



LAW COMMISSION  
TE·AKA·MATUA·O·TE·TURE

December 2011, Wellington, New Zealand | ISSUES PAPER 27

# THE NEWS MEDIA MEETS 'NEW MEDIA'

RIGHTS, RESPONSIBILITIES AND  
REGULATION IN THE DIGITAL AGE







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## RIGHTS, RESPONSIBILITIES AND REGULATION IN THE DIGITAL AGE

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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## FOREWORD

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The internet is often referred to as a “disruptive technology”. In the past, the term disruptive carried a negative connotation. Not today. Thanks to the internet and the read/write culture of the web, every citizen with an internet connection now has unprecedented access to information and, for the first time in human history, the ability to publish and exchange data with a potentially global audience.

This networked world is transforming nearly every facet of life. It presents major challenges – and opportunities – to the way governments, the judiciary, and businesses function.

This Issues Paper deals with a vital aspect of this process of transformation: the news media and whether, and how, it should be regulated in this digital world where anyone can break news and comment on public affairs.

The paper also addresses the broader issue of citizens exercising their free speech rights in the digital era, asking whether the laws which are designed to protect against speech abuses are fit for purpose.

We hope this paper, and the preliminary proposals it makes for reform, will be widely debated in New Zealand – in both traditional and new media fora. The issues it grapples with are vital to the health of our democracy. We look forward to hearing what the public thinks of our proposals.



*Hon Sir Grant Hammond KNZM*  
President of the Law Commission

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Ministry of Culture and Heritage

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The Human Rights Commission

Crown Law

New Zealand Police

Trade Me

NetSafe

InternetNZ

Newspaper Publishers' Association of New Zealand

The Media Freedom Committee

The New Zealand Press Council

The Broadcasting Standards Authority

Fairfax Media New Zealand

APN News & Media

Television New Zealand

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The Lead Commissioner on this paper was Professor John Burrows. Senior researchers and policy advisers were Cate Honoré Brett and Rachel Hayward.

# Call for submissions

The Law Commission is seeking wide feedback from stakeholders and the New Zealand public on the issues raised in this paper.

On page 17 we have posed a number of questions relating to our terms of reference and the contents of this paper. The summary, which can be found on page 3, sets out the various preliminary proposals we have put forward for public discussion. We are keen to receive a broad cross section of views on these questions and our preliminary proposals.

In February 2012 we will be hosting discussion forums on our website where the public can share their views on the issues and proposals discussed in this report.

We are happy to receive submissions or comments on this Issues Paper via our website, email or by mail. The submissions deadline is **Monday 12 March 2012**.

Hard copy submissions and comment should be sent to:

**New Media Review**

**Law Commission**

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# Summary and preliminary proposals

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## OUR TERMS OF REFERENCE

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1. In October 2010 the Law Commission was asked to review the adequacy of the regulatory environment in which New Zealand's news media is operating in the digital era.
2. In conducting this review we were asked to deal explicitly with the following questions:
  - how to define “news media” for the purposes of the law;
  - 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 end; and
  - whether the existing criminal and civil remedies for wrongs such as defamation, harassment, breach of confidence and privacy are effective in the new media environment and, if not, whether alternative remedies may be available.
3. This Issues Paper unpacks the policy and legal questions underlying these questions and puts forward for public consultation and submission a number of preliminary proposals for legal and regulatory reform.
4. Although on the face of it narrow in scope, this paper deals with issues of fundamental importance to all New Zealanders, including the future of the news media and the rights and responsibilities attached to the exercise of free speech in the digital era.

5. The paper is divided into two parts. In Part 1, which comprises chapters 1 – 6, we address the first two questions posed in our terms of reference. These deal with the special type of publishers known as the “news media” and the laws and regulatory environment in which they operate. In Part 2, comprising chapters 7-8, we deal with the much broader issue of citizens exercising their speech rights in the digital environment and ask whether the current legal remedies for speech abuses are adequate.

#### **PART 1: WHO ARE THE “NEWS MEDIA” AND HOW SHOULD THEY BE REGULATED?**

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6. Underpinning these questions is the long standing presumption that the news media play a vital role in a healthy democracy and this role requires special legal protections. This is reflected in a long list of legal privileges and exemptions in the New Zealand statute book which we outline in detail in chapter 3.
7. The reporting of news and current affairs involves a strong element of public trust. There is an expectation that the news media, who are granted legal privileges and exemptions, will exercise their publishing rights responsibly.
8. Sometimes that expectation is contained in an express legal requirement that reporting be “fair” or “fair and accurate”. Sometimes it is contained in a requirement of “accreditation”. Sometimes that requirement is justified by adherence to a code of practice and oversight by a regulatory body. At other times the expectation of responsibility is simply assumed.
9. Another presumption underpinning the first two questions of our terms of reference is that the law, or some form of regulation, has a role to play in holding the news media accountable to the public for the exercise of their powers.
10. All publishers are subject to the law as it is enforced in the courts. As far as other forms of regulation are concerned, in New Zealand, only broadcast media are held *legally* accountable to standards through the Broadcasting Act 1989. Print media have traditionally been subject only to industry self-regulation through the Press Council, membership of which is voluntary. Because one of the critical functions of the news media in a democracy is to act as a watch dog on government, there is a powerful argument for ensuring the state does not have any censorship powers over the news media. Traditionally this has been the primary justification for ensuring the newspaper industry has not been subject to statutory oversight in New Zealand and many other Commonwealth countries.

**The policy problems:**

11. Before the advent of the internet there was little practical necessity to consider the question: ‘who are the news media’? The ‘news media’ simply comprised the state-funded public service broadcasters and the large private industry which between them produced the nation’s daily newspapers, television and radio news and current affairs programmes.
12. These were the entities, most of them privately owned, entitled to access the special legal privileges set out in the statute book, and these were the entities held accountable to the legal and ethical standards associated with the exercise of this type of speech.
13. However in the era of the read/write web, the traditional news media, which we refer to in this report as the mainstream media, have lost their monopoly on the generation and dissemination of news and commentary. They must now compete with a range of new digital publishers, including news aggregators and current affairs bloggers, who are undertaking similar types of publishing as the mainstream media. In chapter 2 we provide an overview of this rapidly evolving new media landscape.
14. At the same time the digital environment is resulting in increasing convergence between formerly distinct sectors of the media and communications industry.
15. On one level this convergence is resulting in the collapse of the boundaries which have traditionally separated the print and broadcast segments of the news media. Increasingly these once discrete entities are transforming themselves into multi-media companies, capable of producing news in a rich mixture of text and audio-visual formats, disseminated on an ever expanding array of platforms and devices, and promulgated via social media.
16. This new decentralised and democratised model for the generation and dissemination of news and current affairs is enriching public debate. It has the potential to strengthen democracy by increasing participation in public affairs; widening the sources of information available to the public; providing a greater diversity of opinion and strengthening the levels of scrutiny and public accountability.
17. However it also creates a set of policy and legal challenges, including the following two key issues which are the focus of this review:
  - a lack of clarity in law as to which types of publishers should qualify for the statutory privileges and exemptions which at the moment apply to the “news media”;
  - a lack of regulatory parity, both between different types of traditional news media (print and broadcasters) and between traditional news media and the new digital publishers.

18. These questions are not merely academic, but are producing real problems for consumers and producers of news. Examples of these problems include:
- At present there are gaps in the regulation of some types of content produced by traditional news media. For example, while it is possible to complain to the Broadcasting Standards Authority about a serious inaccuracy in a news or current affairs programme that is broadcast on radio or television, it is not possible to complain about exactly the same content made available on-demand on a broadcaster's website, or about the text in a story on a broadcaster's website.
  - Similarly, while the provision of audio-visual content assumes an increasing importance in the news offerings of newspaper websites, these companies are not subject to the same statutory regulation which applies to other broadcasters.
  - Meanwhile, new web-based publishers of news and current affairs, both commercial and amateur, are not currently accountable to *any* regulator or complaints system – other than the basic legal framework which applies to all citizens, restricting speech which defames or causes harm.
  - On the flip side, some new publishers are facing obstacles in their ability to gather news and access information or places, such as the press gallery or news conferences, because they are not always regarded as “bona fide” members of the news media.
19. Over and above such pragmatic and competitive concerns looms the much larger public interest question: how to protect and nurture the generation and dissemination of news and current affairs in this dynamic new environment?
20. These are just some of the drivers which sit behind the first two questions posed in our terms of reference. From a public policy perspective they require us to consider whether, and in what circumstances it may be in the public interest to:
- extend the legal privileges and exemptions which currently apply to traditional news media to some new publishers; *and*
  - require this category of publishers to be held accountable, via some sort of regulatory regime, to the types of journalistic standards that have traditionally applied to news media.
21. In chapters 3 and 4 of this paper we provide a detailed analysis of the arguments for the existence of this system of privileges and accountabilities for the news media, and suggest why it is important both to retain this system for traditional news media, and extend it to some other publishers.

**Part 1: A summary of our preliminary conclusions and proposals**

22. With respect to the first policy question, *is it in the public interest to extend the legal privileges and exemptions which currently apply to traditional news media to some new publishers*, our preliminary view is “yes” - provided these privileges are matched by acceptance of the countervailing standards and accountabilities which have traditionally applied to the mainstream news media.
23. Our survey of New Zealand’s web publishing environment shows there are a number of new web-based entities taking on some of the democratic functions traditionally assigned to “the press”: providing a public watchdog on corporate and state power and facilitating the free flow of information and ideas among citizens.
24. As a matter of principle we believe the legal and regulatory environment should encourage diversity in the news media market.
25. New Zealand is an increasingly ethnically and socially diverse nation and it is critical that this diversity of view points and interests be reflected in our national debates and in the formation of public opinion.

In our view these new publishers should, in principle, enjoy the same media protections and privileges accorded traditional news media.

26. This was also the conclusion reached by the Canadian Supreme Court in 2009 when considering the scope of defences available in defamation actions. Writing for the majority, McLachlin C.J. expressly recognised and endorsed the complementary role of emerging new media:<sup>1</sup>

[t]he traditional media are rapidly being complemented by new ways of communicating on matters of public interest, many of them online, which do not involve journalists.

These new disseminators of news and information should, absent good reasons for exclusion, be subject to the same laws as established media outlets.

**The second question then is how to define which publishers should benefit from the system of legal exemptions and privileges currently reserved for the “news media”?**

27. As we explain in chapter 4 of this Issues Paper, these legal protections are designed to protect a special type of speech with special characteristics – including, most significantly a commitment to truthfulness and accuracy.
28. The type of speech the law affords special protection must be exercised responsibly.
29. We therefore put forward for public discussion the following set of criteria which we propose might provide a statutory definition of the “news media” for the purposes of accessing the legal privileges and exemptions.

For the purposes of the law the “news media” includes any publisher, in any medium, who meets the following criteria:

- a significant proportion of their publishing activities must involve the generation and/or aggregation of news, information and opinion of current value;
- they disseminate this information to a public audience;
- publication must be regular;
- the publisher must be accountable to a code of ethics and a complaints process.

30. It is important to note this definition is not intended to exclude others from reporting or commenting on the news. It simply proposes a set of statutory criteria to resolve the current uncertainty as to which groups and individuals qualify for the legal privileges and exemptions assigned to the media. It does not favour a particular category of publisher, traditional or new media, but rather seeks to protect a *special type of speech and publication purpose*.
31. The implication of this definition is that those publishers who wish to be regarded as the news media for the purposes of the law must be subject to a complaints process.
32. The second question posed by our terms of reference is to which complaints process should the currently un-regulated news media be held accountable – the Broadcasting Standards Authority (BSA) or the Press Council?
33. In chapter 5 we consider the strengths and weaknesses of these two existing regulatory bodies, the Press Council and the BSA. Gaps and inconsistencies already exist in how these two bodies cover traditional news media and our preliminary conclusion is that neither is well suited to respond to the rapidly evolving converged new media environment.
34. In New Zealand representatives of both print and broadcast media have commented on the inevitability of increased convergence and its implications for regulation, as per the following extract from a Television New Zealand response to a 2008 government consultation on regulation in the digital era:<sup>2</sup>
- The traditional reasons for regulating broadcasting in the traditional ways are fast disappearing. Distinctions between broadcasting, telecommunications, print and other forms of media are becoming increasingly blurred. This calls into question the logic of maintaining separate regulatory frameworks – BSA, ASA, Press Council.
35. In chapter 6 we review the various regulatory models for news media and how they are applied in democracies around the world and note that the regulation of the news media and the wider communications sector is the subject of major reviews in a number of overseas jurisdictions, as the impacts of convergence and digital technology challenge the traditional format-based approaches.<sup>3</sup>

36. Our preliminary proposal, outlined in detail in chapter 6, is to establish a new, independent regulator for all **news media**, regardless of the format or delivery platform.
37. The model we put forward for discussion in this paper is underpinned by the following fundamental principles:
- A free press is critical to a democracy. The Bill of Rights guarantee of freedom of expression must lie at the basis of any news media regulation. It requires that sanctions be proportionate, that accountability rather than censorship should be the guiding principle, and that any regulation should be free of state control.
  - The news media should exercise their freedom responsibly and be accountable when they fall below the appropriate standard. The privileges and exemptions conferred on the news media by law should be conditional on a guarantee that there will be responsibility and accountability.
  - Media regulation should be truly independent, both from government, and also from the industry itself.
  - Any regulatory system should foster rather than stifle diversity and growth in the generation of news and current affairs in New Zealand.
  - The system of regulation should be flexible and platform neutral, although standards may sometimes need to take account of different modes of delivery or types of publisher.
  - Any system of media regulation should not inhibit the freedom of speech of individuals who are not part of the news media. There should remain a right for individuals to speak out, however unorthodox or even wrong their views may be.

The new regulator we are proposing would have the following features:

- It would be independent of both government and the news industry.
- Appointments to the regulator would be by an independent panel. The regulator would comprise industry and non-industry representatives, the latter being the majority.
- The regulator would be responsible for working with the various sectors of the industry and consulting with the wider public to devise the set of principles by which it adjudicates. As is already the case under the current broadcasting regime, we envisage there being a number of different codes based on these principles but appropriate to different news producers and publishing environments – for example bloggers may devise their own codes.
- The regulator would be recognised by statute and funded by contributions from members and subsidised by the state.

38. As is currently the case, publishers themselves would be responsible for trying to resolve complaints in the first instance, and the regulator would effectively adjudicate only those complaints which had not been satisfactorily resolved between the complainant and the publisher. Many traditional and new web-based publishers have robust processes for responding to readers' concerns. We do not propose disturbing those arrangements.
39. Adequate resourcing is crucial for the effectiveness of our proposed regulator. However the burden of funding this body should not fall solely on news publishers.
40. It is in the public interest that as many news publishers, including small start-ups, belong to such a standards body and a lack of financial resources should not be an impediment to joining. The state and wider public have a strong interest in a robust and ethical news media and we see no reason why this body should not receive state support, provided there are no strings attached to the appropriation. There are precedents for such arrangements in other jurisdictions.<sup>4</sup>

#### Which publishers would be subject to the new regulator?

41. Our proposed statutory definition of "news media" outlined above, implies that all publishers who wish to access the legal privileges of the news media, such as exemptions from the Privacy Act, would have to be subject to the independent complaints body.
42. Beyond that self-selecting criterion, we seek submissions from the public and stakeholders as to whether any publisher should be compelled by statute to be subject to the body or whether it should be entirely voluntary.
43. In chapter 6 of the Issues Paper we put forward two options for consideration:

##### Option one:

- Membership should be entirely voluntary. Publishers who wish to have the legal standing of news media would join, because only by being subject to this complaints body would they meet the statutory requirements of "news media".

##### Option two:

- Membership should be compulsory for some categories of news publishers who meet a proposed set of criteria including for example:
  - those for whom publication is undertaken as a business or commercial activity;
  - those who are providing broad or general news services to a wide public.
- Membership would be voluntary for others.

44. Other criteria which may be appropriate to determine compulsory membership might include audience size and reach. We seek public views on those issues.

### Entertainment

45. The new regulatory body we propose in this Issues Paper would be set up to deal with unresolved complaints relating to news and current affairs content. That was the focus of our terms of reference.
46. However for many corporates, the generation and dissemination of news and current affairs forms only one part of their activities. The commissioning, production, purchase and distribution of entertainment content is an increasingly dominant part of the core business of most media companies.
47. In New Zealand entertainment content is currently subject to two different statutory regimes: films and videos are subject to the statutory regime set out in the Films, Video and Publications Classification Act 1993 which establishes the Office of Film and Literature Classification and creates the role of the Chief Censor. Entertainment content that is broadcast on radio and free-to-air or subscription television services is subject to the Broadcasting Act 1989. There is some overlap between the two statutes, as broadcasters must not broadcast any films that have been banned or restricted under the censorship regime.
48. Both these statutes were designed for a pre-digital era and create a regulatory regime based on increasingly problematic distinctions between the formats in which entertainment content is consumed, rather than the content itself.
49. While it is beyond the scope of our terms of reference to explore these issues in any depth, we believe there is a strong public interest in continuing to provide regulatory controls on some types of entertainment content, most notably free to air content which is harmful to children. We note that the issue of entertainment regulation has been under active consideration by the Ministry of Culture and Heritage and the Office of the Chief Censor within the broader context of content regulation in the digital era.
50. We also note that the Australian Law Reform Commission has recently released a report recommending radical reform of that country's regulation of entertainment content across all platforms and those proposals may provide useful material for those considering options for New Zealand.<sup>5</sup>

## PART 2: SPEECH HARMS: THE ADEQUACY OF THE CURRENT LEGAL SANCTIONS AND REMEDIES

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51. The large majority of New Zealanders publishing on the internet would not come within the ambit of the new regulatory system we propose. In essence they will be able to exercise complete freedom of speech. They can, without fear of any regulator, be inaccurate in their facts, unbalanced in their coverage and extreme in their opinions. The public can rely on them, or not, as they see fit. They would not be recognised as “news media” for the purposes of the statutory privileges.
52. But, even though they would be beyond the reach of any news regulator, these other publishers will remain subject to the *law*. They will be liable to the same consequences as the established media for wrongs such as defamation, contempt of court, publication of a suppressed name, breach of copyright – just as they are now.
53. However, not everyone who publishes on the internet is aware of or respects the existing legal constraints on speech. Added to this, the internet and its associated technologies create novel ways of causing harm through speech abuses – and creates numerous challenges for those seeking to enforce the law or obtain remedies.
54. In chapters 7–8 of this Issues Paper we address these issues and the third leg of our terms of reference:
 

**Whether the existing criminal and civil remedies for wrongs such as defamation, harassment, breach of confidence, and privacy are effective in the new media environment, and if not, whether alternative remedies might be available.**
55. Except in the area of cyber-bullying, there is little empirical research available about the size and nature of the problems associated with speech abuses on the internet in New Zealand. The public consultation following the release of this Issues Paper will hopefully provide a better understanding of the issues.
56. In chapter 7 of this paper we draw on information from a number of public and independent organisations, including New Zealand Police, the offices of the Privacy Commissioner and the Human Rights Commission and the internet safety organisation NetSafe, to provide a preliminary assessment of the level of harms. We also sought the views of Trade Me, Facebook and Google regarding the scope of the problem and the efficacy of their community monitoring and reporting tools with respect to managing speech abuses on message boards and social media sites.
57. Our preliminary conclusion is that the existing and potential harms are significant, particularly for young people whose lives are increasingly enmeshed in social media.

58. Our preliminary proposals involve a combination of legislative amendments and alternative complaints procedures. The law, even when better tailored, can only go so far. For some people the machinery of the courts and the criminal justice system presents too large a hurdle to pursue a prosecution, while taking civil legal action for wrongs such as reputational damage or privacy breaches is beyond the financial reach of most citizens.
59. Our first set of proposals is aimed at ensuring the types of serious speech harms arising from digital communication are covered by appropriate offences and that existing speech laws can be readily applied in the digital environment. We propose to:
- review the statute book to ensure all provisions imposing controls on communication are expressed widely enough to fulfil the purpose intended in the particular legislation in the digital environment;
  - consider introducing a new offence of maliciously impersonating another person. As we discuss in chapter 7, real harm can result from malicious impersonation on the web and currently there is no legal remedy unless the impersonation constitutes an element of fraud;
  - amend the Harassment Act 1997 to remove any doubt that its provisions can be applied to cyber-bullying and other forms of online intimidation, by extending its definitions to all forms of electronic communication and material published on websites;
  - clarify whether the offences relating to the misuse of a “telephone device” in the Telecommunications Act 2001 should be extended to computers and review whether the threshold for an offence is suitable for application to internet communications;
  - amend the Human Rights Act 1993 to remove any doubt that provisions barring publications “likely to excite hostility against or bring into contempt” any group of persons “on the ground of the colour, race, or ethnic or national origins of that group of persons” includes all forms of digital publishing;
  - consider amending the sections of the Human Rights Act which address sexual and racial harassment to reflect the importance of cyberspace as a “public place” from which people should not be excluded as a consequence of significant and harmful sexual or racial harassment by others.
60. In addition to these proposals, the Law Commission has previously recommended a number of changes to the Privacy Act 1993 which would address some of the gaps we have found in this review. As well as those changes, we also consider there may be merit in making it an offence, in some circumstances, to publish intimate photographs even when they were taken with the subject’s consent.

61. Finally, incitement to commit a crime is an offence even if the crime is not committed. Yet incitement to commit suicide is not an offence unless the person actually does so, or attempts to do so. Given the distress such incitements may cause in themselves, let alone the possibly devastating outcome, we think there is a strong case for making incitement to suicide criminal.

#### **A Communications Tribunal or Commissioner?**

62. Law reform alone will only go so far in addressing harmful speech in the digital era. We recognise the courts are heavy machinery for many people. A distressed victim or a young person may not wish to give evidence in court. Pursuing a civil remedy in court may be expensive, time consuming and distressing.
63. In many cases, those who have been the victim of harassment or bullying or whose reputations have been unjustifiably damaged, simply wish for the activity to stop or for the offending material to be removed. And yet often, as we discuss in chapter 7, these people feel they have no avenue of complaint or means of redress.
64. In the final chapter of this report we put forward for discussion two alternative options for new mechanisms for dealing with harms arising from speech abuses.

#### *Communications Tribunal*

65. The first proposal outlined is a Communications Tribunal that would operate at a level lower than the court system and which could administer speedy, efficient and relatively cheap justice to those who have been significantly damaged by unlawful communications.
66. The Tribunal would only deal with cases which it judges would have met the threshold of a breach of the law. It should not be a port of call for those with insubstantial complaints.
67. Harm must have resulted or be demonstrably likely to result. That harm might be financial, or might be psychological harm such as distress, intimidation, humiliation or fear for safety.
68. It would not have the power to impose criminal sanctions. Only the courts should be able to enter convictions and impose criminal sanctions such as fines and imprisonment.
69. Sanctions and remedies available to the Tribunal would include the ability to award monetary compensation up to a prescribed level; to order publication of an apology or correction; to order that a right of reply be granted; to order that the defendant cease the conduct in question (a type of injunction); and to make take-down orders against either the perpetrator or an innocent avenue of communication such as an ISP. It might also make a declaration that statements made about the victim are untrue. Failure to comply with an order would be an offence.

*A Communications Commissioner*

70. The second option we put forward for discussion is the establishment of a Communications Commissioner, possibly attached to the Human Rights Commission.
71. Many of the concerns expressed about the harms caused by social media and the internet can be traced back to the fact that there is no clearly accessible central place to take complaints, concerns or questions about material published on the internet. As noted in chapter 7, people can be left feeling that they are “shouting into space.” One response to this is to provide a portal for information and assistance.
72. The role of this person would be to provide information and where possible assist in resolving problems in an informal manner, for example through mediation. Where appropriate, he or she could also make recommendations to responsible authorities and individuals with the aim of preventing problems or improving the existing situation. In cases of serious harm, the Commissioner may refer a complainant to the police. In other cases, many of the harms that we have discussed could be resolved informally by a person with some authority contacting a website administrator to draw their attention to objectionable material, identifying the harm the post is causing, or how it may be in breach of the law.
73. The law already addresses a significant proportion of the harms that are occurring as a result of speech abuses on the internet, but often those affected – and the perpetrators themselves – may be unaware of the nature of the offence and the potential remedy. A key function of the Commissioner would be to assist citizens to access the law.
74. A Commissioner would need some limited powers of investigation and inquiry, but we do not envisage he or she would have powers of enforcement. Any matters that required enforcement powers should be left to the police or other authorities. However we believe the role would have the independence and authority to liaise effectively with publishers. Feedback we received from Facebook suggests that they are responsive to approaches from authoritative bodies when there is clear evidence of behaviour which contravenes domestic law and or their own terms and conditions.
75. We welcome public feedback on these proposals and the questions outlined on page 17.

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- 1 *Grant v Torstar Corp* [2009] SCC 61.
  - 2 TVNZ “*Separating Roles: A proposed approach to the “Future of Content Regulation”* consultation paper (2008).
  - 3 In Britain a wide ranging inquiry into news media standards and regulation is being led by Lord Justice Leveson. For the full terms of reference and supporting information see < [www.levesoninquiry.org.uk](http://www.levesoninquiry.org.uk) >. In Australia there are currently two reviews into media regulation underway. One, focused on the news media, is being led by Federal Court Judge Ray Finkelstein. The other, a broader review, led by the Department of Broadband, Communications and the Digital Economy, is considering the implications of the converged media and telecommunications market for a range of policy issues including licensing and regulation; spectrum allocation and management; local content requirements; media diversity, competition and market structure and community standards. The more tightly focused Finkelstein review is expected to provide its findings to the Convergence Review in early 2012.
  - 4 Examples of self-regulatory media bodies that receive some funding from the state, include Finland (where half the costs of the council are funded by the state); Germany (where the Council is part funded by the state), and Quebec, (part state-funded). In Germany this funding is underpinned by statute. The stated purpose of the statute is to guarantee the independence of the complaints committee of the German Press Council. The state is barred from interfering in any way with the work of the German Press Council.
  - 5 In September 2011 the Australian Law Reform Commission published its report and recommendations for a radical reform of Australia’s regime for classifying and managing offensive and restricted content. Again, these proposed reforms of the traditional media classification system for television programmes, films, videos, and computer games, are designed to provide a robust regulatory response to the new multi-platform delivery channels now available. For details see Australian Law Reform Commission *National Classification Scheme Review* (ALRC DP77, 2011) < [www.alrc.gov.au](http://www.alrc.gov.au) >.

# Questions

## Part 1. Who are the news media and how should they be regulated?

1. As a society, do we still depend on the news media to provide a reliable and authoritative source of news and information about what is going on in our country? (chapter 4: What distinguishes “news media”- and why it matters)
2. Currently our law gives the “news media” special privileges and exemptions in recognition of the important role it plays in a democracy. Is it still in the public interest to treat the news media as a special class of publisher, afforded special legal privileges? (chapter 3: The news media’s special legal status)
3. Few of the Acts which give the news media special legal status actually define what is meant by “news media.” Do you agree with the following definition we have proposed? (chapter 4 at para 4.102)
  - a significant proportion of their publishing activities must involve the generation and / or aggregation of news, information and opinion of current value, for the;
  - purpose of dissemination to a public audience;
  - publication must be regular;
  - the publisher must be accountable to a code of ethics and a complaints process.
4. Because the news media depends on public trust, and can exercise considerable power in society, it has traditionally been held accountable to higher ethical standards than other types of publishers. In the web environment, with its facility for public participation, instant feedback and moderation, is it still necessary to hold the news media accountable to some external regulator? (chapter 6: Regulation of the news media at 6.41).
5. If you think it is in the public interest for the news media to continue to be subject to some form of external accountability, what is the most appropriate form of regulation? (chapter 6).
  - Is there still a case for treating broadcasters differently from other publishers, continuing to make all broadcasters subject to Government imposed regulation, as is the case at present?

- If you think that media convergence means there is no longer a strong case for treating newspaper publishers and broadcasters differently, then what is the most appropriate form of regulation for the news media?
    - State regulation, with standards and sanctions set out in legislation?
    - Some form of independent regulation such as we propose where neither the government nor the news industry controls the regulator?
    - If you support the independent model we propose, should membership be entirely voluntary or compulsory for some publishers?
6. Traditionally, the standards to which the news media have been held accountable have dealt with the following matters: (chapter 4 at 4.30)
- Accuracy;
  - Fairness and balance – ensuring for example that news is not deliberately distorted through the omission of important facts or view-points;
  - Respect for individuals’ rights to privacy;
  - A commitment to public interest rather than self-interested publishing;
  - Transparency; ensuring conflicts of interest are declared;
  - Good taste and decency; ensuring the general public is not offended by the gratuitous publication of offensive content.
- Do you think these standards are still important?
7. Do the internet and the facility for others to comment and participate in the news process change any of these standards? (chapter 6 at 6.41)
8. Should all news media be accountable to the same standards irrespective of the medium in which they publish? Or is there a distinction to be made between content which is broadcast to mass audiences simultaneously and content which is accessed by individuals on demand? (chapter 6 at 6.92)
9. Is there a case for extending the news media’s legal privileges to non-traditional publishers, such as bloggers, who wish to undertake news reporting and commentary on public affairs? (chapter 4 at 4.80)
10. If so, is it reasonable to expect those non-traditional publishers wishing to access these legal privileges reserved for the news media to be also be accountable to standards and an external body? (chapter 4)

**Part 2 Speech harms: The adequacy of the current legal sanctions and remedies**

11. How serious a problem do you think speech abuses are on the internet? eg cyber-bullying and harassment, harms to reputation or invasions of privacy. (chapter 7)
12. How effective are the non-legislative remedies that operate within online communities, including the systems of online reporting employed by social media sites such as Facebook? (chapter 7 at 7.144)
13. Do you think the law is currently able to deal adequately with these sorts of damaging speech when it occurs on the internet? (chapter 7.60)
14. Do you support the idea of an alternative tribunal able to provide speedy and efficient remedies for those who have been harmed by a criminal offence on line? (chapter 8 at 8.43)
15. Do you have any other comments on the proposals in this Issues Paper, or on its contents?

# Chapter 1

## The context of our review

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### THE WORLD WIDE WEB

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- 1.1 Somewhere in the Egyptian region of Ibrahimya is a child named “Facebook Jamal Ibrahim.” According to a report in Egypt’s Al-Ahram newspaper, the child’s young father decided to name his first born after Mark Zuckerberg’s social networking site to honour the critical role it played in fomenting and executing the January 2011 popular uprising against President Hosni Mubarak.
- 1.2 Commenting on this story in a blog post on the website TechCrunch, Alexia Tsotsis noted that “the baby girl could just have easily been called “Twitter” “Google” or even “Cellphone Camera.” However, for the moment at least, Facebook had become “the umbrella symbol for how social media can spread the message of freedom.”<sup>6</sup> Tsotsis went on to suggest a Nobel Peace Prize should be awarded to the “internet as a whole for all it had done to advance democracy in the Middle East and North Africa.”
- 1.3 The fact that social media, rather than traditional media brands such as CNN or the BBC, was celebrated as the agent of “people power” in Tsotsis’ column is emblematic of another revolution that has swept the world over the past decade, transforming societies and challenging the fundamentals of commerce, politics, media and the law.
- 1.4 This revolution, like the 18th century Industrial Revolution, has been propelled by technology, specifically, the digitisation of information and the development of a global network of computers by which to transmit this data – the internet.
- 1.5 Together these have created a paradigm shift in how individuals and societies function, giving birth to what is variously described as the “digital age” or the “global information society”.

- 1.6 An offshoot of an American Cold War military defence project, the internet in its earliest iterations was designed to facilitate communication and file sharing between a closed network of computers. By 1971 it had been extended to embrace a network of 23 government and university research centres across the United States. Two decades later, the transformative potential of the internet began to be realised with the invention of the World Wide Web, the system of computer servers and communication protocols which allows information (text, audio and video) to be transmitted and retrieved by users connected to the internet.
- 1.7 The next step-change occurred at the turn of the century with the arrival of what is commonly known as web 2.0, which provided the platforms and tools to allow users with no specialist knowledge to generate and share their own content and to perform myriad functions from social networking to online learning, shopping and entertaining.
- 1.8 The speed with which the world has entered the web 2.0 age has been breathtaking. In 2009, just four decades since its inception, the International Telecommunication Union estimated that 2 billion people, or just under a third of the world's population had internet connection.<sup>7</sup> According to InternetNZ there were 3.6 million internet connections in New Zealand in October 2011.<sup>8</sup>
- 1.9 At the same time quantum leaps in the science of digitization and micro-processing are enabling the transmission, retrieval and storage of an almost infinite quantity of data at speeds and costs unimaginable only a decade ago.
- 1.10 One of the defining features of the internet, exemplified by the popular uprisings in Egypt and Tunisia in early 2011, is its ability to simultaneously connect thousands of people and to facilitate the continuous exchange of rich information (including text, audio and video) among them via the web.
- 1.11 In this important respect, the internet not only dissolves distance and time, it also collapses the previous boundaries between different modes of communication – the printed and spoken word, the still and moving image – and the means by which these forms of communication were previously transmitted: the telephone, the radio, the television, scanners and facsimile machines.
- 1.12 This phenomenon, known as 'convergence' is one of the critical concepts underpinning the internet age and driving both technological and cultural change. On a technological level this can be seen in the rapid evolution of computers, telephones, televisions and audio-visual recorders into powerful multifunctional devices, such as laptops, netbooks, smart phones and iPads, operating on networked digital platforms.
- 1.13 Users of these technologies can now simultaneously surf the internet, conduct face-to-face conversations with friends or colleagues across the world, trade shares, access a plethora of different news and entertainment and broadcast their every thought to a potentially global audience using platforms such as Twitter.

- 1.14 Just as the advent of the mechanical printing press in the 15th and 16th centuries facilitated mass literacy, providing the conditions for the political, economic and social transformations of the Renaissance, so too the internet has provided the tools for social transformation.
- 1.15 Given the speed and rate of these changes it is impossible to predict precisely what impact this new digital era will have on future societies. However it is already clear that the internet is presenting major challenges to the way governments, the judiciary, businesses and the media carry out their functions.
- 1.16 At the same time, it is forcing us to rethink fundamental human constructs such as privacy, identity, transparency, anonymity, memory, security, and intellectual property.
- 1.17 Commenting on recent discussions among G8 nations on regulation and the internet, American author and blogger Don Tapscott summarised the scale of the change heralded by the internet and the read/write culture of the web:<sup>9</sup>

[t]he Internet is changing every institution in society. It enables new approaches to innovation, requiring new thinking about patents and copyright. It renders old institutions naked, requiring more transparency on the part of governments and corporations. It disrupts old models of learning and pedagogy demanding a [changed] relationship between students and teachers in the learning process. It offers new models of democracy based on a culture of public discourse, in turn compelling old style politicians to engage their citizens. It turns intellectual property into bits, that don't know the old rules that governed [how] atoms behave. It drops the transaction costs of dissent, subjecting dictators and tyrants to the power of mass participation. It breaks down national boundaries and [requires] a rethinking of how peoples everywhere can cooperate to solve global problems. And, for the first time in history, children are an authority on the most important innovation changing every institution in society.

- 1.18 In essence, the web has placed the tools of publishing in the hands of every individual with access to it. And, just as critically, platforms such as Facebook, which now boasts over 700 million users worldwide, allow those individual voices to connect and aggregate, creating virtual global “communities of interest”. Thanks to the disruptive nature of the web, these cyber crowds are capable of wielding levels of power and influence hitherto reserved for the mass media and those with access to traditional sources of economic and political power.
- 1.19 The medium in which this great proliferation of publishing is taking place possesses a set of quite unique characteristics which together help explain the game-changing nature of this technology. These include the following:
- publication on the internet is both instantaneous and global;
  - once published, digital content is virtually un-erasable;
  - users can publish and participate in online activities without revealing their real identities;

- there is an almost infinite capacity to store data of every kind, from the millions of “tweets” broadcast each day, to the world’s largest libraries;
- the development of powerful search engines and web browsers allows instant, and perpetual, retrieval of this data, the vast bulk of which can be accessed freely;
- the decentralised architecture of the internet and the speed and frequency with which data is saved, copied, cross-referenced, routed and re-routed around the globe makes the system highly resistant to attempts to control how users behave or to interrupt or prevent the uploading and downloading of content from the vast network of servers and computers which comprise the web.

## WEB 2.0 AND THE NEWS MEDIA

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- 1.20 Before the invention of the web, mass publishing was largely a capital intensive business, reserved for those with access to multi-million dollar presses and costly physical distribution systems, or, in the case of broadcasting, expensive audio-visual recording and transmitting systems and costly government licences to use scarce airwaves.
- 1.21 Not only has the internet disrupted this model by reducing the barrier to entry to extraordinarily low levels, but it has also challenged the commercial model which had, for more than 150 years, funded the gathering of news and the professionalisation of journalism. Historically, newspapers’ profitability turned on their ability to deliver mass audiences to advertisers: now those audiences have migrated online, where news from myriad sources is available free of charge and where advertisers have a wide range of options for reaching consumers, including online retailing.
- 1.22 At the same time traditional news media must now compete with a vast spectrum of new publishers. Included in that spectrum are sites like WikiLeaks, and the giant news aggregators like Yahoo and Google News. Alongside these are the millions of bloggers, many of whom also aggregate and disseminate content produced by traditional news media.
- 1.23 And while only a very small percentage of these millions of digital publishers will have as their primary purpose the collection and dissemination of news, all are *capable* of publishing, and passing on, text and audio-visual information, instantaneously and without the fetters of lawyers, editors and fact checkers.
- 1.24 Like many other established institutions the internet has presented traditional news media companies with a raft of opportunities and challenges, some driven by the technology itself, others arising from this changing competitive environment in which they now operate. Foremost among these are:

- the convergence of formerly distinct sections of news media on the web as traditional print publishers and broadcasters transform themselves into “multimedia companies” capable of publishing news in numerous channels;
  - the requirement for all news companies to respond to the demands of continuous news deadlines on the web and to be competitive in the “live” or “spot news” market;
  - the requirement for news companies to both participate in, and compete with, non-traditional news sources, including social media platforms such as Twitter and Facebook;
  - the challenge to the news media’s ability to retain control of, and monetise, exclusive content in an environment designed for copying, sharing, linking, repackaging and re-publishing.
- 1.25 This rapidly changing economic and competitive environment in which the traditional news media now finds themselves has given rise to a number of fundamental questions about the function and sustainability of the news media. Some, including *The Economist*, have gone so far as to suggest “[t]he mass-media era now looks like a relatively brief and anomalous period that is coming to an end.”<sup>10</sup>
- 1.26 Whether or not this prediction proves accurate, there can be no doubt the impacts of the internet on the traditional news media are profound.
- 1.27 Among the many issues under scrutiny in this challenging new context are the questions of media standards, and the legal and regulatory environment in which the news media operate.

### United Kingdom and Australia

- 1.28 In Britain, the phone hacking scandal which has enveloped Rupert Murdoch’s publishing conglomerate, News International, has given rise to a wide-ranging independent inquiry into the “culture, practices and ethics of the press” led by retired judge Lord Justice Leveson.<sup>11</sup> As well as investigating the specific allegations relating to *News of the World*, the inquiry has been asked to make recommendations:
- a. for a new more effective policy and regulatory regime which supports the integrity and freedom of the press, the plurality of the media, and its independence, including from Government, while encouraging the highest ethical and professional standards;
  - b. for how future concerns about press behaviour, media policy, regulation and cross-media ownership should be dealt with by all the relevant authorities, including Parliament, Government, the prosecuting authorities and the police.
- 1.29 To assist the inquiry team identify the key public policy issues underpinning the inquiry, Lord Leveson has conducted a number of seminars focusing on:
- the competitive pressures on the press and the impact on journalism;

- the rights and responsibilities of the press;
  - supporting a free press and high standards – approaches to regulation.
- 1.30 The Leveson panel is to include the impact of social media within the ambit of its inquiry and is due to report back its recommendations on future regulatory approaches within a year.
- 1.31 Parallel to the Leveson inquiry, in September 2011 the Australian Government announced its own independent inquiry into media standards and regulation to be led by former Federal Court Judge Ray Finkelstein. Its terms of reference are to examine:<sup>12</sup>
- a) The effectiveness of the current media codes of practice in Australia, particularly in light of technological change that is leading to the migration of print media to digital and online platforms;
  - b) The impact of this technological change on the business model that has supported the investment by traditional media organisations in quality journalism and the production of news, and how such activities can be supported, and diversity enhanced, in the changed media environment;
  - c) Ways of substantially strengthening the independence and effectiveness of the Australian Press Council, including in relation to on-line publications, and with particular reference to the handling of complaints;
  - d) Any related issues pertaining to the ability of the media to operate according to regulations and codes of practice, and in the public interest.
- 1.32 Although arising in different contexts, the terms of reference for these two reviews share certain common themes, including the impact of technology on the economic model, competitive environment and standards and practices of mainstream media companies.
- 1.33 In Australia, the Finkelstein inquiry is taking place within the context of a much broader government review into the impact of convergence on the entire media and communications landscape. The Convergence Review, led by the Department of Broadband, Communications and the Digital Economy, is considering the implications of the converged media and telecommunications market for a range of policy issues including licensing and regulation, spectrum allocation and management, local content requirements, media diversity, competition and market structure and community standards. The more tightly focused Finkelstein review is expected to provide its findings to the Convergence Review in early 2012.
- 1.34 Besides these two reviews, in September 2011 the Australian Law Reform Commission published its report and recommendations for a radical reform of Australia's regime for classifying and managing offensive and restricted content.<sup>13</sup> Again, these proposed reforms of the traditional media classification system for television programmes, films, videos, and computer games are designed to provide a robust regulatory response to the new multi-platform delivery channels now available.

### The New Zealand context

- 1.35 In 2006 the then Labour-led government initiated a far-reaching *Review of Regulation for Digital Broadcasting* with similar scope to Australia's Convergence review. The terms of reference for the joint Ministry of Culture and Heritage and Ministry of Economic Development review encompassed a wide range of issues including the implications of digital technology for competition and diversity; distribution channels; intellectual property rights; content acquisition; accessibility to publicly funded and public service content; networks and access to spectrum.<sup>14</sup>
- 1.36 While this review was discontinued by the incoming government, work building on this review has continued within the relevant Ministries, including on-going discussions and consultations on possible reforms to the regulatory environment for media. The implications of the digital era for censorship and classification are also under active consideration by the Chief Film Censor's office.
- 1.37 While we have been able to draw on the breadth of research undertaken in New Zealand in this area over the past decade, the terms of reference for our review differ from the earlier reviews and indeed from the reviews underway in the United Kingdom and Australia.

### *Regulatory gaps in the new media environment*

- 1.38 Our primary brief is to identify the regulatory gaps which have emerged as traditional *news media* have moved their publishing activities online.
- 1.39 We have also been asked to consider whether there is a case for extending media regulation to some of the new participants – for example, current affairs bloggers and news websites which are currently unregulated. A quid pro quo of such an extension would be to see these new publishers gain access to the legal and organisational preferences which are currently reserved for the traditional news media.
- 1.40 Although focused on the regulatory environment, rather than explicitly on press standards, the drivers behind our review are in many respects similar to the overseas inquiries discussed above. Like their counterparts in Australia and the United Kingdom, New Zealand media companies are confronting falling profits, increasing competition from non-traditional publishers, the challenges of convergence and the requirements of continuous news cycles.
- 1.41 In an introduction to its 2008 Annual Report, the New Zealand Press Council acknowledged the threats to the news industry as a result of the twin effects of the internet and the undercutting of the advertising model which had supported news gathering for more than 150 years:<sup>15</sup>

...As the audience has migrated into the electronic media so newspapers have gone there too but because cash has declined, the demands of serving perpetual website updates, blogging and multi-media reporting have not always been met with correspondingly increasing staffing...

...Journalists are notorious complainers but it is reasonable to question if print reporters being required to produce reports across a wide range of outlets across an ever-increasing time frame is conducive to good in-depth reporting.

- 1.42 Alongside these internal pressures, the traditional news industry is also confronting the external pressures arising from the lack of regulatory parity between news media and unregulated web publishers on the one hand, and broadcasters and print publishers on the other.
- 1.43 The degree of control exerted by the state over the media has varied over time and with respect to different mediums. Traditionally, print media have been governed by a self-regulatory body, the Press Council, which responds to public complaints and adjudicates these against a set of agreed journalistic principles.
- 1.44 Broadcasters, on the other hand, are currently regulated by an Independent Crown Entity, the Broadcasting Standards Authority (BSA), a government appointed complaints body whose mandate is to enforce a series of statutorily backed industry codes designed to maintain standards of decency, fairness, accuracy and privacy in free-to-air and subscription broadcasting services.
- 1.45 However significant gaps and contradictions are emerging in these parallel systems of state and self-regulation for print media and broadcasters as the channels for delivering news converge in the multi-media digital environment.
- 1.46 More significantly, traditional news media find themselves competing for audience share with online publishers, some of whom are positioning themselves squarely in the news and current affairs segment, but who are not currently subject to any regulatory body.
- 1.47 Broadcasting Standards Authority chair Peter Radich has been explicit about the tensions this lack of parity creates for traditional broadcasters, stating in the BSA's 2010 Annual Report:<sup>16</sup>

We are acutely aware of the challenges involved in maintaining standards in the segment of traditional broadcasting when similar standards do not apply to Internet broadcasting. It is time for the Broadcasting Act to be reviewed.

- 1.48 Similar sentiments were expressed by newspaper executives and web editors with whom we spoke in the course of our preliminary consultation. They explained how in the porous digital environment they were often competing directly with publishers who, while subject to the law, were not held accountable to the same regulatory and ethical constraints as journalists. They cited instances where bloggers had breached court orders on their websites and readers could find the suppressed information just a "mouse click away" from the news story, effectively placing social media in the same competitive space as conventional news media.<sup>17</sup>

- 1.49 On the other side of the media divide, some bloggers with whom we consulted expressed frustration at being denied access to news sources, including admission to organisations like the Parliamentary Press Gallery and forums such as press conferences because of their lack of official status and legal recognition as part of the “news media.”
- 1.50 Over and above such pragmatic and competitive concerns looms the much larger public interests question: how to protect and nurture the generation and dissemination of news and current affairs in this disruptive new environment?
- 1.51 Before the advent of the read/write web there was little difficulty in defining what was meant by the term “news media“. Similarly there was a broad acceptance of the special legal privileges and accountabilities attached to the news gathering and publishing activities of media companies. That consensus no longer exists.
- 1.52 A critical question we have been asked to address as part of our review is;
- 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 end.
- 1.53 In order to answer this question we must first unpack the assumptions which underpin it and discuss the following critical policy issues:
- is it possible, and desirable, to define “news media” in the web 2.0 era?
  - if so, are the traditional justifications for affording the “news media” special privileges, and subjecting them to specific industry regulation, still valid in this new publishing environment?
  - and, finally, if those justifications remain valid, what type of regulatory environment should apply, and to whom?

#### *Remedying harm in the web 2.0 era*

- 1.54 The third question we address in this paper concerns the wider issue of what remedies and redress the public should have when they suffer significant harms as a result of publishing on the internet.
- 1.55 Specifically, our terms of reference require us to consider:
- whether the existing criminal and civil remedies for wrongs such as defamation, harassment, breach of confidence and privacy are effective in the new media environment and if not whether alternative remedies are available.
- 1.56 In addressing this question we are concerned not just with the news media and the laws and regulations governing them, but rather with the broad spectrum of publishers discussed earlier, from the amateur blogger whose words may be read by a handful of others, to the celebrity whose tweets may be read by a million people or more.

- 1.57 These novel forms of publishing are in fact already subject to both the criminal and civil law irrespective of the fact that publication takes place on the internet. The exercise of free speech on the internet is, in theory at least, subject to the same limitations that apply in other mediums.
- 1.58 However, many of the statutes directed at preventing and punishing harms arising from various types of publishing were written before the internet was invented and so are not necessarily capable of capturing speech abuses that arise in the web 2.0 era.
- 1.59 In Part 2 of the Issues Paper we survey the extent of these harms; outline the legal remedies currently available and discuss how the gaps and uncertainties in these laws might be addressed to better deal with the digital environment.

### **Structure of the Issues Paper**

- 1.60 The first part of this paper is focused on the news media and the questions we have been asked to address relating to news media regulation.
- 1.61 We begin, in chapter 2, by providing a descriptive overview of the New Zealand news media landscape on the web. While not claiming to be comprehensive, this chapter aims to provide a sense of the spectrum of publishing occurring on the web, drawing out the distinctions between the different types of publishers and the extent to which their activities might be regarded as “news-like”.
- 1.62 In chapter 3 we survey the statutory privileges and exemptions which currently apply to the news media in New Zealand and briefly discuss the traditional rationales behind granting the media this special legal status. Alongside these statutory privileges and exemptions we also discuss the institutional and organisational conventions which exist to assist the news media in its news gathering activities.
- 1.63 Having described both the web 2.0 publishing environment, and the current legal status of the news media, we then move on in chapter 4 to address the first question posed in our terms of reference: is it possible to define “news media” for the purposes of the law? In addressing this question we first briefly traverse the historical origins of the mass media and then discuss the evolution of the constitutional role of “the press” in a modern democracy. We then unpick some of the fundamental principles inherent in journalism if it is to fulfil these civic functions and in the process identify what it is that distinguishes “news” from other types of speech. We then attempt to apply these distinctions to the spectrum of publishers outlined in chapter 2 and reach some tentative conclusions about the possibility, and desirability of classifying them as “news media.”
- 1.64 Finally we set out the argument for why this special class of speech must be preserved - whoever is exercising it - and why standards and accountability are critical to its survival.

- 1.65 In chapter 5 we describe the current parallel systems of accountability for the news media operating in New Zealand and examine the strengths and weaknesses of both the Press Council and the Broadcasting Standards Authority. Our focus is on convergence, and the need for a regulatory model capable of responding to the challenges and opportunities of the digital web publishing environment.
- 1.66 Chapter 6 turns to developments in news media regulation overseas and sets out the range of regulatory approaches possible – from a system which relies on the law, backed by internal industry standards, and consumer/user feedback at one end of the regulatory spectrum through to state regulation at the other.
- 1.67 We then put forward our preliminary proposal for a new independent converged news media regulator and outline two options for the jurisdiction of this regulator. In option one we discuss the merits of compelling some classes of publishers to come under its jurisdiction, and in option two we discuss a purely voluntary option.
- 1.68 In the final two chapters of the paper we address the third leg of our terms of reference: whether the legal remedies available for those who suffer serious harms as a result of speech abuses are fit for purpose in the web 2.0 era.
- 1.69 Chapter 7 outlines the scope of these harms and provides an overview of the legal and non-legal remedies currently available. This chapter includes a discussion of the self-regulatory systems and reporting tools available on sites such as Facebook to manage speech harms.
- 1.70 Chapter 8 examines the adequacy of these laws in dealing with speech abuses in the web era and makes preliminary proposals for how the law might be amended or in some cases new offences created to deal with the new publishing environment.
- 1.71 Finally in chapter 8 we put forward for discussion the possibility of establishing a new tribunal to provide those who have been harmed by serious speech abuses with swift and easily accessible remedies. We also put forward some preliminary ideas for how the law might deal with offensive speech in the new digital environment.

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- 6 Alexia Tsotsis "To celebrate the Jan 25 Revolution Egyptian Names his firstborn 'Facebook'" (2011) TechCrunch < [www.techcrunch.com/2011/02/19/facebook-egypt-newborn](http://www.techcrunch.com/2011/02/19/facebook-egypt-newborn) > .
  - 7 International Telecommunication Union "Measuring the Information Society" (2011) < [www.itu.int/ITU-D/ict/publications/idi/2011/Material/MIS2011-ExceSum-E.pdf](http://www.itu.int/ITU-D/ict/publications/idi/2011/Material/MIS2011-ExceSum-E.pdf) > .
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  - 15 New Zealand Press Council "Annual Report 2008" at 11-12. < [www.presscouncil.org.nz](http://www.presscouncil.org.nz) > .
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  - 17 For example Cameron Slater, author of a blog titled *Whale Oil Beef Hooked* has campaigned against the use of suppression orders and in September 2010 was convicted on charges related to breaches of non-publication orders by publication on his blog. *R v Slater* [2011] DCR 6. His activities and the site received widespread coverage in the mainstream media. Mr Slater appealed to the High Court against the convictions and sentences imposed. The appeals were dismissed on 10 May 2011, but Mr Slater was subsequently granted leave to appeal to the Court of Appeal in relation to one question of law, as to whether the information or material posted on the *Whale Oil* blog constituted a "report" or "account" of proceedings in breach of the provisions of the Criminal Justice Act 1985. At the time of writing, the Court of Appeal has not yet issued a judgment in this matter.

## Part 1

WHO ARE THE  
"NEWS MEDIA"  
AND HOW  
SHOULD THEY  
BE REGULATED?



# Chapter 2

## Online media in New Zealand

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### INTRODUCTION

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- 2.1 The first question posed in our terms of reference is whether it is possible to define ‘news media’ for the purposes of the law? As discussed in the introductory chapter, the digital era is characterised by the ubiquity of publishers using a variety of channels or platforms to communicate with potentially very large audiences.
- 2.2 As a result of this proliferation of publishers the mainstream media has lost its monopoly on the generation and dissemination of news. This is not to imply that the internet has fostered a substantial growth in the number of organisations dedicated to gathering and producing news. Rather it has allowed a much broader range of individuals and groups to participate in an activity formerly reserved for those attached to professional news organisations.
- 2.3 In some instances that participation closely mirrors that of the mainstream media. Sites such as the Korean-based *OhmyNews* pioneered citizen journalism, providing a professionally moderated platform via which thousands of individuals could submit daily news items.<sup>18</sup> In many other instances though, the generation of news-like content is only one of many different activities users make of a publishing platform. For example, social media sites such as Facebook, although not primarily intended as news channels, are nonetheless increasingly used to publish information which formerly may have taken the form of a “press release” submitted to the mainstream media. Specialised news applications are also being developed for social media like Facebook.

- 2.4 Our aim in this chapter is not to provide a definitive answer to the question “who are the news media?” but rather to provide a descriptive overview of the spectrum of New Zealand publishers who are, in part or whole, engaged in the types of publishing activities which have formerly been associated with the traditional news media. By this we mean the generation, aggregation and dissemination of news and commentary on the gamut of issues commonly referred to as “public affairs.”
- 2.5 Given the vast amount of user-generated content (UGC) online and the speed with which publishers enter and exit the internet, it is not possible to provide a comprehensive picture.
- 2.6 We begin by examining the online presence of the key mainstream media organisations in New Zealand. We then turn to web-only news publishers, including the broad range of individuals and collectives who comprise New Zealand’s blogging community. Finally we turn to social media such as Facebook and Twitter and examine to what extent those publishing on these platforms can be considered news generators.
- 2.7 We are aware of the limitations of positioning different publishers along this spectrum. The porous nature of the web and the ability of users to “link” material means content published in one context is rapidly assimilated into a multiplicity of other contexts. This interconnectivity is a critical feature of the internet and also presents one of the challenges in attempting to establish meaningful boundaries between different types of content producers.
- 2.8 Throughout this discussion we also attempt to draw out the features of web publishing which distinguish it from publishing in the traditional channels – television, radio broadcasting and print. In doing so we foreshadow the issues we will confront when addressing the regulatory gaps in media law and also the question of remedies for harms resulting from web publications.

## THE ‘NEWS’ PUBLISHING SPECTRUM

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### 1. New Zealand’s mainstream media on the web

- 2.9 Arguably the most striking feature of the mainstream media’s web presence is the extent to which the boundaries which formerly separated print, television and broadcasting have been dissolved. In adapting to the web environment, mainstream media companies are increasingly presenting their users with a common, rich, mixture of text and audio-visual content.

- 2.10 New Zealand's major print and television broadcasting media companies, APN News & Media, Fairfax Media New Zealand, Television New Zealand, and TV3, are each grappling with the implications of 24 hour, seven-day-a-week publishing.<sup>19</sup> Where once newspapers and television were able to marshal their reporting resources around set broadcasting and printing schedules, now the internet enables – and requires – a constant supply of breaking and updated news. Newspaper publishers, with their long lead times between deadlines and distribution had, in the past, specialised in generating original news and analysis: now they must also compete head to head with broadcasters, including social media, in the live or spot news market.
- 2.11 An extension of this uncoupling of content from scheduled broadcasting or publication times is the shift towards “demand-driven” content. Increasingly radio and television broadcasters are making both news and entertainment available on their websites for access at the time of a user's choosing. Alongside programmes which have been previously broadcast, there is also a growing menu of web-only content including extended “raw” interviews and video clips.
- 2.12 Most are also responding to the web's evolving norms including the expectation that users will be able to comment on news stories and contribute to the reporting of live news events as they unfold.
- 2.13 In the following section we describe the online presence of mainstream media companies and discuss some of the important ways in which they differ from their traditional mediums; print, television and radio.

#### *Print media on the web*

- 2.14 Over the past decade New Zealand's major newspaper companies, APN News & Media, (publishers of *The New Zealand Herald*, *the Herald on Sunday* and a stable of regional newspapers) and Fairfax Media New Zealand (*The Dominion Post*, *The Press*, the *Waikato Times*, the *Sunday Star-Times* and regional papers) have established themselves as the country's dominant news websites.
- 2.15 Between them, Fairfax's *stuff.co.nz* and APN's *nzherald.co.nz* attracted, on average, over 388,000 unique browsers to their general news web pages each day in September 2011.<sup>20</sup> Global digital measurement and marketing company comScore reported that in May 2011 these two news websites were both reaching about two thirds of the potential online audience.<sup>21</sup>
- 2.16 Independent publisher, Allied Press, publishers of the *Otago Daily Times*, has a more limited online presence, ranking seventh in Nielsen's September 2011 report.<sup>22</sup> These sites, along with the smaller weekly business newspaper, the *National Business Review* (NBR), have formed the basis of our analysis of newspaper online presence.

- 2.17 Online newspapers differ significantly from their print or mainstream presence. Fairfax's web-only brand, *Stuff*, provides a national breaking news service and also aggregates content from the company's extensive network of newspapers. The site has its own editor and is able to draw on the resources of the newspapers' newsrooms.
- 2.18 APN's website, *nzherald*, also operates independently from the masthead under a separate editor and company structure but is able to draw on the company's newsroom resources. Both companies place a high premium on breaking news on their websites and the organisation of their newsrooms increasingly reflects this imperative to be first to publish on-line.
- 2.19 The *Otago Daily Times*' online edition replicates approximately 90 per cent of the stories published in the daily print edition, the prominence of stories on the site mirroring their prominence in the paper. Breaking news is posted on the site throughout the day while exclusive content is often held back for the next day's print edition.
- 2.20 The *National Business Review* online also breaks news on its websites and produces content that is distinct from its print publication. Premium content is reserved behind a pay-wall for digital subscribers.
- 2.21 As well as breaking news, the APN and Fairfax websites differ significantly from their print partners in a number of important respects. Audio-visual content, including advertising, plays an increasingly important role on the sites. News videos produced in-house are sometimes preceded by commercial advertising segments.
- 2.22 Both sites also encourage users to contribute by submitting photographs and video clips of live news events. The *Otago Daily Times* offers a unique function entitled "your news" that allows "local citizen journalists" to submit their own news and photos for online publication.
- 2.23 All of these sites invite some form of user interactivity, including the facility to comment on blogs and a selection of news stories. Unlike the print publications, which require contributors to the letters columns to provide their full names and addresses, the websites allow readers to comment on stories using a pseudonym. However sites require those commenting to register using their names and in the case of the *Otago Daily Times*, physical address and phone number.
- 2.24 Increasingly too these traditional publishers are embracing social media both as a promotional tool, driving traffic to their websites, and as a reporting resource. Most can be "followed" on Twitter and "liked" on Facebook. Journalists, or automated feeds, may "tweet" breaking news or headlines together with links to the story on the company's website.
- 2.25 The web 2.0 zeitgeist is also reflected in the facility for readers to share content through a variety of channels including email, Facebook, MySpace, Digg, Reddit, StumbleUpon, LinkedIn and Twitter.

- 2.26 Alongside the major newspapers, a number of current affairs magazines have developed web presences offering live news and online-only content. For example, APN News & Media owned weekly, *The Listener*, now offers readers a distinct web offering, including web-only content, news blogs and updated news stories, drawing on the *New Zealand Herald* for the latter. Ian Wishart, publisher of *Investigate* has also developed a website complementing his magazine and other print publications and including news links to multiple overseas and local online news and current affairs sites. Tangible Media, publishers of *idealog* magazine have also developed multi-media websites to complement their print products.

#### *Television on the web*

- 2.27 Like print companies, traditional television broadcasters face significant challenges adapting to the economic, technological and cultural changes of the internet and web. And like print publishers, they are attempting to reposition themselves as “multi-media” companies capable of using a variety of different channels to reach their audiences/users.<sup>23</sup>
- 2.28 As part of this strategy both TVNZ and TV3 have developed websites offering a diverse range of content and services.<sup>24</sup> Both sites provide breaking news, television programme guides, sports and entertainment. Māori Television and Sky’s websites are designed to provide portals to the channels and their services/programmes but neither attempt to provide a continuous general news site.
- 2.29 TVNZ and TV3’s websites differ significantly from their mainstream presence. The websites provide a mixture of videos (including live media streams for major news stories), text and photographs. The sites publish news stories and hourly breaking news updates. They both generate and publish videos and stories from their newsrooms and also aggregate content produced by other media organisations, attributing accordingly.
- 2.30 For news organisations accustomed to broadcasting at scheduled times, accessing a continuous news feed and comprehensive coverage range has been a critical ingredient in building web audiences. Up until 2011 both major broadcasters relied to some extent on commercial arrangements with the independent news wire service, the New Zealand Press Association (NZPA) to help meet the challenge of 24 hour news cover. This 131-year-old news co-operative, jointly owned by Fairfax, APN and the five remaining independent newspapers had provided a core news wire and picture service to its own members’ newspapers, as well as selling content to third parties such as TVNZ and MediaWorks.<sup>25</sup> However in August 2011 NZPA closed, following the decision by Fairfax New Zealand to withdraw funding from the agency.<sup>26</sup>

- 2.31 In the wake of NZPA's demise both Fairfax New Zealand and APN News & Media moved to establish their own network news services, FNZN and APNZ respectively. APNZ is based around a copy sharing arrangement between 50 subscribing newspapers, including APN's own newspapers and a handful of independent titles including the *Otago Daily Times*. Fairfax's new wire service, Fairfax New Zealand News (FNZN) augmented its existing group copy sharing model, Wirestream, drawing on its masthead newsrooms and its national political, sport and business bureaus. Supplementing these two corporate schemes, the Australian news agency AAP (jointly owned by Fairfax and News Limited) has boosted its New Zealand presence, setting up NZ Newswire (NZN).
- 2.32 The impact of NZPA's withdrawal and the establishment of these new services can already be seen on the television websites, with TVNZ attributing news content to a range of sources including Fairfax, NZN, *BusinessDesk*, *Newstalk ZB*, and *Reuters*. TV3 credits include NZN, AP and *RadioLIVE*.
- 2.33 A significant feature unique to the online presence of television stations is that users decide what to view and the order in which to view it. For example both sites provide an on-demand function whereby users can catch up on missed programmes.
- 2.34 These sites also allow for increased user interaction, albeit to different degrees. TVNZ does not allow comments on its news content but does provide a "community" message board in respect of its on-demand television material. This community forum allows registered users to post comments on the community message boards. TV3, on the other hand, allows users to post comments on all news stories and, like TVNZ, users can participate in a community message board relating to the "on-demand" material.
- 2.35 TVNZ and TV3 also utilise social media platforms as a way of promoting both news and entertainment content.
- 2.36 For example in the immediate aftermath of the November 2010 Pike River mine explosion on the South Island's West Coast, TV3 established a "Supporting the Pike River Miners" Facebook page which served as a vehicle for the expression of public grief while also allowing the company to monitor community sentiment and views about the unfolding story.
- 2.37 Both broadcasters encourage users to share articles and to follow the sites, as well as individual shows, on Facebook and Twitter.
- 2.38 In March 2011 in an experimental move TVNZ launched a new interactive channel called "U", aimed at the 15 – 25 demographic and featuring a block of content driven by a live Facebook application.

*Radio on the web*

- 2.39 Radio broadcasters are also diversifying and expanding their services in response to the challenges and opportunities offered by the web. Both the public service broadcaster Radio New Zealand, and commercial broadcaster *Newstalk ZB* (part owned by APN News & Media) use their websites to provide supplementary material and to facilitate on-demand access to previously broadcast content.<sup>27</sup> For example, Radio New Zealand has developed a multi-layered web offering including specialist sections expanding on broadcast programmes. It also provides listeners with a number of ways in which to download and live stream its audio material. This on-demand facility clearly differentiates the site from its mainstream or traditional presence.
- 2.40 Another commonality is that these sites supplement their audio content with text and photographs and short audio-visual clips. Listeners can follow live broadcasts and also read short text news updates carried on the websites.
- 2.41 The Radio New Zealand and *Newstalk ZB* sites differ in terms of user interaction, reflecting their different market positions. Radio New Zealand offers very little by way of user interaction. It does not invite comments. It does however use the social networking platforms, Facebook and Twitter, for cross-promotional purposes.
- 2.42 *Newstalk ZB* is a highly interactive site which displays “current topics” on the home page and invites participation by way of comments. It also invites users to “tell us what you think” for use on the talkback radio programme. This can be done by toll-free calling, texting or by emailing. Text messages of other listeners can be viewed by clicking on a link. It also holds public polls whereby users can express their views on a ‘yes’ or ‘no’ question by checking a box. It is also active in terms of cross promotion via social networking platforms and allows users to follow *Newstalk ZB* on Twitter and “like” on Facebook. Further, users can share the stories via links provided at the end of each story on hundreds of social networking platforms.
- 2.43 Alongside these dominant radio broadcasters are a plethora of community and niche broadcasters many of whom are utilising the various digital technologies to maximum effect. A prime example is *Kiwi FM* which was established as a public private partnership to promote the New Zealand music industry. The station also broadcasts a news and current affairs segment produced by Glenn Williams who uses a mix of technologies and platforms, including YouTube, to transmit his breakfast show.

## Discussion

- 2.44 At least two themes are immediately obvious from this brief description of the mainstream media's presence on the web:
- the speed of change as companies respond both to constant technological developments (including new functionality and new platforms) and to the competitive challenges/opportunities these create;
  - the level of convergence between the formerly discrete mediums.
- 2.45 The manner in which the mainstream media news websites covered the various sessions of the Royal Commission of Inquiry into the Pike River mine disaster provides a good example of convergence. At different stages of the inquiry *Stuff* and both TVNZ and TV3 provided streamed video coverage of the hearings, (with the court imposed ten minute time delay). The sites also provided what were effectively live blogs or news wraps constituting a short-hand summary of the day's proceedings. At one point *The Press* embedded in its website a recording of a miner's 111 call to emergency services. Archival video, still photography and news stories supplemented the live news coverage.
- 2.46 This level of convergence looks set to continue. State broadcaster Radio New Zealand is, for example, discussing a proposal put forward by South Pacific Pictures' John Barnett to develop a public service television channel off the back of Radio New Zealand.<sup>28</sup> This proposal, which was under active consideration at the time of writing, illustrates the manner in which dramatic reductions in the capital costs around television broadcasting make possible the seamless evolution of one type of news publisher to another.

## 2. Web only "News" Media

### Introduction

- 2.47 This next category comprises a broad spectrum of web publishers who are engaged in either generating, aggregating and/or commenting on news and current affairs. The news and current affairs components of these sites may in some instances be the site's primary focus or it may comprise a small or occasional component of broader publishing activities. These sites have "news like" qualities but are not currently covered by a regulatory body.
- 2.48 The category is extremely broad. It includes: sites like *Scoop* which are squarely in the business of breaking and publishing news and generating comment; sites like *Yahoo!New Zealand* which aggregate news content produced by others and specialist sites which incorporate elements of news and current affairs alongside advocacy or public relations and marketing content.

2.49 In the following discussion we attempt to distinguish the different features of these various sites and the extent to which news and current affairs is critical to their publishing activities. For ease of discussion we have grouped these sites into the following categories:

- (a) Online News Sites & News Services;
- (b) Online news aggregators;
- (c) Public relations and advocacy sites.

a) *Online News Sites & Services*

- 2.50 This sub-category includes web-based news sites whose publishing activities most closely resemble those of the traditional news media in that they generate and aggregate news and current affairs and these activities are central to their business model.
- 2.51 In this category are open, generalist sites such as *Scoop.co.nz*, and specialist business and financial sites such as *interest.co.nz*, *NewsRoom.co.nz* and *BusinessDesk*. These latter two are subscription-only services targeting the corporate and professional sectors with tailored news and news aggregation services.
- 2.52 *Scoop* is an example of a site which bears some resemblance to an online newspaper both in appearance and content. Like the online versions of the mainstream print newspapers, *Scoop* is a multimedia generalist news site offering a mix of text and audio-visual content. The site is run by an experienced editorial team, led by journalist Alastair Thompson. The site is accredited to the New Zealand Parliamentary Press Gallery. In September 2011 Nielsen Media Research ranked *Scoop* as sixth out of the top ten news sites with a daily average of 8,038 unique browsers.<sup>29</sup>
- 2.53 With only limited reporting resources, *Scoop's* editorial philosophy is to target and develop stories it believes are of public significance and which may be overlooked or drop off the agenda of the mainstream media. In addition to news and comment generated by its own writers, *Scoop* also specialises in publishing submitted material from a wide variety of sources, including media releases provided by corporates.
- 2.54 *Interest.co.nz's* primary focus is on providing consumers and businesses with an independent source of business news. The site provides breaking business news, property information, and other financial information and commentaries. It has a strong focus on consumer finance and in particular on providing users with tools to compare retail interest rates. Original content is generated by a small editorial team comprising three editors based in Auckland and a political reporter based in the Press Gallery in Wellington.

- 2.55 The site makes strong use of cross-media promotion and incorporates video (primarily hosted on YouTube), text and photographs. This includes a daily 90 second YouTube broadcast of top financial and general news stories fronted by managing editor Bernard Hickey and sponsored by the BNZ.
- 2.56 The site encourages a high degree of user participation. Unlike mainstream media sites, journalists often participate in the online discussion, posting comments themselves.
- 2.57 *NewsRoom* and *BusinessDesk* are both subscription news services focusing their reporting resources on generating and aggregating business and political stories aimed at the corporate and finance sector.
- 2.58 *NewsRoom* was established in 1996 as a private venture but has been wholly owned by the New Zealand stock exchange, NZX, since 2007. Like *Scoop*, and *interest.co.nz*, *NewsRoom* has full Parliamentary accreditation and operates in many respects like a subscription wire service. It describes itself as a news agency with a “no-spin” editorial policy aimed at providing accurate and reliable information.”<sup>30</sup> Clients also have access to tailored newsfeeds drawing on the company’s extensive archives and wire services.
- 2.59 *BusinessDesk* describes itself as a “white label” high quality business news service, available on wholesale subscription to any media channel.<sup>31</sup> It has contracts to provide a range of content, including by-lined business and economic features, on a non-exclusive basis, to a range of media organisations including *Yahoo! New Zealand*, *APN*, *TVNZ* and *Scoop*. Established in 2008 by specialist economic and political journalists Patrick Smellie and Jonathan Underhill, it provides subscribers with a daily news feed including overnight market reports and a synthesis of the key developments in specific market sectors including company news and regulatory/legislative developments.
- 2.60 Both *Scoop* and *NewsRoom* emphasise the importance of providing a direct channel for the dissemination of press releases to their audiences. In this respect their business philosophies owe more to the unmediated and decentralised culture of the web than to the “publisher as gatekeeper/mediator” model associated with traditional news media.
- 2.61 For example, in promoting the benefits of its services, *NewsRoom* explicitly addresses the benefits of receiving information such as press releases in their raw or unedited form:<sup>32</sup>

We have dedicated journalists whose job it is to ensure we get the news out fast.

Mainstream media get the majority of their news from press releases, which is edited and then sub-edited. This takes time and does not always provide you with the complete story [...] *NewsRoom* subscribers can see the news unfold as journalists do in mainstream media newsrooms, but journalists are not dictating what you can see and can’t see.

- 2.62 The concept that users should have access to raw and primary material wherever possible is also reflected in *Scoop's* practice of providing readers with multiple links to source material. This is a part of the culture of internet publishing and has a transparency that is not always part of the culture of mainstream media where material is frequently cited without referencing or linking to source documents.
- 2.63 All these sites are run on commercial lines. *Scoop* has formed what it describes as the "Scoop Media Cartel" as a mechanism for selling advertising on affiliated blog sites. This is a commercial agreement drawn up between *Scoop* and a number of popular blogs, such as *Kiwiblog*, *Pundit*, *Public Address* and *Spare Room* in which *Scoop* provides links to the blogs from the *Scoop* website and sells advertising spots on the blog sites. The arrangement is purely commercial and *Scoop* has no editorial control over the blog sites.

#### Special interest sites

- 2.64 Alongside these more traditional general news and subscription business wire services there are a number of sites which target specific segments of the market but which may incorporate general news content as part of their offering.
- 2.65 The technology news site *Geekzone.co.nz* is an example of a successful specialist subject site that is perhaps closer to a highly interactive online magazine than a general news site. It provides breaking and other technological news, and reviews and comment covering a broad range of topics including telecommunications, computing, IT and business. The site carries significant advertising but subscribers are able to access the content without advertising. *Geekzone* is highly interactive, inviting postings and comments on all news articles. It also provides IT job listings, forums, blogs and chat rooms with video or text chatting capabilities. Subscribers are able to establish private discussion forums with invitation-only access. The site provides a rich forum for the exchange of specialist knowledge, information and views about a very wide range of technology related issues including industry and regulatory matters.
- 2.66 Many other industry and business websites have evolved to provide consumers with access to information and to promote services. Examples include *Zoodle*, a property website melding data and information generated by Terralink and *realestate.co.nz*.

#### b) Online News Aggregators

- 2.67 Aggregating, sharing and commenting on content created by others is a core functionality of the read/write web. One of the significant challenges facing traditional news organisations in the digital era has been the emergence of news aggregators such as those established by the search engines Yahoo and Google. News aggregators may not produce any original content, relying instead on filtering, organising, repackaging and linking to content produced by others, including traditional media organisations.

- 2.68 A 2010 study of news aggregators conducted by The Berkman Center for Internet & Society at Harvard University identified four distinct categories of news aggregators:<sup>33</sup>
- feed aggregators, such as *Google News* and *Yahoo!New Zealand* which gather and organise material from particular types of websites (in this instance news websites) and republish the headlines and introductions to stories, often but not always linking readers back to the original host site;
  - speciality aggregators which gather information from a number of different sources on a particular topic linking back to the source site;
  - blog aggregators which may use third party content in various ways including cutting and pasting, quoting and linking to third party content;
  - user-curated aggregators such as *digg* and *Reddit* which feature user-submitted links and content drawn from a wide variety of sources including YouTube and blog posts.
- 2.69 In New Zealand *Yahoo!New Zealand* ranks as the third most popular general news site.<sup>34</sup> Up until April 2011 the site was jointly owned by Telecom New Zealand and Yahoo!7, a joint partnership between the Australian media company Seven Network Ltd and US-based technology company Yahoo! Inc. The site is now wholly owned by Yahoo!7 but remains in partnership with Telecom.
- 2.70 Up until its demise, the bulk of *Yahoo!New Zealand's* news content was provided under a commercial contract with the wire service NZPA. The site now relies heavily on *Newstalk ZB*, *BusinessDesk* and AAP's *NZ Newswire*. It also features video content from other providers and reproduces *Newstalk ZB* headline news. Entertainment information and video previews feature strongly on the site. The site also offers free email services in conjunction with Telecom Xtra.
- 2.71 Readers wishing to comment on stories must first register and create an account with *Yahoo!New Zealand*.
- 2.72 Despite the fact that *Yahoo!New Zealand* generates very little of its own news content, its very high ranking as a news site makes it strong competitor of the mainstream media news sites, *Stuff* and *nzherald*.<sup>35</sup>
- 2.73 Alongside these large corporate news aggregators there are a number of smaller, locally established websites which focus primarily on providing a platform for contributed news and user-generated content. *Infonews*, set up in 2006 by Southern Institute of Technology students Fraser Mills and Peter Hodge, is an example of a news website designed to provide a platform for citizen or "grassroots" journalism. The site allows any individual or organisation to post news, photos, and events. The contributor retains control of and may edit whatever information they chose to post.

- 2.74 The site carries only limited advertising and is organised by region and topic allowing users to tailor their selections according to their subject interests and location. The site carries a large number of press releases including those generated by local authorities, politicians, clubs, marketing and public relations firms and sporting organisations.
- 2.75 *Infonews* makes use of social media to distribute headline news via Twitter and Facebook.
- 2.76 *Voxy.co.nz*, is an example of a general news site which aggregates its material from a number of sources including, before its closure, NZPA. The site carries the tag line “Your Voice –Uncensored” and has positioned itself as an aggregator of information and news from its community of users. *Voxy* is owned by the media company Digital Advance.
- 2.77 A number of other news sites appear to operate on similar basis to *Voxy*, aggregating press releases and supplementing this with some content produced internally. For example in 2009 *TopNews*, which appears to operate business and technology news web portals in a number of countries, began publishing in New Zealand.
- 2.78 *Dan News*, which carries the tag line, “Breaking News, Media and Bloopers”, is run by a self-described “hobbyist” and aggregates audio clips and promotional/programming information from the major broadcasters. We were told there is no formal arrangement between the broadcasters whose content is posted and the site’s owner. The site’s emphasis is on entertainment rather than news, but *Dan News* is an active tweeter with media followers and uses Twitter as a live news feed.

*c) Public relations and advocacy sites*

- 2.79 Web publishing has also become an important tool in the marketing and promotion of businesses, educational institutions, governmental and non-governmental organisations.
- 2.80 For example, all major political parties in New Zealand have their own websites which provide both an interface with the public and a repository for policy, speeches, and public announcements. These sites also carry “news clips” in the form of the parties’ own press releases and video coverage of public meetings, press conferences etc. The National Party’s site includes a link to the Prime Minister’s website which features the Prime Minister’s personal “video journal” in which he reflects on the week’s activities.
- 2.81 These sites and their content are all cross-referenced and linked to self-publishing and social media sites including YouTube, Flickr, Facebook and Twitter.

- 2.82 As discussed in the introductory chapter, web publishing has also become an important forum for consumer and advocacy groups to share information and apply pressure on organisations and individuals. Examples of consumer advocacy sites in New Zealand include *CYFSWatch* and the *ACCforum* which provide platforms for the exchange of information and views on the performance of the Accident Compensation Corporation and the government's child protection agency Child, Youth and Family.<sup>36</sup>
- 2.83 The web also provides a channel via which individuals can conduct their own campaigns targeting businesses, institutions or individuals.
- 2.84 In New Zealand an example of this type of site is *Kiwisfirst*, edited by Vince Siemer. The site focuses on the New Zealand judiciary and legal system and offers robust critiques of individual judges and the conduct of the courts.<sup>37</sup>

### 3. The Blogosphere – from “Hard news” to gossip

- 2.85 The development of user-friendly blogging software and hosting services such as Word Press have facilitated the rapid proliferation of blogs, or weblogs. Technorati, an internet search engine for blogs, follows over 100 million blogs.<sup>38</sup> In its 2010 “state of the blogosphere” report, Technorati suggested the blogosphere was changing significantly as a result of the growing popularity of micro and mobile blogging.<sup>39</sup> Further the line between blogs and social networking is dissolving with the sharing of blog posts increasingly through social media.
- 2.86 Blogs are either hosted on a website or interface, such as Blogspot, or have their own separate website. Blogs vary greatly in terms of professionalism, readership and influence. At one end of the spectrum are hobbyists who write diary-like entries primarily for the consumption of colleagues, friends or family. At the other, are the bloggers with specialist subject knowledge in areas such as business, politics, law, the media, science and the arts.
- 2.87 New Zealand has an active blogging community straddling this spectrum. Among the specialist subject bloggers are respected and influential communities of legal and technology bloggers including, for example, barrister and media lawyer Steven Price (*Media Law Journal*), Victoria University lecturer Dean Knight (*Laws 179 Elephants and the Law*), Professor Andrew Geddis (*Pundit*), Mauricio Freitas' technology blog, *Geekzone*, and Richard McManus's seminal blog *ReadWriteWeb*, to name but a few.
- 2.88 Alongside the specialist subject bloggers there is a growing number of individual and collective blog sites whose primary focus could broadly be defined as “news and current affairs.” The blog site *Tumeke!* publishes rankings of many of New Zealand's most well-known political and news blogs and since the survey began in 2007 the number of blogs included in the current affairs category has risen from 164 to 203.<sup>40</sup>

- 2.89 Some of these bloggers have come from a traditional journalistic or academic background but many have not. Among the longest running current affairs blogs are journalist Russell Brown's *Hard News* (hosted on *Public Address*) and Bruce Simpson's *Aardvark*.<sup>41</sup>
- 2.90 There are a number of well-established collective blog sites, including some, like *Public Address* and *Pundit*, which bring together bloggers with a variety of views and perspectives and which are not overtly affiliated with any particular ideology or political party.
- 2.91 However, blogging has evolved as a robust and often polarised forum for debate and many blogging collectives and bloggers are strongly partisan – indeed it is a common feature for bloggers to include on their websites links to other bloggers categorised as “left/middle/right”.
- 2.92 Some sites, such as *The Standard*, (which describes itself as the “New Zealand Labour movement newspaper reborn digitally“), *Frogblog* (the Green Party) and *Red Alert* (Labour caucus), are clearly affiliated with political parties/movements. Others, like Cameron Slater's *Whale Oil Beef Hooked* blog, David Farrar's *Kiwiblog* and lawyer Cathy Odger's *Cactus Kate*, present their own political perspective and have forged distinctive online identities.
- 2.93 The most prolific bloggers will post at regular intervals throughout the day. For example, David Farrar, author of *Kiwiblog*, posts approximately six to eight blogs per day.
- 2.94 Bloggers typically draw on material from a wide variety of media, integrating the original content on which they are commenting into the body of their work by cutting and pasting excerpts from mainstream media websites (text and video) and linking to other websites or bloggers. It is also common for bloggers to post documents and or links to source material (including, for example, official reports or research) referred to in their blogs.
- 2.95 Although primarily a forum for opinion, bloggers also break news, sometimes strategically. For example, in the period during which this Issues Paper was researched, blogger Cameron Slater broke a number of news stories which were subsequently carried in the mainstream media.<sup>42</sup> Bloggers, including Cameron Slater, also frequently critique mainstream media and in particular point out when they have been “scooped” by a blogger.
- 2.96 However the relationship between mainstream media and bloggers increasingly appears to be more symbiotic than adversarial. Many bloggers have strong political and media networks which they are able to use strategically – in much the same way as have journalists working for the mainstream media. Like their mainstream counterparts, a number of bloggers, including for example Russell Brown, David Farrar and Bomber Bradbury, have several other media roles as producers, media commentators and interviewers. David Farrar has recently been taken up as a columnist in the *New Zealand Herald* and also has a blog on *Stuff*. Many bloggers are also adept users of social media such as Twitter and Facebook, using these mediums to cross-promote their blogs and to monitor other publishers.

- 2.97 In contrast with mainstream journalists in the past, bloggers frequently develop strong communities of followers with whom they actively engage. The quality of blog postings on sites like *Pundit* and *Public Address* is often matched by the calibre of the commentary they attract. A blogger's influence is often measured not just by the number of unique viewers the blog site attracts but also by the number of participants and the number of external sites linking into it.<sup>43</sup>
- 2.98 The blog's administrator (who is often also the author of the blog) sets the parameters for user engagement, deciding whether to moderate comments and where to set the boundaries around questions of tone, taste and decency. Standards and the levels of control vary widely: the internet culture's aversion to censorship is often evident in the lack of moderation. This can sometimes see commentary descend into highly derogatory and abusive exchanges between different commentators.
- 2.99 Most bloggers are unpaid but a number of sites do carry paid advertising. *Public Address*, *Pundit*, *Spare Room* and *Kiwiblog* are all part of the "Scoop Media Cartel" a centralised arrangement by which Scoop sells advertising and links to these blog pages.<sup>44</sup>

#### 4. Social Media

- 2.100 The rapid evolution and adoption of social media and networking is perhaps the most significant recent cultural development within the web 2.0 environment. There are literally millions of social networking forums facilitating the sharing of text, photographs and audio-visual content among users.
- 2.101 The spectrum of social media platforms ranges from community message boards or chat rooms, which are user-generated and tend to arise around interest groups, through to the wide reaching social networking platforms such as Twitter and Facebook which allow messages to be broadcast to the world.
- 2.102 The term "chat room" is simply descriptive of synchronous or asynchronous conferencing. Thus it can apply to instant messaging chats and online forums that either stand-alone or are provided as an additional forum on a website, such as the community message board on Trade Me; to a stand-alone chat room; through to a full immersive graphical social environment such as in a multiplayer online game world (like Runescape). They tend to be free and require the creation of some kind of account or registration so that they have a username and a password.
- 2.103 Messaging forums can appear in countless forms including communities formed around a particular technology, interest or activity such as a chat room or a message forum on special interest sites. They can exist as an online forum, such as the message boards on Trade Me and Geek Zone. Trade Me's message boards are organised around topics, or discussion threads, and attract on average 25,000 new posts per day.<sup>45</sup>

- 2.104 These forums allow for posting and responding to messages, but do not allow for the level of interactivity of instant messaging. Chat rooms, on the other hand, tend to be stand-alone sites that provide a venue for people of a common interest group to communicate with each other in real-time. There are millions of chat rooms available for virtually every area of interest, including mothers groups, baton twirling, martial arts, crafts and so on.
- 2.105 At the other end of the social networking spectrum lies the more generic broadcasting-to-the-world social networking. These are the sites that have much larger numbers of users and that are formed and joined for the prime purpose of communicating and connecting with friends in an online environment. Messages can either be broadcast to the world or restricted to the user's selected group of contacts.
- 2.106 With more than 700 million users, Facebook is increasingly used by public figures and organisations as a public relations tool, including the strategic release of information and "news". As discussed earlier, it has also become an important cross-promotional and information source for mainstream media.
- 2.107 Facebook and *MySpace* facilitate the sharing of virtually any personal information including text, photographs and video. Flickr differentiates itself by primarily being a photo-sharing platform with messaging capabilities. Twitter on the other hand only allows for short messages (140 characters at a time) to be published.
- 2.108 They all incorporate an ability to gather friends, "follow", or adapt some other way of grouping people together, either on the basis of a shared history or on the basis of interest areas. For example, Twitter allows users to "follow" other users so that the other person's tweets will show up on their "timeline". Further, users can join a conversation by tweeting with symbols such as # (which indicates a topic) or @ (which indicates a person). A user's profile page allows them to follow people who have mentioned (or tweeted a message with @ before that user's username). It is a common function for users to be constantly informed as to what other people within their community are thinking or doing. Examples include the "news feeds" page on Facebook and the "timeline" on Twitter.
- 2.109 There is a significant overlap with web-based email and these social networking platforms. For example, *Flickr* makes provision for users to find friends who may also be using *Flickr* by importing contacts from email accounts, or by undertaking a search of a friend's name. *Flickr* also makes provision for groups to form on the basis of a specific interest area or a group-raising awareness. Further most of these sites provide regular email updates so that users are constantly aware of what is occurring on their profile page or threads of messages that they have added to.

- 2.110 There is an ability to share information from other sources. This is generally done with the assistance of a “widget” (a stand-alone application that can be embedded into third party sites by any user on a page where they have rights of authorship). The widget will appear on other websites allowing the user to click on a button and have it link to their social networking account. Provision is then also generally made for the user to “follow” the source on Twitter or “like” on Facebook.

## **MODERATION & CONTROL ONLINE**

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### **Self-regulation and communal accountability**

- 2.111 Although most of these different online publishers and publishing channels are not currently accountable to a regulatory body, it is a mistake to assume there is no form of control or accountability associated with them.<sup>46</sup>
- 2.112 The degree of control and accountability online varies considerably from site to site and organisation to organisation. To a large extent these differences reflect the nature and function of the websites themselves. Some sites, such as Trade Me’s community message boards are set up to operate like open public forums; others, like some personal blog sites, operate more like private spaces into which the public are invited. Mainstream media organisations often sit somewhere between these two models.
- 2.113 As discussed in the introductory chapter, the internet culture is defined by a powerful commitment to free speech values and an equally powerful aversion to censorship. This, combined with the anonymity frequently associated with digital communication, has helped create an environment characterised by robust debate and a reliance on bottom-up, or user, control.
- 2.114 However alongside the cyber norms which influence how individuals conduct themselves on line, there are a wide range of tools used to moderate and control online behaviour. Organisations like Trade Me, whose business model depends on public trust, have invested millions of dollars in developing their own sophisticated software designed to protect themselves and their customers from a range of illegal and unethical behaviour.
- 2.115 Most large corporate online operators, including social and mainstream media organisations, have detailed terms and conditions which users must accept as a condition of use. Most also require users to register and provide email addresses and other identifying information as part of the “sign-up” process.
- 2.116 Over and above these base-line standards website operators may adopt varying levels of day-to-day control over their sites. The risk averse may pre-moderate user comments before publication. Others rely on community or user moderation, whereby participants can vote to have content removed. This system may be backed up by a discretion to ban persistently abusive users and take down offensive content.

- 2.117 In the following discussion we look briefly at the types of moderation employed by the spectrum of publishers surveyed in this chapter.

*Moderation of news sites*

- 2.118 Both *Stuff* and *nzherald* require users to agree to terms and conditions before posting comments on their websites. All comments are moderated before publication. *Stuff* does not require users to register before commenting, but does require users to provide a name and email address and to tick a box indicating they accept the terms and conditions. Registering provides access to more services and content and requires use of a password.
- 2.119 The *nzherald* website requires users to register the first time they submit a comment. Users must provide their name, email address and a password. The site's terms and conditions, are set out in clear and accessible language.<sup>47</sup>
- 2.120 Both *Stuff* and *nzherald* allow users to comment under pseudonyms but *nzherald* suggests it would prefer users to make comments using their full names, consistent with the approach taken to letters published in the newspaper's opinion pages.
- 2.121 It should be noted that commenting on news stories or other content is entirely at the discretion of the website operators. The decision whether or not to allow comment might relate to the nature of the content, (for example a report of an on-going trial typically would not be open for public discussion on a news website), or to more practical considerations such as the amount of resource available to pre-vet comments submitted for publication.
- 2.122 TVNZ users are required to accept (by way of ticking a box) TVNZ's Terms and Conditions which advises on copyright and privacy policy but not as to the content of the comments.<sup>48</sup> TV3 users are not currently expected to register, or to accept any terms or conditions.
- 2.123 Both TV3 and TVNZ moderate comments pre-publication, and they will not appear until they have been approved. These sites also reserve the right to bar users should they believe the user is posting abusive content.
- 2.124 None of the online newspapers provide a clear avenue for lodging complaints about content although we were told readers simply use the email address and newsroom details on the sites' "contact" pages to complain about content. The Broadcasting Standards Authority (BSA), however, requires entities under its jurisdiction to provide a clear avenue for the laying of a complaint. Both TVNZ and TV3 have clear links on their homepage for users to make a complaint regarding the content of a television programme. In respect of radio stations, where Radio New Zealand provides a link to a formal complaints page, *Newstalk ZB* does not provide a clear avenue for complaint other than the ability to contact the editorial team.

*Web-only news and blog sites*

- 2.125 Although not covered by the jurisdiction of a regulatory body, most websites included in this survey provide clear statements about the nature of their site and what might be described as the publishing philosophy and standards which apply to content carried on the site. Typically these will reinforce the basic legal constraints that apply to all speech in New Zealand, such as the need to avoid defaming others.
- 2.126 However beyond these basic requirements the standards and practices of web publishers vary widely. The generalist and specialist news sites such as *Scoop* and *interest.co.nz* and the business wire services are clearly positioned at the professional end of the publishing spectrum and their standards and practices reflect that. The news site *Voxy* monitors all of the submitted material pre-publication and has ultimate editorial control over the blogs. *Voxy* will delete or edit comments from the blog thread if necessary but will seldom delete or edit a blog post. Some sites, on the other hand, do not moderate or exercise any editorial control over articles submitted by registered users pre-publication. Any editorial control and monitoring is retrospective and is heavily reliant on community monitoring. Our research found contributed content on at least one news site which clearly breached suppression orders.
- 2.127 Within the blogosphere there are widely divergent approaches to moderation and control – some of which is dictated by the sophistication or otherwise of the underlying technology supporting the blog. As discussed earlier, blogs cover a multitude of topics and target markets and the level of professionalism and editorial control exerted by the authors and blogging communities varies accordingly.
- 2.128 Some blogs provide comprehensive statements setting out rules or expectations for commenting. *Kiwiblog*, for example sets out a demerit points-type system whereby users accumulate points and once they reach a certain number will be blocked from posting. The editor of this blog retains the right to edit or delete any comments.
- 2.129 The more professional bloggers tend to have clear transparency policy and open disclosure statements about their personal and professional affiliations, interests and history.<sup>49</sup>
- 2.130 Whilst blogs are primarily used to share information and express opinions, this subjectivity does not infer a disregard for factual accuracy. On the contrary, the very nature of the blogging user-interaction model means writers are constantly open to challenge on matters of both fact and opinion. The blogging community as a whole not only moderates the content and tone of the comment threads but also the content of the blogs. This self-regulation is apparent from a perusal of the message board but also occurs more privately via email between users and the author of the blog.

- 2.131 However blog sites are not democratic public forums: as noted earlier they are often highly partisan and blog posts and commentary can be highly offensive and personally abusive. Ultimately, the blog administrator/author sets both the tone and the threshold for abusive speech. A person who has been denigrated or who has been the subject of a false allegation on a blog site is entirely dependent on the blog's administrator for any redress or corrective measures.
- 2.132 We discuss the tools that have been developed within self-publishing and social media platforms such as Facebook in chapter 7 of this paper in the context of legal and non-legal remedies for harms arising from speech abuses.

## CONCLUSION

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- 2.133 In this chapter we have attempted to provide a snap shot of the spectrum of web-based publishing in New Zealand. This picture is, of necessity, partial and transitory.
- 2.134 In the following chapter we attempt to draw some tentative conclusions about the defining characteristics of news media and what such parameters might imply for the categorisation of the range of web publishers surveyed in this chapter.
- 2.135 Before doing so it may be useful to draw out a number of observations about the new environment in which the media are now operating.

### *Size still matters*

- 2.136 Although the proliferation of publishers has fractured audiences, the reality is that in most western democracies, including New Zealand, the public continues to rely on mainstream media companies as its primary source of news – for the moment at least.
- 2.137 Analysis of online sites visited by New Zealanders in May 2011 by global digital measurement and marketing company comScore, showed that of the potential 2.8 million internet users in this country (aged 15+), 96% had accessed a newspaper website. This was twice the global average reach for news sites. New Zealanders also spend significantly longer on news websites compared with the global average. APN & Media's *nzherald* site and Fairfax Media's *Stuff* site lead the news sites by a large margin, both reaching about two-thirds of the potential online audience.<sup>50</sup>
- 2.138 Similarly, despite the increasing trend towards on-demand and customised media, for a very significant proportion of New Zealanders television and radio continue to play a dominant role in setting the news agenda and focusing public and political attention.

- 2.139 This handful of public and private enterprises continues to channel significant resources into generating news across a broad range of topics judged to be of interest and importance to the public. News is a core component of their businesses and critical to the success of their web presence.

#### *Symbiotic relationships*

- 2.140 However, what our analysis also reveals is the increasing interdependence between these traditional news companies and emergent forms of journalism ranging from the so called “citizen journalists” who provide raw material to news sites through to the current affairs bloggers who increasingly help shape the news agenda.
- 2.141 This symbiotic relationship between traditional and new news media is highly significant given the critical role search engines such as Google play in determining what is seen and unseen on the web. For example, a virtually unknown blog site can be lifted from total obscurity to first or second ranking on a Google search page if it is referenced prominently on a mainstream media website.<sup>51</sup>
- 2.142 Linking is central to the web culture and this characteristic creates a porousness which can see quasi-private publications, such as those which take place on websites and forums, pulled through into mass audience websites with sometimes far-reaching consequences for those individuals involved.
- 2.143 For the moment though, it often requires a mainstream media organisation to focus public attention on the “tweet” or video post or blog entry and to construct the “news narrative” which gives the content added momentum and credibility.

#### *Dis-mediation*

- 2.144 To some extent the suggestion that “citizen journalism” is a new phenomenon born of the web is a mistake. Journalists and news organisations have always been dependent on the public for news – in fact journalists were traditionally valued for the breadth and depth of their sources.
- 2.145 What has changed of course is that now the “sources” do not necessarily need the journalists to make public the information they wish to disseminate.
- 2.146 This ability to bypass the gatekeepers came though strongly in our analysis of some of the new news media organisations discussed earlier in this chapter. Within the culture of these new ventures the idea that “raw” or “unedited” content is made available to users is seen as a desirable attribute.
- 2.147 Similarly, within the blogosphere the culture of imbedding links to source content allows users to conduct their own enquiries and move seamlessly from site to site – choosing when and if to return to the original blog post.

- 2.148 At a fundamental level, where once the public were dependent on large media organisations with expensive hardware to provide coverage of live news events such as high profile criminal trials, it is now possible for any individual with smart phone technology to provide instant coverage.
- 2.149 For the moment this possibility remains more of a theoretical threat to mainstream media organisations than a practical reality for the reasons already outlined: although anyone can broadcast, not everyone can marshal a mass audience to view that broadcast.
- 2.150 That said, those with an understanding of how to manipulate search engines to elevate their content can quickly achieve large audiences, particularly when operating in a small market like New Zealand and especially if they are given a hand-up by the mainstream or social media.

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- 18 At the time of writing OhmyNews International had changed its approach to publishing contributed content after a re-appraisal of its role. For details see < [www.english.ohmynews.com](http://www.english.ohmynews.com) > .
- 19 Although radio broadcasters are also challenged by the internet they are accustomed to multiple deadlines and continuous broadcasting.
- 20 Nielsen Consumer and Media Insight General News Sites Ranking Report for September 2011 rated [stuff.co.nz/news](http://stuff.co.nz/news) as the top site with 214,334 average daily unique browsers; [nzherald.co.nz/news](http://nzherald.co.nz/news) was rated second with 173,827. In the month of September over two million unique browsers visited the *Stuff* site and 1.8 million the *nzherald* site. Duplication of browsers between the two was estimated to be 17.6%.
- 21 Amy Weinberger, *State of the Internet New Zealand* (2011) < [www.comscore.com/Press\\_Events/Presentations\\_Whitepapers/2011/State\\_of\\_the\\_Internet\\_New\\_Zealand](http://www.comscore.com/Press_Events/Presentations_Whitepapers/2011/State_of_the_Internet_New_Zealand) >
- 22 The report estimated [odt.co.nz/news](http://odt.co.nz/news) received 7,315 average daily unique browsers in September 2011. Monthly unique browsers for September 2011 were estimated at 121,736.
- 23 In introducing the Television New Zealand Amendment Bill to Parliament on 23 March 2010 the Minister of Broadcasting Dr Jonathan Coleman spoke of the need for Television New Zealand “to be recognized as a digital media company” capable of functioning in a “converging media environment” (23 March 2010) 662 NZPD 10440.
- 24 TVNZ’s news site ranked 4th in the Nielsen September 2011 ratings with 32,791 average daily unique browsers. TVNZ’s monthly unique browser total for September 2011 was 512,869.
- 25 The remaining independent publishers are Allied Press (Otago Daily Times), the Gisborne Herald, the Ashburton Guardian, the Greymouth Evening Star and the Westport News.
- 26 In April 2011 it was announced NZPA was to be wound up after major shareholder, Fairfax Media, gave notice of its intention to withdraw support. In 2006 NZPA had moved to a fully commercial model, generating its own content and entering into service agreements with a wide range of publishers including *Yahoo!New Zealand*, Telecom, TV3, MediaWorks and the *National Business Review*. NZPA also provided 24 hour international wire feeds for New Zealand media companies and provided a service for the distribution of press releases via its news wire. At the time that its closure was announced NZPA was generating around 800 New Zealand news stories a week. Following its demise the Australian wire service, AAP, which is jointly owned by Fairfax and News Ltd, boosted its New Zealand resources with a view to breaching some of the gap left by NZPA. NZPA’s demise is likely to have a major impact on a wide range of media and is also likely to see the development of new cross-media partnerships and commercial content sharing arrangements.
- 27 Radio New Zealand News and Newstalk ZB were ranked 8th and 9th in Nielsen’s September 2011 with an average of 5,716 and 4,505 daily unique browsers respectively. Radio New Zealand’s monthly unique browser total for September 2011 was estimated to be 106,796 and Newstalk ZB’s 84,803.
- 28 David Beatson “RadioWith Pictures – give it a crack” (2011) Pundit < [www.pundit.co.nz](http://www.pundit.co.nz) > .
- 29 Scoop’s monthly unique browser total for September 2011 was estimated by Nielsen to be 175,645.
- 30 < [www.newsroom.co.nz](http://www.newsroom.co.nz) > .
- 31 < [www.businessdesk.co.nz](http://www.businessdesk.co.nz) > .
- 32 < [www.newsroom.co.nz](http://www.newsroom.co.nz) > .
- 33 Kimberly Isbell “The Rise of the News Aggregator: Legal Implications and Best Practices” (Research Publication no.2010-10 The Berkman Center for Internet & Society at Harvard University, August 30, 2010) at 2.
- 34 Nielsen’s September 2011 ranking of general news sites estimated *Yahoo New Zealand* attracted on average 119,502 daily unique browsers.

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- 35 *Yahoo!New Zealand's* rankings are likely to be influenced in part by the legacy of its commercial relationship with Telecom whereby Yahoo! Xtra was the default homepage for many computers sold in New Zealand, along with the news portal being offered up to Yahoo email users.
- 36 In 2007 police protection was provided to a dozen social workers who were named in threatening and derogatory posts as part of a "name and shame" campaign launched on the original CYFSWatch website.
- 37 Vincent Siemer, has been before the courts on a number of occasions in relation to publications on his website.
- 38 See < [www.technorati.com](http://www.technorati.com) > .
- 39 Technorati "State of the Blogosphere 2010" (2010) < [www.technorati.com](http://www.technorati.com) > .
- 40 < [www.tumeke.blogspot.com](http://www.tumeke.blogspot.com) > .
- 41 < [www.publicaddress.net/hardnews/](http://www.publicaddress.net/hardnews/) > and < [www.sardvark.co.nz](http://www.sardvark.co.nz) > .
- 42 These included the publication of papers obtained under the Official Information Act relating to political briefings by the Security Intelligence Service in relation to the Israeli citizens caught up in the Christchurch earthquake. Cameron Slater "Phil Goff and his briefings he never had" (2011) *Whale Oil Beef Hooked* .
- 43 For example Tumeke's ranking is derived from a combination of website traffic, number of posts and comments and links from other sites. In December 2009 the top five sites according to this measure were *Kiwiblog*; *Whale Oil Beef Hooked*; *The Standard*; *Cactus Kate*; and *Not PC*.
- 44 For details of the commercial arrangement see < [www.cartel.scoop.co.nz](http://www.cartel.scoop.co.nz) > .
- 45 Information provided to the Law Commission by Trade Me May 2011.
- 46 They are of course all accountable to the law. In addition, as we will discuss in chapter 5, the Press Council has extended its jurisdiction to the news websites associated with the newspaper industry. However much of the content on broadcasters' news sites is unregulated because it falls within the exclusions contained in the Broadcasting Act 1993.
- 47 < [www.nzherald.co.nz/site-information-help/news/article.cfm?c\\_id=500827&objectid=10423788](http://www.nzherald.co.nz/site-information-help/news/article.cfm?c_id=500827&objectid=10423788) > .
- 48 Registration requires the users name, email, gender, region of interest (selected from a dropdown list), year of birth, mobile number (optional), username and a password.
- 49 David Farrar, for example, provides an extensive disclosure statement on *Kiwiblog* regarding his personal and political leanings.
- 50 Amy Weinberger, above n 21.

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- 51 For example, in April 2011 it was revealed in Parliament that a senior ACC medical assessor had initiated defamation proceedings against an anonymous ACC claimant for alleged defamatory comments she had made about him on her blog site. Debate then took place within the mainstream media as to the merits of this course of action without at any point repeating the allegedly defamatory comments.

However a simple Google search under the terms "ACC doctor + defamatory comments" produced within 0.22 seconds a menu of ten stories, including some by mainstream media. The top item returned by the search engine was a Google cached (copied) version of the ACC Claimants Support Network - ACC Focus website which included a text version of a story attributed to a major news source and containing a hyperlink taking readers directly to the offending blog and the allegedly defamatory comments about the doctor.

The blog's author initially queried how a blog with perhaps no more than 15 followers could possibly have caused \$200,000 worth of reputational damage to the doctor. However, within days of this story being carried by the mainstream the alleged defamation had spread like a virus on the web.

In another example politician and prominent media commentator threatened to take legal action over what he claimed to be defamatory material contained in a personal blog written by a woman with whom he had been in a relationship. Mainstream media coverage of the dispute saw the hitherto little known blog post rise in the Google rankings as numerous other commentators and bloggers linked to the blog and its inflammatory contents from their own websites.

# Chapter 3

## The news media's special legal status

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### INTRODUCTION

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- 3.1 All the publishers surveyed in the preceding chapter are subject to the legal constraints which apply to anyone exercising their free speech rights in New Zealand. None is entitled to defame others or breach court orders or invade a person's privacy or breach their copyright.
- 3.2 However only one category of publishers, the mainstream media, is currently subject to the regulatory regimes (statutory and self-regulatory) which apply to the news media – despite the fact that many publishers included in our survey are clearly in the business of generating and commenting on news and current affairs.
- 3.3 Similarly, only the mainstream media is normally able to take advantage of the special privileges and exemptions which the law grants news organisations in recognition of the critical role those who gather and disseminate news to the public play in a democracy.
- 3.4 One of the central questions our Issues Paper addresses is whether there is a case for extending the system of legal privileges and countervailing regulatory accountabilities which currently applies to traditional news media to some of these new publishers.
- 3.5 In the next chapter we attempt to analyse more closely the arguments for such an extension, and ask what it is that characterises this special type of speech which requires legal protection and accountability.
- 3.6 But first we set out the nature of the legal privileges and exemptions which apply to the news media and explain why these privileges exist, and the conventional expectations about how the news media will exercise these privileges.

## Media privileges

### *Rights of attendance*

- 3.7 A number of statutes provide that news media reporters may attend proceedings in courts even when other members of the public are not permitted to attend. Our criminal courts, including courts martial, normally sit in public, but statutes provide that when certain grounds exist the public can be excluded. With one rare exception, that power of exclusion cannot be used to exclude “accredited news media reporters”.<sup>52</sup> Those reporters also have the right to attend sittings of the Family Court and the Youth Court, and some disciplinary tribunals, even though the general public have no right of admission. In these situations they may sometimes be able to report what goes on in the public’s absence. At other times that reporting right may be curtailed or even removed, but the reporters are still entitled to be present, as observers if nothing else.<sup>53</sup> In this capacity they are the eyes and ears of the public and serve as an assurance that the judiciary are subject to scrutiny and thus accountable.
- 3.8 The rules about allowing cameras and audio recorders in court are not statutory, but are contained in a set of guidelines which supplement the court’s inherent jurisdiction.<sup>54</sup> Application must be made to a judge for permission. If the application is allowed, the guidelines provide for a standard set of conditions which govern what can be filmed or recorded and what cannot. The judge can vary those conditions, or add to them, in the particular case. It is usually only the mainstream media who apply for permission.
- 3.9 Parliament confers privileges on those members of the media who are accredited to the Press Gallery.<sup>55</sup> This privilege is rather different from that which applies in the courts because Parliament virtually always sits in public, so the privilege does not give exclusive *attendance* rights. Rather, the Press Gallery is granted privileges in respect of *access* and *facilities* to assist in the objective of accurate and responsible reporting of the proceedings of Parliament and the business of ministers and other members of Parliament.
- 3.10 In respect of other kinds of meetings equivalent allowances are not made. In the case of local authority meetings the relevant legislation simply provides that “bona fide” members of the media have a right to attend as members of the public, and to report the proceedings.<sup>56</sup> But if the public are excluded the media can be excluded as well, and usually are. In that sense they have no more rights than anyone else. However the express reference to a right to report does suggest that while in attendance they are in a more privileged position than other members of the public.
- 3.11 The significance of the expression “bona fide member” is not clear, but it could be interpreted as requiring a connection with an established media organisation. It suggests an expectation of responsibility. The New Zealand Public Health and Disability Act 2000 has a similar provision in relation to board meetings, except that the phrase “bona fide” is replaced by “genuine”.<sup>57</sup>

- 3.12 It is the court attendance privileges which deserve most discussion. The relevant statutes almost all confer the privilege on “accredited” news media reporters. The word “accredited” has no statutory definition. Nor does the term “news media”. So the question is raised squarely of whether members of the “new” media – bloggers or website hosts for instance – have standing to attend when the general public cannot.
- 3.13 The purposes of allowing the media to remain in court are twofold. The first is, unless reporting is restricted for any reason, to provide the public with a fair and accurate account of the proceedings. Fairness and accuracy are the hallmarks of court reporting: reports which lack those attributes may be defamatory, and even in contempt of court. The second purpose is to ensure that there is scrutiny of the proceedings on behalf of the public to ensure that judges remain accountable. Both of these purposes assume that the representatives of the media allowed to remain in court will maintain acceptable standards of reporting, and that they will act responsibly. False, distorted, or prohibited accounts are not in the public interest. As White J said in the *Slater* name suppression case: “the right to report fairly and accurately carries with it a significant responsibility to ensure balanced reporting ...”.<sup>58</sup>
- 3.14 For reasons such as these, the Ministry of Justice has issued guidelines as to how it “accredits” news media for the purpose of attendance in the Family Court.<sup>59</sup>
- The Ministry will accredit a news media organisation if it is subject to a code of ethics or professional standards and has a relevant complaints procedure. This is both to encourage a professional standard of reporting and to ensure that there is an appropriate process for dealing with complaints about inaccurate or unbalanced reporting.
- 3.15 The Criminal Procedure Act 2011 contains very similar criteria for accreditation to attend and report criminal proceedings when the public are excluded.<sup>60</sup> (At the time of writing these provisions have been passed but are not yet in force.)
- 3.16 In both Family Court and criminal proceedings the judge retains a discretion in a particular case to allow attendance by a person who is not “accredited”.
- 3.17 So it is clear that these court attendance exemptions are viewed as carrying with them an obligation of responsibility.
- 3.18 As far as the guidelines for in-court cameras and audio recording are concerned, the application forms which accompany them assume that it is only the mainstream media who are going to apply for permission to film, photograph or record proceedings. However the judge’s inherent powers to control his or her own court could no doubt enable him or her to grant permission to others on such conditions as deemed appropriate.

- 3.19 The criteria for membership of the Press Gallery are that members must be “bona fide journalists employed by outlets that regularly publish a substantial volume of parliamentary or political material”.<sup>61</sup> Applicants are scrutinised by the Gallery chairperson who may ask for recent examples of the applicant’s work before making a recommendation to the Speaker. Membership of the Press Gallery is granted following the Speaker’s approval of an application. The door is not open to all who engage in the activity of communication. For instance, they must not be involved in political lobbying. Certain standards of conduct are required and sanctions such as suspension from the Gallery may follow if those standards are not met.<sup>62</sup>

#### *Exemptions from obligations*

- 3.20 Other Acts provide that the media are exempt from certain obligations which fall on others. The Fair Trading Act 1986 imposes liability for misleading statements made “in trade”.<sup>63</sup> The court can grant a number of remedies, including compensation for loss suffered. Broadcasters and newspapers are, with certain exceptions relating to advertising, exempt from that requirement.<sup>64</sup> The result is effectively that if a news medium makes a mistake in its facts, perhaps in financial or general news reporting, it cannot be sued under the Fair Trading Act: the wording of the Act’s provisions might otherwise be interpreted to allow that. The provision recognises that while accuracy is an important quality in our media, it is best addressed outside the courts. The urgency and volume of news publication is such that the occasional error is inevitable, and legal liability in the courts entailing possible financial consequences could have a chilling effect which would impede freedom of expression. The Fair Trading Act exemption is currently confined to the mainstream media – newspapers and broadcasters. There may be a question whether it should be broadened to include other media.
- 3.21 The news media are also exempt from the principles of the Privacy Act 1993 so long as they are engaging in “news activities”, which is defined as gathering and disseminating news and current affairs.<sup>65</sup> Some find the media’s exclusion from the Privacy Act difficult to understand. But there is a reason for it. Of course the news media should respect privacy. However the Privacy Act is about privacy in a special sense. It relates to the way information is collected, the way it is held, rights of access to it, and the use that can be made of it. It is in fact a data protection statute and many of its provisions are incapable of sensible application to the media’s business. The media’s obligation to respect privacy should be defined in a different way which recognises the public interest in freedom of information. The codes and principles applied by the Broadcasting Standards Authority and the Press Council, which we discuss later in this chapter, do this. So does the new tort of invasion of privacy. This raises the important question, which the Law Commission discusses in its report on the Privacy Act,<sup>66</sup> whether the news media exemption should be confined to media organisations which are subject to a code of practice and oversight by a regulator.

<sup>62</sup> Law Commission Issues Paper

- 3.22 Our electoral legislation is another example. It creates offences such as publishing or distributing or broadcasting on polling day any statement likely to influence an elector. Its focus is to stop campaigning, and other sorts of communication activity, which might deflect an elector from the objective decision-making which is necessary on the day of an election. Again there is a limitation on this prohibition to ensure that nothing in it is to restrict the publication of a party name in news relating to the election published in a newspaper or by broadcasting.<sup>67</sup> The purpose is to ensure that the media can provide information on a matter of national importance without being constrained in an artificial way: *provided* they are engaging in the provision of news, without the motive of influencing voting.
- 3.23 A similar provision is to be found in the Electoral Referendum Act 2010 which restricts referendum advertisements. But “referendum advertisement” does not include the editorial content of a periodical, a radio or television programme, or a publication on a “news media internet site”.<sup>68</sup>
- 3.24 The Copyright Act 1994 makes it a civil wrong to publish or disseminate copyright material without the consent of the copyright holder.<sup>69</sup> But there is an exception in the case of a “fair dealing” for the purpose of “reporting current events by means of a sound recording, film or communication work”, and also in a newspaper.<sup>70</sup> “Communication work” was inserted in 2008, with the clear intent of extending the protection beyond newspapers and broadcasting. This is a recognition that the dissemination of news is of necessity an urgent business, and at times the most efficient and sensible way of doing it may be to allow the media to borrow words and images from elsewhere. Case law has emphasised that the purpose of using the other work is all important: it must be for the purpose of reporting current events and not for the purpose of competing with the original. And the use of the material must be “fair”. There must, for example, not be overlong direct quotes.<sup>71</sup>
- 3.25 The fair reporting privileges in the Defamation Act 1992 also protect the media.<sup>72</sup> Fair and accurate reports and summaries of many types of proceeding, including court cases, Parliamentary proceedings and the proceedings of meetings, are privileged even though some of the material being conveyed may be defamatory. This protects the messenger rather than the original content, and is recognition that the public need to be fairly and properly informed of what is happening in our governmental institutions, both national and local. It would be a constraint on free speech if the media were to pay the price for any defamatory material in the information which it is their job to pass on to the public. Although these provisions have been in force for a long time – indeed many existed at common law – they are not confined to the mainstream media. In fact, they are not confined to the “media” at all. They cover anyone who publishes a report of the various kinds of proceedings. But the key qualification is that the report must be “fair and accurate”. In other words acceptable *standards* of reporting must be observed.

- 3.26 Another “accurate report” privilege is set out in section 61(2) of the Human Rights Act 1993. It provides it is not a breach of the unlawful racial disharmony provisions of section 61(1) to publish in a newspaper periodical or magazine, or to broadcast by radio or television, a report that someone else has used words infringing section 61(1) “if the report ... accurately conveys the intention” of the person who used the words. In other words the generator of the words commits a wrongful act, but the media *reporting* them do not. But the report must be *accurate*.
- 3.27 Finally, we note the provisions in some of our finance and securities legislation which exempt “journalists” from the need to comply with the disclosure and other obligations of financial and securities advisers.<sup>73</sup> The reason for this is simple. Journalists do not hold themselves out as experts in such matters, and the public know that. It is only those whose main business is financial advising who are caught by the requirements. But, once again, a *consequence* of the exemption is that the media can safely report on financial matters without fear of adverse consequences. Freedom of information is thus facilitated. The term “journalist” is not defined. Perhaps it does not need to be.

#### *Protection of sources*

- 3.28 The confidentiality of journalists’ sources has been a much debated topic. If journalists are to have access to important information they may sometimes need to assure their sources that they will not be named. That confidentiality has to some extent been recognised by the legal system for a long time, but subject to the overriding requirement that if, in the interests of a fair trial, a judge decides that the identity of a source should be disclosed, he or she can so require. The Evidence Act 2006 codifies that position, although it stops short of describing the journalist’s protection as a “privilege”.<sup>74</sup> (There is a not dissimilar provision in the Privacy Act 1993 which provides that, alone among the news media, TVNZ and Radio NZ must allow a person access to information about him or herself held by that news medium. But they do not have to disclose the *source* of that information.)<sup>75</sup>
- 3.29 The Evidence Act defines “journalist” as:<sup>76</sup>
- a person who in the normal course of that person’s work may be given information by an informant in the expectation that the information may be published in a news medium.
- 3.30 “News medium” is defined to mean:<sup>77</sup>
- a medium for the dissemination to the public or a section of the public of news and observations on news.

3.31 That definition may be wide enough to encompass a blog or other website, but there is a significant express statutory acknowledgment that one of the factors the court must weigh in the balance in deciding whether to require disclosure is:<sup>78</sup>

the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

3.32 Whether our courts will be prepared to hold that the protection extends beyond the mainstream media remains to be seen.

3.33 We note that the New Jersey Supreme Court recently refused to allow a blogger to use the New Jersey “Press Shield” law which protects members of the news media from revealing confidential sources. The court noted that were it otherwise, anyone with a Facebook account could claim the journalist privilege.<sup>79</sup> However the New Zealand provision does not confer a privilege: it is rather a codification of the established law of confidentiality, and it may be that the court’s power to override confidentiality may render the question a less significant one than it is in the United States.

#### **Informal recognition**

3.34 On a day-to-day basis, news media, and the journalists employed by them, are given preferential access in a wide range of circumstances. These privileges have no legal status and are typically conferred at the discretion of those organising, or in control of the event.

3.35 For example, police and emergency services have developed protocols for how they engage with representatives of the news media when they are reporting on an accident or police investigation. Similarly almost all major public bodies and government departments have press offices and communication teams, one of whose functions is to provide information to the news media.

3.36 Politicians and other powerful figures in society are often buffered from the media by advisers who determine which media outlets (and journalists) will have access to them. Factors such as audience share, and the perceived influence of the news organisation, will often play a role in determining access.

3.37 In addition there are numerous other contexts in which news media are granted special access so that they are able to report an event to the public. These include major cultural and sporting events; shareholder meetings; press conferences; notable funerals and other public ceremonies.

- 3.38 Wherever held, even if it is a public facility such as a town hall, the organisers can grant such attendance permissions as they like. The choice of attendees is theirs. But if they want the event to be reported they are probably more likely to allow the attendance of reporters from the mainstream media than they are lesser known bloggers or Twitter users. In other words there is likely to be a coincidence between the media which have recognition for statutory purposes and those recognised informally for other purposes, although there is no inevitability about that.
- 3.39 On one level these conventions we have described are simply an efficient organisational response to society's dependency on the news media as an intermediary for transmitting news and information. Already "citizen journalists" are playing an increasingly important role in this process just as the government is moving to proactively push out information to the public, bypassing the news media.
- 3.40 However neither of these developments negates the role of a professional body whose primary task is to provide citizens with accurate and impartial reports on what is happening in society.

### Conclusions

- 3.41 A vital question for this project is which of the news media should be able to take advantage of the statutory exemptions and privileges. In a few cases, the legislation is quite express about it.<sup>80</sup> In other instances the media exemptions are broadly construed.<sup>81</sup> But in the case of the Privacy Act exemption, and all the court attendance privileges, the exemption is phrased in terms simply of the "news media", or "accredited" news media.
- 3.42 Many of these Acts pre-date the digital era and the advent of citizen journalism and the blogosphere. The inconsistencies and imprecision in how the news media's traditional statutory exemptions and privileges should be applied, and to whom, clearly need to be addressed. The reasons for the privileges and exemptions and the principles underlying them need to be examined in making decisions about where the boundaries should be drawn.
- 3.43 More importantly, the rationale of these privileges and exemptions are relevant to our inquiry as to what the "news media" are, and what their societal function is. The discussion in this chapter suggests that at least the following concepts underlie some or all of these privileges and exemptions:
- a. The media's functions of providing news to the public, and ensuring that public officials are held accountable, are so important in a democracy that the law should not unduly impede their exercise of those functions.

- b. There is an expectation that the media who have privileges and exemptions will exercise them responsibly. Sometimes that expectation is contained in an express requirement that reporting be “fair” or “fair and accurate”. Sometimes it is contained in a requirement of “accreditation”; sometimes that requirement is justified by adherence to a code of practice and oversight by a regulatory body; sometimes it is not defined. At other times the expectation of responsibility is simply assumed.
- 3.44 While the media must provide us with news, and indeed we depend on them to do so, they cannot be expected to be experts in all matters they communicate to us. Given the speed with which they must act, the volumes of material with which they must deal, and the limitations of length within which they must work, perfection is not to be expected. The flow of information should not be impeded, or “chilled”, by too rigorous legal restrictions.
- 3.45 All this points to the conclusion that the law assumes the existence of a “news media” which is essential to the flow of information in a democracy, and which is trusted to provide that information in a responsible manner. Citizens rely on it for the information they need to exercise their rights, and governments and agencies of state rely on it for the dissemination of information about their activities. We shall pursue this concept further in the next chapter.

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- 52 Criminal Justice Act 1985 s138(3); Crimes Act 1961 s375A; Summary Proceedings Act 1957 s185C; Court Martial Act 2007 s39(30); Armed Forces Discipline Act 1971 s139. The Criminal Procedure Act 2011 will replace most of these provisions. The exception is in rare cases where matters of security or defence arise – Criminal Justice Act 1985 s138(2)(c).
- 53 Family Courts Act 1980 s11A; Family Proceedings Act 1980 s159; Children Young Persons and Their Families Act 1989 s166; Care of Children Act 2004 s137. See also the Social Workers Registration Act 2003 s80 and the Health Practitioners Competence Assurance Act 2003 s97.
- 54 Ministry of Justice “In-Court Media Coverage Guidelines” (2008) < [www.justice.govt.nz](http://www.justice.govt.nz) > .
- 55 Office of the Speaker “Rules of the Parliamentary Press Gallery” (2011) < [www.parliament.govt.nz](http://www.parliament.govt.nz) > .
- 56 Local Government Official Information and Meetings Act 1987 s49.
- 57 New Zealand Public Health and Disability Act 2000, Schedule 3 clause 34.
- 58 *Slater v Police* HC, Auckland, CRI 2010-404-379, 10 May 2011 at [45(c)].
- 59 Above n 54 at 31.
- 60 Criminal Procedure Act 2011 s198.
- 61 Above n 55 at [9].
- 62 The Speaker recently suspended the NZ Herald from covering politics from its Press Gallery Office for two weeks for a breach of Parliament’s rules about photography in the House. “Speaker bans Herald for 10 days over photo in Parliament” *The New Zealand Herald* (New Zealand, 18 October 2011).
- 63 Fair Trading Act 1986 s9.
- 64 *ibid* s15.
- 65 Privacy Act 1993 s2(1) (definitions of “agency” and “news activity”).
- 66 Law Commission *Review of the Privacy Act 1993* (NZLC R123, 2011) [4.35] – [4.41].
- 67 Electoral Act 1993 s197(1)(g).
- 68 Electoral Referendum Act 2010 s31(2)(b).
- 69 Copyright Act 1994 s16.
- 70 *ibid* s42(2) and (3).
- 71 John Burrows and Ursula Cheer *Media Law in New Zealand* (6th ed, LexisNexis Wellington 2010) at [4.1.3].
- 72 Defamation Act 1992 ss 16-18, Schedule 1, Part 2.
- 73 Financial Advisers Act 2008 s14; Securities Markets Act 1988 s2, definition of “investment advice”.
- 74 Evidence Act 2006 s68.
- 75 Privacy Act 1993 s29(1)(g).
- 76 Evidence Act 2006 s68(5).
- 77 *ibid*.
- 78 *ibid* s68(2).
- 79 “New Jersey court denies blogger shield protection”, (2011) Reuters.

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- 80 The Electoral Act 1993 exemption, for example, applies just to information published in a newspaper or other periodical, or in a radio or television broadcast (s197(1)(g)). So do the exemptions in the Fair Trading Act 1986.
- 81 For example the fair dealing exemption in the Copyright Act 1994, while referring to newspapers and broadcasters, extends the coverage to any “communication work” which as defined goes beyond the mainstream media. Similarly, the Electoral Referendum Act 2010 takes the concept beyond the traditional media by referring to a “news media website” but leaves open what exactly is meant by a “news media website”.

# Chapter 4

## What distinguishes “news” media and why it matters

### INTRODUCTION

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- 4.1 The first question we have been asked to consider as part of this review is how to define “news media” for the purposes of the law. From a public policy perspective this requires us to consider whether, and in what circumstances, it may be in the public interest to:
- extend the legal privileges and exemptions outlined in the previous chapter, which currently apply to traditional news media to certain categories of web publishers; *and*
  - require this category of web publishers to be held accountable, via some sort of regulatory regime, to the types of journalistic standards that have traditionally applied to news media.
- 4.2 In the preceding chapter we outlined the range of statutory exemptions and privileges available to the news media and highlighted the problem the law now faces in drawing the boundaries as to who and what constitutes “news media.” In order to address this question we need to examine the fundamental principles which underpin the news media’s special legal status.
- 4.3 Having identified these public interest rationales for treating the news media as a special class of publisher, we then turn to the emerging web publishers who are undertaking “news activities” but who are not currently subject to the codes of ethics and systems of accountability which apply to traditional news media.
- 4.4 With respect to these publishers we ask two questions:
- is there a public interest in extending the news media’s legal status and system of standards and accountabilities to a broader class of publisher?
  - if so, what types of publishing activities on the web might be included and in what contexts?

- 4.5 We begin by briefly traversing the evolution of the modern “news media”, its role in a democratic society and the rationale behind the system of special “rights” and “responsibilities” traditionally applied to news media organisations.

## THE EVOLUTION AND ROLE OF THE “NEWS MEDIA”

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### History

- 4.6 The “news media” has existed as a distinct commercial entity for only a relatively short period in historical terms. Its evolution is inextricably tied to the development of the commercial printing press in the 17<sup>th</sup> and 18<sup>th</sup> centuries. As printing technologies advanced, becoming both faster and cheaper, it became possible to disseminate information to mass markets.
- 4.7 In their seminal book on journalism, American media theorists Bill Kovach and Tom Rosenstiel describe how the earliest newspapers in America and Britain grew out of the conversations in coffee houses and pubs and contained a mixture of factual information, such as the shipping news, political argument and gossip.<sup>82</sup>
- 4.8 However the germ of modern journalism was also evident among the very earliest print periodicals to be published in Europe in the 1600s and was reflected in their explicit aim to search out, and publicise, the truth about public affairs:<sup>83</sup>
- [U]nlike the proclamations and town criers who provided the information those in power wanted distributed, these new periodicals aspired to tell people what the government actually did. Though government often clamped down on these early printers, as it would so often in the world, they established investigative reporting as one of the earliest principles that would set journalism apart from other means of communication with the public.
- 4.9 British media historian James Curran describes how, in the early 1700s, England’s political elite responded to the nascent power of the emerging political press by imposing taxes and legal controls, such as a ban on the reporting of Parliament and the introduction of a law of seditious libel making it a criminal offence to criticise Parliament.<sup>84</sup>
- 4.10 Political administrations and their oppositions also sought to cultivate newspaper proprietors, winning their political allegiance through the use of inducements such as subsidies, exclusive access to information and official advertising.<sup>85</sup>

- 4.11 However by the late 1700s and early 1800s segments of the commercial press began to carve out some independence from the political elite. A turning point for the English press occurred when newspapers campaigned on behalf of a politician imprisoned in 1763 for writing articles critical of the government. Curran suggests the press's success in mobilising public opinion against England's draconian libel laws and the general prohibition on reporting Parliament represented the first demonstration of the "subversive potential of the commercial press."<sup>86</sup>
- 4.12 This early flexing of muscle by newspaper proprietors was reinforced by the increasing profitability of their trade as a result of a dramatic growth in advertising revenues during the early to mid-1800s:<sup>87</sup>
- Increased advertising largely financed the development of independent news-gathering resources that rendered newspapers less dependent upon official information. It also encouraged a more independent attitude among proprietors by making it more lucrative to maximize advertising through increasing circulation than to appeal to government and opposition for political subsidies.
- 4.13 In America the newspaper which pioneered this new economic model was the *New York Sun* which was launched in 1833. The paper targeted mass audiences with a populist mix of crime and human interest stories and sold for a single penny. The success of the *Sun's* commercial model depended on building large circulation by pricing the newspaper as an everyday commodity and substituting the foregone circulation revenue with money from advertisers who, in turn, gained access to a mass market through the pages of the newspaper.
- 4.14 For commercial news organisations this basic model was to provide both the economic engine that would sustain newsrooms and the basic editorial recipe that would attract large audiences for the next 170 years.
- 4.15 Curran argues that throughout the late 18th and early 19th century the power and political influence of newspaper proprietors grew in proportion to their papers' circulations. This increased political weight was in turn reflected in a growing number of legal privileges awarded to the press.<sup>88</sup>
- 4.16 In 1843 the press's lengthy and often bitter campaign to reform England's criminal libel laws resulted in the passage of Lord Campbell's Libel Act. For the first time "truth" became a legitimate defence against criminal libel charges when a statement dealt with a matter of "public interest". Up until that point English common law had held the reverse of this – the truthfulness of a statement criticising the government or politicians was seen to exacerbate the libel because it was likely to be more damaging.<sup>89</sup>
- 4.17 Throughout the 20th century Curran suggests that while parliamentary politics in Britain remained a contest between two opposing class-based ideologies, the press, with its increasing economic and social power, gravitated towards the "anti-ideological" stance of the professions.<sup>90</sup>

It stressed knowledge, expertise and rationality – central to the credentials and public legitimisation of the professions – in opposition to prejudice and unthinking partisanship. It also took pride in the supposed disinterest of professional people who were able to serve the public interest, because they were independent of both business and labour.

- 4.18 Television and radio also had a profound impact on public affairs reporting and the concept of professional standards. Unlike the newspaper industry, which was dominated by private enterprise, broadcasters relied on the use of radio spectrum, a public resource that was controlled by the state under various licensing regimes. Initially in the United Kingdom and New Zealand, the state had a monopoly on both television and radio broadcasting and when both were incrementally opened to commercial competitors the state was able to attach minimum legal requirements to those utilising this powerful new medium. Among these was a requirement for balance and fairness – or political neutrality – in the coverage of news and current affairs.
- 4.19 That said, while newspapers and commercial broadcasters increasingly adopted professional standards with respect to their news reportage, many remained overtly politically and or ideologically aligned. Often such allegiances became integral to a publisher’s or broadcaster’s “brand position” and were carefully calculated to appeal to targeted segments of the population.<sup>91</sup>

#### **The role of the media in a modern democracy**

- 4.20 From this very truncated and simplified historical overview it is clear that the entity we know today as the “news media” evolved haltingly over a period of several centuries, enabled by technology, but subject to a range of often conflicting social, political and economic forces.
- 4.21 The printing press provided a means of amplifying and concentrating individual speech in a way that was accessible to ordinary citizens for the first time in human history. Mass circulation newspapers, and their broadcast media equivalents, gave rise to a new political force, public opinion, which was to have a profound effect on how governments behaved and democratic institutions evolved over the next 170 years.
- 4.22 However, it was only as newspaper proprietors began to achieve a measure of real independence from the political system, and were freed from the legal constraints on free speech, that the power of the press began to be realised.
- 4.23 The fundamental importance of a free press was famously entrenched in the American Constitution which was ratified in 1781. The Constitution’s often quoted First Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

- 4.24 An independent and free press, unfettered by political interference, was seen to be a necessary embodiment of an individual's right to free expression and an essential condition for democracy. Put simply, unless citizens were able to freely access and exchange information and opinions about what was happening in society, they were not able to self-govern. All other rights and freedoms were conditional on an individual's right to speak and be heard without fear of reprisal.
- 4.25 As we have discussed, the idea that the press would act as a watchdog and check on political power was embedded in the philosophy of some of the earliest pamphleteers and periodical writers.
- 4.26 Throughout the course of the 20th century the idea that the press had an important role to play in the democratic process advanced and became a central plank in the defence of an independent and free press.
- 4.27 The expectation that even the commercial press was somehow accountable to the public for fulfilling this quasi-constitutional function was very clearly articulated in the 1949 United Kingdom Report of the Royal Commission on the Press:<sup>92</sup>

The press may be judged, first, as the chief agency for instructing the public on the main issues of the day. The importance of this function needs no emphasis.

The democratic form of society demands of its members an active and intelligent participation in the affairs of the community, whether local or national. It assumes that they are sufficiently well informed about the issues of the day to be able to form the broad judgments required by an election, and to maintain between elections the vigilance necessary in those whose governors are their servants not their masters.

More and more it demands also an alert and informed participation not only in purely political processes but also in the efforts of the community to adjust its social and economic life to increasingly complex circumstances.

Democratic society, therefore, needs a clear and truthful account of events, of their background and their causes; a forum for discussion and informed criticism; and a means whereby individuals and groups can express a point of view or advocate a cause.

- 4.28 This passage captures the classic theory of the function of "the press" in a liberal democracy, which is to:
- act as independent watchdog on the exercise of state and private power;
  - represent the public;
  - disseminate information to the public; and
  - provide a forum for public debate.

- 4.29 These public interest functions assigned to the news media have provided the justification for many of the special statutory and common law privileges and exemptions granted to the press in modern democracies such as our own. For example, the news media's role as representative of the public, disseminator of information and independent watchdog on the exercise of power all underpin journalists' special status in Parliament and the courts. Similarly, exemptions from laws such as the Privacy Act 1993 and specific media defences against defamation actions are both designed to ensure the news media is not unjustifiably constrained in its news reporting activities.

### **News gathering as a "public trust"**

#### *Press power, standards and accountability*

- 4.30 The fact that the news media is engaged in an activity which serves both a commercial *and* a public interest was captured succinctly by Henry Steed, a former editor of *The Times*, when he stated in 1938 that the "underlying principle that governs, or should govern, the Press is that the gathering and selling of news and views is essentially a public trust."<sup>93</sup>
- 4.31 Steed's assertion that the core business of news media companies involves some element of "public trust" goes to the heart of why the news media have traditionally been treated as a special class of publisher, accountable to explicit professional codes and standards.
- 4.32 These standards, and the values they are intended to protect, bear closer inspection because they make explicit the essence of journalistic practice – and what sets it apart from other forms of communication.
- 4.33 To be useful, news must be reliable. Truthfulness - or at least a commitment to getting the facts right - lies at the heart of journalism, as Kovach and Rosenstiel explain:<sup>94</sup>

The desire that information be truthful is elemental. Since news is the material that people use to learn and think about the world beyond themselves, the most important quality is that it be usable and reliable...

Truthfulness creates, in effect, the sense of security that grows from awareness and is at the essence of news.

- 4.34 Kovach and Rosenstiel note that "the promise of being truthful and accurate" was central to the marketing claims of some of the earliest newspapers in America and Europe. Even the early tabloids, such as Joseph Pulitzer's *New York World*, sought to assure readers of the accuracy of their reporting. For example in 1913 Pulitzer set up a Bureau of Accuracy and Fair Play, overseen by its own press ombudsman, to reinforce his claims of reliability.

- 4.35 In the contemporary context the need for truthfulness and accuracy is reflected in what Kovach and Rosensteil describe as journalism's "culture of verification" which translates into such basic practices as fact checking and sourcing of claims.
- 4.36 Alongside truthfulness and accuracy, there is also an expectation that the news media will try to maintain an objective stance and apply standards of balance and fairness with respect to its news gathering and reporting. Again, such requirements underpin the idea of "reliability" and translate into basic requirements that important facts or countervailing opinions will not be deliberately omitted; that those likely to be damaged by a claim have the opportunity to reply; and that the journalist will not intentionally mislead or misrepresent.
- 4.37 Critically, too, the news media must strive to be transparent in how they report the news so that the public is able to make its own assessment of where the truth might lie when matters are unclear: opinion, rumour and conjecture must be distinguished from fact; vested interests and agendas made explicit; sufficient context provided so as to give meaning to events.
- 4.38 Although not always well publicised, we see these broad principles reflected with remarkable consistency in the professional codes of news media organisations all over the world. Here in New Zealand for example both the Press Council and the Broadcasting Standards Authority have developed principles and standards covering these fundamental issues of journalistic practice.
- 4.39 The journalists' code of ethics drawn up by the Engineering, Printing and Manufacturing Union, (to which journalists belong), summarises these core values which are supposed to underpin journalistic practice:<sup>95</sup>
- Respect for truth and the public's right to information are overriding principles for all journalists. In pursuance of these principles, journalists commit themselves to ethical and professional standards. All members of the Union engaged in gathering, transmitting, disseminating and commenting on news and information shall...report and interpret the news with scrupulous honesty by striving to disclose all essential facts and by not suppressing relevant available facts or distorting by wrong or improper emphasis.
- 4.40 Finally, those who purport to be authoritative and reliable sources of news and information can exert tremendous power in society. Reputations, businesses and elections can be made or lost as a result of sustained media pressure. While it is in society's interest that the press be free to carry out its democratic functions, it is also essential that there be some way of "guarding the guardians" to ensure the power of the press is exercised responsibly and abuses are checked.
- 4.41 One of the key indicators of reliability is a willingness to be upfront when serious mistakes are made. Owning up to, and correcting errors is in this sense a marker of trustworthiness.

- 4.42 Hence there must be a mechanism by which the news media is made accountable to the public for serious breaches of journalistic standards and the “public trust” vested in them.

## DISCUSSION

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### How do the theory and new reality match up?

- 4.43 In the preceding discussion we have briefly rehearsed the traditional arguments supporting the roles the news media play in a modern democracy. We have argued that in order to carry out these roles effectively the news media must be independent and free of political and unjustifiable legal constraints. They must have access to Parliament and the courts and other institutions exercising power over the public. Recognising the importance of these functions, the news media have been granted special legal privileges and exemptions.
- 4.44 We then considered the implications of this civic dimension of news reporting for the way media organisations operate and for the practice of journalism. In order to be useful news must be reliable. Reporting processes need to be accurate, fair and transparent. Journalists and their employers need to be independent of those they cover and conflicts of interest made apparent.
- 4.45 Finally, we discussed the need for accountability. Media organisations that purport to provide reliable and authoritative accounts of what is happening in the world exert significant power in society. This power must be exercised responsibly and the news media called to account when it is abused.
- 4.46 The chief purpose of this review is to consider whether this system of privileges, matched by countervailing responsibilities and accountabilities, should be extended to some of the emerging web based publishers who are engaged in news-like activities. This task presents a number of practical and philosophical challenges.
- 4.47 To begin with, it has to be acknowledged that some of the assumptions which underpin the system of media rights and responsibilities we have rehearsed in this chapter are open to challenge.
- 4.48 While democracies all over the world acknowledge the critical role of a free press as a watchdog on power, it has largely been left to the free market to deliver this “public good” and, as Curran points out, the corporatised media of today is a very different beast to the pioneering public affairs newspapers of 18th century England.<sup>96</sup>

By contrast, media systems in the early twenty-first century are given over largely to entertainment. Even many so-called ‘news media’ allocate only a small part of their content to public affairs – and a tiny amount to disclosure of official wrongdoing. In effect the liberal orthodoxy defines the main democratic purpose and organisational principle of the media in terms of what they do not do most of the time.

- 4.49 Events unfolding within the British media at the time of writing tend to reinforce Curran's contention that in an era of the conglomeration of news media "the market can give rise not to independent watch dogs serving the public interest but to corporate mercenaries which adjust their critical scrutiny to suit their private purpose."<sup>97</sup>
- 4.50 Kovach and Rosenstiel raise similar concerns about the sublimation of the "public interest" function of journalism within the burgeoning entertainment industry and question whether "press freedom" may be used as a Trojan horse to advance purely commercial ends:<sup>98</sup>
- [C]onglomeration and the idea behind much corporate synergy in communications - that journalism is simply content, or all media are indistinguishable - raise another prospect. The First Amendment ceases to imply a public trust held in the name of a wider community. Instead it lays claim to special rights for an industry akin to the antitrust exemption for baseball. In this world, the First Amendment becomes a property right establishing ground rules for free economic competition, not free speech.
- 4.51 At the same time there are indications that public trust in the news media – something we have argued is fundamental to both the news media's commercial success and its public utility – has become increasingly strained.
- 4.52 Prior to the *News of the World* phone hacking scandal in 2011, there were already indications that trust in the media in some parts of the world was declining sharply. An independent review by Britain's Media Standards Trust cites public research showing a significant decline in public trust in journalism across a range of mastheads including "up-market" newspaper brands.<sup>99</sup> The report also examined the impact of the internet, economic pressures and competition on accuracy and professional standards.
- 4.53 Similarly in Australia recent public opinion polling has shown significant declines in public trust in media. The 2011 *Essential Report* showed wide variations in the public perception of the trustworthiness of different media brands with public broadcaster ABC retaining its perception of trustworthiness but declining levels of trust in commercial television news and current affairs and radio.<sup>100</sup>
- 4.54 We are not aware of any recent large scale independent survey of public trust in New Zealand news media. However a broad ranging review of the Press Council undertaken by Sir Ian Barker and Professor Lewis Evans in 2007 included a small-sample public survey with a question about perceptions of news media accuracy. The respondents were evenly divided on whether or not they considered the New Zealand press "does a good job of providing accurate accounts of events in news stories."<sup>101</sup>
- 4.55 The conflation of commercial interests with free speech rights and questions over the news media's trustworthiness inevitably muddy the debate around the news media's role in society and whether and how the industry should be organised commercially and regulated.

- 4.56 Arguably though the greater challenge to the idea that the news media are a special class of publisher is external rather than internal. It comes of course from the internet and the democratisation and decentralisation of publishing enabled by the read/write culture of the web.
- 4.57 In theory at least, the public no longer need depend on the news media to provide “a clear and truthful account of events, of their background and their causes; a forum for discussion and informed criticisms; and a means whereby individuals and groups can express a point of view and advocate a cause” as prescribed by the British Royal Commission on the Press half a century ago.
- 4.58 Thanks to the web, there are now a multiplicity of sources via which citizens can inform themselves about what is happening in the world and literally millions of forums in which they can express opinions and “advocate a cause”.
- 4.59 In a special report on the future of news published in July 2011, *The Economist* argued that with the advent of social media, the news industry is coming “full circle”, returning to its discursive origins in the public houses and markets of the pre-industrial era where information and robust opinions were shared horizontally rather than vertically.<sup>102</sup>
- 4.60 This change, they argued, was altering the very character of news:<sup>103</sup>
- News is also becoming more diverse as publishing tools become widely available, barriers to entry fall and news models become possible, as demonstrated by the astonishing rise of the Huffington Post, WikiLeaks and other newcomers in the past few years, not to mention millions of blogs. At the same time news is becoming more opinionated, polarised and partisan, as it used to be in the knockabout days of pamphleteering.
- 4.61 These changes could be seen to undermine the rationales for treating the news media as a special class of publishers. Instead, some might argue all publishers should perhaps be subject only to the minimum legal constraints on free speech which apply to everyone and be accountable only to their readers and the market with respect to standards. We return to these arguments in chapter 6 where we discuss the various regulatory options.
- 4.62 However, in our view *The Economist's* prediction that “the mass-media era now looks like a relatively brief and anomalous period that is coming to an end”<sup>104</sup> remains at least arguable.
- 4.63 While citizen journalism and participatory media may be producing new forms and giving voice to new players, the reality is that the internet and web 2.0 have also provided a platform by which traditional media companies have been able to grow audiences and create global brands with unprecedented reach and power.
- 4.64 The fact that newspaper revenues and paid circulation in many western nations are in terminal decline does not mean that these audiences have been lost.
- 4.65 For example figures released by the Audit Bureau of Circulations Electronic show that leading newspaper websites in Britain and the United States are drawing between 30 and 80 million unique monthly visitors. In Britain the most popular news website, the Mail Online receives 1.7 million average daily visitors.

- 4.66 Similarly, as discussed in chapter 2, online market research shows that a very significant proportion of New Zealand's adult population continues to rely on traditional news services, including print, radio and television, as their primary source of local news – albeit often now accessed via new media channels, including third party aggregators and social media sites.<sup>105</sup>
- 4.67 Hence, while traditional newspaper and broadcast companies are without doubt confronting major challenges to their business models as a result of the shift to web, they continue to dominate the news market as a result of their ability to *coalesce mass audiences*.
- 4.68 Commentators argue that given the low barriers to entry on the web, the mainstream media's monopoly on mass markets can now be quickly replicated by new players. *The Huffington Post*, for example, began life in 2005 and by the time it was sold to AOL in 2011, had eclipsed the *New York Times* in terms of unique monthly browsers. YouTube is another example of a content curator with an unprecedented ability to focus and engage global attention on content published on its site.
- 4.69 However these examples fail to acknowledge the distinctions and dependencies between many new media players and the traditional press. *The Huffington Post*, for example, relied very heavily in its initial stages on aggregating and commenting on the news generated by its competitors in the traditional media. Similarly, traffic to user-generated content published on YouTube is frequently driven via mainstream media.
- 4.70 Michelle Grattan, political editor of Fairfax Media's Melbourne daily newspaper, *The Age* discussed the ambiguity of the diversity of new publishing models in a July 22 column.<sup>106</sup>
- Like many other media issues, diversity is a simple concept that's complex in reality. The expansion of digital platforms (by both the main media owners and others), endless websites and blogs have increased diversity. That's good. But mostly this is not diversity based on the ability to gather news.
- In general, the heavy-hitting media power remains in the hands of a very small number of media companies; in Australia concentration is very high. For example News Ltd has about 70 per cent of our newspaper readership market.
- 4.71 Within this new media ecosystem there exists a complex and evolving symbiosis between new and traditional media.
- 4.72 In the introduction to this Issues Paper we described the critical role that the publishing platform provided by Facebook played in fomenting the Arab Spring. We also discussed the phenomenon of WikiLeaks and the impact of this and other whistle blower sites on governments and citizens.
- 4.73 However, in both these instances mainstream media outlets played a critical role in *amplifying, verifying* and *analysing* the information released to the world.

- 4.74 *The Economist* makes reference to this growing interdependence between old and new media in its analysis of the Arab uprising. It describes how a Tunisian protest video posted on Facebook was spotted by journalists working for Al Jazeera, the influential Qatar based broadcaster, who then broadcast the images on air.
- 4.75 *The Economist* cites Middle Eastern media expert, Marc Lynch, who believes in this instance social media depended on the power and reach of Al Jazeera to realise its potential:<sup>107</sup>
- Social media spread images of protesters in Tunisia that might otherwise have been suppressed by the regime, but it was the airing of these videos on Al Jazeera...which brought those images to the mass Arab public and even to many Tunisians who might otherwise not have realised what was happening.
- 4.76 In much the same way Julian Assange worked in partnership with some of the world's leading traditional news media brands, including the *Guardian*, the *New York Times* and *Der Spiegel* in releasing a tranche of United States diplomatic cables.
- 4.77 In this way Assange was able make use of the agenda-setting qualities of these highly credible mass-market news brands and to draw on their staff's analytical and editorial skills, allowing the public to make sense of the information that was being released.
- 4.78 But as *The Economist* notes, in the wake of the latest release of documents Assange has undertaken a strategic reassessment of WikiLeaks's position in the media spectrum. Instead of a mere conduit for the release of data, WikiLeaks now describes its activities as journalism, describing its staff as journalists and Assange himself as its editor-in-chief.
- 4.79 Significantly, from the perspective of this review, Assange's assumed motivation for this repositioning is to ensure WikiLeaks is able to take advantage of the First Amendment press protections and the legal privileges, including the ability to protect its sources, which are reserved for traditional journalists.

#### PRELIMINARY CONCLUSIONS

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- 4.80 This leads us to a number of important preliminary conclusions. First, irrespective of who might fulfil this function, we believe society continues to depend on authoritative and disinterested sources of information about what is happening in the world.<sup>108</sup>
- 4.81 Our provisional conclusion is that, for the moment at least, traditional news media continue to play a pivotal and powerful role in generating and disseminating news and information to the public because of their continued dominance of mass market publishing across an ever-expanding range of platforms.

- 4.82 While social media and other forms of web publishing have enriched the news and public affairs arena, to date their role is to complement rather than to substitute for traditional media. In discussing the role of new actors engaged in "news like" activities there is often a failure to distinguish one form of communication from another. Advocacy, propaganda, public relations, activism – these are all legitimate forms of communication but they serve a different function and involve a different process than the *disinterested* gathering and disseminating of news of public interest.
- 4.83 No matter how imperfectly the commercial press may exercise the functions of the fourth estate with respect to fostering democracy, the underlying rationales for press freedom remain unchanged. 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.
- 4.84 Similarly the *News of the World* scandal has reinforced the rationales for requiring the news media to exercise their powers responsibly and to be accountable for carrying out their news activities in accordance with professional and ethical standards.
- 4.85 For these reasons we conclude that despite, or indeed because of, the rich new publishing environment that has evolved in the web 2.0 era, there continues to be a public interest in recognising a distinct type of publisher, the news media, with particular *rights* and *responsibilities* arising from the nature of their activities.
- 4.86 We now turn to the very specific question posed by this review: *is it in the public interest that this system of rights and responsibilities be extended to some new types of web publishers who are undertaking similar activities to traditional news media? And if so, what criteria should be used to decide which publishers?*
- 4.87 With respect to the first question, our preliminary view is yes, there are a number of policy rationales for extending this system of rights and accountabilities to some types of non-traditional news media.
- 4.88 Our survey of New Zealand's web publishing environment shows there are a number of new web-based entities taking on some of the democratic functions traditionally assigned to "the press": providing a public watchdog on corporate and state power and facilitating the free flow of information and ideas among citizens.
- 4.89 As a matter of principle we believe the legal and regulatory environment should encourage diversity in the news media market. New Zealand is an increasingly ethnically and socially diverse nation and it is critical that this diversity of view point and interests be reflected in our national debates and in the formation of public opinion.
- 4.90 These new publishers should, in principle, enjoy the same media protections and privileges accorded traditional news media.

- 4.91 This was also the conclusion reached by the Canadian Supreme Court in 2009 when considering the scope of defences available in defamation actions. Writing for the majority McLachlin CJ expressly recognised and endorsed the complementary role of emerging new media:<sup>109</sup>

[t]he traditional media are rapidly being complemented by new ways of communicating on matters of public interest, many of them online, which do not involve journalists.

These new disseminators of news and information should, absent good reasons for exclusion, be subject to the same laws as established media outlets.

- 4.92 The quid pro quo, in our view, is that new players in this market who wish to position themselves as credible and reliable sources of news and current affairs should also held accountable to professional standards. Like their counterparts in the traditional news media, web publishers who seek to reach wide public audiences and influence debate on public affairs can exert significant power. Some form of accountability is a healthy check on the abuse of that power.
- 4.93 The question then follows: which publishers and in which contexts?
- 4.94 We tackle this question in the second half of this chapter. Our starting point is to ask which of these publishers would meet the common sense description of a “news activity” set out in legislation such as the Privacy Act 1993.
- 4.95 We then move to the more difficult and necessarily subjective assessment of the nature and characteristics of these new publishers. Here we consider questions such as whether their primary purpose is journalistic? Does the published content have the attributes of journalism we discussed earlier, such as a commitment to accuracy? Are clear distinctions drawn between fact and opinion? Between facts and rumour or gossip? Is the author independent of their subject matter? Is there any explicit commitment to ethical standards? And is there an effective means of accountability?

## WHERE TO DRAW THE LINE?

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### A two pronged test?

- 4.96 Having established that there is an arguable public interest in extending the news media’s system of rights and accountabilities to some non-traditional web publishers, we now turn to the question of which publishers this extension should apply to, and in which contexts it should operate?
- 4.97 We begin with the relatively straightforward descriptive test to help identify “news activities” and then turn to the more difficult task of assessing whether such activities constitute journalism.

- 4.98 These are largely uncharted waters given that until the advent of the internet and web 2.0 there was little need to draw sharp demarcations defining news media. Much of New Zealand's statute law predates the digital era and so reflects that less complicated reality.
- 4.99 As discussed in the previous chapter, our statute book contains many examples of laws which use of the phrase "accredited news media reporter" when indicating to whom the particular provision applies. In most instances the Act provides no further definition of what is meant by the phrase.<sup>110</sup>
- 4.100 Hence the multiple references to the "news media" contained in legislation provide little assistance in determining which types of new publisher might be covered by the particular provision.
- 4.101 The Privacy Act 1993 does however provide what was in 1993 a practical working definition of the news media – a category excluded from the provisions of that Act for reasons discussed in the preceding chapter. The Act employs two concepts: that of a "news agent" and "news activity"
- 4.102 A "news activity" is defined in the Act as:<sup>111</sup>
- (a) the gathering of news, or the preparation or compiling of articles or programmes of or concerning news, observations on news, or current affairs, for the purposes of dissemination to the public or any section of the public:
  - (b) the dissemination, to the public or any section of the public, of any article or programme of or concerning:
    - (i) news;
    - (ii) observations on news;
    - (iii) current affairs.
- 4.103 And for the purposes of the Act a "news medium" means:
- any agency whose business, or part of whose business, consists of a news activity; but, in relation to principles 6 and 7, does not include Radio New Zealand Limited or Television New Zealand Limited.
- 4.104 The Act's broad definition of a "news activity" continues to be appropriate in the current context. Crucially, the definition makes clear that in order to qualify as a "news activity" the *purpose* behind the gathering of information must be the *public dissemination* of that information.
- 4.105 The Act also makes clear that comment and opinion on news meets the definition of a "news activity".
- 4.106 However the second leg of the test, which requires that the medium excluded from the Act must be an "agency whose business, or part of whose business, consists of a news activity" introduces a commercial requirement which does not necessarily suit the web 2.0 era where "news activities" may be carried out by individuals with no commercial driver.

- 4.107 As we have discussed, since the advent of the web, news dissemination has been uncoupled from the traditional agencies making it more difficult to draw bright line distinctions between different types of publishing activities and mediums.
- 4.108 This issue suggests that instead of focusing on the agent ( a news organisation) or even the actor (whether the author is a qualified journalist, for example) in determining whether a publication qualifies as a “news activity” for the purposes of the law, it may be more helpful to focus instead on the quality and characteristics of the content itself.
- 4.109 Canadian information law specialist Teresa Scassa makes this case in a paper examining the ways in which a number of jurisdictions are grappling with how to apply journalistic privileges, exemptions and defences in the web era.<sup>112</sup>
- 4.110 With respect to Canada’s privacy laws Scassa notes that the exemptions for the media are not confined to established news organisations or journalists but rather apply to “any individual who collects, uses or discloses personal information exclusively for journalistic purposes.”
- 4.111 Scassa discusses the approaches courts in a number of different jurisdictions have taken in defining “journalistic purpose”, noting that with respect to Quebec privacy law “journalistic purpose has little to do with the credentials of the person disseminating the information or the media in which the information is disseminated. It turns instead on the quality of the information itself and the public interest in access to that information.”<sup>113</sup>
- 4.112 She notes, however, that the courts have adopted different approaches depending on the legal question under consideration. Who should benefit from privacy law exemptions? Who should benefit from qualified privilege or “responsible journalism” defences in defamation actions? Who should benefit from the journalist-confidential source privilege?
- 4.113 Scassa identifies some of the characteristics that courts in different jurisdictions have considered potentially relevant in assessing whether or not the privileges and exemptions should apply to a particular publication in a specific context. These included:
- whether the *purpose* of the publication was the gathering and *dissemination* of “news” or matters of “public interest”;
  - whether the publication purported to provide a neutral report;
  - whether publication was regular;
  - the quality of the information disseminated and the public interest in accessing it;
  - whether publication involved the application of transformative editorial skills; and
  - whether the publication, and the manner in which the information was gathered, conformed with journalistic norms and standards.

4.114 On analysis, not all of these markers proved useful. For example, with respect to the neutrality requirement, Scassa commented that “any definition of journalistic purposes that includes objectivity as a criterion could embroil judges and adjudicators in an exercise fraught with difficulty – one that may ultimately be detrimental to the values of freedom of expression.”<sup>114</sup>

4.115 In the context of defamation actions, Scassa outlines a significant development in Canadian defamation law as a result of a 2009 Canadian Supreme Court decision which created a new defence of “responsible communication on matters of public interest”. This allows defendants in libel cases where statements of fact are disputed to escape liability if they can show they “acted responsibly reporting on a matter of public interest”. The defence is available to bloggers and other non-journalist publishers provided they can establish two elements:

- that the publication is on a matter of public interest; and
- that the publication was responsible, in that the defendant was diligent in trying to verify the allegation.

4.116 Scassa also explores the connection between the concept of “responsible” publishing and adherence to accepted journalistic norms or codes of ethics against which the actions of the publisher could be assessed:<sup>115</sup>

The defamation cases and the Quebec approach to invasion of privacy and the media both rely on a qualitative assessment of the journalistic material that is at issue. This assessment is made in part by evaluating the public interest in the subject matter, and in part by assessing the level of care taken by the reporter – that is by considering ethics.

Thus adherence to certain norms or standards is more important than the identity or credentials of the person disseminating the information.

4.117 This Canadian development mirrors developments elsewhere. The United Kingdom courts have also developed a “public interest” defence which, likewise, only applies if the journalism has been responsible. Among the factors to be taken into account are the steps taken to verify the information, whether the publication contains the gist of the plaintiff’s side of the story, and tone. Similarly the New Zealand courts have recognised a privilege primarily for discussion of political and governmental matters, although its exact extent is still not clear. This privilege is lost if “improper advantage” has been taken of the occasion of publication. The Court of Appeal has said that this involves asking “whether the defendant has exercised the degree of responsibility which the occasion required”.<sup>116</sup>

4.118 In conclusion Scassa suggests that as the courts and law makers consider how to apply the legal privileges and defences designed for traditional media, it will be increasingly important to recognise that in the future “journalistic purposes may be served by a growing range of information intermediaries”. And that as a result:<sup>117</sup>

The focus should not be on the nature of the actor, but rather on whether the purposes are journalistic. Another important consideration may be the regularity of the information dissemination activity.

While not necessarily determinative, regular publication (no matter the form or media) may suggest a sustained general purpose. Yet by the same token, regularity of publication may carry with it a greater onus on the author and publisher to be aware of the ethical boundaries of such activity.

- 4.119 In a sense Scassa's conclusions move away from the traditional organisational and professional claims on statutory rights towards a "first principles" public interest approach which simply asks: is it in the public interest for these types of publications to attract the privileges formerly reserved for traditional news media? And, if so, how should they be held accountable?

## APPLYING THE TESTS IN THE NEW ZEALAND CONTEXT

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### Is it a news activity? Is it journalism?

#### *Web-based news sites*

- 4.120 Our brief overview of web publishing in New Zealand outlined in chapter 2 describes a broad spectrum of publishers with varied purposes including social and political activism and advocacy, public relations, and individual self-expression.
- 4.121 Alongside these there is a readily identifiable category of publishers who quite clearly would meet the "news activity" test set up in the Privacy Act 1993 and whose activities are clearly "journalistic" in purpose.
- 4.122 The dissemination of news and current affairs commentary is without doubt the primary purpose behind online publishers like *Scoop*, *Interest.co.nz*, *Voxy* and subscription services such as the *Newsroom* and *BusinessDesk*. These publishers devote resources to the generation of news and comment on matters of public interest; update their websites and news feeds constantly and exercise editorial control over the content they publish.
- 4.123 Similarly, news aggregators, such as *Yahoo!New Zealand*, while relying on news feeds from other content generators, curate this content and retains oversight of what is published on its site.
- 4.124 Many of the current affairs bloggers described in the chapter 2 would also meet the Privacy Act's "news activity" test.

- 4.125 The second, and more difficult, question relates to the underlying qualities and characteristics of the publications themselves. Is the *purpose* of the publication dissemination of news and information of public interest to a wide audience? Is publication regular? Does the publisher purport to provide a neutral and accurate account? Has the publication involved transformative editorial skills? Have the publication, and the manner in which the information was gathered, conformed to journalistic norms and standards?
- 4.126 This list of questions posed by Scassa and others does not pretend to be exhaustive. It does however provide some important indicators which might help differentiate between the type of speech we have argued requires special protection, and accountability, and other types of speech which need only be subject to the minimal constraints to which all speech is subject.
- 4.127 It is not necessary or possible to reach any definitive conclusions about how these qualitative, and invariably subjective, tests might apply to both the traditional and new publishers surveyed in chapter 2. However some preliminary observations may be useful.

#### News websites and services

- 4.128 A number of the new web-based general and specialist news sites and news services surveyed in chapter 2 are clearly journalistic. Sites like *Scoop* and *interest.co.nz* and the business wire services are all positioned as credible sources of news and information. They publish regularly, generate their own content using transformative editorial skills and exert editorial control over their content to ensure it conforms to journalistic norms such as accuracy.
- 4.129 Other websites contained in the survey appear to be operating more as repositories for unedited material provided by sources who may or may not have a direct interest in the information they are supplying. Some of these sites do not appear to exert any editorial oversight or control and do not accept responsibility for the accuracy or reliability of information carried on the site. Still others are clearly identified as advocacy or public relations sites and do not purport to be providing disinterested information.
- 4.130 While none of these sites are currently accountable to a complaints body, as discussed in chapter 2, many publish their own standards and are accountable to their readers/subscribers for the quality and reliability of their content. Their commercial success is dependent on their credibility, which is of itself a demanding form of accountability.
- 4.131 However because these sites are not accountable to any complaints body any person who has been harmed by an inaccurate or false report or whose privacy has been breached has no recourse to redress other than through a formal legal process.

*Bloggers*

- 4.132 It seems evident that a number of the 203 “political and news blogs” included in *Tumeke’s* 2009 rankings are intent on attracting large audiences and care about their “ratings” and influence and are adept at maximising their “voice” and visibility. In other words, their *purpose* includes the dissemination of information and commentary to a potentially wide public audience.
- 4.133 Blogging is a regular activity for these publishers and while most focus on commenting on, rather than generating, news, many will incorporate original source material or links to new information in the context of their posts. Many are expert commentators and highly skilled writers and thinkers whose work clearly involves the application of “transformative editorial skills”.
- 4.134 Although few, if any of these bloggers are able to support themselves financially from their publishing activities, a number of the sites carry paid advertising.
- 4.135 Some, such as blogger David Farrar, have also ventured into occasional court reporting – an area formerly reserved for traditional news media.<sup>118</sup>
- 4.136 Blogs are, by their nature, robust and opinionated and while some blogs written by subject experts can clearly be regarded as disinterested, many others are overtly partisan or ideological. Indeed it is the norm for blog sites to categorise other bloggers as “right” “centre” or “left” when ordering their links to these sites.
- 4.137 While it may be tempting to draw an analogy between bloggers and the columnists who traditionally occupied the “opinion pages” of newspapers, this fails to capture the multifaceted nature of blogging – and its unique place in the news ecosystem.
- 4.138 In the course of a 24 hour news cycle a blog may encompass a uniquely broad range of functions and purposes. It may break news or leak a report; it may provide followers with links to new scientific research or unsubstantiated gossip; it may advance a pet political or personal cause or launch an attack on another commentator. It may also promote an event or a product. It will almost certainly have engaged in some way with the arguments and views of its readers.
- 4.139 This blurring of purpose creates difficulties when attempting to apply traditional journalistic standards.
- 4.140 Like the websites described above, news and current affairs blog sites are not currently covered by any common code of ethics or rules, and nor are bloggers accountable to either of the news media complaints bodies.
- 4.141 So, for example, accredited media reporting on court proceedings are bound by a set of rules which attempt to balance the principles of open justice with the need for a fair trial and the interests and concerns of victims and witnesses. These rules are explicit about the importance of fair and balanced court reporting in meeting these needs.

- 4.142 Non-traditional media, such as bloggers, are not necessarily conversant with or formally accountable to these rules.<sup>119</sup>
- 4.143 Traditional news media are held accountable to standards of accuracy, balance and fairness, with respect to their news reporting activities but these standards do not apply to bloggers.
- 4.144 However, given bloggers are primarily concerned with commentary and analysis, rather than generating original news, it is arguable that Kovach and Rosenstiel's requirement for objectivity and independence from the subjects they cover is an inappropriate standard.
- 4.145 More significant might be the extent to which bloggers achieve transparency by publishing under their real names and making accessible clear and full disclosures of political and professional relationships.
- 4.146 It is also noteworthy that while bloggers may not be formally accountable for the accuracy of what they publish, the "culture of verification" which Kovach and Rosenstiel highlight as critical to journalistic endeavours, is in effect "hardwired" into the architecture of many blogs as expert commentators provide instant scrutiny of the publishers' assertions.
- 4.147 A countervailing concern however is that anonymity is also deeply embedded in the culture of the internet and while this characteristic is often celebrated as a facilitator of freedom of expression – particularly in the context of non-democratic and oppressive regimes – it also makes verification of information particularly problematic as evidenced by a number of well publicised instances where high profile bloggers have been revealed as frauds.<sup>120</sup>
- 4.148 Of course the mainstream media are not immune from the risks of fabrication and misrepresentation, and some would argue that bloggers frequently achieve a level of transparency not matched by mainstream media through the practice of "linking" which provides readers with instant access to source material and other information relied upon by the blogger.
- 4.149 It is also evident that bloggers frequently exert strong editorial control over the content on their website and over what user-generated content they permit others to post. In this respect they are no more or less accountable to their readers than traditional newspaper editors who exercise total discretion as to which if any contributions to the letters pages to accept for publication.
- 4.150 A significant difference however exists between bloggers and the editors of a newspaper or other traditional broadcasters with respect to complaints.
- 4.151 Currently the public has no redress of any sort, short of taking legal action, if they are harmed by content posted on a blog. The decision to remove injurious content is purely at the discretion of the blog's author or webhost.

- 4.152 No doubt in theory a person targeted by a blogger has ample opportunity to respond by way of defence and counter-attack. But given the uneven power balance between that aggrieved person and the author of the blog, it is often unrealistic or even counter-productive for the individual who has been harmed to engage in an online dispute with the blogger. There is currently no avenue of complaint and no way to correct damaging and untrue content unless that content meets the high threshold to bring a civil action against the publisher.

*Social media*

- 4.153 What then of social media and the tens of thousands who are posting on publicly Facebook walls; contributing to Trade Me community discussion threads; posting short videos to or tweeting?
- 4.154 As with the blogosphere, the use of social media platforms to publish information covers an infinitely wide range of publishers and purposes.
- 4.155 It is also important to distinguish between conduits, such as Twitter, which is increasingly used to break news, and sites such as YouTube which is a destination publishing site and which exerts some form of oversight and control over the content users upload.
- 4.156 The focus therefore needs to be on the *intent of the content creators* who use these platforms to publish information rather than on the channels themselves.
- 4.157 So, for example, a politician who uses Facebook or Twitter to announce policy or comment on matters of public interest is using these platforms as a means of communicating with their constituency or the wider public in much the same way as they might have previously done by issuing a press release to mainstream media. Their purpose is to inform and possibly influence public opinion. They have a direct interest in the information being released and their purpose is not journalistic.
- 4.158 Nor can individuals who use Twitter to disseminate unsubstantiated gossip or to express personal opinions on events in the public arena be considered journalistic in their purpose. Although the information they tweet may be disseminated to a potentially wide audience, there will often be no expectation that the tweeter is personally accountable for the accuracy of the information. Often the purpose of the tweet will simply be to alert others to content published by traditional and non- traditional news media.
- 4.159 However, channels such as Twitter are increasingly being used for clearly journalistic purposes by both traditional and non-traditional news media. Journalists working for mainstream media organisations are encouraged to use these mediums to break news and drive traffic to websites.
- 4.160 It is reasonable to assume news organisations publishing on these platforms are accountable for applying the same journalistic standards for publications in these social medium as on their websites or traditional platforms. In effect they are using Twitter as an unmediated news wire service.

- 4.161 Individuals who are not formally attached to traditional news organisations may also use these new mediums for journalistic purposes – i.e. to disseminate news and commentary on current affairs to a public audience. In some contexts, depending on the public interest in the content broadcast, it may be appropriate that such an individual would have access to journalistic defences in a defamation action for example. It is less clear that such an individual should be caught by the broader systems of privileges and accountabilities that apply to those for whom the gathering and dissemination of news is their primary purpose in publishing.

#### PRELIMINARY CONCLUSIONS

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- 4.162 In this chapter we have argued that in order to flourish, democratic societies need access to credible and authenticated sources of information and that the “public trust” given to such providers demands that they exercise their freedom of expression responsibly and are accountable to the public.
- 4.163 As is evident from the crisis that erupted in Britain in July 2011 over the ethics of a number of mass market newspapers, the notion of “public trust” in the context of at least some sectors of the news media is severely strained. This has prompted a serious re-examination of media ethics and adequacy of the controls and accountability of the news media industry in the United Kingdom and elsewhere.
- 4.164 At the same time the advertising-based economic model that has supported the professionalisation of journalism and the establishment of monolithic news media organisations may not survive the internet. Meanwhile, the read/write technology of the web has removed the barriers to entry which once protected the news industry, paving the way for novel and previously unimaginable ways of producing the “public good” function inherent in journalism.
- 4.165 However, as Timothy Balding, CEO of the World Association of Newspapers pointed out in his address to a UNESCO conference on new media in 2007, this ubiquity of publishing carries both risks and opportunities:<sup>121</sup>

The news business is becoming, happily, more and more a dialogue between the providers and receivers of information rather than an imposition of opinions and perspectives by an elite caste.

On the negative side, the Internet has opened up extraordinary new possibilities for the widespread, damaging and sometimes dangerous manipulation of information, which is difficult, if not impossible to stem.

In my view this phenomenon will increasingly place a heavy responsibility on professional journalists to maintain high standards of fact-checking, honesty and objectivity.

The very fundamentals of our societies and democracies will be lost if we are unable any longer to distinguish between true and false information.

- 4.166 Our provisional conclusion is that, for the moment at least, traditional media continue to play a pivotal and powerful role in generating and disseminating news and information to the public as a result of its continued dominance of mass market publishing across an ever expanding range of platforms.
- 4.167 Alongside these traditional publishers in New Zealand, as elsewhere, there is a rapidly expanding category of non-traditional sources of news and comment on public affairs. Some of these are becoming increasingly influential and we note a growing interdependence between new and traditional news media.
- 4.168 In this chapter we have attempted to describe both the functional and qualitative characteristics associated with the special type of speech which has traditionally been published by the news media. Because of its importance, this type of speech attracts special legal and non-legal privileges.
- 4.169 Our preliminary conclusion is that in order to qualify for these special news media privileges and exemptions, publishers<sup>122</sup> must have the following four characteristics:
- a significant proportion of their publishing activities must involve the generation and/or aggregation of news, information and opinion of current value;
  - they disseminate this information to a public audience;
  - publication must be regular and not occasional; and
  - the publisher must be accountable to a code of ethics and a complaints process.
- 4.170 In proposing this schema, which does not differ substantially from that which we proposed in our August 2011 Review of the Privacy Act, we are in no way intending to imply that publishers who do not wish to conform with such requirements should be excluded from undertaking journalistic work.<sup>123</sup> There are a number of independent journalists working in New Zealand who, because they do not publish regularly and are not formerly affiliated with a complaints body, would fall outside these criteria.
- 4.171 However as Scassa discusses, it is highly likely that were such publishers to find themselves defending a defamation or privacy action, they would be able to avail themselves of the defences used by journalists provided they could meet the sort of tests the courts now apply to citizen journalism: what was the degree of public interest in the material published and how responsibly did the publisher act in gathering and publishing the material?
- 4.172 Furthermore, it may well be that some statutes conferring access to privileged reporting rights (say in the courts) would allow the judge or other presiding officer a discretionary power to admit reporters on an ad hoc basis even though they did not meet the criteria we have proposed. But meeting those criteria would confer a *right* of access.

- 4.173 Our proposed schema would not interfere with the fundamental free speech rights of citizens and nor would it impose unnecessary constraints on private publishing activities. What it would do is provide some clarity for those publishers who wish to be considered part of the news media and who choose to be constrained by the ethical standards and accountabilities inherent in that type of speech.
- 4.174 In other words those who wish to position themselves as credible and authoritative sources of news and current affairs, and to access the legal privileges and exemptions associated with these activities, will need to demonstrate their willingness to adhere to journalistic standards and will need to be accountable to a complaints body.
- 4.175 Crucially, it is important to understand this prescription is not intended to protect a particular set of actors or news agents, but rather a particular type of speech – whoever exercises it.

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- 82 Bill Kovach and Tom Rosenstiel *The Elements of Journalism: What Newspeople Should Know and the Public Should Expect* (Three Rivers Press, Random House, New York, 2007) at 16.
- 83 Ibid at 141.
- 84 James Curran *Media and Power* (Routledge, London, 2002) at 74-75.
- 85 Ibid at 73.
- 86 Ibid at 74.
- 87 Ibid at 75.
- 88 Ibid. at 63.
- 89 Ibid at 75.
- 90 Ibid at 68.
- 91 In Britain, for example, many mass circulation tabloid newspapers continue to explicitly endorse political parties and in almost all countries in the world commercial television networks have positioned themselves to appeal to different market segments.
- 92 Quoted in B Berelson and M Janowitz (eds) *Reader in Public Opinion and Communication* (2ed, The Free Press, New York, 1966) 535-536.
- 93 Cited in Gavin Ellis "Different strokes for different folk: Regulatory distinctions in New Zealand Media" (2005) 11(2) *Pacific Journalism Review* at 63.
- 94 Bill Kovach and Tom Rosenstiel *The Elements of Journalism: What Newspeople Should Know and the Public Should Expect* (Three Rivers Press, Random House, New York, 2007) at 37.
- 95 "Journalism Code of Ethics" available at < [www.epmu.org.nz/journalism-code-of-ethics/](http://www.epmu.org.nz/journalism-code-of-ethics/) > .
- 96 James Curran *Media and Power* (Routledge, London, 2002) at 219.
- 97 Ibid, at 221.
- 98 Kovach & Rosentiel *The Elements of Journalism: What Newspeople Should Know and the Public Should Expect* (Three Rivers Press, Random House, New York, 2007) at 18.
- 99 Media Standards Trust: "A More Accountable Press Part 1: "The Need for Reform: is self-regulation failing the press and the public?" (2009) < [www.mediastandardstrust.org](http://www.mediastandardstrust.org) > .
- 100 Essential Media "Trust in Media:" Essential Media Communications Report 110725 (25 July 2011) < [www.essentialmedia.com.au](http://www.essentialmedia.com.au) > .
- 101 Ian Barker and Lewis Evans *Review of the New Zealand Press Council* (prepared for the Press Council 2007) Appendix V at [139].
- 102 Special Report: The News Industry "The people formerly known as the audience" *The Economist* (9 July 2011).
- 103 Ibid, at 16.
- 104 Ibid.
- 105 Analysis of online sites visited by New Zealanders in May 2011 by global digital measurement and marketing company comScore, showed that of the potential 2.8 million internet users in this country (aged 15 +) 96% had accessed a newspaper website. This was twice the global average reach for news sites. New Zealanders also spend significantly longer on news websites compared with the global average. APN & Media's *nzherald* site and Fairfax Media's *Stuff* site lead the news sites by a large margin, both reaching about two thirds of the potential online audience.

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- 106 Michelle Grattan "Pressing news to discuss" *The Age* (Australia, 22 July 2011) < [www.theage.com.au/.../pressing-news-to-discuss-20110721-1hqtt.lt](http://www.theage.com.au/.../pressing-news-to-discuss-20110721-1hqtt.lt) > .
- 107 Mark Lynch "Tunisia and the New Arab Media Space" (2011) FP Foreign Policy < [www.foreignpolicy.com](http://www.foreignpolicy.com) > .
- 108 Disinterested news sources are those whose purpose is to disseminate information to the public and who do not have a personal interest in the information released.
- 109 *Grant v Torstar Corp* [2009] SCC 61.
- 110 See for example the Adoption Act 1955, s 22; Family Courts Act 1980, s 11A; Protection of Personal and Property Rights 1988, s 79; Care of Children Act 2004, s 137; Domestic Violence Act 1995, s 83; Family Proceedings Act 1980, s 159; Court Martial Act 2007; Children, Young Persons and their Families Act 1989, s 166; Crimes Act 1961, s 375A; Summary Proceedings Act 1957, s 185C; Armed Forces Discipline Act 1971, s 139; Social Workers Registration Act 2003, s 80; Health Practitioners Competence Assurance Act 2003, s 97.
- 111 Privacy Act 1993, s 2(1).
- 112 Teresa Scassa "Journalistic Purposes and Private Sector Data Protection Legislation: Blogs, Tweets and Information Maps" (2010) 35 *Queen's LJ* at 747.
- 113 *Ibid.*, at 10.
- 114 *Ibid.*, at 8.
- 115 *Ibid.*, at 14.
- 116 *Lange v Atkinson* [2000] 3NZLR 385 (CA) at [46].
- 117 Teresa Scassa "Journalistic Purposes and Private Sector Data Protection Legislation: Blogs, Tweets and Information Maps" (2010) 35 *Queen's LJ* at 18.
- 118 In August 2010 blogger Cameron Slater made an application to Judge David Harvey to "live blog" or "Tweet" the proceedings of his own trial for offences against the Criminal Justice Act. Judge Harvey refused to allow live blogging because it did not comply with the ten minute time delay required of all those reporting on live court proceedings. However he indicated Slater was free to broadcast by whatever means he chose. Interestingly Judge Harvey also permitted broadcast media to post running reports of the trial direct to their websites, provided publication respected the ten minute delay.
- In March 2003 David Farrar, author of *Kiwiblog*, applied to the registrar of the Supreme Court to cover an application for leave to appeal a decision of the Court of Appeal involving contempt charges against Vincent Siemer. Farrar was given approval to cover the case without any constraints. His live blog of the full bench hearing contained a mix of personal observation, commentary and reportage.
- In July 2010 Farrar blogged from the initial hearing of the Judicial Conduct Panel hearing complaints against Justice Bill Wilson. His blog post opened by noting that a "media benchmark" had informed him of a requirement that live reporting must be delayed by 10 minutes.
- 119 *Media Guide for Reporting the Courts* (2 ed, 2008) < [www.justice.govt.nz](http://www.justice.govt.nz) > .
- 120 For example in June 2011 it was revealed that a much feted Syrian blogger, writing under the pseudonym "Amina" was not in fact "A gay Girl in Damascus", as the blog was titled, but rather a married, middle-aged man living in Scotland. For background on this case and the issues surrounding anonymity on the internet see Ethan Zuckerman's blog "Understanding Amina" < [www.ethanzuckerman.com](http://www.ethanzuckerman.com) > .
- 121 UNESCO, *New Media and the Press Freedom Dimension*, Paris 2007. Available at < [www.unesco.org](http://www.unesco.org) > .

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- 122 The “publisher” will usually (although not invariably) be a body corporate. Employees of such a publisher would have equivalent privileges and exemptions provide they could produce evidence of their employment status. Private individuals could also qualify provided they satisfied the statutory criteria.
- 123 In our final report *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC R123, Wellington, 2011), we recommended that for the purposes of exemption from the Act the term “news media” should be confined to media agencies which operate under a code of ethics and are subject to a complaints body.

# Chapter 5

## Regulating news media: strengths and weaknesses of the current approaches

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### INTRODUCTION

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- 5.1 Having defined “news media” for the purposes of the law, and established the need for some form of public accountability for those exercising this type of speech, we now turn to the second question in our terms of reference: whether, and to what extent, the jurisdiction of the Broadcasting Standards Authority and/or the Press Council should be extended to cover these new publishers. As discussed in the introductory chapter, there is currently a lack of regulatory parity between traditional news media and unregulated web publishers on the one hand, and broadcasters and print publishers on the other.
- 5.2 In this chapter we examine this regulatory parity problem in more depth, and in particular the “regulatory gaps” which exist in the jurisdiction of these two bodies with respect to both new, and traditional, news media.
- 5.3 We begin by outlining the two regimes that currently regulate print news media and broadcast media, explaining the rationale for the two different regulatory approaches and assessing the strengths and weaknesses of each.
- 5.4 Finally we discuss the implications of convergence and the web 2.0 era for the future regulation of news media and consider the arguments for a single regulator.

## THE PROBLEM

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### Regulatory gaps: Broadcasting

#### *The current approach*

- 5.5 In New Zealand as in Britain, both television and radio were initially tightly controlled by the state. Although private individuals pioneered early radio broadcasting in the 1920s, by 1932 the government had effectively taken control of broadcasting. The first private radio licences were not issued in New Zealand until 1970 and the first private television broadcaster was not issued with a warrant until 1989 with the launch of TV3.<sup>124</sup> That said, it was in response to pressure by private operators, including the pirate radio station Radio Hauraki, which broadcast from international waters in the mid-1960s, that the Government enacted the Broadcasting Authority Act 1968. The Authority's primary functions were to rule on applications for broadcasting warrants and to ensure warrant holders complied with the conditions attached to their warrants.
- 5.6 Significantly, the 1968 legislation also made explicit reference to the standards which were to be observed by all broadcasters, whether public or private. The Broadcasting Authority was to use its powers, to ensure that:<sup>125</sup>
- (a) Nothing is included in programmes which offends against good taste and decency or is likely to incite to crime or to lead to disorder or to be offensive to public feeling;
  - (b) Programmes maintain a proper balance in their subject-matter and a high general standard of quality;
  - (c) News given in programme (in whatever form) is presented with due accuracy and impartiality and with due regard to public interest.
- 5.7 Similar provisions were included in the Broadcasting Act 1976, requiring both state and private broadcasters to conduct their businesses in such a way as to ensure:<sup>126</sup>
- [T]hat programmes reflect and develop New Zealand's identity and culture; and that programmes are produced and presented with due regard to the need for good taste, balance, accuracy, and impartiality, and the privacy of individuals:
- 5.8 The 1976 Act established a Broadcasting Tribunal, one of whose functions was to adjudicate complaints about alleged breaches of standards where the complaint had not been satisfactorily resolved by the broadcaster. Complainants taking a case to the tribunal were forced to first sign a declaration that they would not pursue any legal action with respect to the subject matter of their complaint.<sup>127</sup>

- 5.9 New Zealand's tightly regulated broadcasting environment underwent radical reforms in 1989 and radio spectrum was put up for commercial tender under a property-rights system which continues today.
- 5.10 However, despite opening broadcasting up to free market competition, the state continued to require all broadcasters to comply with statutorily prescribed standards. These standards were spelt out in the Broadcasting Act 1989 which made broadcasters individually responsible for maintaining standards that were consistent with:<sup>128</sup>
- a. the observance of good taste and decency; and
  - b. the maintenance of law and order; and
  - c. the privacy of the individual; and
  - d. the principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest; and
  - e. any approved code of broadcasting practice applying to the programmes.
- 5.11 The Act also established a complaints body, the Broadcasting Standards Authority (BSA), whose primary functions were to determine complaints, where the relevant broadcaster had been unable to do so itself, and to work with industry to devise agreed broadcasting codes of practice in line with the standards set out in the Act. The BSA has developed four codes, covering free-to-air television, pay television, radio and election programmes. The codes contain standards which all broadcasters must follow when broadcasting programmes in New Zealand.
- 5.12 The BSA was constituted as a Crown entity and its chair and board members were appointed by the Governor-General on the advice of the Minister of Broadcasting.
- 5.13 The rationale underpinning this system of statutory standards, backed by a complaints appeal body, was the orthodox view that while the radio spectrum was to be freed up for competition, access remained conditional on adherence to basic standards and accountabilities. Television in particular was perceived as a powerful, all pervasive medium with a unique ability to impact on audiences. Use of spectrum required a licence, and, failure to comply with an order of the BSA could, in some circumstances, lead to a broadcaster being found to be in breach of their licence.
- 5.14 The broader reforms were intended to open the broadcasting sector to competition and to create clearer demarcations between the public sector broadcasters, Television New Zealand's TV One and Radio New Zealand, and their commercial competitors. The reformers could not of course have anticipated a time, just two decades hence, when competition would come from the internet and when the content itself would be uncoupled from the traditional linear broadcasting model.

- 5.15 Today the model of scheduled linear broadcasting to mass audiences is only one of a variety of delivery options available to the public. Consumers can now download or live stream content from an infinite variety of sources; and they can time-shift content that has been broadcast previously using set-top devices such as My Sky or via websites offering “on-demand” replay functions. They can also bypass traditional broadcasters altogether by using a range of file sharing software applications, such as Bit Torrent, which allow the exchange of music and video files among networked computers.<sup>129</sup>
- 5.16 As we outlined in chapter 2, traditional broadcasters have responded to these technological advances by developing their own web portals through which audiences can access programmes that have been previously broadcast on-demand. They can also access web only content that has not been previously broadcast, including extended interviews and content specifically produced for the internet. These websites also feature regular news updates and stories, often accompanied by short videos.

*Applying the Broadcasting Act in the Web 2.0 era*

- 5.17 Although the Broadcasting Act was not drafted with the internet in mind, the definitions of what constitutes a “programme” and “broadcasting” for the purposes of the Act are sufficiently broad as to encompass content transmitted via the internet.<sup>130</sup> However the Act specifically excludes from coverage the transmission of two particular categories of programs, namely, those:
- a. made on the demand of a particular person for reception only by that person or;
  - b. made solely for performance or display in a public place.
- 5.18 The intention of the legislators would appear to have been to ensure private individuals viewing home movies would not be forced to comply with the standards regime and, similarly, films offered for public viewing in theatres and other such venues which were already covered by the Films, Videos and Publications Classification Act 1993 were not subject to the broadcasting regime.
- 5.19 However, despite the fact that sub clause (a) was drafted long before the advent of “on-demand” television, the BSA’s position has been that clause (a) means they do not have jurisdiction over any “on-demand” content available online.<sup>131</sup>
- 5.20 These definitional problems are translating into real problems for consumers. In the course of our preliminary consultation for example we were told by one broadcaster that members of the public wishing to complain about content on their website were informed the sites were not covered by the Broadcasting Act.

- 5.21 This is borne out in a November 2010 complaint against a Television New Zealand One News item which was then appealed to the BSA. The complainant was outside the 20 day limitation for complaints but argued that as the content was still available for download on the broadcasters' website it should still be possible to lodge a complaint on that basis. The BSA declined to hear the appeal on the grounds that the on-demand version was outside its jurisdiction. In its decision it noted that the broadcaster's response to the complainant had been to inform them that "the material shown on the internet was not subject to the Broadcasting Act 1989, and therefore it declined to accept the complaint."<sup>132</sup>
- 5.22 The precedent for this response was a 2005 case, *Davies and Television New Zealand Ltd-2004-207* when a complainant who found himself out of time for complaining about the original television screening of an episode of Fair Go, lodged a complaint over the online version which was still available on-demand via the broadcaster's website. The BSA held it could not hear the complaint.
- 5.23 Similarly the BSA's jurisdiction is not currently regarded as extending to any other audio-visual content made available only on a broadcaster's website or on-demand via another platform. Nor is it possible for consumers to complain about any written content, including news stories, published on a broadcaster's website.
- 5.24 The BSA does however accept jurisdiction over content that is streamed live over the internet because this is regarded as analogous to traditional public transmissions that were being "pushed out" to wide audiences simultaneously, as distinct from content that is "pulled" to the individual viewer on their demand.
- 5.25 Just as these gaps have opened in the BSA's jurisdiction over traditional broadcasters, similar gaps now exist with respect to the BSA's ability to regulate the content of other publishers who make audio-visual content available on-demand to the public on news websites and blog sites. So for example, audio-visual content published on sites like *Yahoo!New Zealand* or other news websites is not subject to the broadcasting legislation. Nor does the BSA have jurisdiction over user-generated audio-visual content published on social media sites such as YouTube.

## Solutions

- 5.26 The regulatory gaps identified above have been considered in the context of a number of internal and external reviews over the past five years. The most comprehensive of these took place in 2006-2008 within the broader context of the then Labour government's response to the advent of digital broadcasting and the imminent arrival of ultrafast broadband in New Zealand. As part of this review the Ministries of Culture and Heritage and Economic Development produced a number of research papers exploring the implications of convergence and digital technology on a broad range of issues including spectrum management and media regulation.<sup>133</sup> In tandem with this review the BSA commissioned research on the regulatory challenges facing broadcasters. One paper, co-authored by lawyer Steven Price and journalist Russell Brown, focused on the architecture of the internet itself and the implications for content regulators.<sup>134</sup> The second paper reviewed international approaches to content regulation and their relevance to New Zealand.<sup>135</sup>
- 5.27 The Labour-initiated review came to a halt with the change of government but the pressure for regulatory reform of the broadcasting environment has not abated with various initiatives underway within the Ministry of Culture and Heritage, and the BSA itself calling for a review of the Act in its 2010 Annual Report.<sup>136</sup> Broadcasting Minister Jonathan Coleman concurred with this assessment in a statement to NZPA in November 2010.<sup>137</sup>

### *Amending the Broadcasting Act 1989*

- 5.28 There has been on-going discussion about the merits of amending the Broadcasting Act 1989 to extend its jurisdiction at least as far as the content available to the public on broadcasters' websites.
- 5.29 Such an amendment would be consistent with moves by recent governments to give statutory recognition and support to the new digital broadcasting environment. For example in 2007 the then Labour government passed the Broadcasting Amendment Bill which enabled funding agencies to support the development of digital broadcasting including the funding of video-on-demand, interactivity between broadcaster and audience, and the "reversioning" of content for non-broadcast platforms (such as the internet or mobile phones). Similarly, the Television New Zealand Amendment Bill was designed to assist Television New Zealand reposition itself as a "multi-media" content provider.<sup>138</sup>
- 5.30 In our view logic and public expectation favour extending the BSA's jurisdiction to cover content accessed in these new ways. It makes little sense to say that the *same or similar content* made *publicly available* by the *same broadcaster* is within BSA jurisdiction if it is accessed via traditional television, but not if it is accessed via the internet.

- 5.31 The ‘on-demand’ distinction, while important in some contexts, seems less relevant when applied to content that has been produced with the *purpose* of broad public dissemination, irrespective of whether this dissemination occurs during scheduled broadcast or at a time elected by the viewer. Public availability is surely the key.
- 5.32 Whether the standards and codes that apply to web only content accessed on-demand should be different from those which apply to content that is streamed or pushed out in scheduled programming is a question we return to in chapter 7.
- 5.33 But beyond this relatively straightforward extension of the BSA’s jurisdiction lie two more difficult questions: who should regulate the written content on broadcasters’ websites and in what circumstances should the BSA’s jurisdiction extend to the audio-visual content of non-traditional news websites ?
- 5.34 We return to these questions below, when we consider the impact of convergence on the approach to regulation.

#### *The Press Council*

- 5.35 The Press Council is a self-regulatory body whose jurisdiction extends to New Zealand’s daily newspapers, and the publications produced by members of the New Zealand Community Newspapers’ Association, the Magazine Publishers Association and the journalists’ union, the Engineering Printing and Manufacturing Union (EPMU).
- 5.36 The Council came into being in 1972 as the result of a joint venture by the then Newspaper Proprietors’ Association (which would become the Newspaper Publishers’ Association of today) and the New Zealand Journalist’s Association, which at that time represented the country’s journalists (now the EPMU). The explicit motivation behind its establishment was to avert plans by the Labour Party to establish a statutory Press Council if it became the Government.<sup>139</sup>
- 5.37 The council is currently made up of 11 members: a chairperson (so far always a retired judge), five persons representing the public and five industry representatives. It is dependent on its industry members for its funding. Its primary function is to decide on complaints made against its members.
- 5.38 Just as those with a complaint about a radio or television programme must first try to resolve the complaint with the relevant broadcaster before appealing to the BSA, so too those complaining about a print publication must first attempt to resolve the issue with the editor of the publication. Only if this fails, will the Press Council become involved, and even then the complaint may be dealt with through mediation rather than go to a hearing of the full council.
- 5.39 The Press Council underwent its first independent, first principles review in 2007 when retired High Court Judge Sir Ian Barker and Victoria University Professor Lewis Evans were asked to determine “whether the basic concept of self-regulation on which the council was founded” continues to be an “appropriate basis for a Council of this kind, independent of government.”<sup>140</sup>

- 5.40 We will consider the review's key findings and recommendations below but first focus on how the Press Council has dealt with the regulatory gaps which have emerged as a result of web publishing.

*Press Council's response to the web*

- 5.41 Because it is not a statutory body, the Press Council has been free to determine its own response to the internet without any legislative amendments or the consent of any external agency. In its 2007 report the Barker review recommended that the "principles and practices of the Press Council might be applied to the electronic print publication both for members of the Press Council and non-members, providing the latter can be feasibly funded."<sup>141</sup>
- 5.42 The Council has extended its jurisdiction to all content published on its members' websites – including audio-visual content. When requested, it has also taken on a role as adviser and occasional mediator in relation to complaints arising from content published on non-traditional media websites.
- 5.43 The Press Council's Executive Director provided us with an overview of the type of complaints and inquiries the council was fielding with respect to online content.<sup>142</sup> Because the council operates as an appeals body, only those complaints which had not been resolved satisfactorily with the newspapers' web editors came before the council.
- 5.44 Most cases involved content that was available both online and in hardcopy, although in the past three years the Council had heard five complaints against the Fairfax news website, *Stuff* (none of which were upheld.)
- 5.45 Among the issues the Council has had to consider as a result of complaints or inquiries from the public are:
- the appropriate standards and level of control web editors should apply to reader comments on news websites (this was in relation to allegedly offensive comments posted on a news story announcing the resignation from Parliament of Greens MP Sue Bradford);
  - how to respond to complaints relating to accuracy when the original website story which had prompted the complaint was subsequently amended (this was in relation to a news story, supplemented by video, on Hone Harawira's comments on TVNZ's *Te Karere* programme regarding the killing of Osama bin Laden);
  - how to respond to requests for the removal of potentially damaging content from website archives years after the story's original news value has passed;
  - how the long term availability of content on websites affects the current 30 day limitation on initiating complaints against publishers;
  - how requirements for fairness, balance and accuracy in reporting court proceedings can be met when online coverage may only extend to a single, stand-alone story covering the prosecution's opening address;

- how to interpret the requirement that publishers maintain distinctions between fact and opinion, given the lack of separation online between commentary and news reporting on some websites;
  - how to deal with complaints involving content that is published behind a pay wall and withheld from the complainant; and
  - in what circumstances is the news media justified in reproducing photographs published on social media sites.
- 5.46 Alongside these issues relating to content on traditional print websites, the Press Council has also been approached by members of the public for assistance in dealing with non-traditional websites, including responding to a small number of written complaints against *Kiwiblog*, *Yahoo!New Zealand*, television websites, Trade Me and *Unlimited*.
- 5.47 Although these cases were regarded as outside the Press Council's jurisdiction, its Executive Director advised the individuals as to how to direct their concerns to the website's editor and in some cases liaised directly with the relevant body to help facilitate a resolution.

#### **STRENGTHS AND WEAKNESSES OF THE TWO MODELS**

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- 5.48 Although both the BSA and the Press Council function as complaints appeal bodies, there are important differences between the two.
- 5.49 The Press Council is a self-regulatory body which depends on the voluntary co-operation and compliance of its member organisations. It has no statutory power to enforce decisions or impose sanctions. In contrast, the BSA is a Crown entity established by statute. All broadcasters are covered by its jurisdiction and it is able to apply a range of sanctions including compensatory damages in privacy cases, and other commercial penalties such as forcing a broadcaster to forego advertising revenue by broadcasting commercial-free for a period, or, in extreme cases suspending broadcasting for up to 24 hours.
- 5.50 The Press Council has a set of principles which are intended to provide guidance to the public and publishers with respect to ethical journalism. In contrast the BSA must apply standards laid down in primary legislation and work with industry to translate these into specific codes of practice which are used to assess complaints. It has developed a significant body of media jurisprudence particularly in the area of privacy.

- 5.51 The Press Council is entirely dependent on funding from its member organisations for its annual budget of \$237,000.<sup>143</sup> It has one full time staff person and adjudicated 65 complaints in 2010. A further 10 complaints were resolved through informal mediation. The BSA's 2010 revenue was \$1.4 million, \$762,241 of which came from the industry levy and \$609,000 from the Crown. It has a full time chief executive, three legal advisers, an administrator and three part time support staff. In 2010 the BSA adjudicated 193 complaints, 77% of which concerned news, current affairs and factual programming.<sup>144</sup>
- 5.52 Industry members of the Press Council are appointed by representatives of their respective sectors and the public representatives by an appointment's panel comprising nominees of the Newspaper Publishers' Association (NPA) and the EPMU, the chief Ombudsman and the current chair. The chair, who must be independent of the press, is appointed by the stakeholders. In contrast, the BSA's chair and board members are all appointed by the Governor-General on the advice of the Minister of Broadcasting.
- 5.53 In the following discussion we consider the strengths and weaknesses of the two regulatory approaches. This is a preliminary assessment only, and does not pretend to provide a detailed cost benefit analysis of the two models, but rather a framework for further discussion.

#### *Independence*

- 5.54 In chapter 4 we discussed the pivotal role the news media play in a democracy as a check on power. The 2007 Barker-Evans review of the Press Council made explicit reference to the need to preserve the Council's independence from the state in order to ensure the press could fulfil its functions as "an important leg of the constitution of a democratic country".<sup>145</sup>
- 5.55 Although government agencies play no role in the BSA's complaints procedures, or in setting industry codes of practice, as noted above the BSA's chair and board members are appointed by the Governor-General on the advice of the Minister of Broadcasting. This leaves room for, at the very least, a perception of politicisation.
- 5.56 However, as the Barker-Evans review pointed out self-regulation is not a guarantee of independence as there is always the potential for any form of industry self-regulation to be "affected by controlling interests".<sup>146</sup> And, as historian James Curran points out in his analysis of media power in Britain, state power is only one of the sources of power the press should be monitoring, and from which it needs to maintain its independence.<sup>147</sup> Corporatized media is a major seat of economic and political power, raising legitimate questions as to how effective an industry-controlled complaints body can be when asked to be a guardian of itself.

- 5.57 The Barker-Evans review made a number of important recommendations about the Press Council's level of independence from the industry, including a recommendation that it become a separate legal entity rather than a body that could be dissolved at the whim of the industry. In response to this recommendation, at the time of writing the Press Council is in the process of being established as an incorporated society.
- 5.58 The reviewers were also concerned at the possible conflict between the Press Council's dual functions as a public complaints body and a body committed to the promotion of freedom of speech and freedom of the press in New Zealand. They felt the press freedom advocacy role did not sit comfortably with the "objectivity needed for the discharge of the Press Council's complaint role".<sup>148</sup> Instead they recommended the council adopt the wording of the Australian Press Council objective which is to promote "freedom of speech through a responsible and independent print media and adherence to high journalistic and editorial standards."<sup>149</sup> A final point to note is that neither the BSA nor the Press Council is currently able to initiate investigations into significant breaches of standards by media organisations but rather must rely on receiving a complaint from a member of the public before doing so.

#### *Accessibility*

- 5.59 A key indicator of the success of any consumer complaints system must be the ease with which members of the public can access it. The primary requirement is that the public be aware of the complaints system and how it works. Broadcasters are legally obliged to publicise information about how to go about making a complaint about a programme and are alerted to the broadcasting codes of practice. Newspapers are under no such obligation with respect to the Press Council's complaints procedures. A number of newspapers do publish information advising readers how to go about having mistakes corrected in the news pages but few provide readers with ready access to their publication's codes of ethics or alert them to the existence of the Press Council.
- 5.60 The Barker-Evans review concluded that public awareness of the Press Council was lower than for other industry complaints bodies and recommended that all publications under the Council's jurisdiction should be obliged to regularly include information about the public's right to complain to the Press Council in print and on news websites. We are informed by the Press Council that response to this request has been "patchy".
- 5.61 Another important tool for increasing public awareness of the complaints procedures, and the standards the public can expect of the news media, is the publication of important decisions. Both the BSA and the Press Council make their decisions available online through their respective websites.

- 5.62 In cases of serious breaches the BSA can require a broadcaster to broadcast a statement and sometimes an apology. The BSA also issues press releases summarising decisions that it considers significant or likely to be of public interest. The Press Council requires members to publish decisions when a complaint is upheld but has little control over how and where the decision is published. It does not issue press releases alerting other media to significant rulings.

#### *Efficacy and powers*

- 5.63 Any assessment of the efficacy of these two bodies at maintaining standards necessarily involves value judgements about the competing interests both bodies are constantly attempting to reconcile. The standards and principles underpinning these regulators' adjudications require them to constantly review the meaning of ethical journalism. This involves weighing the fundamental public interest in free speech against countervailing interests in rights such as privacy, and the responsible and fair exercise of the media's powers.
- 5.64 On one view the BSA's use of industry standards, guidelines and practice notes, provides both broadcasters and the public with some clarity about what responsible journalism looks like. In contrast the Press Council's principles are deliberately broad, reflecting the Council's view that editors and their employers are responsible for making publishing decisions and determining the boundaries of responsible journalism, not a complaints body.
- 5.65 Both approaches are open to criticism. Some broadcasters believe the BSA fails to give sufficient weight to the Bill of Rights free speech provisions and that overly prescriptive standards can have a chilling effect on news gathering activities. They also claim inconsistency in decision making has resulted in confusion around the practical application of standards such as privacy. On the other hand, the Barker review pointed to the fact that the Press Council is unusual in relying on loose principles without any specific standards and recommended that these principles undergo urgent review.<sup>150</sup>
- 5.66 In recent times broadcasters have also been concerned by what they regard as a unilateral shift in the BSA's interpretation of "good taste and decency standards". In April 2011 in an unprecedented joint action, Television New Zealand and TVWorks (TV3 and C4) appealed two BSA decency decisions in the High Court at Auckland.<sup>151</sup>
- 5.67 What this demonstrates is that there is an inevitable tension between the regulators and the regulated with respect to the standards applied when determining complaints. Arguably though, the Press Council, with its objective of promoting press freedom, is far less prescriptive in its approach to standard setting than the BSA.

*Powers*

- 5.68 As a statutory body the BSA has the power to compel parties to disclose information and to appear before the Authority to give evidence. The Press Council has no such powers to conduct its own inquiries into a complaint. The BSA has a broad range of sanctions available to it including the ability to recover costs for the Crown, award damages in privacy cases and, in the most severe breaches, order a broadcaster off-air for up to 24 hours. The only sanction available to the Press Council is the requirement that editors publish the adjudication, giving it fair prominence.<sup>152</sup>
- 5.69 The Barker-Evans review rejected the idea of giving the Press Council the ability to impose financial penalties suggesting it would need statutory backing and so would undermine the self-regulatory model. The report cited the traditional view that an “upheld” decision was regarded as a serious professional embarrassment by editors and this constituted an effective sanction.
- 5.70 However the Press Council’s 2010 Annual Report noted some push-back from some editors with respect to the publication of unfavourable Press Council decisions. It noted that in a few cases editors had sought to “modify or weaken the effect of the adjudication by critically commenting on it.”<sup>153</sup> However marginal a problem, this may indicate a shift in perception of the Press Council’s authority in the new media environment.
- 5.71 Similarly, in the course of our preliminary consultation we heard from a highly regarded former broadcast journalist who suggested that unfavourable BSA decisions had little or no impact on their working life and indeed in some cases they had been unaware that the BSA had upheld complaints involving their own work, suggesting this was not regarded as an important performance benchmark by the employer.

*Efficiency*

- 5.72 Both the BSA and the Press Council operate on relatively small budgets with minimal staffing levels. As a self-regulatory body the Press Council relies on good will of members supplemented by board fees and minimal expenses. The volume of complaints to the BSA is significantly higher than those received by the Press Council.<sup>154</sup> Arguably the Press Council is able to function in its current form because the level of complaints it has to adjudicate remains relatively low. Any extension of jurisdiction – or increase in the volume of complaints – would have significant implications for resourcing levels.

- 5.73 As demonstrated with respect to the two bodies' response to the internet, the self-regulatory model also allows for flexibility not always available to a body bound by statute. However, as yet the Press Council has not dealt with any significant body of complaints with respect to internet content, and none involving audio-visual content, and it remains a moot point how it might deal with an increase in the volume and complexity of internet related complaints given its current resourcing constraints.

### Conclusion

- 5.74 It is arguable that from a consumer's perspective the BSA provides a more robust and meaningful remedy for serious breaches of media standards than does the Press Council. Its processes are however more costly and legalistic.
- 5.75 However, alongside the need for effective remedies for serious breaches of media standards, it is vital to consider the impact of regulatory models on the freedom and independence of the press. On this count, there are legitimate concerns about the perception that there might be potential for the politicisation of a Crown entity such as the BSA.
- 5.76 Similarly, public consultation undertaken by the Barker-Evans review found significant levels of concern at the independence of the Press Council from the news industry.
- 5.77 In our view the fundamental weakness of both the Press Council and the BSA is the fact that both were designed to operate in a traditional media environment which no longer exists. In other words, neither was designed for the digital era. We discuss the basis for this assessment below.

### CONVERGENCE: THE ELEPHANT IN THE ROOM

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- 5.78 A common thread in all of the research and reviews into media regulation undertaken in New Zealand over the past decade is the recognition that the silos which traditionally defined different sectors of the news media are rapidly dissolving. Digitisation, the internet and the web have combined to create a plethora of new ways of producing and delivering content to consumers. In the process the boundaries between broadcasters, print media and telecommunication operators have become increasingly blurred.
- 5.79 This reality was acknowledged by stakeholders and individuals who gave feedback on the Ministry of Culture and Heritage's 2008 consultation paper *Broadcasting and New Digital Media: Future of Content Regulation*. The Press Council in its submission to the Ministry had this to say about media convergence:<sup>155</sup>

The Council notes that there is now considerable overlap or genuine convergence between what were formerly separate media interests. Websites of television stations, radio stations and newspapers contain video clips, radio broadcast clips and written word. A journalist may not only write for a newspaper, but may present via audio or video on radio, television or on-line. The different types of media are intertwined and the Council believes that the convergence will become greater, rather than smaller.

- 5.80 In a similar vein, Television New Zealand noted the current regulatory environment was creating an uneven playing field for traditional broadcasters and could no longer be justified in practical or policy terms.<sup>156</sup>

The traditional reasons for regulating broadcasting in the traditional ways are fast disappearing. Distinctions between broadcasting, telecommunications, print and other forms of media are becoming increasingly blurred. This calls into question the logic of maintaining separate regulatory frameworks – BSA, ASA, Press Council.

- 5.81 In the course of our preliminary consultation with news media executives we were left in no doubt that those at the head of traditional print and broadcast companies regard themselves increasingly as “content producers” rather than the more narrowly defined broadcasters and newspaper publishers. A number outlined scenarios where they would in future produce packaged content for third party distribution. A number already have contracts to do so.
- 5.82 The advent of ultrafast broadband will no doubt have a very significant impact on the use of audio-visual content on media websites and on the development of internet protocol television services. Internet capable television is already making a significant impact on the market along with technologies such as the iPad. The importance of online video for the economic survival of traditional newspaper and television companies as they compete for audiences and online advertising revenue was underscored in a Pricewaterhouse Coopers report on media companies’ response to the gravitation of audiences to the internet.<sup>157</sup>
- 5.83 The digital revolution has profound implications for every aspect of media regulation. The breadth of issues was outlined in the terms of reference for the 2006 joint Ministry of Culture and Heritage and Ministry of Economic Development Review of Regulation for Digital Broadcasting. Alongside content regulation, this review also considered the much broader issues of competition and diversity; distribution channels; intellectual property rights; content acquisition; accessibility to publicly funded and public service content; networks and access to spectrum.
- 5.84 Our focus is far more tightly drawn and is concerned primarily with considering options for regulating new and traditional news media in this converged environment.
- 5.85 In this area too there appears to be a growing recognition of the inappropriateness of retaining different regulatory models for print and broadcast media when the two are becoming increasingly entwined.

- 5.86 Former New Zealand Herald editor-in-chief, Gavin Ellis, confronted these issues in a 2005 critique of the orthodox justifications for state involvement in broadcasting and concluded that the digital revolution had rendered many of them obsolete.<sup>158</sup>
- 5.87 In its 2008 Annual Report the Press Council acknowledged the logic of a single code to govern all news media:<sup>159</sup>
- What had once been separate media interests now overlapped between newspapers and broadcasters and the Council could see the logic in the proposition that there be one code to govern all media so that consumers knew the same standards applied to all media.
- 5.88 In addition to the phenomenon of convergence, some of the traditional justifications for tougher statute-backed regulation of broadcasters no longer pertain. Digital broadcasting technologies and the advent of ultrafast broadband have transformed the competitive environment for broadcasters and removed the barriers to entry that existed when broadcasters were reliant on access to scarce radio spectrum.
- 5.89 Some would also argue that the fragmentation of the media market and consequent loss of market share by the once dominant state broadcasters has further eroded the case for tougher broadcasting standards as consumers now have significantly more choice. We explore these arguments further in the next chapter.
- 5.90 However, while the old assumptions which have underpinned the parallel approaches to news media regulation appear to have been seriously undermined in the digital era, the prospect of a single regulator raises a raft of important questions which will require widespread consultation with the public and media stakeholders.
- 5.91 Critically, in the new media environment, these questions must be focused not on the medium but rather on the content producers and the consumers.
- 5.92 It requires us to return to the fundamental question of media standards and ask how the objectives underpinning the BSA and the Press Council can best be delivered in the internet age.
- 5.93 Among the questions we might need to address include:
- Do the current broadcasting standards still reflect the public's expectations of what they value and expect from broadcast and print media?
  - Does the public have different expectations and standards for content they access on-demand as opposed to content that is live streamed to them?
  - Does the public expect the same journalistic standards to apply to news content accessed from websites and television or newspapers?
  - Does the public expect fairness and balance in news media reporting and if so how do they think this can reasonably be achieved in the age of instant and continuous news reporting online?

- 5.94 We hope to receive feedback from the public on these issues during the consultation period following the release of this paper.
- 5.95 In the following chapter we offer some preliminary ideas about how a single regulator might function.

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- 124 The first private commercial broadcasting licences were issued to Radio Hauraki and Radio 1 in 1970.
- 125 Broadcasting Authority Act 1968, s 10 (1).
- 126 Broadcasting Act 1976, s 3 (c).
- 127 Broadcasting Act 1976, s 67 (4).
- 128 Broadcasting Act 1989, s 4 (1).
- 129 Under the provisions of New Zealand's Copyright (Infringing File Sharing) Amendment Act 2011 individuals illegally sharing copyrighted files over the internet face an escalating infringement regime which ultimately could result in a person losing their internet account for up to six months.
- 130 Under section 2 of the Broadcasting Act 1989 broadcasting means "any transmission of programmes, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus". Programme means:(a) sounds or visual images, or a combination of sounds and visual images, intended—(i) to inform, enlighten, or entertain; or (ii) to promote the interests of any person; or (iii) to promote any product or service; but (b) does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text.
- 131 The BSA identifies three different ways in which viewers can currently access content online:
- Video material that must be downloaded to the user's computer before it can be viewed. Such material is downloaded in whatever order will allow the download to occur in the shortest possible time.
- Video material that is "streamed". Such video material can be played at the click of a button without the user having to first download the video to his/her computer for playback. The video is downloaded in small chunks, in sequence, as it plays.
- Video material that is "live streamed". Such video material does not allow a user to watch that content "on demand" at a time of their choosing. Such material plays continuously, independent of demand.
- The BSA's position is that only this latter category, live streamed content, is currently covered by the Act.
- 132 *Johnson and Television New Zealand Ltd - 2010-152* < [www.bsa.govt.nz](http://www.bsa.govt.nz) > .
- 133 Ministry of Culture and Heritage *Digital Broadcasting: Review of Regulation: The implications for regulatory policy of the convergence between broadcasting, telecommunications and the internet*, Volume one (2008); *Digital Broadcasting: Review of Regulation: Discussion Paper Volume two* (2008) *Broadcasting and New Digital Media: Future of Content Regulation* (2008).
- 134 Russell Brown and Steven Price *The Future of Media Regulation in New Zealand: Is there One?* (Prepared for the Broadcasting Standards Authority, May 2006).
- 135 Millwood Hargreave et al *Issues Facing Broadcast Content Regulation* (2006).
- 136 In the foreword to the BSA's Annual Report 2010 chair Peter Raddich noted "We are acutely aware of the challenges involved in maintaining standards in the segment of traditional broadcasting when similar standards do not apply to internet broadcasting. It is time for the Broadcasting Act to be reviewed."
- 137 NZPA "Broadcasting Act to be reviewed for relevance in the internet age" 17 November 2010.
- 138 (23 March 2010) 661 NZPD 9733.
- 139 Benedict Kingsbury "Complaints Against the Media: A Comparative Study" (1980-1982) 1 Canterbury Law Review 155 at [157].

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- 140 Ian Barker and Lewis Evans *Review of the New Zealand Press Council* (prepared for the Press Council 2007).
- 141 *Ibid*, at 78.
- 142 Email from Press Council Executive Director Mary Major to Law Commission regarding internet complaints (2 August 2011).
- 143 In 2009 the Council's budget was increased from \$188,500, following a recommendation of the Barker-Evans review, allowing, *inter alia*, the executive director to increase her hours of employment.
- 144 Broadcasting Standards Authority Annual Report 2010 at 11.
- 145 Ian Barker and Lewis Evans *Review of the New Zealand Press Council* (prepared for the Press Council 2007) at 9.
- 146 *Ibid*, at 9.
- 147 James Curran *Media and Power* (Routledge, London 2002) at 224.
- 148 Ian Barker and Lewis Evans *Review of the New Zealand Press Council* (prepared for the Press Council 2007) at 76.
- 149 The objectives of the newly incorporated Press Council are to "provide the public with an independent forum for resolving complaints against the print media, and to promote press freedom and to maintain the press in accordance with the highest professional standards..."
- 150 Ian Barker and Lewis Evans *Review of the New Zealand Press Council* (prepared for the Press Council 2007) at 73.
- 151 In this case the court upheld TVNZ's appeal but dismissed TV3's. The court also noted that BSA was entitled to depart from its own precedents. See *Television New Zealand Limited and another v West and another* (High Court Auckland CIV-2010-485-2007, 21 April 2011).
- 152 New Zealand Press Council Complaints Procedure < [www.presscouncil.org.nz/complain.php](http://www.presscouncil.org.nz/complain.php) > .
- 153 New Zealand Press Council "Annual Report 2010" at 8.
- 154 In 2009/2010 the BSA issued 193 decisions based on 210 complaints. In the same period the Press Council issued 65 decisions. A further 84 complaints did not require adjudication.
- 155 New Zealand Press Council "Annual Report 2008" at 23.
- 156 TVNZ "Separating Roles: A proposed approach to the "Future of Content Regulation" consultation paper" (2008).
- 157 IAB Internet Advertising Revenue Report: *An industry survey conducted by PwC and sponsored by the Interactive Advertising Bureau IAB 2011. First Six Months Results September 2011* < [www.pwc.com](http://www.pwc.com) > .
- 158 Gavin Ellis "Different strokes for different folk: Regulatory distinctions in New Zealand media" (2005) 11(2) *Pacific Journalism Review* at 63.
- 159 New Zealand Press Council "Annual Report 2008" at 17.

# Chapter 6

## Regulation of the media – a new regulator

### INTRODUCTION

- 6.1 In the preceding chapter we argued that the traditional format-based models for regulating the news media are not well suited to the digital era. Instead we proposed to address the issues of regulatory parity through a new converged regulator.
- 6.2 Our current regulatory arrangements, based on traditional distinctions between print and broadcast media, are similar to those in the jurisdictions to which New Zealand traditionally compares itself – the United Kingdom, Australia and most of the provinces of Canada.<sup>160</sup>
- 6.3 By way of contrast, many other jurisdictions have one body, often self-regulatory, with responsibility for both print and broadcast news media.<sup>161</sup>
- 6.4 The growth of new media, the pressures of convergence, and concerns raised by the allegations of phone hacking that re-emerged in the United Kingdom in July 2011, have resulted in the establishment of a number of reviews and inquiries into media regulation in other jurisdictions. As noted earlier in this Issues Paper, there are two major reviews of media regulation underway in the United Kingdom, one of the regulatory frameworks supporting the communications sector,<sup>162</sup> and the other, the Leveson Inquiry, to inquire into the culture, practices and ethics of the press.<sup>163</sup>
- 6.5 In Australia, the Convergence Review is considering the existing regulatory framework applying to media and communications services, to ascertain whether current regulation and policy frameworks remain appropriate and effective in a converging environment, and an independent inquiry is examining print and online media, focusing on ethics, regulation and the Australian Press Council.

- 6.6 Against this background of on-going change, we discuss a range of regulatory models for the news media, and then discuss a proposal for a new system of media regulation in New Zealand.

### REGULATORY MODELS

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- 6.7 Regulatory strategies are often described in terms of a pyramid,<sup>164</sup> or a continuum, with government intervention and sanctions increasing along the continuum, or with each layer of the pyramid.
- 6.8 The spectrum of options is usually seen as having self-regulation at one end and government regulation at the other, and we will adopt that approach in the discussion of the range of models below. However, the lines between regulatory models are not always hard and fast. For example, some press councils that are essentially self-regulatory are backed up or underpinned by legislation. Others are described as self-regulatory by one commentator, and co-regulatory by another.
- 6.9 The media freedom group Article 19 suggests that self-regulation may be a misnomer in some situations, and that the term “independent regulation”, avoiding undue influence from any quarter, so as to preserve press freedom, might be more appropriate.<sup>165</sup> We agree with this view, and will use this terminology in our discussion of the options for regulation in New Zealand later in this chapter. In the following paragraphs, we use the traditional regulatory terms, but note that some of the examples provided may be described by others as being at a slightly different place on the regulatory spectrum.

#### Government/state regulation

- 6.10 At the top of the regulatory pyramid is government regulation, or “command and control” regulation, which occurs when the State sets the legislative or regulatory rules, monitors compliance with them and enforces them by imposing sanctions. Government regulation has the advantages of universal coverage, compulsion, legal enforceability and democratic accountability. It may provide effective overarching controls on market behaviour, and minimum standards of quality, fitness and service performance. The statutory nature of the framework makes the imposition and enforcement of monetary penalties and stringent sanctions less problematic than in a self-regulatory context.
- 6.11 However government regulation is also criticised as being expensive, inefficient, stifling innovation, and inviting enforcement difficulties. Because it is statutory in nature, it is less flexible and responsive to change than a self-regulatory or co-regulatory model. It may also result in greater restrictions being imposed on freedom of expression, and have lower levels of cooperation from the industry.

- 6.12 In the United Kingdom, broadcasting and telecommunications are regulated by the United Kingdom Office of Communications (OfCOM), a statutory body established under the Communications Act 2003. OfCOM is required under the Communications Act 2003 and the Broadcasting Act 1996 to draw up a code for television and radio, covering standards in programmes, sponsorship, and product placement in television programmes, fairness and privacy.<sup>166</sup> The Code must secure standards objectives set out in the Communications Act, and also gives effect to a number of requirements relating to television laid down in European Union directives. The Code is a set of principles and rules, and includes practices to be followed in relation to matters of fairness and privacy.
- 6.13 In cases of a breach of the Code, OfCOM will normally publish a finding on its website. When a broadcaster breaches the Code deliberately, seriously or repeatedly, OfCOM may impose statutory sanctions against the broadcaster. By way of contrast with the limited range of sanctions available to the self-regulatory UK Press Complaints Commission, the sanctions available to OfCOM include a decision to:<sup>167</sup>
- a. issue a direction not to repeat a programme or advertisement;<sup>168</sup>
  - b. issue a direction to broadcast a correction or a statement of OfCOM's findings which may be required to be in such form, and to be included in programmes at such times, as OfCOM may determine;<sup>169</sup>
  - c. impose a financial penalty;<sup>170</sup>
  - d. shorten or suspend a licence (only applicable in certain cases);<sup>171</sup> and/or
  - e. revoke a licence (not applicable to the BBC, S4C or Channel 4).<sup>172</sup>
- 6.14 In most cases the maximum financial penalty for commercial television or radio licensees is £250,000 or 5% of the broadcaster's 'Qualifying Revenue', whichever is the greater.

### Self-regulation

- 6.15 At the other end of the spectrum is self-regulation. A self-regulatory scheme is one in which the rules that govern market behaviour are developed, administered and enforced by the people whose behaviour is to be governed, rather than being imposed by the state.<sup>173</sup> Self-regulation usually has no or little government involvement, other than the general underlying legal framework of consumer protection and laws relating to business, contracts and competition. Industry takes the lead in setting regulatory standards and enforcing compliance. A code of practice is the most common form of self-regulation.<sup>174</sup>

- 6.16 A large number of press councils are self-regulatory, and operate without any state support or involvement. Examples include press councils in Australia, Canada (Alberta, the Atlantic Provinces, British Columbia, Manitoba and Ontario – Quebec operates with some state funding, as we will discuss below), the Netherlands, Norway, Sweden, Switzerland, the United Kingdom and New Zealand. These self-regulatory models do not necessarily apply only to the regulation of print media: the press councils in Norway, Switzerland and the Netherlands regulate broadcasting as well as print.
- 6.17 In Norway, the government abolished the statutory Broadcasting Complaints Commission in 1997, in favour of the entirely self-regulatory Norwegian Press Council. One of the reasons given for this withdrawal of public regulation was that the Press Council was a better known entity, highly respected by the media and the public. It was already taking cases even if they were simultaneously brought before the Broadcasting Complaints Commission, and the abolition of the Commission avoided a duplication of work.<sup>175</sup>
- 6.18 In Ireland, the Press Council was established in 2007. The Irish Press Council is industry funded, but section 44 of the Irish Defamation Act 2009 provides for its formal recognition, and Schedule 2 of the Act sets out the minimum requirements of the body recognised as the Press Council. These include a requirement for the Press Council to adopt a code of standards that includes ethical standards; rules relating to accuracy where reputation is likely to be affected; to prevent intimidation and harassment; and to ensure respect for privacy, integrity and dignity of the person. The Code of Practice itself was drawn up by representatives of the industry. The Irish model provides a good example of the difficulties of categorising regulatory structures in black and white terms – some describe the system as self-regulatory, while others call it co-regulatory, because of its statutory underpinning.
- 6.19 Self-regulation has the potential to be more flexible and responsive to change than government regulation. This is a considerable advantage in an area in which change is a constant – for example, self-regulatory bodies can extend their remit without the need for legislative change. Thus, like a number of overseas press councils, the New Zealand Press Council has decided itself that it will consider complaints about online material, while the Broadcasting Standards Authority is unable to do so because of the constraints of its legislation.
- 6.20 Self-regulation is also often cheaper than government regulation, being funded predominantly or entirely by industry. Its proponents argue it encourages a culture of engagement, goodwill and responsibility on the part of the industry. The very desire to avoid greater regulation can be a strong incentive to the industry to maintain standards – a survey of the history of press councils suggests that their creation, or in the case of existing bodies, their reform, usually occurs as a response to a crisis of some kind, resulting in a threat of government regulation.<sup>176</sup>

- 6.21 On the other hand, critics of self-regulation might ask how the arguments that self-regulation generates a culture of engagement and responsibility stack up in the face of allegations of phone hacking by members of the news media in the United Kingdom. Self-regulation may be open to abuse, and is marked by a lack of democratic accountability. When standards are set by industry groups, with an economic interest in the regulated industry, there may be a risk of bias towards weak standards that favour business. Where broader public interests are involved there may be a risk that industry-based groups do not take a sufficiently broad view of the world.
- 6.22 Self-regulation also relies on industry-wide commitment to be effective. The key element of a self-regulatory system is the voluntary participation of those who are regulated by the system. Where that support is not present, the credibility of the whole system can be undermined – and its financial viability threatened.

*Sanctions imposed by self-regulatory bodies*

- 6.23 One of the characteristics of self-regulation is that generally rules and codes of conduct are formulated by the relevant industry, and the industry is solely responsible for enforcement. A feature of self-regulatory press councils in almost all jurisdictions we considered is that they have limited sanctions which they can impose where a complaint is upheld. The most common sanction is the publication of a decision critical of the media body in question. Criticism of self-regulation of the press often focusses on this issue, with self-regulatory bodies being described as “toothless” because of their inability to impose fines.
- 6.24 However, others insist that sector-wide self-regulatory bodies should *only* have the power to impose moral sanctions, such as the publication of a correction or an apology, and argue that the concept of voluntary compliance is fundamental to self-regulation:<sup>177</sup>

Law courts play no role in adjudicating or enforcing the standards set and those who commit to them do so not under threat of legal sanction, but for positive reasons, such as the desire to further the development and credibility of their profession. Self-regulation relies first and foremost on a common understanding by members of the values and ethics at the heart of their professional conduct.

- 6.25 Editors and journalists maintain that publication of an adverse decision is an effective sanction because no editor wants to have to admit to his or her readers that a publication or broadcast was inaccurate, unbalanced, or otherwise breached the standards they had agreed to follow. Yet there continues to be a degree of public scepticism over whether publication alone is a meaningful sanction. The question also arises as to how a press council can ensure that adverse decisions are published with due prominence – or in some circumstances, are published at all.

- 6.26 In the Netherlands, the Press Council Foundation (the industry organisation that established the press council) has entered into a voluntary agreement with several chief editors, whereby the medium gives an undertaking that it will publish decisions of the council. Not all chief editors have signed the agreement.<sup>178</sup>
- 6.27 Very few press councils have the ability to impose fines. The Swedish Press Council can charge a publication an “administrative fee”, which is used to fund its activities. Newspapers with a circulation of 10,000 copies will pay up to 12,000 SEK. Newspapers with larger circulation pay up to SEK 30,000.<sup>179</sup>
- 6.28 In 2009, a study considering press councils in Western Europe commented in relation to the Swedish Press Council that the general impression was that the administrative fines imposed had barely any effect, and that the media, particularly the tabloids, were simply resigned to them. The study noted the risk that if the fines were set too high, papers might be tempted to offer payments to complainants for the withdrawal of a complaint.<sup>180</sup>
- 6.29 The concerns raised about press councils having the power to impose sanctions often refer to the effect any such power would have on the underlying nature of a press council as an inexpensive forum for resolving complaints without unnecessary legal formality. On this view, the ability to impose significant sanctions would raise the stakes in press council complaints, raising issues of legal representation, onus and standard of proof, and rights of review and appeal. If substantial fines were available, there may also be issues of a potential chilling effect on the freedom of the press.
- 6.30 In the United Kingdom, to date the Press Complaints Commission has resisted calls for it to have the power to levy fines or award compensation. However, in a 2009/10 review, the United Kingdom Culture, Media and Sport Select Committee made a number of recommendations aimed at making regulation of the press in the UK more effective, describing it as “toothless” compared with other regulators.<sup>181</sup> It recommended that the Press Complaints Commission should have the power to fine its members where it believed that the departure from the Press Complaints Commission’s Code of Practice was serious enough to warrant a financial penalty, including, in the most serious of cases, suspending the printing of the offending publication for one issue.<sup>182</sup>

The industry may see giving the PCC the power to fine as an attack on the self-regulatory system. The reverse is true. We believe that this power would enhance the PCC’s credibility and public support. We do not accept the argument that this would require statutory backing, if the industry is sincere about effective self-regulation it can establish the necessary regime independently.

- 6.31 The Leveson inquiry will no doubt revisit the question of the adequacy of the PCC’s current sanctions.

*Self-regulatory bodies with state funding*

- 6.32 Self-regulation does not necessarily exclude the possibility of state funding. There are examples of self-regulatory media bodies that receive some funding from the State, including Finland (where half the costs of the council are funded by the state); Quebec, (part state-funded) and Germany (where the Council is part funded by the state with funding underpinned by statute).<sup>183</sup> The stated purpose of the German statute is to guarantee the independence of the complaints committee of the German Press Council. The state is barred from interfering in any way with the work of the German Press Council. The total of each year's grant is decided in the federal budget debate.<sup>184</sup>
- 6.33 In Belgium the Flemish press council, the Raad voor de Journalistiek, is indirectly financed in part by the government, which subsidises the journalists' union that provides half the funding for the council.<sup>185</sup>

**Co-regulation**

- 6.34 Co-regulation lies on the spectrum between self-regulation and state regulation. It usually involves industry association self-regulation with some oversight or ratification by government.<sup>186</sup> Co-regulation has been described as having the advantage of allowing a higher level of control by government, while still allowing industry-led regulation.<sup>187</sup>
- 6.35 There are many different forms of co-regulatory model. One is where a co-regulatory system is initiated by the state – the state lays down a legal basis for the co-regulation system, so that it could begin to function.<sup>188</sup> One of the key distinctions between self- and co-regulatory schemes has been described as being the voluntary nature of the participation in the scheme:<sup>189</sup>
- In a co-regulatory-system, non-compliance with the given rules is directly or at least indirectly (e.g., in the form of possible revocation of a licence) sanctioned by the state (public authority). Thus, the market players concerned are not actually free in their decision to participate in the system.
- 6.36 In Australia the regulation of television and radio content is subject to co-regulatory arrangements. Most aspects of broadcast programme content are governed by codes of practice developed by industry groups and registered by or notified to the Australian Communications and Media Authority (ACMA), a statutory body.<sup>190</sup> Once the codes are implemented, ACMA monitors compliance with them and deals with complaints made under the codes that are not resolved by complaint to the broadcaster.
- 6.37 The ACMA also administers a co-regulatory scheme for online content through codes of practice, and enforces Australia's anti-spam law. The co-regulatory scheme aims to address community concerns about offensive and illegal material online and to protect children from exposure to unsuitable material.<sup>191</sup>

- 6.38 A co-regulatory model established by statute can be found in Denmark. The Danish Press Council regulates both print and broadcast media. It was established by the government after a self-regulatory body collapsed in 1992 because of economic disputes between journalists and media owners, and a lack of support from most media outlets.<sup>192</sup> Created under the Media Liability Act 1991, the Danish Press Council is an independent body. Its members are appointed by the Minister of Justice, but on the recommendation of various bodies.<sup>193</sup> Section 50 of the Act provides that decisions of the Press Council cannot be brought before another administrative authority. Despite being established by statute, the Danish Press Council is entirely industry-funded.
- 6.39 Co-regulation provides a halfway house between state regulation and industry self-regulation. It allows the industry to partially regulate itself, but provides a statutory “back-stop”. It can allow for a wider range of sanctions than a purely self-regulatory model, depending on the degree of government oversight or involvement. In Australia, where a person has breached a provision of a code, the ACMA may direct compliance with the code. In that case a failure to comply is an offence, which is punishable by criminal, civil and administrative penalties. The ACMA has a reserve power to make an industry standard if there are no, or no adequate, industry codes.<sup>194</sup>
- 6.40 Co-regulation shares many of the advantages and disadvantages of self-regulation and government regulation. It may not be as flexible or speedy in its response to changing circumstances as a purely self-regulatory system, but it may be seen to provide greater protection where important public policy goals are at stake.

#### No regulator

- 6.41 There is another option, outside the standard regulatory pyramid, and that is not having a regulator at all, leaving regulation to the framework of the ordinary law, such as the law of defamation, privacy and harassment.
- 6.42 In discussing a range of options for the reform of the regulation of the press in the United Kingdom, Martin Moore of the Media Standards Trust noted that one possibility was to abolish the Press Complaints Commission without setting up a replacement body. He described the benefit of this approach as being its recognition of the difficulties of creating a new system that cuts across very different content and an increasing range of media and platforms.
- 6.43 This would not preclude news organisations setting up their own internal systems for monitoring standards and considering complaints, as many do now. In the United States, for example, there is now only one state press council that considers complaints.<sup>195</sup> Many newspapers (including the Washington Post and the New York Times) use news ombudsmen to receive and investigate complaints from readers about accuracy, fairness, balance and good taste in news coverage. The ombudsman recommends appropriate remedies or responses to correct or clarify news reports. In the most serious cases, he or she may discuss the error in his or her ombudsman’s column.

6.44 This model is also consistent with a view that suggests that the internet presents new opportunities for people to hold the media to account in a timely fashion, so that there is no longer any need for a regulatory body. If one of the media makes a mistake, that will be corrected by a flood of messages on Twitter or comments on blog sites.<sup>196</sup> The media as a whole, in other words, will self-correct. Honesty and integrity are maintained by sheer weight of numbers, and it happens very quickly. There is no need for an independent regulator.

6.45 In February 2011, the Board of Directors of the Minnesota News Council announced the closure of that organisation. Funding issues were one reason for the closure. The other was the internet:<sup>197</sup>

The growth and expansion of the Internet had a profound impact on our efforts. The proliferation of blogs, which allowed news consumers their own distinct voices, email and comment sections to online news stories, provided an instantaneous outlet for complaints, concerns and commentary on the news. Our hearing process, which was both thorough and, as a result, time-consuming, couldn't measure up to the instant access allowed by electronic media.

6.46 However, we are not convinced by this rationale for abandoning an independent regulator. "Censorship" by other media can only take matters so far. For one thing, this self-correcting mechanism deals principally with accuracy issues: it is much less well adapted to deal with, say, issues of privacy, fair treatment, and good taste. Nor does it always ensure a good outcome on accuracy issues. Some serious inaccuracies may not attract the attention of bloggers on the social media. Nor does a volume of responses necessarily mean that a single "right" answer will be arrived at.

6.47 Critically too, it disregards the very real power imbalances which persist in the web publishing environment. An aggrieved individual may not feel inclined to join public battle with a well-known and influential website. Nor, if an error or other breach of standards appears in on a mainstream media news site, can it be guaranteed that all readers will see a stream of corrective comment in the social media. Furthermore, just as editors have famously always had the power that comes with "having the last word", so too can the blogger or web publisher dictate the terms of the debate.

6.48 There is, we believe, no substitute for the systematic investigation of a complaint by an independent body. We agree with the views recently expressed by the Executive Director of the Organisation of News Ombudsmen:<sup>198</sup>

Often the reason given for abandoning the position [of news ombudsman] is credited to (or blamed on) the Internet. Some editors think that blogs and media critics can do as good a job of holding a news organisation accountable. In some cases, this may be true. But in my experience, accountability requires a systematic approach to complaints, combined with an ability to know the newsroom culture, and then have the capacity to make an independent judgment about a legitimate complaint.

- 6.49 Many of the privileges and exemptions currently accorded the news media depend on the assumption that the media will behave in a responsible and trustworthy manner. We believe that we are still a long way from a state where the public no longer wants or needs a mainstream “news media” which it can rely on for a reasonably dependable account of necessary news and information. We think the required public trust is best ensured by the presence of an objective and independent regulatory body. In the next part of this chapter we consider the form such a regulator should take.

## A NEW REGULATOR?

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### A single regulator

- 6.50 In the last chapter we examined and compared the two current media regulators in New Zealand: the Press Council and the Broadcasting Standards Authority. We saw that there are at least three problems with the existing structure:
- a. The two bodies are very different – the one statutory and the other voluntary. That distinction is at least in part based on history, and is becoming increasingly hard to justify in the new age.
  - b. There are presently “gaps” in coverage: some material is subject to no regulation at all even though it is generated by “traditional” media and intended for wide public consumption. The most striking example is on-demand material on broadcasters’ websites. That is truly anomalous, and a matter of confusion to the public, which sees the online material as just an extension of the broadcaster’s usual business.
  - c. The phenomenon of convergence which we discussed in the last chapter means that websites of broadcasters and newspapers are increasingly alike: both contain large amounts of text, and often a significant component of audio-visual material. Other news sources derive their news from both. That different standards and modes of regulation should apply to both is increasingly hard to understand, and even harder to justify. Much the same standards of accuracy, fairness, respect for privacy etc. apply across the boundaries.
- 6.51 If one were to retain both the existing regulators the question of how their respective jurisdictions might be extended to cover existing gaps would be fraught with difficulty. Because it is a voluntary body not defined by statute, the Press Council perhaps could extend its jurisdiction more widely but there would be real questions as to where the boundaries should be drawn. Should more news aggregators (as opposed to news generators) or bloggers have an automatic right to join? Moreover the Press Council is largely concerned with print and would have to adapt its operation to deal with audio-visual material.

- 6.52 If the Broadcasting Act were to be amended to redefine “broadcast” to cover online on-demand material, there would again be a question of where to draw the line. Would it cover *any* communication on the internet, or only communications from what might be described as the traditional broadcasters? Would the BSA’s jurisdiction extend only to audio-visual material on a website, or would it also cover all print content, or print content only so far as that was inseparable from the audio-visual component?
- 6.53 We do not believe that the current dual regulator model is one which can satisfactorily survive in the new age. As time passes, convergence can only increase. Common ownership of different kinds of media remains a real possibility in New Zealand as it is elsewhere in the world. Increasingly it is the content of the communication which is important rather than the platform from which it is communicated. In other words, it is the message rather than the mode.
- 6.54 We are of the view therefore that a single regulator is the way of the future. No doubt such a regulator may have to cope with subtle differences between print, audio-visual material, and other manifestations of modern communication technology. But different forms of communication are now so often combined in a single whole that we believe a single regulator should be entrusted with the task. Basic standards of good journalism remain the same whatever the form of communication.

#### **What regulatory model should be adopted?**

- 6.55 In determining what form this regulator should take and the way it should operate, we have had regard to the attributes of good quality regulation drawn by the Treasury from a number of sources, and set out in the form of best practice regulation principles and indicators.<sup>199</sup>
- 6.56 We have also been guided by the following principles.
- A free press is critical to a democracy. The Bill of Rights<sup>200</sup> guarantee of freedom of expression must lie at the basis of any media regulation. It requires that sanctions be proportionate, and that accountability rather than censorship should be the guiding principle.
  - The news media should exercise their freedom responsibly and be accountable when they fall below the appropriate standard. The privileges and exemptions conferred on the news media by law should be conditional on a guarantee that there will be responsibility and accountability.
  - Media regulation should be truly independent, both from government, and also from the industry itself.
  - Any regulatory system should foster rather than stifle diversity and new forms of publication.

- The system of regulation should be flexible and platform neutral, although standards may need sometimes to take account of different modes of delivery or types of publisher.
  - Any system of regulation of the media should not inhibit the freedom of speech of individuals who are not part of the media. There should remain a right for individuals to speak out, however unorthodox or even wrong their views may be.
- 6.57 As we have seen, there are many possible regulatory models. Unfortunately the terminology used to describe them is not always consistent. “Self-regulation” and “co-regulation” in particular can mean different things in different contexts. “Self-regulation” can mean that an industry in fact regulates itself, or that the industry has set up a body which then operates independently. “Co-regulation”, as we have seen, can take a multitude of forms, from the state having considerable involvement to its having virtually no part other than requiring that the regulator be established. To avoid this confusion of terminology we prefer to refer simply to **independence**.
- 6.58 The critical question is whether the new single regulator should be under the control of the state or whether it should operate independently of the state. The Broadcasting Standards Authority is presently nearer to the state-control end of the scale. Its members are appointed by the government; the standards are prescribed by statute, as are the sanctions which the Broadcasting Standards Authority can impose. However New Zealand has examples of successful regulation which are completely independent of the state. The Advertising Standards Authority and the Banking Ombudsman, for instance, both enjoy substantial confidence in both the public and the relevant industry. The university system provides other examples, in relation to both audit and course approval.<sup>201</sup>
- 6.59 Perhaps these industries have special features which make them amenable to regulation of this kind. Advertising takes place in a highly competitive market. An advertiser which fails to comply with a decision of the Advertising Standards Authority does so at its peril: the public may respond by not purchasing the advertised product. Banking is also competitive and a bank which is regularly before the Banking Ombudsman is likely to attract less custom.
- 6.60 The media context is rather different. There is a paradox. Overseas experience would suggest that the more flamboyant and sensational a publication is, the better it sells. The *News of the World* had a far greater circulation than the *Times* or the *Guardian*. The Media Standards Trust has said:<sup>202</sup>
- The current financial and structural crises are unique and are placing intense pressure on the press to capture public attention. The need for more sensationalism and more scoops can have undesirable consequences for standards. ...
- 6.61 Despite this, we are of the view that regulation which is independent of government and is rigorous and well-run (and those qualifications are essential) is the best model, even in the media market, for the following reasons.

- 6.62 First, a free press flourishes best in a climate where there is no, or limited, government control of what can be published. The danger of government regulation is that the regulator may serve, or just as seriously *appear* to serve, political ends, in the form either of the appointments made to it or the decisions made by those appointees. We do not suggest that the New Zealand Broadcasting Standards Authority has ever been open to those influences, but the possibility that it could be must inevitably reduce the confidence of the industry in it. A body which operates free from state control is likely to be better respected by the media themselves than a body which the government has forced on them.
- 6.63 Secondly, the public are likely to have less respect for an industry which has to be forced by the state to comply.
- 6.64 Thirdly, independent regulation costs the public less, in that industry pays for at least part of it. This however should not be a decisive factor: it can entail the disadvantage that industry may be inclined to contribute less funding than is ideally desirable. The Press Council has not been immune from that criticism.
- 6.65 Fourthly, the point is well made in the review of the New Zealand Press Council that independent regulation can actually be more stable and predictable than state regulation which is susceptible to variations in approach by different government administrations.<sup>203</sup> Those variations can be responses to economic pressures, lobbying by sections of the public and even of the industry, and political agendas. It has been said that “Governments, even if freely elected, are participants in the political contest and therefore not best-suited to enforce rationality and fairness.”<sup>204</sup>
- 6.66 Fifthly, in line with the great majority of other jurisdictions in the free world, New Zealand’s print media have long been free from state regulation. Voluntary press councils are the norm. To move to cross-media regulation by the state would send the wrong message about this country’s media. In fact there is comment in the New Zealand Court of Appeal that it is possible to say that the New Zealand press is better behaved than some of its relations in other parts of the world.<sup>205</sup> So, if there is to be a single regulator we prefer the independent model even though that means changing the present regime for broadcasters.<sup>206</sup>
- 6.67 No doubt some will prefer government regulation, and the overarching controls it can provide. Some sectors of the public may be unhappy at the introduction of what they might see as a weakening of regulation, at least as far as broadcasters are concerned. They are likely to draw attention to the British Press Complaints Commission’s failure to stamp out thoroughly objectionable conduct such as phone hacking. The Press Complaints Commission itself issued a statement in the wake of that scandal acknowledging that “it can no longer stand by its 2009 report on phone hacking and the assertions made in it”.<sup>207</sup> It promises to review all aspects of its operation to increase public confidence. “We need to identify how the model of an independent Press Complaints Commission can be enhanced best to meet these challenges.”<sup>208</sup>

- 6.68 Detractors are also likely to point to the fact that in other industries and professions the tendency is the other way – towards increased state regulation. Private investigators and security personnel, real estate agents, the financial markets and the insurance industry: all have recently been subjected to tighter statutory regulation. But most of this has been a response to a former lack of regulation rather than to effective independent regulation.
- 6.69 Yet there will doubtless be concerns that regulation without government intervention will lead to a drop in standards: that there will be a tendency to pander to the lowest common denominator, particularly in audio-visual material; and that there might be a failure to take account of the wider public interest. Those commercial pressures are undeniable. That is why the regulator, in addition to being independent from the state, must also be substantially *independent from the industry*. A regulator subject to industry control, where the industry itself could dictate membership, the content of the codes of practice, and the sanctions which could be imposed, would not command public confidence. The regulator, once set up, must stand independent from the industry, and not be subject to its direction. In the next section we expand upon the concept we envisage.
- 6.70 For the reasons we have given we continue to believe that truly independent regulation is the best option in the media context. However, the system we propose should be trialled, on the understanding that it will be reviewed after a set period of time – we suggest three years. If it is then found to have deficiencies it should be amended and strengthened.

#### **THE REQUIREMENTS OF EFFECTIVE MEDIA REGULATION**

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- 6.71 In our view, the following are the requirements of effective media regulation.

##### **Independence**

- 6.72 The regulator must be independent. As we have said, it must be clear that it is not subject to the control or direction of either the government or industry.
- 6.73 There are a number of facets of independence: membership, form, and funding. In terms of membership, there should be a rigorous appointments process undertaken in the set-up stages by an independent panel, and later, in relation to replacement members, by the authority itself. A majority of the members should be from outside the industry and be representatives of the public. But there should be some industry representation. The panel needs to be informed about how the industry works, and the very real pressures of time, resource and expertise it faces. The industry members should contain representatives of both proprietors and journalists. Once appointed, members should have fixed terms and only be able to be removed for cause, and not at the instigation of either the industry or the government.

- 6.74 As to form, the regulator should have its own independent existence, preferably in the shape of an incorporated society. As a result of a recommendation in the recent review, the New Zealand Press Council is in the process of becoming an incorporated society.
- 6.75 Independence requires that funding should be adequate and secure, not able to be reduced at industry whim. Lack of resources inevitably results in the cutting of corners. It can lead to a failure to encourage complaints, and to a tendency to deal with those it receives less thoroughly than is desirable. It can mean a failure to undertake other essential functions such as education and reviews. The failure of several press councils internationally is in part explicable by inadequate funding. While the industry should contribute the major part of the funding, we think there is a role for a state contribution as well. The state has an interest in a responsible media. But it is critical that state funding has “no strings attached”, and that it does not give the state the power to influence the composition or operation of the regulator.

#### Access

- 6.76 The regulatory body must be able to be easily accessed by members of the public. Its existence, and the mode of making complaints, should be clearly and regularly publicised both online and in the traditional media outlets. Complaints should be free, or at the very least inexpensive. The authority’s processes should be well publicised, efficient and quick. Complaints without obvious merit should be filtered at the outset by a subcommittee or executive. That is currently done by the Press Council; the BSA is handicapped by lack of such a process. The complaints which proceed should be dealt with as efficiently as possible. Ponderous legalistic process is to be avoided.
- 6.77 It is also good practice for the regulator to act as an appeals body. Complaints should be directed in the first instance to the media organisation complained against, and should only proceed to the regulator if the media organisation’s resolution of the complaint does not satisfy the complainant. This will ensure the number of complaints dealt with by the regulator remains manageable. The public will also have more respect for a media organisation that is seen to deal appropriately with complaints against it.

#### Transparency

- 6.78 Transparency requires that codes of practice, decisions and the reasons for them should be made available not just to the complainant but also to the public on the regulatory body’s website. Every year they should be summarised in tabular or other easy-to-understand form in the annual report.

### Effectiveness

- 6.79 The body must be manifestly seen to be effective. Its effectiveness should be demonstrated in the resulting quality of the media. Decisions should be tough enough to give the public confidence, while nevertheless maintaining proper balance and respect for freedom of the media. A regulator which upholds only a minute percentage of complaints does not inspire confidence.
- 6.80 A regulatory body is more effective if its function extends beyond simply hearing complaints. It should proactively monitor the media and take action against conduct which it deems unworthy. Complaints present a partial and fragmented picture. They are dependent on a member of the public having the energy, time and will to complain. There is no guarantee that there will be enough self-appointed media monitors to ensure that most of the ground is covered. It would be preferable for the regulatory body itself to be able to keep an eye out for undesirable practice, particularly in relation to practices leading up to publication as opposed to the content of publication: investigatory practices are often less visible to the public. Currently neither the Press Council nor the BSA have a clear monitoring role of this kind: they act on complaints, although the BSA is by its act empowered to issue advisory opinions as well.
- 6.81 We do not see any conflict between these “adjudication” and “policing” roles. Other regulators have them. It is more economical and effective to locate them both in one body.
- 6.82 The Media Standards Trust in the United Kingdom is strongly of the view that an effective regulator should be able to act without receiving a complaint:<sup>209</sup>

... the public expects a press self-regulator to monitor standards within the industry, [and] proactively investigate possible breaches of the code. ... The PCC should have an obligation to investigate possible breaches of the editorial code of practice (the code) regardless of whether or not it has received a complaint.

### Appeal

- 6.83 We believe that justice is better done to all those involved if there is a right of appeal, and we therefore support the concept of a media appeals body which would sit above the first instance regulator of which we have been speaking. It would be similarly independent. Currently decisions of the BSA can be appealed to the High Court; there is no right of appeal from the Press Council. The Advertising Complaints Board is subject to appeal to an appeals authority.

### Best practice

- 6.84 Those constituting the regulatory body must keep abreast with developments in regulation in other sectors, and internationally. Relationships should be maintained with media regulators in other countries. While local needs may not be identical with those in other jurisdictions, much can be learned from developments, successes and failures elsewhere. The media regulatory body should also maintain relationships with other agencies whose work may impact on or inform its own, such as the Advertising Standards Authority and internet bodies like Internet New Zealand and NetSafe.

### Sanctions

- 6.85 It is obvious that decisions of a media regulator must mean something. They must be such that the media are induced to comply with them. The only sanction that the New Zealand Press Council can currently impose is a requirement agreed to by its member media organisations that they will publish decisions against them. That is not a negligible sanction, provided the publication of the decision is prominent and adequate. A requirement to publish an adverse decision should remain one of the sanctions of the new regulatory body we envisage. It should be published in all versions of the medium in question: online as well as hard copy or broadcast.
- 6.86 We do not propose that statute should prescribe the sanctions that the regulator can impose. But it is not impossible for agreed sanctions to go well beyond required publication of adverse findings. Media organisations which join the system can be bound by contract and it is not beyond the bounds of contractual undertakings for media organisations to be obliged to take down an offending publication from their website when so directed. This would seem to us to be a necessary sanction. There is not much point in apologising for a publication if the content of it remains readily accessible. No doubt the power to order such a remedy would need to be exercised with care, and in proper balance with the Bill of Rights Act guarantee of freedom of expression. We understand that advertisers whose advertisements are found by the Advertising Standards Authority to be non-compliant invariably take them out of circulation.
- 6.87 We also consider that the power to require publication of an apology, correction or retraction should form part of the armoury of sanctions, as should the granting of a right of reply to an aggrieved citizen.
- 6.88 Whether there should be power to order compensation to an affected person is a more moot point. An agreed settlement involving such a payment is one thing; power to order it is another. The BSA currently has such a power in relation to invasions of privacy but nothing else; the Press Council does not have it at all. Any power to grant compensation should set a relatively modest maximum.

- 6.89 Monetary penalties are even more problematic. Once again the contract entered into by those joining the system could probably provide for such monetary obligations, but unless they were very significant they might have little impact on a large media corporation, and, conversely, have a disproportionately adverse effect on smaller organisations. They might create more ill-will than they are worth. They would raise issues of legal representation, and engender an undesirable adversarial approach. For these reasons we do not currently favour this sanction.
- 6.90 However it may be worth considering an order to pay costs. This would serve in part as a sanction, but would also contribute to the funding of the regulatory body. The BSA has such a power at the moment. The maximum quantum should not be such as to cause adverse effects similar to those discussed in the context of fines.
- 6.91 It has not been customary in decisions of either the Press Council or the Broadcasting Standards Authority to name the journalist or other media employee who has been guilty of the transgression. That reticence is understandable in most cases but we do believe that in serious cases a decision may acquire added force if the transgressor is named. Even if that is not done, one would expect the media agency to at least inform the responsible employee of the decision and to take steps to ensure the conduct is not repeated. We understand that this does not always happen at the moment.

### Codes

- 6.92 Another essential feature of good media regulation is the existence of a code of practice. Education, both in journalism training schools and on the job, is an essential feature of good regulation, so the code must be well-known by those employed in the industry.
- 6.93 The Broadcasting Standards Authority has, in consultation with broadcasters, formulated a set of codes. The Press Council has a statement of principles which serve the same function as a code but are expressed at a greater level of generality. The journalists union likewise has a code of ethics.<sup>210</sup> As we saw in an earlier chapter, certain recurrent features are common to all of these: for example, the emphasis on accuracy, correction of mistakes, fairness, balance, respect for privacy, and concern for the interests of children. There are a number of questions to consider.
- 6.94 How and by whom should the codes be prepared? Independence, the heart of a free press, is best assured if the government plays no part in the formulation of codes. Rather they should be formulated by the regulatory authority itself or an equivalent body composed of industry representatives and members of the public. It is important that industry members who understand the operational requirements of their trade be involved, but members of the public must also be able to communicate and address the concerns which affect them. There should be wide consultation on draft codes, both in industry and the general public.

- 6.95 We believe that surveys of the public should be undertaken to find out what citizens expect of the media in this modern age. Do the current standards still reflect what we expect of our media? Are there different expectations of content accessed on-demand and that which is live streamed, and between free-to-air television and pay television? If so, do those expectations relate to any more than standards of decency? Are there different expectations as to accuracy between a once-a-day print newspaper and its on-line version which can be updated and changed on a constant basis? How important is balance in a single news provider given the range of views available in other media? News media codes should reflect the public sentiment on such matters. Careful consideration should also be given to the implications for a code of the new forms of media. To what extent should the traditional media utilise material from the social media or from “citizen journalists”? Does the rise of blogging affect our traditional view of the line between opinion and fact?
- 6.96 The second issue is where a code should sit on the scale between general principle and more detailed description. Generality allows more discretion and therefore flexibility for both the media and the regulatory body, but provides less certainty and more room for differences in interpretation. On the other hand, detailed codes provide more certain guidance, but do not allow the same flexibility in marginal cases and may not be comprehensive in their coverage: some matters may not be covered at all.
- 6.97 Current models differ very substantially. As noted, the Press Council relies on broad statements of principle. The BSA codes rely on a combination of general principles and guidelines as to their application, but the guidelines have in some instances hardened into something more like rules. Some overseas examples are more detailed than either – for example the British Broadcasting Commission’s Editorial Guidelines.<sup>211</sup> The right balance may be somewhere in the middle. Currently we prefer something more detailed than the Press Council’s principles. The Review of the Press Council expressed a similar view.<sup>212</sup>
- 6.98 Finally there is the question of content. The essential elements are the principles of good journalism to which we have already alluded. In our view the bar should be set quite high to maintain public confidence.
- 6.99 Each society has its own particular sensitivities. Codes should recognise these, and not follow international models slavishly. There may need to be distinctions drawn between the treatment of public figures and private persons. Subtle distinctions may also be necessary as to how central concepts are applied to different platforms of delivery. The goal should be convergence, not uniformity. The differing circumstances of the different kinds of media need to be reflected. Both pictures and words can have permanent existence and their combined operation can create effects far beyond what was the case 50 years ago. But the impact of pictures can still be greater than that of words, and extended footage of sensitive material or grieving persons can be more intrusive than written descriptions of the same material.

- 6.100 It will also need to be decided whether pay TV and free-to-air TV need to be differentiated in the codes, the one allowing more freedom of choice than the other. The codes should also regulate not just what is published, but also how information is obtained. Deceptive and unfair information-gathering practices must be controlled. Presently the BSA can hear complaints about such practices only if there has been a *broadcast*. We would not wish to see a new regulator's jurisdiction so confined.
- 6.101 Finally, it is important that codes be regularly revised. New issues emerge, technologies change, and expectations can change too, over time.

### Conclusions

- 6.102 Our conclusions are in line with those of Gavin Ellis, who wrote in 2004 advocating a model of regulation based on the Advertising Standards Authority:<sup>213</sup>

An all-media standards body could be formed ... so long as it had a significant majority of public members, a transparent appointment process utilising the Office of the Ombudsman, a former member of the judiciary at its head, a mediation service as an intermediate stage between initial complaint to a media operator and formal complaint, plus meaningful powers of redress.

Removing the state from regulation of legitimate free expression is a laudable aim. So, too, is the creation of a body with jurisdiction over both electronic and print media. It would not only account for convergence but also remove the current double standard over standards.

### THE ISSUE OF JURISDICTION

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- 6.103 A major question is which media agencies should be subject to the jurisdiction of the regulator that we propose. In our view there are two options, a voluntary model, or one in which a number of media are required to belong, with the membership of others being optional.

#### Voluntary

- 6.104 The first option is that it be left to members of the media, both traditional and new, to decide whether or not to join. We think it likely that the great majority of the traditional media, and some of the new, would join because of the advantages membership of the system would bring:
- a. There would be a brand advantage. Membership of the system would mark them off as communicators with an assurance of responsibility and reliability. The Media Standards Trust has said:<sup>214</sup>

In an age where newspaper are competing for readers and advertising revenue with outlets which are not subject to any self-regulatory framework (such as blogs and social networking sites) a quality assurance mark can help guide readers towards publications which adhere to standards.

- b. Only those members of the media who join would attract the privileges and exemptions granted to the news media by law. Statutes conferring such privileges and exemptions will be confined to those who belong to the proposed regulatory system. Steps have already been taken in this direction in the new Criminal Procedure Act, in relation to attendance at criminal proceedings in the courts;<sup>215</sup> and a similar solution has been proposed in the Law Commission's Review of the Privacy Act 1993 for media who are exempt from the Privacy Act.<sup>216</sup>
  - c. Subjection to a regulatory body can sometimes save the expense and trouble of court proceedings. A complainant who alleges he or she has been defamed, or that his or her privacy has been invaded, may opt for the cheaper and quicker mode of redress before the regulatory body rather than taking proceedings in court, as would otherwise be their entitlement.
  - d. The attractions of joining such a system are increased if the alternative is a form of government intervention.
  - e. It may well be that those bodies determining access to news conferences and other forms of meeting, formal or informal, may find membership of a complaints body a useful criterion for deciding on entry.
- 6.105 Members of the scheme would also be likely to induce others to join it. Those inducements might involve access to news sources, training, etc.
- 6.106 It is our view that these advantages and inducements are likely to ensure that most of the media will want to belong. After all, the newspapers found it advantageous to set up their own Press Council without any legal requirement to do so. In our discussions with members of the industry in the course of this review we have been told that most members of the industry want to be known as ethical media. Brand is important.
- 6.107 There will remain a large number of communicators using the new forms of technology who either do not fall within the definition of news media that we are suggesting, or wish to stand outside any regulatory system. We anticipate that many bloggers and website hosts would prefer it that way. Under this option they would be allowed to do so. Those people would have the right to say or publish anything they wish, however wrong and however extreme it may be, provided they did not cross the line of legality. They would remain subject to the law and could be prosecuted or sued in the courts if they went so far as to break the law. In the next chapter we consider whether there may be other forms of redress for those harmed by illegal conduct.

6.108 Media not subject to the regulatory body we propose might also elect to develop their own individual methods of quality assurance. For example, in the course of our preliminary consultation we learned of discussions within some sections of the blogging community of establishing voluntary codes for bloggers.

### Compulsory

- 6.109 On the other hand there may be concerns that the advantages of joining the regulatory system might not be enough for some of the media, which would prefer to forgo those advantages in favour of the freedom of an unregulated environment. The increased media competition from non-traditional media, which will be enhanced by the launching of ultra-fast broadband, and the prospect of diminished revenues, arguably create an environment for ethical corner-cutting. The less profitable the news media become the more they may seek to lower operational costs and diversify into forms of “infotainment” which may decrease their appetite for signing up to a regulatory body.
- 6.110 High concentration of media ownership connection is also a factor. If one of the large media players opted out of the regulatory system what would be the consequence? Media power is greater in the new converged environment: there is the opportunity for harmful or inaccurate content to be networked across multi-media sources. New Zealand’s weak and diminishing public service broadcasting system also has implications for standards and balance.
- 6.111 The second option for deciding who should belong to the proposed regulatory system is that a number of media would be *required* to belong, with others having the option to. The difficulty of this solution is in defining who should be *required* to belong.
- 6.112 One possibility is that the list should comprise the traditional media subject to the present regulators: the newspapers which are currently under the jurisdiction of the Press Council, and television and radio broadcasters which are currently regulated by the BSA. The difficulty with this solution is that it is backward-looking and based on the traditional delivery platforms of press and broadcasting.
- 6.113 Another possibility is that the “compulsory” list should consist of media which meet a set of prescribed criteria. Those criteria might be such as the following:
- that the publication of news, and commentary on the news, is a significant part of the organisation’s enterprise;
  - that publication is to the public or a section of the public;
  - that publication is regular, rather than occasional;
  - that publication is undertaken as a business or commercial activity;
  - that the coverage of the news by the organisation is broad and general rather than confined to narrow specialisations.

- 6.114 Each of these criteria contains general expressions which may require the exercise of judgement in particular cases, but in total they seem to us to reflect the characteristics of what most people recognise as a “news medium”. The last two criteria would exclude most bloggers. The last would exclude specialist publications of interest to only a small sector of the public. It seems to us arguable that the kind of publication which the public would want to be regulated is one which contains, in one place, a representative sample of the day’s news so that a reader, or listener, or viewer, can get an overall impression of the important things that “are going on in the world”.
- 6.115 This way of dealing with the problem assumes that news organisations meeting listed criteria of the kind we have suggested *must* be subject to the regulator. Other organisations which provide news or commentary on a regular basis, but which do not meet all those criteria, would have the option of belonging or not. Bloggers and niche news sites, for instance, would fall into that latter category. They could join if they saw advantages in doing so, or remain outside the regulatory system if they preferred.

#### **Advantages and disadvantages**

- 6.116 There are advantages in both options. Voluntary membership allows more freedom for organisations, and is arguably more in accord with the ideals of freedom of expression. Partially compulsory membership involves less risk and would not be susceptible to allegations of state control, because even though membership would be compulsory for some, it would be independent of government. We seek views on the preferable option.
- 6.117 Whichever option is chosen, there will be some organisations which stand outside it by choice. These would be unregulated, and could say anything they liked, provided they stayed within the boundaries of the law. They would be liable to legal sanctions in the courts if they committed legal wrongs such as defamation, contempt of court or invasion of privacy, but they would not be subject to the jurisdiction of the proposed regulator. That is not to say, however, that the regulator could not receive complaints about them. If it did, it would have no power to impose any sanctions. But there would be no reason why, if the regulator was concerned about the conduct of some elements in the unregulated media, it could not draw that conduct to public attention in a report. In that regard it would not be dissimilar to the Privacy Commissioner who has no jurisdiction to deal with complaints about the news media, but who nonetheless has power “to make public statements in relation to any matter affecting the privacy of the individual or any class of individuals”.<sup>217</sup>

### SHOULD THERE BE A STATUTE?

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- 6.118 The final question is whether the regulatory system that we propose should have statutory authorisation and recognition.
- 6.119 If there is to be an element of compulsion about joining the scheme there would have to be a statute. It is not unknown, nor is it inconsistent, for a statute to require the setting up of a regulatory system which will then operate quite independently of the state. The New Zealand Institute of Chartered Accountants Act 1996 effectively does so. It requires the Institute to draw up its own professional rules and set up a disciplinary body to enforce them. The Act simply provides, in section 5, that the functions of the Institute include: “(b) to promote, control and regulate the profession of accountancy and its members in New Zealand.” By section 6, the Institute must have rules that provide for a Professional Conduct Committee and a Discipline Committee. By section 7 “the Institute must always have a code of ethics that governs the professional conduct of its members”. Variants are also found in the Electricity Industry Act 2010 and the Financial Advisers Act 2008. Likewise, the Education Act 1989 provides that the universities will establish their own system of accreditation and course approval.
- 6.120 It would however be less usual to require by *statute* the setting up of a system of independent regulation which no-one is legally obliged to join. That is in fact the type of regulation we put forward in our first option above. Under that option the media would have the option to join the system or not.
- 6.121 Even on that scenario, we nevertheless advocate a statutory basis for four reasons:
- a. As has been indicated, the various acts conferring privileges and exemptions on the media would define the news media entitled to those privileges and exemptions as those subject to a regulatory system. There would therefore need to be a statutory definition of what that regulatory system was.
  - b. The present Broadcasting Standards Authority, being a statutory body, would need to be dismantled by a statute, which should preferably outline the system which is to replace it.
  - c. The new authorising statute which we propose could be made subject to a requirement of review after a period of three years. That would enable an assessment of how well the self-regulatory system was working.
  - d. The state itself has an interest in a responsible media. It cannot be assured of accurate reporting of its constitutional organs – for example courts, parliament and the executive – without it. This is not just an argument for statutory authorisation. It is also an argument for state contribution to funding as we foreshadowed earlier in this chapter. Russell Brown and Steven Price have said:<sup>218</sup>

There is a case to be made (and it's made, for example, by Ellen Goodman and C. Edwin Baker) for public investment in media services that strive to be objective, balanced and accurate, that focus on issues of public concern, that clearly differentiate between fact and comment and between news and advertising, and that offer a range of viewpoints – because democracy cannot function properly without this. And because the market may not provide it by itself. A standards regime is crucial to maintaining and guaranteeing the standards of such media services, even if it applies to relatively few media outlets.

6.122 So, even if membership of the regulatory system is to be voluntary, we believe it should be recognised by statute.

6.123 This kind of statutory recognition of a media regulatory body is not without precedent internationally. As we demonstrated in the last chapter, a number of press councils throughout the world do have statutory backing, although in some of those cases the relationship of the state with the regulator is closer than we would wish. Ireland has the kind of model we would advocate. There the Defamation Act 2009 confers statutory recognition on a press council. Section 44 provides:

44. (1) The Minister may by order declare that such body as is specified in the order shall be recognised for the purposes of this Act, and a body standing so recognised, for the time being, shall be known, and in this Act is referred to, as the "Press Council".

(2) Not more than one body shall stand recognised under this section for the time being.

(3) No body (other than a body that stands recognised under this section for the time being) shall be known as, or describe itself as, the Press Council.

## ENTERTAINMENT

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6.124 The terms of reference for this review required us to focus on the gaps which have emerged in the regulatory environment for the *news* media: that is to say media which disseminate news, information, current affairs and commentary on those things. The new regulatory body we have proposed in this chapter would be set up to deal with unresolved complaints relating to *news* and *current affairs*.

6.125 But most of our news media do more than disseminate news. Almost all media publish advertisements. Newspapers occasionally publish poems, short stories and cartoon strips, although by far the dominant part of their content is news. But broadcasters are different. Some radio stations and television channels broadcast no news at all: in the case of radio, some stations are confined to music, some television channels are devoted entirely to films and other kinds of entertainment. Even the broadcasters which have news and commentary as a significant and important part of their enterprise also disseminate a large amount of content which is purely entertainment: films, "soaps" and drama serials, game shows, competitions, reality shows and the like. The question arises as to whether the proposed new regulator should also deal with complaints relating to entertainment content?

### How entertainment content is currently regulated

- 6.126 Technological convergence is producing the same type of gaps and inconsistencies in the regulation of entertainment content as we have seen with respect to the news media. Entertainment content is currently subject to two different statutory regimes. Films and videos are subject to the statutory regime established by the Films, Video and Publications Classification Act 1993 which establishes the Office of Film and Literature Classification and creates the role of the Chief Censor. Entertainment content that is broadcast on radio and free-to-air or subscription television services is subject to the Broadcasting Act 1989.
- 6.127 Both these statutes were designed for a pre-digital era and create a regulatory regime based on increasingly problematic distinctions between the formats in which entertainment content is consumed, rather than the content itself.
- 6.128 The current regime relies on a mix of legislative prescriptions and classifications to achieve the critical policy objectives. The most stringent legal controls, including outright censorship, are aimed at preventing the dissemination of content that is deemed to be truly objectionable such as child pornography and graphic sexual violence. Content which is deemed to fall below this high legal threshold is subject to a classification regime, which places age restrictions on some content and provides guidance to consumers about the age-appropriateness of other content.
- 6.129 Programmes broadcast on free-to-air television do not have to be rated or classified but are subject to the codes and standards mandated in the Broadcasting Act 1989. As we have discussed earlier, these codes cover issues such as taste and decency and require broadcasters to ensure content that is inappropriate for young viewers is only broadcast during “adult” viewing hours. Broadcasters use advisories alerting viewers to programs which contain sexual or violent content likely to offend.
- 6.130 While the public has the right to complain to the BSA about entertainment content as well as news programmes, in fact complaints about entertainment content comprised only 14% of the BSA’s adjudications over the past two years, with the remaining 86% all concerned with news and current affairs.<sup>219</sup>
- 6.131 Complaints about news and current affairs programmes tend to be dominated by questions of fairness, accuracy and balance. However the issues which concern the public with respect to entertainment content that is broadcast on television and radio tend to focus on questions of taste and decency and the type of content that young children should be exposed to with, or without, parental supervision – in other words, the expectations viewers have of broadcasters with respect to their legal obligations to maintain programming standards.

### Options for regulating entertainment content

- 6.132 Research suggests New Zealanders continue to have high expectations of the standards broadcasters should observe with respect to programmes which are available without restriction to the public and in particular, programmes which are likely to be seen by minors.
- 6.133 There are a number of options for dealing with entertainment in a system which recognises a new regulator of the type we propose.
- 6.134 The first is to provide that if a news medium is subject to the jurisdiction of the proposed regulator, that regulator will deal with *all* its content. However in the scheme we envisage, membership of the new regulator may be voluntary. If any news medium opted out, that would leave its entertainment content unregulated. In the interests of the younger viewing audience in particular, we think that would be entirely unsatisfactory. There would be no control over content unless it met the high threshold of an “objectionable publication”, in which case it would be a criminal offence.
- 6.135 The second possibility is to continue to draw regulatory distinctions between entertainment content that is delivered in different formats as is currently the case, tailoring the system to accommodate the new modes of delivery such as pay TV and free-to-air TV; or between live streamed programmes and on-demand programmes.
- 6.136 However, digital technology is having the same disruptive effects on this traditional format-based regulatory system for entertainment content as we have explored with respect to the mainstream media. And for the same reasons, we believe the current regulatory approach to entertainment requires fundamental reform.
- 6.137 It is beyond the scope of this review to explore in any depth the many issues confronting producers and consumers as a result of digitisation and the web, but it may be useful to outline just some of the gaps and inconsistencies which have already emerged:
- a. Consumers can now bypass traditional distributors, including broadcasters, and access content directly through a variety of means for consumption at the time and place of their choice. This means traditional tools for regulating content, including watershed viewing times and age-based classification systems become less effective when the distributor is no longer the gatekeeper controlling what consumers access.
  - b. The Broadcasting Act as it is currently drafted leaves large gaps in what is currently regulated, including, as we have discussed, on-demand content and web-only content which has not previously been broadcast. The advent of ultra-fast broadband is likely to see an explosion in content accessed on-demand rather than through linear broadcasting.

- c. The facility to repackage and repurpose entertainment content for delivery to consumers in different forms means there are growing inconsistencies and inefficiencies at the interface between the statutes regulating entertainment content. Programmes produced or accessed in one format may fall under a different regulatory regime once repurposed for consumption in another e.g. depending on whether a programme is live-streamed, down-loaded on-demand, purchased online or as a DVD, it may be subject to different regulatory requirements even though the content has not changed.
- 6.138 These issues point to the need for a fundamental parallel review of the regulatory environment for the entertainment industry.
- 6.139 One option would be to explore a single regulator with jurisdiction over all news and entertainment content. Despite the obvious attractions in the idea of a single regulator, we believe there are real difficulties in combining the regulation of news media with the regulation of entertainment content. Critically, we have argued that the state must play no role in regulating the news media, but there is an arguable case for government to play in protecting the public from exposure to objectionable material and there is in our view clearly a role for government in protecting children from exposure to disturbing and harmful content. In these areas self-regulation or market controls may not be sufficient. Hence regulating the news media and entertainment under the same body creates immediate and fundamental problems.

#### **Our preliminary view**

- 6.140 We believe that given the rapidly evolving digital environment the primary focus of regulatory regimes must be content rather than format or mode of delivery. Mode of delivery can be an important factor in assessing the degree of risk to the public and therefore the strength of regulatory response required. However these are questions of degree rather than a reflection of the fundamentally different policy objectives underpinning the regulation of the news media and the entertainment sector.
- 6.141 Our suggestion, and we welcome views on it, is that all entertainment programmes, whether they be films, or serials, or reality shows, or otherwise, which involve no element of news content, should be dealt with in the same way.
- 6.142 A separate piece of legislation should make provision for classification (where that can practicably and sensibly be done in advance); content warnings so that viewers have an element of choice; and reviewing time guidelines to protect younger audiences. That legislation should be administered in an office separate from the new regulator that we propose. Whether that office should be state-controlled is a matter for further consideration. But we think it should have compulsory and not voluntary jurisdiction.

- 6.143 We believe that entertainment should be dealt with as a separate exercise. It is not strictly within our terms of reference, and we do not explore the matter further in this Issues Paper. But it has been necessary to make reference to it in working through the jurisdiction and nature of the proposed regulator.
- 6.144 We note that our view in this regard is consistent with the proposals contained in a recent Issues Paper published by the Australian Law Reform Commission (ALRC), the *National Classification Scheme Review Discussion Paper*.<sup>220</sup> The ALRC proposes the introduction of a new Classification of Media Content Act, which would cover classification on all media platforms: online, offline and television.
- 6.145 The Act excludes news and current affairs. If adopted it would establish a new National Classification Scheme overseen by a single regulator. The proposed regime applies different levels of compulsion and control to content that is freely available to the public, including entertainment that is broadcast, and content that is access restricted. Content that would have to be classified before it was sold, hired, screened or distributed in Australia would include:
- feature length films produced on a commercial basis;
  - television programs produced on a commercial basis;
  - computer games produced on a commercial basis and likely to be MA 15 or higher;
  - all media content containing explicit adult content or that is likely to be restricted;
  - only voluntary classification for all other content.
- 6.146 The proposed new framework envisages:
- a. a greater role for industry in classifying content, allowing government regulators to focus on the content that generates the most community concern, and to ensure access to adult content is properly restricted;
  - b. content will be classified using the same categories, guidelines and markings whether viewed on television, at the cinema, on DVD or online;
  - c. changes to classification categories, with age references to help parents choose content for their children; and
  - d. the federal Government taking on full responsibility for administering and enforcing the new scheme.
- 6.147 In our view the proposed Australian scheme may provide a valuable starting point for the review of the regulation of our own entertainment sector.

- 160 The Canadian broadcasting system is different as it is divided into public, private and community sectors. Regulation of broadcasting is divided between the Canadian Broadcast Standards Council (CBSC), a self-regulatory body that is the complaints resolution body for private radio and television stations and specialty services; and the Canadian Radio-Television and Telecommunications Commission (CRTC), which has statutory responsibility for the regulation and supervision of the Canadian broadcasting and telecommunications systems. The CRTC hears appeals from decisions of the CBSC.
- 161 In 2007 the Review of the New Zealand Press Council indicated that 63% of press councils have a jurisdiction that incorporates print and broadcast media, including Algeria, Belgium, Benin, Botswana, Bulgaria, Burkina Faso, Spain (Cataluna), Québec, Chile, Cyprus, Denmark, Estonia, Fiji, Finland, Ghana, Iceland, Israel, Italy, Ivory Coast, Kenya, Lithuania, Luxemburg, Macedonia, Malta, Nepal, Netherlands, Norway, Papua New Guinea, Portugal, Russia, Senegal, South Korea, Switzerland, Taiwan, Tanzania, Turkey and Washington State.
- 162 See < [www.culture.gov.uk/what\\_we\\_do/telecommunications\\_and\\_online/8109.aspx](http://www.culture.gov.uk/what_we_do/telecommunications_and_online/8109.aspx) > .
- 163 "PM statement on phone hacking" (13 July 2011) < [www.number10.gov.uk/news/pm-statement-on-phone-hacking/](http://www.number10.gov.uk/news/pm-statement-on-phone-hacking/) > .
- 164 Ayres and Braithwaite *Responsive Regulation* (Oxford University Press, New York, 1992) at 39.
- 165 Article 19 and the International Federation of Journalists *Freedom and Accountability: Safeguarding free expression through media self-regulation* (March 2005), at 26.
- 166 < [stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/background/](http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/background/) > .
- 167 The specific provision which empowers OFCOM to impose sanctions for a breach of licence conditions will depend upon the type of licence held. OFCOM's powers to impose sanctions for breach of a relevant enforceable requirement on the BBC are contained in section 198 of the Communications Act 2003 and the BBC Agreement, and its powers in respect of S4C are contained in section 341 of, and Schedule 12 to, the 2003 Act.
- 168 Under, for example, section 40(1) of the Broadcasting Act 1990 (UK), section 236(6) of the Communications Act 2003 (UK), and, in the BBC's case, clause 93(5) of the BBC Agreement.
- 169 Under, for example, sections 40(1) and 109(3) of the Broadcasting Act 1990 (UK), section 236(2) of the Communications Act 2003 (UK), clauses 93(1) and (2) of the BBC Agreement and paragraph 15 of Schedule 12 to the Communications Act 2003 (UK) in S4C's case.
- 170 Under, for example, sections 41(1) and 110(1) of the Broadcasting Act 1990 (UK), clause 94(1) of the BBC Agreement and section 341(2) of the 2003 Act in S4C's case.
- 171 Under, for example, sections 41(1) and 110(1) of the Broadcasting Act 1990 (UK).
- 172 Under, for example, sections 42 and 111 of the Broadcasting Act 1990 (UK) and 238 of the Communications Act 2003 (UK).
- 173 Ministry of Consumer Affairs "Market Self-Regulation and Codes of Practice" (April 1997) at 2.
- 174 Ministry of Consumer Affairs "Industry-Led Regulation Discussion Paper" (July 2005) at 11.
- 175 Sven Egil Omdal, "Self-regulation of TV-Content, The Norwegian Experience" (2003), Presentation at the 17<sup>th</sup> meeting of the European Platform of Regulations Authorities, at 2.
- 176 Examples include Canada, Ireland, United Kingdom, the Netherlands and New Zealand.
- 177 Article 19 and the International Federation of Journalists *Freedom and Accountability: Safeguarding free expression through media self-regulation* March 2005 at 11.
- 178 Daphne C Koene, *Press Councils in Western Europe* (Netherlands Press Council Foundation, 2009) at [5.8]

- 179 See < [www.po.se/](http://www.po.se/) > This equates to roughly NZ \$2000 – \$5,500.
- 180 Daphne C Koene, *Press Councils in Western Europe* (Netherlands Press Council Foundation, 2009) at [6.8].
- 181 House of Commons Culture, Media and Sport Committee *Press standards, privacy and libel Second Report of Session 2009–10* HC 362-I < [www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/362i.pdf](http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/362i.pdf) > .
- 182 Ibid, at 146 para 92.
- 183 Law for Guaranteeing the Independence of the Complaints Committee of the Press Council 1976. The Council's structures and duties are governed in its statutes of 25 February 1985 - [www.presserat.info/service/english/keyfacts-in-english.html](http://www.presserat.info/service/english/keyfacts-in-english.html)
- 184 Article 19 and the International Federation of Journalists *Freedom and Accountability: Safeguarding free expression through media self-regulation* March 2005 at 34.
- 185 See < [www.rvdj.be/node/210](http://www.rvdj.be/node/210) > .
- 186 Ayres and Braithwaite *Responsive Regulation* (Oxford University Press, New York, 1992) at 102.
- 187 *Report of the Steering Group for the Review of the Regulation of Alcohol Advertising* (March 2007) at 56.
- 188 See Palzer and Scheur “Self-regulation, co-regulation, public regulation” [www.emr-sb.de/news/Palzer\\_Scheuer\\_Unseco-Clearinghouse\\_Yearbook2004.pdf](http://www.emr-sb.de/news/Palzer_Scheuer_Unseco-Clearinghouse_Yearbook2004.pdf) Following this approach, some commentators describe the Irish Press Council as a co-regulatory model, while others call it self-regulatory, or simply refer to it as an independent regulator.
- 189 Ibid < [www.emr-sb.de/news/Palzer\\_Scheuer\\_Unseco-Clearinghouse\\_Yearbook2004.pdf](http://www.emr-sb.de/news/Palzer_Scheuer_Unseco-Clearinghouse_Yearbook2004.pdf) > .
- 190 See < [www.acma.gov.au/WEB/STANDARD/pc=PC\\_90078](http://www.acma.gov.au/WEB/STANDARD/pc=PC_90078) >; Broadcasting Services Act 1992 (Cth) s123.
- 191 See < [www.acma.gov.au](http://www.acma.gov.au) > .
- 192 *The Media Self-Regulation Guidebook* (Office of the Representative on Freedom of the Media, Organization for Security and Cooperation in Europe, 2008) < [www.osce.org](http://www.osce.org) > .
- 193 The chair and vice-chairman must be members of the legal profession, appointed on the recommendation of the President of the Danish Supreme Court; and of the six remaining members, two must be appointed on the recommendation of the Danish Journalists' Union; two on the recommendation of the print and broadcast media; and two public representatives must be appointed on the recommendation of the Danish Council for Adult Education.
- 194 Broadcasting Services Act 1992 (Cth) sch 7 cl 89, and 91-94 and Part 6. See also Australian Law Reform Commission *National Classification Scheme Review Discussion Paper* (ALRC DP 77, 2011) at [11.24].
- 195 The Washington News Council, < [www.wanewscouncil.org](http://www.wanewscouncil.org) > .
- 196 In the course of preliminary consultation with editors of a New Zealand news website we were given examples of how rapidly and efficiently this system of reader feedback operates through platforms such as Twitter and Facebook.
- 197 See: < <http://news-council.org/> > .
- 198 Jeffrey Dvorkin: “Death of the Ombud? Only in Canada” (2011) Organisation of News Ombudsmen < [www.newsombudsmen.org/articles](http://www.newsombudsmen.org/articles) > .
- 199 Peter Mumford, “Best Practice Regulation: Setting Targets and Detecting Vulnerabilities” (2011) 7(3) *Policy Quarterly*, at 36.

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- 200 New Zealand Bill of Rights Act 1990 s 14.
- 201 The Education Act 1989 s 260 empowers the Vice-Chancellors' Committee to exercise the powers of the New Zealand Qualifications Authority in this regard.
- 202 Media Standards Trust "Can independent self-regulation keep standards high and preserve press freedom?" A submission by the Media Standards Trust to the PCC's review of governance (January 2010) < [www.mediastandardstrust.org/wp-content/uploads/downloads/2010/08/Reforming-independent-self-regulation.pdf](http://www.mediastandardstrust.org/wp-content/uploads/downloads/2010/08/Reforming-independent-self-regulation.pdf) > .
- 203 Ian Barker and Lewis Evans *Review of the New Zealand Press Council* (prepared for the Press Council 2007) at 11.
- 204 *The Media Self-Regulation Guidebook* (Office of the Representative on Freedom of the Media, Organization for Security and Cooperation in Europe, 2008) < [www.osce.org](http://www.osce.org) > at 11.
- 205 *Lange v Atkinson* [2000] 3NZLR 385 (CA) at [34].
- 206 Although deriving from a very different age it is perhaps still worth quoting the famous words of Jefferson writing to Edward Carrington in 1787: "If it were left to me to decide whether we shall have a government without newspapers or newspapers without a government I shall not hesitate a moment to prefer the latter."
- 207 Statement from the PCC on phone hacking (6 July 2011) < [www.pcc.org.uk/](http://www.pcc.org.uk/) > .
- 208 Ibid.
- 209 Media Standards Trust "Can independent self-regulation keep standards high and preserve press freedom?" A submission by the Media Standards Trust to the PCC's review of governance (January 2010) < [www.mediastandardstrust.org/wp-content/uploads/downloads/2010/08/Reforming-independent-self-regulation.pdf](http://www.mediastandardstrust.org/wp-content/uploads/downloads/2010/08/Reforming-independent-self-regulation.pdf) > .
- 210 See < [www.epmu.org.nz/journalism-code-of-ethics](http://www.epmu.org.nz/journalism-code-of-ethics) > .
- 211 See < [www.bbc.co.uk/editorialguidelines/guidelines](http://www.bbc.co.uk/editorialguidelines/guidelines) > .
- 212 Ian Barker and Lewis Evans *Review of the New Zealand Press Council* (prepared for the Press Council 2007) at 73.
- 213 Gavin Ellis "Different strokes for different folk: Regulatory distinctions in New Zealand media" (2005) 11(2) *Pacific Journalism Review* at 82.
- 214 Media Standards Trust "Can independent self-regulation keep standards high and preserve press freedom?" A submission by the Media Standards Trust to the PCC's review of governance (January 2010) < [www.mediastandardstrust.org/wp-content/uploads/downloads/2010/08/Reforming-independent-self-regulation.pdf](http://www.mediastandardstrust.org/wp-content/uploads/downloads/2010/08/Reforming-independent-self-regulation.pdf) > .
- 215 Criminal Procedure Act 2011, s198.
- 216 Law Commission, *Review of the Privacy Act 1993* (NZLC R123, 2011).
- 217 Privacy Act 1993, s13(h).
- 218 Russell Brown and Steven Price *The Future of Media Regulation in New Zealand: Is there One?* (Prepared for the Broadcasting Standards Authority, May 2006).
- 219 Figures obtained from BSA Annual Reports 2010 and 2011.
- 220 Australian Law Reform Commission *National Classification Scheme Review Discussion Paper* (ALRC DP 77, 2011).

## Part 2

SPEECH HARM:  
THE ADEQUACY  
OF THE  
CURRENT LEGAL  
SANCTIONS  
AND REMEDIES



# Chapter 7

## Free speech abuses: quantifying the harms and assessing the remedies

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### INTRODUCTION

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- 7.1 The large majority of New Zealanders publishing on the internet will not be within the regulatory system we have proposed for the news media. In essence they will be able to exercise complete freedom of speech, within the limits of the law. They can, without fear of any regulator, be inaccurate in their facts, unbalanced in their coverage and extreme in their opinions. The public can rely on them, or not, as they see fit. They would not be recognised as “news media” for the purposes of the statutory privileges.
- 7.2 But, as noted in chapter 6, even though they would be beyond the reach of any regulator, these other publishers will remain subject to the *law*. They will be liable to the same consequences as the established media for wrongs such as defamation, contempt of court, publication of a suppressed name, breach of copyright, etc.
- 7.3 Before the advent of the web, the risk of causing harm to others through the exercise of free speech was most commonly a question that concerned the news media rather than ordinary citizens. However, now that everyone has the ability to publish, these risks – and potential liabilities – are much more widely shared.
- 7.4 The idea of restraining, or delaying free speech, in order to protect other human rights is an anathema to many internet users. Free speech values and an abhorrence of censorship have been hardwired into the architecture of the internet and are deeply embedded in its culture. When attacked, these values are often fiercely defended.

- 7.5 However, censorship is not the only enemy of free speech. Those who exercise their free speech to intimidate, bully, denigrate and harass others on the internet lessen the credibility of free speech arguments. Even though the web provides those who are harmed by abusive speech the opportunity to exercise their right of reply, not all have the courage or the standing to exercise it. In effect, those who exercise their free speech rights to cause harm may inhibit others from participating freely in this vital new public domain. The practical anonymity afforded abusers, and the lack of real-life consequences can create an environment where such abusive behaviour can thrive.<sup>221</sup>
- 7.6 The law imposes constraints on certain types of speech and in some circumstances provides remedies for those harmed by others' speech. However most of these laws were drafted in the pre-digital era and questions now arise as to how effective they remain. These questions have given rise to the third leg of our terms of reference, which requires us to consider:
- whether the existing criminal and civil remedies for wrongs such as defamation, harassment, breach of confidence and privacy are effective in the new media environment and if not whether alternative remedies may be available.
- 7.7 In order to address this question we must first understand the nature and scope of the problem of speech abuses on the internet. To assist us we approached a number of organisations for feedback on the nature and scope of the issues they were confronting with respect to internet harms. Among these were New Zealand Police, the Solicitor General's Office, the Privacy Commissioner, the Human Rights Commission, and NetSafe, an independent multi-stakeholder organisation which promotes the safe use of the internet in New Zealand.<sup>222</sup> We also approached Facebook, Google and Trade Me for information about their own internal systems for managing speech abuses.
- 7.8 We outline below the scope of the problem associated with abusive and harmful speech on the internet, and review the various forms of legal redress available to the public when publishing causes real harm.
- 7.9 We then discuss the weaknesses and the gaps that appear to exist in the current law with respect to harmful communications in the digital era, foreshadowing areas where we believe there may be merit in amendments, or the creation of new offences. We also consider the problems encountered by those seeking to access and enforce the law with respect to internet-based offending.

Finally we consider the alternative remedies available to those who are the victims of online speech abuses, namely the self-regulatory systems put in place by the corporations which control the global internet properties where hundreds of thousands New Zealanders congregate each day – corporations such as Yahoo, Google and Facebook.<sup>223</sup>

## THE HARMS

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- 7.10 In many respects damaging behaviour that occurs on the internet mirrors off-line behaviours. Harassment, defamation, hate speech, invasions of privacy – all these abuses of free speech predated the internet.
- 7.11 However, as discussed in chapter 1 of this Issues Paper, the architecture of the internet has introduced significant new dimensions to these problems, in many cases amplifying their harmful consequences and forcing us to rethink what might constitute an effective remedy.
- 7.12 For example, the ease with which even the most amateur internet users can capture, manipulate and disseminate personal information about others for malicious purposes, is a new and unique function of the platforms and technologies associated with web 2.0. Social media sites do more than simply replicate the dynamics of the school playground or workplace lunch room. They provide an unprecedented vehicle for the viral distribution of gossip and information, enabling malevolent users to target a victim’s social network simultaneously. Moreover, damaging content can be difficult, if not impossible, to completely eradicate.
- 7.13 The advent of powerful search engine technology has blurred the parameters between the public and the private spheres of life.
- 7.14 Searching on a person’s name can instantly retrieve damaging or misleading content which, in the absence of a web browser, would be invisible to all but the handful of individuals disseminating it.
- 7.15 Practical anonymity can encourage abusive speech and at the same time shelter the abuser from any consequences of their actions. “Flaming”, a term used to describe the posting of inflammatory and abusive comments on the internet, has become a common feature of internet discussions, as has the practice of adopting multiple internet identities (or avatars).
- 7.16 Harmful content can continue to cause damage long after the original publication. Online “reputation management” has become an industry in its own right, manipulating search engines to bury damaging content. In the course of our research we were told that the work involved in replacing one or two damaging articles that appear on the first page of a Google search results page could cost approximately \$2,250.<sup>224</sup>
- 7.17 But to date, those without money, technical know-how, or personal or professional influence, have had to come to terms with the power of web browsers to define their online persona.

- 7.18 Estimating the number of New Zealanders who have suffered significant harm either individually or professionally as a consequence of abusive publishing presents real difficulties. Each day New Zealanders undertake a great variety of online activities from banking and retailing to social networking and entertainment. In each of these spheres they risk exposure to a range of potential harms, from identity theft and fraud to reputational damage or exposure to offensive material. The absence of any central repository for recording adverse events makes it difficult to estimate how frequent and how serious these events are.<sup>225</sup>
- 7.19 The following summarises the information we received from New Zealand Police, the Human Rights Commission, the Office of the Privacy Commissioner and NetSafe with respect to harms caused by internet publishing.

#### **New Zealand Police response**

- 7.20 The anecdotal evidence provided to us suggested police were being asked to respond to a broad range of offending, not all of which met the threshold of a criminal offence – or indeed constituted any sort of offence under our current laws. Examples provided to us as part of an informal survey of district officers included:<sup>226</sup>
- investigations into online breaches of court orders, including name suppressions and publication of suppressed evidence on social media sites, blogs, and message boards;
  - investigations into instances of alleged harassment, cyber-bullying and threatening behaviour;
  - investigations into identity theft and malicious impersonation;
  - investigations into alleged sexual predation/grooming;
  - investigations into the malicious use of the internet to disseminate offensive or damaging information;
  - investigations in response to threatened suicides publicised online.
- 7.21 One example of malicious publishing provided to us involved the peers of a young person who had committed suicide posting offensive and denigrating messages about the deceased on a social media site.<sup>227</sup>

We had a number of juveniles that were committing suicide and then some of their 'so called' friends would post nasty comments that hurt the family. I was able to get Bebo to close down the site to any further posting and remove the nasty ones.

- 7.22 Police have also occasionally become involved in instances where the internet has been used to threaten or intimidate. In 2007 police protection was provided to a dozen social workers who were named in threatening and derogatory posts on the *CYFSWatch* website.<sup>228</sup> In 2010 police investigated a case in which a Dunedin man published death threats against another person on Facebook, and most recently, in September 2011, an 18-year-old was charged after threatening the government in a video posted on YouTube.<sup>229</sup> In November 2011 an 18-year-old male pleaded guilty in the Christchurch District Court to two charges of making an objectionable publication after he used his cellphone to make an intimate video of a female acquaintance. The existence of the video became wildly known among the victim's peer group and on social media networks.<sup>230</sup>
- 7.23 There was also evidence to suggest that social media were being used by parties involved in family court cases, including custody disputes and sexual abuse investigations, with one officer reporting a case where Facebook postings by family members on opposite sides of a sexual abuse allegation led to a formal complaint after the identity of the alleged abuser was revealed. A similar case was brought to the attention of the Blenheim District Court in September 2011 when the lawyer acting for a man facing multiple sex charges said his client, who had name suppression, was "outed" on Facebook by the families of his teenage victims.<sup>231</sup>
- 7.24 A Crown Law analysis of 28 investigations into alleged breaches of court orders over the past two years reinforced the claim that many complaints arose in the context of Family Court cases, with suppressed details allegedly being published in a variety of media, including websites and social media sites.<sup>232</sup>

### Privacy and Human Rights complaints

- 7.25 A sample of internet related complaints and enquiries fielded by the Privacy Commissioner's office over a two year period between 2009 – 2011 indicated that a significant proportion involved the misuse of personal information in the context of family or personal relationship conflicts, including for example the posting of incriminating photographs on social networking sites.
- 7.26 Under section 56 of the Privacy Act information collected or held in connection with a person's personal affairs is exempt from the Act and so in many of these cases the Commission has been forced to decline jurisdiction.<sup>233</sup>
- 7.27 Other common complaints involved instances where a person believed their privacy may have been breached after an employer or work colleague had discovered incriminating or inflammatory content on the complainant's Facebook page, resulting in some form of disciplinary action. The Commission told us that people often mistakenly believed such content was private despite the fact it may be available to a wide circle of friends and acquaintances within the Facebook community.<sup>234</sup> In other instances people sought the Commission's assistance when false Facebook pages were set up in an individual's name and were used to embarrass or otherwise harm the complainant.

- 7.28 Complaints were also upheld in two instances where individuals had legitimately obtained sensitive personal information under the Official Information Act but had then gone on to breach the Privacy Act by publishing the information on their own websites. In one instance the publication revealed sensitive financial information and in another identified children who were allegedly the victims of a crime.
- 7.29 The Commission had also faced a claim that publishing damaging personal information on a person's website was covered by the "news" exemption. However in the Commission's view the exemption did not apply to the website in question.
- 7.30 The Human Rights Commission is another forum for complaints about internet publishing which may breach New Zealand laws.<sup>235</sup>
- 7.31 A survey of internet-related complaints handled by the Commission between January 2008 and June 2011 found 110 complaints relating to potentially discriminatory content on websites; 30 of these related to content hosted on New Zealand sites and the remainder on overseas sites – predominantly Facebook.
- 7.32 Almost all of the 33 complaints regarding overseas sites received between January and June 2011 related to a homophobic US website linking the Christchurch earthquake to sin. Race-related complaints comprised the majority of other complaints over the whole survey period. The Commission considered it was unable to accept jurisdiction over these complaints because the content was hosted overseas.
- 7.33 The majority of complaints about New Zealand hosted content were also race-related but over 40% were resolved at the inquiry stage. Of those that were referred for investigation the majority did not reach the threshold to be progressed.
- 7.34 While this complaints analysis might suggest that racial harassment and abuse is not a major issue for New Zealanders operating on the internet, this was not the conclusion reached by researchers at Victoria University's Centre of Applied Cross-Cultural Research who analysed the online commentary following a number of high profile controversies involving broadcaster Paul Henry and politician Hone Harawira in 2010.<sup>236</sup>
- 7.35 The centre's deputy director Professor James Liu told us he was disturbed and discouraged by the levels of hatred, obscenity and violence implicit in much of the commentary that accompanied video clips of these broadcasts hosted on YouTube.
- 7.36 He believed the anonymity of the comment functions provided on sites like YouTube and the lack of effective monitoring of hate speech raised real risks for the standards of public discourse around race issues. The fact that these commentaries were easily accessible to young people increased the cause for concern.

## NetSafe

- 7.37 As part of its work promoting cyber-safety, NetSafe staff provides an advisory service to members of the public dealing with internet issues which may or may not be unlawful, but which nonetheless cause significant distress and sometimes harm to the individual. It is one of the few avenues available to the public when dealing with issues such as hate speech, harm to reputation and various forms of online harassment.
- 7.38 Between April 2009 and June 2011 NetSafe logged 1,279 inquiries from members of the public dealing with a range of internet issues. Text and cyber-bullying accounted for a significant proportion of these, together with incidents involving the misuse of social networking sites to victimise, harass, defame or intimidate individuals.<sup>237</sup>
- 7.39 Cyber-bullying and harassment took a variety of forms including emails, texts, phone messages, blog sites, and forums. NetSafe told us that in some cases compromised Internet accounts were used to send out malicious rumours and false information to the contacts of the person concerned.
- 7.40 A significant proportion of complaints and inquiries related to the misuse of social networking sites. These sites were used to launch attacks on people's reputations, spread damaging and degrading rumours, publish invasive and distressing photographs and harass individuals. Sometimes the offender would set up a false profile page on a social networking site or in dating or pornography sites to disseminate the damaging content.
- 7.41 NetSafe provided us with a number of anonymised examples of the type of harms reported by members of the public to them. Among these were the following scenarios:
- In 2011 NetSafe began to receive complaints from parents and schools concerned about the proliferation of anonymous Facebook pages used to publish derogatory and often sexually explicit rumours about students. NetSafe told us the first of these gossip pages to come to their attention included "extremely derogatory" comments about students and ultimately is thought to have played some part in the suicide of a young girl. The parent who approached NetSafe for help had tried unsuccessfully to have the pages taken down by Facebook. In this instance NetSafe used a recently established personal contact with Facebook to have the sites removed. Since that time a number of similar sites have emerged, including one focused on pupils from four top Auckland high schools. Facebook pages can only be set up by Facebook account holders and so it should be possible to identify those responsible for establishing these pages. NetSafe passed on to the Law Commission Facebook's response to its queries regarding these malicious gossip sites:

Our team has begun an investigation of the persons responsible for creating these accounts and will take action on those in line with our terms. While we cannot release the details of these investigations, you can rest assured that there will be action taken against persons who engage in this sort of abusive behavior, as we have no tolerance for bullying.

- The establishment of fake Facebook pages for malicious purposes also features prominently in complaints dealt with by NetSafe. One such example provided to us involved a prison inmate who was alerted to the fact that someone had set up a fake profile page publishing personal details which placed both him and his family at risk. His partner was unable to have the site taken down and the prisoner himself had no access to the internet and was unable to report the abuse. NetSafe eventually succeeded in doing so but only a month after the page was first published.
- In another case the principal of a South Island secondary school told us of a year-long and as yet unsuccessful battle to remove a fake Facebook page purporting to belong to a teacher. The site originally included lewd comments which were both distressing and damaging to the teacher concerned but despite repeated reports to Facebook, the page remained. Police advised there was no law against impersonating another person unless there was some pecuniary gain and no crime had been committed. The principal commented to us that their inability to engage with a real human being associated with Facebook left them feel as if they were “shouting into space”. He told us the incident was not isolated.
- Another recent example of malicious impersonation involved a professional woman whose job required her to maintain a strong online profile but who found her profile had been linked to a pornography site in such a way that when her name was “googled” it was indexed to an item which said “Hottest Whore” and sent searchers directly to the pornographic site. This had caused immense distress to the woman and her family.
- NetSafe also provided examples of threatening, abusive and malicious postings made using email, websites, forums, blogs and mobile telephones. Personal information obtained in one context could often be used to harass a person in numerous different ways as illustrated by this complainant:

someone is stalking me and my family. They are sending me mail in the post, they have got a phone sim and text....they got all my kids private info and are putting it up on fake Facebook pages, they have included my neighbour and old boss and a current colleague – it’s sexually explicit and harassment and stalking. There have been threats but we have no idea who is doing it. ...the police know but say there is nothing they can do to trace this person.

- 7.42 NetSafe has also participated in recent government-led discussions about the ways in which the internet is impacting on New Zealand’s long standing problem of youth suicide and self-harm. The impact that both traditional and new media can play in either ameliorating, or exacerbating, the problem is a matter of on-going debate in this country.

- 7.43 The Coroners Act 2006 imposes tight restrictions on the publication of detailed accounts of individual suicides in the belief that such publicity can in some circumstances contribute to copy-cat suicides and can lead both to the normalization and glamorisation of suicidal behaviours. In addition the Ministry of Health has developed Suicide Reporting Guidelines for the news media. These guidelines are currently under review after the Chief Coroner, Neil MacLean, questioned whether there may be benefit in more open public discussion about the problem. One of the points raised by the news media in the context of this review was that the current legislative restrictions were being substantially undermined by suicide discussions in social media networks.
- 7.44 A preliminary report on the issues prepared for the Prime Minister John Key in November 2010 by the Ministerial Committee on Suicide Prevention noted the complex and only partially understood impacts of the internet on self-harming behaviours:<sup>238</sup>
- On the positive side, the internet can provide support, information and a community for those contemplating suicide or who are self-harming. On the negative side, cyber-bullying is an increasing issue, as are websites that encourage suicide and give information on ways to commit suicide.
- 7.45 The report noted that while there was little empirical research into the effects of social networking sites on rates of self-harm, “the evidence appears to building of a link between memorial pages and suicide contagion.”<sup>239</sup>
- 7.46 Revised suicide reporting guidelines were due for release at the time of writing.

#### *International experience*

- 7.47 A recent study on cyberstalking undertaken by researchers at Bedford University in England, supported by Britain’s Crown Prosecution Service, found cyberstalking was now more common than physical harassment. Perpetrators often targeted total strangers rather than people with whom they had some past association such as former partners. Nearly 40% of the victims were men and most were aged between 20-39.<sup>240</sup>
- 7.48 One of the report’s co-authors, psychologist Dr Emma Short, told the *Guardian* there was lack of understanding of the impacts of online harassment and that in a third of the cases surveyed the victims had experienced clinically observable psychological harm.<sup>241</sup>
- 7.49 The survey found incidents where people had received death threats and victims were made to believe the perpetrator knew how to physically reach them and their family. Others had suffered serious reputational damage and psychological distress after the perpetrator used social media to circulate false allegations about them.

- 7.50 One example highlighted in the *Guardian* report involved the online harassment of a 47-year-old woman and her family which involved the perpetrator harvesting information about the family from the internet, including the children's social media postings, to create a sense that they were under surveillance. He also posted allegations about the couple, including a claim they were paedophiles and had been involved in drug dealing. Despite the menacing and sustained nature of the harassment the couple failed to get any assistance from the police until the perpetrator, who was a casual acquaintance, caused physical damage to the couple's car.
- 7.51 Variants of this type of behaviour have been reported around the world including the well documented case of female students at Yale Law School who were eventually forced to sue those responsible for a sustained anonymous campaign of sexual harassment launched by a group of young males on the college admissions webforum.<sup>242</sup>
- 7.52 An article on the online site of *Wired* magazine backgrounding the events which gave rise to the damages lawsuit explained how harms caused by the original postings had been amplified by the web:<sup>243</sup>
- The Jane Doe plaintiffs contend that the postings about them became etched into the first page of search engine results on their names, costing them prestigious jobs, infecting their relationships with friends and family, and even forcing one to stop going to the gym for fear of stalkers.
- 7.53 In other cases people have impersonated an individual online, setting up false accounts on pornography or dating sites and impersonating them in chat rooms or on message boards in order to incriminate them or set them up as sexual targets.
- 7.54 In another well documented American case a man whose advances had been rebuffed by a female acquaintance set up bogus accounts in her name and impersonated her in online chat rooms and email, suggesting she fantasised about being raped. He published her physical address and phone numbers, including details about her home security system. On at least six occasions men arrived at the woman's door in response to the supposed invitation to rape her.<sup>244</sup>
- 7.55 Although we are not aware of any official statistics recording the prevalence of cyberstalking in New Zealand the information provided to us by NetSafe suggests that many of the incidents they are responding to, including online impersonation and smear campaigns, are designed to intimidate and cause psychological distress. It is also evident from reviewing a number of the school-related gossip sites that female students are frequently targeted in a sexually derogatory manner.
- 7.56 Alongside these intrusive and threatening online behaviours, there are now daily reports in the world's media of a range of harms associated with online publishing. These include claims of reputational damage to individuals and businesses; privacy breaches; a range of threats to trial processes, including publication of suppressed evidence and prejudicial behaviour by jurors.

- 7.57 Increasingly these cases involve ordinary citizens using social media rather than the news media.
- 7.58 In a landmark case in Britain a 25-year-old man received an 18 week custodial sentence and a five-year “anti-social behaviour order” prohibiting him from using social media after he pleaded guilty to sending malicious communications relating to the deaths of teenagers, including a girl who had been hit by a train.<sup>245</sup>
- 7.59 The case, which bears some resemblance to the incident reported to us by New Zealand police involving offensive messages left on the memorial page of a teen who had committed suicide, involved the offender not only posting offensive comments on the dead teen’s Facebook tribute pages but also creating a YouTube video where he superimposed the dead girl’s face on the front of a train engine.

### LEGAL REDRESS

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- 7.60 No matter how offensive to some, not all the speech abuses outlined in this chapter would meet the threshold of an offence. Like most Western democracies, New Zealand regards freedom of expression as the cornerstone of all other democratic freedoms. This concept has been enshrined in statute since the passage in 1990 of the New Zealand Bill of Rights Act. Section 14 of the Act provides:
- Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.
- 7.61 According to section 5, that freedom, like all others in the New Zealand Bill of Rights Act, should be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
- 7.62 However, freedom of expression is not an absolute right. For example there is no protection for speech which is intended to incite racial violence. Nor do we protect speech which unjustifiably damages a person’s reputation or invades their right to privacy. As a society we also have an interest in protecting the integrity of the justice system and a person’s right to a fair trial. To achieve those ends, it is sometimes deemed necessary to delay or limit freedom of expression.

- 7.63 Some of the free speech abuses we traversed in the first part of this chapter would seem to fall squarely within these categories of prohibited or restricted speech. Others present more complicated challenges and may not fit neatly within the framework of the existing law, or may not meet the current threshold for an offence. Although many of the behaviours we are seeing on the internet mirror off-line behaviours, it is abundantly clear that the internet and its associated technologies have created an environment where the scale, sophistication and severity of speech-related harms is potentially much greater than in the pre-internet era. A prime example of the heightened harms capable of being inflicted through the use of new publishing technology can be seen in the British case discussed at paragraph 7.58.
- 7.64 In the following discussion we ask two questions:
- are the various criminal, civil and regulatory rules and remedies that deal with speech abuses suited for the web 2.0 era?
  - how effective are the non-legislative remedies that operate within online communities, including the systems of online reporting employed by social media sites such as Facebook?
- 7.65 We begin by surveying the existing laws that deal with communication and outline the various offences that already exist and provide some examples of how they have been applied to internet publishing in New Zealand. We then consider the limitations in the existing laws, including definitional problems and gaps in the law and the problems of access and enforcement.

#### **What the law says**

- 7.66 The laws which define the circumstances in which freedom of expression may justifiably be constrained are a mix of statute law made by Parliament, and judge-made or common law. Alongside the public sanctions imposed by the criminal law, citizens may also have the right to pursue a private, or civil action against another party when they have been harmed by another person's speech.
- 7.67 These various branches of the law have evolved differently and reflect different legal and policy principles. Some statutes were written long before the internet era; others have been drafted with an eye to changes in media and communication technologies or in response to novel problems associated with these technologies.
- 7.68 In contrast the common law has evolved over many centuries. Being judge-made it is flexible, and can adapt more readily to new contexts and social problems than the more rigidly defined statute law.

- 7.69 All our laws are a product of a specific social and political context and reflect our changing values, including, most crucially, the manner in which we weigh the interests in free speech against other public and private interests. For example our statute book includes some offences which may be so obsolete as to merit reform or repeal. The law of blasphemy is, in some people's opinion, one of those.<sup>246</sup> Two others, sedition and criminal libel, were repealed some time ago.<sup>247</sup>
- 7.70 As noted the Bill of Rights Act has had a profound effect on how the courts weigh free speech against other interests.
- 7.71 Many of the offences discussed below were created by statutes which predate the Bill of Rights Act. Almost all predate the advent of the internet. However, as we shall see, our existing statute, common, and civil law provides, in theory at least, a wide range of potential remedies for the types of harm we have described in the first part of this chapter.

### Criminal law

- 7.72 The criminal law deals with offences which are investigated by the police and which attract public sanctions imposed by the state through the criminal courts. With one exception, the criminal law of New Zealand is the creature of statute. We have not for the purposes of this Issues Paper attempted a comprehensive review of our New Zealand statute law. Rather we have gathered together the provisions which are of main relevance to the kinds of harms we have detected.

#### *Prohibited uses of speech against a person*

##### Threats

- 7.73 We have noted above the use of the new media to threaten and frighten people. A number of statutory provisions deal generally with threatening conduct. It is an offence, for example, to threaten to kill or cause grievous bodily harm,<sup>248</sup> or threaten to destroy property or destroy or injure an animal,<sup>249</sup> or to threaten to do an act likely to create a risk to the health of one or more people with intent to cause serious disruption.<sup>250</sup>
- 7.74 There is also an offence of intimidation which provides that every person commits an offence who with intent to frighten or intimidate any other person, or knowing that his or her conduct is likely to cause that person reasonably to be frightened or intimidated, threatens to injure that person or any member of his or her family, or to damage any of that person's property.<sup>251</sup> The crime of blackmail also falls under this head. It is constituted by threatening to disclose something about a person with the intent of obtaining a benefit.<sup>252</sup> The threat can be communicated in any way.

- 7.75 The generality of these offences means that they will normally be adequate to deal with threats however communicated – by new media or otherwise. Earlier in this chapter we outlined a number of New Zealand police investigations which have resulted in prosecutions for threats made on the internet.<sup>253</sup>

#### Harassment

- 7.76 In the same vein, New Zealand has a number of statutes which specifically proscribe harassment. Under the Harassment Act 1997 it is a criminal offence to harass another person with intent to cause that other person to fear for their own safety or the safety of a family member.<sup>254</sup> Harassment is defined in some detail.<sup>255</sup> It can be constituted, among other things, by making contact with a person, whether by telephone, correspondence or in any other way, or giving offensive material to a person or leaving it where it will be brought to the attention of that person, or acting in any other way that causes the person to fear for their safety. There may be a question whether these provisions, which were enacted in 1997, are sufficiently clear to cover harassment by new electronic means of communication. We shall address this question in the next section.
- 7.77 The Telecommunications Act 2001, section 112, provides that every person commits an offence who uses or causes or permits to be used, any telephone device for the purpose of disturbing, annoying or irritating any person. “Telephone device” is defined as “any terminal device capable of being used for transmitting or receiving any communications over a network designed for the transmission of voice frequency communication”. Whether this applies to any communication via computer is not absolutely clear. We shall return to this point also in the next section.

#### Sexual and offensive matter

- 7.78 The Office of the Privacy Commissioner and NetSafe told us of instances where people have approached them for help after someone had posted intimate photographs or film of them on Facebook pages or websites, particularly after the breakup of a relationship.
- 7.79 The Crimes Act 1961 provides that it is an offence to publish intimate pictures of someone taken covertly without that person’s consent.<sup>256</sup> But that prohibition only applies where the filming itself took place without consent: it does not extend to pictures taken *with* consent but published *without* consent. Sometimes the latter situation may be caught by other provisions. Section 124 of the Crimes Act renders it an offence to distribute to the public “any indecent model or object”. In 2010 the Crown successfully used this provision in the Crimes Act to bring charges against a 20-year-old Wellington man who posted nude photographs of his former girlfriend on her Facebook profile.<sup>257</sup>

7.80 The Films, Videos and Publications Classification Act 1993 also renders it an offence to be party to an objectionable publication,<sup>258</sup> the term “objectionable” being defined in some detail in that Act.<sup>259</sup> The essence of it is that the publication is likely to be injurious to the public good. Finally, section 131B of the Crimes Act 1961 deals with a related matter. It renders it an offence to for a person to intentionally meet a young person under the age of 16, having met or communicated with them previously, if at the time of doing so he or she intends to engage in unlawful conduct with that young person. The sexual grooming which culminates in this way will commonly have been undertaken via the social media.

#### Incitement

7.81 It is a criminal offence to incite the commission of another offence. If the offence is in fact committed, the inciter is a party to it.<sup>260</sup> If it is not, the incitement itself is criminal and renders the offender liable to a penalty of half that attaching to the offence itself.<sup>261</sup> This could cover such matters as incitements to damage property, to engage in riot, or to injure someone.

7.82 As the riots and looting in England in August 2011 demonstrate, the new media – Twitter for example – can be a potent avenue of incitement. Inciting racial disharmony is a separate offence under the Human Rights Act 1993.<sup>262</sup> It is also a separate offence to publish a description of how to manufacture a firearm or explosive.<sup>263</sup> It is an offence also to incite a person to commit suicide, if the person in fact commits, or attempts to commit, suicide;<sup>264</sup> or to aid or abet a person in the commission of suicide.<sup>265</sup> Suicide pacts also constitute an offence, but only if one or more persons in fact carry out the pact.<sup>266</sup>

#### Financial crime

7.83 We have in other contexts discussed whether identity crime is sufficiently covered by legislation.<sup>267</sup> We are particularly concerned with the use of another person’s identity to obtain monetary benefits. Conduct of this kind will normally fall within the crime of obtaining by deception.<sup>268</sup> So will monetary scams: the use of false inducements (communicated electronically as much as any other way) to extract money from people. The present provisions of the Crimes Act seem to us fit for purpose in this regard.

#### Other

7.84 There are other offences which can be committed by publications of various kinds. We do not need to list them. But they include the numerous prohibitions on various kinds of advertising; constraints on advertisements and other communications relating to forthcoming elections; prohibitions on publishing information acquired by illegal interception, or intercept under warrant; and even (in the rarest imaginable cases) offences relating to the security and defence of New Zealand such as treason, and the publication of improperly obtained official information.<sup>269</sup>

*Constraints on speech in the interest of justice*

## Court reporting

- 7.85 Open justice is a corner principle of New Zealand's judicial system. However, there are times when the court may need to either temporarily or permanently suppress information, including the names of victims or the accused, in order to preserve the integrity of a trial and safeguard the rights of an individual to be assumed innocent until proven guilty.
- 7.86 Section 140 of the Criminal Justice Act 1985 enables a judge to suppress publication of the name of an accused, or other person involved in criminal proceedings.<sup>270</sup> Similar statutes apply to specific courts and tribunals, and specific types of proceeding. For example the statutes governing our Family Court contain provisions requiring non-publication of names to protect the privacy of those involved;<sup>271</sup> the Coroners Act requires that details of suicides be not published unless the Coroner gives permission;<sup>272</sup> the provisions governing Courts Martial have provisions equivalent to those in the criminal courts.<sup>273</sup>
- 7.87 Alongside these statutorily proscribed offences, there is also a common law offence of contempt of court. Contempt deals with publications and other conduct which could prejudice the administration of justice. Most significantly it deals with publications which could prejudice a fair trial, for example by conveying information (such as the previous convictions of the accused) which a jury is not entitled to know. Although, as discussed earlier, prejudicial publishing in social media is an increasing problem both here and overseas, not many contempt cases come to court, and of those that do, in New Zealand, a reasonably high proportion have not resulted in a finding of contempt. The threshold is a high one.<sup>274</sup>
- 7.88 However in recent times there have been a number of successful contempt applications both in New Zealand and in overseas jurisdictions which indicate that the courts are prepared to deal with online breaches of court orders and contempt of courts.
- 7.89 In 2007 lawyer Rob Moodie was found guilty of contempt over his internet publication of suppressed evidence pertaining to the lengthy legal battle over the collapse of an army-built bridge on his clients' King Country farm.<sup>275</sup>
- 7.90 KiwiFirst publisher Vincent Siemer, has been before the courts on a number of occasions in relation to publications on his website.<sup>276</sup>
- 7.91 Most recently blogger Cameron Slater was convicted under the Crimes Act on nine offences relating to online breaches of court suppression orders.<sup>277</sup>
- 7.92 An analysis of inquiries into alleged contempts and/or breaches of court orders since 2009 provided to us by Crown Law suggests a significant proportion of the complaints arose in the context of either Family Court cases or of instances where an individual had embarked on a personal campaign targeting some aspect of the justice system.<sup>278</sup>

- 7.93 In a landmark trial in London's High Court in June 2011 a 40-year-old woman was sentenced to eight months jail after being found guilty of contempt. She had admitted using Facebook to exchange messages with a defendant in a trial in which she was a juror.<sup>279</sup> The Lord Chief Justice warned, in sentencing, that a custodial sentence was "virtually inevitable" for any jurors committing similar contempts. In a similar case a juror in Tarrant County pleaded guilty to four counts of contempt of court in August 2010 after attempting to "friend" a defendant in the case at trial. The juror was sentenced to community service.<sup>280</sup>
- 7.94 In the United States, research conducted by Reuters Legal into the impact of social media on the trial process found that since 1999 at least 90 verdicts in American courts had been challenged as a result of alleged internet-juror misconduct.<sup>281</sup> The majority of these cases had occurred in the last two years with judges granting new trials or overturning verdicts in 28 criminal and civil cases since January 2009.
- 7.95 Questions have recently been raised as to whether New Zealand's law of contempt generally needs reform. That question is being separately addressed in other fora, and we do not need to deal with it here.

#### Civil law

- 7.96 Alongside these statutorily defined offences which attract penal sanctions in the courts, there are also a number of important common law wrongs relating to the improper communication of information which can give rise to civil causes of action. The harmful communication giving rise to these causes of action could occur in either traditional or new media. However, in discussing these various common law wrongs it is important to bear in mind that civil actions require the aggrieved individual to bring court proceedings and many do not in fact have either the means or the desire to do so.

### Defamation

- 7.97 The most important is *defamation*, a cause of action originating in the ancient torts of libel and slander, which enables a plaintiff to sue a defendant for publishing statements which might affect his or her reputation. It was originally a harsh cause of action, and despite recent relaxation of some of its elements it still bears the marks of those origins. The plaintiff does not have to prove that the statement was false, although if the defendant can prove it was true, he or she will escape liability. Nor is it necessary for the plaintiff to prove actual damage: statements reflecting on reputation are presumed to be damaging. Nor is there any need to prove malicious intent: the mere fact of publication is enough, and it is no excuse that the defendant was simply repeating what others had said. It is enough, moreover, if the defamatory statement is published only to a small group of people: indeed one will suffice.
- 7.98 There is also the defamation-related tort of injurious falsehood, constituted by the publication of false information causing pecuniary loss. It applies largely in the commercial arena where damage is done to a business by untrue statements about that business.
- 7.99 In recent times there has been some relaxation of the law of defamation both by statute and at common law. The common law changes have perhaps been the most significant. In this country they have created a privilege for political speech.<sup>282</sup> In England a similar common law extension is leading to something resembling a public interest defence.<sup>283</sup> Defamation actions are more procedurally complex than most, and can result in long drawn out proceedings. The cost of bringing an action can sometimes be more trouble than it is worth. It has indeed been said that there are no winners in defamation actions. However, that being said, it remains a significant constraint. There is no doubt that defamation can be committed by those who disseminate information in any form of media, be it on a website, a blog, Facebook or Twitter. And it is enough that it is communicated to even one person.
- 7.100 Internet publication in defamation cases is no longer unusual.<sup>284</sup> There have been actions in New Zealand relating to statements made in the new media. For example in 2001 the courts ruled on a defamation action involving comments made on an Internet news group, awarding the plaintiff \$30,000 general damages and \$12,000 punitive damages.<sup>285</sup> It has been held that publication in cyberspace is just as much publication as any other form of dissemination. Judge Ross has said:<sup>286</sup>

I know of no forum in which an individual has the freedom to say what he likes and in any manner he wishes about another individual citizen with immunity from suit for all consequences. Merely because the publication is being made to cyberspace does not alter this.

- 7.101 Like any communication, statements made in cyberspace must always be read in the context in which they appear. The robustness and tone of the discussion may affect the impact of a particular contribution: debate on the web is often more robust and forthright than that which may be found in the mainstream media.<sup>287</sup> But, as Judge Ross points out, a factually false statement which reflects on reputation remains defamatory, wherever it is published.
- 7.102 There have been indications in New Zealand that a reference or link on a website to another website which contains defamatory material can render the first website liable as well because it is publishing the same defamation indirectly. However there is now strong Canadian authority to the effect that hyperlinks on a website which lead to defamatory material do not automatically render the linking website liable: the hyperlink has no more effect than a footnote.<sup>288</sup> The Canadian decision is fully reasoned and the New Zealand courts may well follow it.
- 7.103 Reputational attacks on the internet are also beginning to feature in defamation cases coming before the courts in Britain. In August legal information specialists Sweet and Maxwell reported the number of defamation cases in Britain involving social networking sites had doubled in the 12 months to June 2011. Of the 86 cases brought to court in the preceding 12 months, 16 involved alleged defamation on blogs or social media. None related to traditional media websites. Among the social media cases was an action brought by New Zealand cricketer Chris Cairns over comments published on Twitter by former Indian Premier League commissioner Lalit Modi.<sup>289</sup>
- 7.104 In May 2011 Britain's South Tyneside Council successfully lodged a subpoena in a Californian court requiring Twitter to provide the account details of an anonymous tweeter who was allegedly defaming councillors and staff. This case received widespread publicity in the British press because it suggested that, despite the jurisdictional issues, Twitter would potentially hand over user information when there was credible evidence of a potential criminal or civil breach.<sup>290</sup>

### Privacy

- 7.105 New Zealand now has a tort of invasion of privacy. It owes its origins to the 2004 Court of Appeal decision in *Hosking v Runting*.<sup>291</sup> Its ingredients are that publicity must have been given to facts in which there is a reasonable expectation of privacy, that publicity being offensive to a reasonable ordinary person. There is a defence if the matter published is of public concern.

7.106 The tort is still in its infancy in this country and there have been insufficient cases to map out its boundaries in detail. It has been used, for example, to award damages to a former prisoner whose picture, identity and address were widely published in the community where he was living;<sup>292</sup> and to forbid publication of the identity of a young man who was caught up in a high-profile sex scandal involving a politician.<sup>293</sup> But there are uncertainties about many of its ingredients: how far, for instance, one can have a reasonable expectation of privacy in a public place, and whether corporations have a right of privacy as much as individuals. It has also yet to be determined how wide the publicity needs to be to give a cause of action (the term used in the leading judgment is “publicity” not “publication”). But there is no doubt that websites and blogs would meet that test. While initially there were concerns among the media that the tort would gravely impede freedom of information, the infrequency of court cases since *Hosking* has to some extent mitigated that concern.

#### *Breach of confidence*

7.107 Another common law action is the action for *breach of confidence*, which holds that if information is received on an understanding that it will be kept confidential, the recipient must not publish it. Public interest is a defence. There is doubt in New Zealand as to how far a *relationship* of confidence between the parties is necessary, or whether the very nature of the information can impose an obligation of confidence.<sup>294</sup> The question is less important in New Zealand than in the UK, given the development by our courts of the tort of invasion of privacy: we do not need to examine it here. In New Zealand there have been few actions involving the media but once again there can be little doubt that digital publication could infringe just as readily as publication in any other way.

#### *Breach of copyright*

7.108 Breach of copyright also remains a possible cause of action. If material is under copyright it is a breach of that copyright, among other things, to issue copies to the public or to communicate the work to the public. There is no doubt that that can be done electronically just as much as via the traditional media. Recent amendments to the Copyright Act 1994 make that clear, even if it was not clear before. Copyright actions for publications in the media, new or old, are not common and never have been, although they remain a possibility.

7.109 An amendment to the Copyright Act in 2010 introduces new controls over, and remedies for, illegal file sharing. Infringing users can be warned, and on a third occurrence be subject to monetary sanctions, and the possibility of having their Internet connection terminated by their ISP.<sup>295</sup> The new legislation is controversial.

### *Harassment*

7.110 It is still arguable, although not strongly, that there may be a common law tort of harassment. The English authority so suggesting has never been overruled on that point although other aspects of the judgment in the relevant case are no longer good law.<sup>296</sup> Quite apart from that common law possibility, the Harassment Act 1997 also provides for a civil remedy if harassment takes place within the definition in that Act. The victim can apply for an order that the harassment cease; failure to comply with any such order is a criminal offence.<sup>297</sup> The civil remedy for harassment is not dependent on the element of intent which the criminal law requires. It is enough that the harassing conduct has taken place. But the specified acts which can amount to harassment are the same as those for criminal harassment with the same arguable ambiguity about their extent. (The Domestic Violence Act 1995 may also provide a remedy for those who are the victim of harassment by a former partner or someone with whom they ordinarily share a household or have been in a “close personal relationship” with. The Act’s definition of domestic violence includes psychological abuse in the form of harassment, intimidation, and threats.<sup>298</sup>)

### *Wilkinson v Downton*

7.111 The little used tort in *Wilkinson v Downton* might also in theory provide another cause of action.<sup>299</sup> That tort is constituted by communicating false messages calculated to cause nervous shock to the recipient. The facts of the case itself, although they happened well before the electronic age, involved a man by way of a misplaced joke telling a woman that her husband had been seriously injured. He was held responsible for the ensuing nervous shock which she incurred. The potential for this tort’s operation in the internet age is obvious, but its current status is uncertain, and some believe it is obsolete.

*Breach of statutory duty*

7.112 The civil causes of action are fewer than the prohibitions imposed by the criminal law. The two areas are by no means on all fours. However there is a possibility that some of the criminal offences might give rise to an action for damages by the injured person if an intent to allow such a remedy can be inferred from the statutes themselves. This is the province of the uncertain tort of breach of statutory duty. A civil cause of action will lie if, on the true construction of the relevant statutory provision, there was a parliamentary intention to confer a private right of action over and above the public sanction imposed by the statute. In the process of construction the court will consider such things as the purpose of the provision, whether it was intended to protect a particular class of person, and the nature of any specific modes of enforcement provided in the Act. Attempts to instil predictability and principle into this area have not been entirely successful and sometimes litigation is the only way of determining whether such a remedy will lie.<sup>300</sup> There are not many cases in recent years when this cause of action has been successful, and most of those have occurred in a regulatory context. This tort is not likely to be of great or frequent utility in the subject matter of our study.

**The Privacy Act 1993 and the Human Rights Act 1993**

7.113 Although not generally enforceable in the courts, these two statutes do offer a potential avenue of redress for people aggrieved by certain types of communication.

7.114 The Privacy Act 1993, section 6, principle 11, provides that anyone who holds personal information about a person will not disclose it to anyone else. There are, of course, exceptions, which include the need for maintenance of the law, the need to protect health and safety, and the consent of the person concerned. If there is a breach of this principle which causes, or may cause, harm to the person, a complaint may be made to the Privacy Commissioner. The Commissioner attempts to resolve the complaint by obtaining a settlement between the parties. If that cannot be satisfactorily achieved, the matter may then proceed to the Human Rights Review Tribunal which can grant remedies such as damages and orders to cease the offending conduct.

7.115 So disclosures of personal information can be grounds for complaint. But there are at least three limitations on the Act's effectiveness. First, the news media are exempt from principle 11 (and, indeed, from almost all the Act's other principles).<sup>301</sup> Secondly, if material has been collected, or is held, by an individual solely or principally for the purposes of, or in connection with, the individual's "personal, family, or household affairs" the privacy principles do not apply to it. This means that information or pictures acquired in a domestic context are not within the protection of the Act, even if they are published to the world at large via the internet.<sup>302</sup>

- 7.116 Thirdly, if information is already publicly available, it is not a breach of privacy principle 11 to publish it again.<sup>303</sup>
- 7.117 In its recent report on the Privacy Act the Law Commission has recommended amendment to all three of these exceptions; to define the term “news media” narrowly; and to provide that *offensive* use of domestic material and publicly available material should be a breach of the Act.<sup>304</sup>
- 7.118 Section 61 of the Human Rights Act 1993 provides that it is unlawful to publish material likely to excite hostility against or bring into contempt any groups of persons on the ground of their colour, race, or ethnic or national origins. The Act also makes it unlawful in sections 62 and 63 to engage in sexual or racial harassment that is repeated, or so significant that it has an effect on the person’s employment or access to certain types of service. As in the case of the Privacy Act the initial avenue of redress is via a complaint, in this instance to the Human Rights Commission, with the possibility that the matter may proceed to the Human Rights Review Tribunal.
- 7.119 While sections 62 and 63 are widely enough expressed to cover any form of communication (“language...or visual material”), section 61 is rather more ambiguous. It confines its prohibition to “publishing or distributing” written matter, and broadcasting by means of radio or television; to using words “in a public place”; and to using in any place words which were reasonably likely to be “published in a newspaper, magazine, or periodical or broadcast by means of media or television”. While “publish or distribute” is almost certainly wide enough to cover publication in any form of media, electronic or otherwise, the context of the remainder of the section creates enough ambiguity about that to justify a clarifying amendment. We shall return to this later. We shall also examine whether sections 62 or 63 need amendment in relation to the contexts in which they have application.

### Sanctions and remedies

- 7.120 The laws we have outlined, both criminal and civil, are enforceable in the courts. In the case of the criminal law, fines or imprisonment may be imposed. In the civil law the usual remedy is monetary damages.
- 7.121 However the injunction is also a possible remedy in the civil law. Here considerations of freedom of expression must be carefully weighed in the balance. An injunction prohibits speech: it is a form of censorship. The law of defamation has always held that injunctions are an exceptional remedy, only available if damages would not be adequate redress. Interim injunctions are supposed to be exceptional too, only to be ordered if the defamation is clear, and the defendant has effectively no defence. Authority subsequent to the Bill of Rights Act clearly suggests that the same caution should apply to other civil wrongs just as much as to defamation,<sup>305</sup> although the application of this to privacy cases is not quite so clear: in those cases publication effectively destroys the subject matter of the action.<sup>306</sup>

- 7.122 In England there has recently been a succession of cases where celebrities have been successful in getting injunctions to prevent publication of their moral transgressions. Most of these are orders against all the world - that is to say old media, new media, indeed everyone, forbidding publication of the information. They are a relatively new development and are controversial in that there is no named defendant. They are much less sought in New Zealand but are not unknown here either.<sup>307</sup> In England such an injunction sometimes goes to another level, and takes the form of the so-called “super-injunction” which even forbids publication of the very fact that there has been an injunction. The whole matter is thus shrouded in secrecy. Injunctions like this have provoked much controversy and attention, and have recently been the subject of something close to civil disobedience by way of spreading the names on Twitter.<sup>308</sup>
- 7.123 Injunctions are not unknown in the criminal law, but are much rarer, except in contempt cases. There are a number of cases where injunctions have been sought, and sometimes granted, to prevent the publication of contemptuous material.<sup>309</sup> Injunctions may be to prevent publication in the first place, or to cease a publication which has already begun. In the case of publication on the internet, the latter sort of injunction is often called a “take-down order”.<sup>310</sup>

## LIMITATIONS OF THE LAW

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### The challenges of applying the law in cyberspace

- 7.124 Existing criminal and civil law is clearly capable of dealing with many of the types of harmful communication which we discussed in the early part of this chapter. Although many of the laws pre-date the internet, their provisions are often expressed in general terms flexible enough to encompass any form of communication. We have given examples above of successful civil actions and prosecutions. They show that, contrary to some assertions, the internet is not beyond the reach of the law. Effective legal interventions of this kind have a deterrent value.
- 7.125 But the current law is not always capable of addressing some of the new and potentially more damaging ways of using communication to harm others. The obstacles include the difficulties the public can experience accessing the law, including the cost of bringing legal proceedings; the adequacy of investigative resources and tools; problems in the way in which offences are defined; and possible gaps in the types of offences currently included in the statute book.

### *Access problems*

- 7.126 The difficulties of accessing help in dealing with cyber offending and the sense of powerlessness associated with this has emerged as a recurrent theme in our research and in the feedback we received from the agencies we approached for information.

- 7.127 Many citizens are unaware of the range of criminal offences which may apply to harmful and offensive online speech. Moreover, for those who have suffered real harms, the cost and complexity of pursuing civil action creates a high barrier for most citizens when considering how to respond to attacks on reputation or other damaging behaviour on the internet.
- 7.128 NetSafe told us said it was common for people approaching them for assistance to be distressed at the lack of redress available to them:
- Complainants are surprised that there may be nothing Police can do, no mandate for any other agency to intervene, and civil action is very expensive and commonly out of reach for most people. There is a high level of abuse and offensive material which is not necessarily criminal.
- 7.129 The anecdotal feedback we received from police also appeared to indicate that some front-line police experienced a level of frustration at not always having the investigative tools, (including, at times, easy access to internet sites such as Facebook or Bebo from work computers) nor the appropriately defined offences to fit some types of damaging online behaviour.
- 7.130 Resource constraints are also clearly a problem when responding to what may be considered lower level offending such as cyber-bullying or harassment.

#### *Problems of coverage of the law*

- 7.131 In our brief outline of the law applying to communications, we noted some limitations in the coverage of the law. In summary, they fall into two categories.
- Some prohibitions, perhaps because they were passed into law before the internet age, do not obviously cover the more modern forms of communication. In some cases their expression clearly does extend so far; in other cases it is ambiguous whether it does or not.
  - There are also arguably some gaps in the current law, and types of offensive conduct for which there appears to be no legal sanction or remedy at present.
- 7.132 We believe that amendments to legislation would be desirable to address both these deficiencies. In the next chapter on law reform we shall explain the deficiencies in more detail, and propose amendments.

#### *Enforcement problems*

- 7.133 Sometimes, even if the law clearly has been broken, there may be problems enforcing it. The fact that the internet has no geographical boundaries and that once published, information can be stored and accessed from a practically limitless number of places making it difficult, if not impossible, to remove, are among the challenges posed. In the next chapter we consider whether there are possible solutions to some of the enforcement problems discussed below, but for the moment we simply briefly outline some of the practical questions facing enforcement agencies.

Who are the possible defendants?

- 7.134 If an infringing publication has taken place, who can be held accountable, and against whom will criminal sanctions or civil remedies lie? Possible defendants are any media company responsible for the publication; the editor of the relevant publication (if there is one); the individual who wrote and/or uploaded the item in question; the host of the website on which the item has appeared; and (possibly) the internet service provider (ISP). The current law is complex and unclear. The answer may well be different for the purpose of different rules. It depends on the way the law defines the particular offence or civil wrong – whether, for example, intention or negligence is required; on whether in a particular case the defendant had knowledge of the infringement; on the laws of agency (where a company is concerned); and on what amounts to “publication” for the purposes of the particular rule in question.
- 7.135 The responsibility of ISPs is a particularly important issue. We shall return to it in the next chapter.

Who is the main perpetrator?

- 7.136 Anonymity is often thought to be a feature of the new communication environment, making it difficult to trace an individual who may be responsible for an illegal publication. Yet we understand it is in fact forensically possible to trace most communications to their source. There are some legal tools to compel this – for example, in the criminal jurisdiction, a police officer executing a search warrant can require information necessary to access data from a computer.<sup>311</sup>
- 7.137 In the civil jurisdiction in Canada, it has been held that a court can administer interrogatories requiring an ISP to disclose the identity of a specific internet protocol address subscriber, although this should be done only if the party seeking such information has been unable to obtain the information in other ways.<sup>312</sup> A House of Lords decision provides an alternative route to this end by holding that a defendant which has through no fault of its own become involved in the tort of another can come under a duty to assist the plaintiff by disclosing the identity of the wrongdoer.<sup>313</sup> Proceedings have recently been instituted in the UK against Twitter on this basis.<sup>314</sup> So there are ways of tracking law-breakers, although the path is not always easy, and the tools not always available. That is particularly so if the organisation holding such information is out of the jurisdiction. But, as we shall show in the next section, a number of responsible website hosts will respond to requests to co-operate with law enforcement agencies.

*Jurisdiction*

7.138 There can be jurisdictional issues in both the criminal and civil areas. As far as offences are concerned, even though the server hosting a website may be out of New Zealand, it is publication in New Zealand that constitutes the offence here. As Judge Harvey has put it:<sup>315</sup>

In the present case the availability of the material from a server located in San Antonio, Texas in the United States has little relevance. The evidence before me is that the material was able to be read and comprehended in New Zealand (thus constituting a publication) and the material was uploaded on the Whaleoil blog by Mr Slater present in New Zealand at the time. Thus acts necessary for publication – the creation of the material, the posting of the material and the availability of the material to be comprehended by readers in New Zealand – all took place within the jurisdiction.

7.139 If the person who posted the material is in New Zealand he or she is subject to the jurisdiction of the New Zealand courts. That was the position of Cameron Slater, who was fined for publishing on his website the identity of a person whose name was suppressed, even though the server was located overseas. But if the person who posted the material is resident out of New Zealand, there is in practical reality nothing much that can be done in relation to that person. As far as the civil jurisdiction is concerned, there is authority that, at least in theory, a defamation on a website hosted overseas can be defamatory in New Zealand if it is received and read here.<sup>316</sup> It is the actual communication to a reader that matters. Action can be commenced in New Zealand against the overseas publisher. However, courts retain a discretion to strike out such proceedings if New Zealand is not the most convenient forum and there are indications that they may not be slow to exercise it.<sup>317</sup> Such a proceeding is not a realistic option in most cases.

*Spread*

- 7.140 Then there is the difficulty of *spread*. Once published, a piece of information can “go viral”; it may be taken up and repeated by others. It is not unusual for a suppressed name which has appeared on a website to spread rapidly via other websites and media such as Twitter. In the UK recently the suppressed name of a football player became the subject of a multitude of “Tweets”. While in theory every repetition constitutes a separate offence for which every person involved could be prosecuted, the practical realities are obviously such that that is unlikely to happen. But that is not to say that there might not be *some* prosecutions. If the names of offenders can be obtained from Twitter, there is no reason why one or two persons (perhaps the initiator of the swarm of publications, or a person who has incited others to publish, or someone who has offended frequently, or the host of a particularly prominent website) could not be singled out for enforcement measures. A test case of that kind might well have a chilling effect on others. Recently in the UK the Attorney-General said that individuals who had breached an injunction by “tweeting” the name of the footballer in question could be prosecuted: “I will take action if I think that my intervention is necessary in the public interest.”<sup>318</sup>
- 7.141 No doubt such a prosecution cannot erase the harm already done, nor can it guarantee that the same conduct will not be repeated by others. But this does not mean that suppression orders are a waste of time. They serve to limit, if not entirely contain, the availability of the offending information. Moreover they do serve to keep matter out of the mainstream media, which remains many citizens’ source of information.
- 7.142 Exactly the same is true of publications which constitute civil wrongs such as defamation. If a defamatory statement is repeated or passed on by many people via Twitter, in theory the aggrieved individual could sue them all, but the lack of realism in such a procedure is obvious. It would certainly be possible to choose one transgressor as defendant, but the originator of such a communication will quite often be a private individual who is not “worth the powder and shot”. So while in principle defamation affords a powerful means of redress to an aggrieved person, the practical difficulties in the new digital age are obvious. Yet sometimes the threat of legal action may serve to contain publication, and, perhaps more importantly, may serve to deter the mainstream media picking up the story from the social media. Eady J has put this point, which we have already made in relation to the criminal law:<sup>319</sup>

It is fairly obvious that wall to wall excoriation in national newspapers, whether tabloid or broadsheet, is likely to be significantly more intrusive and distressing for those concerned than the availability of information on the Internet ... to those however many who take the trouble to look it up. For so long as the court is in a position to prevent some of that intrusion or distress ... it may be appropriate to maintain the degree of protection.

## Conclusion

7.143 The law can achieve some measure of control over the new forms of communication. There have been, and continue to be, successful court actions against persons who have engaged in unlawful conduct, be it defamation, breach of privacy, contempt of court, or various criminal offences. The law is not powerless. But its enforcement does pose greater challenges than have traditionally existed. Only so much can be done to change those practicalities of enforcement, but in the next chapter we explore possible reforms.

## NON-LEGAL REMEDIES

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### Online solutions to online problems

7.144 As discussed in chapter 2 of this paper, the read/write architecture of the web facilitates some unique forms of self-regulation. User-generated feedback and comment is hardwired into the design of many websites, including blogs and self-publishing platforms like YouTube. In addition many major internet entities have adopted sophisticated automated systems for dealing with offensive or harmful publishing.

7.145 The amount of data shared on these leading internet properties is mind boggling: each month Facebook's 750 million users exchange 30 billion pieces of content. Trade Me, a minnow by Facebook standards, but with an even greater penetration in the New Zealand market, has 2.8 million members who, on average, will publish 25,000 new posts on Trade Me message boards each day.<sup>320</sup> At any given time there may be as many as 550 million words contained on these message boards.

7.146 It is of course not humanly possible (nor, arguably desirable) to preview all user generated content before it is published. Often the existence and content of offending posts will be unknown to the publishing website. Instead sites like Trade Me, Facebook, Twitter and rely on a combination of contractual "terms and conditions" and community moderation to establish and maintain civil behaviour on their sites.<sup>321</sup>

7.147 Typically, users must register and agree to comply with the site's terms and conditions before being able to make use of the site. By default, other users of the site become the agents for policing compliance with these rules and have access to various tools allowing them to "vote" content off and "report" content which transgresses the rules in some way. Facebook told us its "robust reporting infrastructure leverages the 750 million people who use our site to monitor and report offensive or potentially dangerous content."<sup>322</sup>

### *Trade Me*

- 7.148 As an online auction site Trade Me's priority is protecting and enhancing the security of the site and designing systems which can detect frauds and other illegitimate activities with the potential to undermine customers' trust in the site. However Trade Me is also committed to ensuring its community message boards provide a safe environment for discussion and that those using the message boards comply with both internal and legal publishing standards.
- 7.149 Over and above their systems of community moderation and reporting, Trade Me has devoted considerable resource to customising software programmes that will allow them to filter for content that is offensive, including breaches of current court orders relating to suppressed evidence or names. Trade Me's legal team has fostered strong relationships with key private and public sector organisations, including the Police, banks and the telecommunications sector, allowing it to respond swiftly when required.
- 7.150 Trade Me's physical presence in New Zealand and its strong engagement with both its users and the regulators contrasts with the remoteness and inaccessibility of the other online entities which dominate in New Zealand.

### *Facebook and Google*

- 7.151 Like Trade Me, Facebook and the Google-owned site YouTube require users to agree to detailed terms and conditions (referred to by Facebook as its Statement of Rights and Responsibilities) before posting content on their sites. In addition Facebook and YouTube have devised simple sets of "community standards" not dissimilar to the types of publishing codes developed by broadcasters. These community standards provide a straightforward guide to civil behaviour online and cover many of the same types of harmful publishing discussed earlier in this chapter: threats; hate speech; graphic violence; impersonation; privacy and bullying and harassment.
- 7.152 The sites provide a variety of tools for reporting content considered offensive or which breaches community standards. Facebook's "Help Centre" also provides detailed advice on how to manage privacy settings and a variety of self-help tools for responding to abusive or intrusive behaviour of other users.
- 7.153 Members wishing to report abuses can file reports using automated templates which provide a menu of options to describe the nature of the problem.
- 7.154 Like Google, Facebook reserves the right to unilaterally remove content that violates its terms and conditions. Facebook told us that its automated systems removed "thousands of pieces daily" that were in violation of its policies.

- 7.155 To help understand how effective these self-regulatory systems are in preventing and remedying harms such as cyber-bullying, harassment and online impersonation we asked Google and Facebook to provide us with specific information about the extent to which New Zealand users were reporting abuses and the frequency with which such reports resulted in content being removed from sites and/or users having their accounts terminated. We were also interested to know more about the nature of the formal requests Google and Facebook were receiving from police, lawyers or representatives of the government for content to be taken down or for the release of the account details of specific users.
- 7.156 Unfortunately we were told that neither currently captured the sort of information with respect to problem reporting by individual users that would allow them to provide us with the detailed country specific analysis we were seeking.<sup>323</sup>
- 7.157 However, since 2009 Google has published six monthly “Transparency Reports” documenting the number of government or court initiated requests it has received to either remove content associated with one of its products or services or to reveal information about a user.<sup>324</sup> The reports are searchable by country of origin and for those countries which have generated more than ten requests during the reporting period these are broken down to show; the originator of the request (court orders or police/executive); the Google product involved (Street View; Google Search; Blogger; Gmail; ); and the nature of the problem (hate speech; privacy and security; impersonation; defamation etc.).
- 7.158 In addition to this tabulated data, Google provides details of requests dealt with during each reporting period to illustrate country trends and the principles which underpin their decisions whether or not to comply with requests to remove content.<sup>325</sup>
- 7.159 The examples illustrate how Google, as a global entity, is applying what are effectively editorial judgments, weighing the competing claims of free speech against the specific cultural, legal and political interests of hundreds of different sovereign states whose citizens’ make use of their global products and social spaces.
- 7.160 Google’s transparency reports for New Zealand between 2009 - 2010 recorded fewer than ten government/court requests for content to be removed in each of the six monthly reporting periods. Of these, 83% were complied with in the first period and 100% in the second. Because the number of requests fell below ten, Google provided no further detail about the nature of the contested content. Google registered no requests for user information from New Zealand police or the courts over the 18 months. (In comparison, Google received 345 data requests from official Australian sources, 81% of which were either fully or partially complied with.)

- 7.161 Facebook does not report publicly on its interface with law enforcement and other legal or governmental bodies with respect to take down requests or information about users. However they were able to tell us that in the first half of 2011 they had received 21 requests from New Zealand law enforcement agencies. Two of these involved “emergency matters that required urgent handling”.<sup>326</sup>

### Discussion

- 7.162 Without any empirical evidence about the use of reporting tools and the speed and frequency with which content is removed as a result of user reports it is impossible to gauge the effectiveness of community moderation.<sup>327</sup>
- 7.163 Arguably the exponential growth in these two publishing platforms, and Facebook, is of itself clear evidence that for the vast majority of users, the environments are considered safe and civil.
- 7.164 Facebook told us its “culture of authentic identity”, signified by the use of true names and identities, has made Facebook “less attractive to bad actors who generally do not like to use their real names or email addresses.”

People are less likely to engage in negative, dangerous, or harassing behaviour online when their friends can see their names, their posts and the information they share. Our real name culture creates accountability and deters bad behaviour since people using Facebook understand that their actions create a record of their behaviour.

- 7.165 However given the totally unprecedented volume of data being published on sites like *You Tube*, Twitter and Facebook, it is of course inevitable that a percentage of users will abuse the technology and it is evident from the feedback we received from NetSafe that a percentage of these will go unchecked. In response to the problem of people impersonating others online or setting up fake profile pages Facebook told us it had recently introduced a new automated system for auditing accounts reported to be fake or an impersonation.<sup>328</sup>
- 7.166 Facebook also told us it worked with law enforcement agencies from around the world and discloses information “pursuant to subpoenas, court orders, or other requests” where the company had a “good faith belief that the response was required by law.”
- 7.167 The police told us they were that they are actively working with off shore internet entities to “develop and establish procedures to enable information to be sought and obtained in a timely and consistent basis.”<sup>329</sup>
- 7.168 Similarly, police tell us that when the goal is to have offensive content taken down from a website, rather than to initiate a prosecution, some social media sites will respond after receiving a formal request on police letterhead.

- 7.169 This appears to be consistent with the response we received from Facebook describing how it responds to legal requests to remove content. It will first review the content against its own Statement of Rights and Responsibilities and if a violation was found it would remove the content and, if appropriate, disable the account of the person responsible. Occasionally, if content is found to be illegal in the jurisdiction from which the complaint originated, but not in breach of Facebook's terms, the organisation may prevent the content being shown to people in that country but not remove it from the site.
- 7.170 With respect to requests for account details or other user information from law enforcement agencies, Facebook said it may disclose such details "pursuant to subpoenas, court orders, or other requests (including criminal and civil matters) if we have a good faith belief that the response is required by law."
- 7.171 The fact that a request may come from another jurisdiction was not necessarily an impediment to Facebook cooperating provided "we have a good faith belief that the response is required by law under the local laws, apply to people from that jurisdiction, and are consistent with generally accepted international standards."

## CONCLUSION

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- 7.172 Our preliminary research and consultation indicate that significant harms are being experienced by some as a result of the abusive and sometimes malicious use of the internet as a publishing platform. Young people are particularly vulnerable given the all-pervasive nature of social networking in their lives. However the problems are not confined to the young. As we have seen, malicious impersonation and various forms of cyber harassment can have an immensely debilitating effect on people's well-being and may even impact on their professional and business lives.
- 7.173 Existing criminal and civil law is clearly capable of dealing with many of the types of harmful communication which we have canvassed in this chapter.
- 7.174 However, the current law is not always capable of addressing some of the new and potentially more damaging ways of using communication to harm others. The obstacles include the difficulties the public can experience accessing the law; the adequacy of investigative resources and tools; problems in the way in which offences are defined; and possible gaps in the types of offences currently included in the statute book. In addition those websites which publish user-generated content need specific knowledge of transgressions in order to be able to respond effectively to legitimate complaints.
- 7.175 As well as legal remedies, many social media sites rely on a combination of internal controls, including "terms and conditions", backed by community monitoring and reporting systems to deal with speech abuses on their sites.

- 7.176 However there is a lack of empirical information about the effectiveness of these self-regulatory systems and given the vast amount of data published on these sites every day there are clearly limits to the amount of monitoring that can take place.
- 7.177 In the following chapter we put forward some preliminary ideas for ways in which it may be possible to address some of the problems confronting those seeking remedies for speech abuses arising on the internet.

- 221 Internet experts advise that anonymity on the internet is, in most cases, more perception than reality. IP numbers are associated with material posted on the internet making it possible to trace the originator of most content. While anonymising tools are available they are not easy to use.
- 222 NetSafe was established in 1998 as an independent non-profit organisation committed to improving community understanding of the internet and how to enhance safety and security online. It works with a range of governmental and non-governmental organisations including its core strategic partners, the Ministry of Education, the Ministry of Economic Development and InternetNZ, a non-profit open membership organisation whose aim is to promote and protect the internet in New Zealand.
- 223 Analysis of New Zealanders' online habits by digital media measurement company comScore show that social media sites consume the lion's share of the time we spend online. In May 2011 96% of all New Zealand internet users visited a social media site and 79% visited *Facebook*. (By comparison, *Myspace* and *Twitter*'s reach was only 8.2% and 8.5% of the potential online population.) The average time spent on *Facebook* by users in May was 310.9 minutes – compared with 133.6 minutes on Trade Me; 163 on *Google* sites; 36 minutes on Fairfax news sites and 30.2 minutes on APN News and Media sites. *Google*'s dominance in the New Zealand search market is even greater than *Facebook*'s: of the 2.6 million unique searches carried out by New Zealand internet users in May, 90% involved searches performed on *Google* owned properties (*YouTube* and *Google Maps* included).
- 224 Information provided to the Law Commission in confidence by a New Zealand search engine optimisation company.
- 225 Computer security company Symantec has published a number of surveys on cybercrime based on interviews with 20,000 adults in 24 countries including New Zealand. The 2011 Norton Cyber Report estimated that cybercrime, which included financial scams, viruses and malware as well as identity theft and harassment cost New Zealanders NZ\$625.5 million in 2010-2011.
- 226 This summary drew on preliminary feedback to the Law Commission's review provided to police legal advisers by district police. (March 2011).
- 227 Ibid.
- 228 The original site was closed by *Google* following a complaint from the Ministry of Social Development but the offending content was then posted on mirror sites.
- 229 Andrea Warrington "Teen charged over internet video threats." *The New Zealand Herald* (New Zealand, 20 September 2011). Rachel Taylor "Dunedin arrest after Facebook death threat" *Otago Daily Times* (New Zealand, 23 June 2010) < [www.odt.co.nz](http://www.odt.co.nz) >. The 17-year-old Dunedin man investigated over the *Facebook* threats was convicted and sentenced in the Dunedin District Court to 100 hours community work < [www.odt.co.nz](http://www.odt.co.nz) >.
- 230 David Clarkson "Girl forced to move after sex act filmed" *Christchurch Court News*, 25 November 2011, < [www.courtnews.co.nz](http://www.courtnews.co.nz) >.
- 231 "Facebook ID defied court order" *Marlborough Express* (New Zealand, 2 September 2011).
- 232 Crown Law emphasised that some complaints were quickly resolved informally and did not result in a formal investigation. The 28 complaints investigated resulted in a variety of actions including contempt proceedings, referral to the police and the removal of the offending content.
- 233 As part of the Law Commission's 2011 review of that Act we recommended that section 56 be amended to provide that this exemption would no longer apply where the collection, use or disclosure of personal information would be highly offensive to an objective reasonable person.
- 234 The Privacy Commission's 2010 UMR survey, *Individual Privacy & Personal Information, UMR Omnibus Results March 2010* found that 57% of those surveyed believed that Facebook and other social media sites were private spaces – < [www.privacy.org.nz](http://www.privacy.org.nz) >.

- 235 Section 61 of the Human Rights Act 1993 prohibits publications which are “threatening, abusive, or insulting” and “likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.”
- 236 James H. Liu, Caren August, Anne Waapu and Arama Rata *Racism in New Zealand Through the Lenses of Controversy Provided by Social Media on Paul Henry and Hone Harawira*, (2011) School of Psychology, Centre of Applied Cross-Cultural Research, Victoria University of Wellington < [www.diversityissues.org.nz/](http://www.diversityissues.org.nz/) > .
- 237 As well as its advisory and educative roles NetSafe has worked with the New Zealand Police, the Privacy Commissioner and the Department of Internal Affairs to provide internet users with a destination site for reporting incidents on the web which may involve law breaking. The site, called the ORB, provides nine different avenues for lodging online complaints including: internet scams or frauds; privacy breaches; child pornography and exploitation; computer system attacks; objectionable material and online trading issues. The site has been operating for a year and in that time the “child alert” link had been used 101 times to access the Department of Internal Affairs’ Censorship Compliance Unit to the presence of possible child sexual exploitation on the web; 69 times to access the specialist New Zealand police team focused on tracking online child exploitation in New Zealand; 25 times to report objectionable material to the Department of Internal Affairs’ censorship team and 30 times to report possible privacy breaches to the Privacy Commissioner.
- 238 Ministerial Committee on Suicide Prevention *Review of the restrictions on the media reporting of suicides* (prepared for the Prime Minister, Rt Hon John Key, November 2010) at [21] < [www.moh.govt.nz/](http://www.moh.govt.nz/) > .
- 239 *Ibid* at para [7].
- 240 This finding contrasts with other research which has found women much more likely to be the victims of cyberstalking than men. Although there are no official statistics on the incidence of cyberstalking, the British Crime Survey estimates up to 5 million people experience cyberstalking each year in the UK.
- 241 Karen McVeigh “Cyberstalking ‘now more common’ than face-to-face stalking” *Guardian* (United Kingdom, 8 April 2011) < [www.guardian.co.uk/](http://www.guardian.co.uk/) > .
- 242 Ryan Singel “Yale Students’ Lawsuit Unmasks Anonymous Trolls, Opens Pandora’s Box” *Wired* 30 July 2008 < [www.wired.com/](http://www.wired.com/) > . For a full discussion of online harassment see for example Martha C. Nussbaum “Objectification and Internet Misogyny” Saul Levmore and Martha C Nussbaum (eds) *The Offensive Internet: privacy, speech and reputation* (Harvard University Press, 2010) at 68.
- 243 *Ibid*, < [www.wired.com/](http://www.wired.com/) > .
- 244 In April 1999 the offender pleaded guilty to three counts of solicitation for sexual assault and one count of stalking. Joanna Lee Mishler, “Cyberstalking: Can Communication via the Internet Constitute a Credible Threat and Should an Internet Service Provider be Liable if it does?” (2000) 17 *Computer and High Technology Law Journal* at 115.
- 245 See “Internet Troll Jailed After Mocking Teenagers” (2011) *Guardian* < [www.guardian.co.uk/uk/2011/sep/13/internet-troll-jailed-mocking-teenagers](http://www.guardian.co.uk/uk/2011/sep/13/internet-troll-jailed-mocking-teenagers) > . The defendant was charged with two counts under the Communications Act 2003 (UK) – < [www.thelawpages.com/court-cases/Sean-Duffy-7443-1.law](http://www.thelawpages.com/court-cases/Sean-Duffy-7443-1.law) > . Section 127 of that Act provides:
- “Improper use of public electronic communications network:
- (1) A person is guilty of an offence if he—
- (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
- (b) causes any such message or matter to be so sent.

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- (2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he—
- (a) sends by means of a public electronic communications network, a message that he knows to be false,
  - (b) causes such a message to be sent; or
  - (c) persistently makes use of a public electronic communications network.
- (3) A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.
- (4) Subsections (1) and (2) do not apply to anything done in the course of providing a programme service (within the meaning of the Broadcasting Act 1990 (c. 42)).”

246 Crimes Act 1961, s 123.

247 Sedition by the Crimes (Repeal of Seditious Offences) Amendment Act 2007, s 5 and criminal libel by the Defamation Act 1992, s 56(2).

248 Crimes Act 1961, s 306.

249 *Ibid* s307.

250 *Ibid* s307A.

251 Summary Offences Act 1957, s 21.

252 Crimes Act 1961, s 237.

253 Above para 7.22.

254 Harassment Act 1997, s 8.

255 *Ibid* ss 3 and 4.

256 Crimes Act 1961, s 216j.

257 “Naked photo sends jilted lover to jail”, (13 November 2010), < [www.stuff.co.nz](http://www.stuff.co.nz) >.

258 Films, Videos and Publications Classification Act 1993, ss 123-124.

259 *Ibid*, s 3.

260 Crimes Act 1961, s 66(1).

261 *Ibid*, s 311(2).

262 Human Rights Act 1993, s 131.

263 Summary Offences Act 1980, s 8.

264 Crimes Act 1961, s 179(a).

265 *Ibid*, s 179(b).

266 *Ibid*, s 180.

267 Law Commission, *Review of the Privacy Act 1993* (NZLC R123, 2011) at [12.22]-[12.39].

268 Crimes Act 1961, s 240.

269 See Burrows and Cheer, *Media Law in New Zealand* (6th ed, LexisNexis, Wellington, 2011) at ch 10.

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- 270 This provision will soon be replaced by the updated provisions in the Criminal Procedure Act 2011, s 200 and following.
- 271 For example Family Courts Act 1980, s 11A - 11D.
- 272 Coroners Act 2006, s 71.
- 273 Court Martial Act 2007, ss 38 - 39.
- 274 See Burrows and Cheer, *Media Law in New Zealand*, above n at 526 - 562.
- 275 *Solicitor-General v Miss Alice* [2007] 2 NZLR 783. See also *Berryman v Solicitor-General* [2005] 3NZLR 121.
- 276 *Solicitor-General v Siemer* [2011]3 NZLR 101.
- 277 *Slater v Police* HC Auckland CRI-2010-404-379, 10 May 2011 - 8 July 2011. However leave to appeal has been granted on the question of whether the material on the blog was a "report or account."
- 278 Letter from Greg Robins, Associate Crown Counsel, to Law Commission regarding contempt and breaches of court orders (4 October 2011).
- 279 Jason Deans "Facebook juror jailed for eight months" *Guardian* (United Kingdom 16 June 2011)
- 280 Eva Maree Ayala "Tarrant County juror sentenced to community service for trying to 'friend' defendant on Facebook" (28 August 2011) < [www.star-telegram.com/2011/08/28/3319796/juror-sentenced-to-community-service.html#ixzz1e11nYHG](http://www.star-telegram.com/2011/08/28/3319796/juror-sentenced-to-community-service.html#ixzz1e11nYHG). >
- 281 Brian Grow "As jurors go online, U.S. trials go off track" Reuters (United States 8 December 2010)
- 282 *Lange v Atkinson* [2000] 3NZLR 385. The boundaries of this privilege remain ill-defined in New Zealand.
- 283 *Reynolds v Times Newspapers Ltd* [2001] 2AC 127; *Jameel v Wall Street Journal Europe* [2007] 1AC 359.
- 284 John Burrows and Ursula Cheer *Media Law in New Zealand* (6<sup>th</sup> ed LexisNexis, Wellington, 2011) at [2.2.4(e)] and the cases there cited.
- 285 *O'Brien v Brown* [2001] DCR 1065.
- 286 *Ibid* at 1074.
- 287 See for example *Baglow v Smith* [2011] OJ No 3886.
- 288 *Crookes v Newton* 2011 SCC 47. Cf the New Zealand authority *International Telephone Link Pty Ltd v IDG Communications Ltd* HC Auckland CP 344/97, 20 February 1998.
- 289 Ben Dowell, "Rise in defamation cases involving blogs and Twitter" (26 August 2011) *Guardian* < [www.guardian.co.uk](http://www.guardian.co.uk) > .
- 290 "South Tyneside Council 'gets Twitter data' in blog case" 30 May 2011, BBC News, < <http://www.bbc.co.uk/news/uk-england-tyne-13588284> > . Twitter makes clear that serious contraventions of its terms and conditions may result in their passing user details to appropriate investigatory and law enforcement bodies.
- 291 *Hosking v Runting* [2005] 1NZLR 1.
- 292 *Brown v Attorney-General* [2006] DCR 630.
- 293 Noted by Steven Price in *Media Law Journal*, 29 March 2011, at .
- 294 Discussed in *Hosking v Runting* [2005] 1NZLR 1 at [301]; *R v X* [2010] 2NZLR 181 at [41]-[47].

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- 295 Copyright Act 1994, ss 122A-122U.
- 296 *Khorasandjian v Bush* [1993] QB 727.
- 297 Harassment Act 1997, s 9.
- 298 Domestic Violence Act 1995, s 3(1) In this Act, domestic violence, in relation to any person, means violence against that person by any other person with whom that person is, or has been, in a domestic relationship.  
(2) In this section, violence means— (a) physical abuse (b) sexual abuse (c) psychological abuse, including, but not limited to,—(i) intimidation (ii) harassment (iii) damage to property (iv) threats of physical abuse, sexual abuse, or psychological abuse (v) in relation to a child, abuse of the kind set out in subsection (3).
- 299 [1897] 2QB 57. See Stephen Todd,(ed) *The Law of Torts in New Zealand* (5<sup>th</sup> ed, Brookers, 2009) at [4.7].
- 300 *Ibid* ch 3.
- 301 Privacy Act 1993 s 2(1)(b)(xiii).
- 302 *Ibid* s 56.
- 303 *Ibid* s 6, principle 11(b).
- 304 Law Commission *Review of the Privacy Act 1993* (NZLC R123, 2011) [4.35]-[4.41]; [4.74] - [4.75]; [2.97] - [2.99].
- 305 *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129.
- 306 See Stephen Todd (ed) *Law of Torts in New Zealand* (6<sup>th</sup> ed, Brookers, 2009) at [17.4.07].
- 307 *Brash v Doe* (HC Wellington CIV 2006-485-2605 16 November 2006).
- 308 See the discussion in Taylor, < [www.businessinsider.com](http://www.businessinsider.com) > May 23 2011.
- 309 See for example *Burns v Howling at the Moon Magazines Ltd* [2002] 1 NZLR 381.
- 310 See for example *R v Skelton* (HC Hamilton CRI 2006-019-6530, 9 July 2008).
- 311 Summary Proceedings Act 1957, s 198B.
- 312 *Irwin Toy Co Ltd v Doe* [2000] OJ No 3318.
- 313 *Norwich Pharmacal Co Ltd v Commissioners of Customs and Excise* [1973] 2 All ER 943. On this topic general see Harvey, [internet.law.nz](http://internet.law.nz) (LexisNexis, Wellington 2005) at [6.5.13]
- 314 < [www.guardian.co.uk](http://www.guardian.co.uk), 20 May 2011 > .
- 315 *Police v Slater* [2011] DCR 6 at [76]. See, on appeal, *Slater v Police* HC Auckland CRI 2010-404-378, 10 May 2011, 8 July 2011: Slater was granted leave to appeal on one point.
- 316 *Dow Jones & Co Inc v Gutnik* (2002) 210 CLR 575, see also *National News Ltd v University of Newlands* CA 202/04.
- 317 See Burrows and Cheer *Media Law in New Zealand* (6<sup>th</sup> ed LexisNexis 2011) at [2.2.4(e)]
- 318 < [www.guardian.co.uk](http://www.guardian.co.uk), 7 June 2011 > .
- 319 *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 at [24].
- 320 Email from Christine Lanham to Law Commission regarding Trade Me traffic (31 May 2011).

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- 321 An analysis of the use of community moderation and reporting tools by Trade Me analysts showed that in a four week period over October and November 2011 the organization received:
- 2500 reports from members about posts on the message boards. Each report/complaint may have referred to one or more posts.
  - these reports resulted in Trade Me removing 700 individual posts and 840 full threads, or 25,390 posts in total (largely notice and takedown).
  - In addition, the Trade Me message board community voted off 6,643 posts.
- 322 Letter from Sarah Wynn-Williams, Facebook Manager, Public Policy, to the Law Commission regarding Facebook's regulatory mechanisms (18 August 2011).
- 323 Facebook provided us with the following explanation: "Facebook does not flag user reports on a per country basis and many users do not tell us what country they are in. As we do not organize or collate the data on a per country basis, to provide this information we would have review all requests received to try and determine which were from New Zealand. As this is a hugely expensive and time consuming task, I am afraid that we are not in a position to provide the information."  
Google assured us that its reporting and response system was "robust and fast moving" but, like Facebook, it "did not have statistics or data that would be useful to share" regarding the level of user generated complaints from New Zealand and the instances where content has been removed.
- 324 Google Transparency Report 2011 < [www.google.com/transparencyreport/](http://www.google.com/transparencyreport/) > . These reports do not include child abuse material (which is automatically removed from Google sites) and nor do they include copyright-related removals associated with YouTube.
- 325 Their website includes the following examples: "July - December 2010 Italy: We received a request from the Central Police in Italy for removal of a YouTube video that criticized Prime Minister Silvio Berlusconi and simulated his assassination with a gun at the end of the video. We removed the video for violating YouTube's Community Guidelines.
- Jan - June 2010 China During the period that Google's joint venture operated google.cn, its search results were subject to censorship pursuant to requests from government agencies responsible for internet regulation. Chinese officials consider censorship demands to be state secrets, so we cannot disclose any information about content removal requests for the two reporting periods from July 2009 to June 2010. Youtube was inaccessible in China during this reporting period.
- Argentina The courts in Argentina issued two orders that sought the removal of every search result mentioning a particular individual's name in association with a certain category of content. The number of search results at issue well exceeds 100,000 results. We did not attempt to approximate the number of individual items of content that might be encompassed by those two court orders. Google appealed those orders. The number of user data requests we received increased by 37% compared to the previous reporting period.
- July - December 2009 Argentina A federal prosecutor claimed that information about him and his wife (a federal judge) had been posted for analysis on two political blogs and asked that we remove them. We removed a portion of one of the blogs for revealing private information about the judge, but otherwise did not comply because it did not violate our internal policies.
- Germany A substantial number of German removal requests resulted from court orders that related to defamation in search results. Approximately 11% of the German removal requests are related to pro-Nazi content or content advocating denial of the Holocaust, both of which are illegal under German law."
- 326 Email from Sarah Wynn-Williams to Law Commission regarding complaints' breakdown (2 September 2011).
- 327 The exception, as noted earlier, is Trade Me which was able to provide an analysis of the use of community reporting as a regulatory tool with respect to the oversight of message boards.

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328 If this revealed a problem with the account the person would be sent a message requiring them to provide evidence that they were in fact the account holder, such as registering and confirming a mobile phone number. If they failed to do this within a specified time the account is disabled. In addition Facebook alerted us to the fact that their Help Centre allows people attempting to have an imposter account disabled to get access to information related to those accounts without submitting a subpoena or other formal legal processes.

329 Letter from Jackie McCallough, Police Legal Adviser, to the Law Commission (2 September 2011).

Police note that many of the large online entities are incorporated in New Zealand and NC3 has had success in serving a warrant on the registered company address in New Zealand and its parent US entity by email. Police are also working to develop a letter of agreement with Yahoo which would provide alternative protocols allowing it to access subscription/registration details and IP/activity logs in some circumstances.

# Chapter 8

## Free speech abuses: options for reform

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### INTRODUCTION

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- 8.1 Robust communication has been a hallmark of the internet since its inception. Free speech values and an abhorrence of censorship are central to its culture.
- 8.2 Some internet advocates may argue that any damage caused by offensive online speech might be regarded as an unfortunate by-product of the much greater good associated with the rough and tumble of the free flow of information and ideas on the internet.
- 8.3 Our tolerance for offensive and damaging speech is influenced by myriad individual, cultural and environmental factors. Many would argue that cyberspace provides millions of different “environments”, and that individuals are therefore free to choose the type of content they expose themselves to, and the types of online company they keep.
- 8.4 This is true – to an extent. Those who are offended by obscenities and personal invective can avoid reading those websites which publish such speech. However, while it may be a feasible strategy for adults to avoid destinations likely to offend them, it is no solution to tell young people whose peers are living their lives on Facebook and You Tube to simply avoid these sites. Such a remedy is surely the 21st century equivalent of denying a child access to television.
- 8.5 Furthermore, as we have discussed, such content is not easily removed or quarantined, thanks to Google or similar search engines and the practice of caching.
- 8.6 In the preceding chapter we concluded that the criminal and civil law already covers many of the harmful online behaviours reported by the likes of NetSafe. However we also observed that there are problems accessing and enforcing the law and sometimes in determining whether the Acts are in fact capable of being applied to internet speech. We also noted some gaps in the law.

8.7 In this chapter we:

- make preliminary proposals for amendments to various statutes addressing speech-related harms;
- ask whether there is a case for creating a body capable of providing swift and inexpensive redress for those who have been seriously harmed by speech abuses;
- ask whether there is a case for establishing an independent Commissioner to act as a portal for complaints about speech-related harms.

## REFORMING THE LAW

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### Problems of coverage of the law

8.8 As discussed, there are two main problems with respect to coverage:

- defining the type of communication covered by the statute.
- providing a legal remedy to novel publishing harms arising on the internet.

8.9 We discuss our preliminary proposals for dealing with these problems below.

#### *Type of communication covered*

8.10 As noted there are wide variations in how statutes define the type of communication they cover. Some extend their prohibitions, expressly or impliedly, to *any* form of communication.

8.11 That is the case with many of the provisions prohibiting publication of material suppressed by a court. The standard phrase “in any report or account of proceedings” could hardly be wider. It would appear to cover a report in any medium, including a blog or other website (although some residual doubts about the extent of this are the subject of an appeal, as noted in the previous chapter). Most of the Crimes Act provisions about threats and incitements are couched in the most general terms: they can be communicated in any way. Those provisions, although written a long time ago, are in terms flexible enough to do service in any communication environment. Other provisions expressly and in some detail extend the prohibition to elements beyond the mainstream media. An example is the Coroners’ Act 2006 which prohibits the making public of certain information about self-inflicted death. “Make public” is expressly defined as meaning publishing by means of broadcasting, a newspaper, a book or magazine, a sound or visual recording, or “an internet site that is generally accessible to the public or some other similar electronic means”<sup>330</sup>. In similar vein, the Films, Videos and Publications Classification Act 1993, which creates offences relating to objectionable publication, provides that a publication is constituted by supplying, distributing or importing not only in physical form but also by means of electronic transmission “whether by way of facsimile transmission, electronic mail or other similar means of communication other than by broadcasting”<sup>331</sup>.

- 8.12 Other provisions, however, are narrower, and extend their reach only to quite specific types of communication. For example the Prostitution Reform Act 2003 prohibits advertisements for commercial sexual services on radio or television, or in a newspaper or periodical (except in the classified advertisement section) or in a public cinema.<sup>332</sup> That is quite specific, and does not apply to advertisements on the internet or other forms of new media.
- 8.13 Such instances are few enough, but we think there should be a perusal of the statute book to make sure that all controls on communication are widely enough expressed to fulfil their purpose. In some areas – and the Prostitution Reform Act may be one – there may be a genuine reason for confining the offence to the mainstream media. In others there may not.
- 8.14 In this regard we draw attention to three provisions in particular where we think the existing drafting would benefit from amendment to make it clear beyond doubt that they cover communication in cyberspace. Perhaps they would be so interpreted now, but there is advantage in spelling it out beyond doubt.
- 8.15 The first is the Harassment Act 1997, where both the civil and criminal provisions use a definition of “harassment” which provides that it can be constituted, among other things, by:<sup>333</sup>
- making contact with a person, whether by telephone, correspondence or in any other way;
  - giving offensive material to a person or leaving it where it will be brought to the attention of that person; or
  - acting in any other way that causes the person to fear for their safety.
- 8.16 Probably most instances of cyber-bullying would already be held to be covered by the first of the above paragraphs when the person is targeted directly. There are District Court decisions supporting that interpretation.<sup>334</sup> But the advantages of expanding the provision to clearly cover harassment in cyberspace are (a) that it removes any shadow of doubt; and (b) that the message is clearly apparent to all who use the legislation. We think the ambit of the first paragraph should be clarified by inserting “electronic communication” after “telephone, correspondence”. More important, we think, is to expand the second paragraph to make it clear that “leaving [offensive material] where it will be brought to the attention of that person” includes placing offensive messages on websites, or in the social media. Harm can be done, and is done, by offensive messages which are not sent directly to the subject of, but to others (sometimes very many others) in circumstances where it is highly likely they will come to the notice of the subject. The second of the above paragraphs is presently not clearly adapted to that situation.

- 8.17 The second is section 112 of the Telecommunications Act 2001. It prohibits the use of a “telephone device” to convey disturbing, annoying or irritating messages. There is currently some doubt as to what the boundaries of “telephone device” are. As currently defined it is “any terminal device capable of being used for transmitting or receiving any communications over a network designed for the transmission of voice frequency communication”. Whether this applies to any communication via computer is not absolutely clear, particularly since the advent of wireless.
- 8.18 We think that should be clarified. If communication via computer is to be covered, consideration will need to be given to the interface of this provision with the Harassment Act 1997. But there is merit in so providing: to do so would mean there would be a clear route for prosecuting deeply disturbing conduct of the kind referred to in paragraph 7.58 above.
- 8.19 The United Kingdom Communications Act 2003 makes it an offence to send by means of a “public electronic communications network” a message that is “grossly offensive or of an indecent, obscene or menacing character”.<sup>335</sup>
- 8.20 The third is the Human Rights Act 1993. Currently section 61 renders it unlawful:
- (e) to publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television words which are threatening, abusive, or insulting; or
  - (f) To use in any public place as defined in section 2(1) of the Summary Offences Act 1981, or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting; or
  - (g) to use in any place words which are threatening, abusive, or insulting if the person using the words knew or ought to have known that the words were reasonably likely to be published in a newspaper, magazine, or periodical or broadcast by means of radio or television, -
- being matter or words likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.
- 8.21 Probably paragraph (a) extends to internet publication: “publish or distribute” is certainly wide enough to do so, and “written material” is defined to include “signs and visible representations”. But the section is drafted with an eye to an earlier time, and a possible argument could be made that when read in the context of paragraphs (b) and (c) the whole provision is confined to the traditional print and broadcast media. It could, we think, be usefully updated.

- 8.22 Sections 62 and 63 deal with sexual and racial harassment respectively. They render it unlawful to use language or visual matter which is offensive to a person, and is either repeated, or of such a significant nature, that it has a detrimental effect on the person in respect of a number of specified areas, including:<sup>336</sup>
- (g) access to places, vehicles and facilities;
  - (h) access to goods and services; ...
  - (j) education.
- 8.23 We have no doubt that harassment of the kinds with which the sections deal can deter individuals, particularly young people, from using the social media, and thus limit their interaction with their peers. That is perhaps covered by paragraph (h), but not clearly and unarguably so. We wonder whether the matter is significant enough to justify adding a further paragraph: “(k) participation in fora for the exchange of ideas and information”.
- 8.24 The *common law* is less problematic in this regard. Its inherent flexibility is well able to deal with all forms of communication. In relation to contempt of court there is no doubt that any form of dissemination of prejudicial material via any vehicle of communication can constitute a contempt. In New Zealand proceedings have been commenced in relation to publication of allegedly prejudicial material on a website. The Solicitor-General has, on occasion, warned that if material is not removed from a website, contempt proceedings might ensue. In both the United Kingdom and New Zealand concerns have been expressed about jurors in a criminal case doing their own research on the internet to discover material which might be relevant to the case before them. There is precedent in the United Kingdom for proceedings being commenced against a juror guilty of prejudicial conduct by use of the social media.<sup>337</sup>

#### *Gaps in the law*

- 8.25 Should there be new provisions to fill gaps in the law which have been revealed by the advent of the new media: where, in other words, there is no provision that obviously covers conduct of a harmful kind?
- 8.26 It is clear from the above discussion that damage can be caused by the impersonation of people, particularly in the social media: for example by false Facebook pages. Sometimes such conduct may amount to harassment. It will often be defamatory, and sometimes may involve a breach of privacy, but that gives rise only to a civil remedy. If the impersonation is for financial gain it will usually constitute fraud or obtaining by deception. It is also an offence to impersonate various occupations: for instance a police officer and a pilot.

- 8.27 But there may still be cases in which real hurt can be caused by falsely impersonating another person, but no other provision obviously covers what has happened. We have considered whether there should be an offence of maliciously impersonating another person. Such a provision would not be without precedent in this country. It used to be an offence to “impersonate another person by means of a radio station”.<sup>338</sup> That unqualified prohibition could doubtless serve to protect a number of interests – both of the person concerned and the public in general. It is now repealed. We believe a more targeted provision of the kind we outlined above is at least worthy of consideration.
- 8.28 Careful consideration would need to be given to the elements of any such offence. Malice would be an essential ingredient. Impersonation for the sake of humour is one thing; impersonation with the intention of causing harm is another altogether. The harms against which the proposed offence might be directed might include intimidation, and fear for safety. We seek views on this, and in particular whether the existing offences can in fact deal with the mischief we have identified.
- 8.29 A second possible gap in the law relates to the publication of intimate photographs. We are aware of several cases where, on the breakup of a relationship, one former partner posts intimate pictures of the other on the internet. We asked in our review of the Law of Privacy whether if intimate pictures are taken with a person’s consent, it should be an offence to publish them on the internet without that person’s consent.<sup>339</sup> We there concluded not, but the matter may be worthy of further consideration. There is at least one case where a judge resorted to section 124 of the Crimes Act to enter a conviction and impose a sentence of imprisonment in a case of this kind.<sup>340</sup> That section, whose origins are over 100 years old, is arguably not best adapted to the purpose. It expressly deals with “distributing to the public any indecent model or object”. There perhaps needs to be a more direct route to the end result.
- 8.30 Thirdly, we noted above three possible gaps in the Privacy Act. The “news media” are not bound by the information privacy principles; it is not an infringement of privacy if the information published was collected or held for domestic purposes; and it is not an infringement of privacy to publish material already publicly available. In its review of the Privacy Act the Law Commission recommended amendments to fill all these gaps.<sup>341</sup> It recommended that “news media” be defined to encompass only media which subscribe to a code of ethics and are subject to a complaints body: the large range of communicators in cyberspace who do not meet those conditions would then be clearly covered by the Privacy Act. It also recommended that the domestic purpose exception should not protect the offensive use of material, and that, likewise, the “publicly available” exception should not be available to exempt offensive and unreasonable use. We continue to support those recommendations.

- 8.31 Finally, incitement to commit a crime is an offence even if the crime is not committed.<sup>342</sup> Yet incitement to commit suicide is not an offence unless the person actually does so, or attempts to do so.<sup>343</sup> Given the distress such incitements may cause in themselves, let alone the possibly devastating outcome, we think there is a strong case for making incitement to suicide of itself criminal. Attempted suicide is no longer a criminal offence, but we believe that is no reason for decriminalising incitement.

## Enforcement Issues

### *Responsibility*

- 8.32 There is a question of who is legally responsible when the law is broken by a publication, whether on the internet or elsewhere. In other words who is the appropriate defendant? Is it the media company; the editor of the publication (if there is one); the host of the website on which the item appears; the individual who generated the content; or even the internet service provider (ISP) through whose channel the item reaches the viewer? We have said above that the answer may well be different for the purpose of different parts of the law. We do not propose to attempt to formulate any general principles in this Issues Paper.
- 8.33 However the position of ISPs merits special consideration. In relation to defamation, the issue needs clarification. Defamation is a tort of absolute liability. Anyone who has contributed to the dissemination of defamatory material is, in theory, liable for it whether they know of its defamatory nature or not. Before statute remedied the position even printers were liable for what was published: their liability was based simply on the fact that they had been involved in the *dissemination* process even though they had played no part in the *creation* of the material. The question is how this rule affects ISPs. They can probably take advantage of s21 of the Defamation Act 1992 which provides a defence of “innocent dissemination”:

**21. Innocent dissemination** – In any proceedings for defamation against any person who has published the matter that is the subject of the proceedings solely in the capacity of, or as the employee or agent of, a processor or a distributor, it is a defence if that person alleges and proves-

- (a) That that person did not know that the matter contained the material that is alleged to be defamatory; and
- (b) That that person did not know that the matter was of a character likely to contain material of a defamatory nature; and
- (c) That that person’s lack of knowledge was not due to any negligence on that person’s part.

- 8.34 In reports in 1999 and 2000 the Law Commission recommended that any doubt be put to rest, and that there be a statutory amendment to the effect that:<sup>344</sup>

the definition of “distributor” in section 2(1) of the Act be amended to include explicit reference to an ISP.

We continue to support this amendment.

- 8.35 The question of the liability of ISPs in other legal contexts is similarly unresolved, but the more reasonable view would seem to be that an ISP is a conduit for the publications of others rather than a publisher itself. Mr Justice Eady has described an ISP as a “passive medium of communication”.<sup>345</sup> It is too punitive to make it strictly liable for material posted by third parties. If liability is to attach at all, it should be only in relation to infringing material of which it has been given clear and specific notice, and in relation to which it declines to take such remedial action as is within its power. The Law Commission so recommended in 1999 and 2000.<sup>346</sup> In this Issues Paper we do not further discuss the question of imposing general legal liability of a kind which would involve criminal sanctions or civil liability in damages against ISPs. But, as we shall expand on shortly, we do wonder whether there might be merit in a provision which would enable a court or tribunal to issue “take-down orders” against ISPs and website hosts irrespective of their legal responsibility for the content.

### *Enforcement*

- 8.36 As we saw above, the modes of enforcement available against the mainstream media are also available, and have been used, against communicators using the new media. The law governs all, and the consequences of breaching it should be the same for all. Taking legal action against a few infringers is not without value. It can contain the spread of the objectionable content, and can serve to keep infringing material out of the mainstream media where it would receive its greatest exposure. Particularly damaging communications which constitute a criminal offence sometimes do merit the time and resource it takes to track down perpetrators and prosecute them.
- 8.37 Yet we have noted in the previous chapter the very real difficulties of enforcing the law against the new media. We have considered whether the law relating to enforcement requires amendment or expansion in the new environment. Realism dictates that there are limits to what one can effectively achieve.

- 8.38 Yet, as we have demonstrated, breaches of the law by the newer means of communication can cause significant psychological harm, and even worse, to victims. We wish to explore the possibility of a swift and reasonably effective remedy for such persons. We seek views whether there should be a statutory power in the courts to make take-down orders, or cease-and-desist orders, and whether such a power should be available against avenues of communication such as ISPs or website hosts, even though they themselves are not legally parties to the wrongdoing. What victims usually want is simply that the damaging communications about them stop, or be removed from the internet.
- 8.39 We understand that website hosts and ISPs are usually prepared to do this now if they are requested to and if they are satisfied that the law has been broken. As we have seen, many responsible website hosts have systems in place which allow members of the public to complain about postings, and which result in offending material being taken down, so far as it is possible to do so. It is not going a great deal further to empower a court to *order* such a take-down in appropriate cases if other avenues have failed, and if the hoped-for co-operation has not been forthcoming.
- 8.40 We emphasise that we are not proposing that ISPs should be legally responsible for anything which they transmit in the sense that they could incur sanctions. Nor are we suggesting that website hosts should be liable to greater legal responsibility than they were before. The proposal is simply that they could be subject to a court order to remove infringing material.
- 8.41 Such a power would need to be carefully circumscribed and qualified. The power should be exercised only in cases where there has been a breach of the law; where that breach has caused or is likely to cause demonstrable distress, humiliation or harm; and after proper consideration of whether the order is a justified limitation on the Bill of Rights Act guarantee of freedom of expression. It should only be exercised when other remedial measures have failed or are impracticable. It is not envisaged that the Crown would often have access to this remedy: to do so it would have to demonstrate damage to the public interest in the continued publication of the item. An order should require the ISP or website host to *take reasonable steps* to remove the item. This last qualifier is necessary because an ISP's powers are limited. It cannot itself remove a single posting from a website, although it can block access to the website as a whole. It may however be able to exert some influence over website hosts, and be able to persuade them to remove particular offending items.
- 8.42 The order would extend to any servers hosting such content to which the ISP has access or control directly or by conventional arrangements. Nor can an ISP or website host guarantee that an item will be completely removed for all time: the removal of the original item will not necessarily expunge it from other sites to which it may have migrated, and it may still remain in caches or internet archives. However such take-down (or cease-and-desist) orders can achieve much, and we think they deserve consideration as a general remedy. We anticipate that they would seldom be needed. We seek views on this matter.

## A LOWER LEVEL TRIBUNAL?

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### Introduction

- 8.43 As we have seen there is already an armoury of legal rules which control the harmful use of communications. We have proposed ways in which that legal armoury might be enhanced and strengthened to render it more fit for purpose in the internet age. The courts have significant powers in relation to unlawful communications. They include criminal sanctions, and civil remedies such as damages and injunctions. We have asked in the last section whether there should be a further power to make take-down orders against channels of communication such as ISPs even though they themselves may not be legally responsible for the item in question.
- 8.44 It is the courts which impose the sanctions and remedies. But courts are heavy machinery. Individuals may have neither the means nor the will to pursue transgressors through the court system. We ask in this section whether there is room in New Zealand for a Communications Tribunal at a level lower than the court system, which could administer speedy, efficient and relatively cheap justice to those who have been significantly damaged by communications in media of all kinds.

### Tribunals

- 8.45 In its 2008 Issues Paper *Tribunals in New Zealand*,<sup>347</sup> the Law Commission traced the long history of tribunals, and examined the rationale for their establishment. Tribunals can be set up for different reasons and to fulfil different ends. Many are for the purpose of reviewing and appealing administrative decisions, others are for regulating and disciplining members of professions. However, most relevant in the present context, others exercise the function of administering justice between citizens by resolving disputes and awarding remedies. This last group exercise a purely judicial function, and perform a task which might otherwise be done by a court. They are, in fact, mini courts. In New Zealand they include the Disputes Tribunal, the Copyright Tribunal, the Employment Relations Authority, the Motor Vehicle Disputes Tribunal, the Human Rights Review Tribunal, the Tenancy Tribunal, and the Weathertight Homes Tribunal.
- 8.46 There are several main justifications for setting up tribunals of this kind. First, they *enhance public access to justice*. They are less expensive for litigants: the filing fee is low, or even non-existent. They usually operate with less formal procedures than a court, and can receive evidence which might not be admissible in court. To this extent they are less “intimidatory” than a court.
- 8.47 Secondly, because their jurisdiction is limited in subject-matter they can dispose of cases more quickly than a court. *Speed and efficiency* are hallmarks of a good tribunal system.

- 8.48 Thirdly, they enable the development in each tribunal of *subject-matter expertise*. An expert, specialist, subject-matter tribunal is not only likely to make better decisions: it is also likely to dispose of cases more efficiently, and its decisions are likely to be more consistent.

### **A Communications Tribunal**

- 8.49 We think a Communications Tribunal would exhibit all these advantages. We said in the previous section that while the law is capable of providing remedies for many types of harmful conduct, it is often unrealistic for an individual to bring court proceedings, or even to lay a complaint with the police. A tribunal could administer quick and efficient justice in a more informal manner than can the courts. Sometimes it could operate by telephone or video conference. Often speed can matter: a complainant may want offensive material taken down quickly. The comment was strongly made to us in consultations that “there really needs to be a way for people to get faster takedowns across the board”.
- 8.50 It would also constitute a single, well publicised and accessible point of entry for those wanting a remedy for harmful media communication. Currently some parties may contact police, others NetSafe, others a website host (if they have the knowledge); others may not know where to start. The simplicity of a single “one stop shop” with easy access has attractions.
- 8.51 The tribunal would develop considerable expertise not just in media law, but also in modern communications technology. That combination of two areas of specialist knowledge does not often coexist in one individual. The tribunal would become experienced in the balancing exercise required by the Bill of Rights Act; this has proved a challenge for some courts, let alone lay tribunals. It is crucial in this area that proper weight be given to freedom of expression, and that only truly harmful communications be constrained. This developed expertise should enable consistency of decision-making, and thus earn public confidence.

### **Features of a Communications Tribunal**

#### *Breaches of the law*

- 8.52 The tribunal must not become a censorship body. It would only accept jurisdiction over cases which it determined amounted to a breach of the law. It would effectively be a surrogate court.

- 8.53 However this is not to say that the tribunal should only have jurisdiction in established civil causes of action such as defamation or invasion of privacy. We noted earlier that sometimes criminal offences have no counterpart in the civil system. We envisage that the tribunal would also have jurisdiction where the victim has incurred demonstrable harm as the result of a commission of a criminal offence. The purpose would be to redress such harm and prevent its recurrence. If, for example, it were to be determined that behaviour in the social media constituted the offence of intimidation, the tribunal might make orders to repair the damage to the victim, or to cease the conduct in question. To put it another way, it could enforce a kind of generalised tort of breach of statutory duty.
- 8.54 We repeat that the tribunal would have jurisdiction to make orders only when the law had been broken. To allow a jurisdiction to make orders merely on the ground that conduct had caused harm, whether through a breach of the law or not, would in our view be insufficiently precise. It would not comply with the requirement in the Bill of Rights Act that any limitation on the right of freedom of expression must be “prescribed by law”. It could confer too great a discretion.
- 8.55 Yet once it had determined that the law had been broken, the tribunal would only have power to make orders where that breach of the law had resulted in demonstrable harm, or where harm was demonstrably likely to result. That harm might be financial, or might be psychological harm such as distress, intimidation, humiliation or fear for safety.
- 8.56 The required harm would need to be defined, and the threshold would need to be reasonably high, to avoid the tribunal being flooded with insubstantial complaints: some citizens are more anxious than others, and some parents are more than usually protective of their children. The threshold for invoking the power to make orders would need to be set at the level of “objectionable to the reasonable person”. That test, or variants of it, is becoming familiar at common law.<sup>348</sup> There would need to be a filtering mechanism to dispose of complaints which did not meet that threshold.

#### *The plaintiffs*

- 8.57 We envisage that the Crown could not be a complainant before the tribunal. The tribunal’s purpose would be to redress harm to individuals in their personal capacity. In appropriate cases, particularly where there had been defamation or malicious falsehood, bodies corporate might also have access.
- 8.58 Another question is whether complainants to the tribunal would need to be personally affected. In general we think they should, but parents and guardians should be able to lay complaints on behalf of children in their care. Class actions also require consideration, particularly in the area of inciting racial disharmony: the relevant provisions of the Human Rights Act 1993 are expressly targeted at the protection of groups.

*Remedies*

- 8.59 The tribunal's jurisdiction would not involve imposing criminal sanctions. Only a court should be able to enter convictions and impose sanctions such as fines or imprisonment. We envisage the tribunal as a means by which individuals harmed by breaches of the law are able to obtain redress in their own right.
- 8.60 The remedial powers available to the tribunal would include the award of monetary compensation; the legislation should desirably impose a monetary limit.<sup>349</sup> It would also have power to order publication of an apology or correction; to order that a right of reply be granted; to order that the defendant cease the conduct in question (a type of injunction); and to make take-down orders against either the perpetrator or an innocent avenue of communication such as an ISP. It might also make a declaration that statements made about the victim are untrue. It may well be that the take-down order would be a favoured remedy, although it would need to be granted with care, and after full consideration of the Bill of Rights Act's guarantee of freedom of expression. Failure to comply with an order would be an offence.
- 8.61 The practical difficulty of tracing the originator of an offensive communication might impact on the tribunal's jurisdiction just as it does in other contexts. In some cases, therefore, a request, or order, against an ISP or website host may be the only practical solution. But if the tribunal believes the originator of the material should be pursued, consideration should be given to whether the tribunal should have power to require an ISP (or IPAP) to disclose the details of an account holder, as the District Court can presently do under the new Copyright legislation.<sup>350</sup>

*Those subject to the tribunal*

- 8.62 Anyone publishing in any media, including bloggers, website publishers and users of the various social media platforms, would be subject to the tribunal. The tribunal would in fact be a "communications" tribunal rather than a media tribunal in the traditional sense. Its role would be to provide redress to citizens for harmful communications which are in breach of the law.
- 8.63 The news media itself would also be subject to the tribunal, although we think it likely that complainants would often go to the independent news regulator in the first instance. However in cases where the news media had broken the law there would be nothing to preclude citizens from seeking remedies from the Tribunal.

*Precedent*

- 8.64 Over a period of time the tribunal would build up a body of precedent. Its decisions should be reported, and be accessible online. In this way it would be more than an instant dispute resolution service: it would have an enduring value in the legal system, and establish some baselines about the boundaries of harmful conduct. But if its decisions were inconsistent with high authority the latter would obviously prevail.

*Appeal*

- 8.65 There should be a right of appeal against determinations of the tribunal. It would need to be determined to which court that appeal should lie – District Court or High Court. We tend to the latter. It would also need to be decided whether the appeal should be on the merits, or on a question of law only. Our present preference is the former: the shady boundaries of “question of law” have proved problematic in other contexts.<sup>351</sup>

*Some problems*

- 8.66 We acknowledge that some problems will need resolution. None of them, we think, are intractable.
- 8.67 First, we said earlier that the tribunal would have jurisdiction not just over torts and other civil wrongs, but also over breaches of the criminal law which have resulted in harm to an individual. Consideration would need to be given to the relationship between the criminal law and the tribunal’s decision. If the police have charged a person with an offence, could the tribunal hear a complaint against that person and make (say) a take-down order or an order for compensation in advance of the outcome of the criminal proceedings? Could the tribunal in a particularly serious case suggest that the matter be referred to the police? If later criminal proceedings resulted in an acquittal, would there need to be a reconsideration of the tribunal order? Given the differing purposes of the two types of proceeding these questions may not be as difficult of resolution as might at first appear.
- 8.68 Secondly, there will be boundary issues between the tribunal and other tribunals or regulators. If, for example, an organ of the new media publishes material which is in serious breach of an individual’s privacy, should it be the Privacy Commissioner or the new tribunal that deals with it? Should the complainant have a choice or should the legislation clearly provide that it is to be one or the other? There is nothing necessarily wrong with choice: for example there are instances now where a person aggrieved by a breach of privacy can elect to proceed via the Privacy Commissioner or via the court in a tort action. But it may have to be decided whether, if choice might lead to inconsistent streams of authority, a single route might be better.

- 8.69 The “news media” under the jurisdiction of the regulator that we propose would also be subject to the proposed media tribunal. The *regulator* would enforce a code of ethics; the *tribunal* would enforce the law. Yet in a few cases there could be overlap: for example a false statement which breached the code requirement of accuracy but was also defamatory at law. In this circumstance there would seem to be no particular problem with allowing the individual a choice: in fact it exists now in relation to both the Press Council and the Broadcasting Standards Authority.
- 8.70 However these boundary issues, however they may be resolved, do create the potential for confusion. There might be misunderstandings about the respective roles of the regulator and the tribunal. There would need to be carefully prepared public information about this.
- 8.71 A further question is whether an aggrieved individual should, in the case of an established civil cause of action such as defamation or invasion of privacy, retain the right to bring proceedings in the court – High Court or District Court – rather than use the tribunal. We think so. While tribunal proceedings will usually be an attractive option for a claimant, he or she should not be deprived of his or her right of access to the courts.
- 8.72 This raises the issue of how the new tribunal might deal with defamation cases. Many have wished for a long time that there was a simple and effective way of addressing defamation. The proposed tribunal might provide an arena for this. That is an attractive possibility. Defamation still remains one of the most complex, time-consuming and expensive of all legal proceedings. In some ways that can have its benefits, as Steven Price has recently pointed out.<sup>352</sup> The very existence of such heavy machinery can mean that settlements are easier to obtain in the early stages. But if the plaintiff elects to take the tribunal track it may be that the procedures would not be as simple as they had hoped. That is likely to be the case if the defendant pleads truth or honest opinion, in which case argument would have to be heard on both sides.
- 8.73 The new process would be likely to work well only if the inaccuracy was clear and manifest, and there was no clear defence. But those are the very cases that are likely to be settled now, or to be disposed of under the summary judgment procedure. Provisions introduced into our Defamation Act in 1992 to provide for offer of amends and the publication of correction statements have done little to ease the way of this ponderous tort. Nevertheless in such clear cases access to the proposed tribunal may provide a quick route to a remedy, in particular a take-down order. Speed will be a major advantage of the proposed tribunal. This is an area, however, where consideration of freedom of expression will have to be very carefully regarded.

## Conclusion

- 8.74 We are attracted to the idea of a Communications Tribunal. It could provide a speedy and streamlined route to justice which nonetheless achieves a proper balance between freedom of expression and redress for the harm which some communications can cause.
- 8.75 There is resistance to setting up new tribunals unless the case for them is made out very clearly. They cost money, and a proliferation of tribunals can lead to fragmentation. It is to a degree speculative how many cases the new tribunal would get, although from the evidence we have provided in the previous chapter we do think the proposed tribunal would attract a reasonable volume of work.
- 8.76 Possibly its functions could be performed by an existing tribunal such as the Human Rights Review Tribunal. We are inclined to think not: there would be a degree of specialisation required, and a streamlining of process, which would make that solution less than optimal. The best solution may be to appoint a District Court Judge to chair the tribunal.
- 8.77 We seek views on our proposal for a Communications Tribunal.

## A COMMISSIONER

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- 8.78 If the disadvantages of establishing a tribunal are deemed to outweigh the advantages, another option is to establish an independent commissioner to whom members of the public can turn for information and assistance.
- 8.79 Many of the concerns expressed about the harms caused by social media and the internet can be traced back to the fact that there is no clearly accessible central place to take complaints, concerns or questions about material published on the internet. As noted in chapter 7, people can be left feeling that they are “shouting into space.” One response to this is to provide a portal for information and assistance.
- 8.80 The role of this person would be to provide information and where possible assist in resolving problems in an informal manner, for example through mediation. Where appropriate, he or she could also make recommendations to responsible authorities and individuals with the aim of preventing problems or improving the existing situation. In cases of serious harm, the commissioner may refer a complainant to the police. In other cases, many of the harms that we have discussed could be resolved informally by a person with some authority contacting a website administrator to draw their attention to objectionable material, identifying the harm the post is causing, or how it may be in breach of the law.

- 8.81 As we noted in the preceding chapter, the law already addresses a significant proportion of the harms that are occurring as a result of speech abuses on the internet, but often those affected – and the perpetrators themselves – may be unaware of the nature of the offence and the potential remedy. A key function of the commissioner would be to assist citizens access the law.
- 8.82 To be effective, a commissioner would need some limited powers of investigation and inquiry, but we do not envisage he or she would have powers of enforcement. Any matters that required enforcement powers should be left to the police or other authorities. The advantage of a dedicated commissioner is that over time he or she would be able to establish relationships with social media networks and internet entities that may enable issues to be addressed more effectively – so that complainants are shouting to a listener, rather than into space. The feedback we received from Facebook suggests that they are responsive to approaches from authoritative bodies when there is clear evidence of behaviour which contravenes domestic law and or their own terms and conditions.
- 8.83 The commissioner’s role would also provide an early warning system for website administrators who may not be aware that there is objectionable material somewhere on their site.
- 8.84 One proposal is that the commissioner’s role could be attached to the Human Rights Commission. The Commission already has a number of Commissioners focused specifically on areas such as race relations, disability and equality employment opportunities. In its work resolving complaints, the Commission is accustomed to balancing free speech issues against other human rights questions.
- 8.85 Attaching the Commissioner to a well-established entity would also be cost-effective and help with public awareness of the availability of this possible route for seeking assistance. We would welcome feedback on that proposal.

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- 330 Coroners Act 2006 s73.
- 331 Films Videos and Publications Classification Act 1993 s123(4).
- 332 Prostitution Reform Act 2003 s11.
- 333 Harassment Act 1997 ss 3 and 4.
- 334 See for example *Rodriguez v Osborne* (DC, Auckland, CIV 2009-004-28, 3 March 2009) and “Copycat ‘friend’ guilty of harassment” *The Daily Post* 26 November 2011. See also Judge David Harvey: “Cyberstalking and Internet Harassment: What the Law Can Do”. NetSafe < [www.netsafe.org.nz](http://www.netsafe.org.nz) > .
- 335 Communications Act 2003 (UK) s127.
- 336 Human Rights Act 1993 ss 62(3) and 63(2).
- 337 Jason Deans “Facebook juror jailed for eight months” *Guardian* (United Kingdom, 16 June 2011).
- 338 Radio Regulations 1970 r 49. The maximum fine was \$100.
- 339 Law Commission *Invasion of Privacy: Penalties and Remedies* (NZLC R113, 2010) at [8.13].
- 340 “Naked photo sends jilted lover to jail”, (13 November 2010), < [www.stuff.co.nz](http://www.stuff.co.nz) > .
- 341 Law Commission *Review of the Privacy Act 1993* (NZLC R123, 2011) at [2.99] and [4.73] – [4.75].
- 342 Crimes Act 1961, s311(2).
- 343 *Ibid* s179(a).
- 344 Law Commission *Electronic Commerce Part 2* (NZLC R58 1999) at [262] – [270]; Law Commission *Electronic Commerce Part 3* (NZLC R68 2000) at [80].
- 345 *Bunt v Tilley* [2006] 3 All ER 336 at [36] – [37].
- 346 Above 344. *EC Part 2* at [260] and *EC Part 3* at [76] – [79].
- 347 Law Commission *Tribunals in New Zealand* (NZLC IP 6, 2008).
- 348 See for example *Hosking v Runting* [2005] 1 NZLR 1 in relation to the tort of invasion of privacy.
- 349 As, for example, in the case of the Disputes Tribunal and the Broadcasting Standards Authority. Compare the Weathertight Homes Tribunal.
- 350 Copyright Act 1994, s122Q.
- 351 See Law Commission *Tribunal Reform* (NZLC SP 20, 2008) chapter 8.
- 352 Steven Price “Defamation – anything but straightforward”, NZ Lawyer issue 166, 12 August 2011.

