It is only in the past twenty or so years that the societal value of privacy has become of interest and still more recently that there has been a particular focus on the value of privacy for democracies, University of Amsterdam Professor of Ethics Beate Roessler proposed to the 2015 IP and Media Law Conference at the University of Melbourne Law School today (November 24).

"Privacy protection is necessary not only for individual freedom and autonomy but also for the functioning of the democratic society," she said.

Beate Roessler is Professor of Ethics at the University of Amsterdam and chair of the Capacity group of Philosophy and Public Affairs. She also chairs its Department of Philosophy. In her keynote address she explored her work examining the difficulty of keeping up privacy standards on social network sites and the role of anonymity in social/political relations and the consequences of the loss of that anonymity.

Professor Roessler pointed to statements by Edward Snowden in 2013 and 2015 as an interesting focus upon the democratic value of privacy, where he had justified his revelations partly upon the contest between the state's surveillance and the individual citizen's privacy.

She listed three steps in the conceptualisation of privacy – firstly, the classic conception of Warren and Brandeis as the right to be let alone, the fundamental idea being that the right to freedom is protected by, and dependent upon, the right to privacy.

The second step after Warren and Brandeis was the ‘social dimensions of privacy’.

"The social norms which regulate privacy enable us to play different roles," she said. "They enable us to play these different roles and have these different relations.

"Privacy is also a social practice, meaning the norms protect individual privacy and the right is part of the practice.

"Also respect for the privacy of other people is part of the practice. It is part of the deal of the social norms of privacy. The right to privacy and respect is always socially contextualised.

"The idea that we are democratic subjects is also the idea that our privacy is protected."

She explained that the value of privacy has for the most part of the last hundred years been conceived of in purely individual terms: the protection of privacy being important or even constitutive for the protection of individual freedom and autonomy.

The third step after Warren and Brandeis was the significance of privacy for democracy.

"I want to argue that it is precisely this social and democratic value of privacy which is at stake in the digitized society," she proposed.
She said events in Paris this month had not changed her mind about the value of privacy in democracy, but did make the issues more challenging to address publicly.

“Political participation is dependent on the protection of privacy,” she said.

The loss of privacy affects all social and political relations between people, she argued.

Although the right to privacy remains important as an individual right, the Snowden revelations have made clear that violations of privacy have immediate impact on our social lives as well as on liberal democracies.

Privacy is under pressure in the digitized society through state surveillance, consumer surveillance, via the ‘internet of things’, and through social network sites with the voluntary sharing of personal data including the self-tracking devices and the quantification of self movement.

> “New technologies do have an impact on our relationships, for better or for worse.
> “The right idea is to think about what does privacy do in our society, and if that changes how far can we go with that change?”

She used privacy settings as an example of the status of privacy in society: “Standard preferences are public, but privacy is an extra task or an achievement.”

“Our personal data are analysed by companies that are collecting, storing and mining as the default. It is what is happening if we do nothing. “Forgetting, deleting is an extra task, an achievement.”

Anonymity was important to privacy, but as Snowden revealed our anonymity is not protected any longer.

“Lack of anonymity can cause loss of freedom, harmful for the individual and democratic society,” she said.

She pointed to the use of drones as the next “massive threat”.

She said arguments against anonymity such as accountability and public security did not allow for the fact that neither had increased markedly in recent years with large scale surveillance.

> “The threat of a life without the protection of privacy involves the transformation of social and political relations,” she concluded.
> “If we have to assume there is no privacy protection any longer in our social relations it means our social relations tend to get homogenized.
> “How can I understand myself as a democratic subject if I can’t assume any longer that my privacy is not being protected?
> “How do we change and how does society change, when our sense of privacy changes, when we lose the differences in self-presentation, possibilities of political participation, and when we lose the possibilities of control?”

From 2003-2010 Roessler was Socrates-Professor for the Foundations of Humanism at Leiden University. Before, she taught philosophy at the Free University, Berlin, Germany, and at the University of Bremen, Germany. Roessler studied philosophy at Tuebingen, London, Oxford, and Berlin and completed her PhD in 1988 at the Free University Berlin (on theories of meaning in analytic philosophy and hermeneutics). In November and December 2015 she is visiting as a research fellow at University of Melbourne, Melbourne Law School. Her publications include Social Dimensions of Privacy: Interdisciplinary Perspectives (edited with Dorota Mokrosinska, Cambridge: Cambridge University Press 2015) and The Value of Privacy (Polity Press, 2005).

The full conference program is here. Our paper (Pearson, Bennett and Morton) was titled 'Mental health and the media: a case study in open justice' (see earlier blog here) and was presented yesterday (November 23).

Those interested in privacy as a topic might also see my timeline of privacy in Australia here.

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Disclaimer: While I write about media law and ethics, nothing here should be construed as legal advice. I am an academic, not a lawyer. My only advice is that you consult a lawyer before taking any legal risks.

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Filed under Privacy, Uncategorized

Tagged as Australian media, free expression, journalism, law, mark pearson, media, media ethics, media history, media law, political commentary, press freedom, privacy, privacy law, right to privacy, social media law

JULY 30, 2014 · 11:36 AM

New Australian Press Council standards start August 1

Guest report from JASMINE LINCOLN, Griffith University media freedom intern

The Australian Press Council (APC) has released its new Statement of General Principles as part of its Standards Project where it is reviewing its Standards of Practice and creating new ones.

It applies to all print and online news material from August 1, 2014.

Mark Pearson (@Journlaw) recently had the chance to interview Australian Press Council chair Professor Julian Disney on the role and direction of the Council.
In this interview he discussed the recent reforms to the Council, the move to improve its editorial standards, and the future for media 'self-regulation' as broadcast, print, online and social media formats continue to converge.

(12 mins, recorded 17 March 2014). Apologies for some audio sync issues!

The Council states on its site:

The revised Statement of General Principles does not seek to change substantially the general approach which has been taken previously by the Council. The main purposes are to ensure that the Principles accurately reflect that approach, are as clear as possible and are succinct.

Amongst other things, the new Statement of General Principles clarifies

• the principle that reasonable steps must be taken to ensure that factual material is accurate and not misleading applies to material of that kind in all types of article;
• the principle of reasonable fairness and balance applies to presentation of facts (including presentation of other people's opinions) but not to writers' expressions of their own opinion.

The Principles focus on four sets of key values:

• accuracy and clarity;
• fairness and balance;
• privacy and avoidance of harm;
• integrity and transparency.

The first phase of the Council's ongoing changes has involved a review of the General Principles and the development of Specific Standards.

The next phase of the project includes a number of developments, including reviews of Privacy Principles and new Specific Standards on technological media outlets.

Also amongst these developments is a "systemic monitoring of compliance" (Australian Press Council, 2014) regarding the practice of the new standards.

This will directly affect the work of journalists because they will have their articles examined by the APC.

According to Press Council chair Professor Julian Disney, there are two main reasons for this Standards Project: so that the Standards of Practice are clearer and so they appropriately reflect the modern media context.

As a result of this project, the APC hopes that the new standards “will deal more effectively” with numerous complaints that they receive each year.

Sources:


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I recently had the chance to interview Australian Press Council chair Professor Julian Disney on the role and direction of the Council.

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The go-to document for journalists refusing to 'fess up their sources or taking the high ethical ground is the [MEAA Journalists’ Code of Ethics](http://www.meaajournalists.org.au/medialaw/meaa-code-of-ethics) – but the irony is that the journalists’ union uses notoriously ineffective and opaque processes to police this high profile code.
Unlike the Australian Press Council, the ethics panel of the Media, Entertainment and Arts Alliance (MEAA) has actual disciplinary powers at its disposal for use against individual journalists who breach its Code of Ethics – but it has rarely used them. Its powers extend to any journalists who are members of the Alliance. However, these days large numbers of journalists throughout the industry are not members.

In 1999, the alliance updated the code to a twelve-item document, requiring honesty, fairness, independence and respect for the rights of others. The alliance's ethical complaints procedures are outlined in Section 8 of the Rules of the MEAA (2009), summarised on the union’s website. Complaints must be in writing stating the name of the journalist, the unethical act and the points of the Code that have been breached. The judiciary committee (made up of experienced journalists elected every two years by state branch members) then meets to consider the complaint. They can dismiss or uphold the complaint without hearing further evidence, call for further evidence and hold hearings. Hearings involve the committee, the complainant and the journalist and follow the rules of natural justice. Lawyers are excluded. Penalties available to the committee include a censure or rebuke for the journalist, a fine of up to $1000 for each offence, and expulsion from the union. Both parties have 28 days to appeal to an appeals committee of three senior journalists in each state elected every four years and then to a national appeals committee of five journalists.

Because of the secrecy surrounding the cases and their outcomes there are few ethics panel case studies to work with. In 2003 Chris Warren provided me with the judgment of a 2002 case involving a complaint against a Sydney cartoonist who, the complainant alleged, portrayed the then opposition leader Kim Beazley as a person with a ‘physical and intellectual disability’, in breach of clause 2 of the code. The complaint also suggested the depiction was ‘inaccurate, unfair and dishonest’ and denied Mr Beazley a ‘right of reply’, in breach of clause 1. He also complained of a ‘continuing and malicious campaign of denigration of Labor leaders by this cartoonist’. The cartoonist’s defence was that all cartoonists regularly breached the letter of several clauses every time they did their work, but that this was the nature of artistic expression and satire. The complaint of unethical behaviour was dismissed on the basis that there was no ‘malicious bias’ and that any inaccuracy ‘was consistent with the satirical traditions of newspaper cartoons’.

Under Rule 67(h), the decisions and recommendations of the ethics panel shall be published in accordance with any guidelines that may be issued by the National Journalists’ Section Committee. When I interviewed MEAA federal secretary Chris Warren in 2003, he said the issue of publication of adjudications was a difficult one because of potential defamation action by participants. This makes it difficult to get information about MEAA ethics panel cases. Muller (2005: 185) wrote: 'The practical result of this is that no other than the parties, the panel and the MEAA executive ever hear about the complaints that are lodged, or what happens to them. This not only severely circumscribes the effectiveness of the procedure as a mechanism of accountability, but it offends against the principles of free expression, openness and transparency, and leaves the profession open to accusations of hypocrisy.'

While the MEAA’s website outlines the complaints procedures, it does not feature any records of complaints against journalists. Thus, both its journalist members and the general public remain ignorant of the nature and progress of any complaints against its members. In 2003 Chris Warren confirmed that the organisation received very few complaints each year, and that most were referred to the Australian Press Council. The Walkley Magazine in 2006 noted that the committee received only 67 original complaints and held five appeals between 2000 and January 2006, but could not deal with 34 of the complaints because they were to do with journalists who were not MEAA members. This meant only 33 complaints were handled in five years, an average of just over six per year. A separate tally of complaints to the Victorian branch of the MEAA by Muller (2005: 183) found that over the ten years 1993–2002 inclusive, just 23 complaints were received by the ethics panel of the Victorian branch. He provided a summary of each of them (Muller 2005: 187-8).

MEAA National Secretary Chris Warren told the Independent Media Inquiry last year that since the revised code was adopted in 1999 only three members had been censured or rebuked and that no member had been expelled for almost four decades (Finkelstein, 2012, p. 195). The reality is that with membership voluntary, the MEAA needs someone else to discipline its members when they act unethically. Its return to Press Council membership in 2005 opened the way for the MEAA to refer most complaints to that body or to the ACMA rather than having its own ethics panel deal with them at the risk of an embarrassing finding and the potential loss of a member.

There are scores of ethical codes of practice and guidance documents across the various media industry platforms – far too many for a single journalist to reflect upon while encountering a particular ethical dilemma. The irony is that the MEAA ‘Code of Ethics’ is the best known and most highly regarded ethical statement for the profession but there is a remarkably ineffective mechanism for its enforcement.

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Whither media reform under Abbott?

By MARK PEARSON Follow @Journlaw

Where will the new Liberal-National Coalition government led by Prime Minister Tony Abbott head with the reform of media regulation? Communications Minister Malcolm Turnbull and Attorney-General George Brandis were vocal opponents of the former Gillard Government's proposals to merge press self-regulation with broadcast co-regulation into a new framework.

Recent inquiries into media regulation in the UK (Leveson, 2012), Australia (Finkelstein, 2012) and New Zealand (Law Commission, 2013) have recommended major changes to the regulation of media corporations and the ethical practices of journalists. Their motivation for doing so stemmed from public angst – and subsequent political pressure – over a litany of unethical breaches of citizens' privacy over several years culminating in the News of the World scandal in the UK and the subsequent revelations at the Leveson Inquiry (2012) with an undoubted ripple effect in the former colonies.

Many contextual factors have informed the move for reform, including some less serious ethical breaches by the media in both Australia and New Zealand, evidence of mainstream media owners using their powerful interests for political and commercial expediency, and the important public policy challenge facing regulators in an era of multi-platform convergence and citizen-generated content. Minister Turnbull is an expert on the latter element and it is hard to imagine him not proposing some new, perhaps ‘light-touch’, unified regulatory system during this term in office.

By way of background, two major inquiries into the Australian news media in 2011 and 2012 prompted a necessary debate over the extent to which rapidly converging and globalised news businesses and platforms require statutory regulation at a national level. Four regulatory models emerged – a News Media Council backed by recourse to the contempt powers of courts; a super self-regulatory body with legislative incentives to join; a strengthened Australian Press Council policing both print and online media; and a government-appointed ‘Public Interest Media Advocate’.

The $2.7 million Convergence Review, announced in late 2010, was meant to map out the future of media regulation in the digital era (Conroy, 2010). However, revelations of the UK phone hacking scandal and Labor and Green disaffection with Rupert Murdoch's News Limited in Australia, prompted the announcement in September 2011 of a subsidiary inquiry – the $1.2 million Independent Media Inquiry – specifically briefed to deal with the self-regulation of print media ethics. Its architects – former Federal Court judge Ray Finkelstein assisted by University of Canberra journalism professor Matthew Ricketson – argued they could not decouple print news self-regulation from broadcast ‘co-regulation’ in the digital era, so devised a statutory model including both in their report of February 28, 2012, two months prior to the release of the report of its parent Convergence Review (Finkelstein, 2012).

The Independent Media Inquiry (Finkelstein) report was an impressive distillation of legal, philosophical and media scholarship. Among many sensible proposals, it called for simpler codes of practice and more sensitivity to the needs of the vulnerable. But its core recommendation for the ‘enforced self-regulation’ of ethical standards prompted fierce debate. It proposed a News Media Council to take over from the existing self-regulatory Australian Press Council and co-regulatory Australian Communications and Media Authority to set journalistic standards with a streamlined complaints system with teeth (Finkelstein, 2012, pp. 8-9) The body would cover print, online, radio and television standards and complaints. It would have a full-time independent chair (a retired judge or ‘eminent lawyer’) and 20 part-time members evenly representing the media and the general citizenry, appointed by an independent committee (Finkelstein, 2012, pp. 290-291). The government's role would be limited to securing the body's funding and ensuring its decisions were enforced, but “the establishment of a council is not about increasing the power of government or about imposing some form of censorship” (Finkelstein, 2012, p. 9).

The report stressed the model would be ‘enforced self-regulation’ rather than ‘full government regulation’;

…an independent system of regulation that allows the regulated parties to participate in the setting and enforcement of standards (as is presently the case), but with participation being required, rather than voluntary (Finkelstein, 2012, p. 287).

Nevertheless, refusal to obey an order to correct or apologise would see a media outlet referred to a court which could issue an order to comply with further refusal – triggering a contempt charge and fines or jail terms for recalcitrant publishers (Finkelstein, 2012, p. 298). Such a court would be charged with the relatively straightforward task of determining whether the publisher had disobeyed an order of the statutory News Media Council. Only then might publishers get the opportunity for an appeal – again by a judge in court.

The 'Finkelstein inquiry' was only ever meant to be an advisory to its parent Convergence Review, chaired by former IBM Australia managing director Glen Boreham, which released its final report in April, 2012 (Convergence Review, 2012). News media regulation represented a much smaller element of the Convergence Review's overall brief, particularly after this topic had been hived off to the Finkelstein inquiry, so this matter constituted a relatively small part of its report. While the Convergence Review report shared Finkelstein's concerns about shortcomings with existing regulatory systems, it proposed that 'direct statutory mechanisms … be considered only after the industry has been given the full opportunity to develop and enforce an effective, cross-platform self-regulatory scheme'. In other words, it was offering the media industry 'drinks at the last chance
The review's definition of 'content service enterprises' (control over their content, a large number of Australian users, and a high level of revenue drawn from Australia) would catch about 15 media operators in its net. Others might be encouraged to join the body with a threat to remove their current news media exemptions to privacy laws and consumer law 'misleading and deceptive conduct' provisions (Convergence Review, 2012).

Both inquiries acknowledged – and rejected – the notion of a revamped Australian Press Council proposed in various submissions and appearances by its chair, Professor Julian Disney. (The Press Council was established in 1976 as a newspaper industry 'self-regulatory' body – a purely voluntary entity with no powers under law.) Nevertheless, during and after the reports, and with new support from most of its members, the Press Council moved quickly to ramp up its purview and powers to address many of its documented shortcomings such as the refusal of some member newspapers to publish its findings and the threat of withdrawal of funding from others (Simpson, 2012). It locked its members into four year commitments and established an independent panel to advise on its review of its content standards. Those standards are due to be announced soon.

In 2013 the Gillard Labor Government introduced a 'News Media (Self-regulation) Bill' to establish a new role of 'Public Interest Media Advocate' with the power to deregister bodies, like the Australian Press Council, if they failed to police effectively the ethical standards of their newspaper and online members. Ultimately, the proposal might leave media outlets without their current exemptions from compliance with the Privacy Act in their newsgathering operations. The Labor government later withdrew the proposal when it could not garner enough support in the Parliament – in the face of strong opposition from the mainstream media and the Coalition (now government) with Turnbull and Brandis as the lead naysayers.

The big question now centres upon not if, but when, they choose to propose some new regulatory system where serious media ethical breaches across all media platforms are channelled through a single – self-regulatory? – body. And the further – and crucial issue – will be whether they can face up to serious legal and institutional challenges and move their purview to a more effective power base. (Convergence Review, 2012, p. 51). The news standards body 'would administer a self-regulatory media code aimed at promoting standards, adjudicating complaints, and providing timely remedies' (Convergence Review, 2012, p. 153).

Unlike Finkelstein, the Convergence Review decided not to be prescriptive about the constitution or operational requirements for such a body, beyond some broad requirements. The largest news media providers – those it deemed 'content service providers' – would be required by legislation to become members of a standards body. Most funding for the new body should come from industry, while taxpayer funds might be drawn upon to meet shortfalls or special projects (Convergence Review, 2012, p. xiv). It would feature:

- a board of directors, with a majority independent from the members;
- establishment of standards for news and commentary, with specific requirements for fairness and accuracy;
- implementation and maintenance of an ‘efficient and effective’ complaints handling system;
- a range of remedies and sanctions, including the requirement that findings be published on the respective platform. (Convergence Review, 2012, p. 51)

Australia's global free press standing depends upon them devising the magic formula the earlier inquiries failed to concoct.

References


Updated: Privacy in Australia – a timeline from colonial capers to racecourse snooping, possum perving and delving drones

By MARK PEARSON Follow @Journlaw

The interplay between the Australian media and privacy laws has always been a struggle between free expression and the ordinary citizen’s desire for privacy. I have developed this timeline to illustrate that tension.

1827: NSW Chief Justice Francis Forbes rejects Governor Ralph Darling’s proposal for legislation licensing the press, stating: “That the press of this Colony is licentious may be readily admitted; but that does not prove the necessity of altering the laws.” ([Historical Records of Australia, Series 1, Vol. 13, pp. 290-297](https://historicalrecords.gov.au/series/1/vol/13/290-297))

1830: The Sydney Gazette and New South Wales Advertiser publishes an extract from London’s New Monthly Magazine on the prying nature of the British press compared with its European counterparts, stating: “The foreign journals never break in upon the privacy of domestic life”. But the London newspapers would hound a ‘lady of fashion’ relentlessly: “They trace her from the breakfast table to the Park, from the Park to the dinner-table, from thence to the Opera or the ball, and from her boudoir to her bed. They trace her every where. She may make as many doubles as a hare, but they are all in vain; it is impossible to escape pursuit.”

1847: NSW becomes the first Australian state to add a ‘public benefit’ element to the defence of truth for libel – essentially adding a privacy requirement to defamation law ([ALRC Report](https://www.alrc.gov.au/publications/report-11))

1882: First identified use of the phrase ‘right to privacy’ in an Australian newspaper. Commenting on a major libel case, the South Australian Weekly Chronicle (22.4.1882, p.5) states: “A contractor having dealings with the Government or with any public body has no right to privacy as far as those dealings go.”

1890: In a landmark [Harvard Law Review article](https://harvardlawreview.org/articles/samuel-d-warren-and-louis-d-brandeis-the-right-to-privacy/), the great US jurist Samuel D. Warren and future Supreme Court Justice Louis D. Brandeis announce a new ‘right to privacy’ in an article by that very name. There is a ripple effect in Australia with several mentions of the term in articles between 1890-1900.

1937: A radio station used a property owner’s land overlooking a racecourse to build a platform from which it broadcast its call of the horse races. The High Court rules the mere overlooking of the land did not constitute an unlawful interference with the racing club’s use of its property. The decision viewed as a rejection of a common law right to privacy: [Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor](https://www.hcourt.gov.au/judgements/1937/58CLR479) (1937) 58 CLR 479.
1948: Universal Declaration of Human Rights is proclaimed in Paris. Article 12 provides: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks” (United Nations Universal Declaration of Human Rights, GA. Res 217A(III), UN Doc A/Res/810 (1948).)


1972: Australia signs the ICCPR.

1979: Australian Law Reform Commission releases its first major report on privacy – Unfair Publication: Defamation and Privacy, ALRC 11. It recommends a person be allowed to sue for damages or an injunction if ‘sensitive private facts’, relating to health, private behaviour, home life, and personal or family relationships, were published about him or her which were likely in all the circumstances to cause distress, annoyance or embarrassment to a person in the position of the individual. Wide defences were proposed allowing publication of personal information if the publication was relevant to the topic of public interest. (pp. 124-125).


1984: Australian Journalists’ Association (AJA) revises its 1944 Code of Ethics to include a new clause (9) requiring journalists to “respect personal grief and personal privacy and shall have the right to resist compulsion to intrude on them”.

1987: The Privacy Act 1988 is enacted, applying initially only to the protection of personal information in the possession of Australian Government departments and agencies.

1999: Media Entertainment and Arts Alliance (MEAA) issues another revised Code of Ethics preserving the grief and privacy elements in clause 11.

2000: Privacy Act 1988 provisions are extended to larger private sector organisations, and 10 National Privacy Principles (NPPs) are introduced, determining how companies must collect, use and disclose, keep secure, provide access to and correct personal information. Media organisations are exempted from the provisions as long as they ascribe to privacy standards published by their representative bodies.

2001: High Court rejects an argument for a company’s right to privacy after animal liberationists trespass to film the slaughter of possums in a Tasmanian abattoir and someone gives the footage to the ABC, but the court leaves the door open for a possible personal privacy tort: Australian Broadcasting Corporation v. Lenah Game Meats (2001) 208 CLR 199.

2003: A Queensland District Court judge rules the privacy of the former Sunshine Coast mayor Alison Grosse had been invaded by an ex-lover who continued to harass her after their affair had ended. She is awarded $108,000 in damages: Grosse v. Purvis [2003] QDC 151.

2007: Victorian County Court Judge Felicity Hampel SC holds that a rape victim’s privacy was invaded when ABC Radio broadcast her identity in a news report despite state laws banning the identification of sexual assault complainants. She is awarded $110,000 in damages: Jane Doe v. ABC & Ors [2007] VCC 281.


2012

- The Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Privacy Amendment Act) passed, to take effect in 2014, featuring new Australian Privacy Principles (APPs), more powers for the Australian Information Commissioner, tougher credit reporting rules and new dispute resolution processes. Media exemption remains unchanged.
- Independent Media Inquiry (Finkelstein Review) releases its report recommending a News Media Council take over from the existing Australian Press Council and Australian Communications and Media Authority with a streamlined news media ethics complaints system with teeth. Refusal to obey an order to correct or apologise could see a media outlet dealt with for contempt of court. Privacy breaches cited as a reason for the move.
- Commonwealth Government’s Convergence Review releases its final report rejecting the Finkelstein model but instead proposing a ‘news standards body’ operating across all media platforms, flagging the withdrawal of the privacy and consumer law exemptions from media outlets who refuse to sign up to the new system.

2013

- The federal attorney-general directs the Australian Law Reform Commission to conduct an inquiry into the protection of privacy in the digital era. The inquiry will address both prevention and remedies for serious invasions of privacy with a deadline of June 2014.
At the same time the government introduces legislation to establish a Public Interest Media Advocate with the power to strip media outlets of their Privacy Act exemptions. That part of the legislation is later withdrawn.

The federal attorney-general seeks state and territory input on the regulation of drones following the Privacy Commissioner’s concerns that their operation by individuals was not covered by the Privacy Act.

2014

The Australian Law Reform Commission (ALRC) releases a Discussion Paper, Serious Invasions of Privacy in the Digital Era (DP 80, 2014). The proposed elements of the action include that the invasion of privacy must occur by: a. Intrusion into the plaintiff's seclusion or private affairs (including by unlawful surveillance); or b. Misuse or disclosure of private information about the plaintiff. The invasion of privacy must be either intentional or reckless. A person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstance. The court must consider that the invasion of privacy was 'serious', in all the circumstances, having regard to, among other things, whether the invasion was likely to be highly offensive, distressing or harmful to a person of ordinary sensibilities in the position of the plaintiff. The court must be satisfied that the plaintiff's interest in privacy outweighs the defendant's interest in freedom of expression and any broader public interest in the defendant's conduct.

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Tagged as Australian media, blogging, Code of Ethics, defamation, election, fair comment, free expression, honest opinion, journalism, law, mark pearson, MEAA, media, media ethics, media history, media law, political commentary, press freedom, privacy, privacy law, right to privacy, social media law

July 2, 2013 · 3:15 AM

‘Mindful journalism’ – introducing a new ethical framework for reporting

By MARK PEARSON Follow @Journlaw

This is an abridged version of the conference paper I presented to the Media, Religion and Culture division of the International Association for Media and Communication Research Conference, Dublin City University, on Saturday, June 29, 2013.

This paper explores the possibility of applying the fundamental precepts of one of the world’s major religions to the practice of truth-seeking and truth-telling in the modern era and asks whether that ethical framework is compatible with journalism as a Fourth Estate enterprise. It is not meant to be a theological exposition as I am neither a Buddhist nor an expert in Buddhist philosophy. That said, no academic paper topic like this arises in a vacuum, so I must first explain the personal and professional context from which this issue has arisen over four decades and has intensified in recent years. Most of my academic work has been in the field of media law – and its focus has been mainly upon the practical application of laws and regulations to the work of journalists. From time to time that ventures into media ethics and regulatory frameworks – the philosophical, self-regulatory and legislative frameworks that inform and relate to any examination of the actual laws impacting upon journalists.

Professional ethical codes are not religious treatises, and neither were holy scriptures spoken or written as codes of practice for any particular occupation. This paper attempts to do neither. Rather, it sets out to explore whether the foundational teachings of one religion focused upon living a purer life might inform journalism practice. At some junctures it becomes apparent that some elements of the libertarian model of journalism as we know it might not even be compatible with such principles – particularly if they are interpreted in their narrowest way. The teachings of other religions might also be applied in this way. When you look closely at Christianity (via the Bible), Islam (the Koran), Hinduism (the Bhagavad Gita), Judaism (the Torah) and through the Confucian canon you find common moral and ethical principles that we might reasonably expect journalists to follow in their work, including attributes of peace journalism identified by Lynch, (2010, p. 543): oriented towards peace, humanity, truth and solutions. The Dalai Lama’s recent book – Beyond Religion – Ethics for a Whole World (2011) – explored his vision of how core ethical values might offer a sound moral framework for modern society while accommodating diverse religious views and cultural traditions. It is in that spirit that I explore the possibilities of applying some of Buddhism’s core principles to the secular phenomenon of journalism. It also must be accepted that Buddhist practices like ‘mindfulness’ and meditation have been adopted broadly in Western society in recent decades and have been accepted into the cognitive sciences, albeit in adapted therapeutic ways (Segal et. al, 2012).

We should educate journalists, serious bloggers and citizen journalists to adopt a mindful approach to their news and commentary which requires a reflection upon the implications of their truth-seeking and truth-telling as a routine part of the process. They would be prompted to pause and think...
The Noble Eightfold Path attributed to the Buddha – Siddhartha Gautama (563 BCE to 483 BCE) – has been chosen here because of the personal reasons listed above, its relative brevity, and the fact that its core elements can be read at a secular level to relate to behavioural – and not exclusively spiritual – guidelines. Gunaratne (2005, p. 35) offered this succinct positioning of the Noble Eightfold Path (or the ‘middle way’) in Buddhist philosophy:

The Buddhist *dharma* meant the doctrine based on the Four Noble Truths: That suffering exists; that the cause of suffering is thirst, craving, or desire; that a path exists to end suffering; that the Noble Eightfold Path is the path to end suffering. Described as the “middle way,” it specifies the commitment to *sīla* (right speech, action and livelihood), *samma dāna* (right effort, mindfulness, and concentration), and *pañña* (right understanding and thoughts).

It is also fruitful to explore journalism as a practice amidst the first two Noble Truths related to suffering (*dukkha*), and this is possible because they are accommodated within the first step of the Eightfold Path – ‘right views’. The Fourth Noble Truth is also integrative. It states that the Noble Eightfold Path is the means to end suffering. Here we consider its elements as a potential framework for the ethical practice of journalism in this new era.

**Application of the Noble Eightfold Path to ethical journalism practice**

Each of the constituent steps of the Noble Eightfold Path – understanding free of superstition, kindly and truthful speech, right conduct, doing no harm, perseverance, mindfulness and contemplation – has an application to the modern-day practice of truth-seeking and truth-telling – whether that be by a journalist working in a traditional media context, a citizen journalist or a serious blogger reporting and commenting upon news and current affairs. Smith and Novak (2003, p. 39) identified a preliminary step to the Buddha’s Noble Eightfold Path that he saw as a precondition to its pursuit – the practice of ‘right association’. This, they explained, acknowledged the “extent to which we are social animals, influenced at every turn by the ‘companioned example’ of our associates, whose attitudes and values affect us profoundly” (Smith & Novak, 2003, p. 40). For journalists this can apply at a number of levels. There is the selection of a suitable mentor, an ethical colleague who might be available to offer wise counsel in the midst of a workplace dilemma. There is also the need to acknowledge – and resist – the socialization of journalism recruits into the toxic culture of newsrooms with unethical practices (McDevitt et al., 2002).

Further, there is the imperative to reflect upon the potential for the ‘pack mentality’ of reportage that might allow for the combination of peer pressure, competition and poor leadership to influence the core morality of the newsgathering enterprise, as noted by Leveson (2012, p. 732) in his review of the ethical and legal transgressions by London newspaper personnel.

Again, there is a great deal more that can be explored on this topic, but we will now concentrate on a journalistic reading of the steps of the Eightfold Path proper. Kalupahana (1976, p. 59) suggests its constituent eight factors represent a digest of “moral virtues together with the processes of concentration and the development of insight”.

1. **Right views**, Smith and Novak (2003, p. 42) explained that the very first step in the Eightfold Path involved an acceptance of the Four Noble Truths. Suffice it to say that much of what we call ‘news’ – particularly that impacting on audiences through its reportage of change, conflict and consequence – can sit with Smith and Novak’s (2003, p. 33) definition of *dukkha*, namely “the pain that to some degree colors all of finite existence”.

Their explanation of the First Noble Truth – that life is suffering – is evident when we view the front page of each morning’s newspaper and each evening’s television news bulletin:

The exact meaning of the First Noble Truth is this: Life (in the condition it has got itself into) is dislocated. Something has gone wrong. It is out of joint. As its pivot is not true, friction (interpersonal conflict) is excessive, movement (creativity) is blocked, and it hurts (Smith & Novak, 2003, p. 34).

This is at once an endorsement of accepted news values and a denial of the very concept of there being anything unusual about change. As Kalupahana (1976, p. 36) explains, a fundamental principle of Buddhism is that all things in the world are at once impermanent (*anicca*), unsatisfactory (*dukkha*) and nonsubstantial (*anatta*). News, too, is about the impermanent and the unsatisfactory. It is premised upon identifying to audiences what has changed most recently, focusing especially on the most unsatisfactory elements of that change. Yet given Buddhism’s premise that all things are subject to change at all times and that happiness is achieved through the acceptance of this, it might well erode the newsworthiness of the latest upsetting accounts of change in the world since we last looked. Yet in some ways this step supports the model of ‘deliberative journalism’ as explained by Romano (2010, p. 11), which encourages reports that are ‘incisive, comprehensive and balanced’, including the insights and contributions of all relevant stakeholders. Most importantly, as Romano suggests:

> **Journalists would also report on communities as they evaluate potential responses, and then investigate whether and how they have acted upon the resulting decisions (Romano, 2010, p. 11).**

Thus, the notion of ‘right views’ can incorporate a contract between the news media and audiences that accepts a level of change at any time, and focuses intention upon deeper explanations of root causes, strategies for coping and potential solutions for those changes prompting the greatest suffering.
proscriptive list of prohibited practices. A recent example is the
mediation of many news products today. The notion of telling the truth and being accurate lies at the heart of journalism practice
and is foremost in most ethical codes internationally. It is an unquestionable truth that, while a single empirical fact might be subject to scientific
measurement and verification, any conclusions drawn from the juxtaposition of two provable facts can only constitute what a scientist would call a
'theory' and the rest of us might call 'opinion'. In defamation law, collections of provable facts can indeed create a meaning – known as an
'imputation' – that can indeed be damaging to someone's reputation (Pearson & Polden, 2011, p.217). Thus, it becomes a question of which truths are
selected to be told and the ultimate truth of their composite that becomes most relevant.

Smith and Novak (2003, p. 42) suggest falsities and uncharitable speech as indicative of other factors, most notably the ego of the communicator. In journalism, that ego might be fuelled in a host of ways that might encourage the selection of certain facts or the portrayal of an individual in a
negative light: political agendas, feeding populist sentiment, peer pressure, and corporate reward. They state:

False witness, idle chatter, gossip, slander, and abuse are to be avoided, not only in their obvious forms, but also in their covert ones. The covert forms – subtle belittling, 'accidental' tactlessness, barbed wit – are often more vicious because their motives are veiled (Smith and Novak, 2003, p. 42).

This calls into question the very essence of celebrity journalism for all the obvious reasons. Gossip about the private lives of the rich and famous, titillating facts about their private lives, and barbed commentary in social columns all fail the test of 'right speech' and, in their own way, reveal a
great deal about the individual purveying them and their employer, discussed further below under 'right livelihood'. Taken to its extreme, however, much news might be considered 'uncharitable' and slanderous about an individual when it is in fact revealing their wrongdoing all calling into question their public actions. If the Eightfold Path ruled out this element of journalism we would have to conclude it was incompatible even with the
best of investigative and Fourth Estate journalism. Indeed, many uncomfortable truths must be told even if one is engaging in a form of 'deliberative journalism' that might ultimately be for the betterment of society and disenfranchised people. For example, experts in 'peace journalism' include a
'truth orientation' as a fundamental ingredient of that approach, and include a determination "to expose self-serving pronouncements and representations on all sides" (Lynch, 2010, p. 543).

4. Right conduct. The fourth step of ‘right conduct’ goes to the core of any moral or ethical code. In fact, it contains the fundamental directives of
most religions with its Five Precepts which prohibit killing, theft, lying, being unchaste and intoxicants (Smith and Novak, 2003, p. 44). Many
journalists would have problems with the final two, although the impact upon their work would of course vary with individual circumstances. And while many journalists might have joked that they would ‘kill’ for a story, murder is not a common or accepted journalistic tool. However, journalists have often had problems with the elements of theft and lying in their broad and narrow interpretations. The Leveson Report (2012) contains
numerous examples of both, and the extension of the notion of ‘theft’ to practices like plagiarism and of ‘lying’ to deception in its many guises have
fuelled many adverse adjudications by ethics committees and courts.

Importantly, as Smith and Novak (2003, p. 43) explain, the step of right conduct also involves ‘a call to understand one’s behavior more objectively
before trying to improve it’ and ‘to reflect on actions with an eye to the motives that prompted them’. This clearly invokes the strategic approach
developed by educationalist Donald Schön, whose research aimed to equip professionals with the ability to make crucial decisions in the midst of
practice. Schön (1987, p. 26) coined the expression ‘reflection-in-action’ to describe the ability of the professional to reflect upon some problem in the
midst of their daily work. The approach was adapted to journalism by Sheridan Burns (2013) who advised student journalists:

You need a process for evaluating your decisions because a process, or system, lets you apply your values, loyalties and principles to every new set
of circumstances or facts. In this way, your decision making will be fair in choosing the news (p. 76).

Even industry ethical codes can gain wider understanding and acceptance by appealing to fundamental human moral values and not just offering a
proscriptive list of prohibited practices. A recent example is the Fairfax Media Code of Conduct (undated) which poses questions employees might ask
themselves when faced with ethical dilemmas that might not be addressed specifically in the document, including:

Would I be proud of what I have done?
**Right living.** The Buddha identified certain livelihoods that were incompatible with a morally pure way of living, shaped of course by the cultural mores of his place and time. They included poison peddler, slave trader, prostitute, butcher, brewer, arms maker and tax collector (Smith and Novak, 2003, p. 45). Some of these occupations might remain on his list today – but one can justifiably ask whether journalism would make his list in the aftermath of the revelations of the Leveson Inquiry (2012). That report did, of course, acknowledge the important role journalism should play in a democratic society, so perhaps the Buddha might have just nominated particular sectors of the media for condemnation. For example, the business model based upon celebrity gossip might provide an avenue for escape and relaxation for some consumers, but one has to wonder at the overall public good coming from such an enterprise. Given the very word ‘occupation’ implies work that ‘does indeed occupy most of our waking attention’ (Smith and Novak, 2003, p. 44), we are left to wonder how the engagement in prying, intrusion and rumor-mongering for commercial purposes advances the enterprise of journalism or the personal integrity of an individual journalist who chooses to ply that trade. The same argument applies to the sections of larger media enterprises who might sometimes produce journalism of genuine social value, but on other occasions take a step too far with intrusion or gossip without any public benefit. This is where journalists working in such organisations might apply a mindful approach to individual stories and specific work practices to apply a moral gauge to the actual tasks they are performing in their work and in assessing whether they constitute ‘right living’.

**Right effort.** The step of ‘right effort’ was directed by the Buddha in a predominantly spiritual sense – a steady, patient and purposeful path to enlightenment. However, we can also apply such principles to the goal of ethical journalism practice in a secular way. Early career journalists are driven to demonstrate success and sometimes mistake the hurried scoop and kudos of the lead story in their news outlet as an end in itself. There can also be an emphasis on productivity and output at the expense of the traditional hallmarks of quality reportage – attribution and verification. Of course, all news stories could evolve into lengthy theses if they were afforded unlimited timelines and budgets. Commercial imperatives and deadlines demand a certain brevity and frequency of output from all reporters. Both can be achieved with continued attention to the core principle of purposeful reflection upon the ethics of the various daily work tasks and a mindful awareness of the underlying mission – or backbone – of one’s occupational enterprise – striving for the ‘right intent’ of the second step.

Institutional limitations and pressure from editors, reporters and sources will continually threaten a journalist’s commitment to this ethical core, requiring the ‘right effort’ to be maintained at that steady, considered pace through every interview, every story, every working day and ultimately through a full career. As the Dalai Lama wrote in *Beyond Religion* (2011, p. 142):

> The practice of patience guards us against loss of composure and, in doing so, enables us to exercise discernment, even in the heat of difficult situations.

Surely this is a useful attribute for the journalist.

**Right mindfulness.** This is the technique of self-examination that Schön (1987) and Sheridan Burns (2013) might call ‘reflection in action’ and is the step I have selected as central to an application of the Eightfold Path to reportage in the heading for this article – ‘Mindful Journalism’. Effective reflection upon one’s own thoughts and emotions is crucial to a considered review of an ethical dilemma in a newsgathering or publishing context. It is also essential to have gone through such a process if a journalist is later called to account their actions. Many ethical decisions are value-laden and inherently complex. Too often they are portrayed in terms of the ‘public interest’ when the core motivating factor has not been the greater public good but, to the contrary, the ego of an individual journalist or the commercial imperative of a media employer. Again, the Leveson Report (2012) detailed numerous instances where such forces were at play, often to the great detriment to the lives of ordinary citizens.

As Smith and Novak (2003, p. 48) explain, right mindfulness ‘aims at witnessing all mental and physical events, including our emotions, without reacting to them, neither condemning some nor holding on to others’. Buddhists (and many others) adopt mindfulness techniques in the form of meditation practice – sometimes in extended guided retreats. While I have found this practice useful in my own life, I am by no means suggesting journalists adopt the lotus position to meditate in their newsrooms or at the scene of a breaking news event to peacefully contemplate their options. The extent to which individuals might want to set aside time for meditation in their own routines is up to them, but at the very least there is much to be gained from journalists adopting the lay meaning of ‘being mindful’. In other words, journalists might pause briefly for reflection upon the implications of their actions upon others – the people who are the subjects of their stories, other stakeholders who might be affected by the event or issue at hand, the effects upon their own reputations as journalists and the community standing of others, and the public benefits ensuing from this particular truth being told in this way at this time. Most ethical textbooks have flow charts with guidelines for journalists to follow in such situations – but the central question is whether they have an embedded technique for moral self-examination – a practiced mindfulness they can draw upon when a circumstance demands.
There is a special need for journalists to be mindful of the vulnerabilities of some individuals they encounter in their work. Many have studied the interaction between the news media and particular ‘vulnerable groups’, such as people with a disability, those with a mental illness, children, the indigenous, the aged, or those who have undergone a traumatic experience. Our collaborative Australian Research Council Linkage Project on ‘Vulnerability and the News Media’ (Pearson et al., 2010) reviewed that research and examined how journalists interacted with those who might belong to such a ‘vulnerable group’ or who might simply be ‘vulnerable’ because of the circumstances of the news event. We identified other types of sources who might be vulnerable in the midst or aftermath of a news event involving such a ‘moment of vulnerability’ and assessed the question of ‘informed consent’ to journalistic interviews by such individuals. Ethical journalists are mindful of such potential vulnerabilities and either look for alternative sources or take considered steps to minimise the impact of their reportage.

This concern for others also invokes the notion of compassion for other human beings, a tenet central to the teachings of all major religions, and a hallmark of Buddhism. The Dalai Lama has explained that it is often mistaken for a weakness or passivity, or ‘surrender in the face of wrongdoing or injustice’ (Dalai Lama, 2011, p. 58). If that were the case, then it would be incompatible with Fourth Estate journalism which requires reporters to call to account those who abuse power or rort the system. However, the Dalai Lama explains that true compassion for others requires that sometimes we must do exactly that:

Depending on the context, a failure to respond with strong measures, thereby allowing the aggressors to continue their destructive behaviour, could even make you partially responsible for the harm they continue to inflict (Dalai Lama, 2011, p. 59).

Such an approach is perfectly compatible with the best of foreign correspondence and investigative journalism conducted in the public interest – and is well accommodated within the peace journalism model explained by Lynch (2010, p. 543).

8. Right concentration. Some have compared ‘right concentration’ to being in ‘the zone’ in elite sporting terminology – so focused on the work at hand that there is a distinctive clarity of purpose. Smith and Novak (2003, p. 48) explain that concentration exercises – often attentive to a single-pointed awareness of breathing – are a common prelude to mindfulness exercises during meditation.

Initial attempts at concentration are inevitably shredded by distractions; slowly, however, attention becomes sharper, more stable, more sustained (Smith and Novak, 2003, p. 48).

It is such concentrated attention that is required of consummate professionals in the midst of covering a major news event. It is at this time that top journalists actually enter ‘the zone’ and are able to draw on core ethical values to produce important reportage and commentary within tight deadlines, paying due regard to the impact of their work upon an array of individual stakeholders and to the broader public interest. It is in this moment that it all comes together for the mindful journalist – facts are verified, comments from a range of sources are attributed, competing values are assessed, angles are considered and decided and timing is judged. And it all happens within a cool concentrated focus, sometimes amidst the noise and mayhem of a frantic newsroom or a chaotic news event.

Towards a secular ‘mindful journalism’

This paper does not propose a definitive fix-all solution to the shortcomings in journalism ethics or their regulation. Rather, it is an acknowledgment that the basic teachings of one of the world’s major religions can offer guidance in identifying a common – and secular – moral compass that might inform our journalism practice as technology and globalization place our old ethical models under stress.

Leveson (2012) has identified the key ethical and regulatory challenges facing the British press and Finkelstein (2012) has documented the situation in Australia. One of the problems with emerging citizen journalism and news websites is that their proponents do not necessarily ascribe to traditional journalists’ ethical codes. The journalists’ union in Australia, the Media Alliance, has attempted to bring them into its fold by developing a special “Charter of Excellence and Ethics” and by the end of April already had 12 news websites ascribe to its principles, which included a commitment to the journalists’ Code of Ethics (Alcorn, 2013). This might be a viable solution for those who identify as journalists and seek a union affiliation, but many do not, and in a global and multicultural publishing environment the challenge is to develop models that might be embraced more broadly than a particular national union’s repackaging of a journalists’ code.

I have written previously about the confusion surrounding the litany of ethical codes applying to a single journalist in a single workplace. There is evidence that in many places such codes have failed to work effectively in guiding the ethics of the traditional journalists for whom they were designed, let alone the litany of new hybrids including citizen journalists, bloggers, and the avid users of other emerging news platforms.

My suggestion here is simply that core human moral principles from key religious teachings like the Noble Eightfold Path could form the basis of a more relevant and broadly applicable model for the practice of ‘mindful journalism’.

References


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Disclaimer: While I write about media law and ethics, nothing here should be construed as legal advice. I am an academic, not a lawyer. My only advice is that you consult a lawyer before taking any legal risks.

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