

Office of the Privacy Commissioner submission on Broadcasting Code Review Consultation

Introduction

- 1 The Office of the Privacy Commissioner (OPC) welcomes the opportunity to provide a submission on the Broadcasting Standards Authority's (BSA) proposed changes to the Broadcasting Standards Codebook. Our submission focuses on the questions in the BSA's consultation document that relate to privacy.
- 2 OPC notes that the BSA proposes to combine the existing codes for pay TV, free-to-air TV and radio into a single code. We agree that it makes sense to do so.
- 3 The ability to complain to the BSA about breaches of broadcasting standards for the protection of individual privacy plays an important role in the legal framework for privacy protection. The BSA's privacy standard and complaints process allows privacy issues in the broadcast media to be considered in an accessible forum that gives appropriate consideration both to individual privacy and to the public interest.
- 4 The BSA's jurisdiction also helps to fill a regulatory gap that would otherwise be created by the exclusion of news entities in their news activities from the coverage of the Privacy Act 2020. The news media exemption from the Privacy Act applies only to news entities that are subject to the oversight of the BSA or another regulator.¹

Key points

- 5 OPC has the following key comments on the proposed changes to the Code:
 - The proposal to revise the guidelines to the privacy standard to remove the 'highly offensive' element and instead consider offensiveness as part of assessing the 'reasonable expectation of privacy' appears to anticipate future developments in New Zealand privacy law. OPC is comfortable with this proposal, so long as the offensiveness element is adequately covered in the discussion of reasonable expectation of privacy.
 - OPC notes that currently the BSA has more detailed privacy guidance in the Codebook, in addition to the privacy standard and its guidelines. OPC considers there is value in retaining elements of the privacy guidance that are not currently reflected in the draft privacy standard and guidelines.
 - OPC believes the guidelines to the privacy standard should more fully address collection of information as well as its use and disclosure.

¹ Privacy Act 2020, s 8(b)(x), and definitions of 'news activity' and 'news entity' in s 7(1).

- OPC proposes some changes to the discussion of reasonable expectation of privacy in the draft guidelines.
- OPC supports the draft policy on third-party privacy and fairness complaints.
- OPC proposes some changes to the draft policy on complainant name suppression.

Privacy

Q12: Recognising privacy law developments, guidelines to the privacy standard have been amended to remove the requirement that private information be disclosed in a way that is ‘highly offensive to an objective reasonable person’. Factors that might previously have been considered in assessing offensiveness, are considered when assessing the ‘reasonable expectation of privacy’. Do you support this and, if not, why?

- 6 Developments in privacy law are given as the reason for removing the ‘highly offensive’ test from the guidelines to the privacy standard. The Court of Appeal has recently posited that the privacy tort may well benefit from re-examination and that there are strong arguments for removing the ‘highly offensive’ requirement. However, it found that the case before it was not a suitable vehicle for the reform it was being asked to take.² As such, while there is no longer a separate ‘highly offensive’ test in English privacy law, that position has not yet been adopted by New Zealand courts.
- 7 It is also worth noting that a ‘highly offensive’ test is used as a jurisdictional limit in the Privacy Act 2020. In particular, the Privacy Act does not generally apply to an individual’s conduct of their own personal affairs. Provided that the collection is lawful, and the action is ‘solely’ for the individual’s personal or domestic affairs, the Privacy Act is not engaged **unless** the collection, use, or disclosure of the personal information would be highly offensive to a reasonable person.³
- 8 However, OPC would be comfortable with removing the ‘highly offensive’ element of the guidelines to the privacy standard, so long as the discussion of reasonable expectation of privacy adequately covers the element of offensiveness. Our further comments on the draft privacy guidelines below are made with this point in mind.

Status of the current privacy guidance in the Codebook

- 9 It would be helpful to know whether the BSA proposes to revise the additional guidance on privacy currently contained in the BSA Codebook, or whether the new privacy standard and guidelines replace that guidance. Some, but not all, elements of the guidance have been incorporated in the proposed guidelines to the standard.⁴

² *Hyndman v Walker* [2021] NZCA 25.

³ Privacy Act 2020, s 27.

⁴ We refer to the further guidance set out here, below the privacy standard and guidelines: <https://www.bsa.govt.nz/broadcasting-standards/resources/privacy-standard-and-guidance/>.

10 We have noted in our comments below some specific points from the privacy guidance that could be included in the guidelines to the standard. In addition, the following topics are covered in greater detail in the guidance than in the draft guidelines:

- informed consent
- legitimate public interest
- intrusion upon solitude or seclusion.

OPC considers that this content (with any appropriate amendments) could usefully be incorporated into the guidelines to the standard, or retained as separate guidance.

Scope of the privacy standard: collection of information

11 At 7.1, the draft guidelines state that ‘The privacy standard applies only when private information or material is disclosed about identifiable living individuals.’ The standard focuses on disclosure, but the means by which information is collected also have important privacy implications.

12 In a letter dated 24 August 2021, the then Privacy Commissioner submitted a complaint about a breach of the BSA Radio Code’s privacy standard by Radio New Zealand, concerning the broadcast of information obtained from data stolen by unknown persons in a cyber attack and made available on the ‘dark web’. The BSA is still considering this complaint, and we make no further comment on it in this submission. However, the Privacy Commissioner’s letter raised an issue concerning the scope of the privacy standard, which is relevant to the current Code review.

13 The Commissioner noted that the Privacy Act covers the collection of personal information as well as its use and disclosure. A news entity in carrying on news activities is exempt from the coverage of the Privacy Act. However, in exchange for this exemption from the Privacy Act, the news media is expected to be subject to appropriate privacy standards through the BSA or another regulator. OPC considers that media privacy standards must protect individuals against unethical collection practices, as well as against unwarranted disclosure of private information. As the Commissioner noted in his letter, collection of information alone is enough to cause significant harm to individuals.

14 We therefore recommend that the BSA consider how the privacy guidelines can be amended to better cover issues of collection of information by broadcasters, beyond the issues of misrepresentation or deception covered by the fairness standard. Collection should be a privacy consideration in its own right, and it should be possible for the BSA to consider the impact of collection that intrudes on reasonable expectations of privacy separately from the impact of any broadcast of material obtained through that collection.

15 We note that issues of collection are covered to some extent under guideline 7.6 and under the fairness standard (see particularly guideline 8.7 to that standard in the current consultation draft). However, these guidelines have some limitations.

- 16 Draft guideline 7.6 provides that a broadcaster should not intentionally intrude upon a person's solitude or seclusion in a way that is inconsistent with a reasonable expectation of privacy. This provides some coverage of intrusive methods of gathering information, but does not address other collection methods which engage privacy interests. Collecting personal information that is known to be product or subject of a cyber attack, privacy breach or breach of confidence clearly engages privacy interests and can lead to significant harm. While we recognise that there may be competing interests, the standard includes a defence of public interest which provides a balance between the personal and public interests that may be engaged.
- 17 Guideline 8.7 (which is unchanged from the current Code) covers misrepresentation or deception, but not other forms of unreasonably intrusive collection.
- 18 We also note that there is a reference in one of the 'reasonable expectation of privacy' factors listed at draft guideline 7.3 to 'the means by which the information was gathered'. However, this factor still relates only to 'the content disclosed', rather than treating collection as a privacy issue distinct from disclosure. The guidelines would also benefit from spelling out more clearly the 'means' that are likely to be inappropriate for gathering information (see para 6.1 of the privacy guidance in the current BSA Codebook).
- 19 The BSA could consider whether elements of information privacy principle 4 of the Privacy Act could be a useful point of comparison for thinking about collection issues in the broadcasting context. OPC would be happy to assist the BSA in any further consideration of collection issues.

Reasonable expectation of privacy

- 20 OPC is generally comfortable with the factors listed at 7.3 to be considered when deciding whether there is a reasonable expectation of privacy. However, we query the factor 'whether the individual has made efforts to protect their privacy'. A person should not need to make special efforts to protect their privacy in order to have their privacy protected. We also suggest that disclosure for the purpose of harassment, referred to in the current privacy guidance in the BSA Codebook, could be included as a factor at 7.3.
- 21 At 7.5, the draft guidelines discuss reasonable expectations of privacy in a public place. We have two suggestions here:
- The draft defines a public place as one 'generally accessible to, and/or in view of, the public'. We suggest that 'and/or' should be 'and'. People can have reasonable expectations of privacy in a place, such as a private home or garden, where it may be possible for the public to see them but which is not generally accessible to the public.
 - Draft guideline 7.5 sets out a number of circumstances in which an individual may be particularly vulnerable, so as to give rise to a reasonable expectation of privacy even in a public place. We suggest that the BSA consider whether, in some circumstances, a person may have a reasonable expectation that they will not be recorded engaging in an intimate activity, even in a place that can be

seen by the public. This is particularly relevant if the BSA does not accept our previous suggestion that a public place should be defined as one that is not only viewable by but also accessible to the public. Otherwise, there is a danger of voyeuristic recording and broadcasting of intimate activity that an individual would not realistically expect to be recorded. We acknowledge that this is a complex and highly contextual issue, and would be happy to discuss it further with the BSA.

- 22 At 7.6, the existing guideline dealing with intrusion on solitude or seclusion has been redrafted to refer to intrusion that is inconsistent with a reasonable expectation of privacy rather than one that is highly offensive. Removing the ‘highly offensive’ requirement for intrusion and focusing on reasonable expectation of privacy appears to be more protective of privacy. However, OPC suggests that the factors for assessing a reasonable expectation of privacy be reviewed to ensure they are relevant in the intrusion context. It could also be helpful to bring the discussion of intrusion on seclusion from the current privacy guidance into the updated guidelines. OPC would be happy to discuss this matter further with the BSA.

Defences

- 23 OPC has no specific comments on the defences of legitimate public interest and consent, but we note that these topics are discussed in significantly more detail in the current privacy guidance in the BSA Codebook.

Commentary

- 24 The draft commentary notes that expectations of privacy vary with time, culture and technology. OPC agrees, and notes in particular the need for further exploration of different cultural attitudes to privacy. This is an area that OPC itself will be exploring further, particularly in relation to Māori perspectives on privacy. We currently have no specific suggestions for inclusion in the draft standard, but we would expect culture to be taken into consideration when assessing the factors relevant to reasonable expectations of privacy. There may be opportunities for OPC to partner with the BSA to explore cultural perspectives on privacy.

Other

Q13: The BSA is reviewing its policy on third-party privacy and fairness complaints. A draft is set out, below, in Appendix A. Do you have any issues with or suggestions for this policy?

- 25 OPC supports the draft policy on third-party privacy and fairness complaints, and has no changes to suggest.

Q14: The BSA is reviewing its policy on complainant name suppression (as set out, below, in Appendix B). Do you have any issues with or suggestions for this policy?

- 26 OPC has the following suggestions for changes to the draft policy on complainant name suppression. These comments relate to the factors set out at para 4 of the draft:
- Reference to publication causing 'specific adverse consequences' for the complainant. It could be helpful to specifically state that such adverse consequences could include a realistic prospect of significant harassment, either in person or online.
 - Reference to 'whether publishing the decision, including the complainant's identity, is appropriate or necessary to effectively remedy harm caused to them'. It is hard to see how publication of the complainant's identity could help to remedy harm caused to them if the complainant has asked for their name to be suppressed.
 - The age and vulnerability of the complainant (particularly whether the complainant is under the age of 16) should be a factor for consideration.

Q15: Do you have any other feedback on the Draft Codebook?

- 27 As noted above, OPC thinks there is value in the more detailed privacy guidance in the current Codebook, and we would appreciate hearing from the BSA about whether the guidance is to be revised following revision of the privacy standard and guidelines.

Conclusion

- 28 We would be happy to discuss our submission with the BSA, and have noted at paras 19, 21 and 22 some particular matters on which we may be able to assist the BSA.