

3. Different strokes for different folk: Regulatory distinctions in New Zealand media

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For much of the past century there was broad acceptance of the stark contrast between the state's involvement in the regulation of the content of broadcasting and its laissez-faire relationship with the columns of the press. The 'failed market' argument that substantiated regulation of the airwaves was difficult to counter. Fundamental changes in technology and media markets have, however, rendered the rationale open to challenge. Some aspects of the 'failed market', such as frequency scarcity, simply do not apply in the digital age. This article examines the nature of media regulation in New Zealand, noting its similarity to the dichotomous approach in Britain, Canada and Australia but also its divergence toward a more neo-liberal market model that largely limits statutory oversight to matters that fall broadly into the categories of morals and ethics. It argues that, given the New Zealand Government's decision more than 15 years ago to forego regulation of ownership or the mechanisms that would serve the public good aspirations of a Reithian model, the continuing role of the state in regulation of broadcasting is questionable. A replacement model could be based on an effective regulatory body already present in the New Zealand media industry—the Advertising Standards Authority.

GAVIN ELLIS

Retired editor-in-chief of the New Zealand Herald

IN 1938 a former editor of *The Times*, Henry Wickham Steed, stated that the 'underlying principle that governs, or should govern, the Press is that the gathering and selling of news and views is essentially a public trust'. He believed it was a form of trust akin to that of a doctor and patient but

potentially more dangerous when dishonoured. Like the medical practitioner, the journalist enjoyed such trust in part because there existed mechanisms to call to account those who breached it. In Wickham Steed's day it was the power of the courts alone. Today, journalism in what may be called the British tradition retains a tenuous hold on that trust by supplementing legal constraint with second-tier regulation.

Newspapers and magazines have enjoyed a freedom from state control—other than legal constraint and remedy—that suggested Milton's *Areopagitica* defence of the printing press has continued to ring in politicians' ears. Perhaps also influenced by the First Amendment to the United States Constitution, Westminster-style governments have shown a continuing reluctance to engage in statutory control over the content of print media in peacetime. It is a reticence that has not extended to broadcasting and New Zealand is one of many nations that claim a level of oversight over broadcasters that is not extended to their print counterparts.

This article will outline the systems in New Zealand that regulate content of print and electronic media, explore the way in which these systems operate and examine how they are perceived by the public. It will then address the diminished basis on which one is subject to state authority while the other has its own form of comparable accountability, and will consider how that basis may be further eroded by media convergence. It will conclude by suggesting the wider adoption of an existing regulatory model that has the virtues of self-regulation and the maintenance of public trust. It is appropriate, however, to begin with the mechanics of media regulation in New Zealand.

The regulators

Three principal bodies provide avenues for complaint about the content of New Zealand media and the performance of those connected with them. The bodies are the New Zealand Press Council, the Advertising Standards Authority and the Broadcasting Standards Authority. Only the latter is a Government-appointed statutory body. The other organisations emerged from a tradition of self-regulation in the print media.

The Press Council was established in 1972 by newspaper proprietors and the journalists' union as a hasty response, some believe, to the suggestion that an incoming Labour Government was considering a statutory press body (Tully & Elsaka, 2002). The Newspaper Publishers Association (NPA) and the En-

gineering, Printing and Manufacturing Union (EPMU) remain the council's constituent bodies. The costs of the council are met by industry bodies. Membership of the council is a mix of industry and public representatives with the public members required to hold a majority. Five persons represent the public and are chosen by a panel comprising a nominee of the NPA, a nominee of the EPMU, the current council chairperson and the New Zealand Chief Ombudsman. Industry representation comprises two NPA appointees, two EPMU appointees and one appointee from the Magazine Publishers Association. The chairperson, who must be unconnected with the press and who effectively represents the public's casting vote, is chosen by the panel for a five-year term. By convention this post is filled by a retired High Court judge. The Hon. Barry Patterson, QC, replaced Sir John Jeffries as chairman on July 1.

The council has three objectives:

- Consideration of complaints about the conduct of the Press and of others in relation to the press;
- Promotion of freedom of speech and freedom of the press;
- Maintenance of highest professional standards by the press.

The vast majority of newspapers and magazines accept Press Council jurisdiction and the body has taken the view that it may also consider complaints against those publications that have not formally submitted to its oversight. It has done so on a number of occasions. Complaints must first be made to the publication concerned. If the complainant is dissatisfied with the response or receives no reply, a complaint may be laid with the council. The council informs the publication of the details of the complaint and seeks a response which is forwarded to the complainant for comment before the council begins its adjudication. Publications are not required to publish adjudications that are not upheld (but may do so) but each organisation that has accepted Press Council jurisdiction undertake to publish adjudications where a complaint against it is upheld.

There are a number of caveats to the complaint process. Complainants must waive their rights to legal remedy before the council considers matters that could have that recourse. The complaints procedure outlined in its annual reports states that this is to avoid the council being used as a 'trial run' for litigation. Complaints are considered in private and the parties are not legally represented although they may appear in person (few do so and in 2004 only three complainants appeared before the council). There is no right

of appeal, although the council will re-consider cases where material errors of fact can be shown. The council has no power to fine or otherwise punish offenders.

Council deliberations rely on both precedent set by previous adjudications and reference to a Statement of Principles adopted in 1999. The statement includes references to accuracy, privacy, confidentiality, advocacy, discrimination and subterfuge and sets guidelines for corrections, headline and caption writing, reporting on children and young people, photographs, the distinction between comment and fact, and letters to the editor.

An analysis of adjudications can be found in Table 1. Increasingly, complainants are using the council's Statement of Principles against which to register their complaints. In 2002, the council stated in its annual report that the number of complainants citing principles had risen from 42 percent in 2000 to 63 percent in 2002. The nature of complaints shows only minor variation from year to year and generally follows the pattern of 2004.

Until 1970, all broadcasting in New Zealand was state-owned and private television was not introduced until 1989, which may suggest a residual proprietorial attitude that, in small part at least, explains why print media are free from state oversight but radio and television in New Zealand fall under the jurisdiction of the Broadcasting Standards Authority, a Crown Entity established in the sweeping reforms to broadcasting embodied in the Broadcasting Act 1989. The BSA is responsible for programme standards but not the programme mix. Beyond a charter that requires the state-owned commercial television broadcaster, TVNZ, to feature programmes that reflect and enhance New Zealand's character (under the *Television New Zealand Act 2003*, TVNZ has the unenviable task of trying to give effect to public broadcasting objectives while maintaining its commercial performance), the state's hold on what New Zealanders see is limited to provision of a funding body. This is the Broadcasting Commission (which operates under the title NZ on Air), and it makes grants to applicants for programmes that meet 'public good' objectives. The commission also funds the operation of the two state-owned non-commercial radio networks, National Radio and ConcertFM.

The Broadcasting Standards Authority is funded by an appropriation from Parliament and by a levy on broadcasters. The BSA comprises four members, appointed by the Governor-General on the advice of the Minister of Broadcasting. The chair must be a barrister or solicitor of not less than seven years' experience. One member is appointed after consultation with broadcasters

Table 1: Press Council adjudications, 2002-2004

	'02	'03	'04
Adjudications issued	48	52	45
Upheld	8	14	9
Part upheld	2	5	3
Not upheld with dissent	1	2	0
Not upheld	36	31	33
Not adjudicated	39	27	30
Mediated/resolved	3	3	3
Withdrawn	1	2	1
Withdrawn at late stage	1	2	1
Not followed through	16	9	12
Out of time	2	2	0
Not accepted	3	2	2
Outside jurisdiction	3	0	3
In action at end of year	10	7	8
Total complaints	87	79	75

Source: New Zealand Press Council

and another with public interest groups. The current chair, Joanne Morris, is also a member of the Waitangi Tribunal that considers Maori grievances under the Treaty of Waitangi.

The authority's mandated tasks include:

- Receiving and determining complaints about alleged breaches of codes of broadcasting practice;
- Encouraging broadcasters to develop codes for its approval on a range of issues of ethics and taste;
- Conducting research on broadcasting standards.

Unlike the Press Council, the BSA has the ability to order publication of an approved statement when a breach has been determined. In addition it can both impose fines and deny a broadcaster advertising revenue by requiring it to transmit commercial-free for up to 24 hours. While fines (up to a limit of

NZ\$5000), characterised as compensation, have been routinely imposed on broadcasters, the somewhat Draconian denial of revenue provision has rarely been applied (Day, 2000). Failure to comply with an order by the authority is an offence carrying a fine of up to \$100,000. Its decisions may be appealed to the High Court and both broadcasters and complainants have done so (Burrrows & Cheer, 1999).

In the five years to June 2004, the BSA issued an average of 214 decisions a year (roughly three times that of the Press Council), upholding about 25 percent. Complaints, 68 percent of which were against television broadcasters in 2004, relate largely to good taste, fairness and accuracy, and privacy. The number of complaints and decisions rose rapidly after the establishment of the authority and for the past five reported years has averaged about 190 a year (See Table 2).

Neither the Press Council nor the Broadcasting Standards Authority deal with complaints regarding advertising. The BSA initially had responsibility for broadcast advertising but in 1993 that task was passed to the Advertising Standards Authority, a self-regulating industry body that already handled complaints about press advertising. The ASA has two independent complaints bodies: the Advertising Standards Complaints Board (ASCB) and the Advertising Standards Complaints Appeal Board. (ASCAB) The ASCB has eight members—four public members with no media connections and four industry representatives—plus a public member chairperson who has a casting vote. The ASCAB has three members, two of whom (including the chairperson) must be public members. An upheld complaint may result in the withdrawal of an advertisement or a refusal of media to carry it. Decisions are made public. In 2004 the ASCB considered 257 complaints, of which 48 percent were upheld or settled. Fifty-three decisions were appealed, 35 of which were not accepted for consideration. Of the 18 decisions considered, six appeals were allowed and one was settled.

While both the Press Council and the BSA are concerned with considering complaints and upholding appropriate standards, both bodies have also entered into areas of advocacy. In so doing both are fulfilling their remits. However, the difference between the two bodies is apparent in their empowering documents. The Press Council's constitution requires it to uphold the principles of freedom of speech and of the press but deals with objectives only in general terms. Section 21 of the *Broadcasting Act 1989* gives the BSA

Table 2: BSA adjudications, 1990-2004

	Complaints received	Decisions issued
July 2003-June 2004	196	203
July 2002-June 2003	169	182
July 2001-June 2002	186	259
July 2000-June 2001	197	189
July 1999-June 2000	206	239
July 1998-June 1999	204	184
July 1997-June 1998	174	177
July 1996-June 1997	206	199
July 1995-June 1996	179	171
July 1994-June 1995	162	144
July 1993-June 1994	168	151
July 1992-June 1993	159	144
July 1991-June 1992	106	76
July 1990-June 1991	52	45

Source: Broadcasting Standards Authority

not only authority for the maintenance of standards but a strong catalytic role in their creation. The Act prescribes the areas in which that advocacy should lie and, unlike the Press Council’s mandate in favour of free expression, is predicated on an assumption of the need for public safeguards against what might be seen as injurious publication. Those differences have dictated the direction in which each organisation has taken its advocacy role.

In his final annual overview in the Press Council’s annual report for 2004, Sir John Jeffries devoted a significant section to press freedom and the council’s role. He said:

Though no journalist in this country feels physically threatened for merely doing their job that does not mean defenders of press freedom can pack up their tools and go home. In democracies like this, attacks usually take a more sophisticated form. And whatever form they come in, attacks need to be firmly repelled.

Jeffries describes press freedom as ‘a battle the Press Council is proud to help wage’. Several recent complaints to the council illustrate how it has done so. A complaint was made against *The New Zealand Herald* for carrying comments by ‘a self-confessed climate-change agnostic’ in an article on global warming. The complaint, by a professor from the University of Virginia’s environmental sciences department, claimed the article was inaccurate, lacked balance and showed excessive advocacy. The council did not uphold the complaint, commenting:

The press’s requirements ensure a...popular and general approach to the most arcane subjects and wide-ranging, mass-readership publications will report minority views and even opinions that may be manifestly counter to the prevailing wisdom, or even wrong...Advocates of a particular standpoint may not find the press always serving their purpose, but then the function of the press is to serve their readers in the broadest sense. (Press Council Adjudications 2004, Case 962)

In another case brought against *The Press* (Christchurch) and *The New Zealand Herald* by the New Zealand Immigration Service (Press Council Adjudications 2004, Cases 983 & 984), the council found itself weighing statutory secrecy against the right to report the proceedings of Parliament. Both newspapers had published the name of a man seeking refugee status after he had been named during a parliamentary debate. The Immigration Service claimed publication was a breach of the man’s statutory right to confidentiality under the *Immigration Act*. In a lengthy adjudication the council relied on the authority of Lord Denning M.R. in *Attorney-General v Times Newspapers Ltd* which mentioned the Bill of Rights 1688 before stating: ‘Whatever comments are made in Parliament, they can be repeated in the newspapers without any fear of an action for libel or proceedings for contempt of court.’ The council’s adjudication said that ‘in the absence of direct New Zealand authority the council considers it prudent to follow the English case. To do otherwise might suggest primacy of the courts over Parliament’.

The council has been active in international circles in the promotion of press freedom and has acted as an adviser in the setting up of a press complaints procedure in the Kingdom of Tonga where such freedom has been under concerted attack (See Robie, 2004).

If the Press Council has gained a reputation as a defender of press free-

dom, the Broadcasting Standards Authority has established itself at the forefront in establishing a balance between that freedom and the right of an individual to privacy. Privacy is embodied in a set of adjudication principles developed by the authority during the course of its early deliberation on complaints in that area. However, the BSA has a statutory right under the Broadcasting Amendment Act 2000 to require the development of a separate privacy code which would be a binding form of restraint on broadcasters. In late 2001 it decided to conduct research into privacy and informed consent issues. The result of that research was a monograph, published in 2004, entitled *Real Media Real People: Privacy and Informed Consent in Broadcasting*. The authority chair, Joanne Morris, said in a foreword that as a result of the research, there seemed little desire for a separate code but there was a suggestion that existing principles be re-examined.

There are several striking findings in this research. The first is that there is a gulf between the general public's understanding of the rights of individuals when featuring in the media, and the actual legal position of those individuals. This suggests that better, more accessible information might be useful so that the public clearly understands both its rights and obligations and the rights and obligations of the media to go about their professional tasks. The second is the degree of unanimity between various stakeholder groups and members of the public on some key issues. Almost all respect the principle that protection of children and the vulnerable is highly important. Many agree that public figures have less right to privacy on important issues than ordinary members of the public. What does this mean in practice? Should individuals have complete control over the use of recordings/images in which they feature?—in law and in practice no, but many individuals disagree. Should a consent form always be used—it is impractical for some areas of media e.g. news gathering and most radio interviews, but may be sensible for longer-form programmes, and competitive formats where participation is sought by the individual. If the method of gaining information is intrusive (e.g. hidden cameras), but there is a justified suspicion of wrongdoing, are privacy principles less important?—no, but the public interest is a valid defence. Are there special issues in recording Maori people?—yes.

The authority has built up a large number of precedent-setting decisions on

privacy. Between July 1998 and December 2003 it dealt with 132 privacy complaints of which 48 were upheld. The authority's seven-point set of privacy principles provides protection for the ordinary citizen but a number of cases cited by Michael Stace (Stace, 2004) in a wide-ranging discussion of the application of the principles also reveals a minefield for broadcasters.

- A 1999 complaint against Television New Zealand's *Holmes* current affairs programme found that in spite of parental consent, the privacy of an eight-year-old child with attention deficit disorder had been breached because his permission had not been given to film him (Decision 1999-087/089).

- In a programme that revealed a child's paternity, his privacy had been breached even though both parents had given their permission for filming (Decision 1999-093/101)

- While it is generally considered that filming is permitted in a public place, the authority has ruled that intrusion can occur there. It ruled that filming an injured person climbing out of a car after an accident was a breach (Decision 2003-043)

It would be wrong, however, to suggest the authority has no regard for the public's legitimate right to know. It does pay attention to public interest defences in complaints alleging breach of privacy. Stace set out the way in which the authority determines privacy complaints:

The procedure the Authority now applies before assessing a privacy complaint is to determine whether the person whose privacy is alleged to have been breached is in fact an identifiable individual. Once the Authority has determined that there has been an apparent breach of privacy, it then assesses, if raised, the broadcaster's contention that the complainant consented to the broadcast.

In the case of children, the Authority requires assurance from the broadcaster regardless of parental consent, that it has taken the best interests of the child into account. With adults, the Authority looks closely at the circumstances in which an all-encompassing release form has been signed. It also accepts that consent may be implied by the complainant's actions.

Broadcasters often argue that the disclosure of the information contained in the broadcast is justified in the public interest. Indeed, the circumstances in which this matter is raised frequently involve what would otherwise be a clear breach of an individual's privacy. While the Authority insists that the information disclosed must be in the public

interest, and not merely of public interest, it accepts that disclosure in the public interest overrides an individual right to privacy.

Because of the importance of the factual situation of each complaint and the range of situations with which the Authority is required to deal, it is difficult to generalise about what factual situations amount to a breach of privacy. It can be noted, however, that a person shown participating in criminal behaviour is unlikely to have a privacy complaint upheld.

The BSA has been the public's principal conduit through which claims for breach of privacy have been pursued. Certainly the number of complaints (about 20 a year) far exceed those to the Press Council (five in 2004). However, there is growing acceptance that the Court of Appeal judgment in *Hosking v Runting & Otrs* (which involved the photographing of a television celebrity's children in a public place), while unsuccessful, has established a tort of privacy in New Zealand. Although the judgement set a high threshold for success in such claims, the future may see the courts becoming an alternative to the BSA in some cases.

Burrows and Cheer have been generous in their praise of both the BSA and the Press Council, stating that 'the BSA's decisions continue to contribute much to the standards of ethical journalism in New Zealand broadcasting' and that the Press Council's adjudications, in addition to contributing much to the practice of journalism in New Zealand, 'reinforce a number of fundamental ethical principles that supplement the 'real law' applied in the courts'.

Attitudes toward the regulators

Such praise may reflect the objective view of two of the country's leading academics in media law but the positions taken by both the BSA and the Press Council inevitably bring them into conflict with either the media, their subjects or the public in general.

In August 2004 the BSA published the results of a survey of complainants who submitted formal complaints in 2003. Conducted by the research company Colmar Brunton, the survey involved both qualitative telephone interviews (10) which informed the design of a self-completion questionnaire sent to 123 complainants, 66 per cent of whom returned completed questionnaires. More than half were first-time complainants, 31 per cent had made two to three complaints and 10 per cent had made four or more com-

plaints. Twenty nine percent felt the final decision by the authority was either ‘very fair’ or ‘fair’. Forty percent felt it was unfair and 20 per cent felt it was very unfair. However, the researchers noted a strong correlation between perceptions of fairness and whether or not the decision was in the complainants’ favour. The complaints process itself was generally positive, with 62 per cent believing that they had had the opportunity to voice their concerns and on most aspects of the process positive and neutral comments outweighed the negative. However, as the researchers noted, ‘there were significant proportions of complainants who struggled with some elements of the process and held poor perceptions of the process overall’. Nonetheless, many of the issues revealed by the survey appear to be administrative rather than conceptual. In its 2005 Statement of Intent, the BSA highlighted, as a priority, the need to make improvements to its complaints processes.

On the other side of the ledger, however, there is disquiet among broadcasters over what they regard as inconsistent decisions by the authority. As well as privacy issues, broadcasters have found themselves facing differing interpretations of offensive material, what is permissible after the 8.30 pm ‘watershed’ and when the use of graphic footage is justified in news bulletins (See Decision 1999-064 v Decision 2001-211; Decision 1998-090/1 v Decision 2002-029 and Decision 1999-080 v Decision 2001-212. Decisions carried on BSA website www.bsa.govt.nz).

The Press Council has not canvassed its complainants to seek their views but has, from time to time, sought public comment on its operations. It was as a result of such consultation—and criticism—that it adopted its statement of principles in 1998. To that point, complainants had no clear guidelines on which to base their applications for redress. There has been similar criticism of the lack of an appeals process within the Press Council. In spite of this, the council has resisted calls for another body to review its decisions, opting instead for a procedure whereby it will re-examine cases if new evidence or disclosure of material error can be provided.

The most strident criticism of the council in recent times has been by a National Party Member of Parliament, Murray McCully. One of his party’s principal political strategists, McCully in July 2004 launched an attack on the media in which he said the council ‘has been long discarded as a serious regulator of professional standards by practitioners such as myself’. Set against the background of a recent Sunday newspaper article that compared the National Party leader, Dr Don Brash, and right-wing Australian activist Pauline

Hanson, McCully told the National Press Club that his party had decided against complaining to the Press Council about the article, which he described as ‘malicious, unprofessional, offensive, unethical, inaccurate, unbalanced and unfair’. He said the decision not to complain to the council was ‘about the most resounding vote of no confidence we could express in that organisation and its processes’. He said the council was a body with few clear rules, ‘other than the ones they make up along the way’, and was dominated by a small number of media chains. He was also critical of the time the council took to deal with complaints, saying most complainants were statistically likely to be dead before their complaint was dealt with.

McCully’s criticism has not translated into party policy promising changes to press regulation. However, it did highlight a number of issues with which the council has yet to effectively grapple. One is the perception—not borne out by the membership structure of the council—that it is dominated by the media companies. A public majority of one may be sufficient to ensure that the public hold sway but perception and reality are seldom resolved by reference to slim margins. Increased public representation would help to overcome suggestions of media domination. Secondly, the council already uses its Statement of Principles in adjudications but the preamble is equivocal—‘these Principles are not a rigid code, but may be used by complainants should they wish to point the Council more precisely to the nature of their complaint’. That does not instil confidence in the process. If the council is referencing complaints against the principles, it seems a short step to say unequivocally that it will apply them in adjudications. However, it is the council’s resistance to an appeal process that is, perhaps, the most puzzling. Both the BSA and the ASA have established processes for appealing decisions.

The Press Council is alone among the oversight bodies in denying that additional level of redress. In New Zealand the council functions less as a mediating body than as a ‘judicial’ one. It does not act as an intermediary but as an adjudicator. In theory, a complainant or the ‘accused’ could seek a judicial review of a council decision but such recourse lacks the virtue of in-built transparency and even, perhaps, natural justice (given the cost of taking the matter to court). An appeal process would provide both. As for McCully’s death-before-satisfaction criticism, the council over the past three years has had between seven and 10 complaints carried over into the following year, an average of about 10 percent.

Comparable regulators

A direct comparison with the three nations most often referenced against New Zealand—Australia, Canada and the United Kingdom—is somewhat problematic given that all three countries maintain public broadcasting systems that are either wholly or substantially funded directly by the state or through public licence fees. State-owned radio in New Zealand may fit the model, but commercially-operated TVNZ cannot, in spite of the laudable aims of its charter.

Some comparisons, however, may be made. All three countries operate forms of self-regulating press complaints bodies. The Australian Press Council, the United Kingdom's Press Complaints Commission and Canada's provincial press councils operate along broadly similar lines to that of New Zealand's press body. Each has a mix of public and industry representatives, all hear complaints and all have either guidelines or codes against which those complaints are considered. All, like New Zealand, are based on redress rather than punishment.

All three countries have state regulation of broadcasting media and have moved to aggregate regulatory functions covering all aspects of broadcasting and telecommunications under single authorities. The Canadian Radio-television and Telecommunications Commission's members are appointed by the Canadian Cabinet and report to Parliament through the Minister of Canadian Heritage. They are subject to orders from Cabinet. The CRTC, established in 1968, has up to 13 fulltime and six part-time commissioners and a staff of 400. It is both a licensing and a complaints body and has a strong mandate to promote Canadian content. Last year it was involved in controversial decisions over the provision of international services on cable television. It approved carriage of the Arab satellite network Al Jazeera but only after meeting Canadian Jewish Congress concerns by requiring the editing out of hate speech; refused carriage of Italian network RAI because it competed with a Canadian Italian-language service; and delayed but finally allowed a digital licence for Fox News.

Both Britain and Australia are latecomers to the integration of electronic regulation. In 2003 the United Kingdom merged five regulatory authorities into the Office of Communications (Ofcom). It has a current staffing level of about 750 (a 32 percent reduction on its predecessors). Ofcom regulates both telecommunications and broadcasting, requiring the latter not only to meet

codified programme standards but also imposing content quotas on free-to-air services. In 2004 it proposed a new broadcasting code, consolidating the six separate codes for television and radio that it had inherited, which it implemented in mid-2005. In 2004-2005 it considered 4184 programme complaints, of which 3994 were complaints about programme standards (75 percent not upheld) and the remainder over fairness or alleged breaches of privacy (85 percent not upheld, not entertained or discontinued).

Australia's electronic regulator, the Australian Communication and Media Authority (ACMA) came into being on July 1, 2005 with the merging of the Australian Communications Authority and the Australian Broadcasting Authority with a combined staff of about 500. The ACMA has, at least as an interim measure, adopted the programme standards developed by the ABA. Unlike its British and Canadian counterparts, the ACMA also has control over internet content and can require Australian content providers to remove prohibited material from Australian-hosted websites and advise service providers of appropriate filters for foreign-hosted content. Broadly speaking it can act against providers of material (on open websites) that would be restricted or banned by Australia's film classification body.

All three cross-sector regulators have eschewed adjudicating on television and radio advertising. That function has variously been devolved to Advertising Standards Canada, Britain's Advertising Standards Authority and the Australian Advertising Standards Bureau.

New Zealand has no similar cross-sector regulatory body and there appears to be no pressure for the BSA and the Broadcasting Commission (NZ on Air) to merge with those elements of the Commerce Commission that currently regulate the telecommunications industries. Nor is there any indication that the Government will move away from a price-bidding system of commercial spectrum allocation.

Who should regulate?

While the media in New Zealand, as elsewhere, is regularly criticised over content, the issue of how it should be regulated and by whom is not, it must be said, a matter of great current debate. A discussion paper released in February by the Ministry of Culture and Heritage, that raised the possibility of wider powers for the BSA, did not engender wide public discussion. That is unfortunate because changes to media within New Zealand and the emer-

gence of new regulatory bodies in other countries suggest, I believe that such a debate should take place. However, contrary to what some may see as the conventional wisdom of the state providing a bulwark against globalised media, I would argue that the established reasons for state involvement in the regulation of expression have been systematically broken down. The digital future is one in which convergence will render delivery methods immaterial and the replacement of single-medium organisations with multimedia structures will be complete. As the future unfolds it will be increasingly difficult to clearly differentiate between print and broadcasting (streaming video and customised newspapers will be downloaded to the one device) and, hence, the dichotomous treatment of print and broadcast media will be increasingly questionable.

Hallin and Mancini (2004) noted in their discussion of the media model in north and central Europe that the political culture in those countries demonstrated the strength of civil society ‘and a tendency to devolve to institutions of civil society functions that otherwise might be exercised by the state’. While they go on to discuss the way in which those states treat broadcasting as a continuing part of *res publica*, they believe that strong press councils make state intervention less important than it might otherwise be. It seems but an extension of this view to suggest that, if the community is prepared to allow print media to be governed by robust self-administering accountability systems, it has no grounds to demand that broadcast media must be held accountable to a statutory body on issues in the same plane.

The regulatory distinction has already become tattered at the edges. Founded on the twin justifications of scarce frequencies and intrusive power, the regulation of broadcasting—further legitimised by the state’s claim to sovereign rights over the radio spectrum—was a broadly-accepted concept for most of the twentieth century. Broadcasting was seen as an example of ‘market failure’ that required government intervention (Krattenmaker & Powe 1994). There was a need, under that orthodox view, for state control of both the ownership and content of broadcasting and, even in the free-market United States, this was the practice for decades. For the past 25 years in New Zealand, however, the government has exercised virtually no control over the type or level of ownership, nor has it been moved to place programming requirements on all broadcasters.

The place of technological determinism is, I believe, undeniable. Digital

technology renders the 'scarce frequency' justification redundant: high capacity digital satellite and cable delivery make hundreds of channels a reality; and digital delivery reduces reliance on the radio spectrum. To further erode the distinction, the internet is capable of functioning as a radio or television receiver via the telephone lines.

The same technological changes have put a question mark over the issue of undue influence. Audience fragmentation and subscription services put power in the hands of the consumer. While network television may continue to command more than half the viewership even in mature multi-channel environments and Katz's theory on the sharply declining effect of television has been challenged (Curran, 2002), choice and the range of content has undoubtedly increased exponentially since the 'influence' justification was developed. It is reasonable to suggest that, at least, 'influence' is less than in the past. And to choice must be added the new demand for people's time presented by massive growth in use of the internet.

The internet may provide some guidance to the future direction of media oversight. It has been regarded as ungovernable, although national security, property rights and child pornography have led to some revision of that view (van Cuilenburg & McQuail, 2003). Its potential contribution to a Habermasian public sphere has fed the argument in favour of minimal regulation. Countering that argument has been the threat that global media oligopolies will also colonise cyberspace and its regulation may become a political issue (Herman & McChesney, 1997). The February 2005 UNESCO International Conference on Freedom of Expression in Cyberspace in Paris encouraged the development of guidelines for the legal underpinning of commercial Internet enterprises but warned explicitly against regulation that could inhibit the free flow of information. While not going so far as to suggest a stripping away of accountability in traditional media, the Internet debate, nonetheless, goes to the heart of the issue of media regulation: the need to set the limit for where government may tread.

McChesney (2003) is correct when he dismisses the argument that digital technology renders regulation obsolete: multiplicity is not a substitute for accountability. However, Sunstein (1997) offers useful advice in setting some boundaries. The constitutional issues do not change simply through the introduction of new technologies. Any government, not simply that of the United States, has a role in fulfilling the Madisonian ideal of media as a tool of

democracy and that legitimises both anti-monopolistic regulation and guarantees of access. A government also has a legitimate role in policing ‘controllable’ speech such as obscenity, false and misleading commercial speech and libel but this should stand alongside a Madisonian commitment to free speech.

Such general principles are important, but it is not the present purpose to argue generally for the relative merits and demerits of state authority and self-regulation. Rather it is to deal with the specifics of the New Zealand case, not as it might be but as it is.

Let us consider the areas over which New Zealanders—through Parliament—have indicated they wish to see some oversight. Those areas include:

- Programme standards
- Fairness and balance
- Privacy

They have not included ownership restrictions, programme-based licence requirements, programme quotas, or publicly-funded non-commercial television services, most of which have figured in New Zealand’s past but which do not appear to be part of its future. While the future provision of public service broadcasting in New Zealand is a debate that should also be encouraged, for our purposes we may assume that the focus of media oversight in New Zealand is ethical and moral, not cultural or commercial.

It is on that basis that I question the role of a government-initiated regulatory framework for broadcasting in place of the self-administered media accountability system to which the press has bound itself. Ethics and morals are, I believe, the very stuff that M*A*S are designed to oversee. While not denying the place of government in the delineating of moral standards (over matters such as pornography, for example), the issues with which the BSA might grapple sit within the limits that the law imposes, not outside them. If they are within the law, why are the broadcasters subject to statutory control?

Curran (2002), in a penetrating analysis of the schools of media criticism, refers to media regulation as attempts ‘to ensure that the media serve the needs of society rather than simply the private interests of shareholders’. It is clear from the limited powers conferred on the BSA—extant for some years—that successive governments have foregone such a role.

Section 14 of New Zealand’s *Bill of Rights Act* states that ‘everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form.’ Section 5 of the

Act says that limitations on this and other guaranteed freedoms should be confined to ‘such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. After allowing for the Millian principle of prevention of actual harm or the imminent threat of it, how can the state assume a statutory role in the moral and ethical conduct of the media without breaching not one but both of those provisions? The state should not be the media’s moral minder.

That is not to deny the need for standards and accountability. That accountability begins within each organisation. In-house codes of conduct are a patch-work in the New Zealand media and suggest fertile ground for further study. Part of the price all media should be willing to pay for an absence of state authority over them is a robust and accessible code of conduct. The other price to be paid is acceptance of an autonomous public accountability system.

Conclusion

This article began by recalling the cornerstone of the media—public trust. A pre-requisite to gaining that trust is unambiguous accountability. Baroness Onora O’Neill in the 2002 BBC Reith Lectures suggested this is not to be achieved through micro-management and central control but through good governance.

Such governance will not earn the public’s trust unless the public itself plays a leading role. No matter how well-intentioned state appointees may be, a statutory system is open to allegations of ‘stacking’ to reflect the government’s own leanings (a charge made by McCully against the BSA in his 2004 criticism of the media). For their part, the media acting as their own judge and jury leads understandably to charges that they are self-serving (a criticism that McCully levelled at the Press Council). The solution must be a system that is not open to either charge and which embodies both transparency and efficacy. It must be a system that has an overt public majority, clear guidelines and set processes for reviewing its decisions. Ironically, the model can be found in the unashamedly commercial arm of the media—advertising.

The Advertising Standards Authority, Advertising Standards Complaints Board and the Advertising Standards Complaints Appeal Board are bodies that enjoy the support of electronic and print media, the Government and the public (In 2004, the ASCB received 777 complaints, which is the highest ever

received in one year and some indication of public trust).¹ A 2003 review of the advertising of therapeutic products in Australia and New Zealand, prepared by Mike Codd who is a former head of the Australian Prime Minister's Department and latterly chancellor of Wollongong University, held up New Zealand's self-regulatory regime as a model worthy of emulation across the Tasman.

The advertising bodies form a model that, with some modification and the adoption of the best features of both the BSA and the Press Council, could produce a model media accountability system.

An all-media standards body could be formed on the ASCB/ASCAB model (but separate from those bodies that would continue to adjudicate on advertising) so long as it had a significant majority of public members, a transparent appointment process utilising the Office of the Ombudsman, a former member of the judiciary at its head, a mediation service as an intermediate stage between initial complaint to a media operator and formal complaint, plus meaningful powers of redress.

Removing the state from regulation of legitimate free expression is a laudable aim. So, too, is the creation of a body with jurisdiction over both electronic and print media. It would not only account for convergence but also remove the current double standard over standards.

Note

¹ The 777 complaints filed in 2004 included 263 duplicates; 180 were rejected for various reasons and 22 were withdrawn or resolved. The total of substantive complaints was 459 of which 257 went to decisions.

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Gavin Ellis, retired New Zealand Herald editor-in-chief, was presented with the 2005 Astor Award for Press Freedom at the Commonwealth Press Union conference in Sydney in March. He worked at the Herald in editorial and management roles for 32 of his 40 years in journalism. He is now engaged in postgraduate studies and tutoring with the University of Auckland.

gavin.ellis@xtra.co.nz

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