ARTICLE 19

Malaysia: Draft Media Council Act

Legal analysis

Executive summary

In this analysis, ARTICLE 19 reviews the draft Media Council Act, March 2019 (the Draft Act), currently being discussed in Malaysia, for its compliance with international human rights law, in particular standards on the right to freedom of expression.

ARTICLE 19 notes that international human rights standards do not prescribe a specific model of media regulation. Instead, they require that any regulation meets specific criteria in order to be compatible with the right to freedom of expression, as regulatory measures for the media could interfere with press freedom. With the exception of the broadcast media, for whom regulation is commonly accepted as necessary, ARTICLE 19 views specific legislation on the press with caution as it is often a tool for governments to excessively restrict, rather than protect, the right to freedom of expression. Self-regulation of the press is highly preferable to regulation by a statutory authority, which would risk endangering the independence of the media and impinge on the free flow of information.

At the same time, self-regulation must be meaningful: it must not only provide protection for members of the journalistic profession, but also hold them accountable to their profession and hold press outlets accountable to the public. ARTICLE 19 notes that, although self-regulation is the preferred model, statutory and coregulatory systems may be compatible with international human rights standards provided they include strong guarantees for media freedom and the independence of regulatory bodies. This applies to the proposal in the Draft Act.

Although the Draft Act contains a number of positive features, ARTICLE finds that the proposed scope of the Act – which covers all forms of media – is confusing; especially in the light of the existing regulation of the broadcasting sector by the Malaysian Communication and Multimedia Commission (MCMC). There is no mention of the MCMC in the Act and it is therefore unclear how the proposed Media Council will interact with the MCMC, or how any overlap in their mandates will be reconciled.

Further, ARTICLE 19 is concerned about the process that led to drafting of the Draft Act. The process was led by several major media organisations and lacked full transparency and the opportunity for all relevant stakeholders to participate. We submit that any agreement on press regulation requires broad public participation and agreement between all relevant stakeholders. Finally, ARTICLE 19 believes that the Draft Act should form part of a broader discussion about freedom of expression and the media environment in Malaysia, including the repeal or amendment of repressive laws, including the Printing Presses and Publications Act 1984, the Sedition Act 1948, Security Offences (Special Measures) Act 2012, the Official Secrets Act 1972, and the Film Censorship Act 2002.

Summary of key recommendations

- All stakeholders should link the development of the Act to improving protection of freedom of expression in the country, including advocacy for Malaysia signing and ratifying the International Covenant of Civil and Political Rights as a matter of urgency. This would send a strong message that international human rights standards guide any legislation related to the media, and freedom of expression in general, in the country. There should also be wide-scale consultation and participation of all stakeholders to finalise the Act;

- The Preamble of the Draft Act should explicitly provide for the independence of the Council and the fulfilment of the fundamental objectives of regulation: the accountability of members of the profession to their peers, accountability of media outlets to the public and protection for journalists;
- The Act should clearly differentiate between the regulation of broadcast and print/online media, or only cover the press under the Media Council Act. The relationship between the Media Council and the existing MCMC should be clarified; while the Communications and Multimedia Act should also be fully reviewed for its compliance with international standards;
- The option of membership in the Media Council could be extended to others who perform journalistic functions on a voluntary basis;
- The Act should include a provision stating that the functional, operational and administrative autonomy of the Council and the Exco is fully guaranteed in all matters and that any economic or political interference is prohibited;
- The Act should specify that members of the Exco cannot be members of government or members of a political party, and they are free to carry out their work without economic or political interference. The mechanism for ensuring the diversity of Exco members should also be improved, in particular by addressing gender balance in the composition of the Exco and outlining a clear process for appointing various stakeholder representatives;
- The procedure for adopting the Code of Conduct should be clearly outlined. The process of developing the Code should be participatory and open to public consultation, involving all stakeholders and the public;
- Thus, the Media Council should act reasonably and impartially; and exercise its discretionary powers in good faith and for a proper, intended and authorised purpose, within the limits of its decision-making powers;
- The Code of Conduct should be based on international professional ethics and good practices. This will help avoid possible arbitrariness inherent in vague, broad moral concepts. It should address misconduct by members of the press, including sexual harassment;
- All sanctions and remedial actions that can be imposed by the Council should be clearly specified;
- The remedial actions available should include the publication of correction and reply. The possibility of the Committee to direct the nature, extent and placement of corrections and apologies should be limited;
- The power to censure should be limited to violations of the Code of Conduct (Article18(1));
- The veto power granted to the Chairman in Article 18(2) should be deleted;
- A right of appeal against decisions should be included in the provisions;
- The purpose of the dispute mediator in Article 19 should be clarified;
- The Act should establish a scaled industry-specific levy as the main source of funds for the Council. Funding of the Council via governmental grants should be explicitly restricted and it should only be a source of supplementary funds. Any governmental grant should not be perceived as conditional on the Council conducting its work in a manner which is not antagonistic to the government;
- Any subsequent legislation, following the repeal or amendments of certain acts, should be viewed as an opportunity to review the respective laws for their full compliance with international freedom of expression standards.

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Introduction

The Media Council Act (Draft Act) was prepared by a working group of publishers in the Malaysian media industry, in response to the Government's call for self-regulation of the media industry. There has been discussion for several years regarding the creation of a press council in the country (to be set up within a voluntary process) but no press council has been formed.

ARTICLE 19 welcomes the opportunity to contribute to the process of improving the protection of media freedom in the country, which includes improving media regulation. We have extensive experience in analysing media regulation laws and policies around the world.[1] In Malaysia, ARTICLE 19 analysed various freedom of expression related legislation,[2] and made submissions to United Nations (UN) mechanisms regarding the context of freedom of expression, including a submission to the Malaysia's third Universal Periodic Review.[3]

At the outset, ARTICLE 19 notes that specific legislation on press regulation should be approached with caution as it is often a tool for governments to excessively restrict, rather than protect, the right to freedom of expression. As discussed below, the test of necessity to justify infringements of the right of freedom of expression requires that where the government interferes with the right, it should choose the least restrictive means available. Given the importance of the press in a democratic society, it stands to reason that journalists and their publications should not be subject to greater restrictions on the right to express themselves than ordinary people.

ARTICLE 19's position is that self-regulation of the print press is the preferable model of regulation of the press, but that self-regulation must be meaningful. It must not only protect members of the journalism profession but also hold them accountable to their professional counterparts, and hold press outlets accountable to the public. Self-regulation has been successfully implemented in a number of countries, where it has promoted a constructive and effective approach to media ethics.

However, statutory regulation (as well as co-regulation) of the press exist in a number of countries. These systems have not been found in all cases to be incompatible with international freedom of expression standards because they provide strong guarantees for media freedom and the independence of regulatory bodies.

In this analysis, ARTICLE 19 finds that the current version of the Draft Act should be further improved to fully guarantee media freedom and the independence the proposed Media Council.

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[1] See, e.g., ARTICLE 19, Media Regulation in the UK, available at https://bit.ly/1ZCQzaV; Statement on the Media Council of Kenya Bill, 2006, March 2006, available at https://bit.ly/2IZmCyW; Tunisia: Draft Decree on the Establishment of a Press Council, December 2014, available at https://bit.ly/2XNe2Yi; Egypt: 2018 Law on the Organization of the Press, Media and the Supreme Council of Media, November 2018, available at https://bit.ly/2IbYHvJ; Somalia: Draft Media Law, April 2018, available at https://bit.ly/2Pvcxul.

[2] See, e.g., ARTICLE 19, Malaysia: Submission to the Institutional Reform Committee, available at https://bit.ly/2IMPzim; Malaysia: "Anti-Fake News Act," 2018, available at https://bit.ly/2L7tA7t; or Malaysia: Communications and Multimedia Act, 24 March 2017, available at https://bit.ly/2XO1eAU.

[3] ARTICLE 19, Malaysia: fulfill UPR commitments, end attacks on freedom of expression, 14 March 2019, available at https://bit.ly/2UJ1EXh; Malaysia: Proposal to reform laws to protect royals' reputation threaten freedom of expression, 11 January 2019, available at https://bit.ly/2IXqlgd; or Malaysia: Joint submission to the UPR, 5 April 2018, available at https://bit.ly/2UI9TTd.

In the following sections, we analyse the key provisions of the Draft Act and offer recommendations for improvement. We stand ready to provide further assistance in incorporating these comments into the final version of the Act.

At the same time, ARTICLE 19 supports a transparent and inclusive consultation process to develop media regulation in Malaysia, which should elicit feedback from a wide variety of stakeholders. It is imperative that the process for drafting the Act be transparent. We are aware that large media organisations prepared the Draft Act without the full participation of all stakeholders. Neither all representatives of the press nor the public were included. The limited participation of stakeholders and the restricted circulation/dissemination of the draft Act to stakeholders selected by the drafters raises doubts regarding the fairness of the process and does not bode well for establishing a professional, independent and accountable Media Council.

Further, ARTICLE 19 believes that the current discussion about the introduction of a Media Council should form part of a broader discussion about promotion of freedom of expression and strengthening the media environment in Malaysia. This should include the repeal or amendment of repressive laws such as the Printing Presses and Publications Act 1984, the Communications and Multimedia Act 1998 (which is foreseen in this draft Act), the Sedition Act 1948, Security Offences Act, Official Secrets Act 1972, and Film Censorship Act 2002.

International standards on freedom of expression

The right to freedom of expression

ARTICLE 19's analysis of the Draft Act is informed by international standards on the right to freedom of expression, including the International Covenant on Civil and Political Rights (ICCPR). While Malaysia has not signed or ratified the ICCPR, despite its commitment to do so,[4] ARTICLE 19 submits that the obligations contained in the ICCPR largely reflect customary international law. They should, therefore, guide interpretation of the freedom of expression protection contained in Article 10(a) of the Malaysian Federal Constitution, as well as other international human rights instruments to which Malaysia is a State Party.

Under international law, the right to freedom of expression is not an absolute right and may be legitimately restricted by the State in certain circumstances. A **three-part test** sets out the conditions against which any proposed restriction must be scrutinised:

- The restriction must be **provided by law**: it must have a basis in law, which is publicly available and accessible, formulated with sufficient precision to enable individuals to regulate their conduct accordingly.[5]

- The restriction must **pursue a legitimate aim**, exhaustively enumerated in Article 19 para 3 of the ICCPR, namely: national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, and/or the protection of the reputation or rights of others.

- The restriction must be **necessary in a democratic society, meaning that it must be necessary and proportional**. This entails an assessment of whether the proposed limitation satisfies a "pressing social need" and whether the measure is the least restrictive way to achieve the aim.

The UN Human Rights Committee (HR Committee), which is the authoritative international human rights body on the interpretation of Article 19 of the ICCPR, in its General Comment No. 34 on freedom of expression, highlighted that "free press" should be "able to comment on public issues without censorship or restraint and to inform public opinion."[6] The HR Committee also affirmed that States must ensure that any regulation of the press meets the three-part test set out in Article 19(3) ICCPR, outlined above.[7]

The draft Media Council Act must, therefore, be assessed for its compliance with these standards.

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[4] ARTICLE 19 joint UPR submission, *op. cit.*, para 5.
[5] See, e.g., UN Human Rights Committee, General Comment No 34, 12 September 2011, paras 24-25; or European Court of Human Rights, *The Sunday Times v UK*, App. No. 6538/74, 26 April 1979, para 49.
[6] General Comment No. 34, *op.cit.*, paras 13 and 20.
[7] *Ibid.*, paras 13 and 20.

Media regulation

Media regulation poses several challenges: the right to freedom of expression requires that the government refrain from interference, yet Article 2 of the ICCPR places an obligation on states to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant." The international standards on freedom of expression thus require that States not only refrain from interfering with the right, but that they also take positive steps to ensure that citizens have access to diverse and reliable media sources.[8] The primary objective of media regulation should be to promote the development of an independent and pluralistic media. This is necessary to uphold the public's right to receive information from diverse sources.

As noted earlier, self-regulation is internationally recognised as the preferred method of print media regulation (the same considerations apply to online media outlets). The special mandates on the right to freedom of expression, appointed by UN Human Rights Council, the Organization for Security and Cooperation in Europe (OSCE), and the Organization of American States (OAS), have warned of the risk of interference in the work of regulatory bodies and emphasised that it is essential that the media be permitted to operate independently of government control.[9] Where self-regulation has demonstrably failed, a public authority may be entrusted with some limited aspects of media regulation, provided it does not function as a quasi-judicial organ. With regard to such bodies, it is accepted that, as a general rule:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which *is transparent, allows for public input and is not controlled by any particular political party*.[10] [emphasis added]

At the same time, self-regulation must be meaningful: it must not only provide protection for members of the journalistic profession, but also hold them accountable to their profession and hold press outlets accountable to the public.

It should be also noted that statutory regulations of the print press or specific laws on print press exist in a number of countries. Although the statutory regulation of the printed press should be a matter of last resort, it is also possible for such models to comply with international standards, provided that they guarantee the fundamental principles of true independence and freedom of the press.

Whether established voluntarily or by law, ARTICLE 19 has long argued that sector-wide self-regulatory bodies should be:

- **Independent** from government, commercial and special interests;
- Established via a fully **consultative and inclusive process**;
- **Democratic and transparent** in their selection of members and decision-making;

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[8] Article 2 of the ICCPR obliges States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant."

[9] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression, adopted 18 December 2003. The success of self-regulatory mechanisms in several countries has also prompted the African Commission on Human and Peoples' Rights to declare in its Declaration of Principles on Freedom of Expression in Africa, Principle IX that "[e]ffective self-regulation is the best system for promoting high standards in the media."

[10] The 2003 Joint Declaration, *op.cit.*

- Include **tripartite representation** from journalists, media owners and members of the public; and
- Have the power to **impose only moral sanctions**, such as the publication of a correction or an apology. They should not be entitled to issue fines, ban media outlets, or exclude individual members from the profession.[11]

[11] ARTICLE 19, Freedom and Accountability: Safeguarding Free Expression through Media Self-Regulation, March 2005, available at https://bit.ly/2VBPZy4.

Analysis of the Draft Act

This analysis follows the structure of the Draft Act which consists of 5 parts:
- Part I addresses the establishment of the Media Council.
- Part 2 deals with membership of the Media Council.
- Part 3 outlines the procedure for creating the Code of Conduct.
- Part 4 establishes a dispute resolution mechanism.
- Part 5 sets out the powers of the Media Council to make rules and regulations.

Preamble

ARTICLE 19 finds it is positive that the Preamble to the Draft Act refers to freedom of the media, as protected by the Federal Constitution and Article 19 of the Universal Declaration of Human Rights (UDHR). It is also positive that the Preamble acknowledges the importance of journalists and the media in creating a more just society and expresses commitment to improving the standards of journalism in Malaysia.

We note that these provisions can be further improved by explicitly stating that the aim of the Act is to provide full guarantees of the independence of the Council as well as to provide protection for journalists, hold individual journalists accountable to their profession, and hold media outlets accountable to the public. It might also be useful to include references to international freedom of expression standards, including those in Article 19 of the ICCPR.

Recommendation:
- The Preamble of the Draft Act should explicitly the independence of the Council and to fulfil the fundamental objectives of regulation - accountability of members of the profession to their peers, accountability of media outlets to the public and protection for journalists.

The Media Council

Article 3 of the Draft Act provides for the establishment of the Media Council, hence a statutory body under the law.

ARTICLE 19 reiterates that self-regulation is the preferable option to statutory councils, in line with the requirement that media regulation should use the least restrictive means possible. If there is a less restrictive, accessible means of achieving the same legitimate aim, the more restrictive means employed necessarily fails the test guiding international standards on restrictions of freedom of expression. We encourage the stakeholders to consider whether establishing the council through an entirely voluntary process should be further explored and pursued. The following comments would then also apply to setting up the council through a non-legislative process.

Functions
The functions of the Media Council, as set out in Article 5 of the Draft Act, include *inter alia*, the maintenance of the highest standards of journalism and the preservation of freedom of the media in accordance with Article 19 of the UDHR; investigation of complaints for all kinds of media (print, broadcast and online media) and the conduct of persons employed by them in

relation to the public; protection of the independence of journalists and the media; establishing a code of conduct for all media and educating journalists and members of the public on this code of conduct; and providing further recommendations regarding the media industry or accredited journalists.

ARTICLE 19 supports the foreseen mandate of the Media Council as both an advocate for freedom of expression and monitor of standards of conduct within the media profession.

Members of the Council

Membership

Article 6 of the Draft Act establishes three categories of membership: publishers and owners of print, online and broadcast media; media associations; and working journalists.

ARTICLE 19 observes that opening membership to **online publications** is not problematic, since many online publishers are in fact the online versions of traditional media outlets or are the media themselves.

Similarly, ARTICLE 19 finds that opening membership in the Media Council to **bloggers** may be positive to the extent that it is voluntary and fosters professionalism by encouraging bloggers to follow the ethical standards of the traditional media of their own accord. However, blogs are fundamentally different from traditional media outlets due to the fact that anyone may opt to self-publish online without prior editing or commissioning by an intermediary (e.g. a newspaper editor), and may cover any topic from politics to personal interests. Therefore, it is important that membership remain optional.

However, in ARTICLE 19 notes that the operating context for **broadcasters** differs significantly from that of print or online media. As it currently stands, Malaysian broadcasters are regulated by the Communications and Multimedia Act 1998.[12] Under this Act, the Malaysian Communications and Multimedia Commission (MCMC) performs a wide range of administrative and quasi-judicial tasks, including regulating the content of broadcasts. The relationship between the existing MCMC and the proposed Media Council is not specified in the Act, which does not make any reference to the MCMC, although it is intended to cover broadcasters as well. This creates confusion and potential conflict between the two bodies, which are foreseen to have similar mandates over the broadcasting industry.

ARTICLE 19 therefore recommends that the relationship between the Media Council and the MCMC be clarified. This is notwithstanding our ongoing concern with the MCMC's lack of independence and other freedom of expression concerns with the Communications and Multimedia Act.

The definition of "**working journalist**" in Article 2(d) requires that the person in question works in media on a permanent basis, receives remuneration on a regular basis, and that their employment is related primarily to editorial functions (Article 2(d)). ARTICLE 19 suggests that

[12] ARTICLE 19, Malaysia: The Communications and Multimedia Act 1998, February 2017, available at https://bit.ly/2DDvVRF.

this definition excludes many journalists who work as independent freelancers or for multiple press outlets, and that it should be opened to these individuals on a voluntary basis.

Recommendations:

- Clearly differentiate between the regulation of broadcast and print/online media, **or** only cover the press under the Media Council Act, given existing regulation of broadcasters;
- Clarify the relationship between the Media Council and the existing MCMC. The Communications and Multimedia Act should also be fully reviewed for its compliance with international standards;
- Extend the option of membership to others who perform journalistic functions on a voluntary basis.

Composition of the Executive Committee

The Draft Act provides that the Chair of the Executive Committee (Exco) must not be a member of government or member of a political party (Article 8(1)). However, ARTICLE 19 believes that this should apply to the rest of the Exco as well.

Importantly, an essential requirement for an effective press regulator is that it is independent from potential sources of interference, including government, business, and the press itself. Article 9 para 1 letter 3 states that "no working journalist who owns, or carries on the business of management of any media company shall be eligible for election" to the Exco. However, ARTICLE 19 believes that the independence from the commercial and other interests should be provided for all members of Exco.

Article 9 of the Act stipulates the composition of the Exco will include members from the Sabah and Sarawak ethnic groups, members of trade unions, working journalists and also other individuals nominated by organisations and institutions reflecting the public interest.

ARTICLE 19 welcomes the proposal to include members of the public. "Mixed councils," such as the model proposed in Malaysia, are considered to elicit greater public trust than industry only councils. We recommend that the process for selecting independent members of the council should be clearly articulated.

Equally, ARTICLE 19 supports the Council's attempt to reflect the diversity of Malaysian society and ensure equality in participation by including members of Sabah and Sarawak origins (Art. 9(1)(a) and (2)). We further recommend that gender balance in the composition of Exco should also be considered.

Furthermore, it is a positive sign for the Council's independence that the Executive Committee will be elected by its members (Article 9(1)). In this regard, steps should be taken to ensure that the process is fair and transparent.

Exco members are supposed to be elected to "ensure a fair representation of media organisations from the different languages in which media is published in Malaysia" without explaining how this will be achieved (Article 9(2)(a)). Additionally, there is supposed to be a limit of 1 "person having an interest in or employed by any media organisation, media association or group of media organisations" (Article 9(2)(b)), without any explanation as to how this limit would be enforced.

Tenure of Office

Article 10 of the Draft Act provides that the Chairperson and other members of the Executive Committee shall hold office for a period of three years, "provided that the Chairperson shall continue to hold such office until the Executive Committee is reconstituted in accordance with the provisions of Section 9 for a period of six months whichever is earlier". The meaning of this provision is unclear and should be clarified.

General Meeting of the Council

ARTICLE 19 notes that the provisions of Article 13 on extraordinary general meetings are confusing. We believe that the same rules as for the General meeting should apply for extraordinary general meetings to avoid the possibility of evading the Annual General Meeting (AGM) rules by hosting an extraordinary general meeting (Article13(7)).

Recommendations:

- The Act should include a provision stating that the functional, operational and administrative autonomy of the Council and the Exco is fully guaranteed in all matters and that any economic or political interference is prohibited;
- The Act should specify that no member of the Exco may be a member of government or member of a political party; and members are free to carry out their work without economic or political interference;
- The Act should further improve its mechanism for ensuring the diversity of Exco members, in particular gender balance in the composition of the Exco, and outline a clear process for appointing various stakeholder representatives;
- Article 10 should be reworded to clarify its intended meaning.
- The quorum for the AGM, not currently specified, should be stipulated in Article 13(4).
- The same rules for notice and quorum should apply to extraordinary general meetings.

Code of Conduct

The Council will have the mandate to establish a code of conduct (Article 5(1)(e)).

ARTICLE 19 notes that it is positive that the Code of Conduct is to be developed pursuant to consultation amongst members and adopted by a general meeting of the Council (Article 17(1)).

However, we note that the process for development of the Code of Conduct is unclear. It would be advisable to provide more information about how the consultation will be carried out (not necessarily in the Draft Act itself but in an accompanying document). As the foundational document upon which decisions of the Council will be made, it is critical that the Code of Conduct be established through a consultative, inclusive and transparent process that will ensure a broad sense of ownership among the media community and will encourage support for self-regulation from the bottom-up as compared to an externally imposed solution.

Recommendations:

- The procedure for adopting the Code of Conduct should be clearly outlined. The process of developing the Code should be participatory and open to public consultation, involving all stakeholders and the public;
- Thus, the Media Council should act reasonably and impartially; and exercise its discretionary powers in good faith and for a proper, intended and authorised purpose, within the limits of its decision-making powers.
- The Code of Conduct should be based on international professional ethics and good practices. This will help to avoid possible arbitrariness inherent in vague, broad moral

concepts. It should address misconduct by members of the press, including sexual harassment.

Dispute Resolution Mechanisms

Power to Censure

In Article 18, the Draft Act foresees the Media Council's power to censure, and the publication of details regarding its inquiries. The Council will have the power to act on its own cognizance and is not required to receive a complaint (Article 18(1)).

ARTICLE 19 suggests that there should be checks and balances to ensure this power is not exercised arbitrarily. The power to censure should be based on clear principles, e.g. the bylaws of the Council, not based on "journalistic ethics or public taste" as set out in the Act but not defined (Article 18(1)). Further, the meaning of Article 18(2) which states, "provided that the Council may not take cognizance of a complaint if in the opinion of the Chairman, there is no sufficient ground for holding an inquiry", is unclear. This seems to grant a veto power to the Chairman, which opens up the procedure to arbitrariness.

The sanctions, in the event of a finding of misconduct, are vaguely worded in Article 18 and seem to be limited to "warn, admonish or censure the newspaper, the news agency, the broadcasting station, the editor or the journalist or disapprove the conduct of the editor or the journalist." It is unclear where this finding would be published. The Council should have its own website to publish information there, at a minimum.

The Draft Act does not explicitly provide for the publication of corrections or apologies. For the sake of certainty, ARTICLE 19 suggests that all sanctions that can be imposed by the regulator should be clearly listed.

ARTICLE 19 observes that the right to correction and the right to reply – which are the most appropriate forms of sanctions for press misconduct – should be defined and distinguished as follows:

- A **right of correction** is limited to identifying erroneous information published earlier, with an obligation on the publication itself to correct the incorrect information;

- A **right of reply** gives any person the right to prepare a response that will be disseminated by a mass media outlet where the publication of incorrect or misleading facts has infringed a recognised right of that person and where a correction cannot reasonably be expected to redress the wrong.[13]

ARTICLE 19 also notes positively that no financial sanctions are foreseen, since it is of the opinion that press regulatory bodies should only have the power to impose moral sanctions, such as the publication of a correction, a reply, or an apology. They should not be entitled to fine or ban media outlets or exclude individual members from the profession. Usually, the sanction imposed is the public shame of being found to have broken the Code and having to admit this in one's own publication.

[13] *C.f.* The Camden Principles on Freedom of Express and Equality, 2009, Principle 7, available at https://bit.ly/1XfMDrL.

Mediation of Disputes
Article 19 of the Draft Act allows for a mediator to be appointed to facilitate dispute settlement between parties.

ARTICLE 19 notes that it does not clarify what types of disputes would be subject to this procedure. It may be that this is how the decisions of the Exco will be reviewed, since no other specific appeal mechanism is outlined against the decisions of the Exco. ARTICLE 19 notes that in other countries, for example in Ireland, the Press Ombudsman adjudicates complaints, and the Press Council is responsible for hearing appeals of Ombudsman decisions. A similar process could be considered here.

Recommendations:
- All sanctions and remedial actions that can be imposed by the Council should be clearly specified;
- The sanctions available should include the publication of a correction or reply;
- The possibility of the Committee to direct the nature, extent and placement of corrections and apologies should be limited as follows:
  - It should receive similar prominence as the original article;
  - It should be proportionate in length to the original article;
  - It should be restricted to addressing the impugned statements in the original text;
  - It should not introduce new issues or comment on other correct facts;
  - In the case of a reply, it should only be available to respond to statements which breach a legal right of the person involved, not to comment on opinions which the reader or viewer dislikes;
- The power to censure should be limited to violations of the Code of Conduct (Article18(1));
- The veto power granted to the Chairman in Article 18(2) should be deleted;
- A right of appeal against the decisions should be included in the provisions;
- The purpose of the dispute mediator in Article 19 should be clarified.

General

Fund of the Council
ARTICLE 19 observes that the issue of funding, which will be a key factor in ensuring the Council's independence and public perception of its credibility, is unclear. It seems that the Council will have the power to levy fees but there is no information given on how this will be determined.

To ensure the independence of the Council, conditions for the use of a levy on the print media sector should be further elaborated in order to maximise its potential as a workable source of funds. Relying on an industry levy is an effective means of ensuring that the Council remains accountable to the industry and utilises its funds efficiently. The levy payable should correspond to the financial capability of the media outlet. This should be more clearly outlined in the Draft Act. For example, in India, the levy is only payable by those newspapers which have a daily circulation of over 5,000 copies.[14] We suggest that a scaled fee structure for all print media outlets would be an appropriate method. In addition to scaling the levy according to the

[14] Press Council Act, 1978.

circulation of the publication, we suggest also creating categories for which a reduced levy or waiver applies.

There is substantial potential for the levy to cover the vast bulk of the operating costs of the Council. This would remove most of the need to rely on other sources of funding. The funding model should also consider restrictions on possible funding from the Government. It should specify that any government grants to the Council are not perceived to be conditional on the Media Council conducting its work in a manner which is not antagonistic to the Government. Again, the levy should be the primary source of funds, with any potential governmental grants only providing supplementary funds, on which the Council is not dependent in any substantive manner. This is absolutely crucial for the Council's independent status.

Repeal

It is positive that the Act foresees the repeal of the Printing Presses and Publications Act 1984 and Sections 211 and 233 of the Communications and Multimedia Act 1998 (Art. 25). ARTICLE 19 has previously voiced concern about these repressive laws.[15]

Recommendations:

- The Act should establish the scaled industry-specific levy as the main source of funds for the Council. Funding of the Council via governmental grants should be explicitly restricted and should only be a source of supplementary funds. Any governmental grant should not be perceived as conditional on the Council conducting its work in a manner which is not antagonistic to the government;
- Any subsequent legislation, following the repeal or amendments of certain acts, should be viewed as an opportunity to review the respective laws for their full compliance with international freedom of expression standards.

[15] See e.g. ARTICLE 19, 2019 UPR submission, *op.cit.;* or ARTICLE 19, Malaysia: Sedition Act upheld in further blow to free expression, 6 October 2015, available at https://bit.ly/2GNrQMD.

About ARTICLE 19

ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19), is an independent human rights organisation that works around the world to protect and promote the rights to freedom of expression and information. It takes its name and mandate from Article 19 of the Universal Declaration of Human Rights which guarantees the right to freedom of expression. ARTICLE 19 has produced a number of standard-setting documents and policy briefs based on international and comparative law and best practice on issues concerning the rights to freedom of expression, as well as intervened in domestic and regional human rights court cases. This work frequently leads to substantial improvements to proposed domestic legislation.

On the basis of these publications and ARTICLE 19's overall legal expertise, ARTICLE 19 publishes a number of legal analyses each year, comments on legislative proposals and existing laws that affect the right to freedom of expression, and develops policy papers and other documents. ARTICLE 19 has carried out this work since 1998 as a means of supporting positive law reform efforts worldwide, frequently leading to substantial improvements in proposed or existing domestic legislation.

For more information about ARTICLE 19's work in Malaysia, please contact Nalini Elumalai, Malaysia Programme Officer, nalini@article19.org, +60 1136535927 (Malaysia).