



**Submission by
Free TV Australia Limited**

Australian Communications and Media
Authority

*Review of the Privacy Guidelines for
Broadcasters Consultation Paper*

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1 EXECUTIVE SUMMARY

- The data relating to complaints made by the public and the outcome of investigations by ACMA does not support the need for a review of the Guidelines.
- As the law in Australia affecting privacy and the media is currently subject to a number of reviews, a review of the Guidelines is inappropriate at the present time.
- If the Guidelines are amended, the ACMA should propose any specific updates or changes that are justified, rather than presenting a new set of guidelines.
- The amended Guidelines should expressly state that the privacy provisions in the Commercial Broadcaster Codes relate only to news and current affairs programs.
- The principles in the Draft Guidelines relating to what the Commercial Broadcaster Codes protect against are new, do not accurately reflect Australian law, and are not necessary. In particular, the concept of seclusion should be removed from the Draft Guidelines.
- The use of "personal information" in the Draft Guidelines is inappropriate because it could be confused with "personal information" as defined in the Privacy Act and is not used in the Commercial Broadcaster Codes. The concept of "personal information" should be removed from the Draft Guidelines.
- In relation to consent, the Draft Guidelines should expressly refer to the range of existing legal requirements that apply to broadcasters in reporting certain material. In respect of children in particular, it is inappropriate for broadcasters to be required to second guess the consent of a parent or guardian.
- The material relating to public figures should be brought together under one heading and the factors relevant to deciding whether to broadcast information relating to public figures should be set out.
- The requirement that there is a "clear and identifiable link" between material in a broadcast and the public interest in order to meet the public interest test is too onerous and not warranted. The Draft Guidelines should clarify when this test would be met.



2 Introduction

Free TV Australia represents all of Australia's commercial free-to-air television broadcasters. In 2011 commercial free-to-air television is the most popular source of entertainment and information for Australians, with our members providing nine channels of content across a broad range of genres, as well as rich online and mobile offerings, all at no cost to the public.

Free TV appreciates the opportunity to comment on the ACMA's *Review of the Privacy Guidelines for broadcasters - Consultation Paper (Draft Guidelines)* relating to ACMA's review of the *Privacy Guidelines for Broadcasters 2005 (Guidelines)*.

Free-to-air television broadcasters provide a wide range of high-quality news, information and current affairs programming. Free TV takes community and legal standards regarding the privacy of individuals very seriously.

There already exists a wide range of privacy protections which apply to commercial free-to-air television broadcasters and there are serious sanctions which apply to a breach of those protections.

As well as general privacy law, commercial free-to-air broadcasters must also comply with detailed Commercial Television Industry Code of Practice provisions designed to protect individuals' privacy. The ACMA is empowered to investigate complaints under this Code and a range of substantive enforcement provisions apply.

In addition, there is a broad range of state and commonwealth statutes which protect against inappropriate or unfair means of gathering or disclosing personal information and images.

In Free TV's view, the media privacy regime currently in place provides effective safeguards for the protection of private rights and interests and strikes an appropriate balance between these rights and the fundamental rights of freedom of expression and the need for free flow of information on matters of public concern. The already high level of regulation in this area including in relation to the identification of individuals in certain proceedings, as well as the use of listening or optical surveillance devices, demonstrates that the State and Commonwealth Parliaments have given these matters appropriate consideration and have enacted laws which suitably balance the relevant interests. Accordingly, it is not necessary for ACMA to seek to materially override or re-state the nuanced legislative provisions which licensees are already working within.

The low overall level of complaint indicates that the public is generally satisfied with the treatment of privacy in the media and suggests that the current system is working.



The conditional exemption of media organisations under the *Privacy Act 1988* (Cth) (**Privacy Act**) is intended to grant greater not lesser freedom in service of the public interest in open communication and the right to know.

Free TV does not support any further regulation of privacy in the media space or any moves to restrain the media's vital role in upholding freedom of speech and the free flow of information.

We support the current co-regulatory system as media privacy issues are best managed by industry specific codes of practice administered by regulatory bodies that have specific knowledge and understanding of the media industry.

If there is to be any new right of privacy, it should be narrowly confined to meet any demonstrated need, and should be subject to a media exemption and to clear defences in circumstances where the public interest in communication should always prevail over any privacy right. It is not appropriate to attempt to introduce new rights by the issue of new Guidelines.

It is not appropriate to extend the operation of industry codes to the point where the regulatory burden for broadcasters is greater than would apply if they did not have the benefit of the media organisation exemption in the Privacy Act. The overall regulatory burden of the co-regulatory scheme should remain less than if media organisations were regulated under the Privacy Act.

3 Preliminary issues

3.1 Need for review

Free TV's figures show that, in the five years to 2011, privacy complaints represented just 3.3% of complaints overall received by broadcasters.

Further, during the most recent review of the Commercial Television Code of Practice (**Code**), of the 1467 submissions received overall, only seven commented on privacy matters. This represents just 0.5% of all submissions.

The Annual Reports of ACMA also show that, in the five years to 2009/10, of the 238 investigations conducted by the ACMA into commercial free-to-air commercial television, there were only three breach findings in relation to privacy. This represents 0.8% of all investigations.

Appendix 1 to the Draft Guidelines includes only seven case studies. A number of these case studies are not recent. In Free TV's view, this is indicative of the low number of privacy complaints.

Free TV submits that the data relating to complaints, investigations and case studies regarding the codes of practice of the commercial television and radio and



community broadcasting sectors (**Commercial Broadcasting Codes**) demonstrates that the public is generally satisfied with the treatment of privacy in the media.

Further, this data demonstrates that commercial free-to-air broadcasters are overwhelmingly compliant with the Code and that the Guidelines are working satisfactorily.

In the introduction to the Draft Guidelines, ACMA identifies two key issues: guidance on when material used in a broadcast invades an individual's privacy as distinct from when it relates to personal or private affairs and issues surrounding consent particularly relating to children. In our submission these key issues cannot be identified from a consideration of the complaints data. To the extent that the ACMA believes these issues should be addressed we submit that the ACMA should have regard to the success of the existing guidelines and propose minor rather than wholesale amendments to the Guidelines.

3.2 Timing

The ACMA stated in the Draft Guidelines that in conducting this review, it considered relevant provisions of the Commercial Broadcasting Codes, ACMA commissioned research papers, the Australian Law Reform Commission (ALRC) report 108 and developments in the law.

Yet the law in Australia affecting privacy and the media is currently subject to a number of reviews as set out following, including in response to ALRC report 108. Many of these significant reviews were announced subsequent to the ACMA issuing its draft Guidelines on 25 August 2011. Free TV submits that, having regard to these important reviews, a review of the Guidelines is inappropriate at the present time.

Further, ACMA should postpone the review of the Guidelines until it can have regard to the recommendations of each of these reviews and any subsequent changes to the legal and regulatory landscape affecting privacy and the media arising from these reviews.

3.2.1 Review of privacy law

The Government is currently reviewing the reforms proposed by the Australian Law Reform Commission (**ALRC**) in its 2008 report, *For Your Information: Australian Privacy Law and Practice* (ALRC report 108) (**ALRC Report**). Among other things, the ARLC recommended substantial reforms to the Privacy Act.

In the ALRC Report the ALRC made recommendations to change Australia's privacy laws, including:

- recommending the introduction of a statutory cause of action for a serious invasion of privacy (recommendations 74-1 to 74-7); and
- insertion of definitions of "journalism" and "media" organisation, which would have the effect of narrowing the "journalism" exception under the Privacy Act (recommendations 42-1 and 42-2).



The ALRC also recommended changes that may affect the role of the Privacy Commissioner under the Privacy Act (see chapters 45-47).

Following the recommendation in the ALRC Report, on 23 September 2011 the Department of Prime Minister and Cabinet released an issues paper, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, inviting comment on whether a statutory cause of action for breach of privacy should be incorporated into Australian law. The paper calls for comments by Friday 4 November 2011.

The issues paper deals with matters that are directly relevant to possible invasions of privacy by the media. The matters raised for consideration go directly to

the interaction between the Privacy Act and broadcasters. They are also directly relevant to the existing regulatory role of ACMA in relation to privacy. Having regard to the substantial overlap between the matters raised for consideration by the issues paper and content of the New Guidelines, in our submission, it is inappropriate to proceed with the new guidelines at this time. Any change to the Guidelines would be better, in terms of both relevance and context, having regard to the outcome of the consultation on matters raised in the issues paper.

The issue of new Guidelines is not a trivial matter for Free TV's members in terms of analysis, implementation and training of journalists. Accordingly, the issue of new Guidelines should proceed only when the guidelines are a significant improvement and it might reasonably be expected that they will have ongoing application. The current environment of rapid change strongly suggests that the Draft Guidelines will soon be outdated.

In our submission ACMA should delay the introduction of any new Guidelines until the current consultations are concluded and any outcomes known.

3.2.2 Review of media law

The Government is currently conducting the Convergence Review, which on 19 September 2011 issued a discussion paper entitled *Community Standards*. This paper includes consideration of the following issues:

- Do the provisions in the current broadcasting codes of practice adequately reflect community standards and expectations?
- Are there particular areas where the codes work well/badly?
- Are there particular community expectations that are not dealt with?

The Convergence Review report is due by the end of March 2012.

Further, the Department of Broadband Communications and the Digital Economy has announced an Independent Media Inquiry in support of the Convergence Review, which on 18 September 2011 issued an issues paper setting out important matters that it will consider, including:

- Is it appropriate that media outlets conform to standards of conduct or codes of practice?



- In considering alternative models for regulation of the media, would it be appropriate for such a model to include rules that would (among other things) prevent the unreasonable intrusion into an individual's private life or prohibit the gathering of information by unfair means (for example, by subterfuge or harassment)?

The panel is required to provide a report to the Government by 28 February 2012.

3.3 Approach

The Draft Guidelines present a new set of guidelines, rather than updating or amending the Guidelines. In Free TV's view, the Draft Guidelines are not an improvement on the Guidelines. Given the limited objectives that the ACMA is seeking to achieve and the fact that the Guidelines have been working well for 5 years and are well understood, we submit that ACMA should prefer consistency.

Free TV submits that, instead of presenting a new set of guidelines, the ACMA should propose specific changes that update or amend the Guidelines where such updates or changes are justified.

Further, Free TV submits that the Draft Guidelines should more closely reflect the wording of the Commercial Broadcasting Codes. The Guidelines are subsidiary to the Codes. They are an aid to interpretation not a stand alone policy in their own right or a replacement or an alternative source of power for the ACMA. Accordingly, it should be clear from the terminology used in the Draft Guidelines and the processes that are described that the ACMA's power comes from investigating a matter covered by a Code. The Guidelines previously stated "In reading these guidelines it is important to note that: the guidelines are advisory and do not have any legally binding force."

The ACMA describes the code registration process on page 1 of the Draft Guidelines. The Guidelines are not subject to this process and in their revised draft form are not endorsed by a majority of providers of broadcasting services in the commercial free-to-air sector.

While the ACMA states the Draft Guidelines are intended to assist broadcasters to better understand their privacy obligations under the Commercial Broadcasting Codes, the current draft is more accurately described as a reflection of the ACMA's interpretation of our obligations under the Codes, which may or may not be supported by the express Code wording which have been deliberately crafted and subjected to the code registration process.

4 Content of Draft Guidelines

4.1 Scope of regulatory framework

The Commercial Broadcaster Codes regulate privacy only in the context of news and current affairs (e.g. cl 4.3 of the Code). As drafted, the Draft Guidelines give the impression that the principles apply to all broadcast material. For example, the flow chart in Figure 1 on page 5 of the Draft Guidelines does not include a threshold question (e.g. "Does the material relate to news or current affairs?"). This gives the



impression that the Draft Guidelines are relevant to whether there has been an *invasion of privacy*, rather than a *breach of a Commercial Broadcaster Code*.

Free TV submits that the Draft Guidelines should expressly state that the privacy provisions in the Commercial Broadcaster Codes relate only to news and current affairs programs. In particular, the following amendments should be made to the Draft Guidelines:

- the section headed "Introduction" should expressly reference the provisions of the Commercial Broadcaster Codes in Appendix 2 of the Draft Guidelines;
- the section headed "The general principle" should include a statement to the effect that the Commercial Broadcaster Codes only apply in the context of news and current affairs; and
- the section headed "Investigation steps" should include a new first step that provides: ">Check that the matter is broadcast material covered by a relevant code".

Further, Figure 1 on page 5 should be amended to better reflect that there is no "privacy code" but instead the process described in the figure takes place in relation to the provisions in the Commercial Broadcaster Codes relating specifically to privacy. For example, the first step ("Material relating to the person's personal or private affairs is disclosed/ the person's seclusion is intruded upon") should instead provide a staged test, such as:

- "Does the complaint relate to an issue covered by a relevant code?"
- then, "Is the issue privacy?"
- then, "Has the relevant provision been breached?"

4.2 Seclusion

The Draft Guidelines do not contain an express recognition that conduct carried out in public is generally not private. There is a statement of this kind under the heading "Material in the Public Domain" but that statement appears to relate to published information rather than behaviour in public. It is important to the day to day operation of the media that the Guidelines recognise that conduct carried on in public is generally not private. At the very least the Guidelines should clarify when a person would reasonably expect that their activities would not be observed or overheard and there should be a presumption against it where a person is in a public place.

Free TV submits that the principles expressed in "The general principle" section of the Draft Guidelines relating to what the Commercial Broadcaster Codes protect against are new principles that are not based on the Commercial Broadcaster Codes.

Further, Free TV submits that these principles do not accurately reflect Australian law and, to the extent that they impose new requirements, are not necessary.

Free TV submits that the concept of seclusion be deleted from the Draft Guidelines.

The key principle that is common to the Commercial Broadcaster Codes is that the broadcaster:



"...must not use material relating to a person's personal or private affairs or which invades an individual's privacy unless there is a public interest in broadcasting such information...".

The principles expressed in the section headed "The general principle" in the Draft Guidelines are not consistent with this key principle in the following ways:

- the prohibition on using material relating to personal or private affairs in the Commercial Broadcaster Codes is not limited to cases where to do so would "invade a person's privacy";
- the term "personal information" used in the Draft Guidelines is not used in any of the Commercial Broadcaster Codes; and
- the concept of "invading a person's privacy" by "intruding upon his or her seclusion", as stated in the Draft Guidelines, is more complex and arguably more limited than the concept of simply "invad[ing] a person's privacy" as stated in the Commercial Broadcaster Codes.

4.2.1 Lack of application to Australian law

In respect of the concept of "seclusion", the wording used in "The general principle" section of the Draft Guidelines is consistent with the statement made in paragraph 4.4 of NSW Law Reform Commission Report 120, *Invasion of Privacy*, released in April 2009 (**NSW Law Report**) that the "widespread understanding that the role of privacy in private law is to protect information privacy and seclusion".

Free TV notes that, in addition to the list of matters set out on page 1 of the Draft Guidelines that the ACMA has considered in reviewing the Guidelines, the ACMA has considered the NSW Law Report.

Free TV submits that it is not appropriate to take this assertion of a "widespread understanding" of the "role of privacy in private law" as the basis for the general principle in the Draft Guidelines for the following reasons.

The term "seclusion" in relation to the meaning of "privacy" is more fully explained in *ABC v Lenah Game Meats Pty Limited* (2001) 208 CLR 199 (**Lenah Game**). The footnotes in the Draft Guidelines refer in particular to the discussion of Gleeson at paragraphs 42 and CJ Gummow and Hayne JJ at 125 of *Lenah Game*. Free TV notes that at paragraph 120 of *Lenah Game*, Gummow and Hayne JJ give a detailed explanation of the tort law of the United States, including a reference the following definition of the American tort of "Intrusion upon seclusion":

"One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be **highly offensive** to a reasonable person."
(emphasis added)

Free TV submits that it is clear from the wider context (that this is only one of 4 components of the American tort) and this formulation of one component, that an invasion of "seclusion" as used in the Draft Guidelines is not sufficient to capture the notion of breach of privacy. In particular, the concepts of



"solitude" and "private affairs" would also be necessary for an accurate description of this element. In our submission, this demonstrates that the term "seclusion" is not adequate to describe the foundation of the private right of action in American law. It also indicates that the actual concept is outside any "common understanding" and inappropriate as a key concept for Australian use. We note that it is not an element of the cause of action proposed by *Issues Paper, A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, released by the Department of Prime Minister and Cabinet on 23 September 2011 (*Issues Paper*).

As such, the assertion in the NSW Law Report referred to above regarding the "widespread understanding" of the role of privacy in private law is made by reference to an analysis of *United States law* by judges of the High Court. Free TV submits that this understanding is not necessarily widespread amongst ordinary Australians. Or indeed practising lawyers or High Court judges.

Free TV also notes that the court's comments regarding American tort law were relevant in *Lenah Game* because the applicants in that case asked the court to recognise a right of privacy in Australian law but the court declined to find such a right in Australian law. Consequently, these comments are not directly relevant to the operation of the privacy provisions in the Commercial Broadcasters Codes and indeed go further than the scope of the Code which is not, in our submission, the appropriate role for the Guidelines. The Guidelines should act only as an aid to interpretation of the Code.

Further, in Free TV's view, if there is going to be a right of action for serious invasion of privacy in Australia, this is likely to be based on the recommendations of the ALRC in the ALRC Report and the outcome of the Issues Paper inviting comment on whether a statutory cause of action for breach of privacy should be incorporated into Australian law.

Accordingly, Free TV submits that the proposed formulation of a right of action for serious invasion of privacy is more developed than the proposed formulation of "invasion of privacy" proposed by the Draft Guidelines and should take precedence.

4.2.2 Natural and ordinary meaning

Free TV submits that the natural and ordinary meaning of intrusion on seclusion does not accurately or completely describe the circumstances that are understood to constitute an invasion of privacy.

A common definition of "seclusion" is "the state of being secluded", where secluded means "shut off or separated from others". According to its ordinary meaning, "seclusion" is a very narrow term that does not accurately apply to the concept of "privacy" as used in the Commercial Broadcaster Codes. For example, this term does not easily apply to conduct in a public place even where a party may have a reasonable expectation of privacy.

4.2.3 Provisions in Code

To the extent that the intention is to capture private behaviour in a public place, Free TV submits that the Code already contains provisions relating to



the types of circumstances that would be captured by a new "seclusion" test. In particular, clause 4.3.3 relates to the feelings of relatives and viewers, and clause 4.3.6 relates to the exercise of sensitivity in broadcasting images of or interviews with bereaved relatives and survivors or witnesses of traumatic accidents.

4.2.4 Adequacy of Guidelines

The Guidelines provide that "Conduct may be considered private where it is carried on in circumstances that the parties would have had a reasonable expectation that their activity/conversion would be observed or listened to only by themselves" (**Expectation Test**). Free TV submits that these words are clear and more effective than the concept of "intrusion on seclusion" referred to in the Draft Guidelines.

The section headed "Seclusion" on page 6 sets out circumstances in which a person's seclusion may be intruded upon. This section states that "It is possible for [an invasion] to occur in a public space". Free TV notes that the Guidelines also make the important observation that "Conduct carried out in public places (that is places to which the public has unrestricted access) is generally not considered private". In Free TV's view, this important observation, or an explicit presumption that conduct in private places will generally be public, should be included in any revised guidelines.

This section headed "Seclusion" in the Draft Guidelines also uses a modified version of the Expectation Test with an additional requirement that "a person of ordinary sensibilities would consider the broadcast of these activities to be inappropriate or offensive". Free TV submits that, in order for the additional requirement to be consistent with the formulation set out by Gleeson CJ in *Lenah Game*, it should refer to a broadcast that is "highly offensive", not "inappropriate or offensive".

Further, Free TV submits that the report commissioned by ACMA, *Community research into broadcasting and media privacy: Research report commissioned by the Australian Communications and Media Authority*, prepared by GfK bluemoon in August 2011 does not support the use of change in approach in the Draft Guidelines to focus on the concept of seclusion. In fact, the report appears to reflect views that are reflected in the Guidelines as they operate in relation to the existing Commercial Broadcasting Codes.

4.2.5 Case studies

Appendix 1 to the Draft Guidelines includes seven case studies (from 2005, 2003, 2009, 2010, 2008, 2008 and 2010). Two of these case studies relate to live radio and, therefore, are of limited relevance to Commercial Television Broadcasters. In four of the seven cases, the complaint was upheld under the Guidelines. In one case, the complaint was dismissed because of an identifiable public interest (a ground that would remain available under the Draft Guidelines). In one case, the complaint was dismissed because the complainant could have little or no expectation of privacy having regard to her behaviour (a ground that would also continue to apply under the Draft Guidelines as it could not be argued that the complainant expected seclusion).



In the final case, case study 3, it is reported in the Draft Guidelines that "ACMA made a "no finding" decision on whether the material breached the privacy clause of the Commercial Television code largely because it considered that the 2005 Privacy Guidelines focused on material *relating to a person's private affairs (informational privacy)*...and did not provide adequate guidance on the code element dealing with *material that invades a persons privacy (seclusion)*". We note that in that case a finding of breach was made in relation to 4.3.6 of the Commercial Television code relating to exercising sensitivity in the broadcasting of images and that the call for the Guidelines to be amended to provide further assistance regarding the meaning of "invades an individual's privacy" does not argue for the redrafting of the entire code or the approach to definition that is adopted in the Draft Guidelines.

In case study 4 the ACMA recommends that broadcasters should seek express consent before entering a persons premises, using a listening device to record their conversation and (having recorded the conversation) broadcasting the recorded conversation or segments of it. These recommendations:

- do not recognise that there are existing laws addressing trespass, use of listening devices and the recording of conversations. The law of Victoria, for example, recognises that a listening or video recording device may be used by a person who is a party to the activity being recorded:
- go further than the regulation of broadcasting to matters related to filming and land access. For this reason they are too broadly stated; and
- do not recognise that there is a long history of the legitimate use of video an audio recordings by the media in the public interest. Legislation in on video surveillance in some states includes an express exception in so far as the publication of the film is reasonably necessary in the public interest. Consider for example subsection 11(2)(i) of the Surveillance Devices Act (1999) Vic.

In our submission the recommendations made in case study 4 are unrealistic and overly broad. Having regard to the wider regulatory context the recommended steps are highly inappropriate particularly where the conduct of the broadcaster is in the public interest.

4.3 Concept of personal information

In respect of what information is covered by the Guidelines, the Guidelines use the terminology in the Commercial Broadcaster Codes ("Information that relates to a person's private affairs") and define this phrase by reference to whether the individual is identifiable and whether the broadcast of the information "is likely to cause harm or distress to a reasonable person in the position of the individual".

In contrast, the Draft Guidelines use the concept of "personal information" which is not a concept found in the Code.



Free TV submits that the use of "personal information" is inappropriate because it could be confused with "personal information" as defined in the Privacy Act and because this term is not used in the Commercial Broadcaster Codes.

Free TV also submits that the types of information referred to in the section headed "Personal information" in the Draft Guidelines are too restrictive of the media because:

- The list of "personal information" appears to closely follow the categories of "sensitive information" set out in the Privacy Act with some expansion ("financial affairs" and "other sensitive personal matters" do not fall within the definition of "sensitive information" in the Privacy Act), but is not limited by the requirement that these types of information must also be "personal information" as defined by the Privacy Act. In Free TV's view, inclusion of this list adds complexity that does not assist with an understanding of the intention of the code. In our view the term the phrase "personal or private affairs" is perfectly adequate.
- There are many instances where a film made in a public place will provide information of the kinds listed as "personal information", but broadcast of the film would not cause harm or distress. In Free TV's view, the current position, which allows broadcasters to broadcast film in these circumstances, should be maintained.

Free TV also submits that the use of an open-ended definition of "personal information" is too restrictive. For example, a film showing a traditional family provides some information regarding the sexual preferences of the parents in the film. Under the Draft Guidelines, this broadcast may disclose "personal information" (because it discloses facts about a person's sexual preferences) and therefore would be regarded as invading a person's privacy.

For the reasons above, Free TV submits that the concept of "personal information" should be removed from the Draft Guidelines.

Free TV notes that the Draft Guidelines provide less clarity for broadcasters when deciding whether to broadcast a film or recording because, while the Guidelines provide tests the broadcaster can apply in these circumstances, the Draft Guidelines provide broad, open statements that are unrelated to the rationale for deciding whether or not to broadcast particular material (i.e. to avoid harm or distress). An example of such a broad open statement is the statement included in the section headed "Personal information" that "The information need not be secret or confidential in order to be private".

ACMA should have regard to the journalism exemption in the Privacy Act.

4.4 Consent

Free TV submits that the section headed "Consent" in the Draft Guidelines should be amended by adding express reference to the extensive existing legal requirements that apply to broadcasters in relation to reporting certain material (e.g. regarding the victims of crime). Similarly, the section headed "Children and vulnerable people" should be amended to refer to the range of legal requirements that protect children from being named in the media in certain circumstances.



In Free TV's view, the statement in the section headed "Consent" that "The absence of an objection will not automatically be taken to be consent" may be misleading because, in some circumstances, the absence of an objection will indicate consent. For this reason, Free TV submits that this statement should be removed from the Draft Guidelines. The Guidelines should be amended to include a presumption that absence of objection will be considered consent except in exceptional circumstances.

In the section headed "Children and vulnerable people" in the Draft Guidelines, there is a statement that "Even where consent is obtained, there may be circumstances where a person of ordinary sensibilities would consider the use of material that invades the child's privacy to be inappropriate or offensive". Free TV submits that it is not appropriate for broadcasters to be required to 'second guess' the consent of a parent or guardian.

The Draft Guidelines do not define a vulnerable person. The Draft Guidelines should clarify whether being a vulnerable person is something that relates to a person's circumstances or particular characteristics of the person.

The Code generally provides that consent is an effective cure for many issues but these Guidelines suggest that even where an informed consent has been given with respect to a child a broadcaster may be in breach. This inconsistency between the Code and the Guidelines seems unsustainable. In our view the Draft Guidelines must be made consistent with the Code.

4.5 Public figures

The Guideline deals with public figures under one heading. The Draft Guidelines deal with public figures in part under the section headed "Identifiable person" and in part under the heading "Public interest".

Free TV submits that the material relating to public figures be brought together under one heading and that factors to be considered when deciding that information relating to the private affairs of a public figure should be broadcast should include matters relating to the:

- carrying out of duties;
- use of public resources; and
- views or attitudes that are relevant to the performance of public duties.

4.6 Public interest

In order to meet the public interest test, the Draft Guidelines require that there is "a clear and identifiable link between [the material broadcast] and the public interest" and that this link exists "at the time of the broadcast".

Free TV submits that the requirement of there being "a clear and identifiable link" between the material broadcast and the public interest should be clarified. For example, in Free TV's view, it is not clear if the story broadcasted must be *about* a matter of public importance or if it will be sufficient if it is apparent from the context that there is a relationship between the material broadcasted and matters of public importance.



In Free TV's view, the requirement in the Draft Guidelines that there is a "clear and identifiable link" suggests a degree of specificity that is not warranted. In many cases the public interest element dimension of a story arises broadly from its context without the link being identified in the story. For example, a story focusing an individual suffering consequences of drug use might not deal include specific reference to the government programs or policy. However, the broad experience of a case of social injustice would be of genuine public interest.

The Current Guidelines include a statement that whether something is of public interest will depend on the circumstances including for example whether a matter is capable of affecting the people at large so they might legitimately be interested in or concerned about what is going on or may happen to them or others. This statement is not included in the draft Guidelines which instead limit themselves to identifying examples of public interest issues. This approach is more restrictive than the current Guidelines . Free TV submits that the approach taken by the Guidelines is preferable to the approach taken by the Draft Guidelines.