

# **REGULATING FOR DEMOCRACY**

---

A Critical Analysis of the New Zealand Law Commission's  
Proposed News Media Regulator

James Daniel Tait-Jamieson

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws  
(Honours) at the University of Otago – Te Whare Wānanga o Otāgo

11 October 2013

## **ACKNOWLEDGEMENTS**

To my supervisor, Professor Andrew Geddis, thank you for your help and patience throughout the year.

To my parents, thank you for your love and support, and for your proofreading skills.

# TABLE OF CONTENTS

<b>I</b>	<b>Introduction</b>	<b>1</b>
<b>II</b>	<b>Regulating for Democracy</b>	<b>4</b>
<b>A</b>	<b>The Democratic Importance of the News Media</b>	<b>4</b>
1	The traditional argument	4
2	A mediating institution	6
3	Democratic functions	8
4	Citizen v consumer	9
<b>B</b>	<b>The Regulatory Response</b>	<b>13</b>
1	Independence	13
2	Diversity	14
3	Public accountability	15
<b>III</b>	<b>Independence</b>	<b>17</b>
<b>A</b>	<b>The Current State of Independence</b>	<b>17</b>
<b>B</b>	<b>The Law Commission's Model</b>	<b>19</b>
1	Independence from government	19
2	Independence from industry	22
<b>C</b>	<b>Implementation</b>	<b>24</b>
1	The Law Commission's recommended process	24
2	The British and Australian experiences	24
3	The Government's rejection	26
4	A backstop solution?	27
<b>IV</b>	<b>Diversity</b>	<b>30</b>
<b>A</b>	<b>A Diverse Media Landscape</b>	<b>30</b>
<b>B</b>	<b>The Law Commission's Response</b>	<b>32</b>
<b>C</b>	<b>Evaluation of the Risks</b>	<b>34</b>
1	The rights and privileges	34
2	The definition	37
3	Structural bias	39
<b>D</b>	<b>The NZ on Air Anomaly</b>	<b>40</b>

<b>V</b>	<b>Public Accountability</b>	<b>43</b>
<b>A</b>	<b>Public Access</b>	<b>43</b>
1	Awareness	43
2	The complaints process	44
3	Transparency	45
<b>B</b>	<b>Effectiveness</b>	<b>46</b>
1	Remedies and sanctions	46
2	Further options	49
<b>C</b>	<b>A Broader Role</b>	<b>51</b>
<b>VI</b>	<b>Conclusion</b>	<b>53</b>
	<b>Bibliography</b>	<b>54</b>

## *I Introduction*

The news media industry is undergoing a period of intense transformation.<sup>1</sup> The digital revolution has broken down the traditional barriers to publishing, allowing anyone with a computer and an internet connection to reach a vast global audience. The traditional news media must now compete in a fractured and saturated online world where consumers expect content to be plentiful, instantaneous and free. These changes raise a difficult challenge for news media regulation: how to respond to the digital revolution, with its emphasis on openness, transparency and freedom, while protecting the core democratic functions of the news media.

In October 2010, Simon Power, the Minister of Justice, asked the New Zealand Law Commission to look at the law's response to one aspect of the digital revolution: technological convergence.<sup>2</sup> Applied to the news media, convergence describes the way the digital world allows previously separate technological systems such as text, audio and video to come together online.<sup>3</sup> Convergence challenges the traditional regulatory distinctions between print and broadcast media.

The Law Commission had to deal with a confusing three-limbed regulatory system comprised of two self-regulatory bodies, the New Zealand Press Council ("Press Council") and the Online Media Standards Authority ("OMSA"), and the statute-based Broadcasting Standards Authority ("BSA"). The Press Council was set up the

---

<sup>1</sup> See Penny O'Donnell, David McKnight and Jonathan Este *Journalism at the Speed of Bytes: Australian Newspapers in the 21st Century* (The Walkley Foundation, 2012) <[www.thefutureofjournalism.org.au](http://www.thefutureofjournalism.org.au)>; and Andrew Currah *What's Happening to Our News?* (University of Oxford, Reuters Institute for the Study of Journalism, 2009).

<sup>2</sup> Simon Power "Law Commission to review regulatory gaps around 'new media'" (press release, 14 October 2010) <<http://beehive.govt.nz/release/law-commission-review-regulatory-gaps-around-039new-media039>>. The terms of reference were narrowly framed: "How to define 'news media' for the purposes of the law" and "Whether and to what extent the jurisdiction of the Broadcasting Standards Authority and/or the Press Council should be extended to cover currently unregulated news media, and if so what legislative changes would be required to achieve this." Simon Power also asked the Law Commission to consider the law's response to harmful digital communications.

<sup>3</sup> Henry Jenkins in *Convergence Culture: Where Old and New Media Collide* (NYU Press, New York, 2008) at 2 describes convergence broadly as "the flow of content across multiple media platforms, the cooperation between multiple media industries, and the migratory behavior of media audiences who will go almost anywhere in search of the kinds of entertainment experiences they want." This dissertation is concerned with the technological aspect of convergence. For an example, see Fairfax New Zealand Ltd's combined news and information website, Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>. Stuff contains text, images and video, as well as links to the wider online world.

Newspaper Publishers' Association in 1972 to provide an independent system to resolve disputes concerning print media.<sup>4</sup> Its jurisdiction has recently been expanded to cover members' websites.<sup>5</sup> The BSA is a government regulator set up by the Broadcasting Act 1989 with jurisdiction over all broadcast content in New Zealand.<sup>6</sup> In response to the Law Commission's review, the broadcasting industry recently set up the OMSA. The OMSA is a self-regulatory body that covers news and current affairs content published online by its members, the seven major New Zealand broadcasters.<sup>7</sup> The regulatory landscape has become a complicated mix of bodies with different agendas, and gaps and overlaps in membership.

The Law Commission recommended the creation of a new regulator, the News Media Standards Authority ("NMSA"), to replace the Press Council, the OMSA, and the news and current affairs jurisdiction of the BSA.<sup>8</sup> The NMSA would be essentially self-regulatory, but would be recognised in statute for the purpose of conferring the current statutory rights and privileges of the news media on its members. Membership would be voluntary and open to all news media organisations regardless of technology. The NMSA would become a "one stop shop" for all news and current affairs complaints in New Zealand.<sup>9</sup> However, in September of this year, the Government decided not to take up the Law Commission's recommendations. Simon Power's replacement, the Hon Judith Collins MP, said there was "no crisis of confidence in the mainstream media" and "no pressing need for statutory or institutional change."<sup>10</sup> The Law Commission's proposal would be kept in mind as an option for the future.

---

<sup>4</sup> See generally Ian Barker and Lewis Evans *Review of the New Zealand Press Council* (2007) at 21–48 [Press Council Review]; and Jim Tully and Nadia Elsaka "Ethical Codes and Credibility: The Challenge to Industry" in Judy McGregor and Margie Comrie (eds) *What's News?* (Dunmore Press, Palmerston North, 2005) at 143–145.

<sup>5</sup> Steven Price *Media Minefield: a Journalist's Guide to Media Regulation in New Zealand* (New Zealand Journalists Training Organisation, Wellington, 2007) at 149–153.

<sup>6</sup> Broadcasting Act 1989, ss 20 and 21. See chapter II B for a discussion of the jurisdiction of the BSA. Also see Price, above n 5, at 3–6; and Hugh Rennie "Broadcasting Following Deregulation" in Margie Comrie and Judy McGregor (eds) *Whose News?* (Dunmore Press, Palmerston North, 1992).

<sup>7</sup> OMSA Constitution (2013) <<http://www.omsa.co.nz/wp-content/uploads/OMSA-Constitution-June-2013.pdf>>, sch 2 r 1(a) and sch 5.

<sup>8</sup> Law Commission *The News Media Meets 'New Media'* (NZLC R128, 2013).

<sup>9</sup> *Ibid*, at [5.30].

<sup>10</sup> Judith Collins and Craig Foss "Government responds to news media report" (press release, 12 September 2013) <<http://www.beehive.govt.nz/release/government-responds-news-media-report>>.

The challenges of convergence are not going away. If an updated regulatory system is not needed now, it will be in the future. The old technology-specific approach is archaic, confusing, and fails to take advantage of the opportunities of digital technology. The Law Commission's proposals offer a possible way forward. This dissertation will evaluate these proposals against the democratic importance of the news media.<sup>11</sup> Firstly, I examine the news media's democratic role in society and the consequences these have for regulation. I argue that there are three crucial aspects to a democratic news media regulator: independence, diversity and public accountability. The following chapters use these three aspects as a structure from which to critique the Law Commission's proposals. Two recent independent inquiries in the United Kingdom and Australia provide a useful comparison: the *Leveson Inquiry into the Culture, Practices and Ethics of the Press* ("Leveson Inquiry") and the *Independent Inquiry into the Media and Media Regulation* ("Finkelstein Inquiry").<sup>12</sup> These latter two inquiries were not triggered by convergence, but by ethical concerns. Nevertheless, they had to contend with the wider issue facing the Law Commission: how to protect the democratic importance of the news media in the digital age.

---

<sup>11</sup> The Law Commission, in its Issues Paper, recognises the democratic implications of the review: *The News Media Meets 'New Media'* (NZLC IP27, 2011) at [4].

<sup>12</sup> The Rt Hon Lord Justice Leveson *An Inquiry into the Culture, Practices and Ethics of the Press* (The Stationery Office, London, 2012) [Leveson Inquiry]; the Hon R Finkelstein QC *Report of the Independent Inquiry into the Media and Media Regulation* (Report to the Minister for Broadband, Communications and the Digital Economy, Canberra, 2012) [Finkelstein Inquiry]. In 2011, the Australian Government set up a Convergence Review Committee to look into the wider effects of convergence on media content and communications services. The Final Report includes a section on news and commentary which takes into account the recommendations of the Finkelstein Inquiry: Australian Government *Convergence Review* (Final Report to the Minister for Broadband, Communications and the Digital Economy, Sydney, 2012) [Convergence Review]. The Convergence Review explains the differences between its approach and that of the Finkelstein Inquiry at 155–156. This dissertation will focus on the independent news-specific Finkelstein Inquiry.

## *II Regulating for Democracy*

The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.

– Thomas Jefferson<sup>13</sup>

It is widely recognised that the news media perform a crucial function in democracy.<sup>14</sup> How we understand that function will determine the law's regulatory response. The task is not as simple as it sounds. The work of modern political science has demonstrated that our traditional understanding is limited and fails to reflect the full role of the news media in society. In this chapter, I use both the traditional arguments and the modern re-evaluation to put together a more accurate conception of the news media's democratic role. In the second half, I turn to the role of regulation and ask how it can protect and enhance that role.

### *A The Democratic Importance of the News Media*

#### *1 The traditional argument*

The traditional liberal-democratic approach views the media as an extension of the right of freedom of expression.<sup>15</sup> Freedom of expression can be justified in various ways. The justification that attaches a special democratic importance to the news media is the argument from democracy, a subset of the argument from truth.<sup>16</sup> The

---

<sup>13</sup> Thomas Jefferson "Letter to Colonel Edward Carrington" (16 January 1787) in Thomas Lipscomb and Andrew Bergh (eds) *The Writings of Thomas Jefferson* (Thomas Jefferson Memorial Association, Washington DC, 1903).

<sup>14</sup> See generally James Curran *Media and Power* (Routledge, London, 2002); Geoff Kemp "Chapter 1: Media, Politics and Democracy" in Babak Bahador et al (eds) *Politics and the Media* (Pearson, Auckland, 2013); Brian McNair *Journalism and Democracy* (Routledge, New York, 2000); and Mark Wheeler *Politics and the Mass Media* (Blackwell Publishers, Oxford, 1997).

<sup>15</sup> Recognised in New Zealand Bill of Rights Act 1990, s 14 and the International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976), art 19.2.

<sup>16</sup> Thomas Gibbons *Regulating the Media* (Sweet and Maxwell, London, 1991) at 15. For a guide to the philosophical justifications for freedom of expression, see Frederick Schauer *Free Speech: a philosophical enquiry* (Cambridge University Press, Cambridge, 1982). The



argument from truth, generally attributed to John Stuart Mill and John Milton, assumes that truth is most likely to emerge from a competition of views.<sup>17</sup> The only way to test that an idea is true is to hold it up against conflicting ideas. The argument reached its most eloquent judicial form in the famous dissent of Justice Oliver Wendell Holmes in *Abrams v United States*:<sup>18</sup>

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good is better reached by free trade in ideas – that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

In a democracy, the people are the ultimate deciders of *political* truth. To make good decisions, they must have all available information and ideas before them. Alexander Meiklejohn applies the argument to the town meetings in the early days of European settlement in New England. The whole town would gather together in one hall to debate the rules that would govern them as a society:<sup>19</sup>

The final aim of the meeting is the voting of wise decisions. The voters, therefore, must be made as wise as possible. The welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about.

The argument can also be illustrated with other examples of direct democracy such as the Athenian *agora* and, closer to home, early Māori tribal decision-making.<sup>20</sup>

In a direct democracy a news media is not necessary. The citizenry is small enough to allow everyone to come together to share their views. In a modern representative democracy, this is impossible. A news media is required to spread information and ideas between geographically and socially separated individuals. The British press, in

---

argument from self-autonomy is another important justification for the news media. It focuses on the role that freedom of speech has in enabling personal autonomy, independence and self-fulfilment. The argument does not, however, explain the news media's *democratic* importance.

<sup>17</sup> John Stuart Mill "On Liberty" in John Gray (ed) *On Liberty and Other Essays* (Oxford University Press, Oxford, 1998); John Milton "Areopagitica" in Gordon Campbell (ed) *Complete English Poems: John Milton* (Everyman, London, 1993).

<sup>18</sup> *Abrams v United States* 250 US 616 (1919) at 630.

<sup>19</sup> Alexander Meiklejohn *Political Freedom: The Constitutional Powers of the People* (Harper & Row, New York, 1965) at 26.

<sup>20</sup> Geoff Kemp "Chapter 2: Media History" in Babak Bahador et al (eds) *Politics and the Media*, (Pearson, Auckland, 2013) at 20.

the 17th and 18th centuries, used the argument from democracy in its struggle against government licensing and censorship.<sup>21</sup> The argument from democracy, once focused on the free speech of individuals, became a powerful justification for press freedom. Today, the news media are often seen in the same light, as inextricably tied up with the fundamental right of freedom of expression.<sup>22</sup> The result is a legacy of voluntary codes, industry-led complaints bodies (such as the Press Council and the OMSA) and a general anathema to government interference.

## 2 *A mediating institution*

The philosophical justification for freedom of expression diverts our attention from the internal workings of the news media. Modern political science prefers to see the news media as an *institution*. Looking at the news media from this perspective helps to reveal its editorial nature. The media has huge power to shape speech. It chooses which voices to amplify, which to turn down and, crucially, which to mute altogether. It bends, distorts and cuts individual voices in whichever way it sees fit. In Meiklejohn's town hall, six of the townsfolk might share their views. The media might decide to only report five views and, under the right of free speech, they would be perfectly justified in doing so. By conceiving of the news media as an institution, rather than an extension of individual rights, we can start to investigate the effect the news media has on democracy.

A more accurate conception of the news media is as a *mediating* institution that brings individuals together as citizens to share information and ideas and engage public authority. This theory originates in Jürgen Habermas' concept of the public sphere.<sup>23</sup> Habermas traces the emergence of a public sphere in the coffee-houses, salons and clubs of Western Europe. Free-thinking individuals ("civil society") would come together as a public to engage the "public authority" in "rational-critical discourse".<sup>24</sup> The creation of a public sphere was a necessary precursor to meaningful self-government. The public sphere soon grew beyond these shared spaces and the free press emerged as a vital component. In Britain, with the launch of the *Craftsmen* and *Gentlemen's Magazine*, "the press was for the first time established as a

---

<sup>21</sup> James Curran and Jean Seaton *Power Without Responsibility: the Press, Broadcasting, and New Media in Britain* (6th ed, Routledge, London, 2003) at 6–17.

<sup>22</sup> The Finkelstein Inquiry, above n 12 at [2.14] looks at the differences between "free speech" and "free press" and concludes, "[f]or the most part, though, they represent the same ideal."

<sup>23</sup> Jürgen Habermas *The Structural Transformation of the Public Sphere* (MIT Press, Cambridge, Massachusetts, 1989).

<sup>24</sup> Ibid, at 27.

genuinely critical organ of a public engaged in critical political debate: as the fourth estate."<sup>25</sup> The theory has been criticised for idealising the public sphere and neglecting social minorities.<sup>26</sup> However, the central idea remains as a reminder of the "indissoluble link between the institutions and practices of mass public communication and the institutions and practices of democratic politics."<sup>27</sup>

The relationship between people and their elected officials is central to any democracy. In a direct democracy, such as Meiklejohn's town hall, the relationship is immediate and unhindered. In a representative democracy, the news media fit in between. As Bruce McNair explains, "Modern politics are largely mediated politics, experienced by the great majority of citizens at one remove, through their print and broadcast media of choice."<sup>28</sup> The traditional argument does not take account of this distinction. Habermas' theory fills in the gap. It explains how the media help constitute the "public sphere" and define the key relationship in democracy. This places the news media in an extremely powerful position.<sup>29</sup> The news media's design and structure, however, is not preordained. Like any institution it can change. This is perhaps the most important lesson from Habermas' theory: change the way the news media works and you change how democracy functions.

---

<sup>25</sup> Ibid, at 60.

<sup>26</sup> Craig Calhoun "Introduction: Habermas and the Public Sphere" in Craig Calhoun (ed) *Habermas and the Public Sphere* (MIT Press, Cambridge, Massachusetts, 1992) at 2–3.

<sup>27</sup> Nicholas Garnham "The Media and the Public Sphere" in Craig Calhoun (ed) *Habermas and the Public Sphere* (MIT Press, Cambridge, Massachusetts, 1992) at 360.

<sup>28</sup> McNair, above n 14, at 1.

<sup>29</sup> In this sense, the news media perform a constitutional function. In "Using Constitutional Realism to Identify the *Complete* Constitution: Lessons from an Unwritten Constitution" (2006) 54 Am J Comp L 587 at 594, Matthew Palmer explains, "To a constitutional realist, a constitution is comprised of *all* those factors that significantly affect how public power is exercised." Palmer's method would seem to require attributing the news media with a constitutional function. In New Zealand, before the introduction of a mixed member proportional voting system, Geoffrey Palmer in "Towards a Constitutional Theory for the Media in the MMP Era" in Judy McGregor (ed) *Dangerous Democracy? News Media Politics in New Zealand* (Dunmore Press, Palmerston North, 1996) advanced what he saw as a constitutional theory for the media in the era of MMP voting: "The burden of my argument is that the media carries out a constitutional function of importance to the health of New Zealand government and democracy. If that thesis is correct, then high standards of journalism will improve the quality of government and the public's ability to participate in it. Media degradation, on the other hand, will have an adverse effect on the political system." More recently, Mark Tushnet in *The New Constitutional Order* (Princeton University Press, Princeton, 2003) at 19–22 discusses the role of the media in the constitutional order of the United States.

### 3 Democratic functions

In its role of mediating institution, the news media has five key functions:<sup>30</sup>

#### (a) Watchdog

In its traditional function, the news media are seen as the eyes and ears of the public and are charged with holding the government to account. Edmund Burke famously likened this power to that of the three traditional estates of the English Parliament. The media represent "a Fourth Estate more important far than they all."<sup>31</sup> Like the other estates, the news media provide an important check on public power. The watchdog function, more than any other, requires that the news media be free from government influence. Its association with free speech and the ideals of the early press have led the watchdog function to dominate our perception of the news media at the expense of its other functions.<sup>32</sup> The free press rhetoric also directs our understanding of the watchdog role towards government. In the modern era, private power can be just as influential as public power; the news media needs to be in a position to guard against both.<sup>33</sup>

#### (b) Informational

In their informational role, the news media provide the public with an account of what is happening in society. They are required to establish facts, check sources, judge the relevance and news-worthiness of events, seek comment from appropriate people and present the information in a user-friendly form. This task of reporting the news puts the news media in a powerful position to influence and frame the issues which will form the basis of public deliberation.

#### (c) Deliberative

For Habermas, the public sphere is principally a forum for "rational-critical discourse".<sup>34</sup> It brings people together to consider, discuss and debate the issues affecting society. In *Lange v Atkinson*, Lord Nicholls described political debate as "at

---

<sup>30</sup> The title of the five functions are taken from Kemp, above n 14, at 4. See also Curran, above n 14, at 239.

<sup>31</sup> Thomas Carlyle in *On Heroes, Hero-Worship, and the Heroic in History* (James Fraser, London, 1908) at 392 attributes the quote to Burke.

<sup>32</sup> Curran, above n 14, at 215.

<sup>33</sup> Ibid, at 224.

<sup>34</sup> Calhoun, above n 26, at 9.

the core of representative democracy."<sup>35</sup> The mainstream media is not ideally suited to performing this function. Communication is generally one-way and citizens are at risk of becoming passive receivers of news and opinion. Too often, communication turns to domination.<sup>36</sup> Digital technology, discussed in chapter IV A, has huge potential to enhance this function.

#### (d) Representational

Mediators work in two directions. One of the news media's functions is to gauge the opinions of the people and represent them to government.<sup>37</sup> The representational function requires that the news media are able to reach out to all sectors of the populace so that when the media speaks it does so in a way that adequately represents the public view, with all its differences, contradictions and bias.

#### (e) Constitutive

The news media's constitutive function is not always mentioned but it is probably the most important and its greatest achievement.<sup>38</sup> The news media bring disparate individuals together to form a public and, amidst differences and conflicts, create a sense of a "shared consciousness" and "imagined political community".<sup>39</sup> It is the formation and maintenance of a public sphere that makes all the other functions possible. The challenge is to make this public sphere as inclusive as possible.

### 4 *Citizen v consumer*

The news media's democratic functions exist in an uncertain relationship with the free market's focus on profit. In many cases, the interests of citizen and consumer align. News organisations often establish their legitimacy by showing their willingness to

---

<sup>35</sup> *Lange v Atkinson* [2000] 1 NZLR 257 (PC) at 260.

<sup>36</sup> Calhoun, above n at 29. Also see Kemp, above n 14, at 7.

<sup>37</sup> One of the ways the media performs this function is through the use of opinion polls; see Janet Hoek and Philip Gendall "Public Opinion Polling: Supporter or Subverter of Democracy" in Judy McGregor (ed) *Dangerous Democracy? News Media Politics in New Zealand* (Dunmore Press, Palmerston North, 1996).

<sup>38</sup> Kemp, above n 14, at 4; see also Curran, above n 14, at 239.

<sup>39</sup> Benedict Anderson *Imagined Communities* (Verso, London, 2006). Cass Sunstein in *Republic.com 2.0* (Princeton University Press, Princeton, New Jersey, 2009) discusses the potential for the Internet to reduce that "shared consciousness" by allowing individuals to filter information they receive, blocking out views and ideas different to their own. The concept is often referred to as "cyber-balkanisation".

fulfil their democratic role. C P Scott, editor of the *Manchester Guardian*, famously described the newspaper as having "a moral as well as a material existence."<sup>40</sup> Perhaps the strongest justification of the commercial model is that it gives the news media the necessary freedom to fulfil its traditional watchdog function. Paul Dacre, editor of the *Daily Mail*, warned the Leveson Inquiry of the dangers of limiting that freedom.<sup>41</sup>

Indeed, I would argue that Britain's commercially viable free press – because it is in hock to nobody – is the only really free media in this country. Over-regulate that press and you put democracy itself in peril.

Sometimes commercial imperatives can interfere with the news media's social responsibilities.<sup>42</sup> Eric Beecher, former editor of the *Sydney Morning Herald*, describes the realities of shareholder control:<sup>43</sup>

Almost all the key decisions being made about journalism – particularly newspaper journalism – in most advanced countries, now revolve around cutting costs. ... It is sad for journalism, and sad for democracy, but it is the reality of a world where media is fragmenting so much and nearly all media is owned by corporations whose primary responsibility is to their shareholders.

A large body of political science research focuses on the effects that the free market model has on the news media's democratic functions. Understanding the limits of the free market model can help us design a regulatory system that mitigates those dangers.

The mainstream news media are effectively controlled by a small number of people. Private control can be abused by media barons to advance their own views at the expense of others.<sup>44</sup> The most recent example is Rupert Murdoch's influence over

---

<sup>40</sup> C P Scott *The Making of the "Manchester Guardian"* (F Muller, London, 1946) at 161, cited in Law Commission, above n 8, at [3.12] and the Finkelstein Inquiry, above n 12, at [2.52]. Scott was editor of the *Manchester Guardian* (now the *Guardian*) from 1872 to 1929.

<sup>41</sup> Leveson Inquiry, above n 12, at [4.17].

<sup>42</sup> Public service broadcasting is not immune to the effects of the commercial model. Public broadcasters may be forced to solicit advertising to partially fund their activities and may have to meet audiences targets to justify their existence. Since the demise of the TVNZ Charter, the state-owned broadcaster, Television New Zealand Ltd, has been run to deliver a profit. See Chris Rudd "Chapter 3: Political Economy of the Media" in Babak Bahador et al (eds) *Politics and the Media* (Pearson, Auckland, 2013) at 41–42.

<sup>43</sup> Matt Philp "Changing future of news" *The Press* (Christchurch, 14 April 2007) in Bill Rosenberg *News Media Ownership in New Zealand* (Auckland, 2008) at 60.

<sup>44</sup> Rudd, above n 42, at 37.

some of News Corp's print titles in Britain. Murdoch described himself to the Leveson Inquiry as a "curious person who is interested in the great issues of the day" and who was "not very good at holding [his] tongue." "If you want to judge my thinking," he told the Inquiry, "look at *The Sun*."<sup>45</sup> New Zealand has not seen the rise of high-profile media barons but our mainstream media environment has seen a steady concentration in ownership over the last few decades as organisations fold, merge, or are taken over. The vast majority of our media environment is in the hands of a very small number of companies, the majority of which are foreign-owned.<sup>46</sup>

Market pressures can affect the way organisations report the news.<sup>47</sup> The advertising-based revenue model can make organisations careful about harming the interests of their advertisers and may make organisations more likely to pander towards attractive advertising audiences at the expense of marginal groups. This affects the ability of the news media to perform their representative and constitutive functions. Competitive pressures are having an increasingly large effect on the ability of the news media to gather and present news. Alistair Morrison argues that the deregulation of the news media in New Zealand has led to fewer journalists and more stress. Good political reporting is a niche product that is not always compatible with the need to return a profit.<sup>48</sup> The need to sell stories tends to cause journalists to focus more on personality, rather than the issues. Bartholomew Sparrow argues that this makes the news media ferocious in their coverage of election contents but remarkably docile in reporting policy.<sup>49</sup> The competitive challenges of the free market system are not

---

<sup>45</sup> Leveson Inquiry "Transcript of Morning Hearing 25 April 2012" <<http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-25-April-2012.pdf>> at 36–39.

<sup>46</sup> The four major news media providers in New Zealand are John Fairfax Holdings Ltd, APN News and Media Ltd, SKY Network Television Ltd and Mediaworks New Zealand (owned by Ironbridge Capital and in receivership as at 5 October 2013). See generally Rosenberg, above n 43, and Paul Norris "News Media Ownership in New Zealand" in Judy McGregor and Margie Comrie (eds) *What's News? Reclaiming Journalism in New Zealand* (Dunmore Press, Palmerston North, 2002). Norris concludes at 52, "If there is safety in numbers, New Zealand is in perilous danger."

<sup>47</sup> See Bartholomew H Sparrow *Uncertain Guardians* (John Hopkins University Press, Baltimore, 1999) at 74–104.

<sup>48</sup> Alastair Morrison "The Challenge of MMP (or Will Journalism be Caught with its Pants Down?)" in Judy McGregor (ed) *Dangerous Democracy? News Media Politics in New Zealand* (Dunmore Press, Palmerston North, 1996) at 40–41.

<sup>49</sup> Sparrow, above n 47, at 25–72. For a similar argument applied in a New Zealand context, see Alister Browne "Reporting the Politicians: Feasting in the Gallery" in Judy McGregor (ed) *Dangerous Democracy? News Media Politics in New Zealand* (Dunmore Press, Palmerston North, 1996) at 73.

getting any easier. Newspapers are struggling to survive in the face of reduced advertising revenue and falling circulation.<sup>50</sup>

Mainstream news organisations have similar organising structures and their journalists gather news in similar ways. This often results in different news organisations presenting similar information and opinions.<sup>51</sup> James Curran writes that the British press, despite enjoying a range of different titles, actually have a "remarkably narrow arc of opinion".<sup>52</sup> In New Zealand, Karl du Fresne has recently written about the "pack-hunting" tendencies of our political reporters. The fear of missing the scoop inhibits reporters from chasing different leads to their colleagues.<sup>53</sup> Collectively, journalists can be hesitant to criticise institutions they rely on such as the political system (as opposed to political actors) on which they depend for sources of information<sup>54</sup> and the capitalist system which defines their main organising principle.<sup>55</sup>

The conception of the news media as a mediating institution makes these critiques possible. It allows us to look past the rhetoric of free speech and consider how the design and structure of the news media affect its ability to perform its democratic functions. The next section will consider how regulation can help structure the news media in a way that allows it to fulfil its democratic role.

---

<sup>50</sup> *The Economist* in "The End of Mass Media: Coming Full Circle" (United Kingdom, 7 July 2011) has argued that the Internet revolution will bring about the end of mass media.

<sup>51</sup> See Herbert Gans' discussion of the mechanics of news production in *Democracy and the News* (Oxford University Press, New York, 2003) at 45–68; and Noam Chomsky and Edward Herman's "propaganda model" in *Manufacturing Consent: the Political Economy of the Mass Media* (Pantheon Books, New York, 2002) at 1–36.

<sup>52</sup> Curran, above n 14, at 231.

<sup>53</sup> Karl du Fresne "Press gang" *NZ Listener* (Auckland, June 1 2013) 28.

<sup>54</sup> Sparrow, above n 47, at 179.

<sup>55</sup> For an explanation of the Marxist critique of the news media, see Wheeler, above n 14, at 21–22.



## ***B The Regulatory Response***

News media regulation has many objectives. These include upholding the privacy of the individual, ensuring the news media operate within the general law, allocating frequencies and protecting standards of decency.<sup>56</sup> This dissertation will focus on the objective of protecting the news media's democratic functions. The idea of regulation sits uneasily with the traditional understanding of the media where regulation is seen as interference with free speech. The modern conception of the news media is much more open to the possibility of regulation. It ties the news media's legitimacy to the function it serves in society. The position of the news media is often described as a "public trust".<sup>57</sup> As trustee, the news media must act in the interests of the beneficiary, the public. The Law Commission prefers the idea of a "social contract".<sup>58</sup> The social contract idea helps to explain the self-interest of the media. While trustees are not supposed to benefit from the property they hold, contracts are meant to be mutually beneficial. Both concepts tie the news media's privileged position to the role they serve in society. The role of the regulator is to enforce that relationship.

The ability of regulation to control the activities of the news media is severely limited by the requirement of independence. Heavy-handed state-based regulation would compromise the news media's ability to represent the public and hold the government to account. The government cannot force the news media into perfectly performing its democratic role, nor is the news industry likely to offer a self-regulatory solution that abandons its commercial foundation. This leaves two goals for regulation: encourage a diverse media landscape where different news organisations balance out the limitations of each other; and, as far as possible, hold the media accountable to the public, to whom they owe their existence.

### ***1 Independence***

Independence is a critical element to news media regulation.<sup>59</sup> It allows the media to report and comment on the actions of the government without the threat of government interference. Independence is often understood in terms of the early

---

<sup>56</sup> See generally Gibbons, above n 16.

<sup>57</sup> Tim Dwyer *Legal and Ethical Issues in the Media* (Palgrave Macmillan, Basingstoke, 2012) at 127.

<sup>58</sup> Law Commission, above n 8, at [3.16]

<sup>59</sup> Gibbons, above n 16, at 23–31.

struggle for press freedom against government licensing and censorship.<sup>60</sup> The threat to independence is no longer as great but its importance has not diminished. The news media are understandably anxious to protect their freedom. Even with the best intentions, governments may abuse their power, directly or indirectly, intentionally or unintentionally. Even the perception of a lack of independence can be enough to damage the legitimacy of the news media in the eyes of the public.<sup>61</sup>

Media regulation has been slower to wake up to the importance of independence from industry.<sup>62</sup> Here, the concerns are different. We are not worried about the ability of industry to censor and silence the news media – publishers are free to say whatever they want provided they operate within the law and the relevant code of ethics – but the ability of industry to reduce the effectiveness of regulation. If the industry has too much control, it may be able to damage the effectiveness of a regulator by reducing funding, reducing the regulator's public awareness, stacking personnel in its favour and limiting potential remedies.<sup>63</sup> The rise of large amalgamated media corporations increases the weight that any one entity can place on a regulator.

## 2 *Diversity*<sup>64</sup>

The "public trust" concept narrows our thinking to the question of how individual news media should behave. It assumes that it is possible for an organisation to meet its democratic responsibilities. The political science research covered earlier in this chapter demonstrates that every organisation will have its own internal bias, whether intended or not.<sup>65</sup> A better regulatory response is to look at the news media as a whole with its different publishers, each with different structures and behaviours. Media diversity can help to balance out bias and reduce the risk that some viewpoints will be suppressed, increasing the overall marketplace of ideas.

Diversity helps the news media to perform their watchdog and news-gathering functions. These functions require more than independent news media, but *willing* news media. Without sufficient diversity, the public may be left with news media that are either unwilling or incapable of investigating certain issues in a fair and

---

<sup>60</sup> Curran, above n 14, at 215.

<sup>61</sup> Press Council Review, above n 4, at 67.

<sup>62</sup> Curran, above n 14, at 224.

<sup>63</sup> The British press' resistance to meaningful self-regulation is a good example. It is covered in the Leveson Inquiry, above n 12, at 195–218 and 216–218.

<sup>64</sup> Often discussed as "plurality"; I prefer "diversity". It is better at stressing the importance of not only multiple media organisations but *different* media organisations.

<sup>65</sup> The previous discussion can be found earlier in this chapter at A4.

comprehensive manner. The Law Commission, when discussing the importance of independent media, points out that "[it] is only because of a free press – in this instance The *Guardian* newspaper – that the world discovered how badly some sections of the press in Britain had failed."<sup>66</sup> However, a free press alone would not have been enough to ensure that the hacking scandal surfaced. It was media diversity that ensured there was a viable and healthy newspaper prepared to expose the actions of other members of the profession.

Diversity also helps the media to reach out to minority groups, meeting its constitutive and representative functions. The United Kingdom's Office of Communications ("Ofcom") is required by law to further the interests of both "citizen" and "consumer".<sup>67</sup> Ofcom tend to differentiate the terms by focusing on the idea of the citizen interest as "social inclusion":<sup>68</sup>

We realized very quickly... that what we were talking about was not consumers. We were talking about citizens. We were talking about people who were perfectly capable in principle of going to the shop and buying the thing as a consumer, but actually might they be isolated from our society in a way that made it difficult to know that that was what they should be doing?

The United Nations Declaration of Human Rights grants everyone "the right to take part in the government of his country."<sup>69</sup> For most individuals, the news media forms the framework through which they take part in government. A lack of diversity limits the opportunities for minorities to engage in the media system. If we are to take seriously the right of participation in government, then our regulatory system must encourage, and not limit, diversity.

### 3 *Public accountability*

The news media's claim of democratic importance comes from the service it provides to the public. More than any other public body, a news media regulator needs to be directly accountable to the public. There is no other candidate. If the government

---

<sup>66</sup> Law Commission, above n 8, at [4.82].

<sup>67</sup> Communications Act 2003 (UK), s 3(1).

<sup>68</sup> Collette Bowe, quoted in Sonia Livingstone and Peter Lunt "Representing Citizens and Consumers in Media and Communications Regulation" (2007) 611 *Annals of the American Academy of Political and Social Science* 51 at 60. Livingstone and Lunt at 61–62 criticise this interpretation of "citizen" for only concentrating on a "quantifiable but small segment of the population".

<sup>69</sup> *United Nations Declaration of Human Rights* GA Res 217 A(III) (10 December 1948), art 21.

performs the role, it would harm the news media's independence, affecting its ability to adequately represent, inform and protect the public. The regulator must be designed in a way that enables the public to challenge the media and have confidence that they will be listened to.

Media regulators are generally designed around a complaints process that allows individuals to allege that a publisher has breached the relevant standards. These standards are predominantly focused on accuracy, honesty and fairness; and are generally well-accepted.<sup>70</sup> The individual-led process generally works well. Individuals who are harmed by the news media or who have a special interest in a particular issue will lodge a complaint. The decision to uphold the complaint will give the individual concerned a remedy and will encourage future compliance. Sometimes, however, the goals of the individual may not align with the public interest. Individuals may be willing to settle for "back-door" monetary payments when the public would be better served by a published correction or individuals might not have sufficient motivation to bring a wider complaint about the way the news media have covered a particular issue. This latter situation is particularly difficult where the issue concerns more than one publisher. It is important that individuals receive some form of redress when they have suffered at the hands of the media – breaches of privacy or damage to reputation are not issues to be taken lightly. We must not forget, however, the wider goals of public accountability: to encourage and reward the media for performing their democratic functions. Regulation must be designed in a way that can move from individual cases to consider the wider implications of the news media's behaviour.

---

<sup>70</sup> Gavin Ellis "Journalism's road codes: The enduring nature of common ethical standards" (2012) 18(2) Pacific Journalism Review at 121. For a more critical discussion on how the principles are expressed, see Tully and Elsaka, above n 4.

### *III Independence*

The Law Commission claims that its proposed model "would be genuinely independent of both government and the news media industry."<sup>71</sup> To evaluate this claim, this chapter will begin with a discussion of the limitations of the current regulatory regime. It will then look at the two limbs of the Law Commission's claim: independence from government and independence from the news media industry. Lastly, this chapter will look at what is potentially the greatest threat to independence: the implementation process.

#### *A The Current State of Independence*

The current news regulators lack independence: the BSA from government; the Press Council and the OMSA from industry. The BSA is a partially-funded Crown entity set up by statute. The Broadcasting Act requires the BSA to "act independently in performing its statutory functions and duties, and exercising its statutory powers."<sup>72</sup> Nevertheless, there is scope for the perception of a lack of independence.<sup>73</sup> The chairperson and members are appointed politically, on the advice of the Minister of Broadcasting and the statute can be overturned at the whim of the government of the day.<sup>74</sup> The government's involvement in the BSA is typical of broadcasting regulation. Traditionally, broadcasting regulation tries to deal with two policy problems: how to allocate a limited number of frequencies and how to control the considerable influence of broadcasting on the populace.<sup>75</sup> These problems are no longer relevant. Internet radio and satellite television allow for an almost infinite number of broadcast organisations, eliminating the need to allocate frequencies and reducing the influence any one organisation is able to wield.<sup>76</sup> However, the structure of broadcasting regulation is still principally determined by these two pre-digital problems. Broadcasting is still in the process of achieving what the press managed two centuries ago: breaking free from government licensing.<sup>77</sup>

---

<sup>71</sup> Law Commission, above n 8, at [7.7].

<sup>72</sup> Broadcasting Act 1989, s 21(5).

<sup>73</sup> Mediaworks made this point in its submission to the Law Commission, quoted in Law Commission, above n 8, at [5.67].

<sup>74</sup> Ibid, at [5.62]–[5.67].

<sup>75</sup> For a history of broadcasting regulation (and deregulation) in NZ see Rennie, above n 6.

<sup>76</sup> Gavin Ellis "Different strokes for different folk: Regulatory distinctions in New Zealand media" (2005) 11(2) *Pacific Journalism Review* at 78–79.

<sup>77</sup> In Britain, press taxes were progressively abolished in the 19th century: James Curran "Global Journalism: A Case Study of the Internet" in Nick Couldry and James Curran (eds) *Contesting*

In 2007, Ian Barker and John Lewis reviewed the operations of the Press Council. This was the Press Council's first independent review since its inception in 1972. The Barker-Evans Review identified a perception of a lack of independence from the news media industry.<sup>78</sup> The Press Council is closely associated with the Newspaper Publishers' Association and the Engineering, Printing and Manufacturers Union. These two bodies appoint the governance board and, until recently, have had full power to dissolve the Press Council.<sup>79</sup> Industry governance is a recurring problem in press councils around the world. Decision-making boards may be independent but the industry can still exert structural influence through governance mechanisms.<sup>80</sup> Many of the criticisms addressed in the Barker-Evans Review – inadequate funding, a lack of sanctions, no real power to investigate properly – are governance issues.<sup>81</sup> In response to the Barker-Evans Review, the Press Council recently become an incorporated society.<sup>82</sup> It can no longer be dissolved at the whim of the news media industry. This change gives the Press Council more stability but does not address all the issues.

The OMSA suffers from a similar lack of independence at management level. The Management Board is comprised of at least three people, all of whom are appointed by the OMSA's members.<sup>83</sup> The members have the exclusive power to alter the OMSA's rules and procedures at a general meeting.<sup>84</sup> Members also have final say over appointments to the two complaints committees (though the recommendation process is suitably robust).<sup>85</sup> Finally, members have full power to wind up the OMSA by two standard resolutions of two-thirds majority.<sup>86</sup> The Press Council and the

---

*Media Power: Alternative Media in a Networked World* (Rowman & Littlefield Publishers, Lanham, Maryland, 2003) at 21.

<sup>78</sup> Press Council Review, above n 4, at 67 and 76.

<sup>79</sup> Ibid, at 76.

<sup>80</sup> Lara Fielden *Regulating the Press: a Comparative Study of International Press Councils* (University of Oxford, Reuters Institute for the Study of Journalism, 2012), at 26–32.

<sup>81</sup> For the criticisms, see Press Council Review, above n 4, at 67–68.

<sup>82</sup> Law Commission, above n 8, at [5.71].

<sup>83</sup> OMSA Constitution, above n 7, r 10(b).

<sup>84</sup> Ibid, r 17.

<sup>85</sup> Ibid, rr 12 and 13. An "independent person" will sit on the Appointments Panel along with the Chairman and Deputy of the Authority and the Chairman of the Complaints Committee (a retired Judge or Queen's Counsel). The Authority will appoint committee members following the recommendations of the Appointments Panel. The process for appointments to the Press Council is similar. The exception is that the "independent person" is named as the Chief Ombudsman (art 6 of the Press Council's Constitution in Press Council Review, above n 4, at 49–50).

<sup>86</sup> Ibid, rr 27 and 15(a).

OMSA may be free from government interference but they do not achieve satisfactory independence from industry.

### ***B The Law Commission's Model***

The Law Commission's model attempts to address the independence issues that plague the current system. Government involvement in the NMSA would be limited to recognising the regulator for the purpose of granting rights and privileges on its members and funding the regulator's oversight and monitoring functions. Industry would provide the bulk of the funding and have minority representation on the decision-making and governance boards. The Chief Ombudsman would be involved in the appointment of the chairperson.<sup>87</sup> The proposal partly draws on the structure of the Advertising Standards Authority ("ASA") in which the government, industry and Chief Ombudsman all play similar roles.<sup>88</sup> The model provides more stability than a complete self-regulated model yet still delivers the greater efficiency and lower costs of self-regulation.<sup>89</sup> News media regulation, however, is a very different field to advertising with a much greater importance to democracy. We can not expect the ASA model to make a seamless transition. Moreover, the Law Commission's proposal for a single regulator increases the potential risks of independence. The culture fostered by a single regulator would extend much further than the technology-specific regulators of the analogue world. If the regulator failed to give the media a genuinely free voice to criticise government, or failed to keep commercial pressure from limiting its effectiveness, the harm would be felt throughout the news media. It would not be able to be balanced through a different regulator.

#### *1 Independence from government*

The government will have very little to do with the NMSA. There will be no government involvement in any of the appointments and the NMSA will formulate its own rules and content (following the recommendations from the Law Commission).<sup>90</sup> The role of statute "would be limited to recognising the new framework, without any degree of prescription on the creation or operation of the standards body

---

<sup>87</sup> Law Commission, above n 8, at R11.

<sup>88</sup> Ibid, at [7.29]; *Bugger... it's ok! The Case for Advertising Self-Regulation* (Advertising Standards Authority, Wellington, 2008) at 3. Ellis, above n 76, at 81–88 also uses the ASA model to imagine a single-standards news media regulator.

<sup>89</sup> For a discussion of the benefits of self-regulation, see Anthony Ogus *Regulation: Legal Form and Economic Theory* (Portland, Oregon, Hart Publishing, 2004) at 107–110.

<sup>90</sup> Law Commission, above n 8, at [7.30] and [7.34].

whatsoever."<sup>91</sup> An Act of Parliament would be required to change the jurisdiction of the BSA so that it no longer covered news and current affairs and to apply the existing statutory provisions dealing with media rights and privileges to members of the NMSA.<sup>92</sup>

The role of statute in the Law Commission's proposals is a lot less intrusive than in those of the Leveson Inquiry and the Finkelstein Inquiry. On a continuum of possible statutory intervention with self-regulation at one end and government regulation at the other, the Law Commission's proposals are on the less intrusive end of the scale:

(a) Self-regulation

In a purely self-regulatory system there is no role for statute. The regulator is wholly set up and funded by the industry. The OMSA is the purest example of media self-regulation in New Zealand.

(b) Statutory recognition

The NMSA is a step up from self-regulation. The regulator is recognised by statute for the purpose of granting rights and privileges. The Law Commission points out that the Press Council is actually recognised in statute, in the Criminal Procedure Act 2011.<sup>93</sup> However, the NMSA's statutory recognition would be much more extensive.

(c) Statutory criteria

The Leveson Inquiry's recommendation is for the regulator to be required to meet certain statutory criteria. A state recognition body would certify the regulator.<sup>94</sup> Under this system, statute does not simply recognise the regulator but dictates what it should do. The use of statutory criteria is an attempt by the Leveson Inquiry to create a statutory foundation that still gives a certain amount of power and responsibility to the industry.

(d) Statute-backed sanctions

In the previous systems, the regulator's power over news media organisations is fixed through contract. The Finkelstein Inquiry's model is compulsory for major media organisations. Statute must not only recognise the regulator but determine

---

<sup>91</sup> Ibid, at [7.170].

<sup>92</sup> Ibid, at [7.172]–[7.173]. See chapter IV C1 for a discussion of the statutory rights and privileges.

<sup>93</sup> Ibid, at [7.174]; s 198(2)(a) defines "member of the media" as those subject to a code of ethics and the complaints procedure of the BSA or the Press Council.

<sup>94</sup> Leveson Inquiry, above n 12, at 1771–1773; Law Commission, above n 8, at [7.175].



who will be bound and give legal power to the regulator to impose sanctions.<sup>95</sup> Lord Leveson discusses the possibility of a "backstop regulator" in the case where news organisations fail to establish a regulator that meets the statutory requirements or where certain organisations fail to join the new regulator.<sup>96</sup> This backstop regulator would be similar to the Finkelstein model.

(e) Government regulation

The functions and powers of a government regulator, such as the BSA, are completely set up by statute and secondary legislation.<sup>97</sup> The regulator is either funded by the government or, in the case of the BSA, by a statute-imposed levy on the industry.<sup>98</sup>

The Leveson and Finkelstein Inquiries were triggered by concern at the news media's ethical failures. This helps explain why they ultimately recommended an increased role for the government. Their recommendations do not preclude genuine independence from government but, as the role of statute is increased, control of the regulator moves further into the hands of politicians and there is more opportunity for that that power to be abused. New Zealand's review was not motivated by the same concerns and our lighter touch reflects that.

One influential argument against any statutory-based regulation is that the use of statute, even in a very light-handed way, is a start down a slippery slope towards licensing and censorship.<sup>99</sup> Future governments would find it easy to extend the powers. Lord Leveson dismisses the argument: any widening of government powers would still require an Act of Parliament to be passed and the same procedures followed as for an entirely new Bill.<sup>100</sup> He notes that in the past 50 years there has not been any great willingness on the part of the UK Parliament to regulate the press.<sup>101</sup> Even if we accept the general premise of the argument, it is hard to see the Law Commission's recommendations as much of a threat. Overall, the NMSA would *reduce* government involvement in news media regulation by removing the BSA's jurisdiction over news and current affairs. The increase in involvement in press

---

<sup>95</sup> Finkelstein Inquiry, above n 12, at [11.27]–[11.38], [11.44] and [11.77].

<sup>96</sup> Leveson Inquiry, above n 12, at 1793–1794.

<sup>97</sup> See the Broadcasting Act 1989, ss 20–34.

<sup>98</sup> Ibid, ss 30A–30G.

<sup>99</sup> Leveson Inquiry, above n 12, at 1772: "The main argument that has been made against statutory underpinning or recognition is that any legislation touching on press standards provides the thin end of the wedge for political interference in the press." The Law Commission, above n 8, acknowledge the argument at [7.171].

<sup>100</sup> Leveson Inquiry, above n 12, at 1780.

<sup>101</sup> Ibid.

regulation to a more extensive statutory recognition does not leave much scope for the sort of incremental wearing away of press freedom that the media are concerned about. Statutory criteria and statute-backed sanctions are more dangerous. Given the relative weakening of government involvement in news media regulation, it is not surprising that the Law Commission did not feel the need to follow Lord Leveson's example and incorporate a statutory guarantee of press freedom in its proposal.<sup>102</sup> The tentative acceptance from some areas of the industry (the harshest critics of any government interference) suggests that the Law Commission has got the balance right.<sup>103</sup>

Self-regulation is essential to news media independence and the commission's voluntary regime could preserve it. Beyond that, we should not go.

## 2 *Independence from industry*

There are two main challenges to the NMSA's independence from industry: the direct involvement of industry personnel on the NMSA's boards and the funding arrangements.

### (a) Representation

One of the big advantages of self-regulation is the access it gives to relevant expertise.<sup>104</sup> The Law Commission accepts that there needs to be representation from industry to keep the NMSA "informed about how the industry works and the very real pressures of time, resource and expertise it faces."<sup>105</sup> To keep industry involvement to a minimum, the Law Commission recommends a number of safeguards: industry representatives will be in a minority on both decision-making and governance boards, current editors will not be able to serve on the boards, and members will have fixed terms so they cannot be easily removed by industry for

---

<sup>102</sup> Ibid, at 1780–1781. There is a strong argument that the NMSA will be bound by the New Zealand Bill of Rights Act 1990 and, therefore, will have to allow for the right to freedom of expression in s 14. This argument is discussed further in chapter V B2.

<sup>103</sup> "Editorial: Media Regime Must Keep Regulation Voluntary" *The New Zealand Herald* (Auckland, 27 March 2013) <[http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10873844](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10873844)>. See also Isaac Davison "Media Industry Backs Bid for New Watchdog" *The New Zealand Herald* (Auckland, 27 March 2013) <[http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10873856](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10873856)>.

<sup>104</sup> Robert Baldwin and Martin Cave *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, Oxford, 1999) at 126–127; Ogus, above n 89, at 107.

<sup>105</sup> Law Commission, above n 8, at [7.31].

unfavourable conduct.<sup>106</sup> These safeguards are sensible. It is important that the NMSA has the necessary expertise to engage with the industry. Keeping the industry connections to a minimum should prevent the industry exercising undue influence over the NMSA and ensure impartiality.

#### (b) Funding

The Law Commission concludes that the NMSA "will need to be funded principally by the industry. There is no other viable source."<sup>107</sup> There will be limited state funding for the NMSA's oversight and monitoring functions.<sup>108</sup> Further state funding would be incompatible with the Law Commission's largely self-regulatory model. The Law Commission acknowledges the potential for the industry to use funding to influence the NMSA. It recommends tying media agencies to the NMSA through long term contracts to achieve sufficient funding certainty.<sup>109</sup> It also recommends that, like the Press Council, the NMSA has separate legal existence as an incorporated society to make it harder for the industry to wind up the regulator by simply pulling away funding and support.<sup>110</sup>

The success of this approach will depend on the contracts. These will be the responsibility of the establishment working party.<sup>111</sup> This will not be an easy task. The NMSA will have to deal with a much larger range of publishers than the BSA, the Press Council, or the OMSA. It will have to decide how funding should be split between different technologies (print, radio, TV and digital) and organisations with very different sizes and structures (from small-scale blogs to big corporations), all against the backdrop of a rapidly changing industry.<sup>112</sup> The establishment working party may well find a reluctance to commit to long-term contracts that offer the certainty that the regulator needs. The large media organisations are likely to be in a strong position to hold out for a more advantageous deal that could jeopardise the NMSA's effectiveness. The implementation stage will be critical.

---

<sup>106</sup> Ibid, at [7.31]–[7.33].

<sup>107</sup> Ibid, at [7.93].

<sup>108</sup> Ibid, at [7.105].

<sup>109</sup> Ibid, at [7.94]–[7.96]. The other option would have been statutorily enforcing funding. This would have significantly increased the role of statute in the regulator.

<sup>110</sup> Ibid, at R11(e).

<sup>111</sup> Ibid, at [7.82].

<sup>112</sup> Ibid, at [7.97].

## ***C Implementation***

### *1 The Law Commission's recommended process*

The NMSA is, in theory, reasonably independent from both government and industry. The difficulty will be in its implementation. The Law Commission recommends a two-step process:<sup>113</sup>

(a) Parliament will pass legislation to remove the BSA's jurisdiction over news and current affairs and restrict the current statutory rights and privileges of the news media to the NMSA's members. The Act will contain a commencement section that delays its coming into force until an Order in Council is passed recognising the NMSA. This means the NMSA will have to be set up *before* the Act becomes operative.

(b) An establishment working party will be set up comprised of representatives of the public and industry (in the minority) and an independent chairperson. The chairperson will appoint the rest of the members in consultation with industry and public representatives. The working party will consult widely and draw up a constitution and model funding contracts.

The report is not clear about which of these two steps is to happen first, or even who is supposed to take the initiative in setting up the working party. If the proposal is to be resurrected, there appear to be two options: either industry gets together and goes to government to ask it to pass legislation or the government unilaterally decides to change the law, forcing the industry to go along with the proposal. Either way, the government will have to agree with the proposal.

### *2 The British and Australian experiences*

Recent experiences in Britain and Australia give us an idea of the challenges in the implementation process. The Leveson Inquiry enjoyed much greater publicity than the Law Commission's report. The Inquiry responded to blatant invasions of privacy and a complete disregard of ethics by certain parts of the British press. The scandal

---

<sup>113</sup> Ibid, at [7.184]–[7.188].

put a lot of pressure on politicians to respond to the problem.<sup>114</sup> After the publication of the Leveson Inquiry's report, the three major political party leaders came together and struck a deal where the new regulator would be recognised by royal charter (rather than statute as Lord Leveson proposed).<sup>115</sup> Most press organisations were against the deal. While work was under way putting together the new regulator, the press put forward their own proposed royal charter.<sup>116</sup> The rival press bid ended up being submitted to the Privy Council (the Queen's ministerial advisory body) before Parliament's charter, resulting in a complicated constitutional situation. It is unclear how the Privy Council are to consider the rival bids.<sup>117</sup> Alan Rusbridger, editor-in-chief of the *Guardian*, the newspaper that outed the hacking scandal, has expressed dismay that Lord Leveson's search for an independent solution to press regulation will end up being decided by a "mechanism controlled by ministers."<sup>118</sup> The British experience is an extreme example in a media environment characterised by powerful media barons, partisan newspapers and recurring ethical failures. New Zealand does not have the same problems. Nevertheless, the example gives us an idea of the potential power of the press to block and stall press reform. Even with original three-way cross-party support, the English government has still not yet succeeded in implementing its proposed solution.<sup>119</sup>

The Australian experience, while not reaching the same heights of publicity, has been equally calamitous. After the Finkelstein Inquiry's strong recommendations, the Government's own Convergence Review Committee released its final report. The Convergence Review disagreed with certain aspects of the Finkelstein Inquiry,

---

<sup>114</sup> Richard Tait "Never Waste a Good Crisis: The British Phone Hacking Scandal and its Implications for Politics and the Press" in Holli A Semetko and Margaret Scammell (eds) *The SAGE Handbook of Political Communication* (SAGE, London, 2012) at 525.

<sup>115</sup> Patrick Wintour "Press Regulation Deal: the Key Points" *The Guardian* (United Kingdom, 18 March 2013) <<http://www.theguardian.com/media/2013/mar/18/press-regulation-deal-key-points>>.

<sup>116</sup> Patrick Wintour and Lisa O'Carroll "David Cameron's Dilemma over Rival Press Regulation Plan" *The Guardian* (United Kingdom, 25 April 2013) <<http://www.theguardian.com/media/2013/apr/25/david-ferguson-press-regulation>>.

<sup>117</sup> Lisa O'Carroll "Press Regulation: Government's Plan for a New Watchdog Delayed until Autumn" *The Guardian* (United Kingdom, 12 July 2013) <<http://www.theguardian.com/media/2013/jul/12/press-regulation-government-plan-delayed-autumn>>.

<sup>118</sup> Josh Halliday "Government should Reopen Talks on Press Regulation, says Alan Rusbridger" *The Guardian* (United Kingdom, 24 May 2013) <<http://www.theguardian.com/media/2013/may/24/government-press-regulation-alan-rusbridger>>.

<sup>119</sup> As at 8 October 2013. For the latest delay, see Patrick Wintour and Lisa O'Carroll "Newspapers' plans for post-Leveson press regulation rejected" *The Guardian* (United Kingdom, 8 October 2013) <<http://www.theguardian.com/media/2013/oct/07/ministers-seek-compromise-over-press-regulation>>.

including the proposal for the regulator to be statute-based and government-funded.<sup>120</sup> The Government responded with a watered-down version that contained neither the strong news media regulation proposals in the Finkelstein Inquiry nor the more sweeping changes to the general media landscape recommended by the Convergence Review.<sup>121</sup> Its most controversial point was a public interest media advocate to decide whether significant mergers could go ahead and to authorise independent self-regulatory bodies dealing with news standards.<sup>122</sup> Despite criticism for giving in to industry, the government still found itself under heavy media pressure and it struggled to secure the support of the necessary crossbenchers to get the proposals through Parliament. The Government ended up withdrawing its proposal amidst strong Opposition and media pressure.<sup>123</sup>

The British and Australian experiences demonstrate just how difficult it is to set up an independent news regulator. Ideally, the government needs the support of the news media. Where this is not possible, the government should seek strong cross-party support in Parliament. Without cross-party support, the media have a strategic advantage and can use their communicative power to damage the government and side with the opposition. A cross-party solution would also help to create a more stable foundation for the regulator, making it less likely to be overturned or modified by a subsequent government, and reinforcing the independence of the news media from partisan political influence.

### 3 *The Government's rejection*

New Zealand is in a much better position to implement a new regulator than Australia or Britain. Firstly, the Law Commission's recommendations are a lot more palatable to the news media industry than those of the Leveson or Finkelstein Inquiries and

---

<sup>120</sup> Convergence Review, above n 12, at 155–156.

<sup>121</sup> Susan Forde "Media Reform: Hysterical Attacks on Weak Conroy Suggestions tell the Real Story" *The Age* (Melbourne, March 14 2013) <<http://www.theage.com.au/federal-politics/media-reform-hysterical-attacks-on-weak-conroy-suggestions-tell-the-real-story-20130314-2g1p2.html>>.

<sup>122</sup> Stephen Conroy "Government response to Convergence Review and Finkelstein Inquiry" (press release, 12 March 2013) <<http://bit.ly/11XvO5P>>.

<sup>123</sup> David Wroe and Lenore Taylor "Media Reform Bills Teetering" *The Age* (Melbourne, 19 March 2013) <<http://www.theage.com.au/federal-politics/political-news/media-reform-bills-teetering-20130318-2gb9s.html>>; Jonathan Swan "Media Reform Fails to Survive Days of Wrangling and Dashed Hopes" *The Age* (Melbourne, 22 March 2013) <<http://www.theage.com.au/federal-politics/political-news/media-reform-fails-to-survive-days-of-wrangling-and-dashed-hopes-20130321-2giu6.html>>.

have even received some tentative support from industry.<sup>124</sup> Broadcasters, in particular, will find the NMSA to be a more favourable regime than the government-controlled BSA.<sup>125</sup> Nevertheless, the Government decided not to follow through on the report. For the time being, the Government appears happy to let the media deal with the problems of convergence.<sup>126</sup>

The media in New Zealand have already made good progress in dealing with these challenges, for instance through the setting up of the Online Media Standards Authority. There is no pressing need for statutory or institutional change.

There may not be an urgent need for change but the current three-limbed system can hardly be considered satisfactory. The cynical explanation for the Government's rejection is that setting up a new regulator is not politically expedient. A brief look at the British and Australian experience would be enough to scare any government off getting involved in news media regulation and risk the negative exposure. With a general election approaching in 2015, the risk to the Government of a messy fall out with the news media is heightened. There has been little public response to the Government's rejection, just a feeling in the online world that this has been a lost opportunity.<sup>127</sup> The Government sensibly said it would keep the proposal in mind for the future.<sup>128</sup> The news environment keeps changing. At some point a government will have to do something.

#### *4 A backstop solution?*

The industry is in a powerful position to resist regulation. It has huge potential to make life difficult for the Government. However, the government has one trump up its sleeve: the threat, whether actual or implied, of harsher statute-imposed regulation. The industry is a lot more likely to get behind new regulation when it is the lesser of

---

<sup>124</sup> See above n 103.

<sup>125</sup> Steven Price "TVNZ's Weird Response to the Law Commission" (2013) Media Law Journal <<http://www.medialawjournal.co.nz/?p=600>>.

<sup>126</sup> Collins, above n 10.

<sup>127</sup> David Farrar "No Unified Media Regulator" (13 September 2013) Kiwiblog <[http://www.kiwiblog.co.nz/2013/09/no\\_unified\\_media\\_regulator.html](http://www.kiwiblog.co.nz/2013/09/no_unified_media_regulator.html)>; Cameron Slater "No Changes to Media Regulatory Landscape" (13 September 2013) Whale Oil Beef Hooked <<http://www.whaleoil.co.nz/2013/09/changes-media-regulatory-landscape/#axzz2gBFtlkEi>>; Mike O'Donnell "Govt Cool on Mega Media Regulator" (21 September 2013) Stuff.co.nz <<http://www.stuff.co.nz/business/opinion-analysis/9197612/Govt-cool-on-mega-media-regulator>>.

<sup>128</sup> Collins, above n 10.

two evils. Self-regulation is often the response to such threats.<sup>129</sup> The creation of the OMSA is a clear example. If it was not for Simon Power's request to the Law Commission to look into convergence it is unlikely that the industry would have troubled itself with the creation of a new regulator. The creation of the Press Council was a similar response to the threat of statutory intervention.<sup>130</sup>

If the government is ever serious about implementing the Law Commission's proposals it would do well to threaten something worse. The Law Commission offers such a threat, albeit a vague one, in its report. It recommends a review process, led by the Chief Ombudsman, after the regulator's first year.<sup>131</sup> The review sends a message to the industry that if it does not make the NMSA work, the government might have to step in. The Leveson Inquiry recommends an alternative "backstop" regulator that would step in if industry failed to put together the recommended regulator or if individual organisations opted out of the industry solution.<sup>132</sup> Such a situation would only arise "if the press fails to deliver the independent regulation that is required and that the public have a right to demand."<sup>133</sup> Lord Leveson thought that not having such a backstop would be a "do nothing" response to the task of encouraging membership.<sup>134</sup>

The Law Commission's proposed Communications Tribunal could have been such a backstop. The Tribunal was proposed as part of the Law Commission's package dealing with harmful digital communications and would have been a mini harassment court for online harm.<sup>135</sup> One of the incentives of membership of the NMSA was to be exclusion from the jurisdiction of the Tribunal.<sup>136</sup> However, the Tribunal would have been limited to controlling communications that caused significant distress.<sup>137</sup> The threshold for obtaining a remedy would have been high – probably too high to have had much of an effect on the news media. The Government ultimately rejected the proposal.<sup>138</sup>

---

<sup>129</sup> Baldwin and Cave, above n 104, at 126.

<sup>130</sup> Press Council Review, above n 4, at 21.

<sup>131</sup> Law Commission, above n 8, at [7.18].

<sup>132</sup> Ibid, at [7.1]–[7.7].

<sup>133</sup> Leveson Inquiry, above n 12, at 1783.

<sup>134</sup> Ibid, at 1787.

<sup>135</sup> The Law Commission's report, *Harmful Digital Communications: The adequacy of the current sanctions and remedies*, forms Appendix A to Law Commission, above n 8. The recommendations dealing with the Communications Tribunal are at 228–229.

<sup>136</sup> Ibid, at [7.114].

<sup>137</sup> Ibid, at 228.

<sup>138</sup> Judith Collins "Time's up for cyber bullies" (press release, 4 April 2013) <<http://www.beehive.govt.nz/release/time039s-cyber-bullies>>.



If the NMSA failed to gain the support of industry, the government would have to look to the statute-sanctioned, state-funded model of the Finkelstein Inquiry.<sup>139</sup> Finkelstein argued that the experiences of the Australian Broadcasting Corporation (ABC) and the British Broadcasting Corporation (BBC) show that it is still possible for a publicly-funded body to be sufficiently independent.<sup>140</sup>

It is not always easy to maintain this independence, and governments may attempt from time-to-time to use their control over funding to influence the behaviour of the broadcasters. But, by and large, that pressure has been resisted quite successfully.

There are precedents for designing independent government-funded public institutions. The state radio broadcaster, Radio New Zealand, is guaranteed independence under the Radio New Zealand Act 1995.<sup>141</sup> The Electoral Commission is an independent Crown entity established under the Electoral Act 1993.<sup>142</sup> The salaries of Members of Parliament, Ombudsmen and Parliamentary Commissioners are determined independently by the Remuneration Authority.<sup>143</sup> The courts, a state-funded institution, have a long tradition of operating free from government interference.<sup>144</sup> Such a model is not an ideal solution – it would give statute a far more significant role than currently proposed – but it is potentially viable and leaving it as an alternative might just put enough pressure on industry to force a successful self-regulatory solution.

---

<sup>139</sup> Finkelstein Inquiry, above n 12, at [11.53].

<sup>140</sup> Ibid, at [6.67].

<sup>141</sup> Sections 11–13. Also see the requirement in s 7(1)(f) (the Charter) to provide "comprehensive, independent, impartial, and balanced national news services and current affairs."

<sup>142</sup> See part 1 of the Act. In particular, s 7 requires the Electoral Commission to "act independently in performing its statutory functions and duties."

<sup>143</sup> Remuneration Authority Act 1977, s 1(a) and sch 4. The members of the Remuneration Authority are appointed by the Governor-General by Order in Council (s 5).

<sup>144</sup> *Laws of New Zealand Constitutional Law* (online ed) at [49].

## *IV Diversity*

Diversity requires a variety of media organisations with different business models, target audiences and personnel. This chapter begins with a look at the various options for media diversity. I then move on to the Law Commission's proposals and ask what effect they might have on media diversity. The need for independent regulation limits what governments can do to encourage diversity. In the last section, I look at one mechanism that we have in New Zealand to increase diversity: the Broadcasting Commission.

### *A A Diverse Media Landscape*

There are many ways to create a diverse news media environment. Within the mainstream media, the main concern is the increased concentration of media ownership.<sup>145</sup> Bill Rosenberg, in his report on news media ownership in New Zealand, concludes that "the need for changes in the ownership, regulation and commercialisation of our media is exceptional."<sup>146</sup> These changes have to come from government.<sup>147</sup> There is little that an independent regulator, such as the NMSA, can do to limit the commercial interests of the news media's owners. The challenge of convincing the news media to voluntarily sign up to regulation is already difficult enough. Trying to convince the news media to voluntarily cede their commercial freedom would be a whole new challenge.

Diversity requires not only multiple media organisations, but *different* media organisations. Non-commercial media organisations are one such solution. They have different structures and motivations to the mainstream media and are generally less

---

<sup>145</sup> See above n 46 and the corresponding discussion in chapter II B4. Recent research in the United States has disputed whether limited ownership actually limits diversity. Monopolistic media providers do not wish to compete with their own channels and will naturally try to expand to smaller and smaller interest groups to increase their overall market share. The argument has merit within the wider environment. The news media, however, as the British experience demonstrates, is particularly susceptible to political interference and more likely to suffer from a homogenisation of viewpoints than the entertainment sector. See Ryan H Weinstein "The Diversity Paradox: Media Ownership Regulation and Program Variety" (2004-2005) 10 *Stanford Journal of Law, Business & Finance* 150.

<sup>146</sup> Rosenberg, above n 46, at 68.

<sup>147</sup> For an discussion of New Zealand and the United Kingdom's current response to media ownership, see Andrew Geddis "The press: the media and the 'Rupert Murdoch problem'" in Keith D Ewing, Jacob Rowbottom and Joo-Cheong Tham (eds) *The Funding of Political Parties: Where Now?* (Routledge, New York, 2012).

profit-motivated, more accountable to the public and better at focusing on the needs of the *citizen*.<sup>148</sup> Common examples are public service broadcasters, community radio stations and student magazines.<sup>149</sup>

The Internet is the great new hope for media diversity. It has been described as a "communications revolution" that breaks down publication barriers and "permits diversity of views to be communicated on a global scale."<sup>150</sup> Anyone with a computer and an internet connection has the potential to reach an audience infinitely larger than that of any broadcast or print network. The Internet allows blogs, news websites, multimedia channels and aggregators to compete with traditional print and broadcast journalism.<sup>151</sup>

Much of the critical praise of the Internet focuses on the potential it has to improve public deliberation. Mark Wheeler suggests that the Internet has "replaced the Greek *agora* and the coffee shops of the eighteenth century" and become the "public sphere in which issues are debated and politics framed."<sup>152</sup> Likewise, Brian Roland has predicted that the digital environment "would more nearly reflect First Amendment notions of free speech and unbridled expression, and more thoroughly facilitate Holmes' marketplace of ideas."<sup>153</sup> Political opinion is now shared and debated digitally on blogs, forums, comment sections and social media. The Law Commission describes a "growing symbiosis between new and old media."<sup>154</sup> New media often use the mainstream media as a starting point for comment and deliberation and the mainstream media often use new media forms as a news source.

---

<sup>148</sup> For a discussion of the role that non-commercial media can play in democracy, see Saima Saeed "Negotating Power: Community Media, Democracy, and the Public Sphere" (2009) 19(4/5) *Development in Practice* 466; Curran, above n 14, at 239–247; and Livingstone and Lunt, above n 68, at 63–64.

<sup>149</sup> The non-commercial news sector in New Zealand is dominated by the public radio broadcaster, Radio New Zealand. There are two state-owned television broadcasters that produce news and current affairs content: Television New Zealand and Māori TV. Television New Zealand is required to turn a profit. Previous attempts to amend its Charter to allow for a less commercial focus have been overturned (Rudd, above n 42, at 41–42). Māori TV, established under the Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003, is focused on promoting Māori language and culture.

<sup>150</sup> Brian M Rowland "Media Fairness: Regulation, Diversity, Reality" (2001-2002) 3 *Florida Coastal Law Journal* 67 at 86.

<sup>151</sup> For a discussion of some of the new online news media sources in New Zealand, see Anthony Robins "Evolving online media in New Zealand" (12 August 2012) *The Standard* <<http://thestandard.org.nz/evolving-online-media-in-nz/>>.

<sup>152</sup> Wheeler, above n 14, at 207–209.

<sup>153</sup> Rowland, above n 130, at 90.

<sup>154</sup> Law Commission, above n 8, at [3.4].

The Internet has had a milder influence on news production. The Law Commission's research shows that New Zealanders generally still turn to mainstream media organisations for their daily news.<sup>155</sup> While the Internet has lowered the cost of publishing, news gathering is still an expensive activity that takes time, resources and expertise.<sup>156</sup> There are some influential new Internet-based news sites (such as Scoop and Interest) but they tend to complement, rather than replace, traditional media.<sup>157</sup> Overseas research suggests that people are more likely to turn to such organisations when they feel they are not getting reliable news from their usual sources, or when news is breaking rapidly.<sup>158</sup> It seems there is still room for professional journalism, albeit under an increasingly difficult business model. Nevertheless, the Internet is still a very new technology and it is impossible to predict how it will affect the media landscape of the future. The most we can do is stay open to the opportunities it brings.

## ***B The Law Commission's Response***

The Law Commission does not attempt to actively encourage diversity. It merely tries to create a system that is open to different organisations.<sup>159</sup>

There is a strong public interest in ensuring that in determining how legal privileges and exemptions are allocated, the law enables rather than stifles such diversity.

Anything more would require the regulator to favour certain media. This would damage the regulator's independence and make self-regulation more difficult. The news media industry would be understandably reluctant to be involved in a system

---

<sup>155</sup> Big Picture Marketing and Research Ltd *Public Perception of News Media Standards and Accountability in New Zealand* (summary of the online survey conducted for the Law Commission, April 2012) at [3.1].

<sup>156</sup> Law Commission, above n 8, at [4.72].

<sup>157</sup> Scoop <[www.scoop.co.nz](http://www.scoop.co.nz)> focuses on providing information as it is released to the media, creating a "no spin" media environment. Interest <[www.interest.co.nz](http://www.interest.co.nz)> focuses on business and economic news. Also see Bernard Hickey's public interest journalism project <[journalism.org.nz](http://journalism.org.nz)> (still in construction), modelled in part on ProPublica <[www.propublica.org](http://www.propublica.org)>: John Drinnan "Hickey Shelves Journalism Website Plans" *The New Zealand Herald* (Auckland, 30 November 2012) <[http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=10851056](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10851056)>.

<sup>158</sup> Weinstein, above n 145, at 169.

<sup>159</sup> Law Commission, above n 8, at [3.53].

that privileged certain members. If the government is to actively encourage media diversity, it must do so outside the regulatory system.

The Law Commission's system emphasises content over form.<sup>160</sup> It does not seek to protect a particular type of publisher, but the "public's dependence on a reliable source of information about what is happening in the world."<sup>161</sup> The focus on content inevitably leads the Law Commission to recommend single-standards regulation over the current three-pronged regulatory approach. The current system skews the media environment: broadcasters are subject to a statutory regulator, newspapers are self-regulated and independent online content is not regulated at all.<sup>162</sup> Single-standards regulation would replace this system with a single regulatory body and a single code of standards.

The example of online video content further illustrates the inequity of the current approach: video content on stuff.co.nz is regulated by the Press Council;<sup>163</sup> video content on tvnz.co.nz that replicates a television broadcast is regulated by the BSA;<sup>164</sup> video content on tvnz.co.nz that is not tied to a television broadcast is regulated by the OMSA;<sup>165</sup> and video content on thedailyblog.co.nz is not covered by any regulator.<sup>166</sup> In the digital world, the only viable way to create a level, discrimination-free playing field is single-standards regulation.<sup>167</sup>

The Law Commission's proposals would effectively create a self-licensing system. Organisations that wish to take advantage of news media privileges would have to agree to the corresponding responsibilities. This system would formalise the news media's democratic role of mediating institution.<sup>168</sup>

---

<sup>160</sup> Law Commission, above n 8, at [7.137].

<sup>161</sup> Ibid, at [3.54].

<sup>162</sup> For the jurisdiction of each of the current regulators, see chapter I.

<sup>163</sup> Press Council Complaints Procedure <[www.presscouncil.org.nz/complain.php](http://www.presscouncil.org.nz/complain.php)>, r 1.

<sup>164</sup> Section 6(1)(a) of the Broadcasting Act 1989 requires broadcasters to "receive and consider formal complaints about any programme *broadcast* by it [my italics]." Under s 21(1)(a), these complaints may then be referred to the BSA. The definition of "broadcasting" in s 2 does not include "transmission of programmes... made on the demand of a particular person for reception only by that person." To be considered, online video content will have to match original broadcast content and the complainant will have to point to the original broadcast.

<sup>165</sup> OMSA Constitution, above n 7, sch 2 r 1(a).

<sup>166</sup> The Daily Blog is not currently a member of the Press Council or the OMSA.

<sup>167</sup> The Convergence Review, above n 12, at x reached a similar conclusion, recommending "a flexible and technology-neutral approach" to all content regulation.

<sup>168</sup> Law Commission, above n 8, at [45].

In essence, our scheme formalises the unwritten social contract which had traditionally existed between the news media and the public they serve. It does this by cementing the connection between the rights and freedoms of the media and their corresponding responsibilities.

This is an important shift from the ad hoc, inconsistent, technology-focused approach taken in the current statutes dealing with the news media. The only restriction under the Law Commission's system will be the recommended statutory definition of "news media".<sup>169</sup> Provided a news organisation meets this definition, it will be on the same regulatory and legal footing as any other.

## ***C Evaluation of the Risks***

### *1 The rights and privileges*

The NMSA will become the sole gateway for organisations wanting to take advantage of the current statutory rights and privileges. The effect of the NMSA's formalised structure will depend on the importance of the rights and privileges which it controls. The Law Commission divides these into four categories:<sup>170</sup>

(a) privileges giving special access to the courts and local authority meetings;<sup>171</sup>

(b) statutory exceptions to the Fair Trading Act 1986, Human Rights Act 1993 and Electoral Act 1993 designed to allow the media to report the news without being

---

<sup>169</sup> Ibid, at R10.

<sup>170</sup> The Law Commission discusses these privileges at [2.7]–[2.29].

<sup>171</sup> Several statutes give the news media special access to the courts and tribunals: Criminal Procedure Act, ss 97, 198 and 199; Family Courts Act 1980, s 11A; Family Proceedings Act 1980, s 159; Children, Young Persons, and Their Families Act 1989, s 166; Care of Children Act 2004, s 137; Social Workers Registration Act 2003, s 80; Health Practitioners Competence Assurance Act 2003, s 97. The news media have the right to report from local authority meetings open to the public: Local Government Official Information and Meetings Act 1987, s 49; New Zealand Public Health and Disability Act 2000, sch 3, cl 34. The news media may be heard in applications in relation to suppression orders: Criminal Procedure Act 2011, ss 210 and 253. Lastly, s 68 of the Evidence Act 2006 protects journalists' sources. Access to the Press Gallery is controlled by Parliament's own rules: Office of the Speaker "Rules of the Parliamentary Press Gallery" (2011).

overly burdened by the threat of litigation, and a general exception to the information privacy principles in the Privacy Act 1993;<sup>172</sup>

(c) defences under the Defamation Act 1992 and Copyright Act 1994 for fair news reports (these will not be affected by the NMSA);<sup>173</sup> and

(d) non-statutory access commonly given to members of regulators by government and community organisations.

The new system will add four more incentives:<sup>174</sup>

(e) brand and reputational advantage from being a member of the NMSA, including the opportunity to use a "kite mark" to mark membership;

(f) exclusion from the proposed Communications Tribunal (now rejected);

(g) access to public funding from NZ on Air for broadcast news and current affairs programmes (discussed in section D); and

(h) the option of a mediation service to settle cases that might otherwise end up in court.

The Law Commission describes these rights and privileges as "not insignificant".<sup>175</sup> It points out that many of the privileges and exemptions are the result of media submissions in the drafting process.<sup>176</sup> Together, they form a disparate collection. The access privileges in (a) do not appear to be a significant advantage over the rights of the public. The privileges giving access to local authority meetings only apply to meetings open to the public.<sup>177</sup> Where the news media have the right to sit in closed court, their ability to report proceedings is often constrained by privacy rules.<sup>178</sup> The privileges generally make the news media's job easier, for example, by allowing the media to be heard in applications for suppression orders and protecting journalists'

---

<sup>172</sup> Fair Trading Act 1986, s 9; Human Rights Act 1993, s 61(2); Electoral Act, s 197(1)(g); Privacy Act, s 2(1).

<sup>173</sup> Defamation Act 1992, ss 16–18; Copyright Act 1994, s 42.

<sup>174</sup> Law Commission, above n 8, at [7.111]–[7.118].

<sup>175</sup> Ibid, at [7.107].

<sup>176</sup> Ibid, at [7.108].

<sup>177</sup> Local Government Official Information and Meetings Act 1987, s 49; New Zealand Public Health and Disability Act 2000, sch 3, cl 34.

<sup>178</sup> See for example, Family Courts Act 1980, s11B(3).

sources.<sup>179</sup> The publication privileges in (b) are more significant. They reduce the threat of litigation, allowing media organisations to focus on reporting the news. The complete exemption from the principles in the Privacy Act is particularly important.<sup>180</sup> Privacy law is a potential minefield for journalists. The task of the mainstream media would become harder and more complicated without these statutory protections. Smaller organisations, however, may decide that it is easier to forgo these privileges and not seek membership of the NMSA. The statutory privileges in (c) are unaffected by the Law Commission's proposal.

The extra privileges in (e) to (h) are incentives to encourage news organisations to join the NMSA. Since the Law Commission's report, the Government has rejected the proposed Communications Tribunal.<sup>181</sup> This limits the extra incentives to the reputational advantage that comes from being a member of the NMSA, access to public funding for news and current affairs programmes, and the option of the mediation service. Like the statutory privileges, these privileges are useful but it is hard to see them constraining the news activities of any organisation or individual that chooses not to join the NMSA.

The privileges in (a) to (d) all relate to news gathering and reporting. None of the privileges affect the ability of the news media to engage in opinion and debate. They will be superfluous to most blogs and opinion-based publications that do not gather news. In a sense, the NMSA is less a general news media regulator than a *news gathering* regulator. The focus on primary news gathering helps protect freedom of speech by placing accountability only where it is needed and where the potential for harm is greatest: on the reporting of current events. Opinion and debate are secondary functions; they are only possible when they start with a reliable account of what is happening in society. The NMSA's rights and privileges are most likely to affect smaller scale organisations involved in gathering news such as community-funded radio stations, newspapers and websites. They will have no choice but to sign up. If the NMSA is to truly "enable diversity," it must be open to the membership of these organisations and structured in a way that is not unfairly prejudicial.

---

<sup>179</sup> Criminal Procedure Act 2011, ss 210 and 253; Evidence Act 2006, s 68.

<sup>180</sup> "[A]gency", as defined in s 2(1) of the Privacy Act 1993, does not include "in relation to its news activities, any news medium".

<sup>181</sup> Collins, above n 138.



## 2 The definition

The most obvious way in which the Law Commission's proposal will restrict media diversity is through the proposed definition of "news media". Publishers who wish to take advantage of the statutory privileges will have to meet the following criteria:<sup>182</sup>

- (a) a significant element of their publishing activities involves the generation and/or aggregation of news, information and opinion of current value;
- (b) they disseminate this information to a public audience;
- (c) publication is regular and not occasional; and
- (d) the publisher must be accountable to a code of ethics and to the NMSA.

Provided the first three criteria are met, the NMSA will be expected to admit the publisher and the publisher will become accountable to the NMSA's code of ethics.<sup>183</sup>

The definition is targeted at "entities". This is a broad term and must include individuals.<sup>184</sup> This interpretation fits with the Law Commission's emphasis on content over form and its discussion of the rights of bloggers and other individuals.<sup>185</sup>

Paragraph (a) looks at the type of content organisations produce. It is not clear whether entities must generate (or aggregate) news, information *and* opinion or whether just one of the content types is enough. The Law Commission probably had the latter interpretation in mind. It would be absurd for a news organisation that decided not to publish opinion to be ineligible for membership of the NMSA. The reference to "current value" is also problematic. It makes sense applied to information and opinion – information and opinion not of "current value" can hardly be relevant to news publishing – but is dangerous applied to news. It seems to require a subjective value judgment of the worth of an organisation's published news. The Concise Oxford English Dictionary defines news as "newly received or noteworthy information about recent events."<sup>186</sup> Any further qualification is unnecessary. One solution would be to remove the words "information and opinion of current value" from the main definition. News could be defined in a separate subsection to include

---

<sup>182</sup> Law Commission, above n 8, at R10.

<sup>183</sup> Ibid, at R14.

<sup>184</sup> Currently, there are no individual members of the Press Council or the OMSA. Rule 5(a) of the OMSA Constitution, above n 7, allows "[a]ny media proprietor, individual or organisation which carries on activities aimed at a public audience online" to be eligible for membership provided they pay the subscription.

<sup>185</sup> The Law Commission discusses the New Zealand blogosphere at [2.85]–[2.99].

<sup>186</sup> *Concise Oxford English Dictionary* (11th ed (revised), Oxford University Press, Oxford, 2008).

"information and opinion that is substantially related to news." This would focus the statutory rights and privileges where they are intended – on the production of news – but would still allow bloggers and other online media performing news-related activities to join the NMSA.

In the Law Commission's Issues Paper, the "significant element" requirement read "significant proportion".<sup>187</sup> The current version should stifle any temptation to use a mathematical analysis to determine whether an organisation is eligible for membership. News gathering may be a small part of an organisation's activities but may still be a "significant element" that, in the interests of society, should enjoy the rights and privileges of news media.

Paragraph (b) requires the information to be disseminated to a public audience. Dissemination to a public audience is broader than mere "publication" in defamation law which simply requires publication to a third person.<sup>188</sup> It is not so broad, however, that it requires dissemination to all citizens, simply a "public audience." It would be enough that the content be *available* to the public, whether for free or at cost. The statutory privileges are premised on the public interest in news and information. Paragraph (b) simply reflects that requirement. It will not exclude organisations only publishing to small audiences.<sup>189</sup>

Paragraph (c) requires publication to be "regular". The qualification, "not occasional", seems to imply a low threshold. This requirement should be of some comfort to media professionals who are worried that the NMSA will open the floodgates to anyone with a vague desire to report the news. Some bloggers, citizen journalists and amateur reporters (for example, someone wishing to cover a particular court case) would not be eligible to become members of the NMSA. Paragraph (c) seems to be a conscious decision to protect the public's interest in reliable, balanced news-gatherers that have taken it on themselves to report current events, rather than pick and choose particular issues. This is a break from the Law Commission's dictum of "content over form" but it seems to be a sensible place to draw the line. Occasional publication does not demonstrate a willingness to take up the wider responsibilities of the news media.

---

<sup>187</sup> Law Commission, above n 8, at [4.169].

<sup>188</sup> *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 (CA) at 527–529.

<sup>189</sup> The Finkelstein Inquiry, above n 12, at [11.67] attempts to create a numerical threshold to decide if a publisher is sufficiently large to be required to join the regulator. The Law Commission's system is voluntary; it seeks to encourage membership through incentives and, therefore, does not have to worry about specifying who must join.

Overall, the Law Commission's definition achieves a good balance between allowing new and alternative news organisations while protecting the public interest in a reliable source of information. A news organisation that does not meet the Law Commission's definition is unlikely to be one that will attract the public's trust. My sole recommendation is a closer look at the wording of paragraph (a).

### 3 *Structural bias*

If the NMSA is to foster diversity, its internal rules and practices must not discriminate between different news organisations. There will be minority industry representation on the NMSA's decision-making boards, governance board and establishment committee.<sup>190</sup> The Law Commission's requirement for one panel member to have "expertise in new media and digital communications technology" is a good first step.<sup>191</sup> It will help ensure that industry representation does not favour certain publishers.

Once set up, the NMSA will have to apply its codes and penalties in an even-handed way. Over time, the core ethics standards have proven sufficiently broad to be applied across different media forms.<sup>192</sup> The Press Council has demonstrated the ability to apply its more flexible standards to alternative media organisations:<sup>193</sup>

Student newspapers as a genre have a long history of provocation and even offensiveness, and that is to be expected in fiery crucibles such as universities. As well, their choice of language and in-your-face approach to issues are often not for the faint-hearted. The Press Council acknowledges the genre and is prepared to make allowances for it, as long as essential principles are maintained.

The decision-making boards should be able to apply the core principles to a range of providers. The Law Commission's recommendation of sub-codes for different media will help provide guidance to publishers and the addition of an appeals body will help ensure the standards are applied consistently.<sup>194</sup> The Law Commission recommends publication-based remedies such as the requirement to publish adverse decisions,

---

<sup>190</sup> Law Commission, above n 8, at R11(b).

<sup>191</sup> Ibid, at R11(c).

<sup>192</sup> Ellis, above n 70, at 121.

<sup>193</sup> *Otago Mental Health Support Trust v Critic-Te Arohi Press Council*, Case 2144, October 2010 <[http://www.presscouncil.org.nz/display\\_ruling.php?case\\_number=2144](http://www.presscouncil.org.nz/display_ruling.php?case_number=2144)>.

<sup>194</sup> Law Commission, above n 8, at [7.60] and [7.78].

publish an apology, and offer a right of reply.<sup>195</sup> These respond directly to the harm caused and will be easier to apply across different publications than financial-based penalties.

Lastly, the costs of membership might restrict non-commercial organisations from becoming members of the NMSA. There is little the NMSA can do here to help. Financial assistance is beyond the NMSA's capabilities. Government funding would compromise the regulator's independence and the mainstream media cannot be expected to subsidise their smaller competitors, especially while facing the financial challenges of the modern news environment. If the government is going to help, it needs to do so through a body that is separate to the NMSA. In the next section I look at one possible solution.

#### ***D The NZ on Air Anomaly***

The New Zealand Government currently funds local media content through the Broadcasting Commission (known as New Zealand on Air).<sup>196</sup> The Broadcasting Commission helps fund a wide variety of sound and visual programmes, some of which involve news and current affairs.<sup>197</sup> It also provides funding to community radio stations and television channels.<sup>198</sup> Recipients of funding must provide the Broadcasting Commission with "undertakings that the programme or content will be consistent with the standards specified in section 4(1)."<sup>199</sup> These standards include compliance with "any approved code of broadcasting practice applying to the programmes."<sup>200</sup> Under the current system, the vast majority of funding recipients are broadcasters.<sup>201</sup> They fall under the jurisdiction of the BSA and must follow the Codes of Broadcasting Practice.<sup>202</sup> Under the Law Commission's system, the BSA will lose jurisdiction over news and current affairs. If a broadcaster wishes to apply for funding for news and current affairs programmes, it will have to be a member of the NMSA and, therefore, bound by the NMSA's code of standards.<sup>203</sup> The change is

---

<sup>195</sup> Ibid, at R17; see the discussion of remedies in chapter V B1.

<sup>196</sup> Broadcasting Act 1989, ss 35–53.

<sup>197</sup> Ibid, s 36(1)(a).

<sup>198</sup> See the NZ on Air website <[www.nzonair.govt.nz](http://www.nzonair.govt.nz)> for details of the Broadcasting Commission's funding decisions.

<sup>199</sup> Broadcasting Act 1989, s 40.

<sup>200</sup> Ibid, s 4(1)(c).

<sup>201</sup> For those that do not, see the "Digital Media" section of the NZ on Air website, above n 198.

<sup>202</sup> Broadcasting Act 1989, s 4(1)(e). The Codes of Broadcasting Practice can be found at Broadcasting Standards Authority "Codes & Standards" <[www.bsa.govt.nz/standards](http://www.bsa.govt.nz/standards)>.

<sup>203</sup> Law Commission, above n 8, at R29 and [7.115]–[7.117].

necessary to make sure that news content funded by the Broadcasting Commission will still be accountable to a code of standards.

The Law Commission's proposal reveals the inconsistencies in the Broadcasting Commission's system. The Broadcasting Commission was created in the pre-convergence world. Under the Broadcasting Act 1989, the Broadcasting Commission is to make funds available for:<sup>204</sup>

- (e) broadcasting; and
- (f) the production of programmes to be broadcast; and
- (g) the archiving of programmes.

"[B]roadcasting" is defined in the Act as "any transmission of programmes..." and "programme" is defined as "sounds or visual images, or a combination of sounds and visual images..." and not "visual images... that consist predominantly of alphanumeric text."<sup>205</sup> The Broadcasting Act was amended in 2008 to reflect changes in the digital environment.<sup>206</sup> The Broadcasting Commission can now also make funds available for:<sup>207</sup>

- (a) transmitting on demand; and
- (b) producing content for transmitting on demand; and
- (c) archiving content.

"[T]ransmit on demand" is defined as "the transmission of content, by any means...". This allows the Broadcasting Commission to fund programmes that will only be viewed online. "[C]ontent" is defined as meaning both "programmes" and "visual images that consist predominantly of alphanumeric text and software".<sup>208</sup> This definition is confusing. It seems that the Broadcasting Commission cannot fund pure text content unless it is combined with software, such as in the recently-funded mobile phone app, *Let's Get Inventin'*.<sup>209</sup> For example, a hyperlinked online story book would probably meet the definition but an online short story would not. In the news environment, the Broadcasting Commission can fund online video, online radio

---

<sup>204</sup> Broadcasting Act 1989, s 36(1).

<sup>205</sup> Ibid, s 2.

<sup>206</sup> Broadcasting Amendment Act 2008 No 3.

<sup>207</sup> Broadcasting Act 1989, s 36(2). The Broadcasting Commission must do so "in a manner consistent with its primary functions."

<sup>208</sup> Ibid, s 2.

<sup>209</sup> Craig Foss "Productive first year for NZ On Air's digital fund" (press release, 13 September 2013) <<http://www.beehive.govt.nz/release/productive-first-year-nz-air's-digital-fund>>.

and, potentially, text-based journalism combined with software.<sup>210</sup> This means the Broadcasting Commission could fund an online news interview programme but not text interviews on the same website. Similarly, it could fund an online community radio channel but not an online text-based website such as Bernard Hickey's proposed non-profit news site, *Journalism.org.nz*.<sup>211</sup>

The Law Commission's review recognises that the only viable option in the digital age is to treat different technologies equally. The Broadcasting Commission's functions under the Broadcasting Act are dominated by pre-convergence thinking. Applied online, they are confusing and unfair.<sup>212</sup> When the time comes for single-standards news media regulation, the funding options available to the Broadcasting Commission – at least as far as they apply to news and current affairs programmes – should also be revisited. The Broadcasting Commission's funding capabilities should be extended to apply to all news content.<sup>213</sup> The NMSA cannot do any more to promote diversity. Extending the Broadcasting Commission's mandate would help fund valuable news content and community providers without disturbing the NMSA's independence.

---

<sup>210</sup> A further complication is working out which standards would currently apply to an online news programme funded by the Broadcasting Commission. Under s 40 of the Act, recipients of funding must provide "undertakings that the programme or content will be consistent with the standards specified in section 4(1)." These standards include under s 4(1)(e) "any approved code of broadcasting practice applying to the programmes." It is not clear which standards, if any, would apply. The BSA does not have jurisdiction over online content that does not replicate broadcast content (above n 164). The OMSA would probably have jurisdiction over an programme proposed by one of its members but its membership is limited to the seven major broadcasters (above n 7). Print-based providers wishing to apply for funding for audiovisual news programmes would find themselves in a regulation gap. A practical solution would be to stretch the "broadcasting standards" requirement in s 4(1) to include the Press Council's Statement of Principles. The other option, and the only option for non-members of the Press Council, would be to just admit that no "broadcasting standards" apply to the programme per s 4(1)(e) and leave the programme unregulated.

<sup>211</sup> See above n 157.

<sup>212</sup> David Farrar "NZ on Media" (2009) Kiwiblog <[http://www.kiwiblog.co.nz/2009/09/nz\\_on\\_media.html](http://www.kiwiblog.co.nz/2009/09/nz_on_media.html)>; Janet Wilson "Show Me The Money!" (2009) The Beautiful & The Damned <<http://www.janetwilson.co.nz/2009/09/show-me-the-money/>>.

<sup>213</sup> Arguably, the same logic applies to all entertainment content. The Law Commission, above n 8, at [8.1]–[8.30] recommend a wider review of entertainment regulation.

## *V Public Accountability*

Public accountability can be split into three parts. Firstly, the public needs easy access to the regulator. It must be aware the regulator exists, be able to engage in the complaints process, and have access to the relevant codes, procedures and decisions. Secondly, the public needs to have confidence that the regulator is effective. The regulator must be empowered with meaningful remedies and sanctions and subject to the wider scrutiny of appeal and review. Lastly, public accountability must extend beyond the individual-led complaints process. There must be some method of overseeing the wider trends and practices of the news media.

### *A Public Access*

#### *I Awareness*

The current system suffers from mixed levels of awareness. In the Law Commission's research, only 43% of those surveyed knew who to go to to make a complaint; 57% either did not know or were unsure.<sup>214</sup> Awareness was divided unevenly between the different regulators. When prompted, 93% had heard of the BSA yet only 26% had heard of the Press Council.<sup>215</sup> The Barker-Evans Review of the Press Council reached a similar conclusion. It found "that the Press Council was not as widely known amongst the general populace as other industry-based complaint schemes."<sup>216</sup> It suggested that what is important is not whether individuals know about the relevant body but whether they have "ready ways to discover if there is a body."<sup>217</sup> While such a process of discovery may be feasible, it is an unreasonable expectation. It would be difficult to create a strong culture of accountability if the regulator's existence was not well-known. The recent creation of the OMSA – which presumably has very minimal public recognition – makes the discovery process all the more confusing. If we accept that the public's ability to hold the media to account is an important one, then we must make that process as simple as possible.

The BSA's higher levels of awareness can at least partly be explained by the requirement in the Broadcasting Act for broadcasters "to broadcast on each channel or broadcasting station operated by the broadcaster notices (each of which shall be of

---

<sup>214</sup> Big Picture Marketing and Research Ltd, above n 155, at [8.1].

<sup>215</sup> Ibid, at [8.3].

<sup>216</sup> Press Council Review, above n 4, at 78.

<sup>217</sup> Ibid, at 79.

at least 15 seconds' duration) publicising the procedure for making such complaints."<sup>218</sup> The Law Commission recommends a similar system:<sup>219</sup>

There should be a requirement, imposed by contract on all members of the NMSA, to regularly publish a statement that they are bound by the NMSA's code and that complaints can be made about breaches of it.

This requirement should help the public's awareness of the NMSA. The fact that the NMSA replaces a confusing three-pronged system will also help. The public will not have to worry about choosing between multiple regulators.

## *2 The complaints process*

The Law Commission's recommended process is very similar to those of the BSA, Press Council and the OMSA.<sup>220</sup> Anyone is able to complain.<sup>221</sup> In the first instance, complainants must approach the publisher unless they can show a good reason for not doing so.<sup>222</sup> If the complaint is not resolved at this preliminary stage, complainants will then be able to approach the NMSA.<sup>223</sup> The NMSA, like the current regulators, will be able to filter complaints to remove those which are "trivial, vexatious, improperly motivated or outside its jurisdiction."<sup>224</sup> The Law Commission recommends the process be kept "as informal as possible."<sup>225</sup> Complainants will simply be required to point to a standard they believe has been breached or, if they simply seek a declaration, allege general unethical conduct.<sup>226</sup> This will reduce the

---

<sup>218</sup> Broadcasting Act 1989, s 6(1)(ba).

<sup>219</sup> Law Commission, above n 8, at [7.90].

<sup>220</sup> Price, above n 5, at 3–6 and 149–153; OMSA Constitution, above n 7, sch 2 and 4.

<sup>221</sup> Law Commission, above n 8, at [7.63]. There was some suggestion during the Leveson Inquiry (above n 12, at 1591–1592) that only those directly affected by a breach in standards should be able to complain. Lord Leveson at 1592 dismissed the argument, pointing out, "If a title has agreed to conform to certain standards then it is a reasonable expectation that they should do so without any group who maintains that those standards are not being upheld being accused of trying to interfere with freedom of expression." The Law Commission at [7.63] seem to agree: "The maintenance of proper media standards is an issue for everyone."

<sup>222</sup> Law Commission, above n 8, at [7.64]. The OMSA is the only current regulator where this is not the case (OMSA Constitution, above n 7, sch 2 r 1).

<sup>223</sup> Law Commission, above n 8, at [7.64].

<sup>224</sup> Ibid, at [7.67]; compare Broadcasting Act 1989, s 11: "The Authority may decline to determine a complaint referred to it under section 8 if it considers– (a) that the complaint is frivolous, vexatious, or trivial." As at 5 October 2013, all complaints to the OMSA have failed at this filtering step.

<sup>225</sup> Law Commission, above n 8, at [7.91].

<sup>226</sup> Ibid, at [7.56].



cost and expertise required to engage in the process, allowing general members of the public to easily lay a complaint.

There is little research on the current complaints process. The Law Commission's research did not survey enough complainants to provide useful information.<sup>227</sup> The Barker-Evans Review of the Press Council surveyed complainants and provides some information, albeit specific to the Press Council.<sup>228</sup> Complainants were generally happy with the procedure – they disagreed that the process was too complicated, formal, intimidating or took too much time<sup>229</sup> – but not happy with the way in which the Press Council handled the complaint. The majority disagreed that the process was fair and thought that the Press Council took the media organisation's word for what happened.<sup>230</sup> Complaints were evenly divided on the value of the process but thought that the concept of the Press Council was valuable (66.7%).<sup>231</sup> The Barker-Evans Review suggests that the problems with the Press Council lie beyond the actual complaints process. Greater independence, transparency, meaningful remedies, and the ability to take the complaint further should help to create a greater impression of fairness and justice. There does not appear to be any significant need to depart from the current process.

### 3 *Transparency*

The Law Commission recommends that the "NMSA should be transparent in its operations and decisions and should take all reasonable steps to keep the public informed."<sup>232</sup> The NMSA will be required to publish its code of practice, decisions, Annual Report and organisational documents.<sup>233</sup> The current regulators do a fair job of publishing most of these documents on their websites.<sup>234</sup> The Law Commission's

---

<sup>227</sup> Ibid, at [8.6]. The research took a random sample of the population. Of that sample, only 3% had made a complaint, making it difficult to draw any conclusion about the overall complaints process.

<sup>228</sup> Press Council Review, above n 4, at 60.

<sup>229</sup> Ibid, at 62.

<sup>230</sup> Ibid, at 62.

<sup>231</sup> Ibid, at 62–63.

<sup>232</sup> Law Commission, above n 8, at [7.92].

<sup>233</sup> Ibid.

<sup>234</sup> Broadcasting Standards Authority <[www.bsa.govt.nz](http://www.bsa.govt.nz)> (under s 21(c) of the Broadcasting Act 1989, one of the functions of the BSA is "to publicise its procedures in relation to complaints"); Press Council <[www.presscouncil.org.nz](http://www.presscouncil.org.nz)>; Online Media Standards Authority <[www.omsa.co.nz](http://www.omsa.co.nz)>. The Press Council could do a better job of publishing its constitution.

recommendation should strengthen the current availability of information. It echoes the statutory recognition in the Official Information Act 1982 that access to information can encourage more effective public participation and promote the accountability of officials.<sup>235</sup> It also fits with the general trend towards openness in government. Like the public bodies to which the Official Information Act applies, the NMSA will be performing a critical public function. Transparency will increase the public's ability to engage in the regulatory process and give it greater confidence in the NMSA's procedures.

The Law Commission also recommends that "each media agency that belongs to the NMSA should be required to report each year on the complaints it has handled itself."<sup>236</sup> The requirement will be limited to formal complaints. The initial attempt at resolving the complaint is an important part of the process. The Barker-Evans Review stressed that "a sensible and measured response by an editor or some senior member of the editorial team at first instance will often deflect the ire of a complainant."<sup>237</sup> Transparency could interfere with the incentives for organisations to respond well to a complaint at first instance. Organisations might decide that if they have to report every complaint, they may as well let them run to the official NMSA stage. Requiring disclosure of all formal complaints could also lend spurious "knee-jerk" complaints unwarranted credibility. On the other hand, the handling of internal complaints is valuable information that gives the public an idea of an organisation's commitment to journalistic standards. A sensible solution would be to restrict the reporting requirement to basic data on the numbers of complaints received, their general substance, and their resolution. This would give the public wider information about how the in-house resolution process functions but still give strong incentives for organisations to deal with complaints as early as possible.

## ***B Effectiveness***

### *1 Remedies and sanctions*

The Leveson Inquiry, Finkelstein Inquiry and the Law Commission all accept the case for stronger powers. The Law Commission recommends the following.<sup>238</sup>

---

<sup>235</sup> Official Information Act 1982, s 4(a).

<sup>236</sup> Law Commission, above n 8, at [7.87].

<sup>237</sup> Press Council Review, above n 4, at 81.

<sup>238</sup> Law Commission, above n 8, at R17.

- (a) a requirement to publish an adverse decision in the relevant medium, with the NMSA having the power to direct the prominence and positioning of the publication (including placement on a website and period of display);
- (b) a requirement to take down specified material from a website;
- (c) a requirement that incorrect material be corrected;
- (d) a requirement that a right of reply be granted to a person;
- (e) a requirement to publish an apology;
- (f) a censure; and
- (g) a power to terminate a member's contract and suspend or terminate membership in the case of persistent or serious non-compliance with the standards or with the decision of the NMSA.

The powers in (a) to (f) are publication-based and are similar to those recommended by the Finkelstein Inquiry.<sup>239</sup> They all involve some limitation on the publisher's right to publish what they would like. The Law Commission draws the line at preventing initial publication; the remedies will only apply after the fact.<sup>240</sup> The Law Commission's recommendations are a significant increase in powers from those of the Press Council and the OMSA. If the Press Council upholds a complaint, the only remedy is a requirement on the publication concerned to publish the decision and give it fair prominence.<sup>241</sup> The OMSA has slightly extended powers. Along with publishing a summary of the Complaints Committee's decision, the publisher must "take any other action with regard to the content stipulated by the Complaints Committee, including withdrawing, modifying, correcting or clarifying it."<sup>242</sup>

The BSA has a wider range of powers. It can order monetary compensation of up to \$5000 for privacy breaches, prevent the broadcaster from broadcasting for 24 hours, and recover costs.<sup>243</sup> Unlike the Law Commission, the Leveson Inquiry recommended that its new regulator have the power to impose monetary sanctions.<sup>244</sup> Lord Leveson based his reasoning on the difference between remedies and sanctions: remedies are designed to respond to the particular harm that was the subject of the

---

<sup>239</sup> Finkelstein Inquiry, above n 12, at [11.74]–[11.76]. Finkelstein's recommendations correspond with (a) to (e) of the Law Commission's list. The power to terminate a member's contract in (g) would be unnecessary in Finkelstein's system as sanctions will be statutorily enforced.

<sup>240</sup> Law Commission, above n 8, at [7.66].

<sup>241</sup> Press Council Review, above n 4, at 53.

<sup>242</sup> OMSA Constitution, above n 7, sch 2, r 5(b)(ii). The increase in powers over the Press Council is probably due to one of two reasons: either an anticipation of the Law Commission's recommendation for stronger sanctions, or due to the fact that online content is easier to edit and modify than print content and is more likely to be repeatedly accessed after publication.

<sup>243</sup> Broadcasting Act 1989, ss 13(1)(b), 13(1)(d) and 16.

<sup>244</sup> Leveson Inquiry, above n 12, at 1767.

complaint; sanctions seek to punish and have a deterrent effect.<sup>245</sup> Lord Leveson did not think that the remedies available to the Press Complaints Commission ("PCC") were effective.<sup>246</sup>

While it may be embarrassing for editors to publish adjudications, this sanction is not enough to deter repeat offending. Further, I have seen no evidence that the sanctions regime overall has had a long-term impact on the behaviours and actions of publications or journalists who were found to have transgressed.

The decision to recommend monetary sanctions went against the evidence of many submitters that the requirement to publish adjudications was an adequate disincentive for editors.<sup>247</sup> Similarly, the Law Commission says that it was "told by the newspapers and the Press Council that the requirement to publish an adverse decision is effective."<sup>248</sup> Some will view these comments with a dose of cynicism; it is clearly in the interests of the industry to justify weaker sanctions. Nevertheless, the Law Commission's recommendations should be sufficient. It does not have to deal with the same ethical concerns as the Leveson Inquiry and yet the recommendations still go further than the Press Council's current powers. The requirement to not only publish a decision, but also an apology and/or a right of reply is a significant intrusion on the editorial role and should increase the deterrent effect of the current system. The recommendations also match the findings of the Barker-Evans Review that most complainants want the regulator to correct the relevant mistake through retraction or clarification.<sup>249</sup> Monetary sanctions would be unnecessary and difficult to apply across the NMSA's larger range of publishers. Publication-based remedies respond directly to the harm caused, automatically taking into account the scale of the particular publication.

In the case of persistent non-compliance, the NMSA will be able to terminate a member's contract. This would be a bold step and, in the case of a large media organisation, the NMSA would risk losing a significant proportion of its funding. The Finkelstein Inquiry recommended statutory backing to prevent its regulator becoming a "toothless tiger" without the ability to properly enforce its sanctions.<sup>250</sup> The aim of independence precludes the Law Commission from recommending a similar provision. The NMSA will largely have to rely on moral pressure. It needs to be able to speak from a position of integrity, in a similar way to an ombudsman or

---

<sup>245</sup> Ibid, at 1591.

<sup>246</sup> Ibid, at 1553.

<sup>247</sup> Ibid, 1553–1555.

<sup>248</sup> Law Commission, above n 8, at [7.69].

<sup>249</sup> Press Council Review, above n 4, at 61.

<sup>250</sup> Finkelstein Inquiry, above n 12, at [11.77].

commissioner. Strong public awareness and confidence will help the NMSA achieve such a position.

## 2 Further options

The NMSA's complaints process will provide a simple, cost-effective means to resolve most complaints. Further dispute resolution options will allow complainants and publishers to test the NMSA's conclusions, reducing the risk of bad decisions and creating a more just system. By subjecting the regulator to outside scrutiny, it should also give the public greater confidence in its ability to hold the news media to account.

Within the NMSA, the Law Commission recommends the establishment of an appeals body and a mediation service.<sup>251</sup> The former has been foreshadowed by the OMSA's newly created appeals body.<sup>252</sup> An appeals body would help establish a body of precedent to shed light on the NMSA's method of applying its code of standards.<sup>253</sup> It would also give complainants assurance that they are not at the mercy of a single committee. The disadvantage of an appeals body is its potential to drag out the complaints process. To avoid this risk, appeals should be limited to issues of interpretation that will be of wider benefit to the news media and the public. The mediation service would enable complainants and news media organisations to settle cases that might otherwise end up in court, providing another dispute resolution option.<sup>254</sup> The system would be voluntary; it would not be able to be formalised without a statutory foundation.<sup>255</sup> Both the appeals body and the mediation service will increase the NMSA's capability to deal with complaints and create a greater perception of justice.

The Law Commission "think[s] it likely that the decisions of the NMSA would be subject to judicial review in the High Court."<sup>256</sup> In *Electoral Commission v*

---

<sup>251</sup> Law Commission, above n 8, at [7.78]–[7.79].

<sup>252</sup> OMSA Constitution, above n 7, sch 3. Neither the Press Council nor the BSA contains an appeals body, though decisions of the BSA may be appealed to the High Court through s 18 of the Broadcasting Act 1989.

<sup>253</sup> Price, above n 5, at 3 and 149 explains the difficulties of trying to extract a consistent jurisprudence from the decisions of the BSA and the Press Council. The task is difficult but not impossible.

<sup>254</sup> Law Commission, above n 8, at [7.79]–[7.84].

<sup>255</sup> Ibid, at [7.82].

<sup>256</sup> Ibid, at [7.78].

*Cameron*,<sup>257</sup> the Court of Appeal used the broad definition of "statutory power" in the Judicature Amendment Act 1972 to review a decision of the ASA's Complaints Board.<sup>258</sup> The court held that "statutory power" extended to "the formulation by the [ASA] of regulations or by-laws (the codes) and the decisions by the Board in accordance with them so as to affect the rights, powers and privileges of the [Electoral] Commission."<sup>259</sup> The Court placed weight on the statutory recognition of the ASA in the Broadcasting Act and the extent to which the ASA was able to impose collective standard-setting on the Electoral Commission and other advertisers. This gave the ASA "a role of a public nature."<sup>260</sup> In *Easton v Human Rights Commission*, the High Court followed the Court of Appeal's reasoning in *Cameron*, holding that decisions of the ASA's Board were reviewable.<sup>261</sup> The Law Commission has consciously modelled the NMSA on the ASA. Like the ASA, it will enjoy statutory recognition and its position as sole news regulator will allow it to impose a similar level of collective standard-setting, affecting the rights, powers and privileges of news media organisations. It is likely that the reasoning in *Cameron* would apply to the NMSA.<sup>262</sup> The scope of review, however, is likely to be limited. In *Cameron*, the Court of Appeal held that bodies like the ASA exercising public regulatory functions "may not easily fall for examination on conventional grounds" and that a more flexible approach may be necessary.<sup>263</sup> The courts would probably be reluctant to exercise too much power over a self-regulatory body like the NMSA, especially given that it is set up to enjoy independence from the state. Limited powers of review would still be enough to ensure that the processes followed by the NMSA are fair and consistent.

The New Zealand Bill of Rights Act 1990 ("NZBORA") could provide another way for the public to hold the news media to account. It would also be particularly important for the news media, allowing publishers to point to the right of freedom of expression in s 14. The Law Commission does not think that the NZBORA would apply to the NMSA.<sup>264</sup> Instead, it recommends that both the constitution of the

---

<sup>257</sup> *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA).

<sup>258</sup> Judicature Amendment Act 1972, s 3.

<sup>259</sup> *Electoral Commission v Cameron*, above n 257, at 429.

<sup>260</sup> *Ibid*, at 424.

<sup>261</sup> *Easton v Human Rights Commission* HC Wellington CIV-2009-485-726, 10 February 2010 at [33].

<sup>262</sup> Statutory power is not determinative of review: *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) at 11. If the courts did not follow the reasoning in *Cameron*, it could still be possible to argue that the nature of the NMSA's powers required its decisions to be reviewable.

<sup>263</sup> *Electoral Commission v Cameron*, above n 257, at 430.

<sup>264</sup> Law Commission, above n 8, at [7.53].

NMSA and its code of practice recognise and guarantee the right of freedom of expression in the NZBORA.<sup>265</sup> Nevertheless, by a similar logic to *Cameron*, there is a good chance the NZBORA *will* apply to the NMSA. Under s 3(b), the NMSA clearly exercises a "public function" and there is a strong argument that that public function is "conferred... pursuant to law" through the various statutes that recognise the NMSA. Without that statutory recognition, the NMSA would be unable to exercise its public function. Complainants or publishers would be able to argue in court that, in deciding the relevant complaint, the NMSA did not act within the NZBORA.<sup>266</sup>

### ***C A Broader Role***

The Barker-Evans Review argued that the Press Council should be more than just an adjudicator of complaints: it has a "broader role of informing on the issues that affect the ability of the media to openly and objectively convey matters of the day."<sup>267</sup> The Law Commission agrees. It recommends that "the NMSA should keep an overview of trends, and undertake research and conduct public surveys to monitor and draw attention to any developments or practices which could detrimentally affect standards."<sup>268</sup> This role would be funded through contracts with the government.<sup>269</sup> It would allow for a more proactive approach in the maintenance of standards, similar to that of an ombudsman or commissioner.<sup>270</sup> The NMSA has the necessary expertise but the success of the role will largely depend on the personnel involved and sufficient government funding.

---

<sup>265</sup> Ibid, at [7.53].

<sup>266</sup> For a discussion of the ways in which the BSA applies the NZBORA, see Claudia Geiringer and Steven Price "Moving from Self-Justification to Demonstrable Justification — the Bill of Rights and the Broadcasting Standards Authority" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation* (LexisNexis NZ, Wellington, 2008). It is likely that the NMSA would be required to follow a similar approach.

<sup>267</sup> Press Council Review, above n 4, at 88.

<sup>268</sup> Law Commission, above n 8, at [7.86].

<sup>269</sup> Ibid, at [7.102].

<sup>270</sup> Alastair Morrison, above n 48, at 44 even suggests that the parliamentary commissioner concept is one worth pursuing for the news media. Provided the NMSA has sufficient independence and is suitably resourced, it should be able to exercise its oversight and monitoring function in a similar way to an ombudsman or commissioner. The concept should at least provide the NMSA with some ideas as to how to exercise this role effectively.

This broader role could extend further than the maintenance of standards, to encouraging public debate about the media. In 1991, Margie Comrie and Judy McGregor wrote:<sup>271</sup>

The news media are dangerously under-debated in New Zealand society. There is a worrying absence of critical scrutiny about such issues as ownership and control, the role of the news media, what values they employ and the relationship between politics and the news media.

The situation does not seem to have changed much since then. A single-standards regulator could help stimulate a wider appreciation of the importance of the news media in New Zealand society. The NMSA would have greater awareness than any of the current regulators and would be the prime authority in a more formalised system. It could leverage these attributes to encourage debate and discussion through conferences, relationships with academics and, of course, close work with news media organisations. Journalism's ability to find a place for itself in the digital age will arguably depend on its ability to convince the public that its functions are democratically important. Greater public awareness and discussion of this importance would benefit both the news media and democracy.

---

<sup>271</sup> Margie Comrie and Judy McGregor "Introduction" in Margie Comrie and Judy McGregor (eds) *Whose News?* (Dunmore Press, Palmerston North, 1992) at 9.



## *VI Conclusion*

News media regulation has slowly and pragmatically developed over centuries to encompass different technologies and different democratic demands. Digital convergence requires a fundamental change. The current system, with its uneven structure and technology-specific regulators, looks increasingly like a form of regulatory apartheid. The Law Commission's proposed news media regulator, the NMSA, makes the necessary change. It defines the news media by what they do rather than who they are, tying them to their democratic role. The NMSA will be genuinely independent, protecting the integrity of regulation and the ability of the news media to hold the government to account. It will enable diversity, creating a technology-neutral platform open to a diverse range of publishers whether large or small, commercial or alternative, online or offline. Lastly, it will hold the news media accountable to the public, to whom it owes all its claims of importance.

The Law Commission's proposals currently sit in a limbo of unimplemented reports. Eventually, they will have to be revisited. When that time comes, I recommend a few improvements:

- (a) Implementing an independent regulator will not be easy. The government should investigate the possibility of a statute-based solution that still guarantees the independence of the news media. A statute-based solution is not ideal, but it would help motivate the news media to get behind a genuinely independent solution.
- (b) The Law Commission's definition of news media should be modified to focus its content requirements on the generation and/or aggregation of news. News does not need to be qualified by the phrase "current value", nor does it need to exist alongside information and opinion.
- (c) The creation of a single-standards regulator would be an opportune time to reconsider the technological distinctions that apply to the Broadcasting Commission, at least in the area of news and current affairs. In the post-convergence world, the only fair solution is for the Commission's funds to apply across all technologies.

The Law Commission's proposals deserve genuine consideration. They are an opportunity for the news media to reassert its democratic role in society and carry it forward into the future.

## *Bibliography*

### ***Legislation***

Broadcasting Act 1989.

Care of Children Act 2004.

Children, Young Persons, and Their Families Act 1989.

Communications Act 2003 (UK).

Copyright Act 1994.

Criminal Procedure Act 2011.

Defamation Act 1992.

Electoral Act 1993.

Evidence Act 2006.

Fair Trading Act 1986.

Family Courts Act 1980.

Family Proceedings Act 1980.

Health Practitioners Competence Assurance Act 2003.

Human Rights Act 1993.

Judicature Amendment Act 1972.

Local Government Official Information and Meetings Act 1987.

Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003.

New Zealand Bill of Rights Act 1990.

New Zealand Public Health and Disability Act 2000.

Official Information Act 1982.

Privacy Act 1993.

Radio New Zealand Act 1995.

Remuneration Authority Act 1977.

Social Workers Registration Act 2003.

### ***Cases***

*Abrams v United States* 250 US 616 (1919).

*Easton v Human Rights Commission* HC Wellington CIV-2009-485-726, 10 February 2010.

*Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA).

*Lange v Atkinson* [2000] 1 NZLR 257 (PC).

*Lange v Atkinson* [1998] 3 NZLR 424 (CA).

*Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

*Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 (CA).

### ***International Treaties***

International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976).

*United Nations Declaration of Human Rights* GA Res 217 A(III) (10 December 1948).

### ***Regulator Materials***

New Zealand Press Council "Complain" <[www.presscouncil.org.nz/complain.php](http://www.presscouncil.org.nz/complain.php)>.

New Zealand Press Council "Statement of Principles" <[www.presscouncil.org.nz/principles.php](http://www.presscouncil.org.nz/principles.php)>.

Online Media Standards Authority *OMSA Constitution* (2013) <[www.omsa.co.nz/constitution/](http://www.omsa.co.nz/constitution/)>.

*Otago Mental Health Support Trust v Critic-Te Arohi Press Council*, Case 2144, October 2010 <[http://www.presscouncil.org.nz/display\\_ruling.php?case\\_number=2144](http://www.presscouncil.org.nz/display_ruling.php?case_number=2144)>.

## **Reports**

*Bugger... it's ok! The Case for Advertising Self-Regulation* (Advertising Standards Authority, Wellington, 2008).

Australian Government *Convergence Review* (Final Report to the Minister for Broadband, Communications and the Digital Economy, Sydney, 2012) [Convergence Review].

Ian Barker and Lewis Evans *Review of the New Zealand Press Council* (2007) [Press Council Review].

Big Picture Marketing and Research Ltd *Public Perception of News Media Standards and Accountability in New Zealand* (summary of the online survey conducted for the Law Commission, April 2012).

Lara Fielden *Regulating the Press: a Comparative Study of International Press Councils* (University of Oxford, Reuters Institute for the Study of Journalism, 2012).

The Hon R Finkelstein QC *Report of the Independent Inquiry into the Media and Media Regulation* (Report to the Minister for Broadband, Communications and the Digital Economy, Canberra, 2012) [Finkelstein Inquiry].

Law Commission *The News Media Meets 'New Media'* (NZLC IP27, 2011).

Law Commission *The News Media Meets 'New Media'* (NZLC R128, 2013).

The Rt Hon Lord Justice Leveson *An Inquiry into the Culture, Practices and Ethics of the Press* (The Stationery Office, London, 2012) [Leveson Inquiry].

Penny O'Donnell, David McKnight and Jonathan Este *Journalism at the Speed of Bytes: Australian Newspapers in the 21st Century* (The Walkley Foundation, 2012).

Bill Rosenberg *News Media Ownership in New Zealand* (Auckland, 2008) <<http://canterbury.cyberplace.org.nz/community/CAFCA/publications/Miscellaneous/mediaown.pdf>>.

## **Books and Book Chapters**

Benedict Anderson *Imagined Communities* (Verso, London, 2006).

Robert Baldwin and Martin Cave *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, Oxford, 1999).

Alister Browne "Reporting the Politicians: Feasting in the Gallery" in Judy McGregor (ed) *Dangerous Democracy? News Media Politics in New Zealand* (Dunmore Press, Palmerston North, 1996) 64.

John Burrows and Ursula Cheer *Media Law in New Zealand* (6th ed, LexisNexis NZ, Wellington).

Craig Calhoun "Introduction: Habermas and the Public Sphere" in Craig Calhoun (ed) *Habermas and the Public Sphere* (MIT Press, Cambridge, Massachusetts, 1992).

Joseph N Cappella and Kathleen Hall Jamieson *Spiral of Cynicism: The Press and the Public Good* (Oxford University Press, New York, 1997).

Noam Chomsky and Edward S Herman *Manufacturing Consent: the Political Economy of the Mass Media* (Pantheon Books, New York, 2002).

Margie Comrie and Judy McGregor "Introduction" in Margie Comrie and Judy McGregor (eds) *Whose News?* (Dunmore Press, Palmerston North, 1992) 9.

James Curran "Global Journalism: A Case Study of the Internet" in Nick Couldry and James Curran (eds) *Contesting Media Power: Alternative Media in a Networked World* (Rowman & Littlefield Publishers, Lanham, Maryland, 2003).

James Curran *Media and Power* (Routledge, London, 2002).

James Curran and Jean Seaton *Power Without Responsibility: the Press, Broadcasting, and New Media in Britain* (6th ed, Routledge, London, 2003).

Tim Dwyer *Legal and Ethical Issues in the Media* (Palgrave Macmillan, Basingstoke, 2012).

Herbert J Gans *Democracy and the News* (Oxford University Press, New York, 2003).

Nicholas Garnham "The Media and the Public Sphere" in Craig Calhoun (ed) *Habermas and the Public Sphere* (MIT Press, Cambridge, Massachusetts, 1992).

Andrew Geddis "The press: the media and the 'Rupert Murdoch problem'" in Keith D Ewing, Jacob Rowbottom and Joo-Cheong Tham (eds) *The Funding of Political Parties: Where Now?* (Routledge, New York, 2012).

Claudia Geiringer and Steven Price "Moving from Self-Justification to Demonstrable Justification — the Bill of Rights and the Broadcasting Standards Authority" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation* (LexisNexis NZ, Wellington, 2008) 295.

Thomas Gibbons *Regulating the Media* (Sweet and Maxwell, London, 1991).

Jürgen Habermas *The Structural Transformation of the Public Sphere* (MIT Press, Cambridge, Massachusetts, 1989).

David Halberstam *The Powers That Be* (Alfred A Knopf, New York, 1979).

Janet Hoek and Philip Gendall "Public Opinion Polling: Supporter or Subverter of Democracy" in Judy McGregor (ed) *Dangerous Democracy? News Media Politics in New Zealand* (Dunmore Press, Palmerston North, 1996) 210.

Henry Jenkins *Convergence Culture: Where Old and New Media Collide* (NYU Press, New York, 2008).

Geoff Kemp "Chapter 1: Media, Politics and Democracy" in Babak Bahador et al (eds) *Politics and the Media* (Pearson, Auckland, 2013).

Geoff Kemp "Chapter 2: Media History" in Babak Bahador et al (eds) *Politics and the Media* (Pearson, Auckland, 2013).

*Laws of New Zealand* Constitutional Law (online ed).

Brian McNair *Journalism and Democracy* (Routledge, New York, 2000).

Alexander Meiklejohn *Political Freedom: The Constitutional Powers of the People* (Harper & Row, New York, 1965).

John Stuart Mill "On Liberty" in John Gray (ed) *On Liberty and Other Essays* (Oxford University Press, Oxford, 1998).

John Milton "Areopagitica" in Gordon Campbell (ed) *Complete English Poems: John Milton*, (Everyman, London, 1993).

Alastair Morrison "The Challenge of MMP (or Will Journalism be Caught with its Pants Down?)" in Judy McGregor (ed) *Dangerous Democracy? News Media Politics in New Zealand* (Dunmore Press, Palmerston North, 1996) 30.

Paul Norris "News Media Ownership in New Zealand" in Judy McGregor and Margie Comrie (eds) *What's News? Reclaiming Journalism in New Zealand* (Dunmore Press, Palmerston North, 2002) 33.

Anthony Ogus *Regulation: Legal Form and Economic Theory* (Portland, Oregon, Hart Publishing, 2004).

Geoffrey Palmer "Towards a Constitutional Theory for the Media in the MMP Era" in Judy McGregor (ed) *Dangerous Democracy? News Media Politics in New Zealand* (Dunmore Press, Palmerston North, 1996) 17.

Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford, Melbourne, 2004).

Michael Parenti *Inventing Reality: The Politics of the Mass Media* (St Martin's Press, New York, 1986).

Steven Price *Media Minefield: a Journalist's Guide to Media Regulation in New Zealand* (New Zealand Journalists Training Organisation, Wellington, 2007).

Hugh Rennie "Broadcasting Following Deregulation" in Margie Comrie and Judy McGregor (eds) *Whose News?* (Dunmore Press, Palmerston North, 1992) 60.

Geoffrey Robertson and Andrew G L Nicol *Media Law: The Rights of Journalists and Broadcasters* (2nd ed, Longman, London, 1990).

Chris Rudd "Chapter 3: Political Economy of the Media" in Babak Bahador et al (eds) *Politics and the Media* (Pearson, Auckland, 2013).

Frederick Schauer *Free Speech: a philosophical enquiry* (Cambridge University Press, Cambridge, 1982).

C P Scott *The Making of the "Manchester Guardian"* (F Muller, London, 1946).

Bartholomew H Sparrow *Uncertain Guardians* (John Hopkins University Press, Baltimore, 1999).

Cass Sunstein *Republic.com 2.0* (Princeton University Press, Princeton, New Jersey, 2009).

Richard Tait "Never Waste a Good Crisis: The British Phone Hacking Scandal and its Implications for Politics and the Press" in Holli A Semetko and Margaret Scammell (eds) *The SAGE Handbook of Political Communication* (SAGE, London, 2012).

Jim Tully and Nadia Elsaka "Ethical Codes and Credibility: The Challenge to Industry" in Judy McGregor and Margie Comrie (eds) *What's News?* (Dunmore Press, Palmerston North, 2005) 142.

Mark Tushnet *The New Constitutional Order* (Princeton University Press, Princeton, 2003).

Mark Tushnet *Taking the Constitution Away from the Courts* (Princeton University Press, Princeton, 1999).

Mark Wheeler *Politics and the Mass Media* (Blackwell Publishers, Oxford, 1997).

### ***Journal Articles***

Linda Clark "NZ Watchdogs must Keep Up with Media's Changing Face" (2012) 18(2) *Pacific Journalism Review* 46.

Gavin Ellis "Different strokes for different folk: Regulatory distinctions in New Zealand media" (2005) 11(2) *Pacific Journalism Review*.

Gavin Ellis "Journalism's road codes: The enduring nature of common ethical standards" (2012) 18(2) *Pacific Journalism Review*.

Sonia Livingstone and Peter Lunt "Representing Citizens and Consumers in Media and Communications Regulation" (2007) 611 *Annals of the American Academy of Political and Social Science* 51.

Matthew Palmer "Using Constitutional Realism to Identify the *Complete* Constitution: Lessons from an Unwritten Constitution" (2006) 54 *Am J Comp L* 587.

Brian M Rowland "Media Fairness: Regulation, Diversity, Reality" (2001-2002) 3 *Florida Coastal Law Journal* 67.

Saima Saeed "Negotating Power: Community Media, Democracy, and the Public Sphere" (2009) 19(4/5) *Development in Practice* 466.

Teresa Scassa "Journalistic Purposes and Private Sector Data Protection Legislation: Blogs, Tweets and Information Maps" (2009-2010) 35 *Queen's Law Journal* 733.

Ryan H Weinstein "The Diversity Paradox: Media Ownership Regulation and Program Variety" (2004-2005) 10 *Stanford Journal of Law, Business & Finance* 150.

### ***Newspaper Articles and Web Content***

"Editorial: Media Regime Must Keep Regulation Voluntary" *The New Zealand Herald* (Auckland, 27 March 2013) <[http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10873844](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10873844)>.

"The End of Mass Media: Coming Full Circle" *The Economist* (United Kingdom, 7 July 2011).

Isaac Davison "Media Industry Backs Bid for New Watchdog" *The New Zealand Herald* (Auckland, 27 March 2013) [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10873856](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10873856)>.

John Drinnan "Hickey Shelves Journalism Website Plans" *The New Zealand Herald* (Auckland, 30 November 2012) <[http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=10851056](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10851056)>.

Karl du Fresne "Press gang" *NZ Listener* (Auckland, June 1 2013).

David Farrar "No Unified Media Regulator" (13 September 2013) *Kiwiblog* <[http://www.kiwiblog.co.nz/2013/09/no\\_unified\\_media\\_regulator.html](http://www.kiwiblog.co.nz/2013/09/no_unified_media_regulator.html)>

David Farrar "NZ on Media" (2009) *Kiwiblog* <[http://www.kiwiblog.co.nz/2009/09/nz\\_on\\_media.html](http://www.kiwiblog.co.nz/2009/09/nz_on_media.html)>.

Susan Forde "Media Reform: Hysterical Attacks on Weak Conroy Suggestions tell the Real Story" *The Age* (Melbourne, March 14 2013) <<http://www.theage.com.au/federal-politics/media-reform-hysterical-attacks-on-weak-conroy-suggestions-tell-the-real-story-20130314-2g1p2.html>>.



Josh Halliday "Government should Reopen Talks on Press Regulation, says Alan Rusbridger" *The Guardian* (United Kingdom, 24 May 2013) <<http://www.theguardian.com/media/2013/may/24/government-press-regulation-alan-rusbridger>>.

Lisa O'Carroll "Press Regulation: Government's Plan for a New Watchdog Delayed until Autumn" *The Guardian* (United Kingdom, 12 July 2013) <<http://www.theguardian.com/media/2013/jul/12/press-regulation-government-plan-delayed-autumn>>.

Mike O'Donnell "Govt Cool on Mega Media Regulator" (21 September 2013) Stuff.co.nz <<http://www.stuff.co.nz/business/opinion-analysis/9197612/Govt-cool-on-mega-media-regulator>>.

Steven Price "TVNZ's Weird Response to the Law Commission" (28 March 2013) Media Law Journal <<http://www.medialawjournal.co.nz/?p=600>>.

Anthony Robins "Evolving online media in New Zealand" (12 August 2012) The Standard <<http://thestandard.org.nz/evolving-online-media-in-nz/>>.

Cameron Slater "No Changes to Media Regulatory Landscape" (13 September 2013) Whale Oil Beef Hooked <<http://www.whaleoil.co.nz/2013/09/changes-media-regulatory-landscape/#axzz2gBFtlkEi>>.

Jonathan Swan "Media Reform Fails to Survive Days of Wrangling and Dashed Hopes" *The Age* (Melbourne, 22 March 2013) <<http://www.theage.com.au/federal-politics/political-news/media-reform-fails-to-survive-days-of-wrangling-and-dashed-hopes-20130321-2giu6.html>>.

Janet Wilson "Show Me The Money!" (2009) The Beautiful & The Damned <<http://www.janetwilson.co.nz/2009/09/show-me-the-money/>>.

Patrick Wintour "Press Regulation Deal: the Key Points" *The Guardian* (United Kingdom, 18 March 2013) <<http://www.theguardian.com/media/2013/mar/18/press-regulation-deal-key-points>>.

Patrick Wintour and Lisa O'Carroll "David Cameron's Dilemma over Rival Press Regulation Plan" *The Guardian* (United Kingdom, 25 April 2013) <<http://www.theguardian.com/media/2013/apr/25/david-cameron-press-regulation>>.

Patrick Wintour and Lisa O'Carroll "Newspapers' plans for post-Leveson press regulation rejected" *The Guardian* (United Kingdom, 8 October 2013) <<http://www.theguardian.com/media/2013/oct/07/ministers-seek-compromise-over-press-regulation>>.

David Wroe and Lenore Taylor "Media Reform Bills Teetering" *The Age* (Melbourne, 19 March 2013) <<http://www.theage.com.au/federal-politics/political-news/media-reform-bills-teetering-20130318-2gb9s.html>>.

### ***Press Releases***

Judith Collins "Time's up for cyber bullies" (press release, 4 April 2013) <<http://www.beehive.govt.nz/release/time039s-cyber-bullies>>.

Judith Collins and Craig Foss "Government responds to news media report" (press release, 12 September 2013) <<http://www.beehive.govt.nz/release/government-responds-news-media-report>>.

Stephen Conroy "Government response to Convergence Review and Finkelstein Inquiry" (press release, 12 March 2013) <<http://bit.ly/11XvO5P>>.

Craig Foss "Productive first year for NZ On Air's digital fund" (press release, 13 September 2013) <<http://www.beehive.govt.nz/release/productive-first-year-nz-air's-digital-fund>>.

Simon Power "Law Commission to review regulatory gaps around 'new media'" (press release, 14 October 2010) <<http://www.beehive.govt.nz/release/law-commission-review-regulatory-gaps-around-039new-media039>>.