SUBMISSION TO THE SENATE STANDING COMMITTEE ON ENVIRONMENT AND COMMUNICATIONS

MEDIA REFORMS PACKAGE

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INTRODUCTION

I thank the Committee for the opportunity to make this submission. It is made in my capacity as a Senior Research Fellow in the Centre for Advancing Journalism at the University of Melbourne, but the views expressed are entirely my own and do not purport to represent those of the Centre or of the University. I should also declare that I was engaged as a consultant to the Independent Inquiry into the Media and Media Regulation (the Finkelstein Inquiry).

I would be available to appear before the Committee and answer questions about this submission if required.

SCOPE

This submission is addressed to only the following parts of the package of changes to media laws proposed by the Government in the week beginning 11 March:

The *News Media (Self-Regulation) Bill 2013*.

The *Public Interest Media Advocate Bill 2013*.

ISSUES

The issues canvassed in this submission are:

1. Media as an institution of democracy
2. Media accountability and regulation
3. Independence of the Public Interest Media Advocate (PIMA)
4. Structure of an effective media accountability system
5. Criteria for declaring a news media self-regulatory body
6. The question of standards

1. Media as an institution of democracy

A liberal democracy cannot function without a free media to give practical effect to the right of individual citizens to free speech. It is the means by which information, ideas and opinions are exchanged among the people. For current purposes, the reasoning of the High Court of Australia in Lange v the ABC (1997) will suffice to illustrate the point:

> Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the Members of the House of Representatives and the Senate shall be "directly chosen by the people".

The High Court went on to note the centrality of the media in supplying the means by which that freedom of communication was given practical effect in a modern democracy.

While the High Court confined itself to the specific field of government and politics, the point holds for all the information, ideas and opinions that an individual citizen needs to participate in political, social and economic life. It is a major institutional function of the media to supply those needs.

The media has a further institutional function, that of holding to account those who are in positions of power: the "Fourth Estate" or watchdog function. Those loci of power held to account by the media include government.

In order that this function may be performed credibly and vigorously, it is essential that the media be independent of those over whom it keeps watch, including government.

2. Media accountability and regulation

The freedom and independence necessary to the effective institutional functioning of the media as described above is in no way inconsistent with the requirement that the media itself be accountable for its performance. The media is a locus of power in its own right, and like all others in positions of power, it owes accountability to the public.

The media's attitude to being made accountable has habitually and historically been a mixture of arrogance, contempt and promotion of naked self-interest. It deploys various well-worn arguments: that accountability somehow impinges on press freedom and freedom of speech; that the media is accountable to its readers and audiences; that the media itself is in the best position to be judge and jury in its own cause.

The debate – if it may be dignified with the term – since the Government announced its package of media measures in the week beginning 11 March 2013, has been long on free speech and short on accountability.

There is a point of principle here: in a liberal democracy the public is entitled to hold those in power to account. The media is a power. It should, as a matter of principle, be held to account.

Moreover, public trust in the media and in the profession of journalism is low in Australia. The Finkelstein Inquiry presented 45 years' of data saying so. When an institution that is so central to a democracy is held in low public esteem, the institution is weakened and so is the democracy. Trust is built on performance, on accountability for performance and on transparency of process in assessing performance.

It follows that the Australian polity as well as the media as an institution would be strengthened, not weakened, by a transparent, independent mechanism of media accountability.

In my submission, this is best achieved by self-regulation underpinned by statute, which is what the Government proposes. I therefore support the Government's proposals in principle. However, the detail causes me, with regret, to speak out against them.

3. The independence of the PIMA

The mechanism proposed by the two pieces of legislation, taken together, fails the test of independence.

The PIMA is to be appointed by the Minister, and the PIMA will have power to "declare" whether a particular body is suitable for the purpose of media self-regulation. The PIMA can be re-appointed or not re-appointed. The PIMA's appointment can be terminated by the Minister for "misbehaviour".

The PIMA holds office on terms and conditions not necessarily disclosed in the legislation that may be determined by the Minister. The PIMA is to be dependent on the Department of Broadband, Communications and the Digital Economy for resources. There is no mention of an independent budget. All this pIaces the post of PIMA in an administratively weak position, and in thrall to the Minister.

In the face of these weaknesses, the clause of the Bill saying the PIMA is not subject to direction of the Minister is unconvincing.

The PIMA should be appointed at arm's length from government, for example by a process similar to that used for appointments to the Board of the Australian Broadcasting Corporation. The PIMA should be an office of the Parliament, with its own budget and security of tenure. Removal procedures should be commensurate with those for other offices of the Parliament such as the Auditor-General.

For the reasons set out above, I regret that I cannot support the proposal for the PIMA in its current form.

4. Structure of a media self-regulation system

The News Media (Self-regulation) Bill opens up the possibility of multiple self-regulatory bodies. It is possible that each newspaper company could have its own. This is absolutely absurd. What does a person do who has complaints against multiple newspapers? Complain to each in turn? How will consistency of standards be achieved and, more than this, how will consistency of outcomes be achieved?

Fragmentation is already the bugbear of media regulation in Australia: the Press Council for newspaper publishers; the ethics panel of the Media Entertainment and Arts Alliance (MEAA) for unionised journalists (but not others); the Australian Communications and Media Authority (ACMA) for broadcasters.

The proposed structure represents fragmentation on stilts.

There should be one, and one only, self-regulator, as recommended by both the Finkelstein and Convergence inquiries. And – also as recommended by them – it should cover print, broadcast and online news and current affairs.

Aside from the simplicity of such an arrangement, with corresponding benefits for public visibility, ease of public understanding, and operational consistency, it would liberate broadcast news and current affairs from the system of government licensing. It is wrong in principle that any news and current affairs media should be subject to government licensing. It was done away with in respect of newspapers in the seventeenth century, and survives only as a relic of early broadcast technology coupled with political reluctance to relinquish control over something politicians should not have control over in the first place.

For these reasons, and once again with great regret, I find myself opposed to the detail of an approach that I support in principle.

5. Criteria for declaring a self-regulatory body

If there were to be one self-regulatory body only – even if just for print media – then much of the detail in Section 7 (3) of the Bill could be done away with, and in its place could go a simple formula:

- The standards of ethics and practice of the new body should be at least no less stringent than those of the Australian Press Council and the MEAA.

- The procedures for investigating complaints should be at least no less rigorous than those of the Australian Press Council, but should be conducted in public wherever possible.

- The self-regulator should have the power to conduct own-motion investigations.

- The self-regulator should have power to order the publication of corrections, apologies and other non-legal forms of making amends, and to order in broad terms the degree of prominence to be given them.

- The self-regulator should have the power to suspend or expel an organisation that fails to comply with an order, with consequent loss of immunity from the operation of the Privacy Act and other privileges at law that apply to media organisations.

- In other respects, the sanctions available should be at least no less stringent than those of the Press Council.

- The self-regulator should be resourced sufficiently to carry out these functions and have the power to levy media organisations accordingly.

- Its functions should also include appropriate research into relevant subjects with a view to improving professional standards.

There must be a stick to persuade media organisations to comply. Their record of non-compliance or minimal compliance is so long and consistent that they cannot be trusted to comply without the existence of some goad.

6. The question of standards

Section 7 (3) (c) of the News Media (Self-Regulation) Bill refers to "community standards" as a criterion for assessing a self-regulator's suitability.

This is the wrong standard. Community standards are fine for matters such as decency or language as they apply to broadcast of material other than news or current affairs because in that context they are generally concerned with minimising the risk of offending community sensibilities.

Standards and ethics in news and current affairs have little to do with community sensibilities and a great deal to do with balancing the public interest against competing (often private) interests. Certainly there are general standards concerning such matters as privacy, fairness and accuracy, but there are many others: justification for harm; independence from improper influence; transparency of purpose; protection of sources; "ownership" of the story; betrayal of subjects. Community standards have nothing to say about these because they are specialised ethical issues of which the community as whole has little knowledge and no known opinion.

Journalists do many things in the course of their work which offend against community standards, for example by obtaining information in circumstances that an ordinary member of the community might think questionable or downright wrong. But ethically a journalist may be able to justify these actions by reference to a greater public interest.

The appropriate standards are those of established professional norms. Many are set out in the Principles of the Press Council and in the MEAA Code of Ethics. They are not the last word but they are a good start.

Conclusion

It pains me to have to write in this vein about a proposal which in principle I support. The media will not make themselves effectively accountable without having a statute to say they must. History tells us that. But the detail of these proposals forces me to come out against this particular model.

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