

11-30-2005

The privacy mandala: Towards a newsroom checklist for ethical decisions

Mark Pearson

Bond University, m.pearson@griffith.edu.au

Follow this and additional works at: http://epublications.bond.edu.au/hss_pubs



Part of the [Film and Media Studies Commons](#)

Recommended Citation

Mark Pearson. (2005) "The privacy mandala: Towards a newsroom checklist for ethical decisions".Nov. 2005.

http://epublications.bond.edu.au/hss_pubs/249

The Privacy Mandala: Towards a newsroom checklist for ethical decisions

Mark Pearson, Bond University

Paper presented to the Journalism Education Association Conference, Gold Coast, November 30, 2005.

Abstract

Regulators and the courts are increasing privacy constraints upon the news media. Journalists and editors are being called to account for their decisions which intrude into the private lives of citizens under the pretext of being in the so-called “public interest”. Judges and self-regulatory bodies are demanding news organizations explain their internal processes for decisions which have legal and ethical consequences. This paper tracks the developments in privacy law and ethical regulation and suggests a schema journalists might use when weighing up the privacy elements of a news item. As one stage in a larger study of privacy, it focuses primarily upon the codes of practice of six main media self-regulation bodies and identifies the key elements in the privacy-journalism domain. It then draws upon them to propose a decision-making tool for newsroom use, labeled the “Privacy Mandala”. Finally, it suggests a filter by which editors and news directors can view the commercial criteria they will inevitably be motivated to consider as part of the process.

Note: Background sections of this paper have been delivered previously as part of presentations to Media Law Advocates Training Programme, at Oxford University in July 2005 and the Pacific Area Newspaper Publishers Association annual conference in Cairns in August 2005. The author gratefully acknowledges funding from the Australian Press Council and Bond University and the work of research assistant Morgan O’Brien-Powell for this project.

The privacy debate has advanced markedly over the past few decades, to the point where news reportage is being dangerously inhibited. The Australian Press Council has generously funded research we are conducting at Bond University’s Centre for New

Media Research and Education, tracking that rise of privacy at the expense of press freedom. This paper traces the scale of that development before distilling key principles from the main self-regulatory codes and then foreshadowing a new schema journalists might use when weighing up the privacy elements of a news item.

The Background

Just over 100 years ago there was no notion of a formal “right to privacy”. Other laws had evolved over centuries to protect the individual’s space and reputation in a variety of ways, including defamation, copyright, trespass, nuisance and confidentiality. Then, in a landmark *Harvard Law Review* article in December 1890, the great US jurist Samuel D. Warren and future Supreme Court Justice Louis D. Brandeis devised a new right to privacy in an article by that very name (Warren 1890). They used the excesses of newspapers of the time as their excuse. Their words might well be exactly those spoken by critics of celebrity gossip mags today. They wrote: “The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery.” Warren had been spurred to write the seminal piece after a daily newspaper had published the guest list of a high society dinner party his family had hosted at his Boston mansion which he saw as a gross invasion of his privacy.

The Americans proceeded to develop their new right to privacy over the ensuing century, but that wonderful document – the First Amendment to the US Constitution – limited its impact on the media in that country, rendering the citizen’s right to privacy as merely a shield against overly intrusive government interference.

For several decades the new right failed to take hold in the UK or Australia. Our strong tradition of press freedom, despite the lack of a First Amendment equivalent, restricted privacy to the realm of those other ancient actions.

Even the law of nuisance was restricted. Our High Court decided in 1937 that a radio broadcaster who had built a platform outside the Victoria Park race track to conduct its own broadcasts of the races was not infringing the rights of the course owner. The 1937

decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) [58 CLR 479](#) was for several decades viewed as our High Court's disapproval of the development of a right to privacy. There, Latham CJ refused to extend the law of nuisance to allow the owner of a racecourse to prevent radio broadcasts of events from a platform on neighbouring land.

The UK tightened its self-regulatory systems, and its concerns over privacy, after the Calcutt Inquiry in 1989 told the press they were "drinking at the last chance saloon". The new Press Complaints Commission was established soon after.

However, a major turning point came in Britain and Europe with the death of Princess Diana in 1997 after a car chase involving paparazzi. Court decisions since then have moved towards a right to privacy. In 1998 the UK passed its *Human Rights Act* which incorporated the *European Convention on Human Rights* into British law, including a right to privacy (Article 8) and a right to free expression (Article 10). European countries already had a strong jurisprudence in privacy. Germany even has a right over pictures of oneself, leaving it open for citizens to sue if they do not like the way their image has been used in a publication. In France, photographs can only be published with the consent of the subject.

Meanwhile, the UK's Press Complaints Commission has become so concerned with demonstrating its concern for individuals' privacy that it might well be labelled the "Political Correctness Commission". In 1998 it found against *Hello!* magazine which featured a photograph of former Beatle Sir Paul McCartney and his children inside the very public Notre Dame Cathedral soon after the death of his wife Linda (PCC Decision 30-5-1998: www.pcc.org.uk). More worrying, in 2002 it upheld a complaint against a regional newspaper which did not ask the permission of a man it photographed dining in a restaurant and published as part of an advertorial (PCC Decision 22/2/02: www.pcc.org.uk). It made editors question whether mere bad manners should constitute an ethical or legal infringement.

Editors no doubt find disturbing the extent to which the courts have begun to reward celebrities who feel their privacy has been infringed. In the UK the courts have held back from developing a new tort of privacy, but have chosen to bend and stretch the ancient

action of breach of confidence to compensate. Michael Douglas and Catherine Zeta-Jones convinced the High Court that *Hello!* Magazine had breached their confidence by publishing unauthorized photographs of their wedding taken by a paparazzi who posed as a guest: *Douglas and Others v Hello! Ltd* [2001] QB 967; [2001] 2 All ER 289. Last year the House of Lords found against the Mirror for publishing a photo of supermodel Naomi Campbell leaving a drug addiction clinic because, despite being taken in a public place, it revealed confidential information about her medical condition: *Campbell v. MGN Limited* [2004] UKHL 22. And the European Court of Human Rights went a step further by finding that Princess Caroline of Monaco had a right to privacy when she was photographed with a long lens while holidaying on a public beach: *Case of Von Hannover v Germany* (Application No. 59320/00) 24 June 2004. Such photographs did not contribute to public debate on the role of the princess, the court ruled.

While our own courts are not locked into privacy obligations through international agreements like the British and Europeans, they have still looked to the UK for precedent. As in Britain, plaintiffs in Australia have frequently turned to breach of confidence claims to provide redress. There were indications as early as the 1980s that a privacy tort might evolve in Australia. In *Church of Scientology v Woodward* (1982) [154 CLR 25](#), 68 Murphy J identified what he called "unjustified invasion of privacy" as a developing tort. However, more recently prominent actors and footballers failed in attempts to have such an action recognised: *Cruise and Kidman v Southdown Press Pty Ltd* (1993) 26 IPR 125; *Australian Consolidated Press Ltd v Ettingshausen* (Unreported, CA (NSW), BC9302147, 13 October 1993).

The Lenah Game Meats Case: *Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd* [2001] HCA 63 (15 November 2001) represented the turning point in the development, with the High Court refusing to rule out a potential privacy tort. It involved substantial disagreement among the High Court justices and a reluctance to progress a privacy tort in a case where the facts and pleadings did not provide a comfortable fit. Lenah was a game meat slaughtering, processing and export company. An unknown person or persons trespassed into its abattoir and planted secret cameras which recorded the killing of cute and cuddly brush tail possums for export. There was nothing illegal about the company's operations and it followed best practice standards in its processes.

The Australian Broadcasting Corporation came into possession of the footage and was about to broadcast it as part of a current affairs program when Lenah sought and obtained an interim injunction to prevent them broadcasting it. The majority of the High Court discharged the injunction on the grounds the lower court did not have authority in equity to grant it, but in the process raised the prospect of a future privacy tort. Gleeson CJ and Callinan J. favoured the English approach of extending the breach of confidence action to apply to the filming of private activities. All except Callinan J were unwilling to entertain the notion of it granting privacy rights to a corporation. Significantly, three of the justices spoke against a 70 year precedent in saying the *Victoria Park* case would not prevent a future court from developing a privacy tort, partly because modern conditions demanded a different outcome.

In 2003, a Queensland District Court judge ruled in the case of *Grosse v Purvis* [2003] QDC 151 (16 June 2003) there was indeed a right to privacy when he held 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. This was an inferior court decision, and is yet to be seen whether superior courts will confirm this line of thinking. Several other causes of action were available to Ms Grosse in that case so the judge's initiation of the tort is seen by many as quite cavalier.

Earlier this year (2005) Nicole Kidman won a temporary restraining order against two magazine photographers who were camped outside her property and following her in a vehicle (Pearson 2005). The NZ Court of Appeal turned its attention to the matter in 2004 in *Hosking & Hosking v Simon Runtig & Anor* [2004] NZCA 34 (25 March 2004). It decided by a 3-2 majority to move ahead with a privacy tort, although the minority were extremely vocal in their criticism of the development and launched a strong defence of press freedom. The NZ test, as outlined by Gault, P at para 117 is:

Two fundamental requirements for a successful claim for interference with privacy:

1. The existence of facts in respect of which there is a reasonable expectation of privacy;
and
2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

The Hoskings were media personalities who had adopted twins and later separated. They asked for their privacy, but a magazine photographer snapped the mother walking the twins in their stroller in a public place. The court decided this fact scenario did not meet its new test of privacy invasion, but of course had to develop the tort in order to rule out this scenario. The work was done.

The most worrying outcome of all these privacy-related actions is that the legal system (and most of society, for that matter) does not distinguish between the very different media functions of Fourth Estate scrutiny and trashy gossip. Every judicial precedent resulting from a paparazzi prank can make it that much harder for the responsible press to perform its watchdog role which great historical figures like John Stuart Mill, John Milton and Thomas Jefferson had envisaged.

Data protection legislation in Australia has developed in a similar way to many other jurisdictions. The Privacy Act 1988 (Cth) (amended by the Privacy Amendment (Private Sector) Act 2000 (Cth)) confers a degree of enforcement power upon the Federal Court and the Federal Magistrates Court but falls well short of conferring a statutory tort of privacy invasion because it focuses mainly on private information held by government departments and large corporations and it features a news media exemption.

I have just traveled through Europe and the US interviewing editors, academics and lawyers about these issues, and nowhere had the issue moved further to the disadvantage of the press than in Malta, where the Data Protection Act requires the media to seek the permission of anyone, even in the background of a photograph, before publishing it. That rules out photographs of news events in public places, a sea of faces at a sports event, and even the artistic portrait of people relaxing in a park. Thankfully, the government in that country has not yet chosen to act against media organizations for breaching this law, but it demonstrates the extremes to which more repressive regimes could take this new right to privacy, all the while looking to the examples of the courts and the parliaments of western democratic nations for offering them this new gift of censorship.

Newsroom strategies

While the courts have been active in considering privacy actions against the media in recent years, many more privacy cases have been dealt with by self-regulatory bodies, particularly the Australian Press Council. As well as the Press Council, a further five Australian media bodies feature privacy guidelines as part of their ethical codes.

Whether or not a court or a self-regulatory body ultimately reviews a journalist's decisions in privacy matters, reporters and news directors are frequently called to account for such decisions, sometimes in other media such as talkback radio programs or on the ABC's Media Watch program, and often simply by their own readers, viewers or listeners as they discuss the material they are accessing. Journalists would be better equipped to engage in such debate, answer such challenges and defend their decisions if they had more effective and transparent processes in place when handling an ethical decision in the newsroom. There is no doubt the daily editorial conferences in major news organizations sometimes feature ethical discussion over whether a particular photograph should be used and whether certain facts about a person should be revealed. A full anthropological study of such meetings might give an insight into the processes and language used when discussing such decisions. This author's experience of such meetings is that they would benefit from some basic tools to help guide discussion and ensure all bases are covered when reaching a privacy-related news decision. This paper sets out to offer such a tool.

Many, notably, Sheridan-Burns (Sheridan Burns 1996), Allen and Miller (Allen and Miller 1997, August) and Pearson (Pearson 2000) and (Pearson 2003) have written about the importance of reflective practice in the newsroom. Richards (Richards 2005) has linked classical ethical approaches to individual autonomy in trying to navigate the complexity of privacy as a journalism issue, while Hirst and Patching (Hirst 2005) have used the metaphor of "ethical fault lines" in examining prickly questions like the issue of privacy.

The different legal approaches to privacy noted above are indicative of the varying cultural approaches to the notion of personal privacy and the different weightings accorded to free expression as a competing value. The topic is a complex one, as evidenced by the closeness of decisions of the highest courts and regulatory bodies of

Europe, the UK, Australia and New Zealand when trying to adjudicate cases where the media have infringed upon individuals' privacy.

Those very courts have looked to the internal mechanisms of news organizations and the codes of their self-regulatory bodies in trying to determine whether credible and professional decision-making processes have been followed in deciding whether to publish ethically dubious material. In fact, in the UK the courts are now required to look to "any relevant privacy code" for guidance in balancing public interest vs. privacy disputes in their determinations under s.12 of the Human Rights Act 1998.

It is difficult in the cut and thrust of pressing deadlines for editors and journalist to adopt comprehensive and detailed checking processes. Sometimes there are just minutes available for key ethical decisions about whether to use a photograph, to crop it in a certain way, or to include a particular paragraph in a story. That said, there are codes of practice we can look to for general guidance in such matters. They include the MEAA (AJA) Code of Ethics (MEAA 1999), the Australian Press Council's Statement of Principles (APC 2005) and its accompanying Privacy Standards (APC 2005b), the codes of the various broadcasting co-regulatory bodies, and various in-house codes adopted by major news organizations.

While all these are useful documents, they are either sparse in their directions or are not worded in a form which would be readily accessible for working journalists and therefore unlikely to be a reference point for editorial conferences or regulatory hearings where such matters are under debate. Further, many media organizations appear to be working under several sets of guidelines simultaneously. All operate with reference to the MEAA (AJA) Code of Ethics and at least their own industry's code of practice. Our research team has taken the six main self-regulatory codes and developed from them a more useful schema of situations, actions, and individuals which might in turn lead into a workable device for journalists (reporters, editors, news directors, and photographers) and regulatory bodies and perhaps even courts seeking to weigh up the competing privacy-public interest elements of a story. It aims to help journalists cover the main avenues of consideration when reaching their own decisions and, in turn, offer them a tool for

explaining their decisions logically and systematically. We have named it the “Privacy Mandala”.

Methodology

While some basic quantitative data was available, such as the number of privacy-related decisions made by regulatory organizations in a given year, the nature of the material was essentially textual (written self-regulatory codes of practice). Given that the primary aim of the study was to develop a more effective mechanism for dealing with privacy decisions, the following steps were taken:

1. Key regulatory bodies’ codes were examined for privacy criteria.
2. Those criteria were distilled into key categories of consideration.
3. A model was developed to help guide journalists in their ethical decision-making on privacy matters.

The codes: key elements of the guidelines

As a first step in such a process, we summarized the key privacy elements of the various industry codes of practice and major Australian and New Zealand court decisions in the area. Industry codes included the MEAA (AJA) Code of Ethics [MEAA] (MEAA 1999); the Australian Press Council’s Statement of Principles and Privacy Standards [APC] (APC 2005), (APC 2005b); Free TV Australia’s Code of Practice [FTV] (FTV 2005); Commercial Radio Australia’s Code of Practice [CRA] (CRA 2005); the Australian Broadcasting Corporation’s Editorial Policy and its Charter of Editorial Practice [ABC] (ABC 2005); and the Special Broadcasting Service Codes of Practice [SBS] (SBS 2005). Square brackets indicate the abbreviations to be used in the analysis below.

The following privacy considerations were identified within these codes:

Table 1: Key privacy factors gleaned from regulatory codes

Element	Description	Sources
----------------	--------------------	----------------

1. Nature of private material		
Private activity	“An activity that is carried on in circumstances that may be taken to indicate that any of the parties to it desire it to be observed only by themselves but does not include an activity carried on in any circumstances in which the parties to it ought reasonably to expect that it may be observed by someone else.” ABC Editorial Policy 6.9.4	ABC
Personal	Do not emphasise personal characteristics like sexuality, race, religion, family relationships, marital status, colour, gender, disability, age, illness, unless relevant. Only use personal data for purpose originally intended. Should ensure personal info is accurate and current. Not disparaging or prejudiced use.	MEAA, APC, ABC, FTV
Rights	ABC’s Charter “will respect legitimate rights to privacy of people featuring in the news.” “Respect is given to each person's legitimate right to protection from unjustified use of material which is obtained without an individual's consent or other unwarranted and intrusive invasions of privacy” “Rights of individuals to privacy should be respected in all SBS programs”	ABC CRA SBS
Death	Respect private grief. Victims and bereaved have right to terminate interviews and photo sessions. Reactions of relatives when being informed of the death of a family member should not be recorded or used. Respect funeral requests and pool with other media. Take care and liaise with police in reporting deaths and identifying victims. Regard cultural matters related to identifying indigenous dead. “In covering murders, accidents,	MEAA, APC, ABC, FTV ABC, FTV ABC ABC, FTV ABC SBS

	funerals, suicides and disasters, SBS expects its program makers to exercise great sensitivity, particularly when approaching, interviewing and portraying people who are distressed.”	
Rumour	Should be identified as such if published	APC
Confidences	Should be respected and confidential information protected.	MEAA, APC
Offensiveness	Special care with material likely to cause offence, particularly photographs.	APC
File footage	Identify and use with care. Beware distressing nature of file footage of dead relatives.	ABC, FTV
2. Means of intrusion		
Honesty	Transparency in performance of journalism role. Hidden cameras not to be used. “SBS journalists will identify themselves and SBS before proceeding with an interview for broadcast.”	MEAA, APC ABC SBS
Respect	“Journalists should not unduly intrude on the privacy of individuals and should show respect for the dignity and sensitivity of people.”	APC, ABC,
Recording	Permission needed prior to recording conversations.	ABC
Consent	“Respect is given to each person's legitimate right to protection from unjustified use of material which is obtained without an individual's consent or other unwarranted and intrusive invasions of privacy.”	CRA
3. Fame factor		
Public figures	Sacrifice their right to privacy, where public scrutiny is in the public interest, but not all together. Intrusion must be related to public duties or activities. “In order to provide information which relates to a person’s performance of public duties or about other matters of public interest, intrusions upon privacy may, in some circumstances, be justified.” “However, in order to provide	APC ABC SBS

	information to the public which relates to a person's performance of public duties or about other matters of public interest, intrusions upon privacy may, in some circumstances, be justified"	
Children	<p>"Exercise special care before using material relating to a child's (U16) personal or private affairs."</p> <p>Obtain parental consent before linking a child with crimes involving family members or disclosing sensitive health or welfare information, unless exceptional public interest concerns.</p> <p>"Except in special circumstances, children who have recently been victims of, or eyewitnesses to, a tragedy or traumatic experience should not be interviewed or featured."</p>	FTV FTV ABC
Vulnerability	Take care with those vulnerable or unaware of media practice.	MEAA
Third parties	<p>Court reports should not identify friends and relatives of accused unless necessary.</p> <p>Rights to privacy of innocent third parties to be respected.</p>	APC ABC
4. Damage caused		
Incaccuracies	<p>Swift correction of harmfully inaccurate personal information.</p> <p>"Accuracy is the highest priority of news and current affairs and SBS will take all reasonable steps to ensure timely acknowledgment and correction of any errors of fact."</p>	APC SBS
Public interest	Or "social importance" as described by Morrison (Morrison 2002)	
Public interest	<p>Powerful consideration.</p> <p>" 'Public interest' is defined as involving a matter capable of affecting the people at large so they might be legitimately interested in, or concerned about, what is going on, or what may happen to them or to others."</p> <p>Will override many other restrictions.</p> <p>"However, in order to provide information to the public which relates to a person's performance of public duties</p>	MEAA, APC APC FTV, CRA SBS

	or about other matters of public interest, intrusions upon privacy may, in some circumstances, be justified”	
Public record	Overrules privacy concern	APC
Explanation	Public interest decisions should be explained	APC

While the above elements can be gleaned from the regulatory codes, they are by no means a comprehensive account of privacy concerns. Others have become evident via court decisions and some items of legislation listed above. The next stage of this project will inject further relevant elements into the mix, and there may well be other general categories developed as a result. For the purposes of this paper, however, we are able to group the elements into at least five basic headings which can form the basic structure to the conceptual map we develop below – the Privacy Mandala. Each is discussed briefly here.

While all of the above codes use the word “privacy”, only the ABC’s ventures to try to define what it means by “private activity”: “an activity that is carried on in circumstances that may be taken to indicate that any of the parties to it desire it to be observed only by themselves but does not include an activity carried on in any circumstances in which the parties to it ought reasonably to expect that it may be observed by someone else.” (ABC Editorial Policy, 6.9.4). This alone seems to raise as many issues as it resolves. While it classifies as private those situations arising out of view, it goes nowhere near recent courts’ and Press Council decisions which allow for activities in public which individuals might still expect to have an element of privacy, for example an intimate dinner in the corner of a restaurant. Restricting the activity to whether it might be “observed” by others is a far narrower interpretation. Further, it fails to take account of the many other elements of privacy which might not be in that physically observable dimension such as data about one’s background or characteristics which one might wish to keep to oneself.

That said, the ABC along with the MEAA, the APC and FTV Australia all counsel against the highlighting or misuse of personal characteristics such as sexuality, race and marital status. Such clauses indicate an overlap between the privacy of such details and the potential discriminatory use of them but fail to resolve the tension between the need

for identifiable and descriptive facts about people in reportage and the intrusive or discriminatory use of such facts. For example, most newspaper reporters find the age of an interviewee an interesting fact by which they might identify someone to give a reader a better description of a news subject, while the guidelines might interpret this detail as discriminatory or intrusive. Better guidance is needed in these areas.

Four of the codes – the ABC, APC, Commercial Radio Australia and SBS – use the word “right” when referring to privacy guidelines. For example, the ABC’s says its Charter “will respect legitimate rights to privacy of people featuring in the news.” This is very surprising given the ABC was the appellant in Australia’s most significant recent High Court challenge against there being a “right” to privacy in Australia: *ABC v. Lenah Game Meats* (2001). It can only be assumed that the Corporation intends the word “right” to be interpreted in the lay, rather than strictly legal, sense in its Charter.

Several other indicators as to the nature of private material appear in the documents. All codes except Commercial Radio Australia’s call for special care with situations involving death and its associated grief, which covers a significant number of major news events. There could be several explanations for this, but an important factor must be the prominence given to potential psychological harm to grief and trauma in the academic literature and popular press reports throughout the late 1980s and 1990s. For example, see: (Richards 1996; Castle 1999; McLellan 1999).

The codes also flag potential danger zones for privacy material, including journalistic use of rumour (APC), confidential information (MEAA and APC), offensive material particularly photographs (APC) and file footage (ABC and FTV). Putnis (Putnis 1994) alerted the industry to the latter hazard in his study of television use of file footage, which he identified as sometimes being “displaced, re-cut and recycled”.

The codes also identify several methods of privacy intrusion. They sometimes identify the items in the positive, with the MEAA and APC both calling for transparency in the journalism role and the APC and ABC calling upon reporters to show respect for people’s privacy, while specific practices are identified as intrusive such as the use of hidden cameras (ABC), non-identification of reporters (SBS), not seeking permission to record

conversations (ABC) and the failure to obtain consent for the use of private material (CRA). Most have a public interest overriding clause explained in discussion below.

All codes deal with individuals' status as public figures or, alternatively, with their naivety of media practice in dealing with whether intrusion of their privacy might be more or less justifiable. These also deal with the kinds of individuals involved, with special concern over the intrusion into the lives of children. The APC suggests public figures should be prepared to sacrifice their right to privacy "where public scrutiny is in the public interest", while the ABC and SBS say intrusion may be justified when it relates to a person's "public duties". The MEAA warns journalists not to exploit those who may be "vulnerable or unaware of media practice". The APC and the ABC counsel journalists against intruding into the lives of innocent third parties, with the APC restricting that advice to court cases. The FTV and the ABC make special mention of the vulnerability of children. The FTV code suggests "special care" be exercised before reporting upon a child's personal or private affairs and advises journalists to get parental consent before linking a child to crimes involving family or detailing "sensitive health or welfare information". Of course, laws usually prohibit this as well. The ABC warns journalists not to feature child witnesses to tragedy or traumatic experiences "except in special circumstances".

All this concern over the category of individual whose privacy might be intruded upon links with Chadwick's (Chadwick 2004) notion of a "taxonomy of fame". Victorian Privacy Commissioner Paul Chadwick has devised a useful starting point for weighing up whether someone is deserving of a certain level of privacy. He calls it the five categories of fame, each justifying different levels of protection. He argues quite correctly that public figures who have courted fame or sought a public position deserve less privacy than those who find themselves in the public spotlight by the hand of fate or because they have been born into a famous family. His five distinct categories include: fame by election or appointment, fame by achievement, fame by chance, fame by association and royal fame. He suggests the tension over media exposure of private details of an individual can be "eased" by the use of such categories. Nevertheless, even the codes seem to go further than Chadwick's list which does not account for the special circumstances of children in the news.

Clearly the potential damage to an individual resulting from a privacy invasion is an important consideration, however it gains scant attention in the codes themselves. This may be because much of the damage of a gross invasion of privacy might be incalculable, such as emotional scarring and other traumas. Nevertheless, there is some hinting at the fallout from privacy invasions with SBS calling for timely correction of any errors of fact and the APC requiring swift correction of “harmfully inaccurate personal information”. Interestingly, no allowance is made for such information which may be harmfully accurate yet published without public interest grounds.

The “public interest” exception to many of these requirements features in all of the media codes with varying degrees of explanation. Only the APC goes so far as to define “public interest”, which it says is “involving a matter capable of affecting the people at large so they might be legitimately interested in, or concerned about, what is going on, or what may happen to them or to others.” This stops well short of the proposal by Morrison and Svenning (Morrison 2002) which suggests the term “public interest” has so frequently been confused with mere public curiosity that it should be replaced by the more meaningful expression “social importance”. Public interest is the trump card in many of our decisions, but we need to explain why a photo of Nicole Kidman collecting her children from school *is* of such social importance if we are to justify our intrusion into her privacy. Perhaps it is of social importance because she has publicly criticized formal schooling, or perhaps because she has publicly claimed to be home-schooling them, or perhaps it is not of social importance but just mere curiosity and we have no right publishing this photo at all.

The APC suggests a further step publications should take when relying on public interest exemption: they should explain the basis of that decision to their readers. This links with some suggested strategies featured in the conclusion to this paper.

The Privacy Mandala: Towards a device for journalists and regulators

How do we combine these multifarious considerations into a useful device for journalists and editors to use in a newsroom when confronted with a privacy dilemma? We can start by identifying the main spheres of concern with privacy issues, including a version of

Chadwick's categories of fame. As a final consideration we feed in the public interest / social importance of the material.

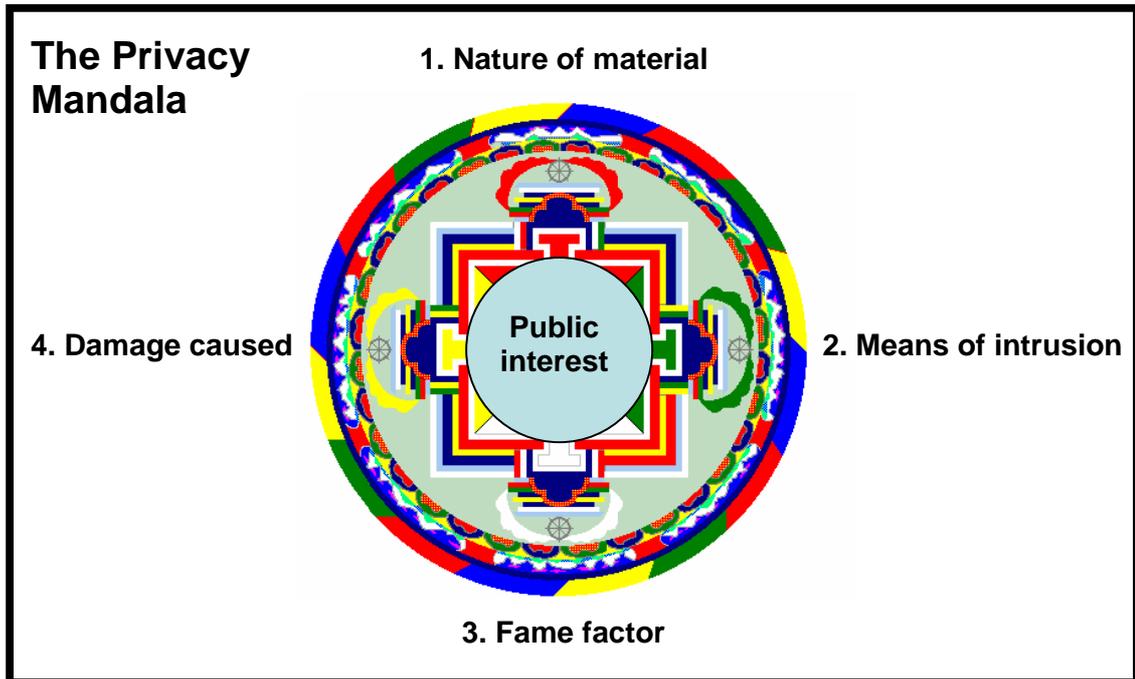
This means we can feature the following key factors for a journalist or editor to consider when weighing up a privacy intrusion:

1. The nature of private material.
2. The means of intrusion:
3. The fame of individual (adaptation of Chadwick's categories of fame): Red flag items here include children and the "media vulnerable"
4. The damage caused. That is, the level of directly predictable monetary loss, shock or embarrassment (variable according to individual's circumstances and cultural factors) and potential for future loss or harm.

We then need to factor into the consideration the crucial "public interest" value, presented as a counterpoint to the above. This would operate on a scale from the prevention of death or injury and exposure of crime or corruption through the exposure of hypocrisy, setting the record straight, exposure of waste or inefficiency, preventing death or injury, or something merely of curiosity or gossip value. Part of the social importance decision-making process requires a decision on the level of centrality of the private material to the story. This was at issue in the Naomi Campbell case, where the court decided a photograph depicting her leaving the drug clinic was unnecessary to the story.

The web of relationships and considerations is illustrated here as the Privacy Mandala.

Table 2: The Privacy Mandala



Why the Mandala?

A “mandala” metaphor has been borrowed from Buddhist terminology to aid with the analysis of the media-privacy issue here, but also ultimately with analysis of a matter in the newsroom. It would have been simpler, perhaps, to choose a more straightforward metaphor like a compass. However, there are aspects of the mandala which add value to our discussion. Like the Western concepts of privacy and reputation, it relates to an individual’s value of the self, often a deeply spiritual phenomenon. Mandala, which can take a range of forms, are also meant to be vehicles for meditation, and here ours provides a mechanism to do just that as we meditate in the professional workplace upon the values of privacy and press freedom. The intercultural nature of the metaphor is also no accident. In an increasingly globalised and multicultural society, media organizations occasionally need reminders that there are numerous interpretations of “privacy” among their audiences and news sources which might require special respect or consideration. Further, mandala are inherently complex. The Tibetan mandala are laden with meaning at a multitude of levels. So too is the privacy debate, with each of the four axes listed here representing a series of subsidiary factors needing to be considered in any decision to intrude. While there

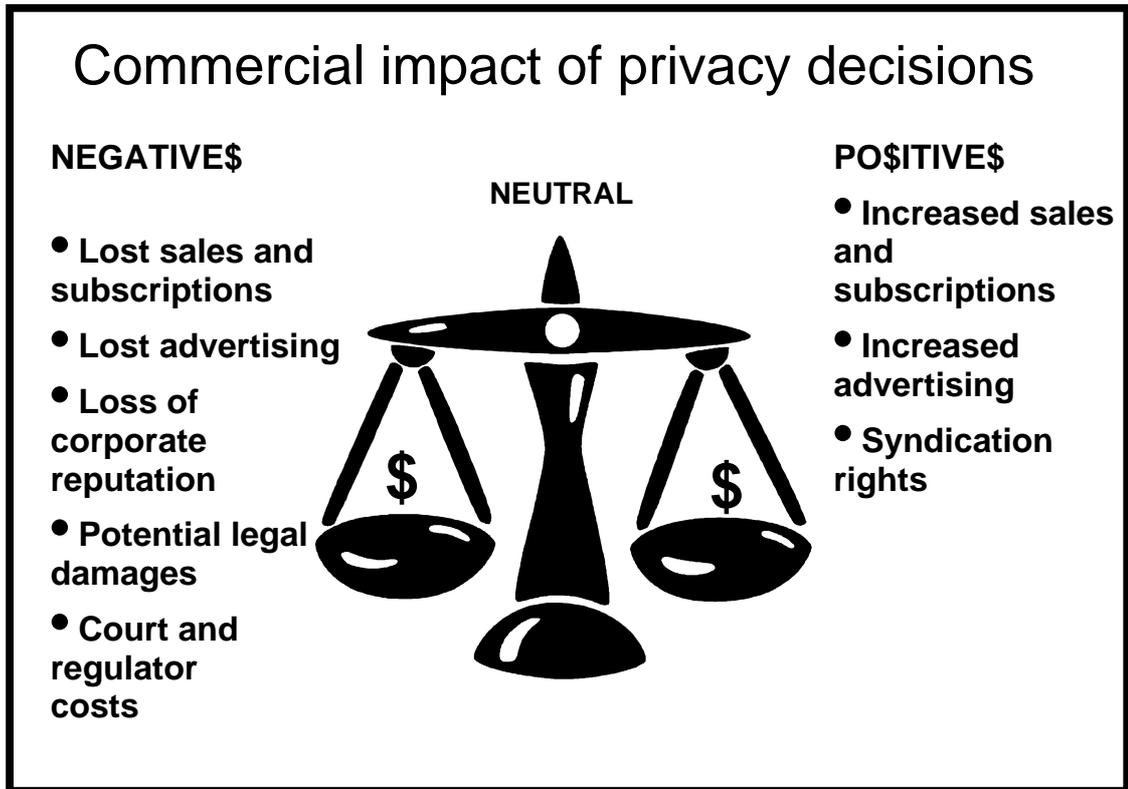
may be occasional clear-cut cases where privacy or the public interest are overwhelming “winners”, the majority of news situations fall into a negotiable zone where the most we can ask of a media organization is that it has considered the relative values carefully before deciding to, first intrude on a citizen’s privacy, and, secondly, publish the result of such an intrusion. The mandala can be used effectively to help with decision-making at both of those key moments in the news process.

When presented in this graphical form, some of the first four realms of privacy could further be displayed in shades of pink, with some listed as “code red” items. This will be the subject of forthcoming research, where material from key recent court cases is factored into the mandala. From the above discussion, it is clear that it would take a matter of overwhelming public interest to successfully counter a “code red” matter like the invasion of privacy of a child or a grieving relative of someone killed in tragic circumstances. These would need to have their social importance factors clearly articulated by an editor choosing to go ahead and publish the item.

Commercial considerations

Quite separate from the mandala graphic is an independent area of consideration which is rarely mentioned in the ethics textbooks: the commercial impact of a story. It is rarely addressed because theorists seem to work on the assumption that media organizations should be motivated primarily by a public or social good which is forever being compromised by a commercial imperative. However, the reality is that editors and news directors are motivated at least as much by circulation and ratings as by a public duty to deliver the news. Their own tenure depends on their success in this regard, and it has been demonstrated that celebrity news and gossip sells newspapers and magazines and that hidden cameras and consumer advocacy doorstops boost current affairs television ratings. That said, the commercial impact of privacy decisions might be positive, negative or neutral, as illustrated by the following graphic.

Table 3: Commercial impact of privacy decisions



The table takes account of the fact that there may be a range of potential profits or costs resulting from a story involving a privacy intrusion, including gained or lost circulation or ratings, advertising, syndication rights, corporate reputations, legal damages, and court or regulator costs. The courts would frown upon news organizations formally weighing up the potential monetary outcomes against the intangible human damage which could be caused by a privacy invasion. That said, there is little doubt journalists go through such a process, either formally or informally, when deciding whether to run with a story which pushes the privacy margins.

Transparency and explanation

While there is little doubt many media organizations go through considerable angst in deciding whether or not to run a story which features some level of privacy intrusion, they have been inclined to keep the reasons for those decisions to themselves unless there is an ensuing disciplinary hearing or court case. News organizations should be encouraged to explain their ethical decision-making to their readers, viewers and

listeners. It would take only a few paragraphs in a newspaper to accompany an intrusive photograph with an account of why there is an overwhelming public interest in readers seeing the material in question. Similarly, a news or current affairs anchor could devote a couple of sentences to say: “We realize this story involves a compromise of Miss X’s privacy, but we feel there is a greater public interest served by audiences viewing first-hand the emotional impact of a tragic event.” Such transparency would demonstrate to regulators and courts that a decision had been considered carefully and might well minimize the groundswell of protest from readers and audiences which often follows a privacy intrusion.

Conclusion

This paper has covered considerable terrain on the topic of privacy and journalism. It has sketched the background to privacy as a legal phenomenon and outlined the trends which have developed in Australian and international courts in the area throughout the last century. It has then distilled from Australian media regulations the key elements of privacy as they apply to the practice of journalism. It has grouped them into five key categories, covering the nature of the private material, the means of intrusion, the relative fame of those intruded upon, the level of damage caused, and the level of public interest or social importance of the story at hand. It has pointed to the importance of commercial considerations through increased ratings, circulation, or advertising sales as an additional consideration editors and news directors might taken into account before finalizing their privacy decisions. Finally, it has demonstrated that transparency in ethical decisions can provide some benefits to news organizations.

It is not claimed that the Privacy Mandala holds all the answers for a journalist faced with a privacy decision. Other factors might deserve inclusion and it is hoped that feedback from presentations like this and the analysis of major court cases will offer new candidates as categories. Privacy criteria will later be distilled from at least two recent court cases: *ABC v. Lenah Game Meats* and *Hosking & Hosking v Simon Runting & Anor* [2004] NZCA 34 (25 March 2004).

This research should serve to demonstrate that there are workable models for ethical decision-making in the newsroom which can elevate discussion in editorial conferences above the gut feelings of news executives and force the articulated justification of decisions to intrude. Further, such a model might even help journalists proceed through an ethical minefield like privacy confident they have at least considered carefully the implications of their actions. That, surely, is in the public interest.

References

(2001). **Lenah Game Meats Case** (2001). Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd [2001] HCA 63 (15 November 2001). Online. Available www.austlii.edu.au. Accessed October 14, 2003.

ABC (2005). ABC Charter and Code of Practice. Sydney, Australian Broadcasting Corporation. **2005**.

Allen, R. and N. Miller (1997, August). Reflective practice in journalism education. Annual meeting of the Association for Education in Journalism and Mass Communication, Chicago, Illinois.

APC (2005). Statement of Principles. Sydney, Australian Press Council. **2005**.

APC (2005b). Privacy Standards, Australian Press Council. **2005**.

Castle, P. (1999). "Journalism and trauma: Proposals for change." APME 7: 143-150.

Chadwick, P. (2004). Privacy and Media - subtle compatibility - five categories of fame. 26th International Conference on Privacy and Personal Data Protection, Wroclaw, Poland.

CRA (2005). Codes of Practice and Guidelines. Sydney, Australian Broadcasting Authority (ACMA). **2005**.

FTV (2005). Commercial Television Industry Code of Practice, Free TV Australia. **2005**.

Hirst, M., & Patching, R. (2005). Journalism Ethics. Arguments and Cases. South Melbourne, Oxford University Press.

McLellan, T. (1999). "Fair game or fair go?: Impact of news reporting on victims and survivors of traumatic events." AMPME 7: 53-72.

MEAA (1999). Revised MEAA Code of Ethics., Media Entertainment and Arts Alliance.

Morrison, D., & Svehng, M. (2002). The Public Interest and Media Privacy. Ruled by Recluses. Privacy, journalism and the media after the Human Rights Act. D. H. Tambini, C., IPPR: p65ff.

Pearson, M. (2000). "Reflective practice in action: Preparing Samoan journalists to cover court cases." APME **8**: 22-33.

Pearson, M. (2003). "Press freedom and open justice in the curriculum: A reflective practice approach." University of Technology Sydney Law Review **5**: 150-160.

Pearson, M. (2005). Press freedom suffers for celebrity security. The Australian: 16.

Putnis, P. (1994). Displaced, Re-cut and Recycled: File-tape in Television News. . Gold Coast, Queensland, Centre for Journalism Research and Education, Bond University.

Richards, I. (1996). "Dealing with death: Intrusion into grief and journalism education." AJR **18**(1): 99-106.

Richards, I. (2005). Quagmires and Quandaries. Exploring Journalism Ethics. Sydney, UNSW Press.

SBS (2005). SBS Codes of Practice. Sydney, Special Broadcasting Service.

Sheridan Burns, L. (1996). "Blocking the exits: Focus on the decision in ethical decision making." AJR **18**(1): 87-98.

Warren, S., & Brandeis, L. (1890). "The Right to Privacy." Harvard Law Review **4**(5): 193-220.

Mark Pearson is Professor of Journalism at Bond University, Australia. This paper acknowledges funding from the Australian Press Council and Bond University for this project and the research assistance of students Morgan O'Brien-Powell and Dale Rolfe. Thanks also to the reviewers of the submitted paper for their comments.