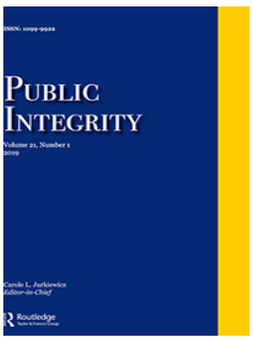

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GUEST EDITORIAL

Fake News: Could Self-Regulation of Media Help to Protect the Public? The Experience of the Australian Press Council

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"Fake news" comes in two forms: false information intended to deceive, and deceitful description of genuine information when it does not accord with the views of the person calling it "fake." Either way—the reality of false news or the strategy to throw doubt on genuine news and evidence—it threatens to undermine democratic processes, and the broader social fabric.

Modern technology is making fake news much easier. People rely on sources that may have no commitment to truth, and groups of people can easily engage only with like-minded people and dismiss alternative perspectives. Yet, new technology is also offering wider and more direct connections, with the potential to better inform the public and provide avenues for people to express their views and engage in public discourse.

The challenge is to find a workable ethical regime that supports the positive potential of technology while limiting the risks of negative use and impact. There is no easy answer, but some strengthening of self-regulation within the media and modification of government regulation are required. Each country will need to find the response most likely to work, but some international collaboration is also likely required.

BALANCING FREEDOMS AND RESPONSIBILITIES

The U.S. Constitution's First Amendment guarantees freedom of speech and freedom of the press. The freedoms are not unfettered, however, as the courts balance the interests of freedom of expression with the need to protect citizens from harm. Thus, they neither allow

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injury to "any other person in his rights, person, property, or reputation," nor allow someone to "disturb the public peace, or attempt to subvert the government" (*Near v. Minnesota,* 283 U.S. 697 [1931]; http://cdn.loc.gov/service/ll/usrep/usrep283/usrep283697/usrep283697.pdf). While the Supreme Court referenced "the great doctrine . . . *that every man shall be at liberty to publish what is true, with good motives and for justifiable ends* [emphasis in original]," it did not impose requirements for truth, good motives, or justifiable ends prior to publication.

Australia does not have an explicit constitutional right to freedom of speech, but the courts have found an implied freedom of discussion from the prescription of a representative democracy, implying that they have the right to discuss government and political matters [*Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1; http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1992/46.html]. The absence of explicit constitutional rights, however, has led the courts to allow firmer constraints on speech and freedom of the press than in the U.S.—for example, through defamation laws. Yet, there are no laws that directly impose requirements for truth, good motives, or justifiable ends.

How might truth with good motives and for justifiable ends be encouraged? One way is to distinguish between categories of people and organizations that communicate publicly through the media, and to identify for each an appropriate set of obligations and incentives:

1. The vast, and growing array of individual communicators (engaging via social media; personal blogs; newsletters; etc.), constrained only by the laws of defamation; anti-discrimination; public safety; and their own personal or organizational ethics and mores.
2. The declining band of independent publishers who claim a professional role in the dissemination of news and commentary, guided by their professional ethics, whether explicitly articulated or not.
3. Those funded or licensed by government, who may be subject to conditions beyond the legal constraints those categories face.

IMPACT OF NEW TECHNOLOGY

First, technology is expanding the scale and reach of the first category, with the potential for positive impact and the risks of negative impact referred to above.

The risks are increasing because technology is also substantially disrupting the second category of independent publishers, undermining their access to advertising revenues, ability to conduct "public interest" journalism, and maintain their professional standards. It is pushing publishers toward focusing more on popular entertainment (to gain readers) and relying upon sources of information and comment that it cannot easily oversee. Also, the former boundaries between news and commentary are being blurred, changing the way "facts" are presented.

While diversifying the range of people and organizations in each of the categories, technology is also causing a convergence of the second and third categories, as independent publishers look to retain (or expand) their audiences through digital platforms, some of which are subject to licensing conditions policed by government. There is also increased reporting of material from the first category by those in the second and third.

Further, technology has introduced a new category of "aggregators," who claim not to be publishers but merely serve as platforms for media communicators. Accordingly, they also often claim not to be subject to the legal or professional constraints applying to others.

GOVERNMENT REVIEWS

Governments around the world are reviewing the downsides of the communications revolution. The UK's Leveson Inquiry in 2011 (https://webarchive.nationalarchives.gov.uk/20140122144905/http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp) was initially a response to revelations of illegal behavior by the Murdoch press, breaching privacy laws and bribing officials. The focus was on media communicators, and a recommendation was promulgated for a new independent self-regulator to set and monitor standards, with press membership being voluntary and strongly encouraged. Leveson assumed broadcasters would not apply for membership, as they are covered by the UK's Broadcasting Code (http://www.legislation.gov.uk/ukpga/2003/21/part/3/chapter/4/cross-heading/programme-and-fairness-standards-for-television-and-radio; https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code).

The 2012 Finkelstein Review (http://pandora.nla.gov.au/pan/132662/20120321-1002/www.dbcde.gov.au/digital_economy/independent_media_inquiry.html) focused more on "convergence," proposing a single government regulator to set and monitor media standards. More recently, a parliamentary inquiry in Australia studied the impact of new technology on "public interest" journalism, but was unable to agree to any substantial action. The Government has also asked the Australian Competition and Consumer Commission (ACCC; https://www.accc.gov.au) to inquire into digital platforms and their impact on the supply of news and journalistic content, using the lens of competition and assessing possible breaches of competition law and/or the need for regulation reform.

The U.S. is also reviewing these issues particularly through the impact on national security, and there is currently an extensive public debate about the responsibilities of the aggregators, particularly Google and Facebook.

In Australia, there is considerable unease about government becoming directly involved in regulation of media beyond the category of communicators, and the Finkelstein recommendations have not been accepted. No doubt such unease would be greater in the U.S. in light of its history and Constitutional provisions. A less interventionist approach is to strengthen the arrangements for the second category by articulating firmly the standards expected and providing a stronger and more independent monitoring mechanism. This approach would not solve all the problems being raised, but could offer a partial solution for other measures to build upon.

THE AUSTRALIAN PRESS COUNCIL

The Finkelstein Review helped to spark a significant strengthening of the role and capacity of the Australian Press Council (APC; https://www.presscouncil.org.au), a self-regulatory

body focused on the second category of publishers. The strengthening was accepted by the industry in part to reduce the pressure for direct government intervention.

The APC was first established in 1976 on a purely voluntary basis to "promote good standards of media practice, community access to information of public interest, and freedom of expression through the media." It is funded by its members, and managed by its Council, which includes some members, independent journalists, and "public members"—people with no previous connection to media.

The APC issues standards of good media practice which its members must apply. It responds to complaints about material in newspapers, magazines, and associated digital outlets, and engages in public policy debates freedom of speech and to promote the responsibilities of the press to uphold standards of good practice.

The APC has been criticized as a "toothless tiger," too beholden to its publisher members. In response to such criticisms, it has greatly strengthened its capacity and independence:

- Its funding from publisher members was doubled.
- A significant increase in the number of members, particularly digital publishers.
- Members now must enter into contracts which require commitment and funding for three years.
- Members must publish APC adjudication decisions using the exact words and placement required.
- Members must prominently advertise their APC membership and how readers can make complaints.
- Public members now include both people with considerable experience and a high public profile, and more backgrounds.
- Revised and sharpened General Principles and additional standards and guidelines on sensitive issues such as reporting on suicides and family and domestic violence (guidelines on LGBTI have been added).

The APC's General Principles require publishers to "take reasonable steps" to meet standards relating to accuracy, fairness, and balance. They were revised in 2014 in response to industry developments. The accuracy requirements now apply both to news reports and to "factual material," including commentaries and op-eds.

Most complaints are handled by the APC Secretariat, by way of either action by the publisher or dismissal of the complaint. A minority are referred to an adjudication panel comprising public members and independent journalist members only. Adjudication panel processes are formal hearings, but care is taken to ensure procedural fairness. Decisions by the Secretariat and panels are closely monitored and discussed by the full Council to ensure consistent interpretation of standards and to identify issues that might require new or modified guidelines.

Many countries have press councils, with varying structures and processes yet all look to promote standards and press freedom. It is important to note that freedom of the press is not necessarily consistent with freedom of speech, if it misinforms the public, denies access to different views, or intimidates people to be silent. Australia has chosen to use self-regulation

to get the balance right, but the reforms pursued to date by no means address all the problems of "fake news."

OTHER MEASURES LIKELY TO BE REQUIRED

Strengthening self-regulation of the second category would still leave growing numbers in the category untouched, other than by constraining how their material is used by the second category. School education and parental guidance are almost certainly part of the answer, but teachers and parents need tools to help them provide such guidance. There is also a useful role to be played by academics and nonprofits. We have yet to settle some of the big issues mentioned earlier:

- Convergence and consistency, if not uniformity, in the standards and their oversight across the second and third categories.
- How standards set in different countries should apply to publishers who cross national boundaries (and what form might a reciprocal arrangement take).
- The responsibilities of aggregators who ought to be subject to the standards applying to the second or third category.
- The application of competition law to aggregators, ensuring an even playing field for advertisers and media organizations.

The last two issues almost certainly will require deliberation at an international level at some stage. The ACCC's digital platforms inquiry, which is to deliver its final report in June 2019, may prove to be a useful input into such deliberation (https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry).

CONCLUSION

"Fake news" has become a more serious problem because of the ease with which material can be conveyed and because of the disruption that technology is causing the traditional press. The underlying problem is to ensure that freedom of speech and the press has proper appreciation of the responsibilities involved—ideally that what is published is true and published with good motives. But regulating such responsibilities is becoming more difficult.

Firmer self-regulation, in my view, is a significant part of the answer, but is by no means sufficient.

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Andrew Podger is a Public Member of the Australian Press Council. The views and opinions expressed in this article are those of the author and do not purport to reflect the views or opinions of the Council nor its individual members.