

MEDIA LAW AND ETHICS IN MAURITIUS

Preliminary Report by Geoffrey Robertson QC

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Dear Prime Minister,

It is an honour to present this Report on Media Law & Ethics Reform. In my lecture on Developments in Media Law, delivered in the Sir Harilal Vaghjee Memorial Hall, I expressed the view that Mauritius would benefit from a new and comprehensive media law rather than piecemeal reform. At our meeting in September 2010, you agreed and said that you wanted the nation to have the benefit of a modern law in this field, which would fully respect human rights and provide for the greatest degree of transparency consistent with individual privacy and government efficiency. For that reason you invited me to survey all law impacting upon the media, and to report on how best to implement paragraph 8 of the published Government Programme, 2010-2015, which promises to secure privacy rights, freedom of expression and greater professionalism in the media.

In undertaking this task, I thought it sensible to await several important overseas developments. The law in Mauritius, with the Privy Council as its final court, is inevitably influenced by developments in English common law, and the new Defamation Bill introduced by the coalition government in the UK will make changes in the definition of the civil wrong of defamation, and its application to internet libel, which it would be wise for Mauritius to adopt so that there is a common approach in both countries. The Bill is now approaching its final stages in the UK Parliament. I awaited the decision of the Grand Chamber of the European Court of Human Rights in *Mosley v UK*, which now sets out the current approach in Europe to the protection of individual privacy. Your country has historic respect for both French and English laws, and it seems to me that law reform is on a sound basis when it adopts the legal principles which now bind both nations through their adherence to the European Convention on Human Rights.

The most important reason for holding the Report, however, has been the soul-searching enquiries into professional ethics in the press, conducted in both the UK and Australia after scandalous revelations in 2011 about the widespread 'hacking' of private telephones and bribery of public servants by journalists and editors in the employ of News Ltd and other publishers. In consequence, major public enquiries were set up under Lord Justice Leveson in the UK and Justice Ray Finkelstein in Australia to consider journalistic ethics and the vexed question of statutory as against voluntary regulation of the media. The Leveson Report, published on 29 November 2012, comprises some 1900 pages. I have now had an opportunity to consider that Report, and the response to it by political parties and newspapers in the UK which has controversially resulted in a Royal Charter which threatens

newspapers with penalties unless they sign up to a regulatory body. In Australia, legislation which would have provided a statutory regulator to oversee voluntary press councils has been defeated, after raising some political turmoil.

These developments demonstrate both the importance of ethical regulation of the media and the difficulty of getting it right. While I have found little evidence that the media in Mauritius has invaded citizens' privacy on anything like the scale of the media in the UK, the Leveson and Finkelstein reports are helpful in their analysis of the role that legislation might play in ensuring greater professionalism in the press.

It has been a privilege to research this report and to discuss aspects of it with journalists, editors, lawyers and public officials in Mauritius, and of course with the Solicitor General and your good self. It is a large project, but I have done my best to present these provisional conclusions in non-technical language and at reasonable length. They are not set in stone. I hope that the publication of the report will be followed by a period of discussion and debate over its proposals, amongst the media, lawyers and judges, MPs, civil society and members of the public. I will be happy to return later in the year, after considering all responses, to make a final set of legislative proposals.

Yours sincerely,

Geoffrey Robertson QC

April 2013

1. INTRODUCTION

1. This report considers whether, and to what extent, the laws and practices in respect of the mass media in Mauritius require reform to make them compatible with concepts of freedom of expression and human rights in a modern democracy. Let me say at once that I find the country's press is vibrant and seeks to inform (by communication of news) to illuminate and provoke (by opinionated and social columns) and to entertain. Yet, there have in the past year or so, been cases of an editor sent to prison for "scandalising the court" whilst in 2013 an interim injunction granted against leading newspapers in order to protect provisionally an individual's privacy has caused controversy and confusion. In the *2012 Global Rankings for Press Freedom*, published by Freedom House, Mauritius came sixty-second, below Tuvalu, Taiwan, Papua New Guinea, Malta, Costa Rica and Vanuatu, but Mauritius is a stable democracy, with many newspapers and other media outlets and commercial radio (but not as yet commercial TV) stations which compete with the national broadcaster. However, its media law is undeveloped and anachronistic, full of English criminal offences long ago abolished in the UK, and without any legislative provision for freedom of information. Its patchwork quilt of obsolescent criminal laws and undeveloped civil wrongs not only work to deter public interest journalism: the law offers no remedy that is speedy or efficient for the rectification of false news or defamation and there is no clear protection for individual privacy. I have, in the following pages, sought to produce an advanced set of laws and regulations that would enable Mauritius to stand high in the future league tables of democracies which both uphold the right of their citizens to free speech and ensure that abuses of that freedom are kept to a minimum.
2. It is important, in constructing a law for the media, to bear victims in mind, sometimes the victims of inaccuracies and mistakes that inevitably creep into the coverage of a rapidly developing story, but sometimes the victims of gross invasions of privacy by the media in the interests of its own profit, by circulation-boosting sensationalism. Whilst the media in Mauritius seems happily free of the disgraceful behaviour of the British tabloid press which led to the Leveson Inquiry – journalists hacked telephones and bribed public officials – there is no room for complacency. Last year one Mauritian editor was condemned internationally for publishing the crime-scene photograph of a partly-clad murder victim, and this year a Supreme Court judge criticised the ignorance of some reporters who were unaware that the

Supreme Court Registry was open on Saturday or that the Chief Justice's name appeared as a formality on every writ, and who were said to have constructed inaccurate conspiracy theories based upon such misunderstandings.¹ A report by the "African Media Barometer" in 2010 claimed that in Mauritius "media practitioners are generally ignorant of human rights. Coupled with their prejudice, this often results in stories that are not fair or ethical. The inclination not to check facts and figures is common amongst journalists at specific media houses, and is a cause for concern".² This Report also claims that political bias is common place. So the other side to the coin of media freedom, the deal by which the press is guaranteed its liberty in return for accuracy, fairness and respect for human dignity, also requires attention. Whilst there is a statutory provision for complaints against broadcasters there is no Press Council or voluntary system for adjudicating complaints about ethical misbehaviour or bias, or for ensuring the rights of reply which media law in Europe now insists upon as a basic human right.³

3. The Media Trust, a body that was designed to set standards of journalism, has become largely moribund. It is there, however, as a statutory presence, and I recommend that it be re-invigorated as a standard-setting body. In recommending a new media law for Mauritius, I have opted for a *Freedom of Information Act* and a number of measures that will enhance the legal freedoms of journalists and broadcasters to report the news that matters in a democracy, but I have also tried to ensure that the price of that freedom – accuracy, fairness, respect for citizen privacy – is encouraged and enforced.
4. Journalism is not a profession. It is the exercise by occupation of the right of free expression available to every citizen, under the Mauritius Constitution and under Human Rights Conventions to which Mauritius is a party. It follows that the right itself – the right to write (or to broadcast or to blog) – cannot in principle be withdrawn or taken away from anyone by a system of licensing or professional discipline of the kind to which doctors and lawyers are subject or required diplomas or degrees. However, it can certainly be held to professional standards of a kind set out in the annexed Code of Conduct. It can be – and often is – restricted by rules of law made for the wider public good, which permit the criminal punishment of

¹ *Soornack N. v Le Mauricien Ltd & Ors* 2013 SCJ 58.

² Friedrich-Ebert-Stiftung, *African Media Barometer: The first home grown analysis of the media landscape in Africa – Mauritius 2010* (fesmedia Africa, 2010) 53 [4.2].

³ *Ediciones Tiempo SA v Spain* [1989] 62 DR 247.

journalists and editors or, more often, the award of damages against their paper or its proprietor. It has been my general approach in devising a new media law system to avoid the prospect of criminal convictions, and certainly jail sentences, for any journalist who was acting in the course of his duties to uncover and to publish newsworthy information. The only exception – and it is demonstrated by recent media scandals in the UK – is when journalists descend to bribing and corrupting public officials, or deliberately and illegally hack into telephones to obtain tittle-tattle of no genuine news value. In respect of corruption offences, journalists are in no different position to any other member of the public, although there may be some cases where, on the facts, the public interest in the information is such that they should not be prosecuted. In the UK, this is recognised not by a specific defence but the issuance of “guidelines” by the DPP as to what situations might immunise a journalist from prosecution. I have recommended that this approach should be adopted in Mauritius, so that hopefully prosecutions of media representatives in future will be rare. If journalists are taught, as I recommend, how to comply with the code of conduct, and this code is adhered to by editors and broadcasters under the guidance of a media Ombudsperson, then there should be no occasion in the future for sending an honest journalist to jail.

5. Media law reform is a sensitive issue, as the controversies over implementing the Leveson and Finkelstein recommendations in the UK and Australia shows. In the UK, the press may soon face fines of up to £1 million and exemplary damages if they do not comply with “voluntary” legislation. Recently the governments of South Africa and of Hungary have been severely criticised over proposals which were thought to place undue restrictions on the media. The Hungarian government was required to change its plans so that its law reforms will conform with the privacy and free speech guarantees of the European Convention on Human Rights. That Convention is binding on both France and Britain, the countries which have culturally and jurisprudentially contributed most to Mauritius, and it seems to me that progressive law reform will not go wrong if it remains faithful to the principles which have emerged from the European Court of Human Rights in Strasbourg. I am confident that my proposals for changes in Mauritius media law will pass that test. In such tricky areas as privacy, as the European Court pointed out in the *Mosley* case, there is a broad “margin of appreciation” which countries possess in the choice of procedures and remedies to resolve the clash between the right to media freedom and the right to human dignity, but the basic rule is that on the one hand the law should not permit the suppression

of information of genuine public interest and on the other it should not allow improper intrusion into the intimacies of private life for no purpose other than sniggering sensationalism. This European position may be read into the law of Mauritius through section 12 of its Constitution. As Justice Balancy put it in the recent case of *Soornack v Le Mauricien*, “Article 12 of our Constitution is a reflection of article 10 of the European Convention of Human Rights and the protection of private life of an individual is ensured in Article 8 of the same Convention. Both in England and in France the Courts have aligned themselves in England with the jurisprudence of the European Court in relation to those two rights which are provided for in the European Convention”.⁴

6. Another area which may be subject to legitimate difference in national law is the question of incitement to racial and religious hatred. In the USA, for example, under the First Amendment, it is not a crime to fuel racial hatred, whilst in Europe, more sensitive to racial issues after the Holocaust, criminal laws against such forms of racial and religious offence have been upheld as consistent with free speech guarantees, which do not protect people who incite others to crime or intend to cause breaches of the peace. Mauritius, with its delicate ethnic balance and determination to protect its multi-cultural society against racism, cannot be criticised for maintaining this offence in its law, which parallels similar provisions in British, French and other European laws, so long as it protects discussion of race and immigration issues in circumstances where there is no intention to provoke public disorder. I am confident that the provisions in the Draft Bill pass muster under human rights standards, although after public discussion and on receiving my final Report it will of course be for Parliament to have the final word on the laws that the country should adopt.
7. Regulation by law can be cumbersome and expensive and it is generally regarded as better for the media to be regulated, if not by itself, at least by bodies that are independent of government and respected by press and public alike. In many countries of the British Commonwealth, following a precedent dating from the 1950s in the UK, a “Press Council” or “Press Complaints Commission”, funded by the industry and comprising laypeople and editors, has been set up to deal with public complaints. Whenever investigated, however, these bodies have been shown to be fairly ineffective; they are usually over-favourable to the press, which often takes little or no notice of their adjudications. They are no substitute for newspapers which

⁴ *Soornack N. v Le Mauricien Ltd & ors 2013 SCJ 58*, judgement, 6 February 2013, 10.

appoint their own ombudsmen to deal with complaints, and which agree to adhere to a code of conduct which is policed effectively by a body that is independent both of the government and of the media. I have addressed this issue by recommending an alternative dispute mechanism – a media Ombudsperson – whose remedies, where appropriate, would be more prompt and effective than any court could provide. I have sought to encourage ethics in journalism by drafting a possible code of conduct for journalists, editors and broadcasters and by giving the Media Trust – currently somewhat moribund – a new lease of legal life.

8. It will be apparent to any student of Mauritius media law that it is anchored in the past – much of the legislation was drafted in colonial times. Now we have the revolution in electronic communications, and states are just beginning to consider regulating regimes for the web, and for Facebook, twitter and You tube. The Leveson Report has been much criticised for ignoring these new forms of communication, which do have a capacity to invade privacy, breach court rulings on anonymity, and cause distress by cyber-bullying and offensive insults. I have made some recommendations relating to social media, and suggested adoption of ‘guidelines’ by the DPP, similar to those in the UK, to decide whether to prosecute racist or obscene tweets and postings.
9. I believe that media law, because it impacts so directly upon the rights of individuals, should be stated in legislation as simply as possible, leaving the courts to develop its principles through decided cases. For that reason I have eschewed the detail that makes media laws in some countries hundreds of pages long. Before any Bill based on my final recommendations is presented to Parliament, however, it will require attention from the Attorney General's office for cross-referencing with other statutes, in particular with the Independent Broadcasting Authority Act, which governs broadcasting. I should at this point explain that broadcasting has, in Mauritius as in most other countries, developed a somewhat different regulatory regime to the print media: television and radio are subject to licensing whilst newspaper publication does not require governmental permission. This distinction was initially justified because of the limited frequencies available for broadcasting, and mainly for this reason licensing of TV and radio is specifically permitted by Article 10 of the European Convention. The communications revolution has rendered this reasoning increasingly outdated, now that cable and satellite television permit multiple channel choice. There is, however, a feeling in some quarters that radio, and television especially, are media with more immediate power than newsprint, and thus require more careful

regulation. Broadcasting does have a unique capacity to create immediate or short-term panic. I am conscious that the question of whether commercial television licences should be issued is a political issue in Mauritius, and that it has dimensions other than the legal. However, pluralism is generally accepted as a very good thing in the media. Although I was struck by the excellence and dedication of MBC officials and their staff, I nevertheless think that they could benefit from competition. If commercial television licences are to be issued, as I recommend, it will be important that an effective regulatory system is in place to ensure professionalism and to deal with complaints.

10. Both English law and French law have historically used criminal sanctions as a means of dealing with media misconduct. But it is no longer regarded as acceptable to jail editors and journalists for doing their job, other than for deliberate and grave crimes such as bribery or blackmail or inciting racial hatred. The reforms that I suggest will remove the threat of prison in most cases. Further liberalisation will be achieved by a freedom of information provision which will, for the first time, give the media – and anyone else – the right to obtain documents otherwise secreted in government departments. In order to assist the media to deal ethically with these new freedoms, a statutory Ombudsperson will be appointed to adjudicate on freedom of information requests refused by public authorities. An independently-appointed Media Ombudsperson (it would be sensible and economic to combine the role) sitting with assessors in a Media Commission, will also adjudicate claims by individuals or organisations that they have been treated unfairly or have had their privacy illegitimately invaded by reports in newspapers or broadcasts or by electronic media. In addition, there will be a carefully defined statutory tort of invasion of privacy to ensure that victims of intrusion can claim a right to compensation and the basis for obtaining an interim privacy injunction will be clarified. The Media Trust will be reinvigorated and will provide training for journalists and encourage responsible professionalism. The overall objective of my report is to provide more information to the public, and more freedom in analysing and publishing that information, whilst better serving the right of individuals to protect themselves from inaccuracies and privacy invasion.

11. This approach is, as I understand from paragraph 8 of the Government Programme 2010-2015, in conformity with the announced policy of the Government of Mauritius:

*“The Government is committed to supporting the fundamental rights of all citizens, including privacy rights and freedom of expression. A plural, fair and independent media is an essential component of a democratic system. Accordingly, Government will also support greater professionalism in the media and the powers and functions of the Independent Broadcasting Authority will be reviewed to provide for ethical conduct and safeguard of the fundamental rights of all our citizens”.*⁵

This was re-affirmed in the Government Programme 2012 – 2015 as follows –

*“Government strongly supports professionalism and highest ethical conduct in the media and will support training initiatives in this regard. Government is also conscious of the need to protect the interests of all citizens against invasion of privacy and unfounded attacks on their integrity or character and will introduce appropriate legislative amendments to this end.”*⁶

12. It is generally recognised that the law as such, although it may conduce to media professionalism, is not sufficient for that important purpose. This requires a Code of Conduct, overseen and enforced by a Press Council or Ombudsperson. Most European and Commonwealth countries have such a body. The Parliamentary Assembly of the Council of Europe, as early as 1970, declared that it would be desirable to put in place professional training and a professional code of ethics for journalists, covering *inter alia*

Accurate and well-balanced reporting, rectification of inaccurate information, clear distinction between reported information and comments, avoidance of calumny, respect for privacy, respect for the right of fair trial.

13. It recommended the establishment of "press councils empowered to investigate and even to censure instances of unprofessional conduct". There are press councils,

⁵Presidential Address: Government Programme 2010-2015'(Speech delivered at the Sir Harilal Vaghjee Memorial Hall, 8 June 2010).

⁶ Presidential Address: Paragraph 13, p 31, Government Programme 2012-2015, (Speech delivered on 16 April 2012).

media regulators or press ombudsmen in most advanced countries (but not the United States other than a regulator for broadcasters), some of them established by statute whilst others are operated and paid for by the media itself. The exact way in which a regulator should be constituted is a matter for debate: to what extent should its members be drawn from the media or the law, or from the lay public? Should its powers be backed by statute, or should they arise from voluntary – perhaps contractual – agreement amongst media organisations? In my judgment, the answers to these questions depend upon the kind of organisation, in any given society, that can operate effectively and in accordance with history and tradition to achieve the goals identified by the Council of Europe in its 1970 Declaration.

14. There can be no doubt that the media performs a vital function in the public interest by providing platforms for provision of information, comment and entertainment. Why then should it require any “regulation”, above and beyond the law? Because inevitably, in fulfilling its public function, mistakes are made – sometimes honestly, sometimes by inexperienced or ill-trained reporters, sometimes as a result of personal or political bias. These errors are not appropriately punished as crimes, because they lack anti-social intent. Nor are they matters sensibly taken to court, with the inevitable delays and expense. But they often cause damage or mental upset to innocent individuals, especially if they remain uncorrected on the record. On the record forever, these days, as many newspapers are accessible on internet archives (to which a correction may be hyper-linked). Most complaints from members of the public are about inaccuracies, and most of these can be readily proven. Decent and sensible editors, faced with that proof, will usually make the correction without an order from a Regulator, but not all editors will do so voluntarily. It is therefore in the interests of *truth* – a pre-eminent value in any news reporting – that there be an independent and experienced person or body with power not only to establish the truth of the matter but to ensure that it is communicated as soon as possible to readers or viewers who would otherwise remain misled. Errors cleared up voluntarily or by such a regulatory system do not require or deserve punishment: the regulatory mechanism is simply a means of putting them right. It is an aid to freedom of expression, which derives its value from the dissemination of true facts, not half-truths and falsehoods.

15. Regulation, especially when pursuant to a Code of Ethics, can have an important role in training journalists in ethical conduct. It can serve the public interest by developing

respect in the media for human dignity and personal privacy. Regulatory rulings and decisions can build up precedents to guide editors when making difficult decisions about where to draw the line. Without this ethical compass as a guide, decisions to publish can be made – in the urgency of news reporting – which can subsequently be perceived as morally wrong. An example is provided by the decision of the editor of the “Sunday Times” in Mauritius in July 2012 to publish, as a front-page “exclusive”, crime scene photographs of the dead and partly naked body of murder victim Michaela McAreavy and close-ups of her injuries. This caused outrage and hostility towards Mauritius in Ireland, where Prime Minister Enda Kenny said that “the publication of these images represents an appalling invasion of privacy and is a gross affront to human dignity.” I suspect that most people in Mauritius would agree. There was no public interest in the publication, other than to sell more copies of the newspaper on the back of a grisly “exclusive”, and it would have breached the privacy provision of any Code of Conduct – if the media in Mauritius had a Code of Conduct, let alone a Code that was respected and enforced (or respected precisely because it was enforced). Instead, the police responded to public outrage by charging the editor with the dragnet offence of “outrage to public and religious morality” although religious morality was not involved and the outrage, as the Irish Prime Minister pointed out, was really to human dignity and family privacy. This kind of outrage cannot be sensibly deterred by civil action or by criminal punishment under a law so vague that it threatens genuine press freedom (many great reformers have had to outrage the public before action is taken) but by a shared sense amongst editors and journalists that certain conduct is unseemly and unethical, and brings discredit on all who work in the media. That sense can be built up through ethical rulings by a respected and independent Ombudsperson and assessors, which are examined and taught, by a panel of wise and representative individuals whom I hope will be appointed to the Media Trust. Those individuals – eight, plus a chairperson they select – will have independence from both government and from the media industry because a majority will be from neither camp.

16. In crafting a regulatory system, it is important to take into account the practical need for independence from vested interests. Running through the *Africa Media Barometer –Mauritius 2010* is both a suspicion of government, accused of attempting to manipulate or ‘spin’ the media in its favour (as all governments and political parties in democracies are wont to do) and to hold out rewards in terms of placement of

government advertising,⁷ and a suspicion of newspaper owners, alleged to interfere regularly with journalists' copy and to re-write their stories to conform with proprietorial wishes to influence public opinion.⁸ It follows that any regulatory body must not be dominated either by government or industry appointees, and the regulator (the media Ombudsperson, as I recommend) must be independent of both, It is also worth remembering – and celebrating – the journalists' revolt of 1984, when 44 journalists were arrested for protesting against a new and repressive law which forced newspapers to post a large financial bond to ensure their good behaviour. This gave the government unacceptable power over the press, and it was repealed the following year, when protest was directed against another new law making it a serious criminal offence to insult holders of public office, a repressive measure which was also subsequently repealed.

17. On the other hand it must be accepted that regulation costs money – if implemented, the work of the Ombudsperson and the Media Commission will be paid for from Government funds (unless the media is required to make a contribution). I have recommended that half of the costs of the Media Trust should be met by newspapers and broadcasters, and half by the Government – and these stakeholders are entitled to have some representation in decisions as to how their money (in the government's case, public money) should be spent on training courses and seminars for journalists and trainees (perhaps in conjunction with communications departments at educational stakeholders such as the University of Mauritius and the University of Technology, Mauritius, and with the British Council or Alliance Française). There has been a long and heated and somewhat arid debate over 'self-regulation' in Mauritius, described by one academic in 2010 as holding out "little hope for level-headed resolution".⁹ Whilst this debate has some point in the UK, where voluntary self-regulation has been exposed by the Leveson enquiry as a sham and the issue is whether it can be reformed (e.g. by newspapers entering into contracts which could subject them to fines of up to £1 million) or should be statute-backed, in Mauritius there has been no self-regulation system at all (other than a voluntary internal

⁷ This issue, which I had planned to address in this Report, is at present subject to litigation, but I shall welcome any submissions on the matter and address it in my Final Report.

⁸ See Friedrich-Ebert-Stiftung, *African Media Barometer: The first home grown analysis of the media landscape in Africa – Mauritius 2010* (fesmedia Africa, 2010) 33, [57] ("Interference from owners is rife").

⁹ See Christina Chan-Meetoo, *State or Self-Regulation: The Search for Common Ground* in Christina Chan-Meetoo and Roukaya Kasenally, *The Media in Mauritius – A Dialogue Session* (African Books Collective, 2012) 87.

complaints system set up by the *La Sentinelle* group in 2010). My view – and I note that it is shared by the head of the Africa Media Initiative, Mr. Amatou Mahtar Ba¹⁰ – is that regulation of the media cannot be left in the hands of either the government or of the industry itself: whilst these vested interests are entitled to representation, it seems to me that the body appointing the regulators must be independent of both – which is why I recommend a role in this respect by the Judicial and Legal Service Commission, or alternatively by the reformed Media Trust which will have a majority of members drawn from civil society. An Ombudsperson should have no links to political parties or to press interests, and his or her utter impartiality shall be the best qualification for adjudicating complaints against the media. As the Media Trust already exists in statutory form, notwithstanding its current moribund state, it seems most sensible to change its constitution and to build it into a body which can fund and supervise the training of journalists and monitor any threats to free speech.

18. In my view, the best regulatory system is one that is manifestly independent of government or party politics, and when adjudicating complaints against the media is not dominated by members of the media or influenced by media funding. Although large countries have broadcasting regulators as well as Press Councils, I have kept in mind that Mauritius has a small population and fewer media outlets, and that creating new institutions can be extremely expensive and likely to exhaust the limited pool of available talent. I have therefore proposed a Media Ombudsperson, established by statute but independent of Government, appointed by the Judicial and Legal Service Commission, sitting with two assessors. These three individuals will form the Media Commission which will adjudicate complaints and issue decisions. The Ombudsperson will also be available to mediate cases that would otherwise end in court. An example of a similar system of regulation may be found in the Republic of Ireland (a recognised respecter of free speech - 12th on the Freedom House Global Ranking, 2012) where a press council and press Ombudsperson are established by statute and recognised in other legislation (such as the Defamation Act) but are independent of government and funded by a levy on the media.¹¹ The Press Ombudsperson is appointed by the Press Council, so is accountable only to the Council and not to the press or to the government. The Irish model shows that statutory regulations can co-exist with true freedom of expression. Having the Media

¹⁰Ibid.

¹¹ See Edward Rees, Sophie Traherne and David Ward, 'Comparative Study of Press Councils: Resources Report' (Report, Electoral Reform International Services, 2011) 8-9.

Ombudsperson and the two assessors appointed by the Judicial and Legal Service Commission would guarantee their independence from both the government and the press. In addition, I am recommending the re-invigoration of the Media Trust with a majority of trustees representing the public and appointed by civil society bodies. The Media Trust should be funded equally by the government and the media industry, should conduct courses in ethics and standards for trainee and working journalists and should speak out on issues of press freedom that arise from time to time in the country. This will require significant changes to the Media Trust Act which at present gives the Prime Minister and the Minister of Finance disproportionate powers of appointment.

19. The Privy Council, which remains the final court of appeal for Mauritius, comprises English law lords whose attitude to freedom of expression, at least in the UK itself, has been influenced by the free speech guarantees of the European Convention. Privy Council case law however is still influenced by a colonial approach, from a time when more restrictive press laws than those applied in England were upheld in British dependencies because of the feared unruliness of “coloured populations”.¹² However, more recently this unacceptable consideration has been replaced by the theory propounded in *Ahnee v DPP of Mauritius* (1999)¹³ that crimes like “scandalising the court”, although obsolete in Britain, might nonetheless be necessary in “small islands” like Mauritius. This approach has been criticised as unacceptably paternalistic – the UK too is a “small island” and freedom of expression is a universal guarantee which should not be affected by the size of the country or its population. However, it must be noted that some Mauritian judges – e.g. those who decided *DPP v Dhoocharika & Others*¹⁴ have adopted this approach:

“We need hardly state that in a small state jurisdiction such as ours, the administration of justice is more vulnerable than in large and well-established jurisdictions such as the UK and Canada”.

20. It is not clear why this should make it necessary for a small jurisdiction to maintain press offences that are regarded as unnecessary in larger democracies. It seems to me, as an observer on frequent visits to the country, that Mauritius is a modern and stable democracy with institutions which are reasonably respected and capable of

¹² See *McLeod v St Aubyn* (1899) AC 549.

¹³ 1999 2 AC 294.

¹⁴ 2011 SCJ 356.

withstanding critical scrutiny, especially criticism that is expressed intertemperately or irrationally. For that reason I do not recommend placing extra restrictions on the media because Mauritius is a “small island”. However this consideration does legitimately come into play in other respects – for example, I have constantly borne in mind the limited pool of persons appropriate for appointment to regulatory bodies in a country with 1.2 million people, and the need to avoid the expense of duplicating regulatory functions. This is why, for example, I have recommended only one “media Ombudsperson” to deal with complaints against broadcasters as well as newspapers, and why I consider that this same official, working full-time and with a secretariat, could “double up” as the Freedom of Information Commissioner.

21. I have previously conducted a review of the nation's media law at the request of the then Attorney General,¹⁵ following the report that press interests commissioned from Kenneth Morgan OBE entitled **Safeguarding Freedom, Responsibility and Redress for Mauritius and its Media** (1998) which recommended the establishment of a statutory Press Council. In preparing this new report I have had the benefit of meetings on media-related subjects with the Prime Minister, the Chief Justice, the Cabinet Secretary and the Attorney and Solicitor Generals, the Chairman and Director of the Independent Broadcasting Authority, the Chairperson and members of the Law Reform Commission, the Acting Director of the Government Information Service and the Director together with producers and journalists from the Mauritius Broadcasting Corporation as well as with a number of newspaper editors, proprietors and journalists. I have benefited from discussions with the Chair of the Australian Press Council, Professor Julian Disney. I have been assisted at different times by Ms. Jen Robinson, Mr. Mark Stephens of the London firm of Finers Stephens Innocent, Ms. Joanna Frivet and Mr. Peter Anstee, and I wish to express my gratitude for assistance with the final version to Ms Odile Ombrasine and Mrs Vishwani Rambissoon of the Attorney General’s Office. On 28 May 2008 I gave a public lecture at the Sir Harilal Vaghjee Memorial Hall on "The Development of Media Law" and received constructive feedback from a number of persons who attended. In 2012 I gave the keynote address at a conference on media law in Mauritius and had the opportunity to outline my thinking on the subject and to discuss it with the President, the Prime Minister and the Attorney General and with journalists and editors. Needless to say, the views that I have formed and hereby impart are entirely my own. I have not sought to set out the present law in any detail: a neat summary will be found at Mr

¹⁵ See Geoffrey Robertson, ‘Reform of Media Law in Mauritius’ (4 June 1999).

Sanjay Bhuckory's chapter on Mauritius in a recent book "Expression and the Law in the Commonwealth", edited by Robert Martin. I have written this report for the general public and have tried as far as possible to avoid legal technicalities. These must be considered, of course, when it comes to drafting legislation. I have been greatly assisted, in considering the law of Mauritius, by the Solicitor General (Mr. Dabee) and members of his office.

2. THE CONSTITUTION OF MAURITIUS

22. A presumption in favour of free speech is made in section 12(1) of the **Constitution of Mauritius**. It guarantees to every person in this nation that they shall enjoy "*the freedom to hold opinions and to receive and impart ideas and information without interference*". This is the guarantee that is found in Article 19 of the **Universal Declaration of Human Rights** and Article 19 of the **International Covenant on Civil and Political Rights** which Mauritius has ratified. It is reflected in Article 10 of the **European Convention on Human Rights**, which has been interpreted and developed by the European Court of Human Rights in case law that is binding on the courts of France and Great Britain and 45 other European countries. That case law establishes that the right may be asserted by newspaper and media corporations which are involved in the business of imparting ideas and information to the public, whose editors and journalists have a "watchdog" role to report matters of public interest. To fulfil that watchdog role, journalists should be able to obtain information about government activities; they should be able to protect their sources from reprisals and they should not be subject to injunctions or damages when they act responsibly and carefully, even if some stories they publish turn out to be wrong – provided, of course, they have published prominent corrections at an early opportunity.
23. One basic principle of human rights and English common law that is not adequately protected by the Mauritius Constitution is the rule that justice must be seen to be done. One important reason for open justice is to permit court reporting. However, sections 10(9) & (10) of the Constitution are very permissive – they permit courts to close their doors on reporters whenever the judge thinks it "expedient" so to do. It was a mistake – one of the very few that the distinguished draftsman of the Constitution made – not to restrict court secrecy to cases where this was "necessary" for justice to be done. The protection of 'open justice' therefore requires a statutory provision defining the exceptional cases where it is necessary for the court to sit in secret.

24. Because journalism in Mauritius is the exercise of a constitutional right, its practitioners cannot be licensed or banned from practice. However, because the freedom entails certain responsibilities, it cannot be absolute or immune from legal restraints. Section 12(2) of the Constitution sets out many such grounds for restraint: defence, public safety, public order, public morality, the need to protect the reputation and rights of others and of persons involved in legal proceedings, confidential information, the authority of the courts and so forth, so long as these constraints are "*reasonably justifiable in a democratic society*". This formula eschews the weasel word "expedient", but is still a somewhat broader justification for censorship than is to be found in Article 10 of the European Convention, where restraints on free speech must be proved to be **necessary** in a democratic society. The latter standard reflects the modern view that freedom of speech is a fundamental value and should only be overridden in response to a pressing social need. I do not think, therefore, that an existing Mauritian law is good just because it is constitutional: it must be shown to serve a purpose that is necessary in a democracy.
25. Similarly, I do not think that the media should be entitled to destroy an interest simply because it is not listed as an exception in Section 12(2): privacy, for example, is not there mentioned, other than "the private lives of persons concerned in legal proceedings" (which suggests that the only persons guaranteed privacy protection are those who have already begun proceedings, and the form of protection is merely a ban on the reporting of evidence.) Modern media law, certainly as it emerges from the European Convention, requires the press to respect the citizen's private life, home and family, at least where there is no public interest involved in disrupting that private life. The Mauritian Constitution, drafted in the 1960s on the basis of English law at that time, is defective in guaranteeing no privacy protection other than for persons involved in litigation or (in Section 3(c) and Section 9) for the protection of the privacy of homes and property against unlawful search and seizure. This inadequacy does not mean that any common or statute law developed to protect privacy would be unconstitutional – the Mauritian Constitution does not prohibit such laws – but it means that they must come about either through Parliament or through the courts. So some protection of its privacy is legitimately provided by Article 22 of the Civil Code, and further common law development may come from following European precedents. A better way forward would be for Parliament itself to approve a modern civil law defining a tort of invading privacy.

26. I have analysed all the current laws that impact on the media in Mauritius. Some of the criminal laws are old and outdated and should in my view be abolished or substantially reformed. The civil law of defamation is in some confusion, and should be simplified. A new Freedom of Information provision is essential, as is greater protection for open justice. There should be liberalisation of the conditions for obtaining a broadcasting licence. These reforms would ensure greater press freedom. On the other hand there is inadequate protection for privacy and the storage and handling of personal data. The mode of treatment of complaints about broadcasting is unsatisfactory: these should be handled by a complaints body which is entirely independent both of the broadcasters and of government and it should have a power to fine and recommend sanctions to the IBA and, if necessary, to suspend the broadcasting licence in the case of repeated breaches. The performance of the print media is uneven in respect of handling complaints and affording a right of reply: there should be one body, entirely independent of government, which can adjudicate complaints quickly and direct corrections or rights of reply if editors wrongly refuse to make or offer them. Perhaps most important of all, in the long term, is my recommendation that the **Media Trust** should be re-invigorated, properly funded and given a clear statutory duty to train young journalists in techniques for achieving accuracy and teaching them about ethics and standards. I consider that these reforms will, collectively, serve to enhance both media freedom and media responsibility in Mauritius.

3. **CRIMINAL LAWS**

a. **Sedition**

27. Advanced democracies do not jail journalists or editors for the exercise of political free speech rights. There should be no call for penal laws against sedition in an established and confident democracy. Old British sedition laws and Napoleonic 'insult' laws were much used against radical pamphleteers in past centuries (use of sedition laws against the American colonists helped to provoke the War of Independence) and are sometimes deployed against dissidents by repressive regimes in the Commonwealth or in francophone countries, but have fallen into disuse in England and France where their revival would be widely condemned. Sedition has recently been abolished in the UK and I can see no reason why it should persist in Mauritius. The maintenance of draconian laws prevents it from being recognised in the top ten or twenty nations that endorse freedom of speech. This does not mean

that the media should be completely exempt from criminal penalties. A journalist may be guilty of fraud (e.g. by tipping shares in a company in which he has a secret interest) or of bribery if he pays public official for information or of telephone tapping or of incitement to crime or disorder or deliberately trying to prejudice a trial: these are well established criminal offences for which jail sentences may be justified. But otherwise, with the exception of stirring up race or religious or ethnic hatred (behaviour which history shows may at certain times or in certain communities cause great damage), there is no "speech crime" worthy of putting journalists and editors in prison: falsehoods and calumnies can be dealt with by fines or court ordered damages and injunctions or (in the case of broadcasters) by reprimands and fines and even, for repeat corporate offenders, revocation of their broadcasting licence.

28. For this reason, in my view, the crime of **sedition (section 283)** Criminal Code) should be abolished, as it has been in the UK. It is wrong to have a crime carrying a prison sentence for "exciting contempt or disaffection towards the government" – in a democracy this is often what the opposition will do!¹⁶ It has been held in *Masson v R* (1972) MR 298 that truth is not a defence and this is entirely unacceptable in the case of criticisms of government. The vagueness of this dragnet offence is not saved by having it prosecuted only by the consent of the DPP (**section 287B**) although this provision may prevent or deter its use. Nor do I think **section 286** – an old colonial law against importing seditious publications which gives the President the power to ban any book he considers might excite disaffection towards the government or the courts or might cause ill will amongst different classes of citizens – has any relevance to a modern democracy. It is entirely unworkable and indeed counterproductive, since any such sedition will simply be posted on the internet and readily made available in the country by fax and by email from abroad. This discretionary power, moreover, has caused controversy in the past, an example being the banning of the book, "The Rape of Sita", winner of the Commonwealth Prize for Best Novel in Africa. The main objection was to the title itself, simply for linking the Hindu goddess Sita, symbol of chastity and purity, to the word "rape", although the author claimed to be making a political comment on the history of Mauritius by re-writing an episode of

¹⁶ In Britain, the common law offence was hardly ever used in the half-century before abolition, and never successfully. The common law would appear to have developed so as to require proof of an incitement to violence: see *Ex parte Chaudhury* (1991) 1 All ER 306.

the Ramayana.¹⁷ This power to impose an import ban on books is a pointless relic of colonial times.

29. It follows that **sections 287** and **287A**, which give the court special powers to ban newspapers for sedition or even for possible future sedition, should be repealed. These provisions go beyond what is "reasonably justified", let alone what is "necessary" in a democratic society. The fact that a newspaper has once been convicted of sedition cannot warrant suspension of all its future publications. It is inappropriate to maintain in the Criminal Code the old sedition test of "exciting disaffection towards the government," which could curtail the legitimate right of democratic protest or the test of "stirring up ill will between different classes" in a society that is committed to equality. It is of course relevant when it comes to inciting racial hatred, but that is best dealt with by a specific criminal law (see below).

b. Criminal Libel

30. I consider that the crime of libel (section 288) should be reformed, at least in respect of the media. It is impossibly wide – any imputation "prejudicial to honour, character or reputation" may be prosecuted even if it is true and even where the subject of the criticism is dead. It is not a defence for the media to prove truth, as it is for civil libel: the media defendant must in addition prove that the publication was for the public benefit - a requirement which would certainly infringe the free speech guarantee of the European Convention. There is no qualified privilege defence of the kind that was upheld recently by the House of Lords in the cases of *Reynolds v Times Newspaper Ltd*¹⁸ or *Jameel v Wall Street Journal Europe*¹⁹ of responsible journalism in the public interest. The House of Lords indicated over 30 years ago that a criminal libel threat to public interest media would be incompatible with the Article 10 freedom of expression guarantee.²⁰ In my view, section 288 (which might have some use outside a media context, eg. To protect against harassment by 'poison pen' letters or blackmail) should at least be amended so that it complies with free speech principles. In the latter case, it would only be used to prosecute those who deliberately publish serious allegations they know to be false with intent to injure. It would be for the

¹⁷ See Lindsey Collin, *The Rape of Sita* (Bloomsbury 2001) and Eileen Williams-Wanquet, 'Anti-novel as Ethics: Lindsey Collen's *The Rape of Sita*' (2005) 15 *Connotations* 200, 214.

¹⁸ (1999) WLR 1010.

¹⁹ (2006) 3 WLR 642.

²⁰ *Gleaves v Deakin* (1980) AC 477 per Lord Diplock.

prosecution to prove that the statement was false, that it was published intentionally, and with deliberate intention to injure another person.

31. There appear to be no recent prosecutions in Mauritius and if there were any in the future then section 288 might, if unreformed, be held by the Privy Council to be contrary to section 12 of the Constitution. The retention of obsolete offences in the Criminal Code tends to make Mauritius look to outsiders as if it still clings to repressive colonial-era laws, especially if these are used as “holding charges”. There are, however, some valuable provisions that should be transferred to a civil libel or media regulatory context. In the latter case, I refer in particular to **section 289** which requires the owner or editor of any newspaper to permit the defamee a right of reply of up to twice the length of the defamatory article, which must be published immediately and in the same place and typeface as the original article. Penalty for non-compliance can be a fine of up to 100,000 rupees. There can hardly be any objection from the media if this provision is transposed to a non-criminal context, as a right of reply which could be ordered by an ombudsman or, if accorded quickly and reasonably by an editor, could ground a defence of “responsible journalism” to any libel action.

c. Other Crimes: Inciting disobedience, publishing false news, insult

32. The crime of "inciting civil disobedience or resistance to law" (**Section 284**), may be committed by a newspaper or through any other medium as specified in **Section 206**. I question the necessity for this offence, because the common law makes it a crime to incite, aid or abet or conspire to breach the law. It is unacceptable that a crime carrying up to 2 years in prison should include the encouragement of resistance, not only to laws but to "the authorities entrusted with their execution". As a result of the vagueness of this offence, its possible use against legitimate protest or trade union activity and the fact it has not been used in recent years, I recommend its abolition, especially as it could be used as a sword of Damocles to discourage publications which might merely support legitimate protest.

33. The crime of "publishing false news" – **section 299** – was held to be unconstitutional by the Privy Council in *Hector v Attorney General of Antigua*,²¹ although the formulation in section 299 is somewhat narrower than in the Antigua case. In the

²¹ (1992) All ER 1003.

subsequent Mauritian case, *Police v Gordon Gentil*,²² the Supreme Court ruled that the defence of good faith makes section 299 constitutional, but I am not so sure - the burden of proving the defence is on the media, whereas it should be for the prosecution to negative the media's claim to good faith. The crime should, preferably, be abolished as civil action for defamation will compensate persons injured by the falsehood, and the regulatory system I propose would provide a quick and effective remedy, namely a correction ordered by the Media Commission, published immediately and with due prominence. Alternatively it could be amended so as (a) to refer only to news that the publisher knows to be false and (b) publishes with the intention of causing a breach of the peace or with the intention of vilifying the person about whom the false statement is made. It overlaps with section 288, and if reformed would overlap with section 288 if that section were reformed. I question whether both offences are necessary and would welcome submissions on this point.

34. The offence of **insult (section 296)** is even more objectionable, since it comes with no public interest defence and covers the publication of "any injurious expression" whether by way of comment or cartoon. It appears to be a relic of the Napoleonic insult laws, passed to protect public officials from criticism and has no place in a modern democracy. The penalty for a "printed insult" is up to two years imprisonment, and although the offence is vague and capable of abuse if used to prosecute robust critics, there is no "filter requirement" of prosecution only with the DPP's consent. It would be best, if Mauritius wants a reputation as a friend to free speech, if this crime were expunged from the statute books.

d. Inciting Racial and Religious Hatred

35. The crime of **stirring up racial hatred (section 282)** is important, and was recently (2008) considered and amended by Parliament. Such crimes are accepted, if carefully defined, in European countries although in the U.S. they would conflict with the First Amendment. However, it would only pass muster under modern democratic standards if amended to remove the stirring up of "contempt" (stirring up hatred should be the only crime) and especially to remove "political opinions" and "creed" as grounds of liability. In a democracy, citizens should be free to attack the political opinions of others as vigorously as they like, and similarly to criticise religious dogmas, creeds and cults in robust terms subject to a law against inciting religious

²² (1998) MR 121.

hatred or public disorder. The maximum penalty of 20 years imprisonment seems excessive and disproportionate and should be reduced to 10 years, which should be ample to deal with the worst case scenario where such racist speech is intended to stir up violence. I am also concerned about **Section 282(2)** which would appear to create an offence of strict liability (i.e. without an intention to offend) which nonetheless carries up to four years in prison, for printing or publishing material containing racist comments. The printer or publisher should only be liable if he or she **knows** the nature of the material and publishes it recklessly as to the consequence that it will stir up racial hatred.

36. Serious criminal liability should in my view be contingent upon an intention to commit the crime. In relation to religion, the public order concerns of the old offence of blasphemy are amply covered in section 206 ("outrage against public and religious morality") and sections 184 (Disturbing a religious ceremony), 185 (outrage on religious worship) and 186 (assaulting minister of religion).
37. **Section 206** punishes outrage against "public and religious morality" by "any writing, newspaper, pamphlet or other printed matter" or by any cartoon, but exempts "matters of opinion on religious questions, decently expressed or written". I am not convinced that this exemption goes far enough to protect satire, polemic and robust commentary. Decency is in the eye of the beholder, and I do not see why laws and regulations against obscene speech should not apply to all subjects, without a specially restrictive test for religious opinions. The present Mauritian laws against racial and religious hatred are, inevitably, somewhat broadly expressed, and I recommended that they be subject to the further safeguard of not being prosecuted without the consent of the DPP, whose public interests' guidelines would caution against prosecuting legitimate protest against political stances taken by religious groups. The international outrage against the severe sentences passed on the 'Pussy Riot' group, who briefly protested in a church over the political support its patriarch was giving to the re-election of President Putin, must be remembered. I also recommend removing the term "religious morality" from Section 206. This is far too vague and abstract to serve as an element of a criminal offence. "Public Morality" – the element which would remain – would include generally accepted moral precepts that derive from religious as well as humanist teachings.

38. I should add that there is a useful inherent power in the courts to grant injunctions against behaviour that threatens decent religious observance or against religions which behave in ways that disturb others. The case of *Aumeer v L'Assemblee de Dieu – Mission Salut*²³ is a useful illustration of the latter, when it was held that the constitutional right to worship could not be exercised in ways which caused inconvenience to others (thus worshippers could exercise their right to pray, but not by way of a loud loudspeaker that inconvenienced others who had a right not to pray). This power could be used, for example, to stop paparazzi intruding into churches or funerals.

e. Publication Offences

39. The very old *Newspaper and Periodicals Act 1837* is still in force: it requires every newspaper to deposit with the Accountant General a signed notice giving details of its title, its place of publication, its place of printing, its publisher, printer and editor and their residential address. This law shows its age by a small penalty (100 rupees for every day of unnotified publication) and I question whether it is necessary in an age where internet and blog sites also process news and political commentary and are not subject to any notice requirement. It is, of course, useful to have a register of newspapers and their editors and an address where legal notices can be served, but the demand for residential addresses is over-intrusive. I found no evidence this Act was actively policed.

40. Similarly, there has been no active enforcement of the curious notice provisions in Sections 202, 203, 207, 208 and 209 of the Criminal Code. Section 202 imposes a 100,000 rupees fine or up to one year prison sentence for publishing any printed matter or newspaper unless the publication contains "the real description of the name, profession and place of abode of the author", which would theoretically incriminate newspapers which did not give this information about journalists and contributors. It seems to be ignored. Section 203 of the Act, in English translation, imposes a penalty "for revealing the author of writing" (sic) with a penalty of up to 4 days imprisonment. This may be a matter for mitigation of sentence, but that should be left to the discretion of the sentencing judge, and not turned into a specific offence with a light – almost risible – sentence. Sections 207-8 provide a penalty "for revealing author of outrage against religion" which seems strange, as any such person

²³ (1988) MR 229.

should presumably be revealed, and indeed prosecuted, while Section 209 threatens up to 3 years for "assisting illegal publications". These all appear to be laws that derive from earlier centuries when underground or unauthorised subversive publications were feared and prosecuted severely. They are incoherent in formulation and have not been used in recent years. They have a potential to infringe on freedom of speech and their presence on the statute book indicates a lack of respect for free speech. I recommend their removal.

f. Privacy – A new criminal law?

41. I understand that consideration has been given to creating a new criminal offence to protect the privacy of "public figures". However, I consider it objectionable in principle to give a privileged protection to "public figures" (for example, Members of Parliament, local councillors, judges and chief executives) – and not to other equally worthy citizens or indeed, to every citizen of Mauritius. The law must be no respecter of persons. Although I regard privacy as insufficiently protected in Mauritius, the way forward is a civil law which provides injunctions and damages for breaches of privacy and a code of conduct that is monitored by an independent Ombudsperson. The way backward would be a criminal offence of this type.

42. If the laws described in paragraphs 39 and 40 above are abolished as I recommend, there should be a modern and simple law requiring all bodies (including blog sites) that deal with news to have a registered publisher. There will be no power to remove, and no question of removing, any publisher from the register. There is a case – especially during election periods –for having posters, pamphlets, meetings and other electoral communications authorised by an electoral agent – most countries (including the UK) have laws to this effect.

4. CONTEMPT OF COURT

43. Contempts are generally prosecuted pursuant to common law and the courts' inherent power, and provision for doing so is specifically made by sections 18A-C of the Courts Act 1945 (and see the case of *Procureur General v Wilfrid L'Etang*²⁴). The power to punish for contempt of Court is essential to maintenance of the rule of law: every legal system must be able to ensure the enforcement of its orders. The crime of Contempt of Parliament, however, involves a breach of the rule of law, in as far as

²⁴ 1952 MR 78.

it survives in Mauritius (there is an argument that it does not) to give politicians a power to punish newspaper editors, it should be abolished.

44. The power to punish for contempt of court is the means by which any legal system protects itself from publications that might unduly influence the result of litigation. Especially in respect to jury trials in criminal cases in Mauritius, it is right to prevent publication of information, even true information, which would prejudice the result – e.g. by telling jurors of inadmissible evidence, previous convictions and so forth. It has become more difficult to keep information from jurors – they can often find it on the internet – and this problem needs to be addressed as a matter of criminal law and procedure. So far as the established media is concerned, journalists and their lawyers need clear directions as to what they can and cannot publish about cases that are “active” i.e. are proceeding to trial. They must not demonise persons who are facing criminal charges, they must not report what goes on out of the hearing of a jury, and so forth. The law of contempt does not impose censorship, but it postpones the publication of certain facts until the danger of their impact on a jury is removed. In this respect, contempt operates as a reasonably justifiable restraint on the press – a temporary restraint, to preserve the basic right of free trial. This aspect of contempt law seems understood and respected by the press – there have been few cases of “strict liability” contempt, (where prejudice is caused unintentionally) or of the more serious crime of ‘deliberate contempt’ where a malicious newspaper sets out to prejudice a case. Since courts have the power to stop a trial as an abuse of process if media publicity has made a fair hearing impossible, prejudicial publicity can prove counterproductive as the (probably guilty) defendant will remain free. This is entirely contrary to the public interest, and the media cannot complain about contempt restrictions so long as they are temporary and do not extend to prevent legitimate criticism of judges or lawyers.

a. **Strict Liability Contempt**

45. This should be confined to publications about criminal cases within a specific time period, namely from the point at which a suspect is arrested or charged by police to the point at which his trial is concluded. A statutory rule to this effect would favour the media, which can at common law commit contempt when the case is merely ‘imminent’ and no charges have been laid, and later, when the trial is over and the case is on appeal. The earlier period is too uncertain to justify a restraint on the

media and in the latter appeal period the case is before judges, not jurors, and judges should not be influenced by prejudicial press reports.

It would also assist the media if the standard of liability for this class of contempt were clearly defined. I would limit it to:

“any publication about a trial or the administration of justice which creates a substantial risk that the course of justice in any particular proceedings will be seriously impeded or prejudiced”

This definition, based on that in the 1981 UK *Contempt of Court Act*, is narrower than the common law definition in Mauritius – it requires a *substantial* risk of *serious* prejudice, whilst the common law simply requires a real risk of any prejudice. To this extent, statutory clarification would enhance press freedom. It would, theoretically at least, apply to non-jury civil cases, although the occasions on which the media could seriously prejudice a civil trial would be very few. Putting illegitimate pressure on witnesses, or seeking to intimidate a party into abandoning its legitimate claims, might provide examples.

b. A Public Interest Defence?

46. This is important, to prevent proceedings being launched simply with the object of keeping the press quiet because the case is *sub judice*, without any intention of bringing it to trial. This was the device of the “gagging writ” and it was ended in the UK by S.5 of the 1981 *Contempt of Court Act*. Such a provision, absent at present in Mauritius, ensures that public debate and criticism on matters of importance can continue, even though, as a side-effect, individual proceedings might be prejudiced. I recommend that there be a public interest defence to contempt charges, in the following terms:

“A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court if the risk of impediment or prejudice is incidental to the discussion”.

This change, too, would benefit the media, as the common law of contempt has at present no public interest defence.

c. **Deliberate Contempt**

47. It is an offence at common law to publish material that is designed to prejudice criminal proceedings that are pending or ‘imminent’. The crime itself is essential to stop a newspaper maliciously waging a campaign to convict somebody already on trial, or blackguarding and defaming a party to litigation to pressure them into dropping the case. However the press must be entitled to urge that particular individuals *should* be prosecuted, and to comment on the morality or sense of ongoing civil litigation. These limits should be made clear in a statutory definition of deliberate contempt, as a crime of “intentionally prejudicing or frustrating the administration of justice in particular proceedings”. I consider that, unlike the UK position, the public interest defence should be available, although I accept that it will rarely avail a defendant who sets out to prejudice a trial. But once again, this reform would extend the freedom of the press.

d. **Scandalising the Court**

48. This head of contempt (described in Scotland as ‘murmuring judges’) is in the process of abolition in the UK: a Bill to this effect has passed in the House of Lords and the Law Commission has recommended its demise in its December 2012 report.²⁵ Although obsolete in England, where there have been no successful prosecutions since the 1930’s, it has been alive and punishing editors in Mauritius: See *Badry v DPP*²⁶; *Ahnee v DPP*²⁷; *DPP v Jean France Blais*²⁸ and most recently *DPP v Dhoocharika*²⁹, a case in 2011 where the editor of *Samedi Plus* was jailed for three months for publishing defamatory comments about the Chief Justice by a disbarred barrister. The Privy Council has given the editor leave to appeal, and will be asked to reconsider its approach in *Ahnee*, namely that

“...it is permissible to take into account that in a country such as Mauritius, the administration of justice is more vulnerable than in the

²⁵ United Kingdom Law Commission, *Contempt of Court: Scandalising the Court*, Report No 335 (18 December 2012).

²⁶ [1983] 2 AC 297.

²⁷ [1999] AC 549.

²⁸ [2002] Unreported – apparently Mr. Blais circulated a letter suggesting that a judge would be better equipped to sell dumplings (“boulettes”) than to sit in the High Court.

²⁹ 17 October 2011 (Judges K.P. Matadeen and A.A. Caunhye).

*UK. The need for the offence of scandalising the court on a small island is greater.*³⁰

49. It is arguable that in small countries, or those with “vulnerable” administrations, it may be all the more necessary for the media to probe the judiciary and that the right to freedom of expression does not shrink with the size of the country.³¹ Essentially, the decision as to whether the judiciary in Mauritius needs special protection is one that should be made by the parliament of Mauritius, and not by the judiciary itself. Judges have absolute privilege to answer critics, if it is appropriate, in their judgments, and a recent example is provided by Judge Domah in the *Soornack* case, who set out some of the elementary factual mistakes made by journalists. There should be no inhibition on judges suing for defamation – the remedy available to everyone else who is falsely attacked in the media. A genuine “small island” point might arise here, if it is feared that the number of judges means that the case would be decided by a judicial friend (or, for that matter, foe) selected from the small judicial pool. In commonwealth countries this problem can be solved by ‘importing’ a judge from another Commonwealth jurisdiction to hear the case, and of course in Mauritius there is the re-assurance of an impartial court of final appeal, namely the Privy Council. If my recommendation for a media Ombudsperson is acted upon, any judge traduced by a newspaper could make a complaint and quickly receive an impartial adjudication which the newspaper would have to publish with a prominence commensurate with its importance. I consider that this would be a better solution to unsubstantiated ‘scandalising’ of judges than to put editors in prison.

50. This was the view of the Law Commission in England, which recommended abolition of the crime of scandalisation. It pointed out that abuse of judges (there was a lot of it, on-line) had little or no impact – it was often by disappointed litigants, and “the

³⁰ [1999] 2 AC 294 at [21]. The author of this report has appeared for Mr. Dhoocharika, *pro bono* (i.e. without payment) in order that the Privy Council can consider his case.

³¹ See Geoffrey Robertson QC and Andrew Nicol QC, *Robertson & Nicol on Media Law* (Thompson, 2006, 5th ed) [7-055] 451.

very extremity of the language prevents most readers from taking it seriously”.³² The Commission made the important point that “preventing criticism contributes to a public perception that judges are engaged in a cover-up and that there must be something to hide”.³³ As far as false allegations of fact were concerned, it thought that a civil action for defamation would be sufficient to set the record straight, whilst the offence, under s127 of the UK *Malicious Communications Act* of “*sending a letter or electronic communication which is indecent or grossly offensive, of a menacing character; or information which the sender knows to be false*” would amply cover all cases of personal threat to a judge. (This is similar to the Mauritius offences in section 32 of the Postal Services Act and section 46(g) & (h) of the Information and Communication Technologies Act) It concluded that scandalising the court was in principle an infringement of freedom of speech which should not be retained without strong justification. That did not exist in the UK, where prosecutions would be regarded as self-serving on the part of judges and counter-productive by re-publicising the allegations and giving the contemnor a platform. It added that “the offence is no longer in keeping with current social attitudes”.³⁴ However, as the case of *Dhoocharika* will be decided by the Privy Council (and I may be instructed to appear in it), it would be appropriate to await the views expressed by their Lordships. The suitability of “scandalisation” is a question upon which I would particularly welcome submissions.

e. Contempt of Parliament

51. Historically, the Parliament at Westminster and its offshoots in the Commonwealth have always claimed the right to regulate and punish misbehaviour, not only by MPs but by outsiders, particularly the media. Their powers to regulate their own members and stop them, for example, breaching Cabinet or Parliamentary Committee confidences is unobjectionable. However, the use of an obsolete criminal jurisdiction by MPs to punish their own critics in the media is incompatible with modern free speech guarantees, not to mention democracy.

52. The Mauritian Parliament's privileges are preserved in the *National Assembly (Privileges, Immunities and Powers Act (Act 22 of 1953)*. Section 6(1)(n) of that Act provides that publishers of defamatory statements or writing upon the National

³² United Kingdom Law Commission, *Contempt of Court: Scandalising the Court*, Report Law Comm No 335 (18 December 2012) [33].

³³ *Ibid*, [27].

³⁴ *Ibid* [93].

Assembly constitutes the offence of contempt of the Assembly. This offence, triable at least before a Court and not before Parliament, is nonetheless obnoxious to democracy and may indeed be contrary to common law: see the House of Lords decision in *Derbyshire County Council v Times Newspapers*,³⁵ which declined to allow a local council standing to sue for libel. In *Coralie v R*³⁶, the court in Mauritius held that a critic could be prosecuted for "collectively defaming" the legislative council by attacking the majority party in it, and that placing the burden of proof that the attack was not defamatory on the media defendant did not breach the Constitution (although the court did say that a 6 week prison sentence was "massively excessive" and should be commuted to a fine). *Coralie* was a case in the 1950s when human rights and free speech principles were not fully developed. Today, they should protect citizens against jail and fine merely for criticising Parliament, even if their criticisms are wrongheaded or malicious. (During the election period, MPs should be able to obtain fast track injunctions against the publication of falsehoods, granted by a judge and if my recommendations pass into law they will have the Ombudsperson and the corrective services of the Media Commission). In my view, the Court's power to jail critics for contempt of Parliament should be abandoned and MPs should be content with the opportunity to sue their critics for defamation or breach of privacy. Parliament would retain its contempt powers over MP's, whom it could decide to fine or suspend or even remove, but not to imprison. The Speaker could refer any serious misreporting of Parliament to the Ombudsperson's Office and the Media Commission could order the publisher to correct its erroneous report.

5 DEFAMATION – THE CIVIL LAW

53. The main legal means for an individual to nail lies and vindicate his or her reputation is the law of civil libel. This may be the subject of some confusion in Mauritius. The right to damages is based on Article 1382 of the Civil Code (which does not appear to have an authoritative English translation) but the definitions and defences are contained in the outmoded criminal libel law: see paragraphs 28 and 29 above. The leading civil case of *Lesage v Mason*³⁷ indicated that French law governed this claim but that English case law development might be relevant. This has been a cause of

³⁵ (1993) AC 534.

³⁶ (1957) MR 290.

³⁷ (1976) MR 172.

confusion: in *Cordouan v Jardin*³⁸, for example, it was held that the English law “right to reply to a defamatory attack” defence could not be raised, because it was not found in French law. A recent decision of Judge Peeroo in *Dookhony v La Sentinelle*³⁹ applied the English legal developments influenced by Article 10 of the European Convention which provide the press with a broad public interest defence, known as the *Reynolds/Jameel* “responsible journalism” defence. This was followed by *Ohsan-Bellepeau & Anor v La Sentinelle Ltd*⁴⁰ where the court approved the ‘responsible journalism’ defence, pointing out that the price for avoiding liability when they get things wrong was to act according to reasonable professional standards. This is a most welcome development for press freedom in Mauritius, but doubts have been expressed as to whether it is consistent with the decision in *Lesage*. The time has come to consider whether there should be a statutory definition of civil libel along the lines of the proposed definition in the UK's Defamation Bill, namely “*a statement is not defamatory unless its publication has caused or is likely to cause substantial harm to the reputation of the claimant*” and in which the defences are truth, fair (i.e. honest) comment and public interest privilege for responsible journalism.

54. What constitutes “responsible journalism”? It must be journalism – and this includes editing – which is ethical and conforms with the Code of Conduct. (A serious breach of the Code will generally disentitle a newspaper or broadcaster from reliance on the defence). It must, perhaps most crucially, be journalism that takes reasonable care to check potentially defamatory statements of fact – there must be interrogations of sources, a search for corroboration, an attempt, where appropriate, to find out the other side of the story, and so forth. Much will depend on the circumstances, and allowances will be made for the urgency in which news must be reported, but errors of the kind detailed in the *Soornack* judgment, such as accusing the Chief Justice of coming specially to court when his name was on a writ (his name is on every writ) and accusing the Registrar of opening the court specially on a Saturday (when it is open every Saturday) are examples of clumsy journalism, drawing adverse inferences from “facts” that could readily have been checked and found to be incorrect. The defence will also be lost through “malice” – which means not only spite or ill-will, but more importantly a recklessness towards the truth. Any journalist or editor who publishes a story because of its sensation value, not caring whether it is true or false, will not be permitted to rely on the defence.

³⁸ (1883) MR 145.

³⁹ (2008) SCJ 61.

⁴⁰ (2009) SCJ 114

55. One important aspect of responsibility is the willingness of a newspaper or broadcaster to apologise when it has got something wrong and damaged a person's reputation. If the apology is genuine, and prominently displayed, it will serve in large part to undo the damage. In cases of defamation "absent of malice", this factor should greatly assist the defence of responsible journalism. Anomalously it does not do so in the UK at present, where the test of responsibility applies at the point of publication and not afterwards. This is unfair to responsible editors who recognise their mistakes, and the law should make clear that a sincere and prominent apology will be regarded as an important indication of journalistic responsibility.
56. Most libel cases, at least where the "responsible journalism" defence cannot be availed of, turn on the issue of truth. Here, there is another anomaly in English law: libel is the only civil wrong where the defendant bears the burden of proof. For archaic reasons, English law 'presumes' that every defamatory statement is false – although often they are true or partly true – and the defence bears the burden of rebutting that presumption. This is a burden which is difficult to bear, and there are litigants like Lance Armstrong, the lying cyclist who won libel damages against newspapers in England which accused him of doping but which could not prove it to the high standard required in a libel court. This seems to me wrong in principle: all who use the civil law to force others to come to court and claim damages against them should prove their case. The leading textbook on libel admits that the rule "inhibits the ability of the media to expose what they believe to be matters of public concern"⁴¹ and this is why U.S. courts refuse to enforce the libel judgments of English courts. One advantage of a reform that places the burden on the plaintiff is that libel judgments from Mauritius will then in all probability be enforceable in the U.S., although English libel judgments will not. It should be pointed out that it is not difficult for plaintiffs to prove that a defamatory statement made about them is false – all they have to do is to go into the witness box and testify to that effect. It will then be for the newspaper to cross-examine and call its evidence: if the case for the Plaintiff is more credible than that of the newspaper, then he or she will, normally, succeed at the trial.

⁴¹ Richard Parkes and W.V.H. Rogers(eds), *Gatley on Libel and Slander* (Sweet and Maxwell, 11th Ed, 2010).

57. It would be possible to include other procedural reforms such as a "fast track" means of getting libel cases decided by way of summary trial (with a low cap on damages) and empowering the courts to issue a "declaration of falsity" which would restore a reputation damaged by lies and restore it effectively and speedily, without heavy damages being awarded against the press. It is a regrettable fact, in Mauritius and elsewhere, that libel cases are very expensive to bring and take a long time to come to trial. The plaintiff in *Dookhony's* case, for example, complained of libels published in February 1997: judgment was not delivered until March 2008 – a wait of 11 years! Had he won, the delay in vindication would have made victory of little use to him. This is a reason for providing a fast track in the courts, but more importantly for providing an alternative dispute mechanism for cases where a reputation has been falsely assailed and vindication is urgently sought. This is one important reason for my recommendation to establish a "media Ombudsperson" who would be available to provide mediation services to the parties to any defamation action. Indeed, changes should be made to rules of court so that parties are required to attempt mediation prior to trial. This was an important recommendation of the Leveson Report in Britain.

6. OPEN JUSTICE

58. I have commented (para 21 above) on the inadequacy of the Mauritius Constitution's protection of free speech, namely its permissive approach to closing courts whenever it seems "expedient" so to do. I consider that the principle that justice must be seen to be done is fundamental: in the words of Jeremy Bentham, "[p]ublicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial". Not only does open justice guard against judicial misbehaviour, it deters perjury by witnesses and sharp practice by lawyers. Press reporting of court cases enhances public knowledge and appreciation of the workings of the law, it assists the deterrent function of criminal sentencing, and it permits the revelation of matters of genuine public interest. The English common law was adamant that, as Lord Halsbury put it in *Scott v Scott*, "Every court in the land is open to every subject of the King"⁴² allowing exceptions only where justice could not be done *unless* it was done in secret – in cases involving disputes over secret patents, for example, or involving children.

⁴² *Scott v Scott* 1913 AC 417.

59. It has to be said that the great open justice principle of the common law has been whittled down by the European Convention on Human Rights, which allows all sorts of exceptions to it, and fails to recognise the court reporter as the watchdog of justice. In the UK, the fine words of *Scott v Scott*⁴³ have been forgotten by modern judges and replaced by the sterile prose of Article 6, which permits them to close their courts whenever they think that the parties to a case need privacy, and the UK government has recently been promoting legislation to have national security issues heard behind closed courtroom doors – in part, this was an effort to keep secret evidence about how it used the U.S. base at Diego Garcia for illegal rendition of a Libyan dissident to torture in Tripoli. If Mauritius had, in statute law, a simple and clear enunciation of the principle that courts must sit in public unless justice cannot otherwise be done, this would provide better protection for media freedom than is enjoyed by countries in Europe. I recommend this, with the addition that in cases where, for example, the public are excluded because of fears of disorder in court, the press should be permitted to remain, as they should if reporting restrictions (as in cases involving children) are in place.

7. PROTECTION OF JOURNALISTIC SOURCES

60. Every press code requires, as an ethical rule, that a journalist must protect his or her sources. Without such protection, many sources would not come forward to provide newsworthy information – they would ‘dry up’, as would the supply of news. Although the U.S. Supreme Court has refused to grant this journalistic privilege, there are some thirty-eight states that have passed “shield laws” that permit journalists to refuse to answer questions which may reveal the identity of a source who has been promised anonymity. The common law in England never provided such protection, and journalists were fined and imprisoned for contempt of court if they refused to answer questions that would reveal the identity of a source. Their right to stay silent has now been confirmed by the European Court of Human Rights in the landmark case of *Goodwin v UK*,⁴⁴ where findings of contempt against a journalist were held to be a breach of the freedom of expression guarantee, which included a presumption in favour of newsgathering. Only some overriding and urgent necessity could “outweigh the vital public interest in the protection of a journalist’s source”. I therefore

⁴³ Ibid.

⁴⁴ [1996] 22 EHRR 123 at [39].

recommend – and this is another reform which would protect journalists and editors as well as their sources of information – a new statutory provision of the kind

“no court may require a person to disclose, nor is any person guilty of contempt for refusing to disclose, the source of information contained in a publication for which he is responsible unless it is clearly established that such disclosure is essential in the interests of justice”.

8. GUIDELINES FOR MEDIA PROSECUTIONS

61. Concern over prosecution of journalists for criminal offences that may be committed in the course of their work as journalists is justified by the fact that on occasion it is necessary for journalists to break the law in order to expose serious misbehaviour. The greatest achievement of investigative journalism – Watergate, which led to the indictment of President Nixon and members of his administration – began when a journalist broke the law by contacting members of a grand jury. The greatest recent public interest exposure in Britain – of MP’s who were falsely and sometimes criminally claiming expenses – was made possible by a newspaper paying £110,000 in very dubious circumstances to procure the information. Sometimes, journalists will have to “go along” with criminals in order to expose them. What approach should prosecuting authorities take to such cases, bearing in mind the European Court ruling that “Freedom of Expression constitutes one of the essential foundations of a democratic society” and that, so far as the press is concerned, “it is incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas, the public has a right to receive them. Were it otherwise, the press would be unable to play its vital role of public watchdog”.⁴⁵

62. In order to give appropriate weight to the importance of freedom of expression in decisions on whether to charge journalists and editors with criminal offences, it appears to me that certain procedures should be established – if not by law then by regulation and practice. In the first place, any such decision should not be made by the police, but should be referred to the DPP. In the second place, the DPP should carefully consider whether the evidence clearly establishes that the offence had been committed, and that any public interest defence (if one is available) can be disproved beyond any doubt. Thirdly, where it is clear after such scrutiny that an offence has

⁴⁵ *Sunday Times v UK (No 2)* [1992] 14 EHRR 123

been committed, it should only be prosecuted if the public interest so requires. The test that is applied in these circumstances by the DPP in Britain is

*“Whether the public interest served by the conduct in question outweighs the overall criminality”*⁴⁶

63. This is a sensible approach, and I commend it to the DPP in Mauritius. It will, of course, involve consideration on the one hand of whether serious harm has been done, or whether the conduct has involved threats or intimidation or corruption (in which case the public interest in the information obtained is unlikely to excuse the criminality) and on the other hand, the importance of the information to the public especially if it exposes serious impropriety, incompetence or waste of public money.

64. The DPP in the UK has recently issued guidelines for prosecuting cases involving communications sent by electronic media. Such cases are unlikely to involve professional journalists, but they do involve people who make use of – or abuse – their right of free speech. The guidelines came about because of an acute problem: hundreds of millions of communications were being sent each month, on Facebook, Twitter, LinkedIn, YouTube etc, and many were racist or anti-religious or offensive or arguably in breach of laws against indecent or insulting communications. The courts would have been full of electronic communication criminals had the DPP not used his discretion to announce, in the form of guidelines, that only the very worst cases would be prosecuted, namely where communications made credible threats to kill or injure individual targets or deliberately breached court orders (e.g. for anonymity of rape victims) or where there was a high level of discriminatory abuse of a victim targeted with the intention of causing distress or anxiety. These guidelines are a sensible way of both limiting the need to waste public resources on minor prosecutions and of accepting a high level of freedom for speech on social media – one of the advantages of the internet. Again, I commend the guidance to the DPP of Mauritius.⁴⁷

9. PRIVACY

⁴⁶ Crown Prosecution Service, *Guidelines for Prosecutors on assessing the public interest in cases affecting the media* (13 September 2012) <[⁴⁷ See Crown Prosecution Service, *Interim Guidance on prosecuting cases involving communications sent via social media* \(19 December 2012\).](http://www.cps.gov.uk/legal/d_to_g/guidance_for_prosecutors_on_assessing_the_public_interest_in_cases_affecting_the_media_/> .</p></div><div data-bbox=)

65. There have been few privacy cases in Mauritian law. Although sections 3 and 9 of the Constitution give an individual the right to "protection for the privacy of his home and property" this seems confined to protection against invasion of the home (e.g. by telephone tapping) and may not cover invasion of the person (e.g. by use of telephoto lenses, or obtaining confidential medical data or information from private diaries). Article 22 of the Civil Code does provide a right to damages and permits access to a judge in Chambers in 'urgent' cases but is unspecific about the remedies the judge may grant or the principles on which he or she may grant them, although measures available would include seizures, injunctions and interim orders. In January 2013 the media in Mauritius expressed great surprise when an interim injunction (discharged a few weeks later) was granted after an urgent application before the Judge in Chambers of the Supreme Court in the *Soornack* case, based on the privacy provision of Article 22. There was much criticism of the court, but as the judge made clear in his decision, published five days later, the injunction was, as a temporary measure, entirely justified.⁴⁸ (I would pause here to recommend to the judiciary, with respect, that whenever they grant an order which imposes even brief restraint on the press, they should in deference to the importance of free speech give their reasons at the same time as they make the order. Had this been done in *Soornack*, much of the confusion that the judge so eloquently describes in his judgment delivered five days later, might not have arisen).

66. Article 22 has been rarely used and has no authoritative English translation. In my view Parliament should replace it with a carefully defined right to bring a civil action for damages as a result of any injury suffered by unwarranted invasion of person, family or home, or by publishing intimate private facts, unless this is warranted in the public interest, e.g. for revealing or detecting crime or serious misbehaviour or protecting public health or safety or exposing misleading claims or disclosing governmental or official incompetence that affects the public. I have reflected this principle in the draft Code of Conduct, but respect for privacy is not merely a matter for journalistic ethics: in a bad case, the victim should have the right to claim damages, or if forewarned of publication, to obtain an interim injunction if any defence is unlikely to succeed.

67. I am aware that the media may be concerned about a "new" privacy law but I emphasise that there is a criminal offence to a similar effect that has long been on the

⁴⁸ *Soornack N. v Le Mauricien Ltd & ors* 2013 SCJ 5, ruling 10 January 2013, Justice Domah. It was discharged by Justice Balancy on 6 February 2013 in 2013 SCJ 58.

statute books as well as an ill-defined civil law in Article 22, which both judges in the *Soornack* case acknowledged had permitted injunctions to be issued for breaches of privacy. It is better from the media's perspective for them to face a clearly defined civil action instead, and/or a reprimand from a regulator. Broadcasters which repeatedly invade privacy may - and may deserve to - lose their license. Moreover, I consider it important for the media in Mauritius to bear in mind that firm privacy protection is now in place throughout Europe and tourists (some of them public figures) will be attracted to visit a country which offers them similar safeguards. They may be deterred if Mauritius becomes a haven for papparazzi, where they have no hiding place on their honeymoon or holiday. It is worth reminding the media of Resolution 1165 of the Parliamentary Assembly of the Council of Europe in 1998 which noted that personal privacy, especially of celebrities, was often invaded in order to boost media profit. It went on:

i.. It is often in the name of a one-sided interpretation of the right to freedom of expression, which is guaranteed in Article 10 of the European Convention on Human Rights, that the media invade people's privacy, claiming that their readers are entitled to know everything about public figures.

ii. Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts.

iii. It is therefore necessary to find a way of balancing the exercise of two fundamental rights, both of which are guaranteed in the European Convention on Human Rights: the right to respect for one's private life and the right to freedom of expression.

68. This resolution reaffirmed the importance of every person's right to privacy afforded by Article 8 which required protection against interference by private persons or institutions, including the mass media. The resolution also set out specific guidelines on the necessary content of national legislation:

i. the possibility of taking an action under civil law should be guaranteed, to enable a victim to claim possible damages for invasion of privacy;

- ii. *editors and journalists should be rendered liable for invasions of privacy by their publications, as they are for libel;*
- iii. ...
- iv. *economic penalties should be envisaged for publishing groups which systematically invade people's privacy;*
- v. ...
- vi. *provision should be made for anyone who knows that information or images relating to his or her private life are about to be disseminated to initiate emergency judicial proceedings, such as summary applications for an interim order or an injunction postponing the dissemination of the information, subject to an assessment by the court as to the merits of the claim of an invasion of privacy;*
- vii. *the media should be encouraged to create their own guidelines for publication and to set up an institute with which an individual can lodge complaints of invasion of privacy and demand that a rectification be published.*

69. This resolution shows how in Europe the pendulum has swung against the media on the issue of privacy: it is no longer acceptable, in the name of free speech, to intrude on people's private lives for the purpose of degrading or humiliating them or simply to make money by pandering to curiosity about how people behave in their intimate relations. There is, however, a difference between illegitimate snooping by the media, and its recording of the obvious. There can be no objection to pictures and reports about the behaviour of important people in public: this amounts to news. So do stories which may intrude into private matters – bank accounts, for example – to expose misbehaviour such as tax evasion. The fact that privacy is or will be invaded by a story is by no means the end of the matter – there may be many reasons why an injunction should be refused. A good example is the case of England's football captain Rio Ferdinand, who tried to stop a newspaper publishing details of a secret sexual relationship. The judge, Nicol J, ruled that "sexual behaviour in private is part of the core aspects of individual autonomy which Article 8 is intended to protect" but that it will not in fact be protected if reporting of it "makes a contribution to a debate of general interest" – in that case, about Ferdinand's fitness for the captaincy of England

and the “false image” he had cultivated about his loyal relationship with his partner.⁴⁹The protection of privacy gives way to the public interest, but temporary restraining orders (injunctions) on the press may have to be imposed until trial (when, if the plaintiff is successful, they may be made permanent) or at least for a week or so until the prepared arguments of both sides are considered by the court.

70. I do not agree, incidentally, with that part of the European Parliament Resolution 1165 that says that privacy and free speech are of "equal value". Free speech is fundamental to democracy and is a right that serves the entire community, whilst privacy is a claim made by an individual - often a powerful individual - to stop the truth from coming out. Free speech must override privacy, in my view, unless what is sought to be published contains intimate personal details of the individual or his or her home or family, and when there is no particular public benefit other than public curiosity to be derived from the publication. This is, broadly, the test that I recommend should be adopted to replace Article 22 and is a test of the kind that has been approved by European jurisprudence.

71. This, however, begs the question – which caused so much confusion in the *Soornack* case – of the remedy that should be applied temporarily while privacy claims are litigated. The interim injunction was described by the press as a “gagging order”, a description to which the first judge (Domah J) took exception, pointing out that it was an order which only temporarily prevented the press from publishing, until he could decide the issue. However, it is an order that prevents publication. It is temporary when the application is first made by the plaintiff (the stage 1 decision) until the judge decides (within a few weeks) that the case should go forward (the stage 2 decision); it may then be continued for a year or so until trial (the stage 3 decision) whereupon, if the plaintiff is successful, it will usually be made permanent. So there are three possible stages at which the press may be restrained, and the first two will be before the merits become clear. What test should the court apply at these early stages? In *Soornack* the court applied the so-called *American Cyanamid* test, which merely requires the claimant to show an arguable case and then for the court to decide where the balance of convenience lies – usually, the court will decide that it lies in favour of maintaining the order suppressing publication of the story until the time of trial, which may be years away or may never take place. In media cases in the UK, the *American Cyanamid* test has now been replaced, in the interests of freedom of

⁴⁹ *Rio Ferdinand v MGM Ltd* (2011) EWHC 2454.

expression, by the *Cream Holdings*⁵⁰ test, which requires the plaintiff to show that he or she is “likely” to succeed at trial. There is a degree of flexibility – at stage 1 (which should involve an injunction lasting no more than a week) the plaintiff should only have to show a reasonable prospect of success, but at stage two he or she must convince the court that success is *likely* before it imposes an injunction until trial. This, it seems to me, is an approach which gives appropriate weight to the importance of free speech, whilst enabling the court to protect individuals, and their families and children, wherever it seems that, otherwise, their privacy will be grossly invaded. Of course, every case turns on its own facts: the injunction in *Soornack* was discharged because the court considered that the action was really for libel, to which the *Cream Holdings* test applied. But in a clear case of breach of privacy with no strong public interest justification, application of the *Cream Holdings* test will permit an injunction to stay in place until trial.

10. FREEDOM OF INFORMATION

72. Mr Tony Blair has always been proud of incorporating the European Convention on Human Rights into English domestic law, but has described his introduction of a Freedom of Information Act as the worst mistake he ever made, because it gave the media access to information that enabled it to embarrass his government ever afterwards.⁵¹ Civil servants generally oppose the idea: in the words of “*Yes Minister*”’s Sir Humphrey Appleby, “*Open Government is a contradiction in terms, Minister. You can be open, or you can have government.*” So there is no doubt that any government that introduces a Freedom of Information Act makes a rod for its own back, and gives the media many free kicks to harass and embarrass it. Nonetheless, putting both the interests of politicians and of the press aside, when the interests of the public are considered, it is clear that in a democracy they are entitled to know certain facts and information about what the government is planning to do. It is their government and public service, in the sense that their taxes pay for it, and the more information they have about its workings, the more constructive can be their criticisms and the more they can understand and appreciate its work on their behalf. Thus, contrary to Mr Blair’s opinion (which may have been partly tongue-in-cheek), it is my view that reasonably open government leads to better government, and that every democracy

⁵⁰ *Cream Holdings v Bannerjee* [2005] 1 AC 253.

⁵¹ See Tony Blair, *Autobiography*, p.127, p.516. He reproaches himself as “a naive, foolish, irresponsible nincompoop” for allowing a wide-ranging Freedom of Information Act, which was used as a ‘weapon’ by journalists.

should offer some statutory basis for citizens – including the media – to obtain access to information held within government departments, the publication of which would not damage important interests..

73. Freedom of information does not mean that all information held by government will be revealed. Far from it. The press has no right to see, let alone to publish, secret information about criminals or police investigations of suspected terrorists, or communications from foreign Governments, information which would damage national security, or information which would intrude into the privacy of citizens or contracts with private companies that are, for good reason, confidential. Such material will be covered by exemption clauses in the Act. Minutes of Cabinet meetings, or confidential negotiations about government projects, not to mention, including plans for the budget, must not be immediately accessible. I would suggest a 15 year delay for Cabinet minutes, for example, and no right of access to documents evidencing government negotiations until after the particular project has been either completed or abandoned. In some countries, Freedom of Information Acts have a system of ministerial certificate, whereby a minister can certify that particular applications transgress an exemption. Government Departments must be entitled to reject a Freedom of Information application on the grounds that it is vague or frivolous or ill-defined or too wide-ranging, and they will of course be entitled to make a reasonable charge for compiling the information. The procedure will be for the Department to make the initial decision on whether to provide the sought-after information. If it refuses, the newspaper or citizen can appeal to an independent arbiter – I suggest the Media Ombudsperson that I recommend for dealing with complaints against the press. The Ombudsperson will make a decision on the merits, which may be appealed by the losing party by way of judicial review, to the Supreme Court. The test in judicial review is whether the Ombudsperson's decision is legally flawed or unreasonable, not whether it was correct on the merits, so I do not think the Supreme Court will be clogged with freedom of information review cases.
74. I should add that experience in other countries shows that freedom of information cannot be introduced overnight. It generally takes some time to agree on the scope of the law which requires a special statute, and then a year or so for officials in each department to be trained to implement that law.
75. Freedom of Information legislation is often accompanied by legal protection for “whistleblowers”, and employees are thereby protected against dismissal if they

disclose illegality, danger to health and safety, damages to the environment etc. The disclosure must be made in good faith and without prospect or promise of personal gain. Protected disclosures can include disclosures to the press if these are reasonable – certainly if the employee has reason to think that his employer would not act upon them if made through proper channels. There are detailed provisions in UK law (The *Public Interest Disclosure Act*) and I recommend they be simplified and placed in Mauritius employment law.

11. BROADCASTING

76. The first point to be made about television broadcasting is that there is too little of it. The Mauritian Broadcasting Corporation (MBC) has a monopoly, which is unhealthy in itself because it deprives the Corporation of the spur of competition and the public of the pleasures of variety, other than that provided by foreign satellite services. I am aware that this has been a hot political topic in Mauritius, and I have to say that the inspection and assessment I made of MBC in 2010 gave no reason to question its performance, although I have heard some criticism of its reluctance to cover incidents of national embarrassment, such as the 1999 riots. Competition would in such cases help to keep it up to the mark. Given the general accepted view that freedom of expression is served by pluralism, when state broadcasters compete with an independent sector, I do think that, in principle, several licences should be made available for local television broadcasters if and when appropriate applications are made for them. The initial licences should have stringent conditions requiring programmes to avoid offence and to be presented impartially, and should require a significant percentage of programmes to be of Mauritian origin.
77. The provisions of section 19 of the IBA Act 2000, which preclude more than 20% of shares in a broadcasting company being held by foreigners, act as a deterrent to foreign investment in the local broadcast media. Other countries are far more relaxed about foreign involvement, which should have no deleterious affect on broadcasting so long as licence conditions relating to accuracy and impartiality etc are strictly enforceable. Australia has no foreign ownership threshold and in South Africa it is double that of Mauritius, i.e. 40%. I recommend that a threshold of 50% should be adopted, in the hope that it will attract investment to the broadcasting industry. (Sections 4(e) and 19 of the IBA Act will in this event require amendment). There is, after all, no explicit statutory bar on the grant of commercial television licences and the failure to develop a commercial television sector in Mauritius may be due to a

lack of overseas funding and a perception that licences would not be favoured by Government. I should point out that some questions that must be asked of licence applicants (whether they are “fit and proper persons” or whether, especially in the case of a newspaper applicant, it would be in the national interest for it to hold a t.v. licence as well) would be investigated and answered by the Media Commission or the Media Trust.

78. The MBA has a specific statutory duty to offer a right of reply, and this feature should be common to all media. The MBA Act, section 19 provides:

Right of reply(1) Any person who alleges that his honour, character. Reputation or goodwill has been adversely affected by

a. Any matter which has been broadcast by the Corporation, or

b. Any political broadcast during any election campaign, may, without prejudice to any right he may have under any other enactment, make a written application in the prescribed form to the Chairman for a right of reply within five days of the matter broadcast or within forty-eight hours of the political broadcast, as the case may be.

2 Where the Board is satisfied that the honour, character, reputation or goodwill of the applicant has been adversely affected and the applicant has made his application in the form and within the period mentioned in subsection (1), it shall at the earliest available opportunity grant to the applicant a right of reply on such terms and conditions as it thinks fit.

79. It is appropriate for a broadcaster to deal with complaints internally in the first instance. There must, however, be recourse to an independent adjudicator if no resolution is reached directly with the complainants. The IBA Act establishes an Authority which may give directions to the MBA as well as to private licensees. Section 30 establishes a complaints committee to deal with complaints about breaches of the code of ethics, unjust or unfair treatment in a broadcast programme or unwarranted infringement of privacy. This provision is not working effectively: IBA officials were themselves aware, in their discussions with me, that the public did not perceive it as acting effectively in dealing with complaints. In a valuable meeting with IBA Director Mr Suraj Bali, he explained that public confidence would be boosted if

complaints were dealt with by an independent person or body – like the Ombudsperson in South Africa.

80. Not only is the Complaints Committee perceived as a creature of the IBA, but Section 30 is so narrowly drawn jurisdictionally that the committee cannot entertain a complaint of its own motion or from anyone other than the "person affected". In practice, this is much too restrictive: broadcast media may get away with outrageous conduct simply because the victim of it does not want to spend the time and money in taking action against the broadcaster or the victim is a tourist who has left the country. Moreover the complaints committee itself has no investigatory power or ability to do more than to request the IBA to issue a direction. In this sense the committee is very much a "toothless tiger": its only power is to forward its decision to the IBA and to ask it to issue a direction under section 5(1) of the IBA Act, and that direction can only relate to publishing the complaints committee's adjudication. In these circumstances, a licensee could get away with deliberately broadcasting false news or defamation; it would only be obliged to give a right of reply (days later) or to suffer the complaints committee adjudication months later, which at worst it would be obliged to publish. This inadequate accountability can conduce to reckless or careless conduct in relation to news stories. I heard allegations that private licensees sometimes took liberties with their radio news broadcast by asserting facts that they did not bother to check, since any mistake could be corrected later without even offering an apology. Whether or not these claims are correct, the point remains that broadcasting law does not provide any disincentive for such unprofessional behaviour.

81. This is not satisfactory. There must be an independent complaints mechanism (independent of the IBA as well as of the government) which has a power to order on-air corrections together with paid publication of its adjudications in newspapers, and power to order compensation to be paid to victims. It must be entitled to recommend to the IBA that it impose fines or suspend or even revoke the licence of the errant broadcaster. Recent misbehaviour by broadcasters in Britain – deceiving the public in TV quizzes and so on – has resulted in fines of up to half a million pounds. The regulator must have teeth for biting, not for gnashing. Although it is right to leave the most serious sanctions, if a punitive fine, or licence suspension or cancellation, to the IBA (with whom the licence-holder contracts) and the IBA may occasionally impose a lighter penalty or find reason to disagree with the Media

Commission, the status of that body – far higher than the existing Complaints Commission – would mean that its recommendations could not be ignored.

82. I recommend that a new complaints authority should be established, independent of the IBA and government, to consider whether licensees have breached the standards they have agreed to comply with and which are embodied in their licence. This authority should have power not only to direct publication of its adjudications, order compensation for any person who has suffered from such misconduct, but also to report to the IBA with a recommendation for a reprimand or fine. It should be entitled, in cases of repeated misconduct or refusal to co-operate, to recommend suspension or revocation of the broadcasting licence. The IBA must however be bound, before considering such a recommendation, to give adequate notice and an opportunity to the licence holder to make representations. The licence holder would have a right to apply to the Supreme Court for judicial review of any decision to suspend or revoke its licence.
83. There seems to be a widespread misunderstanding of the 1987 Privy Council decision in *Norton v Public Service Commission*. It is widely believed that in this case the Privy Council held that statutory commissions had no power to impose fines. But that decision turned on the fact that the commission had no **legal** power to fine because no law had ever been passed to give it that power – it had taken it by regulation (i.e. by a rule which had not been put before Parliament), and the regulation was *ultra vires*. This has nothing to do with the power to fine that can be provided for in a radio or television license, which is a contract between the IBA and the licensee, in which the latter agrees to comply with a code of conduct and to pay any fine or penalty in the event of a breach. This kind of agreement comes within section 12 of the Constitution, which begins "**except with his own consent**, no person shall be hindered in the enjoyment of his freedom of expression...". A licence of course is a contract entered into by your own consent: if you want to run a radio or television station, you consent to pay any fine that is levied for breach of the code, or to suffer suspension or revocation of your licence if you breach it seriously or repeatedly.
84. For the above reasons I recommend that the IBA Act be amended by abolishing the statutory Complaints Committee and transposing its remit to an independent authority, namely the Media Commission chaired by the Ombudsperson assisted by two assessors. As will appear (see para. 94 & seq.) I envisage the Ombudsperson as a

full time position, chairing the Media Commission which will adjudicate complaints against newspapers as well as broadcasters. The Ombudsperson will be a distinguished personage with an office and investigative and secretarial support, and I consider – given the overall number of complaints – that the Media Commission will have ample opportunity to deal with them quickly, and to order on-air corrections or publication of a summary of its adjudication.

85. In making recommendations for what would be, in effect, a new kind of Complaints Commission, I am aware that in the past complaints against broadcasters have not been numerous and I do think that it is important to avoid constructing a cumbersome regulatory system for a developing industry in a small country. It would be a mistake to set up a full-time body of regulators, especially in a nation where persons qualified to adjudicate and who are independent of politics are in relatively short supply. For that reason, it would be appropriate to give this task principally to the Media Ombudsperson who would deal with complaints against broadcasters as well as against newspapers and magazines. In making adjudications he or she would sit with two part-time assessors, one of whom would have practical experience in journalism or editorship. The Media Commission could directly rebuke or censure a broadcaster, and make them pay the complainants' expenses and provide some limited compensation, but any fine, suspension of licence or revocation of licence would be for the IBA to decide, and its decision (not the recommendation made by the Media Commission) would be subject to judicial review. Were this model to be preferred, then the Media Commission would issue adjudications but any decision to suspend or revoke a private broadcasting licence in the event of repeated transgressions would be taken by the IBA, in a fair hearing procedure which would be subject to judicial review.

12. ELECTRONIC COMMUNICATIONS

86. The Leveson Report characterised the internet as operating in an “ethical vacuum”, without proclaimed standards, “so that bloggers and others may, if they choose, act with impunity”.⁵² This is not correct, in the sense that bloggers are (if they can be identified) liable to be sued for defamation or invasion of privacy and to be

⁵² Lord Justice Leveson, ‘The Leveson Inquiry’, Presented to Parliament pursuant to section 26 of the Inquiries Act 2005, *An Inquiry into the Culture, Practices and Ethics of the Press*, 29 November 2012, Vol II, Chapter 7, [3.2] 736.

prosecuted for contempt if, for example, they post or tweet the name of a person whose identity is protected by court order. Leveson has been criticised for despairing of any regulation of the internet, beyond indirect regulation of on-line newspapers and broadcasting news services by dint of the fact that the print or copies or broadcast programmes have themselves been subject to regulation. I am not so sure that this “hands off” approach to the internet is justified: Twitter, Facebook, and other social networking sites can spread rumours and lies within nano-seconds: a false story that “goes viral” by way of electronic communication could be believed by many millions. There is a tendency to post lies,, propaganda, and material the purpose of which is to bully and to emotionally blackmail. Why should a regulator of press and broadcasting be deterred from deciding whether “news” presented on a blogsite is true or false, if it is doing real damage? If there are postings that credibly claim that the Prime Minister, or the CEO of a major company, is dying, that would have an effect on the stock market. If Twitter falsely claims that an individual has a sexually communicable disease, that could cause him to be shunned and avoided. Why should society not avail itself of some independent means of nailing such lies?

87. I revert to the philosophy which underscores much of my report, namely that the best cure for abuses of free speech is more speech, correcting what went falsely before. If individuals are being damaged by lies circulating on the net, I consider it a responsibility of government, on behalf of all decent members of society, to find a way of limiting that damage. The liars may not be identifiable , and the internet service providers will probably be outside the jurisdiction and may be reluctant to alter the posting. But the internet is one interacting, gossiping and back-biting place where errors are exposed with something akin to glee. A finding by an authoritative regulator, put up on its own website, would be quickly picked up and circulated, and ISP’s could hyper-link it to the dishonest blog or tweet. Readers would not read the falsehood without at the same time being aware that there was another – more truthful – side to the story. The victim would be vindicated, not through fines or police action, but simply by the existence of an authoritative refutation of the lie, from an independent and respected source. For this reason I recommend that the regulator – the Media Commission – should have discretion to entertain complaints about electronic communications and social media, although only from individuals affected and only where they are suffering real damage. The Ombudsperson and the assessors would then be empowered to decide whether the posting or tweet was accurate, and to post the adjudication on the Ombudsperson’s website – which

would, by statute, be a libel-free zone, in the sense that postings would carry absolute privilege and copyright would be waived so the adjudications could be reproduced far and wide. ISP's that are at present unwilling to remove content without a court decision could take the word of the regulator as a cue for so doing. Google, which is similarly reluctant to remove content unless it has been held to be libellous should also accept the umpire's verdict. In other words, although social media would not be directly affected by the Media Commission's rulings, these would operate as a powerful deterrent to false claims. It would in fairness be right for the Ombudsman to notify the blogger or tweeter of the complaint and invite them to defend their statements, which they could do by email if they wished.

13. COMPLAINTS AGAINST THE PRESS

88. It is obviously sensible for editors of newspapers and magazines to resolve complaints themselves, and as quickly as possible, by having their own code of conduct and a "reader's representative" to decide whether it has been breached. It is pleasing that *Le Sentinelle* group has published a code of conduct for its journalists and responsibly offers independent adjudication for any dissatisfied complainants. I fully accept, however, that other newspapers and magazines do not have the funding or the circulation to be able to offer this service. Mr. Ken Morgan's 1998 report stated that most editors and proprietors were in favour of a statutory Press Council, although my enquiries more recently suggest that they have become more cautious: they are particularly concerned that any statutory body could become politicised through appointments by whichever party is in government. This concern is genuine and not without justification. To allay it, any new statutory body should either be independent of government or at least comprise as many, or more, representatives of the media than representatives of government, together with public representatives unconnected with either, who should be in the majority.
89. In Australia, the Finkelstein Review recommended a statutory Press Council of 20, predominately lay persons, ten men and ten women, with an ex-judge appointed as chair. It should have powers to fine and order corrections and apologies. This has come in for criticism from various quarters – my own concern is that it would be

cumbersome, the majority of council members would have no experience of newsgathering and that hearings and decision-making would be unwieldy. It is much easier, in terms of fact-finding, for this to be conducted by or under the supervision of one person with some juristic and journalistic experience, sitting with two assessors, leaving broader policy decisions or issues about adding to or interpreting the Code of Practice to a larger Assembly, with strong lay representation, called a Press or (if broadcasting is included) a Media, Council or Trust. Incidentally, I find the notion of a “Complaints Committee” much too limiting: the Media Trust must monitor attacks on free speech (it should be able to issue comments on, for example, any proposed new laws that would undermine media freedom) and it should organise the training of journalists and the promotion of ethical standards, as well as being responsible for keeping the Code of Conduct up to date.

90. In Britain, Lord Justice Leveson’s *Inquiry into the Culture, Practices and Ethics of the Press* concluded that the value of free speech “does not mean that the price of press freedom should be paid by those who suffer, unfairly and egregiously, at the hands of the press and have no sufficient mechanism for obtaining redress. There is no organised profession, trade or industry in which the serious failings of the few are overlooked because of the good done by the many”.⁵³ It found many serious failings – “Misrepresentation and embellishment” in news reports, and a “reckless disregard for accuracy”, and unjustifiable invasions of privacy, and condemned the self-regulatory Press Complaints Commission as “neither a regulator nor fit for purpose to fulfill that responsibility”. It reported that “The PCC gave the public a false impression of what it could do and never acknowledged the limitation of its powers”. Its core recommendation was the establishment of a press regulator, underpinned by statute, with powers to impose heavy fines on newspapers:

“an independent regulatory body should be established, with the dual roles of promoting high standards of journalism and protecting the right of individuals. That body should set standards, both through its code and in relation to governance and compliance. The body should: hear individual complaints against its members about breach of its

⁵³ Lord Justice Leveson, ‘The Leveson Inquiry’, presented to Parliament pursuant to section 26 of the Inquiries Act 2005, *An Inquiry into the Culture, Practices and Ethics of the Press*, 29 November 2012, Executive Summary [10].

standards and order appropriate redress while encouraging individual newspapers to embrace a more rigorous process for dealing with complaints internally; take an active role in promoting high standards, including having the power to investigate serious or systematic breaches and impose appropriate sanctions; and provide a fair, quick and inexpensive arbitration service to deal with any civil law claims based upon its members' publications".⁵⁴

91. This strikes me as an accurate description of the regulator I would wish for Mauritius, although I would add a separate body – the Media Trust – to perform the task of training journalists in ethical conduct and investigative journalism, and to alert the public to attacks on free speech and to be the custodian of the Code of Conduct. There has been no dissent in Britain to this regulatory objective as defined by Leveson, although disputes have arisen as to how it can be achieved. For example, the newspaper industry's preference for a body which would impose sanctions through contracts with its members becomes unworkable, as Leveson points out, if just one major newspaper refuses to join up. His solution – a scheme of "incentives" for those who do join, such as relief from exemplary damages if sued for defamation, strikes me as inequitable and his suggestion that even successful newspaper defendants should be deprived of their entitlement to costs as grossly unfair. A voluntary regulator may develop standards that some papers think is inimical to free speech and they might on principle withdraw, or not join in the first place: that should not disentitle them to their rights or expose them to crippling damages. As Finkelstein points out, a sensible regulatory system should apply to all media, and the only way to do that is by statute, not by incentives. As will become clear, I disagree in certain other respects with the Leveson recommendations, at least as they might be applied to Mauritius: there is no need for million pound fines, for example, and I consider that the recommendations that the regulator should order the publication of an insincere apology to be inconsistent with freedom of expression. But the 'big picture' that emerges from Finkelstein and Leveson – that there must be a regulatory body independent of government and media interests, empowered to correct media falsehoods and to provide speedy and effective redress to victims of media malpractice, remains undimmed. Its establishment is a necessary task for every government in a democracy, and media interests have a correlative duty to offer this

⁵⁴ Ibid, [57].

support. After all, they should be proud of their ethical practices, and that pride can only be justified if their record can stand up to objective scrutiny.

92. Both Finkelstein and Leveson and indeed the European Commission, provide many examples of the need for a regulator to hear complaints that the news is inaccurate, that those injured by the press should have redress, and that proprietorial interests which slant or spin the news to favour political interests should at least be subject to a corrective system entitling false statements to be declared as such and victims of personal or political attack to answer back. There are egregious examples of proprietors who claim the right (which in a free society they certainly have) to have the newspapers and television stations that they own promote the parties and the causes that interest them. Rupert Murdoch, for example, does not seek to hide the fact that *The Sun* newspaper and Fox News in America propagate his particular political and social values, and that support may be so influential as to affect an election result (“It was the Sun wot won it” as his paper boasted of the 1992 UK elections) or to take a government to war.⁵⁵ The point at which “propagation” becomes propaganda, however, is the point at which a regulator is entitled to intervene, by ordering prominent (even front page) corrections of demonstrably false statements, and directing that those who have been vilified should be entitled to answer back, at least in a letters’ column. Directions from a regulator are, in this sense, not hostile to free speech, but rather add to it by ensuring that the truth, or at least the other side of the story, is heard in the papers that would otherwise ignore it. Similarly, as Leveson points out

“ethical standards are not inconsistent with a free press but necessary for it fully to realise the value of its freedom... people are the stock-in-trade of journalism. An ethical press will therefore be especially mindful of the need to ensure that the individuals it deals with, both as sources of information and as the content written about, are treated as subjects not objects... with families, connections and group identities which may be affected by the treatment of the individual.”⁵⁶

⁵⁵ See Leveson above, [3.54] 117, citing evidence to suggest that Murdoch support was essential for the Blair government to join the UK with the U.S. invasion of Iraq.

⁵⁶ See Leveson, Vol I, Chapter 4, [4.3(d)] 82 and [4.6] 84.

93. His report also makes the point that breaches of an ethical code are often not deliberate. They are, in fact, inevitable: the very best editors and journalists make mistakes, especially under the pressure of deadlines.⁵⁷ Sometimes, of course, ethical breaches will be deliberate, especially in pursuit of sensational stories, where there can be “an unethical cultural indifference to the consequences of exposing private lives”.⁵⁸ Leveson found disturbing evidence in the British press of “discriminatory, sensational or unbalanced reporting in relation to ethnic minorities, immigrants and asylum seekers” – the poor and oppressed who cannot answer back and are reluctant to complain (which is why any regulator worth its salt must take up such cases without waiting for a complaint). It found many examples of “chequebook journalism” where the press paid for a story yet did not disclose this fact to its readers, who were therefore deprived of information to judge whether the sensations in the story were related to the sensation of receiving a lot of money for telling it. It also found unpleasant examples of “payback”, when newspapers vilified people who had publicly criticised them, e.g. for sexist behaviour (‘page 3’ in the Sun) or for low standards. This potential for viciousness in the press is one reason why a right of reply is essential, enforced by what Leveson calls “a speedy, effective and cost-free regime”.⁵⁹ I agree, but I doubt whether the regime will always be cost-free: those traduced by the media will often go to lawyers, who will take the case to editors and if they do not receive a satisfactory response they will take it up with the regulator, and law firms will spend what Americans call “billable time” putting together a submission, perhaps replying to the paper’s counter-submission or attending at a hearing. If their clients are vindicated, I do not see why the lawyer’s reasonable and necessary costs should not be paid by the intransigent newspaper. This should especially be the case if (as I recommend) changes are made to the rules of court so that every libel and privacy action is first sent off to the Ombudsperson for possible mediation.

A Suggested Solution

94. It is necessary to devise a regulatory system which protects media freedom (other than freedom to lie and publish falsehoods) in which the regulation is done by persons who are independent of all political parties and the media as well. The body which in Mauritius is considered to be most independent is the Judicial and Legal

⁵⁷ Ibid, Vol II, Chapter 2, [1.11] 453.

⁵⁸ Ibid, Vol II, Chapter 2, [2.3] 473.

⁵⁹ Ibid, Vol IV, Chapter 3, [6.2] 1512.

Service Commission (chaired by the Chief Justice) which appoints judges, so I suggest it as the appointing body for the Ombudsperson, and the two assessors who would sit under his or her chairmanship to constitute the Media Commission. This new system features a **Media Ombudsperson**: a full-time job, running an office which receives complaints and arranges for them to be mediated if the parties agree. If not, the Ombudsperson will convene the Media Commission, the adjudicative body, comprising the Ombudsperson and two assessors. The assessors (one of whom must have had practical experience in the media) will also be appointed by the Judicial and Legal Service Commission. The Media Commission will be the body that directs corrections and rights of reply, and recommends to the IBA any penalty by way of fine, or suspension or revocation of radio and TV licences. The **Media Trust** will be re-invigorated. Funded 50-50 by the Government and the media, it will organise training courses in ethics and investigative journalism, will speak out on threats to press freedom and will keep the Code of Conduct (the basis of complaints to the Media Commission) up to date.

95. The regulator, i.e. , the media Ombudsperson sitting with two assessors, as the Media Commission – should have power to direct publication of corrections and of adjudications, and to direct their prominence. The British press were prepared to give a regulatory body power to fine up to 1% of the turnover of the publication found to have committed a systematic failure to respect the Code of Conduct, up to £1 million. As I shall explain, I am not minded at this stage to recommend a power to fine the press, although a power to recommend to the IBA that it impose fines on TV or radio licencees would of course be an available potential sanction in their case. Instead (and this power will not be available in the UK) I consider that reasonable costs (eg. up to a maximum of about R100,000) should be awarded to victims who complain successfully over a breach of the Code, and that they should have compensation, up to a maximum of about Rs 500,000, for actual loss or distress occasioned by the false or unfair article. I am unimpressed by Leveson’s arguments against the awarding of compensation and costs.⁶⁰ It is said that victims will be more inclined to go to the regulator for money rather than to deal directly with the publisher, but there is no reason, if they have actually suffered loss, why the publisher should not offer to pay, and the victim would not be awarded expenses by the Media Commission if he or she had refused a reasonable offer from the publisher and insisted on taking his case to the Ombudsperson. (For non-Mauritian readers of this Report, the sums are actually

⁶⁰ Ibid, Vol IV, Chapter 3, [5.10-5.11] 1634.

quite modest by UK standards: Rs 10,000 is only £211, so the maximum for legal costs and expenses would only be £2,100, with compensation up to £10,400).

96. Research shows that media regulators exist in most European and Commonwealth countries so there is no reason why the system would not work effectively in Mauritius. The very fact that the industry has not been able to agree on even a weak and voluntary self-regulator, since the idea of a statutory regulator was floated (and recommended) in the 1998 Morgan report, suggests that any voluntary system will be ineffective unless it is backed by a statute that applies its rulings to all publications. It will be important, however, in obtaining acceptance from the industry of a body that will be novel for Mauritius, to ensure that its directions are perceived as reasonable and proportionate. For that reason I have not recommended that it should have the power to fine, although this recommendation might have to be revisited if other sanctions in time prove inadequate. Again, I am reminded that the media in Mauritius has not misconducted itself like the English tabloid press, but as I have already indicated, some recent cases and the evidence of malpractice from the *African Media Barometer – Mauritius 2010* does show that there is no reason for complacency.
97. To be accepted as a modern democracy with proper free speech and human rights provision, Mauritius should put in place a media complaints system as soon as possible. There is no need for the disputes over the mechanism that have bedevilled the reception of the Leveson Report. I take the view that the best machinery is the tried and tested format of an Ombudsperson – a model that Leveson praised for receiving and dealing with complaints but which the UK press was not prepared to offer. However, I am persuaded that all regulatory power should not reside in just one person, even though he or she will be appointed by the same body as appoints the independent judiciary. For that reason, when a complaint has to be decided because it cannot be conciliated, the Ombudsperson must sit as chair of the Media Commission, which will have two additional members ('the assessors') who will participate freely and vote on the adjudication.
98. The Media Commission will be an adjudicative body, but what about the all-important job of promoting and teaching ethical standards, and maintaining support for press freedom? This brings me to the Media Trust, established in 1994 by the Media Trust Act with nine board members; four of them journalists or editors; two from government ministries, one electronic media journalist and one member from a

journalists' association. The Media Trust Act provides that the Chairman should be appointed by the Minister for Information, but I think it would be necessary, to ensure independence, for the Chairman to be appointed independently of the government, the trustees themselves. I consider that there should be four members of the Board drawn from civil society and independent of government and of the media: I provisionally suggest that appointments be made by nomination from the Bar Council, the Council of the University of Mauritius, the Ombudsperson for Children and the Equal Opportunities Commission. The other four trustees should comprise: one proprietor or editor, one journalist, one MBC nominee and one representative of the Minister. The Media Trust should receive funding both from the government and from media corporations, on a 50-50 basis, in order to carry out its important duties of training journalists in professional ethics.

99. The Media Trust has become moribund in recent years: there have been complaints that the Minister has failed to appoint a new chairman, and some of its directors have resigned. The Media Trust should in my view be re-activated and re-energised. The Ombudsperson and the Media Commission would, separately be enforcing a code of conduct setting out the basic standards recognised in all democracies as the bedrock of responsible journalism and editorship. That Code would be implied (it should in time be expressly inserted) in all contracts of employment of journalists, broadcasters, photographers and the like, stipulating that no employee shall be required to break the Code, and that he or she has a right to refuse assignments that would require a breach of the code. It would be intolerable if any journalist suffered discipline or career detriment for asserting conscientious rights to act according to the Code. I have drafted a Code (at Appendix) which could serve as a starting point. The Ombudsperson would be an independent figure, who could act immediately on complaints that had not been resolved within a few days by newspapers or radio and television stations. In any case which is appropriate for mediation, the Ombudsperson would appoint a mediator for the task. The Media Commission would have power to direct media entities to publish in an appropriate way any finding made against them, and to pay any expenses (up to a maximum of Rs 100,000 rupees) incurred by the successful complainant. In the case of broadcasters, the Media Commission would additionally be empowered to recommend to the IBA that they impose sanctions, although the actual decision so to do would remain that of the IBA Board. The Media Commission's decisions would be subject to judicial review for error or

unreasonableness, and the Court could in appropriate cases direct the Commission to reconsider the decision.

100. The Media Commission would not, for reasons I have explained, have the power to suspend or revoke television and radio licenses, as that would and should remain with the IBA. In the case of newspapers and magazines, its powers would extend to directing them to publish adverse adjudications (at their own expense by taking out space in newspapers) and ordering payment to victims of compensation if they have suffered quantifiable damage as a result of any breach of the code, up to a maximum of Rs 500,000. Newspapers subject to this adjudication process would be relieved of any civil liability in relation to the complaint, because the complainant would, by seeking the Ombudsperson's verdict, forgo any right to sue for defamation or for breach of privacy. I suspect that most people attacked by the media would prefer a quick and speedy and prominent retraction rather than to wait many years for a court decision.

101. How might the Media Commission operate? The Statute will require all proprietors of newspapers, magazines and broadcasters to nominate a person within their employ who will be responsible for compliance and who should be advertised as such to the public. Citizens who complain of inaccuracy or other breaches of the Code, or who are entitled to a right of reply, will have first to contact the compliance officer (usually an editor or executive) to request a correction or a chance to reply. If they go direct to the Ombudsperson, his office will pass them first to the relevant compliance officer, so that the case can, if possible, be settled between the parties. If no agreement is reached within seven days, the Ombudsperson's Office will investigate the disputed issue. If the parties do not agree on mediation, or if it fails, the Media Commission will convene and will proceed to hear any evidence and to issue an adjudication as to whether the Code has been breached. That adjudication will be notified to the parties and published on the Media Commission website.

102. In the case of bloggers, tweeters, 'Facebookers' and other electronic communicants, the Media Commission will have no formal powers over them but may receive complaints of serious inaccuracy or unfairness and, if satisfied that this has caused or is likely to cause harm or damage, may proceed to a hearing and adjudication which will be posted on its website. It may draw the adjudication to the attention of the DPP and to the press and it will of course receive attention on social networks. In the case of broadcasters, the Commission will have power to order them

to read out a corrective statement, e.g. during or at the start of one of their news bulletins; they may be ordered to purchase advertising space in the press to publicise the adjudication, and a recommendation may be sent to the IBA to the effect that the finding of a Code breach would justify a reprimand or fine or the suspension or withdrawal of their licence. (It will be for the IBA to decide whether or to what extent to act on this recommendation). In the case of newspapers or magazines, the Commission will have power to order the publication of an adjudication, or a summary thereof, or an appropriate correction, or order a right of reply, and will be able to direct the prominence with which these matters should be published. The Commission might also order the errant paper to take out advertising space in other papers, at its own expense, to publish the adjudication or correction. The Commission will be able to award up to Rs 500,000 in compensation to the victim, where damage has definitely been suffered, and may order payment of up to Rs 100,000 to cover expenses of bringing the complaint (including legal expenses, if reasonably incurred). This sum may also be used to claim back from the offending paper any costs incurred by the Ombudsperson's office in investigating the case.

103. It will be apparent from the above description that I differ from the Leveson approach to "punishing" an errant paper. In the UK, a new Press Complaints Commission is being proposed that can impose fines of up to £1 million – a disproportionate sum that could send papers and magazines into bankruptcy and would conduce to an expensive, rather than a free, press. I consider that while fines may be recommended for broadcasters, the obligation on the print media to pay compensation to its victims and costs to the regulator, and most gallingly to pay to advertise its errors in the newspapers of competitors, will be a sufficient deterrent to future malpractice.

104. I also depart from Leveson (and from Finkelstein) in the matter of forced apologies. Both judges have recommended that regulators should have contractual or statutory power to require newspaper editors to publish apologies (presumably along lines drafted by the regulator) with front-page prominence. Neither judge seems aware that a forced apology is not only a contradiction in terms (apologies should always be sincere) but is actually a denial of free speech, precisely because it is forced speech and it is false speech. (When asked in court whether he ever published any falsehoods in "Private Eye", its editor replied "Yes. The apologies") Although a sincere apology for a journalistic mistake should always assist the defence of "responsible journalism" it can never be the role of a regulator in a free society to force editors to publish

apologies in which they do not believe.. Where an editor voluntarily offers an unqualified apology, the Media Commission may take this into account in deciding whether any further action is necessary to put the record straight and it will obviously reduce the damage to the victim and hence the compensation awarded. But it cannot be a remedy that a regulator should *order*.

105. The Ombudsperson's office would be established by statute, and the enabling legislation would provide it with a flexible and informal procedure. I am aware that some object to the word 'Ombudsman' as gender-specific, and the modern thinking is to replace it with by "Ombudsperson'. The androgynous word "Ombud" is sometimes suggested. Although 'Ombudsman' is the term used in the Constitution, recent legislation in Mauritius has established an Ombudsperson for Children, and the latter is the more acceptable terminology in Mauritius today. So the key person in my scheme will be the Media Ombudsperson: a respected individual of high moral standing with some background in law and journalism, and completely independent of government or of any political party (the Act should exclude persons who have held political office or hold shares in any media company).It may be useful to have statutory requirement of judicial and media experience as qualification for the position and since independence is critical to the efficiency of this model, to open the position to foreign applicants to ensure that good candidates are available if the local applicants lack independence or experience. He or she will need an office and investigative and secretarial support. Given the additional duties to arrange professional training and to deal with FOI requests, the job should be full time, and remunerated at not less than the salary level of a Supreme Court Judge.

106. The Ombudsperson's Office will be empowered by statute to receive complaints against any newspaper, magazine or radio or television broadcast for breach of the code of conduct. The Ombudsperson will decide whether each complaint is sufficiently serious, and arrange for it to be mediated. If either party rejects mediation, the Media Commission will convene, hear any evidence and issue an adjudication which may have directives for publication attached which the offending media organisation will be obliged to implement. Where the adjudication is long, the direction may be to publish a summary, with a prominence directed by the Ombudsperson. Similarly, the Ombudsperson may order a correction to be published, with a prominence that would attract the attention of readers who would have seen the original false story. In cases where a complainant has been identifiably attacked and has been refused any publication of a response, the Media Commission may

order a right of reply of reasonable length and prominence. I think it essential (as does Lord Justice Leveson) that the Ombudsperson should have power to monitor the media and to act in respect of conduct that appears blatantly to infringe the Code of Conduct. In such cases, his office would call for a response from the media in question, without waiting for a complaint.

107. There is an excellent precedent for the Media Ombudsperson, found in the **Ombudsperson for Children Act (2003)**, which establishes just such an office, with statutory power of investigation, mediation and public reporting. I have adopted some of these powers for the Media Ombudsperson, although I do not consider that compulsory orders on newspapers are either necessary or desirable so I have not given the Ombudsperson or the Commission the powers of search and seizure of evidence that are appropriate for obtaining evidence to prosecute those who abuse children. The Media Ombudsperson will only achieve the respect and receive the co-operation needed from the media if he proceeds fairly, with due regard for the media's ethical duty to protect its sources of information.

108. The Kenneth Morgan Report recommended that the Media Trust should fund the office of the regulator, but this would prove unrealistic if media organisations refused to pay up or refused to join. This has been a devastating problem for voluntary self-regulation in England, where one major press body refuses to join or to pay anything towards the complaints system. Where the Media Trust is concerned, the Trustees themselves would apportion payments among all newspapers and broadcasters who would be obliged by law to pay their due share, and I consider that their contributions should be matched, rupee for rupee, by the government. The Chair of the Media Trust should be a paid position although on the basis that the job will involve a time commitment of some eight weeks each year.

14. **THE MEDIA TRUST**

109. The Trust should meet at least once every 3 months, and its responsibilities will include keeping under review the Ombudsperson's work and the Code of Conduct, which it will have power to amend by unanimous resolution. It will publish a report

every two years, laid before Parliament, which will summarise the work of the Trust over that period.

110. There will always be cases where the issues are so polarised, or the plaintiff so bent on damages, that the complaints system can offer no alternative to an adversary action in the Court room. However, I believe that most serious complaints against the media can be handled effectively by this alternative mechanism, to the benefit both of complainants, on the one hand, and of editors and journalists on the other. It is by no means the only possible effective mechanism. The institutional framework for bodies of this kind matters less than the dedication and inspiration of the persons chosen to occupy positions on the Board of the Media Trust and of course the Ombudsperson and the Media Commission, who must be imbued with the principles of free speech while possessing the wisdom to identify and convincingly condemn the occasions on which it has been abused. The system does not rely on measures that can be described as punitive, other than in cases of repeated misconduct: it proceeds on the assumption that the best remedy for abuse of free speech is more speech.

15 SUMMARY OF RECOMMENDATIONS

In order to secure privacy rights, freedom of expression and greater professionalism in the Mauritian Media my report sets out the following recommendations.

Key Reforms/Overview

1. Abolish sedition and similar archaic political offences and remove the threat of prison in most cases of media misconduct (except for narrowly defined crimes such as inciting racial hatred or bribery).
2. Introduce a Freedom of Information Act which gives the media the right to obtain documents from government departments.
3. Introduce a statutory tort of invasion of privacy with a strong public interest defence to ensure victims of gross intrusion can claim a right to compensation.

4. Establishment of a Media Ombudsperson and a Media Commission to adjudicate complaints.
5. Extending the reach of the law to recent forms of internet communication.
6. Adoption of guidelines in respect of social media.
7. Encourage ethics in journalism through a code of conduct approved by the Media Trust.
8. Reinvigorate the Media Trust which will provide training for journalists and encourage the highest standards and issue reports in defence of press freedom.

Sedition

9. The crime of sedition (section 283 of the Criminal Code) should be abolished.
10. Section 286 – an old colonial law against importing seditious publications which gives the President the power to ban such books should be repealed.
11. Repeal sections 287 and 287A, which gives the court special powers to ban newspapers for sedition or even for possible future sedition.

Criminal Libel

12. The crime of libel (section 288) should be amended or abolished., at least in respect of the media.
13. Some valuable provisions relating to libel should be transferred from the Criminal Code into civil law. Section 289 – the right to reply - should be transferred to the Ombudsperson.

Other Crimes: Inciting disobedience, publishing false news, insult

14. The crime of “inciting civil disobedience or resistance to law” (section 284) may be committed by a newspaper or through any other medium as specified in Section 206. Section 284 is overly punitive and redundant and should be repealed.
15. Either repeal section 299 (the crime of “publishing false news”) or amend it so as to refer only to news that the publisher (a) knows to be false and (b) publishes or

with the intention of causing a breach of the peace with the intention of vilifying a person about whom the false statement is made.

16. Remove section 296 (the offence of “insult”).

Inciting Racial and Religious Hatred

17. Amend section 282, the crime of stirring up racial hatred, to remove the stirring up of “contempt” (stirring up of hatred should be the only crime) and remove “political opinions” and “creed” as grounds of objection.

18. Reduce the maximum penalty of section 282 from 20 years imprisonment to 10 year maximum.

19. Amend section 282(2) which appears to create a strict liability offence for printing or publishing material containing racist comments. This crime may be committed if the printer or publisher *knows* that the material is likely to stir up racial hatred, and publishes it with that purpose or reckless as to that consequence.

20. The new section 282(1)(e) that makes it an offence “to offend the religious feeling of another person” is too wide. Public order concerns are amply covered in section 206 (“outrage against public and religious morality”) and sections 184, 185 and 186.

21. Section 206 should be subject to the further safeguard of not being prosecuted without the consent of the DPP. Further, the term “religious morality” is too vague.

Publication Offences

22. Repeal or amend the *Newspaper and Periodicals Act 1837* .

23. Repeal Sections 202, 203, 207, 208 and 209 of the Criminal Code and replace the archaic notice provisions with a modern law requiring only the address of publishers.

Contempt

Abolish the crime of Contempt of the Assembly

Strict Liability Contempt

24. Strict liability contempt should be confined to publications about criminal cases within a specific time period, namely from the point at which a suspect is arrested or charged by police to the point at which his or her trial is concluded.

25. The standard of liability for this class of contempt should be clearly defined, viz:

“any publication about a trial or the administration of justice which creates a substantial risk that the course of justice in any particular proceedings will be seriously impeded or prejudiced”.

Public Interest Defence

26. A public interest defence for contempt charges should be introduced in the following terms:

27. “A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court if the risk of impediment or prejudice is incidental to the discussion”.

Deliberate Contempt

28. The press must be entitled to urge that particular individuals should be prosecuted, and to comment on the morality or sense of ongoing civil litigation. These limits should be made clear in a statutory definition of deliberate contempt, as a crime of “intentionally prejudicing or frustrating the administration of justice in particular proceedings”.

Scandalising the Court

29. The crime of scandalisation should be reconsidered in so far as it may be constituted by publishing criticism of judges, subject to the impending decision of the Privy Council on whether, or in what form, the crime still exists.

Defamation – the civil law

30. Consideration may be given to a statutory definition of civil libel similar to the proposed definition in the UK's Defamation Bill, namely "a statement is not defamatory unless its publication has caused or is likely to cause substantial harm to the reputation of the claimant" and in which the defences are truth, fair (i.e. honest) comment and public interest privilege for responsible journalism.
31. Procedural reforms such as a "fast track" means of getting libel cases decided by way of summary trial (with a low cap on damages) and empowering courts to issue a "declaration of falsity" which would restore a reputation damaged by lies and restore it effectively and speedily, without heavy damages being awarded against the press.

Open Justice

32. There should be a simple and clear enunciation of the principle that courts must sit in public unless justice cannot otherwise be done. In cases where, for example, the public is excluded because of fears of disorder in the court, the press should be permitted to remain, as they should if reporting restrictions (as in cases involving children) are in place.

Protection of Journalistic Sources

33. There should be a new statutory provision which would protect journalists and editors from forcible disclosure of their sources of information, viz:

"no court may require a person to disclose, nor is any person guilty of contempt for refusing to disclose, the source of information contained in a publication for which he is responsible unless it is clearly established that such disclosure is essential in the interests of justice".

Guidelines for Media Prosecutions

34. The importance of freedom of expression should be given appropriate weight in decisions on whether to charge journalists and editors with criminal offences:
 1. The decision should not be made by the police, but should be referred to the DPP

2. The DPP should carefully consider whether the evidence clearly establishes that the offence had been committed, and whether the prosecution can convincingly refute any public interest defence.
3. Where it is clear after such scrutiny that an offence has been committed, it should only be prosecuted if the public interest served by the conduct in question outweighs the overall criminality.

35. Social media offences should only be prosecuted where communications made credible threats to kill or injure individual targets or deliberately breached court orders (e.g. for anonymity of rape victims) or where there was a high level of discriminatory abuse of a victim targeted with the intention of causing distress or anxiety.

Privacy

36. A statute should very carefully define the right to bring a civil action for damages as a result of any injury suffered by unwarranted invasion of person, family or home, or by publishing intimate private facts, unless this is warranted in the public interest.

37. The test for interim injunctions should be that in the UK case of *Cream Holdings*, i.e. the plaintiff must convince the court that success at trial is *likely* in order for an injunction to be granted.

Freedom of Information

38. Mauritians should have freedom of information legislation.

Broadcasting

39. Several licenses should be made available for local television broadcasters if suitable applicants come forward . Their suitability should be subject to consideration by the Media Trust.

40. Section 19 of the IBA Act 2000 should be amended to increase the maximum threshold of foreign ownership of shares in Mauritian broadcasting companies to 50%.
41. A new complaints authority should be established, independent of the IBA and government, to consider whether licensees have breached the standards they have agreed to comply with and which are embodied in their licence. This authority should have power not only to direct publication of its adjudications and order compensation for any person who has suffered from such misconduct, but also to report to the IBA with a recommendation for a fine only in cases of repeated misconduct or refusal to co-operate, a suspension or revocation of the broadcasting licence. The IBA must however be bound, before considering such a recommendation, to give adequate notice and an opportunity to the licence holder to make representations. The licence holder would have a right to apply to the Supreme Court for judicial review of any IBA decision to suspend or revoke its licence.
42. The IBA Act should be amended by abolishing the Complaints Committee and transposing its remit to a new independent authority. That authority should be the Media Commission, which has the same task of investigation and adjudication in relation to printed media and the internet. Given the overall number of likely complaints, it will have ample opportunity to deal with them quickly, and to order on-air corrections or publication in short form news of a summary of adjudication. It would be appropriate to give this task to the Media Commission which would deal with complaints against broadcasters as well as against newspapers and magazines.. The Commission would issue adjudications but any decision to suspend or revoke a private broadcasting licence in the event of repeated transgressions would be taken by the IBA, in a fair hearing procedure which would be subject to judicial review.

The Internet and Social Media

43. The Media Ombudsperson should have discretion to entertain complaints about electronic communications and social media, although only from individuals affected and only where they are suffering real damage. The Media Commission would then be empowered to decide whether the posting or tweet was accurate, and to post the adjudication on its website – which would, by statute, be a libel-

free zone, in the sense that postings would carry absolute privilege and copyright would be waived so the adjudications could be reproduced far and wide.

Complaints against the Press

44. There should be a Media Ombudsperson, who would chair the Media Commission, which would have the task of adjudicating complaints that are not resolved by newspapers themselves or by broadcasters. The Commission would enforce a Code of Conduct, setting out the basic standards recognised in all democracies as the bedrock of responsible journalism and editorship. The Ombudsperson would be an independent figure who could act immediately on complaints that had not been resolved within a week by newspapers or radio and television stations. In any case which is appropriate for mediation, the Ombudsperson would appoint a professional mediator for the task. The Commission would have power, of its own volition, to direct media entities to publish in an appropriate way any finding made against them, and to pay any expenses (up to a maximum of Rs100,000 rupees) incurred by the successful complainant. In the case of broadcasters, the Commission would additionally be empowered to recommend to the IBA that they impose sanctions, although the actual decision so to do would remain that of the IBA Board. The Commission's decisions would be subject to judicial review for error or unreasonableness but there would be special statutory provisions to ensure that applying for judicial review would not delay or postpone media compliance with a directive to publish a correction.

45. The Media Commission would not have the power to suspend or revoke television and radio licenses, as that should remain by contract with the IBA. In the case of newspapers and magazines, its powers would extend to directing them to publish adverse adjudications (at their own expense), and ordering payment to victims of compensation if they have suffered quantifiable damage as a result of any breach of the code, up to a maximum of Rs 500,000. The complainant would, by seeking the Commission's verdict, forgo any right to sue for defamation or for breach of privacy.

46. Recommended operation of the Media Ombudsperson under a Media Commission:

- I. All newspapers, magazines and broadcasters will be required to nominate a person responsible for compliance, who should be advertised as such to the public. Citizens who complain of inaccuracy or other breaches of the Code, or who are entitled to a right of reply, will have first to contact compliance officer (usually an editor or executive) to request a correction or a chance to reply. If they go direct to the Ombudsperson, his/her office will pass them first to the relevant compliance officer, so that the case can, if possible, be settled between the parties. If no agreement is reached within seven days, the Ombudsperson may, if the parties agree, arrange for the dispute to be mediated. In absence of agreement, or if mediation fails, the Media Commission will proceed to hear the case and issue an adjudication as to whether the Code has been breached. That adjudication will be notified to the parties and published on the Commission's website.
- II. In the case of bloggers, tweeters, 'Facebookers' and other electronic communicants, the Ombudsperson will have no formal powers over them but the Media Commission will convene and adjudications, which may be adverse to them, will be published on the Media Commission's website. The Ombudsperson may draw his adjudication to the attention of the DPP and to the press and it will receive attention on social networks.
- III. In the case of broadcasters, the Commission will have power to order them to read out a corrective statement, e.g. during or at the start of one of their news bulletins; they may be ordered to purchase advertising space in the press to publicise the adjudication, and a recommendation may be sent to the IBA to the effect that the finding of a Code breach would justify a reprimand or fine or the suspension or withdrawal of their licence. (It will be for the IBA to decide whether or to what extent to act on this recommendation).
- IV. In the case of newspapers or magazines, the Commission will have power to order the publication of an adjudication, or a summary thereof, or an appropriate correction, and will be able to direct the prominence with which it should be published. The Media Commission might also order the errant paper to take out advertising space in other papers, at its own expense, to publish the adjudication or correction. The Commission will be able to award up to Rs 500,000 in compensation to the victim, where damage has definitely been suffered, and may

order payment of up to Rs 100,000 to cover expenses of bringing the complaint (including legal expenses, if reasonably incurred).

47. Where an editor voluntarily offers an unqualified apology, the Media Commission may take this into account in deciding whether any further action is necessary to put the record straight and it may reduce the damage to the victim and hence the compensation awarded. But it cannot be a remedy that a regulator should order.
48. The Media Ombudsperson should be a respected individual of high moral standing with some background in law and journalism, and completely independent of government or any political party. Persons who have held political office or hold shares in any media company should be excluded as candidates. The position should be open to foreign applicants. He or she will need an office and investigative and secretarial support. Given the additional duties arranging professional training and dealing with FOI requests, the job should be full time.
49. The Media Ombudsperson should be selected by the Judicial and Legal Service Commission, which must co-opt for this task the chair of the Media Trust and two other persons with practical experience in the media. The Judicial and Legal Service Commission should also appoint two assessors, one of whom must have practical working experience in the media.
50. The Ombudsperson will be empowered by statute to receive complaints against any newspaper, magazine or radio or television broadcast for breach of the code of conduct, to decide whether each complaint is sufficiently serious to call for a response, and if so to undertake any necessary investigation or conciliation. If the parties do not agree to mediation, or if it fails, the Media Commission will hold a hearing and issue an adjudication which may have directives for publication attached which the offending media organisation will be obliged to implement. Where the adjudication is long, the direction may be to publish a summary, and in some cases (especially where an error is conceded) the direction may be to publish a correction).

The Media Trust

51. The Media Trust Act 1994 should be amended so that the trustees comprise as many, or more, representatives of the media than representatives of government, together with public representatives unconnected with either, who should be in the majority on the board of the Trust. The Media Trust *must be independent of government and independent of the media*. To this effect, there should be four members of the Board drawn from civil society and independent of government and of the media: (the Equal Opportunities Commission, the Bar Council, the Council of the University of Mauritius and the Ombudsperson for Children would be the nominating bodies) one proprietor or editor, one MBC executive, one journalist and one representative of the Minister of Information. These eight trustees should elect a ninth trustee as chairman, who would be independent both from the government and the media. The Media Trust should receive funding both from the government and from media corporations, on a 50-50 basis, in order to carry out its important duties of training journalists in professional ethics and holding lectures and discussions on free speech issues.
52. The Trust should meet at least once every 3 months, and its responsibilities will include keeping under review the Code of Conduct, which it will have power to amend by unanimous resolution. It will publish a report every two years, which will summarise the work of the Trust over that period and will be laid before Parliament.

This Report

53. This Report should be published by the Government as soon as practicable after its delivery to the Prime Minister, and in both print and electronic form.
54. After a suitable period for discussion and written submission (say 5 months) a final Report should be presented, including draft legislation prepared with the assistance of the Attorney General's Office, for effectuating its recommendations which can be put before Parliament in such form as the Government decides.

APPENDIX

CODE OF CONDUCT

1. Accuracy

(1) Reasonable care must be taken not to publish false, misleading or distorted material, including photographs and edited film or videotape.

(2) In particular, journalists, editors, subeditors and broadcasters must strive to report the news truthfully and fairly.

(3) All media must be astute to distinguish between statements of fact, conjecture, and the personal opinion of writers and broadcasters. When allegation or rumour is reported it must be clearly identified as such, and a reasonable opportunity given to subjects of the allegation or rumour to comment upon it prior to any publication.

(4) Headlines and captions to pictures and voice-overs video must provide a reasonable reflection of the contents of the report or picture in question.

(5) All news must be presented with due impartiality. Any personal interest or bias affecting the publisher of news, or editors and journalists writing or presenting that news, must be declared in the article or programme which contains the news in question.

2. Fairness

(1) Whenever it is demonstrated that a significant inaccuracy or misrepresentation has been published, it should be corrected promptly and with a prominence equal at least to the original mis-statement.

(2) When the error is egregious, or arose from the negligence or lack of professionalism of the publisher, a full and genuine apology should be offered publicly.

(3) A reasonable and prompt opportunity must be afforded to every individual or entity attacked in a publication to reply to that attack, whether by disputing facts or taking issue with comments, Such replies should not be rejected merely because they cast doubt on the professionalism of the author of the attack.

3. Advocacy

Newspapers and periodicals are entitled to advocate their own views in editorials and in comments clearly identified as such. Broadcasters must maintain due impartiality in coverage of news and political issues, but may broadcast “personal view” programmes clearly labelled as such.

4. Elections

The duties of accuracy and fairness must be scrupulously adhered to during election periods. Without prejudice to the operation of Section 19 of the Mauritius Broadcasting Act, corrections, and rights of reply must be published prior to election day as soon as possible, and in any event no later than 3 days after the offending publication. The media must in this period co-operate fully and immediately with the Media Ombudsperson's investigative and adjudicative procedures.

5. Privacy

Everyone is entitled to respect for his or her private and family life, home and correspondence. There must be no intrusion into grief and shock at times when the need for solitude is obvious. Information or other material (including photographs) obtained by invasion of privacy cannot be published unless publication is believed by the media on reasonable grounds to be in the public interest, as defined in paragraph 15 and in particular:

- (a) detecting or exposing crime or seriously anti-social conduct; or
- (b) protecting public health and safety; or
- (c) preventing the public from being misled by some statement or action of a Government official, corporation or public figure.

6. Children

(1) Children under the age of 16 should never be interviewed without parental consent.

(2) Children must not be photographed at school without the approval of school authorities.

(3) There must be no publication of details of the private life of children unless there is a clear public interest justification, and this justification does not exist merely because their parents are public figures.

(4) Children who are victims or even alleged victims of sexual offences should not be identified, except where this is expressly permitted by a court.

7. Special Occasions

The media must pay special respect to the value of privacy in covering -

- (a) funerals
- (b) patients in hospitals;
- (c) children in schools;
- (d) person admitted to mental hospitals;
- (e) church services.

8. Misrepresentation

Journalists should not use deceit, dishonesty or misrepresentation in order to obtain information, unless these devices are essential for obtaining material of significant public interest.

9. Ethnic Prejudice

The media must strive to avoid prejudicial or perjorative reference to a person's race, ethnicity, religion or sexual orientation or to any mental illness or disability. Unless this is a report of court proceedings or Parliament or is otherwise justified in the public interest, it must not publish comment which is intended or likely to stir up racial or ethnic hatreds.

10. Confidential sources

A journalist should not reveal the identity of a source to whom he has promised confidentiality, unless satisfied that the source has tricked him or her or involved him or her in a criminal act or has waived the confidential relationship.

11. Payments to Criminals and Witnesses

Payments or offers of payment should not be made to potential witnesses at criminal trials or to persons for confessing to involvement in crime.

12. Conflicts of interest

If the publisher or anyone involved in the publication of any news report, feature article or programme has any financial or other significant interest in the subject matter, that interest must be disclosed by or in the course of the publication. Journalists must disclose any possible conflict of interest to their editor.

13. Decency and Public Order

The media shall refrain from publishing matters (including advertisements) which are indecent and obscene, or likely to encourage vice, crime or anti-social behaviour, racial or religious disorder, or are bad for health.

14. Advertising Standards

(1) No advertisement should mislead or exploit the credulity or inexperience of consumers. Wherever objective scientific claims are made about or for a product the advertiser must be in a position to confirm them.

(2) Advertisements should contain nothing that is likely to cause serious or widespread offence, especially on the grounds of race, religion, sexual orientation or disability.

(3) Advertisers should not unfairly portray people in an adverse or offensive way and should not identify individuals without their permission.

15. Sanctions

The Media Ombudsperson may require newspapers, periodicals and internet sites to cease to exhibit advertisements which breach the above standards, and may apply to the court to enforce any such orders. In the case of broadcast advertisements, he or she must report licensees who carry infringing advertisements to the Independent Broadcasting Agency.

16. The Public Interest

In justifying any breach of provisions of this Code on grounds of public interest, journalists and editors should be aware that any such interest other than the following will need particularly strong justification:

- exposing or detecting crime
- exposing significantly anti-social behaviour
- exposing corruption or injustice
- disclosing significant incompetence or negligence
- protecting peoples' health & safety
- preventing people from being misled by public statements
- disclosing information that assists people to better comprehend or make decisions on matters of public importance
- disclosing breaches of this Code or other Codes of Conduct
- disclosing otherwise secret censorship or attempts to restrain freedom of expression

17. It should be an essential part of this Code that its provisions are to be implied in every contract for employment of editors, journalists, camera-people, film-makers and the like. The provision shall make clear that no employee may be required to breach the Code, and that any instruction to do so shall be deemed a breach of contract by the employer.