

Media access to emergencies – command, control or co-ordination?

Eburn argues that tension between the obligations of the relevant emergency service and the right of the media to report matters in the public interest can be overcome through cooperation.

PAPER ORIGINALLY PRESENTED AT THE 2009 EMPA CONFERENCE

ABSTRACT

This paper considers whether or not the emergency services have the legal power to restrict media access to a disaster area or to restrict how the media report the event. It is argued that as the media have a legitimate interest in reporting on disaster events, the emergency services need to facilitate their access to the disaster rather than attempt to control how the media go about their task. It is argued that the media and emergency services organisations must coordinate their response for the benefit of the emergency service organisation, the media and the public generally. The emergency services do not have the legal power to take any other approach.

* This paper was named as the best research paper of the EMPA conference.

Introduction

This paper sets out to answer two questions regarding the relationship between the media and the emergency services; they are:

1. Can the media be removed from, or prohibited from entering, an area affected by an emergency (such as the scene of a rescue or accident, or an area subject to an evacuation order)? and
2. Can the media be prevented from broadcasting material regarding or obtained at a disaster site?

Answering these questions will identify a possible or perceived tension between the obligations of the relevant emergency service and the right of the media to report matters in the public interest. This tension will be best resolved by cooperation rather than by attempts to exercise command or control over journalists and media organisations.

Obligations of the emergency services

For the sake of convenience this paper will take relevant New South Wales law as its examples, but the principles to be applied will be similar in each Australian jurisdiction, see box.

The Commissioner of the NSW Fire Brigades is charged with taking 'all practicable measures for ... protecting and saving life ...' where that life is endangered by fire or a hazardous materials incident' (*Fire Brigades Act 1989* (NSW), s 6). The State Emergency Service is 'to protect persons from dangers to their safety and health ... arising from floods and storms' (*State Emergency Service Act 1989* (NSW), s 8). The Rural Fire Service is 'to provide rural fire services for New South Wales' which includes 'the protection of persons from dangers to their safety and health ... arising from fires in rural fire districts' (*Rural Fires Act 1997* (NSW), s 9).

For provisions similar to those contained in the NSW legislation and discussed here, see: *Emergencies Act 2004* (ACT) s 34; *Bushfires Act 1980* (NT) s 50; *Fire and Emergency Act 1996* (NT) s 20; *Disasters Act 1982* (NT) ss 16 and 19; *Fire and Rescue Service Act 1990* (Qld) s 53; *Disaster Management Act 2003* (Qld) s 107; *Fire and Emergency Services Act 2005* (SA) ss 42, 97 and 118; *Fire Service Act 1979* (Tas) s 29; *Emergency Management Act 2006* (Tas) s 40 and Schedule 1; *Country Fire Authority Act 1958* (Vic) s 30; *Metropolitan Fire Brigades Act 1958* (Vic) s 32B; *Fire and Emergency Services Authority of Western Australia Act 1998* (WA) ss 18B, 18G and 18L.

Apart from these specific tasks, there are other more general obligations upon the emergency services to take reasonable steps to ensure the health and safety of others. These obligations can arise under statute (such as Occupational Health and Safety legislation (see *Occupational Health and Safety Act 2000* (NSW), ss 8(2) and 20; *Workcover v NSWFB 2006*) and the common law.

To allow the emergency services to meet their obligations, they are given specific powers to evacuate, or restrict access to, the emergency area. The officer in charge at a fire or hazardous materials incident may take 'such measures as the officer thinks proper for the protection and saving of life' (*Fire Brigades Act 1989* (NSW) s 13). This includes taking action to:

... cause to be removed any person ... the presence of whom ... might, in the officer's opinion, interfere with the work of any fire brigade or the exercise of any of the officer's functions. (*Fire Brigades Act 1989* (NSW) s 19).

The Director-General of the New South Wales State Emergency Service may:

... if satisfied that it is necessary or convenient to do so for the purpose of responding to an emergency ... direct ... a person ...:

(a) to leave any particular premises and to move out of an emergency area or any part of an emergency area ...

[or]

(c) not to enter the emergency area or any part of the emergency area. (*State Emergency Service Act 1989* (NSW) s 22)

The incident commander of the Rural Fire Service may:

... for the purpose of ... protecting persons ... from an existing or imminent danger arising out of a fire, incident or other emergency ... take any other action that is reasonably necessary or incidental to the effective exercise of such a function; (*Rural Fires Act 1997* (NSW) s 22).

Although there is no express power to exclude people from the fire zone, such a power may be implied in section 22.

What follows from this review is that the power to control the movement of people in and around an emergency area is not an unlimited discretion. Each piece of legislation provides that power only when it is required to ensure the safe and efficient response to the incident.

The role of media

The media have a legitimate and important role in Australian society. 'Journalists inform society about itself and make public that which would otherwise be private.' (Breit 2007, 5). Making 'public that which would otherwise be private' may in some circumstances be intrusive and unlawful but in other circumstances it may be a great public service revealing corruption, inefficiency or incompetence or show examples of resilience, bravery, selflessness and other ideal behaviour.

The community at large have a legitimate interest in events that attract the response of the emergency services (CMC 2004, 31). Reporting on floods and fires, in particular major events that may threaten homes and lives is in the public interest. The emergency services

rely on the media to communicate messages about what areas are at risk and what people exposed to the risk should do to prepare for oncoming events.

It is beyond the scope of this paper to fully justify the claims that the media can and does play an important role in the community. For the sake of the argument, that proposition will be assumed. What follows is that the media have a legitimate interest in seeking access to disaster areas and whilst there, they may want to secure footage, photographs, sound recordings and conduct interviews with people involved in the event. Some of those people may want to sing the praises of the responders, others may want to criticise what has been done at either a policy level or in terms of the 'on the ground' response. Reporting all points of view, favourable and unfavourable, is part of the charter of the relevant media agencies (ACMA 2004, 32; ABC 2007, 7, Australian Press Council 2006, [3]; Commercial Radio 2004, [2]; MEAA, n/d, [1]).

The potential conflict

Chas Keys (1993) put it this way:

"Emergency managers are periodically critical of what they perceive to be cavalier media attitudes, a focus on sensation and gore, intrusiveness at the disaster scene, the twisting of facts to fit a convenient model or preconception, and a tendency to ignore the emergency services' side of the story. The problem does not work only in one direction, of course. Media people sometimes see emergency managers as high-handed, secretive with information, claiming 'ownership' of an event of public interest and cordoning it off from public scrutiny, and being generally untrusting and unhelpful."

This may represent the 'old approach' to the media (Cohen, Hughes and White 2008, 110) but the pressure on both emergency service and media organisations during a disaster means that conflict may again arise if the relationship is not properly managed. Where there is a perceived conflict, members of the emergency services may wish to remove the media or restrain their action.

Command and control?

As has been noted, above, the fire and emergency agencies can only limit freedom of movement where that is necessary to preserve health and safety or to facilitate the appropriate response to the emergency. Merely ordering people 'out' because that is easier than considering whether or not it is essential and whether or not their legitimate interests can be met, would not be an appropriate decision under the emergency services legislation.

The emergency or disaster is not the private property of the emergency services and there is 'no property in a spectacle' (*Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* [1937]). The media are free to photograph what they can observe of a fire or flood.

The emergency services are not, generally, charged with preserving all the rights of people affected by an emergency. People may well have privacy rights that could be infringed by an intrusive media presence and may have legal claims to compensation (*Privacy and Personal Information Protection Act 1998* (NSW); *Privacy Act 1988* (Cth); *Giller v Procopets* [2008]) but that does not mean the emergency service charged with responding to the fire, flood or storm is also required, authorised or competent to protect those rights.

There are rules with which media agencies must comply when dealing with the broadcasting of information that is unfair, infringes privacy [ACMA 2004, 32; ABC 2007, 4, Australian Press Council 2006, [3]; Commercial Radio 2004, [2]; MEAA, [8] and [9]] or may prejudice a criminal prosecution [Breit 2007, 160] but the fire and emergency services do not have a specific authority, capacity or duty to monitor and enforce these rules.

It can be concluded, therefore, that:

1. Emergency services personnel do not have the legal power to restrict media access to disaster or emergency areas except where that restriction is a legitimate and reasonable restriction based on safety or operational reasons;
2. Emergency services personnel do not have the legal power to dictate to media staff what they may or may not film, record or report.
3. If there are restrictions on media access and publication they are imposed by the law governing the media, rather than emergency services, and it is up to the media enforcement agencies, such as the Australian Communications and Media Authority, and in cases where criminal prosecutions are involved, the police, to enforce.

Coordination

Fire and emergency services have the responsibility of protecting people from risks to their health and safety caused by the fire, flood or storm. Statutory and common law duties do not, however, impose an obligation to guarantee safety; rather they impose an obligation to take reasonable steps to preserve health and safety, taking into account:

... the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. (*Wyong Shire v Shirt* 1980, [14]).

People may have legitimate reasons to be in harm's way during a fire or flood and the emergency services must consider these when considering mandatory evacuations. Taking a fire ground as an example, the fire authorities in Australia have generally adopted the 'Stay or go' policy as good advice to give to residents. In short that policy says people at risk from bushfire 'need to plan to stay and defend them, or plan to leave early' (AFAC 2005, 5).

The logical and necessary consequence of encouraging people to plan to 'stay and defend' their properties is that people must be allowed to stay in the fire ground even though they are exposed to the risk of injury from the fire. Equally, in a flood people may need to remain with their properties to protect assets or otherwise manage their own response.

Other services providers may need to access affected areas to perform their duties. For example, during a flood, the State Emergency Service may evacuate an area and close off roads and other access but if an ambulance paramedic needed to cross the flooded river to provide care, it would be expected that the paramedic would be transported in an appropriate flood boat or helicopter. In that example the paramedic has a legitimate interest in entering the area and that would need to be taken into account. In some cases the danger may be so great that the SES would refuse to allow the paramedic into the disaster area. In deciding what is the appropriate response the SES would have to consider the need to preserve the ambulance paramedic's safety, the needs of the person requiring the paramedic's assistance, the safety of the SES officers and the opportunity cost involved in diverting assets to that task and away from other pressing tasks. The appropriate response, except in the most extreme cases, is not to declare an area off limits to everyone regardless of who they are and why they want to access the area, but to consider particular cases on their merits.

The media have a legitimate interest in accessing the disaster area and that interest needs to be considered. The Australasian Fire and Emergency Services Authorities Council says:

"As the print and electronic media are a primary means of providing information to the community, and media organisations have a legitimate right to information regarding fire events, fire agencies should facilitate their access to relevant information and fire events. Fire agencies should manage media access to firegrounds to provide for the safety of media crews." (AFAC 2005, 9 (emphasis added)).



The media have a legitimate interest in seeking access to disaster areas.

There is some similarity between the emergency services and the military. Fighting fires and responding to disasters breeds camaraderie between members who may well be faced with life threatening situations. The emergency services, even if staffed by volunteers, are a government agency whose principal accountability is to the government, not shareholders or 'customers'.

"The media by comparison ... is, with few exceptions, privately owned and accountable to stockholders with a mission of reporting newsworthy events that will either sell newspapers, magazines, or airtime for a monetary profit. The goal of the ... media is to write or present an intriguing story. That "attention-getter" translates to money. The ... [emergency service], by contrast, is not a profit-making entity. It exists solely because the ... public wants it to exist due to a perceived need for protection ... (Oehl 2004, 39-40)"

The tensions between the emergency services and the media may not be as extreme as those between the military and the media, but they can exist where members of the emergency services are reluctant to value the contribution made by a journalist who will be looking for a story and who is not bound by the rules of the emergency service nor loyal to the service or the government. Nonetheless the emergency services need to recognise that media reporting of the disaster is in the public interest and that the freedom to communicate on important issues and issues of a political nature (CMC 2004, 32-34 and 40-42) including how the government (represented by the emergency services) is managing a response to a disaster is an essential freedom in a democracy (*Nationwide News Pty Ltd v Wills* (1992); *ACT Television v Commonwealth* (1992); Australian Press Council 2006, [Preamble]). The emergency services also need to rely on the media to get their message to the public, to warn them of the dangers, to prepare them to respond and to tell the story of their response (Cohen, Hughes & White 2008, 113; CMC 2004, 21). Although there may be tension between the services and the media, they in fact need each other to do their job.

The military, particularly the American military, noted this reality after a series of conflicts with varying degrees of media access and freedom. During the Vietnam war the military-media relationship failed where there was a perceived 'reality gap' between what was being reported by the administration and the reality observed on the ground (Oehl 2004, 42; Rodriguez 2004, 58). The same situation could apply if the reality of the emergency does not match the official reports issued during press briefings or where the emergency service organisation is perceived to be delivering 'spin' or a public relations message rather than information (Cohen, Hughes & White 2008, 110-113).

In 'Operation Iraqi Freedom', the US military took journalists with them, the journalists were embedded with combat troops, got to know the troops and experience the same dangers but were free to report on anything including failings by the military and on civilian casualties (Oehl 2004, 51). Oehl, a former military commander, says:

"The process of embedding media served to break down some of the preconceived notions and prejudices that the military and media industries had towards one another by educating both sides on the duties and responsibilities of the other. The shared experiences of military members and the reporters embedded with them should ultimately result in a better understanding of not only why a relationship is necessary but how such a relationship can be mutually beneficial to both camps. (Oehl 2004, 52)."

Emergency service organisations need to consider how they will work with media organisations to facilitate access to, and understanding of, information relating to any particular incident. Facilitating media access, for example by assisting them to travel with a fire appliance or a flood boat, may improve the relationship, facilitate the spread of vital information and allow the story, good and bad, of the response to be told for the mutual benefit of the media and the emergency services. It is clear that the fire services, at least, are moving in this direction and facilitating media access with appropriate pre-deployment training and assistance on the fire ground (Cohen, Hughes & White 2008, 115; AFAC 2005, 9)

Conclusion

If the conclusions of this paper are correct, the media have a legitimate interest in reporting on incidents and emergencies and the emergency services do not have the legal right to control their access except for safety and operational reasons, nor do the emergency services have the authority to restrict what is reported. The reality is that the media will, and should, report on major emergencies whether the emergency services like the tone of the report or not. It is not, therefore, up to the emergency services to exercise either command or control over the actions of the media.

The emergency services need to coordinate with the media, recognising their legitimate interest in attending and reporting on emergencies and disasters. Emergency service organisations need to facilitate that interest in the same way they would assist others with a legitimate interest to access the disaster area.

The media and emergency services organisations must coordinate their response for the benefit of the emergency service organisation, the media and the public generally. The emergency services do not have the legal power to take any other approach.

References

Legislation

- Bushfires Act 1980 (NT).*
- Country Fire Authority Act 1958 (Vic).*
- Disaster Management Act 2003 (Qld).*
- Disasters Act 1982 (NT).*
- Emergencies Act 2004 (ACT).*
- Emergency Management Act 2006 (Tas).*
- Fire and Emergency Act 1996 (NT).*
- Fire and Emergency Services Act 2005 (SA).*
- Fire and Emergency Services Authority of Western Australia Act 1998 (WA).*
- Fire and Rescue Service Act 1990 (Qld).*
- Fire Brigades Act 1989 (NSW).*
- Fire Service Act 1979 (Tas).*
- Metropolitan Fire Brigades Act 1958 (Vic).*
- Occupational Health and Safety Act 2000 (NSW).*
- Privacy Act 1988 (Cth).*
- Privacy and Personal Information Protection Act 1998 (NSW).*
- Rural Fires Act 1997 (NSW).*
- State Emergency Service Act 1989 (NSW).*

Legal authorities

- ACT Television v Commonwealth (1992) 177 CLR 106.*
- Giller v Procopets [2008] VSCA 236.*
- Inspector Mayo-Ramsay (WorkCover Authority of NSW) v The Crown in the Right of the State of New South Wales (NSW Fire Brigades) [2006] NSWIRComm 356.*
- Nationwide News Pty Ltd v Wills (1992) 177 CLR 1.*
- Victoria Park Racing & Recreation Grounds Co Ltd v Taylor (1937) 58 CLR 479.*
- Wyong Shire v Shirt (1980) 146 CLR 40.*

Other references

- ABC**, 2007, *Code of Practice*, Australian Broadcasting Corporation, Sydney <<http://www.abc.net.au/corp/pubs/documents/codeprac07.pdf>> at 7 January 2008.
- ACMA**, 2004, *Commercial Television Industry Code of Practice*, Australian Communications and Media Authority, Canberra <http://www.acma.gov.au/webwr/aba/contentreg/codes/television/documents/commercial_tv_industry_code_of_practice_2004.pdf> at 7 January 2009.

AFAC, 2005, *Position Paper on Bushfires and Community Safety*, Australian Fire and Emergency Services Authorities Council, Melbourne <http://www.afac.com.au/_data/assets/pdf_file/0011/2414/PositionPaperonBushfiresandCommunitySafety.pdf> at 7 January 2009.

Australian Press Council, 2006, *Statement of Principles*, <<http://www.presscouncil.org.au/pcsite/complaints/sop.html>> at 7 January 2009.

Breit, R., 2007, *Law & Ethics for Professional Communicators*, Lexis/Nexis Butterworths, Sydney.

CMC, 2004, *Striking a balance: An inquiry into media access to police radio communications*, Crime and Misconduct Commission Queensland, Brisbane.

Cohen, E., Hughes, P. & White, P.B., 2008, 'The media and fire services: Dealing with conflicting agendas' in Handmer, J. and Haynes, K. (eds) *Community Bushfire Safety*, CSIRO Publishing, Melbourne.

Commercial Radio Australia, 2004, *Codes of Practice & Guidelines*, <<http://www.acma.gov.au/webwr/aba/contentreg/codes/radio/documents/cra-codeofpractice.pdf>> at 17 January 2009.

Keys, Chas., 1993, 'Uneasy Bedfellows: Emergency Managers and the Media' 8(2) *The Macedon Digest* 12-14

MEAA, undated, *Media Alliance Code of Ethics*, Media Entertainment and Arts Alliance, Sydney <<http://www.alliance.org.au/code-of-ethics.html>>.

Oehl, Michael J., 2004, 'Embedded Media: Failed Test or the Future of Military-Media Relations?' in Pasquarett, M, Wheatley J and Dion R (eds) *Perspectives on Embedded Media: Selected Papers from the U.S. Army War College*, U.S. Army War College, Carlisle <http://www.au.af.mil/au/awc/awcgate/army-usawc/embedded_media_papers.pdf> at 7 January 2009.

Rodriguez, Jose L., 2004 'Embedding Success into the Military-Media Relationship' in Pasquarett, M, Wheatley J and Dion R (eds) *Perspectives on Embedded Media: Selected Papers from the U.S. Army War College*, U.S. Army War College, Carlisle <http://www.au.af.mil/au/awc/awcgate/army-usawc/embedded_media_papers.pdf> at 7 January 2009.

About the author

Michael Eburn is a Senior Lecturer in Law at the University of New England, Armidale, NSW. He holds a Master of Laws from the University of Newcastle and is currently undertaking a PhD at Monash University on International Disaster Response law and practice.

His research interests are in the area of the emergency services and emergency response. He is the author of *Emergency Law* (2nd ed, 2005, The Federation Press) as well as numerous articles and conference papers on legal issues facing the emergency services. He is a regular guest presenter at the EMA Institute, Mt Macedon.

This paper won the best paper award at the EMPA conference in 2009.