

## **Response to Issues Paper 27: The News Media Meets ‘New Media’ from Professor Ursula Cheer, School of Law, University of Canterbury**

Congratulations on a very thoughtful and useful issues paper about a very complex area of communications, in which the legal issues arising are increasingly challenging to law makers and government.

I propose to take the very straightforward approach of attempting to answer the questions you have posed in the order you have published them starting at p 17 of the paper.

1. The answer to this is an emphatic ‘yes’! In all my discussions with community groups, colleagues, members of the media, and students, it is the news media that is still regarded as the ‘go to’ source for news. Television is still ubiquitous, probably for the older generation, as the medium in which news is located. The internet is the medium for younger people, who still take a while to acquire the news habit, however. It is another question entirely whether people trust the media as much as they did, the Leveson inquiry and the behaviour of the UK tabloid media having caused considerable damage to the trade. However, I believe that with a commitment to good and fair regulation, trust can and will be restored. The Law Commission’s look at new media fits into those worldwide developments, but fortunately, is not motivated by a betrayal of the public trust as in the UK. Therefore, NZ has an opportunity to develop balanced regulatory reform in a less intense environment. The point is, though, that people still know what news is and seek it out. The news media provides it. (This does beg the question of what is news media now, as your paper goes on to show). I do not think there are currently any reliable and authoritative alternative sources. Clearly governments should not be in control of this in functioning democracies, and although citizen journalists can provide some news, particularly images during conflict and the like, lack of training and resources mean that such coverage can only ever augment normal newsgathering activities. Although journalism is passing through a crisis of sorts currently, with many media outlets being under strain due to lack of well-trained, experienced personnel or even sufficient personnel, an increasingly extreme commercial imperative, and the growing lack of trust referred to above, many excellent journalists continue to deliver the news to us in a way that is more efficient than any other method currently on offer.
2. It is indeed still in the public interest to treat the news media as a special class of publisher, with attendant special legal privileges. The role of the media as the fourth estate is still crucial in functioning democracies. A group of hardy investigators with nous, organised around a common code of behaviour, is required to stand outside government and the private sector, and to regularly ask both what they are doing and why, and comment publicly on what it finds. As we have a social contract with governments to do things on our behalf, so we have one with media in laws that recognise media have special legal privileges provided they go about their job within the general law. In fact, I don’t think media have that many privileges. The privilege to protect sources can be overridden ultimately. There is exemption from the Privacy Act as to news

gathering activities, there are special defences for certain offences, and of course, there are strong Bill of Rights arguments which can be raised in relation to publishing and disseminating information (how much stronger these are for media than for ordinary people could be the subject of an excellent Honours paper!) So there are some, but in fact, not too many overall. That should not change.

3. The proposed definition looks workable. The use of the words 'significant proportion' may be problematic in terms of inviting argument about meaning, but I do not see that specifying a particular proportion would be an improvement, as it would lack flexibility. Similarly with 'regular'. Media hate lack of precision but I do not think it is too crucial here. I am unsure what is meant by 'opinion of current value'? Value to who? Who decides? I think the BSA codes refer to 'periods of current interest'. Wouldn't 'interest' be clearer? I note also that Chapter 4 refers to the need for accountability to a complaints body (4.174). Your question refers to publishers being accountable to a code of ethics and a complaints process. A process is not the same as a body. Any blogger could set up a process which just involved her or him looking at complaints and accepting or rejecting them. Do you mean an 'independent' process, therefore?
4. Yes, it is necessary to hold the news media accountable to some external regulator on the web as a final system of recourse if necessary. Public participation and commentary on websites is very selective. Moderation is patchy. Websites and issues on websites attract those who have a special or similar interest in them, as do different news media. Comment can be very homogenous, 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. So if there are serious inaccuracies which cause harm, media should take responsibility for publishing such material, whether it is on the web or not.
5. I do support a form of regulation for all media that is as independent as possible of both government and media. I think it is right to focus on the publication, not the medium, and so broadcast, print, online and any other form of media which appears in future should be covered by the same system as much as possible. I think the overseas models of a single regulator work reasonably well as long as their tasks do not become too big and they are properly (this means 'well') resourced. I am really not sure how independent a body set up by government statute can be. You are really describing a form of co-regulation like the BSA but you have tried to make it more acceptable to the media by emphasising its independence. This means it will all come down to the set-up stages and that independent panel you propose. Yes, of course the appointment process should be rigorous and the panel independent, but just who gets to appoint the panel? I think NZ is so small, whoever is appointed to the panel and whoever is ultimately appointed will be subject to criticism as representing some interest or other. So I suppose the important thing to aim for is as much transparency as possible in the appointments process as well as in the functioning of the regulator itself.

The idea of having a majority of members outside the industry and representing the public is a good one but members of the public often lack legal expertise. How are the members to be guided? Is there to be a Chair and who should that person be? Bodies such as these have obligations as to applying the Bill of Rights that are increasingly being focussed on by the courts, though extreme formality in decision making is quite appropriately not required. Where is that expertise going to come from for the members? I do agree, however, that ponderous legalistic process must be avoided.

I assume the industry members will include new media representatives? They may not be seen as belonging to 'the industry'.

Funding will certainly be an issue. It will be crucial. 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.

I agree the body should have a complaints, as well as a monitoring process. It should also have an educative role as well. I think the Classification Office has done this well in the past.

There should certainly be a right of appeal from the body's decisions.

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. I think the paper currently pussyfoots around this issue. It does not think sanctions should be prescribed but suggests strongly that take-down, apology, correction right of reply and retraction are necessary. If these are not in the statute, how can their use be guaranteed? If they are considered necessary, why are they not to be in a statute? Relying on the law of contract is clumsy, and could create another whole layer of expense and delay which would not serve the system.

A power to grant modest compensation is a good idea, as are costs. These should also be in the statute. 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.

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.

6. I think all the standards suggested in the paper are still important although I have reservations about the final one, - good taste and decency. These sorts of complaints are becoming more and more difficult to adjudicate and rightfully harder to make a successful complaint about. Any regulatory body upholding such complaints is often open to attack for making subjective judgments. I think calling them 'good taste and decency' complaints is misleading now and the phrase is very loaded. So I suggest that the standard should be relabelled along the lines of 'Inappropriate or distressing content' with appropriate guidelines referring to sex, violence, hate speech and exploitation, and material containing offensive language. The guidelines would also include the need to appropriately select time of broadcast. However, they should not allow complaints about blasphemy unless true hate speech is involved.
7. I do not believe the facility for others to comment and participate in the news process online alters the need for the standards referred to in 6. above, for the reasons outlined at 4. above.
8. See 4. above.
9. Yes, non-traditional publishers like bloggers should be treated as news media where they wish to undertake news reporting and commentary on news affairs – so long as they fit the definition suggested in the paper. They will essentially then be recognised as news media and will be behaving like it in the sense of having established some form of self-regulation, which is to be encouraged.
10. I do not favour voluntary entry into the regulatory system. I support a form of compulsory membership because I believe the commercial incentives to avoid regulation if possible are very high and will not dissipate in the future. In NZ, magazines have resolutely remained outside membership of the Press Council and I am convinced broadcasters would have abandoned the BSA long ago without the statutory imperative. It is in the nature of a robust press to throw off the shackles if possible. So I think the regulatory system should apply in the way suggested in 6.113.

It follows that I do support the setting up of the system by statute.

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

11. Yes, I do think that there are serious speech abuses on the internet which cause harm and are difficult for people to remedy. Here are some examples brought to me in my work:
  - a. A young woman severely distressed and needing counselling after her ex-boyfriend maliciously published intimate photos of her on the internet after the relationship broke up. The photos had originally been taken with her permission.
  - b. A young woman who had been secretly filmed in her bathroom by a male flatmate discovered the images on his laptop. He was convicted under the covert filming legislation and fined, but later bragged about the whole incident in social media, and gloated that the penalty was minor. This young woman was prepared to sue using the privacy tort, but this requires a court to extend the tort to situations where the information has not been published widely.
  - c. A young woman distressed at being interviewed by media after the Christchurch earthquakes and then being misreported, together with use of material from her

Facebook page, without permission. The Press Council only endorses payment of a small fee for breach of copyright in such circumstances.

12. Systems of online reporting are a good idea as a first level of recourse for those who are harmed online. Some moderators of online communities are very responsible and responsive. However, once again, this is very patchy. Such moderators are obviously very responsible in the first place, in setting up such processes. It is those who don't care, or who are actively irresponsible or malicious who are more likely to cause harm and to resist any request for take-down. The law should address those as being more likely to cause damage.
13. The law does have gaps at present in dealing with such issues. I give real examples at 11. above.
14. I do indeed support the idea of alternative methods of providing speedy and efficient remedies for those harmed by speech online. I do tend to think, however, that the criminal courts are the right place to deal with crimes. So if there are gaps in the criminal law, they should be plugged and prosecuted if possible, especially if they are serious. And if an offence is very minor, it should not be prosecuted. It does appear sometimes the criminal law is inadequate, however. The young woman I described above who was filmed by her flatmate was in that position. She was forced to use the civil law of privacy and faced an uphill battle doing so. So perhaps the law needed to change to allow greater penalties for that offence. I am unclear how the tribunal would work in her case. Her case was prosecuted. The state had done its duty. Why should there be a further right based on the criminal behaviour to go to a tribunal? What about double jeopardy? And why should some people who are the victim of criminal offences involving communications also be entitled to seek compensation when victims of other crimes may not be? Overall, I do not think criminal behaviour should be dealt with in this way.

But dealing with civil unlawful behaviour in this way may be a good idea. In fact, media, more than members of the public, have been suggesting a sort of tribunal to me for years, with defamation and privacy in mind. Such an idea is clearly emerging from the Leveson Inquiry in the UK also, so the ideas being mooted there are very useful. Low level resolution of such disputes is desirable. I suspect, however, there will be no commitment at government level to both a regulatory body and a low level tribunal. I think there is a great deal more work to be done on the latter, but why not look at giving such powers to your suggested regulatory body – combine the two?

**Ursula Cheer**