SUBMISSIONS 2009

As with previous years in 2009 the Press Council made submissions to various bodies on various topics, whenever it was considered freedom of the press was at risk of being impinged on by legislation or regulation.

The following are submissions made in 2009. The Law Commission submissions also included answers to questions put by the Commission. These are not included here.

Submission to the Law Commission on Suppressing Names and Evidence – February 2009

1. Thank you for the opportunity to make a submission on this matter.

2. The New Zealand Press Council was established in 1972 by newspaper publishers and journalists to provide the public with an independent forum for resolution of complaints against the press. It has other important objectives, as noted below. The present constitution of the Press Council comprises six independent members and five industry members.

3. The Press Council has as its second and third objects:

   > "To promote freedom of speech and freedom of the press in New Zealand"
   > And
   > "To maintain the New Zealand press in accordance with the highest professional standards"

4. This submission will concern each of the objects: the first as it pertains to open justice and the role of the Press in reporting court; the second as it relates to the ease with which journalists are able to ensure that the information they source is accurate.

5. We will also comment on relevant matters that have come before the Press Council.

6. In brief it is the Press Council's contention that the best interests of the public would not be served if there were to be any tightening of existing laws relating to suppression of names and evidence.

7. **Open Justice and The Press**

8. The Press's role in being the eyes and ears of the public unable to attend court in person has been reinforced by the Courts.

9. The Press is a partner in ensuring open justice.

10. We cannot express it more clearly than Justice Baragwanath in The Queen v B (at [55])

> *The starting point, and usually the finishing point, must be a presumption of openness, which means that cause must be shown to depart from the logic that the courts are open; the media are the eyes and ears of the community; and so the media may report what the public would have seen had they gone to court. It is essential to be realistic: if, as is usually the case, there will be an ultimate disclosure of the accused's name, little or no purpose may be achieved by an interim order withholding publication. To do so, by imposing unnecessary secrecy, will be counter-productive. The public interest in knowing what is happening in the courts is such that orders of that kind should not be made as of course.*

11. The Press Council does consider complaints about breaches of privacy among them the occasional complaint concerning well-known people. A corollary to this is the possibility that well-known people will, when they appear in court, attract greater media attention.

12. It is unfortunate that a perception has arisen that such people are more likely to get their names suppressed. Publication of their names may well have some impact on them but there should be no separate statutory factor to be taken into account by the presiding judge. Whether people are well-known or not they must receive equal treatment.

13. The presumption of openness should not be lightly overcome by individual rights and interested claims of 'risk'. The Council would argue that *privacy* may not be the appropriate term to use in relation to court proceedings. Rather, there may be *private interests*, which need to be balanced against *public interests* when determining suppression.

14. The Press Council accepts that s5 Bill of Rights requires, in some cases, that the privacy of a person be considered in the balancing act required by s14. However, it is of the view that this balancing act should no be left to an editor when considering a report on a court proceeding. The editor, after all, has the right to publish court proceedings unless an order to the contrary has been made. If privacy is a relevant issue, then the appropriate order should be made by the judge. It is the Council's view that judges at times too readily make suppression orders. In other words, the principle of open justice should be departed from only sparingly and on clearly

articulated grounds determined by a judge. The media should have the right to challenge by appeal the judge's opinion.

15. We note the references to practice in South Australia regarding court reporting. There is little evidence that any unfairness, regarding partial reporting of a court case, is occurring in New Zealand. In fact it is largely general practice that a court case, if embarked on, must be covered from beginning to end. This is not only in the interests of fairness, but because readers expect it.

16. We would regard the term "equal publicity' as problematic. (Q21d). A brief well-written item will often attract far more readers than a longer piece and in any event how can you ensure that the same people read all articles.

17. We can understand the difficulties faced when trying to define a fair trial (2.17 and 2.18), however it is surprising to the Press Council that timeliness was not a factor mentioned.

18. Name Suppression and the Working Journalist

19. Journalists have frequently commented on the difficulty they face in ascertaining the status of suppression orders. This comes about in two ways: the attitude of court staff in releasing information and the difficulty in definitively finding out the current status of any order.

20. This was highlighted in the recent Fairfax Contempt of Court case when even the Solicitor General's office was unable to ascertain, in a timely manner, the status of the suppression orders which Fairfax had been charged with breaching.

21. Two days after being asked by the judges to provide definitive information on the status of each piece of information, the Solicitor General was able to advise the bench that of the 13 items included in the charge, in fact only 6.5 had ever been suppressed.

22. If the Solicitor General's office has such difficulty checking the status and extent of suppression orders how can a working journalist be expected to? The court reporter, working against a deadline, does not have days to spend on researching orders.

23. In the interests of accuracy, and the highest professional standards mentioned above, the Press Council would therefore support a National Register, as do our counterparts in Australia.

24. Professor Ken McKinnon, Chairman of the Australian Press Council, speaking on the Australian situation at the combined Press Council forum *The Press and the Right to Know Under Siege* stated:

> *The upshot of general judicial timidity is to resort to suppression so frequently that any claim of justice being seen to be done can easily be challenged. Last year a survey of media organisations reported close to a thousand suppression orders in existence, a number that was not necessarily the full count. There are no national records so no-one knows how many suppression orders there are. Sometimes the fact that a matter has been suppressed is also suppressed. There is no standard format for a suppression order that shows exactly what has been suppressed and for how long. The lists are not reviewed regularly, so no doubt, some expired suppression notices continue to be treated as if still in force. There is certainly no central electronic register that would allow checking by a daily newspaper approaching an evening printing deadline. ... How can justice be seen to be done in such a ridiculous situation?*

25. Matters that have come before the Press Council

26. The Press Council has dealt with complaints about name suppression and still does so, if the complainant can assure the Council that the matter is not going to be pursued by the Police.

27. This is not a comfortable fit for the Press Council, which is tasked with ruling on ethical breaches rather than legal ones. However we do provide a service to aggrieved members of the public and so will consider such complaints. See the 2005 Annual Report excerpt attached.

28. Most are inadvertent breaches for which the publication is, naturally, apologetic. We contend that these would be overcome with a National Register. We would envisage an on-line register, under the auspices of the Ministry of Justice, who would have the responsibility of updating and maintaining it. Access would be by password, to approved persons only. Access should be trackable.

29. Some complaints relate to identifying information which the complainant alleges makes his/her identity obvious. Some, but not all, of these complainants are successful. More careful wording of suppression orders would eliminate many of these problems. If it is the Court's intention to suppress the identity of an accused, the suppression order should be formulated to provide for this. A standard format for routine suppression orders would reduce the number of uncertainties.

30. The current situation of various media outlets describing an accused by small but differing features, allows the public to build up quite a picture, which can lead to

identification. Each outlet considers they are maintaining the order, so which outlet is then to be regarded as being the one to have breached the order?

31. We have provided answers to the questions in Appendix A.

32. We thank you for the opportunity to provide our views and would happily expand on any point if requested.

SUBMISSIONS TO THE LAW COMMISSION ON THE REVIEW OF THE LAW OF PRIVACY – STAGE 3: Invasion of Privacy: Penalties and Remedies

The New Zealand Press Council has a major object "*to promote freedom of speech and freedom of the press in New Zealand"*. These submissions are made in accordance with that object.

The United Nations adopted the Universal Declaration of Human Rights in 1948. Article 19 states:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Section 14 of the New Zealand Bill of Rights Act 1990, which incorporates the right into New Zealand law, provides that "*Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinion of any kind in any form"*. There are two elements to this right, namely the right to speak freely and the right of the public to be informed.

While section 14 does not refer to freedom of the press "*the right of freedom of the press is no more and no less than the right of all and any member of the public to make comment: Solicitor General v Radio NZ Limited* [1994] 1 NZLR 48.

Section 5 of the Bill of Rights provides that the rights and freedoms contained in the Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. This Council takes the view that any enactment that is likely to limit the right of freedom of expression must be critically examined to ascertain whether it is demonstrably justified. The principle applied in the *Spycatcher* case in the European Court of Human Rights should be applied here, namely the right granted by the Bill of Rights "*is subject to exceptions, however, these must be strictly construed and the need for any restriction must be established convincingly: Observer and Guardian v. UK* (1992) 14 E.H.R.R. 153.

The European Court in *Handiside v UK* (1976) E.H.R.R. 737, defined freedom of expression as:

> Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. It is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".

In the United Kingdom where both freedom of expression and privacy are rights included in law by the Human Rights Act 1988, Article 10(2) of the European Convention of Human Rights expressly sets out the permissible limitations on the right. It states:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of reputation of the rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

The Privy Council, in *Observer Publications Ltd v Matthews and Att.-Gen. of Antigua* (2001) 10 B.H.R.C. 252 referred to the limits which can be placed on freedom of expression in the following terms.

> Any infringement must be "necessary in a democratic society", and "necessary", although not synonymous with "indispensable", means more than "useful", "reasonable" or "desirable". It implies the existence of a "pressing social need".

It is submitted that the New Zealand position should be no more liberal than the United Kingdom position, particularly when privacy is not recognised as a right under the Bill of Rights. Thus, any restriction on freedom of speech and freedom of the press in this country must be established convincingly and necessary in a democratic society.

An example of the potential danger of restricting the public's right to know was the recent attempt by some United Kingdom members of parliament to pass legislation which would have prevented their personal expense claims being open to public scrutiny.

The Council only intends to answer those questions which are relevant to the promotion of freedom of speech and freedom of the press. Before doing so, it will make general observations on the relevant topics.

Chapter 7 (Reform of the Law)

The chapters preceding Chapter 7 detail the current law relating to the disclosure of personal information, including the *Hosking* tort. The history of privacy torts in other jurisdictions, including the limited use of the tort and the limited success of those actions suggests that there may not be a great problem in this area. The various considerations and implications indicate that care is required to establish that there is a need to restrict freedom of expression and that such need is established convincingly.

Another important issue for the press is the need to establish when privacy values can limit freedom of expression. The Supreme Court Judges in *Brooker v Police* [2007] 3 NZLR 91 differed as to whether a value such as privacy, which is not a protected right under the Bill of Rights, can be balanced against freedom of expression which is a right protected by the Bill of Rights. If there is to be an amendment to the law, care should be taken to ensure that privacy can not, as defamation once could, be used for gagging purposes to prevent the public's right to know in the public interest.

The Council acknowledges that there are privacy values which society recognises. However, freedom of expression allows persons, including the media, to comment on private matters. The

public interest dictates that this should be so. That right should not be curtailed by imposing unnecessary legal restrictions on freedom of expression. Any restrictions imposed must be demonstrably in the public interest.

The review of the existing legal position in Chapters 2 to 5 and the commentary on the *Hosking* tort indicate the complexities and uncertainties which exist in applying privacy values. The Council's view is that these uncertainties will change from time to time as society's norms develop. There is a danger, in the Council's view, that these complexities and uncertainties may be compounded rather than clarified by an attempt to legislate in this area. Until new legislation is interpreted by the courts, there is often uncertainty as to its application and, therefore, likely to be a chilling effect on the media.

The Council is not competent to comment on the application of the limitations contained in Article 10(2) of the European Convention of Human Rights. In this country, dignity, financial loss and personal safety and health may restrict freedom of information. However, remedies in these fields are often available under law other than privacy law. Dignity is a difficult concept because, as has been said, many reports in the media affect the dignity of a person referred to in the article. The Council's view is that the media should be entitled to exercise its right to report, notwithstanding dignity issues, if there is a legitimate public concern in the matter being reported.

In summary, the Council's position is that it does not, in general, favour statutory reform of the law on personal information disclosure. The *Hosking* tort should not become a statutory tort and any development, refinement or restriction of it should be made by the courts. While accepting that the terms "reasonable expectation of privacy", "highly offensive to an objective reasonable person" and "legitimate public concern", to take three terms used in the majority decision in the *Hosking* case, are subject to debate and clarification, it is considered that it is more appropriate for a court to define and apply those terms in appropriate cases rather than to attempt to define them by statute. A court can balance the factors of the case and the importance of upholding the right of freedom of expression.

Finally in this section, it is noted that while the paper refers to the legal position, the main newspapers are governed by their own code of ethics and are subject to the review of this Council under the Council's Statement of Principles. The privacy principle states:

> Everyone is entitled to privacy of person, space and personal information, and these rights should be respected by publications. Nevertheless, the right of privacy should not interfere with publication of matters of public record, or obvious significant public interest.

In view of the limited use and success of the privacy tort in other parts of the world and no great perceived need for such a tort in this country, it may be appropriate in the case of the media to leave control of privacy issues to self-regulating industry bodies.

Chapter 8 (Surveillance and other Intrusions)

The Council's position is that like use of personal information, any changes to the laws of surveillance should proceed with caution. The media often relies upon information provided by other agencies. The media should be protected if relying upon information provided by another agency unless the news gatherer itself has breached the law in obtaining the information.

Chapter 12 (Media)

Because of the importance of the media in a democratic society, the Council supports the retention of the provision in the Privacy Act which provides that the media in its news gathering activities is not an agency and, therefore, not subject to the principles in the Act. Any transgressions by media personnel are capable of being dealt with by either the newspaper's code of ethics or by complaints to this Council.

The Press Council's responses to the question are attached. We note, however, that the majority of the questions are seeking answers for alleged transgressions that happen only occasionally and for which no new remedies or law changes are necessary because they happen so rarely. Further, the Privacy Act 1993 allows sufficient room for codes of behaviour for specific behaviours. It is far better, the Council believes, to allow the tort or codes to develop so that real needs are met rather than allowing imagined or relatively few transgressions to risk impeding freedom of expression and the public's right to know.

Electoral Finance Reform: Submission to the Ministry of Justice- June 2009

Thank you for the opportunity to make a submission on the Issues Paper on Electoral Finance Reform. We appreciate being able to have input at this stage and look forward to further involvement as the process continues.

For the moment we make the following points:

Freedom of Expression

The Press Council has as one of its principal objects: "To promote freedom of speech and freedom of the press in New Zealand."

The Preamble to the Council's Statement of Principles states:

There is no more important principle than freedom of expression. In a democratically governed society the public has a right to be informed, and much of that information comes from the media. ...Freedom of expression and freedom of the press are inextricably bound. The print media is jealous in guarding freedom of expression not just for publishers' sake but, more importantly, in the public interest.

These freedoms have been laid down in statute in s 14 of the Bill of Rights Act 1990 which states:

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind and in any form.

At no time is this more important than in the period around an election. We are, therefore, particularly pleased to see Freedom of Expression at Principle 2.

The Council does not question the basic intent of the Electoral Finance Reform – to establish fair and balanced provisions for the conduct of Parliamentary elections – as set out in the Principles. We are, however, concerned that in the establishment of new rules for the conduct of elections, the democratic imperative of citizens' rights to freedom of expression should not be compromised and that there should be no abridgement of the free flow of information during the electoral process.

Freedom of the Press

In terms of freedom of the press the Council regards it as imperative that editorial content of newspapers and magazines exempted. Any definition of Election Advertising must not be not be applicable to editorial content.

We would suggest that a similar protocol is used to that currently employed when the Press Council determines jurisdictional issues with the Advertising Standards Complaints Board. We use the "paid space" rule. If copy in a newspaper has been paid for, even if it has been constructed so as to look like editorial content (advertorial), then it is regarded as advertising, and should be marked as such.

In the run-up to elections editors must be free to report, express opinion, encourage debate and advocate without any 'chilling effect' from a poor definition of Election Advertising.

Names and addresses on Advertisements and Billboards

At the Wellington forum the view was expressed that names and addresses of authorising persons should not be published on advertisements and billboards, but instead should be available on application to the Chief Electoral Office. This was on the basis of anecdotal evidence that those whose names and residential addresses appeared on such advertisements had suffered through having their residential address made known in a very obvious way. We note that current law allows business addresses to be used. (4.22 Issues Paper)

The Press Council would strongly oppose any suggestion that those behind advertisements can be anonymous or semi-anonymous in that they can hide behind 'shop-front' business addresses or box numbers. Their names and verifiable addresses should be publicly available, if for no other reason than that their bona fides can be

independently established by any member of the public. They should be accessible without the need to go through an agency for permission or approval to access. This is fundamental to transparency in the electoral process. (Principle 4). In 2005 the addresses on pamphlets were instrumental in uncovering the influence of the Exclusive Brethren.

Whether their addresses should be on all billboards and advertisements is a moot point but their names certainly should be and their addresses also should be available to the public as of right at, for example, the Chief Electoral Office, or electoral offices throughout the country. There should be no impediment to access to this information.

The Press Council would not have considered that the Sale and Supply of Liquor and Liquor Enforcement Bill could have any implications for freedom of speech or freedom of the press. However we become aware of the extent of the definitions of "Liquor Advertisement" and "Liquor Promotion" as set out in the Bill, and these raised areas of concern for us. We therefore lodged the following submission with the select committee in August 2009.

Submission to the Justice and Electoral Committee on the Sale and Supply of Liquor and Liquor Enforcement Bill – August 2009

Thank you for the opportunity to make a late submission on the Sale and Supply of Liquor and Liquor Enforcement Bill.

2. The Press Council's concerns lie with the definitions of Liquor Advertisement and Liquor Promotion as described in the Bill currently before the House.

3. From the Explanatory Note, the Bills Digest and from a reading of Hansard when the Bill was introduced, it is clear that Parliament did not intend that there should be any impingement on the editorial content of newspapers or magazines.

4. The legal advice to the Attorney General on consistency with the New Zealand Bill of Rights Act s14 addressed possible limits to freedom of expression flowing from the Bill and found that there were limits imposed in the case of advertising, but that that these were justified in terms of s5. It would appear that the Crown Counsel did not consider that the Bill would have an impact on editorial content,

since no comment was made on the limitation of freedom of expression in relation to editorial content.

5. However, because of the broad definitions contained in the draft Bill, the Press Council maintains that editorial content could (unintentionally it would appear) fall within the definitions and thus be subject to possible regulation.

6. Thus, a columnist writing about pinot noir production in Central Otago, for example, could be regarded as promoting wine-drinking. A restaurant review suggesting that a particular wine is a good accompaniment to a particular dish could be said to encourage the use of a liquor product.

7. The Council notes that the Loi Evin, which was intended to regulate alcohol advertising in France has now been interpreted by a French court as applying to editorial content and *Le Parisien* newspaper was fined €5,000 for an article entitled 'The triumph of Champagne."

8. The Council would respectfully suggest that the Committee considers revising the current Bill to ensure that this anomaly, which was clearly not intended by the House, is corrected.

9. We draw your attention to two other pieces of legislation where such amendments have been made**,** for precisely the same reason.

10. The report-back version of the Electoral Finance Bill was amended to read

5 Meaning of Election Advertisement

(2) The following are not election advertisements:

(c) Any editorial material, other than advertising material, in a periodical that is written by, or is selected by or with the authority of, the editor solely for the purpose of informing, enlightening or entertaining readers:

(d) …

(da) Any editorial material, other than advertising material, published on a news media website that is written by, or is selected by or with the authority of, the editor or person responsible for the website solely for the purpose of informing, enlightening or entertaining readers

11. The Public Health Bill was amended to read, in the reported back version:

83 What code of practice or guidelines may provide

(3) Except as provided in Subsection(2)(e) and (f) no code of practice or guidelines may contain provisions concerning the content of any matter that is published in any form or broadcast on any medium.

12. We would ask that the Committee ensures that editorial content is exempted from the provisions of this Bill.

13. We would be happy to provide further information on these points if required.