trends + insights

Media law in New Zealand

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chapman tripp

Contents

The media law landscape is evolving rapidly in New Zealand.

We update you on key legal developments in the five years since our last insights publication and scan the horizon for likely future trends.

These include an expectation that:

- the number of defamation claims will remain relatively steady, although primarily driven by social media
- the public interest defence will continue to trouble the courts in jury trials
- the exact bounds of the invasion of privacy test, in particular whether publicity has to be highly offensive, and the legitimate public interest defence will continue to be areas of uncertainty
- interim injunctions and name suppression applications will continue to be used as mechanisms to stall the media's ability to report on allegations, and
- the media should expect an increase in complaints to regulators about reporting.

We hope that Parliament will be persuaded to update the legal framework within which the media must work, including:

- reviewing the Defamation Act 1992 so that it is fit for purpose, recognising the impact of social media and artificial intelligence deepfakes, and
- codifying and reformulating the tort of invasion of privacy.

Given the societal values involved in both a holistic review is necessary, one which should be conducted by the legislature rather than left to the courts.

Defamation

The defamation system in New Zealand is struggling to keep pace with a social media world in which everyone is a publisher. Other jurisdictions, including Australia and the United Kingdom, have updated their law to ensure that it is still fit for purpose. New Zealand should do the same.

The Defamation Act 1992 is 30 years old and is contending with developments that its architects could never have anticipated. Three areas we have identified as in particular need of reform are:

- The focus in the Act on professional media – 'newspapers' and 'broadcasters' – in terms of access to the statutory defence of innocent dissemination. This can leave digital platform operators unfairly exposed. Some protection might be provided through section 24 of the Harmful Digital Communications Act 2015, but this is a far from perfect solution in a defamation context as the host's responsibility is met once the complaint is brought to the author's attention – meaning that, unless the author consents to the offending material being removed, it can stay up.
- Defamation claims are actionable only where the court is satisfied that the content at issue has caused or would likely cause meaningful harm to the plaintiff's reputation. Two thresholds are available in New Zealand – the "more than minor" harm threshold and the more exacting "substantially affects in an adverse manner the attitude of other people towards him or has a tendency so to do" threshold. The first has been settled practice for the last five years but the Court of Appeal is currently considering an application to prefer the "substantial harm" threshold. A rewrite of the law would allow this question to be interrogated.
- The disconnect between the recognition that defamation cases should be dealt with expeditiously because mud sticks and becomes more caked on over time and the reality that defamation proceedings – from the pleadings through to the use of juries – can drag out over many months. In particular, the review should consider whether the right to a jury trial should continue, especially with the public interest defence being reserved for judges and the complications that the current division creates.

We now look at New Zealand's on the ground experience in defamation law over the last five years.

More resort to defamation

The number of defamation claims has been rising but fewer are making it to trial. Other trends are:

- A growing preference for filing in the District Court rather than the High Court. Possible drivers are:
  - the District Court's lower fees and costs (as identified in *Wiremu v Ashby*[1]), and
  - the High Court referring jurisdiction to the District Court.
- More claims between private citizens and fewer against the media, likely reflecting:
  - increased use of social media and defamatory statements being published on those platforms, and
  - the influence of the responsible communication in the public interest defence, established in *Durie v Gardiner*[2], which created a new protection for the media.
- Fewer claims getting through to trial. More cases are being bogged down in interlocutory disputes around pleadings, meanings or evidence (*Talley's v TVNZ*[3]) or are being struck out on limitation grounds (*Alkazaz v Deloitte Ltd*[4]), or the threshold to proceed is not met (*Adamson v Hutt Valley District*[5]).
- More than half the cases that do make trial are not being contested and are proceeding by way of 'formal proof' (meaning that the defendant has either chosen not to defend the claim or has been barred from so doing due to misconduct). In these circumstances, the plaintiff has to prove the defamation without access to any arguable defences.

We expect these trends to continue – especially given the downsizing of the media and the continuing proliferation of social media.

1. *Wiremu v Ashby* [2019] NZHC 1334, Chapman Tripp commentary.
2. *Durie v Gardiner* [2018] 3 NZLR 131 (CA).
3. *Talley's v TVNZ* [2023] NZHC 696.
4. *Alkazaz v Deloitte Ltd* [2023] NZHC 1592.
5. *Adamson v Hutt Valley District* [2022] NZHC 1860.

Interim injunctions against the media

Interim injunctions to prevent publication are difficult to win as the Courts have long recognised that to restrain the media from publishing is to significantly interfere with freedom of expression. The statutory test is accordingly high – publication must "clearly be unlawful" and there must be "no reasonable possibility of a legal defence". However, even if the argument is not ultimately won, the appeal process can be used to play for time. Two recent cases illustrate the point.

Dew v Discovery

Cardinal Dew sought to block Warner Bros Discovery from publishing allegations that he and another priest had abused children in the 1970s. The High Court and the Court of Appeal each held that the media company had arguable defences of truth and responsible public interest communication and refused to grant the interim injunction. The Cardinal then unsuccessfully appealed to the Supreme Court to require more than just a reasonably arguable defence.[6]

As a result of these manoeuvres, the story – which was originally scheduled to be screened in August 2023 – was not able to be broadcast until March 2024.

Chapman Tripp, which represented Warner Bros. Discovery in these proceedings, argued in a commentary on the case that to avoid delays that infringe on the media's rights to publish, the Courts should not automatically grant non-publication orders pending appeals.[7]

Peter T Rex LLC v NZME Publishing

Peter T Rex LLC and Barbara T Rex LLC, owners of two dinosaur skeletons on display in an Auckland museum in 2023, and an associate of both companies were seeking to stop NZME from publishing allegations questioning their role and motives.

They succeeded (briefly) in obtaining a non-publication order from the High Court pending the interim injunction hearing but the order was later rescinded. They appealed that decision to the Court of Appeal which ruled that the associate's name, address and identifying particulars should not be published but allowed for other information to be made public.[8]

They took this to the Supreme Court which denied leave to appeal,[9] meaning that the Court of Appeal's limited non-publication orders would remain in force pending the interim injunction application.

And that is where things stand at the time of writing. It took from March 2023 to February 2024 for NZME to win the right to publish some of the facts in its possession, but other important details are still off limits.

6. *Dew v Discovery NZ Ltd* [2024] NZSC 21 at [8].
7. There is no automatic right to appeal an interlocutory decision (s 56(3) of the Senior Courts Act 2016) so there should not be an automatic non-publication order pending an appeal.
8. *Peter T Rex LLC v NZME Publishing Ltd* [2023] NZCA 469.
9. *Peter T Rex LLC v NZME Publishing Ltd* [2024] NZSC 10.

Injunctions beyond defamation

Because the defamation hurdle is a high one, other avenues are often pursued to the same end – privacy, confidentiality, statutory prohibitions and contempt of court.

Privacy

Few injunction applications based on breaches or invasions of privacy have succeeded as the courts have applied the same high threshold for prior restraint as applies to defamation claims. But this does not mean that future privacy claims will not succeed.

The Court of Appeal in *Dew vs Discovery* noted that Police in the UK had adopted a formal policy not to release the names of suspects prior to charge and said, were a similar approach to be taken by New Zealand Police, it expected the courts:

> " would wish to consider whether the tort of invasion of privacy can or should be developed to embrace publicity about persons suspected of but not charged with criminal offending, unless some proper justification could be relied on."[10]

Confidentiality

These injunctions are commonly used to restrain the use of hacked or illegally obtained information where the interests protected are privacy and data security. Notable cases include *Waikato District Health Board v Radio New Zealand*[11] and *Te Whatu Ora Health New Zealand v Unknown Defendants*.[12]

But they have also been used successfully in cases where the real harm is reputational. In *America's Cup Event v NZME*, for example, the High Court granted an interim injunction to stop the New Zealand Herald from reporting criticisms in an interim report on the financial management of the event. The Court did this even though it acknowledged that the primary motivation was not to maintain confidentiality but to protect reputations, which the Court considered defamation damages would fail to address.[13]

Statutory prohibitions and contempt of court

The Criminal Procedure Act 2011 contains a number of prohibitions relating to the media in regard to name suppression. We address these separately below, including the Court's inherent jurisdiction and how that has been exercised.

Threshold for bringing defamation claims is easily met

Just because a person has been defamed doesn't mean that person can sue for defamation. New Zealand Courts have ruled that defamation claims are only actionable if the defamation has caused or would likely cause some level of harm to the plaintiff's reputation.

In our 2019 publication, we noted that the New Zealand Courts had favoured the "more than minor" threshold" and that this "would provide little obstacle for most defamation claims, particularly where there was some degree of publicity".[14]

Our prediction has been largely borne out. Most cases where a claim failed to meet the "more than minor" threshold have involved a defamation made to a small group, such as family members,[15] or on a database that few had access to.[16]

The one exception involving the media concerned allegedly defamatory news articles that had been online for a long time. The Court decided to strike out the claims on the basis that few people would click on those stories.[17]

While this threshold has been settled for the last five years, the Court of Appeal has recently heard an appeal inviting it to increase the threshold to the "substantial harm" threshold.

10. *Dew v Discovery NZ Ltd* [2023] NZCA 589 at [142], [146].
11. *Waikato District Health Board v Radio New Zealand Ltd* [2021] NZHC 2002.
12. *Te Whatu Ora Health New Zealand v Unknown Defendants* [2023] NZHC 71.
13. *America's Cup Event Ltd v NZME Publishing Ltd* [2020] NZHC 1756 at [82].
14. In *Craig v Slater* [2020] NZCA 305 the Court of Appeal endorsed the "more than minor" harm threshold and rejected the "substantially affects in an adverse manner the attitude of other people towards him, or has a tendency so to do" threshold. Chapman Tripp acted for the appellant in that case, with Julian Miles KC as senior counsel.
15. *Prasad v Raj* [2022] NZHC 2960; *Adamson v Hutt Valley District Health Board* [2022] NZHC 1403.
16. *Rafiq v New Zealand Customs Service* [2022] NZHC 1756.
17. *Driver v Radio New Zealand Ltd* [2019] NZHC 3275. Chapman Tripp acted for MediaWorks, one of the media companies, involved in the action.

Public interest defence beds in, but confusion remains

A new public interest defence was introduced by the Court of Appeal in *Durie v Gardiner*, 2018. It has two elements:[18]

- the subject matter of the publication must be of public interest, and
- the communication must be responsible.

Although the defence has been in play for more than five years, there are still some practical issues that need to be ironed out.

Public interest limb easily met

The "public interest" test was meant to act as a threshold, but decisions since *Durie* show that the Courts are generous in applying it. So far, only one application has been rejected – comments posted by a former client on his website about lawyers with whom he was in dispute.[19]

Meantime the Courts have accepted that allegations surrounding international equestrians and their governing body or the organisation of a cherry blossom festival in Hamilton[21] can be matters of public interest.

Responsible communication

This test is being applied with much more vigour. In most cases where the defence has been pleaded, the Courts have found that the required degree of responsibility was not made out.

Generally, that finding rests on a failure by the publisher to put the allegations to the plaintiff for comment before publishing. This has been elevated into an almost essential requirement, reflecting the Courts' view that it is generally unfair not to seek comment and that failing to do so increases the risk of inaccuracy.[22] However, while seeking comment might be good journalistic practice, it also increases the risk of being landed with an interim injunction.

The defence is not restricted to the media

The defence is available to anyone who publishes material of public interest in any medium – although private citizens, or even 'citizen journalists' working outside the disciplines of professional journalism, will find it more difficult to establish eligibility, as the numerous cases involving Cameron Slater of Whale Oil illustrate.

An exception is *Christian v Bain*, where both the source and the publisher could demonstrate that they had actively sought to verify the allegations pre-publication, including putting them to the plaintiff. The Supreme Court recently refused leave to appeal the decision, endorsing the finding that the degree of responsibility had been met.[23]

Application of the defence in a jury trial

How the defence should be decided in a jury trial is something of a grey area. In *Durie v Gardiner* the Court decided that the judge alone would determine whether the defence was established but that the decision must be based on the "primary facts" as found by the jury. But exactly how that happens is not clear.

Two cases illustrating different procedural approaches are:

- *Cato v Manaia Media*[24] where the Judge determined the defences, including some matters of fact, after the jury had issued its verdict on liability and damages, and
- *Cao v Stuff Ltd*[25] where a two-part procedure was run with the jury issuing its verdict on the defamation claim and damages followed by a "supplementary" trial in which the Judge considered further evidence to determine whether the public interest defence was made out.

It is also worth noting is that, while judges will generally accept expert evidence from senior journalists on editorial practices and decisions, the Judge in *Cao vs Stuff* ruled it out as "not being likely to offer me substantial help as fact-finder". This is perhaps unfortunate and seems contrary to the clear direction in *Durie v Gardiner* that:

> " the factors must be applied in a practical and flexible manner with regard to the practical realities and with some deference to the editorial judgment of the publisher, particularly in cases involving professional editors and journalists".[26]

18. *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [58].
19. *Hunter v Ross* [2019] NZHC 2489 at [52].
20. *Cato v Manaia Media Ltd* [2023] NZHC 385, although this aspect is under appeal.
21. *Cao v Stuff Ltd* [2024] NZHC 44.
22. *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [67(e)].
23. *Christian v Bain* [2024] NZSC 35.
24. *Cato v Manaia Media Ltd* [2023] NZHC 385.
25. *Cao v Stuff Ltd* [2024] NZHC 44 at [46].
26. *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [68]. See also [47].

When qualified privilege can be lost

The protection provided by the defence of qualified privilege can be lost if the defendant was "predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication".[27]

In *Craig v Williams*, the Supreme Court ruled that to establish whether improper advantage had been taken required first identifying the purpose of the privilege and then determining whether the predominant purpose of the publication was outside that proper purpose.[28] In this case, the question was whether Craig's reply contained content that went beyond what was necessary and/or was made to a wider audience and/or Craig knew that the substance of the attack was true.[29]

Because the Court considered that the jury had been misdirected on these points, it granted the appeal and quashed the $1.27m damages award. The matter was ultimately settled out of court with Williams giving Craig compensation and an apology.[30]

Parliamentary privilege

Parliamentary privilege was last tested in court in *Staples v Freeman*[31] – a claim taken by Bryan Staples, an advocate for victims of the Christchurch earthquake against debt collector Richard Freeman for disseminating defamatory material against him and his company that Winston Peters repeated in Parliament in a speech that was widely reported by the news media.

The case was not defended in the High Court which accepted Staples' argument and awarded $350,000 in damages against Freeman. Peters and the Attorney-General intervened at this point, arguing that Parliamentary privilege should have been applied as it protected both Peters' comments and the fair and accurate reporting of those comments.[32]

The Judge recalled the judgment and a further hearing was held after which Staples was awarded a much smaller $120,000 in damages.

Preliminary hearing on meanings

A plaintiff-friendly aspect of New Zealand defamation law is that only the plaintiff can plead what the allegedly defamatory statements mean. The effect of this is that defendants have to choose between:

- applying to strike out the pleaded meanings on the basis that they cannot be supported by the statements, recognising that the plaintiff can generally replead lesser meanings if they lose; or
- going to trial to contest the pleaded meanings and run defences to them.

Some courts have recognised this dilemma by setting up a preliminary hearing on the meaning of the statements. But unless the parties agree to a judge-alone trial, such hearings cannot determine the actual meanings.
So, the approach can only deliver a meaningful result if the deadline for electing trial by judge or jury is set early in the proceedings rather than – as is now the rule – close to the close of pleadings date.[34]

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27. Defamation Act 1992, s 19.
28. *Craig v Williams* [2019] NZSC 39, [2019] 1 NZLR 457 at [33]-[34], [127]. Chapman Tripp acted for the appellant with Stephen Mills KC as senior counsel.
29. At [33]-[34], [43], [53], [128].
30. www.stuff.co.nz/national/politics/117890039/colin-craig-receives-apology-compensation-from-jordan-williams.
31. *Staples v Freeman* [2021] NZHC 1308.
32. Parliamentary Privileges Act 2014, s 20.
33. *Clarke v Fourth Estate Holdings* (2012) Ltd [2022] NZHC 649. While that application was pointless, because the preliminary question was transformed into a strike out application, the point remains that the Courts are prepared to order a preliminary determination of meanings in appropriate cases.
34. See High Court Rules, r 7.16.

Remedies: trends in damages and declarations

Damages awards are conservative

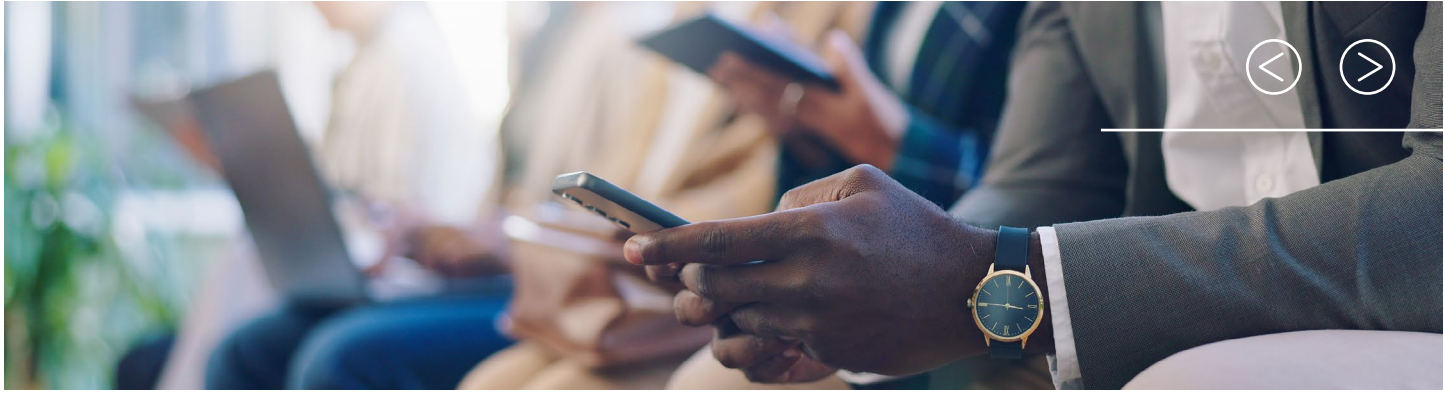
The trend in damages awarded over the last five years has been mostly conservative, with high awards reserved for significant defamatory campaigns or where there has been additional wrongdoing.

- The highest award was the $475,000 Cameron Slater was ordered to pay Matthew Blomfield arising from nine defamatory publications on the Whale Oil blog alleging fraud and other criminal activities.[35]
- The lowest award was $10,000 to a plaintiff accused of cheating on a Facebook motocross group. [36]

Other trends include:

- Where the defamation has been widely published, either through the media, magazines or popular websites, the Courts are prepared to award between $200,000 and $475,000.[37]
- Where publication is limited to a community, depending on the seriousness of the allegations, defamation awards tend to be in the $100,000 range.[38]
- Defamation on social media platforms where the allegations are of dishonesty or cheating but do not amount to criminality tends to attract low-level damages of between $5,000 and $10,000.[39] This can rise to $75,000 where multiple statements alleging breaches of professional obligations and laws are made,[40] and to $170,000 if serious criminality is alleged. [41]

Our view is that the courts are adopting an appropriately conservative approach in relation to mass media defamation but that they may be underplaying the damage caused by defamations on social media.



Declarations increasing in popularity

A declaration is a lower risk, lower reward alternative to seeking damages and is becoming increasingly attractive. Indeed, almost half of the defamation cases that went to trial in the last five years were seeking declarations only.

This may be a response to the current trend toward relatively modest damages awards.

In damages claims, plaintiffs typically recover only around a third of their legal costs and have to rely on the damages award to make up the difference. In a declaration case, the presumption in the Act is that the plaintiff will be awarded solicitor and client costs "unless the court orders otherwise".

However, the record shows that the courts are electing to use this discretion more often than not. In only two of the seven judgments where declarations were granted were costs also granted – and one of those was overturned on appeal.[42]

Tikanga and defamation law

The interplay of tikanga Māori and the common law has come into focus following *Ellis v R* where the Supreme Court relied on tikanga to decide that, notwithstanding Mr Ellis had died, the Court should still determine the appeal because mana is not extinguished at death.[43]

This ruling does not permit defamation actions to continue after the plaintiff's death, given section 3(1) of the Law Reform Act 1963 which was applied in *Hagaman v Little* to end Mr Hagaman's claims.[44]

We consider, however, that tikanga may be brought to bear in some qualified privilege defences, particularly in relation to corresponding duties and interests and in the remedies the courts may apply to restore a person's reputation. Reform is arguably also needed, in line with *Ellis v R*, to permit special damages claims for losses suffered by deceased estates as a result of defamatory publications.

35. *Blomfield v Slater* [2024] NZHC 228.
36. *Wiremu v Ashby* [2019] NZHC 558.
37. *Cato v Manaia Media Ltd* where $225,000 was award in general damages and $15,000 in punitive damages; *Blomfield v Slater* [2024] NZHC 228 where $475,000 was awarded in general and aggravated damages. See also *Craig v Slater* where $325,000 was awarded against Mr Slater; *Craig v MacGregor* [2021] NZHC 3082 where $400,000 was awarded, and *Staples v Freeman* where $350,000 was originally awarded (although reduced due to Parliamentary Privilege issues).
38. *Solomon v Prater* [2020] NZHC 481. But see also Lee v Lee where $150,000 was awarded, and Newton v Dunn where $100,000 was awarded.
39. *Wiremu v Ashby* [2019] NZHC 558. In *Hyndman v Mutch* [2021] NZHC 1153 the Court did not award damages but said if they were to those would have been at most $5,000.
40. *Haden v Holm* [2024] NZHC 1556.
41. *Spring v Williams* [2022] NZHC 2165.
42. *Fourth Estate Holdings (2012) Ltd v Scott* [2020] NZCA 479.
43. At [132].
44. *Hagaman v Little* [2017] NZCA 447; *Hagaman v Little* [2018] NZSC 13.

Invasion of Privacy

Although the tort of invasion of privacy is nearly 20 years old, significant uncertainty remains around its scope as the courts continue to grapple with:

- whether giving publicity to the private facts must be "highly offensive"
- what the scope of the legitimate interest defence is and should be, and
- how the tort might respond to new advances in technologies, such as deepfakes.

There is, therefore, a developing view among New Zealand courts (so far not acted upon) that our legal framework may not be supportive enough in an environment in which privacy is under increased threat. These pressures are being felt with equal or greater force in like jurisdictions, including the United Kingdom and the USA.

Given the societal interests in play and the fact that the courts are not prepared to advance the tort, we consider that legislative review and reform is necessary.

Increased claims

The number of cases relying on the tort have increased in recent years in New Zealand, possibly due in part to developments in England and to a greater focus on privacy issues.

However, unless the Courts reformulate the test to lower or remove the highly offensive requirement, we expect:

- claims against individuals or companies to level off over the next five years,
- claims and class actions for data breaches or leaks to become a feature of the legal landscape, and
- privacy principles to be increasingly wielded against the media in conjunction with defamation claims.

Reformulating the tort

In *Hosking v Runting*,[45] where broadcaster Mike Hosking sought to protect the identities of his young children, the majority of the Court of Appeal ruled that the tort for invasion of privacy had two limbs. It must engage facts:[46]

- in which there is a reasonable expectation of privacy, and
- where publicity would be considered highly offensive.

However Tipping J considered that a "substantial level of offence" would be a more appropriate threshold and the House of Lords took a similar view in *Naomi Campbell v Mirror Group Newspapers Ltd*, where it considered *Hosking* and rejected the "highly offensive" requirement.[47]

This ambivalence around the level of offensiveness has persisted over the last five years.

- In *Hyndman v Walker*[48] the Court of Appeal accepted that comments by Mr Walker as liquidator had breached Mr Hyndman's reasonable expectation of privacy but held that the disclosure did not have the requisite standard of offensiveness. The Court did say, however, that the tort "may well benefit from re-examination".[49]
- In *Peters v Attorney-General* (the appeal from *Peters v Bennett*, where Winston Peters sued two Cabinet Ministers, the Chief Executives of two Ministries and the Ministry of Social Development concerning leaks of superannuation overpayments), the Court of Appeal observed that the "highly offensive" test had been questioned by the Courts and "trenchantly criticised by academic commentators"[50] but decided that this was not the right case to revisit it.
- In *Dew v Discovery NZ*, the Court of Appeal yet again noted the doubts around whether there should be a separate inquiry into whether the publicity was highly offensive,[51] but considered that it was not required to decide the point.

Until the appellate courts make a change, the District Court and High Court will continue to apply the highly offensive test and the tort of invasion of privacy will remain rather limited in its scope.

45. *Hosking v Runting* [2005] 1 NZLR 1 (CA).
46. *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [117] per Gault and Blanchard JJ.
47. *Campbell v MGN Ltd* [2004] 2 AC 457 at [96].
48. *Hyndman v Walker* [2021] NZCA 25.
49. At [3], [69]–[75].
50. *Peters v Attorney-General* [2021] NZCA 355 at [113].
51. *Dew v Discovery* [2023] NZCA 589 at [129].

Level of publicity

In *Hyndman v Walker* the Court of Appeal found that the disclosure did not need to be made publicly or by the media to come within the invasion of privacy tort. It could be to a single person.[52] In doing so, the Court reformulated "publicity" to mean simply disclosure.

Legitimate interest defence

The courts have also signalled a renewed willingness to look at the legitimate public interest defence.

In *Peters*, the Court signalled that, in line with the development in *Hyndman v Walker*, the defence might need to be broadened to:

- encompass legitimate private interests where the disclosure was to an individual or the publicity was limited in scope,[53] and
- protect good faith communications where there was some recognised interest in disclosing the information.[54]

These statements indicate that, if the highly offensive requirement is removed, the courts will expand the protections available to defendants. We consider that this would be an appropriate response given that, unless the scope of the defence is clearly established, any expansion of the tort will likely lead to increased claims, particularly against the media.

Privacy during a police investigation

The High Court in 2019 (*Driver v Radio New Zealand Ltd)* reversed what had been established practice by finding that media reporting in New Zealand of a New Zealander's arrest by Indian Police in connection with an alleged Ponzi scheme could amount to an invasion of her privacy.

This decision was relied on by Cardinal Dew in *Dew v Discovery NZ* to try to stop Warner Bros Discovery from broadcasting allegations about Cardinal Dew while he was being investigated by Police. It failed in this instance in both the High Court and the Court of Appeal.

The distinguishing feature, as the Court of Appeal saw it, was that in *Driver* the media was reporting the details of the police investigation, whereas in *Dew* it was reporting allegations that it had accessed and investigated independently, and it had referred to the police inquiry within this wider context.

Were this not the case, the tort of invasion of privacy could still have a place.[55]

52. *Hyndman v Walker* [2021] NZCA 25 at [50].
53. *Peters v Attorney-General* [2021] NZCA 355 at [119]. Presently, the Courts are holding that such limited communications made under a moral or legal duty does not breach the tort because there is no reasonable expectation of privacy in relation to this limited disclosure: at [171], [177]. See also *Buxton v Xero Ltd* [2020] NZCA 100 at [71].
54. At [120].
55. *Dew v Discovery NZ Ltd* [2023] NZCA 589 at [145]-[146].

International developments

The New Zealand courts are developing the tort of invasion of privacy in light of international developments, particularly those in the United Kingdom, even though the New Zealand tort has a different taxonomy. Based on recent international developments, we consider that the following developments might also be brought to bear in New Zealand.

Invasion of privacy and data breaches

The tort of invasion of privacy is often deployed in the USA in relation to illegal use of information and data breaches. Google entered into a multibillion dollar settlement this year of a class action for secretly tracking users of Chrome in Incognito mode and agreed to destroy billions of data records.

But the UK courts, which tend to be more influential in New Zealand, have been less accommodating.

- In *Lloyd v Google*, the UK Supreme Court rejected a data protection class action on the basis that it was impossible to apply a "same interest" test across all claimants and damages could not be applied across the class.[56]
- In *Prismall v Google*, the English High Court struck out a data privacy class action on the basis that the Court was not convinced the claim passed a minimum severity threshold, even though the disclosed data included medical data.[57] It also rejected that there was an irreducible minimum harm suffered by every member of the class whose data had been transferred, given the need to consider each person individually.

In New Zealand an alternative route is available through the Privacy Act 2020 which provides a right to bring "representative" actions in the Human Rights Review Tribunal. That right depends on the Director of Human Rights Proceedings or a representative of a class commencing proceedings within six months of the claim being rejected by the Privacy Commissioner or Director.[58]

Phone hacking litigation

A number of high-profile cases for invasion of privacy have been pursued in the United Kingdom, demonstrating that the tort can have a significant scope.

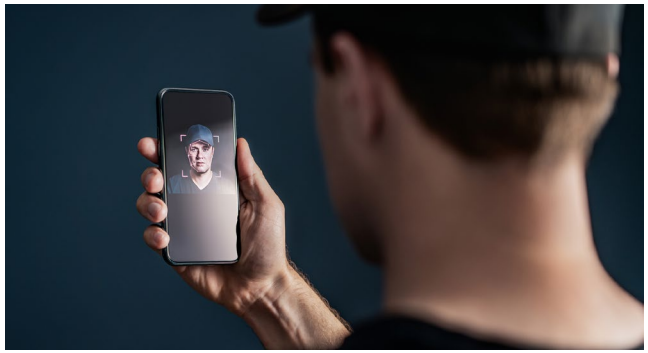
- In 2024, Hugh Grant, Prince Harry and others settled phone hacking cases against various media for reportedly substantial payments. Hugh Grant described the payout, which was made on a Calderbank basis, as having the stench of "hush money" as he would have been exposed to significant costs had he pursued the dispute – even if he won. (Sienna Miller reached a similar (large) settlement in 2021 despite having wanted "to expose the criminality that runs through the heart of this corporation [the Sun]" because she could not afford "the countless millions of pounds to spend on the pursuit of justice").
- In 2023, the English High Court rejected Associated Newspapers Limited's attempt to dismiss claims for invasion of privacy brought by Prince Harry, Elton John, Liz Hurley and others.
- In 2023, Prince Harry won part of his case (brought by him and several other celebrities) against Mirror Group Newspapers, publisher of the *Daily Mirror*, in the phone-hacking proceedings.[60] The High Court ruled that phone-hacking was "widespread and habitual" at tabloids owned by the Mirror Group and that Prince Harry's phone was targeted "to a modest extent" between 2003 and 2009. He received an award of £140,600 in damages.
- In 2021, Megan Markle, the Duchess of Sussex, succeeded in her privacy claim against the Mail on Sunday for publishing a private letter she sent her father.[61] The Duchess ultimately settled for a payment of £1.

While New Zealand media do not operate in the same manner, these cases show that claims for invasion of privacy can be wielded where individuals consider the media to have overstepped.

Deepfakes and AI

Although deepfakes can be deeply damaging and upsetting and are becoming more common and more expert, they have not been seen as coming within the invasion of privacy test because they disclose fictions not facts.[62]

Chapman Tripp has advocated for a statutory response.[63] But if Parliament continues to drag its heels, the courts may have to introduce the "false light" privacy tort from the United States.



56. *Lloyd v Google LLC* [2021] UKSC 50.
57. *Prismall v Google UK Ltd* [2023] EWHC 1169 (KB).
58. Privacy Act 2020, ss 97(6), 98
59. *Lawrence v Associated Newspapers Ltd* [2023] EWHC 2789 (KB).
60. *The Duke of Sussex v MGN Ltd* [2023] EWHC 3217 (Ch).
61. *The Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 273 (Ch).
62. In *ZXC v Bloomberg LP* [2022] UKSC 5 at [111] the UK Supreme Court considered that the privacy tort applied "whether the information is true or false" but that is in the context of the European Convention of Human Rights.
63. Chapman Tripp provided commentary on deepfakes here: https://chapmantripp.com/trends-insights/swift-action-needed-on-ai-and-deepfakes/.

Name suppression & contempt of court

Statutory name suppression

The threshold for persons accused, found guilty or even acquitted of a crime to have their name suppressed is very high. Section 200 of the Criminal Procedure Act 2011 imposes an "extreme hardship" test (although it does make separate provision where there is a real risk of prejudice to a fair trial).

The Supreme Court recently upheld a decision to refuse name suppression to an offender who had sexually violated six victims when he was between 14 and 17 years old.[64] While it accepted that publication would cause the offender's mental health to deteriorate and that he had already been the subject of social media bullying and vigilantism, the Court found that these harms fell short of "extreme hardship".[65]

Persons connected with the proceedings or the accused can also seek to have their identities protected under section 202. This imposes an "undue hardship" test which – until recently – was sometimes interpreted generously by the Courts, but no longer. Starting with *Parker v R* in 2019, a consistently hardline approach has been applied.

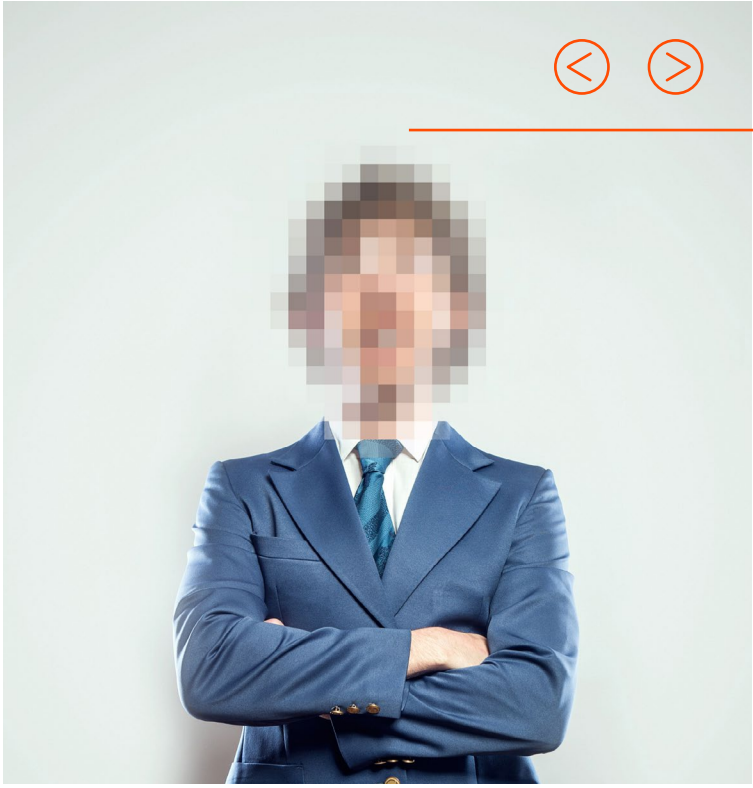
Professional boxer Joseph Parker sought to have his connection with methamphetamine dealers (including, allegedly, transporting currency for them) concealed because identification could damage his career.[66] The Courts accepted that disclosure would cause Parker undue hardship but decided that open justice would not be served by granting name suppression.

Since then, a number of high-profile applications have been turned down, including:

- PR and National Party luminary Michelle Boag in relation to the James Wallace trial,[67]
- the Pathway Trust, seeking to hide its role in housing Joseph Brider, who subsequently broke into the flat next door and murdered his neighbour,[68] and
- Judge Jane Farish, seeking to suppress her relationship with surgeon Ian Dallison who attempted to murder his former business landlord.[69]

But, as with defamation cases, the appeals process can be used to delay publication for months, if not years:

- Joseph Parker's name was suppressed from May 2019 through to March 2021,
- Michelle Boag's name was suppressed from March 2019 until October 2022,
- Pathway Trust's name was suppressed from March 2022 through to May 2024, despite the offender having pleaded guilty in 2022 to the murder, and
- Judge Farish's name was suppressed from August 2022 until June 2024.[70]



There are, however, instances when the Courts have moved quickly to defeat this tactic. For example, when Jesse Kempson, who murdered Grace Millane, applied to the Supreme Court to overturn a decision by the Court of Appeal that his name suppression would lapse the next day, the Supreme Court determined the application within three working days, denying leave on 22 December 2020.

64. *M v R* [2024] NZSC 29 at [69]–[70]. Chapman Tripp and Anna Adams acted for the survivors.
65. At [89].
66. *Parker v R* [2019] NZCA 350, with leave to appeal refused in Parker v R [2021] NZSC 20.
67. *Boag v R* [2022] NZCA 277; Boag v R [2022] NZSC 125.
68. *Pathway Trust v NZME Publishing Ltd* [2024] NZSC 60.
69. *Farish v R* [2024] NZSC 65.
70. Noting that originally it was Mr Dallison who sought name suppression of Judge Farish and she did not seek suppression on her own account. Judge Farish only sought to intervene in the Court of Appeal in respect of suppressing certain information about her private life that was included in her formal witness statement, and the Supreme Court ruled that material should remain suppressed.

Social media and name suppression

Name suppression has been significantly affected by the rise of social media in two ways: it is much harder to keep identities secret, and public shaming and vilification on social media platforms can contribute to findings of extreme or undue hardship.

Identity protection harder

An accused person's name often drifts into the public arena through social media and the internet, even if suppression orders are in place.

Art patron and sex offender James Wallace's identity was widely known, and Jesse Kempson had his name reported in overseas media. Despite multiple breaches by many people, the only person charged with breaching name suppression in relation to Kempson was restaurateur Leo Molloy, who was fined $15,000 and ordered to do 350 hours of community service.

Vilification and public shaming

The Court of Appeal has commented on the destabilising influence of social media in two recent cases.

- In *X v R*, concerning the alleged assailant at the Labour Party youth camp, the Court pointed out that social media occupied a different world to mainstream media,[71] often overlooking or ignoring the facts and being more interested in public shaming than justice or truth.[72]
- And in *DV v R*, the Court took the view that naming the appellants would likely lead to more social media posts, which would be "unbalanced and reasonably extensive, resulting in direct abuse and [the appellants'] continued isolation", increasing the risk to their mental health.[73]

The upshot is that the mainstream media is penalised for social media's vices. We note, however, that while confirming that this reasoning is valid, the Supreme Court recently determined that some level of social media pile-on was not enough to create extreme hardship.[74]

Media takedown orders

The courts have the ability under section 199B of the Criminal Procedure Act 2011 and s 16 of the Contempt of Court Act 2019 to order online platforms or the media to take down information detailing previous convictions in circumstances where the Court considers:

- The materials are likely to create a real risk of prejudice to a fair trial, and
- Ordering their removal is a reasonable limitation on freedom of expression.

Recent decisions indicate that the courts will act only where the need to do so is clear-cut.[75] For example, in *R v Benbow*, the defence (supported by the Crown) sought orders to take down and block Stuff from publishing a podcast on the evidence from the first trial pending the retrial.[76] The Court refused, reasoning that the podcasts kept to the evidence that was led and any fair trial issues could be remedied by clear jury directions.

However, the Supreme Court has decided to hear appeals from three decisions involving takedown orders in a single hearing on 6-7 August 2024, saying they raise points of public importance. The fact that two of the cases have already been tried signals that the Court is open to recalibrating how the powers available under s 199B are applied.

Other statutory suppression

While most statutory suppression is governed by the Criminal Procedure Act 2011, there are also other statutory prohibitions.

In *Newsroom v Solicitor-General*, the Solicitor-General relied on a prohibition in the Family Court Act 1980 to obtain an interim injunction stopping Newsroom from publishing a video documentary and online articles about Oranga Tamariki's practice of reverse uplifts on the basis that they contained data that would betray the identity of a vulnerable person.

The Court of Appeal considered no identifying information had been released and overturned the interim injunction in April 2024 – more than three years after it had first been granted.[77]

71. *X v R* [2020] NZCA 387 at [48]-[49].
72. At [53].
73. *DV v R* [2021] NZCA 700 at [57].
74. *M v R* [2024] NZSC 29 at [79]-[84].
75. *NZME Publishing Ltd v Exley* [2023] NZCA 258.
76. *R v Benbow* [2023] NZHC 1521.
77. *Newsroom NZ Ltd v Solicitor-General* [2024] NZCA 101.

Non-statutory suppression

The courts have an inherent jurisdiction to prohibit name publication before charges are laid in some circumstances, as recognised in the 2019 judgment in *Teacher v Stuff*[78]. The order was sought against Stuff by a teacher who had been accused of inappropriate sexual conduct with children. The police were investigating the allegations but had yet to decide whether charges would be laid.

Although several media outlets had been covering the story and the teacher's identity was widely known, no-one had named him – but Stuff reserved the right to do so. Stuff appealed to the High Court to have the order discharged but the appeal was rejected.

So the Court of Appeal's more nuanced decision in *Dew v Discovery NZ* should be of some comfort to the media. The Court ruled:

> " [W]e are not persuaded that the prospective right to apply for name suppression in the event of a prosecution being commenced would be a proper basis on which to restrain broadcast of the programme.
>
> " Nor in the circumstances, including where the most that can be said is that it is possible a trial may occur at some future point in time, are we persuaded it would be appropriate to order prior restraint on the basis the programme would have a real likelihood of prejudicing fair trial rights".[79]

In relation to civil claims, publication can be prohibited only where it would give rise to specific adverse consequences sufficient to justify an exception to the fundamental rule of open justice and where the interests of justice would be best served were the names and information not made public.[80]

Contempt of court

The law around contempt of court was largely, but not entirely, codified in the Contempt of Court Act 2019. Contempt laws can:

- Limit what the media can report once legal proceedings have been initiated, even when there are no suppression orders in place,[81] and
- Require the media to remove website material.

Limits on commentary

A high profile example is from Australia where a criminal trial had to be vacated after a senior journalist, Michelle Wilkinson, commented on it in a Logies acceptance speech.[82] The Court explained that Ms Wilkinson's status would lend credence to her comments and that:

> " somewhere in this debate, the distinction between an untested allegation and the fact of guilt has been lost.... The prejudice of such representations so widely reported so close to the date of empanelment of the jury cannot be overstated. The trial of the allegation against the accused has occurred, not in the constitutionally established forum in which it must, as a matter of law, but in the media.
>
> " The law of contempt, which has as its object the protection of the integrity of the court but which, incidentally, operates to protect freedom of speech and freedom of the press, has proved ineffective in this case. The public at large has been given to believe that guilt is established. The importance of the rule of law has been set at nil".

The judgment in a subsequent defamation action against Wilkinson and Network Ten was even more scathing.[83] The response from the New Zealand courts confronted with a similar set of circumstances would be the same.

Removal of material orders

Three cases illustrate this power to remove or disable material:

- In *Singh v R*, the Court ordered Stuff to take down internet copies of a Taranaki Daily News article pending the trial and to request Pressreader to do the same.[84]
- In *Wright-Meldrum v Google LLC*, the Court directed that access to a video be removed from YouTube and any other Google platform to preserve fair trial rights.[85]
- In *Webster v Brewer*, the High Court was prepared to force the removal of content deemed seriously defamatory by the Federal Court of Australia and imposed a fine of $5,000 for the "blatant disregard" of the Federal Court's judgment.[86]

Contempt also has a bearing on compliance with jury directions. In *Cao v Stuff*, the High Court discharged a juror who had researched Stuff's Code of Ethics in breach of the rule that jurors do not do their own research and fined the person $250.

78. *Teacher v Stuff Ltd* [2019] NZHC 1170.
79. *Dew v Discovery NZ Ltd* [2023] NZCA 589 at [126].
80. *Erceg v Erceg* [2016] NZSC 135 at [13].
81. *Stuff Ltd v AK* [2020] NZHC 3010 at [31]-[32].
82. *R v Lehrmann* (No 3) [2022] ACTSC 145.
83. *Lehrmann v Network Ten Pty Ltd* [2024] FCA 369.
84. *Singh v R* [2021] NZHC 3019.
85. *Wright-Meldrum v Google LLC* [2022] NZHC 1270.
86. *Webster v Brewer* [2020] NZHC 3519 at [30]-[32].

The Regulators

The sector has three primary regulators – the Media Council, the Broadcasting Standards Authority (BSA) and the Advertising Standards Authority (ASA). Although the ASA has a slightly different remit, there are some common themes across the complaint loads of all three agencies.

Chief among these are that:

01 Relatively few complaints are upheld, particularly in the case of the Media Council and the BSA, and

02 There is significant consumer unease at a perceived drift toward more opinionated or advocacy journalism.

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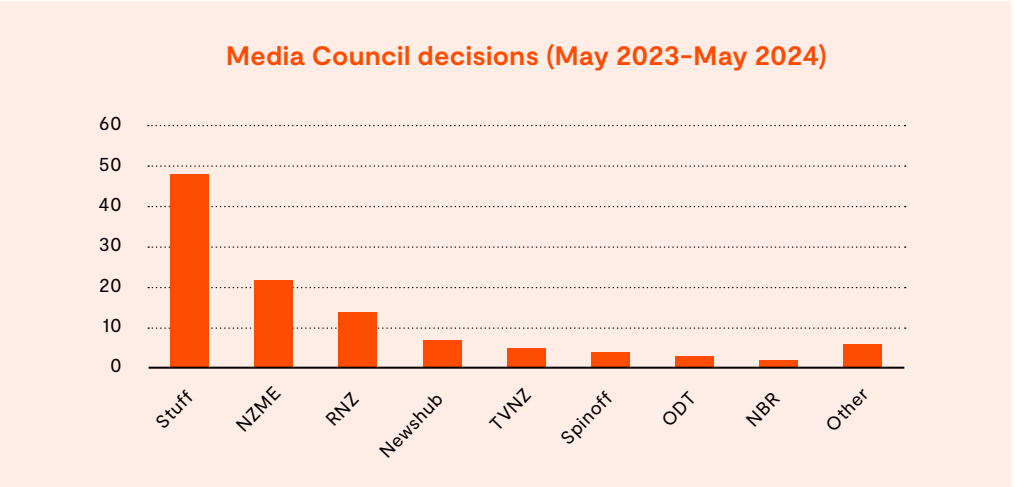
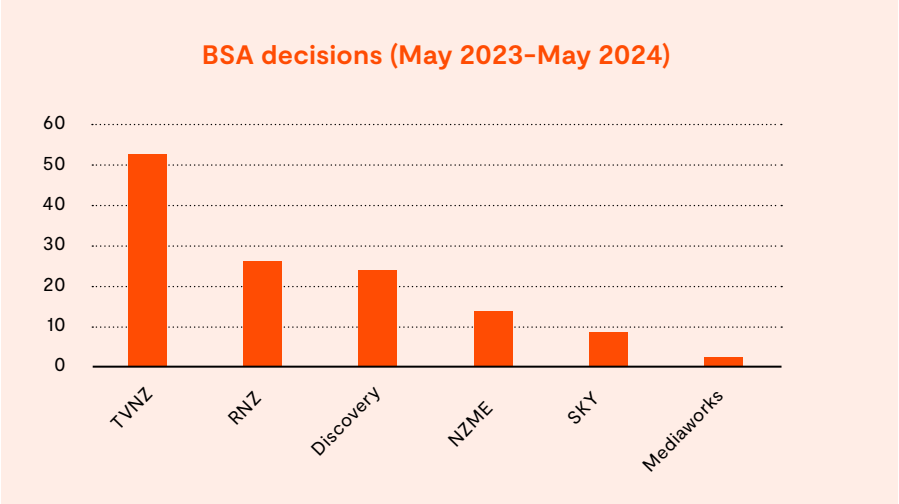
The Zealand Media Council issued 117 decisions in the May 2023 to 2024 year, upholding the complaint in only 18 cases. Of the complaints, most were against Stuff or Stuff-owned papers, with the NZ Herald and NZME-owned entities being the second most complained about entities. Below is a graph illustrating the entities complained against:



The subjects attracting the most controversy and complaints were, in roughly descending order:

- Posie Parker's visit to Australia and New Zealand, and gender issues more generally;
- Media reporting of the Israel/Gaza conflict;
- Climate change coverage - from both sides of the debate;
- Court reporting;
- Te Ao Māori and co-governance; and
- Political reporting and alleged bias or misreporting, including a complaint (not upheld) about John Campbell's opinion piece for TVNZ suggesting the incoming Coalition Government was empty of ideas.

The BSA issued 129 decisions, finding breaches in four cases and partial breaches in another four. Of the complaints, almost half were levelled against TVNZ, with the next two largest sets being against RNZ and then Discovery.



The themes of these complaints were similar to those for the Media Council. However, political bias claims were more common.

A number of claims were received about Jack Tame's interviews on Q+A with Chris Hipkins when he was Prime Minister and with Christopher Luxon when he became Prime Minister. The complainants considered he was too rude and and disrespectful given the nature of the office.

Similarly, a large number of complaints were made to TVNZ and to the BSA following Maiki Sherman's coverage of a 1 News/Verian poll.

The ASA received 1086 complaints against 313 advertisements – of which 130 were accepted for review by the Complaints Board and 108 were subsequently removed or amended.

Television was the most complained about medium until 2021 but has now been surpassed by digital media, primarily social media and social media influencers.

A notable decision, issued late last year, arose from a complaint by Lotto NZ against Jackpot City for advertisements that purported to promote Jackpotcity.net, a free to play, non-monetary site, but also led to Jackpotcity.com – a gambling website. The ASA decided that the campaign was designed to promote the .com site and ruled that it was in breach of the Advertising Standards Code. This decision has significantly expanded the concept of "advertisement," and the media should be aware of this development.

The Media Context

The regulation of the content of media content is fragmented across a range of statutory and industry regulators and bodies.[87] The Department of Internal Affairs embarked in June 2023 on a plan to bring online and traditional media content under a single new independent regulator.

However, following the change of government, the project was discontinued in April 2024 so the regulatory fragmentation will remain.

Fair Pay and the digital giants

Media and Communications Minister Paul Goldsmith announced on 2 July that National would progress the Fair Digital News Bargaining Bill introduced by the Labour Government in August 2023.

The Bill is based on the Australian regime and will require the digital giants – e.g., Meta and Google – to negotiate pay agreements with local news media for using their editorial content.

National had opposed it but came under immediate pressure when in government as the industry went into retrenchment mode in response to acute and continuing financial difficulties.

The ACT Party, which regards the Bill as an unwarranted intrusion into the market, has invoked the "agree to disagree" clause in the Cabinet Manual so the Government will need to rely on the Labour Party to get the legislation over the line.

National has signalled that it will be making some changes to the Bill it inherited from Labour. Included among these are:

- Vesting responsibility for deciding which platforms will be designated under the law with the Minister rather than with the Broadcasting Standards Authority, and
- Not proceeding with Labour's proposal to include AI-generated material.

Even if the Bill does proceed, there is no guarantee that it will be effective. Meta is threatening to stop paying Australian publishers for news items that appear on Facebook, when existing deals expire this year, saying it doesn't rely on news to drive users to its platform.

87. Regulatory responsibility is currently split across a range of organisations including the DIA, the Police, the Classification Office, the Film & Video Labelling Body, the Broadcasting Standards Authority, the New Zealand Media Council, Netsafe and the Advertising Standards Authority.

Key contacts

Justin Graham
Hoa Rangapū (Partner)

T: +64 9 357 8997 M: +64 27 209 0807
E: justin.graham@chapmantripp.com

Tom Cleary
Senior Associate

T: +64 9 357 9889 M: +64 27 722 9430
E: tom.cleary@chapmantripp.com

Liora Bercovitch
Senior Associate

T: +64 9 357 9620 M: +64 27 469 9366
E: liora.bercovitch@chapmantripp.com

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AUCKLAND

Level 34, PwC Tower
15 Customs Street West
PO Box 2206, Auckland 1140
New Zealand

T: +64 9 357 9000

WELLINGTON

Level 6
20 Customhouse Quay
PO Box 993, Wellington 6140
New Zealand

T: +64 4 499 5999

CHRISTCHURCH

Level 5
60 Cashel Street
PO Box 2510, Christchurch 8140
New Zealand

T: +64 3 353 4130

chapmantripp.com