



**Communications Bill 2015**

**Consultation**

**2nd December 2015**

**Further to requests from licenceholders and stakeholders the submission date for responses to the consultation on the Communications Bill 2015 has been extended to 12 noon on 1st February 2016.**



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## **CHAIRMAN'S FOREWORD**

The system of communications regulation on the Island is creaking and inflexible in the face of increased competition and rapidly changing communications requirements and services. The Telecommunications Act dates back to 1984, while the Broadcasting Act has remained largely unchanged since 1993. Both were drafted in a pre-internet age. Until only a few years ago, there were only two incumbent licensees – Manx Telecom and Manx Radio. Today, the Island has two mobile operators, a third fully licensed telecommunications operator, three Internet Service Providers and three radio stations – all competing for the attention of a population of around 85,000 people.

This competition has undoubtedly brought with it greater value for Isle of Man residents and businesses but the legislative framework has not evolved to keep pace. With competition also come disputes and issues not encountered previously. The Broadcasting and Telecommunications Acts, in large part pre-date convergence and were not designed to enable new communications services using satellite, wireless and internet technologies. New legislation will allow the Commission to deal with such issues and developments in a more effective manner.

The Commission consulted in 2009<sup>1</sup> on the approach to take towards the implementation of new legislation laying out a range of options:

- Maintaining the status quo;
- Moving to the standard European approach; or
- Creating an approach specific to the Isle of Man, based around strengthening competition in the retail services and ensuring investment in the Island's infrastructure.

Since this consultation, after substantial work on the Bill, the third option is the model that has been adopted. While the legislation is being tailored for the Isle of Man it is substantially based on the UK Communications Act 2003 which follows the standard European approach. This provides a body of case law for the Isle of Man to follow and is also readily understood by UK and European operators who may wish to operate in the Isle of Man.

**Hon J Watterson BA FCA MHK**

**Chairman, Communications Commission**

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<sup>1</sup> December 2009 Consultation Paper on Proposals for a New Framework for Communications Regulation  
December 2009 "A new framework for communications regulation on the Isle of Man" [Perspective Report]  
August 2010 "Response to Consultation on Proposals for a New Framework for Communications Regulation"  
All available from <https://www.gov.im/cc/ConsultationDetail.gov?id=184> Closed Consultations at [www.gov.im](http://www.gov.im)

## 1. CONSULTATION

### 1.1 About the consultation

A copy of the draft Bill is available on the consultation website. Submissions are welcomed from anyone who may be affected by any of the proposals.

The consultation asks some specific questions of consultees but comments are welcomed on any of the provisions or on general principles.

The consultation period ends on **13th January 2016\***.

A response form is available at <https://www.gov.im/cc/consultations> on the *current consultations* tab. Submissions regarding the proposals should be sent, preferably by email, to:

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The document is available at [www.iomcc.im](http://www.iomcc.im). Paper copies are also available from the Commission.

When submitting your views please indicate if you are responding on behalf of an organisation. To ensure that the process is open and honest and in line with the Government's Code of Practice on Consultation, responses can only be accepted if you provide your name with your response. Unless specifically requested otherwise, any responses received may be published either in part or in their entirety, within three months of the closing date for this consultation, and will be available on the Commission's website.

It is the Commission's view that it is important that consultations are carried out in a transparent manner, that the views of respondents are published, and that the reasoning behind the Commission's consideration of these views can be made clear. Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. Please indicate clearly if any part of your response should be considered to be commercially sensitive, and so required to be confidential. Confidential responses will be included in any statistical summary and numbers of comments received.

\*The first version of the Consultation had 7th January 2016 mistakenly as the closing date.

The purpose of consultation is not to be a 'referendum' but an information, views and evidence gathering exercise from which to make an informed decision. In any consultation exercise the responses received do not guarantee changes will be made to what has been proposed.

## 1.2 **Steps to be taken following consultation**

Following consultation, the next steps in the process will be as follows:

- The Commission will review and publish non-confidential responses to the consultation;
- The Commission will publish a document on its website summarising the main points made and setting out any changes to the proposals;
- Once the Bill becomes law any new orders or regulations which are required will be drawn up.



## **2. INTRODUCTION**

### **2.1 The current proposals**

The Commission is a small organisation (4 staff), with limited budget for professional support, the Bill has to strike a balance so that the Commission can realistically achieve its objectives while providing a stable regulatory environment for investment and protecting the interests of consumers.

The new legislation will:

- Replace the Telecommunications Act 1984 and the Broadcasting Act 1993 with one single piece of legislation.
- Provide for a clear sanctions regime for both broadcasting and telecommunications.
- Allow for greater flexibility in regulation so that new and emerging technology may be adopted with greater speed than is possible under the existing legislation.

Broadcasting:

- Allow for the extension of broadcasting licences for sound broadcasting services and the public service broadcaster.
- Allow for greater flexibility in the issuance of broadcasting licences over newer technologies.
- Enshrine in primary legislation Tynwald's recommendation that Manx Radio is the Island's Public Service Broadcaster (PSB).

Electronic Communications Networks and Services:

- Allow for the continuation of the licensing regime rather than a move to a European General Authorisation model.
- Allow for faster modification of existing licences to deal with rapid changing technologies and services
- Enshrine competition law provisions in primary legislation

### **2.2 Abbreviations**

BA = Broadcasting Act 1993 (an Act of Tynwald)

TA = Telecommunications Act 1984 (an Act of Tynwald)

ECN = Electronic Communications Network

ECS = Electronic Communications Service

PECN = Public Electronic Communications Network

PECS = Public Electronic Communications Service

WTA = Wireless Telegraphy Act 2006 (an Act of Parliament)

## 2.3 **Overview of the Act**

The Act is in eight parts–

Part 1 — Introduction

Part 2 — The Communications Commission

Part 3 — Regulated Activities and Licensing

Part 4 — Broadcasting

Part 5 — Electronic Communications

Part 6 — Enforcement

Part 7 – Proceedings

Part 8 Miscellaneous and Closing Provisions

Schedule 1 – Functions of the Communications Commission

Schedule 2 – Persons Disqualified for Holding a Broadcasting Licence

Schedule 3 – Programme and Fairness Standards for Broadcasting

Schedule 4 – On Demand Programme Services

Schedule 5 – The Electronic Communications Code

Schedule 6 – Restrictions on the Disclosure of Information

Schedule 7 – Consequential Amendments and Repeals

## 2.4 **Wireless Telegraphy**

There are no changes proposed to the current position whereby the Commission is responsible for licensing Electronic Communications Networks and Services (telecommunications systems and the provision of telecommunications services in the terminology of the TA) and Ofcom is responsible for licensing the use of spectrum.

The Commission has no powers, as such, to licence the use of particular spectrum bands nor to grant spectrum rights, nor to set conditions on the use of spectrum. That falls within the remit of Ofcom under the Wireless Telegraphy Act 2006 (WTA) as extended to the Isle of Man.

Ofcom does respect Isle of Man policies and differences and so when scarce frequency bands become available for new important services such as 4G the Commission ascertains the level and nature of demand for the spectrum in the specified bands. It identifies whether a selection process is needed. Eventually, when the assessment and selection process is completed, it makes a recommendation to Ofcom in relation to the issuing of licences under the WTA to the Isle of Man operators, specifying the spectrum bands and the allocations

within these bands that should be included within such licences. Ofcom then issues licences for spectrum use under the WTA where it is satisfied the Commission's recommendation is consistent with its own statutory duties. The Commission and Ofcom work together well and efficiently for the best use of spectrum on the Island as the 4G award process demonstrated.

While there have been discussions about the Commission taking spectrum licensing 'in house', in practice this would entail an increase in Commission staffing or a requirement for specialist consultancy support. Ofcom has a large team whose sole speciality is spectrum assignment, awards and licensing. They also have an enforcement role in this highly technical specialist area, which it would seem inappropriate for the Commission to try and replicate.

### **3. THE BILL IN DETAIL**

#### **3.1 Part One: Introduction**

This part of the Bill in 3 Divisions lays out how the Bill may come into force and definitions used in the Bill.

This interpretation clause defines most of the terms used across the Bill unless it is more appropriate for a term to be defined in the body of the Bill. The Bill follows the UK Communications Act 2003 in much of its terminology, this brings the definitions up to date and in line with EU terminology.

The Bill also makes provision in clause 6 for this section to be amended by order of Council of Ministers in order to future proof the Bill.

The definitions in *Clause 4: Interpretation - electronic communications networks and services and related terms* are broader in scope than in the Telecommunications Act 1984 in that they apply to electronic communications as opposed to telecommunications. These are intended to apply to the provision of an electronic communications network (ECN), or an electronic communications service (ECS), or an associated facility.

The definitions of ECN and ECS are discussed below in more detail in *3.4:Part 3 Regulated Activities and Licensing*.

#### **3.2 Part 2: The Communications Commission**

The constitution of the Commission is laid out in the Communications Commission Order 1989 GC 74/89, the Communications Commission (Amendment) Order 1999 SD 745/99 and the Communications Commission (Amendment) Order 2012 SD 0662/12.

The Communications Commission is a Statutory Board of the Isle of Man Government, comprised of a Chairman, who under the legislation must be the Minister for Home Affairs, and up to 5 members with a range of experiences relevant to the Commission's work appointed in a public recruitment process. Currently there are 4 members not including the Chairman. The Commission staff currently consists of the Director and three other staff.

The Commission has responsibility for licensing and regulating telecommunications and broadcasting on the Isle of Man under the Telecommunications Act 1984, the Radio Masts Regulation Act 1988 and the Broadcasting Act 1993.

One of the Recommendations of the Tynwald Select Committee on Public Service Broadcasting was that the Commission should no longer have a political Chairman. The Isle of Man is unique in Europe in having a political Chair. During the March 2014 Tynwald debate on Public Service Broadcasting this issue was discussed and the recommendation was not carried<sup>2</sup>. However the Chairman stated that it would be discussed in this consultation.

The statements made in that debate still hold in that the Commission is not only concerned with broadcasting, much of its work is actually in the field of telecommunications. The Chief Minister stated *"I have a concern, Madam President that we are actually failing to recognise the importance of the Communications Commission on a much broader base. Yes, they look after Manx Radio, but Manx Radio is only a very small part in reality of what the Communications Commission does, and the main one these days is dealing with telecommunications, which is a huge and hugely important part of our economic prospects for the future, for growth and for diversifying the economy. This is not just a small regulator dealing with Manx Radio; it is an absolutely vital part of the economic infrastructure in Government to ensure that we get the very best out of the opportunities that come our way."* (at 5176).

The Commission recognises the importance of demonstrably maintaining its continued independence in regulating telecommunications and broadcasting on the Island.

The Commission's independence allows it to effectively regulate telecommunications on the Island without potential undue influence from government or industry. The importance of protecting this independence is recognised and adhered to in most Western Democracies. In Europe, independence requirements were reinforced in the 2009 reform package to include the prohibition of political interference. Article 2 of the EU Framework Directive<sup>3</sup> states that "Member States shall guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services." Article 3 of the Directive states that communications regulators "must exercise their powers impartially, transparently and in a timely manner"; and that communications regulators "responsible for ex-ante market regulation or for the resolution of disputes between undertakings... shall act independently and shall not seek or take instructions from any other body in relation to the exercise of these tasks"<sup>4</sup>

The Council of Europe believes that in order to guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector, it is essential to provide for adequate and proportionate regulation of that sector. This serves to guarantee the freedom

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<sup>2</sup> <http://www.tynwald.org.im/business/hansard/20002020/t140318.pdf>

<sup>3</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (framework directive).

<sup>4</sup> EU Framework Directive 2002/21/EC, as amended by Directive 2009/140/EC

of the media while at the same time ensuring a balance between that freedom and other legitimate rights and interests. In order to preserve broadcasting as part of the democratic process, governments in most democratic countries aim to create independent regulators for broadcasting. Even in very small jurisdictions, where the only broadcaster is State funded and budgets are limited, regulation which is independent of the State is seen as vital to preserve the right to freedom of speech.

In practice the Chair of the Communications Commission only has one vote and therefore it would be difficult for him to apply political pressure on the rest of the board. Indeed as the Chairman of the Commission pointed out, during the Tynwald debate, there are advantages to having a Minister on the board of the Commission as the concerns of the Commission and the sectors it regulates can be brought directly to the attention of the Council of Ministers and Tynwald. There is also a saving in having a political Chairman as a non-Political chair would require additional payment. The Chairman, in the Tynwald debate, asked that the ambition to have a non-political chair could be seen as a medium term one rather than a longer term one, not least in order to move and implement this new legislation.

The Bill also makes clear in clause 7 (2) that subject to the Bill and, in particular, the restrictions in clause 8 (Restrictions on directions by Council of Ministers), the Commission has to exercise its functions under the Act independently of any other body.

In particular, the Council of Ministers must not give directions to the Commission in relation to licenceholders, except in relation to the regulation of competition.

The Bill is therefore not proposing any changes to the constitution or status of the Commission at this time.

***Question 1 for consultation: Do you agree that the constitution of the Commission should remain unchanged at this time?***

### 3.3 **Schedule 1: The Functions of the Commission**

Schedule 1 describes the general duties of the Commission and also lays out matters to which the Commission must have regard to in carrying out its functions, that is:

- to further the interests of all members of the public in the Island in relation to communications matters; and
- to further the interests of consumers in relevant markets, where appropriate, by promoting competition.

A number of other matters are laid out which the Commission must ensure including:

- the availability throughout the Island of a range of electronic communications services;
- the availability throughout the Island of a wide range of broadcasting services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests.

Other matters which the Commission must have regard to are designed to ensure the most effective use of the Island's available spectrum and the need to encourage investment and innovation in Electronic Communications Networks and Services. There are also provisions which state that the Commission must have regard to competition on the Island and consumers.

***Question 2 for consultation: Do you consider that Schedule 1 adequately covers what the functions of the Communications Commission should be? Are there any further matters that you would add or anything that should be removed?***

### 3.4 Part 3 Regulated Activities and Licensing

This part of the Bill deals with what are and are not regulated activities for the purposes of the Bill in relation to Broadcasting and ECN and ECS. Clause 11 lays out the penalties for carrying out a regulated activity without a licence.

The Bill makes provision for these regulated activities to be amended by order of Council of Ministers if necessary in response to changing circumstances.

***Question 3 for consultation: In relation to matters other than the regulation of ECN and ECS, which are discussed in detail below, do you feel these provisions are appropriate.***

#### 3.4.1 ECN and ECS Regulation

The Commission consulted in 2009 on the approach to communications regulation and in 2011 stated that the approach would be to create an Island specific solution, based around strengthening competition in the retailing of services and ensuring investment in the Island's infrastructure. This option being the one which would be most suited to the Island's unique position.

The UK moved to a General Authorisation Scheme in 2003 whereby persons do not require prior authorisation before providing electronic networks and services and general conditions of entitlement (that is, conditions which apply to all) and specific conditions (that is, conditions which apply to specific persons) are applied to Communications Providers.

The Commission has committed to retaining a licensing regime where certain conditions have to be met prior to a licence being granted. This proposed approach allows the Commission more control over who is operating in a small market than would be the case under a General Authorisation scheme.

Under the Bill, operating a public ECN or ECS without a licence, where one is required, is an offence.

The Commission only wishes to license activities which are of economic importance to the Island, or of social or cultural value, for example, full telecommunications operators offering fixed and/or mobile services, ISPs and networks used for broadcast transmission.

For example the Commission does not want to license or regulate white space devices, key fobs, baby alarms, TV sets, the Airport radar, business radio, Programme Making and Special Events (PMSE) and taxi radios. The necessary Ofcom Wireless Telegraphy Act licences would still be required by operators using these systems to ensure safety, the correct use of spectrum and to avoid interference.

The Commission as a small organisation considers that its resources would be best placed in licensing and regulating economically and socially important activities.

The Commission has chosen an approach to the regulation of ECN and ECS that will limit what is regulated under the Bill. Only the provision of a public ECN and public ECS will be regulated and associated facilities by reference to such networks or services. The definitions used in clause 3 are:

“public electronic communications network” means an electronic communications network provided wholly or mainly for the purpose of making electronic communications services available to members of the public.

“public electronic communications service” means any electronic communications service that is provided so as to be available for use by members of the public.

#### **(a) Electronic communications network (ECN)**

The Bill in clause 4(1) defines an ECN as:

*(a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and*

*(b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals*

*(i) apparatus comprised in the system;*

*(ii) apparatus used for the switching or routing of signals; and*

*(iii) software and stored data, and*

*(iv) other resources including network elements which are not active.*

The Bill clause 4 (4)(a) also makes it clear that: “*references to the provision of an electronic communications network include references to its establishment, maintenance or operation*”.

The provider should be able to demonstrate that the primary purpose in providing the network is to provide ECS to members of the public. If this were not the case it could lead to the misunderstanding that any network over which ECS are conveyed, such as a private office or residential system, is a PECN.

Under the definition of ECN in the Bill, the presence of a transmission system is a prerequisite. Other resources that permit the conveyance of signals, such as apparatus used for switching or routing of signals, or stored data are not central to the definition although if they are present they will form part of the ECN.

Once the provision of an ECN has been established, the second test to be met is whether it is used wholly or mainly for the provision of publicly available services. This is in order to determine whether the ECN is in fact a public electronic communications network (PECN). The Bill (clause 3(2)) defines a PECN as:

*"an electronic communications network provided wholly or mainly for the purpose of making electronic communications services available to members of the public".*

Two things arise out of this definition, firstly, the ECN must be provided primarily for the making available of electronic communication services (ECS) and, secondly, the availability of those services to members of the public.

### **(b) Electronic communications services (ECS)**

The Bill (clause 4(2)) defines an ECS as:

*"a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except in so far as it is a content service".*

The term 'conveyance' is not defined in the Communications Bill, but 'signal' is (clause 4(10)), as:

*(a) anything comprising speech, music, sounds, visual images, or communications or data of any description; and*

*(b) signals serving for the impartation of anything between persons, between a person and a thing or between things, or for the actuation or control of any apparatus.*

It is important to note that an ECS must have as its principal feature the conveyance of signals rather than the provision of what is comprised in the signals, i.e. content. The Bill defines 'a content service' as (clause 4 (7)):

*"so much of any service as consists in one or both of the following -*

*(a) the provision of material with a view to its being comprised in signals conveyed by means of an electronic communications network;*

*(b) the exercise of editorial control over the contents of signals conveyed by means of such a network."*

In the case of broadcasting, there is plainly a central element that falls within the Bill's definition of a content service. However it is clear that the contents material is comprised in signals that are conveyed over an ECN and that such conveyance involves the provision of an ECS. For the purpose of this Bill it is clear that an ECN over which signals that transmit publicly available broadcasting services are conveyed is a PECN, and that the provider of that network acquires interconnection rights and obligations.

### **(c) Public availability**

The second strand of the Bill's definition of a PECN is the availability of electronic communications services to members of the public. The Commission's understanding is that



a publicly available service is one that is available to anyone who is both willing to pay for it and to abide by the applicable terms and conditions. The provider will not have imposed an upper limit on the class of potential customers other than those that arise from technical or capacity constraints. A publicly available service is distinguishable from a bespoke service restricted to a limited group of individual and identifiable customers.

It is conceivable that a service available to members of the public may only have one customer because others have not chosen to take the service up. However, other customers would not be prevented from taking up the service. By contrast, a service may not be available to members of the public even though it has several customers, for example, in the case of a landlord providing services to tenants on a single set of served premises. The reason the example of the landlord-tenant service is not available to members of the public is not because it is geographically restricted. Rather it is because admittance to the set of potential customers is not generally open to anyone. Instead, it depends on the existence of a prior relationship between provider and customer. A more extreme example of a service that is not available to members of the public while being provided for remuneration is the provision of a payphone service within the confines of a prison.

It is also to be understood that the term members of the public requires a broad interpretation. It is not to be read as residential or small business customers. A service that because of its scale, such as a virtual private network service, is only likely to attract corporate customers is still considered to be available to members of the public.

The Commission intends to use its guidance making powers to help providers in interpreting the legislation.

It is important to note that the Commission intends that all activities currently licensed under the current legislation would continue to be seen as licensed activities and to attract a licence fee.

***Question 4 for consultation:***

***1) Do you agree with the Commission's approach to defining ECN, ECS, PECN and PECS?***

***2) Do you consider that this approach in relation to ECN and ECS will achieve the Commission's aim of continuing to licence activities that are currently licensed?***

### **3.4.2 Excluded Activities**

Clause 10 of the Bill makes provision for Council of Ministers to exclude certain activities by order from constituting a regulated activity.

This is to allow the Commission and Council to react quickly to situations where there may be a need for such an exclusion.

***Question 5 for consultation: Do you consider this clause (Clause 10) is appropriate?***

### 3.4.3 General Prohibition

Clause 11 provides for penalties in respect of carrying on a regulated activity without a licence where one is required. These provisions are similar in effect to those in the Telecommunications Act 1984 and a person who, without a licence, carries on a regulated activity, in circumstances where a licence is required, is guilty of an offence and is liable —

- (a) on summary conviction, to a fine not exceeding £5,000;
- (b) on conviction on indictment, to a fine.

These are the same penalties as under the current TA 1984.

### 3.4.4 Exempt Persons

Clause 12 provides that the Commission may also exempt any person or class or person from the provisions of the Act. Any regulations made under this clause must be laid before Tynwald as soon as possible after they are made. This reflects the practical position that in a particular situation it is likely that the Commission will be working with a business on a business activity or situation with tight deadlines and these will not necessarily fit with the Tynwald timetable.

***Question 6 for consultation: Do you consider that the provisions in Clause 12 are appropriate and will provide the right balance of certainty for licenceholders and flexibility to adapt to different situations.***

## 3.5 Division 2 Licensing

### 3.5.1 Application for a licence and grant of licence

Clauses 13 and 14 deal with the application for and granting of licences. The Commission's experience in granting licences is such that it can be flexible to the needs of operators and consumers and be able to respond quickly to licence requests. Some application procedures may need to be more detailed and in depth than others which can be granted fairly quickly.

Division 2 states that the Commission may determine how and in what form a licence application must be made and what fee or duty may be payable.

The Commission may grant a licence in accordance with such process as it may determine as long as such process is open, transparent and non-discriminatory.

### 3.5.2 Class licences

Clause 15 makes provision for class licences. This is a general authorisation, which usually contains restrictions on the size and extent of the system and the services that can be

offered. Provided that a system falls within the description set out in a class licence, and the operator is able to comply with its terms, they can operate under that licence.

Unlike an individual licence there is normally no need to register or pay a fee to operate under a class licence.

The Class Licence could cover those activities which may technically fall under the definition of a public ECN or public ECS but are of little or no economic or social value to the Island, would be disproportionate to license or would impose too great a burden on operators of those systems.

As drafted the Bill gives the power to Council of Ministers to amend the Act to make provision for class licences, the Commission intends to alter this as being unnecessarily bureaucratic to allow for direct provision for class licenses on the face of the Bill which would be standard in other jurisdictions and more immediately useful for the Commission and businesses.

***Question 7 for consultation: Do you have any comments on class licences as detailed above?***

### **3.5.3 Form and Effect of Licence and Licence Conditions**

Clauses 16 and 17 of the Bill give powers to the Commission to grant licences subject to such conditions as it considers to be appropriate.

For example, conditions re:

- Payment of fees
- Requirement to furnish information to the Commission
- Metering and Billing Requirements
- Wireless Telegraphy Provisions, i.e. the requirement to hold an appropriate UK issued licence under the Wireless Telegraphy Act 2006.

### **3.5.4 Failure to begin providing regulated activities**

A new provision in the Bill is that the Commission may revoke a licence for failure to provide the regulated activity within any time limit specified in a licence.

This is to address the situation where licenceholders have been granted licences to provide services, using scarce and valuable spectrum, failed to provide the licenced service but the Commission found it difficult to revoke the licence.

***Question 8 for consultation: Do consultees consider that this is an appropriate approach?***

### **3.5.5 Codes of Practice**

The Bill makes a new provision in relation to Codes of Practice in that a failure to follow a Code of Practice may be treated in the same way as a breach of a licence condition.

**Question 9 for consultation: Do consultees consider that this is an appropriate approach?**

### 3.5.6 Imposition, variation and revocation of licence conditions.

Clause 20 provides that the Commission may impose new conditions, vary conditions or revoke conditions as long as certain procedural requirements are met.

The Commission must consult appropriate persons on the imposition or variation of a licence condition or revocation of a condition and must have regard to any representation made. Written notice must be given on any decision, with a statement of reasons for the decision and particulars of the right of appeal under the Part 7 of the Bill.

A new provision is that the procedural fairness requirements may be waived if the Commission is satisfied that any delay in acting would seriously prejudice public safety, public health or national security, or would cause significant economic damage to the Island. The licenceholder has a right of reply to this waiver.

A further new provision provides that the procedural requirements do not apply if :

- (a) the licenceholder consents;
- (b) the exercise of those powers is in relation to universal service conditions; or
- (c) the exercise of those powers is in relation to SMP conditions.

The reasons for this new provision are as follows:

*Electronic Communications licences:* this provision replaces the previous less flexible conditions under s.10 of the TA1984 whereby the consent of the licence holder was irrelevant to the consultation requirements, so a 28 day consultation period was required even for a minor licence modification. The Commission was also required to send a copy of a licence modification notice to the Chief Secretary; and if, within the time specified in the notice, the Council of Ministers directed the Commission not to make any modification, the Commission had to comply with the direction.

*Broadcasting :* The BA does allow for the Commission to vary a licence by a notice served on the licence holder if —

- in the case of a variation of the period of the licence, the licence holder consents, or
- in any other case, the licence holder has been given a reasonable opportunity to make representations to the Commission about the variation and
- The Commission may, if the licence holder consents, revoke a licence by notice served on him.

The new provisions provide a procedural fairness requirement that does not exist in the current legislation for Broadcasting Licences.

***Question 10 for consultation: Does this approach provide a pragmatic and fair approach to licensing. In particular, does the approach to the imposition, variation and revocation of licence conditions seem appropriate?***

### 3.6 Division 3: Procedural Fairness

This new provision gives the Commission a procedure to follow before deciding to do any of the actions laid out in cl.21.

- a) revoking a licence for failure to begin providing a licensed service ;
- b) imposing or varying a licence condition or revoking a licence condition;
- c) issuing a direction;
- d) enforcing the public service broadcaster's licence;
- e) suspending a designation applying the Electronic Communications Code;
- f) issuing a direction in relation to the prohibition on collusion;
- g) issuing a direction in relation to the prohibition on the abuse of dominant position;
- h) issuing a direction to a broadcasting licence holder to broadcast a correction or an apology or not to repeat a programme;
- i) imposing a financial penalty on a broadcasting licence holder or suspending or shortening a licence period;
- j) suspending or revoking a licence; or
- k) imposing a financial penalty upon a person who has contravened the prohibition on collusion or the prohibition on abuse of dominant position.

***Question 11 for consultation: are there any comments on the inclusion of any of the matters on this list? Does the new Procedural Fairness Requirement seem proportionate?***

### 3.7 Division 4: Information

Division 4 lays out the provisions around the supply of information to the Commission in connection with its functions.

There are offences created in connection with failure to supply requested information

Clause 26 (3) A person guilty of an offence under this section is liable —

- (a) on summary conviction to a fine not exceeding £5,000 or to custody for a term not exceeding 12 months, or to both; or
- (b) on conviction on information to a fine or to custody for a term not exceeding 2 years, or to both.

A custodial sentence was not previously available. The provisions are also new in relation to Broadcasting where previously if it could be shown that false information had been given in connection with a licence application then the licence could be revoked.

It should be noted that a licence can still be revoked for the provision of false or misleading information – see clause 117 (4) for broadcasting and clause 124(4) (for electronic communications).

***Question 12 for consultation: 1) does this appear a proportionate way of managing offences in relation to the supply of information in relation to Electronic Communications and 2) does this appear a proportionate way of managing offences in relation to the supply of information in relation to Broadcasting?***

### 3.8 Division 5: General: Guidance & Directions

Clauses 28 and 29 make provision for the Commission to give Guidance and also to give written directions to Licenceholders. In respect of giving directions, the Commission must follow the procedural fairness requirements.

#### **4. PART 4 BROADCASTING**

The Island has three local radio stations licensed by the Commission and residents of the Isle of Man have access to services licensed in the UK and offered via the public service multiplexes on digital terrestrial television (DTT), and via Sky and Freesat, which are delivered via the satellite platform.

Although the BA permits the Commission to license audiovisual (TV type services) as well as sound services, and although the relevant Broadcasting Codes are adapted to embrace both audiovisual as well as sound services, none are in fact licensed on the Island.

The June 2011 "Strategic Review of Communications: Key Audio and Audiovisual issues for the Isle of Man Communications Commission" made 4 recommendations with regards to broadcasting, namely:

1. Licence renewal: the Commission should be given specific powers to extend existing licences at the end of their term.
2. The introduction of a licensing or authorisation process to encompass new Audiovisual services originating on the Island.
3. That specific legal provision should be made to clarify the commitments of the Public Service Broadcaster
4. The Commission should consider promoting a self-regulatory approach to ensuring the adherence to a basic minimum of content standards in relation to non-broadcast (e.g. online, on-demand) material with the Commission retaining backstop powers.

The Commission does not intend to regulate or license internet radio.

The Bill covers:

- Sound Broadcast services which would include Manx Radio, Energy and 3FM who broadcast on Island using radio frequencies
- Television Licensable Content Services which would include TV channels based on Island transmitting via satellite or via the internet
- Radio Licensable Content Services would include radio channels based on the Island transmitted via satellite
- On Demand Programme Services are TV type services which are non-linear (such as iPlayer)
- Digital Sound Programme Licences would include digital radio services broadcast on Island using frequencies (e.g. local DAB radio services).

The intention is to only licence

- when the source of the 'broadcast' is from the Island (except for Television Licensable Content Services in the circumstances laid out in clause 9(5)).

- Satellites relaying data would be licensed under the ECN and ECS provisions.

#### 4.1.1 **Division 1 Broadcasting – Suitability of Licenceholders.**

The Bill follows the BA in setting conditions on who may be suitable to hold a Broadcasting Licence.

The provisions are to ensure that

- the applicant is fit and proper,
- the conditions in Schedule 2 (person disqualified for holding a broadcasting licence) have been considered, and
- the applicant has the ability to maintain the service

The Bill also makes provision for changes in control of licenceholders and transferability of licences which are the same as the current provisions.

#### 4.1.2 **Schedule 2 (person disqualified for holding a broadcasting licence)**

These exclusions largely mirror the UK provisions in trying to prevent undue influence on broadcasters and to retain a plurality of news sources.

This applies to all forms of broadcasting other than On Demand Programme Services.

The Bill states that the following persons are disqualified for holding a broadcasting licence

- (a) an individual who is neither —
  - (i) ordinarily resident in the British Islands nor
  - (ii) a national of a Member State of the European Union and who is ordinarily resident within the European Union;
- (b) a body corporate which is neither —
  - (i) incorporated under the law of the Island or the Channel Islands; nor
  - (ii) formed under the law of a Member State of the European Union and which has its registered or head office or permanent place of business within the European Union

There is a new provision in cl. 41 which places an additional requirement for holders of sound broadcasting licences, Manx Radio, Energy FM and 3FM which is that the licence holder —

- (a) must be a body corporate that is incorporated under the laws of the Island; and
- (b) must have at least one director who is an individual and who is ordinarily resident in the Island.



The reasoning is that people in control of an Island broadcaster should be part of the community and have the interests of the Island in the forefront as well as to be easily reachable in case of query or complaints.

#### **4.1.3 Exclusion of Tynwald Members**

While bodies whose objects are 'wholly or mainly of a political nature' are already precluded from holding a licence, the category 'member of Tynwald' has now been specifically added. This acknowledges that the aim of the legislation is to avoid undue political influence in broadcasting.

***Question 13 for consultation: Do you agree with this approach in relation to licensing broadcasting?***

#### **4.1.4 Powers of Council of Ministers to direct licenceholders**

Clause 36 of the Bill replicates current powers in the BA 1993, which are also contained in equivalent UK legislation, for the Council of Ministers to direct the Commission to direct licenceholders to include certain announcements in their broadcasts at specified times or to refrain from including any particular matter in their services.

Where a licenceholder is obliged to make a particular announcement, they may make clear in their service that this is being carried out further to a direction given by the Commission. Similarly, where a licence holder has been obliged to refrain from including a particular matter in their service, the licence holder may announce in the service that this is the case, and may also announce when that obligation has come to an end.

The purpose of these provisions is principally to allow Council of Ministers to address matters of national security or major public interest, and to do so in such a way that the affected broadcasters are not required to take editorial responsibility for the content of the announcements.

### **4.2 Division 2 – Programme and Fairness Standards for Broadcasting**

Programme and Fairness standards are contained in Schedule 3 and the Commission is required to establish and maintain procedures for the handling of complaints.

#### **4.2.1 Schedule 3 (Programme and Fairness Standards for Broadcasting)**

The Commission already publishes Codes<sup>5</sup> which the existing Broadcasting Act licenceholders are required to adhere to. Schedule 3 expands on the requirements for these Codes so that they are more appropriate for the other forms of broadcasting that may be licensed under the new Bill and update the Bill to reflect the current EU standards and norms for example advertising to children.

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<sup>5</sup> Broadcasting Programme Code [https://www.gov.im/lib/docs/cc/codes/2004summerrevisedprogram\\_code.pdf](https://www.gov.im/lib/docs/cc/codes/2004summerrevisedprogram_code.pdf) and the Code of Advertising and Sponsorship [https://www.gov.im/lib/docs/cc/codes/revisedads\\_standardsandsponsorshi.pdf](https://www.gov.im/lib/docs/cc/codes/revisedads_standardsandsponsorshi.pdf)

### 4.3 **Division 3 – Sound Broadcasting Services**

#### 4.3.1 **Additional Considerations for sound broadcasting licences**

The Bill in clause 40 retains the current provisions which require the Commission to give consideration to certain matters in having regard to licensing another local radio station. The Commission must have regard to:

- The extent to which a new service would broaden the range of services available on the Island and cater for tastes different from those already catered for,
- The effect of a new service on existing services, and
- The extent to which demand could be met by other means.

As mentioned above, the holder of a licence to provide sound broadcasting services:-

- a) must be a body corporate that is incorporated under the laws of the Island; and
- b) must have at least one director who is an individual and who is ordinarily resident in the Island.

#### 4.3.2 **Sound Broadcasting Extension of licences**

There are three licences currently awarded by the Communications Commission under the BA 1993 : Manx Radio, Energy Radio and 3FM.

The June 2011 "Strategic Review of Communications: Key Audio and Audiovisual issues for the Isle of Man Communications Commission" recommended that in the case of licence renewal the Commission should be given specific powers to renew existing licences at the end of their term, subject to analysis of the market and its being able to satisfy itself that consumers have an appropriate range of services available to them.

Licence renewals have previously been dealt with by the powers in the BA 1993 that allow an applicant to apply for a new licence, however this has proved a cumbersome process for existing licensees in an environment where there has been no interest shown by new broadcasters.

A specific process will provide more certainty for the industry as well as reducing bureaucracy. This should achieve the aim of balancing the desire for listener choice with the necessity of maintaining the commercial viability of the radio sector. By ensuring that the Commission has the obligation and powers to effectively re-license stations the Isle of Man can cost-effectively maintain this balance.

The Bill in clause 42 provides that a licence may be granted for a period not exceeding 10 years and may be extended (on one occasion only) for a period not exceeding 10 years. This does not prevent a further broadcasting licence being issued to that company after these periods, but this would be done via a new application process where the frequencies would be advertised for use by a possible new applicant as well as the existing applicant. The Commission is also considering making the broadcasting licences co-terminus so that differing market conditions will not prove prejudicial for a particular licenceholder due to the date their licence ends.

The PSB licence is for 10 years with the option to renew on an unlimited basis (this follows the Channel 4 model) and is discussed further in s.4.6 Public Service Broadcaster provisions.

There is no licence term for the other broadcasting licences – they are subject only to surrender or revocation.

***Question 14 for Consultation: 1) Do you agree with this approach to licencing and, in particular the licence extension provisions, and that it will achieve the aim of providing certainty for broadcasters to allow for investment while balancing the desire for listener choice. 2) Do you have any comments on the idea of making the licences of the two broadcasters co-terminus?***

#### **4.4 Division 4 – Radio Licensable Content Service (RLCS)**

Radio licensable content service ("RLCS") licences replace the separate categories of satellite service licences and licensable sound programme service licences (i.e. cable) which were established under the UK Broadcasting Act 1990 (broadly what is in the current IOM BA 1993).

A radio licensable content service is a service provided in digital or analogue form broadcast from a satellite or distributed using an electronic communications network that is to be made available for reception by members of the public and consists of sound programmes.

In broad terms, radio licensable content services do not include internet services or two-way services. Further, they do not include a service which is distributed by means of an electronic communications network only to persons who are within a single set of premises, and not connected to an electronic communications network any part of which is outside those premises. Neither do they include services which are provided only for persons who have a business interest in the programmes included in the service or persons who are all on the business premises of the person receiving the service.

#### **4.5 Division 5 - Television Licensable Content Services (TLCS) .**

A TLCS is a TV service broadcast from a satellite, distributed using an electronic communications network (including services broadcast over the internet), or a service made available by means of a radio multiplex, which meets two basic criteria:

- a) The service consists of, or has as its principal purpose the provision of, "television programmes or electronic programme guides", or both. "Television programmes" includes conventional programmes, advertisements, text and still and moving images, as well as any ancillary services (like subtitling, audio-description or interactive programme enhancements) associated with them. "Electronic programme guides" are services that consist of the listing or promotion of programmes and programme services and provide access to them.
- b) The service is "available for reception by members of the public" as defined in clause 5 (which expressly excludes on-demand programme services. If a member of the

public is able to receive the service (whether free to air, by paying for a subscription or buying a piece of receiving equipment) the service normally meets this criterion.

There are specific exclusions in clause 47 including single premise systems and closed user groups. A service provided with a view to it being broadcast by means of a television multiplex service is not a TLCS.

Ofcom recognises three types of service which can be provided under a TLCS licence:

- Editorial: 'normal' programme service, with conventional programme material and scheduled advertising breaks. Majority of TV channels (including Electronic Programme Guides) fall within this category.
- Teleshopping (home shopping, advertorials, infomercials etc) Teleshopping services may not broadcast material (other than permitted advertising) which does not contain direct offers to the public. Adult chat, adult sex chat and psychic programming are categorised as teleshopping. These types of services will be specifically referenced in any licence. There are also special provisions in place in regard to transactional gambling.
- Self-promotional, a particular kind of advertising where the broadcaster may only promote its own products, services or channels (other than permitted advertising and teleshopping).

Issues: Broadcasters licensed by Ofcom have to adhere to the UK Code of Broadcast Advertising (BCAP code), a code issued in the UK under the Advertising Standards Agency. The IOM has no equivalent to the ASA, however the IOM OFT has been considering an arrangement where the ASA would be the first port of call for IOM Cases, whether that would extend to TV broadcast would have to be considered. The ASA have considerable expertise in this area.

***Question 15 for consultation : Do you have any comments on these provisions?***

#### **4.6 Division 6: Public Service Broadcaster-Manx Radio**

In December 2012, Tynwald commissioned a Select Committee to "examine the matter of the policy, delivery, cost and scope of Public Service Broadcasting; and report with recommendations." The Committee's report was published in March 2014 and the report and its twelve recommendations were debated in Tynwald on the 18th March.

The accepted recommendations are detailed in Appendix Three: Full List of Tynwald Accepted Recommendations from the Select Committee on PSB.

The intention of the new provisions in the Bill as well as provisions in the new Manx Radio licence issued on 27th February 2015 are to allow for a greater transparency in the relationship between Manx Radio, the Commission and Treasury, as well as provide for the security of Manx Radio as the Public Service Broadcaster.

The recommendations that are pertinent to the Bill are laid out below.

**Recommendation 1: That Tynwald accepts Recommendation CM/Rec(2012)1 of the Committee of Ministers to member States on public service media governance<sup>6</sup>, adopted on 15th February 2012 by the Committee of Ministers of the Council of Europe.**

The European Recommendations provide a set of guiding principles mainly concerned with governance arrangements. The Commission has had regard to these principles and taken them into account when developing the PSB provisions in the Bill and in Manx Radio's new licence issued on 27th February 2015. The Commission will also have regard to these principles in the future, wherever possible, in exercising its functions or making policy decisions. The editorial and operational independence of the PSB is also established in clause 50.

The principles also place duties on the Public Service Broadcaster in relation to transparency and involvement with stakeholders.

**Recommendation 3: That the Council of Ministers should bring forward primary legislation to give Manx Radio a permanent existence and status as the independent public service broadcaster of the Isle of Man, and to permit statutory controls on the level of public subvention to Manx Radio.**

The Bill (clause 3) states that the "*public service broadcaster*" means *Radio Manx Limited a company incorporated under the Isle of Man Companies Acts 1931-2004 with company number 001486C and which is licensed to provide a broadcasting service.*"

The Commission considered the model of Channel 4 which is a state owned commercially funded organisation, in looking at the Manx Radio licence and provisions. The Bill provides for a renewal process in clause 49 for the PSB licence and sets certain conditions around that renewal similar to that for Channel 4.

Manx Radio must comply with a statement of station requirements specifying the performance and programme quotas the PSB must meet in order to fulfil its PSB obligations.

The Manx Radio Licence includes a Station Format detailing the requirements for the station, this includes the provision that:

"News and content should be editorially independent of Government and be of high quality. Speech content should not generally\* fall below 40% of its total output between the hours of 6am and 7pm each weekday with news, at least hourly, for 12 hours a day on weekdays and 6 hours a day at weekends. A news programme of at least 60 minutes in duration must be broadcast at breakfast each weekday. Regular sports coverage must also be maintained

Locally produced and presented speech will normally form a significant part of daytime output."

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<sup>6</sup> <https://wcd.coe.int/ViewDoc.jsp?id=1908265>

\* Generally does not include Bank Holidays, special events such as the TT and the period between Christmas and New Year.

As there is no automatic way of assessing the amount of speech content broadcast by Manx Radio has agreed with the Commission a way of demonstrating compliance with this format.

Manx Radio must also prepare an annual statement of programme policy setting out how the PSB obligations will be fulfilled and reporting on the performance from the previous year.

The Commission has enforcement powers in respect of the PSB obligations in that it can vary the licence to add such conditions and make such modifications as is appropriate for remedying the PSB's failure to perform its PSB functions.

**Recommendation 4: That Tynwald is of the opinion that the Treasury should fund Manx Radio to the level of £850,000 which applies in 2014/15; and that any future public service broadcasting funding should be subject to periodical reviews based on reports to Tynwald and with Tynwald's consent.**

Clause 57 of the Bill provides for Treasury, with the approval of Tynwald, to make payments to the PSB which are to be used solely for the purpose of fulfilling the PSB obligations.

This is very similar to the previous provision in Section 12A of the Broadcasting Act 1993. The major change that has occurred is in the administrative relationship between Treasury and Manx Radio so that Manx Radio is now included in the 3 yearly rolling budget cycle which provides greater certainty than the previous annual round of budget discussions.

**Recommendation 5: That in the interests of transparency the Treasury as shareholder of Radio Manx Limited should arrange for the station to show in its accounts which activities are funded from the public subvention and which from commercial income; and that similar accounting should be required under the proposed new statutory framework.**

Treasury and Manx Radio have discussed the requirement to separate accounts to show the split for commercial activities and have decided this would be overly onerous on Manx Radio. However the Bill requires transparency in the preparation of accounts to demonstrate how the PSB funding has been spent.

Manx Radio is obliged under, clause 56 Public Service Broadcaster – financial statements, to provide annually:

- (a) a statement of the use it has made of the monies paid to it under section 57 in that financial year in the fulfilment of its public service broadcasting obligations;
- (b) a statement in respect of the total income derived and costs incurred by the public service broadcaster in that financial year in pursuance of its public service broadcasting obligations; and
- (c) the financial statements of the public service provider.

The Bill also makes provision for a periodical review of the PSB as to its performance and the adequacy of the funding provided by Treasury.

Other Tynwald Recommendations will be covered by amendments to the Memorandum and Articles of Manx Radio.

***Question 16 for consultation: Do you feel that this adequately achieves the objectives of the Tynwald Recommendations as laid out above?***

#### 4.6.1 **Gaelic Broadcasting Committee**

The Gaelic Broadcasting Committee is a statutory body which has responsibilities relating to the Manx Language.

The Committee is constituted under the BA 1993. Section 12(6) of that Act states its functions are "*...to promote, and advise the Communications Commission and the Treasury on, the making and broadcasting of programmes in Manx Gaelic.*"

The Committee is appointed by Council of Ministers under Section 12(3) of the Broadcasting Act 1993 (the 'Act'). Under the Act, the Committee shall consist of a Chair and not less than three other members.

Over the past year there has been some discussion around the functions of Culture Vannin and the Gaelic Broadcasting Committee and consideration of where functions could be merged.

Culture Vannin has agreed to take on the activities of the Gaelic Broadcasting Committee, as it considers that it complements its role under the Manx Heritage Foundation Act 1982 to promote the cultural heritage of the Island. This will provide a broader range of experience to draw on for Gaelic Broadcasting from the Culture Vannin Board.

The Commission will continue to ensure that there is a Manx language programming requirement in the Manx Radio licence and provisions in the Bill require a proportion of Broadcasting to be in Manx Gaelic, this proportion to be decided in consultation with Culture Vannin and Manx Radio.

The Gaelic Broadcasting Committee provisions will be repealed with the Broadcasting Act 1993 and not replicated in the Bill, as the functions can be effectively carried out by Culture Vannin under the Manx Heritage Foundation Act 1982.

***Question 17 for consultation: Is this an appropriate way of managing Gaelic Broadcasting?***

#### 4.6.2 **Schedule 4: On Demand Programme Services**

As On Demand Programme Services (ODPS) are not subject to a licensing regime the provisions relating to them are contained in Schedule 4 to the Bill.

The nature of services that require regulatory oversight is one that has exercised policy makers over the last decade, as the boundaries between services and transmission platforms has shifted. The most recent piece of European regulation – by which the Isle of Man is not bound – has arrived at a distinction whereby Audiovisual media services – that is, services which consist mainly of material that is “television-like” in terms of subject matter and treatment – must be regulated in terms of content and advertising: but the legislation also distinguishes between linear and non-linear distribution by putting on-demand under a less restrictive set of rules. “TV-like” On Demand Programme Services (ODPS) in the UK jurisdiction are subject to a set of minimum regulatory standards.

ODPS include services such as TV catch up and online film streaming services. The platform these services are delivered on does not matter, so services on connected TVs, apps on mobile phones and programmes you view through set top boxes may be regulated under this legislation. Broadcast TV services are not included.

The Isle of Man has, essentially, followed the UK in subjecting ODPS to a minimum set of regulatory standards.

Clause 59 of the Bill provides that a provider of a ODPS will only fall within the regulatory jurisdiction of the Commission if:

- (a) the provider of the service has its head office in the Island;
- (b) the editorial decisions about the on-demand programme service are taken in the Island;
- (c) the provider of the service uses a satellite up-link situated in the Island; or
- (d) although the provider of the service does not use a satellite up-link situated in the Island, the provider of the service uses satellite capacity appertaining to the Island.

And, for the purposes of the Act, a service is an “on-demand programme service” if —

- (a) its principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services;
- (b) access to it is on-demand;
- (c) there is a person who has editorial responsibility for it; and
- (d) it is made available by that person for use by members of the public.

Programmes included on such services must be “TV-Like”, in that they are comparable to the programmes that appear on broadcast television.



The Bill makes provision for the Commission to designate an appropriate regulatory authority for the purposes of any provision of the Schedule. In the UK Ofcom had a contract with ATVOD (Authority for Television On Demand) to be that authority, but has recently taken the process back in house. While the Commission intends, at least initially, to be the regulatory authority, this provision allows for a designation if appropriate.

The Bill requires a person who wishes to operate an ODPS to notify the regulatory authority in advance. The Bill lays out a minimum set of standards that ODPS must adhere to in relation to sponsorship, advertising and harmful material.

The Audiovisual Media Services Directive (Directive 2010/13/EU ) provides for freedom of retransmission and reception for television services within the European Economic Area.

A service which is licensed (or otherwise appropriately authorised) in one Member State does not need separate licensing in any other Member State. Dual licensing is not permitted.

A Member State can only license a service if the provider of that service (“the broadcaster”) falls under the Member State’s jurisdiction in accordance with the Directive.

In order to assess whether a broadcaster falls under a Member State’s jurisdiction, the criteria in Article 2 of the Directive must be applied. Regard is also given to the European Convention on Transfrontier Broadcasting and its amending Protocol (ETS132 and ETS171).

Clause 59 lays out the circumstances under which Schedule 4 has effect. These provisions broadly mirror those in the AVMS Directive.

## **5. PART 5 ELECTRONIC COMMUNICATIONS**

This part of the Bill deals specifically with the provision and licensing of public Electronic Communications Networks (ECN) and public Electronic Communications Services (ECS) and associated facilities.

### **5.1 Division 1 Licences**

This Division outlines certain conditions that must be satisfied prior to the Commission licensing a public ECN or public ECS. These conditions relate to the ability of an applicant to finance and sustain a network or service and ensure that the Commission knows the identity of the controllers of the applicant. “Controller” is defined in the Bill in clause 3. These requirements may be disapplied by regulations made by the Commission in a particular class of case, or applied with modifications.

In granting a licence the Commission must be mindful of its functions under Schedule 1 to the Bill.

The licence conditions may include a provision that the Commission may not for a specific time period impose, or vary a condition or revoke a condition without the consent of the licence holder. This is to give organisations that invest what may be significant amounts in the Island some certainty that their licence will not be changed without their consent.

The licences may be granted for a time specified in the licence, most licences for telecommunications are held in perpetuity unless certain revocation circumstances apply as stated in clause 124.

***Question 18 for consultation: Do these provisions seem appropriate?***

## **5.2 Division 2: Telephone Numbers**

Clause 65 of the Bill allows the Commission to designate Ofcom to perform agreed functions in relation to telephone numbers. S.1(2) of the UK Communications Act 2003, states: "(2) OFCOM shall also have any functions in relation to telephone numbers that are conferred on them by the law of the Isle of Man or of any of the Channel Islands."

Ofcom manages the allocation of telephone numbers for the Isle of Man, including the 07624 and 01624 number ranges. There are a number of obligations placed on IOM operators in relation to the IOM number ranges. This is due to the fact that the Commission wishes to try and ensure that six digit dialling can be retained on the Island and also to ensure that organisations cannot try and 'hold out' as being on the IOM when they are not.

The Isle of Man is part of the UK Numbering Plan which aims to govern how numbers are allocated and used across the British Islands in an efficient manner.

Ofcom has confirmed that it is content with this wording in the Bill.

## **5.3 Division 3 Universal Service Obligations**

Universal service is a concept fundamental to the regulation of telecoms. It means that basic telephone services should be available to everybody upon reasonable request and at an affordable price. These services are considered essential for everyone in current social and economic conditions, and risk not being provided where not commercially viable. Regulatory obligations have therefore been created to ensure their provision.

Manx Telecom is the Universal Service Provider (USP) and currently has Universal Service Obligations (USO) in its licence.

The Bill introduces a new process that aims to allow for more flexibility to be possible in the future as the nature of services change.

The Council of Ministers must by order set out the extent to which the universal service obligations must be provided, made available or supplied throughout the Island.

The things which must be provided are —

- (a) electronic communications networks and electronic communications services;
- (b) facilities capable of being made available as part of or in connection with an electronic communications service;

- (c) particular methods of billing for electronic communications services or of accepting payment for them;
- (d) directories capable of being used in connection with the use of an electronic communications network or electronic communications service;
- (e) directory enquiry facilities capable of being used for purposes connected with the use of such a network or service; and
- (f) accessibility of emergency call numbers without charge.

The requirements above may be amended by Order and the Universal Service Order may also contain guidance on the pricing of the things that must be provided.

### **5.3.1 Designation of Universal Service Provider**

The Commission may by regulations make provision for the designation of the persons (Universal Service Providers) to whom the Universal Service Order may apply.

Some aspects of universal service will be ensured by means of conditions on certain groups of communications providers, for example those providers which offer a telephony service will, as now, have an obligation to ensure that end users can call '112' and '999', free of charge, to access the emergency services.

Others, such as the provision of call boxes, will be placed on Manx Telecom as is currently the case as will a requirement to ensure a tariff for consumers on low incomes or with special social needs. In essence the Commission does not intend to change the Universal Service Obligations at this time, however the Bill will provide flexibility for it to be changed in the future.

The Council of Ministers will have to make a Universal Service Order in accordance with clause 66 to coincide with when this clause comes into force. The Commission will also need to make regulations under clause 67 making provision for the designation of universal service providers.

### **5.3.2 Funding of Universal Service Obligations**

The Bill also makes a new provision that the Council of Ministers may make regulations which would establish a scheme for funding the provision, availability or supply of the Universal Service Obligations by the Universal Service providers. This could require contributions to be made by other communications providers. It is recognised that at some point the provision of USO could become an undue burden on one provider.

As licensees other than MT are increasingly making inroads into fixed services without relying on wholesale purchasing of capacity on MT's fixed network, e.g. through connecting blocks of flats or office buildings to their own or non-MT trunking infrastructure, they are effectively bypassing MT's network. This is usually done in more profitable areas (e.g. in towns, rather than the country) and the effect is that MT may become increasingly unable to pay for their (universal service) obligation to provide services throughout the Island at

current rates. In order to avoid a 'two-tier' system developing (where people living more remotely would have to pay more for their basic telecoms services) some regulators impose a fee on all licensees, to help pay for the universal service element of the fixed network.

This provision gives the Council of Ministers the option of establishing such a fund.

***Question 19 for consultation : 1) Should the Bill make provision for a Universal Service fund? 2) Does the new provision in respect of designating a USP seem unwieldy? An alternative would be to retain the current USO provisions contained in Manx Telecom's licence, do you have any views on this approach?***

#### 5.4 Division 4 Significant Market Power

The Bill provides for both ex-ante and ex-post approaches to competition. Ex-ante regulation is the application of regulation before an abuse of power has necessarily occurred. The reasoning behind its application is that finding that an operator has Significant Market Power (SMP) means that the operator is likely to have the incentive and motivation to behave in a way which exploits its market power to the detriment of competitors and ultimately to consumers. Ex-ante regulation can be contrasted with ex-post regulation, which investigates an incident which has already happened. This is a widely used and commonly understood approach to regulation and underpins the EU Electronic Communications Networks and Services Directives as well as the current Isle of Man Telecommunications Act Licences.

The existing licences for telecommunications operators on the Isle of Man, MT, Sure and Wi-Manx, all contain SMP provisions which largely mirror those contained in the Bill. The Commission identified the appropriate markets and made determinations as to SMP in 2011 and is now implementing the results of those findings.

The Bill puts the process for the finding of SMP and managing that finding, on a statutory basis. The original SMP conditions in the MT licence drew heavily on the EU framework and there has been little change in the transposition beyond some minor updating to reflect changes in the UK and EU.

The main variations from the EU approach are that the Bill does not give the Commission power to impose functional separation. This is a model where there are strong separated walls around operational units within a company, so although the units can still be contained within the one company, each unit is much closer to acting as if it was a separate company with its own management, financial and organisational structure. Further, the separated business units have to operate at 'arm's length' on price-related terms – in effect, they have to buy and sell services between each other in an 'internal market'.

The Commission considers that such a power is not desirable or necessary given that maintaining and monitoring such a functional separation would likely be extremely onerous both for the Commission and for any operator in the Isle of Man, given the size of the market.

The Bill does not empower the Commission to impose conditions in respect of the supply of apparatus. The Commission does not consider, given the size of the market and jurisdiction, that this is likely to be a significant gap in the Commission's regulatory powers in practice.

***Question 20 for consultation: Is this a reasonable approach to the inclusion of SMP/ ex-ante powers in the legislation?***

## 5.5 **Division 5 Electronic Communications Code**

The Bill includes provision for an Electronic Communications Code, this Code updates the current Telecommunications Code in the TA. The amendments are mainly to update definitions. Manx Telecom is currently the only operator with Code powers on the Island under the TA 1984.

The Code is applied by Council of Ministers, after consultation with the Commission and subject to the approval of Tynwald.

Operators with 'Code' powers benefit from some important exemptions from Planning Regulations and may petition Tynwald for compulsory purchase of land for, or in connection with, the establishment or running of the operator's network and enter and survey land if duly authorised.

A Telecommunication Code System Operator is already able to install a mast and/or antenna under permitted development rights, as granted under the Town and Country Planning (Permitted Development) (Telecommunication) Order 2012<sup>7</sup>.

### 5.5.1 **Electronic Communications Code**

The Bill makes provision for the Electronic Communications Code to be applied to

- (a) A licence holder
- (b) A person other than a licence holder if that person provides or intends to provide a system of conduits for use by providers of electronic communications networks in connection with those networks.

A designation from Council may contain exceptions and conditions as Council thinks appropriate having regard to:

- (a) the need to protect the physical environment and to conserve the natural beauty and amenity of the countryside;
- (b) the need to promote economic growth in the Isle of Man;
- (c) the need to ensure that highways are not damaged or obstructed and traffic is not interfered with, to any greater extent than is reasonably necessary;

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[https://www.gov.im/media/992462/townandcountryplanning\\_permitteddevelopment\\_telecommunications\\_order2013.pdf](https://www.gov.im/media/992462/townandcountryplanning_permitteddevelopment_telecommunications_order2013.pdf)

(d) the need to secure that funds are available for meeting any liabilities which may arise from the exercise of rights conferred by or in accordance with the Electronic Communications Code.

A change from the previous legislation is the inclusion of “the need to promote economic growth” as a matter to which Council must have regard to in setting the exceptions and conditions.

The UK is currently consulting on the Code and its application, so the Commission has retained a power for Council of Ministers to amend the Code after consultation in order to adopt any appropriate changes following the UK model.

#### 5.5.2 **Application to the Council of Ministers for designation**

A licence holder or other person wishing to have Code Powers must apply to the Council of Ministers. Currently applications are made to the Commission, unless the licence is a licence issued by the Council of Ministers (i.e. Manx Telecom’s licence issued under s.6 of the TA). In any case Code Powers are not applied until it is approved by Tynwald. In the UK Ofcom makes decisions on Code Powers.

In considering whether to make a designation, Council of Ministers must have regard, in particular, to each of the following matters –

- (a) the benefit to the public of the electronic communications network or conduit system by reference to which the Electronic Communications Code is to be applied to that person;
- (b) the practicability of the provision of that network or system without the application of the Electronic Communications Code;
- (c) the need to encourage the sharing of the use of electronic communications apparatus;
- (d) whether the person in whose case it is proposed to apply the Electronic Communications Code will be able to meet liabilities arising as a consequence of—
  - (i) the application of the Electronic Communications Code in that person’s case; and
  - (ii) any conduct of his in relation to the matters with which the Electronic Communications Code deals.

The TA previously stated that the Code could only be applied where it appeared to the Commission —

- (i) that the running of the system would benefit the public; and
- (ii) that it is not practicable for the system to be run without the application of that code to that person.

The further additions mirror the UK legislation and seem to the Commission to be appropriate in relation to the application of Code Powers.

Council must also consult before designating a person as having Code Powers, as is currently the case.

The Commission may suspend a designation in certain circumstances after following the procedural fairness requirements.

***Question 21 for consultation: 1) Do you consider that this is an appropriate provision for the application of Code Powers?***

***2) Currently an application for Code Powers comes to the Commission (unless the licence is one issued under s.6 of the TA) for a decision and does not come into force until approved by Tynwald. The Bill proposes that all applications will go to Council of Ministers for decision. Does this seem appropriate to Consultees or should applications continue to go to the Commission?***

## 5.6 Division 6: Competition

The Commission currently has no specific, statutory ex post competition powers to provide a 'backstop' against anticompetitive behaviour in the communications markets. While such powers do exist on the Island, lying with the Office of Fair Trading, it is quite different for the communications regulator to have the power to deal with companies potentially threatening the functioning of markets within its remit, than to have to rely on a separate organisation to make its own decision to intervene. The Perspective Report<sup>8</sup> "A new framework for communications regulation" on the Isle of Man also stated "There is also an analogous difference in how a regulator with or without these powers is perceived by regulated and licensed companies."

The Bill contains competition provisions which will allow the Commission to deal ex-post with anti-competitive behaviour in the telecommunications markets. The Office of Fair Trading have permission from Council of Ministers to introduce a Bill to deal with competition issues on Island which will give the OFT concurrent powers with the Commission in relation to competition issues and will also provide the OFT with more powers in relation to managing competition than it does under the current Fair Trading Act 1996.

The Commission will only exercise its powers under clause 87 if directed to do so by the Council of Ministers.

The detail of competition investigations and inspection is contained in Schedule 6 of the Bill. This gives the Commission powers to request and seize information as well as to request a search warrant. All these powers are new to the Commission.

Offences are created if a person falsifies, conceals or disposes of information that a person knows or suspects is or would be relevant to an inspection or investigation.

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<sup>8</sup> <http://www.gov.im/lib/docs/cc/consultations/anewframeworkforcommunicationsr.pdf>

Competition investigations are notoriously expensive, time consuming and resource intensive. The Commission is unlikely to have the necessary resources in house to carry out such an investigation and would be required to seek additional funding in order to carry out such investigations out. The Bill makes provision that any expenses incurred in such an investigation are to be defrayed out of money provided by Tynwald.

The Competition provisions enable the Commission to regulate competition in relation to the provision of Electronic Communication networks, services and associated facilities.

The Commission will have powers:

- to investigate the conduct of persons to determine whether there has been collusion in contravention of the legislation
- to investigate the conduct of persons to determine whether there has been an abuse of the dominant position.
- to secure compliance with obligations in relation to competition
- to impose penalties for contravention
- to publish guidance and public notices as it considers appropriate.

A relevant person is a person carrying on electronic communication matters.

The provisions in the Bill are largely based on the UK Competition Act 1998 and the UK Communications Act 2003, under which Ofcom has concurrent powers with the Competition and Markets Authority.

***Question 22 for consultation: Do you consider that this is an appropriate response to managing competition issues?***

## 5.7 Division 7 Offences

These provisions update those in the Telecommunications Act 1984 and provide penalties covering

- Improper use of a public ECN, making it an offence to send a message that is grossly offensive or of an obscene or menacing character or causes any such message or matter to be sent.
- Fraudulent use of a ECN or ECS that is with intent to avoid payment for such a service
- Possession or supply of anything for fraudulent purposes in connection with the use of ECS.
- Interference with ECN or ECS
- Disclosure of messages and information about usage (there are exceptions to do with the prevention of crime or in the interests of national security).

***Question 23 for consultation: Do you consider that this is an appropriate response to managing offences?***



## 5.8 **Division 8 General**

This Division covers disputes and also the use of certain apparatus and how that may be managed by the Commission. These provisions are largely taken from the current TA licences.

They provide a framework where a licenceholder and another person are in dispute in relation to network access and how the Commission may handle such disputes.

The Commission may make a determination in relation to the dispute and may require one party to make payments to another party or to the Commission in respect of costs and expenses. Any determination by the Commission is binding, but subject to appeal under clause 130 of the Bill.

***Question 24 for consultation: Do you consider that this is an appropriate response to managing such disputes?***

## 5.9 **Subdivision 2 Miscellaneous**

### 5.9.1 **Approval of Apparatus**

The Bill makes provision for apparatus in that the Commission may make notices approving or disapproving apparatus for use.

The Bill also has a wide ranging provision that apparatus which meets the standards set under European Directives is deemed to be acceptable in the Isle of Man.

The use of the following apparatus will be deemed approved:

- (i) apparatus which up until 12 June 2016 complies with the essential requirements set out in article 3 of the RTTE (Radio and Telecommunication Terminal Equipment) Directive; or
- (ii) apparatus which from 13 June 2016 complies with the essential requirements set out in article 3 of the Radio Equipment Directive,

For these purposes

- (a) apparatus which bears the CE marking referred to in Annex VII of the RTTE Directive and articles 19 and 20 of the Radio Equipment Directive (indicating its conformity with all provisions of those Directives, including conformity assessment procedures) is deemed to comply with the essential requirements set out in article 3 of the RTTE Directive or article 3 of the Radio Equipment Directive; and
- (b) apparatus which meets the relevant harmonised standards or parts thereof, whose reference numbers have been published in the Official Journal of the European Communities, is deemed to comply with those of the essential requirements referred to in article 3 of the RTTE Directive or article 3 of the Radio

Equipment Directive as are covered by the said harmonised standards or parts thereof.

This is a pragmatic approach so that equipment that is approved in the EU is not subject to any unnecessary further checking and that apparatus from outside the EU may be approved by notice of the Commission.

***Question 25 for consultation: Do you consider that this is an appropriate provision?***

#### **5.9.2 Use of Certain Conduits for Electronic Communications Purposes**

This provision in relation to the Manx Utilities Authority with respect to authorisation of certain functions in relation to conduits is updated from the TA 1984 s.24.

#### **5.9.3 cl. 109 – 112 Information to be marked on apparatus and charges.**

These clauses, which are also found in the TA 1984, give the Commission certain powers in relation to apparatus, information to be given in advertisements and give a defence in relation to offences under these sections.

#### **5.9.4 Power of Council of Ministers to give Directions**

This provision, from the TA 1984 s.36, gives the Council of Ministers the power to give Directions to any provider of a public electronic communications network in the interests of national security or international relations. A grant may be made by Tynwald for any loss suffered by a provider as a result of such a Direction.

### **5.10 Part 6 Enforcement**

Both the TA 1984 and BA 1993 were deficient in the enforcement of licence conditions. There were few options open to the regulator other than the revocation of the licence which would, in most cases, be seen as disproportionate.

The Bill introduces a scheme of penalties for the regulator to apply.

### **5.11 Division 1 Broadcasting**

While all local broadcasters must comply with the Commission's Codes of Practice on programme content and advertising and sponsorship; where problems occur currently in broadcasting the Commission has limited penalties to apply.

If the Commission, having considered the recording of a programme or feature where there has either been a complaint or has investigated of its own accord, upholds a complaint, it may require the licensee to broadcast a correction or apology or both in such form, and at such time or times, as the Commission may determine and a right of reply may be given when appropriate.

If the licence holder fails to follow a direction from the Commission in respect to any licence condition or a Code of Practice, then the Commission may revoke the licence. This is likely to be disproportionate in most cases. The Commission is therefore proposing a suite of penalties to give a broader range of options.

The new Bill gives the Commission, subject to the procedural fairness requirements:

- the power to direct a licence holder to broadcast a correction, an apology or not to repeat a programme
- a new power to impose financial penalty or shorten the licence period
- a new power to suspend a licence
- the power to revoke a licence.

### 5.12 **Broadcasting Financial Penalties examples**

The Commission wishes to have a balance between imposing a penalty that may have a substantial detrimental effect on a licence holder while still having a punitive and deterrent effect. The intention would not be that a financial penalty was the first resort as a penalty, but would be available to the Commission, unlike now.

It should be stressed that financial penalties are only one course of action that a regulator might take. The Commission would take into account whether or not the breach was serious, deliberate, repeated or reckless. The examples below show the kind of judgement that is made in these cases and the factors taken into account, which include repeated infringements, in particular where warnings have been given, unacceptable infringements of privacy and cases of deliberate mismanagement of premium phone calls from audiences to derive more revenue for the broadcaster.

Examples from Ofcom of financial penalties:

- a) A satellite TV company fined £25,000 for broadcasting a series of programmes where an alternative medical practitioner made claims about products being used to cure potentially harmful medical conditions. Ofcom found that the claims made in the programme amounted to medical advice and as a result some viewers with serious medical conditions might not seek, forego, or delay conventional medical treatment on the basis of what they had seen. Therefore, as a result, there was an appreciable risk of harm to viewers who actively followed the alternative treatments promoted in the programme. Ofcom found that the Licensee permitted Dr Naram to give unsubstantiated and unqualified medical advice with significant potential for harm to viewers and concluded that the broadcast was in breach<sup>9</sup>.*
- b) A local radio station fined £15,000 for a breach of the Ofcom Broadcasting Code that "Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known". This unfair*

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<sup>9</sup> [http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/Asia\\_TV\\_Limited.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/Asia_TV_Limited.pdf)

*conduct caused material harm in terms of financial loss (albeit minimal) to Lakeland listeners who paid to enter the competitions in good faith, and on the basis that they had a fair and equal chance of winning. In fact, all listeners who entered the competitions during the rounds in which a wrong answer had been selected had no chance of winning. In addition, Lakeland's audience overall was deceived as to the fair conduct of the competitions. Breaches of the Code that result in audiences being misled have always been considered by Ofcom (and its predecessor regulators) to be amongst the most serious breaches that can be committed by a broadcaster. As such, these breaches represented a significant breakdown in the fundamental relationship of trust between a local radio station and its audience.<sup>10</sup>*

- c) A satellite TV company fined for repeated breaches of the Code in relation broadcast of adult sex chat programming. Ofcom considered that the Code Breaches were serious because they occurred following previous and numerous warnings both to the licensee specifically and to the industry in general, and extensive guidance that has been published by Ofcom over the previous three years regarding the sexual content of adult sex chat programming.<sup>11</sup>*
- d) A national radio station which was fined £175,000 in total for the decision to broadcast a pre-recorded item where a presenter called a man who was under threat of redundancy from his company pretending to be the HR advisor of the company and ridiculing the man's experiences on air. The station described the decision to broadcast the item (which was pre-recorded) as "inexplicable" because even the presenter had acknowledged after the programme that it had gone too far.*

*In Ofcom's view the case of Mr R was the most serious case of unwarranted infringement of privacy it had heard. In its view, the broadcast was devoid of any justification of public interest and could have had a serious effect on the individual concerned, whose deep distress was evident. The decision by the Licensee to transmit this material was not one which had required a fine judgement on its part. Unlike other cases of potential infringement of privacy, this was not a case where the Licensee was required to make a difficult editorial judgement balancing such factors as freedom of expression, the public interest and privacy of the individual concerned<sup>12</sup>.*

## **5.13 Financial Penalty – Qualifying revenue and maximum fine**

### **1.1 Financial Penalty – Qualifying revenue and maximum fine**

The Commission is considering 3 options in respect of this clause and welcomes comments.

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<sup>10</sup> <http://www.ofcom.org.uk/files/2010/07/lakeland.pdf>

<sup>11</sup> <http://www.ofcom.org.uk/files/2010/07/springdoo.pdf>

<sup>12</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/kiss100.pdf>

As currently drafted, clause 116 of the Bill provides for financial penalties for the holders of broadcasting licences to be no more than 5% of the qualifying revenue – this applies to providers of sound broadcasting services, digital sound programme services, RLCS and TLCS.

The definition and calculation of that qualifying revenue is obviously important in how this clause will function. The Bill currently states that the detail of the calculation of qualifying revenue would be determined in secondary legislation.

**Option 1:** The Commission would closely follow the UK position and financial penalties in relation to broadcasting licenceholders would be calculated as per the table below. For existing licence holders this would mean a maximum penalty of £250,000 or 5% of qualifying revenue if that is greater.

TYPE OF LICENCEHOLDER	MAXIMUM PENALTY	QUALIFYING REVENUE CALCULATION
<p><b>Sound Broadcasting Services, TLCS and RLCS</b></p> <p>[s.110 of the UK Broadcasting Act 1990 and Part II of Schedule 7 to that Act]</p> <p>[s. 250(3) of the UK Communications Act 2003 applies s. 110 of the UK Broadcasting Act 1990 to radio licensable content services]</p> <p>[s. 19(2) to (6) of the UK Broadcasting Act 1990 and Part I of Schedule 7 to that Act (s. 237 of the UK Communications Act 2003 applies s. 19 of the UK Broadcasting Act 1990 to television licensable content services)]</p>	<p>The maximum penalty is whichever is the greater of—</p> <p>(a) £250,000; and</p> <p>(b) 5 per cent of the qualifying revenue for the last complete accounting period falling within the period for which the licence has been in force.</p>	<p>Qualifying revenue calculation:</p> <p>UK Broadcasting Act 1990 s.102</p> <p>“(2) ...the qualifying revenue for any accounting period of the licence holder shall (subject to subsection (6)) consist of all payments received or to be received by him or by any connected person—</p> <p>(a) in consideration of the inclusion in the licensed service in that period of advertisements or other programmes, or</p> <p>(b) in respect of charges made in that period for the reception of programmes included in that service.</p> <p>(3)....</p> <p>(4) In the case of an advertisement included under arrangements made between—</p> <p>(a) the licence holder or any connected person, and</p> <p>(b) a person acting as an advertising agent,</p> <p>the amount of any receipt by the licence holder or any connected person that represents a payment by the advertiser from which the advertising agent has deducted any amount by way of commission shall, except in a case falling within subsection (5), be the amount of the payment by the advertiser after the deduction of the commission.</p> <p>(5) If the amount deducted by way of commission as mentioned in subsection (4) exceeds 15 per cent. of the payment by the advertiser, the amount of the receipt in question shall be taken to be the amount of the payment less 15 per cent.</p> <p>(6) ....”</p> <p>The TLCS calculation is very similar.</p>

TYPE OF LICENCEHOLDER	MAXIMUM PENALTY	QUALIFYING REVENUE CALCULATION
<b>Local digital sound programme services</b> [s. 62 of the UK Broadcasting Act 1996]	In the case of a local digital sound programme service, the maximum amount of a financial penalty which may be imposed is <b>£250,000</b>	(6) The amount of any financial penalty imposed in pursuance of subsection (1) (a) on the holder of a local digital sound programme licence shall not exceed £250,000.

**Option 2:** The Commission could impose financial penalties on providers of all types of broadcasting service to not exceed a stated maximum (which will be different for the different types of broadcasting service) without any reference to qualifying revenue.

- Sound broadcasting services and radio licensable content services £25K
- TLCS £100K (to recognise potentially higher income)
- Digital Sound Programme Services £25K

This would give licenceholders certainty as to any maximum penalty. The penalty would be set at a level appropriate for local broadcasting.

**Option 3:** A hybrid approach to the above, for example only a maximum fine for sound broadcasting services and Digital Sound Programme Services of £25K whereas other services, which are more likely to have a substantial revenue stream, to be fined at a percentage of qualifying revenue.

***Question 26 for consultation: Do you have any preferences or comments on these options? Please give reasons for your answer.***

#### 5.14 Power to suspend or revoke a broadcasting licence

The Bill makes provision for the Commission to suspend or revoke a broadcasting licence if the Commission is satisfied

- (a) that a licence holder has failed to—
- (i) to comply with a statutory provision contained in, or made under, the Act;
  - (ii) to comply with any condition of the licence;
  - (iii) to comply with any direction given by the Commission under the Act; or, and
  - (iv) to pay any fee or duty which has become due and payable under the Act and which has not been paid; and
- (b) that the failure is such that, if not remedied, it would justify the suspension or revocation of the licence.

The Bill makes provision for the procedure to be followed by the Commission in such a case, including notice to the broadcaster to take steps to remedy any issue and an opportunity for

the broadcaster to make representations. There are also provisions under cl.117 (4) of the Bill which enable a licence to be revoked in particular circumstances without the need to give the licenceholder an opportunity to remedy the failure.

***Question 27 for consultation: Do these provisions seem adequate?***

#### 5.15 Division 2 Electronic Communications

The Bill (clause 119) gives the Commission new remedies for when there has been a breach by a licence holder of

- a provision of the Bill
- any condition of the licence
- a direction given by the Commission.

The Bill lays down a procedure for the Commission to give notice to a licence holder in respect of a contravention which will lay out the steps the Commission thinks should be taken by the licence holder in the case and also any penalty that may be imposed.

Penalties for contravention of the notice may be specified in the notice and may also include per diem financial penalties for a continuing contravention of not more than £20,000 per day.

The amount of a financial penalty notified must not exceed 10% of the licence holder's turnover as computed for the purpose of determining the fee payable for the licence holder's licence for the last complete accounting period falling within the period for which the licence has been in force (the "relevant period").

Most licence holders generate revenue from unregulated as well as regulated activities. The relevant turnover only relates to regulated activities. The Commission recently undertook a wide-ranging exercise with all licenceholders to identify regulated activities in order to determine relevant turnover for the purposes of the licence fee payment.

The Bill also gives the Commission the power to suspend or revoke an electronic communications licence with procedures around both of those circumstances. There are also powers to revoke without prior notice in certain specific circumstances for example a serious threat to public safety.

The Bill also allows the Commission to impose a financial penalty in respect of collusion or the abuse of a dominant position. The amount is 10% of the person's relevant turnover for the period of the contravention.

***Question 28 for consultation: Do the penalty processes and the amounts in the case of a financial penalty seem proportionate?***

***Question 29 for consultation: Does the maximum per diem financial penalty for continued contravention, which is at the same limit as the UK, seem appropriate?***

#### 5.16 **Division 3 General: Public Statements**

This provision gives the Commission powers to make public statements about such matters as are laid out in the clause. It requires the Commission to give 7 days' notice to a licence holder prior to issuing a public statement about a matter concerning them, unless urgent action is necessary.

***Question 30 for consultation: Does this provision seem appropriate?***

#### 5.17 **Part 7 Proceedings**

This part makes provision for how proceedings taken under this Act are to be managed. The Bill makes new specific provisions for Appeals against the decisions of the Commission in the exercise of its functions.

The Bill could have introduced a Communications Tribunal in order to hear appeals against decisions of the Commission. It was felt that such a Tribunal would have insufficient call on its time in order to build up expertise in members and would be an unnecessary extra layer of expense when an appeal to the Courts is available.

The appeal lies —

- (a) to the High Court, if it relates to a broadcasting licence; and
- (b) to the High Bailiff in any other case.

***Question 31 for consultation: Do these provisions appear proportionate?***

#### 5.18 **Injunctions**

The Bill makes a new provision which will allow the High Court, on the application of the Commission or Attorney General to grant an injunction or other appropriate remedy, if there is a reasonable likelihood that a person will contravene, continue to contravene, repeat a contravention or has contravened a provision of the Act or a Direction of the Commission.

***Question 32 for consultation: Do these provisions appear proportionate?***

#### 5.19 **Part 8: Miscellaneous and Closing Provisions**

##### 5.19.1 **Fees and Duties**



The Bill makes provision for the Commission to set fees and duties in the circumstances set out in clause 133. The Commission must consult the Treasury prior to setting any fee. All fees and duties payable under the Bill are payable to the Treasury.

This provision recognises the fact that the Commission is required to consider several factors in setting a fee at any time. The Commission will generally consult before setting new fees and will take into account matters such as the value of the spectrum and services to licenceholders. For example, the successful applicants for 4G paid £150,000 each, whereas the value of other spectrum may be much less.

A licence for a local terrestrial radio station is £250 annually which does not recover the Commission's costs, if a large broadcaster were to be established on the Isle of Man, the licence fee may be set as a proportion of relevant turnover as is the case with electronic communications.

The Commission may have regard to certain factors, as laid out in clause 133 (7), in setting a fee or duty.

***Question 33 for consultation: Do these provisions appear to be appropriate?***

#### **5.19.2 Registers**

Currently the Commission is required under s.14 of the Telecommunications Act to keep a register of licences granted under that Act and revocations and any notice made under s.11 (securing compliance with licence conditions).

This register is available on the Commission website at <https://www.gov.im/cc/licensing.xml>. Clause 134 calls for a slightly more detailed register to be made available on past and current licenceholders.

The Commission intends to introduce a provision that if the entry of any particulars in the register would be against the public interest or commercial interests of any person it may choose not to enter those details. This provision is currently contained in the TA, but it is Council of Ministers who directs the Commission not to publish the details.

***Question 34 for consultation: Do the details specified in the Bill, and the addition of a discretion for the Commission in adding details or not, seem appropriate?***

#### **5.19.3 Restrictions on the Disclosure of Information**

The provisions state under which circumstances information obtained under the Act may be disclosed. Contravention of this provision is an offence.

#### **5.20 Schedule 7: Restrictions on Disclosure of Information**

Schedule 7 creates specific exceptions to this clause so that disclosure is not precluded to certain bodies or organisations or in certain situations. Other authorities are also included in

these provisions for the purpose of the Commission sharing information with regulators or other authorities outside of the Island.

The Bill also provides an exemption in relation to notices, public statements and registers produced under the legislation.

***Question 35 for consultation: Do the exemptions specified in the Bill seem appropriate?***

#### **5.21 Foreign Satellite Services**

The provisions in the Bill largely follow the provisions in the TA 1984. Only one Foreign Satellite Service has been proscribed in the Isle of Man, Red Hot Television, in 1993. Proscription makes it a criminal offence to deal with the proscribed company.

***Question 36 for consultation: Do the provisions specified in the Bill seem appropriate?***

#### **5.22 Advance Programme Information**

This provision is taken from the BA 1993 as is Schedule 8 and is a technical provision concerned with the copyright of programme information.

#### **5.23 Application of UK and EU communication legislation**

This provision gives the Commission quite wide powers to apply by order to the Island provisions from any legislation from outside the Island to which this section applies, with any exceptions, adaptations and modifications required.

This provision is important as it gives the Commission the flexibility to deal quickly with any amendments to the UK or any EU legislation as it impinges on the Island.

This provision gives the Commission the flexibility to deal quickly with any amendments to the UK or EU legislation as it impinges on the Island, the Island cannot work in isolation on areas such as management of the radio spectrum or wireless telegraphy. .

***Question 37 for consultation: Do the provisions specified in the Bill seem appropriate?***

#### **5.24 Statutory Documents**

The Bill makes provision about regulations and orders made under this Act. Statutory Documents may be drafted in different ways, for the majority of Orders under the Act they will not come into operation unless they are approved by Tynwald.

However for the statutory documents specified in cl.139 (2) a different procedure is used, that is the negative resolution procedure which requires the statutory documents to be laid before Tynwald as soon as practicable after it is made, and if Tynwald at the sitting at which the statutory document is laid or at the next following sitting resolves that it is to be annulled, it ceases to have effect.

This is in recognition of the fast changing nature of electronic communications and that businesses setting up on the Island may not be able to wait for the full Tynwald procedure, particularly during recess. The clause makes a requirement for the Programme and Fairness standards for Broadcasting to be approved by Tynwald, there is no similar requirement in the UK legislation. There is an argument that this would lose flexibility in this area and the Commission seeks views on this point.

***Question 38 for consultation: Do the provisions specified in the Bill seem appropriate? In particular does the requirement for the Programme and Fairness standards for Broadcasting to be approved by Tynwald seem appropriate or overly bureaucratic?***

#### 5.25 **Amendments, repeals and savings.**

Clause 140 states the repeals and savings arising out of the Act which are detailed in Schedule 9.

## **6. CONSULTATION PROCESS**

The Commission welcomes comments from interested parties on any aspects of the proposals or, indeed, any suggestions regarding alternative proposals.

### **6.1 List of persons and organisations to be consulted**

*The list includes the following:*

- Tynwald Members
- Attorney General
- Local Authorities
- Chief Officers of Government Departments
- Chamber of Commerce
- IOM Law Society
- IOM Trade Unions Council
- Licensed operators
- Ofcom (UK Communications Regulator)
- UK Department for Culture Media and Sport
- Gaelic Broadcasting Committee
- Culture Vannin

### **6.2 The Consultation Code of Practice Criteria**

It is the intention to carry out this consultation in accordance with the Isle of Man Government Code of Practice on Consultation. The Code sets out the following six criteria:

- Consult widely throughout the process, allowing a minimum of 6 weeks for a minimum of one written consultation at least once during the development of the legislation or policy,
- Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
- Ensure your consultation is clear, concise and widely accessible.
- Give feedback regarding the responses received and how the consultation process influenced the policy.
- Monitor your Department's effectiveness at consultation.
- Ensure your consultation follows best practice, including carrying out an Impact Assessment if appropriate.

### **6.3 Comments or complaints**

If you wish to comment on the conduct of this consultation or make a complaint about the way the consultation has been carried out please write to:

The Director  
Communications Commission  
Ground Floor  
Murray House  
Mount Havelock

Douglas, ISLE OF MAN  
IM1 2SF  
Tel: +44(0)1624 677022  
[Carmel.mclaughlin@iomcc.im](mailto:Carmel.mclaughlin@iomcc.im)

## **APPENDIX ONE PREVIOUS CONSULTATIONS AND INFLUENCES ON THE BILL**

All available from the Consultation tab at <http://www.iomcc.im> .

*December 2009 Consultation Paper on Proposals for a New Framework for Communications Regulation*

*December 2009 "A new framework for communications regulation on the Isle of Man"  
[Perspective Report]*

*August 2010 "Response to Consultation on Proposals for a New Framework for Communications Regulation"*

*July 2010 "Strategic Review of Communications – the Isle of Man Approach to Telecommunications Regulation and Spectrum Awards"*

*June 2011 "Strategic Review of Communications: Key Audio and Audiovisual issues for the Isle of Man Communications Commission"*

*June 2011 "Consultation paper on the regulation and licensing of broadcast content and a strategy for digital radio"*

*September 2011 "Response to Consultation on the Regulation and Licensing of Broadcast Content and a Strategy for Digital Radio"*

In relation to Manx Radio and Public Service Broadcasting Provisions (available at [www.tynwald.org.im](http://www.tynwald.org.im) )

*Select Committee of Tynwald on Public Service Broadcasting 2013-14*

*Tynwald Debate on the Select Committee Report March 2014*

## APPENDIX TWO REGULATORY IMPACT ASSESSMENT

<b>DEPARTMENT: Communications Commission</b>		
<b>IMPACT ASSESSMENT OF: Communications Bill 2015</b>		
<b>Stage: Consultation on Draft Bill</b>	<b>Version:1</b>	<b>Date: 25<sup>th</sup> November 2015</b>
<b>Related Publications:</b>  All available from the Consultation tab at <a href="http://www.iomcc.im">http://www.iomcc.im</a> .  <i>December 2009 Consultation Paper on Proposals for a New Framework for Communications Regulation</i>  <i>December 2009 "A new framework for communications regulation on the Isle of Man" [Perspective Report]</i>  <i>August 2010 "Response to Consultation on Proposals for a New Framework for Communications Regulation"</i>  <i>July 2010 "Strategic Review of Communications – the Isle of Man Approach to Telecommunications Regulation and Spectrum Awards"</i>  <i>June 2011 "Strategic Review of Communications: Key Audio and Audiovisual issues for the Isle of Man Communications Commission"</i>  <i>June 2011 "Consultation paper on the regulation and licensing of broadcast content and a strategy for digital radio"</i>		
<b>Responsible Officer: Sue Strang</b>		
<b>Email Address: <a href="mailto:sue.strang@iomcc.im">sue.strang@iomcc.im</a></b>		<b>Telephone:01624 677022</b>

<b>SUMMARY: INTERVENTION AND OPTIONS</b>
<b>Briefly summarise the proposal's purpose and the intended effects</b>  The Commission is bringing forward a new Communications Bill which will: <ul style="list-style-type: none"><li>• replace the outdated Broadcasting Act 1993 and the Telecommunications Act 1984 and bring broadcasting and telecommunications into the same piece of legislation</li><li>• give the Commission a suite of enforcement penalties lacking in the current legislation</li><li>• allow the Commission to act responsively to business requests in electronic communications and broadcasting.</li><li>• put Manx Radio on a statutory footing as the Public Service Broadcaster.</li></ul>

**What are the options that have been considered**

1. Doing Nothing.
2. Amending the existing legislation – the Broadcasting Act 1993 may have been amendable. Due to convergence, it makes more sense for the broadcasting provisions and telecommunications to be brought into one Bill.
3. Repeal the current legislation and incorporate the Broadcasting and Telecommunications Provisions into one piece of legislation.

**Option 3** is the preferred option. Broadcasting and electronic communications have changed out of all recognition in the last 30 years. The Telecommunications Act requires re-writing to take into account European developments as well as new definitions to encompass new technologies.

**Link to Government Strategic Plan**

Grow the Economy: We have a strong and resilient Island infrastructure that provides a foundation for our economic and social success.

Communications Commission Strategic Objective: To provide for the licensing and use of the Island’s communications assets as effectively as possible, to maximise societal value, provide innovation and facilitate new service

**Responsible Departmental Member**

n/a

**Ministerial sign off**

I have read the Impact Assessment and I am satisfied that the balance between the benefit and any costs is the right one in the circumstances.

Signed by the Responsible  
Minister

**Hon J Watterson MHK Chairman of the  
Communications Commission**

Date: 1/12/2015



SUMMARY: ANALYSIS AND EVIDENCE
<b>IMPACT OF PROPOSAL</b>
<p><b>Resource Issues - Financial (including manpower)</b></p> <p>It is not anticipated that the Bill will incur any significant extra costs for the Commission or elsewhere in Government. The important exemption is where the Commission may be called upon to undertake a Competition Investigation under new powers in the Bill. Competition investigations are notoriously expensive, time consuming and resource intensive, the Commission is unlikely to have the necessary resources in house to carry out such an investigation and would be required to seek additional funding in order to carry out such investigations. The Bill makes provision that any expenses incurred in such an investigation are to be defrayed out of money provided by Tynwald.</p>
<p><b>Statement</b></p> <p>The Bill is based on the Communications Act 2003 of Parliament, which implemented a significant portion of the 2002 European Parliament's Directives ("the EC Communications Directives"), which set out a package of measures for a common regulatory framework for electronic communications networks and services.</p> <p>The Bill adapts these provisions for the Isle of Man which will mean provisions are readily understood by EU and other operators.</p> <p>The Bill also gives the Commission more flexibility in the licensing of broadcasting.</p>
<p><b>Likely Financial Costs</b></p> <p><b>One Off</b></p> <p><b>The Commission may need specialist legal assistance in drafting secondary legislation, guidelines, codes and updating of licences.</b></p> <p>The Bill should not require any major changes from businesses. The Bill introduces a new financial penalty clause so that the Commission may impose a financial penalty on licenceholders in certain circumstances e.g. in the case of a breach of licence condition.</p> <p><b>Average Annual (excluding one off):</b> difficult to estimate, but to date there have been few examples of breaches where the Commission would have imposed a financial penalty if one had been available.</p>
<p><b>Likely Financial Benefits</b></p> <p>One Off: It may be that the income for the Commission could be increased if new licenceholders are attracted to the Island. This would in turn indirectly benefit the Island's wider economy.</p> <p>The Bill should not require any major changes for businesses. The Bill introduces a new</p>

<p>financial penalty clause so that the Commission may impose a financial penalty on licence holders in certain circumstances e.g. in the case of a breach of licence condition.</p> <p><b>Average Annual (excluding one off)</b> As above.</p>
<p><b>If the proposal introduces provisions that will require another Department, Board, Office or Body to take on additional work or responsibility please ensure that they have been consulted with early on in your considerations. Please provide a brief statement as to who they are and the consultation that has taken place.</b></p> <p>There are some new procedures in place for Council of Ministers in, for example, identifying where a licenceholder may be given powers under the Telecommunications Code, however this is balanced by the fact that modifications of licences will no longer have to be considered by Council of Ministers.</p> <p>A new procedure for hearing appeals has been introduced into the Bill, that is the High Court and the High Bailiff.</p> <p>The Gaelic Broadcasting Committee and Culture Vannin have been consulted with on the preparation of the Bill as has Manx Radio and the Office of Fair Trading.</p>
<p><b>Are there any costs or benefits that are not financial i.e. social</b></p> <p>Aligning definitions and practice more closely with that in the UK and EU should assist licence holders and prospective businesses.</p>
<p><b>Which Business sectors/organisations will be impacted, if any, and has any direct consultation taken place?</b></p> <p>Consultation will be held with licence holders in the Communications Sector as well as other consultees required under the Consultation Guidelines.</p>
<p><b>Does the proposal comply with privacy law? Please provide a brief statement as to any issue of privacy or security of personal information.</b></p> <p>None known.</p>
<p><b>Has Treasury Concurrence been given for the preferred option</b> Changes in Treasury income or expenditure have not been identified so far in the process, if consultation brings such issues to the attention of the Commission then Treasury Concurrence will be sought prior to entry into the Branches.</p> <p><b>Date of Treasury Concurrence</b></p>
<p><b>Key Assumptions / Sensitivities / Risks</b></p> <p>It is assumed that this legislation will not impact on the Commission's receipts from licenceholders.</p>

<p><b>Approximate date for legislation to be implemented if known</b></p> <p>Late 2016.</p>
<p>SUMMARY: CONSULTATION</p>
<p><b>Consultation in line with Government standard consultation process    Yes</b></p>
<p>Date</p> <p><b>1<sup>st</sup> Consultation</b> 2011 consultation on policy principles.</p> <p><b>2<sup>nd</sup> Consultation</b> Detailed consultation on Bill December 2015</p>
<p><b>Summary of Responses:</b></p> <p>To be collated.</p>
<p>EVIDENCE BASE</p> <p>Use this space to set out any further evidence, analysis and detailed narrative from which you have generated your policy options or proposal.</p> <ul style="list-style-type: none"> <li>• Communications Act 2003 (An Act of Parliament)</li> <li>• Cicra, Channel Islands Regulator <ul style="list-style-type: none"> <li>○ The Telecommunications (Bailiwick of Guernsey) Law, 2001</li> <li>○ Telecommunications (Jersey) Law 2002 (as amended)</li> </ul> </li> <li>• Ofcom UK Regulator <ul style="list-style-type: none"> <li>○ General Authorisation Guidance</li> </ul> </li> </ul> <p>Also discussions with Ofcom Legal Team and Monckton’s Chambers in UK.</p>

### **APPENDIX THREE: FULL LIST OF TYNWALD ACCEPTED RECOMMENDATIONS FROM THE SELECT COMMITTEE ON PSB**

Recommendation 1: That Tynwald accepts Recommendation (2012) 1 on public service media governance, adopted on 15th February 2012 by the Committee of Ministers of the Council of Europe.

Recommendation 2: That Tynwald endorses the recommendations of the Myers report into Manx Radio not specifically dealt with elsewhere as the way forward for public service broadcasting in the Isle of Man.

Recommendation 3: That the Council of Ministers should bring forward primary legislation to give Manx Radio a permanent existence and status as the independent public service broadcaster of the Isle of Man, and to permit statutory controls on the level of public subvention to Manx Radio.

Recommendation 4: That Tynwald is of the opinion that the Treasury should fund Manx Radio to the level of £850,000 which applies in 2014/15; and that any future public service broadcasting funding should be subject to periodical reviews based on reports to Tynwald and with Tynwald's consent.

Recommendation 5: That in the interests of transparency the Treasury as shareholder of Radio Manx Limited should arrange for the station to show in its accounts which activities are funded from the public subvention and which from commercial income; and that similar accounting should be required under the proposed new statutory framework

Recommendation 9: That any future licence given by the Communication Commission for public service broadcasting should incorporate a requirement to deliver a particular percentage of locally produced and presented speech

Recommendation 10: That the Purpose Trust should be disbanded.

Recommendation 11: That discussions should be taken up as soon as possible with the BBC with the aim of arranging for Manx Radio to carry BBC 5Live or the BBC World Service, or another appropriate BBC service, as a sustaining service late at night.

Recommendation 12: That Tynwald encourages co-operation between radio stations where this might help the common goal but rejects any erosion of Manx Radio's remit as the national public service broadcaster of the Isle of Man.