POSITION PAPER ON AIPPA AMENDMENT BILL

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APPENDIX 1. Analysis of media freedom and media regulation
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1. INTRODUCTION

The Constitution of Zimbabwe Amendment (No. 20) Act of 2013 [the Constitution], progressively provides for a number of rights that fall within the regulatory focus of the Access to Information and Protection of Privacy Act [AIPPA] which this paper is focussed on. This is all the more peculiar when compared to the Lancaster House Constitution which did not make provision for and did not explicitly guarantee a number of relevant rights such as access to information and freedom of the media. Even before the coming into force of the obtaining Constitution, regional and international standards on aspects such as regulation of the media and on promotion and protection of access to information already dictated the need for a legislative shift in respect of AIPPA. The coming into force of the Constitution, whose full import on the law in question will be fully explored hereunder, therefore begs legislative shift in order to ensure that AIPPA provisions are in sync with the supreme law of the land. The extent of this required shift will form the subject of discussion of this paper and will be fully outlined hereunder. Because there is no official AIPPA Amendment Bill at hand, the focus of this paper shall be on the existing Act and especially on what an Amendment Bill of the existing Act should focus on in line with relevant regional and international standards and with the current Constitution of Zimbabwe. The recommended reforms will also be based on best practice from other jurisdictions specifically South Africa, Uganda, Kenya and Nigeria, which are some of the nineteen African countries including Zimbabwe, that have an access to information regime.

2. BACKGROUND - OBJECTS OF AIPPA AND ITS EVOLUTION

The Access to Information and Protection of Privacy Act came into force on the 22nd of March 2002 and in terms of its preamble, it seeks to regulate the following aspects;

(i) The right of access to information
(ii) The right to request correction of personal information
(iii) Data protection
(iv) Protection of personal privacy
(v) Regulation of mass media

By also regulating the media and establishing the Zimbabwe Media Commission, the Act does not only entrench statutory media regulation but also cements the impression that access to information is a media rights issue. The two are different and as various instruments on access to information espouse, while media do benefit from a democratic access to information regime, the right is ultimately about citizens being empowered with information that they can use to participate on matters important to their lives from an informed position as well as hold those in office accountable.

Since its enactment in 2002, the Act has been a subject of heated debate with Government justifying its existence, while civil society and the media have been pushing for its repeal or extensive amendment in line with international best practices. In spite of its position, over the years the government has taken some steps to effect some amendments to the law on three occasions in 2003, 2004 and in 2007. However, the effected changes did not deal with much of the substantive matters
but mostly with marginal and administrative issues that left the problematic features of the Act intact. For example, the 2003 amendments\(^1\) focussed a lot on the definitions of terms which include newly introduced terms such as *dissemination, excluded information, legal representative, and periodically printed publication*. The definitions section was also amended by deleting the definition of “*mass media service or mass media*” to provide for two separate definitions. However the meaning remained the same as the previous one. Apart from the definition of terms, some sections that were amended include sections, 22, 35 and section 37 among others. For example section 22 of the act was amended to remove reference to “*public*” safety such that the limitation is only in respect of “*personal*” safety. Further subsections 1(a) and (b) of that provision, were deleted and merged into one provision which is the existing subsection 2 which provides that “*the head of a public body may refuse to disclose to an applicant personal information concerning the applicant if such disclosure will result in a threat to the applicant’s or another person’s safety or mental or physical health*”

Also, while section 35 criminalised the falsification of personal information belonging to the person in question, the provision was amended in 2003 to extend the liability to persons who falsify personal information about third parties. Section 37 was also amended to expand the reasons for the disclosure of archived information, such that instead of disclosure for “*archival or historical purposes,*” such information could be disclosed for the purpose of “*historical research or any other lawful purpose.*”

However, while the 2003 amendments appeared to be expansive, generally it is noted that the worrisome character of the law remained intact.

Equally, although the 2007 amendments established the Zimbabwe Media Commission to replace the Media and Information Commission, the move simply entrenched unpopular statutory regulation that the media, civil society and other stakeholders were opposed to. Despite the enactment of the 2013 Constitution that provides for explicit guarantees for the right to information and an enactment of a law that would ensure the enjoyment of the same, AIPPA remains part of the country’s statutes without fully promoting or guaranteeing the right to information as envisaged in the constitution.

\(^1\) Through Act number 5 of 2003
3. OUTLINE OF PROVISIONS OF THE CONSTITUTION ON OR AFFECTING RIGHT OF ACCESS TO INFORMATION & PRIVACY

3.1 RIGHT TO INFORMATION

Section 62 of the Constitution of Zimbabwe provides an explicit guarantee of the right of access to information, a positive development especially when measured against the Lancaster House Constitution where this right was subsumed under its section 20 provision on freedom of expression and was thus not justiciable in its own stead. Now, section 62 specifically guarantees the right to information in the following terms. That:

(1) Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the State or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability.

(2) Every person, including the Zimbabwean media, has the right of access to any information held by any person, including the State, in so far as the information is required for the exercise or protection of a right.

(3) Every person has a right to the correction of information, or the deletion of untrue, erroneous or misleading information, which is held by the State or any institution or agency of the government at any level, and which relates to that person.

(4) Legislation must be enacted to give effect to this right, but may restrict access to information in the interests of defence, public security or professional confidentiality, to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

Aside from the explicit guarantee of the right of access to information, the Constitution also contains other key provisions that buttress the centrality of the same right and draws out key catalysts for its enjoyment. These include the following;

(i) **Section 61(1)(a)** which provides that;

\[
\text{Every person has the right to freedom of expression, which includes; freedom to seek, receive and communicate ideas and other information.}
\]

This, further to the right espoused in section 62, enhances the scope and guarantee of the right of access to information in that the provision brings out another dimension of access to information as a component of the right to freedom of expression.

Some of the other key constitutional provisions in relation to access to information, include the following:

(i) **Section 6(3) (a) and (b)** as well as **section 6(4)**, places an obligation on the state and all agencies of government to ensure equal treatment and use of all official languages and to promote and develop ALL languages. This is key as limited promotion of some of the official languages has an impact on the extent to which persons who use that language are able to access
information in their languages, thus restricting their right to information. (ii) Section 9-
Implores the state and all its institutions to adopt and implement policies that promote good
governance for purposes such as transparency and accountability while section 298(1)(a), also
stipulates that there must be transparency and accountability in all public finance aspects.

(i) Further, section 315(1) prescribes the promulgation of a law that prescribes procedures for
the transparent procurement of goods and services by the state and all its institutions the
extent to which can only be measured and experienced when relevant, adequate and timely
information is made available.

(ii) Section 196 (3) (c), also implores public officers in leadership to abide by the principle of
accountability to the public for their decisions and actions.

At the centre of these obligations placed on government and public institutions, is the provision of
information relevant to the functions of such institutions and in line with key principles such as
proactive disclosure and timely release of information. The implication of these provisions is that
AIPPA or any law in its place must contain measures that promote and facilitate the transparency
and accountability envisaged in the Constitution.

Also, the constitutional provisions establishing the Zimbabwe Media Commission (ZMC), do speak
to the right of access to information, with section 249 (1) (f) (g) (h) (j) mandating this commission
to;

(i) Ensure that the people of Zimbabwe have fair and wide access to information

(ii) Encourage use and development of all official languages.

(iii) Encourage the adoption of new technology in the media and in the dissemination of
information.

(iv) Conduct research into issues relating to freedom of the press and expression and in this
regard to promote reforms in the law.

3.2 RIGHT TO PRIVACY

Section 57 is the primary provision on the right to privacy providing among other stipulations, that
every person has the right to privacy including the privacy of one’s communications or
property. The right to privacy is also a ground for the limitation of the rights to freedom of expression
and of the media. In terms of section 61(5) (d), these rights to which access to information is central, are
limited where their exercise results in malicious or unwarranted breach of a person’s privacy. Notably
in Europe, the concept of the right to privacy is construed more widely, to the extent that

2Section 57 (a) (d)- Constitution of Zimbabwe -2013
it includes not just privacy of communications as provided for in section 57(d) of the constitution of Zimbabwe, but to also include the right to ask information holders such as search engines, to remove certain personal data from public access. This concept which is commonly known as “the right to be forgotten”, is relied on mostly in relation to data protection laws which are a critical component to privacy and access to information regulation. The right to be forgotten is relied on in certain circumstances such as where the information in question is either inaccurate, inadequate, irrelevant or excessive. But while persons may rely on this component of their right to privacy and protection of personal information, a balance of other related rights has to be made in deciding whether or not to delete the information in question.

In the Zimbabwean context however, it is arguable that in respect of the right to privacy as espoused in section 57 of the constitution of Zimbabwe, the right to be forgotten cannot be easily sustained as the right is confined to “privacy of communications” and yet the right to be forgotten is much broader, including other data and information which may not necessarily be a private communication. Notably though, some components of this “right” are reflected in the current access to information constitutional framework where section 62(3) provides persons with the right to the correction or deletion of untrue, erroneous or misleading information imploring that the access to information legislation should equally provide for the right to request a deletion of the above specified information. This is already provided for under AIPPA. Be that as it may, it is worth noting that the provision in section 62(3) still does not fully encompass the import of the “right to be forgotten” in its broadest scope wherein it entails a total wipeout of specified data. To this end therefore, the right to privacy and to information in the Constitution, arguably do not fully support the concept of the “right to be forgotten,” but be that as it may, it still has to be recognized to a permissible extent in relation to the said rights and be recognized to a limited extent in the access to information law and more comprehensively in a data protection law, with the two laws speaking to each other in this respect.

Further to the above constitutional provisions on the rights of access to information, privacy and freedom of expression, the Constitution also has other provisions that are key in the interpretation of and in determining the scope and ambit of the rights under discussion. These include the following.

3.3 SUPREMACY OF THE CONSTITUTION

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3. Section 62(3) provides persons with the right not to be forgotten entirely but to the correction or deletion of untrue, erroneous or misleading information

4. This was the case in the Court of Justice of the European Commission- [C-131-12], where the applicant requested for the deletion of an auction notice of his repossessed home that appeared on the online pages of a certain newspaper and on google

5. Section 32 of AIPPA only provides for the correction of such information

6. Ibid
Section 2 of the Constitution emphasizes that all law, practice, custom or conduct inconsistent with the Constitution is invalid to the extent of that inconsistency. Thus laws including AIPPA must be in tandem with its provisions.

3.4 OBLIGATION TO FOSTER FUNDAMENTAL RIGHTS AND FREEDOMS

Section 11 obligates the State to take all practical measures to protect the fundamental rights and freedoms enshrined in the Constitution as well as promote their full realisation and fulfillment.

3.5 DUTY TO RESPECT FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

The state and all its agencies as well as every person, are further implored in section 44, to respect, protect, promote and fulfill the rights and freedoms outlined in the Bill of Rights and in terms of section 45, all are bound by the Bill of Rights. Further, in terms of section 46, in interpreting the Bill of Rights, courts are obligated to among other things;

(i) Give full effect to the rights and freedoms enshrined in this Chapter (Chapter 4);
(ii) Promote the values and principles that underlie a democratic society, particularly those outlined in section 3 of the Constitution,
(iii) Take into account international law and all treaties and conventions to which Zimbabwe is a party;
(iv) Pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2.

3.6 REGULATION OF THE MEDIA AND MEDIA FREEDOM

As with the right of access to information, the right to media freedom is one of the new inclusions in the current Constitution as it is guaranteed through section 61(2) which provides that, “every person is entitled to freedom of the media which includes protection of confidentiality of journalists’ sources of information (and that) freedom of the media excludes;

(i) incitement to violence
(ii) advocacy of hatred and hate speech
(iii) malicious injury to a person’s reputation
(iv) malicious and unwarranted breach of a person’s right to privacy
4. REGIONAL AND INTERNATIONAL INSTRUMENTS AND KEY PRINCIPLES ON ACCESS TO INFORMATION, PRIVACY AND MEDIA REGULATION.

In order to fully ascertain the extent to which the current Act should promote the exercise and enjoyment of the right to information, a brief analysis of relevant regional and international benchmarks would be instructive in amending the law. The right of access to information, media freedom, and privacy, are all recognised under international and regional legal instruments. These include the Universal Declaration of Human Rights [Article 19] and the International Covenant on Civil and Political Rights [Article 19]. At continental level, Article 9 of the African Charter on Human and Peoples’ Rights also entrenches the importance of freedom of expression, access to information, privacy and media freedoms. Zimbabwe is a state party to all these international instruments. Some of the specific provisions in the instruments are as follows:

4.1 Universal Declaration of Human Rights (1948)

Article 19 provides that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

4.2 International Covenant on Civil and Political Rights [assented to by Zimbabwe in 1991]

Its Article 19(2) provides that: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Article 19 (3) goes further to provide that the right to freedom of expression should only be subject to restrictions that are provided for in law and which are:

(i) For the respect of the rights and reputations of others;
(ii) For the protection of national security or of public order or of public health or morals.

4.3 Resolution 59(1) of the United Nations General Assembly (1946)

This resolution is to the effect that „Freedom of Information is a fundamental human right and is the touchstone of all the freedoms to which the UN is consecrated.”

Regionally, some of the relevant benchmarks are provided for in instruments such as the African Charter on Human and People’s Rights [ACHPR] and the Declaration of Principles of Freedom of Expression in Africa providing as follows:

4.4 African Charter on Human and Peoples' Rights

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7 MISA-Zimbabwe-Policy brief on the Access to Information and Protection of Privacy Act at page 1
8 Zimbabwe became a signatory in 1986
Article 9 provides that: „Every individual shall have the right to receive information.”


Article I
1. Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.
2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.

Article II
No one shall be subject to arbitrary interference with his or her freedom of expression. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society.

Article IV
1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

   1. The right to information shall be guaranteed by law in accordance with the following principles;
      (i) Everyone has the right to access information held by public bodies;
      (ii) everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right
      (iii) refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
      (iv) public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
      (v) no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society;
      (vi) secrecy laws shall be amended as necessary to comply with freedom of information principles.

2. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

Media regulation

Article 9(3) of the declaration provides that;
(i) Effective self-regulation is the best system for promoting high standards in the media. The declaration further provides that;
(ii) The right to express oneself through the media by practicing journalism shall not be subject to undue legal restrictions.\textsuperscript{10}

Protection of Reputations and Defamation

Article 12 of the declaration obligates states to ensure that their laws relating to defamation are such that;
(i) No one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;
(ii) Sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.
(iii) Privacy laws should not inhibit the dissemination of information of public interest

Protection of Sources and Other Journalistic Material,
Article 15 provides that media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes, except in accordance with the following principles:
(i) The public interest in disclosure outweighs the harm to freedom of expression; and
(ii) Disclosure has been ordered by a court, after a full hearing.

4.6 Resolution on the Right to Freedom of Information and Expression on the Internet in Africa

At its 59\textsuperscript{th} Ordinary session of the Commission through Resolution number ACHPR/Res. 362(LIX) 2016, resolved as follows in respect of the right to freedom of information and expression:

(i) Called on States Parties to respect and take legislative and other measures to guarantee, respect and protect citizen’s right to freedom of information and expression through access to Internet services;
(ii) Urged African citizens to exercise their right to freedom of information and expression in the Internet responsibly.
(iii) Encourages the Special Rapporteur of Freedom of Expression and Access to Information in Africa to take note of developments in the Internet age during the revision of the Declaration of Principles on Freedom of Expression in Africa, which was adopted by the Commission by 2002;
(iv) Urges State Parties, civil society and other stakeholders to collaborate with the Special Rapporteur by contributing to the process of revising the Declaration to consider Internet rights.

\textsuperscript{10} Article 10(2)
4.7 African Charter on Democracy, Elections and Good Governance [2012]

Article 2(10) of this Charter states the promotion of “the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs,” as one of its objectives.

4.8 OTHER PERSUASIVE AUTHORITIES

Besides the obligatory national and international human rights instruments outlined above, the AIPPA amendment bill can also benefit from other non-binding but regionally and internationally recognized instruments and authorities regarding promotion and protection of access to information. These include but are not limited to the following:

(i) The African Commission on Human and People’s Rights, Model law on Access to Information. [since its adoption IN 2013, countries such as Kenya, Togo, Sierra-Leonne, Ivory Coast, Burkina Faso, have since adopted access to freedom of information laws.]


(iii) International Mechanisms for Promoting Freedom of Expression.

(iv) Maputo Declaration Fostering Freedom of Expression, Access to Information and Empowerment of people.


(vi) Atlanta Declaration and Plan of Action for the Advancement of the Right of Access to Information.

(vii) Brisbane Declaration: Freedom of Information, The Right to Know

Any Amendment Bill to AIPPA must take cognizance of the provisions of these instruments particularly those that Zimbabwe is party to, such as of the Declaration of Principles of Freedom of Expression in Africa which is an expansion of Article 9 of the African Charter on Human and People’s Rights.

The state's obligation in ensuring they domesticate these regional and international instruments is enshrined under section 34 of the Constitution which states:

*The state must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law.*
5. AN ANALYSIS OF THE COMPATIBILITY OF AIPPA WITH THE CONSTITUTION OF ZIMBABWE & RECOMMENDATIONS

Measured against the current Constitution of Zimbabwe and as read with relevant regional and international instruments outlined above which aid in fully expounding on the nature and scope of the rights in question, a number of aspects in AIPPA are at variance with the spirit and purpose of the Constitution in respect of the right of access to information. The extent of this variance is as outlined below;

5.1 LIMITED APPLICATION & SCOPE OF THE LAW

5.1.1 Insufficient measures to protect personal information relating to minors

While AIPPA has measures that safeguard and stipulates the collection, disclosure and use of personal information\textsuperscript{11} and further excludes the application of the Act to records that relate to a child’s interest in terms of the Children’s Act [Chapter 5:06],\textsuperscript{12} these measures are still inadequate protection of the rights and interest of minors in respect of the collection, disclosure and use of personal information relating to them. This is more-so considering that AIPPA aims to equally protect the right to privacy.

Recommendation
The Amendment Bill’s provisions on disclosure of personal information must specifically require that in respect of information relating to minors, consent must be obtained first from a minor’s legal, judicial or agreed representative. However, in respect of the collection and use of such information, measures including requiring the knowledge and consent of a minor’s representative, will need to be put in a data protection law alongside measures for the collection, processing and use of other data.

5.1.2 AIPPA has limited scope to facilitate accountability of public bodies.

Despite numerous provisions in the Constitution such as sections 3(h) (g), 9(1), 298(1)(a), which all speak to the need for public institutions to promote good governance through transparent and accountable operations and practices, this is not fully reflected and supported in AIPPA. This is despite the expressed objective in the preamble of the Act that the law is also there to promote public accountability. In fact, its preamble goes on to limit areas upon which accountability can be demanded. It states that the promotion of public accountability is only in respect of correction of misrepresented personal information and not in respect of their operations or the enjoyment of fundamental rights as envisaged in provisions such as s194(e) (f) (h).

\textsuperscript{11} Sections 30. 32. 26 of AIPPA
\textsuperscript{12} First schedule (c ) of AIPPA
**Recommendation**

The free flow of and access to information including proactive disclosure of public interest information by information holders, is at the centre of public accountability and transparency in public institutions including in public sector finance management. These values and national objectives cannot be realized without a strong guarantee and adequate measures to facilitate access to and dissemination of relevant information and the Amendment Bill should thus contain measures to promote and facilitate their fulfillment.

5.1.3 **AIPPA limits application of the law to information held by “public bodies only”**

Whereas section 62(2) of the Constitution guarantees the right of access to information “held by any person,” including by the state, section 5(1) of AIPPA only provides for access to information held by “public bodies” only. This in essence excludes information that is in the custody or under the control of private bodies and is thus contrary to both the Constitution and international best practice which extends the right beyond information held by public bodies\(^\text{13}\).

**Recommendation**

As with section 3(b) of South Africa’s Promotion of Access to Information Act [PAIA]\(^\text{14}\), the Amendment Bill must introduce the right of persons to also access privately-held information in line with the provision of section 62 (2). Also, the AU Model Law is instructive in this regard. It provides for access to information held by relevant private bodies and private bodies. It defines relevant private bodies as any body that would otherwise be a private body under that is: (a) owned totally or partially or controlled or financed, directly or indirectly, by public funds, but only to the extent of that financing; or (b) carrying out a statutory or public function or a statutory or public service, but only to the extent of that statutory or public function or that statutory or public service;

Private Bodies are defined as; (a) a natural person who carries on or has carried on any trade, business or profession or activity, but only in such capacity; (b) a partnership which carries on or has carried on any trade, business or profession or activity; or (c) any former or existing juristic person or any successor in title; but excludes public bodies and relevant private bodies.

The inclusion of all forms of private bodies will ensure that the public has access to information of public interest held by private entities. This is critical in fostering transparency and accountability in the exploitation of public resources administered by private bodies on behalf of government as is

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\(^{13}\) For example, Article 2 of the ACHPR Draft Model Law for African States on Access to Information provides that:

“\(a\) every person has the right to access information of public bodies and relevant private bodies expeditiously and inexpensively; and

\(b\) every person has the right to access information of private bodies that may assist in the exercise or protection of any right expeditiously and inexpensively.\”

\(^{14}\) Act No. 2 of 2000
increasingly becoming the case following government's tendency to subcontract corporates on matters of service delivery for the public good.

5.1.4 AIPPA restricts the right of access to information to that which is contained in a public record only

Although the preamble to AIPPA refers to access to both “records” and “information”, and despite headings that refer to access to “information”, there is consistent confinement of the right to information that is contained in records only. Its section 4 provides that the Act applies to all records in the custody or under the control of a public body. This is also reiterated in sections 5 and 6. The latter actually outlines the procedure for requesting a record. The information to be accessed under the statute is qualified and limited only to a record “that is in the custody or under the control of a public body”, thus excluding unrecorded information. The effect of this is that, AIPPA excludes other categories of information that are not reduced into a record and more importantly, it does not include measures to facilitate access to information through other platforms outside public institutions. This is contrary to what is envisaged by section 62 of the Constitution which guarantees access to “information”. In contrast, section 2 of Uganda’s Access to information Act (UATIA), states that the act applies to “all information and records of government ministries and its other agencies, and further to that, its section 5(1) reiterates that;

Every citizen has a right of access to information and records in the possession of the State or any public body, except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.

The reference to both “information” and “record” in this act is consistently carried throughout the Act, giving a stronger basis for the demand of a broader scope of information other than what is contained in records.

Recommendation

The concept of “Information” is broader than what is stored in a "record" and includes information that is proactively disclosed in the public interest without waiting for information requests. It also encompasses timely dissemination of public interest information on current issues as they happen, as well as the putting in place of mechanisms to facilitate the dissemination of information through other platforms such as public broadcasting and other online information and technology communication platforms. These scenarios cannot be covered by the “record” which AIPPA refers to and the Amendment Bill must broaden the scope of the right beyond “records” to include other measures and platforms that provide the public with information as envisaged in section 61 and 62 of the Constitution.

5.1.5 Limitation of information to citizens only

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Note 7 above at page 5
Act No.6 of 2005
Whereas South Africa’s PAIA defines a “requester” as “any person”, section 5(3)(a) of AIPPA has a blanket confinement of the right to information to citizens, permanent residents and holders of a temporary employment or residence permit or students permit only. This is against the provisions of section 62(2) which has no limitations in respect of information that is required for the protection or exercise of rights and instead, guarantee “every person” the right of access to information held by any person which is required for the protection or exercise of a right. The word “person” is defined in section 332 of the Constitution as “an individual or a body of persons whether incorporated or unincorporated”. As it currently stands therefore, AIPPA excludes classes of persons such as non residents or non-citizens and is thus unconstitutional to this extent.

Recommendation

In as far as information required for the exercise of rights is concerned, the Amendment Bill must provide for all classes of persons to have access to such information without exclusion as envisaged in section 62(2).

5.1.6 Extensively wide limitations

According to MISA-Zimbabwe17, “the list of “excluded information” under Sections 4 and 5 of AIPPA is too long and broad to the extent of detracting the right of Access to Information to unacceptable levels. For example, while documents pertaining to client-attorney privilege18 could justifiably be legally confidential, the protection of for example “a personal note,” or of “teaching materials” constitutes irrational limitations that are not justifiable or reasonable in a democratic society19 and thus in contravention of section 62(4) of the Constitution. Further, this is contrary to international and regional prescriptions that limitations of rights must be narrowly interpreted and strictly defined. Limitations in AIPPA have the effect of unjustifiably curtailing the right to information. For example, while Section 9(1) as read with Section 46 (1)(d) of the Constitution mandates that the State must adopt and implement policies and legislation to develop efficiency, competence, accountability, transparency, personal integrity and financial probity in all institutions and agencies of government at every level and in every public institution, the grounds for limiting the right to information outlined in AIPPA, militate against the attainment of these values. This is particularly the case for the following reasons:

5.1.6.1 Undefined limitations

Some of the grounds for limitations are undefined and potentially compromise the transparent, open and accountable governance envisaged in the Constitution. The terms include “public interest” [s9(4)] and the requirement for disclosure to “authorised persons” only.

(i) While public interest is a ground for refusal of disclosure of information, there is no definition of what is considered to be or not to be in the public interest, leaving that to the discretion of the public official approached.

17 Note 7 above at page 3
18 Section 16- AIPPA
19 ibid
(ii) Whereas section 14 (1) of AIPPA prohibits the disclosure of cabinet deliberations to persons who are not “authorized”, it does not define who an “authorized person” is or how one gets to be so authorized. This provision read with provisions of the Official Secrets Act give a blanket denial of the public’s access to key governmental decisions and processes which amounts to a denial of critical information on state policy and processes.20

(iii) There is no precise definition of the ground upon which refusal of disclosure of information which may cause harm to the planning, financial and economic interests of a public body or of the state such as financial, commercial, scientific or technical information that belongs to a public body or to the State and has monetary value can be granted. This is contrary to the principles of public financial management outlined in section 298(1) of the Constitution such as (a) transparency and accountability in financial matters; (b) transparent, prudent and effective expenditure of public funds. It is also contrary to other provisions of the Constitution such as the requirement for state controlled commercial entities to establish transparent and open procurement systems [section 195(2)]

5.1.6.2 Unjustifiable limitations

These include section 18(1) (a) (i) which restricts access to information relating to inter-governmental relations or negotiations, including disclosure of information that may affect the relations between the government and a municipal or rural district council.

This limitation flouts the grounds provided for in section 62(4) which permits the restriction of the right to information in the instance where the restriction is fair and “justifiable in a democratic society based on openness. This is more-so when the provisions [s62(4) and 86(2)(b)], are read together with the values of openness, responsiveness, transparency and accountability that are outlined in section 3, 8, 9 and section 194(1)(f) of the Constitution on which basis laws and policies must be crafted. Juxtaposed with these Constitutional provisions, it is argued that the status of the relationship between government and a council cannot justifiably outweigh the public interest override, public accountability and the exercise and protection of rights, which access to information is supposed to facilitate.

Recommendations

The Amendment Bill must seek to align existing limitations firstly with the three limitations outlined in section 62(4) i.e. in the interest of defense, public security or professional confidentiality and further in line with the grounds set in section 86 and 87 of the Constitution. The latter sections provide for the general limitation of all human rights and freedoms as well as their limitation during a public emergency. Further, the Amendment Bill must look to precisely define grounds upon which the right to information may be limited, some of which have been identified above.

5.2 **NARROW PUBLIC INTEREST AND PROACTIVE DISCLOSURE PROVISIONS**

While **section 28** of AIPPA provides for a public interest override in favor of disclosure of information, it is limited in that it itemizes a few situations which constitute public interest. These are;

i. The risk of significant harm to the health or safety of members of the public; or  
ii. The risk of significant harm to the environment; or  
iii. Any matter that threatens national security; or  
iv. Any matter that is in the interest of public security or public order, including any threat to public security or public order;  
v. any matter that assists in the prevention, detection or suppression of crime.

In contrast, section 6(4) of the 2016 Kenya Access to Information Act [KATIA] provides a general and unrestricted public interest override with section 6(5) further outlining constitutional principles that should be upheld when considering what constitutes public interest. Section 34(b) of the Ugandan Act, further to the itemized public interest scenarios, does give a broader public interest override for disclosure of information where;

> the public interest in the disclosure of the record is greater than the harm contemplated in the provision in question.

Further, where the disclosure is of national security or public order matters, this can only be made to the **relevant national security agents**, meaning that an applicant or even affected persons would remain uninformed on such critical public interest matters.

**Recommendation**

An Amendment Bill to AIPPA must include a general definition or rider of the “public interest” concept as a way of ensuring that there is clarity on its parameters, thus avoiding the abuse of this concept. The Global Principles on National Security and the Right to Information (Tshwane Principles), provide a definition of the concept which can be adopted or considered in coming up with same in the amendment bill. Information in the public interest is defined in these principles as ;

> Information that is of concern or benefit to the public, not merely of individual interest and whose disclosure is “in the interest of the public,” for instance, because it is useful for public understanding of government activities.

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21 Section 28(1)(iv) of AIPPA  
Further, the amendment bill must adopt a wider public interest override that is not confined to narrowly and vaguely defined specific instances. Section 25 (1-2) of the ACHPR model law would be instructive in widening the public interest override. The latter only allows non-disclosure if the harm to the interest protected by the exemption would outweigh the public interest in the release of information, specifically providing that;

\[
\text{Notwithstanding any of the exemptions in this Part, an information holder may only refuse a requester access to information if the harm to the interest protected under the relevant exemption that would result from the release of the information demonstrably outweighs the public interest in the release of the information. An information officer must consider whether subsection (1) applies in relation to any information requested before refusing access on the basis of an exemption stated in this Part.}
\]

The bill must also ensure that there is precision and clarity in respect of the concepts that are included under the public interest banner such as “public order” to avoid their abuse, as well as include a wider proactive disclosure provision that is not confined to stated instances but which obligates broader disclosure on the functions, powers and operations of bodies as is the case with section 3(3) of Nigeria’s Freedom of information Act [2011]. The provision should also enforce that proactive disclosure must be done including through the use of information and communications technology platforms such as websites, bulk sms and social media platforms to ensure wider and speedy reach of the information.

5.3 ROLE OF ACCESS TO INFORMATION IN FOSTERING TRANSPARENCY AND ACCOUNTABILITY

Aside from “main” provisions on access to information contained in sections 61 and 62, the Constitution also has a number of other provisions that have an impact on the nature and scope of rights and on law and policy making. These include the supremacy of the Constitution (section 2), founding values and principles (section 3) and the national objectives (section 9). Section 3(h) of the Constitution reiterates the fact that Zimbabwe is founded on a value of respect for good governance some of whose principles include transparency, accountability and responsiveness, while section 9(1) on the other hand implores the state to adopt laws and policies that develop efficiency, accountability and transparency in all government and public institutions as a measure to enhance good governance. Further, in terms of section 194, public administration must be governed by principles that ensure; -reasonable response to the people’s needs; -accountability to the people and timely provision of accessible and accurate information;

These provisions denote further responsibilities on information holders beyond having in place official records including the obligation to enhance accessibility and accuracy of information, timely responses to requests for information and wider measures to ensure accountability. However, the provisions of AIPPA do not adequately promote and facilitate the existence of good governance, transparency and accountability in Zimbabwe.

Recommendation

The Amendment Bill must include measures that are wide enough to facilitate the existence of this envisaged environment beyond keeping and providing access to official records. These could include
proactive disclosure obligations for all public institutions, a wider public interest override provision and narrowly couched limitations that will enhance the degree of information such institutions are obliged to release. Further obliging public institutions to submit reports to an independent oversight mechanism on ATI would also go a long way in putting pressure on them and instilling a culture of openness. Related to this, the amendment bill should also include adequate whistleblower protection as is the case with other similar laws such as the Ugandan Act.

5.4 INADEQUATE MEASURES TO GIVE EFFECT TO THE RIGHT OF ACCESS TO INFORMATION UNDER AIPPA

AIPPA further falls short in giving the full effect of the right to information in the following ways:

5.4.1 Duty to collate information

The Centre for Applied Legal Research (CALR) observes that nothing in AIPPA creates a duty on information holders to collate information requested by persons and that resultantly, that gap within AIPPA violates the fundamental international best practice of the duty to assist.23 In fact, the full realization of this right requires that information holders further to collating requested information, create, keep, organise and maintain it in a manner that facilitates the right of access to information.24

Notably, AIPPA does place an obligation on public bodies to “protect personal information that is under his custody or control by taking reasonable steps to ensure that there is adequate security and that there is no unauthorised access, collection, use, disclosure or disposal of such personal information,”25 and to further ensure that personal information is used only for the intended purpose or for other uses with the consent of the person it relates to.26

However, while these measures are positive, they are still inadequate. This is because these stipulations are not linked to any consequential measures that would deter negligent or other harmful handling of information by public bodies. Further, there are also no sanctions tied to the stipulation that information must be used only for the intended purpose or otherwise only with the consent of the person involved. Also, section 34 provides that personal information may be retained by a public body for “at least one year” after use but does not stipulate for how long that body may continue to have such information and when and how it will be disposed of, leaving room for abuse or unjustified use of such information.

RecommendationsThe Amendment Bill will need to outline clearly the measures that ought to be taken by public bodies in the collection, use and disposal of personal information by public bodies. It must also put in place measures that guard against the abuse or other handling of the information which can detrimental to the person it relates to. Some of the measures that must be provided in the Amendment Bill include the following;

23 Note 20 above at page 12
24 Section 6- ACHPR Model law on access to information
25 Section 33- AIPPA
26 Section 36-AIPPA
(i) Outlining the penalties or consequences that could ensue a public body where it uses one’s personal information for other purposes other than the intended and without the consent of the person involved.

(ii) Penalizing negligence or other detrimental action by a public body in respect of its obligations in terms of section 33.

(iii) Specifying the period within which a public body can lawfully keep in its possession, one’s personal information and after how long and in what manner it will be disposed.

These measures are key in ensuring that personal information is possessed only for the period when it is critically needed and that clear guidelines for its disposal are also outlined including a notification to that effect to the person concerned.

5.4.2 Exclusion of other classes of media

Further, AIPPA is also limiting the application of the right to information in respect of the media. While section 62 (1) and (2) of the Constitution, confers the right to access information on the “Zimbabwean Media” broadly, this does not apply to other non-traditional forms of media such as bloggers, freelancers and citizen journalists who are not considered as part of mass media in line with section 2 of AIPPA. The latter defines mass media as: “(a) newspapers, magazines, and other periodically printed publications; and (b) a broadcasting service as defined in the Broadcasting Services Act [Chapter 12:06], insofar as such service employs a journalist requiring to be accredited in terms of section 79; which are intended to be read, seen or heard, as the case may be, by an unlimited number of people”.

Recommendations

The Amendment Bill will need to include a definition of “media” and distinguish who constitutes the “media” for purposes of accessing information in terms of the law.

5.4.3 Stipulation for requests to be in writing

In terms of section 6 of AIPPA, a person who requires access to a record that is in the custody or control of a public body should make a request, in writing. Unlike in other jurisdictions such as Uganda and Nigeria where the requirement for a written request is coupled with room for oral requests, the same option is not available in AIPPA. The lack of an option for oral requests gives room for public institutions to confine information requests to written ones only.

Recommendation

An amendment to AIPPA will need to highlight that requests for information can also be made orally by specified persons who are not in a position to reduce them into writing and that information officers or any responsible person, would in those instances, have the responsibility of

27 Section 11(3) of Uganda’s Access to Information Act [2005] provides for oral information request further to the written ones, as does section 4(5) of Nigeria’s Freedom of Information Act [2011].
reducing these to written requests. This is the position proposed by section 13(1) of the ACHPR Model Law On Access to Information,\(^{28}\) and is similarly provided in the Ugandan and Nigerian laws.

### 5.5 EXTENSIVE TIME FRAMES

While the 30 day turnaround response period is a feature in other countries' ATI laws, this period is all the more detrimental to the right of access to information in that unlike in South Africa where the PAIA places a limit on extension of this timeframe, the same cannot be said for AIPPA. Instead, section 11(1) creates room for an uncapped extension of the initial 30-day period such that the law does not guarantee certainty when one should expect to enjoy the right to information in instances where there is cause for an extension. The Act does not give an exact stipulation of the maximum extension time after the initial 30-day period.

Further, public bodies only have the obligation of informing the requester of the extension with no corresponding obligation to respond within a specified maximum timeframe. The lack of a specified extension timeframe is contrary to the acceptable internal limitation of the right of information outlined in section 62(4) such as fairness and reasonableness.

**Recommendations**

1. The 30 day response time could be reduced to for example the 21-day period provided for in the ACHPR model law or even less especially considering that other countries such as Nigeria\(^{29}\) have limited this to 7 days for both the initial turnaround time and the extension. Kenya has also limited the initial period to 21 days and extension to only one 14 day period.\(^{30}\)

2. This provision would also need to be revised with a view to capping the timeframe for extension of the period within which a response should be granted so that it is not left open to abuse by information holders.

3. Further, the timeframe which has to pass before classified information can be released to the public is also considerably long and should be reduced. For example, section 14(3) provides that information relating to cabinet and local government deliberations may only be released after 25 years, while in terms of section 18 (2), twenty years have to expire before information on inter-governmental business can be released. According to CALR, these extensive timeframes are unreasonable and “detrimental to the principle of an accountable government by equally delaying the social audit process.”\(^{31}\)

\(^{28}\) Information and Media Panel of Inquiry Report [2015]- at pg 380

Further, an example of flexible request procedure is in section 13 of the AU Model Law on Access to Information which states that: “A person who wishes to obtain access to information of an information holder must make a request in writing or orally to the information officer of the body, “ thus if a person makes an oral request, the information holder is obliged to reduce the oral request to writing in whatever format is acceptable.

\(^{29}\) Section 5- Nigeria Freedom of Information Act

\(^{30}\) Section 9(2) and 9(3) of the Kenya Access to Information Act

\(^{31}\) Note 20 above at page 16
5.6 **Oversight Mechanism**

While AIPPA established the ZMC as the access to information oversight body, this has since been transformed into a constitutional body with no oversight function in monitoring and promoting the right to information. This means technically, there is no oversight body to do this currently.

**Recommendation**

There is need for an amended law to establish an independent body that will carry out an oversight function on access to information, as outlined in the ACHPR Model Law and in principle 9 of the APAI Declaration. Powers and duties of the oversight body must be clearly spelt out.

5.7 **Judicial Review**

While section 39 (k) of AIPPA states that one of the functions of the ZMC is to review the decisions of public bodies in respect of access to information requests, the procedure outlined in sections 53 to 57 of the Act does not include judicial review post the ZMC review, a gap that should be addressed in the Amendment Bill. The Amendment Bill should in respect of access to information, outline a clear review process which should include the ATI oversight mechanism as well as specific courts to which further grievances should lie, in line with the obtaining hierarchy of courts in the country. This would be well in line with the demands of the right to administrative justice that are outlined in section 60 of the Constitution, which guarantee all persons lawful and requisite administrative conduct, including in the pursuit of fundamental rights and freedoms. This provision in essence begs for the establishment of effective and adequate enforcement mechanisms at various levels. In light of this provision, the AIPPA amendment bill should therefore also ensure that there are adequate and effective internal as well as external mechanisms for redress of grievances and issues relating to the exercise of the right of access to information.

5.8 **Other General Recommendations**

In line with the above analysis of the extent of AIPPA’s incompatibility with the Constitution, the AIPPA Amendment Bill must also include the following aspects if it is to conform to the spirit and tenure of the current Constitution.

5.8.1 **Measures to enhance the duty to assist and facilitate access**

In order to fulfill this obligation, the Amendment Bill must include the following,

(i) A stipulation of mandatory facilities which a public body must provide to assist persons who may face problems accessing information such as the visually or physically disabled, illiterate persons or those that are otherwise restricted including by language.
(ii) Further, in line with the duty to assist and facilitate access to information, the AIPPA Amendment Bill must include measures to ensure that requests that have been transferred to other bodies are not prejudiced and are still attended to within the prescribed timeframes.

Also, the timeframes in this instance must be short and capped to avoid a situation where responses to transferred requests are unnecessarily delayed and requesters prejudiced. Access to information laws of Kenya and Nigeria\(^{32}\) for example, provide for shorter timeframes within which the transfer process should be dealt with. Whereas section 12(1) of AIPPA provides that a request must be transferred within ten (10) days, section 5 of the Nigerian Act limits this period to 3 days only with the Kenyan act limiting it to 5 days. Further, where the Kenyan act gives a 7 day timeframe within which the requester must be notified of the transfer, AIPPA does not specify the period and whereas both the Zimbabwean and Kenyan Acts expect that the transferred request must be dealt with within the maximum turn-around time, in terms of AIPPA however, there is still room for the 30 day period to be extended.

5.8.2 **Designation of information officers for purposes of implementation of the Act**

As with section 10 of the ACHPR Model law, the Amendment Bill must also designate information officers who are mandated with access to information requests. This is a common feature in other laws for example section 17 of the South African PAIA.

5.8.3 **Clear outline of the information request procedure**

The Amendment Bill must also outline clear procedures to be followed when seeking information which are not currently included in AIPPA. This will go a long way in making the right more enjoyable.

5.8.4 **Costs**

The Amendment Bill must also indicate that the cost attached to information requests shall be only for the processing/ reproduction of the information in question only and not for making the actual request. This would be in line with best practice. For example section 12 of the Kenyan act clearly provides that;

- no fee may be levied in relation to the submission of an application [and that]

- a public entity or private body from which an application for access to information has been made may charge a prescribed fee for the provision of the information and the fee shall not exceed the actual costs of making copies of such information and if applicable, supplying them to the applicant.

Section 15(3) of the South African PAIA also similarly mandates the payment of reproduction and not access fees while at the same time, stipulating categories of persons or circumstances exempted from the required fees.

\(^{32}\) Section 10 and 5 of the Kenyan and Nigerian Act respectively
CONCLUSION

As the country realigns its legislative framework with the Constitution, AIPPA should equally receive extensive amendments so that it gives full effect to the right of access to information. It is clear from the above analysis that the law as currently structured falls short of international best practice in promoting the right to information and of the country's Constitutional provisions. It is against this background that the paper reaffirms positions that have been submitted prior, on the need to revisit the law so as to do the following:

1. Review AIPPA so that it becomes a stand-alone access to information law devoid of media regulation issues. This will ensure that the right to freedom of information is not subsumed and or conflated with media freedom issues. Media regulation should be provided for under a different media law.

2. Besides benchmarking the amendments against the Constitution, the process must also take into cognisance recommendations made in the Information and Media Panel of Inquiry report sponsored and published by government in 2015.

3. The amendment process should also seek to ensure that the law conforms to regional and international standards enunciated in several protocols promoting the right to information.

4. Lastly, the amendment process should be based on wide consultation of key stakeholders, including citizens who are supposed to be the ultimate beneficiaries of such a law.
REFERENCES

1. Access to Information and Protection of Privacy Act [Chapter 10:27]
3. African Charter on Human and People’s Rights
4. Access to information Act- Uganda [2005]
6. Constitution of Zimbabwe Amendment (No. 20) Act of 2013
7. Declaration on Principles of Freedom of Expression in Africa
9. African Charter on Democracy, Elections and Good Governance (ACDEG)
10. International Covenant on Civil and Political Rights
11. Promotion and Access to Information Act No 2 of 2002
12. 1946 Resolution 59(1) of the United Nations General Assembly
15. Information and Media Panel of Inquiry Report [2015]
16. MISA-Zimbabwe policy brief on the access to information and protection of privac.
17. Universal Declaration of human rights
APPENDIX 1

ANALYSIS OF MEDIA FREEDOM AND MEDIA REGULATION PROVISIONS

Since AIPPA currently regulates both access to information and media regulation issues, it is proposed that an amendment of the act removes media regulation aspects and places them in another media law in line with the options provided for in sections 249 (2) and (3) of the Constitution. This media law however would need to equally review a number of aspects currently curtailing the exercise of media freedom as provided for in AIPPA and some of them are as follows;

(i) Independence of the ZMC

In terms of section 235 (1c) of the Constitution, independent commissions such as the ZMC are accountable to Parliament “for the efficient performance of their functions”. Further, Section 323 stipulates that the ZMC shall annually, submit to Parliament, through the Minister, a report on its “operations and activities”. This is contrary to section 42 of AIPPA which stipulates that an annual report of the Commission must be submitted at the end of each year, to the Minister and not to Parliament to whom the Commission is accountable. Further the report envisaged in AIPPA, is on “matters dealt with by the commission”, which is narrower than the report envisaged in the Constitution thus limiting the ambit of oversight and extend of ZMC‟s accountability.

Recommendation

The AIPPA Amendment Bill must align the reporting procedures with that specified in section 323 of the Constitution, where reports lie with Parliament. Further, changes must also be made to give wider obligations to the ZMC in respect of their level of accountability including through the reports to Parliament.

(ii) Undermining of a journalist’s right to protection of journalistic sources

Contrary to the provisions of section 61 (2), which guarantee the protection of journalist’s sources of information, section 42C read with section 42B of AIPPA however empowers the Media Council established in terms of section 42A, to summon any person as a witness in a matter involving the breach of the code of conduct, and in that process, can request the disclosure of any material which can include a journalist” source of information. Further, AIPPA criminalises the failure or refusal to
attend or to produce the required documents or record of information [section 42C(3)] which penalty can be a term of imprisonment\textsuperscript{33}.

Recommendation

These provisions should not be a feature of the Amendment Bill as they are in conflict with the provisions of section 61(2). Instead, the Amendment Bill or subsequent media regulation law must include measures to safeguard the right to protection of sources.

(iii) Criminalization of expression

Despite recent Constitutional Court rulings to the effect that criminalizing the expression of ideas or information is unreasonable and unconstitutional in any democratic society,\textsuperscript{34} AIPPA still contains provisions with the same effect such as section 64 and 80. Section 64, provides for the offense of “Abuse of freedom of expression” which criminalises the publication of false information, while section 80 provides for the offence of “Abuse of journalistic privilege” which again arises from the publication of false information. If found guilty these offences attract a fine or both a fine and a term of imprisonment of up to three and two years respectively.

Recommendation

The Amendment Bill or media regulation bill must remove all provisions that criminalise expression or alternatively, de-criminalise the false news offence created in section 64 and 80 of AIPPA such that any infringement would instead be regulated through civil law. Amendments can also be made to ensure the “recognition of self-regulatory mechanisms, or the statutory re-direction of matters arising out of the relevant disputes to civil proceedings (as opposed to criminal law)”\textsuperscript{35}.

(iv) Privileges of accredited journalists

The privileges of accredited journalists outlined in section 78 currently exclude some key entitlements that accrue in respect of media freedom, in particular the protection of the

\textsuperscript{33} J. Limpitlaw - Media Law Handbook for Southern Africa – Volume 2 at pg 655
\textsuperscript{34} Note I above at page 4
\textsuperscript{35} Note 1 above at page 6

Also the Supreme Court of Zimbabwe made it clear that laws which criminalize falsehoods or other forms of communication or expression, are unconstitutional. For example in the case of Chamakure & Kahiya v The Attorney General, [SC/14/13] the court having declared unconstitutional the offence of publication or communication of a false statement which harms or is likely to harm the interests of the State in the performance of its functions, went on to state that strong constitutional protection of freedom of expression cannot tolerate the imposition of self censorship on free speech and press through fear of lengthy sentences of imprisonment for offences of publishing or communicating false news. And similarly, it is strongly arguable that the false news provisions in AIPPA are equally unconstitutional in effect and must therefore not be a feature on the AIPPA amendment bill.

\textsuperscript{35} Note 1 above at page 6
confidentiality of journalists’ sources of information; freedom of establishment for prospective broadcasters, and the Amendment Bill ought to also include these. Turning journalism into a privilege is a violation of the constitution which recognizes the exercise of the profession as a right. The amendment should take this into consideration to ensure sufficient media freedom as guaranteed in the constitution.

(v) Double regulatory focus

Contrary to the international best practice, AIPPA regulates two aspects that should ideally be separately regulated, with either a freedom of information or access to information law on one hand and a separate one on regulation of the media. According to CALR, the effect of having these two aspects regulated in one piece of legislation is that it leads to “dissonance in the development of one aspect of the Act in favour of the other- one becomes a mere perfunctory inclusion with insufficient attention to its independent development and evolution36. Further, section 62(4) as read with section 249 (2) and (3), create room for the enactment of separate laws for the two aspects and this should be thus reflected in the AIPPA Amendment Bill.

Recommendations

Is recommended that AIPPA be unbundled and in its place two laws introduced on media regulation and access to information. The enactment of a generous Access to Information statute that enables the effective and practical implementation of access to information rights would be in tandem with regional and international standards and would be permissible under s62 (4) of the Constitution of Zimbabwe, which requires the legislature to pass a law to give effect to the constitutional right. On the other hand, a separate media regulation law would also be in line with the constitutional provisions including section 232(d) which establishes the Zimbabwe Media Commission as a separate and independent Commission.

(vi) Privileges of accredited journalists

The privileges of accredited journalists outlined in section 78 currently exclude some key entitlements that accrue in respect of media freedom, in particular the protection of the confidentiality of journalists’ sources of information; freedom of establishment for prospective broadcasters, and the Amendment Bill ought to also include these.

(vii) Regulation of the media

While key human rights instruments such as the Declaration of principles of freedom of expression in Africa promote self regulation of the media,37 the provisions of section 249 of the Constitution

36 Note 9 above at page 21
37 See article 9(3)
vest media regulatory powers on the Zimbabwe Media Commission (ZMC) which entails statutory regulation of the media. However, the Constitution still creates room for the co-existence of the statutory ZMC and a self-regulatory mechanism composed of and run by the media sector itself. Further to the provision on an act conferring regulatory powers on the ZMC, section 249 (3) of the Constitution provides that another act of parliament may be enacted to provide solely for regulation of the media while section 321 further provides that a law may confer additional functions on a commission like the ZMC to permit it to delegate some of its functions which can be to a self-regulatory body.

**Recommendation**

The Amendment Bill that focuses on media regulation must ensure that it fully promotes media freedom including through a feasible co-existence of the ZMC and a self-regulatory body, with the latter especially focusing on regulation of media conduct.