



Submission to the Independent Media Inquiry

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1 Introduction

The Independent Inquiry into Media and Media Regulation raises troubling freedom of speech and freedom of the press issues.

A free and independent press is an absolute necessity for a functioning democracy, and freedom of speech is one of the basic foundations of individual liberty.

The Institute of Public Affairs has written extensively on the concerning sequence of events which led to the announcement of the inquiry.¹

The circumstances under which laws and regulations are imposed has an effect on freedom of the press. Courts have long recognised the 'chilling effects' which government policy can have to restrain free expression. The fear of post-publication criminal or civil challenge can have a substantial deadening effect on public debate by encouraging self-censorship on legitimate issues that would have otherwise been discussed freely. Similarly, regulatory structures can have a chilling effect. Requirements to present "balanced" takes on public matters can make organisations and individuals reluctant to tackle those matters at all, or sterilise their discussion.

As a consequence, the inquiry should also be concerned that the political environment in which it has been formed could also have a chilling effect. As it is plainly the result of outright hostility between News Limited on one side and the federal government and the Australian Greens on the other, the inquiry needs to recognise that its establishment is - or could easily be construed as - an attack on freedom of speech itself.

It is good that the terms of reference have been restrained from inquiring, for instance, into "bias" - which would have been obviously threatening to the free press. But while the extremes have been avoided, there are still substantial freedom of speech issues in both the terms of reference and the issues paper. These concerns are confirmed by the letter addressed by the inquiry's chair to current editors, which seem to clarify the interests of the inquiry.

The terms of reference direct the inquiry to investigate a) compliance with and institutional structures governing self-regulation and codes of conduct and b) print media business models in the age of the internet.

But the issues paper and the chair's letter offer a much broader scope. This scope includes the purpose and philosophical justification for freedom of the press, access to print publication by a diverse set of individuals and groups, and the processes by which newsrooms operate, including fact checking processes and editorial independence. These questions are far outside any plain-English reading of the government's terms of reference. Greens leader Bob Brown claimed on *Lateline* that the terms of reference were drafted so vaguely that they effectively threw the "door wide open" to discuss a much more politicised set of issues than such a plain-English reading. Brown, it seems, was right.

¹ See: Chris Berg, 'Liberty Gets The Chop', *The Sunday Age*, 11th September, 2011; James Paterson, 'Media Inquiry Opens The Door To Intimidation', *Australian Financial Review*, 16th September, 2011; Chris Berg, 'The Assault on Freedom of Speech', *IPA Review*, December 2011 (forthcoming).

Freedom of the press is important for two reasons - the first as it relates to a general right to freedom of speech, and second as it acts to restrain government. Throughout history freedom of the press has been a focal point of the contest between state and society. The media is one of the major bulwarks against the abuse of state power in a free society. This long history and the media's democratic role makes it one of the most sensitive industries - any regulatory or political restraint on freedom of the press represents an erosion of our liberal democracy. That is true even with regulatory interventions which purport to *expand* the democratic nature of the press. Any interference by the state with the media - especially if punitive - has freedom of speech consequences.

With these general principles in mind, this submission will tackle the individual issues raised by the inquiry.

2 Access and balance

Press freedom is important not simply for its relationship to democratic governance but because it is a manifestation of the right to freedom of speech.

So it is concerning that the issues paper approaches the question of press freedom from a purely utilitarian perspective. The "marketplace of ideas" theory is a widely held but ultimately shallow foundation for freedom of speech. (I have explored this critique of the marketplace of ideas thesis on ABC's *The Drum*.²) Perhaps most importantly, a utilitarian defence of speech freedom does not accurately reflect the Australian community's understanding of that freedom. Quite understandably, the popular conception of freedom of speech is as a right, not as a means to an end.³

That right is held by individuals, but it is no less essential when those individuals cooperate in a corporate structure. Simply because a group of people voluntarily form an organisation does not abrogate their right to freedom of speech. In the context of the inquiry, this means that newspapers themselves have as much a right to free expression as the individuals who comprise them.

If we view press freedom as a right, not (as the issues paper suggests) as a means for an end, we must reject the suggestion of the inquiry that government - or any legally delegated body - compel private media organisations to print any material. Item 1.4 of the issues paper asks "Regardless of the justification, is it appropriate, especially in the search for the 'truth' on political issues, that persons holding opposing views have an opportunity to express their views in the media?" That may be a laudable thought for newspaper editors, but it is absolutely no business of regulators or the government.

The right to speak has to include its negative corollary - the right not to speak. A freedom of speech that also compels speakers to express views contrary to their own is no freedom at all. Forcing private newspapers to print material which they disagree with as a matter of course would be a clear and unequivocal breach of freedom of the press.

² Chris Berg, 'Why care about freedom of speech?', *ABC The Drum*, 4th October, 2011

³ The Institute of Public Affairs freedom of speech poll which asked respondents to rank the right to freedom of speech to the right to be protected against offence provides some tangential, but nonetheless indicative suggestions along these lines - 82% of a representative sample of Australians found that former more important to defend than the latter.

3 Regulatory balance provisions in broadcast media

The way similar provisions are used to encourage regulatory interference in radio and television is a further illustration of why the issues paper's suggestions are objectionable.

The radio broadcaster's code of practice claims to ensure that "reasonable efforts are made... to present significant viewpoints when dealing with controversial issues of public importance." In March, the activist group GetUp lodged a formal complaint with the Australian Communications and Media Authority that the 2GB host Alan Jones had breached this code by failing to air a balanced perspective on the science of climate change. This followed an episode of ABC's Media Watch program that alleged Jones and other broadcasters only interviewed a select group of scientists.⁴

The GetUp action demonstrates clearly how provisions designed to enforce balance can be used as a weapon in the political debate, rather than illuminating it. Climate change is one of the most important public issues of our time. If a parallel code - with legal backing - was introduced for the print media, it would invite such regulatory manipulation.

The classic example of this is the Fairness Doctrine in the United States between 1949 and 1987. This doctrine - administered by the licencing agency the Federal Communications Commission - imposed on radio and television broadcasters an obligation "to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues." There is abundant evidence to suggest that, rather than sparking debate over controversial political questions, the response of broadcasters was to suppress it in order to avoid accidentally contravening the doctrine. In a 1997 paper, Thomas W. Hazlett and David W. Sosa argued that the elimination of the doctrine in 1987 was a catalyst for greater discussion of political issues. By looking at nationwide categories of broadcast, they found a substantial break from the long term trend in informational content immediately after deregulation.⁵

Hazlett and Sosa's finding suggests that attempts to enforce balance on speech actually suppresses speech - the Supreme Court's "chilling effect." Even following a utilitarian argument for freedom of speech, this should be of great concern.

4 Self-regulation and statutory authorities

Any attempts to increase the strength of press regulation should be firmly resisted on freedom of speech grounds. This is not to claim that self-regulation is "effective" at achieving any particular government or public goal. Instead, governments cannot put themselves in the position of regulating the press for any purpose. For this reason, any attempt to strengthen, fund, or give regulatory power to the Press Council is inadvisable. Worse still is the suggestion in the issues paper of a statutory body to regulate the press.

Item 10 of the issues paper asks whether there are any alternative models of regulation that could be adopted. This is premature. The case has not been sufficiently made that there is a significant problem in the media that would warrant any political or regulatory response. In fact, while it is

⁴ See Chris Berg "Media Watch: Everyone Loves It Until They Advocate Censorship", *ABC The Drum*, 28th March, 2011

⁵ Thomas W. Hazlett & David W. Sosa, 'Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market', *The Journal of Legal Studies*, Vol. 26, No. 1.

trivially easy to demonstrate inaccuracies or biases or ethical lapses in the press, the proper solution to such failures seems to be working quite well - other media outlets point them out and correct them. Similarly, newspaper letters columns have long been a forum for correction and contest. The institutional structure for debating contrary views is an essential part of the press, and exists without any regulatory imperative.

Furthermore, the risks of vesting a government body with the task of fact-checking or determining what is "comment" and what is "news" should be obviously threatening to freedom of speech, susceptible to politically-inspired nuisance complaints, and a challenge to the independence of the press. These suggested reforms should be strongly rejected by the inquiry.

5 The inquiry must reject increased regulation of the press

Both the circumstances in which the inquiry was commissioned, and the wide range of interference in editorial and press freedom which it canvasses, are cause for significant concern.

Freedom of speech is a vital part of our democracy but it is also a basic right in a liberal society. This inquiry is a substantial challenge to that right. The inquiry needs to reject any expansions by government or regulators into press freedom.

About the author

Chris Berg is a Research Fellow with the Institute of Public Affairs. He is a regular columnist with the *Sunday Age* and ABC's *The Drum*, covering cultural, political and economic issues. He is an award-winning former editor of the *IPA Review*.

His monograph, *The Growth of Australia's Regulatory State*, was published in 2008. He is also the editor of *100 Great Books of Liberty* (with John Roskam) published by Connor Court Publishing in 2010, and *The National Curriculum: A Critique* (2011).

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