

Australian Broadcasting Corporation

submission to the

Australian Law Reform Commission

**Issues Paper on Serious Invasions of
Privacy in the Digital Era**

November 2013

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ABC submission to the Australian Law Reform Commission on its Issues Paper into Serious Invasions of Privacy in the Digital Era

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Introduction

The ABC welcomes the invitation to comment on the Australian Law Reform Commission's (ALRC) issues paper, *Serious Invasions of Privacy in the Digital Era*. Many of the issues raised by the ALRC have already been canvassed by the Department of Prime Minister and Cabinet (DPMC) in its 2011 Issues Paper on a Commonwealth Statutory Cause of Action for Serious Invasion of Privacy. The ABC submitted to that inquiry and maintains the views expressed at that time. Where relevant, the ABC repeats in this submission relevant portions of its 2011 submission to DPMC.

Guiding principles (Question 1)

The ABC broadly agrees with the principle proposed by the ALRC that any statutory cause of action should promote uniformity or consistency in the law applying throughout Australian jurisdictions. It submits, however, that consistency should not be the principal aim where this results in a net loss in protections for freedom of expression. To illustrate, surveillance devices legislation generally prohibits the communication or publication of secret recordings of private conversations or activities. In Victoria, this prohibition does not apply where the communication or publication is in the public interest.¹ There is no equivalent recognition of the public interest in the New South Wales law.² The ABC does not support consistency across

¹ *Surveillance Devices Act 1999 (Vic)*, section 11(2)(b).

² *Surveillance Devices Act 2007 (NSW)*, section 14(2).

jurisdictions if this unduly restricts its ability to gather and present news and information in the public interest.

In addition to the principles proposed by the ALRC, it is suggested—consistent with international privacy instruments—that any law regulating privacy in a way that is likely to affect other rights and freedoms, such as freedom of expression, be limited to what is necessary and proportionate for protecting legitimate interests in a democratic society. In principle, legislation should only be introduced to respond to a clear need or issue that is not otherwise addressed by existing laws or other mechanisms. Existing systems of self- and co-regulation should be taken into account, consistent with promoting access to justice. These principles are consistent with those set out in best-practice regulation guides published by the Australian Government and by the Council of Australian Governments.³

So, for instance, the ABC and other media organisations are subject to certain self- and co-regulatory schemes which provide an avenue of complaint and redress for privacy complaints.⁴ This avenue should be taken into account in any privacy regulation scheme, as is suggested later in this submission at page 12.

The guiding principles should also encompass consideration of the international and cross-border dimensions of data flows and surveillance capabilities. Consideration might be given to the work of the Asia Pacific Economic Cooperation (APEC) work in developing the APEC Privacy Framework.⁵ Cross-border policy development in other areas, such as in finance

³ Australian Government, *Best Practice Regulation Handbook*, July 2013, see especially pages 53 and following, <http://www.finance.gov.au/obpr/proposal/handbook/docs/bpr-handbook.pdf>; Council of Australian Governments (COAG), *Best Practice Regulation – A Guide for Ministerial Councils and National Standard Setting Bodies*, October 2007, http://www.finance.gov.au/obpr/docs/COAG_best_practice_guide_2007.pdf. See especially the “Principles of Best Practice Regulation” at page 4 which include consideration of “a range of feasible policy options ..., including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed;” and states that “government action should be effective and proportional to the issue being addressed”.

⁴ The ABC has self-regulatory standards in its Editorial Policies with which it voluntarily complies and in respect of which it receives and investigates complaints from the public. These standards expressly include a commitment to privacy in section 6 which provides: “Intrusion into a person’s private life without consent must be justified in the public interest and the extent of the intrusion must be limited to what is proportionate in the circumstances”.

This commitment is also contained in the ABC’s Code of Practice which falls under the co-regulatory scheme. Under that scheme, complaints must be taken to the ABC in the first instance and, if the complainant is dissatisfied, may be investigated by the Australian Communications and Media Authority under sections 150 and 151 of the *Broadcasting Services Act 1992 (Cth)*.

The ABC’s Editorial Policies and Code of Practice are publicly available at <http://about.abc.net.au/how-the-abc-is-run/what-guides-us/our-editorial-policies/>. Complaint outcomes relating to internal investigations are available at <http://about.abc.net.au/talk-to-the-abc/feedback-and-enquiries/> and the ACMA publishes its broadcasting investigation reports at <http://www.acma.gov.au/theACMA/Library/Industry-library/Broadcasting/broadcasting-investigation-reports>.

⁵ APEC Privacy Framework, December 2005, <http://publications.apec.org/publication->

regulation,⁶ also suggest guiding principles for regulatory development including, for instance, how to assess whether foreign regulatory schemes provide equivalent protections, whether equivalent foreign regulators should be given some recognition, what cooperative arrangements might be put in place between the domestic and foreign regulators, and what rights and remedies should be available to Australians who access or use foreign services or facilities in Australia.

Types of activities that the cause of action should prevent or redress (Question 2)

The ABC recognises the need and desirability of journalists being able to protect the identity of their confidential sources from exposure or detection. Surveillance and interception powers, and powers of search and seizure, which are exercised secretly, without prior or subsequent notice to the target, which lack adequate accountability and oversight, which result in the collection and retention of excessive and potentially irrelevant or protected information have the potential to be unduly intrusive and may interfere with legitimate newsgathering efforts and other privacy interests.⁷ It is submitted that the cause of action for serious invasions of privacy should be capable of preventing or redressing such activities. Such activities, even where authorised by law, should be actionable where—as the ALRC invites responses to, in Question 12—the conduct does not meet a requirement that it be proportionate, or necessary and reasonable. Also see the ABC’s response to Question 26 below.

Types of actions that the ALRC must ensure are not unduly restricted (Question 3)

Any new statutory cause of action for serious invasion of privacy must not unduly constrain journalistic enquiry, artistic expression or open justice. For example, secret recording can be used by media organisations in investigative journalism, as well as in comedy and satire. The ABC, in its Editorial Policies and Code of Practice, acknowledges and respects that individuals have a reasonable expectation of privacy and also recognises that privacy is not absolute and must be balanced with other public interests such as freedom of expression. This extends to disclosing information in the public interest and permitting artistic expression.

[detail.php?pub_id=390](#). Also available from the Australian Attorney-General’s site, <http://www.ag.gov.au/RightsAndProtections/Privacy/Pages/APECprivacy.aspx>.

⁶ Australian Securities & Investments Commission, *Principles for cross border financial services regulation – Making the regulatory regime work in a cross border environment*, Regulatory guide 54, November 2002, [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/principles.pdf/\\$file/principles.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/principles.pdf/$file/principles.pdf).

⁷ See, for example: <http://www.theguardian.com/technology/2013/sep/30/email-surveillance-could-reveal-journalists-sources-expert-claims>; <http://news.smh.com.au/breaking-news-world/us-publisher-seeks-answers-over-nz-journo-20130731-2qy9y.html>.

The ABC includes limits and safeguards to ensure that the competing public interests are appropriately balanced—see, for instance sections 5.8 and 5.9 of the ABC Editorial Policies which set out the circumstances where secret recording may be used:

Secret recording and other types of deception

5.8 Secret recording devices, misrepresentation or other types of deception must not be used to obtain or seek information, audio, pictures or an agreement to participate except where:

- a justified in the public interest and the material cannot reasonably be obtained by any other means; or
- b consent is obtained from the subject or identities are effectively obscured; or
- c the deception is integral to an artistic work and the potential for harm is taken into consideration.

Mandatory referral

5.9 An appropriately senior ABC person designated for the purpose must approve in advance, having consulted ABC Legal, any proposal:

- a to use secret recording during the production of content commissioned, produced or co-produced by the ABC...

Whether the legislation should include a list of examples (Question 4)

The ABC reiterates its view expressed to the DPMC in 2011 that legislation creating a statutory cause of action should not include a list of activities that are either presumed or may in practice become assumed to constitute an invasion of privacy. This could hamper the court in its assessment about whether a claim is actionable in the first place. For instance, the interest in maintaining the privacy of sensitive personal information may be outweighed by the public interest in disclosure of information relevant to a political leaders' ability to hold public office.⁸ Case law suggests that privacy issues can arise in a wide variety of situations and that the proper resolution of claims alleging a serious invasion of privacy requires, as the UK courts put it, an intense focus on how the various interests at stake are implicated in the particular circumstances of each case.

⁸ See, e.g., the *Case of Éditions Plon v. France* (Application no. 58148/00, 18 May 2004): After the death of former French President Francois Mitterrand, his doctor published a book revealing that Mitterrand had deceived the public about his health when seeking re-election. The European Court of Human Rights found that, while a short-term ban was appropriate in the immediate aftermath of Mitterrand's death given the interests of his grieving family, the long-term ban on the book was disproportionate given the public interest at stake in 'the public's right to be informed about any serious illnesses suffered by the head of State, and the question whether a person who knew that he was seriously ill was fit to hold the highest national office. Furthermore, the secrecy which President Mitterrand imposed, according to the book, with regard to his condition and its development, from the moment he became ill and at least until the point when the public was informed (more than ten years afterwards), raised the public-interest issue of the transparency of political life.'

Threshold for seriousness of privacy invasion (Question 6)

The ABC stands by its 2011 submission to the DPMC in that the Corporation endorses the views of the ALRC and Victorian Law Reform Commission (VLRC) that “highly offensive” is the preferable standard for the statutory cause of action as this sets an appropriately high threshold, focuses attention on significant invasions rather than minor or trivial matters, and is intended to ensure freedom of expression is respected and not unduly constrained. This standard is consistent with the view expressed by Gleeson CJ in *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, and with relevant US and NZ law.

Defining and balancing competing public interest; including the public interest as part of the statutory action or as a defence (Questions 7 and 8)

The ABC repeats its position articulated in 2011 to DPMC, namely:

“The ABC agrees with the approach proposed by the ALRC [in its Report 108]⁹ and New South Wales Law Reform Commission (NSWLRC) [in its Report 120]¹⁰ to integrate consideration of the public interest as part of the cause of action, where the plaintiff would have to establish that the privacy interest outweighs the public interest in disclosure. This would allow the court to assess all the public interests at the outset to determine whether a sufficiently strong claim for invasion of privacy exists, without waiting for a defendant to explain the countervailing public interest as part of a defence.”

“In the absence of written overarching constitutional or other protections for fundamental rights in Australian law (unlike in the US and UK, for instance), freedom of expression needs to be expressly recognised in any statutory cause of action for serious invasion of privacy. This can be done in various ways.

- a. As a starting point, refer to freedom of expression in the objects clause of the statute. A useful approach that could be adapted is that used in the Standing Committee of Attorneys-General’s uniform defamation model bill,¹¹ which provides:

3 Objects of Act

The objects of this Act are:

- (a) to enact provisions to promote uniform laws of defamation in Australia, and

⁹ ALRC, *For Your Information: Australian Privacy Law and Practice*, ALRC Report 108, tabled August 2008, <http://www.alrc.gov.au/publications/report-108>, Chapter 74 (Protecting a right to personal privacy).

¹⁰ New South Wales Law Reform Commission, *Invasion of Privacy*, Report 120, April 2009, http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/report_120.pdf

¹¹ Model Defamation Provisions prepared by the Parliamentary Counsel’s Committee and approved by the Standing Committee of Attorneys-General on 21 March 2005 (<http://www.pcc.gov.au/uniform/pcc-279-94-d10.pdf>). Reputation and privacy are two closely allied personality rights which are often found intertwined – see, for instance, ALRC Report 11, *Unfair Publication: Defamation and Privacy* (<http://www.alrc.gov.au/report-11>), 1979

- (b) to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance, and
 - (c) to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter, and
 - (d) to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter.
- b. Secondly, require the court to balance the public interest in privacy with public interest considerations which may justify invasion of privacy (for example, freedom of expression) to ensure that any restriction on freedom of expression or any other matter of public interest is proportionate to what is needed to protect privacy in the circumstances of the case.
- c. Include a defence (if it is not satisfactorily addressed in the cause of action itself) allowing the privacy-invasive activity in the public interest, and expressly give a non-exhaustive list of matters which the concept of the public interest includes.¹² For exam-

¹² The Commonwealth Attorney General's Department, Revised outline of a possible national defamation law, July 2004

(http://ag.gov.au/www/agd/agd.nsf/Page/Publications_Defamationlawreform-July2004) proposed a defence where the published matter was true and also related to a subject of public interest. This was not adopted by SCAG, but the relevance here is that, drawing in part on the 1979 ALRC recommendations, the proposal defined 'subject of public interest' to enable disclosures about a person's health, private behaviour, financial affairs, home life, personal relationships or family relationships provided:

- (i) it relates to the person's public, commercial or professional activities;
- (ii) it relates to the person's suitability or candidature for a public, commercial or professional office or position;
- (iii) it relates to a decision taken, or likely to be taken, by the person in a public, commercial or professional capacity;
- (iv) it relates to property or services offered to the public;
- (v) it relates to public administration;
- (vi) it relates to the administration of justice;
- (vii) it is reasonable to publish the matter (or, in the case of an imputation or an opinion, the matter conveying the imputation or expressing the opinion) in order to preserve the safety or property of any person;
- (viii) the matter (or, in the case of an imputation or an opinion, the matter that conveys or expresses the imputation or opinion) is published in response to something introduced into public debate by the person himself or herself, otherwise than by way of response to something introduced into public debate by someone else.

The UK Press Complaints Commission adopts a shorter list but the same approach—see their Editors' Code of Practice (<http://www.pcc.org.uk/cop/practice.html>). The Australian Press Council's General Statement of Principles (<http://www.presscouncil.org.au/general-principles>) takes a different tack, defining 'public interest' as 'a matter capable of affecting the people at large so they might be

ple, the ABC Editorial Policies and Code of Practice state that ‘intrusion into a person’s private life without consent must be justified in the public interest and the extent of the intrusion must be limited to what is proportionate in the circumstances’, and a glossary addresses ‘public interest’ as follows:

The “public interest” cannot be exhaustively defined. It includes but is not confined to:

- exposing or detecting crime;
- exposing significantly anti-social behaviour;
- exposing corruption or injustice;
- disclosing significant incompetence or negligence;
- protecting people’s health or safety;
- preventing people from being significantly misled by a statement or action of an individual or organisation in relation to a matter of public importance;
- disclosing information that assists people to better comprehend or make decisions on matters of public importance.

There is also a public interest in the internationally recognised civil and political rights, which include freedom of expression.”

Any definition of public interest should not be exhaustive.

Fault (Question 9)

The ABC continues to endorse the views of the ALRC and NSWLRC that any cause of action introduced should be limited to intentional or reckless breaches of privacy.

Damage (Questions 10 and 11)

The ABC maintains its position that any proposed cause of action should not require proof of damage. As stated in its submission to the DPMC in 2011, “[t]he ABC acknowledges that privacy intrusions can result in humiliation and personal distress which would not generally be accepted as damage for the purpose of establishing a cause of action which depends on damages being proved.”

Defences—authorised by law (Question 12)

The ALRC has sought feedback on whether it should be a defence to a serious invasion that the act or conduct was required or authorised by law and whether this should be qualified by a requirement that the act or conduct be proportionate, or necessary and reasonable. The

legitimately interested in, or concerned about, what is going on, or what may happens to them or to others’.

ALRC points out that, without such a qualification, the conduct might go beyond what might be appropriate in the particular instance.

The ABC agrees that this qualification for proportionality is appropriate and notes that such a requirement is consistent with the ABC's Editorial Policies and Code of Practice which requires (in Standard 6) that any intrusion carried out in the public interest must be limited to what is proportionate in the circumstances.

Defences—other (Questions 13 and 14)

The ABC maintains its position articulated in its 2011 submission to the DPMC, which stated: "The ABC reserves its view on this question [of what defences should be included], as the answer will depend on what form the cause of action (if enacted) takes. In principle, the ABC supports the inclusion of at least the following defences if they are not already appropriately addressed in the cause of action itself:

- the individual concerned consented to the act or conduct;
- the act or conduct was authorised or required by law;
- information published in the course of parliamentary, judicial and other proceedings (i.e., situations which would be covered by the defence of absolute privilege in the context of defamation law);
- fair and accurate report of proceedings of public concern;
- publication of documents or information in the public domain;
- disclosure of matters of public interest; and
- innocent dissemination.

This list is not intended to be exhaustive."

Exempt agencies or activities (Question 15)

Like the DPMC in its 2011 Issues Paper, the ALRC has raised the possibility of exempting law enforcement and national security agencies or activities from a statutory cause of action. The ABC maintains its view expressed to the DPMC in 2011 where it was noted that all three privacy reports at the time from the ALRC, the NSWLRC and the VLRC "recommended against a blanket ban for particular organisations or activities. The law reform commissions took the view that the threshold requirements, together with the defences (authorised under law) would provide 'a more appropriate means to ensure the cause of action does not capture behaviour it should not'.

The ABC supports the law reform commissions' approach. Any statutory cause of action for serious privacy invasion should be of general application."

Monetary remedies (Question 16)

The ABC affirms its position as stated to DPMC in 2011 that “The ABC supports a cap on damages for non-economic loss. The ABC does not express a view about what limit should be set except to recommend that the limit be no more than that which is set for defamation laws, and to again emphasise the importance of uniformity in laws to avoid the prospect of forum shopping for privacy actions.”

Injunctions and other remedies (Questions 17 and 18)

The ABC reserves its position on the appropriateness of remedies as the detail of the drafting will be critical. As submitted to the DPMC in 2011:

“The precise terms of particular remedies will require further scrutiny. For example, corrections orders will need to appropriately take into account the exercise of editorial independence.

Care will also need to be exercised in relation to the use of injunctions and the threat of litigation to ensure they do not unduly restrain freedom of expression or open justice –

- a. Courts already have powers to make non-publication orders and that is the appropriate mechanism for restricting what can be reported. There should be no additional restriction on publishing reports of court proceedings. Nor should there be any additional restriction on publishing reports of parliament or other proceedings of public concern.
- b. The experience in the United Kingdom in relation to the use of injunctions and super-injunctions in privacy claims should inform the drafting of legislation and procedures in Australia. See, for example, the Practice Guidance issued by the Master of the Rolls, Lord Neuberger,¹³ which sets out the procedure for applying for injunctions to protect information said to be private or confidential pending trial. Section 12 of the UK Human Rights Act¹⁴ is also a useful model that could be adapted to ensure a proper balance is struck between free speech and privacy.¹⁵

¹³ *Practice Guidance: Interim Non-Disclosure Orders*, issued by the Master of the Rolls and to come into effect on 1 August 2011. This guidance was originally published in draft form in an Annex to Lord Neuberger’s Committee, *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice*, May 2011. These documents are available at <http://www.judiciary.gov.uk/publications-and-reports/guidance/2011/super-injunction-and-anonymised-inj-data-collection-and-guidance-non-disclosure-inj>. Statistics on the use of privacy injunctions since August 2011 are available at <https://www.gov.uk/government/collections/civil-justice-statistics>.

¹⁴ Section 12 (Freedom of expression), UK Human Rights Act, <http://www.legislation.gov.uk/ukpga/1998/42/section/12>, provides:

- (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

- c. Consideration should also be given to minimising the use of litigation as a threat to the exercise of free speech by introducing 'Anti-SLAPP' protections similar to what are used overseas¹⁶ and here in Australia in the ACT.¹⁷

The ABC notes that the ACT *Protection of Public Participation Act 2008* appears to have come before the courts once, recently; however, the matter was transferred to New South Wales, which did not have a comparable law so the issue was not further considered.¹⁸

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- (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied –
 - (a) that the applicant has taken all practicable steps to notify the respondent; or
 - (b) that there are compelling reasons why the respondent should not be notified.
 - (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
 - (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to –
 - (a) the extent to which –
 - (i) the material has, or is about to, become available to the public; or
 - (ii) it is, or would be, in the public interest for the material to be published;
 - (b) any relevant privacy code.
 - (5) In this section –

"court" includes a tribunal; and

"relief" includes any remedy or order (other than in criminal proceedings).

¹⁵ For practical examples of s 12 being applied by the courts, see *Terry v Persons Unknown* [2010] EWHC 119 (<http://www.bailii.org/ew/cases/EWHC/QB/2010/119.html>) and *Hutcheson v News Group Newspapers* [2011] EWCA Civ 808 (<http://www.bailii.org/ew/cases/EWCA/Civ/2011/808.html>).

¹⁶ SLAPPs is an acronym for Strategic Lawsuits Against Public Participation. A useful overview of SLAPPs, and of the anti-SLAPP laws existing in 26 US states (and some illustrative court cases), is provided by the Citizen Media Law Project (hosted by Harvard University's Berkman Center for Internet Law & Society), (<http://www.citmedialaw.org/legal-guide/responding-strategic-lawsuits-against-public-participation-slapps>). A model draft Anti-SLAPP bill has also been proposed by the Society of Professional Journalists, (<http://www.spj.org/antislapp.asp#4>).

¹⁷ *Protection of Public Participation Act 2008* (ACT), (<http://www.legislation.act.gov.au/a/2008-48/20080912-37699/pdf/2008-48.pdf>), the stated purpose of which is 'to protect public participation, and discourage certain civil proceedings that a reasonable person would consider interfere with engagement in public participation.'

¹⁸ *Bateman and Idameneo (No 123) Pty Limited v Fairfax Media Publications Pty Limited and Ors* [2013] ACTSC 72, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/act/ACTSC/2013/72.html>.

Who may bring a cause of action (Question 19)

The ABC maintains its view in supporting the recommendation of all three law reform inquiries into privacy—the ALRC, NSWLRC and VLRC—that any cause of action for serious invasion of privacy be limited to living persons.

The ALRC asks whether a cause of action should survive death to the benefit of the estate of the deceased person. The ABC agrees with the proposition that, like defamation, privacy is personal and any action should not survive death. Family members may still pursue action where their privacy was affected.

Limitation period (Question 21)

The ABC continues to support the NSWLRC proposal to adopt a one-year limitation period, consistent with defamation laws, with judicial discretion to extend it to three years.

Inclusion of the cause of action in the Privacy Act; appropriate forums (Questions 22 and 23)

The ABC maintains its position from 2011 that: “Other than suggesting that the courts are the most appropriate forum to determine claims in this area, the ABC expresses no view about this except to note that, to some extent, the choice of forum will be dependent on whether the statutory cause of action is comprehensively enacted by the Commonwealth government (i.e., in a way to cover the field), or whether uniform laws are adopted by the States and Territories. As with the ALRC’s recommendations in relation to data protection laws and for the same basic reason—that is, continuing borderless technological change—every care should be taken to avoid the haphazard development across federal, state and territory jurisdictions of differing privacy laws.”

Alternative dispute resolution of privacy complaints (Question 24)

The ABC notes that alternative dispute resolution would seem particularly suitable for privacy complaints, providing for the possibility of resolving issues without compounding the privacy intrusion through a public process. Many privacy regulators already have similar powers and procedures for resolving matters in this way. For example, the Victorian Privacy Commissioner is empowered to conciliate complaints.¹⁹ Where complaints are dealt with informally and in private, consideration should be given to enabling decisions—especially those with precedential value or where public interest matters are concerned—to be published, using anonymisation of one or both party names, if necessary.

¹⁹ <http://www.privacy.vic.gov.au/domino/privacyvic/web2.nsf/pages/conciliation>

Interaction with existing complaints processes (Question 25)

The ABC stands by its submission in 2011 to the DPMC, which stated: “The ABC supports legislative efforts that aim to minimise the prospect of a plaintiff re-litigating matters that have already been adequately dealt with under other laws, and which discourage plaintiffs from ‘double dipping’ by seeking remedies where adequate redress has already been given. Consideration might be given to adapting the approach in section 41(1) of the *Privacy Act 1988 (Cth)*, which sets out the circumstances in which the Privacy Commissioner may decline to investigate or may defer investigation of a complaint. These circumstances include:

- ... (e) the act or practice is the subject of an application under another Commonwealth law, or a State or Territory law, and the subject-matter of the complaint has been, or is being, dealt with adequately under that law; or
- (f) another Commonwealth law, or a State or Territory law, provides a more appropriate remedy for the act or practice that is the subject of the complaint.

Consideration should also be given to empowering a court to decline to entertain a complaint where the matter has already been adequately dealt with under a code of practice, including codes developed under self-regulatory and co-regulatory schemes.”

Gaps in existing laws (Question 26)

In light of relatively recent revelations of extensive and worldwide surveillance by the US National Security Agency, and apparently on their behalf by Australia,²⁰ a number of safeguards should be considered to ensure appropriate accountability and to minimise the likelihood of disproportionate or unreasonable and unnecessary privacy intrusions. Among these is to improve transparency about the extent of data requested and retained, and to permit third parties (such as telecommunications carriers, internet service providers, cloud computing services and social media operators) to disclose such information. An additional protection would be to introduce a presumption of notice for access requests made other than under warrant and provide that notice only be delayed in limited circumstances. The US *Stored Communications Act* offers a model in sections 2703(b) and 2705.²¹

Additional protections should also be introduced when surveillance or search and seizure targets the media, in recognition of the public interest in newsgathering activities. For example, accessing – surreptitiously or otherwise – a journalist’s print or digital email address book and phone records has the real potential to compromise their confidential sources. Where access is through a third party under an administrative request or ex parte order, the targeted media organisation or journalist may never be aware of the intrusion and not have an

²⁰ *WA Today*, [NSA collects millions of email address books with Australia's 'help'](#), 15 Oct 2013 as cited by *The Guardian* in [Australia harvesting email lists on NSA's behalf](#). For extensive coverage of the NSA surveillance issue, see <http://www.theguardian.com/world/series/nsa-files-live>.

²¹ See US Code, Chapter 121, Stored Wire and Electronic Communications and Transactional Records Access, <http://www.law.cornell.edu/uscode/text/18/part-I/chapter-121>.

opportunity to question its legitimacy or breadth, including whether the power might be exercised in an overly-broad manner to capture irrelevant or protected information that should otherwise remain confidential.²² Lack of such safeguards has recently been the subject of government attention in the US when the US DOJ amended its protocols when targeting surveillance on journalists.²³

²² See footnote 7.

²³ Statement of Attorney General Eric Holder on the Justice Department, *Report on Revised Media Guidelines*, <http://www.justice.gov/opa/pr/2013/July/13-ag-783.html>. For background to the incidents triggering DOJ's review, see <http://www.bbc.co.uk/news/world-us-canada-22532057>.