

1. Zones of silence

Forensic patients, radio documentary, and a mindful approach to journalism ethics

Abstract: This article explains a collaborative and critically reflective journalism research project stemming from the wish of an incarcerated forensic mental health patient to be named in public communication about his case. The authors are academics and journalists who embarked upon a combination of journalism, legal processes and academic research to win the right to name Patient A in a radio documentary and in academic works—including this journal article and research blogs. As a case study, it explains the theoretical and ethical considerations informing the journalism and the academic research, drawing upon traditions of documentary production, the principle of open justice and the ethical framework of ‘mindful journalism’. It concludes by drawing lessons from the project that might inform future practitioners and researchers embarking upon works of journalism and research involving vulnerable people and a competing set of rights and public interests.

Keywords: Australia, documentary production, forensic patients, journalism research, journalism ethics, mental health, mindful journalism, privacy, open justice, secrecy

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IN April 2014, the Australian Broadcasting Corporation’s *Background Briefing* programme broadcast *The Man Without a Name* (Morton, 2014), a 40-minute radio documentary on the story of Patient A. Patient A is a forensic patient: someone who has committed a criminal offence, but has been found not guilty by reason of mental illness (Pearson, 2011). In 2002, Patient A set fire to an office building where he had previously worked in the Sydney suburb of Ashfield. One of his former colleagues, Radmilla Domonkos, died of smoke inhalation in the fire. In March 2004, Patient A was found not guilty of murder, and not guilty of manslaughter, by reason of mental illness.

Since then he has been incarcerated in the Long Bay Prison Hospital in New South Wales (NSW), and more recently in the Forensic Hospital, a high-security facility | adjoining the prison.

Under the law in NSW, Patient A cannot be identified and the media cannot report details of his case. However, Patient A has taken the highly unusual step of seeking to have these legal restrictions lifted and his identity disclosed in the public domain. He and his supporters have campaigned through the NSW Mental Health Review Tribunal and the Supreme Court for what he calls ‘the right to his own name’. The *Background Briefing* programme documented that campaign and raised questions about whether current restrictions on the reporting of forensic mental health cases are in the public interest and in the best interest of the individuals concerned.

That documentary grew out of collaborative research by the authors of this article: one an investigative journalist and radio documentary producer who is also a journalism academic, the other a journalist and journalism academic whose research had focused on media law and journalism ethics. In our view, Patient A’s story was a case study with much wider implications: an example of the growth of what we call ‘zones of silence’ within the justice system and other government bureaucracies. These zones of silence are the product of laws that prevent reporting by journalists, and thereby conflict with principles of open justice.

What follows is an academic reflection on the process we followed in attempting to puncture one of these zones of silence: fulfilling Patient A’s wish to be named and have his case discussed in the public arena. As we will show, the broadcast of *The Man Without A Name* created a significant legal precedent, and was a milestone in the reporting of forensic mental health cases in Australia. We also explore the theoretical and ethical considerations informing our journalistic investigation and our academic research, drawing upon traditions of documentary production, the legal concept of open justice, and the ethical framework of ‘mindful journalism’. We conclude by drawing lessons from the project that might inform future practitioners: journalists and researchers seeking to shed light on the workings of the forensic mental health system, who must consider a complex and competing set of rights and public interests.

Open government and zones of silence

Journalists in liberal democracies have traditionally argued that they, and the media institutions for which they work, play a central role in scrutinising the processes of government and holding politicians to account (McChesney & Pickard, 2011; Lewis, 2014). Over the last decade, politicians and government officials in many countries have embraced the rhetoric of open government, arguing that the workings of democracy should become more transparent to citizens.¹ The judiciary, separated in powers under the Australian Constitution from the executive and the parliament, has long endorsed

transparency and public scrutiny of its processes via the principle of ‘open justice’. In recent decades, however, there has been a tendency to develop exceptions to the open justice principle in certain areas where transparency, scrutiny and free expression are deemed to be outweighed by other public rights and interests. In this article, we focus on a particular outcome of this tendency: the use of privacy laws to create zones of silence within the justice system in processes related to mental health. The case study we explore occurred in Australia, but it has resonance with cases in the United Kingdom and the United States. Jeremy Taylor, a reporter with *The Independent*, was closely involved in a series of court cases that successfully sought to allow reporting of cases in the British Court of Protection. According to Taylor (2012):

...some of the decisions that judges were being asked to make were extraordinary, both in medical and legal terms, and often involved requests to breach some of our most fundamental human rights (Taylor, Neary & Canneti, 2012, p. 43). Journalists, however, were excluded from the Court’s hearings, and relatives of vulnerable individuals whose cases were before the Court faced contempt proceedings if they spoke publicly about what they believed were its failings. Ostensibly, this was to safeguard the privacy of those people whom the Court was intended to protect; in practice, says Taylor, it ‘too often [...] feels like local authorities and primary care trusts are trying to shelter their own—often controversial—decisions from public scrutiny’ (Taylor et al., 2012, p. 44).

In the United States, the Center for Investigative Reporting took legal action in the California Supreme Court against the Department of Public Health to force it to reveal details of abuse, malpractice and neglect in state-run homes for people with developmental disabilities. In this case, too, the Department of Public Health fought against the disclosure on the grounds that it would breach patient privacy (Bale, 2015). Pearson (2012) compared and contrasted the competing interests of patient privacy and public accountability in case studies of mental health publication restrictions in the United Kingdom, Victoria and Western Australia.

Patient A’s case shares a fundamental similarity with these examples from different countries and legal jurisdictions. It involves a clash between government’s responsibility to act in the best interests of vulnerable individuals in their care (protecting them from unwanted intrusion by the media) and the public interest (ensuring that the processes involved are open to scrutiny). As Jeremy Taylor expressed it:

Usually the argument used to deny the press access [to the Court of Protection] is that having journalists present would not be in the best interests of the person who seeks the court’s protection. ... But there is a strong public interest to name the local bodies that are in charge of the person. People have a right to know what decisions are being made by officials in their area. (Taylor et al., 2012, p.44)

It is this ‘right to know’, and the complex legal and ethical questions which surround it, that our investigation set out to illuminate.

Research collaboration and ethical practice

Prior to commencing this project, the authors of this article had common research interests and had published academic research on the ways in which privacy laws restricted journalists’ capacity to report on matters of public interest (Pearson 2011; Morton 2012).

As outlined above, we believed that Patient A’s case raised important issues that should be debated in the public domain. We decided we could best contribute to such debate through an ‘action research’ or practice-based approach, using the methodologies of investigative journalism and radio documentary production to explore his case. It was clear to us from the start that this would require us to negotiate some tricky legal issues, and some even more complex and challenging ethical issues as journalists and academic researchers.

Our investigation would potentially involve breaching the privacy of our principal subject, as it required discussion of his case in the public domain: an action in potential conflict with the non-identification provisions of most university codes of ethics and the National Statement on Ethical Conduct in Human Research (National Health and Medical Research Council [NHMRC], 2015), and also problematic with regard to NHMRC guidelines on using mentally ill people as research subjects.² We debated at some length whether or not to separate the journalistic investigation from the academic research process, and only commence the latter once the lead author had completed the journalism part of the project, thus—potentially—bypassing the need for formal approval from the Human Research Ethics Committee at the institution of the lead author who would be undertaking the interviews for the study.

We ultimately decided to put the project through that ethics approval process, since part of the aim of the project was to demonstrate how practice and research could be part of one process which both complement and inform each other.

It also became clear to us early in the research process that existing codes of journalistic ethics had little to say about how we should approach Patient A’s case. The *Media, Entertainment and Arts Alliance Journalists’ Code of Ethics* requires journalists to ‘respect private grief and personal privacy’ (Media Entertainment Arts Alliance [MEAA], 2015), but gives little further guidance, other than to state that ‘Ethical journalism requires conscientious decision-making in context’ (MEAA, 2015).

At the same time we were grappling with these ethical dilemmas in the early stages of the project, co-author Mark Pearson had become interested in developing ways of aiding this ‘conscientious decision-making in context’ by exploring the secular application of the principles of Buddhism’s Noble Eightfold Path. He coined the approach ‘mindful journalism’ (Pearson, 2014). This was later developed into a book co-edited with US and Sri Lankan scholars (Gunaratne, Pearson & Senarath, 2015). We decided to apply

the basic principles of mindful journalism to our ethical deliberations as the investigation proceeded.

There is insufficient space here to elaborate on every element of the mindful journalism approach, but it is premised on basic Buddhist principles such as the acknowledgement of the inherent suffering in life (particularly in a mental health context), the need for kindness and compassion (*metta*) in one's dealings with others, and the fact that one's actions inevitably have implications and repercussions both for oneself and others (*karma*) (Gunaratne, 2015, p. 43). The Noble Eightfold Path offers a system for moral reflection with useful secular application to ethical dilemmas encountered in journalism. While denoted as separate steps of this path, each is co-dependent on the other, and most operate in combination when applied to an ethical dilemma. According to Pearson (2014), those eight steps (and their secular application to reporting) are:

Right Intent—What are the journalist's motivations in reaching an ethical decision? To what extent are ego or commercial rewards driving the decision? To what extent is the journalist motivated by compassion and a desire to ease the suffering of others?

Right Livelihood—How is the decision informed by the most worthy aspects of journalism as a profession?

Right Understanding—To what extent is the decision informed by knowledge of the issue at hand and understanding of the ethical dynamics at play? Is further research needed to understand it better?

Right Thought—Are the journalist's thoughts right-minded and morally based here? Do those thoughts offer further understanding of motivations? Is there a sub-stream of thought giving insight into a journalist's concerns and prejudices?

Right Action—Is each behavioural step in the reportage morally sound? Have all stakeholders been consulted and given a fair hearing? Have appropriate permissions been sought when there is a moral or ethical obligation to do so?

Right Speech—What phrasing is being used to pose questions and to frame the reportage? Is the choice of words fair, accurate, kind and beneficial? If it casts others in a bad light, is that necessary or can it be handled in a different way?

Right Mindfulness—What process for reflection has been built into the reporting process? Is there opportunity for both formal reflection and a conscious 'reflection-in-action'? (Schön, 1987).

Right Concentration—To what extent has there been attention to detail—important details that might affect the interests of stakeholders? What space and time has been allowed for journalists to achieve this concentration—to indeed enter 'the zone' where their performance is maximised.

We will return to each of these elements throughout this article as we document our navigation of key ethical decision-making points (or, as Hirst and Patching describe them, 'fault lines' [2007, p. 3]) throughout the research and reporting process.

The right to a name: Privacy, open justice, and the case of Patient A

The mindful journalism element of ‘Right Understanding’ invokes a journalist to have conducted enough background research on a topic to inform the ethical decisions inherent in the story. This principle is inherent to other approaches to responsible reporting, including peace journalism (Lynch & Galtung, 2010) and inclusive journalism (Rupar & Pesic, [Inclusive journalism and rebuilding democracy], 2012).

The authors had already undertaken considerable research on related topics but appreciated that to do justice to Patient A and other stakeholders in this story they also needed a high level of familiarity with mental health legislation in NSW and, to some extent, with the key psychiatric terminology and institutional processes of the forensic mental health system. They also needed a close familiarity with Patient A’s background and ‘index offence’—the criminal act on which he had been found unfit to stand trial, which had triggered his detention and psychiatric treatment.

We learned from court and tribunal records and from Justice Action sources that Patient A was born in 1959 and came to Australia as a refugee from Iran in 1983.³ He became an Australian citizen in 1986, and worked for some years for the Community Relations Commission in Sydney. He spent some time living in the United States in the 1990s, and returned to Australia in 2000. In late 2003, some months before he lit the fire in early 2002, which caused the death of one colleague and critically injured two others (Carr & Chikarovski, 2002), Patient A had begun writing letters to State and Federal politicians in Australia. In those letters he claimed the then Prime Minister, John Howard, had signed an ‘assassination order’ to have him killed. The letters went unanswered. Believing that no one was listening to his concerns, Patient A wrote more letters to the New South Wales police, warning that he would set fire to himself or to a government building. Those letters also went unanswered (Morton, 2014).

Late in the afternoon of January 19, 2002, Patient A doused the offices in Ashfield with petrol and set them on fire. Media reports at the time described clouds of ‘heavy, dark, acrid smoke’ (Australian Broadcasting Corporation [ABC], 2002) issuing from the building, reducing visibility in the area to ‘absolutely zero’ (ABC, 2002). Patient A was arrested at the scene and charged with murder. It is worth noting that, in his subsequent trial at the NSW Supreme Court in 2003, he and his counsel asserted that he was not mentally ill. It was the presiding NSW Supreme Court judge, Justice Peter Hidden, who declared him unfit to stand trial.⁴ As a result, he was found not guilty by reason of mental illness, and became a forensic patient.

At the time we began our investigation, Patient A was fighting a legal battle with the NSW Mental Health Review Tribunal for what he describes as the right to his own name. The Mental Health Review Tribunal reviews the cases of forensic patients periodically, and determines whether or not they should continue to be incarcerated. Under Section 162 of the *NSW Mental Health Act 2007*, without the consent of the Tribunal, it is an offence to publish or broadcast the name of any person:

- a. To whom a matter before the Tribunal relates, or
- b. Who appears as a witness before the Tribunal in any proceedings, or
- c. Who is mentioned or otherwise involved in any proceedings under this Act or the Mental Health (Forensic Provisions) Act 1990.

In New South Wales, the Tribunal's hearings are, in principle, open to the public. However, they cannot be reported or publicised in any way that might identify either the patient, or members of his or her treating team—the nurses, psychiatrists and other health professionals who are responsible for their care. The President of the NSW Mental Health Review Tribunal, Professor Dan Howard, argues there are strong reasons for this:

We discuss intimate psychiatric detail, personal detail about persons who may have in their illness created a complete train wreck for their lives and for their loved ones. And rather analogous to the health privacy rules and regulations that we have in Australia, the policy view is that it's proper that we take a similar approach to these patients, to these forensic patients, to enable these things to be discussed openly at our hearing without concern that they will be reported, that they will be named and shamed and have this ongoing trauma which they're trying to recover from. (Morton, 2014)

This 'policy view' is in stark contrast to one of the fundamental principles of the common law, namely that courts should be open and legal proceedings should be reportable. Former NSW Chief Justice Jim Spigelman has argued that the principle that justice must be seen to be done is 'one of the most pervasive axioms of the administration of common law systems' (Spigelman, 2005), while Justice Kirby stated in the *Raybos* case that:

Widespread publicity, through the modern media of communications, may do great harm. Sometimes quite unjustifiable damage can be inflicted on individuals... However that may be, a price must be paid for the open administration, particularly of criminal justice. The alternative, of secret trials, where important public rights may be in competition and individual liberty may be at risk is so unacceptable that courts of our tradition will tend to avoid the consequence. (*Raybos Australia Pty Ltd v Jones* [1985] 2 NSWLR 47 at 60)

Cases of forensic patients are subject to fundamentally different levels of public scrutiny to those of prisoners in the criminal justice system. This is true not only of NSW, but of most jurisdictions in Australia, New Zealand and the United Kingdom. As Pearson notes, the proceedings of tribunals in these jurisdictions 'usually have stringent non-publication, non-identification, and secrecy provisions with substantial fines or jail terms applicable in the breach' (2011, p. 95).

Some researchers have already advocated for greater openness and transparency in civil commitment cases, where a decision is taken to involuntarily detain or treat a person

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experiencing a mental illness, but where the person involved has not committed a criminal offence. As Smith and Caple (2014) argue,

Society needs to reconsider the currently closed nature of civil commitment hearings. Due to the gravity of the decisions made at civil commitment review hearings, it is important to ensure that the tribunals are fair, transparent and accountable. Issues of privacy and confidentiality may be adequately addressed by requiring the tribunals to publish redacted reasons and should not be used to justify a complete failure to publish reasons. The publication of reasons by mental health tribunals would go some way in ensuring open justice. (Smith & Caple, 2014, p. 21)

Restrictions on open justice in the forensic system may arguably have more serious consequences, where patients can be detained indefinitely. The effect of these restrictions is to effectively create a zone of silence where the principle of open justice ceases to operate. Privacy provisions intended to protect the ‘intimate psychiatric details’ of forensic patients from the intrusive gaze of the media may actually end up protecting psychiatrists and bureaucrats from public scrutiny.

This impression is certainly reinforced by the tenacity with which the psychiatrists treating Patient A, and Justice Health, the branch of the NSW state government which administers the Forensic Hospital, have opposed Patient A’s desire for the ‘right to his own name’.

In 2008 Patient A came to the attention of Justice Action, a group which advocates for prisoners’ rights in NSW. Patient A had started a petition in Long Bay prison to stop forensic patients being locked in their cells for 18 hours a day. Together with a number of community groups working in the mental health sector, Justice Action publicised the petition, and the lockdown was stopped. Justice Action now became involved with Patient A’s case, and the coordinator of Justice Action, Brett Collins, became Patient A’s tutor—effectively his primary carer within the meaning of the *NSW Mental Health Act* (2007), defined in section 71. In September 2010, Justice Action made a submission to the Mental Health Review Tribunal on behalf of Patient A. The submission requested that:

the provision of s.162 of the Mental Health Act for his privacy be waived and for him to be allowed to use his own name in the campaign for his release and to highlight the unfairness of his treatment and that of others by the Health Department. (Justice Action, 2010)

In other words, Patient A was seeking consent to breach his own privacy. Justice Health, the branch of the NSW government that administers the forensic system, strongly opposed his application, and it was rejected by the Tribunal (*A v Mental Health Review Tribunal* [2012] NSWSC 293).

With the support of Justice Action, Patient A then took action in the NSW Supreme

Court to overturn this decision. In the transcript of the Supreme Court case, sections of the MHRT's 2010 hearing, which would normally not have been made public, are quoted at some length. The then- President of the MHRT, Greg James QC, summarised the grounds on which Justice Health had opposed Patient A's bid to use his own name.

The issue is capacity to be able to determine whether he should publish and run press campaigns or whether that is a manifestation of his particular illness. And I understand that the clinical position as put by some of the Justice Health doctors is that such a campaign and some of the attitudes that [the plaintiff] evinces indicate or are symptomatic of his illness, so that to pander to it is simply to produce a situation that is not to his benefit but adverse to him. (A v Mental Health Review Tribunal [2012] NSWSC 293)

A representative of Justice Health agreed that that was a good summary. In other words, they argued that Patient A was not able to make an informed choice, and lacked the capacity to understand the potential consequences of publicity about his case. Patient A disputes this. He has consistently argued that he is not suffering from a mental illness, and that he wants to publicise not only his own case but larger systemic issues in the treatment of forensic patients. In *The Man Without A Name*, he described his reasons for this as follows:

It doesn't matter if the people know my name, [...] and I'm not afraid to be exposed. [...] the system needs to be exposed so the community and the authorities know what is going on in here in the name of care and treatment. There is no exit door to get out of the system. It's not like the criminal justice system that you get a sentence, then you understand that you have to serve a certain amount of your time or life in the prison system to pay your debt to the community, [...] then you get out and you are a free man again. Here they keep you indefinitely and they keep on injecting you until you agree you have a mental illness. (Morton, 2014)

Patient A has sought, unsuccessfully, to have his case re-tried in the criminal justice system in the belief that, had he been found guilty of manslaughter and served a custodial sentence, he would have been released by now. That was a view shared by his solicitor at the time of our investigation, Peter O'Brien:

Well, he wasn't sentenced so there's a fair bit of conjecture I suppose but at that time, 2002, it's a dangerous act, manslaughter, in other words he did a dangerous act which caused the death of another person. In the order of 4-6 years non-parole, in other words 4-6 years inside a custodial facility by way of sentence would be I think in my opinion a fair estimate. (Morton, 2014)

O'Brien said he believed that by 2014 Patient A would have spent his parole period either in the community or in custody, and his entire sentence would have expired (Morton,

2014). In the forensic mental health system in NSW, however, there is no possibility of parole.

In April 2012, Patient A's action in the Supreme Court was dismissed by Justice Adams, effectively on procedural grounds (*A v Mental Health Review Tribunal* [2012] NSWSC 293). It was shortly after this that we commenced our investigation.

Right Intent, Right Livelihood, and Right Action

A foundation stone for a 'mindful journalism' consideration of the ethical dimensions of a story is the 'Right Intent' of the journalists involved. It was the starting point for our discussions about our reasons for pursuing the story. What were our motivations? What did we hope to achieve via the lead author's work of journalism and our subsequent academic collaboration? Such questions occupied our thinking and discussions at the start of the project and were ones we returned to throughout, particularly as problematic ethical questions arose. We agreed our primary intentions in pursuing the story and the resulting academic outputs were:

- To use Patient A's case to inform the public and our scholarly audiences that there were laws in Australian jurisdictions prohibiting the naming of mental health patients.
- To seek permission to name Patient A if we decided we should do so after mindful reflection upon the ethics of the situation.
- To use the record of our own applications to name Patient A as an insight into the mental health tribunal process.
- To consider Patient A's plight as an anonymised forensic patient facing the prospect of an indefinite period of detention.
- To start a public debate on the level of transparency of the mental health system.
- To map a path for future research in the area.

Was our intent driven by ego? It is hard to separate self-interest and individual reward from any journalistic or research decision. Works of journalism and academic articles carry bylines, and career reputation and advancement is built upon such outputs. However, we did not feel these were primary factors in our decision to pursue the project. Compassion (*metta*) and suffering (*dukkha*) are also difficult phenomena to isolate and assign in such a consideration. We were indeed driven by compassion for the suffering of Patient A and his frustration at facing detention and treatment as an anonymised forensic patient for an act that the state had determined was not a crime but, instead, was the 'index offence' prompting his incarceration. We felt compassion for him for the anxiety that such a story and articles might cause him, the possibility that his psychiatric treatment might be adversely affected, and the potential disappointment stemming from false expectations that his identification and publicity about his case might lead to his release. We also discussed our compassion for other stakeholders and their potential suffering, including the victims of his actions, their families, the mental health

professionals trying to treat Patient A, other anonymous patients who might also want their cases publicised, and our audiences who might suffer anxiety as they recall the suffering of patients subjected to historic institutional abuse in mental health facilities such as Chelmsford in the 1970s (New South Wales Royal Commission into Deep Sleep Therapy [RCDST], 1990).

This in turn linked to our deliberations over Right Livelihood and Right Action—the extent to which our journalistic and academic research activities were affixed to a moral compass and that we were cognisant of the karmic impact of each action, the ripple effect of repercussions for other stakeholders including patient and victims and families, medical staff, current and future patients, and the broader public.

With such ethical dilemmas in mind, in late 2012 the lead author approached ABC Radio National's *Background Briefing* programme with a proposal that they commission an investigative documentary on Patient A's case.⁵ There were a number of reasons for doing so which link to the Eightfold Path step of Right Livelihood. In Buddhism, rightly or wrongly, certain occupations like poison peddler, sex worker and butcher are deemed incompatible with the path to enlightenment. We suggest certain sections of journalism—such as celebrity gossip-mongering, *News of the World*-style privacy intrusion, and cash-for-comment talkback—are ethically compromised. To be true to such ethical principles, Patient A's story needed to be told on a media platform with a strong ethos of ethical practice and in a medium that best allowed the measured account of his situation and its legal context. The Australian Broadcasting Corporation, with its strong regime of editorial standards, was a suitable organisation. Its Radio National programme *Background Briefing* was, and remains, a highly-regarded programme with a national reputation for investigative journalism. The lead author had worked there as a reporter for some years prior to becoming an academic, and was an experienced documentary producer. We believed that being able to call on the expertise of the ABC's Legal Department would greatly assist us in navigating our way through the legal restrictions around the reporting of the case. Of course, the technical compliance with legal requirements does not expunge a journalist's ethical obligations, so advice in this regard was duly weighed against the mindful journalism principles as the project unfolded.

There was, however, a more fundamental reason for choosing radio as the medium in which to tell Patient A's story. As Brett Collins, Patient A's tutor and the coordinator of Justice Action, would later tell us, Patient A had been rendered both nameless and voiceless: he had, effectively, become a 'non-person':

The issue of identity was fundamental to the entitlement to have a name, that people can be, as I am, 'Brett Collins', people know who I am, they hear my name and they can identify me. I have an identity. (Morton, 2014)

We knew that telling Patient A's story on television would be impossible; it was extremely unlikely that the Mental Health Review Tribunal or the Forensic Hospital would allow Patient A to appear on camera. However, we considered it

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might be possible to record an interview with him, which could be broadcast on radio. In other words, it might be possible for his voice to be heard—a desire which we took to be fundamental to his campaign for the ‘entitlement to have a name’.

There is another sense in which we believed that our intent to give Patient A a voice was both in his interest, and in the broader public interest. In the introduction to her study of prisoners’ radio, Heather Anderson wrote:

Prisons are one of the most closed, silent institutions in the justice system (Doyle & Ericson, 1996; Lumby, 2002; Roberts & Hough, 2005); however, in the vast majority of cases, prisoners there are citizens who have been only temporarily removed from the rest of society. The silence imposed upon them exacerbates their segregation from the communities into which it is expected they should successfully reintegrate. With the loss of citizenship rights (either formal or informal ones) it becomes even more vital that prisoners have access to opportunities that enact their citizenship through alternative means. (Anderson, 2012, p. 1)

In many cases, forensic prisoners are not ‘temporarily removed from society’, but may be incarcerated indefinitely. If prisons are one of the most closed, silent institutions in the justice system, then the forensic mental health system represents an even more extreme case, which renders not only the inmates but also the staff—psychiatrists, nurses, doctors—and the bureaucrats who oversee it, invisible to the public.

Anderson (2012), argued that prisoners’ radio programmes could constitute a form of active citizenship, where a citizen is conceived broadly (following Mouffe) as ‘somebody who acts as a citizen, who conceives of herself as a participant in a collective undertaking’ (Mouffe, cited in Anderson, 2012, p. 3), and participation in media production, as ‘a discursive public sphere activity’ (Mouffe, cited in Anderson 2012, p. 3), as a form of active citizenship.

Rather than being broadcast on prison radio, Patient A’s story was to be broadcast on the ABC’s *Background Briefing*, a national radio programme with an average audience of around 200,000 listeners (C. Bullock, personal communication, April 22, 2014).⁶ By bringing his case, and the larger issues which it embodies, into the ‘discursive public sphere’, it could be argued that we were enabling a form of active citizenship for someone who has even less capacity to exercise it than prisoners in the criminal justice system.

The man without a name

In February 2012, *Background Briefing* commissioned the documentary, and we escalated our consideration of the ethical dimensions of the story, and our discussions of its legalities with the ABC’s Legal Team. As the researcher who would be interviewing human subjects, the lead author submitted an ethics application to the Human Research Ethics Committee of the University of Technology Sydney. In its response, the Committee raised

a number of questions and concerns about the project. The major concern revolved around the issue of informed consent—particularly over whether or not Patient A could give informed consent to our request to identify him in the project. This would be an issue we returned to in the documentary itself.

The principle of Right Speech was central to these submissions and also to the phrasing of our accounts of Patient A's circumstances in both the work of journalism and subsequent academic outputs. As Gunaratne et al., (2015), have noted, it 'invokes the avoidance of falsehood, divisive and abusive speech, and gossip mongering' (Gunaratne et al., 2015, p. 147). They quoted the summary of Right Speech said to be offered by the Buddha in the *Vaca Sutta*:

It is spoken at the right time. It is spoken in truth. It is spoken affectionately. It is spoken beneficially. It is spoken with a mind of good-will. (Thanissaro, 2000)

It was thus important that submissions (and subsequent works) be absolutely accurate, measured and crafted with good intent. In the lead author's application to the HREC, he argued Patient A had clearly demonstrated his desire to be identified in the public domain, through the submissions to the Mental Health Review Tribunal made by him and on his behalf by Justice Action for the right to use his own name. He argued that Patient A's tutor Brett Collins—effectively his legal guardian and representative—had also given his consent, and that we would seek his written consent again before proceeding with the project. We also argued that there was a strong public interest in the larger issues surrounding Patient A's case being explored in the public arena.

The Ethics Committee's formal recommendation was that we should seek consent from the Mental Health Review Tribunal to identify Patient A in the proposed *Background Briefing* programme.

In July 2013, after extensive consultation with the ABC Legal Department and their lawyers Deborah Auchinachie and Hugh Bennett, the ABC formally applied to the Mental Health Review Tribunal for permission to name Patient A in the *Background Briefing* broadcast.

In September 2013 we presented our submission to a meeting of the NSW Mental Health Review Tribunal via video link from the MHRT's premises in Gladesville.⁷ Representations had also been made prior to this meeting, on our behalf, by the Australian Broadcasting Corporation Legal and Business Affairs department (Bennett, 2013). We repeated the arguments we had already made to the HREC, additionally arguing that the Tribunal should consider not just the potential harms to Patient A, but the benefits that might flow from his desire for the 'right to a name' being granted, both to him as an individual, and to public awareness of, and debate about, the situation of forensic prisoners. Representatives of Justice Health, whom we cannot name, strongly objected to our application. Their arguments were similar to those made previously before the

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Tribunal, namely that publicity would exacerbate Patient A's condition and have an adverse effect upon his mental health.

In October 2013 the Tribunal wrote to us approving our application (New South Wales Mental Health Review Tribunal [MHRT], personal communication, October 28, 2013). This was extremely exciting, both because we would now be able to name Patient A in accordance with his wishes on the national broadcaster, and because it represented a significant legal precedent. In its Reasons for Decision, the Tribunal referred to Justice Adams' decision in *A v Mental Health Review Tribunal* [2012] NSWSC 293, and stated that:

It appeared to the Tribunal that Adams J seems to suggest that there should be minimal restriction to [his] rights and therefore the publication of his name unless his care and treatment warrants it. ([MHRT], personal communication, October 28, 2013)

The Tribunal weighed up the risk that Patient A's mental health might be adversely affected by the publication of his name against the benefits that might result:

On all the evidence before the Tribunal it seemed that there is a potential risk as well as a potential gain in that, if the application is granted his rights would have been recognised, which he has previously indicated is of great importance to him. (MHRT, personal communication, October 28, 2013)

The Tribunal decided, on balance, to grant our application. However, we now faced a further dilemma, which was primarily ethical rather than legal in nature: whether or not to interview Patient A. This reintroduced our mindful consideration of Right Action in our ethical deliberations. The ethics committee had required us to seek the permission of the Mental Health Review Tribunal to identify Patient A, which we had duly done. However, our mindful reflection upon the dilemma raised a host of questions related to the nature of the documentary medium, legal and ethical requirements on permissions, and the extent to which the airing of a recording of a formerly anonymised person's speech adds an essentially human dimension to their re-established identity—their unique voice.

Our ultimate decision also involved an element of serendipity. We were obliged to make a further application to the Tribunal for permission to name Patient A in our academic research—in other words, in publications such as this article and research blogs—as well as in the broadcast. This time, one of us—the documentary producer—was able to attend the Tribunal's hearing in person inside the Forensic Hospital. Although we were not aware of this in advance, Patient A was also attending the hearing with his tutor, Brett Collins. By chance, the documentary producer met Collins and Patient A at the hearing. Although he was not permitted to take any recording equipment into the hospital, he recorded his impressions of the meeting in the car park immediately afterwards. This is how they were described in the documentary:

Producer: I've just come back from a Mental Health Review Tribunal hearing. This particular hearing was inside the forensic prison which is next to Long Bay Jail, and the most interesting thing about today's hearing was that I got to meet Patient A, the subject of this story, *The Man Without a Name*. I offered him my hand, he shook it, he's got a very firm handshake, and we had quite a long talk about himself and about his case. He is a very articulate man. He spoke to me at length about the facts, as he sees them, of his case. He knew the names and dates of all of the legal judgements, and he certainly was able to present a very coherent argument about why he shouldn't be in the state that he is in now. (Morton, 2014).

During that meeting, the producer asked both Patient A and his tutor Brett Collins if they would consent to a telephone interview. We agreed that Collins would be listening at all times in the studio during that interview, and that Patient A could terminate the call at any time. We also subsequently discussed the issue of whether or not to interview Patient A with the executive producer of *Background Briefing*, Chris Bullock. Before we did the interview we also made a formal request to the Director of the Forensic Hospital for permission to interview Patient A in person, which was subsequently refused. On balance, we decided that we would proceed with a telephone interview, given that Patient A had given his consent in person, that Collins had done so, and we had made every reasonable effort to make it clear to all parties what the possible consequences of the interview could be. The pros and cons of the ethical decision to proceed with the telephone interview, on the technicality that it was not the face-to-face interview that had been denied permission, still left us questioning whether this was a 'Right Action' when so many other competing stakeholder interests come into play. It was a prime example of the ethical 'fault line' noted by Hirst and Patching (2007)—which they described as 'the earthquake-like tremors that often shake individual journalists and/or their organisations to their core as they grapple with ethical dilemmas' (p. 3). We were guided by several considerations which seemed to us to accord with the principles of Right Speech, Right Action, and Right Livelihood outlined above. The first of these was the Mental Health Review Tribunal's argument, in its reasons for granting our application, that by allowing Patient A's name to be used, 'his rights would have been recognized, which he had previously indicated was of great importance to him' (New South Wales, Mental Health Review Tribunal, personal communication, October 28, 2013). Our decision to allow him to speak in the programme, we reasoned, was a further recognition of his rights and could thus be construed as Right Speech; '...spoken at the right time [...] spoken in truth [...] spoken affectionately [...] spoken beneficially [...] spoken with a mind of goodwill' (Thanissaro, 2000).

The lead author, Tom Morton, also interviewed a number of psychiatrists with expertise in the area of forensic mental health cases. In particular, he asked them to comment on the issue of capacity—whether or not Patient A could reasonably be considered capable of making an informed choice. In the *Background Briefing* programme, Dr Chris

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Ryan, a psychiatrist and senior clinical lecturer at the University of Sydney, expressed the following view:

It is important to remember ... that the assumption should be that the person has capacity, so the onus is really on the person who wants to show that they don't have capacity.

It's conceivable for example that a person might think that ... they were divine and it wouldn't matter what anybody said about them, that it would always be good.

That might suggest that they didn't have capacity. But if the person seemed to have the usual understanding of what it means to have your name published and they think it would be in their best interests for their name to be published, then who are we to say 'oh we know better than you'? (Morton, 2014)

This thoughtfully expressed professional judgement of Dr Ryan's gave us some confidence that we were acting with Right Understanding; a nuanced appreciation of the ethical dynamics at play in deciding what was in Patient A's 'best interests' and interviewing him without the consent of Justice Health. Finally, we believed that giving Patient A a voice in the programme and allowing him to exercise 'active citizenship' would also be in the public interest, as it would draw attention to the situation of forensic prisoners and the issues of open justice and accountability touched on above. This seemed to us to accord with the precept of Right Livelihood, as journalism's role in advocating for the public interest and the public right to know is generally regarded as central to its legitimacy and this is emblematic of the most worthy aspects of journalism as a profession.

In early April 2014 the lead author found himself in the midst of the mindful journalism stage of Right Concentration—as he scripted, voiced and edited the programme to length on the advice of the executive producer, ABC legal staff and co-author. This is the stage where all other elements of mindful journalism come into play as the professional enters what in sporting parlance is called 'the zone'—that consummate state of concentration where both practical and ethical decisions arise and are considered reflectively within the tight constraints of a pressing deadline (Schön, 1987).

The *Background Briefing* programme was broadcast on April 20, 2014. For the first time in Australia, a forensic patient had been granted the right to be identified publicly. It was not until half way through the programme that Patient A introduced himself:

My name is Saeed Dezfouli.⁸ I was born in 1958 in Iran and I came to Australia after finishing university, I got a degree in political science. I came to Australia in 1983 as a refugee. In 1986 I became an Australian citizen, and I also started working for the Ethnic Affairs Commission of New South Wales as a court interpreter. Then I joined the panel of the immigration, and then in 1989 I also worked for the Immigration Department as a bilingual information officer, which required intensive training about the system. And this is how I became very familiar with the system. And I was dealing with newly arrived refugees and immigrants in 1989. In 1990 I went to America for 10 years, and in May 2000 I came back to Australia. (Morton, 2014)

In the course of the programme Dezfouli expressed remorse for the death of his colleague Radmilla Domonkos in the fire:

Saeed Dezfouli [Patient A]: I don't deny I committed an unlawful act, because I am responsible for the death of my poor colleague and I had to be treated under the criminal justice system and get a fair go, and I didn't.

Producer: I think that's very important what you've just said Saeed, you've said, 'I am responsible for the death of my poor colleague.' Are you sorry for that?

Saeed Dezfouli [Patient A]: I am deeply sorry. I wish I could bring her back. (Morton, 2014)

He also raised a number of grievances about his treatment in the Forensic Hospital, including the fact that he was being forcibly medicated with anti-psychotic drugs which he believed had harmful side-effects. However, he stressed that he wanted to expose not only the details of his own case, but what he believed were broader systemic abuses in the forensic mental health system:

They make mistakes, and once they make the mistake they're not going to reverse it and accept it any more, they try to proceed with the fact that you were wrong and they were right, and break you down and make you compliant with the regime through medications, and don't recognise the way you are functioning and the way you are. [...] the system needs to be exposed so the community and the authorities know what is going on in here in the name of care and treatment. So somebody should step forward and expose this, and I want to be the one. (Morton, 2014)

Conclusion: The lessons from the case of Saeed Dezfouli

Our investigation, and the *Background Briefing* documentary, shone a light on little-known aspects of the forensic mental health system which receive scant public attention. It created a significant legal precedent which allowed public scrutiny of the case of one forensic patient, Saeed Dezfouli, and raised questions about whether or not the current provisions in the *NSW Mental Health Act 2007* are truly in the public interest. In the documentary, Sascha Callaghan, of the Centre for Values, Ethics and the Law in Medicine at Sydney University, commented on Saeed's case as follows:

Sascha Callaghan: Now, this is a way in which you can see that the whole idea of vulnerability can actually be used really to restrict someone's ability to vindicate their rights. It's actually used in an oppressive way. I mean, I think that there is legitimate public concern about why these sorts of proceedings should be suppressed in this way if it's not legitimately for the protection of the person involved.

Producer: So you're saying in effect that there's a danger that the law in this context can act not to protect the privacy of the individual involved, but in a sense to protect the responsible institutions from public scrutiny?

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Sascha Callaghan: Absolutely. For whose protection is this suppression order being given? (Morton, 2014) It should be stressed here that the documentary—and this academic reflection on our investigation—are not, primarily, an appeal for Saeed Dezfouli's release. As journalists and journalism academics, we are plainly not competent to make any judgement about whether or not he is suffering from a mental illness, nor whether he is likely to pose a danger to himself or others should he be released from custody. It is more an attempt to shed light on the opaque processes of the forensic mental health system, and to suggest that the benefits to patients which might flow from greater openness and transparency may potentially outweigh the possible harms which could result from their identification.

There are strong historical precedents supporting this view. In New South Wales during the 1960s and 1970s, psychiatrists and psychologists at Chelmsford Hospital treated patients with 'deep sleep therapy', which involved placing them in a coma induced by heavy doses of barbiturates for weeks at a time. In the late 1980s, a Royal Commission was established to investigate alleged abuses at Chelmsford. It found that deep sleep therapy had led to the deaths of 24 patients, and that another 24 killed themselves within a year after treatment. In his report, Royal Commissioner Slattery noted the 'atmosphere of secrecy' that surrounded Chelmsford Hospital, and stressed the importance of media coverage in exposing the abuses which had occurred there:

The publication of the articles, the editorials and the television broadcasts, together with the active campaign waged by members of the Chelmsford Victims Action Group and others for an inquiry were undoubtedly instrumental in causing the government to review its earlier decisions and to establish a Royal Commission. (*New South Wales Royal Commission into Deep Sleep Therapy*, 1990, Vol 1, p. 9)

We certainly do not suggest that the kinds of psychiatric malpractice that occurred in Chelmsford are occurring today in the New South Wales Forensic Hospital. However, the case of Chelmsford does illustrate the potential risks which can arise when secrecy prevails, and the only scrutiny of psychiatrists with vulnerable individuals in their care is through the internal processes of the health bureaucracy. In the radio documentary, Professor Merrilyn Walton of the School of Public Health at the University of Sydney argued that, prior to the media coverage Justice Slattery referred to, the NSW Health Department failed to pursue complaints from former patients and relatives about what was happening inside Chelmsford. Walton was a Legal Aid worker on secondment to the Health Department at the time that these complaints were beginning to surface in the 1980s.

Merrilyn Walton: There was many, many opportunities where there should have been full investigations, full inspections of licensed premises. There was absolutely none, even after the coronial enquiries coming out of Hornsby Hospital, and it became clear to me that the Department not only didn't have the skills and competence

to do the investigations, but didn't have the will. It came from the culture where doctors' actions aren't questioned, and the Department of Health had historically adopted that culture where there was a doctor in charge. (Morton, 2014).

The more recent examples involving the California Health Department and the British Court of Protection cited above underline the dangers of secrecy and silence in institutional settings. In our view, law reform bodies, mental health tribunals, and health professionals who work in the forensic system, in consultation with prisoners' rights groups and other civil society organizations, should consider amendments to the law which would relax some of the reporting of forensic cases and allow the identification of patients if that is their wish.

The further purpose of this article was to demonstrate how the principles of 'mindful journalism' (Pearson, 2014) can help guide the ethical decision-making of journalists (and journalism educators) beyond the 'black letter' codes of ethics in the news media and universities. A truly reflective and mindful approach will not resolve all ethical dilemmas to the satisfaction of all stakeholders in a story, particularly if the decision sits on one of Hirst and Patching's (2007) 'fault lines' (p. 3). However, the integrity of reporting can be enhanced if journalists take deliberative steps to reflect inwardly upon their understanding, intent, livelihood, thoughts, actions, and speech in mindful concentration. We suggest that, while such an approach can be applied to all reporting, it is particularly valuable in a story like this one—an issue of legitimate public concern involving vulnerable individuals.

Notes

1. One of President Barack Obama's first actions after taking office was to issue a Memorandum on Transparency and Open Government, committing his administration to creating an 'unprecedented level of openness in Government' (White House Memorandum [WHM], 2009 as cited in McDermott, 2010, p.401) and declaring that this openness, based in a system of 'transparency, public participation, and collaboration' (WHM, 2009, as cited in McDermott, 2010, p.401) would strengthen American democracy. The Australian Information Commissioner, John McMillan, has described open government as 'a vital aspect of Australian democracy' ('Office of the Australian Information Commissioner', [OAIC] 2011, p.1), and argued that 'pressure for greater transparency and public engagement in government is a global commitment' (OAIC, 2011, p. 1).
2. Section 2.2.12 of the NHMRC states: 'Where a potential participant lacks the capacity to consent, a person or appropriate statutory body exercising lawful authority for the potential participant should be provided with relevant information and decide whether he or she will participate. That decision must not be contrary to the person's best interests. Researchers should bear in mind that the capacity to consent may fluctuate, and even without that capacity people may have some understanding of the research and the benefits and burdens of their participation'. This is then further explored in *Chapter 4.5: People with a cognitive impairment*.

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ment, an intellectual disability, or a mental illness. Researchers are asked to consider issues of ongoing consent, the benefits of the research for the respondent, justice for the respondent, and the integrity of the research. Section 4.5.10 requires researchers to explicitly consider:

- d. how the decision about the person's capacity will be made;
 - e. who will make that decision;
 - f. the criteria that will be used in making the decision; and
 - g. the process for reviewing, during the research, the participant's capacity to consent and to participate in the research. This information is to be presented to the HRECs.
3. Justice Action is a community group that advocates for prisoners' rights in NSW.
 4. *Regina v. Saeed Dezfouli*, NSW Supreme Court, common law division, Hidden, J, Thursday May 1 2003, 70059/02, p. 5.
 5. At that stage Patient A's case had received minimal coverage in the mainstream media, with the exception of brief articles in the *Sydney Morning Herald* (Morello, 2012) and *Crikey* (Barns, 2009). Barns' story is about A being injected with drugs against his will, and Morello's story is about A winning access to education. Both news outlets name Patient A but neither reference his campaign for the right to his name.
 6. Personal communication from Chris Bullock, executive producer of *Background Briefing*. While audience figures vary from quarter to quarter, this figure is a yearly average. Prior to making verbal submissions by video link as described, Hugh Bennett, a lawyer from ABC Legal and Business Affairs, had made written submissions to the Mental Health Review Tribunal: Bennett, H. (2013). *Australian Broadcasting Legal and Business Affairs written submissions (September, 10) to the New South Wales Mental Health Review Tribunal*. Unpublished.
 7. The NSW Mental Health Review Tribunal (MHRT) in an email to Hugh Bennett, ABC Legal and Business Affairs representative, advised of the approval of our application to interview Patient A and for him to be named. (NSW MHRT, personal communication, October 28, 2013).
 8. Now that we have named Patient A, we are obliged under the Mental Health Review Tribunal's order to publish the following notice:

It is an offence under the Mental Health Act 2007 (NSW) section 162 to publish or broadcast the name of any person to whom a matter before the Mental Health Review Tribunal relates or who appears as a witness before the Tribunal in any proceedings or who is mentioned or otherwise involved in any proceedings under the Mental Health Act 2007 or the Mental Health (Forensic Provisions) Act 1990, unless consent has first been obtained from the Tribunal. The author has obtained such consent to publish Mr Dezfouli's name. (New South Wales Mental Health Review Tribunal, personal communication, October 28, 2013).

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