



**Australian
Privacy
Foundation**

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4 November 2011

Mr Richard Glenn
Head, Privacy and FOI Policy Branch
Department of the Prime Minister and Cabinet
1 National Circuit
BARTON ACT 2600

Dear Richard

Re: A Statutory Cause of Action

I refer to the Issues Paper made available in September.

I attach the APF's Submission.

Our Submission is open.

We applaud the Department's policy on confidentiality as far as it goes, but urge that the Department adopt a refinement to it.

Where a submission is made in confidence, we submit that the Department should decline to accept and consider it, unless all of the material that it contains is sufficiently sensitive to justify suppression from public view.

Thank you for your consideration.

Yours sincerely

Roger Clarke
Chair, for the Board of the Australian Privacy Foundation
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Australian Privacy Foundation
A Statutory Cause of Action
Submission of 4 November 2011

Executive Summary

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

The APF strongly supports the creation of a statutory cause of action, and made public statements to that effect in 2007 and 2011. Important reasons supporting a statutory cause of action are:

- there are many offensive intrusions for which no privacy protective mechanism exists
- many dimensions of privacy lie outside the narrow scope of existing privacy laws. These include the privacy of the physical person, the privacy of personal behaviour, and the privacy of personal communications
- many organisations, many categories of actions, and individuals generally, are exempt from existing privacy protective mechanisms
- most existing privacy protections are ineffectual, due to weak legislation, lack of resources, lack of enforcement powers, and timidity on the part of privacy oversight agencies
- such non-privacy actions as exist (e.g. defamation, confidence, negligence) fail to fill the void

Many offensive intrusions arise in society generally, including leaks of personal data, surveillance of behaviour, interference with a person's body, and abuse of powers by government agencies.

In addition, there are many instances of offensive intrusions by the media. These are of great concern where they affect 'ordinary people', although the scope of the cause of action must also extend to 'celebrities'. Further, contrary to the assertions frequently made by media commentators, concerns about media abuses originate much more frequently in relation to 'tabloid media' and 'infotainment', and much less often in relation to 'quality outlets' and genuine 'news-reporting'.

The need for the cause of action must be seen as arising primarily in relation to society as a whole. The media must be understood to be just one specific area of application, and one to which a clear, strong and extensive definition of the public interest defence applies, as articulated in the APF's Policy Statement on 'Privacy and the Media' of July 2009.

Clear Recommendations were made by ALRC, over 3 years ago. We submit that, in order to achieve the most desirable form of the cause of action, the legislation should reflect the following refinements to the ALRC's Recommendations:

- the threshold of 'highly offensive' is too high, as it would exclude many offensive intrusions that are deserving of remedies. A plaintiff should be required to show that:
 - (a) the plaintiff has in relation to conduct or information a reasonable expectation of privacy; and
 - (b) the act complained of is sufficiently serious to cause, to a person of ordinary sensibilities, substantial offence or distress, in the relevant context ('offensive intrusion');
- the balancing of interests should be left to the defences. To integrate it into the cause of action would place an unfair burden of proof on the plaintiff – often to prove a negative. However, see our answer to question 8 below concerning factors to be taken into account;
- intention and recklessness, but also a serious lack of care, should all be actionable
- there should be no exemptions for any categories of organisations or actions
- the cause of action must be limited to individuals, because privacy is a human right

There is a pressing need for the statutory cause of action. The APF urges the Government to table legislation as soon as practicable, in order to implement the protections at an early date.

Australian Privacy Foundation
A Statutory Cause of Action
Submission of 4 November 2011

1. Introduction

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

The APF strongly supports the creation of a statutory cause of action.

This was made clear as long ago in 2007, in the APF's submission to the ALRC, at <http://www.privacy.org.au/Papers/ALRC-DP72-0712.pdf>.

Further, in July 2011, the APF published a Policy Statement, at: <http://www.privacy.org.au/Papers/PRoA.html>:

Privacy protection in Australia is seriously inadequate. On the other hand, the privacy interest must always be carefully balanced against other important interests. In particular, privacy protections must not obstruct the legitimate role of the media in holding to account governments, corporations and individuals in positions of power.

The APF strongly supports the introduction of a right of action that has the following characteristics:

- it must be available to individuals, but not to legal persons such as companies
- it must enable a court to grant injunctions, award damages, and impose penalties
- it must require the court to balance the privacy interests of the litigant against other important interests, including and especially 'the public interest'
- it must provide a clear framework and criteria for evaluating a defence that an invasion of privacy is justified in the public interest

The APF strongly welcomes effective consultation processes. On the other hand, we believe that there has been more than enough discussion. We urge the Government to table legislation as soon as practicable, in order to maintain momentum and implement these protections at an early date.

Clear Recommendations were made by ALRC over 3 years ago.

We submit that, in order to achieve the most desirable form of the Cause of Action, the legislation should make several refinements to the ALRC's Recommendations. Details of the refinements that we propose are presented below.

2. Responses to the Issues Paper

This Submission adopts the following approach:

- it discusses key points in each of the Issue Paper's sections in turn
- it provides answers to the specific questions asked
- it is supplemented by copies of:
 - the APF's Policy Statement re a Privacy Right of Action, of July 2011
 - the APF's Policy Statement re Privacy and the Media, of March 2009

2.1 Introduction (pp. 7-8)

The APF welcomes the recognition that a statutory cause of action is a missing element in the Australian legal framework for privacy protection, and has been identified as such by three Law Reform Commissions.

In the area of information privacy, the enactment will fill a gap.

However, it will also establish a foundation for the protection of dimensions of privacy for which no coherent framework is currently in place. This is further addressed in sub-section (4) immediately below, and in our answer to Question 9b.

We appreciate the government's desire to reinforce the case for the cause of action and to review the variations in the models proposed by the three Commissions, in order to refine the design of the scheme.

However, we urge the government to move quickly and directly to implementation.

2.2 The Current Privacy Context (pp. 9-12)

We believe that this section of the paper provides a reasonable summary of the context.

However, we strongly disagree with the statement on page 12 that "In many cases, recordings of private information or collections of data are also handled in ways consistent with an entity's privacy policy, with the Commonwealth Privacy Act, or with equivalent laws".

This is an area of major inadequacy in the current privacy regime. In some (and we would argue many) cases, personal information is not handled in accordance with law and organisations' own policies. Non-compliance is commonplace, due partly to the weak and inadequately resourced monitoring and enforcement regimes under existing laws.

Organisations in both the public and private sectors know that the sanctions for privacy breaches are minor to the point of being non-existent, and in any case the chances of detection are low.

Hence organisations, quite rationally, adopt a risk management approach and give a low priority to privacy compliance and training. As we argue below, the introduction of a cause of action, and the experience of cases brought under the right, will help to focus management attention on privacy issues and will in time lead to higher levels of compliance.

2.3 The Present State of the Law ... (pp. 13-22)

We believe that this section provides a reasonable summary of the present state of privacy law.

We note that the overseas comparisons mostly support the introduction of a privacy cause of action.

2.4 Is There a Need ... (pp. 23-31)

There is a pressing need for a statutory cause of action.

The cause of action has been the subject of media reports in successive waves since 2005, corresponding with the ALRC Discussion Paper and later Report, the NSWLRC Discussion Paper and later Report, the VLRC Discussion Paper and later Report, and the Senate Committee on Online Privacy Hearings and later Report.

There has been a regrettable and unjustified focus in media reporting on the application of the cause of action to the media itself.

It is very important that consideration of the need for the cause of action focus primarily on society as a whole, with the media as just one specific area of application – albeit one in which the public interest defence will be particularly relevant.

We present in this sub-section information relating to:

- the reasons why the need arises
- examples of privacy abuses that arise in society generally
- examples of media behaviour that must be subject to the cause of action

(1) Reasons Why the Need Arises

The need derives from many factors, important among them the following:

- many actions taken by organisations and individuals are highly privacy-invasive, and unjustifiably so, but either no mechanism exists at all for preventing them or enabling action against people who perform them, or alternatively a mechanism exists but is ineffectual
- some actions that are seriously and unjustifiably privacy-invasive lie outside the narrow scope of existing privacy laws. Important examples include:
 - invasions of the privacy of the physical person
 - invasions of the privacy of personal behaviour
 - invasions of the privacy of personal communications
 - invasions of privacy by organisations that are, or whose actions are, exempt from privacy law, such as law enforcement and national security agencies, most organisations in relation to their employees, and most small business in relation to their customers
 - invasions of privacy by individuals
 - invasions of privacy that are excluded from the scope of privacy oversight agencies by virtue of the very large numbers of jurisdictional limitations within privacy laws
- some actions that are seriously and unjustifiably privacy-invasive are nominally within-scope of a privacy oversight agency, but such protections as exist are ineffectual. Reasons for this include:
 - lack of resources in the hands of the privacy oversight agency
 - timidity on the part of the privacy oversight agency
 - lack of enforcement powers in the hands of the privacy oversight agency
- such non-privacy actions as exist (such as defamation, confidence and negligence) fail to fill the void, because they are variously inapplicable, fit very poorly to the need, or do not provide appropriate and effective controls and remedies

(2) Non-Media Examples

A privacy cause of action must be available in relation to any kind of action, harming any kind of privacy, performed by any natural or legal person. Only in that way can the cause of action create the opportunity for balance, and act as a brake on excessive behaviour.

There are many circumstances that the APF believes could give rise to application of the cause of action. Some important categories include:

- leaks of personal data from government agencies and private-sector organisations:
 - in circumstances in which the organisation has clearly failed its obligations in relation to the security of sensitive data
 - as a result of abuse of privilege by individual employees
- surveillance of an individual's actions (whether or not any personal data arises from the activity), including observation by individuals

- interference with a person's body, such as unjustified acquisition of samples of body fluids, e.g. for drug testing, or of biometric measures, e.g. for clocking on and off work
- abuse of powers by law enforcement and national security agencies, such as unjustified arrest, unjustified humiliation, unjustified search and identification procedures and unjustified deprivation of liberty. Some recent or well-known examples in this particular category, who must be able to pursue cases under such a cause of action (whether or not they have recourse under any other cause of action), include the following:
 - Prashant Cherkupalli, reported on at: <http://www.smh.com.au/national/student-illegally-detained-20111023-1menm.html>
 - Muhamed Haneef
 - Musa Konneh, reported on at: <http://www.smh.com.au/technology/technology-news/class-action-filed-over-glitch-wrongly-jailing-young-people-20110608-1fs1h.html>
 - Cornelia Rau
 - Vivian Solon

There is accordingly a pressing need for a statutory cause of action that applies generally to all organisations, and all individuals, without exception. It is of course vital that many other conditions and threshold tests be applied, but these are the subject of other parts of the the Issues Paper and of this Submission.

(3) Media Excesses

There are all-too-frequent instances of seriously and unjustifiably privacy-invasive actions by the media. However, contrary to the assertions frequently made by media commentators, these arise only infrequently in 'quality outlets' and genuine 'news-reporting', and when they do they are in most cases follow-on reporting about 'stories' that have been first published elsewhere.

The vast majority of seriously and unjustifiably privacy-invasive actions by the media originate outside 'quality outlets' and genuine 'news-reporting', in the grey zones of 'info-tainment' and outright 'creative entertainment', which have represented a very large proportion of the output of media organisations in recent years.

Here are some **individuals who have a 'media profile'** and who have been the subject of serious media excesses:

- Lara Bingle
- Belinda Emmett
- Andrew Ettinghausen
- Candice Falzon
- Deltra Goodrem
- Pauline Hansen
- Nicole Kidman
- Jess Origliasso
- Nick Riewoldt
- Sonny Bill Williams

While most of the examples that come to public attention relate to 'celebrities', there are also many that involve 'ordinary' people but which, for that reason, are less memorable and less readily re-discovered when preparing a Submission of this nature.

It is essential that the debate about a cause of action not be unduly influenced by questions as to whether the 'victim' has a public profile. That may (or may not) be relevant to a public interest defence, but it is not relevant to whether or not there has been an offensive intrusion.

Here are a couple of recent examples of **individuals who are not otherwise well-known**, but who have been the subject of serious media excesses:

- the 14-year-old girl interviewed by Jackie O and Kyle Sandilands
- Madaleine Pulver
- the 14-year-old boy charged with drug possession in Bali:
<http://www.theaustralian.com.au/news/nation/give-bali-accused-some-space-lawyer/story-e6frg6nf-1226181938888>

We draw to attention one glaring instance that **originated in what is arguably a 'quality outlet'**, which unsuccessfully sought to justify publication on the basis of it being 'news-reporting' on a matter with an overriding public interest:

- David Campbell

In all of these cases, the disclosures, and in many cases also the collection methods, appear from the coverage to have been seriously and unjustifiably privacy-invasive actions. Moreover, we believe that public opinion largely agrees with that contention.

Whether actions by any of these individuals under a privacy cause of action would have succeeded cannot of course be certain – that would be for the courts to determine. Circumstances and considerations would come to light during proceedings that are not typically reported – hence the importance of a proper judicial process, rather than 'trial by media'.

The Australian Press Council and ACMA have comprehensively demonstrated their inadequacies, ACMA particularly so in the case of David Campbell. Even career-hardened journalists were aghast that Channel 7 escaped scot-free.

The APF sought a dialogue with the media industry and profession in early 2009, with a view to the establishment of much stronger bases for gauging the public interest. The APF's Policy Statement is at <http://www.privacy.org.au/Papers/Media-0903.html>, and attached to this Submission. It proved impossible to even achieve meaningful responses from either the media industry or the media profession, let alone dialogue.

As a general statement, self-regulation is an excuse, not a solution. The media have proven themselves to be incapable of conducting the process well enough to enable it to be projected even as a half-decent excuse.

There is accordingly a pressing need for the statutory cause of action to apply generally, including to the media, without exception. It is of course vital that many other conditions and threshold tests be applied, but these are the subject of other parts of the the Issues Paper and of this Submission.

2.5 Elements of the Cause of Action (pp. 24-38)

We address several aspects of this section in our answers to Questions 4-7, below.

The definition of the privacy action should be in general terms, but the threshold of 'highly offensive' is too high, as it would exclude many intrusions that a reasonable person would regard as objectionable and deserving of remedies.

A plaintiff should be required to show that in all the circumstances:

- (a) the plaintiff has in relation to conduct or information a reasonable expectation of privacy; and
- (b) the act complained of is sufficiently serious to cause, to a person of ordinary sensibilities, substantial offence or distress, in the relevant context.

The assessment of how a 'person of ordinary sensibilities' would react must be context specific. For example, a person who just experienced an accident or the loss of a loved one may be particularly sensitive.

2.6 ... Relevant Factors (pp. 39-40)

We address several aspects of this section in our answer to Question 8 below.

2.7 ... the Types of Invasion ... (p. 41)

It is essential that the cause of action be broad enough to cover all dimensions of privacy. It must not be restricted, for instance, to the publication of private facts – which is the type of privacy breach that has most commonly been at issue in the cases that have come before the courts to date.

We address several aspects of this section in our answers to Question 9 below.

2.8 Defences and Exemptions (pp. 42-44)

We address several aspects of this section in our answers to Questions 10-11 below.

2.9 Remedies (pp. 45-46)

We address several aspects of this section in our answers to Questions 12-14 below.

2.10 Resolving Matters Without Resort to Litigation (p. 47)

We address several aspects of this section in our answer to Question 15 below.

2.11 Other Issues (pp. 48-50)

We address several aspects of this section in our answers to Questions 16-19 below.

Class Actions

Provision should be made for representative or class actions, with appropriate rules, to address the many privacy intrusions that affect multiple individuals. A different cap on damages should apply.

3. Responses to Specific Questions

The text of our Submission above should be read in conjunction with the answers provided below. In some cases, it has been appropriate to repeat some segments of text in both places.

(1) Do recent developments in technology mean that additional ways of protecting individuals' privacy should be considered in Australia?

Yes.

Developments such as social media and cloud computing, and the increasing use of biometrics, CCTV and mobile devices, while they may offer benefits, have also increased pressure on privacy, and existing privacy laws are not adequate to provide the level of protection that Australians expect.

This is, however, not the only reason why the statutory cause is essential. Others include:

- the increasingly privacy-invasive behaviour of organisations, whether or not the behaviour is motivated or enabled by the availability of new technologies
- the clear gaps that already exist in the privacy protection offered by existing information privacy and other laws
- the failure of a common law tort to emerge, despite four decades of public concern and earnest analysis in law journals

(2) Is there a need for a cause of action for serious invasion of privacy in Australia?

Emphatically Yes.

This is comprehensively addressed in section (4) above.

(3) Should any cause of action for serious invasion of privacy be created by statute or be left to development at common law?

The idea that a common law tort might emerge has been discussed in the literature for 40 years. But almost nothing has happened. And in any case, the courts can only deal with cases that come before them, and hence any common law tort that emerged would deal in a piecemeal and unsatisfactory manner with the problems, and would adapt very slowly to future changes in context.

It is also highly likely that individual courts would be unable to achieve balance between privacy and other interests, and that the outcomes would be not only highly uncertain but also in some instances inappropriate from a public policy perspective.

It is essential that the cause of action be created by statute, in order to carefully sculpt the cause of action to the public policy need.

(4) Is 'highly offensive' an appropriate standard for a cause of action relating to serious invasions of privacy?

No.

Highly offensive is too high a threshold, and would exclude many intrusions that a reasonable person would regard as objectionable and deserving of remedies.

A plaintiff should be required to show that, in all the circumstances:

- (a) the plaintiff has in relation to conduct or information a reasonable expectation of privacy; and
- (b) the act complained of is sufficiently serious to cause, to a person of ordinary sensibilities, substantial offence or distress, in the relevant context.

(5) Should the balancing of interests in any proposed cause of action be integrated into the cause of action (ALRC or NSWLRC) or constitute a separate defence (VLRC)?

The balancing of interests should be left to the defences. Integrating this balancing into the cause of action would unfairly place a burden of proof on the plaintiff – often to prove a negative. However, see our answer to question 8 below concerning factors to be taken into account.

(6) How best could a statutory cause of action recognise the public interest in freedom of expression?

Freedom of expression, and other important public interests, can be adequately protected by well crafted statutory defences. See our answer to question 10 below.

(7) Is the inclusion of ‘intentional’ or ‘reckless’ as fault elements for any proposed cause of action appropriate, or should it contain different requirements as to fault?

It is essential that both intentional and reckless breaches be subject to the cause of action.

We further submit that an action should not fail merely because a breach was negligent. A serious lack of care that falls short of recklessness should be actionable (subject to the other requirements), but the remedies should reflect the extent of the carelessness.

(8) Should any legislation allow for the consideration of other relevant matters, and, if so, is the list of matters proposed by the NSWLRC necessary and sufficient?

Of the list of relevant matters suggested by the NSWLRC, some would be appropriate factors to be specified as needing to be taken into account in establishing whether the primary test of ‘offensive intrusion’ has been met, but they should not be separate tests.

Other matters in the list, such as the claimant’s public profile, are more appropriately left to the defence.

The legislation should not preclude the courts from interpreting the law in such a manner that additional matters that may be relevant can also be considered.

(9a) Should a non-exhaustive list of activities which could constitute an invasion of privacy be included in the legislation creating a statutory cause of action, or in other explanatory material?

An expressly non-exhaustive list of activities should be included in the legislation, so as to clearly illustrate the breadth of the cause of action. Such a legislative approach has proven successful, in various contexts, both in Australia and overseas.

(9b) If a list were to be included, should any changes be made to the list proposed by the ALRC?

A non-exhaustive list of activities should include at least the following (all of which deliberately refer to a person’s private life, which must remain the focus of the cause of action):

- (a) there has been an intrusion into an individual’s home, family or otherwise private life;
- (b) an individual has been subjected to surveillance in their home, family or otherwise private life;
- (c) an individual’s private written, oral or electronic communication has been interfered with, misused or disclosed;
- (d) sensitive facts relating to an individual’s private life have been disclosed.

(10) What should be included as defences to any proposed cause of action?

A non-exhaustive list of defences should be included in the legislation. The list should include versions of all the defences recommended by the three Law Reform Commissions, appropriately reconciled and integrated.

In addition, clearer and fuller expressions of the defences for freedom of speech in the public interest, and freedom of artistic expression are needed. Attention is drawn to the formulations in the APF's Policy Statement of 26 March 2009, copy attached.

(11a) Should particular organisations or types of organisations be excluded from the ambit of any proposed cause of action ... ?

No.

There should be no total or even partial exemptions for any organisations or activities.

(11b) Should ... defences be used to restrict its application?

Yes.

The defences will be sufficient to protect other public and private interests.

(12) Are the remedies recommended by the ALRC necessary and sufficient for, and appropriate to, the proposed cause of action?

All the remedies suggested by the ALRC should be available.

(13) Should the legislation prescribe a maximum award of damages for non- economic loss, and if so, what should that limit be?

There should be cap on the amount of damages for non-economic loss. This would help to dispel the alarmism being spread by media organisations that a privacy cause of action would be a 'honeypot', giving rise to actions motivated more by avarice than by genuine harm, as defamation law appears to have been before the introduction of caps.

(14) Should any proposed cause of action require proof of damage? If so, how should damage be defined for the purposes of the cause of action?

There should be no requirement for proof of damage, as some privacy intrusions will simply be inherently offensive, irrespective of any particular harm.

(15) Should any proposed cause of action also allow for an offer of amends process?

Yes.

An offer of amends process would be an appropriate inclusion which should result in acknowledgement of inappropriate behaviour, and the settlement of many actions without the private and public costs of full court proceedings.

(16) Should any proposed cause of action be restricted to natural persons?

Yes.

It is essential that the cause of action be restricted to natural persons.

Privacy is a fundamental human right, recognised in the UDHR, ICCPR, and many other human rights instruments. Under no circumstances must the concept of privacy rights be debased by permitting the right to be applied in any manner whatsoever to legal persons.

(17) Should any proposed cause of action be restricted to living persons?

We are inclined to support the analysis of the NSWLRC, to the effect that there should be no right of action on behalf of deceased persons.

However, it is important that this limitation not be framed in such a way as to compromise actions in relation to offensive intrusions into the privacy of other individuals. Of particular concern is the privacy of next-of-kin and close friends of a deceased person.

(18) Within what period, and from what date, should an action for serious invasion of privacy be required to be commenced?

Generally, we support the recommendation of the VLRC for a three year limitation period, from the date of the relevant conduct, to be the normal rule.

However, we submit that actions should be able to be commenced outside that period, if the plaintiff only became aware of the conduct more than three years after it occurred. In such cases, a limitation period of one year after becoming aware may be appropriate.

(19) Which forums should have jurisdiction to hear and determine claims made for serious invasion of privacy?

There should be the maximum possible choice of jurisdiction, including but not limited to the Federal Magistrates court, in order to minimise costs and procedural barriers in appropriate cases.

APF Policy Statement re a Privacy Right of Action Version of 21 July 2011

Background

The need for effective privacy protections has been well-understood for 40 years - since Sir Zelman Cowen's 'The Private Man' in 1969.

The courts have failed to develop a tort of privacy, and parliaments have provided only very limited and very weak legislation. Privacy Commissioners have not been provided with powers to solve problems, and in any case recent federal Privacy Commissioners do not have a strong record of working to protect people's privacy.

All three Law Reform Commissions have recognised that the time has come to enable people to take legal action against unreasonable behaviour by companies, governments and other individuals. (ALRC 2008, NSWLRC 2009, VLRC 2010). They have framed the new right so as to avoid the risk of a chilling effect on media freedom, by including a 'public interest defence' and a relatively high threshold of 'serious intrusion' that is offensive to a reasonable person. See, in particular, the ALRC's Recommendation No. 74.

Despite the LRCs' careful work, the media have mounted opposition campaigns against the proposal. There have been statements by proprietors and executives, and hysterical articles in the press – in some cases by otherwise steady and responsible reporters and commentators. As has been well-documented, politicians have long lived in fear of the media, particularly the Murdoch press. The proposal has accordingly sat on the back burner for a considerable time.

The revelations about serious misbehaviour by UK News Corporation reporters, and quite possibly by managers and executives, has revived interest in the right to action. On 21 July 2011, the Australian Government announced that it will release a Discussion Paper on the matter (Media Release, mirrored here).

The APF's Position

Privacy protection in Australia is seriously inadequate. On the other hand, the privacy interest must always be carefully balanced against other important interests. In particular, privacy protections must not obstruct the legitimate role of the media in holding to account governments, corporations and individuals in positions of power.

The APF strongly supports the introduction of a right of action that has the following characteristics:

- it must be available to individuals, but not to legal persons such as companies
- it must enable a court to grant injunctions, award damages, and impose penalties
- it must require the court to balance the privacy interests of the litigant against other important interests, including and especially 'the public interest'
- it must provide a clear framework and criteria for evaluating a defence that an invasion of privacy is justified in the public interest

The APF published its Policy Statement on 'Privacy and the Media' in March 2009. This includes what it believes to be an appropriate interpretation of the public interest. It will be submitting this to the Government for consideration.

In addition, the APF strongly supports the removal of the media exemption from the existing provisions of the Privacy Act, as per the ALRC's carefully drafted Recommendation No. 42.

Discussion Points

1. The privacy right of action is not specifically about the media; but it must apply to the media as well as every other individual and organisation
2. Media commentators originally reacted hysterically against the proposal, and have grossly misrepresented what it is, and what impact it would have
3. Media freedoms are crucial to a free society, and crucial to privacy interests. Privacy advocates are intent on ensuring that reasonable behaviour by journalists and publishers is supported, and is not prevented or constrained by the new right
4. The APF remains open to discussions with the media and other interested organisations about its Policy Statement on 'Privacy and the Media', with a view to the development of a common position on how the public interest should be defined

APF Policy Statement re Privacy and the Media Version 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, gradated 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:
 - must be based on 'the public interest', not on 'what the public is interested in'
 - must be sufficiently clear
 - must be of sufficient consequence that it outweighs the person's interest in privacy
 - must be of sufficient consequence that it outweighs any other conflicting interests such as public security and the effective functioning of judicial processes
 - must reflect the Guidelines applicable at the time

- 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.

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

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

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

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."

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 a Patron (Sir Zelman Cowen), 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
- The Media (2007-) <http://www.privacy.org.au/Campaigns/Media/>