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7 June 2012

The Hon. Steven Conroy
Minister for Broadband, Communications and the Digital Economy
Parliament House
Canberra, ACT, 2600

Dear Minister,

Re: New Standards Regulation

I write with respect to the present debate with respect to media regulation in Australia. Liberty's particular focus in that debate is concerned with the protection of civil liberties and in particular with the desirability of underpinning the rights to freedom of expression and privacy. In this letter, I approach the two reports to government recommending changes to the regulatory regime through that prism. In brief, Liberty wishes to support the industry self-regulatory model rather than that underpinned by the creation of a new statutory authority.

The Government has before it two comprehensive reports which make recommendations as to the desirable form and content of media regulation – the Finkelstein inquiry into the Media and Media Regulation and the Convergence Review. Liberty's primary interest is with those sections of these reports that deal with standards in news reporting.

The Finkelstein inquiry recommends the establishment of a News Media Council to oversee the enforcement of standards in the news media. This body would take over the functions of the existing Australian Press Council and the news and current affairs standards of ACMA. The Council would be chaired by a judge or other eminent lawyer and would be comprised of the chair and 20 part time members. Half the members of the Council would be members of the public and the other half would be appointed from the media or from those who have worked in the media. The News Media Council's principal functions would be to:

- develop standards of conduct for the news media on all platforms. These would include certain minimum standards, for example, with respect to fairness and accuracy;
- Investigate and resolve alleged contraventions of the standards in response to complaints or on the Council's own motion;

- Educate the news media about the content of the standards; and
- Educate the public about the standards and about the existence and role of the News Media Council.

The News Media Council would have the following remedial powers:

- To require the publication of a correction;
- To require the withdrawal of an article from continued publication;
- To require a media outlet to publish a reply by a complainant or another relevant person;
- To require publication of the News Media Council's decision or determination; and
- To direct when and where publications should appear.

The News Media Council would enforce its decision, in the face of a refusal by a media outlet to abide by its rulings, by applying to a court of competent jurisdiction for an order compelling compliance.

The News Media Council would be a statutory body engaged in statutory regulation of the news media. The Council's members would be appointed by government upon the advice of an independent committee. It would be established as a statutory authority independent of governmental control or influence.

The Convergence Review proposes a quite different model for the development and preservation of standards of conduct in the news media. Under this model, an independent self-regulatory news standards body would be established. Like the News Media Council it would have the responsibility for the content standards that should apply to news and commentary across all platforms. The news standards body would develop and enforce a code whose purpose would be to promote fairness, accuracy and transparency in professional news provision. The body would incorporate the functions currently performed by the Australian Press Council and ACMA.

Content service enterprises would be required to be members of the body and other professional news and commentary providers would be encouraged to opt in to membership. The system under which members of the Australian Press Council can opt out of membership would no longer prevail. National broadcasters such as the ABC would not be required to join. The Board of the new body would comprise a majority of directors who would be independent of the members. The body would be established by legislation and would be responsible for:

- Establishing standards for the production of news and commentary;
- The maintenance of an efficient and effective complaints system; and
- The enforcement of its decisions through a range of flexible and credible sanctions, including the power to order members to prominently publish its findings on the relevant media platform.

The industry body would be able to refer serious breaches of the standards codes to the new statutory regulator. Similarly, the regulator would be able to refer matters to the industry body for investigation. The statutory regulator which would also be independent of government. The regulator would take the form of a statutory corporation managed by a board. It would assume responsibility for media regulation more generally including the regulation of media ownership and content classification and standards.

The primary source of funding for the self-regulatory news body would be from member contributions. However, the government would also contribute funding to meet a shortfall or to fund specific projects.

The recommended formation of an industry body to oversee the development and application of news and commentary standards sits in contrast to the Finkelstein inquiry which recommends a statutory authority as the appropriate body for these purposes. The Convergence review considers that a statutory authority should be an option of last resort.

As noted previously, Liberty's principal concerns relate to freedom of expression which embraces freedom of the press and to privacy. From that standpoint, we favour the self-regulatory model in the first instance.

It is inconsistent with media freedom for government to be directly involved in the regulation of journalism and journalistic standards. This is so, even if that regulation is to be undertaken by statutory body established independently. The news media play a crucial role in a democratic society. That role is to hold government to account for its policies and activities. For this reason, it is proper that the regulation of the news media should be clearly, structurally protected from direct or indirect governmental influence.

The Finkelstein inquiry proposes that its new media council should be independent and makes suggestions as to how this might best be achieved. But the proposal for a news Media Council remains open to governmental influence, for example, through the government's control of appointments to the Council and through its capacity to determine the Council's budget. The Convergence Review's recommendation for industry led regulation, in contrast, sets its regulatory body at one step further removed from government influence and in so doing preserves industry rather than statutory direction.

At the same time, we are all too aware of the dangers of industry self-regulation. The great weaknesses of the Australian Press Council, for instance, are that membership (and therefore compliance with standards) is voluntary and that the development and enforcement of standards may be compromised by the primary adherence of members to their private commercial interests. For these reasons we support the Convergence Review's recommendation that the new industry body operate within a legislative framework that provides for compulsory membership of the Council and sets down in law the body's functions, powers and remedies. The concerns about governmental appointments to the regulatory body and the provision of adequate funding, raised with respect to Finkelstein, are met in the self-regulatory body by industry determined membership and resource allocation.

We note that should a member of the industry body, proposed in the Convergence review, engage in persistent or serious breaches of the media code, the matter may be referred to the statutory regulator. It is unclear from the review report however what action the regulator could take in response to such a referral. Legislation governing the creation of the new regulator should define its powers in this regard precisely.

There is a further, related question. That is, in what way will the news standards body be held accountable for its activities and to whom? What, for example, should be done if the body is found consistently to misapply the media code or to fail reasonably or fairly to resolve complaints that are brought before it?

For the reasons previously outlined, it would be inappropriate for the body to be accountable to a statutory authority. This suggests that the line of accountability in this respect should not be to the statutory regulator. We note that the regulator is to be accountable through parliamentary and judicial arrangements. The Convergence Review suggests that it could be made responsible to a statutory joint parliamentary committee. It further proposes that its decisions might be made reviewable by the Administrative Appeals Tribunal. We suggest that the news media body should be made similarly accountable.

We turn finally to the issue of privacy. Through its complaint handling function, the news standards body will be the first port of call for individuals who believe their privacy has been improperly or unjustifiably invaded. This is as it should be. In serious cases, however, a process involving conciliation and the publication of retractions and apologies may not be sufficient to deal adequately with the hurt and harm inflicted by gross media intrusions into people's private lives. One thinks in this regard, for example, of recent instances involving Clive James, Lara Bingle, David Campbell and Craig Thompson.

Consequently, Liberty remains firmly of the view that pursuant to its present consultation on the matter, the Government should enact legislation providing for a new statutory tort of privacy, which would enable individuals to sue media and other organizations who engage in seriously personally invasive activities.

Yours sincerely,

Professor Spencer Zifcak
President

CC: The Hon Nicola Roxon, Attorney-General for Australia