

15 July 2016

Ms Michele Reddy
Broadcasting Investigations Section
Australian Communications and Media Authority

By online submission

Dear Ms Reddy

Update of the ACMA's privacy guidelines for broadcasters

ASTRA welcomes the opportunity to comment on the ACMA's proposed updates to the *Privacy guidelines for broadcasters* (the **Guidelines**), which were last reviewed in 2011.

ASTRA is the peak industry body for subscription media in Australia. More information about ASTRA, our members and their contribution to the Australian economy is at Appendix 1.

ASTRA appreciates that frameworks to protect privacy are very important to the community and our members remain committed to privacy protections in broadcasting codes of practice which provide appropriate community safeguards. These provisions must continue to balance respect for an individual's privacy with preserving the media's role of reporting matters of public interest—a function that is essential to the health of our democratic system.

The importance of guidance

The Guidelines play an important role in increasing awareness of privacy obligations contained in broadcasting codes of practice—both within the community and within the broadcasting industry.

While the Guidelines are educative, rather than enforceable in their own right, they provide:

- broadcasters with very useful information about how the ACMA will investigate a broadcasting privacy complaint—this can help, for example, in the development of checklists used in training to promote compliance; and
- provide the regulator with a framework which promotes consistent decision making, and provides a vehicle for the publication from time to time of case studies which demonstrate the application of the rules by reference to real-life situations.

ASTRA considers that the Guidelines have operated effectively to date, and is pleased that the ACMA has indicated that it does not intend to change its approach to privacy matters through this update to the Guidelines.¹

ASTRA Codes of Practice

ASTRA has developed three Codes of Practice, which have been registered and given legal effect by the ACMA under the *Broadcasting Services Act 1992 (BSA)*. Each of ASTRA's Codes contains a privacy provision which applies to news and current affairs programs. For example, the *Subscription Broadcast Television Codes of Practice 2013* provide that:

*In broadcasting news and current affairs programs Licensees must not use material relating a person's personal or private affairs, or which invades an individual's privacy, other than where there are identifiable public interest reasons for the material to be broadcast.*²

Our comments below focus on the following elements of the Guidelines which assist in interpreting these provisions, and are the subject of proposed updates in the draft replacement Guidelines:

- when matter will be in the public domain, and the practicality of the proposed qualification that material must be 'legitimately' in the public domain;
- whether an opinion about a person can be material relating to a person's personal or private affairs for the purpose of the Codes provisions, even if it is not based on fact; and
- a number of other drafting matters, including the extent of the disclosure or intrusion required for a broadcast to be actionable under the Codes.

Matter in the public domain

To date the Guidelines have provided that where matter is already in the public domain its use in a broadcast will not generally be an invasion of privacy. For example, the Guidelines have clarified that if matter is available on an online social media site it will be considered to be in the public domain unless access restrictions have been breached. This has been a relatively straightforward test to apply.

The ACMA is now proposing to add a qualification to this guidance such that only material which is *legitimately* in the public domain will be taken to be generally acceptable to use in a broadcast.

¹ Background information at <http://www.acma.gov.au/theACMA/update-of-the-acmas-privacy-guidelines-for-broadcasters>.

² ASTRA's Codes of Practice are available at <http://www.astra.org.au/advocacy/codes-of-practice>. Relevant provisions are at:

- clause 2.2(c) of the *Subscription Broadcast Television Codes of Practice 2013*;
- clause 1.3 of the *Subscription Narrowcast Television Codes of Practice 2013*; and
- clause 1.3 of the *Subscription Narrowcast Radio Codes of Practice 2013*.

ASTRA is very concerned about this proposed change because the concept of 'legitimacy' is broad and vague and is likely to be very difficult to determine, especially in fast-paced news and current affairs production environments.

In its background material, the ACMA notes that it is seeking to clarify that material may invade privacy where its nature suggests it has been put into the public domain without the affected person's knowledge or consent.³ Expanding on this concept the draft revised Guidelines state that:

The relevant content may be of a nature that suggests that it has been put in the public domain without the affected person's knowledge or consent—for example, material that is inherently offensive, or where the material was uploaded by an account control by someone other than the affected person [emphasis added].⁴

In relation to social media, there may be significant practical challenges for content makers in determining whether matter that is available on an unrestricted page has been put into the public domain without the subject's consent.

Social media example

A photograph of a person which is publicly available on another person's social media profile may reveal their membership of a political association—because the photograph shows them at an event with party political signage and includes other indications they are a member of the party.

Under the Guidelines this would be material relating to a person's personal or private affairs (membership of a political association is listed in the Personal Information section). The fact that the photograph was on another person's profile would bring into question whether there was consent, but this would be extremely difficult to determine definitively. On this basis, and notwithstanding that it was an otherwise innocuous image, a risk-averse journalist may determine that the photo was not legitimately in the public domain.

More broadly, there may be implications for whistle-blowing activity, where the non-consensual release of information may, on a strict reading, be seen as failing the legitimacy test—because of lack of consent—even though it was otherwise seen as important for a broadcaster to report.

Whistle-blower example

Information about the religious affiliation of a public figure who is involved a debate about an issue of importance to religious groups could be leaked and placed on a disclosure website like WikiLeaks.

Under the Guidelines information about the affiliation would be material relating to a person's person or private affairs, or private life, and it could be safely inferred that it was not placed on that website with consent. In this case, a risk-averse journalist

³ Background information at <http://www.acma.gov.au/theACMA/update-of-the-acmas-privacy-guidelines-for-broadcasters>.

⁴ Draft revised Guidelines, page 5.

may again determine that this was not material that was legitimately in the public domain.

ASTRA acknowledges that even if matter was determined not to have been *legitimately* in the public domain it may still be able to be used because the broadcast of that matter was seen to be in the public interest (the final limb in the privacy provisions of the broadcasting codes). However, to avoid a chilling effect on journalism, ASTRA strongly recommends that the ACMA confines its guidance on this issue to address particular identified problems.

Recommendation

ASTRA appreciates that there is legitimate public concern about the practice of posting ‘revenge porn’ online. This phenomenon was defined in the terms of reference for a recent Senate Inquiry as ‘involv[ing] sharing private sexual images and recordings of a person without their consent, with the intention to cause that person harm’.⁵ ASTRA understands that this may be the type of material the ACMA is seeking to deal with when it refers to ‘inherently offensive’ material that would not be legitimately in the public domain.

ASTRA recommends that the ACMA amend the draft revised Guidelines so that they specifically call out this type of depiction as not being legitimately in the public domain. In addition to providing more context about these types of depictions, it has been suggested that the test should be amended so that it provides that material must be both:

- inherently offensive in this way; **and**
- appear to have been uploaded by an account controlled by someone other than the affected person.

ASTRA supports this amendment and recommends that other parts of the Guidelines, including the flowchart on page 3, be amended so that they no longer refer in a vague sense to the concept of matter being ‘legitimately’ in the public domain.

Personal information and opinion

The draft revised Guidelines list on page 4 the types of material relating to a person’s personal or private affairs, or private life that the ACMA considers are covered by privacy provisions in the broadcasting codes. ASTRA does not object to this list, and notes that while not a direct replication, these items are drawn either from the definition of ‘sensitive information’ in the *Privacy Act 1988* (**Privacy Act**) or are examples of what might be considered to be ‘personal information’ under the Privacy Act.

⁵ Terms of Reference, Senate Legal and Constitutional Affairs Committee Inquiry – available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Revenge_porn.

However, we have some concern with the statement in the draft revised Guidelines that '[t]he material need not be factual and may include an *opinion* about a person whether or not it is true' [emphasis added].⁶

We accept that the Privacy Act seeks to ensure secure, responsible and transparent handling of an opinion about a matter such as a person's health, genetic or biometric information (such as the opinion of a doctor recorded after reviewing health tests), as well as information about these matters (such as the test results themselves). However, we contend that the protection of opinion in a data security context under the Privacy Act is quite different to the sharing of an opinion in a news and current context, where 'opinion-making' can be a key element of programming.

In order not to stifle news and current affairs practitioners, one option would be to amend the text in the draft replacement Guidelines to provide that:

The material will usually be factual in nature, however it may include opinions expressed publicly which are based, or claimed to be based on, facts.

This would help target the protection offered by the broadcasting codes to situations where there is an assumed fact base for the opinion, and it is these assumed facts themselves, rather than the opinion, that are taken by audience members to be an accurate description of the subject's personal or private affairs.

Other drafting matters

Disclosure or intrusion should be more than fleeting

The Guidelines indicate at page 2 that once it has been established that a person is identifiable from the broadcast material the ACMA will then consider whether the broadcast material disclosed personal information or intruded upon the person's seclusion.

To date the Guidelines have contained a qualification that the disclosure or intrusion must be more than fleeting in order to be actionable under the relevant Code provisions.

While the term 'fleeting' is retained in the section on intrusion into seclusion at page 4 of the draft revised Guidelines, the qualification has been removed from the Investigation steps section at page 2. In ASTRA's view, the qualification is important and should be reinstated at page 2 so that the opening paragraph of the Investigations steps section reads:

Investigation steps

When investigating the alleged breach of a code privacy provision, the ACMA will consider the elements of a breach:

- > *Was a person identifiable from the broadcast material?*

⁶ Draft revised Guidelines, page 4.

- > **Did the broadcast material disclose personal information *in more than a fleeting way* or intrude upon the person's seclusion *in more than a fleeting way*?**

Emphasising the effect of consent

To date the Guidelines have provided that if informed consent—either express (such as consent in writing) or implied (such as willingness to participate in an interview)—is obtained prior to the broadcast of material, then the person waives his or her claim to privacy protection.

This principle remains essential to the daily operation of news and current affairs programs. Broadcasters must be able to have confidence that with the consent of the subject they can proceed to broadcast private information or material that would otherwise breach privacy.

While ASTRA is therefore pleased that the ACMA proposes to retain a section on the effect of consent in the draft revised Guidelines, we recommend that certain text be given greater emphasis in the revised document. In particular, we recommend that the following statement be elevated from footnote 11 to the body of the document:

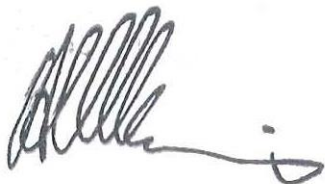
If consent is obtained prior to the broadcast of private material, then the consenting person can have no expectation of privacy. That consent should be 'informed consent'—voluntarily given by a (legally) competent person with an understanding of the use to which the material will be put.

In our view, the Guidelines will be a more useful practical document if they more prominently note that a 'consenting person can have no expectation of privacy'.

If you have any queries or would like to discuss the issues raised in this letter, please contact Holly Brimble, Policy and Regulatory Manager (holly.brimble@astra.org.au).

Yours sincerely

Andrew Maiden
CEO



APPENDIX 1

About ASTRA

ASTRA was formed in September 1997 when industry associations representing subscription (multichannel) television and radio platforms, narrowcasters and program providers came together to represent the new era in competition and consumer choice. ASTRA's membership includes the major subscription TV operators, as well as over 20 independently owned and operated entities that provide programming to these platforms, including Australian-based representatives of international media companies, small domestic channel groups and community-based organisations.

ASTRA's members provide a diverse range of news, information, sport and entertainment programs which deliver significant social benefits to a broad cross-section of the Australian community. In 2016, one third of Australians subscribe, along with millions more who watch subscription content in public venues. Every week more than 1000 hours of first-run locally produced content is broadcast, as well as the best international content.

The subscription TV industry also makes substantial economic contributions. In 2014/15 ASTRA members invested more than \$796 million in local content production, added \$2.083 billion to the economy, and created jobs for 8370 Australians.

Subscription TV is poised to continue to make great contributions in the new media landscape, growing the economy, creating even more jobs and delivering high-value services to consumers. However, in order to fully achieve our potential and ensure global competitiveness, regulatory imposts must be framed so as to avoid undue complexity and inefficiency, and in a way that ensures a level regulatory playing field across broadcasting sectors.