

Government Response to Law Commission report on

*The News Media Meets “New Media”: Rights,
Responsibilities and Regulation in the Digital Age*

Presented to the House of Representatives

GOVERNMENT RESPONSE TO LAW COMMISSION REPORT ON

THE NEWS MEDIA MEETS “NEW MEDIA”: RIGHTS, RESPONSIBILITIES AND REGULATION IN THE DIGITAL AGE

Introduction

The Government has carefully considered the Law Commission’s report, *The News Media Meets “New Media”: Rights, Responsibilities and Regulation in the Digital Age*. The Government welcomes the report, which has thoroughly investigated the impact of technological convergence on the news media, and proposed a single regulatory regime.

The Government responds to the report in accordance with Cabinet Office circular CO (09) 1.

The Government response is not to give effect at this time to the Law Commission’s proposal for a new regulator for all news media, but to observe the further impact of technological convergence on the news media, and the news media’s response to it. The Law Commission’s proposal will be kept in mind as a highly developed option to address any difficulties presented by media convergence.

Executive Summary

The Law Commission’s Report (the Report) reviews the impact of technological convergence on the news media and the current regulation of news content. The Report also considered the definition of “news media” for the purposes of the law in an era when anyone with an internet connection can disseminate news and opinion.

The Report concludes that a new independent body should be created to regulate standards and receive complaints across all news media. The new independent body would replace the current medium-based regulators.

The Report includes 32 recommendations for changes required to establish the new converged standards body. There are an additional two recommendations regarding a review of the regulation of entertainment content.

The Government response thanks the Law Commission for the Report and notes that the Government’s preference is not to make any statutory or institutional changes at this time and to continue to observe how issues of technological convergence are dealt with by the news media. The response notes that the Law Commission’s proposal will be kept in view as a highly developed possible model should reform be considered necessary at a later date.

The Government response also notes that the maintenance of a free and independent news media is central to New Zealand's democracy.

Law Commission report and Government response

In relation to the news media the Law Commission was asked by the previous Minister of Justice to address:

- 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.

The Law Commission was at the same time asked to address the question, “whether the existing criminal and civil remedies for wrongs such as defamation, breach of confidence and privacy are effective in the new media environment and, if not, whether alternative remedies may be available?”. The Law Commission was subsequently asked by the Minister Responsible for the Law Commission to fast-track work on this third question. As a result, the Government in March 2013 announced several measures to tackle cyber-bullying and other harmful communications. This response, therefore, does not consider the Law Commission's proposal regarding harmful digital communications, as the Government has already made decisions on these matters.

The Law Commission's proposal

The Report looks at issues raised by media convergence, in which news content is subject to different regulatory regimes, depending on the medium by which it is carried. The Law Commission also looked at how to define “news media” for the purposes of law in an era when anyone with an internet connection can disseminate news and opinions.

Unlike the reviews that have occurred recently in the UK and Australia, the Law Commission's review was not driven by a crisis of confidence in the mainstream media. It does not suggest that the integrity of the status quo is in question, although it regards the current regimes as fragmented and as falling behind developments in technology. The review considered whether the development of new, less formal kinds of media provider provided an opportunity to rationalise the differing regulatory regimes.

The Law Commission recommended the creation of an independent body, not established by statute, that would regulate standards and receive complaints across all news media. This new body would assume the functions of the Press

Council, the Broadcasting Standards Authority (BSA) (in relation to news and current affairs) and the new Online Media Standards Authority. “News” would 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” (recommendation 3). A majority of the body’s complaints panel, and of an appeals panel above it, would be drawn from outside the media.

The new body’s functions would be to: “formulate a code of practice”, which would be reviewed regularly; “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” (recommendation 12). The standards proposed by the Law Commission that the code of practice would cover would be broadly similar to those currently applying to news and current affairs under the statutory broadcasting standards regime, although without the requirement of balance in the treatment of topical issues that is a feature of the broadcasting standards. These standards would have no statutory basis.

The Law Commission also recommends that “complaints about unethical conduct should also be accepted for adjudication even if the code does not contain any express provision about such conduct”, an innovation compared with the broadcasting regime. The body would also conduct research into public attitudes and publish “advisory opinions” (recommendation 19).

The regulation of content other than news and current affairs (“entertainment” content) would remain with the BSA and the Office of Film and Literature Classification, although the Law Commission recommends that this area of regulation also be reviewed. In respect of good taste and decency and the protection of children in news and current affairs content, jurisdiction would be shared between the BSA and the new body.

Membership of the new body would be voluntary, but only those who submitted to its jurisdiction would be able to access the current privileges and exemptions offered to the news media under law. Membership would be available to persons or entities publishing regularly, where “a significant element” of their published output was news. Those that mainly aggregate news produced by others would be covered, but not entities that only provide the infrastructure for others’ content (such as Facebook, Google or Twitter). Members of the body would be bound by contract to contribute to its funding and to abide by its powers and the complaints process. The Law Commission proposes that some state funding would be provided, but not for the main complaints function.

The body would have the power to require apologies, corrections, deletion of content, and a right of reply for complainants, but not to issue fines (unlike the BSA, which can also award costs in some circumstances). Membership could be

suspended or terminated “in the case of persistent or serious non-compliance with the standards or with the decisions” of the regulatory body.

Further recommendations deal with a proposed method for establishing the new body, a process that would precede any review of the regulation of the remaining, “entertainment” content that would fall outside the body’s jurisdiction. The Law Commission concludes its report by recommending that a separate review of the regulation of entertainment be carried out, examining both the Broadcasting Act 1989 and the Films, Videos, and Publications Classification Act 1993.

Comments on the proposal

The commentary below provides the Government’s views on the key aspects of the Law Commission’s recommendations. There are important considerations to be weighed up in deciding whether major legislative or institutional change is warranted.

The Law Commission’s recommendations provide an integrated package of reforms specifically designed to address the issues presented by media convergence in the realm of news. All of the recommendations to do with the news media fit together to create a system for regulating news media in the digital age. While some ideas within the Report could be adapted as improvements to current regimes, it is not possible to pick and choose only some of these recommendations to progress as proposed.

The proposal provides a voluntary regime for the “currently unregulated news media” referred to in the terms of reference for the Law Commission’s review, such as bloggers and other online commentators. At the same time it would repeal the statutory basis for broadcasting standards. This regime would require extensive legislative change to implement, principally to Parts I and II of the Broadcasting Act 1989, secondarily to several Acts that include a definition of the media in order to confer rights and privileges. (These include the Privacy Act 1993, the Fair Trading Act 1986, the Electoral Act 1993, the Human Rights Act 1993 and legislation relating to courts.)

Some currently unregulated elements of the media might still prefer not to belong to such a regime, and to forgo the legal privileges that membership would provide. The alternative, which the Law Commission considered but rejected, would be statutory compulsion. As the Law Commission acknowledges, where media entities chose to remain outside the regime, the public would still have recourse to the general law, which establishes minimum standards. However, the general law may not provide the specific and timely remedies that could be provided under a regime designed specifically to regulate the news media. At present, “new media” entities can seek to come under the jurisdiction of the self-

regulating Online Media Standards Authority, which commenced operations on 1 July 2013.

The proposed system thus might not entirely address the problem, inherent in the status quo, of “new media” players potentially failing to observe what are commonly held to be desirable standards and of public doubt as to which entities are subject to regulation. It might nevertheless be worth establishing as a way of rationalising the current divided system in which different types of news media using the same platforms are subject to different standards (the Press Council and the Broadcasting Standards Authority, for example). The Government would need to be satisfied, however, that this model of reform would be preferable both to the status quo and to other options.

A regime only for news?

First, it would need to be established whether a single regime that dealt only with news and current affairs was superior to the status quo, in which all kinds of broadcast content at least (though not all content placed online by broadcasters) are subject to the same standards regime, and both the printed and online content of newspapers and magazines are covered by the jurisdiction of the Press Council. Establishing a single regulatory body for news would address technological convergence in relation to one kind of content, but it would do so at the cost of introducing a new division in the regulation of content, between news and “entertainment”.

The split between the regulation of news media and of “entertainment” raises important issues that may warrant further investigation, as the lines defining these media are becoming more fluid and questions of genre – what kind of content is it? – increasingly complex. If convergence, the use of the same technical platforms by different types of media, puts the existence of different regulatory regimes in question, the solution in the longer term might be to adopt a single system for all content. In light of this, if any major statutory or institutional changes were to occur, it would seem prudent that the regulation of all content was considered concurrently, so that the relative advantages of regulating all as opposed to parts of the total media output could be compared. A single regime for all content would entail even more extensive legislative reform than the Law Commission’s proposal, as it would bring into scope the range of content that comes under the Films, Videos, and Publications Classification Act 1993.

The Law Commission’s view in its report is that standards that tend to give rise to complaints in relation to entertainment content in broadcasting, film and other media, such as good taste and decency and children’s interests, should be the responsibility of the state, while news and current affairs should be regulated independently of the state. Where such standards are breached in news and current affairs, the Law Commission recommends that jurisdiction be shared between the proposed independent body and the BSA, with the different

standards being administered by the different bodies. This could, however, be an awkward outcome, as it would introduce a new kind of fragmentation – by standard rather than by medium. As the Law Commission’s report notes, the good taste and decency standard was one of the three standards, along with accuracy and fairness, most often cited in complaints to the BSA about news and current affairs during 2010/11, a typical year.

The desirability of creating a permanent split between “news” and “entertainment” needs to be considered before a decision can be reached on how to regulate news media.

A single regime for broadcast and print media news?

The expectations of the public would also need to be taken into account in considering a major reform of content regulation such as the Law Commission has proposed. To detach the regulation of broadcast news from any statutory basis would be a significant step. Before taking such a step it would be necessary to assess whether broadcasting retains a distinct role in society, compared with other media. For example, broadcasting has for the most part traditionally played a non-partisan role in relation to news and commentary in New Zealand. This, as much as concerns about decency or children’s interests, is an historical reason for the existence of statutory broadcasting standards, including the requirement of balance. This non-partisan role may help to explain the relatively high levels of public trust enjoyed by broadcast news, as found by the Law Commission in a survey conducted as part of its review. The print media, while not as politically partisan as in some other countries, has traditionally regarded itself as freer to take an editorial stance and advocate for or against particular policies and reforms.

Statutory regulation of broadcasting content remains the practice in comparable countries, such as Australia, the United Kingdom or (for appeals) Canada. New Zealand’s approach, in which broadcasters deal with complaints in the first instance and collaborate with a statutory regulator to develop codes based on statutory standards, would generally be classified as co-regulatory and is in the mainstream of international practice. The Government would need to decide whether, and at what point, it wished to adopt a substantially different approach. As the Law Commission notes, many countries are assessing the impacts of convergence on regulatory frameworks. As suggested below, international trends in media regulation should be closely watched in this fast-changing area.

The issue of independence

In recommending that the proposed news regulator be a non-statutory body, the Law Commission put forward the need for it to be independent from Government influence, real or perceived. The Government affirms that the maintenance of a free and independent news media is central to New Zealand's democracy. It is noted that Crown Entities established under the Crown Entities Act 2004 can exercise a high degree of independence. The BSA is an Independent Crown Entity, as are other agencies that play an investigatory or quasi-judicial role. In addition, as the Law Commission notes in its report, state-funded public broadcasters in comparable countries possess statutory independence; the same is the case in New Zealand.

Therefore, it may still be possible for the news media itself to exercise a high degree of independence even when regulated by a body that is established under statute. We acknowledge that, as it notes in its report, the Law Commission received media and academic submissions arguing the contrary: that any state involvement in media regulation was antithetical to the role of the news media in a democracy as a watchdog on the exercise of public power. We also note that the office of the Ombudsman has a clear and entrenched statutory independence from Government. Statutorily established independence is already proven to be robust both in the broadcasting sector and in other, quasi-judicial bodies.

Adopting a standard definition of "news media"

The Law Commission recommended a standardised definition of "news media" to apply across the statute book. The proposed definition would ensure that only those news producers who are subject to a code of ethics and the new independent complaints body would be able to access the statutory privileges currently available to the news media. This proposal requires legislative reform and would need to be considered against other competing Government priorities.

Under the Law Commission's proposal, news producers who do not wish to sign up to a code of ethics and a nominated complaints body could lose legal privileges that they currently enjoy. For example, the Privacy Act 1993 currently confers privileges on the "news media" regardless of whether they are subject to a code of ethics and a complaints body. Those who did not sign-up to a complaints body would lose these protections. The net effect of this recommendation on press freedom would need to be carefully considered.

Harmful digital communications

As noted, the Government is committed to advancing the "harmful digital communications" reforms proposed by the Law Commission. It intends to

introduce a Bill giving effect to these reforms later this year. It may be desirable to allow the legislative changes arising from the harmful digital communications proposals to take effect before assessing any further interventions, as experience with the new law may offer lessons for the regulation of new media in other contexts.

The sequence of reform

As noted, the Law Commission has recommended that the regulation of “entertainment” also be reviewed. The Law Commission also notes inconsistencies in this field and a regime struggling to keep up with technological change. At this stage, we are not convinced that it is desirable that such a review be carried out independently of, or subsequent to, changes to the regulation of news media. Establishing an independent news regulator would leave the Broadcasting Standards Authority, already a compact, lean agency, with a greatly reduced workload. (Complaints about news and current affairs, other factual programmes and talk-back radio typically make up more than two thirds of the total number it receives each year.) Potential consolidation of roles with another agency, such as the Office of Film and Literature Classification, would need to be considered. Prior decisions would need to be made as to:

- whether news should in fact be regulated separately, and
- whether broadcast news and/or other broadcast content should cease to be regulated on a statutory basis and by a Crown agency.

The answers to these questions are fundamental to any reforms and would produce different consequences for the regulation of entertainment.

Conclusion

The Law Commission has produced an excellent report that proposes an innovative solution to the universal challenges presented by media convergence. At the same time, as noted above, it may only offer a partial solution to the problem posed by unregulated “new media” entities. It is also arguable whether technological convergence in itself has dissolved the traditional roles and distinctions between the print and broadcast media. As noted, the Law Commission is not suggesting that the conduct of the print media has been such as to call into question the integrity of the Press Council’s self-regulatory approach to standards. The status quo does exhibit anomalies but does not present a pressing problem, and it might be difficult to achieve the commitment of all parts of the news media to the voluntary but independent regime proposed by the Law Commission.

The Government's preference at this stage, therefore, is to keep the Law Commission's proposal in view as a highly developed possible model, but to continue to observe how issues of convergence are dealt with by the news media in the interim. The Government encourages the industry to continue to develop its own solutions to the difficulties presented by convergence. We note the recent establishment by some industry members of the Online Media Standards Authority, as a good example of the industry taking its responsibilities seriously. The Government would welcome industry continuing to align standards and complaints processes to the extent possible within existing frameworks.

At this time, therefore, the Government prefers inter-agency coordination over statutory and institutional change and has requested that officials actively monitor this continually evolving area and the response of industry to the challenge of convergence. In particular, officials will observe the extent to which the news media adopts improvements proposed in the body of the report by the Law Commission in its critique of the status quo. Some of these can be implemented without establishing the full regulatory model proposed by the Law Commission and have been favourably received by the print media. In the interim a discrete package of reforms in response to current problems with harmful digital communications will be progressed.

The Government will also continue to keep a watchful eye on international developments in media regulation. It will also have an ongoing dialogue with industry.

We note that the Government had decided that certain recommendations from two previous Law Commission reports were best considered in the context of this Government response. It was decided that recommendations 38 and 39 of the Law Commission's report on the Privacy Act and recommendation 74 of the Law Commission's report on the Official Information Act should be considered as part of this Government response.¹ These recommendations relate to defining "news medium" or "news media". As we have decided not to progress the Law Commission's proposal in relation to the news media we have also decided not to progress the above recommendations from the reports on the Privacy Act and Official Information Act.

¹ See *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* and *The Public's Right to Know: Review of the Official Information Legislation*.