

24<sup>th</sup> July 2014



## ARTICLE 19

### **Mozambique Draft Right to Information Law, 2014**

#### **GENERAL COMMENTS**

ARTICLE 19 welcomes the initiative of the Draft Right to Information Law (“draft law”) noting the efforts over ten years to finalize and pass an access to information law in Mozambique. The draft law seeks to serve the realization of access to information in Mozambique for the promotion and protection of public participation, transparency and the proactive disclosure of information by both public and private bodies.

Access information is widely held to be a cornerstone right, crucial both in its own regard and for the functioning of democracy. It is also important for transparency of public affairs and the protection of other human rights. It facilitates both the revelation of human rights violations and exercise other human rights. Finally, the exercise of the right to information is dependent on the creation and maintenance of public records and therefore indirectly contributes to government efficiency.

Despite some positive provisions towards securing the right to information, the draft law in its current form largely fails to adequately enforce the constitutionally enshrined right to information.

This comment highlights recommendations as well as the positive and weak provisions of the draft law; these draw upon regional and international standards, as well as best practices of other states regarding the right to information.

#### **SUMMARY OF RECOMMENDATIONS**

ARTICLE 19 urges that adopting these and other recommendations highlighted in the analysis will significantly improve the Draft Bill and will contribute to better implementation of Mozambique’s regional and international obligations under freedom of information.

- **Article 2** - remove protection over information relating to public life
- **Article 4** - delete national unity and social cohesion
- **Article 5** - Delete human dignity and only refer to it in consideration of exempt information
- **Article 9** - Insert an express requirement for a public body to demonstrate that in refusal of information, there is substantial harm to a legitimate interest and that harm outweighs the public interest in disclosure
- **Article 10** - Insert a provision to require authorities under this law to keep and maintain records
- **Article 14** - Everyone, not just citizens of Kenya, should be entitled to access information
- **Article 15** - Delete provisions requiring proper identification and; categories of information
  - that would require written consent.
- **Article 17** - Protect vulnerable persons by providing for free information for poor and/or
  - marginalized persons.
- **Article 20** - Provide for the 'harm test' which states that a public authority must grant a
  - request for access to information unless it can demonstrate that there is substantial
  - harm to a legitimate interest and that harm outweighs the public interest in
  - disclosure.
- **Articles 21 -24** - Provide proper definitions and revise broad definitions.
- **Articles 25-27** - Revise to state that information which can harm or prejudice honour, good name or public image should be releasable if the information relates to illegal or unlawful activities. This would prevent any information about criminal justice from being release or corruption, or mismanagement by senior officials.
- **Article 26** - An expression provision for the protection of whistleblowers should be inserted.
- **Article 29** - There should be a specific exemption for information that is provided to public bodies as part of a proceeding (such as environmental planning) or done as a contact to a public body or used by a public body in decision making.
- **Article 30** - A policy and timeframe for classification is needed - 12-20 years is recommended.
- **Article 31** - Insert a requirement for the authority to provide written reasons for refusal of information

- **Appeals** - Clarify the process of appeal - both administrative and judicial. Additionally, give 14 days to contest a notification of refusal of information as opposed to 5 days.
- **Sanctions - Chapter IV** - Revise the entire section in line with regional and international standards. Provide sanctions for (i) authorities failure to meet obligations under the law and; (ii) destruction or change of information.
- **Article 41** - An express requirement on public authorities to report on duty & responsibilities under this Act is needed.
- **Budgetary Implications** - For effective implementation of the Act, a budgetary allocation towards but not limited to; designate information officers, public education on the objectives of the Act, administrative costs etc is recommended.

### **POSITIVE PROVISIONS**

The draft attempts to positively enshrine some freedom of information principles including;

- The scope of the draft law covering both public and private entities; with private entities entailing those which perform a public function, carry out activities of public interest or using public funds
- Requests by both individual and collective legal persons
- Protection from having to demonstrate reason or purpose for use of information
- The principle of maximum disclosure which calls for a presumption that all information held by public bodies being subject to disclosure except in very limited circumstances is stated in the draft law
- Written and oral requests for information
- Expeditious processing of information requests with stipulated timeframes on provision of information
- Low cost provision of information limited to the cost of making copies, if needed.
- Express requirement for the identification and designation of a specific 'entity' responsible for implementation of the provisions of the draft law
- Systematic record keeping
- The right of appeal

### **WEAK PROVISIONS**

Majority of the proposed provisions do not adequately provide for the principles of access to information that the draft law is trying to protect. In its current form, the draft law will do little to give persons enforceable rights to information as provided for under

the Constitution of Mozambique.

#### **Definitions - Article 2**

In the definitions, personal information wrongly seeks to include protection of information about a person's public life. This would wrongfully protect public officials and other individuals carrying out public functions from scrutiny in the public interest towards accountability and transparency.

#### **Principles - Article 4**

The limitation of information on the basis of national unity and social cohesion is unjustified and unlawful.

#### **Respect for Human Dignity - Article 5**

Human dignity is not a principle of access to information but rather is considered in a limited sense in consideration of exempted information.

True information that can hurt the honour, good name, reputation of a person (for example evidence of corruption by a public official) is not a legitimate exemption of information.

#### **Right to information - Article 13**

The right to information is recognised internationally as the right of individuals to be able to obtain any information held by a public body for any reason, subject to limited exemptions. It is not limited to information "in the public interest and public domain." In addition, this section refers more to the right of free expression under Article 19 of the International Covenant on Civil and Political Rights.

#### **Legitimacy - Article 14**

The draft law grants the right to information to citizens only. This provision is in conflict with international standards, which recognise that everyone regardless of citizenship or any other criteria has a right of access to public information.

#### **Access to information - Article 15**

The requirement of proper identification will stifle the enjoyment of this right for persons, especially likely marginalized and/or of low

income from making information requests. The section further sets out specific types of information where a written request is required. This separation of information of oral and written requests is unjustifiable.

#### **Deadline for making information available - Article 16**

It is unclear what certificates are referred to in this section and what 'forwarding certificates' means.

#### **Restrictions and Limitations - Article 20**

(1) The draft law does not clarify the authority for determination on what information is classified for restriction, conditional provision or limitation. Information should only be restricted if fit into one of the legally clear definitions

(2) There is a lack of a general requirement that the information would harm the interest to be protected and a lack of a public interest test as prescribed in regional and international law.

#### **State secrets - Article 21**

The definitions and categories of information falling into the state secret category are overly broad and will likely capture information that should not be exempt from disclosure. Worryingly, the section goes on to make information that safeguards rights and freedoms of citizens a state secret.

#### **Judicial Secrecy - Article 22**

There is no definition of what judicial secrecy is.

#### **Professional secrecy - Article 23**

There is no definition of professional secrecy. The section as constructed will limit whistleblowers from disclosing information that would be received by them in the course of their work.

#### **Banking Secrecy - Article 24**

The definitions and categories are overly broad and would prevent to release of information about the activities of public bodies who use banks for their accounts and hide corruption.

#### **Personal data held by authorities - Article 25 and; Information on the private life and privacy of citizens - Article 27**

Both these sections refer to the same issue and should be captured in Article 25. Information which can harm or prejudice their honour , good name or public image should be releasable if the information relates to illegal or unlawful activities. This would prevent any information about criminal justice from being release or corruption, or mismanagement by senior officials.

#### **Trade or Industrial Secrets - Article 28**

The broad construction of this section would also prevent disclosure of information where a private company is operating a public contract or is engaged in illegal behaviour; for example dumping waste, selling dangerous products etc.

#### **Secrets relating to literary, artistic or scientific works (Copyright) - Article 29**

There should be a specific exemption for information that is provided to public bodies as part of a proceeding (such as environmental planning) or done as a contact to a public body or used by a public body in deciding something.

#### **Access to classified documents - Article 30**

There is no policy and timeframe for the classification of information.

#### **Appeals - Chapter III - Guarantees Against Infringement**

This section is lacking the required detail to make it operational. The following is unclear;

Whether an administrative appeal is to be made prior to appealing in a court

- The meaning of hierarchical recourse
- The constitution, purpose and powers of the document review committee
- Which body has independent oversight to ensure that bodies are operating correctly

#### **Administrative Appeal - Section 25**

Five days to contest a notification within notification of an appeal is too short as there may be delays and hindrances to receipt of the notification. Furthermore, the information requester may need to seek counsel on their appeal in advance. A reasonable timeframe such as 14 days needs to be allocated for this.

#### **Sanctions - Chapter IV**

This entire section is very problematic, and its focus is more on setting sanctions on the disclosure of information with none on those who fail to meet their obligations under the law. Additionally, there are no sanctions for change or destruction of information.