

Broadcasting and Social Networking – The Role of Privacy Guidelines

Michael Coonan looks at the use of best practice guidelines on privacy for broadcasters and social networking sites.

The potential adverse effects of privacy breaches in radio and television broadcasts are clearly present, if not amplified, in the online social networking context, particularly for children.

In its report *For Your Information: Australian Privacy Law and Practice* (the **Privacy Report**, August 2008) the Australian Law Reform Commission (**ALRC**) has made a number of recommendations relating to broadcasting and social networking.

In particular, in relation to the journalism exemption in the *Privacy Act 1998* (Cth) (**Privacy Act**) the ALRC has recommended an adequacy requirement for the privacy standards that media organisations must publish and adhere to in order to claim the exemption.¹ The ALRC suggests that:

*This is an important mechanism to ensure that the standards being relied upon are robust and of substance—while respecting the need for a high degree of media autonomy in order to protect freedom of expression—which is vital for the Australian Parliament's stated objective of ensuring safeguards for the handling of personal information.*²

To assist media organisations, the ALRC has also recommended that a template for media privacy standards be developed that they may adopt.³

The ALRC has indicated⁴ that that the template media standards could usefully be informed by the *Privacy guidelines for broadcasters*⁵ (**Broadcasting Privacy Guidelines**) developed by the Australian Communications and Media Authority (**ACMA**).

In light of this recommendation, this article examines the benefits of using guidelines in the hierarchy of regulatory tools, with a particular focus on broadcasters and social networking sites.

This article suggests that publishing guidelines on relevant regulations can be useful for both experienced and new players in the broadcasting and social networking industries; and, can play a particular role for social networking providers, against whom 'black letter law' may not be easily enforceable from one jurisdiction to another.

The Journalism Exemption

Section 7B(4) of the Privacy Act provides that acts done by a media organisation in the course of its journalistic activities (compared with, for example, its collection of personal

information for the purposes of a competition) can be removed from the jurisdiction of the Privacy Act.

In a 2006 speech, the Privacy Commissioner, Karen Curtis, suggested that the exemption "exists to ensure that information of importance to the public interest is not unduly restricted" and is a recognition of "the essential role that free journalism plays in a healthy democracy".⁶

The Privacy Act provides that, to be exempt, a media organisation must commit to published standards which deal with privacy. However, the Privacy Act is currently silent on what constitutes an adequate published standard.

As discussed in the Privacy Report, while the 'traditional' media has generally already published privacy standards (for example, in industry-developed broadcasting codes of practice and the Australian Press Council's *Privacy Standards for the Print Media*), it is open to any media organisation to develop and administer media privacy standards.⁸

This may include emerging media organisations who may wish to obtain the benefit of the exemption in relation to the rules about

Guidance can buttress enforceable rules in primary legislation, subordinate instruments and industry-developed codes of practice.⁹ It can be used to provide immediate assistance in interpreting new regulations¹⁰ or can be prepared by reflection on the operation of a set of rules over a period of time.¹¹

Drawing on the work of Professor Julia Black, the Privacy Report notes that the appropriate time for guidelines is often some time after a rule is first introduced. Professor Black notes that "rules are just a 'best guess' as to the future".¹² If this is accepted, it would appear that rules are amenable to being supplemented with guidance after some experience with their application.

Drawing further on Professor Black's work, the Privacy Report notes that whether or not a rule is 'certain' depends not so much on whether it is detailed or general, but whether all those applying the rule (regulator, regulated firm, court/tribunal) agree on what the rule means.¹³

Dialogue between the regulator and regulated entities in developing guidelines is particularly important in establishing this shared understanding and is indeed vital to the effective operation of the co-regulatory framework for broadcasting and internet regulation in Australia.

Guidelines are often expressed in language that is easier to understand for the lay person

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collection, storage and use of personal information that would otherwise apply under the Privacy Act. Best practice guidance might be particularly useful for these new entrants.

Guidelines in the Regulatory Hierarchy

It is acknowledged that due to its non-binding nature, guidance alone, such as a media standard template, in and of itself will not stop privacy breaches and in and of itself will not provide remedies. However, when guidance is offered to media organisations with a recommendation for use, it can provide start-up check lists or, by providing a basis for the design of systems and procedures, promote behavioural change to achieve compliance more quickly than through remedial action.

From the perspective of decision-makers, guidance can also assist with (although, importantly, not fetter) the exercise of a discretion, often leading to better decision-making by aiding consistency. It has the dual benefit of educating the industry and public about what standards are expected.

than 'black letter law' and can provide case studies to illustrate the operation of a law or regulation. They can also usefully consolidate in one document explanation of related rules from different sources. And, they are flexible as they can be updated outside formal law-making processes to capture current issues.

Where operational check lists in guidelines are integrated into the regulated entity's standard procedures and internal management systems, there is increased opportunity to achieve, as well as prove compliance (for example, by showing records that certain procedures were followed). This is referred to in the Privacy Report as compliance-oriented regulation.¹⁴

A weakness of guidelines is that the public can mistake them for binding or enforceable rules. However, where their status is clear, they help achieve the aim, identified by the ALRC, of "...improving the clarity, consistency and enforcement of privacy laws".¹⁵

ACMA's Broadcasting Privacy Guidelines

The following looks at how the experience of interpreting privacy provisions in broadcasting codes of practice has been distilled into the guidelines which may, if the ALRC recommendations are adopted, assist in developing template media standards.

ACMA released the Broadcasting Privacy Guidelines in 2005 to assist radio and television broadcasters by giving an overview of the way in which ACMA will assess complaints which allege breaches of privacy provisions in the codes.

Speaking at the launch, ACMA's then Acting Chair, Lyn Maddock, noted that Broadcasting Privacy Guidelines sought to address the issue of "how to balance respect for an individual's privacy with the media's role of reporting matters of public interest".¹⁶ Ms Maddock suggested that the effects of privacy breaches can range from embarrassment, harassment and exclusion to detrimental effects on local

- the difference between public and private conduct;
- the use of publicly available personal information;
- obtaining consent to use private information;
- the position of public figures; and
- what constitutes the public interest.

ACMA now refers to these guidelines when reporting on privacy-related investigations of code compliance. For example, in an investigation completed in 2006, ACMA noted that although the Commercial Television Code of Practice does not define 'identifiable public interest', the issue is considered in the Broadcasting Privacy Guidelines.¹⁸

Being a flexible tool, it is open to ACMA to review these guidelines in consultation with industry to provide assistance in interpreting the privacy requirements of codes of practice in relation to current privacy issues in broadcasting.

and non-government organisations based within the UK as well as externally. ACMA was a contributor as well as the National Center for Missing and Exploited Children in the United States. Industry was represented by both local and global providers.

Acknowledging that the internet industry is very diverse, ranging from large global providers to small local services, the Social Networking Guidance states that the assistance it provides is not 'one size fits all'.²² Nonetheless, the document usefully attaches a summary of the relevant (UK) law and provides a check list of matters for providers to consider.

Risks faced by users, particularly children, are common irrespective of their location or the service they are using. These risks are outlined in the Social Networking Guidance. For example, it is noted that children are often unaware of the sometimes unintended audience for their online posts or of their capacity to hide certain information about themselves. As with the Broadcasting Privacy Guidelines, case studies are used to increase the impact of the message.

The Social Networking Guidance provides recommendations for good practice, including (in Part 2) that:

- language and terminology should be accessible, clear and relevant for users;
- providers should make safety information easily accessible, especially during the registration process—for example, reminders to users that they are not anonymous and can be traced through their IP address;
- care be taken about mapping user information from registration straight over to a user's profile;
- 'ignore' functions and the ability to remove friends and tools to review and remove comments be built in;
- defaults be set to private; and
- there be robust complaint handling procedures.

Providers of social networking sites are also reminded to be sensitive to the context in which sites for young users are presented to avoid inappropriate juxtaposition of images and text suitable only for adults with young users' profiles and inappropriate advertising.

Conclusion

In the discussion paper preceding the Privacy Report, the ALRC had indicated that it did not propose regulation of social networking. Rather, it had suggested that children young people, teachers and parents should be educated about social networking websites.²³

While describing the UK Social Networking Guidance as "a useful global initiative that may have an impact [on] the way in which this industry develops", the report notes that initiatives like this are unlikely to stop curious children from making bad privacy choices on the internet.²⁴

Similarly, guidelines in the broadcasting sector may not always prevent breaches of the

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social life and work opportunities. While noting that, on many occasions, there will be no easy answer, Ms Maddock hoped that the Broadcasting Privacy Guidelines would help raise media and public awareness of the issues.

The Broadcasting Privacy Guidelines were developed with extensive input from broadcasters; in particular, the industry groups Free TV Australia, Commercial Radio Australia and the Australian Subscription Television and Radio Association.

This is consistent with the co-regulatory system established by the *Broadcasting Services Act 1992* (Cth), under which industry groups develop regulation in consultation with ACMA.

As noted in the Privacy Report:

[a]s well as prescribing positive steps for compliance, guidance can be phrased in the negative and set out what will not be sufficient in order to achieve compliance with a principle.¹⁷

As such, the Broadcasting Privacy Guidelines outline steps that can be taken in production to avoid breaches of the codes (for example, avoiding sequences showing a subject's face, which may disclose their identity even where their name is not mentioned; and, using 'pixellation' so that footage can still be used without disclosing identity). The Broadcasting Privacy Guidelines include a number of case studies which emphasise the potential impact of privacy violations by the media in a way that is not possible in a document that contains rules alone.

In practical terms, the Broadcasting Privacy Guidelines assist broadcasters to make judgements about:

The Benefits of Guidance for Online Social Networking

Regulation of online social networking needs to assist both the user (through education) and the provider of social networking services to protect privacy.

Unlike the domestically based broadcasting industry, although providers of online social networking services often have an Australian presence, they usually deliver many of their services from outside Australia. Service delivery arrangements can be complex. These services are usually bound to comply with a matrix of legal obligations imposed by many jurisdictions. In these circumstances, guidelines may provide a flexible and useful tool that may be deployed across jurisdictions.

In the Privacy Report, the ALRC found that online social networking raises two main privacy concerns:

- The extent to which young people should be able to choose to disclose information about themselves online.
- The ability of third parties to post, alter or remove personal information about others in the online environment.¹⁹

While this article does not deal in detail with the regulatory options proposed by the ALRC for online social networking, it is worth noting that the Privacy Report does describe as a 'useful global initiative'²⁰ the United Kingdom (UK) Home Office *Good practice guidance for the providers of social networking and other user interactive services 2008* (**Social Networking Guidance**).²¹

As with the Broadcasting Privacy Guidelines, the Social Networking Guidance was developed cooperatively by government, industry

privacy provisions in the broadcasting codes of practice. However, guidelines in both sectors are likely to assist in establishing systems to prevent privacy violations. As with educating the providers of social networking sites, guidelines and the proposed media standards template can perform a valuable educative role for media providers.

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(Endnotes)

- 1 'Recommendation 42–3 The Privacy Act should be amended to provide that media privacy standards must deal adequately with privacy in the context of the activities of a media organisation (whether or not the standards also deal with other matters)'. Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (The Privacy Report), Vol 2, p 1471.
- 2 The Privacy Report, Vol 2, p 1468.

3 'Recommendation 42–4 The Office of the Privacy Commissioner, in consultation with the Australian Communications and Media Authority and peak media representative bodies, should develop and publish:

- (a) criteria for adequate media privacy standards; and
 - (b) a template for media privacy standards that may be adopted by media organisations'.
- The Privacy Report, Vol 2, p 1471.
- 4 The Privacy Report, Vol 2, p 1469.
- 5 ACMA, *Privacy Guidelines for Broadcasters*, http://www.acma.gov.au/webwvr/assets/main/lib100084/privacy_guidelines.pdf.
- 6 Karen Curtis, Privacy Commissioner, *Presentation to the Australian Communications and Media Authority's Information Communications Entertainment Conference*, 23 November 2006, p 9, http://privacy.gov.au/news/speeches/sp07_06.doc.
- 7 Australian Press Council, *Privacy Standards for the Print Media*, http://www.presscouncil.org.au/pcsite/complaints/priv_stand.html.
- 8 The Privacy Report, Vol 2, pp 1458–1459.
- 9 In the Privacy Report it is noted that '[g]uidance is the third part of the regulatory approach adopted by the ALRC. It should be seen as sitting at the base of the regulatory model, in the sense that it is non-binding and, unlike primary and subordinate legislation, does not set out rules or obligations'. Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*. The Privacy Report, Vol 1, p 246.
- 10 For example, Communications Alliance's *Telecommunications Consumer Protections Industry Guideline (G631: 2007)*, released on 18 May 2008 with the registration by the Australian Communications and Media Authority of the *Telecommunications Consumer Protections*

Code C628: 2007. Available at <http://www.commsalliance.com.au/documents/guidelines/G631>.

- 11 For example, the ACMA's *Privacy Guidelines for Broadcasters*.
- 12 The Privacy Report, Vol 1, p 235.
- 13 The Privacy Report, Vol 1, p 235.
- 14 Citing Dr Christine Parker: '... the first step of compliance-oriented regulation is 'providing incentives and encouragement to voluntary compliance and nurturing the ability for private actors to secure compliance through self-regulation, internal management systems, and market mechanisms where possible'. The Privacy Report, Vol 1, p 238.
- 15 The Privacy Report, Vol 3, p 2249.
- 16 Lyn Maddock, *Launch of ACMA Privacy Guidelines for Broadcasters: Speech by Lyn Maddock, Act Chair*, 23 August 2005, <http://www.acma.gov.au/webwvr/aba/newspubs/speeches/documents/23aug05-lmaddock-privacyguidelines.rtf>.
- 17 The Privacy Report, Vol 1, p 248.
- 18 ACMA Investigation Report 1813, http://www.acma.gov.au/webwvr/assets/main/lib101072/tnt-report_1813.pdf.
- 19 The Privacy Report, Vol 3, p 2238.
- 20 The Privacy Report, Vol 3, p 2250.
- 21 *Good practice guidance for the providers of social networking and other user interactive services 2008 (Social Networking Guidance)*, developed on behalf of the Task Force on Child Protection on the Internet, <http://police.homeoffice.gov.uk/publications/operational-policing/social-networking-guidance>.
- 22 Social Networking Guidance, p 10.
- 23 The Privacy Report, Vol 3, p 2246.
- 24 The Privacy Report, Vol 3, p 2250.

A Question of Malice

Chris Chapman provides a case note on *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 which considered the requirements of publication and malice in an action for injurious falsehood.

The introduction of the uniform defamation laws definitively removed the right of a corporation with more than 10 employees to bring an action in defamation. As a result, a corporation which has its products or business publicly attacked must turn to other causes of action if it wishes to rely on the courts for assistance in defending such an attack. One cause of action which may be relied upon is an action for injurious falsehood.

Injurious falsehood is often viewed as related to defamation and it has previously been referred to as 'slander of goods'.¹ But there is a dearth of decided injurious falsehood cases in Australia, especially at the appellate level,² resulting in uncertainty as to the appropriate tests when seeking to establish a case. Decided in the middle of 2008, the decision in *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor*³ (***Australand v TACI***) addresses the appropriateness of applying tests for publi-

cation and malice from the law of defamation to an action for injurious falsehood. The result was that, despite being characterised as an action for 'slander', proving a case for injurious falsehood requires meeting a different standard than is required in defamation actions.

Background – Injurious Falsehood

In the 1892 decision of *Ratcliffe v Evans*⁴ Bowen LJ described the availability of an action as:

That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage is established law. Such an action is not one of libel or slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse,

*analogous to an action for slander of title. To support it actual damage must be shown, for it is an action which will only lie in respect of such damage as has actually occurred.*⁵

The availability in New South Wales of the action described in *Ratcliffe v Evans* was confirmed by Hunt J in *Swimsure (Laboratories) Pty Limited v McDonald*⁶ where His Honour described the action for injurious falsehood as:

*an action on the case at common law consisting of a statement of and concerning the plaintiff's goods which is false (whether or not it is also defamatory of the plaintiff) published maliciously and resulting in actual damage.*⁷

Kirby J described the cause of action as having seven elements in *Palmer Bruyn & Parker v Parsons*,⁸ but agreed with Gummow J that the essential elements are: (1) a false statement (2) made maliciously (3) of or concerning the plaintiffs' goods or business that (4) results in actual damage.⁹

For the purposes of the decision in *Australand v TACI*, McCallum J relied on Gummow's formulation of the required elements¹⁰ but that did not resolve the questions of what, in the context of an action for injurious falsehood, the appropriate test for publication is; nor did it address the question of the