



Government of Samoa

Samoa
Law Reform Commission
Komisi o le Toefuataiga o Tulafono a Samoa

MEDIA REGULATION
Report 10/12

June 2012



GOVERNMENT OF SAMOA

**OFFICE OF THE PRIME MINISTER AND MINISTER FOR THE SAMOA
LAW REFORM COMMISSION**

The Honourable Speaker
THE LEGISLATIVE ASSEMBLY OF SAMOA

In compliance with section 9 (2) of the Law Reform Commission Act 2008, I have the honour to submit to you copies of the Report on Media Regulation, as referred to the Samoa Law Reform Commission for review.

This report sets out the Commission's recommendations from the review of the need for a body to regulate the media and as to the form such a body should take after its public consultations and research on the changes to be in accordance with section 4 of the Law Reform Commission Act 2008.

(Honourable Tuilaepa Lupesoliai Fatialofa Dr. Sailele Malielegaoi)
**PRIME MINISTER AND MINISTER FOR THE SAMOA LAW REFORM
COMMISSION**



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Honourable Tuilaepa Lupesoliai Fatialofa Dr. Sailele Malielegaoi

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(Leota Theresa Potoi)

EXECUTIVE DIRECTOR

SAMOA LAW REFORM COMMISSION

Preface

On 15 November 2011 the Attorney General asked the Samoa Law Reform Commission (**‘Commission’**) to examine the need for a body to regulate the media in Samoa, and to make recommendations for the establishment of such a body (**‘Reference’**).

After conducting preliminary research, on 16 December 2011 the Commission released a discussion paper (**‘Discussion Paper’**) to provide the public and stakeholders with information about this Reference and to present options for reform of the current regulatory framework for the media in Samoa. The Discussion Paper also provided some background about the need for media regulation and gave examples of the regulatory regimes operating in other jurisdictions. The Commission requested submissions in response to the Discussion Paper and the questions it posed.

The Journalists Association of Western Samoa (**‘JAWS’**) requested to meet with the Commission for a briefing about the Reference and to discuss the options for reform presented in the Discussion Paper. Ultimately that meeting, held on 8 February 2012, took the form of a broader consultation with media representatives both from within and outside JAWS (**‘Consultation’**). At the Consultation, the Commission presented the Discussion Paper and explained the options provided in it. Stakeholders were then invited to give their views, which were transcribed by the Commission and taken into consideration during the drafting of this Final Report (**‘Report’**).

Five written submissions were received. These have assisted the Commission greatly in formulating the recommendations provided in the final section of this Report (**‘Recommendations’**). In addition to the information gathered from stakeholders, the Recommendations were informed by the Commission’s review of Samoa’s media framework in its social and cultural setting, our examination of attempts at initiating a system of media regulation in Samoa, and independent research about the systems used to regulate media in other jurisdictions. This research included a study of lessons learnt over decades of press regulation in countries including Australia, New Zealand, South Africa and the United Kingdom.

The Commission thanks the stakeholders for their input, in particular those who provided written submissions. The Commission also thanks the Hon Ray Finkelstein QC for his assistance during the drafting of this Report and Anna Dziedzic for her contribution towards editing and proof-reading.

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1. Introduction

Terms of Reference

1.1 This Reference was given in general terms by the Attorney General, and was understood to involve two tasks: firstly to examine the need for media regulation in Samoa; and secondly to make recommendations about what form such regulation should take. To carry out this work, the Commission had to consider the issues that regulation seeks to address, whether there are alternatives to regulation and, if regulation is necessary, how it can be designed to best fit Samoa's needs.

1.2 The Commission identified during preliminary research that some form of media regulation was needed. In order to make sensible and appropriate recommendations about the form such regulation should take, it was then necessary to consider the following factors:

- the role of education and training within or alongside regulation;
- the identity and structure of a regulating body;
- composition of the regulating body and the appointment of personnel;
- how a complaints system would operate;
- the nature and extent of the powers of the regulating body, including orders available and enforcement options; and
- sources of funding.

1.3 The specific content of any codes of conduct or professional guidelines has not been addressed in this review. The Commission is of the view that the design of such documents is a task for the media industry, or for a regulating body working with representatives from the industry.

1.4 It was implicit in the Attorney General's request that the crux of this Reference related to 'news media'. The Commission has therefore limited its review and Recommendations to this large sub-group of the media. For the purpose of the Reference, the Commission considers news media to include print media (newspapers and magazines) and broadcast media (television, radio and internet sites) that present and disseminate information about current affairs, with or without analysis and opinion.

Overview

1.5 The Commission begins Chapter Two by considering the existing regulatory framework in Samoa against the backdrop of the current media landscape – newspapers, magazines, television, radio and internet. Following this is a description of some of the laws that affect

the media in Samoa, and a brief survey of the social, geographical, technological and other factors that determine the need for media regulation in our country.

- 1.6 In Chapter Three, the Commission asks, *why do we regulate media?* This is a discussion of the theories behind media regulation, based on the special role the media plays in society as a fourth arm of accountability for government, and as the disseminator of information ‘the public has a right to know’. These theories are then discussed with examples from Samoan news media.
- 1.7 Having ascertained the real purpose of media regulation and the key areas of concern for Samoa’s news media, the Commission presents in Chapter Four various possibilities for achieving effective regulation. The techniques discussed span from education and training, through formal regulatory bodies, to the law as a means of regulation.
- 1.8 After exploring these options, the Commission summarises in Chapter Five the views presented in written submissions and during the Consultation. The key arguments and proposals given by media representatives are synthesised to illustrate the common viewpoints and divergent opinions shared with the Commission.
- 1.9 In Chapter Six the Commission presents its Recommendations for reform, which are based on the preceding analysis of the Commission’s independent research and discussions with stakeholders.

2. The Media and Media Regulation in Samoa

Samoan news media

2.1 The public in Samoa has access to a selection of locally operated print and broadcast news outlets.

Press

2.2 There are several print news providers, but the Samoa Observer (**‘Observer’**) is the only daily newspaper. It is bilingual and provides articles on its website, available by subscription. There is also a tri-weekly periodical (Newsline) and a government owned newspaper (Savali), along with other less frequent publications including a recently established monthly magazine (Apia Financial Review). Ownership is varied across these publications.

Broadcast Media

2.3 The Office of the Regulator keeps an up to date register of television and radio stations. There are several television stations offering news content. Most of these are privately owned and operated, and some are operated by church affiliated groups. Of the ten radio stations, Radio Polynesia owns and operates four, while one station is government-owned. The National University of Samoa has a campus radio station funded by the United Nations Educational, Scientific and Cultural Organisation (**‘UNESCO’**).

2.4 Various websites also provide Samoan news content. It is difficult to ascertain whether the websites are run locally. The Commission is not aware of any central register listing Samoan news websites.

2.5 In general, media ownership in Samoa appears to be diverse and there is no obvious monopoly, as occurs in other countries. In Australia, for example, there are 11 metropolitan and national newspapers, with only three owners.¹ Such concentration of media implies a lack of competition, which can stifle diversity of views and opinions.

Influences on the media landscape

2.6 While Samoa does not suffer badly from limited media ownership, it is not necessarily true to say there is great diversity and healthy competition within the news market. The Observer is the only daily news periodical, for example, and Radio Polynesia runs a large proportion of local radio stations. Lack of choice for the public means that diversity of opinions is less likely to flourish and commercial competition is not a strong influence on professional and ethical standards.

¹ Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (2012) 57.

2.7 A further, perhaps more significant, constraint on reporting standards in Samoa is the lack of access to formal education and training for journalists. One stakeholder described in a written submission the interplay between inadequately trained journalists and poor resourcing of media outlets:

All newsrooms are understaffed and under-resourced and very few journalists from my experience have any sort of formal training. So in addition to meeting tight deadlines you have a situation where not only are journalists overworked, they often have no understanding of the importance of the public interest or what constitutes a fair and balanced story.

2.8 The situation described here fits with the observations made by Thompson Foundation consultant Ian Beales when he visited Samoa in 2005 to examine the need for a media code of practice. Beales discovered anecdotally that the most common complaints about Samoan media related to: ‘basic errors of detail; ignorance of the law; failure to confirm facts, corroborate allegations, or to observe the rules of journalistic confidence; and poor editing of articles or broadcasts’. Other issues raised included ‘fairness and balance in relation to editorial matters’, ‘false or dubious claims in advertising material’ and a ‘perceived lack of political impartiality of the State broadcaster SBC’.²

2.9 The National University of Samoa (‘NUS’) offers a Diploma in Media and Journalism, which covers both theoretical and practical material including media law, ethics and basic skills for writing stories. The Diploma can be completed in two years on a full-time basis but mature age students, including working journalists, are encouraged to undertake their studies part-time. Journalism Lecturer Misa Vicky Lepou has informed the Commission, however, that few have shown interest in enrolling in the course. In the future, according to Lepou, NUS hopes to raise the Diploma to Bachelor level. In the meantime, Samoans interested in pursuing media and journalism studies must move overseas to complete a Bachelor’s degree.

Media freedom in Samoa

2.10 Within its terms of reference, the Commission sees its role as providing recommendations that will enhance rather than inhibit media freedom in Samoa. Independent statistics and the conferral of media freedom awards to Samoan news providers suggest that media freedom in Samoa is reasonably healthy but could be improved.

2.11 The Observer regularly prints a list of media freedom accolades on page 13. These include: World Press Freedom Awards from the International Press Institute (2000, 2010);

² Ian Beales, *Draft Code of Media Practice for Samoa: Consultant’s Report* (2006) ‘The Stage One Report’, paras 4–5 <<http://jawscode.blogspot.com/2006/05/stage-one-report.html>> at 26 April 2012.

Pacific Press Freedom Awards from the Pacific Islands News Association (1994, 2001); an International Freedom of the Press Award from the Index on Censorship (1998); a Commonwealth Press Union Astor Award for Press Freedom (1998); and a special recommendation for the University of Papua New Guinea Pacific Investigative Journalism Award (1997).

2.12 Overall, Samoa is ranked well for media freedom by non-governmental organisations collecting data on media freedom worldwide. In 2011, Freedom House categorised the Samoan press as ‘free’ (albeit barely³), giving a score of 30⁴ on a scale defined by the degree to which a country permits the free flow of information, where 0 is the best and 100 is the worst.⁵ This is down slightly from a score of 29 in the three previous years (without explanation). The 2011 score compared well against Fiji (57, ‘partly free’) and Tonga (31, ‘partly free’) and was worse than the ratings for Solomon Islands (29, ‘free’), Papua New Guinea (25, ‘free’) and Vanuatu (25, ‘free’).

2.13 Last year Reporters Without Borders ranked Samoa equal 54th out of 179 countries surveyed for press freedom.⁶ The significant improvement from 111th position in 2010 is not explained.⁷ In the 2011 result, Samoa fared worse than Papua New Guinea (35th) but better than Tonga (equal 63rd) and Fiji (equal 117th).

2.14 While these results are positive, Samoa is on the cusp of being considered only ‘partly free’ by at least one of these organisations and it is important that media freedom improves rather than declines. In past reports about media freedom in Samoa, Freedom House and Reporters Without Borders have listed as their primary concern laws that may be considered to oppress media freedom, rather than day-to-day governmental pressure on the media.

2.15 In 2008, Freedom House reported that ‘[w]hile the constitution protects press freedom in Samoa, the Defamation Law of 1992 contains provisions on criminal and civil libel that remain of concern.’⁸ In its 2004 report, Reporters Without Borders referred to calls by (Editor in Chief of the Samoa Observer) Savea Sano Malifa to abolish the ‘Printers and Publishers Act [sic] which can be used to make editors reveal their sources’. The

³ Countries receiving a score of 0–30 are considered ‘free’; those rating 31–60 are ‘partly free’; and those scoring 61–100 are ‘not free’.

⁴ Freedom House, *Freedom of the Press* <<http://www.freedomhouse.org/report/freedom-press/2011/samoa>> at 24 April 2012.

⁵ Freedom House, *Methodology* <<http://www.freedomhouse.org/report/freedom-press-2011/methodology>> at 24 April 2012.

⁶ Reporters Without Borders, *Press Freedom Index 2011* <<http://en.rsf.org/press-freedom-index-2011-2012,1043.html>> at 23 April 2012.

⁷ Reporters Without Borders, *Press Freedom Index 2010* <<http://en.rsf.org/press-freedom-index-2010,1034.html>> at 23 April 2012.

⁸ Freedom House, *Freedom of the Press 2008: Samoa* <<http://www.freedomhouse.org/report/freedom-press/2008/samoa>> at 24 April 2012.

organisation also commented that ‘Prime Minister Sailele Tuilaepa’s administration lets the independent press report the news freely. But a government plan to impose a code of ethics on journalists has been criticised by the few privately-owned news media’.⁹

2.16 In relation to this last comment, the Commission is unaware of any government plan to ‘impose a code of ethics on journalists’, but understands that Prime Minister Tuilaepa Lupesoliai Sailele Malielegaoi in 2003 had urged the media to introduce its own code of practice.¹⁰ These calls have been repeated and renewed, particularly after reporting on the tsunami that hit Samoa in September 2009.¹¹

2.17 Recognising the need to protect and further develop media freedom in Samoa, the Commission examines below how the current regulatory framework promotes a free and trustworthy media. We consider the implications for media freedom of existing laws, and make recommendations that aim to protect individual rights without jeopardising the media’s right to publish information the public has a right to know.

Media regulation in Samoa

2.18 At present the news media in Samoa is not made accountable to the public through an organised system of regulation. There is limited self-regulation within some media organisations, such as letters to the editor in print publications and a talk-back session on at least one radio station. JAWS adopted an unenforceable Code of Ethics in 1989, and a Broadcasting Regulator is established under the *Broadcasting Act 2010* but has not yet adopted any regulatory role for news media content.

Journalists Association of Western Samoa

2.19 The Journalists Association of Western Samoa is an organisation of voluntary members which aspires to:

- promote cooperation among local journalists and others working in the media, information and public relations sectors;
- promote an understanding of the role of journalism in the community;
- organise activities that promote the aims and values of the Association;
- undertake activities that will lead to improved training of members and increase professionalism;

⁹ Reporters Without Borders, *Samoa – 2004 Annual Report* <<http://en.rsf.org/samoa-samoa-2004-annual-report-03-05-2004.10219.html>> 24 April 2012.

¹⁰ Ian Beales, *Draft Code of Media Practice for Samoa: Consultant’s Report* (2006), ‘Introduction’ <<http://jawscode.blogspot.com/2006/05/introduction.html>> at 24 April 2012.

¹¹ See, for example, Tuilaepa Sailele Lupesoliai Malielegaoi, *Remarks*, Post Tsunami Samoa Editors’ Forum (17 November 2009) published on Journalist Association of Western Samoa website <<http://jawsamoa.blogspot.com/>> at 3 May 2012; and Lanuola Tusani Tupufia, ‘Prime Minister remembers’, *Samoa Observer* (Apia), 28 May 2012, 1, 5.

- establish and uphold a code of ethics;
- establish and maintain contact with like-minded regional and international organisations; and
- develop and maintain freedom of information and expression.¹²

2.20 JAWS' Code of Ethics is published from time to time by media providers. The Code is not enforceable but members seek to uphold it as part of their mutual obligations to the profession, as recognised in the JAWS Constitution.

2.21 The JAWS Code of Ethics emphasises above other values the duty of journalists to serve the truth and the 'public's right to know of events of public importance and interest'.¹³ It recognises media freedom not only as a right but as a responsibility for journalists to uphold, and acknowledges that this responsibility entails obligations to report objectively, accurately and thoroughly and to avoid external influences that might cloud the ultimate objective to reveal the truth.

2.22 The obligations set out in the JAWS Code of Ethics are ascribed to 'individuals whose competence, experience and judgment qualify them for it'.¹⁴ To this end, JAWS pledges to 'encourage individual journalists to adhere to [its] tenets' through 'programmes of education, training and other means'.¹⁵ It also accepts that journalists are accountable to the public and that the public should be encouraged to voice grievances against the media.

2.23 Despite being unenforceable, the JAWS Code of Ethics is a significant document. Through the affirmations made in the drafting and continual publishing of the Code of Ethics, Samoa's journalists demonstrate their commitment to the ethical obligations that come with their position, as well as a willingness to strive to improve journalistic standards.

2.24 Consistently with this commitment, JAWS some years ago identified a need to develop a media code of practice and to investigate the establishment of a self-regulating media council to enforce such a code. With funding and support from the Thompson Foundation and the Commonwealth Media Development Fund, JAWS engaged consultant Ian Beales to examine the need for a code of practice and to draft a code. If the code was generally accepted by JAWS, Beales was then to investigate the need for, and form of, a regulatory body to support it.

¹² Journalists Association of Western Samoa, *Constitution*.

¹³ JAWS, *Code of Ethics* (1989) [I].

¹⁴ *Ibid.*

¹⁵ *Ibid* [VI].

2.25 Having found ‘widespread support’ for a code of practice among government, opposition, civil society and most media providers,¹⁶ Beales completed a draft code and submitted this with his consultant’s report in 2006 (**‘Beales Draft Code of Practice’**: see Appendix D). The draft, which was never officially adopted by JAWS, is misleadingly published under the heading ‘Code of Ethics’ on the JAWS website.¹⁷ Presumably because there was no consensus about the document, Beales never completed the next stage of the project: to determine whether Samoa needed a media council.

Broadcasting Regulator

2.26 Parliament enacted the *Broadcasting Act 2010* to establish a new framework for the broadcasting sector, including a Regulator (s 5) and a Broadcasting Tribunal (s 11). The *Broadcasting Act* focuses mainly on the development and promotion of broadcasting services in Samoa, and on providing fair and equal access to these services, including through a licensing scheme. There is also some provision for content regulation.

2.27 Insofar as the *Broadcasting Act* sets up a system for regulating media content, the system is limited to media outlets that provide a broadcasting service, and does not extend to print media. ‘Broadcasting service’ is defined as ‘the electronic delivery of programs or advertisements in any format, including but not limited to radio, video and internet protocols by means of a broadcasting facility’.¹⁸

2.28 The Broadcasting Regulator, appointed by the Head of State and acting on the advice of Cabinet,¹⁹ may be the same person who acts as Telecommunications Regulator,²⁰ or can be designated as a separate regulatory body within or outside Samoa.²¹ The Head of State has appointed Telecommunications Regulator Mr Donnie De Freitas as Broadcasting Regulator.

2.29 The broad responsibilities, functions and powers of the Regulator, set out in s 7 of the *Broadcasting Act*, include the following duties relating to content-regulation:

- to publish, monitor and enforce standards, classification and scheduling of programs (s 7(g));
- to resolve disputes between service providers and customers (s 7(h));
- to publish, monitor and enforce codes of practice to facilitate implementation of the *Broadcasting Act* (s 7(n));

¹⁶ Ian Beales, *Draft Code of Media Practice for Samoa: Consultant’s Report* (2006) ‘The Stage One Report’, para 7 <<http://jawscode.blogspot.com/2006/05/stage-one-report.html>> at 26 April 2012.

¹⁷ Journalists Association of Western Samoa website <<http://jawsamoa.blogspot.com/>> at 26 April 2012.

¹⁸ *Broadcasting Act 2010* s 2.

¹⁹ *Ibid* s 5(1).

²⁰ *Ibid* s 5(10).

²¹ *Ibid* s 5(3).

- to make orders to compel a person to comply with a regulation, rule, code of practice or licence, or implement the purposes of the Act (s 7(p));
- to investigate complaints against licensees or other service providers, and conduct such other investigations as the Regulator deems necessary to ensure compliance with the Act and with any regulation, rule, code of practice, licence or order, and issue an order in respect of anything prohibited, required or permitted to be done (s 7(q)); and
- to take such other actions as are reasonably required to carry out the Act, the regulations, rules or codes of practice (s 7(t)).

2.30 Any orders issued by the Broadcasting Regulator, including those compelling a person to comply with a code of practice, may be appealed to the Broadcasting Tribunal.²² The Broadcasting Tribunal is established under s 11 of the *Broadcasting Act* and comprises a judge or lawyer as presiding member²³ along with a panel of Tribunal members appointed by the Head of State, acting on the advice of Cabinet.²⁴

2.31 The Broadcasting Regulator's existing functions mostly relate to licensing and spectrum issues, including addressing customer complaints about quality of service. Beyond that, the Regulator has not assumed a function in relation to content and standards monitoring, and no code of practice for broadcast media has been published.

2.32 In the absence of a structured system of media regulation, Savea Sano Malifa, Editor in Chief of the Samoa Observer, has argued that Samoa's laws fill the gap by fulfilling the role of a media regulator.²⁵ It is apposite now to consider the extent to which the law in Samoa operates to regulate the media.

Laws and the media in Samoa

2.33 Freedom of speech is a fundamental right and is protected, with limitations, under art 13 of Samoa's Constitution. All Samoans have the right to freedom of speech and expression, but laws passed by parliament may impose 'reasonable restrictions' on the exercise of the right if this is:

In the interests of national security, friendly relations with other States, or public order or morals, for protecting the privileges of the Legislative Assembly, for preventing the disclosure of information received in

²² Ibid s 10.

²³ Ibid s 12.

²⁴ Ibid s 13.

²⁵ Savea Sano Malifa, interview with Geraldine Coutts, 'Samoa Journalists Divided over Proposed Media Council', *Pacific Beat*, Radio Australia (13 February 2012)

<<http://www.radioaustralia.net.au/international/radio/onairhighlights/samoa-journalists-divided-over-proposed-media-council>> at 24 April 2012.

confidence, or for preventing contempt of Court, defamation or incitement to any offence.²⁶

2.34 Three noteworthy pieces of legislation fall under the ‘defamation’ exception in art 13 of the Constitution.

1. Section 84 of the *Crimes Ordinance 1961* establishes the criminal offence of ‘defamatory libel’, based on the civil law of libel and punishable by 6 months imprisonment.
2. The *Defamation Act 1992/1993* amends the common law ‘relating to libel and slander and other malicious falsehoods’.²⁷
3. Section 10 of the *Newspapers and Printers Act 1992/1993* provides that a defendant in defamation proceedings (civil or criminal) can be compelled to provide information about its sources.

Criminal Defamation

2.35 In its Final Report on the *Crimes Ordinance 1961*, the Commission recommended that s 84 be repealed in the interests of free speech.²⁸ The Commission understands that the amendments to the *Crimes Ordinance* currently being considered by the Parliamentary Select Committee include the repeal of s 84.

Civil Defamation

2.36 An action in defamation remains available under the civil law to provide remedies to a person whose reputation has been wrongfully damaged by a false statement communicated to a third person.²⁹ This law applies equally to journalists, editors, publishers and media organisations as to other legal persons, but because the media wields a special power to widely communicate information about others, defamation law is particularly pertinent for reporters. Samoa’s civil defamation laws are derived from the laws that evolved in the United Kingdom and now also operate in New Zealand and Australia. The operation of the common law of defamation is modified by statute.³⁰

2.37 A recent decision of the Supreme Court found against the owner of Samoan television station TV3 for defamation, awarding \$130,000 to the plaintiff.³¹ Ponifasio, a candidate for the Tautua Party in the 2011 general elections, complained that the defendant had defamed him in a news broadcast aired on 28 February 2011. The essence of the claim was that filmed

²⁶ *Constitution of the Independent State of Samoa 1960* art 13(2).

²⁷ *Defamation Act 1992/1993*, long title.

²⁸ Samoa Law Reform Commission, *Final Report: Crimes Ordinance 1961*, Report 01/10 (2010) 64 R48.

²⁹ See, for example, *Ponifasio v Apia Broadcasting Ltd* [2011] WSSC 136; CP 74 of 2011 (13 December 2011) [26].

³⁰ *Defamation Act 1992/1993*.

³¹ *Ponifasio v Apia Broadcasting Ltd* [2011] WSSC 136; CP 74 of 2011 (13 December 2011).

portions of meetings held by Ponifasio’s rival candidate selected for broadcast gave an unbalanced and derogatory view of the plaintiff, and were designed to portray him as someone who: ‘is a thief, a dishonest and fraudulent person who could not be trusted; is not worthy to be a leader or a representative in Parliament; is a disgrace; is irresponsible; is incompetent’.³² The presiding judge dissected the comments broadcast and found this to be the case.³³

2.38 In his reasons for judgment, Slicer J made the following observations about the importance of media freedom for democracy, and the attendant responsibility of news reporters to be honest and fair:

Elections and the right of citizens to recall or replace a government are central to any political process or governance irrespective of the form of ‘democracy’ adopted by a nation state. A free, honest and fearless media is essential to that process. Samoa has been fortunate in that regard. The media ought be able, without interference by the Executive or Judiciary to express or state its own opinions on matters of public interest. It is often called the ‘Fourth Estate’. But its power and public duty are accompanied by the responsibilities of honesty and fairness.³⁴

2.39 Civil defamation suits do not arise often in Samoa’s courts. In *Ponifasio v Apia Broadcasting Ltd*, Slicer J listed and applied six defamation cases from the last three decades.³⁵ Civil proceedings are costly to run and an award of damages is rarely suitable recompense for a reputation damaged or destroyed. Nevertheless, the availability of civil defamation proceedings is important in any democracy as a means to seek justice in the courts for wrongful damage to reputation.

Newspapers and Printers Act and Journalists’ Privilege

2.40 The *Newspapers and Printers Act 1992/1993* provides for a system of registration for all newspapers and printers. Section 10 has been of particular interest during this Reference. It reads:

Discovery in case of defamation in newspaper - Where in any proceedings the plaintiff claims discovery of the name of the printer or publisher of any newspaper or of any matter relating to the printing or publishing thereof, including any correspondences, written materials or other sources of information whatsoever, in order to enable him or her more effectually to bring or continue an action for damages on the ground of any defamatory statement therein concerning him or her, the defendant shall not be permitted to dispute that claim, but shall be compellable to make the discovery thereby required:

³² Ibid [16].

³³ Ibid [30]–[34].

³⁴ Ibid [3].

³⁵ Ibid [28].

PROVIDED THAT no discovery shall be used for any purpose in any proceeding other than that in and for the purposes of which the discovery is made.

2.41 Journalists have criticised this provision on the basis that it undermines the principle of ‘journalists’ privilege’, which applies in many comparable jurisdictions to prevent journalists from being compelled to reveal their sources. This privilege, acknowledged as ‘the newsman’s ethic’ in the JAWS Code of Ethics,³⁶ is designed to provide protection for journalists’ sources and, in so doing, to safeguard freedom of speech and media freedom by enabling and empowering people to safely speak the truth.³⁷

Overview of Samoa’s media landscape

2.42 Samoa’s media environment consists of a small but active selection of print and broadcast outlets. Media freedom has been rated by independent organisations as fairly healthy but not thriving. Such organisations have expressed concerns that some Samoan laws may operate to oppress media freedom.

2.43 Due to Samoa’s small size, economy and population, there is relatively little choice in print and broadcast providers for the news-consuming public. The same attributes have contributed to limited access for journalists to professional training and education in Samoa. Many of the shortcomings of Samoa’s media – relating to accuracy, relevance, privacy and balanced reporting – can be attributed principally to insufficient training.³⁸

2.44 Recent and ongoing reviews of the media and media regulation in other jurisdictions have focused on ‘media convergence’ and the proliferation of news media outlets, particularly on the web. Some have pointed to the blurred lines between private bloggers and genuine news media providers.³⁹ The influence of online media has been less in Samoa than in other jurisdictions due to limited access to technology. In 2006 less than five percent of households had access to internet.⁴⁰ But growth in this area is inevitable. We expect to see a significant increase in this figure from the 2011 census, and any system of regulation must be able to cope with changes in the way news is delivered.

³⁶ JAWS, *Code of Ethics* (1989) [III.5].

³⁷ See further discussion in Chapter Six, ‘*Newspapers and Printers Act*’.

³⁸ Ian Beales, *Draft Code of Media Practice for Samoa: Consultant’s Report* (2006) ‘The Stage One Report’, para 3 <<http://jawscod.blogspot.com/2006/05/stage-one-report.html>> at 26 April 2012.

³⁹ For example: New Zealand Law Commission, *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age*, Issues Paper 27 (December 2011) 23; Australian Government, *Convergence Review*, Final Report (March 2012) 40.

⁴⁰ Samoa Bureau of Statistics, *Population and Housing Census Report 2006* (July 2008).

2.45 These factors make Samoa’s media landscape unique. Each has been taken into consideration by the Commission in answering the questions whether media regulation is needed in Samoa and, if so, what form it should take. The following Chapter explores the first of these questions.

3. Is Media Regulation Justified?

3.1 Few would dispute the vital role journalists and the media play in a democratic society. Commonly termed the ‘Fourth Estate’, the media, in discharging its responsibility to speak the truth about matters of public concern, provides a unique form of accountability for the other three arms of government – the executive (cabinet), the legislature (parliament) and the judiciary (the courts). The media also has a role in keeping individuals and groups in society accountable for their actions. This responsibility is properly carried out by investigating and providing the facts in a way that allows people to be sufficiently informed to make their own judgments.

3.2 By virtue of their position, journalists often have access to information the public does not. They are expected to disseminate information about public institutions and private organisations in order to facilitate the public’s fuller participation in politics and to enable citizens to exercise their democratic responsibility to choose who governs them. The media provides a voice to the people and can in fact *be* the voice of the people – publishing or broadcasting messages more widely than most individuals are able.

3.3 Along with this responsibility comes great power. People rely on the media to provide information that is accurate and truthful. Especially in cases where the facts are not available elsewhere, the public is vulnerable to incorrect information and to media that tells it what to think rather than providing the facts upon which people can form their own opinion.

3.4 Whereas in the context of democracy the media is the Fourth Estate, in the context of capitalism it is most often a business competing for profit: ‘an institution with its head in politics, its feet in commerce’.⁴¹ While providing an indisputable check on government and corporate powers, unregulated media is itself an unchecked power, susceptible to the influences of commercial enterprise. Such influences can include: self-interest and the interests of others including sponsors, advertisers and media owners; time pressures; and the demands of the readership – increasingly hungry for entertainment – against the backdrop of a need to sell the news. These pressures can lead to transgressions of professional and ethical reporting standards, perhaps most often unwittingly. Influence can lead to unbalanced or

⁴¹ George Boyce, quoted by Julianne Schultz and cited in Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (2012) 37.

biased reporting; time pressures can cause inaccuracies; and the pursuit of a story that will sell can result in breaches of privacy.

3.5 Because of its duty to share information that others would not – or could not – the media is often seen as a bastion of free speech. Indeed, free speech is a central ingredient for effective media. In order to properly understand the media’s relationship with free speech, however, two points must be considered.

3.6 Firstly, freedom of speech and media freedom are not synonymous. There is an imbalance between the way a private individual enjoys freedom of speech and the way a publishing or broadcasting journalist enjoys freedom of speech. While every person in an effective democracy has the power of expression, only a few can exercise the power of the media, whose voice reaches many more and is expected to speak the truth. If this power is not exercised carefully and within appropriate limits, it can result in harm to the individual, which is sometimes irreversible. Media freedom therefore comes with expectations and duties that plain freedom of speech does not require.

3.7 Secondly, neither freedom of speech nor the freedom of the media is an unqualified right. To argue that these rights are absolute implies an assertion that they are supreme over all other rights and public interests. Limitations on the right to free speech are recognised under international and domestic law. Article 19 of the *International Covenant on Civil and Political Rights*,⁴² to which Samoa is a party, acknowledges that the right to freedom of speech comes with special duties and responsibilities. Because of this, its exercise may be subject to certain restrictions as are necessary: ‘(a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals’.⁴³ Article 13 of Samoa’s Constitution also ascribes various limitations to the right of freedom of speech, as discussed above in Chapter Two, ‘Laws and the media in Samoa’.

3.8 Perhaps the most often recognised limitation on freedom of speech and media freedom is the right to privacy, which must be acceptably balanced with the public’s right to know. The ability of citizens to understand the right to privacy and to identify breaches of it may be more problematic in Samoa where traditional emphasis on communal life tends to take precedence over the right to privacy as developed in other parts of the world. This may contribute to misconceptions about the ambit of information the public has a right to know.

⁴² Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁴³ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171, art 19(3) (entered into force 23 March 1976).

3.9 One stakeholder couched the principle in the following way. ‘Is what I am about to report on within the public interest? If so, will the information I am about to report on cause harm to anyone? If the answer is yes, does the public interest justify the harm caused?’ The same stakeholder also reiterated the familiar observation that matters ‘of interest to the public’ are not necessarily the same as matters ‘in the public interest’. The public will be interested in a whole range of issues, but as one commentator has pointed out, ‘[t]he public interest does not mean just satisfying the curiosity of the public’.⁴⁴ Often the sort of information the public is interested in or curious to know will be information that infringes upon the privacy of another. Some examples from the Samoan media help to illustrate this.

Interpretation of media freedom in the Samoan media

3.10 In October 2011 the Samoa Observer printed in full (as requested by Misi Matamu, the alleged letter-writer) a letter, sent by email, from a former police officer serving a sentence in Tafaigata Prison. The letter provided details of an extra-marital affair between Misi Matamu’s wife and another police officer. It also revealed that that police officer’s girlfriend was pregnant.⁴⁵

3.11 Two days later an apology was published by the Observer after Mr Matamu contacted the newspaper claiming that he did not write the letter and did not have an email address. According to the apology, Editor Keni Mata’afa Lesa had made the decision to publish the letter because he had no reason to believe that it was not written by Mr Matamu and because ‘the letter writer’s side of the story deserved to be told’.⁴⁶ In March this year it was revealed that another police officer was being investigated for having fabricated the email.⁴⁷

3.12 While the Observer must be congratulated for having published an apology as soon as its error came to light, the letter itself, and the lasting impact on those implicated in it, could not be retracted once published. The decision to publish the letter raises several concerns. First, despite requesting the daytime contact details of all letter writers, the Observer failed to verify that this very sensitive and controversial email was genuine. Secondly, the Editor saw fit to publish a letter that, while it may have been very interesting to the public, did not reveal any matter that it was in the public interest to know. Thirdly, even if the public interest had justified publishing the letter because it exposed moral corruption within the police force, the private interests of the individuals named therein – Mr Matamu’s wife, the man with whom

⁴⁴ Phil Harding, ‘Journalists need a workable definition of “the public interest”’, *BBC College of Journalism* (27 January 2012) <<http://www.bbc.co.uk/journalism/blog/2012/01/journalism-ethics-do-ends-just.shtml>> at 24 May 2012.

⁴⁵ Letter to the editor, ‘Truth about police affairs’, *Samoa Observer* (Apia), 24 October 2011, 13.

⁴⁶ ‘It was not Misi Matamu’s letter’, *Samoa Observer* (Apia), 26 October 2011, 8.

⁴⁷ Marieta Heidi Ilalio, ‘Police probe fake email being created by female officer’, *Samoa Observer* (Apia), 9 March 2012 http://www.samoaoobserver.ws/index.php?option=com_content&view=article&id=38377:police-probe-fake&catid=1:latest-news&Itemid=50 at 3 May 2012.

she was accused of having an affair, that man's allegedly pregnant girlfriend, and Mr Matamu himself – were not respected.

3.13 More recently, in April this year, the Observer ran a cover page story and follow-up article about a 13 year old girl from a village in Upolu who, having been born with four nipples, was now developing two extra breasts.⁴⁸ A large photo of the child's naked torso, showing the four breasts, was printed on the front page of the newspaper. The Beales Draft Code of Practice states the following in relation to reporting on children:

1.3 (ii) Children under 16 should be free from unnecessary intrusion. Material concerning a child's private life should be published or broadcast only if there is some exceptional public interest other than the fame, notoriety or position of his or her family or guardian.⁴⁹

3.14 While it could be argued that the article was printed in the public interest (to raise money for the girl to undergo an operation for the removal of the extra breasts), it is difficult to conceive that this interest outweighed the girl's right to privacy. Although the writer took measures to conceal the identity of the young girl and her family – changing their names and not showing the girl's face – a mobile phone number was provided, which could lead to the identification of the girl.

3.15 Media freedom is not a freedom to publish or broadcast whatever material the journalist wishes. In addition to privacy, other considerations must be taken into account in the production of news. These include accuracy, balance and honesty. In the haste to publish or broadcast matters of interest to the public (which may also be matters in the public interest), these standards can be forgotten or neglected.

3.16 On more than one occasion Prime Minister Tuilaepa has registered concern about the accuracy of reporting in the aftermath of the tsunami that killed 143 people in Samoa and devastated parts of the southern coastline on 29 September 2009. At a recent international meeting of Pacific leaders, the Prime Minister described unhelpful media reports that were 'either incorrect or designed to sensationalise'.⁵⁰ Soon after the tragic event, at a Post-Tsunami Samoa Editors' Forum, Prime Minister Tuilaepa had urged the media to improve and maintain high standards, and to establish a media council in Samoa:

Let me say again that there is no question about the importance to our societies of a media that is able to report news in complete freedom, express opinions and make criticisms without fear of repression. The media's power to influence public

⁴⁸ Jasmine Netzler-Iose, 'Rare Condition – Teenager with four breasts', *Samoa Observer* (Apia), 16 April 2012, 1; Jasmine Netzler, 'Family ecstatic over offer of operation', *Samoa Observer* (Apia), 30 April 2012, 1.

⁴⁹ Ian Beales, *Draft Code of Media Practice for Samoa: Consultant's Report* (2006) 'General Media Code of Practice' [1.3] <<http://jawscod.blogspot.com/2006/05/stage-one-report.html>> at 26 April 2012.

⁵⁰ Lanuola Tusani Tupufia, 'Prime Minister remembers', *Samoa Observer* (Apia), 28 May 2012, 1, 5.

perceptions is a powerful force and is precisely the reason why the media must also accept and observe the great responsibility of ensuring balanced and fair reporting of news and stories.

This is the context of why I kept reminding our media over the weeks following the Tsunami of the importance of maintaining standards of reporting by ensuring that you do not rely on rumours and hearsay but to go and see personally whether a version provided to the reporter is credible, find out what is in fact the widely held view and then report accordingly.

In a sensitive and highly charged situation, such as in the aftermath of the Tsunami, it becomes even more important that the reporter feels assured that the media story is balanced and presents a full picture of what is going on. I do not need to remind on the key roles of the editor and publisher in this process.⁵¹

3.17 Accuracy and sensitivity were forgotten again in the rush to broadcast information about the impact of flash floods at Vasigano earlier this year. A letter to the editor of the Samoa Observer on 19 March 2012 described a broadcast on Radio Polynesia by a television news correspondent from TV1, reporting live from the scene at Vasigano. The journalist was said to have reported that twelve people had been killed in the flash floods, with four bodies confirmed found and taken to hospital. Later there were reports that five had drowned. Eventually only one person was confirmed dead.⁵²

3.18 A lack of sensitivity in other instances has verged on discrimination. In his Draft Code of Practice, Ian Beales has included the following statement about discrimination:

1.7 (i) The media must avoid prejudicial or pejorative reference to an individual's race, colour, religion, sex, sexual orientation or to any physical or mental illness or disability.

1.7 (ii) Details of an individual's race, colour, religion, sexual orientation, physical or mental illness or disability should be avoided unless relevant to the story.⁵³

3.19 An article on the cover of Newsline in April 2012 titled 'Flag Burner a Mental Case' was both offensive to those with a mental disability and presumptuous about the mental state of the accused. The first sentence of the report reads, '[t]he 31 year old who tired [sic] to burn the national flag in front of the Government Building last Wednesday morning is a mental case'. This statement was based on information provided by a staff secretary to the Prime Minister and the *pulenu'u* (mayor) from the man's village who is reported as having said, 'I

⁵¹ Tuilaepa Sailele Lufesoliai Malielegaoi, *Remarks*, Post Tsunami Samoa Editors' Forum (17 November 2009) published on Journalist Association of Western Samoa website <<http://jawsamoa.blogspot.com/>> at 3 May 2012.

⁵² Letter to the Editor, 'Get your facts right', *Samoa Observer* (Apia), 19 March 2012, 13.

⁵³ Ian Beales, *Draft Code of Media Practice for Samoa: Consultant's Report* (2006) 'General Media Code of Practice' [1.7] <<http://jawscode.blogspot.com/2006/05/stage-one-report.html>> at 26 April 2012.

first saw him back in the village at church last Christmas and he was talking and acting strangely when I met him'. The article goes on, '[f]urther proof of his mental condition involved a lengthy but unsuccessful series of attempts to see the Prime Minister Tuilaepa Sailele Malielegaoi in his office'.⁵⁴ The report was based largely on gossip and speculation and was fuelled by idle public curiosity rather than public interest.

3.20 An article with similar features – this time with racially offensive material – appeared on the front page of the Samoa Observer on 7 June 2011. A photo and large font heading, 'Fears Allayed: "We are not Muslims, we are Sikhs"' bordered an article purportedly designed to reassure the public that there was no secret conference being prepared by Muslim terrorists in Samoa.⁵⁵ 'A group of turban-clad men became the central cause of fears in Apia last week', reads the first line of the article. 'The rumour mill promoted a secret Muslim Convention in town. Others said it was a group of Pakistanis'. Any undertone of irony, if intended, was unlikely to be caught by the average reader, and the tone of the article, while celebrating the arrival of visiting Sikhs in Apia, served to perpetuate negative stereotypes and bad feelings towards Muslims in Samoa.

3.21 Incidentally, immediately below this front-page article a broadcasting blunder is exposed under the heading 'My brother is not dead'.⁵⁶ The subject of the article contacted the newspaper after his brother was reported on the radio to have been killed when he was hit by a government car. Fortunately the family of the man was able to see the funny side of the situation: "'Suddenly I'm hearing on the radio that my brother is dead when he's not'".

3.22 This small selection of examples illustrates that there is much room for improvement in the standards of news reporting in Samoa. This is not only in the professional interests of journalists but also in the interest of the public – who have a right to know the truth via balanced and accurate reporting – and individuals, whose reputations can be irreparably damaged by inappropriate editorial decisions.

3.23 Ray Finkelstein, in his *Report of the Independent Inquiry into the Media and Media Regulation* (**'Finkelstein Report'**), gave the following synthesis of an explanation by Clifford Christians et al about the dominance of the media in modern political democracies:

Maintaining [an] identity as defenders of democracy had become central in the media's normative position, leading to a process of external evaluation, mainly from the academy, about how the media was performing in this role. However, the authors argue, having gained a moral claim to autonomy and non-interference by government for the purpose of carrying out this mission, the media had become

⁵⁴ 'Flag Burner a Mental Case', *Newsline* (Apia), 13 April 2012, 1–2.

⁵⁵ Aigaletaule'ale' F. Tauafiafi, 'Fears Allayed: "We are not Muslims, we are Sikhs"', *Samoa Observer* (Apia) 7 June 2011, 1.

⁵⁶ Marieta Heidi Ilalio, 'My brother is not dead', *Samoa Observer* (Apia) 7 June 2011, 1.

ambivalent about accepting the society's insistence on being accurately informed about public affairs.⁵⁷

3.24 This appraisal of an unregulated media is reminiscent of the situation in Samoa. It has been described thus by one media stakeholder in a written submission to the Commission: '[t]he local media is by all means enjoying its interpretation of free speech and the exercise of press freedom, [but] the core values and basic principles of journalism are not being observed thus resulting into misperception by the public of the performances of the doing of journalism in Samoa'.

3.25 One important function served by media regulation is to educate both journalists and the public about the role of media freedom and its limits: essentially, the rights and responsibilities of the media. Without this education, the media is more likely to violate its responsibilities and the public is less likely to recognise such violations when they occur.

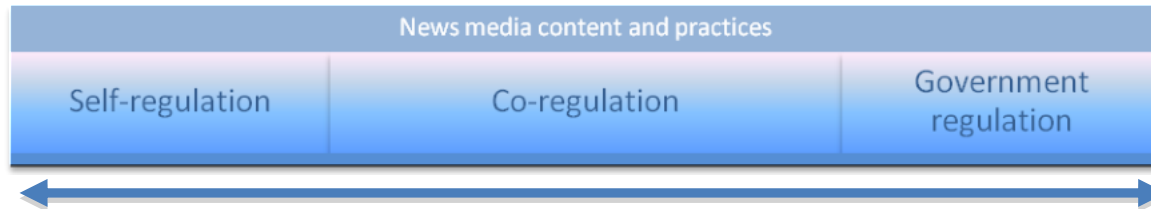
3.26 After years of inaction by the media in addressing these problems of performance and public perception, it is the Commission's view that something must be done. If the publishers and broadcasters who argue that they do not require any regulation are right, they have nothing to fear. In fact, all reporters and news organisations stand to gain more trust from the public who will perceive them as willing to be scrutinised and to take responsibility for their actions.

3.27 The question now is how improvements should be sought: through education and training; through internal regulatory mechanisms implemented by news providers; through a privately established media council; through a statutory regulatory body; or through a combination of measures. The following Chapter explores these options and examines how they have been used in other jurisdictions.

⁵⁷ Clifford Christians, Theodore L Glasser, Denis McQuail, Kaarle Nordenstreng and Robert A White, *Normative Theories of the Media: Journalism in Democratic Societies* (University of Illinois Press, 2009), cited in Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (28 February 2012) 48.

4. Options Available

4.1 In the Discussion Paper, the Commission described the three different forms of regulation defined by the New Zealand Ministry of Consumer Affairs: government regulation; co-regulation; and self-regulation.⁵⁸ The Finkelstein Report illustrates these definitions along a continuum, with government regulation and self-regulation at either end and a series of possibilities under the banner of co-regulation through the middle.⁵⁹



4.2 Other conceptualisations of the spectrum of regulation are more complex and include additional discrete categories: ‘no regulation’; ‘education and information’; and ‘quasi regulation’ (where there is no formal system of regulation but where a government attempts to influence the media in any case).⁶⁰ Whichever notion of media regulation is preferred, there are limits to the usefulness of theorising about discrete forms of regulation. More important than the final label is what methods will work to improve and maintain high journalistic standards across the media industry.

4.3 Logic, along with experience in other jurisdictions, dictates that there are various options which may overlap and operate concurrently. This Chapter assesses how effective the following methods have been elsewhere, and how realistic and valuable they are likely to be in Samoa.

1. **Education and training:** continuing journalistic education for all reporters.
2. **Internal ‘self-help’:** effective systems within media organisations to monitor standards, stimulate awareness of media ethics and the responsibility of news organisations, and address consumer complaints, making corrections where necessary.
3. **External ‘self-help’:** a privately established and organised media council, governed by the media industry and with industry members.
4. **Assistance from outside:** a statutory regulatory body with compulsory participation of all journalists.

⁵⁸ Samoa Law Reform Commission, *Discussion Paper on Media Regulation* (16 December 2011) 1, citing Ian Barker and Lewis Evans, *Review of the New Zealand Press Council* (2007) 8 <www.presscouncil.org.nz/articles/press_council_review.pdf> at 28 June 2012.

⁵⁹ Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (28 February 2012) 270-271.

⁶⁰ *Ibid* 271–273.

5. **The law:** defamation and other laws that seek to place acceptable limits on media freedom.

Education and training

- 4.4 One media stakeholder told the Commission she considers Samoa to be significantly disadvantaged in comparison with other more developed countries such as Australia and New Zealand. Those jurisdictions not only have well-established (if imperfect) systems of media regulation, but provide formal education and training in journalism through a variety of institutions offering Bachelor's degrees, postgraduate degrees and other journalism qualifications. It is not surprising that reviews of media regulation in Australia and New Zealand do not examine lack of training as a prevalent cause of error and breach of professional standards.
- 4.5 In 2006, Ian Beales reported that his evaluation of Samoa's media environment demonstrated anecdotally that complaints about the media 'tended to be related to issues of a perceived lack of professionalism, often due to poor training of journalists and other media practitioners'. Beales remarked that this was not an uncommon phenomenon in 'small national media industries', and that it was being 'addressed in Samoa by the establishment of a media training course at the Polytechnic College and, in best-practice offices by structured in-house training, including on externally validated courses'.⁶¹
- 4.6 While the Commission is optimistic about the developments occurring at the National University of Samoa as described by Senior Lecturer Misa Vicky Lepou and outlined above in Chapter Two, there is a long way to go. Contrary to Beales' comment, the Commission did not hear of any structured in-house training offered to journalists at media offices, and observations from those within the industry suggested that education and training remains a primary concern for improving reporting standards in Samoa.
- 4.7 With or without a formal system of media regulation, ongoing education and training are vital to the improvement and maintenance of high journalistic standards. Without regulation, there is no-one to reliably monitor breaches of journalistic standards. But if journalists are not trained to properly understand their professional and ethical obligations, and if the public is not informed about what to expect from the media, there is nothing to prevent the breach of these standards in the first place or – on a more extreme view – there are no standards to be breached.
- 4.8 As discussed above in Chapter Two, even with a formalised system of education in place, such as the postgraduate journalism degree offered at NUS, the opportunities are not

⁶¹ Ian Beales, *Draft Code of Media Practice for Samoa: Consultant's Report* (2006) 'The Stage One Report', para 3 <<http://jawscode.blogspot.com/2006/05/stage-one-report.html>> at 26 April 2012.

necessarily taken up. Pursuing study may not be considered a priority for those who are already practising journalism and are under constant pressure to produce work. In its written submission to the Commission, JAWS suggested that a media awards night be organised annually in Apia to celebrate the work of top performing journalists. By encouraging news reporters to produce first rate work, media awards may also provide motivation for practising journalists to pursue continuing education and training.

4.9 In addition to in-house training and externally based institutionalised education, an effective system of regulation can be seen as another form of education. Beales commented in his 2006 report that ‘[t]he existence of a workable and enforceable Code of Practice has been found in many countries to be a form of training, by being a constant reminder of the ground rules and raising standards’.⁶² This sort of education not only serves journalists, but ought also to provide the public and the government with a firm understanding of the function of the media and the standards they are required to meet. In any case, it cannot be disputed that ‘[e]ducation, both in journalism training schools and on the job, is an essential feature of good regulation.’⁶³

Internal mechanisms: editorial options

4.10 If options for education and training are not considered effective or sufficient on their own as means to reduce error and raise reporting standards, more formal types of regulation may be required. The first ‘layer’ of formal regulation is in-house self-regulation. This may take the form of:

1. professional standards or a code of practice enforced by the Editor in Chief;
2. means for audience feedback, interaction and critique, including letters to the editor, talk-back radio and ‘*Media Watch*’ style programmes; and
3. a readers’ editor, sometimes called an ‘ombudsman’, employed within a news publishing or broadcasting agency to deal with complaints and monitor compliance with industry codes.

Standards enforced by an editor

4.11 The first of these options is likely to be of limited effect, for reasons already highlighted in this Report. The stressful and competitive news environment is not conducive to thoroughly screening articles for compliance with industry codes. While the Sunday Observer regularly prints a copy of the JAWS Code of Ethics, the examples given in Chapter Three, ‘Interpretation of media freedom in the Samoan media’, show that whatever internal

⁶² Ibid.

⁶³ New Zealand Law Commission, *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age*, Issues Paper 27 (December 2011) 134.

system exists to monitor compliance with the Code, it is not sufficient on its own. Nevertheless, all news media organisations, editors and reporters should be encouraged to be more thorough in ensuring adherence to professional standards.

Outlets for media critique

- 4.12 The second option can be an effective way for the public to be heard about matters concerning the media (as well as other matters). An example is Talofa FM's talkback radio programme, *Moso'oi*. One stakeholder suggested that this programme could be improved if the talkback sessions were pre-recorded. This would enable editors to ensure ethics were observed, and to allow views to be expressed fairly and accurately. Pre-recording too far in advance has the drawback of allowing substantial edits to be made, but radio programmers often apply a delay of 7–10 seconds to ensure that inappropriate content can be removed before it goes to air.⁶⁴
- 4.13 The Samoa Observer often uses its Letters to the Editor section to stimulate public debate and broach issues of importance. In March this year, for example, the Observer published a letter to the editor complaining that a headline story and editorial piece from previous editions of the newspaper were 'very one-sided'.⁶⁵ The impugned articles alleged underhand dealings and revealed certain weaknesses within government Ministries. The letter also derided the Observer's justifications for concealing the sources of their information. Although the Observer had the last word with an editorial in response to the letter,⁶⁶ it could be argued that the publishing of the letter provided an opportunity for dialogue which raised important principles including secrecy of sources and the notion of balanced reporting, and delved deeper into the issues of accountability and transparency raised in the first article.
- 4.14 The interactions with the public provided by letters to the editor and talkback programmes can fulfil one of the core aims of the media, to enrich democracy by encouraging debate and the exchange of opinion. Indeed, this view was published in the Observer's final editorial piece on the matter discussed above:

Why do people bother to write to newspapers? Well, mainly because they have things to say which they think are important for the public to know. So they want the newspaper to publish their views for the world to know what they think ... And the media is there to provide the forum to make that happen.⁶⁷

⁶⁴ For a discussion of the use of delayed programming see, for example, Australian Communications and Media Authority, *Live Hosted Entertainment Radio Programmes: Adequacy of Community Safeguards for the Protection of Participants* (January 2010) 20.

⁶⁵ Asomotu Fa'alava'au, Letter to the Editor, 'One-sided story, editorial', *Samoa Observer* (Apia), 6 March 2012, 12.

⁶⁶ Editorial, 'Response to "Asomotu Fa'alava'au"', *Samoa Observer* (Apia), 12 March 2012, 12.

⁶⁷ *Ibid.*

It is the media, though, that has the power to orchestrate such debates, and in this forum, the media has the final say on whose voices are heard.

4.15 Another way for news providers to ensure balanced reporting and fairness to the individual is to provide a right of reply. A right of reply is a guarantee that individuals and groups who are criticised in a public forum are given an opportunity to defend themselves in the same forum. For example, the British Broadcasting Corporation's Editorial Guideline contains the following fairness principle:

When our output contains allegations of wrongdoing, iniquity or incompetence or lays out a strong and damaging critique of an individual or organisation, those criticised should normally have a right of reply, unless there is an editorial justification to proceed without it.⁶⁸

4.16 The right of reply provides similar benefits to the forums for public discussion discussed above. It can ensure that the public hears the full story and at the same time allows some protection for a person or organisation's reputation.⁶⁹ It also has similar disadvantages associated with the editorial discretion attached to it – including whether there is any right of reply provided at all.

4.17 Some radio stations broadcast announcements offering contact details to listeners who feel the station has breached broadcasting standards, and many newspapers and other publications facilitate an indirect right of reply by providing space for corrections and apologies. The New Zealand Herald reserves a space for corrections on page three of every edition. It invites people to contact the newspaper to have errors corrected, providing telephone, fax and email details. The small section, clearly headed 'Corrections', is used to rectify details such as wrong names, incorrect figures, or opinions and other information that are false or misleading. This service means that basic complaints can be resolved quickly and directly between the complainant and the newspaper. Corrections are always printed in the same place so that they are clear, visible and easy to find.

4.18 In a written submission to the Commission one stakeholder mentioned the Australian Broadcasting Corporation's *Media Watch* television programme as an 'excellent vehicle for promoting media ethics' and a method of informal regulation which 'carries great weight with working journalists'. *Media Watch* is a media analysis programme that exposes and analyses serious instances of media bias and breaches of journalistic ethics and standards, as well as amusing errors in reporting. For a programme like this to be successful, the station broadcasting the programme must be prepared to report on mistakes of its own journalists

⁶⁸ *BBC Editorial Guidelines*, 53 [6.2.3] <<http://www.bbc.co.uk/editorialguidelines/guidelines/>> at 16 May 2012.

⁶⁹ Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (28 February 2012) 248.

and to invest money in a well-produced programme with a format that appeals to a wide audience. If successful, it can also provide an educational role by increasing awareness about journalistic standards and departures from them.

- 4.19 Each of these internal systems foster audience feedback and critique of the media and are positive ways of improving journalistic standards as well as the reputation of media outlets. As such, the Commission recommends in Chapter 6 below (Recommendation 1) that media organisations pursue these techniques in discharging their responsibility to provide the public with information that is fair, balanced and accurate.

Readers' editor

- 4.20 Some news providers employ or contract a media ombudsman or readers' editor to work within the organisation to help monitor compliance with industry standards or private codes of practice, and to settle complaints from the audience internally. The readers' editor is intended to operate independently. If this is achieved, the position has the potential to increase awareness about professional standards among both journalists and the public, as well as to resolve complaints quickly and to the satisfaction of the audience. An effective readers' editor thereby reduces or removes the need for an external complaints mechanism.
- 4.21 As reported by Finkelstein, readers' editors have not been used especially widely in overseas jurisdictions, and have enjoyed varying degrees of success.⁷⁰ Publications and broadcasters using a readers' editor – under various titles – include: the New York Times (United States of America); the Sydney Morning Herald (Australia); the Observer (United Kingdom); CBC Radio-Canada; and the Hindu (India). According to the New York Times, its 'public editor works outside of the reporting and editing structure of the newspaper and receives and answers questions or comments from readers and the public, principally about articles published in the paper. His opinions and conclusions are his own'.⁷¹
- 4.22 The Commission is not persuaded that this solution would remove the need for other forms of regulation in Samoa. First of all, hiring a readers' editor is a private choice for each organisation and news providers may not be in a financial position to fund even a part-time position. Even where a readers' editor is engaged, the Editor in Chief will have the final say on publication, and the commercial pressures of running a 'news business' may still trump any input that person is able to give.

⁷⁰ Ibid 201-203.

⁷¹ The New York Times, *The Opinion Pages* <<http://topics.nytimes.com/top/opinion/thepubliceditor/index.html>> at 8 June 2012.

4.23 Finally, each organisation using a readers' editor is responsible for defining its role and the standards to which it adheres. Resolving complaints satisfactorily at the source is preferable to sending them to an external review mechanism, and the appointment of a readers' editor may assist in reducing errors and increasing awareness about journalistic standards. It will not, however, raise standards across the board or provide the public with the predictability afforded by the adoption of a uniform code of practice applied to all news platforms.

External mechanisms: private and statutory media councils

4.24 External regulatory bodies, often referred to as media councils, have been established in many jurisdictions to ensure fairer, more balanced reporting and to give people a forum through which to lodge a complaint. Some media councils have been set up at the instigation of a group of private media operators, while others have been established by legislation. The form and function of a media council will differ according to factors including: its mandate and composition; who provides funding; how complaints are dealt with; what remedies are available; and whether and how decisions of the council are enforced. If Samoa is to establish a media council, it is important that each of these components is appropriate for the Samoan context.

Private body versus statutory body

4.25 Most media councils throughout the world have been established independently from government processes, while some are supported by legislation or established under statute.

The private media council

4.26 There are several advantages to setting up a news media council privately. The media industry takes ownership of and responsibility for setting the standards it pledges to respect and maintain. In creating and monitoring these standards, working members of the industry bring an understanding of the principles and daily practice of media that no other individual or organisation can offer. The very willingness to establish a private news media council demonstrates a keen interest in improving and upholding the reputation of the media in the eyes of the public.

4.27 In addition, some argue that voluntary adherence to agreed professional standards, combined with peer scrutiny, is more likely to be effective than externally imposed rules and sanctions.⁷² Further, an industry body which operates according to an industry mandate is less likely to be influenced by improper external pressures, including from government.

⁷² See, for example, Miklós Haraszti, 'The Merits of Media Self-Regulation' in Miklós Haraszti (ed), *The Media Self-Regulation Guidebook* (Organisation for Security and Co-operation in Europe, 2008) 15.

Finally, the functions of a private body can be more easily adapted to changing situations and expectations, without the need to amend legislation.

4.28 Seen in another light, the same features of a private body may appear as disadvantages. Depending on its structure and funding, a private media council may not be sufficiently independent from publishers and broadcasters to provide the necessary objectivity to deal fairly with complaints and to secure public trust and confidence. The existence and effectiveness of a private media council relies almost entirely on the willingness of journalists and media organisations to be active in running the council and to agree to be subject to its findings.⁷³ The input of media peers in the decision-making process may be unwelcome and may be rejected. The lack of enforceable remedies may mean that findings of the media council are not taken seriously by journalists and media organisations and that complainant satisfaction is lower. Finally, the ability of a private media council to easily change its core functions could be criticised as lacking accountability and transparency.

The statutory media council

4.29 It is also possible to set up a self-regulatory system through legislation, although recommendations from independent inquiries and threats from governments to this tune tend to be met by strong opposition from the media industry. Some have argued that ‘enforced self-regulation’ is an oxymoron.⁷⁴ This argument – that it is not self-regulation if parliament requires it to be done – does not hold up against a media council established under statute but still under the control and direction of the media industry.

4.30 A more convincing argument against the establishment of a regulatory body is that the potential for government influence constitutes a threat to media freedom and hence to free speech. In reality, though, questions of independence and influence are more accurately tied to issues such as form, substance and funding. A body established by statute can be designed and can operate independently in precisely the same way as a private body established by the media industry.

4.31 Some argue, however, that the ability of parliament to amend legislation before or after it has been passed exposes the self-regulatory nature of such a body, or its independence, to being gradually whittled away.⁷⁵ This is certainly possible to the extent that governments,

⁷³ See, for example, criticisms of the Australian Press Council in Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (28 February 2012) 235.

⁷⁴ See, for example: Joseph Fernandez, ‘Finkelstein Inquiry too flawed to lead to real reform’ (15 March 2012), *The Conversation* <<http://theconversation.edu.au/finkelstein-inquiry-too-flawed-to-lead-to-real-reform-5732>> at 17 May 2012; Editorial comment of the Sydney Morning Herald, ‘Media cure would be worse than the disease’, *Samoa Observer* (Apia) 8 March 2012, 15.

⁷⁵ Lord Hunt and James Harding cited in Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (28 February 2012) 212–213; Grey Hywood, interview with Amy Bainbridge, ‘Austar boss fears

even in democracies, may legislate for the curtailment of fundamental rights and interests as far as this is consistent with the Constitution. It is hoped, though, that any state that consults its people and its media about the need for media regulation will not hasten to limit media freedom. It is certain that it would not do so without resistance.

Mixed private/statutory schemes

4.32 Some jurisdictions, including Australia and New Zealand, have a private body to oversee the print media and a statutory body to deal with broadcast media. This division can be primarily attributed to the historic development of the media industry in these countries. The industry in both Australia and New Zealand was proactive in establishing a private body to deal with complaints about print media in the 1970s. When the need to regulate broadcast media was later identified, a licensing scheme also had to be set up to manage airwaves and so government took responsibility for overseeing both allocation of bandwidth and regulation of content.

4.33 As the Commission indicated in the Discussion Paper, it is preferable that only one body be established in Samoa to regulate all forms of news media content, particularly as convergence of media platforms makes a divide between ‘the press’ and ‘broadcasters’ increasingly irrelevant. This view was supported by stakeholders during consultations and in written submissions. It is also endorsed by the New Zealand Law Commission’s stance that the ‘dual regulator model’ used in New Zealand cannot ‘satisfactorily survive in the new age’,⁷⁶ and the recommendation of Australia’s Convergence Review that a new regulating body should cover all forms of media, because ‘[i]n a converged world it is no longer viable to argue that news and commentary in print media should be treated differently from news and commentary in television, radio and online’.⁷⁷

Mandate

4.34 Most media councils exist primarily for the purpose of setting standards for journalists and media providers and ensuring that these are adhered to – usually by addressing complaints received from the public.

4.35 Some councils also have the power to initiate their own investigations into possible breaches of the standards they set. This power has been described by a former Chair of the Australian Press Council (whose mandate does not currently include own-motion

piracy explosion under NBN’, *Lateline* (15 March 2012) <<http://www.abc.net.au/lateline/content/2012/s3454642.htm>> at 17 May 2012.

⁷⁶ New Zealand Law Commission, *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age*, Issues Paper 27 (December 2011) 127 [6.53].

⁷⁷ Australian Government, *Convergence Review*, Final Report (March 2012) xiv.

investigations) as ‘an extraordinary intervention in the freedom of the press’.⁷⁸ Sir David Calcutt reported that the self-referral of investigations by the United Kingdom Press Commission had undermined the body’s reputation as a fair arbiter because it was seen to act as both prosecutor and judge.⁷⁹ On the other hand, own-motion investigations can helpfully be used to capture important issues not raised directly by complainants or, as recommended for the South Africa Press Council, to examine the causes of repeated offences.⁸⁰

4.36 In addition, many media councils are tasked with promoting media freedom and educating the public and working journalists about both media freedom and journalistic standards. Finkelstein has questioned what ‘promoting media freedom’ means, pointing out that it may be understood simply as the promotion of standards to maintain trust in the industry – functions that are ancillary to the standard-setting and complaints-handling roles of most councils. Some, though, construe the responsibility of ‘promoting media freedom’ as actively supporting a right of the press to communicate in whatever way it sees fit⁸¹ – a role that would appear to be inimical to the basic purposes of a media council.

4.37 The mandates of media councils in other jurisdictions vary in detail and content. It is useful to consider some examples.

New Zealand Press Council: mandate

4.38 The New Zealand Press Council (‘NZPC’) states its mandate simply.⁸² Its main function is to resolve complaints about print media, including online press. The NZPC is also concerned with ‘promoting press freedom and maintaining the press in accordance with the highest professional standards’.

Australian Press Council: mandate

4.39 The objects of the Australian Press Council (‘APC’) are ‘to promote freedom of speech through responsible and independent print media, and adherence to high journalistic and editorial standards’. It is empowered to achieve this by:

- dealing with complaints and concerns about print media content;
- encouraging and supporting media initiatives to address the causes for readers’ complaints;
- monitoring and challenging developments which may adversely affect press freedom;

⁷⁸ Professor Dennis Pearce AO, quoted in Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (28 February 2012) 235.

⁷⁹ Sir David Calcutt, *Review of Press Self-Regulation* (January 1993) 22.

⁸⁰ *Review: Press Council of South Africa* (August 2011) 8, 52–54.

⁸¹ See Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (28 February 2012) 206.

⁸² New Zealand Press Council, ‘Principles: Preamble’ <<http://www.presscouncil.org.nz/principles.php>> at 17 May 2012.

- making submissions on matters concerning freedom of speech and access to information;
- undertaking research and consultation on developments in public policy affecting freedom of speech, and promoting public awareness of such issues;
- promoting an understanding of the objects and activities of the Press Council; and
- encouraging feedback.⁸³

4.40 This mandate is extensive, and present and past Chairs of the APC have stated that the Council is not adequately resourced to fulfil these functions. The current Chair told the Independent Inquiry into the Media and Media Regulation that for the APC to carry out its full mandate, funding would need to double from \$1million to \$2million per annum.⁸⁴

Media Council of Tanzania: mandate

4.41 The Media Council of Tanzania ('MCT') has a similarly onerous mandate, which requires it to:

- promote, assist, safeguard and defend freedom of the media;
- oversee that all involved in the media industry adhere to the highest professional and ethical standards;
- hear and decide complaints from the public and amongst the media against alleged infringements of the Code of Ethics;
- encourage development of the media profession by undertaking various educational activities and campaigning for media freedom;
- monitor developments likely to restrict the supply of information of public interest and importance, investigate conduct and attitudes of corporations and government toward the media and report on such investigations;
- keep the public involved in and informed about the activities of the Council;
- promote and defend the interests of readers, viewers, and listeners;
- promote gender sensitivity, equality, equity and balanced reporting and dissemination of information;
- raise funds;
- publish papers, journals, newsletters and other materials to achieve these objectives; and
- such other things as may be necessary to achieve these objectives.⁸⁵

⁸³ *Constitution of the Australian Press Council Inc* (2011) arts 1 and 3

<http://www.presscouncil.org.au/uploads/52321/ufiles/APC_Constitution_2011.pdf> at 17 May 2012.

⁸⁴ Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (28 February 2012) 237-238.

⁸⁵ *Constitution of the Media Council of Tanzania* (1995) art 3

<<http://mct.or.tz/mediacouncil/images/stories/Publications/Books/MCT%20Constitution.pdf>> at 17 May 2012.

Press Council of South Africa: mandate

4.42 The Press Council of South Africa ('PCSA') has a broad mandate, defined by very general functions. Its Constitution sets out the following objectives and provides that the Council shall do all things necessary or incidental to their achievement:

- to promote and preserve the right of freedom of expression;
- to promote and develop excellence in journalistic practice and ethics and to promote the adoption of and adherence to those standards of practice and ethics by publications that are associated with it;
- to promote the concept of press self-regulation and to set up the office of the Press Ombudsman and South African Press Appeals Panel;
- to accept a Press Code of Conduct enforced by an independent non-statutory, mediating and adjudicating structure aimed at introducing procedures for the expeditious and cost-effective adjudication of complaints;
- to promote public awareness of the existence, function and purpose of the Press Ombudsman and Press Appeals Panel;
- to collaborate and facilitate or organise meetings and conferences with other press councils;
- to undertake such other tasks as are necessary to further the objectives of the Council;
- generally, to promote the principles forming the basis of the South African Press Code.⁸⁶

Structure and composition

4.43 Most media councils are made up of a mix of industry players and people from outside the media, to provide fairness and objectivity. The balance often falls in favour of media representatives, but in his review of Press Self-Regulation in the United Kingdom, Sir David Calcutt persistently emphasised the need to address the power imbalance that exists between the news media and most private individuals.⁸⁷ The New Zealand Law Commission has made a preliminary recommendation that a new regulatory body for New Zealand should contain a majority of members from outside the media industry.⁸⁸ The APC requires a majority of the panel adjudicating a complaint not to be affiliated with the media.

4.44 Often media councils require among their members a lawyer or lawyers, sometimes to sit as the Chair or key decision-maker for complaints and other matters. Some councils also have a requirement for gender balance. Media councils differ in various ways including how

⁸⁶ Press Council of South Africa, *Constitution*, arts 1, 5.

⁸⁷ Sir David Calcutt, *Review of Press Self-Regulation* (January 1993).

⁸⁸ New Zealand Law Commission, *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age*, Issues Paper 27 (December 2011) 130 [6.73].

appointments are made, who adjudicates complaints, and whether an appeal body is part of the structure. It is useful to consider some examples.

Australian Press Council: structure and composition

4.45 The Australian Press Council is staffed by an Executive Secretary and has 22 members, generally appointed for three year terms, comprising:⁸⁹

- an independent Chair (a person who has not previously owned or been employed by a media organisation);
- nine constituent members, nominated by ‘constituent bodies’ (journalistic bodies admitted as members of the association);
- eight public members, independent of media, who apply for advertised vacancies (one of these will be elected by the council to act as Vice Chair); and
- four journalist members, who also apply for advertised vacancies.

4.46 A ‘Complaints Sub-Committee’ considers complaints and prepares draft adjudications, which are presented to the Council for approval.⁹⁰

Media Council of Tanzania: structure and composition

4.47 The Media Council of Tanzania⁹¹ consists of a National General Convention, which is the highest decision-making body of the Council, and a Governing Board, which sets the professional standards and journalistic training and proposes a Code of Conduct and Code of Ethics. There is also a Secretariat, comprising an Executive Secretary and any additional staff required, to carry out the day-to-day activities of the MCT. The National General Convention’s role includes forming policy, electing members of the Governing Board, approving the Code of Conduct and Code of Ethics proposed by the Board, and other decision-making functions. The Governing Board convenes, attends and participates in meetings of the Convention but does not vote.

4.48 Media organisations may join the MCT as ‘full members’, and each full member appoints one delegate to the National General Convention. The Governing Board comprises 13 members: a President (a ‘non-media person’); a Vice-President (a ‘media person’); seven media representatives; and four public representatives (two of whom must be lawyers). Additional requirements are that no single media organisation may have more than one

⁸⁹ For the structure and functions of the Australian Press Council, see *Constitution of the Australian Press Council Inc* (2011) <http://www.presscouncil.org.au/uploads/52321/ufiles/APC_Constitution_2011.pdf> at 18 May 2012.

⁹⁰ Australian Press Council, *Handling Complaints* <<http://www.presscouncil.org.au/handling-of-complaints/>> at 18 May 2012.

⁹¹ For the structure and functions of the Media Council of Tanzania, see *Constitution of the Media Council of Tanzania 1995* <<http://mct.or.tz/mediacouncil/images/stories/Publications/Books/MCT%20Constitution.pdf>> at 18 May 2012.

person as a Board member, and that at least one third of Board members must be women. All members are elected at the National General Convention for terms of three years. Various subsidiary committees are made up of members of the Board. Of these, the Ethics Committee hears and adjudicates on complaints.

Press Council of South Africa: structure and composition

4.49 The Press Council of South Africa⁹² consists of six members from the press and six public members. One of the public members is nominated to be an ‘alternate member’ so that only 11 of the 12 members may vote at one time. Each press member is appointed by an Association representing specific interest groups from among the print media (newspapers, magazines, publishers, journalists and editors). The Council appoints a Management Committee, comprising the Chair of the Council and at least one representative from each of the press and the public.

4.50 There is a Press Ombudsman, who manages the office of the PCSA and adjudicates complaints. The Ombudsman is someone having extensive press editorial experience and also an ability to adjudicate matters fairly and independently. There is also an Appeals Panel, to hear appeals from decisions of the Ombudsman. The Appeals Panel consists of eight members from the press, eight members from the public, and a Chairperson who must have senior experience as a lawyer. Members of the Appeals Panel are appointed by an Appointments Panel, which also appoints the Press Ombudsman, the Deputy Ombudsman and the public members of the Council. The Chair of the Appointments Panel is in turn appointed by the Chief Justice of South Africa, and the Council appoints three further members to the Appointments Panel.

Funding

4.51 The source and sufficiency of a media council’s funding is an important consideration both for its effective functioning – as discussed above in relation to the Australian Press Council’s struggle to carry out its mandate – and for independence. Some have decried state funding as a threat to the independence of a media council,⁹³ while others have criticised media industry funding on the basis that it gives industry players too much power to influence media council decisions.⁹⁴ Measures can be taken to reduce the risk of funder influence, though, such as guaranteeing funding for a set period so that there is no concern that funding will be decreased or withdrawn due to unfavourable decisions of the council.

⁹² For the structure and functions of the South African Press Council, see *Constitution* <<http://www.presscouncil.org.za/pages/constitution-of-the-pcsa.php>> at 18 May 2012.

⁹³ See, for example, discussion in Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (28 February 2012) 180.

⁹⁴ Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (28 February 2012) 183.

4.52 Most media councils around the world are privately funded, but some receive partial funding from government. These include Finland, Quebec and Germany.⁹⁵ Despite receiving government funding, all three jurisdictions rate very highly in terms of media freedom. Reporters Without Borders rank Finland, Canada and Germany 1st, 10th and equal 16th respectively in the 2011-2012 Annual Press Freedom Index.⁹⁶ In 2011 Freedom House reported Finland to be ‘among the most free media environments in the world’, giving it a Press Freedom Score of 10, while Canada was also considered ‘Free’, with a score of 19, and Germany’s press was said to be ‘free and vibrant’, rated at 17.⁹⁷

Complaints process

4.53 Media councils have various ways of investigating and resolving complaints, but speed is a key component. As Finkelstein points out, ‘[t]here is little point in receiving an apology, correction or opportunity to reply months or years after the event’.⁹⁸ His Inquiry reported that the complaints processes for both the Australian Communications and Media Authority and the Australian Press Council were too slow and required reform.⁹⁹

4.54 Some councils oblige complainants to first address the complaint to the journalist or media organisation against whom it is made (for example, in New Zealand and Tanzania¹⁰⁰). If the complainant is dissatisfied with how the complaint was dealt with by that person or organisation, he or she can then make a formal complaint to the council. There may be exceptions to this rule in special circumstances. Other councils permit complaints to be made direct to the council but may then decide to either raise the matter directly with the publication, or ask the complainant to do so (for example, in Australia).

4.55 Some media councils will accept complaints from a third party (that is, a person not personally affected by the material complained of), but in some circumstances may still require the consent of the person aggrieved (for example, in New Zealand). Generally, complaints must be in writing but many councils offer assistance to those for whom this is difficult (for example, in Australia, South Africa and Tanzania).

⁹⁵ New Zealand Law Commission, *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age*, Issues Paper 27 (December 2011) 123 [6.32].

⁹⁶ Reporters Without Borders, *Press Freedom Index 2011* <<http://en.rsf.org/press-freedom-index-2011-2012,1043.html>> at 17 May 2012.

⁹⁷ Freedom House, *Freedom of the Press 2011* <<http://www.freedomhouse.org/report/freedom-press/2011/germany>> at 17 May 2012.

⁹⁸ Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (28 February 2012) 183.

⁹⁹ *Ibid* 283.

¹⁰⁰ References to a country are references to the Press Council of that country.

- 4.56 Issuing a complaint to a media council is an alternative to litigation. To avoid use of this system as a ‘fishing expedition’ for evidence to use in court,¹⁰¹ many councils require complainants to make a written waiver of their right to pursue legal proceedings (for example, in Australia, South Africa and New Zealand). The legal effect of such a waiver is uncertain. Perhaps in an attempt to get around this uncertainty, the Media Council of Tanzania allows proceedings to be commenced in court after the Council’s decision has been given, but evidence used during the Council’s process cannot be adduced in court.
- 4.57 As a first step in receiving complaints, most media councils have a system for disqualifying frivolous or vexatious complaints from consideration. Complaints may also be declined for other reasons, including that the publication or broadcast has a limited audience, that the complaint is not within the jurisdiction of the council or clearly does not show a breach of the standards applied by the council, or that the council would otherwise be unable to effectively deal with the complaint. This is usually done by an Executive Secretary (for example, in Tanzania and Australia), or sometimes by the Ombudsman or key decision-maker (for example, in South Africa).
- 4.58 Once a complaint is received by a council, and accepted for adjudication, it is usually directed to the person or organisation against whom the complaint is made. If informal conciliation has not already been ruled out, it may be attempted at this stage. Where settlement is considered unlikely to succeed, a formal written response from the publisher or broadcaster is required within a set period, around 10–14 days. The complainant will then be given a chance to respond to any comments, and some media councils (for example, in Australia) will then give the publisher or broadcaster a further opportunity for written reply.
- 4.59 As discussed above, arbitration by a media council is an alternative to court proceedings and most media councils emphasise informality and specify conciliation as a core function. Some councils will only hear complaints on the papers, while some offer the opportunity for applicants to make oral submissions in certain circumstances (for example, in New Zealand), and others always provide an oral hearing (for example, in Australia).
- 4.60 The panel adjudicating the complaint may be one person (the Press Ombudsman, in the case of hearings ‘on the papers’ at the Press Council of South Africa), or a committee of around three to five members of the council, including the head of the Council (Ombudsman/Chair/Vice-Chair). There may be a requirement that a majority of the adjudicating team not be affiliated with the media (for example, in Australia). Legal representation may be permitted at hearing, as is currently the case at the Press Council of South Africa. To ensure proceedings are inexpensive and informal, however, the PCSA has

¹⁰¹ See Sir David Calcutt, *Review of Press Self-Regulation* (January 1993) 23.

recently recommended that legal representatives be banned from hearings, with parties still able to seek legal advice prior to hearing.¹⁰²

4.61 A draft adjudication of the complaints committee will usually be submitted to the broader council for approval and any amendments. Some councils provide a mechanism for appeal within the council (for example, the South African Press Appeals Panel, within the PCSA).

4.62 It is in the interests of the complainant, of course, to raise the matter as early as possible since the effectiveness of any available remedy will diminish with time. Some councils give set timeframes in which certain steps must be completed, while others leave it to a key figure, such as the Chair or Ombudsman, to determine deadlines on a case-by-case basis. There is usually a mechanism for timeframes to be extended in special circumstances. The following table provides an example of some time limits set in various jurisdictions.

	APC	MCT	NZPC	PCSA
Complaint to editor, etc			1 month*	
Complaint to council	60 days	6 months	+10 days	14 days
Reply from editor	+14 days	+14 days	+10 days	
Reply from complainant			+10 days	
Apply to appeal decision		+30 days		7 days
Response to application to appeal				7 days

* 2 months for complaints about non-publication.

Remedies and enforceability

4.63 Because most media councils prioritise conciliating disputes in a timely manner and producing practical outcomes, monetary compensation is not usually offered unless it is to pay the complainant's costs associated with the hearing. Media councils may offer the following remedies to aggrieved complainants:

- cautioning or reprimanding the respondent;
- directing that a correction, retraction, explanation, apology and/or the adjudication of the council be published or broadcast in a certain manner;
- ordering that a complainant's reply, comment or letter be published or broadcast by the respondent.

¹⁰² *Review: Press Council of South Africa* (August 2011) 9.

- 4.64 Many councils will require an approved version of their final adjudication to be published or broadcast by the respondent promptly (within 7 days, for example) and with due prominence. In some cases this applies only to a finding against the publisher or broadcaster. ‘Due prominence’ may be broadly defined as a place or time where it is likely to be seen or heard by those who saw or heard the material on which the complaint was based (for example, in Australia). Alternatively, a media council may specify where or when the adjudication must be published or broadcast (for example, on a certain page of the newspaper or at a certain time on the radio).
- 4.65 Once an adjudication has been published or broadcast as required, it is made publicly available. Most media councils publish all adjudications on their website, and may also reproduce them in the organisation’s Annual Report.
- 4.66 The Press Council of South Africa is optimistic that these sorts of ‘moral sanctions’ imposed by media councils are the most effective way of ensuring compliance with journalistic standards. Along with the professional shame or embarrassment involved in publishing or broadcasting an adverse finding, there is often a loss of advertising space added to the costs associated with meeting the council’s procedures for responding to a complaint.¹⁰³ Others claim that editors will aspire to resolve most complaints amicably in order to avoid being publicly criticised.¹⁰⁴
- 4.67 The threat of public shame, however, will not always be enough. Most media councils have no way of compelling respondents to perform what is required by their adjudications, so that there is no guarantee that a respondent will actually publish or broadcast an adverse finding. The Chair of the Australian Press Council recently submitted to the Independent Inquiry into the Media and Media Regulation that the APC’s effectiveness was limited by its inability to enforce its decisions.¹⁰⁵
- 4.68 Some councils have a power to suspend the membership of those who fail to comply with their decisions, but this sort of sanction will only be effective if there are direct detrimental consequences to loss of membership. Suspension from publication or broadcast is another possibility, but is so inimical to the notion of a free press that the Commission has not seriously considered this an option.
- 4.69 Fines have been considered and/or implemented by some councils as another way to encourage the media to comply with professional standards. The Press Council of South

¹⁰³ Ibid 53.

¹⁰⁴ William Gore, ‘Self-Regulatory Bodies’ in Miklós Haraszti (ed), *The Media Self-Regulation Guidebook* (Organisation for Security and Co-operation in Europe, 2008) 33, 36.

¹⁰⁵ Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (28 February 2012) 238.

Africa, however, has reported in a recent internal review that ‘peer pressure’ and publication of findings were better tools for ensuring high journalistic standards. Consistently with this view, the PCSA recommended that ‘repeat offenders’ be identified as such in rulings of the Council.¹⁰⁶ William Gore has argued that a ‘system involving fines becomes more legalistic and confrontational, with lawyers arguing over the size of penalties to be levied. This dilutes all that makes self-regulatory bodies practical and useful.’¹⁰⁷

4.70 In his proposed model for statutory media regulation, Finkelstein recommended that parties be able to apply to a court for an order compelling compliance. Any failure to act in accordance with such an order would be punishable as contempt of court.¹⁰⁸ This recommendation has attracted strong criticism from journalists who argue that the possibility that a decision of the council could result in a prison sentence represents a gross incursion into democracy and media freedom.¹⁰⁹

The Law

4.71 Perhaps the most extreme way of regulating the media is through the law. Some of Samoa’s laws that have a regulatory effect on the media were discussed in Chapter Two, including the more controversial law of criminal libel and the statutory requirement to reveal sources. While these laws may be fairly criticised, the law of civil defamation is an essential form of media regulation. It can bring individuals on equal footing with (usually) more powerful publishers and broadcasters, ensuring that disputes relating to the personal matter of reputation can be adjudicated in a fair forum according to the rule of law. There are several reasons, however, why the law on its own is an insufficient means for regulating the media.

4.72 As one media commentator has argued, defamation law ‘offers a monetary salve for the reputation of a privileged few who can afford to sue’ and does not ‘have much to say about issues such as privacy, nor about quintessential journalistic duties such as fact-checking and seeking more than one view on an issue.’¹¹⁰ This statement points to the high costs associated with litigation, which make it inaccessible to most people. It also illustrates that the principal remedy offered – damages – bears no direct relation to the more common media complaints; a correction or apology would often suffice.

¹⁰⁶ *Review: Press Council of South Africa* (August 2011) 7–8, 51–53.

¹⁰⁷ William Gore, ‘Self-Regulatory Bodies’ in Miklós Haraszti (ed), *The Media Self-Regulation Guidebook* (Organisation for Security and Co-operation in Europe, 2008) 33, 36.

¹⁰⁸ Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (28 February 2012) 298.

¹⁰⁹ For example, Bob Cronin interview with Ashley Hall, ‘Experts debate pros and cons of the Finkelstein Review’, *The World Today*, ABC Radio (9 March 2012) <<http://www.abc.net.au/worldtoday/content/2012/s3449417.htm>> at 21 May 2012.

¹¹⁰ Graeme Orr, ‘Finkelstein’s one-stop shop’ (6 March 2012), *Inside Story* <<http://inside.org.au/finkelstein-one-stop-shop/>> at 17 May 2012.

- 4.73 In addition, damage to reputation is best addressed as quickly as possible, which is why speed is often a central tenet of a media council. Unless a plaintiff is seeking an injunction for material not yet published or broadcast, the court process is unlikely to bring a result within days, weeks, or possibly even months. This means that even where a defamation suit is resolved in favour of the applicant, the time taken detracts from any justice in the final outcome. The damage to reputation has well and truly had time to settle in and the financial compensation therefore is a second-rate substitute for a more suitable remedy.
- 4.74 The essential deficiency of the courts in media regulation is that they are simply not designed, intended or equipped to hear day-to-day complaints about the media. They operate within a small sphere to decide matters arising from infringement of the law. It is not likely that even fairly draconian laws will greatly improve the accuracy, diligence and ethical practices expected of journalists on a daily basis. Indeed, the few examples provided at the end of Chapter Three, ‘Interpretation of media freedom in the Samoan media’, suggest that this has not been the case in Samoa.
- 4.75 Instead, an alleged culture of bullying has built up around the courts’ jurisdiction to hear criminal defamation proceedings. The Observer has reported threats from government officials to take legal action if the newspaper published certain material.
- 4.76 The newspaper’s founder and Editor in Chief, Savea Sano Malifa has had personal experience of Samoa’s criminal libel laws, having been prosecuted for publishing a letter with allegedly defamatory material about a previous Prime Minister. The Commission considers that the law should not be used to intimidate in this way and hopes that introducing alternative ways of making complaints about the media, and repealing criminal libel, will break any habitual recourse to the law as a means to threaten or intimidate.
- 4.77 While protesting about regular threats from Members of Parliament to sue over matters raised by his newspaper, Malifa has also informally submitted on several occasions that the law is sufficient regulation.¹¹¹ As discussed above, the Commission agrees with the shortcomings and unsuitability of the law to address freedom of media and media accountability and is concerned by the trend toward intimidation and threats. This is precisely why Samoa is in urgent need of a system of regulation that provides an alternative to litigation. There must be a form of media regulation in Samoa that is fair and accessible to all people, since any person may be affected by biased or incorrect reporting, or reporting that contravenes the right to privacy.

¹¹¹ Savea Sano Malifa, Consultation with the Samoa Law Reform Commission (8 February 2012); Savea Sano Malifa, interview with Geraldine Coutts, ‘Samoa Journalists Divided over Proposed Media Council’, *Pacific Beat*, Radio Australia (13 February 2012) <<http://www.radioaustralia.net.au/international/radio/onairhighlights/samoa-journalists-divided-over-proposed-media-council>> at 24 April 2012.

4.78 Another view expressed by Malifa and other media representatives in Samoa has been that a system of regulation cannot exist alongside laws that are seen to inhibit a free press. Journalists have called for the repeal of s 84 of the *Crimes Ordinance 1961* (criminal libel) and s 10 of the *Newspapers and Printers Act 1992/1993* before they could contemplate establishing a system of self-regulation. The Commission rejects this argument on the basis that these two discrete laws stand entirely apart from a system of regulation. Media regulation, through a private or statutory media council, is intended as an alternative to legal proceedings and can theoretically exist alongside laws that affect the media. The Commission does, however, in Chapter Six, '*Newspapers and Printers Act*', take this opportunity to comment on the contentious legislation mentioned above.

5. Consultation and submissions

Consultation

5.1 After the release of the Discussion Paper on 16 December 2012, JAWS asked the Commission to attend a meeting of its members to present the document and explain the options for reform. Ultimately the meeting took the form of a consultation. Attendance extended beyond JAWS' membership, with over 20 representatives from an array of media platforms represented, and all participants were invited to contribute their thoughts, opinions and suggestions.

5.2 Members of the media asked why the Commission had been given this Reference, and some suggested the industry would feel foolish to establish a system of media regulation without understanding the reasons behind it. The Commission explained that as an independent body it is not informed about, and is not concerned with, the motivations behind its references. Our Discussion Paper and the presentation given during the Consultation had, however, set out the justifications for media regulation that emerged from our independent research. Other stakeholders, later in the Consultation, suggested that the Reference had probably been given to the Commission due to the Prime Minister's ongoing frustration about the media's failure to establish their own system of self-regulation.

5.3 A senior media representative expressed concern that criminal libel remained on Samoa's statute books, and that this law had been used by Government in the past to suppress media freedom. In addition, he noted with concern that under the *Newspapers and Printers Act 1992/1993* the media may be required to reveal their sources. The stakeholder concluded that no media regulation was required because the law was doing enough to control the media. He later expressed the view that regulation of the media was based on compromise, and that there could be no compromise if there was to be freedom of expression.

- 5.4 Other stakeholders expressed confusion about media regulation in Samoa, asking whether existing laws are not considered a system of media regulation. One media representative submitted that the purpose of media regulation is what is in the best interests of the public and not what is in the best interests of the media or the government, and that any reforms should have that aim in mind.
- 5.5 One stakeholder was of the opinion that government should legislate to provide a workable framework for media regulation: a media council should have freedom but it also needed rules in order to operate effectively. Another stakeholder expressed concern that an independent media council would have no powers of enforcement. Others, however, were of the view that a media council should be independent, and that consideration should be given to how such a body should be funded and structured to avoid influence from government or other donors.
- 5.6 One journalist who preferred a private media council, free from government influence, noted that the idea had been in the pipeline for years, and expressed disappointment that the Prime Minister had felt the need to refer the matter to the Commission. This stakeholder suggested that funding come from government, as industry funding was simply not workable in Samoa. The council should be separated into two divisions so that print and broadcast media could be dealt with separately.
- 5.7 In relation to the membership of a media council, one stakeholder stated the importance of including members from the media industry, as it is those people who understand the issues to be considered by a media council. Another stakeholder, who had earlier suggested that a government representative could sit as a member of the media council, expressed concern that the media should not be too heavy an influence on the council. Other media representatives rejected the idea of a government representative in the media council, but welcomed the suggestion that laypeople and media representatives be given mixed representation.
- 5.8 At the consultation the Commission asked stakeholders for further information about the JAWS Code of Ethics and the Beales Draft Code of Practice. While one stakeholder was able to explain that the Beales Code of Practice had been approved by JAWS in principle but not in practice, many media representatives were unclear about the distinction between the two documents. When the Commission subsequently requested a copy of the JAWS Code of Ethics, more than one journalist referred us to the Beales Draft Code of Practice, which appears on the JAWS website under the heading, ‘Code of Ethics’.

5.9 Concerns were raised about the deadline given for submissions: it was important that the media industry have ownership of the issues raised, and this required more time. The Commission ultimately granted a further extension for submissions.

Submissions

5.10 Of the five written submissions received, four were in favour of a self-regulating body. This included a joint submission from JAWS who reported that at a meeting on 22 February 2012 media stakeholders had decided that the industry be self-regulated and proceed to set up its own self-regulating body, independent from Government.¹¹²

5.11 One stakeholder submitted that a ‘Media Ombudsman’ and a media council should be established by statute, under the model offered by the Commission as ‘Option 2’ of the Discussion Paper. This last submission was made after a careful consideration of the media climate in Samoa, and on the basis that a strong system was required to remedy a lack of adhesion to good reporting standards after a long history without regulation. The stakeholder suggested that the media could work toward greater independence from government after a period of five years.

5.12 All submissions stressed the need for working members of the media to be centrally involved in the development of a regulatory system for media. Some submissions suggested that the Beales Draft Code of Practice could be reviewed and adopted as an enforceable code. Most submissions emphasised the importance of independence from Government, though some suggested that an independent media council may need to seek some government funding. The implication in those submissions was that public funding would not undermine the independence of a self-regulatory system.

5.13 Various structures for a regulatory regime were put forward by stakeholders. One submission suggested adopting the model of the Australian Press Council, with another preferring the New Zealand Press Council model.

5.14 JAWS suggested that the media industry establish an overarching ‘Media Executive Board’ to oversee the work of a separate ‘Media Tribunal’. The Media Executive Board would comprise nine members representing each media platform, preferably media owners and senior journalists. The Board would meet every two months to review complaints and perform the following functions:

- promote media freedom in Samoa;
- monitor media training;
- establish and monitor media professional standards;

¹¹² Journalists Association of Western Samoa, *Submission to the Samoa Law Reform Commission* (16 March 2012).

- monitor the direction of the media industry;
- select Media Tribunal members;
- fundraise;
- ensure compliance with decisions of the Media Tribunal; and
- provide terms of reference for the Media Tribunal.

5.15 The Media Tribunal designed by JAWS would comprise seven members: three from different news media; one representative from the clergy; one representative from civil society; one member of the public; and one legal practitioner. The roles of the Tribunal would be to arbitrate complaints and deliver decisions. Terms of Reference and sittings of the Tribunal would be determined by the Board, and decisions of the Tribunal would be referred to the Board for endorsement. The Tribunal and the Board would employ the same secretary.

5.16 Despite its emphasis on independence from government, JAWS specified that all complaints should be forwarded to the Office of the Government’s Press Secretariat, before being sent on to the person or outlet to which the complaint related. Other submissions specified that not only should a regulatory body be independent from government, but it should also be independent of JAWS. There were concerns about government links within JAWS, as well as the fact that JAWS is not representative of the entire media industry.

5.17 Another stakeholder also suggested that there should be two separate arms to a new regulatory system. A ‘Media Ombudsman’ would receive complaints (once they had first been directed to the media outlet), and would adjudicate these in the first instance. An independent but publicly funded regulatory board of mixed media/government appointment would work with the Ombudsman in an advisory capacity as well as dealing with appeals from decisions of the Ombudsman.

5.18 Most submissions specified that because any regulatory system had to have the support of the media industry, membership to the regulatory body must be compulsory for all working members of the media. No submission expressed in detail how this could be achieved, however.

5.19 Nearly all major media outlets were represented in written submissions to the Commission. One notable absence, however, was the Samoa Observer. The Observer has made its position clear historically and more recently through the input of Editor in Chief Savea Sano Malifa during the Consultation, and in the newspaper’s editorial section:

We repeat, it is this newspaper’s firm view that a Media Council is unnecessary since there are already enough laws to govern the work of the media.

The Court is available for people who feel that they have been wronged by any media organisation to seek redress.

So thanks but no thanks, we will not ‘rejoice and sing hallelujah and hosanna because the government is doing’ the work for us.

First of all, we never invited the Government to do any work for us. Secondly, we’re of the opinion that there is so much rubbish the Government needs to clean up within itself first that it should leave the media alone to do its job.¹¹³

5.20 This comment was given in response to the Prime Minister’s statement recorded in the Observer the previous day that ‘[f]or the past ten years, we have been calling on the media to set up this body themselves but they could not do it, now the government is stepping in to help them’.¹¹⁴ In the same editorial response, the Observer imputed its opinion to the whole media industry: ‘[t]he truth is simple, if the media hasn’t set up the Council after many years, it obviously doesn’t want to. There are more pressing issues to deal with’.¹¹⁵

5.21 Elsewhere, it could be inferred that Mr Malifa would consider cooperating with the establishment of a body to regulate the media if there were changes to Samoa’s legislation. He is indirectly quoted, in his newspaper, as stating that ‘if a body to regulate the media on how they’re carrying out their duties and responsibilities is to be set up, perhaps this country’s laws should be cleaned up first’.¹¹⁶

¹¹³ Editorial, ‘The “weak” media and Tuilaepa Almighty’, *Samoa Observer* (Apia), 21 February 2012, 12.

¹¹⁴ Charlina Tone, ‘PM explains media push’, *Samoa Observer* (Apia), 20 February 2012, 1.

¹¹⁵ Editorial, ‘The “weak” media and Tuilaepa Almighty’, *Samoa Observer* (Apia), 21 February 2012, 12.

¹¹⁶ Charlina Tone, ‘PM explains media push’, *Samoa Observer* (Apia), 20 February 2012, 2.

6. Views and Recommendations

- 6.1 Having examined the layers of regulatory and quasi-regulatory techniques for improving journalistic standards and increasing public accountability of the media, the Commission has concluded that a combination of the first three options discussed in Chapter Four will best achieve these aims in Samoa. The first and third options – education and information, and external self-regulation – are discussed in the Recommendations below. The second option – described as ‘internal self-help’, where news media operators establish mechanisms within their organisations to enhance dialogue with the public – is equally important.
- 6.2 All media organisations should consider what systems they can implement within their organisations to correct errors, improve their relationship with the public and ultimately reduce the need for external regulation. Some of these options will cost media operators very little and may have great impact. Others may require more of a financial commitment, but where appropriate and effective systems are in place, it is likely that the costs of implementing and maintaining them will be offset by the consequent reduced need to defer to external regulation, which will demand more time and money.
- 6.3 In addition, the system of external self-regulation set out in Recommendations 4 to 17 below relies on the support and cooperation of media organisations. Complaints must be directed first to the publisher or broadcaster in question, and therefore all media organisations will benefit from having structured and efficient mechanisms in place for dealing with complaints and – hopefully – resolving them without the need for the external body to intervene.

Recommendation 1: All media organisations should consider implementing and/or improving one or more of the following mechanisms for internal ‘self-help’:

- effective monitoring, by the Editor in Chief, of compliance with company policies and industry codes;
- providing opportunities for audience feedback, interaction and critique, such as letters to the editor, talk-back radio, and regular printing or broadcasting of clearly identified ‘Corrections’ at a consistent time or place;
- employing a readers’ editor to deal independently with complaints, monitor compliance with company policies and industry codes and communicate with the public about media ethics and accountability.

Newspapers and Printers Act 1992/1993

- 6.4 Various media stakeholders have suggested that a necessary precursor to any new system of media regulation in Samoa would be the repeal of laws that are seen to restrict freedom of the media in Samoa (namely, s 84 of the *Crimes Ordinance 1961* – now being considered for repeal by a Parliamentary Select Committee – and s 10 of the *Newspapers and Printers Act 1992/1993*). As discussed above in Chapter Two, ‘Laws and the media in Samoa’, the Commission takes the view that a system of regulation can operate effectively despite these rules, and could in fact discourage recourse to the law to deal with complaints about the media. It has been relevant, however, to consider the content and operation of the *Newspapers and Printers Act* as part of the review of Samoa’s existing framework for regulation of the media.
- 6.5 The Commission is concerned that the *Newspapers and Printers Act* is largely ineffectual and also possibly dangerous. The Ministry of Justice and Courts Administration (the Ministry responsible for administering the *Newspapers and Printers Act*) told the Commission they do not keep a register of newspapers and printers. Enquiries with the Ministry of Commerce, Industry and Labour revealed that only two publications are registered under the *Newspapers and Printers Act*. Given that the legislation prohibits the printing of a newspaper that is not registered, this indicates that the administration of the system established by the *Newspapers and Printers Act* is not effective. In addition, it is likely that the Act only requires registration of hardcopy newspapers and not online press, which also calls into question its value in modern Samoa.¹¹⁷
- 6.6 Of further concern is s 10 of the *Newspapers and Printers Act*, which has been the subject of much criticism from within the media. Journalists’ privilege – the principle that journalists should not be compelled to reveal their sources – is an important facet of freedom of speech and media freedom. The principle is often espoused in media codes of practice, including the JAWS Code of Ethics,¹¹⁸ and has been recognised by courts and parliaments in other jurisdictions.
- 6.7 In *Goodwin v United Kingdom*,¹¹⁹ a British journalist sought to have his right to maintain the confidentiality of a source upheld by the European Court of Human Rights. The House of Lords had found that the interests of justice required that the journalist reveal his informant, who had divulged information from a stolen document. The European Court of Human Rights found that the House of Lords decision had violated the journalist’s right to freedom of speech under art 10 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, and declared at [39]:

¹¹⁷ See definition of ‘newspaper’ (‘any *paper*’, emphasis added) in *Newspapers and Printers Act 1992/1993* s 2.

¹¹⁸ JAWS, *Code of Ethics* (1989) [III.5].

¹¹⁹ Application no. 17488/90, Council of Europe: European Court of Human Rights, 27 March 1996.

The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance [...] Protection of journalistic sources is one of the basic conditions for press freedom.

6.8 It is important for journalists to respect their sources' requests of confidentiality because journalists rely heavily on informants to bring to light facts the public has a right to know. A danger that the identity of a source might be revealed during court proceedings may erode faith in this tenet and may mean that people are not willing to come forward to the media with important information.

6.9 Preliminary research by the Commission has revealed that parliaments in comparable jurisdictions have taken steps to protect journalists' privilege, by enacting 'shield laws'. Such laws generally reflect that there are circumstances where the public interest in revealing information about the source may outweigh the interest in protecting it. Shield laws enacted in New Zealand, Australia and the United Kingdom balance the right of the journalist to keep sources confidential with various other rights.

6.10 In New Zealand, a journalist who has promised not to reveal an informant's identity cannot be compelled in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant. A Judge of the High Court may, though, order that that rule does not apply if satisfied that:

the public interest in the disclosure of evidence of the identity of the informant outweighs:

- (a) any likely adverse effect of the disclosure on the informant or any other person; and
- (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.¹²⁰

6.11 Historically in Australia, journalists have elected to be imprisoned for contempt of court rather than to reveal a source.¹²¹ The Australian parliament has recently modified its shield laws, though, largely replicating s 68 of the *New Zealand Evidence Act*.¹²²

6.12 The Explanatory Memorandum for the Bill that introduced the Australian amendment explains that the party seeking disclosure of information about an informant's identity bears

¹²⁰ *Evidence Act 2006 (NZ)* s 68.

¹²¹ Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Rights and Obligations of the Media First Report*, 'Off the Record: Shield Laws for Journalists' Confidential Sources' (1994) Ch 3.

¹²² *Evidence Act 1995 (Aus)* s 126H.

the onus of establishing the exception to the rule that disclosure cannot be compelled.¹²³ This essentially reversed the onus that existed previously, where the party protecting the information needed to show that the nature and extent of the harm in producing the evidence outweighed the desirability of the evidence being given. Under the new rule, the court will ultimately determine whether the public interest requires disclosure, based on consideration of the primacy of the administration of justice and the need to protect national security.¹²⁴

6.13 The United Kingdom has a similar provision in its *Contempt of Court Act 1981*. Section 10 states that no court can require a person to disclose ‘the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime’.

6.14 Unlike in these jurisdictions, in Samoa, a journalist is not permitted to dispute a request to provide discovery of sources of information. Given the importance of the principle of journalists’ privilege to freedom of speech and democracy, and noting that other jurisdictions have reformed their laws to reflect this, it is the Commission’s view that s 10 of the *Newspapers and Printers Act 1992/1993* should be reviewed. Further, in light of the above concerns about the legislation’s overall efficacy, the Commission recommends a wholesale review of the entire Act.

6.15 In addition, the Commission will consider whether shield laws should be put in place during its review of the *Evidence Ordinance 1961*.

Recommendation 2: The *Newspapers and Printers Act 1992/1993* should be reviewed to examine the effectiveness of the registration system it establishes, and to consider the need to amend or repeal s 10 as it relates to the disclosure of information about a journalist’s source.

Broadcasting Act 2010

6.16 One stakeholder suggested that the *Broadcasting Act 2010* be reviewed and amended to support an appropriate system of regulation for the media. The Commission foreshadowed in its Issues Paper that if the Broadcasting Regulator was not to take on the broader role of media regulator, then the *Broadcasting Act* would need to be amended to reflect the decided limits of the Broadcasting Regulator’s role.

6.17 The Commission is strongly of the view that the Broadcasting Regulator cannot act as a news media regulator, for several reasons. Firstly, no media expertise or experience is

¹²³ Explanatory Memorandum, Evidence Amendment (Journalists’ Privilege) Bill 2010 (Aus) 2.

¹²⁴ Ibid 3.

required of either the Regulator, the office of the Regulator, or the Broadcasting Tribunal to which appeals from decisions of the Regulator may be made.¹²⁵ Secondly, government has a great deal of control over the system established under the *Broadcasting Act*: the Regulator is appointed by the Head of State acting on the advice of Cabinet for three year terms, at the end of which he/she may be replaced;¹²⁶ members of the Broadcasting Tribunal are appointed in the same way, and there is inadequate security of tenure;¹²⁷ the Government may be represented at any hearing of the Broadcasting Tribunal without being liable to pay costs;¹²⁸ and a decision of the Tribunal may not be appealed except under judicial review.¹²⁹

6.18 There is certainly an argument for a government role in regulating some aspects of the media, such as cross-ownership, competition and licensing. This kind of control, however, should be restricted to activity that aims to protect the public, for example from unacceptable bias and power imbalances that might arise where media ownership falls into one or very few hands. The Commission is of the view that while the Office of the Broadcasting Regulator can effectively manage a licensing scheme and undertake most of the other regulatory duties required of it, it cannot be responsible for adjudicating matters relating to news media content.

6.19 Finally, the Broadcasting Regulator's content-based regulation role appears to be included in the *Broadcasting Act* as an afterthought and is not well planned. Most problematically, it does not include regulation of print media. As the Commission has stated above in Chapter Four, 'External mechanisms: private and statutory media councils', any body designed to regulate the news media must capture it in all forms. To add a regulatory role for print media to the Broadcasting Regulator's functions would be untidy and confusing. On these bases, the Commission recommends that any roles involving the regulation of media content be removed from the Broadcasting Regulator's mandate. In discussions with the Commission, the Broadcasting Regulator indicated his agreement with this recommendation.

Recommendation 3: The *Broadcasting Act 2010* should be reviewed to identify and remove any functions that overlap with the role of the News Media Council as described by the Commission in Recommendation 7.

¹²⁵ *Broadcasting Act 2010* s 13(2), requiring qualifications in economics, management finance, broadcasting, engineering, broadcast management or law.

¹²⁶ *Ibid* s 5.

¹²⁷ *Ibid* s 13.

¹²⁸ *Ibid* s 16.

¹²⁹ *Ibid* s 19.

Regulation

- 6.20 A number of reviews of media and media regulation have been recently completed or are now underway worldwide. These inquiries are asking whether self-regulation of the media is working, how convergence can be effectively addressed in media regulation, and how serious ethical breaches by journalists can be prevented. The answers have differed. While the internal Review of the Press Council of South Africa determined that its shortcomings could be addressed by changes to the organisation, the Finkelstein Inquiry into the Media and Media Regulation concluded that the failings of the Australian Press Council could not be satisfactorily addressed by reforms. Finkelstein recommended that a new body for regulation of all forms of media be established by statute.
- 6.21 The United Kingdom has reviewed the state of its media and media regulation a number of times, most recently with the (ongoing) Leveson Inquiry established to investigate the role of the press and police in a number of phone hacking incidents. In 2003, Sir David Calcutt wrote in his Review of Press Self-Regulation in the United Kingdom, '[e]ffective self-regulation, if it could be achieved, would, I believe, be preferable to any form of statutory regulation. The problem is how to achieve it.'¹³⁰ In that Review, Calcutt was ultimately forced to recommend a statutory body, having warned the press in a previous inquiry that this would be the result of a failure to effectively self-regulate. He determined that the press had gone as far as it was able to go, but that it was not far enough.
- 6.22 The Commission agrees with the principle established by the Australian government's Convergence Review. 'Citizens and organisations should be able to communicate freely and, where regulation is required, it should be the minimum necessary to achieve a clear public purpose'.¹³¹ Regardless of the awaited findings of the Leveson Inquiry and the New Zealand Law Commission's review of media regulation in the digital era, and despite Finkelstein's call to establish a statutory body in Australia, it is the Commission's view that the media industry in Samoa should have one last chance at making self-regulation work.
- 6.23 Samoa's media landscape is very different to the environment in which journalists operate in Australia, New Zealand and the United Kingdom. The biggest problems facing the media in Samoa are a lack of formal education and training for journalists, deficient understanding among both the media and the public about journalistic standards, and the absence of any binding code of practice. Until the media has been properly supported to meet these needs itself, the Commission believes that there is no basis for deciding that a regulatory body should be established by statute.

¹³⁰ Sir David Calcutt, *Review of Press Self-Regulation* (January 1993) 7.

¹³¹ Australian Government, *Convergence Review*, Final Report (March 2012) viii.

6.24 Despite some stakeholders preferring Options 2 and 3 from the Discussion Paper, the Commission therefore recommends a model of self-regulation under Option 1. The first layers of a regulatory regime discussed above in Chapter Four – education and internal mechanisms – will be enabled, encouraged and supported by this system.

6.25 In making this recommendation, the Commission acknowledges UNESCO’s call to professional associations, media outlets and industry to ‘promote and strengthen forms of independent and voluntary self-regulation that enhance and support high-quality ethical journalism and build public trust’.¹³² The onus is on the industry to achieve this; the problem, as Calcutt identified, is *how*. He has provided three broad pointers for successful self-regulation:¹³³

1. an automatic source of funding;
2. a means of applying effectively an agreed code of practice; and
3. a will to make self-regulation work on the part of the professional members of the media council.

6.26 This last point warrants emphasis. An industry-established News Media Council will not be effective if it does not have the support of the whole industry. The Commission is cautiously optimistic that the recommendations below will give Samoa’s media the best chance of achieving success through a privately established News Media Council: optimistic because many, if not most, media organisations and journalists have shown a willingness to make self-regulation work; and cautious because this sentiment is not shared by all media organisations and because as yet, no such system has been put in place.

6.27 The Commission is particularly concerned that the most influential print media outlet, the Samoa Observer, has made its official position known: that media regulation is not necessary in Samoa. Despite the best intentions of the majority, it is possible that nothing will be done – even with support through funding and other assistance – or that one or a few recalcitrant media outlets may spell the failure of the system. For these reasons, the Commission also recommends below that a different system be put in place if the media industry fails to regulate itself responsibly in the next two years.

Recommendation 4: The media industry should act independently to establish a News Media Council for the regulation of print, online and broadcast news media in Samoa.

¹³² United Nations Educational, Scientific and Cultural Organisation, *Washington Declaration* (May 2011) 3.

¹³³ Sir David Calcutt, *Review of Press Self-Regulation* (January 1993) 38.

Mentoring and networks

- 6.28 The Recommendations set out below for the establishment and operation of a News Media Council (**‘Council’**) in Samoa are onerous. The development of this organisation will be hard work, and it may not always be clear how certain objectives can be achieved. The Commission recommends, therefore, that a mentoring relationship be developed with one or more well-reputed media councils in other jurisdictions.
- 6.29 To establish useful mentoring relationships, one or two key people, such as the Chair and Executive Secretary of the Council, could undertake a familiarisation trip shortly after the establishment of the Council. By visiting a small number of media councils in other jurisdictions, the representatives from the Samoan News Media Council would learn first-hand about their functions and procedures, and establish ongoing partnerships.
- 6.30 From such relationships, the media industry in Samoa stands to gain practical and technical information about how to establish the News Media Council, as well as the resources and knowledge to enable it to develop the Council as an effective machine for education, training and arbitration of complaints. It is hoped eventually that Samoa can reciprocate by sharing its experiences with its mentoring partner/s. In the future, similar relationships could be developed with partners closer to home, with the Samoa News Media Council sharing its experience and knowledge in order to foster a greater effort at self-regulation in the Pacific Region.
- 6.31 The Commission also recommends that the News Media Council cooperate with media interest groups and networks throughout the Pacific to carry out its mandate as described below in Recommendation 7, particularly with respect to education and information. Relevant organisations may include: the Pacific Freedom Forum; the Pacific Islands News Association; Pacific Media Watch; the Pacific Alliance of Development Journalists; Pacific Islands Journalism Online; and Pasifika Media Association. The Commission is aware that many of these groups lack the resources to fully carry out their objectives, and the resources of the News Media Council are also bound to be limited. By working with media alliances in the Pacific, the Samoan News Media Council will more effectively organise and advertise training seminars and forums in the region.

Recommendation 5: The News Media Council should establish and foster a mentoring relationship with an overseas counterpart or counterparts to share information and expertise.

Recommendation 6: The News Media Council should cooperate with media groups and networks around the Pacific to collaborate in the facilitation of regional seminars and forums for reporters, editors and others involved in the media.

Role/mandate

6.32 The News Media Council will have jurisdiction over all forms of news media, including print, broadcast and online. Its core functions will involve: educating journalists and the public about the roles and responsibilities of the media and the purpose of the News Media Council; developing and maintaining an enforceable Code of Practice; and receiving and addressing complaints relating to breaches of the Code of Practice.

Education and public awareness

6.33 In one written submission received by the Commission, a group of media stakeholders affirmed that:

[s]elf regulation is a pledge by quality-conscious media professionals through a self regulatory body to maintain a dialogue with the public. It is also a joint effort by media professionals and the public, to set professional standards and editorial guidelines and more importantly public belief and confidence in those standards.

This submission emphasised the potential of a self-regulating media to have a very positive impact on the profession of journalism and on the relationship between the news media and the public.

6.34 The Commission shares this view and envisages a significant role in education for a self-regulating News Media Council in Samoa. The Commission's view is encapsulated well by the following statement from another written submission: 'education is critical if you want any form of change to be long lasting – and not just for the journalists but for the government and the public as well'. This stakeholder viewed a media council as a body to support news media and the media industry, rather than a body that would compromise media freedom.

6.35 As part of its role in educating journalists, the Commission recommends that the News Media Council organise seminars once every two months on topics relating either to skills and practice or ethics. The Council should also advertise training and workshops offered externally, both within Samoa and overseas. Members of the Council, regardless of experience or status, should be required to attend a certain number of accredited or approved training courses per year, based on a points system established by the Council. In addition, training seminars should be arranged for journalists found by the Council to have breached its Code of Practice (see below, 'Remedies and Enforcement').

6.36 As well as encouraging and supporting in-house training of journalists, the Council also needs to assist in facilitating change within news organisations. The Commission has heard that frequently, junior reporters who return from seminars and educational forums are not

encouraged and supported by their employers to implement new ideas and strategies. Often while reporters are away attending forums and workshops, others have to take on the burden of their work. As soon as they return they are expected to catch up on lost time.

6.37 According to Yavuz Baydar, awareness-raising within media offices has a big impact on compliance with an approved code of conduct, and by implication improved credibility for journalists. He suggests:

[m]anagers must ensure that ethical issues are regularly discussed by the staff – not just when a specific issue comes up. Standards can be taught internally by well respected, experienced editors. The more the issues are kept alive, the stronger the commitment'.¹³⁴

As part of this function, the Council should support media organisations and editors to establish internal mechanisms for self-regulation of the kind discussed in Chapter Four, and should consider offering small grants for this purpose. It may also be helpful to provide mentors for Editors in Chief and other senior staff in news organisations so that change within these organisations can be better structured and managed. Ideal mentors would be equivalent officers from overseas news media outlets.

6.38 In addition, the Council's mandate must include raising public awareness about the role of the media and the standards to which it must adhere: as noted in the Review of the Press Council of South Africa, 'obscurity is the worst cause of failure'.¹³⁵ A marketing and outreach plan should be developed upon the establishment of the Council, and social media should be considered as a means for communicating messages from the Council.

6.39 Marketing and outreach must include advertising the Council's role and the content of any codes of conduct set by it. Such advertisements should appear at regular intervals in all forms of news media – print, television, radio and online. In keeping with their obligation to make the public aware and informed about the media's role in democracy, media organisations must cooperate with the Council by publishing or broadcasting approved advertisements at least weekly.

6.40 As part of its duty to keep media open, accessible and accountable to the public, the News Media Council should have a staffed office with a shopfront, where members of the public are welcome to come and ask questions as well as lodge complaints. There should also be a website containing information about complaints procedures, the Code of Practice, policies, guidelines and any other information that will assist people to understand the role of

¹³⁴ Yavuz Baydar, 'Setting up a Journalistic Code of Ethics', in Miklós Haraszti (ed), *The Media Self-Regulation Guidebook* (Organisation for Security and Co-operation in Europe, 2008) 22, 29.

¹³⁵ Citing Jean-Claude Bertrand, *Review: Press Council of South Africa* (August 2011) 33.

the Council and how to make a complaint. The website should also contain past decisions of the Council in full.

- 6.41 The Council should collect data to assess how it is functioning and to show trends in the resolution of complaints. These should include key statistics such as: how many complaints are decided by the Council; whether they are settled privately or formally adjudicated by the Council; the outcome of each complaint; whether the media respondent complied with the finding and direction of the Council; and whether the complainant was satisfied with the outcome (based on a customer satisfaction survey to be filled out by each complainant after a complaint has been resolved). These statistics should be set out in an Annual Report of the Council, as well as in quarterly reports to members of the Council and the public.
- 6.42 Quarterly reports should be produced by the Council. These should include guidelines for journalists and complainants developed on the basis of trends arising in complaints and how they have been addressed by the Council, as well as information about courses and training available to reporters in Samoa and overseas. Quarterly Reports could take the form of a newsletter, available both electronically and in hard copy from the office of the Council.
- 6.43 The Commission is highly in favour of the following suggestion by JAWS: '[t]o increase public visibility of the media industry and to motivate practising journalists in their work, it is advised that the [Council] undertakes an annual media awards night'.¹³⁶ The conferral of journalism awards fits with the education and awareness-raising functions of the Council and provides a positive means of ensuring high standards and ethical practice in journalism to complement its adjudicative role.
- 6.44 Aside from the functions just described, the Council should have no general role to 'promote media freedom'. Of course, promotion of media freedom will be incidental to its educational functions. Using the resources of the Council to campaign for media freedom, however, would detract from its main purpose: to set standards; to educate; and to adjudicate complaints. A strong campaigning role could even diminish the reputation of the Council as a fair arbiter of disputes, as the Privacy Committee found to be the case with the United Kingdom Press Council in its 1989 inquiry.¹³⁷ Media freedom will be a fundamental consideration in deciding cases before the Council, but will be served more effectively in this way than by diverting Council funds to more overt promotion.

¹³⁶ Journalists Association of Western Samoa, Submission to the Samoa Law Reform Commission (16 March 2012) 3.

¹³⁷ Report by Sir David Calcutt, *Review of Press Self-Regulation* (January 1993) 7.

Code of Practice

6.45 A core function of the News Media Council will be to establish and maintain professional standards for news media content and practice. Working journalists and editors should be consulted during the initial drafting of a Code of Practice, and reference may be made to the Beales Draft Code of Practice, as several stakeholders have suggested. Some written submissions received by the Commission indicated that improvements could be made to this document, including that a code of practice should be more sensitive to the nuances of the Samoan culture. As stated in Chapter One, the Commission has no comment to make about the content of a Code of Practice. We are confident that the News Media Council, acting in conjunction with working members of the media, will develop a Code that is fair and responsible.

6.46 The Code of Practice, and any associated guidelines or policies, will be made available to journalists and members of the public both online and in hardcopy form at the office of the Council. The Code will be enforceable, and will be enforced at the editorial level in media organisations as well as by the Council through the arbitration of complaints. It will be subject to regular review (see below: ‘Review and Further Recommendations’).

Complaints-handling

6.47 The third core function of the News Media Council will be the determination of complaints from the public. This will be managed according to the system set out below.

6.48 At least initially, the Commission recommends that the Council have no power to initiate its own investigations, because there is a danger that performing own-motion investigations could diminish the perception of the News Media Council as a fair and impartial arbiter, as discussed above in Chapter Four, ‘External mechanisms: private and statutory media councils’. This recommendation should be reviewed, however, as it may be necessary to consider adding this power to the mandate of the Council if its existing complaints mechanism proves ineffective. If the public is slow, for example, to take up this avenue for addressing issues, self-referral might allow the investigation of problems that would otherwise go unchecked.

Recommendation 7: The News Media Council should have the following roles –

1. To educate journalists and the public about the roles and responsibilities of the media and the purpose of the News Media Council, including:
 - (a) organising and advertising seminars for reporters and editors every two months on topics relating either to skills and practice or ethics;
 - (b) advertising journalistic training and workshops offered externally, both in Samoa and

overseas;

(c) requiring members of the News Media Council to attend a minimum number of accredited or approved training courses per year, based on a points system established by the Council;

(d) organising training seminars for journalists found by the News Media Council to have breached its Code of Practice;

(e) encouraging and supporting in-house training of journalists and the establishment of internal mechanisms for self-regulation discussed in Recommendation 1, including by appointing mentors for senior staff in media organisations;

(f) raising public awareness about the role of the media and the standards to which it must adhere, and developing a marketing and outreach plan for this purpose;

(g) requiring members of the News Media Council to publish approved advertisements about the role of the Council;

(h) publishing any applicable codes, guidelines and decisions of the Council, and information about complaints procedures on an official News Media Council website;

(i) collecting data to assess how the News Media Council is functioning and to show trends in the resolution of complaints;

(j) producing an Annual Report, and quarterly reports which should include information such as guidelines for journalists and complainants regarding the complaints process, data gathered as above and information about courses and training available to reporters; and

(k) organising annual Media Awards.

2. To establish and maintain a Code of Practice, in consultation with the media industry more broadly.
3. To enforce the Code of Practice by determining complaints from the public.

Structure and composition

6.49 Some media stakeholders suggested that a regulatory body comprise different arms: a board to operate the marketing, educative and administrative functions of the body and an ombudsman or tribunal to consider and determine complaints. Similar systems are used in other jurisdictions, as discussed above in Chapter Four, ‘External mechanisms: private and statutory media councils’. Due to the small size of Samoa and its media industry, the Commission considers that a simpler structure will more efficiently meet the aims of the News Media Council. Whatever legal personality the News Media Council adopts, it is essential that all members be bound to its rules by an enforceable document such as articles of association.

Appointed members of the News Media Council

6.50 The News Media Council should comprise eleven members:

- five representatives from a cross-section of media (print, online and broadcast);
- five members of the public or representatives from civil society organisations, preferably with experience in adjudication or mediation of disputes, with at least one being a qualified lawyer, who will be appointed as Vice Chair; and
- a Chair, who is a lawyer with at least five years experience as a barrister or judge, preferably with expertise in media law, but having no direct connection with media.

This composition provides media expertise but holds the balance in favour of the public to reflect the existing power imbalance between media and private individuals.

6.51 No gender may make up less than 30% of the composition of the board (for example, at least four of the eleven members must be women). All members of the Council will serve three year terms and may be reappointed. Remuneration will be paid to members as allowances for time spent on official business of the Council.

6.52 One of the more controversial provisions in Fiji's heavily criticised Media Council of Fiji Bill 2003 gave government the power to appoint at least half the Council's members, making it theoretically possible for the government to control the workings of the Media Council.¹³⁸ Whether the Council is established privately or by statute, it is essential that the government does not dictate its membership. Equally, the appointments system must not be dominated by media industry players with a vested interest as to who sits on the Council. It is fair, however, that the industry should decide on the media representatives.

6.53 To ensure sensible, effective and independent appointments to the Council, the Commission recommends that members be appointed by the Chief Justice on nominations given in the following way. Only working members of the media may nominate the five media representatives. To achieve certainty in appointments, the media industry may choose to pool together to nominate their five suggested candidates. Any person *other than* a working member of the media may nominate for the Chair and the five positions to be held by public representatives. These nominations must be accompanied by two referees and, as discussed above, candidates with experience in dispute resolution will be preferred.

¹³⁸ Article 19 Global Campaign for Free Expression, *Memorandum on the Media Council of Fiji Bill* (September 2003) 2; David Robie, 'The sword of Damocles in the Pacific: Two media regulatory case studies' (draft paper) *PR2K3 (Public Right to Know) Conference* (Sydney, October 2003) 17.

Staff

6.54 The Council will employ two paid staff: an Education Officer, who will be an academic or other experienced journalist or editor capable of training journalists and educating the public about ethics and professional standards in journalism; and an Executive Secretary to carry out administrative tasks associated with the operation of the Council. The Education Officer may be employed part-time initially, with the position reviewed during the first review of the News Media Council (discussed below and set out in Recommendation 18). The Executive Secretary will need to be employed on a full-time basis to ensure that the office of the Council remains open to the public during business hours.

Professional membership

6.55 All Samoan journalists, editors and media organisations must be members of the News Media Council if it is to operate effectively. This includes operators of news websites and freelance journalists who submit articles to overseas publications.

6.56 Given that the Commission has decided not to recommend a statutory system of regulation that would compel membership for all working members of the media industry, it is hoped that each individual will participate voluntarily in the process. Failure to join as a member of the News Media Council, would, however, have a detrimental effect on the credibility of any journalist or news media organisation. In addition, the Commission notes that the failure of this body to effectively regulate all news outlets would provide grounds for the implementation of a statutory scheme for regulation.

6.57 To further encourage membership to the Council, the Commission recommends that only members of the Council, or journalists whose employer is a member, are eligible to receive an award at the annual Media Awards.

6.58 As a further incentive, the Commission recommends that legislated media privileges or entitlements will not apply to those who are not members of the Council. There are few legislative concessions for journalists in Samoa, but in other jurisdictions members of the media who are subject to an enforceable code of ethics or code of practice may be permitted to attend closed court proceedings.

6.59 In the interests of open justice, members of the public and the media are generally free to attend court proceedings. It is commonly accepted, however, that the interests of justice may in some circumstances require that proceedings be heard in a ‘closed court’. This principle is set out in art 9(1) of Samoa’s *Constitution*, which provides for the right to a fair trial:

In the determination of his civil rights and obligations or of any charge against him for any offence, every person is entitled to a fair and public hearing within a

reasonable time by an independent and impartial tribunal established under the law. Judgment shall be pronounced in public, but the public and representatives of news service may be excluded from all or part of the trial in the interests of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice.

6.60 There is no specific power provided in the *Criminal Procedure Act 1972* for a judge to make an order to close a court. Such an order may be made, however, consistently with art 9(1) of the *Constitution* and the general powers of a judge to control court proceedings. In addition, ss 61 and 164V of the *Criminal Procedure Act* empower the Supreme Court and Court of Appeal to prohibit the publication of names and other information about a trial.

6.61 At the recommendation of the New Zealand Law Commission, the New Zealand parliament has legislated to ensure that members of the media permitted to be present during closed court sessions are bound by a code of ethics.¹³⁹ This system is designed to ensure that only genuine, responsible and accountable journalists are permitted to be present for the hearing of sensitive and private matters:

(1) An order [to clear the court] under section 197 may not exclude members of the media except on the ground set out in section 197(2)(a)(ii) (which relates to the security or defence of New Zealand).

(2) For the purposes of this section, member of the media means—

- (a) a person who is in the court for the purpose of reporting on the proceedings and who is either subject to or employed by an organisation that is subject to—
 - (i) a code of ethics; and
 - (ii) the complaints procedure of the Broadcasting Standards Authority or the Press Council; or
- (b) any other person reporting on the proceedings with the permission of the court.¹⁴⁰

6.62 Under the current discretionary system in Samoa a judge may order that the media be permitted to remain during closed court proceedings. In the Commission's opinion, however, this system ought to be refined to encourage judges to allow the attendance in closed court proceedings only of members of the media held accountable by the News Media Council recommended in this Report.

¹³⁹ New Zealand Law Commission, *Suppressing Names and Evidence*, Report 109 (October 2009) 47, R14; *Criminal Procedure Act 2011* (NZ) ss 197–199 (not yet in force).

¹⁴⁰ *Criminal Procedure Act 2011* (NZ) s 198 (not yet in force).

6.63 It is in the interests of justice that responsible members of the media be permitted to attend closed court proceedings, provided that the decision remains at the discretion of the judge. In some circumstances, it may be inappropriate for any members of the public or the media to be present, while in other circumstances it will be necessary for the court to make orders restricting the information that may be reported by journalists attending court. Such decisions can only be made by the court on a case-by-case basis. The Commission is firmly of the view, however, that in all circumstances it will only be appropriate for reporters to attend closed court sessions if they are subject to an enforceable code of practice.

6.64 During its recent review of the *Criminal Procedure Act 1972* the Commission made a specific recommendation that courts always be closed when a victim gives evidence in a sexual offence proceeding. We made the following comment about attendance of media during such closed court proceedings:

Media access to closed court proceedings should not be granted. Although other jurisdictions, such as New Zealand, allow the media to be present in a closed court, the Commission is of the view that an important proviso to this admission is that the media provider is subject to a national regulation system. At present, no such system of regulation exists in Samoa.¹⁴¹

6.65 The Commission has revised this recommendation in light of the Recommendations in this Report. For the reasons discussed above, we recommend that the *Criminal Procedure Act 1972* be amended to allow reporters who are members of the News Media Council to be present when a court is closed to hear evidence from a victim in a sexual offence proceeding, at the discretion of the court.

6.66 The *Young Offenders Act 2007* stipulates that all proceedings conducted in the Youth Court must be closed to the public and the media.¹⁴² Criminal proceedings involving children are particularly sensitive. It is recognised at international law that the best interests of the child are a primary consideration in deciding how proceedings should take place.¹⁴³ In addition, the privacy of every child accused must be ensured, in the context of the child's sense of dignity and worth, and taking into account the child's age and the desirability of promoting his or her reintegration in society.¹⁴⁴

6.67 Bearing in mind the special requirements of children in the justice system, the Commission recommends that s 8 of the *Young Offenders Act* be amended to enable the court

¹⁴¹ Samoa Law Reform Commission, *Review of the Criminal Procedure Act 1972*, Report 07/12 (January 2012) 64 [8.26].

¹⁴² Section 8.

¹⁴³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3.

¹⁴⁴ *Ibid*, art 40.

to order that reporters who are members of the News Media Council may be present during proceedings of the Youth Court. It is important that media presence in the Youth Court remain at the discretion of the judge. Additionally, any members of the media in attendance must be subject to an enforceable code of practice with sensible guidelines about reporting on child crime such as those contained in the Beales Draft Code of Practice (see Appendix D). To respect the privacy of the child, provisions for suppression of names and identifying details must remain in place.

Recommendation 8: The governing board of the News Media Council should comprise five representatives from a cross-section of media platforms, five public representatives and a Chair, appointed by the Chief Justice. The five media representatives will be nominated by the media industry, and all remaining members must be nominated by persons outside the industry, with two referees provided. The Chair must be a lawyer with at least five years experience as a barrister or judge, preferably with expertise in media law, but having no direct connection to the media. One of the public representatives must also be a lawyer with strong dispute resolution skills, and will be appointed as Vice Chair. No gender will make up less than 30% of the composition of the board. Members will be paid remuneration according to time spent carrying out official duties for the News Media Council (for example, a daily sitting allowance).

Recommendation 9: The News Media Council must operate a staffed office with a shopfront. There will be two paid employees: an Education Officer (part-time or full-time as necessary), who will be an academic or experienced journalist with teaching skills; and an Executive Secretary (full-time) who will carry out administrative tasks associated with the operation of the Council.

Recommendation 10: All Samoan journalists, editors and media organisations, including operators of news websites and freelance journalists, should be members of the News Media Council. Only members of the Council will be eligible to receive an award at the annual Media Awards (see Recommendation 7).

Recommendation 11: On the establishment of a fully functioning News Media Council, the *Criminal Procedure Act 1972* should be amended to provide that the court, in exercising its power under art 9(1) of the *Constitution* to exclude the public and the media from proceedings, must permit any member of the media, as defined below, to attend, if to do so is in the interests of justice.

A ‘member of the media’ is a person who is in the court for the purpose of reporting on the proceedings and who is either subject to or is employed by an organisation that is subject to:

- (i) an enforceable code of practice; and
- (ii) the complaints procedure of the News Media Council.

Recommendation 12: On the establishment of a fully functioning News Media Council, the *Criminal Procedure Act 1972* should be amended to provide that during the taking of evidence from a victim, sexual offence proceedings should be dealt with in closed court with only the following persons present at the discretion of the court:

- the judge;
- the defendant and his or her counsel;
- the representative of the prosecution;
- court officers responsible and necessary for court proceedings and recordings;
- **any member of the media as defined below;**
- any person whose presence is requested by the witness (such as a support person); and
- any person whose presence is deemed necessary by the court.

A ‘member of the media’ is a person who is in the court for the purpose of reporting on the proceedings and who is either subject to or is employed by an organisation that is subject to:
(i) an enforceable code of practice; and
(ii) the complaints procedure of the News Media Council.

Recommendation 13: On the establishment of a fully functioning News Media Council, s 8 of the *Young Offenders Act 2007* should be amended to enable the court, taking into account the best interests of the child as a primary consideration, to order that any member of the media, as defined below, be permitted to attend proceedings in the Youth Court. Section 8 should not otherwise be amended insofar as it relates to suppression of names and other identifying information.

A ‘member of the media’ is a person who is in the court for the purpose of reporting on the proceedings and who is either subject to or employed by an organisation that is subject to:
(i) an enforceable code of practice; and
(ii) the complaints procedure of the News Media Council.

Funding

6.68 A News Media Council will need to be funded to cover: activities associated with education and training of journalists; marketing and outreach to the public; salaries for the two staff recommended above (see Recommendation 9); allowance for sittings of the adjudication panel; and other administrative and operational costs, including rent of a central premises. In addition, media organisations and journalists defending complaints will have their own costs to bear: respondents may wish to seek legal advice in relation to a complaint and in any event will bear any loss of profits caused by being required to respond to complaints or attend hearings of the Council.

6.69 Most media organisations and freelance journalists in Samoa would not make sufficient profit to provide significant funding for a News Media Council in addition to meeting any incidental costs arising from their membership to such organisations. The Commission therefore recommends that the majority of funding for the News Media Council come from government and aid donors, with a small subscription fee being required from members.

6.70 Keeping in mind the risk of influence associated with those who provide funding to a regulatory body (discussed above in Chapter Four, ‘External mechanisms: private and statutory media councils’), it is imperative that measures be taken to minimise this risk. Funding should be as stable and consistent as possible, while allowing for budgetary changes from year to year (for example, as the Council grows or as more people become aware of the opportunity to make a complaint).

6.71 Funding from the government should be given with ‘no strings attached’ and should be guaranteed for the duration of the review cycle of the Council (recommended below to be two years initially, and every three years thereafter). A minimum amount should be set, with the Council able to apply for more funding as the organisation’s budget may require. Given that funding from the Samoan government for this sort of body is likely to be delivered under the auspices of an overseas aid programme, the Council could also consider the possibility of seeking funding directly through a donor funded scheme or agency such as the Civil Society Support Program run by AusAID.

6.72 To cover any shortfall from government funding, but also to ensure that there is a second steady source of income, the News Media Council may consider seeking a second source of funding from outside Samoa to cover a portion of its operational costs. This funding might come from a non-governmental organisation interested in enhancing journalistic standards in the Pacific and fostering a high performing and free media.

Recommendation 14: The News Media Council should be principally funded by the Samoan government and/or by an overseas aid program or non-governmental organisation. Any funding should be provided with ‘no strings attached’ and should be guaranteed for the review cycle of the Council. Subscriptions should also be taken from members, at an amount determined by the size and profit of the member.

Complaints procedure

6.73 The Commission recommends a thorough and robust yet speedy and inexpensive system for addressing complaints. The system must respect that the first stop for resolving

complaints is ideally the reporters, editors and news media organisations themselves, and must encourage conciliation as the preferred means of resolving disputes. The complaints procedure recommended below also seeks to ensure that procedural fairness is followed, and that the complainant and the respondent journalist or news media organisation are given sufficient information and support throughout the process.

Recommendation 15: The following complaints procedure should be followed by the News Media Council –

1. Before addressing a complaint to the News Media Council, a complainant must demonstrate that he/she first directed the complaint to the offending media provider, and that the complaint was not addressed, or not adequately addressed, within five business days. This requirement may be dispensed with by the Chair of the News Media Council in special circumstances where he/she considers that complaining to the media provider was unlikely to have any effect or would cause undue hardship for the complainant.
2. A complaint must be made within four weeks of the offending material first being published or broadcast.
3. A third party may issue a complaint, but the Council may require permission from the party affected by the alleged breach of the Code of Practice before investigating the complaint, if this is considered necessary.
4. Before a complaint is considered by the News Media Council, the complainant must make a written declaration that he/she is seeking to resolve the matter through the Council rather than by pursuing legal proceedings. As part of this declaration, the complainant will also be required to undertake not to use any information gathered during the investigation of the complaint by the Council in any future legal proceedings.
5. Complaints must be made in writing in English or Samoan before they can be considered, but the Council must provide assistance to those for whom this is difficult.
6. The Chair of the Council may dismiss a complaint if: he/she considers it is frivolous or vexatious; it falls outside the Council's remit; it does not disclose any breach of the Code; or it has been issued outside the required timeframe and there are no special grounds for extending the timeframe.
7. On the day it receives a complaint, the Executive Secretary of the Council must contact the complainant to explain the procedure for progressing the complaint.

8. The respondent must also be contacted immediately on the same day a complaint is received, and must be provided with a copy of the complaint. The respondent will be asked to provide a written response within five business days. The complainant will be provided with the respondent's response as soon as it is submitted to the Council.
9. In the first instance the Council should encourage and assist conciliation in all cases unless it is plain that to do so would be unproductive or counterproductive, or otherwise inappropriate. If conciliation fails, complaints will be formally considered by the Council on the papers, with both parties being given an opportunity to respond. A full hearing may be given if the Council considers it appropriate, and a party may make an application to be heard.
10. Each complaint will be considered, whether on the papers or at a hearing, by a Complaints Committee composed of five appointed members of the Council. The Complaints Committee will comprise the Chair (or Vice Chair if the Chair is unavailable), two media representatives and two public representatives, determined by a roster system. Where a hearing is held, the complainant and respondent will be required to attend, but in order to save cost and minimise formality, lawyers will not be permitted to be present. Hearings will be advertised and open to the public, and journalism students should be encouraged to attend.
11. Unless attempts at conciliation delay proceedings, complaints must be considered by the Council within five business days after receiving the respondent's response, with the matter decided within a further five business days. Immediately after its completion, the written adjudication may be amended, and must be approved, by a majority of the members of the Council. Once this is done, the full written decision will be provided to both claimant and respondent, and will be made available on the News Media Council website once the respondent has published or broadcast an approved version as required.

Remedies and enforcement

- 6.74 It is the Commission's view that punitive measures such as fines should not be necessary to ensure compliance with the Code of Practice. Instead, it should be open to the News Media Council, according to the circumstances of each case, to order a respondent to publish or broadcast a reply, correction, apology and/or an approved version of the Council's finding, with due prominence. In addition, or alternatively, the Council may require a respondent to undertake training or education in a particular area of relevance to the breach committed, to be given by the Education Officer, or at an approved external training course.
- 6.75 The 'approved version' of the Council's adjudication should usually be the full written decision, but if this is too long the Council may approve a summarised version. The Council may require the decision to be published or broadcast in both English and Samoan, with

translations done or approved by it. The use of English and/or Samoan may depend on the original language of the offending article or broadcast.

6.76 The ‘approved version’ of the Council’s finding should always include the News Media Council logo and the heading ‘News Media Council Adjudication’ (or, if in Samoan, an appropriate Samoan translation). For radio and television stations the finding should be broadcast by reading, and also available on the station’s website, if there is one. The Council will determine what ‘due prominence’ requires for any given case, approving the page and/or position of a publication or the time of broadcast/s.

6.77 It is hoped that publishers and broadcasters will cooperate with the procedures of the Council and will comply with its orders, given that the Council will be an industry-operated body whose success depends in part on whether the code of practice is respected and can be effectively enforced. If a person or organisation fails to comply with an order of the Council, the media provider may be suspended or expelled from the Council, with the effect that legislated entitlements discussed above in Recommendations 11, 12 and 13 will not apply.

6.78 Because a majority of the members of the News Media Council must approve all adjudications, it is not logical to offer a right of appeal within the Council. Judicial review may be available in the Supreme Court, noting that the Court is likely to intervene in the decision of a private body like the News Media Council only in exceptional circumstances. For example, an appeal may be upheld where the Council has made its decision in bad faith or with bias or dishonesty, where its process did not comply with the requirements of natural justice, or where the decision was so absurd that no reasonable person could make it.¹⁴⁵

6.79 It is the Commission’s view that it is appropriate that an appeal from a decision of the Council only be available in exceptional circumstances. The success of the News Media Council relies in part on acceptance of its jurisdiction and faith in its processes. Furthermore, the system recommended by the Commission in this Report aims to avoid cost and delay as far as is possible. Recourse to the Courts will not achieve this aim.

¹⁴⁵ For a discussion about where a court may intervene in the decision of a private tribunal see *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 at 550–551 per Tadgell JA.

Recommendation 16: In the event that a respondent to a complaint is found to have breached the Code of Practice, the News Media Council may require the respondent to do any or all of the following –

- publish or broadcast with due prominence an approved version of the Council’s finding (which will be either the full decision or a condensed version and will include the News Media Council logo and the heading ‘News Media Council Adjudication’);
- publish or broadcast with due prominence a reply, correction or apology;
- undertake training or education in a particular area of relevance to the breach committed, to be conducted by the Education Officer or at an approved external course.

Recommendation 17: There will be no appeal from a decision of the News Media Council other than by instituting legal proceedings for judicial review in the Supreme Court.

Review and further recommendations

6.80 An independent review to assess the effectiveness of the News Media Council should be completed two years from now. It may be advantageous for the National University of Samoa to be involved over the next two years in monitoring the progress of the Council. This will not only assist toward the two-year review, but will also provide students with a working appreciation of the purpose and benefits of self-regulation. An independent consultant or organisation should be engaged later to conduct the full inquiry and produce a final report about the Council’s successes and failings.

6.81 If the review finds that the media industry has failed to establish a fully operational private News Media Council as recommended by the Commission above, the Government should establish by statute a body with the same functions. The Commission is of the view that the establishment of a News Media Council through legislation need not involve any dangerous intrusion by the government into the media. The point is not to tighten control on the media but to ensure it takes responsibility for its own work.

6.82 It is imperative, however, to heed warnings from commentators that government might, through the parliamentary process or through later amendment, amend the legislation in ways that diminish the independence of the media council as it was designed.¹⁴⁶ It is also

¹⁴⁶ Lord Hunt and James Harding cited in Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (28 February 2012) 212–213; Grey Hywood, interview with Amy Bainbridge, ‘Austar boss fears piracy explosion under NBN’, *Lateline* (15 March 2012) <<http://www.abc.net.au/lateline/content/2012/s3454642.htm>> at 17 May 2012.

worthwhile reflecting on the mistakes made in the Fiji government's Media Council of Fiji Bill 2003. That draft legislation required a code of ethics to be included as regulations under the legislation, which would enable a Minister to amend the code at will.

6.83 To ensure media freedom is not threatened in Samoa, it is important that if a statutory body must be established, it is done in the manner recommended by the Commission above, and that government respect the importance of an independent media. In particular, the Commission is strongly of the view that the Code of Practice should not be set out in legislation or regulations and should instead be left to the News Media Council to draft and amend as necessary.

6.84 In the event that a statutory body is required, some changes may need to be made, depending on the reasons legislation is required in the first place. For example, if enforcement of the Code of Practice is a concern, it may be necessary to consider making decisions of the Council enforceable by court order. Refusal to comply with such an order should be punishable by fine only. Any divergence from the scheme recommended by the Commission in this report should be scrutinised to ensure that it will not have an overall detrimental effect on a free, but accountable, media.

6.85 The review of the News Media Council should also consider whether any government influence has been brought to bear on the body – associated with its partial funding of the Council or otherwise. If this is found to be the case, it may be decided that any closer involvement by government is not worth the risk and that an imperfect system of self-regulation is preferable to a risk of government censure.

6.86 If the independent review determines that the industry has set up an effective News Media Council, it will make recommendations for the improvement of the Council and further independent reviews will be conducted every three years thereafter. If a statutory body is set up, its effectiveness should also be assessed independently every three years in the same manner.

6.87 Any review will include an appraisal of data gathered by the Council as described above as part of its education and information role, as well as evaluation of the Code of Practice and procedures for handling complaints, and any other assessments necessary to gauge the effectiveness of the Council. Effectiveness will be measured generally against improvements in professional and ethical standards among the media in Samoa, and in public awareness about the role of the media in democratic society. The impact of the News Media Council on media freedom will be another essential consideration for any review, including whether the structure of the Council has in any way enabled government to curtail the media's right to report freely.

Recommendation 18: An independent review to assess the effectiveness of a News Media Council should be carried out two years after the release of this report (**‘Two Year Review’**).

Recommendation 19: If the Two Year Review concludes that the media industry has failed to establish an effective News Media Council, the Government should establish by statute a body with the same functions and characteristics as described by the Commission in Recommendations 5 to 17. If any modifications are made to the model recommended in this Report, they must be only those required to address deficiencies noted in the Two Year Review, without threat to a free but accountable media.

Recommendation 20: If the Two Year Review determines that the existing News Media Council is sufficiently effective, it should make recommendations for the improvement of the Council.

Recommendation 21: Whether or not a statutory body is created after the Two Year Review, further independent reviews of the Media Council and its Code of Practice should be conducted every three years thereafter.

Final Comments

6.88 Some journalists and editors perceive this reference as punishment for the media. The Commission takes a different view. Regulation of the media in Samoa is long overdue. As the Fourth Estate, the media in Samoa has been the only arm of democracy not held accountable under any formal structure.

6.89 Regulation is not about inhibiting the media from expressing the truth; nor is it about punishing the media for publicising views different from those held by public officials. Rather, it is about raising the standards of journalism in Samoa and protecting the public from false, inaccurate and unethical journalism and in so doing, enhancing the independence and dignity of the press and broadcast media.

6.90 It is the hope of the Commission that the recommendations in this report will be seen by journalists as an opportunity to raise the bar of reporting in Samoa, and that decisions of the proposed News Media Council will not be viewed as punishments but as opportunities for learning and for developing a media that enjoys more freedom because it has the respect and confidence of the people of Samoa.

Appendix A – List of Recommendations

Recommendation 1: All media organisations should consider implementing and/or improving one or more of the following mechanisms for internal ‘self-help’:

- effective monitoring, by the Editor in Chief, of compliance with company policies and industry codes;
- providing opportunities for audience feedback, interaction and critique, such as letters to the editor, talk-back radio, and regular printing or broadcasting of clearly identified ‘Corrections’ at a consistent time or place;
- employing a readers’ editor to deal independently with complaints, monitor compliance with company policies and industry codes and communicate with the public about media ethics and accountability.

Recommendation 2: The *Newspapers and Printers Act 1992/1993* should be reviewed to examine the effectiveness of the registration system it establishes, and to consider the need to amend or repeal s 10 as it relates to the disclosure of information about a journalist’s source.

Recommendation 3: The *Broadcasting Act 2010* should be reviewed to identify and remove any functions that overlap with the role of the News Media Council as described by the Commission in Recommendation 7.

Recommendation 4: The media industry should act independently to establish a News Media Council for the regulation of print, online and broadcast news media in Samoa.

Recommendation 5: The News Media Council should establish and foster a mentoring relationship with an overseas counterpart or counterparts to share information and expertise.

Recommendation 6: The News Media Council should cooperate with media groups and networks around the Pacific to collaborate in the facilitation of regional seminars and forums for reporters, editors and others involved in the media.

Recommendation 7: The News Media Council should have the following roles –

1. To educate journalists and the public about the roles and responsibilities of the media and the purpose of the News Media Council, including:
 - (a) organising and advertising seminars for reporters and editors every two months on topics relating either to skills and practice or ethics;
 - (b) advertising journalistic training and workshops offered externally, both in Samoa and overseas;
 - (c) requiring members of the News Media Council to attend a minimum number of accredited or approved training courses per year, based on a points system established by

the Council;

- (d) organising training seminars for journalists found by the News Media Council to have breached its Code of Practice;
- (e) encouraging and supporting in-house training of journalists and the establishment of internal mechanisms for self-regulation discussed in Recommendation 1, including by appointing mentors for senior staff in media organisations;
- (f) raising public awareness about the role of the media and the standards to which it must adhere, and developing a marketing and outreach plan for this purpose;
- (g) requiring members of the News Media Council to publish approved advertisements about the role of the Council;
- (h) publishing any applicable codes, guidelines and decisions of the Council, and information about complaints procedures on an official News Media Council website;
- (i) collecting data to assess how the News Media Council is functioning and to show trends in the resolution of complaints;
- (j) producing an Annual Report, and quarterly reports which should include information such as guidelines for journalists and complainants regarding the complaints process, data gathered as above and information about courses and training available to reporters; and
- (k) organising annual Media Awards.

2. To establish and maintain a Code of Practice, in consultation with the media industry more broadly.
3. To enforce the Code of Practice by determining complaints from the public.

Recommendation 8: The governing board of the News Media Council should comprise five representatives from a cross-section of media platforms, five public representatives and a Chair, appointed by the Chief Justice. The five media representatives will be nominated by the media industry, and all remaining members must be nominated by persons outside the industry, with two referees provided. The Chair must be a lawyer with at least five years experience as a barrister or judge, preferably with expertise in media law, but having no direct connection to the media. One of the public representatives must also be a lawyer with strong dispute resolution skills, and will be appointed as Vice Chair. No gender will make up less than 30% of the composition of the board. Members will be paid remuneration according to time spent carrying out official duties for the News Media Council (for example, a daily sitting allowance).

Recommendation 9: The News Media Council must operate a staffed office with a shopfront. There will be two paid employees: an Education Officer (part-time or full-time as necessary), who will be an academic or experienced journalist with teaching skills; and an Executive Secretary (full-time) who will carry out administrative tasks associated with the operation of the Council.

Recommendation 10: All Samoan journalists, editors and media organisations, including operators of news websites and freelance journalists, should be members of the News Media Council. Only members of the Council will be eligible to receive an award at the annual Media Awards (see Recommendation 7).

Recommendation 11: On the establishment of a fully functioning News Media Council, the *Criminal Procedure Act 1972* should be amended to provide that the court, in exercising its power under art 9(1) of the *Constitution* to exclude the public and the media from proceedings, must permit any member of the media, as defined below, to attend, if to do so is in the interests of justice.

A ‘member of the media’ is a person who is in the court for the purpose of reporting on the proceedings and who is either subject to or is employed by an organisation that is subject to:

- (i) an enforceable code of practice; and
- (ii) the complaints procedure of the News Media Council.

Recommendation 12: On the establishment of a fully functioning News Media Council, the *Criminal Procedure Act 1972* should be amended to provide that during the taking of evidence from a victim, sexual offence proceedings should be dealt with in closed court with only the following persons present at the discretion of the court:

- the judge;
- the defendant and his or her counsel;
- the representative of the prosecution;
- court officers responsible and necessary for court proceedings and recordings;
- **any member of the media as defined below;**
- any person whose presence is requested by the witness (such as a support person); and
- any person whose presence is deemed necessary by the court.

A ‘member of the media’ is a person who is in the court for the purpose of reporting on the proceedings and who is either subject to or is employed by an organisation that is subject to:

- (i) an enforceable code of practice; and
- (ii) the complaints procedure of the News Media Council.

Recommendation 13: On the establishment of a fully functioning News Media Council, s 8 of the *Young Offenders Act 2007* should be amended to enable the court, taking into account the best interests of the child as a primary consideration, to order that any member of the media, as defined below, be permitted to attend proceedings in the Youth Court. Section 8 should not otherwise be amended insofar as it relates to suppression of names and other identifying information.

A 'member of the media' is a person who is in the court for the purpose of reporting on the proceedings and who is either subject to or employed by an organisation that is subject to:

- (i) an enforceable code of practice; and
- (ii) the complaints procedure of the News Media Council.

Recommendation 14: The News Media Council should be principally funded by the Samoan government and/or by an overseas aid program or non-governmental organisation. Any funding should be provided with 'no strings attached' and should be guaranteed for the review cycle of the Council. Subscriptions should also be taken from members, at an amount determined by the size and profit of the member.

Recommendation 15: The following complaints procedure should be followed by the News Media Council –

1. Before addressing a complaint to the News Media Council, a complainant must demonstrate that he/she first directed the complaint to the offending media provider, and that the complaint was not addressed, or not adequately addressed, within five business days. This requirement may be dispensed with by the Chair of the News Media Council in special circumstances where he/she considers that complaining to the media provider was unlikely to have any effect or would cause undue hardship for the complainant.
2. A complaint must be made within four weeks of the offending material first being published or broadcast.
3. A third party may issue a complaint, but the Council may require permission from the party affected by the alleged breach of the Code of Practice before investigating the complaint, if this is considered necessary.
4. Before a complaint is considered by the News Media Council, the complainant must make a written declaration that he/she is seeking to resolve the matter through the Council rather than by pursuing legal proceedings. As part of this declaration, the complainant will also be required to undertake not to use any information gathered during the investigation of the complaint by the Council in any future legal proceedings.
5. Complaints must be made in writing in English or Samoan before they can be considered, but the Council must provide assistance to those for whom this is difficult.
6. The Chair of the Council may dismiss a complaint if: he/she considers it is frivolous or vexatious; it falls outside the Council's remit; it does not disclose any breach of the Code; or it has been issued outside the required timeframe and there are no special grounds for extending the timeframe.

7. On the day it receives a complaint, the Executive Secretary of the Council must contact the complainant to explain the procedure for progressing the complaint.
8. The respondent must also be contacted immediately on the same day a complaint is received, and must be provided with a copy of the complaint. The respondent will be asked to provide a written response within five business days. The complainant will be provided with the respondent's response as soon as it is submitted to the Council.
9. In the first instance the Council should encourage and assist conciliation in all cases unless it is plain that to do so would be unproductive or counterproductive, or otherwise inappropriate. If conciliation fails, complaints will be formally considered by the Council on the papers, with both parties being given an opportunity to respond. A full hearing may be given if the Council considers it appropriate, and a party may make an application to be heard.
10. Each complaint will be considered, whether on the papers or at a hearing, by a Complaints Committee composed of five appointed members of the Council. The Complaints Committee will comprise the Chair (or Vice Chair if the Chair is unavailable), two media representatives and two public representatives, determined by a roster system. Where a hearing is held, the complainant and respondent will be required to attend, but in order to save cost and minimise formality, lawyers will not be permitted to be present. Hearings will be advertised and open to the public, and journalism students should be encouraged to attend.
11. Unless attempts at conciliation delay proceedings, complaints must be considered by the Council within five business days after receiving the respondent's response, with the matter decided within a further five business days. Immediately after its completion, the written adjudication may be amended, and must be approved, by a majority of the members of the Council. Once this is done, the full written decision will be provided to both claimant and respondent, and will be made available on the News Media Council website once the respondent has published or broadcast an approved version as required.

Recommendation 16: In the event that a respondent to a complaint is found to have breached the Code of Practice, the News Media Council may require the respondent to do any or all of the following –

- publish or broadcast with due prominence an approved version of the Council's finding (which will be either the full decision or a condensed version and will include the News Media Council logo and the heading 'News Media Council Adjudication');
- publish or broadcast with due prominence a reply, correction or apology;

- undertake training or education in a particular area of relevance to the breach committed, to be conducted by the Education Officer or at an approved external course.

Recommendation 17: There will be no appeal from a decision of the News Media Council other than by instituting legal proceedings for judicial review in the Supreme Court.

Recommendation 18: An independent review to assess the effectiveness of a News Media Council should be carried out two years after the release of this report (**‘Two Year Review’**).

Recommendation 19: If the Two Year Review concludes that the media industry has failed to establish an effective News Media Council, the Government should establish by statute a body with the same functions and characteristics as described by the Commission in Recommendations 5 to 17. If any modifications are made to the model recommended in this Report, they must be only those required to address deficiencies noted in the Two Year Review, without threat to a free but accountable media.

Recommendation 20: If the Two Year Review determines that the existing News Media Council is sufficiently effective, it should make recommendations for the improvement of the Council.

Recommendation 21: Whether or not a statutory body is created after the Two Year Review, further independent reviews of the Media Council and its Code of Practice should be conducted every three years thereafter.

Appendix B – Acronyms and Abbreviations

APC	Australian Press Council
Beales Draft Code of Practice Commission	Ian Beales, <i>Draft Code of Media Practice for Samoa</i> (2006)
Commission	Samoa Law Reform Commission
Consultation	Meeting of the Commission with media representatives on 8 February 2012
Council	News Media Council recommended by the Commission in this Report
Discussion Paper	Samoa Law Reform Commission’s Discussion Paper on Media Regulation in Samoa (16 December 2011)
Finkelstein Report	Ray Finkelstein, <i>Report of the Independent Inquiry into the Media and Media Regulation</i> to the Australian Minister for Broadband, Communications and the Digital Economy (28 February 2012)
JAWS	Journalists Association of Western Samoa
MCT	Media Council of Tanzania
NUS	National University of Samoa
NZPC	New Zealand Press Council
Observer	Samoa Observer
PCSA	Press Council of South Africa
Recommendations	Recommendations of the Samoa Law Reform Commission in this Final Report
Reference	Reference from the Attorney General to the Samoa Law Reform Commission into media regulation in Samoa
Report	Final Report of the Samoa Law Reform Commission on Media Regulation in Samoa
Two Year Review	The Independent Review of the News Media Council described in Recommendation 16 of the Report
UNESCO	United Nations Educational, Scientific and Cultural Organisation

Appendix C – Organisations and persons consulted

Consultations

Journalists Association of Western Samoa and other interested media representatives

Office of the Regulator

Pacific Freedom Forum

Submissions

Journalists Association of Western Samoa

Misa Vicky Lepou

Pacific Alliance of Development Journalists

Samoa Quality Broadcasting Company, Apia Broadcasting Company, Radio Polynesia and Newsline (jointly)

Sophie Budvietas

Appendix D – Ian Beales’ Draft Code of Practice

An initiative of JAWS in partnership with The Thomson Foundation.

Friday, February 10, 2006

INTRODUCTION By Ian Beales

Draft Code of Media Practice for Samoa: Consultant’s Report

INTRODUCTION

AFTER a period of intense mutual antipathy, a change of leadership in Samoa brought a thaw in relations between the Government and the independent media. At a celebration in August 2003 of the 25th anniversary of the Samoa Observer, the islands’ only seven-day-a-week newspaper, the Prime Minister, Tuilaepa Aiono Sailele Malielegaoi, suggested the press should consider introducing a code of practice. In fact, such a code existed and was operational, having been adapted by the Journalists Association of Western Samoa (JAWS) from a U.S. model some years previously.

However, the executive of JAWS felt that it was indeed time that Samoa had its own, tailor-made Code and, possibly, a self-regulatory Media Council to adjudicate upon alleged breaches of it. JAWS therefore sought assistance from The Thomson Foundation and, with support from the Commonwealth Media Development Fund, I was invited to Samoa to undertake a consultancy. The Thomson Foundation saw this is a two-part operation:

Stage One: I should visit Samoa to establish whether there was support for a Code and what form it should take if it were to command wide industry and public respect. On my return I would draft a Code, reflecting Samoa’s needs and aspirations, which would be sent to all interested parties for consultation, and in the light of that, a final Code broadly acceptable to the industry would be adopted and introduced.

Stage Two: If and when there was general agreement on a Code, I should return to Samoa to investigate the support for a self-regulatory Media Council and whether it was desirable, practical, workable, what form it would take, its remit, mode of operation, and possible funding. In fact, it was necessary to revise this strategy slightly. The form a Code of Practice might take is dictated in part by whether or not there is some sort of adjudicatory body to support it. A Code that relies on the self-discipline of the media to follow its rules would need to be solely prescriptive. The existence of a Media Council, in which both the media and the public have a trust, enables a qualitative Code to be written which is less prescriptive and more interpretive, according to prevailing circumstances and standards.

To determine which kind of Code should be drafted, I therefore added to the brief of the Stage One visit the need to establish whether there was support in principle for an adjudicating Media Council, subject to general agreement on its form, composition, funding and remit.

I spent 13 days in Samoa, consulting widely with members of the media, Government and civil

society, and gave a seminar presentation on the principles of self-regulation to a small, invited audience. I am extremely grateful for the time, patience and unfailing courtesy, wisdom and hospitality, which I received throughout my stay, and offer my warmest thanks to all those who contributed to it.

THE STAGE ONE REPORT

1. The media landscape: Samoa has an ancient, distinctive and proud culture that belies the nation's size. Its customs and values - centred upon the extended family and the communal obligations of village life within the Matai system, and underpinned by intense religious belief and strict observance - are deeply ingrained. The Samoan way of life is widely revered and there appears to be a general consensus for protecting its most positive elements as the nation develops.
2. The media is broadly supportive of this, and it is reflected in tone and approach of coverage. Tensions sometimes arise when traditional concepts - such as the power and autonomy of village councils - are challenged in the name of transparency, freedom of the individual and freedom of expression. Media codes are essentially about establishing a proper balance between rights and responsibilities. Any credible Media Code for Samoa would need to emphasise that balance.
3. Complaints about the media generally, as mentioned to me anecdotally, tended to be related to issues of a perceived lack of professionalism, often due to poor training of journalists and other media practitioners. This is not uncommon in small national media industries, and is being addressed in Samoa by the establishment of a media training course at the Polytechnic College and, in best-practice offices by structured in-house training, including on externally validated courses. The existence of a workable and enforceable Code of Practice has been found in many countries to be a form of training, by being a constant reminder of the ground rules and raising standards.
4. The most common complaints mentioned concerned basic errors of detail, ignorance of the law, failure to confirm facts, corroborate allegations, or to observe the rules of journalistic confidence; and poor editing of articles or broadcasts. Fairness and balance were also issues raised in relation to editorial matters, and false or dubious claims in advertising material.
5. Broadcasting impartiality: The perceived lack of political impartiality of the State broadcaster SBC was frequently mentioned. There seemed to be wide support for the view that SBC's political coverage lacked balance, giving disproportionate airtime to the Government view compared with that of the Opposition.
6. This appeared to be a source of concern to many, accepted with resignation by some, and accepted as the Government's inherent right by others. Areas of concern also included an alleged lack of access to the station by local organisations because of the practice of charging for airtime unless the item appeared in a news programme, and clumsy editing of imported films to censor sex scenes.
7. Support for a Code: I found widespread support for a Media Code among Government,

Opposition, civil society and – most significantly – among media practitioners themselves. No media figure I encountered was publicly opposed and most were strongly supportive. However, one or two key figures, despite repeated contact, were not available for discussion, possibly because they were not members of JAWS¹, but maybe for other reasons. It would be safest to assume they remain to be convinced. It would also be necessary to establish support from all significant overseas publishers of Samoan newspapers and magazines, such as those produced in New Zealand.

8. The general view was that the Code should be comprehensive and embrace as much of the media spectrum as practical, including the print media, broadcasting, advertising and, if possible, cinema films and advertising, and DVDs and video recordings bought or hired for private viewing.

9. Support for a possible Media Council, while very positive, was less clear-cut. Although all media practitioners to whom I spoke were prepared to support it in principle, some significant concerns were registered. Most involved questions of its composition, remit and funding, which are not uncommon, especially in a small nation with limited resources. These difficulties are, with goodwill, usually overcome. The removal of such stumbling blocks would form a major part of the second stage of this project.

10. However, one very senior media figure questioned the political wisdom of the media pursuing self-regulation to such lengths while seriously anti-media legislation, such as Criminal Defamation and the Publishers and Printers Acts remained on the Statute book as a major threat to media freedom in general, and investigative journalism in particular. It is a very real concern and will need to be addressed.

11. Government response: This provides an unrivalled opportunity for the Government of Samoa to consolidate the improvement in relations with the media achieved in recent years. From the Prime Minister down, I was given every assurance that the Government supported media self-regulation and I have no reason to doubt the sincerity of that. It is, of course, quite within the Government's power to respond positively to the industry's initiative on the Code of Practice, by repealing punitive anti-media legislation.

12. I was given the clearest indication that the Government would be prepared to do that, if a credible and working Code were adopted. If it stood by that, the Government would, at a stroke, remove a major obstacle to the establishment of a media council.

¹ Membership of Jaws should not be an issue: the organisation accepts it should not have ownership of a Code which would need the active support of all media outlets, whether members of JAWS or not.

PURPOSE AND PRINCIPLES OF THE CODE

13. The purpose of a Code of Practice is to create a voluntary framework in which the rights and responsibilities of the media can be properly balanced. It should define the responsibilities of the media and the rights of the public, and tell them what they are entitled to expect. No Code can work unless it commands the broad respect of both the media and the public it serves. Once agreement is reached within the industry, the Code creates a level playing field, by unifying the media around a single set of principles to which they can all subscribe. This prevents one media house from being disadvantaged against another.

14. The tone of the Code is important to its chance of success. Some codes are high-sounding and prescriptive, full of moral precepts. However experience suggests that these are often honoured more in the breach than in the practice and are particularly unsuitable in areas with a history of minimal professional training, where they are likely to be seen as lofty and irrelevant.

15. The most successful Codes are usually those which set out acceptable minimum standards rather than improbably high ideals, however noble or worthy. That has been a guiding factor in drafting this Media Code for Samoa.

16. A single self-regulatory system covering print media, broadcasting, advertising and films is an ambitious concept. In most larger modern democracies, the regulatory systems for each media branch are separate and each has its own distinct code of practice, reflecting the differing legal status – i.e. whether it is licensed or not - and consequent obligations to the audience.

17. But having four different regulatory systems is rarely an option for countries, such as Samoa, where the number of expected complaints is likely to be small, and the cost disproportionate. However, the needs of each branch of the media, while often similar, are also sometimes markedly different and the Code must reflect that.

18. I have therefore drafted a set of interlinked Codes, aimed at providing both general and specific rules and guidance, for each media branch:

- The General Media Code is a light-touch regime, whose rules and principles would apply across the whole media spectrum, with differing degrees of relevance. It would be the only Code applying to the press, whose readers are self-selecting.
- The Code of Broadcasting Practice, covering radio and television, is more stringent, since broadcasting is licensed and by accepted convention has special obligations both in editorial and advertising content to an audience that often does not have an individual choice of service provider and is therefore not entirely self-selected.
- The Code of Advertising Practice incorporates rules both for non-licensed outlets - such as newspapers, magazines, and cinema - and for licensed TV and radio.
- The Cinema and DVD Code, is currently drafted as an indicative, advisory Code only, since it

requires a harmonisation of classifications that is outside the immediate scope of this project and would need support from non-media organisations, such as general retailers who might sell or hire Video and DVD recordings.

19. In drafting the Codes, I have drawn widely on the experience of other relevant self-regulatory regimes, including the UK Press Complaints Commission, the Australian, New Zealand and Indian Press Councils, the Press Complaints Commission of Sri Lanka, the Media Codes of Fiji, of Kenya, and of Papua New Guinea; the Ofcom Broadcasting Codes and broadcast advertising Codes of the UK, the BBC's producer guidelines, the UK Independent Television News compliance manual, the Australian Commercial Television Industry Code, the UK Radio Code, and UK, Australian and New Zealand advertising standards codes.

20. Although guidance and principles are traditionally stated separately from the rules in media codes, I have wherever practicable deliberately combined them to illustrate more clearly the meaning and intention.

21. THE GENERAL MEDIA CODE, as drafted, sets out the purpose and philosophy of the Code. It covers the broad range of media obligations of accuracy, fairness, opportunity to reply; protection of privacy; intrusion into grief; protection of children; dealing with sensitive social issues; use of subterfuge; suicide reporting; plagiarism; confidential sources; crime reporting; discrimination against individuals; conflict of interest, misuse of privileged information, inducements and gifts; and appropriate sensitivity for the Samoan culture.

22. From the outset, the Preamble introduces twin themes running through the Code:

- Protection of the rights both of the individual and of the public's right to know, with the balance struck by a public interest defence being available throughout the linked Codes to a greater or lesser extent. This is the mechanism by which a breach of the Code might be justified, for example, by the need to expose crime or corruption.
- The obligation to follow the Code not only to the letter, but also in the spirit, which is a feature almost unique to a voluntary self-regulatory system and is designed to avoid legalistic disputes, especially if an adjudicatory Media Council were to be established.

23. THE BROADCASTING CODE places particular emphasis on impartiality and balance, and the need to prevent unnecessary or unexpected harm or offence, especially to vulnerable people or children.

24. The need for reasonable political balance is stressed, as is a guide to radio and TV coverage of elections. Rules are also included to prevent sponsors from exercising undue influence, and to prevent undisclosed promotions being used in programmes.

25. Preventing harm or offence: There are two principal ways of achieving this in broadcasting:

- The use of scheduling to ensure that potentially offensive or harmful material is not broadcast at a time when the most vulnerable or susceptible groups would be viewing or listening; and
- Issuing and broadcasting advance guidance, warning parents or susceptible viewers that the content of a specific programme may cause alarm or distress.

26. Scheduling is particularly efficient where it is possible to isolate the audience within certain key viewing times, for example by defining a Watershed - such as 9pm - before which only viewing suitable for children, or under parental supervision, can normally be broadcast.

27. Watersheds: While watersheds remain relevant – particularly with free-to-air TV - they are becoming less practical in the emerging international linear media landscape where access to on-demand broadcasting via satellite is less clearly time zoned. Also, there is no clear watershed for radio. Crucially, watersheds do not work very satisfactorily in communities, such as Samoa, where social custom is for the children often to stay up with the parents until late into the evening, normally the most appropriate time for adult TV.

28. Guidance: This leaves advance on-screen guidance as the most attractive option for preventing vulnerable viewers from being confronted by alarming, offensive or unsuitable material unexpectedly. A proper system of guidance enables adult viewers to be their own gatekeepers of what they watch, preventing unnecessary distress or offence, while maintaining access for adults and less susceptible people to a wide range of drama, controversial debate and artistic content.

29. This may be the better option for Samoa, especially if a common system of content- labelling standards can be devised – in conjunction with the Censor’s office - across TV, cinema films, and video and DVD. For this reason, I have not suggested a classification system related to time-zoning of programmes. Instead, I recommend that attempts be made to introduce a uniform content-labelling system, common to all relevant media.

30. Children’s broadcasting would still need to be strictly overseen. The Code makes full and specific allowance for this in both editorial programming and advertising. However, parents are, ultimately, the appropriate gatekeepers for their children. The inherent strength of good and standardised guidance is that it allows them to exercise parental responsibility with real authority; effectively, it allows them to introduce their own watershed, directly suited to their family’s needs.

31. THE ADVERTISING CODE, as drafted, covers the full spectrum of consumer concerns. It includes the need for advertising to be clearly distinguishable as such; the obligation for it not to be misleading, deceptive or exploitative, or to cause unnecessary fear or harm, or to endanger

safety.

32. It provides clear guidance on portrayal of people or individuals in advertisements, protecting them from abuse; and the consumer from being misled, a theme that dominates this section of the Code.

33. Socially-sensitive advertising: An indicative draft has been included on potentially socially sensitive advertising, such as for alcohol, liquor, gambling and medicines. This would need to be checked against existing laws and current in-house rules, where they exist, and would need to be advisory-only until general agreement was reached.

34. There are special sections on the specific requirements for broadcast advertisements both for adults and children. These go further than for general retail advertising in other media, reflecting the need to meet the greater obligations on licensed broadcasters.

35. Responsibility for compliance in any adjudicatory system, such as a Media Council, would be shared by the originators of the advertisement and the media service provider publishing or broadcasting it. In reality, the principal responsibility would be on broadcasters and publishers since they – rather than general retailers or advertisers – would be party to the Media Council.

36. THE CINEMA AND VIDEO/DVD CODE would have similar problems because, while the cinema proprietors might be expected to sign up to a Media Code, electrical and other general retailers selling or hiring DVDs and video recordings would not, and there might be difficulties in securing voluntary compliance. It is also unlikely that there would be complaints other than that the labelling was inadequate or misleading.

37. The Code therefore remains an indicative advisory model, pending further discussion (see para 27 above) on setting up a common system of content labelling, which is strongly recommended.

KEY RECOMMENDATIONS

1. That the draft Codes are made available for wide consultation in Samoa, embracing representatives of all major media outlets, including those who were not available during my visit, as well as those with whom I had discussions.[1](#)
2. That the comments and suggestions be returned to The Thomson Foundation, so that I can make amendments, as appropriate.
3. That the final draft be considered and approved by all the interested parties in the Samoan media and be circulated widely for the information of government and civil society.

4. That the Government of Samoa should be invited to:
 - Endorse the Code;
 - Require all broadcasting service providers to adhere to it as part of their licence obligations; and to -
 - Take steps to repeal both the Criminal Defamation Act and the Publishers and Printers Act as a matter of urgency.
5. That the media simultaneously takes a decision in favour of exploring the desirability, composition, funding and remit of a Media Council of Samoa, which could adjudicate on alleged breaches of the Code.
6. That at the same time a standing committee of the Samoa media, representing all major disciplines and including representative members who are not necessarily associated with JAWS, be formed to review the Code after the first year of operation, and then at least every two years, and revise it as appropriate.
7. That attempts be made to set up a system of common content-labelling for broadcasting, films and DVD and video recordings in conjunction with the media outlets and the censor's office.
8. That there is consultation between media outlets on the advisory code for socially sensitive advertising, so that the indicative rules, as amended, may be consolidated into the general provisions of the Advertising Code.

[1](#) A list of those with whom I had discussions is included in the Appendix on Page 20.

GENERAL MEDIA CODE OF PRACTICE

1. Draft

PREAMBLE (Indicative draft)[1](#)

THIS Code is a voluntary charter to balance the rights and responsibilities of the Samoan media in a free and democratic society. It upholds both the rights of the individual and the public's right to know. It embraces the traditional values of the Samoan way of life and the duty to hold public institutions to account, consistent with freedom of expression and the public interest in exposing corruption and malpractice.

The Code sets the benchmark for the high professional standards which all members of the Samoan media have a duty to maintain. It is the cornerstone of the system of self-regulation to which the media has made a binding commitment.

It is essential to the success of an agreed, voluntary code that it be honoured not only to the letter but also in the full spirit. It should not be interpreted so narrowly as to compromise its commitment to respect the rights of the individual, nor so broadly that it constitutes an unnecessary interference with freedom of expression or prevents publication in the public interest.

Editors, producers, publishers and broadcasting station managers have ultimate responsibility for implementing the Code and should take care to ensure it is observed rigorously by all media staff and external contributors, including non-journalists and advertisers, in broadcasts, publications,

films, advertisements and online or DVD versions.

1. ACCURACY

1.1i The media must take all reasonable care not to publish or broadcast inaccurate, misleading or distorted material, including modified photographs or other visual images, and deceptive advertisements.

1.1ii A significant or material inaccuracy, misleading statement or distortion, once recognised must be corrected, promptly and with due prominence, and - where appropriate - an apology published or broadcast.

1.1iii The media must distinguish clearly between comment, conjecture and fact in editorial output.

1.1iv Advertisements should be clearly distinguishable as such.

1.1v While newspapers and magazines are free to be partisan, broadcasters have a special duty of impartiality and balance.

1.1vi A publication or broadcaster must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published.

1.2 Opportunity to Reply

1.2i A fair opportunity to reply to material inaccuracies must be given when reasonably called for.

1.3 PRIVACY and INTRUSION

1.3i Private life: The media should take particular care to respect the private and family lives of individuals, their home, health, correspondence, and digital communications. Intrusions without consent would need to be demonstrably in the public interest.

1.3ii Children under 16 should be free from unnecessary intrusion. Material concerning a child's private life should be published or broadcast only if there is some exceptional public interest other than the fame, notoriety or position of his or her family or guardian.

1.3iii Pictures: Individuals should not be photographed or filmed in public or private places where there is a reasonable expectation of privacy, without their consent, unless in the public interest.

1.3iv Grief or shock: In cases involving personal grief or shock, enquiries and approaches must be made with sympathy and discretion and published or broadcast with due sensitivity. This should not restrict the right to report legal proceedings, such as inquests.

1.3v Harassment: Journalists or broadcasters must not engage in harassment or intimidation. Unless in the public interest, they should not persist in questioning, telephoning, pursuing or photographing individuals if asked to desist; or remain on their property when asked to leave.

1.4 PROTECTION of CHILDREN

1.4i Children's welfare: A child under 16 must not be interviewed, filmed, or photographed on issues involving their own or another child's welfare unless a custodial parent, guardian or similarly responsible adult consents.

1.4ii At school: Pupils must not be approached, filmed or photographed at school without the permission of the school authorities.

1.4iii In crime stories: The media should have particular regard for the potentially vulnerable position of children who are victims of, or who witness, crime. This should not restrict the right

to report legal proceedings.

1.4iv in sex cases: The media must not, even if legally free to do so, identify children under 16 who are victims or witnesses in cases involving sex offences.

1.4v In incest cases: -

The child must not be identified.

The adult may be identified.

The word "incest" must not be used where a child victim might be identified.

Care must be taken that nothing in the report implies the relationship between the accused and the child.

1.4vi Payments: Minors should not be paid for material involving children's welfare, nor parents or guardians for material about their children or wards, unless it is clearly in the child's interest.

1.4vii TV and radio scheduling and films: Broadcasters and cinemas should take care to ensure that programmes or films scheduled for family audiences generally do not include language, images or content unsuitable for children. Where this is impractical, appropriate advance guidance must be given to allow parents to exercise appropriate control.

1.4viii Advertising material aimed at children should take particular care not to mislead them, disturb them by use of menacing images, encourage them into anti-social, aggressive or violent behaviour; or to compromise their own, or others' safety; or to put undue pressure on parents to buy products.

1.5 GENERAL REPORTING and PROGRAMMING

1.5i Social issues: In dealing with issues of a culturally sensitive, shocking or emotionally painful, nature – such as atrocity, community unrest, violence, drug abuse, brutality, sadism, sexual salacity, or obscenity – the media should take care to present facts, opinions, and visual images with due sensitivity and discretion, subject to its duty to publish in the public interest.

1.5ii Reporting suicide: Care should be taken not to glorify or glamorise acts of suicide, and to avoid excessive detail of the method used, which might encourage imitative attempts.

1.5iii Clandestine devices and subterfuge: The media must not seek to obtain or publish material acquired by using misrepresentation or subterfuge, hidden cameras or clandestine listening devices; intercepting private or mobile telephone calls, messages or emails; or by the unauthorised removal of documents or photographs, unless in the public interest.

1.5iv Hospitals: Journalists or broadcasters must identify themselves and obtain permission from a responsible official before pursuing inquiries in non-public areas of hospitals or similar institutions.

1.5v Confidential sources: Journalists have a moral obligation to protect confidential sources of information, until that source authorises otherwise. However, all reasonable attempts should be made to corroborate a story from other, on-the-record sources. Where the sole source is a confidential informant, an individual or organisation featuring significantly in the report should generally be offered an opportunity to respond.

1.5vi Plagiarism: It is unacceptable for editors or broadcasters to use material from rival media outlets without consent or proper attribution.

1.5vii Competitions should be conducted fairly and without favouring individual contestants.

1.6 CRIME REPORTING

1.6i Identification: In reporting crime or criminal cases, the media should not, unless it is both legally permitted and in the public interest –

- Name or in any way identify, without consent, victims of sex crimes;
- Identify any child aged under 16 accused of a criminal offence;
- Identify without consent relatives or friends of a person accused or convicted of a crime, unless they are relevant to the story.

1.6ii Glorifying crime: News reports and entertainment programmes should avoid glorifying or glamorising crime, violence or seriously anti-social behaviour.

1.6iii Payments must not be made to criminals or their associates for material which glorifies crime in general or exploits a particular crime, unless the information is in the public interest - such as exposing crime or corruption - and cannot be obtained by other means.

1.6iv Witnesses in active or likely criminal proceedings must not be paid or offered payment for information until the trial is over, unless – exceptionally - there is an over-riding public interest in obtaining material and it cannot be obtained by other means. Payment must never be conditional on the trial verdict and should be disclosed in advance to both the prosecution and defence.

1.7 DISCRIMINATION

1.7i The media must avoid prejudicial or pejorative reference to an individual's race, colour, religion, sex, sexual orientation or to any physical or mental illness or disability.

1.7ii Details of an individual's race, colour, religion, sexual orientation, physical or mental illness or disability should be avoided unless relevant to the story.

1 To be amended to include references to an adjudication process, following any agreement on the establishment of a Media Council or similar.

CODE OF BROADCASTING PRACTICE

2. Draft

PRINCIPLES

In addition to the provisions of the General Media Code of Practice, specific essential principles underpin the self-regulation of TV and radio in Samoa:

The need for news or current affairs programmes to be presented with due accuracy and impartiality, and without political bias or in a way intended or likely to secure party-political advantage, or to give undue prominence to the views or opinions of the licence holder or service provider on matters of public policy.

The need to avoid in programmes material that causes harm or unnecessary offence, or which is likely to encourage or incite crime or seriously anti-social behaviour, or to offend public feeling, taking into account generally accepted standards in Samoa, unless there is editorial justification or it is in the wider public interest.

The need to avoid techniques likely to distress, harm, deceive or exploit people, by use of flashing lights, hypnosis, distorting images or by conveying subliminal messages, or in any way influencing the minds of viewers and listeners without them being fully aware of what has occurred.

Broadcasters should respect truth and human dignity and have due regard for susceptible groups. Where material is unsuitable for children or is likely to cause significant offence among the expected audience at the time of broadcast, clear guidance should be given to allow people –

especially parents concerned for their children - to exercise appropriate and informed judgment.

2.1 ACCURACY, FAIRNESS and IMPARTIALITY (See also General Code)

2.1i Factual programmes concerning controversial political, industrial or public policy issues must ensure a wide range of significant, relevant views is fairly reported, and presented even-handedly, in a single broadcast or balanced over a series in a reasonable timescale.

2.1ii Presenters and journalists must not to compromise their impartiality by advocating products or giving undue prominence in programmes to their own views or political opinions.

2.1iii Reconstructions, or the use of actors or models to illustrate news reports, or of flashbacks and library pictures, or similar techniques, must be clearly identifiable as such.

2.1iv Interviews: Contributors to programmes and interviewees must be treated fairly and straightforwardly, and their contribution not distorted or misrepresented by editing or presentation. Wherever practical, they should be told the purpose of the interview, their role in the programme and the nature of other relevant contributions.

2.1v Subterfuge, secret filming or other deceptive practices to obtain interviews or footage should not be used or broadcast unless in the public interest. See general code.

2.1vi Non-factual programmes, such as drama or drama documentaries, must not portray facts or events in a way unfair to an identifiable individual or organisation.

2.1vii Individuals or organisations, against whom damaging allegations are made in programmes, should normally be given a fair opportunity to respond.

2.1viii Competitions should be conducted fairly and without favouring individual contestants.

2.2 PRIVACY (See also General Code)

2.2i Broadcasters must have due regard for the privacy and human dignity of victims when covering public or private tragedy, disaster, war or civil disturbance, and there should be clear editorial justification for any material broadcast.

2.2ii Distress to survivors - or the immediate families of victims - of a tragedy, disaster or serious trauma should be kept to a minimum when preparing broadcasts and, where possible, they should be told in advance of any programme, reconstruction, analysis or drama in which they, or a close relative who has died, feature significantly.

2.3 HARM and OFFENCE

2.3i Broadcasters must avoid causing unnecessary offence, harm or distress by the use of images, behaviour or language, subject to the duty to report in the public interest and to uphold freedom of thought and expression, including access to adult films, drama, humour or satire. Material which may cause offence, as judged by generally accepted standards, must be justified by context, appropriately labelled and scheduled for non-family viewing times.

2.3ii Distressing scenes, depicting death or trauma, close-ups of dead, dying or mutilated bodies, or of execution or torture, or serious violence against people and children, or death or cruelty to animals, should be broadcast only if there is a clear editorial justification, and then normally only after an appropriate warning to viewers or listeners.

2.3iii Violence: Broadcasts featuring strong visual or audio depictions of violence, including sexual violence, should be avoided unless justified editorially or, in a dramatic context, as necessary to the programme.

2.3iv Sex and nudity: The explicit portrayal of sex or sexual relationship, or nudity in a sexual context, must not be broadcast at a time when children or families are likely to be viewing or listening, without clear editorial justification and appropriate warning.

2.3v Offensive language must be avoided unless there is editorial justification, and very strong language should be broadcast only after appropriate warning to viewers or listeners.

2.3vi Inciting crime: Broadcast material must not incite or condone crime or serious anti-social behaviour. Demonstrations of criminal methods must not be broadcast without editorial justification, and in such cases detail should be limited to minimise the risk of imitation.

2.3vii Kidnap and hijacking: Special care must be taken not to broadcast information which is likely to be received by kidnappers or hijackers and put lives at risk or prejudice legitimate attempts to resolve the crisis.

2.3viii Imitative anti-social behaviour: Broadcasters should avoid glamorising harmful or anti-social behaviour - including suicide, illegal drugs, solvent abuse, vandalism, smoking and alcohol abuse - especially where they are likely to influence children or vulnerable people.

2.3ix Disturbing images: Care should be taken to filter out of broadcasts, wherever possible, flashing lights or other images potentially harmful to people affected by photo-sensitive epilepsy. Where this is impractical, appropriate warnings should be given to viewers.

2.3x Occult, exorcism and the paranormal: Care should be taken when featuring non-fictional demonstrations of the occult, exorcism, the paranormal and related practices to be factual and objective and to avoid giving life-changing advice.

2.3xi Hypnotism and subliminal techniques: Broadcasts must not affect the sub-conscious state of susceptible viewers or listeners by inducing hypnosis, or by the use of subliminal techniques to convey information at or below the threshold of normal awareness.

2.4 RELIGIOUS PROGRAMMES (See also General Code)

2.4i Broadcasters, while respecting an individual's right to hold and practice religious and denominational views, must ensure that religious programmes do not misrepresent or discriminate against an individual's beliefs or disparage another faith or denomination.

2.5 Sponsorship and undisclosed promotions

2.5i The content or scheduling of a programme must not be influenced by a sponsor in any way which affects, or appears to compromise, the broadcaster's editorial independence.

2.5ii Sponsorship of news or current affairs programmes covering contentious public issues must be avoided, unless in discrete specialist sections, such as sport, weather, or business.

2.5iii Any reference to the sponsor within the programme should be incidental, non-promotional and have clear editorial justification.

2.5iv Sponsors should be chosen with care to ensure their products or services do not align with programme content in such a way as to make regular reference inevitable, or are otherwise inappropriate – i.e. alcohol or tobacco sponsorship of children's programmes.

2.5v Product placement, except in clearly identifiable advertising breaks, is not permitted. Undue prominence must not be given to named brands or services, unless justified editorially.

2.5vi: Broadcasters must not charge for access to editorial programmes or allow undisclosed promotions. Where charges are made for editorial-style airtime, the broadcast should be clearly labelled as paid-for promotional or community-service material.

2.5vii Supplied video or recorded material from or on behalf of official bodies, commercial companies, or campaigning or promotional organisations should be broadcast only with editorial

justification, and then clearly labelled as such.

2.6 GUIDANCE, LABELLING and SCHEDULING

2.6i Broadcasters must take care to ensure that viewers or listeners are not unexpectedly confronted by material that is likely to cause harm or offence to susceptible people.

2.6ii Programmes containing material which may offend or harm, according to generally accepted standards, should be clearly labelled and appropriate warnings given. Such content would normally include:

- Strong or profane language;
- Serious or sexual violence, sexual scenes or sexual nudity;
- Distressing visual or audio material, involving death, serious injury or tragedy;
- Humorous or satirical references to religion, or deeply-held cultural values;
- Material unsuitable for children, broadcast when they are likely to be affected.

2.6iii Guidance should be clear, consistent and standardised. Where practical, classification should be compatible with other relevant guidance, such as that of the Samoan Censor on films, or the labelling regimes of major foreign suppliers of broadcasting material to Samoa.

2.6iv Films banned by the censor should not be broadcast, except for brief illustrative clips, justified in the public interest - such as in a news report or debate on censorship.

2.6v Scheduling of programmes should avoid broadcasting material which may offend or harm during times of family viewing or listening. If the context – such as a harrowing news report – makes this impractical, the need to broadcast clear warnings is intensified.

2.6vi Adult-only TV programmes should not, as a general guide, be broadcast before 9.00pm. The transition from family viewing should be graduated, with no inappropriate trailers run before this threshold, nor an abrupt change to the most adult content immediately after.

2.6vii As Samoan social customs often lead to children being potential viewers much later than 9.00pm, warnings of unsuitable content should continue well after the threshold to allow parents to exercise appropriate control over their children's viewing.

2.7 ELECTION REPORTING

2.7i Broadcasts of election coverage must take particular care to show impartiality and balance throughout the election period, to ensure no party is given unfair advantage.

2.7ii Due weight must be given to the principal parties, and appropriate coverage to minority parties and to independent candidates with significant policies.

2.7iii When reporting on individual constituencies, the same opportunity to appear in a broadcast must be offered to candidates from each principal party, and others with significant current or past electoral support. However, a candidate cannot exercise a veto by withholding consent. A list of all candidates standing in the constituency should be broadcast.

2.7iv A politician invited to speak purely on general policy should not be offered the chance to make constituency points if rival candidates are not given a similar opportunity to do so.

2.8 broadcasting for children (See also General Code)

2.8i Special care must be taken by broadcasters to protect children and young people under 18 from material which might harm their moral, psychological or physical welfare.

2.8ii Programmes aimed at children under 16, or likely to be seen by them, must not glamorise or condone criminal, harmful or anti-social behaviour easily imitable by children, such as offensive language; drinking, smoking, or drug or solvent abuse; violence, vandalism and self-harm. Such material must not be broadcast when children are likely to be listening, without editorial justification and an appropriate warning.

- 2.8iii Particular care must be taken to avoid including distressing content in programmes intended for, or likely to be seen or heard by, children. Where this is unavoidable, such as in news reports involving tragedy or violence, appropriate warning should be given.
- 2.8iv Sexual material or nudity, unless having a clear educational purpose or other editorial justification, should not feature in children's programmes. No such material should be broadcast when children are likely to be listening or viewing, without editorial justification and an appropriate warning.
- 2.8v Programmes portraying the paranormal, the occult and exorcism should not be broadcast when children are likely to be watching or listening, unless editorially justified.
- 2.8vi Children taking part in programmes must not be exploited, suffer unnecessary stress, be questioned beyond their normal knowledge or competence, or be put in moral, physical or psychological danger or otherwise harmed by their participation.

CODE OF ADVERTISING PRACTICE

3. Draft

PRINCIPLES

In addition to the provisions of the General Media Code of Practice, specific essential principles underpin the self-regulation of cross-media advertising and marketing in Samoa:

- All advertising and marketing must comply with the laws of Samoa, be decent, honest and truthful, and should neither deceive nor mislead the consumer.
- Advertisements should be prepared with a due sense of responsibility to consumers and society and should not undermine public confidence in advertising, or bring it into disrepute.
- All advertising and marketing should respect the generally accepted principles of fair competition in business.

Responsibility for compliance with the voluntary obligations of the Code is shared by the advertiser or marketer and their agents, who must conform when preparing advertising, and by publishers, broadcasters and other media service providers who should not accept material that does not comply with the spirit or letter of the Code.

3.1 decent, honest and truthful

3.1i Recognition: Advertisements should be readily distinguishable as such in whatever form or medium they appear. Where they are likely to be confused with news or editorial matter, they should be clearly labelled as advertising.

3.1ii Offence: Advertising or marketing must not include material likely to cause widespread or serious offence, as judged against generally prevailing standards in Samoa, taking into account the context, medium, likely audience and product advertised. (See General Code).

3.1iii Exploitation: Advertisers must not exploit the consumers' credulity, inexperience, lack of knowledge, or superstition.

3.1iv It is unacceptable to use sexual appeal in a gratuitous, degrading or exploitative way, solely to promote the sale of unrelated products.

3.1vi Deception: Advertisements should not contain material which - by statement or visual presentation, or by implication, ambiguity, exaggeration, omission or other means - creates a false impression likely to mislead or deceive the consumer.

3.1vii Assertive opinion, including robust comment or obvious hyperbole about the merits of the product advertised, is acceptable where it is clearly presented as subjective and not as fact.

3.2 FEAR, SAFETY and HARM

3.2i Advertising must not harm or exploit, personally or financially, vulnerable consumers. No advertising is acceptable from those who practise or advocate illegal or harmful behaviour.

3.2ii Distress: Advertisements should neither cause fear or distress without adequate justification, nor use alarming or horrific claims or images solely for dramatic effect.

3.2iii Legitimate fear: Where shocking images or material are used to promote genuinely remedial or therapeutic action, or to prevent harmful or imprudent behaviour, the alarm caused should be in due proportion to the risk.

3.2iv Dangerous or illegal practices which condone or encourage a disregard for safety should not feature in advertisements, unless justified on educational or social grounds.

3.2v Violence: No advertisement should contain material that condones, or is likely to encourage, violent or unacceptable anti-social behaviour.

3.3 PORTRAYAL, PRIVACY and ENDORSEMENTS (See also General Code)

3.3i Portrayal: Individuals should not be portrayed in advertisements in a way likely to expose them to widespread hostility, contempt, abuse or ridicule, or - taking into account prevailing community standards in Samoa - cause serious offence on the grounds of age, gender, race, ethnic or national origin; cultural, religious, political or ethical belief; sexual orientation, or mental or physical disability.

3.3ii People should not be stereotyped in a negative way likely to cause offence on the grounds of age, gender, race, colour, ethnicity, culture, religion, sexual orientation or mental or physical disability.

3.3iii Privacy: Unfair, adverse, or inaccurate, portrayal of identifiable people in advertisements is unacceptable, without consent.

3.3iv No advertisement should feature, without consent, any identifiable person or their property in a way likely to imply a genuine product endorsement.

3.3v Dead people: References to the recently dead should be made only with care and sensitivity to avoid unnecessary offence.

3.3vi Personal testimonials should be genuine and verifiable and related to the endorser's direct experience of the product advertised.

3.3vii Scientific, governmental or professional research results, unless available from a public source, should not be used to imply endorsement without official consent.

3.3viii Fictitious testimonials must be readily identifiable as such.

3.3ix Children's testimonials must not be used to endorse products.

3.4 COMPETITIVE COMPARISONS and IMITATION

3.4i Comparisons with competitors, such as on price or performance, must be based on valid and verifiable analysis of equivalent products on equal terms and not mislead the consumer.

3.4ii Advertisements should not denigrate or disparage rival products or unfairly attack or discredit competitors' businesses.

3.4iii Imitative advertising, or marketing of imitative products which is likely to mislead or confuse consumers, or take unfair advantage of a rival's brand or reputation, is unacceptable.

3.5 WARRANTIES and 'FREE' OFFERS

3.5i The words 'guarantee' or 'guaranteed' or 'warranty' or 'warranted' should not be used in advertisements unless the terms of the guarantee are freely available to, and verifiable by, the consumer. Media organisations should establish this before accepting such advertising.

3.5ii Advertisements should not describe products or samples as 'free' unless they are supplied to the consumer at no extra cost, other than postage or carriage.

3.6 SOCIALLY SENSITIVE ADVERTISING (Indicative draft)

3.6i Particular care should be taken to fulfil the Code's obligation to comply with the law and social responsibility in areas of special susceptibility, such as in advertising alcohol, tobacco, medicines or health products or services; gambling or lotteries; financial services; politics or public affairs; religion; and advertising aimed at children and young people.

3.6ii Alcohol advertising, where legally permitted, should not glamorise or encourage over-consumption; depict fast, aggressive or immoderate drinking; imply that liquor is therapeutic, essential to social acceptance, sexual success, or a sign of strong character; or place undue emphasis on alcoholic strength, and should not be targeted at children.

3.6iii Betting, gaming and lottery advertisements, where legally allowed, should not portray gambling as a solution to financial problems; or overstate prizes or the chance of winning, or be directed at children or young people under 18.

3.6iv Financial services advertising should not mislead by exaggerating likely gains and should give clear and realistic guidance on the risk to potential investments.

3.6v Health and medicinal advertising should not raise unrealistic expectations by making false or exaggerated claims for the efficacy of foods, remedies or treatments, vitamin or other dietary supplements, slimming aids or methods; or in any way encouraging people to experiment with medication, treatments, or regimes which may be inappropriate or harmful.

3.6vi Political and public affairs advertising, where permitted by law, should identify the advertiser, and should not incite violence or civil unrest, or – in the case of broadcasters – compromise the obligation to due impartiality.

3.6vii Religious, faith, or belief-related advertising should clearly identify the advertiser, and not express matters of faith or doctrine as unqualified fact, nor exploit vulnerable groups such as the bereaved, the sick, the elderly or impressionable young people,

3.6iii Tobacco advertising, where legally permitted, should not glamorise smoking as essential to social success or acceptance and should include appropriate warning of the health risks.

3.7 BROADCAST ADVERTISING

3.7i TV or radio advertisements should follow the relevant provisions of the Broadcasting Code of Practice, especially with regard to scheduling, to avoid causing unnecessary offence and to protect children and vulnerable groups,

3.7ii Product placement, or host selling by presenters in programmes is not acceptable.

3.8 BROADCAST ADVERTISING and CHILDREN

3.8i TV and radio advertisements intended for children, or likely to be seen or heard by them, should follow the general provisions of the Broadcasting and Advertising Codes and those specific to protecting children from material which might cause psychological, physical or moral harm. They should take special care not to:

- Show violence or aggression, encourage anti-social behaviour, or depict children acting in an

anti-social manner.

- Use menacing or disturbing themes likely to cause children unnecessary distress.
- Endanger health or safety by portraying children engaged in unsafe acts, consorting with strangers, or in unsuitable or unsafe situations; or by showing products used in an unsafe way; or by encouraging inappropriate health, hygiene or dietary habits.
- Exploit unfairly children's natural credulity.
- Imply that without the advertised product children will be socially inferior or ridiculed, or that they are disloyal if they do not purchase products.
- Mislead children about the size, qualities, performance or price of products or understate the skill or additional resources needed to use a product successfully.
- Promote competitions that exaggerate the prizes or the chances of winning.
- Urge children to buy products direct without parental approval, or to exhort adults to buy products on their behalf.
- Encourage them to make purchases by mail, telephone or via the Internet without appropriate parental consent.
- Use children to endorse branded products or selling messages.

3.8ii Scheduling: Advertisements which are unsuitable for children, such as those promoting alcohol, or adult pursuits, should be scheduled for times when they are least likely to be viewing or listening.

CINEMAS, FILMS AND DVD & VIDEO

4. Draft indicative Code:

It is important than in public showing of films, or sale of DVDs or video recordings for private viewing, cinema owners or video or DVD retailers should follow the same general standards as the printing and broadcasting media to protect children or vulnerable groups in Samoa.

As cinemas and suppliers of recordings provide an on-demand service, any self-regulatory Code would need to protect the consumer from being misled by ensuring that the guidance and labelling at cinemas, or on video or DVD recording bought or hired for private viewing, was a fair, accurate and true representation of the entertainment content.

Complaints would then be solely on whether it was reasonable for the cinema-goer, or DVD or video consumer, to be offended, harmed or otherwise adversely affected by an entertainment they had voluntarily attended or paid for.

4.1 CLASSIFICATION and GUIDANCE

4.1i Cinema-goers or people buying or hiring video or DVD recordings for private use should not be unexpectedly confronted by material that is likely to cause harm or offence to susceptible people.

4.1ii Guidance to the content of cinema films for public showing, or recordings bought or hired for private viewing should be clear, consistent and standardised. Where practical, classification should be compatible with other relevant guidance, such as that of the Samoan Censor on films, or the labelling regimes of major foreign suppliers of films and video material to Samoa.

4.1iii Labelling of material which may offend or harm, according to generally accepted standards, should be particularly clear and appropriate warnings given. Such content would normally include:

- Strong or profane language;
 - Serious or sexual violence, sexual scenes or sexual nudity;
 - Distressing images involving death, serious injury or tragedy;
 - Humorous or satirical references to religion, or deeply-held cultural values;
 - Material unsuitable for children.
- 4.1iv Films banned by the censor should not be screened or hired.
- 4.1v Cinema advertising is covered by the provisions of the Code of Advertising Practice.