

News Corp Australia

SUBMISSION TO ALRC DISCUSSION PAPER: SERIOUS INVASIONS OF PRIVACY IN THE DIGITAL ERA

12 MAY 2013

INTRODUCTION

News Corp Australia welcomes the opportunity to make a submission to the Australian Law Reform Commission's Discussion Paper: *Serious Invasions of Privacy in the Digital Era* (the Discussion Paper).

While the ALRC states in the Discussion Paper that the cause of action proposed is '*more precise...and in some respects more narrow*'¹ than previous proposals, News Corp Australia remains opposed to the introduction of a statutory cause of action for serious invasions of privacy.

The threat to freedom of speech and communication posed by a cause of action, regardless of how it is structured, will undermine our ability to report in the public interest, to the detriment of the Australian public and Australia's democracy.

News Corp Australia recognises that the ALRC was directed to develop a cause of action, notwithstanding that the principles of good policy making – that there is an identified, articulated and evidenced problem which requires an appropriate and proportionate response of the type being directed to be developed – still have not been discharged. Therefore our concern remains that a cause of action is a solution in search of a problem, and as such should not be countenanced.

Our view remains that:

- No case has been made for a proposed new statutory cause of action
 - The 'problem' is ill-defined and lacks evidence
 - The response is disproportionate – regardless of the proposal being claimed to be 'more precise...and in some respects more narrow'
 - Intervention that arises in spite of a lack of evidence, or evidence to the contrary, should not be pursued
 - A tort of privacy is out of step with the Government's approach to best practice regulation
 - Absence of development of common law does not justify development of statutory intervention
- No case has been made for other legal alternatives – including a tort of harassment
- A cause of action poses a significant threat to freedom of speech and communication – despite attempts to 'balance' this interest within the cause of action
- Unintended consequences of a cause of action remain
- Existing protections are adequate
- International experiences are show tort of privacy is used to restrict legitimate reportage
- People's expectations of privacy are changing.

¹ ALRC Discussion Paper, at [1.30]

NEWS CORP AUSTRALIA'S OVERARCHING CONCERNS REGARDING THE PROPOSED STATUTORY CAUSE OF ACTION FOR SERIOUS INVASION OF PRIVACY & ALTERNATIVES

NO CASE HAS BEEN MADE FOR A NEW STATUTORY CAUSE OF ACTION

As we have stated on previous occasions, including in response to the Issues Paper, it is News Corp Australia's view that the case for a statutory cause of action for serious invasion of privacy still has not been made, including that there is a lack of evidence of a 'problem' and good policy making processes have not been followed.

The 'problem' is ill-defined and lacks evidence

It is relevant that we acknowledge the limitations placed on the ALRC by the Terms of Reference for this Inquiry, and that the ALRC has been asked to recommend a detailed legal design for a statutory cause of action for serious invasion of privacy in the digital era in the absence of evidence.

As is well documented, since 2006 and prior to this ALRC Inquiry there have been four other inquiries into privacy law or related issues undertaken by law reform commissions and Government in Australia². The most recent of which was undertaken by the Department of Prime Minister and Cabinet (DPM&C) in September 2011³. It followed the revelation of phone hacking in the UK and comments made by then-Prime Minister Gillard:

'I do believe Australians, watching all of that happening overseas with News Corp, are looking at News Limited here and wanting to see News Limited answer some hard questions'.⁴

It should be stated that an investigation reported that there was no evidence that similar behaviour to that which occurred in the UK has occurred at News in Australia.

The foreword to the DPM&C consultation document acknowledged that in Australia *'...serious invasions of privacy are infrequent...'⁵*

The consultation also stated: *'in responding to the ALRC recommendation,⁶ the threshold question that must be addressed is whether a statutory cause of action is warranted'.⁷*

Detailed submissions were made to that Issues Paper in 2011, including by News. The Government did not issue a report in response to the Issues Paper.

In March 2012 the Government introduced a package of legislation into the Parliament regarding media 'reforms'. The then Attorney-General, Mark Dreyfus QC, announced that a reference would go to the ALRC regarding a statutory cause of action for serious invasion of

² ALRC Issues Paper, at [6-10] http://www.alrc.gov.au/sites/default/files/pdfs/publications/issues_paper_43.pdf

³ DPM&C Issues Paper: *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, <http://www.ag.gov.au/consultations/pages/Righttosueforseriousinvasionofpersonalprivacyissuespaper.aspx>

⁴ <http://www.abc.net.au/news/2011-07-20/gillard-demands-answers-from-news-ltd/2803108>

⁵ <http://www.ag.gov.au/Consultations/Documents/Righttosueforseriousinvasionofpersonalprivacy-issuespaper/Issues%20Paper%20-%20Statutory%20Cause%20of%20Action%20-%20Serious%20Invasion%20of%20Privacy%20-%20PDF.pdf>, p3

⁶ ALRC Report 108 (2008) recommended that a statutory cause of action for serious invasion of privacy should be introduced

⁷ Op.cit. p3

privacy. This occurred without the Government having issued a report in response to the 2011 DPM&C Issues Paper – and without discharging the fundamental *‘threshold question’* put by Minister O’Connor, as to *‘whether a statutory cause of action is warranted’*.

On 12 June 2013 the then Attorney-General, issued the terms of reference⁸ for the current ALRC Inquiry, requiring the ALRC to develop a *‘detailed design’* and any other legal remedies – and still the threshold question of *‘whether or not a cause of action is warranted’* had not been discharged, and remains so.

The response is disproportionate

Given that evidence of a problem, for which a new cause of action and/or legal alternatives is warranted, has not been identified, it cannot be said that a cause of action for serious invasion of privacy is an appropriate and proportionate *‘response’*, as the problem remains unidentified.

As outlined in the Introduction, while the ALRC states in the Discussion Paper that the cause of action proposed is *‘more precise...and in some respects more narrow’*⁹ than previous proposals, it does not follow that this represents an appropriate or proportionate response as the *‘problem’* remains unidentified.

We continue to be of the view that regulatory and legislative requirements that are ill-conceived and lack an evidentiary underpinning are likely to be burdensome and lead to sub-optimal outcomes and unintended consequences.

Intervention that arises in spite of a lack of evidence, or evidence to the contrary, should not be pursued

As outlined in our response to the Issues Paper, members of the public are able to seek redress regarding newspaper/online coverage via the Australian Press Council. News Corp Australia publishes over 2.5 million stories a year. The Australian Press Council received 65 complaints about containing privacy matters in 2011/2012 (7 per cent of all complaints). Four of those complaints were mentioned in adjudications, and only one of the four was upheld.

Some may be (incorrectly) minded to say that, in light of the very small number of complaints outlined above, media organisations have nothing to worry about regarding a proposed tort of privacy. News Corp Australia cannot agree with such a sentiment. Returning to principle-based policy making, we believe that where there is a lack of evidence of a problem – and as is the case in this matter, evidence to the contrary – then any intervention is sub-optimal, and likely to result in unintended consequences. Intervention that arises in spite of a lack of evidence, or evidence to the contrary, should not be pursued.

A tort of privacy is out of step with the Government’s approach to best practice regulation

We also note that the Government is currently undertaking a deregulation agenda, including the removal of costly, unnecessary and burdensome regulatory and legislative requirements. The impost of a statutory cause of action as a *‘solution’*, in the absence of a *‘problem’*, would

⁸ <http://www.alrc.gov.au/inquiries/invasions-privacy/terms-reference>

⁹ ALRC Discussion paper, at [1.30]

appear to be out-of-step with the efforts of the Government's promotion of best practice regulation.

Absence of development of common-law does not justify development of statutory intervention

The Discussion Paper indicates that the introduction of a cause of action is warranted because there has been deficient development of common-law in Australia. It states that *'the state of development of a country's common law protection of privacy has a significant impact on the question of whether there is a need to legislate for a cause of action'*.¹⁰

While it may be the case that Australia's common law regarding privacy has not developed in recent times, we do not believe that this justifies introducing a statutory cause of action. This is particularly so as it does not appear that there are barriers to the common law developing which would justify a cause of action as a proportionate intervention.

The Discussion Paper also cites the UK and NZ having recommended against the introduction of a statutory cause of action, in view of the common law developments in the countries.¹¹ However we observe that it does not automatically follow that the opposite holds – i.e. that a lack of development of common law requires/necessitates the introduction of a statutory cause of action. Again, we cannot see that this is evidence of a need to intervene with statutory cause of action in Australia.

Lastly, arguments that proposals would 'supplement' the common law¹² regarding the proposed alternative tort of harassment – suffer from the overall lack of best practice policy development beginning with a lack of evidence to substantiate the problem.

Therefore, given the flawed basis of the Terms of Reference and the direction to develop a tort regardless of there being a lack of evidence of a problem, a statutory cause of action – for serious invasion of privacy or other legal redress – should not be countenanced.

NO CASE HAS BEEN MADE FOR OTHER LEGAL ALTERNATIVES – INCLUDING A TORT OF HARASSMENT

Again, while News Corp acknowledges that the ALRC was directed to recommend other legal remedies for redress for serious invasions of privacy, we are of the view that the alternatives recommended in the Discussion Paper – including a tort of harassment – suffer the same lack of evidence and good public policy making as a tort of privacy. Therefore we do not support such recommendations.

A CAUSE OF ACTION POSES A SIGNIFICANT THREAT TO FREEDOM OF SPEECH AND COMMUNICATION – DESPITE ATTEMPTS TO 'BALANCE' INTERESTS WITHIN THE CAUSE OF ACTION

News Corp Australia recognises that the ALRC has considered how other public interests – including freedom of speech and freedom of the press – may be 'balanced' within a cause of action.

¹⁰ Ibid. at [1.26]

¹¹ Ibid. at [1.26]

¹² For example at [3.48]

Notwithstanding the approach recommended by the ALRC, the proposed cause of action continues to represent a threat to freedom of speech and communication – and therefore freedom of the press – and would undermine our ability to report in the public interest.

To expand, the inherent problem lies in the fact that a statutory cause of action does in fact give ‘precedence’ to the right to privacy – as it is privacy that has the ‘protected’ status – by virtue of the statute and the structure of such. Fundamental freedoms and matters of public interest – including freedom of speech and freedom of the press, will therefore be secondary considerations, regardless of the ‘balancing’ exercise that has been incorporated into the statute. It is therefore difficult to see how elements of a cause of action – for example privacy and freedom of speech – which don’t have the same legal status can be truly ‘balanced’.

The Discussion Paper notes that a *‘similar balancing exercise is carried out in the UK, where rights to privacy and to freedom of expression, in Arts 8 and 10 of the European Convention on Human Rights, have been incorporated into domestic law by the Human Rights Act 1988 (UK). Both must be considered when determining whether a cause of action for misuse of private information has been established’*.¹³ However, as noted by News Corp Australia and others on various occasions, freedom of speech in Australia is not enshrined in a legislative right, and it would not have an equivalent legal right to that which privacy would have under a cause of action.

Therefore, regardless of the process outlined by the ALRC as a method for ‘balancing’, it is likely that privacy would be ‘privileged’ over other important interests.¹⁴ Therefore the introduction of the proposed cause of action would impact the right to freedom of speech and related interests, to the detriment of the Australian public and Australia’s democracy.

UNINTENDED CONSEQUENCES OF A CAUSE OF ACTION REMAIN

Again, we reiterate that our submissions to previous consultations, including the Issues Paper and other consultations since 2006, have addressed the unintended consequences that could flow from a statutory cause of action for serious invasion of privacy.

Our concerns regarding unintended consequences are not assuaged by claims that the proposed cause of action is ‘more precise...and in some respects more narrow’ than previous proposals.

For example, the complication of the legal process by the overlap of laws remains a substantial issue.

To expand, it is likely that such an overlap with existing laws and will lead to confusion in court cases and extended hearings. In practice therefore, parties will be tied up in hearings attempting to determine which action/s are available to them – which would likely mean extending court hearings and increasing costs. Another consequence is that potentially aggrieved parties may also cherry-pick an avenue for action based on the remedies available. The (we believe misguided) inclusion of monetary damages as a remedy further exacerbates this issue.

In short, there is a range of sub-optimal outcomes resulting from legislative overlap and judicial complexity that would result from the introduction of a cause of action – including one that is claimed to be more precise and narrower than previous proposals.

¹³ Ibid. at [8.13]

¹⁴ Ibid. at [8.5]

EXISTING PROTECTIONS ARE ADEQUATE

As we have outlined previously, and as the ALRC acknowledges in the Discussion Paper, Australia has an extensive body of laws which protect privacy directly and indirectly, across the civil and criminal spectrums, including:

- Commonwealth *Privacy Act 1988* including amendments that came into effect in March 2014;
- State and Territory privacy and personal information legislation;
- Surveillance and listening devices legislation;
- Various statutory restrictions on publication;
- Trespass;
- Nuisance;
- Defamation; and
- Breach of confidence.

We believe that the current statutory and common laws are able to address concerns regarding invasion of privacy. We believe, as outlined previously in this submission, that here is also opportunity, should the need be identified, for common law or amendment to specific statutes to address specific identified problems.

INTERNATIONAL EXPERIENCES TORT OF PRIVACY USED TO RESTRICT REPORTAGE

As we have outlined above and previously, much of the international experiences arising from a cause of action are undesirable restriction of free reportage, and it is not clear that the proposal included in the Discussion Paper would minimise these.

We reiterate that we have observed that the course of action available in the UK has predominantly been used by public figures, celebrities and sports stars, largely to restrain people (including ex-partners) from going to the media with stories. There has also been the making of ‘super injunctions’ to prevent publication of the identity of claimants, the details of the information of the claim and the matter of the injunction itself. This is a matter of concern as it undermines the freedom of speech and communication – in the NSW ICAC example as previously submitted, it would clearly be an issue.

Further, the utility of such injunctions is a live question in the digital era. For example, there have been a number of cases where injunction and anonymity orders were made, and details have been spread via social media, which, in the Ryan Giggs case, was preceded by being named in Parliament by a Member under parliamentary privilege.

PEOPLE’S EXPECTATIONS OF PRIVACY ARE CHANGING

Lastly, over the last few years we have seen an explosion in the availability of social media, and people’s voluntary interaction and participation with, and take-up of, a broad range of social media services. During this time people have also become more willing to share information about themselves – both about their ‘private’ lives and their personal information. This has, and continues to shape the notion of ‘private’. As a result attitude to privacy is evolving, and people are becoming more willing to share information that they may have been seen as private or personal.