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## **SBS Submission to Australian Law Reform Commission Issues Paper 43 - Serious Invasions of Privacy in the Digital Era**

### **About SBS**

SBS is a national broadcasting service which operates under the *Special Broadcasting Service Act 1991* (Cth) (**SBS Act**). SBS's principal function is to provide multilingual and multicultural radio and television services that inform, educate and entertain all Australians, and, in doing so, reflect Australia's multicultural society. SBS broadcasts to a national television and radio audience, and delivers content online on its website.

SBS also delivers content on social media services such as Facebook and through third party platforms including YouTube, IPTV (e.g. Sony Bravia) and mobile services (e.g. iPhone and Android applications).

### **General statement of principle**

SBS welcomes the opportunity to respond to this Issues Paper.

SBS is of the view that there should not be a statutory cause of action for serious invasion of privacy, for the following reasons:

- the existing co-regulatory scheme applying to SBS and to the media generally already protects individual rights to privacy to an adequate level in relation to the risks of media intrusions;
- the range of current federal and state laws which already provide protection of individual privacy in Australia; and
- the lack of any counterbalancing protection of free speech under Australian law.

However, we acknowledge that the limited remit of the ALRC in the present inquiry is to look at what the terms of a statutory right to privacy should be (and not whether Australia should adopt a statutory right at all).

In summary, SBS's principle submissions to the Issues Paper are:

- privacy must be balanced against free expression;
- a broad view must be taken on what amounts to “public interest”, taking into account contemporary modes of reporting or “telling stories” in the public interest;
- there must be robust and flexible defences for media organisations; and
- other options for reform exist, such as updating laws on surveillance and harassment as a more effective way of addressing the causes of privacy concerns.

### 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?

Overall, SBS agrees with the guiding principles set out in the Issues Paper. A few observations on specific principles:

The balancing of privacy with other values and interests: the most important issue to consider is the balancing of privacy with other values and interests, including free expression. Public interest is obviously a vital value to balance against private interests, however, SBS is concerned that a whole genre of story telling could be put at risk by enacting a tort of privacy if a broader value encompassing the free exchange of information and ideas is not also a balancing interest.

Baroness Hale in the House of Lords decision on Naomi Campbell's privacy claim<sup>1</sup> recognised this broader ideal:

*“...The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made.”*

International standards in privacy law: It is dangerous to look too much to international standards in privacy law, as many of the countries which are developing case law in privacy have human rights charters or instruments which grant a fundamental protection to freedom of expression. As Justice Callinan noted in *ABC v Lenah Game Meats*<sup>2</sup>, “[a]ny principles for

<sup>1</sup> *Campbell v MGN Ltd* [2004] UKHL22 at 148.

<sup>2</sup> [2001] HCA 63 at 332.

an Australian tort of privacy would need to be worked out on a case by case basis in a distinctly Australian context”.

### 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.

SBS’s view is that many of the concerns attributed to breaches of privacy can be addressed by existing laws and actions in relation to stalking, harassment, surveillance, use of carriage services, trespass, copyright, breach of confidence and other laws restricting the disclosure of sensitive facts in a range of circumstances. There are few gaps left that could not be rectified more effectively by strengthening the existing laws rather than enacting a new tort of privacy.

The gaps that do exist tend to be created by advances in technology. For example, in some states, it may be legal to use a telephoto lens to look into private dwellings or spaces, provided that the person with the camera is standing on public property. The added power of these cameras means that images or footage can be recorded from a great distance (for example, the photographs of Kate Middleton and Prince William were taken from a public road, a kilometre from the chalet in which they were staying). Tasmania, for example, has adequately covered this particular activity in section 13A of the *Police Offences Act 1935*.

We also note statutory developments in the UK (such as the *Protection from Harassment Act 1997*) focused on harassment, including continued surveillance and other conduct, which gives plaintiffs wider options than are available between trespass and obtaining an AVO.

SBS’s view, therefore, is that activities the law does not currently prevent are best dealt with by specific targeted reforms, so that there is no wider impact than is necessary to redress the issue.

**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?

SBS is extremely concerned with the potential chilling effect a tort of privacy would have on contemporary methods of expression and story telling and the impact on SBS’s ability to fulfil its Charter<sup>3</sup>. Having individuals tell stories from their personal experience is a powerful method of engaging audience interest in issues of public interest.

As a public broadcaster, SBS makes and communicates a variety of programs which would be impacted by a statutory cause of action for serious invasion of privacy. Some examples include:

- (a) News reporting: in reporting on issues of the day, media organisations need to be able to record in public streets and venues. Many individuals do not like to be filmed

<sup>3</sup> as set out in section 6 of the *Special Broadcasting Service Act 1991*.

without consent and may use a statutory cause of action, or the threat of such an action, to make film crews or journalists back off, even if an event is newsworthy and in the public interest.

- (b) Current affairs programming: programs like SBS's *Insight* use an audience of interested people to explore a broad range of issues affecting Australian and global communities. Many of the stories used are personal and sensitive – and may reveal facts about individuals not present on the show.
- (c) Documentary film making: SBS has made many documentaries which involve people telling their stories, including the landmark program *Once Upon A Time In Cabramatta*. Participants on these shows talk about their lives and families. Again, these discussions can lead into sensitive territory.
- (d) Crowd-sourced user generated content: many media companies ask their audience to submit photos, stories, songs etc. from their personal experience to “share” with the online community.
- (e) a general ability to explore issues of interest and tell Australian multicultural stories in a way which includes identified individuals.

The following case studies illustrate the kinds of material which could be unduly restricted by a statutory cause of action.

#### Hypothetical case study #1: *Insight* and fertility

SBS's *Insight* program frequently covers sensitive topics, and invites guests to appear who can speak personally to how that issue has affected their life. By way of example, a typical program could focus on an issue like fertility and sperm/egg donors. On such a program, *Insight* may seek participants from the following groups: parents who had failed to conceive, sperm or egg donors, and young people who were conceived using this method.

It is highly likely that discussion of the personal story of any of these individuals may reveal sensitive or private matters about other people who may not be part of the program. For example, a woman who talks about how she and her ex-husband had to use a sperm donor to conceive their baby is revealing two personal matters: that her ex-husband has a medical issue of some kind, and that the children of that marriage were not actually the biological children of her husband. Both of these may or may not be considered “private”, depending on how widely they are known by the family and their wider community.

It is a significant concern for SBS that a decision maker considering this solely on public interest grounds may regard a discussion around fertility to be in the public interest, but may not find that the public interest supports showing this particular story. For example:

- (a) The decision maker could find that the broadcaster could have used a different family, where all members of the extended family group have provided consent, and therefore the broadcast of the sensitive matter is not justifiable. This line of argument

would mean that any family found by SBS to illustrate this sort of story could be vulnerable to a privacy complaint.

- (b) The decision maker could also find that obscuring the woman's identity (for example, by blurring her image) would have reduced the impact on the ex-husband, and therefore the publication made by SBS is not justifiable in the public interest. But again, this conclusion does not take into account how these kinds of programs tell stories. These programs are all about putting a human face and dimension on difficult issues. From a production point of view, it is more likely that if people cannot be identified, the story would not go ahead at all.

Broadcasters have limited resources to sift through case studies in order to find a family where all members consent for one party to tell their story, resulting in program producers directing their resources to other, more easily obtainable, stories.

Whilst SBS can take some steps to reduce impact of a publication, it is not feasible to suggest that ID can be completely obscured in every case which raises sensitive issues.

#### Hypothetical case study #2: biographical pieces

SBS has several programs which look at the background and lives of prominent Australians (including *Who Do You Think You Are* and *The Observer Effect*). It can often happen that people are asked questions about their difficult family circumstances. Let's assume a prominent athlete is featured on the show, and asked about comments she's made in the past about her tough upbringing. The athlete reveals that her father was an alcoholic, and her mother was institutionalised for five years in the 1970s. The athlete also reveals she has a genetic condition which, whilst not stated in the program, may be generally known to affect any full siblings of a person with such a condition.

The mother, father, and siblings of the athlete could all argue that private facts about them have been revealed. In this instance, it is clearly not open to SBS to obscure the athlete's identity – the whole focus of the piece is on her. SBS would argue that it's vital these kinds of stories are told in some detail – there are many public policy issues (like depression, breast cancer, mental illness, etc) which become easier to talk about when high profile and successful Australians reveal how their own lives have been affected. These stories can also be key to understanding the athlete's own story – where their drive comes from, or why they have become a particular kind of athlete.

The difficulty is where an affected individual may feel that in telling the athlete's story, the program has crossed a line into telling their story, to which they did not consent. This is a constant risk with biographical material but the flipside is that chapters in Australia's cultural history may remain untold.

#### Hypothetical case study #3: public drinking and anti-social activity

There have been several waves of interest over the last few years in public drinking to excess and violence resulting from this trend. It is common for newsrooms to send a team outside a pub and film any extreme behaviour. Let us assume that four young men are

intoxicated in a public street, drinking, swearing, breaking a glass or two, and then vomiting against the wall. They are filmed by a news crew, also standing on a public street. Should the ID of the young men involved be obscured? There is little doubt that the people filmed will not like that material being put to air, as it shows them in a questionable light. However, what is being filmed is exactly what any person would see walking down the street at that time. SBS's view is that any law on privacy should not regulate recording of activities occurring in public.

To give another example, there is a lot of footage of the Cronulla riots showing many people engaged in anti-social activity. Some people shown in that footage have later recanted and spoken of their embarrassment. However, this footage again is of events occurring in a public place and the discomfort of the individuals involved is not a sufficient reason to give rise to a privacy argument. SBS's Charter requires it to reflect Australia's multicultural society and in order to achieve this to its fullest extent, SBS needs to show the faces and tell the stories of the Australian population, as it appears on the street.

#### Hypothetical case study #4: Archival footage

SBS and other news organisations now have a substantial bank of archival footage, which is an important historical record. It is vital that we can access and use archival footage without privacy posing an obstacle.

Taking the example of public drinking from case study #3, let's assume that this footage was recorded in the early 1980s in Cabramatta, and aired on national television at that time. Then, in 2013, SBS commissions a documentary on Cabramatta which featured a segment focussed on alcohol and social issues, and the public outcry which occurred in the 80s about inappropriate drinking. It is proposed to use a segment of the archival news report in the new documentary. Should the men pictured be able to argue for suppression of the footage on privacy grounds? SBS would again argue against the need to obscure identity.

There is also the additional issue that, given the age of the footage, it would be nearly impossible to identify and track down the individuals shown to obtain consent. However, SBS's position would remain that this should not be necessary at law. There should be an assumption that if something has gone to air on national television or been published in a documentary or other public record forum, anyone depicted cannot later argue for a right to privacy.

SBS's Codes of Practice<sup>4</sup> require us to consider privacy on a case-by-case basis. On occasion, SBS has pixelated historical footage, e.g. SBS recently elected to use pixelation on archival footage which showed a mugging victim lying on the pavement. In the original news story, the person had been identifiable but, taking into account the privacy obligations under our Code and other considerations, SBS was of the view that showing their image would be inappropriate.

The low level of privacy code complaints shows the system is working well. However, an exercise of editorial discretion is different to a compulsory legal obligation.

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<sup>4</sup> <http://www.sbs.com.au/aboutus/corporate/view/id/109/h/Codes-of-Practice>

## 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?

SBS submits that the key for any statutory cause of action is flexibility. The more activities or matters that are included to “assist” with the formulation of a breach of privacy action, the more likely it is that these tests will become rigid and inflexible. It is vital that courts consider each case on its facts.

The key question should be whether the alleged breach is highly offensive. Scope must be allowed for current community standards to influence the interpretation of the courts.

We note Lord Justice Leveson made a similar observation in his report following the investigation into press activities in the UK:

*“4.2...the way in which the common law has addressed these issues has allowed flexibility of approach and a sensible enunciation of the relevant factors to be taken into account when balancing the competing issues in fact sensitive cases. I pay tribute to the work of the judges who have contributed to the jurisprudence in this area with clarity and care. It does not appear that legislative intervention will do other than generate further litigation as attempts are made to discover the extent to which the new framework matches the developing law.”<sup>5</sup>*

Rather than list examples in a new cause of action, SBS would again advocate an approach of “filling in the gaps”, by strengthening existing laws such as surveillance and harassment.

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

- (i) misuse of private information; and
- (ii) intrusion upon seclusion?

A single cause of action for serious invasion of privacy is to be preferred although, as stated previously, SBS considers this the “least worst option”.

## 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?

It is SBS’s view that if a cause of action for serious invasion of privacy evolves, then “highly offensive” on an objective standard is an appropriate standard to establish a claim.

<sup>5</sup> Lord Justice Leveson, *Inquiry into the Culture, Practices and Ethics of the Press* (2012) Vol 4, pg 1508 found at <http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp>

From the media perspective, there are many circumstances where people may not appreciate being filmed whilst they are in public. A lower standard than “highly offensive” would invite many trivial or minor complaints. This is particularly the case given the highly subjective nature of the concept of “privacy”, and the differing standards across the community as to what is considered intrusive.

A “highly offensive test” will assist the media in practical ways. Returning to the Insight hypothetical, as mentioned above, there are steps which can be taken to mitigate the impact of publication on the ex-husband. For example: by avoiding use of the woman’s surname; not mentioning places, dates or times; not naming or showing an image of the husband; and being careful about the specific facts disclosed (e.g. not saying “we used a donor because my ex-husband was impotent”, saying instead “we used a donor because we couldn’t otherwise conceive”.) If these steps are taken, and the ex-husband still threatens an action, SBS can at least point to the mitigating circumstances to argue that the reasonable person would not consider the disclosure “highly offensive” given the careful and proportionate way that the matter has been dealt with.

SBS agrees an invasion of privacy can only be actionable where a reasonable expectation of privacy exists. However, we note that this expectation has been applied to an unreasonably low benchmark in some European jurisdictions - for example, German and European court decisions relating to photos of Princess Caroline, and the decision about J.K Rowling’s son in the UK.

### **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:

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

In SBS’s view, the preferred approach is for the balancing of interests in any cause of action to be integrated into the cause of action. If a plaintiff wishes to establish a cause of action, the onus should be on the plaintiff to displace the “public interest” when making their case.

As discussed above, Australia has no right to free speech. In other jurisdictions, public interest considerations would be given weight in any determination on privacy which could burden freedom of speech. It is therefore particularly important that such issues of public interest are considered as a threshold issue to whether the cause of action is made out.

SBS submits that such considerations must also be taken into account when deciding whether to grant an injunction.



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

The scope of “public interest” should necessarily be broad. The danger of formulations such as that of the Victorian Law Reform Commission’s “purposes relevant to the common good” is that they impose a high standard on publications, suggesting that they must be exposing corruption, crime or wrongdoing or discussing issues of great significance in society in order to be protected by the public interest standard. More mundane publications should still be allowable by reference to the public interest.

As discussed earlier, an individual story may not hold up to a public interest test, yet there is overall public interest in protecting a public media domain which allows for free flow of information and exchange of ideas. Even where a publication may be relatively trivial, consideration should still be given to the general principle as to whether it is justified to impose limits on publication per se. For instance, public reports of the fact the former German Chancellor Gerhard Schroeder dyed his hair were suppressed in Germany. Whilst this may not be a matter going to the heart of public governance, in SBS’s submission it would be excessive to prohibit such discussion on privacy grounds.

We also reiterate the points made above in our first case study – the possibility of alternate ways of telling a story should not be used as an argument to defeat the “public interest” in a particular method of publication.

### **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?

In SBS’s view, it is vital that the fault element of intentional or reckless are the focus of the cause of action, and negligent or otherwise unintentional invasions of privacy are excluded. In addition, it must constitute an intention to invade privacy, and not merely intention to do the act.

SBS agrees that “intention” can be broadly defined to cover scenarios where it would be obvious to a reasonable person in the circumstances that an invasion of privacy would be certain to result from the relevant conduct. This is consistent with the common law approach to the meaning of “intention” in other areas of law.

There are many ways in which footage, images or other material may breach someone’s privacy in a way which is unintentional. A common example would be the kind of footage filmed for use in news broadcasts, often wide angle shots of crowds, or footage of incidental comings and goings out of buildings relevant to a news story. It is very possible that in such a story, a person or incident might be captured that the person considered a breach of their privacy. However, it would be very difficult for news organisations to vet any material filmed in public for potential privacy breaches, especially where the reason why the material is so offensive to that particular individual may not be apparent to a viewer who has no particular knowledge of the individual captured on film.

These fault elements could also assist documentary or other filmmakers wishing to use seemingly innocuous archival footage, where the exact context and identity of those depicted cannot be determined.

## Damage

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

**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)?

In the vast majority of complaints concerning privacy breach, there would not be any proof of actual damage (e.g. for economic loss, for loss of employment, earnings or profit).

SBS's view is that the cause of action should require proof of damage in order to discourage frivolous and vexatious claims. However, if it is decided that such proof is not necessary, SBS notes that any compensation for "hurt feelings", "mere distress" or "embarrassment" should not seem disproportionate with the damages available in other causes of action (e.g. defamation).

## Defences and exemptions

**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?

SBS agrees that there should be a defence that conduct was authorised or incidental.

We disagree that there should be a requirement that the act or conduct is proportionate, necessary or reasonable.

**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?

SBS supports importing defences from defamation law wherever they are applicable. Such defences would include:

- Absolute privilege: it is vital to ensure that people giving evidence at trials or speaking in Parliament do not have to worry about privacy actions.
- Publication of public documents: if details about an individual are published in a public document, it should follow that this information is no longer private; and further accurate reports based on the document should not breach anyone's privacy.

- Fair report of proceeding of public concern: if details of an individual are disclosed in a proceeding of public concern, it would usually follow that that information is no longer private, and further accurate reports about the proceedings should not breach privacy.
- Qualified privilege for provision of certain information: a provision along these lines would be key to ensuring that any right to privacy did not burden the right to free political communication. It would need to be adapted from the defamation context, but guiding principles could be looking to the conduct of the disclosing party (e.g. was it reasonable? Was it proportionate? Were steps taken to manage the disclosure? etc.)
- Innocent dissemination: this is important to protect third party disseminators, in line with the protection as it stands under the Defamation Act.
- Triviality: this is an important defence, to cover situations where it is agreed private information has been disclosed, but the overall impact is negligible.

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

SBS agrees on all the defences listed by the ALRC as other potential appropriate defences. In particular, SBS supports the following:

The information was already in the public domain – SBS’s view is that in most circumstances, this should be a complete rebuttal to a privacy action, as public domain material cannot be held to be “private”.

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

SBS is of the view that journalists and media organisations should be excluded from the ambit of the proposed cause of action, provided that the privacy breach occurs whilst journalists or documentary makers are engaging in the course of journalism – consistent with the exemption in the *Privacy Act 1988* (Cth). SBS understands that in Australia, the bulk of privacy complaints are more concerned with the actions of private citizens and aggregators of personal information (including social media websites and other forms of online business). Journalists engaging in the course of journalism are not a high risk area. SBS has previously reported on our low rate of privacy complaints – with only six privacy complaints since 2005, and only three of those six actually from the individual affected (rather than an unrelated member of the public).

If there is a concern about a privacy breach by a journalist or a media organisation, complaints could continue to be dealt with under the current regulatory and co-regulatory regime (e.g. in the case of SBS, internal complaints handling, which may then be referred to the Australian Communications and Media Authority (**ACMA**)).

Note however that if there is a media carve out from the operation of any new cause of action then the inclusion of “public interest” defences are still necessary to provide protection to

individuals who publish public interest material but who may not be journalists per se. For this reason SBS advocates a dual “belt and braces” approach to carve out an exemption for journalists and media organisations, but also to provide for public interest defences.

### Monetary remedies

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

- (i) a maximum award of damages;
- (ii) a maximum award of damages for non-economic loss;
- (iii) exemplary damages;
- (iv) assessment of damages based on a calculation of a notional licence fee;
- (v) an account of profits?

In relation to (i) and (ii), SBS agrees with a maximum cap on damages, which should not seem excessive in relation to the current cap on defamation damages.

SBS does not support exemplary damages or account of profits, as they are not appropriate for this type of action. SBS is generally of the view that there should not be a wider range of remedies for privacy than are found in other like actions as it may encourage individuals to bring privacy actions where another action would be more appropriate.

SBS could support (iv) provided that this does not allow for “double-dipping” – for example, someone cannot argue for a high award for damages, and then also receive a licence fee for the disclosure.

### 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)?

SBS submits that allowing injunctive relief where an individual believes a privacy breach is imminent or threatened undermines free speech principles. Plaintiffs could attempt to obtain injunctions over unpublished news stories or documentaries on speculative grounds, at great expense to the media. Injunctive relief should only be offered in extreme circumstances and the burden must be on the plaintiff to prove serious breach, or high likelihood of harm.

We reiterate our point in question 7 that interests such as public interest and freedom of expression must be taken into consideration when deciding whether to grant an injunction.

To illustrate the impact of injunctions, we will return to the Insight case study outlined earlier in this paper. A day or two prior to the taping of the program, let's assume the father either obtains an injunction, or threatens to obtain one. Insight's producer is faced with a difficult choice: include the daughter as a guest (and run the risk of significant legal costs, and being unable to put the program to air on time), or decide to cut the daughter from the program. The reality is, given that shows are taped without much gap between editing and broadcast,

it may be too high risk to include anything which could be subject to an injunction (regardless of whether we would be likely to succeed at a hearing, or not).

### **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?

SBS agrees that an order for the destruction or removal of material found to be a serious invasion of privacy would be reasonable. In respect of other remedies, we would argue for consistency with defamation law, noting that plaintiffs are unable to obtain an order for an apology in defamation matters.

### **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?

SBS is of the view that this should be consistent with the provisions under defamation law (for example, s10 of the NSW Defamation Act) which provide that there is no cause of action once a person is deceased.

Similarly, we would also argue against corporations being able to bring a cause of action for serious invasion of privacy.

**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?

SBS is of the view that if there is to be an action relating to serious invasion of privacy, it must be personal, and brought by the relevant individual or individuals affected. Given that much of the action relates to disclosure (and the impact of disclosure) it is difficult to see what purpose is served by a third unaffected party bringing the action. No like provision is contained in defamation law, and SBS considers this to be the preferable approach.

### **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?

SBS proposes a one year limitation from the date of initial publication or disclosure.

## 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?

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

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

We have no comment in relation to question 22 and 23.

In relation to alternative dispute resolution, we consider that voluntary dispute resolution options should form part of the process.

## 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?

SBS is currently subject to a regulatory regime set up by the *Broadcasting Services Act 1992* (Cth) and the SBS Act. Complaints made under SBS's Codes of Practice are investigated by the SBS Ombudsman. If a complainant considers the response to be unsatisfactory, they may refer the matter to ACMA.

SBS's Codes of Practice include a specific code on privacy. Code 1.9 provides:

*"The rights of individuals to privacy should be respected in all SBS programs. However, in order to provide information to the public which relates to a person's performance of public duties or about other matters of public interest, intrusions upon privacy may, in some circumstances, be justified."*

The Codes of Practice also include provisions on the broadcast of interviews, talkback and audience responses (Code 1.8) and the broadcast of violent and distressing events in news and current affairs (Code 2.4).

As discussed, SBS has had a low volume of complaints relating to privacy. It would however put SBS in a difficult position if someone could elect to make a complaint under the Codes of Practice, obtain a finding from the SBS Ombudsman and/or the ACMA and then pursue further litigation under the new statutory cause of action.

## 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?

**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?

SBS is not opposed to new or supplemental laws targeted at harassment. SBS does not consider a cause of action for intrusion into “personal activities or private affairs” is necessary, given the laws already targeted towards different types of intrusion – and such an action would raise many of the same issues and difficulties as a statutory cause of action for privacy.

As expressed in our opening statement and in our response to question 2, SBS is generally of the view that strengthening existing laws is the best approach in redressing the harms to which the statutory tort is aimed. The existing laws and actions that provide protection of individual privacy in Australia include: laws in relation to stalking, surveillance, use of carriage services, trespass, copyright, breach of confidence and other laws restricting the disclosure of sensitive facts. By strengthening existing laws the harms are better redressed than by enacting a statutory tort of privacy.

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

The key area of concern to the public is online breaches of privacy. Social media and other technological developments create significant opportunities for greater social cohesion, connection and interaction in ways that are not fully realised today. Technology may well be driving some changes in social attitudes to privacy, but this is not a reason to clamp down on such developments.

A more powerful strategy is to educate citizens so that they become more literate about how best to protect their own privacy (including how to use “opt in” or “opt out” functions, and understanding social media privacy policies). Educational programs to promote digital literacy remain the most effective method of protecting individual privacy in a world of rapid technological change. There are barriers of cost and access to legal services which prevent many people from seeking redress through the courts. Current “no-cost” regulatory provisions and programs to promote digital literacy are the best way to protect the position of all individuals.