

Australian Broadcasting Corporation

Submission to the

**Senate Environment and Communications
Legislation Committee**

**Inquiry into the National Broadcasters
Legislation Amendment (Enhanced
Transparency) Bill 2017**

February 2018



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Executive Summary

- The stated objective of the Bill is to establish greater salary expenditure transparency for the national broadcasters and in doing so also address potential gender pay equity issues.
- The Bill sets out that this will be achieved by compelling the national broadcasters to report personal details, including names and remuneration, of individuals who receive salaries above an arbitrary threshold.
- This level of disclosure exceeds the 2017 remuneration reporting guidelines for Commonwealth agencies and Commonwealth companies as established by the Department of Prime Minister and Cabinet.
- The ABC complies with the Commonwealth remuneration reporting guidelines and also meets commercial media industry and private sector salary disclosure reporting requirements, as set out in the *Corporations Act 2001*.
- The ABC is of the view that the remuneration transparency measures the Corporation has taken appropriately address the stated objectives of the Bill.
- The ABC is also of the view that the provisions contained in the Bill unnecessarily impinge on individual privacy, are disproportionate to the stated objectives of the proposed legislation, sanction unreasonable levels of scrutiny on individuals and have potential to adversely affect the expenditure of public funds.

Introduction

The ABC welcomes the opportunity to make this submission to the Senate Environment and Communications Legislation Committee's inquiry into *The National Broadcasters Legislation Amendment (Enhanced Transparency) Bill 2017 (the Bill)*. The Bill, introduced by the Minister for Communications and the Arts, Senator the Hon Mitch Fifield, proposes to amend the *Australian Broadcasting Corporation Act 1983 (the ABC Act)*, requiring the Corporation to include additional information in its annual report setting out the:

- name, position and total salary and allowances of any individual employee paid over a threshold amount, which will commence at \$200,000 and then be indexed annually.
- total amount paid and name of each individual who is party to one or more on-air contracts if the amount in the reporting period is more than a threshold amount, which will commence at \$200,000 and then be indexed annually.

As set out by Minister Fifield in the second reading speech, the objective of the Bill is to:

“provide more transparency in how the broadcasters allocate Government funding in relation to remuneration for staff and on-air talent. This measure not only provides transparency in the allocation of funding but will also provide for the comparison of remuneration between male and female employees and on air-talent.”¹

The ABC fully supports transparency and accountability in the expenditure of public money. As such, the Corporation has taken action to deliver the most transparent level of remuneration reporting of any publicly-funded entity in Australia, and further, provides detailed remuneration reporting in line with the private sector.

The ABC has considered the stated aims of the proposed legislation and is of the view that the provisions included in the Bill do nothing to contribute to those aims, are onerous, exceed best practice in the public and private sectors, and will prove counter-productive.

This submission addresses in detail the stated rationale for the imposition of these reporting obligations, sets out the inherent flaws in that rationale and establishes why the ABC strongly opposes the enactment of this Bill. In summary, the ABC's opposition to the Bill is that:

- Not only does the ABC already comply with Commonwealth corporate governance legislative requirements and recommended Commonwealth guidelines for salary disclosure, but also meets private sector remuneration reporting practice, making the transparency rationale obsolete.
- It is not necessary for an organisation to publish personal salary information to be able to report on gender pay.

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<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F3c0ea04b-bee9-4c09-9a7d-92d71100e212%2F0157%22>

- There is no cogent reason why amongst Commonwealth tax-payer funded entities, only the public broadcasters should be compelled to fulfil these statutory reporting obligations.
- The right to individual privacy is paramount in Australian society and should only be compromised when there is clear public interest. No reasonable public interest case has been substantiated for this proposed legislation.

Formation of the Bill

On 15 August 2017, Senator Pauline Hanson announced that One Nation had given conditional support for the passage of the Government's Media Reform Bill through the Senate in exchange for the enactment of various measures, including a number that specifically focus on the ABC.² The Minister for Communications and the Arts, Senator the Hon Mitch Fifield, confirmed later that day the Government would introduce the measures sought by One Nation in return for their vote in the Senate.³

In setting out the perceived necessity for disclosure of individual salary information by the national broadcasters, the Minister stated that it would increase transparency of the remuneration of senior staff and on-air talent, similar to the obligations imposed on the British Broadcasting Corporation (**BBC**) in 2017. Minister Fifield also stated that if the ABC and SBS did not agree to implement this government policy, then they would be forced to do so through the introduction of legislation, consequently drafted in the form of the Bill currently before this Inquiry.

Under Subsection 8(2) of the ABC Act, the ABC Board is required to take consideration of any Commonwealth Government policy furnished by the Minister. The ABC Board considered the Government's national broadcaster salary disclosure policy in the context of the current reporting required of the ABC, additional voluntary remuneration reporting established by the ABC Board, comparative salary disclosure practices required of government agencies and commercial entities, and potential detrimental effects of the policy that may have not been considered in its drafting.

In evaluating these factors, the ABC Board determined that the policy was unwarranted and counter-productive, and that the ABC would continue to disclose salary information consistent with applicable laws and existing practices. In response to the decision, on 6 December 2017 Minister Fifield introduced this Bill to the Senate.

In this submission the ABC will give evidence that the Corporation already provides greater transparency than any other government agency in relation to the reporting of employee remuneration. The ABC also believes that drawing a correlation between the publication of personal details and individual salary information and the pursuit of gender pay equity is flawed and misguided, and further, that the Bill is legislative overreach, with individual right to privacy

² <https://shop.onenation.com.au/blogs/labor-ldp-plan-to-burn-cane-growers/one-nation-gives-conditional-support-to-media-reform>

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http://www.minister.communications.gov.au/mitch_fifield/news/one_nation_support_for_media_reform_package#.WjM5nIWWZaQ

diminished without reasonable justification. As this Bill is neither in the public interest nor leads to any greater corporate governance, the ABC is of the view that the only intended outcome it actually achieves is the fulfilment of the Government's agreement with One Nation.

Transparency and Accountability

In setting out the principles for the Bill, the Explanatory Memorandum states:

“These amendments are primarily intended to increase the financial reporting transparency of the national broadcasters. The measures will complement the Government's existing policy that public agencies and entities should be transparent in how Commonwealth funding is allocated and spent.”⁴

The ABC agrees that transparency and accountability are the cornerstones of good governance in the expenditure of taxpayer funds. As a corporate Commonwealth entity, the ABC operates under the *Public Governance, Performance and Accountability Act 2013* (**the PGPA Act**). The PGPA Act sets the standards of governance, performance and accountability for all Commonwealth entities and as such, charges the ABC Board and Executive with specific accountability measures, including the preparation of financial statements, the disclosure of directors' interests, and the publication of annual reports.

In terms of salary disclosure, the ABC complies with the Executive Remuneration Reporting Guidelines established for Commonwealth departments, entities and companies by the Department of Prime Minister and Cabinet in 2017. Under these guidelines Commonwealth departments, entities and companies disclose executive remuneration information in bands of \$25,000 increments, detailing the number of executives in each band only. There is no requirement to disclose individual remuneration information under these guidelines.

The guidelines also set out the remuneration reporting of other 'highly-paid' employees, commencing at a threshold of \$200,001, and reporting the number of these employees within each \$25,000 incremental band only. Again, under the guidelines there is no requirement to reveal the individual names or individual remuneration of these employees. Examples of government department reporting under these guidelines are available from the websites of The Department of Prime Minister and Cabinet⁵ and the Department of Communications and the Arts.⁶

The Explanatory Memorandum to the Bill also states:

“The proposed reporting requirement is targeting the highest paid employees and on-air talent. In the case of the ABC, together these employees represented just over three per cent of total staff as at 30 June 2017. By definition, this cohort consumes a disproportionately higher slice of overall employee expenditure than lower tiers of employee.”⁷

⁴ https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=s1111

⁵ <https://pmc.gov.au/who-we-are/accountability-and-reporting/executive-remuneration>

⁶ <https://www.communications.gov.au/documents/senior-executive-remuneration-range-2016-17>

⁷ https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=s1111

It is notable that in 2016-17, approximately 6.5 per cent of Department of Prime Minister and Cabinet employees and 6.5 per cent of Department of Communications and the Arts employees fell within the Commonwealth reporting guidelines, compared to 3 per cent of ABC employees.

Further to the ABC's compliance with the Commonwealth guidelines, as the ABC Board advised Minister Fifield in November 2017, and prior to the introduction of this Bill, the ABC committed to additional remuneration reporting from January 2018 that aligns with standards in the private sector as set out in the *Corporations Act 2001* (**the Corporations Act**). This additional reporting discloses on an annual financial year basis the total remuneration paid to Key Management Personnel (**KMP**).

Under s300A of the Corporations Act, listed companies must present a remuneration report to shareholders at each Annual General Meeting, disclosing the board's policies for determining the nature and amount of remuneration paid to KMP. The definition of KMP is derived from Accounting Standard AASB124. Relevantly, it is limited to:

"persons having authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (executive or otherwise)..."

The Seven West Media 2017 Annual Report provides an example of this practice in the private sector media industry, where the only publication of individual names and remuneration is in respect to KMP and there is no public disclosure of the remuneration of other employees.⁸

The ABC's disclosure of salaries under the Executive Remuneration Reporting Guidelines and the additional reporting in alignment with private sector practices are published on the ABC website.⁹

In considering the additional salary disclosure required of the ABC in this proposed legislation, it is noteworthy that:

- The ABC furnishes the highest level of salary disclosure transparency of any taxpayer funded agency.
- The ABC meets the salary disclosure standards required of Australian commercial media and other listed private sector companies as set out in the *Corporations Act 2001*.
- The salary disclosure obligations that would be required under this proposed legislation not only exceed Australian government guidelines, but established disclosure practice required of private sector entities.

When questioned in the Additional Senate Estimates hearing on 27 February 2018 as to why the public broadcasters should be compelled to disclose a greater level of salary detail than government departments or other Commonwealth companies such as the NBN Co, Minister Fifield stated that:

⁸ <http://www.sevenwestmedia.com.au/assets/pdfs/2017-Annual-Report.PDF> P.78

⁹ <http://about.abc.net.au/how-the-abc-is-run/what-guides-us/remuneration-disclosure-log/>

*"I think there's a particular public interest in ABC and SBS as media organisations."*¹⁰

It is unclear what public interest is achieved in singling out specific Commonwealth agencies for additional disclosure requirements purely because they are media organisations, apart perhaps from satisfying some perceived public curiosity about the salaries of recognisable on-air talent.

In his second reading speech, Minister Fifield also drew a comparison between the existing salary disclosure for parliamentarians, ministers of the Crown, judges, and senior public servants and military officers, and the disclosure regime established for the national broadcasters by this Bill.¹¹

The ABC notes that the salaries of these positions are set by the Remuneration Tribunal, and in the case of senior military personnel, the Defence Force Remuneration Tribunal, and are applied to the positions, rather than individuals as required under this Bill. In terms of public servants, the Remuneration Tribunal only determines the pay structure of the departmental Secretary. It should also be noted that as a Principal Executive Officer, the salary of the position of Managing Director of the ABC is also set by the Remuneration Tribunal¹² and disclosed accordingly, as well as through the ABC's voluntary KMP remuneration disclosure process.

The ABC is of the view that there is no equivalence between the salary disclosure that occurs as part of the Remuneration Tribunal process and the disclosure of personal salary information that would be captured through this proposed legislation.

The ABC contends that the prescriptive measures that would be established by this Bill are both unwarranted, as the ABC already meets the highest levels of transparency, and unprecedented, setting disclosure levels beyond those required in law by any other organisation in Australia, taxpayer funded or otherwise.

Gender Pay Equity

As a publicly-funded organisation and one that is obliged to reflect and engage with the whole Australian community, the ABC prioritises equity for, and diversity of, its workforce. In terms of gender, this includes specific targets for equal representation of women at senior levels of the organisation and gender pay equity across the Corporation.

In accordance with this objective, the ABC conducted its first gender pay analysis in May 2017. The analysis found that there is no pay gap unfavourable to women at any level in the ABC. Further, the ABC also notes that five of its seven board members are female (noting one

¹⁰ http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/e7a8364f-1f69-4a4b-9f10-70eef15e6814/toc_pdf/Environment%20and%20Communications%20Legislation%20Committee_2018_02_27_5938.pdf;fileType=application%2Fpdf#search=%22committees/estimate/e7a8364f-1f69-4a4b-9f10-70eef15e6814/0000%22 P. 63

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<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F3c0ea04b-bee9-4c09-9a7d-92d71100e212%2F0157%22>

¹² <http://www.remtribunal.gov.au/offices/principal-executive-offices/principal-executive-office-background>

government appointed board position and the staff-elected board position are currently vacant), 49 per cent of ABC senior executive is female and 51 per cent of the general workforce is female. The ABC also notes that 44 per cent of Australian Public Service (APS) secretaries and 44 per cent of APS senior executive service employees are female.

While the ABC's female representation at senior levels is higher than that of the APS, it is notable that of all Commonwealth agencies, only the national broadcasters have been compelled to disclose individual remuneration.

In rationalising the need to publish individual salary details, the Explanatory Memorandum to the Bill states:

*"The publication of de-identified and potentially aggregate information about these employees' and salaries and allowances, and the payments made to contractors in key on-air roles, is considered inadequate because it would not provide the transparency required to not only allow the public to see how its money is being spent, but also in identifying if there is a gender salary gap across similar roles or level of talent."*¹³

The ABC contends that there is no direct correlation between the publication of individual names and salaries and the identification of gender pay gaps, and the disclosure of this level of personal information is not necessary for an organisation to be transparent about its gender pay equity. This objective can be met by the de-identified reporting of this data.

In its February 2018 report, the Parliamentary Joint Committee on Human Rights also noted that the stated objective of the Bill in identifying gender pay equity does not require the disclosure of individual salaries:

*"While the minister explains that de-identified and aggregate information would be insufficient to determine how the ABC and SBS are spending their money and to identify any gender salary gap, it is not clear from the statement of compatibility why this should be the case. There appear to be other, less rights-restrictive, measures available that would be sufficient to allow members of the public to hold the national broadcasters accountable for how they spend public funds, without limiting the right to privacy of employees and on-air talent. For example, de-identified or anonymised information as to the number of employees and on-air talent earning over certain amounts, such as setting out the number of employees paid more than a certain amount in pay bands, would also reveal how the ABC and SBS are spending public money."*¹⁴

As indicated previously in this submission, the ABC is committed to the regular reporting and monitoring of gender pay equity.

¹³ https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=s1111

¹⁴ https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=s1111
P.52

Further, the ABC notes that organisations such as Australia Post have been able to achieve gender pay equity without the onerous administrative requirements and impingement on personal information prescribed in this Bill.¹⁵

Comparisons with the BBC

The ABC believes the assertions that the enactment of this Bill will both enhance transparency and promote gender equity are without basis and the measures the ABC has taken already achieve the positive outcomes intended by the proposed legislation. A supplementary rationale for the introduction of this Bill is that the BBC is now compelled to disclose individual remuneration details, and so should Australia's national broadcasters. As the Minister stated in the second reading speech:

“Similarly, the British Broadcasting Corporation (BBC) publishes information in its annual report on the names of all senior executives of the BBC paid more than 150,000 pounds from licence fee revenue in that financial year. In addition, the names of all other staff of the BBC paid more than 150,000 pounds from licence fee revenue in that financial year is set out in pay bands.”

The ABC notes that the BBC opposed this new disclosure regime on the grounds it would undermine its ability to compete for talent and would also create an inflationary salary environment. In response to the legislated requirement to disclose individual salaries, BBC Director General Tony Hall stated:

“It's pushing wages up at a time when we're bringing down costs, and undermining the competitiveness of the BBC.”¹⁶

The ABC is also of the view that the disclosure of individual remuneration proposed under the *National Broadcasters Legislation Amendment (Enhanced Transparency) Bill* has significant potential to lead to wages pressure for the Corporation. These concerns are magnified even more for the ABC than the BBC as it is a considerably smaller player in the Australian media market than the BBC is in Britain, receiving approximately one-third of the BBC's funding on a per capita basis. Comparatively, this makes the ABC much less able to retain talent than the BBC can in its domestic market.

Privacy implications

In the context of privacy concerns, the Explanatory Memorandum to the Bill states that:

“The publication of the names, positions and combined amount of salary and allowances paid to employees, and equivalent information for on air talent, is consistent with the prohibition on arbitrary or unlawful interference with a person's privacy, insofar as it is reasonable, necessary and proportionate to achieving the legitimate end sought.”

¹⁵ https://auspost.com.au/content/dam/auspost_corp/media/documents/diversity-and-inclusion-annual-report-2017.pdf P.1

¹⁶ <https://www.screendaily.com/news/bbc-warns-of-talent-pay-inflation/5120146.article>

In establishing the view that the national broadcaster salary reporting disclosure is a necessary and legitimate objective, the Explanatory Memorandum states:

“There is a strong public interest in ensuring the Australian people can scrutinise the spending by publicly funded national broadcasters for the engagement of on-air talent contactors and employees.”

Further, in setting out the rationale for the disclosure of individualised salary information, the Explanatory Memorandum states:

“The publication of de-identified and potentially aggregate information about these employees’ and salaries and allowances, and the payments made to contractors in key on-air roles, is considered inadequate because it would not provide the transparency required to not only allow the public to see how its money is being spent, but also in identifying if there is a gender salary gap across similar roles or level of talent.”

The ABC agrees that the objectives of the Bill are legitimate; that is, to facilitate transparency in the expenditure of public monies and transparency in the reporting of gender pay data. However, the ABC cannot agree that the functions of the Bill achieve the intended outcome or are in any way in the public interest.

As set out in the privacy legislative framework, in order for an interference with the right to privacy to be permissible, the interference must be reasonable, necessary and proportionate to that objective. The ABC does not believe that the Bill meets any of these criteria and this is a case of extraordinary legislative overreach.

Is the Bill in the Public Interest?

While public interest is contextual and not exhaustive, generally it is understood that actions in the public interest will deliver a community benefit or outcome. Certainly, it is commonly understood that what is in the public interest does not always correlate with that which some in the community may find of interest.

The ABC believes that while sections of the community may be curious about the salaries of some on-air employees, there is no evidence of any beneficial public interest outcome by exposing the national broadcasters to a greater level of public scrutiny than any other government agency, company or entity.

This is reinforced by the fact that the ABC already provides the highest level of transparent remuneration reporting to the public of any government agency or corporation. In fact, the enactment of this Bill will be detrimental to the public interest by creating an environment where salaries may rise and the ABC’s ability to attract and retain employees will be undermined.

Is the Bill Necessary to its Objectives?

Previously in this submission it has been established that the ABC already provides the highest remuneration transparency levels required of either the Australian public or private sector, rendering this proposed legislation unnecessary.

Further, the ABC has disproved the assertions that disclosure of individual personal information is in any way necessary to enhance transparency of taxpayer-funded expenditure or transparency of gender pay equity. This view has been reiterated in the report from the Parliamentary Joint Committee on Human Rights, which states that it is not necessary to disclose individual salary information to meet the stated objectives of the Bill.

Is the Bill Proportionate to its Objectives?

In assessing whether the provisions in the Bill are proportionate with the intended outcomes, the Parliamentary Joint Committee on Human Rights also found that:

“concerns arise as to whether the public disclosure of the names and remuneration of employees and on-air talent earning over \$200,000 is proportionate to the legitimate objectives being pursued. Notwithstanding that persons employed or engaged by the ABC and SBS are remunerated for undertaking a public role, disclosure of a person's salary reveals a person's financial standing to the public at large and therefore constitutes a significant intrusion on a person's personal circumstances and private life.”¹⁷

The ABC agrees that the measures established in this Bill impinge on the privacy of individuals and requires the national broadcasters to disclose individual information disproportionate to other public sector agencies, ostensibly on the basis that they are media organisations. Earlier in this submission the ABC established that the Corporation already exceeds public sector salary transparency guidelines and meets commercial media industry and more generally, private sector salary reporting practices.

Is the Bill Reasonable in Meeting its Objectives?

The ABC is subject to Commonwealth privacy legislation and as a result, is unable to disclose personal information unless it is reasonably necessary for a particular purpose, function or activity.

In assessing whether the disclosure of personal information is reasonable, the Explanatory Memorandum to the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* states:

Whether the collection, use or disclosure is reasonably necessary is to be assessed from the perspective of a reasonable person (not merely from the perspective of the entity proposing to undertake the activity).¹⁸

¹⁷ https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=s1111 P. 51-52

¹⁸

http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2F4813_em_s_00948d06-092b-447e-9191-5706fdfa0728%22 P.53

In setting out the reasons why individual salary disclosure takes precedence over individual privacy concerns, the Minister stated in his second reading speech:

“Privacy issues are of course a concern to those who will be affected by this amendment. I appreciate that. However, taxpayers have a right to know how their money is being spent for high profile employees and on-air talent. These individuals occupy significant positions of public trust and so it is reasonable to expect greater transparency of the remuneration arrangements that apply to high-earning individuals at taxpayer-funded broadcasters.”

Further, the Explanatory Memorandum to the Bill reasons that:

“Publication of the employee or individual’s name will allow the Australian public to identify the person and the role they perform, and assess whether the national broadcasters have achieved appropriate value for money in relation to the spending of public monies.”

The ABC does not believe that this rationale is either fair or reasonable, and that rather, its employees should be subject to the same levels of accountability as other publicly-funded employees. Further, the assertion that it should be left to the public to assess whether an individual is delivering value for money in the performance of their role is of considerable concern.

In the case of ABC employees, they are accountable to the public through their line management and ultimately to the ABC Board, which under Section 8 of the ABC Act is charged with ensuring that “that the functions of the Corporation are performed efficiently and with the maximum benefit to the people of Australia”. ABC employees undertake regular performance assessment by management with the skills, knowledge and expertise to assess whether the employee is meeting the requirements of their role. To suggest that this assessment and valuation can be left to the court of public opinion sets an unreasonable burden on ABC employees.

The ABC also notes that in its February 2018 report, the Senate Standing Committee for the Scrutiny of Bills stated its concerns regarding the diminution of individual privacy created by this Bill:

“The committee is concerned that, in publishing the names and remuneration details of ABC and SBS employees and contractors receiving more than \$200,000, the bill impacts on the right to privacy of such persons and may unduly trespass on personal rights and liberties. The committee draws these scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of publishing such details.”¹⁹

The ABC consider that the disclosure regime placed on individuals by this Bill is precisely the situation which the privacy legislation intends to guard against, that it unduly impinges on the privacy of individuals, and is neither necessary, reasonable nor proportionate to the stated objectives of the Bill.

¹⁹ https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=s1111
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Closing comments

It is on the public record that the proposed legislation before this Committee was drafted to fulfil a political agreement rather than in response to any demonstrable accountability issues. In any case, as established in this submission, the ABC's remuneration reporting regime surpasses that expected of publicly-funded entities and meets those expected of commercial media and other private sector companies. In any objective assessment, these measures fulfil the stated aims of the proposed legislation, making this Bill redundant.

Further, this submission has also established that the Bill is deeply flawed. It selectively imposes certain conditions on two statutory authorities without reason, is disproportionate in its weighting of perceived public interest in balance with the right to privacy, exposes individuals to unnecessary public scrutiny and has the potential to undermine the ABC's ability to attract and retain high-performing employees

The ABC is not complacent in its responsibilities as the national public broadcaster and will continue to be accountable to the Australian public. However, the measures proposed in this legislation are ill-conceived and unwarranted, and for these reasons the ABC strongly opposes the Bill.