ANTONIA LEGGAT

WHAT IS SUCCESSFUL REFORM? REGULATING THE NEWS MEDIA FOR SUSTAINABILITY

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Faculty of Law
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Abstract

*The last decade has seen a rapid increase in the creation and use of technology. Laws around the globe have struggled to keep up with media that has changed in response to technological convergence. The 2013 Law Commission Report—*The News Media Meets 'New Media'*—proposed the creation of a single regulatory body, covering all news media who voluntarily join, but its recommendations were rejected by the Government.*

This paper tracks the industry's self-regulation following the Law Commission report. It asks the question which has divided stakeholders and differentiates New Zealand, Australian and British drives at reform: what is successful reform of the news media? It concludes that "success" means a responsive, consistent, clear, cohesive and independent self-regulatory system. The New Zealand attempt at reform has led to some short-term benefits, but the current regulatory system's lack of sustainability represents long-term failure of reform. This failure was due to an absence of public or political motivation for reform, the Law Commission's over-emphasis on an industry-preferred scheme, and because New Zealand media has not reached the legal and ethical lows of overseas media. The extent of this failed regulation will become apparent as convergence continues, increasing functional gaps and making harms more evident. Looking forward, a bolder model, including fining and greater incentives, presents the best chance of successful reform.

Key words: Law Commission; news media; new media; convergence; Leveson inquiry; Finkelstein report

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I Introduction

> "Literature is our Parliament too … invent Writing, Democracy is inevitable."[1]

Technological innovations "like King Midas miraculously transform all they touch, if not exactly into gold, at least into something utterly new".[2] With the advent of new forms of technology and means of communication, the law must adapt to ensure consistent, cohesive and coherent coverage. However, existing laws have struggled to do so for the regulation of news media in New Zealand. This has left a subset of media that is no-man's land.

In most democracies, the news media plays a vital—if not constitutional—role. News is a social construct, involving communication of information in a mediated way. It places information in "some context, offering interpretations of it and suggesting a proper meaning for it", contributing to public perception "of what is normal and deviant, acceptable and unacceptable".[3] However, at times the news media oversteps its role of holding up a mirror to society; instead using the mirror for its own purposes and breaching ethical or legal rules. As early as 1765, Sir William Blackstone recognised that if a person "publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity".[4]

This paper argues that the difficulties in reforming the news media stem from the different, or improperly cast, answers to the question: what is successful reform of the news media? While some conceive it as end-goal related (forcing proper media behaviour), others see success in prompting the industry to make its own changes, while still others consider all that is needed is a government-led 'health check' of the current regulatory matrix. Because stakeholders differ in their views of success significantly, any overall success must involve a compromise between these goals. Further, being unclear of what success looks like means that the issues, and mischief to be solved, have not been framed properly.

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[1] Thomas Carlyle *On Heroes, Hero Worship, and the Heroic in History* (University of California Press, Oxford, 1993) at 141.

[2] James Curran and Jean Seaton *Power Without Responsibility: The Press, Broadcasting, and New Media in Britain* (6th ed, Routledge, London, 2003) at 297.

[3] Thomas Gibbons *Regulating the Media* (Sweet and Maxwell, London, 1991) at 1.

[4] *Blackstone's Commentaries on the Laws of England* (Cavendish Publishing, London, 2001) Book IV at 151–152.

Part II of this paper outlines the drivers for media reform in New Zealand, considers arguments for and against regulation, and outlines the fundamental concepts pertaining to the news media. Part III examines the current media regulation matrix in New Zealand and the impact of technological convergence. Part IV looks at the vision of successful reform according to the 2013 Law Commission paper titled *The News Media Meets 'New Media'* and the Government response, and compares the reasons for the Government's resistance to change to the aftermath of the respective reviews in the United Kingdom and Australia.

Part V analyses the industry response over the last five years, post-Law Commission report. While there have been some short-term benefits stemming from the drives at reform, these are not sufficiently sustainable to be considered the consequences of successful reform. Part VI argues that successful reform requires a forward-looking self-regulatory system that responds to technological change: a middle ground which respects press freedoms in a democracy, as well as rights of the population to be protected from unethical or illegal practices. This conception of success places the power of reform in the hands of the industry. We have not achieved such success in New Zealand because the public and political interest, once at a high worldwide, has begun to die down; the Law Commission's recommendations provided an easy escape for the industry; and because our press has not reached the legal and ethical depths of the United Kingdom.

II Ideal Viewpoint and Nature of Reform

> "[The news media] is a powerful, non-democratically organised force which influences the political process and shapes cultural attitudes, and which can cause great damage to businesses and people's lives. In all forms of power, those who exercise it must be subject to some constraint."[5]

A Drivers for Reform

Views of the success of regulation depend on how the stakeholders frame the issues that need to be solved. There has been a juxtaposition between those approaches that focus on the harm caused, and those that centre their analysis on functional concerns owing to emerging technology. This paper argues that both approaches offer critiques of the status quo.

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[5] Ray Finkelstein and Rodney Tiffen "When Does Press Self-Regulation Work" (2015) 38 Melbourne Univ Law R 944 at 951.

One view of success requires remedying of harms which are amplified by technology: both societal and personal harms. This suggests the need for an increasingly strict regulatory regime. The recent renewed interest in the fake news phenomenon (albeit an old phenomenon) demonstrates that citizens are aware of these practices and still expect such breaches to be remedied. A successful regulatory scheme will prevent a situation in which people cannot rely on the news, due to not knowing whether it is true. Consider the extent to which we rely on the media around elections to inform us, and the subversion of democracy if the media takes advantage of this. On the other hand, communicating the news is fundamental since it encourages democratic debate. Therefore, any authoritarian regulatory scheme which prevents a free flow of information cannot be considered a success. Successful reform will avoid either of these extreme harms to the nature of the news media.

On top of the societal harms caused by irresponsible and unregulated news media, there are personal harms. The Law Commission emphasised that it found nothing to suggest New Zealand's news media is unethical or untrustworthy.[6] However, those who suggest that the New Zealand news media is not 'broke' in any way overlook the power of the industry, inconsistencies in accountability, and ethical boundaries progressively crossed. The former Chair of the Australian Press Council, Professor Ken McKinnon, points to some questionable modern news media practices; falling below the illegal practices of late in the United Kingdom, but still requiring remedying.[7] Particularly, there is pursuing of individuals based on inaccurate information and commercially-driven irresponsible practices. Following the "teapot" scandal of 2011, the then-Prime Minister John Key condemned the media for "*News of the World* style tactics" and considered it the "start of a slippery slope".[8] Perhaps more realistically, the Law Commission merely considered it clear that the competitiveness encouraged in the digital world was starting to erode good journalistic culture in New Zealand.[9]

Likewise, the 2013 New Zealand National Integrity System Assessment, conducted by Transparency International New Zealand, considered that our news media was mostly

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[6] Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC R128, 2013) at [37].

[7] Australian Federal Government *Convergence Review* (March 2012) at 49.

[8] Amelia Wade "Key's *News of the World* 'cheap shot'" (16 November 2011) New Zealand Herald <www.nzherald.co.nz>.

[9] Law Commission, above n 6, at [4.22].

independent and "very active and successful" in informing the public.[10] However, due to the financial reality of the last decade and New Zealand's small size, there is concentration of media ownership, often by overseas-owned companies. This means the driving force behind press behaviour becomes profit for the benefit of shareholders, not concern for public interest or democratic conversation. This drive is especially powerful given the continued falling media profits, increasing cross-platform competition, and the challenge of the continuous, instant news cycle.[11]

Where content is irrelevant, publications lose readers. However, where it is inaccurate, readers often do not know. The New Zealand market is small, so consumers have little choice or influence over the material supplied. Further, publishers are not overly-reliant on reader satisfaction; only one-quarter of their income on average stems from circulation sales – the rest being from advertising.[12]

The Commerce Commission, in its recent decision declining the merger of Fairfax and New Zealand Media and Entertainment, makes clear that ownership confers power. It emphasised that competition would be removed in key markets around New Zealand if the merger was approved, and it expressed concern over the resultant price increases and reductions in innovation and quality.[13] New Zealand does not regulate ownership of media, except through competition law. Quoting the Law Commission's media report in its decision, the Commerce Commission found that there were no media ownership restrictions "or other mandatory journalistic regulations that would be effective enough … to materially constrain the merged entity".[14] Thus other areas of the law are affected by the lack of cohesive media regulation.

Further, new media forms are powerful, so have the potential to cause more harm than the traditional media. Increasingly, bloggers break news before the mainstream media. Examples include David Farrar (of Kiwiblog fame) publicising the Green Party's list for the 2008 election and news of an Internet Protocol (IP) address within Parliament being used to edit Bill English's Wikipedia page being broken by The Standard. In research on the impact of blogs published during the 2005 election, Kane Hopkins and Donald

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[10] Transparency International New Zealand *Integrity System Assessment* (2013) at 262.

[11] Law Commission, above n 6, at [14.0].

[12] Raymond Finkelstein *Report of the Independent Inquiry into the Media and Media Regulation* (Australian Federal Government, 2012) at 190.

[13] *NZME Limited and Fairfax New Zealand Limited* [2017] NZCC 8 at [X25].

[14] At [X42].

Matheson found that blogs are increasingly used for political campaigning.[15] Mainstream journalists openly recognised that they used blogs as sources. The authors conclude that the power of new media can be even greater than traditional forms of media. Another example is the WikiLeaks website, which states were, at first, unable to stop. The publishers acted "on ideals and without income, offices, distribution lists or any other things that in the past have been essential".[16] Indeed, Dr Geoff Kemp argues that online news media has displaced the role of traditional media, becoming the Fifth Estate.[17] Consider also Nicky Hager's *Dirty Politics* exposé, published before the 2014 election. Hager made public the interaction between politicians and bloggers, where politicians used blogs as tools to attack political opponents or present a particular public image. He recognised incidents of "dirty type[s] of politics that is not normal in this country", noting that "[e]ach example is not earth shattering on its own but the cumulative effect is intended to wear down their opponents".[18] These continued difficulties draw into question the Government position that our media does not create sufficient issues to warrant action. In the Law Commission's view, the issues it considers are "not merely academic", but create tangible problems.[19]

1 Why now?

Another view of successful regulation is espoused by those who see the key driver for reform as functional: clarifying who is the news media in the digital age. Consistent regulation of all news media by an independent body has two purposes. First, it provides recognition of new media organisations as reputable news reporters. They will gain privileges that only traditional news media organisations do currently. Some publishers are restricted from gathering news, for example being barred from entry into press conferences, because they are not lauded with the title of being bona fide members of the news media. Further, those that are currently regulated desire consistency, in order to avoid the current situation where some publishers face no consequences for pushing ethical and legal boundaries.

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[15] "Blogging the New Zealand Election: The Impact of New Media Practices on the Old Game" (2005) 57(2) Pol Sci 93.
[16] Geoff Kemp and others (eds) *Politics and the Media* (2nd ed, Auckland University Press, Auckland, 2016) at 184.
[17] At 164.
[18] Nicky Hager *Dirty Politics* (Craig Potton Publishing, Nelson, 2014) at 11 and 43.
[19] Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) at [18].

Secondly, regulation that makes clear who the news media is allows harms to be remedied. While the Law Commission's report was centred in addressing personal harms, it also made recommendations about the definition of news media. The boundary between non-news media and the news media is only becoming more blurred as new technologies emerge, suggesting that reform *now* is apt. This difficulty stems from technological convergence collapsing our traditional distinctions between media. As a result, the harms caused by new media reporters often cannot be remedied in the same way. Not all people can afford to bring defamation or breach of privacy claims, so an effective body of recourse is key. There is no such single body. The current media matrix is still separated into traditional categories of broadcasting and print and the position of bloggers and news aggregators is unclear and sporadic. A broader problem recognised by the Law Commission is that often the internet publisher has the last word so people are not prepared to take it to court for fear of a David versus Goliath battle.[20]

To use an example, if an article breaching a person's privacy is published on a blog, and that person cannot afford to bring a private claim, there has traditionally been no body to which they can have recourse. There have been some changes recently to this situation with the Press Council expanding its jurisdiction to cover online material. However, this relies on the blogger being a member, and how traditional standards apply to online media is still an issue in flux. If the same article appeared in a newspaper, it is likely that the publisher is a member of the Press Council, and so the person can make a complaint. Likewise, with a broadcast of the same material. To adopt the words of Steven Price, this situation is "insane":[21]

> If identical videos are posted on a newspaper's website, a broadcaster's website, and broadcast on television, complainants may have to go to different bodies, make different arguments, and receive different outcomes and remedies.

This approach is long-outdated in our digital age; something which the public is aware of. The 2016 World Internet Project found that over two-thirds of internet use was to search for news.[22] A study into the public perception of news media, conducted on request of the Law Commission, found that newspaper websites were twice as popular as paper

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[20] Law Commission, above n 19, at [6.47].

[21] Steven Price "Law Commission's new media paper" (12 December 2011) Media Law Journal <www.medialawjournal.co.nz>.

[22] Charles Crothers and others *The Internet in New Zealand* (Auckland University of Technology, 2015) at 7.

equivalents.[23] 92 per cent those surveyed agreed that the same standards ought to apply to all news media, regardless of their medium of publication.[24]

B Forward-Looking Self-Regulation

This paper looks to three examples of countries attempting to regulate the news media cohesively; all of which failed to prompt any lasting law reform. While the reports took different approaches, they all highlighted that to have any success, reform should be forward-looking and based on self-regulation. They also all emphasised freedom of the press, so considered independence from government fundamental (although their respective models implemented this to different extents).

First, comparing New Zealand regulatory bodies suggests putting in place forward-looking structures in the area of media is important. As media law academic, Ursula Cheer, suggests, the ideal time to do so is before New Zealand encounters the issues that the United Kingdom has: we have "an opportunity to develop balanced regulatory reform in a less intense environment".[25] The operation of New Zealand and United Kingdom press councils show that purely defensive, self-regulation is not effective. This contrasts with the Advertising Standards Authority, which adopts a more aspirational code, as discussed in Part III.

Secondly, self-regulation is the most appropriate vehicle for reform in this area. "Regulation" has broad meaning. It involves all social control,[26] with the state "shaping and guiding … to achieve the ends that are thought desirable".[27] Self-regulation involves rules that govern market behaviour being developed, administered and enforced by the people whose behaviour is governed.[28] Self-regulation can be external (involving an overarching body) or internal (where bodies adopt their own codes or appoint independent ombudsmen or readers' representatives).[29] The Law Commission's proposal is self-regulatory, yet has elements of co-regulation, providing some statutory basis and an

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[23] Big Picture Marketing and Research Ltd *Public Perception of News Media Standards and Accountability in New Zealand* (April 2012) at [3.1].
[24]At [9.1].
[25] Ursula Cheer "Response to Issues Paper 27: The News Media Meets 'New Media' from Professor Ursula Cheer, School of Law, University of Canterbury" at [1].
[26] Mike Feintuck and Mike Varney *Media Regulation, Public Interest and the Law* (Edinburgh University Press, Great Britain, 1999) at 28.
[27] Gibbons, above n 3, at 4.
[28] Law Commission, above n 19, at [6.15].
[29] Finkelstein, above n 12, at 8.

Ombudsman-appointed safeguard. Self-regulation is the best option in the area of media regulation, as statutory intervention impedes press freedom, and the market has incentive to regulate itself (for its reputation and legal benefits).[30]

One reason why regulating the news media is difficult is because journalism has not traditionally been considered a profession, and so not liable to regulation in the same way as other professions. As *The Economist* notes, journalism "cannot be regulated as medicine and law can: anybody must be free to report, comment and criticise".[31] Freedom of expression demands that journalists cannot be struck off from their role and prevented from practising if they are found to have breached ethical or legal rules.[32] Likewise, Professor Jane Singer suggests that on top of having "esoteric knowledge", the body needs to be able to restrain entry to be a profession.[33] Journalism has no entrance requirements which you would expect of a profession, and bloggers are even less aligned with the idea of a single, unified profession. However, the news media's traditional public service ideal has similarities to that of a profession. This is indirectly recognised in *Slater v Blomfield* (*Slater*), where the High Court considered that bloggers can be journalists for the purposes of s 68 Evidence Act 2006, meaning that they do not have to disclose their sources unless court-ordered.[34]

Looking at whether to regulate or not, the Law Commission considered orthodox economic theory, recognising that markets operate most efficiently when consumers can make their own decisions around consumption, without regulatory control.[35] It quoted a Ministry of Economic Development paper which stated that:[36]

> 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 … the different capabilities and resources available to government to influence behaviour and conduct [and] the relative strengths and weaknesses of different regulatory

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[30] Ray Finkelstein and Rodney Tiffen "When Does Press Self-Regulation Work" (2015) 38 Melbourne Univ Law R 944 at 951.

[31] "Fit to Print" *The Economist* (online ed, London, 4 February 2012).

[32] Sara Hadwin and Duncan Bloy *Law and the Media* (Sweet and Maxwell, London, 2007) at 214.

[33] Jane Singer "Who are these guys?: The online challenge to the notion of journalistic professionalism" 4(2) Journal 139 at 2–4.

[34] *Slater v Blomfield* [2014] 3 NZLR 835 (HC).

[35] Law Commission, above n 6, at [4.30].

[36] Ministry of Economic Development *Regulating for Success: A Framework* (2009) at [5.4].

approaches, or mix of approaches, and when and how these are best used.

Applying these factors suggests that strict regulation, such as statutory change, is not desirable. The news media is a service-based industry, so the consumers are, and should remain, the best judges of their own interests.[37] There is also the argument that too much government interference produces distortions in the market.[38] Most importantly, increased regulation increasingly interferes with freedom of the press. Excessive regulation creates a chilling effect, where people are deterred from speaking freely, for fear of being captured by regulation. In *Lange v Atkinson* Elias J (as she then was) noted that this chilling effect "inhibits dissemination of information and comment on matters of public interest because of the risk of liability".[39] Finally, on a practical level, some suggest that the social costs of *any* regulation exceed the benefits. For example, affected parties can retaliate through the internet, and the internet is so ubiquitous and pervasive that full regulation is (arguably) impossible.[40]

However, some regulation is necessary – and well-accepted in other areas. We can point to the acceptance that the state intervenes on market failures, such as when there are monopolies.[41] Further, the inaccuracies or ethical breaches of the media are rarely obvious, even to an observant consumer, so we cannot rely on the market to regulate itself. Likewise, the idea of quality in media content is nebulous, so an independent regulator can better apply fair standards and definitions.[42] Because of the media's purported public service purpose, regulation seems less controversial as long as it is in the public interest.[43] Further, Professor Thomas Gibbons notes that freedom of speech is often heralded as a decisive defence against regulation, but in reality, the news media's underlying commercial interests means that "their association with truth and participation in a democracy is only incidental".[44]

[37] Gibbons, above n 3, at 4.
[38] Finkelstein and Tiffen, above n 30, at 946.
[39] *Lange v Atkinson* [1997] 2 NZLR 22 (HC) at 37.
[40] Ian Barker and Lewis Evans *Review of the New Zealand Press Council* (2007) at 15.
[41] Gibbons, above n 3, at 5.
[42] Gibbons, above n 3, at 101 and 125.
[43] Gibbons, above n 3, at 32 and 40.
[44] Gibbons, above n 3, at 19.

C Nature of Law Reform and The Media

1 Theories of the press

How the role of the press is cast in any one society affects how we think about what is necessary for successful reform. The liberal or libertarian theory is adopted in New Zealand. The theory states that the role of the news media is to inform the public; scrutinise government; and act as a medium for public debate.[45] The public is assumed to be rational, being capable of evaluating truth as opposed to lies: "the right to search for the truth is one of the inalienable natural rights of man".[46] This school of thought is grounded in Enlightenment thinking and the works of John Milton, John Locke and John Stuart Mill.[47] As Mill noted, silencing expression is a: [48]

> … peculiar evil … If the opinion is right, [society is] deprived of the opportunity of exchanging error for truth; if wrong, [society loses] what is almost as great a benefit, the clearer perception and livelier impression of truth.

These ideas prompted the popular classification of the press as the Fourth Estate in government.[49] The main issue with this conception of the press, which we can see in New Zealand, is that if control, ownership or management of the press is in the hands of "a powerful few", they are given an "uneasy power".[50] It also means that anyone can set up a media organisation, with very few restrictions. They then gain a "megaphone", through which they can communicate to a large audience.[51] There are no barriers to entry into this powerful position. This theory being applied in New Zealand means that for reform to be successful it must seek a balance between respecting individual rights and freedom of the press (which cannot be undermined, at any cost).

2 Underlying concepts

A number of important concepts must be upheld in order to successfully reform the news media, and these demonstrate the human interest involved in a carefully balanced scheme.

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[45] Curran and Seaton, above n 2, at 346.

[46] Fred Siebert, Theodore Peterson and Wilbur Schramm *Four Theories of the Press* (University of Illinois Press, Illinois, 1956) at 3.

[47] At 6.

[48] Stefan Collini (ed) *'On Liberty' and Other Writings* (Cambridge University Press, Cambridge, 1989) at 20.

[49] Finkelstein, above n 12, at 35.

[50] Siebert, Peterson and Schramm, above n 46, at 4.

[51] Lord Justice Leveson *Report of An Inquiry into the Culture, Practice and Ethics of the Press* (The Stationery Office, 2012) at 76.

First, the news media has an underlying role as a check on, and enabler of, democracy. Democracy relies on the public being informed.[52] In 1699, Daniel Defoe, in his famous pamphlet *Essay on the Regulation of the Press*, stated, "since this Nation is unhappily Divided into Parties, every Side ought to have an equal Advantage in the use of the Press".[53] Over 300 years later, the editor of *Private Eye* magazine, Ian Hislop noted, "[i]f the state regulates the press, then the press no longer regulates the state, and that is an unfortunate state of affairs".[54]

Sir Geoffrey Palmer argues that, for this reason, the news media "carries out a constitutional function of importance to the health of New Zealand government and democracy".[55] This contrasts with the more sceptical view of other commentators, like Gibbons, who suggests that the contemporary news media is more interested in providing entertainment, meaning its "primary function is commercial rather than constitutional".[56]

Secondly, the reviews of news media discussed in this paper all recognise freedom of the press as a central concept. The news media must be independent to act as a check on state power. In the early days of printing, the Crown controlled what was printed. The development of modern political parties in the United Kingdom in the 1860s led to a closer link between politics and news; Members of Parliament often owned or funded newspapers.[57] Now, New Zealand traditionally ranks high globally for freedom of the press, although this is reducing.[58] The scope of freedom of the press is notoriously hard to specify. As Alexander Hamilton recognises in the 84th *Federalist* paper, it depends "on public opinion and on the general spirit of the people and of the government."[59] Applying this in modern times, press freedom includes at least a:[60]

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[52] Gibbons, above n 3, at 20; and *Royal Commission on the Press, 1947-1949* (Stationery Office, 1949) at 100.

[53] Daniel Defoe *Essay on the Regulation of the Press* (Oxford University Press, London, 2009) at 12.

[54] Dan Sabbagh "Leveson inquiry: Ian Hislop claims PCC would not give him a fair hearing" (17 January 2012) The Guardian <www.theguardian.com>.

[55] Geoffrey Palmer "Towards a constitutional theory for the media in the MMP era" in J McGregor (ed) *Dangerous Democracy?* (Dunmore Press, Palmerston North, 1996) 17 at 21.

[56] Gibbons, above n 3, at 179.

[57] Curran and Seaton, above n 2, at 6.

[58] "Ranking 2017" (2017) Reporters Without Borders <www.rsf.org>; and "Press Freedom's Dark Horizon" (2017) Freedom House <www.freedomhouse.org>.

[59] Alexander Hamilton, James Madison and John Jay *The Federalist* (Harvard University Press, United States of America, 2009) at 567.

[60] "Press Freedom's Dark Horizon" (2017) Freedom House <www.freedomhouse.org>.

> … media environment where coverage of political news is robust, the safety of journalists is guaranteed, state intrusion in media affairs is minimal, and the press is not subject to onerous legal or economic pressures.

Thirdly, freedom of expression is central to any regulation which is based on liberal theories. The news media is a vessel of free speech.[61] Freedom of expression is provided for in art 19 of the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights, and upheld in s 14 New Zealand Bill of Rights Act 1990.[62] The High Court has held that the Broadcasting Standards Authority must undergo a Bill of Rights analysis when upholding a complaint, including considering the significance of free speech.[63] The Press Council has upheld the prima facie width of this right, accepting arguments by proponents of freedom of expression that it extends, at least in relation to opinion, to "the freedom to be vulgar, stupid, ignorant, offensive and just plain wrong."[64]

Still, "[e]ven the most ardent, card-carrying civil libertarians are not committed to an unconditional defence" of freedom of expression.[65] Under s 5 Bill of Rights Act 1990, limitations on such freedoms are permitted if they are reasonable and justified in a free and democratic society. Further, merely upholding a complaint does not in itself damage freedom of expression.[66] The right to discuss public matters has been limited to matters within the public interest, affecting "people at large" such that they are "legitimately interest in" it.[67] Similarly, Baroness Hale in *Campbell v MGM* notes that "[t]here are undoubtedly different types of speech … some of which are more deserving of protection in a democratic society than others." [68] As recognised by the Court of Appeal in *Hosking v Runting*, the debate is not the importance of freedom of expression, but the scope in a

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[61] Gibbons, above n 3, at 13.

[62] Universal Declaration of Human Rights GA Res 217 A (1948); and International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976).

[63] See William Akel, Steven Price and Robert Stewart "Media Law" (paper presented to New Zealand Law Society Continuing Legal Education seminar, February 2017) at 118; *Television New Zealand v Viewers for Television Excellence Inc* [2005] NZAR 1 (HC) at [56]; and *Television New Zealand v Minister of Agriculture and Fisheries* HC Wellington AP 89/95, 13 February 1997 at 33–35.

[64] "Ken Orr Against Sunday Star-Times" (September 2003) New Zealand Press Council <www.presscouncil.org.nz>.

[65] Wojciech Sadurski *Freedom of Speech and Its Limits* (Kluwer Academic Publishers, Netherlands, 1999) at 1.

[66] *Television New Zealand v West* [2011] 3 NZLR 825 (HC) at [90].

[67] *London Artists Ltd v Littler* [1969] 2 QB 375 at 391. See also *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL).

[68] *Campbell v MGM* [2004] UKHL 22 at [148].

particular case.[69] For example, in *Television New Zealand v Police*, the public interest in conviction weighed against public and private interests (freedom of the press, privacy and property rights) in relation to search warrants.[70] Still, any suggestion of regulation tends to be "mercilessly distorted and caricatured by newspapers as being tantamount to threatening to impose on them the conditions under which newspapers exist in Zimbabwe, Syria or Hungary".[71] This was clear in the British media's response to the Leveson report, discussed in Part IV.

III How We Got Here

> "The law has always struggled to keep pace with technology – never more so than now, given the unprecedented pace and impact of technological change".[72]

A Convergence

Media practices have always followed technology, rather than the reverse.[73] Great changes were made to the nature of the news media following the printing press arriving in England in 1476, creating a "sweeping change in communication possibilities".[74] More changes were made following the lapse of the Licensing of the Press Act 1662, making the news the subject of public debate as never before. Joseph Addison, an editor of a 17th century newspaper, *The Spectator*, praised himself for bringing "philosophy … to dwell in Clubs and Assemblies, at Tea-Tables and in Coffee Houses".[75] The Industrial Revolution, starting in the late 18th century, changed the "size, scope and status" of print: "the press became 'the Press'".[76]

More recently, we cannot underestimate the impact of the invention of the telegraph in the 1840s, digital typesetting, facsimile, and the commercial use of computers.[77] As Thomas Jefferson noted in a letter to John Adams, "[t]he light which has been shed on mankind by

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[69] *Hosking v Runting* [2004] NZCA 34 at [178].
[70] *Television New Zealand v Police* (2009) 13 CRNZ 48 (HC) at 59.
[71] Julian Petley "The Leveson Inquiry: Journalism ethics and press freedom" (2012) 13(4) Journal 529 at 532.
[72] Law Commission, above n 6, at iv.
[73] Russell Brown and Steven Price *The Future of Media Regulation: Is There One?* (May 2006) at 4.
[74] Finkelstein, above n 12, at 24.
[75] Dieter Stein and Ingrid Tieken-Boon van Ostade (eds) *Towards a Standard English 1600-1800* (Walter de Gruyter & Co, Berlin, 1993) at 41.
[76] Kemp and others, above n 16, at 30.
[77] Curran and Seaton, above n 2, at 237–238.

the art of printing has eminently changed the condition of the world".[78] The same can be said with the advent of the internet, which has developed at "breathtaking speed".[79] As the Commerce Commission notes, the *primary* news medium is online.[80]

Like many other industries, the news media was affected by the Global Financial Crisis. American newspapers lost USD64.5 billion in market value in 2008 alone.[81] This has two impacts for news media practices. First, New Zealand press has become dominated by competitive commercialism, which has led to the increased use of technology as a competitive tool. Breaches of ethical and legal boundaries are becoming more common. Second, it resulted in a move away from print toward digital-first strategies, seeking maximum audiences to gain maximum advertising revenue. Convergence became even more noticeable.

Convergence is a process "whereby new technologies are accommodated by existing media and communication industries and cultures", involving "adaptation, merging together and transitioning process[es]".[82] The boundaries between different forms of media—printed word, spoken word, images and sounds— are broken.[83] The Ministry for Culture and Heritage recognises that convergence has led to difficulties in regulation. These include misalignment of law with social and industry realities; gaps in the existing framework; and inconsistent treatment of like content.[84] However, overall, New Zealand has not experienced convergence to the same extent as other countries, such as through combined newspaper-web-television companies, given its small media market. Still, convergence is apparent to some degree, as shown in the simultaneous television-radio-internet broadcasts of Newshub, occurring since 2016.

New Zealand also faces convergence of ownership.[85] New Zealand media companies are almost exclusively controlled by four companies, overseas owned, with a "near duopoly"

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[78] B L Rayner *Sketches of the Life, Writings, and Opinions of Thomas Jefferson* (A Francis and W Boardman, New York, 1832) at 118.

[79] Law Commission, above n 19, at [1.8].

[80] Commerce Commission, above n 13, at [X7].

[81] Jeff Kaye and Stephen Quinn *Funding Journalism in the Digital Age* (Peter Lang Publishing, New York, 2010) at 5.

[82] Tim Dwyer *Media Convergence* (McGraw-Hill Education, England 2010) at 2.

[83] Law Commission, above n 19, at [1.11].

[84] Ministry for Culture and Heritage *Content Regulation in a Converged World* (August 2015) at 10.

[85] Artur Lugmayr and Cinzia Dal Zotto (eds) *Media Convergence Handbook – Vol. 1* (Springer, London, 2006) at 29–30.

in print and radio, and monopolies in pay television and mostly in local daily newspapers.[86] We do not have the "vigorous and colourful" competition of the last century.[87] As a result, James Curran and Jean Seaton note that in fact, "'[c]hoice is thus already a chimera".[88]

Convergence has led to a movement from a publisher-audience dichotomy to the public becoming 'prosumers' (producers and consumers of news material). This makes the focus of reform wider; to be successful it must cover a range of people. Instead of being passive recipients, everyday people use quasi-journalistic practices and actively influence news content.[89] They can do so at no cost, instantly, permanently, and, currently, with few professional or legal consequences.[90] This has resulted in a news ecosystem which is horizontal (everyone can publish), bidirectional (involving discussion between journalists and the public) and diffused.[91]

In light of convergence, we can ask how we can continue to expect the news media to regulate itself completely and ensure its objectivity and impartiality.[92] Yet, as the Law Commission notes, the decentralisation caused by convergence can actually strengthen democracy by increasing diversity of opinion and participation.[93]

B Current Media Regulation Matrix

New Zealand, like Australia, Canada and the United Kingdom, predominantly relies on their news media being self-regulatory.[94] Price and Russell Brown appositely summarise New Zealand's media regulation as:[95]

> … a patchwork of private and public regulatory bodies, common law and statute, and rules applicable generally and ones that only apply to certain platforms or types of

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[86] Bill Rosenberg *News Media Ownership in New Zealand* (13 September 2008) at 1.

[87] Geoffrey Palmer *New Zealand's Constitution in Crisis* (John McIndoe Ltd, Dunedin, 1992) at 205.

[88] Curran and Seaton, above n 2, at 301.

[89] Kemp and others, above n 16, at 166.

[90] Law Commission, above n 19, at [1.19].

[91] Alberto Ardèvol-Abreu, Catherine M Hooker and Homero Gil de Zúñiga "Online news creation, trust in the media, and political participation: Direct and moderating effects over time" (online journal article, Journalism: Theory, Practice & Criticism, 2017) at 2.

[92] At 5.

[93] Law Commission, above n 19, at [16] and [25].

[94] Gavin Ellis "Different Strokes for different folk: Regulatory distinctions in New Zealand media" (2005) 11(2) PJR 63 at 76.

[95] Brown and Price, above n 73, at 5.

> content. Different regulatory bodies apply different standards. The boundaries between them are not always clear, so there are overlaps and gaps.

Founded in 1975, the New Zealand Press Council is the primary example of industry self-regulation in New Zealand. Following the recommendations of the 2007 Barker-Evans review, it became independent through an incorporated society, meaning the body cannot be dissolved easily by the industry (the only options are dissolution if the Registrar of Incorporated Societies declares it is no longer performing its duties, or liquidation).[96] The Press Council traditionally had jurisdiction only over print media (material published in newspapers and magazines). As discussed in Part V, this was recently extended to cover news websites and blogs.

However, the Press Council has traditionally been considered an example of ineffective self-regulation. It develops principles that apply to its members but has only limited powers to remedy breaches of these, including requiring the publication to publish the essence of the ruling and issuing reprimands; it may not award damages. This structure encourages a responsive, complaints-driven perspective, rather than promotion of aspirational values.

In contrast, the Advertising Standards Authority is a model for successful reform in the area of media regulation. The Association of New Zealand Advertisers notes that advertisers take responsibility for their standards because "[i]f consumers trust advertising, it is more effective".[97] It also avoids a costly and public judicial process. As complaints are dealt with on an average of 13 days and the number of complaints reviewed by it have increased over time, we could speculate that this means the system is providing effective recourse and encouraging public participation.[98] The regulation is purposely flexible to adapt to new media and changing societal views.

The Broadcasting Standards Authority is the result of statutory regulation under the Broadcasting Act 1989. It creates four codes of practice, covering election programming, radio, free-to-air television and pay television. It determines complaints, with appeals from its decisions going to the High Court. Its powers are wider than the Press Council, including requiring payment of costs to the Crown or the complainant, and restraining broadcasting. While the Press Council is funded entirely by its members, the Broadcasting

[96] Barker and Evans, above n 40.

[97] "Self-Regulation" Association of New Zealand Advertisers <www.anza.co.nz>.

[98] Advertising Standards Authority *Bugger, it's okay - the case for advertising self-regulation* (2008) at 8.

Standards Authority is party government-funded and broadcasters with a total revenue exceeding $500,000 are automatically liable to pay a levy. These powers mean that, from a consumer's viewpoint, the Broadcasting Standards Authority offers the most meaningful remedy.[99] However, while there is no cost to the complainant, its processes are legalistic and costly to the taxpayer.

Media regulation is also seen in the functions of the Office of Film and Literature Classification and a long list of statutes regulating media activities. In-house and union ethics also affect news media operation, as do common law protections such as privacy and defamation torts. Various ethical codes exist at present for different mediums. For example, Fairfax, APN and E tū (which subsumed the Engineering, Printing and Manufacturing Union) each have codes of practice. The Law Commission criticised this, finding that, to be meaningful, these codes need to be enforced, uniform and not changed at whim because of commercial pressures.[100]

The Law Commission noted that there are, currently, four groups of media whose position is unclear in the media matrix described.[101] First, there are websites of print publishers: Fairfax's Stuff and APN's NZHerald. These publishers use newsroom resources and present similar content, alongside audio-visual material, and encourage audience participation. Secondly, there are web-only news media organisations, like Yahoo! New Zealand and Scoop. These aim to present unfiltered information, such as press releases, so readers can see the news as journalists do.[102] Next there are online news aggregators, such as GoogleNews and Voxy. Finally, there has been a proliferation of blogs. The regulation provided by, and for, these publishers differ, but primarily depend on the publishers' own initiative; for example, if they require users to agree to terms before posting. Quoting Lara Fielden, a British researcher, who has written on the benefits of different regulatory models, the Law Commission felt that:[103]

> 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,

[99] Law Commission, above n 19, at [5.74].
[100] Law Commission, above n 6, at [2.40].
[101] Law Commission, above n 6, at [2.1]–[2.4].
[102] Law Commission, above n 6, at [2.61].
[103] Law Commission, above n 6, at [1.48], quoting Lara Fielden *Regulating for Trust in Journalism: Standards Regulation in the Age of Blended Media* (Reuters Institute for the Study of Journalism, 2011) at 15.

> all at the same time, perhaps even authored by the same journalist, then the wholly different regulatory regimes to which each element is subject begin to feel increasingly arbitrary and irrational.

Privileges and exemptions are extended to the news media. These privileges include to sit in court, attend the Press Gallery and sometimes local authority meetings.[104] The main exemptions are from the principles of the Privacy Act 1993, when a person is engaged in news activities (defined broadly);[105] from liability for misleading statements made in trade under the Fair Trading Act 1986; and from revealing sources under the Evidence Act 2006.[106] Other exemptions include from electoral legislation; some factors under the Copyright Act 1994; fair reporting privileges under the Defamation Act 1992; and from certain requirements under the Human Rights Act 1993. There are also informal benefits: for example, the emergency services, politicians and companies have internal practices for contact with the media.[107] All these benefits, the Commission proposes, result in a quid pro quo situation: if "new players" want to present as reliable, they must account to professional and legal standards.[108] However, as discussed in Part VI, these privileges alone are unlikely sufficiently enticing to most media organisations.

IV Proposed Solutions

"[T]he internet is a game changer".[109]

A New Zealand Law Commission Report

Prior to the Law Commission report, the Labour Party (then in government) commissioned a report in 2006, titled *Regulation for Digital Broadcasting*, focusing on convergence. However, the incoming National-led Government discontinued it. In October 2010, Simon Power, the then-Minister of Justice, referred to the Law Commission with the following terms of reference:[110]

- To establish how to define news media legally; and

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[104] Law Commission, above n 6, at [3.7]–[3.19].
[105] Section 2.
[106] Section 68.
[107] Law Commission, above n 6, at [3.34]–[3.37].
[108] Law Commission, above n 6, at [4.92].
[109] Law Commission, above n 6, at [7.158].
[110] New Zealand Government "Law Commission to review regulatory gaps around 'new media'" (press release, 14 October 2010).

- Whether, and to what extent, the jurisdiction of the Broadcasting Standards Authority and/or Press Council should be extended to cover currently unregulated news media and, if so, what legislative changes would be required.

The report also responded to a third point of reference; that section being fast-tracked, accepted by the Government and evolving into the Harmful Digital Communications Act 2015.

1 Framing the issues

For reform to have success it must clarify issues with the status quo, and specify the envisioned solutions. Successful reform stems from solving the problems identified. The Issues Paper starts off stating the assumption underlying the terms of reference: that *some form* of regulation has a role.[111] This is because news media depends on public trust and given its potential power in society, there is justification to hold it to higher ethical standards than other publishers (for example, people who post on social media).[112] The Law Commission's key standards for successful reform were ensuring continued diversity and growth of the news, platform-neutral standards (unless the platform is relevant to consider), and press freedom.

In its Issues Paper, the Law Commission considered that these successes could be met be industry self-regulation.[113] Based on free press ideas, government intervention should be minimal. The Commission suggested that there will be more respect for the principles, and adherence to them, if developed by those who must follow them. While it was not decisive to its conclusion, this was the cheaper option. Also, the Commission considered self-regulation more stable and predictable than government regulation, given the oft-changing seat of power. The key aspects of this body were independence (from the industry and Government), accessibility, transparency, effectiveness, right to appeal and the development of sanctions.[114]

2 Stakeholders' views of success

Only 72 submissions were made in response to the Issues Paper. In general, the print media (unsurprisingly) supported the new regulator. Most submitters favoured a voluntary model

[111] Law Commission, above n 6, at [9].
[112] Law Commission, above n 6, at 17.
[113] Law Commission, above n 6, at [6.61]–[6.66].
[114] Law Commission, above n 19, at [6.72]–[6.99]

if some regulation was put in force. The Engineering, Printing and Manufacturing Union argued that a single regulator was "inevitable" in the future.[115]

The majority of submitters looked to equality as the key marker of successful reform, because they sought fair competition in the age of competitive journalism. Allied Press (the publisher of the *Otago Daily Times* and New Zealand's only surviving major independent media company[116]) agreed with McLachlin CJ, of the Supreme Court of Canada, in *Grant v Torstar Corp*, that the "new disseminators of news and information should, absent good reasons for exclusion, be subject to the same laws as established media outlets".[117] However, other submitters were concerned that inequality would continue despite reform. Allied Press hypothesised that the new guidelines "will be followed anyway by responsible media" but not gain the "co-operation of 'cowboy' operators who … already thumb their nose at the law, often without any real consequences".[118] The "well-meaning legislation … will be followed only by people who are prepared to operate" within it.[119]

Some submitters felt that reform was not needed because the law already responds to the new media, and hence adding another layer of regulation would limit press freedom excessively. The status quo was adequate; successful reform only involved enforcement of a level playing field. District Court judge David Harvey, writing extrajudicially, argued that existing rules are already responding to the changes in technology and society. He references *Police v Slater*, which upheld a conviction against a blogger for breaching name suppression orders under s 140(4) Criminal Justice Act 1985.

Broadcasters emphasised the need for recourse, arguing that state support was necessary for reform to have lasting success. In striking contrast, the Press Council wrote a defensive submission, stating that the status quo was necessary to ensure independence of the press.[120] It considered that controlling interests have not interfered with its practice. However, it conceded that it would be more successful in carrying out its purposes with more powers, such as requiring an apology and a take-down of an article.

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[115] NZ Amalgamated Engineering, Printing & Manufacturing Union "Submission to the Law Commission Report: The News Media Meets New Media" at 4.
[116] Law Commission, above n 6, at [4.47].
[117] *Grant v Torstar Corp* [2009] SCC 61 at [96].
[118] Allied Press Limited "Submission to the Law Commission issues paper 'The news media meets new media: Rights, responsibilities and regulation in the digital age'" at 3.
[119] At 3.
[120] New Zealand Press Council "New Zealand Press Council submission to the Law Commission on its Paper 'The News Media Meets New Media'" at 3.

3 Report: industry-led responsibility

The Law Commission's view of successful reform involved prompting industry-led self-regulation that was responsive to technological change. Its policy objectives were to enable widespread media privileges, ensure accountability and provide signalling and effective redress to the public.[121] The report considers both drivers for reform which are explored in Part II: functional constraints and societal and personal harms caused by irresponsible news media practices. These drivers prompted 32 recommendations, favouring a single regulator called the News Media Standards Authority.[122] The body would be independent, not established by statute (except for indirect recognition through the news media privilege sections). It would create a code of conduct and receive complaints on all news media, from anyone. It would assume the functions of the Broadcasting Standards Authority, Press Council and the Online Media Standards Authority. There would not be an appeal to a court, but to a media appeals body.

Because of the Commission's focus on industry buy-in, it recommended that the body develop its own complaints process and penalties, however it would not have power to fine because fines would need to be so large to make a difference to large organisation's behaviour.[123] This conclusion is questioned in Part VI. Penalties would be agreed with members by contract, and could include requiring the take-down of material, a correction, an apology or censuring. These decisions show the Commission's desire to keep the industry on side, and seek its cooperation. Greater fines, or fines proportionate to revenue, would give the body more power, more in line with the Broadcasting Standards Authority rather than the Press Council. The fear of removing the possibility of self-regulation, through alienating the industry, underlies the Commission's report.

In response to the question of defining news media for the statutes which confer benefits, the Commission proffered a functional, rather than medium-based, definition:[124]

> (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.

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[121] Law Commission, above n 6, at [1.82]

[122] Law Commission, above n 6, at [39]–[43].

[123] Law Commission, above n 6, at [7.74].

[124] Law Commission, above n 6, at 16.

From the Commission's point of view, this approach to membership would merely formalise the unwritten social contract between the news media and the public they serve.[125] Again, this represents an attempt at compromise following industry submissions, some of which were critical of the proposed definition for being overly inclusive and others thought it was too exclusive. This definition, the Commission proposes, would mean that publishers can *position themselves* within it. Success to the Commission is, once again, industry-led responsibility.

4 Government response

In September 2013, the National-led Government declined to action the Commission's recommendations, although accepting it was an "excellent" report.[126] The Government thought it needed to consider consolidation with the Office of Film and Literature Classification, and found that some of the Commission's recommendations could be implemented without a full regulatory model (although it does not pinpoint these). Underlying the lack of government priority is likely also the view of the Chief Censor who, in his submission, rejected a super-regulator as "undesirable and unnecessary".[127] It is inconsistent with the Government focus on a "smaller and leaner" state sector.[128] The response takes an even more industry-led point of view than the Commission: Hon Judith Collins stated she wished to send a "clear message" to the industry of Government expectations.[129]

Pervading the response is the reality that the Government had little political interest in making change. This is seen in many of the reasons given, which were not sufficiently significant in themselves to reject any change. The response suggested that extensive legislation was needed. However, the changes are not particularly large, especially compared to the Australian proposals.[130] The only noteworthy amendment would be to the Broadcasting Act 1989 to restrict the Broadcasting Standards Authority's news jurisdiction. The Government was concerned that some media organisations might not join. It stated that there was no crisis of confidence in the media, so the steps proposed by the

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[125] Law Commission, above n 6, at [45].

[126] "New Zealand Government "Government Response to Law Commission report on *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age*" (12 September 2013) at 9.

[127] A R Jack "Submission on Issues Paper #27 *The News Media Meets 'New Media'*" at [7].

[128] At [7].

[129] "Government responds to news media report" (23 July 2015) Ministry for Culture and Heritage <www.mvh.govt.nz>.

[130] Price, above n 21.

Commission were not warranted.[131] It doubted "whether technological convergence in itself has dissolved the traditional roles and distinctions between the print and broadcast media".[132] One may question this reasoning. As proposed previously, while the *extent* of convergence in New Zealand may not be as large as other countries, the fact of convergence can hardly be disputed. Further, the Government did request the report on the basis of issues caused by convergence.

Journalist-turned-lawyer, Linda Clark, opines that the Government only looked into media regulation originally because of the force of "a young and reformist Cabinet Minister" and, correctly hypothesising, suggests that "[h]is colleagues may be less included to buy a fight".[133] It is because the public has not bought into the issue and there is no "political urgency" to regulate.[134]

The response noted that the recommendations "would need to be considered against other competing Government priorities".[135] Political reasons underlie this statement. David Farrar argues that the Government does not see the status quo as "broken", so it will never be a legislative priority.[136] In the two months prior to the response, some high-profile issues relating to the media were released. In one, the accusation was made public that the New Zealand Defence Force, with help from the United States' National Security Agency, was spying on a journalist, Jon Stephenson, while he was working on an assignment on Afghanistan. To then discuss regulation would have drawn unwanted attention to these issues.

The Government instead placed the responsibility for the next steps into others' hands, asking officials to *actively* monitor the "continually evolving area" and industry response.[137] Already, it suggested, the Online Media Standards Authority (discussed in Part V), was a "good example of the industry taking its responsibilities seriously".[138] The report promised that the Government would monitor international developments and would

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[131] New Zealand Government, above n 126, at 3.
[132] New Zealand Government, above n 126, at 9.
[133] Linda Clark "NZ Watchdogs Must Keep Up with Media's Changing Face" (2012) 18(2) PJR 46 at 49.
[134] At 49.
[135] New Zealand Government, above n 126, at 8.
[136] David Farrar "Final Law Commission report on new media and news media" (26 March 2013) Kiwiblog <www.kiwiblog.co.nz>.
[137] New Zealand Government, above n 126, at 10.
[138] New Zealand Government, above n 126, at 10.

have an ongoing conversation with the industry. However, the present position leads to the conclusion that the Government's faith in the industry was largely misplaced.

B Success for Overseas Inquiries

The United Kingdom and Australia have also failed to successfully reform their news media. These reports represent different approaches to very similar issues. While the United Kingdom viewed successful reform as upholding high ethical standards with strong consequences, Australia considered forward-looking aspirational goals centrally, and New Zealand focused on voluntariness and cooperation as fundamental to the success of any reform.

1 Leveson inquiry: ethics

Before the inquiry, Prime Ministers Tony Blair and David Cameron had attempted to control press practices (at least relating to their political reporting) by forging alliances with them.[139] As Cameron later recalled in a speech, "there is a less noble reason" why the illegal press practices continued:[140]

> … party leaders were so keen to win the support of newspapers, we turned a blind eye to the need to sort this issue, get on top of bad practices, to change the way our newspapers are regulated.

The catalyst leading to the report was the revelation that some members of the press had been using illegal techniques, including phone hacking. Cameron asked Lord Justice Leveson (as he then was) to lead an independent inquiry into that particular conduct (Part Two) and to inquire into press culture and ethics, making recommendations for future regimes (Part One).[141] The result of this was the Leveson inquiry, stretching over a year and costing upwards of GBP5 million. The four-volume report consists of nearly 2,000 pages.

Leveson focused on upholding ethics and providing effective recourse as key markers of successful reform. This is a consumer protection-led view of success; an unsurprising stance given the widespread unsatisfactory practices. Leveson stated he "had no doubt that … there has been a recklessness in prioritising sensational stories, almost irrespective of

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[139] See Steven Barnett and Judith Townend "'And What Good Came Of It At Last?' Press-politician relations post Leveson" (2014) 85(2) Polit Quart 159.

[140] "David Cameron's speech on phone hacking – the full text" (8 July 2011) The Guardian <www.theguardian.com>.

[141] Leveson, above n 51, at 4–5.

the harm that the stories may cause and the rights of those who would be affected".[142] At the outset, Leveson noted the importance of holding power to account under the rule of law.[143] Under the rule of law no one is above the law, so some restrictions on freedoms is necessary.

Leveson recommended an independent self-regulatory body; similar to the Law Commission's findings. To uphold ethics in a meaningful way, genuine recourse was considered important. Like our Press Council, Leveson found that the English equivalent, the Press Complaints Commission, was insufficient, it having a "profound lack of any functional or meaningful independence from the industry".[144] The Press Complaints Commission was widely believed to be a "toothless poodle".[145] As then-Deputy Prime Minister Nick Clegg noted, this is how the industry wanted it; it was "run by the newspapers, for the newspapers, who act as their own judge and jury".[146] Its operation was also limited; for example, if a person was subject to unsatisfactory behaviour by the press, the Press Complaints Commission could not act unless that person complained.

For the United Kingdom, Leveson found that successful reform required effectiveness. In turn, this meant that all news publishers must be covered.[147] Still, he considered independence key, both in terms of perception and substance.[148] Therefore, this proposed body would not just be able to require apologies and corrections, but, unlike the Law Commission model, it would be able to impose fines. Further, members would have been offered benefits, including use of a kitemark (a notification of quality appearing on publications).

2 Convergence Review*: responsive legislation*

Preceding Australia's Finkelstein report was the *Convergence Review*, written for the Minister for Broadband, Communications the Digital Economy in 2012. It reviewed the

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[142] Lord Justice Leveson *Report of An Inquiry into the Culture, Practice and Ethics of the Press: Executive Summary* (The Stationery Office, 2012) at [32].
[143] Leveson, above n 51, at 61–65.
[144] Leveson, above n 51, at 1520.
[145] Ed Miliband, former leader of the Labour Party "Speech on News of the World Closure" (London, 8 July 2011).
[146] Nick Clegg, former Deputy Prime Minister of the United Kingdom "Liberal way forward for the press: free, accountable, plural" (speech, London, 14 July 2011).
[147] Leveson, above n 51, at 1752.
[148] European Convention on Human Rights (opened for signature 4 November 1950, entered into force 3 September 1953), art 10(2).

whole Australian media policy framework given convergence. It noted upfront that the default position should be deregulatory, in order to encourage innovation.[149] However, given the real practical problems existing and the fact that market forces were not acting as a natural solution, regulation was necessary.[150] To ensure that future challenges are met, the report considered that principles-based legislation, technologically-neutral was required.

The Review saw successful media reform as aiming for less concentrated ownership, and prompting law that is responsive to technological change. It proposed replacing the Australian Communications and Media Authority with a single communications regulator; and a single Communications Act (covering telecommunications, radiocommunications and broadcasting). The new body would be subject to judicial review. It also recommended an industry-led body to oversee journalistic standards; ultimately absorbing the functions of the Australian Press Council and some of the Australian Communications and Media Authority's powers. This body would have no statutory powers and voluntary membership. Once again, unlike the New Zealand model, it would have the power to impose high sanctions, up to five per cent of a broadcaster's qualifying revenue. Further, it focuses less on independence than the New Zealand vision, as the majority of funding would be from members, but if underfunded, it would be supported by government.

The Review's focus on responsiveness is also seen in its proposal that particular media organisations be defined as "content service enterprises" and be subject to regulations.[151] This means that, to be included, the organisation has to be professional (for example, excluding social media postings), so it would have covered approximately 15 main organisations in Australia.

3 Finkelstein report: idealistic goals

The *Independent Media Inquiry*—otherwise known as the Finkelstein report—was headed by retired Federal Court judge Raymond Finkelstein. Opening the report, akin to Leveson it emphasised the "democratic indispensability" of the free press.[152] It also noted that the press has responsibilities because of its powerful nature and the harm unrestricted free press can cause.[153]

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[149] Australian Government, above n 7, at 3.

[150] Australian Government, above n 7, at 4.

[151] Australian Government, above n 7, at ix.

[152] Finkelstein, above n 12, at 23.

[153] Finkelstein, above n 12, at 7.

Finkelstein took a more academic, theoretical and idealistic approach to regulating the media. Its conception of successful reform required enforcement of standards and encouragement of (non-binding) aspirational principles (differing from usual media regulators). This approach shows that the Australian experience is not as dire as the United Kingdom's, but expresses a desire to actively craft responsible practices. Finkelstein recognised that the Australian Press Council had many limitations, lacking funds and powers and relying on publishers' goodwill. The report recommended the establishment of a News Media Council to take over the Press Council and the Australian Communications and Media Authority's current affairs standards. It would cover print, online, radio and television news content. Unlike the other models, it would have government funding.

4 Application to New Zealand

New Zealand has not reached the depths of unethical and illegal practices of the United Kingdom – nor has it ever had a similar press culture. In Fairfax's submission, it urged the Law Commission to distinguish the overseas inquiries given the differences in social structure and media environment.[154] Equally, the Leveson report considered that overseas proposals were not "ideal structures" to apply in the United Kingdom as they "are embedded in the social, cultural and historical functions of the media in each country".[155] Indeed, as Kemp notes, New Zealand news media cannot "claim the resources or intellectual firepower of [*The*] *New York Times* or the national influence of Rupert Murdoch's stable of British newspapers".[156] While London has ten daily newspapers, New Zealand newspapers have predominantly regional monopolies. The Law Commission noted that "we have not seen the sort of systemic abuse or perversion of power alleged in Britain".[157] As Clark suggests, our issues are merely "sins of omission".[158]

However, New Zealand does have functional gaps in media regulation, and often breaches of legal and ethical standards. Leveson noted that the inquiry was not just centred against the *News of the World* hacking; there was "too little in the way of titles taking responsibility, or considering the consequences for the individuals involved".[159] There were also few internal sanctions; a disregard for accuracy "where the story is just too big

[154] Fairfax Media "Submission of Fairfax Media: The News Media Meets 'New Media: Rights, responsibilities and regulation in the digital age" at 3.
[155] Leveson, above n 51, at 1733.
[156] Kemp and others, above n 16, at 245.
[157] Law Commission, above n 6, at [4.21].
[158] Clark, above n 133, at 49.
[159] Leveson, above n 142, at [37].

and the public appetite too great"; and a "cultural tendency" to resist complaints "as a matter of course".[160] This is true of New Zealand media. However, the differences in cultural practice suggest that a different approach to the reform process is needed for it find success, as outlined later in Part VI.

C Comparing Stalled Attempts at Reform

Despite the four reports involving slightly different emphasis on what successful reform includes, all failed. The reasons for failure differ. The United Kingdom's aggressive approach to reform was met with aggression; the Australian idealism was overly ambitious given the political environment; and the New Zealand's aim at compromise provided too much leeway for the industry to respond with short-term stopgaps only.

Leveson's failure was rooted in its aggressive approach to curb media practices. Commentators called it "clever and moderate", yet the industry responded with "absurd hysteria".[161] There was a widespread panic in the media that the government was threatening freedom of the press. The *Daily Mail* titled an article "judicial farce and a dark day for freedom".[162] The *Telegraph* called the recommendations "a slippery slope to state meddling".[163]

Independent self-regulation, similar to Leveson's vision, was accepted by large majorities in both Houses. The then main political leaders—Cameron, Nick Clegg and Ed Miliband—agreed to set up an independent press body by Royal Charter, as opposed to Leveson's legislative recommendations. The Charter process was used to emphasise independence of the media from Parliament; Parliament would have no place in amending it. The Charter covered the appointment process to an independent Recognition Panel and criteria for recognition of a self-regulator. It agreed that the industry could propose its own regulation system, provided that it met certain criteria. The independence of the body, and its compliance with these rules, would be overseen by the Recognition Panel every two to three years. Further, Parliament created incentives for the industry to create a self-regulator. It set out strong powers, including to impose million-pound fines on publishers and require them to pay costs when a claim is made against them, even if they win, and if

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[160] Leveson, above n 142, at [38]-[39].

[161] Steven Barnett "Leveson Past, Present and Future: The Politics of Press Regulation" (2013) 84(3) Polit Quart 353 at 354.

[162] "A judicial farce and a dark day for freedom" (31 October 2013) Daily Mail <www.dailymail.co.uk>.

[163] "Let us implement the Leveson Report, without a press law" (29 November 2012) The Telegraph <www.telegraph.co.uk>.

they refused to join a regulator. This was inserted into s 40 of the Crimes and Courts Act 2013.

The news media, unsurprisingly, responded negatively towards this. Labour peer David Puttnam called the Charter "straight out of the Joseph Goebbels propaganda rulebook".[164] The main barrier to actual reform became apparent: lack of industry cooperation. First, the industry did not even consider implementing the Leveson model. It created its own draft Royal Charter which it insisted the Privy Council consider: a tactical move to delay Parliament's charter.[165] The press began a pattern of publicly attacking anyone who agreed with Leveson or the parliamentary charter – somewhat undermining its pretence that its behaviour need not be regulated. In the meantime, the industry also formed its own regulator to replace the Press Complaints Commission, covering newspapers and magazines: the Independent Press Standards Organisation. This purported to be delivering Leveson recommendations and be the "[t]oughest regulator in the world",[166] but its proposals still left regulatory control in the hands of the main publishers and it only met 12 of the 38 Leveson recommendations, meaning it did not differ significantly from the Press Complaints Commission.[167] It also does not boast the membership of some key players, namely *The Guardian*, *The Independent*, and the *Financial Times*. The industry charter was rejected by the Privy Council.

Secondly, the regulatory model eventually put in place has had little effect because of the lack of industry cooperation. Parliament's Royal Charter was approved by the Queen in October 2013, but publishers refused to sign up to it, preferring the Independent Press Standards Organisation. Part Two of the Leveson inquiry, dealing with the hacking scandal, has been abandoned by the Conservative Party, which also has promised to repeal s 40, thus undermining Leveson's effectivity. Recently, Sir Harold Evans has backed a new press regulator as a rival to the Independent Press Standards Organisation; a charitable trust called IMPRESS. It proposes to enforce the Leveson recommendations which the Independent Press Standards Organisation ignores. How these two regulators will coexist

[164] Lord David Puttnam (speech to Media Pluralism and Freedom in a Connected World seminar, Dublin, 22 March 2013).
[165] Barnett, above n 161, at 359.
[166] Ian Burrell "Press announces timetable for 'toughest regulator in the world'" (24 October 2013) The Independent <www.independent.co.uk>.
[167] "It's 2014 and We're Still Implementing Leveson Inquiry Recommendations" (2014) London School of Economics and Political Science Media Policy Project Blog <www.blogs.lse.ac.uk>.

remains to be seen. Regardless, the continued fragmentation and 'picking and choosing' available to the media threatens consistent regulation.

Likewise, the Australian reports have not led to lasting reform. However, there, failure was due to overly-ambitious statutory proposals, and the political backdrop. The Gillard Labor Government unveiled a six-bill legislative reform package in response to the Convergence and Finkelstein Reviews, asking Members of Parliament to decide quickly on it.[168] This haste was due to the Government's decision that it was not prepared to spend months negotiating every part of it, and that it was an 'all or nothing' set. The most controversial bill was the Public Interest Media Advocate Bill 2013, which created an independent office with the power to register bodies as a "news media self-regulation body", performing its functions under the News Media (Self-regulation) Bill 2013. Organisations could be removed from protection under the Privacy Act 1988 if they were not members. However, the Bill lacked support and was withdrawn. Contrary to the Government's stated 'take it or leave it' approach, two bills passed. Like our Press Council, the Australian Press Council pre-emptively responded to avoid any further government-led reform attempts. It quickly locked members into a four-year commitment and established an independent panel to advise on content standards.[169]

Ultimately, as Dr Joseph Fernandez notes, the Australian experience was a "debacle" with an "abrupt and ignominious end".[170] This situation is unsurprising given the Government's small majority and the ambitious six-bill package, which included regulation of ownership. The Opposition opposed the reform; then-opposition leader Tony Abbott stated that the Government "cannot cop criticism, and when it is criticised it reveals its authoritarian streak".[171] The Australian Greens, who originally supported putting Finkelstein's recommendations into action, had concerns about other aspects of the bills.[172] The bills also faced criticism from independents who were former Labor members.[173] Julia Gillard's leadership was defeated by Kevin Rudd weeks after the bills were withdrawn, with the new leadership ruling out media reform. The Liberal (Abbott-Turnbull) Government has not

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[168] Joseph M Fernandez "The Finkelstein Inquiry: Miscarried Media Regulation Moves Miss Golden Reform Opportunity" (2013) 4 The Western Australian Jurist 23 at 54.

[169] Mark Pearson and Mark Polden *The Journalist's Guide to Media Law* (Allen & Unwin, Australia, 2015) at 23.

[170] Fernandez, above n 168, at 59.

[171] (18 March 2013) 4 APD HR 2349.

[172] Australian Department of Parliamentary Services *Media reform: in shallows and miseries* (23 October 2013) at 13.

[173] At 38.

revisited the issue. In her autobiography, Gillard compared the "bullying culture" of the media to "the school playgrounds of yesteryear".[174] Yet she accepts "[u]ndoubtedly that the media reforms were poorly handled", owing to frustration rather than lack of need.[175] A lesser bill, focusing purely on the Finkelstein recommendations would likely have found more success.

These approaches taken in these reform attempts differed, yet the aftermaths were equally unsuccessful. The Leveson Report strongly condemned the press, such that it fought back with its own Charter, whereas the Law Commission worked to cooperate with the media, thus not alienating them. The Australian reports approached the issue from an academic point of view and envisioned an ethical Eden of media regulation; Leveson was a well-publicised court-like setting; and New Zealand addressed the issues purely from a law reform point of view. The Finkelstein Review could not have looked more different to Leveson: the hearings "were anodyne, held in old-fashioned rooms … Julia Gillard did not give evidence … Instead of Hugh Grant, we had a parade of academics".[176]

These comparisons do not provide much hope for media reform. If neither an aggressive nor cooperative model results in success, this suggests that there is something inherent about media regulation that makes reform near impossible. However, Part VI explores how success is possible.

V Responses: The Last Five Years

> "We are in the midst of changes whose future direction can only dimly be discerned".[177]

A Industry Response Post-Law Commission Report

The Online Media Standards Authority was created following the Issues Paper, and out of fear that the Commission's preliminary conclusions would be actioned. Its members looked to the Advertising Standards Authority as an example of successful self-regulation, noting that its decisions were rarely reviewed, and that, overall, it was considered by most to be a

[174] Julia Gillard *My Story* (Bantam Press, Great Britain, 2014) at 459.
[175] At 459.
[176] Stephen Brook "You say Leveson… we say Finkelstein" (2012) 23(3) Br Journal Rev 27 at 28.
[177] Finkelstein, above n 12, at 10.

fair system.[178] They called the Online Media Standards Authority a "targeted, pragmatic response".[179]

The Online Media Standards Authority's jurisdiction covered complaints about news content on the member broadcasters' websites (filling the gap which the Broadcasting Standards Authority could not regulate). It was an initiative of Television New Zealand, Sky/Prime, MediaWorks Television and MediaWorks Radio, Māori Television, Radio New Zealand and the Radio Network. Bloggers were also permitted to join, but few did. Cameron Slater, of Whaleoil, joined but later pulled out. It was funded by its members, and independent of government (the committees being made up of some industry representatives, but a majority of lay people). The Online Media Standards Authority created its own standards code, overseen by a Complaints Committee and Appeals Committee. Between 2013 and 2016, approximately 50 cases were decided (over half of the average number of annual decisions by each of the Broadcasting Standards Authority and Press Council).

The Law Commission considered that the Online Media Standards Authority showed a willingness of the industry to be accountable, but did not address the fundamental issue of convergence; the lack of regulatory equality between print and broadcasters.[180] The body was industry, not consumer-focused and the body exacerbates the problem of fragmentation.

Further, the Online Media Standards Authority was clearly an attempt to prevent the Commission's recommendations being implemented. The preventative industry response is a not dissimilar pattern historically. The Press Council was only established to avert the Labour Party's plans to establish a statutory equivalent if it was to become government.[181] Since we can question the effectiveness of the Press Council in times of changing technology, we can anticipate similar shortcomings of industry self-regulation which is not a response to genuine issues, but a pre-emption to prevent the wielding of a larger stick. As explored in Part II, defensive self-regulation is not effective long-term because usually no active steps, responsive to technological and societal change, are taken. Equally, the aspirational approach taken in Australia places too high a burden on the industry, and alienates it. A mid-point must be carved out.

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[178] Joint Broadcasters "New Media Review" (4 April 2012) at [34].
[179] At [58].
[180] Law Commission, above n 6, at [11].
[181] Law Commission, above n 19, at [5.36].

The Government has monitored the Press Council's response to the Law Commission's criticisms, in particular relating to the publicity of the complaints process and sanctions.[182] It has ruled out extending the Broadcasting Standards Authority jurisdiction to cover online news and current affairs, considering that self-regulation exists. The Government supports the Broadcasting Standards Authority and Press Council working to remedy the lack of clarity given convergence, by proving public information about the different complaints systems and jurisdictions.[183]

B Short-Term Benefits

On the surface, the New Zealand attempt at reform has been a failure as, following the Government's rejection of the Law Commission's recommendations, there has been no other Government-led regulation. The Broadcasting Standards Authority prophetically predicted that such a "wide ranging review may have the effect of causing short term improvements [but it will then] be put on the shelf".[184] However, the attempts at reform have prompted some industry response. The report was only ever intended as a "health check", to ensure media frameworks remained effective.[185] There has been a check, as key issues have been made public and some changes made. The Press Council showed willingness to address some of its shortcomings, as seen in its Commission submission, and it has threatened to impose harsher regulation.[186] The Press Council has heard complaints against online members, notably The Spinoff, Stuff and Kiwiblog, and even considered complaints against a non-member website when the publisher was willing to enter into dialogue with it.[187]

Generally, bloggers, the print news media, the Newspaper Publishers Association and Television New Zealand welcomed most of the Law Commission's recommendations, regardless of the Government response. Farrar praises the Law Commission's recommendations for having a "welcome dose of common sense and respect for a free

[182] Letter from Mark Field-Dodgson (Senior Policy Adviser – Ministry for Arts, Culture and Heritage) to Antonia Leggat regarding the Law Commission report *The News Media Meets 'New Media'* (15 September 2017).

[183] Field-Dodgson, above n 182.

[184] Broadcasting Standards Authority "Law Commission Issues Paper – Media" (12 March 2012) at [7].

[185] Ministry for Culture and Heritage, above n 84, at 5.

[186] Clark, above n 133, at 49.

[187] "Adam Greenwell Against interest.co.nz" (September 2016) New Zealand Press Council <www.presscouncil.org.nz>.

media, which avoids the excesses recommended in the UK and Australia".[188] The opportunity extended to non-traditional media to be de facto members of the news media has generally been well-received. In light of their digital-first strategies, most media organisations accept that the compartmentalised approach of different regulators for different mediums is outdated.[189] Clark notes that those that "look and act like mainstream media" relished the Law Commission's proposed extensions of news media privileges and obligations.[190] On the flip side, we could question whether we want a system where everyday people can get media privileges merely from how they present themselves.

The Harmful Digital Communications Act 2015, alongside the existing common law protections and developing common law, have also responded to some uses of media in the modern age. For example, there are instances of courts seeing the need to fill some of the gaps left by convergence, in the absence of a strong self-regulatory scheme. Examples include *Slater*, in which the High Court quotes the Law Commission's report. In *Solicitor-General v Siemer*, the High Court sentenced Vincent Siemer, of Kiwisfirst, to six weeks' imprisonment for contempt of court for publishing a suppressed a preliminary judgment.[191] The wide definition of "digital communication" under the Harmful Digital Communications Act 2015 means it covers blogs.[192]

There are also some sound reasons for not imposing the full Law Commission model. There is the possibility that the super-regulator model would not have solved any problems. The Commission could have set a higher standard of regulation, and its penalties were minor. After all, online media content can be disseminated rapidly and is hard (if not impossible) to retract, so this increased power needs increased regulation. There is also an issue of funding. In Cheer's submission, she noted that if the industry can withdraw funding, "the integrity and status of the regulator will be affected".[193] She argued that funding should not "have strings attached or be [able to be] withdrawn at a whim", affecting "composition and operation".[194] Thompson saw the regulator as solving only part of the

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[188] Farrar, above n 136.

[189] Clark, above n 133, at 47.

[190] Clark, above n 133, at 47.

[191] *Siemer v The Solicitor-General* [2012] NZCA 188; [2012] 3 NZLR 43. Upheld in *Siemer v The Solicitor-General* [2013] NZSC 68.

[192] Section 4.

[193] Cheer, above n 25, at [5].

[194] Cheer, above n 25, at [5].

problem. Many online news sources consumed in New Zealand do not originate from here, so local news publishers would be put at a commercial disadvantage.[195]

The voluntariness emphasised in the Commission's vision of successful reform placed much faith in the industry, and could have led to little substantive change. Organisations may not have become members, or opted out if decisions displeased them. Even the Commission, in its Issues Paper, briefly sets out a plan B if voluntary membership is not practical, by requiring membership for large traditional media companies like Television New Zealand and the New Zealand Herald, with the option for others to opt in.[196] Similarly, the New Zealand Journalists Training Organisation submitted that the body would not stop "new media mavericks" and "rogue operators" from acting illegally, pointing to the United Kingdom as an example, despite its stronger controls.[197]

C Long-Term Failures

Despite the industry response, which represents some short-term success, and the risk that the super-regulator would have faced more challenges, the status quo represents a failed reform against a long-term perspective. Failure of news media reform is creating a regulatory system which only deals with part of the media, where the industry does not regulate itself sufficiently, and which sees the press continues to breach legal and ethical rules. This is the situation in which New Zealand finds itself. The lacuna explored in Part II remains. As the New Zealand National Integrity System Assessment found, New Zealand has "the most deregulated media market in the Western world".[198]

The Online Media Standards Authority is now defunct. "With little fanfare", at the end of 2016 it announced that its functions were being transferred to the Press Council.[199] The Press Council expanded its jurisdiction to digital content of members' news and commentary websites and blogs (where they have joined voluntarily), so there was an element of duplication.[200] However, following in the rich history of self-regulatory regimes being established to head-off legislative change, the industry has placated government and public concern, yet created no meaningful change – at least so far.

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[195] Peter Thompson "Form submission from: Media regulation submission form" at 6.

[196] Law Commission, above n 19, at [43].

[197] New Zealand Journalists Training Organisation "Submission to Law Commission about Review of Regulatory Gaps and the New Media" at 1.

[198] Transparency International, above n 10, at 262.

[199] Akel, Price and Stewart, above n 63, at 119.

[200] "OMSA Broadcast Members join Press Council" (9 March 2017) Press Council <www.presscouncil.org.nz>.

Television and radio programming (broadcast and published on broadcasters' websites) are now covered by both the Press Council and Broadcasting Standards Authority. People can complain to both, and take advantage of the different standards applied. Further, there are only 10 digital members of the Press Council - a mere drop in the ocean of blogs and news aggregators.

As new technology emerges, and with the introduction of ultra-fast broadband, the failures of the regulatory system are becoming clearer. The Government has recognised this. It has publicised its intention to introduce legislation later in 2017 to regulate on-demand video under the Broadcasting Act 1989, through the Digital Convergence Bill. Hon Maggie Barry suggests that "the law needed to be future-proofed to allow for technological changes in the future". This Bill follows a broader review of telecommunications policy given convergence, and the 2015 report *Content Regulation in a Converged World*.[201] The Government considered that the video on-demand services were a regulatory gap which needed consistency for the public and a level playing field for publishers.[202] The Ministry for Culture and Heritage intends to consult with stakeholders about the Bill, following the 2017 general election, subject to approval of the incoming government.[203]

Overall, the Law Commission model would have solved many of the problems existing with New Zealand media. It was far more likely to be accepted by the media than the United Kingdom or Australian models – and this is why some short-term success has ensued. Based on the United Kingdom experience, it is clear that the Law Commission approach of increasing carrots rather than sticks is both constitutionally-appropriate and more effective. For example, Richard Desmond, co-owner of *The Irish Daily Star*, removed his publications from the English Press Complaints Committee but joined the Irish Press Council because the latter offered distinct benefits.[204] The limitations of the Law Commission model were those that were inherent in the mere fact of regulating the media, particularly in the possibility of voluntariness backfiring and as regards funding. Compulsory membership threatens freedom of the press excessively, arguably unconstitutionally so. Underlying government funding undermines independence. Still, Part VI argues that, for a sustainable regulatory scheme, a bolder proposition would have likely found more success from a reform point of view.

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[201] Ministry for Culture and Heritage, above n 84.

[202] Field-Dodgson, above n 182.

[203] Field-Dodgson, above n 182.

[204] Lara Fielden *Regulating the Press: a Comparative Study of International Press Councils* (Reuters Institute for the Study of Journalism, 2012) at 39.

VI Looking Forward: Successful Reform of the News Media

> "[W]e need to consider not only the right of the press to publish but also the right of readers to receive the information which they need in order to function effectively as citizens of a democratic society".[205]

A Clarity and Cohesiveness

Clarity and cohesiveness are the necessary elements for successful news media regulation. Clarity of standards and transparency of decisions within a self-regulatory scheme have been accepted as necessary by all three jurisdictions discussed. Cohesiveness, as between different mediums, is required for a sustainable scheme. This can be seen in the success of the Advertising Standards Authority which particularly puts its success down to effectiveness (simple complaints processes and publicised reports) and coverage (over different media platforms).[206] These are lacking in the present short-term focus: as Finkelstein notes, "piecemeal measures" lack longevity.[207] On top of this clarity and cohesiveness, the reformed system must be self-regulatory and forward looking, as discussed in Part II. These are the objective criteria of successful reform: what is necessary to prevent the present harms in a sustainable manner.

The question becomes which form of regulation best achieves these goals. On one hand, clarity and cohesion are more likely with government regulation since it is better resourced, has legal enforceability (unlike if it were voluntary) and universal coverage.[208] However, Fairfax in its Law Commission submission argued that "any regulation should be light-handed".[209] Given the importance of freedom of speech and the news media's unique role, we should look to self-regulation as the "least worst", least "big [b]rother system of regulation" in a democracy.[210] Also, on a practical level, self-regulation is appropriate as the industry has technical knowledge which the government lacks. It is also flexible so can

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[205] Julian Petley "The Leveson Inquiry: Journalism ethics and press freedom" (2012) 13(4) Journal 529 at 532.

[206] Advertising Standards Authority "Submission to the Ministry for Culture and Heritage on the Content Regulation in a Converged World Discussion Paper" at 2.

[207] Finkelstein, above n 12, at 8.

[208] Finkelstein, above n 12, at 274.

[209] Fairfax Media, above n 154, at 2.

[210] Angela Phillips, Nick Couldry and Des Freedman "An Ethical Deficit? Accountability, Norms, and the Material Conditions of Contemporary Journalism" in Natalie Fenton (ed) *New Media, Old News: Journalism and Democracy in the Digital Age* (Sage Publications, India, 2010) 51 at 64.

respond more flexibly to technological change. The Finkelstein review noted that self-regulation encourages ownership of standards and rules.[211] This leads to more consistent rule-abiding practices.

Cohesive regulation is not only necessary in the digital age, but also more efficient. In its decision-making the Law Commission also looked to the standards for a regulatory solution proposed in the Leveson report: effectiveness, fairness, objectivity standards, independence and transparency, powers and remedies and cost.[212] Applying these factors, Leveson preferred a 'one-stop shop' approach because one set of standards is applied, it is easier for consumers, and is an efficient use of government resources both to set up and on an ongoing basis.[213] The Law Commission envisioned that the Chief Ombudsman would appoint a person to facilitate and oversee the formation of the body, and would initiate a review after a year of operation, to see whether it is effective. Therefore, this model strikes the right balance between independent self-regulation and requiring some tangible results. Of the reports discussed, it offered the best chance for clear and cohesive regulation.

B Another Option: Fines and Incentives

Still, some changes to the New Zealand model are necessary to get to successful reform, as they would achieve sustainability. Cheer regards the Law Commission recommendations as "uneasy compromises", the body being voluntary but with incentives.[214] Still, the New Zealand model was more likely to be accepted by the industry than the United Kingdom's proposal given that its focus was forward-looking, not about censuring past behaviour; that it focused on privileges as enticement; and that it consistently rejected any government involvement. In contrast, the "philosophical bedrock" of the Leveson report, was centred in correction over forward-looking regulation of content.[215] It was a post-hoc system, seeking to repair damage rather than provide aspirational guidelines or ensure no errors are made. The New Zealand vision was also more modest than that of Australia.

The New Zealand situation cannot be fully aligned with the United Kingdom's. The Law Commission held back its report until Leveson was published, and learnt that its aggression

[211] Finkelstein, above n 12, at 274–275.
[212] Law Commission, above n 6, at [5.59]; and Leveson, above n 51, at [10.29].
[213] Leveson, above n 51, at [5.30].
[214] Ursula Cheer "New grand media regulator recommended by Law Commission" (2013) Thomson Reuters <www.thomsonreuters.co.nz>.
[215] Barnett, above n 161, at 355.

was met with aggression. However, greater pressure on the New Zealand press, rather than seeking compromises, may have had more success. Weaker pushback against the industry led to weaker attempts by the industry at change. As it is, the more lenient views of the Commission (even incorporating weaker plans B and C) allowed the industry to purport to self-regulate with empty promises. It was able to take advantage of the lack of Government priority.

Further, the New Zealand news media prides itself on having the responsibility lacking in the United Kingdom's media culture. Sara Hadwin and Duncan Bloy note the perception of a self-regulatory body as an "'old boy' network", which extends generosity to editors.[216] However, the introduction of lay members must limit this. Further, editors find it humiliating, even to print the ruling, and do not take criticism against their publication's ethics or integrity lightly. Particularly this is because any complaint takes time, money and requires legal advice. The Barker-Evans review of the Press Council found that the industry has a "strong incentive" to ensure its "product[s] and services are socially acceptable, and that the public has this perception" as it is, after all, a business.[217]

Thus the New Zealand media would not have responded with the same aggression as the United Kingdom media had the Law Commission offered less of a compromised model, considering the industry was far more open to a self-regulatory scheme. Present long-term failures are due to the media's ability to placate public and political interest with short-term changes. Incorporating fining would have led to a more successful body. Other regulators have the ability to fine, such as the Broadcasting Standards Authority and a number of professional disciplinary bodies. The Commission did not fully consider the option of a sliding scale fining system, taking into account aspects like revenue. If an organisation makes significant funds out of a breach, the consequences should be greater. Significant monetary penalties are needed to deter media behaviour where that behaviour actually earns it profit or readers. For example, Slater later equated his $2,000 fine from breaching the suppression order to being "slapped over the wrist with a wet bus ticket".[218]

To ensure that the fining would not lead to organisations not joining the self-regulatory body, the incentives must be greater. It is clear that the Commission's carrot, rather than stick, approach, was appropriate. However, the benefits currently extended to the news media are not sufficient. Farrar notes that bloggers have already been allowed some

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[216] *Law and the Media* (Sweet and Maxwell, London, 2007) at 208.

[217] Barker and Evans, above n 40, at 8.

[218] "Editorial: Bloggers can't be above the law" (19 September 2010) Stuff <www.stuff.co.nz>.

privileges practically. For example, the Treasury let them into Budget lockups where they are deemed to have legitimate reasons for access; and some court registrars allow them to report from the media bench.[219] Likewise, Fairfax argued that the voluntariness was unrealistic in practice as the benefits were not sufficiently enticing; publications smaller than it could "flourish" even without access to court and the Press Gallery.[220] Price queries whether the law would "seriously take away TV3's source protection rights and subject them to the Privacy Act if they didn't join".[221] For an effective regulation system, it must. Further incentives could be through a well-publicised kitemark. The Law Commission study found that few people knew there were self-regulatory media bodies. Therefore, any kitemark could provide a reputational brand advantage if clear enough. In the internet age, many organisations seek to have the "halo effect" which automatically extends to print media.[222] Otherwise, readers are unlikely to trust its news. The Law Commission's recommendation that public funding for broadcasting only be available for members also strengthens this.[223]

The Law Commission's focus on industry buy-in was appropriate, given that this is fundamental to a scheme with any longevity. The proposed regulation was minimal, at least compared to other professions, as it did not require any licences for members to practice. This makes it more palatable to the industry. The idea that publishers undertake some responsibilities, and must be regulated in the exercise of their functions, is not controversial - as recognised by the Harmful Digital Communications Act 2015. However, proportional fining and greater (equally enforced) incentives would lead to the best possibility of success. This model offers the greatest likelihood of all media joining, and proactively responding to technological change. In relation to the few 'cowboy' operators, the criminal and civil law will continue to develop, as they have been.

C Likelihood of Reform

The reports show that reforming news media is inherently difficult due to two factors: a lack of government support and lack of industry buy-in. Public interest in seeing reform is not enough. These are consistent throughout the three jurisdictions discussed.

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[219] David Farrar "Submission by David Farrar on The News Media Meets 'New Media'" at 1.

[220] Fairfax Media, above n 154, at 3.

[221] Price, above n 21.

[222] Rasha A Abdulla and others *The Credibility of Newspapers, Television News, and Online News* (paper presented to the Mass Communication and Society Division, Association for Education in Journalism and Mass Communication, Florida, 9 August 2002) at 3–4.

[223] Law Commission, above n 6, at [7.117].

To move forward with media regulation in New Zealand will require a re-energised Government interest. This may be in the form of public criticism of, and highlighting, the failings of the Online Media Standards Authority, putting pressure on the industry to create a system of *effective* self-regulation, at threat of the Government now accepting the Law Commission's recommendations. However, public interest is unlikely sufficient as a catalyst alone. Globally, there was great interest in this matter, yet this did not continue following the failed attempts at reform. The Government likely also fears more wasted time and money in creating a scheme which will not be adopted by the industry. Reform without a dire problem to link to is inherently difficult. Still, leaving review until a situation akin to the United Kingdom emerges is not the best option because it will prompt a defensive media stance.[224]

A further difficulty inherent in regulating the news media, which will continue into future discussions of reform, is the subjectiveness of regulating democratic institutions. For example, in regulating the fruit industry, there are objective and clear standards to apply; but regulating press behaviour is less black and white. Freedom of expression is not at play in the former industry. However, these difficulties do not make reform impossible. Much depends on culture. Nordic countries (such as Sweden, Finland, Norway and Denmark) are always ranked highly for press freedom, yet more accepting of regulation.[225] Nearly every media organisation voluntarily signs up. Self-regulation is far more effective if the culture is accepting of it. However, the New Zealand news media's response over the past five years has demonstrated its acceptance of some self-regulation. Even though the government did not enforce any regulation, the industry has responded to convergence in some areas, such as in the Press Council's extended jurisdiction. Therefore, reform is not doomed to fail merely because it threatens regulation.

Another difficulty is that law reform is often prompted through public pressure which is, in turn, informed and influenced by the media. Since 2013, media comments and reports on reform have subsided. In the Law Commission's study, 52 per cent of respondents would "definitely support" the body and 36 per cent were open to it.[226] Thus, the lack of public interest argument (as opposed to the United Kingdom's situation) must fail. The difficulty stems from the public being unaware of the extent of breaches.

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[224] Feintuck and Varney, above n 26, at 66.
[225] Reporters Without Borders, above n 58.
[226] Big Picture Marketing and Research, above n 23, at [9.7].

Still, one hint that review is likely is that this area does not appear to be significantly divisive politically. The real question is whether the Government will see fit to add it to its list of priorities. In light of the Harmful Digital Communications Act 2015 only recently placating the public to some extent regarding use of media technology and harms, the impetus for priority has not been present. However, this, alongside the Digital Convergence Bill, show a willingness of the Government to address such issues with changing technology. This is a step in the right direction.

The constant compounding of the problem suggests that some action will need to be taken – even if it is not an urgent matter. Changes to the use of the internet are continuing. The digital-first strategies adopted by major media companies are becoming more extreme. Interest in the printed format is becoming rarer, and even extinct among younger news consumers. It is true that the relationship between politicians and the media has been, and will remain to be, difficult. But the conversation in recent years suggests a mutual respect (or at least acceptance) for their respective functions. As Palmer notes:[227]

> The media and politicians are bound together by a powerful bond of mutual need. Politicians provide news for the media. The media provides exposure for politicians to the public … It will always be a tense relationship in mutual trust.

D Consistency: a Legal System Responsive to Changes in the Media

In requesting the Law Commission's report, Minister Power noted "it's imperative the law keeps pace with technology and that we have one set of rules for all news media", noting our present "Wild West" of cyberspace.[228] There is an incredibly fine tight-rope to walk between ensuring a scheme is both predictable (so the media can consider its actions and the public have recourse), and responsive to changing technology. Three countries have made similar recommendations around reforming the news media. Yet none have been put into practice. The public and political interest in reform was at a global high between 2011 and 2014, yet no legislated changes followed - clearly showing that the nature of the particular reform is inherently highly contentious. This paper argues that all have missed opportunities to put in place a scheme to develop alongside technology. Consistency of standards and enforcement, over time and despite evolving technology, is another hallmark of successful reform. This lack of sustainability is the central failure of the current regulatory matrix.

[227] Palmer, above n 87, at 201.
[228] New Zealand Government, above n 110.

Regulation can evolve, to be responsive to changing technology. A useful example is the Danish system of media regulation. As consolidated in 2014, its Media Liability Act 1998 applies to most mass media. Under subs 1(3) it applies to "[t]exts, images and sound programmes that are periodically imparted to the public, provided that they have the form of news presentation" equivalent to other examples of publications given. The Act establishes a press council, strong penalties (including imprisonment) for breaches of the Act, and outlines criminal liability for media content. All mass media complaints can be made to the Danish Press Council for breaches of "sound press ethics".[229]

The Danish example shows that a wider definition of news media can be responsive to changes in technology, even if written in statute. However, a statutory approach is not the appropriate response in New Zealand, given its emphasis on free press. Likewise, the *Convergence Review* found that principles-based legislation would be the best form of regulation, rather than black-letter law.[230] We can create a responsive, forward-looking scheme through ensuring that any statutory change is principles-based and wide enough to allow the independent regulation to "apply, amend or remove regulatory measures as circumstances require".[231] The use of the Royal Charter as a tool of reform in the United Kingdom is a demonstration of the great care governments have taken to ensure that freedom of the press is not compromised. There will always be whispers of government interference if a statutory model is proposed.

The Law Commission proposals were correctly orientated towards future technological change. Particularly, this can be seen in the definition of news media, which was not limited by medium, but functionally-defined. In theory, it could extend to publishers on mobile applications, or other developing forms of technology. The second reason it promised a responsive, long-lasting solution was through the self-regulatory model. This allows for changes in societal practice, for example, as new ways to invade privacy are established (such as through private information sourced from applications, or information physically collected through drones). As publishing continues to move globally, the codes of conduct could reflect this, whereas constant amendments of legislation are impractical, laborious and time-consuming. It also allows the industry to reflect on what is proper practice, whereas a statutory scheme like that of the Broadcasting Standards Authority, with judicial recourse, puts the decision-making power in the hands of those who are not experts in the nature of modern press pressures and public expectations.

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[229] Media Liability Act 1998 (Denmark), s 34.

[230] Australian Government, above n 7, at 13.

[231] Australian Government, above n 7, at ciii.

Still, there are those who take a pessimistic view of the ability of the law to respond to changing technology. Naturally, a future-proofed scheme takes more consideration and an element of guesswork. Accurately, the Issues Paper recognised that the speed and rate of technological change means that it is "impossible to predict precisely what impact this new digital era will have on future societies".[232] It even quotes the extreme view of *The Economist* that the era of mass media "now looks like a relatively brief and anomalous period that is coming to an end".[233] Despite this uncertainty, even those in opposition to the Commission's recommendations do not debate the technological developments occurring at an accelerating rate.

In Fairfax's submission, it stated that the review should focus on a "proven need" and "correcting real or proven anomalies rather than trying to adapt regulation for perceived problems or issues which could arise in the future".[234] Unsurprisingly, it saw the law as "admirably self-correcting" despite technological change.[235] Fairfax believed that users adapted with technology, recognising that errors exist when there is the fast-flow of information, and "those who embrace the digital age also expect greater freedom and little or no gate-keeping [which] inevitably means fewer rules".[236] Harvey also warns of the danger of applying "properties of one paradigm … *mutatis mutandis* to another without recognising that paradigmatic change introduces concepts that are so utterly different … assumptions about information are invalid".[237] Regulatory models may not transfer to the new paradigm, just as rules around the printing press do not translate to digital technologies. While a logical point, we should not overstate this. Over 500 years elapsed between the invention of the printing press and the computer. So, while the Law Commission's model would never be expected to outlast this time period, it would likely adapt through a number of significant technological revolutions.

Ultimately, the more positive view is the appropriate way forward. As Price put it, the Government response is "short-sighted" given that the "existing patchwork system is

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[232] Law Commission, above n 19, at [1.15].

[233] "Coming full circle" *The Economist* (online ed, London, 7 July 2011).

[234] Fairfax Media, above n 154, at 1–2.

[235] Fairfax Media, above n 154, at 2.

[236] Fairfax Media, above n 154, at 2.

[237] David Harvey "Submission of D.J. Harvey on Law Commission Issues Paper 27 *The News Media Meets 'New Media'*" at 2.

rapidly passing its use-by date".[238] He considers that the opportunity was missed to "fix up what even the media agrees is an untenable system".[239] Of course, just because we have not "plumbed to the depths of [our] offshore cousin" is no reason to assume that we do not have a problem, or we will not.[240] Between the flexible self-regulatory scheme, the addition of an Ombudsman overlooking the set-up of the new regulatory body, and the anticipated regular reviews of the body, the Law Commission recommendations showed a good measure of future-proofing. Changes can be made.

VIIConclusion

This paper has concluded that the purported industry compromises in the United Kingdom, Australia and New Zealand have not made any sustainable changes. None serve as examples of successful news media reform. Requirements of successful reform of the news media in New Zealand are: independence, self-regulation, responsiveness, consistency, clarity and cohesiveness of regulatory schemes. However, the work that has been done on the nature of news media regulation need not be wasted; instead, it can be used to create a forward-looking, all-inclusive scheme of news media regulation. Genuine industry buy-in is necessary, as is meaningful impact of regulation, so creating one body with the ability to fine and provision of greater incentives (which are consistently enforced) is the best way forward.

The failures of the present regulatory matrix will become more evident with increased technological change. The status quo continues to deteriorate. However, it will take renewed public and political interest in reforming an area which has not yet reached the legal and ethical lows of the United Kingdom. Still, the reasons that the Government gave for rejecting the Commission's recommendations have not held up over time, and the Government's faith in the industry was insufficient.

Mike Feintuck and Mike Varney accurately sum up the situation we find ourselves in:[241]

> … the incoming tide is in the process of changing the contours of the landscape, and perhaps even washing parts of it away. Observers are free to watch … as waves of technological innovation and convergence, globalisation and cross-media

[238] Steven Price "No one-stop media regulator" (2 October 2013) Media Law Journal <www.medialawjournal.co.nz>.
[239] Price, above n 238.
[240] Mike O'Donnell "Govt cool on mega media regulator" (22 September 2013) Stuff <www.stuff.co.nz>.
[241] Feintuck and Varney, above n 26, at 244.

> conglomeration combine, and then appear to wash over, familiar landmarks on the media scheme… but for those charged with regulating the media, watching is not an option, and instead they must intervene if the tidal forces are not simply to be allowed to take their course.

To add to this metaphor, burying our heads in the sand cannot be an appropriate response to an inevitably continuing difficulty, no matter how many factors are needed for successful news media reform. The present position may currently be manageable (if only just), but it is not sustainable.

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