COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF INTERNATIONAL LAW AND SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES IN RESPONSE TO LAW COMMISSION OF INDIA CONSULTATION PAPER ON MEDIA LAW

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The views stated in this submission are presented only on behalf of the Section of International Law and Section of Individual Rights and Responsibilities of the American Bar Association. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors, and therefore may not be construed as representing the policy of the Association.

The Section of International Law and the Section of Individual Rights and Responsibilities (together the “Sections”) of the American Bar Association (“ABA”) welcomes the opportunity to provide comments to the Law Commission of India (the “Law Commission”), in response to the Law Commission’s May 2014 Consultation Paper on Media Law (“Consultation Paper”). The Sections appreciate the substantial thought and effort by the Law Commission reflected in the Consultation Paper. The Sections are available to provide additional comments or to participate in any further consultations with the Law Commission, as it deems appropriate. The Sections’ over 20,000 members include attorneys from all over the world and their comments reflect the members’ expertise and experience with issues relating to media law worldwide.

The Consultation Paper presents 42 questions in 10 areas. The questions fall into 4 general categories: (1) regulation of media content; (2) regulation of media structure; (3) state-owned media; and (4) regulatory structure. The Sections address these questions generally within each category.

**Media Content**

The questions presented in the Consultation Paper regarding media content relate to the 7 areas of (a) paid news, (b) opinion polls, (c) media and individual privacy, (d) trial by media and rights of the

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2. The 10 areas are: (1) methods of regulation; (2) paid news; (3) opinion polls; (4) cross media ownership; (5) media and individual privacy; (6) trial by media and rights of the accused; (7) defamation; (8) publications and contempt of court; (9) regulations surrounding government owned media; and (10) social media and Section 66A of the Information Technology Act, 2000.


4. Id. at ¶5.5.

5. Id. at ¶7.4.
accused,6 (e) defamation,7 (f) publications and contempt of court,8 and (g) social media and Section 66A of the Information Technology Act, 2000.9 The concerns that apparently underlie calls to regulate content in these several contexts are that of misleading or offending the audience,10 invading privacy,11 infringing the rights of the accused,12 and erosion of public confidence in the administration of justice.13

The guiding principles in the Sections’ comments are that speech is an essential freedom that may be abrogated only in the most extreme circumstances, to protect other equally important values, and that speech should not be restricted for the purpose of ameliorating deficiencies in other areas instead of directly addressing those deficiencies. Speech should not be constrained merely because the message is undesirable and/or unfounded in the eyes of some. As the Law Commission recognizes, protection of other values may “lead to a ‘chilling effect’ on the publication of free and independent news articles and puts undue pressure on journalists and publishing houses” and a balance must be made.14 The United Nations Human Rights Committee has stated “it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.”15

In the case of paid news,16 while payment may indicate that the “news” report is biased and perhaps even false, it is not necessarily uniformly the case. A paid news report that is accurate may provide useful information to readers. A blanket prohibition against paid news is a disproportionate infringement of speech to address the concern about bias and veracity. The Sections believe that full disclosure of any compensation for the “news” report is sufficient prophylactic against potential reader confusion. There are apparently significant regulations already in force constraining paid news that the

6 Id. at ¶8.4.
7 Id. at ¶9.4.
8 Id. at ¶10.5.
9 Id. at ¶12.3.
10 Id. at ¶¶4.1, 5.1.
11 Id. at ¶7.1.
12 Id. at ¶¶8.1-8.3.
13 Id. at ¶10.1.
14 Id. at ¶9.1.
16 The Consultation Paper asks: “Should paid news be included as an election offence under the Representation of the People Act, 1951? How should it be defined? What enforcement mechanisms should be put in place to monitor and restrict the proliferation of paid news?” Consultation Paper at ¶4.6.
Law Commission believes are insufficiently enforced.\textsuperscript{17} The Sections suggest that enforcement of existing law may be more effective than adding yet more regulation that may be ineffective if still unenforced, in addressing the concerns of misleading the reader and subverting his/her choices in the democratic process. The Sections see no need to monitor and restrict the proliferation of paid news beyond possibly a disclosure requirement that is enforced.

Similarly, while some opinion polls\textsuperscript{18} may be biased and perhaps even manipulated,\textsuperscript{19} it is not uniformly the case. Rigorously conducted opinion polls serve the useful purpose of discovering the views of those surveyed, which may inform both candidates and policy makers. The Sections see no need to regulate opinion polls beyond possibly a disclosure requirement regarding methodology.

Concerns about invasion of privacy\textsuperscript{20} apparently stem from the increasing publication of sensational stories and stories that may have been instigated by “sting” operations\textsuperscript{21} by the media that may have little public interest value by most standards.\textsuperscript{22} The Sections recognize that privacy is a value that needs to be protected. Privacy may even in some instances trump freedom of speech. However, the experience in the U.S. indicates that the establishment of general principles that are to be applied on a case-by-case basis regarding how privacy should be balanced against the right of speech, is more flexible and may ultimately be more effective than attempting a priori to regulate all possible scenarios of invasion of privacy or “sting” operations. For example, different privacy standards apply depending on whether the subject of a news report is a “public” person rather than a “private” person.\textsuperscript{23} Whether a person is “public” or “private” may change depending on the circumstances.

Related to privacy concerns are concerns about defamation and infringing on the rights of the accused to a fair trial. As to defamation,\textsuperscript{24} there is concern that attempts to curb irresponsible journalism may

\textsuperscript{17} Id. at ¶¶4.3-4.5.

\textsuperscript{18} The Consultation Paper asks: “Do opinion polls require any kind of regulation? If so, what kind? What are the reasons for seeking such regulation, if any? Will such regulation be constitutionally valid?” Id. at ¶5.5.

\textsuperscript{19} Id. at ¶5.1.

\textsuperscript{20} The Consultation Paper asks: “Should a statutory body have powers to adjudicate complaints of false sting operations? Should there be a specific statutory provision for treating false sting operations as a punishable offence? Should the existing framework of laws be suitably amended to include specific guidelines governing disclosure of private information by the press? Is there a need for detailed guidelines on reporting of sub judice matters? Is the current definition of “Identifiable larger public interest” under the Cable TV Networks (Regulation) Act, 1995 comprehensive?” Id. at ¶7.1.

\textsuperscript{21} The Sections have no understanding of what may be a “false” sting operation.

\textsuperscript{22} Id. at ¶7.1.

\textsuperscript{23} See, e.g., U.N. Human Rights Committee, General Comment No. 34 (“UNHRC General Comment 34”), Article 19: Freedoms of opinion and expression, para 34, U.N. Doc. CCPR/C/GC/34 (2011) (“the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.”).

\textsuperscript{24} The Consultation Paper asks: “Should there be modifications in the law of civil and criminal defamation as it applies to journalists? If so, what should these modifications be?” Consultation Paper at ¶9.4.
chill speech. There are existing laws in India governing defamation that apparently do not differentiate between journalists and other speakers. In the U.S., truth is an absolute defense against defamation, and there is a broader scope to make statements regarding public figures than private persons. The Sections understand that India’s courts may have adopted a standard similar to that adopted by the U.S., under which even false statements regarding a public figure may be protected unless it is demonstrated that the statements were made with actual malice. The UNHRC has stated that:

Defamation laws must be crafted with care to ensure that...they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties....States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.

With respect to the rights of the accused, there is concern that there is trial by media that subverts due process, by pressuring judge, prosecutors and defense counsel. In the U.S., “gag” orders prohibiting the reporting of a matter sub judice is an extraordinary remedy taken only if it is clear that the rights of the parties to a fair trial would otherwise be infringed. Rather than prohibit reporting of a matter, the preferred approaches in the U.S. are alternatives such as sequestering the jury or removing the trial to a venue where media coverage is likely to have had less impact upon the process, and the jury.

25 Id. at ¶9.1.
26 Id. at ¶¶9.2-9.3.
29 UNHRC General Comment 34 para 47 (footnotes omitted).
30 The Consultation Paper asks: “What form of regulation, if at all, is required to restrict media reporting of sub-judice matters? Should the application of postponement orders be narrowed down by introducing guidelines/parameters such as kinds of publications to be covered, categories of proceedings which may be covered? If some form of media regulation is required in reporting of matters which are sub-judice, should the same be in the form of a self-regulated media or should the Courts apply the present law of contempt to check such prejudicial publications?” Consultation Paper at ¶8.4.
31 Id. at ¶8.1.
There has apparently been growing concern that media coverage of the increasing numbers of public interest lawsuits is eroding public confidence in the administration of justice.\(^{33}\) Contempt proceedings against media are apparently intended to prevent such erosion.\(^ {34}\) As the Consultation Paper points out, “[i]n the USA, the offence of scandalising the court is unknown and courts initiate action for contempt only when they determine that there is 'clear and present danger' to the administration of justice.”\(^ {35}\) While the Sections believe that the U.S. approach appropriately balances freedom of speech with the administration of justice, it suggests that, given the relatively recent enactment of Section 13(b) of the Contempt of Courts Act,\(^ {36}\) it may be wise to await the further development of jurisprudence under that provision before considering further statutory or Constitutional amendments.

The recent and rapid development of social media has raised concern regarding the use of social media to mislead, offend or incite violence.\(^ {37}\) These concerns were apparently the impetus for the enactment of Section 66A of the Information Technology Act, 2000, and proposals for further amendments and regulation.\(^ {38}\) The Sections suggest that a prohibition on “objectionable content” is difficult if not impossible to enforce in an objective way or a way that would not restrain speech beyond any interest in limiting misleading or offensive content, or speech that incite violence.

The Sections understand that to the extent that Section 66A proscribes unlawful promotion of enmity, hatred, and ill-will, or intentional disparagement of a group’s religious beliefs, this behavior is currently regulated by other statutory provisions. Therefore, Section 66A is in any event duplicative of other statutory provisions that currently define and regulate unlawful speech. It is unclear that creating another regulatory authority or enacting additional laws would add significantly in an effective way to the existing legal prohibitions against false statements, defamation and inciting violence. If Section 66A is retained, the Sections suggest that “objectionable content” be defined within the context of social media, and digital media in general, as speech that is already legally proscribed under Section 19 of India’s Constitution and the concomitant case law and statutory enactments, thereby promoting jurisprudential harmony in this area of law. The Sections also suggest that, as a remedy for abuse of the prohibition, a law be enacted to provide for remedies against lawsuits that are intended to censor,

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\(^{33}\) Consultation Paper at ¶10.1.

\(^{34}\) Id.

\(^{35}\) Id. at ¶10.3. The Consultation Paper asks: “What are the further legislative or Constitutional amendments necessary to the law on contempt of court to ensure freedom of the press? Should scandalising or tending to scandalise the Court continue as a ground for contempt of court?” Id. at ¶10.5.

\(^{36}\) Id. at ¶10.4.

\(^{37}\) Id. at ¶¶12.1, 12.2.

\(^{38}\) Id. The Consultation Paper asks: “Should the existing law be amended to define what constitutes ‘objectionable content’? Should Section 66A of the IT Act be retained in its present form or should it be modified/repealed? Is there a need for a regulatory authority with powers to ban/suspend coverage of objectionable material? If yes, should the regulatory authority be self-regulatory or should it have statutory powers?” Id. at ¶12.3.
intimidate, and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition.  

**Media Structure**

With respect to the structure of media, there is concern that media monopolies exist that adversely affect news coverage or dominate geographic regions. As the Consultation Paper points out, the Competition Act, 2002, applies to media. The Sections suggest that the Competition Act fully addresses concerns that concentration of media ownership may adversely affect competition in the media industry and there is no need for sector-specific regulations addressing the competition implications of media ownership and the structure of the media industry.

As to non-competition concerns relating to media ownership, some countries, such as Finland and Sweden, apply only sector-neutral competition law and merger control to the media sector. Others, such as Spain and the Netherlands, have recently relaxed their media ownership controls in recognition of the adequacy of competition law to deal with threats to competition and the public interest as a result of any increase in control across a number of media markets. The United Kingdom continues to reassess and question the need for its system of media ownership controls and the form they should take. The UK public interest test for the control of media mergers under the Enterprise Act of 2002 has been criticized as unworkable and overly subjective and remains subject to an ongoing review. In the U.S., the Federal Communications Commission limits cross-ownership of broadcast stations and newspapers, and reviews the limits every four years to determine whether the rules are in the public interest, repealing or modifying any regulation it determines does not meet this criterion.

In the current era of individual access to the Internet that enables a plethora of individual voices to reach multitudes, it is unclear that cross-ownership restrictions are needed to protect “diversity” of expression. The Sections recommend that India examine how different countries have addressed the issue, especially in light of the existence of alternatives to ownership caps, such as the Competition Act. The licensing regime can also place obligations on media owners to conduct their business in a manner that respects impartiality and choice. Another alternative to ownership caps is to require media entities above a specified size to disclose their ownership structures. Transparency as to political and corporate

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39 Beyond the majority of U.S. states that have enacted such laws, South Africa and the provinces of Ontario and Quebec in Canada have also established remedies for such lawsuits.

40 The questions presented in the Consultation Paper relating to the structure of media are: “Is there a current need for restrictions on cross control/ownership across the media sector? If so, what shape should such restrictions take? Are mergers and acquisitions guidelines necessary for the sector to regulate concentration of media ownership? If so, what are the key factors such regulations must capture? Do mandatory disclosure norms need to be imposed on media entities? Should certain categories of entities be restricted from entering into broadcasting activities?” Id. at ¶6.6. The Sections note that these questions are substantially similar to many of the questions raised by the Telecom Regulatory Authority of India in two recent consultations on similar issues. Telecom Regulatory Authority of India, Consultation Paper on Issues relating to Media Ownership, 15 February 2013; Telecom Regulatory Authority of India, Consultation Paper on Monopoly/Market dominance in Cable TV services, 3 June 2013.

41 Consultation Paper at ¶¶6.1, 6.3.

42 Id. at ¶6.4.
ownership should mitigate some of the concerns of media concentration. The Sections see no basis for restricting certain categories of entities from entering into broadcasting activities, instead of considering such transactions on a case-by-case basis taking into consideration all relevant circumstances at that time.

State-Owned Media

With respect to state-owned media, there is significant concern regarding their independence and credibility. These concerns may be exacerbated in the case of news radio, which in India is wholly state-owned. However, state-owned media serve the important functions of covering subjects often ignored by private media and is “a channel through which news about developmental initiatives is passed on to the common man but can also be an independent filter shaping the common man’s perception of government policies and their implementation.”

The Sections suggest that structural changes will be more effective than regulations in achieving the goals of independence and credibility. For example, in the case of radio, privatization of at least some news radio may be more effective than regulating independence and quality of government news reporting to ensure that the illiterate poor and those in remote areas receive quality news reporting. In all cases, the function of reporting news should be separated from the function of disseminating information about government initiatives. To the extent media remain state-owned, separate departments may be responsible for gathering and disseminating information about government initiatives and for gathering and reporting general news. As to the structure and operation of state-owned news organizations, the Sections suggest that the models of the BBC in the United Kingdom and the NHK in Japan may be helpful in this regard.

Regulatory Structure

Regarding regulatory structure, there already exists in India distinct systems for regulating print, broadcast media and social media. It is arguable that no specific regulation is needed for print media, beyond the general prohibitions against defamation and invasion of privacy. In contrast, it seems clear that some specific regulation of broadcast media is necessary. At minimum, the allocation of spectrum

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43 The Consultation Paper asks: “What regulations can be introduced to ensure independence of government-owned media? How should such regulations be enforced?” Id. at ¶11.6.

44 Id. at ¶11.2.

45 Id. at ¶11.4.

46 Id. at ¶11.1.

47 The Consultation Paper asks: “Do the existing self-regulation mechanisms require strengthening? If so, how can they be strengthened? In the alternative should a statutory regulator be contemplated? If so, how can the independence of such regulator be guaranteed? Specifically: How should members of such regulator be appointed? What should the eligibility conditions of such members be? What should their terms of service be? How should they be removed? What should their powers be? What consequences will ensue if their decisions are not complied with? Should any such change be uniform across all types of media or should regulators be medium-specific?” Id. at ¶3.18.

48 Id. at ¶¶3.1-3.4, 3.9-3.11.
requires some government or other coordinated administration. As to digital and social media, while it does not have the clear technological needs for government regulation that broadcast media has, it may require more scrutiny than traditional print media as to content, given its use by so many who are not professional journalists. However, it is unclear what level of scrutiny would be appropriate for digital and social media and to whom that scrutiny might be applied. Even though the new social media are businesses, they also offer individuals a means of communicating with the world in ways that cannot be regulated without regulating the individuals. It is unclear who or what would be the object of any potential regulation of social media by government or any other entity. (For example, adopting the size of a business as a criterion for regulatory purposes is a traditional approach that is largely inapplicable for social media.) These questions are the subject of much debate in the U.S. in seeking the appropriate balance between speech and other values. The Sections suggest that these threshold questions be studied more thoroughly before consideration is given to the specifics of any regulatory structure, or to adding to the existing regulatory structure.