



# **The Finkelstein Report into Media and Media Regulation**

## **Licensing, censorship and accountability**

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## Introduction

The proposed News Media Council recommended by the Finkelstein Report into the Media and Media Regulation represents a significant threat to freedom of speech.

- The Council would be a *de facto* licensing scheme for printed and online media. Licensing over the printed press ended in the English-speaking world in 1695.
- The Council would enable state censorship of controversial content.
- The Council represents a reversal of democratic accountability: rather than state being accountable to the opinions of citizens, it would make citizens' opinions accountable to the state.
- The Council would not only regulate the speech of newspapers and television broadcasters, but it would regulate the activities of virtually every citizen who expresses opinions online or in print. Nearly every website, magazine, journal, and newsletter published in Australia would come under the News Media Council's jurisdiction.

The extraordinary breadth of the proposed News Media Council's jurisdiction suggests that, despite the Finkelstein report's 400 pages of philosophy, history, economics, and public opinion research, it has not been properly thought through.

## What does it recommend?

The report, written by the former Federal Court judge Ray Finkelstein with the assistance of Matthew Ricketson, a Professor of Journalism at the University of Canberra, recommends the establishment of a News Media Council to regulate all news and current affairs outlets in Australia. (paragraphs 11.44 – 11.86)

Finkelstein defines news media as entities "that gather, analyse and disseminate news, often with their own opinions added." (11.65)

News media entities would include:

- Television and radio broadcasters currently regulated by the Australian Communications and Media Authority
- Any printed news media with a print run of more than 3,000 copies per edition. (11.67) This would include newspapers as large as the *Herald Sun* and the *Age*, all the way to small magazines and newsletters.
- Any website covering news and opinion that received a minimum of 15,000 "hits" per year. (11.67) In other words, any website receiving as little as 41 hits per day would come under the News Media Council's jurisdiction. (This could be as few as one unique individual visitor per day.) Overseas websites that have "more than a tenuous connection with Australia" would also be included. (11.69)

The News Media council would develop and enforce "standards of practice" for all news media that "should incorporate certain minimum standards, such as fairness and accuracy." He writes: "These standards could be based on already existing codes which have developed either by the media or in consultation with the media." (11.52)

For example:

- The Commercial Radio Code of Practice insists that “reasonable efforts” are made to present “significant viewpoints” on controversial issues.
- The Media Alliance Code of Ethics emphasises “honesty, fairness and independence”.
- The Herald and Weekly Times’ Editorial Code of Conduct states that journalists should “try always to tell all sides of the story in any kind of dispute” and that “facts must be reported impartially, accurately and with integrity.”
- The Australian Press Council’s General Statement of Principles says that publications should “take reasonable steps to ensure reports are accurate, fair and balanced”.

These standards will be enforced through a complaints mechanism. If the Council finds that media outlets have breached the standards, it will have the power to:

- require publication of correction,
- require the publication of a reply,
- require the “withdrawal of a particular article from continued publication (via the internet or otherwise.)” (11.74)

Failure to comply would be resolved in court. If news entities refuse to comply, they would be subject to contempt of court proceedings “punishable in the usual way”. (11.77)

The News Media Council will cost around \$2 million a year and will be paid for by taxpayers. (11.85)

### **A) The News Media Council would be a *de facto* licensing scheme**

The Finkelstein report says clearly that “Licensing the press should ... be rejected, because in a democratic society the government should not be involved in controlling who should publish news. Nor should it be involved in setting and evaluating press practices.” (11.26)

Yet under this definition, Finkelstein’s proposed News Media Council would itself be a *de facto* licensing scheme.

Compliance with the Council’s code of standards would be mandatory for all publishers of “news media”, from radio broadcasters to small websites. Non-compliance with the standards would be ultimately punishable by fines or jail-time. It is hard to see how this differs in any substance from a licensing scheme.

Further reason to believe this media structure would be indistinguishable from licensing is the emphasis that the Finkelstein report places on the benefits of membership in the News Media Council.

While discussing the possibility of an expanded Australian Press Council, he recommends “legal privileges from privacy and consumer legislation, and possibly protection of journalists’ sources, should only be available to members or those employed by members.” (11.40) The problem, in Finkelstein’s view, with the Press Council is that “while membership of the APC can be ‘encouraged’ it cannot be guaranteed.” (11.41)

The proposed Council is supposed to resolve that problem. Here Finkelstein also imagines that there will be organisations that “see value in the role of the News Media Council to opt into the system”. (11.68)

Any media outlet that systematically refused to comply with the standards – one which refused to be driven by “fairness” or “balance” – would quickly find itself unable to publish.

Finkelstein’s confusion about what constitutes “licensing” is founded in the distinction he makes between “government” regulation and “enforced self-regulation”. (10.14)

The concept of “enforced self-regulation” is an attempt, found in the academic literature on regulatory governance, to bridge the gap between self-regulation and “command-and-control” law.<sup>1</sup>

The distinction Finkelstein offers is, however, false.

The News Media Council would be a standard independent regulatory agency. It will be as much an arm of government as the Australian Communications and Media Authority, the Australian Competition and Consumer Commission, or the Australian Prudential Regulatory Authority.

The only distinguishing institutional feature of the News Media Council would be its elaborate appointments process: the members of the Council would not be appointed by parliament, but by a board of three academics, the Solicitor-General and the Commonwealth Ombudsman. (11.46)

This would offer some degree of separation from the executive. But that separation would not make the Council any less of a government agency. The Classification Board has a similar structure, and one could not suggest that Australia’s classification system is “self-regulation”. Nor would one properly describe the broadcasting codes of practice regulated by the ACMA as “self-regulation”.

According to the description of licensing given within the report itself – government “controlling who should publish news” and “setting and evaluating press practices” – the News Media Council would be a full-blown licensing system for the Australian press.

## **B) The News Media Council would be empowered to censor speech**

Finkelstein writes that the News Media Council is not “about increasing the power of government or about imposing some form of censorship.” (10)

It is hard to see how that is the case.

One of the remedial powers Finkelstein offers the News Media Council is the “withdrawal of a particular article from continued publication (via the internet or otherwise.)” (11.74) That is virtually the definition of censorship. Finkelstein does not explain why he would not consider this power to be censorship, but we can infer from his earlier arguments he rests this belief on the “self-regulatory” nature of the News Media Council.

The Finkelstein report does explore the concept of censorship when discussing a related remedial power held by the News Media Council: the enforcement of a “right of reply” for complainants.

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<sup>1</sup> (A conceptual critique of this distinction is found in *Chris Berg, The Growth of Australia’s Regulatory State: Ideology, Accountability and the Mega-Regulators*, Institute of Public Affairs, Melbourne, 2008.)

Here his argument is also surprisingly weak. Finkelstein claims that an enforceable right of reply would be “interference with editorial freedom”, but could not be described as censorship. He writes that “It should be remembered that such a right would only be enforced after an independent process found there was merit in the complaint, and so would exclude baseless complaints.” (9.29) This is a strange claim: censorship is not censorship if it has merits?

The right to freedom of speech must be the right to determine the content of that speech. What Finkelstein describes as “editorial freedom” is the essence of free speech; not a distinct concept that can be limited while speech freedoms are left unharmed.

Ultimately, the News Media Council would have the power to censor speech that it has decided does not adhere to its self-written standards.

The fact that it would act only in response to complaints, would have the ability to determine the “merits” of those complaints, and would not answer directly to parliament, does not change that fact.

### **C) The News Media Council would make public opinion accountable to government, rather than government accountable to public opinion.**

Finkelstein writes that the purpose of the News Media Council would be to make “the news media more accountable to those covered in the news, and to the public generally.” (10)

He bases this on a distinction between two theories of the press: “Libertarian Theory” and “Social Responsibility Theory”.

For Finkelstein, Libertarian Theory is a belief that truth will emerge from a “free market of ideas” – a free press will enrich public debate. (2.72)

By contrast, Social Responsibility Theory posits that the press is an essential and constituent part of democratic governance, and necessary if democracy is to function. (2.79)

Finkelstein argues that Libertarian Theory was proven “inadequate” by the “industrialisation of the press” and the economics of newspapers in the 19<sup>th</sup> and 20<sup>th</sup> century. Furthermore, he argues, the marketplace of ideas only encourages “inequality, abuse of power, intellectual squalor, avid interest in scandal, an insatiable appetite for entertainment and other debasements and distortions.” (2.73)

Strikingly, that is exactly the same sort of argument which was used by opponents of universal suffrage – that the lower classes would not use their democratic freedom responsibly.

But Finkelstein’s Libertarian Theory has been narrowly defined: it excludes any concept of freedom of speech as a value worth protecting *in and of itself*.

This absence is particularly notable as in an earlier section he writes at length about the “self-fulfilment and autonomy” defence of free speech (2.35-2.40). The autonomy model of free speech forms the basis of most “libertarian” arguments for freedom of expression.

Contrary to Finkelstein's views, libertarian philosophies do not claim that truth will necessarily defeat falsehood, or that a free debate will be free of "intellectual squalor" or "entertainment".<sup>2</sup>

Finkelstein's critique of the theory of freedom of speech is founded on a straw man. That is perhaps no surprise. He does not cite any theorists working in the libertarian tradition.

Finkelstein approves of Social Responsibility Theory. But he believes it has a weakness. He writes that this theory "is essentially a plea for the media to take upon itself the task of acting responsibly ... But it is quite silent on the questions—responsible to whom, and by what means?" (2.78)

The News Media Council is designed to offer an institutional answer to those questions. Yet the structure of the body means the media would not be responsible to "those covered in the news, and to the public generally". The media would be responsible to a government agency.

This is a significant reversal of democratic accountability. Rather than government being accountable to social institutions like the press, Finkelstein proposes that accountability flow the other direction: that social institutions be accountable to government.

This is doubly concerning because of the extraordinarily broad jurisdiction he has drawn for the Council. Virtually all public debate would be accountable to this government agency.

Nevertheless, even if we granted Finkelstein's own tenuous assumptions, should we strive to make the media accountable to "those covered in the news"? The News Media Council would inevitably be used by prominent individuals to harass or punish critics.

The origins of the Independent Media Inquiry were explicitly political. Government minister and the Greens have long been critical of perceived "bias" in the media on issues such as the government's stimulus package, and the National Broadband Network. (The Finkelstein report spends a great deal of time analysing whether certain newspapers are biased on the issue of climate change.)

The News Media Council would inevitably be a forum used by politicians and activists to attack their opponents. This is not an idle concern. ACMA regulations governing broadcasting are often used as political and partisan weapons.<sup>3</sup>

Australia is a liberal democracy that grounds its legitimacy on free and open debate. Finkelstein's recommendations are a significant philosophical and practical threat to that democratic principle.

### **A political threat to freedom of speech**

One major focus of the Finkelstein report is the esteem in which the media is held by the public. (4.9-4.42) But is it really the role of the government to help restore the reputation of private businesses?

Even under Finkelstein's own terms, his proposed News Media Council would undermine the very press and speech freedoms that advocates of the Social Responsibility Theory ground their philosophy upon.

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<sup>2</sup> See Chris Berg, "Why Care About Freedom Of Speech?" *ABC The Drum*, 4 October 2011

<sup>3</sup> See Chris Berg, "Media Watch: Everyone Loves It Until They Advocate Censorship", *ABC The Drum*, 28 March 2011

When John Locke wrote his short essay 'Liberty of the Press' in 1693, he urged parliament not to renew Charles II Licensing Act. Parliament's failure to renew this Act spelled the end of press licensing in the English speaking world.

As Locke wrote, press licensing is "an invasion on the trade, liberty, and property of the subject".

The News Media Council would be a government licensing body with the power to censor speech. It represents a significant threat to the freedom of speech of all Australians.

### **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).

He is the author of a forthcoming book on freedom of speech.

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