

Background

The Samoa Law Reform Commission ('Commission') received a reference on 15 November 2011 from the Prime Minister and the Attorney General to review the need for a body to regulate the media, and to make a recommendation as to the form such a body should take.

This Discussion Paper will present options for such regulation, and will be sent to the media in Samoa for their submissions, as well as to the general public. After receiving submissions, the Commission will make a recommendation to the Prime Minister and the Attorney General on the best option to adopt.

Concerns about process and social norms such as, for example, the protection of rights to privacy, are prime motivations for regulation of the media. While media freedom is essential to the operation of a genuine democracy, and is protected by the Constitution of Samoa (art 13 – freedom of speech and expression), public confidence in the media is also crucial to its success as a trusted and reliable source of news and information.

Effective media regulation protects individuals and society from harm by preventing and remedying the wrongful publication of private, false, biased or otherwise harmful information and in so doing, it is said to protect and deepen the fundamental right to freedom of expression.¹ It is important, however, that any regulation of the media is legitimate and fair and is not used to arbitrarily gag the media or censor information the public has a right to know. For these reasons, the question is not *whether* Samoa should establish a system for media regulation, but *how* this should be done.

The Commission proposes that an effective media regulating body would undertake the following tasks in relation to all forms of media, including print, online, television and radio:

- encourage and promote media freedom;
- create professional standards for the media, and monitor compliance with these, to ensure a free press that also has the confidence of the public; and
- consider complaints about the conduct of media organisations according to a process that is transparent and accessible.

There are three broad types of media regulation, defined as follows by the Review of the New Zealand Press Council, citing the New Zealand Ministry of Consumer Affairs.²

- **Government regulation:** government makes the rules.
- **Co-regulation:** the rules are developed, administered and enforced by a combination of government agencies and people whose behaviour is to be governed.

¹ United Nations Educational, Scientific and Cultural Organisation (UNESCO), *The Importance of Self Regulation of the Media in Upholding Freedom of Expression* (2011) 7.

² Ian Barker and Lewis Evans, *Review of the New Zealand Press Council* (2007) <www.presscouncil.org.nz/articles/press_council_review.pdf> 8.

- **Self-regulation:** the rules are developed, administered and enforced by the people whose behaviour is to be governed.

The Review pointed out that ‘different types of regulation are appropriate in different circumstances’, depending on the issues to be addressed in regulation and the motivating factors for establishing a system of regulation.³

Government regulation offers the advantages of reliable resourcing (often a combination of government funding and compulsory industry funding) and legally enforceable standards that may be applied to all media providers. On the other hand the media, often termed the ‘fourth estate’, are responsible for reporting on the actions of the other three arms of government. For this reason, some argue that government should not have any involvement in the regulation of media.⁴ At the least, the danger of bias or undue influence means that a government regulating body should be at arm’s length of the government to ensure independence (for example, a statutory body). Another criticism of government regulation is that while enforceable penalties may increase compliance, the media tend to be less cooperative in a true sense as they are distanced from and distrustful of the government process. In addition, the more formal procedures for dealing with complaints are likely to be more costly.⁵

Self-regulation operates on the premise that media providers do not want to attract public animosity and that it is therefore in their interests to promote not only media freedom but also ethical and responsible media practices. Moreover, the media industry has special knowledge that enables the creation of relevant standards which media providers are more likely to comply with. The disadvantages of self-regulation include the fact that self-regulating bodies are normally industry-funded. This means funds can be tight, and it creates pressure on self-regulating bodies to act in the interests of their media industry financiers, possibly also contributing to public mistrust of the system. In addition, self-regulating bodies do not have coercive powers, and rely on the cooperation of media providers, firstly to become members and then to comply with standards, guidelines and decisions of the body.

The options set out in this Discussion Paper represent the three forms of regulation – government regulation, self-regulation, and co-regulation – and reflect the most obvious models to fit with Samoa’s existing regulatory framework. The Commission recognises transparency as vital for any form of media regulation because one of its main objectives is to maintain public confidence in a fair, accessible media. It is also desirable for those exercising regulatory functions to be as impartial as possible, yet at the same time well informed about industry standards and guidelines.

³ Ibid.

⁴ See for example, Article 19, *Statement on the Draft Media Council of Kenya Bill (2006)* <www.article19.org/pdfs/analysis/kenya-media-council-bill.pdf> at 7 December 2012.

⁵ Ian Barker and Lewis Evans, *Review of the New Zealand Press Council (2007)* 4, 9 <www.presscouncil.org.nz/articles/press_council_review.pdf> at 9 December 2011.

Existing framework

In 2005, consultant Ian Beales was engaged to examine the need for a media council and a code of practice in Samoa. He concluded that there was a need for a code of practice, and that the idea was well supported by the public, government and most media providers. Mr Beales consequently formulated a draft Code of Practice, but the Journalists Association of Western Samoa ('JAWS') has not moved to formally adopt this code.⁶ JAWS already has a Code of Ethics in place, but without a regulatory body to enforce it, the Code of Ethics is little more than a guide for the media and public. It has recently been used, however, as a relevant fact to support a finding of defamation in the Supreme Court.⁷

Mr Beales found there was some support from within the industry for a media council but there was concern about how such a body would be composed, what its mandate would be, who would fund it, and whether meaningful self-regulation could be pursued while the criminal offence of defamation remained as a threat to media freedom.⁸ The Commission has recommended in a previous report that s 84 of the *Crimes Ordinance 1961*, which prescribes the offence of 'defamatory libel', be repealed in the interests of free speech.⁹ If parliament repeals this provision, only a civil action in defamation will be available to an aggrieved person.

In 2009 the Prime Minister at the Post Tsunami Samoa Editors' Forum repeated a plea to the media industry in Samoa to establish a Media Council to oversee standards of balanced and accurate media reporting.¹⁰ No such body has been set up.

In 2010 parliament enacted the *Broadcasting Act 2010* to establish a new framework for the broadcasting sector, including a Regulator (s 5) and a Broadcasting Tribunal (s 11). The Broadcasting Act focuses mainly on development and promotion of broadcasting services in Samoa, and on providing fair and equal access to these services. There is no explicit provision for regulation of media content, although the objectives of the Act, and the powers it gives to the Regulator, are broad enough to encompass regulation of broadcast media (but not, in its current formulation, print media). The role of Regulator may either be filled by the Telecommunications Regulator (subs 5(10)), or by another regulatory body within or outside Samoa (subs 5(3)).

⁶ Journalists Association of Western Samoa, "Code of Ethics" (2006) <<http://jawscode.blogspot.com/>> at 15 December 2011.

⁷ *Ponifasio v Apia Broadcasting Ltd* [2011] WSSC 136; CP 74 of 2011 (13 December 2011).

⁸ Ian Beales, "Code of Ethics: Draft Code of Practice for Samoa" (2006) <<http://jawscode.blogspot.com/2006/05/stage-one-report.html>> at 28 November 2011.

⁹ Samoa Law Reform Commission, *Report 01/10—Review of the Crimes Ordinance 1961* (2010) 64 'Recommendation 48'.

¹⁰ Prime Minister's Remarks, Post Tsunami Samoa Editors' Forum (17 November 2009) <<http://jawsamoa.blogspot.com/2010/01/post-tsunami-samoa-editors-forum-pm.html>> at 12 December 2011.

Other jurisdictions

Both Australia and New Zealand have two separate mechanisms for regulating the media: a private, industry-funded self-regulating body to address complaints about print media (including online print media); and a government-funded but independent statutory body with powers to regulate broadcast media including telecommunications, television and radio. There appears to be no rationale for this separation of print media from broadcast media in regulation, and it is thought to reflect the natural evolution of media regulation in those countries.¹¹

The industry 'Press Councils' in Australia and New Zealand were both established in the 1970s as a reaction to concerns about press freedom and also public perception of the media. Regulation of other media by statutory bodies followed decades later. Concerns about the effectiveness of the Press Councils has prompted independent reviews in both countries, in 2007 in New Zealand, and in 2011 in Australia (currently underway, to be concluded in March 2012).

Regardless of the model used, it is the Commission's view that there is no advantage in separating print media from broadcast media under a regulatory system. Indeed, in the interests of efficiency and cost, and acknowledging that distinctions between these forms of media are becoming increasingly blurred, any regulatory model chosen must sensibly cover all types of media. This view is supported by the findings of a survey conducted under the 2007 Review of the New Zealand Press Council¹².

Option 1: Media council as a private body

In Samoa a self-regulating body, in order to provide genuine regulation of all kinds of media, would need to be modified from the Australian and New Zealand Press Council models. Those jurisdictions developed a second body for government regulation of broadcast media as they saw the need arise, whereas Samoa has the benefit, discussed above, of establishing one body to regulate both print and broadcast media.

A 'media council' would be set up voluntarily by the media industry as a private body without legal powers of enforcement. The media council would rely on the willingness of its voluntary members to comply with the professional standards it set, and with the decisions and penalties it imposed as a result of complaints.

The media council would be responsible for promoting media freedom, preparing professional standards for its members, and considering complaints. Membership of this operational side of the media council would be composed of a combination of representatives from a selection of the following

¹¹ Ian Barker and Lewis Evans, *Review of the New Zealand Press Council (2007)* 18
<www.presscouncil.org.nz/articles/press_council_review.pdf> at 9 December 2011.

¹² Ibid.

groups: the media industry (journalists, owners of media companies); the public (including public interest groups); the judiciary; and government (government representation is not common but does occur in some jurisdictions around the world). To maintain true self-representation, appointments to this panel would need to be made from within the industry, for example by the Chairman of the council or by votes from members of the council.

Representatives appointed to the media council would together develop professional standards, perhaps based on the draft code developed by Ian Beales and adopted by JAWS, and possibly also with additional input from other industry players and members of the public. The council would also establish and widely advertise a complaints procedure.

The complaints procedure for a self-regulating body would normally involve investigation by the media council, and possibly mediation between the publisher/broadcaster and the complainant where appropriate. After adjudication, the media council would record and make its ruling known to both publisher and complainant, applying remedies such as a printed or broadcasted public apology or correction of the error by the media organisation.

There is no right of appeal from a media council, and without legal powers its penalties are not enforceable. A complainant unsatisfied with an outcome would have no recourse other than to institute a legal action otherwise allowable under Samoan laws. Some media councils require complainants to sign a declaration that they will not pursue the matter in court, regardless of the outcome. Such a requirement goes strongly against the rights of the complainant and against the rule of law and in any case may not be upheld in a court of law.¹³

There is also the possibility for a media council's mandate to include initiating its own complaints or investigations. Many press councils have this function, but the Review of the New Zealand Press Council concluded that this should not be necessary where the council effectively promotes its presence, has meaningful professional standards and records all its decisions.¹⁴ There is also a risk that by self-referring matters for investigation, the media council would lose credibility with the public as an impartial arbiter.

Press councils in other jurisdictions can be comfortably funded by media corporations, given their scale and revenue. In Samoa, it may be difficult for a media council to self-fund. Other options, including government funding and overseas donors, would need to be considered, bearing in mind the impact of the funders' identities on effective independent self-regulation.

Option 2: Media Regulator as a statutory body

The Head of State has appointed an independent Telecommunications Regulator under s 6 of the *Telecommunications Act 2005*, whose role includes investigating complaints against telecommunications

¹³ Ian Barker and Lewis Evans, *Review of the New Zealand Press Council* (2007) 20
<www.presscouncil.org.nz/articles/press_council_review.pdf> at 9 December 2011.

¹⁴ Ibid.

service providers either of its own motion or at the instigation of another person.¹⁵ Under s 5 of the *Broadcasting Act 2010*, the Head of State can appoint this same person to be the Broadcasting Regulator. Alternatively, Cabinet may approve the appointment of a separate regulatory body to act as Regulator (subs 5(3)). Resources are a genuine factor in this consideration, and the fact that the office of Telecommunications Regulator has already been set up and is fully staffed gives weight to this first option. In addition, the independence of a Cabinet-approved separate regulatory body is diminished by the broad power of Cabinet to dismiss it at any point after approving it, if the body is ‘considered to be unsatisfactory in meeting the objectives’ of the Broadcasting Act (subs 5(4)).

Whether subsumed under the existing role of Telecommunications Regulator or established as a separate statutory body, the Broadcasting Regulator would be independent of both the government and the media industry, and would be required to undertake its duties with impartiality.¹⁶ Under the Broadcasting Act, the Regulator is responsible for appointing staff not employed as contract employees under the Public Service Act 2004 (subs 8(5)) and must prepare annual financial reports (subs 8(14)). The following provisions of the Act, however, may detract from the Regulator’s supposed independence from government: the Regulator is appointed in accordance with terms approved by Cabinet (subs 5(5)); the Head of State may appoint the Minister as Regulator (albeit on an interim basis, up to six months) (subs 5(7) and 5(9)); the Minister may second an employee of the Ministry to work within the office of the Regulator (subs 8(7)(a)); the Minister may decide that the Regulator’s office share resources with another Government organisation (subs 8(7)(b)).

The Regulator would be given the powers and responsibilities to establish an enforceable code of practice and hear complaints about the media, at the same time as promoting media freedom. The role as envisaged under the Broadcasting Act would need to be expanded, either by amendments to the Broadcasting Act, or by enacting new legislation, to encompass regulation of print media. It is important to note that any legislation, amended or enacted, to provide for regulation of broadcast and print media in Samoa must comply with the constitutional guarantee of freedom of speech and expression.

Under the Broadcasting Act the Broadcasting Regulator is given powers to investigate complaints and make orders, including orders to compel a person to comply with regulations, rules, codes of practice and licences (subs 7(1)(p) and 7(1)(q)). It is an offence to fail to comply with such an order (ss 7(1)(q) and 66), but either party may appeal the order in the Broadcasting Tribunal (ss 10, 17(2)). There is no right of appeal from the Broadcasting Tribunal to a court (s 19).

The New Zealand legislation for regulation of broadcast media also creates offences for failing to comply with the decision of the regulator (‘the Authority’).¹⁷ The New Zealand legislation differs from Samoa’s Broadcasting Act, however, in that it offers greater transparency by setting out procedural rules for

¹⁵ *Telecommunications Act 2005* s 8(1)(s).

¹⁶ *Broadcasting Act 2010* subs 7(3).

¹⁷ *Broadcasting Act 1989* (NZ) s 14.

handling of complaints by the Authority,¹⁸ including the publishing of decisions.¹⁹ The New Zealand Act also provides three important ‘buffers’ to the Authority’s punitive power:

1. there is a right of appeal to the High Court from decisions of the Authority;²⁰
2. the orders available to the Authority are limited by legislation;²¹ and
3. the media industry is required to undertake its own regulation and complaints-handling before the Authority becomes involved.²²

These features should be considered if a statutory body for media regulation is established in Samoa, to act as a counterweight to the punitive powers of the Regulator. The third measure, inclusion of the media industry in the complaints process, requires further explanation.

New Zealand’s Broadcasting Act provides a sort of legislated system of co-regulation, under which broadcasters themselves are responsible for maintaining standards consistent with benchmarks relating to good taste and decency, privacy, the maintenance of law and order, avoiding bias, and any approved code of practice (s 4). In addition, complainants are required to refer their complaint directly to the offending publisher or provider before taking it to the Authority, unless the complaint is about privacy (in which case the individual may choose to refer it directly to the Authority). This system recognises the advantages of self-regulation as a first preference.

The New Zealand system is creditable for its inclusion of individual industry players in the regulation and complaints process, but stops short of incorporating cohesive, industry-wide self-regulation. To achieve a more complete system of co-regulation in Samoa, a separate self-regulating arm could be established as an addition to the ‘statutory body’ model. A representative body following the model of the media council could be set up to act as an advisory board, providing the Media Regulator with recommendations and input on codes of practice, licensing arrangements and complaints-handling. In this way, representatives from the media, the public, and possibly also government and non-government sectors, could have a guiding role in the development of uniform and universally applicable professional standards, and in monitoring of media compliance with them.

Option 3: Media Council established under statute

A third option for consideration is the establishment of an independent media council (similar to that proposed in Option 1) under new legislation. Such legislation would set out details regarding the composition of the media council (for example, media representatives, members of the public, judge/barrister) and how members are chosen or appointed. How many other details are provided in the enabling legislation will depend on how rigid or flexible the media council is intended to be, whether it is to be given punitive powers, and what level of independence from government it will have.

¹⁸ Ibid, ss 8–12, 13A.

¹⁹ Ibid, s 15.

²⁰ Ibid, s 18.

²¹ Ibid, ss 13, 13A.

²² Ibid, ss 4–7.

If details such as complaints-handling procedure, relevant principles for a code of ethics, or even the code itself, are set out in legislation or regulations the body will look and operate more like the statutory body model in Option 2. On the other hand, if matters regarding the operation of the media council, including drafting and publishing of the media code, are not provided for in legislation the media council will resemble more closely the model set out in Option 1: a body responsible for its own day-to-day running, including development of its own code of ethics which can not be amended by parliament or the Minister, but a body that does not have any mechanism for enforcing its decisions.

While membership of traditional media councils (in terms of the cooperating media providers) is normally voluntary, it would be possible for legislation to mandate membership, so that all media industry players would be accountable to the media council.

In order to give this media council full and final power to publish professional standards and codes of practice, to monitor compliance with these, and to investigate complaints, all with respect to both print and broadcast media, the parallel powers of the Regulator under the Broadcasting Act would need to be removed.²³ The Broadcasting Regulator would retain the other powers and duties set out in the Broadcasting Act. This would result in a possibly confusing and inefficient division of regulating powers between the Broadcasting Regulator and the legislated media council.

Removing the content-regulation role of the Broadcasting Regulator from the Broadcasting Act would also signal the removal of any coercive powers in relation to decisions about complaints. Unless an appeals procedure was provided for in the statute creating the media council, a complainant unsatisfied with the outcome of an investigation of the media council would need to institute a new legal action in order to seek redress, if available under Samoan laws.

Call for responses

Whichever of the three options is preferred, there is considerable scope within each as to how it is structured. The Commission asks you to select your preferred option, and according to your choice seeks your views on the following aspects:

Option 1 – Media Council as a private body

- 1.1 What members/representatives would make up the decision-making arm of the media council (ie, the ‘council’ itself, responsible for developing and promoting a code of conduct and undertaking regulatory tasks)?
- 1.2 How should those members be appointed?
- 1.3 What should be the functions and powers of the media council?
- 1.4 Should the media council have the power to instigate its own investigations?
- 1.5 How should the complaints system operate?

²³ See *Broadcasting Act 2010* subs 7(g), 7(n), 7(q).

- 1.6 Should the media council require complainants to waive their right to legal action when they make a complaint to the council?
- 1.7 How should the media council be funded?

Option 2 – Media Regulator as a statutory body

- 2.1 Should the Telecommunications Regulator fulfil the role of Broadcasting and Press Regulator, or should a new and separate statutory body be established?
- 2.2 If a new statutory body is established, what would its membership be?
- 2.3 What additional measures, if any, are necessary to ensure the independence of the media regulator?
- 2.4 Should there be a right of appeal from decisions of the media regulator, other than to the 'Broadcasting Tribunal', and if so, to where?
- 2.5 (a) Should the complaints mechanism and/or orders available to the media regulator be set out in legislation?
(b) If so, what should the complaints procedure be, and what orders could the regulator make?
- 2.6 Should legislation require that complaints are first directed to the broadcaster/publisher?
- 2.7 Should legislation require that all broadcasters/publishers have their own professional standards/code of conduct, and established and advertised complaints-handling mechanism?
- 2.8 (a) Should a representative 'advisory board' be established to advise the media regulator on the code of conduct and complaints and investigations?
(b) If so, what representatives should sit on the advisory board?

Option 3 – Media Council established under statute

- 3.1 Which details should be set out in the legislation creating a media council? For example:
 - Membership of the decision-making arm, and manner of appointment;
 - Compulsory/voluntary membership of media organisations;
 - Code of ethics, or principles to guide a code of ethics;
 - Complaints mechanism;
 - Orders available to the media council on completing investigation of a complaint;
 - Availability of appeal.
- 3.2 Where you have specified that a matter be set out in the legislation, please indicate how you think the matter should be dealt with (eg, what members should make up the decision-making arm? How should they be appointed? What should be the principles guiding a code of ethics? etc.).

The Commission prefers to receive responses in writing. It is not necessary to respond to all questions.

Responses should be sent by Tuesday 31 January 2012, to the Executive Director, Samoa Law Reform Commission, Private Bag 974 or by email to commission@samoalawreform.gov.ws