

Australian Broadcasting Corporation

submission to the

Australian Law Reform Commission

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

May 2014

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

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Introduction

The ABC welcomes the opportunity to comment on the Australian Law Reform Commission's (ALRC) discussion paper, *Serious Invasions of Privacy in the Digital Era*. The Corporation does not express a view as to whether or not a statutory tort for serious invasion of privacy should be introduced. As noted in the ABC's November 2011 submission to the Department of Prime Minister and Cabinet (DPMC) inquiry into introducing such an action, the ABC recognises that the debate about such a change in law is not only – or even mainly – about privacy and media behaviour. Very few privacy complaints are made to media regulators and self-regulators. If the government determines a new statutory action should be enacted, then the ABC maintains its stance that appropriate safeguards be incorporated into the legislation to ensure that journalistic enquiry and artistic expression is not unduly constrained.

The ABC also maintains its views as expressed in its November 2013 submission to the ALRC during the issues paper stage of this inquiry. The ABC recognises and welcomes many of the ALRC's proposals in its discussion paper, which are consistent with the ABC's earlier submission in recognising and protecting freedom of expression. However, the ABC takes the view that some of the ALRC's proposals in its discussion paper are problematic. These are briefly discussed below.

Matters for further consideration

Threshold for serious invasion of privacy

The ALRC proposes that the new cause of action is only available where the invasion of privacy is “serious” and that, in assessing seriousness, regard be given to whether the invasion was likely to be “highly offensive, distressing or harmful”. The ABC regards “serious” as too low a threshold as courts may take a view that “serious” can simply include matters that are not trivial or trifling. The ABC stands by its earlier submission 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.

The ABC does not take issue with extending the standard along the lines suggested by the ALRC to encompass—in addition to highly offensive—invasions that are regarded as “highly distressing” or “seriously harmful”.

Defining the public interest

The ABC welcomes the ALRC’s proposal to include the balancing of privacy with public interests such as freedom of expression and freedom of the media within the cause of action itself, rather than as a defence (Proposals 8-1 and 8-2). Consideration should be given to recognising that freedom of expression and of the media extends not just to matters relating to investigative journalism but also to artistic expression and to the expression of stories and views by members in the community, as facilitated by the ABC and other media.

The ABC queries the appropriateness of including within the meaning of “public interest” (Proposal 8-2) categories for “national security” and “the economic wellbeing of the country”, as any such activities are likely fall within the category of lawful activity, which the ALRC proposes as a defence (Proposal 10-1).

Limitation period

The ABC had proposed that, consistent with defamation laws, a limitation period of one year with judicial discretion to extend that period to three years be introduced, should a tort be enacted. The ALRC has proposed a limitation period of one year from the date the person becomes aware of the privacy invasion with judicial discretion to extend this to three years from the date of the privacy invasion, whichever is earlier (Proposal 9-4). The ABC submits that the date at which the limitation period commences should be the date of first publication, noting that judicial capacity to extend the limitation period to three years should be sufficient, on balance, to accommodate any complainant belatedly becoming aware of the matter complained of. In this regard the proposed tort should be seen as consistent with defamation proceedings. Moreover, and especially with the proliferation of publication of material online, serious consideration should be given to including a “single publication rule” along the lines

of the provision introduced into Section 8 of the UK *Defamation Act 2013*,¹ the effect of which is explained as follows:

This section introduces a single publication rule to prevent an action being brought in relation to publication of the same material by the same publisher after a one year limitation period from the date of the first publication of that material to the public or a section of the public. This replaces the longstanding principle that each publication of defamatory material gives rise to a separate cause of action which is subject to its own limitation period (the “multiple publication rule”)...²

The potential for multiple actions in defamation in Australia as a result of there being no single publication rule is a significant issue for media organisations, and similar concerns would apply to any proposed privacy tort which did not deal with the issue.

Necessity as a defence

In response to Question 10-2, the ABC submits that there should be a defence of necessity, for the reasons canvassed in paras 10.60 to 10.62.

Consent as a defence

The ALRC proposes to exclude consent as a basis for defending an allegation of serious invasion of privacy, proposing instead that consent be considered as part of the test of actionability (as a factor in determining whether the plaintiff had a reasonable expectation of privacy) so that the court can assess the quality and scope of the plaintiff’s consent with the defendant’s conduct and interests (para 10.89). The ABC considers that, while it is appropriate to look at the issue of consent in considering actionability, it is appropriate for consent to be included as a complete defence where it clearly encompasses publication of the matter complained of. It is noted that the issue can be complex where, for instance, consent is later withdrawn or where the scope of consent is unclear.

Damages and other remedies for serious invasion of privacy

The ABC welcomes the ALRC’s proposal to set a cap on damages. A cap is consistent with the ABC’s view in its November 2013 submission on the ALRC’s issues paper where a cap was supported, but no view expressed as to the amount to be set aside from ensuring it did not exceed that set for defamation laws. In the ABC’s view the cap for defamation damages should be regarded as the upper limit for privacy breach damages, and consideration should be given to setting a lower cap.

The ABC does not support the introduction of exemplary damages, as proposed by the ALRC at Proposal 11-5. The ABC’s view is that, in circumstances where currently there is no

¹ <http://www.legislation.gov.uk/ukpga/2013/26/crossheading/single-publication-rule>.

² Explanatory note to section 8, *Defamation Act 2013 (UK)*,
<http://www.legislation.gov.uk/ukpga/2013/26/notes/division/5?view=plain>.

breach of privacy tort, a new capacity to award compensatory damages would suggest there is no need to provide for further damages of a punitive nature. The ABC agrees with the Office of the Australian Information Commissioner's suggestion, quoted in para 11.40, that remedies should be directed at compensating a plaintiff.

The ABC suggests that, in assessing the amount of damages to be awarded, courts be directed to have regard—in addition to those mitigating factors listed by the ALRC in its Proposal 11-2—to whether the defendant reasonably believed that the actions comprising the invasion were carried out in the public interest.

The ABC supports the inclusion as mitigating factors whether an apology or correction was made. However, further consideration should be given to the ALRC's proposals that courts be empowered to order corrections and apologies (Proposals 11-11 and 11-12), as this can seriously impinge on the editorial independence of the media and especially of the ABC which, like the Special Broadcasting Service (SBS), is governed under purpose-built legislation that already balances the national broadcasters' independence with the accountability measures introduced by other laws. (See the ABC and SBS joint submission along similar lines in response to the ALRC's classification inquiry.³)

In relation to the ALRC's proposal that courts be empowered to order defendants to deliver up and destroy material (Proposal 11-10), the ABC notes that in making such orders, courts should be required to also consider countervailing public interests in favour of not destroying or removing material (e.g., the community's interest in being informed about matters of public interest). Consideration should also be given, when an order for delivery up is made, to allowing defendant's to redact material that may otherwise be confidential or sensitive (such as confidential source material).

Proposed expansion of ACMA's power

The ALRC proposes to extend the Australian Communication and Media Authority's (ACMA's) powers to enable it to make a declaration that compensation be awarded in respect of a serious invasion of privacy (Proposal 15-1). The ALRC acknowledges that the ACMA is not empowered under current legislation to regulate the national broadcasters in the same way as other media are regulated (para 15.11) in that the ACMA's power is recommendatory only in respect of ordering remedies. However, the ALRC's proposed expansion of the ACMA's powers does not take this distinction into account. The ABC does not support an expansion of the ACMA's powers along the lines proposed. As argued earlier in this submission and in the joint ABC/SBS submission to the ALRC's classification inquiry, the national broadcasters are subject to a carefully balanced regulatory scheme that ensures independence while appropriately addressing accountability.

The ABC also notes that, while privacy complaints to the media and media regulators are few at present, the introduction of compensation via the ACMA may well result in an increase of complaints, which could in turn have a chilling effect on the media's ability to investigate and report on matters of public interest.

³ ABC and SBS Joint Submission to the ALRC National Classification Scheme Review, November 2011, especially pages 1-9, <http://about.abc.net.au/wp-content/uploads/2012/06/ABC-SBSSubmissionALRCClassificationReviewDec2011.pdf>.

Alternative dispute resolution

The ALRC has declined to recommend the introduction of a bar on plaintiffs taking judicial proceedings where they have already received a determination through alternative dispute resolution mechanisms (paras 9.79-9.81). The ABC maintains its view, expressed in its November 2013 submission, that courts should be given the ability to decline to entertain a complaint where the matter has been adequately dealt with under an alternative complaints procedure, such as under codes developed and administered under self- or co-regulatory schemes. The prospect of being able to re-litigate a privacy complaint can hamper the resolution of complaints through less formal means. For instance, the ABC's Code of Practice makes clear that the ABC may decline to investigate a complaint if "the complaint concerns content which is or becomes the subject of legal proceedings. In the ABC's view, there is a clear public interest in preventing "double-dipping", the more so when a complainant is provided with an avenue of redress, holding out the prospect of monetary compensation, which previously did not exist.

Safe harbour schemes for internet intermediaries

The ALRC proposes that the new Act (if introduced) should provide a safe harbour scheme to protect internet intermediaries from liability for serious invasions of privacy committed by third-party users of their service (Proposal 10-7). The ABC suggests that such protection extend to cover both internet service providers and internet content hosts—similar to the protection currently provided under clause 91 of Schedule 5 to the *Broadcasting Services Act 1992 (Cth)*. This limited immunity and the comparable one provided in the United States *Communications Decency Act 1996* (referred to by the ALRC at paras 10.66 and following) are useful models worth considering. The ABC, like many media organisations, provides forums and other services for the community to engage in discussion and debate. The ABC submits that, as now, it and other content hosts should not be held liable for third-party misconduct of which it is not aware.

Uniform surveillance Laws

The ABC welcomes the ALRC's proposals that surveillance devices laws be uniform across the states and territories (Proposal 13-1) and that a defence of responsible journalism be introduced (Proposal 13-4), although it remains to be seen how that defence is drafted. The ABC also reserves its view as to whether the use of surveillance devices in public places or through participant monitoring (Proposal 13-3) should be uniformly excluded from the offence provisions. The ABC suggests that, in the latter case, it is arguable that the recording by a participant is not the problem and that it is the further communication of the recorded private activity which should be proscribed, subject to relevant defences. The ABC also suggests that serious consideration be given to including a separate defence for the broader public interest (e.g., as the Victorian legislation currently provides in respect of communicating material obtained through surveillance where the extent of communication is no more than necessary in the public interest).

In relation to the ALRC's proposal that courts be empowered to award compensation to

victims of unlawful surveillance (Proposal 13-5), regard should be given to existing powers, such as those provided under the Victorian *Sentencing Act 1991*, which allows victims to ask the sentencing court for a compensation order requiring the offender to pay for any mental or physical harm or distress suffered, once the court finds the offender guilty of an offence (such as the offences for unlawful surveillance under the Victorian *Surveillance Devices Act 1999*) – see Division 2 of Part 4 of the Victorian *Sentencing Act*.