

This submission is from David Farrar. I am the owner and editor of Kiwiblog. I also write regular columns for the NZ Herald and Stuff websites, and have commented on both political and technological issues for most major New Zealand media outlets.

I am also a former Vice-President of InternetNZ, chair their policy advisory group and am a director of the .nz Domain Name Commission Ltd. I do not speak for either InternetNZ nor the DNCL.

My responses to the questions asked by the Law Commission are below. I hope they are useful, and look forward to further engagement in this area.

David Farrar

Q1 As a society, do we still depend on the news media to provide a reliable and authoritative source of news and information about what is going on in our country?

Yes, but with increasingly less reliance on traditional media such as broadcasters and print media. There are now numerous sources of news and information about New Zealand. The media are the most important source, but not the only one.

With the advent of the Internet, citizens now have access to a huge amount of information that was unthinkable 20 years ago. You can watch Parliament live, or read a transcript of it within hours. You can see press releases from newsmakers at websites such as Scoop. You can search for and locate source reports referred to in the media.

Q2 Currently our law gives the "news media" special privileges and exemptions in recognition of the important role it plays in a democracy. Is it still in the public interest to treat the news media as a special class of publisher, afforded special legal privileges?

Yes, as 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.

A couple of examples I will offer. Treasury has allowed bloggers into their Budget lockups, where they deem the site to have legitimate reasons for access. Likewise some court registrars have allowed bloggers to report from the media bench. It would be undesirable if in defining news media in future, government (and other) institutions adopted a policy of not extending any access to persons or organisations that may still provide a genuine service in terms of information sharing.

Certain legal privileges such as Privacy Act exemptions are probably not extendible on a case by case basis, but most privileges are. I note with approval the recent law change around court access, and that discretion was given to Judges to allow non-media to remain, if convinced of legitimate need.

There will always be some people and organisations that undertake news reporting activities which are of public value, yet will not qualify legally as news media. The law, and the practice of government entities, should not seek to frustrate them.

Q3 Few of the Acts which give the news media special legal status actually define what is meant by “news media.” Do you agree with the following definition we have proposed?

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

The definition tends to be geared more towards organisations than individuals, and may not cater for freelance media.

The requirement that a significant proportion of their publishing activities must involve the aggregation of news, info and current affairs could arguably disallow some current media. Perhaps “non-trivial” would be a better test.

The requirement to have regular publication could also be problematic, if a narrow definition of regular is used in interpretation. An annual publication is a regular publication while a publication that comes out two or three times a year could be deemed ir-regular.

Q4 Because the news media depends on public trust, and can exercise considerable power in society, it has traditionally been held accountable to higher ethical standards than other types of publishers. In the web environment, with its facility for public participation, instant feedback and moderation, is it still necessary to hold the news media accountable to some external regulator?

It is debatable that the onset of the Internet has reduced the power of traditional media, and if media get facts wrong (for example), they are already held up to scrutiny and correction by others.

However at this stage the media still have significant enough power, that some external accountability is desirable.

Q5 If you think it is in the public interest for the news media to continue to be subject to some form of external accountability, what is the most appropriate form of regulation?

- **Is there still a case for treating broadcasters differently from other publishers, continuing to make all broadcasters subject to Government imposed regulation, as is the case at present?**
- **If you think that media convergence means there is no longer a strong case for treating newspaper publishers and broadcasters differently, then what is the most appropriate form of regulation for the news media?**
 - **State regulation, with standards and sanctions set out in legislation?**
 - **Some form of independent regulation such as we propose where neither the government nor the news industry controls the regulator?**
 - **If you support the independent model we propose, should membership be entirely voluntary or compulsory for some publishers?**

I do not believe there is a case for broadcasters to be treated differently from other publishers. It is silly that broadcasters with tiny influence such as Stratos TV or a local radio station with a few thousand listeners are subject to a more punitive regime than major daily newspapers.

There is arguable a case that one differentiates media on the basis of their reach, ie number of listeners, readers or subscribers. That is more logical than the medium used.

In terms of the type of regulation, I think state regulation of the media, including new media, would be a very bad development for New Zealand. There is an inevitable tension between the Government and the news media, as the media help hold the Government to account. Having the same Government decide who qualifies to be media, and appoint the people who hear complaints against media is a significant conflict of interest.

While we are fortunate in New Zealand to have had relatively benign Governments, there are plenty of examples from other countries about the threats to press freedom from Governments that do not like media they see as hostile to them.

An independent regulator is desirable, and I agree independent from both the Government and media organisations also. I believe the regulator should be an independent incorporated society whose role is not just to regulate, but to be a professional organisation of journalists. However the complaints process be independent of the membership. The majority of members of the complaints body should represent the public interest. The method of appointment will be a crucial detail.

My preference is for the regulator to be financed purely by the industry. If the Government partially funds the regulator, it gives them a degree of control over it.

The regulator may naturally want to not displease the Government in case their funding is affected.

Broadcasters currently fund around half the BSA, and the print media fund all of the Press Council. I do not believe a combined regulator would necessarily cost the media significantly more money. Arguably the broadcast media would not find paying slightly more than they do at present untenable, if it is in return for having an independent regulator, rather than a Government controlled one. I would propose a membership fee based on revenue.

In terms of membership of the regulator, I believe it should be voluntary for all publishers. Of course a media organisation that decided not to subscribe, would not necessarily enjoy all the legal protections afforded to news media, but they should be able to decide for themselves whether or not to continue on without those legal privileges or protections.

If there is compulsion, then it should only apply to the very largest publishers, who have concentrated power.

Q6 Traditionally, the standards to which the news media have been held accountable have dealt with the following matters:

- **Accuracy;**
- **Fairness and balance – ensuring for example that news is not deliberately distorted through the omission of important facts or viewpoints;**
- **Respect for individuals' rights to privacy;**
- **A commitment to public interest rather than self-interested publishing;**
- **Transparency; ensuring conflicts of interest are declared;**
- **Good taste and decency; ensuring the general public is not offended by the gratuitous publication of offensive content.**

In general yes, however accuracy needs to be seen in light of a 24/7 news cycle, that initial early reports may have inaccuracies, and what is important is correcting them as early as possible.

I think the standard around good taste and decency is important in some mediums, but less so in others. There is a difference between a newspaper where if you want to read one story, you must access the entire newspaper, and a website where content can be given a warning over taste and decency, and people have to specifically click to get past it.

The standard of fairness and balance is appropriate, but may be viewed differently in different mediums.

Q7 Do the internet and the facility for others to comment and participate in the news process change any of these standards?

Yes, to some degree. Issues such as balance can be mitigated by the ability for competing viewpoints to be seen attached to the main article. In a newspaper the only voice heard is that of the journalists. Likewise in a broadcast, any content is controlled by the broadcaster. The medium of the Internet allows other voices to be heard, both within the one website, but also through criticism on other sites.

Q8 Should all news media be accountable to the same standards irrespective of the medium in which they publish? Or is there a distinction to be made between content which is broadcast to mass audiences simultaneously and content which is accessed by individuals on demand?

I believe different standards should apply to different mediums. I offer an example. One or more newspapers ran a story about the Waitangi Day pub crawl in London. The story that appeared in the print edition was unbalanced, quoting one sole complainant. It gave the impression of the pub crawl which was inaccurate, with some facts wrong such as the timing of events.

The website version of the story had the same flaws initially. However during the day as more information came to light, including comments from police supporting the pub crawl's behaviour, the nature of the story changed dramatically to one far more balanced.

I believe it would be quite appropriate for the newspaper version of the story to be judged a breach in standards. The one off nature of publication demands higher requirements for accuracy and balance. The nature of Internet publishing being self-correcting (the story was attracting much criticism elsewhere) led to the story becoming more accurate without need for regulatory action.

Q9 Is there a case for extending the news media's legal privileges to non-traditional publishers, such as bloggers, who wish to undertake news reporting and commentary on public affairs?

Yes, but not just bloggers. Blogging is just one form of publication on the Internet. This should be on an opt in basis only.

An associated question is whether the privileges of media extend to online activity by journalists. What is the status of a journalists' twitter account? Is that required to be balanced? Are blogs by journalists any different to an opinion column?

Q10. If so, is it reasonable to expect those non-traditional publishers wishing to access these legal privileges reserved for the news media to be also be accountable to standards and an external body?

Yes, but as I note in Q2, those non-traditional publishers that do not wish to legally be classified as news media, should not automatically be restricted from access to certain things, if they are still serving the public interest. The distinction between those who are legally defined as media and other publishers should not be seen as a bright line, but more a continuum.

Q11. How serious a problem do you think speech abuses are on the internet? e.g. cyber-bullying and harassment, harms to reputation or invasions of privacy.

I think the problems are not insignificant. While all these things happened before the Internet, the Internet has for some magnified the impact of it, and allowed such speech to happen anonymously.

Q12. How effective are the non-legislative remedies that operate within online communities, including the systems of online reporting employed by social media sites such as Facebook?

Generally they are effective, but there are limits to this effectiveness. The sheer volume of comments made on some Internet sites means that any action has to be complaint driven.

Many sites are operated by US companies, and their policies reflect US law.

Also while some material can be easily deemed unacceptable, such as death threats, it is not generally within the competence of site owners to determine if allegations made are true, or if something is defamatory.

It is also worth noting that some people will try to complain to site owners about comments made which portray them in a bad light, and that it is in the public interest to have those comments publicly available. Malicious allegations can become a form of censorship, and this is a growing problem.

Finally there are of course some sites, which have no policies at all about acceptable content, and do not police their content in any way. These may be in countries with little legal incentive to be otherwise. However they are globally accessible. Hence any action taken in NZ, can be of limited impact.

Q13. Do you think the law is currently able to deal adequately with these sorts of damaging speech when it occurs on the internet?

No, but that does not mean any new law will better deal with this sort of damaging speech, in light of the global nature of the Internet. Any new law should also take into consideration the potential chilling effect of malicious complaints.

Q14 Do you support the idea of an alternative tribunal able to provide speedy and efficient remedies for those who have been harmed by a criminal offence on line?

The suggestion is made that “there should be a statutory power in the courts to make take-down orders, or cease-and-desist orders, and whether such a power should be available against avenues of communication such as ISPs or website hosts, even though they themselves are not legally parties to the wrongdoing”

So long as the basis for decision making by the courts is based on existing law, and that there is natural justice and due process, such a power could be useful. ISPs and content hosts do not wish to decide for themselves what constitutes (for example) harassment, but will happily obey court orders.

There is some merit to the proposed Communications Tribunal. However my observation of the behaviour of some individuals on the Internet is there is significant potential for a small minority to use such a tribunal to relentlessly complain about people or sites they disagree with. There would need to be significant disincentives for this to not occur. At a minimum all complainants should have to fully identify themselves.

I struggle with the idea of a Tribunal having the power to order publication of an apology or even a correction, against the wishes of a publisher. I also think it would be dangerous to let anybody less than a full court make takedown orders.

What I would suggest as an appropriate role for a Tribunal is the proposed ability to declare that statements made about a victim are untrue. This is what most genuine victims want – their reputations cleared. A Tribunal with such a power could in fact provide an innovative alternative to defamation proceedings which have long been beyond the ability of most victims to fund, and in the Internet age has also become somewhat counter-productive.

I would propose merging the proposed Commissioner and Tribunal models, so you have a Tribunal with the investigative powers of the proposed Commissioner, but its power is limited to finding of fact. The nature of the Internet where the more something is linked to, the higher it rises in search engines means that these finding of facts would be the best remedy to harm caused by false statements.

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