

## **SBS Submission to Australian Law Reform Commission Discussion Paper 80 – Serious Invasions of Privacy in the Digital Era**

SBS welcomes the opportunity to respond to this Discussion Paper.

For the record, SBS remains of the view that there should not be a statutory cause of action for serious invasion of privacy – the reasons for this have previously been set out at length in SBS’s previous submission to the ALRC.

However, we acknowledge the limited remit of the ALRC is to look at what the terms of a statutory right to privacy should be (and not whether we should adopt a statutory right at all). SBS will therefore consider the model proposed by the ALRC in this context.

In summary, SBS maintains the views expressed in its November 2013 submission to the ALRC. We note that some of our views have been adopted or taken into account when crafting the proposed statutory right, and we welcome this outcome. However, SBS would like to raise reservations with the following key points.

### **Invasion of Privacy**

#### **Proposal 7–1**

The test proposed is that the cause of action is available only when the invasion of privacy is “serious”. In addition, when considering whether something is serious, a decision maker must have regard to whether the invasion was, or was likely to be, “highly offensive, distressing or harmful”.

SBS reiterates its original submission that a test of “highly offensive” as opposed to a test of “serious” is the preferable approach. From the media perspective, there are many circumstances where people may not appreciate being filmed while they are in public, and might consider the encroachment by any major media organisation into their space to be “serious”. A lower threshold than “highly offensive” may invite many trivial or minor complaints.

### **Remedies**

#### **Proposal 11–5 and Proposal 11–7**

As submitted in its original submission, SBS does not support the proposals for exemplary damages or account of profits, as they are not appropriate for this type of action.

#### **Proposal 11-9 and Proposal 12-2**

SBS notes that it remains particularly concerned about the impact of injunctions for this type of cause of action. While it will assist that decision makers must consider the impact on freedom of expression or other public interest factors when deciding to award the injunction, the threat of injunctions creates a chilling effect.



### **Proposal 11-11 and Proposal 11-12**

SBS is concerned about the proposal that courts could be empowered to order corrections and apologies, and we note that this could have implications for SBS's editorial independence, which SBS is required to safeguard under the *Special Broadcasting Services Act 1991* (SBS Act). The ABC will be similarly affected under their legislation.

### **Surveillance**

#### **Proposal 13-1 and Proposal 13-4**

SBS supports an approach of uniformity to surveillance legislation as a more effective option for reform and a more effective way of addressing the causes of privacy concerns – provided that the legislation allows for broad public interest concerns to permit both the creation of a recording, and the subsequent communication of that recording by the media.

### **New regulatory mechanisms**

#### **Proposal 15-1**

SBS is concerned that the two elements of Proposal 15-1 do not align with the co-regulatory system in which SBS (and other Australian broadcasters) expect to operate. This regime does not contemplate personal redress for aggrieved individuals, such as in the form of compensation.

In this system SBS is directly responsible for regulating its programming activities through the SBS Codes of Practice, as provided for in as provided for under the SBS Act. SBS has its own internal system of self-regulation through the independent role of the SBS Ombudsman who investigates complaints about SBS's compliance with its Codes, including privacy. SBS is subject to regulatory oversight through the ACMA, and parliamentary accountability. The number of complaints SBS receives under its privacy code of practice is very low.

SBS is particularly concerned that Proposal 15-1 will have an unusual effect on SBS (and other broadcasters) in that the ACMA, not a court, is presumably entitled to determine that SBS's actions constitute the tort of 'serious invasion of privacy'.

SBS notes that under Proposal 8-1, the plaintiff will have the onus to prove that their privacy interest outweighs any competing public interest and the interest of the defendant in free speech. Proposal 15-1 is inconsistent as it would allow the ACMA – a non-judicial body – to determine that a broadcaster has committed a tort based on its investigation into whether the broadcaster has complied with its own code of practice, rather than a determination made during legal proceedings.

SBS is also concerned that the expansion of the ACMA's powers to specify compensation is inconsistent with the penalty regime under the *Broadcasting Services Act 1992* (BSA) for breaches of broadcasting codes of practice (for the licensed broadcasters). The specification of an amount of compensation would presumably entitle the ACMA to interpret the damage incurred by an individual which is not a power contemplated by the BSA.



This represents a radical departure from the current system of regulation and the extent of the ACMA's enforcement powers under the BSA. The proposal will also have a disproportionate effect on the broadcast media compared to the print and online media.

SBS submits that, if a privacy tort is to be created by statute, a better model would be for the cause of action to be stated as a right within the Privacy Act 1988. This would enable the existing exemptions and qualifications in relation to media to be maintained. The Privacy Commissioner should deal with complaints by individuals in relation to all claims under the Act. ACMA would continue to deal with codes complaints as is currently the case.