In August 2008, during my first year as the host of Media Watch, we aired a special program about privacy.

The Australian Law Reform Commission had just brought out a weighty report which recommended, among many other things, that the federal parliament should legislate for a statutory right to privacy. People who believed their privacy had been unlawfully breached by a newspaper, magazine, TV program or website should be able to sue the publisher for damages, just as they currently sue if their reputations have been defamed.

That recommendation was strenuously opposed – and still is – by the big newspaper and magazine publishing houses in Australia. It would do little for ordinary folk, they argued, who cannot afford to sue. It would, however, be a potent weapon in the hands of the rich and famous, especially those accused of wrongdoing by the media.

The President of the Law Reform Commission, Professor David Weisbrot, pooh-poohed these concerns. The challenge to privacy, he argued, was posed by gossip writers and websites, tittle-tattle magazines, not serious investigative journalism. And he added (SLIDE 2)

> *I'd be very concerned if anything we recommended halted genuine investigative journalism, of which there's precious little in Australia and there should be a great deal more.*
> *(*Prof David Weisbrot, ALRC, 13 Aug 2008) (SLIDE 3)

I encountered a very different view from the then Managing Editor of the Sydney Morning Herald, Sam North. He offered several examples of serious investigations – for example, the Financial Review's stories about the mysterious shareholders in the Offset Alpine printing press – that could probably have been stopped by the determined use of a tort of privacy.

He added that every other country that has such a law also has a constitutional, or at least a statutory, protection for free speech and a free press, which judges have to balance against the individual's interest in privacy. Australia does not.

How much weight did Australian judges give to freedom of speech, I asked Sam North? He replied: (SLIDE 4)

> *Sam North: Very little... (Judges) have an antipathy towards the media and freedom of expression and freedom of speech doesn't rate very highly.* (SLIDE 5)
>
> I asked him: *So if it was up to individual judges to weigh the right of privacy on the one hand and the right of media to free speech on the other, how do you think you'd go?* (SLIDE 6)
>
> He relied: *I think we would go badly.* (SLIDE 7)

No doubt the lawyers and judges in this distinguished company are shocked that a mere journalist would hold such a dim view of the judiciary. But it's a view that is very widely shared by my peers. In fact, I would go further than Sam North. I think that when judges are required

to weigh almost any interest or right, public or private, against the right of the media to report freely, the media goes badly.

Between the legal and the journalistic views of the world, a great gulf is fixed. And this afternoon I want to look at just a couple of examples in some detail.

In March 2012, Ray Finkelstein QC recommended that the media should be made more accountable, with a far more satisfactory process for dealing with complaints. It should be overseen by a News Media Council whose decisions would be, ultimately, enforceable by the courts.

The Council would be financed by the taxpayer, not by the news media, and would consist of twenty part-time members headed by a full time chair.
(SLIDE 8)
And, wrote Mr Finkelstein (at 11.50), *"the chair should be a retired judge or other eminent lawyer."* (SLIDE 9)

It was taken by most lawyers as the most natural suggestion in the world. And yet the Law Societies and the Bar Councils of Australia would look dimly on the notion that a taxpayer-funded body should be set up to handle complaints against the legal profession, and that it should be chaired by a retired newspaper editor.

Mr Finkelstein's report was met by a predictable chorus of outrage in the media. It's entirely understandable to feel that when it comes to the perils of any kind of accountability, the media doth protest too much. But that should not blind us to the fact that Mr Finkelstein's was a radical

solution – the first time the print media would have been regulated by a statutory authority since the early years of the colony.

A radical solution – but to what, precisely? Why was it needed?

Ray Finkelstein's response to that question is summarised in the penultimate section of his report, which is called *Reform.* He asks the question *Is There A Problem?* and then devotes some fourteen paragraphs to answering it. There's a problem of market failure, he observes, which has led to over-concentration of ownership – though there's not much a News Media Council could do about that. There's the problem of the growing mistrust of the media by the public, which he had charted earlier in the report by looing at opinion polls over some decades. But more directly, he writes (SLIDE 10)

> *the news media can cause wrongful harm to individuals and organisations by unreliable or inaccurate reporting, breach of privacy, and the failure to properly take into account the defenceless in the community.* (Final Report 11.10) (SLIDE 11)

And he gives five – and only five – "striking instances". All are matters with which *Media Watch* has dealt at least once, so I have my own quite well-researched views on them. Let me quote what Mr Finkelstein (2012: 11.11) wrote about each in turn, with my own gloss following: (SLIDE 12)

> • A minister of the Crown has his homosexuality exposed. He is forced to resign.

Mr Finkelstein is talking about David Campbell, then transport minister in the government of New South Wales. Private investigators contracted to Seven News covertly videotaped him coming out of a gay sex club in Sydney. He resigned on the afternoon before Seven News aired its report (20 May 2010). What Mr Finkelstein doesn't mention is that the current regulator, the ACMA, found that Seven News did not breach the provisions of the commercial television code of practice relating to privacy. In my opinion, its grounds for that finding were bizarre. But the fact remains that the charge of breach of privacy, in this case, was dismissed by the statutory regulator. (SLIDE 13)

> • A chief commissioner of police is the victim of false accusations about his job performance fed to the news media by a ministerial adviser. Following publication of the articles, he is forced to resign.

Mr Finkelstein is talking about the so-called Weston affair, in which a serving police officer was seconded to advise the Victorian government's Minister of Police, and used his position to leak stories to the Melbourne media that crucially undermined Chief Commissioner Simon Overland.

Victoria's Office of Police Integrity, which tapped Weston's phone, found that his activities 'almost certainly contributed to the course of events that led to the Chief Commissioner's resignation.' *Media Watch* thought that the media had been, as usual, too reluctant to examine its own part in the affair, which was murky. But we did not conclude definitively that the media had behaved inappropriately.

Whatever the media's role, Mr Finkelstein omitted one crucial fact: virulent though the press campaign against Simon Overland was, and

difficult though his relationship with the Baillieu government had become, his resignation was precipitated by a finding by the Victorian Ombudsman that he had wrongly allowed misleading crime statistics to be released during an election campaign. (SLIDE 14)

> • A woman is wrongly implicated in the deaths of her two young children in a house fire. Her grief over her children's death is compounded by the news media coverage.

Media Watch looked at this case in some detail. The source of the problem, we found, was the Victoria Police's media release, which strongly hinted that the mother was suspected of murdering her children. Their deaths were later found to have been entirely accidental, but the police allowed speculation to run rampant on social media for 36 hours, without intervening or updating its release. With the exception of a single columnist writing in the Herald Sun, the mainstream media was much more responsible in its handling of the story than social media. (SLIDE 15)

- Nude photographs said to be of a female politician contesting a seat in a state election are published with no checking of their veracity. The photographs are fakes.

This is a reference, of course, to the publication in March 2009 (SLIDE 16) in the Sunday Telegraph and other News Ltd Sunday tabloids, of pictures purporting to show a nude 18 year-old Pauline Hanson. *Media Watch* spent a whole program outlining how the fake photographs came to be published, and it was certainly a classic example of lousy journalism, driven by a desire to sell papers. But Mr Finkelstein omits to

say that the following week, (SLIDE 17) the Sunday Telegraph published a prominent and grovelling front page apology - precisely the remedy that his News Media Council might have ordered. It is believed that Ms Hanson also received substantial monetary compensation. (SLIDE 18)

- A teenage girl is victimised because of her having had sexual relations with a well-known sportsman.

I assume this refers to the so-called "St Kilda schoolgirl". If so, it's one way of putting it. Another would be that a teenage girl used social and mainstream media obsessively to advertise her sexual adventures, to publish compromising pictures of St Kilda football players, and later to entrap a famous AFL players' agent (*Media Watch* 2011b). For the most part the mainstream media reported the matter with much more restraint than she used herself on Twitter and Facebook. (SLIDE 19)

So there you go. Five examples of 'wrongful harm' to individuals cited by Mr Finkelstein. But in my opinion only two were clear-cut cases of irresponsible and culpable journalism. In one case, the victim was rapidly compensated both with money and in a front-page apology. In the other, the current statutory regulator – for the perpetrator was a television channel, not a newspaper - disagreed with both *Media Watch* and with Ray Finkelstein, and found that Seven News's behaviour was justified.

It's not clear to me that any of those 'striking instances' of harm to individuals or organisations would have been prevented, or that the 'victims' would have been better compensated, by the existence of a News Media Council.

More to the point, if I were still in the chair at Media Watch, and I applied to Mr Finkelstein's summary of these examples the ordinary tests of fairness and accuracy that I applied routinely to newspaper journalism, I'd say they would have failed. In order to justify a regulatory proposal that could well have proved much more draconian than he portrayed it to be. Mr Finkelstein, it seems to me, took a more jaundiced view of the media's intentions, and its performance, in those instances, than the facts warranted.

And in that he is all too typical of most judges, in most courts, in most jurisdictions in this wide brown land.

The legal profession, it seems to me, is professionally inclined to disdain the methods of journalism as lacking in forensic rigour. Often, of course, that disdain is justified, but not always. And the legal profession has a natural tendency to weigh one public interest – the interest of justice – above all others. In the interest of justice, judges will jealously protect an individual's right to a fair trial, or to an unsmirched reputation, or to the recovery of compensation for damages. The public good is served, in legal eyes, by ensuring that these individual rights and interests are served. And when those interests have to be weighed against other public interests – for example, the public's interest in malfeasance being exposed through the processes of investigatory journalism – those other interests get short shrift indeed.

Journalists often prate about 'the right to know' when what they mean is the right to satisfy the public's prurient desire to know. But there are illuminating exceptions: one in particular which, though the case has so

far been heard in the courts of New South Wales, concerns a Victorian newspaper – The Age – and three of its finest investigative journalists, Richard Baker, Nick McKenzie and Philip Dorling.

I want to spend a bit of time on this case because the judge's reasoning seems to me, and I suspect to most journalists, to be almost comically perverse. (SLIDE 20)

Back in February 2010 The Age published a front page story headlined "Fitzgibbon's $150,000 from Chinese developer"

The story alleged that former defence minister Joel Fitzgibbon had received undeclared benefits from Ms Helen Liu, a wealthy and influential Chinese-Australian property developer who had known both Mr Fitzgibbon and his father for decades. She had been cultivating them both, the story alleged, on behalf of the Chinese state, or at least of powerful figures within the Chinese government. (SLIDE 21)

It is hard to imagine a story that is more obviously in the public interest than one which shows that a politician who later rose to become Australia's Defence Minister was under undeclared obligations to a Chinese agent of influence. Provided, of course, that the story is true.

The allegations were based on a parcel of documents provided to the Age's investigative team by three unnamed sources – sources that The Age's investigative team had been in correspondence with for ten months. Three documents that allegedly included Helen Liu's own handwriting were especially damning – and those documents, Ms Liu claims, are forgeries.

She asked the court to apply a rule of civil procedure and to order The Age journalists to identify their sources, so that she could take action against those sources for defamation.

The case was argued out over ten whole days in court, in October 2010 and February 2011. Her Honour Justice Lucy McCallum then took a year to mull over her judgment, before in February 2012 ordering that the journalists hand over (SLIDE 22)

> *all memoranda, notes, notebooks, audio recordings video recordings, diaries, draft articles, correspondence, records of interview and other documents … which identify any such person or persons by name or further description.*

Pretty comprehensive. (SLIDE 23)

Now I'm conscious that for a non-lawyer to criticise a learned judge's carefully reasoned judgment – one that received high praise from the Chief Justice and was unanimously upheld by the New South Wales Court of Appeal in February this year – reeks of temerity. And no doubt she will feel that I have not done her reasoning justice. But here's how it looks to me.

The Age's counsel contended that the High Court, in finding in the Constitution an implied freedom of speech in political matters, had effectively prevented the application of this procedural rule whenever the matter involved dealt with politics and governance.

That was probably over-reach in anyone's language. Justice McCallum emphatically rejected it: (SLIDE 24)

In my view, the constitutionally prescribed system of government is likely to be adversely affected by the automatic exclusion of all confidential sources of political information, including sources of lies and misinformation, from the operation of the rule.

The problem, of course, is that no one yet knows whether The Age was dealing with sources of truth or sources of lies and misinformation – that is precisely the issue that Helen Liu wants to test in court. (SLIDE 25) But to force journalists to reveal their sources' identity is surely only justified if the judge believes it more likely than not that the sources <u>are</u> dishonest – especially since (and this is a factor that the judge never once refers to) the chance that the journalists will ever surrender their sources' identities is very small: much more likely, the reporters will end up, eventually, in prison for contempt of the court.

But to continue: in addition to the implied constitutional right to freedom of speech in political matters, there is the so-called newspaper rule, which discourages judges from ordering journalists to reveal their sources during preliminary and interlocutory proceedings. Oh well, yes, Her Honour reasons, (SLIDE 26)

The newspaper rule (as it presently applies) will ordinarily protect the source, unless disclosure of his or her identity is necessary in the interests of justice.

Ah! The interests of justice. And in this case discosure IS necessary in the interests of justice, she reasons – and her reasoning presents

investigative journalists with a glorious example of Catch 22. (SLIDE 27)

Normally, after all, someone in Ms Liu's position could sue The Age and its journalists, and they would have to prove, on the balance of probabilities, that the imputations in their article were true. That would mean they would have to satisfy the court that the documents were not forged.

But, precisely because this involved a matter of great public interest and concerned politics and governance, it is probable that The Age could avail itself of the defence of qualified privilege. In that case all it would have to prove is that it was reasonable to publish in the circumstances. Mind you, that is not as easy as it sounds: over the years, in all jurisdictions in Australia, the courts have set the bar for the test of "reasonableness" very high indeed.

Now, the purpose of that defence – which is available in the uniform Defamation Acts and in common law – is precisely to make it possible to publish matters of grave public interest even if you cannot prove them to be true.

So, in this case, how would The Age go with a qualified privilege defence? Justice Lucy McCallum wrote this: (SLIDE 28)

> *In his affidavit, Mr Baker set out in great detail the steps he took in the preparation of the two articles. On the strength of that material…it must be concluded that defences of qualified privilege might well succeed.* (143) (SLIDE 29)

In other words she formed the view that on the face of it the reporters might well be found to have acted reasonably, because they had taken adequate steps to ensure as best they could that the story was accurate and that the documents were genuine.

But that would not prove that they were genuine, argued the judge. In order for that matter to be finally resolved, Ms Liu needed to be able to sue the sources, who would probably not be able to avail themselves of the qualified privilege defence. To do that, she needed to know who they were. Ergo, in the interests of justice, the newspaper rule should be disregarded and the reporters should be forced to identify them.

From a journalist's point of view, this judgment carries a profoundly concerning message. You are pursuing a story of great public interest, which you can only publish if you use material obtained from sources to whom you have promised confidentiality.

But the more the story is in the public interest – especially if it deals with political matters - the more likely it is that you will be able to avail yourself of the qualified privilege defence to a defamation suit; the greater care you take to ensure that your story is fair and accurate, the greater the chance that the court will find you have acted reasonably in publishing it, and the qualified privilege defence will succeed. But the greater the chance that the defence will succeed, the greater the chance that another court will order you to reveal your source so that the person whose wrongdoing you are claiming to have exposed will be able to sue the source instead of you. Therefore, since you cannot ethically reveal your source, the more important your story and the more care you take in

preparing it, the greater the chance you will end up in prison for contempt of court.

Great outcome for the public interest, for freedom of press, and for the governance of the nation.

There were many other disturbing aspects of the judgment, from a journalist's point of view, that I haven't time to go into here. But perhaps most concerning, to me, was the continual emphasis Justice McCallum put on the possibility that The Age's sources were deliberately lying, or that someone unknown to them had forged the documents. I've quoted one example above. Her is another: (SLIDE 30)

> *An absolute and immutable protection of confidentiality wherever demanded by a journalist's source (in cases of political discussion) … would expose politicians and others involved in government and politics to the risk of false and malicious attack from their detractors without recourse or remedy.* (SLIDE 31)

Not once in her lengthy judgment did Justice McCallum dwell on the corollary: that if the sources were honest and the documents genuine, the consequences for the nation's security were potentially immense; and that more generally, by forcing the journalists to reveal their sources, she was establishing a precedent that would be deeply discouraging to anyone who, finding themselves in the possession of true and accurate evidence of malfeasance by a powerful individual, thinks of taking it to a journalist.

Of course sources can abuse the promise of confidentiality. That is a possibility of which every experienced investigative journalist is all too well aware. It is something both they and their editors consider carefully before publishing stories that rely on such sources. And that's why the law insists that to avail themselves of the qualified privilege defence, publishers must prove their actions are reasonable, and why the courts have always set the bar for reasonable behaviour so high. In this instance, a part of the test of reasonableness would surely be to ask what steps The Age took to assure itself that the documents – which would have been put in evidence, even if the sources were not – were genuine.

That reasonableness test is surely an adequate protection against the risk of false and malicious attack. It has certainly always seemed so to journalists, I can assure you. But not, it seems, to judges.

I've spent a lot of time on one case. That's because Justice Lucy McCallum is no maverick: she is considered to be a judge who takes press freedom seriously. Her judgment, as I've said, was upheld by the New South Wales Court of Appeal. (SLIDE 32) Indeed, in dismissing The Age's appeal against it, Chief Justice Tom Bathurst described it as "…a judgment which I might respectfully say is both clear and carefully reasoned" – high praise from that particular source. (SLIDE 33)

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And of course the New South Wales courts are not alone. Victorian judges have become notorious for their willingness to dish out suppression orders at the drop of a hat. We are now witnessing the curious spectacle of the executive branch in Victoria drawing up legislation – the Open Courts Bill - to force the judicial branch to honour

its obligation to ensure that justice is seen to be done. So much for the judiciary being the bastion of the public's liberties.

To sum up: there is a case to be made for stronger regulation of the media – though the present government and its Communications Minister made a pretty poor job of making it. But in my view, it should not be statutory regulation. And for pity's sake, don't make the chairman a judge.