(a) Six members elected by the shareholders;

(b) One member nominated by the Editors and other journalists employed by the company;

(c) One member nominated by the other employees of the company;

(d) One member nominated by the Trust;

(e) One member nominated by the Minister in charge of the subject of Media;

(f) One member nominated by the Leader of the Opposition.

The Chairperson of the Board of Directors shall be elected by the Directors as shall be specified in the Articles of Association of the company.

Editorial Independence

The composition of the Board of Directors will necessarily ensure editorial independence. Furthermore, the Director appointed exclusively by the journalists of the company will, in particular, not merely represent, but protect, their interests.

Media Freedom and Professional Excellence

The Terms of Reference of the Committee are emphatic about the objective of the broad-basing of the ANCL and (i) "transferring the... ANCL into a free and independent media institution of professional and journalistic excellence", and (ii) "Strengthening media freedom and media democracy".

The Committee is of the view that divesting state ownership and control of the ANCL will be a definite step towards achieving the above objectives. However, this needs to be supplemented by the consolidation of an overall democratic political culture in our country, where the Government, the public, media professionals and media institutions recognize and sustain the noble ideals of media freedom and democracy. The Committee sincerely hopes that the broad-basing of the ownership of the ANCL is accompanied by a relentlessly strong democratic culture where media freedom is constantly guarded by a vigilant public and made truly meaningful through media independence, professionalism and professional excellence.

The members of the committee were Mr. Sidat Sri Nandalochana - Chairman, Dr. Jayadeva Uyangoda Mr. Rohan Edrisinha and Mr. R.M. Gunasekera ■

REPORT OF THE COMMITTEE TO ADVISE ON THE REFORMS OF LAWS EFFECTING MEDIA FREEDOM AND FREEDOM OF EXPRESSION

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

CONSTITUTIONAL GUARANTEES OF FREEDOM OF EXPRESSION

16.1 The guarantees of freedom of expression in the Constitution must be brought into conformity with Sri Lanka's international legal obligations set in the International Covenant on Civil and Political Rights (ICCPR).

Freedom of expression

16.2 The right to freedom of expression in the constitution should be re-phrased to reflect the wording of the ICCPR which states, in article 19.1, that "Everyone shall have the right to hold opinions without interference".

Freedom of information

16.3 The Constitution should explicitly include freedom of information, as in the May 1995 draft, but the draft should be amended to set it out in more detail as in the ICCPR, which states, in article 19.2, that the right to freedom of expression "shall include freedom to seek, receive and impart information and ideas of all kind regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". Accordingly, the formulation in the 22 November 1994 draft of the Minister of Justice and Constitutional Affairs, which spelt out this right in detail and also provided safeguards against indirect restrictions such as abuse of control over newsprint etc should be restored and incorporated into the Constitution.

Constitutional restrictions on fundamental rights

16.4 The restrictions on fundamental rights in the Constitution should be reformulated to comply with restrictions permissible under the International Covenant on Civil and Political Rights. The provisions in the Constitution and the Ministry draft, setting out restrictions relating to parliamentary privilege should be removed.

16.5 The restrictions in the Constitution must be reformulated to incorporate, in every instance, the requirement that the restriction, be "necessary in a democratic society". This has in fact been done in the May 1995 draft proposals. However it remains desirable that the wording be further reformulated along the lines of the wording in the ICCPR to make it unambiguously clear that restrictions are the exception.

16.6 The Constitutional provisions relating to fundamental rights should also be formulated to comply with the requirement of the ICCPR that any derogations from these rights can be made only "in time of emergency which threatens the life of the nation, the existence of which is officially proclaimed", and "to the extent strictly required by the exigencies of the situation". The Constitution must also state explicitly that any such emergency derogations should not involve discrimination solely on grounds of race, colour, sex, language, religion or social origin.

16.7 In order to ensure that any derogations from fundamental rights be strictly confined to those permitted under article 4.3 of the ICCPR, the Constitution must also state clearly those rights which cannot be derogated from at any time or order any circumstances. These should include protection against retroactive penal legislation.

Constitutional rights of non-citizens, police and armed forces

16.8 The Constitution should be amended, as proposed in the May 1995 draft, so as to accord all fundamental rights including those relating to free expression, to all persons within the state's territory, with the exception of restrictions relations relating to the right to vote and to be elected or other rights which the ICCPR states it is permissible to restrict in the case of non-nationals.

16.9 The Constitution should be amended to remove the restrictions on the application of fundamental rights to members of the armed forces and the police, with the possible exception of certain restrictions in respect of the right of association including the right to form and join a trade union, which are permissible under the ICCPR.

Judicial review of the constitutionality of legislation

16.10 The Constitution must be amended to permit judicial review at any time of both existing and future legislation to examine whether it is invalid on the ground of inconsistency with the fundamental rights set out in the Constitution. There should be no time limit on the judicial review of enacted legislation.

Newspaper and Press Laws

16.11 the Official Secrets Act, which defines official secrets vaguely and broadly, should be repealed, A Freedom of Information Act (the need for which we have dealt with separately in this report) could include appropriate provision for a careful and narrowly defined exception relating to official secrets, where disclosure of information will be the norm and secrecy the exception.

16.12 Section 16 of the Press Council Law of 1973. which prohibits newspapers from publishing proceedings of Cabinet meetings, decisions or Cabinet documents, and certain other matters, is arbitrary and restrictive and cannot be justified. (Insofar as it deals with official secrets and security-related matters, our above observations on the Official Secrets Act apply. Insofar as it deals with profane, obscene or indecent matter, this is already covered by the Profane Publications Act and the Obscene Publications Ordinance.) Section 16 should be repealed in toto.

Offences Under the Penal Code

16. 13 The following provisions in the Penal Code that impinge on freedom of expression should be amended or repealed:

(a) Section 118, which makes it an offence to bring the Queen/ President into contempt by contumacious insulting or disparaging words (spoken or written), is not found in the Indian penal code, and we see no reason to retain it in our law. It should be repealed.

(b) Section 120 of the Penal Code, dealing with "sedition", is much wider in scope than the corresponding provision in the Indian Penal Code (which was amended in 1980). As now defined, it can be used to stifle peaceful and legitimate criticism of the government. It should be amended.

(c) Section 479, dealing with criminal defamation, should be repealed as, despite the several defences it allows, the possibility of such prosecution can discourage criticism of government ministers and policies or the expression of political dissent. The requirement of the Attorney-General's sanction for a prosecution has not proved an effective safeguard.

If it is not to be repealed, the section should be amended so as to vest the decision whether or not to indict in a judge of the high court with proper guidelines similar to those in English law, namely
- there should be a clear prima facie case;
- the libel must be so serious that it is proper for the criminal law to be invoked: and
- public interest requires the institution of criminal proceedings.

There should be provision for the accused to be heard against the application for permission to indict.

Parliamentary Privilege

16.14 The four amendments that have been made to the Parliament (Powers and Privileges) Act 1953 are unacceptable and should be repealed. These are:

The hasty amendment of 1978 granting Parliament the power (earlier conferred only on the Supreme Court) to impose fine or imprisonment. This makes Parliament a judge in its own cause, and is in conflict with the right recognised by the International Covenant on Civil and Political Rights to a fair trial by a competent, independent and impartial tribunal.

- The 1987 amendment' by necessary consequence, as it provides for enhanced punishments to be imposed by Parliament.

- The 1980 amendment, which created the new offence of wilfully publishing words or statements after the Speaker has ordered them to be expunged from Hansard. To deny the public the knowledge of how their representatives comport themselves in Parliament is a serious infringement of the right to information, and may have a direct bearing on a voter's decision as to whom to support at the next election.

- The 1984 amendment, which inter alia permits newspapers to publish allegations against judges made in Parliament that would otherwise be contempt of court. In our view this is a situation where the interests of protecting the independent functioning of the judiciary should prevail.

16. 15 There is, however, also an element of the original Parliament (Powers and Privileges) Act of 199953 which restricts freedom of expression. Paragraphs 7 and 8 of the Schedule to the 1953 Act, make a punishable offence of breach of privilege to publish a defamatory statement reflecting on the proceedings and the character of parliament, or a defamatory statement concerning any member in respect of his conduct as a member. The Act sets out no defences (e.g. truth, fair comment) such as are found in the normal law of defamation.

16. 16 In the view of the Committee, neither Parliament nor its members require any protection from defamation over and above that enjoyed by ordinary citizens. Indeed the principle reflected in several decisions of the European Court of Human Rights is that "The limits of acceptable criticism are..... wider as regards politicians as such than as regards a private individual". The International Covenant on Civil and Political Rights does not recognize parliamentary privilege as one of the permitted restrictions on freedom of expression.

16. 17 For the foregoing reasons we also recommend that paragraphs 7 and 8 of the Schedule to the Act be repealed.

Contempt of Court

16. 18 In view of the perils faced by the media in the exercise of their right of freedom of expression and publication, and their duty to keep the public informed, there should be a Contempt of Court Act which would clarify the substantive and procedural laws. Such an act should restrict the concept of scandalizing the court to the publication of abusive or scurrilous comment about a judge as a judge, or of an imputation of impropriety or of corrupt bias, or attack on his integrity as a judge.

"Banning" of Publications by the Customs

16. 19 The law should be clarified to ensure that the import of publications cannot be interfered with except on grounds that are constitutionally permissible and are compatible with the freedom of expression and information.

The Sixth Amendment to the Constitution

16. 20 The Sixth Amendment to the Constitution, which prohibits and imposes drastic penalties for even the peaceful advocacy of separatism, should be repealed. The Committee (with one dissent) recommends that no prohibition of the peaceful advocacy of separatism should be included in the new Constitutional, provisions.

Censorship and Other Restrictions under Emergency Rule

16. 21 Past and present practices with regard to the application of censorship has often been arbitrary and erratic, and in violation of the publics right to know. They have also been in violation of international standards of freedom and expression. Several examples have been given in our report.

16. 22 The Committee is perturbed at the fact that censorship is imposed by emergency measures without public announcement or explanation. The Committee therefore recommends that all emergency regulations which restrict freedom of expression, assembly or association be published immediately in the Sinhala, Tamil and English press. They should also be tabled in Parliament and lapse if not specifically approved by resolution within two weeks.

16. 23 The Committee further recommends the law and practice relating to censorship be kept strictly within the framework permitted by international norms, notably the International covenant on Civil and Political Rights, to which Sri Lanka is a party. Policy on censorship should also guided by the Johannesburg Principles on National Security, Freedom of Expression and Access to Information.

Confidentiality of Sources of Information of Newspapers and Other Media

16. 24 The absence of such protection in Sri Lanka is a serious impediment to investigative journalism and the exposure of public scandals and wrongdoing. The right of journalists not to be compelled to disclose their sources of information should be guaranteed by law. Any exceptions should be strictly confined to the requirements of criminal justice in cases of grave crime, and should be on a court order made after a hearing at which the journalist concerned has the right to be represented.

A Right of Reply

16. 25 Provision should be made in legislation for a right of reply, to protect individuals against factually incorrect statements and engender respect for their reputation, dignity, honour, feelings and privacy, and to encourage a greater sense of responsibility in the exercise of the freedom of expression, information and publication. The reply should be confined to the aggrieved person's version of the facts and should not be longer than is necessary to correct the alleged inaccuracy or distortion.

A Freedom of Information Act

16. 26 A Freedom of Information Act should be enacted which makes a clear commitment to the general principle of open government and includes the following principles-

- disclosure to be the rule rather than the exception;

- all individuals have an equal right of access to information;

- the burden of justification for withholding information rests with the government, not the burden of justification for disclosure with the person requesting information;

- all individuals improperly denied access to documents or other information have a right to seek relief in the courts.

16. 27 The law should specifically list the types of information that may be withheld, indicating also the duration of secrecy. Legal provision must be made for enforcement of access, with provision for appeal to an independent authority, including the courts, whose decisions shall be binding.

16. 28 The law should make provision for exempt categories, such as those required to protect individual privacy including medical records, trade secrets and confidential commercial information, law enforcement investigations, information obtained on the basis of confidentiality, and national security.

16. 29 The legislation should included a punitive provision whereby arbitrary or capricious denial of information could result in administrative penalties, including loss of salary, for government employees found in default.

16. 30 Secrecy provisions in other laws must be subordinate to the freedom of information law or must be amended to conform with it in practice and in spirit.

Responsibility By State-Run or Public-Funded Media

16. 31 State-run or public-funded media are obliged to maintain a fair balance of alternative points of view and to allow political opponents of the government full opportunity to put across their views at all times, not only at times of election. This principle necessarily follows from the constitutional guarantees of freedom of expression and information, and the guarantee against discrimination. It has been upheld by the courts cases in recent in several countries. State-run or public-funded media should clearly distinguish between, on the one hand, the public and state interest and, on the other, the interest of the political party in power at the time.

16. 32 Such media should also recognize and fully reflect, at every level of activity, the multi-ethnic, plural nature of our society, and the issue of language rights.

16. 33 A legal and administrative framework for all state-funded media should be established to ensure effective implementation of these responsibilities.

The Electronic Media

16. 34 Measures for the protection and promotion of broadcasting freedom should be set out in law. The legislation should specifically state the public's right to receive information and opinion on matters of public interest, the principle of respect for the plural, multi-ethnic nature of our society, and the policy of development of community radio. it should explicitly state the basic principle that the public-funded media must maintain a fair balance of alternative points of view at all times, not only at times of election. Disparity in the service provided in the two official languages, is no mere technical denial of the constitutional rights but a serious deficiency in the process of trying to build a just and harmonious society. It is necessary that the law also articulate the principle that the state-run or public-funded media should at every level of its activities recognize and reflect the multi-ethnic, plural mature of our society and the issue of language rights.

An Independent Broadcasting Authority

16. 35 The Law refereed to above should establish a separate public authority that is independent of government, to lay down in detail and oversee the implementation of the broadcasting policy outline above. The same authority should be responsible for the licensing of community radio and private broadcasting, including technical aspects.

16. 36 The selection process for the members of this body must be such as to ensure it is not dominated by any political group, and that those appointed are sensitive to the need for pluralism and committed to the basic principles enunciated in the broadcasting policy.

State Broadcasting

16. 37 The framework established for state broadcasting should recognize the difference between, on the one hand, the state and the public interest, and, on the other hand, the government and the interest of those who may for the time being exercise government power.

16. 38 The principle of editorial independence of the state broadcasting authorities and the independence of their governing bodies should guaranteed by law.

16. 39 Radio and television broadcasting by the state should continue to be undertaken by separate corporations but with necessary changes in the law to guarantee both the independence of their governing bodies and their editorial independence. The governing boards should be independent of government.

16. 40 Members of the governing boards should be appointed with a mandate to act as independent trustees of the public interest in broadcasting, and not as representatives of government or any

special interests. The members should be appointed for a fixed term according to specified criteria. The process for selecting members should be such as to ensure it is fair and not subject to political pressures.

Private Broadcasting

16. 41 Permitting private broadcasting is one way of promoting pluralism in sources of information and preventing media monopolies. However as commercial stations are influenced by business and advertizing considerations, they may also be unwilling to criticize government policy. Broadcasting requires capital outlay and sophisticated technology which need to be deployed in the public interest without consideration of profit-making. While media diversity is important, therefore, granting licenses to private broadcasters should not be viewed as a substitute for ensuring the pluralism and independence of public-funded broadcasting.

16. 42 Licenses for private broadcasting should be allocated by the independent authority we have recommended. Allocation of licenses should be fair and non-discriminatory and in accordance with stated criteria.

Community Radio

16. 43 A policy for the development of community radio should be set out in law.

16. 44 Community radio should receive certain limited support from the state, with assurances against governmental interference in programming. It should be assisted to obtain necessary foreign broadcasting material which comes within the scope of interest of the station.

16. 45 Community radio services must not be precluded from broadcasting news, whether of regional, community, national or international interest.

16. 46 Some limits should be prescribed on the time provided for commercials. The regularity authority should ensure that at least 50% of the programming should be definitely within the declared aims of the community radio service.

Complaints

16. 47 Complaints about violations of these principles of other aspects of broadcasting freedom should be referred to the proposed Media Council.

A Media Council Act

16. 48 The Press Council Law should be replaced with a Media Council Act, the scope of which would cover both print and electronic media. The Act should articulate the freedom of the media in terms of the requirements of the International Covenant on Civil and Political Rights and seek to uphold and promote freedom of the media as so articulated.

16. 49 The objectives of the Act should include:

(a) promotion of freedom and responsibility of the mass media of social communication,

(b) ensuring the right of the citizen to be informed freely, factually and responsibly on matters of public interest,

(c) ensuring the maintenance of high standards of communication ethics,

(d) keeping under review developments likely to restrict the supply of information of public interest and importance and developments in the various media which may tend towards concentration or monopoly and to take appropriate remedial action.

16. 50 In order that the Council be enabled to function as an independent body without political preferment or other bias or pressure it would have as members a majority of media personnel of proven competence and integrity and other persons of high intellectual attainment, of known liberal views and distinguished in various fields of activity. As some of the functions of the Council would be to inquire into complaints from members of the public against newspapers, radio or television, some members of the Council would need judicial or legal experience together with a manifest interest in the promotion of the fundamental rights of citizens.

16. 51 All members of the Council should be nominees of an independent body or bodies. The authority appointing the members of the Council must be guided strictly by the criteria set out above.

16. 52 After due process of inquiry the Council would have the power to order a correction, an apology, or censure the particular medium of publication, as the circumstances warrant. Any issue of contempt should be referred to the courts. The Act should contain no provision similar to Section 16 of the Press Council Law prohibiting publication to cabinet decisions and other matters. The Council should function as an independent body and should therefore not be required to comply with any directions which any persons or body may give it. Such a direction would be tantamount to interference with its independence. ■

The members of the committee were. R.K.W. Gunasekera (Chairman), Prof. Shirani Bandaranayake, Suriya Wickremasinghe, Rohan Edirisinghe and Dr. Jayampathi Wickremaratne.