

CAMLA COMMUNICATIONS LAW BULLETIN

Communications & Media Law Association Incorporated

Volume 34, No 1. March 2015

Media Standards: Some Challenges and Opportunities

On 4 February 2015, the Chair of the Australian Press Council, Prof Julian Disney AO provided the following address to the National Press Club.

Thank you for the opportunity to address the Press Club. I will begin with some background about the Press Council and its recent progress. Then I will make some comments about current media standards – concentrating, as the Council does, on print and online media. I will finish by suggesting some priorities for preserving and strengthening those standards, and for preserving and strengthening genuine freedom of speech for all and freedom of the press.

THE PRESS COUNCIL

1. INTRODUCTION

1.1 Establishment and coverage

The Council was established in 1976 by the major journalists' union and association of publishers, fearing that widespread public dissatisfaction with the press was putting its freedom at risk of statutory regulation.

Fairfax did not join for the first six years, saying that the Council could not meet the public's expectations of it. News was very reluctant to join and soon withdrew for almost a decade. The media union, having played such a key founding role, withdrew for almost two decades.

The only major newspaper now outside the Council is *The West Australian*, which withdrew when the other publishers agreed to strengthen the Council. Since then, however, a number of digital-only publishers have joined, including ninemsn, crikey, New Matilda and The New Daily.

1.2 Main roles

The Council's main role has always been to receive complaints about publications and say whether it thought they were justified – the object was described by the inaugural Chair, former High Court justice Sir Frank Kitto, as being:

by constant insistence upon high ethical principles in journalism to raise the general standard of performance in exercising the freedom which the law allows to the Press and by so doing to preserve public regard for that freedom, for the sake of the Press of course, but ultimately and most importantly for the people.

The Council's second role involves drawing up, disseminating and reviewing the Standards of Practice which it applies when deciding

CONTENTS

Media Standards: Some
Challenges and Opportunities

Case Update: Seven Network
Ltd v Commissioner of Taxation

Enhancing Online
Security for Children

Bank Technology Failures:
A New Frontier for
Regulatory Intervention?

Profile: Lynette Houssarini
Senior Lawyer Team Leader,
Disputes & Training at the ABC

Valeska Bloch &
Victoria Wark

Editorial Board:
Niranjan Arasaratnam
Page Henty
David Rolph
Shane Barber
Lesley Hitchens
Matt Vitins
Deborah Healey

Printing & Distribution:
BEE Printmail



Media Standards [CONT'D]

- > whether particular complaints should be upheld. Sometimes this has included retrospective monitoring of a particular publication's compliance with the Standards.

The Council's third role is making public statements on policy issues, especially about freedom of speech, public access to information and freedom of the press. A recent and very important example of this work was the Council's intensive, two-year campaign against proposals that a statutory authority be set up to regulate the press.

1.3 Self-regulation?

The Council system is often described as self-regulation, but neither "self" nor "regulation" is really accurate.

a potential benefit of digital publishing is to compensate substantially for Australia's unusual lack of diversity in newspaper ownership

First, its constitution establishes it as an independent body. The publishers usually provide all the funding, but they appoint less than 40% of the governing body (which then appoints all the other members - including the Chair, public members and independent journalists - as well as setting the Standards of Practice). They appoint none of the Adjudication Panel members, and the majority of those members must be from outside the industry.

Second, it cannot really be called a regulator - let alone a censor as is sometimes alleged. It cannot enforce its decisions except to require that they be published. Its power, like that of most Ombudsmen, is merely to express a view. Unlike the Independent Press Standards Organisation (*IPSO*) - its new industry-established counterpart in the UK - it cannot require a correction to be published or impose a fine.

2. STRENGTHENING EFFECTIVENESS

In 2009, the publishers sharply reduced the Council's already modest funding and range of activities. Shortly afterwards I was invited to join the Council as Chair. An extensive program was developed to strengthen its effectiveness and the publishers agreed to restore the lost funding.

A year later, facing strong criticism from the Finkelstein Inquiry into media regulation, the publishers agreed to further substantial funding increase for the Council and to setting future funding levels at least three years in advance. They also agreed that withdrawal from the Council should be subject to four years notice, and they should no longer be repre-

sented on the Adjudication Panel for deciding complaints.

The design and implementation of the Council's strengthening program has been helped by consultations involving more than one hundred community leaders, editors and journalists. The News Corp representative on the Council played a key role in securing support from other publishers.

I shall mention briefly some of the progress which has been achieved.

2.1 Complaints handling

Publications must now include in each issue a standard notice about the Council's complaints-handling role. This partly explains why the number of complaints has risen by over 50%. Some complaints are made by a number of separate complainants and during the last six months of 2014 the total number of new complainants exceeded 3000.

Complaints-handling processes are clearer, fairer and more rigorous. About 5-10% lead to an adjudication; another 15-20% are remedied by agreement; and in a number of other cases a new Letter of Advice process is being applied. The letter may, for example, advise the publication that, although a particular complaint is not being referred to the Adjudication Panel, some of the publication's justifications for the material in question are borderline or invalid.

Adjudications are now made by a Panel of 5-7 members, not by unwieldy discussions amongst all 23 Council members. They are published prominently - complying with specific Council requirements about the timing, page range and positioning. Links to them are required on the publisher's home page and permanently on the digital version of the original material. These changes effectively addressed what had been a key focus of public criticism.

2.2 Standards of Practice

After lengthy consultation, the Council unanimously agreed last year on a revised set of the General Principles by which it assesses complaints. The new version is much clearer, briefer and more internally consistent. It provides realistic benchmarks of acceptable practice, rather than utopian aspirations.

How the General Principles apply in particular areas is being fleshed out in a series of Specific Standards. The first two focused on covering suicides and on contacting patients in hospital. Work is now being undertaken on aspects of digital publishing and on conflicts of interests, especially arising from proliferating practices like 'content marketing' or 'native advertising.'

2.3 Policy statements

The Council's recent policy work has been dominated by the public inquiries and debate about media regulation, including possible replacement of the Council by a new statutory regulator. Its public submissions and evidence to the inquiries, as well as the credibility of its plans to become more effective, were widely recognised as crucial to the Council's survival.

MEDIA STANDARDS IN THE CURRENT ENVIRONMENT

I shall begin with some brief comments about impacts of digital publishing.

3. IMPACTS OF DIGITAL PUBLISHING

3.1 Some benefits

Writers and readers have much faster and cheaper access to a broader range of information and opinion. Space is often less constrained than in newspapers; material can be corrected and updated more readily; and links improve readers' access to related material. New voices and methods have been introduced, including through readers' comment streams. Social media has enabled people to convey their knowledge and views more widely than around the barbecue.

Concern has long been expressed about lack of diversity in ownership of mainstream Australian newspapers. In 1986, the Chair of the Council, former Supreme Court Justice Hal Wootten, resigned when the Council 'decided' by a tied vote not to express concern or take any other action about News Limited's impending takeover of the Herald and Weekly Times group. He described the takeover as probably 'the greatest threat to the freedom of the press in the [then ten-year] life of the Council..

Whether or not one shares that view, a potential benefit of digital publishing is to compensate substantially for Australia's unusual lack of diversity in newspaper ownership. But this will require some digital-only publishers achieving much wider readership, and much greater influence on major newspapers and broadcasters. Indeed, the current position may worsen if Fairfax Media becomes less involved in newspaper publishing.

Some small websites and blogs may become more influential and sustainable through cooperation. For example, they could join to fight against their material being re-published instantaneously by competitors without payment or even acknowledgment. They could perhaps establish a joint portal and subscription as an additional way of accessing their websites and blogs.

3.2 Some problems

Digital publishing has tended to increase the competitive pressures to publish without adequately checking for accuracy and without giving reasonable opportunities for prior correction or comment by people who are closely affected. Yet "getting it right" before publishing is even more important than in pre-digital days, especially as search engines make material much more readily and permanently accessible.

While digital material can be readily corrected, many readers are unlikely to revisit an article to see whether any corrections have been made. Also, they may have read the article when re-published by another outlet that does not notice or post the correction, and is difficult or impossible to contact and persuade to do so.

Even if the original material was accurate, its permanent availability through search engines may cause unjustified damage. For example, the laws allowing people not to disclose some long-past convictions are ineffective if the convictions remain on search engines. Also search results often list reports of an allegation much more prominently than they list reports of a subsequent

denial or dismissal (if reported at all).

The speed and lack of constraint of social media often strengthens the pressure, or perceived justification, for print and digital publishers to depart from traditional practices like withholding names of accident victims until their relatives know and not publishing close-up photographs of people in distress.

It is important to emphasise, however, that while digital competition has damaged standards of accuracy, fairness and privacy in some ways, the quality of many print and online articles has benefited greatly from the wider and faster access to information and opinions which digital media has made possible.

4. GENERAL STANDARDS OF PRACTICE

4.1 A lot of excellence

There is a lot to like in modern print and online media. Every day I admire material that is especially perceptive, courageous, fair, entertaining or challenging. Many editors and journalists make great use of digital publishing while also becoming more aware of the dangers it can present. Many work very hard to maintain quality in severely depleted newsrooms, often against less scrupulous competition.

From the vast array of examples of the importance of press scrutiny, one could just mention almost at random the Australian Wheat Board, the detention of Dr Hanif, the exploits of Eddie Obeid, the Catholic Church, the Health Services Union and the Commonwealth Bank.

Some small websites and blogs may become more influential and sustainable through cooperation. They could join to fight against their material being re-published instantaneously without payment or even acknowledgment

Nevertheless, as in most if not all areas of human endeavour, some significant weaknesses need to be recognised and addressed.

4.2 Serious inaccuracy and misrepresentation

Indisputable errors or misrepresentations are too common. A perceived need to beat competitors does not justify inadequate checking of facts, especially because, as I have mentioned, it is often impossible to fully rectify the impact of errors – even if corrected online within minutes.

Many of the worst misrepresentations occur on prominent pages, often in headlines or opening paragraphs. Sometimes they may reflect editors' commercial or political concerns rather than the perspectives of the relevant journalist and article.



Media Standards [CONT'D]

- News reports are too often distorted by writers' opinions, especially through the use of loaded language (is a person a "freedom fighter" or a "terrorist"?) or by omission of key facts. Some prominent columnists can adeptly express strong opinions in ways which are highly likely to be read as indisputable facts yet are indisputably inaccurate or misleading.

while digital competition has damaged standards of accuracy, fairness and privacy in some ways, the quality of many print and online articles has benefited greatly from the wider and faster access to information and opinions which digital media has made possible

Some publishers are very reluctant to correct significant errors promptly, clearly and prominently. Digital-only publishers may tend to be more willing to do so than newspapers. But the rush to publish first, even if by only a few seconds, can make them more prone to error.

4.3 Unfairness and undue harm

Unfairness arises too often from failing to contact a person who is going to be strongly criticised in an article, or not publishing their response in a reasonable and timely manner. Publishing a later letter does not necessarily provide sufficient opportunity for them to correct or comment on prominent and seriously damaging articles

– especially if the letter is unreasonably edited or obscurely positioned.

The Council has long expressed concern about the unfairness of headlines and opening sentences which strongly assert facts or opinions that are not supported by the accompanying text but are likely to be left as the lasting impressions in the minds of many readers. This practice remains too common – indeed, it may have become more frequent in some publications.

The Council does not expect all articles or issues of a publication to be entirely fair or balanced, especially if different perspectives are also given reasonable exposure at some other time. That is reflected in the fact that the overwhelming majority of complaints to the Council on those grounds are not upheld.

From its earliest days, the Council emphasised what it called:

the duty, which must be accepted if freedom of the Press is to retain the support of the public, to respect the right of the

general reader to be informed of the arguments on each side of a public debate upon which a paper has expressed its own views.

The current Standard of Practice says that publications must take reasonable steps to ensure factual material (which includes reporting the opinions of others) is presented with reasonable fairness and balance. This does not preclude particular publications, or individual journalists and columnists, from running vigorous and sustained campaigns. Some recent examples have been powerful and effective without being misleading or grossly unfair. But there have also been instances where distorted reporting of facts and opinions has gone beyond acceptable limits.

The Council gives such weight to the public interest in free speech that it rarely upholds complaints about offensive material, unless it is likely to cause substantial distress, prejudice, or risks to health or safety. This does not mean the Council necessarily regarded the material in question as being fair or conducive to genuine democracy, whether it was presented in text or graphic form. Indeed, the Council has been concerned from its inception that this kind of material can significantly weaken public support for press freedom.

4.4 Unjustified intrusions on privacy

Digital publishing has increased the opportunities and pressures to intrude on reasonable expectations of privacy. This includes widely re-publishing social media material that clearly was not intended to be used in the different context or had been posted by someone else without due regard for the person's privacy and safety.

Some social media providers contribute to these problems with privacy settings that are complex or largely ineffective. But newspapers and other re-publishers also have responsibilities not to make intrusive use of the material, especially if a deceased person or vulnerable people like children or grieving relatives are involved.

There is a common belief in the media that if a photograph is taken in or from a place to which the public has access, there is necessarily no breach of privacy. But the true test is whether the relevant place and activity meant that the person had a reasonable expectation of privacy from the intrusion or subsequent publication (for example, perhaps, when visiting a gravesite). The same applies to comments that have been surreptitiously overheard or recorded.

It must be strongly emphasised, however, that some intrusions are justifiable in the public interest (though not merely because the public is interested). This can apply, for example, to intrusions which help to expose serious malpractice, whether in government, business or elsewhere. Indeed, some intrusions may be ethically justifiable on this ground even though they are illegal.

4.5 Some possible trends

Many experienced journalists and some editors have told me that standards of accuracy and fairness are generally lower than a couple of decades ago. One

said, with both sadness and anger, that at the newspaper in which he has a senior position, the editorial approach has changed from "go and find out what the story is" to being "go and find a source who will say this is the story".

Whether or not these assessments are entirely correct, misrepresentations, serious unfairness, personal abuse and failures to publish adequate corrections or responses seem to have become more common in some quarters in recent years.

THE WAY AHEAD

I come now to the final part of my remarks today, with some suggestions about the way ahead for the Press Council, and some comments about media standards, free speech and press freedom.

5. THE PRESS COUNCIL

Despite recent progress, much work remains if the Press Council is to fulfil its responsibilities adequately. I shall briefly suggest some key priorities for action.

5.1 Promulgating and monitoring Standards of Practice

The new General Principles and Specific Standards - approved by all Council members - need to become well-known across the industry, and the series of Specific Standards needs to be developed further.

New information and training materials about these Standards of Practice are being prepared, and publishers will be asked to cooperate by posting them on their intranets and inviting Council representatives to internal training and refresher sessions.

An already agreed priority for the Council is to regularly monitor the extent to which the Standards are being observed. It commissioned independent monitoring a decade or so ago, looking retrospectively at coverage of particular events and topics.

The purpose of this strategy is not to adjudicate on particular material, but rather to assess whether the Standards of Practice need to be amended and/or further action taken to emphasise the need to comply with them. The strategy was re-endorsed by the Council in its submission to the Finkelstein inquiry (and approved in the News Corp submission). It needs now to be taken forward.

5.2 Handling complaints promptly and informally

Further efforts need to be made to fast-track the Council's handling of complaints where delay can greatly weaken the prospects of an appropriate remedy or, on the other hand, greatly disadvantage a publication.

Some recent changes in structures and processes have laid the foundation for improvements. But they have been hampered by the Council's own transitional delays as well as by excessive legalism and obstruction from some publications and complainants.

Further changes seem necessary to emphasise that the Council is more like an Ombudsman than a tribunal. After all, like an Ombudsman, it can only express an opinion, not enforce compliance. This should not lead, however, to the Council's opinions being expressed less forthrightly. Indeed, they may already have become less forthright than in some of its earliest years.

5.3 Considering complaints by general readers

The Council needs to continue strengthening the effectiveness of its responses to complaints and concerns expressed by people who are not directly affected by the material in question (sometimes misleadingly called "third party complaints").

All publisher members of the Council hold themselves out to their readers as complying with its Standards, and the Council has always said that readers can ask it to determine whether the Standards have been observed in a particular case. Last year it made significant changes aimed at streamlining the handling of these matters, including preventing them from straying beyond consideration of possible breaches of its Standards of Practice.

Very recently, as in earlier times, the Council has firmly rejected attempts to impose unreasonable constraints on its handling of these complaints. It is essential that the Council continues to do so and to refute recent misrepresentations of its improved processes.

5.4 Considering possible breaches without a complaint

The Council's long experience indisputably demonstrates many reasons why complaints are not made to it despite there being a very clear, or at least highly probable, breach of its Standards.

Even where a person has been directly and badly affected by the material in question, they may believe - often on entirely reasonable grounds - that complaining will lead to retribution or to further airing of the objectionable material.

Even if they wish to pursue a complaint, they may be unable to do so because of financial or work constraints, limited education or confidence, serious illness, or deep grief from loss of a family member in the incident being reported upon.

Some people may have benefited from the publication of inaccurate or unfair material, and rather than bring a complaint may prefer that the material is left unexamined.

In many other cases, the material may not directly affect any particular person but nevertheless be of considerable significance to many readers, some of whose subsequent actions may be affected by it.

Further changes seem necessary to emphasise that the Council is more like an Ombudsman than a tribunal. After all, like an Ombudsman, it can only express an opinion, not enforce compliance



Media Standards [CONT'D]

- > These problems partially explain why an eminent editor, David Bowman, reflected on the first ten years of the Council that its record shows:

a good many peccadilloes [have] become the subject of public complaint against the press while nearly all the big crimes go unremarked. This confirms that the [C]ouncil may well try to make more use of its right to lay complaints itself. One would hope that a series of exemplary cases would result.

Consideration will also need to be given to further interaction between the Council and the Advertising Standards Board especially as digital competition is further blurring the line between advertising and the kind of material which falls within the Council's ambit.

The Council decided a few years before I became Chair that it would investigate some possible breaches of its Standards even if it had not yet received a formal complaint. The Council now needs to implement that decision more effectively.

It should also be willing to consider matters where there has been no complaint but it is especially important to clarify publicly whether certain material exemplifies a serious breach of a particular Standard of Practice. This approach should be used sparingly and, where feasible, after consulting any person who is directly affected by the material in question.

Some special safeguards should apply, as they do to a somewhat analogous process of the broadcasting regulator, the Australian Communications and Media Authority (ACMA). Also, it would be important to ensure strict observance of the general Council practice that people who refer a matter for adjudication are not involved in the adjudication itself.

This slightly expanded approach would still be much narrower than the UK industry has authorised for its new press council, IPSO, involving extensive and systemic investigations of broad aspects of a publication's conduct, rather than only of a particular instance.

But unless it is willing to move cautiously in this direction, the Council's public explanation and application of its Standards of Practice will remain heavily dependent on the happenstance of appropriate complaints being made on key issues – and its ability to promote good media standards on issues of considerable importance will remain seriously deficient.

5.5 Some other priorities

A few other priorities for Council action can be suggested briefly:

- recruit more digital-only publishers (perhaps through a collective membership, as currently applies to country and suburban papers);
- implement the Council's earlier in-principle decision to establish an independent process for adjudicating on complaints about coverage of the Council itself;
- develop further the regular program of Round Table consultations and other meetings with community leaders and front-line journalists across Australia;
- prescribe and monitor benchmarks for publications' own complaints-handling processes, including analysis of the statistics that publishers have undertaken to provide to the Council each quarter.

The Council will also need to keep at least a watching brief on the continuing trend towards convergence between print, digital and broadcast media. Its detailed proposals for a new Independent Standards Organisation to take over the Council's role and those of bodies such as ACMA were broadly endorsed by the official Convergence Review in 2012. The proposed body was to be sufficiently independent of both government and the media to command public confidence.

Consideration will also need to be given to further interaction between the Council and the Advertising Standards Board especially as digital competition is further blurring the line between advertising and the kind of material which falls within the Council's ambit.

5.6 Independence and integrity

Above all, the Council must not be diverted from meeting the responsibilities that it, including its major publisher members, has solemnly assured the public it will fulfil. If honouring these commitments meets fierce attack from a powerful voice or voices in the industry, the Council will need to continue standing firm.

Potential estrangement or loss of a dissident publisher, no matter how powerful, cannot justify deceiving the public and disadvantaging the other publishers who will continue to respect Council processes and decisions, even when not agreeing with them. Moreover, the Council would retain the option of considering complaints against non-members – the failings of which, as Sir Frank Kitto pointed out, can endanger the general freedom of the press.

6. FREEDOM OF THE PRESS AND FREEDOM OF SPEECH

Finally, some brief comments on freedom of the press and its relationship with freedom of speech.

6.1 Press freedom

The Council's main and unique contribution to the cause of press freedom is its core work of developing standards of media practice and responding to

complaints about possible breaches. This role necessarily consumes the dominant share of the Council's resources. So it is not usually appropriate or feasible to become heavily involved in particular campaigns to which major media outlets or other powerful organisations can devote much greater resources and influence.

The Council may be able to contribute on some occasions, provided that its resources are not diverted by having to handle some publications' unreasonable obstruction and misrepresentation. In that eventuality, prime contenders for its attention might include the major intrusions on press freedom caused by government restraints on coverage of security, police and so-called "border control" activities.

There are, however, some other areas in which substantially chilling effects on press freedom may occur but which are getting much less public attention. They include:

- a government repeatedly giving a closely-aligned publication advance access to key information and policies, ahead of other media and the general public;
- a government leaking details of an impending announcement to a particular publication on condition that the initial report does not include prior comment from anyone else;
- a major non-media organisation recruiting its own staff journalists and giving them sole or privileged access to key information and facilities to report on the organisation's activities;
- a publication's financial difficulties making it especially vulnerable to demands for favourable coverage in return for advertising or other support.

It is important that the Council's statements on issues of press freedom avoid seeming to be docile echoes of publishers' views rather than fairly conveying the views of its diverse members. This independent credibility was especially important in resisting the recent proposals for a new statutory regulator.

6.2 Freedom of speech

A community does not enjoy genuine freedom of speech unless the freedom is realistically exercisable by as broad a range of people as possible. The freedom should not be largely the preserve of powerful interests in government, business or the ranks of publishers. These powerful interests also should not use their freedom of speech to gravely damage - even destroy - other people's freedom of speech.

It is especially important that freedom of the press is not abused in this way. For example, a publication can gravely damage or deny other people's freedom of speech by:

- repeatedly and seriously misrepresenting what a person has said - especially if it also denies the person a reasonable opportunity to correct the misrepresentation by a letter to the editor or otherwise; or
- repeatedly abusing or intimidating a person with whose views it disagrees, and repeatedly allowing - perhaps encouraging - its letters and comments sections to be used at length for those purposes; or
- breaching without good cause the confidentiality of a person who wished to exercise their freedom of speech in private, not in public; or

- publishing seriously false or misleading information on the basis of which some of its readers exercise their own freedom of speech to unwittingly express views they would not have held if accurately informed.

If a publication repeatedly and flagrantly engages in these kinds of practices, can it credibly portray itself as a supporter of free speech? Or is it only a supporter of free speech for people with whom it agrees or from whom it seeks support?

Indeed, can a Press Council credibly portray itself in that way if it quietly acquiesces in the publication's practices? And should other publications turn a blind eye?

Some of the greatest obstacles to achieving and sustaining genuine freedoms are extremism and hypocrisy by people who prominently propound them and have privileged opportunities to exercise them. This applies especially to freedom of speech and of the press, which are far too important to be put at risk in this way.

The Council's main and unique contribution to the cause of press freedom is its core work of developing standards of media practice and responding to complaints about possible breaches

PROFESSOR JULIAN DISNEY AO has been the Chair of the Press Council since December 2009. He is a Professor of Law at the University of New South Wales, founder and National Chair of Anti-Poverty Week, and Chair of the NSW Energy and Water Ombudsman. He is also a member of the Board of Governors of the Committee for the Economic Development of Australia, and of the Asialink Advisory Council. Prof Disney has held a number of significant roles including with the Sydney Welfare Rights Centre as President of the Australian Council of Social Service, President of the International Council on Social Welfare and as a Law Reform Commissioner in New South Wales for seven years and a member of the Australian Government's Economic Planning Advisory Council. A full biography of Professor Disney is available at http://www.presscouncil.org.au/uploads/52321/ufiles/Chair_of_the_Council_updated_22_September_2014.pdf
