

Fiji Media Industry Development Act 2010: An Analysis

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ARRANGEMENT OF SECTIONS

PART 1—PRELIMINARY

SECTION

1. Short title and commencement
2. Interpretation

PART 2—MEDIA INDUSTRY DEVELOPMENT AUTHORITY OF FIJI

3. Establishment of the Media Industry Development Authority
4. Composition of the Authority
5. Meetings and proceedings of the Authority
6. Appointment of officers, servants and agents
7. Term of office
8. Functions of the Authority
9. Powers of the Authority
10. Appointment of the Minister

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Fiji Media Industry Development Act 2010: An Analysis

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ABBREVIATIONS

CFL	-	Communications Fiji Limited
FBC	-	Fijian Broadcasting Corporation
ICCPR	-	International Covenant on Civil and Political Rights
NFP	-	National Federation Party
OHCHR	-	Office of the High Commissioner for Human Rights
PACMAS	-	Pacific Media Assistance Scheme
UDHR	-	Universal Declaration of Human Rights
UNDP	-	United Nations Development Programme

Introduction and Background

Introduction and Background

This is an analysis of Fiji's punitive Media Industry Development Act 2010, designed to regulate the national news media and the practice of journalism in the country (henceforth referred to as "the Act"). The controversial law was first promulgated as the Media Industry Development Decree on 25 June 2010, before it was designated as an 'Act', as with all other Promulgations and Decrees stemming from the 2006 coup. This analysis marks and covers the first decade since the Decree/Act came into effect.

The Act represented a fundamental change in the country's news media history in replacing media self-regulation – a hallmark of media freedom in most democracies – with a form of government regulation, by dint of the powers vested in the responsible Minister (presumably communications minister) and the Attorney General. Since the inception of the Act and until the 2022 general elections, both these government portfolios had been held by the Honourable Aiyaz Sayed-Khaiyum — resulting in a meshing of the different roles and giving rise to numerous conflict of interest situations.

Under the Act, the Minister establishes a Media Industry Development Authority to monitor/regulate the national media, while the Attorney General nominates the Media Tribunal to conduct hearings on complaints of breaches of the Act and its Codes, with the right to impose financial penalties (henceforth referred to as "the Authority" and "the Tribunal").

Some of the major concerns with the Act relate to:

- lack of consultation with the media fraternity before its implementation;
- conflict of interest manifest in the roles of the Minister and the Attorney General;
- broadness in the wording of the provisions;
- risk of media's exposure to potentially frivolous, vindictive and vexatious complaints;
- uneven hearing process and restricted appeal provisions;
- disproportionate punitive measures.

The Act criminalises what were once considered journalism ethics, such as imbalanced reporting. Additionally, while there is much emphasis on media regulation, action on media development, a core part of the Act, is apparently lacking.

The rate of the penalties does not differentiate between serious offences such as publishing material "against the national interest", or simple misdemeanors like failing to include a byline in a news story, with identical punishments for both offences.

In addition, the Media Tribunal is not bound by formal rules of evidence, even though it can dispense financial penalties and compensation payments. Not only do the Authority and complainants have broader appeal rights than a media organization, under the 2013 Constitution, one cannot challenge the lawfulness of any Decree or decision taken under a Decree unless the Decree provides for that challenge.



The Act represented a fundamental change in the country's news media history in replacing media self-regulation – a hallmark of media freedom in most democracies – with a form of government regulation, by dint of the powers vested in the responsible Minister.

Notably, the Act was among the post-2006 coup promulgations and decrees included in the 2013 Constitution that were dubbed “super laws” because in instances of inconsistency with the 2013 Constitution, these decrees prevail over the conflicting constitutional provision. For example, if a restriction in the Act violates the constitutional right to freedom of expression, this particular restriction overrides the freedoms in the 2013 Constitution¹.

The Act has remained largely unchanged since its implementation 10 years ago, and the many problems relating to it remain unaddressed, especially from the media fraternity’s point of view. While the FijiFirst Government was satisfied with the Act, the media fraternity had various problems, ranging from its broad terms to the punitive measures for any breaches.

The context—mediating media regulation and freedom of speech

The government’s premise for the Act was to improve journalistic professionalism and to curb inflammatory news reporting within Fiji’s multi-ethnic context, with four coups between 1987-2006 partly blamed on racial tensions. In an address in 2012, then Prime Minister Voreqe Bainimarama stated that the Act would deter “self-interested individuals” who “fan the flames of prejudice and intolerance”². He reiterated that freedom of expression, while a vital component of Fiji’s 2013 Constitution, was not an absolute right: “With freedom comes responsibility to keep our society cohesive and protect the rights of every citizen”³.

While it is not unusual for countries to impose media regulation alongside legislation on defamation, privacy, hate speech and so forth, even if they overlap, the former needs to meet certain international benchmarks and standards. International laws are clear that bodies which regulate the media need to be independent of government. Neither the Authority nor the Tribunal are, and yet both have extensive powers. The Act falls short in this regard, and some critics see it primarily as a form of media censorship and control. The FijiFirst Government continuously rejected such assertions, with the then Attorney General informing the 2015 Human Rights Council session in Geneva that the Constitution unequivocally recognised “freedom of expression” but not the “freedom to incite violence or racial hatred”⁴.

In some respects, concerns about the media’s role in provoking conflict in fragile states such as Fiji are valid. As a coup-prone, multiethnic country, Fiji fits the category of vulnerable societies, where social tensions embody long-term, low-intensity conflicts that flare up periodically⁵. Usually, the media in such developing countries are under-resourced, under-trained, under-educated and inexperienced. Because of these circumstances, journalists sometimes inflame tense situations by virtue of their professional shortcomings, rather than deliberate biasness⁶. In Fiji’s case, the national media’s allegedly adversarial stance, coupled with a disproportionate focus on ethnicity has been blamed for exacerbating pre-existing ethnic and political tensions, although the media dismiss such allegations as shooting the messenger⁷.

In some research findings, some Fijian journalists and media organisations are deemed complicit in Fiji’s 2000 coup due to alleged inflammatory reporting that emphasised the conflict’s ethnic angle, while ignoring the other variables, such as corruption and uneven development. Fijian academic, Professor Steven Ratuva contends that the media portrayal of the country’s first Indo-Fijian

¹ Citizens’ Constitutional Forum. (2013). *An Analysis: 2013 Fiji Government Constitution*. Suva, Fiji: Citizens’ Constitutional Forum.

² Bainimarama, V. (2012, January 1). *Address on the removal of Public Emergency Regulations*.

³ Bainimarama, V. (2016). *Hon PM Bainimarama speech at the University of the South Pacific’s open day*.

⁴ *Ibid*.

⁵ Howard, R. (2003). *Conflict sensitive journalism: a handbook*. Vancouver, BC: Institute for Media, Policy and Civil Society and International Media Support

⁶ Frohardt M., & Temin, J. (2003). *Special report: Use and abuse of media in vulnerable societies*. Washington, DC: United States Institute for Peace.

⁷ Morris, R. (2015). Fiji media regulation: Emerging from ‘worst of times’ to the ‘best of times’? *Pacific Journalism Review*, 21(1): 34–39.



However, any limitations on media rights and freedom of speech should comply with the fundamental norms of democracy outlined in various international treaties. This is to protect against unjustified/opportunistic abuse of state power.

Prime Minister, Mahendra Chaudhry, fed into and fueled the rising tide of ethnic tensions: While the media did not create the conditions for the ethno-nationalist upsurge, which was already present, they provided the nationalists with the “legitimacy to roll on”⁸.

Ratuva’s observations match some international scholars’ assertions that an overly combative media can be destructive in a transitional setting by provoking “violent inter-group conflicts and political polarisation”⁹. This includes what is referred to as “attack dog journalism”—an aggressive style of reporting that harms “fledgling democracies by nurturing intolerance and diminishing faith” in democratic leaders¹⁰.

While freedom of expression is universally recognised as a fundamental human right, all countries place some limits on this right as a safeguard against hate speech and obscenity. Article 19 of the Universal Declaration of Human Rights (UDHR), which states that, “Everyone has the right to freedom of opinion and expression”, is qualified by Article 3, which posits that “Everyone has the right to life, liberty and security of person”¹¹.

However, any limitations on media rights and freedom of speech should comply with the fundamental norms of democracy outlined in various international treaties. This is to protect against unjustified/opportunistic abuse of state power. Since Fiji is the first Pacific Island country to ratify all core nine international human rights treaties, this analysis benchmarks the media Act against some international treaties to determine how well it measures up to international standards and best practices. The benchmarks include the 1996 International Covenant on Civil and Political Rights (ICCPR), a binding treaty ratified by a majority of countries¹². Fiji became a party to the ICCPR on 16th August 2018.

Fiji’s media Act has some parallels with media legislation in multi-ethnic countries like Malaysia and Singapore, among others. These countries have experienced damaging communal riots in the past, and their media policies are founded on social cohesion and national stability as the blueprint for development. However, both Malaysia and Singapore are regularly criticised by international media watchdogs for clamping down on media rights, and they often achieve low scores on various international press freedom and human rights indexes. In Malaysia, corruption is a long-standing concern, and the country’s repressive media law is said to be a contributing factor¹³.

In Fiji’s case, the Act can be regarded as a government attempt to strike a balance between media freedom and free speech to safeguard social cohesion and state stability—the country’s two major challenges since independence in 1970. Whether the Act has harmonised the two somewhat conflicting ideals is still in dispute, understandably so, since media freedom and social cohesion are complex issues in Fiji.

⁸ Robie, D. (2001). Coup coup land: the press and the putsch in Fiji. *Asia Pacific Media Educator*, 10, 148–62

⁹ Voltmer, K. (2013). *The media in transitional democracies*. Cambridge: Polity Press.

¹⁰ Spiess, M. (2011). From watchdog to lapdog? MSc Thesis, London School of Economics and Political Science, London.

¹¹ Universal Declaration of Human Rights.

¹² International Covenant on Civil and Political Rights 1966 (ICCPR).

¹³ The Global Anticorruption Blog. (2021, January 22). *A Lesson in Democracy? The Bitter Irony of Malaysia’s Failed Anticorruption Coalition*.

As commentators have observed, there are other provisions in the Public Order Act and the Crimes Act that address communal incitement. In this regard, the problem with the Act is that it does not limit regulation to ethnically inflammatory content, but is rather broad in nature. In practice, media have been observed to adopt self-censorship, especially with regards to anything too critical of the government, to avoid prosecution.

Self-regulation under the Fiji Media Council

The introduction of the Act led to the disbandment of the Fiji Media Council (thereafter referred to as the “Media Council”), which had represented media self-regulation in Fiji since 1998. The Media Council was set up on the recommendations of a 1996 Fijian Government-commissioned study, funded by the United Kingdom’s Thomson Foundation.

The Thomson Foundation report had noted that while “responsible governments and politicians should share a common aim — in the best interest of their society — their roles are different: In a healthy democratic society, the relationship between politicians and a free press is, quite properly, likely to be wary, questioning and sceptical, rather than close, cosy or adulatory”¹⁴.

The voluntary Media Council, funded by the media industry, was overseen by an independent chairman, Daryl Tarte, with an equal representation from each media outlet and members of the public. The Complaints Committee was made up of three independent public representatives, with any written complaints judged against a professional code of ethics and practice. The Complaints Committee’s verdict was final, with the statements published in full by all media organisations who were members of the Media Council¹⁵.

The Media Council had no legal powers to impose any punitive measures, and it was, at times, dubbed “toothless tiger”, mostly by government politicians¹⁶. In response to such allegations, the Media Council chairman, Tarte, stated:

Some may argue that the Complaints Committee should have more teeth and power to impose fines or other sanctions. However, the council is a voluntary organisation with no legal status. The Complaints Committee addresses complaints on the basis of ethics and not law, though these inevitably do overlap. The adjudication takes the form of a reasoned judgement upholding or rejecting the complaints and the media organisations are committed to publishing that adjudication. This is a moral rather than a legal obligation¹⁷.

The criminalisation of journalism ethics in the Act, such as balanced reporting, is at odds with media legislation in a democratic framework. It can be seen as an example of over-legislation that has reduced media’s maneuvering space and exposed them to a greater degree of legal risk, to the detriment of journalism.



In a healthy democratic society, the relationship between politicians and a free press is, quite properly, likely to be wary, questioning and sceptical, rather than close, cosy or adulatory.

¹⁴ Morgan, Kenneth, and Thomas, John Prescott. (1996). *Future media legislation and regulation for the Republic of the Fiji Islands*. Consultancy report. Cardiff: The Thomson Foundation.

¹⁵ Tarte, D. (2008). The Fiji Media Council: Form, function and challenges. *Fijian Studies*, 6(1&2), 227–234.

¹⁶ Robie, D. (2016). Unfree and unfair?: Media intimidation in Fiji’s 2014 elections? Available at: <https://press-files.anu.edu.au/downloads/press/p337333/html/ch05.html?referer=1839&page=8>.

¹⁷ Tarte, Daryl (1997). Fiji News Council: Annual Report No 2, December 31.

The Act in summary

The Act was controversial from the start, with the media fraternity complaining about a lack of consultation, in both its formulation and implementation. Media organisations and journalists were summoned to the Suva Holiday Inn in April 2010 and given only two-and-a-half hours to read the 50-page draft, before being asked for comments and submissions. The then Attorney-General Sayed-Khaiyum told the assembled media that the proposed Decree was “not a debate”¹⁸. Suspicions that the Decree was *fait accompli* were vindicated when the promulgated version turned out to be almost identical to the draft, save for a few minor adjustments¹⁹.



The apparently disproportionate focus on media regulation compared to media development is a major shortcoming: legislation and control on their own are not enough to meet the Act’s stated objective of lifting professional standards in a country like Fiji.

The Act establishes two different channels for any complaints, although in practice the line between them is fuzzy since they both deal with breaches of the Act and Codes. The Tribunal deals with complaints and disputes (more civil in nature) with power to order payment of penalties, compensation and compliance, while the Magistrates Courts and the High Court have jurisdiction over offences. Prosecutions for offences in court are instituted with the consent of the DPP.

Between them, the Authority and the Tribunal monitor the news media, and adjudicate. Both the Authority and the Tribunal are required to take and follow directions from the responsible Minister. Besides these procedurally ‘incestuous’ situations, there are concerns about the impreciseness in the language of the Act, and the lopsided hearing mechanism and appeals procedure. These indicate that under the Act, not all litigants may be equal before the law, raising concerns about a fair hearing and redress.

The legal protections afforded to the Act, and the fact that the hearings are not bound by the formal rules of evidence, even though the Tribunal has the power to hand down financial penalties and compensation, are cause for concern²⁰. Fines and imprisonment apply after successful convictions in the Magistrates Court or the High Court.

Besides media regulation, the Act covers media development and the promotion of local content. While media regulation has been debated/covered at length, the media development aspect has escaped similar levels of attention and activity, even though it is an important component of the Act. The apparently disproportionate focus on media regulation compared to media development is a major shortcoming: legislation and control on their own are not enough to meet the Act’s stated objective of lifting professional standards in a country like Fiji, where research indicates a typically young, inexperienced, undertrained and underqualified journalist corps at the forefront of news coverage, with limited prospects for training and development²¹.

¹⁸ Morris, R. (2015). Fiji media regulation: Emerging from ‘worst of times’ to the ‘best of times’? *Pacific Journalism Review* 21(1): 34–39.

¹⁹ Ibid.

²⁰ Media Industry Development Act 2010

²¹ Singh, S. B., & Hanusch, F. (2021). SPECIAL REPORT: Watchdogs under pressure: Pacific Islands journalists’ demographic profiles and professional views. *Pacific Journalism Review: Te Koakoa*, 27(1 & 2), 132-149. <https://doi.org/10.24135/pjr.v27i1and2.1164>.

The Act is organised in the following manner:

Part 1 establishes the Act as a law and defines some terminologies, while **Part 2** creates the media monitoring body, the Media Industry Development Authority, and outlines its functions. Appointed by the responsible Minister, the Authority's composition was slightly different from the original draft decree, but its powers remained largely unchanged, including full protection from liabilities.

Part 3 consists of media codes, which were incorporated from the Media Council code of ethics. The major change was that what were classified as ethical breaches in the Media Council code of ethics became criminal offences in the Act, with the word "should" replaced with the word "must". **Part 3** also sets out advertising rules, including advertising to children and political advertising, besides the Television Programme classification code.

Part Four covers content regulation, whereas **Part 5** covers enforcement of media standards. **Part 6** covers registration of media organisations, **Part 7** looks at special features of media organisations, while **Part 8** establishes the Media Tribunal, to receive and deliberate on any complaints, with the power to hand down financial penalties and compensation. **Part 9** covers complaints to the Authority, and **Part 10** covers proceedings before the Tribunal. **Part 11** deals with miscellaneous provisions, including the Minister's power to make orders in emergencies. **Schedule 1** and **Schedule 2** outline the media code of ethics and practice, and the general code of practice for advertisements respectively. **Schedule 3** covers advertising to children.

Additional features, activities/milestones and consolidated annual report

Aside from a reduction in the penalties for journalists, editors and publishers, and a restricted appeal provision for the media, there were no major changes in the final version of the Act. For instance, the 10 per cent foreign ownership restriction of local media organisations was retained, forcing News Limited, the Australian owners of Fiji’s oldest newspaper, *The Fiji Times*, to offload to a locally-owned company, the Motibhai Group, on 22 September 2010²².

In the fifth year of the Act’s implementation, in February 2015, there was a failed attempt by the Authority to charge the *Fiji Sun*, only to be withdrawn on the threat of legal action by the *Sun*, on the basis of a breach of procedure on the part of Authority’s chairperson, Ashwin Raj²³. In July 2015, journalists’ two-year prison terms and \$1000 fines were removed from the Act, but this was seen as inadequate since the editors’ and publishers’ penalties were retained. This was seen as indirect pressure/censorship in that the newsroom managers would be forced keep their reporters on a leash to avoid being penalised²⁴.

The Authority had not produced any annual reports in eight years, in breach of Section 15 of the Act. This necessitated the production of a consolidated 2010-2018 annual report dated 18 July 2019²⁵. The report shows a total of 45 registered media organisations and freelance reporters, with a total of 103 complaints assessed between 2010-2018, with all resolved through mediation²⁶. The report states that in dealing with the complaints, the Authority preferred “constructive dialogue over a punitive prosecutorial role”. According to the annual report, no media organisation was penalised and the media Tribunal was never convened in the first eight years of the Act. This is touted as a positive sign in the consolidated annual report²⁷.

Even though the Act’s provisions have not been implemented, they are seen to have a chilling effect on the Fijian media. The role of the Authority and Tribunal in overseeing the media raises questions about the independence of the media and their ability to operate without interference. Moreover, the Act and its impacts should not be seen in just the past or present contexts. Neither should they be seen in the context of the current or past government, or the current media Authority. The potential future implications under a more hostile government and/or Authority need to be considered as well. There is no guarantee that the “constructive” approach favoured by the Authority thus far will prevail under future administrations. In fact, a different Authority may choose to adopt a more hardline, punitive and prosecutorial stance. As long as the Act is in place in its current shape and form, these risks are truly well and alive.



The Authority had not produced any annual reports in eight years, in breach of Section 15 of the Act. This necessitated the production of a consolidated 2010-2018 annual report dated 18 July 2019.

²² Perrottet A. (2015). News values in three Pacific nations: A case study in development journalism and the reporting of the Pacific Islands Forum in Fiji, Vanuatu and New Zealand. Unpublished Master’s Thesis, Auckland University of Technology, Auckland, New Zealand.

²³ Singh, S. (2017). State of the media review in four Melanesian countries – Fiji, Papua New Guinea, Solomon Islands and Vanuatu – in 2015. Coral Bell School of Asia Pacific Affairs, ANU College of Asia and the Pacific, The Australian National University, Canberra.

²⁴ Ibid.

²⁵ Media Industry Development Authority. (2019). *Consolidated Annual Report: 2010-2018*.

²⁶ Ibid.

²⁷ Ibid.

Features of the analysis

This thematically-organised analysis is approached from a ‘journalism practice’ perspective, rather than a legal perspective. Only those sections with the most impact on the practice of journalism are addressed, while those with minimal direct impact, such as advertising, are not considered in any great detail.

While some hypothetical scenarios envisaged and analysed in this report have not eventuated, there is no guarantee that these situations cannot, or will not occur in future, under another government, or another Authority, with a different mindset or approach towards media regulation. In this regard, the media Act is like a guillotine around the media’s neck, that can be activated at any time of any administration’s choosing.

Due to the limitations of time and resources, the analysis does not review any other related laws and regulations in Fiji in any great detail, except in passing.

The analysis concludes that while there are rightful concerns about the risks of uninformed, inflammatory reporting in a country grappling with social conflicts and a coup culture, it is important to strive for the right balance between media regulation and media rights. As it stands, the discrepancies in the Act indicate a legal framework heavily weighted against news media organisations and media workers, which raises serious questions about a free and fair environment for the media to operate in.

Such is the nature of journalism, including deadline pressures, that mistakes, including ethical lapses, are sometimes inevitable. However, should a ‘mistake’ cross the line, there is sufficient recourse within Fiji’s criminal justice system to deal with it, without having to criminalise ethics, as in the Act. In most democracies, the laws against defamation, obscenity, and privacy, to name a few, provide adequate safeguards. Usually, these laws are not considered attacks on media freedom.

Besides serious questions about the fairness or otherwise of the Act and the administration of justice, there are major concerns about the impact on journalism and its public interest role, with

various international media watch groups blaming the Act for a culture of “self-censorship”. The issues do not just affect the media fraternity, but the nation at large, given the role of the national media in upholding freedom of speech and good governance. By disempowering the media, governments can disempower the citizenry as well.

The Act has not been reviewed in the first decade of its implementation and this report recommends a roundtable of all the affected parties to discuss the prevailing issues and consider how to best address some long-standing concerns. The review concludes with a set of recommendations for interrogation and consideration.



The analysis concludes that while there are rightful concerns about the risks of uninformed, inflammatory reporting in a country grappling with social conflicts and a coup culture, it is important to strive for the right balance between media regulation and media rights.

Analysis and Discussion

Analysis and Discussion

The media's difficulties with the Act stem from the outset, including the lack of consultation in its formulation and implementation, the vagueness of the Act's provisions and its punitive measures. There are additional concerns about the roles of the Authority and the Tribunal, including their links with the government (the Minister and the Attorney General), the hearing and appeal procedures, and accountability issues in relation to the immunities in the Act.

These complications are discussed in the following sections:

Powers of the Responsible Minister and Attorney General

Under **Section 4(1)**, the “Authority shall consist of a chairperson and five other members, appointed by the Minister”, on three-year renewable terms. The appointees include the Solicitor-General (or his or her nominee) and one each representative of consumers, children and women, plus an expert in journalism and/or the media industry. Besides appointing the Authority, the Minister decides its terms and conditions, and has the power to remove any member(s). Under **s8(b)**, the Authority is required to advise the Minister on matters relating to the media and under **s9(k)** it refers to the Tribunal complaints brought to the Minister by members of the public, or public officers, or other Ministers. Under **s10(1)**, the Minister can give directions to the Authority, which is to be followed (**s10(2)**). The Minister may even designate another office to perform the Authority's functions (**s11**).

Under **Section 45**, the Attorney General advises the President on the appointment of the Tribunal, someone who is qualified to be appointed as a judge, to hear any complaints and make decisions (**s50(1)**). The President determines the Tribunal's terms and conditions, again on the advice of the Attorney-General (**s48**). Furthermore, the Attorney General can appear at Tribunal hearings and make submissions to the very Tribunal he had a hand in appointing (**s51(2)**). Under **s50(3)**, the Tribunal is not subject to the directions or control of any authority, “provided that the Minister may issue policy, administrative and financial guidelines to the Tribunal, and the Tribunal must act in accordance with any guidelines given by the Minister”.

The various roles of the Minister/Attorney General signify the removal of the government-media ‘separation of powers’ buffer that existed under self-regulation. This buffer is regarded as an indicator of an independent media in a democratic framework. This buffer is absent in the Act, where the Authority acts as the prosecutor while the Tribunal acts as the judge, with the Minister/Attorney General presiding over both. Not only can the Minister receive complaints against the media and refer them to the Authority, he may issue guidelines to the Tribunal, which sits in judgement, and must heed the Minister's advice. Besides, a key member of the Authority, the Solicitor General, is an officer of the Attorney General's chambers. These procedurally ‘incestuous’ situations pose a major risk for the media, especially with no specific exemption in the Act barring the Minister/Attorney General from participation in cases involving the government or the Attorney General's chambers. To the contrary, the Minister can receive complaints from other Ministers for referral to the Authority, and the Attorney General can make submissions at Tribunal hearings — the very Tribunal that was appointed on his advice. Moreover, the Communications Minister may issue policy guidelines as the Minister — guidelines that the Tribunal must follow.

For the Act and its procedures to have the full confidence of the public and the media, the appointments of key bodies like the Authority and the Tribunal must not only be above board, they must be seen to be above board. But this is far from the case because of the conflicting roles of the Minister/Attorney General, which breach the basic tenets of an independent judiciary.

Similarly, the Attorney-General is bestowed with the right to make submissions before the very Tribunal that he had a hand in appointing, with a say in the remuneration of the Tribunal. With no apparent requirement in the Act to recuse the Attorney General, it is conceivable that he can make submissions in cases involving government, including the Attorney General's chambers. Section 45(4) states that in advising the President on the Tribunal's appointment, the Attorney-General must be satisfied of the appointee's independence. Ironically, it is the Attorney General's independence that is in question due to the web of conflict of interest situations connected to the role.

Complaints, hearings, appeals

Under **Section 25** the Authority may investigate breaches of the Act, based on reasonable grounds, and refer the matter to the Tribunal for determination. "Reasonable grounds" is not defined. Under **s54**, the Authority may investigate suspected breaches proactively, without waiting for a complaint to be lodged.

The Authority's powers under **Section 54** are over and above what prevailed under self-regulation, when the Media Council only launched investigations in response to written complaints, with the media required to publish/broadcast the findings in full. One risk of the Authority's preemptive powers is that the media are potentially exposed to any manner, or any number of frivolous or vexatious claims, on the whim of the Authority, or those in control of the Authority. Prolonged and/or multiple enquiries could prove costly for the media in terms of time, finance and morale, with a potentially debilitating impact on journalism as a whole. This contradicts the Act's stated aim to improve media services in the country. While the Authority's consolidated Annual Report 2010-2018 indicates that it did do not launch any investigations on its own accord²⁸, this is no guarantee that this situation will prevail into the future, or that a different Authority will not adopt a more hardline position against the media. To minimise the risk of a witch hunt, the Authority should only investigate cases after receiving a complaint. Alternatively, as an accountability measure, there should be clear guidelines for launching pre-emptive investigations.

Under **Section 60**, the Authority may summarily dismiss a complaint, facilitate a resolution, or refer it to the Tribunal. Any complainant whose complaint the Authority dismissed may take the complaint to the Tribunal for another round of deliberations (**s62(2)**). In the case of appeals (**s79(1)**) "any complainant or the Authority aggrieved by a decision of the Tribunal in relation to any complaint referred to the Tribunal (under section 62(1, 2)) may appeal the decision of the Tribunal to the Court of Appeal". Under (**s79(2)**), any media organisation aggrieved by a decision of the Tribunal in relation to any complaint referred to the Tribunal under section 62(1, 2) may appeal the decision of the Tribunal to the Court of Appeal, provided that no appeal shall lie against any decision of the Tribunal, unless it involves a "financial penalty or monetary compensation of a sum in excess of \$50,000".

Concurrent to **Section 2**, Section 79(2) seems to bar media organisations from taking any Tribunal decisions to an appellate body, except monetary decisions in excess of \$50,000: In Section 2, "complainant" refers to a person who makes a complaint to the Authority, Tribunal or the Minister and "complaint" means a complaint by any complainant to the Authority, Tribunal or the Minister, against any media organisation, or any employee, officer, servant or agent of any media organisation. This section does not identify/specify editors and publishers as "complainants" since they are usually treated as the defendants, suggesting that editors and reporters have no right to appeal. As a result, the editors and reporters seem to have no right to appeal except those decisions of the Tribunal which involves a financial penalty or monetary compensation exceeding \$50,000.

²⁸ Media Industry Development Authority. (2019). *Consolidated Annual Report: 2010-2018*.

The Act was designed to deal with complaints against media organisations and their employees. The Authority investigates the cases and lays charges, while the Tribunal sits in judgement. While Section 79(2) allows restricted appeal to media organisations for financial penalties in excess of \$50,000, all other decisions cannot be appealed if unfavourable to defendants.

Under **s65(1)**, the Tribunal can impose financial penalties of up to \$100,000 on media organisations and \$25,000 on publishers and editors for various offences. The Tribunal can also order media organisations and publishers/editors to pay maximum compensations of \$100,000, and \$25,000 respectively, besides issue orders for corrections and apologies. The Authority and/or the complainants can apply to the High Court to have orders of the Tribunal enforced (**s65(3)**).

The apparently restricted appeal process raises several questions:

- Why are the petitioners and the prosecutor (complainants and the Authority) permitted the full gamut of the appeal, but the defendants given restricted appeal rights only?
- Why can't the defendants appeal Tribunal decisions in the ordinary courts, just as the petitioners/complainants can?
- Why are the defendants' appeal restricted to decisions involving financial payments in excess of \$50,000? On what basis was the \$50,000 threshold arrived at?
- Why are the defendants denied the right to appeal decisions that do not involve penalties below the \$50,000 threshold?
- Why aren't all litigants treated equally under the Act?

Furthermore, under **Section 68**, the Tribunal is not bound by formal rules of evidence, other than those relating to witnesses, and giving the accused a chance to be heard. It is not clear why Tribunal hearings should be exempt from the normal evidentiary processes and standards, especially when the Tribunal has all the authority to hand down significant financial penalties and compensation.

While Tribunal proceedings are open to the public, the Tribunal's right to hold closed-door proceedings (**s77(1)**) means that the details of certain hearings could be hidden from the public eye. Although closed-door hearings are normal/acceptable in a proper court of law under exceptional circumstances, public hearings are a way to show the general public that the justice system is functioning properly and treating all litigants fairly. Public hearings are all the more important when it concerns an Act that was imposed to regulate the national media, with no separation of powers. Hence, the lack of clarity on the grounds/justifications for closed hearings is more concerning than usual, and raises questions about the validity of due process, which, under the open justice principles, tends to benefit from public scrutiny.

Immunities, protections and emergency powers

Under **Section 88**, no court or adjudicating body in the country can accept, hear, determine, or entertain any challenge on the legality of the Act and/or any decision of the Minister, or of any State official, made under the Act.



Tribunal can impose financial penalties of up to \$100,000 on media organisations and \$25,000 on publishers and editors for various offences. The Tribunal can also order media organisations and publishers/editors to pay maximum compensations of \$100,000, and \$25,000 respectively, besides issue orders for corrections and apologies. The Authority and/or the complainants can apply to the High Court to have orders of the Tribunal enforced (**s65(3)**).

These immunity clauses show how the Act and its entities are bestowed with all the powers under law, without being bound by the core accountabilities of the justice system, such as an appeal/challenge. This could become a license to act with impunity. Because the hearings do not follow normal standards for evidence and because of the lack of recourse (appeal) for the defendants, the immunities become a bigger concern. They exemplify authority without responsibility. This appears to breach the most basic principles of justice, as enshrined in Article 7 and Article 10 of the Universal Declaration of Human Rights:

All are equal before the law and are entitled without any discrimination to equal protection of the law. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him²⁹.



Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.

Section 80 covers the powers bestowed on the Minister in any emergency. This includes the power to stop any broadcast or publication that the Minister feels may lead to disorder and place undue demands on the security agencies, result in a breach of the peace, and/or undermine the Government and/or the State (**s80(1)**). Under **s80(2)**, media organisations must submit to the Minister all news material before broadcast or publication. The Minister can order any person or entity to cease all activities if they fail to comply with the directives (**s80(3)**).

Emergency powers are part of the conditional restrictions on free speech that are universally recognised to safeguard state and society for the duration of the emergency only. However, international conventions require that any emergency restrictions are imposed under stringent conditions, within clearly prescribed time limits as a safeguard against the misuse of such powers. The Syracuse Principles in the International Covenant

on Civil and Political Rights (ICCPR) define a legitimate national security interest as one that aims “to protect the existence of the nation or its territorial integrity or political independence against force or threat of force”. The derogation clauses in the ICCPR, such as Article 4, state that in a “state of public emergency which threatens the life of the nation”, the authorities “may take measures to address the situation”³⁰.

According to **Clause 39** of the Syracuse Principles, a threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the State, and: (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State, or the existence or basic functioning of institutions indispensable to ensure and project the rights recognised in the Covenant”. **Clause 30** states that national security cannot be invoked to, “prevent merely local or relatively isolated threats to law and order”, whereas **Clause 40** states that, “Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4”³¹.

Likewise, a Global Freedom of Expression, Columbia University analysis in 2015 says that States must provide “careful justification for not only their decision to proclaim a state of emergency, but for any specific measures based on such a proclamation”. Any derogation to the right to freedom

²⁹ Universal Declaration of Human Rights.

³⁰ Syracuse Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex, UN Doc E/CN.4/1984/4 (1984)

³¹ Ibid.

of expression are deemed unlawful unless they are in accordance with these rules and interpretive principles³².

Such caveats and clarifications are not specified in the Act in that it does not fully define what constitutes a state of emergency, nor does it require the Minister to provide justifications for declaring an emergency. The Act does not specify the legal frameworks and/or international conventions that will guide the declaration of an emergency, and the application of emergency regulations, although this can be assumed since Fiji is bound by the international acts that it is signatory to.

Regardless, the lack of clarity is a concern for the media given the general tendency to overuse emergency powers in defiance of international norms. In Fiji, the Public Emergency Regulations promulgated in April 2009 was continuously renewed on the grounds of national stability. The emergency regulation was still in place after the promulgation of the Media Industry Development Decree in June 2010. By the time the emergency regulations were lifted in January 2012, almost three years had passed, which seems rather lengthy for an emergency law.

Pre-publication censorship (prior restraint of speech) is regarded as one of the most severe infringements of free expression, used only in extreme situations. Normally, speeches and publications are first aired, and if they breach the country's laws, charges are laid accordingly. In its review of the Act, the International Lawyers Project highlights as a major concern the Minister's discretion to impose pre-publication censorship without any discernable caveats against the overuse of such powers. The report noted that prior restraint curtails the opportunity for public appraisal. This was concerning because "in the long run, the preservation of civil liberties rests upon an informed and active public opinion"³³.

Content regulation

With regards to the ambiguities in the Act, some major concerns surround **Section 22**, which states: "The content of any media service must not include material which:

- (a) is against the public interest or order;
- (b) is against national interest, or;
- (c) creates communal discord.

While countries' rights to place some limits on free speech in the national interest are universally recognised, Section 22's vagueness stands out as a risk for the media, besides apparently breaching some international norms. Article 19(3) of the ICCPR recognises restrictions on free speech for national security purposes, but within reasonable limits. ICCPR Article 20 states:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law³⁴.

However, any such laws are to be applied in a balanced manner so as not to weaken the basis and workings of a democracy, and not become a platform for media censorship. This is outlined in the UN Office of the High Commissioner for Human Rights (OHCHR) Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred and discrimination, hostility or violence. The plan encourages states to define terms such as 'incitement' narrowly since "the broader the definition of incitement to hatred, the more it opens the door for arbitrary application of these laws³⁵."

³² Global Freedom of Expression. (2015, December). Freedom of Expression and National Security: Balancing for protection.

³³ International Lawyers Project. (n.d). Fiji Media Industry Development Decree 2010. Issues list and practices summary.

³⁴ International Covenant on Civil and Political Rights 1966 (ICCPR).

³⁵ Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

For the media, a major issue with Section 22 is, who decides ‘what is in the national interest’, or ‘against the public interest or order?’ This question is pertinent since ‘national interest’ or ‘public interest’ can be subjective, with the media, the government, and indeed the public having different viewpoints.

The lack of clarity puts the media on uncertain grounds in that any number of news reports could be deemed to be against the national interest by the government of the day. For instance, in a practical sense, where do the media stand in the news coverage of opposition views, political rallies and/or unions and civil society protests? The coverage of such events is routine work in journalism, including publishing/broadcasting interviews that may include anti-government sentiments and imagery, such as posters and placards. Can the media be deemed to be against the national interest, or against public interest/order, if they report such events?

For example, are the media at risk if they report the details of a strike/protest that degenerates into chaos and disorder? What if the media had reported the details of a disorderly strike/protest prior to the disturbances taking place, including the strike leaders’ call to arms, and/or denouncement of government? Can the media be cited for acting against the public interest or order, or the national interest? These are relevant questions given that in January 2018, the Fijian police questioned a national union leader, Felix Anthony, for allegedly “sabotaging the economy” for a march in support of suspended airport workers, which was widely reported in the national media³⁶. The then Prime Minister and the Attorney General regularly accused sections of the national media of “anti-government bias”³⁷.

The Council of Europe Freedom of Expression Guidelines on preventing the abuse of law states that national security, public order, and hate speech laws should ensure that the key terms and concepts are defined with sufficient precision³⁸.

So far, this review indicates that the Act’s regulating authorities, content regulation provisions, hearing processes, punitive measures and emergency powers do not appear to meet some international norms. The terms are vague, the independence of the officers implementing the Act is questionable, and the hearings are not based on full evidentiary process, with restricted access to the higher courts, and unclear conditions for imposing emergency laws.

Next, we address concerns about the Act’s punitive measures.



For the media, a major issue with Section 22 is, who decides ‘what is in the national interest’, or ‘against the public interest or order?’ This question is pertinent since ‘national interest’ or ‘public interest’ can be subjective, with the media, the government, and indeed the public having different viewpoints.

³⁶ Fiji union leader questioned about ‘sabotaging the economy’. (2018, January 24). RNZI. Available at: <https://www.rnz.co.nz/international/pacific-news/348619/fiji-airport-workers-file-back-after-tribunal-ruling>

³⁷ Singh, S. (2021). A year in the life of Fiji’s beleaguered national news media: Insights from the 2016 state of the media report and some potential implications of development journalism. *Journalism*, 22(2), 553-570.

³⁸ Council of Europe. (2021). *Freedom of Expression: Preventing abuse of law*.

Fines and jail terms

The penalties for breaching the Act by an editor or a publisher is a maximum fine of \$10,000 and/or imprisonment for a term not exceeding two years, and for a media organisation, the maximum fine is \$100,000. It is uncertain how the fines and jail terms were determined. According to one peer-reviewed academic paper, the sanctions are equal to those in the Singaporean Media Act³⁹. However, Singapore is a much larger economy, with a far bigger media industry and much higher profit margins and journalist salaries.

The Council of Europe Freedom of Expression guidelines call for proportionality in punitive sanctions, and due restraint in resorting to criminal proceedings/sanctions for press offences, emphasising that excessive sanctions be reserved for exceptional situations⁴⁰. When benchmarked against the European guidelines, the fines and jail terms in the Act appear to breach the principles of proportionality. For example, the penalties for a minor offence such as failing to carry a byline, and a more serious offence such as publishing content against the national interest, are identical: financial liabilities of up to \$25,000 and/or imprisonment of up to two years for editors and publishers, and liabilities of a \$100,00 for the media organisations.

Disclosure provisions

Under **Section 26(1)**, the Authority can compel the surrender of relevant documents and information, and under **Section 27(1,2)** it can, on the strength of a court warrant, enter and search any premises, as well as seize documents and equipment, forcefully if necessary. Likewise, under **Section 28(1, 2)**, the Authority can seek a Tribunal order to force the media to disclose confidential sources. Under **Section 28(4)** media are exempt from disclosures relating to corruption/abuse by a public officer.

For the disclosure of documents (papers), the Authority seeks an order from the Magistrate Court, but for the disclosure of confidential sources (persons), it seeks an order from the Tribunal. When it comes to seeking an order under the media Act, the courts would be deemed more independent than a government-appointed media Tribunal obliged to follow the communication Minister's guidelines, who, under the former government, was also the Attorney General, with a hand in appointing the Tribunal in the first place.

In its analysis of the Act, the International Lawyers Project stresses that only an independent judiciary should be permitted to issue an order compelling the disclosure of a confidential source⁴¹.

Additionally, the forced disclosure of confidential sources clashes with a fundamental journalistic tenet to keep such confidences, even at the risk of prosecution. Among other things, any such a betrayal of trust threatens whistle-blowing, a crucial element of both public interest and investigative journalism.

The International Lawyers Project analysis of the Act called for the protection of journalists who disclose lawfully confidential information, unless they knowingly participated to illegally obtain the information⁴². There is no such distinction in the Act, which has a blanket requirement to surrender information, or face charges. This breaches the OHCHR position to implement national laws protecting the confidentiality of sources and whistleblowers, besides providing the public the right to access to information⁴³.

³⁹ Dutt, R. (2010). The Fiji media decree: A push towards collaborative journalism. *Pacific Journalism Review*, 16(2), pp. 81-98.

⁴⁰ Council of Europe. (2021). *Freedom of Expression: Preventing abuse of law*

⁴¹ International Lawyers Project. (n.d). *Fiji Media Industry Development Decree 2010. Issues list and practices summer*

⁴² International Lawyers Project. (n.d). *Fiji Media Industry Development Decree 2010. Issues list and practices summery.*

⁴³ United Nations Human Rights Office of the High Commissioner. (2015, September 8). *Report on protection of sources and whistleblowers.*

Some of the OHCHR report’s main recommendations include:

- *Ensure national legal frameworks provide for the right of access to information in accordance with international standards:* National legal frameworks establishing the right to access information should be aligned with international human rights norms. Exceptions to disclosure should be narrowly defined and clearly provided by law and be necessary and proportionate.
- *Adopt or revise and implement national legal frameworks protecting whistleblowers:* State laws should protect any person who discloses information that he or she reasonably believes to be true and to constitute a threat or harm to a specified public interest⁴⁴.

Section 25 in the 2013 Fijian Constitution guarantees public right to access information but a Freedom of Information Bill is yet to be brought before Parliament. The absence of Freedom of Information legislation in Fiji means that confidentiality of sources is even more important to access sensitive, public interest information without fear of legal reprisals.

Criminalisation of ethics

Schedule 1, Section 18(1) is virtually lifted from the Media Council of Fiji guidelines which, in turn, were based on international benchmarks, tailored for Fijian conditions. The significant change is that ethics, considered non-punitive breaches under the Council guidelines, are regarded as criminal offences in the Act, with the word “should” replaced with the word “must”. This is unprecedented in most democracies where media self-regulation is in place.

Unlike ethics, a set of guidelines voluntarily adopted by the media as part of their professional practice, laws are a set of state-imposed, enforceable rules and regulations that are universally applied, and must be followed by everyone equally. Journalism ethics are not written in stone but serve as principles to guide professional practice. Journalistic ethics are not absolute either, simply because real world conditions give rise to various unique situations/problems that may require varied, rather than standard responses. A single, prescribed, one-size-fits-all response to all the different and complex journalistic ethical dilemmas that may arise simply does not exist.

For example, although the media widely accept objectivity as an ethic, it is not enforced by law, nor universally applied, for various practical reasons, including the fact that it is not possible to be fully objective in the real sense, due to human, institutional, organisational, time, space, financial and various other considerations/limitations. Besides, there is fierce debate in the journalism field about whether objectivity best serves the public interest, at all times, and in all situations. But under the Act, ‘objectivity’ is mandatory. The Act also states that: “Media organisations shall show fairness at all times, and impartiality and balance in news on political matters, current affairs and controversial questions”.

Not only are the three terms — fairness, impartiality and balance — not clearly defined in the Act, they can be subjective, based on one’s standpoint, especially in political matters. Besides, conventionally speaking, the media have the right to take political positions as well as editorialise.

What is regarded as ‘biased’ coverage by the government may be considered fair comment by the opposition, the public or the media. Whose view is correct? Whose view should prevail?



Not only are the three terms — fairness, impartiality and balance — not clearly defined in the Act, they can be subjective, based on one’s standpoint, especially in political matters.

⁴⁴ Ibid.

Under self-regulation, it was possible to run an unbalanced story as long as the concerned individuals were contacted for their comments and declined, or did not respond. The focus was on fair comment, facts and evidence, absence of malice, the public interest and the efforts by journalists to achieve balance. These are not considered in the letter of the Act on balanced reporting, which creates uncertainty in the minds of the media and constrains news reporting boundaries.

Furthermore, the legal requirement for balance can be manipulated to avoid media scrutiny by simply not responding to media queries, in the knowledge that without balancing comments, the story could be in breach of the Act, hence rendered unpublishable. With ‘balance’ criminalised, the media may decide to err on the side of caution, and not run potentially problematic stories without a rebuttal. Parties that are being investigated by the media could use Section 18 to their advantage by not responding to media questions. This could be counterproductive to the public interest, besides a waste of time and resources for the media organization, especially if a valid story goes unpublished. It is a demotivating experience for journalists to see all their hard work amount to nothing.

On paper, balanced reporting is a legal requirement, but in practice it is not monitored or enforced. In November 2016, the National Federation Party (NFP) leader Biman Prasad claimed that the Fiji Broadcasting Corporation (FBC) and the *Fiji Sun* either ignored their media releases, or reported government reactions to their statements, without first reporting their original statements⁴⁵. The NFP is imputing that the *Fiji Sun* and the FBC ran unbalanced stories, and that the Authority turned a blind eye because the stories favoured the government. While there is no record of the NFP lodging a complaint against the two media organisations for alleged breach of the Act, the Authority, under Section 54, has the power to launch investigations on its own accord.

Any lapses or inconsistencies in the application of the Act not only breeds uncertainty but adds to the perception that the Authority is biased, which erodes confidence in it. For instance, in her research paper on Fiji’s 2014 elections, Fijian academic Mosmi Bhim claimed that the Authority ignored biased or inflammatory reporting by the FBC and the *Fiji Sun*, which were regarded as pro-government media. Bhim questioned the “effectiveness and impartiality” of the Authority and whether such a body was actually needed⁴⁶.

In addition, media publish or broadcast editorials based on opinion, besides providing space for columnists, letter writers and others with certain viewpoints. Is having an opinion and expressing it in the media considered an offense, given that opinions, by definition, do not have to be fair, balanced or impartial? Can the media be sanctioned if a complaint is lodged against an unbalanced opinion piece, now that balanced news is a legal requirement? While newspapers have continued to publish opinion pieces and analysis in various forms without being penalised so far, the law is there, and it can be activated and applied at any time of the Authority’s, or the Minister’s choosing.

It is this type of uncertainty that is said to have had a chilling effect on journalism in Fiji.

Another example of the risks of criminalising ethics is “interviews”, which the Act says “must” be arranged, conducted, and edited fairly and honestly. Under the Act, potential interviewees are entitled to know in advance details such as the interview format, subject and purpose; whether it will be transmitted live or recorded; when it will be printed or broadcast; whether it may be edited; and whether only part of it, or all of it will be used. Interviewees “must” know in advance the identity and roles of the other subjects likely to be interviewed at the same time, or on the same topic, for the same programme or article.

⁴⁵ Prasad B. (2016). NFP working committee meeting – remarks by leader.

⁴⁶ Bhim, M. (2015). FIJI: “Stifled aspirations”: The 2014 general election under restrictive laws. *Pacific Journalism Review*, 21(1), 108–25.

Under the Media Council, these requirements were part of journalists' ethical obligations, which they "should" endeavor to fulfil as far as possible, rather than "must" fulfill, as in the Act. Previously, allowances were made for the fact that in a practical sense, it is not always possible to meet all the pre-interview ethical requirements due to logistical issues. At times, it is impossible to know some interview details in advance. Only after the original interview is concluded can the reporter decide, with some clarity, as to who to contact next for reactions, verifications and/or rebuttals. Moreover, it is not possible to have all the questions ready in advance, since follow-up questions arise during the course of the interview. In certain stories, it simply may not be prudent to reveal the questions beforehand. All these variables are not considered in the wording of the Act, under which these are legal requirements that "must" be complied with.

The criminalisation of ethics is questionable when the media are legally liable under existing laws if they cross the line on privacy, harassment and pursuit, subterfuge, coverage of children, victims in sexual cases and deceptive practices. Criminalising an ethic such as balance is unnecessary since legislation like the Defamation Act are in place should the media step out of line. This includes other existing legislation, as alluded to in **Section 21(1)** which states that "The provisions of this Act relating to codes of standards for the media do not displace any other written law or rule of law relating to obscenity, blasphemy, incitement to commit a crime, the publication of details of court cases, protection of witnesses, defamation, sedition or any other law relating to the media whatsoever".

Criminalising journalism ethics is questionable when, according to **21(2)**, All media organisations, in spite of the Act, are bound by all written law, including—

- (a) the Official Secrets Acts;
- (b) the Public Order Act 1969;
- (c) the Defamation Act 1971;
- (d) the Broadcasting Commission Act 1952; and
- (e) the Television Act 1992

In this regard, between 2012 and 2016, *The Fiji Times* employees were charged on three different occasions under the country's penal code, rather than under the Act. In March 2017, charges of inciting "communal antagonism" against three *The Fiji Times* Limited employees was amended to sedition. The charges were laid in response to a reader's letter published in *The Fiji Times*' iTaukei-language daily, *Nai Lalakai*, on 27 April 2016⁴⁷. In 2012 and 2013 the newspaper was charged with contempt of court in two separate cases⁴⁸. This indicates the adequacy of Fiji's judicial system to deal with media transgressions. That to date no media have been charged or convicted under the Act brings into question the need for a specific media act.

Corrections

Under **Section 36**, the Authority's jurisdiction in "correction of false or distorted statements" extends well beyond what prevailed under self-regulation. In the case of print media, the Authority can direct corrections to be published without charge, in as prominent a position and manner as the original article, containing the facts considered by the Authority to be true (**s36(1)**). In addition, the correcting statement "must be delivered with the direction" and "not contain any comment or expression of opinion..." (**s36(2)**).

⁴⁷ Amnesty International. (2017, March 28). *Fiji: Drop politically-motivated charges against The Fiji Times*. Available at: <https://www.amnesty.org.au/drop-charges-fiji-times/>

⁴⁸ Freedom House. (2014, December 1). *Freedom of the Press 2014 – Fiji*. Available at: <https://www.refworld.org/docid/54a148fa2a.html> [accessed 14 August 2021]

Section 36(3) covers broadcast media: “if any article, item, report, advertisement or news is broadcast which, in the opinion of the Authority, is false or distorted, the Authority may, by notice in writing delivered to the principal office of the media organisation, direct to be broadcast without charge, at such times as directed and in as prominent a position and manner as that in which the original material was broadcast, a statement containing the facts considered by the Authority to be true”.

Under the Media Council, the complaints committee had the final say on decisions/corrections arising from a hearing. All the media organisations that were members of the Media Council had made a commitment to publish any decision/judgement in full, but neither the positioning of the statement nor its prominence was specified.

Because of the Minister’s and the Attorney General’s links to the Authority and the Tribunal, ‘corrections’ become contentious under the Act unlike under the more independent Media Council. Theoretically speaking, what if the complainant on whose behalf the media are ordered to issue a correction is the government, or the Attorney General’s chambers? What if the media concerned dispute the ‘facts’ and ‘opinions’ as understood/presented by the government-appointed Authority? Because the independence of the Authority is in some question, so is the neutrality of any mandated corrections, especially if it concerns the government. For instance, if the dispute over the facts concerns a story that is critical of the government, is there a chance that the Authority/Tribunal would feel pressured/inclined to come up with a version of a ‘correction’ that leans towards the government viewpoint? Especially given the oversight enjoyed by the Minister over the Authority and the Tribunal.

Section 36(5) allows media organisations to take any disputes over corrections with the Authority to the Tribunal, but as mentioned, the Tribunal’s neutrality can be in question.

It is important that the system is above board, and that the media have full confidence in it, since the matter of corrections is a serious one for media organisations and their employees: any admission of guilt/culpability via corrections not only exposes them to potentially costly defamation lawsuits but could also compromise any legal defence.

Requirement for bylines

One of the seemingly more benign requirements is **Section 23**, “The content of any print media which is in excess of 50 words must include a *byline* and wherever practical, the content of any other media service must include a byline”.

Bylines are a standard element of transparency and accountability in journalism, to enable news consumers to know who the author of a particular article is. Bylines are usually voluntary rather than compulsory, and they can be withheld for various reasons, including journalist safety and security. In Fiji, some stories ran without bylines during the coups in 1987, 2000 and 2006, when journalists faced threats and intimidation. This protection is no longer an option under the Act, which could be an added risk for journalists and media organisations, at least in certain situations.

Section 23 is apparently a response to isolated claims by some journalists that some of their editorial supervisors sometimes tended to edit/re-angle stories to such an extent that the stories’ originality is lost, due a totally different slant or emphasis. There has been no research or investigation into this issue, and it is not clear how prevalent this problem is.

While the ‘byline’ clause is one of the least controversial ones in the Act, it is not without risks, since a breach could result in a maximum fine of \$100,000 for media organisations, and \$25,000, or imprisonment of up to two years, for editors and publishers. These are rather harsh consequences for the simple act of not including a byline, whether willfully, which is unlikely given the penalty, or in error, which would more likely be the case. Section 23 does not meet the Council of Europe Freedom of Expression guidelines for proportionality in punitive sanctions, and due restraint in resorting to criminal proceedings/sanctions for press offences⁴⁹.

Media ownership and cross media ownership reforms

Section 38, “Special features of media organisations”, has also had a major impact on the national media landscape in relation to media ownership structure.

Under **Section 38(1)**, foreign ownership of local media organisations is limited to 10 per cent equity, with at least 90 per cent to be owned by Fijian citizens permanently residing in the country. The former government argued that this was the norm in several countries, including Australia, the United States and Singapore, and that as a strategic national asset, the national media should be in the hands of locals with a permanent stake in the country⁵⁰.

Section 39(2) imposes limits on cross media ownership. Any person or associate with an interest in any one media organisation may own a further interest in only one other media organisation, in the same medium (whether print or broadcast). The beneficial interest in second media organisation is limited to 25 per cent non-voting interest. Any business in a media organisation of a different medium is restricted to five per cent non-voting interest. Internet content is exempt, provided that the content is “the same” as that disseminated by the media organisation in its print or broadcast media.

Media ownership structural reforms usually aim to address media concentration, that is, the domination by one or a few media organisations. Media ownership issues are complex, and any reforms need to be carefully considered to avoid unintended consequences, which sometimes become fully observable only after the changes have been effected.

In one of the more significant outcomes of the ownership rules, the Australian owners of *The Fiji Times*, News Limited, were forced to sell the newspaper to a local conglomerate, Motibhai Limited, while the country’s second daily, the *Fiji Sun*, was owned by another local conglomerate, CJ Patel. To have both newspapers in the hands of two major local businesses is in itself a form of media concentration, which goes against the stated aim of government’s media ownership reforms. Unlike News Limited, which was exclusively in the newspaper business in Fiji, the local owners of *The Fiji Times* and the *Fiji Sun* are involved in multiple national business enterprises, with vast investments in various sectors of the economy. These commercial investments are affected by government plans and policies, which makes both companies somewhat vulnerable to the government of the day.

This business risk raises several questions: to what extent can the newspapers freely carry out their watchdog role if there is a risk to their owners’ greater business interests, especially when the newspaper side of the business is a tiny fraction of their overall return on investment? Would the business owners risk their wider interests by allowing their publications a free reign to criticise government, or are they more likely to take a safer approach, and mellow down criticism, especially if it risks angering the government and making their businesses a target?

⁴⁹ Council of Europe. (2021). Freedom of Expression: Preventing abuse of law.

⁵⁰ Dutt, R. (2010). The Fiji media decree: A push towards collaborative journalism. *Pacific Journalism Review*, 16(2), pp. 81-98.

These concerns have been raised before by Fijian economist, Professor Wadan Narsey:

The real weakness in Fiji's media industry currently is that Fiji's media owners are not dedicated independent media companies, but corporate entities with much wider business interests which are far more valuable to the media owners than profits from their media assets. This is exacerbated by the reality that the media owners' other investments are extremely vulnerable to discretionary government policies, which can cause greater financial harm than the media profits are worth⁵¹.

Could media owner concerns about the business risks of unrestrained critical reporting of the government be a contributing factor to various claims that the Fijian media are practicing self-censorship? For instance, the former Attorney General/Minister for Communication, who had a powerful role in the Act, had publicly criticized *The Fiji Times* and its owners on a number of occasions. In 2018, he said the "paper hit a new low under the Motibhai Group's eight years of politically-driven administration"⁵².

It is often alleged that *The Fiji Times*, whose reporting was deemed more critical of the FijiFirst government, lost out on lucrative government advertising contracts to its rival, the *Fiji Sun*, which was considered government-friendly, although the *Sun* insisted that it won the government contracts in a fair bid⁵³.

The crux of the local ownership law is that it gives government a greater hold on the national print media due to the exposure of the print media owners' significant non-media business interests to government policies. It does not matter whether the current government is exercising this hold or not. What matters is that this control is there to be exercised, if not by this government, then future governments, at their convenience.

With the cross-media ownership reforms, there are costs and benefits as well, especially in the broadcast media sector. While the restrictions prevent some elements of monopolisation, they encourage other forms of domination. The restrictions stop media organisations from taking full advantage of the new technology to further develop multi-media products, expand their businesses and increase revenue streams. The reforms go against the idea of media convergence, and the interconnection of different media platforms, which is the future in the digital media age.

Because state-owned entities are exempt from the media ownership restrictions (40), the national broadcaster, the FBC, enjoys a distinct advantage over the country's major private-commercial broadcasters, Communications Fiji Limited (CFL), Fiji Television, and Mai TV. Since the FBC is the only mainstream broadcaster allowed to operate both radio and television stations, it enjoys a major market advantage in that it is able to cross-fertilise and cross-promote its programmes on both platforms. This puts the FBC in a stronger position to appeal to a wider audience, and to draw a greater share of both radio and television advertising. This is in addition to the government fees and loan guarantees that go to the FBC for its services as the national broadcaster. Compared to its rivals, the FBC is flush with funds, and able to attract the best talent, which is another major advantage.

Rather than level the field, the local media ownership and cross media ownership reforms have had the opposite effect in some respects.

⁵¹ Narsey, W. (2013). *Fiji media moguls quashing media freedom*. Available from: <http://narseyonfiji.wordpress.com/2013/02/07/fiji-media-moguls-squashing-media-independence-7-feb-2013/>

⁵² War of words erupt between Sayed-Khaiyum and Prasad on Qorvis motion. Available at: <https://fijivillage.com/news-feature/War-of-words-erupt-between-Sayed-Khaiyum-and-Prasad-on-Qorvis-motion-ks5r92>

⁵³ Robie, D. (2016). *Unfree and unfair??: Media intimidation in Fiji's 2014 elections?* Available at: <https://press-files.anu.edu.au/downloads/press/p337333/html/ch05.xhtml?referer=1839&page=8>.

In print media, localisation of ownership was achieved at the cost of the conglomeration of that segment of the national media. Arguably, Fiji might have been better off with at least one of the two national newspapers under foreign owners with no other business ventures in the national economy. To some extent, this would mean being less beholden and vulnerable to the business policies of the government of the day. The cross media ownership reforms have put the FBC in a dominant position in what has become an uneven broadcast media sector landscape.

Media development and research, consolidated annual report

Since the Decree's promulgation in 2010, much of the focus, including media commentary, discussions in civil society circles and academic research has been on media regulation; yet media training and development, a major function of the Act, is hardly addressed.

Under **Section 8(a)**, the Authority is required to “encourage, promote and facilitate the development of media organisations; under **s8(c)**, “facilitate the provision of a quality range of media services (in) the national interest”; and **s8(f)**, “promote local content in print and broadcast media”.

Likewise, under **Section 9(a)**, the Authority **may** conduct research and investigations necessary for the improvement and development of media in Fiji; under **s9(c)**, it may “enter into joint ventures or partnerships with other media authorities, international agencies or private organisations for the purpose of promoting media services. Under **Section 9(d)**, the Authority may “provide training schemes, whether by itself or with the co-operation of other persons or bodies...for the officers of the Authority and others concerned with media services”.

It has been difficult to ascertain the Authority's achievements in media training and development, and in the promotion of local content, due to the lack of timely data, records and information. This includes the consistent failure to produce annual reports on time. In the first eight years of its existence, the Authority has managed to produce only one consolidated annual report between 2010-2018⁵⁴.

This is a breach of **Section 15**, which requires the Authority to prepare a report on its activities no more than three months after the end of each financial year for the Minister “to be laid” before Cabinet. The consolidated annual report offers no explanation as to why annual reports were not published annually as required by the Act.

The consolidated annual report shows a total of 103 complaints “independently assessed and investigated” by the Authority in the eight years, 2010-2018, an average of 12.8 complaints a year⁵⁵. Although Section 54 empowers the Authority to investigate breaches, it was never activated. Instead, the Authority opted for mediation by writing to media organisations, seeking retraction and correction. The Media Tribunal has never been convened in the consolidated annual report period from 2010-2018⁵⁶. The fact that in eight years not a single one of the 103 complaints had to be investigated brings into question the seriousness of the complaints. And the inactivity of the Authority and the Tribunal over the course of eight years brings into question the very purpose of the Act.



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⁵⁴ Media Industry Development Authority. (2019). *Consolidated Annual Report: 2010-2018*.

⁵⁵ Ibid.

⁵⁶ Ibid.



Besides granting permission to foreign organisations to run training courses and the Authority’s then director Ashwin Raj delivering speeches and presentations at some of the trainings, it is unclear what other contribution the Authority made towards the training—intellectual, financial, or otherwise—as per its mandate.

In October 2013, the Authority announced that foreign media trainers would no longer be able to conduct workshops in Fiji without first registering with it⁵⁷. According to the consolidated annual report, the Authority collaborated with development partners such as the Australian Government-funded Pacific Media Assistance Scheme (PACMAS), the OHCHR, and independent institutions such as the Judiciary, the Fijian Elections Office, the Human Rights and Anti-Discrimination Commission, and civil society organisations to conduct workshops on several critical issues. The report indicates around seven workshops between 2014-2018, an average of one per year⁵⁸.

Besides granting permission to foreign organisations to run training courses and the Authority’s then director Ashwin Raj delivering speeches and presentations at some of the trainings, it is unclear what other contribution the Authority made towards the training—intellectual, financial, or otherwise—as per its mandate. Neither is it clear from the consolidated annual report whether the Authority allocated a separate budget, or any budget for that matter, for training and development. It seems that these activities were entirely foreign-funded, with the funders setting the agenda and designing the training modules.

Besides ad-hoc donor-funded training, the Authority does not appear to have any specific training and development plan that is available publicly. There are no documents outlining any short, medium, or long-term strategies the Authority might have had in place or may have implemented.

With regards to research, the consolidated annual report cites just one item in eight years: a “three-month snapshot” between August-November 2018 of media content that “attests to the extent to which Fiji enjoys freedom of the press including the right to political expression without fear of reprisal, recrimination and self-censorship and the existence of a plurality of political perspectives on contentious issues”⁵⁹. Aside from this rather limited, one-off research endeavor, it is not clear what other research activity the Authority has undertaken or commissioned in its 10-year existence. The 2010-2018 financial report does not show any other budget allocation or expenditure for research.

Likewise, **under s8(f)**, it is the Authority’s responsibility to promote local content in print and broadcast media. Again, it is unclear what strategy the Authority has had in place for local content, if any; whether the strategy has been implemented in the last 10 years, and if so, what are the outcomes and achievements. Given the importance placed on local content in the Act, has a budget been allocated for this specific activity? There is no indication of this in the 2010-2018 consolidated annual report, which shows zero spending on initiatives to encourage local content. This suggests that the Authority has been largely inactive on this front as well.

⁵⁷ Freedom House. (2014, December 1). *Freedom of the Press 2014 – Fiji*. Available at: <https://www.refworld.org/docid/54a148fa2a.html>.

⁵⁸ Media Industry Development Authority. (2019). *Consolidated Annual Report: 2010-2018*.

⁵⁹ Ibid.

Conclusions and Recommendations

Conclusions and Recommendations

This review of the Fiji Media Industry Development Act takes account of a decade of application since its implementation in the form of a decree to replace media self-regulation with media regulation by the Government. The Act has been tried and tested in the real sense, and ample time has passed to evaluate and assess its utility in terms of how it interacts and intersects with journalism practice in the country.

As highlighted in this report, the challenges with the Act, from a journalistic viewpoint, stem from the following:

- Lack of consultation in the Act's design and implementation.
- Some duplication with the existing legal system.
- Conflict of interest between the Minister, Attorney General, the Authority and the Tribunal.
- Criminalisation of journalism ethics.
- Skewed hearing process due to the deviation from evidentiary procedures.
- Restricted appeal process with the complainants given more rights than the defendants.
- Limited recourse to legally challenge the decisions of the Authority and the Tribunal.
- Lack of clarity in some key clauses, increasing both uncertainty and risk for the media.
- Disproportionately heavy fines and jail terms, even for minor breaches, such as failing to use a byline.
- Lack of records, including the Authority's failure to produce annual reports in timely fashion.
- Lack of attention on media training and development aspects of the Act, including the promotion of local content.
- No specific budget for media development/training and promotion of local content.
- No coherent medium or long-term strategy to assist in the development the media sector or increase local content.

This section summarises the major findings and makes recommendations for redress. The details follow:

Convene a roundtable to review the Act

A root cause of the Act's many problems stem from the lack of consultation with the media organisations, and considering any input from them. Being summoned in the eleventh hour to review and respond to a complex legal document in the short span of two hours is unreasonable. Moreover, in the 10-year life of the Act, no review or reform has taken place.

The first recommendation is to return to the drawing board and re-assess the Act in the context of its decade long existence and application, to identify any problems, and see how they can be addressed. This should be a consultative exercise involving all the relevant parties, such as the news media sector, civil society organisations, women's groups, youth, members of the public, government representatives, and so forth.

The proposed roundtable/review is not just timely, with the Act having been put to test for more than a decade, but a highly useful exercise to get some genuine feedback from the media, based on their interactions/experiences with the legislation in the course of their everyday work. It is an opportunity for the parties to find common ground and apply it in the Act. Any changes would be designed to make the Act more workable for the media, while addressing the concerns of the government and any other groups, especially allegations about the lack of professionalism and inflammatory reporting, and how to best tackle them.

The proposed review could go a long way in dispelling the notion that the Act is a government tool designed to control the media for its own ends and purposes. Given that the role of the media is fundamental to democracy and freedom of speech, the media's fears and concerns should be addressed. Their views need to be canvassed and respected. Media should be given due recognition in the review of the Act through genuine consultations and revisions based on consensus.

Reconsider the powers of the Minister and the Attorney General

It is further recommended that the proposed review reexamine the Minister and Attorney General roles in the Act to address the conflict of interest with the Authority and the Tribunal, which discredits the Act in the eyes of many. Given governments' vested interests when it comes to the national news media, it is recommended that the minister and attorney general are not thus empowered in appointment of the Authority and the Tribunal, in line with the separation of powers principle.

Currently, not only does the minister appoint the Authority and give directions to it but may issue guidelines to the Tribunal as well. Furthermore, the Attorney-General, not only nominates the Tribunal, but reserves the right to make submissions at hearings.

The Minister's and the Attorney-General's recusal is critical to restore the separation of powers buffer in the Act. This would be consistent with international protocols, such as the UNDP Oslo Governance Centre 'media and conflict prevention research and policy' stance that regulatory frameworks should support a system conducive to freedom of expression. Regulatory bodies connected with the state can have undue influence on journalists⁶⁰.

Remove the punitive sanctions

It is recommended that the fines, jail terms and monetary compensations are removed due to the potentially chilling impact on journalism, the risk of media self-censorship and undue financial losses. The Authority should be reconfigured and reconstituted to deal with ethical breaches in a non-punitive manner. Any criminal matters are best left for Fiji's judiciary to deal with, including jail terms and financial penalties. The judiciary is not only experienced, but comparatively more qualified, competent, impartial, and democratic, with proper hearing and appeal mechanisms, and with no direct ties to the Minister or the Attorney-General. Moreover, the punitive measures appear arbitrary, whereas Fiji's judiciary has a systematic method for determining any such penalties, based on proportionality, precedence, and evidence.

Address one-sided hearing and restricted appeals procedures

The recusal of government representatives and the elimination of the punitive measures will go a long way in addressing the problems in the Act. Assuming that these measures are not adopted, it then becomes incumbent that the one-sided hearing and the apparently restricted appeal procedures are corrected to achieve equality before the law. In the interest of a fair hearing, it is recommended that the media fraternity is given the same privilege as its accusers, that is, the right to challenge any Tribunal decisions.

That the Tribunal is not bound by formal rules of evidence in hearings is another example of a procedure that is unfair on the media. It is recommended that the hearings should be based on the normal evidentiary processes found in any court of law, especially when the Tribunal has all the authority to impose financial penalties and compensation.

⁶⁰ UNDP Oslo Governance Centre media and conflict prevention research and policy. (2017, November 2). *How media can be an instrument of peace in conflict-prone setting*.

Still on hearings, closing some proceedings to the public without any caveats goes against the principle of the open justice system, which holds that the courts should operate in a fully transparent manner⁶¹. In keeping with the norms of open justice, it is recommended that by and large, the Tribunal hearings should be open to the public, and that the general grounds for any closed hearings should be articulated in the Act, so that all the parties are clear about this from the outset.

Lifting the protections

Likewise, it is recommended that the protections that prevent any challenge against the Act and/or any decision made by any official made under the Act's provisions, is lifted. Viewed jointly with the provision that the Tribunal is not bound by formal rules of evidence, the immunities in the Act raise major concerns about the fairness, objectivity and transparency of any proceedings, as well as the administration of justice. These provisions are in apparent breach of the rights enshrined in the United Nations Universal Declaration of Human Rights:

Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law.

Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him⁶².

Caveats on pre-emptive investigation

Regarding the Authority's powers to investigate suspected breaches of the Act without a complaint, it is recommended that this clause is reexamined, and safeguards/caveats inserted to reduce the likelihood of the media falling victim to frivolous or vexatious investigations, including politically motivated witch hunts. This is a palpable risk given that the Authority is appointed and remunerated on the directions of a government minister, whose directives the Authority must follow.

It is recommended that the Act require the Authority to provide sufficient and justifiable reasons for launching pre-emptive investigations as a due-diligence measure, and as a protective mechanism against the abuse of due process. The Authority should be required to present evidence to support a preemptive investigation from a relevant authority such as a magistrate, and only proceed once permission is granted.

Caveats on emergency powers

The conditions for any emergency-based restrictions should be both clear and stringent, in line with international norms. Fiji is a signatory of the Syracuse Principles, and it is recommended that it is referenced in the Act, with its derogation clauses used as a framework to re-examine and revise emergency powers. It is recommended that the definition of an "emergency" and justifications for declaring it are articulated in the Act to minimise the risks of 'emergencies' becoming the pretext for unjustified and/or excessive censorship.



The conditions for any emergency-based restrictions should be both clear and stringent, in line with international norms.

⁶¹ Bosland, J., and Gill, J. (2014). The principle of open justice and the judicial duty to give public reasons. *Melbourne University Law Review*, 38, 482-524.

⁶² United Nations Universal Declaration of Human Rights. (1948, December 10). Available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

Decriminalise professional code of ethics

It is recommended that the Act's code of ethics is decriminalised, and that they serve as a guiding principle for the practice of journalism, as is the norm in most democracies. It bears repeating that criminalising ethics is unnecessary, since adequate legislation is in place should the media/journalists cross the line and commit a crime. The impracticalities of criminalising ethical breaches have been discussed at length earlier in this report. Besides, it is alleged that the Authority is not consistently enforcing ethical standards, such as turning a blind eye to stories that favour government. This adds to confusion and uncertainty in the media sector and gives rise to perceptions of biasness on the Authority's part.

Publication of corrections and disputes over corrections

Regarding corrections, the Authority directs the content and placement of any correcting statement to be published or broadcast, based on the Authority's version of the 'truth'. There is nothing in the Act that allows the affected media to have a look at the correction/statement beforehand, and provide final feedback, for the Authority's consideration. Given the possibility of differences in opinion over the facts and the lettering of the corrections and given that corrections can have legal implications for the media, it is recommended that there is some consultation with the media before the corrections are finalised and made public, even if the Authority has the final say.

It is also recommended that besides seeking recourse with the Tribunal, the media should be able to take any disputes over corrections through the court system as well. Because of the Tribunal's links to the Minister and Attorney-General, the higher courts are a more neutral avenue to seek redress over the facts and the wording of corrections.

Relax requirement for compulsory bylines

With regards to the compulsory requirements for bylines, it is recommended that this clause is removed altogether, and the matter of bylines is left to the media organisations' discretion. Alternatively, it is recommended that an exception to compulsory byline is made when safety is an issue, for instance when journalists face threats and intimidation over the stories that they may be covering. Currently there is no such protective measure in the Act, and it is recommended that it is considered.

Revisit media ownership reforms

It would be prudent to review the media ownership situation and reforms periodically, say every four-five years, to gauge the impact, and address any issues that may have arisen. For instance, it is a requirement of the United States Congress that the Federal Communications Commission reviews its media ownership rules every four years to determine whether the rules are in the public interest, and to repeal or modify any regulation that does not meet this criterion⁶³. There is no reason why Fiji should not adopt a similar good practice approach.

This review's findings – that the local media ownership and cross media ownership laws had increased media concentration in some ways – call for a re-examination of the laws. It is recommended that these laws are revisited, and thoroughly discussed with all the relevant parties to identify any problems and determine the best way forward. Questions to be addressed include, 'how well are the reforms working, and what, if anything should be changed to further improve things?' 'What is working, and what is not working?'

⁶³ United States Federal Communications Commission. FCC Broadcast Ownership Rules. Available at: <https://www.fcc.gov/consumers/guides/fccs-review-broadcast-ownership-rules>

It is recommended that the cross media ownership restrictions are also revisited. The question is whether the private broadcasters should be free to operate both radio and television stations.

Restricting private broadcast media to either radio or television stations in the digital media era is regressive. It stunts their growth by stopping them from taking full advantage of the new technology to expand their businesses, while giving the FBC, which is exempt from the restrictions, an unfair market advantage.

The cross media ownership review should consider questions such as: ‘Will lifting cross media ownership restrictions benefit the country or not? Is it needed to level the playing field for the private broadcasters? Will lifting the restrictions contribute to a more diverse, and a more critical broadcast media sector in Fiji? Is protecting the State broadcaster necessary or justified?’

Clarify content regulation clauses

Likewise, the content regulation clauses need more clarity since in their current form, they are a potential trap for the media, as pointed out by the International Lawyers Project report⁶⁴. The terms, ‘against the public interest or order; against national interest; or creates communal discord’, need to be further defined to comply with international norms.

Media training and promotion of local content

The review found no regular annual records of activities and initiatives as evidence of media development and local content promotion on an annual basis. Since media training and promoting local content are a core part of the Authority’s responsibilities, it is recommended that the Authority address them in a systematic manner, rather than on an ad hoc basis. The Authority can start by putting out proper annual and financial reports in timely fashion, as a way of being accountable to

taxpayers, and giving itself some direction with regards to future development. The Authority should devise a specific media development plan, with clearly outlined vision and mission statements, as well as a separate annual budget for media development and local content.

A media training and development plan is crucial to improve standards, simply because legislation on its own is not enough. Legislation alone does nothing to improve lack of training and qualifications in the national journalist corps, with studies showing that Fijian journalists are younger, less experienced, and less educated than counterparts in many other parts of the world⁶⁵.

Training is indispensable for empowering journalists to operate competently in a rapidly transforming media landscape and for dealing with fast-changing social, political, technological and economic paradigms. As part of its mandate to develop the media sector, the Authority should lobby government, the private sector and donor agencies for specific scholarships in journalism as part of strategies for uplifting standards. It should not just rely on strong laws and punitive sanctions.



Authority should lobby government, the private sector and donor agencies for specific scholarships in journalism as part of strategies for uplifting standards. It should not just rely on strong laws and punitive sanctions.

⁶⁴ International Lawyers Project. (n.d). *Fiji Media Industry Development Decree 2010. Issues list and practices summery.*

⁶⁵ Hanusch, F., & Uppal, C. (2015). Combining detached watchdog journalism with development ideals: An exploration of Fijian journalism culture. *International Communication Gazette*, 77(6), 557-576.

It is not necessarily the Authority's role to provide hands-on training, and that is not recommended. What the Authority should do is more than just rubber stamp training courses developed by overseas organisations for delivery in Fiji. The Authority should take ownership of at least some aspects of the training through meaningful contribution based on a broad vision for the development of the national media. The Authority should also lobby government to make a financial contribution to the training programme to demonstrate commitment to, and ownership of training, rather than rely entirely on training based on handouts from foreign donors and delivered by foreign trainers. Since media ownership has been localised, why not training and development, by allocating some local funding, rather than rely on foreign funds entirely? Local input is crucial not just to decolonise the training, but for the sake of context and relevance as well.

It is recommended that the Authority design a strategic plan, with annual targets, and a specific budget for media training and development. Likewise, for the promotion of local content, which should be approached in a professional and systematic manner, rather than superficially.

Produce annual reports in timely fashion

It is vital that the Authority produces annual reports, including financial reports, in a timely fashion. This is not just to be accountable as a taxpayer funded institution, but to be able to use the data to assess its own performance and lay the foundation for future planning in successive years. By not producing annual reports in a timely manner, the Authority is in breach of the very Act that it is responsible for enforcing, thereby setting a rather poor example. The Authority can hardly preach the mantra of the Act while failing to practice its most basic requirements.

The Recommendations in Summary

In the final part, this report summarises the recommendations into 24 main points to help Fiji address the challenge of regulating the media for social cohesion and national progress, without excessively suppressing freedom of speech:

1. Roundtable of all the affected and interested parties to review the Act.
2. Address/mitigate the conflict of interest situations in the Act by reconsidering the scope of the Communications Minister and Attorney-General's involvement in the Authority and the Tribunal.
3. Reconstitute the Authority and confine it to dealing with ethical breaches.
4. Decriminalise journalism ethics.
5. Remove punitive measures.
6. The hearing and restricted appeal processes to be made fair and balanced for media.
7. The Act stipulate potential circumstances/reasons for any closed door hearings.
8. Hearings and judgments to follow normal evidentiary process, rather than based on hearsay.
9. Media should be allowed to appeal/challenge any decisions by the Authority and/or the Tribunal.
10. Limit Authority's powers to preemptively investigate suspected breaches of the Act.
11. Introduce caveats on the Minister's emergency powers to meet international benchmarks.
12. Define the Act's key terms and clauses to provide clearer grounds for what constitutes a breach.
13. The disclosure of confidential sources by media should be determined by the courts, rather than the Tribunal.
14. Table a Freedom of Information Bill in Parliament.
15. Introduce whistle-blower protection legislation.
16. Allow media a final say on corrections before they are published.
17. The media should be able to take any disputes over corrections to independent courts.
18. Remove, or relax requirement for compulsory bylines.
19. Review media ownership laws to address media concentration.
20. Design a strategic plan for media development, and for the promotion of local content.
21. Produce annual and financial reports of the Authority in a timely fashion.
22. Authority to lobby government for budgetary support for media training and for the promotion of local content.
23. The Authority lobby the private sector and donor agencies for specific scholarships and other forms of support for the media sector.
24. Review the media Act in every five years.

Act Lacks Standards of Proof and Violates Due Process

By Daniel Barr

Special Guest Contributor

While the Media Act and the included Media Code of Ethics and Practice are 51 pages that purport to provide for a system to govern the news media in Fiji, the truth is that they do not provide much of a system at all, except provide the Media Industry Development Authority (the “Authority”) with complete discretion in determining what violates the Act and how to punish a violation of the Act. The rules of evidence do not apply. There are no standards of proof. There are no elements of any alleged offense that a claimant or the Authority must prove. There are no burdens of proof that a claimant or the Authority must satisfy to successfully make out a claim. And, there are no legal defenses for a media entity to raise, other than to deny a charge. There is a complete absence of due process. In short, a media entity can be found liable by the Authority of undefined violations of the Act that contain no elements to be proven and can be based upon factual assertions that are not supported by evidence that would be admissible in a court of law.

Let me run through a few provisions of the Act to highlight some of these problems.

First of all, a “media dispute” is defined by section 36 of the Act as “any article, item, report, letter or advertisement...which in the opinion of the Authority is false or distorted...” The Act is silent on how the Authority determines what is “false or distorted.” Must it be absolutely true or substantially true? What does “distorted” mean? Does it mean the statement was taken out of context? Does it mean the statement is true, but arguably makes a false implication? And if it makes a false implication, must that implication be one that is likely understood by a reasonable reader, or does it suffice that no matter how unreasonable the implication is, as long as it is recognized by the Authority, that is good enough. Undefined and vague terms are always a problem in the law, and the Act has tons of undefined and vague terms

Article 8

Article 8 lists the functions of the Authority. Section C provides that it is “to facilitate the provision of a quality range of media services in Fiji *which serves a national interest*” Who decides if something “serves a national interest” and what factors are used to determine that? It seems the Authority makes that determination with no guidelines whatsoever and could, if it wanted to, declare that anything that it did not like was not in the “national interest.” For instance, is a well-reported and documented story about official corruption in the Fijian government something the Authority could decide is not in the national interest?

Section D provides that the Authority must “ensure that media services in Fiji are maintained at a high standard in all respects and, in particular, in respect of the *quality, balance, fair judgment and range of subject-matter of their content.*” Again, there do not seem to be any guidelines for the Authority to determine if something is “quality,” “balanced” or is the result of “fair judgment.” There is nothing to stop the Authority from applying these terms in a highly subjective and arbitrary way without any evidentiary support.

Section E states that the Authority shall “ensure that nothing is included in the content of any media service which *is against the public interest or order, or national interest, or which offends against good*

taste or decency and creates communal discord.” The Act is silent on how the Authority “shall” “ensure” that none of these undefined things happen. The silence would seem to give the Authority unfettered power to “ensure” that these undefined things do not happen.

And if there were any doubt of the broad powers the Act gives to the Authority, Section G states that the Authority shall “perform such other matters as the Authority may determine to be in the interests of the media and in furtherance of the objects of this Act.” Section G give the Authority *carte blanche* to do whatever it wants as long it determines in its sole judgment “to be in the interests of the media and in furtherance of the objects of the Act.”

Article 9

Lest one had any doubt about broad, undefined powers the Authority has, Article 9 expressly states that “[t]he Authority shall have the power to do *anything* for the purposes of discharging its function and duties under this Act...” Not only does the Authority have the power to enforce various undefined offenses, whether or not they supported by actual evidence, but here, the Authority is give the power to do *anything* in order to enforce the Act.

Article 17

In addition to having the power to do “anything” to discharge its function as it see fit, Article 17 confers absolute immunity over the Authority from criminal or civil suit.

Article 22

This provides that media content must not include material that “(a) is against the public interest or order (b) is against the national interest or (c) creates communal discord.” None of these vague terms are defined, nor is the media given any guidelines on what factors would be considered in determining whether any content had resulted in any of these three undefined things. The fact that the Authority has the discretion to define these terms, or not, gives it the ability to assert its power in a capricious fashion, if it so chooses. Again, could the Authority decide that a well-reported and documented story about official corruption in the Fijian government is not in the “public interest” or the “national interest”? There is nothing in the Act that would prohibit it from doing so.

Article 24

This is one of several articles setting out penalties for violating the Act. Fines up to \$100,000 (or in the case of editors or publishers, \$25,000) plus the possibility of a prison term of up to 2 years seems grossly excessive. Again, there are no guidelines in the Act for how the Authority would determine the amount of the fine and/or incarceration.

Article 27

This Article gives the Authority power to apply to the Magistrate Courts for a search warrant on a news media entity if “there are reasonable grounds for suspecting that there are responsive documents on the premises”. In contrast, in the United States it is far more difficult to get a court to issue a search warrant on the news media. In fact, the U.S. Department of Justice’s policy found at 28 C.F.R. §50.10(a) (3) provides that that Department of Justice can apply for a search warrant of a news media entity: “*only to obtain information from, or records of, members of the news media when the information sought is essential to a successful investigation, prosecution, or litigation; after all reasonable alternative attempts*

have been made to obtain the information from alternative sources; and after negotiations with the affected member of the news media have been pursued and appropriate notice to the affected member of the news media has been provided, unless the Attorney General determines that, for compelling reasons, such negotiations or notice would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm.”

Article 28

This Article states that the Authority must only show “good cause” to force the disclosure of a confidential source, unless the confidential source concerns official corruption or abuse of public office by a public office holder. “Good cause” is not defined here, but it is usually a fairly low showing of why a litigant needs or is entitled to something. In contrast, in the United States, most states, including Arizona, have a shield law, which protects the media from having to disclose confidential sources. In Arizona, the protection for a confidential source is absolute, which means there is no circumstance where the media would be forced to divulge the identity of a confidential source. The Arizona shield law, A.R.S. §12-2237, which has been enacted in 1937 provides as follows:

“A person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station, shall not be compelled to testify or disclose in a legal proceeding or trial or any proceeding whatever, or before any jury, inquisitorial body or commission, or before a committee of the legislature, or elsewhere, the source of information procured or obtained by him for publication in a newspaper or for broadcasting over a radio or television station with which he was associated or by which he is employed.”

The Media Tribunal – Articles 44-52

As I understand it, the President of Fiji appoints one person to be the chairperson of Tribunal. That person needs to be familiar with the law and “qualified” to be a judge in Fiji. The tribunal can handle complaints that the Authority refers to him or her. It can also handle appeals. The Act is silent on what standard of appellate review the Tribunal applies to appeals. Is it *de novo* review, where the Tribunal looks at the evidence anew and makes its own factual determinations? Or is the appellate review standard abuse of discretion, where the Tribunal accepts the factual findings of the Authority and looks to see only if there were significant legal errors. A media entity may not appeal any ruling by the Tribunal to the Court of Appeal, unless the fine assessed by the Tribunal exceeds \$50,000

Article 80

This gives the Minister the power to issue a prior restraint to prevent printing or broadcast of any story where he “has reason to believe...may give rise to disorder ...” This is an extraordinary power where the Minister has sole discretion to make this determination based simply upon his belief that something may happen. In contrast, prior restraints have been presumptively unconstitutional in the United States for the past 92 years. In *New York Times v. United States*, the U.S. Supreme Court held that the government “carries a heavy burden of showing justification for the imposition of such a restraint,” and that President Nixon failed to carry the burden to stop the publication of the Pentagon Papers, which was an internal U.S. Government history about the Vietnam War and how successive U.S. governments of both parties had lied to the American people about it.

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