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Summary

THE PURPOSE OF OUR REVIEW

- 1 This report is about the different rights and responsibilities which apply to communicators in an era when anyone with an internet connection has the potential to broadcast to the world.
- 2 All those who publish in New Zealand, whether as individuals or as entities such as news media companies, are subject to the basic legal constraints which protect citizens' interests in their reputation, privacy, personal safety, and right to a fair trial. Within these legal constraints, citizens are free to exercise their freedom of expression, including publishing views which are extreme, false, misleading and/or offensive to some.
- 3 The news media, however, have additional rights and responsibilities, reflecting the vital role they have played as a conduit of reliable information about what is happening in the world and as a means of holding power to account.
- 4 To facilitate the news media in carrying out these core democratic functions, the law grants these publishers certain legal privileges and exemptions not available to ordinary citizens. For example under the Criminal Procedure Act 2011 the news media have a statutory right to remain in a closed court and to appeal suppression orders. They alone have the right to communicate electronically from the court.² The news media are specifically exempt from the information privacy principles in the Privacy Act 1993, and certain provisions of the Electoral Act 1993, the Human Rights Act 1993 the Fair Trading Act 1986.
- 5 In turn, the news media are subject to additional standards, some enshrined in law, others by self-imposed professional and ethical codes, designed to ensure their privileges and exemptions are exercised responsibly; that the information they disseminate conforms to basic standards of accuracy and fairness; and that they are held accountable for any abuse of their power.³

2 See ch 2 at [2.9].

3 See chs 2 and 5 for discussion of the various statutory and self-regulatory complaints bodies currently responsible for upholding media standards in New Zealand.

- 6 However, this system of statutory privileges, matched by countervailing responsibilities, evolved in an era when the public was largely dependent on the mainstream media as their only source of reliable news and information. It also developed at a time when “print” and “broadcast” media were two distinct entities, subject to different standards and forms of accountability based on the formats in which they distributed their news.
- 7 Neither of these assumptions holds true today. New Zealanders now have access to a plethora of news sources ranging from global media brands through to the spectrum of “new media” providers generating, aggregating, and commenting on news. Most significantly, the public are now able to generate, debate and distribute news and opinion themselves, without reliance on the mainstream media.
- 8 At the same time the bright line distinctions between traditional broadcast and print media are becoming increasingly blurred as commercial media companies converge online, producing a rich mix of text and video accessed via a variety of different channels and devices. This blurring of boundaries between professional and amateur, print and broadcast, moderated and unmoderated, corporate and social media is a defining characteristic of the new converged media landscape. It also gives rise to a number of policy problems and is the key driver behind this review.
- 9 Currently news and current affairs is subject to different standards and complaints procedures – or none at all – depending on who created it and the format and channel via which it is distributed. For example, broadcast news is subject to statutory standards and complaints processes but broadcasters’ content accessed via an app or on-demand is not necessarily subject to these same standards.⁴ News accessed via a website may or may not be subject to standards and a complaints process, depending on whether it has been produced by a mainstream media company or a new generation digital news publisher.⁵
- 10 In response to these gaps New Zealand broadcasters recently established a new self-regulatory complaints body, the Online Media Standards Authority (OMSA), to deal with complaints relating to news and current affairs content that is published on mainstream broadcasters’ websites – including on-demand content that has not been previously broadcast.
- 11 In chapter 5, we discuss this and other initiatives to address the problems with the current regulatory systems. We note here that while such initiatives show a strong willingness on the part of the industry to provide accountability, they do not address the fundamental problems created by convergence – a lack of regulatory parity between print and broadcasters and an absence of accountability for new media undertaking “news-like” activities.

4 See ch 1 at [1.51], fn 48.

5 See ch 2 at [2.54] – [2.63].

- 12 This lack of parity between print and broadcast media is likely to become increasingly problematic over the next five years as the roll out of ultra-fast broadband (UFB) creates increased opportunity and demand for high quality video content accessed via the internet.⁶ In this environment the distinction between traditional broadcasters and the producers of streamed video and audio content will become increasingly blurred. From a news producer's point of view, it also creates an uneven playing field.
- 13 More critically, from a news consumer's point of view, the proliferation of different bodies responsible for enforcing different standards for the same or similar news content is likely to become increasingly problematic as the pace of convergence continues.
- 14 Addressing these gaps and inconsistencies in the standards and accountabilities which apply to news content in a converged media environment is a key objective of this review. It requires us to address the following three central questions:⁷
- First, in an era when anyone can break and disseminate news to a potentially mass audience, how do we define the term “news media” when determining who should be entitled to access the special legal privileges and exemptions which have traditionally been reserved for this category of publisher?
 - Second, how do we determine which publishers, and what content, should be subject to the additional standards and accountabilities which have traditionally been applied to the news media?
 - And third, what form should this accountability take? Should all news media be subject to legally enforceable standards, as is largely the case for New Zealand broadcasters, or is it more appropriate for all news media to be subject to voluntary accountability systems as is currently the case with the print media (as well as broadcasters' online content that will soon come under OMSA)?
- 15 Alongside these questions relating to the news media we were also asked to consider whether the laws and remedies which are available to ordinary citizens with respect to harmful communication are fit for purpose in the digital age.

6 See ch 1 at [1.57].

7 See ch 3 for discussion of the rationale for preserving the news media's legal status.

- 16 This latter part of our review was fast-tracked at the request of the Minister Responsible for the Law Commission, the Hon Judith Collins. In August 2012 we delivered a Ministerial Briefing Paper, recommending a package of legal and enforcement reforms designed to offer a graduated response to the types of harms which can result from the misuse of new communication technologies.⁸ These included amendments to existing statutes to ensure they can be applied in the digital environment, a new electronic communications offence and the establishment of a specialist Communications Tribunal able to provide citizens who have suffered significant harms with speedy and effective remedies such as take down orders. The briefing paper is reproduced as Appendix A to this report.
- 17 In this report we return to the other focus of our review:
- how should the term “news media” be defined for the purposes of the law; and,
 - how should this special group of publishers be held accountable to the public in the digital era?

International context

- 18 Our own review has been conducted in parallel with two major inquiries into news media standards and accountability in Britain and Australia. In Britain, the phone hacking scandal which enveloped Rupert Murdoch’s publishing conglomerate, News International, gave rise to a two-part independent inquiry into the “culture, practices and ethics of the press” led by Lord Justice Leveson. The Leveson Report, published in November 2012, focused primarily on the adequacy of press regulation and did not directly address the broader context of media convergence.⁹ It recommended the establishment of an independent self-regulatory body with an enhanced role in enforcing standards and significantly greater powers and sanctions than the pre-existing Press Complaints Commission. At the time of writing the British Government had yet to finalise its response to the Report’s recommendations.
- 19 Unlike the Leveson Inquiry, Australia’s *Independent Inquiry into the Media and Media Regulation*, led by former Federal Court Judge, the Hon R Finkelstein QC, was explicitly required to examine the ways in which technology was impacting on the news business model, the quality of journalism, and the effectiveness of accountability mechanisms.
- 20 The Finkelstein Report, published in February 2012, highlighted a wide range of issues including an erosion of public confidence in news media and a

8 Law Commission *Harmful Digital Communications: the Adequacy of the Current Sanctions and Remedies* (Ministerial Briefing Paper, 2012). The Briefing Paper and accompanying draft bill are attached as Appendix A.

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

persistent recurrence of standards failures.¹⁰ The Report concluded that the current regulatory mechanisms were “not sufficient to achieve the degree of accountability desirable in a democracy.”¹¹ It recommended the current print and broadcast regulators be replaced by a single converged standards body, responsible for enforcing standards across all news media, regardless of format.

- 21 Alongside these two high-profile inquiries there have also been two major Australian reviews focused on the implications of media and technological convergence for regulatory frameworks. The first was an Australian Law Reform Commission review of Australia’s censorship and content classification system;¹² the second a multi-faceted convergence review, 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.¹³
- 22 The cross-fertilisation of ideas between these various international reviews has been invaluable to us and it will be evident that we have drawn on many of the principles and proposals put forward in these various reports. However, it is important to note that our proposals are a response to the specific problems we were asked to address and reflect our own unique context: they draw on research and analysis of New Zealand’s media environment, the views of submitters, and our own assessment of how best to balance New Zealanders’ interest in a strong, independent *and* accountable news media in the digital era.
- 23 In the following section we summarise the major conclusions and recommendations contained in this report. For more detailed explanations of the principles and rationales underpinning our recommendations we encourage readers to refer to the relevant chapters of the report.

10 The Hon R Finkelstein QC *Report of the Independent Inquiry into the Media and Media Regulation* (Report to the Minister for Broadband, Communications and the Digital Economy, Canberra, 2012) at 103 – 124 [Finkelstein Report].

11 At 8.

12 Australian Law Reform Commission *Classification – Content Regulation and Convergent Media* (ALRC R 118, 2012) [*Classification Review*].

13 Australian Government *Convergence Review* (Final Report to the Minister of Broadband, Communications and the Digital Economy, 2012) [*Convergence Review*]. This review drew on the recommendations of both the Finkelstein Report and the *Classification Review*.

KEY CONCLUSIONS

Principles & policy objectives

- 24 The internet has created a step-change in the way in which individuals are able to exercise their right to freedom of expression – protecting this right is of fundamental importance. Accordingly, we endorse the position adopted by both the Australian *Convergence Review* and the Australian Law Reform Commission’s *Classification Review*, which determined that for reasons of principle and practicality in this new era of information abundance, the scope of any regulatory intervention must be limited to the minimum required to achieve the policy objectives.¹⁴
- 25 The policy objectives of our recommended reforms are to:
- recognise and protect the special status of the news media, ensuring all entities carrying out the legitimate functions of the fourth estate, regardless of their size or commercial status, are able to access the legal privileges and exemptions available to these publishers;
 - ensure that those entities accessing the news media’s special legal status are held accountable for exercising their power ethically and responsibly;
 - provide citizens with an effective and meaningful means of redress when those standards are breached; and
 - signal to the public which publishers they can rely on as sources of news and information.
- 26 In line with the Australian reviews we recognise the need for any new system of accountability to take into account the profound changes in the media environment brought about by the internet. These include a recognition that the internet and web 2.0 technologies have empowered media consumers to make active choices, lessening the case for “protectionist” regulation. Like the Leveson and Finkelstein Inquiries, we recognise that in this dynamic new publishing environment there remains an overriding public interest in ensuring the survival of a robust news media, unfettered by political interference.
- 27 However, as these Inquiries also recognised, the news media continues to be a powerful institution in its own right. As well as facilitating the democratic process it is also potentially capable of distorting it through unfair, selective or misleading reporting. It is capable of derailing the administration of justice, and causing significant financial, emotional and reputational harm. It is therefore in the public’s interest that there is an effective mechanism for holding the news media to account for the exercise of its power.

¹⁴ See ch 1 at [1.80] – [1.81], fn 60.

- 28 But the news media must be free to publish as they see fit – the purpose of any standards body is to provide public accountability and a proportionate remedy when that publishing breaches important ethical standards. In other words our mechanism for influencing organisational behaviour is via accountability rather than any type of prior constraint. This is a critical distinction which is sometimes lost in the rhetoric around “regulation” of the news media.
- 29 Finally, there is a strong public interest in ensuring that any accountability mechanisms for the news media encourages rather than stifles diversity. It must therefore provide a level playing field for all those carrying out the functions of the fourth estate, irrespective of their size, commercial status, or the format in which they publish or distribute their content. In other words it must be technology neutral focusing on content and context rather than the format or delivery platform.

Policy conclusions

- 30 Based on these principles and core propositions, we reach a number of conclusions about the way in which the law should define the term “news media” when conferring statutory privileges and exemptions, and how those accessing these privileges should be held accountable.
- 31 First, for reasons we outline in chapter 3, we conclude that there is a strong public interest in adopting a broad-church definition of “news media” reflecting the need to nurture a diverse and robust fourth estate during a time of unprecedented commercial and technological disruption. This conclusion is based on an acknowledgment that the commercial model which has funded primary news gathering is under threat and that the institutional news media may not survive the paradigm shift brought about by the internet. At the same time the virtual elimination of barriers to publishing now makes it possible for any individual or organisation to undertake the core democratic functions assigned to the news media. This has the potential to strengthen democracy and increase the accountability of Parliament and the courts, and other powerful public and private institutions.
- 32 For this reason we conclude it is important to extend the news media’s special legal status to other publishers who are engaged in generating and disseminating news and commentary and in performing the other functions of the fourth estate – *provided these entities are willing to be accountable to an independent standards body to ensure these privileges are exercised responsibly.*
- 33 Second, from a consumer’s point of view we see no justification for retaining the current format-based news media complaints bodies which are largely based on outmoded distinctions between print and broadcast media. Within the next decade it is conceivable that there will be few if any printed daily newspapers. Over the same time period there is likely to be an exponential increase in the amount of audio-visual content accessed on-demand via mobile and other devices. In this converged environment consumers must be confident that consistent standards apply to similar types of content irrespective of the format or platform by which it is accessed.

- 34 It is significant in our view that many of New Zealand’s mainstream media, including Television New Zealand, Radio New Zealand and the Newspaper Publishers’ Association, accept that a single standards body for all news media is the logical consequence of convergence. As Fairfax Media stated in its submission to this review: “[n]ew technologies and convergence mean all major companies have multi-media operations and adjudicating complaints separately would be a nonsense”.¹⁵
- 35 Independent research commissioned for this review also indicates that the New Zealand public sees merit in a single media complaints body: 52 per cent of respondents to an online survey said they would “definitely support” the establishment of such a body and a further 36 per cent said they were open to the idea.¹⁶
- 36 The final question we address is whether this new converged standards body should have statutory jurisdiction over all New Zealand news media, as the Broadcasting Standards Authority currently has over broadcasters, or whether instead it should be a non-statutory body, like the Press Council, OMSA and the Advertising Standards Authority, whose members choose to be subject to their authority.
- 37 Our review has not found any evidence to challenge the mainstream media’s own assertion that New Zealand has an ethical and trustworthy news media. Although the Big Picture Research indicates some concern over the accuracy of the New Zealand media, it did not reveal a wholesale loss of confidence.
- 38 For this and for other reasons we discuss in chapter 7, we conclude that it is not in the public interest to impose statutory regulation on the New Zealand news media. Instead, in line with the principles outlined above, we believe accountability to an external standards body should be entirely voluntary.¹⁷ However, as we outline in the following section, membership of our proposed new body will bring with it advantages which in our view will be of considerable value to those willing to be subject to its jurisdiction.

SUMMARY OF RECOMMENDATIONS

A single, independent news media standards authority

- 39 We recommend that the New Zealand Press Council, the Broadcasting Standards Authority and the Online Media Standards Authority be replaced

15 Submission of Fairfax Media (9 March 2012) at [4].

16 Big Picture Marketing Strategy and Research Ltd *Public Perception of News Media Standards and Accountability in New Zealand* (summary of the online survey conducted for the Law Commission, April 2012) < www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media > [Big Picture Research].

17 See ch 4.

with a single independent standards body with jurisdiction over all news media broadcasters, newspapers, and online providers.¹⁸

- 40 This body would not be established by statute but it would be indirectly recognised in statutory provisions that create the various news media privileges.¹⁹ It should have a separate legal existence independent of the industry. It should preferably be an incorporated society. The new body would be independent of both the state and the media industry in both its adjudication and governance structures. There should be no government or industry involvement in appointments to the new body. We suggest this body could be called the **News Media Standards Authority (NMSA)**.
- 41 The NMSA would be responsible for enforcing standards across all types of news publishers, irrespective of the format or distribution channel. It would adjudicate complaints relating to news, current affairs, news commentary and content such as documentaries and factual programming which purports to provide the public with a factual account of real events involving real people.
- 42 As is the case with New Zealand's Advertising Standards Authority, the Press Council and OMSA, membership of the NMSA would be entirely voluntary. However, the following advantages would be available to those publishers who were willing to be subject to the accountability of this independent standards body:
- **Legal exemptions and privileges:** only those publishers who belong to the standards body would be eligible for the legal privileges and exemptions currently available to the news media;²⁰
 - **Complaints resolution and mediation:** the standards body would provide members with a quick and effective mechanism for dealing with complaints which might otherwise end up in costly court action, this could be of particular benefit in defamation and privacy cases;²¹
 - **Public funding:** a consequence of our recommendations is that only publishers (new and mainstream) who belong to the standards body would be eligible for funding support from New Zealand on Air for the production of news and current affairs and other factual programming;²²
 - **Brand advantage:** membership of the standards body would provide a form of quality assurance and reputational advantage. We also anticipate it

18 See ch 7. The Broadcasting Standards Authority (BSA) would retain jurisdiction for the time being over entertainment content, and over news and current affairs in relation to standards of good taste and decency, and the protection of children.

19 See ch 7 at [7.173].

20 See ch 3 at [3.101] and ch 7 at [7.107] – [7.110].

21 See ch 7 at [7.79] – [7.84].

22 See ch 7 at [7.115] – [7.117].

would become the benchmark used to determine who is to access other non-legal media privileges such as entry to the Parliamentary Press Gallery, admission to press conferences or access to embargoed releases, for example. The membership status of a publisher could be indicated through the adoption of a “qualmark” indicating compliance with the appropriate standards and complaints procedures.²³

43 In chapter 7 we provide a detailed explanation of the proposed structure, functions and powers of this proposed new standards body. It is intended that the NMSA would be able to provide speedy and effective remedies when standards have been breached. We recommend a wider range of powers for the new standards body. They would be spelled out in membership contracts between the standards body and the media agencies, and should include:

- a requirement, as at present, to publish an adverse decision in the medium concerned, the regulator having power to direct the prominence and positioning of this publication;
- a requirement to take-down specified material from the website;
- a requirement that incorrect material be corrected;
- a requirement that a right of reply be granted to a person;
- a requirement to publish an apology; and
- a censure.

We do not recommend, however, any monetary sanctions, either fines or compensation.

A statutory definition of “news media”

44 We recommend amending the various statutes which currently confer privileges or exemptions specifically on the news media to ensure that in each instance the term “news media” is consistently defined as meaning entities which meet the following statutory criteria:

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

45 In essence our recommendation formalises the unwritten social contract which has traditionally existed between the news media and the public they

²³ See ch 7 at [7.111] – [7.113].

serve. It does this by cementing the connection between the rights and freedoms of the media and their corresponding responsibilities.

- 46 This concept is not new. The Criminal Procedure Act 2011 already contains a provision which restricts certain court reporting privileges to entities which are subject to a code of ethics and which are accountable to either the Press Council or the Broadcasting Standards Authority (BSA).²⁴ The Press Council, a non-statutory body, therefore has a measure of statutory recognition under the current law. Our recommendation is to align all the statutes conferring privileges and exemptions specifically on the news media with this approach. We consider that formally linking the privileges of the news media with accountability to a standards body in this way is necessary to ensure a full and varied membership of the NMSA.

IMPLEMENTATION

- 47 Our preference is for the new standards body to come into existence without any statutory underpinning to that body's creation. We think it is preferable in the first instance for an independent standards body to be set up without any form of state coercion.
- 48 However, we do consider it to be in the public interest for there to be an independent person appointed by the Chief Ombudsman to facilitate the formation of the new body and to oversee its establishment. We are aware that there are a number of initiatives underway within the industry to address the gaps we have identified during our review. These are commendable and will no doubt assist in bringing together the new converged body. However, they do not address the convergence problem from a consumer's perspective.
- 49 We also recommend that the Chief Ombudsman conduct a review of the new complaints body against the criteria we have recommended to assess its effectiveness after a year. If for example the incentives we have outlined are not sufficient to attract the major media companies, or if the strengthened powers we propose lead to some companies leaving the standards body, or if for any other reason the NMSA is not working as it should, the option of another form of regulation may have to be reconsidered.

Consequential statutory changes

- 50 There are two consequential statutory amendments, however, that will be required to bring about the new model we recommend. It will be necessary to amend the Broadcasting Act 1989 to restrict the news jurisdiction of the BSA that will be assumed by the new standards body. The BSA is a statutory body and its jurisdiction can only be changed by statute.
- 51 The other will be required to achieve the recognition we wish to give to news media that are subject to the new standards body. As already indicated,

24 Criminal Procedure Act 2011, s 198(2).

this will involve amending the existing statutes which confer privileges and exemptions specifically on the news media so that they apply to those individuals and entities which belong to the new standards body and subscribe to its code of practice.

Dependencies

- 52 As noted earlier, this report is focused on resolving two questions: how to determine which publishers should be party to the system of privileges and accountabilities which have traditionally applied to the news media, and what form should that accountability take. We have endeavoured to provide a solution that recognises the fundamental changes which have occurred in the ways in which citizens exercise their freedom of expression in the digital age, is proportionate to the problem, and fosters a robust, independent and diverse news media.
- 53 We also recognise though that the majority of individuals using digital communication technologies, including many bloggers, will choose to sit outside our proposed new complaints body and will not be covered by its standards. However, they will be subject to the law of New Zealand and also the various measures we have recommended in our earlier Ministerial Briefing Paper to combat communication harms. These include a new criminal offence covering highly offensive communications; changes to the Harassment Act to ensure it can be readily applied to digital publishing; and a new Communications Tribunal capable of providing speedy and efficient remedies, including take down orders, in instances where digital publishing has resulted in serious harm to an individual.
- 54 The dependencies between the two packages of reforms are intentional and together they are intended to provide a flexible and proportionate response, suited to the converged digital environment.

RECOMMENDATIONS

Chapter 7

A new converged standards body

- R1 A news media standards body (the News Media Standards Authority or NMSA) should be established to enforce standards across all publishers of news, including linear and non-linear broadcasters, web-based publishers and the print media.
- R2 The NMSA should assume the functions of the Press Council, the Broadcasting Standards Authority (BSA) and the Online Media Standards Authority (OMSA) with respect to news and current affairs.
- R3 “News” should be interpreted broadly to include news, current affairs, news commentary and content which purports to provide the public with a factual account and involves real people.

Eligibility

- R4 Membership of the NMSA should be available to any person or entity (whether within New Zealand or elsewhere) that meets the following criteria:
 - (a) a significant element of their publishing activities involves the generation and/or aggregation of news, information and opinion of current value;
 - (b) they disseminate this information to a public audience; and
 - (c) publication is regular and not occasional.
- R5 The following entities should not be considered to be carrying out an activity that meets the criteria set out in R4:
 - (a) Online Content Infrastructure Platforms (OCIPs);
 - (b) The Office of the Clerk of the House of Representatives.

Membership

- R6 Membership of the NMSA should be voluntary.
- R7 Any person or entity that the NMSA determines to be eligible for membership shall become a member by entering into a contract with the NMSA.
- R8 Contracts between the NMSA and its members should include:
 - (a) the complaints process by which the members will be bound;
 - (b) the powers of the NMSA, with members being bound to comply with the exercise of any such powers;

- (c) the annual financial contribution to be paid by each member to the NMSA;
 - (d) the obligation on members to regularly publicise the NMSA's code of practice or statement of principles, the NMSA's complaints process and their own complaints handling process.
- R9 Contracts between the NMSA and its members should have a term of at least five years and should allow only limited rights for the member to terminate the contract before its expiry such as insolvency or corporate merger. In its discretion the NMSA should be able to enter into membership contracts for shorter terms with individuals.

The "news media" – a legal definition

- R10 The various statutes which currently confer privileges or exemptions specifically on the news media should be amended to ensure that in each instance the term "news media" is consistently defined as meaning entities which meet the following statutory criteria:
- (a) a significant element of their publishing activities involves the generation and/or aggregation of news, information and opinion of current value;
 - (b) they disseminate this information to a public audience;
 - (c) publication is regular and not occasional; and
 - (d) publisher must be accountable to a code of ethics and to the NMSA.

Independent structure and governance

- R11 The NSMA should be genuinely independent of both the government and the news media industry, both in relation to the adjudication of complaints, and in relation to its governance and management:
- (a) The chairperson should be a retired judge or other respected, experienced and well known public figure, appointed by the Chief Ombudsman.
 - (b) A majority of complaints panel members should be representatives of the public who are not from the media industry, with a minority having industry experience who are representative of both proprietors and journalists, but not including currently serving editors.
 - (c) One complaints panel member at least should have expertise in new media and digital communications technology.
 - (d) Complaints panel members and the chairperson should be appointed for fixed terms.
 - (e) The NMSA should have separate legal existence, preferably in the form of an incorporated society. Should the structuring of the NMSA include a governance or management board or panel, that board or panel should not be controlled by media industry appointments.

- R12 The NMSA should have the following functions:
- (a) to formulate a code of practice;
 - (b) to adjudicate complaints about breaches of the code;
 - (c) to monitor and report on trends in media practice and audience satisfaction;
and
 - (d) to mediate disputes about matters which otherwise might proceed to court.
- R13 The NMSA's constitution should expressly recognise and require the NMSA to act in accordance with the guarantee of freedom of expression in the New Zealand Bill of Rights Act 1990.

Code of Practice

- R14 The code of practice should clearly set out the standards against which the conduct of the news media is to be judged and which will form the basis of complaints from the public:
- (a) The content of the code should be formulated by the NMSA or by a committee set up by the NMSA, with no government influence on its content.
 - (b) The code should be formulated after consultation with the industry and the public.
 - (c) The code should capture to the fullest extent possible the traditional tenets of good journalism (including accuracy, correction of error, separation of fact and opinion, fairness to participants, good taste and decency, compliance with the law, the protection of privacy and the interests of children, and principles about news gathering practices) in a way which meets the demands of modern New Zealand society.
 - (d) The code should expressly recognise the guarantee of freedom of expression in the New Zealand Bill of Rights Act 1990 as a guiding principle and strive to maintain an appropriate balance between this interest and other important interests such as privacy, while making clear that the code's principles may be overridden by the public interest in publication. Guidance should be provided on what the "public interest" means.
 - (e) Sub-codes should provide for the differing public expectations of different publishing mediums.
 - (f) The code should be available on the NMSA's website. It should be reviewed on a regular basis.

Complaints process

- R15 The complaints process should include the following features:
- (a) Anyone should be able to lodge a complaint that a standard or principle has been breached, even if they are not directly affected by the breach. Complaints about unethical conduct should also be accepted for adjudication even if the code does not contain any express provision about such conduct.
 - (b) Complaints should first be directed to the media agency that is the subject of the complaint for resolution, with recourse to the NMSA if the complainant is not satisfied with the outcome.
 - (c) Complaints may be referred directly to the NMSA if there is good reason for not first approaching the media agency that is the subject of the complaint.
 - (d) Complaints may be made about breaches of standards or principles relating to both publication and news gathering practices.
 - (e) The NMSA should decline to consider complaints it considers to be trivial, vexatious, improperly motivated or outside its jurisdiction.
 - (f) Access to the NMSA should be as easy and straightforward as possible for members of the public. The NMSA should provide clear information on how to make a complaint.
 - (g) Complaint processes should be as informal as possible.
 - (h) Complaints should generally be dealt with on the papers, with hearings being reserved for matters of high public importance.
 - (i) There should be provision for dealing quickly with urgent complaints.
 - (j) Decisions on complaints should be published online, and be readily available.
- R16 Each member of the NMSA should report annually to the NMSA on its own handling of formal complaints.

Powers

- R17 The powers of the NMSA should include:
- (a) a requirement to publish an adverse decision in the relevant medium, with the NMSA having the power to direct the prominence and positioning of the publication (including placement on a website and period of display);
 - (b) a requirement to take down specified material from a website;
 - (c) a requirement that incorrect material be corrected;
 - (d) a requirement that a right of reply be granted to a person;
 - (e) a requirement to publish an apology;
 - (f) a censure; and

(g) a power to terminate a member's contract and suspend or terminate membership in the case of persistent or serious non-compliance with the standards or with the decisions of the NMSA.

R18 In relation to complaints about unethical conduct for which the code makes no express provision, the powers of the NMSA should be limited to issuing a declaration that such conduct is undesirable.

Oversight and Monitoring

R19 The functions of the NMSA should include monitoring trends, undertaking research and conducting public surveys to assess and publicise any developments or practices which could detrimentally affect news media standards as well as issuing reports and advisory opinions. The results of the exercise of this function should be published promptly and be available to the public on the NMSA's website.

Mediation

R20 The NMSA should establish a mediation service to which cases could be referred as an alternative to court action and should provide clear information about using the mediation service.

Appeals

R21 A media appeals body should be established to hear appeals from decisions of the NMSA about complaints. The appeals body should comprise two representatives of the public and one representative of the media industry, though not a currently serving editor. The NMSA should provide clear information about the appeals process.

Funding

R22 The NMSA (including the appeals body and any other related boards, panels or committees of the NMSA) should be funded by members.

R23 In addition, state funding should be provided to the NMSA specifically and only for the purpose of meeting the function set out in R19. The NMSA should enter into a funding contract with the relevant government department to carry out this function on terms that negate any perception of state influence over the operation of the NMSA. The contract should be for an initial term of at least five years.

Transparency

- R24 The NMSA should be transparent in its operations and decisions and to achieve this should take all reasonable steps to keep the public informed. As well as publishing the membership criteria, the code of practice or statement of principles and guidance, information about its complaints process (including appeals) and mediation service, its decisions and the results of its research and public surveys carried out under its monitoring function, the NMSA should make available on its website (and keep updated):
- (a) its constitution and any other corporate documents that are required to establish and maintain the NMSA;
 - (b) its Annual Report (including financial statements) and annual complaints statistics;
 - (c) a list of its complaints panel and appeal body members and the members of any other governance, funding or other panels or committees;
 - (d) a list of members;
 - (e) its contracts with members;
 - (f) its funding contract with the relevant government department to carry out its monitoring function; and
 - (g) any memorandum of understanding between the NMSA and the BSA in relation to their concurrent jurisdiction.

Transition and consequential amendments

- R25 An establishment working party should be set up, chaired by an eminent independent person nominated by the Chief Ombudsman. The rest of the working party should be appointed by the chairperson, after consultation with the news media industry. Industry representatives should be in the minority. The working party should not exceed seven members.
- R26 The working party should consult widely, including with the BSA, the Press Council and OMSA.
- R27 The tasks of the working party should include:
- (a) drawing up the constitution of the NMSA, providing for both its management and adjudication functions;
 - (b) laying down the manner of, and the criteria for, appointing panel members of the NMSA in accordance with R11 and ensuring that the Chief Ombudsman or her nominee has an involvement in the appointment process;
 - (c) appointing the foundation panel members of the NMSA, including foundation members of the complaints panel and the appeals panel;
 - (d) drawing up a mechanism for industry funding of the NMSA;

- (e) drawing up model forms of contract to be entered into between the NMSA and members of the news media electing to belong to it; and
- (f) advising, if necessary, on the initial funding contract with government to support the NMSA's oversight and monitoring functions.

R28 An amendment act should come into force once the NMSA has been established to clarify that the benefit of the media privileges contained in the Privacy Act 1993, the Fair Trading Act 1986, the Electoral Act 1993, the Human Rights Act 1993 and the courts legislation is conferred on those members of the news media that are members of the NMSA.

R29 Public funding of news and current affairs through the Broadcasting Commission should be subject to a condition imposed by the Commission that the disseminator of any resulting production is a member of the NMSA.

R30 The BSA should retain its jurisdiction over news and current affairs with respect to the good taste and decency and protection of children standards only. It would have concurrent jurisdiction with the NMSA over those standards.

R31 The Broadcasting Act 1989 should be amended to alter the jurisdiction of the BSA with respect to news and current affairs in accordance with R2 and R30, with such amendment taking effect once the NMSA has been established.

R32 The operation of the NMSA should be reviewed by the Chief Ombudsman or her nominee after it has been in existence for 12 months.

Chapter 8

R33 A review of the regulation of entertainment content should be undertaken as soon as is feasible to address the issues of convergence, with a view to achieving platform-neutral regulation that provides the public with clear choice as to content. In the meantime, the BSA should retain its jurisdiction over the broadcasting of entertainment.

R34 Any such review should seek to provide adequate protections against the dissemination of objectionable content and content from which children and young persons should be protected, as well as providing a channel for public complaints.

Chapter 1

Introduction

THE PURPOSE OF OUR REVIEW

- 1.1 By June 2012 more than 2.5 million New Zealanders, over half the population, were mobile broadband users.²⁵ To the generation who have grown up with the internet these statistics will seem as unremarkable as those recording the number of households with a telephone connection or a television. Revolutionary as these technologies were, they cannot compare with the paradigm shift which has occurred as a result of digitisation and the internet.
- 1.2 Using hand-held internet-connected devices such as smart phones and tablets, citizens can simultaneously surf the internet, conduct face-to-face conversations with friends or colleagues across the world, trade shares, access a plethora of news and entertainment, and create and distribute their own multi-media content to a potentially global audience using platforms such as YouTube and Twitter.
- 1.3 In essence, the web has placed the tools of publishing in the hands of every individual with access to it. The internet and mass participatory media have given new meaning to individual freedom of expression, providing unprecedented ways in which New Zealanders can exercise their right to “seek, receive, and impart information and opinions of any kind, in any form.”²⁶
- 1.4 These new communication technologies are also having profound impacts on the mainstream news media. Old format-based distinctions between print and broadcasting are dissolving as news media companies create and distribute content in a variety of formats and channels for access via an array of devices. And increasingly, mainstream media are harnessing the power of social media and user-generated content to source, promote and distribute their own content.

25 Statistics New Zealand *Internet Service Provider Survey* (12 October 2012).

26 New Zealand Bill of Rights Act 1990, s 14.

- 1.5 Evidence of this rapid convergence between mainstream and new media can be found in every news bulletin and on every news website in New Zealand. Stories broken by bloggers percolate up into the mainstream news agenda;²⁷ information and commentary sourced from social media such as Twitter or Facebook feature with increasing prominence in mainstream news; and audiences are provided with more and more opportunity to shape the news agenda by providing content and commentary.²⁸
- 1.6 **This review is about the laws and standards which apply to different types of communication in this converged media environment.**
- 1.7 All those who publish in New Zealand, whether as individuals or as entities such as news media companies, are subject to the basic legal constraints designed to protect citizens' interests in their reputation, privacy, personal safety and right to a fair trial. Within these minimal constraints, citizens are free to exercise their freedom of expression, including publishing views which are extreme, false, misleading and/or offensive to some.
- 1.8 The news media, however, have additional rights and responsibilities, arising from the public trust implicit in the functions they perform as a primary source of reliable information about what is happening in the world and as a means of holding power to account. In turn, they are subject to higher standards, some imposed by law, others by self-imposed professional and ethical codes, designed to ensure that their privileges and exemptions are exercised responsibly, that the information they disseminate conforms to basic standards of accuracy and fairness, and that they are held accountable for any abuse of their power.²⁹ These requirements are unique to the news media – other citizens exercising their right to freedom of expression are bound only by the law of the land.
- 1.9 The terms of reference for our review span two separate but overlapping sets of issues: the first of these relate to the news media and require us to consider who should be subject to the regime of special privileges and countervailing

27 A recent example of an agenda-setting story being first broken by a blogger occurred in October 2012 when news of a security flaw in the Ministry of Social Development's computer system was first revealed on the current affairs website *PublicAddress* by blogger Keith Ng. Stories broken by prominent blogger Cameron Slater on his website *Whale Oil Beef Hooked* are also frequently picked up by mainstream media.

28 See for example < www.stuff.co.nz/stuff-nation > an interactive sub-brand of Fairfax Media's *Stuff* news website launched in September 2012. The initiative allows users to submit their own material for publication on the general news website under the masthead *Stuff Nation*. Readers are encouraged to undertake reporting assignments, discuss stories and collaborate with Fairfax journalists.

29 Currently all New Zealand broadcasters are subject to the provisions of the Broadcasting Act 1989, which includes requirements to maintain programme and presentation standards consistent with the observance of good taste and decency; the maintenance of law and order; the privacy of the individual; and balance in the treatment of controversial issues of public importance. Print media are not subject to statutory standards but to their own ethical and professional codes backed by an industry led complaints body, the Press Council.

responsibilities which have traditionally applied to the news media now that anyone can break news and disseminate information to a potentially mass audience.

- 1.10 Specifically, our terms of reference required us to address two questions relating to the news media. First:

How to define “news media” for the purposes of the law?

And secondly to consider and to recommend:

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?

- 1.11 The other issue we were required to address concerns the rights and responsibilities of ordinary citizens who are not part of the “news media” – no matter how broadly that term might be defined. While not subject to the type of standards and accountabilities associated with the news media, all digital communicators will however remain subject to the law. The terms of reference required us to consider whether these universal laws are in fact fit for purpose in the digital age. Specifically:

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?

- 1.12 In December 2011 we published a two-part Issues Paper, *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age*, setting out our preliminary response to these questions and putting forward for public debate a number of preliminary proposals for reform.³⁰
- 1.13 These proposals included changes to existing legislation relating to speech offences and the establishment of two new bodies for adjudicating complaints – one for the news media and another to deal with harmful communications involving private citizens.
- 1.14 The proposals were widely debated in both traditional and new media forums during a four-month consultation period between December 2011 and March 2012. We received 72 formal submissions and a large number of comments and contributions from those participating in online discussions and forums.³¹
- 1.15 In the course of this consultation Coroners, Police and the Post Primary Teachers’ Association, expressed particular concern about the ways in which

30 Law Commission *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) [Issues Paper].

31 The submissions to this review are available on the Law Commission’s website at < www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media > .

- the abuse of communication technologies was contributing to truancy, school failure and a range of adolescent problems including depression, self-harm and suicide.³²
- 1.16 In May 2012, in response to this public concern, the Minister responsible for the Law Commission, the Hon Judith Collins, asked us to fast track our final recommendations with respect to the third leg of our original terms of reference – the adequacy of the current legal framework for dealing with harmful communications in the digital era.
- 1.17 This work took the form of a Ministerial Briefing Paper, titled *Harmful Digital Communications: The Adequacy of the Current Sanctions and Remedies*, which was delivered to the Minister in August 2012. The Briefing Paper and accompanying draft bill have been included as Appendix A to this final report.
- 1.18 Our Ministerial Briefing Paper focused on what we described as "harmful digital communication". It proposed a package of legal and enforcement reforms designed to provide a graduated response to the types of harms which can result from the misuse of new communication technologies. These included amendments to existing statutes to ensure they can be applied in the digital environment, a new electronic communications offence and the establishment of a specialist Communications Tribunal able to provide citizens who have suffered significant harms with speedy and effective remedies such as take-down orders.
- 1.19 In this report we return to the other focus of our review: the legal and organisational rights and responsibilities which have traditionally applied to the news media in New Zealand.
- 1.20 From a public policy perspective we were required 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.
- 1.21 These questions arise because of the paradigm shift which has occurred as a result of the internet and the digitisation of information. In this revolutionary new media environment where anyone is able to publish to the world, the mainstream media have lost their monopoly on the generation and mass dissemination of news.
- 1.22 This has given rise to fundamental questions about the ongoing viability and legitimacy of the news media as a special class of publisher with access to legal

32 Simon Collins and Vaimoana Tapaleao "Suicide link in cyber-bullying" *The New Zealand Herald* (online ed, New Zealand, 7 May 2012); Submission of New Zealand Police (March 2012); Submission of New Zealand Post Primary Teachers' Association (March 2012).

rights, and subject to countervailing responsibilities, which do not apply to ordinary citizens. It has forced us to adopt a first principles approach to the policy questions underpinning our terms of reference.

International context

- 1.23 Our own review has been conducted in parallel with two major inquiries into news media standards and accountability in Britain and Australia. In Britain, the phone hacking scandal which enveloped Rupert Murdoch’s publishing conglomerate, News International, gave rise to a two-part independent inquiry into the “culture, practices and ethics of the press” led by Lord Justice Leveson.

Leveson Report

- 1.24 Unlike our own review, the Leveson Inquiry did not directly confront the issue of convergence and what it means for regulatory models in the digital era. Instead its focus was firmly on the British newspaper industry.
- 1.25 Lord Justice Leveson released his 2,000 page *Report of an Inquiry into the Culture, Practices and Ethics of the Press* (the Leveson Report) in November 2012.³³ It represents the most exhaustive review of press standards ever undertaken in Britain.
- 1.26 The nine months of oral hearings, in which 637 witnesses gave evidence, either in person or in writing, took place against the backdrop of an ongoing police inquiry into alleged illegalities involving members of the British press.³⁴
- 1.27 Lord Justice Leveson concluded that while the entire British press served the country “very well for the vast majority of the time”, there was compelling evidence of serious ethical failings extending well beyond the newspapers specifically targeted in the hacking scandal.³⁵ Too often, in Lord Justice Leveson’s view, the press had failed to meet its responsibilities to “respect the truth, to obey the law and to uphold the rights and liberties of individuals”:³⁶

The evidence placed before the Inquiry has demonstrated, beyond any doubt, that there have been far too many occasions over the last decade and more (itself said to have been better than previous decades) when these responsibilities, on which the public so heavily

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

34 See Leveson Report, Executive Summary at fn 2, noting that by October 2012 there had been over 90 arrests in connection with the various police inquiries into alleged illegal practices by sections of the press, police and public officials. These included 17 arrests in connection with Operation Weeting (interception of mobile phone messages); 52 arrests in connection with Operation Elveden (payments to public officials); and 17 arrests in conjunction with Operation Tuleta (dealing with other complaints of data intrusion such as computer hacking and access to personal records).

35 Leveson Report, Executive Summary at [8].

36 At [6] – [7].

rely, have simply been ignored. There have been too many times when, chasing the story, parts of the press have acted as if its own code, which it wrote, simply did not exist. This has caused real hardship and, on occasion, wreaked havoc with the lives of innocent people whose rights and liberties have been disdained. This is not just the famous but ordinary members of the public, caught up in events (many of them, truly tragic) far larger than they could cope with but made much, much worse by press behaviour that, at times, can only be described as outrageous.

- 1.28 And while these criticisms did not extend to all sections of the press, Lord Justice Leveson argued that it was unconscionable that innocent victims of the news media be left without effective redress because of the benefits to the wider society from a free press:³⁷

There is no organised profession, trade or industry in which the serious failings of the few are overlooked because of the good done by the many. Indeed, the press would be the very first to expose such practices, to challenge and campaign in support of those whose legitimate rights and interests are being ignored and who are left with no real recourse.

- 1.29 Lord Justice Leveson concluded that the body responsible for enforcing press standards and providing remedies for those impacted by ethical breaches, the Press Complaints Commission, had failed. It lacked genuine independence, was hamstrung by “numerous structural deficiencies”, was largely controlled by the industry, and was inadequately resourced.³⁸
- 1.30 In recommending how these deficiencies might be addressed, Lord Justice Leveson confronted the same fundamental challenge all policy and law-makers face when considering how to attain effective public accountability without curbing the freedom of the news media.
- 1.31 Lord Justice Leveson’s solution relies on establishing a set of benefits for those choosing to sign up to the new regulator, and potentially costly penalties for those who opt to remain outside the body, but who later find themselves defending a court action.
- 1.32 We discuss Lord Justice Leveson’s proposals in greater detail in chapter 5. While it will be apparent that there are many similarities between his broad approach and our own, there are also important differences. In part these reflect the very different contexts within which these policy responses have arisen.

37 At [10].

38 At [42].

Finkelstein Report

- 1.33 In contrast, Australia’s *Independent Inquiry into the Media and Media Regulation*, led by former Federal Court Judge Raymond Finkelstein, was explicitly required to examine the ways in which technology was impacting on both the news business model and the quality of journalism, and the effectiveness of accountability mechanisms.³⁹
- 1.34 Although there was no evidence of illegality or systemic abuse of media power on the scale alleged in Britain, the Finkelstein Inquiry was driven by a combination of political concern about perceived media bias, the intense concentration of media ownership in Australia, and declining public trust in traditional news media.
- 1.35 The 467 page report, published in February 2012, included detailed analysis of the structure and profitability of Australia’s newspaper sector, the impact of the internet and convergence on competition, and the efficacy of the existing regulators for press and broadcast media. In assessing the news media’s performance and compliance with its own codes of ethics, the inquiry drew on a detailed meta-analysis of 21 surveys, spanning four decades, which examined public perceptions of media trust, performance, bias, power and ethics.
- 1.36 The report highlighted a wide range of issues including the erosion of public trust in the news media and persistent recurrence of standards failures. These included privacy violations, injury to reputation, partisanship in politics, bias and commercially-driven opposition to government policy.⁴⁰
- 1.37 Finkelstein concluded that the current regulatory mechanisms were “not sufficient to achieve the degree of accountability desirable in a democracy”.⁴¹

39 The Hon R Finkelstein *QC Report of the Independent Inquiry into the Media and Media Regulation* (Report to the Minister for Broadband, Communications and the Digital Economy, Canberra, 2012) at [1.2] [Finkelstein Report] describes the inquiry’s terms of reference as requiring investigation of:

- 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 online 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.

40 At 103 – 124.

41 At 8.

- 1.38 This conclusion was based on his assessment of the gaps and inconsistencies in the system, including the lack of regulatory oversight of online news publications, the cumbersome and slow complaints processes for broadcast media and what he described as serious structural constraints within the Australian Press Council, which did not have “the necessary powers or the required funds to carry out its designated functions.”⁴² Finkelstein noted that news media’s ability to walk away from the Press Council if dissatisfied with its decisions constituted a major flaw in the self-regulatory model, weakening its authority and undermining its resourcing.
- 1.39 He recommended the current print and broadcast regulators be replaced by a single converged regulator, responsible for enforcing standards across all news media, regardless of format.

Convergence reviews

- 1.40 Alongside these two high-profile inquiries there have also been two major Australian reviews focused on the implications of media and technological convergence for regulatory frameworks.
- 1.41 The first of these was the Australian Law Reform Commission’s (ALRC) first principles review of Australia’s censorship and classification system which reported in February 2012;⁴³ the second was a multi-faceted review 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 *Convergence Review: Final Report* (the *Convergence Review*)⁴⁴ was published in March 2012 and drew in the findings and recommendations of both the Finkelstein Report and the ALRC’s report on *Classification – Content Regulation and Convergent Media* (the *Classification Review*).
- 1.42 Although the focus and scope of these three Australian reviews differ, they each grapple with the disruptive impacts of digital technology and convergence on the regulatory environment. In the pre-digital era identifying the target of media regulation and determining the boundaries of intervention were relatively straightforward matters. However, determining what to regulate and how to calibrate, target, and enforce that regulation has now become far more complex as bright line distinctions between media formats and genres, creators, consumers and distributors become increasingly blurred.
- 1.43 This has forced reviewers and policy makers to re-examine the fundamental justification for regulatory intervention, whether it be the traditional

42 At 8.

43 Australian Law Reform Commission *Classification – Content Regulation and Convergent Media* (ALRC R118, 2012) [*Classification Review*].

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

classification and censorship schemes applied to entertainment, or the imposition of statutory requirements for balance and fairness for news media broadcasters.

- 1.44 The cross-fertilisation of ideas that has been possible as a result of these numerous parallel reviews has been invaluable. Throughout this report we consider their findings in greater depth and draw on a number of them in shaping our own recommendations. In turn, the Finkelstein Inquiry has drawn on aspects of our work.⁴⁵
- 1.45 However, it is important to emphasise that our proposals are a response to the specific problems we were asked to address and reflect our own unique context

THE NEW ZEALAND CONTEXT

Standards and accountability in a converged environment

- 1.46 Unlike the Leveson and Finkelstein Inquiries, our own review was not driven by a crisis of confidence in the mainstream media. Rather, it was prompted by *media convergence*, and a growing concern about the disparity in the ethical and legal standards and accountabilities that applied to mainstream and new media in this converged environment.
- 1.47 From a consumer's perspective this means broadly similar news and current affairs content accessed digitally is subject to different standards and regulatory regimes – or none at all – depending on whether it has been created by a broadcaster, a newspaper company or an online publisher.
- 1.48 British academic Lara Fielden, who has published widely on the challenges of standards regulation in the age of convergence, illustrated the problem in this way:⁴⁶

If a single screen can provide the consumer with a blend of content from a mainstream broadcaster, an online newspaper, a video on-demand service, and an internet blogger, all at the same time, perhaps even all authored by the same journalist, then the wholly different regulatory regimes to which each element is subject begin to feel increasingly arbitrary and irrational both to consumers and providers. Nor, whether consumed separately or in combination, is the regulation transparent, and therefore meaningful, to the public. It fails to enable the public to discriminate between regulated and unregulated content, and to make informed choices and selections. Instead brand associations may be relied on which ... can be misleading and in particular fail to support younger consumers and newer providers.

45 For example, see Finkelstein Report, above n 39, at [8.47].

46 Lara Fielden *Regulating for Trust in Journalism: Standards Regulation in the Age of Blended Media* (Reuters Institute for the Study of Journalism, University of Oxford and City University London, 2011) [*Regulating for Trust in Journalism*] at 15.

In Fielden's view, unless policy makers adopt a "first principles" approach to resolving this regulatory labyrinth "public trust across media will be put at risk."⁴⁷

The regulatory gaps and inconsistencies

- 1.49 Historically, for reasons we explore later in this report, New Zealand's 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. 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.
- 1.50 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.
- 1.51 The absence of any form of regulatory oversight for some content, and the application of different standards for others, is creating problems for both consumers and producers of news. For example, under the Broadcasting Act 1989 the public are not able to complain to the BSA about the content of:
- programmes that remain available on-demand 20 days after the original broadcast;⁴⁸
 - content that is hosted on broadcasters' websites but which has not previously been broadcast;
 - text and pictures on broadcasters' websites.
- 1.52 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.
- 1.53 Meanwhile, new web-based publishers of news and commentary on 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.

47 At 2.

48 For example, see Broadcasting Standards Authority *Davies and Television New Zealand Ltd* 2004-207. The 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.

- 1.54 On the flip side, some new publishers informed us they can face 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.
- 1.55 Since the publication of our Issues Paper in December 2011 the major broadcasters have set up a self-regulatory complaints body, the Online Media Standards Authority (OMSA), to deal with any complaints relating to news and current affairs content that is published on broadcasters' websites – including on-demand content that has not been previously broadcast. We discuss this and other initiatives to address the problems with the current regulatory systems in chapter 5 of this report.
- 1.56 Foreshadowing this discussion here, we point out that while these initiatives show a strong willingness on the part of the industry to provide accountability, they do not address the fundamental problems created by convergence – a lack of regulatory parity between print and broadcasters and an absence of accountability for new media undertaking “news-like” activities.
- 1.57 This lack of parity between print and broadcast media is likely to become increasingly problematic over the next five years as the roll out of ultra-fast broadband (UFB) creates increased opportunity and demand for high quality video content accessed via the internet. In this environment the distinction between traditional broadcasters and other producers of streamed video content will become increasingly blurred and irrelevant to consumers.⁴⁹
- 1.58 A number of New Zealand's major broadcasters argued in their submissions to this review that in this converged environment it was inequitable for business, and undesirable for consumers, to retain a dual regulatory model. MediaWorks argued that the current dual regulatory regime created an “asymmetric and unfair regulatory environment” for New Zealand media,⁵⁰ while Television New Zealand argued that a single regulator would provide “a level playing field across all media, ensuring fairness and consistency, and promoting cost efficiencies and ensuring greater accessibility for consumers.”⁵¹

Standards and accountability for new media

- 1.59 As Lord Justice Leveson noted in his report, the speed of technological change is creating unprecedented competitive and economic pressures on the mainstream media.⁵² The public no longer relies exclusively on their local

49 The New Zealand Government is investing \$1.5 billion in the roll out of ultra-fast broadband (UFB) infrastructure over ten years.

50 Submission of MediaWorks NZ Limited (11 April 2011) at [11].

51 Submission of Television New Zealand Limited (4 April 2011) at [16].

52 Leveson Report, above n 33, Executive Summary at [16].

press for their news: at one end of the spectrum they have access to the best journalism from around the world, much of it free, and at the other, they can mine Twitter, Facebook, YouTube and millions of blog sites for news and information. The fact that the mainstream media no longer has a monopoly on breaking and disseminating news has profound implications for almost every aspect of their business, including, in Lord Justice Leveson's view, the maintenance of professional and ethical standards:⁵³

All of this provides competition and, in particular, raises profound questions about the ability of any single jurisdiction to set standards which, in a free and open society, can be breached online with the click of a mouse. ...

On the other hand, that is not a reason to race to the bottom and accept lower standards which do not respect the rights and liberties of individuals.

- 1.60 The pressure on standards, and the effects on the mainstream media of competing with new digital publishers who are not subject to journalistic codes featured as a major concern in a number of submissions to this review. BSA 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:⁵⁴

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.

- 1.61 In a submission to our review Allied Press, publisher of the *Otago Daily Times*, emphasised what it perceived as the corrosive effects of this new breed of unregulated new media on the mainstream media:⁵⁵

There seems to be developing circumstances whereby web-based and electronic media are able to flagrantly breach conventions, contempt laws and other rules without sanction, while the print media is obliged by practice, and, by formal action against individual newspapers, to observe them – to commercial disadvantage.

- 1.62 As discussed earlier, all publishers, including bloggers and web-based media, are in fact subject to New Zealand law. This was demonstrated in September 2010 with the conviction of blogger Cameron Slater on charges relating to breaches of non-publication orders on his blog *Whale Oil Beef Hooked*. The prosecution followed Mr Slater's long-running campaign against the use of suppression orders by the courts.⁵⁶

53 At [17]–[18].

54 Broadcasting Standards Authority *Annual Report* (2010) at 4 – 5.

55 Submission of Allied Press Limited (6 March 2012) at 2.

56 See *Police v Slater* [2011] DCR 6. Mr Slater appealed to the High Court against the conviction and sentence imposed. The appeal was 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.

- 1.63 However, this prosecution was perceived by some as a long overdue response to a much more pervasive problem relating to the lack of standards and accountability of some web-based publishers. Allied Press’s submission encapsulates one of the important drivers behind this review: in the converged media environment mainstream publishers, who are bound by professional codes and standards, now find themselves in direct competition with unregulated newsmakers.
- 1.64 In chapter 2 of our Issues Paper we described the broad spectrum of online entities who are now engaged, to a greater or lesser degree, in generating, curating, aggregating, and disseminating news and commentary on matters of public interest to New Zealanders. These include the traditional print and broadcast companies (who are now converging to become multi-media companies publishing on a variety of devices and platforms); web-only news and news aggregation services; and a diverse community of bloggers whose primary focus is news and current affairs.
- 1.65 One of the key policy problems we address in this report is determining where to draw the line between those publishers who should be subject not just to the law of the land, but also to the higher ethical standards and accountabilities which have traditionally applied to news journalism.
- 1.66 In responding to this question, we also determine which of these new publishers should have access to the legal privileges and exemptions which are granted to the news media. As we discuss in the following chapter, the news media have traditionally been accorded a special legal status in recognition of the critical function they perform in a democracy. These legal privileges and exemptions are designed to ensure the news media have access to critical institutions such as the courts and exemptions from statutes, such as the Privacy Act 1993, to ensure they can gather and disseminate the news. However, most of the statutes conferring these privileges and benefits on the news media were drafted in the pre-digital era and so do not define what is meant by the term “news media.”
- 1.67 Judges in our courts are sometimes now confronted with bloggers and other new media wishing to report on the proceedings of a trial or hearing. While judges have the discretion to determine whether or not to permit these activities, they also confront the question as to whether some of these new publishers might not claim a *right* to report alongside mainstream media.⁵⁷
- 1.68 These policy problems give rise to our terms of reference. In essence they require us to answer two dependent questions:

57 One relevant example brought to our attention involved the Auckland website *allaboutauckland*, that was asked to obtain some form of media accreditation as part of its application to video record the proceedings of an Environment Court hearing in January 2013 <www.allaboutauckland.com>. While the site was granted a three-month Press Council membership, in the event leave to record the hearing was not granted.

- *Which publishers should have the news media's legal privileges?*
 - *Which should be subject to the standards and accountabilities traditionally associated with the generation and distribution of news?*
- 1.69 Crucially, we are then required to recommend what form that accountability should take. Is it sufficient for one, or all, of the existing complaints bodies, the Press Council, the BSA or the newly established OMSA, to extend their jurisdiction to fill the existing gaps?
- 1.70 Or are the changes in how news and current affairs are produced and accessed in the digital age so profound as to demand an entirely new approach?

OUR APPROACH

First principles

- 1.71 Digital communication technologies and media convergence require us to adopt a first principles approach to the questions posed in our terms of reference. They require us to re-evaluate the public interest in continuing to recognise the news media as a special class of publisher, with access to legal rights not available to ordinary citizens, and in continuing to hold the news media accountable to standards not applied to ordinary communicators.
- 1.72 In chapter 3 of our report we consider the public interests underpinning the first part of this proposition: the case for preserving the news media as an entity with special legal and organisational rights and privileges. We consider what differentiates “news media” from other types of communicators and draw on these characteristics to construct a definition of “news media” for the purposes of determining which entities should be entitled to access the news media’s privileges and exemptions.
- 1.73 In chapter 4 we undertake a similar exercise with respect to the question of standards and accountabilities. Again, we adopt a first principles approach, asking whether there is a defensible rationale for imposing different standards and accountabilities on the news media and, if so, what form these should take. This exercise involves the careful balancing of *two critical public interests*: the public interest in a robust and unfettered news media; and the public interest in an ethical media, subject to effective and appropriate accountability mechanisms.
- 1.74 In order to determine the most appropriate approach to news media accountability in the digital environment we were required to assess both the potential and actual harms arising from ethical breaches by mainstream and new media, and the effectiveness of the remedies available under the existing complaints regimes.

- 1.75 Unlike Britain and Australia, there is a paucity of independent empirical data measuring public trust in the New Zealand news media. The news media themselves are conflicted when it comes to assessing their own performance and there is currently no way of independently assessing the level of complaints they receive from the public or how these are resolved.⁵⁸
- 1.76 To assist us in assessing the scope of the problem we commissioned an independent market research company, Big Picture, to undertake research into a number of critical issues under consideration as part of the review including public perceptions of news media standards, accountabilities and complaints bodies.⁵⁹
- 1.77 In chapter 4 of this report we draw on this research, submissions, and an analysis of the complaints appealed to the Press Council and the BSA over the past five years to provide some assessment of the problem.
- 1.78 In chapters 5 and 6 we then move on to assess the strengths and weaknesses of the existing accountability mechanisms and consider the options for reform with particular focus on the proposals put forward in the Finkelstein and Leveson Reports.
- 1.79 Having considered the various options available for providing public accountability for their power, we turn, in chapter 7 to outline our proposal to create a new converged independent standards body for all news media, irrespective of format or delivery channel.
- 1.80 Our recommendations in chapter 7 are guided by a number of principles and propositions which have much in common with those underpinning the Australian *Convergence Review* and *Classification Review* referred to earlier. Foremost among these is the recognition that the internet has created a step-change in the way in which individuals are able to exercise their right to freedom of expression – protecting this right is of fundamental importance.
- 1.81 Accordingly, we endorse the position adopted by both the Australian reviews which concluded that for reasons of principle and practicality in this new era of information abundance the scope of any regulatory intervention must go no further than that which can be justified in order to meet the specific policy objectives.⁶⁰

58 In ch 4, at [4.88] – [4.100], we discuss trends in the number and type of adjudications made by the Press Council and the BSA as one indicator of the level of satisfaction with news media standards in New Zealand.

59 Big Picture Marketing Strategy and Research Ltd *Public Perception of News Media Standards and Accountability in New Zealand* (summary of the online survey conducted for the Law Commission, April 2012) < www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media > [Big Picture Research].

60 For the 10 principles which guided the *Convergence Review* see *Convergence Review Committee: Emerging Issues* (discussion paper, Canberra, 2011) at 8 – 10. For the principles underpinning the *Classification Review*, above n 43, see the report summary at 13.

- 1.82 The policy objectives of our recommended reforms are to:
- recognise and protect the special status of the news media, ensuring all entities carrying out the legitimate functions of the fourth estate, regardless of their size or commercial status, are able to access the legal privileges and exemptions available to these publishers;
 - ensure that those entities accessing the news media's special legal status are held accountable for exercising their powers ethically and responsibly;
 - provide citizens with an effective and meaningful means of redress when those standards are breached; and
 - signal to the public which publishers they can rely on as sources of news and information.
- 1.83 Finally in chapter 8 we address the issue of entertainment content. Although the regulation of this type of content largely falls outside the scope of our project, we outline some of the issues that we consider will need to be considered in any future review.

Chapter 2

The News Media's rights and responsibilities

INTRODUCTION

- 2.1 Many people are unaware of the fact that in most western-style democracies, including our own, the law accords the news media a special legal status. As a result the news media have legal privileges and exemptions which are not available to ordinary citizens. As we will discuss in greater depth in the following chapter, these are intended to ensure the news media are able to perform their democratic functions. Some of these legal provisions give the news media privileged access to information or places, enabling them to fulfil their function as the public's "eyes and ears"; others are designed to protect news gathering and publishing activities to ensure that these processes are not unjustifiably fettered.
- 2.2 Alongside these legal privileges, the news media are also accorded many organisational privileges, again, intended to facilitate their role as a primary gatherer and disseminator of news.
- 2.3 These formal and informal privileges have traditionally been matched by countervailing responsibilities. For example, there is an assumption, sometimes explicit, sometimes implicit, that the news media will act ethically and exercise their rights in a way that is consistent with the public's interest in fair and accurate reporting. These requirements are unique to the news media – other citizens exercising their right to freedom of expression are bound only by the law of the land.
- 2.4 The expectation that the news media will act ethically in the way in which they gather and report the news extends beyond the contexts in which they exercise their special legal privileges and exemptions. The news media depend on the public's trust for their commercial success. With that trust comes power, and a requirement for accountability.

- 2.5 The question we confront in this review is who should be subject to this regime of special privileges and countervailing responsibilities now that anyone can break news and disseminate information to a potentially mass audience. Clearly the privileges and exemptions could not have been intended to extend to anyone who communicates via media of any kind. Nor is it reasonable for all communicators to be held accountable to the news media's ethical standards.
- 2.6 In the next chapter we examine the rationales for continuing to recognise the news media as a special type of communicator, with special legal status and responsibilities. But first we set out in this chapter the rights and ethical responsibilities and accountabilities which currently apply to the mainstream news media in New Zealand.

NEWS MEDIA LEGAL PRIVILEGES AND EXEMPTIONS

- 2.7 We begin by summarising the most important of the news media's legal privileges and exemptions. They can be divided into two kinds: those which grant special rights of access to information, and those which facilitate the dissemination of information to the public.

Access privileges

Courts

- 2.8 A number of statutes grant news media reporters the right to attend court hearings which other members of the public have no right to attend. This includes criminal proceedings from which the public have been excluded,⁶¹ and Family and Youth Court cases where the public have no right to attend in the first place.⁶² Media attendance is to enable scrutiny of the proceedings on behalf of the public to ensure that judges remain accountable. In this respect the media are the "eyes and ears" of the public. Some of the statutory provisions give the court the discretion to allow others to attend in particular cases, but the media are the only ones with a statutory right. That is a significant difference.

61 Criminal Procedure Act 2011, ss 97, 198 and 199.

62 Family Courts Act 1980, s 11A; Family Proceedings Act 1980, s 159; Children, Young Persons, and Their Families Act 1989, s 166; Care of Children Act 2004, s 137. See also the Social Workers Registration Act 2003, s 80 and the Health Practitioners Competence Assurance Act 2003, s 97.

- 2.9 The media's special status is evidenced in two further ways. First they have standing in criminal proceedings to be heard in relation to applications for suppression orders or applications to renew, vary or revoke suppression orders; and to appeal in relation to such orders.⁶³ That is a significant right. No one else, other than the Crown or defence, has it. Second, they alone have the right to communicate electronically from the courtroom, for example by tweeting.⁶⁴
- 2.10 For a long time the relevant statutes did not define news media for these purposes, but now the Criminal Procedure Act 2011 does so in relation to criminal proceedings.⁶⁵ It means media which are subject to a code of ethics and a complaints procedure. The In-Court Media Coverage Guidelines⁶⁶ and the guidelines for the Family Court⁶⁷ adopt a very similar definition, although it is not statutory.

Meetings

- 2.11 In the case of local authority meetings and some other types of public meeting bona fide or "genuine" news media reporters have a right to attend as members of the public and to report proceedings.⁶⁸ That is a lesser right than in the case of the courts, for the media can be required to leave any private parts of the meeting along with members of the public. However the statutory reference to reporting proceedings suggests that while they are in the public part of the meeting they have a right to report, probably a more privileged position than members of the public.

Parliamentary Press Gallery

- 2.12 Accreditation to the Press Gallery is not regulated by statute but by Parliament's own rules. Parliament virtually always sits in public, so accreditation does not give the media exclusive attendance rights as in the case of the courts, but it does grant privileges in respect of facilities and access to Members of Parliament and Ministers of the Crown. The criteria for membership of the Gallery are that members should be bona fide journalists, "employed by outlets that regularly publish a substantial volume of

63 Criminal Procedure Act 2011, ss 210 and 283.

64 Ministry of Justice "In-Court Media Coverage Guidelines 2012" in *Media Guide to Reporting the Courts* (Wellington, 2012), Appendix 1, cl 5. Leave may be granted in other cases, but not as a matter of right.

65 Criminal Procedure Act 2011, s 198.

66 "In-Court Media Coverage Guidelines", above n 64, cl 3(1).

67 Family Court of New Zealand "Media Guidelines" (attendance in court by "accredited" media) < www.justice.govt.nz/courts/family-court/about/media/guidelines > .

68 Local Government Official Information and Meetings Act 1987, s 49; New Zealand Public Health and Disability Act 2000, sch 3, cl 34.

Parliamentary or political material.”⁶⁹ Standards of conduct are required and can be enforced by sanctions including suspension from the Gallery.

Journalists’ sources

- 2.13 The Evidence Act 2006 codifies what had probably become the common law position: that journalists do not have to disclose their sources in court unless the judge so orders. This is also an aspect of access to information, because sources may decline to provide material to journalists if they are afraid it might be disclosed in court.⁷⁰ The Act defines both “journalist” and “news media” in such a way as to leave it open exactly who is included in those terms. Does it for example include a blogger? Overseas courts have given different answers to that question: the New Jersey Supreme Court has refused to allow a blogger to use the New Jersey Press Shield law,⁷¹ whereas an Irish Court has taken the opposite view.⁷²
- 2.14 In New Zealand the question may not be quite so critical, because even if a blogger or other communicator was held not to come within the protection of the section he or she might still be covered by another provision which gives the court discretion to allow evidence to be withheld on grounds of confidentiality.⁷³ Nevertheless, the journalist protection is stronger because there is a *presumption* of non-disclosure. In that respect it is not unlike the court attendance privilege.

Publication privileges

- 2.15 The other group of privileges facilitates the dissemination of information by exempting the news media from some of the legal constraints which apply to members of the public. The purpose is to enable important information to reach the public without the media being unduly constrained by the fear of litigation or other legal action.

69 Office of the Speaker “Rules of the Parliamentary Press Gallery” (2011).

70 Evidence Act 2006, s 68.

71 Terry Baynes “New Jersey Court Denies Blogger Shield Protection” *Reuters* (online ed, New York, 7 June 2011).

72 *Cornec v Morrice & Others* [2012] IEHC 376.

73 Evidence Act 2006, s 69.

- 2.16 The first category consists of legislation providing that certain legal obligations do not apply to the media. Thus, newspapers and broadcasters (an old-fashioned dichotomy which reflects the age of the legislation) are not bound by an important section of the Fair Trading Act 1986: they are not liable to legal action if they engage in “misleading conduct in trade”.⁷⁴ So, for example, if a news medium makes a mistake in its facts, perhaps in its financial reporting, it cannot be sued under the Fair Trading Act. Inaccuracies of that kind are best dealt with by regulators rather than by the courts.
- 2.17 Likewise, the news media are not bound by the Information Privacy Principles in the Privacy Act 1993.⁷⁵ This is not to say that they should not respect individual privacy, but rather that the provisions of the Privacy Act impose constraints of a kind that could unnecessarily inhibit news reporting. The media should operate under privacy principles more closely tailored to the media’s special needs. In fact the codes of the Broadcasting Standards Authority (BSA) and the principles of the Press Council do provide such principles.
- 2.18 Our electoral legislation provides another example. The offence of publishing, on polling day, any statement liable to influence an elector does not constrain the publication of a party name in news relating to the election published in a newspaper or by a broadcaster.⁷⁶ Finally the Human Rights Act 1993 allows newspapers and broadcasters to accurately report racist statements made by another even though the maker of the statements might have infringed the Act.⁷⁷

Wider privileges

- 2.19 We note here two other “reporting” privileges, even though the statutes creating them do not confine them to the news media: they are available to anyone communicating a report in any way. But we mention them here to show that the privileges only attach to publications which exhibit a degree of responsibility: the word “fair” is used in both the statutes which create them. Both of them allow reporters to pass on to the public words used by others.

74 Fair Trading Act 1986, s 9. There are exceptions for certain kinds of advertising material. Some have queried whether the Fair Trading Act exemption is justified but we think it is. The media clearly thinks so, and there are equivalent exemptions in Australia: Trade Practices Act 1974 (Cth), s 65A. The purpose of the Australian exemption has been described as being “to maintain an effective and enforceable TPA. That purpose is served by releasing [the media] from undesirable inhibitions on the provision, by them, of news, information, opinion and comment ...” See *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd* [2009] HCA 19 at [42].

75 Privacy Act 1993, s 2(1) definition of “agency” and “news activity”.

76 Electoral Act 1993, s 197(1)(g)(i); see also the Electoral Referendum Act 2010, s 31(2)(b).

77 Human Rights Act 1993, s 61(2).

- 2.20 The Defamation Act 1992 has long conferred a privilege of that kind on *fair and accurate* reports of the proceedings of many public agencies (for example the courts and commissions of inquiry) and statements issued by public officials for public information.⁷⁸ And the Copyright Act 1994 provides that it is a defence to an action for breach of copyright that there has been a fair dealing for the purpose of reporting current events by means of a sound recording, film or communication work, or in any other way.⁷⁹
- 2.21 This recognises that the dissemination of news is of necessity an urgent business, and at times the most efficient, sensible and accurate way of doing it may be to allow communicators to borrow words and images from elsewhere. However, as we have said, these two privileges go wider than just the “news media” and we would not wish to change that.⁸⁰

The future

- 2.22 We support the continuance of the existing statutory privileges and exemptions. Our challenge is to decide who, in this converged environment, should be entitled to them. There may be another question which we do not grapple with here. Should the statutory privileges and exemptions be increased in number? In the digital environment we may someday have to consider, for example, whether responsible media should be protected against unauthorised propagation of their stories by re-tweeting or pasting into blogs. Total removal of such downstream publication is sometimes virtually impossible. We can envisage a time when matters such as this may need to be reviewed.

Non-statutory privileges

- 2.23 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.
- 2.24 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.
- 2.25 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

78 Defamation Act 1992, ss16 – 18, sch 1 pt 2.

79 Copyright Act 1994, s 42.

80 See John Burrows and Ursula Cheer *Media Law in New Zealand* (6th ed, LexisNexis, Wellington, 2010) at [4.1.3(d)].

- influence of the news organisation, will often play a role in determining access.
- 2.26 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.
- 2.27 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.
- 2.28 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.
- 2.29 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.

NEWS MEDIA RESPONSIBILITIES

- 2.30 As we have noted, public trust requires that the news media's privileges and exemptions are exercised responsibly. One judge has said in relation to court reporting that "the right to report fairly and accurately carries with it a significant responsibility to ensure balanced reporting".⁸¹ A submitter to our review said "[s]imply having privileges is not enough. It's knowing how to exercise oneself responsibly with those privileges."⁸²
- 2.31 If there are to be news media exemptions from the general laws relating to privacy and accurate reporting, as provided for under the Privacy Act and the Fair Trading Act, for example, then the public interest requires that there are strong regulatory assurances of accountability to appropriate standards as a proxy for the legal rules.
- 2.32 That expectation of responsibility appears explicitly in some of the statutory provisions. The Human Rights Act requires an "accurate" report. The local government legislation and Press Gallery reporting privileges use the

81 *Slater v Police* HC Auckland CRI-2010-404-379, 16 May 2011 at [45] per White J.

82 Submission of Andrew Bonallack *Capital Community Newspapers* (11 March 2012).

expression “bona fide”; the Defamation Act refers to “fair and accurate” reporting. Most importantly, however, the court privileges are now showing a trend (whether statutory or in guidelines) that the media to whom those privileges are available should be responsible to a code of ethics and complaints procedures of a recognised media regulator.

- 2.33 In the following section we provide a brief overview of the journalistic codes to which New Zealand news media generally subscribe and a description of the bodies responsible for enforcing these codes and standards.⁸³

Ethical codes and standards

- 2.34 The fundamental requirements of ethical journalistic practice have been enunciated in codes and standards for well over a century. A comparative study of the codes adopted by individual news companies, journalists’ organisations and media complaints bodies in the United States, the United Kingdom, Canada, Australia, Ireland and New Zealand has found remarkable consistency in the underlying principles.⁸⁴ The study, by former *New Zealand Herald* editor in chief, Dr Gavin Ellis, identified 18 common principles governing what he described as “Anglo-American” journalism. Foremost among these was a “universal belief in the principle of accuracy, with its attendant principles of error correction and right of reply.”⁸⁵ Alongside the requirement for accuracy, virtually all news organisations also recognised the requirement for fairness, respect for privacy, and the protection of confidential sources.⁸⁶
- 2.35 The common commitment to ethical journalistic practice can be seen in the editorial codes adopted by New Zealand’s two leading print media companies, Fairfax Media and APN News & Media. The Fairfax Code stipulates that staff must strive to be “accurate, fair and independent” and goes on to describe the behaviours it expects from staff in pursuit of these goals. This includes a requirement that staff will:⁸⁷
- Present news and comment honestly, bearing in mind the privacy and sensibilities of individuals as well as the public interest.

83 At present the voluntary industry-led body, the Press Council, is responsible for overseeing standards for newspapers and their websites while broadcasters are subject to the statutory complaints body, the BSA. In February 2013 another voluntary industry-led complaints body, the Online Media Standards Authority (OMSA), was established to deal with complaints about online content on broadcasters’ websites, but has not yet commenced operation. See ch 5 at [5.23] – [5.24]; [5.117] – [5.125].

84 Gavin Ellis “Journalism’s Road Codes: The Enduring Nature of Common Ethical Standards” (2012) 18 *Pacific Journalism Review* 112.

85 At 115.

86 At 115.

87 Fairfax Media “Fairfax Media New Zealand Journalism Charter” (31 August 2011) < www.fairfaxmedia.co.nz/dotAsset/36730.pdf >.

- Correct mistakes by prompt correction and clear explanation and, where necessary, apology.
 - Ensure journalists and photographers respect the law, identify themselves and their purpose clearly and not misrepresent themselves unless there is a case of compelling public interest and the information cannot be obtained in any other way.
 - Approach cases involving personal grief or shock with sympathy and discretion.
 - Ensure that staff act professionally so as not to compromise the integrity or reputation of themselves or their publication.
 - Value originality in journalism, take every reasonable precaution to avoid plagiarism, respect the copyright and other intellectual property rights of others, and ensure staff are aware of their responsibilities in this regard.
 - Not allow the personal interests of journalists to influence them in their professional duties.
 - Not allow the professional duties of journalists to be influenced by any consideration, gift or advantage offered and, where appropriate, disclose any such offer.
- 2.36 APN News & Media's editorial code of ethics covers a similar range of issues including accuracy, balance, independence, prejudice, privacy, and treatment of sources.⁸⁸ It provides a detailed guide to the types of behaviour it expects from its editors and journalists in order to comply with the requirements of ethical journalism. For example, on the need for balance the code specifies:
- We will be honest and fair in gathering, reporting and presenting the news in the pursuit of truth. In areas of controversy or disagreement, a fair voice will be given to opposing views.
 - We will ensure that headings and captions fairly represent content.
 - We will endeavour to give people a timely opportunity to respond to allegations or comments made against them.
- 2.37 State broadcaster Radio New Zealand has also developed a comprehensive charter of editorial practice spanning both its legislative and ethical or professional obligations.⁸⁹ This 80 page document provides detailed guidance on a wide range of issues including taste and decency, fair dealing with the public, covert and surreptitious methods, and the treatment of online content.
- 2.38 Alongside the codes of ethics developed by individual media organisations the Engineering, Printing and Manufacturing Union (EPMU), the union which represents journalists, has also developed a code of ethics for its members. It

88 APN News & Media Editorial Code of Ethics (July 2011) < www.apn.com.au/apn/assets/File/APN_Editorial_Code_of_Ethics_29_07_11.pdf > .

89 Radio New Zealand "Editorial Policies" (2007) < www.radionz.co.nz/assets/cms_uploads/000/000/003/Editorial_Policy_May_2007.pdf > .

summarises the core values which it considers should underpin journalistic practice:⁹⁰

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 ... (a) ... 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.

- 2.39 The extent to which these common principles influence a news organisation and what it publishes or broadcasts is of course highly variable, reflecting the different histories, cultures and commercial and competitive pressures that characterise individual news organisations. Ellis points to the gross ethical breaches uncovered in the course of the Leveson Inquiry in the United Kingdom as an example of the type of culture which can develop in an intensely competitive environment. However he argues that while the News International scandal has led to an exhaustive re-examination of how journalists and news organisations are held to account, they are unlikely to lead to a fundamental re-definition of the underlying journalistic standards and principles:⁹¹

The standards themselves will go unchallenged because the protection they provide has a strong foundation, stretching back a century, in which philosophical principles and practical applications were fused together early in the process.

Complaints bodies

- 2.40 To be meaningful there must be some way of enforcing such codes and holding the news media to account for serious breaches. In New Zealand, as in Britain and Australia, the strength of these codes and the mechanisms by which they are enforced differ for print and broadcast media.
- 2.41 Here we provide an overview of New Zealand's two operational complaints bodies, the Press Council and the Broadcasting Standards Authority (BSA), and the principles and standards against which they adjudicate. In chapter 5 we evaluate the effectiveness of these two bodies and the extent to which they continue to be fit for purpose in the era of converged media.

The Broadcasting Standards Authority

- 2.42 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

90 Engineering, Printing and Manufacturing Union "Journalist Code of Ethics" < www.epmu.org.nz/journalist-code-of-ethics/ > .

91 Ellis, above n 84, at 119.

New Zealand until 1970 and the first private television broadcaster was not issued with a warrant until 1989 with the launch of TV3.

- 2.43 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.
- 2.44 New Zealand's tightly regulated broadcasting environment underwent radical reforms in 1989 and the radio spectrum was put up for commercial tender under a property-rights system which continues today. However, despite opening broadcasting up to free market competition, the state continued to require all broadcasters to comply with statutorily prescribed standards.
- 2.45 These standards were spelt out in the Broadcasting Act 1989 which made broadcasters individually responsible for maintaining standards that were consistent with:⁹²
- the observance of good taste and decency;
 - the maintenance of law and order;
 - the privacy of the individual;
 - 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
 - any approved code of broadcasting practice applying to the programmes.
- 2.46 The Act also established the BSA as a complaints body, 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.⁹³ 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.
- 2.47 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

92 Broadcasting Act 1989, s 4.

93 Section 21.

order of the BSA could, in some circumstances, lead to a broadcaster being found to be in breach of their licence.

The Press Council

- 2.48 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 EPMU.
- 2.49 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 Journalists' 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.
- 2.50 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. Unlike the BSA, which has statutory powers, the Press Council depends on the voluntary co-operation and compliance of its member organisations.
- 2.51 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.
- 2.52 Instead of statutory codes, the Press Council adjudicates complaints against a set of agreed principles intended to provide guidance to the public and publishers with respect to ethical journalism. These principles cover core requirements around matters such as accuracy, fairness and balance, balancing privacy rights against other public interests, the protection of children, confidentiality, conflicts of interest and corrections.
- 2.53 We discuss the Press Council's structure and role in greater depth in chapter 5.

THE POLICY PROBLEM

- 2.54 The system of legal and organisational privileges matched by countervailing responsibilities outlined in this chapter was not designed for the digital publishing environment. In this environment it is possible for former print companies to distribute audio-visual content and for broadcasters to produce

text-based news. It is also possible for anyone with access to the internet and digital publishing technology to report the news.

- 2.55 As a consequence of this new converged media environment there is now:
- 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.
- 2.56 Most of the laws which confer privileges or exemptions on the news media were drafted in the pre-internet era. As a consequence most provide no assistance in determining the parameters of the term “news media”. Furthermore the statutory provisions which do provide some clarification of the term are often inconsistent in their definition. Some are confined to broadcasting and newspapers, a reflection of their age, and need to be updated.
- 2.57 At the same time, gaps and inconsistencies are emerging with respect to the standards and accountabilities which apply to news content in the digital environment. For example, while it is possible to complain to the BSA about a serious inaccuracy in a news or current affairs programme that has been broadcast on radio or television, it is not possible to complain to the BSA about content made available on-demand from a broadcaster’s website, or about the text in a story on a broadcaster’s website.
- 2.58 The Broadcasting Act was designed in an era when programmes were live-streamed for the simultaneous reception by a mass audience: today, increasingly, content is accessed on-demand by individuals on an array of platforms and devices, including mobile apps. The Act specifically excludes this “on-demand” content from its jurisdiction.⁹⁴ (In February 2013 a coalition of New Zealand broadcasters launched the Online Media Standards Authority (OMSA), to deal with complaints about online content on mainstream broadcasters’ websites. We describe OMSA and consider its implications for our proposed regulatory reforms in chapter 5.)

94 The definition of a “broadcast” in the Broadcasting Act 1989, s 2, is sufficiently broad to encompass content transmitted via the internet. However the Act specifically excludes from coverage programmes “made on the demand of a particular person for reception only by that person”.

- 2.59 There is also a lack of parity in the regulatory environment within which traditional broadcasters and online news publishers operate. Audio-visual content published on a newspaper website is not subject to the same statutory complaints system which applies to broadcasters, but rather to the self-regulatory regime enforced by the Press Council.⁹⁵
- 2.60 The provision of high quality video is likely to become an increasingly important component of all news content providers over the next five years. From a consumer's perspective it is difficult to justify why different complaints regimes should apply to news videos depending on whether they are produced by a former newsprint company or by a broadcaster.
- 2.61 At the same time the majority of 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 otherwise causes harm. In chapter 2 of our Issues Paper we described this broad spectrum of online entities who are now engaged to a greater or lesser degree in generating, aggregating and disseminating news and commentary on matters of public interest to New Zealanders.⁹⁶
- 2.62 These include professionally produced commercial and semi-commercial news sites such as *Scoop*, *interest.co.nz*, *NewsRoom*, *Yahoo!New Zealand*, *Voxy* and *MSN.NZ*, popular news and current affairs blog sites such as, *Kiwiblog*, *Whale Oil Beef Hooked* and *Public Address* which generate both news and commentary, and the many community message boards and forums where the news is debated and occasionally broken. While most if not all of these sites have developed their own publishing standards and terms and conditions for contributors, some may welcome the opportunity to access the same legal and organisational rights, and be subject to the same accountabilities, as currently apply to mainstream news media.⁹⁷
- 2.63 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

95 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. The Council has extended its jurisdiction to all content published on its members' websites – including audio-visual content.

96 Law Commission *The News Media Meets the 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) at 40 – 46.

97 In the course of consultation we were told 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.

- 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.

2.64 In the following chapter we examine the public interest arguments underpinning these questions.

Chapter 3

Defining “news media” for the purposes of the law

INTRODUCTION

The issues

- 3.1 In the preceding chapter we set out the legal and organisational rights, and countervailing responsibilities, assigned to the “news media” in New Zealand. The primary objective of this review is to identify who should be subject to this system of rights and responsibilities and in what circumstances. In order to do this we are first required to define this term, “news media.”
- 3.2 As discussed in our introductory chapter, 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 public service broadcasters and corporates which between them produced the nation’s daily newspapers, television and radio news and current affairs programmes. These were the entities, most of them privately owned, entitled to access the special legal privileges set out in the preceding chapter, and these were the entities held accountable to the statutory and ethical standards associated with the exercise of this type of communication.
- 3.3 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. In chapter 2 of our Issues Paper we described the broad spectrum of online entities who are now engaged, to a greater or lesser degree, in generating, curating, aggregating, and disseminating news and commentary on matters of public interest to New Zealanders.⁹⁸ These include the traditional print

98 Law Commission *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) [Issues Paper].

and broadcast companies who are now converging to become multi-media companies publishing on a variety of devices and platforms; web-only news and news aggregation services and a diverse community of bloggers whose primary focus is news and current affairs.

- 3.4 In this digital ecosystem there is a growing symbiosis between new and old media, and those who consume and create content. Mainstream media are making increasing use of social media to distribute content, drive traffic, source news and engage audiences.
- 3.5 This blurring of boundaries between professional and amateur, moderated and un-moderated, corporate and social media is a defining characteristic of the new media landscape. It also gives rise to fundamental questions about the nature of news, the role of the news media, and the rationale for continuing to distinguish this type of publisher from other content creators.
- 3.6 For example, in an age when every citizen has the potential to "broadcast themselves" why should the law continue to assign a special legal status to just one class of publisher, the "news media"? Equally, in an age when ordinary citizens are able to exercise unprecedented choice and control over the quality and quantity of information they access about the world around them, what justification remains for imposing higher standards on a small sector of that vast market of content creators – those known as "news media"?
- 3.7 In order to answer these questions we must first ask what *purpose* is served in preserving this special arrangement for news media, however defined. In chapter 4 of our Issues Paper, we undertook such a first principles exercise, unpacking the ideas and assumptions which underpin the current system of news media rights and responsibilities.
- 3.8 We attempted to define the core characteristics of journalism and to identify the attributes which distinguish the "news media" from other content creators. We argued that the news media perform a number of vital functions in society and for this reason there was a clear public interest in continuing to recognise them as a distinct class of publisher with special rights and accountabilities. We then put forward a preliminary definition of "news media" for the purpose of determining who should be subject to these rights and responsibilities.
- 3.9 In this chapter we re-examine these core propositions in the light of submissions and further research and analysis. We then set out the conclusions we have reached about the nature of news and the role of the "news media" and how it should be defined in the digital era.

THE ROLE OF THE NEWS MEDIA

Our preliminary proposition

- 3.10 In our Issues Paper we described how 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. 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.
- 3.11 Throughout the course of the 19th and 20th centuries the idea that the press had an important role to play in the democratic process took hold, becoming a central plank in the defence of an independent and free press. An individual’s fundamental right to freedom of expression became conflated with “freedom of the press.”
- 3.12 Although exclusively privately owned, and often highly partisan, the press itself sought legitimacy for its increasing power and influence by explicitly articulating its wider social role and obligations as illustrated in the following quotation from the famous editor of the *Manchester Guardian*, CP Scott:⁹⁹
- A newspaper has two sides to it. It is a business, like any other, and has to pay in the material sense in order to live. But it is much more than a business, it is an institution; it reflects and it influences the life of the community ... it has, therefore a moral as well as a material existence, and its character and influence are in the main determined by these two forces.
- 3.13 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*:¹⁰⁰
- 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 ...
- 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.
- 3.14 Alongside these obligations to provide the public with reliable and accessible sources of information, the press was also charged with being the public’s

99 CP Scott (1846-1932) *The Making of the “Manchester Guardian”* (F Muller, 1946) 161 as cited in The Hon R Finkelstein QC *Report of the Independent Inquiry into the Media and Media Regulation* (Report to the Minister for Broadband, Communications and the Digital Economy, Canberra, 2012) at [2.52] [Finkelstein Report].

100 Quoted in B Berelson and M Janowitz (eds) *Reader in Public Opinion and Communication* (2nd ed, The Free Press, New York, 1966) at 535–536.

“eyes and ears” and, most critically, using their privileged access to provide an independent watch-dog on the exercise of state and other seats of power. The expectation that the news media, in its varied forms, would perform these core democratic functions provided the rationale for their legal and organisational privileges and differentiated them from other purely commercial enterprises.

- 3.15 However, the news media’s special freedoms were matched by countervailing responsibilities. Foremost among these was the requirement that the public must be able to rely on the truthfulness, or accuracy, of what they read. Fact and opinion needed to be clearly differentiated. And the public needed to be confident that the news media did not use its considerable power and influence to deliberately mislead or cause unjustifiable harm.
- 3.16 This, in crude terms, describes the social contract which was understood to exist between mainstream news media and the public it serves, and on whom it has relied for its commercial success.

Mainstream media and disruptive technology

- 3.17 In chapter 4 of our Issues Paper we asked how this 20th century construct aligned with the reality of mass participatory media in the digital age. We identified a number of fundamental internal and external challenges, including the following:
- The fact that the advertising-based revenue model which funded primary news gathering and the professionalization of journalism has been substantially undermined.
 - The fact that within this context of diminishing revenues and resources, news media companies face a range of competitive pressures and complexities arising from disruptive technology. These include the requirements for formerly distinct sections of the news media to develop “multi-media” capacities, and to compete in the “speed journalism” market where they confront 24 hour news cycles and continuous news deadlines.
 - The challenge to the news media’s ability to retain control of, and monetise, exclusive content in a digital environment founded on free access and designed for copying, sharing, linking, repackaging and republishing.
 - And, critically the competitive challenge to the mainstream media’s monopoly on mass publishing brought about by the internet and the read/write web.
- 3.18 This latter point, in theory at least, can be seen to challenge the fundamental rationale for preserving the news media as a special entity performing unique democratic functions. In an age when the barriers to mass communication have been reduced to previously unimaginably low levels, it is arguable that the public no longer depends on the news media for a clear and truthful account of events.

- 3.19 Thanks to the internet and the World Wide 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”.
- 3.20 In a special report on the future of news, *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. This change, they argued, was altering the very character of news:¹⁰¹
- 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.
- 3.21 In our Issues Paper we acknowledged 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 the following chapter.

Our preliminary conclusion

- 3.22 While acknowledging the step-change brought about by the digital revolution, we reached the preliminary conclusion that, for the moment at least, there remained a public interest in continuing to recognise the news media as a special class of publisher with distinguishing rights and responsibilities *arising from the functions they perform*.
- 3.23 We based this conclusion on the following arguments. First, the type of communication engaged in by the news media has unique characteristics linked to its distinct purpose. These characteristics, including a commitment to accuracy, distinguish it from other types of expression. In discussing the role of new actors engaged in “news like” activities there is often a failure to recognise these distinctions. 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 reasonably **dispassionate** gathering and disseminating of news of public interest. While alternative sources play an increasingly important part in the news ecosystem, for the moment at least mainstream media outlets play a critical role as **primary news gatherers**, and as an efficient mechanism for **amplifying, verifying and making sense** of the information released to the world.

101 Special Report: The News Industry “The people formerly known as the audience” *The Economist* (London, 9 July 2011).

- 3.24 Second, while newspaper revenues and circulations may be in serious decline in many western-style democracies, this does not mean the news media has lost its power or influence.¹⁰² Much of the mainstream media's power derives from its ability to coalesce mass audiences. It provides a mechanism by which citizens are given access to the same body of information, on which they can rely to make informed judgements, at roughly the same time. This allows societies to debate issues and reach consensus based on **common knowledge**. It is a vital role the mass media performs in a democracy. Digitisation and new communication technologies have amplified the reach and influence of mass media, allowing it to coalesce global audiences on a previously unimaginable scale. Arguments for relaxing the responsibility requirements for news media fall down in the face of these realities.
- 3.25 Third, while the digital idealists argue that the public can now source information and news horizontally and so no longer depend on institutional news media, the facts do not yet support this democratised ideal. Despite the plethora of sources and fragmentation of audiences, there are in fact few alternative *primary news gatherers* and market research clearly shows that for the moment at least the public continues to rely on mainstream media sources for their news – regardless of whether it is accessed via social media or via traditional channels.

Submitters' views

- 3.26 The majority of submitters agreed with the proposition that in order to flourish democratic societies need access to credible and authenticated sources of information and that, for the moment at least, the news media played a key role in fulfilling that need. However there was less consensus about the extent to which the news media are in fact fulfilling these democratic functions and whether, in the future, they will be required to do so. This divergence of views often reflected a fundamental philosophical disagreement about the desirability of a centralised professionalised group acting as an intermediary and "gatekeeper" or filterer of information in society.
- 3.27 To a large extent this dichotomy reflected the old media/new media divide as illustrated in the following excerpts from the submissions of the New Zealand Press Council and Google New Zealand. In the view of Press Council members, the advent of mass publishing and the internet had intensified the public interest in a professional news media:¹⁰³

102 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 November 2012 Britain's most popular news website, the *Mail Online* received on average 7 million daily unique browsers.

103 This quotation is taken from a document prepared by members of the Press Council in response to the questions posed by the Law Commission in our Issues Paper. This supplemented the formal submission of the Press Council (March 2012) but did not represent the Council's collective view.

When bloggers and citizen journalists can post stories comprising a mixture of fact, opinion and bias at the push of a send button; when the increasing numbers of public relations and lobby groups are generating and circulating their spin; when politicians are increasingly of the opinion that they should be able to determine what is published about them and their policies, and that they should not be subject to scrutiny, the role of the independent professional news media is more important than ever.

- 3.28 In contrast Google argued that the internet has fundamentally challenged the concept of the news media as the guardian of democracy:¹⁰⁴

The traditional media promoted and protected these ideals [democratic functions of the press] through the twentieth century. But the rise of the Internet has led to a much broader toolbox of ways to achieve these same outcomes. Letters to the editor have been supplemented with blogs and social media; political blogs research and expose State actions; and citizens enjoy a wide range of avenues through which to contact their elected representatives and make their views known. While the traditional media remains a way to “represent the public”, new media allows the public to represent themselves.

- 3.29 Others, including Television New Zealand (TVNZ), held a more nuanced position. TVNZ suggested that while “[p]articipatory online media” was giving rise to “valuable new forms of voice”, these largely “complement” rather than displace the “dispassionate reporting of the news”.¹⁰⁵ As evidence of the public’s continued reliance on traditional news sources TVNZ reported that *One News* at 6 pm reached on average a total of 950,000 viewers per night in 2011.¹⁰⁶

- 3.30 Similarly APN cited Nielsen Research figures showing that *The New Zealand Herald* print and online editions reach on average 805,000 readers each day. APN pointed to the dependence of many new media channels on the content produced by primary news gatherers such as themselves: “[t]he proliferation of bloggers, twitter feeds and mobile services rely in great measure on this ‘source news’ and information from mainstream news providers, either in commentary or by ‘sharing’.”¹⁰⁷

- 3.31 In an individual submission Victoria University media researcher, Peter Thompson, supported this view, arguing that “[d]espite the proliferation of user-generated content and the ostensible plurality of new media platforms, it is notable that news media consumption still defaults to the mainstream media sources, even if they are accessed through more complex platforms.”¹⁰⁸

- 3.32 However, alongside this practical acknowledgment of society’s ongoing dependence on the mainstream news media, there was some scepticism about

104 Submission of Google New Zealand Limited (14 March 2012) at 10 (footnotes omitted).

105 Submission of Television New Zealand (4 April 2012) at [23].

106 At [22].

107 Submission of APN News & Media (March 2012) at 6.

108 Submission of Peter Thompson (9 March 2012) at 1.

the extent to which the commercial news media were in fact fulfilling the democratic functions attributed to it in our Issues Paper.

- 3.33 A number of submitters argued that as a result of competitive pressures and their own resource constraints the mass media were devoting less attention to the core functions on which their legitimacy rests: fact checking, verification, providing fair and impartial coverage of the courts, Parliament and local government and undertaking public interest investigative reporting.
- 3.34 This led some, including Thompson, to question whether the rationale for the news media's privileged legal status remained valid because in their view the mainstream media no longer performed many of the core democratic functions which the privileges were intended to facilitate: in Peter Thompson's words:¹⁰⁹

Any standard political economic analysis of the news media in New Zealand would reveal a significant gap between the ideals of public interest journalism and actual news production practices. This is not generally attributable to the ethical shortcomings of individual reporters but the pressures to maximise audiences and advertiser revenue and the lack of time and resources to investigate issues in depth.

- 3.35 This was a common theme in many of the online forums where our Issues Paper and its preliminary proposals were debated.¹¹⁰

The role of the news media: what we conclude

- 3.36 We acknowledge the validity of many of the arguments put forward for questioning the future viability of the mainstream media as we know it. There can be no doubt that the traditional model for generating and disseminating news is severely strained by disruptive technology.
- 3.37 There can be no doubt either, as Google pointed out in its submission,¹¹¹ the internet and mass participatory media have empowered citizens to exercise their democratic rights in ways that were simply not possible in the pre-digital era. These new communication technologies have given citizens access to limitless sources of data, most of it free, and created networked public spheres where they can exchange information, opinions and ideas instantaneously and without recourse to intermediaries – other than those providing connectivity.

109 Thompson, above n 108, at 2.

110 Law Commission "Who are the News Media?" (*Public Address*, 29 February 2012) <publicaddress.net/speaker/media-regulation/>; David Farrar "What Media Standards Should Apply?" (*Kiwiblog*, 6 March 2012) <www.kiwiblog.co.nz/2012/03/what_media_standards_should_apply>; The Law Commission "What do we mean by 'news media'?" (*Pundit*, 7 March 2012) <www.pundit.co.nz/content/what-do-we-mean-by-news-media>.

111 Google, above n 104, at 10 – 11.

- 3.38 This has allowed many more participants, whether amateur or expert, to participate in these activities. And in the process it has allowed citizens to challenge the mainstream media's efficacy, and integrity, in performing these tasks and its role as gatekeeper and agenda setter.
- 3.39 There is ample evidence of the profound and growing influence new media are having both on mainstream media's culture and content. As we discussed in chapter 2 of our Issues Paper, there are well over 200 current affairs bloggers in New Zealand, some of which have become a rich alternative source of information and commentary. Although primarily a forum for the expression of robust opinion, a number of high profile blog sites are used to break news. Bloggers are also increasingly taking on a watch dog role over mainstream media, critiquing their performance and alerting the public to their alleged failures.
- 3.40 The dynamic and symbiotic relationship between traditional and new media is increasingly evident in the news agenda, as news broken within the blogosphere percolates up into the mainstream media – either through strategic alliances or more organically through the use of social media and search engines.
- 3.41 At the same time, mainstream media is moving to incorporate the values and tools of social media in their own processes and products. Readers and viewers are invited to supplement reporters' coverage of live news events and to comment on stories. Facebook and Twitter are routinely used to interact with audiences, promote the sharing of content, source information and build brands. Most recently, Fairfax Media, publishers of *Stuff*, launched a separate section, *Stuff Nation*, allowing users to contribute their own material to the national website.
- 3.42 But revolutionary as these changes are, they have not, in our view, eliminated the public's need for ready access to credible and authenticated sources of information about what is happening in their communities and the world at large. Nor have they eliminated the need for primary news gatherers – people and organisations who gather information in a *reasonably dispassionate* manner for the express purpose of disseminating that information to the public, rather than because they gain some personal, political or organisational advantage from doing so. Nor have they eliminated the public's need for fair and accurate reports of the activities of the private and public institutions whose decisions impact on the lives of ordinary citizens. Nor have they eliminated the need for the impartial scrutiny of Parliament, legislators and the courts.

- 3.43 And nor have they yet produced a more efficient or reliable way of producing general interest news for general consumption. For the moment at least New Zealanders depend on a small number of corporate media companies for their daily news. Unsurprisingly, given the dominance of Australian-owned media in New Zealand, this was also the conclusion reached by the Australian *Convergence Review*:¹¹²
- Since the 1990s, there has been a diversification in the way Australians access media. Australians have embraced smartphones and tablets to access news and entertainment. This trend will only accelerate. Despite these changes, Australians continue to get the vast majority of news and entertainment from a relatively small number of established providers.
- 3.44 This is consistent with the findings of independent research we commissioned on the public's perception of news media standards and accountability in New Zealand. The research targeted a representative sample of 750 New Zealanders aged 18-70 and was conducted via an online survey comprising a combination of structured and open-ended questions completed between 15 and 22 March 2012.¹¹³
- 3.45 When asked to nominate their *main* source of information, 42 per cent nominated television, 25 per cent newspaper websites, and 11 per cent newspapers, with the remaining sources nominated as the main source by less than 10 per cent.
- 3.46 Survey respondents were also asked if they received "conflicting or different reports of the same news story" in different media, which account would they be most inclined to believe. Again, and in line with its top ranking as the main information source, television far out-rated all other media sources for reliability with 48 per cent saying they would be most inclined to believe a television news report. Newspaper websites ranked second for reliability with 25 per cent support, Radio New Zealand 12 per cent, and newspapers 11 per cent. Only one per cent said they would rely on blogs, message boards, Facebook or Twitter.
- 3.47 When asked to explain why they would rely on certain media more than others when receiving conflicting news reports, those who nominated television and newspaper websites referred to these two medium's ability to provide live updates and live video footage. Those who preferred radio and newspapers felt the content available in these mediums was more likely to have been well researched with more attention to factual detail.

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

113 Big Picture Marketing Strategy and Research Ltd *Public Perception of News Media Standards and Accountability in New Zealand* (summary of the online survey conducted for the Law Commission, April 2012) < www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media > [Big Picture Research].

- 3.48 Irrespective of how critics may rate the mainstream media's performance, this research and the ratings surveys tend to reinforce the point made by Victoria University academic Peter Thompson in his submission to this review:¹¹⁴

The majority of people still rely on the mainstream news media to identify, process and prioritise information and news that they will use as the basis for everyday life decisions, including decisions about voting.

DEFINING "NEWS MEDIA"

Our preliminary proposition

Who should have access to media privileges?

- 3.49 Having established what we regard as a clear public interest in continuing to recognise the news media as a special type of publisher, entitled to certain legal and organisational privileges, the next question we were required to address was how to define this special type of publisher for the purposes of the law.
- 3.50 As discussed in our introduction to this chapter, 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 public service broadcasters and corporates which between them produced the nation's daily newspapers, television and radio news and current affairs programmes. With the advent of the internet the news media lost their monopoly on the generation and dissemination of news, requiring us to reconsider the fundamental public interests in treating them as a special class of publisher with respect to the law.
- 3.51 In our Issues Paper we argued that the special legal status accorded the news media was not intended to advantage or protect the media as an *institution*, but rather to facilitate and safeguard the *functions* traditionally performed by the fourth estate. But as we have discussed above, the mainstream media are not the only ones now able to perform these functions – moreover, the mainstream media's capacity to fulfil these functions is under increasing pressure as a result of the disruptive impact of new technology on their business model.
- 3.52 Given this fluid and uncertain media landscape we argued it was necessary to adopt a first principles approach to the question of media privileges and identify the public interests at stake in determining who accesses them, and in what circumstances.
- 3.53 In our view there were two important public interests which needed to be recognised and promoted in any scheme which assigns special legal privileges to certain publishers. First, any scheme must take full account of the

114 Thompson, above n 108, at 1 – 2.

fundamental changes in communication technology brought about by the internet. The removal of barriers to publishing has created the potential for a much more diverse and robust news environment and allows for new ways of performing the media's democratic functions. There is a strong public interest in ensuring that in determining how legal privileges and exemptions are allocated, the law *enables* rather than stifles such diversity.

- 3.54 Second, any move towards greater media diversity must not undermine the core characteristics which distinguish journalism from other types of communication and expression. The rationale for continuing to recognise the news media as a distinct class of publisher with special freedoms is based on the public's dependence on a reliable source of information about what is happening in the world. This reliability derives from the fact that the information has been gathered reasonably dispassionately, subjected to some form of verification, and reported accurately and fairly.
- 3.55 **These distinctions are, in our view, critical features of the type of communication media law is interested in privileging. There must therefore be some way of ensuring accountability to these standards by those wishing to access the media's legal privileges and exemptions.**
- 3.56 As we note in chapter 2, most of the statutes conferring special privileges or exemptions on the news media do not define what is meant by the term. The two notable exceptions to this are the Privacy Act 1993 and the Criminal Procedure Act 2011. For reasons explained in the preceding chapter, the news media are excluded from the provisions of the Privacy Act and so it was imperative that the term be precisely defined in this legislation. The Act employs two concepts: that of a "news medium" and "news activity". The Act defines a "news activity" as:¹¹⁵
- (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.
- 3.57 A "news medium" is defined as "any agency whose business, or part of whose business, consists of a news activity". To qualify for the exclusion, an entity must both be undertaking a "news activity" and meet the definition of a "news medium".
- 3.58 In our preliminary view the Act's definition of a "news activity" captures a number of the important elements we identified as being fundamental to the

115 Privacy Act 1993, s 2(1).

role of the press. In particular, we noted that “dissemination to the public” or a “section of the public” had to be the *purpose* for which the information was gathered or compiled.

3.59 However, for the reasons outlined above, we concluded that the statutory definition of “news media” should not be constrained by considerations of whether or not a publisher was engaged in a commercial operation, or whether they attracted a certain audience size, but rather by their willingness to hold themselves accountable to the standards and professional codes which differentiate news media from other communicators.

3.60 We argued that instead of focusing on the agency (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 as well on the quality and characteristics of the content itself. We pointed out that these qualities are in fact already well defined in the standards and professional codes to which New Zealand’s news media are already held accountable – either by statute or by voluntary adoption.

3.61 For example the New Zealand journalists’ code of ethics drawn up by the Engineering, Printing and Manufacturing Union (to which many journalists belong), summarises these core values which are supposed to underpin journalistic practice:

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.

3.62 It was our preliminary view that such codes of ethics encapsulate the essential characteristics of the type of speech democratic governments around the world intended to protect in granting the news media special legal privileges. For this reason we proposed that accountability to such a code of ethics should be hard-wired into the statutory definition of the news media.

OUR PROPOSED STATUTORY DEFINITION OF “NEWS MEDIA”

3.63 In order to access the statutory exemptions and privileges available to the news media we proposed that the entity would have to meet the following criteria:¹¹⁶

116 Issues Paper, above n 98, at [30].

- a significant proportion of their publishing activities involves the generation and/or aggregation of news, information and opinion of current value;
- they disseminate this information to a public audience;
- publication is regular and not occasional; and
- the publisher is accountable to a code of ethics and a complaints process.

Submitters' views

- 3.64 Our proposal to introduce a statutory definition of the news media that would in effect discriminate between different publishers based on their willingness to be held accountable to a code of ethics and a complaints process met with a mixed response from submitters.
- 3.65 While the majority of submitters supported the broad thrust of this definition, others expressed concerns, including:
- opposition in principle to the special treatment of the news media in law;
 - concern at the dilution of the news media's distinct role as a result of extending statutory privileges to 'new media';
 - concern about the potential for any statutory definition of news media to have a chilling effect on freedom of expression and emerging new media;
 - concern about the potential for the definition to inappropriately capture segments of the communications industry such as publishing platforms and content hosts which do not exert any editorial control over content.

Opposition in principle to special legal status for news media

- 3.66 Just as some submitters argued that the public no longer depends on the mainstream media, some also argued that there was no longer any rationale for reserving legal privileges and exemptions for "news media" – however liberally defined. They argued this system of privileges was devised at a time when the public needed the news media to act as their "ears and eyes" and to provide a conduit for information. Thanks to the revolution in communication technologies this era had passed and with it the dependence on the news media as an intermediary and information gatekeeper.
- 3.67 Auckland District Court Judge David Harvey, submitting in a personal capacity, made this point in the preamble to his submission:¹¹⁷

... I wonder if the time has come, with the increased opportunities for "citizen journalism" to dispense with special treatment for MSM [mainstream media] and make what have been privileges for MSM open to all.

117 Submission of David Harvey at 5.

- 3.68 Others however pointed out that this system of rights and privileges was designed to promote a particular public interest rather than a commercial entity. APN, publishers of *The New Zealand Herald* noted:¹¹⁸

The rights are as representatives of the public, not commercial advantages or concessions to the owners of news media companies. If we are to act as a Fourth Estate, the eyes and ears of others who cannot be within the settings of power and decision-making, the news media will need the access and protections our democracy has afforded us.

- 3.69 A number of submitters also emphasised the fact that there was a social contract implicit in the media's special privileges. This contract required those accessing the privileges to exercise them responsibly and to provide the public with dispassionate, fair and accurate reporting. There would be no practical way of enforcing this contract if the privileges were extended to all citizens.

Concern at dilution of news media's legitimacy

- 3.70 Others were concerned that extending the media's legal status to other publishers for whom "dispassionate news gathering" was not core business, risked diluting the news media's credibility and legitimacy.

- 3.71 Radio New Zealand, a state-owned company which is subject to a statutory requirement to provide the public with impartial news coverage, questioned why bloggers and others, for whom news gathering was a discretionary activity, should enjoy the same legal privileges and exemptions.¹¹⁹

- 3.72 It argued there was a fundamental distinction to be drawn between the role of journalists, as primary news gatherers, and that of bloggers or other commentators. The public depended on organisations like Radio New Zealand to provide factual and dispassionate information: "[n]o case can be made out for those expressing opinions in the form of blogs to obtain the same status as primary news gatherers."¹²⁰

- 3.73 Similarly, the Newspaper Publishers' Association was concerned at any "weakening of its members' legitimacy" which may result from an indiscriminate extension of news media privileges:¹²¹

Although the internet has blurred boundaries and virtually eliminated barriers to publishing, non-traditional publishers such as bloggers need to earn any legitimacy they crave.

Many already piggyback on mainstream media, lifting and sourcing content without attribution, and they cannot automatically assume legal rights and privileges extended to the established news media.

118 APN News & Media, above n 107, at 6.

119 Submission of Radio New Zealand (9 March 2012) at 2.

120 At 2.

121 Submission of the Newspaper Publishers' Association (March 2012) at 7.

- 3.74 However, in his submission prominent blogger David Farrar argued that while there was merit – and practical advantage – in preserving the system of privileges and exemptions for “news media”, he did not believe this should be used to exclude others who did not meet the statutory definition.¹²²

... it will be difficult for some media to perform their role if they do not have the legal privileges they currently have such as Privacy Act exemptions, ability to stay in closed court etc. It is impractical to extend these privileges to all citizens.

But having said that, whenever possible the privileges and exemptions given to news media, should be made available to those who do not qualify as news media, or choose not to seek formal recognition. Any legal definition of news media should be seen as the minimum group of citizens who should have this right. It should not be used to take rights or privileges away from other citizens.

- 3.75 Others saw merit in extending privileges to new media provided this extension was tied to a requirement to comply with ethical standards. The Post Primary Teachers' Association saw this as a way of lifting standards and accountability.¹²³

All New Zealanders would be better served if the requirement to report truthfully and accurately were extended to the new media. Higher levels of accountability might also better serve democracy by encouraging more broad and thoughtful analysis of issues in contrast to the focus on simplistic, sensationalist, and often abusive, adversarial positions that currently prevails.

- 3.76 Similarly, in supporting the extension of legal privileges to non-traditional news media “who wish to position themselves as credible and authoritative sources of news and current affairs”, New Zealand Police suggested the “application of known standards and accountabilities will provide predictability around measures to be applied to the ‘new media’ and how breaches are to be treated.”¹²⁴

122 Submission of David Farrar at 1.

123 Submission of the New Zealand Post Primary Teachers' Association (March 2012) at 3.

124 Submission of New Zealand Police (March 2012) at 2.

Chilling effect

3.77 Others, however, argued that there were serious risks in attempting to give the term “news media” a statutory definition. Journalism lecturer Jim Tucker’s view was that the definition would result in a type of formal accreditation or registration of journalists which would be an anathema to press freedom.¹²⁵ He argued that building a requirement of accountability to a complaints body into a statutory definition of “news media” would effectively place the complaints body in the position of “gatekeeper”, making decisions about who was and was not bone fide “news media”:¹²⁶

By implication, that means someone gets to control what is reported and by whom, thus weakening the principle of monitoring and scrutinising government to which journalists have traditionally hewn.

3.78 We address these concerns in chapter 7 of this report, where we describe our proposed new complaints body and the criteria for membership.

Need for narrower definition of “news media”

3.79 A number of companies argued that our proposed definition of news media was too broad and failed to capture critical distinctions between those who created content and those who aggregated, hosted or facilitated its dissemination.

3.80 In its submission Google argued that if the Commission concluded that it was in fact necessary to define the term “news media” then the proposed definition should explicitly exclude what it called “online content infrastructure platforms” (OCIPs) such as YouTube, Facebook and Twitter:¹²⁷

... OCIPs differ fundamentally from traditional content distributors and publishers such as television and radio. They host content that is uploaded by others and play a minimal (if any) editorial or curatorial role in relation to the hosted content.

3.81 Google argued that for a similar reason aggregators, such as *Google News*, should not be caught by the definition because its processes were “entirely automated” and involved “no human editors selecting stories or deciding which ones deserve top placement.”¹²⁸

3.82 Google argued this lack of editorial input and control meant there could be no basis for requiring OCIPs and aggregators to be accountable to standards or a complaints body. To give effect to this distinction it proposed amending the proposed definition of news media to explicitly exclude aggregators and

125 Submission of Jim Tucker (4 March 2012) at 3.

126 At 3.

127 Google, above n 104, at 20.

128 At 22.

include a requirement that the publisher "apply transformative editorial skills" before they would meet the threshold of "news media."¹²⁹

- 3.83 Both Trade Me and InternetNZ also emphasised the importance of clearly distinguishing between the different functions, and therefore responsibilities or liabilities, of different agents in the publishing continuum.¹³⁰
- 3.84 Approaching the issues from a different perspective, state broadcaster Radio New Zealand also wished to see the definition of news media tightened, arguing that the legal privileges attached to this definition were intended to protect dispassionate news gathering for public dissemination.¹³¹

Radio New Zealand's position is that it is imperative that a distinction is made between the generation of news and information, the aggregation of news and information, and thirdly, the generation of opinion of current value ...

Aggregation and newsgathering are inherently different activities and the level of responsibility and privilege attached to each activity should reflect that ...

OUR CONCLUSION: DEFINING "NEWS MEDIA" FOR THE PURPOSES OF THE LAW

- 3.85 The disruptive impact of technological change on the media landscape is likely to continue for decades. At this point it is not possible to accurately predict where convergence will end, nor what impact it will have on how news will be produced and distributed in the future and by whom.
- 3.86 As this chapter has illustrated, submissions to this review reflect the ongoing and fundamental debate about whether in this age of mass participatory media it is necessary, or desirable, to retain this idea of the news media as a special class of publisher and to enshrine this in law.
- 3.87 This dichotomy is reflected in submitters' various concerns about giving news media a statutory definition: on the one hand some in the mainstream media are concerned that our definition is too loose, and does not sufficiently distinguish between the professional and amateur. Others, however, are concerned that any definition risks constraining the newly democratised media landscape.
- 3.88 In our view, in this fluid environment of merged media content and providers, there remains a powerful public interest in explicitly recognising and protecting the type of communication whose purpose is to provide the public with a reliable and dispassionate source of information about what is happening in the world.

129 At 5.

130 Submission of Trade Me Ltd (12 March 2012) at [25]–[26]; Submission of InternetNZ (12 March 2012) at [3.3.4] – [3.3.6].

131 Radio New Zealand, above n 119, at 3.

- 3.89 However, we are clear that this public interest does not lie in preserving an institution or entity – the mainstream media – but rather in protecting and promoting the core functions assigned to the fourth estate in a liberal democracy, irrespective of whether those functions are performed by established media, independent freelance journalists or citizen bloggers.
- 3.90 For this reason our recommended definition of “news media” contains no reference to business activities or audience size. In our view these characteristics are not core, in a principle sense, to the public interest the law is designed to promote. In practice it is likely that those undertaking the type of regular, dispassionate reporting of the courts and other public institutions will either be public service media or aligned to some commercial operation. However, in the digital era this is not axiomatic.
- 3.91 In recommending that the legal privileges and exemptions be extended beyond the established institutional media, we are therefore recognising the public interest in fostering a diverse, resilient and truly independent news media. However we do not believe that our liberal definition will undermine the legitimacy of mainstream media as some submitters fear.
- 3.92 Anyone wishing to access the news media’s privileges and exemptions under our proposed definition would be required to be accountable to a code of ethics and a complaints process. As discussed in chapter 2, these codes of ethics encapsulate the essence of journalistic practice, ensuring compliance with the universal principles of fairness and accuracy. By implication, only entities willing to be held accountable to these core principles will be able to satisfy the statutory criteria we are proposing.
- 3.93 This provision, in our view, provides a simple mechanism for tying the privileges and exemptions to the purposes for which they were intended: a way, for example, to ensure that those seeking to access the news media’s exclusive *right* to report on certain kinds of court proceedings, do so in a way that is consistent with the requirement for impartial, accurate and balanced media reporting.
- 3.94 Some submitters were concerned that by hard wiring this ethical requirement into the definition of “news media” we were in effect discriminating against amateur and citizen journalists and thus having a chilling effect on debate or diversity of news sources.
- 3.95 We reject that argument for two reasons. First, nothing in our definition interferes with the rights of any citizen to exercise their freedom of expression. Never before have the barriers to exercising those freedoms been so low. Nothing we are recommending will alter that fact.
- 3.96 By removing any commercial or audience size requirement we have ensured that any individual who wishes to position themselves in this way will be able to do so.

- 3.97 But by requiring that anyone claiming the title "news media" should also be accountable to a code of ethics and a complaints process, we are also seeking to recognise and protect the public trust involved in any enterprise which purports to provide reliable and accurate news and information to the public.

The question of news aggregators

- 3.98 Some submitters argued it was inappropriate to bring news aggregators within the statutory definition of news media because they did not create content and so would not need to access media privileges. We accept that news aggregation websites are unlikely to need to access media privileges but we are not persuaded that they should not be accountable for the content they publish. As far as the public is concerned they are a source of news as much as any other provider. If what they publish on their site is inaccurate or harmful, the citizen suffers as much as if he or she had read it in a newspaper or seen it on television. The impact on the public is what matters. Moreover the line between aggregation and content creation is an increasingly blurred one: most news websites now contain as much material supplied by others as content they create themselves.
- 3.99 However we agree with Google that a line must be drawn somewhere. The definition of news media should perhaps explicitly exclude OCIPs such as YouTube, Facebook and Twitter. If the system is to be voluntary as we recommend it will not in the end matter much, but it is as well to have a definitional exclusion at the outset.
- 3.100 We should also be explicit that the Office of the Clerk at the House of Representatives should be excluded from any definition of news media. The broadcasting of Parliament is a vehicle for transmitting the debates in the House. It is the channel by which the views of Members of Parliament can be conveyed to the public. What is said in Parliament is subject to Parliamentary privilege. Broadcasts are also subject to absolute privilege in defamation. We believe that the Office of the Clerk should not be counted as a news medium for regulatory purposes.

A statutory definition of "news media"

- 3.101 Taking these points into consideration, we conclude that in order to be eligible for the statutory exemptions and privileges available to the news media, an entity or individual would have to meet the following criteria:
- (a) a significant element of their publishing activities involves the generation and/or aggregation of news, information and opinion of current value;
 - (b) they disseminate this information to a public audience;
 - (c) publication is regular and not occasional; and
 - (d) the publisher is accountable to a code of ethics and a complaints process.

- 3.102 For reasons explained in chapter 7, we are not recommending that a definition of the “news media” be created in a standalone statute. Instead we recommend that the key statutes which employ the term “news media” be amended to reflect the new definition.¹³²
- 3.103 In the next chapter we ask what form the news media’s accountability should take.

132 Ch 7 at [7.186]; R28.

Chapter 4

What form of accountability?

INTRODUCTION

- 4.1 In the preceding chapter we set out the functions assigned the news media in a liberal democracy. We argued that despite the democratisation and decentralisation of these functions enabled by the internet, there continued to be a compelling public interest in continuing to recognise “news media” as a distinct class of communicator and in according them special legal status.
- 4.2 We also concluded that it was important that anyone entitled to the news media’s legal privileges and exemptions should be accountable to basic journalistic standards. The question we now turn to is what form should this accountability take?
- 4.3 As we discuss in the introductory chapter, this question arises because of the gaps and inconsistencies which have emerged in the current regulatory systems as a result of digitisation and convergence.
- 4.4 Currently web-based news sites and current affairs bloggers are subject only to the minimum legal requirements which apply to all communicators. Broadcasters are subject to statutory regulation with respect to the content they live stream, but content made available on-demand, and the content published on their websites, falls outside this regulatory framework.¹³³ Newspapers, and their affiliated websites, meanwhile, are self-regulated and accountable to the industry-established Press Council.

133 Since the publication of our Issues Paper, *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, Wellington, 2011) [Issues Paper], the mainstream broadcasters have set up a new self-regulatory complaints body, the Online Media Standards Authority (OMSA), to deal with any complaints relating to news and current affairs content that is published on their websites – including on-demand content that has not been previously broadcast. At the time of writing, OMSA’s complaints committee had yet to become operational.

- 4.5 Whether this lack of regulatory parity between different types of publishers continues to be justified in the digital era is one of the fundamental questions we must address in this review.
- 4.6 But some argue that in an era when information and spectrum scarcity have been replaced by digital abundance, the rationale for targeted media regulation must be reassessed. The need for a “first principles” approach was emphasised in Google’s submission to the Australian Law Reform Commission’s review of Australia’s entertainment classification system:¹³⁴
- Today’s media landscape is very different. The ‘audience’ of passive recipients of content has been replaced by citizen creators and citizen journalists engaging interactively with media platforms/services such as YouTube, Facebook, Yahoo!7 and ninemsn, to create and distribute content. Vertical media silos have been replaced by a horizontal, converged landscape of platforms, content providers and users, facilitated by communications networks ... In this changed environment, how we determine the appropriate policy approach to regulation of content needs to be fundamentally reconsidered.
- 4.7 We accept, as did the Australian Law Reform Commission, the Finkelstein Inquiry and Australia’s *Convergence Review*, that such a first principles approach is required given the profound effects of technological and content convergence. In the preceding chapter we identify what we regard as a clear public interest in ensuring that the news media remain accountable to certain minimum ethical standards governing how they gather and communicate news and current affairs.
- 4.8 In this chapter we draw on the views of submitters, the findings of the Australian and British reviews and inquiries and our own research to assess what form that accountability should take.

THE REGULATORY SPECTRUM

The challenges and ambiguities of the regulatory environment for news media

- 4.9 Few, if any, of the mainstream media who made submissions to this review disputed the need for some form of external accountability. APN, publishers of *The New Zealand Herald*, argued that any organisation which routinely held others to account, should itself be willing to submit to external scrutiny:¹³⁵

A vigorous news media should relish rigorous standards and rigorous scrutiny on behalf of the substantial public audiences relying on its journalism.

134 Australian Law Reform Commission *Classification – Content Regulation and Convergent Media* (ALRC R118, 2012) at [2.64] [*Classification Review*].

135 Submission of APN News & Media (March 2012) at 7.

- 4.10 However, just as the Finkelstein and Leveson inquiries discovered, there was considerably less agreement among submitters about the strength of the required accountability, the mechanisms for achieving it, and who should be subject to it.
- 4.11 In our Issues Paper we described the spectrum of regulatory options available when looking to influence organisational behaviour. At one end of that spectrum is government regulation. Typically this involves the state setting the legislative or regulatory rules, monitoring compliance and enforcing sanctions. At the other end of the spectrum is self-regulation. Here the rules governing market behaviour are developed, administered and enforced by the people whose behaviour is to be governed, rather than by the state. Between these two bright lines is a range of mechanisms which may combine elements of both. For example the state may establish the legislative basis for the system but leave the industry to determine the rules and standards and to administer the scheme. This is often referred to as co-regulation. Often co-regulation involves compulsory coverage, for some, if not for all sections of the industry.
- 4.12 The choice of regulatory models is typically influenced by a matrix of factors, including the severity of the potential and actual harms to individuals and society, the characteristics of the market itself (for example its competitiveness) and the leverage available to the regulator. While some of these assessments may involve weighing empirical evidence, others will reflect changing social and political values and priorities.
- 4.13 The question of media regulation raises additional complex, and sometimes anomalous, sets of issues. Most western-style democracies proceed from the basis that a free press flourishes best in a climate where there is no, or very limited, government control over what can be published. For this reason, as we outlined in our Issues Paper, in many of these countries the newspaper industry has been left to self-regulate. As we outline in chapter 2, this typically takes the form of professional and corporate codes, backed by a complaints body such as the New Zealand Press Council.¹³⁶

136 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.

- 4.14 However, many of these same countries have adopted a far more interventionist approach to broadcasters, subjecting them to statutory rules and sanctions.¹³⁷ One of the rationales put forward for this heavier regulatory approach is the perception that this medium is more pervasive and exerts a more powerful influence in society. One inference that could be drawn from this is that the more influential the media the stronger the regulatory oversight deemed necessary by policy makers.¹³⁸
- 4.15 A more persuasive explanation for the different regulatory approaches to the press and broadcasters probably lies in the different leverage available to the state with respect to these two media. Broadcasters required access to radio spectrum, a scarce public resource subject to a competitive licensing regime. In contrast, newspaper companies were entirely privately owned, providing little regulatory leverage.
- 4.16 Historically too, the commercial press has typically responded to threats of regulatory reform by appealing to their constitutional rights to “freedom of the press,” a term often conflated with “freedom of speech” and “freedom of expression.”
- 4.17 However these terms do not have precisely the same meaning. “Freedom of expression” is an individual right, not a right belonging to corporate news media or the “owners of the press.”¹³⁹ The individual right to freedom of expression became conflated with the “free press” in the American Constitution at a time when the industrial press was in fact the only mechanism by which individuals could exercise their speech rights (although as many commentators have pointed out the only individuals who were *guaranteed* that right were those who owned and controlled the presses).
- 4.18 But since the advent of broadcasting, and now the internet, “the press” is only *one* means of mass communication, making it difficult to justify why one

137 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 (UK). Ofcom is required under that Act and under the Broadcasting Act 1996 (UK) to draw up a code for television and radio, covering standards in programmes, sponsorship, and product placement in television programmes, fairness and privacy. 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.

138 See for example, The Hon R Finkelstein QC *Report of the Independent Inquiry into the Media and Media Regulation* (Report to the Minister for Broadband, Communications and the Digital Economy, Canberra, 2012) at [6.25] – [6.28] [Finkelstein Report]; and Australian Government *Convergence Review* (Final Report to the Minister for Broadband, Communications and the Digital Economy, Sydney, 2012) at 6 [Convergence Review]. Both the Finkelstein Report and the *Convergence Review* examine the various rationales put forward to justify the different regulatory approach to broadcast media.

139 For example, see a discussion of the distinctions between speech rights and media freedom in Onora O’Neill *Regulating for Communication - Policy Brief: Regulation, Regulators and the Crisis of Law and Government* (The Foundation for Law, Justice and Society, Oxford, 2012).

sector of the news industry should be advantaged by lighter regulation simply by virtue of the fact they continue to publish newspapers.

- 4.19 There are of course, other, compelling public interests in an unfettered news media and for conferring special communication rights and privileges (of the sort outlined in chapter 2) on *all* those engaged in the production and dissemination of news. As discussed in the preceding chapter these arguments rest on the role the news media have traditionally played in ensuring the public is reliably informed on matters of public importance and in ensuring those exercising power are held accountable. These functions require the news media to be free of compromising or inappropriate business or political interference.
- 4.20 But given the public trust and influence vested in those performing these democratic functions, there is also a vital public interest in ensuring the guardians are themselves held to account. For media academic Damian Tambini, this dichotomy has been powerfully underscored by the evidence heard during the Leveson Inquiry:¹⁴⁰
- The media and journalism are arguably one of the key guarantors of good political governance in serving accountability and playing a watchdog role. But they can also undermine good governance. The Leveson Inquiry has heard evidence that policy favours have been traded for, or adjusted, in return for favourable coverage. And it has heard evidence that media have abused the privileges available to them in pursuit of stories that have no public interest justification.
- 4.21 In New Zealand we have not seen the sort of systemic abuse or perversion of power alleged in Britain. Indeed many media submitters to our review were at pains to point out that New Zealand has not experienced the crisis in public trust which has fuelled media reviews in other parts of the world. An indication, some suggest, of the New Zealand media's more responsible and ethical approach.
- 4.22 However, while it is true that this review has not been prompted by scandal or allegations of unethical behaviour on the part of the mainstream media, it is also clear from submissions that there is a perception among some that shrinking journalistic resources and the competitive pressures stemming from the internet and social media risk eroding some of the media's core capabilities – including the task of primary news gathering, and the verification of information.
- 4.23 While regulatory oversight cannot directly address these issues, it can provide an environment which fosters ethical news media, reinforces standards, and supports those engaged in public interest journalism. It must also safeguard the two critical public interests we have identified – genuine independence of the news media and genuine accountability to the public.

140 Damian Tambini *The End of Press Freedom - Policy Brief: Regulation, Regulators and the Crisis of Law and Government* (The Foundation for Law, Justice and Society, Oxford 2012) at 5.

- 4.24 The paramount need to protect the news media’s right to publish freely, without any form of prior censorship or constraint, and free from commercial or political interference, demands that any intervention be restricted to two things: ensuring media practices and processes comply with the industry’s own ethical codes, and ensuring that there are effective remedies when these codes are breached and unjustified harm is caused.
- 4.25 Determining what type of mechanism is needed to achieve those outcomes – for example, whether it requires a body with statutory powers, like the Broadcasting Standards Authority (BSA), or whether a self-regulatory body is to be preferred – requires an assessment of the following:
- the structure and nature of the news media in New Zealand and the environment in which they are operating;
 - the potential and actual harms resulting from ethical failings or abuses of media power; and
 - the effectiveness of the existing forms of accountability including the regulatory bodies, Press Council and the BSA.
- 4.26 In the following discussion, we consider the first two points. In the following chapter, we examine the effectiveness of the existing media standards bodies. Throughout the course of this assessment we pay particular attention to how the internet and new media are impacting on the mainstream media’s position and influence in society. We also draw on the findings and conclusions of the Leveson and Finkelstein Reports.
- 4.27 We begin by describing the conventional rationales put forward for any regulatory intervention in a market and assessing the extent to which these rationales apply to the production and consumption of news in this country.

WHAT TYPE OF ACCOUNTABILITY?

The market as a mechanism of accountability

- 4.28 In its submission, Allied Press, publishers of the *Otago Daily Times*, stated that the “ultimate judgement” of any news organisation came back to the “relationship of trust between publisher and reader; broadcaster and viewer”:¹⁴¹

Our survival as a commercial entity rests upon our organisation being on the “right” side of the ledger in terms of reader/viewer/advertiser judgement. Integrity is the lynchpin of all that we do.

- 4.29 While there can be no doubt that the free market and consumer choice exert a powerful influence on the behaviour of media organisations – including helping to define the boundaries of what is acceptable and unacceptable to the

141 Submission of Allied Press Limited (6 March 2012) at 4.

public – there are weaknesses in the argument of consumer sovereignty when applied to the news media.

- 4.30 According to orthodox economic theory, markets operate most efficiently when consumers are left to make informed, rational choices that reflect the true costs and benefits of their consumption decisions, without the distorting effects of regulatory intervention.
- 4.31 However, most also recognise that this ideal does not always exist in the real world and that in some circumstances intervention may be justified. The most commonly accepted rationale for intervention is market failure. This might occur when consumption of a product generates costs which are borne more widely than the individual (externalities), or conversely when the product confers benefits on the wider society which cannot be restricted to the individual consumer or be fully reflected in the price of that commodity (a public good). Market failure may also occur when the consumer's ability to exercise choice is impeded either by a lack of competition or imperfect information.
- 4.32 As part of the inquiry into media regulation in Australia, the Finkelstein Inquiry assessed the Australian media market against these accepted rationales for regulatory intervention.
- 4.33 The Finkelstein Report concluded that there was clear evidence of market failure on the following grounds:¹⁴²
- (a) **News is a public good:** the production of news generates “external” social benefits to society beyond the private benefits accruing to producers and consumers of news. These wider social benefits cannot be reflected in the cost to the individual consumer, leading towards an undersupply.
 - (b) **Competition is limited:** the Report stated that ownership of Australia's newspaper market was among the most concentrated in the developed world. Between them, two companies, News Limited, and Fairfax Media accounted for 86 per cent of total newspaper circulation in Australia.¹⁴³
 - (c) **The news media generate negative externalities:** the harms resulting from media mistakes and unethical behaviour are not borne solely by the media and their consumers but by wider society: “this includes those subjected to adverse reporting, who have no meaningful redress at law, and the community as a whole insofar as it depends upon the media for news and public affairs reporting in order for democracy to function properly.”¹⁴⁴
 - (d) **Consumer choice is impaired by information asymmetry:** the Report noted that “[t]he general reader is seldom in a position to know whether

142 Finkelstein Report, above n 138, at 267 – 284.

143 At [3.12].

144 At [11.17].

the information provided in a story is accurate, whether the sources quoted are reliable, and whether all the relevant facts have been interpreted objectively.”¹⁴⁵

4.34 With respect to competition, the Report stated:¹⁴⁶

The Australian newspaper market is far from the ideal truly competitive market which imposes considerable discipline on suppliers of products. In highly concentrated markets, and the Australian newspaper market is one such market, that discipline is dissipated and consumers have little choice and little power to influence what is supplied.

4.35 It also noted that this high concentration of ownership and lack of competition in the primary news market carried a number of risks, including:¹⁴⁷

- a lack of diversity in the views that are given voice;
- the possibility that a handful of people (media owners or journalists) will unduly influence public opinion;
- a decline in standards because of the absence of effective competition.

4.36 The Report concluded:¹⁴⁸

This adversely affects democracy. If everything that is worth saying is not said satisfactorily, informed debate on important political and social issues will be at risk. The privately-controlled free and open market will be impaired. Many ideas will be killed before they are heard. Democracy is the loser.

4.37 In assessing the significance of “negative externalities” generated by the news media, the Finkelstein Inquiry was able to draw on a detailed meta-analysis of 21 surveys, spanning four decades, which examined public perceptions of media trust, performance, bias, power and ethics.

4.38 Based on this research and evidence of submitters, the Report concluded there was a “persistent recurrence” of standards failures among sections of the Australian news media including privacy violations, injury to reputation, partisanship in politics, bias, obsessive attempts to influence government, commercially-driven opposition to government policy, unfair pursuit of individuals based on inaccurate information, failure to separate news from comment, and failure to sufficiently differentiate expert from lay opinion.¹⁴⁹ The Report also noted a “wide difference in what the media and public consider ethically acceptable concerning privacy and deception.”¹⁵⁰

145 At [11.4].

146 At [7.6].

147 At [11.5].

148 At [11.6].

149 At [4.81]. See generally Finkelstein Report, above n 138, ch 4 at 103–124.

150 At [4.80].

- 4.39 The Report considered that these failures could at times cause serious and unjustified harms to individuals and society and were contributing to the erosion of public trust in the news media.
- 4.40 The Report concluded that the existing self-regulatory regime to which Australia's print media had traditionally been subject had failed to exert a powerful enough influence over standards and did not provide the necessary incentives to cope with the clear failures in the market.

The New Zealand news market

- 4.41 The theoretical justifications put forward in the Finkelstein Report for some form of regulatory oversight of the newspaper market in Australia have clear application in our own context. The specific examples of market failure – including the problems of externalities and information asymmetries – are structural problems inherent in the business of gathering and selling news. On the face of it New Zealand's media market exhibits similar concentration of ownership and limited competition as identified in the Finkelstein Report. However, for reasons we will set out below, we view these market failures through a different lens and draw different conclusions about their implications for regulatory reform in the digital age.

Competition

- 4.42 New Zealand's media market is also characterised by concentrated ownership. Five entities dominate the print and broadcast markets: Fairfax Media New Zealand (part of the Australasian company Fairfax Media), APN News & Media (majority shareholders, Irish Independent News and Media and Australian equity fund Allan Grey), MediaWorks (private equity owned), Television New Zealand (state owned) and Sky (at the time of publication Rupert Murdoch's News Limited was in the process of selling its 43.65 per cent share in Sky to a range of institutional investors).
- 4.43 The daily metropolitan print and online news market is shared between APN News & Media and Fairfax New Zealand. Unlike Australia, there are no longer any competing daily metropolitan newspapers.¹⁵¹ However APN and Fairfax compete directly with one another in the Sunday newspaper market and, most significantly, in the provision of New Zealand's online news.
- 4.44 In December 2012 *Stuff* (Fairfax New Zealand), and *nzherald.co.nz* (APN News & Media), ranked second and third, respectively (behind Wikipedia) in the top 15 news and information websites in New Zealand with a combined

151 Melbourne and Sydney continue to be serviced by competing daily newspapers.

unique audience of just under two million.¹⁵² Between them, it is estimated they had a combined reach of about 57 per cent of New Zealand's total active online audience.¹⁵³

- 4.45 Audience share is similarly concentrated in the broadcast sector. The rival radio networks, *The Radio Network* (a subsidiary of the Australian Radio Network jointly owned by APN News & Media and Clear Channel Media and Entertainment) and *MediaWorks Radio* (MediaWorks) are estimated to have over 85 per cent of market share between them.¹⁵⁴
- 4.46 The free-to-air television market is operated by a mix of private and publicly-owned companies, including Television New Zealand (TV One, TV2, TVNZ U) and Māori Television, (Māori TV and Te Reo), MediaWorks (TV3 and FOUR) and Sky (Prime). Sky is also the dominant provider in the subscription television market offering satellite coverage to over 50 per cent of New Zealand households. In 2012 it entered into a partnership with TVNZ to launch a basic subscription channel, Igloo TV, using Sky's digital terrestrial spectrum providing a mixture of free-to-air, on-demand paid and pay-per-view programming.¹⁵⁵
- 4.47 Allied Press is the only surviving major independent media company. It publishes the *Otago Daily Times*, a stable of regional and community newspapers and also owns a number of local radio and television stations.

Disrupted market

- 4.48 The Finkelstein Report noted that highly concentrated media ownership posed a number of potential risks including limiting the extent to which ideas and information were contested, disproportionate influence of dominant media players and declining standards as a result of weak competition.
- 4.49 However, it is arguable that the greatest threat to the provision of quality national news arises not from weak competition but from the pace of technological change and its impact on the profitability of corporate news media. In New Zealand, as in Australia, the major newspaper companies are making the transition to digital delivery against a backdrop of declining

152 Nielsen Consumer and Media Insights & Nielsen Online Ratings *New Zealanders and Online News Consumption* (Category Report: News and Information – December 2012). Unique audience is defined as the projected number of unique persons that have visited a website or used an application at least once in the specified reporting period. Persons visiting the same website or using the same application more than one time in the reporting period are only counted once.

153 Ibid.

154 Merja Myllylahti *JMAD New Zealand Media Ownership Report* (AUT Centre for Journalism, Media and Democracy, 2012) at 18.

155 In 2010 Sky partnered with a number of New Zealand's leading internet service providers to launch iSky, an online television service which allows subscribers to access content via computers, lap tops and other mobile devices. In February 2012 Fairfax New Zealand announced the launch of a video streaming news service *Stuff IPTV Channel* accessed via Sony Internet TVs.

revenue. While digital advertising is increasing, web and mobile advertising do not offer the yields traditionally derived from print and broadcast television advertising, forcing far-reaching reforms throughout the industry.¹⁵⁶

- 4.50 In August 2011, the independent news wire service, the New Zealand Press Association (NZPA) became a casualty of the ongoing industry restructuring. The 131 year old news co-operative, jointly owned by Fairfax New Zealand, APN and the remaining independent newspapers, had provided a core news wire and picture service to its own members' newspapers and websites as well as selling content to third parties such as TVNZ and MediaWorks. The service closed in August 2011 after Fairfax New Zealand withdrew its funding from the agency.¹⁵⁷
- 4.51 Since then the pace of rationalisation has increased as noted in a report on the state of New Zealand media by Auckland University of Technology researcher Merja Myllylahti:¹⁵⁸

In 2012 it became apparent that the traditional business models of New Zealand print media were failing and the "digital first" approach was not (yet) making real impact on the bottom lines of APN and Fairfax. In New Zealand, commercial news media's transformation from print to the digital environment has reduced jobs; remodelled newsrooms; expanded to non-core businesses and triggered asset sales.

- 4.52 Myllylahti noted that while some New Zealand print assets looked likely to be offered for sale, there was also likely to be increasing focus on the potential of both digital audio broadcasting and the provision of high quality video on-demand services off the back of the Government's billion dollar investment in ultra-fast broadband.

New media as alternative news sources

- 4.53 The other important factor in assessing levels of competition is, of course, the rise of new publishing platforms which allow newsmakers to bypass the mainstream media, providing the public with alternative news sources. Social media networks like Twitter have fundamentally changed the environment in which news is broken and is increasingly used as an "official" channel for the dissemination of breaking news. Mainstream media must keep pace with

156 See generally Myllylahti, above n 154, at 19–24.

157 In the wake of NZPA's demise both Fairfax New Zealand and APN News & Media moved to establish their own network news services, Fairfax New Zealand News (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, 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 Media and News Limited) has boosted its New Zealand presence, setting up NZ Newswire (NZN).

158 Myllylahti, above n 154, at 21.

- this 24 hour continuous news cycle while at the same time undertaking their core functions of verification and contextualisation.
- 4.54 Beyond the spot or live news market however, the impact of new media publishers on the breadth and depth of local news available to New Zealanders is less clear. Chapter 2 of our Issues Paper contained a detailed overview of this new media landscape.¹⁵⁹ This included an attempt to distinguish between the different types of new media publishers, the various functions they were performing, and the relationship between these new entities and the mainstream media.
- 4.55 We do not propose to repeat this analysis here except to restate a number of conclusions we reached which have a bearing on the level of competition and diversity in the New Zealand media market.
- 4.56 First, and most significantly, we concluded that this proliferation of publishers is enriching public debate and has the potential to strengthen democracy by increasing participation in public affairs, widening the sources of information available to the public and providing a greater diversity of opinion. It is also providing a new form of accountability for the mainstream news media as bloggers and others critique aspects of the mainstream media's coverage of political and other events.¹⁶⁰
- 4.57 However, we also noted a number of caveats: despite the massive proliferation of publishing online, only a small percentage of this new publishing activity is focused primarily on the *generation* and dissemination of original, local, news and current affairs. For example, we identified only a small number of professional, internet-native entities for whom this was the primary focus: these included sites such as *Scoop*, *NewsWire*, *BusinessDesk*, *allaboutauckland.com* and *interest.co.nz*.
- 4.58 Alongside this relatively small pool of original content creators, are a number of news aggregators, such as *infornews.co.nz*, *Voxy.co.nz* and *Yahoo!New Zealand*, who generate little if any original news, but instead filter, organise, repackage and re-publish content drawn from multiple other news sources.
- 4.59 Similarly we noted that while New Zealand has an active blogging community, including over 200 individual and collective blogs largely concerned with commentary and debate on New Zealand news and current affairs, only a small proportion of these provide reportage and *generate* original news with any regularity.
- 4.60 Even the most prolific and high profile bloggers attract only a small fraction of the audiences which mainstream media sites attract each day. In order for a story broken on a blog site to gain momentum, it typically must percolate up through the social media ecosystem into the mainstream media.

159 Issues Paper, above n 133.

160 See for example Bryce Edwards "NZ Politics Daily: Did Media Fall For Manufactured Coup?" *The National Business Review* (online ed, Auckland, 18 December 2012).

- 4.61 Recent research into the news media consumption habits of New Zealanders and Australians suggests that in both countries around two thirds of the population (61 per cent and 68 per cent respectively) continue to depend on traditional news media sources accessed off-line.¹⁶¹ In both countries, commercial television outranks all other media as the main source of news for the largest proportion of the population (36 per cent in Australia and 42 per cent in New Zealand).
- 4.62 After commercial television, the news sources which ranked highest for New Zealanders as the “main news source” were newspaper websites (25 per cent), newspapers (11 per cent), other news websites (eight per cent) and Radio New Zealand (six per cent). In this respect New Zealanders differed from Australians, with newspaper websites emerging as the “main source of news” for only eight per cent of Australians, the same percentage as relied on public broadcasters and Australian metropolitan and local newspapers.¹⁶²
- 4.63 When asked which news media source they would be most inclined to believe if there were conflicting accounts of a news story in different media, television and newspaper websites again ranked highest at 48 and 25 per cent respectively.¹⁶³
- 4.64 While based on a small sample, this research suggests that the majority of New Zealanders currently continue to rely on a comparatively small pool of mainstream providers – foremost amongst them TVNZ, MediaWorks, Fairfax New Zealand and APN News & Media – for authoritative accounts of domestic news and current affairs.
- 4.65 This analysis leads us to conclude that while “new media” are making a significant impact on the New Zealand news market, and providing some competition and accountability for mainstream media, the imbalance in resources and audience share means these effects are, for the moment, modest.

Information asymmetries

- 4.66 Another rationale for regulatory intervention advanced by Finkelstein was the extent to which consumers’ judgements and choices around news are impaired because they are not in a position to assess whether a report is fair and accurate or whether important facts have been omitted.

161 Big Picture Marketing Strategy and Research Ltd *Public Perception of News Media Standards and Accountability in New Zealand* (summary of the online survey conducted for the Law Commission, April 2012) < www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media > [Big Picture Research]. See also Australian Communications and Media Authority *Digital Australians - Expectations About Media Content in a Converging Media Environment* (research report, 2011) at 38 – 39 [Digital Australians].

162 *Digital Australians*, at 39.

163 Big Picture Research, above n 161.

- 4.67 Again, while we agree in principle with this analysis, it is arguable that the internet and interactive publishing are significantly altering this imbalance in favour of the reader/consumer. One of the core functionalities of web 2.0 is the facility to comment on and share content. Most mainstream media organisations have embraced this technology and are fostering user interaction.
- 4.68 As discussed above, the internet has also given rise to many alternative sources of opinion and commentary: critiquing the mainstream media's account of events is an important function carried out by many of these new media publishers.
- 4.69 Powerful search technology also allows consumers to access primary materials, academic research and expert opinion on almost any topic. Citizens caught up in major news events anywhere in the world are able to transmit images and reports of these events instantly. While it often falls to professional media organisations to verify such reports, the fact is, news consumers now have a variety of competing sources from which to draw their own conclusions.
- 4.70 In short, in the age of mass participatory media, audiences are no longer the passive recipients of information. They are often inquiring and sometimes, better informed than the traditional news sources.
- 4.71 That said, we also acknowledge that the ideal of the inquiring and sceptical user is just that – an ideal. This point was made by Victoria University academic Peter Thompson who pointed out that “the standard of rational dialogue from the audience on news websites is highly varied” and:¹⁶⁴
- ... not everyone is equally knowledgeable or equipped to engage in critical disputation – so it is imperative that the basic facts presented in the news be subject to basic professional standards. Most people still want to be able to believe what they read.

The “public good” problem

- 4.72 The processes of gathering, verifying and contextualising news is expensive and time consuming. It can also be financially risky. The benefits of these activities accrue to the whole of society, and are never able to be reflected in the cover price of a newspaper – giving rise to the so called “public good” problem. Arguably, the decision to make premium news journalism available free online has exacerbated this problem.
- 4.73 In many countries the problem is mitigated by the provision of taxpayer funded public sector broadcasters subject to their own statutory charters. In England for example the BBC's journalism is subsidised via a television licensing fee.¹⁶⁵ This was also the case in New Zealand until 1999 when the

164 Submission of Peter Thompson (9 March 2012) at 4.

165 In the year to March 2012, the annual licensing fee of £145.50 contributed £3.6 billion to the BBC's revenues.

licensing fee was abolished, increasing TVNZ's dependence on advertising revenue. In Australia there are two state funded broadcasters, (ABC and SBS), and media surveys consistently shows these brands to be regarded as highly trustworthy.

- 4.74 Alongside TVNZ, New Zealand has two other publicly owned broadcasters, Radio New Zealand and Māori Television. Both have their own statutes setting out their objectives and charters.¹⁶⁶ In addition, the state funds a range of Māori and general interest content for broadcast or digital delivery via its two funding agencies, New Zealand on Air and Te Māngai Pāho.¹⁶⁷
- 4.75 Another rationalisation impacting the market in 2011 was the closure of TVNZ7. The channel was launched in 2008 as a commercial-free public service digital broadcaster with a strong focus on news, current affairs and documentaries. Although TVNZ is state-owned, it is no longer bound by any specific public service charter with respect to its programming mix.

Harms

- 4.76 Unlike the Finkelstein and Leveson Inquiries, our own review was not driven by scandal or a perceived crisis in public confidence in the mainstream media. It was driven instead by concern at the gaps and inconsistencies which had arisen in the regulatory environment for news media as a result of convergence. However, as we explain in the introductory chapter, the underlying concern is about professional standards and accountability and how these can be applied in this era of ubiquitous publishing. In order to address this question it is important to assess how well New Zealand's news media (mainstream and new) are performing against their own professional and ethical standards. Such an assessment is an important indicator of whether the current regulatory environment is in fact providing the necessary level of accountability to maintain public trust in the news media.
- 4.77 In reaching their own conclusions about the adequacy of the existing news media standards bodies in their respective countries, the Finkelstein and Leveson Inquiries were able to draw on a very significant body of research

166 The Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003 establishes the channel as a statutory corporation. The Act requires that the corporation be a high quality, cost effective television provider which informs, educates and entertains, broadcasting mainly in te reo Māori. The Radio New Zealand Act 1995, s 7, sets out the broadcaster's obligations under its charter which are to "to provide innovative, comprehensive, and independent broadcasting services of a high standard ..." This includes broadcasting "programmes which contribute towards intellectual, scientific, and cultural, spiritual, and ethical development, promote informed debate, and stimulate critical thought."

167 In 2011, New Zealand On Air allocated \$84m to television productions; \$32m to radio; \$12m to Māori broadcasting; \$5m to community broadcasting; \$5m to music and \$2.4m to digital productions. Between 2009 and 2012 New Zealand on Air approved grants of over \$5.3m for the production of the news and current affairs programmes *Q&A* (Television New Zealand) and *The Nation* (TV3).

and oral and written submissions specifically addressing the issues of news media standards and public trust.

- 4.78 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.¹⁶⁸ The report also examined the impact of the internet, economic pressures and competition on accuracy and professional standards.
- 4.79 As we noted in our Issues Paper, there is a dearth of robust independent research on New Zealand news media's performance and to our knowledge no systematic monitoring of public trust in the news media.¹⁶⁹
- 4.80 Despite this lack of detailed research, it is possible to draw some tentative conclusions about the public's perception of the news media's performance drawing on a range of different sources including:
- the volume and nature of complaints received by the Press Council and the BSA;
 - public submissions on this review;
 - our own independent research into public perceptions of news media standards and accountability in New Zealand.

Research

- 4.81 In March 2012, we commissioned an independent market research company to undertake some base line research on New Zealanders' perceptions of news media standards, accountabilities and complaints bodies. The research targeted a representative sample of 750 New Zealanders aged 18 to 70 and was conducted via an online survey comprising a combination of structured and open-ended questions completed between 15 and 22 March 2012.¹⁷⁰
- 4.82 As part of the research, survey participants were asked to assess the news media's overall performance and were also quizzed about their awareness of news media standards and their perceptions of how well the news media complied with these standards.

168 Media Standards Trust *A More Accountable Press Part 1: The Need for Reform - Is Self-Regulation Failing the Press and the Public?* (2009).

169 Issues Paper, above n 133, at [4.54]. 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." See Ian Barker and Lewis Evans *Review of the Press Council* (2007) at 139.

170 Big Picture Research, above n 161.

- 4.83 When asked whether New Zealand news media were providing “adequate coverage” of what they felt to be the “important current events and issues of the day”, 65 per cent of respondents said “mostly” and 23 per cent “sometimes.” Respondents were also asked whether they felt “reporting errors” (inaccurate or incorrect reporting) were a problem for New Zealand news media. Just over a quarter of the sample felt that errors were a problem, with the remaining evenly divided between “no” (38 per cent) and “don’t know” (36 per cent). Those with higher educational qualifications were significantly more likely to think errors were a problem with 32 per cent of those with a Bachelor’s Degree perceiving errors to be a problem (compared to 26 per cent of the general population). A third of those of Asian or Indian ethnicity also perceived errors to be a problem.
- 4.84 Less than half (39 per cent) were spontaneously aware of the existence of professional standards which apply to the news media. When prompted with definitions of media standards, 60 per cent said they had heard of them. The highest level of awareness was around broadcasting standards. Of those who were aware of the standards, less than half felt they knew where to find them – equating to 24 per cent of the total population.
- 4.85 After the standards were explained, respondents were asked to rate their importance. Slightly less than 70 per cent of the sample regarded the standards as “extremely important”. The most commonly cited reasons for regarding these standards as important were the need for accuracy, honesty and balance, the need to prevent bias and to protect the public’s rights.
- 4.86 When asked to nominate the three media sources they regarded as best complying with news media standards, television ranked highest (nominated in the top three by 70 per cent of the sample) followed by newspapers (57 per cent) and Radio New Zealand (42 per cent). After these three sources there was a marked fall-off in compliance rankings, with newspaper websites nominated in the top three by only 28 per cent of the sample, commercial radio by 20 per cent and other news websites by 10 per cent. Twitter was ranked in the top three news sources for reliability by 15 per cent of the sample and Facebook by one per cent.
- 4.87 There was a strong correlation between the media sources regarded as most compliant with standards and those regarded as most reliable.

Complaints to the Press Council and the BSA

- 4.88 In the first instance anyone wishing to complain about a news item must attempt to resolve the issue directly with the publisher. Currently there is no publicly available data about the level of such complaints, although a number of newspapers run prominent daily corrections columns.
- 4.89 Anyone dissatisfied with the publisher’s response is able to appeal their decision to either the Press Council or the BSA.

- 4.90 Analysis of the volume and type of complaints appealed to these two bodies over the past five years shows both bodies have seen an increase in the number of cases coming to them for adjudication.
- 4.91 In its 2011 Annual Report the BSA noted that it had experienced a 90 per cent increase in the number of complaints from four years ago. In 2010/2011 the BSA issued 236 decisions (stemming from 250 complaints) upholding 69 (29 per cent) in part or in total. This compares with 125 cases adjudicated in 2006/2007 of which 27 per cent were upheld in part or total.¹⁷¹
- 4.92 Over 80 per cent of the 236 decisions issued in 2010/2011 concerned television broadcasts and over two thirds (68 per cent) concerned news, current affairs, factual programming and “talk-back” radio.¹⁷² Early evening news and current affairs programmes made up a significant proportion of the complaints. Of the complaints upheld, the most common standards found to have been breached were those dealing with accuracy, fairness, good taste and decency.
- 4.93 The BSA noted that the 2010/2011 increase in total complaints was explained in part by multiple complaints about specific episodes of *Breakfast* (hosted by broadcaster Paul Henry) and the New Zealand drama *Outrageous Fortune*.¹⁷³
- 4.94 In the latest reporting year (June 2011 to June 2012) the number of complaints fell back to 195 of which 162 decisions were issued and only 17 (10 per cent) were upheld.¹⁷⁴ Over 70 per cent of the decisions involved news, “factuals” or election programmes.¹⁷⁵
- 4.95 However, despite the recent increase in the volume of complaints, analysis over two decades does not show a sustained increase in the number of complaints but rather considerable yearly fluctuations. Similarly, the percentage of complaints upheld over this period has fluctuated from highs of 34 and 35 per cent in 1993-1995 to 2012’s low of 10 per cent.¹⁷⁶
- 4.96 Like the BSA, the Press Council has also experienced a marked increase in the total number of complaints received over the past four years. The total number of complaints received annually increased from an average of 72, between 2004 and 2008, to an average of 128, in the last four years. These numbers peaked in 2012 with a total of 157 complaints.
- 4.97 However, analysis of adjudicated decisions does not reveal any significant or sustained increase in the percentage of complaints being upheld which

171 Broadcasting Standards Authority *Annual Report* (2011) at 11.

172 At 11.

173 At 11.

174 Broadcasting Standards Authority *Annual Report* (2012) at 55.

175 At 16.

176 At 55, 56.

continue to average around 30 per cent. There has however been a steady increase in the number of complaints resolved through mediation.¹⁷⁷

- 4.98 In part this is likely to be a consequence of the greater flexibility with which the Press Council has been able to respond to the digital publishing environment. Not only has it extended its jurisdiction to its members' websites, its executive director has also taken an active role in resolving complaints relating to a number of non-member websites such as *Scoop*, *Yahoo!New Zealand* and *MSN NZ*.
- 4.99 This has meant the Press Council has been forced to grapple with a range of new ethical and practical problems arising from the digital publishing environment. Some of these issues relate to journalistic processes and practices around the publication of user-generated content or content sourced from social media including Facebook and Twitter. Other issues relate to the architecture of the internet itself and the implications for complainants and publishers when contested content remains available on search engines – or in other cases hidden behind pay walls.
- 4.100 For the adjudicators, the complexities of determining complaints can be made more complex when the content complained about has either been removed from the website or amended in some way. On the one hand, the speed with which corrections can be made is a distinct advantage when errors are made, but it can also raise concerns for the complainant when there is no acknowledgment that the original content was incorrect, or when cached versions of the original content continue to feature prominently in searches.¹⁷⁸

Submissions

- 4.101 Our Issues Paper made a number of bald assertions about the role and importance of the news media in a liberal democracy. As we noted in the previous chapter, these assertions were met with a degree of scepticism from some submitters. Some were highly critical of the mainstream media's standard of reporting. They questioned whether impartial reporting and fact checking were in fact still core capabilities of the news media and whether public interest journalism remained a serious pursuit for commercial media driven by the twin demands of ratings and revenue.
- 4.102 Perhaps not surprisingly, some of the strongest criticisms of the mainstream media's performance came from those commenting on our proposals through

177 Mediated cases represented 1.28% of total complaints received in 2007; 4% in 2008; 9% in 2009; 6% in 2010 and 2011 and 10% in 2012.

178 The Press Council advised us that unless there is a compelling reason to remove content which has been the subject of a complaint – for example in cases involving privacy breaches or unjustifiable reputational damage – the Council's preference is for the original content which has been found to be in breach to remain available so that the record remains intact, but for there to be an obvious acknowledgement of error and a link to the Press Council decision.

online consultation forums such as that hosted by *Public Address* in February 2012. Issues raised included “ratings, ego and 'hit' driven media”, selective reporting, institutional and political bias, inaccuracies and a failure to engage in substantive issues. A number of commentators suggested that new media publishers, including part-time bloggers, who were not subject to commercial constraints, were an increasingly important alternative news source.

- 4.103 However, as we highlighted in the preceding chapter, not all submitters regarded part-time bloggers and other new media commentators as the panacea to mainstream media failings. Criticisms of some new media publishers focused on the lack of adherence to any ethical code, the publication of unsubstantiated information, including damaging allegations, the publication of information suppressed by the courts, and a failure to adequately differentiate between opinion and fact.
- 4.104 A number also pointed out that the “robust” exchange of opinions on some news and current affairs blog sites often descended into low-level debates where personal vitriol and misinformation flourished. Professor Ursula Cheer also questioned whether the self-correcting feedback loops in these forums were always effective:¹⁷⁹

Comment can be very homogeneous, and redneckery, bias, and basic inaccuracy can prevail when a discussion builds up a head of steam. I have got into web discussion on legal issues and completely killed the conversation by correcting the inaccuracies which made up most of the commentary. But commentary does not always self-correct mistakes or deliberately damaging material online. And the material may stay in cyberspace until removed.

WHAT WE CONCLUDE

Media Standards

- 4.105 Our review has not found any evidence to challenge the mainstream media’s own assertion that New Zealand has an ethical and trustworthy news media. Although our independent research indicates some concern over the accuracy of the New Zealand media, it did not reveal a wholesale loss of confidence. Indeed, most still regarded television news as the most reliable source of news.
- 4.106 Nor do the nature and volume of complaints appealed to the Press Council and the BSA indicate any radical change in levels of public dissatisfaction with the professional standards of mainstream news media in New Zealand.

179 Submission of Professor Ursula Cheer at [4].

- 4.107 However, while we have not sought or received any evidence to contradict that assertion, we believe it must be subject to a number of important qualifications:
- (a) There is a paucity of robust independent information about the public’s perception of, and trust in, the New Zealand news media and very little scrutiny – either by other media or by independent bodies.¹⁸⁰
 - (b) The number of complainants who approach the Press Council and BSA is a sub-set of those who first complain to the news media. However because there is no transparency around the level of complaints made directly to news media companies we have no way of assessing what percentage of cases go to appeal. Our research also found that 10 per cent of survey participants said they would not complain because they did not trust the complaints process.¹⁸¹
 - (c) Research indicates there is low public awareness of the Press Council (only 26 per cent of our survey sample had heard of it) and while the BSA’s visibility is much higher, the BSA’s own research suggests that only a small percentage of those complaining directly to a broadcaster were aware that they can appeal to the BSA if unhappy with the broadcaster’s response.¹⁸² The research also found that many of those who had considered making a complaint to a broadcaster had not done so because they believed “nothing would change as a result.”¹⁸³
 - (d) There is very limited public visibility of the professional ethics, codes and standards to which the news media hold themselves accountable. Unless the public has a strong awareness of what internal standards apply to news gathering and reporting, there is limited opportunity for them to hold the news media to account for ethical breaches.
- 4.108 Alongside these qualifiers, it is arguable that in the medium term the greatest challenge to journalistic standards arises from the intense commercial and competitive pressures mainstream media companies face in the transition to digital delivery.
- 4.109 As our brief overview of the New Zealand news media landscape shows, we are not immune from these impacts. Although consumers have access to a vast array of international news sources, competition in the primary news market in New Zealand has been steadily weakening. This raises questions about the extent to which consumers are able to exercise real choice and about

180 Radio New Zealand’s *Media Watch*, *The New Zealand Herald*’s weekly media column (John Drinnan) and Russell Brown’s *Media 3* (formerly *Media 7*) are the main source of media critique in the mainstream media. Specialist news and current affairs bloggers, including media experts such as Steven Price (*Media Law Journal*), are increasingly engaged in critiquing the mainstream media.

181 Big Picture Research, above n 161.

182 Nielsen Corporation *New Zealanders’ Knowledge of Broadcasting Standards* (report for the Broadcasting Standards Authority, 2010) at 11–12 < www.bsa.govt.nz > .

183 At 11.

the extent to which the news media are themselves critiqued and challenged by authoritative alternative news sources.

- 4.110 We note that while “new media” are mitigating these effects to some extent, these effects are modest because of the limited capacity of non-commercial media to consistently generate news (as opposed to comment and debate) and because of the public’s ongoing reliance on mainstream media as a default provider. We also note that in New Zealand the provision of public service media is limited.
- 4.111 New Zealanders’ dependence on a limited number of dominant media players – in both the new and mainstream media – presents the same risks as identified in the Finkelstein Report. These include a lack of diversity, the potential for a small number of publishers (mainstream and new media) to exert undue influence on the news agenda and public opinion, and a potential decline in standards.

The need for effective external accountability

- 4.112 We conclude that there continues to be a strong public interest in ensuring there are effective mechanisms for holding the media to account for the exercise of their power and for remedying harms arising from any breaches of ethical and professional standards.
- 4.113 In its submission to our review, Allied Press made the point that their commercial survival depended on remaining on “the ‘right’ side of the ledger” in terms of reader/viewer/advertiser judgement.¹⁸⁴
- 4.114 In the digital era these “customers” now have myriad ways to make their views heard, to comment directly and publicly on what they read, see and hear in the news media and to provide instant and sometimes devastating feedback via mechanisms such as Twitter when a news organisation is judged to have tripped up. But market feedback is often a blunt instrument: it can certainly punish blatant breaches of standards once they have been exposed, but it does not necessarily encourage ethical behaviour or provide an effective or proportionate remedy for individuals who are harmed.
- 4.115 As Britain’s tabloid newspapers prove, while the public might condemn the news media for unethical news gathering practices, it has always had a strong appetite for the types of stories these practices produce, often rewarding these papers with mass circulations. The same can be said of new media publishers who push the boundaries with respect to legal and ethical standards and are then rewarded with high internet traffic and rankings in search engines. In other words, the market sometimes rewards unethical or illegal behaviour.
- 4.116 Nor does market feedback provide an effective form of accountability for the individual who has been harmed as a result of a damaging false report or an invasion of privacy. To argue that such an individual has the ability

184 Allied Press Limited, above n 141, at 4.

to right the wrong by commenting on the original story or publishing their own account is to ignore the major power imbalance between individuals and corporate media.

- 4.117 In the digital environment, damaging content published by the mass media has unprecedented reach and permanence. The reputational attack or privacy breach is repeated each time the damaging content is retrieved by a search engine. It can persist for years and individuals who have been unjustifiably harmed by damaging and inaccurate reporting are often reliant not just on the original publisher but also on remote parties – such as Google – to remove the damaging content.
- 4.118 And while it is true that citizens have the right to seek redress through the courts when the published content breaches the law, the reality is that the expense of pursuing a civil action for defamation or breach of privacy means this is simply not a meaningful remedy for most private citizens.
- 4.119 The same arguments apply to public and private institutions if they are unjustifiably harmed by biased, misleading or inaccurate media reports. Although these bodies will often have access to much greater resources, including in some cases large public relations and legal departments, the harms cannot always be easily rectified.
- 4.120 In other words, the mainstream media – and, increasingly, some new media – are uniquely powerful mechanisms for shaping public opinion and calling others to account.
- 4.121 In considering how best to achieve this accountability, it is vital to recognise the very real challenges of enforcing standards in an era of merged media, where the boundaries between professional and amateur, moderated and unmoderated content are increasingly blurred, and where the mainstream media face enormous competitive and commercial pressures.
- 4.122 As Leveson noted, at a time when standards can be breached by anyone, and the offending content accessed online with the click of a mouse, there is a need to recognise that “burdensome or insensitive regulation” could further imperil the sustainability of the national and regional news media on which the public still depends.¹⁸⁵
- 4.123 In the next three chapters we explore what this analysis means for the type of oversight body which best promotes the fundamental interests in a robust, ethical and accountable news media in this era of convergence.

185 The Rt Hon Lord Justice Leveson *Report of An Inquiry into the Culture, Practice and Ethics of the Press* (The Stationery Office, London, 2012) Executive Summary at 6 [17].

Chapter 5

Convergence – the case for reforming oversight of news standards

INTRODUCTION

- 5.1 In the preceding chapter we argue that society as a whole needs a mechanism by which the news media can be held accountable and citizens can access meaningful remedies. As we discuss in chapter 2, there are currently two bodies in New Zealand responsible for upholding news media standards and providing citizens with remedies when these standards are breached: the industry-led Press Council and the statutorily established Broadcasting Standards Authority (BSA).¹⁸⁶
- 5.2 A central policy question we have been asked to address is how to deal with the lack of parity and the gaps in the coverage of these two complaints bodies. These gaps have occurred as new web-based publishers undertaking “news-like activities” emerge and as traditional print and broadcast media converge online. Our terms of reference required us to consider whether the jurisdiction of either of the existing complaints bodies should be extended to some of these new digital news media.
- 5.3 The paradigm shift in the media environment brought about by the internet requires us to adopt a first principles approach to this question. The two existing complaints bodies pre-date the digital era. They reflect an analogue world where the sources of news and information were far more limited and the formats in which news was delivered were confined to print and broadcast.

¹⁸⁶ Another industry-led complaints body, the Online Media Standards Authority (OMSA), has been established to deal with complaints about online content on broadcasters’ websites, but had not commenced operation as at the date of this report. See [5.23] – [5.24].

- 5.4 A regulatory design paper describes the complex matrix of factors that need to be taken into account when considering the best options for influencing organisational behaviour:¹⁸⁷

The appropriateness of any particular regulatory strategy is contingent on the nature of the regulatory problem and overall regulatory objective. It requires an appreciation of the legal, political, and market context of any particular policy problem. It also requires an understanding of the different capabilities and resources available to government to influence behaviour and conduct. And, finally, it requires an understanding of the relative strengths and weaknesses of different regulatory approaches, or mix of approaches, and when and how these are best used. Having regard to all these factors, the task is to select the strategy that best promotes the public interest.

- 5.5 In the preceding chapters we examine the nature of the regulatory problem and objective, and the unique policy challenges associated with attempts to influence the behaviour of the news media through externally imposed systems of accountability. We also consider the commercial and competitive pressures under which the mainstream news media are currently operating as a consequence of disruptive technology.
- 5.6 In this chapter we turn to an analysis of the existing complaints bodies and how they are functioning in this digital environment. We focus on the policy problem raised by convergence, the responses to this problem from the news media and the regulators, and consider the available regulatory options. We also critique the strengths and weaknesses of the current dual regulatory approaches against the established benchmarks of effective regulation. We report what submitters had to say about the preliminary proposals for reform put forward in our Issues Paper and explain some of the initiatives taken by key media stakeholders to address the gaps identified in our Issues Paper.
- 5.7 We begin with a discussion of how technological and content convergence is fundamentally changing the regulatory environment for the news media and why, in our view, this requires a new approach.

187 Ministry of Economic Development (now the Ministry of Business, Innovation and Employment) *Regulating for Success: A Framework* (2009) at 84.

CONVERGENCE – THE POLICY PROBLEM

- 5.8 As we demonstrated in our Issues Paper, a significant problem with the current model is that the different approaches to regulating broadcast and print media are becoming increasingly difficult to justify in an age of media and technological convergence.¹⁸⁸ Digitisation, the internet and the web have combined to produce a plethora of new ways of producing and delivering content to consumers.¹⁸⁹ As a result the boundaries between print, broadcast media and the telecommunications sector have become increasingly blurred. It has also reduced the barriers of entry to mass publishing, allowing new entities – amateur and professional – to compete in the news market.
- 5.9 In our Issues Paper we identified the emergence of significant gaps and contradictions in the parallel systems of state regulation for broadcasters and self-regulation for the print media.¹⁹⁰ We described the key policy problems resulting from this convergence as:¹⁹¹
- (a) the emergence of gaps in the regulatory framework resulting in some content being subject to no regulatory oversight at all despite being generated by mainstream media and intended for wide public consumption;¹⁹²
 - (b) a lack of regulatory parity between print and broadcast media: all news media now produce text and audio-visual content for mass distribution but only broadcasters are subject to statutory regulation; and
 - (c) a lack of regulatory parity between mainstream media and the new digital publishers: websites and digital publishers undertaking news-like activities are currently unregulated.

188 See also Gavin Ellis “Different Strokes for Different Folk: Regulatory Distinctions in New Zealand Media” (2005) 11 *Pacific Journalism Review* 63; Russell Brown and Steven Price *The Future of Media Regulation in New Zealand: Is There One?* (Report for Broadcasting Standards Authority, 2006). For further discussion of the issues associated with convergence, see Ministry for Culture and Heritage *Broadcasting and New Digital Media: Future of Content Regulation* (Consultation Paper, 2008); InternetNZ *Responding to Convergence in Communications Markets* (Discussion Document, 2012).

189 See Law Commission *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) at chs 2 and 4 [Issues Paper].

190 At [1.45].

191 At 6 – 7.

192 On-demand content accessed via broadcasters’ websites is one striking example. The creation of OMSA in February 2013 was in direct response to this issue.

- 5.10 There are three possible approaches to the identified problems:¹⁹³
- (a) close the gaps by extending the jurisdiction of both the BSA and the Press Council to include currently web-based unregulated news content;¹⁹⁴
 - (b) fill the gaps by introducing an additional body, such as the Online Media Standards Authority (OMSA),¹⁹⁵ to deal with currently unregulated web-based news content;¹⁹⁶ or
 - (c) replace the existing bodies with a single standards body responsible for defining and enforcing standards across all news media irrespective of the platform on which they publish.¹⁹⁷
- 5.11 The first two options would leave the regulatory parity problem unresolved and require arbitrary boundaries between content regulated by statute and content subject to self-regulatory schemes.¹⁹⁸ Our preliminary conclusion in the Issues Paper was that neither of the existing models is suited to the age of converged media and instead a new single standards body is desirable.

The response from consultation

- 5.12 The public research we commissioned indicated that the public are very open to the idea of a single body to deal with complaints against all news media,¹⁹⁹ with a preference for an independent authority (61 per cent), and that there is a good degree of support from the New Zealand public around a set of standards that are uniform across all media.²⁰⁰
- 5.13 The case for a single, independent body with jurisdiction over all news media also received support from a number of major news media organisations including the state broadcasters (Television New Zealand and Radio New Zealand), the Newspaper Publishers' Association (a trade organisation which

193 An alternative option is put forward in the submission of the Chief Censor (12 March 2012) at [8] – [12]. Another view expressed in the submission of TechLiberty (12 March 2012) at 3 is that accountability to an external body is no longer necessary in the web environment.

194 For example, see Option 1 in submission of Jim Tucker (4 March 2012) at 5 – 6.

195 See [5.23] – [5.24].

196 For example, see the joint submission of broadcasters TVNZ, MediaWorks, ThinkTV, SKY Network Television, Radio NZ, The Radio Network, and the Radio Broadcasters' Association (4 April 2012) at [28] – [49].

197 For example, see Option 2 in submission of Jim Tucker, above n 194, at 6.

198 For example text-based stories published on newspaper websites, and the same or similar content on broadcasters' websites, would be subject to different complaints procedures.

199 Big Picture Marketing and Strategy Research Ltd *Public Perception of News Media Standards and Accountability in New Zealand* (summary of the online survey conducted for the Law Commission, April 2012) < www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media > [Big Picture Research]: 52 % definite support plus an additional 36 % possible support.

200 Big Picture Research, above n 199: 92 % agree that the same standard ought to apply, regardless of the mode of publication (with over 55 % strongly agreeing).

represents 28 daily and Sunday newspapers) and the journalists' union, the Engineering, Printing and Manufacturing Union (EPMU).²⁰¹

- 5.14 Unsurprisingly perhaps the most vigorous proponents of a converged standards body were traditional broadcasters, like TVNZ, who argued that a single body would provide “a level playing field across all news media ... ensuring greater accessibility for consumers.”²⁰² MediaWorks also expressed a principled opposition to the dual regulatory regime suggesting that it created an “asymmetric and unfair regulatory environment” for New Zealand media.²⁰³ The Media Freedom Committee, an industry group which advocates on free speech matters on behalf of all major news publishers (print and broadcasters) also suggested the time had come for a single body:²⁰⁴

The majority view on the MFC is that the time has probably come for the mainstream media to answer to a single regulator ... Editors believe it is no longer necessary – if it ever was – for the complaints processes for print and broadcast media, along with their websites, to be different.

- 5.15 For most mainstream media however, support for a single standards body was predicated on a non-statutory model – in other words moving towards a lighter regulatory environment for broadcasters, rather than moving print along the regulatory spectrum towards statutory regulation. However, not all were convinced that the dual regulatory system was broken to such a degree as to require the overhaul proposed in the Issues Paper.
- 5.16 For example, while accepting that technological change, including convergence, had led to a lack of regulatory parity, Google argued that the Commission had not demonstrated that large numbers of consumers were being left without a remedy because of the lack of jurisdiction over the online content of news organisations on the one hand, and nor, it argued, had it demonstrated that the inability to complain about new media sites, such as bloggers or unregulated news websites, was creating a significant problem. Google therefore argued that without evidence of such a problem, there was:²⁰⁵

201 See also support for a converged approach in the submissions of David Harvey at 8, Professor Ursula Cheer at 5, Massey University Journalism Programme academics (Alan Samson, Dr Grant Hannis and Dr James Hollings) at [3.2], The Equal Justice Project (Human Rights Division of Auckland University's Faculty of Law) at [2.1], Trade Me Limited (12 March 2012) at [20], the Screen Production and Development Association (SPADA) (29 March 2012) and the New Zealand Society of Authors (March 2012).

202 Submission of TVNZ (4 April 2012) at [16].

203 Submission of MediaWorks (11 April 2012) at [11].

204 Submission of the Media Freedom Committee at [3.6]. See also the submission of Fairfax Media (9 March 2012) acknowledging that a single regulator is inevitable for the future.

205 Submission of Google New Zealand Limited (14 March 2012).

- (a) no justification to extend any regulatory regime to new media;²⁰⁶ and
- (b) no justification for over-hauling the Press Council/BSA model.
- 5.17 Google proposed an alternative solution to amend the Broadcasting Act 1989 to extend jurisdiction to broadcasters' websites and on-demand content. It saw no case for forcing "new media" such as current affairs bloggers under this or any other regulatory regime. Two print submitters, magazine publishers ACP and Allied Press, publishers of the *Otago Daily Times* and regional television broadcasters CTV and Channel 9, also disputed the need for any change to the current regulatory system.
- 5.18 Allied Press was strongly opposed to any change to the Press Council's voluntary self-regulation model for newspapers and proposed that the gaps identified in the Issues Paper could be filled by extending the jurisdiction of the BSA to cover broadcasters' websites and other internet-based websites, leaving the Press Council to cover newspapers and their websites. Allied Press was also sceptical that the model proposed in the Issues Paper would in fact be successful in moderating the behaviour of outliers:²⁰⁷
- Any new regulations will be followed anyway only by responsible media and will fail completely in securing any form of control or co-operation of "cowboy" operators who, as previously outlined, already thumb their noses at the law, often without any real consequences.
- 5.19 ACP pointed out that the news media are already subject to a raft of laws including defamation law, contempt, consumer law and confidentiality:²⁰⁸
- We are concerned that the Law Commission appears to underestimate the "handbrake" effect of the threat of legal action on all publishers, treating it as though it is a remote possibility and not the very real risk it actually is.
- ACP also argued that any gaps in the existing regulatory system could most efficiently be dealt with by "minor amendments to current policies or statutes."²⁰⁹

Developments

- 5.20 Since the publication of our Issues Paper we have continued to liaise with the key media stakeholders and in that process have been made aware of initiatives to address some of the problems we had identified.
- 5.21 First, in response to the issues raised in the Issues Paper, the Newspaper Publishers' Association (NPA) confirmed its preference to expand the remit

206 In its submission it appears that Google assumes that new media would be compelled to come under the proposed news media regulator, which is not in fact the proposal.

207 Submission of Allied Press Limited (6 March 2012) at 3.

208 Submission of ACP Media Limited at [4.4].

209 At [2.3].

of the existing Press Council to form a new independent self-regulatory body (the “Media Council”) that would be broad enough to include not just the print media (and related online sites), but also the wholly online media, and broadcasters – both linear and website/on-demand content – provided the broadcasters are willing to join.²¹⁰

5.22 The NPA proposed the new Council would have the following features and functions:

- voluntary and open to the new media that meet the Law Commission’s recommended criteria²¹¹ and who are willing to be subject to the Council’s authority;
- setting a Code of Standards (or codes if necessary) to encompass specific broadcast or digital needs, after public consultation;
- chair and panel members to be appointed by an electoral college, with industry but no government input;
- powers to direct the publication of corrections and apologies;
- funded by the news industry with a variable funding formula to accommodate small operators;
- encouraging members to use a qualmark on news products to signal to consumers their adherence to independent standards;
- providing pre-publication guidance to editors about standards compliance; and
- requiring regular publicising of complaints processes for consumers by members.

5.23 Another development has been the launch of a new complaints body, the Online Media Standards Authority (OMSA), a joint initiative by the major broadcasters, including MediaWorks, Television New Zealand, Sky/Prime, The Radio Network, Māori Television and Radio New Zealand.²¹² This self-regulatory body (largely modelled on the Advertising Standards Authority and Press Council models) is to provide a complaints adjudication mechanism for news and current affairs published solely online. In their joint submission the broadcasters described this initiative as a “pragmatic and immediate response” to the regulatory gaps identified in the Issues Paper.²¹³ Although limited initially to handling complaints about online news and current affairs,

210 See Linda Clark “NZ Watchdogs Must Keep Up With Media’s Changing Face” (2012) 18 *Pacific Journalism Review* 46 at 48.

211 Issues Paper, above n 189, at [4.169].

212 OMSA was registered as an incorporated society on 17 January 2013 and publicly launched on 14 February 2013. It is due to begin operations in the second quarter of 2013.

213 Joint submission, above n 196.

the broadcasters see potential for the new body to extend its jurisdiction in the future to other genres of online content.²¹⁴

- 5.24 Membership of OMSA would be entirely voluntary. Like the current Press Council, OMSA would be entirely industry funded and its governance structures controlled by the industry, but its chair and the majority of its seven member complaints panel will all be independent of the industry. The initial chair of the complaints committee is retired Court of Appeal judge Sir Bruce Robertson. We discuss OMSA's structure further at the end of this chapter.²¹⁵

Implications of convergence

- 5.25 These initiatives by the mainstream media to address the regulatory gaps that have emerged as a result of convergence and digitisation share many common features. Both support voluntary, industry-led self-regulation that is independent of government. Both support the application of similar standards to news and current affairs irrespective of the format in which it is published. Both are dependent on voluntary compliance and industry funding. In this respect they do not vary greatly from the type of independent media standards body we proposed in our Issues Paper.
- 5.26 However, the OMSA initiative is industry rather than consumer-facing, and side-steps – or arguably exacerbates – the fundamental problem with the existing format-based regulation. Instead of two different standards bodies, consumers would have to negotiate three different regulatory regimes. As we saw in the research we commissioned, there is strong public support for a single news media complaints body.
- 5.27 British academic Lara Fielden, who has published widely on the challenges of standards regulation in the age of convergence, has reached the view that unless policy makers adopt a “first principles” approach to resolving this regulatory labyrinth “public trust across media will be put at risk.”²¹⁶
- 5.28 Just such a first principles approach has been adopted by the major media and convergence reviews we have surveyed. Although the focus and scope of these reviews differ, they each grapple with the disruptive impacts of digital technology and convergence on the regulatory environment, and generally recognise that format-based regulatory models designed in a pre-digital era are no longer fit for purpose.

214 See also the submission of Television New Zealand (TVNZ) (4 April 2012) confirming its support for OMSA in the short term, while supporting the establishment of a converged body in the longer term, whether as an extension of OMSA or through establishing a similar body with larger membership.

215 At [5.117] – [5.125].

216 Lara Fielden *Regulating for Trust in Journalism: Standards Regulation in the Age of Blended Media* (Reuters Institute for the Study of Journalism, University of Oxford and City University London, 2011) at 2. See ch 1 at [1.48] where we cite Fielden's research.

- 5.29 The one review that did not address the central issue of convergence was the Leveson Inquiry.²¹⁷ Overall, however, there is a clear shift in favour of converged regulation, although some reviews are still ongoing and the reviews that have been concluded remain subject to the response of the relevant government before they are progressed.²¹⁸
- 5.30 In Australia, the Finkelstein Report saw the following advantages in a “one stop shop” regulatory arrangement applying to all news producing media, regardless of delivery platform:²¹⁹
- It is fairer that all providers of news and public affairs content be subject to a single set of standards consistently administered by the same body and with the same sanctions (allowing for some minor variations to accommodate platform-specific differences).
 - It is more satisfactory for consumers to have one body to which they may complain regardless of the platform concerned.
 - It is a more efficient use of government resources to set up and maintain a single regulator for news and current affairs reporting standards than to have different regulators for different entities.
- 5.31 We maintain our preference for a single standards body and note that the majority of New Zealand’s major news producers also see this as the inevitable consequence of digitisation and convergence. As Fairfax Media stated in its submission, “[n]ew technologies and convergence mean all major companies have multi-media operations and adjudicating complaints separately would be a nonsense.”²²⁰
- 5.32 Having established the case for a single converged standards body for all news media we now turn to consider what type of body this should be. We begin this exercise by examining the strengths and weaknesses of the existing complaints bodies to assist in identifying the critical attributes necessary for effective oversight of news standards.

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

218 One aspect on which there is divergence is the timing of converged regulation and whether it should be implemented in the short to medium term, or whether there should be a more gradual process towards converged regulation. For example, see the Working Group on Content Regulation, British Screen Advisory Council “BSAC Communications Bill Report” (September 2011) < www.bsac.uk.com/policy-papers > .

219 The Hon R Finkelstein QC *Report of the Independent Inquiry into the Media and Media Regulation* (Report to the Minister for Broadband, Communications and the Digital Economy, Canberra, 2012) at [11.34] [Finkelstein Report].

220 Submission of Fairfax Media (9 March 2012) at [4].

CURRENT REGULATORY MODELS

- 5.33 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.²²¹ As we discuss in the following chapter, these historical regulatory measures for the news media have been the subject of a number of reviews in the United Kingdom and Australia.
- 5.34 In this section we compare and contrast some of the primary features of the Press Council and the BSA, before assessing their overall strengths and weaknesses. Because of their different positions on the regulatory spectrum, the two bodies differ in significant ways with respect to their governance, functions, jurisdiction and powers. In chapter 2, we provide an overview of the background to the establishment of the BSA and the Press Council respectively,²²² and in chapter 4 we provide some analysis of the level of complaints to each body.²²³
- 5.35 The third complaints body, OMSA, has not commenced operation as at the date of this report. We have not therefore included OMSA in this analysis, although we outline some of its features at the end of this chapter.

Nature and sanctions

- 5.36 The Press Council is a self-regulatory body which depends on the voluntary co-operation and compliance of its member organisations.²²⁴ It has no statutory power to enforce decisions or impose sanctions but creates an expectation that each member of the Press Council will publish an adjudication upheld against it.

221 See Issues Paper, above n 189, at ch 5, for further discussion of the regulatory spectrum including the approaches in other jurisdictions.

222 Ch 2 at [2.40] – [2.53]. See also Issues Paper, above n 189, at ch 5.

223 Ch 4 at [4.88] – [4.100].

224 See Issues Paper, above n 189, at [6.15] – [6.33] for a discussion of self-regulation as a regulatory model. See also Ministry of Economic Development, above n 187, at 72 – 73, 85; Finkelstein Report, above n 219, at [10.24] – [10.25]; Advertising Standards Authority Submission (March 2012); Advertising Standards Authority “Bugger ... it’s ok: the Case for Advertising Self-Regulation” at 12 – 13; Working Group on Content Regulation, above n 218.

- 5.37 In contrast, the BSA is a Crown entity established by statute and operates within a co-regulatory content regulation environment. Complaints are only referred to the BSA if the complainant is dissatisfied with the handling of their complaint by the broadcaster.²²⁵ All broadcasters are covered by its jurisdiction and it is able to apply a range of sanctions including compensatory damages in privacy cases,²²⁶ and other commercial penalties such as forcing a broadcaster to forego advertising revenue by broadcasting commercial-free for up to 24 hours.²²⁷ The BSA can also order publication of an approved statement where it finds a complaint is justified²²⁸ (unlike the Press Council), and it can make costs awards.²²⁹ Failure to comply with a BSA order is an offence carrying a fine of up to \$100,000.²³⁰

Functions

BSA

- 5.38 The functions of the BSA are set out in section 21 of the Broadcasting Act and include:
- (a) receiving and determining complaints;
 - (b) publicising its procedures in relation to complaints;
 - (c) issuing advisory opinions;
 - (d) encouraging the development of, and approving, codes of practice; and
 - (e) conducting research on matters relating to standards in broadcasting.

Press Council

- 5.39 The objects of the New Zealand Press Council Incorporated are set out in clause 3 of its Constitution and “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

225 Broadcasting Standards Authority *Statement of Intent 2012-2015* at 6. See Issues Paper, above n 189, at [6.10] – [6.14] for a discussion of state regulation and [6.34] – [6.40] for a discussion of co-regulation as regulatory models. See also Ministry of Economic Development, above n 187, at 77; Finkelstein Report, above n 219, at ch 10.

226 Broadcasting Act 1989, s 13(1)(d).

227 Section 13(1)(b). However, this power has only been used once: see Broadcasting Standards Authority *Diocese of Dunedin and 12 others and TV3 Network Services Ltd-1999-125-137* (order for suspension of advertising for 2.5 hour period). In extremely rare cases broadcasting can be suspended for up to 24 hours. This power has only been used once: see Broadcasting Standards Authority *Barnes and ALT TV Ltd-2007-029* (order for suspension of broadcasting for a five hour period).

228 Broadcasting Act 1989, s 13(1)(a).

229 Section 16.

230 Section 14.

highest professional standards”. The complaints function is delegated to the Council.²³¹

Freedom of expression and other interests

- 5.40 In theory, the two adjudicating bodies have different approaches to balancing freedom of expression against other important interests. The BSA (a body subject to the New Zealand Bill of Rights Act 1990) states its purpose is to:²³²

... oversee New Zealand’s broadcasting standards regime so that it is fair to all New Zealanders, by balancing the broadcasters’ right to freedom of expression with their obligation to avoid harm to individuals and society.

The Press Council gives *primary* consideration in dealing with complaints to freedom of expression and the public interest in publication.²³³

- 5.41 We have not observed that the theoretical difference in approach makes any difference in practical terms to the decisions of the two bodies. But it is worth noting the view of Gavin Ellis in his 2005 article that the different expressions of the advocacy function have influenced each body’s direction:²³⁴

The Press Council’s constitution requires it to uphold the principles of freedom of speech and of the press but deals with objectives only in general terms. Section 21 of the Broadcasting Act 1989 gives the BSA not only authority for the maintenance of standards but a strong catalytic role in their creation. The Act prescribes the areas in which that advocacy should lie and, unlike the Press Council’s mandate in favour of free expression, is predicated on an assumption of the need for public safeguards against what might be seen as injurious publication.

Principles and standards

- 5.42 The Press Council and the BSA take different approaches to how they define and apply standards. The standards applied to the print media are more open-ended than those applied to broadcasters. The Press Council has a set of principles which are intended to provide guidance to the public and publishers with respect to ethical journalism.²³⁵

231 New Zealand Press Council Incorporated *Constitution* (2011) cl 10.1. See Ian Barker and Lewis Evans *Review of the Press Council* (2007) at 76 [Barker-Evans Review].

232 Broadcasting Standards Authority *Statement of Intent*, above n 225, at 4.

233 New Zealand Press Council *Statement of Principles* at the preamble. It is not altogether clear whether the Press Council is subject to the New Zealand Bill of Rights Act, as a body carrying out a public function “conferred by law” for purposes of s 3. The preamble declares “The Press Council endorses the principles and spirit of the Treaty of Waitangi and the Bill of Rights, without sacrificing the imperative of publishing news and reports that are in the public interest.”

234 Ellis, above n 188, at 68 – 69.

235 Brown and Price, above n 188, at 33.

The Press Council's "Statement of Principles" contains a less detailed and far-reaching set of constraints for print publishers than the equivalent broadcasting codes. For example, the rules about what constitutes an invasion of privacy, or breach of the fairness and balance standards, are much clearer in the broadcasting codes, and the Statement of Principles does not contain rules about taste and decency, law and order, alarming material, or the reliability of sources (though complainants may complain to the Press Council about matters not contained in the Statement of Principles).

- 5.43 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. There are four codes (free-to-air television, pay television, radio and election programmes). These codes contain the standards to be followed by broadcasters as well as guidelines to assist in interpreting the standards. The BSA has also developed 12 practice notes to explain the likely approach the BSA takes to particular issues about standards.²³⁶ It has developed a significant body of media jurisprudence particularly in the area of privacy.²³⁷

Funding and resourcing

- 5.44 The Press Council is entirely dependent on funding from its member organisations for its annual budget of \$237,000. It has one full time staff person and adjudicated 60 complaints in 2011.²³⁸
- 5.45 The BSA's 2011/12 revenue was \$1.443 million, of which \$787,282 came from the industry levy and \$609,000 from the Crown. It has a full time chief executive, two legal advisers, an administrator and two part-time support staff. It contracts its financial services from NZ on Air who it is co-located with. In 2011/12 the BSA released 162 decisions (236 decisions in 2010/11),²³⁹ 67 per cent of which concerned news, current affairs and factual programming (68 per cent in 2011).²⁴⁰

Appointments

- 5.46 Industry members of the Press Council are appointed by representatives of their respective sectors and the public representatives by an appointments panel comprising nominees of the Newspaper Publishers' Association (NPA)

236 The practice notes from the Broadcasting Standards Authority include: *Costs Awards in Favour of Complainants* (2012), *Privacy Principle 1* (2011) and *Privacy Principle 4* (2011), *Controversial Issues – Viewpoints (Balance) as a Broadcasting Standard in Television* (2010), and *Controversial Issues – Viewpoints (Balance) as a Broadcasting Standard in Radio* (2009).

237 See John Burrows and Ursula Cheer *Media Law in New Zealand* (6th ed, LexisNexis, Wellington, 2010) at [6.3]; Ellis, above n 188, at 71 – 73.

238 New Zealand Press Council *Annual Report* (2011).

239 A number of decisions in the 2010/11 year involved multiple complaints about the same programme: see Broadcasting Standards Authority *Annual Report* (2011).

240 Broadcasting Standards Authority *Annual Report* (2012).

and the EPMU, the chief Ombudsman and the current chair.²⁴¹ The chair, who must be independent of the press, is appointed by industry stakeholders.

- 5.47 In contrast, the BSA's chair and board members are all appointed by the Governor-General on the advice of the Minister of Broadcasting.

Complaints process

- 5.48 Access to the complaints processes of both the Press Council and the BSA is contingent on a complaint first being made to the publisher or broadcaster. If the complainant is not satisfied with the initial handling of the complaint, it may then be referred to the Press Council or to the BSA.²⁴²
- 5.49 The Press Council and the BSA each have a mechanism for filtering complaints and declining to consider them further. The Press Council's constitution confers discretion to decline a complaint if the circumstances make it inappropriate for resolution by the Council²⁴³ and from time to time a gatekeeper committee (comprising the chair, a public member and an industry member) will consider whether or not a particular complaint should be referred to the full Council for adjudication. The BSA may decline to determine a complaint if it is frivolous, vexatious or trivial.²⁴⁴ A complainant to the Press Council must waive their rights to bring legal action in relation to their complaint.²⁴⁵
- 5.50 The option of mediation, with the agreement of the publication and the complainant, is offered by the Press Council, but this is not available in relation to BSA complaints. There is a right of appeal from a decision of the BSA to the High Court, but there is no appeal from a Press Council decision.²⁴⁶
- 5.51 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, although its complaint procedures indicate that it may request further information from the parties in appropriate circumstances in accordance with natural justice.²⁴⁷

241 Jim Tucker points out, in his submission, above n 194, an unusual aspect of the New Zealand Press Council is that, unlike the United Kingdom, its lay membership can outvote the industry representatives.

242 For an overview of each complaints process, see Burrows and Cheer, above n 237, at ch 14.

243 Constitution of the New Zealand Press Council, above n 231, cl 10.4.

244 Broadcasting Act 1989, s 11.

245 New Zealand Press Council "Complaints Procedure" < www.presscouncil.org.nz/complain.php > at [12]. The Barker-Evans Review, above n 231, at 54, found that few complaints that are made to the Press Council would be able to be pursued through the courts and the number of complainants asked to sign waivers was low.

246 On the lack of an appeal right from decisions of the Press Council, see Ellis, above n 188, at 74 – 75.

247 New Zealand Press Council "Complaints Procedure", above n 245, at [7].

- 5.52 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.²⁴⁸ 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.²⁴⁹
- 5.53 The BSA, in enforcing statutorily backed industry codes, has not been able to extend its complaints jurisdiction to online content without statutory amendment. The BSA's chair has acknowledged the challenges involved in maintaining standards in relation to traditional broadcasting when similar standards do not apply to internet broadcasting and the increasing recognition that the Broadcasting Act needs review or replacement.²⁵⁰
- 5.54 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.

Developments

- 5.55 Since the publication of our Issues Paper, we are aware that the BSA has begun consulting with broadcasters about the broadcasting codes with a view to developing a modernised, user-friendly, single code in the form of a handbook that would highlight freedom of expression, and include commentary on the purpose of each standard, as well as guidance extracted from past decisions. Rather than continuing with different codes for different platforms, the concept is to develop a single set of standards, the application of which would be dependent on context and medium.²⁵¹

248 The Barker-Evans Review, above n 231, at 78, 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.”

249 See Issues Paper, above n 189, at [5.43] – [5.47] for an overview of the type of complaints and inquiries to the Press Council relating to online content.

250 Broadcasting Standards Authority *Annual Report* (2010) at 4; *Annual Report* (2012) at 4.

251 See Broadcasting Standards Authority *Statement of Intent*, above n 225, at 7, 12 and 27 – 28; Broadcasting Standards Authority *Annual Report* (2012) at 19.

- 5.56 We are also aware of a proposal by the Press Council to strengthen its independence and authority by introducing binding contracts with its members which would allow it to improve its effectiveness across a range of measures, including the strength and enforcement of sanctions for serious ethical breaches. The Press Council has sought publisher agreement to giving greater prominence to its decisions.²⁵²

ASSESSMENT OF STRENGTHS AND WEAKNESSES

- 5.57 Our next step is to consider the strengths and weaknesses of the current regulatory models that apply to the press and to broadcasters. We have taken account of the principles of good regulation developed by the Treasury as a tool for assessing existing regulatory regimes,²⁵³ and note in particular the regulatory objectives of proportionality,²⁵⁴ certainty,²⁵⁵ flexibility,²⁵⁶ durability,²⁵⁷ transparency and accountability.²⁵⁸
- 5.58 We have also noted the principles of effective regulation formulated by the Office of Communications (Ofcom), the United Kingdom communications

252 For example, in the case of print media, the proposal is that if a complaint against an article published on pages 1 to 3 is upheld, and the Press Council's decision is not published on the equivalent page, there should at least be a pointer on that page to direct readers to where the decision can be found; and if the brief form of the decision is published, it should point to the full decision on the Press Council website.

In the case of the online media, the proposal is that if a complaint against an article is upheld, it should be annotated to read "A complaint to the Press Council against this article has been upheld on the grounds of [inaccuracy/lack of balance/etc.]" and there should be a link to the decision on the Press Council website. If an article has been altered because of story development, the annotation should take the following form: "An earlier version of this story stated [details of story]. This version was found to have breached Press Council principles"; and should provide a link to the Press Council's decision.

253 The Treasury *The Best Practice Regulation Model: Principles and Assessments* (2012).

254 Proportionality – the burden of rules and their enforcement should be proportionate to the benefits that are expected to result.

255 Certainty – the regulatory system should be predictable to provide certainty to regulated entities and be consistent with other policies. One indicator is that there is consistency between multiple regulatory regimes that impact on single regulated entities where appropriate.

256 Flexibility – regulated entities should have scope to adopt least cost and innovative approaches to meeting legal obligations. A regulatory regime is flexible if the underlying regulatory approach is principles or performance-based, and policies and procedures are in place to ensure that it is administered flexibly, and non-regulatory measures, including self-regulation, are used wherever possible.

257 Durability – the regulatory system has the capacity to evolve to respond to new information and changing circumstances. Indicators of durability include feedback systems to assess how the law is working in practice including well-developed performance measurement and clear reporting, and that the regulatory regime is up to date with technological and market change, and evolving social expectations.

258 Transparency and Accountability – in essence, regulators must be able to justify decisions and be subject to public scrutiny.

and media regulator, from its experience of regulating a number of sectors and working with a variety of statutory, co-regulatory and self-regulatory bodies in the media and electronic communications sectors. Ofcom suggests that there are some core principles shared by effective regulation. These relate both to the governance and accountability of the regulatory body that establish independence and safeguard against undue influence, and to the operational independence and capability of the regulatory body to ensure public confidence, credibility and, over time, help to build public trust.²⁵⁹

5.59 Draft criteria for a regulatory solution were developed for module 4 (potential press regulatory solutions) of the Leveson Inquiry as follows:²⁶⁰

- (a) Effectiveness – any solution must be perceived as effective and credible by the press as an industry and by the public, including recognising the importance of a free press in a democracy, and a press which acts responsibly and in the public interest, and ensuring durability and sufficient flexibility to work for future markets and technology, and be capable of universal application.
- (b) Fairness and objectivity of standards – a credible and sufficiently independent statement of standards that is driven by the public interest.
- (c) Independence and transparency of enforcement and compliance – enforcement of ethical standards including the appointments process to be sufficiently independent to command public respect.
- (d) Powers and remedies – to provide credible remedies and include effective powers, and support compliance by the industry both directly and indirectly.
- (e) Cost – the solution must be sufficiently reliably financed to allow for reasonable operational independence and appropriate scope, but without placing a disproportionate burden on either the industry, complainants or the taxpayer.

5.60 In light of those principles and criteria, we now consider the aspects of the two regulatory approaches in the areas we identified in the Issues Paper as being key: independence, accessibility and transparency, effectiveness, the

259 Office of Communications (Ofcom) *Submission to the Leveson Inquiry on the Future of Press Regulation* (2 April 2012) at 5 – 6. See also Ofcom, written evidence to the House of Lords Communications Committee’s inquiry into media convergence and its public policy impact (published 19 October 2012), annex, Principles of Effective Regulation.

260 See also Finkelstein Report, above n 219, at [10.29]. The report notes features that should be present in any regulatory system, including clearly-specified objectives; an organisational structure involving suitable personnel; adequate ongoing funding (and transparency of funding); transparency and objectivity in decision-making processes; appropriate mechanisms for implementation and enforcement of decisions; visibility to the public, by promotion and explanation of its role and functions; periodic reviews of performance; and appropriate accountability mechanisms.

approach to standards and principles, sanctions and remedies, and the issues of appeals and waivers.²⁶¹

- 5.61 This assessment includes reporting on the submissions we received to the Issues Paper. We received a range of responses to the current regulatory approach. Some questioned its effectiveness. Others, however, expressed satisfaction with the current arrangements which were regarded as well-established.

Independence

- 5.62 The importance to our democracy of a free press that holds other sectors accountable and acts as a check on power requires that any regulation of the news media be truly independent. The different structures of the BSA and the Press Council mean a consideration of the extent of their independence raises different issues. In the case of the BSA, the issue is whether this statutory body is sufficiently independent of government, while in the case of the Press Council, the question is whether this self-regulatory body is sufficiently independent of the media industry.

- 5.63 As Gavin Ellis described the problem in his 2005 article:²⁶²

No matter how well-intentioned state appointees may be, a statutory system is open to allegations of ‘stacking’ to reflect the government’s own leanings ... For their part, the media acting as their own judge and jury leads understandably to charges that they are self-serving ... The solution must be a system that is not open to either charge and which embodies both transparency and efficacy.

- 5.64 Submissions to the Issues Paper from media academics Ursula Cheer and Peter Thompson argue that both the state (BSA) and industry (Press Council) models are flawed and that genuine independence from both is an absolute requirement of any media standards body. Thompson felt that “neither the government nor the market should be the primary locus of regulation.”²⁶³ Cheer identified issues with both industry and state funding models:²⁶⁴

If either industry or government can withdraw or reduce funding, the integrity and status of the regulator will be affected. Neither state funding or industry funding can have strings attached or be withdrawn at a whim. Neither funding source should be able to affect composition and operation.

BSA

- 5.65 Government agencies do not necessarily play a role in the BSA’s complaints procedures, or in setting industry codes of practice; however, under the

261 Issues Paper, above n 189, at ch 6.

262 Ellis, above n 188, at 81.

263 Submission of Peter Thompson (9 March 2012) at 5.

264 Submission of Professor Ursula Cheer at 3.

present structure, the state is a force in the setting of standards.²⁶⁵ The Broadcasting Act lays down standards that broadcasters are expected to comply with in the areas of good taste and decency, the maintenance of law and order, the privacy of the individual and providing a reasonable opportunity to present significant points of view on controversial issues of public importance.²⁶⁶

- 5.66 The Act also requires the BSA to encourage the development and observance by broadcasters of codes of practice (or to issue such codes itself) in relation to the protection of children, the portrayal of violence, fair and accurate programmes and correction and redress procedures, safeguards against denigration and discrimination, restrictions on the promotion of liquor, appropriate classification warnings, and the privacy of the individual.²⁶⁷ In addition, 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.²⁶⁸
- 5.67 Media Works reported its belief that the current regime is damaged by perceptions of lack of independence:²⁶⁹

We stress we are talking about perceptions – we are not alleging that the current members of the BSA lack integrity in the manner in which they approach their work but the fact remains that:

- The regime is set up by statute
- The BSA is a Crown entity
- It is partly government funded
- Appointments are political (i.e. made by government ministers of the moment) and there is no transparency regarding the appointment process
- Broadcast media has never had anyone it suggested appointed as the industry representative

- 5.68 Overall, broadcaster and academic submitters supported the proposal for an independent model, arguing that any state involvement in news media oversight is antithetical to one of the news media's core functions in a democracy – to act as a watchdog on the exercise of political power.

265 Submission of the Broadcasting Standards Authority (BSA) (12 March 2012).

266 Broadcasting Act 1989, s 4(1).

267 Section 21(1).

268 See for example the submissions of Peter Thompson, above n 263, and SPADA, above n 201. SPADA submitted that this perception may be exacerbated by the BSA having only 4 members and suggests a panel of 12 to 16 members, of which 9 would be a quorum, consisting of a chairperson (retired High Court Judge or QC), a lay deputy chairperson, media representatives, and six lay members.

269 Submission of MediaWorks, above n 203, at [11].

- 5.69 The BSA noted its status as an independent Crown entity which means that the government cannot direct or seek to influence it in its work,²⁷⁰ and expressed concern about removing the state “backbone” from news media oversight.²⁷¹

We think the State has an interest in balancing the media’s rights of freedom of expression along with the responsibilities that come with these. ...

We think it is too easy to assume that the involvement of the State as a regulator of the media is contrary to the best interests of the society served by the media. ...

We would expect that a proposal for the State to withdraw from regulatory involvement will be contentious.

Press Council

- 5.70 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 fulfill its functions as “a critically important leg of the constitution of a democratic country”.²⁷² That review made a number of important recommendations about the Press Council’s level of independence from the industry, responding to criticisms made to it that the Press Council is perceived not to be independent of the publishers, and that underfunding is symptomatic of its lack of independence, underscored by its reliance on an informal funding mechanism.²⁷³

The perception of independence of the Press Council from the print media interests, is, in our view, paramount to greater public acceptance of the Press Council and greater use of its services. Various submitters perceived the Press Council as lacking in independence because of its alleged limited funding from and close association with the NPA, which had the power to change the structure of the scheme or even abandon it. Survey respondents adopted similar concerns. One suspects that some of these critics were unaware of the exact composition and *modus operandi* of the Press Council. Yet, the perception of lack of independence is fairly widespread.

- 5.71 The review recommended that the Press Council become a separate legal entity to enhance its independence rather than a body that could be dissolved at the whim of the industry. Responding to this recommendation, the Press Council was registered as an incorporated society on 20 December 2011.

270 Broadcasting Standards Authority *Statement of Intent* above n 225, at 6, 20. See also Broadcasting Act 1989 s 21(5): “Except as provided otherwise in this or any other Act, the Authority must act independently in performing its statutory functions and duties and exercising its statutory powers ...”

271 Submission of the BSA, above n 265, at [30], [31] and [38].

272 Barker-Evans Review, above n 231, at 9.

273 At 76. See also Ellis, above n 188, at 75; and Press Complaints Commission (UK) *The Governance of the Press Complaints Commission: an Independent Review* (2010), which includes recommendations for increasing the influence of lay members to enhance independence of the PCC from industry.

5.72 The Press Council advised that during the term of the current members there has not been any attempt by the controlling interests to affect decisions of the Council.²⁷⁴ The Council cites this and the fact that incorporation means that it cannot be dissolved at the whim of the industry, in response to concerns about adequate independence.²⁷⁵

5.73 While the independence of the Press Council's adjudications is not in question, there is a residual issue, however, in relation to the Press Council's governance. As noted above, as well as independence and transparency of enforcement and compliance, independent governance is also a critical attribute. In Lara Fielden's review of Press Councils, she notes:²⁷⁶

The governance structure of a Press Council, including the composition of its board, is central to the question of whether it considers itself an 'independent regulator'. However, the simple arithmetic of whether Council board members are independent public representatives or industry appointees tells only part of the story. The composition of related panels, including management boards, appointment panels, funding bodies, and code committees is also revealing in any consideration of the issue of independence ... In some countries considered here an industry-only, or industry-majority, management board sits alongside the more public-facing council and is responsible for the Press Council's funding, constitution, code of practice, and/or appointments to the Press Council itself.

5.74 We consider that independent governance is a fundamental factor to consider in relation to our stated objective of ensuring that media regulation is truly independent, both from government and from the industry itself. As suggested by the former Ministry of Economic Development, one characteristic of an effective self-regulatory regime is that consumers and other outsiders are represented on the governing board of the regime.²⁷⁷

5.75 The Press Council's constitution provides that:²⁷⁸

The Society shall be administered, managed and controlled by the Executive, which shall be accountable to the members of the Society for the implementation of policies of the Society as approved by annual general meeting.

274 Submission of the Press Council (March 2012). See also submission of Massey University Journalism Programme, above n 201: "suggestions of partiality in adjudications are also misstated – decision-making demonstrably does not occur in voting blocs, nor are the adjudicators one-sidedly "pro-newspaper"; and submission of Jim Tucker, above n 194: "when adjudications come to a vote, the ballot is rarely split along lay-industry lines." The perception of an individual submitter, however, was that the Press Council appears to favour the media complained about, and to be "little more than a rubber stamp for bad behaviour by the media."

275 See also the submissions of Fairfax Media, above n 204, and the Newspaper Publishers' Association (NPA) (March 2012).

276 Lara Fielden *Regulating the Press: a Comparative Study of International Press Councils* (Reuters Institute for the Study of Journalism, University of Oxford, 2012) at 26 [*Regulating the Press*].

277 Above n 187, at 75.

278 New Zealand Press Council *Constitution*, above n 231, cl 23.1.

The Executive comprises a member appointed by each of APN, Fairfax, and the NPA, as well as the chairperson of the Council who is a non-voting member of the Executive ex-officio.²⁷⁹ The Executive of the Press Council is therefore controlled by the industry.²⁸⁰ This is in contrast to the Council itself, where five members represent the public, three are appointed by the industry and two are appointed by the EPMU, and the chairperson is to be independent.

- 5.76 In practical terms, this means that industry interests exert a measure of control over any steps the Press Council may wish to take to update its policies and procedures, or to alter any other structural matters. For example, consideration of the expansion of the range of sanctions available to the Press Council, as recommended by the Barker-Evans Review, requires consultation with industry members.

Accessibility and Transparency

Public awareness of complaints bodies

- 5.77 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.²⁸¹ Newspapers are under no such obligation with respect to the Press Council's complaints procedures.
- 5.78 Research we commissioned for this review indicated that less than half of the New Zealand public know where to go in order to make a complaint about news media standards.²⁸² Even once they know where to go, people can be unsure about the process. One person commenting on the *Public Address* forum reported his experience as follows:

It was about 5 months after I finally found the Press Complaints form ... and I also wasn't confident my complaints were sound enough to be carried through (plus it felt there was an added complexity regarding internet articles and the archiving of the various versions). The initial "damage" had been done anyway; I felt a bit helpless regarding the whole situation.

279 At cl 19.1.

280 See also at cl 31.2, the Executive has a level of control of the Council's finances as the budget is subject to the approval of the Executive.

281 Broadcasting Act 1989, s 6(1). A compliance audit found nearly all broadcasters to be compliant with the Act, with improved compliance from the previous audit: Broadcasting Standards Authority *Annual Report* (2012) at 19.

282 Big Picture Research, above n 199.

- 5.79 The BSA is the better known avenue of complaint (76 per cent), with a further 12 per cent stating they would go directly to the media source. The BSA also has far greater prompted awareness than the Press Council with 93 per cent of respondents having heard of the BSA, but only 26 per cent having heard of the Press Council.²⁸³
- 5.80 The Barker-Evans Review concluded that public awareness of the Press Council was lower than for other industry complaints bodies and its targeted survey revealed that individuals had low awareness of the Press Council and its functions.²⁸⁴ The review recommended a range of actions to lift awareness of its activities, including 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.
- 5.81 We are informed by the Press Council that response to this request has been "patchy". The Press Council notes that the number of complaints has increased over the last 18 months which may suggest growing public awareness. It also proposes that publications under its jurisdiction be obliged by contract to regularly publicise the Press Council's complaint procedures.²⁸⁵

Public awareness of standards or principles

- 5.82 In our commissioned research, 39 per cent of people responding were aware of any news media standards, although this level rose to 60 per cent after prompting. Of those with any awareness, less than half (42 per cent) knew where to find these standards.²⁸⁶
- 5.83 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. This was reflected in our commissioned research which found that of those who could recall publicity being given to news standards, the large majority (82 per cent) cited television advertising.²⁸⁷

283 Big Picture Research, above n 199. Knowledge of the two bodies increases with age, with those in the 50 to 70 age bracket having the highest awareness of the BSA (96%) and the Press Council (37%). Women are slightly more likely to have heard of the BSA (95% vs 91% of men) while men are more likely to have heard of the Press Council (32% vs 20% of women).

284 Barker-Evans Review, above n 231, at 78 – 79.

285 Submission of the Press Council, above n 274, at 4.

286 Big Picture Research, above n 199. The BSA's own commissioned research indicated that New Zealanders are most aware of standards around offensive or obscene language (45%) or around sexual or lewd conduct (35%), with balance and fairness issues considerably less likely to come spontaneously to mind than more overt issues such as language – see ACNielsen, above n 283.

287 Big Picture Research, above n 199.

Publicity about decisions

- 5.84 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. The BSA identifies its website as the first point of contact for complainants and a critical tool for searching decisions and enabling users to understand the broadcasting regime, and an upgrade of the website is a current focus.²⁸⁸
- 5.85 In cases of serious breaches, the BSA can require a broadcaster to broadcast a statement (in a form approved by the BSA), in the manner and within the timeframe specified in the BSA's order,²⁸⁹ and sometimes an apology.²⁹⁰ The BSA also issues press releases summarising decisions that it considers significant or likely to be of public interest.
- 5.86 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.

Effectiveness

- 5.87 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 the goodwill of members supplemented by board fees and minimal expenses. The print editors believe that the Press Council has served the public well: "[i]t is funded by the industry and has proved to be an inexpensive, effective and timely means of giving redress to those who feel they have been unfairly treated."²⁹¹
- 5.88 However, a submission from the Massey School of Communication, Journalism and Marketing suggests that Press Council weaknesses relate to poor resourcing:²⁹²
- rendering it impotent in some of its recommended functions, such as publication of research and comment on topical media issues; taking on a wider mediation role; liaison with industry and public on press freedom issues; and the absence of an appeal process. Poor resourcing also impinges on members' ability and availability to produce thorough judgments and take part in mediation.

288 Broadcasting Standards Authority *Statement of Intent*, above n 225, at 12.

289 Broadcasting Act 1989, s 13(1)(a).

290 See Burrows and Cheer, above n 237, at 204.

291 Submission of the NPA, above n 275, at [1.19]. See also the submissions of the Media Freedom Committee and Jim Tucker, above n 194.

292 Submission of Massey University Journalism Programme, above n 201, at [3.4].

- 5.89 The volume of complaints to the BSA is significantly higher than those received by the Press Council.²⁹³ A 2009 survey of broadcasters found that for the most part, broadcasters were satisfied with how the BSA manages the complaints process, although the overall time taken was an issue for some.²⁹⁴

Standards and Principles

- 5.90 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 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 power.²⁹⁵

BSA

- 5.91 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. Radio New Zealand submitted that the system of developing a Code of Practice that is subsequently approved by the BSA has worked well and that reviews have been conducted efficiently and effectively. A 2009 survey of 10 broadcasters who had been subject to a formal complaint in 2007 and 2008, found that the BSA's final decisions were perceived to be fair.²⁹⁶

293 See however the submission of the Press Council, above n 274, at 4, noting that the Council has adjudicated on 125 complaints over the last two years, roughly the same number as in the previous three years combined.

294 Nielsen *Broadcaster Complaints Process: Satisfaction Survey* (report for Broadcasting Standards Authority, 2009). Submission of TVNZ, above n 214, at [40] suggested greater filtering of unmeritorious complaints as it believes too much time and resource is being spent on such claims by broadcasters and the BSA. SPADA, in its submission, above n 201, at [7.1] also suggested a filtering process by a sub-panel for vexatious or trivial complaints.

295 For example, see the purpose of the BSA in Broadcasting Standards Authority *Statement of Intent*, above n 225, at 4, 6, and 9 – 11.

296 Five out of nine broadcasters considered the BSA's decisions to be "fair" or "very fair", and only one rating the BSA's decision as "unfair": Nielsen *Satisfaction Survey*, above n 294. The BSA's target for the 2012-2013 year is that 80% of broadcasters rank BSA processes and working relationships as good or very good on a five-point scale: Broadcasting Standards Authority *Statement of Intent*, above n 225, at 29.

- 5.92 Some broadcasters believe the BSA fails to give sufficient weight to freedom of expression, affirmed by section 14 of the New Zealand Bill of Rights Act, and that overly prescriptive standards can have a chilling effect on news gathering activities. The BSA counters that it has started to incorporate a more considered and thorough freedom of expression analysis into its decisions.²⁹⁷ The BSA also commissioned media academic Steven Price to review its approach to the Bill of Rights Act in its decisions who found that generally the BSA does a very good job of justifying its decisions.²⁹⁸
- 5.93 Broadcasters also claim inconsistency in decision-making has resulted in confusion around the practical application of standards such as privacy²⁹⁹ and express concern about the BSA's interpretation of "good taste and decency standards."³⁰⁰
- 5.94 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, with TVNZ's appeal being upheld, and TV3's being dismissed.³⁰¹ A further appeal by TVNZ against a BSA decision on good taste and decency in a current affairs programme was upheld in October 2011.³⁰² These determinations provide the BSA with further judicial guidance in applying the good taste and decency standard in the case of news and current affairs which may assuage the broadcasters' concerns.³⁰³

297 Broadcasting Standards Authority *Annual Report* (2012) at 15-17. The BSA suggests it may be possible that the reduced number of appeals (only 2 in the 2012 reporting period) is due to its renewed focus on freedom of expression.

298 Steven Price *The BSA and the Bill of Rights* (report for Broadcasting Standards Authority, 2012). See also JF Burrows *Assessment of Broadcasting Standards Authority Decisions* (report for Broadcasting Standards Authority, 2006) at 16-19; Burrows and Cheer, above n 237, at [14.2.4].

299 For example, see the submission of SPADA, above n 201. To verify these comments, an assessment of the BSA's decisions would be required, for example see Burrows *Assessment of Broadcasting Standards Authority Decisions*, above n 298, at 10-12. In that review, Professor Burrows emphasized the importance of consistent decision-making and concluded that overall the BSA's decisions for 2005 were self-consistent, subject to an anomaly in the case of covert filming.

300 Submission of TVNZ, above n 214, at [62.3]. See also the submission of Vienna Richards (March 2012) at 6, with the view that sometimes the BSA comes across as being weighted in favour of the industry in some decisions.

301 See *Television New Zealand Limited v West* [2011] 3 NZLR 825.

302 *Television New Zealand Limited v Freeman* HC Wellington CIV 2011-485-840, 26 October 2011.

303 One of the BSA's key deliverables is to commission independent focus groups to litmus test its decisions against community attitudes to standards: see Broadcasting Standards Authority *Statement of Intent*, above n 225, at 23. The latest survey was carried out in May 2012 and focused on the good taste and decency standard, but did not include decisions relating to news and current affairs.

Press Council

- 5.95 The Press Council's principles are deliberately broader, 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.
- 5.96 The Barker-Evans Review pointed to the fact that the Press Council is unusual in relying on broad principles without any specific standards and recommended that these principles undergo urgent review. A review was undertaken and the Statement of Principles has been revised, adding some additional detail but not to a significant degree.³⁰⁴ The review did not address all the issues raised in the Barker-Evans Review such as providing detailed guidance in relation to the interests of children and young people, more specific principles in relation to privacy, and generally tightening up the principles.³⁰⁵
- 5.97 The Press Council put forward a tentative view that the Statement of Principles gives it greater flexibility than a Code of Practice, and that if the Statement of Principles was converted to a Code, it suspects fewer complaints would be upheld.³⁰⁶ The NPA submitted that fairness and balance in particular may depend on the context, that great care needs to be taken in defining such standards, and that they need to be left reasonably flexible.³⁰⁷ Fairfax's submission expressed the hope that the existing Press Council codes would be the basis for the consideration of any new codes.³⁰⁸

Sanctions and remedies

BSA

- 5.98 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.³⁰⁹
- 5.99 The Privacy Commissioner commented on the level of compensation that can be awarded by the BSA in relation to privacy complaints, regarding the current \$5,000 maximum limit as unduly low, unfair and potentially distorting the compensation process.³¹⁰

304 However a new principle dealing with conflicts of interest was introduced.

305 Barker-Evans Review, above n 231, at 73.

306 Submission of the Press Council, above n 274, at 4.

307 Submissions of the Press Council, above n 274, and the NPA, above n 275.

308 Submission of Fairfax Media n 204.

309 This power has only been used once: see above n 227.

310 Submission of the Privacy Commissioner (20 March 2012) at 4.

- 5.100 TVNZ however did not want to see any increase in compensation payments, and expressed concern about costs orders as being contrary to the scheme of a prompt and informal complaints system.³¹¹
- 5.101 Colin Peacock's 2009 assessment of 40 BSA decisions was largely uncritical of the BSA's range of penalties:³¹²

Costs are almost always modest sums, and awards to the Crown are usually well under the NZ\$5,000 upper limit, even for what the Authority describes as "serious departures" from the standards.

However, for a broadcaster, it still feels like getting fined by a court, particularly when it comes on top of the cost and time it can take to defend a complaint. Sometimes broadcasters resent the fact that complaints can be made by individuals, companies or government organisations with substantial resources which can include their own legal teams.

However, some broadcasters will also acknowledge that if the Authority didn't exist they might be fighting more legal battles in which the costs and financial penalties could be much greater.

Journalists and broadcasters will appreciate that when a complaint is upheld, the only penalty may be the publication of the decision itself.

Many complainants request an apology in their submissions on orders, but these are rarely ordered by the Authority. None was granted in any of the decisions I consulted for this report. Journalists will welcome this because issuing public apologies would imply that the entire broadcast was deficient – or that the individual 'apologee' had been unfairly targeted by the broadcaster. Arranging justice for aggrieved parties is not the Authority's main job – that's a matter for the courts.

Press Council

- 5.102 The only sanction available to the Press Council is the requirement that editors publish the adjudication, giving it fair prominence.³¹³ Some submissions to the Issues Paper felt that the Press Council's sanctions are inadequate and lack teeth. An individual submitter had the following view:³¹⁴

311 Submission of TVNZ, above n 214, at [50]. SPADA, above n 201, also does not favour the current system of the BSA awarding costs.

312 Colin Peacock *Principles and Pragmatism: An Assessment of Broadcasting Standards Authority Decisions from a Journalist's Perspective* (review for Broadcasting Standards Authority, 2009) at 10.

313 New Zealand Press Council *Annual Report* (2011) at 6. The Press Council has noted that on occasion editors have sought to modify or weaken the effect of an adjudication by critically commenting on it. While the Council's Statement of Principles does not prevent this, the Council notes that such action risks undermining the public's confidence in the self-regulatory complaints system. See New Zealand Press Council *Annual Report* (2010) at 8.

314 Submission no. 50.

Rightly or wrongly, the Press Council is not seen (in the business world in particular) as a body that has teeth or will do anything more than provide (to use a colloquial term) a *slap over the wrist with a wet bus ticket*. The complainant thus may feel that it is not worth it – buying a fight with the press may not be good for business. Conversely the offended party may feel that the best option is to take legal action rather than to go through a Press Council process.

5.103 This submitter had a number of suggestions for improvements to the Press Council’s processes including the power to order publication of a retraction or apology on the same page as the offending article, the power to have the newspaper make a donation as part of a successful complaint, and the discretion to criticise the media if necessary.

5.104 In her submission, Professor Ursula Cheer said:³¹⁵

Sanctions indeed must mean something. The Press Council has never overcome the limits of its sanctions. It has lacked effectiveness and standing from the public and the media’s point of view. ...

A power to grant modest compensation is a good idea, as are costs ... On balance, I don’t think monetary penalties are necessary. They would bring the jurisdiction closer to a criminal regulatory one, which is inappropriate. If there has been such harm as might justify a monetary penalty, the behaviour is likely to be serious and covered by some other relevant form of action, such as an actual criminal offence or a civil claim of some sort.

5.105 The Barker-Evans Review recommended a new scale of decision to replace the current “upheld/not upheld” distinction.³¹⁶ The proposal was for a range from ‘Rejected’ (when there is little chance a complaint will be accepted), ‘Not Upheld’ (where the publisher is considered to have behaved properly), ‘Partially Upheld’ (where some but not all parts of a complaint are justified), ‘Upheld’ (when a publisher has acted improperly but not irresponsibly) and ‘Censured’ (when the complaint is upheld and a rebuke is warranted). Fairfax’s submission on our Issues Paper supported a scale along these lines as it felt the present ‘uphold’ or ‘not uphold’ adjudication of the Press Council is inadequate and can be confusing.

5.106 In its submission to the Issues Paper, the Press Council accepted that it should have more powers³¹⁷ and that the following additional powers may be appropriately created by contract with industry members:³¹⁸

- the power to direct an offending article be taken down from a website;

315 Submission of Professor Ursula Cheer at 3.

316 Barker-Evans Review, above n 231, at 68 – 69. At 79, the review found that the Press Council’s remedies were not considered prompt or effective by the legal profession, and few lawyers knew of the complaint option.

317 The proposal to enhance the powers of the Press Council was also the preferred option put forward in APN’s submission (March 2012).

318 Submission of the Press Council, above n 274, at 5.

- the power to require publication of an apology, correction or retraction;
- possibly the power to order that a complainant be given a right of reply; and
- the power to direct where in a publication details of its adjudication should appear and the form of the publication of the adjudication.

Appeals and waivers

5.107 The Press Council and the BSA take different approaches to the issue of concurrent jurisdiction and appeals. The Press Council requires complainants to waive the right to bring legal proceedings in the courts as a condition of making a complaint,³¹⁹ and there is no right of appeal from a Press Council adjudication. However the BSA does not require a waiver of legal rights, and there is a right of appeal from a BSA determination to the High Court.³²⁰

5.108 Some submissions preferred the option of a right of appeal to another body other than a court.³²¹ The Screen Production and Development Association (SPADA) suggested an appeals board, similar to the current practice of the Advertising Standards Authority (ASA), with prescriptive grounds for appeal.

5.109 The BSA registered its concern about any removal of appeals from the High Court:³²²

We think that it is a very serious step to place bodies such as these outside the supervision of the Courts. These bodies will be developing important jurisprudence and in our view what they do should be the subject of supervision and review by the Courts.

The BSA's considered view is that issues of broadcasting standards should ultimately be reviewable through the state's independent judicial or tribunals system as serious jurisprudential, moral and public policy issues sometimes arise.³²³

Conclusion

5.110 We now summarise our assessment of the two regulatory bodies. This assessment is based substantially on submissions, comment and opinion,

319 Barker-Evans Review, above n 231, at 70 recommended the abolition of the waiver of future action against a publication as being of doubtful legal validity and finding it to be an impediment to the use of the Press Council. It suggested instead a requirement that complainants agree not to commence legal proceedings while the complaint is before the Press Council.

320 Broadcasting Act 1989, s 18.

321 See submissions of TVNZ, above n 214; SPADA, above n 201; and Kiwis for Balanced Reporting on the Middle East (21 February 2012).

322 Submission of the BSA, above n 265, at [41].

323 Broadcasting Standards Authority *Annual Report* (2012) at 5.

the reviews commissioned by the BSA on aspects of its performance and operations, and the Barker-Evans Review of the Press Council. Apart from these reviews we note that there is an absence of systematic review and feedback providing empirical data.³²⁴

Independence

- 5.111 The perception of potential politicisation arises in relation to the BSA primarily due to the process of government appointments of board members. Conversely, the Press Council remains under the structural control of the news media industry, although its complaints function is exercised under an independent chair and public member majority. In our assessment, neither body meets our stated objective of truly independent regulation, both from the government and from the industry itself.³²⁵

Accessibility and Transparency

- 5.112 Public awareness of the BSA as a complaints body is high, however, public awareness of the Press Council is concerningly low. Awareness of the standards and principles in relation to news and current affairs (e.g. accuracy, fairness and balance) leave room for improvement in relation to both the BSA and the Press Council. The Press Council's feedback and reporting mechanisms are not as well developed as the BSA's. Overall, the transparency and accountability of the BSA as a statutory body is higher than the Press Council.³²⁶

Effectiveness

- 5.113 A capability review would be necessary to assess definitively the capability of the Press Council and the BSA. 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 the Press Council. Our impression is that both bodies demonstrate effectiveness within their relatively small budgets; however, as yet the Press Council has not dealt with any significant body of complaints with respect to internet content, and the BSA none at all. It remains a moot point how the current bodies might deal with an increase in the volume and complexity of internet related complaints. The Press Council may be circumscribed by its much smaller budget.

324 While the BSA reviews aspects of its operations periodically, providing a measure of information, less information is available in respect of the Press Council, other than the formal Barker-Evans Review in 2007 which conducted surveys of the public, organisations, complainants and media organisations.

325 Issues Paper, above n 189, at [37].

326 See ch 7 at [7.88] – [7.92] for further discussion of access and transparency. See Fielden *Regulating the Press*, above n 276, at 117 for a summary of the Australian Press Council's reforms in relation to transparency. See also Richard Sambrook *Delivering Trust: Impartiality and Objectivity in the Digital Age* (Reuters Institute for the Study of Journalism, University of Oxford, 2012).

Standards and Principles

5.114 The Press Council's Statement of Principles is expressed at a greater level of generality than the BSA's set of codes. Overall we think that the balance between flexibility and certainty is better reflected in the BSA's codes of practice. As we noted in the Issues Paper, we believe that greater detail is required in the Press Council's Statement of Principles, as recommended by the Barker-Evans Review.³²⁷ Adequate detail is necessary to ensure appropriate responsibility and accountability on the part of the news media who abide by the principles. As we acknowledge in chapter 7 however, there are advantages and disadvantages in either flexible principle or more detailed prescription.³²⁸

Powers and sanctions

5.115 The decisions of a media standards body must mean something. In our assessment, the Press Council's range of sanctions is too limited and requires expansion, at least along the lines set out in the Barker-Evans Review. On the other hand, the BSA's power to award compensation for invasions of privacy but nothing else is an anomaly.

Appeals and waivers

5.116 We believe that justice requires a right of appeal and that the current lack of any appeal right from an adjudication of the Press Council is an issue which should be addressed. On the issue of waivers required of complainants by the Press Council, we endorse the Barker-Evans Review recommendation that absolute waivers be replaced with more limited waivers that cover the complaints determination process.³²⁹

OMSA – a third complaints body

5.117 As noted above, as at the date of this report, the Online Media Standards Authority (OMSA) has been created but has not commenced operation. We are not therefore in a position to carry out any performance analysis; however, we outline some of its features as apparent from its core documents and some of the issues its creation raises in relation to this review.

327 See submission of Professor Ursula Cheer at 3:

“As to Codes, I actually think the process around the BSA codes is better than a set of principles, even if the latter was the Press Council principles beefed up. I think although the media don't like the BSA codes, they do have input into them and can claim some ownership. The BSA codes have been altered over the years in a way that favours media in some cases and the public in others. Media complain that general laws are often vague and uncertain. The BSA codes are more precise than the Press Council principles. I think that the regulator should formulate the codes after a consultative process.”

328 At [7.54].

329 Barker-Evans Review, above n 231.

- 5.118 OMSA has adopted the mode of industry self-regulation utilised by the Press Council and the ASA. As noted above, the Press Council model does not meet the stated objective of truly independent regulation, due to the level of industry control of its governance. In following this model, OMSA has also been established under the ultimate control of the broadcasting industry.³³⁰
- 5.119 The makeup of the OMSA Complaints Committee is designed to have an independent majority. The method of appointments may benefit from greater independence from OMSA however. Members of the Complaints Committee, including the chairman, are appointed on the recommendation of OMSA's Appointments Panel.³³¹ The Appointments Panel in turn comprises OMSA's chairman and deputy chairman (industry appointments), the chairperson of the Complaints Committee and an independent person. The Appointments Panel differs from the Press Council's in that it does not include the Chief Ombudsman.³³²
- 5.120 In terms of membership admission to OMSA, any media proprietor, whether an individual or an organisation, which carries on activities aimed at a public audience online, is eligible for membership, subject to paying the required subscription. OMSA has the power to decline any application if it considers the applicant unable to meet the its listed objects.³³³ It remains to be seen whether OMSA will attract and admit a variety of online content providers.
- 5.121 OMSA's constitution does not require its members to enter into binding contracts, and any member may resign on giving six months' notice.³³⁴ As noted above, the Press Council are considering introducing binding membership contracts to improve its overall effectiveness. Contracts would also provide a greater degree of funding certainty.
- 5.122 OMSA has been established without any legislative change, the broadcasters' stated objective being to advance a self-regulatory solution without requiring recourse to Parliament.³³⁵ However a wholly non-legislative option does not address the issue we discuss in chapter 3, namely which news content creators and providers should have the benefit of the various privileges and exemptions that are currently enjoyed by the mainstream news media. Without addressing that question, there may not be adequate incentives in place to encourage non-mainstream news media to become members of OMSA, leaving it the preserve of the mainstream broadcasters.

330 Online Media Standards Authority *Constitution* cl 10, provides for the powers of the Authority to be vested in the Management Board, the members of which comprise the Authority chairman and deputy chairman and at least one other member, all of whom are industry appointed.

331 At cl 12.

332 New Zealand Press Council Incorporated *Constitution* cl 9.

333 Online Media Standards Authority *Constitution* at cl 5.

334 At cl 6.

335 Joint submission, above n 196, at [27].

- 5.123 The creation of OMSA itself raises the issue of whether a consequential amendment to section 198(2)(a)(ii) of the Criminal Procedure Act 2011 should be considered. That section includes organisations that are subject to the BSA or Press Council complaints procedures as “members of the media” for the purpose of orders clearing the court.³³⁶
- 5.124 Lastly, although OMSA will provide an avenue for complaint in relation to the online news content of its members, its creation runs counter to the currents of convergence in that it sets up a further platform-based complaints body and represents proliferation rather than regulatory convergence.
- 5.125 While OMSA provides an avenue for complaint about content that is not currently covered by existing processes, it introduces additional complexities for the public in determining which complaints body to approach, on what basis and within which timeframe. A complainant may need to make multiple complaints in relation to identical content that appears on a variety of platforms. The running of three different complaints bodies, each with different sets of standards or principles, interpretations and decisions introduces a higher risk of inconsistency. This may undermine the ability of complainants with multiple complaints about the same content to obtain appropriate remedies. We also note that the breadth of each body’s jurisdiction is not identical and may mean that gaps remain in certain scenarios, potentially still leaving some complainants without access to a complaints mechanism, although the gap is smaller than previously.

CONCLUSION

- 5.126 We conclude that it is problematic to continue with a parallel regulatory system that involves multiple bodies operating under different criteria.³³⁷ Having assessed the various facets of the problem by considering the relevant legal, political, and market contextual factors, as well as the profound technological changes enabling online news dissemination, we are persuaded that the current dual regulatory approach has become untenable due to the issues of regulatory parity to which that approach now gives rise to. A new approach is required.
- 5.127 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 and the convergence of media platforms. While the Press Council has a higher degree of flexibility due to its non-statutory constitution, our view is that neither model is sufficiently convergence-ready and a single converged

336 Current members of OMSA are subject to the BSA complaints procedure and are therefore eligible to be considered “members of the media” for purposes of the Criminal Procedure Act. However any non-BSA members that are admitted to OMSA will not be eligible without a statutory amendment and would have to rely on judicial discretion to avoid exclusion from the court.

337 With the launch of OMSA, there will be three different complaints bodies.

standards body should deal with all complaints relating to news, current affairs and news commentary based on content provision rather than platform of delivery.

5.128 Regulatory convergence was presaged by Gavin Ellis in his 2005 article:³³⁸

I would argue that the established reasons for state involvement in the regulation of expression have broken down. The digital future is one in which convergence will render delivery methods immaterial and the replacement of single-medium organisations with multimedia structures will be complete. As the future unfolds it will be increasingly difficult to clearly differentiate between print and broadcasting (streaming video and customised newspapers will be downloaded to one device) and, hence, the dichotomous treatment of print and broadcast will be increasingly questionable.

5.129 **Our preferred option is for a single converged standards body.**³³⁹ This is supported by the submissions of some of the major news media organisations including the state broadcasters, MediaWorks, the Media Freedom Committee and the NPA, and other stakeholders such as SPADA and the journalists' union (the Engineering, Printing and Manufacturing Union).

5.130 The BSA supports the review of existing structures and acknowledges that it makes sense for media convergence to be recognised in any reform of the current regime. Radio New Zealand strongly supported the conclusion that there is no longer a strong case for treating newspaper publishers and broadcasters differently. TVNZ made the following key point in its submission:³⁴⁰

The creation of a single body for overseeing news content would also provide a level playing field across all media, ensuring fairness and consistency, promoting cost efficiencies and ensuring greater accessibility for consumers. In our view there is no longer any rational basis to support a multi- or dual-regulator model for news content standards. The basic journalistic standards remain the same regardless of the method of delivery. Convergence has meant that the boundaries between broadcasting, print media and online have become increasingly blurred. In our view the need for a level playing field is a compelling reason for the establishment of a single body to establish and enforce standards across all news content.

5.131 There is therefore a measure of consensus in favour of a converged approach, although as we acknowledge earlier in this chapter, there is not unanimity. Among those that support a converged approach, the critical question is what form a new or reformed entity should take.³⁴¹

338 Ellis, above n 188, at 78.

339 See ch 7 for recommendations to establish a new independent complaints body (the News Media Standards Authority).

340 Submission of TVNZ, above n 214, at [16].

341 Another issue is the timing of reform and whether a converged approach should be fully implemented in the short term or in stages. See the submission of MediaWorks, above n 203.

5.132 The Australian media and communications regulator, ACMA, notes that in a convergent environment, self- or co-regulatory arrangements may be preferable to direct government regulation:³⁴²

It has been observed that '[c]onvergence brings new stakeholders into market contact and can energise self- and co-regulation, which *may* outperform unaided statutory regulation' for a number of reasons, such as lower compliance costs and a better grounding in expert information or market realities. It has been argued that in a convergent environment, media content should be regulated via a system that allows for self- and co-regulatory approaches and emphasises citizen participation and digital media literacy.

5.133 It is these more difficult questions to which we now turn, including:

- Where on the regulatory spectrum should a converged standards body sit?
- Should membership of that body be voluntary or compulsory?

342 Australian Communications and Media Authority *Optimal Conditions for Effective Self- and Co-Regulatory Arrangements* (Occasional Paper, 2011) at 9, (footnotes omitted) 12 – 13.

Chapter 6

The international perspective

INTRODUCTION

- 6.1 In the pre-digital era, identifying who should adhere to news standards and determining the boundaries of intervention were relatively straightforward matters. However, those issues have now become far more complex as bright line distinctions between media formats and genres, creators, consumers and distributors become increasingly blurred. This has forced reviewers and policy makers to re-examine the fundamental justification for regulatory intervention, whether it be the traditional classification and censorship schemes applied to entertainment, or the imposition of balance and fairness requirements for news media broadcasters.
- 6.2 In the context of this review, we must ask: where should the news media now sit on the regulatory spectrum? What level of accountability is it reasonable and necessary to expect of news providers? If format is no longer a rational basis to determine regulatory strength, what is? In the age of blended media, does the public have different expectations of the standards and accountabilities of the print, broadcast or online media? As posed by one commentator:³⁴³
- Is the protection of a public sphere of regulated, responsible, ethical public media a 20th century hangover, or is it something that we want to replicate for the new converged environment?
- 6.3 New Zealand is not alone in grappling with the nature of media oversight in the face of technological convergence, and its implications for the press and the media. There have been a number of significant and pertinent reviews in Australia and the United Kingdom in particular, and we have followed

343 Damian Tambini, London School of Economics and Political Science (LSE) “Committee on Convergence Kicks Off with Big Policy Questions” (LSE Media Policy Project, 24 October 2012) < blogs.lse.ac.uk > .

- their progress with interest although we remain mindful of New Zealand's particular market context and circumstances.³⁴⁴
- 6.4 The reviews fall into two main categories: they either have their genesis in concerns about media practices and standards due to demonstrable failings (such as the Leveson and Finkelstein Inquiries);³⁴⁵ or they focus primarily on the challenges posed by convergence (such as this review, the review of the Communications Act 2003 in the United Kingdom, and the *Convergence Review* in Australia).³⁴⁶
- 6.5 However, the reviews have largely tackled common issues relating to the news media such as regulatory convergence,³⁴⁷ preferred models for standards bodies (statutory, self-regulatory or independent), voluntary or compulsory membership, incentives for membership, types of powers and remedies, and funding streams to support standards bodies:³⁴⁸

344 We have also considered the implications of convergence as outlined in the previous chapter, including the converged regulatory model suggested by Gavin Ellis in his article "Different Strokes for Different Folk: Regulatory Distinctions in New Zealand Media" (2005) 11 *Pacific Journalism Review* 63. See also Russell Brown and Steven Price *The Future of Media Regulation in New Zealand: Is There One?* (Report for Broadcasting Standards Authority, 2006); Ministry for Culture and Heritage *Broadcasting and New Digital Media: Future of Content Regulation* (Consultation Paper, 2008).

345 The Rt Hon Lord Justice Leveson *Report of An Inquiry into the Culture, Practice and Ethics of the Press* (The Stationery Office, London, 2012) [Leveson Report]; The Hon R Finkelstein QC *Report of the Independent Inquiry into the Media and Media Regulation* (Report to the Minister for Broadband, Communications and the Digital Economy, Canberra, 2012) [Finkelstein Report]. See also Press Complaints Commission (UK) *The Governance of the Press Complaints Commission: an Independent Review* (2010), and the reviews of UK parliamentary committees including the House of Lords Select Committee on Communications *The Future of Investigative Journalism* (16 February 2012); House of Lords and House of Commons Joint Parliamentary Committee on Privacy and Injunctions *First Report* (2012). For earlier reviews of the press, see Leveson Report, at Part D, ch 1; Department for Culture, Media and Sport "Press Regulation in the UK: summary" (DCMS submission to the Leveson Inquiry: narrative on Press Regulation, 9 July 2012, afternoon).

346 Jeremy Hunt, Secretary of State "A Communications Review for the Digital Age" (Open Letter, 16 May 2011) < www.culture.gov.uk > [Communications Act Review]; Australian Government *Convergence Review* (Final Report to the Minister for Broadband, Communications and the Digital Economy, Sydney, 2012) [*Convergence Review*]. See also House of Lords Select Committee on Communications *Media Convergence and its Public Policy Impact* (Call for Evidence, 2 August 2012); Australian Communications and Media Authority *Converged Legislative Frameworks – International Approaches* (Occasional Paper, 2011); and Australian Law Reform Commission *Classification – Content Regulation and Convergent Media* (ALRC R118, 2012).

347 However regulatory convergence did not fall within the scope of the Leveson Inquiry.

348 Lara Fielden *Regulating the Press: a Comparative Study of International Press Councils* (Reuters Institute for the Study of Journalism, University of Oxford, 2012) at 94 [*Regulating the Press*]. Academic work by Lara Fielden has analysed a potential regulatory model for journalism in the United Kingdom: *Regulating for Trust in Journalism: Standards Regulation in the Age of Blended Media* (Reuters Institute for the Study of Journalism, University of Oxford and City University London, 2011) [*Regulating for Trust in Journalism*]. See also Nigel Warner "Life After Leveson: The Challenge to Strengthen Britain's Diverse and Vibrant Media" (Institute for Policy Research, 2012).

As debate over the future of press regulation in the UK develops through the Leveson Inquiry and beyond, it is surfacing a host of thorny issues such as the very purpose of regulating the press; whether the basis for press regulation should be voluntary or mandatory or some combination; whether compliance should focus on incentives or sanctions; whether a regulatory body should be primarily concerned with complaint-handling or standards auditing, promotion, and enforcement; how it should weigh rights of freedom to impart and receive information on the one hand and privacy and reputation on the other; who can complain; transparency and accountability; the scope of jurisdiction in relation to cross-platform and cross-national providers.

- 6.6 The conclusions of the overseas reviews demonstrate that there is a spectrum of options available for deployment in the design of a converged standards body. In this chapter we outline some of the available options, to provide background for chapter 7 in which we set out our preferred model. We consider that none of the models we have examined from the overseas reviews are entirely suited to New Zealand's converging media environment; our preferred model therefore is not a carbon copy of what has been proposed overseas, although it has had the benefit of being informed by the extensive analysis that has been undertaken.
- 6.7 In this chapter we outline the main findings of the various reviews on some of the key issues, such as:
- whether membership of a news standards body should be voluntary or compulsory;
 - the appropriate nature of membership incentives;
 - the appropriate powers for a news standards body and remedies that should be available to complainants;
 - the appropriate funding sources for a news standards body; and
 - the role of statute in creating a backdrop or underpinning for a news standards body.

We begin, however, with a review of responses to the threshold question of whether there should be greater regulatory convergence.

REGULATORY CONVERGENCE

- 6.8 “Regulatory convergence” refers to the extent to which areas that traditionally have been regulated separately have been brought under common oversight. In both the United Kingdom and Australia, some convergence has already taken place with Ofcom (in the United Kingdom) and the Australian Communications and Media Authority (ACMA) having statutory responsibilities in relation to both broadcasting and telecommunications. Press Councils (in the United Kingdom, the Press Complaints Commission) continue to operate in both countries on a self-regulatory basis, similar to the New Zealand Press Council.
- 6.9 Reviews in both countries are assessing issues of further regulatory convergence. Greater convergence of media services has thrown up gaps and inconsistencies, raising questions about how oversight should be re-examined and reformulated. This is complicated by the different regulatory traditions of broadcasting (statutory regulation), the print media (self-regulation) and online media (not specifically regulated). It is also complicated by the rate of change. As the Finkelstein Report notes, “[i]n a period of transformation, such as the one being experienced currently, adjustments can occur rapidly and how the market will eventually settle is difficult to predict.”³⁴⁹
- 6.10 In New Zealand, a review of broadcasting regulation was initiated by the Ministry for Culture and Heritage and the former Ministry of Economic Development; however, the work was not progressed beyond a consultation paper following the change of government in 2008.³⁵⁰

Australia

Convergence Review

- 6.11 The *Convergence Review* identified that the current content-specific, platform-specific and provider-specific content codes are inconsistent, confusing and inflexible. It concluded that there is no justification for news and commentary to be subject to different systems for complaints and enforcement depending on the platform on which it is delivered³⁵¹ and proposed two new bodies and a tiered approach to content regulation:

349 Finkelstein Report, above n 345, at 327. The uptake of ultra-fast broadband for example may increase the use of converged services, see Tambini, above n 343.

350 Ministry for Culture and Heritage *Broadcasting and New Digital Media: Future of Content Regulation*, above n 344; “Briefing for the Incoming Minister of Broadcasting” (December 2011) at 8 – 9. See also Law Commission *The News Media Meets the ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) at 111–114 [Issues Paper].

351 *Convergence Review*, above n 346, at 49.

- (a) A communications regulator to be responsible for all compliance matters related to media content standards *except for news and commentary*, with new content services legislation replacing the Broadcasting Services Act 1992 (Cth) and existing classification legislation;
 - (b) An independent self-regulatory news standards body that would cover all platforms (print, online and television and radio) and that would ultimately absorb the functions of the Australian Press Council (APC) and the Australian Communications and Media Authority (ACMA) in relation to news and commentary. (However, the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS) would operate under their own updated statutory charters, rather than being brought under the news standards body.)
- 6.12 There would be linkages between these two new bodies. For example, the news standards body would be able to refer persistent or serious breaches to the communications regulator. On the other hand, the communications regulator could request the news standards body to investigate potential breaches, and would have to be satisfied that the new self-regulatory arrangements were working effectively before the broadcasting codes for news standards were repealed. It would also conduct a review of the news standards body after three years, at which time it could recommend the continuation of the news standards body, legislative adjustments to improve its effectiveness, or its dissolution (should it prove ineffective) and replacement with direct statutory measures.

Finkelstein Inquiry

- 6.13 The Finkelstein Report also recommended a single converged regulator for news producers, irrespective of delivery platform.³⁵² The proposed News Media Council would apply a substantially uniform set of rules to all news producers (print, online, radio and television), taking over from the news and current affairs standards functions of the APC and ACMA:³⁵³

In an era of media convergence, the mandate of regulatory agencies should be defined by function rather than by medium. Where many publishers transmit the same story on different platforms it is logical that there be one regulatory regime covering them all.

- 6.14 The report identified a number of benefits in a “one stop shop” regulatory arrangement that applies to all news producing media.³⁵⁴ However, the converged regulator proposed by the Finkelstein Report differed from that recommended by the *Convergence Review* in some respects such as membership compulsion and statutory backing, as we discuss below.

352 The Inquiry received around 9600 comments calling for “the creation of one strong and independent regulator that can hold all media to the same standards of conduct.” *Convergence Review*, above n 346, at 49.

353 Finkelstein Report, above n 345, at 8 – 9.

354 At [11.34]. See ch 5 at [5.30].

United Kingdom

Review of Communications Act

- 6.15 The review of the Communications Act 2003 (UK) is ongoing, with a White Paper due in 2013. An industry Working Group paper contributing to the review notes that for news and information, distinctions between broadcasters, newspapers and publishers will blur as each develop new converged services comprising audio, video, text and interactive features.³⁵⁵ New regulatory oversight will have to deal with a world where an ever wider range of content will be available through linear and non-linear sources, and in which both will be accessed via the same devices.³⁵⁶ The paper therefore concludes that convergence exposes inconsistencies in the regulation of different types of media and services but that a single overarching regulatory model may not be feasible in the short term, instead recommending a flexible and pragmatic approach that can evolve over time.³⁵⁷
- 6.16 In relation to news provision, the industry Working Group noted that convergence raises the argument to deregulate the rules that apply to broadcasters, but concluded that any deregulatory measures should proceed with caution as it is important not to undermine levels of trust in television news.³⁵⁸

Lara Fielden

- 6.17 In her book on media regulation, Fielden advocates a period of managed transition towards a tiered framework for media regulation.³⁵⁹ Her proposed framework would narrow statutory regulation to baseline regulation for television and video on-demand (tier 3), complemented by independent regulation, initially of the press, but over time expanded to broadcasters, video on-demand providers and currently unregulated online providers (tier 2). Fielden also proposes another tier of statutory regulation in relation to public service content (tier 1).

Leveson Inquiry

- 6.18 The Leveson Inquiry was tasked with specifically investigating press practices, rather than the news media more broadly, and did not address issues of convergence. However, some submissions to the Leveson Inquiry proposed converged regulation of news providers. For example, the Media

355 Working Group on Content Regulation, British Screen Advisory Council “BSAC Communications Bill Report” (September 2011) < www.bsac.uk.com/policy-papers > at [2].

356 At [23].

357 At 9 – 10.

358 At [49].

359 Fielden *Regulating for Trust in Journalism*, above n 348, ch 4.

Standards Trust proposed strengthened self-regulation that could extend in the future to a range of news publishers using different platforms.³⁶⁰

- 6.19 Other proposals envisaged some degree of regulatory convergence. For example, the Media Regulation Roundtable proposed a new Media Standards Authority that would be open to any media organisation outside the statutory system of broadcast regulation, including newspapers, magazines, news websites and bloggers.³⁶¹

Other jurisdictions

- 6.20 Lara Fielden's review of Press Council models noted that the Press Councils in Norway, Finland and Denmark cover the three print, broadcast and online media platforms.³⁶² For example, the Danish Press Council has registered blogs and Twitter accounts as members, and the Norwegian Press Council has extended coverage to associated social media sites such as Twitter and Facebook, so that comments by journalists in the social media are covered if they are used in connection with their journalism. The Finnish Press Council has also developed rules for media websites and deals with user-generated content. Sweden has a cross-platform code, although this is administered by three different regulators.

MEMBERSHIP – VOLUNTARY OR COMPULSORY

- 6.21 One critical question which has received different answers in the various reviews is the extent to which membership of a media standards body should be voluntary or whether the news media should be compelled to become members. The issue is prominent in both Australia and the United Kingdom as there have been high profile departures by newspapers from the respective Press Councils, potentially weakening the status and jeopardising the funding arrangements of the self-regulatory bodies.³⁶³ The withdrawal of publishers from the self-regulatory system has also been a major issue in Canada.
- 6.22 Proponents of a free press, however, take issue with compulsion:³⁶⁴

360 Media Standards Trust "A Free and Accountable Media" (submission to the Leveson Inquiry, June 2012) at 97.

361 Media Regulation Roundtable "Final Proposal for Future Regulation of the Media: A Media Standards Authority" (submission to the Leveson Inquiry, 7 June 2012) at [56]. The roundtable is an independent group of academics, journalists, lawyers and others brought together by the Reuters Institute for the Study of Journalism and the Media Standards Trust to discuss issues of future media regulation.

362 Fielden *Regulating the Press*, above n 348, at 16 – 17.

363 Fielden *Regulating for Trust in Journalism*, above n 348, at 44 – 47.

364 Editorial, "Leveson Inquiry: Prejudging the Judge" (*The Guardian*, 1 November 2012).

the trouble with compulsory regulation is that, in the wrong hands, it could edge us back towards something that looks like the licensing of the press and of journalists – something that was abolished in the late 17th century and which has no place in a free society.

Australia

- 6.23 Both the Finkelstein Report and *Convergence Review* recommended an element of compulsion in their proposed regulatory frameworks. The Finkelstein Report concluded that self-regulation without mandatory adherence would not work to address the identified problems:³⁶⁵

Any group that wields, or has the potential to wield, enormous power should be required to observe appropriate standards without provision to ‘opt out’. In this respect the media, like any social institution should be accountable for its performance, as are most other powerful groups in society.

The proposed News Media Council would cover all news media, using the definition of “news media” put forward in our Issues Paper,³⁶⁶ with some changes. For example, for online news publishers, threshold numbers were proposed before the publisher would be subject to regulation.³⁶⁷ While it would be compulsory for all news media that exceed the fairly low threshold to participate, it would also be possible for non-qualifying news media to opt in on a voluntary basis.³⁶⁸

- 6.24 The approach of the *Convergence Review* to news and commentary was that major media organisations should be required to participate in any scheme, regardless of platform, and they should not be able to “opt out”.³⁶⁹ The threshold at which regulation would be mandated is to be set at a fairly high level. Only “content service enterprises” would be required to become members. Content service enterprises are those entities that have control over the professional content they deliver, have a large number of Australian users of that content (initially 500,000 per month), and have a high level of revenue derived from it (initially AU\$50 million per annum). It is estimated that around 15 media operators would currently fall within this threshold. Other content providers that fall outside the threshold for mandatory participation would be able to opt in to membership.

United Kingdom

- 6.25 Whether membership of a standards body should be mandatory was one of the key themes considered by the Leveson Inquiry. Voluntary membership was an element of the proposal put forward by the Media Regulation

365 Finkelstein Report, above n 345, at [11.27].

366 Issues Paper, above n 350, Summary and Preliminary Proposals at [29].

367 Finkelstein Report, above n 345, at [11.67].

368 At [11.68].

369 *Convergence Review*, above n 346, at 50.

Roundtable, and was also the preference of the Co-ordinating Committee for Media Reform.³⁷⁰

- 6.26 The Media Standards Trust favoured mandatory participation for large media organisations (larger than “small companies” as defined in the Companies Act 2006 (UK)) that meet the definition of the news media we proposed in the Issues Paper,³⁷¹ with voluntary membership being available for smaller and international news publishers:³⁷²

Focusing on large news publishers distinguishes between freedom of expression, which we believe should be entirely unconstrained within the bounds of the law, and corporate speech, which due to its power and influence ought to be accountable.

- 6.27 The Joint Parliamentary Committee on Privacy and Injunctions suggested that membership of a reformed media body should include all major newspapers, with significant penalties for those who are not members.³⁷³
- 6.28 Lord Justice Leveson concluded that any reformed system, if it is to be effective, should include all major publishers of news, if not all publishers of newspapers and magazines. His report did not recommend mandatory membership however, but rather a voluntary scheme with strong membership incentives such as an arbitration service and litigation costs incentives to encourage universal membership.³⁷⁴ While strongly preferring effective self-regulation, as a back-up option if this fails to work effectively, the report suggested that the Office of Communications (Ofcom) could act as a backstop regulator for those publishers who fail to join a self-regulatory scheme.³⁷⁵

370 Media Regulation Roundtable, above n 361; Co-ordinating Committee for Media Reform, submission to the Leveson Inquiry (13 July 2012) at 8. Voluntary membership is also an element of the framework developed by Fielden in *Regulating for Trust in Journalism*, above n 348, with some additional mandatory requirements for public service providers.

371 Issues Paper, above n 350, Summary and Preliminary Proposals at [29].

372 Media Standards Trust, above n 360, at 74.

373 House of Lords and House of Commons Joint Committee on Privacy and Injunctions *First Report* (2012) ch 5 at [179]–[180].

374 Leveson Report, above n 345, at Part K; Executive Summary at recommendations [23]–[26]. Another suggested incentive is establishing a kite-mark for use by members to establish a recognised brand of trusted journalism: Executive Summary at recommendation [35].

375 At Part K, chapter 8, 1,793 – 1,794.

Other jurisdictions

- 6.29 Lara Fielden in her review of Press Council models, notes that membership is consistently voluntary, except in the case of Denmark, where membership is mandatory for all broadcast and print media who publish at least twice per year, and voluntary for the online media.³⁷⁶

MEMBERSHIP INCENTIVES

- 6.30 The challenge of achieving broad buy-in by the media, either to ensure comprehensive voluntary membership of the relevant standards body, or to ensure broad support for the body where membership is compulsory, requires relevant media incentives to be analysed.
- 6.31 The role of incentives is central to Lara Fielden's work on standards regulation where she pays close attention to the Irish Press Council model and the procedural advantages for members under Irish defamation law.³⁷⁷ The Defamation Act 2009 (Ireland) contains a defence of fair and reasonable publication where the court considers a number of factors including the publisher's membership of the Press Council or equivalent body, and adherence to its standards:³⁷⁸

A key provision of the new [Defamation] Act ... is that it facilitates and encourages publications, where appropriate, to apologise for errors without a potentially costly admission of legal liability. The recognition of the Press Council and the Press Ombudsman under the Act strengthens the role of the Office of the Press Ombudsman in negotiating satisfactory resolutions to complaints that may involve apologies where these are agreed and appropriate.

Although it is technically possible for publications that are not member publications of the Press Council to claim similar privileges, they will have the difficult task, if they are to do so, of convincing a court that their standards and structures of accountability are no less rigorous and professional than those moderated by the Press Council. In these circumstances, membership of the Press Council will be, for all publications that have yet to take this step, a valuable asset.

- 6.32 Fielden also looks more widely at a range of incentives that could operate to support a voluntary model. Her proposed model is described as “incentivised voluntary participation,” a middle way between compulsory and voluntary

376 Fielden *Regulating the Press*, above n 348, at ch 4.

377 At [4.2].

378 Press Council of Ireland *Annual Report (2009)* at 2, cited by Fielden in *Regulating for Trust in Journalism*, above n 348, at 58. See the critique of the Irish model by Martin Moore “Why Leveson Won't Opt for the Irish Model of Press Regulation – and What the ‘Irish Model’ Actually Means” (International Forum for Responsible Media (Inform) blog, 31 October 2012).

membership.³⁷⁹ Benefits and privileges could include accreditation in relation to court reporting and other privileged access to information, attractive advertising and search engine associations based on content credibility, recognition of affiliation by the courts in privacy or defamation proceedings, potential tax or charity incentives, and differentiation from non-member services and unregulated content.³⁸⁰

- 6.33 Proposals put forward to the Leveson Inquiry included a variety of legal and commercial incentives, including some of those identified by Fielden:
- alternative dispute resolution to costly legal proceedings, particularly in defamation, enhanced defences for members, and additional rights and remedies for complainants against non-members such as a statutory right of reply and correction and additional damages awards;³⁸¹
 - a public interest defence to protect publishing in the public interest even where it might otherwise involve a breach of the law;³⁸²
 - a system of journalistic accreditation covering court reporting;³⁸³
 - information privileges such as access to confidential official briefings;³⁸⁴
 - VAT tax benefits;³⁸⁵ and
 - commercial incentives such as a “kite-mark” to distinguish regulated content from unregulated content.³⁸⁶
- 6.34 The model developed by Lord Justice Leveson includes some significant incentives including an arbitration service and litigation costs incentives, as outlined above.

379 Fielden *Regulating the Press*, above n 348, at [7.2.2]; *Regulating for Trust in Journalism*, above n 348, at [4.4].

380 Fielden *Regulating for Trust in Journalism*, above n 348, at 56 – 57.

381 See Media Regulation Roundtable, above n 361, at 24 – 26. See also the proposal of the Coordinating Committee for Media Reform above n 370, at 8 – 11.

382 See Media Standards Trust, above n 360, Part 5.

383 Blair Jenkins, Carnegie UK Trust, “Better Journalism in the Digital Age” (2012) (evidence to the Leveson Inquiry, 28 March 2012), at 20; Media Regulation Roundtable, above n 361, at [72]; compare Media Standards Trust, above n 360 at 59 – 60.

384 Media Regulation Roundtable, above n 361, at [72].

385 Publications in the United Kingdom that contain a substantial amount of news are zero-rated for value-added tax (VAT): for an overview see Media Standards Trust, above n 360 at 50–54. However there are concerns that tying this advantage to membership of a regulatory body may not be permissible under European law: see Media Regulation Roundtable, above n 361, at [73]; Lord Hunt of Wirral, submission to the Leveson Inquiry (8 June 2012) at [51]

386 Media Regulation Roundtable, above n 361, at [72].

- 6.35 A parallel development in the United Kingdom to the Leveson Inquiry has been work on a Defamation Bill in response to mounting concerns that defamation laws are not striking the right balance and are having a chilling effect on freedom of speech that can impede responsible investigative journalism.³⁸⁷ One of the proposed changes to that country's defamation law is the statutory expression of a defence of responsible publication on a matter of public interest.³⁸⁸ In determining whether a publisher acted responsibly, the court could have regard to a number of matters. Adherence to a code of ethics is not specifically listed, but may prove to be a relevant non-statutory factor for the media.

POWERS AND REMEDIES

- 6.36 The most difficult issues around the range of powers for media standards bodies are whether the body should have the power to impose financial sanctions, and whether people should have an enforceable right of reply to stories that are published about them.
- 6.37 In her review of Press Council models, Lara Fielden found that none of the Press Councils she surveyed have the power to fine, other than in Sweden. In her reform proposal, Fielden suggests that there should be a range of “credible” sanctions and investigatory procedures, without specifying financial sanctions, but specifically including suspension and expulsion.³⁸⁹
- 6.38 The News Media Council proposed in the Finkelstein Report, would not have the power to award compensation or impose fines. Its powers would be confined to publication of an apology, the withdrawal of an article, the publication of a reply, the publication of determination of a complaint, and the power to direct where that publication should appear. After weighing the arguments for and against an enforceable right of reply and assessing international comparisons, the report concluded that a new regulatory framework should provide individuals with an enforceable right of reply,³⁹⁰ but not an enforceable right of access to the media due to too many practical obstacles.³⁹¹
- 6.39 The powers recommended by the Leveson Report for a new press standards body include the power to direct appropriate remedial action and the publication of corrections and apologies (including the nature, extent and

387 House of Lords and House of Commons Joint Committee *Draft Defamation Bill* (First Report, 2011). See also Patrick Vollmer “Defamation Bill (HL Bill 41 of 2012-13)” (House of Lords Library Note, 4 October 2012).

388 Defamation Bill (HL Bill 41) cl 4. The common law defence established in *Reynolds v Times Newspapers* [1999] UKHL 45 would be abolished.

389 Fielden *Regulating for Trust in Journalism*, above n 348, at 123.

390 Finkelstein Report, above n 345, at [9.19] – [9.49].

391 At [9.51] – [9.67].

placement of apologies), and the power to impose appropriate and proportionate financial sanctions for serious or systemic breaches (including financial sanctions of up to one per cent of turnover with a maximum of £1 million).³⁹² The Leveson Report expressly excluded any power to prevent publication of any material³⁹³ and did not recommend a statutory right of reply.

FUNDING

- 6.40 The question of how a media standards body should be funded is closely connected to the theme of independence. There are concerns that any public funding potentially carries the risk of increased government control, while industry funding may create the perception that a self-regulatory body is not sufficiently independent of the media industry and, where membership is voluntary, may carry the risk that funding could shrink should membership reduce.
- 6.41 Broadcasting regulation is usually partly publicly funded, while Press Councils are generally entirely industry funded. In her comparative review of Press Council models, Lara Fielden noted that two Press Councils (Germany and Finland) receive state funding but on a “no strings” basis. In Germany, the independence of the Press Council from state-funding contributions is guaranteed in law.³⁹⁴ Fielden’s proposed reformed model for a standards body would be industry funded, with the independence of decision-making being assured through the composition of the board and by procedural requirements.³⁹⁵

Australia

- 6.42 Responding to concerns about under-funding of the Australian Press Council, the Finkelstein Report concluded that funding of the new regulatory body should be by the government out of the consolidated fund, rather than by levy (the administration cost of which could exceed the levy itself) or industry funding.³⁹⁶ The report also recommended a review by the Productivity Commission into the health of the news industry within the next two years or so to see if there is a need for government support.³⁹⁷
- 6.43 Conversely, the *Convergence Review* recommended that funding for its proposed news standards body be majority funded by members rather than

392 Leveson Report, above n 345, Executive Summary at recommendations [15], [16], [19].

393 At recommendation [17].

394 Fielden *Regulating the Press*, above n 348, at 99.

395 Fielden *Regulating for Trust in Journalism*, above n 348, at 7.

396 Finkelstein Report, above n 345, at [11.53].

397 Executive Summary at [21].

being fully funded by government. It was recommended that the government make a financial contribution but this would be limited to specific purposes such as a funding shortfall or to provide project-based funding.

United Kingdom

- 6.44 The Leveson Report concluded that the new self-regulatory body should be industry funded. The report recommended that funding be settled in agreement between the industry and the board of the self-regulatory body, with the board certifying the adequacy of the indicative budget. It is suggested that funding settlements should cover a four to five year period and be negotiated well in advance.³⁹⁸

FORM OF CONVERGED NEWS STANDARDS BODY – EXTENT OF STATUTORY BACKDROP

- 6.45 The form that any converged news standards body should take is difficult to resolve, in part due to the different regulatory traditions of the broadcast and print media. The print media have traditionally resisted any form of statutory regulation as interfering with the freedom of the press, and they have fiercely defended the self-regulatory model as the most appropriate form for any news standards body. That model has been critically reviewed in Australia by the Finkelstein Inquiry and in the United Kingdom by the Leveson Inquiry, where the APC and the Press Complaints Commission (PCC) respectively are regarded as seriously flawed. What is proposed in each case are measures to strengthen adherence to news standards, although proposals vary over the extent of statutory underpinning required for a new standards body.
- 6.46 By contrast, content regulation has historically taken the form of statutory regulation for linear television channels and radio stations. Statutory regulation has been regarded as appropriate in the analogue world, where television and radio represented the main forms of media content delivered to the home. But as new forms of digital media have become more prevalent, co-regulatory and self-regulatory models have emerged as the main means of regulating content delivered via non-linear services.³⁹⁹
- 6.47 From the overseas reviews, what emerges is a spectrum of options for oversight of the news media, from self-regulation at one end that does not require any legislative provision or recognition, through to statutory regulation. Intermediate options are now being considered that may resolve some of the problems of the existing regulatory models and achieve regulatory convergence.⁴⁰⁰

398 Leveson Report, above n 345, Executive Summary at recommendation [6].

399 BSAC Working Group on Content Regulation, above n 355, at [22].

400 For example, see the range of options for press regulation developed by Martin Moore “Reform of Press Self-Regulation – a Spectrum of Possible Models” (29 September 2011) <<http://mediastandardstrust.org>>.

- 6.48 One crucial question is what part legislation would play to implement these options. On the one hand, it is argued that any legislative backing raises the spectre of state involvement that could adversely impact on press freedoms. Others argue, however, that it depends on the type of legislative backing as to whether such a risk arises, and that some legislative options would shore up independent regulation rather than create a risk of greater state control.⁴⁰¹ Some object to a legislative option that would require compulsory membership of the standards body.
- 6.49 The options for statutory underpinning emerging from the various inquiries include the following (or a combination of the following):
- (a) simply recognising a self-regulatory body in legislation (without imposing any requirements on that body);⁴⁰²
 - (b) recognising various media privileges, defences or alternative dispute resolution processes in legislation (an incentives-based approach);
 - (c) mandating who must belong to a news standards body;
 - (d) empowering the news standards body (including in relation to sanctions); or
 - (e) setting the objects and minimum requirements for the news standards body.⁴⁰³

Australia

- 6.50 The two key Australian reports diverged on the question of whether a converged news media standards framework should have any statutory backing.

Finkelstein Report

- 6.51 The Finkelstein Report recommended replacing the APC with a statutory entity, although the Report was careful to make clear that the proposed News Media Council would not impose any form of censorship, rather, this form of regulation is centred on improving the accountability of the news media: “[t]he News Media Council should have secure funding from government and its decisions made binding, but beyond that government should have no role.”⁴⁰⁴
- 6.52 The Report rejected the option of licensing the press: “[i]n a democratic society the government should not be involved in controlling who should

401 For example, see former chair of the British Press Council, Sir Louis Blom-Cooper QC, cited in the Finkelstein Report, above n 345, at [11.30]; submission of Peter Thompson (9 March 2012).

402 For example, see Criminal Procedure Act 2011, s 198(2)(a), for recognition of the self-regulatory New Zealand Press Council.

403 For example, see Defamation Act 2009 (Ireland), Schedule 2.

404 Finkelstein Report, above n 345, at 9.

publish news.”⁴⁰⁵ The Report also rejected maintaining the status quo option for the print media:⁴⁰⁶

Ordinarily, the preferred option would be self-regulation. But in the case of newspapers, self-regulation by code of ethics and through the APC has not been effective ... Doing nothing, therefore is not a road to success. It would simply perpetuate a self-regulation system that is only marginally effective and has not adequately measured up to community expectation.

6.53 The deficiencies with the status quo self-regulatory arrangements were identified as follows:⁴⁰⁷

- lack of awareness of the APC and its role;
- inability to properly investigate a complaint for lack of binding powers;
- lack of resources and funding;
- insufficient powers of enforcement;
- appearance of lack of independence from publisher members;
- insufficient streamlining of complaints procedures; and
- the ability of members to withdraw membership or reduce funding.

6.54 The Finkelstein Report also considered the option of strengthening the APC but concluded that a strengthened Press Council would end up as an odd mixture of a private body with some statutory powers that would be partly funded by government. This hybrid option was not the preferred option, although it was considered preferable to the status quo.⁴⁰⁸

6.55 The preferred model was one of “enforced self-regulation” that needs to have the backing of the law to be effective:⁴⁰⁹

A sufficient improvement would be an independent system that allows the regulated parties to participate in the setting and enforcement of standards (as is presently the case) but with participation being required, rather than voluntary.

The benefits of this model were said to include:⁴¹⁰

405 At [11.26].

406 At 285.

407 At 237–238.

408 At [11.43].

409 At 287. The review did not explicitly explore incentivised regulation as an alternative model: see Fielden *Regulating the Press*, above n 348, at 55.

410 Finkelstein Report, above n 345, at [11.33], [11.86].

- No state involvement in appointing members of the regulatory body, in the setting of standards or in decisions regarding breaches of standards, thus minimising the risk of potential attempts for state interference with, or control of, speech.
- It retains almost all the benefits of self-regulation, but ensures a more robust and effective operation of the system.
- Government funding of the statutory body (which is what would ordinarily follow) ensures adequacy of funding, which promotes independence from those it regulates.

Convergence Review

6.56 The *Convergence Review* also concluded that the current system for regulating the Australian news media is not effective. However, it reached a different conclusion on the question of whether the replacement body should be reflected in legislation and the news standards body it proposed would not be a statutory authority.

6.57 While the *Convergence Review* agreed with much of the analysis and some of the findings of the Finkelstein Report, it regarded a statutory body as a position of last resort and preferred an industry-led body in the first instance:⁴¹¹

The Review has concluded that a media industry scheme with an independent governance structure is the most effective way of promoting standards, adjudicating on complaints, and providing timely remedies. It would also avoid the sensitivities associated with direct regulation of journalism, which plays such a key role in scrutinising the processes and activities of government. The Review proposes that the government first test the effectiveness of a self-regulatory arrangement that operates across all platforms ... The news standards body would set clear goals to be achieved within a specific time frame. If, on review, this industry-led body was not effective, the government would have the last resort option of introducing some direct statutory measures.

6.58 Nevertheless, the recommendations of the *Convergence Review* contain statutory elements such as mandating membership for larger media entities. In addition the ABC and SBS would continue to operate under their own updated statutory charters, and therefore would be outside the reach of the news standards body. The *Convergence Review* model also provides for a review of the news standards body after three years to see if it should continue or be replaced by a statutory body.

411 *Convergence Review*, above n 346, at 50 – 51.

United Kingdom

Leveson Inquiry

- 6.59 One of the key themes to emerge in the Leveson Inquiry was the extent to which there should be a statutory “backstop” for press regulation, and submissions made to the Leveson Inquiry canvassed a wide variety of models.⁴¹² A number of favourable references to a statutory backdrop were made in evidence to the Inquiry; however, several editors strongly opposed any statutory backdrop, citing the risk of later function creep by politicians: “any Parliamentary involvement would be the ‘thin edge of the wedge’ which could result in fuller statutory control of the press.”⁴¹³
- 6.60 The models put forward ranged from an absence of statutory backing to minimal statutory backing through to substantial statutory backing. Examples include:
- (a) Contractual arrangements backing membership to the PCC as an alternative to statutory regulation (Lord Black’s proposal on behalf of the newspaper industry).⁴¹⁴ The Leveson Report concluded that while the proposal would represent a significant improvement, there were flaws including the extent of industry control and a lack of long term stability.⁴¹⁵
 - (b) Independent self-regulation subject to review, with the introduction of statutory measures if self-regulation is found to be inadequate or ineffective. Ofcom supported a non-statutory model on the following terms:⁴¹⁶

Properly constituted, effective, independent self-regulation could be the principal, or conceivably, even the sole basis of a new model of regulation. Such an approach might be supported by a clearly defined and early review of the effectiveness of the arrangements. This, in turn, might be backed by a clear intent to introduce an enabling statute if the self-regulatory arrangements proved to be ineffective or inadequate.

412 Damien Carrick “Privacy, Regulation and the Public Interest” (Reuters Institute for the Study of Journalism, University of Oxford, 2012) at 30–31.

413 Paul Dacre, editor in chief of the Associated News Group, cited by Carrick, above n 412, at 29.

414 Lord Black is the chairman of the Press Standards Board of Finance (PressBoF). For a summary of the industry proposal, see the Leveson Report, above n 345, Executive Summary at [52]; Part K at ch 2. See also Lord Hunt of Wirral, above n 385; Carrick, above n 412, at 26 – 27.

415 Leveson Report, above n 345, Executive Summary at [53] – [55]; Part K at 1,750.

416 Office of Communications (Ofcom), submission to the Leveson Inquiry on the Future of Press Regulation (2 April 2012) at [6.3].

- (c) An option raised by the British Prime Minister is one based on the British Advertising Standards Authority:⁴¹⁷

There are ways of setting up a regulatory system that is effectively independent, that is non-statutory, that does not have the Government's fingerprints all over it, as it were, and that can do a good and trusted job, as we see in the case of advertising standards.

The source of the powers of the advertising regulator is a legal agreement with the statutory broadcasting regulator (Ofcom), with whom it acts in a "co-regulatory partnership."⁴¹⁸ Its modus operandi in relation to non-broadcast advertising has been described as follows:⁴¹⁹

Crudely, when the ASA is policing non-broadcast ads, it is a self-regulator, backed by the industry and relying on industry peer pressure for most of its clout. In a small minority of cases where its rulings are ignored or flouted, it can call on what the ASA calls its "legal backstop", meaning it can refer miscreants to the Office of Fair Trading for punishment (i.e. fines).

- (d) A different approach is based on incentives,⁴²⁰ where statutory provisions around media privileges are adopted as an alternative to compulsory membership:⁴²¹

On the other hand the idea of compelling newspapers to participate in a regulatory scheme is highly undesirable. Better to have a third way where legislation would guarantee a regulator's independence and provide legal advantages to participants. These "carrots" will encourage voluntary participation and genuine buy-in.

- (e) A contractual approach with statutory recognition of the regulatory body, plus incentives such as enhanced defences and dispute resolution mechanisms. For example, the Media Standards Authority proposed by the Media Regulation Roundtable would be established by statute which would recognise its independence from government and the media and would include a guarantee of media freedom.⁴²²

417 Philip Ward "Press Regulation – the Debate" (House of Commons Library Note SN/HA/6357, 20 June 2012) at 18 – 19. See also Gavin Ellis "Different Strokes for Different Folk: Regulatory Distinctions in New Zealand Media" (2005) 11 *Pacific Journalism Review* 63, suggesting an all-media standards body based on the Advertising Standards Complaints Board - Advertising Standards Complaints Appeal Board model.

418 The position is different in New Zealand, where the Advertising Standards Authority is a purely self-regulatory body that does not have any formal co-operation with the BSA, however, laws such as the Fair Trading Act can be considered a legal back-stop to this model.

419 Bagehot's Notebook "What exactly is 'independent' press regulation?" (14 July 2011).

420 For example, see Media Regulation Roundtable, above n 361.

421 Carrick, above n 412, at 31. See also Fielden *Regulating for Trust in Journalism*, above n 348.

422 Media Regulation Roundtable, above n 361.

- (f) The model put forward by the Co-ordinating Committee for Media Reform is also a mix of self-regulation with statutory backing.⁴²³ The model comprises a News Standards Commission (independent but established by statute) to oversee the code of practice, an independent News Ombudsman to deal with complaints at first instance, and a News Adjudication Tribunal (based on the employment tribunal model) to adjudicate cases not resolved by the News Ombudsman.
- (g) The Media Standards Trust proposal also contains both statutory and self-regulatory elements.⁴²⁴ It involves self-regulation (recognised in statute) with oversight by a statutory body. First layer regulation would be carried out by self-regulatory organisations (SROs) who would be responsible for complaints handling and redress, and an annual report detailing performance. Minimum standards for SROs (including codes of conduct) would be set by a backstop independent auditor (BIA) established under statute, who would also provide oversight, including powers to fine SROs or strike off SROs that repeatedly fail to meet their obligations.
- (h) Statutory regulation of the print media also received support such as from retired judge Sir Stephen Sedley:⁴²⁵

What I would therefore commend for consideration is, in outline, the setting up of a new statutory printed media regulator, governed by rules authorised by Parliament and designed to ensure a fair inquisitorial, rather than adversarial, procedure ...

It is designed simply to suggest that there is now a powerful case for independent statutory regulation of the mainstream media; that regulation can solve a number of problems for which neither litigation nor self-regulation is proving adequate; and that it can be done fairly and effectively without either licensing the press or giving the regulator a monopoly of the truth.

- 6.61 In his report, Lord Justice Leveson concluded that none of the options presented to his inquiry met all of the necessary criteria for a regulatory solution.⁴²⁶ His recommended approach is an independent body with the dual roles of promoting high standards of journalism and protecting the rights of individuals. It would set standards through a code, hear complaints about breaches of standards, order appropriate redress, promote high standards including a power to investigate serious or systemic breaches, and provide a fair, quick and inexpensive arbitration service to deal with civil law claims against member publications.

423 Co-ordinating Committee for Media Reform, above n 370.

424 Media Standards Trust, above n 360.

425 Sir Stephen Sedley, submission to the Leveson Inquiry (October 2011) at [14], [26].

426 See ch 5 at [5.59].

6.62 Lord Justice Leveson suggested this system could provide an incentive in relation to civil litigation costs by requiring courts to take account of a publisher's failure to use the arbitral system in making costs awards. In addition, membership of the regulatory system is proposed as a relevant factor in damages awards in relation to the media torts such as defamation and breach of privacy.⁴²⁷

6.63 In order to give effect to these membership incentives, legislation would be necessary to underpin the independent self-regulatory system and facilitate its recognition in legal processes. It is proposed that legislation would identify the requirements to be met by the self-regulatory body (as specified in the report) and provide a process by which Ofcom (or an independent Recognition Commissioner) would ensure that the statutory requirements have been met.⁴²⁸ Lord Justice Leveson specifically denied that this would amount to statutory regulation of the press. Instead he described it as:⁴²⁹

... a statutory verification process to ensure that the required levels of independence and effectiveness are met by the system in order for publishers to take advantage of the benefits arising as a result of membership.

To counter concerns that legislation would create a slippery slope towards government intervention in the press, he recommended that the legislation include an express duty on the government to protect freedom of the press.⁴³⁰

Joint Parliamentary Committee on Privacy and Injunctions

6.64 Rather than utilising legislation, the report of the Joint Committee on Privacy and Injunctions proposed that a standing commission of both Houses of Parliament should scrutinise the process of industry-led reform in coming years, with powers to call for papers and summon witnesses, reporting annually on the progress of reform and the effectiveness of the new body, with consideration being given to statutory oversight if the industry fails to establish an independent body with public confidence.

Communications Review

6.65 The industry Working Group paper contributing to the review of the United Kingdom's Communications Act recommends a flexible staged approach to regulation, and that statutory regulation for linear television and radio remain for so long as it continues to be effective and proportionate.⁴³¹ In particular, any deregulatory measures in relation to television news should proceed with caution and some current standards regulation should continue: accuracy,

427 Leveson Report, above n 345, Executive Summary at [67].

428 Executive Summary, at recommendations 27–33.

429 Executive Summary at [73].

430 At [72].

431 BSAC Working Group on Content Regulation, above n 355, at 1.

impartiality (in relation to public service broadcasters) and rules in relation to covering elections and referenda. The paper recommends that self-regulatory or co-regulatory models should be used where possible, but that backstop powers should be available where necessary.

Lara Fielden

- 6.66 Lara Fielden's work on standards regulation recommends a combination of statutory and independent voluntary requirements.⁴³² Under Fielden's tiered regulatory model, the print media would move to a model of independent, statutorily recognised press regulation, with the potential for this tier to be expanded in future to broadcasters, video on-demand and currently unregulated online providers. Fielden's proposal is that a new Communications Act would recognise an independent voluntary standards body, arguing that statutory recognition would provide a secure foundation for independence including composition and independence of the board and adjudicating panels, and recognition of procedures and sanctions. This model would not confer statutory powers, rather it would provide statutory links to the significant privileges associated with membership, along the lines of the model of statutory recognition in the Defamation Act (Ireland).

Other jurisdictions

The Irish model

- 6.67 The Irish model is a system of press regulation recognised in Irish law:⁴³³
- The 2009 Irish [D]efamation [A]ct recognises the existence of a Press Council and a Press Ombudsman, sets out minimum requirements for the Press Council, outlines the composition of the Council and its funding, and sets out the broad parameters of the complaints process.
- 6.68 While this statutory recognition does not actually establish the Irish Press Council, the Defamation Act sets out the principal objects of the Council, which include the protection of freedom of expression of the press, the protection of the public interest by ensuring ethical, accurate and truthful reporting, maintaining certain minimum ethical and professional standards, and the protection of privacy and dignity of the individual. The Act also sets out the requirements for independence, the composition of directors, funding, investigations and hearings, and powers to require the publication of a determination in any form and manner directed by the Council.

⁴³² Fielden *Regulating for Trust in Journalism*, above n 348, at ch 10.

⁴³³ Moore, above n 378.

Denmark


- 6.69 The Danish Press Council is an independent public tribunal established under the Media Liability Act 1998 (Denmark).⁴³⁴ The Act sets out the Press Council's purposes: to deal with complaints about journalistic ethics, to contribute to the development of press ethics and to handle complaints about the legal right of correction. The Act also provides for a right of reply and the sanction of being required to publish the Council's decision where a complaint is upheld, along with the punishment for failing to comply (a fine or imprisonment of up to four months).

CONCLUSION

- 6.70 Over the period of our review, Australia and the United Kingdom have been engaged in intense debate about the enforcement of media standards. We have found the debate and conclusions of the overseas reviews enlightening and helpful, although our own particular media culture and history, press freedoms, market context and progress towards convergence means that we must identify the optimal framework for upholding media standards in New Zealand.
- 6.71 Overall, while our preference is for an independent converged regulator that covers the print, broadcast and online platforms, our preferred model is one that incentivises voluntary membership of a news standards body, rather than a model that incorporates an element of compulsion.⁴³⁵ However we face the same conundrum that Lord Justice Leveson acknowledged: to be effective, a new system must include the major media outlets. Therefore the membership incentives must be strong enough to ensure that the key participants will be covered.
- 6.72 Our preferred model is one that does not involve legislation to establish the standards body, but only to recognise it once it is set up, by conferring legal privileges on its members. In the next chapter we outline our conclusions and preferred model for a New Zealand news standards body.

434 Fielden *Regulating the Press*, above n 348, at 52. Fielden notes at 17 that the Danish statutory model is narrowed by limiting complaints only to those who have a direct interest, and only to matters covered in the code of ethics.

435 This aligns largely with Lara Fielden's proposed tier 2: *Regulating for Trust in Journalism*, above n 348, at 122–124.



Chapter 7

Ethical journalism – a new approach to media standards in the digital age

INTRODUCTION

- 7.1 The primary objective of this review is to determine which publishers of news content should be entitled to the legal rights and subject to the countervailing responsibilities which have traditionally applied to the news media in New Zealand. In the preceding chapters we describe the difficulties of this task now that everyone has the potential to break and disseminate news. Despite these challenges, we argue there is still a public interest in recognising the news media as a special type of communicator with access to certain legal privileges and exemptions and in continuing to hold them accountable to ethical standards.
- 7.2 In chapter 3 we propose a way to define this special type of communicator for the purpose of the law. A core criterion for eligibility is that the communicator be subject to an ethical code and an independent complaints body. In our view, a commitment to basic ethical standards, such as accuracy and fairness, is fundamental to the type of communication the law intended to privilege. We also argue that it is in the public's interest to ensure all those who wish to fulfil the news media's functions, and are prepared to accept the associated responsibilities, be entitled to do so, rather than confining these privileges to those who meet certain organisational requirements, such as audience size or commercial purpose.

7.3 Our terms of reference asked us to consider which, if either of the two existing news media complaints bodies, the Press Council or the Broadcasting Standards Authority (BSA), is best positioned to provide the mechanism by which the currently unregulated news media be held accountable.⁴³⁶ Because of the paradigm shift brought about by the internet, we have adopted a first principles approach to this question. In chapter 4 we re-examine the case for any type of regulatory intervention, before turning to the specific challenges of regulating the news media. In chapter 5 we examine the strengths and weaknesses of the Press Council and BSA in the dynamic environment of convergence.

7.4 We have reached two major conclusions in relation to the Press Council and the BSA:

- both have structural weaknesses when it comes to independence;⁴³⁷ and
- both are format-based and were not designed for the converged media environment.⁴³⁸

Our preliminary view, discussed in chapter 5, is that the newly established Online Media Standards Authority (OMSA), does not resolve these problems.⁴³⁹

7.5 As discussed in the preceding chapter, a number of other significant overseas media reviews have reached a similar conclusion about the implications of convergence, recommending various new approaches to the specific regulatory challenges they have been asked to tackle. This cross-fertilisation of ideas has been invaluable and it will be evident that we have drawn on many of the principles and proposals put forward in these various reports.

7.6 However, our recommendations are a response to the specific problems we were asked to address and reflect our own unique context: they draw on research and analysis of New Zealand's media environment, the views of submitters to our Issues Paper, and our own assessment of how best to balance the interests of New Zealand citizens in a strong, independent and accountable news media in the digital era.

7.7 In this chapter we detail our recommendation to establish a new independent media complaints body, which we have provisionally called the News Media Standards Authority (NMSA). The body we are proposing would be responsible for maintaining standards across all types of news publishers, irrespective of the format or distribution channel. It would combine the best features of the two existing bodies: it would be flexible and adaptable

436 See ch 1 at [1.10] – [1.11] for an outline of the terms of reference.

437 Ch 5 at [5.111].

438 Ch 5 at [5.127]; Law Commission *The News Media Meets the 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, Wellington, 2011) at [5.77] [Issues Paper].

439 Ch 5 at [5.117] – [5.125].

like the Press Council, but would have greater powers and more meaningful sanctions, like the BSA. Crucially, it would be genuinely independent of both government and the news media industry.

- 7.8 The NMSA would have the functions of setting codes of practice; adjudicating on breaches of those codes, with a range of effective sanctions available to it; and monitoring trends in media practice. We also believe it should offer a mediation service for cases which might otherwise go to court.
- 7.9 For reasons we will explain below, we recommend that it be entirely discretionary whether or not a publisher of news content wishes to contract into this scheme. However, under our recommended scheme, only those who are willing to be held contractually accountable to the NMSA will be able to access the news media's legal privileges.
- 7.10 In essence, our scheme formalises the unwritten social contract which has traditionally existed between the news media and the public they serve. It does this by cementing the connection between the rights and freedoms of the media and their corresponding responsibilities.
- 7.11 We are also recommending that other important benefits be reserved for those willing to opt into this system – including access to public funding for the production of news and current affairs programmes, and access to mediation services to avert defamation proceedings. However the greatest benefit of all, in our view, will be the brand advantage that will attach to those willing to be held publicly accountable for the standards by which they operate and the reliability of their journalism. Demonstrable accountability can be expected to contribute to increased levels of public trust, with a positive impact on circulation and audience retention.
- 7.12 We begin in this chapter by briefly re-stating the principles and policy objectives underpinning our new standards body, followed by a description of the detail of how it would be structured, including its functions and powers. We then consider the risks and benefits of our recommendation that membership of the NMSA be voluntary and describe how the new scheme should be brought into being and monitored.

PRINCIPLES AND POLICY OBJECTIVES

- 7.13 As discussed in chapter 1, our review is concerned with a small but vital sub-set of communicators – those who purport to provide the public with reliable and reasonably dispassionate accounts of what is happening in the world. A key driver behind our review has been the emergence of the new media, some of whom are undertaking functions traditionally performed by the mainstream media, including holding the various branches of government to account.
- 7.14 In considering how best to approach the question of news media rights and responsibilities in this dynamic new environment, we, like other convergence

reviews, have recognised the need to take cognisance of the following critical factors:⁴⁴⁰

- (a) The public continues to rely on the news media as an important source of information on which to base decisions, including decisions about how to exercise their democratic rights. For this reason there is an overriding public interest in ensuring New Zealand has a robust news media.
- (b) The news media is a powerful institution in its own right. As well as facilitating the democratic process it is also potentially capable of distorting it through unfair, selective or misleading reporting. It is therefore in the public's interest that there is an effective mechanism for holding the news media to account for the exercise of its power.
- (c) The internet has created a step-change in the way in which individuals are able to exercise their right to freedom of expression. Protecting this right is of fundamental importance. There is a strong public interest in ensuring that any regulatory scheme for the news media encourages rather than stifles diversity.
- (d) In the era of technological and media convergence any regulatory regime must focus on content rather than format or delivery platform.
- (e) "News and current affairs" is a special type of content that requires a different regulatory approach because of its fundamental importance to a healthy democracy.

7.15 As noted by the Australian *Convergence Review*, the scope of any intervention should be limited to the "minimum required to achieve a clear public purpose".⁴⁴¹ We must also take account of the profound changes in how we access and use information in the digital age – including, crucially, the increased choice and control which individuals can exercise in this interactive media environment.⁴⁴²

7.16 We set out the policy objectives of our reforms in chapter 1,⁴⁴³ and repeat them here. These objectives are to:

- (a) recognise and protect the special status of the news media, ensuring all entities carrying out the legitimate functions of the fourth estate,

440 See Australian Government *Convergence Review: Emerging Issues* (discussion paper, 2011) at 8 – 10 [*Convergence Review, Emerging Issues*]; Australian Law Reform Commission *Classification Review – Content Regulation and Convergent Media* (ALRC R118, 2012) at 13 [*Classification Review*].

441 *Convergence Review, Emerging Issues*, above n 440, at 8, principle 1: "Citizens and organisations should be able to communicate freely and where regulation is required, it should be the minimum needed to achieve a clear public purpose".

442 See *Convergence Review, Emerging Issues*, above n 440, at 8, principle 2: "Australians should have access to and opportunities for participation in a diverse mix of services, voices, views and information."

443 Ch 1 at [1.82].

- regardless of their size or commercial status, are able to access the legal privileges and exemptions available to these publishers;
- (b) ensure that those entities accessing the news media's special legal status are held accountable for exercising their power ethically and responsibly;
 - (c) provide citizens with an effective and meaningful means of redress when those standards are breached; and
 - (d) signal to the public which publishers they can rely on as sources of news and information.

The core characteristics of our recommended standards body

- 7.17 As we discuss in chapter 4, the policy challenge lies in balancing these competing public interests in a free, but ethical, news media.
- 7.18 We consider that this can be achieved by ensuring the regulatory focus is on providing a mechanism for effective accountability rather than any form of publishing constraint. The news media must be free to publish as they see fit – the purpose of any standards body is to provide public accountability and a proportionate remedy when that publishing breaches important ethical standards. Our recommended mechanism for influencing organisational behaviour via accountability rather than any type of prior constraint is a critical distinction which is sometimes lost in the rhetoric around “regulation” of the news media.⁴⁴⁴
- 7.19 In this respect the NMSA would function in a similar fashion to the existing complaints bodies (the BSA, the Press Council and now OMSA), adjudicating cases which have not been resolved successfully by the publisher. However, it would differ in a number of important respects from these bodies to ensure that it has the independence, transparency, accessibility, flexibility, durability, resources and powers required to be an effective regulatory body in the era of converged media.
- 7.20 In chapter 5 we conclude that both the existing models are inherently deficient in some respects, particularly with regard to independence. Crucially too we conclude that because the two models are positioned differently on the regulatory spectrum, it is not possible to simply extend their respective jurisdictions to bridge the regulatory gaps and inconsistencies which have emerged in the digital publishing environment. To do so would result in entrenching the existing regulatory inequalities in the current environment and would fail to provide the type of durability and consistency required to achieve our objectives. We argue that the new standards body we recommend needs to combine the best of both the existing models: the flexibility,

⁴⁴⁴ See Ian Cruse and Sarah Tudor “Leveson Report: Reaction” (House of Lords Library Note LLN 2012/041); Editorial “Censoring the Media” (*The Press*, 3 December 2012); Editorial “Crucial to Protect Press Freedom” (*The New Zealand Herald*, 5 December 2012); Steven Price “We Don’t Need No Stinking Press Regulation” (*Media Law Journal*, 6 December 2012).

adaptability and non-legalistic processes of the Press Council with the more effective remedies of the BSA.

- 7.21 In summary, we take the view that a single converged standards body should deal with all news, current affairs and news commentary.⁴⁴⁵ Its jurisdiction should be based on content provision rather than platform of delivery. Independence must be a hallmark in order to ensure its effectiveness and sufficient public trust, and that means independence from both government and the media industry. It would have the functions of setting codes of practice; adjudicating on breaches of those codes, with a range of effective sanctions available to it; and monitoring trends in media practice. We also believe it should offer a mediation service for cases which might otherwise go to court.
- 7.22 The remainder of this chapter will deal with the nature of this regulator, which of the news media should belong to it, and the means (statutory or otherwise) by which it will be created.

THE NEWS MEDIA STANDARDS AUTHORITY

- 7.23 We now describe how the NMSA would satisfy the principles discussed above, and the requirements of effective regulation. We note that our recommendations are broadly consistent with those of the Australian *Convergence Review*⁴⁴⁶ – although that review has adopted a different approach to the question of compulsory coverage, which we will address later in this chapter.

Independent governance and organisational structure

- 7.24 It is critically important that the NMSA be as independent as possible from both government and the industry.⁴⁴⁷ Independence from government, we believe, is of particular importance. This will involve a move away from the BSA model which has a significant degree of state control. The BSA's members are appointed by the government; broadcasting standards are prescribed by statute, as are the sanctions which the authority can impose.
- 7.25 The danger of state control is that the authority may serve, or just as seriously appear to serve, political ends, in the form either of the appointments made

445 The category of “news” and “current affairs” would include content which purports to provide the public with a factual account: see [7.35] – [7.44] below.

446 Australian Government *Convergence Review* (Final Report to the Minister for Broadband, Communications and the Digital Economy, Sydney, 2012) at ch 4 [*Convergence Review*].

447 The same conclusion about the need for structural independence has been reached in other inquiries, see for example House of Lords and House of Commons Joint Committee on Privacy and Injunctions *First Report* (2012) at ch 5, [170]; The Rt Hon Lord Justice Leveson *Report of An Inquiry into the Culture, Practice and Ethics of the Press* (The Stationery Office, 2012) Part K at 1,590 [Leveson Report].

to it or the decisions made by those appointees. We do not suggest that the BSA has ever been open to those influences, but the possibility that it could be must inevitably reduce the confidence of the industry in it.

- 7.26 No doubt some will believe that a degree of state “backbone” is desirable, and that complete independence from the state will weaken oversight: that there will be a tendency to pander to the lowest common denominator, and that commercial pressure might lead to a failure to take account of the wider public interest. The BSA itself put such a view to us:⁴⁴⁸

We think the State has an interest in balancing the media’s rights of freedom of expression along with the responsibilities that come with these.

- 7.27 That might indeed be a concern if what was proposed was pure self-regulation. Industry control of the authority would in its way be just as unsatisfactory as state control. It would not command public confidence. This point was strongly made by many people during the Leveson Inquiry.⁴⁴⁹ Announcing the Inquiry, the British Prime Minister, David Cameron, said:⁴⁵⁰

There is a strong case for saying it’s institutionally conflicted because competing newspapers judge each other. As a result it lacks public confidence ... my starting presumption is that [the new system] should be truly independent, independent from the press, so the public will know that newspapers will never again be solely responsible for policing themselves.

- 7.28 No doubt the United Kingdom press has exhibited failings far in excess of anything that has happened in New Zealand. But the perception and confidence arguments are just as strong here. The importance of independence was emphasised in the Barker-Evans Review of the New Zealand Press Council in 2007.⁴⁵¹
- 7.29 So what we propose is a system which, in addition to being independent of government, is also substantially independent of industry. The Advertising Standards Authority (ASA) is a useful model.⁴⁵² However, as we shall demonstrate, complete separation from industry will not be entirely easy to achieve. The following are the elements of independence.
- 7.30 First, there should be a carefully devised method of making appointments to the NMSA. There should be no government involvement in these appointments. In the set-up stages the appointments should be made by an independent panel, the details of which we discuss later in this chapter.

448 Submission of the Broadcasting Standards Authority (12 March 2012) at [30].

449 Philip Ward “Press Regulation – the Debate” (House of Commons Library Note SN/HA/6357, 20 June 2012).

450 Joe Sinclair “PM Signals End of Press Complaints Commission” (*The Independent*, 8 July 2011).

451 Ian Barker and Lewis Evans *Review of the Press Council* (2007), recommendations 2 – 7 [Barker-Evans Review].

452 Advertising Standards Authority < www.asa.co.nz > .

The chairperson of the NMSA should be a retired judge, or other respected, experienced and well known public figure.

- 7.31 A majority of the members should be representatives of the public who are not from the media industry. A minority, however, should have industry experience. The NMSA 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 include representatives of both proprietors and journalists. However we believe it is preferable that current editors should not be appointed, for they would be sitting in judgement on their competitors. The Leveson Report makes that point strongly.⁴⁵³ We also believe that at least one member should have expertise in new media and digital communication technology.
- 7.32 Second, once appointed, members should have fixed terms, and only be able to be removed for cause, and not at the instigation of the industry or anyone else. There should be power to reappoint a member for one further term.
- 7.33 Third, the NMSA should have a separate legal existence independent of any industry bodies.⁴⁵⁴ It should preferably be an incorporated society. The *management* of such a body should be independent of the industry in the same way that the *adjudication* function is. The observations of Lara Fielden which we quoted in chapter 5 are strongly on point.⁴⁵⁵ We think that the present arrangement whereby the management of the Press Council is in the hands of an executive committee controlled by the industry is less than ideal. Any governance board or panel should not be controlled by media industry appointments.
- 7.34 Fourth, the content of the code of practice should be formulated by the NMSA itself or a committee set up by it. The government should have no influence on the content of the code. We deal with the code below.

Jurisdiction: what is “news”?

- 7.35 The NMSA’s jurisdiction should be based on the nature of the content provided to the public rather than platform delivery. It should cover linear and non-linear broadcasters, web-based publishers, and print. The NMSA would only adjudicate complaints relating to news, current affairs and news commentary.

453 Leveson Report, above n 447, Executive Summary at recommendations 4, 5 and 13.

454 This was one of the recommendations of the Barker-Evans Review, above n 451, recommendation 3. The Press Council implemented that recommendation by registering as an incorporated society at the end of 2011.

455 Ch 5 at [5.73].

- 7.36 For present purposes it will be sufficient to conflate “news” and “current affairs”. Except for the fact that current affairs tends to relate to political and governmental matters and can involve more analysis than straight news, the two are very much the same. We put them both under the rubric of “news”. The question is what that means, and how it differs from “entertainment”.
- 7.37 Besides news and current affairs, the media publish content which is pure entertainment. In the broadcast media, this includes a variety of forms of entertainment. Yet where is the line to be drawn between “news” and “entertainment”? Sometimes news items have no purpose other than to entertain and sometimes shows which are primarily of entertainment value do contain factual material about real people (reality TV for example).
- 7.38 A number of submitters told us that the line between “news” and “entertainment” will be difficult, if not impossible, to operate in practice. Yet it is a distinction which has been recognised elsewhere. The Australian *Convergence Review* has drawn a precisely similar distinction;⁴⁵⁶ likewise the Australian Law Reform Commission’s recommendations provide that news and current affairs programmes should be exempt from the classification scheme that it proposes.⁴⁵⁷ A similar distinction can be found in New Zealand in the Films, Videos, and Publications Classification Act 1993, where films about news are expressly exempt from labelling.⁴⁵⁸
- 7.39 The distinction between news and other forms of content certainly poses difficulties, but they are not insuperable. The difficulty is most likely to arise in relation to “factual” programming: that is to say reality shows, documentaries and the like. We believe it is justifiable to take a wide definition of “news” as including any publication which purports to provide factual information and which involves real people. This is because such publications raise the issue of journalistic standards. Are the facts presented accurate? Is any part of the publication misleading? Have individuals portrayed been unfairly treated? Has anyone’s privacy been invaded? Has information been obtained by the use of deception? If so, the individuals involved should have the right to complain to the NMSA which will apply the appropriate ethical standards.
- 7.40 So we would include in the term “news” documentaries and such “factual” and “reality” programmes as depict real people. We would also include sports programmes. “News commentary” which would also be within the jurisdiction of the NMSA would include programmes such as *Campbell Live* (TV3), *Seven Sharp* (TVOne), radio talk-back, letters to the editor and sporting analysis. We are not alone in taking this stance. The Privacy Commissioner takes a similarly broad view. She has held that the National

456 *Convergence Review*, above n 446, at chapter 4.

457 Australian Law Reform Commission *Classification – Content Regulation and Convergent Media* (ALRC R118, 2012), recommendation 6-3 [*Classification Review*].

458 Films, Videos, and Publications Classification Act 1993, s 8(1)(g).

Business Review's "The Rich List" and TV3's *Target* come within the rubric of "news activity" and are thus outside her jurisdiction.⁴⁵⁹

- 7.41 Purely fictional programmes raise issues that are more likely to involve taste and decency, and suitability for children. In our view they are not suitable for adjudication by a body whose focus is *news*. We believe a separate body with stronger enforcement powers should deal with them. Currently the Censor's Office does some of this work and the BSA has jurisdiction over *broadcast* entertainment. In the next chapter we argue that there needs to be a separate review of this sector to achieve a coherent solution for the new converged environment.
- 7.42 Our proposed division into "news" and "entertainment" does, however, pose two difficulties. One is simply that in a few instances (and we think they will be very few) it may be extremely difficult to decide into which category a particular publication falls. To meet that case we think the NMSA and the appropriate entertainment authority could draw up a set of protocols for deciding which of them should deal with the complaint in question.
- 7.43 The second difficulty is that sometimes a "factual programme" may involve serious taste and decency issues – the portrayal of sex or violence, for instance. In these cases, while a complaint might properly be made to the NMSA, it should have the option to refer it to the entertainment body so that more appropriate enforcement action can be taken. Flexibility is the key to solving issues of this kind.
- 7.44 Currently the BSA hears complaints about broadcast entertainment content. We envisage that even after the NMSA comes in existence and the BSA's jurisdiction over news is transferred to it, the BSA should remain in existence to deal with broadcast entertainment content, pending the recommended review of the entertainment sector. We also recommend that during that period the BSA retain its jurisdiction over news in relation to standards of good taste and decency and protecting the interests of children.

Functions and powers

- 7.45 The NMSA should have the following functions:
- to formulate a code of practice;
 - to adjudicate complaints about breaches of the code;
 - to monitor and report on trends in media practice and audience satisfaction; and
 - to mediate disputes about matters which otherwise might proceed to court.

⁴⁵⁹ *Talley Family v National Business Review* (1997) 4 HRNZ 72; Case Note 38197 [2003] NZPrivCmr 24. See also John Burrows and Ursula Cheer *Media Law in New Zealand* (6th ed, LexisNexis, Wellington, 2010) at 377–380.

Codes and Standards

- 7.46 The NMSA, or an independent committee set up by it, should formulate a code of practice (or, if preferred, statements of principle) which clearly set out the standards against which the conduct of the news media is to be judged and which will form the basis of complaints from members of the public. The code should be available on the NMSA's website.
- 7.47 Codes go to the heart of the system and serve two fundamental purposes. They serve as a kind of rule book to guide the conduct of journalists and editors, and they constitute the standards against which the authority will adjudicate complaints.⁴⁶⁰
- 7.48 The code must be regarded as reasonable and credible by both the industry and the public. It should therefore be formulated after consultation with the industry and the public, and should capture to the fullest extent possible the traditional tenets of good journalism in a way which meets the demands of modern New Zealand society. The existing codes, including those of the Press Council, the BSA, OMSA and those used in the news media industry itself, should be consulted in the formulation of the new code.
- 7.49 The passage of time can change expectations, and the emphasis of the standards may need to change from time to time. For example, modern codes emphasise intrusion into privacy to a greater extent than used to be the case. The code should be reviewed on a regular basis.
- 7.50 As to the content of the code, we propose the following.

Freedom of expression

- 7.51 First, a code should clearly recognise the right to freedom of expression, and strive to maintain an appropriate balance between this interest and other interests such as privacy. It should be clear that sometimes prima facie breaches of the code's principles may be overridden by the public interest in publication.
- 7.52 There is no doubt that freedom of expression must be a guiding principle. Agreeing with the view expressed in the Leveson Report, we believe that the NMSA should give guidance as to what "public interest" means.⁴⁶¹ It is a concept which has caused uncertainty in many contexts.

460 Lara Fielden *Regulating the Press: a Comparative Study of International Press Councils* (Reuters Institute for the Study of Journalism, University of Oxford, 2012) at [5.2] [*Regulating the Press*]. See also Leveson Report, above n 447, at Part B, chapter 4, [4.14], and Executive Summary at recommendation 36.

461 Leveson Report, above n 447, Executive Summary at recommendation 42: "A regulatory body should provide guidance on the interpretation of the public interest that justifies what would otherwise constitute breach of the Code. This must be framed in the context of the different provisions of the Code relating to the public interest, so as to make it easier to justify what might otherwise be considered as contrary to standards of propriety."

- 7.53 It is unlikely that the New Zealand Bill of Rights Act 1990 (BORA) would apply to the NMSA. As we are recommending that the NMSA not be set up by statute, it is difficult to argue that it will be a body which performs “any public function, power, or duty conferred or imposed on that ... body by or pursuant to law”.⁴⁶² But it is important that the NMSA acts on principles equivalent to those in BORA. We recommend that both the constitution of the NMSA and the code of practice it draws up expressly require the NMSA to recognise, and act in accordance with, the BORA guarantee of freedom of expression.⁴⁶³

Level of prescription

- 7.54 Second, there is a question of whether the code should be in terms of broad flexible principle or more detailed prescription. There are advantages and disadvantages of both styles. The Press Council prefers the broad statement of principle to enable more flexibility from case to case. The BSA codes contain similar fairly broad statements of principle accompanied by more detailed guidelines which have come to take on the appearance of rules. The new OMSA Code of Standards sets out each standard in general terms, with brief guidelines in relation to some standards. But, as far as possible, the code should be free from ambiguity, so as to leave little room for argument.

Level of specification

- 7.55 Third, there is also the question of whether a code should be a complete and exhaustive code, or whether it should be left open for complainants to complain about other matters which are not specified. The Press Council prefers the latter approach, and is one reason it prefers to speak of “statements of principle” rather than a code.
- 7.56 We are uncomfortable with the notion that remedies or sanctions can be brought to bear in relation to conduct which is not proscribed by the code. Yet in this fast-moving environment it may be difficult for the framers of the code to foresee and provide for everything in advance. We suggest, therefore, that complainants should be able to complain about conduct which is unethical even though the code does not make express provision for it; but that in such a case the NMSA’s power should extend no further than to make a declaration that the conduct is undesirable. The NMSA should then proceed to amend the code. We think that careful drafting of the code in the first place should ensure that this situation does not arise often.

Core principles of good journalism

- 7.57 Fourth, a code would normally be expected to contain a number of core principles which are at the heart of good journalism from whatever platform it is delivered. Those principles are age-old, and appear in journalism codes of ethics the world over. They include such things as accuracy, correction of

462 New Zealand Bill of Rights Act 1990, s 3(b).

463 Section 14.

error, separation of fact and opinion, fairness to participants, good taste and decency, the protection of privacy and the interests of children.

Illegality

- 7.58 Fifth, we believe that one of the standards in the code should require compliance with the law. The BSA's "Law and Order" standard, or a variant of it, would be appropriate. This would allow complaints, for example, about the publication of suppressed names, or trespass by reporters on property. There is no reason why a standards body whose job is to maintain proper standards should not take cognisance of breaches of the law, and every reason why it should. Ethical standards often overlap with legal rules: for example the privacy standard presently includes cases of illegal interception and trespass.
- 7.59 In some cases, criminal proceedings in the court might ensue as well, but their function is different: criminal proceedings result in punishment, whereas the standards body is often as much about remedy (for example a take-down order) as about sanction. Moreover in some cases of infringement of the law, prosecution does not result for whatever reason: in such a case, if the NMSA could not take action nothing would happen at all.

Variations for type of medium

- 7.60 Sixth, in addition to those overarching principles there will need to be variations depending on the type of medium. There are different expectations of public service broadcasters than of bloggers. Film has a different impact than print. On-demand material with its element of choice is different from linear presentation. Sub-codes could and should recognise these differences. Bloggers, for example, could not always be expected to be constrained by any requirement of balance to the extent that mainstream media might, although any court reporting they did would obviously need to be balanced. But bloggers would be bound by the core principles. Those who found those too constraining would not be obliged to join up to the system.

News gathering

- 7.61 Seventh, the principles in a code should include not only principles about what content should or should not be published, but also principles about news gathering practices. For example, intimidation and harassment of subjects and secret filming should be dealt with, even if the information obtained is not published. The public interest should be carefully factored into such principles. Another possibility for consideration is whether there should be any requirement of prior notice to a person before a negative story about him or her is published: this has been the subject of some debate in the United Kingdom.⁴⁶⁴

464 Ward, above n 449, at [3.5].

Independent formulation

- 7.62 Finally, as we have indicated earlier, the government should not influence the content of the codes through statute or regulation or in any other way. They should be formulated by the NMSA as a truly independent body.

Complaints adjudication

- 7.63 A principal function of the NMSA will be to receive, investigate and determine complaints from members of the public about breaches of journalistic standards. We believe that anyone should be able to lodge a complaint even if they are not directly affected by the publication in question. The maintenance of proper media standards is an issue for everyone.
- 7.64 Complaints should be directed to the media agency itself in the first instance, with recourse to the NMSA if the complainant is not satisfied with the outcome. However, we do favour an exception to this in a case when the complainant can show good reason for not approaching the agency first. This may be because he or she reasonably believes that he or she is being victimised, or because of previous unsatisfactory experiences. This is also the view taken by the Australian Press Council.⁴⁶⁵
- 7.65 Complaints should be able to be made not just about material which has been published but also about unethical or illegal news gathering practice (including trespass, harassment and deception, for example).
- 7.66 We have heard it suggested that complaints should be able to be made before the event with a view to preventing publication of damaging material but we firmly believe this would be to go too far. Such an injunctive power would be an unjustifiable intrusion on freedom of expression. It would be a form of censorship.⁴⁶⁶
- 7.67 There would need to be an ability to filter complaints and reject, without the need for an investigation, those which are trivial, vexatious, improperly motivated or outside its jurisdiction.

Effective powers, remedies and sanctions

- 7.68 As we discuss in chapter 5, there are considerable discrepancies between the powers of the BSA and those of the Press Council. The sole sanction administered by the Press Council is a requirement that an adverse decision be published in the newspaper concerned. The BSA has more sanctions in its armoury. They include a requirement to publish apologies and corrections, an ability to take a channel off the air for up to 24 hours,⁴⁶⁷ or require a similar

465 Australian Press Council submission to the *Convergence Review*, above n 446, (October 2011) < www.dbcde.gov.au > at [D3].

466 The potential for injunctive relief would remain available through the courts.

467 This type or order has only been used once: see Broadcasting Standards Authority *Barnes and ALT TV Ltd-2007-029* (order for suspension of broadcasting for a five hour period).

period free from advertising.⁴⁶⁸ The BSA can also award compensation in the case of invasion of privacy and costs to the Crown and the complainant. At times, substantial amounts have been awarded under this last head.

- 7.69 We are told by the newspapers and the Press Council that the requirement to publish an adverse decision is effective.⁴⁶⁹ Editors do not like such negative publicity. We are sure this is the case, but note that some Press Councils elsewhere in the world have had considerable difficulty in enforcing that requirement in an effective way.⁴⁷⁰ This has been an issue of concern for the New Zealand Press Council in recent times as noted in the 2010 Annual report.⁴⁷¹
- 7.70 Submissions from the Press Council and the media industry accepted the case for a wider range of powers.⁴⁷² More teeth are needed. We recommend that a wider range of powers be spelled out in the contract between the NMSA and the media agencies who belong to it, and should include;⁴⁷³
- a requirement, as at present, to publish an adverse decision in the medium concerned, the NMSA having power to direct the prominence and positioning of this publication (including placement on website and period of display);
 - a requirement to take down specified material from the website;
 - a requirement that incorrect material be corrected;⁴⁷⁴
 - a requirement that a right of reply be granted to a person;⁴⁷⁵
 - a requirement to publish an apology, with the NMSA having power to direct the prominence and positioning of this; and

468 This type of order has only been used once: see Broadcasting Standards Authority *Diocese of Dunedin and 12 Others and TV3 Network Services Ltd-1999-125-137* (order for suspension of advertising for 2.5 hour period).

469 See Press Council *Annual Report* (2011) at 6.

470 Fielden *Regulating the Press*, above n 460, at [5.4].

471 Press Council *Annual Report* (2010) at 8.

472 Submission of the Press Council (March 2012) at 5; submission of APN (March 2012) at 3.

473 Compare recommendations of the Leveson Report, above n 447, Executive Summary at recommendations 15-20. See also The Hon R Finkelstein *QC Report of the Independent Inquiry into the Media and Media Regulation* (2012) at [11.74] – [11.76] [Finkelstein Report].

474 Rather than removing material from a website, it may be more effective to attach a permanent corrective statement to the material.

475 Some might argue that such a requirement might exert a “chilling” effect on the media, see Ward, above n 449, at [3.6]. But this is not a strong point in our view. Providing a right of reply can also be regarded as expanding speech rights. The new media thrive on to-and-fro. And New Zealand defamation law has long required a right of reply as a condition of retaining certain of the Defamation Act’s reporting privileges: Defamation Act 1992, s 18.

- a censure.
- 7.71 We also consider that, in exceptional cases, the NMSA should have the power to suspend or terminate the membership of a media agency. This would obviously be a very rare occurrence, and would be appropriate only if the agency was in serious and repeated non-compliance with the code or with decisions of the NMSA. Termination, or cancellation, is a standard remedy for serious breach of contract, and this should be no exception. We have noted that membership of the NMSA will be a mark of responsibility. Serious offending diminishes the brand, and termination may be necessary to protect the reputation of the NMSA and its other members.
- 7.72 However, the step should not be taken lightly, and we would expect that usually a number of warnings should precede the application of the sanction. Of course suspension or termination would not mean that the news agency concerned would be driven from the market or be required to cease publishing. It would continue as before, but without the benefit of the privileges accruing to membership of the standards body. The suspension or termination would also need to be proportionate to the breach and, in most cases, we would expect the media agency concerned to be able to seek reinstatement of their membership after a suitable period. We also expect that a decision to terminate or suspend membership (or to decline reinstatement) would be subject to judicial review.
- 7.73 We have considered whether there should be monetary sanctions such as fines, or remedies such as compensation. That question received a mixed response in the United Kingdom in the course of the Leveson Inquiry,⁴⁷⁶ but attracted some support even from people with strong media connections who advocated heavy fines for very serious misdemeanours. The Leveson Report does recommend such fines, and at a very high level.⁴⁷⁷ However, we do not presently support monetary sanctions, either damages or penalties.
- 7.74 Monetary sanctions would need to be very significant in the case of larger organisations. A fine of say \$5,000 is not likely to act as a meaningful deterrent to that sector of the media industry. More significant monetary sanctions, however, would be likely to lead to increased legalism in the handling of complaints, including the deployment of counsel and an adversarial process. It would be undesirable, in our view, to create incentives for litigious behaviour. The complaints system needs to be fast and flexible to be effective and therefore could be unduly weighed down by the spectre of financial sanctions. Our preference is for the power to impose monetary sanctions to be reserved for the courts in cases where the law has been broken.

⁴⁷⁶ Ward, above n 449, at [3.1].

⁴⁷⁷ Leveson Report, above n 447, Executive Summary at recommendation 19 (financial sanctions up to 1% of turnover with a maximum of £1million).

- 7.75 We considered whether monetary penalties might be appropriate in the case of flagrant or repeated offending. But we believe that a strong mark of disapproval, such as a censure, or a direction that an apology be published in a prominent manner as determined by the NMSA, or (as a last resort) suspension or termination, serves equally well as a deterrent. As noted above,⁴⁷⁸ so far in New Zealand there is no evidence of the sort of behaviour that has characterised some elements of the British press (giving rise to the Leveson Inquiry), which might have provided stronger justification for the introduction of monetary penalties.
- 7.76 We have carefully considered whether the BSA's existing power to award up to \$5,000 compensation for invasion of privacy should be replicated in the new authority. We have concluded not. It has never been clear why privacy alone carried that sanction. An individual can be equally hurt by inaccurate statements or unfair treatment. (Indeed unfairness is often an alternative ground of complaint to invasion of privacy.) We therefore prefer to treat invasion of privacy no differently from breach of any other standards. A person seriously aggrieved would still have the right to bring tort proceedings in court,⁴⁷⁹ and the mediation service we recommend may sometimes result in an agreed sum being offered to settle the matter, in privacy as well as other kinds of case.
- 7.77 An enhanced range of sanctions such as we have recommended above should have the beneficial effect that complainants who might have a potential cause of action in the courts, say for defamation, might be encouraged to take the route of an NMSA complaint rather than expend resources and time pursuing a court action. That happens now with the Press Council and BSA. It is to everyone's advantage.

Appeal

- 7.78 We believe that justice is better accorded to all those involved if there is a right of appeal from decisions of the NMSA. Because it will not be a state agency, that appeal could not be to a court. However, we support the concept of a media appeals body which would sit above the first instance authority. It would be similarly independent and appointments to it made by the same process. Currently decisions of the BSA can be appealed to the High Court; there is no right of appeal from the Press Council. The Advertising Standards Complaints Board is subject to appeal to an appeals authority comprising two representatives of the public and one representative of the media industry: it is this model that we advocate for the NMSA. In addition we think it likely that the decisions of the NMSA would be subject to judicial review in the High Court.

478 At [7.28].

479 In a number of New Zealand cases, ordinary "non-celebrity" plaintiffs have brought privacy actions in the Courts. See, for example, *Andrews v TVNZ* [2009] 1 NZLR 220; *C v Holland* [2012] NZHC 2155.

Mediation

- 7.79 We recommend that the NMSA should provide a mediation service to enable complainants and media agencies to settle cases which might otherwise proceed to court. The United Kingdom Press Complaints Commission currently operates such a system, and it has attracted favourable comment.⁴⁸⁰ Such a service could be a particular benefit in defamation cases, and perhaps privacy also. Defamation cases are well known for their procedural complexity and the time and expense required to proceed to a court hearing. The Defamation Act 1992 contains certain incentives to plaintiffs not to continue with large damages claims (for example the provisions for declarations, correction recommendations, and retraction or reply) but these have not been notably successful.⁴⁸¹
- 7.80 We note that in the United Kingdom, one proposal put forward to the Leveson Inquiry proposed a Media Standards Agency (MSA) which could among other things engage in alternative dispute resolution of defamation cases.⁴⁸² It would extend to an arbitration process which would make determinations binding on the parties. A news medium which participated in such a process and complied with the requirements of the MSA would have a complete defence to a defamation action unless the matter was published maliciously.⁴⁸³
- 7.81 In similar vein, the Defamation Act 2009 (Ireland) gives an advantage to a news medium belonging to the Press Council if it pleads a public interest defence to a defamation action (although even non-members gain an advantage if they have adhered to standards equivalent to those required by the Press Council).⁴⁸⁴ Such a concept has real attractions. It would provide an apparatus for complainants to settle genuine claims under the guidance of an experienced mediator and it would provide a real incentive for media to join and remain under the jurisdiction of the new authority.
- 7.82 However, some issues would arise in seeking to introduce a mechanism such as the Irish one. The full potential of such a system could not be realised without legislation. A plaintiff could bypass the system in the absence of

480 Ward, above n 449, at [2.6].

481 Defamation Act 1993, ss 24 – 27.

482 Media Regulation Roundtable “Final Proposal for Future Regulation of the Media: A Media Standards Authority” (Submission to the Leveson Inquiry, 7 June 2012); Leveson Report, above n 447, Part K at 1,697. See also the Joint Parliamentary Committee on Privacy and Injunctions, above n 447 at ch 5 at [209]; Ward, above n 449, at 26 – 29.

483 The Leveson Report, above n 447, did not include any specific recommendations about mediation but concluded that the proposed new press standards body should provide an arbitration process in relation to privacy, defamation and other media cases that would be a quick, fair and inexpensive system for resolving these disputes: Executive Summary at recommendation 22. While it would not be a mandatory process, it would be incentivised by way of costs advantages, with the courts having the power to impose costs penalties on non-members of the self-regulatory body: Executive Summary at recommendation 26.

484 Defamation Act 2009 (Ireland), s 26(2)(f) and (g).

statutory compulsion, and the “public interest” media defence which applies in Ireland could not be introduced here without an amendment to our Defamation Act.

- 7.83 We consider that something could be achieved along these lines even without a statute. A non-statutory system which simply made available an expert machinery for parties to settle disputes which might otherwise escalate to court proceedings could be attractive to potential litigants. It could be an incentive for media to support the standards body that we recommend.
- 7.84 Rule 7.79(5) of the High Court Rules provides:

A Judge may, with the consent of the parties, make an order at any time directing the parties to attempt to settle their dispute by the form of mediation or other alternative dispute resolution (to be specified in the order) agreed to by the parties.

The ready availability of a mediation service expert in media matters could be an attractive forum for parties for the purpose of this rule. We recommend that the NMSA should provide a mediation service and clear information about using it. However, mediation is not always a cheap process. Thought will need to be given as to how costs can be kept down. The availability of some NMSA members to act as mediators might be a possibility.

Oversight and Monitoring

- 7.85 Oversight is an important factor in the maintenance of standards. There are of course funding implications if this is to be another function of the NMSA, another reason for guaranteeing that funding levels remain adequate.⁴⁸⁵
- 7.86 Nevertheless, an effective standards body needs to be more than just an adjudicator. We think the NMSA should keep an overview of trends, and undertake research and conduct public surveys to monitor and draw attention to any developments or practices which could detrimentally affect standards.⁴⁸⁶ It should from time to time issue reports or advisory opinions. The Press Council has done this in the past,⁴⁸⁷ and the BSA often does so.⁴⁸⁸
- 7.87 We also recommend that each media agency that belongs to the NMSA should be required to report each year on the complaints it has handled itself. However this obligation to report would have to be confined to formal written complaints. If it were to include every phone-call received by an editor the task would become unmanageable.

485 See further at [7.102] below for discussion of a funding stream to support this function.

486 See Finkelstein Report, above n 473, at [11.56] – [11.57].

487 See Barker-Evans Review, above n 451, at 80, suggesting that ideally the Press Council’s funding would be sufficient to service the Press Council’s broader functions such as commissioning research.

488 Broadcasting Act 1989, s 21(d), (h). This is also a function carried out by agencies such as the Privacy Commissioner: Privacy Act 1993, s 13(1)(p).

Transparency and accessibility

- 7.88 The news media sometimes adopt their own set of professional ethics and standards, such as those developed by the journalists' union, and major newspaper companies. However, these professional codes and standards which guide journalistic practice can be difficult for the public to find. We also note that news websites do not provide obvious mechanisms by which the public can complain about content.
- 7.89 It is also critically important that the existence of the NMSA should be well known and that its functions and the means of making complaints be well advertised. The Broadcasting Act 1989 requires that broadcasters advertise the right to make complaints.⁴⁸⁹ The Press Council has for some time requested its members to advertise the complaints body but reports compliance has been "patchy". A recent survey conducted for the Law Commission showed that only 26 per cent of respondents had heard of the Press Council.⁴⁹⁰
- 7.90 There should be a requirement, imposed by contract on all members of the NMSA, to regularly publish a statement that they are bound by the NMSA's code and that complaints can be made about breaches of it. There should be clear directions as to where the code can be found. Members should also publicise their own complaints handling processes. Those statements should be prominent and contain clear contact details.⁴⁹¹
- 7.91 Access to the NMSA should be as easy and straightforward as possible. There should be clear and well publicised information on how to make a complaint. It should be easy and inexpensive to do so. The complaint processes should be as informal as possible. Most cases should be dealt with on the papers without a hearing, with hearings being reserved for matters of high public importance. There should be provision for dealing quickly with urgent complaints.
- 7.92 The NMSA should be transparent in its operations and decisions and should take all reasonable steps to keep the public informed:
- (a) First, the code of practice should be publicly available on the NMSA's website.
 - (b) Second, the decisions of the NMSA and the appeals body should be published online and be readily available. In this way precedent grows,

489 Broadcasting Act 1989, s 6(1).

490 Big Picture Marketing and Strategy Research Ltd *Public Perception of News Media Standards and Accountability in New Zealand* (summary of the online survey conducted for the Law Commission, April 2012) < www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media > [Big Picture Research].

491 The BBC < www.bbc.co.uk/aboutthebbc/insidethebbc/howwework/ >, the Guardian < www.guardian.co.uk/info/our-values > and the New York Times < www.nytc.com/press/ > are models of transparency in this regard.

and both editors and members of the public can have a clearer idea of how the standards work in practice.

- (c) Third, the NMSA should publish an Annual Report including financial statements and complaints statistics.
- (d) Fourth, the NMSA should publish and keep updated information about its organisational arrangements including:
- its constitution and any other corporate documents required to establish and maintain the NMSA;
 - a list of its complaints panel and appeals body members and the members of any other panel or committee established in relation to the governance, funding or operation of the NMSA;
 - a list of its members and copies of its contracts with members;
 - its funding contract with the relevant government department to carry out its monitoring function;⁴⁹² and
 - any memorandum of understanding entered into between the NMSA and the BSA in relation to their concurrent jurisdiction.⁴⁹³

Funding

- 7.93 In order to be effective in carrying out its functions, the NMSA will need to be adequately resourced. It will need to be funded principally by the industry. There is no other viable source. The Press Council is presently totally funded in this way. Yet this does create certain difficulties.
- 7.94 First, if a major industry body, perhaps one of the large newspaper companies or a major broadcaster, were to withdraw from the NMSA, the reduction in funding may put the very existence of the NMSA in jeopardy. This has happened on occasion overseas and has led to the demise or serious weakening of the Press Councils concerned.⁴⁹⁴
- 7.95 This can to some extent be remedied by tying all the media agencies to the NMSA by contract for a set term of say five years (although the NMSA should have the discretion to negotiate shorter term contracts with members who are individuals).⁴⁹⁵ The contract would not only deal with funding, but

492 See [7.104] below.

493 See [7.43] – [7.44] above.

494 Lara Fielden *Regulating for Trust in Journalism: Standards Regulation in the Age of Blended Media* (Reuters Institute for the Study of Journalism, University of Oxford and City University London, 2011) at 44–47.

495 This exercise is being undertaken by the Australian Press Council, and we understand that the New Zealand Press Council is likewise considering it. Lord Hunt, current chairman of the Press Complaints Commission (UK), also strongly supports this solution: see “Submission to the Leveson Inquiry from the Rt Hon the Lord Hunt of Wirral MBE” (8 June 2012).

- would bind the signatory agencies into the system of accountability and the sanctions that could be imposed. To promote funding stability, the member's right to terminate the membership contract before its term has expired should be limited to events such as insolvency or corporate merger. We would expect that if the system works as it should the contracts would be renewed on their expiry.
- 7.96 Second, if the industry is the sole funder there may be an incentive not to fund at an optimal level. In Australia, the Finkelstein Report noted the submission of a former chair of the Australian Press Council: “[t]he problem ... is that the press have an incentive not to give the APC too much money, because it would only be able to criticise them better.”⁴⁹⁶ We acknowledge that this is speculative, and that if media organisations are persuaded of the possible adverse consequences of the NMSA otherwise being seen to be ineffective, they may in fact be incentivised to fund it appropriately. However, we do note that levels of funding were the subject of comment in the 2007 review of the Press Council.⁴⁹⁷
- 7.97 Third, a difficulty with the funding being supplied solely by industry is that smaller organisations such as bloggers, if they are admitted to membership, are unlikely to be able to afford as much by way of subscription as their larger corporate colleagues. So those larger organisations may have bear the larger share of the funding burden, something they may be reluctant to do.
- 7.98 Finally, if the body is totally funded by industry the public perception might be unfavourable. The NMSA might be seen as too closely tied to the industry, just as total state funding may create a perception of state control.
- 7.99 So what is the solution? We proposed in our Issues Paper that while the majority of the funding should come from industry, the state should also make a contribution.⁴⁹⁸ The government's contribution to the BSA might be transferred to the new body. The state has an interest in a responsible media just as much as the public, and should be prepared to support it.
- 7.100 This suggestion of a state contribution was met with suspicion and disapproval by those media who made submissions on our Issues Paper. They feared that state funding would have strings attached, and that this would open the way to a degree of state control. That need not be so, and it is certainly not our intention.
- 7.101 It would need to be made very clear that any state contribution to the NMSA must not be accompanied by state influence. That is perfectly feasible. Judges are entirely paid by the state, and indeed are executive appointments, but there is not the slightest doubt that they are completely independent in exercising their judicial functions. In the media context, well regarded and

496 Finkelstein Report, above n 473, at 236.

497 Barker-Evans Review, above n 451, at 67.

498 Issues Paper, above n 438, at [6.76].

independent news agencies such as the BBC and the ABC are entirely state funded. So we continue to support a state contribution to the funding of the new authority.

- 7.102 The Australian *Convergence Review* also supports the idea of partial state funding, but believes it should be limited to specific purposes, for example to fund projects.⁴⁹⁹ We support that idea. If there is to be partial state funding it should be “ring-fenced” for research and surveys commissioned by the NMSA in the exercise of its oversight and monitoring function. This would leave the industry funding the complaints arm of the NMSA which performs the adjudicative functions, with the state making a financial contribution to essential ancillary functions that verify the continuing effectiveness of the authority on behalf of the public.
- 7.103 It is important that these ancillary functions receive adequate funding. As noted above, we also think there is a benefit in spreading the funding burden to limit any undue increase in the contributions required from media industry participants. Requiring the media industry to fully fund the NMSA may result in the cost of membership deterring potential applicants, especially from the new media sector.
- 7.104 We recommend that the state funding for the specific purposes of oversight and monitoring outlined above⁵⁰⁰ should be secured by a contract between the NMSA and the relevant government department. The terms of the funding contract should negate any perception of state influence over the operation of the NMSA.
- 7.105 As far as the media organisations’ own contributions are concerned, funding mechanisms will need to be worked out in detail. Levies should be based on revenue bands for commercial entities, with lower rates for individual communicators, and more nominal fees for low-profit or non-profit entities. The establishment of a detailed mechanism would be a function of the set-up body we discuss below.⁵⁰¹

The benefits of membership

- 7.106 The complaints regime outlined above has the potential to provide a significant level of accountability. Its success will depend in a large measure on the news media’s willingness to enter into contractual agreements to join the NMSA, comply with its rulings and to provide it with adequate resources. The quid pro quo is that those who are willing to do so will have access to a number of important benefits.

499 *Convergence Review*, above n 446, at 52.

500 At [7.86].

501 At [7.177] – [7.183].

Legal privileges and exemptions

- 7.107 Under our recommended regime, only those entities willing to join the NMSA would be eligible to access the news media's legal privileges and exemptions which we describe in chapter 2. This would be reflected in amendments to each of the statutes containing these media provisions. The privileges and exemptions are not insignificant. They include being able to attend a closed court, and to challenge suppression orders; and being exempt from the Privacy Act 1993, and some provisions of the Fair Trading Act 1986, the Electoral Act 1993 and the Human Rights Act 1993.
- 7.108 Some of these privileges and exemptions were included in the relevant Acts as a result of submissions by the media, itself an illustration of how much they mean to the media and how necessary they are to the effective dissemination of news. There are similar privileges and exemptions in the United Kingdom, but they are fewer and not as absolute or clearly defined. As one example, the Data Protection Act 1998 (the United Kingdom equivalent of New Zealand's Privacy Act 1993) exempts journalistic material, but only where publication of it is in the public interest, and where compliance with the Act would be incompatible with the journalistic purpose.⁵⁰² There are doubts about its exact scope.⁵⁰³ This is in contrast to the simple unqualified exemption in the New Zealand Privacy Act.⁵⁰⁴ Nor are the privileges of attendance in closed court as clear-cut. Entitlement to the New Zealand privileges and exemptions, as a whole, constitute a stronger incentive to the media.
- 7.109 A small number of submitters to our Issues Paper thought that it is wrong in principle, and perhaps even unconstitutional, to grant special legal privileges to some but not all the media. The creation of a privileged class was said by one submitter to be the equivalent of a kind of licensing.⁵⁰⁵ We are not persuaded by this argument. If it is wrong to favour one class of the media there are only two alternatives. One is to abolish the privileges altogether so that no one has them. That would limit access to important information and make it more difficult to disseminate the news, to the detriment of citizens.
- 7.110 The second alternative is to give the privileges to anyone who intends to publish the information thus derived. But a line has to be drawn somewhere. It would be unworkable if any member of the public who wishes to write something about a court case should have full access privileges even when the court is closed to the public, or that anyone could opt to be exempt from Acts such as the Privacy Act that otherwise apply to the general public. Provided those news content providers who fall within a set of defined criteria have the free right to opt into the system if they wish, and thus have access to the

502 Data Protection Act 1998 (UK), s 32(1).

503 Leveson Report, above n 447, appendix 4, at 1,910 – 1,912.

504 Privacy Act 1993, s 2(1), definition of “agency” (xiii).

505 Submission of Jim Tucker (4 March 2012). See also submission of Ross Johnston (12 March 2012); submission of David Harvey at 5; submission of Tech Liberty (12 March 2012).

privileges, with corresponding accountability for their responsible exercise, we cannot see that there is any constitutional difficulty.

“Brand” advantage

- 7.111 We believe, and this has been confirmed by some of the media personnel with whom we spoke, that the fact of belonging to the NMSA would be a mark of responsibility which distinguishes a member news medium from others, and gives it a reputational advantage. There are benefits in being demonstrably part of a group of media which have bound themselves to act responsibly and are prepared to be held to account. We see this as possibly a greater incentive than the legal privileges. It may be that some, like the BBC in Britain, the ABC in Australia and Radio New Zealand in this country, might say that they do not need such a brand because they have built such a reputation themselves independently of it. That may be so, but for most media we think the brand will be significant. The media are often undervalued in New Zealand. It should improve their reputation and standing in the community if they are visibly part of a system which places a high value on responsibility.
- 7.112 Moreover, the membership of the NMSA is likely to lead to a range of privileges beyond the strictly legal. On a day-to-day basis, news media and their journalists are given preferential access in a wide range of circumstances. This includes invitations to attend media conferences of public and private agencies, early embargoed access to media releases, invitations to meetings (such as shareholder meetings), police and emergency service media briefings, and so on. Membership might also be made a condition of membership of the Press Gallery in Parliament. Politicians and other powerful figures in society are often buffered from the media by advisers who determine which media outlets will have access to them. Most people and organisations prefer to deal with accountable media with whom there is a higher degree of trust. Membership of a regulatory system is a way of demonstrating that accountability.
- 7.113 It may be that members of the authority could “kite-mark” their publications to indicate to the public that they belong. This would differentiate the accountable from the rest so that the public, including organisations and members of government, can make an informed choice. One Danish industry commentator has argued that transparency is the key to ensuring that citizens:⁵⁰⁶

... know when they are on websites, mobile apps or newspapers produced and edited by professional journalists and editors, respectful of media law and ethical standards ... The professional media must separate themselves from the crowd by displaying a special obligation to credibility, fairness and independence.

We think this will be a significant inducement to join.

506 Lisbeth Knudsen, cited by Fielden in *Regulating the Press*, above n 460, at 81.

Exclusion from jurisdiction of proposed Communications Tribunal

7.114 In our Ministerial Briefing paper on harmful digital communication,⁵⁰⁷ we have recommended the establishment of a Communications Tribunal to provide the public with quick and efficient access to remedies when they have experienced significant harm as a result of digital publications. It was our recommendation that the news media would not be subject to the jurisdiction of that Tribunal, since such complaints would be dealt with by the new standards authority (NMSA).⁵⁰⁸ Publishers not subject to the NMSA would however be subject to the Communications Tribunal.

Access to public funding

7.115 The Broadcasting Commission (New Zealand on Air) funds broadcasting and the production of programmes to be broadcast; it can also make funds available for on-demand transmission. The Commission must require from recipients an undertaking that the programme will be consistent with the standards specified in section 4(1) of the Broadcasting Act. The majority of the recipients of funding are production companies, but the Commission requires that they have a contract with a broadcaster.

7.116 Many of the programmes funded are documentaries or factual programmes which would come within the definition of “news” for the purpose of the recommendations in this report.⁵⁰⁹ If our recommendations are accepted, the standards with which the recipients must undertake to comply in relation to “news” programmes would have to be those in the NMSA code. To ensure ultimate accountability for standards, the broadcaster with whom the recipient contracts should therefore be subject to the NMSA’s jurisdiction.

7.117 We recommend that the Broadcasting Commission should make it a condition of funding “news” programmes that the broadcaster with whom the recipient contracts be a member of the NMSA. This would serve to assure standards. It would also act as another incentive for broadcasters to join the NMSA.

Mediation

7.118 As discussed above we recommend that the NMSA should provide a mediation service to enable complainants and media agencies to settle cases which might otherwise proceed to court. This would be a clear advantage to member agencies.

507 Law Commission *Harmful Digital Communications: the Adequacy of the Current Sanctions and Remedies* (Ministerial Briefing Paper, 2012) at ch 5 [Briefing Paper]. The Briefing Paper and accompanying draft bill is attached in Appendix A.

508 At [61], [5.95]; Communications (New Media) Bill (attached in the Appendix to the Briefing Paper), cl 14(4)(b).

509 At [7.35] – [7.44]; R3.

WHO SHOULD BE SUBJECT TO THE NMSA?

Eligibility

- 7.119 Consistent with our principle of fostering media diversity, and harnessing the potential of the new media, we believe it is crucial that membership of the NMSA should be open to a broad church of media outlets.
- 7.120 We propose the following minimal criteria. First, the entity must meet our recommended definition of “news media”, which contains the following ingredients:⁵¹⁰
- a significant element of their publishing activities involves the generation and/or aggregation of news, information and opinion of current value;
 - they disseminate this information to a public audience;
 - publication is regular and not occasional.
- 7.121 Second, anyone wishing to join the NMSA must be willing to be accountable to its code of practice and complaints process, and to comply with the rulings of the NMSA.
- 7.122 These criteria would clearly admit all mainstream media and those publications which are presently subject to the Press Council or the BSA. The criteria would also admit a range of websites of which *Scoop*, *Yahoo!New Zealand*, *MSN NZ* and *InfoNews* are examples, and some of the more prominent bloggers. Our instinct is that most bloggers would wish to stay outside the system because of the greater freedom that would give them. A few might decide to opt for membership because of the privileges and the acknowledgment of responsibility that would give them. We understand that a few bloggers have already expressed interest in joining the Press Council.⁵¹¹
- 7.123 It has been said to us that such a system would potentially admit a very diverse range of publishers, which might dilute the brand associated with membership of the standards body. However, we support diversity. In such a dynamic environment it would be wrong to allow membership only to the traditional media. But we have considered whether there should be additional entry criteria for non-mainstream media such as requiring that an individual applicant must have a journalist qualification (say a Diploma of Journalism); or have been employed in a mainstream media organisation for a period of time; or have a record of compliance with the law.

510 See ch 3.

511 As at the date of this report, no decisions have been made by the Press Council relating to the admission of bloggers to its membership, although we understand that the Press Council has granted a three month membership to the web-based news site < www.allaboutauckland.com > . See ch 1 at n 57.

- 7.124 We are, however, reluctant to impose any such requirements. Some members of the new media contribute strongly and responsibly to public debate even though they have no journalistic training or experience. Conversely, some reporters and presenters on “mainstream” outlets, radio for example, are not trained journalists and push the boundaries as much as most bloggers. They have done so for years. We believe that the sanction of suspension or expulsion from membership which we outlined above is sufficient should new members prove unable or unwilling to comply with the required standards.
- 7.125 When an application is made by a media outlet to join the scheme, the NMSA will have to assess the application and decide whether it meets the criteria set out above. In some cases there might be a question of whether its news content is “significant” in a qualitative rather than purely quantitative sense. (The proportion of the total content devoted to news would be only one factor to be taken into account.) Likewise, there might sometimes be a question of what “regular” publication means. The NMSA would need to make the necessary judgements on those questions, which are essentially questions of degree. It might be expected to produce a set of guidelines to assist applicants. As recommended above, the NMSA should compile a list of the media agencies and outlets subject to its jurisdiction. The list should be published on its website. We would anticipate that an organisation aggrieved by a decision to decline an application to join the NMSA could bring an action for judicial review in appropriate circumstances.⁵¹²
- 7.126 There is a growth of offshore media being consumed locally. Indeed a few New Zealand journalists publish on such sites. There would seem to be no reason why an organisation situated outside New Zealand, a substantial part of whose news content was directed at a New Zealand audience, should not be able to join the NMSA. The contract of this organisation with the NMSA would be binding, even though enforcement might present procedural difficulties. But if such an organisation were minded to join there would seem to be no sensible reason for excluding it. Its very desire to conform to standards of propriety would in itself be sufficient reason for admission.
- 7.127 If such an organisation declined to join, it would not be subject to the NMSA, and it would be difficult to enforce New Zealand law against it. Nevertheless, the law could be more readily enforced against New Zealand residents contributing content to an overseas publication.

512 See *Stratford Racing Club Inc v Adlam* [2008] NZAR 329 at [53].

Aggregation and content creation

- 7.128 We received some argument in submissions that aggregators, as opposed to content creators, should not be subject to the jurisdiction of the NMSA.⁵¹³ Aggregators simply collect together items published elsewhere by others. They have no creative input. Yet there is no reason why aggregators should not be able to join if they wish to. As far as the public is concerned they are a source of news as much as any other provider. If what they publish on their site is inaccurate or harmful, the citizen suffers as much as if he or she had read it in a newspaper or seen it on television. The impact on the public is what matters.
- 7.129 Moreover the line between aggregation and content creation is an increasingly blurred one: most newspapers now contain as much material supplied by others as content they create themselves. Indeed some believe that the future shape of the news media is likely to be a hybrid of creation and aggregation. Similar in kind are online news message boards and forums where content is generated by citizens but is published by the website host. That is simply another form of aggregation, and the host would be eligible to join the NMSA if the criteria for entry were met.
- 7.130 However, we agree with Google's submission that a line must be drawn somewhere. The definition of "news media" should explicitly exclude what Google calls Online Content Infrastructure Platforms (OCIPs) such as YouTube, Facebook and Twitter:⁵¹⁴

OCIPs differ fundamentally from traditional content distributors and publishers such as television and radio. They host content that is uploaded by others, and play a minimal (if any) editorial or curatorial role in relation to the hosted content.

If the system is to be voluntary as we recommend it will not in the end matter much, but it is as well to have a definitional exclusion at the outset.

- 7.131 We should also be explicit that the Office of the Clerk at the House of Representatives should be excluded from any definition of "news media". The broadcasting of Parliament is a vehicle for transmitting the debates in the house. It is the channel by which the views of Members of Parliament can be conveyed to the public. What is said in Parliament is subject to Parliamentary privilege. Broadcasts are also subject to absolute privilege in defamation.⁵¹⁵ We believe that the Office of the Clerk should not be considered a "news medium" for regulatory purposes.

513 Submission of Google New Zealand Limited (14 March 2012) at 22, submission from Massey University School of Communication, Journalism and Marketing, submission of InternetNZ (12 March 2012) at [3.3.5].

514 Submission of Google New Zealand Limited (14 March 2012) at 20.

515 Defamation Act 1992, s 13. See also Standing Orders of the House of Representatives (2011).

Should membership be compulsory for some?

- 7.132 In this section we reach the conclusion that membership of the NMSA should be voluntary. We shall explain our reasons for arriving at this conclusion. This will be a change from the present position where all New Zealand broadcasters are legally bound to comply with the statutory standards set down in the Broadcasting Act. They are also compelled to be subject to the adjudication of the BSA. Under our proposal they would no longer be legally bound in this way.⁵¹⁶ Like all news publishers, their membership of the NMSA would be entirely voluntary. While we believe the incentives which attach to membership of the NMSA would be sufficient to attract responsible news media, we do need to address the risk that a major media company, including a broadcaster, could opt not to join.
- 7.133 We first ask whether there is any compelling case for some news producers to be *required* to join the NMSA. If so, it will be necessary to formulate a set of criteria for defining that category of news producers, a formidable task in itself. In the past, as we have discussed, this line between statutory regulation and voluntary self-regulation was based on physical format and the qualities inherent in these different mediums. The distinction was partly based on history, and partly on the fact that the consumption of newspapers was seen to involve more personal choice and control while linear broadcasting was seen to be a more invasive, public and persuasive medium requiring higher levels of accountability.
- 7.134 In the merged media environment these demarcations between “print” and “broadcasting” have become increasingly problematic. Instead, as the Australian reviews demonstrate, policy and law makers have looked to other content characteristics to help determine the strength of regulation required.⁵¹⁷ Precisely which characteristics are seen as critical in determining whether regulation should be compulsory or voluntary varies depending on the underlying purpose of the intervention. As we saw in the preceding chapter, some of the most common distinctions are drawn between:
- public service versus private providers;
 - professional or commercial versus amateur publishers;
 - audience size; and
 - linear free-to-air broadcasters versus pay TV.

As can be seen from this list, the thrust of regulation has shifted from format (alone) to a more nuanced set of characteristics which can be applied

516 Broadcasters of news would however remain subject to the BSA’s jurisdiction specifically in relation to the following standards: good taste and decency and the protection of children. See [7.44] above.

517 *Convergence Review*, above n 446, *Classification Review*, above n 457, Finkelstein Report, above n 473.

to content produced in any format and which essentially attempts to differentiate between professional mass news media and other content providers.

- 7.135 In our Issues Paper we considered the possibility of the type of tiered model which has been recommended by the Australian *Convergence Review*, applying the same type of demarcations – audience size, commercial publisher – to distinguish between those who would be subject to compulsory regulation and those who would simply have the opportunity to opt in.⁵¹⁸
- 7.136 Submissions to the Issues Paper on this matter were divided. The majority of news media submitters proposed that membership should be voluntary, at least for a trial period. Others were not so sure. Fairfax for example signalled doubts about whether such a system would work for all but the largest media organisations, relying as it would on incentives, and Radio New Zealand thought membership should be compulsory for those media which exercise editorial control over what they publish.⁵¹⁹ Most non-media submitters favoured a compulsory regime or a mix of compulsory and voluntary.
- 7.137 However in the era of merged media, we see practical and philosophical difficulties with attempting to *compel* compliance for some sectors of the news media based on measures such as “audience size” and “commercial status”. As we discuss in chapter 3, the web is a porous publishing environment which allows for the viral dissemination of content which may initially have had a very limited audience. It also allows those with little or no capital, and with no commercial intentions, to publish to a potentially global audience. In principle we see no reason why the accountability of an individual who generates or aggregates news and other information of a factual nature *for the purpose of public dissemination* should be any different than the accountability of a commercial entity.
- 7.138 We believe that in this fluid environment where there is likely to be continued convergence between new media, the mass media, internet infrastructure providers and the telecommunications sector, the goal should be to create a regulatory environment which strongly incentivises rather than compels compliance and where the focus is on environmental factors that foster these incentives to belong, rather than creating a threshold based on the size of market participants or their services which triggers compulsory membership.
- 7.139 We also believe there is a risk that compulsory compliance could act as a barrier to news making. For some sectors of the news media, providers could seek to reduce their news activities in order to avoid mandatory compliance. We prefer a system whereby compliance is purely voluntary and there are adequate incentives operating to create sufficient buy-in.

518 Issues Paper, above n 438, at [43] (option two).

519 See the submissions of Fairfax Media (9 March 2012); Radio New Zealand (9 March 2012).

Linear broadcasting

- 7.140 Some argue that, even in the converged era, there continues to be a public interest in imposing statutory regulation on linear broadcasting. There are a number of rationales for this, including the argument that content that is pushed out to the public in a simultaneous broadcast has a unique potency and that the majority of citizens still rely predominantly on the essentially passive reception of this pre-packaged news. In this context, some argue, the mode of delivery – simultaneous transmission to a mass audience – does continue to have a bearing on the regulatory model.
- 7.141 We agree that broadcast television remains a very potent medium. Our own and other research shows that despite the plethora of news sources now available, the majority of New Zealanders continue to depend on mainstream broadcasters for their news. And we have argued that this trust and dependence demands accountability. However, in our view, it is open to question whether it requires a different form of accountability simply because the information is packaged and live streamed at a scheduled time.
- 7.142 To begin with, although this content is *pushed out* to the public for simultaneous reception, the reality is that the public are no longer cast as passive recipients of the “six o’clock news”. Just as they can select which news websites to visit and which audio and video content to access, they can also exert considerable choice and control over how they receive the broadcast news. They are able to view it at the time and place of their choice. They can select which parts of it they watch and which device they receive it on. In this sense the fact that it was originally live streamed at a scheduled time becomes less significant.
- 7.143 It is also questionable whether broadcasters are in fact more influential than other news media. In New Zealand, as in Britain and Australia, newspapers’ newsrooms have tended to be better resourced than broadcast media, for whom news production accounts for only a small portion of the content they produce. As a consequence, newspapers and their associated websites have tended to set the news agenda. Although, for the reasons discussed in chapter 4, this may be changing as a result of the mounting pressures on newspaper businesses, it is arguable that newspapers and their websites continue to break the lion’s share of news in New Zealand.
- 7.144 It is also evident that, even over the period of this review, audio-visual content, including high quality live streamed video, is becoming an increasingly important component of newspaper websites, and this is only likely to escalate with the roll out of ultra-fast broadband over the next five years. This will further challenge the idea that linear broadcasters should be subject to compulsory regulation while others providing professionally edited audio-visual news content should not.
- 7.145 That said there is little doubt that, for the moment at least, a news story still depends on the oxygen of television exposure in order to have its full impact felt. However, as pointed out in the Finkelstein Report, there is something

perverse in arguing that a particular news medium requires stronger regulation because it is such an effective disseminator of information to the public – a function we have argued is fundamental to democratic societies.⁵²⁰

- 7.146 The flip side to this argument of course, is that such powerful news mediums also have the capacity to do real damage. But our analysis of New Zealand's broadcast news media does not reveal systematic ethical breaches. There is without doubt significant variation in standards observable between different broadcasters, reflecting their different brands and market positions, but no flagrant disregard for standards. It is of course arguable that this may be a result of the stronger regulatory environment and stronger penalties to which they are subject, however, analysis of complaints does not reveal a sustained upward trend over the past decade.
- 7.147 The Australian *Convergence Review* would leave the ABC and SBS outside the scope of their proposed regulator, because they operate under their own statutory charters.⁵²¹ In New Zealand, Radio New Zealand operates under the statutory charter and principles set out in section 7 of the Radio New Zealand Act 1995. Those principles replicate some elements of what we would expect to be in the code of a news standards body: impartial and balanced news coverage for example. They go further, by requiring high quality contribution to intellectual, spiritual and cultural development, and the stimulation of critical thought. They do not go as far in that they omit many elements one would expect to be in a code (for example, fairness, respect for privacy). The Act sets up no complaints mechanism.
- 7.148 We can therefore see no argument for excluding Radio New Zealand from membership of the NMSA. That would be to set it apart from its private competitors. It is presently subject to the BSA, and its submission to our Issues Paper supported the idea of a converged standards body.⁵²² Any difference in the expectations for a public service broadcaster can be reflected in the codes applied by the NMSA.⁵²³

The risks of an incentivised but entirely voluntary model

- 7.149 We acknowledge there are risks associated with an entirely voluntary model. These include the possibility that:
- the benefits attached to being subject to the new standards body will not be strong enough to off-set the compliance costs;
 - stronger sanctions imposed by the new standards body will prompt news media to defect or set up alternative models;

520 Finkelstein Report, above n 473, at [6.28].

521 *Convergence Review*, above n 446, at ch 4.

522 Submission of Radio New Zealand (9 March 2012).

523 See above at [7.60].

- the standards and compliance contracts required of the members will prove too onerous for smaller new media publishers.
- 7.150 The dominance of a small number of news media companies in New Zealand means the effectiveness of the new standards body would be seriously undermined if one of these companies opted not to join, or balked at the contractual agreements that they will be asked to enter into. Under our recommended body, the industry will not be able to determine the limits of its powers. This may prove too great a strain for voluntary compliance. This risk may be exacerbated by the pressures the industry is facing and the high cost of news production compared to entertainment content.
- 7.151 From a harms perspective there is also the risk that publishers who opt not to join the NMSA would be in a position to push the boundaries around privacy and good taste and decency without any external accountability.
- 7.152 It is also possible that new commercial alliances between different sectors of the news media would allow publishers to “free ride” on the back of media that belong to the standards body. For example, a broadcaster could opt out of the system but contract to purchase court coverage or political coverage from another media company which was a member of the NMSA. Such contracts to supply news content to competing media are already in existence in New Zealand.
- 7.153 Finally, there is the risk that new media publishers, including bloggers, may find compliance with the new standards body too restrictive and onerous, and so the model would fail in its intention to promote higher standards and greater diversity in the news media sector.
- 7.154 While these risks are real, we believe that the worst fears can be effectively mitigated by the other mechanisms to which non-members of the NMSA would be subject. Gross breaches of standards of decency will be caught by the Films, Videos, and Publications Classification Act;⁵²⁴ and as we suggest above, the BSA (or any other body that replaces it), should in its jurisdiction over entertainment also be able to deal with such serious transgressions.⁵²⁵ The Privacy Commissioner will be able to deal with privacy infringements, and the new Communications Tribunal which we recommended in our Briefing Paper would have the power to deal with breaches of principle which cause real harm to people.⁵²⁶ And of course there is always the avenue of court action if the law is broken.
- 7.155 However, we hope and believe that these measures will be unnecessary in relation to the big media players. As we have explained it is in their interests to join the NMSA, and we think the legal and commercial incentives should

524 Films, Videos, and Publications Classification Act 1993, s 3, definition of “objectionable”.

525 At [7.44].

526 Briefing Paper, above n 507, at [60(b)]; ch 5.

prove strong enough for them to do so. The NMSA may also be able to exert a degree of pressure on recalcitrant organisations by issuing invitations to them to join, and by naming them publicly if they decline those invitations.

Conclusion

- 7.156 In summary, we support an entirely voluntary regime backed by strong incentives (legal, branding and otherwise) allowing accountable news media to differentiate themselves from other content providers and providing the public with a measure of quality assurance. Our reasons are as follows.
- 7.157 First, we believe a voluntary, incentives-based regime is more consistent with the principles, factors and objectives we outline above.⁵²⁷ In this era of information abundance and increased consumer choice and control, regulation should be the minimum required to achieve a clear public purpose.⁵²⁸ With respect to news media regulation, those purposes are to provide a clear signal to the public about what content they can rely on as credible sources of news and information, and to provide effective remedies when the news media abuse their privileges and power.
- 7.158 Second, the internet is a game changer, reducing our reliance on dominant news sources and increasing levels of choice and control individuals can exercise, weakening the case for protective regulation.
- 7.159 Third, it is in the interests of society that there be a diverse range of providers of such information – and that the regulatory environment does not provide a disincentive to new entities nor a barrier to entry.
- 7.160 Fourth, the print media have never been subject to compulsory regulation and although they are now increasingly engaged in “broadcast-like” activities, we do not regard format as a compelling rationale for imposing higher standards of accountability.
- 7.161 Fifth, in the digital environment it could sometimes be difficult to enforce a compulsory regime, for example in the case of a website that went offshore to avoid capture.
- 7.162 Finally, and conclusively, the media themselves are more likely to respect and support a standards body and abide by its requirements if they have joined it by choice because they see advantages in it, rather than being otherwise coerced into doing so.
- 7.163 The incentives we have explained above are, we believe, strong enough to mean that it will be very much in the interests of the large media organisations to join the new standards body. Moreover New Zealand has an encouraging history of voluntary regulation. The ASA, which depends entirely on voluntary compliance, has demonstrated that it is possible to

527 At [7.14] – [7.16].

528 *Convergence Review, Emerging Issues*, above n 440.

combine meaningful sanctions and voluntary compliance. Although *recognised* in statute, the ASA has no statutory powers, but nonetheless succeeds in gaining the compliance of a wide range of advertisers even though its decisions can result in multi-million dollar advertising campaigns being pulled from the air.

7.164 All the main newspapers have joined the Press Council,⁵²⁹ and we are not aware of any moves by any of them to withdraw their membership. We understand that all the mainstream broadcasters have voluntarily joined OMSA, the new compliance body for the broadcasters' online presence. There would seem to us to be no reason why these agencies would be any less willing to join the NMSA. Our consultation with both the mainstream and new media through the course of this review lends weight to our belief that a voluntary regime is viable in the New Zealand context.

7.165 As far as new media are concerned, the statement of blogger Cameron Slater is of interest:⁵³⁰

Under this regime so long as I agree to submit to the rules, process and responsibilities as outlined then it is very simple, I will be classified as "news media".

It does need to be voluntary though. When I was asked about this by the Law Commission and subsequently by journalists my answer has been the same. By having it voluntary bloggers can choose to seek "certification", so to speak, and in doing so they are signalling that they are prepared to be responsible news and commentary providers. Likewise a blogger can choose to remain outside of the regime and suffer the impression of a lack of responsibility and the accompanying diminishment of the value of what they have to say. Professionalism and competition will ensure that bloggers and other new media people will voluntarily join the regime. Remaining outside will eventually marginalize those who opt to stay outside of regulation.

7.166 We therefore believe that membership of the NMSA should be voluntary in the first instance and that the matter should be reviewed after a year. If it is then found not to be working satisfactorily, stronger measures might be deemed necessary. That review should be conducted by the Chief Ombudsman or her nominee.⁵³¹

The position of non-members

7.167 There will be a very large number of new media who will not be within the jurisdiction of the proposed new standards body, either because they do not

529 The Press Council's *Statement of Principles*, footnote 4, lists the organisations and newspapers that have agreed to abide by the principles and provide financial support. The National Business Review accepts jurisdiction but does not contribute financially.

530 Cameron Slater "The Law Commission Report into New Media" (*Whale Oil Beef Hooked* blog, 12 December 2011) < www.whaleoil.co.nz > .

531 Other reviews have also suggested a review of any new arrangements and the progress of reform; see Joint Parliamentary Committee on Privacy and Injunctions, above n 447, at [187]; *Convergence Review*, above n 446, at 53.

meet the criteria for entry or because they elect not to join. There will be bloggers, website hosts, Facebook users and a myriad of others. These will continue unregulated and may continue to publish as they wish. They can be inaccurate in their facts, extreme, even outrageous, in their opinions and rude in their tone, without recrimination.

7.168 However, and very importantly, they will remain subject to the law, and will be subject to possible court action if they break the law.⁵³² Apart from that there will be truly free expression.

7.169 Nor is it true to say that the law will confer *no* privileges on them. The privileges by which the law exempts publishers from liability for defamation, and the “fair dealing” exemptions in the Copyright Act 1994, are not, and never have been, confined to the news media, although the news media are the most frequent beneficiaries of them. These “privileges” are simply incidents of the free speech rights which belong to everyone. We repeat what we said in our Issues Paper:⁵³³

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.

LEGISLATIVE IMPLICATIONS

7.170 The question is whether statute is required to bring about the reforms that we recommend. Our preferred option for an independent voluntary news standards body is one where the role of statute would be limited to recognising the new framework, without any degree of prescription on the creation or operation of the standards body whatsoever.

7.171 The news media strenuously resist the intrusion and imposition of statute into their affairs. Even the moderate statutory underpinning recommended by the Leveson Report⁵³⁴ sparked opposition. A concern is that if there is any statutory basis to a system of media oversight, politicians could find it too easy to “ratchet it up a little” later.⁵³⁵ We do not recommend a statutory body, nor any new statutory powers. In fact, we recommend that the role of statute be reduced with the removal of the jurisdiction of the statutory-based BSA in relation to news standards. But to achieve the necessary operating environment for a comprehensive, independent voluntary regime, based on

532 On the implementation of the recommendations in our Briefing Paper, above n 507, ch 5, they will also be subject to remedial but not punitive action if they cause significant harm to an individual by breaking the proposed law-based principles.

533 Issues Paper, above n 438, at [4.173].

534 Leveson Report, above n 447, Executive Summary at recommendations 27 – 33.

535 Ward, above n 449, at [2.12] citing James Harding, editor of *The Times*.

- incentives, rather than statutory compulsion, two consequential statutory amendments would be required.
- 7.172 The first is that it will be necessary to change the jurisdiction of the BSA by largely removing its jurisdiction over news and current affairs. The BSA is a statutory body and its jurisdiction can only be changed by statute. We anticipate that that would involve at least one additional consequential amendment: New Zealand on Air funding would be subject to a condition that the standards in the NMSA code would be observed, instead of, as now, the statutory standards in the Broadcasting Act.
- 7.173 The second primary statutory amendment would contain a list of the existing statutory provisions conferring media privileges and exemptions and amend each one to provide that the news media on which the privileges are conferred are those media which subscribe to a code of practice and are subject to the NMSA. This definitional amendment would mean that access to the statutory exemptions and privileges available to the media would be conditional on accountability to a code of ethics and a complaints process. But this does not mean that the NMSA will therefore be a statutory body. The NMSA will not be created by statute, neither will its processes or standards be prescribed by statute. It is simply that its existence will be *recognised* by statute.
- 7.174 That happens now. The Press Council is not a statutory body, but it is recognised by the Criminal Procedure Act 2011 in which it is provided that the journalists who have court attendance privileges under that Act include those from organisations which belong to the Press Council.⁵³⁶ Other non-statutory entities whose existence is recognised by statute include the ASA⁵³⁷ and Local Government New Zealand.⁵³⁸ This is all we mean by “recognition”.
- 7.175 Beyond “recognition” there are two possible types of “statutory underpinning” but we do not see need for either of them. First, it would be possible to have a system whereby statute simply mandated the creation of a standards body but left it entirely to the industry and others to establish it in their own way. That indeed is the way the profession of Chartered Accountancy is regulated in New Zealand.⁵³⁹ Another sort of “statutory underpinning” is contained in the Leveson Report: a list of the criteria the recommended media standards body should meet, and the creation of a recognition body to ensure that it does.⁵⁴⁰
- 7.176 We would not wish to go so far in New Zealand. If membership of the standards body is to be voluntary there is no need in our view for any greater statutory underpinning. We would prefer that the opportunity should

536 Criminal Procedure Act 2011, s 198(2)(a).

537 Broadcasting Act 1989, ss 8(2), 21(3).

538 Local Government Act 2002, ss 6(4), 259A(6).

539 New Zealand Institute of Chartered Accountants Act 1996.

540 Leveson Report, above n 447, Executive Summary at recommendations 27– 33.

be given to set up the new body, as the Press Council and the Advertising Standards Authority were set up, independently of any Act of Parliament. If such a system does not work after a reasonable trial it would be necessary to seek another alternative. The Australian *Convergence Review* has reached much the same conclusion.⁵⁴¹

HOW TO BRING THE NEW REGIME INTO FORCE

Independent working party

- 7.177 The question is how and when the NMSA should be set up. Presently the Press Council covers newspapers and newspaper websites. It has also recently assisted other websites to handle complaints – *Scoop*, *Yahoo!New Zealand* and *MSN NZ* for example. Being unconstrained by statute it is capable of extending its jurisdiction even further. It could for example even admit to membership small news websites and bloggers.
- 7.178 As a response to our Issues Paper the broadcasters, both television and radio, have created a new body, OMSA, to deal with the websites of broadcasters (and perhaps others).⁵⁴² The BSA remains seized of actual broadcasts. We commend the Press Council and the broadcasters for their initiative in filling some of the existing gaps. Both of their systems have similar objectives and modes of operation. The Press Council and broadcasters have been in discussion with each other to share ideas.
- 7.179 When OMSA has bedded in there will be two parallel self-regulatory systems doing the same job in relation to different platforms of delivery. A person who is adversely affected by material published in a number of media may have to lodge complaints with two bodies (or if it has been broadcast as well, with three). They may get different outcomes from each body. The jurisdiction of each complaints body is not the same and therefore gaps will remain. That seems less than consumer friendly. Nor is it economically efficient to finance separate personnel and administrative services. We maintain the view that there should be a single standards authority with a single point of entry. Convergence of the media themselves must inevitably lead to a convergence of a standards authority.
- 7.180 One option would be to recommend that OMSA and the Press Council should begin discussions with a view to merging their two organisations. That way there would be industry buy-in. But we conclude that this solution is not optimal. The parties may not be able to agree on all details. Moreover, such a process includes the risk that one party might be perceived as “taking over” the other. It is also past focussed and is liable to bring with it “baggage” from the former entities. We therefore consider it is necessary to focus on the

541 *Convergence Review*, above n 446, at 52 – 53.

542 Online Media Standards Authority (OMSA) < www.omsa.co.nz > .

establishment of a new body, albeit one which draws on the best features of the bodies which already exist.

- 7.181 The question is how to achieve this. Obviously the media industry needs to be heavily involved in that process of creation, but we think that, to achieve unarguable neutrality and objectivity, an establishment working party needs to be set up. We believe it should be chaired by the nominee of the Chief Ombudsman. The nominee should be an eminent, independent person such as a retired judge. The rest of the group should be appointed by the chairperson after consultation with the industry. They should include representatives of the industry and representatives of the public. Ideally the working party should not exceed seven persons, with industry representatives in the minority.
- 7.182 The working party will obviously need to consult widely. Those consultations should include the Press Council, OMSA and the BSA. It will be essential to draw on the experience of those bodies. Industry acceptance of the eventual model will also be crucial. Without wishing to be prescriptive, we envisage that the tasks of the working party would be as follows:
- It would draw up the constitution of the NMSA, providing for both its management and its adjudication functions.
 - It would lay down the manner of, and the criteria for, appointing the members of the NMSA, in accordance with the guidelines set out earlier in this chapter. We believe that all appointments should have the involvement of the Chief Ombudsman or her nominee.
 - It would itself appoint the foundation members of the NMSA.
 - It would draw up a mechanism for industry funding of the NMSA.
 - It would draw up model forms of contract to be entered into between the NMSA and members of the news media electing to belong to it.
 - It would advise, if necessary, on the initial funding contract with government to support the NMSA's oversight and monitoring functions.
- 7.183 When the NMSA has been set up it would replace the Press Council, OMSA and substantially assume the BSA's jurisdiction over news and current affairs.⁵⁴³

Legislative amendments

- 7.184 As we have indicated earlier, our hope is that this can be accomplished without any direct statutory intervention. The media will be better respected if it can. Yet, as we have said, the nature of the exercise requires at least

543 At [7.44] above, we recommend that the BSA retain its jurisdiction over news in relation to standards of good taste and decency and protecting the interests of children.

recognition by statute, because the definition of “news media” in the various statutes confirming privileges assumes the existence of such a body.

- 7.185 We propose a process of the following kind. An Act should be passed containing two provisions. The first would largely remove the jurisdiction of the BSA over news and current affairs.⁵⁴⁴
- 7.186 The second would be a section, and an accompanying schedule, amending all the Acts conferring statutory privileges specifically on the news media, by defining “news media” as organisations subject to (a) a code of ethics and (b) the complaints process of “the News Media Standards Authority”. This would be defined in such a way to make it clear that there is to be only one such body. The Defamation Act 2009 (Ireland) is a useful precedent.⁵⁴⁵
- 7.187 But the coming into force of the Act would be delayed. A commencement section would provide that the provisions would come into force by Order in Council when the NMSA had been set up. This means that the state would not *create* NMSA; it would simply *recognise* it for the purpose of the statutory media privileges and exemptions. It would do no more than the Criminal Procedure Act already does in respect of the Press Council, and schedule 1 of the Defamation Act does in respect of a body safeguarding the standards of the press.⁵⁴⁶ Moreover the statutory recognition would itself not become operative until after NMSA had already been set up. Its setting up would be entirely independent of statute.
- 7.188 As we indicated earlier, the setting up and operation of the converged authority should be reviewed after a period of one year. That review should be undertaken by the Chief Ombudsman or her nominee. If there were found to be inadequacies or failures, or if insufficient progress had been made, the possibility of more directive intervention would then have to be considered.

RECOMMENDATIONS

A new converged standards body

- R1 A news media standards body (the News Media Standards Authority or NMSA) should be established to enforce standards across all publishers of news, including linear and non-linear broadcasters, web-based publishers and the print media.
- R2 The NMSA should assume the functions of the Press Council, the Broadcasting Standards Authority (BSA) and the Online Media Standards Authority (OMSA) with respect to news and current affairs.

544 We recommend however at [7.44] above that the BSA retain its jurisdiction over news in relation to standards of good taste and decency and protecting the interests of children.

545 Defamation Act 2009 (Ireland), s 44.

546 Defamation Act 1992, sch 1, Part 2, cl 7.

- R3 “News” should be interpreted broadly to include news, current affairs, news commentary and content which purports to provide the public with a factual account and involves real people.

Eligibility

- R4 Membership of the NMSA should be available to any person or entity (whether within New Zealand or elsewhere) that meets the following criteria:
- (a) a significant element of their publishing activities involves the generation and/or aggregation of news, information and opinion of current value;
 - (b) they disseminate this information to a public audience; and
 - (c) publication is regular and not occasional.
- R5 The following entities should not be considered to be carrying out an activity that meets the criteria set out in R4:
- (a) Online Content Infrastructure Platforms (OCIPs);
 - (b) The Office of the Clerk of the House of Representatives.

Membership

- R6 Membership of the NMSA should be voluntary.
- R7 Any person or entity that the NMSA determines to be eligible for membership shall become a member by entering into a contract with the NMSA.
- R8 Contracts between the NMSA and its members should include:
- (a) the complaints process by which the members will be bound;
 - (b) the powers of the NMSA, with members being bound to comply with the exercise of any such powers;
 - (c) the annual financial contribution to be paid by each member to the NMSA;
 - (d) the obligation on members to regularly publicise the NMSA’s code of practice or statement of principles, the NMSA’s complaints process and their own complaints handling process.
- R9 Contracts between the NMSA and its members should have a term of at least five years and should allow only limited rights for the member to terminate the contract before its expiry such as insolvency or corporate merger. In its discretion the NMSA should be able to enter into membership contracts for shorter terms with individuals.

The “news media” – a legal definition

- R10 The various statutes which currently confer privileges or exemptions specifically on the news media should be amended to ensure that in each instance the term “news media” is consistently defined as meaning entities which meet the following statutory criteria:
- (a) a significant element of their publishing activities involves the generation and/or aggregation of news, information and opinion of current value;
 - (b) they disseminate this information to a public audience;
 - (c) publication is regular and not occasional; and
 - (d) the publisher must be accountable to a code of ethics and to the NMSA.

Independent structure and governance

- R11 The NSMA should be genuinely independent of both the government and the news media industry, both in relation to the adjudication of complaints, and in relation to its governance and management:
- (a) The chairperson should be a retired judge or other respected, experienced and well known public figure, appointed by the Chief Ombudsman.
 - (b) A majority of complaints panel members should be representatives of the public who are not from the media industry, with a minority having industry experience who are representative of both proprietors and journalists, but not including currently serving editors.
 - (c) One complaints panel member at least should have expertise in new media and digital communications technology.
 - (d) Complaints panel members and the chairperson should be appointed for fixed terms.
 - (e) The NMSA should have separate legal existence, preferably in the form of an incorporated society. Should the structuring of the NMSA include a governance or management board or panel, that board or panel should not be controlled by media industry appointments.
- R12 The NMSA should have the following functions:
- (a) to formulate a code of practice;
 - (b) to adjudicate complaints about breaches of the code;
 - (c) to monitor and report on trends in media practice and audience satisfaction; and
 - (d) to mediate disputes about matters which otherwise might proceed to court.
- R13 The NMSA’s constitution should expressly recognise and require the NMSA to act in accordance with the guarantee of freedom of expression in the New Zealand Bill of Rights Act 1990.

Code of Practice

- R14 The code of practice should clearly set out the standards against which the conduct of the news media is to be judged and which will form the basis of complaints from the public:
- (a) The content of the code should be formulated by the NMSA or by a committee set up by the NMSA, with no government influence on its content.
 - (b) The code should be formulated after consultation with the industry and the public.
 - (c) The code should capture to the fullest extent possible the traditional tenets of good journalism (including accuracy, correction of error, separation of fact and opinion, fairness to participants, good taste and decency, compliance with the law, the protection of privacy and the interests of children, and principles about news gathering practices) in a way which meets the demands of modern New Zealand society.
 - (d) The code should expressly recognise the guarantee of freedom of expression in the New Zealand Bill of Rights Act 1990 as a guiding principle and strive to maintain an appropriate balance between this interest and other important interests such as privacy, while making clear that the code's principles may be overridden by the public interest in publication. Guidance should be provided on what the "public interest" means.
 - (e) Sub-codes should provide for the differing public expectations of different publishing mediums.
 - (f) The code should be available on the NMSA's website. It should be reviewed on a regular basis.

Complaints process

- R15 The complaints process should include the following features:
- (a) Anyone should be able to lodge a complaint that a standard or principle has been breached, even if they are not directly affected by the breach. Complaints about unethical conduct should also be accepted for adjudication even if the code does not contain any express provision about such conduct.
 - (b) Complaints should first be directed to the media agency that is the subject of the complaint for resolution, with recourse to the NMSA if the complainant is not satisfied with the outcome.
 - (c) Complaints may be referred directly to the NMSA if there is good reason for not first approaching the media agency that is the subject of the complaint.
 - (d) Complaints may be made about breaches of standards or principles relating to both publication and news gathering practices.
 - (e) The NMSA should decline to consider complaints it considers to be trivial, vexatious, improperly motivated or outside its jurisdiction.

- (f) Access to the NMSA should be as easy and straightforward as possible for members of the public. The NMSA should provide clear information on how to make a complaint.
- (g) Complaint processes should be as informal as possible.
- (h) Complaints should generally be dealt with on the papers, with hearings being reserved for matters of high public importance.
- (i) There should be provision for dealing quickly with urgent complaints.
- (j) Decisions on complaints should be published online, and be readily available.

R16 Each member of the NMSA should report annually to the NMSA on its own handling of formal complaints.

Powers

R17 The powers of the NMSA should include:

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

R18 In relation to complaints about unethical conduct for which the code makes no express provision, the powers of the NMSA should be limited to issuing a declaration that such conduct is undesirable.

Oversight and Monitoring

R19 The functions of the NMSA should include monitoring trends, undertaking research and conducting public surveys to assess and publicise any developments or practices which could detrimentally affect news media standards as well as issuing reports and advisory opinions. The results of the exercise of this function should be published promptly and be available to the public on the NMSA's website.

Mediation

R20 The NMSA should establish a mediation service to which cases could be referred as an alternative to court action and should provide clear information about using the mediation service.

Appeals

R21 A media appeals body should be established to hear appeals from decisions of the NMSA about complaints. The appeals body should comprise two representatives of the public and one representative of the media industry, though not a currently serving editor. The NMSA should provide clear information about the appeals process.

Funding

R22 The NMSA (including the appeals body and any other related boards, panels or committees of the NMSA) should be funded by members.

R23 In addition, state funding should be provided to the NMSA specifically and only for the purpose of meeting the function set out in R19. The NMSA should enter into a funding contract with the relevant government department to carry out this function on terms that negate any perception of state influence over the operation of the NMSA. The contract should be for an initial term of at least five years.

Transparency

R24 The NMSA should be transparent in its operations and decisions and to achieve this should take all reasonable steps to keep the public informed. As well as publishing the membership criteria, the code of practice or statement of principles and guidance, information about its complaints process (including appeals) and mediation service, its decisions and the results of its research and public surveys carried out under its monitoring function, the NMSA should make available on its website (and keep updated):

- (a) its constitution and any other corporate documents that are required to establish and maintain the NMSA;
- (b) its Annual Report (including financial statements) and annual complaints statistics;
- (c) a list of its complaints panel and appeal body members and the members of any other governance, funding or other panels or committees;
- (d) a list of members;
- (e) its contracts with members;

- (f) its funding contract with the relevant government department to carry out its monitoring function; and
- (g) any memorandum of understanding between the NMSA and the BSA in relation to their concurrent jurisdiction.

Transition and consequential amendments

- R25 An establishment working party should be set up, chaired by an eminent independent person nominated by the Chief Ombudsman. The rest of the working party should be appointed by the chairperson, after consultation with the news media industry. Industry representatives should be in the minority. The working party should not exceed seven members.
- R26 The working party should consult widely, including with the BSA, the Press Council and OMSA.
- R27 The tasks of the working party should include:
- (a) drawing up the constitution of the NMSA, providing for both its management and adjudication functions;
 - (b) laying down the manner of, and the criteria for, appointing panel members of the NMSA in accordance with R11 and ensuring that the Chief Ombudsman or her nominee has an involvement in the appointment process;
 - (c) appointing the foundation panel members of the NMSA, including foundation members of the complaints panel and the appeals panel;
 - (d) drawing up a mechanism for industry funding of the NMSA;
 - (e) drawing up model forms of contract to be entered into between the NMSA and members of the news media electing to belong to it; and
 - (f) advising, if necessary, on the initial funding contract with government to support the NMSA's oversight and monitoring functions.
- R28 An amendment act should come into force once the NMSA has been established to clarify that the benefit of the media privileges contained in the Privacy Act 1993, the Fair Trading Act 1986, the Electoral Act 1993, the Human Rights Act 1993 and the courts legislation is conferred on those members of the news media that are members of the NMSA.
- R29 Public funding of news and current affairs through the Broadcasting Commission should be subject to a condition imposed by the Commission that the disseminator of any resulting production be a member of the NMSA.
- R30 The BSA should retain its jurisdiction over news and current affairs with respect to the good taste and decency and protection of children standards only. It would have concurrent jurisdiction with the NMSA over those standards.

- R31 The Broadcasting Act 1989 should be amended to alter the jurisdiction of the BSA with respect to news and current affairs in accordance with R2 and R30, with such amendment taking effect once the NMSA has been established.
- R32 The operation of the NMSA should be reviewed by the Chief Ombudsman or her nominee after it has been in existence for 12 months.

Chapter 8

Entertainment

INTRODUCTION

- 8.1 Our terms of reference asked us to investigate the news media: how the law defines news media these days, and whether changes need to happen to the way the news media are held accountable. Accordingly in this report we have concentrated on the news functions of the media – that is to say on their functions of gathering and disseminating news, and providing news commentary to the public. In other words we have been concerned with the media as the fourth estate in our democracy and with the upholding of proper standards of journalism.
- 8.2 Yet, as we noted in the previous chapter, many of our media, especially the broadcast media, engage in much more than news and commentary on news. They broadcast content in a variety of genres that provide *entertainment*. Increasingly, the boundaries between news and current affairs programming and the provision of entertainment content are blurring with programmes such as *7 Days* (TV3) and *Seven Sharp* (TVOne).
- 8.3 Entertainment involves different considerations from “news”.⁵⁴⁷ The standards of proper journalism in relation to news mainly involve such matters as accuracy, correction of error, separation of fact and opinion, fairness to interviewees and subjects, objectivity, and respect for privacy. Taste and decency may sometimes be involved as well. However, entertainment standards are almost entirely concerned with taste and decency. They are about curbing the publication of offensive, disturbing or excessively explicit matter. Most importantly, they are about protecting children and young persons.
- 8.4 In this report we have not dealt with the subject of entertainment standards in depth as it is beyond our terms of reference. Yet this subject is in similar need of examination. The explosion of new media and the phenomenon of convergence that we cover in this report are highly visible in this sector of the media as well.

547 How one draws the line between “news” and “entertainment” is discussed in ch 7 at [7.36] – [7.44].

- 8.5 The growing overlap between news and entertainment content means that we have had to at least consider the current regulatory treatment of entertainment content. We do not make recommendations about it in this report, except to say that it should be the subject of separate review, to touch on some matters which we believe worthy of further investigation, and to give some indication of the challenges ahead in this area.

THE PRESENT POSITION

- 8.6 Presently entertainment content is dealt with in the following ways. First, the Broadcasting Standards Authority (BSA) has oversight of both news and entertainment content that is broadcast to the public. The Broadcasting Act 1989 provides that “the observance of good taste and decency” and “the maintenance of law and order” are among the standards to be observed by all broadcasters.⁵⁴⁸ The BSA codes expand on those standards. In particular they require warnings where content is likely to disturb or offend; they require broadcasters to be mindful of the interests of children and to observe watershed viewing times; and they require care and discretion when dealing with violence.⁵⁴⁹
- 8.7 The Broadcasting Act further provides that if a film has been classified under the Films, Videos, and Publications Classification Act 1993, a broadcaster must not broadcast the film contrary to the classification.⁵⁵⁰ Complaints may be made to the broadcaster and the BSA if these standards are not met.⁵⁵¹ The BSA has a special power in relation to a programme series. If it decides that a particular programme in a series is objectionable, it can require information about further programmes in the series, and can require that a particular programme not be shown, or that the series be cancelled.⁵⁵²
- 8.8 If news is to be removed from the BSA’s jurisdiction as we recommend in this report,⁵⁵³ the BSA would continue to have jurisdiction over programmes which do not fall into the category of “news”. However, as we have seen earlier, the BSA’s jurisdiction under the Broadcasting Act is tightly constrained. It can deal only with broadcasts as that term is defined in the Act; that definition does not include programmes available on-demand. A large amount of content on the internet is thus beyond the reach of the BSA, even if it is accessible from a broadcaster’s own website.

548 Broadcasting Act 1989, s 4(1).

549 See for example, the BSA Free-to-Air Code of Television Broadcasting Practice, standards 1, 9 and 10.

550 Broadcasting Act 1989, s 4(2).

551 Section 6.

552 Section 13A.

553 Ch 7, R2.

- 8.9 Second, the Films, Videos, and Publications Classification Act sets up the Classification Office whose function is to classify publications, including films. Material may be classified as objectionable, or restricted to persons of a certain age or a specific class.⁵⁵⁴ “Objectionable” is fully defined. It involves an element of harm to the public interest.⁵⁵⁵ The Act also provides that films, including videos, that are to be supplied to the public must be labelled, although this does not include films of news.⁵⁵⁶
- 8.10 The Act also creates a number of offences.⁵⁵⁷ In particular, it is an offence to supply or distribute an objectionable publication or to supply or distribute a restricted publication otherwise than in accordance with its classification.⁵⁵⁸
- 8.11 The mandate of the Classification Office is broad. In addition to films, books and other printed material the word “publication” is widely defined as extending to:⁵⁵⁹
- (d) a thing (including, but not limited to, a disc, or an electronic or computer file) on which is recorded or stored information that, by the use of a computer or other electronic device, is capable of being reproduced or shown as 1 or more (or a combination of 1 or more) images, representations, signs, statements or words.

That is capable of extending to content on the internet.

- 8.12 The Classification Office’s website gives this information about its jurisdiction:⁵⁶⁰

Internet-sourced publications are subject to New Zealand classification law when they are downloaded to a computer in New Zealand, and films and games supplied to the New Zealand public via download must comply with New Zealand law.

The Classification Office can classify publications such as a printout of a webpage; images, moving images or files from a website; emails and chat logs.

The Classification Act has jurisdiction over websites if they are operated or updated from New Zealand

... Chat logs are subject to the law and chat rooms likely to be of concern are monitored by the Department of Internal Affairs. The Office has classified clips from YouTube as well as other material from websites.

554 Films, Videos, and Publications Classification Act 1989, s 23(2).

555 Section 3.

556 Sections 6, 8(1)(g).

557 Part 8.

558 Sections 123(1)(d), 125(1)(a).

559 Section 2.

560 Office of Film and Literature Classification “Classification in New Zealand – Classification and the internet” < www.censorship.govt.nz > .

- 8.13 In serious cases, prosecutions are possible and occasionally happen. But the jurisdiction of the Classification Office is limited. All it can do is to classify: it is a censorship office. It can receive and consider classification requests, but it is not a complaints body as such, and has no complaints jurisdiction.

THE PROBLEM REQUIRING ATTENTION

- 8.14 Both Acts are around 20 years old, although the Films, Video and Publications Classification Act has been updated several times, most significantly in 2005. The advent and remarkable acceleration of the new forms of communication have created a sea change in the way the public access entertainment content. As we said in the Issues Paper:⁵⁶¹

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.

In other words the phenomenon of convergence is as much an issue here as it is in the news context.

- 8.15 There are some clear anomalies. Here are two examples. First, films have to be classified and labelled before being distributed to consumers.⁵⁶² But a “film” is defined as “a material record”, which excludes live streamed material.⁵⁶³ So a film (which includes a DVD) showing explicit material is treated differently from a live streamed performance of exactly the same content.
- 8.16 Second, “exhibiting” a film expressly excludes broadcasting it.⁵⁶⁴ So films shown on television do not have to be classified or carry labels. (In fact broadcasters often do put up classifications and labels sometimes devised by themselves). Television series are different again, in that their first release is usually on television, even though a DVD may be released later. If that happens the DVD has to be classified and labelled, whereas the original broadcast does not. The system has simply failed to keep pace.
- 8.17 While the Classification Office does have powers of classification of “publications”, the sheer quantity of the material and the origins of much of it from overseas make this a very limited tool. The Australian Law Reform Commission has given this graphic summary:⁵⁶⁵

561 Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011), at [6.137a] [Issues Paper].

562 Films, Videos, and Publications Classification Act 1989, s 6.

563 Section 2.

564 Section 2, definition of “exhibit to the public”.

565 Australian Law Reform Commission *Classification – Content Regulation and Convergent Media* (ALRC R118, 2012), at 25-26 [Classification Review].

The volume of media content available to Australians has grown exponentially. There are over one trillion websites, hundreds of thousands of 'apps' available for download to mobile phones and other devices, and every minute over 60 hours of video content is uploaded to YouTube (one hour of content per second).

- 8.18 As far as the Broadcasting Act is concerned, the BSA can deal only with broadcast material. As we have noted, it has no jurisdiction, for example, over content made available by internet protocol television unless it is live streamed. Nor does it have jurisdiction over online on-demand streaming services such as Quickflix which has recently entered the New Zealand market.⁵⁶⁶ The BSA's jurisdiction is tied to a past of platform-based regulation.
- 8.19 A review of this new and complex environment is necessary to see what is needed and, just as importantly, what is feasible. The current legislation based on the mode of content delivery is out of date. New forms of access and convergence are creating increasing problems. Technology is outstripping the law.

Australian Classification and Convergence Reviews

- 8.20 In Australia, two recent reviews have produced helpful reports. In February 2012 the Australian Law Reform Commission produced a report entitled "*Classification – Content Regulation and Convergent Media*".⁵⁶⁷ The report emphasises the importance of platform neutrality in any new system. Given the vast amount of material available the review concludes that it is only feasible to classify feature films, television programmes and computer games. For the rest, the recommended new Classification of Media Content Act should provide for the reasonable steps different types of content provider might be expected to take to restrict access to unsuitable material.
- 8.21 The *Classification Review* recommends a new single regulator which would have primary responsibility for regulating the new scheme. That regulator would not be concerned with news or current affairs. Its functions would include monitoring and enforcing compliance with classification law; handling complaints about classification; and liaising with relevant Australian and overseas agencies. It would have the power to pursue civil penalty orders against content providers. In its monitoring function, it would have the power to commission relevant research.⁵⁶⁸
- 8.22 Also in 2012, the Australian *Convergence Review* reported.⁵⁶⁹ This report separates out news, and commentary on news, from other content. In relation

566 < www.quickflix.co.nz > .

567 *Classification Review*, above n 565.

568 Australian Law Reform Commission *Classification – Content Regulation and Convergent Media* (ALRC R118, 2012), Summary Report.

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

to the first it recommends a self-regulatory news standards body. In relation to other content it recommends a new communications regulator to be responsible for all compliance matters related to media content standards. That would include administering the new national classification scheme proposed by the Australian Law Reform Commission. It would have jurisdiction over organisations which meet a quantum threshold in terms of both audience and revenue.⁵⁷⁰

- 8.23 The regulator would have a general power to set content standards where there was a need for regulatory intervention. It would also be able to set standards for children's television content. Such standards could take into account how the content is accessed by users, because as the report says "[t]he principle of technology neutrality does not demand that standards be applied in an identical way to all services."⁵⁷¹ Where the regulator is responsible for approving and enforcing content standards, it should have direct enforcement powers and there should be a graduated range of effective remedies. It should have the discretion to determine the most effective complaints procedures.

A New Zealand Review

- 8.24 It is beyond our terms of reference to conduct a review of the entertainment sector. But such a review is urgently needed.⁵⁷² A solution needs to be found to the anomalies which have arisen in the present system. It needs to be brought up to date.
- 8.25 We do not wish to foreshadow the outcome of any such review, but suggest that it should take the following matters into account:
- Adults should be able to make choices as to the content they wish to view. Clear information is important in enabling that choice.
 - Children and young persons should be protected as far as possible from access to unsuitable content.
 - Content which is objectionable in that it is harmful to the public interest should be unlawful and all practical steps should be taken to prevent access to it.

570 Executive Summary at ix, describing entities which meet the quantum threshold as "content service enterprises".

571 At 56.

572 A review of content regulation was to be considered by the government last year, although we understand that this decision was deferred pending the outcome of this review: see Ministry for Culture and Heritage "Briefing for the incoming Minister of Broadcasting" (December 2011) at 8-9. See also Ministry for Culture and Heritage *Broadcasting and New Digital Media: Future of Content Regulation* (Consultation Paper, 2008); Ministry for Culture and Heritage and Ministry of Economic Development *Digital Broadcasting - Review of Regulation, vol 1 - the implications for regulatory policy of the convergence between broadcasting, telecommunications and the internet* (Research Paper, January 2008) and *vol 2* (Discussion Paper, 2008).

- Regulation should be platform-neutral. Any regulatory regime needs to be broadened to take account of the expanded digital environment and its focus should therefore be on content, rather than on the format or mode of delivery. Broadcasts, films, serials and other forms of entertainment should be dealt with in a consistent way.
 - There should be a channel through which members of the public can complain about unsatisfactory content.
- 8.26 We believe the idea of a single “converged” regulatory body merits close consideration, just as we have recommended for the news sector. This would involve creating a body which would combine the functions of the Office of the Chief Censor and the BSA and extend to fill gaps for which there is presently no solution.
- 8.27 In this report we recommend an independent voluntary standards body for news and commentary on news.⁵⁷³ We have explained that independence, in particular independence from government, is vitally important in that context.⁵⁷⁴ Such a construct may be less suitable for entertainment content. Given the important policy of protecting children’s interests, our preliminary view is that the state needs to play a part, even though it may perhaps be a co-regulatory part, in the regulation of entertainment content.
- 8.28 Nor is the voluntary system that we recommend for news⁵⁷⁵ necessarily appropriate either. Entertainment content providers should not be able to opt out of a protective system of this kind. So any new regulator of entertainment content may need to be statutory and have appropriate powers and sanctions available to it.
- 8.29 Above all, any new system needs to acknowledge the practicalities of the situation: there is only so much the law can do. But the extent of what it can do should be realistically explored. At the very least, anomalies of the kind we referred to earlier should be able to be eliminated or at least reduced.
- 8.30 The two Australian reports on classification and convergence⁵⁷⁶ should be a useful reference for a New Zealand review, although what is suitable for another jurisdiction may not always fit New Zealand’s needs and culture. But the problems to which we have referred are of such an unusual character that the Australian solutions should at least be a helpful starting point. It would also be worth considering the desirability of developing a consistent

573 Ch 7, R1. Ch 7 describes the News Media Standards Authority (NMSA) that we recommend be established.

574 Ch 7, R11.

575 Ch 7, R6.

576 *Classification Review*, above n 565; *Convergence Review*, above n 569. Other current reviews of interest are noted in ch 6, fn 346.

trans-Tasman approach that fosters co-operation between national regulatory bodies, to the benefit of consumers.

RECOMMENDATIONS

- R33 A review of the regulation of entertainment content should be undertaken as soon as is feasible to address the issues of convergence, with a view to achieving platform-neutral regulation that provides the public with clear choice as to content. In the meantime, the BSA should retain its jurisdiction over the broadcasting of entertainment.
- R34 Any such review should seek to provide adequate protections against the dissemination of objectionable content and content from which children and young persons should be protected, as well as providing a channel for public complaints.

Appendix A

Ministerial Briefing Paper



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Wellington, New Zealand | August 2012

Ministerial Briefing Paper

HARMFUL DIGITAL
COMMUNICATIONS:
The adequacy of the current
sanctions and remedies

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

In New Zealand, as in many other countries, there is growing and strong concern about the use of new communication technologies to cause harm. Young people are particularly vulnerable, but the problem is by no means confined to them: there are examples of the most disturbing and damaging communications between adults as well. There is a widespread desire that something be done.

Because of these concerns, the Minister Responsible for the Law Commission, the Honourable Judith Collins, has asked the Law Commission to expedite the part of its project on the New Media which deals with this topic.

The Commission has considered the many submissions it received on its issues paper "The New Media meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age." It has also undertaken further research, commissioned an online survey and consulted with a number of key agencies and persons. We record our particular thanks to the Police, the Chief Coroner, the Human Rights Commission, NetSafe, Trade Me, Judge David Harvey, Dr John Fenaughty and Steven Price for so generously making available their time, experience and expertise. We also wish to acknowledge our debt to Steven Price's writings on the subject.

Something needs to be done. We present our findings and recommendations in this paper. They form an integrated package which we believe is a proportionate response to a growing problem.

In order to meet the shortened time frames it was agreed with the Minister that we would produce a briefing paper containing our recommendations rather than a formal report. However, in every other respect the contents of this paper reflect the normal processes employed by the Commission in arriving at its final position. This paper will be attached to our final report on the New Media, as an appendix, in due course.

This project was led by John Burrows. The legal and policy advisers were Cate Honoré Brett, Rachel Hayward and Joanna Hayward.

Hon Sir Grant Hammond KNZM
President of the Law Commission

Harmful Digital Communications: the adequacy of the current sanctions and remedies

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Summary

HOW THIS REPORT CAME ABOUT

1. In New Zealand, as in many other jurisdictions around the world, there is growing concern about the use of new communication technologies to cause harm. Cyberspace, in one commentator's view, has provided a "vast unsupervised public playground" where bad actors can harass, intimidate, and defame, causing emotional and psychological distress to others with relative impunity.¹
2. Young people, who are both guinea pigs and pioneers in this technological revolution, are particularly vulnerable. In 2011, the Prime Minister John Key called for a "national conversation" on how to reduce bullying in our schools after cell phone videos of children being bullied became prominent on the internet.²
3. In recent months New Zealand's Coroners, Police and the Post Primary Teachers' Association (PPTA), which represents secondary school teachers, have all expressed concerns about cyber-bullying and the ways in which the abuse of communication technologies is contributing to some significant issues facing adolescents. These range from truancy and school failure to issues such as depression, self-harm and suicide.³
4. In May 2012, in response to these rising concerns, the Minister responsible for the Law Commission, the Hon Judith Collins, asked us to fast-track part of our project reviewing the adequacy of the regulatory environment for dealing with new and traditional media in the digital era.
5. Our preliminary proposals were set out in an Issues Paper *The News Media Meets 'New Media': rights, responsibilities and regulation in the digital age* published online in December 2011.⁴ In this paper we considered the problem of harmful

1 Report of the Nova Scotia Task Force on Bullying and Cyberbullying *Respectful and Responsible Relationships: There's No App for That* (Nova Scotia, 29 February 2012) at 12.

2 Audrey Young "PM Tells Schools to Act Against Bullies" *The New Zealand Herald* (online ed, New Zealand, 29 March 2011).

3 Simon Collins and Vaimoana Tapaleao "Suicide link in cyber-bullying" *The New Zealand Herald* (online ed, New Zealand, 7 May 2012); Submission of New Zealand Police (March 2012); Submission of New Zealand Post Primary Teachers' Association (March 2012).

4 Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the*

digital communication by citizens as part of a wider review of the adequacy of the regulation of both new and traditional media in the digital era.

6. In this report, prepared at the Minister's request, we deal exclusively with the part of our review which is concerned with the use of new communication technologies by citizens. We address three questions:
 - (a) how to adapt our laws to ensure they are fit for purpose in the digital era;
 - (b) how to ensure these laws can be understood and accessed by ordinary citizens; and, critically
 - (c) how citizens can access meaningful remedies when they have experienced significant harm as a result of digital communication.
7. Our proposals are focused primarily on the law. But amending the law and introducing new offences will not be enough. Unless the law is understood by citizens, consistently enforced, and its remedies meaningfully applied, it is of limited value. Hence we are as much concerned in this report with putting forward proposals for how to make the law *accessible* and *effective* in the age of mass participatory media as we are with the creation of new offences.
8. Even then, better and more accessible laws will only go so far in addressing digital communication harms. We must also address the growing information and power asymmetries which exist in cyberspace. The digital divide applies not only in relation to access to technology but also with respect to people's ability to harness the power of technology for legitimate and illegitimate purposes.
9. For concepts like "digital citizenship" to have meaning, there will need to be a collaborative approach. This will require involvement from a number of participants including parents, schools, law enforcement agencies, policy makers and the domestic and global corporations which act as intermediaries between citizens and the networked public spheres in cyberspace where an increasing amount of our lives are spent.
10. Hence we emphasise the need for our recommendations to be treated as a package: law change without education and without mechanisms for effective enforcement will not succeed.
11. The fundamental planks of our reform, which are summarised on pages 14-20, are:

Digital Age (NZLC IP27, 2011).

- **The creation of a new criminal offence tailored for digital communication.**
 - **Amendments to the Harassment Act 1997, the Human Rights Act 1993, the Privacy Act 1993 and the Crimes Act 1961 to ensure that the provisions of these Acts can be readily applied to digital communications.**
 - **The establishment of a Communications Tribunal to provide citizens harmed by digital communications with speedy, efficient and cheap access to remedies such as takedown orders and “cease and desist” notices.**
 - **New legal requirements for all New Zealand schools to help combat bullying of all kinds, including cyber-bullying.**
12. Some of the proposals we put forward in this report are novel and in the following summary we are only able to outline them in broad terms. We strongly encourage readers to refer to relevant sections of the report for a full explanation of what is proposed. A draft bill is annexed to the report.
13. Although this report has been fast-tracked, its content and structure reflect the usual processes undertaken by the Commission when finalising recommendations for Government. These include a three month period for submissions, and further research and consultation following the publication of our Issues Paper.

OUR APPROACH & TERMINOLOGY

14. In this report we consider the issue of cyber-bullying within the wider context of harmful digital communication. It is a subset of the type of communication harms we have been asked to address. Adolescents and schools are not immune from the law and while it is important not to criminalise young people, it is also important that they understand what society expects and the types of behaviours it will punish.
15. Throughout this report we use the term “harmful digital communication” to describe the type of behaviour our reforms are targeting. We have adopted this term in preference to the term “speech harms”, which we used in the Issues Paper, because we think it better reflects the multi-media nature of much digitally mediated interaction in cyberspace.
16. The term applies not only to one-to-one communication but more broadly to the range of digital publishing which occurs in cyberspace. This includes the uploading of user-generated content (audio-visual, pictures or text) on websites and platforms such as

YouTube and Facebook, and the use of micro-blogging sites like Twitter to disseminate information and opinions.

17. The distinguishing feature of electronic communication is that it has the capacity to spread beyond the original sender and recipient, and envelop the recipient in an environment that is pervasive, insidious and distressing.
18. The concept of harm is also pivotal to this report. In the context of this report we use the term “harmful” to describe the full range of serious negative consequences which can result from offensive communication including physical fear, humiliation, mental and emotional distress. Not all harms arising from communications are proscribed by law. The criminal law has typically been concerned with protecting citizens from communication harms which invoke fear for physical consequences, either personal or proprietary, or which are obscene or harmful to children. The civil law, in the past, also typically shied away from providing remedies for emotional harm as such. However, as we demonstrate later, in both civil and criminal spheres the law has been moving towards recognition of, and protection from, emotional harm.
19. Nevertheless we recognise that there will be some difficult issues at the margin. Within the community at large and within younger demographics particularly, the threshold for when a communication causes the level of distress that can be described as “harmful” and when it simply causes annoyance or irritation may sometimes be difficult to pinpoint.
20. But we have reached the view that when the level of emotional distress can be described as *significant*, the law has a role to play.

The importance of freedom of expression

21. This report is primarily about the laws to which we are all accountable when we communicate. Its recommendations are not aimed at censorship. Nor are they about criminalising speech which offends people *simply* because it may be abusive, nasty, vulgar, untrue or inflammatory.
22. Freedom of expression is a fundamental human right enshrined in the New Zealand Bill of Rights Act 1990. The Act specifies that freedom of expression “may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Precisely where the law sets those limits is a reflection of our core values as a society, including what value we place on tolerance, civility and inclusivity.

23. Overseas jurisprudence increasingly recognises differences in the value of different kinds of speech. Political speech is seen as being of the highest importance, gratuitous personal attacks and “hate speech” the lowest – although even there the reaction of the law must not be disproportionate: freedom of speech is too important.
24. Technology itself plays a critical role in shaping – and challenging – our values and concept of what is acceptable and what behaviour should be outlawed. This dynamic relationship between technology and social values has always been reflected in the law and lies at the heart of this current debate about how we respond to digital communication harms.
25. For example, many New Zealanders will be surprised to learn that our current Telecommunications Act 2001 contains a little known (or used) provision, dating back to 1987, prohibiting the use of a telephone to intentionally offend someone by using “profane, indecent, or obscene language”. The Act also makes it an offence to use the telephone “for the purpose of disturbing, annoying, or irritating any person, whether by calling up without speech or by wantonly or maliciously transmitting communications or sounds, with the intention of offending the recipient.”⁵
26. The threshold (“disturbing”, “annoying”, “irritating”, “offending”) seems low by today’s robust standards. There is perhaps doubt whether it would now survive a Bill of Rights vet.⁶
27. However, clearly there must be some limits to what is regarded as acceptable expression. That is the task we are confronting in this report and the task Parliament will grapple with should it decide to proceed with the changes we are recommending. We believe the limitations on freedom of expression which we recommend are justified, indeed necessary, to mitigate the harms which we have identified.

5 Telecommunications Act 2001, s 112(a), s 112(b).

6 Although we support the premise that causing offence may in some circumstances constitute a criminal offence, we believe the threshold created in this offence may be so low as to be incompatible with the Bill of Rights Act and today’s robust communication environment. Nor is it clear the provision as currently drafted applies to all digital communication. We therefore believe that consideration should be given to reviewing this provision – see chapter 4, para [4.79].

SUMMARY OF CONTENTS

The problem

28. In chapter 2 of this report we revisit the problem described in our Issues Paper, and address the following critical questions:
- (a) What differentiates digital communication and how do these differences affect the nature and severity of harms associated with speech abuses?
 - (b) How serious is the problem – and in particular, how is it impacting on vulnerable sections of the population, especially the young?
29. With respect to the first question, we note the following critical features which distinguish digital communication and its associated harms from offline communication:
- The viral nature of cyberspace and the potential for information to be disseminated instantly to worldwide audiences;
 - The ubiquity of the technology which means communications are no longer constrained by time and place but can be accessed anywhere, anytime by anyone;
 - The persistence of information disseminated electronically;
 - The ease with which digital information can be accessed/searched;
 - The facility for anonymous communication and the adoption of multiple online personae.
30. We conclude that these characteristics are producing novel ways in which people can cause harm to one another. And, as a recent Nova Scotia report on cyber-bullying notes, they have also unlocked the potential of the bully:⁷
- Traditional bullying tends to take place in secluded places, like washrooms, hallways and school buses, where there is little adult supervision. The cyber-world provides bullies with a vast unsupervised public playground, which challenges our established methods of maintaining peace and order – it crosses jurisdictional boundaries, is open for use 24 hours a day, seven days a week, and does not require simultaneous interaction.
31. The facility to generate, manipulate and disseminate digital information – which can be accessed instantaneously and continuously – is producing types of abuse which simply have no precedent or equivalent in the pre-digital world.

⁷ Report of the Nova Scotia Task Force on Bullying and Cyberbullying *Respectful and Responsible Relationships: There's No App for That* (Nova Scotia, 29 February 2012) at 12.

32. Citizens, including teenagers and younger, with no specialist expertise or technical assistance can, in effect, cause irreparable harm to one another's reputations and inflict enduring psychological and emotional damage.
33. In chapter 2 of the report we provide examples of how these defining characteristics of digital communication are giving rise to novel harms. We discuss the range of serious impacts that covert and overt bullying can have on adolescents, including contributing to educational failure, depression and self-harm. With respect to suicide and self-harm, we emphasise that bullying is only one of a number of complex inter-related risk factors. Its impact, like the impact of other stressors, will vary according to a range of variables including the person's resilience, their home and school environment and any underlying personality or psychiatric disorders – most significantly, depression.
34. We also stress the importance of approaching adolescent aggression within the broader context of adult aggression and role modelling. NetSafe, an organisation focused on improving cyber safety in New Zealand, emphasised in its submission that more than half of the approximately 75 serious complaints they deal with each month involve adults, the majority of whom have been directed to them by Police after exhausting other avenues of complaint.⁸
35. NetSafe noted that "the distress of those contacting our service is often painfully apparent. The majority of adult targets contact us after being threatened with physical harm."⁹
36. Although unable to provide quantitative data, Police submitted that staff were dealing with a "growing number of complaints from members of the public who have been intimidated, bullied, harassed and threatened on the Internet."¹⁰
37. We note that the paucity of quantitative national data on cyber-related communication harms creates challenges for policy makers.

8 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.

9 Submission of NetSafe (24 February 2012) at 1.

10 Submission of New Zealand Police (March 2012) at 3.

38. Independent research we commissioned suggests that as many as one in ten New Zealanders has some personal experience of harmful communication on the internet. That rate more than doubles to 22 per cent among the 18-29 demographic who are the heaviest users of new media.¹¹ Research undertaken by NetSafe's former Research Manager, Dr John Fenaughty, in conjunction with the University of Auckland found that 1 in 5 New Zealand high school students experienced some form of cyber-bullying or harassment in 2007.¹²
39. These figures are broadly consistent with the academic literature although estimates vary depending on the different definitions, samples and methodologies used.
40. Irrespective of the quantum of the problem, in our view, this potential to cause significant harm, some of it indeed devastating, demands an effective legal remedy.

The case for change

41. As Google pointed out in its submission to this review, "the mere existence of harmful speech is not sufficient to justify additional regulation. It is necessary to show that existing legal and self-regulatory remedies are ineffective."¹³
42. In chapter 3 we review the effectiveness of the range of tools available to manage and mitigate the types of harm described in chapter 2. We discuss the concept of "digital citizenship" and the importance of empowering users through education about the use of digital technology and the rights and responsibilities that accompany this. We also review the self-regulatory systems already in place within different networked public spheres on the internet such as user "terms of use agreements" and community moderation and reporting tools.
43. In Google's view the paradigm shift in how citizens use new media, and in particular the degree of control and choice they are able to exercise over how they interact and what they consume, has fundamental implications for how problems such as harmful content should be managed in the digital era:¹⁴

11 Under s 6(2)(b) of the Law Commission Act 1985 the Commission is mandated to "initiate, sponsor, and carry out such studies and research as it thinks expedient for the proper discharge of its functions." For a full discussion of the research refer chapter 2, para 2.20 of this report.

12 John Joseph Fenaughty *Challenging Risk: NZ High-school Students' Activity, Challenge, Distress and Resiliency, within Cyberspace* (PhD Dissertation, University of Auckland, 2010).

13 Submission of Google New Zealand Ltd (14 March 2012) at 16.

14 *Ibid*, at 15.

[O]nline communities set, refine and enforce their own community standards. If content is made available that is considered to be unacceptable or offensive, users will protest and remedial action can be taken very quickly. Online businesses risk their livelihood if inappropriate content is repeatedly published as audiences and users will quickly switch to other sites.

44. Both Google and Facebook argued that policies directed at reducing the problem of harmful communication in cyberspace need to focus in the first instance on empowering users by educating them about their rights and responsibilities as “digital citizens” and providing them with the technological tools to exercise these rights and responsibilities effectively. These strategies are reinforced by the “terms of use” agreements employed by many internet intermediaries and, ultimately, by the legal systems which apply to the users themselves and the content they create.
45. We endorse this approach and believe it is both consistent with the principles of freedom of expression and reflects the practical realities of the new era of mass participatory media.
46. The question we address in chapter 3 is whether this combination of self-regulation, underpinned by domestic law, is in fact providing effective remedies for those who experience significant harms as a result of communication abuses. *In other words, is there a gap between the reach of the self-regulatory systems on the web and the reach of the law?*
47. In our view there is such a gap. In paragraphs 3.63 – 3.92 we put forward our reasons for reaching this conclusion. These are based on our own research into the effectiveness of self-regulatory tools; the evidence of submitters and our review of New Zealand’s existing speech laws. The following critical points inform our assessment:
 - (a) User empowerment is a laudable ideal but for the moment there exist a number of important information and power asymmetries in cyberspace. The digital divide applies not only in relation to access to technology but also with respect to people’s ability to harness the power of technology for legitimate and illegitimate purposes.
 - (b) Self-regulatory systems on the internet are extremely variable reflecting the huge spectrum of services, platforms and content hosts available to users. Given the unprecedented volume of data exchanged on the internet every day, and the global nature of many internet intermediaries, it is inevitable that even the most sophisticated self-regulatory systems will fail at times.

- (c) The most serious types of harmful digital communication will often involve a breach of the law. A number of the examples cited in chapter 2 of this report did in fact end up being prosecuted under existing offences. However, the existing law is not always easily applied to digital communication and not all of the new and potentially more damaging harms arising from the use of new technology are covered by existing laws. This is particularly so with respect to the severe emotional distress which can be caused by invasive and ubiquitous digital communications.
 - (d) Critically, the law, like terms of use agreements, is only useful if it is accessible and enforceable – and capable of providing effective remedies. While the existing criminal and civil law could deal with many types of harmful digital communications, in practice there are a number of obstacles that impede access to justice by those who have suffered harm. These include:
 - (i) A lack of knowledge of the law and/or the availability of redress, by both victims and enforcement officers;
 - (ii) The complexity of identifying possible defendants in an online situation;
 - (iii) The breadth and speed of spread of information on the internet;
 - (iv) Problems of establishing jurisdiction, where material is hosted overseas.
48. Submissions confirmed the themes that had emerged from our preliminary research and consultation as to the problems people encounter in accessing help to deal with cyber-offending, and their resulting sense of powerlessness.
49. While it is not possible to overcome all of these problems, we believe our package of reforms will make a significance difference.

SUMMARY OF RECOMMENDATIONS

1. A new communications offence tailored for digital communication

50. One of the key conclusions we reach in chapter 2 of this report is that the new communication technologies can have effects which are more intrusive and pervasive, and thus more emotionally harmful than in the pre-digital era. The impacts of such behaviour can derail lives and contribute to mental illness, suicide and self-harm. Overseas jurisdictions, including the United Kingdom, Australia and some states in

America, are increasingly moving to criminalise communication causing serious distress and mental harm.¹⁵

51. In New Zealand currently the criminal law currently provides only limited protection against communications which cause mental distress – in the absence of physical threats.
52. We recommend the introduction of a new offence which targets digital communications which are “grossly offensive or of an indecent, obscene or menacing character” *and* which cause harm.
53. While criminalising young people is to be avoided, in egregious cases, this new offence could be applied to anyone over the age of 14, with those aged between 14 and 17 being tried in the Youth Court (see paragraph 4.76 of the report and recommendation R1 for a full explanation of the offence and draft wording).
54. Types of digital communications covered by the offence would include comments on websites, message boards and blogs, and in the social media (e.g. Facebook and Twitter), and also emails and texts. The distinguishing feature of electronic communication is that it has the capacity to spread beyond the original sender and recipient, and envelop the recipient in an environment that is pervasive, insidious and distressing.

2. Amendments to existing laws to ensure fitness for purpose

55. With the exception discussed above, we conclude that by and large New Zealand’s existing criminal and civil law is capable of being applied to digitally mediated communications. However we recommend a number of amendments to both criminal and civil laws to make them better fit for this purpose. These include amendments to **the Harassment Act 1997, the Human Rights Act 1993, the Privacy Act 1993 and the Crimes Act 1961** to ensure that the provisions of these Acts can be readily applied to digital communications.
56. In some instances we recommend extending their scope to cover behaviours enabled by new communication technologies such as the publication online of intimate photographs. Under our proposed amendments it would be an offence to publish intimate photographs or recordings of another person without their consent. We also recommend that the laws about online sexual grooming be tightened.

15 See chapter 4 at [4.73]-[4.75] for a discussion of these developments.

57. We recommend that it become an offence to incite a person to commit suicide, irrespective of whether or not the person does so.

3. The establishment of a Communications Tribunal

58. In chapter 3 of this report we point out that even the most sophisticated web-based moderation and reporting systems cannot always provide the type of timely, tailored response required in cases of serious harm.

59. **To bridge this gap we recommend the establishment of a specialist Communications Tribunal capable of providing speedy, cheap and efficient relief outside the traditional court system.** It would in effect operate like a mini-harassment court specialising in digital communications. New Zealand already has precedents for such informal methods of dispute resolution in the form of the Tenancy Tribunal, the Human Rights Review Tribunal and the Disputes Tribunal.

60. The Tribunal we propose would comprise a District Court judge supported (where necessary) by an expert internet adviser. There would be a number of judges designated to act. It would have the following features and powers:

- (a) The Tribunal's jurisdiction would be protective, rather than punitive or compensatory. It would not have any powers to impose criminal sanctions. It would be limited instead to providing civil remedies, such as takedowns and cease and desist orders. In some cases it might also require apologies, right of reply, corrections or retractions. We do not propose that it have any power to award monetary compensation.
- (b) The Tribunal would be a solution of last resort and the threshold for obtaining a remedy would be high. Complainants would have to demonstrate that the communication complained about had caused significant harm, including distress, humiliation or mental harm. They would first have had to attempt to resolve the matter through other avenues.
- (c) Before granting a remedy the Tribunal would need to determine that the communication not only caused significant distress but that it also breached one or more of a set of principles we have proposed. These principles will be substantially derived from the existing and proposed criminal and civil laws we have discussed in this report. They would make accessible to ordinary citizens the fundamental legal rights and responsibilities which attach to the use of modern communication technologies.

- (d) Among the other factors the Tribunal would have to take into account would be: the *nature* and *purpose* of the communication and whether it was the type of speech requiring high protection, such as political speech; the truth or falsity of the statement; the context in which it was expressed; and the conduct of the complainant – including the extent to which that conduct may have contributed to the harm suffered.
 - (e) An order by the Tribunal would not preclude a complainant from also pursuing a civil action or criminal prosecution. Its role is to provide a speedy and accessible remedy in cases of significant harm. Punishment is a matter for the courts.
 - (f) The news media would not be subject to the Tribunal except in cases where the news media outlet responsible for publishing the offending content was not subject to one of the established regulatory bodies – the Broadcasting Standards Authority or the Press Council or any regulator which may replace them.
61. Those entitled to complain to the Tribunal should be the victims themselves or parents or guardians where the victim is a child or young person. In addition the Chief Coroner, Police and School Principals would have direct access to the Tribunal in serious cases involving threats to safety or where there has been a breach of the Coroners Act 2006 with respect to publishing details of a suicide.
62. In the first instance the target of Tribunal orders would be the author of the offending communication. Where that person's identity was unknown the Tribunal would have the power to require Internet Service Providers and other intermediaries to reveal the person's identity to the Tribunal.¹⁶ Once notified, anyone subject to an order would have the opportunity to defend the proposed action. In some egregious cases the Tribunal may decide to make the identity of an offender publicly known as a form of deterrence. In cases where the author could not be located an ISP or web administrator may be required to remove or amend the offending content.
63. We propose that the Tribunal would be empowered to make orders against minors in cases of persistent and serious cyber-bullying which have not been satisfactorily resolved by a school or other agency.

16 These proposed powers to obtain account details are similar to those vested in the Copyright Tribunal under provisions of the Copyright (Infringing File Sharing) Amendment Act 2011.

4. The establishment of a statutorily recognised mediation agency

64. Before a complainant came to the Tribunal there would need to be evidence they had taken steps to resolve the problem themselves. This requirement serves two purposes: first it would ensure the Tribunal was not overwhelmed with trivial cases, and second, it is consistent with the premise that the first line of defence against harmful communication in cyberspace should be users themselves.
65. We recommend that NetSafe be given statutory recognition as an “approved agency” responsible for triaging and, where possible, mediating complaints before they reach the Tribunal.¹⁷ As we have already noted, the non-profit NGO NetSafe is one of few organisations specifically focused on bridging the digital divide and actively promoting digital citizenship through education, advice and practical technological support. It works collaboratively with a number of government departments and organisations including the Police, and the Ministries of Education and Economic Development.¹⁸ It has undertaken pioneering work in the education sector around responsible use of online technologies and initiated the National Task Force on Cyber-Bullying. As noted by Google in its submission to us, NetSafe’s programmes have been described as “world leading”.¹⁹
66. We recommend that the advisory and mediation functions NetSafe currently carries out be given formal recognition. Specifically we propose that NetSafe be deemed an “approved agency” with the responsibility to advise complainants and, where appropriate, attempt to achieve a resolution by negotiation, mediation and persuasion. In cases involving clearly criminal behaviour, or where the harm was so immediate and significant, complaints could be re-directed immediately to the Police and/or Tribunal.
67. In order to carry out this front-line advisory effectively NetSafe would require a significant boost in resourcing.

17 While in our view NetSafe is ideally suited to perform these functions, the proposed legislation would provide for the Minister to appoint any person or organisation as an “approved agency” including for example Police or the Human Rights Commission.

18 The functions of the Ministry of Economic Development have now been integrated into the Ministry of Business, Innovation and Employment.

19 Submission of Google (14 March 2012) at 27.

The role of ISPs and other Intermediaries

68. The development of consistent, transparent, and accessible policies and protocols for how intermediaries and content hosts interface with our proposed Tribunal and with the approved agency (our recommendation is NetSafe) will be critical to their effectiveness.

69. We recommend that the approved agency work with these private sector agencies, including New Zealand's telecommunications companies, to develop such guidelines and protocols. Trade Me, an organisation which has both considerable technical and regulatory expertise would be an invaluable partner in that process.

5. Cyber-bullying and schools

70. The law changes proposed in this report and the back-stop created by the proposed new Communications Tribunal will support the work of parents and schools combatting cyber-bullying. Young people aged 14 and over will be subject to the new electronic communications offence. They will also be subject to the rulings of the Communications Tribunal. The Chief Coroner, Police and School Principals will be able to seek the Tribunal's assistance in cases where there is a risk to life including potential contagion effects with respect to youth suicides.

71. In addition we make the following specific recommendations:

(a) Introduce the following new legal requirements for all New Zealand schools to help combat bullying of all forms, including cyber-bullying:

- (i) The National Administrative Guidelines for public schools should include a requirement that a school must implement an effective anti-bullying programme;
- (ii) The law should be amended to make it a criterion for registration of a private school that the school provide a safe and supportive environment that includes policies and procedures that make provision for the welfare of students.

(b) In addition, we recommend the Ministry of Education consider;

- (i) The development of an agreed definition of bullying behaviour, including cyber-bullying, encouraging schools to use it in anti-bullying policies;
- (ii) The establishment of on-going and routine data collection systems with standardised methods for defining and measuring covert and overt forms of bullying;

(iii) The development of measurable objectives and performance indicators for activities intended to improve school safety; and

(iv) The development of reporting procedures and guidelines.

(c) We also propose that schools explore expanding the use of Information and Technology contracts, which are routinely used in schools, to educate students about their legal rights and responsibilities with respect to communication. These contracts could incorporate the communication principles which will underpin the work of the new Communications Tribunal. This distillation of the law into simple and accessible principles could provide teachers and parents with a valuable tool for introducing young people to some of the fundamental values which are reflected in our law.

72. A full discussion of each of these recommendations, and the policy rationale for them, can be found in the relevant sections of this report. In particular we draw readers' attention to chapter 4 where we address the Bill of Rights issues raised by our proposals.

Chapter 1: What this is about

THE SCOPE OF THIS INQUIRY

Our terms of reference

- 1.1 In October 2010 the Law Commission was asked by the Government to review the adequacy of the regulatory environment in which New Zealand's news media is operating in the digital era.
- 1.2 As part of 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.
- 1.3 In November 2011 we published an Issues Paper, *The News Media Meets 'New Media': rights, responsibilities and regulation in the digital age*, setting out our preliminary response to the questions posed in our terms of reference and putting forward for public debate a number of preliminary proposals for reform.²⁰
- 1.4 These proposals included changes to existing legislation relating to speech offences and the establishment of two new bodies for adjudicating complaints – one for the news media and another to deal with harmful communications involving private citizens.
- 1.5 The proposals were widely debated in both traditional and new media forums during a four-month consultation period between December 2011 and March 2012. We received 72 formal submissions and many hundreds of comments and contributions from those participating in online discussions and forums.²¹

²⁰ Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011).

²¹ The submissions to this review are available on the Law Commission's website at
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Cyber-bullying

- 1.6 Since the publication of our Issues Paper there has been growing concern about the problem of cyber-bullying. Coroners, Police and the Post Primary Teachers' Association (PPTA), which represents secondary school teachers, have all drawn our attention to their concerns about the ways in which the abuse of communication technologies is contributing to truancy, school failure and a range of adolescent problems including depression, self-harm and suicide.²²
- 1.7 In May 2012, in response to this public concern, the Minister responsible for the Law Commission, the Hon Judith Collins, asked us to fast track our final recommendations with respect to the third leg of our original terms of reference – the adequacy of the current legal framework for dealing with harmful communications in the digital era.
- 1.8 Governments in Australia, the United Kingdom, Canada and some states of America are all grappling with these issues and considering ways in which the law and educational policy can effectively intervene to prevent harm to young people.²³
- 1.9 The academic literature has established a clear association between bullying and other forms of aggression and a number of negative outcomes for adolescence, including educational failure, depression and self-harm.
- 1.10 In this report we consider the issue of cyber-bullying within the wider context of harmful digital communication. It is a subset of the type of communication harms we have been asked to address. Adolescents and schools are not immune from the law and while it is important not to criminalise young people, it is also important that they understand what society expects and the types of behaviours it will punish. In chapter 6 of this report we discuss how our overall policy package can support schools and parents in tackling cyber-bullying.

OUR PRELIMINARY PROPOSALS

- 1.11 In our Issues Paper we reviewed the criminal and civil law of New Zealand to assess its fitness for the digital age. We also considered whether the current legal provisions

www.lawcom.govt.nz.

22 Simon Collins and Vaimoana Tapaleao "Suicide link in cyber-bullying" *The New Zealand Herald* (online ed, New Zealand, 7 May 2012); Submission of New Zealand Police (March 2012); Submission of New Zealand Post Primary Teachers' Association (March 2012).

23 For a discussion of the various reports and legislative responses initiated in these jurisdictions see chapter 6 at paras 6.62–6.70 of this report.

were capable of responding adequately to the types of communication harm which have no precedent in the offline world, such as malicious impersonation or hijacking of another person's online identity.

- 1.12 As well as assessing the fitness of the law, we raised concerns about the difficulties of accessing and enforcing the law effectively in cyberspace, given the porous nature of the internet, the speed with which content can be disseminated and the difficulty in identifying perpetrators and holding them to account.
- 1.13 In response to these challenges we put forward a number of preliminary proposals for discussion. These included giving courts the power to issue takedown orders when content was clearly in breach of the law. We raised for discussion two alternative new mechanisms for dealing with harms arising from speech abuses: a Communications Tribunal or a Communications Commissioner.
- 1.14 The proposed Communications Tribunal was designed to operate as a "mini-court," administering speedy, efficient and relatively cheap justice to those who have been significantly damaged by unlawful communications.
- 1.15 The second option we put forward for discussion was the establishment of a Communications Commissioner, possibly attached to the Human Rights Commission. The Commissioner would not have the enforcement powers of a Tribunal but rather his or her role would be to provide information and where possible assist in resolving problems in an informal manner, for example through mediation.

THE CONTENTS OF THIS REPORT

- 1.16 In order to meet the shortened time frames it was agreed with the Minister that we would produce a briefing paper outlining our recommendations for law change rather than a formal report. However in every other respect the contents of this report reflect the normal processes employed by the Commission in arriving at its final policy position. This has included commissioning further independent research, close consideration of the public submissions and on-going consultation with key stakeholders.
- 1.17 In chapter 2 of the report we revisit the problem of harmful speech on the internet. We outline what submitters told us about the scope and severity of the problem and what our own research reveals. Within this context we also discuss the phenomenon of cyber-bullying, drawing on both New Zealand and international literature.
- 1.18 Having summarised the problem we then address the question posed by our terms of

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reference – are the current remedies fit for the digital age? In chapter 3 we describe a three-tiered approach to addressing harmful digital communication. The first line of defence lies with user empowerment, which includes educating people about their rights and responsibilities as digital citizens and in the use of technology to give effect to these. Secondly, this user empowerment is supported by the self-regulatory tools and infrastructure which private companies have developed to promote good behaviour and deal with problem speech on the net. The third tier is the legal framework which applies to all online communication and which anchors user empowerment and the self-regulatory systems. We assess the strengths and weaknesses of this three-tiered approach and set out our conclusions about its effectiveness.

- 1.19 In chapters 4 – 6 we turn to the solutions. In chapter 4 we outline the specific law changes we are recommending to Government. In chapter 5 we outline our proposal to establish a new Communications Tribunal to provide citizens with access to a quick and affordable means of remedying significant harms arising from digital communications. And finally in chapter 6 we make some specific recommendations about cyber-bullying and how law change may support the many initiatives in this area.

Terminology

- 1.20 In our Issues Paper we used the term “speech harms” to describe communications which cause harm to others. This encompasses defamatory speech which harms others’ reputations; speech which threatens others or which is intended to inflict serious emotional damage; and speech which results in the invasion of a person’s privacy.
- 1.21 However in our view this term does not adequately capture the characteristics of digitally mediated communication which may incorporate speech, text and audio visual elements. We think the term “harmful digital communication” better describes the problem our reforms target.
- 1.22 The term applies not only to one-to-one communication but more broadly to the range of digital publishing which occurs in cyberspace including the uploading of user-generated content, including audio-visual material on websites and platforms such as YouTube and Facebook, and the use of micro-blogging sites like Twitter to disseminate information and opinions.
- 1.23 We take a similarly broad view of what is meant by the term ‘expression’ in the context of human rights debates. As we discuss in chapter 4, our courts have held that

flag burning²⁴ and lying down in front a car²⁵ as a protest are forms of 'expression'. So we take the word 'expression' as being wide enough to cover all the types of communication with which we deal in this paper.

- 1.24 The term "cyber-bullying" is also increasingly used to describe a range of abusive or harmful electronic communications. In the offline world, "bullying" usually implies a repeated behaviour carried out in the context of adolescent peer relationships. An implied power imbalance exists between aggressor and victim. However the term cyber-bullying is often applied more loosely to encompass all forms of electronically communicated abuse, whether one-off or persistent.
- 1.25 In this report we reserve the term cyber-bullying to describe the range of intentionally harmful communications which occur within the context of adolescent relationships.
- 1.26 The concept of harm is also pivotal to this report. In the context of this report we use the term "harmful" to describe the full range of serious negative consequences which can result from offensive communication including physical fear, humiliation, mental and emotional distress.
- 1.27 Not all harms arising from communications are proscribed by law. The criminal law has typically been concerned with protecting citizens from communication harms which invoke fear for physical consequences, either personal or proprietary, or which are obscene or harmful to children. The civil law, in the past, also typically shied away from protecting emotional harm as such. However, as we demonstrate later, in both civil and criminal spheres the law has been moving towards recognition and protection of that sort of harm. We recognise that within the community at large and within younger demographics particularly, the threshold for when a communication causes the level of distress that can be described as "harmful" and when it simply causes annoyance or irritation may sometimes raise difficult issues at the margins. But we have reached the view that when the level of emotional distress can be described as significant the law has a role to play.
- 1.28 Finally, this report makes frequent reference to the various private businesses which provide the interface between users and much of cyberspace. These businesses perform a wide variety of functions and services including: platforms and tools which enable users to create, publish and share their own content (user-generated content); search

24 *Morse v Police* [2012] 2 NZLR 1 (SC).

25 *Police v Geiringer* (1990-1992) 1 NZBORR 331. See however the comment by Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 313.

tools, web browsers and applications which provide an interface with the internet, and connectivity services which provide access. Throughout this report we use the generic term internet “intermediaries” and “content hosts” to describe these entities which typically do not themselves create content. In some contexts we refer more precisely to “internet service providers” (ISPs) when we are referring specifically to the simple function of providing internet connectivity. However it should be noted that many internet businesses provide a mix of services: for example many telecommunication companies not only provide connectivity but have also entered into agreements with media companies to provide content. Similarly a community of bloggers operating their own website will often be both content creators, and “hosts” to the content provided by their community of contributors.

- 1.29 It should also be noted that these entities vary enormously in their size, sophistication, and the degree of control they exert over their users. These distinctions can be important when considering what role these various entities should play in monitoring and enforcing the domestic laws to which those who use their services are subject.

THE PRINCIPLES UNDERPINNING OUR RECOMMENDATIONS

- 1.30 The package of reforms we recommend in this report are underpinned by the following principles and premises.

The role of the law

- 1.31 The law has a vital role to play in civil society. It embodies our common values and defines the behaviours we regard as acceptable and unacceptable. However in a democratic society people’s freedom should only be limited to the extent necessary to protect others from harm. This principle is of vital importance when considering laws which constrain people’s right to freedom of expression, a fundamental human right upon which all other rights depend.
- 1.32 However no rights are absolute. In any civil society a balancing of rights will sometimes be required in order to protect other important interests such as the right to a fair trial, the right to privacy, and the right to protect one’s reputation. The New Zealand Bill of Rights Act 1990 requires that the rights protected in that Act, including freedom of expression, “may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”²⁶

²⁶ New Zealand Bill of Rights Act 1990, s 5.

- 1.33 Precisely where the law sets those limits is a reflection of our core values as a society, including what value we place on tolerance, civility and inclusivity. As discussed earlier, technology itself plays a critical role in shaping – and challenging – our values and our concept of what is acceptable behaviour. This dynamic relationship between technology and social values has always been reflected in the law and lies at the heart of this current debate about how we respond to digital communication harms.
- 1.34 While the law has an important role to play in anchoring and reinforcing socially acceptable behaviour, it must be acknowledged that laws targeting harmful communication can only go so far. Harmful communication is often part of a wider pattern of aggressive behaviour, in both the adult and young person contexts. That wider pattern may require a range of solutions, both legal and non-legal. But the law has an important part to play as one of the tools.

The law, technology & harm

- 1.35 In principle, laws should reflect broad principles which are capable of being applied in a technology-neutral manner. On one level the abuse of new communication technologies to cause intentional harm to another can be seen as an extension of offline behaviours. However this is too simplistic. For the first time in history, individuals with access to basic technology can now publish, anonymously, and with apparent impunity, to a potentially mass audience. This facility to generate, manipulate and disseminate digital information which can be accessed instantaneously and continuously is producing types of abuse which have no precedent or equivalent in the pre-digital world.
- 1.36 In our view the resulting emotional harms that can arise from the misuse of digital communication technologies are of such a serious nature as to justify a legal response.
- 1.37 For reasons of principle and practicality, recourse to the law should be the last resort reserved for those who have suffered serious harm. We endorse the views expressed by Google and Facebook in their submissions that user empowerment, digital citizenship and self-regulatory solutions must be the first line of defence in tackling harmful communication in cyberspace.²⁷

²⁷ In its submission Facebook described the concept of “digital citizenship” in the following terms:

“Digital citizenship typically describes the rights – and also the responsibilities – that each of us has in the online world, similar to the rights and responsibilities enjoyed offline. This can include, for example, the right to own information that we create online, and to represent ourselves accurately to the audience of our choice. It also includes the responsibility to treat others as we want to be treated, to respect people’s

- 1.38 However we also believe that there are significant power and information asymmetries in cyberspace which mean not all are able to harness these new technologies to defend themselves from illegitimate attack.
- 1.39 Self-regulatory systems and tools are also highly variable across the internet. When they are absent or ineffective, citizens who have suffered serious harm should, in our view, have a right to access effective legal remedies. These remedies must be proportionate, and provide meaningful solutions.
- 1.40 Ensuring that the law is fit for purpose in the digital age is only one part of our challenge. To be useful, the law must also be understood, and accessible to citizens.
- 1.41 Given the fundamental importance of cyberspace and communication technologies we do not, in principle, support remedies which depend on terminating citizens' access to the internet. However, we note that many of the private businesses providing access and services reserve the right to de-activate accounts for non-compliance with terms of use contracts.

The need for a collaborative approach

- 1.42 As a matter of principle the target of any criminal or remedial actions must be focused on the author of the offending communication, rather than the entities providing access, publishing platforms and services – so called internet intermediaries.
- 1.43 However, creating a civil cyberspace will require the active collaboration of users, educators, parents, and those global internet and telecommunications businesses whose profitability depends on the billions of people engaging online.
- 1.44 Finally, it is vital that policy or legal responses to a phenomenon such as cyber-bullying are not rooted in a defensive or reactionary response to new technology. This technology is enabling young people to connect, relate and access information in ways that were hitherto unimaginable. The challenge we face is how to create a digitally responsible citizenry – not how to “control” or artificially constrain that technology or people's access to it.

digital space, and to stand up for others online.”

Chapter 2: Understanding harmful digital communication

INTRODUCTION

Context

- 2.1 The number of citizens using digital communication technologies and participating in networked public spheres such as Twitter and Facebook is growing exponentially. More than 90 per cent of New Zealanders in the 15-49 age group are mobile phones users and in May 2011, 1.9 million New Zealanders had active internet connections via mobile phones.²⁸ A survey of New Zealand secondary school students carried out in 2011 found that 65 per cent of pupils had a Facebook account.²⁹
- 2.2 In our Issues Paper, *The News Media Meets 'New Media': Rights, Responsibilities and Regulation In The Digital Age* we described how this digital revolution has placed the tools of mass publishing in the hands of every citizen with access to the internet.³⁰ It has brought incalculable benefits to society and transformed nearly every facet of life. However, it has also created novel ways in which people can use technology to harm others – instances of which are reported around the world on a daily basis.³¹
- 2.3 Securing cyberspace from a range of threats is a priority for governments all over the

28 Statistics New Zealand "Internet Service Provider Survey: 2011" (press release, 14 October 2011); *Household Use of Information and Communication Technology: 2009* <www.stats.govt.nz/browse_for_stats/industry_sectors/information_technology_and_communications/hh-old-use-of-ict/household-ict-2009-tables.aspx>.

29 CensusAtSchool NZ is a voluntary online survey of New Zealand students in Years 5 – 13. The survey is a joint venture between Statistics New Zealand, the University of Auckland and the Ministry of Education. The 2011 census results were based on surveys of 24,941 students. <www.censusatschool.org.nz/about/>.

30 Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011).

31 See for example BBC News "Rutgers webcam spy Dharun Ravi sentenced to 30 days" (online ed, 21 May 2012) at <www.bbc.co.uk/news/world-us-canada-18149395> and Sarah O'Meara "Internet Trolls Up Their Harassment Game With 'Beat Up Anita Sarkeesian'" The Huffington Post (6 July 2012) at <www.huffingtonpost.co.uk/2012/07/06/internet-trolls-online-beat-up-anita-sarkeesian-game_n_1653473.html>; "Parent outrage at Facebook bullying" The Gisborne Herald (reproduced on nzherald, online ed, 5 May 2012).

world, including our own.³² In its latest survey, global security company Symantec assessed that cyber-crime, including financial scams and fraudulent transactions using stolen identities, cost New Zealand an estimated \$625 million in 2011.³³

- 2.4 Although these global reports do include some indicators of social harms online, to date there has been less emphasis on measuring the economic and psycho-social impacts of harms resulting from the misuse of digital communications technologies such as attacks on reputation, malicious impersonation, sexual and racial harassment, and invasions of privacy.
- 2.5 Global internet companies such as Google and Facebook provide users with tools to report content which is offensive and which breaks their terms of use. However as yet there is no independent means of assessing how frequently these tools are used and to what effect.³⁴
- 2.6 The lack of consistent measurement and reporting of incidents involving communication abuses presents a challenge for policy makers and indeed we make recommendations later in this report about the need for better data collection in this area by Police and schools.
- 2.7 In response to this paucity of data the Law Commission requested an independent market research company to undertake research into New Zealanders' perceptions of a number of issues relating to the media and the internet. We summarise the findings in relation to harmful digital communication in the following discussion.
- 2.8 We also draw heavily on submissions and in particular the assessment of organisations such as NetSafe and the Police who are often contacted by those experiencing significant cyber-related harms.³⁵

32 For example in 2011 the Ministry of Economic Development created a multifaceted Cybersecurity Strategy for New Zealand. For details refer <www.med.govt.nz/sectors-industries/technology-communication/cyber-security>.

33 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.

34 Google publishes a six-monthly "Transparency Report" 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. However these reports do not extend to the use of community reporting tools to flag content or the amount of content removed as a result of such community reporting.

35 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

2.9 In the following discussion we set out our findings based on these various sources of information and address the following critical questions:

- What differentiates digital communication and how do these differences affect the nature and severity of harms associated with speech abuses?
- How serious is the problem – and in particular, how is it impacting on vulnerable sections of the population, especially the young?

2.10 Throughout this discussion we use the general term “harmful digital communication” to cover the spectrum of behaviours involving the use of digital technology to intentionally threaten, humiliate, denigrate, harass, stigmatise or otherwise cause harm to another person. We reserve the term cyber-bullying for such abuses which occur within the context of adolescent peer relationships.

THE PREVALENCE OF DIGITAL COMMUNICATION HARMS

General population

2.11 Submissions to our review revealed a spectrum of opinion about the size and significance of the problem. These views often reflected the submitter’s organisational perspective. At one end of the spectrum, Google argued that the Commission had failed to demonstrate that there was any pressing problem that were not being adequately dealt with either by the self-regulatory tools available on the internet, or, in the case of significant harms, by the existing laws such as privacy, defamation and contempt.³⁶

2.12 At the other end of the spectrum, NetSafe, Police and the Post Primary Teachers’ Association (PPTA) argued that the problem was significant and growing. Police submitted that “existing and potential harms to the public from speech abuses are significant” and although unable to provide quantitative data, staff were dealing with a “growing number of complaints from members of the public who have been intimidated, bullied, harassed and threatened on the Internet.”³⁷

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.

36 Submission of Google New Zealand Ltd (14 March 2012) at 3.

37 Submission of New Zealand Police (March 2012) at 3. Submission of the Post Primary Teachers’ Association (March 2012) at [2.1].

- 2.13 In June 2012 the *Otago Daily Times* reported that Police in Oamaru and Dunedin were dealing with complaints from the public relating to threatening and offensive text messages on a daily basis. According to Police the content of the texts ranged from “ambiguous threats to threatening to kill, commit suicide and text messages which breached protection orders”.³⁸
- 2.14 The PPTA submitted that cyber-bullying was a serious problem which occupied the “blurred space between home and school” making it unclear whose responsibility it was to respond. The effects it argued were very serious:³⁹
- Cyber-bullying is implicated in truancy, may lead to suspension when the victim reacts to it in the non-virtual world and most tragically, to suicide.
- 2.15 NetSafe, which has collaborated with a number of government agencies including Police, and Internal Affairs, to provide a channel for reporting serious cyber offending, estimated that on average its support staff were assisting 75 people each month who were dealing with various forms of electronic harassment or abuse.⁴⁰ Of these 75 complaints, NetSafe estimated approximately half would typically relate to serious harassment or other online abuse being experienced by an adult, and half would involve various forms of cyber-bullying or harassment involving adolescents.
- 2.16 NetSafe tells us that the majority of those who utilise their services have either been directed to them by schools or the Police and have often exhausted other avenues of complaint. In its submission NetSafe noted that “the distress of those contacting our service is often painfully apparent. The majority of adult targets contact us after being threatened with physical harm.”⁴¹
- 2.17 It seems plausible to assume that both the Police and NetSafe are dealing with some of the more extreme and persistent cases involving serious harm. However not all those experiencing harms will either know of the existence of NetSafe or will feel motivated or empowered to complain. Without any centralised reporting system it is difficult to gauge the size of this larger pool experiencing harms.
- 2.18 However there are a number of indicators which suggest the problem is not insignificant. For example a survey of 13,713 New Zealand households carried out by Statistics New Zealand between October 2009 and January 2010 found that seven per

38 Andrew Ashton “Police want culprits to get message on text bullying” *Otago Daily Times* (online ed, 10 June 2012).

39 Submission of the Post Primary Teachers’ Association (March 2012) at [2.1].

40 Submission of NetSafe (24 February 2012) at 1.

41 Ibid.

cent of 15-19 year olds and five per cent of 20-29 year-olds had received harassing or threatening messages via their mobile phones in the preceding 12 months and similar percentages had been the victim of personally targeted online harassment.⁴² Approximately half of those in the 15-29 year-old age group who had experienced harassment were sufficiently concerned to report the incident.

- 2.19 Vodafone New Zealand told us that since November 2010 over 60,000 account holders have made use of the text and pxt blocking facility which the company launched to assist customers to combat mobile bullying and harassment.⁴³
- 2.20 To further assist us in assessing the scope of the problem we commissioned independent research company Big Picture to undertake research into a number of critical issues under consideration as part of the review.⁴⁴
- 2.21 The research targeted a representative sample of 750 New Zealanders aged 18-70 and was conducted via an online survey comprising a combination of structured and open-ended questions completed between 15 and 22 March 2012.
- 2.22 In line with our terms of reference, the research had a split focus: part one of the survey inquired into public perceptions of news media standards, accountabilities and complaints bodies while part two focused on the internet and people's experiences of speech harms in the digital environment.
- 2.23 The research found that one in ten (10 per cent) of the total sample reported that they had "personal experience of harmful speech on the internet." (Survey participants were told examples of harmful speech might include things like cyber-bullying and harassment, harm to reputation or invasion of privacy.) However this jumped to nearly a quarter (22 per cent) of 18-29 year-olds, who are much higher users of social media. Maori and Pacific Islanders and those not in paid employment also reported higher

42 Statistics New Zealand "*Household use of Information and Communication Technology: 2009*" <www.stats.govt.nz/browse_for_stats/industry_sectors/information_technology_and_communications/hh-old-use-of-ict-info-releases.aspx>.

43 In addition Vodafone told us that between March 2010 – March 2012, the company issued warnings to 5,250 customers as a result of using their phones in abusive or illegal way. Vodafone's mobile terms and conditions include an agreement "not to use your Mobile Device or the Services for an abusive, illegal or fraudulent purpose." Persistent offenders can also have their ability to text deactivated for a specified period or in extreme cases have their account deactivated.

44 Under s 6(2)(b) of the Law Commission Act 1985 the Commission is mandated to "initiate, sponsor, and carry out such studies and research as it thinks expedient for the proper discharge of its functions." Big Picture is an independent market research company based in Auckland. <www.bigpicture.co.nz/home>.

rates at 19 and 17 per cent respectively.

- 2.24 Researchers also attempted to gauge the extent to which participants regarded harmful speech online such as cyber-bullying, harassment, and reputational damage as a problem. Of the total sample 59 per cent said they were either “extremely concerned” or “concerned” and a further 25 per cent were “mildly concerned”. Although 54 per cent of 18-29 year-olds said they were concerned about online speech harms, only 11 per cent rated themselves as “extremely concerned” compared with 20 per cent of the total sample. It appears that although younger people experience online speech harms more frequently, they are less concerned by it.
- 2.25 A higher proportion of Maori and Pacific Island respondents reported they were “extremely concerned” about harmful speech than the general population (32 per cent compared with 20 per cent of the total sample).
- 2.26 Significantly, when asked where they would go if they experienced “a serious problem with harmful speech on the internet” two fifths (42 per cent) of participants that responded said they did not know. A further 20 per cent said they would go to the Police and 17 per cent to the website’s own complaints system.
- 2.27 While this research involved a relatively small sample and in some cases required respondents to grapple with unfamiliar concepts, it does seem to indicate that there is an emerging awareness and experience of online speech harms within the general population and within the younger demographic particularly.

Adolescents

- 2.28 NetSafe estimates that 1 in 5 New Zealand high school students experienced some form of cyber-bullying or harassment in 2007. This estimate is based on research undertaken by NetSafe’s former Research Manager, Dr John Fenaughty, in conjunction with the University of Auckland. The research, conducted between 2007-2011, involved surveying and interviewing around 1,700 New Zealand secondary school students about how frequently they encountered – and how successfully they dealt with – a range of different cyber “challenges” or risks.⁴⁵ These challenges included cyber-bullying and harassment, unwanted sexual solicitation and unwanted exposure to inappropriate content of both a sexual and non-sexual matter. Study participants were asked “In the past year has someone ever tried to use a mobile phone

⁴⁵ John Joseph Fenaughty *Challenging Risk: NZ High-school Students’ Activity, Challenge, Distress and Resiliency, within Cyberspace* (PhD Dissertation, University of Auckland, 2010).

or the internet to bully or to be mean and hurtful to you?" Most interpreted cyber-bullying or harassment as meaning "the transmission of mean and hurtful communications and content to someone online or on-mobile." This might directly target an individual, such as text bullying, or involve indirect/relational aggression, such as spreading malicious rumours via social networking sites.

- 2.29 A third of those surveyed reported at least one experience of electronic bullying or harassment in the past year. Of these, 24 per cent reported that the bullying was via mobile phones and 17.5 per cent via the internet. The highest incidence of cyber-bullying was reported among 15-19 year-old females, at 36.9 per cent. Just under a third (29.3 per cent) of the total sample had been exposed to unwanted sexual content and 18 per cent had experienced unwanted sexual solicitation.
- 2.30 One of the challenges for researchers is understanding how such incidents actually affect young people given the changing norms in cyberspace. For example, content which adults might find highly insulting or offensive may be considered neither in the context of a text exchange between peers.
- 2.31 For this reason Fenaughty did not assume that every challenging incident online resulted in harm but rather explored the extent to which adolescents were distressed by the various cyber challenges. Significantly, he found around half of those who had experienced some form of cyber-bullying in the previous year reported a level of distress associated with the event. In terms of the percentage reporting distress associated with the range of different risks encountered by the group, cyber-bullying rated second only to unwanted exposure to inappropriate content such as violent or gruesome images.
- 2.32 A number of other studies have been carried out examining the incidence of various forms of digital abuse, including text bullying, among New Zealand secondary school students. These include a 2006 survey of 1,153 11-18 year-olds from two New Zealand secondary schools in which 41 per cent reported having been text bullied – half of these on a one-off basis and 14 per cent on a more persistent basis.⁴⁶
- 2.33 Another study collected questionnaires from 3,400 year 9 and 10 secondary school students in the Tasman Police District in which 35.8 per cent of all students reported being subject to some form of cyber-bullying in the last year, and 18.5 per cent of all students reported subjecting another person to some form of cyber-bullying in the last

46 J Raskauskas and JE Prochnow "Text-Bullying in New Zealand: A Mobile Twist on Traditional Bullying" 16 New Zealand Annual Review of Education (2006) 89-104.

year.⁴⁷

- 2.34 These rates were significantly lower, however, than rates of reported physical aggression. 68.3 per cent of participating students reported some form of physical aggression (the use of physical presence or indirect bodily force towards another person or their personal possessions to intentionally cause harassment, intimidation, humiliation or provocation) against them in the last year. Even higher were reported rates of relational aggression (receiving behaviour from their peers that involved disparaging and manipulating actions, embarrassing comments and disclosures, exclusion and indirect harassment) with 90.8 per cent of students reporting some form of this being used against them in the past year.⁴⁸
- 2.35 Last year's report on improving outcomes for New Zealand adolescents by the Prime Minister's Chief Science Advisor noted that although the data was unclear it was likely that at least 15 per cent of New Zealand adolescents have been victims of text or online bullying of some sort.⁴⁹ Within this definition it included "behaviours such as spreading rumours about the target, sending threatening messages, posting photographs or videos online to embarrass the target, and posting content (e.g. through Facebook or on a blog) to damage the reputation or friendships of a targeted individual."
- 2.36 Prevalence studies from around the world have produced divergent results reflecting different sample sizes and methodologies, different definitions of cyber-bullying and digital harassment and the different access young people have to the various cyber platforms and technologies.
- 2.37 For example, in Britain a recent survey of 4,605 11 to 16-year-olds found 28 per cent had experienced some form of cyber-bullying.⁵⁰ For a quarter of these the electronic

47 Dr Donna Swift *The Girls' Project. Girl Fighting: An investigation of young women's violent and anti-social behaviour* (Stopping Violence Services, Nelson, 2011) at 25.

48 A definition of relational aggression cited by Swift at 18 is "negative social behaviours that are intended to harm relationships, social roles and/or social standing": R Pronk and M Zimmer-Gembeck "It's "mean" but what does it mean to adolescents? Relational aggression described by victims, aggressors and their peers" 25(2) *Journal of Adolescent Research* (2010) 175 – 204.

49 A report from the Prime Minister's Chief Science Advisor *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence* (Office of the Prime Minister's Science Advisory Committee, May 2011) at 124 [3.2.1] "PMCSA Report".

50 Emma-Jane Cross and others *Virtual Violence II: Progress and Challenges in the Fight against Cyberbullying* (A report commissioned by Nominet Trust in association with the National Association for Head Teachers, London, 2012) at 6 <www.beatbullying.org/pdfs/Virtual-violence-II.pdf>.

harassment was sustained over a period of time.

- 2.38 A 2009 report on the prevalence of covert bullying, including cyber-bullying, among Australian students found that 7.8 per cent of 12-15 year olds reported frequent (every few weeks or more) experiences of online or mobile bullying.⁵¹ Behaviours classified as cyber-bullying included “threatening emails”, “nasty messages or prank calls”, someone sending or posting “mean or nasty” comments or pictures, someone “pretending to be them to hurt others” or being “deliberately ignored or left out of things on the Internet.”
- 2.39 As we discuss later in this chapter, in May 2012 New Zealand’s Chief Coroner, Judge Neil MacLean, expressed concern about the emergence of cyber-bullying as a background factor contributing to the high rates of suicide and self-harm among adolescents in this country.

WHAT IS DIFFERENT ABOUT DIGITAL COMMUNICATION?

As a person who has been subjected to death threats and other bullying over the internet, I know how serious these are. During that period, I felt nervous leaving my house, and did not feel safe walking along the streets. The language used stigmatised me, and it affected my self-esteem, and my mood. This was in the form of e-mails sent to my work, e-mail sent to me through academia.org, and a page set up on Facebook, specifically for abusing me.

- 2.40 This submitter to our review conveyed in matter-of-fact terms how modern communication technologies can be employed on multiple fronts to besiege an individual. Not only did the threats undermine this man’s physical sense of safety but they also invaded his professional relationships and spilled over into social media via Facebook. Other submitters described the loss of their reputations and unravelling of their lives as a consequence of the viral nature of harassment campaigns conducted via the internet. One described how defamatory and false information disseminated via Twitter by an acquaintance using an pseudonym effectively infected their identity.⁵²

This material is available to anyone who ‘Googles’ my name i.e. potential employers, work colleagues, customers etc. The nature of the comments is very humiliating and damaging to my reputation.

- 2.41 For those unfamiliar with the power of modern communication technologies it is sometimes difficult to fully appreciate the ways in which it can be subverted. Nor is it possible to appreciate the extent to which young people’s lives are enmeshed in social

51 D Cross and others *Australian Covert Bullying Prevalence Study* (Child Health Promotion Research Centre, Edith Cowan University, Perth 2009).

52 Submitter’s name withheld (submission dated 12 March 2012).

media. These two factors together are critical to understanding the ways in which digital communication can damage in ways which find no real parallel in the pre-digital world.

2.42 These differences arise from the nature of the technology itself and how it is shaping our communication culture. When misused, the technology can exacerbate the harms associated with abusive communication in a number of important ways:

- (a) Perpetrators can be anonymous or adopt multiple online personae and construct fake profiles as a platform to attack others. The ability to send anonymous texts and comment anonymously may have a disinhibiting effect on the communicator, disconnecting them from their victim and the consequences of their actions; while from the victim's perspective, the anonymity of the abuser can exacerbate the victim's sense of powerlessness;
- (b) In the past a person's home life was to some extent insulated from workplace or school-based bullying. Now mobile phones and the internet mean the harassment can penetrate all aspects of the victim's life. Given the ubiquity of technology and the extent to which it is enmeshed in our everyday lives, it is not possible to simply "walk away" or disengage from cyberspace;
- (c) The viral nature of the internet and digital communication can magnify the impacts of bullying by creating potentially large "audiences" of bystanders and/or recruiting peers to participate in the bullying activity. Bystanders may experience significant trauma simply from witnessing harassment;
- (d) The permanence of digital information and searchability of the web means damaging content can survive long after the event and can be used to re-victimise the target each time it is accessed. The potential for cached material to be "re-discovered" long after it was initially posted can exacerbate the harms as the target may be uncertain how widely the content has spread and who has seen it.

2.43 Mobile phones, which for the young are now as basic a tool as a pen, are now capable of being used to record and distribute photographs and short video clips. Even amateur users can upload such audio-visual content to social media sites, making them available to potentially large audiences instantaneously.

2.44 In the course of his practice at NetSafe, Dr John Fenaughty explained he had encountered examples of young people being sent threatening text messages accompanied by disturbing images of dead or mutilated bodies, thereby increasing the distress associated with the words. In other instances, images of the victim may be

manipulated in degrading or threatening ways and distributed among peer groups with the intention of humiliating the target. Intimate photographs may be used in a similar way to stigmatise and humiliate another person

2.45 For young people the distress associated with the possession and dissemination of intimate photographs and video recordings can be particularly acute. This was graphically demonstrated in the 2010 case of a 16-year-old Christchurch student who was forced to relocate schools and cities after two male acquaintances coerced her, while drunk, into performing various sexual acts which they recorded on a cell phone.

2.46 In May 2012 the now 21-year-old ring leader was sentenced to 12 months jail after a jury found him guilty of making and possessing an indecent publication the content of which the Judge described during sentencing as “disturbing and harrowing.” In a Victim Impact Statement the young woman provided a compelling account of how online and offline bullying and abuse engulfed her as knowledge of the existence of the video became commonplace around her school community and on Facebook:

In less than a day after it happened, I started getting more abuse at school, people started calling me XXXX XXXX, slut and I was being humiliated in front of the class and the kids at school, it got so bad that I could not stay in class and I could not walk around at lunch time without being abused. The kids were saying I've seen your video and there was stuff on Facebook about it, apparently X and X wrote a synopsis about what happened. I heard that X connected his phone to his big TV and showed the video...

2.47 The Judge also pointed out that the fact these images were stored on the offender’s cell phone and shown to others, and that the existence of these images became widely known among the young girl’s school and community exacerbated the impact on the victim.⁵³

Someone published details on Facebook, and she was instantly notorious. The evidence does not establish whether it was the footage, or an account of the incident that was published. The victim’s parents disowned her. She was held up to public ridicule. She had no option but to leave her school and community. She made several suicide attempts. She is now living with another family in a different community and trying to get her life back on track.

2.48 Although it was unclear from the evidence how widely the video had been viewed, the fact that the images had been stored on the perpetrator’s phone meant there remained the potential for them to be shown at any time and for them to re-emerge in the future.

2.49 This point was emphasised by a Sydney magistrate in April this year during the trial of a 20-year-old man who had placed nude photographs of his girlfriend on Facebook in an act of revenge after their relationship ended. In sentencing the man to six months’

53 *R v Broekman* DC Christchurch CRI-2011-061-000199, 3 April 2012.

jail the Magistrate drew attention to the “incalculable damage” that can be done to a person’s reputation by the irresponsible posting of information in such places as Facebook.⁵⁴

The harm to the victim is not difficult to contemplate: embarrassment, humiliation and anxiety at not only the viewing the images by who people who are known to her but also the prospect of viewing by those who are not. It can only be a matter of speculation as to who else may have seen the images and whether those images have been in stored in such a manner which, at a time the complainant least expects, they will again be available for viewing, circulation or distribution.

2.50 This case was reported to be the first instance in Australian history in which a person was jailed for uploading intimate photos in social media. It mirrors the case of a 20-year-old New Zealand man who received a four month jail sentence in 2010 for a similar offence.⁵⁵ Similarly in May 2012 police successfully prosecuted a 22-year-old Christchurch man under a little used provision of the Telecommunications Act after he sent a text to a woman threatening to place naked photos of her on Facebook.⁵⁶

2.51 The facility to manipulate digital images also creates new ways of inflicting emotional harm on others, as NetSafe pointed out in its submission:⁵⁷

Manipulation of digital images has been used to create seemingly offensive situations that are entirely fictional. NetSafe is aware of local instances where the publication of sensitive images of targets of such harassment has been associated with suicidal behaviour and ideation.

2.52 A notorious example of this type of malicious manipulation of digital images came to public attention in the Britain in September 2011 after a 25-year-old English man was jailed for posting fictional videos and mocking messages relating to the deaths of a number of teenagers, including one who had been hit by a train. As well as posting taunting and highly offensive messages on the teenagers’ Facebook memorial pages Sean Duffy also created a YouTube video called “Tasha the Tank Engine” featuring the dead girl’s face superimposed onto the front of a fictional train engine.⁵⁸

2.53 While such an extreme example of malicious use of communications technology has not been reported in New Zealand, Police did refer us to instances where they had

54 Heath Aston “Ex-lover punished for Facebook revenge” *Sydney Morning Herald* (reproduced on Stuff, New Zealand, 23 April 2012).

55 “Naked photo sends jilted lover to jail” (13 November 2010) < www.stuff.co.nz >.

56 David Clarkson “Man in court over naked pic threats” (31 May 2012) < www.stuff.co.nz >.

57 Submission of NetSafe (24 February 2012) at 1.

58 See “Internet Troll Jailed After Mocking Teenagers” *The Guardian* (online ed, 13 September 2011) <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>. For the relevant offence (s 127), see chapter 4 at [4.74].

intervened after peers of suicide victims had posted offensive and denigrating messages on memorial pages created for the deceased.⁵⁹

- 2.54 Later in this report we consider whether such behaviour should be criminal in New Zealand.
- 2.55 It is also a relatively simple matter to create false profiles and accounts on the web and this is an increasingly common form of harassment used by those wishing to inflict harm on someone with whom they have some form of relationship.
- 2.56 In our Issues Paper we gave a number of examples of such harassment by impersonation, including that of a South Island secondary school teacher who battled unsuccessfully for more than a year to have a false Facebook page containing lewd comments removed from the site. 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. Currently there is no offence directly applicable to this type of behaviour.
- 2.57 In another 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.⁶⁰
- 2.58 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 to NetSafe:

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

59 Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) at [7.2].

60 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*, 115 at 116.

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.

2.59 Variants of this type of behaviour have been reported around the world including the 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 web forum.⁶¹

2.60 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:⁶²

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.

2.61 The ease with which people can share content on the web and comment on other's posts also offers the potential for mob-like behaviour – the anonymity afforded posters often encouraging more extreme forms of abuse and minimising the chances of accountability.

2.62 This was illustrated in a recent British case in which a 45-year-old British woman became the target of what has been described in court as “vicious and depraved” abuse after posting supportive comments about an “X Factor” contestant on her Facebook page. Anonymous attackers responded by creating a false profile in her name using her picture to post explicit comments and vilifying her. In an interview with the Independent newspaper the woman explained how this seemingly trivial affair rapidly spiralled out of control:⁶³

At the time I thought of it as banter. But after a few days people started saying to me ‘You're popping up all over the internet’. People were inciting hatred against me. They weren't just targeting me, they were also dragging young girls into it as well. They weren't playing.

2.63 In June 2012, in what has been hailed as a landmark case, the High Court granted the woman a disclosure order compelling Facebook to reveal the IP addresses and account details of those responsible for posting the offensive content.

61 Ryan Singel “Yale Students’ Lawsuit Unmasks Anonymous Trolls, Opens Pandora’s Box” *Wired* (Online ed, 30 July 2008) < www.wired.com >. For a full discussion of online harassment see for example Martha C Nussbaum “Objectification and Internet Misogyny” in Saul Levmore and Martha C Nussbaum (eds) *The Offensive Internet: privacy, speech and reputation* (Harvard University Press, 2010) at 68.

62 Ibid.

63 Terri Judd “Landmark ruling forces Facebook to drag cyberbullies into the open” *The Independent* (online ed, 9 June 2012).

HOW DOES CYBER-BULLYING DIFFER?

2.64 As we have discussed above, digital communication differs in significant ways from earlier forms of communication. The “text bomb” and the video clip of the school yard brawl that is viewed 32,000 times on YouTube within 24 hours have no precedents in the pre-digital era.

2.65 The authors of a recent Nova Scotia report on cyber-bullying nicely summarised the ways in which these new communication platforms and technologies have unlocked the potential of the bully.⁶⁴

Traditional bullying tends to take place in secluded places, like washrooms, hallways and school buses, where there is little adult supervision. The cyber-world provides bullies with a vast unsupervised public playground, which challenges our established methods of maintaining peace and order – it crosses jurisdictional boundaries, is open for use 24 hours a day, seven days a week, and does not require simultaneous interaction.

2.66 The authors note that while some young users simply do not comprehend the public nature, reach and longevity of their on-line communications, others exploit these characteristics to maximum effect.⁶⁵

The immediacy of online transactions encourages impulsive acts with no thought to the consequences, a behaviour pattern that is already common in many youth, and peer pressure may further promote harmful deeds that unfortunately have instant and powerful impact with no effective retraction possible.

2.67 A good example of this type of behaviour has been seen in New Zealand over the past 18 months with the emergence of anonymous Facebook pages where large numbers of students from one or more secondary schools participated in mob-like harassment of fellow students. The pages’ administrators are typically anonymous and the pages are often used as a vehicle for spreading vicious and damaging allegations about other teenagers. As NetSafe has reported, in some cases these sites would attract hundreds of followers within the space of 24 hours and include highly offensive comments and claims about other students including denigrating their physical appearance and sexuality. Most recently the *New Zealand Herald* reported that a group of local mothers had complained to the police and alerted schools to an anonymous Facebook page containing threatening and damaging posts about local Gisborne teenagers.⁶⁶

64 Report of the Nova Scotia Task Force on Bullying and Cyberbullying *Respectful and Responsible Relationships: There’s No App for That* (Nova Scotia, 29 February 2012) at 12.

65 Ibid.

66 “Parent outrage at Facebook bullying” *New Zealand Herald* (online ed, New Zealand, 5 May 2012).

- 2.68 These sites illustrate how effectively social media can be used to intentionally harm others by damaging their peer relationships. Malicious rumours, often concerning a person's relationships or sexuality, whether true or false, can be spread virally and the anonymity encourages others to participate at least by reading the contents if not actively commenting. Individual teachers and schools have also been targeted.
- 2.69 Researchers point to such sites as examples of the ways in which bullying behaviour often occurs as part of complex social interactions between peer groups and needs to be understood in this relational context.

Impacts of cyber-bullying

- 2.70 The Australian Covert Bullying Prevalence Study noted that covert bullying, which goes unnoticed or unaddressed by adults, including cyber-bullying, presents particular risks to its victims and challenges for those attempting to prevent it:⁶⁷

...research into how to address covert bullying is still in its infancy. This is due in part to the erroneous perception that while covert bullying is unpleasant it is generally considered to be a less harmful form of behaviour. Emerging research indicates, however, that covert bullying has the potential to result in more severe psychological, social, and mental health problems than overt bullying, and is not only more difficult for parents and schools to detect, but also has the capacity to inflict social isolation on a much broader scale than overt bullying. Furthermore, the recent digital media revolution of the last decade has provided an additional platform and encouraged a communication culture within covert bullying can operate among young people.

- 2.71 To date there has been limited New Zealand research specifically on cyber-bullying harms. As discussed earlier, as part of his study of students' resilience in the new digital environment, Dr John Fenaughty sought information about the emotional/psychological impact various cyber challenges had on survey participants. Significantly, around half of those who had experienced some form of cyber-bullying in the previous year reported a level of distress associated with the event. In terms of the percentage reporting distress associated with cyber challenges, this rated second only to unwanted exposure to inappropriate content such as violent or gruesome images.
- 2.72 The most common strategies reported by those who had experienced distressing cyber-bullying were "ignoring the problem" (69.5 per cent); confrontation/fighting (51.2 per cent) peer support (29.6 per cent) technical solution (7.9 per cent). Just over half reported resolving the problem.

⁶⁷ D Cross and others *Australian Covert Bullying Prevalence Study* (Child Health Promotion Research Centre, Edith Cowan University, Perth 2009) at 3.

The link between cyber-bullying, suicide and self-harm

- 2.73 In May 2012 New Zealand's Chief Coroner, Judge Neil MacLean, expressed concern about the emergence of bullying, and cyber-bullying in particular, as a "background factor" in New Zealand's high youth suicide rate. He also noted that bullying featured as one of the factors researchers found when investigating incidences of self-harm among adolescents.⁶⁸
- 2.74 This was followed on June 1 by the release of Coroner Wallace Bain's findings in relation to the death in July 2009 of a 15-year-old North Island girl. The Coroner found that this teenager had died as a result of taking a fatal dose of her father's heart medication but that there was enough doubt about her actual intent to prevent him from reaching a finding of suicide. The Coroner concluded that the teen had taken the medication in response to the end of her relationship with the 27-year-old with whom she had been having an affair and that her actions, and subsequent communications, suggested this was a cry for help.
- 2.75 In his findings the Coroner drew attention to the impact on the teen of a series of highly abusive and threatening text messages written by her lover's wife in the days and hours leading up to her death. As part of his recommendations the Coroner called for stronger legal penalties for those who use new technologies to inflict emotional harm on others – particularly vulnerable young people.
- 2.76 As a society we are understandably disturbed by the possibility that the misuse of technology may now be playing a role in New Zealand's persistently high rates of youth suicide. However, it is also vital to consider this issue within the much broader context of adolescent mental health and well-being. New Zealand researchers have developed a clear understanding of the risk factors associated with suicide and self-harm in adolescents, and while exposure to bullying and other forms of aggression certainly features as a risk factor, it is only one strand in a complex picture.
- 2.77 In New Zealand to date there has been only a handful of cases where coroners have explicitly considered the role of technology in a young person's suicide. We reviewed the findings of five such inquests conducted between February 2006 and June 2011. The ages of the young people ranged between 12 and 17 years of age.⁶⁹

68 Simon Collins and Vaimoana Tapaleao "Suicide link in cyber-bullying" *New Zealand Herald* (online ed, New Zealand, 7 May 2012).

69 One of the first cases to come to public attention involved the death of a 12-year-old Putaruru girl in February 2006. Although the coroner made no reference to bullying in his brief findings, it is apparent

- 2.78 In many respects an analysis of these cases illustrates the complexity of the underlying issues associated with youth suicide. In a few cases it appears that bullying was a contributory factor and that the particular characteristics of digital communications which we discussed earlier – including the disinhibiting effects of texting and the “wrap-around” nature of digital interactions – may have amplified the emotional impact and harms.
- 2.79 However in other cases the role that digital technology may have played appears to be far more nuanced: for example, even when there was no evidence of malice or intention to harm the recipient, there was the suggestion that texting itself could result in distorted communication which could, in some contexts, have a far greater emotional impact than verbal or face-to-face communication. One coroner referred to the impact of a “texting frenzy”; another referred to the impact of a highly emotionally charged late night text exchange between a vulnerable young man and two young female friends where the possibility of one or more of their suicides was discussed.
- 2.80 But what is also abundantly clear from these cases, and the research literature, is that bullying is only one of a number of complex inter-related risk factors associated with suicide and its actual impact, like the impact of other stressors, will vary according to a range of variables including the person’s emotional resilience, their home and school environment and any underlying personality or psychiatric disorders – most significantly, depression.
- 2.81 Alcohol and drug use in adolescents is also another very important risk factor. Both can reduce inhibitions and heighten the normal impulsivity associated with adolescents and may lead a vulnerable young person to respond catastrophically to a stressor such as a relationship break-up, or physical or emotional conflict. So for example, an abusive anonymous text message or degrading comment left on a social media site may act as a trigger for self-harm or suicide in some contexts.

Contagion effect

- 2.82 As this discussion demonstrates, there are a number of novel ways in which digital

from the witness statement provided by the child’s mother that her daughter had been subjected to a sustained period of bullying involving both texts and emails. It was also however apparent that the 12-year-old had been exposed to a number of suicide deaths within the close-knit community, including that of a cousin a matter of days earlier. In an interview with the *New Zealand Herald* the mother acknowledged that there were likely to be a number of factors contributing to her daughter’s death but that the ‘orchestrated campaign’ of threatening and pejorative texts and emails had played a part.

communications technology can be used to cause emotional and mental harm to vulnerable adolescents. Bullying can create a downward spiral in a vulnerable young person's life, leading to social isolation and depression which in turn heightens the risk of suicide and self-harm.

- 2.83 Alongside these factors research also suggests that the networked world presents another challenge for those attempting to prevent suicide – the risks associated with the detailed discussion and glamorisation of suicide.
- 2.84 These issues were examined in depth by Otago University's Department of Preventive and Social Medicine as part of research into a suspected suicide cluster in a rural New Zealand community in 2006.⁷⁰
- 2.85 Researchers noted that while the mainstream media had adhered scrupulously to suicide reporting guidelines and had avoided all references to the emergence of a cluster of suicides in the community, discussion of the events was rife within social media.
- 2.86 The researchers concluded that "in view of other evidence linking publicity and social modelling to suicide contagion" it was likely that the use of texting and social media to spread information (factual and false) about the suicides had "increased the risk of suicide contagion" in relation to these suicides. The posthumous popularity and glamorisation of those who had committed suicide added to this risk:

Many of those who took their own lives in the cluster received attention and dedications from hundreds of other people via Bebo.com, which may have added further to the risk of contagion.

- 2.87 In their recommendations the researchers noted the importance of the early identification of an emerging suicide cluster to enable timely and co-ordinated intervention. To achieve this the researchers recommended that suspected youth suicides should be immediately notifiable not just to coroners but to public health services.
- 2.88 They also recommended taking immediate action to try to mitigate potential sources of contagion – "including removal of Bebo or Facebook sites". They also noted that texting and social media was being harnessed by many youth counselling agencies to

70 Lindsay Robertson and others "An Adolescent Suicide Cluster and the Possible Role of Electronic Communication Technology" *The Journal of Crisis Intervention and Suicide Prevention (Crisis)* 2012; DOI: 10.1027/0227-5910/a000140. Investigators undertook a forensic examination of eight suicides that were either linked temporarily, geographically or through some other inter personal connection. Among the key issues they explored was whether, and in what ways, the use of modern communication technology such as texting and social media, had impacted on these events.

deliver appropriate services to the young. However they also advocated that suicide prevention agencies actively monitored social media sites in the wake of youth suicides to detect anything which may give rise for concern:

Electronic communications provide valued links between young people, but they may also become a source of suicide contagion following a suicide. When this escapes the scrutiny of the adult community it may make it difficult to recognise a cluster as it is developing. A multidisciplinary approach to recognising and responding to a suicide cluster is essential.

- 2.89 This research and its conclusions underscore the complexity of the issues and the need for policy makers to understand not only the risks associated with new media, but also the ways in which social media and technologies such as texting can be *protective* – both as channels through which young people can seek help but also via which they can connect with their peers.
- 2.90 In chapter 6 of this report we provide an overview of the policies and programmes which have been developed to tackle bullying in schools and we make some recommendations about how the law and the existing anti-bullying strategies can best confront cyber-bullying.

SUMMARY AND CONCLUSIONS

- 2.91 This discussion points towards a number of conclusions. First, as noted in the introduction to this chapter, the major research focus with respect to cyber-crime has been in relation to financial and other security threats. However increasing concern about cyber-bullying in particular is producing a growing body of quantitative and qualitative research into the prevalence and impact of harmful digital communication.
- 2.92 Independent research we commissioned suggests that as many as one in ten New Zealanders has some personal experience of harmful communication on the internet. That rate more than doubles to 22 per cent among the 18-29 demographic who are the heaviest users of new media. These figures are broadly consistent with the academic literature although estimates vary depending on the different definitions, samples and methodologies used.
- 2.93 However, as we have noted earlier, robust communication is a hallmark of the internet and not everyone exposed to abusive or offensive communication will be harmed. It seems incontrovertible that technology is influencing how we communicate and relate socially and, as the early adopters of this technology, young people are both shaping and being shaped by these new ways of interacting digitally. Free speech values and an abhorrence of censorship are deeply embedded in the culture of the internet,

challenging traditional concepts of where the line should be drawn with respect to communication which in the past has been regarded as so abhorrent or damaging that it requires legal prohibition and punishment.

- 2.94 But even allowing for changing communication norms, research suggests that a significant proportion of adolescents exposed to cyber-bullying and harassment experience distress as a result.⁷¹
- 2.95 In addition it is evident from the submissions of Police and NetSafe that a growing number of New Zealanders are turning to these organisations for help after experiencing significant distress as a consequence of harmful direct and indirect digital communication. We understand from NetSafe that many of the 75 people who turn to them for assistance each month have been diverted by the Police and have already exhausted all other avenues of complaint. Given NetSafe's modest public profile and the challenges the Police face in pursuing many cyber-related communication offences, it seems reasonable to assume that there is significant under-reporting of digital communication offences.
- 2.96 Another important conclusion which emerges from this discussion relates to the *nature* of the harms which can arise from digitally mediated communication. On one level the abuse of new communication technologies to cause intentional harm to another can be seen as an extension of offline behaviours. However this is too simplistic. For the first time in history individuals with access to basic technology can now publish, anonymously, and with apparent impunity, to a potentially mass audience. This facility to generate, manipulate and disseminate digital information – which can be accessed instantaneously and continuously – is producing types of abuse which simply have no precedent or equivalent in the pre-digital world. In other words, ordinary citizens, with no specialist expertise or technical assistance can, in effect, cause irreparable harm to one another's reputations and inflict enduring psychological and emotional damage. Irrespective of the quantum of the problem, in our view, this potential to cause significant, and potentially devastating, harm demands an effective legal remedy.
- 2.97 Finally, with respect to adolescence, it seems unarguable that digital communication technology has allowed relational bullying and personal harassment to reach a scale and sophistication hitherto unimaginable. It is also unarguable that, for the same reasons as discussed above, the harms which may arise from this type of wrap-around

71 John Joseph Fenaughty *Challenging Risk: NZ High-school Students' Activity, Challenge, Distress and Resiliency, within Cyberspace* (PhD Dissertation, University of Auckland, 2010).

bullying and harassment have been exacerbated.

- 2.98 However, this same technology is also empowering young people, including those who might otherwise be marginalised, by providing powerful new ways through which they can connect and interact. It also enables young people to seek out help and to seek assurance in ways which are not dependent on the quality of their adult relationships.
- 2.99 The weight of international and New Zealand evidence supports the view that cyber-bullying should not be approached as a discrete practice but as a manifestation of intentionally harmful acts perpetrated and experienced by adolescents within the context of individual and peer relationships. However, it is critical that policy makers are alert to the very real differences between covert and overt forms of aggression, and in particular the unique challenges created by digitally mediated bullying and harassment, which crosses over the boundary between school and home life.
- 2.100 Similarly, it is important that the risks associated with bullying generally and cyber-bullying specifically, including the association with suicide, are understood within the wider broader context of adolescent health and wellbeing. In this respect the PMCSA report provides an invaluable resource for policy makers attempting to understand the complex personal, social and environmental factors which are contributing to a range of poor outcomes for New Zealand adolescents.

Chapter 3: User empowerment and self-regulation – is it enough ?

ISSUES PAPER

- 3.1 As Google pointed out in its submission to this review, “the mere existence of harmful speech is not sufficient to justify additional regulation. It is necessary to show that existing legal and self-regulatory remedies are ineffective”.⁷²
- 3.2 In chapter 7 of our Issues Paper we described the existing legal and non-legal remedies available to curb harmful communication.⁷³ These include a substantial body of statute and judge-made law and the various self-regulatory systems which operate within many of the networked public spheres on the internet itself.
- 3.3 We reached the following preliminary conclusions about the adequacy of these legal and non-legal remedies:
- (a) While the existing criminal and civil law is capable of dealing with many of the communication harms we have described, our preliminary view was that the law was not always capable of addressing some of the new and potentially more damaging harms arising from the use of new technology.
 - (b) In addition there were a number of impediments to the successful application of the law with respect to harmful digital communication. These included a lack of knowledge of legal rights and responsibilities; difficulties accessing the law; difficulties enforcing the law as a result of inadequate investigative resources and tools and difficulties in obtaining evidence and identifying perpetrators.
 - (c) With respect to the self-regulatory tools that have evolved within cyberspace, we stated that a lack of robust data made it difficult to assess their effectiveness.
- 3.4 In this chapter we return to the issue of self-regulation and discuss the strengths and weaknesses of the current non-legislative solutions to harmful digital communication. In doing so we draw on what submitters told us about their experiences of using these systems to resolve problems and our own research findings.

⁷² Submission of Google New Zealand Ltd (14 March 2012) at 16.

⁷³ Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) at 160.

THE ADEQUACY OF EXISTING SELF-REGULATORY SOLUTIONS

Who constrains communication in cyberspace?

- 3.5 As both Google and Facebook pointed out in their submissions, the amount of data shared on leading internet properties is mindboggling: every minute there are an estimated 60 hours of video uploaded to YouTube; every day on average 483 million people around the world actively engage on Facebook,⁷⁴ uploading on average more than 250 million photos; each week an estimated 1 billion tweets are sent by Twitter users.⁷⁵
- 3.6 Trade Me, a minnow by Facebook standards, but with an even greater penetration in the New Zealand market, has 2.9 million members who, on average, will publish 20,000 new posts on Trade Me message boards each day.⁷⁶ At any given time there may be as many as 550 million words contained on these message boards.
- 3.7 Because participation in these networked spheres is free it is sometimes assumed that cyberspace is the equivalent of a digital “commons”, where free speech is unfettered and the only rules that apply are those which participants make up themselves.
- 3.8 In fact most interactions in cyberspace depend on intermediaries which provide the platforms and services which allow us to publish and access content and interact with others. These include internet giants such as Google whose search technologies have become the portal through which a vast number of people interface with cyberspace. Countless businesses around the world provide technologies and platforms for the creation and hosting of user-generated content. And the telecommunication sector provides internet connectivity.
- 3.9 Preserving the internet from censorship and regulation is a core objective of many cyber-based businesses – an objective which can have both a commercial and ideological imperative. For example Google’s mission is to “facilitate access to information for the entire world, and in every language.” Censorship is incompatible with this aim.
- 3.10 However this does not mean that Google and other global internet intermediaries are operating outside the law. These companies, and the individuals using their services,

⁷⁴ Submission of Facebook (14 March 2012) at 2.

⁷⁵ Submission of Google New Zealand Ltd (14 March 2012) at 21.

⁷⁶ Submission of Trade Me (12 March 2012) at 1.

are all subject to the laws and regulatory systems of the countries in which they are domiciled. The terms and conditions to which users agree when contracting to use services such as Twitter, Facebook, YouTube and Google make clear that users are responsible for their own behaviour on these sites, but that the sites themselves are subject to the law and require those who use them to respect these legal boundaries.

- 3.11 For example, Twitter makes it clear that while it accepts no responsibility for content distributed on its platform, it reserves the right to restrict content and to co-operate with enforcement agencies when its terms of use have been violated:⁷⁷

We reserve the right at all times (but will not have an obligation) to remove or refuse to distribute any Content on the Services, to suspend or terminate users, and to reclaim usernames without liability to you. We also reserve the right to access, read, preserve, and disclose any information as we reasonably believe is necessary to (i) satisfy any applicable law, regulation, legal process or governmental request, (ii) enforce the Terms, including investigation of potential violations hereof, (iii) detect, prevent, or otherwise address fraud, security or technical issues, (iv) respond to user support requests, or (v) protect the rights, property or safety of Twitter, its users and the public.

- 3.12 Not surprisingly, given their pivotal role at the interface between users and cyberspace, internet intermediaries find themselves at the centre of policy discussions about how to manage the competing interests of freedom of expression versus other human rights. And while these companies often stress their passive role as intermediaries, nonetheless they are increasingly forced to grapple with complex decisions about if and when to accede to requests to remove content, deactivate accounts or block access to sites.

- 3.13 In its submission to this review the Equal Justice Project drew attention to this “inherent tension between the need for corporate accountability and the right of private commercial sectors to self-regulate within the operation of the law.”⁷⁸

- 3.14 And as these submitters went on to point out, these tensions have taken on a whole new dimension as a result of mass participatory media sites like Facebook:⁷⁹

In 2011, the official user count for Facebook was reported to be a monumental 854 million (monthly users); more populated than the average nation-state, yet the entity is largely free to determine guidelines and balances considerations for multiple jurisdictions against its own (user) interests. This observation does not purport to be a pretext to suggest active online-forum or corporate regulation, yet it points to an eerie lack of uniformed regulatory governance for such online mediums.

77 Twitter: Restrictions on Content and Use of the Services available at <www.support.twitter.com/groups/33-report-abuse-or-policy-violations#topic_166>.

78 Submission of the Human Rights division of the Equal Justice Project, Faculty of Law, University of Auckland (received 30 March 2012) at [3.1].

79 Ibid.

- 3.15 At the other end of the spectrum from such internet giants are the millions of bloggers and website administrators each with their own particular objectives and communities of interest. Participation in these communities will often involve adherence to some sort of rules or norms but these may be minimalist, or, in some instances non-existent.
- 3.16 In other words, just as with traditional media, there are the mainstream global entities, such as Google and Facebook, with strong commercial imperatives to invest in sophisticated self-regulatory systems and, alongside these, an almost infinite number of medium-sized and niche sites with an equally diverse approach to the question of user rights and responsibilities.
- 3.17 Given this diversity it is clear that people's experiences in cyberspace will vary greatly depending on the environments in which they spend their time and how they interact with others.
- 3.18 This idea that users make active choices about their engagement in cyberspace has important implications for policy makers when thinking about how to respond to problems like harmful communication. Unlike broadcast media which pushes content out to passive audiences, the web requires users' active participation to search out or "pull in" content and make choices about what they expose themselves to.
- 3.19 In its submission Google described how "internet users are now much more in control of the content they consume and have been given the tools to create, edit, mash-up, distribute, share and comment on content like never before."⁸⁰
- 3.20 In Google's view this paradigm shift in how citizens use media has fundamental implications for how problems such as harmful content should be managed in the digital era:⁸¹
- [O]nline communities set, refine and enforce their own community standards. If content is made available that is considered to be unacceptable or offensive, users will protest and remedial action can be taken very quickly. Online businesses risk their livelihood if inappropriate content is repeatedly published as audiences and users will quickly switch to other sites.
- 3.21 Rather than resorting to legal solutions to tackle abuses of these powerful new communication technologies, both Google and Facebook emphasised the importance of "bottom-up" solutions which harness the power of users and technology.
- 3.22 In summary then, these corporations argue that policies directed at reducing the problem of harmful communication in cyberspace need to focus in the first instance on empowering users by educating them about their rights and responsibilities as "digital

⁸⁰ Submission of Google New Zealand Ltd (14 March 2012) at 15.

⁸¹ Ibid.

citizens” and providing them with the technological tools to exercise these rights and responsibilities effectively. These strategies are reinforced by the “terms of use” agreements by which users are contractually bound to internet intermediaries and, ultimately, by the legal systems which apply to the users themselves and the content they create.

- 3.23 We have no argument with this approach and believe it is both consistent with the principles of free speech and reflects the practical realities of the new era of mass participatory media.
- 3.24 However, the question to which we now turn is whether in practice this combination of self-regulation underpinned by domestic law is in fact providing effective remedies for those who experience significant harms as a result of communication abuses. Specifically, we are interested in whether there is a gap between the reach of the self-regulatory systems on the web, and the reach of the law.
- 3.25 In the following discussion we do not pretend to provide an exhaustive answer to this question – as mentioned earlier, there are literally millions of different destinations in cyberspace and billions of users. Instead we report what our own research and submitters have told us about their experiences and views of the current systems and laws.

SELF-REGULATORY TOOLS

- 3.26 As we noted above, internet intermediaries and content hosts vary hugely in their size, complexity and sophistication, and their commitment to user rights and responsibilities.
- 3.27 In their submissions both Google and Facebook emphasised the commercial imperative of investing heavily in developing tools and systems which support user safety:⁸²
- Providers want their brand associated with comfort, safety and security. Ultimately, it is imperative to a provider's bottom line to get this right. Otherwise users will switch to a different service. That is particularly true in the highly-competitive world of the web, where an alternative is only a click away.
- 3.28 As discussed, like many privately owned internet services Google (which owns YouTube) and Facebook rely on a combination of contractual “terms and conditions” and community moderation to establish and maintain civil behaviour on their sites.
- 3.29 Typically, users must register and agree to comply with the site’s terms and conditions

⁸² Ibid, at 14.

before being able to make use of the site. As Facebook pointed out in its submission, those using its platform are governed by the company's Statement of Rights and Responsibilities, which prohibits the posting of content that "harasses, intimidates or threatens any person, or that is hateful or incites violence."⁸³ These are complemented by a set of Community Standards, designed to provide a more "user-friendly summary of the legal terms set out in the Statement of Rights and Responsibilities."

3.30 By default, other users of the site become the agents for policing compliance with these rules and standards. Users 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 system "leverages the 845 million people" who use its site to monitor and report offensive or potentially dangerous content. This community moderation was backed up by "a trained team of global reviewers who respond to reports and escalate them to law enforcement as needed."⁸⁴

3.31 In addition Facebook detailed a range of other measures it takes to minimise abuses of the site and to support vulnerable users. These included:

- (a) Facebook's 'authentic identity' culture which mitigates against "bad actors who generally do not like to use their real names or email addresses";
- (b) Facebook's own automated systems for removing content that violates policies, including the deployment of technology specifically developed to detect child exploitative materials;
- (c) Facebook's partnerships with suicide prevention agencies, including three in New Zealand, which aim to ensure vulnerable users have access to appropriate support;
- (d) Facebook's special safety and privacy tools that have been developed in recognition of the special needs of adolescent users. These include privacy default settings for accounts of minors that ensure that they do not have public search (i.e. search engine) listings created for them, thereby reducing the visibility of minors on the web.

3.32 When users report content that is believed to be in breach of the law or of the site's own terms and conditions Facebook told us it was quick to respond including, when appropriate, taking "corrective action".⁸⁵

In serious or potentially criminal matters, this involves account termination or referral to law

⁸³ Submission of Facebook (14 March 2012) at 5.

⁸⁴ Ibid, at 6.

⁸⁵ Ibid, at 6.

enforcement. For less serious matters, we will remove any content that violates our policies and direct people to the Community Standards when they next log in to further educate them about the policies that govern the site.

3.33 In a similar vein Google detailed the range of policies and processes it employed “to minimise and provide remedies for harmful speech online.”⁸⁶ These included:

- (a) Clear policies regarding what content is and is not acceptable, such as the YouTube Community Guidelines;
- (b) Tools that provide users with simple and effective ways to report any content that breaches community standards or guidelines, or otherwise causes concern to site users (e.g., the YouTube flag system);
- (c) Tools that enable parents to determine what level of content they wish their children to be exposed to on YouTube and the Android Market online app/game store;
- (d) Educational initiatives such as its partnership with NetSafe to create the Google Family Safety Centre.

3.34 Trust and safety are also critical to the success of New Zealand’s leading domestic internet property, Trade Me. In its submission Trade Me outlined the systems it has put in place to protect users including a 24 hour, seven day a week “policing team” staffed by Trade Me employees capable of responding to a range of user problems. While Trade Me’s primary focus relates to the integrity of their sales processes, they have also expended significant resources in developing technology and systems to ensure their Community Message Boards are not used harmfully or in breach of the law.⁸⁷ Users can also fast-track unsuitable content for review.

3.35 In its submission Trade Me provided us with a snap shot of how these systems were used by the Trade Me community in November 2011. In the previous month:⁸⁸

- Members placed close to 600,000 posts on the message boards;
- Trade Me received some 2,500 reports from members about these posts;
- In response the message board team responded by removing 700 individual posts and a number of full threads;

86 Submission of Google New Zealand Ltd (14 March 2012) at 15.

87 For example in its submission Trade Me explained that when it becomes aware of a name suppression order that is likely to be breached it typically sets message board alerts designed to bring potential infringements to its attention.

88 Submission of Trade Me Limited (12 March 2012) at 40.

- Over the same time the community voted off 6,643 posts.

Assessing the effectiveness of self-regulatory solutions

3.36 Given their dominance of the networked public spheres, and the extraordinary volume of data exchanged by the millions of people around the world who use Facebook and Google services each day, it is inevitable that breaches will occur. For example, anyone who types the phrase “school fights + New Zealand” into the YouTube search engine will find a selection of video clips featuring student assaults. Some are clearly staged, some are featured within the context of a news programme, many are several years old. An infamous Australian clip involving a retaliatory assault in a Sydney school has been viewed more than 7 million times since it was posted a year ago. The most recent New Zealand clip was posted in February 2012 and had been viewed more than 7,000 times when we accessed it in June. It appears to feature a brawl captured on a cell phone.

3.37 Of course anyone who views these clips must first have *intentionally* sought them out. If they were offended by the content of the video they are free to report them using the simple tools available on the site. If the video in question was deemed to be in breach of YouTube’s community standards (which prohibit uploading videos showing “graphic or gratuitous violence” among other things)⁸⁹ it may be removed by the site’s administrators. The user who posted it might receive a strike – repeated violations can lead to various penalties including disabling of the user’s ability to post new content for a period, or in the case of persistent offending, account deactivation.

⁸⁹ YouTube’s community standards state as follows:

- Graphic or gratuitous violence is not allowed. If your video shows someone being physically hurt, attacked, or humiliated, don’t post it.
- YouTube is not a shock site. Don’t post gross-out videos of accidents, dead bodies or similar things intended to shock or disgust.
- Respect copyright. Only upload videos that you made or that you are authorized to use. This means don’t upload videos you didn’t make, or use content in your videos that someone else owns the copyright to, such as music tracks, snippets of copyrighted programs, or videos made by other users, without necessary authorizations. Read our Copyright Tips for more information.
- We encourage free speech and defend everyone’s right to express unpopular points of view. But we don’t permit hate speech (speech which attacks or demeans a group based on race or ethnic origin, religion, disability, gender, age, veteran status, and sexual orientation/gender identity).
- Things like predatory behavior, stalking, threats, harassment, intimidation, invading privacy, revealing other people’s personal information, and inciting others to commit violent acts or to violate the Terms of Use are taken very seriously. Anyone caught doing these things may be permanently banned from YouTube.

3.38 But as our submitters told us, even when users do utilise the reporting tools provided by websites to alert administrators to the presence of offensive content, it can often be a long and frustrating process. Of necessity these automated reporting systems rely in the first instance on pre-coded templates which do not always provide the appropriate channel for addressing complex human behaviours. In the course of our inquiry we were made aware of many cases where individuals had battled for months to have highly offensive content, including false Facebook pages, taken down.

3.39 These included instances where students had set up “hate pages” on Facebook to publish malicious rumours and content about other students; where individuals had been targeted by anonymous posters creating false online profiles containing damaging content; and where highly defamatory allegations had been disseminated via blog sites.

3.40 NetSafe was very clear in its submission and in subsequent meetings with us that many people who come to them for help feel defeated and distressed by the complexity of complaints systems and the lack of direct communication channels.

3.41 Given the size of these networked platforms it is no surprise that individual complainants should fall through the cracks. This is the case even with highly motivated corporate players such as Google and Facebook but as InternetNZ pointed out in its submission, it is even more of a risk with internet services and content hosts who have no such commitment to standards or concerns about their users’ safety.⁹⁰

3.42 In the absence of any centralised body responsible for monitoring complaints about online communication it is difficult to assess how effective New Zealanders consider the self-regulatory tools and laws to be. At this point neither Google nor Facebook produce country specific reports on the use of community reporting tools and the type or volume of content that has been removed as a consequence of such individual user reports. Without this type of information it is difficult to assess how effective users find these tools.

Independent research findings

3.43 As discussed earlier, the Law Commission contracted independent research company Big Picture to survey New Zealanders about a range of issues relating to standards and accountability with respect to both traditional and new media. As part of this research participants were surveyed about:

- their awareness of the “laws, rules or standards” that apply to harmful speech

⁹⁰ Submission of InternetNZ (12 March 2012) at 9.

online;

- their awareness and assessment of “safeguards which operate within online communities, including the systems of online reporting employed by sites such as Facebook”;
- their awareness of where to go for help if they were experiencing “a serious problem with harmful speech on the internet” which they had been unable to resolve themselves.

3.44 On the first point only one in ten respondents was spontaneously aware of the laws, rules or standards which apply to harmful speech on the internet. Among those in the 18-29 demographic, who are much higher users of new media, this rose to one in eight.

3.45 With respect to awareness of online safeguards and reporting tools, less than a third (29 per cent) of the total sample said they were aware of these tools. Among the younger demographic, awareness was higher, at 39 per cent.

3.46 Of those who were aware of the existence of online safeguards and reporting tools, 25 per cent regarded these systems as either “effective or extremely effective” and 63 per cent thought they were “effective some of the time or not at all.” Of the younger demographic a third (34 per cent) regarded these safeguards as either “effective or extremely effective.”

3.47 Asked where they would go if confronted with a serious problem involving harmful speech on the internet that they had been unable to resolve, a large proportion – 42 per cent – said they did not know.

3.48 Even among the younger demographic, 38 per cent said they did not know where to go for help if they had a serious problem with harmful speech that they could not resolve.

3.49 Of those who nominated a body, 20 per cent said they would go to the Police and 17 per cent said they would go to the website’s own complaints system. Just four per cent said they would seek legal advice.

3.50 When asked whether there should be some form of accountability by social media sites for harmful content 45 per cent said “definitely” and a further 37 per cent “maybe”. The most common reasons given by those who were *definitely* in favour of some form of accountability for social media platforms:

- Content can be very harmful or damaging;
- Sites need to be held accountable;
- Standards should apply to users and providers.

3.51 Reasons given by those who were either ambivalent or opposed were a mix of principle and pragmatism:

- The individual makes the choice, not the site;
- Free speech/people can say what they want;
- Individuals need to be held accountable;
- Can't control everyone/difficult to regulate.

3.52 Despite the higher incidence of harmful speech exposure within the younger demographic, this group were less in favour than the general population of social media being held accountable with 33 per cent saying they felt social media definitely should be held accountable compared with 45 per cent of the total population.

Submitters' views

3.53 In our Issues Paper we sought feedback from the public about many of these same issues, including the effectiveness of the non-legal remedies that operate within online communities and the adequacy of the existing law.

3.54 As we might expect, those submitters who regarded the problem of digital communication harms as significant tended to be more sceptical about the adequacy of the current legal and non-legal solutions. Conversely, submitters like Google suggested the problem was ill-defined and adequately addressed by the non-regulatory systems already in place online, backed by the law.

3.55 In its submission Trade Me noted that the effectiveness of online safeguards such as reporting tools depended on their “accessibility, responsiveness and ease of use.”⁹¹ It noted that some websites make their reporting tools difficult to find or have none. Trade Me also stressed the importance of providing users with direct access to real-time assistance over the phone. In the course of consultation, Trade Me told us they are approached by their members for assistance after being unable to get a response from offshore web operators. At times Trade Me will end up approaching such operators on their members' behalf.

3.56 NetSafe submitted that while technical solutions “are widely touted” as the solution to harmful digital communication “in reality there are limited instances where such solutions are effective”.⁹²

91 Submission of Trade Me Ltd (12 March 2012) at 12, 37.

92 Submission of NetSafe (24 February 2012) at 2.

- 3.57 It suggested that blocking techniques offer only partial and temporary solutions to prevent abusive content from reaching its target. Reporting systems could be effective if they were easy to access and the host or platform was responsive. NetSafe told us that its experience dealing with the dominant and more mature internet properties such as Facebook and Google indicated these organisations systems and levels of responsiveness to user complaints was constantly improving. However this was often not the case with smaller web-based businesses lacking the resources or “not managed by companies with a strong social responsibility focus.”
- 3.58 Police also questioned whether online reporting and other self-regulatory systems employed by social media sites were adequate, citing an “increasing number of requests for help/advice from members of the public (both young and old) in relation to Facebook issues and other forms of social media harassment.”
- 3.59 “Sweet As Social Media”, a New Zealand advocacy group formed to “fight anti-social behaviour and bullying online,” reported a lack of awareness and/or utilisation of automated systems for dealing with offensive content. The group submitted that many who had made use of these systems found the process slow and that many were “frustrated by a lack of response or remedy from these sites.”⁹³
- 3.60 The Commission also received a number of submissions from organisations and individuals outlining their own personal experiences of attempting to utilise online reporting tools to deal with a range of problems including fake profiles, hate sites and malicious impersonation.
- 3.61 In its submission the National Council of Women (NCW) outlined a campaign to have Facebook remove pages which it believed were “advocating, supporting and trivialising rape and violence against women.”⁹⁴ NCW said despite widespread opposition to these pages Facebook had been reluctant to take action, saying that opinion that was outrageous or offensive to some did not necessarily violate the company’s policies. Some pages were eventually taken down but NCW pointed out that not all individuals or groups had the time or resources to apply the type of commercial and public pressure that was required before action was taken.
- 3.62 An individual submitter who had been the subject of defamatory publications on Twitter described her frustration at the lack of remedies available to her:

93 Submission of Sweet As Social Media (received 15 March 2012) at 12.

94 Submission of the National Council of Women of New Zealand Te Kaunihera Wahine O Aotearoa (30 March 2012).

I have reported my case to the police, but they are unwilling to act as direct threats were not made. Twitter claims no rules were broken despite the obvious defamatory content and Google won't even entertain my complaint unless it is backed by a 'law enforcement agency'.
I do feel powerless to act to protect my reputation.

The limits of user choice and the “right of reply”

- 3.63 As discussed in our Issues Paper, robust communication has been a hallmark of the internet since its inception and for many the facility for users to directly participate in debates and exercise their free speech rights mitigates any harm that might arise. The read/write web⁹⁵ is, on this view, a self-correcting system which enables constant scrutiny and correction by users.
- 3.64 It is also a system that requires users to make active choices. Unlike traditional broadcast media content which is “pushed out” to a mass market, new media relies on people to actively seek out (or “pull in”) content and to exercise a level of choice and judgement about what they consume and with whom they engage which is entirely new.
- 3.65 These characteristics of the new media environment are often seen to be highly significant when considering policy and legal responses to harmful online conduct.
- 3.66 However, while we agree that these characteristics are significant and that over time users will become increasingly adept at exercising choice and amplifying their own voice online, there are a number of compelling reasons why, for the moment at least, we cannot entirely depend on this new paradigm to protect users from speech harms.
- 3.67 To begin with, there exist a number of important information and power asymmetries in cyberspace. For example, those who run blog sites and who host interactive forums and websites are not only able to set the terms and conditions which apply to those using these sites but they are also able to determine how much control to exercise over content (e.g. whether or not to monitor user comments), and whether and when to remove content. Website administrators will also often have access to significant information about their users, including email addresses, IP addresses, the search engine query used to find the website and the referring page or link from which the user came to the site.⁹⁶

95 The read/write web refers to the set of web tools that allow for conversation, collaboration and creation. See BBC News “Berners-Lee on the read/write web” (online ed, 9 August 2005).

96 David Farrar “Privacy and New Media” (Presentation at Privacy Awareness Week forum, 3 May 2012, Wellington) <privacy.org.nz/assets/Files/PAW-privacy-forums/David-Farrars-presentation.pdf>.

- 3.68 A person who has been targeted by a blog and/or by participants in an online discussion thread certainly has the option of defending themselves and or correcting information that may be factually incorrect by participating in the comments. But a single correcting comment embedded in a long tail of abusive commentary may not have much effect – particularly if the originating blog post continues to assert false or malicious information.
- 3.69 Also, web-based interactions are mediated by the same sorts of power imbalances that exist offline: mob-like bullying behaviour by cliques of like-minded individuals congregating online is not easily countered by the lone voice of the targeted individual. And while it is possible to comment anonymously online or to adopt a different persona, it will often be the case that participants in online discussions will know each other's real identities.
- 3.70 Of course, the person who is the subject of the abuse does not have to visit the blog site or engage with their attackers. But given the porous nature of the web, this may prove a less effective solution than it might first appear. As we have discussed, content that appears in one context can quickly go viral as it is linked to or copied by other users. Prominent blog sites are regularly trawled by mainstream media and there are almost daily examples of content published within a quasi-private forum becoming truly public. Trade Me pointed out that New Zealand news media regularly harness the Trade Me message boards in this way.⁹⁷
- 3.71 The submitter who went to the Police after becoming aware of defamatory statements about her on Twitter provides a good example of why it is not always possible to quarantine or ignore content on the web. This person was not an avid user of new media but her attention was drawn to the defamatory posts by a journalist who had googled her name while researching a business story. The submitter discovered that anyone seeking her out on the web, including prospective employers and business clients, was being directed by the search engine to the offensive content.
- 3.72 Paradoxically, private individuals with a limited or non-existent online presence can be more adversely affected by malicious communication disseminated via searchable platforms such as Twitter. Damaging content about a high profile individual may be buried in pages of "good" or neutral content, but when there is limited information about the person online the defamatory content rises high in the search rankings.

⁹⁷ It is worth noting that while those with a Trade Me account can browse message boards the company has chosen to architect the site in such a way as to preclude Google or other search engines from indexing content on message boards.

- 3.73 The submitter to our review was advised to bolster her online profile by creating relevant and high quality content in an attempt to bury the defamatory content. This worked for a brief period but was ultimately unsuccessful.
- 3.74 Also, while the relationship between online content hosts and publishers and users is arguably a great deal more dynamic, responsive and egalitarian than the relationship between consumers and traditional news media companies, cyberspace is not a level playing field. Bloggers' motivations, vested interests and relationships with their sources can be every bit as opaque as in the established media.

CONCLUSIONS

- 3.75 In this chapter we have outlined a three-tiered approach to dealing with harmful communications in cyberspace. The first tier involves what Facebook describes as "user empowerment". This requires educating internet users about their rights and responsibilities in cyberspace and equipping them with the technical knowledge and tools to exercise these rights and responsibilities.
- 3.76 The second tier involves the self-regulatory systems which have evolved on the internet to support standards and control bad actors. These self-regulatory systems often include terms of use contracts which outline the types of behaviours which are unacceptable and protocols for dealing with breaches of these terms. Commercial entities have developed increasingly sophisticated reporting infrastructures and technologies which allow users to flag content which breaches a site's terms and conditions.
- 3.77 The third tier is the body of statutory and common law which provides the boundaries for acceptable speech for citizens regardless of what channel they are using to communicate.
- 3.78 In principle we agree with this approach. Cyberspace is a vital forum for the free exchange of information and ideas among citizens and heavy-handed regulatory intervention is neither defensible from a free speech perspective, nor practically achievable.
- 3.79 Empowering people to exercise their rights and responsibilities in cyberspace and providing infrastructure and technologies to give effect to these must form the first line of defence against digital communication harms.
- 3.80 However it cannot be the *only* line of defence. Citizens should have the right to legal protection and meaningful redress when they suffer significant harm as a result of

communication abuses. In this chapter we have identified a number of problems with the existing self-regulatory remedies available to citizens harmed by digital communication. Our research and the information provided to us by submitters indicate there is currently a gap which neither the self-help mechanisms nor the law is adequately bridging. To bridge that gap will require the collaboration of industry, legislators, educators, parents and users. In the following chapter we argue that the law needs to be extended to better protect against some of the serious emotional harms which can be caused by the new forms of communication.

- 3.81 For the reasons outlined in this chapter we do not believe that the current mix of user empowerment and self-regulatory and legal solutions is always capable of providing that redress.
- 3.82 User empowerment is a laudable ideal but for the moment there exist a number of important information and power asymmetries in cyberspace. The digital divide applies not only in relation to *access* to technology but also with respect to people's ability to harness the power of technology for legitimate and illegitimate purposes.
- 3.83 And while we endorse the view that self-regulatory systems must always be a user's first line of defence against harm, we are not convinced that these systems, even at their most sophisticated can provide a total solution. Terms of use contracts are only meaningful if they are enforced by the corporations who impose them and reporting tools are only useful if they result in action.
- 3.84 Our research indicates awareness of the existence of online reporting tools is relatively low, even among the younger demographic (39 per cent) and of those who are aware of the tools only a third of the younger demographic rated them as "either effective or extremely effective".
- 3.85 Moreover self-regulation on the web is extremely variable: publishers who have no commercial or other interest in attracting mass participation may choose not to apply any standards or sanctions to their own or their community's behaviour online.
- 3.86 These conclusions are supported by NetSafe which reports that many of those who turn to their organisation for assistance feel defeated by the lack of responsiveness of website administrators and other content hosts to the existence of harmful content.
- 3.87 And while it is true that people can exercise considerable choice and control over how they interact on the web and with whom, the porous nature of the internet and the power of search engines means damaging content that has limited exposure in its original form can quickly find its way into much more public spheres after being

indexed by search engines.

- 3.88 This brings us to the effectiveness of the law as the backstop to these self-regulatory measures and the third prong of the strategy for addressing harmful communication.
- 3.89 In our Issues Paper we reached the preliminary conclusions the existing criminal and civil law was capable of dealing with many but not all of the new and potentially more damaging harms arising from the use of new technology.
- 3.90 More critically, we drew attention to a number of impediments to the successful application of the law with respect to harmful digital communication. These included a lack of knowledge of legal rights and responsibilities; difficulties accessing the law; difficulties enforcing the law as a result of inadequate investigative resources and tools; and difficulties in obtaining evidence and identifying perpetrators. There is also a significant problem in providing citizens with quick access to meaningful remedies given the slowness of the court processes and the speed with which harmful content can be disseminated on the internet.
- 3.91 In short we are persuaded by NetSafe's view that there is currently a gap between where self-regulatory systems end and the law begins and this gap is leaving those who have suffered real harm with no recourse to justice.
- 3.92 In the following chapters we set out our proposals to bridge that gap.

Chapter 4: Changes in the law

INTRODUCTION

- 4.1 In this paper we ask whether the technology revolution, and the new forms of communication it has provided us with, requires movement in our legal rules. We conclude that it does.
- 4.2 The proposals contained in this chapter are focused primarily on the law. But amending the law and introducing new offences will not be enough. Unless the law is understood by citizens, consistently enforced, and its remedies meaningfully applied, it is of limited value. Hence we are as much concerned in this report with putting forward proposals for how to make the law accessible and effective in the age of mass participatory media as we are with the creation of new offences. We address this issue in chapter 5.
- 4.3 We are not advocating fundamental changes to New Zealand's laws – we propose one new offence, and some extensions and modifications of others. However we are advocating novel solutions for how people access the law and how the law is applied. The internet and the read/write web have brought about a paradigm shift in communications and like all institutions, the justice system must adapt – with respect both to the sanctions and remedies it provides to citizens.
- 4.4 We believe these proposals are a justified and proportionate response to the problems of harmful digital communication. If implemented, they would more effectively curb certain types of harmful communication. Given the fundamental importance of freedom of expression it is vital that these constraints go no further than can be justified in a liberal democracy. A very large and complex body of legal and philosophical writing has been devoted to the question of what constitutes “expression” in the human rights context, and when the law may be justified in constraining it. In the following discussion we provide a necessarily high level account of how these debates underpin our proposals.

The NZ Bill of Rights Act 1990

- 4.5 The dynamic relationship between technology and social values is reflected in the law and lies at the heart of this current debate about how we respond to digital communication harms.
- 4.6 In any deliberative exercise involving the law and communication section 14 of the

New Zealand Bill of Rights Act 1990 (BORA) is a key factor.⁹⁸ It provides:

Freedom of Expression – 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.

4.7 Like all Bill of Rights freedoms, it is qualified by section 5, which provides:

Justified limitations – Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

4.8 Section 14 raises several questions about which views may differ. The first question is what ‘expression’ means. Does it, for example, include conduct? Is posting an obscene photograph on a website ‘expression’? We prefer to take the widest possible view of ‘expression’. That is probably the legislative intent: ‘of any kind in any form’ would suggest so. The New Zealand courts have responded similarly: the Court of Appeal has said the word is “as wide as human thought and imagination”.⁹⁹ Our courts have held that flag burning¹⁰⁰ and lying down in front a car¹⁰¹ as a protest are forms of ‘expression’. So we take the word ‘expression’ as being wide enough to cover all the types of communication with which we deal in this paper.

4.9 The second question is whether all types of expression, however objectionable or harmful they may be, come within the cover of section 14. This raises the question of the scope of section 14. One view is that each right in the Bill of Rights Act must be interpreted in light of the values it was enacted to protect. On this view it might be argued that speech which has no legitimate value and serves no legitimate purpose, does not fall within the protection of section 14 at all. Thus, for example, images of child pornography, or gratuitously offensive personal comments would not be within the scope of section 14, and laws prohibiting their communication would raise no Bill of Rights Act issues at all.

4.10 The other view is that all expression falls within section 14, in which case the question becomes whether a law prohibiting certain types of expression (for example child pornography or offensive personal comments) is a justified limitation under section

98 See the discussions in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at chapter 12; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act : A Commentary* (Lexis Nexis, Wellington, 2005) at chapter 13.

99 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [15] per Tipping J.

100 *Morse v Police* [2012] 2 NZLR 1 (SC).

101 *Police v Geiringer* (1990-1992) 1 NZBORR 331. See however the comment by Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 313.

5.¹⁰²

- 4.11 It is very difficult to envisage a case of a truly objectionable message where the end result would be any different, whichever approach was taken. There is at least one New Zealand case (involving contempt of court) when the Judge took both approaches in the alternative and reached the same result.¹⁰³ While acknowledging that there is another view, for the purposes of this paper it is convenient to take the second approach and assume that even the most offensive and objectionable communications fall within the ambit of section 14, and that restrictions placed on them by the law must be justified in terms of section 5.
- 4.12 Having said that, the approach we are taking does not assume that all types of communication are of equal value. International jurisprudence has moved towards a view that these are a number of levels of speech value. The highest value is accorded to political speech, the lowest to hate speech and gratuitously offensive personal comments without any legitimate purpose. Restrictions on speech of high value require much stronger justification under section 5, restrictions on speech at the bottom of the “value pyramid” require minimal justification.¹⁰⁴
- 4.13 The third question is, taking all of the foregoing into account, how one applies the section 5 test, i.e. whether the limitation proposed is reasonable, prescribed by law, and such as “can be demonstrably justified in a free and democratic society.” The application of section 5 by the courts has led to some of the most complex jurisprudence in our law. That is unfortunate, because it makes understanding of the process very difficult for persons, particularly lay adjudicators, who have to apply it. But for present purposes it may be said the crucial elements are as follows:¹⁰⁵
- (a) The purpose of the proposed limitation on the freedom must relate to “concerns which are pressing and substantial.”
 - (b) The measures adopted to limit the freedom must be rationally connected to that purpose.
 - (c) The limiting measures must not impair the right more than reasonably necessary.

¹⁰² See *R v Hansen* [2007] 3 NZLR 1 (SC) at [22] per Elias CJ.

¹⁰³ *Solicitor General v Radio New Zealand* [1994] 1 NZLR 48 (HC).

¹⁰⁴ Jacob H Rowbottom “To Rant, Vent and Converse: Protecting Low Level Digital Speech” (2012) 71 CLJ 355.

¹⁰⁵ Based on the Canadian case *R v Oakes* [1986] 1 SCR 103. New Zealand Courts have commonly adopted that test: see *R v Hansen* [2007] 3 NZLR 1 (SC) at [64] per Blanchard J and at [103]–[104] per Tipping J.

(d) The limiting measures must be proportionate to the purpose sought to be achieved. This element is particularly important. One should not “use a sledgehammer to crack a nut”.

4.14 As Tipping J summarised it in *R v Hansen*: “Whether a limit on a right or freedom is justified under section 5 is essentially an inquiry into whether a justified end is achieved by proportionate means”.¹⁰⁶

Applying these principles

4.15 In the context of this paper we have had to ask first whether the various kinds of communication we are addressing require legal intervention: whether, in other words, there is a pressing and substantial concern which the law should meet. In this chapter we argue that if such communications cause significant harm then such intervention is needed.

4.16 We also have had to consider what is a proportionate response. In paragraphs 4.72 to 4.76 of this chapter we argue that in some cases, particularly if the communication is grossly offensive and causes real harm, a criminal response is justified. In other cases amendments to the civil law will be appropriate.

4.17 In chapter 5 we turn to the question of remedies. We propose a tribunal which could make orders, the purpose of which is to protect the affected person, for example by requiring that the harmful communication be removed. In each case which comes before it, the tribunal will need to consider whether the order sought is justified in terms of section 5.

4.18 We would also note that several of the reforms we propose merely amend earlier legislation to ensure that it is fit for purpose in the digital age. Some of that legislation was tested against the Bill of Rights in its original form, and our reforms do not really involve any greater limitations on freedom of expression than that legislation already imposed.

4.19 For example, New Zealand’s Telecommunications Act 1987 created an offence in connection with the “misuse of a telephone device”. It has been re-enacted in the Telecommunications Act 2001. As well as prohibiting the use of a telephone to intentionally offend someone by using “profane, indecent, or obscene language”¹⁰⁷ the Act also makes it an offence to use the telephone “for the purpose of disturbing,

¹⁰⁶ *R v Hansen* [2007] 3 NZLR 1 (SC) at [123].

¹⁰⁷ Telecommunications Act 2001, s 112(a).

annoying, or irritating any person, whether by calling up without speech or by wantonly or maliciously transmitting communications or sounds, with the intention of offending the recipient”.¹⁰⁸

- 4.20 The threshold (“disturbing”, “annoying”, “irritating”, “offending”) seems low by today’s robust standards. There is perhaps doubt whether it would now survive a Bill of Rights vet.
- 4.21 However there clearly must be legal limits to what is regarded as acceptable speech. There always have been, and we must face the question of the extent to which the limits need to change in the new environment. That is the task we are confronting in this report and the task Parliament will grapple with should it decide to proceed with the changes we are recommending. We are satisfied that the changes we propose are proportionate to the harms that need to be addressed.
- 4.22 We are not alone in this. Governments elsewhere in the world are similarly reviewing their statute books.

THE CURRENT LAWS CONSTRAINING COMMUNICATION

- 4.23 In our Issues Paper we set out in some detail the various laws which exist to constrain and remedy such harmful speech.¹⁰⁹ These include a mix of statute and judge-made laws, and include criminal offences and civil wrongs. The current framework is a patchwork of measures that together provide a degree of protection from speech harms, both online and offline.

Criminal Law

- 4.24 Criminal law is concerned with maintaining law and order and protecting society. A criminal penalty is a more significant fetter on free speech than a civil remedy and expresses condemnation of the action as a wrong against society.¹¹⁰ Cases are brought by the state and investigated by the Police. Penalties for breaches of the criminal law may involve fines or imprisonment. The standard of evidence required is beyond reasonable doubt.
- 4.25 Long standing rules of the criminal law, which are for the most part contained in the

¹⁰⁸ Telecommunications Act 2001, s 112(b).

¹⁰⁹ Law Commission *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011), chapters 7-8.

¹¹⁰ See discussion of the New Zealand Bill of Rights Act 1990 above at [4.5] to [4.14].

Crimes Act 1961 and the Summary Offences Act 1981, are capable of addressing certain types of harmful communication. Most of them are phrased in technology-neutral language, and enact basic principles which can do service in the modern world.

Threats and intimidation

- 4.26 A number of the provisions of the Crimes Act 1961 deal with threats. It is an offence to threaten to kill or cause grievous bodily harm,¹¹¹ to destroy property or injure an animal,¹¹² or to do an act likely to create a risk to the health to one or more people with intent to cause serious disruption.¹¹³
- 4.27 The Summary Offences Act 1981 contains an offence of intimidation which is committed by a person who, with intent to frighten or intimidate the 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.¹¹⁴
- 4.28 The offence of blackmail under the Crimes Act is constituted by threatening to disclose something about a person with the intent of obtaining a benefit.¹¹⁵
- 4.29 The Harassment Act 1997, in addition to providing civil remedies, also creates an offence of harassing another person with the intent to cause them to fear for their own safety or the safety of a family member.¹¹⁶
- 4.30 The Telecommunications Act 2001 offence of misuse of a telephone was set out above at para 4.19. We are aware of this offence being used to prosecute a man who sent text messages threatening to put naked pictures of a woman on Facebook.¹¹⁷ So, despite a threshold which we have described as low, it is available to deal with deserving cases.

Sexual matters

- 4.31 The Crimes Act makes sexual grooming an offence. It is an offence for a person to intentionally meet or set out to meet a young person under the age of sixteen, having

111 Crimes Act 1961, s 306.

112 Crimes Act 1961, s 307.

113 Crimes Act 1961, s 307A.

114 Summary Offences Act 1981, s 21.

115 Crimes Act 1961, s 237.

116 Harassment Act 1996, s 8.

117 David Clarkson "Man in court over naked pic threats" Fairfax NZ News (online ed, 31 May 2012) <www.stuff.co.nz>.

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.¹¹⁸

4.32 The Crimes Act provides that it is an offence to publish intimate picture of someone taken covertly without that person's consent.¹¹⁹ This does not cover the publication of intimate pictures that are taken with consent, but published without consent. However other offences have sometimes been used to cover that situation. For example, it is an offence under the Crimes Act to distribute an indecent object or model.¹²⁰ Albeit with a degree of liberal interpretation, this has been used to convict a person who published intimate pictures on the internet even though the pictures were initially taken with the subject's consent.¹²¹

4.33 It is also an offence under the Films, Videos, and Publications Classification Act 1993 to make or distribute an objectionable publication.¹²² A publication is objectionable if it deals with matters such as sex, horror, crime, cruelty or violence in a way that is likely to be injurious to the public good.¹²³ Publications of children or young persons who are nude or partially nude and are reasonably capable of being regarded as sexual in nature are deemed to be objectionable.¹²⁴ A publication is also deemed objectionable if it tends to promote or support the exploitation of children or young persons for sexual purposes.¹²⁵

Incitement

4.34 It is an offence to incite counsel or procure a person to commit suicide if the person in fact commits, or attempts to commit, suicide.¹²⁶ It is also an offence to aid or abet suicide. Suicide pacts are also unlawful, but only if one or more participants to the pact

118 Crimes Act 1961, s 131B.

119 Crimes Act 1961, s 216J. See Law Commission *Intimate Covert Filming* (NZLC SP15, 2004).

120 Crimes Act 1961, s 124. The leave of the Attorney-General is required before a prosecution may be brought under this provision.

121 "Naked photo sends jilted lover to jail" Fairfax NZ News (online ed, 13 November 2010) <www.stuff.co.nz>.

122 Films, Videos, and Publications Classification Act 1993, ss 123-124. See *Broekman v R* [2012] NZCA 213.

123 Films, Videos, and Publications Classification Act 1993, s 3(1).

124 Films, Videos, and Publications Classification Act 1993, s 3(1A).

125 Films, Videos, and Publications Classification Act 1993, s 3(2)(a).

126 Crimes Act 1961, s 179.

actually carry out the act of suicide.¹²⁷

- 4.35 It is an offence to excite racial disharmony.¹²⁸ This requires the use of threatening, abusive or insulting language with intent to excite hostility or ill-will against a group of people on the ground of colour, race, or ethnic or national origins.
- 4.36 It is also generally an offence to incite any person or persons to commit an offence whether that offence is actually committed or not.¹²⁹

Civil Law

- 4.37 The civil law is concerned with resolving disputes between citizens or organisation, and sometimes between citizens or organisations and the state. Actions are initiated by citizens seeking compensation or other remedies for harms they allege have been caused by the other party. They are not prosecuted by the police and the standard of proof is on the balance of probabilities, rather than beyond reasonable doubt which applies in criminal trials.
- 4.38 The civil law comprises both common law and statute law. The common law is made up of the legal doctrines that have their genesis in and are developed by case decisions of judges. This can be contrasted with statute law that is contained in legislation (including judicial decisions that interpret the legislation).
- 4.39 One of the main categories of the common law that is relevant to online speech harms is the law of torts, or civil wrongs, which provide a basis for a private citizen to sue for harm suffered by the actions of another person.¹³⁰

Torts

- 4.40 The tort of invasion of privacy is a relative newcomer whose existence has been confirmed by the New Zealand Court of Appeal in the case of *Hosking v Runting* in 2004.¹³¹ It provides a remedy for publicity given to facts in respect of which there was a reasonable expectation of privacy, the publication being highly offensive to a

127 Crimes Act 1961, s 180.

128 Human Rights Act 1993, s 131.

129 Crimes Act 1961, s 66(1)(d).

130 In the following chapter we recommend the distillation of the key principles from the relevant torts into a set of principles to provide an accessible summary of this part of the law and to guide the remedies granted by the new tribunal we recommend.

131 *Hosking v Runting* [2005] 1 NZLR 1 (CA).

reasonable objective person.¹³² There is a defence if the material published is of public concern.

- 4.41 The tort in *Wilkinson v Downton* provides a remedy for the intentional infliction of harm. The case itself involved the communication of maliciously false information which caused nervous shock to the recipient.¹³³ This tort might be thought to have particular relevance in the internet era. But there are no recent examples of its use; it is virtually obsolete.
- 4.42 The possibility of a tort of harassment has been postulated by the English Court of Appeal but has gained little traction.¹³⁴ Whether it contains any spark of life is open to question. In New Zealand, the Harassment Act 1997 and the Domestic Violence Act 1995 provide certain remedies for harassment, discussed below.
- 4.43 The tort of breach of statutory duty sometimes provides a remedy in damages for breach of a statute. It is perhaps possible that breach of a criminal statute (say the offence of intimidation) might be able to be remedied by civil action. There is however, no certainty about that.¹³⁵ The cause of action is unpredictable and is likely to be seldom available in the kind of situation we are addressing.
- 4.44 The law of defamation provides a remedy for statements about a person which adversely affect their reputation and cannot be proved true. It is an ancient common law action and is encumbered by complex and time-consuming procedures, but its mere existence remains a powerful deterrent against the publication of false allegations. Defences and some privileges have been codified in the Defamation Act 1992.
- 4.45 The law of breach of confidence¹³⁶ provides a remedy for the publication of information which has been imparted in confidence. There is a defence if the information is of public interest. This area of the law, while still significant, has more limited scope in New Zealand due to the existence of the privacy tort in *Hosking v*

132 For discussion of the privacy tort, see Law Commission *Invasion of Privacy: Penalties and Remedies* (NZLC IP14, 2009) at chapters 6 and 7; (NZLC R113, 2010) at chapter 7.

133 *Wilkinson v Downton* [1897] 2 QB 57. See Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [4.7]. "Nervous shock" is more limited than emotional distress.

134 *Khorasandjian v Bush* [1993] QB 727.

135 See Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at chapter 8.

136 Breach of confidence is sometimes classified as an equitable wrong rather than a tort.

*Runting.*¹³⁷

Statute

- 4.46 Much civil law is “judge-made” or common law, but another source is the legislation enacted by Parliament to provide redress for citizens who are harmed by unlawful communication. The most important of these Acts for the purpose of this review is the Harassment Act 1997 which provides the remedy of a restraining order in respect of harassing conduct.
- 4.47 The concept of harassment is defined by the Act.¹³⁸ It requires more than one piece of conduct over a twelve month period.¹³⁹ A restraining order will not be made unless the conduct causes distress to the victim.¹⁴⁰ Even where the conduct causes distress, a restraining order will generally not be made against a person under the age of 17.¹⁴¹ Later in this chapter we suggest some amendments to the Harassment Act.
- 4.48 The Domestic Violence Act 1995 provides for the making of protection orders against domestic violence. “Domestic violence” is defined as including psychological abuse including among, other things, intimidation or harassment.¹⁴² It is a condition of every protection order that the respondent must not engage in or threaten to engage in behaviour which amounts to psychological abuse or encourage any other person to do so, and must not (with necessary exceptions) make contact with the other by any means, including electronic message.¹⁴³
- 4.49 The Copyright Act 1994 provides that a person has a right not to have a “literary... or artistic work falsely attributed to him as author”.¹⁴⁴ This has occasionally been used to provide a remedy to persons who have been parodied, or to whom a false quotation has been attributed.¹⁴⁵ It could perhaps be used in relation to such things as false Facebook

137 For discussion of the relationship between the privacy tort and breach of confidence, see Law Commission *Invasion of Privacy: Penalties and Remedies* (NZLC IP14, 2009) at [6.16]-[6.21].

138 Harassment Act 1997, s 4.

139 Harassment Act 1997, s 3.

140 Harassment Act 1997, s 16(1)(b).

141 Harassment Act 1997, s 12.

142 Domestic Violence Act, s 3.

143 Domestic Violence Act, s 19(1), (2). Police also have a limited power to make temporary safety orders when that is necessary to ensure the safety of a person: s 124B.

144 Copyright Act 1994, s 102.

145 See for example *Moore v News of the World* [1972] 1 QB 441; *Clark v Associated Newspapers Ltd*

pages. Relief by way of damages and injunction are available.

Regulatory Remedies

- 4.50 Parliament has also passed Acts to protect people's right to privacy (the Privacy Act 1993) and right to equality (the Human Rights Act 1993). Both Acts provide for regulators (the Privacy Commissioner and the Human Rights Commission) to deal with complaints and both have provisions specifically addressing communications which may breach rights to privacy or which infringe human rights. The Human Rights Review Tribunal hears complaints under both Acts which have not been able to be resolved by the Commissioners.
- 4.51 The Privacy Act 1993 enacts a set of information privacy principles.¹⁴⁶ Principle 11 provides that an agency must not disclose any personal information about a person unless one of a number of statutory exceptions applies. The news media are exempt from this principle,¹⁴⁷ but communicators which fall outside the definition of news media (such as ordinary citizens) are caught by it. Later in this chapter we point to some targeted amendments to the Privacy Act that the Law Commission recommended in an earlier review of that Act.
- 4.52 The Human Rights Act 1993 provides that conduct likely to excite racial disharmony is a ground of complaint, and also that sexual or racial harassment are unlawful in so far as they have a detrimental effect on a number of listed matters such as employment or access to services.¹⁴⁸ Later in this chapter we recommend some targeted amendments to the Human Rights Act.

THE NATURE OF OUR PROPOSED REFORMS

- 4.53 As we noted, much of our present law was settled long before the advent of the new media and new forms of communication and those who framed the law could not have been expected to foresee it. Despite that, much of the law is expressed in terms of flexible principle which is technology-neutral and which can work perfectly well in the new environment. But it would be surprising, given the technological and social changes which have taken place over the last few years, if the law remained entirely

[1998] 1 WLR 1558.

146 Privacy Act 1993, s 6.

147 Privacy Act 1993, s 2, definition of "agency".

148 Human Rights Act 1993, ss 61- 63.

satisfactory.

- 4.54 Another challenge is that the applicable law is widely spread across case law and the statute book. There are relevant provisions in the criminal law that have different consequences to breaches of the requirements of the civil law. The spread of the relevant law creates issues of accessibility. It is not always easy for people to readily appreciate the legal implications of their online activities, or for people who are impacted by the online activities of others to access legal remedies.
- 4.55 The reforms proposed in this chapter have a number of objectives. Some are simply amendments to existing laws to ensure they can be readily applied in the digital environment.
- 4.56 But in a number of cases we are proposing new offences to address the specific harms which we have argued are a hallmark of certain types of digitally mediated communication. In doing so we are in effect proposing where New Zealand society might set the legal threshold for offensive communication in the digital era.
- 4.57 In this chapter we recommend a new communications offence to be placed in the Summary Offences Act. We consider that there is clear justification for a tailored offence that people can look to as a primary mechanism to address egregious communication harms at the high end of the scale. We also recommend targeted changes to the law in the areas of harassment, incitement to suicide and intimate covert filming. We continue to support recommendations the Law Commission has made for changes to the Privacy Act that would also usefully respond to problems identified in this review. And we recommend some targeted amendments to the Human Rights Act to clarify its applicability to online communications.
- 4.58 As well as these measures to fill apparent gaps in the law, in the following chapter we recommend the distillation into an accessible set of principles of the law that applies to communication harms. The purpose of these principles would be to clearly encapsulate the relevant law (without rigidly codifying it) in a way that could be applied by complaints handling bodies and ultimately by the new tribunal that we recommend in the next chapter. A particular benefit of this approach is to raise awareness in the community of the expectations enshrined in the law that are currently dispersed through case law and the statute book.

Submitters' views

- 4.59 The majority of submitters were supportive of the proposals to review the statute book to ensure that provisions targeting speech abuses could be effectively applied in the

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internet era.

- 4.60 Where concerns were raised these generally related to whether the specific amendments we were proposing to various statutes were the most appropriate vehicle for achieving the desired objectives. For example the Police questioned whether the Telecommunications Act was the appropriate vehicle to address harmful communications via computer.
- 4.61 The Human Rights Commission raised concerns about the usefulness of the Commission's proposal to amend section 61 of the Human Rights Act (which prohibits the publication and distribution of material which is threatening, abusive or insulting "if it is likely to excite hostility against a group of persons by reasons of their colour, race, or ethnic or national origins") to make clear it applies to electronic communications. The Commission indicated that the threshold for an offence under this section was so high as to render the provision inoperable, which meant there was little point in simply amending the current section to apply to e-media without first undertaking a more fundamental review of the law itself.
- 4.62 More fundamentally, some submitters questioned the need for new communication offences either on the grounds that the targeted behaviour was already covered by existing provisions or because they did not believe there was strong enough evidence of actual harms.
- 4.63 We have taken these views into account in formulating the proposed legal reforms outlined below.

Criminal law reforms

- 4.64 The long-standing rules of the criminal law which, as we have seen, are for the most part contained in the Crimes Act 1961 and the Summary Offences Act 1981, are capable of addressing many types of harmful communication. Most of them are phrased in technology-neutral language, and enact basic principles which can do service in the modern world.
- 4.65 We have not identified a large numbers of gaps in the criminal law relating to online communication harms; however the few that we have identified are of significance. We recommend a new communications offence, as well as some clarifying amendments to some existing offences.

Threats, Intimidation and Offensive Messages

- 4.66 The threats and intimidation with which the criminal law is presently concerned all

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relate to the creation of fear of a particular kind: the fear of physical damage, be it to person or property. The infliction of distress or mental harm is not covered unless it relates to potential damage of that very tangible physical kind.

4.67 The only inroad into this is that the courts have indicated that they may be prepared to interpret “grievous bodily harm” in the Crimes Act 1961 as including “really serious psychiatric injury, identified as such by appropriate specialist evidence.”¹⁴⁹ Whether this would apply, and if so how it would apply, to *threats* to cause grievous bodily harm is undetermined.

4.68 This reflects the old view that mental distress alone was not something of which the law would take cognisance. In 1973 the editors of *Salmond on Tort* said that mental distress “may be too trivial, too indefinite, or too difficult to prove for the legal suppression of it to be expedient or effective.”¹⁵⁰ As late as 2004, Lord Hoffmann said:¹⁵¹

In institutions and workplaces all over the country people constantly say and do things with the intention of causing distress and humiliation to others. This shows lack of consideration and appalling manners, but I am not sure that the right way to deal with it is always by litigation.

4.69 Although these statements were made in the tort context, they convey a sentiment that was once present throughout the law. Nevertheless, we consider that, in the 21st century, it should be an offence to cause serious distress or mental harm even though that distress is not related to fear of physical harm. We take this view for several reasons.

4.70 First, fear which anticipates physical harm is not itself physical harm; it is a state of mind, and may be no more severe or hurtful than other kinds of distress – humiliation and fear of verbal attack, for example. There is no reason in principle why these other sorts of emotional harm should be viewed any less seriously.

4.71 Secondly, the distinction between physical and emotional harm has been broken down over a considerable period of years. In a criminal case in the United Kingdom, Lord Steyn has noted that “the civil law has for a long time taken account of the fact that there is no rigid distinction between body and mind.”¹⁵² The new tort of invasion of privacy redresses intangible harm; aggravated damages address injured feelings; in the law of contract damages can lie for emotional distress. A breach of privacy for the

149 *R v Mwai* [1995] 3 NZLR 149 (CA) at 155.

150 RFV Heuston (ed) *Salmond on Torts* (16th ed, Sweet & Maxwell, London, 1973) at 14.

151 *Wainwright v Home Office* [2004] 2 AC 406 at [46].

152 *R v Ireland* [1998] AC 147 (HL) at 156. See also *R v Mwai* [1995] 3 NZLR 149 (CA) at 154-155.

purposes of the Privacy Act 1993 requires damage, which can be constituted by significant humiliation, loss of dignity, or injury to feelings. And the criterion for the grant of a restraining order under the Harassment Act 1997 is distress of the plaintiff. In the criminal sphere, mental harm (caused by work-related stress) is specifically included in the definition of “harm” for the purposes of the health and safety legislation, including its criminal provisions.¹⁵³ There are offences relating to invasion of privacy in the Crimes Act, for example the provisions about intimate covert filming.¹⁵⁴ Perhaps most notably, since 1987 the Telecommunications Act has made it an offence to use a telephone device “for the purpose of disturbing, annoying or irritating any person” or to wantonly or maliciously transmit communications or sounds with the intention of offending the recipient.¹⁵⁵ (As we have previously noted the threshold for this offence seems even lower than one might expect.) So the criminal law already penalises some types of conduct causing mental distress.

- 4.72 Thirdly, as we have demonstrated in the preceding sections of this report, the new communication technologies can have effects which are more intrusive and more pervasive, and thus more hurtful, than many other forms of activity. The potential emotional harm is greater than before. There is a risk that it may lead to self-harm or worse. The prospect is sufficiently worrying to justify extending the law. It is right that the law should be concerned about it.
- 4.73 Finally, overseas jurisdictions are increasingly moving to criminalise communications causing serious distress and mental harm. In the United Kingdom, it is an offence to send an electronic communication of an indecent, obscene or menacing character, or one which is grossly offensive.¹⁵⁶ In Victoria, Australia, the offence of stalking is committed by a person acting in a way that could reasonably be expected to cause physical or mental harm to a victim.¹⁵⁷ The Australian Criminal Code makes it an offence to use a carriage service (for example a mobile phone or the internet) in a way which is menacing, harassing or offensive.¹⁵⁸ And in a number of American states there are statutes which make it an offence to send electronic communications without legitimate purpose which would cause a reasonable person to suffer substantial

¹⁵³ Health and Safety in Employment Act 1992, ss 2, 49-50.

¹⁵⁴ Crimes Act 1961, Part 9A.

¹⁵⁵ Telecommunications Act 2001, s 112.

¹⁵⁶ Communications Act 2003 (UK), s 127.

¹⁵⁷ Crimes Act 1958 (Vic), s 21A(2)(g).

¹⁵⁸ Criminal Code 1995 (Cth), s 474.17.

emotional distress.¹⁵⁹

4.74 We believe that there should be an offence of sending an offensive message with intent to cause distress. We have had regard to section 127 the Communication Act 2003 (UK). Its provisions, so far as material, read:

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.
- (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.

4.75 It is something of this nature that we advocate, although we would prefer the United Kingdom provision to be modified in several ways. The offence in subsection (1) does not explicitly require any specific intent or mens rea, and there is no requirement that the message must in fact result in any distress or other mental harm. That in subsection (2) seems to have too low a threshold for a criminal offence: “annoyance, inconvenience or needless anxiety” are not strong emotions.

4.76 We think the elements of the proposed offence should be:

- (a) The message must be grossly offensive, or of an indecent obscene or menacing character, or knowingly false.
- (b) The sender must either:
 - (i) Have an intention to cause substantial emotional distress or,
 - (ii) Know that the message will cause substantial emotional distress.
- (c) The message must be such as would cause substantial emotional distress to a reasonable person in the position of the victim.

¹⁵⁹ For example, Rhode Island General Laws §11-52-4.2; Missouri Revised Statutes, Title XXXVIII, §565.090; 2011 Minnesota Statutes, §609.749; Michigan Penal Code 1931, §750.411s; Wisconsin Statutes, Criminal Code, §947.0125; Delaware Code, Title 11, chapter 5, §1311; 2011 Florida Statutes, Title XLVI, chapter 784, §748.048; Massachusetts General Laws, Part IV, Title I, chapter 265, §43A. In some cases a pattern of conduct is required, in others a single act is sufficient.

- (d) The message need not be directed specifically at the victim, provided that it is placed in the electronic media and is in fact seen by the victim.
- (e) In determining whether a message is grossly offensive, the court should take into account such factors as the extremity of the language employed; the age and characteristics of the victim; whether the message was anonymous; whether the message was repeated; the extent of the circulation of the message; whether the message is true or false (in some contexts truths are more hurtful than falsity, in others the reverse is the case); and the context in which the message appeared (different fora may lead users to expect different levels and styles of discourse).

4.77 Some other jurisdictions have specific offences relating to malicious impersonation. An example is Texas which specifically outlaws online impersonation with the intent to harm, defraud, intimidate or threaten, using the persona or name of another person to create a webpage on a social network site or other internet website or to send messages on such a website.¹⁶⁰ However, we are satisfied that the new offensive communication provision we are recommending is sufficient, without specifically providing for online impersonation.

4.78 The provision would to some extent overlap with the existing offences relating to intimidation and threats. It should be added to this group of offences rather than replace any of them. Each of the existing offences serves wider purposes. The specific nature of the provision we recommend serves as a clear, readily accessible directive to persons about a particular type of activity. It conveys a precise message.

4.79 We considered whether the new offence should replace the relevant offence in the Telecommunications Act as the new offence can be considered to be a more technology-neutral version of the existing offence, although the new offence would have a higher threshold. However we conclude that the Telecommunications Act offences should be retained to deal with the particular problem of nuisance phone calls, but believe that consideration should be given to raising the threshold for the requisite emotional distress.

Incitement

4.80 We have considered whether there should be a specific law of inciting others to harass a person. A problem can be raised by groups of people “ganging up” to send hurtful messages another. However, section 66 of the Crimes Act 1961 provides that everyone

¹⁶⁰ Texas Penal Code, chapter 33, s 33.07(a).

is party to and guilty of an offence who incites, counsels or procures any person to commit an offence.

- 4.81 Section 311 further provides that anyone who incites, counsels or attempts to procure any person to commit any offence, even if the offence is not committed, is liable to the same punishment as if they had attempted to commit the offence. In other words incitement to commit an offence is itself an offence. We think, therefore, that there is no need to create a specific offence of inciting offensive communication. It is caught by the more general provisions.
- 4.82 We have given considerable thought to the question of incitement to suicide. Presently the Crimes Act penalises incitement to suicide only if suicide is attempted, or in fact occurs. We remain of the view we expressed in the Issues Paper that, given the distress such incitements may cause in themselves, let alone the possibly devastating outcome, there is a strong case for making incitement of suicide in itself criminal.¹⁶¹
- 4.83 Attempted suicide is no longer a criminal offence, but we believe that is no reason for decriminalising incitement. We note that the Canadian Criminal Code criminalises counselling a person to commit suicide “whether suicide ensues or not”.¹⁶² We recommend a similar provision in New Zealand. We note that it will extend beyond cyber harassment and catch also a wider range of inciting conduct. The circumstances of the incitement, and the manner in which it was conveyed, would obviously be matters to be taken into account in sentencing.
- 4.84 We do not anticipate that the provision we recommend would be used very often. “Incite” is a strong word: the Oxford Dictionary defines it as “urge” or “spur on”, thus implying a desire in the inciter that the subject should actually commit suicide. The incitement offence would also be limited to inciting a particular person to suicide, rather than a non-specific direction. Most messages referring to potential suicide are not sufficiently specific or do not go as far as actual incitement. Some are intended to hurt and cause distress rather than to induce the recipient to self-harm. Communications of that kind are, we believe, sufficiently covered by the general offensive communication provision which we recommend. However, we consider it appropriate that the small number of very harmful communications that do specifically incite a particular person to suicide should be caught by the offence of incitement.

161 Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) at [8.31].

162 Criminal Code of Canada RSC 1985 c C-46, s 241.

- 4.85 There are two forms of communication that the proposed provision will not cover, and which we do not think it should. One is the communication which glorifies suicide. Memorial pages on social media sometimes fall into that category, and there is some evidence that they can lead others to copy what has happened. If memorial pages specify the means of death they are likely to be in breach of the Coroners Act 2006, but it would be neither sensible nor practically possible to go beyond that. One cannot outlaw eulogies on the ground that they might induce some impressionable young people to engage in destructive conduct.
- 4.86 Nor presently are we inclined to specifically outlaw publications which in general terms describe methods of inducing one's own death. In so far as such publications offend against the public interest they may fall into the category of objectionable publications in the Films, Videos, and Publications Classification Act 1993, and we currently see no need to go beyond that.

Sexual Matters

Grooming

- 4.87 Presently the sexual grooming provisions in the Crimes Act require that the defendant must have either: met the young person, travelled with the intention of meeting them, or arranged for or persuaded the young person to travel with the intention of meeting them.¹⁶³
- 4.88 Here too we favour a provision that makes the process of grooming criminal in itself, even though no overt act has been done in preparation for a meeting. There is such a provision in the New South Wales Crimes Act.¹⁶⁴ We recommend that it be an offence if a person:
- (a) engages in any conduct that exposes a person under the age of 16 years (the young person) to indecent material; and
 - (b) does so with the intention of making it easier to procure the young person for unlawful sexual activity with him or her or any other person.

Intimate films

- 4.89 In the Issues Paper *Invasion of Privacy: Penalties and Remedies* the Law Commission asked whether the publication of intimate pictures of a person without their consent

¹⁶³ Crimes Act 1961, s 131B.

¹⁶⁴ Crimes Act 1900 (NSW), s 66EB(3).

should be an offence, even though the pictures were originally taken with the consent of the person.¹⁶⁵ We were then inclined to think not.¹⁶⁶ This conclusion was in part based on the availability of civil damages for breach of privacy.¹⁶⁷ The Law Commission also recommended changes to the Privacy Act to remove the availability of the “domestic affairs” exception in section 56, where a disclosure is highly offensive to an ordinary reasonable person.¹⁶⁸

- 4.90 In the relatively short time since the Law Commission concluded its privacy review however, there have been a number of publicised cases involving the publication of intimate pictures without the consent of the subject of the pictures.¹⁶⁹ Often this behaviour occurs in conjunction with the breakdown of a relationship.¹⁷⁰
- 4.91 Prosecutions have been brought against the perpetrators of these acts, under criminal provisions that were not necessarily designed to deal with this issue. It has led a judge in one case to press into service section 124 of the Crimes Act (distribution or exhibition of indecent matter), to which we have referred above, to deal with it despite the rather strained interpretation that that involved.¹⁷¹
- 4.92 Judge Becroft was reported in that case as saying that he was adapting an old print law for the internet age. However section 124 is not particularly suited to this situation. It has been suggested that there may be difficulties with such photographs being considered to be “indecent”, given the hyper-sexualisation of the Internet and that the real issue is that the criminal law does not provide an adequate response for the dissemination of images that seriously impinge on the dignity of another person.¹⁷²

165 Law Commission *Invasion of Privacy: Penalties and Remedies* (NZLC IP14, 2009) at 246.

166 Law Commission *Invasion of Privacy: Penalties and Remedies* (NZLC R113, 2010) at [3.32].

167 See *L v G* [2002] DCR 234 where a woman seeking damages when pictures taken of naked body were published in an adult magazine was awarded \$2,500.

168 Law Commission *Review of the Privacy Act* (NZLC R123, 2010) at R45. As discussed at [4.125] we continue to support this recommended amendment to the Privacy Act.

169 For example, in 2010, Australian model Lara Bingle threatened to sue a former boyfriend for breach of privacy for selling an intimate picture of her to a woman’s magazine after a breakup.

170 Jody Callaghan “Sexting growing issue for Kiwi teens” *Fairfax NZ News* (online ed, 5 July 2012) <www.stuff.co.nz>.

171 “Naked photo sends jilted lover to jail” *Fairfax NZ News* (online ed, 13 November 2011) <www.stuff.co.nz>.

172 Jonathan Barrett and Luke Strongman “The Internet, the Law, and Privacy in New Zealand: Dignity with Liberty?” (2012) 6 *International Journal of Communication*, 127 at 136-137.

- 4.93 The publication of intimate pictures without the consent of the subject is a form of privacy intrusion. The level of harm and distress that is caused is significant. The criminal law is invoked for privacy intrusions considered serious enough to warrant that response, such as outsiders recording private conversations without consent,¹⁷³ peeping and peering into a private dwelling,¹⁷⁴ and intimate covert filming without consent.¹⁷⁵ We consider that the focus of the criminal law should now be on whether the *publication* of the images is without consent, rather than, as now, on whether the images were originally *taken* with consent. This behaviour can be viewed essentially as a form of intimidation.
- 4.94 In our view, the reported level of online publication of intimate visual recordings now warrants an amendment to the Crimes Act to criminalise the publication of intimate images by the person who made the image, without the consent of the person depicted. Accordingly, we recommend that the covert filming provision of the Crimes Act 1961 be amended to provide that it is an offence for the creator of an intimate picture to publish it without consent even though the picture may have been taken originally with subject's consent.
- 4.95 We acknowledge that the policy decision in invoking the criminal law in this situation is finely balanced. Other recommendations in this report would provide non-criminal remedies for victims of this behaviour. The tribunal we discuss in the next chapter would have the power to order that offensive material be taken down from websites and online forums. Later in this chapter we discuss the changes to the Privacy Act that are needed so that victims can more readily bring complaints about this behaviour to the Privacy Commissioner and seek a remedy such as an award of damages. A criminal offence would be a further tool in addressing this issue; we consider it is appropriate to provide a criminal law response, given the serious nature of the behaviour and its consequences for the victim.
- 4.96 We have also taken account of the youth of many people tending to engage in such conduct. One question is whether it is appropriate to criminalise youthful behaviours. We are persuaded, however, that the implications of the more extreme types of behaviour are so serious that a criminal offence is warranted. Prosecutions would no doubt be reserved for the most serious cases; they would not be common among the lower age groups. However, the deterrent effect of a criminal penalty would clearly

173 Crimes Act 1961, Part 9A.

174 Summary Offences Act 1981, s 30.

175 Crimes Act 1961, s 216H.

signal the outer limits of internet freedoms.

4.97 We note that a new offence would be subject to certain limitations. For example an “intimate visual recording” is a recording made in private, rather than a public place.¹⁷⁶ The criminal law would not therefore respond to the publication of an intimate visual recording taken in a public place.

4.98 Another limitation is that the offence would apply only to the publication of intimate images by the person who created them. The offence will not therefore catch behaviours such as “sexting” where teens take intimate images of themselves and share them with others who may on-share the images more broadly than was expected. It will also not catch publication of an intimate image by someone other than the person who created it. For example one scenario might involve a partner of the image’s creator posting an intimate image of their partner’s lover on the internet to humiliate or intimidate them. While such scenarios could involve substantial harm and distress, we consider that it is appropriate to target the criminal publication offence (in cases where the picture was taken with the consent of the subject) to the creator of the image because of the serious breach of trust involved. Cases of publication without consent by third parties should be dealt through civil law mechanisms such as Privacy Act complaints and the tribunal remedies that we propose in the next chapter.

Threats to publish an intimate or objectionable image

4.99 We have also considered the case of *R v Broekman*, where a young man was prosecuted for making an objectionable publication, namely exploiting a female for sexual purposes.¹⁷⁷ In that case video footage was taken of an intimate sexual act by a 16-year-old girl.¹⁷⁸ Details were published on Facebook which, as we describe in chapter 2 of this report, caused a great deal of distress to the subject of the footage.¹⁷⁹ It is not clear whether it was the footage itself or an account of the incident that was circulated, leading to the devastating impact on the subject of the footage through being ostracised by her family and community.

4.100 The existing criminal offence in the Films, Videos, and Publications Classification Act 1993 proved sufficient in this case to successfully prosecute the offender. However, one issue which the case raises is whether threats to publish intimate or objective

176 Crimes Act 1961, s 216G.

177 Films, Videos, and Publications Classification Act 1993, s 124.

178 *R v Broekman* [2012] NZCA 213.

179 See Chapter 2, at [2.46]–[2.48].

pictures should be prosecuted. In some cases they could be now, but only if they are made to induce sexual activity,¹⁸⁰ or involve blackmail.¹⁸¹ Possession offences may enable a prosecution to be brought.¹⁸² If the threats are made by electronic communication, they would be caught by the new summary offence of offensive communication we recommend.

4.101 We are reluctant at this stage to recommend that a threat to publish intimate pictures should of itself be criminal, because this would involve considering whether a threat to commit *any* offence should itself be criminal. Currently it is not, and we think that would be to open the door too wide. Threatening conduct which does not fall within any current criminal offence, or the new ones we recommend in this chapter, will often be redressable in the civil courts under the Harassment Act 1997, and presently we prefer to leave matter there.

Recommendations: criminal law

R1 A new communications offence should be created in the Summary Offences Act 1981 as follows:

Causing harm by means of communication device

1. A person (**person A**) commits an offence if person A sends or causes to be sent to another person (**person B**) by means of any communication device a message or other matter that is –
 - (a) Grossly offensive; or
 - (b) Of an indecent, obscene, or menacing character; or
 - (c) Knowingly false.
2. The prosecution must establish that –
 - (a) person A either –
 - (i) intended to cause person B substantial emotional distress; or
 - (ii) knew that the message or other matter would cause person B substantial emotional distress; and
 - (b) the message or other matter is one that would cause substantial emotional distress to a person in person B's position; and
 - (c) person B in fact saw the message or other matter in any electronic media.
3. It is not necessary for the prosecution to establish that the message or other matter was directed specifically at person B.

¹⁸⁰ Crimes Act 1961, s 129A.

¹⁸¹ Crimes Act 1961, s 237.

¹⁸² Films, Videos, and Publications Classification Act 1993, s 131; Crimes Act 1961, s 216I.

4. In determining whether a message or other matter is grossly offensive, the court may take into account any factors it considers relevant, including –
 - (a) The extremity of the language used:
 - (b) The age and characteristics of the victim:
 - (c) Whether the message or other matter was anonymous:
 - (d) Whether the message or other matter was repeated:
 - (e) The extent of the circulation of the message or other matter:
 - (f) Whether the message or other matter is true or false:
 - (g) The context in which the message or other matter appeared.
5. A person who commits an offence against this section is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000.
6. In this section, **communication device** means a device that enables any message or other matter to be communicated electronically.

R2 Section 179 of the Crimes Act should be amended so that incitement to suicide is an offence, regardless of whether the recipient proceeds to commit suicide or not, by deleting the words “if that person commits or attempts to commit suicide in consequence thereof”.

R3 A new section 131C should be added to the Crimes Act making it an offence to expose a young person to indecent material or provide an intoxicating substance to a young person with the intention of making it easier to procure the young person for unlawful sexual activity with him or her or any other person.

R4 The intimate covert filming provisions in Part 9A of the Crimes Act 1961 should be extended to provide a further offence in section 216J:

- A person (person A) who takes a visual recording of another person (person B) with person B's knowledge or consent is liable to [imprisonment for a term not exceeding 3 years] if –
- (a) person A publishes the recording without person B's consent; and
 - (b) the recording is of a kind described in section 216G(1)(a) or (b) and would be an intimate visual recording if taken without person B's knowledge or consent.

Civil law reforms

4.102 Our review of the civil law has led us to conclude that it would be desirable to make certain targeted amendments to the Harassment Act, the Privacy Act and the Human Rights Act, to clarify the application of those laws in online contexts.

The Harassment Act 1997

4.103 The Harassment Act provides for the restraining order.¹⁸³ The Act is now 15 years old

¹⁸³ Harassment Act 1997, Part 3.

and while it has been utilised in cases of harassing electronic communication with some creative interpretation, we think amendments are needed to remove any doubt or uncertainty that it applies to electronic communications. This would ensure that the Act is capable of responding to the challenges of online harassment, and that it is clear on its face that it does so.

4.104 We recommend four changes.

Expressly including electronic communications as a specified act of harassment

4.105 First, one of the items in the list of specified acts in the definition of harassment is:¹⁸⁴

making contact with that person (whether by telephone, correspondence or in any other way)

This can doubtless be interpreted as including electronic communications but given that telephone and correspondence are expressly itemised it would be appropriate to add electronic communications to the means of making contact and we recommend accordingly.

4.106 Secondly, paragraph (e) of the definition provides that another specified act is:

giving offensive material to that person, or leaving it where it will be found by, given to, or brought to the attention of, that person

This phraseology seems particularly appropriate to hard copy. It requires a liberal interpretation to hold that it covers such things as false Facebook pages or comments placed on a blog which has not been directly sent to the subject but may come to his or her attention.

4.107 In a recent District Court case, Judge Harvey was of the view that blog comments can fall within the paragraph where the blogger is *aware* that the material will come to the attention of the victim or it is *reasonably foreseeable* that the victim would access the material.¹⁸⁵ In this case it was reasonably foreseeable that, having become aware of the existence of offending posts, the victims would continue to visit the blog to see if they had been removed, and in so doing would have discovered further offensive posts.

4.108 While the current provision is therefore capable of covering electronic communications such as blog posts, it would be useful, in our view, if the statute was explicit about this. An explicit provision would assist to raise awareness of the law and make clearer to bloggers and to the community the potential liability that may arise in making offensive comments online.

¹⁸⁴ Harassment Act 1997, s 4(d).

¹⁸⁵ *Brown v Sperling* DC Auckland CIV-2012-004-00925, 15 June 2012 at [204]-[209].

4.109 We recommend a separate paragraph in the section to the following effect:

Places offensive material in any electronic media and either the victim views that material, or it is reasonably likely that it will be brought to his or her attention.

Continuing acts as a pattern of conduct

4.110 Thirdly, section 3 of the Harassment Act requires that to constitute harassment there must be “a pattern of behaviour”, and that this includes “doing a specified act on at least two separate occasions within a period of twelve months”.¹⁸⁶ Yet a single internet posting which continues for a lengthy period causes as much, or perhaps even more, damage and distress than two discrete individual acts.

4.111 The Law Commission considered this question as part of its review of the law of privacy, recommending that section 3 be amended so that a pattern of behaviour can be constituted either by a single protracted act, as well as two or more specified acts within 12 months.¹⁸⁷

4.112 We continue to support that recommendation and consider that just as a single protracted act of surveillance should qualify as a specified act of harassment, similarly a single offensive internet posting that persists over a period of time should also qualify as potential harassment.¹⁸⁸ The implementation of the earlier Law Commission recommendation would address the issue in both contexts.

4.113 We see no need to prescribe any particular length of time that a specified act of harassment must persist. A restraining order can only be made when distress is caused; this is a sufficient criterion.

Effect of restraining order

4.114 Fourthly, section 19 of the Harassment Act prescribes the effect of a restraining order.

It provides that it is a condition of every restraining order that the respondent must not:

Do, or threaten to do, any specified act to the person for whose protection the order is made

While this may be interpreted to cover the cessation of continuing conduct, it is not the most natural meaning of the words. We therefore recommend that the section be

¹⁸⁶ Harassment Act 1997, s 3.

¹⁸⁷ Law Commission *Invasion of Privacy: Penalties and Remedies* (NZLC R113, 2010) at R22. The government is due to respond to the recommendations in this report in September 2012.

¹⁸⁸ There is precedent in Queensland, where the Criminal Code provides that to constitute the offence of stalking all that is required is conduct “engaged in on any one occasion if the conduct is protracted”: Criminal Code 1899 (Qld), s 359B.

amended to provide that it also be a condition of a restraining order that the defendant must take all reasonable steps not to continue any specified act. The ‘reasonable steps’ qualifier is necessary because the defendants may not be able to remove the content from all parts of the internet where it may have been cached or archived.

The Privacy Act 1993

4.115 The Privacy Act 1993 regulates the handling of personal information about people, and privacy principle 11 restricts the disclosure of personal information, including online disclosures.

News medium: qualifying conditions

4.116 The Privacy Act’s information privacy principle 11 provides that an agency holding personal information about a person should not disclose it to anyone else unless one of a number of exceptions applies. A “news medium” is not an agency for this purpose and therefore does not need to comply with the requirements of principle 11.

4.117 There is presently some debate about the boundaries of that expression. The Law Commission recommended as part of its review of the law of privacy that the term “news medium” should include only those media which are subject to a code of ethics and subject to a complaints body.¹⁸⁹

4.118 We discussed the question of news media exemptions more widely in part one of the Issues Paper in the present reference,¹⁹⁰ and will return to it in our final report on that reference. If “news medium” is to be defined in this narrower way, disclosures of personal information in the electronic media which fall outside that definition will not have the benefit of the news media exemption. This would mean that such disclosures will need to comply with the requirements of principle 11 and will be subject to the jurisdiction of the Privacy Commissioner. We consider that would be appropriate.

4.119 Even if that issue is resolved however, there remain two further Privacy Act exceptions that can significantly reduce the protections available to persons whose privacy is damaged by internet publications.

189 Law Commission *Review of the Privacy Act: Review of the Law of Privacy Stage 4* (NZLC R123, 2011) at R38.

190 Law Commission *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) chapter 4.

Publicly available publication and domestic affairs exceptions

4.120 First, it is an exception to information privacy principle 11 that “the source of the information is a publicly available publication”. According to Professor Paul Roth, New Zealand has an extremely broad exemption for “publicly available information”.¹⁹¹ Its effect in an online context is that once personal information, even deeply sensitive personal information, is published once on the internet, no-one can be liable for increasing its circulation by publishing it on other sites.

4.121 Secondly, section 56 of the Privacy Act provides that:

Nothing in the information privacy principles applies in respect of

- (a) the collection of personal information by an agency that is an individual; or
- (b) personal information that is held by an agency that is an individual,

where that personal information is collected or held by that individual solely or principally for the purposes of, or in connection with, that individual's personal, family or household affairs.

4.122 This has been described as a “crucial exception”:¹⁹²

It allows a vital “social” space within which individuals may conduct themselves without fear of breaching the strictures of information privacy laws.

4.123 But arguably the breadth of this exception also needs some outer limits. Currently it means that intimate pictures taken in the context of a domestic relationship may be exempt from the Privacy Act principles, including principle 11, even if they are later published on the internet, perhaps on the breakdown of the relationship.¹⁹³

4.124 As part of its review of the Privacy Act, the Law Commission considered the breadth of these exceptions and recommended:

- (a) The “publicly available publication” exception should not be available where the use or disclosure of publicly available information would be unfair or unreasonable;¹⁹⁴
- (b) The “domestic affairs” exception should not be available where the personal information has been collected unlawfully, through misleading conduct, or where

191 Paul Roth “*Data Protection Meets Web 2.0: Two Ships Passing in the Night*” (2010) 33 UNSW Law Journal 532 at 545.

192 Gehan Gunasekara and Alan Toy “MySpace” or “Public Space” [2008] 23 NZULR 191 at 213.

193 For discussion of the scope of the “domestic affairs” exception see Paul Roth “*Data Protection Meets Web 2.0: Two Ships Passing in the Night*” (2010) 33 UNSW Law Journal 532 at 536-544.

194 Law Commission *Review of the Privacy Act: Review of the Law of Privacy Stage 4* (NZLC R123, 2011) at R10.

the use or disclosure of the information would be highly offensive to an objective reasonable person.¹⁹⁵

4.125 We continue to support these recommendations and consider that they would be useful in addressing online communication harms that significantly impact on a person's privacy. The "unfair or unreasonable" threshold imposed in relation to the "publicly available publication" exception is lower than the "highly offensive" threshold for the domestic affairs exception. Regardless of the particular threshold however, complaints may only be made if a breach causes "significant humiliation, significant loss of dignity or significant injury to feelings".¹⁹⁶

The Human Rights Act 1993

4.126 Section 61 of the Human Rights Act 1993 provides that it is unlawful to publish matter which is likely to excite racial disharmony. We have been told by the Human Rights Commission that the threshold for liability under this provision is so high that it is almost never met. Any amendments to this provision would be a matter for review of the Human Rights Act, and is beyond our present scope. But when this exercise is undertaken we recommend that the section, which currently expressly refers to written matter and broadcast matter, should also, to avoid any doubt, refer to electronic communications as well. We also believe that, when such a review takes place, consideration should be given to extending the disharmony provisions to cover insulting or abusive conduct relating to religion, ethical belief, gender, disability and sexual orientation as well as race.

4.127 Sections 62 and 63 deal with sexual and racial harassment respectively. They provide that such harassment must have a detrimental effect on the person in relation to a number of specified benefits including access to goods and services and education. Harassment of the kinds with which these sections deal has the potential to deter individuals, particularly young people, from using social media, thus limiting their interaction with their peers. Perhaps that is covered by the access to goods and services provision,¹⁹⁷ but not clearly and unarguably so.

4.128 We believe the matter is significant enough to justify adding a further item to the list of benefits which can be affected by the harassment "participation in any fora in the electronic media for the exchange of ideas and information".

¹⁹⁵ Ibid, at R45.

¹⁹⁶ Privacy Act 1993, s 66(1)(b)(iii).

¹⁹⁷ Human Rights Act 1993, s 62(3)(h), s 63(2)(h).

Recommendations: civil law

R5 We recommend the following amendments to the Harassment Act:

- (a) An amendment to section 4(1)(d) so that it is explicit that making contact with a person can include electronic communication;
- (b) The addition of a further “specified act” of harassment in section 4 to the following effect:
“giving offensive material to a person by placing the material in any electronic media where it is likely that it will be viewed by, or brought to the attention of, that person.”
- (c) An amendment to section 3 to provide that a continuing act over a protracted period is capable of constituting harassment (as recommended in the Law Commission’s Invasion of Privacy report).
- (d) To make a condition of a restraining order that applies to a continuing act that the respondent must take reasonable steps to prevent the specified act from continuing.

R6 We recommend the following amendments to the Privacy Act:

- (a) An amendment to the “publicly available publication” exception in information privacy principle 11 so that the exception is not available where the disclosure of personal information obtained from such a publication would be unfair or unreasonable (as recommended in the Law Commission’s Privacy Act report);
- (b) An amendment to section 56 so that the “domestic affairs” exception is not available where the disclosure of personal information would be highly offensive to an objective reasonable person (as recommended in the Law Commission’s Privacy Act report).

R7 We recommend the following amendment to the Human Rights Act:

- (a) Section 62 (sexual harassment) and section 63 (racial harassment) should be amended to include an additional area of application:
“participation in any fora in the electronic media for the exchange of ideas and information”.
- (b) Section 61 (racial disharmony) should be amended to refer to electronic communications, in addition to other forms of publication.

CONCLUSIONS

4.129 We have reached the view that changes in the law are necessary and desirable. We note the comment of the Police in their submission to our issues paper:

Police considers the current law is not always capable of addressing some of the new and potentially more damaging ways of using communication to harm others. This, combined with the practical difficulties of investigating offensive conduct over the Internet, can lead to very real difficulties in enforcing the law against ‘new media’.

4.130 No-one believes that creating new law will itself solve the problem of cyber-bullying and harmful communications. The causes of that problem are complex, and the

solutions to them are social and educational as well as legal. Sometimes the offensive communications with which we are dealing are part of a wider pattern of conduct. Enforcement of the law through the courts can also be problematic and unrealistic, particularly in the case of young persons.

4.131 However, the law does have an important part to play. The prosecution of even a few offenders serves as a warning to others. Moreover the law is an authoritative public statement of what is and what is not acceptable in the eyes of society and the mere fact of its existence serves as a deterrent. It is supportive to victims to know that if the conduct to which they are being subjected is serious enough, the law enforcers, namely the Police and the courts, are available at the end of the line. It is also helpful to those dealing with perpetrators, particularly young people, to have the backing of the law. And the law enforcers, the police in particular, welcome clarity in the law.¹⁹⁸

4.132 Uncertainty as to whether a particular provision covers the case is not conducive to swift action. As context and society change, and the harms to which people are subjected change, the law must change too.

4.133 It may be argued that the threshold for creating a new criminal offence is, and should be, a high one, and that some of the matters for which we recommend criminalisation might be more adequately dealt with through other channels. One commentator, while acknowledging that online communications can have such harmful consequences that criminal sanctions are justified, expresses concern about laws that are overly expansive and catch communications that do not deserve the heavy penalties imposed by the criminal law, suggesting that such laws should be tailored to deal with the most serious and deliberate cases of harassment or bullying, and noting the chilling effect of broadly worded criminal offences.¹⁹⁹

4.134 We have been mindful of this caution and have been careful to put forward tailored amendments to our laws that include suitably high thresholds so that only those communications that have caused serious harms come within their scope. We have given careful thought to the threshold for criminality, and the requirements of the Bill of Rights Act, in defining the offences. We note that most of our recommendations

198 In their submission to our issues paper the Police supported the introduction of new offences, referring particularly to an "offensive communication" offence, malicious impersonation, publication of intimate photos, and incitement to suicide: submission of the Police (March 2012) at 4.

199 Jacob H Rowbottom "To Rant, Vent and Converse: Protecting Low Level Digital Speech" (2012) 71 CLJ 355.

mirror developments in other jurisdictions.²⁰⁰

4.135 We are conscious of the fact that there has been a recent tendency to decriminalise what were formerly speech offences. The abolition of criminal defamation and sedition are recent examples. What we propose is not in conflict with that movement. Sedition was about political speech. Criminal defamation was always an exceptional category in which a prosecution was only authorised if the public interest required that it should proceed. The public as well as the private interest was central to this part of this law.

4.136 As we noted earlier in this paper, overseas jurisprudence increasingly recognises differences in the value of different kinds of speech. Political speech is seen as being of the highest importance, gratuitous personal attacks and “hate speech” the lowest, although even there the reaction of the law must not be disproportionate: freedom of speech is too important.²⁰¹ We are concerned about protecting citizens from substantial mental and sometimes physical harm caused by communications of the two latter kinds. We are concerned with creating a safer environment for people. We are satisfied that that objective is serious and important enough to be supported by the criminal law. In terms of the New Zealand Bill of Rights Act 1990, the exceptions to freedom of expression that we advocate are “justified in a free and democratic society”.²⁰²

4.137 Finally we note that the laws controlling harmful communications will be reflected in the principles which will be applied by the new tribunal which we discuss in the next chapter of this report. That body will have no power to impose criminal sanctions, but will be empowered to take remedial measures to protect victims. The availability and accessibility of appropriate non-criminal remedies is important to ensure that there is a balanced approach, and that the criminal law is reserved for the most serious cases. Our objective of creating a safer environment for people will be developed further in the next chapter.

200 See above at [4.73].

201 Jacob H Rowbottom “To Rant, Vent and Converse: Protecting Low Level Digital Speech” (2012) 71 CLJ 355.

202 New Zealand Bill of Rights Act 1990, s 5.

Chapter 5: Enforcement

ISSUES PAPER AND SUBMISSIONS

- 5.1 As we noted earlier, the law provides a vital anchor for the values and principles by which our society operates. There are many legal rules now which are capable of redressing many of the harms resulting from online communications. From time to time there are successful prosecutions and civil actions. But in order to be truly effective in reinforcing those values and principles the law must be accessible to the public and be capable of providing speedy and meaningful redress.
- 5.2 This is true with respect to all types of wrong-doing and a number of submitters to our review commented that our discussion about the barriers to accessing justice were not restricted to communication offences. We accept that argument. But as we pointed out in our issues paper there are some unique challenges in applying the law in cyberspace. While the existing criminal and civil law could deal with many types of harmful digital communications, in practice there are a number of obstacles that impede access to justice by those who have suffered harm. These include:
- (a) A lack of knowledge of the law and/or the availability of redress, by both victims and enforcement officers;
 - (b) The complexity of identifying possible defendants in an online situation;
 - (c) The breadth and speed of spread of information on the internet;
 - (d) Problems of establishing jurisdiction, where material is hosted overseas.
- 5.3 Submissions confirmed the themes that had emerged from our preliminary research and consultation as to the problems people encounter in accessing help to deal with cyber offending, and their resulting sense of powerlessness.
- 5.4 The Police advised that one of the problems they faced in responding to complaints about communications abuses, which increasingly involve social media and online fora, is that not all of the harms reported meet the threshold of a criminal offence, or indeed constitute any sort of offence under the current law. They submitted that nevertheless these harms are frequently significant, and supported the proposal to enhance and strengthen existing laws to make them fit for purpose, as well as introducing a number of new offences.
- 5.5 But even where there are already appropriate laws to deal with harmful communications, there are still significant flaws in the present system of enforcement.

In summary, these are the cost of bringing proceedings, the time taken by traditional systems of enforcement to deal with the issue, and the complexity of gathering evidence and establishing proof.

5.6 In his submission, Judge Harvey identified the main source of the problem as being one of process, rather than the effectiveness and availability of remedies, and raised three key issues:²⁰³

(a) legal processes do not operate within “internet time”, when information is disseminated virally and globally within minutes:

Significant damage may be done in the time that it takes to bring civil proceedings to a hearing – even in the case of an injunction.

(b) the cost of civil proceedings and restrictions on legal aid place access to the civil jurisdiction of the courts beyond the reach of many ordinary citizens – and given the evidential and legal complexities that surround litigation of “online” matters, self-represented litigants face a daunting task;

(c) there are difficulties in bringing a criminal prosecution primarily because the evidence gathering process can be complex and multi-jurisdictional, and police investigative resources are limited.

5.7 In its submission, NetSafe also referred to the problems of bringing a criminal prosecution, noting it could be time-consuming and difficult for law enforcement to collect the level of digital evidence required to successfully prosecute the offender, particularly where hosts of harmful communications are based overseas. Even when such evidence can be accessed, prosecution is further complicated by the need to prove that the abuse was produced by the alleged offender (and not someone else who happened to use their IP address or login at that time).

5.8 In NetSafe’s experience, the majority of interventions by the law usually occur on an informal, ad hoc basis and involve police officers contacting the alleged offenders and requesting that the threats of harm desist.

5.9 NetSafe also echoed Judge Harvey’s concerns about the costs and timeliness of court proceedings in the context of harmful digital communications:

When it comes to speech abuses that are not covered by the criminal statutes, practical opportunities for the law to produce redress are nearly non-existent for the majority of the public who do not command the financial resources to be able to take the matter through civil proceedings.

The inability of the law to effectively help targets of such abuse mainly centres on the likelihood of action and the time required for such actions to be taken. The longer abusive content remains online

²⁰³ Submission from Judge David Harvey at 11.

the increased chance of distress and victimisation is for targets of such speech abuses. Other than when police officers act informally, it is unlikely the law can produce redress in a time frame that is effective for the targets of such abuse. This issue is particularly salient for targets of abuse that relies on diminishing their social standing, for the longer such material remains online, the more damage it can do to the target's social network.

The proposals in our issues paper

5.10 In our Issues Paper we reached the preliminary conclusion that there was a need for some mechanism by which those who had been harmed by digital communication could be assisted in resolving their disputes and/or be given access to a specialist court capable of administering speedy, efficient and relatively cheap remedies.²⁰⁴ We sought feedback on two alternate preliminary proposals for achieving these objectives.

A Communications Tribunal

5.11 The first proposal was for the establishment of a Communications Tribunal that would operate like a mini-court dealing with cases where demonstrable harm has resulted or is likely to result.²⁰⁵ That harm might be financial, or might be psychological harm such as distress, intimidation, humiliation or fear for safety. The tribunal would only deal with cases where it judged the offending content amounted to a breach of the law.

5.12 The tribunal's functions would be protective, rather than punitive. Its job would be to provide remedies for the victim rather than mete out punishment for perpetrators – the power to impose criminal sanctions should be reserved for the courts not a specialist tribunal of this sort.

5.13 However we proposed that the tribunal would have the power to impose a number of sanctions and remedies, including 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 (after a fair hearing) to make takedown orders against either the perpetrator or an innocent avenue of communication such as an internet service provider (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.

²⁰⁴ Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) chapter 8.

²⁰⁵ *Ibid*, at [8.43]-[8.77].

A Communications Commissioner

5.14 The second option we put forward for discussion was the establishment of a Communications Commissioner, possibly attached to the Human Rights Commission.²⁰⁶ The Commissioner would not have the enforcement powers of a tribunal but his or her role 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.

What submitters said

5.15 The great majority of submitters supported the proposition that there needed to be some domestically based and authoritative mechanism for assisting people to resolve disputes and address serious harms caused by abusive digital communication.

5.16 Among the few exceptions was Google, which reiterated its belief that harmful speech online was best addressed through existing legal and self-regulatory mechanisms and that a Communications Tribunal would be a “disproportionate response to an as yet ill-defined problem”.²⁰⁷ Its objection to a Communications Commissioner, with lesser powers, was more muted and indeed it accepted that such a body may have some merit “in some limited circumstances”. It pointed out that NetSafe, an organisation whose work it strongly endorsed, was already carrying out many of the functions outlined for the proposed Commissioner.²⁰⁸

5.17 Facebook shared Google’s conviction that “user empowerment” combined with a “robust site reporting infrastructure and technology” were the most effective responses to online communication abuses, but it did not directly oppose the idea of a Commissioner or Tribunal. It was however concerned to ensure any investigative or enforcement powers vested in a tribunal were consistent with its own established

206 Ibid, at [8.78]-[8.85].

207 Submission of Google New Zealand Ltd (14 March 2012) at 30.

208 Ibid, at 27.

protocols for responding to legal requests for account holder information and escalations of serious legal harms or threats which occurred on their platform.²⁰⁹

5.18 Google and Facebook's preference for non-regulatory solutions reflect what a submitter described as "the inherent tension between the need for corporate accountability and the right of private commercial sectors to self-regulate within the operation of the law".²¹⁰

5.19 And, as these submitters went on to point out, these tensions have taken on a whole new dimension as a result of the unique place Facebook inhabits:²¹¹

In 2011, the official user count for Facebook was reported to be a monumental 854 million (monthly users); more populated than the average nation-state, yet the entity is largely free to determine guidelines and balances considerations for multiple jurisdictions against its own (user) interests. This observation does not purport to be a pretext to suggest active online-forum or corporate regulation, yet it points to an eerie lack of uniform regulatory governance for such online mediums.

5.20 The Equal Justice Project concluded that there would inevitably be tensions between the non-legislative remedies employed by online communities and the judicial and legislative remedies in place within domestic jurisdictions. However, it was clear that "whatever form this coexistence may take, users need a complaint body that is direct and accountable" and that has the "power to demand negotiations".

5.21 The principle that New Zealand users need access to a complaints body that is accessible and that has some teeth to negotiate with global entities was endorsed in the submissions of key stakeholders including Police, the Human Rights Commission, the Post Primary Teachers' Association, the Privacy Commissioner, NetSafe and Trade Me.

5.22 In its submission NetSafe clearly articulated the benefits it saw flowing from the establishment of a tribunal and/or a Commissioner.²¹² These included:

- (a) Lowering the barrier for victims looking for redress because a tribunal would not require proof "beyond reasonable doubt" and would operate cheaply and on much faster time frames than traditional courts, thereby providing meaningful remedies;

²⁰⁹ Submission of Facebook (14 March 2012) at 9.

²¹⁰ Submission of the Human Rights division of the Equal Justice Project, Faculty of Law, University of Auckland (received 30 March 2012) at [3.1].

²¹¹ Ibid.

²¹² Submission of NetSafe (24 February 2012) at 4.

- (b) Providing a deterrent effect for offenders who currently feel empowered by the barriers to successful prosecution and the very real belief they will not be sanctioned in any way;
- (c) Providing an incentive to resolve disputes at an earlier stage to avoid referral to a tribunal – NetSafe argued that if any agency were empowered to work with victims and alleged offenders to resolve complaints through mediation and negotiation this would both incentivise parties to resolve issues, and also provide a filter, ensuring only serious cases were referred to a tribunal for adjudication;
- (d) Allowing for the productive engagement of industry partners – NetSafe argued that the pre-tribunal triaging of complaints would allow other agencies and organisations, including schools, to become engaged in the resolution of problems;
- (e) Speeding up the responses from content hosts and infrastructure companies by providing a “national contact” point mandated to liaise directly with the influential internet companies and organisations whose co-operation would be required to give effect to notice and takedown orders and obtain information about the identity of anonymous authors etc.

Tribunal or Commissioner model

- 5.23 In our Issues Paper we presented the proposals for a Communications Tribunal or a Commissioner as alternate options.²¹³ Some submitters, including NetSafe, saw merit in the two working in tandem – the Commissioner as a mediator and filter for the tribunal. Other submitters expressed a clear preference for one over the other.
- 5.24 Those who preferred a Commissioner to a tribunal usually did so for two reasons: a belief that the Commissioner model was less legalistic and more flexible, and more likely to be able to mediate solutions and a concern that the alternative tribunal was overly interventionist and risked compromising critical free speech rights online.
- 5.25 InternetNZ for example argued that in the first instance at least, a Commissioner, with a mandate to educate and mediate, would be a suitably “light touch regulation” with the option of for a “stronger response if the light touch doesn’t work over time”.²¹⁴ It argued that “more empirical evidence of harms and the inadequacy of current redress mechanisms” was required before taking an “expensive and complex step with

²¹³ Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) at chapter 8.

²¹⁴ Submission of InternetNZ (12 March 2012) at 10.

potentially toxic side effects.”

- 5.26 Other submitters were more concerned about how the proposed tribunal would work in practice and whether in order to deliver speedy justice it would inevitably compromise vital legal principles such as the rights of defendants to raise a defence.
- 5.27 Fundamentally too, some argued whether it was in fact possible (let alone desirable) to short-circuit the necessarily complex legal arguments involved in assessing alleged defamations or privacy breaches. A number also raised concerns about how the tribunal’s determinations would impact on the rights of defendants in any future criminal proceedings which may eventuate further down the line.
- 5.28 In its submission, the Dunedin Community Law Centre cited the concerns expressed by barrister and media law expert Steven Price about the dangers of a parallel legal process and the challenges a tribunal would face:²¹⁵
- Issues around what constitutes free speech and defamation are complex, and will be difficult to establish fairly, speedily and efficiently through a Tribunal process.
- 5.29 For this reason, these submitters preferred the Commissioner model, arguing that in cases of serious harm the Commissioner could refer the matter to the Police for investigation and prosecution through the courts in the normal manner.
- 5.30 Some endorsed the suggestion in the Issues Paper that a Communications Commissioner might be attached to the Human Rights Commission, an organisation which was already accustomed to balancing free speech issues against other human rights questions.
- 5.31 For its part the Human Rights Commission acknowledged that it already had the ability to deal with freedom of expression issues and had good relations with other agencies that have a role in regulating media. However it emphasised that if its mandate were to be extended to deal with more generalised speech harms this would require funding and resources to support this role. The Human Rights Commission also commented that the Commissioner may be cheaper but it was also weaker as it would not have the enforcement powers of the proposed tribunal.²¹⁶
- 5.32 While the Human Rights Commission said it favoured the tribunal option because it had more teeth, it also expressed concerns about the difficulties the tribunal would encounter in establishing evidence of “demonstrable harm” – the proposed threshold

²¹⁵ Submission of the Dunedin Community Law Centre (12 March 2012) at 6.

²¹⁶ Submission of the Human Rights Commission (12 March 2012) at [8.3].

required before it would take action.²¹⁷

As we have already indicated, this will not always be easy to demonstrate particularly in relation to the relevant sections of the HRA [Human Rights Act]. Humiliation, loss of dignity and injury to feelings, for example, is the head of damages most frequently relied on under the HRA and the most difficult to establish with any precision.

5.33 The New Zealand Police also favoured a tribunal with enforcement powers but no ability to impose criminal sanctions. It emphasised the importance of giving the tribunal the power to require an internet service provider or other content hosts to disclose the details of an account holder, noting that the “co-operation of the ISP cannot always be relied upon”.²¹⁸ In the view of Police, removal of the infringing material was crucial in order to prevent further victimisation.

5.34 In a similar vein Trade Me argued in favour of a tribunal because it would have investigative and enforcement powers and would play an influential role in establishing the parameters of acceptable behaviour:²¹⁹

[S]uch a tribunal will build up a strong set of case law about what is “reasonable” and “responsible” which will be useful in indicating where the line of good practice is, delivering better overall behaviour but also less frivolous or unrealistic claims.

5.35 With respect to the alternative proposal for a Commissioner, Trade Me noted that NetSafe already carries out many of the functions proposed for the Commissioner and has already forged many of the critical relationships with intermediaries and content hosts like Facebook and Google. It suggested that “greater resourcing of this function would be preferable to setting up a Commissioner.”²²⁰

RECOMMENDED MODEL: TRIBUNAL PLUS APPROVED COMPLAINTS HANDLING BODY

5.36 We are persuaded by the research we have undertaken, the submissions we have received and the comments of agencies such as NetSafe and the Police, that harmful cyber communications constitute a real problem in today’s society, and that the present modes of law enforcement are not adequate to deal with them. The courts are often not a realistic option for people who want swift and effective redress. We believe that there needs to be an appropriate mechanism to provide relief outside the

217 Ibid, at [7.4].

218 Submission of New Zealand Police (12 March 2012) at 5.

219 Submission of Trade Me (12 March 2012) at [46].

220 Ibid at [48].

traditional court system. Such an innovation was supported by many of the submissions we received on the subject.

5.37 This would not be out of place in the New Zealand legal system. The Privacy Act 1993 provides redress outside the court system for invasions of privacy, and the Human Rights Act 1993 for discriminatory behaviour. The Broadcasting Act 1989 provides remedies for people who have been adversely affected by breach of a range of broadcasting standards including the standard that broadcasters must treat people fairly. The harm and distress caused by some online communications is at least as great as, and sometimes greater than, the harms targeted in these statutes. We have outlined some striking instances in chapter 3. We believe that a speedy and informal system of resolving problems in the online environment will support not only victims, but also families, schools and others who have to deal with and advise on harmful online behaviour and its consequences.²²¹

5.38 We believe that such a system should have a number of characteristics:

- (a) It should be well publicised.
- (b) It should be easily accessible.
- (c) It should operate as informally as possible.
- (d) It should operate quickly.
- (e) It should be inexpensive to those using it.

5.39 So what should the new machinery be? Having put forward two alternatives in the issues paper – a tribunal with power to make enforceable orders or a commissioner with persuasive rather than coercive power – we have formed the view that a tribunal is justified. As we pointed out in the issues paper, New Zealand has often resorted to this method of dispute of resolution: the Human Rights Review Tribunal, the Tenancy Tribunal and the Disputes Tribunal are well known examples.²²² The advantages of tribunals are exactly those that we list in paragraph 5.38 above: they provide justice which is accessible, informal, speedy and inexpensive. The tribunal solution has the support of a number of significant organisations including NetSafe, the Police and the Human Rights Commission. When answering the question in the issues paper Trade Me said “absolutely”, noting the importance of speed and responsiveness.

²²¹ For commentary on a low cost regulatory approach to digital communications, see Jacob H Rowbottom, “To Rant, Vent, and Converse: Protecting Low Level Digital Speech” (2012) 71 CLJ 355.

²²² Law Commission *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) at [8.45].

- 5.40 A tribunal would provide a backstop for other agencies – such as NetSafe – which attempt to resolve issues of this kind. It would also give a legal authority which would be useful to schools, the Police and other agencies. It would have the added value that its determinations would likely be recognised as authoritative by large overseas website hosts and service providers which, even though not resident within our jurisdiction, would regard such these determinations as sufficient reason to take the required action in respect of the offensive communications. In the current absence of such an entity it can be difficult to get such an action.
- 5.41 But before proceeding to outline the features of the proposed tribunal, a preliminary question needs to be disposed of. Given that the main relief which is likely to be sought by most complainants is an order to takedown or discontinue the offensive conduct, might the Harassment Act 1997 as currently applied in the District Court not be enough? It gives power to the District Court to make a restraining order in relation to various forms of harassment. If that Act were to be subject to the minor amendments we have suggested in the previous chapter, it might be argued that it is adequate to be the kind of backstop we are suggesting. We do not favour this solution. As the enforcement authority under the Harassment Act, the District Court acts under the rules of court (adapted for the purpose of the Act)²²³ and is subject to all the incidents of its ordinary jurisdiction.
- 5.42 The advantages of a specialist tribunal will be that it would develop specialist knowledge not just about communications law but also about the developing communications technologies. It would also have the usual advantages of a tribunal over a court in that it could act quickly, informally and relatively inexpensively. It would mitigate the effects of wealth imbalance between the parties. There is the further advantage that orders under the Harassment Act cannot be made against minors under 17;²²⁴ we would anticipate that sometimes a tribunal order might be appropriate against young persons.
- 5.43 This tribunal would be less formal machinery than the ordinary court system. It would also be able to build up a body of consistent precedent in its specialist field. Nevertheless there might remain cases where a complainant would prefer to use the Harassment Act route. That might be particularly so where the harassment involves a variety of types of conduct or where the harassment reaches the threshold of criminal

223 Harassment Act 1997, s 42; District Court Rules 2009, Part 7.

224 Harassment Act 1997, s 12.

harassment.²²⁵

- 5.44 So we support a tribunal model. But the tribunal alone will not be enough. A very large number of cases may not need a tribunal: they may be able to be resolved by some form of alternative dispute resolution. Particularly in the case of young persons this will often be greatly preferable to a hard-hitting judicial resolution. Moreover, if the tribunal were to be the only mechanism it might be flooded with complaints, some of them of a relatively minor kind. There needs to be some way of controlling what reaches the tribunal. So in addition to the tribunal there needs to be a process or machinery to receive, 'filter' and try to resolve complaints before the tribunal's jurisdiction is activated. For a time we were of the view that a Commissioner of the kind we discussed in the issues paper might be the answer. This would in fact involve adopting both of the issues paper options, rather than treating them as alternatives. The Commissioner would attempt to mediate a solution; the tribunal would be activated if those measures failed.
- 5.45 However, particularly in the present fiscal climate, "the Commissioner plus tribunal" model could involve heavier new machinery than may be necessary or desirable. We are therefore recommending a similar but less formal structure. We think that the preliminary filtering and negotiation functions (which we regard as essential) should be undertaken by an existing body or bodies which would receive formal ministerial approval to undertake them. The non-governmental organisation NetSafe currently does such work and would seem to us to be an outstanding candidate for such approval. So in essence the scheme we recommend is a two-step mechanism whereby:
- (a) Complaints about offensive internet communications would go initially to an "approved agency" like NetSafe which would advise complainants and attempt to achieve a resolution by a process of negotiation, mediation and persuasion.
 - (b) If a complaint cannot be resolved in this way, provided the threshold of seriousness is reached, it might then proceed to a tribunal which can make enforceable orders. To that extent the tribunal would serve as a 'backstop' where dispute resolution procedures have failed or are unsuitable.
- 5.46 Nothing in all of this, of course, will affect the criminal law. In really serious cases that law should remain as the ultimate sanction, sometimes in parallel with the tribunal process. The purposes served by the two are different.
- 5.47 We now proceed to discuss the two elements in this scheme. We shall deal with the

²²⁵ Harassment Act 1997, s 8.

tribunal first. In what follows we acknowledge the assistance we have derived from the writings and presentations of Steven Price, who commented helpfully on the proposals in our issues paper.²²⁶

The Tribunal

Who would the tribunal be?

- 5.48 The tribunal could be a Judge, or other person of legal experience and standing. It would be important for the job description for the position to include, in addition to expertise in communications law, an understanding of the New Zealand Bill of Rights Act 1990. Understanding and empathy with young people would also be an advantage, for some but by no means all of the cases would involve young participants.
- 5.49 Even more importantly, the tribunal should have an understanding of communications technology. Ideally the tribunal itself should have a degree of expertise in that subject. One of the submitters to our Issues Paper said colloquially that some of people working for the tribunal should be “Gen Y”.²²⁷ “They need to demonstrate that they are well versed in different forms of social media”. However, it might be enough in an appropriate case for the tribunal to sit with an expert technical adviser.
- 5.50 Although each case would be heard by a single tribunal member, as for example is the case in the Disputes Tribunal, there might be a number of persons designated for the role to meet the exigency that would otherwise arise if one appointee was unable to hear a particularly urgent case. We are attracted to the idea of designated District Court judges undertaking the task, because there would then be no need to build a new tribunal structure. The support services would already exist. There is a useful precedent in the Victims’ Special Claims Tribunal set up under the Prisoners’ and Victims’ Claims Act 2005.

The type of communication

- 5.51 The tribunal jurisdiction would extend to all forms of electronic communication. It

226 Steven Price, “A heroic – but slightly defective – plan to save the online world” NZ Lawyer (online ed, 18 May 2012) <www.nzlawyermagazine.co.nz>. See also the IT Country Justice blog “Dealing with Speech Harms – A Commentary of Steven Price’s Answer to the Law Commission” (5 June 2012) <theitcountryjustice.wordpress.com>.

227 Gen Y or Generation Y is generally considered to be the generation born between about 1983 and 2004, a generation which is marked by an increased use of and familiarity with communications, media and digital technology.

would include comments on websites, message boards and blogs, in social media (e.g. Facebook and Twitter), and also emails and texts. We do not wish to include other forms of communication – for example telephone, hard copy letter or face to face comments. The distinguishing feature of electronic communication is that it has the capacity to spread beyond the original sender and recipient, and envelop the recipient in an environment that is pervasive, insidious and distressing. There are also evidential advantages: a copy of the electronic message will usually be readily available.

- 5.52 We noted in the previous chapter that the laws of some other jurisdictions make special provision for harmful electronic communications. Similarly in New Zealand, the law on unlawful spam is confined to “commercial electronic messages”.²²⁸ In other words there is legislative precedent for giving special attention to electronic communications.

Complainants

- 5.53 Those entitled to complain to the tribunal should be the victims, the parents or guardians where the victim is a child or young person or a person with a disability, and school principals on behalf of students. We also believe that the Police should have access to the tribunal where a communication constitutes a threat to the safety of any person. We do not envisage that the Crown, or any Government agency, should be able to complain: we do not see the mechanism as one to enable the Crown to address, for example, name suppression breaches or contempt of court. But Government employees and individuals employed by Crown agencies would have rights in relation to harm sustained by them in their individual capacity. For example an employee of a government department, or a school teacher, might complain about conduct towards them in the course of their employment.
- 5.54 One issue of standing is the position of bodies corporate. Sometimes business enterprises can suffer serious damage as a result of malicious attacks by competitors or disgruntled clients. But bodies corporate are artificial constructs and therefore cannot themselves suffer mental harm or distress. We conclude that the right to complain should be confined to natural persons. However an attack on a small business will often be read as an attack on the proprietor personally, in which case he or she would have standing to complain.

Jurisdiction: the threshold

- 5.55 We have emphasised previously that only particularly serious cases should come to the

²²⁸ Unsolicited Electronic Messages Act 2004. Note also the Electronic Transactions Act 2001.

tribunal. Complainants should have to demonstrate two things:

- (a) Firstly, they should show that they have attempted to resolve the matter through other avenues. The tribunal is effectively a backup solution when other approaches have failed. We shall elaborate on this later in the chapter, and explain the prior role of the “approved agency”.
- (b) Secondly, the harm should be significant before a complaint reaches the tribunal. Complainants should demonstrate that the communication complained about has caused, or is likely to cause, *significant* emotional distress. The whole purpose of this new machinery is to remove or minimise harm to individuals, and not to regulate or enforce community standards. It is a protective jurisdiction. The threshold should be a high one.

5.56 Proof of significant emotional distress may be thought to be problematic. Usually it will be sufficiently demonstrated by the nature of the communication itself: much of the material coming before the tribunal is likely to be of such a kind that it would clearly cause real distress to any reasonable person in the position of the applicant. This blended objective/subjective standard is reflected in the Harassment Act which requires, as a condition of making a restraining order, that the behaviour causes distress to the applicant, and is of such a kind that would it cause distress to a reasonable person in the applicant’s particular circumstances.²²⁹ The Privacy Act requirement that an interference with privacy must cause damage including “significant humiliation, significant loss of dignity or significant injury to the feelings of the complainant”²³⁰ appears not to have been problematic.

5.57 Causation of harm is not always straightforward. The complexities of the notion of causation in the law are well known and well documented.²³¹ In our present context, the fact that cyber messaging is sometimes part of a wider pattern of conduct, and that sometimes it is also part of an exchange of communication in which the “victim” has knowingly participated, renders the question of causation of harm even more difficult. In one case under the Harassment Act the Judge found that the ‘victim’ was a significant contributor to her own misfortune, and declined to find that the offensive

229 Harassment Act 1997, s 16(1)(b)(ii).

230 Privacy Act 1993, s 66(1)(b)(iii).

231 Todd has said: “In truth, the inquiry into cause is apt to produce perplexing legal and philosophical problems which the courts, not surprisingly, frequently have had difficulty in resolving”: Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [20.1].

blog comments complained of caused her distress.²³² We do not think that a legal definition of 'cause', even if it were possible, would be helpful, and are content to leave questions of causation to the judgment of the tribunal in each case.

Jurisdiction: the law

5.58 It will be necessary to specify the types of unlawful communication over which the tribunal has jurisdiction. There are three alternatives:

- (a) First, one could require that the tribunal would only have jurisdiction where there had been an alleged breach of the law: that is to say, where a rule of our civil or criminal law had been broken. We have outlined in the previous chapter the groups of offences, civil causes of action, and regulatory rules that make up our body of communications law.
- (b) Secondly, one could formulate a specially designed set of ethical standards, the breach of which would give the tribunal jurisdiction. Some but not all of these ethical standards might overlap with the law.
- (c) The third is a middle way between the first two. It is a statutory code which derives solely from the existing legal rules but is expressed in plain and accessible language.

5.59 We prefer this third alternative. One advantage is that it ensures that the rules to be applied by the tribunal are accessible in one place, and are easy to understand. That serves an educative function as well as an adjudicative one. A reader can see in one place the prescription of unacceptable internet behaviour. Otherwise the law to be applied by the tribunal would have to be located in its original form, scattered in a variety of places, some of it criminal, some civil, with different standards of proof and different defences.

5.60 Another advantage is that the essential substance of the codified list would reflect the existing law, although of necessity it would not be an exact distillation of it. That has particular attractions in terms of the New Zealand Bill of Rights Act. One of the powers of the tribunal will be to make takedown orders, which are effectively injunctions. It is a requirement of the Bill of Rights Act that limitations on freedom of expression should not only be justifiable in a free and democratic society, but should also be *prescribed by law*.²³³ Finally if we were to adopt solution (b) above, it might be

²³² *Brown v Sperling* DC Auckland CIV-2012-004-00925, 15 June 2012.

²³³ New Zealand Bill of Rights Act 1990, s 5.

alleged that we were trying to “regulate the internet.”

- 5.61 In summary, the law to be applied by the tribunal would comprise a set of principles expressed in plain language which derive from the law of New Zealand, both statute law and common law. They could not be accurately described simply as a summary of that law, but it can properly be said that they would be based on it. This technique is not unknown in other contexts. In fact the terms and conditions of some of the large social media websites use a similar methodology.²³⁴

The Principles

Nature of the Principles

- 5.62 The principles we recommend below are derived from the criminal law, the civil law and the regulatory rules, both those that currently exist and those which we have recommended should be added.²³⁵ The principles are expressed in a way which draws no distinction between their origins, because the tribunal’s powers in respect of them will be the same. The tribunal will have no criminal or punitive jurisdiction and there will be no issues of differing burdens of proof. The tribunal’s function will be to prevent and minimise harm caused by breaches of the law. Its powers, which will be outlined in detail in the next section, will include power to make takedown orders, orders to refrain from publishing similar material in the future, and orders to require the publication of apologies.
- 5.63 Nor are the principles as we state them qualified by conditions or defences. Instead, such matters are recognised as factors to be taken in account in deciding whether to make an order, and if so what kind of order. We emphasise again that the tribunal’s jurisdiction will only be invoked where significant harm can be shown: to that extent all the principles must be read as impliedly subject to that qualification. The principles are thus, as it were, “stripped down law”.
- 5.64 It may be said that it is unorthodox to grant what is effectively a civil remedy in relation to a criminal offence. But that is not without precedent. In the days before accident compensation, civil actions would sometimes lie in the tort of breach of statutory duty even where the statute imposed criminal duties: the factories legislation was an example.²³⁶ As we pointed out in the previous chapter, this tort is of uncertain

234 See chapter 3 at [3.29].

235 See chapter 4.

236 See Stephen Todd (ed) *The Law of Tort in New Zealand* (5th ed, Brookers, Wellington, 2009) at

scope these days. The provisions we propose provide clarity that civil tribunal orders can issue even in relation to criminal activity. It would indeed be illogical if they could not.

- 5.65 In conclusion, then, the principles derive from the law and are reduced to a form which is accessible to both internet users and victims. Their accessibility will serve both an educational and a deterrent function.

Substance of the Principles

- 5.66 The principles we recommend are as follows:

There should be no communications which cause significant emotional distress to an individual because they:

1. Disclose sensitive personal facts about individuals. This derives from the tort of invasion of privacy; from information privacy principle 11 in the Privacy Act;²³⁷ and from the intimate filming provisions of the Crimes Act²³⁸ (both existing and as we recommend they should be amended).
2. Are threatening, intimidating or menacing. This derives from the various intimidation provisions of the Crimes Act and Summary Offences Act, and also from the new summary offence which we recommend in the previous chapter.²³⁹ It extends beyond fear of bodily or property damage: that is one of the features of the new summary offence.
3. Are grossly offensive. This derives from the new summary offence we recommend.²⁴⁰ If it is thought that this is too vague a test, it must be remembered that the tribunal will also need to find that significant harm has resulted. There will be overlap with some of the other principles, but there will be some cases where no other principle serves the purpose, yet where the message is so disturbing that redress is merited. The *Duffy* case might be an example.²⁴¹ The test of grossly offensive should be what is grossly offensive to a reasonable person in the position of the complainant. One does not want the standards of an unusually nervous or sensitive person to be the

[8.203(2)].

237 Privacy Act 1993, s 6.

238 Crimes Act 1961, ss 216G – 216N.

239 Chapter 4 at [R1].

240 Ibid.

241 See chapter 2 at [2.52].

touchstone: a reasonable degree of robustness is required. However, the test must to an extent be contextual: if the complainant has voluntarily entered into an online conversation on a chat-room or blog which is known for particularly robust, even extreme, discussion, the complainant's expectations must to some degree affect what another person in their position would regard as offensive.

4. Are indecent or obscene. This derives from the new summary offence we recommend, from the intimate filming provisions,²⁴² and also from the sexual grooming provisions of the Crimes Act,²⁴³ amended as we propose. The potential harm in the latter instance does not require further demonstration.
5. Are part of a pattern of conduct which constitutes harassment. Such conduct can be subject to a restraining order under the Harassment Act now so long as it causes distress, and there is no reason why the proposed tribunal should have any less power, provided the harm threshold is met. We have recommended that, for the purposes of the Harassment Act, "pattern" may be constituted by a succession of individual acts or one continuing act:²⁴⁴ the same should apply here.
6. Make false allegations. This derives from the new summary offence we recommend, from the tort of *Wilkinson v Downton*,²⁴⁵ from the law of false attribution, and also from the law of defamation. It would cover false statements about both the complainant and other matters. It would cover things such as false Facebook pages, and hoaxes intended to cause distress. The requirement to demonstrate harm will ensure that only serious falsehoods are addressed. Though malice is an ingredient of the proposed new offence, it is not of defamation: we have elected to use the defamation standard because the purpose of the new scheme is to mitigate harm, and it is the effect of the statement on the victim rather than the intention of the author which is relevant. When the statement alleged to be false is about the complainant, and is such as to cause reputational damage, we believe that the burden of proof should rest with the defendant to prove truth. Otherwise there is a misalignment with the law of defamation. The overlap between defamation and this proposed principle will not be without difficulty: we deal with that later in this chapter.

242 Crimes Act 1961, ss 216G – 216N.

243 Crimes Act 1961, s 131B.

244 Chapter 4 at R5(c).

245 Chapter 4 at [4.41].

7. Contain matter which is published in breach of confidence. This derives from the law of breach of confidence.²⁴⁶ While public interest is a defence to the civil cause of action, here the public interest in publication will be a matter to be taken into account by the tribunal in deciding whether to make an order. Given principle 1, this principle is likely to have limited application.
 8. Incite others to send messages to a person with the intention of causing that person harm. This derives from the incitement provisions of the Crimes Act.²⁴⁷ While there appears to be no equivalent principle in the civil law it is appropriate to adopt it in the present context to address, in particular, group bullying. A message inciting harm to another would usually be able to be categorised as “grossly offensive” under principle (3) in any event.
 9. Incite or encourage another to commit suicide. This derives from the provision in the Crimes Act,²⁴⁸ amended as we propose.²⁴⁹
 10. Denigrate a person by reason of that person’s colour; race; ethnic or national origins; religion; ethical belief; gender; sexual orientation or disability. This derives from the Human Rights Act 1993,²⁵⁰ amended as we propose.²⁵¹ Normally such a communication will also fall into the category of “grossly offensive”.
- 5.67 It will be apparent that sometimes a communication may fall under more than one principle. Overlaps are common place in the legal system, and we are not concerned by that.
- 5.68 The principles must also be read in light of the considerations to be taken into account before an order is made. These considerations are outlined in para 5.80 below.

Procedures and powers

- 5.69 The rules of procedure of the tribunal should facilitate speedy and relatively informal justice, ensuring however that the rules of natural justice are complied with. Sometimes, particularly in cases where the health and safety of the complainant are at stake, the tribunal might have to move very quickly. The tribunal would have power to

²⁴⁶ Chapter 4 at [4.45].

²⁴⁷ Crimes Act 1961, ss 66(1), 311(2).

²⁴⁸ Crimes Act 1961, s 179.

²⁴⁹ Chapter 4 at R2.

²⁵⁰ Human Rights Act 1993, ss 21, 61, 131.

²⁵¹ Chapter 4 at R7(b). See also [4.126].

receive evidence which might not be admissible in a court of law, to decide cases “on the papers”, and when a hearing is appropriate to conduct it by Skype or videoconference or even by teleconference. In cases which may involve a takedown order, the opportunity for the defendant to be heard would usually be a requirement of natural justice, although there might be cases of such urgency that an ex parte order of an interim nature would be justified. The tribunal would have power to take evidence on oath and to require the supply of information where that was necessary.

- 5.70 An important procedural issue is how complaints should proceed where harmful communications are made anonymously. Anonymous communications currently pose the following difficulties for complainants: the complainant cannot approach the communicator directly to seek redress; the complainant may experience particular distress in not knowing where the communications originate from; and the extremity of the communication may be intensified under the cloak of anonymity.
- 5.71 The identity of the communicator may be relevant for the following reasons: so that the communicator can be asked to remove, modify or correct a communication; so that a formal complaint can be made where the communicator does not comply with such a request; or to provide redress to the complainant as revealing a communicator’s identity may have an appropriate condemnation value.
- 5.72 We therefore recommend a three stage process. At each stage it is important to balance the interests of the complainant in exercising their rights to seek a remedy for the harm they have suffered, and the value of protecting anonymous speech from a freedom of speech perspective.²⁵²
- 5.73 The first step is a process whereby a complainant can request the source of the harmful communication to remove, modify or correct it. First the request should go to the complaints handling body we recommend later in this chapter. This body would pass the request on to the relevant internet service provider (ISP)²⁵³ or other internet entity (for example Facebook or Google). Finally, the internet intermediary would be required to pass the request to their account holder.²⁵⁴ If the person receiving such a request responds to it, the complainant may consider the matter sufficiently

252 See Steven J Horowitz “Defusing a Google Bomb” (2007) 117 *The Yale Journal Pocket* Part 36.

253 ISPs have a similar conduit role under the Copyright Act 1994, Part 6.

254 Of course, there will be situations where this process will not be available where communications cannot be traced to a specific account holder, such as communications made from internet cafes.

resolved.²⁵⁵

- 5.74 The second step would involve an application to the tribunal for a discovery or production order²⁵⁶ that would require any relevant internet intermediary such as Facebook, Google or an ISP to provide identity details.²⁵⁷ An application for discovering the identity behind an anonymous communication could be made simultaneously with filing a complaint in the tribunal, or might precede it where identity is a necessary element of the complaint.²⁵⁸
- 5.75 The tribunal should have the discretion to deal with the substance of the complaint in a manner that preserves the anonymity of the respondent. Where the tribunal considers that the respondent's anonymity should be removed, the respondent should be provided with the opportunity either to take steps to address the alleged harm (i.e. through taking steps to remove or moderate the material in question) in lieu of losing their anonymity.
- 5.76 The third step relates to remedies and would provide for anonymity to be removed where the tribunal is persuaded by a complainant (after hearing arguments on both sides) that this step is appropriately condemnatory and therefore provides a measure of redress to the complainant. The tribunal's powers to make orders (outlined below) should include the power to order removal of the respondent's anonymity.²⁵⁹

Order-making powers

- 5.77 The tribunal should have power to make the following orders:
- (a) An order to takedown material. Given that this is a kind of injunction, the requirements of the New Zealand Bill Rights Act would have to be vigilantly

255 However, the complainant may have grounds to proceed with a complaint, even where the material is removed or modified, such as where the complainant seeks further measures such as an apology or acknowledgement, or an order restricting any further such communications.

256 See for example Human Rights Act 1993, s 126A. In the United Kingdom, the process used is a "Norwich Pharmacal" order; see Terri Judd "Landmark ruling forces Facebook to drag cyberbullies into the open" *The Independent* (online ed, 9 June 2012).

257 This would not require the intermediary to assess the nature of the complaint or to takedown the material in question at this stage; it would simply require the intermediary to provide account information under the authority of a tribunal order. As we discuss below however, the tribunal should have the power to order an intermediary to takedown material at a later stage of the process.

258 For example where a pattern of harassment by a particular person is alleged.

259 Compare the Copyright Act 1994, s 122A.

observed: the order would need to be a justified limitation on freedom of expression. Ex parte applications should be granted only in exceptional cases.

- (b) An order to cease publishing the same, or substantially similar, communications in future. While similarity is a question of degree, something like this is necessary to prevent a defendant from continuing to attack the complainant using slightly different messages or avenues.
- (c) An order not to encourage any other person to engage in similar communication with the complainant.
- (d) A direction that the order may apply to a person other than the defendant if there is evidence that the defendant has encouraged that other to engage in offensive communication to the complainant.²⁶⁰
- (e) A declaration that the communication in question breaches the statutory principles. This would have significant persuasive power, even if not mandatory authority, in relation to websites operating out of the jurisdiction.
- (f) An order to correct a factually inaccurate statement in the communication.
- (g) An order that the complainant be given a right of reply.
- (h) An order to apologise to a defendant, together with such other forms of restorative justice as may be appropriate in the case. We do not, however, think that monetary sanctions are either necessary or appropriate.
- (i) An order that the identity of the source of an anonymous communication be released.
- (j) An order that the names of any of the parties be suppressed.

5.78 Non-compliance with an order of the tribunal would constitute an offence, and would be punishable in the District Court by fine or imprisonment.

5.79 We considered whether in an extreme case termination of an internet account might be appropriate, but concluded that this would be to go too far. To deprive an individual, and perhaps also members of his or her family, of such an all encompassing source of communication and information could not be justified in this digital age.

Considerations to be taken into account in Tribunal orders

5.80 In exercising its functions the tribunal must have regard to the importance of freedom of expression. In deciding whether or not to make an order, and the form that any such

²⁶⁰ There is a similar provision in section 18 of the Harassment Act 1997.

order should take, the tribunal would have to take into account relevant considerations including:

- (a) The content of the communication and the level of harm caused by it.
- (b) The purpose of the communicator in communicating it. For example, satire or humour, is different from malice.
- (c) The occasion, context and subject matter of the communication. For example, a contribution to political debate is a different thing from a gratuitous personal attack with no legitimate motive.
- (d) The extent to which it has spread beyond the original communicator and recipient. For example, the size of the audience increases the hurt.
- (e) The age and vulnerability of the complainant.
- (f) The truth or falsity of the statement. In some contexts truth is more hurtful than fabrication, in others the reverse.
- (g) The extent to which the communication is of public interest.
- (h) The conduct of the defendant, including any attempt by the defendant to minimise the harm caused.
- (i) The conduct of the complainant, including the extent to which that conduct has contributed to the harm suffered. There might be cases where the complainant has voluntarily participated in online conversations which have escalated to the point that the complainant now wishes to call a halt to the other party's excesses. In such cases questions may arise as to the expectations of the complainant when he or she entered the discussion forum, particularly if the forum is well known for robust expression. It might even be held in such a case that the complainant was the effective cause of his or her own eventual distress: in other words that he or she "brought it on themselves".

5.81 We regard consideration (g) (the extent to which the communication is in the public interest) as being of special importance. Such a qualification is present in the common law in relation to invasion of privacy and breach of confidence, and also appears in the official information legislation as an override of the grounds on which information might otherwise be withheld. In our present context, even though a communication might hurt an individual, a countervailing public interest in the subject matter might sometimes be strong enough to outweigh the interests of the complainant. This might possibly be the case if the communication was part of a vigorous debate about a political matter, or a high profile crime, accident or natural disaster.

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5.82 The principles we have outlined in paragraph 5.66 must be read in light of these relevant considerations. They serve to qualify their otherwise absolute nature.

5.83 To take an example, principle 6 provides simply that there should be no communication of messages which “make false allegations”. On its face, this may seem too simple a proposition, but we have not ignored the complexities of the law from which it is derived. It should be noted:

(a) That the tribunal must take into account the purpose of that communication.

Malice and lack of legitimate purpose will be relevant to the making of an order.

(b) That the tribunal must take into account any public interest in publication.

(c) That the tribunal must take into account the occasion and subject matter of the communication.

(d) That the tribunal must take into account the audience to which the message has been communicated.

5.84 In addition the tribunal will only act if the complainant can show significant harm; and if a proposed order limiting freedom of expression can be justified in a free and democratic society.²⁶¹ If the defendant pleads that the allegation is in fact true, the tribunal may decide that the case is not suited for the tribunal unless other factors, such as the offensive nature of the communication, justify an interim order to cease publication.

5.85 The tribunal would have no power to impose criminal sanctions. The punishment of breaches of the criminal law is, and should remain, the preserve of the courts.

5.86 The tribunal should give reasons for its decisions, and they should be published. The tribunal should have a web presence and the decisions should appear there. Consideration might also be given to making them available through NZLII. Over time a set of precedents would develop, which would give a degree of certainty as to where the lines of unacceptable behaviour are to be drawn. The requirement to publish reasons brings its own problems. The victim of the message should often be anonymous. Sometimes, too, the facts may need to be stated with careful economy so as not to identify by reference. But the Privacy Commissioner has similar problems, and the case notes from her office manage to provide useful information without identification, and without invading privacy or confidence.

²⁶¹ New Zealand Bill of Rights Act 1990, s 5.

Defendant

5.87 Usually it will be the creator of the content of the communication who will be the subject of the order, but if the creator cannot be traced, or is out of the jurisdiction, or is unable himself or herself to delete the content of the communication from the website, the tribunal should have power also to make an order against a website host, an internet service provider or other internet intermediary. Those entities will not generally be responsible in law for the communication.²⁶² But the fact that they may not be legally responsible for the material should not, in an appropriate case, prevent the tribunal ordering them to take it down. Accountability for failure to comply with such an order would arise where:

- (a) clear notice has been given to them of exactly where the material is located and the content of it, and
- (b) they do not do all that is reasonable to remove the material. (It may not always be possible to remove all traces of material from the various places to which it may have migrated on the internet.)

5.88 We emphasise that there must be no suggestion that the website host or intermediary should be the first point of call when an order is sought. The fact that they are easier to find is not a reason. An order should be made against them only if unsuccessful attempts have been made to seek an order against the content creator. We elaborate on the role of such intermediaries later in this chapter.

5.89 No doubt there will be cases where the tribunal will not be able to act effectively. However there will be many cases where it will. In the great majority of cases that we have in mind the complainant will know who the offenders are, and they will be within the jurisdiction. They will be the main targets of the tribunal's authority. There will doubtless be a few who evade the system. That is so of any law.

Appeals

5.90 Some of the orders the tribunal might make are of a significant nature, especially an order to takedown a communication, or to refrain from future similar conduct. They constrain freedom of expression and involve Bill of Rights Act issues. Conversely, the personal harms which these orders address are serious ones. These considerations argue in favour of a right of appeal. As against that, however, the tribunal is one where

²⁶² We do not elaborate in this report on cases where such entities might be liable to legal sanctions for publishing the material in the first place, but we expect such cases will be exceptional.

specialist knowledge and experience are important, and it is knowledge and experience which will not be possessed by every appeal judge.²⁶³

- 5.91 On balance we favour a right of appeal. It should be on the merits. It should lie to an appeal tribunal comprising two District Court Judges. The tribunal and the Judge hearing the appeal should be able to sit with an adviser specialising in information communication technologies (ICT). There should be special procedures to enable the appeal to be dealt with quickly.

Two special cases

- 5.92 Two special cases of internet harm require separate consideration. First, incitement or persuasion to suicide or self-harm is different from the other harms we have been considering. It is not always directed at a single individual, but can have a wider audience. The same is true of the publication of details of a suicide: that kind of communication is generally prohibited by the Coroners Act 2006.²⁶⁴ If such publications are generalised and of such a kind that they might influence members of the public at large, there is no specific victim who might bring a case to the Commissioner or the tribunal. In this situation we think there is room for an exception to the general rule that only a victim or a person acting on his or her behalf can complain. We think that in cases such as these the Chief Coroner should be able to apply to the tribunal for a takedown order or an order to discontinue the conduct.
- 5.93 Secondly, defamation raises special considerations. Where truth or honest opinion is pleaded there is always the potential for lengthy argument. Defamation cases can become protracted and procedurally complex, and it will probably not be possible for the tribunal in every case to accord them the effective speedy justice we hope it will be able to apply to other sorts of harm. However, we would make two comments. The first is that if, as will often be the case, the statement complained about is extravagant and manifestly untrue, no possible defence of truth or honest opinion will be available. In that sort of case, the tribunal should be able to dispose of the matter quickly. Even now, the courts can sometimes award summary judgment, or grant an interim injunction, restrictive though the rules for those orders are. If, on the other hand, the defendant does plead truth or honest opinion and there is some basis for such a defence, the tribunal may decide that it is an inappropriate forum to determine the case,

²⁶³ Legislation Advisory Committee "Guidelines on Process and Content of Legislation" (May 2001) at chapter 13.

²⁶⁴ Coroners Act 2006, s 71.

and that the matter should be remitted to a court. Even then, however, if the tone of the communication is highly offensive, and the distress occasioned substantial, those factors might still justify the award of an interim injunction (or takedown order) pending further investigation by a court. In that case the mental harm caused by the communication and its tone might be more significant than the reputational harm which is the essence of a defamation case.

Relationship with other proceedings

- 5.94 There are four questions about how the tribunal might relate to other adjudicators or regulatory bodies. The first question is how the tribunal would relate to the converged media regulator that we proposed in part one of the issues paper.²⁶⁵ Will the news media which are governed by the proposed regulator also be subject to the tribunal? The Commission has not yet finally reported on this matter, and the ensuing discussion is contingent on its continuing to hold the view expressed in the issues paper.
- 5.95 On one view it could be argued that the news media should be subject to the tribunal because, whereas the regulator applies a code of good practice, the tribunal applies a set of principles based on the law of New Zealand, and those media are bound by the law. On the other hand if the new media regulator is effective, the codes it prepares will cover (among many other things) the sorts of conduct that will be within the tribunal's jurisdiction. If the regulator's powers are rigorously and effectively exercised, in particular its power to require takedowns, it should be able to grant effective remedies for breach. This being so, we think it would be confusing and duplicative for individuals to be able to resort to the tribunal as well as the regulator. If the conduct was demonstrably unlawful, court action would still be available against the offender.
- 5.96 Secondly, there is a question of whether invasions of privacy on the internet should be dealt with by the Privacy Commissioner or by the new tribunal. Privacy invasions are a small subset of internet harms, but they are one for which there is presently a remedy (unless the communicator is a news medium which is exempt from the Privacy Act principles). The question is whether in such a case the complainant should have a choice of forum or, if not, which of the Privacy Commissioner or the tribunal it should be. We tend towards the option that the complainant should have a choice. Choice of forum is not unknown elsewhere in the law. In some cases the choice would be

²⁶⁵ Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) at chapter 6.

exercised according to whether the communication in question was part of a wider pattern of conduct which was within the jurisdiction of one regulator or the other, in others according to the remedy desired. Care would be needed, however, to ensure that one route did not become seen as a 'softer' option.

- 5.97 Thirdly, some of the communications dealt with by the tribunal may involve criminal conduct which is investigated by the police. In very serious cases, criminal prosecutions should remain the ultimate sanction. We do not see any objection in principle to such parallel processes. Their purposes are quite different. The recourse to the tribunal is to remove or mitigate a serious harm to the complainant; the fact that the harm has occurred, and has been addressed by the tribunal, does not determine whether criminality has been established and whether the communicator should incur a criminal penalty. Just as civil and criminal proceedings can both lie in respect of the same act, so we think criminal proceedings and a complaint to the tribunal should be able to co-exist.
- 5.98 Fourthly, the existence of the commissioner or tribunal process does not mean that the victim is deprived of his or her rights to seek justice in the courts instead. If he or she wishes to seek substantial damages for, say, defamation or invasion of privacy, he or she must continue to have a right to take a civil action in the courts. Likewise if the offensive communication in question is part of a much wider pattern of victimisation and harassment, as it might well be for example on the breakup of a relationship, the victim may elect to go to the District Court for a restraining order under the Harassment Act or to the Family Court for a protection order under the Domestic Violence Act 1995. But the complainant would have to elect between the two avenues. He or she could not pursue both.
- 5.99 It would be different, however, if a complainant went directly to the court to seek no more than an order which could have been granted by the tribunal. We are alive to the fact that there may, however rarely, be a well-resourced complainant who brings a claim to court with a view to exploiting a resource imbalance between the two parties. In such a case we believe that the defendant should have the right to request, and the court to order, that the matter be transferred to the tribunal. There is such a power in section 37 of the Disputes Tribunal Act 1988.

The “approved agency”

- 5.100 It is clear that the tribunal cannot be the sole machinery to resolve difficulties of the kind with which we are dealing. This is so for two reasons.

- 5.101 The first reason is that there will need to be a high level of seriousness before a matter proceeds to the tribunal. Freedom of expression must not be constrained except for very good reason. Moreover, a flood of insubstantial complaints could burden the tribunal to the extent that its workload would be unmanageable. So there has to be a means of controlling, or “filtering”, what comes to the tribunal.
- 5.102 Some such avenues already exist independently of anything that we might recommend. Many websites have their own internal system of moderation and censorship. Complainants should be required to try there first. In the same way, complainants who are school children should be required to approach the school first, the school referring matters on only where internal resolution fails. Schools, with the assistance of the Ministry of Education, should adopt consistent and effective policies for the handling of such matters. Then, perhaps most importantly, education and user awareness are key. Good “digital citizenship” should be the aim, and already large responsible providers are promoting it. As this develops the pressures on a complaints mechanism should decrease. Nonetheless it is clear that there will need to be some mechanisms for ‘filtering’ complaints.
- 5.103 The second reason is that the tribunal should be a backstop. Many complaints will be much better handled by less formal means: by techniques of mediation, negotiation and persuasion. In the case of young people in particular recourse to a judicially imposed solution in a tribunal should indeed be a last resort. Persuasion, with the possibility of tribunal proceedings in the background, should be an effective tool in many cases. That is a model which has been employed in New Zealand: the Privacy Act and the Human Rights Act are notable examples which bear an analogy with the present situation.
- 5.104 On this basis we believe there needs to be an agency through which complaints must pass before they reach the tribunal. There are a number of possible ways of achieving this end. One would be for the tribunal itself to have support staff who would receive all complaints and refer them to mediation in the first instance, rather in the way the Tenancy Tribunal works. This, however, would involve creating a new structure. It could be cumbersome. The same may be said of the office of a Communications Commissioner. We were initially attracted to this as a possibility, although as an alternative rather than as an adjunct to a tribunal. But given that there is a degree of speculation as to how great a load of work there will be, we would prefer at least in the early stages to utilise and build on structures which already exist. We therefore support the concept of an “approved agency”, in other words an existing person or entity which

is appointed by the Minister by Gazette notice as a body entitled to perform the relevant functions.

5.105 There are analogies elsewhere in our law. Among them are approved dispute resolution schemes under the Financial Service Providers (Registration and Disputes Resolution) Act 2006 and approved organisations under the Animal Welfare Act 1999.

5.106 In this context the functions of that agency would be:

- (a) To advise persons on steps they may take to resolve a problem caused by an electronic communication and whether they may have a ground of complaint. In some cases this may involve the agency in advising the enquirer to go to the police. Helping inquirers to select the appropriate recourse will be a proper function. There should be an online platform for receiving complaints and providing information. An 0800 telephone number should be employed.
- (b) To receive complaints about electronic communications.
- (c) To decline some complaints because the matter complained about is unlikely to cause harm, or is otherwise inappropriate for investigation.
- (d) To investigate substantial complaints and attempt to achieve settlement between the complainant and the person responsible. The settlement might include such things as an apology, an undertaking to takedown the offending material and an undertaking to refrain from such content in future.
- (e) To liaise with website hosts and ISPs and request them to takedown or moderate posts which are clearly offensive.
- (f) To liaise with other agencies such as schools, the Police, Commissioners such as the Privacy Commissioner, the Children's Commissioner and the Human Rights Commission, the Ministry of Social Development and InternetNZ in attempts to resolve wider issues surrounding the communications complained about.
- (g) To advise the complainant to seek an order from the tribunal requiring a website host, ISP or internet intermediary to identify the author of an offensive communication.
- (h) To advise the complainant to refer to the tribunal:
 - (i) any complaint which meets the appropriate level of seriousness and which has proved incapable of resolution by other means;
 - (ii) any complaint which is so serious, and resolution of which is so urgent, that it should be referred directly to the tribunal without mediation;

(i) To certify that it has recommended a referral of such a complainant to the tribunal.

5.107 We envisage that an agency would be approved to exercise these functions by the Minister of Justice by Gazette notice. It may be that there could be several agencies so approved, although if the workload is manageable we think one would be preferable. The idea of a well-publicised single point of entry has clear advantages.

5.108 Presently, one organisation which is clearly suited to the task is NetSafe. NetSafe is a non-governmental organisation, partly funded by government, which performs many of the tasks already. It advises people who are upset by electronic communications. It has formed good relationships with other agencies such as the Police, the Ministry of Education and ISPs. It knows and has dealings with big offshore operations such as Google and Facebook and commands their respect. As Google noted in its submission to our issues paper, “NetSafe’s work has been praised by government, who have described its programme as ‘world leading’.”

5.109 We believe that NetSafe should be an ‘approved agency’ for the purposes we have outlined.

5.110 However, this would inevitably involve an increase in its workload. The quantum of that increase is difficult to estimate in advance, but, particularly in the early stages before the threshold for complaints is clearly delineated and understood, it could be significant. It is imperative that NetSafe has appropriate systems in place, and that it be appropriately resourced. The state should provide necessary additional funding.

Wider functions

5.111 In addition to the complaints function which we have described, there is a clear need for a body with more general oversight functions.

5.112 They would include the following:

- *Education and publicity* – Education about appropriate online conduct and safety on the internet is becoming increasingly important for users young and old. Just as the Privacy Commissioner performs a range of education and guidance functions, so would such a function be desirable in the context we are addressing. The development of good digital citizenship is a priority.
- *Research* – Related to this last point, some agency needs to keep abreast of developments in technology and patterns of internet use and abuse. Currently we lack sufficient hard, detailed, statistical data.
- *Policy oversight* – It would be desirable, too, to have an agency with the function of

providing advice to the government about the need for change or updating of legislation or government policy.

5.113 It is not absolutely necessary that the complaint-handling “approved agency” should be the same one which performs these wider functions. But there are clear advantages in its being so. The combination of similar functions in the Privacy Commissioner in the Privacy Act works well. It means that a single body becomes expert and authoritative in the subject matter. The wider oversight activity would benefit the complaints-handling function, and vice versa. Co-location in one agency is also clearer for the consumer and makes it more cost effective to promote the organisation and its services. We strongly support all functions being combined in one agency. This is another reason for NetSafe being the approved agency. It already performs some of the wider functions.

5.114 We have noted previously that cyber-bullying is sometimes part of a wider and complex set of issues. It is important that the approved agency maintains a close working relationship with other agencies, such as the Police, the Children, Young Persons and their Families Service (CYPFS) and the Ministry of Education, which also deal with bullying and relationship issues, so that coordinated responses can be developed.

The role and responsibilities of internet intermediaries and content hosts

5.115 In their submissions to our review a number of internet based businesses, including Google and Trade Me, emphasised the need for clarity and consistency in the treatment of Internet Service Providers (ISPs) and other internet intermediaries in any legislative reforms we propose.

5.116 In our Issues Paper, and in earlier reviews conducted by the Law Commission, we have adopted the widely supported position that entities which act as conduits or intermediaries for the publication of content, such as ISPs and content hosts, should not be legally liable, in the first instance, for the innocent dissemination of content created by their users.

5.117 As Trade Me pointed out in its submission:²⁶⁶

... everyone can be a publisher on the internet, and ...online content hosts are often not in a position to know, let alone pre-vet, all the content that appears on their websites. Nor is there an effective technology filter for the truth, or for offensive or illegal content.

5.118 However, as we discussed in chapter 3, many of these companies do employ various

²⁶⁶ Submission of Trade Me (12 March 2012) at [54].

self-regulatory tools, including terms of use contracts and community moderation and reactive reporting to support the responsible use of their services.

- 5.119 How far these entities are prepared to go in terms of proactive policing and enforcing their own terms of use contracts, and how responsive they are to users' complaints varies considerably. Alongside the considerable resourcing implications of enforcing standards, there can be difficult commercial and ethical issues to balance.
- 5.120 These interests include the companies' own legitimate rights as private entities to run their businesses as they see fit; the interests of their customers to privacy; the wider public good in supporting the free flow of information on the internet and the legitimate interests of governments and law enforcement agencies in upholding the law and protecting the interests of their citizens.
- 5.121 One of the important features of our proposed reforms is to provide an authoritative, locally based, mechanism for mediating on behalf of complainants, and, in cases where mediation fails, securing remedies for those affected by harmful digital communication.
- 5.122 As we have stated, as a matter of principle, the target of these actions should be the person responsible for the content. But identifying that target, and providing them with the opportunity to respond to a complainant will sometimes require the active co-operation of intermediaries, whether they be a locally based ISP or website administrator or a global entity such as Facebook.
- 5.123 Similarly, there may be occasions when an intermediary or content host is compelled by an order of the tribunal to take certain steps, such as removing content after the author has failed to do so. Once content has been removed from a site it may also be necessary to request that cached versions of the old content be removed from search engines' indexed caches in order to make takedown more effective.
- 5.124 Large corporations like Google, Trade Me and Facebook have well developed protocols for how they respond to authoritative requests from governments and law enforcement agencies for information about users or to notice and takedowns. However in other cases these protocols may not be easy to access, or implement, even for law enforcement agencies – particularly when the entity has no physical presence in New Zealand. And, as we discussed earlier, internet intermediaries and content hosts vary hugely in size and complexity and it is by no means the norm for all to have clear and transparent policies for how they will respond to complaints or to legitimate requests for user information.

5.125 As Trade Me pointed out during consultation, to maximise the effectiveness of the tribunal and NetSafe's work it will be important to develop clear protocols with content hosts and intermediaries, both New Zealand based and overseas, to ensure consistent and speedy responses to notice and takedown orders and other information.

5.126 In its submission Trade Me emphasised the important role these entities can play in upholding the law and facilitating its enforcement:²⁶⁷

in our experience, the architecture of the internet can help facilitate maintenance of the law in a way that was not previously possible. However it requires a co-operative approach.

5.127 Trade Me proposed the development of a code for content hosts and intermediaries, a requirement of which would be adherence to the notice and takedown principle that is already enshrined in other legislation.

5.128 We agree that critical to the effectiveness of our proposed tribunal will be the development of consistent, transparent, and accessible policies and protocols for how intermediaries and content hosts interface with it and with NetSafe. We recommend that NetSafe work with these private sector agencies, including New Zealand's telecommunications companies to develop such guidelines and protocols. Trade Me, an organisation which has both considerable technical and regulatory expertise, would be an invaluable partner in that process.

CONCLUSIONS

5.129 We are persuaded that there are serious harms resulting from electronic communications which require addressing. The concerns exposed by organisations such as the Police, some coroners, NetSafe, and the Human Rights Commission are evidence enough of that. The harms often go unaddressed. Some of the alleged harms are so serious (suicide and self-harm, for instance) that even the risk they might occur justifies remedial measures.

5.130 Something can be done by educating users in good digital citizenship, and by improved self-regulation and moderation by website hosts and intermediaries. Cyber-bullying and other kinds of harmful speech are also symptomatic of wider social problems which require address, as far as that is possible, by extra-legal techniques.

5.131 However, the law has an important part to play. In chapter 4 we recommended some changes to existing legal rules, and the creation of some new legal rules. These range from a new criminal offence (the top of the pyramid) to changes in some of our

²⁶⁷ Ibid, at [44].

regulatory statutes. These new legal provisions (in particular the criminal offences) will have an important deterrent, even if cases seldom reach the courts, and will serve to delineate the limits of the community's tolerance for the misuse of communications tools.

5.132 In this chapter we propose a new regime for addressing the harms suffered by individuals. The purpose is to provide a more accessible mechanism than now exists for addressing individual hurt. It comprises an approved agency or agencies, with persuasive power, to receive complaints and attempt to resolve them, backed by a tribunal which can make enforceable orders, including takedown orders, when efforts at settlement fail. The proposals have the following features.

5.133 First, they are not disproportionate in terms of resource. If the tribunal consists of District Court judges, and if NetSafe becomes an approved agency, there will be no new structures required, although some of the existing structures are likely to require extra resource. Our proposals build on what is presently there.

5.134 Secondly, the set of principles, based on the law, which will be applied by the tribunal will serve an educational and awareness function as well as a deterrent one. Internet awareness is a critical objective of this project.

5.135 Thirdly, the new agency/tribunal structure will be a well-publicised point of entry which will enable remedies to be obtained informally, relatively cheaply and (above all) quickly. In other words the remedies will be accessible. Access to justice represents what a society and its legal systems stand for.

5.136 Finally, the new system will not compromise other legal sanctions. The criminal law will be available for serious cases, and the right to sue in a court of law, for example for defamation, will still be an option. It is impossible to predict the exact level to which the new structures will be used, but there is ample evidence of need to justify the reform. Currently the avenues available are simply not enough to address the problems which exist. There is a gap that needs to be filled, and the proposals aim to do so. If we do not try this, nothing will improve. The reform is a package, the parts of which are inter-dependent. The package needs to be seen as a whole.

Recommendations

R8 Complaints about offensive internet communications should go initially to an "approved agency" which would advise complainants and attempt to achieve a resolution by a process of negotiation, mediation and persuasion.

R9 If a complaint cannot be resolved in this way, it may then proceed to a tribunal which can

make enforceable orders, provided the threshold of seriousness is reached.

R10 The tribunal should consist of a District Court judge drawn from a panel of District Court judges designated for the purpose. The tribunal may sit with an expert in information communication technology.

R11 The tribunal's jurisdiction should extend to all forms of electronic communications.

R12 Those entitled to complain to the tribunal should include the victims (other than non-natural persons), the parents or guardians where the victim is a child or young person or a person with a disability, school principals on behalf of students, and, where the communication constitutes a threat to the safety of any person, the Police.

R13 Only particularly serious cases should come to the tribunal. Complainants should have to demonstrate two things:

(a) that they have attempted to resolve the matter through other avenues; and

(b) that the communication complained about has caused, or is likely to cause, significant harm, including significant emotional distress.

R14 The tribunal must not make an order unless it is satisfied that there has been a breach of one of the principles in R15.

R15 There should be no communication of messages which cause significant harm to an individual because they:

1. Disclose sensitive personal facts about individuals.
2. Are threatening, intimidating or menacing.
3. Are grossly offensive.
4. Are indecent or obscene.
5. Are part of a pattern of conduct which constitutes harassment.
6. Make false allegations.
7. Contain matter which is published in breach of confidence.
8. Incite or encourage others to send messages to a person with the intention of causing that person harm.
9. Incite or encourage another to commit suicide.
10. Denigrate a person by reason of his or her colour; race; ethnic or national origins; religion; ethical belief; gender; sexual orientation or disability.

R16 The rules of procedure of the tribunal should facilitate speedy and relatively informal justice, ensuring however that the rules of natural justice are complied with. In particular:

(a) The tribunal should have power to receive evidence which might not be admissible in a court of law, to decide cases "on the papers", and when a hearing is appropriate to conduct it by videoconference or teleconference.

(b) The tribunal should have power to take evidence on oath and to require the supply of information where that was necessary.

(c) The tribunal should have the discretion to deal with the substance of the complaint in a manner that preserves the anonymity of the respondent. Where the tribunal considers that the respondent's anonymity should be removed, the respondent should be provided with the opportunity either to take steps to address the alleged harm in lieu of losing their anonymity.

R17 The tribunal should have power to make the following orders:

- (a) An order to takedown material from the electronic media.
- (b) An order to cease publishing the same, or substantially similar, communications in future.
- (c) An order not to encourage any other person to engage in similar communication with the complainant.
- (d) A direction that the order may apply to a person other than the defendant if there is evidence that the defendant has encouraged that other to engage in offensive communication to the complainant.
- (e) A declaration that the communication in question breaches the statutory principles.
- (f) An order to correct a factually inaccurate statement in the communication.
- (g) An order that the complainant be given a right of reply.
- (h) An order to apologise to a defendant, together with such other forms of restorative justice as may be appropriate in the case.
- (i) An order that the identity of the source of an anonymous communication be released.

R18 The tribunal should have the power to make an order against a defendant, an internet service provider, a website host, or any other relevant internet intermediary requiring material to be taken down from the internet.

R19 The Chief Coroner should be able to make an application to the tribunal for an order that material relating to suicide that is prohibited by the Coroners Act 2006 be taken down from the internet.

R20 In exercising its functions the tribunal must have regard to freedom of expression. In deciding whether or not to make an order, and the form that any such order should take, the tribunal would have to take into account relevant considerations including:

- (a) The content of the communication, its offensive nature and the level of harm caused by it.
- (b) The purpose of the communicator in communicating it.
- (c) The occasion, context and subject matter of the communication.
- (d) The extent to which it has spread beyond the original communicator and recipient.
- (e) The age and vulnerability of the complainant.
- (f) The truth or falsity of the statement.
- (g) The extent to which the communication is of public interest.
- (h) The conduct of the defendant, including any attempt by the defendant to minimise the harm caused.
- (i) The conduct of the complainant, including the extent to which that conduct has

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contributed to the harm suffered.

R21 The tribunal should not have the power to impose criminal sanctions or monetary sanctions.

R22 The tribunal should give reasons for its decisions, and they should be published.

R23 There should be a right of appeal on the merits from decisions of the tribunal to an appeal tribunal consisting of two District Court judges. The judges hearing the appeal should be able to sit with an adviser specialising in information communication technologies. There should be special procedures to enable the appeal to be dealt with quickly.

R24 The tribunal or an appeal tribunal may refer a complaint to a court if it considers the complaint could be more approximately dealt with by a court.

R25 If a matter comes before a court which could be dealt with by the tribunal, the court may refer the matter to the tribunal.

R26 A person or organisation may be appointed by the Minister as an "approved agency".

R27 The functions of an approved agency should be:

- (a) To advise people on steps they may take to resolve a problem caused by an electronic communication and whether they may have a ground of complaint.
- (b) To receive complaints about electronic communications.
- (c) To decline some complaints because the content of the communication is unlikely to cause harm, or is otherwise inappropriate for investigation.
- (d) To investigate substantial complaints and attempt to achieve settlement between the complainant and the person responsible.
- (e) To liaise with website hosts, ISPs and other internet intermediaries and request them to takedown or moderate posts which are clearly offensive.
- (f) To liaise with other agencies such as schools, the Police, the Privacy Commissioner, the Ministry of Social Development and InternetNZ in attempts to resolve wider issues surrounding the communications complained about.
- (g) To advise the complainant to seek an order from the tribunal requiring a website host, ISP or internet intermediary to identify the author of an offensive communication.
- (h) To advise the complainant to refer to the tribunal:
 - any complaint which meets the appropriate level of seriousness and which has proved incapable of resolution by other means;
 - any complaint which is so serious, and resolution of which is so urgent, that it should be referred directly to the tribunal without mediation;
- (i) To certify that it has recommended a referral of such a complainant to the tribunal.

R28 NetSafe should be an approved agency.

R29 The approved agency should also have general oversight functions including education and publicity, research, and policy oversight.

R30 The approved agency should work with intermediaries and content hosts to develop guidelines and protocols regarding their relationship to the approved agency and the tribunal.

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Chapter 6: The education sector

INTRODUCTION

- 6.1 In chapter 3 we discussed the nature of cyber-bullying, and how it presents particular threats to victims, and particular challenges to those attempting to prevent it. As we noted, while cyber-bullying is by no means limited to relationships between adolescents, it is becoming an increasing issue in schools.
- 6.2 Cyber-bullying has recently come into sharp focus in the context of a *New Zealand Herald* campaign highlighting the impact of violence and bullying on New Zealand adolescents. In the context of this campaign, the Chief Coroner, Judge Neil MacLean, expressed his concern about the emergence of bullying, and cyber-bullying in particular, as a “background factor” in New Zealand’s high youth suicide rate. He also noted that bullying featured as one of the factors researchers found when investigating incidences of self-harm among adolescents.²⁶⁸
- 6.3 In 2011, the Prime Minister John Key called for a “national conversation” on how to reduce bullying in our schools after mobile phone videos of children being bullied became prominent on the internet.²⁶⁹
- 6.4 In this report we have argued that from a policy point of view cyber-bullying should not be divorced from the wider social problem of harmful digital communication. That said, we also recognise that there are compelling reasons for prioritising resources and tailoring solutions for adolescents who as a group are both the highest users of new media and the group most vulnerable to some of the harms associated with its misuse.
- 6.5 The impact of new media and digital technology were considered as part of a wide ranging report on the challenges confronting New Zealand adolescents commissioned by Prime Minister John Key in 2009 (“the PMCSA report”).²⁷⁰ The authors emphasised the need for policy and law makers to understand the radically changed

268 Helen L. Fisher and others “Bullying Victimization and Risk of Self Harm in Early Adolescence: Longitudinal Cohort Study” *British Medical Journal* (26 April 2012).

269 Audrey Young “PM Tells Schools to Act Against Bullies” *The New Zealand Herald* (online ed, New Zealand, 29 March 2011).

270 A Report from the Prime Minister’s Chief Science Advisor *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence* (prepared for the Prime Minister by the Office of the Prime Minister’s Science Advisory Committee, May 2011).

environment in which young New Zealanders were growing up:²⁷¹

The nature of peer pressure and role models has been radically altered by exposure to electronically connected social networks and to very different media content. Young people have far greater freedom, engendered by more ready access to funds. While the exact impact of these changes is difficult to ascertain, it is clear they have radically affected the social pressures that influence adolescent behaviour. This creates challenges for parents and society in establishing boundaries and acceptable behaviours.

- 6.6 The PMCSA report also emphasised the importance of evidence-based policy when tackling problems such as New Zealand's high youth mortality rates, alcohol and drug related problems, violence, and the spectrum of mental and behavioural disorders.
- 6.7 Reviewing the effectiveness of education policy is well beyond the scope of the Law Commission's original terms of reference for this project and we make no claim to expertise in this area. Our task is to assess the adequacy of the law with respect to harmful digital communications, of which cyber-bullying is an example. However, cyber-bullying must be addressed within the broader context of strategies for combatting adolescent aggression and bullying. The law performs a critical part in anchoring educational strategies for combatting bullying, but it can only go so far when dealing with minors.
- 6.8 In this chapter, we provide an overview of the legal framework which operates in the education sector. We discuss how the law and existing strategies can respond to bullying and cyber-bullying, and consider whether changes to that framework are required.
- 6.9 In preparing this report we reviewed some of the most significant reports and inquiries that have been produced in response to bullying in New Zealand over the past decade, including the two-part report produced by Dr Janis Carroll-Lind on behalf of the Children's Commissioner in 2009/2010, *School Safety* (2009) and *Responsive Schools* (2010).²⁷²
- 6.10 We met with staff from the Ministry of Education²⁷³ and also sought the views of Chief Human Rights Commissioner, David Rutherford, who played a pivotal role in advocating for the victims and their families in relation to an inquiry into the response

271 Ibid, at 2.

272 Dr Janis Carroll-Lind *School Safety: An Inquiry into the Safety of Students at School* Office of the Children's Commissioner, 2009 ("*School Safety*"); Dr Janis Carroll-Lind *Responsive Schools* Office of the Children's Commissioner, 2010 ("*Responsive Schools*").

273 We sought to meet with the Education Review Office, but it has not proved possible to do so.

to bullying at Hutt Valley High School,²⁷⁴ and who is taking a close interest in bullying as a human rights issue.²⁷⁵ We consulted with NetSafe, which works closely with schools in relation to cyber-bullying. We also met with the Chief Coroner, Judge Neil MacLean.

APPROACHES TO PREVENTING BULLYING

- 6.11 Although the precise relationship between online and offline aggression is not yet well understood, there is a general consensus that the two are related. People who are respectful, tolerant and aware of their legal rights and responsibilities in relation to their fellow citizens in their physical interactions are unlikely to adopt an entirely different way of relating to others in cyberspace.
- 6.12 Similarly experts argue that cyber-bullying and other forms of abusive digital communication among adolescents needs to be understood in the broader context of interpersonal and relational aggression and bullying behaviour.²⁷⁶
- 6.13 It is clearly accepted in New Zealand that bullying should be viewed as a whole school problem, requiring a whole-school solution. When anti-bullying initiatives are being developed in a school, all those affected – teachers, boards, parents, students and administrators – should be involved in the full process.²⁷⁷ There is no shortage of anti-bullying approaches and programmes available, and a number have been successfully trialled and evaluated in New Zealand schools over time.²⁷⁸
- 6.14 The view of the Chief Human Rights Commissioner, David Rutherford, is that it is

274 Office of the Ombudsmen *Report of David McGee, Ombudsmen on Complaints Arising Out of Bullying at Hutt Valley High School in December 2007* (2011).

275 See Human Rights Commission *School Violence, Bullying and Abuse: a Human Rights Analysis* (March 2009).

276 For example a 2005 study by Massey University researcher Juliana Raskauskas found that young people who experienced text-bullying were also likely to be victimised by verbal bullying or relational aggression. Similarly a 2010 study by Otago University researcher Louise Marsh found students involved in text bullying were significantly more likely to be involved in traditional forms of bullying and were less likely to feel safe at school. However the precise relationship between on-line and off-line bullying behaviours is not fully understood.

277 Dr Janis Carroll-Lind *School Safety* Office of the Children's Commissioner, 2009 at 85.

278 These programmes were described in detail in the reports by the Office of the Children's Commissioner: *ibid*, at 97, and Dr Janis Carroll-Lind *Responsive Schools* Office of the Children's Commissioner, March 2010 at 28.

vitaly important that the programme adopted be evidence-based.²⁷⁹ *School Safety*, the 2009 report by the Office of the Children's Commissioner, concluded that no matter which programme is introduced, to maximise success, schools must first have effective policies and procedures in place.

- 6.15 In relation to schools' reporting of incidents of violence and abuse, the report found that there was no consistency in the way that schools across New Zealand deal with issues around safety. While recognising the individuality of each school to make its own informed decisions, it proposed that schools should follow the same broad guidelines wherever possible.²⁸⁰
- 6.16 In 2009 the Government introduced the Positive Behaviour for Learning programme (PB4L),²⁸¹ led by the Ministry of Education. PB4L adopts a whole school approach to promoting positive behaviour. The Ministry of Education provides a variety of tools and resources on its website for schools in this regard,²⁸² and additional funding was provided in this year's budget to support the PB4L programme, and the implementation and piloting of other evidence-based programmes.²⁸³
- 6.17 In April 2012, the Prime Minister also announced a Youth Mental Health package, including funding for a range of initiatives aim to improve prevention and treatment services for young people with or at risk of mental health problems. The Ministry of Education says a number of school-based initiatives will be delivered as a result of this funding, including making schools more responsible for student well-being, and creating indicators to measure student well-being.²⁸⁴

279 The Commissioner cites the KiVa anti-bullying program developed in Finland that is being trialed in the United States: see Antti Karna and others "A Large-Scale Evaluation of the KiVa Antibullying Program: Grades 4-6" (2011) 82 *Child Development* 311 One of the important components of the programme is procedures for handling acute bullying cases that come to the attention of the school.

280 Carroll-Lind *School Safety* at 65.

281 Ministry of Education, Te Kete Purangi website <pb4l.tki.org.nz/About-PB4L/What-is-PB4L>.

282 Ibid <pb4l.tki.org.nz/Deter-bullying/Positive-behaviour-to-deter-bullying>.

283 Ministry of Education <www.minedu.govt.nz/theMinistry/Budget/Budget2012/SpecialEducation.aspx>.

In 2010 the Government provided \$45 million of initial funding for the PB4L Action Plan for the first five years of implementation. Budget 2010 provided \$15 million additional funding over two years, and Budget 2012 provided a further \$15 million of additional funding for 2012/2013 year.

284 Ibid.

LEGAL FRAMEWORK

- 6.18 At the outset we acknowledge the difficulties created for teachers, principals and Boards of Trustees by increasing public expectation that schools can and should address the myriad social problems that students bring to the classroom each day. As the Post Primary Teachers' Association pointed out in their submission, cyber-bullying presents particular challenges in this respect because it "occupies the blurred space between home and school so it is not always clear whose responsibility it is."
- 6.19 However, from an educational point of view, student achievement can be detrimentally impacted by both bullying and cyber-bullying behaviours. Where students generally feel safe and positive in the school environment, this is likely to have a key influence on learning outcomes. Schools therefore have a role in promoting positive psychosocial development, in addition to fostering academic achievement. As ERO notes:²⁸⁵
- Students cannot learn effectively if they are physically or verbally abused, victims of violence, racial or sexual harassment, discrimination or bullying, or if their school surroundings are unsafe....
- Providing a safe physical and emotional environment (including safety on the internet) for students at school is one of the basic responsibilities of each board of trustees. However, it is also one of the requirements that is most difficult for boards to address, both because there are so many factors that impact on student safety, and because safety issues do not always have clear solutions.
- 6.20 From a legal point of view it is clear that the boards of trustees of New Zealand state schools are required to provide a safe physical and emotional environment for their students, and comply in full with any legislation developed to ensure the safety of students and employees.²⁸⁶
- 6.21 The National Administration Guidelines (NAGs) issued by the Ministry of Education set out statements of desirable principles of conduct or administration.²⁸⁷ NAG 5

²⁸⁵ Education Review Office *Guidelines for Board Assurance Statement and Self-Audit Checklists* (2011) at 23.

²⁸⁶ National Administration Guidelines 5(a) and (c). Section 60A of the Education Act 1989 provides that the Minister may publish these guidelines by notice in the Gazette, as part of the National Education Guidelines (NEGs). The National Administration Guidelines (NAGs) set out the administrative framework that Boards of Trustees must use to work towards the NEGs. There should be policies and procedures in place in each school to achieve the NAGs.

²⁸⁷ There may be a case for considering whether the overarching obligation on schools to provide a safe environment for students should be placed on a stronger legislative footing, for example in the Education Act itself rather than remaining in a subordinate instrument such as the Guideline. Possible advantages of elevating the requirement into legislation might include confirmation of the importance and priority to be

provides as follows:

Each board of trustees is also required to:

- (a) provide a safe physical and emotional environment for students;
- (b) promote healthy food and nutrition for all students; and
- (c) comply in full with any legislation currently in force or that may be developed to ensure the safety of students and employees.

- 6.22 The Education Act 1989 also requires the principal of a state school to take all reasonable steps to ensure that students get good guidance and counselling, and to tell a student's parents of matters that in the principal's opinion are preventing or slowing the student's progress through the school, or are harming the student's relationships with teachers or other students.²⁸⁸ Teachers and Boards of Trustees must report to parents any matters that may put a student at risk of not achieving.²⁸⁹ Registered teachers also have an ethical obligation to promote the physical, emotional, social, intellectual and spiritual wellbeing of learners.²⁹⁰
- 6.23 These Education Act obligations apply only to state schools. There are no equivalent legislative obligations that apply to private schools. In 2009, the Law Commission recommended that the registration criteria set out in legislation for private schools should contain a requirement that a school must provide a safe and supportive environment that includes policies and procedures that make provision for the welfare of students.²⁹¹ This recommendation has not been implemented.
- 6.24 The Education Review Office (ERO) evaluates and reports on the education and care of students in schools and early childhood services, and the implementation of government education priorities in these sectors. Most schools are reviewed every three years.
- 6.25 As part of a review of an individual state school, ERO asks the Board of Trustees to attest to compliance with a range of legislation and regulation. It specifically investigates the following areas of compliance: students' physical and emotional safety

given to student safety, and giving greater prominence to student safety in the overall legislative framework. In the time available to prepare this report however, we have not had the opportunity to carry out the necessary investigation and consultation on this option to be able to reach any particular conclusions.

288 Education Act 1989, s 77.

289 National Administration Guideline (1).

290 New Zealand Teachers' Council *Code of Ethics for Registered Teachers* (2004) at (1)(f).

291 Law Commission *Private Schools and the Law* (NZLC R108, 2009).

(including prevention of bullying and sexual harassment); stand-downs, suspensions and exclusions; teacher registration; and student attendance.²⁹² ERO follows up on items where the school reports non-compliance or says that it is “unsure.”

6.26 ERO highlighted issues of bullying in a 2007 report which sets out its expectations of good practice by schools in both the prevention and management of bullying. ERO expects that, as a matter of good practice, schools will:

- (a) monitor incidents of bullying;
- (b) develop, update or review anti-bullying policies and procedures;
- (c) include in existing policies ways to deal with text bullying;
- (d) report self-review findings to the board of trustees and wider school community;
- (e) provide professional development for teachers related to particular anti-bullying programmes or strategies;
- (f) implement or extend anti-bullying programmes for students; and offer workshops and support for parents.

6.27 In relation to private schools, during the Law Commission’s 2009 review of private schools, ERO expressed concern that the existing criteria for registration for private schools did not give it sufficient power to comment on matters such as a tolerance for bullying, unless it could fit them under some other head such as “standard of tuition” or “suitable staffing”.²⁹³

6.28 The responsibilities of schools to provide a safe environment are reinforced by other statutes including the Health and Safety in Employment Act 1992.²⁹⁴ This statute primarily protects staff from harm as it regulates workplaces, but indirectly provides students as people “in the vicinity of a workplace” with some protection from

292 Education Review Office *Framework for Schools* (2011) at 6. <www.ero.govt.nz>.

293 Law Commission *Private Schools and the Law* (NZLC R108, 2009) at [2.54].

294 See Ministry of Education *Health and Safety in Schools: Guidelines to the Health and Safety in Employment Act and the Health and Safety Code of Practice for State and State Integrated Schools* <www.minedu.govt.nz>. The Code has been notified under section 70 of the Education Act 1989, which allows the Secretary of Education to specify terms and conditions including such matters as minimum safety and health requirements by notice in the New Zealand Gazette, and so state and integrated schools are obliged to comply with it (but not private schools). Separate codes for State Schools and State Integrated Schools were merged into one code in 2003. While the Code deals with particular matters of health and safety such as construction work, noise, heating, and first aid, it does not refer specifically to bullying. The Code requires schools to keep a register of accidents and serious harm (affecting staff and students); however, “serious harm” is limited to physical injury or hospitalisation.

hazards.²⁹⁵ The Act requires a register to be kept of accidents and near miss incidents.

6.29 Finally it is worth noting obligations under international instruments such as the United Nations Convention on the Rights of the Child.²⁹⁶ Article 19 provides:

- (1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any person who has care of the child.
- (2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

6.30 Bullying and violence in schools is an issue that has arisen in New Zealand reports under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights.²⁹⁷

EFFECTIVENESS OF LEGAL FRAMEWORK

6.31 How effective is the current legal framework in operation? Despite the legal obligations that exist, the 2009 *School Safety* report by the Office of the Children's Commissioner found that a minority of schools either had no systems in place, or those systems were not robust enough to cope when things go wrong. It proposed that schools should follow the same broad guidelines wherever possible.²⁹⁸ NetSafe has also told us that many of the schools it deals with do not have effective policies in place.

295 Health and Safety in Employment Act 1992, s 5, s 16. "Hazard" is broadly defined in the Act as any activity or event (whether arising or caused within or outside a place of work) that is an actual or potential source of harm, and includes a situation where a person's behaviour may be an actual or potential source of harm to another person. But while the definition of "harm" includes both physical and mental harm, the latter must be caused by work-related stress.

296 For other relevant instruments, see Human Rights Commission *School Violence, Bullying and Abuse: A Human Rights Analysis* (2009) at [10].

297 Human Rights Commission *Consideration of New Zealand's third periodic report on the implementation of the International Covenant on Economic, Social and Cultural Rights* (submission to Committee on Economic, Social and Cultural Rights, March 2012) at [3.11]. See [6.53] below.

298 Carroll-Lind *School Safety* at 132.

Ombudsman's inquiry

- 6.32 An example of that kind of situation can be found in the events that occurred in December 2007 at Hutt Valley High School, when a number of violent assaults took place. Both the victims and the perpetrators were students of the school. A group of parents laid complaints with the Office of the Ombudsmen, prompted by the school's refusal to retract a public statement made about it having handled the incidents reasonably and responsibly.
- 6.33 Ombudsman David McGee investigated and presented a report on the matter to the House of Representatives in September 2011.²⁹⁹ The investigation covered how the incidents were handled by the School, Child Youth and Family (part of the Ministry of Social Development), the Education Review Office, and the Ministry of Education.
- 6.34 The Ombudsman made a number of findings and suggestions for change. When the events in question occurred, the school did not have any targeted anti-bullying programmes or policies in place. The Ombudsman concluded that if there had been a mandatory obligation on the school to implement an anti-bullying programme, the events that occurred in December 2007 are less likely to have happened. He considered that the national framework needed to be strengthened, and that it should be compulsory for all schools to implement an anti-bullying programme.
- 6.35 In the Ombudsman's view, the most appropriate vehicle for effecting this change was an amendment to National Administration Guideline 5, to require each board of trustees to implement an effective anti-bullying programme. Inclusion of the requirement in the Guideline would emphasise the pivotal importance of student safety in this area.³⁰⁰
- 6.36 Monitoring of the anti-bullying policies would continue to be undertaken by Education Review Office in accordance with procedures it already had in place.³⁰¹
- 6.37 The Ombudsman also suggested that to complement the requirement for mandatory anti-bullying programmes, schools should be given more specific guidance on the levels of punishment that should be given for various infringements.³⁰²

²⁹⁹ Office of the Ombudsman *Report of David McGee, Ombudsman, on Complaints arising out of Bullying at Hutt Valley High School in December 2007* (2011).

³⁰⁰ *Ibid.*, at 39.

³⁰¹ Education Review Office *Safe Schools, Strategies to Prevent Bullying* (May 2007).

³⁰² *Ibid.*

Research findings

- 6.38 As we have noted, the Children's Commissioner's *School Safety* report found there was no consistency in the way that New Zealand schools deal with issues around safety.³⁰³ The Australian Government has commissioned research into covert and cyber-bullying. Two studies investigated the prevalence and impact of covert bullying (including cyber-bullying) and made a number of recommendations to address the issue in Australian schools.³⁰⁴
- 6.39 A recent comparative study found some significant differences in the content of anti-bullying policies between schools in New Zealand and schools in Victoria, Australia. In Victorian schools, bullying policies have been mandatory since 2003, and resources have been provided to support schools in developing such policies. In relation to the approach taken by New Zealand schools, the researchers noted:³⁰⁵
- While the Board [of Trustees] sets goals and policies, the governance structure allows for variation in how schools might develop and implement policies. Some schools take a zero tolerance perspective on problem behaviours, using suspensions and expulsions, whereas other schools look for more innovative ways to keep students attached to school, through restorative practices and other processes.
- 6.40 14 of the 267 responding New Zealand schools did not have an anti-bullying policy. Of the remainder, one-third of the New Zealand schools had a specific anti-bullying policy separate from other policies, as opposed to 75 per cent of the Australian schools. Most of the New Zealand schools embedded their anti-bullying policies in their behaviour management or discipline policies, whereas those of the Victorian schools were more likely to be found in their student engagement documents.³⁰⁶
- 6.41 The review suggested that the differences between New Zealand and Victorian policies

303 Carroll-Lind *School Safety*.

304 D Cross and others *Australian Covert Bullying Prevalence Study* (Child Health Promotion Research Centre, Edith Cowan University, Perth, 2009) [ACBPS]; B Spears and others, *Behind the Scenes: Insights into the Human Dimension of Covert Bullying* (Hawke Research Institute for Sustainable Societies, Centre of the Analysis of Educational Futures, University of South Australia, 2008).

305 L Marsh and others "Content analysis of school anti-bullying policies: a comparison between New Zealand and Victoria, Australia" (2011) 22 *Health Promotion Journal of Australia* 172 at 173. The researchers randomly selected 640 New Zealand schools (out of a possible total of 2582) towards the end of the 2009 academic year, and asked each for their anti-bullying policy. 42 per cent of the schools replied. The sample therefore included 267 schools (or 10 per cent of the total schools in the country). The researchers noted that additional policies could not be obtained from websites, as it seemed rare for schools to place their policies online.

306 *Ibid* at 174.

might indicate that more comprehensive anti-bullying policy formation by schools requires an element of necessity (schools must have a policy) and adequate government resources to develop a separate policy.³⁰⁷

- 6.42 The review also noted that many New Zealand schools lacked an inclusive description of what constitutes bullying behaviours.³⁰⁸

Clearly defining bullying communicates to the whole school community what behaviours are not acceptable, and makes the implementation, enforcement, and monitoring of the policy more successful.

- 6.43 One of the main differences between schools in Victoria and New Zealand was the relatively low number of New Zealand schools that included cyber and mobile phone bullying in their definition.³⁰⁹ Bullying outside school was infrequently mentioned overall.

- 6.44 The study concluded:³¹⁰

As in England and Victoria, NZ schools may benefit from Ministry of Education provision of clear guidelines on how to develop effective policies and what the minimum standard should be for these policies, while at the same time allowing schools the autonomy to develop a policy that specifically suits each school's needs. By developing a comprehensive policy which details what bullying behaviour involves, how the school will respond to incidents of bullying, recording and maintaining data on bullying incidents, having a comprehensive strategy for bullying prevention and periodically evaluating the policy, schools are more likely to reduce bullying in their schools.

Human Rights Commission

- 6.45 The Human Rights Commission (HRC) has expressed the view that the prevalence of peer to peer violence and abuse in schools shows that the current legislative and regulatory framework fails to provide enough protection for children and young people.³¹¹ Building on the suggestions made in the Ombudsman's 2011 report, the HRC proposes that legislation be enacted to require all schools (public, private and integrated) to:

- (a) implement school safety programmes and policies on a whole-school basis;

³⁰⁷ Ibid at 175.

³⁰⁸ Ibid.

³⁰⁹ Ibid at 176.

³¹⁰ Ibid.

³¹¹ Human Rights Commission *Consideration of New Zealand's third periodic report on the implementation of the International Covenant on Economic, Social and Cultural Rights* (submission to Committee on Economic, Social and Cultural Rights, March 2012) at [3.10].

- (b) appoint and train safety officers who will facilitate responses to violence, abuse and bullying;
- (c) institute a process to respond to complaints of violence, bullying and harassment; and
- (d) report annually to the Education Review Office on whole-school approaches to school safety; the number of incidents of violence, abuse and bullying; and complaint outcomes.

6.46 The HRC has expressed its commitment to advocating for and monitoring progress in implementing a national response to bullying, violence and abuse in schools including legislative, policy and/or practice changes required to improve students' safety at school.

Law Commission's view

6.47 Based on the research findings noted above and the views put forward by the Ombudsman, the Human Rights Commission and NetSafe, we support the introduction of a mandatory requirement for the adoption of anti-bullying policies in all schools. Specifically, we support Ombudsman McGee's suggestion of an amendment to National Administration Guideline 5 to require public schools to implement anti-bullying policies.

6.48 When it considered Ombudsman McGee's report on incidents at Hutt Valley High in 2007, the Education and Science Select Committee was persuaded by the submission of the Ministry of Education that it was not necessary to take such a step, and that a number of the issues raised in the report are being adequately addressed. The Ministry was not in favour of the proposed amendment to NAG 5 to require anti-bullying programmes:³¹²

It considered that in the several years since the incidents, it has come to be expected that all schools will have systems and processes to manage bullying. The ministry was concerned that the processes used in some schools might not constitute "anti-bullying programmes," although they might be effective in a particular school's circumstances. The change might thus impose obligations on some schools without significantly improving the environment for children.

The ministry also said that guidance material for boards of trustees on applying Guideline 5 is being developed. The ministry's Core Governance Knowledge Base is designed to equip boards of trustees and principals to manage health and safety issues appropriately, and one section focuses on creating a positive school environment to reduce bullying.

312 Education and Science Committee *Report from an Ombudsman, Complaints Arising out of Bullying at Hutt Valley High School in December 2007*" (NZ House of Representatives, 3 May 2012) at 3.

- 6.49 Despite the reservations expressed by the Ministry of Education in response to the Ombudsman's report, we consider there must be a clear requirement for schools to have specific anti-bullying policies and procedures in place. For state schools, this could be implemented by an amendment to National Administration Guideline 5, as Ombudsman McGee suggested in his report. Evidence we received from NetSafe indicates that bullying is a major issue in schools, that many schools still do not have effective anti-bullying policies in place, and that there is a lack of awareness and resourcing in schools to manage the issue effectively. We consider it is vitally important to ensure that *all* schools have appropriate policies and procedures in place. We note this is the expectation of the Minister of Education.³¹³ At present that is not the case.
- 6.50 In our view, an equivalent requirement should extend to private schools. It should be a criterion for registration that the school provide a safe and supportive environment that includes policies and procedures that make provision for the welfare of students.³¹⁴ Private schools are subject to a different regulatory system and are not subject to the Guidelines. It will be necessary to ensure that management of this issue can be monitored by ERO and reported on to parents as part of any private school review.

MEASUREMENT

- 6.51 The comparative Victoria/New Zealand survey discussed above notes the importance of recording and maintaining data on bullying incidents, and periodic re-evaluation of bullying policies.
- 6.52 In 2007, the Education Review Office found that schools' measurement of the effectiveness of their anti-bullying initiatives was often anecdotal in nature, or was measured more broadly against analyses of incident reports and decreases in the number of detentions or stand-downs. ERO recommended that schools evaluate the effectiveness and impact of their anti-bullying initiatives through a regular self-review programme. ERO provided some questions to support schools in this process, which were endorsed and extended by the Office of the Children's Commissioner in its report

313 Hon Anne Tolley, former Minister of Education, Letter to all Boards of Trustees (4 April 2011) <www.minedu.govt.nz>.

314 This is consistent with an earlier recommendation: Law Commission *Private Schools and the Law* (NZLC R108, 2009) at R14.

into school safety.³¹⁵ The report also referred to a range of school climate surveys available to assist schools in measuring the safety of their physical and emotional environment.

6.53 Collation and management of data on violence and bullying in schools continues to be an issue. In May 2012, the United Nations Committee on Economic, Social and Cultural Rights released its conclusions on the consideration of reports submitted by State parties under articles 16 and 17 of the International Covenant on Economic Social and Cultural Rights. In relation to New Zealand, the Committee noted with concern that violence and bullying were widespread in schools, and endorsed the Human Rights Commission's proposals for New Zealand to:³¹⁶

- (a) systematically collect data on violence and bullying in schools;
- (b) monitor the impact of the student mental health and wellbeing initiatives recently introduced in schools on the reduction of the incidence of violence and bullying;
and
- (c) assess the effectiveness of measures, legislative or otherwise, in countering violence and bullying.

6.54 In Australia, the emergence of new technologies has led to covert and cyber-bullying becoming an issue for many schools. The Australian Government commissioned two research projects to better understand these issues and the impact on Australian schools.

6.55 The first study, the Australian Covert Bullying Prevalence Study (ACBPS), investigated the prevalence and impact of covert bullying (including cyber-bullying) in Australian school communities. Covert bullying was broadly defined as any form of aggressive behaviour that is repeated, intended to cause harm and characterised by an imbalance of power, and is 'hidden', out of sight of, or unacknowledged by adults.

6.56 Cyber-bullying was defined by young people as cruel covert bullying used primarily by young people to harm others using technology such as: social networking sites, other chat-rooms, mobile phones, websites and web-cameras.³¹⁷

6.57 The resulting report made a number of recommendations to address covert and cyber-

315 Carroll-Lind *School Safety* at 79-80.

316 Human Rights Commission "Commission welcomes UN Committee recommendations on social, economic and political rights" (media release, 25 May 2012).

317 D Cross and others *Australian Covert Bullying Prevalence Study* (Child Health Promotion Research Centre, Edith Cowan University, Perth, 2009) (ACBPS) at xxi.

bullying in Australian schools. Recommendations for national policy and practice included:³¹⁸

- (a) Establish an Australian Council for Bullying Prevention that reports to the Prime Minister to lead the review of the National Safe Schools Framework and the concurrent development of a strategy that considers the other recommendations made in the report.
- (b) Revise the National Safe Schools Framework and its implementation in schools to explicitly encourage schools to address covert and overt bullying and provide the necessary resources to support schools to minimise this bullying through their policy and practice.
- (c) Establish ongoing and routine data collection systems with standardised methods for defining and measuring covert and overt forms of bullying.

6.58 The second study also recommended a review of the National Safe Schools Framework and the Bullying No Way website³¹⁹ to address and include more on the issues of covert and cyber-bullying.³²⁰

Law Commission's view

6.59 We note that in his 2011 report, the Prime Minister's Chief Science Advisor emphasised the importance of evidence-based policy. In order to develop evidence-based policy in the area of bullying and cyber-bullying, and assess its effectiveness, New Zealand needs reliable data relating to incidents of inappropriate student behaviour and complaints received about bullying. The development of measurable objectives and performance indicators for activities intended to improve school safety is also critical.

REPORTING

6.60 One of the key concerns of the Human Rights Commissioner, is the lack of a clear framework for schools around the reporting of violence and bullying by schools internally and to parents (of both bully and victim) and external agencies such as ERO,

³¹⁸ Ibid, at xxxi.

³¹⁹ Bullying No Way website <www.bullyingnoway.gov.au>.

³²⁰ B Spears and others, *Behind the Scenes: Insights into the Human Dimension of Covert Bullying* (Hawke Research Institute for Sustainable Societies, Centre of the Analysis of Educational Futures, University of South Australia, 2008).

Child Youth and Family and the Police. In his view there needs to be clear guidelines about reporting procedures, particularly in serious cases.

Law Commission's view

6.61 We agree that it is highly desirable for schools to be equipped with clear models that provide processes for informing the relevant personnel within schools, including the Principal, as well as parents and external agencies as appropriate in the circumstances of any particular incident. In particular, we suggest that there needs to be a clear integration of schools' anti-bullying policies with the right of parents to be informed.

ANTI-BULLYING LEGISLATION

6.62 A number of overseas jurisdictions have opted to take a legislative approach to the problem of bullying, including cyber-bullying. In Canada, Nova Scotia, Ontario and Quebec have all introduced anti-bullying legislation,³²¹ and New Brunswick and British Columbia have indicated their intentions to do the same.

6.63 The Ontario and Quebec Bills both contain definitions of bullying, which include cyber-bullying, and require schools to adopt and implement anti-bullying and anti-violence policies or plans. Both Bills amend education legislation, but do not amend the criminal code.

6.64 In Nova Scotia, a recent report recommended amendments to the Education Act relating to jurisdiction over bullying that occurs off-site, mandatory reporting by principals, and ensuring that schools have appropriate policies in place.³²² The report also recommended that the Education Act be amended to include a provision requiring parents to take reasonable steps to be aware of their children's online activities, at least to the extent that such activities may detrimentally affect the school climate, and to report relevant information to the school principal or other relevant staff.

6.65 Bill No 27, a private member's Bill, was also introduced into Nova Scotia's General Assembly in April of this year.³²³ The Bill provides that any youth who cyber-bullies

321 Bill No 56 (Quebec) (an Act to prevent and deal with bullying and violence in schools) was introduced in early 2012.

322 Report of the Nova Scotia Task Force on Bullying and Cyberbullying *Respectful and Responsible Relationships: There's No App for That* (Nova Scotia, 2012).

323 Bill No 27, Cyberbullying Intervention Act (An Act to Promote Cyberbullying Intervention and Parental Responsibility) The Bill defines cyberbully as meaning to use the Internet or any other form of electronic communication, including social media, emails and text messages, deliberately or recklessly, to cause,

commits an offence, and that parents also commit an offence if they knew or ought to have known the youth was Cyber-bullying.

- 6.66 In the United States, state legislation relating to bullying has grown rapidly in the last 13 years.³²⁴ A flurry of legislative action was triggered by the Columbine High School shootings in 1999, and later fuelled by a number of highly visible suicides among school-aged children and teenagers that were linked to bullying.³²⁵ This is particularly noteworthy in a country in which freedom of speech is a fiercely protected value.
- 6.67 Out of the 46 states with anti-bullying laws in place, 36 have provisions that prohibit cyber-bullying and 13 have statutes that grant schools the authority to address off-campus behaviour that creates a hostile school environment. The most commonly covered key components in state legislation are the development and implementation of district policies, the scope of jurisdiction over bullying acts, definitions of prohibited behaviour, and disciplinary consequences.³²⁶
- 6.68 In Australia, the National Safe Schools Framework (NSSF) is strengthened by legislation that requires all schools to align their policies with the guiding principles of the Framework.
- 6.69 In June 2011, a Joint Select Committee on Cyber-Safety tabled its report on the Inquiry into Cyber-Safety entitled *High-Wire Act: Cyber-Safety and the Young*. Among its recommendations, it proposed the development of an agreed definition of cyber-bullying to be used by all Australian government departments and agencies, and encourage its use nationally. It also recommended that a legislative approach be developed to enable schools to deal with bullying incidents out of school hours.
- 6.70 New South Wales explicitly criminalises bullying and cyber-bullying in relation to school children. Section 60E of the Crimes Act 1900 (NSW) makes it an offence punishable by imprisonment to assault, stalk, harass or intimidate any school student or member of staff of a school while that student or staff member is attending a school, whether or not any actual bodily harm occurs. The section does not cover bullying outside school premises.

directly or indirectly, harm to another person. Under the Bill "harm" means physical or emotional harm to a person that would also harm a reasonable person in those circumstances.

324 V Stuart-Cassel, A Bell and JF Springer *Analysis of State Bullying Laws and Policies* (US Department of Education, Washington DC, 2011).

325 *Ibid*, at ix.

326 *Ibid*, at 79.

Law Commission's view

- 6.71 Beyond the recommendations we make in relation to the amendment of National Administration Guideline 5 and changes required for private schools, we do not presently support specific legislation relating to cyber-bullying or bullying in New Zealand.
- 6.72 Cyber-bullying and bullying may of course be dealt with under existing New Zealand law, subject to restrictions around the age of criminal responsibility.³²⁷ For example, some instances of physical bullying may constitute an offence, such as assault. The same would apply with the new communications offence that we recommend in chapter 4 for inclusion in the Summary Offences Act 1981. That offence may well apply to some cases of cyber-bullying, where the offender is 14 or older.
- 6.73 We also envisage that children, parents and schools may apply for orders to the new tribunal that we recommend in chapter 5 of this report.
- 6.74 However we think it is the new approved agency which we recommend in chapter 5 that will be of the most practical assistance to students, parents and schools when issues related to cyber-bullying arise. We note in this regard that NetSafe is already very active in this area, and has strong established relationships with many schools, with the Ministry of Education, the Police, and companies like Facebook and Google. NetSafe has a dedicated cyber-bullying website offering advice to parents, schools and young people.³²⁸
- 6.75 One of the practical recommendations NetSafe makes for schools and teachers is the development of a class contract, that includes appropriate behaviour "online and on mobile" both inside and outside of school time. NetSafe also recommends that all schools have a suitable ICT Use Agreement (for which it provides templates) and ensure that students understand the terms of those agreements. We endorse the value of this practice. We suggest that further work could be done to develop the educative potential of ICT Use Agreements, for example by adopting the set of principles discussed in chapter 5 as an educative tool.

³²⁷ In New Zealand, the minimum age of criminal responsibility is 10, but children under the age of 14 cannot be prosecuted except for the offences of murder and manslaughter. In all other cases, the matter must be dealt with by way of a Family Group Conference and if necessary, an application can be made to the Family Court that the young person is in need of care and protection. The Youth Court deals with young persons aged 14 or over but under 17. A young person 17 or over who commits offences is dealt with as an adult in the District Court or, if the offence is serious, in the High Court.

³²⁸ NetSafe, Cyberbullying Website <<http://www.cyberbullying.org.nz>>.

6.76 The recent Australian inquiry into cyber-safety commented on the importance of “Acceptable Use Agreements” and supporting policies covering the use of the technology supplied to students. However it found that these agreements are not always backed by procedures that are followed consistently, or even widely known and understood.³²⁹

For such Agreements to be effective, they must be:

- clear about the rights and responsibilities of users, especially penalties for breaches of conditions of use;
- signed by students and parents/carers;
- preceded by information sessions on cyber-safety, perhaps presented wholly or partially by the young people themselves, and
- supported by policies that are known and understood by all staff and students, so that they can be implemented promptly, effectively and consistently.

6.77 NetSafe has developed the concept of Digital Citizenship in New Zealand schools, a model which aims to produce confident, capable digital citizens with a combination of technical and social skills that enable them to be successful and safe in the internet age. If the tribunal that we recommend in chapter 5 is established, we anticipate that the terms of future ICT Use Agreements in schools could refer to the statement of principles which form the basis of the tribunal’s jurisdiction. This would help confirm the legal basis of digital citizenship in New Zealand schools, setting out a clear statement of what is and is not acceptable conduct on the internet.

CONCLUSIONS

6.78 The weight of international and New Zealand evidence supports the view that cyber-bullying should not be approached as a discrete practice but as a manifestation of intentionally harmful acts perpetrated and experienced by adolescents within the context of individual and peer relationships. However, it is critical that policy makers are alert to the very real differences between covert and overt forms of aggression, and in particular the unique challenges created by digitally mediated bullying and harassment which crosses over the boundary between school and home life.

6.79 Similarly, it is important that the risks associated with bullying generally and cyber-bullying specifically, including the association with suicide, are understood within the wider broader context of adolescent health and wellbeing. In this respect the PMCSA

³²⁹ Joint Select Committee on Cyber-Safety, Parliament of the Commonwealth of Australia *High-Wire Act Cyber-Safety and the Young* (interim report, 2011) at 261-262.

report provides an invaluable resource for policy makers attempting to understand the complex personal, social and environmental factors which are contributing to a range of poor outcomes for New Zealand adolescents.

- 6.80 We consider that the package of reforms we recommend in this report will be of real assistance in relation to dealing with cyber-bullying by or among adolescents. In particular, the approved agency we recommend, which may be a body such as NetSafe, will be able to assist schools, parents and students by providing advice as to their options, guiding them towards appropriate self-regulatory remedies where those are available, and investigating substantial complaints and liaising with website hosts to request material to be taken down or moderated.
- 6.81 In particularly serious cases which cannot be otherwise resolved, a school Principal, student or parent may have recourse to the tribunal that we recommend in chapter 5. Principals, along with the Police and Coroners, would be one group provided with direct access to the new tribunal in serious cases involving threats to safety. School Principals will be able to seek the Tribunal's assistance in cases where there is a risk to life including potential contagion effects with respect to youth suicides.
- 6.82 In addition to these wider reforms, we make some specific comments and recommendations in relation to bullying and cyber-bullying.
- 6.83 We recommend that National Administration Guideline 5 be amended, to require each board of trustees to implement an effective anti-bullying programme.
- 6.84 We also recommend that it should be a criterion for registration of a private school that the school provide a safe and supportive environment that includes policies and procedures that make provision for the welfare of students. The last National Report by ERO into school safety and strategies to prevent bullying was published in 2007.³³⁰ That report presented the findings of an analysis of 297 ERO education review reports that included information about what schools were doing to prevent bullying. Given the developments in this area both in New Zealand and overseas in the last five years, we suggest it would be timely for ERO to revisit the subject by way of a national report.
- 6.85 We encourage the Ministry of Education to consider the following matters that our research and consultation indicate are on-going issues in New Zealand's response to bullying and cyber-bullying:

³³⁰ Education Review Office *Safe Schools: Strategies to Prevent Bullying* (May 2007).

- (a) the development of an agreed definition of bullying behaviour, including cyber-bullying, and encouraging schools to use it in anti-bullying policies;
- (b) the need to establish ongoing and routine data collection systems with standardised methods for defining and measuring covert and overt forms of bullying;
- (c) the need for the development of measurable objectives and performance indicators for activities intended to improve school safety;
- (d) the need for the development of reporting procedures and guidelines.

Recommendations

R31 National Administration Guideline 5 should be amended, to require each board of trustees to implement an effective anti-bullying programme.

R32 It should be a criterion for registration of a private school that the school provide a safe and supportive environment that includes policies and procedures that make provision for the welfare of students.

R33 The Ministry of Education should consider further work in the following areas:

- (a) the development of an agreed definition of bullying behaviour, including cyber-bullying, encouraging schools to use it in anti-bullying policies;
- (b) the establishment of ongoing and routine data collection systems with standardised methods for defining and measuring covert and overt forms of bullying;
- (c) the development of measurable objectives and performance indicators for activities intended to improve school safety;
- (d) the development of guidelines for the reporting of serious incidents of bullying and cyber-bullying.

R34 Consideration should be given to further developing the educative potential of Information and Technology (ICT) contracts to inform students about their legal rights and responsibilities with respect to communications, using for example, the set of principles developed in chapter 5 as an educative tool.

APPENDIX

Communications (New Media) Bill

Bill drafted for the Law Commission by the Parliamentary Counsel Office

Communications (New Media) Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Communications (New Media) Act **2012**.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

Part 1

Approved Agency and Tribunals

Preliminary provisions

3 Purpose

The purpose of this Act is to mitigate harm caused to individuals by electronic communications.

4 Interpretation

In this Act, unless the context otherwise requires,—

Agency means a person or an organisation appointed as an Approved Agency under **section 8**

Appeal Tribunal means an Appeal Tribunal constituted under **section 18**

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chief executive means the chief executive of the department that is for the time being responsible for the administration of this Act

communication means an electronic communication, and includes any text message, writing, photograph, picture, audio-visual recording, or other matter that is communicated electronically

harm includes emotional distress

individual means a natural person

Minister means the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act

Tribunal means a Tribunal constituted under **section 12**.

5 Application

This Act applies to electronic communications.

6 Act binds the Crown

This Act binds the Crown.

Communication principles

7 Communication principles

(1) Every Agency or Tribunal performing functions or exercising powers under this Act must take account of the following communication principles:

Principle 1

A communication should not disclose sensitive personal facts about an individual.

Principle 2

A communication should not be threatening, intimidating, or menacing.

Principle 3

A communication should not be grossly offensive to a reasonable person in the complainant's position.

Principle 4

A communication should not be indecent or obscene.

Principle 5

A communication should not be part of a pattern of conduct that constitutes harassment.

Principle 6

A communication should not make a false allegation.

Principle 7

A communication should not contain a matter that is published in breach of confidence.

Principle 8

A communication should not incite or encourage anyone to send a message to a person with the intention of causing that person harm.

Principle 9

A communication should not incite or encourage another person to commit suicide.

Principle 10

A communication should not denigrate a person by reason of his or her colour, race, ethnic or national origins, religion, ethical belief, gender, sexual orientation, or disability.

- (2) **Section 13(2)** states how the communication principles affect the exercise of functions or powers of the Tribunal.

Approved Agency

8 Agency

- (1) The Minister may, by notice in the *Gazette*, appoint any person or organisation as an Approved Agency for the purposes of this Act.
- (2) Before appointing an Agency, the Minister must be satisfied that the person or organisation to be appointed has the appropriate knowledge, skills, and experience to carry out the Agency's functions under this Act.
- (3) An Agency holds office for the term, and has the functions, specified in the notice under **subsection (1)**.
- (4) A person is not to be regarded as being employed in the service of the Crown for the purposes of the State Sector Act 1988 or the Government Superannuation Fund Act 1956 solely because of his or her appointment as the Agency.

9 Functions of Agency

The functions that may be conferred on an Agency by notice under **section 8** are—

- (a) to help people to resolve problems caused to them by electronic communications;
- (b) to receive and assess complaints about electronic communications;
- (c) to investigate complaints, unless the Agency considers the subject-matter of the complaint is unlikely to cause harm or the complaint is otherwise inappropriate for investigation;
- (d) to liaise with website hosts and internet service providers and, if appropriate, to request them to take down or amend posts that are clearly offensive;
- (e) to liaise with schools, departments, and other agencies to resolve wider issues surrounding communications complained about;
- (f) to advise a complainant in an appropriate case to apply to a Tribunal for an order under **section 16** requiring a website host, internet service provider, or telecommunications provider to identify the author of an offensive communication;
- (g) to advise a complainant to refer a complaint to a Tribunal if the Agency is satisfied that—
- (i) the complaint meets the appropriate level of seriousness and has proved incapable of resolution by other means; or
- (ii) the complaint is so serious, and the resolution of it is so urgent, that it should be referred directly to the Tribunal without mediation;
- (h) to certify that it has recommended the referral of a complaint to a Tribunal;
- (i) to use education and publicity to improve online conduct and safety on the Internet;

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- (j) to undertake research relevant to the purpose of this Act, particularly in order to keep abreast of developments in technology and patterns of internet use;
- (k) to provide advice to the Government on matters relating to this Act and to recommend changes to legislation or Government policy where appropriate.

10 Powers of Agency

- (1) An Agency has all the powers necessary for carrying out the Agency's functions.
- (2) An Agency may delegate the Agency's functions to any other person or organisation, subject to any limitations or conditions imposed by the Minister.

11 Agency may decide to take no action

- (1) An Agency may decide to take no action or, as the case may require, no further action, on any complaint if the Agency considers that—
 - (a) the complaint is frivolous or vexatious or is not made in good faith; or
 - (b) the subject-matter of the complaint would not cause significant distress, humiliation, or harm to a reasonable person.
- (2) An Agency may decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Agency that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.
- (3) If an Agency decides to take no action or no further action on a complaint, the Agency must inform the complainant of that decision and the reasons for it.

Tribunals

12 Tribunals

- (1) Every Tribunal consists of a District Court Judge designated for the purpose of this Act by the Chief District Court Judge.
- (2) The Judge must be designated from a panel of District Court Judges maintained by the Chief District Court Judge.
- (3) The Chief District Court Judge may at any time add or remove a Judge from the panel.

13 Functions, duties, and powers of Tribunals

- (1) The functions of a Tribunal are—
 - (a) to consider and determine applications for any order under **section 16**;
 - (b) to exercise and perform any other functions, powers, and duties that are conferred or imposed on it by or under this Act or any other enactment;
 - (c) to do any other thing necessary for performing, or reasonably incidental to, the Tribunal's functions.
- (2) The Tribunal must not consider or determine any application for any order under **section 16** unless it is satisfied that—
 - (a) a communication principle has been breached; and
 - (b) that breach has caused or is likely to cause significant harm to an individual.
- (3) The Tribunal has all the powers that are reasonably necessary to enable it to perform its functions.

14 Complaints and applications

- (1) Any of the following may make a complaint to a Tribunal about any offensive or harmful online communication:
 - (a) the victim of the communication;
 - (b) a parent or guardian of the victim;
 - (c) the principal of an educational establishment, if any student of that establishment is a victim of the communication;
 - (d) the Police, if the communication constitutes a threat to the safety of any person.
- (2) The Chief Coroner may apply to a Tribunal for an order under **section 16(1)(a) or (b)** in respect of a communication that contravenes a provision of the Coroners Act 2006.
- (3) A complaint must not be made by a person to whom **subsection (1)(a), (b), or (c)** applies unless an Agency has considered the subject-matter of the complaint and determined what action (if any) to take.
- (4) A complaint is not within a Tribunal's jurisdiction if—
 - (a) the complainant and the victim are not individuals or, if the complainant and the victim are the same person, that person is not an individual; or
 - (b) the subject-matter of the complaint can be dealt with under the complaints procedure of the Broadcasting Standards Authority or the Press Council.
- (5) A complaint must be—
 - (a) made in or on a form provided or approved by the chief executive; and
 - (b) identify the complainant; and
 - (c) state the subject-matter of the complaint.
- (6) A Tribunal may require a complainant to complete a statutory declaration stating either or both of the matters in **subsection (5)(b) and (c)**.

15 Consideration and determination of complaints by Tribunal

- (1) A Tribunal must conduct a formal hearing about a complaint if the complainant so requests, but the Tribunal may proceed without a formal hearing if one is not requested.
- (2) A Tribunal must consider and determine a complaint with as little formality and technicality, and as speedily, as is permitted by—
 - (a) the requirements of this Act; and
 - (b) a proper consideration of the complaint; and
 - (c) the principles of natural justice.

16 Orders that may be made by Tribunal

- (1) A Tribunal may, on a complaint or an application, make 1 or more of the following orders:
 - (a) an order requiring that material specified in the order be taken down from any electronic media;
 - (b) an order to cease publishing the same, or substantially similar, communications in the future;
 - (c) an order not to encourage any other person to engage in similar communications with the complainant;
 - (d) a declaration that a communication breaches a communication principle;
 - (e) an order requiring that a factually incorrect statement in a communication be corrected:

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- (f) an order that the complainant be given a right of reply;
 - (g) an order to apologise to the complainant;
 - (h) an order requiring that the author of a particular communication be identified.
- (2) A Tribunal may apply an order or part of an order under this section to all or any of the following:
- (a) the defendant;
 - (b) an internet service provider;
 - (c) a website host;
 - (d) any other person, if the Tribunal considers that the defendant is encouraging, or has encouraged, the other person to engage in offensive communication towards the complainant.
- (3) In deciding whether or not to make an order, and the form of an order, a Tribunal must take into account the following:
- (a) the content of the communication, its offensive nature, and the level of harm caused by it;
 - (b) the purpose of the communicator in communicating it;
 - (c) the occasion, context, and subject-matter of the communication;
 - (d) the extent to which the communication has spread beyond the original communicator and recipient;
 - (e) the age and vulnerability of the complainant;
 - (f) the truth or falsity of the statement;
 - (g) the extent to which the communication is of public interest;
 - (h) the conduct of the defendant, including any attempt by the defendant to minimise the harm caused;
 - (i) the conduct of the complainant, including the extent to which that conduct has contributed to the harm suffered.
- (4) In exercising its functions, the tribunal must have regard to the importance of freedom of expression.
- (5) A Tribunal must give reasons for its decisions and those reasons must be published.

17 Evidence

- (1) A Tribunal that is satisfied, on an application made by the Agency or on its own motion, that any person can provide information, documents, or things, or give evidence, that will or may be relevant to its consideration of a complaint, may make an order—
- (a) requiring that person to produce to the Tribunal any information, or documents, or things specified in the order; or
 - (b) requiring that person to give evidence to the Tribunal about matters that, in the opinion of the Tribunal, are relevant to its consideration of the complaint.
- (2) If an order is made under **subsection (1)(a)**, the Tribunal may, as a condition of the order, require the chief executive to reimburse the person who is the subject of the order for the actual and reasonable expenses incurred by that person in complying with the order or in producing any specified class of information, documents, or things.
- (3) An application by the Agency for an order under **subsection (1)** must be in writing and must—

- (a) set out the reasons why the order is sought; and
 - (b) if an order is sought under **subsection (1)(a)**, set out the information, documents, or things in respect of which the order is sought; and
 - (c) explain why the information, documents, things, or evidence in question will or may be relevant.
- (4) A Tribunal may receive as evidence any statement, document, information, or matter that, in the Tribunal's opinion, may help the Tribunal to determine a complaint, whether or not it would be admissible in a court of law.

18 Right of appeal to Appeal Tribunal

- (1) A complainant who considers that a Tribunal's determination of his or her complaint is wrong in law may appeal, in accordance with the rules of court, to a District Court consisting of 2 Judges sitting as an Appeal Tribunal.
- (2) Any District Court Judge other than the Judge who sat as the Tribunal appealed from may be a member of an Appeal Tribunal.

19 Power to refer matter to court

- (1) A Tribunal or an Appeal Tribunal may refer a complaint to a District Court or other court for its determination if it considers that the complaint would be more appropriately dealt with by that court.
- (2) **Subsection (1)** does not prevent a Tribunal or an Appeal Tribunal from making any order under **section 16** pending the court's determination of the complaint.
- (3) The court to which the complaint is referred may make any orders it thinks fit in the interests of justice, including any order that a Tribunal can make under **section 16**.

20 Transfer of proceedings from court

- (1) If proceedings within the jurisdiction of a Tribunal have been commenced in a District Court before a complaint in respect of the same issues between the same parties has been lodged in a Tribunal, or transferred to a Tribunal under this section, a Judge or Registrar of that court may, on the application of either party or of the Judge's or Registrar's own motion, order that the proceedings be transferred to a Tribunal.
- (2) If proceedings within the jurisdiction of a Tribunal have been commenced in the High Court before a complaint in respect of the same issues between the same parties has been lodged in a Tribunal, or transferred to a Tribunal under this section, that Court or a Judge of that Court may, on the application of either party or of its or that Judge's own motion, order that the proceedings be transferred to a Tribunal.
- (3) A Tribunal to which proceedings are transferred under subsection (1) or (2) may have regard to any notes of evidence transmitted to it and it is not necessary for that evidence to be given again in the Tribunal unless the Tribunal so requires.

21 Technical advisers

- (1) A Tribunal or an Appeal Tribunal may appoint a technical adviser who specialises in electronic communication to assist it in considering and determining a complaint or an appeal.
- (2) The duties of a technical adviser are—

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- (a) to sit with the Tribunal; and
- (b) subject to **subsection (3)**, to act in all respects as an extra member of the Tribunal.
- (3) A Tribunal's determination of a complaint or an appeal must be a determination of the Judge or Judges alone.
- (4) The chief executive must pay technical advisers the remuneration and allowances determined from time to time by the Minister.

22 Offence of non-compliance with order

- (1) A person who fails to comply with an order made under **section 16 or 19** commits an offence.
- (2) A person who commits an offence against this section is liable on conviction to [imprisonment for a term not exceeding 3 months or a fine not exceeding \$5,000].

Part 2

**Amendments to other enactments to regulate harmful behaviour
in new media**

Subpart 1—Summary Offences Act 1981

23 Principal Act

This subpart amends the Summary Offences Act 1981.

24 New section 21A inserted

After section 21, insert:

“21A Causing harm by means of communication device

- “(1) A person (**person A**) commits an offence if person A sends or causes to be sent to another person (**person B**) by means of any communication device a message or other matter that is—
 - “(a) grossly offensive; or
 - “(b) of an indecent, obscene, or menacing character; or
 - “(c) knowingly false.
- “(2) The prosecution must establish that—
 - “(a) person A either—
 - “(i) intended to cause person B substantial emotional distress; or
 - “(ii) knew that the message or other matter would cause person B substantial emotional distress; and
 - “(b) the message or other matter is one that would cause substantial emotional distress to someone in person B's position; and
 - “(c) person B in fact saw the message or other matter in any electronic media.
- “(3) It is not necessary for the prosecution to establish that the message or other matter was directed specifically at person B.
- “(4) In determining whether a message or other matter is grossly offensive, the court may take into account any factors it considers relevant, including—
 - “(a) the extremity of the language used;
 - “(b) the age and characteristics of the victim;
 - “(c) whether the message or other matter was anonymous;
 - “(d) whether the message or other matter was repeated;

- “(e) the extent of circulation of the message or other matter;
 - “(f) whether the message or other matter is true or false;
 - “(g) the context in which the message or other matter appeared.
- “(5) A person who commits an offence against this section is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000.
- “(6) In this section, **communication device** means a device that enables any message or other matter to be communicated electronically.”

Subpart 2—Crimes Act 1961

25 Principal Act

This subpart amends the Crimes Act 1961.

26 New section 131C inserted

After section 131B, insert:

“131C Conduct aimed at procuring young person for unlawful sexual activity

A person (**person A**) is liable to imprisonment for a term not exceeding 7 years if he or she—

- “(a) exposes a person under the age of 16 years (the **young person**) to indecent material or provides the young person with an intoxicating substance; and
- “(b) does so with the intention of making it easier to procure the young person for unlawful sexual activity with person A or any other person.”

27 Section 179 amended (Aiding and abetting suicide)

In section 179(a), delete “, if that person commits or attempts to commit suicide in consequence thereof”.

28 Section 216J amended (Prohibition on publishing, importing, exporting, or selling intimate visual recording)

After section 216J(1), insert:

“(1A) A person (**person A**) who takes a visual recording of another person (**person B**) with person B’s knowledge or consent is liable to [imprisonment for a term not exceeding 3 years] if—

- “(a) person A publishes the recording without person B’s consent; and
- “(b) the recording is of a kind described in section 216G(1)(a) or (b) and would be an intimate visual recording if taken without person B’s knowledge or consent.”

Subpart 3—Harassment Act 1997

29 Principal Act

This subpart amends the Harassment Act 1997.

30 Section 3 amended (Meaning of “harassment”)

After section 3(2), insert:

- “(3) For the purposes of this Act, a person also harasses another person if—
- “(a) he or she engages in a pattern of behaviour that is directed against that other person;
- and

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“(b) that pattern of behaviour includes doing any specified act to the other person that is one continuing act carried out over any period.

- “(4) For the purposes of **subsection (3)**, **continuing act** includes a specified act done on any 1 occasion that continues to have effect over a protracted period (for example, where offensive material about a person is placed in any electronic media and remains there for a protracted period).”

31 Section 4 amended (Meaning of “specified act”)

- (1) In section 4(1), definition of **specified act**, paragraph (d), after “correspondence,”, insert “electronic communication.”
- (2) In section 4(1), definition of **specified act**, after paragraph (e), insert:
- “(ea) giving offensive material to a person by placing the material in any electronic media where it is likely that it will be seen by, or brought to the attention of, that person:”.

32 Section 19 amended (Standard conditions of restraining orders)

After section 19(1), insert:

- “(1A) It is a condition of every restraining order that applies to a continuing act within the meaning of section 3 that the respondent must take reasonable steps to prevent the specified act from continuing.”

Subpart 4—Human Rights Act 1993

33 Principal Act

This subpart amends the Human Rights Act 1993.

34 Section 61 amended (Racial disharmony)

- (1) In section 61(1)(a), after “radio or television” insert “or other electronic communication”.
- (2) In section 61(2), after “radio or television” insert “or other electronic communication”.

35 Section 62 amended (Sexual harassment)

After section 62(3)(j), insert:

- “(k) participation in fora for the exchange of ideas and information.”

36 Section 63 amended (Racial harassment)

After section 63(2)(j), insert:

- “(k) participation in fora for the exchange of ideas and information.”

Subpart 5—Privacy Act 1993

37 Principal Act

This subpart amends the Privacy Act 1993.

38 Section 6 amended (Information privacy principles)

- (1) In section 6, Principle 10(a), after “publicly available publication”, insert “and that, in the circumstances of the case, it would not be unfair or unreasonable to use the information”.
- (2) In section 6, Principle 11(b), after “publicly available publication”, insert “and that, in the circumstances of the case, it would not be unfair or unreasonable to disclose the information”.

39 Section 56 amended (Personal information relating to domestic affairs)

In section 56, insert as subsection (2):

- “(2) Subsection (1) does not apply if—
- “(a) the personal information is disclosed to or used by any person other than the individual or his or her immediate family; and
 - “(b) that disclosure or use would be highly offensive to an ordinary reasonable person.”



Appendix B

List of submitters

- 1 Alan Armstrong
- 2 Dr Jonathan Barrett
- 3 Bernard Bourke
- 4 Professor Ursula Cheer
- 5 David Farrar
- 6 Shenagh Gleeson
- 7 Rebecca Goldsmith
- 8 Stephen Hansen
- 9 Judge DJ Harvey
- 10 Barbara Insull
- 11 Keith Johnson
- 12 Ross Johnston
- 13 Heather Leaity
- 14 Geoff Lealand
- 15 Edward H Lipsett
- 16 Lyn Milnes
- 17 Confidential submission
- 18 Matthew Sew Hoy
- 19 Wendy Sisson
- 20 Peter Thompson
- 21 Jim Tucker
- 22 Peter Zohrab
- 23 ACP Media Ltd

- 24 Allied Press Ltd
- 25 APN News & Media
- 26 Broadcasting Standards Authority
- 27 Capital Community Newspapers
- 28 Catalyst90
- 29 Dunedin Community Law Centre
- 30 Education Directions
- 31 NZ Amalgamated Engineering, Printing & Manufacturing Union Inc.
(EPMU)
- 32 Freeman Media
- 33 Human Rights Commission
- 34 Kiwis for Balanced Reporting on the Middle East
- 35 InternetNZ
- 36 Māori Television
- 37 Massey University, Journalism Programme (Samson, Hannis and Hollings)
- 38 Media Matters in NZ (incorporating Children's Media Watch)
- 39 NetSafe
- 40 New Zealand Journalists Training Organisation
- 41 Newspaper Publishers' Association (NPA)
- 42 Office of Film & Literature Classification
- 43 New Zealand Society of Authors (PEN New Zealand Inc.)
- 44 Kay Jones
- 45 Radio New Zealand
- 46 Science Media Centre, Sciblogs.co.nz
- 47 Sweet As Social Media
- 48 Tech Liberty
- 49 Trade Me Ltd
- 50 Confidential submission
- 51 Advertising Standards Authority
- 52 Dr Calum Bennachie
- 53 Vienna Richards

- 54 Fairfax Media
- 55 Google New Zealand Ltd
- 56 Facebook
- 57 Office of the Clerk of the House of Representatives
- 58 Media Freedom Committee
- 59 Privacy Commissioner
- 60 Post Primary Teachers' Association
- 61 Police
- 62 Gavin Ellis
- 63 University of Auckland, Faculty of Law, Equal Justice Project: Human Rights Division
- 64 Human Rights Foundation
- 65 National Council of Women
- 66 The Screen Production and Development Association (SPADA)
- 67 The New Zealand Press Council
- 68 Radio Network
- 69 Television New Zealand
- 70 Joint Broadcasters – Television New Zealand, MediaWorks NZ, ThinkTV, SKY Network Television, Radio New Zealand, The Radio Network, Radio Broadcasters' Association
- 71 MediaWorks NZ Limited
- 72 Confidential submission

