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Submission

**'AUSTRALIA'S RIGHT TO KNOW' COALITION  
INDEPENDENT AUDIT INTO THE STATE OF MEDIA  
FREEDOM IN AUSTRALIA**

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## The Australian Privacy Foundation

The Australian Privacy Foundation (APF) is the leading non-governmental organisation dedicated to protecting the privacy rights of Australians. We aim to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians.

Since 1987 the Australian Privacy Foundation has led the defence of the rights of individuals to control their personal information and to be free of excessive intrusions. We use the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed.

For further information about the organisation, see [www.privacy.org.au](http://www.privacy.org.au)

## Introduction

APF welcomes both the formation of the 'Australia's Right to Know' coalition and the commissioning of the independent audit. We strongly believe that there is largely a common interest between privacy advocates and others concerned about government secrecy and an erosion of public accountability.

We are strong supporters of the essential role of strong and independent news and current affairs media, although we caution that this is not synonymous with an unregulated media business sector. The media are also heavily involved in commercial activity unrelated to any 'public interest' role, and much of their editorial output is in the area of 'infotainment' or pure entertainment, which can make few if any claims to special protection or privileges founded on a 'fourth estate' role.

We also hope that the audit, and the Right to Know campaign, can avoid overly simplistic characterisation of the relationship between governments and the media. Recent historians of the press such as Joad Raymond have pointed out that the relationship cannot be reduced to a simple story of good and brave journalists fighting repressive government censorship. Press and media interests have often enthusiastically cooperated with Government efforts to mould public opinion and have often received benefits from doing so. Recognition of the complex and often symbiotic relationship, and an appropriate degree of humility, would be welcome.

In this submission, we address firstly **information privacy laws**, which necessarily also involves a discussion of some related aspects of **Freedom of Information (FOI) laws**. We then go on to address issues relating to **surveillance laws; FOI more generally; whistleblower protection; restrictions on reporting of legal proceedings; protection of journalists' sources; secrecy in anti-terrorism laws, privacy tort law, defamation, and intellectual property protection.**

## Information Privacy

We are aware that many media organisations and journalists see information privacy laws as part of the problem in relation to erosion of a public 'right to know'. We submit that this perception is due more to the way these privacy laws have been misinterpreted and abused than to their existence and intended application. The first New Zealand Privacy Commissioner, Bruce Slane, coined the term BOTPA ('Because of the Privacy Act') to describe the all too frequent claims that the NZ Privacy Act was standing in the way of other public interests. In many cases, in all jurisdictions, such claims are false – the organisation concerned could meet the other public interest without breaching privacy law, but for whatever reason chooses not to, and instead hides behind an incorrect assertion that privacy legislation prevents them. The Commonwealth Ombudsman, John McMillan, alluded to this tendency in a recent speech in Canberra.

Information privacy laws such as those we have in Australia are in any case only partly about secrecy, confidentiality and non-disclosure. They are also about transparency, control and accountability and as such should be seen as natural allies of other accountability laws providing for Freedom of Information (FOI), Public Records, Whistleblower protection etc.

Used effectively by individuals, civil society NGOs and the media, privacy laws can be powerful tools in opening up the workings of government and business. The information privacy or protection principles at

the heart of privacy laws include requirements for organisations to explain their record keeping systems, both in up-front notices and in more detail on request, and rights of access for individuals to information about themselves, which can further illuminate the way in which bureaucracies (both public and private) operate.

The impact of information privacy laws on a public 'right to know' is felt in two complementary ways. Firstly they can impact on the availability of information – agencies and organisations' ability and willingness to disclose information to the public and to journalists and reporters. Secondly, to the extent that privacy laws apply to media organisations and journalists, they can directly affect the operations of media organisations, including restrictions on the collection, use and disclosure of personal information, with an obligation to give individuals access to, and correct, information held about them.

### Impact on access to public sector information

The effect of the Privacy Act 1988 on access to 'official' federal government information is generally through the operation of Information Privacy Principle (IPP) 11, which governs disclosure of personal information by Commonwealth agencies. The starting point of IPP11 is that personal information should only be disclosed for the purpose of collection or with the consent of the individual concerned. There are other exceptions, but none that relate directly to any general 'public interest' that would allow disclosure to the media. On the contrary, the exception that would usually be applied to any media request would be the 'required or authorised by or under law' which allows agencies to defer to the provisions of the Commonwealth FOI Act 1982 (FOIA) which deal with personal privacy.

There is a complex and confusing interaction between privacy and FOI laws. The thorough in-depth review of the Commonwealth FOIA by the Australian Law Reform Commission (ALRC) in 1995 resulted in many sensible recommendations – including some about the privacy aspects. To date, the Commonwealth government has failed to respond to the ALRC's 'Open Government' report, and in some respects has further weakened the FOIA, contrary to ALRC's recommendations.

Section 41 of the FOIA provides an exemption allowing information to be withheld where it would involve the unreasonable disclosure of 'personal information'. S.27A provides that an agency considering whether to release a document containing personal information *may* seek the opinion of the individual(s) concerned, and if the agency does so, it must take any submission into account. In deciding whether to seek an individual's opinion, the agency must have regard to the extent to which the information is publicly known or available from other publicly accessible sources and the association between the individual and the matters dealt with in the requested document. It may also take into account any other relevant matters.

This discretion has a mixed effect as far as the media are concerned. The first two criteria *should* prevent agencies withholding information already in the public domain or readily available elsewhere, but the third criterion allows them broad discretion to withhold on the grounds that the personal information is not sufficiently associated with the subject of the request. The fourth criterion should allow agencies to take into account the public interest in 'a public right to know' and the overall objectives of the FOIA, but seems rarely to be used in this beneficial way.

Soon after the passage of the Privacy Act 1988, the FOIA was amended to replace the concept of 'personal affairs' information with the concept of 'personal information' defined in the Privacy Act. Personal information is a broader concept, and this was a desirable change in relation to information about third party individuals and in relation to some sensitive personnel/HR information about public servants. Before the change, too much personal information was released based on a very narrow view by the AAT and courts as to what constituted 'personal affairs'.

However, there was a regrettable side-effect of the change in that government agencies can use the s.41 personal privacy exemption as an excuse for not disclosing information about the exercise of Commonwealth public servants' official duties.

This consequence *should* be countered by the requirement in s.41 for the disclosure to be 'unreasonable', and one would have hoped that tribunals and courts would have taken a robust view that disclosure of information about a public servant's official duties would rarely be 'unreasonable'. Unfortunately, this

does not seem to have happened and far too much information is withheld on what even the Foundation would regard as spurious privacy grounds. For instance, it is in our view ridiculous for agencies to withhold the names of the public servants who have dealt with particular matters, the identity and qualifications of consultants and contractors, or the salaries and benefits received by individual public servants – such things are matters of public interest which should be publicly available for accountability reasons.

The ALRC considered this issue in its 1996 Report, and recommended a revision of section 41 of the FOIA to change the default presumption to ‘disclosure’ unless withholding was on balance in the public interest, with guidelines to be developed jointly by the (proposed) FOI Commissioner and the Privacy Commissioner.<sup>1</sup> We support such a revision *in relation to information about public servants*, subject to further discussion of what the proposed guidelines would say about the suggested public interest test – this relates to our wider concern about a public interest test for a media exemption from privacy laws (see below).

We do not support the ALRC recommendation *in relation to personal information about other individuals* (citizens and clients of government agencies) where the default presumption should remain non-disclosure, but with a clear public interest exception.

Similar issues apply in relation to the interaction of privacy principles and FOI laws in the States and Territories.

In summary, we favour amendments to FOI laws in all jurisdictions that resulted in:

- (a) a presumption in favour of disclosure of personal information relating to a public servants performance of their official duties, with an exception for unreasonable intrusion into personal affairs, and
- (b) a presumption in favour of non-disclosure for all other personal information, with an exception for disclosures to the media in the public interest.

#### Impact on media organisations ability to perform their public interest role

In our submission to the ALRC on its Issues Paper 31 – Review of Privacy, we argued that the exemption for media organizations in section 7B(4) is far too broad – journalism is not defined and the definition of media organisation effectively allows anyone to claim the exemption by setting up a ‘publishing’ enterprise. The condition requiring a public commitment to privacy standards can be satisfied by the organisation itself, with no independent assessment.

We acknowledged that there are legitimate concerns about the balance between privacy rights and freedom of expression, and about the legitimate public interest role of the media. However, in our view these concerns should be addressed with selective exceptions to some of the principles, if justified, rather than by a blanket exemption.

If there are to be selective exceptions for public interest media activity (as we believe there should be), then the terms ‘in the course of journalism’, ‘news’, ‘current affairs’ and ‘documentary’ as used in section 7B(4) will need to be much more carefully and closely defined. While difficult, it is necessary to distinguish between genuine news and current affairs journalism, which deserve some exemptions from compliance with some of the principles, and the infotainment, entertainment and advertising which makes up the bulk of media content and which should be subject to privacy principles to the maximum extent practicable.

There is no justification for extending privileges and exemptions that are necessary and desirable for the ‘fourth estate’ role of the media to these other areas of activity. Unless media organisations are prepared to accept this, they will continue to run the risk of the privileges themselves being ‘wound back’ to the detriment of their vital public interest role.

Differentiating the public interest activities of the media from their other activities would also provide a basis for the public interest tests needed to implement our recommended approach to decisions on

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<sup>1</sup> ALRC Open Government - Recommendations 59 & 60

disclosure of personal information under both FOI and surveillance laws (discussed elsewhere in this submission).

### Industry Complaints Procedures

Your audit also needs to take an honest look at existing channels for complaints against the media through the Press Council, Broadcasting Codes and ACMA. These self-regulatory or co-regulatory schemes need to be able to demonstrate credible independence and objectivity in relation to those being regulated. We submit that too many of the rulings of these schemes have displayed a clear bias in favour of media respondents and against the legitimate privacy concerns of complainants. Unless media organisations recognise the inadequacy of these schemes, they will continue to run the risk of more restrictive laws which may ‘over-correct’ and threaten the legitimate public interest role of the media.

If far more of the media’s activities should be subject to the Privacy Act, as we suggest, then the current self-regulatory complaint mechanisms would ultimately be subject to review by a statutory regulator. This would currently be the Privacy Commissioner, although the current ALRC Review may take up suggestions made for alternatives and/or a right of appeal to a tribunal. Wherever this role lies, we do not believe the media have anything to fear from this oversight, provided there are well-crafted public interest exceptions.

### Remedies and penalties for media intrusion

We believe that the media’s view of privacy laws has unfortunately been coloured by the potential for very large awards under defamation laws (discussed further below) and by fears that privacy torts (also discussed below) could also result in large payouts. We have little sympathy for the misuse of defamation laws by public figures who, even when successful in their actions, are often undeserving of significant monetary damages by any ‘lay’ perspective.

Experience of complaints under privacy laws around the world suggests that most complainants are far more interested in an apology, and a change of practice by the respondent to stop the same detriment to others, than they are in compensation. To the extent that compensation is a factor, both the amounts expected and the amounts awarded are relatively modest – under NSW and Victorian Acts they are in any case capped at \$40,000 and \$60,000.

We believe that financial penalties are an important tool in the armoury of privacy protection, but that the desirable pattern is one of more frequent small awards or civil penalties. This would send the desired message to respondents that there will be an economic consequence of non-compliance and unreasonable intrusion, but without the prospect of huge windfall damages which are wholly disproportionate to the damage.

### Surveillance laws

There are specific laws governing the use of particular technologies such as CCTV, listening devices and tracking devices. Some of this legislation, including the federal *Telecommunications (Interception and Access) Act 1979* and the various State listening devices laws, actually pre-date general Information Privacy laws. Some of these laws have been updated and new ones introduced in response to the inadequate coverage of those general privacy laws, such as the *Workplace Surveillance Act 2005 (NSW)*.

More recently, there have been calls for regulation of photography in public places. Some practices such as ‘upskirting’ and photography in change rooms and on beaches have already been criminalised in some jurisdictions. The Victorian Law Reform Commission is currently reviewing the whole issue of surveillance in public places.

APF acknowledges that the news media have legitimate concerns about the effect of these surveillance laws on newsgathering. On the other hand, some of the most egregious cases of media intrusion have involved unwelcome and grossly intrusive photography. The extent to which these practices might be addressed by a privacy tort is discussed below, but even if such a cause of action is introduced, litigation will never be a practical option for individuals of ordinary means.

Our position on the media and surveillance laws is that, as for information privacy laws, surveillance laws should apply to media organisations, without any general exemption, but with targeted exceptions for genuine news and current affairs activities, based on a public interest test.

## **Other Freedom of Information issues**

Apart from the interaction of privacy and FOI laws already discussed, in relation to FOI more generally, we share concerns over recent decisions that have narrowed access. It is clear that, since the inception of FOI, Government support for FOI legislation has been at best lukewarm. Recommendations for reform of obvious defects, such as in the ALRC Report already cited, various parliamentary enquiries, and by both Commonwealth and State Ombudsmen, have been largely ignored. Recent tribunal and court decisions have simply reinforced the statutory limitations that Governments have inserted in the legislation in the first place.

While the ostensible function of FOI laws is to promote transparency in public decision-making, Governments rely on the creative application of a range of exceptions to make this function a virtual nullity, even where the laws make it clear that embarrassment to politicians and agencies is never a good reason to withhold information. Any credibility that FOI laws still enjoy is largely due to their support of individuals to access and correct their own files, but even here, applicants are often frustrated because disclosures might involve embarrassment to the agency or its political masters.

Personal access and correction is a function which could have been equally well performed by privacy legislation had it been introduced early enough. The weakness of privacy legislation often means that the law has not adequately provided access and correction functions even after being introduced. For instance, access and correction rights under the *NSW Privacy and Personal Information Protection Act 1998* are subject to far too many sweeping exceptions to make them effective. For example, even though a main impetus for that legislation was the exposure by the Independent Commission against Corruption in 1992 of a corrupt trade in personal information involving NSW Police, the Police Force is largely exempted from the Act.

## **Whistleblower protection**

We share the concerns expressed in *Australia's Right to Know* about the penalties imposed on people who take their concerns to the media. At the same time, we recognise that there are different kinds of leaks. Surreptitious or self-serving leaks by those in power designed to influence public perceptions of particular events are an accepted part of media reporting. Where this kind of leaking is used to smear dissenters, the media has a responsibility to critically examine the information provided rather than just doing the Governments' dirty work for them.

There certainly is a need to strike a fairer balance in relation to restrictions on disclosure of information by public sector workers. The aim should be to maintain democratic openness and the exercise of individual freedom of conscience while at the same time protecting the legitimate confidentiality that attaches to Government deliberations and relations with other organizations.

Whistle-blowing legislation provides a recognised mechanism for achieving a balance between confidentiality and disclosure, but one which is imperfectly realised in Australia. Authorised disclosures to approved watchdog agencies can only go so far. Those agencies can be constrained in dealing with issues because of limited investigative resources, conflict of interests or lack of real independence. Commonwealth whistleblower provisions such as section 16 of the Public Service Act or section 24F of the Crimes Act are only effective in limited circumstances. Whistleblowers can still be too easily smeared or discredited without any real form of legal protection. At the same time, neither the legitimate confidentiality issues of governments, or the interests of whistleblowers themselves, would be served by allowing any disgruntled employee to go directly to the media. Your audit could perform a useful service by exploring how the protections under whistleblower legislation could be extended, for example by establishing mechanisms whereby whistleblowers whose concerns have not been addressed through formal channels could go public with their concerns while still being protected.

## **Restrictions on reporting legal proceedings**

Restrictions on media coverage of legal proceedings involves balancing the principle of open justice against a number of legitimate interests including privacy. These other interests include the protection of the objectivity of juries, witnesses and determiners of fact; the protection of victims of blackmail and sexual offences; and the protection of children who are involuntary parties or entitled to a presumption of limited responsibility. And yet, these other interests are too often left out of the equation, with restrictions

attacked by the media simply as unreasonable concerns for privacy. The media relies heavily on the courts as a source of news. Journalists have a responsibility to be aware of and respect these legitimate restrictions.

### **Protection of journalists' sources**

The line between the rights of parties in legal action to pursue legitimate forensic discovery and the claims of journalists to protect their sources is always going to be a fraught one. No business is happy to have a search warrant executed on their premises or to have their sensitive records subpoenaed. Nevertheless, it is hardly realistic to propose that courts should be deprived of access to accurate and relevant information when resolving disputes and that the power to uncover this evidence must necessarily override the confidentiality interests of individuals and corporations. Journalists who advocate shield laws often argue that they are treated unfairly, compared with the way lawyers enjoy legal professional privilege. However, legal professional privilege has been steadily cut back, and cannot be used to shield illegality or to undermine the powers of the courts. There is certainly a case for some conditional protection of journalists' sources, similar to the privilege for professional confidential communications under the NSW Evidence Act, but the claim for an absolute privilege is much more difficult to justify.

### **Secrecy in anti-terrorism laws**

We share the concerns expressed in *Australia's Right to Know* that anti-terrorist laws that involve detention without charge and prohibitions on disclosure of the fact that people are detained have failed to strike an acceptable balance. This does not mean that law enforcement and intelligence agencies should not be given necessary powers to detect and prevent terrorism. Again, the issue is one of balance. Offences which impute guilt for what a person thinks or says or who his relatives are need to include standard legal safeguards. Powers to detain people for what they might do on the basis of undisclosed risks need to incorporate strong accountability mechanisms. This is especially so given ample demonstrations of how strong the temptation is to exploit such powers for political ends. In Australia, we have clear historical instances of the way ASIO, the police special branches, and politicians have exploited intelligence powers. Why on earth would we believe that the risks are no longer there?

As cases under the new powers, including the recent Haneef case, have shown, when the Government is anxious to exploit these powers for political effect, the problem is not necessarily simply one of secrecy so much as one of selective publicity and self-justificatory leaking. Secrecy performs a more insidious function of avoiding accountability for the ways in which the laws are applied, for example in the lack of clear information about the legal basis on which Dr Haneef was detained.

We are also very concerned about the secrecy that surrounds more and more of the exercise of coercive statutory powers in circumstances only marginally or not at all related to terrorism offences. Recent examples include the introduction of 'delayed notification' search warrants, and the prohibition on informing individuals that they have been the subject of suspicious matter reports under the AML-CFT Act.

### **A statutory tort of privacy intrusion?**

The recent move to consider privacy tort laws can be seen as a necessary response to developments in the common law that are already taking place. Overseas, cases of alleged media intrusion have involved both the creative adaptation of the law of confidentiality (mainly in the UK) and the emergence of a new privacy tort. Recent inferior court cases in Queensland and Victoria raise the possibility of a privacy tort emerging by default in Australia in response to public demand for individual remedies.

The NSW Law Reform Commission's current suggestion of legislatively defining the scope of an emerging action of privacy make a lot of sense compared with the alternative of a case-by-case approach steadily extending the conduct that such a right would cover. We expect shortly to comment in more detail on the NSW LRC's Consultation Paper, and will copy our submission to you.

### **Defamation law reform**

As the Law Reform Commission's 'tort' Consultation Paper notes, the removal of a public interest justification from the NSW Defamation Act provides an argument for legislatively recognising a right to

sue in privacy so as to maintain the status quo. This would recognise that defamation laws to date have served a privacy protective function in the absence of a legally recognised action for breach of privacy. The concepts of protection of reputation and publication that underpin defamation law can be seen to be somewhat strained by expanding forms of communication, both through the media and between individuals. Reframing the issues at stake in the form of the question as to whether there has been an unreasonable intrusion on privacy can be seen to remove the artificial way in which the issues were often posed in recent defamation cases.

We would not argue with the proposition that defamation laws can have a chilling effect on freedom of speech. However, for the media they have been part of the landscape since the early years of white settlement. The attempt to codify nationally consistent defamation laws goes some way to meet objections that a more centralised media is unfairly exposed to inconsistent and unpredictable actions.

### **Intellectual Property Protection**

We do not consider that restrictions on freedom of speech and communication should be limited to those issues nominated in *Australia's Right to Know*. For example, the inquiry should consider the effect of recent changes to intellectual property laws as a result of Australia's involvement in both multilateral and bilateral trade agreements. This has led to a questionable extension of copyright terms, increasing penalties for various kinds of copyright infringements including the use of technical media that are thought to aid infringement, and further limits on fair use copyright exceptions. Moves towards greater legal protection for factual information in databases could have unpredictable effects on privacy.

The effect of these changes threatens to limit the ability of ordinary people to communicate with each other or access and refer to the information they need to sustain free expression. To investigate growing threats to freedom of speech and expression without considering the impact of these laws and the way they criminalize communication would be to take a highly selective approach to the subject.

Given the potential conflict of interest, it may be overly optimistic to expect an inquiry sponsored by major media organizations, who are major copyright holders, to explore this in detail, but we would welcome at least recognition of the issue.

### **Conclusion**

As privacy advocates, we welcome the opportunities that a detailed investigation of freedom of speech and expression in Australia today could provide. If this task is approached in a responsible and consistent way, we believe that it should contribute to a clearer understanding of the value and functions of privacy as an important human right in the information age. We believe that such a review should recognise privacy laws as an acceptable constraint on what is appropriately published or disclosed, which need not interfere excessively with the public interest role of news and current affairs media. Indeed we suggest that privacy laws are in many respects natural allies of other accountability and transparency measures.

We look forward to the report of the audit and to the opportunity to engage with the Australia's Right to Know coalition in subsequent stages of its campaign – and in particular to devising a suitable public interest test for any media exemptions from privacy and surveillance and FOI laws.

*Please note that postal correspondence takes some time due to re-direction – our preferred mode of communication is by email to [mail@privacy.org.au](mailto:mail@privacy.org.au), which should be answered without undue delay.*