MEMORANDUM

on a set of

Draft Laws Regulating Journalists, the Media and the Right to Information in Timor Leste

London
March 2009

ARTICLE 19 · 6-8 Amwell Street · London EC1R 1UQ · United Kingdom
Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · law@article19.org · http://www.article19.org

TABLE OF CONTENTS

About the ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation. These publications are available on the ARTICLE 19 website: http://www.article19.org/publications/law/standard-setting.html.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme operates the Media Law Analysis Unit which publishes a number of legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive law reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at http://www.article19.org/publications/law/legal-analyses.html.

If you would like to discuss this Memorandum further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at law@article19.org.

Summary of Recommendations

- Effective measures should be added to the draft Media Council Law with a view to enhancing the independence and effectiveness of the Council.
- The powers of the Media Council should be significantly curtailed and apply only to such matters as are described clearly in law.
- The whole system for accrediting journalists/providing professional identity cards should be fundamentally reworked. Instead of setting legal conditions on this, anyone who can demonstrate that they do actually work on a regular basis as a journalist should be recognised as one and granted an identity card.
- Many of the provisions on journalists' rights, including to authorship, copyright and privileged access to places, need to be reconsidered. They should, for the most part, address these issues only in very general terms, leaving more detailed rules to be developed elsewhere.
- The rules on duties of journalists should be removed. Otherwise, the system should be radically reworked to make the substantive rules more appropriate to the work of journalists and to limit the sanctions to warnings.
- The rules prohibiting media outlets from engaging in other commercial activities and limiting foreign investment to 10% should be removed, and the excessively general rule on ownership should either be replaced by a more specific rule or removed.
- The law should distinguish more clearly between the rights of correction and reply and limit the latter to instances where a legal right of the claimant has been breached.
- Consideration should be given to making more concrete support commitments for community radios, for example by establishing a fund for them or by reserving part of the frequency spectrum for their use.
- The rules on content for community radios should be relaxed and they should be able, within a general framework, to set their own priorities.
- The rules on resolving competing applications for radio licences from one community should be more flexible to allow the local context to be taken into account.
- The rule prohibiting community radios from developing networks should be removed.
- The regime of exceptions to the right of access should be reworked so that a full list of exceptions is included in the right to information law, and so that exceptions are limited to cases where disclosure would pose a risk of serious harm to a protected interest and where this harm outweighs the benefits of disclosure of the information.
- A far more extensive set of proactive publication obligations should be included in the right to information law.
- The limits on the use of information provided in response to a request for information and penalisation of the disclosure of confidential information should be removed.
- The regimes of sanctions in both the draft Media Law and the draft Media Council Law should be reviewed to bring them into line with international standards.

1. Introduction

This Memorandum analyses a set of five draft laws prepared on behalf of the UNDP for consideration by the authorities in Timor Leste. These laws are as follows: "Statute of the Media Council" (draft Media Council Law), "Freedom of Information and the Conduct of Media Activity" (draft Media Law), "Statute for the Professional Activity of Journalists" (draft Journalists Law), ""Community Radio Stations" (draft Community Radio Law) and "Right of Access to Administrative Documents or Documents Which May be Considered of Interest to the State of Timor-Leste" (draft Right to Information Law).[1] This Memorandum analyses these draft Laws against international standards on freedom of expression.

Together, these draft laws establish a broad framework for regulation of the media, journalists and access to information held by public bodies in Timor Leste. To the extent that these are currently missing from the regulatory framework, the initiative to introduce these laws is welcome. The specific content of these laws includes a number of positive features. The introduction of right to information legislation is something that ARTICLE 19 has been promoting in different countries for many years now, while the idea of a specific set of rules on community broadcasting is also very welcome.

The draft laws being proposed do not address the all-important issue of licensing of broadcasters, which is currently under the jurisdiction of ARCOM, the Timor Leste Communications Regulatory Authority). They also do not address the question of the regulation of public broadcasting. A comprehensive approach to media law reform would address these two issues as well.

Although the laws generally provide a positive framework for media regulation, there are also a number of serious concerns with the proposed rules. A general concern is that, taken together, the laws are unnecessarily complex, with the result that their legal implications are not clear. This is to be avoided in any legal system, but it is a particular concern in Timor Leste, a very small country with few legal resources. Furthermore, there are a number of instances of repetition and overlap running through the different laws, adding to the potential for confusion. In some cases, the same matter is dealt with differently in different draft laws, giving rise to potentially different, or even contradictory, interpretations. It would help to address these problems if the laws were simplified and, with the exception of the draft Right to Information Law, integrated into one law. The specific concerns are detailed in the analysis below, and the key recommendations are noted above.

Timor Leste acceded to the *International Covenant on Civil and Political Rights* (ICCPR)[2] on 18 September 2003. As such, it has committed itself to the legally binding obligation "to take the necessary steps … to adopt such laws or other measures as may be necessary to give effect to … the right to freedom of expression."[3] Freedom of expression includes the

[1] The analysis is based on a translation of these laws from Portuguese into English. ARTICLE 19 has done some verification of the translation, which is generally of a high standard. At the same time, there may still be some errors based on translation.
[2] UN General Assembly Resolution 2200A (XXI), adopted on 16 December 1966, in force since 23 March 1976.
[3] ICCPR, note 2, Articles 2(2) and 19(2).

right to "impart information and ideas of all kinds … in writing or in print",[4] and, although this right is not absolute, any restrictions on it must be strictly "necessary" for the achievement of one of the legitimate aims listed in Article 19 of the ICCPR. Under international law, this establishes a high legitimacy threshold to be overcome before restrictions are deemed to be justified.

In the following chapters, we elaborate on our concerns in more detail. Section II assesses the independence and powers of the proposed Media Council, Section III looks at the definition and rights and obligations of journalists, Section IV deals with the rules governing the media, including community radio, Section V addresses the right to information and Section VI looks at the regime of sanctions. In each case, a description of the rules is followed by analysis and then recommendations.

2. The Media Council

2.1 Independence

Article 1 of the draft Media Council Law establishes the Media Council, which has a broad remit to undertake a range of activities of relevance to the media. It is well established under international law that bodies which exercise regulatory powers in relation to the media should be independent in the sense that they are protected against political or commercial interference. The reasons for this are clear; if the regulator is not independent, politics will be introduced into its decision-making, to the detriment of the free flow of information in society. While an effort has been made to ensure that the Media Council is independent, more could be done to secure this.

Overview

Pursuant to the draft Media Council Law, the Media Council consists of three main organs, the Regulatory Council, the Executive Council and the Statutory Auditor (Article 12). The Regulatory Council is the peak body, setting overall policy and direction, and overseeing the decisions of the Executive Council (Article 23).

Articles 14 and 15 of the draft Media Council Law provide for the appointment of four of the five members of the Regulatory Council by Parliament, with the fifth being appointed by those four. Groups of at least five and not more than ten Parliamentary Deputies may propose a list of four candidates for membership of the Regulatory Council to the Speaker. At least ten days before the election, the parliamentary committee responsible for media shall undertake hearings to verify that nominees meet the prescribed conditions. The actual election takes place by Parliamentary Deputies selecting the list they wish to be appointed. Any list which receives a two-thirds majority vote shall be elected. Removal of any member of the Council is also effected by a two-thirds majority vote of the Parliamentary Deputies.

Nominees must be Timorese citizens of independence, fitness and merit, and with recognised experience in journalism, law, teaching or civil society (Article 17(1)). Certain

[4] ICCPR, note 2, Article 19(2).

individuals may not be appointed, including those with 'incompatibilities with high public office', who have recently carried out official media sector functions, with a financial interest in media businesses, or who perform any other public function except part-time teaching (Article 16). The chair shall be a former magistrate, judge or public prosecutor.

Members are appointed for five years, non-renewable (Article 18). They must carry out their duties independently, and may not make negative statements about the work of the Council as long as they remain members (Article 19). Members are to be independent and are not subject to instruction from State organs, except in relation to the proper management of public assets, services or funds (Article 17(2)).

Article 22 of the draft Media Council Law provides for the dissolution of the Regulatory Council in the event of serious irregularities, which may be effected by a two-thirds vote of the Parliamentary Deputies.

For its part, the members of Executive Council include the chair of the Regulatory Council, who shall also be chair of the Executive Council, and representatives of owners of press media outlets (one member), the operators of radio and television media outlets (one member each) and three representatives elected by practicing journalists with at least five years experience (Article 29). The Statutory Auditor is appointed by Parliament in the same manner and at the same time as members of the Regulatory Council.

The Media Council has a number of sources of income, including from the fines and financial sanctions it applies (Article 68; see also Article 31 of the draft Media Law). The Chair is remunerated in line with a Parliamentary Deputy, while remuneration of other members shall be set by official decree (Article 72).

Analysis

Generally, the structure of the Media Council and the appointment of its various bodies provides good protection against political interference. At the same time, the system could be improved. A general comment is that the system is rather complex for a very small country such as Timor Leste and it might perhaps make more sense to do away with the Executive Council and just have one oversight body.

Protection for independence could be improved in the following ways:

- As a general rule, the more bodies that are involved in the process, the greater the protection against political bias. Provision could be made for the public and civil society to play a role in nominating and selecting candidates for membership. This could be achieved, for example, by publishing the lists of candidates and inviting public comment or by allowing civil society to nominate candidates.
- The term 'incompatibilities with high public office', one of the prohibitions on election to the Regulatory Council, is unduly vague and could be abused to exclude practically anyone. Instead, individuals with strong political connections, for example deputies or senior party officials, should be excluded.
- The guarantees of independence of the Regulatory Council are seriously undermined by allowing for State instructions concerning the proper management of public funds, which could be construed to cover practically everything the Council does. Instead, this should be managed through parliamentary oversight, as with other aspects of the Council's work.

- The rule that the chair should be a former magistrate, judge or public prosecutor is counterproductive. Not only is it far too limiting, in terms of the pool of people to draw upon for this position, but there is no reason for it and requiring the chair to be a former State official could undermine the independence of the Council. Instead, the members of the Regulatory Council should appoint their own chair.
- It is not clear who appoints the executive director of the Media Council. It should be clear that this is either the Regulatory Council or the Executive Council.
- Linking the remuneration for the chair to a Parliamentary Deputy is positive; the same sort of linking should be done for other members of the Regulatory Council, rather than leaving this to a decree, which could provide an avenue for political pressure.

It is also not clear why it was felt to be necessary to include a provision on dissolution of the Regulatory Council. This would presumably only be applicable in very extreme cases of a breakdown of the Council and, in this case, the Parliament could still use its individual power of removal to remove each and every member separately. Including this in the draft Law almost implies that the drafters felt it was likely that the Regulatory Council as a whole might become so dysfunctional that it needed to be dissolved, hardly a positive signal to send.

There are, in addition to this, a number of potential practical problems with the system for appointing members to the Regulatory Council:

- It is not clear how well the process for appointing the members of the Regulatory Council will work in practice. If, for example, three list of possible candidates were submitted by different groups of deputies, it could well be that no list would garner the required two-thirds, or even a majority, vote. Furthermore, the rationale for requiring the submission of lists, as opposed simply to candidates, is not clear.
- The areas of competence for members of the Regulatory Council – namely experience in journalism, law, teaching or civil society – are too narrow, particularly for a small country like Timor Leste. Other areas of relevant expertise include business, public service and engineering.
- The prohibitions on election to the Regulatory Council are too limiting. The exclusion of anyone with any financial interest 'whatsoever' in media is too stringent; this would include someone who had a limited number of shares in a media enterprise. Similarly, the prohibition on carrying out any public function except part-time teaching is unnecessary and would exclude a wide range of potentially good candidates.
- Limiting tenure to one five-year period is unduly restrictive. Most media laws in other countries allow members of oversight bodies to be re-elected, but only once. This allows for more continuity of expertise and for keeping good people on board.
- The blanket restriction on members of the Regulatory Council from making negative statements about the Media Council as long as they remain members is an undue restriction on not only their own freedom of expression, but also the right of the public to receive information. These individuals are in a unique position to understand the activities of the Media Council and, while they owe a duty to the Council, they should not be totally debarred from making critical comments.
- There are conflict of interest problems with allowing the Media Council to use the fines it levies as part of its own income. Instead, these should become part of general revenues.

Recommendations:

- Consideration should be given to only having one oversight Council as part of the Media Council.
- The various measures described above for enhancing the independence and effectiveness of the Media Council should be reflected in the law.

2.2 General Powers

Overview

The draft Media Council Law allocates a number of general powers to the Media Council. Pursuant to Article 2(2), everyone who performs media activities is subject to Media Council supervision. Article 3 refers to the powers of the Media Council, among others, to supervise transparency of media ownership and to safeguard the expression of pluralistic ideas, while Article 4 adds to this ensuring compliance with programming criteria, protecting weaker members of society, protecting individual rights of publicity, and receiving and ruling upon complaints. Pursuant to Article 23(3), the Regulatory Council has the specific tasks, among others, of ensuring the accuracy of news, promoting compliance with best journalistic professional practices, taking necessary measures to safeguard pluralism, deciding on complaints involving the rights of citizens (and of journalists), and deciding on conflicts of interest relating to the transmission of events of general interest. The Regulatory Council may also, either of its own motion or at the request of an interested party, adopt general or specific recommendations directed at the media sector or a specific media outlet, although these do not have binding force (Article 56).

All public and private entities are required generally to collaborate with the Media Council (Article 6(1) of the draft Media Council Law). Pursuant to Article 71, officials of the Media Council are given extensive powers, based on those of 'agents of authority', including to access facilities of entities under their supervision, to requisition documents and to demand collaboration of competent authorities.

Articles 39 to 42 of the draft Media Council Law address the processing of complaints by the Media Council. Pursuant to Article 39, any interested party may lodge a complaint regarding a violation of their rights, or of any legal or regulatory norm. Complaints regarding copyright, works which should be classified, professional identity cards for journalists, and journalistic ethics and misdemeanours are dealt with by the Executive Council, while other matters are dealt with by the Regulatory Council. The draft Media Council Law provides for both conciliation and binding decisions by the two Councils.

Failure to comply with a decision regarding the right of reply, to publish material or to surrender a professional identity card shall be considered to be a contempt of court. It is also contempt to fail to comply with any decision of the Media Council where that decision indicates that non-compliance will constitute contempt. Finally, failure to abide by any decision relating to obligations 'inherent in the licensing of media activities that require licensing' is also contempt of court (Article 60).

The Media Council is itself responsible for punishing misdemeanours, which attract fines of USD500-2,500 when committed by an individual and of USD5,000-10,000 when committed by a legal person. Misdemeanours essentially include all of the matters referred to above as crimes of contempt of court, a well as any other violation of the provisions of the draft Media Council Law, which are subject to fines of between USD500-5,000.

The draft Media Law includes reasonably detailed provisions on who is liable for media content, on various presumptions regarding intent and on when truth may be proven (Articles 24-27). These include the rule that proof of truth may not be proffered where the facts concerned do not relate to matters of public interest (Article 28(2).

Analysis

The powers of the Media Council and its various organs, as described above, are potentially vast and undefined. Although the different laws define the scope of the right of reply, the rules relating to obtaining a professional identity card by journalists and journalistic ethics in some detail, the rest of the obligations referred to are largely or completely undefined. Thus the draft Media Law prohibits 'practices which concentrate [ownership of] companies' in the media sector, but this is not defined (Article (10)). The importance of transparency of ownership is referred to in various places, and some rules on this are contained in the draft Media Law (see Article 6), but these are very vague and unclear. The other regulatory notions introduced in the draft Media Council Law – such as pluralism, programme criteria, accuracy of news and transmission of events of public interest – are completely undefined. Despite this, failure to comply with these 'rules' can lead to serious sanctions.

Pursuant to international law, restrictions on freedom of expression must be clearly set out in law. The reasons for this are clear. Only the legislature should have the power to restrict fundamental rights. Vaguely worded rules essentially give wide discretion to officials to define the boundaries of permissible behaviour, in breach of this principle. Furthermore, it is not appropriate to subject media and others to potential sanction without giving them clear advance notice of what is prohibited.

Many of the ideas referred to in the various laws – including pluralism, combating concentration of media ownership, and promoting accuracy of news and programming criteria – are potentially appropriate regulatory areas. However, far more detailed rules on what, precisely, is required and how they are to be achieved would be needed to be included in the law before they might legitimately lead to any sanctions.

It is not legitimate to restrict proof of truth to situations where the facts relate to matters of public interest. Proof of truth should always be allowed and should normally be determinative of the issue.

Recommendations:

- The powers of the Media Council should be significantly curtailed and apply only to such matters as are described clearly in law, such as the right of reply.
- Proof of truth should always be allowed in cases involving media content.

3. Journalists

3.1 Definition and Identity Cards

Overview

The main definition of a journalist is contained in Articles 1-3 of the draft Journalists Law. According to Article 1, a journalist is a professional who carries out journalistic activities – gathering and processing information for circulation through the media – as his or her 'principal, regular and remunerated' occupation, except where this is done mainly for promotional purposes (advertising) (this is essentially identical to the definition of a journalist contained in Article 1(a) of the draft Media Law). Pursuant to Article 2, a journalist must, as a condition of exercising the profession, hold a professional identity card issued by the Media Council. Furthermore, to be a journalist, one must be a citizen of Timor Leste, be 17 years old, be entitled to vote, enjoy the full exercise of one's civil rights, have at least completed secondary education, and have carried out the functions of a journalist for at least five years, as a local correspondent or collaborator for Timorese or foreign media (this is essentially identical to the definition of a journalist contained in Article 15 of the draft Media Law). For its part, the draft Media Council Law refers to working for five consecutive or 10 non-consecutive years as a journalist as the principal occupation, whether or not one has been paid for this (Article 45(3)).

Article 3 of the draft Journalists Law sets out a number of incompatibilities in relation to the profession of a journalist. In particular, journalists may not be involved in advertising or public relations work, plan commercial strategies, provide information or security services for any political body or corporation, undertake military service, hold a post in government or any public administration of a political nature, undertake public interest or social solidarity activities, or promote, on a non-remunerated basis, the activity of the media outlet for which he or she works. Individuals shall be barred from the profession during any period during which they perform any of these functions and for six months thereafter, during which time they must surrender their professional card.

Individuals who are officially and permanently directors of news at a media outlet despite not meeting the criteria of Article 1 for whatever reason are treated as journalists. They have the same right of access to information, and they must abide by the ethical rules for the profession, respect the rules of incompatibility described above and obtain a professional identity card (Article 12 of the draft Journalists Law). The draft Media Council Law, for its part, assimilates these individuals to journalists and provides for them to obtain an identity card (Article 45(6) of the draft Media Council Law).

Pursuant to Article 13 of the draft Journalists Law, 'local correspondents, specialised collaborators and collaborators' with regional or local media who perform journalistic activities on a regular basis, but without it being their 'principal, permanent and remunerated occupation', are bound by the ethical duties of a journalist and may obtain an identity card from the Media Council (see Article 45(6) of the draft Media Council Law).

The draft Media Council Law also provides for practitioners of journalism to obtain a provisional identity card during trainee periods, which are defined as the first 12 months of working as a journalist. This gives them most of the rights of journalists, except in relation

to ownership (copyright) over their work and the right to participate in a media organisation. Article 14 of the draft Journalists Law provides that foreign journalists are bound by the ethical duties of journalists and, in turn, have the right to obtain accreditation from the Media Council, which guarantees their right to access to information.

Articles 46-47 of the draft Media Council Law set out the process for applying for a professional identity card. These appear to envisage cases where individuals work as freelancers, providing that those who are self-employed do not need to obtain a statement from their employer.[5] The rules also include an odd provision seeking to address cases where more than one journalist has the same professional name, providing for the more senior journalist to take that name.

Article 49 provides for renewal of the 'professional licence', which is valid for three years. Renewals must be applied for within two months of the expiry of the existing identity card, failing which a fine of 50% of the fee will be charged for the first 30 days of delay, or 100% of the fee beyond this point. The draft Law is silent as to the fees for obtaining the identity card in the first place, or for its renewal.

The draft Journalists and Media Laws provide that having a professional identity card is a 'necessary condition for exercising the profession of a journalist' (Articles 2(1) and 15(1), respectively), while the draft Media Council Law states that this is necessary condition for working as a journalist (Article 45(1)).

Analysis

The precise import of these rules is unclear. One interpretation is that they bar anyone who does not meet the conditions from working as a journalist, in the ordinary sense of that word (i.e. providing material for dissemination in the media). If this is the case, then these rules represent a clear violation of the right to freedom of expression, which international courts have explicitly said rules out such restrictions on access to the profession.

Another interpretation is that the rules establish a two-tier structure among individuals who would normally be considered to be journalists: those who meet the conditions for obtaining a professional identity card – in particular that they have worked for five years as journalists, have completed their secondary education, and enjoy their civil rights – and those who do not. The main attributes of being a 'journalist' on this interpretation are privileged access to certain places and documents, the right to recognised authorship, the right to protect one's confidential sources of information, the right to participate in editorial policy, and being subject to the duties of a journalists (see below for an analysis of these).

This interpretation, which reflect the idea of a sort of special accreditation system, is less clearly offensive to the right to freedom of expression than the first one. At the same time, it is not the practice in most democracies and hardly seems conducive to the development of a professional cadre of journalists. Rather, it seems intended to create privilege for the more senior members of the profession, hardly a legitimate objective.

[5] The draft Law actually excuses them from providing photographs of themselves but it is assumed that this is a typographical mistake.

It may be noted that the rules bear very little relationship to professionalism. Being 17, having completed secondary education and not having lost one's civil rights have only the most tangential relationship with professionalism. Having worked for five years is also no guarantee of journalistic quality. It is easy to imagine, indeed is it almost certainly the case, that some individuals with only a couple of years of experience are better journalists than others with many years of experience.

Furthermore, the rules are confusing and appear to be illogical. In particular, it is not clear why local correspondents with less than five years experience and who work as journalists on a regular, but not on a principal, permanent and remunerated basis, should receive an identity card while their colleagues who do work on a principal, permanent and remunerated basis may not.

There are a number of other problems with this system. There is no justification for most of the rules of incompatibility. In particular, there is no reason why journalists should not engage in advertising or public relations activities, plan commercial strategies, provide information services, and so on, as long as they do not abuse their journalistic privileges for this other work. It is not clear how the authorities in Timor Leste could hold foreign journalists to the local ethical rules, and this is not legitimate as these journalists are already bound by the rules applicable to the media outlets for which they work. The rule on resolving cases of journalists having the same name appears to arise from a confusion with the analogous but very different situation of media outlets having the same name. It is nothing short of bizarre for a law to reallocate peoples' names in this way and any confusion would better be settled by reference to other data, such as the middle name or date of birth, as it would in any other case where such problems. Finally, the fines for late reapplication for an identity card do not make sense. It is not logical to charge more for a late renewal than for the original application. It should be up to the individual to decide whether or not to maintain his or her professional standing.

Recommendation:

- The whole system for accrediting journalists/providing professional identity cards should be fundamentally reworked. Instead of setting legal conditions on this, anyone who can demonstrate that they do actually work on a regular basis as a journalist should be recognised as one and granted an identity card.

3.2 Rights and Obligations

Overview

As noted above, the proposed legal regime, and the draft Journalists Law in particular, creates a number of rights and obligations for journalists. Pursuant to Article 5, journalists have a right to recognition of authorship of their work, to object to modifications which misrepresent that work, but not to merely 'formal modifications', to refuse to have their name associated with a piece with which they do not agree, and to copyright protection. The latter is deemed to mean that the employing media outlet shall have free use of the work for a maximum of 90 days, after which it shall revert to the author (see also Article 16 of the draft Media Law, which provides a shorter set of similar rules). These rules are

supplemented by Article 9 which provides, among others, that journalists may object to publication of their work in media outlets other than the one they work for and that profound alteration of a journalist's work is grounds for him or her to quit the job, in which case he or she shall receive the equivalent of one and one-half months compensation for each year worked, and a minimum of three months' salary.

Article 6 of the draft Journalists Act (see also Article 4 of the draft Media Law) is essentially a mini right to information rule for journalists, providing for their access to information held by public bodies, subject to certain exceptions, and for a system to resolve refusals to provide access.

Article 7 provides for privileged access by journalists to public places with limited capacity or where payment for access is required. It provides that systems may be established for this, that journalists may not, except as provided for by law, be prevented from entering or remaining in such places, that where such privileged access is insufficient, priority should be given to national media outlets and that in case of disagreement in relation, the Media Council shall have the power to order a binding resolution of the issue.

Article 8 of the draft Journalists Law contains a detailed regime for the protection of confidential sources of information, which is largely in line with international standards on this. Article 4 of the draft Media Law also contains brief provisions on this, which do not appear to add anything to the rules in the draft Journalists Law.

Article 11 of the draft Journalists Law sets out a list of some 26 'duties' of journalists. These include a range of general and more specific obligations such as to report honestly, to balance privacy and the duty to inform, not to gather information affecting dignity, not to pay for conducting interviews, to try to use diverse sources of information and to have at least two sources, and to treat the official languages with respect and to use them correctly. Articles 53-55 of the draft Media Council Law set out a procedure for sanctions for breach of these provisions, which include warnings, reprimands and suspension from the practice of journalism for up to 12 months. The process is overseen by the Executive Council, either at its own initiative or upon receiving a complaint.

Analysis

The rules set out in Article 5 of the draft Journalists Act are well-intentioned but are, for the most part, either inadequate or overly rigid and unnecessary. Copyright and other authors' rights are too complex to be dealt with in a few provisions in a general law on journalists. Furthermore, some of the specific rules in the draft law are inappropriate, inasmuch as they attempt to impose rigid constraints on these rights. One example of this is that the media outlet has free use of journalistic work for 90 days and that the journalist may object to the work being carried in any other media outlet. It is quite normal, and ultimately to the benefit of both the journalist and the general public, for works to be syndicated among different media outlets, including potentially international ones. With the Internet, media outlets may well wish to publish for longer than 90 days and it is also common for outlets to republish historical material on occasion. Another example is the attempt to define what sort of modifications a journalist can or cannot object to, which is both unduly rigid and ultimately insufficient to address this complex issue. Another rigid rule is the one relating to the right to quit over a disagreement about work, with compensation. This could easily be abused and, in any case, is not something which it is appropriate to impose by law. All

of these matters should be negotiated between the media outlet and the journalist (or all journalists on staff as a collective) rather than imposed by law.

The access to information rules in Article 6 of the draft Journalists Act and Article 4 of the draft Media Law are not legitimate for a number of reasons. It is not appropriate to have special rules on this for journalists (since this is a fundamental human right that applies to everyone). The draft Right to Information Law already deals with this issue. And the rules in Article 6 are inadequate to guarantee properly the right to information and may actually be used to limit this right beyond what is permitted by the main right to information law.

As with the rules in Article 5, the rules regarding privileged access to places by media workers set out in Article 7 are well-intentioned but ultimately impractical and excessively rigid. Such special accreditation systems really need to be established on a case-by-case basis, with different rules in place, for example, for access to parliament, the courts and premiere sporting events. It is not appropriate to apply the same template to access to public places (like parliament) and to events run on a for-profit basis by private bodies (like most sporting events).

One specific problem with the envisaged regime is that it is very unclear and, for the most part, cast in permissive ('may') rather than binding terms. Inasmuch as the rules may imply that journalists should benefit from free access to places which normally charge for access, they are in appropriate (although businesses may wish to grant them free access to promote media coverage). Another is that certain provisions – for example regarding the right of journalists to enter and to remain in places subject only to the law – are unworkable. Does this mean, for example, that a sports stadium could not remove a journalist after the end of an event for purposes of cleaning the stadium, because this is not provided for by law? It is not clear why national media organs should always take precedence over other media outlets in terms of access. It might make more sense to privilege local media outlets in the case of a public discussion about an event or issue in their locality. It is not appropriate to give the Media Council binding powers in this area, which would allow it to make decisions affecting a potentially wide range of other bodies, such as Parliament, private commercial bodies, and so on.

The duties of journalists, as provided for in Article 11 of the draft Journalists law and as enforced in accordance with Articles 53-56 of the draft Media Council Law, represent a very serious breach of the right to freedom of expression. These are essentially ethical matters, which should not be enforced by a statutory body such as the Media Council and which should never lead to suspension of the right to practise journalism. Indeed, this sanction should never be imposed, except perhaps in the context of conviction for a serious crime leading to imprisonment.

Furthermore, the list of duties is, even as a set of self-regulatory ethical duties, very problematical. Many of the rules – including that journalists must treat official languages with respect, that they should use two sources of information, and that they should not gather information that affects the dignity of others or carry out acts of publicity – are simply not justifiable. Others should be more tempered, for example by introducing the idea of striving to attain these goals or the idea that the rule should normally, but not necessarily always, be respected. This is the case, for example, in relation to the rules on interpreting and commenting on matters of public interest and using multiple sources. Yet other rules

should be made subject to an overriding public interest test. Some of the rules do incorporate this, but others should as well, including respecting the presumption of innocence, not exploiting sources' vulnerabilities and not concealing relevant information.

Recommendations:

- Journalists' rights to authorship, copyright and the like, as addressed in Articles 5 and 9 of the draft Journalists Act, should either be addressed only in a very general fashion or a more detailed set of rules on these matters should be developed. Article 16 of the draft Media Law should be removed to avoid duplication and any chance of conflicting rules.
- The provisions on the right to information should be removed from the draft Journalists and Media Laws, and this issue should be dealt with exclusively in a right to information law.
- Instead of providing for firm rules in relation to privileged access to places by journalists, the law should set out a framework of principles and then let each concerned body work out its own detailed rules. Instead of giving the Media Council binding powers to resolve disputes, it should be given conciliation or mediation powers.
- The provisions on protection of confidential sources of information in the draft Media Law should be removed, leaving this issue to be dealt with exclusively in the journalists law.
- The rules on duties of journalists should be removed. Otherwise, the system should be radically reworked to make the substantive rules more appropriate to the work of journalists and to limit the sanctions to warnings.

4. Media Outlets

4.1 General Rules

Overview

The draft Media Law includes a number of rules relating to the running of media outlets, as well as some rules designed to protect media outlets from interference. Article 5, among other things, prohibits the promotion of any boycott against a media outlet.

Article 6 of the draft Media Law establishes a number of rules relating to the establishment of media outlets. It prohibits media outlets from engaging in activities that are not related to their main media role. It limits foreign ownership of media outlets to 10% of the total capital. And it prohibits generally 'practices which concentrate' media ownership.

Articles 18-23 of the draft Media Law define the rights of correction and reply, which may be claimed by anyone who has been the subject, even indirectly, of any media reporting containing false, distorted or erroneous facts that may affect his or her reputation. The right is voided where the media outlet, with the agreement of the affected party, corrects the mistake. And the exercise of these rights precludes the use of other legal remedies relating to the same matter. The right may be claimed up to 30 days after the affected person becomes aware of the dissemination of the statement. The law imposes a number of limits

on these rights, clear time limits for their provision, and a right to appeal any refusal to provide them to the Media Council. Articles 43-44 of the draft Media Council law provide for the processing of appeals regarding a refusal to provide a correction or reply.

Analysis

There is no reason why individuals should not organise a boycott of a media outlet. Indeed, this may be a protected exercise of the right to freedom of expression, for example, where the boycott was to indicate disapproval of the policies of the media outlet or its stance on certain issues.

Although no doubt well-intentioned, the rules provided for in Article 6 of the draft Media Law which are highlighted above are in practice counter-productive. There is no reason why media outlets should not engage in any commercial practices it may wish to; indeed some of the most successful media in the world do this and it can make an important contribution to their overall financial health. Similarly, although many countries do impose some limits on foreign media ownership, particularly in the broadcast sector, an overall limit of 10% is too low. Foreign investment in the media can bring not only much-needed capital, but also expertise, something which is of the greatest importance in Timor Leste. Finally, while it is important to limit concentration of media ownership, the extremely general rule provided for in Article 6 fails to set proper standards in this area, instead simply granting undue discretion to the Media Council.

The rules on the right of correction and reply are, by and large, in line with international standards in this area. One concern is that the rules do not sufficiently distinguish between these different remedies. In particular, a right of correction, whereby a media outlet is required to correct factual mistakes, is very different from, and far less intrusive than, a right of reply, which gives the affected person access to the media to make his or her own statements. Closely related to this is the scope of these rights, which arise whenever material might affect someone's reputation. This is appropriate for a right of correction, but the more intrusive right of reply should be limited to cases where a person's legal rights, including to reputation, have been breached and a right of correction would not remedy the wrong. Without this limitation, the right might be invoked by anyone who has been the subject of media reporting which he or she does not like and claims includes misleading material.

Recommendations:

- The rule prohibiting the promotion of any boycott against a media outlet should be removed.
- The rules prohibiting media outlets from engaging in other commercial activities and limiting foreign investment to 10% should be removed.
- The excessively general rule on ownership should either be replaced by a more specific rule or removed.
- The law should distinguish more clearly between the rights of correction and reply and limit the latter to instances where a legal right of the claimant has been breached.

4.2 Community Radio

Overview
Article 1 of the draft Community Radio Law defines a 'public community radio broadcasting service' as a broadcasting service of low power, with restricted coverage, licensed on behalf of a not-for-profit community association. Article 7 provides that this must be a duly registered community association, with at least ten members, which has established a Community Council, consisting of at least five local community representatives.

Article 3 of the draft Community Radio Law provides in very general terms for support to be provided for community radios in various ways, including through financial and technical support, and awareness-raising.

A number of articles in the draft Community Radio Law impose programming commitments on community radios. These include, among others, devoting a 'significant part of their transmission time' to promoting official languages and to gender equity and equality of minorities. They are also required to give preference to educational, artistic and cultural programming, and to promote respect for human beings 'and other living things'. Any citizen from the community has the right to voice his or her ideas through the community radio (Articles 4 and 6 of the draft Community Radio Law).

Article 10 of the draft Community Radio Law addresses situations where more than one association wishes to provide a community radio service in a given community. In that case, the licensing body should seek to promote agreement among the various applicants and, failing that, it shall award the licence to the more worthy applicant or, if they are of equal merit, it shall select one by lot.

Article 12 of the draft Community Radio Law rules out community radio networks. Article 14 provides for warnings, fines and licence revocation for breach of the rules.

Analysis
The definition of a community radio, while laudable, is unduly rigid and stringent. No doubt all communities should strive to meet these goals, but membership of less than ten people or the inability to collect five people for a Community Council should not debar an association from receiving a community broadcasting licence.

The provision of support for community radios provided for in Article 3 of the draft Community Radio Law is welcome but it is really more of a policy statement than something to be included in a law. Furthermore, it is extremely general. It would be preferable, for example, if the law established a specific fund to support community radio and/or guaranteed the reservation of a minimum proportion of frequencies for them.

The content requirements for community radios set out in Articles 4 and 6 of the draft Community Radio Law are for the most part positive social goals, although they should not be required to promote official languages (indeed, they might instead wish to focus on promoting local languages which are at risk of dying out). At the same time, they are too specific and controlling. Latitude should be given to communities to set their own priorities

for their community radios, within general guidelines. And the rule that anyone may have access to the radio may not be workable, depending on how significant demand for this is and the size of the community.

The rules for dealing with competing applications from one community for a radio are problematical. While getting the various applicants to associate may work well in some cases, in others an externally imposed agreement may be a recipe for disaster. In some cases, there may be a good reason to grant both applicants a licence (for example, if the community is strong enough to support two radios). Choosing between stations by lot is not an appropriate way of resolving this. It should always be possible to identify a better applicant.

There is no reason to rule out community radio networks. Indeed, these should be encouraged, as they are an excellent way for these radios to share experiences and relevant programming, and to build capacity.

The sanctions provided for in the law are appropriate. At the same time, it should be made clear that a warning should normally be the sanction in case of a first violation of the rules, with the heavier sanctions being reserved for repeated breaches, where warnings have failed to address the problem.

Recommendations:

- The rules on what qualifies as a community broadcaster should be relaxed so as not to rule out legitimate applications which fail to meet all of the formal criteria.
- Consideration should be given to making more concrete support commitments for community radios, for example by establishing a fund for them or by reserving part of the frequency spectrum for their use.
- The rules on content for community radios should be relaxed and they should be able, within a general framework, to set their own priorities.
- The rules on resolving competing applications for radio licences from one community should be more flexible to allow the local context to be taken into account.
- The rule prohibiting community radios from developing networks should be removed.
- The law should provide for graduated sanctions for breach of the rules, making it clear that heavier sanctions should be imposed only where warnings have failed to redress the wrong.

5. The Right to Information

Overview

Pursuant to Article 1 of the draft Right to Information Law, only citizens have a right to access information (see also Article 2(1)). Article 3(2) limits the scope of the right to information which refers to the creation or management of 'decisions, acts, contracts or financial funds directly or indirectly related to the State'.

Exceptions to the right of access are provided for at different parts of the draft Right to Information Law. Article 3 excludes a number of types of information including documents classified, in accordance with the law, as State or military secrets, or that are rendered secret by law, and 'personal notes, drafts or other records of a similar nature', Article 6 adds to this, among others, personal information, except with the consent of the person concerned, and documents the disclosure of which could harm internal or external security. Article 9 adds to this documents relating to trials, before a final decision has been taken or the proceedings are archived.

The draft Right to Information Law contains only very limited proactive publication requirements for public bodies, at Article 4. These include general information about the public body, internal regulations and normative documents, and other rules and interpretations of law.

Article 7 of the draft Right to Information Law establishes a number of limits on the use of information, including on using it for purposes other than those stipulated. It also makes it a crime to disclose confidential information, while Article 20(3) provides for penalties of between USD1,000 and 20,000 for this.

Analysis

Better practice laws provide for anyone to access information held by public bodies. This is unlikely to impose any appreciable burden on the authorities and is more consistent with the idea of a human right to information, which should be universally applicable. The limits on the scope of information covered are also problematical. The right should apply to all information held by public bodies, regardless of the reason they hold it.

The draft Right to Information Law effectively relies on classification and other secrecy laws as the main means of defining exceptions to the right of access. This is problematical as these other laws are unlikely to be in accordance with accepted international standards on openness, which require exceptions to serve a limited list of legitimate confidentiality interests, and allow withholding of information only where disclosure would pose a risk of serious harm to one or more of those interests, and this harm outweighs the overall public interest in disclosure of the information. Most of the exceptions specifically spelt out in the draft Right to Information Law also fail to conform to these standards, as most do not include any harm test and none are subject to a public interest override.

The clear trend in relation to access to information is to impose increasingly wide positive obligations on public bodies to disclose information proactively. This is important to ensure that individuals can access a minimum platform of information about public bodies and to promote openness in general. The draft Right to Information Law falls far short of established international practice in this area.

The limits on the use of information provided in response to a request for information, set out in Article 7 of the draft Right to Information Law, are based on a misunderstanding of the role of this type of law, which is to promote openness, not to limit abuse of it. It is not for public bodies to stipulate how information they disclose should be used. While existing civil and criminal laws still theoretically apply to the use of that information, the fact that the information is held by a public body should normally rule out any problems in that regard. It would also be preferable if the right to information law did not include penalties,

particularly of such a severe nature, for disclosure of confidential information, given that its role is to try to introduce a change in the culture of secrecy within government, not to perpetuate it.

Recommendations:

- The right to information should apply to everyone, not just citizens, and to all information held by public bodies, irrespective of the use to which this information is put.
- The regime of exceptions to the right of access should be reworked so that a full list of exceptions is included in the right to information law, and so that exceptions are limited to cases where disclosure would pose a risk of serious harm to a protected interest and where this harm outweighs the benefits of disclosure of the information.
- A far more extensive set of proactive publication obligations should be included in the right to information law.
- The limits on the use of information provided in response to a request for information and penalisation of the disclosure of confidential information should be removed.

6. Sanctions

Article 29 of the draft Media Law provides for the suspension of media outlets for between a week and a year after three findings against them within five years, while the responsible director may, in such cases, be banned from working in a managerial or editorial post for up to three years. It also provides for an addition fine of between USD500 and 5,000 upon being held liable in court for damages for duly edited content. Article 30 provides for a number of different fines for various misdemeanours, as do Articles 61-62 of the draft Media Law. As has already been noted, both laws include a number of excessive and unduly vague restrictions which might trigger these sanctions.

Suspending a media outlet is a very extreme sanction which should be applied, if at all, only in the very most egregious cases of repeated and gross abuse of the rules. Breaching the rules in the draft Media Law three times in five years does not, of itself, come anywhere near this standard. Banning someone from practising journalism cannot be justified as a restriction on freedom of expression. It certainly cannot be justified for breach of content rules which are not even spelt out clearly in the law.

Recommendation:

- The regimes of sanctions in both the draft Media Law and the draft Media Council Law should be reviewed to bring them into line with international standards.