Chapter One

Defamation, Privacy, the Finkelstein Report and the Regulation of the Media

The Honourable Ian Callinan

The fact that the media may have an excessive opinion of their relevance and importance in public affairs does not mean that they are unimportant or irrelevant. Their relevance lies more, however, in their capacity to influence politicians than in their ability to persuade ordinary viewers, readers and listeners. Polls regularly taken of the public show consistently that the public distrust the media. We all favour those of the same mind as ours, just as we are resistant to those who are not. Even talk-back radio which those on the Left of the political divide seek to denounce as rabble rousers generally speaks, I believe, to the like-minded. Even so, a simple message clearly and repeatedly stated does have public impact. But, ironically, the greatest impact of the media is upon those who should themselves be persuading or influencing the media, the politicians. It is by this means that the media wield their greatest influence.

Some years ago, on separate occasions, I had conversations with a prime minister and the Leader of the Opposition. I suggested that politicians were far too reactive, too responsive to what the media were saying. Why, I asked, was this so, if, as I believed to be the case, and the polls consistently demonstrated, the public was so deeply sceptical about and distrustful of the media? The Prime Minister disagreed with me. He said that the relentless 24-hour news cycle compelled close attention and immediate responses to the media. The Leader of the Opposition was more receptive: *"You're quite right"*, he said. *"I don't know why for the life of me we do it."*

Now is not the time to debate that. The media do have an established role in public life. No matter how badly they may behave on occasions, deplorably so, in distortion, commercialism, omission [quasi censorship], sensationalism and bias, I cannot imagine how democracy could properly function without them.

There is no question that the media are not what the political class would wish for. Their ideal is of a far less questioning, less critical and more malleable institution. Politicians are interested in power. Most can never get enough of it. It is not unnatural that they would wish to have power and control over the media. For hundreds of years after the invention of the printing press they exercised that power.

Equally, it is not surprising that politicians might seize upon revelations of grave media misconduct even though it occurred, albeit under the same ownership of media outlets as exists here, on the other side of the world, as an opportunity to regain a long lost grip on the media. Although there does not appear to be evidence of that sort of misconduct here, on any view the Australian media are not Caesar's wife.

In 2011 the Federal Labor Government established an inquiry into the media and media regulation, to be conducted by a recently retired Federal Court judge, the Honourable Ray Finkelstein. Mr Finkelstein was assisted by a number of people and was able to report by 28 February 2012. The principal term of reference for the inquiry

was the effectiveness of the current media codes of practice in Australia, particularly in light of technological change, leading to the migration of print media to digital and on-line platforms.

Mr Finkelstein was very conscious of the advent of the internet and the problems, he said, which it raised, not only for the commerciality of existing orthodox media outlets, but also for standards of accuracy generally in the dissemination of news and comment. His focus, however, having regard to the terms of reference, and the climate in which the inquiry was established, was upon the orthodox media itself.

Mr Finkelstein concluded that there was a serious problem. It was a problem that was incurable simply by competition, competition probably more illusory than real. He formed the view, rather reluctantly I suspect, that there should be an independent statutory body, a regulatory body to be called the "News Media Council", to oversee the enforcement of standards for the news media. He thought that there should be an independent body to appoint the members of the News Media Council.

I have written and spoken elsewhere upon the outsourcing of responsibility by governments, and this, if it were to occur, would be another instance of that, the government appointing another supposedly independent body to appoint yet another independent body.[1] Mr Finkelstein's council would consist of a full-time independent chair, a former judge or other eminent lawyer, and 20 part-time members all of whom would be remunerated. It would be for the new council to develop "standards of conduct which would govern the news media". The same standards so developed would not need to apply across all delivery platforms: some would need to be specific. They would be reviewed every three years. One of the central powers of the council would be to investigate and resolve alleged contraventions of the standards, either upon complaint made, or of its own motion.

It would also have a function of educating the news media about the content of the standards, and the public about the role of the News Media Council. I confess that I tend to baulk at the use of the word "educate". When such a power is conferred upon any regulatory body, I fear that the real purpose is one of "re-education" with all the Stalinist overtones that that word has.

Mr Finkelstein said that the council should not be a "toothless tiger". It would need to have a means of enforcing its decisions. If a media outlet refused to comply with a council determination, then the council should have the right to apply to a court of competent jurisdiction to compel compliance. Any failure to obey the court order would be a contempt of court and punishable as such. This would be, he thought, a deterrent to breaches of standards and an incentive to resolve the complaint by discussion.

This short summary does not do full justice to the thought and good intentions of the author of the report and his discussion of the failures on the part of the media which brought him to the decision which he reached. I have the highest regard for Mr Finkelstein but I cannot help thinking that there is an air of unrealistic idealism in his assessment of the benefits which would flow from the existence of such a council, which included, transparency of dealings with complaints of wrongs by the media, accountability of the media, a restoration of public confidence in them, and the improvement of journalistic standards.

With one important qualification which will become apparent later, I agree that the media, uniquely in institutional public life, are effectively answerable to no one. There

is much more in the Finkelstein Report with which to agree than to disagree. His short summary of the history of attempts to regulate the media is excellent. He charts damningly the ineffectiveness over many years of the Australian Press Council. He is alive to the dangers of government intervention in any form but, in my respectful opinion, underestimates the proclivity of any government to control the media despite that there might be a structure, an independent commission on a term appointment, designed to resist that proclivity.

On occasions no one has been more critical of the media than I have. I have been the object of their disapproval and even, on occasions, much rarer, of their approbation. I have acted for and against them on many occasions. I served for a short period as a director of the Australian Broadcasting Corporation. I have had to adjudicate as a Judge on their conduct. This close personal acquaintance over some 40 odd years has not, I assure you, endeared them to me. I do acknowledge, however, that they have frequently been responsible for the revelation of misconduct and highly beneficial reforms in public and commercial affairs.

I remember once when I was acting for a media outlet it was relevant to know why a journalist had described a relatively modest house in his article as a mansion. "*Mate*", he said, *"We call any house of more than 25 squares a mansion, just as any car of over 6 cylinders, a limousine"*. I was at a Bar conference in London in 1998 at which Philip Knightley, a distinguished Australian journalist and writer, and an expert on the clandestine world, spoke. I was no stranger to the arrogance of the media, but he shocked me when he said that the media had an absolute right to the answer to any question which it chose to ask. He added, *"And if you don't give an answer when they ask you, they'll make it up, and they're fully entitled to do so"*.

I recall a case in Brisbane, *Copley v Queensland Newspapers Pty Ltd*,[2] in which a barrister sued for defamation. The newspaper had published that in prosecuting some police officers he had shouted at the complainant and treated her, in effect, as the Defendant, protecting the police officers and failing in his duty as a prosecutor. There was not a word of truth in it. The Director of Prosecutions, a man of the highest rectitude, who had briefed the barrister, was alarmed by the story. He went down to the court house and listened in full to the tape recording which had been made, as was the practice of those proceedings. Having satisfied himself about the probity and diligence of his prosecutor, he called the editor of the newspaper, for which ironically he had previously acted for many years, to ask for the story to be corrected. He urged the editor or some other senior person at the newspaper to listen to the tapes as he had. The arrogant response was that someone from the paper might do that, at some stage, if he, the Director, arranged for the tapes to be delivered to the newspaper. The tapes were in the custody of the court and necessarily would remain so. No correction was made. The barrister sued. The principal defence of the newspaper was of qualified privilege, a defence which would only succeed if the Plaintiff were able to prove, among other things, an absence of good faith on the part of the newspaper. Good faith requires honesty of purpose but not necessarily accuracy of content. On that, and all other issues, the newspaper produced only one witness, the journalist. The management of the newspaper did not know that the Plaintiff's lawyers had discovered that the journalist, who by then was no longer employed by it, had been guilty of financial irregularities in relation to his employer, in short that its own witness on good faith had breached that very faith owed to his employer. During the course of

the trial, the journalist claimed that some information for the article had come to him from a confidential source which he was honour bound not to reveal, a curious appeal to honour, in view of the newspaper's and its journalist's own conduct. Everyone in the court room was, I believe, sceptical about whether the source existed. The journalist's refusal to answer the question placed him in contempt of court. The Judge had no choice but to send him to prison. He did this very reluctantly after having given the journalist ample opportunity to obtain a release from the supposed source. The sentence imposed by the Judge was 10 days, but, of course, by indicating that he would answer the question, he could have purged his contempt and secured an immediate release.

Why do I tell you this true story? The answer is, because it shows that the media regard themselves as being above the law. The sentence was imposed on a Friday. By Saturday every media outlet in the country with a voice or a newspaper, martyred and sanctified the journalist and vilified the trial Judge. And worse, a pusillanimous Executive crumbled and released the journalist from prison by Tuesday: another example of the politicians' deference to the media.

Legal professional privilege prevents me from telling stories of even more egregious media misconduct. They remain unrepentant, determinedly denying themselves insight into their own failures. I think that many of them have long forgotten the famous edict that opinions are free but facts are sacred.[3] The media conduct businesses. They are not altruistic institutions and should not seek to hide behind the pretence that they are, whenever they are criticised. So, too, they should acknowledge the charade of editorial independence for what it is, a convenient escape hatch of a proprietor, an editor or, indeed, anyone else associated with the media outlet or journalist concerned.

What is editorial independence? A myth, I suggest. Is it independence of the managing editor, or the news editor, or the Opinions Piece editor, or a columnist or some other journalist? There was a time when there was only one editor of a major newspaper, a C. P. Scott-type figure, a person who was known to be fiercely independent, or otherwise transparently inclined to a particular line and view, and honestly expressive of it. I am always amused when I read the grandiose assertion that *"The Australian",* or the *"Sydney Morning Herald"* [insert whichever you wish], says, pronounces, denounces, proclaims, that it is the opinion of it that X or Y should be the next prime minister, or that some other public affair should proceed in a certain way. What does this mean? Have all the staff voted on it? Did the cadet journalist, or the compositor or his contemporary equivalent, or the circulation manager, or the advertising manager, or the major shareholders, have a vote? The notion that the owners, the ultimate funders of the business of a media outlet should always be denied a voice in news or policy of the outlet is quite frankly preposterous.

It is matters such as these, as well as the findings of Mr Finkelstein, and public concern that the sort of conduct which occurred overseas, may just possibly have occurred here, that has brought the politicians and some of the public to the point of considering that the freedom of the press, that the privilege of free speech itself, may have been so abused, that some regulation is necessary.

There are, however, several reasons why, despite all of my concern, and a long and sometimes close, not always approving, acquaintance with the media, that I am nonetheless strongly opposed to any further form of regulation.

First, as abused as free speech may sometimes have been, it is true to say that it is

fundamental to democracy. Any form of regulation of it is far too risky.

Secondly, regulation in almost every aspect of national life tends to be overdone. Some regulatory bodies eventually become over-zealous, over-intrusive, over-numerous, and expensive. They sometimes intervene to justify their own existence rather than because intervention is necessary. Ironically, they sometimes allow themselves be goaded into that by media demands for, as the tabloids say, "more scalps". I do not see Mr Finkelstein's model as a lean one. It contemplates a body of 20 people with an independent chairman and a complaints handling process. That sounds to me like an expensive bureaucracy.

Thirdly, such regulation, and there has been a deal of it, of the media as has occurred has not, in my opinion, been entirely appropriate or successful. The foundation for regulation by the Federal Government is the Post and Telegraphs power. How surprised the founders would be to learn that the power had been exercised to control the sale or purchase by a media company of a newspaper, as a condition of the keeping or gaining of a licence to broadcast or telecast entertainment or, for example, as a threat to a telephone company, that, unless it cooperated in the creation of a national broadband monopoly by the government, it could be compelled to divest itself of its holding in a pay television company.[4] Subject only to the technical constraints imposed by the limits of the spectrum and access to satellites, there is a strong case that anyone, on payment of a modest fee only, should be entitled to a licence to broadcast or telecast. Why should a broadcaster have to pass a "fit and proper" person test, when it is unthinkable that such a test might be applied to a publisher in the print media? Indeed, so appalling on occasions have been some efforts on the part of elements of the print media that one might wonder whether a person can only be such a publisher if he or she is an improper person.

A fourth reason is that the establishment of a Media Council is unnecessary. A little history needs to be addressed for an understanding of why this is so.

The defamation laws of all of the States until recently represented a measured evolution of the balance between free speech and freedom of the press, on the one hand, and the reasonable expectations of fairness to the public on the other. The States had enacted various defamation Acts, generally but not exactly the same. The law rightly allowed the media a great deal of latitude. The media, as always, wished for more, claiming that it was difficult for them to defend defamation cases. That claim was wrong. Anybody who has had to prove the negative, the absence of good faith for a Plaintiff, knows what a formidable defence this is.

In 2005, an Attorney-General in a federal coalition government interested himself in the defamation law. This was not Federal Government business. It was obvious to anybody with any experience in the area that the media would exploit any opportunity to change the law by tilting the balance further in its favour. That is exactly what happened. The Federal Attorney-General effectively imposed a uniform defamation law on all of the States.

This imposition was a particularly unfortunate one in the absence of a right of action for invasion of privacy. What was foreseen happened. The role of the jury was much reduced, leaving it to decide the questions, whether the publication was defamatory or not and some, but not all, of the factual components of the defences. The defence of truth and public benefit was enlarged to a complete defence of truth only. The jury was denied any role in their assessment, and damages were capped.

Exemplary or, as they are sometimes called, punitive damages, were abolished.

Not surprisingly the media had asserted that all of these changes did not go nearly far enough. The extravagance of juries was greatly overstated. The experience of defamation practitioners is that juries are generally measured in their approach to damages. Exemplary damages were reserved only for the worst possible cases, the ones in which the defamer had acted in contumelious disregard of the defamed. The highest award of which I am aware in recent times for exemplary damages was about $35,000 in a case of many blatant improprieties by a newspaper, including an attempt to intimidate a potential witness by the journalist after the proceedings were started, by misrepresenting to the potential witness that the person with her was a Federal police officer: *Griffiths v Queensland Newspapers Pty Ltd*.[5]

In his report, Mr Finkelstein correctly refers to the disadvantage which Plaintiffs suffer when they seek to sue large media outlets for defamation. Even when successful, the Plaintiff can be out of pocket and, if unsuccessful, can be ruined. Any defamation or other relevant law needs to take account of, and seek to remedy, this imbalance.

It is against this background that I state the fourth reason why I am opposed to a statutory or regulatory body. The best way of ensuring both free speech and reasonable media conduct is to restore and, indeed, enhance, in some respects, the former defamation law which the Federal Attorney-General caused to be changed. The full role of the jury should be restored. There should be a right to exemplary damages in extreme cases. Let people actually vindicate their rights and not some large and unwieldy bureaucracy which I think, regrettably, any regulatory body will not do or do well.

There also needs to be enactment of an invasion of privacy law which enables people to sue when their privacy is invaded. There is insufficient time to develop this here. Such a law is now well on the way to being established in the United Kingdom and has been recommended by the Australian Law Reform Commission. I said most of what I want to say on that topic in my dissenting judgment in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.[6] It would not be a difficult law to write and should provide at least the same sorts of defences as were provided previously under the various State defamation laws.

I am particularly anxious to see the role of the jury restored. Juries are much maligned. Those who criticise them are very often those who have had little experience of them. There have been few occasions on which I have disagreed with their verdicts, even when I have been on the losing side of the case. What is published, how information is used or misused are peculiarly matters of public interest in the broadest possible sense. The public should be the judge. What is fair, what is decent or proper, is peculiarly a matter for the community. There is no better representative of the community than the jury.

There is a real problem and it is well identified by Mr Finkelstein giving, as he does, examples of costs actually incurred in some cases. How can an ordinary person who has been defamed afford to litigate? My proposal would be that damages be no longer capped as they used not to be, and, as I say, that exemplary damages again be available, and that a proportion, say half the exemplary damages and a quarter of the compensatory damages, be paid into a fund for defamed persons who cannot afford to litigate. Why should this not be so? In flagrant cases of breach of intellectual property,

additional damages can be awarded. To damage a person's reputation can be as distressing, and sometimes as financially damaging, as a breach of intellectual property rights.

Furthermore, all torts, of which defamation is one, are intended to have a deterrent effect, and, in my experience, nothing deters indefensible defamation more than the financial pain that the defamer itself will suffer by an award of damages and costs. Further, an appropriate measure would be that if the defamer be held liable in damages, it pay the whole of the defamed plaintiff's costs on an indemnity basis unless the defamer has made an offer of the same amount, or more than the damages awarded, and has apologised.

A fifth reason is, that I foresee that the regulatory model proposed is unlikely to reduce litigation anyway. Its rulings will inevitably be contested in the courts. Costs for one kind of a proceeding are bound to be incurred in many cases. Those costs will have to be paid by either the public, or the relevant media outlet. A regulatory body that would not be seen to be exercising judicial power could probably be established, but this is not beyond doubt. An ingenious legal mind might well be able to mount at least an arguable case that the matters coming before the council are really legal issues fit for determination by a Chapter III Court only.

A further reason, sometimes overlooked, but, in my view, compelling argument for a strong unfettered commercial media is that there is already a publicly-funded one which, particularly in this electronic age, is publishing (electronically) on a 24-hour basis. The corporate governors of that medium are appointed by the government. That is more than enough, in my view, for any Executive. Mr Finkelstein rightly speaks of commercial barriers to entry. Government-owned broadcasting authorities may not be commercial barriers but in some ways they can operate as barriers, or at least deterrents to entry by other less-handsomely funded potential entrants.

In a sense I have already anticipated the last objection that I have to the regulatory tribunal. It is that despite all the things that might legitimately be said against the media over the years, if a strong media did not exist, society would suffer, and many excesses of power and financial improprieties would go undetected and unpunished. I would want nothing to increase that risk.

Endnotes

1. *"Responsible Government – In Dilution"*, *Quadrant*, April 2008.

2. Queensland Supreme Court, unreported, 30/07/1992, Dowsett J.

3. Charles Prestwich Scott, "A Hundred Years", essay in *Manchester Guardian* (1921).

4. I. D. F. Callinan, "Law, Economics and Interdisciplinary Indeterminacy" in J. Gleeson & R. Higgins (eds), *Constituting Law – Legal Argument and Social Values*, 2011.

5. [1993] 2 Qd R 367.

6. (2001) 208 CLR 199 at 142-166.