

Media exemption

Background

4.1 One of the aims of the Bill is the achievement of a balance between competing social interests. These include the often divergent interests in the flow of information to the public through the media and the interest in the privacy of the individual. In attempting to reach an appropriate balance between these interests, the Bill includes an exemption for the acts and practices of media organisations done in the course of journalism.

4.2 In his second reading speech, the Attorney-General, the Hon Daryl Williams AM QC MP, said that:

The media in Australia have a unique and important role in keeping the Australian public informed. In developing the Bill, the government has sought to achieve a balance between the public interest in allowing a free flow of information to the public through the media and the individual's right to privacy. In order to achieve this balance, the Bill does not apply to acts and practices of media organisations in the course of journalism.¹

4.3 The key to the media exemption is contained in subclause 7B(4) of the Bill. It provides:

An act done, or practice engaged in, by a media organisation is exempt for the purposes of paragraph 7(1)(ee) if the act is done, or practice engaged in, by the organisation in the course of journalism.

4.4 The Bill defines 'journalism' and 'media organisation' as follows:

¹ The Hon Daryl Williams AM QC MP, House of Representatives, 12 April 2000, *Hansard*, p.15077.

journalism means the practice of collecting, preparing for dissemination or disseminating the following material for the purpose of making it available to the public:

- (a) material having the character of news, current affairs, information or a documentary;
- (b) material consisting of commentary or opinion on, or analysis of, news, current affairs, information or a documentary.²

media organisation means an organisation whose activities consist of or include the collection, preparation for dissemination or dissemination of the following material for the purposes of making it available to the public:

- (a) material having the character of news, current affairs, information or a documentary;
- (b) material consisting of commentary or opinion on, or analysis of, news, current affairs, information or a documentary.³

4.5 Clearly these provisions provide a broad exemption from the proposed private sector privacy regime for the media. Both traditional and emerging forms of 'media organisation' will fall within the definition of that term, while the breadth of the definition of 'journalism' will ensure that it encompasses a range of individuals.

4.6 The Committee notes, however, that the media exemption only extends, according to clause 7B(4) of the Bill, to an act done, or practice engaged in, by an organisation in the course of journalism. The Committee understands this to mean that a journalist is only exempt in relation to acts or practices done in the course of their journalistic activities. The use or disclosure of information by a journalist for another purpose, such as publishing a list, would not fall under the exemption and would be subject to the National Privacy Principles (NPPs). This interpretation was put to the Australian Press Council which gave evidence that the Committee's view accorded with its understanding of the ambit of the provisions.⁴ Professor Pearce, Chairman of the Australian Press Council stated that it was the view of the Council that:

...this is truly a journalism protection and could not be exploited for another purpose altogether.⁵

2 See Item 18 of Schedule 1 of the Bill which amends subsection 6(1) of the *Privacy Act 1988*.

3 See Item 19 of Schedule 1 of the Bill which amends subsection 6(1) of the *Privacy Act 1988*.

4 Australian Press Council, *Transcript*, p.221.

5 Australian Press Council, *Transcript*, p.222.

Support for a media exemption

- 4.7 The Committee received evidence that supported the need to give special consideration to the media in the context of privacy. The Communications Law Centre, for example, said that:

The CLC supports an exemption for the media in relation to their news gathering and reporting activities. We have previously argued that special considerations arise in relation to the issue of privacy and the media... The right to privacy must be balanced against the important public interest in freedom of speech and recognition of the media's role in facilitating the free flow of information and informing the public.⁶

- 4.8 Electronic Frontiers – Australia Inc submitted that:

As a strong supporter of the principles of freedom of speech and freedom of the press, EFA recognises the need for consideration to be given to the effects of privacy legislation on news media.⁷

- 4.9 In oral evidence, the Australian Press Council expressed its satisfaction with the exemption noting that, in its view, the exemption reached an appropriate balance between the interests of privacy and the freedom of the press.⁸

Criticism of the media exemption

- 4.10 Most submissions dealing with the exemption suggested that while the media had an important societal role to play and should be given special consideration in privacy legislation, the exemption in the Bill was unsatisfactory because of the breadth of its coverage.

- 4.11 The NSW Privacy Commissioner, for example, argued that:

The combined effect of the way journalism and media organisation are defined...to broadly cover the activities of collecting or preparing of information for dissemination or disseminating it to the public is far wider than necessary to protect the freedom of expression through the media.⁹

6 Communications Law Centre, *Submissions*, p.S337.

7 Electronic Frontiers Australia, *Submissions*, p.S320.

8 Australian Press Council, *Transcript*, p.217.

9 Privacy NSW, *Submissions*, p.S293.

- 4.12 The focus of many concerns about the breadth of the definitions of 'journalism' and 'media organisation' was on the use of the word 'information' in both definitions. The Australian Privacy Charter Council submitted that it:

...is a serious mistake to try to define the exemption via a definition of journalism that rightly includes reporting etc of "information". This correctly characterises the profession of journalism broadly, but results in the exemption applying to virtually anything that a publisher does. ...[T]here is no justification for the exemption extending to so-called "infotainment" or other forms of publication and broadcasting.¹⁰

- 4.13 The Federal Privacy Commissioner suggested that:

The inclusion of the word "information" within the definitions would appear to allow an organisation to publish or broadly disseminate any personal, confidential information, which could include sensitive information, under the pretext that it was engaged in journalism. For example, a lobby group could publish a "newsletter" that contained a significant amount of personal information about its critics, by claiming a media exemption on the basis that it was making information available to the public.¹¹

- 4.14 The application of the exemption to the online environment also caused concern. Electronic Frontiers – Australia Inc suggested that under the proposed definition:

...almost any web site on the Internet could be considered to qualify [for the media exemption], given that all web site providers "disseminat[e] the following material for the purposes of making it available to the public: (a) material having the character of...information..."¹²

- 4.15 This view was endorsed by the NSW Privacy Commissioner whose submission stated that the media exemption appeared '...to cover any organisation which collects and disseminates personal information over the Internet...'.¹³

- 4.16 The effect of the exemption on the Internet was also referred to by the Attorney-General's Department in oral evidence. It was acknowledged that the exemption could in some circumstances be obtained by

10 Australian Privacy Charter Council, *Submissions*, p.S249.

11 Privacy Commissioner, *Submissions*, p.S382.

12 Electronic Frontiers Australia, *Submissions*, p.S320.

13 Privacy NSW, *Submissions*, p.S293.

organisations that use the Internet to disseminate information regardless of whether that information has the character of news.¹⁴

Suggested amendments to the media exemption

- 4.17 The Victorian Government suggested that, as a minimum, the word ‘information’ should be deleted where it occurs in the definition of ‘journalism’ in the Bill¹⁵. This view was shared by the Department of Health and Aged Care which suggested that the deletion of the word ‘information’ would allow the definition of journalism to be closer to the generally accepted meaning of that word.¹⁶
- 4.18 The Federal Privacy Commissioner suggested that the definitions of journalism and media organisation could be tightened if the word ‘information’ was removed from them.¹⁷ This would, according to the Privacy Commissioner ‘...make the link to news and news related activities clearer without unduly impeding legitimate media activities.’¹⁸
- 4.19 Another option indicated by the Privacy Commissioner was to narrow the exemption so that it could not apply to organisations with only a peripheral connection to news related activities. The New Zealand *Privacy Act 1993* and proposed Victorian private sector privacy legislation were cited as models for this type of amendment. It was noted that the New Zealand Act defines a ‘news medium’ as an agency ‘whose business, or part of whose business, consists of a news activity.’¹⁹ The Australian Privacy Foundation supported the Federal Privacy Commissioner’s suggestions.²⁰
- 4.20 While the Australian Press Council rejected the idea that the definitions were too wide, it did indicate that a compromise position could be the insertion of the word ‘principal’ before ‘activities’ in the definition of media organisation. It was suggested that this would limit the range of bodies that could rely on the exemption.²¹
- 4.21 The NSW Privacy Commissioner, on the other hand, argued that the ‘...exemption should be narrowed to focus on the traditional news

14 Attorney-General’s Department, *Transcript*, p.9.

15 Victorian Government, Department of State and Regional Development, *Submissions*, p.S198.

16 Department of Health and Aged Care, *Submissions*, p.S406.

17 Privacy Commissioner, *Submissions*, p.S383.

18 Privacy Commissioner, *Submissions*, p.S383.

19 Privacy Commissioner, *Submissions*, p.S383 quoting *NZ Privacy Act 1993 s.2*.

20 Australian Privacy Foundation, *Submissions*, p.S521.

21 Australian Press Council, *Submissions*, p.S636.

gathering, reporting and broadcasting functions of the media.²² The Commissioner did not, however, provide any indication of what those traditional functions consist of and how they might be defined.

4.22 The Communications Law Centre argued that journalism should be defined in accordance with its ordinary meaning, together with factors such as:

- whether the activity is undertaken for an organisation one of whose primary purposes is the production and dissemination of news, current affairs, observations on news and current affairs, documentaries or reporting on issues of public interest;
- whether the activity is covered by an industry or professional or ethical code which deals with issues of professional and ethical conduct including privacy; and
- whether the publication occurs in the course of disseminating material to the public that relates to an issue of public interest.²³

4.23 The proposal to include a public interest test in the exemption was also made by the Victorian Government,²⁴ the Australian Privacy Charter Council²⁵ and Electronic Frontiers Australia Inc (EFA).²⁶

Consideration of proposed amendments

Amendment of definitions

4.24 The deletion of the word 'information' from the definition of journalism (and possibly also the definition of media exemption) was considered by the Committee. The amendment would limit the extent of the media exemption by reducing the scope of those activities that could be described as journalism and those organisations that could be described as media organisations.

4.25 Unfortunately, the amendment could also have the effect of limiting unnecessarily the freedom of the press, as the dissemination of information is an important part of the function of the media. In addition, excluding the word 'information' from the definition of journalism could

22 Privacy NSW, *Submissions*, p.S293.

23 Communications Law Centre, *Submissions*, p.S338.

24 Victorian Government, Department of State and Regional Development, *Submissions*, p.S198.

25 Australian Privacy Charter Council, *Submissions*, p.S249.

26 Electronic Frontiers Australia, *Submissions*, p.S320.

result, in the event of a privacy complaint, in the media and public being forced to make fine distinctions between material of the character of news (which therefore benefits from the exemption) and material of the character of information (which is subject to the National Privacy Principles). This type of unnecessary regulatory interference would clearly be unsatisfactory.

- 4.26 The Committee also considered the proposal to amend the definition of media organisation made by the Australian Press Council. It is unclear, however, whether inserting the word 'principal' before 'activities' in the definition of media organisation would provide any real obstacle to organisations that wish to take advantage of the media exemption. It would not appear to be difficult for an organisation to structure itself in such a way to legitimately argue that its 'principal activities' are those of a media organisation. On the other hand, given the range of activities engaged in by what are recognised generally as traditional media organisations, the suggested amendment may have a limiting effect on their access to the media exemption.
- 4.27 The Committee therefore agrees with the view expressed by Electronic Frontiers Australia Inc. that:
- ...it is unlikely that the proposed definitions...could be narrowed in a way that would not be likely to adversely affect freedom of the press.²⁷
- 4.28 The Committee does not accept that amending the relevant definitions in the Bill is an appropriate solution to the problems raised in evidence about the media exemption. The breadth of the definitions remains a concern and the Committee encourages the Privacy Commissioner to monitor the effect of the exemption in practice. At paragraph 4.53 the Committee proposes a number of changes to the structure of the exemption which, if accepted, should avoid the need to modify the definitions in the future. However, the appropriateness of the definitions should be considered in a review of the legislation within two years of the commencement of the Bill.

Models from other jurisdictions

- 4.29 The Federal Privacy Commissioner advocated adopting a provision similar to the model used in New Zealand privacy legislation. In oral evidence, the Commissioner suggested that the New Zealand model would narrow the exemption in the Bill at two levels.

27 Ibid.

It appears as though the New Zealand legislation on what is a media organisation is a bit narrower. ... But then, under that, the definition of what is news activity is narrower than the Australian definition.²⁸

- 4.30 The Commissioner went on to argue that the provisions proposed in Victoria with regard to privacy legislation in the private sector were even narrower than the New Zealand model.²⁹ Under the Victorian proposal, the exemption would be restricted to an organisation 'whose business, or whose principal business, consists of news activity'.³⁰ However, as the Victorian Bill did not proceed, there is no empirical evidence to suggest that its practical operation would be superior to the exemption contained in the Bill.
- 4.31 The Privacy Commissioner could not give evidence as to whether the New Zealand media exemption had operated effectively either. In a supplementary submission, the Commissioner provided the Committee with extracts from a report prepared by the New Zealand Privacy Commissioner into the operation of the New Zealand *Privacy Act 1993*.³¹ In that report, the New Zealand Privacy Commissioner did not recommend any legislative change in respect of the exemption.³²
- 4.32 The Australian Privacy Charter Council, however, suggested that while it:
- ...is open for us to steal ideas from other jurisdictions, ...it is probably overstating the reality to say that any jurisdiction has actually solved the media problem.³³
- 4.33 The Federation of Australian Commercial Television Stations went even further and rejected the idea that the New Zealand legislation had worked effectively in New Zealand. It complained that the New Zealand legislation had, in general, a chilling effect on the media.³⁴ The Australian Press Council made a similar point and suggested that the New Zealand legislation had resulted in a number of years of conflict between the New Zealand Privacy Commissioner and the media.³⁵ It would be undesirable for the Federal Privacy Commissioner's resources to be expended

28 Privacy Commissioner, *Transcript*, p.40.

29 Privacy Commissioner, *Transcript*, p.40.

30 Privacy Commissioner, *Submissions*, p.S383.

31 *Necessary and Desirable: Privacy Act 1993 Review* – Report of the Privacy Commissioner on the First Periodic Review of the Operation of the Privacy Act (NZ), November 1998, *Exhibit No.46*.

32 *Necessary and Desirable: Privacy Act 1993 Review* – Report of the Privacy Commissioner on the First Periodic Review of the Operation of the Privacy Act (NZ), November 1998, *Exhibit No.46*.

33 Australia Privacy Charter Council, *Transcript*, p.167.

34 Federation of Australian Commercial Television Stations, *Submissions*, p.S621.

35 Australian Press Council, *Transcript*, p.219.

unnecessarily in conflict with the media because of the adoption of a legislative model from another jurisdiction.

- 4.34 The Committee inclines towards the view expressed in oral evidence by the representative of the Australian Privacy Charter Council that no jurisdiction has yet been able to resolve the inevitable tension between privacy regulation and the media. In this context, and in light of the evidence of media dissatisfaction with the New Zealand legislation, the Committee considers that it would be unwise to follow the models used by other jurisdictions.

Public interest test

- 4.35 The inclusion of an overarching public interest test in the media exemption could be argued to be a means of ameliorating the inadequacies of the definition of journalism and media organisation. That is, if it is not possible to describe with sufficient clarity the organisations and the activities to which the exemption will apply, a seemingly objective standard to be applied in each case could provide some certainty. In addition it could be argued that a public interest test, by providing an external benchmark, could reduce the number of counter-intuitive exemptions that could otherwise apply under a broadly defined provision. For example, even though the propaganda wing of a terrorist organisation could argue that the dissemination of material that vilifies and provides personal information about individuals of a particular race could be argued to be ‘information’, it would be possible to object to that organisation obtaining the benefit of the media exemption because it is contrary to the public interest.
- 4.36 The Victorian Government,³⁶ the Communications Law Centre³⁷ and the Australian Privacy Charter Council³⁸ suggested that some form of public interest test should be included in the exemption. As a consequence of its rejection of the proposal to amend the definition of ‘journalism’ in the Bill, Electronic Frontiers Australia Inc. also argued for the inclusion of a public interest test in the media exemption so as to provide some form of limitation to the freedom granted to the media.³⁹
- 4.37 The representative of the Australian Privacy Charter Council gave evidence that:

36 Victorian Government, Department of State and Regional Development, *Submissions*, p. S198.

37 Communications Law Centre, *Submissions*, p.S338.

38 Australian Privacy Charter Council, *Submissions*, p.S250.

39 Electronic Frontiers Australia, *Submissions*, p.S320.

The legislation as it is written today precludes an argument even being entered into about whether there is a public interest or not. What we are suggesting is that the media exemption should be there, but that an argument could at least be entered as to whether that was in the public interest and then, just as all other privacy complaints are decided, an arbitrator or the Privacy Commissioner would make a decision.⁴⁰

- 4.38 However, the concept of the 'public interest' is not without its difficulties. To suggest that one can easily determine the public interest in any given circumstances is a gross oversimplification of the myriad of considerations that need to be taken into account. The Committee is not convinced that a public interest test can be used in a way that would allow timely and efficient resolution of privacy disputes with media organisations. To require the Privacy Commissioner or an approved code adjudicator to embark on an analysis of the public interest in any particular media issue would be excessively onerous. In addition, the delay caused by having to investigate the public interest in a media issue would derogate from both the community's interest in the timely publication of newsworthy material and the individual's interest in the speedy enforcement of their privacy rights. For these reasons the Committee does not support the inclusion of a public interest test in the Bill.

Industry codes

- 4.39 The Committee notes that the Communications Law Centre, in its submission, suggested that a relevant factor in establishing whether an organisation should be subject to the media exemption is whether the activity is covered by an industry, professional or ethical code dealing with issues including privacy.⁴¹
- 4.40 In the context of the Bill this would mean that if, in the event of a privacy complaint, it can be said that the journalist or media organisation had complied with the standards in their code, it would be open to the journalist or media organisation to use the media exemption as a defence to the complaint.
- 4.41 A proposal of this form was put to the Australian Press Council whose representative, Mr Beeby, responded by indicating that most media organisations and journalist groups already have their own strict codes of conduct.⁴² The Australian Press Council gave further evidence that:

40 Australian Privacy Charter Council, *Transcript*, p.166.

41 Communications Law Centre, *Submissions*, p.S338.

42 Australian Press Council, *Transcript*, p.219.

...the concept of freedom of the press must carry with it a concept of responsibility of the press as well. One of the principles against which we judge whether the press has acted properly includes the question of an improper invasion of privacy.⁴³

- 4.42 While the Council went on to express concern at the prospect of the Privacy Commissioner being empowered to involve his office in the internal workings of media organisations,⁴⁴ it did not appear that the Committee's proposal for a voluntary code would be opposed.
- 4.43 Electronic Frontiers Australia Inc, when asked to comment on the Committee's proposal, expressed concern that some individuals could be excluded from being described as a journalist because the administrator of the proposed code of conduct refused to allow them to register under the code.⁴⁵ The Committee shares this concern but believes that it could be overcome by setting appropriate standards for inclusion under the code.
- 4.44 It should be noted, however, that the Committee is not proposing that a code of conduct for the media be an 'approved privacy code' for the purposes of the Bill. If this were the case, the code would effectively nullify the exemption granted to the media. Rather, the code could be developed as a set of ethical principles cognisant of the importance of the protection of the privacy of the individual. A voluntary code of conduct under this proposal could be developed by the Privacy Commissioner or an industry body such as the Australian Press Council. The Committee encourages the Privacy Commissioner in consultation with the media to develop a model code as an acceptable standard for others who wish to develop codes of their own.
- 4.45 The Privacy Commissioner's model code could be accessed by independent media organisations or freelance journalists who do not have the resources to develop their own code and are not affiliated with any other media group. This would ensure that any person seeking to obtain the benefit of the exemption has ready access to a model standard.
- 4.46 Clearly, for this proposal to work effectively the community must be made aware of its existence and of the rights individuals may have to seek redress for a perceived privacy breach. Equally, the practical effect of the proposal should be monitored to ensure that it adequately addresses the need to ensure the responsible use of the media's special exemption.

43 Australian Press Council, *Transcript*, p.224.

44 Australian Press Council, *Transcript*, p.220.

45 Electronic Frontiers Australia, *Transcript*, p.302.

Conclusions

- 4.47 The Committee accepts that the freedom of the press and the free flow of information to the public via the media are important elements of a democratic society. The Committee also accepts that the application of the National Privacy Principles to the media without modification could lead to unreasonable restrictions being placed on the media's freedom. That even the Federal Privacy Commissioner⁴⁶ and privacy advocacy groups such as the Australian Privacy Foundation⁴⁷ agree on the need to avoid restricting the core functions of the media is particularly persuasive.
- 4.48 The Committee, like the general public, is acutely aware of past incidents of breaches of privacy by media organisations and expresses concern at the enormous potential for breaches if media organisations or journalists behave irresponsibly. In light of this concern, the Committee believes that media organisations and journalists should recognise that if they fail to treat privacy issues responsibly they cannot hope to maintain the benefit of this broad exemption.

Recommendation 8

The Committee recommends that the operation of this exemption be monitored and specifically reassessed in the next review of this legislation.

- 4.49 The Committee is of the view that some modifications to the Bill in its application to the media are justified. It acknowledges though that an appropriate balance between the interest in a free media and the privacy of the individual is a notoriously difficult one to reach. The preponderance of the evidence received by the Committee, however, indicated that the appropriate balance has not been reached by the proposed media exemption.
- 4.50 While the Committee accepts the need for the media to be treated differently with respect to privacy regulation in some circumstances because of the competing interest in maintaining press freedom, there are a number of modifications that should be made to the Bill in order to encourage the media to behave responsibly in the light of its privileged position.
- 4.51 The Committee is of the view that, while the definitions used in the exemption should not be amended, another criterion for gaining the benefit of the exemption should be included in the Bill. This criterion,

46 Privacy Commissioner, *Submissions*, p.S381.

47 Australian Privacy Foundation, *Transcript*, p.102, *Submissions*, p.S520.

based on the Communication Law Centre's suggestion, is adherence to a code of conduct for journalists and media organisations developed by the Privacy Commissioner or a relevant professional body such as the Australian Press Council (in consultation with the Privacy Commissioner).

- 4.52 This proposal has the advantage of leaving in place the broad definitions currently in the Bill while at the same time ensuring that those legitimately engaging in the profession of journalism are subject to adequate professional standards. It will also have the benefit of actively involving the mainstream of the profession in privacy protection.
- 4.53 Clearly, further consultation with the relevant members of the media will be required. However, the Committee encourages the adoption of its proposal as an innovative solution to the difficulties inherent in the tension between privacy protection and the freedom of the media.

Recommendation 9

The Committee therefore recommends that, in order for a journalist or media organisation to obtain the benefit of the media exemption under this legislation, he, she or it must subscribe to a code developed by a media organisation or representative body or, in the absence of such a code, a model code prepared by the Privacy Commissioner.

- 4.54 The Committee envisages that a media organisation could indicate its compliance with this requirement by including a notice in its publication that it subscribes to an industry code or, in the absence of a suitable industry code, the model code developed by the Privacy Commissioner.

Recommendation 10

The Committee further recommends that the Privacy Commissioner conduct an education campaign to inform the public about the special provisions applying to the media.

