SUBMISSION TO THE SENATE STANDING COMMITTEE ON ENVIRONMENT AND COMMUNICATIONS - MEDIA REFORMS PACKAGE.

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I am a freelance journalist and author, and the Director of the Centre for Advancing Journalism at the University of Melbourne. The staff and fellows of the Centre disagree on some key issues regarding the appropriate method of news media regulation, and the views I express here are my own.

My colleagues and I are agreed on one thing - that the debate over news media accountability is a vitally important one, and that there is a need to address the issue of public trust in Australian journalism. Trust in newspapers especially and in journalists as a professional group is low. The industry has been reluctant to address this, and the associated issue of accountability, with key reforms to self regulation made only under severe political pressure. This was the case with the establishment of the Australian Press Council, and is the case again now.

We share a sense of dismay that sections of the news media seem intent on either closing down or distorting the present debate, including vituperative attacks on individuals. The media's attention has been focused almost entirely on its right and freedoms. It has paid scant attention to the parallel issue of accountability.

We have been proud to host public events at which a diversity of views on these matters have been presented, including speeches by News Limited CEO Kim Williams, Australian Press Council Chair Julian Disney, Professor Matthew Ricketson and Lord Justice Brian Leveson.

The Centre will continue to do what it can to make sure that these matters are properly ventilated.

I have confined my comments here to my area of expertise - the regulation, future and practice of journalism.

The Current Bills

I am not against the idea of making the media's rights and privileges under law contingent on effective self regulation.

This is a reasonable approach to the very difficult problem of allowing the news media vital freedom and autonomy under the law, yet also holding it to account for breaches of accepted standards.

There is no perfect solution to this difficult balancing act, but the thrust of the proposed approach, which has been suggested by various independent inquiries over the years[1], would not necessarily be an attack on freedom of speech, but rather would enhance accountability and the public's right to information. I outline my reasoning on this in a later section of this submission.

However, I think the Bills as presently drafted are seriously flawed. If they were passed in their current form, the balance would be struck in the wrong place, with too much discretion given to a Government-appointed statutory officer, the proposed Public Interest Media Advocate (PIMA). I have outlined the flaws below, in approximate order of importance.

1. Standards for Self Regulation Bodies

In Section 7(3) of the *News Media (Self Regulation) Bill*, the PIMA is given dangerously wide discretion in deciding whether a news media self regulation body meets standards. The long list of eligibility requirements to which the PIMA must "have regard" include amorphous criteria such as "community standards" and "other matters relating to the professional conduct of journalism". The PIMA must "have regard to" the "extent to which" the body meets these criteria.

In particular, reliance on “community standards” is misguided. The set of standards that should be applied are the professional standards of journalism, the norms of which are well

[1] Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice,* ALRC Report 108. 12 August 2008, Pg 1472 ff. The ALRC considered an approach similar to that contained in the current Bills, and while it did not recommend it, stated " The ALRC has ongoing concerns about the capacity of a self-regulatory system to preserve the tenuous balance between the public interest in freedom of expression and the public interest in adequately safeguarding the handling of personal information."
More recently, these issues are considered in the Convergence Review Final Report, and the Report of the Independent Inquiry into Media Regulation.

known, specified in the professional literature, and well tested in practice. They deal with the concepts of privacy, fairness and accuracy listed in 7 (3) (b) and plenty more besides.

The test should be the extent to which the body's standards meet the norms of professional standards. At a minimum, these should be those set out in the existing Principles of the Australian Press Council and the Code of Ethics of the Media Entertainment and Arts Alliance, but with scope to broaden and deepen these standards. This broadening and deepening would be one of the functions of an authorised media self regulation body.

The application of "community standards" in this context is wrong in principle. Journalists, in the course of their work, do many things in the public interest that violate community norms of behaviour. The public interest would be severely harmed, and the role of the media dangerously inhibited, if they were to be prevented from acting in ways that might violate community standards. For example, the media sometimes reveal information that harms people and have obtained it by means that the community might think underhand or dishonest. These are difficult ethical dilemmas that need to be resolved by reference to professional standards, which are designed to take into account the complexities involved. This is a task utterly unsuited to general community standards.

Given that the PIMA has the power to withdraw authorisation from self regulation bodies, which would make its member news media organizations unable to operate in more than a sporadic fashion, this is far too wide a discretion. It is too big a "dab of statute"[2] to be consistent with a free and autonomous media.

What is needed is a list of minimum standards, as objective as it is possible to make them, that must be met in order for a news media self regulation body to be authorised. This would make the PIMA's processes and decision making as transparent as possible, and provide clarity to the industry and the public.

A starting point for the development of such a list was provided in the Report of the Convergence Review (page 51).

An authorised News Media Self Regulation Body should:

- Have a board of directors, the majority of whom should be independent from the media
- Have adequate funding and resources
- Establish and publish standards for news and commentary, including requirements for fairness and accuracy
- Maintain an efficient and effective complaints-based system

[2] This term was used by the actor Hugh Grant, as a member of the Hacked Off group, which is advocating reform to media regulation in the United Kingdom.

- Have a flexible range of remedies and credible sanctions, including the power to order the publication of its findings.

Levels of funding required could be determined, and altered as necessary by regulation, or overseen by the Australian Communications and Media Authority or another statutory body.

I would add to this list a requirement that the body have the power and capacity to launch own-motion investigations, without the need for a complaint. Sadly, there are many disincentives to complaining about the media in this country. This is particularly the case for those in the public eye. This means that many breaches of media standards are never the subject of complaint, yet the fact that no action is taken brings the system of self regulation into disrepute, and adds to public cynicism about journalistic standards.

2. The PIMA Should Be Appointed Through an Arms' Length Process

Section 8 of *The Public Interest Media Advocate Bill* states that the PIMA is to be appointed by the Minister. Given the importance of this appointment to issues of freedom of speech, this is an inadequate process and at odds with the requirement for the PIMA to act independently of executive government.

Better alternatives could be:

- Appointment through an arms' length process, similar to that presently in place for the ABC and SBS Boards.
- Appointment by Parliament

3. There Should Only Be One News Media Self Regulation Body

One of the principal reasons the present system of news media self regulation is less effective than it should be is because it lacks profile, and members of the public either do not know it is possible to lodge a complaint, or are confused about which body to complain to. This was a common thread in submissions to the Independent Media Inquiry and the Convergence Review from former Press Council Chairs, the Media Entertainment and Arts Alliance and other industry bodies.

The whole point of the Convergence Review was to create a converged system.

To allow multiple complaints bodies, as under the present Bill, would add to confusion, and run counter to the need for convergence in media regulation.

The main alternative body to the Australian Press Council is the system set up by Seven West Media following its decision to withdraw from the APC. Even on the vague wording of the standards the PIMA must apply, it would seem that the Seven West Media scheme

would not currently receive authorisation. However, it could presumably be reformed, and other media organizations are also likely to set up "in house" schemes and seek authorization. This would make the PIMA's job in policing standards extremely difficult, add to public confusion and thus undermine effective self regulation.

The PIMA should be tasked with authorising a single News Media Self Regulation Body.

4. There Should be a Converged System, or a Road Map Towards One

The Convergence Review was given its name for a reason, but the urgent need to move to a converged system of media regulation has been ignored in the present Bills. The public statements of the Minister suggest that convergence of regulation remains a medium-term aim, but this is not reflected in the Bills.

Media convergence means that a regulation system that is determined by platforms is destined fast to become irrelevant or ineffective. The Bills should either allow for a move to a converged system of media regulation, or lay out a time period and process of review under which this will be achieved.

The position of the PIMA is related to this point.

5. Why a PIMA, rather than an Agency? And Why Part Time?

The functions given to the PIMA under these Bills were, under the Convergence Review recommendations, to be handled by a new communications regulating agency to replace the Australian Communications and Media Authority.

It may be that the PIMA model has been chosen because it is anticipated that there will be a movement to a converged system in the next few years, and there is a desire to avoid establishing a bureaucracy for temporary purposes. However, there is no indication of this in the Bills (see above point).

Particularly if the 75 per cent reach rule is removed, it is likely the PIMA will have a number of amalgamation, takeover and merger applications to deal with in very short order. More work will result from the likely breakup of some of Australia’s large media organisations in the next few months. The PIMA's job will be impossible for a single person, particularly if they are part time.

The creation of a PIMA before the creation of a converged system is problematic for a number of reasons. The following point also relates to this.

6. Is Now the Right Time to make the Privacy Exemption Contingent?

The proposal to make the Privacy Act exemption for print and online media contingent on approved self regulation is very similar in its effect to the present system of broadcast news media regulation, but the current system of broadcast regulation is more onerous, because licences can be withdrawn or have conditions imposed.

Under the present system of regulation, radio and television media organisations have the primary responsibility for ensuring that the material they broadcast reflects community standards. Most aspects of program content are governed by codes of practice developed by industry groups representing the various broadcasting sectors. The Australian Communication and Media Authority registers codes once it is satisfied that broadcasters have undertaken public consultation and the codes contain appropriate community safeguards. Once this has been done, broadcast media can then have licences withdrawn, or (more normally) conditions imposed, for breaches of standards.

Both the report of the Independent Media Inquiry (Finkelstein Report) and that of the Convergence Review anticipated a unified system of news media regulation, encompassing broadcast, print and online. The recommendations of both suggested that ACMA should give up its role regarding news media regulation, and that print, online and broadcast media should be brought under the same self regulation scheme.

This would have represented a considerable liberalisation of the regulation of broadcast news media. While the need for codes to be approved by a statutory agency would remain, the threat of licence withdrawal or limitation would be removed.

As a matter of principle, news and current affairs coverage should not be subject to government licensing, no matter what the platform of dissemination. At the same time, it should be subject to effective accountability.

Such a liberalisation would have perhaps helped to redress concerns that making rights and privileges contingent on self-regulation was an unacceptable attack on freedom of speech. It would have helped to bring the reforms into perspective.

The Government has apparently decided not to attempt a converged system of regulation at the present time.

It may be that either the converged system should be brought forward to coincide with making the exemption in the Privacy Act contingent, or alternatively that the attempt to involve the Privacy Act exemption be put off until media regulation systems are converged - an outcome all sides seem to agree is inevitable and necessary.

However, given the current political climate and the public statements of the Opposition on these matters, it seems likely that if the current Bills are not passed, the opportunity to improve media self regulation will be lost for the foreseeable future.

Why Making the Journalism Exemption in the Privacy Act Contingent on Membership of a Self Regulation Body is not an Attack on Freedom of Speech.

Freedom of speech is a right held by individuals, not organisations.

While this has always been the case, it is newly important to remember it in our own time when, for the first time in human history, the means of publication are in the hands of most citizens.

The wording of every important statement of the right to freedom of speech, from Milton's famous 1644 speech to the English Parliament to the Australian High Court decision in the Lange case, makes clear that freedom of speech is an individual right, and is held by "the press" only consequentially. Every individual has a right to publish.[3]

The right to freedom of speech can be claimed by media organisations only because they are composed of individuals, and because they disseminate news, views and information to citizens. They do not hold the right merely because they are media. They hold it to the

[3] Milton's famous Aeopagitica speech to the Parliament of England in 1644 is one of the earliest statements of the right to freedom of speech and expression, and against censorship of the press. Milton makes it clear that the reason the press should be free is because censorship means individual citizens will be less open to reason and truth.
The Universal Declaration of Human Rights Article 19 also makes it clear that the right is held by individuals, and only consequentially by media.
"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."
The First Amendment to the United States Constitution was also conceived as a right held by citizens to meet and exchange ideas, and again only consequentially a right of "the press"
"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."
There are only limited constitutional guarantees to freedom of speech in Australia (and the insertion of a Bill of Rights has been resisted by some of the very media organizations most concerned with threats to freedom of speech in the current debate). However, in the unanimous High Court judgment in *Lange v Australian Broadcasting Corporation,* the court held there was an implied freedom of communication on government and political matters. The freedom was grounded on the functioning of democratic and responsible government, requiring freedom of communication between the voters and their representatives. The right was a negative right, not a positive one. It operates chiefly as a restraint on executive and legislative power. Once again, the right is relevant to media organisations as a consequence of the right held by citizens, and because of the role of media in disseminating information and ideas to citizens.

extent that they put the rights of citizens to freedom of speech and access to information into practical effect.

Individuals have the right to receive news, views and ideas. Recognition of this is why, in most liberal democracies, special protections and privileges are granted to media organisations to allow them to publish with freedom and a high degree of autonomy under the law. The exemption for journalism in the Australian Privacy Act is one such protection and privilege.

For the most part, the media does an effective job of disseminating news, views and ideas.

However media organisations can also restrain, compromise or limit citizens' rights to freedom of speech and dissemination of information. The risk is particularly great when control of news media outlets is concentrated in a few hands.

If a media organisation has published incorrect or false material, then it has ceased to serve the rights of citizens to information. The "path of reason" as Milton might have put it, has been compromised.

Therefore errors should be corrected. If a media organisation fails to publish a correction, then to that extent it compromises its claim to special protections arising from the rights of individual citizens to be informed.

If a media organisation publishes only a limited range of views, and excludes other views, including rights of reply, then that too is a compromise of freedom of speech. The media outlet's service to citizens is compromised, and with it, the claim to special protections and privileges.

To require the publication of corrections and rights of reply is not a restriction on freedom of speech. Rather, it is an expansion of the practical exercise of freedom of speech by citizens.

These are non-controversial points. Most media organisations in Australia acknowledge that the freedom of the press comes with responsibilities of this kind, and fairness, balance, correction of errors and rights of reply are covered by every major code of conduct and statement of principles applying to news media around the world, including, in Australia, the Media Alliance Code of Ethics and the Statement of Principles of the Australian Press Council.

Yet, as recent adjudications of the Australian Press Council demonstrate, citizens often have trouble obtaining corrections and rights of reply in our news media. [4]

The question at the heart of the current debate, and the debate in the wake of the Leveson Inquiry in the United Kingdom, is how to encourage or enforce meaningful self regulation.

A self-regulation scheme that member bodies can sabotage or abandon at will is unable to be effective. A self regulation scheme that nobody knows about is worthless.

While publishers are at the moment expressing great support for the reformed Australian Press Council, less than a decade ago they cut its funding drastically in favor of establishing an industry lobby group - the Right to Know Coalition. This could happen again. Recent reforms to the APC are to be greatly welcomed - but one major media organisation has opted out, and the reforms have been made only under the pressure of the recent inquiries.

Here and overseas, the debate comes down to where and whether to apply a "dab of statute" to either encourage or enforce meaningful self regulation.

There is no reason, in principle, why media organisations that make money from disseminating information should not be forced to accept that their privileges are contingent on their service to citizens. In regulating that service, there is a role for a "dab of statute". While we are right to fear and guard against government interference in a free media, we should also fear attempts by large media proprietors to undermine or undervalue the rights of citizens to accurate information.

Any system under which a citizen (including an editor or a journalist) can be subjected to legal penalties for conscientious free speech is repugnant. Only other essential public interests can justify limitations on such freedom.

But the current Bills do not propose this. The approach recommended by the Finkelstein Report has been rejected. Rather, the Bills propose that privileges under law held by media organisations should be contingent on a self-regulation scheme that holds them to account publicly for breaches of standards.

Making the Privacy Act exemption contingent on self-regulation is not a perfect solution, but if the legislation was properly drafted, such a scheme could enhance the rights of citizens to free speech and access to information, and not detract from them.

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[4] See, for example, Australian Press Council Adjudications 1558, 1553, 1550, 1549, 1547 and 1554. It should be remembered that these recent cases reflect only those where citizens knew how to complain, and were sufficiently determined to do so.

The Other Problem

The last 12 months has been a momentous time in Australian news media, and the next 12 months will bring more fundamental alterations to the landscape. It is likely that the years 2012 and 2013 will be a time of greater change in news media than at any period since the advent of television.

The crisis in the business models of our mainstream media organisations could lead to a perception that this committee and the legislation it is considering are addressing the wrong problem, and that the issue is not how to regulate news media, but how to ensure that we still have a news media to regulate.

Many people do not realize the depth or imminence of the crisis, and our stock market based major media organisatons do not want to talk about it. There are very few sources from which this committee can learn of the depth of the problem.

In the last few weeks, Fairfax Media's share price has risen. Why? Certainly not because of a boost to revenue. Rather, investors are anticipating its break-up, with the parts worth more than the whole.

Who will own *The Age* and *The Sydney Morning Herald*? It may be that nobody will want them. The Monday to Friday operations are not sustainable in print form, and an online-only model cannot sustain newsrooms at anything like their current level. At the same time, the costs of downsizing the businesses to a sustainable level are so large that it may be nobody wants to take the mastheads on.

This major shakeout is, I think, now only months away.

Meanwhile News Corporation is restructuring, which will bring more changes, and more pressure on the budgets of the newspaper mastheads.

Channel Ten is vulnerable. So are some of our regional publishers.

So are we looking at the wrong problem here?

It is profoundly disappointing that the several submissions to the Finkelstein and Convergence Review that recommended action to support journalism and encourage new media startups were not seriously considered or taken up.

However, I don't think it is wrong to be looking at the issue of news media and journalism standards. In fact, it is more important than at any recent time.

Whatever the next few months brings, we are entering the post industrial age in news media. In future, journalism enterprises will be smaller, and more modestly profitable.

There will be many "cottage industries" in news and information, playing to niche audiences. Already, the growth area for journalism jobs - the places where most of my students are finding work - are small news media organizations and startups.

One side effect of the shrinking of the big news media organizations will be a decline in the traditions and cultures of the newsroom. While newsroom can be toxic, they have also been the home of standards, ideals and expectations. They have been the main mechanism through which the professional norms of journalism have been perpetuated.

It is therefore particularly vital that we act to articulate and maintain standards for journalism practice, because the industry is about to become even less able to do this for itself.

This will be particularly the case if the coming shakeout leads to even more concentration of mainstream media ownership, as seems likely.

A related point is that parliament should be careful that it regulates for the present and the future, not only for what is and has been.