



**Submission by
Free TV Australia**

Australian Law Reform Commission

*Serious Invasions of Privacy in the Digital
Era – Discussion Paper*

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EXECUTIVE SUMMARY

- While the ALRC's terms of reference require it to consider what a cause of action for serious invasions of privacy should look like, rather than whether one should be introduced at all, Free TV submits that the second question is a critical threshold that has not been met, and accordingly, the discussion is somewhat artificial.
- On this important threshold issue, Free TV does not support either a statutory cause of action for serious invasions of privacy, or a new statutory tort of harassment, or any broadening of the ACMA's powers to deal with privacy matters, for the reasons identified below.
- Additional layers of privacy regulation are unnecessary as there is no identified gap in the existing privacy law framework. The current framework of legislative, common law and regulatory protections is extensive, effective in protecting individuals and is operating well.
- There is no demonstrated need for additional layers of privacy regulation to be introduced. The number of privacy complaints in respect of commercial free-to-air television broadcasters is very low and declining.
- Additional layers of privacy regulation would:
 - unnecessarily complicate privacy laws;
 - have a deterrent effect on news and journalism, and increase uncertainty;
 - potentially lead to a range of unintended consequences for individuals in an evolving technological and social context and have a stifling effect on innovation; and
 - place an unjustified regulatory burden on Free TV members, including by exposure to complex and costly litigation.
- Free TV welcomes the ALRC's proposal that legislation in relation to surveillance devices should be uniform across Australian States and Territories. Any such legislation should include a clear public interest exception which recognises the need for journalists to be able to use such devices as part of their role in providing important news and current affairs coverage.

Introduction

Free TV Australia (**Free TV**) is the peak industry body representing all of Australia's commercial free-to-air television broadcasting licensees. Free TV welcomes the opportunity to respond to the ALRC's Discussion Paper 80, '*Serious Invasions of Privacy in the Digital Era*'.

While Free TV understands that the ALRC is not considering the question of whether or not a statutory cause of action should be introduced, Free TV considers that this is a critical threshold question that should be answered before embarking on any detailed analysis of such a statutory action.

Consistent with Free TV's submission to the Issues Paper, Free TV remains opposed to a statutory cause of action for privacy. The existing privacy law framework is extensive and already imposes a significant regulatory burden on broadcasters. There is no demonstrated gap in the existing framework, and no evidence of any problem that justifies the introduction of a statutory cause of action. Such a cause of action will place undue weight on privacy at the expense of other important rights and freedoms, including freedom of communication.

For the same reasons, Free TV also opposes a new statutory tort of harassment, broadening of the scope of breach of confidence remedies for serious invasions of privacy, and broadening the powers of the ACMA in relation to quantifying compensation for breaches of privacy.

Free TV is of the view that regulatory creep in the form of additional layers of privacy regulation would have the effect of increasing regulatory costs for broadcasters in an area of law where there is already an excessive amount of regulation. This is not justified in circumstances where there is no evidence of any significant problem.

Threshold question: Should a Statutory Cause of Action be introduced?

As stated above, Free TV is opposed to a statutory cause of action for serious invasions of privacy. Free TV remains of the view that there is no public policy or evidential basis for the introduction of a statutory cause of action.

1. Current protections are extensive

The existing privacy regime applicable to broadcasters provides a strong level of privacy protection for individuals.

As outlined in Free TV's submission to the ALRC's Issues Paper, its members are subject to a comprehensive set of privacy laws, some of which apply to organisations generally, some of which place specific limits on how broadcasters can use material relating to a person's personal or private affairs, and some of which is contained in legislation regulating a diverse range of areas of law, across a range of jurisdictions, and often not in a consistent or easily decipherable manner. These laws include Commonwealth, State and Territory legislation and the common law, as well as industry codes of practice, including in particular, the Commercial Television Industry Code of Practice ("**the Code**"), and the ACMA's Privacy Guidelines for broadcasters ("**the Guidelines**") (which supplement the Code).

The process for making complaints to the ACMA in relation to breaches of the Code and the Guidelines is thorough, free for complainants and can lead to serious consequences for broadcasters. The process is detailed further in the Guidelines and on the ACMA website.¹

The Code is subject to review every three years. In accordance with s 123 of the *Broadcasting Services Act 1992*, the Code cannot be registered unless:

- The Code provides appropriate safeguards for the matters it covers; and
- There has been adequate public consultation on the Code.

A review of the Code is currently underway. In undertaking this review, Free TV will have regard to the ACMA's findings arising out of the *Contemporary Community Safeguards Inquiry*, in relation to the content of contemporary broadcasting codes of practice, including in relation to privacy issues and the ethical standards of broadcasters, in the context of ensuring that adequate measures are in place, via the Code, to protect the public against what are considered to be unreasonable privacy intrusions.²

The current regulatory framework is very effective in ensuring that the privacy rights of individuals are protected. Further legislation is unnecessary and would simply increase regulatory uncertainty and act as a deterrent to the effective reporting of news and current affairs.

2. There is no demonstrated need

As argued in Free TV's submission to the Issues Paper, no inadequacy in relation to the protection currently afforded privacy by statute and common law has been demonstrated.

Free TV's 2011 submission to the Department of the Prime Minister and Cabinet indicated that from 2006 - 2011; privacy complaints represented just 3.3% of complaints overall received by broadcasters.

Since 2011, these figures have declined:

- From 2008 to 2013 privacy complaints represented 3.2% of overall complaints received; and
- From 2011 to 2013, privacy complaints represented just 1.8% of overall complaints received by broadcasters.

Additionally, the 2012-13 Annual Report of the ACMA showed that, while there were a total of 2178 enquiries and written complaints about commercial, national and community broadcasters during 2012-13, there were only 2 breach findings relating to privacy by commercial television broadcasters, and 3 non-breach findings.

In the foreword to the 2011 Issues Paper "A Commonwealth Statutory Case of Action for Serious Invasion of Privacy", produced by the Department of Prime Minister and Cabinet, the Hon Brendan O'Connor noted, "serious invasions of privacy are infrequent".

¹ ACMA, *Privacy guidelines for broadcasters*, December 2011, Figure 1 *Steps to determining a breach of the code privacy provisions*, at 3. Information about how to make complaints is available on the ACMA website at: <http://www.acma.gov.au/theACMA/About/The-ACMA-story/Regulating/how-to-make-a-report-or-complaint>

² ACMA, *Contemporary Community Safeguards Inquiry*, Issues Paper, June 2013, at 53-57.

Therefore, an additional statutory cause of action would only serve to impose additional regulatory obligations on broadcasters. It would act as an unnecessary impediment to broadcasters' business practices, contrary to principles of good regulatory practice and evidence-based policy making. It would encourage individuals to pursue litigation, with the main goal being personal financial benefit, in circumstances where there are already both criminal and civil avenues for redress available. It is also noteworthy that a statutory cause of action such as the one proposed will only benefit the small number of plaintiffs that are sufficiently financially well-off to fund such litigation, which is likely to be lengthy and expensive.

3. No 'counterbalancing' statutory right of freedom of communication currently exists

As highlighted in Free TV's response to the Issues Paper, unlike other jurisdictions, Australia does not have a 'counterbalancing' statutory right of freedom of communication or freedom for the media to seek out and disseminate information of public concern.

Therefore, a 'counterbalance' in the form of a right to privacy is not necessary in circumstances where no statutory right of freedom of communication exists. Any statutory cause of action would not operate to 'harmonise' Australian laws with those of the UK or the US, which operate in the context of a Bill of Rights (in the case of the UK) and constitutional freedoms (in the case of the US), and which are strongly upheld in those jurisdictions.

In Australia in the current landscape, a statutory cause of action would simply add an additional layer of regulation and complexity, in circumstances where there is no gap or demonstrated need in the existing legal framework, and where no counterbalancing right of communication exists.

4. Need to ensure privacy laws are relevant in the evolving technological and social context

Recent and evolving technologies do not require an additional layer of privacy protection in the form of a statutory cause of action for serious invasions of privacy.

Existing laws in relation to privacy including the Privacy Act and the privacy provisions of the Code are drafted in a manner that is technology-neutral. While developments in technology mean that information can be disseminated to more people more quickly, those technological developments have not resulted in an increase in broadcasters misusing private information. Broadcasters continue to apply great diligence in protecting individuals' privacy in the course of their operations, across all platforms and technologies. As indicated above, the very low number of privacy complaints brought against broadcasters evidences the diligence that is exercised.

In the context of an evolving technological and social media environment, individuals' expectations of privacy are changing and are also highly variable from individual to individual (and particularly across generations). This new environment makes it extremely difficult, from a public policy perspective, to codify what should constitute a serious invasion of privacy. It also consequently makes it very difficult for organisations to decipher what kind of conduct is being proscribed. In this sense, an over-arching statutory cause of action will not necessarily 'fit' the current social context, given that it is becoming decreasingly possible to ascertain what a particular person's reasonable expectations of privacy might be.

The current social media environment supports individual choice by giving consumers the ability to choose how they engage with social media, and what and with whom they communicate. Over-regulation or inappropriate regulation in the area of privacy will stifle these kinds of activities and act as a deterrent to engaging in this new environment.

The proposed tort of privacy

The ALRC's terms of reference require it to consider what a cause of action for serious invasions of privacy should look like, if such a cause of action were to be introduced.

As indicated above, Free TV is of the view that there is no public policy or evidential basis for the introduction of a statutory cause of action.

If such a cause of action were under consideration, Free TV is of the view that the ALRC's proposal in its current form risks unreasonably encroaching on freedom of speech and freedom of communication. The following aspects of the proposed cause of action would be particularly detrimental:

- any application of the cause of action to reckless conduct. News and current affairs reporting takes place under strict time constraints that require rapid evaluation of material. In these circumstances, penalties for reckless breaches would be likely to introduce a level of conservatism that may prevent or delay the reporting of news, because the test for "recklessness" in law carries with it a necessary value judgment about what is a reasonable or unreasonable risk.
- any failure to include public interest and consent as defences in addition to requiring a court to weigh up whether the plaintiff's interest in privacy outweighs the defendant's interest in freedom of expression and any broader public interest, as an element of the cause of action. Defences operate quite differently from provisions which allow a court to balance a number of factors to determine which should take precedence in a particular case. For example, a defence of consent would prevent the plaintiff from succeeding in establishing a cause of action if the defendant can prove that the plaintiff in fact consented. It would therefore provide a degree of certainty to the defendant that, if consent has been obtained, then the law has been complied with. However, if consent is simply a factor that is weighed against other factors in order to determine whether a matter may proceed to be heard, a court may choose to place less weight on the fact that the plaintiff consented, at its discretion. The defences of public interest and consent should be included in addition to any balancing provision to determine whether the plaintiff has a cause of action.
- any failure to require the plaintiff to prove damage in order to bring an action under the new tort. The absence of such a requirement would significantly increase the risk of the cause of action being misused and simply encouraging litigation in circumstances where there is a clear public interest in dissemination of the relevant private information.

Should a tort of harassment be introduced to prevent and redress serious invasions of privacy instead?

As outlined above, there is no identified gap in the existing privacy law framework.

The framework is extensive, effective in protecting individuals and is working well.

Therefore, while Free TV supports uniform laws across Australian States and Territories, it does not support any move to supplement existing laws with an additional layer of legislation or regulation, whether by way of a statutory tort of privacy, or a statutory tort of harassment.

An additional statutory cause of action, whether it is for serious breaches of privacy or for harassment, would impose additional regulatory obligations on broadcasters and act as an unnecessary impediment to broadcasters' business practices, contrary to principles of good regulatory practice and evidence-based policy making. As with a statutory case of action for serious invasions of privacy, a statutory cause of action for harassment would encourage individuals to pursue litigation in circumstances where there are already both criminal and civil avenues for redress available.

If a uniform law across Australian States and Territories is considered, it is fundamental that an appropriate exemption for the reporting of news and current affairs in the public interest is included.

Broadening remedies for breach of confidence

Free TV also does not support any broadening of the scope of breach of confidence remedies for serious invasions of privacy.

The ALRC notes that very few cases have awarded equitable compensation for breach of confidence, with the case of *Giller v Procopets* remaining the sole appellate authority for the recovery of compensation of emotional distress in a breach of confidence action, over five years after it was decided.³

Free TV is of the view that this is a reflection of the fact that very few matters of this nature have gone before the courts. As the ALRC has identified, the development breach of confidence at common law may well lead to damages for emotional distress being granted in appropriate cases. This is a matter that should be left to develop at common law.

Uniform surveillance devices legislation

Free TV welcomes the ALRC's proposal that legislation in relation to surveillance devices should be uniform across Australian States and Territories, and that such legislation should include a public interest defence or exception.

As noted by the ALRC, inconsistency in this area of law means that organisations with legitimate uses for surveillance devices face increased uncertainty and regulatory burden.⁴ A technologically neutral definition of 'surveillance device' would further promote consistency across devices.

Any such legislation should include a public interest defence or exception, to achieve an appropriate balance between the need for regulation of the use of surveillance devices to protect an individual's privacy, and the need for journalists to use such devices as part of their role in providing important news and current affairs coverage.

³ ALRC Discussion Paper 80, *Serious Invasions of Privacy in the Digital Era*, at 184.

⁴ ALRC Discussion Paper 80, *Serious Invasions of Privacy in the Digital Era*, at 197.

Responsible use of surveillance devices can lead to news stories that uncover corruption, illegal behaviour, or behaviour that endangers the community, among other matters.

Journalists (and film or documentary makers) should be able to use surveillance devices as part of their role in investigating and reporting on stories where there is a genuine public interest. Similarly, the media should be able to publish material that has been obtained by a third party using a surveillance device, if it is in the public interest to do so.

Proposed new ACMA power to quantify damages

Free TV opposes any broadening of the powers of the ACMA in relation to quantifying compensation for breaches of privacy in breach of a broadcasting code of practice.

An extension of the ACMA's powers in this way would be at odds with its functions, set out in Part 2 of the *Australian Communications and Media Authority Act 2005 (ACMA Act)*. Unlike the OAIC, which has specific functions in relation to the protection of the privacy of individuals,⁵ the ACMA is primarily tasked with regulating industry, including by way of determining industry standards and compliance with industry codes.⁶

As indicated above, as part of these functions the ACMA can impose additional licence conditions on broadcasters, suspend or cancel licences which it has granted to broadcasters, as well as impose significant civil and criminal penalties. In the ordinary course of carrying out its functions, the ACMA does not currently quantify damages. It would require a significant extension of its powers and resources to properly perform this additional function. Free TV considers this is a judicial function best left to the courts, which are tasked with enforcing such determinations.

The ALRC suggests that this expansion of the ACMA's functions would deter broadcasters from invading individuals' privacy.⁷ However as indicated above, the complaints data does not suggest that such deterrence is required. The ALRC also notes in its Discussion Paper that 'the ACMA's figures indicate that the additional power proposed may be rarely used'.⁸ It is therefore unclear how this type of expansion of the ACMA's functions and resources required to perform those functions, is justified.

Adverse consequences of complicating existing privacy laws with additional layers of regulation

As indicated in Free TV's submission to the Issues Paper, increasing the regulatory burden on broadcasters by introducing a statutory cause of action, either for serious invasion of privacy or for harassment, or by expanding the ACMA's current functions

⁵ *Australian Information Commissioner Act 2010*, s 9.

⁶ *ACMA Act*, Part 2.

⁷ ALRC Discussion Paper 80, *Serious Invasions of Privacy in the Digital Era*, at 222.

⁸ ALRC Discussion Paper 80, *Serious Invasions of Privacy in the Digital Era*, at 223.

with respect to serious invasion of privacy, will have a number of detrimental economic consequences. It will:

- Have a deterrent effect on news and journalism, and increase uncertainty;
- Lead to an increase in the number of court actions, and in practice will mean that Free TV members and other organisations will have to make sure that they are insured for such actions;
- Increase the regulatory burden on organisations;
- Require organisations to increase their investment in protecting against such actions by way of reviewing current practices, staff training etc;
- Require Free TV members and others to invest significant resources in defending such actions if they are brought;
- Lead to an increase in frivolous or speculative actions;
- Act as a disincentive to organisations to fully utilise new communications tools such as social media sites;
- Act as a disincentive to social media sites to innovate.