



**Submission to the Australian Law Reform Commission's
Inquiry into Serious Invasions of Privacy in the Digital Era Issues Paper**

20 November 2013

Introduction

The Australian Subscription Television and Radio Association (ASTRA) welcomes the opportunity to comment on the Australian Law Reform Commission's (ALRC) *Serious Invasions of Privacy in the Digital Era* Issues Paper.

About ASTRA

ASTRA is the peak industry body for subscription television (STV) in Australia. ASTRA was formed in September 1997 when industry associations representing subscription (multichannel) television and radio platforms, narrowcasters and program providers came together to represent the new era in competition and consumer choice. ASTRA's membership includes the major STV operators, as well as over 20 independently owned and operated entities that provide programming to these platforms, including Australian-based representatives of international media companies, small domestic channel groups and community-based organisations.

Received in one third of Australian homes, STV gives Australians access to quality, exclusive, live, original and award-winning international and Australian programming across many genres, including movies, news, children's, documentary/current events, light entertainment, lifestyle and drama, live, local and international sport, music, ethnic language, local weather and pay per view events. In 2012-13, STV invested around \$700 million in Australian content production, employing 6600 Australians and adding \$1.6 billion to the Australian economy.

General comments on the subscription television industry and privacy

ASTRA's members take very seriously the protection of personal information supplied to them by their subscribers and, more generally, the privacy of the public at large. ASTRA's members are committed to ensuring that they protect the personal information of their subscribers and, in relation to news and current affairs reporting, the privacy of members of the public.

While ASTRA acknowledges that there is no general right to privacy under Australian law, special statutory provisions and enforceable industry codes of practice relating to privacy apply to television broadcasters that, in ASTRA's view, provide sufficient protection to individuals who are concerned about serious invasions of their privacy by STV broadcasters and narrowcasters.

Australian law presently recognises the special place that media organisations hold in relation to the dissemination of information that may be deemed to be personal, or private, information. The law seeks to provide a balance between respecting individual privacy and acknowledging the media's role of informing the public. Media organisations are presently exempt from the operation of the National Privacy Principles to the extent that they engage in "acts or practices...in the course of journalism", provided that the media organisation is publicly committed to observing written standards "which deal with privacy in the context of the activities of a media organisation".¹

As set out below, ASTRA's members have demonstrated a long-standing commitment to privacy protection by the inclusion of relevant provisions in successive codes of practice registered by the federal communications and media regulator, the Australian Communications and Media Authority (the ACMA).

ASTRA Codes of Practice

ASTRA submits that the current co-regulatory model for STV, overseen by the ACMA, is an example of industry-based regulation that works well both for citizens and broadcasters, including in relation to privacy issues.

¹ Privacy Act, s 7B(4).

Under the *Broadcasting Services Act 1992* (BSA), industry groups representing the providers of subscription television services must develop, in consultation with the ACMA, codes of practice applicable to the broadcasting operations of subscription television services.

The BSA provides for matters pertaining to privacy to be set out in the industry codes of practice with which subscription television providers must comply. The Subscription Broadcast Television (SBT), Subscription Narrowcast Television (SNT) and Subscription Narrowcast Radio (SNR) Codes of Practice (“the ASTRA Codes”) provide that news and current affairs programs “...must not use material relating to a person’s personal or private affairs, or which invades an individual’s privacy, other than where there are identifiable public interest reasons for the material to be broadcast.”²

By law the ACMA may only register a code of practice if it is satisfied that:

- the code of practice provides appropriate community safeguards for the matters covered by the code;
- the code is endorsed by a majority of providers of broadcasting services in that section of the industry; and
- members of the public have been given adequate opportunity to comment on the code.³

These provisions mean that the relevant industry-specific regulator is already empowered to ensure that appropriate privacy provisions are included in broadcasting codes of practice.

ASTRA commences a review of its codes of practice every three years to ensure they remain relevant to community and industry. The ACMA will take into account submissions made during the public consultation process – which must be undertaken as part of the review – as well as its own research and any other information it deems relevant, before being satisfied that a code of practice provides appropriate community safeguards.

In addition, the privacy provisions of the ASTRA Codes are supported by the ACMA’s Privacy Guidelines for Broadcasters 2011 (the “Privacy Guidelines”).⁴ The ASTRA Codes and the Privacy Guidelines recognise the important role played by the media of informing the public while balancing this right with the need to respect individual privacy. The Privacy Guidelines provide guidance to media organisations on dealing with material that relates to a person’s private affairs and identifying what constitutes a ‘public interest’ which may justify an intrusion into an individual’s privacy.

The ACMA has the power to investigate complaints relating to alleged breaches of the ASTRA Codes. People who believe that their privacy has been invaded through the news reporting activities of a media organisation may in the first instance direct their complaint to the relevant licensee and, if not satisfied with the response, then escalate the complaint to the ACMA. If the ACMA finds that a licensee has breached the ASTRA Codes then a number of remedies are available to the ACMA to deal with that breach, from rectification notices to imposing an additional licence condition requiring compliance with a code of practice to, ultimately, revocation of a licence.

Furthermore, where the ACMA is satisfied that a broadcasting code of practice for the STV industry is not operating to provide appropriate community safeguards in relation to a particular matter, the Authority has the power to determine a mandatory standard for the STV industry in relation to that matter.⁵

² SBT Codes of Practice, cl 2.2(c); SNT Codes of Practice, cl 1.3; SNR Codes of Practice, cl 1.3.

³ BSA, s 123(4).

⁴ Available on the ACMA website at: <http://www.acma.gov.au/theACMA/Library/Industry-library/Broadcasting/privacy-broadcasting>.

⁵ BSA, s 125.

ASTRA and its members are committed to the ASTRA Codes and the Privacy Guidelines and believe that this system works well, as it ensures appropriate protections are in place to protect an individual's privacy without imposing unnecessary financial or operational burdens on industry. ASTRA notes that the ACMA has never found a breach of the ASTRA Codes in relation to privacy. Indeed, ASTRA is unaware of any complaints to STV broadcasters in relation to the privacy obligations under the ASTRA Codes.

In addition, the current scheme provides industry with flexibility to respond to community standards while minimising the burden on government and the court system, and avoiding the expense and distress of litigation for individual complainants.

General comments on the proposed cause of action

Existing protections are sufficient

While noting that the ALRC does not intend to again canvas the threshold question as to whether a statutory cause of action should be introduced,⁶ ASTRA nevertheless strongly reiterates its position that it does not believe that the introduction of an additional cause of action for serious invasion of privacy is necessary, particularly given the protection already provided under existing laws to people who believe that their privacy has been invaded in a serious manner.

As the New South Wales Law Reform Commission (NSWLRC) stated: "An argument for the introduction of a statutory cause of action for invasions of privacy... must be based on the inadequacy of the protection currently afforded by privacy statute and common law".⁷ ASTRA does not consider that a clear rationale for the new cause of action has been identified in the reports of any law reform commission or in the Issues Paper.

Australia's extensive privacy laws already offer adequate protection – such laws include:

- the *Privacy Act 1988* (Cth) and State and Territory privacy and personal information legislation;
- legislation relating to surveillance and listening devices;
- legislation containing statutory restrictions on publication; and
- common law covering conduct which could affect privacy such as defamation law, breach of confidence, trespass and nuisance.

To the extent that existing statutory regimes are inadequate to deal with specific privacy issues such as those arising out of technological advancements, ASTRA considers that the better option is to update such laws or relevant industry codes to address identified gaps. ASTRA considers that this approach is preferable to having a new layer of legislation which is likely to further complicate this area of law by creating overlapping (and arguably alternative) causes of action.

In addition to the regimes described above, subscription television broadcasters are required to have published standards which deal with privacy in order to claim the journalism exemption under the Privacy Act.⁸ This is achieved by inclusion of privacy provisions in the ASTRA Codes which are supported by the Privacy Guidelines. As such, if there are particular gaps in the ASTRA Codes and Privacy Guidelines (which ASTRA does not believe there are), these could be addressed by updating the relevant codes rather than by introducing a new blanket legislative regime.

⁶ Issues Paper, p. 12.

⁷ Consultation Paper No. 1 Invasion of Privacy, May 2007.

⁸ Privacy Act, s 7B(4)(b).

ASTRA believes that the current regulatory regime is appropriate because it allows for broadcasters to liaise directly with aggrieved persons to address their concerns and, if a complainant is not satisfied with the response provided by the broadcaster, by taking their complaint to the industry regulator for independent review. Such a complaint process is undertaken in an efficient and streamlined manner, which is in the interest of both parties.

In short, there is no evidence that existing privacy provisions as they relate to the operation of subscription broadcasters are inadequate, or that further legislative intervention is required. As a general principle, new or additional regulatory measures should only be contemplated when there is clear evidence of a ‘problem’ that needs to be ‘solved’, and only then where the effectiveness of regulation in achieving the public interest objective clearly outweighs the detrimental to media business activities. As noted in recent comments by the Hon Josh Frydenberg, MP, Parliamentary Secretary to the Prime Minister:

Questions must be asked first before any new regulations are passed. What is their purpose? Their cost? Their impact on new entrants? And their effectiveness in managing risk? Only then, when it is absolutely necessary, with no sensible alternatives available, should we proceed with regulation.⁹

Complication of the legal system as a result of the overlap in laws

ASTRA is concerned that the introduction of a new cause of action could create confusion for complainants as to their potential avenues for making complaints and obtaining remedies for privacy breaches and may therefore result in prolonged court or administrative appeals actions. In our view the existing co-regulatory framework is most the appropriate avenue for redress because it allows a complainant to address the problem directly with the relevant broadcaster and, if such discussions fail, then with the industry regulator as an impartial third party adjudicator. The ASTRA Codes, supported by the Privacy Guidelines are effective in dealing with serious invasions of privacy, and this regime has worked well for both industry and the public.

If a statutory cause of action was introduced, there would be no guarantee that such a cause of action will be the only one recognised in Australia. The High Court has noted the potential for a privacy tort and it has been recognised in lower courts. Therefore, the common law may develop a different cause of action to the one that may be proposed following this review.

Insufficient protection for freedom of expression

It is incorrect to say that the introduction of the proposed cause of action will bring Australia into line with other countries. Unlike Australia, countries which have a cause of action relating to serious invasions of privacy also have a corresponding explicit protection for the right of freedom of expression (under, for example, a Bill of Rights). Free speech rights influence both judicial and community attitudes to the interpretation of the causes of action – and without a corresponding protection for the right of freedom of expression, that right is likely to be narrowly (and prescriptively) defined by the new statutory cause of action as part of a “public interest” consideration.

The proposed regime is too broad

Breadth of proposed cause of action

The proposed cause of action is unacceptably broad. Among the many possible consequences, the new cause of action may:

⁹ The Hon J Frydenberg, MP, “We can’t afford not to cut red tape” *Australian Financial Review*, 29 October 2013.

- prevent people from doing things which they consider in the public interest for fear of possible liability or, alternatively, may be used as a sword by individuals seeking to deflect such public scrutiny (eg in relation to corruption and bribery); and
- increase the frequency of disputes and complexity of disputes (particularly given the overlapping nature of the proposed cause of action) resulting in extensive public and private resources being consumed.

Further, it is not only traditional forms of media who will be affected by the new cause of action. Emergent media, small media outlets and even individual bloggers would be subject to claims, and a fear of vexatious claims may stifle the creation and development of new forums for public discussion.

Breadth of proposed remedies

The range of remedies available to a complainant should be different depending on the circumstances of the case. For example, in the case of harassment or stalking, the most appropriate remedy would seem to be a court order preventing such conduct in the future by imposing a criminal sanction. On the other hand, where there has been actual damage to a person's reputation as a result of an invasion of privacy, damages might be a more appropriate remedy (although defamation laws already provide a cause of action for a complainant whose reputation has been damaged. Also, note our comments in respect of Question 16 below).

Specific comments on aspects of the Issues Paper

While maintaining and in no way limiting our position that the introduction of a statutory cause of action for serious breaches of privacy is unnecessary, ASTRA provides the following comments on key issues raised in the ALRC's Issues Paper – a number of which highlight the problems and unworkability of the proposed cause of action.

We have focused on responding to questions which are especially relevant to media organisations; both in terms of news gathering and reporting, as well as interaction with consumers through websites, forums and social media pages.

Principles guiding reform

Question 1. What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, the design of a statutory cause of action for serious invasion of privacy? What values and interests should be balanced with the protection of privacy?

Guiding principles

ASTRA considers that it is important to ensure that any new cause of action requires an assessment, on a case by case basis, of whether there is a serious invasion of privacy. Such an assessment should be based on the particular circumstances as well as the community standards at the time, and not on a regimented check-box approach against a specified list of examples of behaviour which do, or do not, result in a serious invasion of privacy.

In addition, if a new cause of action is to be introduced, ASTRA considers that it is vital that there is a uniform regime across Australia, rather than there being different regimes in different States and Territories. This is a particular concern for those in the media industry where reporting, broadcasting and interaction with customers frequently takes place on a national rather than a regional or local basis.

The scope of any new cause of action should be clearly defined so that it does not result in an additional layer of law which is likely to result in forum shopping, double-dipping and both a time and cost uncertainty for potential claimants and defendants alike. For example, where a

consumer makes a complaint under the ASTRA Codes, it should not be permitted to bring a claim against the relevant broadcaster merely because it does not agree with the determination given at the end of that process.

Balancing of values and interests

While ASTRA recognises and supports the importance of individual privacy, we strongly agree with the ALRC that “[p]rivacy of the individual is not an absolute value which necessarily takes precedence over other values of public interest” and that “[i]t must be balanced with a range of other important values, freedoms and matters of public interest”, including, amongst others:

- freedom of speech (including by the media);
- freedom of artistic and creative expression;
- the value of participation in the global digital world;
- the importance of allowing people to engage in digital communications (both with each other and with the media itself); and
- the value in having an informed public (particularly in real time rather than on a delayed basis).¹⁰

Importantly, these competing values have implicit rather than explicit recognition in Australia. Freedom of speech is subservient to defamation law and may not defeat a claim except via a limited implied constitutional power. Freedom of speech is as important as a right of privacy and ASTRA submits that the ALRC should not design a statutory cause of action where freedom of speech yields to privacy; they are rights of equal value. The ALRC should clearly articulate the specific interests requiring privacy protection and craft a cause of action to only protect those interests.

The impact of a statutory cause of action

Question 2. What specific types of activities should a statutory cause of action for serious invasion of privacy prevent or redress? The ALRC is particularly interested in examples of activities that the law may not already adequately prevent or redress.

Nil comment at this time.

Question 3. What specific types of activities should the ALRC ensure are not unduly restricted by a statutory cause of action for serious invasion of privacy?

The scope of any new statutory cause of action for an invasion should be limited in relation to broadcasting so that actions which fall within the ASTRA Codes and Privacy Guidelines continue to be permissible. Existing privacy regulation as it applies to subscription television has worked effectively for many years to ensure an appropriate balance between individual privacy and the broader public interest requirements for media including freedom of artistic and creative expression and informing the public. ASTRA may have further comment on the scope of activities which should fall outside any new cause of action once the elements of that cause of action have been clearly identified.

Invasion of privacy

Question 4. Should an Act that provides for a cause of action for serious invasion of privacy (the Act) include a list of examples of invasions of privacy that may fall within the cause of action? If so, what should the list include?

¹⁰ Issues Paper, p. 14.

ASTRA considers that a list of examples of serious invasions of privacy (whether exhaustive or non-exhaustive) should not be included. The inclusion of examples has little or no regard to the balance which needs to be struck based on both the particular circumstances and community standards at the relevant time. The inclusion of examples is also likely to result in both parties addressing each of the examples to try and demonstrate whether there has been a serious invasion of privacy, which will divert the attention of the court from the balancing act and may also result in the non-exhaustive examples becoming part of the cause of action.

Question 5. What, if any, benefit would there be in enacting separate causes of action for:

- ***misuse of private information; and***
- ***intrusion upon seclusion?***

The misuse of private information may breach the National Privacy Principles as well as be considered a breach of confidence. It is unclear what is meant by “intrusion upon seclusion” – however, there are already well established proprietary rights preventing trespass. If a person is otherwise visible then it is unclear what interests this additional right would be seeking to protect.

Privacy and the threshold of seriousness

Question 6. What should be the test for actionability of a serious invasion of privacy? For example, should an invasion be actionable only where there exists a ‘reasonable expectation of privacy’? What, if any, additional test should there be to establish a serious invasion of privacy?

ASTRA would agree that, were a statutory cause of action to be contemplated, it must include a threshold test of sufficient significance to discourage litigation of trivial or minor matters. At a minimum, ASTRA considers that a complainant must be required to establish that:

- there is a disclosure of information about personal matters of a person (and not a corporation, business or similar entity);
- they had a reasonable expectation of privacy (including as regards the type of information concerned) in the circumstances;
- such expectation of privacy was not displaced by a competing public interest or by the individual having given consent to the disclosure;
- there was a breach of that privacy which was unreasonable by reference to the standard of the ordinary and reasonable person; and
- that such serious breach of the person’s privacy causes, or is reasonably likely intended to cause, serious harm.

Finally, ASTRA submits that consideration of public interest matters, as well as a person’s office, behaviours and interests must be taken into account when determining whether a particular circumstance amounts to a serious invasion of privacy.

Privacy and public interest

Question 7. How should competing public interests be taken into account in a statutory cause of action? For example, should the Act provide that:

- ***competing public interests must be considered when determining whether there has been a serious invasion of privacy; or***
- ***public interest is a defence to the statutory cause of action?***

As stated above, ASTRA believes that the special statutory provisions and enforceable industry codes of practice relating to privacy that apply to television broadcasters adequately address

this balance by providing sufficient protection to individuals who are concerned about serious invasions of their privacy, making a new statutory cause of action unnecessary.

If a statutory cause of action is to be created, all public interest considerations must be considered when determining whether there has been a serious invasion of privacy. As the NSWLRC argued, the circumstances of a particular case, including whether there was a public interest in the information being disclosed, may lead to the conclusion that there could be no reasonable expectation of privacy (and so no invasion of privacy by extension).

ASTRA considers that the onus of proof should be on the claimant to establish that their reasonable expectation of privacy in the circumstances was not outweighed by the public interest in, for example, freedom of information / expression. This approach is preferable for a number of reasons:

- the starting position should be that individuals in a public place do not have a reasonable expectation of privacy – observing other people, commenting and interacting with them is an important part of any community;
- there may not be someone who can evidence the public interest beyond the defendant who may not have the ability or resources to establish the public interest;
- it discourages vexatious claims as the cause of action cannot be established unless the public interest is displaced, whereas having public interest go towards a defence is likely to prolong the length of time during which an unmeritorious claim is heard; and
- it also signals the priority being given to freedom of information / expression. This is particularly important in Australia where we have only an implied freedom of political communication following the line of High Court cases emanating from *Nationwide News Pty Ltd v Wills*.¹¹

Serious Invasions of Privacy in the Digital Era

Question 8. What guidance, if any, should the Act provide on the meaning of ‘public interest’?

As set out in our general comments, ASTRA submits that, for the purposes of any proposed statutory cause of action for serious invasions of privacy, determining the ‘public interest’ should be left to the circumstances of the particular case and community interests and standards at that time.

ASTRA notes, however, that concept of ‘public interest’ will remain unclear in the context of any statutory cause of action for privacy at least until the concept has been tested through litigation. In the interim, uncertainty over the application of any new privacy laws would likely mean a ‘chilling effect’ for news and current affairs investigation and reporting, particularly where there is no explicit recognition of freedom of expression.

Fault

Question 9. Should the cause of action be confined to intentional or reckless invasions of privacy, or should it also be available for negligent invasions of privacy?

As per Question 6, it should only be actionable for intentional disclosures of personal information. ASTRA considers that a complainant must establish that the act or conduct of the defendant was intentional or reckless and not merely negligent. Acts which are done without the intention of breaching any privacy should not be caught – this would result in making people unduly careful about disclosing information which they believe to be innocent in case it is actually an invasion of privacy.

¹¹ (1992) 108 CLR 681.

Damage

Question 10. Should a statutory cause of action for serious invasion of privacy require proof of damage or be actionable per se?

A cause of action must require proof of damage. The circumstances of each matter will be different, so a “per se” action would not be appropriate if the disclosure has caused any damage. A per se action may also encourage serial litigants and dubious proceedings.

Question 11. How should damage be defined for the purpose of a statutory cause of action for serious invasion of privacy? Should the definition of damage include emotional distress (not amounting to a recognised psychiatric illness)?

See Question 6.

Defences and exemptions

As stated above, if a statutory cause of action was to be contemplated, public interest considerations should be taken into account in the first instance when determining whether there has been a serious invasion of privacy, rather than as a defence.

ASTRA notes the ALRC’s comment that “it is arguable that consent should be relevant to considering whether the threshold for a serious invasion of privacy has been established, rather than as a defence.” As a general point, ASTRA would agree that the issue of consent (including implied consent) is vitally important when considering issues of privacy, both in relation to use of personal information provided by subscribers as part of their commercial agreement with a STV platform, and in relation to news gathering and reporting activities.

In relation to the use of personal information provided by subscribers, STV providers are already subject to the provisions of the Privacy Act.

In relation to news gathering and reporting activities, consent to be filmed, interviewed or to the release of otherwise private information should carry significant (if not determinative) weight under any proposed statutory cause of action for serious invasions of privacy.

Question 12. In any defence to a statutory cause of action that the conduct was authorised or required by law or incidental to the exercise of a lawful right of defence of persons or property, should there be a requirement that the act or conduct was proportionate, or necessary and reasonable?

No. If the defence was authorised or lawful then privacy considerations should not limit that defence.

Question 13. What, if any, defences similar to those to defamation should be available for a statutory cause of action for serious invasion of privacy?

As noted in ASTRA’s answer to Question 3, without knowing the elements of the cause of action, it is challenging to determine the scope of appropriate defences. However, ASTRA considers that all the defamation defences should be available, otherwise a claimant might be able to circumvent the defamation regime by bringing a claim under the new cause of action rather than as a defamation action.

Question 14. What, if any, other defences should there be to a statutory cause of action for serious invasion of privacy?

As noted in ASTRA’s answer to Question 3, without knowing the elements of the cause of action, it is challenging to determine the scope of appropriate defences. At a minimum, however, defences should be available:

- where the act or conduct:
 - was required by or authorised by law;
 - was incidental to the exercise of a lawful right of defence or person or property;
 - was a publication or disclosure which would be covered by qualified or absolute privilege under defamation law, a fair comment or fair report;
 - was carried out by a police or public officer engaged in their duty, was not disproportionate to the matter being investigated and was not committed in the course of trespass;
 - was considered by the person acting to be reasonably necessary to eliminate or reduce a possible health, safety or security risk to themselves or another person(s);
 - was a publication of the information for the purpose of exposing a public feud, misfeasance or corruption;
 - was taken for the purpose of rebutting an untruth;
- where the disclosure was “user generated content” and was removed by the defendant in a timely manner once it became aware of the disclosure; and
- where the information was already publicly available including where it is contained on a publicly viewable social media page (ie where you are not required to log-in to view the information).

Question 15. What, if any, activities or types of activities should be exempt from a statutory cause of action for serious invasion of privacy?

Without knowing the elements of the cause of action it is particularly hard to assess relevant exemptions. However, exemptions are likely to be appropriate where:

- the defendant is already subject to appropriate regulation in the field (eg through ACMA / ASTRA codes for STV); and
- a determination has already been made by a body with jurisdiction (such as the ACMA for broadcasters).

Monetary remedies

Question 16. Should the Act provide for any or all of the following for a serious invasion of privacy:

- **a maximum award of damages;**
- **a maximum award of damages for non-economic loss;**
- **exemplary damages;**
- **assessment of damages based on a calculation of a notional licence fee;**
- **an account of profits?**

ASTRA is unclear about the purpose of awarding remedies in the case of a serious invasion of privacy as a monetary award is unlikely to put the complainant in the position that they would have been in had the serious invasion of privacy not occurred – we consider that further discussion of the benefits of awarding damages is required. Accordingly, ASTRA has no comment on the appropriate maximum award of damages at this time. We note, however, that if damages are included as a remedy, we consider that the amount of any such damages should be reduced to take into account any remedial steps already taken by the defendant.

ASTRA does not consider that there can be a reasonable expectation of privacy where an individual has consented to information being disclosed (eg by the grant of a licence) and so the calculation of damages by reference to a hypothetical licence fee is not appropriate.

Injunctions

Question 17. What, if any, specific provisions should the Act include as to matters a court must consider when determining whether to grant an injunction to protect an individual from a serious invasion of privacy? For example, should there be a provision requiring particular regard to be given to freedom of expression, as in s 12 of the Human Rights Act 1998 (UK)?

ASTRA considers that a statutory power to grant injunctions to protect against serious invasions of privacy is neither appropriate nor necessary. Under broadcasting legislation, STV broadcasters already face sanctions for breaches of privacy requirements under the ASTRA Codes of Practice, with potential significant impacts on their broadcasting operations, ranging from remedial action as agreed with the ACMA to the suspension or cancellation of the relevant broadcasting licence.

Other remedies

Question 18. Other than monetary remedies and injunctions, what remedies should be available for serious invasion of privacy under a statutory cause of action?

ASTRA is concerned at the wide range of remedies currently being contemplated in relation to the proposed cause of action. We consider that certain of the proposed remedies are not appropriate either in the context of a proposed privacy cause of action or as a result of the impact such remedies would have on competing interests such as freedom of expression. Further, offering a wide range of remedies may result in complainants forum shopping particularly if, for example, it is easier to obtain a remedy under the new cause of action than under defamation law.

Rectification of business or information technology systems

ASTRA notes the ALRC contention that “[s]erious invasions of privacy may also arise due to systemic problems with business processes or information technology systems...”. ASTRA opposes the extension of any new cause of action relating to such circumstances which it considers are already sufficiently dealt with under new provisions of the Privacy Act. As such, ASTRA does not consider it appropriate to include a remedy requiring the defendant to rectify its business or information technology practices as part of a new cause of action for serious invasions of privacy.

Official apologies or corrections

ASTRA opposes any additional remedies that, for example, would compel apologies or corrections. ASTRA submits that existing provisions in the ASTRA Codes, which are subject to enforcement by the ACMA, are sufficient remedies in the context of broadcasting. In addition, where there has been a serious invasion of an individual’s privacy, discussion of the relevant information may result in further harm to the individual concerned rather than being an effective remedy.

The context in which corrections may be appropriate seems to be limited to where there has been a disclosure of false information. In those circumstances it seems more appropriate for a complainant to bring a claim for defamation. In any event, we note that correcting errors is a matter of good journalistic practice, and that the number of complaints regarding news and current affairs programming (and content generally) on STV is extremely small, with no complaints at all in relation to privacy obligations under the ASTRA Codes.

Further, the broadcasting of statements at the compulsion of the regulator (whether on air, in print or on the internet) raises significant free speech concerns – the role of media in relation to public discussion in Australia would make any such power significantly different from similar powers in relation to the regulation of other sectors of Australian industry. The principle of free

speech requires that editorial content is determined by the media entity, not by the Government, Parliament or the judiciary.

Declarations

ASTRA does not consider that any new cause of action should include declarations as a remedy in respect of the activities of broadcasters. When an ACMA investigation does find a breach of a code provision or licence condition by a broadcaster, the ACMA publishes its findings on its website and routinely announces the results of such investigations, ensuring a significant level of publicity is generated in relation to any adverse findings against a licensee.

Enforceable undertakings accepted by a licensee as agreed to by the ACMA in such circumstances can also include a requirement for the licensee to acknowledge the ACMA's findings on the broadcaster's website. In addition, section 205W(5) of the BSA specifically gives the ACMA the power to publish an undertaking on its website.

Who may bring a cause of action

Question 19. Should a statutory cause of action for a serious invasion of privacy of a living person survive for the benefit of the estate? If so, should damages be limited to pecuniary losses suffered by the deceased person?

No, it is the privacy interests of the person harmed which should be protected; not unrelated parties like a person's estate. This is consistent with the approach taken in respect of defamation.

Question 20. Should the Privacy Commissioner, or some other independent body, be able to bring an action in respect of the serious invasion of privacy of an individual or individuals?

ASTRA submits it would be inappropriate for the Privacy Commissioner or any other body or person, other than the aggrieved person, to bring an action for serious invasion of privacy. This suggestion means the Privacy Commissioner must put itself into the shoes of an aggrieved person when the Privacy Commissioner has no personal understanding of the significance or offensiveness of the disclosure. The cause of action should only be available for persons who have been harmed by the relevant disclosure.

Limitation period

Question 21. What limitation period should apply to a statutory cause of action for a serious invasion of privacy? When should the limitation period start?

ASTRA considers that the law should take the same approach as defamation in this regard. Accordingly, the limitation period should be no longer than 12 months from the date the serious invasion occurs. This would ensure that an aggrieved person does not prolong the disclosure of the relevant information and thereby increase the potential damages claim.

Location and forum

Question 22. Should a statutory cause of action for serious invasion of privacy be located in Commonwealth legislation? If so, should it be located in the Privacy Act 1988 (Cth) or in separate legislation?

If a statutory cause of action were to be introduced, it should be under Commonwealth legislation.

Question 23. Which forums would be appropriate to hear a statutory cause of action for serious invasion of privacy?

The courts would be the most appropriate forum.

Question 24. What provision, if any, should be made for voluntary or mandatory alternative dispute resolution of complaints about serious invasion of privacy?

Nil comment at this time.

Interaction with existing complaints processes

Question 25. Should a person who has received a determination in response to a complaint relating to an invasion of privacy under existing legislation be permitted to bring or continue a claim based on the statutory cause of action?

As stated above, the ASTRA Codes, as registered and overseen by the ACMA under the BSA, provide sufficient privacy protections for individuals in relation to the operations of STV broadcasters, as well as potentially significant sanctions against STV broadcasters for breaches of privacy provisions under the existing ASTRA Codes.

As set out in our general comments, ASTRA does not consider that complainants should be able to forum shop or double-dip where there are multiple causes of action – particularly where complaints have already received a determination under one process (eg under the ASTRA Codes).

Other legal remedies to prevent and redress serious invasions of privacy

Question 26. If a stand-alone statutory cause of action for serious invasion of privacy is not enacted, should existing law be supplemented by legislation:

- **providing for a cause of action for harassment;**
- **enabling courts to award compensation for mental or emotional distress in actions for breach of confidence;**
- **providing for a cause of action for intrusion into the personal activities or private affairs of an individual?**

As set out in our general comments above, ASTRA considers that the current regime, comprised of legislation, common law and industry codes of practice, provides sufficient privacy protection for individuals including sanctions for breach.

Serious Invasions of Privacy in the Digital Era

Question 27. In what other ways might current laws and regulatory frameworks be amended or strengthened to better prevent or redress serious invasions of privacy?

Nil comment at this time.

Question 28. In what other innovative ways may the law prevent serious invasions of privacy in the digital era?

Nil comment at this time.