

Privacy and the Media - A Normative Analysis

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Abstract

The media plays a vital role in informing the public, and hence underpinning democracy. It is accordingly very lightly regulated, and data protection laws apply to media organisations in only a qualified manner, or not at all. Segments of the UK media have seriously misbehaved in recent years, and similar problems arise in many other countries.

The media is undergoing rapid change, induced by Internet technology and the undermining of both subscription and advertising revenues. The emergence of networked media has heightened competition, has led to rapid convergence of print, broadcast and other media forms, and has forced staff reductions. In addition, enthusiastic amateurs have become 'the unofficial media'. Regulatory reform is urgently needed, but must take into account the many ways in which the media sector is in flux.

This paper presents a normative proposal for the regulation of the media's impacts on privacy. It reflects the realities of 21st century media, recurrent issues, privacy needs, and the varied terms of the many existing self-regulatory Codes of Conduct. The empirical base is entirely from within one country, Australia. However, the privacy needs are recognised in international instruments, and the themes are common. The resulting proposal therefore has relevance in most countries.

The proposal developed in this paper provides a basis for the preparation of laws or Codes for print, broadcast, networked and/or converged media. Alternatively, it may be used as a reference-point against which existing and proposed laws and Codes can be assessed.

1. Introduction

The term 'the media' refers variously to organisations, channels and technologies whereby information is communicated to large audiences. The scope encompasses news, propaganda, advertising and entertainment. The term generally does not extend to means whereby individual members of the audience seek and gain access to stored information, i.e. the media industry embodies supplier-push rather than consumer-pull. This paper does not address the propaganda, advertising and entertainment aspects of the media, but focusses on news and current affairs, including radio review programmes and video-documentaries.

The profession of journalism, which underlies 'news and current affairs', plays a vital role in informing the public. Critical examination of media releases and investigate reporting result in the exposure of inappropriate behaviour, particularly by governments, is a crucial element of an effective democracy.

In common with all other human undertakings, however, there are challenges in maintaining quality in the media. Areas of concern include inappropriate data collection practices, such as deceit, and insensitivity in dealing with vulnerable people; and inappropriate features of publications such as inaccuracy, unfairness, bias, failure to declare potential conflict of interest, insensitivity and unreasonable discrimination. Media organisations have, however, parlayed the widely-perceived importance of their work into substantial freedom from regulation.

This paper is specifically concerned with the impacts on individuals who come to the attention of the media, and in particular with privacy-invasive data collection practices and unjustified disclosure of personal data. Because of the limited controls that are applied to the media, there are frequent abuses of privacy by media organisations, and the aggrieved have little or no recourse available to them.

This paper identifies and analyses the privacy needs in the media area, and puts forward a specific proposal for a regulatory framework that carefully balances the privacy interest against the vital role that the media plays in democracies. It does this by undertaking a careful analysis of privacy needs within the specific context of the news media. It then articulates the abstract needs into specific, operational guidance, in the form of a Code Template. The purpose is to ensure privacy protections for people, by providing clear information to the staff of media organisations, and establishing a firm foundation for the assessment of complaints about media behaviour.

The analysis and the general and specific proposals are developed within a single jurisdictional context, that of Australia. On the other hand, the privacy needs are recognised in international instruments, and the themes are common. The resulting proposal therefore has general relevance.

The paper commences with a general description of contemporary media, media organisations and media behaviour. Subsequent sections examine the requirements, present a normative framework, and outline a Code Template containing specific guidance for media organisations and their staff.

2. The Media in the Early 21st Century

A series of broad waves of media can be usefully distinguished, each complementing rather than replacing earlier forms. A previous paper arising from this research program, Clarke (2012a) distinguished display media (from cave-paintings to scrolls and on to billboards), print media (pamphlets, books, newspapers and magazines), sound and recording media, broadcast media, and most recently networked media – at first 'wired' and now 'unwired' and supporting mobile users. See also Gorman & McLean (2009).

As presaged above, the primary focus in this paper is on journalism – the preparation of news, current affairs and documentaries, by means of the discipline of collecting, analysing, cross-checking and presenting information regarding events and issues that are 'in the public interest'. Journalism includes 'opinion', but opinion needs to be clearly distinguished as such.

The ideals of journalism are frequently compromised, and sometimes corrupted or debased. The term 'advertorialism' is usefully applied where the analysis and cross-checking functions are compromised, and propaganda issued by government public relations and corporate marketing units is published with very limited editing, let alone critical consideration or an endeavour to achieve balance. Another form of compromise, which is of more direct relevance to this paper, might be termed 'voyeurnalism'. This involves the presentation of information that is not justifiable 'in the public interest' but rather is 'what the public is interested in', or 'what the public may be able to be caused to be interested in'. This paper is concerned primarily with journalism, but also to some extent with voyeurnalism, because of the prevalence with which it deals in content relating to identifiable individuals.

The quality press (once called 'the broadsheets') presents itself as being committed to journalism, but increasing proportions of its publications have been lapsing into both advertorialism and voyeurnalism. The rest of the press (once called 'the tabloids') focus on voyeurnalism, with varying depths of journalism veneer. In the broadcast media, portions of the radio market segment continue to evidence at least some journalism, but commercial television channels heavily compromise their news and current affairs programs towards sensationalist presentation and voyeurnalism.

The networked media wave has seen the emergence of new competitors, but also the search by existing organisations for synergies between new and old forms. The term 'media convergence' has been much-used to refer to the

impacts of networks on previous media forms. In this paper, the significance of convergence is that it highlights the commonality of quality and privacy issues across all media forms.

Networked media has had two further impacts of relevance to the analysis that follows. As media organisations moved onto one another's turf, and as newcomers emerged, competition for content, for customer attention, and for subscription revenue, have all greatly intensified. The longstanding media organisations have suffered even greater reductions in advertising revenue. Classified advertising has become more competitive. In the display advertising area, meanwhile, the available revenue is not only spread more thinly over more channels, but a single organisation, Google, is extracting far higher margins than did the value-chains through which advertisements were placed in the past. In the new era of much-reduced revenues, serious doubts have been expressed about the capacity of the media organisations that have conducted journalism to sustain the discipline of collecting, analysing, cross-checking and presenting information.

The other impact has been the growth in 'unofficial media', including personal web-sites containing commentary, image and video, 'web-site diaries' (blogs), video-postings (supported by, for example, YouTube), and 'social media' (particularly Facebook and Twitter). More formalised instances of collaborative news reporting also exist, and the 'Arab Spring' of 2011 featured a considerable amount of direct reporting via networked media. This is also having a diluting effect on longstanding media empires.

Considerable evidence exists of privacy-abuse by media organisations. Only a little of that evidence can be found in case law, and in reports by quasi-judicial tribunals and self-regulatory organisations. This is because relatively few complaints are successful, and even those decisions deliver so little satisfaction to complainants that few people waste their time initiating complaints.

In the preparatory study for this paper, the author assembled a set of case studies that show a wide range of abuses (Clarke 2012a). That study also examined the three potential sources of protections against those abuses: tort law (such as trespass, nuisance, stalking and misrepresentation), privacy laws, and media codes. Codes have been published variously by media organisations, by industry associations, by the self-regulatory body for the print media, the Australian Press Council (APC), and by the oversight agency for commercial broadcast media, the Australian Communications and Media Authority (ACMA). The case studies showed that almost no redress was achieved. It was clear from the study of protections against media privacy abuses that the regulatory schemes are seriously deficient. The Finkelstein Inquiry into the Media and Media Regulation in Australia was in no doubt that serious problems exist and that the existing mechanisms "are not sufficient to achieve the degree of accountability desirable in a democracy" (DBCDE 2012).

The evidence of privacy abuses combined with the inadequacies of the available protections have provided the base on which the following section builds the analysis of privacy requirements.

3. The Needs

This section presents the requirements for the effective protection of privacy, balanced against the public interest. The purposes of the analysis are to state requirements, to provide outline arguments in support of them, and to lay the basis for a short-form statement or template. The study is specific to Australia. On the other hand, many aspects of the 'privacy and the media' landscape are shared with large numbers of other jurisdictions, particularly in democratic countries. The analysis therefore has international relevance.

The analysis and proposal draws heavily on a series of projects led by the author for the Australian Privacy Foundation (APF). Eleven submissions, policy statements and letters are identified in the Reference List (APF 2007-2011). The primary references are (APF 2009 and 2011c).

Privacy protection depends on a framework, by which is meant multiple infrastructural elements, linked within an architecture. At the core is a set of Principles, perhaps expanded into Standards, which provide abstract statements of the requirements that need to be satisfied. These are of no direct use to harried reporters, who by the nature of their work have to gather, analyse, make judgements and write very quickly. Nor do abstract statements help editors to assess drafts, or complaints-handlers to quickly resolve post-publication disputes. It is therefore essential that the abstract Principles be operationalised into Codes that provide practical guidance. The first two sub-sections outline the necessary structure.

Promulgation of documents achieves nothing, however, unless their contents are understood and applied. The third sub-section deals with their assimilation and use by reporters. The fourth discusses their relevance to dispute-resolution. Two further elements are necessary. The fifth sub-section describes the regulatory mechanism that is needed in order to ensure that Codes are taken seriously, and the final sub-section outlines a final fallback for serious and repeated breaches, in the form of a cause of action in the courts.

3.1 Principles and Standards Articulated into Codes

It has long been accepted that the quality of journalism is dependent on respect for a range of principles. For example, the Australian Journalist's Association's Code dates to 1943 (MEAA 1996). Various Codes are published by individual media organisations, by industry associations, by the self-regulatory organisation for the print media, APC, and by the oversight agency

for commercial broadcast media, ACMA. No segment of the Australian media is subject to regulator.

Much of the Australian private sector is subject to a very weak, generic legislative scheme enacted in 1999 as amendments to the Privacy Act 1988 (Cth). Media organisations are entirely exempt, however. Exercise of the exemption merely requires that the media organisation be "publicly committed to observe [published] standards that deal with privacy in the context of the activities of a media organisation" (Privacy Act s.7B(4)). Media organisations are free to choose or create any 'standards' that they like, provided that they purport to "deal with privacy". There are no external standards or tests of credibility, and there is no requirement for consultation with the affected public.

Unsurprisingly, examination of the current Codes shows that they are highly deficient (Clarke 2012b). Most limit themselves to abstract statements. All of them address only a sub-set of the concerns. Very few are backed up by effective business processes that enable people whose privacy has been abused to gain redress.

Principles alone are valueless as a means of protecting privacy. They need to be articulated to a sufficient level of detail in order to provide guidance for the practice of journalism. Similarly, complaints-handling is dependent on the existence of criteria whereby the appropriateness of media behaviour can be assessed. One approach that has been adopted, and that is the subject of current work by the Australian Press Council, is the expansion of Principles into 'Standards' (APC 2011a, 2011b),

However, even these lengthier Standards are insufficient to solve the problem. Journalists have always worked under time-pressure. Their plight has been exacerbated in recent years by the sharpening of competition, and cost-pressures resulting in fewer resources with which to sustain quality. In these circumstances, more than ever, guidance must be expressed in forms that are readily accessible to the harried media professional, and at a sufficient level of practical detail.

The appropriate way to achieve this is to ensure that each media professional has a Code available to them that operationalises the Principles and Standards within their particular context. The press, broadcast media and networked media each has its own *modus operandi*, its own sources and channels, and its own news-cycle. Politics, business, the courts, health, sport and social issues, all have their own norms. For a Code to be seen by each particular media professional as relevant to their world, a sufficiently large set of Codes is needed.

Each Code must be structured and expressed in ways useful to the particular category of media professional. They must be able to quickly locate and drill down to what they need. Relevant examples must be included, designed to encapsulate the accumulated experience in that context. Wherever possible,

these should be based on relevant cases that have been determined by complaints-handlers, and other commonly encountered circumstances. In order to ensure comprehensiveness, some examples may need to be contrived. Together the examples must convey all key aspects of the balancing of the public interest in information against the privacy interests of individuals who are 'in the news'.

3.2 Privacy Protections Within the Codes

Neither the privacy interest nor the public interest is paramount. Appropriate balances must be found, and weighed against practicalities and costs. Counsels of perfection would be unfair in hectic operational environments. Nonetheless, Codes must define the black from the white, and indicate how the inevitable 'grey area' situations need to be approached.

To fit to the needs of media organisations, it is necessary to structure each Code into sections that correspond to the phases of media activity. These can be identified as:

- information gathering
- publication
- review processes and remedies

Both information-gathering and publication are subject to general requirements of justification and proportionality. Justification must be based on either the individual's consent or an overriding public interest. Proportionality must be based on relevance and necessity of the specific information to that interest.

A Code Template is provided as an Appendix to this paper. It expresses underlying Principles, provides Definitions of key terms, and declares the specific categories of activity that represent breaches. This section provides analysis that underlies the definitions but is not appropriate as part of the Code itself.

The interpretation of the term 'the public interest' is central to privacy protection. It must not be infected with elements of 'what the public is interested in'. Keating (2010) put it this way: "The public interest means publication or non-publication guided by what is in the interest of the public as a whole, not what readers or an audience might find interesting or titillating".

A definition of 'the public interest' has been used by the self-regulatory body for the print media, APC, since at least December 2001, and has recently been adopted by the oversight agency for the broadcast media, ACMA. The definition derives from a UK judgement in *London Artists v Littler* (1969) 2 QB 375 at 391. Lord Denning, then Master of the Rolls, said that "There is no

definition in the books as to what is a matter of public interest. All we are given is a list of examples, coupled with the statement that it is for the Judge and not for the jury. I would not myself confine it within narrow limits. Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment" (emphases added).

The words "people at large ... may be legitimately interested in" appear to open the scope out to 'what the public is interested in'. However, those comments were made in a very specific context. In defamation law, the defence of fair comment is dependent on the comment being made "on a matter of public interest". The term 'a matter of public interest' in the 'defence of fair comment' context is very different from the term 'the public interest' in the privacy context. Moreover, a number of statutes use the term 'the public interest'. The term's meaning has to be interpreted in each specific context. Any suggestion that Denning's interpretation has any legal authority in the context of privacy is entirely spurious. The APC/ACMA definition is not an appropriate basis for a Code that relates to privacy protection.

Another serious inadequacy that is frequently embodied in discussion about the public interest is the loose notion of a 'public figure' and the assumption that a public figure necessarily sacrifices their privacy. On the contrary, people about whom media activities are justified in the public interest need to be considered individually, and compromises to their privacy must be justified in the particular circumstances that apply.

A News Ltd lawyer was quoted in Keating (2010) as saying that "the main problem is 'public interest' is a nebulous concept that is difficult to define and even more difficult to weigh against the circumstances of a case. It's the practical application that will cause the problems". Keating argued that "Rather than abandoning the public interest, the media needs to put more time and effort into fostering a better practical understanding of the term". In fact, over a year earlier, the APF's Policy Statement had proposed a specific process, and specific interpretations of six public interest elements (APF 2009). The six elements, discussed in the Code Template below, are:

Relevance to:

1. the Performance of a Public Office
2. the Performance of a Corporate or Civil Society Function of Significance
3. the Credibility of Public Statements
4. Arguably Illegal, Immoral or Seriously Anti-Social Behaviour
5. Public Health or Safety
6. an Event of Significance

The Code Template also defines the term 'overriding public interest', and identifies a number of additional factors relevant to the assessment of justification and proportionality.

3.3 Processes for Assimilation and Application

Principles, Standards and Codes achieve nothing unless they are carried through into practice. To achieve this, the following process aspects are particularly important:

- education and training are essential, to ensure assimilation
- a positive obligation must be placed on journalists to apply them
- controls must be implemented to ensure that that they have been applied

To ensure that new entrants to the profession are well-prepared, the educational processes for journalists must include emphasis on the ethical and legal obligations associated with news-gathering and publication. One approach to achieving this is to require them to familiarise themselves with and apply the Code Template or more specific Codes developed from it.

Within the workplace, induction and training must ensure that journalists have access to, and a clear understanding of, the Code. Periodic reminders and refreshers must be built into journalists' working life.

There must be unequivocal mechanisms whereby journalists are subject to the Code, in particular the reading of the Code into their terms of employment or terms of contract. Not only the media organisation, but also individuals, must have positive and legally-enforced obligations to apply the Code.

In order to ensure the Code's application, controls must be incorporated into media organisations' workflows, such that sub-editors and editors detect and address breaches by individual journalists and ensure that inappropriate information-gathering practices are avoided, and that inappropriate exposure of personal data does not survive through to actual publication.

3.4 Processes for Review and Redress

There must be a positive obligation on media organisations to handle complaints about behaviour by media organisations and their employees and contractors. The reference-point for complaints-handlers needs to be the relevant Code, if one exists, or failing that then the Principles and Standards.

Complaints processes must be straightforward and accessible. There is a well-established international standard with which the processes need to comply

(ISO 10002:2004). Because the Codes articulate and operationalise the Principles and Standards, most complaints should be able to be investigated quickly and resolved promptly.

The threshold tests for a complaint to succeed must not be set unduly high. In particular:

- the public interest test must be applied to each item of data, not just to the whole set of data. For example, the fact that a person's children attend a private school might be pertinent; but the name of the specific school is less likely to be)
- the key test must be set at a level such as 'reasonably causing a person concern or offence' rather than, for example, 'being highly offensive'
- the reference-point must be the person whose privacy has been invaded, not some abstract construct such as 'a person of ordinary sensibilities'

Impactful sanctions must be available when the seriousness of the breach calls for them. On the other hand, most complainants want an acknowledgement of error, an apology, and/or correction, retraction or clarification. The limited remedies available in print form, such as further publication and letters to the editor are complemented in networked media by such possibilities as changes to the archived copy.

There must be a clear channel whereby those people who are not satisfied with the media organisation's handling of the matter can seek review by an independent organisation, which must in turn have the obligation, the requisite powers, the resources and the commitment to resolve problems, and the commitment to impose sanctions where they are deserved.

3.5 A Regulator

Self-regulation is an excuse, not a solution. The failure of the various self-regulatory models is regularly demonstrated. Self-regulation cannot be persisted with. On the other hand, given the importance of journalism to democracy, the fine judgement needed in making decisions, and the considerable risk of direct or indirect interference in the process by the government of the day or by public servants, a government regulatory agency for the media is not appropriate.

The appropriate governance model is a public regulatory body, with the following features:

- constitution as a statutory corporation or a company limited by guarantee
- scope, principles and powers for the organisation, established by statute

- a governance structure and processes dominated by the interests of the intended beneficiaries of the regulation, but with access to a deep understanding of the realities of the activities that are being regulated
- a governance structure and processes held in check by obligations to remain in close contact with both media organisations and journalists, on the one hand, and representatives of and advocates for the various dimensions of the public interest, on the other
- assured funding, from both media organisations and the public purse

The notion of 'co-regulation' has been much-abused. A properly-implemented scheme, however, offers considerable advantages for all parties. The requirements described in this document reflect the criteria summarised in Clarke (1999).

The risks to privacy are common to all forms of media, and the process of convergence reinforces the need for the regulatory body's scope to encompass all media forms, including all print media, all broadcast media and all networked media, and both private sector corporations and public sector organisations such as the Australian Broadcasting Corporation and the Special Broadcasting Service. The scope definition needs to be expressed broadly in order to ensure that the further new media that will doubtless emerge in the future are automatically within the regulatory body's ambit.

The regulatory body must have the power to determine and promulgate the Principles and Standards and the Codes that articulate them. However, in preparing and revising Principles, Standards, Codes and associated business processes, the regulatory body must have obligations:

- to place high value both on media freedoms, as a check on the power of government and business, and on privacy
- to achieve and sustain balance among the objectives of a free and open society and privacy protections
- to interact with and consider submissions from media organisations and journalists, and their representative organisations
- to interact with and consider submissions from representatives of and advocates for all population segments and organisations affected by media behaviour

There must be a positive obligation on the regulatory body to handle complaints about behaviour by media organisations and their employees and contractors. There needs to be a policy that complaints should be first handled by the media organisation whose behaviour is being complained about; but the regulatory body needs to have a discretion to handle complaints at first instance when the circumstances make that a more practicable procedure.

As with internal complaints-handling, the reference-point need to be the relevant Code, if one exists, or failing that then the Principles and Standards.

Complaints processes must be straightforward, accessible and compliant with the international standard (ISO 10002:2004). Because a clear framework is in place, most complaints should be able to be investigated quickly and resolved promptly.

The regulatory body must have available to it a comprehensive, graduated range of measures available to it in the form a 'compliance pyramid', with a broad base of education and guidance, mediation and arbitration, together with sanctions and enforcement mechanisms available when necessary to deal with serious or repeated breaches. There must be effective means whereby non-compliance by media organisations with the Principles, the Standards, the Codes or the regulatory body's determinations is subject to further sanctions sufficient to deter other organisations from such behaviour.

The regulatory body must have an obligation to apply the review processes and remedies and to apply them appropriately, and the requisite resources to apply them. The regulatory body must have the powers necessary to protect the interests of the intended beneficiaries, and to protect itself. The regulatory body must have the resources necessary to enable it to perform its functions.

3.6 A Statutory Cause of Action

A privacy cause of action is a necessary, complementary privacy-protection measure. It needs to be applicable to every individual and organisation, with the media as just one specific area of application. The media must, however, have special protection by means of a clear and strong public interest test along the lines identified earlier and expressed in greater detail in the Code Template.

The reasons the cause of action is necessary are that:

- several dimensions of privacy lie outside the narrow scope of existing data protection laws. These include the privacy of the physical person, the privacy of personal behaviour, and the privacy of personal communications
- there are many unjustifiable privacy intrusions for which no privacy protective law exists
- many organisations, many categories of actions, and individuals generally, are exempt from existing data protection mechanisms
- most existing privacy protections are ineffectual, due to weak legislation, lack of resources, lack of enforcement powers, and timidity on the part of privacy oversight agencies
- such non-privacy actions as exist (e.g. defamation, confidence, negligence, nuisance, trespass, passing-off, harassment and stalking) fail to fill the void

To be successful, a plaintiff should be required to show that they had a reasonable expectation of privacy and that the act was sufficiently serious to cause, to a person of ordinary sensibilities, in the relevant context, substantial offence or distress ('offensive intrusion'). Intention, recklessness, but also a serious lack of care, should all be actionable.

No such cause of action has emerged in Australian courts, or been enacted by Australian Parliaments. The Commonwealth Government did, however, call for submissions in relation to an issues paper in 2011 (DPMC 2011).

4. A Code Template

The previous section presented the requirements for the effective protection of privacy, balanced against the public interest. In particular, Privacy Principles and Standards need to be articulated into Codes that provide clear and operationally useful guidance to particular categories of media professional. This section provides an outline of the approach adopted to the creation of a Code Template, and reports on trial applications.

4.1 Preparation of the Code Template

The drafting of the Code Template took into account the Foundation Principles that emerged from the analysis, and the body of case studies. These insights were complemented by a perusal of existing Codes. This enabled the adoption of terms used by media organisations, and assisted in ensuring the Template's comprehensiveness.

Clarity is important. Media professionals need a practical guidance document. The organisation and expression need to ensure that it is readily accessible by all interested parties. In order to achieve this, the Principles were separated from the specific operational requirements, and three sections were distinguished, relating to the phases of research, publishing and complaint-handling. To ensure that terms are used in a consistent manner, explanations of their intended meanings were consolidated into a definitions section.

The Code Template can be applied by media organisations, industry associations, self-regulatory bodies and regulators as a basis for establishing, reviewing or upgrading their own Codes. It can also be used by other parties, including public interest advocacy organisations, oversight agencies and regulators, to assess the adequacy of Codes proposed or promulgated by other organisations.

The media as a whole needs a general body of principles and standards. On the other hand, there is considerable diversity in the modes of operation of print, broadcast and networked media, and in the extent to which media organisations conduct journalism, advertorialism and voyeurism. There

are also different legal contexts, e.g. for print, for commercial broadcast, and for the two national broadcasters. Hence the text in the Code Template needs to be supplemented by examples that encapsulate accumulated experience in each particular context to which Codes are addressed. Generally, examples need to be based on real-world situations, including those encountered by professionals working in the particular context and relevant cases that have been determined by complaints-handlers. To ensure comprehensiveness, some examples may need to be contrived.

The Code Template is provided in an Appendix to this paper. It comprises the following sections:

- a set of Foundation Principles relating to each of the three phases
- a set of defined terms
- specific standards in each of the three areas

4.2 Trial Application

The Code Template has been used as a basis for assessing a number of Codes that existed in Australia at the end of 2011. The assessments are provided in Clarke (2012b).

Several observations arise from these trials. It proved to be reasonably straightforward to compare the Codes against the Code Template. All of the Codes that were assessed failed against the requirements, many by a wide margin. The least-worst Code was found to be that of News Ltd (News Ltd 2006). It is moderately comprehensive, and noticeably more so than even those of the ABC and the Fairfax broadsheets. The News Ltd advantage may, however, be nominal, because evidence exists that, until late 2011, its existence was not commonly known within the company and processes to apply it were, at best, informal (Simons 2011). The broadcast media Codes (ACMA 2009) satisfy almost none of the requirements.

The assessments showed that the Code Template is in no sense 'privacy-absolutist'. Indeed, a large majority of the privacy-protective features specified in it already appear in one or more of the existing Codes. For example, the Proportionality Principle (A1.4) is evident in four Codes, provisions relating to all aspects of deceit (A3.3) appear in at least two Codes each, care with the publication of sensitive personal data (A4.6) appears in four, and so does a specification for a complaints-handling process (A5.2). In addition, five of the six elements of the public interest are identified in the Code published by the Fairfax broadsheet, 'The Melbourne Age'.

5. Conclusions

An analysis of privacy needs was undertaken, in order to develop a set of Principles and to articulate them into a generic guidance document for the staff of media organisations. When compared against existing Codes, the resulting guidance document is not extremist or outlandish. It is, however, comprehensive, in that it addresses all of the privacy needs rather than the limited sub-set that is found in the mostly *ad hoc* and poorly-developed documents issued by media organisations, industry associations and self-regulatory bodies.

The Code Template is capable of being applied directly, but its real intention is to provide a resource for organisations that develop Codes for media professionals in particular contexts, such as journalists in parliamentary press galleries, cameramen attending crime and accident scenes, and reporters doing live broadcasts from suburban streets. In addition to operational guidance, the Code Template, and especially Codes derived from it, provides a firm basis for the handling of complaints, including determination of whether or not particular media behaviour, and the publication of particular personal information, are justified by an overriding public interest, and proportionate in the circumstances.

The official media need to be seen to be professional and professionally responsible, in order to distinguish their product from that of the amateur media that have been enabled by Internet services. The official media also need to be highly efficient in their activities, due to their shrinking revenue-base. The Code Template offers assistance to media organisations in relation to the projection of their professionalism, and the efficiency of their information-gathering, publishing and complaint-handling functions.

Widespread dissatisfaction with media standards is evident in a variety of countries, most notably the UK and Australia. Adoption of this Code Template would materially assist media organisations in recovering their credibility and forestalling more drastic action that could threaten the media's crucial democratic functions.

Appendix: The Code Template

This Code applies to all activities of all media organisations and their employees and contractors that involve the gathering or publication of personal data about any person.

A1. Foundation Principles

The following are Foundation Principles:

1. Information Gathering:

- 1.1 Personal data must not be sought or gathered, by or for a media organisation, unless a clear justification exists
- 1.2 Personal behaviour must not be observed or recorded, by or for a media organisation, unless a clear justification exists
- 1.3 In either case, the justification must be based on:
 - consent by the person to whom the data relates; or
 - an overriding public interest
- 1.4 The nature of the activities, and their degree of intrusiveness:
 - must reflect the nature and extent of any consent provided; and
 - must be proportionate to the nature and significance of the public interest arising in the particular circumstances

2. Publication:

- 2.1 The identities of individuals, personal data about them, and records of their behaviour must not be published unless a clear justification exists, and any undertaking in relation to anonymity must be respected
- 2.2 The justification must be based on:
 - consent by the person to whom the data relates; or
 - an overriding public interest
- 2.3 The content and style of publication:
 - must reflect the nature and extent of any consent provided;
 - must be relevant to the public interest arising in the particular circumstances; and
 - must be proportionate to the nature and significance of the public interest arising in the particular circumstances
- 2.4 Publication cannot be justified based on prior publication alone, whether the prior publication was by another media organisation or by anyone else, including by the individual concerned

3. Review Processes and Remedies:

- 3.1 Effective complaints-handling processes must be available to people who believe these Principles have not been respected

A2. Definitions

The following Definitions apply:

By '**personal data**' is meant data about a person whose identity is apparent in the circumstances. It is not necessary for the person to be identifiable solely from the data published by the media organisation, if the media organisation was aware, or should reasonably have been aware, that other data is readily available that can be combined with the data it publishes in order to identify the person.

The notion '**the public interest**' comprises six elements, but with the possibility of extension. The six elements are:

1. **Relevance to the Performance of a Public Office.** This encompasses all arms of government, i.e. the parliament, the executive and public service, and the judiciary. The test of relevance is mediated by the significance of the role the person plays. For example, publication of the fact that a Minister's private life has been de-stabilised (e.g. by the death of a family member, marriage break-up, or a child with drug problems) is more likely to be justifiable than the same fact about a junior public servant. Publication of the identities and details of other individuals involved (e.g. the person who died, or the child with drug problems) is also subject to the relevance test, and is far less likely to be justifiable
2. **Relevance to the Performance of a Corporate or Civil Society Function of Significance.** Senior staff of organisations outside the public sector also have significant economic and social impacts. The relevance test needs to reflect the size and impact of the organisation and its actions, the person's role and significance, and the scope of publication
3. **Relevance to the Credibility of Public Statements.** Collection and disclosure of personal data may be justified where the information demonstrates inconsistency between a person's public statements and their personal behaviour, or demonstrates an undisclosed conflict of interest. However, the exposure of hypocrisy involves a proportionality test, based on the scope of the person's influence.
4. **Relevance to Arguably Illegal, Immoral or Seriously Anti-Social Behaviour.** This applies to private individuals as well as people performing functions in organisations. For example, in the case of a small business that fails to provide promised after-sales service, or a neighbour who persistently makes noise late at night, some personal data is likely to be relevant to the story. Collection and disclosure of other personal data will, on the other hand, be very difficult to justify
5. **Relevance to Public Health or Safety.** For example, disclosure of a person's identity may be justified if they are a traveller who recently entered Australia, they are reasonably believed to have been exposed to a serious contagious disease, and their present whereabouts is unknown

6. **Relevance to an Event of Significance.** This is challenging, and requires care. For example, a 'human interest' story such as a report on bush fire-fighter heroics, may well justify the publication of some level of personal data in order to convey the full picture. Similarly, victims of serious crime come into the public eye for one or more short periods of time. Generally, consent is necessary; but where this is impractical and the story warrants publication, the varying sensitivities of individuals must be given careful consideration. This is especially important in the case of people caught up in an emergency or tragedy, who are likely to be particularly vulnerable

Other public interest elements may need to be recognised. However, in the handling of a complaint, any such justification must be argued, and the onus lies on the media organisation to demonstrate that the benefits of information gathering and/or publication outweigh the privacy interest.

For clarity, the expression 'the public interest' does not encompass what the public is interested in, nor what the public may be able to be encouraged to be interested in.

Dependence on the existence of a public interest is not enough. It is necessary that there be '**an overriding public interest**'. By this is meant that the public interest must be of sufficient consequence that it outweighs the person's interest in privacy and any other conflicting interests such as public security and the effective functioning of judicial processes.

When assessing whether the public interest is sufficient to over-ride the privacy interest, and when assessing proportionality, several **additional factors** may need to be considered. The following factors have the effect of reducing the zone of privacy protection and increasing the scope for publication and to some extent also for information gathering:

1. **Self-Published Information.** Where an individual has published personal data about themselves, that person's claim to privacy in respect of that data is significantly reduced. However it is not extinguished. In particular, justification becomes more difficult the longer the elapsed time since the self-publication took place, and the less widely the individual reasonably believed the information to have been made available. Further, to qualify as 'self-published', information must have been published by the individual themselves, not by another individual, even a relative or close friend or associate.
2. **Public Behaviour.** Where data about an individual arises from public behaviour by that individual, the person's claim to privacy in respect of that behaviour is reduced. However, public behaviour does not arise merely because the individual is 'in a public place', because there are many circumstances in which people in a public place have a reasonable expectation of privacy. For example, 'public behaviour' does not include a quiet aside to a companion in a public place.

3. **Attention-Seekers.** In the case of people who are willingly in the public eye (e.g. celebrities and notorieties), consent to collect and publish some kinds of personal data may be reasonably inferred. But this does not constitute 'open slather', and in particular denial of consent must be respected. Moreover, this mitigating factor is not applicable to the attention-seeker's family and companions.

On the other hand, there are factors that increase the zone of privacy protection and reduce the scope for information-gathering and publication, especially:

1. **Vulnerability of the Person** whose privacy is being invaded, and of the people associated with them. Examples include children, the mentally disabled, homeless people, accident victims, the recently bereaved, and individuals associated with a person accused or convicted of a crime

A3. Information-Gathering Behaviour

The following data-gathering activities are breaches of this Code, unless they are justified by an overriding public interest, taking into account relevant factors, and in particular the sensitivity of the context and the degree of discomfort, anger or distress that the performance of the activity may give rise to:

- (1) activities that intrude into the person's private space
- (2) activities that intrude into the person's reasonable expectations of privacy, notwithstanding that the person is in a public space
- (3) activities that involve deception, such as the following:
 - masquerade as another person
 - misrepresentation or subterfuge intended to cause a person to provide information (sometimes called 'pretexting')
 - observation or recording under circumstances in which the person would not reasonably expect observation or recording to be taking place
- (4) activities that exploit vulnerability, naiveté or ignorance about media organisations' collection practices. Particular concern arises in the case of children and people with limited mental capacity or experience
- (5) activities that intrude into the private space of people in sensitive situations, such as accident victims, witnesses to accidents, and the bereaved
- (6) activities that place pressure on a person to behave in a particular manner or to divulge sensitive data, such as conveying the implication

that the person is under a legal or moral obligation, intimidation and excessive persistence

- (7) activities that the person reasonably perceives to constitute trespass, nuisance, obstruction, pursuit, harassment or stalking

A4. Publication

The following publication activities are breaches of the Code, unless they are justified by an overriding public interest, taking into account relevant factors, and in particular the sensitivity of the context and the degree of discomfort, anger or distress that the performance of the activity may give rise to:

- (1) identification of an individual who has not provided consent, and especially of an individual who has requested anonymity or pseudonymity
- (2) identification of an individual who the media organisation does or reasonably should know may be thereby placed at risk, even if they have provided consent
- (3) identification of an individual who is associated with a person accused or convicted of a crime but who is not themselves directly implicated in the relevant activity
- (4) disclosure of personal data that has been provided in confidence, or as background information to assist in understanding the circumstances
- (5) disclosure of personal data that is not relevant to the matter, even if consent has been provided
- (6) disclosure of sensitive personal data, even if the person concerned has given consent, unless that data is not merely relevant, but also demonstrably important, to the matter being reported
- (7) disclosure of sensitive images, audio or video concerning a person, even if the person concerned has given consent, unless that data is not merely relevant, but also demonstrably important, to the matter being reported

A breach of any aspect of this section is not justified merely on the basis that the individual's identity or the personal data had been previously published by a media organisation, or was otherwise in the public domain. Each publication by each media organisation is subject to all of these requirements.

A5. Review Processes and Remedies

Each media organisation must ensure that a person who considers that that media organisation, or an individual performing actions on its behalf, has breached this Code must have available to them:

- 1 a process whereby a complaint can be made to that media organisation, in the justified expectation that the complaint will be considered and responded to
- 2 a process whereby the complaint is considered and responded to by that media organisation
- 3 a process whereby a complaint can be escalated beyond the media organisation
- 4 access to a quasi-judicial organisation with sufficient powers that remedies can be determined that are commensurate with the seriousness of the breach
- 5 access on appeal to judicial review

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