulletins, current affairs and information programmes, interviews and panel and phone-in discussions.

Conduct of Interviews, section 5:

People who are to be interviewed shall be:

- ▶ advised of the subject of the interview
- ▶ informed beforehand whether the interview is to be recorded or broadcast live.

Before conducting an interview with a child, the licensee shall request permission from the child’s parent or guardian to conduct the interview.

The licensee shall exercise due sensitivity in conducting interviews with bereaved persons or survivors or witnesses of traumatic incidents.

Comments, section 6:

- ▶ A comment, whether by the licensee or by a person invited on air by the licensee, shall be presented in a manner that clearly indicates that it is a comment.
- ▶ A comment shall be an honest expression of opinion and shall be made only on facts which are clearly stated.

Privacy, section 7:

The licensee shall not present material which invades a person's privacy unless there are public interest reasons for doing so.

The licensee shall not use information acquired from a person without the person's consent unless the information so acquired is essential to establish the credibility and authority of a source, and where the programme for which the information is required is clearly of important public interest.

Subject to the law, the journalists' convention in relation to the protection of sources which require confidentiality shall be respected.

The licensee shall ensure that the identity of a victim of a sexual offence is not divulged in any broadcast, unless the victim consents, in writing, to the disclosure of his or her identity.

Licensees shall ensure that the identity of a child victim of a sexual offence is not divulged in any broadcast under any circumstances.

The licensee shall avoid gratuitous and repetitive detail in covering sexual offences.

Paying Criminals for Information, section 8:

The licensee shall not pay to obtain information from persons involved in crime or persons who have been engaged in crime unless there is a compelling public interest in doing so.

Prohibition on Party-Political Broadcasts, section 9:

The licensee shall not permit party-political broadcasts under any circumstances except during an election period.

The licensee shall not permit party-political adverts under any circumstances.

Elections, section 10:

Party-political broadcasts: The licensee shall be required to air contesting party-political broadcasts, affording all contesting political parties similar opportunities.

Equitable treatment of political parties by licensees:

- ▶ If during an election period, the programming of any licensee extends to the elections, political parties and issues relevant thereto, the licensee shall provide reasonable opportunities for the discussion of conflicting views and shall treat all political parties equitably.
- ▶ In the event of any criticism against a political party being levelled in a particular programme of any licensee without such party having been afforded an opportunity to respond in the same programme or without the view of such political party being reflected, the licensee concerned shall afford such a party

a reasonable opportunity to reply to the criticism.

- ▶ If within 48 hours before the commencement of the polling period, a licensee intends broadcasting a programme in which a particular political party is criticised, the licensee shall afford the political party a reasonable opportunity to reply in the same programme, or as soon as is reasonably practicable and before polling day,
- ▶ The opportunity to reply shall be broadcast with the same degree of prominence and, where applicable, in substantially the same time slot as the original criticism.

In accordance with Bocra's complaints handling procedure which is found at the end of the Broadcasters' Code of Practice, if a member of the audience has been aggrieved by a broadcaster not adhering to the code while providing the broadcasting service, the member of the audience is required to raise the complaint first with the station manager. In the event that the complaint is not resolved to the audience member's satisfaction, then it should be escalated to Bocra.

4.3 Other aspects of broadcasting-related regulations

4.3.1 The Broadcasting Regulations

Broadcasts conducted without Bocra's authority

In terms of section 26 of the Broadcasting Regulations, licensees shall not conduct any broadcasts, other than those permitted in their licence. Licensees must apply to Bocra, in writing, to conduct broadcasts which are not permitted in their licence.

Applications to broadcast programming outside the scope of a licensee's licence must include the name of the licensee, the date on which the licensee was granted their licence by Bocra and the type of broadcasts which the licensee intends to conduct.

Successful applications will require the licensee to pay an additional annual fee to Bocra.

Licensees whose applications have been rejected by Bocra may appeal to the minister, within 14 days of the rejection, who shall decide on whether or not to grant the application.

Amendment of licence conditions by Bocra

In terms of section 27 of the Broadcasting Regulations, Bocra may amend any licence condition to such extent as may be necessary by virtue of an international agreement or convention to which Botswana is a party; or where the amendment does not cause substantial prejudice to the licensee. Bocra is required to inform the licensee that they intend to amend a licence condition and provide the licensee 30 days' notice of its intention to do so.

Licensees may make a written representation to Bocra in respect of the intended amendment within three months or within a period determined by Bocra.

Amendment of licence conditions at request of licensee

In terms of section 28 of the Broadcasting Regulations, licensees may apply to Bocra to amend their licence conditions at any time.

Applications for the amendment of a licence must include the reasons for the proposed amendment and be accompanied by any relevant documents or information.

Bocra may invite other licensees to make representations on the applicant's proposed amendment; or indicate to Bocra, in writing, whether the proposed amendment, if granted, will be prejudicial to their interests.

Where other licensees make representations on the applicant's intended amendment, such representations shall be delivered to the applicant on the same day.

The applicant shall be given such period as may be determined by Bocra to respond.

Restrictions on dealing with foreign governments

In terms of section 29 of the Broadcasting Regulations, licensees shall not acquire any licence, right, privilege or concession from a foreign government, or enter into any agreement with such government, without the approval of Bocra.

Obligations on different types of broadcasting licensees

Fees payable by different broadcasting licensees

The schedule to the Broadcasting Regulations outlines the different fees payable by each of the different broadcasting licence categories.

Cable broadcasting

In terms of section 30 of the Broadcasting Regulations, a cable owner is required to re-transmit the terrestrial television broadcasts of a local public television service which is licensed in Botswana. A television terrestrial broadcast which is re-transmitted via cable must have the use of at least one channel of a cable network. In cases where the re-transmission of a programme is obligatory, re-transmission shall be via channels that are available to every subscriber to a cable network. In cases where a cable network utilises three or fewer channels, the broadcasts of Botswana Television shall be subject to obligatory transmission.

Cable owners must identify the broadcasts that its subscribers wish to have re-transmitted via the cable network and must broadcast its subscribers' choices. Where there are unutilised channels in a cable network, after a cable owner has broadcast its subscribers' choice of broadcasts, the cable owner may utilise the channels to broadcast any programmes, provided that the cable owner notifies its subscribers of its intentions regarding such use at least two months before the commencement of broadcasting.

Should a majority of a cable owner's subscribers oppose the cable owner's intention to utilise channels to broadcast any programmes, the cable owner may only utilise such channels if it ensures that shielding is provided, at no extra cost, to the subscribers who do not wish to receive the broadcasts.

Community broadcasting

In terms of section 31 of the Broadcasting Regulations, community licensees shall broadcast the following programming services on a community broadcasting service:

- ▶ community programming
- ▶ announcements promoting broadcasting services
- ▶ public service announcements
- ▶ information programmes funded by public service organisations or the government
- ▶ announcements providing information about the programmes to be broadcast on the community broadcasting service channel.

Where a licensee does not broadcast community programming on a community broadcasting service channel, the licensee may distribute the programming service of a local radio station or an educational radio programming service on that channel. This is a very confusing provision because it appears to allow a community radio broadcaster to carry the programming of any existing Botswana radio station, whether public, commercial or otherwise, or educational radio programming.

Commercial broadcasting

In terms of section 32 of the Broadcasting Regulations, commercial licensees who engage in commercial broadcasting shall ensure that advertisements are broadcast in the allotted breaks in a programme and in the interval between the end of one programme and the beginning of another. Additionally, they are prohibited from having more than four advertising breaks per hour in the case of television broadcasts.

Commercial broadcasters, both television and radio, are required to adhere to the following restrictions concerning advertising:

- ▶ The advertising content of any programme shall not exceed:
 - ▶ 30 seconds, in a programme lasting five minutes
 - ▶ two minutes, in a programme lasting ten minutes
 - ▶ three minutes, in a programme lasting 15 minutes
 - ▶ five minutes, in a programme lasting 35 minutes.
- ▶ In a period of programming lasting for 60 consecutive minutes, there cannot

be more than 12 minutes of advertising unless:

- ▶ a licensee broadcasts the programme as a public service
- ▶ there was a national broadcast (we assume that this is akin to a public service announcement) which interrupts a scheduled programme and results in the loss of advertising time.

A licensee shall be entitled to compensate advertisers for any loss caused by interruptions in broadcasts over a period of seven days following the day on which the interruption occurred, by increasing the specified advertising time in an hour-long programme to not more than 14 minutes.

Licensees who engage in commercial broadcasting shall keep a record of:

- ▶ the title of every broadcast programme
- ▶ the time at which every broadcast programme commences and ends
- ▶ the use of electro-mechanical reproduction in the course of a broadcast and the form and nature of such reproduction
- ▶ the time at which any advertisement or programme is broadcast and the duration thereof
- ▶ the name of the sponsor of an announcement
- ▶ the time at which an interruption of a broadcast occurs and the duration of and reason for such interruption
- ▶ in respect of the broadcast of a speech:
 - ▶ the name of the speaker
 - ▶ the organisation, if any, under whose auspices the speech is given
 - ▶ the name of the political party or the political affiliation of the person giving the speech, where a speech is made on behalf of a political party for the purpose of promoting the election of any person.

Should Bocra intend to inspect the records of a licensee, they must notify the licensee.

Public broadcasting

In terms of section 33 of the Broadcasting Regulations, public broadcasters shall do all such acts as may be required by Bocra or under a licence granted by Bocra. Public broadcasters are required to ensure, as far as is reasonably possible, that the programmes they broadcast:

- ▶ consist of a wide range of subject-matter
- ▶ serve the needs of different audiences

- ▶ are transmitted at appropriate times, considering, the children who may be watching, or listening to, such programmes
- ▶ are accurate, fair and impartial
- ▶ do not contain any material expressing the opinion of the broadcaster on current affairs or matters of public policy
- ▶ do not cause offence to the religious views and beliefs of the persons belonging to a particular religion or religious denomination
- ▶ provide a public service for the dissemination of information, education and entertainment
- ▶ reflect the diversity of cultural activities in Botswana
- ▶ provide coverage of sporting and other leisurely interests
- ▶ contain educational material.

Complaints

In terms of section 34 of the Broadcasting Regulations, licensees are required to establish procedures to investigate and deal with complaints levelled against them by members of the public. These procedures must be submitted to Bocra before licensees begin operating. Where there is a change in procedures previously submitted to Bocra, the change must be submitted to Bocra within seven days of being made.

Licensees are required to broadcast information on the procedure for lodging complaints at least three times per week during prime time.

Should a complaint be referred to Bocra, licensees must submit, on request, any recordings or documentation required by Bocra and respond to queries from Bocra relating to allegations of non-compliance with the CRAA or with their licence conditions. Licensees are also required to submit, on request by Bocra, written reports or written responses to allegations of non-compliance with the CRAA or with their licence conditions, when requested, before Bocra during the adjudication of any complaint or investigation into any alleged non-compliance with the CRAA or with their licence conditions.

Bocra shall invite licensees to make written or oral representations within such period as may be specified where it intends to investigate any alleged non-compliance with the CRAA or with licence conditions, or any complaint relating to the licensee's failure or refusal to deal with, or the unsatisfactory handling of any complaint made by a member of the public.

Where Bocra finds that a licensee has failed to comply with any provisions of the CRAA or has breached any of its licence conditions, the board may make such order as it considers appropriate provided that where the Bocra imposes a fine.

Bocra may, under the broadcasting regulations, order a licensee to broadcast an apology, correction or retraction, in such terms as it may specify.

Dispute resolution

In terms of section 35 of the broadcasting regulations, in any dispute between licensees, or between a licensee and any other party, either party may refer the matter to Bocra for dispute resolution.

Bocra may order that the parties engage in mediation before it accepts referral of a matter for dispute resolution. Should Bocra accept a matter for dispute resolution, Bocra may:

- ▶ appoint a person to assist in the resolution of the dispute
- ▶ proceed to render a decision.

Information provided to Bocra relating to the resolution of a dispute shall be kept confidential unless Bocra determines that the information is in the public interest.

Information provided to Bocra by any of the parties to a dispute, for the purpose of dispute resolution, may not be used by the parties for other purposes unless the prior consent of the party providing the information has been sought.

During the dispute resolution process, the person appointed by Bocra may request:

- ▶ additional information from the parties
- ▶ the parties' attendance at any meeting to discuss the matter in dispute.

Should a party to a dispute referred to Bocra not comply with a request the person appointed by Bocra may refer the matter to Bocra. Bocra may then order the party to comply with the request.

Any agreement reached by the disputing parties after the dispute resolution process shall be in writing and signed by all the parties to the dispute.

Should no agreement be reached after the dispute resolution process, the person appointed by Bocra shall submit a report to Bocra concerning all the unresolved matters about the dispute.

Bocra may, after accepting the referral of a matter for dispute resolution, render a decision concerning any unresolved matters.

General penalty

In terms of section 36 of the Broadcasting Regulations, any person who contravenes a provision of the broadcasting regulations for which no specific penalty is prescribed, shall be guilty of an offence and liable to a fine.

5 Media self-regulation

The Press Council of Botswana (a voluntary self-regulatory body distinct from the Media Council, discussed earlier in this chapter) has published a code of ethics. It governs the conduct and practice of all media practitioners, media owners, publishers and media institutions. It is enforced by the Press Council of Botswana. The key elements contained in the code are highlighted under the headings as they appear in the code:

5.1 General duties

▶ General standards

- ▶ to maintain the highest professional and ethical standards
- ▶ to inform, educate and entertain the public professionally and responsibly
- ▶ to disseminate accurate and balanced information, and ensure that comments are genuine and honest
- ▶ never to publish information known to be false, or maliciously make unfounded allegations about others, intending to harm their reputations.

▶ General duties

- ▶ to maintain the highest professional and ethical standards by being honest, fair and courageous in newsgathering, reporting and interpreting information
- ▶ to defend the principle of freedom of the press and other mass media by striving to eliminate news suppression and censorship.

5.2 Good practice

▶ Accuracy

- ▶ Check facts when compiling reports.
- ▶ Editors and publishers must take proper care not to publish inaccurate material.
- ▶ Both reporter and editor must ensure that all reasonable steps have been taken to check the accuracy of a report.
- ▶ Facts should not be distorted by out-of-context reporting.
- ▶ Special care must be taken when reports could harm individuals, organisations or the public interest.
- ▶ Before publishing a story of alleged wrongdoing, all reasonable steps must be taken to obtain responses from the named individual or organisation.

▶ **Correction of inaccuracy or distortion**

- ▶ On discovering the publication of a significant distortion of the facts, a media institution must publish a correction promptly and with comparable prominence. If a person's reputation has been damaged, an apology must also be published promptly and with comparable prominence.
- ▶ Any finding by the Press Council on its performance must be reported on fairly and accurately by the media institution concerned.

▶ **Right of reply/rebuttal**

A fair opportunity to reply must be given to a person or organisation that is the subject of an inaccurate or unfairly critical report.

▶ **Comment, conjecture and fact**

- ▶ Clear distinctions must be made between comment, conjecture and fact.
- ▶ Comment must be a genuine expression of opinion relating to fact.
- ▶ Comment or conjecture must not be presented in such a way as to create the impression that it is fact.

5.3 Rules of the profession

Undue pressure or influence

- ▶ There can be no suppression or distortion of information that the public has a right to know due to pressure or influence from advertisers or others who have a corporate, political or advocacy interest in the media institution concerned.
- ▶ A media practitioner must not succumb to cultural, political or economic intimidation intended to influence reporting.

Public interest

A media practitioner must act in the public interest without undue interference from any quarter.

Payment for information

- ▶ No report may be published, suppressed, omitted or altered in return for a payment of money or other gift or reward.
- ▶ No person can be paid to act as an information source unless there is a demonstrable public interest in the information, and the resulting report must indicate that information has been paid for.

Reporting of investigations

Reports may inform the public about arrests of suspects by the police, but they

should not contain the names of suspects until the police have filed formal charges unless it is in the public interest to do so.

Privacy

- ▶ It is normally wrong to intrude into a person's private life and report on it without his or her consent.
- ▶ Such reporting can only be justified when this would be in the public interest, such as:
 - ▶ detecting or exposing criminal conduct
 - ▶ detecting or exposing anti-social conduct
 - ▶ protecting public health and safety
 - ▶ preventing the public from being misled by the public statements or actions of an individual, which is contradicted by his or her private conduct.

Intrusions into grief or shock

In cases involving personal grief or shock, enquiries and approaches must be made with sympathy and discretion.

Interviewing or photographing children

- ▶ Interviewing or photographing a child under the age of 16 should not normally be done without the consent of a parent or guardian.
- ▶ When interviewing or photographing a child in difficult circumstances or with disabilities, special sympathy and care must be exercised.
- ▶ Children must not be approached or photographed at schools without the permission of the school authorities.

Children in criminal cases

The name of any child offender under the age of 16 arrested by the police or tried in the criminal courts must not be published.

Victims of crime

- ▶ Victims of gender violence must not be identified unless they have consented to such publications, and the law authorises them to do so.
- ▶ Where such consent is given subject to conditions, these conditions must be respected.

Innocent relatives or friends

The relatives and friends of a person accused or convicted of a crime should not

be identified unless this is necessary for the full, fair and accurate reporting of the crime or the criminal proceedings.

Gathering of information

- ▶ Gathering information should be done openly, and media practitioners should identify themselves as such.
- ▶ Information and pictures should, as a general rule, not be obtained by misrepresentation, subterfuge or undercover techniques.
- ▶ Surreptitious methods of information-gathering may be used only where open methods have failed to yield information. This must be in the public interest, for example, to detect or expose criminal activity, or to bring to light information that will protect the public.

5.4 Editorial rules

Hatred and disadvantaged groups

- ▶ Material that is intended or is likely to cause hostility or hatred to persons on the grounds of their race, ethnic origins, nationality, gender, physical disabilities, religion or political affiliation must not be published.
- ▶ Utmost care must be taken to avoid contributing to the spread of ethnic hatred or to the dehumanisation of disadvantaged groups when reporting events and statements of this nature.
- ▶ Dehumanising and degrading pictures of a person may not be published without his or her consent.

National security

- ▶ Material must not be published that will prejudice the legitimate national security interests of Botswana in regard to military and security tactics and strategy, or intelligence material held for defence.
- ▶ However, the above does not prevent the media from exposing corruption in security, intelligence and defence agencies, or from commenting on their levels of expenditure and overall performance.

Plagiarism

Plagiarism (making use of another person's words or ideas without proper acknowledgement and attribution of the source of those words or ideas) must not be engaged in.

Protection of sources

When sources are promised confidentiality, that promise shall be honoured unless released by the source.

6 Case law and the media

In this section, you will learn:

- ▷ the definition of common law
- ▷ how Botswana’s courts have dealt with defamation matters
- ▷ how Botswana’s courts have dealt with government withdrawing advertisements from newspapers as a response to press criticism

6.1 Definition of common law

The common law is judge-made law. It is made up of judgments handed down in cases adjudicating on disputes brought by people, whether natural (individuals) or juristic (for example, companies). In common law legal systems such as Botswana’s, judges are bound by the decisions of higher courts and also by the rules of precedent. This requires that rules laid down by the court in previous cases be followed unless they were clearly wrongly decided. Legal rules and principles are, therefore decided on an incremental, case-by-case basis.

This section focuses on a number of judgments in relation to defamation, as well as on an important judgment on the constitutionality of withdrawal of government advertisements as a response to press criticism.

6.2 Defamation

This chapter has already dealt extensively with the general issue of defamation as it arises in respect of criminal defamation. It is important to note, however, that defamation is more usually dealt with in civil contexts, where a person who has been defamed seeks damages to compensate for the defamation. All the cases dealt with in this section arise in the context of civil cases of defamation.

6.2.1 Defences to an action for defamation

There are several defences to a claim based on defamation.⁸ These defences include:

- ▶ truth in the public interest
- ▶ absolute privilege, for example, a member of the National Assembly speaking in parliament

- ▶ qualified privilege, statements made in the discharge of a duty. For example, the duty to provide information in connection with the investigation of a crime, enquiries as to the creditworthiness of a person and so on.

Besides the above, which constitute defences to a charge of criminal defamation, there are other defences available in a civil defamation claim, including:

- ▶ fair comment on true facts and which are matters of public interest.
- ▶ self-defence (to defend one's character, reputation or conduct).
- ▶ consent.

Below are two cases that deal with defences to an action for defamation.

In *Khimbele v Sebenego and Others; Caphers v Sebenego and Others* 2001 (2) BLR 105 (HC), a defamation action was brought by two people named in a newspaper report as having been bribed by an attorney. In fact, the people had received unsolicited cash from the attorney but had immediately handed the money over to their superior and acted entirely appropriately and honestly. The newspaper raised a number of defences, two of which merit particular attention because of how the court analysed the journalist's conduct.

- ▶ The first defence was that the report was comment. The court rejected this, saying that to be justifiable as fair comment, the comment:

must appear as comment and must not be mixed up with the facts that the reader cannot distinguish between what is a report and what is comment. Care should therefore be taken to keep such comments as are made separate from the fact reported so that readers may be able readily to distinguish between the two [At page 114].

The court found that it did not appear 'that the allegation [was] intermingled with any opinion' and that in its view the statement that the attorney corruptly gave money to the plaintiffs was 'a statement of fact and not a comment' [At page 115].

- ▶ The second defence was that the report contained a fair and accurate report of proceedings in a court, that is, was subject to qualified privilege. However, the court did not accept this, saying that the statement that the attorney corrupted (as opposed to attempted to corrupt) the plaintiffs by giving them money was a 'substantial inaccuracy and not privileged at common law' [At page 117].

In *Tibone v Tsodilo Services (Pty) Ltd t/a The Sunday Sun and Others* Case No CVHLB-000235-7 (as yet unreported) the then-minister of minerals, energy and water resources brought a defamation action against the Sunday Sun regarding allegations that he was involved in corruption concerning a tender. The newspaper raised a defence of privilege, saying it was reporting on a debate that had taken place in parliament. This was rejected by the court, which found correctly that:

Honest, balanced and responsible journalism demands that the readership is presented with a balanced picture of what is reported and where a report or article deals with debate, especially debate of national importance such as we are dealing with here, then the readership is presented with the negative and positive aspects of the debate [At page 32].

The judge went on to find on the facts that he ‘cannot accept ... that the articles represented balanced reporting’ and that ‘the manner of reporting brings into focus my concern that imputations of corruption are made against the plaintiff ... without any factual basis whatsoever as the allegations of corruption [made in parliament] were not aimed at anyone in particular’ [At page 33].

The journalists involved had, among other things:

- ▶ interviewed only those MPs who had made adverse comments
- ▶ not published the press statement released by the permanent secretary of the relevant department
- ▶ not published the press statement released by the Directorate of Corruption and Economic Crimes that its investigation had revealed no corruption
- ▶ produced no hard evidence that the minister in question had ‘apologised’, as he was alleged to have done in the report.

The court found that the defendants had acted in bad faith and maliciously. The defence of qualified privilege regarding the reporting on events in parliament failed in this case.

6.2.2 Remedies for defamation

There are three main remedies in respect of defamation in the absence of a defence:

Publication of a retraction and an apology by the media organisation concerned

Very often a newspaper or broadcaster will publish a retraction of a story or allegation in a story, together with an apology, where it has published a false, defamatory statement. Whether or not this satisfies the person who has been defamed will depend on several factors, including the seriousness of the defamation; how quickly the retraction and apology is published; and that prominence is given to the retraction and apology (this is a combination of the size of the retraction, the position in the paper and on the particular page concerned).

Action for damages

This is where a person who has been defamed sues for monetary compensation. It takes place after the publication has occurred, and damages (money) are paid

to compensate for the reputational damage caused by the defamation in circumstances where there are no defences to defamation. The quantum of damages (the amount to be paid in compensation) will depend on several, including whether or not an apology or retraction was published and also the standing or position in society of the person being defamed.

In *Dibotelo v Sechele and Others* 2001 (2) BLR 588 (HC), the plaintiff in the action for damages for defamation was a senior judge who had been defamed by a newspaper, which had alleged (wrongly) that he had misappropriated funds. In making a substantial damages award, the judge made several important statements, namely, that:

- ▶ The only way of impressing on 'all concerned that ... unfounded attacks are not to be made is by awarding exemplary damages' [At page 594].
- ▶ He was 'anxious not to create the impression that the courts, by their protection of a person's right to unsullied reputation, unwittingly whittle down the press's freedom of speech' [At page 595].
- ▶ Any damages awarded to the plaintiff 'should reflect the delicate balance between the two competing interests' [At page 595].

This has been echoed in *Tibone v Tsodilo Services (Pty) Ltd t/a The Sunday Sun and Others* Case No CVHLB-000235-7 (as yet unreported) in which the judge held that while he was:

mindful of the effect of robust or excessive damages on freedom of speech, courts should not ... be seen to condone irresponsible journalism or malicious reporting by an award of damages so low as to embolden rather than discourage errant publication [At page 38].

Prior restraints

This is where the alleged defamatory material is prevented from being published in the first place. Where a person is aware that defamatory material is going to be published, he or she may be able to go to court to, for example, obtain an interdict prohibiting the publication, thereby preventing the defamation from occurring. Prior restraints such as these are dangerous because they deny the public (readers of a publication or audiences of a broadcaster) the right to receive the information that would have been publicised had it not been for the interdict. Prior restraints are seen as being a last resort mechanism. The legal systems of countries that protect the right to freedom of expression usually prefer to allow publication and to deal with the matter by damages claims, in other words, using after publication remedies.

6.3 Withdrawal of government advertising as a response to press criticism

In a critically important case, *Media Publishing (Pty) Ltd v The Attorney-General and*

Another 2001 (2) BLR 485 (HC), the Botswana High Court, in an application for an interim interdict, granted the applicant, the owner of two newspapers, an interdict declaring that a government directive banning all government advertising in the two newspapers was wrongful and unlawful. The directive had been issued by the president shortly after the newspaper had published a number of articles that were critical of the president and the vice-president. In reaching its decision, the court made a number of extremely important statements, including:

Government cannot act with a view to taking away an individual's benefits as an expression of its displeasure for the individual's exercise of a constitutional right as this would tend to inhibit the individual in the full exercise of that freedom for fear of incurring punishment ... The message implicit in the directive is that an individual, being a beneficiary to governmental patronage, who in the exercise of its freedom of expression goes beyond what the government is comfortable with, faces the possible unpleasant consequence of losing certain benefits which it would otherwise have received. This hinders the freedom to express oneself freely [At page 496].

The court found on the facts that the applicant had established a prima facie right:

that the executive's act of withdrawing advertisement patronage from the applicant's papers in order to express its displeasure regarding what it perceived to be exceeding the limit of editorial freedom amounts to an infringement of the ... applicant's freedom of expression [At page 497].

Notes

- 1 <https://www.worldometers.info/world-population/botswana-population/> [Last accessed 23 April 2020]
- 2 <http://www.statsbots.org/bw/poverty> [Last accessed 23 April 2020]
- 3 <https://www.se4all-africa.org/seforall-in-africa/country-data/botswana/> [Last accessed 23 April 2020]
- 4 <https://www.internetworldstats.com/africa.htm#bw> [Last accessed 23 April 2020]
- 5 <https://www.itu.int/en/ITU-D/Spectrum-Broadcasting/DSO/Pages/dataminer.aspx> [Last accessed 23 April 2020]
- 6 Bocra ISDB-T Standards of Botswana, Issued by Botswana Communications Authority, Document Number DTT002, Revision 1, Date 10/03/2015. [Last accessed 23 April 2020]
- 7 <https://www.mmegi.bw/index.php?aid=80548&dir=2019/april/15> [Last accessed 18 May 2020]
- 8 See FDJ Brand, 'Defamation', *LAWSA*, 2nd ed, Volume 7, paras 245ff. Note that the common law of South Africa is frequently cited and followed in Botswana's courts.