NSW COUNCIL FOR CIVIL LIBERTIES SUBMISSION

ON

ISSUES PAPER: A COMMONWEALTH STATUTORY CAUSE OF ACTION FOR SERIOUS INVASION OF PRIVACY

General Comments

The NSW Council for Civil Liberties (CCL) applauds the Government's reactivation ofthe discussion on the obvious and pressing need for more effective protections for personal privacy in Australia.

It has been a source of disappointment that the Government has, to date, sidelined the 2008 recommendations of the Australian Law Reform Commission (ALRC) advocating a statutory remedy for serious breach of personal privacy.[1]The publication of this Issues Paper honours the Government's earlier commitment to return to these (and other) recommendations following work on a stage 1 implementation of the ALRC Report[2].

CCL is hopeful that the Government is acting in good faith and this time around will make a decision to act on the ALRC's recommendation that Australia should implement a cause of action for serious invasion of privacy and proceed quickly to implementation. We therefore welcome the opportunity to respond to the issues paper: **A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy (Issues Paper)[3]**and reaffirm our longstanding position supporting stronger privacy protections, including a statutory cause of action for serious breach of personal privacy.[4]

It is not, however, our intention to ague again the broad case for this. The arguments demonstrating the need for more effective protection of privacy, and specifically, for a statutory cause of action for serious invasion of personal privacy, have been extensively and repeatedly debated in recent years, including in the context of three reviews by separate Law Reform Commissions (LRCs).[5] These reviews generated an enormous input of information and argument from interested groups/agencies and individuals across all sectors.

All three LRC's concluded that, all things considered, a statutory cause of action for serious invasion of privacy should be legislated in Australia and advised their governments accordingly. All three LRC

[1] Australian Law Reform Commission Report on Australian Privacy Law and Practice, 2008, Report 108 (ALRC Report 108) , chapter 74.
[2]Australian Government First Stage Response to Australian Law Reform Commission Report on Australian Privacy Law and Practice, 2008.Quoted in Issues Paper 2011, p.8
[3]Issues Paper: A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy, Department of the Prime Minister and Cabinet, Commonwealth of Australia, September 2011 (Issues Paper 2011)
[4] CCL made a submission to the ALRC Inquiry into Privacy Legislation in which we addressed this matter. We argued in support of a statutory cause for action then and our position remains the same NSWCCL Submission to the ALRC Inquiry into Privacy Legislation, 31 /1/2007 pp.3ff.
[5] These reviews resulted in three reports: New South Wales Law Reform Commission, Report 120, Invasion of Privacy (2009); (NSWLRC Report); Victorian Law Reform Commission , Surveillance in Public Places: Final Report 18, 2010; (VLRC Report) and the ALRC Report 108 in 2008.

reports gave detailed and careful consideration to how this could best be done so as to properly and wisely balance the various countervailing public interests and other relevant factors, and produce a reasonable, fair and effective statutory remedy.

It is clear that the substantive arguments have been made persuasively. What is now needed is the political will to take this forward.

Given the Australian Government's disappointing decision to reject the widely supported recommendation that it should legislate for a Human Rights Charter for Australia[6], it would be some compensation for the community to have an effective remedy for gross invasion of the fundamental right to privacy legislated in this term of government.

The current Issues Paper is sensibly drawn from the findings of the three LRC reviews and largely directs our attention to the matters of detail that need to be resolved to allow legislation to be drafted and enacted.

CCL agrees that this is the appropriate focus for what is hopefully the last round in the discussion of this important matter prior to Government action to bring forward appropriate legislation.

Summary of CCL Position on Major Issues for Resolution

CCL advocates:

- Legislation for a statutory cause of action for serious invasion of privacy to be drafted and enacted in this term of Government
- The balancing of interests aspects should constitute a separate defence
- Protection of the public interest in freedom of expression must be appropriately recognised by at least:
    - Inclusion of a limited definition of public interest in a non-exhaustive list of defences
    - The limited definition of public interest to cover 'matters of concern to the public interest'
    - No blanket exclusions of journalists/media organisations from the ambit of the legislation

  Serious consideration for separate legislation for the right to freedom of expression including freedom of the press.
- Complementary action to strengthen the powers of the Australian Information Commissioner

RESPONSE TO SPECIFIC QUESTIONS

1. ***Do recent developments in technology mean that additional ways of protecting individuals' privacy should be considered in Australia?***

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[6] This was the cornerstone recommendation of the National Human Rights Consultation Committee's Report September 2009.

Yes. The need for additional protections has been well documented. It predates recent technological innovation. But recent advances in communication and surveillance technology make the need for stronger and additional protections for personal privacy increasingly urgent.

The Issues Paper summarises the range, scope and impact of the major new technologies that are impinging on personal privacy. There is no doubt that the changes underway are dramatic and transformational.

The Government's related Convergence Review reflects legitimate concern about the impact of new technology in the communications area. From a privacy perspective, these concerns also encompass the dramatic extension of surveillance capacity and practice in public and private spheres and of personal data capture and dissemination by an increasing range of small and large enterprises and government agencies.

The challenge of modern technology to privacy is enormous and profound. The famous assertion by the founder of Facebook that privacy is no longer a 'social norm' was presumably meant to be a celebration of the erosion within the community of the concept and valuing of privacy. Given that Facebook's interests are self-evidently at odds with an individual's privacy interests, this was not a surprising perspective for the organsiation's founder to have taken. Facebook users are its product and it has an obvious commercial interest in acquiring and making available, as much information about its users as it can.

This dismissive perspective on the continuing relevance of personal privacy in our modern, technologically advanced world, is expressed with growing frequency and often by people associated with organisations with an interest in limiting constraints on communication or surveillance technologies. For example, during a major, public debate on CCTV surveillance programs in Sydney in 2010, several prominent, speakers queried the continued relevance of personal privacy as a genuine concern in our modern hi-tech society. The then Victorian Commissioner of Police was blunt in her assertion that the expressions of concern by other speakers about the invasion of privacy through CCTV surveillance were exaggerated. Her position rested on the standard dismissive query: 'what do people have to hide?' But the Commissioner also asserted a critical generational change: younger people, with a lifetime experience of web based social media, instant information sharing and a myriad of cheap, communication and recording devices, no longer cared about personal privacy. (IQ^2 Debate Series, Sydney 6/7/2010).

Countering this trend, there is much evidence that the community is increasingly aware of, and concerned by, the loss of control they have over personal information once it hits the world wide web or is captured by the myiad of government and commercial enterprises requiring some variation of our personal information.

One manifestation of this concern has been the growing demand for stronger controls over personal information on social networks. For example, despite the views expressed by its founder, Facebook has, in recent years, acted to significantly improve both user security and the privacy controls a user can utilise. (See different default levels of information sharing on Facebook from 2005 to 2010: http://mattmckeon.com/facebook-privacy/ and Summary of privacy options that may be set mid-2010: http://flowingdata.com/201005/17/facebook-privacy-options-untangled/)

This is, in part, a forced response to competition from Google, but is a clear signal that, even the giant social media corporations are registering that the public's demand to maintain control over personal and private information cannot be ignored.

CCL agrees that additional ways of protecting individuals' privacy are essential and urgent, given the profound and increasing impact of surveillance and communication technology. Additional statutory protections must be one element.

2. ***Is there a need for a cause of action for serious invasion of privacy in Australia?***
   Yes.

   While there is a range of existing protections/remedies relating to privacy in Australia, there are major weaknesses and gaps in this protection.

   The existing privacy legislation at Commonwealth and State levels does not provide protection or remedy for many kinds of invasion of personal privacy. The focus of existing legislation is on data protection. Related legislation in the fields of defamation, breach of contract, trespass and telecommunications, only cover some aspects of invasion of privacy and leave other gross breaches without remedy.

   As demonstrated in all three Law Reform Commission Reports on this topic, common law protection of personal privacy in Australia is undeveloped and unlikely to provide an effective route for appropriate protection in any reasonable timeframe.[7]

   CCL agrees with the view that legislation 'may provide a clearer legal structure for the cause of action, and could provide for a more flexible range of defences and remedies than would be possible if the cause of action grew on a case-by-case basis within the common law.'[8]

   NSWCCL's experience of privacy commissioners/agencies at state and commonwealth levels is consistent with the widespread perception that they lack adequate powers and resources. They have consequently tended to a greater timidity than some other public watchdog agencies in the interpretation of their role and practice. Conciliation has an important role in the remedying of privacy breaches, but the predominant and almost exclusive focus on conciliation cannot provide effective protection nor remedy for serious invasion of privacy.

   Similar observations can be fairly made about the efficacy of the Press Council and the Australian Communications and Media Authority (ACMA) in relation to the protection of personal privacy.

3. ***Should any cause of action for serious invasion of privacy be created by statute or be left to development at common law?***

   By statute. (See response to 2)

   CCL has long held the view that a statutory protection is to be preferred in the Australian context on the grounds of coherence and clarity, timeliness and accessibility.

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[7] Summarised in Issues Paper 2011, pp13ff.
[8] Issues Paper 2011, p.29

There is wide agreement that common law in relation to a privacy tort in Australia is undeveloped and unlikely to progress significantly in the foreseeable future. But in any case, a common law development would have to fit within existing types of action (eg breach of confidence), whereas the creation of a statutory cause of action would be both more certain and more exact.

All three LRC's have examined these options in recent years and are unanimous in their recommendation of a statutory instrument.

4. ***Is 'highly offensive' an appropriate standard for a cause of action relating to serious invasions of privacy?***

No. Offensive is a more appropriate standard. This should be one of a number of matters to be taken into account- as proposed by the NSWLRC.[9]

CCL notes the divergence of views across the LRC's on this[10]. We agree that the standard must be sufficient to deter trivial or frivolous action.

But, we share the view that there is a strong probability that 'highly offensive' would skew the standard to the extreme end of 'offensiveness' and thereby result in an inappropriately limited definition of the standard.

The combination of 'serious invasion' of privacy and 'offensive' to a person with ordinary sensibilities is sufficient and appropriate and provides a reasonable and balanced criterion.

While not accepting the necessity, CCL would not object to a more moderate intensifier than 'highly offensive'. The ALRC had initially proposed 'substantial offence'[11]. This would effectively exclude the trivial and the offensive without seriously limiting the scope towards only the 'most' offensive of invasions.

5. ***Should the balancing of interests in any proposed cause of action be integrated into the cause of action (ALRC or NSWLRC) or constitute a separate defence (VLRC)?***

The balancing of interests should constitute a separate defence.

CCL shares the views of the VLRC (and the initial view of the ALRC) that the most persuasive argument, and most important factor, in deciding this matter, is that the plaintiff should not have to prove a negative.

Conversely, CCL shares the view that it is appropriate that the defendant should have to prove the public interest defence for what would otherwise be an unlawful action. In addition, the defendant is more likely to have the evidence and is therefore better placed to bear the burden of proof.

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[9] See list of matters in response to question 8 below.
[10] Summarised Issues Paper 2011, pp 32-3.
[11] This was the proposal in the ALRC Discussion Paper quoted ALRC Report p32

6. ***How best could a statutory cause of action recognise the public interest in freedom of expression?***

   CCL recognises this to be a pivotal issue. It is of central importance that the statutory cause of actions establishes an appropriate balance between the individual right to privacy and freedom of expressions –including freedom of the press and artistic expression. Both are necessary to a civil and democratic society.

   Experience with defamation cases demonstrates that such countervailing interests can, with appropriate legislation, be wisely and appropriately balanced by the courts.

   In addition, CCL considers the development of a legislative protection for freedom of speech, including freedom of the press, would be an appropriate and effective response to allay the fears that many people have about the possible, unintended effects on free speech and the free press of the proposed privacy tort. It would also be a significant strengthening of protection for a human right fundamental to democracy in Australia - given the lack of an Australian Bill of Rights or Human Rights Charter and the limitation of the implied constitutional right to freedom of 'political' expression[12].

   CCL supports the following:
   - Inclusion of public interest as a defence (in a non exhaustive list)
   - Inclusion of limiting definition of 'public interest' from the expansive 'anything the public has an interest in' to 'matters of concern to the public interest[13]
   - No exclusion of journalists, media organisations from the ambit of the legislation
   - Serious consideration for the separate legislation for a right to freedom of speech including freedom of the press.

7. ***Is the inclusion of 'intentional' or 'reckless' as fault elements for any proposed cause of action appropriate, or should it contain different requirements as to fault?***

   No. 'Negligent' should not be excluded as a fault element.

   CCL notes the variety of views across (and within) the LRCs. We also recognise that 'reckless' can be interpreted expansively and may encompass a range of 'negligent' behaviour/acts. However, there would be unnecessary uncertainty as to coverage of a range of negligent actions which resulted in a serious invasion of privacy. There is no persuasive reason to exclude 'negligent'. On this we accept the line of argument put forward by the VLR that exclusion is unnecessary, and that it is likely there will be serious invasions of privacy in which the actions are so grossly negligent (but unintentional) breaches, that civil action ought be possible. [14]

   The legislation should either include 'negligence' as well as 'intentional' and 'reckless' as specified fault elements or remain silent on this aspect. CCL is less certain about the merits of excluding 'accidental' but on balance thinks it probably wiser not to exclude it.

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[12] This position is argued in the submission to this Issues Paper by the Castan Centre for Human Rights Law , October 2011, pp13 ff.

[13] See discussion of VLRC position in Issues Paper 2011, p 37.

[14] Quoted in Issues Paper 2011, p38. The VLRC gives the example of a medical practitioner leaving a patient's highly sensitive medical records on a train or tram.

8. ***Should any legislation allow for the consideration of other relevant matters, and, if so, is the list of matters proposed by the NSWLRC necessary and sufficient?***

Yes it would be useful to include other relevant matters.
Yes the matters included in NSWLRC draft bill are appropriate. They are:

- *is the subject matter of the complaint private or not ?*
- *is the nature of the invasion such as to justify an action?*
- *does the relationship between the parties affect actionability ?*
- *does the claimant's public profile affect actionability ?*
- *does the claimant's vulnerability affect actionability?*
- *does any other conduct of the claimant and the defendant affect actionability?*
- *what effect has the conduct had on the claimant?*
- *does the defendant's conduct contravene a statutory provision*

The list should be non-exhaustive.

As noted in our response to (5), public interest factors should be considered as defence not as basis for cause of action.

9. ***Should a non-exhaustive list of activities which could constitute an invasion of privacy be included in the legislation creating a statutory cause of action, or in other explanatory material? If a list were to be included, should any changes be made to the list proposed by the ALRC?***

CCL considers the inclusion of 'a non-exhaustive list of activities which could constitute an invasion of privacy' in the legislation as useful. A non-exhaustive list is not likely to limit other appropriate, actionable activities

CCL has no preference as to whether this list should be included in in the legislation or the explanatory material.

The ALRC list includes the obvious activities that should be covered. [15] Less obvious matters will be left to the court's judgement. Attempts to define possible, non-obvious activites would be not be useful.

10. ***What should be included as defences to any proposed cause of action?***

CCL notes the different approaches of the LRC's to the defences that should be listed.

CCL considers that:

- public interest considerations should be included in the list of defences - see response to (5).

[15] a) there has been an interference with an individual's home or family life; b) an individual has been subjected to unauthorised surveillance; c) an individual's correspondence or private written, oral or electronic communication has been interfered with, misused or disclosed; or d) sensitive facts relating to an individual's private life have been disclosed. Quoted in Issues Paper 2011, p41.

- Consent should also be considered as a defence and not integrated into the cause for action.

  For both these factors, CCL argues that it is not appropriate for the plaintiff to have to prove a negative.

Beyond these, the different lists/approaches of the LRCs all have merit and a high degree of commonality. CCL considers that at least the following should be included in a list of defences:

- Public interest considerations including at least
  - the implied constitutional freedom of political communication
  - freedom of expression and the related interest of the public to be informed about matter of public concern

  In supporting public interest considerations CCL supports the limiting definition of the VLRC:

  > *'not all matters of interest to the public are matters of public interest that ought to deprive a person of their right to privacy. In particular, the public interest defence ought not to extend to matters that satisfy a curiosity about the private lives of others, but serve no other purpose relevant to the common good'*[16]
- Consent
- Act or conduct was incidental to the exercise of a lawful right of defence of person or property
- Act or conduct was required or authorised by or under law
- Publication of the information was, under the law of defamation privileged

The list should be non-exhaustive and, as proposed by the ALRC, should be allowed to evolve over time.

11. Should particular organisations or types of organisations be excluded from the ambit of any proposed cause of action, or should defences be used to restrict its application?

No. There should be no exemptions for organisations or types of organisations.

The combination of threshold requirements and defences will provide adequate means of managing/blocking inappropriate actions.

CCL considers this to be a critically important issue. The source of a large proportion of serious privacy breaches are the kinds of organisations that will argue for exemption. Experience of other kinds of legislation (eg Freedom of Information) has demonstrated that these blanket exemptions can seriously undermine the effectiveness of the protection/right meant to be provided by the legislation.

12. Are the remedies recommended by the ALRC necessary and sufficient for, and appropriate to, the proposed cause of action?

Yes - noting that they are a non-exhaustive list.

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[16] VLRC Report , p157.

13. ***Should the legislation prescribe a maximum award of damages for non-economic loss, and if so, what should that limit be?***

    No. CCL does not consider it necessary or appropriate to specify a maximum award for non-economic loss. It is not likely that damages will be excessive.

    The legislation should provide a disincentive to breaching personal privacy. In the case of corporations, a maximum cap of $150,000 on damages, as the NSWLRC proposes, will weaken the disincentive power. Courts should be allowed flexibility to propose proportionate and reasonable damages.

14. ***Should any proposed cause of action require proof of damage? If so, how should damage be defined for the purposes of the cause of action?***

    No. This is consistent with torts of trespass and defamation and with privacy legislation in other jurisdictions.

    It is difficult to quantify loss in the kinds of situations where breach of privacy has occurred, and the loss is not merely financial.

    CCL considers the most persuasive argument rests on the fact that privacy is a fundamental human right. Serious breach of privacy should therefore be actionable at law regardless of whether or not damages have been incurred.

15. ***Should any proposed cause of action also allow for an offer of amends process?***

    Yes. CCL supports the option of settlement without litigation, consistent with the defamation process and, more broadly, consistent with the principle of the Civil Dispute Resolution Act 2011.

    It is important however, that there are checks to ensure that the plaintiff has voluntarily and genuinely accepted this process.

16. ***Should any proposed cause of action be restricted to natural persons?***

    Yes. Human rights are applicable only to natural persons and not to corporations.

17. ***Should any proposed cause of action be restricted to living persons?***

    Yes. CCL accepts the arguments of all three LRC's on this matter.

18. ***Within what period, and from what date, should an action for serious invasion of privacy be required to be commenced?***

    CCL notes the different views of the VLRC (three years to be consistent with period for personal injuries and outer limit of defamation) and the NSWLRC (one year with court discretion to extend to 3 years consistent with defamation law).

CCL considers a one year period with court power to extend to three years to be appropriate.

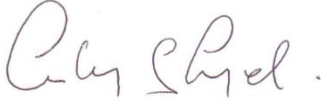
19. ***Which forums should have jurisdiction to hear and determine claims made for serious invasion of privacy?***

CCL supports single federal legislation applicable across Australia and jurisdiction could be conferred on the federal court and magistrates court.

There would also be merit in considering the Administrative Appeals Tribunal as an appropriate forum. The AAT would be a speedier and certainly a more affordable and accessible forum.

This submission was prepared on behalf of the NSW Council for Civil Liberties by Dr Lesley Lynch in consultation with members of the NSWCCL Privacy Sub-Committee.

Dr Lesley Lynch



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NSW Council For Civil Liberties
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