

FIJI MEDIA INDUSTRY DEVELOPMENT DECREE 2010 ISSUES LIST AND BEST PRACTICES SUMMARY

Set forth below is a preliminary summary of certain high-level issues raised by the Media Industry Development Decree 2010 (the “Decree”). This issues list sets forth the features of an enabling legal environment for a free media, including examples of democratic models exhibiting best practices in furtherance of such an environment, and notes whether and to what extent these features are addressed by the Decree. Please note that we have not had the opportunity to review related laws and regulations, and, therefore, our comments below are limited to, and based solely on, our review of the Decree and comparative review of media laws in selected countries.

I. STRUCTURAL/PROCEDURAL CONSIDERATIONS

A. Independence of the Regulating Authority

Best Practices

In a democracy, the news media play the role of a government watchdog, thereby increasing its accountability. Conversely, strict government control over the media stifles freedom of expression and limits the ability of citizens to monitor their government. Counter-examples to best practices are more instructive in this regard than examples of best practices. Overwhelmingly, non-democratic societies or societies with gravely deficient democratic processes do not enjoy an independent media. Government-owned and/or controlled media have a tendency to promote propaganda crucial to maintaining an existing political power base and suppress attempts by the media or individual journalists to challenge the approved “government line” on controversial issues. In such a context, journalists are (rationally) motivated to report what is deemed acceptable by the government rather than present a challenge to the government and risk their livelihoods (or in some cases, their lives). A free media is, by definition, free to criticize the government that it seeks to hold accountable and free to impart information of public interest, which is vital to creating an informed citizenry upon which a functioning democracy is built.

Moreover, a society that aspires to the rule of law recognizes that laws must be general, public, prospective, intelligible, consistent, practicable, stable and congruent. It is difficult (if not impossible) for citizens to conform their behavior and evaluate the actions of their government if they lack access - in advance - to the rules designed to guide their behavior and government actions, including the decisions, laws, and procedures used to arrive at those rules. Thus, ex post facto proclamations of the law should be prohibited, and discretion in enforcement of the law should be strictly limited. Further, disputes concerning enforcement and interpretation of the law should be adjudicated, in accordance with procedures established by law, by an independent judiciary insulated from the pressures of the executive and legislative bodies of the government, so that decisions may be reached fairly and without fear of retaliation.

The Decree

The Decree fails to distinguish between the executive, legislative and judicial functions in regulating the media. The decree vests control of the Authority, which regulates the media, in the hands of executive government officials. Such officials have broad powers in establishing and controlling the activities of the Authority and the Tribunal (which adjudicates media disputes) and in the application of the Decree. For example, the President controls the appointment and removal of members of the Tribunal, and the Minister controls appointment and removal of members of the Authority, with or without cause. In addition, the Minister may, in his discretion, (a) exempt any person or entity from compliance with the Decree, (b) exercise expansive emergency powers over media content, (c) order amendments to media codes and promulgate regulations under the Decree, (d) issue directives to the Tribunals, (e) delegate performance of the functions of the Authority to other bodies, and (f) generally direct the performance of the functions of the Authority.

1. *Discretion in Establishing the Authority.*
 - a. The Minister appoints the chairperson and the other five members of the Authority (Section 4(1)).
 - b. There is no limit on the number of terms that the chairperson or members of the Authority appointed by the Minister may serve (Section 4(3)).
 - c. The Minister may remove the chairperson and other members of the Authority with cause (including, e.g., for undefined periods of “absence” and undefined categories of “misbehavior”) or without cause (Section 4(6)).
2. *Discretion in Application of the Decree.* The Minister may, in his discretion and for any purpose, exempt any person, body or authority from the provisions of the Decree (Section 86).
3. *Control over the Authority and Media Legislation/Regulations.* The Minister maintains significant control over the Authority (Section 85).
 - a. The Minister may order amendments to Media Codes upon recommendation by the Authority (Section 18(5)).
 - b. The Minister may direct the performance of the functions of the Authority (Section 10).
 - c. The Minister may promulgate regulations prescribing matters required or permitted under the Decree (Section 85).
4. *Control over Media Dispute Resolution*
 - a. The Tribunal established to hear and determine complaints and adjudicate actions for breach of Media Codes and other matters relating to media disputes consists of one Chairperson appointed (and removed) by the President (Sections 44, 47 and 50(1)).
 - b. The Minister may issue policy, administrative and financial guidelines to the Tribunal, which must act in accordance with any guidelines given by the Minister (Section 50(3)).
5. *Control of Media Ownership.*
 - a. The Decree limits cross-media ownership and foreign ownership of media organizations, but media organizations that are state-owned or majority state-owned are not bound by such limitations (Sections 39 and 40).¹

¹ Note to Draft: Every media organization must be directed or managed by citizens of Fiji permanently residing in Fiji, and at least 90% of the ownership interests in each such media organization must be beneficially owned by citizens of Fiji permanently residing in Fiji (Section 38). To discuss the extent to which this is a practical issue / limitation. An exception to cross-media ownership is internet content, which must be “the same” as the content disseminated by the media organization in print or broadcast media. To discuss a “substantially similar” standard.

6. *Emergency Powers.* The Minister has ultimate “emergency powers” over all media content (Section 80).
7. *Non-Exclusive Jurisdiction.* The Minister may designate another office to perform functions of the Authority (Section 11).
8. *Conflicts of Interest.* Fines imposed on members of the Authority or officers or staff of the Authority for failure to disclose a conflict of interest are limited to \$5,000 (Section 16(5)).

B. Media Access to Remedies

Best Practices

As a matter of due process and equal protection – both essential aspects of democracy and the rule of law – media organizations and individuals should have full access to fair legal remedies for acts or decisions that violate their rights, including the opportunity to present their case in any dispute, the challenge the rules, and appeal decisions to an independent authority. For example, in the United States, an individual with a complaint against a media organization or another individual can file a formal lawsuit or can file an informal or a formal complaint with the governmental that regulates broadband communications such as TV and radio (the Federal Communications Commission, or “FCC”); in each case, and the complainant can ultimately appeal to an independent judiciary. The rulemaking process in the FCC is transparent and open to comment from the public, and all rules can be challenged in the federal courts. Similarly, the EU Electronic Communications Framework directives mandate a national regulating authority (“NRA”) independent of any other body, an effective right of appeal to an independent authority for disputes between media organizations and the NRA, and within the NRA an impartial and transparent rulemaking process that includes consultation with interested parties.

The Decree

The Decree grants broad powers to the Authority and the Tribunal, both appointed by executive officials, to make, investigate and prosecute complaints against the media, using low evidentiary standards. The media have limited ability to challenge or appeal such complaints or decisions rendered against them.

1. *General Approach to Media.* Despite its stated purpose to “encourage, promote and facilitate the development of media organizations” (Section 8(a)), the Authority generally controls and restricts the media, hears complaints against the media, and has broad discretion to launch an investigation against any media organization irrespective of whether it receives a complaint (Section 54).
2. *Liberal Complaint Procedures.*
 - a. A complaint may be made to the Authority orally, and upon receipt of the complaint, the Authority may (but not shall) require that the complaint be made in writing (Sections 53(1) and 55(2)).
3. *Discretion in Devising Procedures.* The Authority may adopt rules of procedure, in its discretion, to carry out the purposes of the Decree (Section 12).
4. *Limited Ability to Challenge the Authority.*
 - a. The ability to challenge the Decree and decisions made pursuant to the Decree (on appeal or otherwise) are severely limited if not entirely prohibited (Section 88).
 - b. The ability to appeal a decision of the Tribunal is limited to complainants, the Authority and media organizations (and even then, only if the decision involves payment of a fine or damages in excess of \$50,000). There is no express right to appeal granted to individuals (e.g., individual defendants) other than complainants (Section 79).

5. *Treatment of Evidence.* For purposes of the Decree, documents obtained pursuant to the Authority's investigations are admissible as evidence in any proceeding under the Decree and are prima facie evidence of the facts contained therein.

C. Protection of Journalists from Undue Criminal and Civil Liability

Best Practices

To prevent the chilling of legitimate speech by disproportionately punishing illegal speech, liability for publication should be specifically circumscribed to limited circumstances and proportional to the government interest being protected by the restriction. Strict liability (either criminal or civil) for speech should be severely limited. The United States has limited the liability imposed for publishing content in the control of a third party or information illegally obtained by a third party but legally obtained by the media organization, particularly in matters of public interest. Strict criminal liability for speech is impermissible in the United States. Both the United States and the European Court of Human Rights employ a proportionality analysis in determining the legitimacy of restrictions on speech.

THE DECREE

The Decree grants broad powers to the Authority and the Tribunal to apply civil and criminal penalties. Punishments for violations of the Decree include fines (in some cases up to \$100,000), personal liability for employees of media organizations, awards of (uncapped) damages and prison sentences.

1. *Broad Investigative Powers.* The Authority has broad investigative powers, including the ability to force production of documents or records of any type by media organizations (but not the ability to force identification of confidential sources).
 - a. The Authority may carry out an investigation if it has reasonable grounds to suspect a violation of any provision of the Decree or the Media Codes (Section 25), including by requiring document production by any person and an explanation of the document by such person (Section 26(3)), by obtaining a warrant for entry into premises and seizure of such documents and by taking "any other steps which appear to be necessary for the purpose" of taking possession of any document appearing to be relevant (Section 27). A fine not exceeding \$10,000 or imprisonment for up to two years or both may be imposed on any person in violation of this provision (Section 29).
 - b. The Authority may carry out an investigation against any media organization (after receipt of a public complaint or sua sponte) and may require the production of records of any type in the custody or control of a media organization which may relate to the Authority's investigation (Section 58).
 - c. It is unclear how and whether the two sets of provisions described in (a.) and (b.) above work together and whether the same standards apply ("reasonable grounds," etc.).
2. *Disproportionate Penalties.* Punishment for violations of the Decree typically consists of fines not exceeding \$10,000 or imprisonment not exceeding two years or both (Sections 29, 30, 31, 32, 84). In addition to any fines or prison sentences it imposes, the Tribunal may impose liability in respect of every issue of the newspaper in which a corrective statement does not occur in print as ordered by the Tribunal, consisting of a fine of up to \$10,000 or imprisonment for up to two years or both for every additional offense (i.e. every successive issue in which the corrective statement is not published) (Section 67(2)).
3. *Criminal Liability.* As noted above, prison sentences (generally up to two years) may be imposed for violations of the Decrees (numerous provisions). The Magistrates Court and the

High Court have jurisdiction to hear criminal matters and impose criminal penalties (Section 81), although it is unclear whether they have exclusive jurisdiction over such matters.

4. *Personal Liability.* Complaints may be brought directly against employees of media organizations for media violations (Section 53(3))
5. *Award of Damages.* In addition to the fines set forth in various provisions of the Decree, the Tribunal is also authorized to award uncapped damages in its discretion, except that no order for the payment of damages may be entered against the Authority or the State (Section 76).

II. NEWSGATHERING

A. Access to Information

Best Practices

An informed citizenry depends on the ability of individuals (including journalists) to access information, and an enabling legal environment includes a right of individuals to access public information. International norms and laws strongly support freedom of information (“FOI”) rights. At this time, approximately 80 statutes in the world recognize FOI rights, and at least 50 nations have established a constitutional right to government information.

Essential features of this diverse body of national and international legislation for FOI rights are: (a) a presumption of openness, and an express right of individuals to request public information and a corresponding obligation of public bodies to provide such information, (b) the requirement that any exceptions to the right to information be for a legitimate interest and necessary in a democratic society, limiting the opportunity for arbitrary refusals, (c) a review process with a mechanism for independent appeal, and (d) enforcement measures with protection for FOI officials discharging their duties in good faith. An effective access to information law will also include protection for journalists who disclose lawfully protected information unless they knowingly participate to illegally obtain the information, an independent review of custodial denials of disclosure of information, and sanctions for willful violation by officials who unlawfully deny requests for information. An international non-governmental organization, Article 19, has developed a Model Freedom of Information Law,² incorporating best practices from around the world, which is instructive in this regard.

The Decree

Although the Decree imposes an obligation on the Tribunal to publish its decisions, it does not provide for an FOI right to individuals generally or obligate any other governmental bodies to provide information to the public, and it lacks the corresponding protections for individuals (including journalists) requesting public information.

1. The Decree does not provide for a right to access to public information.
2. The Decree does provide that the decisions of the Tribunal must be in writing (including its rationale in reaching its decision) and that the proceedings of the Tribunal shall be open to the public unless the Tribunal orders otherwise (Sections 75(3) and 77(1)).

B. Protection of Confidential Sources

² Note to Draft: The Model Freedom of Information Law is publicly available at www.article19.org/pdfs/standards/modelfoilaw.pdf

Best Practices

In addition to access to information, the protection of journalists' confidential sources is fundamental to effective newsgathering, and any exceptions to such protection, if permitted at all, should be prescribed by law and narrowly defined. In such circumstances, only an independent judiciary, in accordance with the prescribed exceptions, should be permitted to issue an order compelling disclosure of a confidential source.

The Decree

The Decree provides for the protection of confidential sources; however, we note that the Tribunal (which may order disclosure of confidential sources) is not an independent body and consists of one Chairperson appointed by the President.

1. Journalists have an obligation to protect confidential sources (Schedule 1(19)).
2. The Authority may not require identification of the source of any information published by a media organization except through application to the Tribunal for an order and a showing of good cause as to why the disclosure is necessary (which application shall not be granted in relation to corruption or abuse of office by a public officer) (Section 28).

III. DIRECT CONTENT REGULATION

A. No Licensing of Journalists and Objective Registration Criteria for Media Organizations

Best Practices

The licensing of journalists poses a risk to democratic governance by allowing authorities to determine whether an individual enters into the profession, and such determination can operate as a form of censorship.

Journalism in the United States is not subject to direct licensing requirements. The First Amendment prohibits any licensing of the press.³ The publishing of blogs and other online journalism, in addition to newsprint journalism, is an unlicensed practice. Outside of the United States, the Inter-American Court of Human Rights held that a Costa Rican journalist licensing scheme on the grounds that it was contrary to the American Convention on Human Rights, because it has the consequence of denying journalists the full use of the media as a means of expressing themselves or imparting information.⁴ Likewise, the 1980 MacBride Commission report to UNESCO found that: "Licensing schemes might well lead to restrictive regulations governing the conduct of journalists."⁵

Licensing has been embraced in some countries as a method of keeping high standards for journalism. However, the approach discussed above represents best practice because it recognizes that licensing represents a grant to the government of indirect censorship power by allowing the government to determine who may conduct journalistic activities. As with prior restraint (described below), procedural

³ US Constitution, First Amendment (1971).

⁴ Advisory Opinion OC-5/85, November 13, 1985, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985).

⁵ <http://www.scribd.com/doc/52132938/Many-Voices-One-World-The-MacBride-Report-1980>

limitations have a substantive impact on the freedom of expression. This approach has become more compelling as bloggers increasingly supplement and supplant traditional news organizations in engaging in legitimate participation in, reporting on and discussion of matters of public interest.

If required, registration of media organizations should not be subject to discretion by the authorities nor be tied to such organization's anticipated content. A determination as to whether a particular organization has met required registration criteria should be accompanied by an effective right of appeal to an independent judiciary.

The Decree

The Decree does not appear to provide for a licensing regime for individual journalists; however, the requirement that all media organizations register with the Authority may operate as a licensing scheme for journalists. The definition of "media organization" includes any person or other entity who or which disseminates information, news, opinion, entertainment, advertisements and similar items to the public, and includes any person or entity who or which creates an internet website capable of being accessed by the public. Presumably, independent bloggers would be covered by this broad definition. The registration requirements, on their face, are not content-based, but it is possible that the Authority may use the registration process to exercise discretion as to who may and may not engage in journalistic activities.

1. All media organizations that provide or intend to provide media services must be registered with the Authority (Sections 9(i) and 33(1)).
2. Registration is achieved by the proprietor submitting to the Authority an affidavit disclosing specified information (not related to content) regarding the media organization and ownership interest by any person in the media organization (Section 33(5)).
3. Failure to register may result in a fine of up to \$10,000 or up to two years imprisonment or both, upon summary conviction (Section 33(8)), which is presumably not appealable since it does not meet the dollar threshold for appeals.
4. The Decree does not expressly provide for any right to appeal should it be determined that the Authority failed to register any media organization.

B. No Prepublication Review

Best Practices

Prior restraint (or pre-publication censorship) of speech is one of the most serious infringements on free expression, and the presumption against its use is a necessary feature of an enabling legal environment for the media. Subsequent punishment must be fair (i.e., proportionate to the violation) and impartial to avoid a chilling effect on speech (i.e., self-censorship).

In the United States in particular, prior restraint is considered a particularly oppressive form among restrictions on speech and is heavily scrutinized by the courts.⁶ The doctrine of prior restraint forbids the implementation of pre-publication restrictions, such as administrative licensing schemes, judicial injunctions and other determinations of the legality of speech before it is published. Prior restraint is properly juxtaposed with subsequent punishment, and, in this way, it is often seen as a procedural limitation rather than a substantive limitation on expression. Some argue that the deterrent of a subsequent punishment may also operate to prevent future communications from being made and,

⁶ *Near v. Minnesota*, 283 U.S. 697 (1931)

therefore, there is no meaningful distinction between prior restraint and subsequent punishment; however, the impact on free expression may be quite different when the government prevents a communication from ever seeing the light of day. A system of prior restraint curtails the opportunity for public appraisal and increases the chances of abuse, and, in the long run, the preservation of civil liberties rests upon an informed and active public opinion.

The Decree

The Decree expressly authorizes the Minister to order pre-publication review in a variety of circumstances, and gives the Minister broad discretion to exercise such authority.

1. The Minister has the authority to order pre-publication review (Section 80(2)).
2. The Minister has the authority to order the person or entity that fails to obey Section 80(2) to cease all activities and operations (Section 80(3)).
3. The Minister may exercise such authority in an “emergency” context; however, the Decree allows for such review in a wide variety of circumstances, including where there is reason to believe that dissemination of the information may give rise to disorder, cause undue demands on the security agencies, result in a breach of the peace, promote disaffection or public alarm, or undermine the Government and the State of Fiji (Section 80(1)).

C. Protection of Narrowly-Defined State Interests

Best Practices

Even in democratic societies, certain narrowly-defined state interests justify restrictions on speech, provided that such restrictions are achieved through the least restrictive means possible for protecting the legitimate interest, and are compatible with democratic principles. For example, national security, as well as the prevention of imminent violence, are considered legitimate bases for regulating free expression in an enabling legal environment. However, protecting state institutions and symbols from insult is not considered a legitimate state interest, because such insult laws generally have the effect of shielding public officials from criticism, which, in turn, impedes the functioning of a democratic society.

National Interest. The Johannesburg Principles⁷ require that all restrictions on speech in the name of national security be explicit, narrow and have the genuine purpose and demonstrable effect of protecting a country’s existence or its territorial integrity against the threat of force. In defending such restrictions, a government must show that the speech poses a serious threat, that the restriction is imposed by the least restrictive means, and that the restriction is compatible with democratic principles.

In the United States, there is a heavy presumption against government censorship based on its own claims of national interest or security. In 1971, *The New York Times* published excerpts from a report on the Vietnam War classified as “Top Secret,” which gave the American public insight into the extent to which the government had misled the public during the war. Rather than punish the newspaper, the Court weighed the public interest against notions of national security, on which the government relied, in deciding that the First Amendment protected the right of the newspaper to publish the information. A Supreme Court Justice Hugo Black wrote: “Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent

⁷Johannesburg Principles on National Security, Freedom of Expression, and Access to Information, 1 October 1995.

any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.”⁸

Further, the United States Supreme Court stated that the word “security,” used as a vague term, cannot be put forward by the government to limit the freedom of speech.⁹ It is a general principle of the rule of law that the law must be sufficiently explicit to enable a person to understand the consequences of his actions. This principle underpins the “void for vagueness” doctrine articulated by the U.S. Supreme Court and which operates to invalidate a law if it does not adequately inform those who are subject to it what conduct on their part will render them liable to its penalties.” Further, “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”¹⁰

Discord/Disorder. Many democracies recognize that the prevention of lawlessness and incitement to violence are legitimate interests of the government. The United States imposes an explicit two-part test to determine whether a restriction on expression is warranted to prevent such actions. For the expression to be restricted, it must, first, aim to incite imminent lawless action, and second, be reasonably likely to succeed in producing a serious harm. The foundation of U.S. Supreme Court jurisprudence concerning prevention of lawlessness and incitement to violence is based on this “clear and present danger” test,¹¹ which aims to strike a balance between allowing the government to take action to prevent lawlessness of which there is a clear and present threat, and allowing for the free flow of ideas – even those controversial or offensive - without threat of reprisal unless they meet the very high bar of presenting a “clear and present danger.” Justice Louis Brandeis wrote that: “[N]o danger flowing from speech can be deemed clear and present, unless the incidence of evil is so imminent that it may befall before there is opportunity for full discussion,” and that advocating lawlessness, however reprehensible, could not be a justification for restricting free speech where there is no indication that the advocacy would be immediately acted on.¹²

Similarly, Article 10 of European Convention on Human Rights allows restrictions on expression to the extent “necessary in a democratic society, in the interests of national security, territorial integrity or public safety.” The emphasis on necessity to democracy is an important and oft-invoked limitation. The European Court on Human Rights has interpreted this standard set forth in Article 10 with respect to the prevention of lawlessness in a way which takes into account the actual threat of the expressions in question¹³ and which resembles the “clear and present danger” test in U.S. Supreme Court jurisprudence.

Political Speech. The United States Supreme Court has repeatedly denied censorship of political speech, maintaining a strong tradition of protecting political dialogue. In the landmark case of *New York Times Co. v. Sullivan*, the Court instated an high burden of proof for defamation claims against public officials, affirming that the freedom to discuss public affairs and figures is fundamental to the functioning of a democracy.¹⁴ By providing robust protection for the discussion of politics, the United States fosters a legal enabling environment for critical ideas and encourages public oversight of, and involvement in, national politics.

⁸ *NY Times Co. v. United States*, 403 U.S. 713 (1971).

⁹ *Id.*, at 403.

¹⁰ *Connally v. General Construction Co.*, 269 U.S. 385 (1926).

¹¹ *Whitney v. California*, 247 U.S. 357 (1927). Note that the test was articulated in earlier cases, most notably, *Schenck v. United States*, 249 U.S. 47 (1919); however, earlier cases resulted in the suppression of speech through application of a less stringent iteration of the test.

¹² *Id.* at 376 and 377.

¹³ *E.g.*, *Zana v. Turkey*, 25 November 1997, Publication 1997-VII and *Incal v. Turkey*, 9 June 1998, Publication 1998-I.

¹⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The European Convention on Human Rights protects speech with exceptions only where “necessary in a democratic society.” The European Court on Human Rights has interpreted that this standard leaves little scope for any limitation on political speech or debate on matters of public interest. While the European Court has recognized limits to expression in order to prevent incitement to violence,¹⁵ the Court has nonetheless stated that the limits of permissible speech are wider with regard to the government than in relation to a private citizen or even politicians.¹⁶

The Decree

While the Decree’s inclusion of national security and communal discord as justifications for restricting speech find resonance in modern democratic societies, state dignity and honor do not. Moreover, the basis for restricting speech in the applicable provisions is unduly vague, and should be narrowly drafted to (a) provide guidance to citizens as to what is prohibited and (b) protect the defined interest without capturing more broadly speech that would otherwise be protected in a democratic society.

1. *National Security and National Interest*
 - a. The Minister may order prepublication review when the Minister believes that publication would “cause undue demands upon the security agencies” or “give rise to disorder” (Section 80(2)).
 - b. “National interest” is a protected interest referenced throughout the Decree which is not further defined in the Decree.
 - i. Serving the “national interest” and ensuring that nothing is included in the content of the any media service which is against the “national interest” are among the functions of the Authority (Sections 8(c) and (e)).
 - ii. The content of the media must not include material which is “against national interest” (Section 22(b)), and a fine not exceeding \$100,000 may be imposed on media organizations or a fine not exceeding \$25,000 or imprisonment for up to two years or both may be imposed on publishers or editors in violation of this provision (Section 24).
2. *Communal Discord and Incitement to Violence*
 - a. The Minister may order prepublication review when the Minister believes that publication would “result in a breach of the peace, promote disaffection or public alarm” (Section 80(2)).
 - b. Ensuring that nothing is included in the content of the any media service which would create “communal discord” is among the functions of the Authority (Section 8(e)).
 - c. The content of the media must not include material which “creates communal discord” (Section 22(c)), and a fine not exceeding \$100,000 may be imposed on media organizations or a fine not exceeding \$25,000 or imprisonment for up to two years or both may be imposed on publishers or editors in violation of this provision (Section 24).
 - d. Schedule 1(28) prohibits content likely to “promote civil insurrection” or “encourage crime or public disorder.”
3. *State Dignity and Honor (Seditious Libel)*
 - a. The Minister may order prepublication review when the Minister believes that publication would “undermine the Government and the State of Fiji” (Section 80(2))
 - b. Note that defamation statutes exist external to the Decree which may warrant additional review.

¹⁵ *Zana v. Turkey*, 25 November 1997, Publication 1997-VII.

¹⁶ *Ozturk v. Turkey*, 28 September 1999, Publication 1999-VI.

4. *Politics / Elections*

- a. Schedule 2(17) requires mandatory identification of “any advertiser whose advertisement deals with a matter of public controversy or advocates a particular position on an issue.”
- b. Section 20 requires that political advertising comply with the decree, which includes prohibitions of content against the government and national interest, as set forth Section 80.
- c. Schedule 2(8) prevents any advertising that “denigrates” any “political” belief.
- d. The Authority may refer to the Tribunal complaints brought against the media by the public or public officers or other Ministers (Sections 9(j) and (k)). Note that the referral of a matter to the Tribunal by a media organization constitute a bar to any other proceeding in any other court of law in relation to the subject matter of that dispute (Section 36(7)); however, it is unclear whether referral by the Authority has the same effect, or, if it does not, what is the procedure, if any, for removal of a case referred by the Authority to another court of competent jurisdiction.

D. Protection of Narrowly-Defined Collective Interests

Best Practices

Collective Interests, Generally. Laws protecting public peace, the dignity of identity groups (by regulating hate speech), public morals and religious beliefs are sensitive areas of public policy and should be determined democratically and in accordance with the fundamental principles of fairness and impartiality. As a general policy matter, even “offensive” speech is protected for several reasons: (a) pluralism and tolerance are necessary in democratic society, (b) the media’s role is to present all sides of issues in the public interest, (c) the dissemination of ideas is the best method for the search for truth and “good speech” will prevail over “bad speech,” and (d) the right of expression is essential to human dignity and self-determination. However, in addition to the state interests in security, peace, safety, health and morals, there are several generally recognized collective and individual interests that justify government regulation of speech, including rights of reputation, dignity, equality, privacy and confidentiality.

Hate Speech. Most Western democratic frameworks for regulating hate speech attempt to balance an individual right to freedom of expression against other individual rights, in particular, dignity, and other, sometimes constitutionally, prescribed limitations on the right to free speech in the name of the public interest. Many countries, such as Canada, France, Germany and the UK, have criminalized hate speech, with potential punishments including a fine and/or imprisonment, ranging from one year (France) to fourteen years (Canada). Most hate speech laws (for example Canada, France and Germany) restrict speech constitutions incitement to hatred or violence, recognizing the right to safety of the target of such speech, but others, including in Iceland, the Netherlands and Norway, also restrict less aggressive forms of speech, such as degradation or insult. The balance between the rights of the speaker and the rights of the target is left to courts to decide on a case-by-case basis. Factors weighed in deciding whether hate speech regulation is constitutionally permissible are: the likelihood of incitement to violence (including historical factors), the value of the words in a democratic society, and the important role (as well as responsibilities of) the media in a democratic society.

Religion. Religion and religious views of individuals in most modern democracies are protected under constitutional rights of freedom of religion and belief, including the right to express and practice one’s religion, adding an extra consideration in the balance of collective and individual interests against freedom of speech. In addition, many countries (Canada, Australia, Ireland and Denmark, for example) still have criminal blasphemy laws on the books. However, blasphemy laws have been abolished in the U.S. and the UK and discouraged by the European Parliament, and have not been enforced for many years

in several democracies which nevertheless retain such laws on the books. Some blasphemy laws, such as those in Canada and New Zealand, also contain explicit exceptions for opinions on religious subjects presented in good faith. These developments appear to recognize that blasphemy laws, enacted and maintained in societies with minimal diversity or even state sanctioned religion, are not compatible with, and should not be invoked to restrict, freedom of speech, and that religion is properly within the sphere of public debate.

Public Interest and Public Morals. Content regulation in the name of the public interest or public morality is generally accepted in democratic societies, and it is acknowledged that the contours of such regulation will be informed by the history and contemporary norms of any given society. However, precision is key in crafting restrictions so that persons can identify the conduct and speech that the rules are meant to prohibit and foresee the consequences of their actions. Where content regulation pertaining to morality exists, it is often limited to certain types of pervasive and intrusive media (e.g. broadcasting), and time and context are factors used determining the illegality of certain material, with a particular concern for the well-being of children. For example, in the United States, broadcast media can only publish “indecent” and “profane” material between the hours of 10pm and 6am, because broadcast media are intrusive into the home and easily accessible by children. “Obscene” material may not be published at all, but the Supreme Court has articulated various factors, such as community standards, specificity of the law and the entire context and social value of the publication to try to define obscenity and narrow the application of the prohibition.

The Decree

The Decree does not address hate speech, though it does provide that media organizations shall avoid discriminatory or denigrating references. Specific regulation of hate speech, with a focus on incitement to violence, could be justified in Fiji for the protection of public safety and the safety of individuals given its tumultuous history and racial minorities. Any addition of such a restriction on speech (in light of the already extensive restrictions in the Decree) should only be considered once the Decree is redrafted with an explicit presumption of a right of access to information and right to freedom of expression, and if the Commission is satisfied that offenses will be evaluated by neutral courts who fairly and properly afford weight to such rights and freedoms, and, in particular, the role of the media in a democratic society, when balancing them against the interests of the enumerated restricted classes (See Schedule 1(6)).

With respect to religion and public morals, the Decree utilizes overbroad concepts which are likely to cause self-censorship. These limitations should be narrowly drafted to limit application of the prohibitions and permit as much speech as possible in the public interest.

1. *Hate Speech.* Although not treated specifically, Schedule 1(6) provides that media organizations shall avoid discriminatory or denigrating references, including based on gender, ethnicity, color, religion, sexual orientation or preference, physical or mental disability or illness or age.
2. *Religion.*
 - a. In addition to the duty to avoid discriminatory references based on religion, Schedule 1(13) obligates media organizations to refer to religious bodies in a balanced, fair and sensitive manner, and avoid intentionally giving offense to believers of all faiths.
 - b. Any advertisement which causes offense to adherents of any major religion is prohibited (Schedule 2(18)).
3. *Public Interest and Public Morals.*

- a. Ensuring that nothing is included in the content of the any media service which is against the “public interest or order...or which offends good taste or decency” are among the functions of the Authority (Section 8(e)).
 - b. The content of the media must not include material which is “against the public interest or order” (Section 22(a), and a fine not exceeding \$100,000 may be imposed on media organizations or a fine not exceeding \$25,000 or imprisonment for up to two years or both may be imposed on publishers or editors in violation of this provision (Section 24)..
 - c. Ensuring that media services are maintained at a high standard in respect of “quality, balance [and] fair judgment” are among the functions of the Authority (Section 8(d)).
 - d. Schedule 1(3)(d) gives some examples of public interest which, while generally appropriate, could be expanded to further facilitate a free media.

E. Protection of Narrowly-Defined Individual Interests

Best Practices

Individual Interests, Generally. Laws protecting individual interests must carefully balance the public interest, recognize that public officials must tolerate considerably more criticism than private individuals, and distinguish between statements of fact and statements of opinion.

Privacy. The right to privacy is recognized in many constitutions (for example in Brazil, Spain and Switzerland) and domestic law regimes (such as in France, Italy and Canada) as well as international agreements such as the European Convention on Human Rights and the International Convention on Civil and Political Rights, and is an individual interest often weighed against freedom of the press. In particular, courts weigh the expectation of privacy of the individual at the time (considering the location and renown of the individual) and the value of the information to the public interest. “Public interest” does not necessarily mean what sells, but, rather, what contributes to a legitimate public debate or prevents the public from being misled. Public records and public places are usually acceptable for collecting information, but wiretapping is not. Privacy is often given greater weight in certain situations, such as for children or the victims or witnesses of a crime. Privacy is also protected by other laws such as trespass, harassment and data protection.

Reputation. Defamation generally encompasses the publication of a false statement (written or oral) that damages the reputation of another. Most democracies have narrowed this restriction to allow for greater protection of the media’s right to freedom of expression through such mechanisms as incorporating an element of intent or knowledge of the defendant, shifting the burden of proof from the defendant to the plaintiff, enacting protections or privileges for responsible journalism or good faith and reasonable belief of the truth, and analyzing the relevance to the public interest of the subject matter and/or the plaintiff (see discussion of “political speech” above). As a policy matter, governments have also aimed to curb defamation suits against the media by granting a right of reply or correction (see below).

Right of Reply/Correction. Some variation of the right to reply or the right of correction is broadly recognized in democratic societies (with the notable exception of the United States), either as a right recognized in international law (such as in the American Convention on Human Rights), a constitution (such as in Portugal) or by statute (as in France and South Korea, for example). The justifications for such a right, despite the countervailing fear of government intrusion on editorial decisions, are: (a) the protection of human dignity, reputation and privacy, (b) the promotion of responsible journalism, (c) as an efficient and less burdensome means of countering defamation than lawsuits (see above), (d) the

promotion of the marketplace of ideas and the public's right to receive diverse information, and (e) leveling the playing field of access to media. Many jurisdictions have limited the right as relating to facts only and/or imposed procedural limitations in timeliness, length and placement of the reply.

The Decree

With respect to privacy, the Decree as written generally describes best practice; however, without further specifications in the provisions of the law, the Commission should be satisfied that in its interpretation the factors discussed above are accorded proper weight and construction and a full and fair analysis is conducted by an independent authority.

The Decree does not cover defamation law.

The general granting of a right of reply in the Decree is not against international trends. Article 36 does provide some important limitations on the requirement to publish; however, the Decree should be more robust in its protection of the media through the implementation of limitations such as timeliness and length of the reply, and the general grant of a right to reply to editorial statements in Section 1(2) should be similarly procedurally and substantively limited to only factually untrue or misleading statements.

1. *Privacy.* Schedule 1(3) treats privacy rights giving due consideration to the public interest.
2. *Right of Reply/Correction.*
 - a. The Authority may require publication of a corrective statement containing facts considered by the Authority to be true for any item which is "false or distorted" in the opinion of the Authority (Section 36).
 - b. Corrective statements and apologies are required where a statement is significantly inaccurate, misleading or distorted (Schedule 1(1)(b)).
 - c. Media organizations have an obligation to provide an opportunity to reply to any individual or organization on which the mead comments editorially (Schedule 1(2)).

F. Commercial/Advertising Regulation

Best Practices

Advertising laws generally require that advertising be (a) truthful and substantiated and (b) not materially misleading or unfair, and are designed to protect consumers from financial injury. Many legal systems directly regulate advertising to children, including by prohibiting advertising that exploits the inexperience of children or encourages minors to persuade parents or others to purchase the goods or services advertised.

In contrast to political speech, commercial speech is subject to additional government restriction. Commercial speech is speech that is economic in nature and is generally aimed at influencing the recipient to take a certain action. Although the Supreme Court has specifically upheld the constitutionality of regulations restricting advertising that concerns an illegal product or where the advertising is deceptive,¹⁷ it has nonetheless extended protection to commercial speech in many cases and, in recent years, has questioned the validity of a distinction between commercial speech and other forms of speech at a fundamental level.¹⁸

¹⁷ *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

¹⁸ *44 Liquormart, Inc. v Rhode Island*, 517 U.S. 484 (1996) (Justice Thomas Dissent)

The Decree

The Decree introduces a number of vague content standards in its regulation of commercial speech that are not justified by the nature of commercial speech, and such regulation should be limited to protecting consumers from false and misleading statements, except with respect to children or other vulnerable groups, for which additional content regulation may be justified.

1. Schedule 2 provides content standards for advertising such as “prevailing standards of taste and decency” (Section 6), prohibiting “denigration,” “disparagement” and “offense” (Sections 8, 13 and 18), and other vague content standards
2. Schedule 3 provides content regulation for advertisements “aimed at children” which is generally prohibits exploitative advertising.

IV. RELATED LAWS SUBJECT TO REVIEW

- A. Reference is made in the Decree to various other laws which have not been provided and which would support a comprehensive review of the media law regime.
 1. Media Code of Ethics and Practice (Section 18(1)).
 2. General Code of Practice for Advertisements (Section 18(2)).
 3. Code for Advertising to Children (Section 18(3)).
 4. Television Programme Classification Code (Section 18(4)).
 5. Tobacco Control Act of 1998 (Section 19(1)(c)).
 6. Electoral Act of 1998 (Section 20(1)).
 7. Laws relating to obscenity, blasphemy, incitement to commit a crime, the publication of details of court cases, protection of witnesses, defamation, sedition and other law relating to the media (Section 21(1)).
 8. Official Secrets Act (Section 21(2)(a)).
 9. Public Order Act (Section 21(2)(b)).
 10. Defamation Act (Section 21(2)(c)).
 11. Broadcasting Commission Act (Section 21(2)(d)).
 12. Television Decree of 1992 (Section 21(2)(e)).
 13. Registration of Newspapers Act - Repealed (Section 87(a)).
 14. Press Corrections Act - Repealed (Section 87(b)).