



**Australian  
Privacy  
Foundation**

<http://www.privacy.org.au>

[Secretary@privacy.org.au](mailto:Secretary@privacy.org.au)

<http://www.privacy.org.au/About/Contacts.html>

13 July 2013

Contemporary Community Safeguards Inquiry  
Australian Communications and Media Authority  
P.O. Box Q500  
Queen Victoria Building NSW 1230

Dear ACMA

**Re: Contemporary Community Safeguards Inquiry**

The Australian Privacy Foundation (APF) is the country's leading privacy advocacy organisation. A brief backgrounder is attached.

The APF makes the following submissions in relation to Chapter 4A of the Issues Paper, pp. 53-60.

**1. Failure to Implement the Proportionality Principle**

The APF submits that the current privacy interventions within ACMA's regulatory scope are seriously deficient. This is evident from the weak decisions the organisation has had to make, the low regard in which the public holds the organisation, and the small volume of complaints made to it.

The privacy protections, as outlined in Table 12 on pp. 54-55, are currently subject to the qualification "unless there is a public interest ...". In terms of the APF's Meta-Principles for Privacy Protection, this in effect implements the Justification Principle (4.), but not the Proportionality Principle (5.). The Principles are attached and at <http://www.privacy.org.au/Papers/PS-MetaP.html>.

It is essential that the qualification be upgraded to ensure that not only does a public interest exist, but also that it is of sufficient significance that it outweighs the individual's privacy interest.

The operative words could be amended simply by appending those words to the expression "unless there is a public interest. However, alternative formulations could achieve the level of protection that is needed, provided that they implement the Proportionality Principle.

It is noteworthy that this protection already exists in the case of the ABC's provision relating to intrusions.

**2. Inappropriate Definition of 'The Public Interest'**

The Issues Paper fails to discuss what is meant by 'the public interest'.

Codes administered by ACMA generally interpret the phrase highly liberally, e.g. "whether material that invades privacy is in the public interest, will depend on all the circumstances including whether a matter is capable of affecting the community at large so that citizens might be legitimately interested in or concerned about what is going on".

The APF submits that this interpretation results in serious shortfalls in privacy protection.

That wording derives from a UK judgement in *London Artists v Little* (1969) 2 QB 375 at 391. Lord Denning, then Master of the Rolls, said that "There is no definition in the books as to what is a matter of public interest. All we are given is a list of examples, coupled with the statement that it is for the Judge and not for the jury. I would not myself confine it within narrow limits. Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment".

That judgement is at best only indirectly relevant to the context of privacy and the media, because Denning's words referred only to defamation law, and specifically to the defence of fair comment (which is dependent on the comment being made "on a matter of public interest").

In the words of a former Australian Prime Minister, "The public interest means publication or non-publication guided by what is in the interest of the public as a whole, not what readers or an audience might find interesting or titillating" (Keating 2010).

The notion of the public interest must be clearly defined so as to identify the specific categories of circumstance that justify a person's privacy interest being overridden.

The APF submits that the relevant categories are:

- relevance to the performance of a public office
- relevance to the performance of a corporate or civil society function of significance
- relevance to the credibility of public statements
- relevance to arguably illegal, immoral or seriously anti-social behaviour
- relevance to public health or safety
- relevance to an event of significance

Further detail is contained in the APF's Policy Statement on Privacy and the Media, which is attached and at <http://www.privacy.org.au/Papers/Media-0903.html>

It is essential that the Codes administered by ACMA be amended in order to remove the permissive interpretation of 'the public interest' and substitutes for it a suitably restrictive definition.

### **3. Unjustified Scrutiny of Public Figures**

On p. 59, the Issues Paper says "it is accepted that public figures will be open to a greater level of scrutiny of any matter that may affect the conduct of their public activities and duties".

One aspect of that statement is seriously inappropriate. The onus must be on the person intruding on another's private space, or making a disclosure, to justify their actions. It is completely inadequate to use such permissive language as "any matter that may affect ...".

The APF submits that the norm must be re-stated along the lines of "any matter that demonstrably affects ..." or "is demonstrably relevant to ...", and that this must be carried through into the Codes that ACMA administers.

### **4. The Right to be Forgotten**

In Q.80 on p. 60, the question is raised "can [information that is already in the public domain] become private again through, for example, the passage of time?".

The APF submits that the answer is emphatically 'Yes'.

Any person that publishes personal data must satisfy the Justification and Proportionality Principles. Just because personal data was once published because it was relevant and appropriate to do so at that time does not mean that it is necessarily relevant and appropriate at some time in the future. The test must be applied on each occasion.

Society places great emphasis on opportunities for individuals to redeem themselves, and, as the Issues Paper notes, this has been extended as far as the suppression of criminal convictions after a period of time.

It is essential that the media be precluded from publishing personal data merely because it has previously been published.

## **5. The Incursions of Social Media**

The excesses apparent in social media during its first decade are already beginning to result in behavioural adaptations.

The APF submits that the media must not be permitted to excuse unjustified or disproportionate incursions and disclosures on the basis that amateurs do it.

Moreover, each media outlet must be subject to the Justification and Proportionality tests. Under no circumstances should any organisation be permitted to indulge in inappropriate behaviour merely because some other media outlet has already done so.

## **6. Genres Other Than News and Current Affairs**

The Issues Paper refers to new genres such as 'observational documentaries' and the 'broadcasting of real-life events'.

The APF submits that it is essential that personal data be protected, and that impositions on individuals and publication be subject to the Justification and Proportionality Principles, nomatter what the media genre.

Chapter 4A notes how important privacy is to the Australian public.

Current protections have been shown to be inadequate. This Inquiry has the opportunity to fix the serious problems identified in this Submission by adapting its frame of reference as described above, and then carrying the modifications through into all Codes that it administers.

The APF would of course be pleased to clarify any aspect of this Submission.

Thank you for your consideration.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Roger Clarke', with a long horizontal stroke extending to the right.

Roger Clarke  
Chair, for the Board of the Australian Privacy Foundation  
(02) 6288 1472                      Chair@privacy.org.au

## Australian Privacy Foundation

### Background Information

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems. It makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters.

Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance.

When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.

The APF is open to membership by individuals and organisations who support the APF's Objects. Funding that is provided by members and donors is used to run the Foundation and to support its activities including research, campaigns and awards events.

The APF does not claim any right to formally represent the public as a whole, nor to formally represent any particular population segment, and it accordingly makes no public declarations about its membership-base. The APF's contributions to policy are based on the expertise of the members of its Board, SubCommittees and Reference Groups, and its impact reflects the quality of the evidence, analysis and arguments that its contributions contain.

The APF's Board, SubCommittees and Reference Groups comprise professionals who bring to their work deep experience in privacy, information technology and the law.

The Board is supported by Patrons The Hon Michael Kirby and Elizabeth Evatt, and an Advisory Panel of eminent citizens, including former judges, former Ministers of the Crown, and a former Prime Minister.

The following pages provide access to information about the APF:

- Policies <http://www.privacy.org.au/Papers/>
- Resources <http://www.privacy.org.au/Resources/>
- Media <http://www.privacy.org.au/Media/>
- Current Board Members <http://www.privacy.org.au/About/Contacts.html>
- Patron and Advisory Panel <http://www.privacy.org.au/About/AdvisoryPanel.html>

The following pages provide outlines of several campaigns the APF has conducted:

- The Australia Card (1985-87) <http://www.privacy.org.au/About/Formation.html>
- Credit Reporting (1988-90) <http://www.privacy.org.au/Campaigns/CreditRpting/>
- The Access Card (2006-07) [http://www.privacy.org.au/Campaigns/ID\\_cards/HSAC.html](http://www.privacy.org.au/Campaigns/ID_cards/HSAC.html)
- The Media (2007-) <http://www.privacy.org.au/Campaigns/Media/>



## Meta-Principles

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### APF's Meta-Principles for Privacy Protection

APF has worked on a wide variety of issues over more than a quarter-century. Its Policy Statements and its Submissions reflect the following set of ground rules, or meta-principles, which APF submits must be generally applied.

#### 1. Evaluation

All proposals that have the potential to harm privacy must be subjected to prior evaluation against appropriate privacy principles.

#### 2. Consultation

All evaluation processes must feature consultation processes with the affected public and their representative and advocacy organisations.

#### 3. Transparency

Sufficient information must be disclosed in advance to enable meaningful and consultative evaluation processes to take place.

#### 4. Justification

All privacy-intrusive aspects must be demonstrated to be necessary pre-conditions for the achievement of specific positive outcomes.

#### 5. Proportionality

The benefits arising from all privacy-intrusive aspects must be demonstrated to be commensurate with their financial and other costs, and the risks that they give rise to.

#### 6. Mitigation

Where privacy-intrusiveness cannot be avoided, mitigating measures must be conceived, implemented and sustained, in order to minimise the harm caused.

#### 7. Controls

All privacy-intrusive aspects must be subject to controls, to ensure that practices reflect policies and procedures. Breaches must be subject to sanctions, and the sanctions must be applied.

#### 8. Audit

All privacy-intrusive aspects and their associated justification, proportionality, transparency, mitigation measures and controls must be subject to review, periodically and when warranted.

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## APF Policy Statement re Privacy and the Media

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Revision of 26 March 2009

### Preliminary Comments

Freedom of the press is a vital component of democracy.

There must be constraints, but they must be finely judged, in order to ensure that inappropriate behaviour in business and government can be exposed.

Privacy is a key human value, and one that is often not appreciated until it is lost. It is important that privacy be sufficiently protected.

Finding appropriate balances between openness and privacy is challenging, because of the enormous diversity of contexts, and the highly varying levels of concern different people have about different aspects of their privacy.

### The Need

A framework is needed within which the media are able to work when making decisions about whether the collection of personal data, and the publication of personal data, unreasonably infringes privacy. That framework needs to be filled out with guidelines in relation to particular categories of people, data and contexts. The framework and guidelines need to be brief, clear and practical. They must not put the media in a straitjacket, but must enable them to exercise professional judgement in each situation as it arises.

The APF declares below the Framework it considers to be appropriate. The APF further proposes an indicative set of Guidelines to accompany and articulate the Framework.

These are presented in full knowledge of the existence since 2001 of the Australian Press Council (APC)'s Statement of Principles and Privacy Standards. The APF's position is that, after a decade's experience:

- detailed guidance is necessary
- the Framework and Guidelines need to apply to all media
- a comprehensive, graduated range of sanctions is necessary
- complaints schemes must be credibly independent of the organisations and individuals that are subject to the regulation, and complaint determinations must be appealable
- the APC does not provide adequate guidance, and any that may exist in the broadcasting field is seriously inadequate
- the existing self-regulatory and co-regulatory schemes (i.e. that operated by the APC, and the broadcasting codes administered by ACMA under s. 123 of the Broadcasting Services Act) have not satisfied these requirements

### The Framework

The term *the media* is used in this document in a comprehensive manner, to refer to organisations and individuals publishing on a professional basis, through print, radio, television, web-sites and other media, and their employees and contractors.

Increasingly, organisations and individuals outside the media are performing much the same functions as the media, in a less formal manner. Appropriate balances need to be applied to the media right now, so that the standards can be applied to the general public in the near future.

The term *personal data* refers to data that can be associated with an identifiable human being. It is used in a comprehensive manner, in order to encompass all data forms such as text, audio, image and video.

1. The media must not seek, and must not publish, personal data unless a justification exists.
2. The justification:
  - o must be based on 'the public interest', not on 'what the public is interested in'
  - o must be sufficiently clear
  - o must be of sufficient consequence that it outweighs the person's interest in privacy
  - o must be of sufficient consequence that it outweighs any other conflicting interests such as public security and the effective functioning of judicial processes
  - o must reflect the Guidelines applicable at the time
  - o must not claim reliance on a prior publication, but rather must stand on its own
3. In order to facilitate the handling of complaints, the media must be able to provide the justification for seeking, and for publishing, personal data, as described immediately above.
4. Internal complaints mechanisms must exist.
5. External complaints mechanisms must exist, which must be suitably resourced, must operate appropriate processes in a timely manner, and must be credibly independent from the complainee.
6. The consideration of a complaint about a specific instance of collection or publication of personal data must take into account information provided by the complainant, the justification presented, the context, the Guidelines applicable at the time the act in question occurred, and prior instances of comparable situations.
7. Appropriate forms of action must be available when complaints are upheld. The primary recourse needs to be published acknowledgement of inappropriate behaviour, and apology. In the case of privacy intrusions that are serious, blatant or repeated, a graduated series of sanctions is necessary, including professional rebuke, and the award of adequate (but not excessive) damages against corporations and against individuals.

## Guidelines

The diversity of contexts is enormous. On the other hand, great depth of experience has been accumulated. It is not tenable for the pretence to be sustained that 'there are no rules'. It is acknowledged, however, that the 'rules' need to be expressed in qualified terms, that professional judgement needs to be applied, and that reasonable exercise of professional judgement needs to be taken into account as an important mitigating factor, even where a particular act is subsequently judged to have been inappropriate. The Guidelines focus on publication within Australia.

The following are provided as indicative Guidelines, in order to convey the sense of what the APF considers to be fair balances between the vital need for free media and the high value of personal privacy.

The justification for the collection or publication of personal data must be based on one or more of the following:

**Consent.** The consent of the individual concerned is sufficient justification for personal data to be collected and published. Particularly for sensitive personal data, express consent is needed. For less sensitive data, implied consent may be sufficient. Where multiple individuals are directly identified (rather than merely indirectly implicated), the consent of each is needed.

**Relevance to the Performance of a Public Office.** This encompasses all arms of government, i.e. the parliament, the executive and public service, and the judiciary. The test of relevance is mediated by the significance of the role the person plays. Publication of the fact that a Minister's private life has been de-stabilised (e.g. by the death of a family member, marriage break-up, or a child with drug problems) is more likely to be justifiable than the same fact about a junior public servant. Publication of the identities and details of other individuals involved (e.g. the person who died, or the child with drug problems) is also subject to the relevance test, and is far less likely to be justifiable.

**Relevance to the Performance of a Corporate or Civil Society Function of Significance.** The relevance test needs to reflect the size and impact of the organisation and its actions, the person's role and significance, and the scope of publication.

**Relevance to the Credibility of Public Statements.** Collection and disclosure of personal data may be

justified where it demonstrates inconsistency between a person's public statements and their personal behaviour, or demonstrates an undisclosed conflict of interest.

**Relevance to Arguably Illegal, Immoral or Anti-Social Behaviour.** This applies to private individuals as well as people performing functions in organisations. For example, in the case of a small business that fails to provide promised after-sales service, or a neighbour who persistently makes noise late at night, some personal data is likely to be relevant to the story, but collection and disclosure of other personal data will be very difficult to justify.

**Relevance to Public Health and Safety.** For example, disclosure of a person's identity may be justified if they are a traveller who recently entered Australia and they are reasonably believed to have been exposed to a serious contagious disease.

**Relevance to an Event of Significance.** For example, a 'human interest' story such as a report on bush fire-fighter heroics, may justify the publication of some level of personal data in order to convey the full picture. Generally, consent is necessary; but where this is impractical and the story warrants publication, the varying sensitivities of individuals must be given sufficient consideration. This is especially important in the case of people caught up in an emergency or tragedy, who are likely to be particularly vulnerable.

**Any Other Justification.** A justification can be based on further factors. However, in the handling of a complaint, any such justification must be argued, and the onus lies on the publisher to demonstrate that the benefits of collection or publication outweigh the privacy interest.

**Mitigating Factors.** The outcome of the above relevance tests may be affected by the following factors:

**Self-Published Information.** Where an individual has published personal data about themselves, that person's claim to privacy is significantly reduced. However it is not extinguished. In particular, justification becomes more difficult the longer the elapsed time since the self-publication took place, and the less widely the individual reasonably believed the information to have been made available. Further, only information published by the individual themselves affects the relevance test, not publication by another individual, even a relative or close friend or associate.

**Public Behaviour.** Where data about an individual arises from public behaviour by that individual, the person's claim to privacy is reduced. However, public behaviour does not arise merely because the individual is 'in a public place'. For example, 'public behaviour' does not include a quiet aside to a companion in a public place.

**Attention-Seekers.** In the case of people who are willingly in the public eye (e.g. celebrities and notorieties), consent to collect and publish some kinds of personal data may be reasonably inferred. But this does not constitute 'open slather', and active denial of consent must be respected. This mitigating factor is not applicable to the attention-seeker's family and companions.

**CAVEAT.** Special care is needed in relation to categories of people who are reasonably regarded as being vulnerable, especially children and the mentally disabled, but depending on the circumstances, other groups such as homeless people and the recently bereaved.

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## Resources

ACMA (2009) 'Broadcasting Codes Index' Australian Communications and Media Authority, 2009, at [http://www.acma.gov.au/WEB/STANDARD/1001/pc=IND\\_REG\\_CODES\\_BCAST](http://www.acma.gov.au/WEB/STANDARD/1001/pc=IND_REG_CODES_BCAST)

APC (2009) 'Statement of Principles', Australian Press Council, 2001-2009, at <http://www.presscouncil.org.au/pcsite/complaints/sop.html>

"For the purposes of these principles, 'public interest' is defined as involving a matter capable of affecting the people at large so they might be legitimately interested in, or concerned about, what is going on, or what may happen to them or to others"



APC (2009) 'Privacy Standards', Australian Press Council, 2001-2009, at [http://www.presscouncil.org.au/pcsite/complaints/priv\\_stand.html](http://www.presscouncil.org.au/pcsite/complaints/priv_stand.html)

APF (2007a) 'Submission to the Australian Law Reform Commission's Review of Privacy – Answers to questions in ALRC Issues Paper 31' Australian Privacy Foundation, January 2007, at pp. 14-15 of [http://www.privacy.org.au/Papers/ALRC\\_IP31\\_070202.pdf](http://www.privacy.org.au/Papers/ALRC_IP31_070202.pdf)

APF (2007b) 'Submission to 'Australia's Right To Know' Coalition's Independent Audit into the State of Media Freedom in Australia' Australian Privacy Foundation, August 2007, at <http://www.privacy.org.au/Papers/ARKC-MediaFreedom-0708.pdf>

APF (2007c) 'Supplementary Submission to 'Australia's Right To Know' Coalition's Independent Audit into the State of Media Freedom in Australia' Australian Privacy Foundation, October 2007, at <http://www.privacy.org.au/Papers/ARKC-MediaFreedom-0710.pdf>

APF (2007d) 'Submission to the Australian Law Reform Commission re the Review of Australian Privacy Law – Discussion Paper 72' Australian Privacy Foundation, December 2007, at p. 68 of <http://www.privacy.org.au/Papers/ALRC-DP72-0712.pdf>

Ofcom (2005a) 'The Ofcom Broadcasting Code 2008 – Section 8: Privacy' [U.K.] Office of Communications, 2005, at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/privacy/>

"Meaning of 'warranted':

" ... where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public"

"Meaning of 'legitimate expectation of privacy':

Legitimate expectations of privacy will vary according to the place and nature of the information, activity or condition in question, the extent to which it is in the public domain (if at all) and whether the individual concerned is already in the public eye. There may be circumstances where people can reasonably expect privacy even in a public place. Some activities and conditions may be of such a private nature that filming or recording, even in a public place, could involve an infringement of privacy. People under investigation or in the public eye, and their immediate family and friends, retain the right to a private life, although private behaviour can raise issues of legitimate public interest.

"8.2 Information which discloses the location of a person's home or family should not be revealed without permission, unless it is warranted.

"8.3 When people are caught up in events which are covered by the news they still have a right to privacy in both the making and the broadcast of a programme, unless it is warranted to infringe it. This applies both to the time when these events are taking place and to any later programmes that revisit those events.

"8.4 Broadcasters should ensure that words, images or actions filmed or recorded in, or broadcast from, a public place, are not so private that prior consent is required before broadcast from the individual or organisation concerned, unless broadcasting without their consent is warranted".

"Suffering and distress

"8.16 Broadcasters should not take or broadcast footage or audio of people caught up in emergencies, victims of accidents or those suffering a personal tragedy, even in a public place, where that results in an infringement of privacy, unless it is warranted or the people concerned have given consent.

"8.17 People in a state of distress should not be put under pressure to take part in a programme or provide interviews, unless it is warranted.

"8.18 Broadcasters should take care not to reveal the identity of a person who has died or of victims of accidents or violent crimes, unless and until it is clear that the next of kin have been informed of the event or unless it is warranted."

"People under sixteen and vulnerable people

"8.20 Broadcasters should pay particular attention to the privacy of people under sixteen. They do not lose their rights to privacy because, for example, of the fame or notoriety of their parents or because of events in their schools. ...

"Meaning of 'vulnerable people':

"This varies, but may include those with learning difficulties, those with mental health problems, the bereaved, people with brain damage or forms of dementia, people who have been traumatised or who are sick or terminally ill."

Ofcom (2005b) 'The Ofcom Broadcasting Code 2008 – Guidance Notes: Section 8: Privacy' [U.K.] Office of Communications, 2005, at <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/guidance8.pdf>

"Private lives, public places and legitimate expectation of privacy

"Privacy is least likely to be infringed in a public place. Property that is privately owned, as are, for example, railway stations and shops, can be a public place if readily accessible to the public. However, there may be circumstances where people can reasonably expect a degree of privacy even in a public place. The degree will always be dependent on the circumstances.

"Some activities and conditions may be of such a private nature that filming, even in a public place where there was normally no reasonable expectation of privacy, could involve an infringement of privacy. For example, a child in state of undress, someone with disfiguring medical condition or CCTV footage of suicide attempt."

"Practice to follow 8.17 People in a state of distress

"Even if grieving people have been named or suggested for interview by the police or other authorities broadcasters and programme makers will need to make their own judgements as to whether an approach to such people to ask them to participate in a programme or provide interviews may infringe their privacy."

PCC (2007) 'Code of Practice' [U.K.] Press Complaints Commission, 1991-2007, at <http://www.pcc.org.uk/cop/practice.html>

"Private places are public or private property where there is a reasonable expectation of privacy" (since January 1998).

PCI (2007) 'Code of Practice for Newspapers and Periodicals' Press Council of Ireland, 2007, at <http://www.pressombudsman.ie/v2/presscouncil/portal.php?content=includes/codeofpractice.php>

"Principle 5.4 Public persons are entitled to privacy. However, where a person holds public office, deals with public affairs, follows a public career, or has sought or obtained publicity for his activities, publication of relevant details of his private life and circumstances may be justifiable where the information revealed relates to the validity of the person's conduct, the credibility of his public statements, the value of his publicly expressed views or is otherwise in the public interest."

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