PRIVACY, REGULATION AND THE PUBLIC INTEREST

The UK experience and the lessons it might hold for Australia

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Table of Contents

Introduction

Chapter 1: Phone hacking: The catalyst for debate in the UK

Chapter 2: Protection of Privacy in UK courts
- The law as it has developed in UK – public interest in the courts
- Anonymised and Super Injunctions in the UK
- Does the Law impinge on Freedom of Expression in the UK?
- A Statutory Right to Privacy in the UK – idea rejected
- A Public interest defence in the UK
- AUSTRALIA: Privacy Discussion Paper

Chapter 3: Protection of Privacy in UK via Regulatory Frameworks.
- The Current Framework – UK Newspapers - Press Complaints Commission
- The Current Framework – UK Broadcasters – OFCOM
- AUSTRALIA: Current Regulatory Frameworks

Chapter 4: Some Proposals on the Table in the UK
- Lord Hunt
- Hugh Tomlinson
- Max Mosely
- The pros and cons of low-cost adjudication forums

Chapter 5: Two Proposals on the Table in AUSTRALIA
- Finklestein Inquiry
- Convergence Review
- Lessons Australia can draw from the UK
- Lessons the UK can draw from Australia

Chapter 6: Regulation in the age of Convergence

Chapter 7: Conclusions
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INTRODUCTION

Journalists and their employers face continual ethical dilemmas around the collection of private information and whether to publish or broadcast this information.

In the UK, *The News of the World* phone hacking scandal has demonstrated that some journalists and their employers have comprehensively failed in the way they tackle these dilemmas. The Leveson Inquiry into the culture, practices and ethics of the media is currently trying to come up with a set of recommendations that will ensure such misconduct is never repeated. Another important contribution is the March 2012 *House of Lords/House of Commons Joint Committee on Privacy and Injunctions*.

In Australia, there is also considerable discussion around the regulation of the media and privacy. This focus is partly as a result of the *News of the World* scandal in the UK but it also stems from an environment where convergence, the shortening of news cycles and financial pressures are placing pressure on journalists and news outlets.

In September 2011, the Commonwealth released an issues paper titled *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*. In February 2012, an *Independent Inquiry into Media and Media Regulation* recommended statutory regulation across all media platforms – TV, radio, print and on-line. On 1 May 2012, a long awaited Commonwealth *Convergence Review* was released. It recommended an industry-led body to oversee journalistic standards for news and commentary across all platforms in the media. Membership of the industry-led body would be mandatory for major news providers, except the public broadcasters.

As Australian policy-makers consider the radical options outlined in these documents, it is important that Australians have an understanding of the tumultuous events unfolding in the UK and what lessons can be gleaned from robust UK debates around how to create a better system. It is also important to identify the substantial differences between the two countries.

There are two main mechanisms for addressing breaches of privacy by the media. The first is through the courts, the second is via the regulatory framework. This research project aims to synthesise the insights of UK media lawyers, journalists and academics on the advantages and disadvantages of these two main mechanisms as they currently operate. It also seeks their views about how the regulatory framework could be improved to prevent future abuses.

While views differ around the best way forward, all parties agree on the need to strike the right balance between the right to privacy and the right to freedom of expression. The differences of opinion often lie with defining “the public interest”. When it comes to regulatory reform there is also a good deal of debate around whether there should be self-regulation, statutory regulation or independent regulation with a statutory underpinning.

This report does not focus in great detail on developments in Australia but offers reflections on the relevance of the UK experience.
Chapter 1 provides a brief overview of the current fractious UK debate around privacy, regulation and the public interest.

Chapter 2 explores how privacy disputes are decided by English courts and some of the debates around reform.

Chapter 3 looks at the current regulatory frameworks of print and broadcast media in the UK media.

Chapter 4 analyses some of the main options for regulatory reform currently being considered by the Leveson Inquiry including self-regulation, independent regulation with statutory underpinning and statutory regulation.

Chapter 5 looks at two recent Australian proposals recommending a single form of regulation across all media platforms. It then seeks to draw lessons for both countries from the experience of the other.

Chapter 6 assesses the prospects for regulation in the age of convergence and in particular a proposal for a three tier system which allows media organisations to effectively choose their own level of regulation.

At the time of writing, the Leveson inquiry is continuing to hear new evidence. Any day now prosecutors are expected to announce whether or not they plan to lay criminal charges with respect to phone hacking. This is a fast moving story. This report is current up to Friday 13 July.
CHAPTER 1 Phone hacking: The catalyst for debate in the UK

In the first half of 2012, the UK was focused on a number of significant events: The unfolding crisis in the Euro zone; preparations for the London Olympics and the jubilee celebrations marking 60 years of the reign of Queen Elizabeth II. Holding its own in this crowded media landscape was the Leveson inquiry into the culture, ethics and practices of the print media.

The proceedings were webcast live from the Royal Court of Justice in central London and received substantial media coverage. Almost every day, politicians, police and media figures appeared before Lord Justice Leveson revealing ethical and professional shortcomings and a disturbing web of close, often inappropriate connections.

The inquiry was set up following the extraordinary revelation that the mobile phone of murdered teenager Milly Dowler had been hacked into by News of the World journalists. Mark Lewis, the lawyer for the Dowler family describes this revelation as “a game changer”. While there has been prior instances of phone hacking, they had involved royalty, celebrities, politicians or sports people “Groups that the public are told court publicity and don’t deserve privacy”. The Milly Dowler case was different. As Lewis puts it “the public were saying, hang on a minute. We’ve been lied to. This was a much bigger thing.” There was now an understanding by the public that ordinary people could be victims of media misconduct. ¹

The revelations triggered widespread public revulsion and a series of criminal investigations. One of the jewels of the Murdoch media empire, the 168 year old News of the World folded. There was also a wave of sympathy for other phone hacking victims who had commenced civil suits. Milly Dowler’s family settled their civil case against News International, the former publishers of The News of the World for £2 millions, plus a further £1 million for charity.

London Barrister Hugh Tomlinson QC is heavily involved in litigation arising out of phone hacking. He says that it there are anywhere between 2,000 and 4,000 victims, about 1,000 of those could be described as “core victims”. By May 2012 about 110 civil actions had been commenced, about 70 of which had been settled and about 40 are still active. These actions are for misuse of private information and breach of confidence.²

At the time of writing in early July 2012, criminal investigations are continuing and no charges have yet been laid. It is anticipated that charges will be laid under The Regulation of Investigatory Powers Act 2000. Under this act it is an offence to intercept communications.

As the criminal investigations progressed and the civil cases churned through the litigation process, over at the Royal Courts of Justice, the Leveson inquiry continued to hear from witnesses. One of its goals is to make recommendations for a more effective policy and regulation that supports the integrity and freedom of the press while encouraging the highest ethical standards. It is expected that Lord Justice Leveson will hand down his recommendations sometime in late 2012.

¹ Interview, Mark Lewis, Taylor Hampton Solicitors, Thursday 31 May 2012
² Interview, Hugh Tomlinson QC, Matrix Chambers, Thursday 24 May 2012
In many ways the lead up to the release of Lord Justice Leveson’s findings is the calm before the storm. In late May, a fiery rally organised by the Hacked Off group was held at Westminster Central Hall. There was much discussion of the need to prepare for the political fight that will erupt once the recommendations are made public. Many of the speakers spoke of their fear of a concerted campaign by media owners to pressure government into watering down or even not implementing Leveson’s recommendations. Conversely, many in the media are concerned that justifiable concerns about phone hacking may prompt recommendations that could have profound, long term implications for freedom of speech.

No doubt, Lord Justice Leveson will make recommendations about the relationship of the press with both politicians and the police. It is possible he may even have something to say about media ownership and plurality. This report acknowledges the importance of those wider issues but focuses on the issue of privacy and media ethics.

Richard Peppiatt is a former “red top” journalist with The Daily Star newspaper, now a vocal critic of the industry.

“When you are immersed in that world you don’t see people as people. You see them as targets who can provide information or quotes. You lose any moral or ethical considerations. In your desperation to get a story you forget you are dealing with individuals, family life, privacy.”

“The people who pursued the Milly Dowler story, they are not dishonest human beings. But once they suspended reality she became a character in a narrative. In order to get the next part of this narrative – they weren’t thinking we’ve just hacked into a dead child’s telephone.”

One of the major questions facing the UK is how to ensure journalists do not suspend reality. How can journalists and media organisations internalise values and ethics? Can this be done through the use of carrots and sticks? What role does regulation play? What role do the civil courts play?

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3 Hacked Off rally, Westminster Central Hall, Thursday 17 May
4 Interview Richard Peppiatt, former journalist Daily Star, Saturday 12 May 2102
CHAPTER 2: Protection of Privacy in UK Courts

This chapter looks at how privacy disputes are decided by English courts and role the “public interest” plays in the decision making process. It goes on to discuss a recent parliamentary report which considered whether or not the UK should create a statutory right to privacy. A similar debate is currently taking place in Australia. The chapter concludes by looking at the similarities and difference between the two countries and what lessons, if any, Australia might glean from the UK experience.

The law as it has developed in the UK – public interest in the courts

In the UK, there is no statutory right to privacy as such. There is a cause of action for breach of confidence which has developed into a tort of misuse of private information. This evolution has been heavily influenced by the *European Convention on Human Rights*. In the UK, this convention has been incorporated into *The Human Rights Act 1998*.

There have been a number of high profile cases where individuals have brought civil actions for damages against media outlets. In determining these cases courts determine whether the information is private. If so, courts then balance the right to privacy (Article 8) with the competing right to freedom of expression (Article 10). In this balancing exercise there is an intense focus on the facts in the case.

This balancing process requires the judge to weigh up the public interest in maintaining the confidence against the public interest in publishing the disclosure. There are no set definitions of “private” or “public interest” which are superimposed upon the facts. Rather the judge must look at the individual facts of the case.

There have been a number of high profile cases. One of the most famous is the decision in *Mosely v News Group Newspapers*. Max Mosely was president of the Formula One motoring organisation. He was secretly recorded by *The News of The World* engaging in a consensual sadomasochist orgy. The newspaper published articles under the headlines titled “F1 boss has sick nazi orgy with 5 hookers” with sub heading “son of Hitler loving fascist in sex shame”. The newspaper web site posted footage of the orgy. Mosely sued, and the court ruled in his favour. The intimate sexual nature of the material was deemed clearly private. Mr Justice Eady also determined that in fact there was no Nazi theme to the orgy and no illegality. With this in mind he looked closely at the facts to determine whether the public interest in disclosing the information was outweighed by the public interest in not publishing.

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6 Ibid, para17-19.
such intimate information. He found in favour of Max Mosely, awarding him £60,000 in damages.  

A recent September 2011 decision of Mr Justice McNicol in Rio Ferdinand v MGN provides an insight into how the courts currently approach the public interest. In April 2010, The Sunday Mirror ran a story with the headline “My Affair with England Captain Rio”, containing details of a sexual relationship between a Ms Carly Storey and England football captain Rio Ferdinand.

The judge held that on balance there was sufficient evidence to find that there was reasonable expectation of privacy. He then proceeded to examine the facts closely and concluded on balance that the public interest in publication outweighed the public interest in maintaining confidence.

One facet of “public interest” is correcting a false image. Rio Ferdinand projected an image as a reformed bad boy, and now a committed family man. Furthermore, by seeking to meet Ms Storey at hotels where he was staying with his team, he was in breach of his obligations as a team member. In addition, there was a debate about whether or not the defendant was a suitable person to be appointed captain of the English team. A previous captain John Terry was dismissed because of an affair with the girlfriend of a team mate. The judge held that the position of team captain includes being a role model.

These two decisions and others like them illustrate how judges grapple with concepts of public interest by applying “an intense focus” on the particular facts of a case. They also lay bare that only those with deep pockets can try their chances in the courts. In order to secure £60,000 in damages, Max Mosely had to spend up-front £850,000 on legal fees.

The law as it has developed in the UK – Anonymised and Super Injunctions

In the UK, it is possible for parties to obtain an “anonymised injunction” from a court which prevents publication of information that would be a breach of confidence. The injunction prevents the names of one or both parties being published. It is also possible to obtain a “super injunction” which goes further and prohibits any publication or disclosure of the existence of the injunction.

There have been a number of highly controversial cases where individuals and corporations have sought such injunctions. One case involved Trafigura, a corporation which sought an injunction preventing the publication of an article about its dumping of toxic waste in the Ivory Coast.

In another case, footballer Ryan Giggs obtained an injunction preventing The Sun newspaper from publishing details of an extramarital affair. While the media respected the injunction, Giggs was named in some 75,000 tweets. A member of parliament then identified Giggs in parliament. At that point the media published the information. The Ryan Giggs case and others like it reveal the ability of new media platforms like Twitter to effectively undermine court rulings. This development raises

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profound questions for the future of media regulation.

These injunctions and others like them gave rise to substantial concern. In May 2011, a report by the Master of the Rolls Lord Neuberger of Abbotsbury titled *Super Injunctions, Anonymised Injunctions and Open Justice* contained a number of recommendations to tighten up procedures for granting injunctions, ensuring they were granted only when strictly necessary and requiring that they be kept under review. It appears these measures have worked. Since 2010, only two super injunctions have been granted. Since these reforms concern about anonymised and super injunctions has greatly reduced.  

**Does the Law impinge on Freedom of Expression in the UK?**

In the UK, views differ around the impact of the breach of privacy legal framework upon freedom of speech.

David Price is a lawyer who acts for both plaintiffs and defendants. He thinks the criminal law should be used to full force against phone hacking and other illegal activities. However, he has concerns about how the law has developed in recent years. He believes that information that was publishable ten years ago is no longer publishable and freedom of expression is being eroded. David Price questions whether and if so, to what extent, celebrity gossip should be subject to legal restriction. He also questions the assumption that it has no value.

“*We learn from our own experiences in life and from other people's experiences in life, and most inappropriate stories involve cautionary tales of some kind that people can learn from. Why do people want to read about them? There must be some element of educative purpose. And it's not just a question about the value of the information. The starting question would be - should you stop somebody from communicating that information? Should you stop someone from reading it? Bearing in mind, that there's someone who wants to communicate it and somebody wants to read it, why should you stop that interaction? On what basis?*”

David Price maintains if privacy laws are too strict in any area there is a consequential risk that journalists will stop investigating powerful people and this is not in the public interest. He believes that more than enough deference is shown to celebrities. Allowing them even more latitude to take advantage of their privileged position is not necessarily a good thing.

Hugh Tomlinson QC (who has acted for many plaintiffs including Ryan Giggs) believes the law has developed appropriately.

“To say that we're less free, I mean, it seems to me to be a very crude use of the word. I mean, yes the tabloids are less free to publish tittle-tattle. Those who have privacy interests are more free to protect them”.

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9 Privacy and Injunctions, page 68.

10 Interview, David Price, David Price lawyers, Thursday 24 May
Tomlinson says, generally speaking, the courts strike the right balance between the right to privacy and the right to freedom of expression. He acknowledges that there are “grey areas” but everybody knows that if a case involves exposure of crime or serious wrongdoing, privacy law will not apply in these cases.”

Hugh Tomlinson dismisses the idea that public interest is sometimes interpreted too narrowly by the courts.

“The notion of public interest the judge is applying is very, very close to the notion of public interest in the (Press Complaints Commission) editor's code which the press has freely subjected themselves to. They can hardly say that that is an improper threat on their freedom of expression. They've agreed to do it themselves….but I think the judges have taken an extraordinarily wide view of public interest…. probably wider than the editor's code. So… the reason the press found it objectionable is because they just ignored the editor's code and they can't ignore the judges”.  

Gill Phillips is the Director of Editorial Legal Services at The Guardian newspaper, a publication noted for its investigative journalism. It was the newspaper that broke many phone hacking stories and was initially prevented from publishing the Trafalgar story.

She says the current legal framework does not present problems for The Guardian. The newspaper does not focus on celebrities. It does however focus on politicians where there may well be a public interest. Gill Phillips distinguishes between stories about people who are interesting and stories where there is a public interest.

Gill Phillips says it is usually relatively easy to cover legitimate stories without unnecessarily delving into private lives. She points to the recent example of the conservative defence minister Liam Fox who resigned in 2011 after it was revealed he was often accompanied on official travel by his friend Adam Werrity.

Gill Phillips says it was clear that the relationship was inappropriate irrespective of any sexual dimension. “There may or may not have been some sort of sexual relationship but nobody went anywhere near it. And I think partly because they didn't need to, because the public interest in the story was enough as it was. And if you were going to go to it, well, what was the public interest in it?”

Gill Phillips says the legal framework is essentially sound and does not impede investigatory journalism.

“I don’t always agree with the decision that the court makes. But I do understand the basis on which they make them… The great advantage of the courts is that they can move, they can be flexible… It's a bit like a barge, you know, it's a very slow process, but they can do that. And I think as we've seen in a way with Ferdinand and Strasbourg, there's been a shift.”

11 Interview, Hugh Tomlinson QC, barrister Matrix Chambers, Thursday 24 May 2012

Gill Phillips is referring to the Rio Ferdinand decision and two recent decisions of the European Court of Human Rights (ECHR) based in Strasbourg. Both ECHR decisions have been welcomed by the media as a swinging of the pendulum in favour of freedom of speech over the right to privacy.

One involved the publication of a photo and accompanying article of Princess Caroline of Monaco and her husband on a skiing holiday, while her father Prince Rainier was ill. The court found that there was a public interest in reporting the way in which the members of the family “reconciled their family obligations with the legitimate needs of their private lives, among which was the desire to go on holiday.”

The second case involved a famous German actor who was arrested at Munich beer festival for possession of cocaine. Following publication of a front page article, the actor succeeded in obtaining injunctions preventing further discussion of his case. The court overturned these injunctions.

Justin Walford is Editorial Legal Counsel at News Group Newspapers, which publishes The Sun and formerly published The News of the World. The Sun is a “red top”, part of the Murdoch controlled News international group. A racy tabloid with topless page three models, it is the highest selling newspaper in the UK.

Speaking in his own capacity as opposed to a spokesperson for News Group, Justin Walford says he also believes that in the last twelve month the courts (both in the UK and in Strasbourg) have been taking a slightly more pro-journalist view with a slightly wider definition of public interest. This approach recognises the importance of public debate even around private conduct.

“Recognition perhaps that the public debate that takes place about morality, about how a certain individual should conduct themselves counter-weighs that individual’s privacy in certain areas.”

Justin Walford is also pleased that the approach to anonymised injunctions has changed in recent times.

“We fought more injunctions than anybody else… A number of high profile footballers were using the privacy laws to conduct private lives that were, perhaps, questionable in the sense of opening up issues of how individuals conduct themselves.....Public interest issues, how girls are used, if you like, passed from one to the other and the sort of lifestyle and attitude to other people, in particular women, of what you call throw-away lifestyle attitude. And there were legitimate questions that could be asked. But I think we were very concerned that injunctions would be granted quite quickly with anonymity, and we fought a number of those injunctions.”

13 Von Hannover v Germany (no. 2) [2012] ECHR 228, para 117, http://www.bailii.org/ eu/cases/ECHR/2012/228.html

14 Axel Springer AG v Germany (Application no. 39954/08)07/02/2012, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#f"dmdocnumber"="900156"f"itemid"="001-109034"
Justin Walford points to high profile legal disputes around footballer Ryan Giggs and banker Fred Goodwin. He maintains that by challenging the injunctions there was a groundswell of concern and a number of MPs and a member of the House of Lords broke the injunctions by speaking in parliament.

"Whether that was right or wrong was a matter for them and for parliament. But what did happen, was there was a groundswell of a feeling that it was not right that people: A] got anonymity, b] that very often one could find things very quickly on the internet, and one couldn't read about it in newspapers or see it on television, or hear it on the radio … And we then had the Masters of the Rolls making some very sensible changes. And we had the courts themselves accepting that actually maybe things had got a little bit out of hand on anonymity. The result is now far, far fewer injunctions."

Lawyer Mark Lewis acts for many people who say their privacy has been breached by the media. He believes that the number and type of anonymised injunctions were not excessive and the pendulum has now swung too far back towards publication. Mark Lewis maintains that public figures should be entitled to a private life and describing footballers as role models makes little sense. They are famous for their sporting ability not their moral leadership. He also takes the view that any discussion of the legal framework has to be alive to the broader practices and approach of the red top newspapers. This is particularly true of kiss-and-tell stories where young people are sometimes approached by newspapers who have obtained evidence of a relationship, either through phone hacking or other means. As Mark Lewis sees it, these people are effectively issued with an ultimatum.

"We’ve already got a story about you. We know it. Our sources already told us. We can either make you look very bad or we can make it look like you’re the victim, and we’ll even pay you a little bit of money." And that person is a victim of the press who is then put into a position normally of saying "Well, you’re gonna run the story, at least make me look half decent and I might as well earn a few pounds out of the story."

Mark Lewis describes this tactic as a form of blackmail.

In summary, there is a widespread consensus that over the last twelve months there has been a general trend towards interpreting the public interest more broadly. This trend has been welcomed by media groups. Some of those decisions are of concern to lawyers who act for complainants.

A Statutory Right to Privacy in the UK – idea rejected

Given that it is possible to discern general trends in court decision making – should parliament spell out in legislation where it thinks the balance should lie between the right to privacy and the right to freedom of speech?

15 Interview, Justin Walford, News Group Newspapers’ editorial legal counsel, Thursday 17 May 2012

16 Interview, Mark Lewis, Taylor Hampton Solicitors, Thursday 31 May 2012
The effectiveness and appropriateness of the current common framework around privacy was recently examined by the House of Lords/House of Commons Joint Committee on Privacy and Injunctions. The committee released its report on 27 March 2012.

The Committee considered whether or not the UK should adopt a statutory right to privacy which would define the both “privacy” and the “the public interest”. The committee concluded that a privacy statute would not clarify the law.

“The concepts of privacy and the public interest are not set in stone and evolve over time. We conclude that the current approach, where judges balance the evidence and make a judgment on a case by case basis, provides the best mechanism for balancing article 8 and article 10 rights.”

Hugh Tomlinson QC is disappointed by the committee’s conclusion. He is of the view that it is quite possible to craft a statutory definition that will not quickly go out of date. He gives two reasons why legislation is the way forward.

“First is that I think in a democracy, these things ought to be debated by the democratically elected representatives. They ought to be discussed. They ought to be considered and then it can’t be said that this was slipped in by the back door by dangerous activists, judges, dubious characters in Strasbourg. And [second] I do think it will provide an opportunity to have clarity where there is no clarity at the moment.”

Prash Naik is Controller of Legal and Compliance with Channel 4. He takes a different view from Hugh Tomlinson QC. Prash Naik thinks a privacy statute risks reducing clarity, not increasing it. He regards it as an invitation for litigation.

“It's an invitation for lawyers, and I'd include myself in this, to deconstruct meanings, to argue over what they intended, what was meant, I think going down that route is the wrong way to go.”

The Guardian’s Gill Phillips also thinks the committee reached the right conclusion.

“I don’t think you can define privacy, and you have to be very careful about what you do with public interest… I think if you have the public interest as a list of things that there is a danger that the court's going to say, “Well, this doesn't go anywhere, this doesn't fit.” And it's far better just to leave it fluid and flexible. Public interest is like an elephant. You sort of know it when you see it.”

“And I don’t really see that putting that in statute does anything other than possibly make it more restrictive and less holistic in terms of being able to just develop and be living. The great advantage of the courts is that they can move, they can be flexible.”

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17 Privacy and Injunctions, executive summary
18 Interview, Hugh Tomlinson QC, barrister Matrix Chambers, Thursday 24 May 2012
19 Interview, Prash Naik, Controller of Legal and Compliance, Channel 4, Thursday 7 June 2012
The committee took the view that flexibility is important. It also concluded that the criticism that privacy law is judge-made does not hold. The committee found the current framework is firmly and clearly rooted in legislation, namely *The Human Rights Act 1998*.

**A Public Interest Defence in the UK**

Currently in the UK, there is no general public interest defence for journalists who break the law in pursuit of the public interest.

Professor Julian Petley, chair of journalism and screen media at Brunel University, is a passionate advocate for regulation of the press in the public interest. Nevertheless he is concerned that many important pieces of UK legislation do not contain public interest defences. These include *The Computer Misuse Act 1990, The Official Secrets Act* and *The Bribery Act 2010*. Other pieces of legislation such as *The Data Protection Act* and *the Regulation of Investigatory Powers Act 2000* do contain a public interest defence.

Professor Petley believes it is very important that a public interest defence exist in all relevant legislation. He points to the MPs Expenses Scandal. In 2009, *The Daily Telegraph* paid a public official £110,000 for information relating to MP expense claims. The story led to a series of resignations, sackings, retirements, prosecutions and convictions.

“Clearly, that did involve payment for information which didn't belong to the newspaper. That is, of course, strictly speaking, illegal. But I don't think anybody would seriously argue that that shouldn't have been allowed to happen or that there shouldn't have been a public interest defence because it was so manifestly obviously in the public interest. But I've got a number of journalist friends who have infringed certain laws in pursuit of a story which they are genuinely convinced is in the public interest”.  

Another case where media in engaged in illegal activity was the “canoe man” case. In 2008, *Sky News* hacked into the emails of Anne and John Darwin. The couple had faked John's death in a canoeing mishap in order to collect life insurance. The police described the evidence provided to them by *Sky News* as “pivotal” to the conviction of the couple on 15 charges of money laundering and fraud.  

In response to these sorts of cases, in early 2012, the Director of Public Prosecutions issued interim guidelines for prosecutors to consider before they commence proceedings against journalists. The guidelines require an assessment of both the public interest served by the conduct, the overall criminality and then weighing up these two considerations against each other.

The guidelines have been widely welcomed but there is still concern among media groups and free speech advocates that journalists are reliant on benign and clear thinking prosecutors. Once charges

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21 Interview, Professor Julian Petley, *Brunel University*, Friday 25 May 2012

are laid, courts would not have the ability to consider public interest arguments.\textsuperscript{23}

To solve this problem Julian Petley believes serious consideration should be given to creating either consistent public interest defences in all relevant acts or create a statutory defence in a single piece of legislation.

“If journalists know that there is a public interest defence available to them, surely that encourages good and brave and investigative journalism. Whereas, if the journalist isn't really quite sure what the legal position is and every case is going to be decided very much on its own merits, albeit with reference to legal precedent, he or she is in a difficult position in my view. So, I see this as encouraging and protecting a good journalism.”\textsuperscript{24}

\section*{AUSTRALIA: Privacy Discussion Paper}

The March 2012 \textit{The House of Commons/House of Lords Joint Committee on Privacy and Injunctions} report has effectively closed down the debate on whether or not the UK should adopt a Privacy Statute.

Australia however is just commencing a similar debate. In September 2011, the Commonwealth released an issues paper titled \textit{A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy}.\textsuperscript{25} The discussion paper addresses a broad range of possible intrusions into privacy, including but not primarily focussed on those by the media. Despite the broad nature of the discussion paper much of the subsequent debate has centred on the potential impact of any “right to privacy” on freedom of expression. The government is currently considering the submissions it received in response to the discussion paper.

While at first brush the debate may appear similar in both countries, there are in fact some profound differences.

In Australia, there are only two lower court decisions which recognise a common law right to action for invasion of privacy. There are no appellate court decisions.\textsuperscript{26} It is possible to bring an action for breach of confidence in Australian courts. But there appear to have been very recent few court decisions involving the media. One case \textit{Australian Football League v The Age} saw a judge grant a permanent injunction preventing the publication of the identity of any footballer who tested positive

\begin{footnotes}
\item[23] Alex Bailin QC and Edward Craven, \textit{Investigative Journalism and the Criminal Law: The DPP’s guidelines and the need for a public interest defence}, Inform’s Blog, 16 May 2012, 
\item[24] Interview, Professor Julian Petley, \textit{Brunel University}, Friday 25 May 2012
\item[25] \textit{Issues Paper A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy}, Commonwealth of Australia, Department of Prime Minister and Cabinet, September 2011, 
\url{http://www.ag.gov.au/Consultationsreformsandreviews/Pages/ACommonwealthStatutoryCauseofActionforSeriousInva
\item[26] Ibid, page 13,
\end{footnotes}
under the AFL’s Illicit Drugs Policy.  

Unlike most countries, at a national level, Australia does not have a constitutionally entrenched Bill of Rights or Human Rights Act which protects liberties including privacy and freedom of expression. Currently there is no prospect of a Human Rights Act being adopted in Australia.

One reason for the dearth of breach of confidence cases involving media is clear. Australia simply does not have anything approaching the UK’s intrusive, highly competitive red top newspaper culture. There are serious breaches of privacy by the print media but they are not as common or (generally speaking) as egregious as in the UK. This could explain why legal envelopes have not been pushed.

Alternatively, the lack of a clear, well-worn legal path may deter aggrieved people (and their lawyers) from commencing legal actions.

How big is the problem in Australia? In its submission in response to the privacy discussion paper the ABC did not express a view in favour or against a privacy law. However, the submission included a collation of the number of privacy related complaints received by the Australian Press Council and the main broadcast regulator (ACMA) over a 20 year period. It found that privacy related complaints accounted for about 5% of complaints to both bodies and has remained steady over the period. The submission acknowledges that the data is incomplete but it does support the assertion that “in Australia the media are not and have not been, a major contributor to privacy intrusion”.  

While Australia does not have a competitive, tabloid newspaper culture, it does have a highly competitive commercial TV current affairs culture.

In May 2010, Channel Seven’s Today Tonight program broadcast a story revealing NSW Transport Minister David Campbell emerging from a gay sex club. ACMA ruled that this was a breach of privacy but was justified by public interest. Sydney Morning Herald journalist Richard Ackland was very critical of this decision which he described as circular.

‘The only public interest, torturously conjured, was a public interest in knowing that Campbell had resigned from the ministry because Seven was about to air its story about him’.  

Cases such as this demonstrate while the number of complaints may be small, they can neverthe-

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less be serious. Supporters of privacy legislation argue that current regulatory and legal frameworks are not sufficient and a statutory right to privacy is necessary. Supporters argue that a clear articulation of “privacy” and “public interest” would prevent the law from developing in unpredictable ways and this would be of benefit to everyone, including media organisations.

On the other hand, Australia has experienced no equivalent of the UK phone hacking scandal. There are few reported court cases involving media intrusion and few complaints are made to regulatory bodies. Peter Bartlett, a prominent Australian media lawyer who acts for the media industry, has described the proposal for a statutory right to privacy as unnecessary. “It’s like cracking a nut with a sledgehammer.”

The Australian government is currently considering submissions.

**Conclusion**

In the UK, there is a broad consensus that courts currently do a good job in deciding breach of confidence / misuse of private information cases. This view is not universally held but it is the considered finding of a recent Joint Parliamentary Inquiry into Privacy and Injunctions. The committee concluded there was no need to create a statutory right to privacy.

From an outsider’s perspective, the decision of the committee seems sensible. As a matter of principle, it may be desirable to have the concepts of “privacy” and “public interest” spelt out in legislation by an elected parliament. However, the current process whereby judges engage in a balancing process with an intense focus on the facts, allows judicial decision making to embrace highly nuanced and evolving concepts of privacy and public interest. There is a risk that a detailed definition could be read as an exhaustive list and would allow unforeseen scenarios to fall between the cracks.

Australia is currently considering whether or not to adopt a statutory right to privacy. Because of the many substantial differences between the two countries, it is difficult to draw easy lessons from the UK experience which can be applied in Australia.

While the recent UK Joint Parliamentary Committee on Privacy and Injunctions report gave an approving nod to the current legal framework, it was concerned that protection of privacy was only open to the wealthy few who can afford to go to court. The committee concluded that the most important way of improving protection of privacy is to overhaul and strengthen existing regulation of the media. Regulation is the focus of the next chapter.

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31 *Privacy and Injunctions*, executive summary
Chapter 3: Protection of Privacy in the UK via Regulatory Frameworks.

Those with complaints about a breach of privacy by UK media currently have two alternatives. The first option is to pursue a claim through the courts. The second option is to lodge a complaint with a regulatory or complaint handling body. If the complaint is against a newspaper, the complaint is lodged with The Press Complaints Commission (PCC). If the complaint is with a TV or radio station, it is lodged with OFCOM.

This chapter outlines how both regulatory systems operate. It also details how public service broadcasters have sought to internalise principles like “public interest”. It explores how some organisations have adopted decision making processes which are used whenever a potential impact on privacy emerges.

The Current Framework – Newspapers - Press Complaints Commission (PCC)

The Press Complaints Commission is an industry body with voluntary membership. In addition to privacy, the PCC Editor’s Code deals with a range of topics including accuracy, harassment and discrimination. The code states that where there is a “public interest”, actions otherwise contrary to the code are permissible.

(1) The public interest includes but is not confined to:

   i) Detecting or exposing crime or serious impropriety.
   ii) Protecting public health and safety.
   iii) Preventing the public from being misled by an action or statement of an individual or organisation.

(2) There is a public interest in freedom of expression itself.

(3) Whenever the public interest is invoked, the PCC will require editors to demonstrate fully that they believed that publication or journalistic activity undertaken with a view to publication would be in the public interest and how and with whom it was established at the time.  (added December 2011)  

Like many institutions the PCC has been found wanting in its handling of the phone hacking scandal. One of the tasks of Lord Justice Leveson is to recommend what form a replacement body should take.

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According to Mark Lewis the lawyer for the family of Milly Dowler – the Press Complaints Commission floundered when the allegations of phone hacking first emerged. Not only did it blithely accept assurances by News of the World that phone hacking was not taking place, Lewis describes how the head of PCC Baroness Peta Buscombe gave a speech saying the Guardian story did not live up to expectations. Ultimately Baroness Buscombe resigned over her handling of the issue.33

The PCC was set up in 1990. The logo of the PCC declares it is “fast, fair and free”. It cannot award damages. The strongest sanction at its disposal is requiring a publication of a critical ruling. In contrast, the courts can issue injunctions and award damages but litigation is very expensive and takes a long time.

So how effective is the PCC? Hugh Tomlinson QC says the PCC has never had any real independence from its members and it was never a genuine regulator. He describes it as a toothless mediation service, only useful when facts are not in dispute.

“I had a case some years ago, an old lady, the mother of a very well-known person. She was in a hospital. She was certainly senile and a reporter tricked her way into her room for an interview, ….we complained. And they came up with some ridiculous story about how she identified herself, which was complete nonsense and the PCC said ”Well that’s it. We can’t do anything. ”This is what the newspaper said. We’ve got to accept it.” So it never actually was able to go beyond and investigate the facts.” 34

Former Daily Star journalist Richard Peppiatt describes a PCC complaint as ”just something to be folded tightly and used to fix a wobbling chair.” He maintains that even when newspapers were prepared to negotiate with a complainant, the relative bargaining power of the parties meant newspapers could water down any response. What should be a prominent apology became a clarification buried in middle of the newspaper. 35

Another major criticism often levelled against the PCC is that it is too easy for newspapers to leave the organization. Publisher Richard Desmond owns the The Daily Express, The Sunday Express, The Daily Star and The Daily Star Sunday. Some years ago he withdrew his newspapers from the PCC. Richard Peppiatt was working as journalist on The Daily Star at the time Richard Desmond withdraw from the PCC. Richard Peppiatt says from his vantage point the exit made absolutely no difference, standards were already low.

Gill Phillips from The Guardian is less critical. She says that the PCC process has proved useful on occasion. In September 2011, the PCC resolved a complaint in favour of the newspaper.

The complaint was made by Rebecca Todd who runs a security firm that had infiltrated

33 Interview, Mark Lewis, Taylor Hampton Solicitors, Thursday 31 May 2012
34 Interview, Hugh Tomlinson QC, barrister Matrix Chambers, Thursday 24 May 2012
35 Interview, Richard Peppiatt, former journalist Daily Star, Saturday 12 May 2102
environmental groups on behalf of utility companies. Ms Todd complained that a Guardian article which included a photo and references to emails was a breach of several sections of the editor’s code including privacy. Taking into account the public interest considerations, the PCC dismissed the complaint.  

Justin Walford lawyer with *The Sun* says the good work of the PCC is often overlooked. He hopes that whatever replaces the PCC will retain its system of pre-publication notices. This process allows individuals or families (often grieving) to ask the PCC to send out an email to its distribution list requesting media not to make contact. Justin Walford says this is very practical, effective system which affects many lives, “particularly non-celebrities, just members of the public, who get caught up in their 15 minutes of fame. They don't want to be caught up in the limelight. And in such instances, the PCC is immensely helpful…. it makes a real difference”.

**The Current Framework – Broadcasters – OFCOM**

In contrast to print media, TV and radio broadcasters are regulated by OFCOM, the Independent regulator and competition authority for the UK communications industries.

The rationale for statutory regulation is that unlike print – radio and TV use public resources and are beamed directly into people’s homes. Traditionally consumers actively choose to buy newspapers which they bring into their homes, whereas TV and radio are available with the flick of a switch.

OFCOM’s Broadcasting Code sets standards across a range of areas including accuracy, sponsorship and privacy, as well as impartiality and fairness. Unlike newspapers there is an expectation that broadcasters should not be partisan.

OFCOM has the power to impose a range of sanctions including fines and can even withdraw a broadcast licence.

In addition the BBC and Channel Four also have their own editorial guidelines. These guidelines set out processes as well as principles. For instance, the BBC guidelines state that before intruding privacy through surreptitious recording

1. The BBC must be satisfied that there is prima facie evidence of serious misbehaviour or illegality (in other words a public interest reason for intruding on privacy)
2. Undercover reporters must then observe first hand actions that support evidence that they already have
3. Only at this point can secret recordings begin.

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37 Interview, Justin Walford, *News Group Newspapers' editorial legal counsel*, Thursday 17 May 2012

38 Interview, David Jordan, *BBC Editorial Policy and Standards*, Friday 1 June 2012
David Jordan, the director of Editorial Policy and Standards at the BBC says this process was applied when filming *Winterbourne View*, a recent BBC documentary that exposed the abuse of young disabled people in a care facility. It was also used when filming a program called *Undercover Soldier*.

“We put an individual in undercover into the army for six months as a recruit to expose bullying that was taking place at an army barracks. We had very strong prima facie evidence of that. We went through the same (three step) process. In that particular instance, we clearly had a very, very high public interest.”

While the BBC does have comprehensive guidelines, poor decisions are made. In 2009, OFCOM fined the BBC a total of £150,000 for breaching privacy and broadcasting offensive material. The fines were imposed after comedians Russell Brand and Jonathan Ross in a pre-recorded radio program broadcast explicit, intimate and confidential information about Georgina Baillie, the granddaughter of the actor Andrew Sachs. Essentially the pair discussed a sexual relationship between Brand and Baillie.

In less serious cases OFCOM can simply make findings that there has been a breach of the code.

Channel 4 also operates under the OFCOM code and a set of internal guidelines similar to the BBC.

Prash Naik is the Legal and Regulatory Controller with Channel 4. He says that when preparing any story for Channel 4 that may intrude on privacy, journalists are required to ask themselves the following questions.

1. Is there a reasonable expectation of privacy?
2. Has there been an infringement of privacy?
3. How do you balance the right to privacy against the right to freedom of expression?

Journalists are required to have a clear audit trail of deliberations on issues as they arise. Prash Naik says that by following clear guidelines and processes serious errors are mostly avoided. And when errors do occur, as in the recent case of Andrew Peet, they are not as serious as they might otherwise be.

In June 2012 OFCOM upheld in part a Complaint by Mr Andrew Peet over the Channel 4 TV program *Party Paramedics: Corfu Carnage*. Andrew Peet was filmed for a series which looks at binge drinking by UK nationals while on holiday in various parts of the world. Mr Peet was filmed while receiving medical treatment for injuries sustained while intoxicated. At a later point he specifically refused to give permission for the material to be broadcast. The footage was broadcast
with his face obscured. Despite this measure, Mr Peet’s family and workmates were able to identify him in the broadcast. He complained to OFCOM.42

Prash Naik says OFCOM concluded that the program makers did not infringe Mr Peet’s privacy in filming him because this was warranted in the public interest. OFCOM recognised there was a legitimate public interest in the challenges faced by the emergency services in treating those injured as a result of their intoxication. However, broadcasting footage of Mr Peet was a breach of his privacy because, although his face was obscured he was still identifiable via his voice. No statutory sanction e.g. a fine was imposed.

“Ofcom felt we hadn't acted indiscriminately or recklessly. We'd acted responsibly given the public interest. However, on balance our judgement [in not concealing his voice] was wrong in their view.”

“The code... lays down the principles and the rules. How you seek to apply that is down to individual broadcasters. The reason we set out a paper trail for example with secret filming is, one, it's good practise. Two, it requires producers to articulate what their public interest is, what their evidence is, and this demonstrates that it's not a fishing expedition... So for us, having a paper trail is very valuable. Most importantly, if you've got a subsequent regulatory complaint, or more importantly, a legal complaint, you've got a clear methodology to follow. And what was very telling in Leveson is that in a lot of these cases of alleged phone hacking, or email hacking, there's very little paper evidence. A lot of it appears to have been done off the cuff.”43

Hugh Tomlinson QC agrees. He says the lack of an audit trail has proved to be very problematic for the former publisher of News of the World in responding to civil law suits brought by phone hacking victims.

“The News of the World has no direct evidence as to what happened. Because the people involved have either been arrested and therefore won’t talk to them or have disappeared or died or they're just not cooperating. So they actually have no one that knows what happened. [This means] the cases are all about inference from documents, documents of a hugely incomplete nature. And so any civil trial will be a rather curious affair...It would not be an examination of the detailed facts of what happened. So the absence of a trail, a trial is never going to get to the bottom of the actual details of the misconduct.”44

Public service broadcasters must apply rigorous processes and principles to all material, irrespective of whether it is generated internally or externally. Newspapers often offer audio visual material of secret recordings to TV. David Jordan from the BBC says the response to these offers highlights the different approaches of newspapers and the public service broadcasters.


43 Interview, Prash Naik, Controller of Legal and Compliance, Channel 4, Thursday 7 June 2012

44 Interview, Hugh Tomlinson QC, barrister Matrix Chambers, Thursday 24 May 2012
David Jordan says the BBC was recently offered secret recordings made by undercover journalists from *The Telegraph* newspaper. The reporters posing as constituents visited a series of Liberal Democrat ministers and recorded the conversations.

“Now again, those secretly recorded interviews were not conducted under the terms which we would have applied to justify them. There wasn't any evidence of wrongdoing or criminal activity. So we didn't use the material, although we had to report the story, obviously, because it was widely circulating amongst the newspapers and elsewhere.”

Interestingly, parts of the recorded conversation with Vince Cable (at that time the secretary of state for business) were not broadcast by *The Daily Telegraph*. In these sections Vince Cable indicated that he had "declared war on Murdoch." The BBC subsequently obtained a leaked copy of this part of the interview. The BBC concluded that there was a strong public interest in this information which justified the intrusion of privacy. Accordingly it did broadcast the material.

David Jordan says the Vince Cable case illustrates the difficulty of making judgements, particularly where you're not in control of the recording process, about whether or not invasions of privacy of this sort, which involve secret recordings, are or are not justified.45

These instances demonstrate that the concept of public interest is approached and understood quite differently by different parts of the media.

The guidelines and processes adopted by the BBC and Channel 4 are aimed at creating a culture where all journalists, as well as editorial staff, engage in a process of decision making that places public interest at the centre of the news gathering and editorial process. Internal to the organization this creates accountability and responsibility. External to the organization the public are able to assess journalistic output in light of understood processes.

This approach to journalism is not universal. In June 2012, Paul Dacre the editor in chief of the Associated News Group delivered a submission to the Leveson Inquiry questioning its draft criteria for assessing proposals for regulatory reform.

*It hardly needs me to remind the Inquiry of the Sisyphean nature of defining the public interest. The simple definition, of exposure of criminality, is far too narrow. It must clearly also cover wrongdoing, hypocrisy and incompetence in cases where no criminal law has been broken, as well as allow disclosure of information that helps the public understand and make decisions on any matter that affects them.*

“Bearing all this in mind, I am concerned that the draft criteria appear to introduce an overarching principle that all journalism must be “benchmarked” against the public interest. If this is what is intended it would be an extraordinary departure from the law and the code of practice, which would seriously limit the rights of the press and the public to impart and receive information.”

Neither parliament nor the common law has ever required journalists to demonstrate that the public

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45 Interview, David Jordan, *BBC Editorial Policy and Standards*, Friday 1 June 2012
interest is served, across the board, in all conduct and all published material.

Large areas of popular journalism – gossip, the lives of celebrities and real-life human dramas - lay no claim to public interest what so ever (but in fact make a considerable contribution to the public debate about what is right and wrong in society). These kinds of stories are enjoyed by many millions of readers and have always been. Efforts may be made to try to suppress such material in newspapers. It will be a huge struggle to do so on the internet.”

AUSTRALIA: Current Regulatory Frameworks

Australia currently has a media regulation scheme which is broadly similar to that in the UK. The Australian Press Council (APC) is an industry body that deals with complaints against newspapers. Membership is voluntary. The Australian Communications and Media Authority (ACMA) is a statutory body that regulates broadcasters.

Proposals to transform the Australian regulatory framework will be discussed in Chapter 5.

Conclusion

No doubt every media organisation makes legal assessments about whether it can or cannot legally defend a particular article or broadcast. A separate issue is the extent to which organisations seek to insert a particular understanding of “public interest” into the fabric of the news gathering process. Clearly different news organisations have very different views. At one end of the spectrum are the public service broadcasters, at the other end are the “red top” newspapers.

For the public service broadcasters these processes are regarded as both risk reduction but also as quality control in a positive sense. In contrast the “red top” newspapers are not bound by statutory regulation and they are targeting a specific audience with specific preferences.

Lord Justice Leveson is charged with designing a new regulatory architecture for the press. A major question is to what degree a new system would seek to promote the concept of public interest, over and above bald compliance with the sections of a regulatory code.

A basic question is what if any broader concept of public interest could or should be adopted by a new press regulator? Another basic question is how it might be embedded into the DNA of an organization? The only realistic way for Lord Leveson to effect real cultural change is for news organisations to genuinely embrace any new regulatory and ethical framework. As Lord Justice Leveson considers the various regulatory models on offer, one of the big questions is what model can deliver real buy-in by the news organisations.

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Chapter 4: Reform Proposals before the Leveson Inquiry

The Leveson Inquiry is divided into four separate modules. The first is looking at phone-hacking and other potentially illegal behaviour. The second, the relationship between the police and press, the third the relationship between the press and politicians. The fourth module requires Lord Justice Leveson to make recommendations for a more effective policy and regulation that supports the integrity and freedom of the press while encouraging the highest ethical standards.

There are many proposals for regulatory reform which are being put to the Leveson Inquiry. It would be impossible to detail them all in this report. In broad brush terms they fall into the following main categories: the preservation of self-regulation; the adoption of a statutory system or the creation of a hybrid system.

This chapter describes some of the proposals which have been discussed by the Inquiry to date.

Lord David Hunt: The Preservation of Self-Regulation

The current head of the Press Complaints Commission Lord David Hunt has suggested what could be termed “an amped up PCC”. He describes the current PCC system as primarily “complaints handling” rather than “comprehensive self-regulation”. His aim is to address the failings of the current by creating, for the first time, genuine self-regulation.

He suggests the creation of a new body, more independent of the newspaper barons. It would have a small board, with an independent chairman and an independent majority. This chairman would also be known as the press ombudsman.

Membership of the new body would be voluntary but based on long-term binding contracts. This mechanism would address “the Desmond problem” by preventing newspaper proprietors making a decision to walk out of the process. If determinations of the new body were ignored, the new body could enforce its ruling, via contract, through the courts.

Lord Hunt acknowledges that the PCC currently has no ability to address or investigate systemic issues. He proposes that the new PCC would have two separate arms:

1. Complaints arm
2. Standards arm

The Complaints Arm would essentially continue the work of the current PCC. It would encourage parties to resolve disputes between themselves but occasionally bring them together for adjudication. There would be no formal, compulsory arbitration system incorporated into the new regulator. There would continue to be no monetary awards or compensation.

The Standards Arm would enforce standards and promote compliance. It would have powers to investigate and issue fines if there was a finding of a serious or systemic breakdown of standards.

There would also be a focus on strengthening self-regulation. A named individual will become responsible for overseeing standards at each publisher. There would be an annual audit, through
which each publisher would be required to show how each publication is ensuring the code is being followed and standards being maintained. 47

Lord Hunt believes that the industry needs to focus more sharply on the public interest.

_Not only should a new regulator should be thoroughly imbued with the public interest, but the idea must first be inculcated over time within the individual and collective psyches of each publisher and each publication._48

The new body would continue to provide the PPC’s pre-publication and anti-harassment services.

In his recent submission to the Leveson Inquiry, Paul Dacre the editor in chief of the Associated News Group, outlined a number of sticks which could be used to encourage newspapers to join a new industry-led regulator. He suggested denying the issuing of press cards to journalists whose employers are not participants. More dramatically, he also suggested that access to the services of the UK Press Association’s news wire service be confined to participants. 49

In his appearance before the Leveson Inquiry Lord Black, the chairman of the funding body that finances the PCC spoke in support of self-regulation. He argued that the media is a very fast changing industry and a statutory framework would not be able to keep up with the pace of change. 50

**Hugh Tomlinson QC: Media Standards Authority**

Many are calling for the creation of a body – completely separate from both the industry and government. One proposal has been developed by a group of academics, journalists and lawyers brought together by the Reuters Institute for the Study of Journalism and the Media Standards Trust. It calls for the creation of Media Standards Authority or MSA.

London barrister Hugh Tomlinson drafted the proposal which has been submitted to the Leveson Inquiry. 51

Participation in the MSA would be voluntary but underpinned by legislation that would spell out its powers and independence. The legislation would also detail substantial legal advantages for members. These advantages would include the creation of a mediation and adjudication scheme for complaints which anyone wishing to bring court proceedings against a participant would have to


Ibid.

48 Paul Dacre, _Proposals for the Regulation of the Press by Paul Dacre, Chairman of the Editors’ Code Committee_, 8 June 2012, page 7


use before going to Court. An arbitration scheme would also be available if both sides were agreeable.

If a matter did proceed to court, members would be able to rely on additional legal defences, not available to non-members. This type of incentive currently exists in the Irish press regulation scheme. In the so-called “Irish model”, The Defamation Act recognises the existence of the Press Council and sets out how courts may take membership into account when considering public interest defences.

Under the MSA system participants facing defamation proceedings would be able to rely on a new defence of ”regulated publication”. A participant who was sued for libel who published a prompt suitable correction and sufficient apology and paid compensation and gave other redress as ordered by the MSA would have a complete defence unless the material was published maliciously. In addition, in privacy proceedings, there would be a “public interest publication” defence for participants who could show that they had adhered to the public interest requirements of the Code. The determination of the MSA on this point would be persuasive but not binding on a court.

Furthermore non-members would be liable for additional damages in court proceedings.

Although established by enabling legislation the MSA would not have the power to impose statutory sanctions on the media. Sanctions would be imposed under the terms of the “membership contract” between the MSA and the participants. Unlike the PCC, the MSA would have the power to award compensation or order the publication of fair and accurate summaries of its rulings.

The MSA proposal acknowledges that a voluntary system is preferable to a compulsory one. The possibility of prosecution or committal of media organisations or individual publishers for a refusal to take part in a system of compulsory regulation or for “publishing whilst not being registered” would be perceived by the media and the public as censorship and would not be credible. It is too high a price to pay for the advantages of comprehensive regulation. It is also recognised that compulsion would encourage publishers to move on line or offshore.

The proposal focuses on the positive benefits of consent. By actively involving the media in its operation a voluntary system would assist in promoting changes in the journalistic culture which has led to recent abuses.

The MSA would also have the power to investigate systemic issues and issue fines where there were repeat breaches of the code.52

Channel Four’s Prash Naik has some reservations about the MSA model.

“\textit{I think it's an interesting model. I think the difficulty is it's too complex. And I think that it would require primary legislation, which involves time, and parliamentary time at that. Although arguably the Defamation Bill is going through so it could be shoehorned into that. I think also what's slightly untested is how many papers would feel this is a big enough selling point for them to want to buy into it. It's hard to gauge.}”

\textsuperscript{52} Ibid
If you are a broadsheet, it's in your interest to join because a lot of your investigations will rely on public interest defence. If you're a tabloid, you'd be thinking, "Well, I'm going to lose most of these cases, aren't I? And why would I want to sign up to a body that is going to limit what I can do and it's also going to leave me vulnerable to litigation."  

Paul Dacre the editor in chief of the Associated News Group has a more fundamental objection to statutory underpinning. Although at one point open to the idea, he now has grave concerns. He fears that "any Parliamentary involvement would be the 'thin end of the wedge' which could result in fuller statutory control of the press".  

**Max Mosely: Press Tribunal**  

Max Mosely has put forward the idea of a Press Commission and Press Tribunal. The Press Commission would be the successor to the PCC. Its role would be to make and amend the rules. A separate body, the Press Tribunal would apply and enforce the rules. The tribunal would be set up by statute and deal with privacy, defamation and harassment and accuracy. The tribunal would have authority over the printed press and all on-line material. Organisations governed by OFCOM would not fall within the jurisdiction of the new tribunal. No lawyers would be allowed in the tribunal unless a complainant appoints a lawyer whereupon the newspaper would be allowed to do the same.

Damages in defamation cases would be capped and there would be a focus on corrections and apologies. Damages in a bad breach of privacy case would be a “a very large fine”.  

Hugh Tomlinson QC believes that if regulation is mandatory it will be all too easy to avoid the jurisdiction.

“It seems to me, the danger of that with the system of media tribunals, is it doesn't actually address the central regulatory issues because a lot of the regulatory problems are not individual complaint-based. They're systemic issues. But I think more generally, if you have a system of compulsion then necessarily, people will avoid it… For example if Okay! Magazine moved its production to Calais, and then just imports its magazines into England you'd have some difficulty in subjecting it to any English regulation. It would effectively be doing exactly the same as before, but would be completely outside your regime. And those difficulties shouldn't be underestimated.”

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53 Interview, Prash Naik, Controller of Legal and Compliance, Channel 4, Thursday 7 June 2012  
56 Interview, Hugh Tomlinson QC, barrister Matrix Chambers, Thursday 24 May 2012
The advantages and disadvantages of low-cost adjudication forums

Underpinning many of the proposals is an acknowledgement that currently it is exorbitantly expensive to bring an action for privacy or defamation through the courts. Max Mosely has acknowledged that there is currently a high stakes, “a Rolls Royce” court system that works well for the rich but locks out ordinary people.\(^{57}\)

Consequently many proposals envisage quicker, cheaper forums that enable complainants to receive damages or compensation.

Justin Walford from the *Sun* (speaking in a personal capacity) believes that a system that cut costs would have real advantages for all parties.

“It would mean that a local newspaper wouldn't have to spend huge amounts of money dealing with High Court matters in London….. The courts are trying to encourage arbitration and mediation in whole sectors of court actions, quite rightly….. it would be a quick, efficient system. It would have to have caps, one might cap damages at £10,000 or £15,000.”

Justin Walford thinks that if a complainant chooses to bypass this system they should be liable for cost penalties in any subsequent High Court Proceedings.\(^{58}\)

Lawyer Mark Lewis, who acts for plaintiffs, believes low cost tribunals or forums are certainly a way forward. However, he does have concerns about capping costs and damages. If the option of going to court is closed off or restricted, this may adversely affect complainants.

If a newspaper has done the calculation thinking, ““How many extra copies of that newspaper are we going to sell? Well, you know what? If that claim is only worth £25,000 in damages and they're only going to get £20,000 back in costs, its £45,000 for the printing of whatever we like about that person... So we can trash their reputation. By all means reduce legal costs and increase damages, but there should be a financial disincentive to tell lies about people”.\(^{59}\)

If a low cost tribunal or other adjudication system is adopted, it will be necessary to work through the implications for all involved and the wider policy implications.

Conclusion

In the UK the Leveson Inquiry into the ethics, practices and culture of the press is considering a number of different models for strengthening press regulation. In broad terms the models fall into three categories: the continuation of self-regulation, low cost media tribunals and voluntary


\(^{58}\) Interview, Justin Walford, *News Group Newspapers' editorial legal counsel*, Thursday 17 May 2012

\(^{59}\) Interview, Mark Lewis, *Taylor Hampton Solicitors*, Thursday 31 May 2012
independent regulation with a statutory underpinning.

Prash Naik sums up the real politick of the inquiry in the following way:

“There's so much political pressure. They've got to be seen to be acting. Self-regulation would be seen as a kind of cop-out. Statutory regulation is too far in the other direction.”

One option Lord Leveson may look very closely is the model drafted by Hugh Tomlinson QC for a Media Standards Authority. Despite its complexity, the Media Standards Authority proposal is strong.

Because of the comprehensive failure of the PCC to address phone hacking, there is a widespread belief in the UK that self-regulation has failed. Clearly there needs to be a fundamental break with past practice. Advocates for an amped up PCC argue that genuine self-regulation has never been attempted and should now be implemented. But at the end of the day there is a clamour for a system fully independent of the newspaper houses.

On the other hand the idea of compelling newspapers to participate in a regulatory scheme is highly undesirable. Better to have a third way where legislation would guarantee a regulator’s independence and provide legal advantages to participants. These “carrots” will encourage voluntary participation and genuine buy-in. The unanswered question remains whether newspapers will want to participate.

Another unanswered question revolves around how voluntary any decision to participate in the MSA would actually be. If the sticks and carrots strengthen over time, it may not be viable to opt-out. This would create a de facto mandatory scheme. A similar concern applies to proposals for self-regulation. Paul Dacre has suggested that access to the news wire services of the Press Association be conditional upon signing on a self-regulatory code. Again this would amount to a de facto mandatory scheme, the only difference is that the pressure is being brought to bear by large newspaper groups as opposed to government.

From an Australian perspective the issue of voluntary vs mandatory participation is an interesting one. Two reform proposals on the table require mandatory participation by newspapers. These two proposals will be discussed in the next chapter.

And there is of course there is a broader question. How might any regulatory framework cope with the rapidly unfolding challenges posed by convergence?

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60 Interview, Prash Naik, Controller of Legal and Compliance, Channel 4, Thursday 7 June 2012

61 Paul Dacre, Proposals for the Regulation of the Press by Paul Dacre, Chairman of the Editors’ Code Committee, 8 June 2012, page 7
CHAPTER 5: AUSTRALIA

The debate around media regulation in the UK, Australia and elsewhere is taking place at a time of unprecedented technological change. Any new regulatory system must be designed to cope with continuous on-going change. It must be flexible and forward thinking.

Australia currently has a media regulation scheme which is broadly similar to that in the UK. The Australian Press Council (APC) is an industry body that deals with complaints against newspapers. Membership is voluntary. The Australian Communications and Media Authority (ACMA) is a statutory body that regulates broadcasters.

While the Leveson process continues in the UK, in Australia, in 2012, two important federal government reports on media regulation have been released.

- The Finkelstein Inquiry - Independent Inquiry into Media and Media Regulation (February 2012)\(^{62}\)
- The Convergence Review (May 2012)\(^{63}\)

Both concluded that the current system for regulating news media is not effective and both advocate a comprehensive and far reaching overhaul. The Convergence Review focussed on the inconsistencies in regulation across different media platforms. The Finkelstein Inquiry concluded that the APC does not have the necessary powers or the required funds to carry out its designated functions. It concluded that ACMA’s processes are cumbersome and slow.

It is beyond the scope of this report to comprehensively analyse the findings of both documents, especially those contained the broad ranging Convergence Review which covers issues including media ownership. Rather this chapter looks at two important features of the two Australian proposals.

1. Both squarely face convergence by recommending a single mandatory media regulation scheme across all media platforms – print, TV, radio and on-line. Only public broadcasters would be exempt.
2. Both require mandatory participation by newspapers. One proposal calls for statutory body, the other an industry-led body.


The Finkelstein Inquiry - Independent Inquiry into Media and Media Regulation (February 2012)

In 2011, the Australian federal government formed an Independent Inquiry into Media and Media Regulation. The inquiry was chaired by former Australian Federal Court Justice Ray Finklestein.

In February 2012, the inquiry published its findings and recommendations. Ray Finklestein QC concluded that there are serious structural problems with the current system.

He recommended the creation of a new statutory body called the News Media Council (NMC) which would receive secure funding from government. It would set journalistic standards and handle complaints across all media platforms – print, on-line, radio and TV. The NMC would cover all news providers. Compliance with NMC would be mandatory for all broadcasters and all news providers that distribute more than 3,000 copies of print per issue and all news internet sites that have a minimum 15,000 hits a year.64

For the first time, online news would be regulated.

“In an era of media convergence, the mandate of regulatory agencies should be defined by function rather than by medium. Where many publishers transmit the same story on different platforms it is logical that there be one regulatory regime covering them all.” 65

The NMC would rule on complaints. It could require a media outlet to publish an apology, correction, retraction or right of reply but it would not have the power to levy fines or award compensation. 66 However, if a media organisation ignored a ruling of the NMC it could be in contempt of court.

Many Australian print journalists and media organizations have expressed grave concerns that newspapers would for the first time be regulated by statute and open to contempt of court proceeding if they fail to comply with a NMC ruling.

Kim Williams is chief executive officer of News Limited.

Having a statutory, government-funded and therefore politically vulnerable body limiting the freedom of our journalists has real implications for the standards of democratic accountability …..the very principle of a free press demands that any press complaints body be totally free of government pressure and that means it must be based on the principle of self-regulation.67

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64 Report of the Independent Inquiry into the Media and Media Regulation, The Hon R Finklestein QC, 28 February 2012,

65 Ibid., Executive Summary para 9


67 Kim Williams, Fining and jailing of journalists a threat in over-regulation, The Australian, 14 July 2012,
Prash Naik, Controller of Legal and Compliance Channel 4, recently spent three months in Australia. He read the executive summary of the Finklestein inquiry with interest.

“What was interesting in the preamble is the notion that there was this problem with Australian newspapers. But having come from the UK and watched the phone hacking scandal unfold, trust me, you don’t have a problem with your newspapers anywhere near the kind of problems back in the UK. You’ve got the usual problems of privacy infringements, libel actions, fairness and accuracy, which are kind of part and parcel of the media generally. I didn't get the sense that there was a kind of overarching descent to the kind of gutter-press that you have seen in parts of the UK press.”

But Prash Naik thinks the Finklestein recommendations are a brave attempt to address at least the challenges of convergence. However, he thinks the definition of news provider and the threshold to catch various social media is unrealistic.

That is also the view of Kim Williams.68

“By extending the complaint net to bloggers, the system will be clogged with petty grievances, leaving substantive complaints against mainstream media outlets languishing in some poor harassed investigator's in-tray for years.”69

The Convergence Review (May 2012)

In March 2011, the Australian government set up an inquiry looking at media convergence and how it should be addressed. In May 2012, the Convergence Review released its final report.

The review recommends a light touch regulatory framework across all platforms. Perhaps the most striking element of this approach is the recommendation that broadcast services no longer be licensed.

Like the Finklestein Inquiry, the Convergence Review also recommends a single regulatory system across all media platforms, including on-line. It recommends the formation of a statutory regulator to replace the existing Australian Communications and Media Authority (ACMA). It also recommends the formation of a News Standards Body (NSB) to oversee journalistic standards for news and commentary across platforms. In contrast to the Finklestein recommendation the NSB would be industry-led, it would not be a statutory body and most of its funding would come from members.


68 Interview, Prash Naik, Controller of Legal and Compliance, Channel 4, Thursday 7 June 2012

However like the Finkelstein inquiry, participation is mandatory. The Convergence Review proposal requires “content service enterprises” to join the NSB. Content service enterprises are defined to include major media enterprises, rather than the more expansive notion of “news providers” discussed in the Finkelstein review. To fall within the definition of content service enterprise organisations must have control over the content supplied, a large number of Australian users and receive a high level of revenue from supplying content to Australians.

Like the “Irish Model” and the Media Standards Authority model (drafted by Hugh Tomlinson QC) there may be legal incentives enshrined in legislation for members. However in direct contrast to the Irish and Tomlinson models, membership would be mandatory. 70

The Convergence Review is vague about powers and sanctions:

“The news standards body would be expected to impose credible sanctions on its members and have the power to prominently and appropriately publish its findings on the relevant media platform. It should also be able to refer to the communications regulator any cases where there have been significant of persistent breaches and a member refuses to comply.” 71

It is unclear what powers the communications regulator would have in such circumstances. This vagueness raises questions about whether or not this proposal places new restrictions on print media. Even if it is the decision of the industry-led NSB to create such a referral option, participation in the scheme is mandatory. An individual newspaper cannot opt out.

**Lessons Australia can draw from the UK**

Both the Finklestein Inquiry and the Convergence Review recommend a single form of regulation across the all media platforms. The Finklestein Inquiry proposes an independent statutory body called the *News Media Council*. The Convergence review proposes an industry-led *News Standards Body* with a statutory underpinning. Although defined differently, both proposals require participation by media organisations.

The debate in Australia could benefit from consideration of some of the proposals before the Leveson Inquiry into the culture, practices and ethics of the press. The model for a Media Standards Authority proposed by Hugh Tomlinson QC does not compel membership. Rather it encourages membership by a series of legal incentives set out in statute. As previously discussed voluntary membership is preferable to mandatory participation. Perhaps media hostility to the two Australian proposals might fade if participation was made voluntary and more attractive by a series of legal “carrots”. The Convergence review does propose legal advantages for participants, but participation is mandatory for major media organisations.

The realities of convergence support a single consistent regulatory framework being adopted across media platforms. In the future it will perhaps be difficult to distinguish the output of newspaper and TV station. However, it does not automatically follow that a one-size-fits-all regulatory approach

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should be adopted across the board. Perhaps, as in the Media Standards Authority proposal, it is preferable to give news organisations a range or regulatory options from which to pick.

These ideas will be explored in the next chapter.

**Lessons the UK can draw from Australia**

For month after month, the Leveson Inquiry sitting in the Royal Courts of Justice in London has heard evidence of misconduct and ethical failings by some parts of the UK press. The inquiry has heard compelling evidence from victims of hacking. It has also heard evidence from politicians, police, journalists and media proprietors which reveal how powerful groups interact and how they make decisions.

This focus has given the Leveson Inquiry a strong understanding of how institutions and organisations work. This knowledge is reflected in the discussion of the various well thought through proposals for a replacement of the Press Complaints Commission.

However perhaps this intense head-down concentration could be complemented by the blue-sky Australian approach. In Australia, the Convergence Review and the Finklestein Inquiry have looked to the horizon. Both Australian proposals have sought to map out a broad brush framework that will cope with the challenges of convergence.

In the next chapter those challenges are discussed and two UK thinkers put forward their ideas of how the future might look.
CHAPTER 6: Regulation in the age of convergence

This report has concentrated on privacy, the public interest and regulation. But is a focus on regulation misplaced? Some observers believe too many hopes are placed on regulatory models. As convergence gathers pace, regulation is becoming increasingly irrelevant.

London media lawyer Mark Stephens is a partner with Finer Stephens Innocent. He says the Press Complaints Commission proved to be wholly ineffectual but it is unlikely that any future regulator would be any more effective. If a new regulatory framework is too onerous, the result will be “regulatory arbitrage” from printed newspapers to online news sources beyond the reach of any regulator.

Mark Stephens says rather than concentrate on regulation, a more effective way of tackling press misbehaviour would be to robustly apply existing criminal laws.

“We have perfectly good criminal laws, unenforced, by pliant policemen which would've stopped the excesses of the media. Laws criminalizing phone hacking, bribery of policemen & public figures, harassment, trespass, etc.

In the US, phone hacking stopped dead in 1998, after a Cincinnati Enquirer journalist hacked the phones of executives of Chiquita Bananas. The company paid a $10m pre-action and the journalist went to jail. All this on a public interest story.

Since then we have seen the growth in the US of "news gathering torts" which have prevented the excesses we saw grow unchecked in the UK.”

In contrast, regulatory regimes like OFCOM are less effective. Stephens says in this day and age it is easy to for a news organization to move its operation to a jurisdiction with less onerous regulation. He recommends embracing a more libertarian approach that encourages consumers to be able to sift through high and poor quality content.

It would certainly appear that UK newspapers are currently contemplating their options. David Jordan (Editorial Policy and Standards BBC) expects Lord Justice Leveson will confine his recommendations to the print media. However, David Jordan says if the inquiry takes a more

72 Roy Greenslade, What Leveson should do about regulation - the unsubbed copy (Mark Stephens section), 18 June 2012, http://www.guardian.co.uk/media/greenslade+law/lord-justice-leveson

73 Mark Stephens, Tweets, Beaks and Hacks: Regulation and the Law in the Age of New Media Journalism address to Redirecting Fleet Street: Media Regulation and the Role of Law Conference, organized by Foundation for Law, Justice and Society, held at Wolfson College, Oxford University, 18 May 2012, http://podcasts.ox.ac.uk/redirecting-fleet-street-3-tweets-beaks-and-hacks-regulation-and-law-age-new-media-audio
expansive approach there could be a backlash.

“I was at a meeting the other day where a leading newspaper group indicated that should on line content be included in the eventual Leveson outcome….they would move their on-line operations to the USA.”  

How can a regulatory framework address the reality of convergence and the ability of news providers to base them anywhere in the world?

Lara Fielden is a researcher with strong background in the law and journalism. In 2011 she was commissioned by the City University London and The Reuters Institute for the Study of Journalism to write a report titled Regulating for Trust in Journalism. Standards regulation in the age of Blended Media.

She concluded that separate regulation for print, broadcast, and on-line material no longer makes sense.

“Newspapers are not just printed but on line and carry video packages with the look and feel of traditional TV; broadcasters publish web sites including text based articles similar to on line print offerings; schedule programs are available on demand, on digital channels and a variety of web sites; user generated material vies for on line audiences alongside professionally produced content; professional and amateur bloggers share the same debates.”

Lara Fielden calls for a new approach to address “regulatory incoherence”. She suggests a three tier approach. Members of each tier would flag their membership of a tier with a clear “standards mark”.

**Tier 1 Premium standard regulation of public service providers across all media platforms.**

This first tier would provide clear statutory regulation of content providers with public service duties and privileges. It would set premium standard content standards, similar to OFCOM standards, including impartiality, balance and providing a range of viewpoints. The rules would be set out in statute and administered and enforced by a regulator with statutory powers.

Initially the top tier would apply only across broadcasting. But over time other providers, whose selling point is impartiality could join this tier. Similarly over time private broadcasters without public service obligations could elect to move to tiers 2 or 3.

**Tier 2 Independent regulation of private providers across platforms.**

This second tier would be introduced initially for the press but could overtime include media across other platforms. There would be regulation independent of both state and industry, recognised by

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74 Interview, David Jordan, BBC Editorial Policy and Standards, Friday 1 June 2012

75 Regulating for Trust in Journalism. Standards Regulation in the age of blended media, Lara Fielden, City University of London and Reuters Institute for the Study of Journalism, 2011, page 2

http://reutersinstitute.politics.ox.ac.uk/?id=594
both but beholden to neither. There would be a range of legal advantages attached to membership of this tier. In return for these benefits the press would be required to accept a range of sanctions and investigatory procedures at the disposal of the new regulatory body. 76

Hugh Tomlinson QC envisages that in the medium term the Media Standards Authority Proposal (see chapter 4) could evolve into the tier 2 put forward in the Fielden model. 77

**Tier 3 Baseline Regulation for broadcast and video on demand services.**

For providers not wanting to commit to standards set out in tier 2 – there would baseline regulation of all private broadcast and video on demand providers consistent with the demands of European agreed standards. These could include protection of the under 18s, a prohibition on incitement and hatred and commercial obligations. Overtime newspapers could elect to join tier 3 (sacrificing benefits and privileges) meanwhile currently unregulated online providers could enter this tier. 78

Like the two Australian proposals, the Fielden model squarely addresses the challenges posed by convergence and calls for an integrated, comprehensive regulatory system across all platforms. However, there are some clear differences. Both Australian models compel participation. The Fielden model is voluntary and with the exception of public service broadcasters, all media organizations will ultimately be free to choose from three different levels of regulation.

That choice will be made clear to consumers via a standards mark that will feature prominently on the web site, printed page or broadcast. The idea of a badge of membership is common to a number of proposals currently on the table before Lord Justice Leveson. However, the idea that consumers will differentiate between organisations on the basis of these kite flyers is untested. The proposal places a good deal of faith in the idea that consumers will discriminate. But how easy will it be for them to do so? Perhaps they might be confused by the following:

- If tier 1 websites have links to tier 2 or tier 3 web sites. Or perhaps even host or embed material from such sites.
- If this system is adopted in multiple countries, could one country’s tiers and attached standards crowd out the tiers and standards of smaller nations? This could certainly happen for global languages like English, Arabic and Spanish.
- If a TV station or newspaper has the look and feel of a tier 1 outfit, will a standards mark have more impact on perceptions than other visual cues and subtle signals?
- If displayed in news agencies and other stores, will newspapers of a particular tier be displayed together? Or will all newspapers be mingled in together?

Media concentration might be another potential fly in the ointment. It’s possible that a three tier system would work better in a competitive media market like the UK, rather than a highly concentrated media market such as Australia. In a competitive market there is a great need to differentiate one’s product. For market leaders in a concentrated market there is less need to carve

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76 Ibid. pages 6-8,
77 Interview, Hugh Tomlinson QC, *barrister Matrix Chambers*, Thursday 24 May 2012
78 *Regulating for Trust in Journalism*. pages 6-8.
out a niche. For example, if News Limited (which accounts for 70% of Australian newspaper market) decided not to participate, the three tier system immediately becomes somewhat side lined. As with the Media Standard Authority proposal (discussed in chapter 4) it is unclear whether media organisations will embrace this framework. On the other hand a range of appropriate “carrots” could well secure participation.

There are certainly many unanswered questions. But are there any practical (or desirable) alternatives to placing faith in the consumer and a series of choices in the hands of media organisations? Probably not.

Convergence is transforming the media beyond recognition. The distinctions between TV, radio, print and on-line are collapsing. News organizations are increasingly offering a wide range of cross platform material. Hence the traditional different forms of regulation are becoming increasingly irrelevant. A practical way forward is to allow news organizations to choose their own form of regulation and ensure that consumers understand the standards that news organizations have embraced.
CHAPTER 7: Conclusions

Convergence is transforming journalism. In the process of writing this report, through reading cases, articles and interviewing experts, it is impossible to ignore that the UK, Australia and all other countries are struggling to come up with a forward looking, flexible approach to media regulation. How do you ensure freedom of expression? What recourse exists for those who are victims of media incompetence or misbehaviour? There are many different and varied aspects to this challenge.

Previous chapters of this report concentrate on how privacy disputes are dealt with by the UK courts and media regulators, offering reflections on the UK experience and how it might inform a similar debate in Australia. This final chapter summarises the report, and offers observations and some limited conclusions. The intertwined issues of privacy, public interest and regulation, raise more questions than answers.

The Courts

As discussed in Chapter 2, breach of confidence /misuse of private information cases regularly come before the UK courts. A recent UK joint parliamentary committee concluded that the current legal framework operates well and there is no need to create a statutory right to privacy. The UK law is heavily informed by the right to privacy and the right to freedom of expression set out in the UK Human Rights Act.

In balancing these competing rights judges weigh the public interest in maintaining information confidential against the public interest in revealing the information. Neither the public interest nor privacy is defined in legislation. The committee found there is no need to create a privacy statute that would define these terms. It felt the concepts of privacy and the public interest are not set in stone and evolve over time. It concluded that a case by case approach is preferable to spelling out definitions which may quickly go out of date.

In September 2011, the Australian government released an issues paper titled A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy. The federal government is currently considering the submissions. It is difficult to draw direct comparisons between the UK and Australia. The media culture is very different in both countries. Australia does not have a group of highly competitive “red top” newspapers which focus on scandal and gossip. In Australia, few breach of confidence cases involving the media come before the courts. A strong argument can be put that there is not a sufficient problem to warrant the adoption of a statutory cause of action for serious invasion of privacy.
Media Regulation

As discussed in Chapter 1, the Leveson Inquiry into the culture, practices and ethics of the UK press was formed in response to the phone hacking scandal. There is a broad consensus that the Press Complaints Commission needs to be replaced. The inquiry is considering a broad range of options for press regulation including more effective self-regulation, low cost tribunals and independent regulation underpinned by legislation.

The phone hacking scandal revealed the profound ethical failures of some journalists and the ineffectiveness of the PCC to adequately address a challenging issue. As a result the proposals on the table all focus on creating a stronger, more independent regulator with increased powers. A great deal of thought has gone into the architecture of the various frameworks, the most significant of which are described in Chapter 3. Of these, the most interesting is the Tomlinson model, with its voluntary ‘carrot and stick’ approach. There is also a great deal of focus on improving the ethical standards of journalists.

In contrast in Australia the debate around media has not been framed by a single scandal like phone hacking. Rather the catalyst for discussion has been convergence, media plurality and a general unease around media standards in particular bias and inaccuracy.

The proposals of the Finklestein Inquiry and the Convergence Review are less fine grained than those on the table in the UK. Both proposals are bold and visionary. Both recommend a single form of regulation across all media platforms. Both recommend mandatory participation by news organizations. Not a great deal of thought is given to buy-in by the media and no water tight solutions are suggested that would secure compliance in an on-line world.

Both countries could gain from observing what is taking place in the other country. Australia could draw on ideas about how to create a voluntary scheme, while the UK could start to consider a blue sky approach to the challenges of convergence.

In the UK, researcher Lara Fielden has put forward a three tier regulatory model. Her model recognises that the traditional divisions between media platforms are collapsing and in the future newspapers and TV stations will more and more resemble each other. It also recognises that compelling participation is an increasingly difficult proposition. A better approach is to allow news organizations to choose their own level and form of regulation and educate the public to distinguish between these different forms. Each of the three tiers of regulation will be accompanied by a different set of legal and regulatory obligations. Members of each tier would flag their membership of a tier with a clear “standards mark”.

The model presupposes that the public will be able to distinguish between the three tiers. This is a big assumption. But what is interesting about this model is that it lets go of control. It acknowledges a world of uncertainties and fluidity.
INTERVIEWS

Interview, Prash Naik, Controller of Legal and Compliance, Channel 4, Thursday 7 June 2012

Interview, David Jordan, BBC Editorial Policy and Standards, Friday 1 June 2012

Interview, Mark Lewis, Taylor Hampton Solicitors, Thursday 31 May 2012

Interview, Richard Thomas, former UK Information Commissioner, Monday 28 May 2012

Interview, Professor Julian Petley, Brunel University, Friday 25 May 2012

Interview, Hugh Tomlinson QC, barrister Matrix Chambers, Thursday 24 May 2012

Interview, David Price, David Price lawyers, Thursday 24 May


Interview, Justin Walford, News Group Newspapers' editorial legal counsel, Thursday 17 May 2012

Interview, Richard Peppiatt, former journalist Daily Star, Saturday 12 May 2102

Bibliography

REPORTS


Regulating for Trust in Journalism. Standards Regulation in the age of blended media, Lara Fielden, City University of London and Reuters Institute for the Study of Journalism, 2011, http://reutersinstitute.politics.ox.ac.uk/?id=594


COURT DECISIONS


Axel Springer AG v Germany (Application no. 39954/08)07/02/2012, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"dmdocnumber":"900156"},{"itemid":"001-109034"}

Von Hannover v Germany (no. 2) [2012] ECHR 228, http://www.bailii.org/eu/cases/ECHR/2012/228.html


ADJUDICATIONS

Complaint by Mr. Andrew Peet Party Paramedics: Corfu Carnage, Channel 4, 31 January 2012, OFCOM Broadcast Bulletin, Issue number 207, 11 June 2012,
http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb207/obb207.pdf


PODCASTS

Mark Stephens, Tweets, Beaks and Hacks: Regulation and the Law in the Age of New Media Journalism address to Redirecting Fleet Street: Media Regulation and the Role of Law Conference, organized by Foundation for Law, Justice and Society, held at Wolfson College, Oxford University, 18 May 2012, http://podcasts.ox.ac.uk/redirecting-fleet-street-3-tweets-beaks-and-hacks-regulation-and-law-age-new-media-audio


PRESS RELEASES


ACMA, Seven Breaches Minister’s privacy broadcast is in the public interest, 10 February 2011, http://www.acma.gov.au/WEB/STANDARD_PC/pc=PC_312442


MEDIA REPORTS, OPINION PIECES, ARTICLES

JULY


James Cusick, The Independent, Leveson Inquiry: Any framework to legally regulate Britain’s press would be continually challenged, 9 July 2012,


**JUNE**


Dan Sabbagh, *Leveson inquiry: after 86 days, the battle for reform is just starting*, The Guardian, 21 June 2012, [http://www.guardian.co.uk/media/2012/jun/21/leveson-inquiry-battle-reform-starting](http://www.guardian.co.uk/media/2012/jun/21/leveson-inquiry-battle-reform-starting)


Roy Greenslade, *What Leveson should do about regulation - the unsubbed copy* (Mark Stephens section), 18 June 2012, [http://www.guardian.co.uk/media/greenslade+law/lord-justice-leveson](http://www.guardian.co.uk/media/greenslade+law/lord-justice-leveson)


MAY


APRIL


MARCH


Rodney Tiffen, *Finkelstein gets a bad press*, Sydney Morning Herald, 14 March 2012,


**FEBRUARY**


**NOVEMBER 2011**


**JULY 2011**


**RALLY**

Hacked Off rally, Westminster Central Hall, Thursday 17 May

**LECTURES**


**COURSE NOTES**


**SUBMISSIONS TO LEVESON INQUIRY**

48


**LEVESON INQUIRY DOCUMENTS**


**SUBMISSIONS RE PRIVACY DISCUSSION PAPER**


**CODES OF CONDUCT**