12 May 2014

By email: privacy@alrc.gov.au

Dear Professor McDonald,

The Arts Law Centre of Australia (**Arts Law**) is pleased to comment in writing on the Serious Invasions of Privacy in the Digital Era Discussion Paper (**Discussion Paper**) and is grateful for your time on the telephone on 6 May 2014 where we raised a number of these issues for discussion.

Arts Law commends the ALRC's ongoing commitment to broader community engagement in relation to the issues raised in the Discussion Paper and we are pleased to comment on the Discussion Paper. We have provided feedback throughout the Privacy review, most recently in relation to the Serious Invasions of Privacy in the Digital Era Issues Paper (IP 43). We will set out the general position briefly (Part A), and then move to addressing some but not all of the proposals and questions posed by the ALRC in the Discussion Paper (Part B).

About the Arts Law Centre of Australia

The Arts Law Centre of Australia (**Arts Law**) is the national community legal centre for the arts. Established in 1983 with the support of the Australia Council for the Arts, Arts Law provides artists and arts organisations with:

- Specialist legal and business advice;
- Referral services;
- Professional development resources; and
- Advocacy.

About our clients and their relevance to the privacy discussion

Arts Law works nationally to support the broad interests of artistic creators, the vast majority of whom are emerging or developing artists and the organisations which support them. Arts Law provides over 2,500 legal advice ‘services’ to Australian artists and arts organisations a year. This includes telephone and face to face legal advice, referrals and document reviews.

Arts Law makes this submission on behalf of our broad client base including those who practice as:

- visual artists including photographers;
- authors including journalists;
- film makers including documentary film makers; and
- peak or professional organisations which represent the interests of the above clients.

The relevance of the Discussion Paper to our clients is illustrated by the fact that 250 of the approximate 4500 legal problems we have addressed in the last three years relate to:

- privacy (including of information, and personal privacy);
- defamation (including relating to the use of images and film or information about others);
- confidentiality (including of information about and images and film of others); and/or
- trespass (personal and property).

PART A – Our General Position

Our general position on the increased protection of privacy in Australia's digital era

Arts Law, and numerous stakeholders it has consulted in the preparation of this response, remains unsupportive of the introduction of a cause of action for invasion of privacy. Our engagement with both the Australian Institute of Professional Photographers and the National Association for the Visual Arts reinforces this view. Despite the ALRC's Proposal 4-1, we are pleased to note that the relatively narrow construction of the recommended cause of action by the ALRC in its Discussion Paper could limit the potential scope for liability under such a cause of action, the damages sought, and unmeritorious claims being brought.

We agree with the ALRC's general position that the protection of freedom of expression and freedom of artistic expression are fundamental pillars of a democratic and "free" society and that any increased privacy protection should be carefully balanced against those freedoms.

We note the potentially competing human rights of privacy (Article 17) and freedom of expression (Article 19) expressed in the International Covenant on Civil and Political Rights (ICCPR). We are mindful that as no general right to freedom of expression is enshrined at law, artistic and creative activities ever more vulnerable to restriction, particularly if a these activities are not expressly carved out of a cause of action for invasion of privacy.

Part B – Our response to specific proposals or questions in the Discussion Paper

1. **Proposal 8-1**

   Arts Law strongly supports the "up-front" inclusion of freedom of expression in formulating any cause of action for serious invasion of privacy. This places the onus on the applicant and not on the respondent artist (for example, filmmaker or photographer) to establish their interest in freedom of expression as a defence, incurring the potential financial, reputational and time cost of doing so after proceedings are commenced.

2. **Proposal 8-2**

2.1 Arts Law strongly agrees the inclusion of "freedom of expression" within the matters of public interest for consideration by a court is necessary and notes the significant importance given by the ALRC to the balancing of private and public interests. As such, Proposal 8-2 should direct a court to consider the various public interest criteria, rather than invite it to do so. As such, the words "a court may consider", should be replaced with the words "a court must consider".

2.2 If the ALRC wishes for the court to have the discretion to consider any other matters which it thinks relevant to the public interest, in addition to the factors proposed by the ALRC at Proposal 8-2, the ALRC could recommend that the list of factors at 8-2 includes a new subsection (i); "any other interests the court deems in the public interest."

2.3 Arts Law is concerned that until "freedom of expression" generally, and "freedom of artistic expression" more specifically, is enshrined at law in Australia, that the interpretation of these terms by a court is uncertain unless they are defined in a new statutory cause of action. Unless artistic expression is specifically identified as an interest which is to be balanced against any right to privacy, art and the creation of it, risks (unacceptably) falling outside the scope of factors to be considered. We are concerned, that proposal 8-2 (a), suggests a definition of "freedom of expression" which is possibly more limited than one a court might otherwise construct because the inclusion of "political communication" might suggest a definition of "freedom of expression" which does not consider freedom of "artistic expression".

2.4 This lack of predictability around the way that "freedom of expression" is interpreted could be managed by including "freedom of artistic expression" as a freedom a court should consider in balancing the interests of the plaintiff and the public interest. Arts Law believes that "freedom of expression" ought to expressly include "artistic expression" so a court is specifically required to consider that freedom in any claim.

2.5 We therefore suggest that the list of public interest matters which a court may consider is amended as follows:

(a) *Freedom of expression, including political communication and artistic expression*

2.6 Alternatively, if the words "and artistic expression" are not included, the term "freedom of expression" should not be followed by the words "including political communication" and should be left entirely undefined for interpretation by the courts.

3. Question 9-1

This question seeks input on state and territory bodies, specifically. In the event that a federal cause of action was enacted, a federal forum regulating any complaints made under the new cause of action would surely be more appropriate. It would seem that the Office of Australian Information Commissioner (OAIC) could be an appropriate forum for managing complaints because it already deals with complaints or matters in relation to privacy (rights conferred under the Privacy Act 1988), freedom of information and government policy. Given the nature of the proposed cause of action, but we are unable to comment whether it, or a newly formed body might be more capable of interpreting "freedom of artistic expression" with the appropriate level of understanding and respect for, the role that art and the documentation of our society, plays. In any event, it is essential that any forum which deals with complaints is funded and properly educated in relation to the ambit of its responsibilities and the importance of maintaining freedom of expression, in particular, freedom of artistic expression.

4. Proposal 9-4

Arts Law does not agree with the tiered test proposed for statute barring by the ALRC, nor the time period within which claims may be brought. A person should not be able to bring an action for invasion of privacy beyond a year from:

(a) the date the serious invasion of privacy occurred; or

(b) the date that material created in the course of that serious invasion of privacy was first published or communicated.

5. Question 10-1

It is unclear from the submission what point of difference Proposal 10-4 could strike compared to the current defence of qualified privilege at common law and our concern is that aligning a proposed defence in a cause of action for serious invasion of privacy with that of defamation may be fraught with difficulty because the causes of action bear some significant differences and the applicable defences should too. We would be interested in considering any other alternatives that the ALRC may have considered, including the possible combination of defences (potentially of the kind described in Proposal 10-2 and 10-4).

6. Proposal 11-2

Arts Law supports the mitigating factors set out in this proposal.

7. Proposal 13-1

We agree in principle that the harmonisation of the various state and territory surveillance devices instruments (collectively, **surveillance devices laws**) would lead to further clarity, provided that aspects of the surveillance devices laws are also better defined. However, if the ALRC proposes that Proposal 13-3 is adopted, and laws are harmonised in accordance with this proposal, we do not support this proposal. That is, to the extent that harmonisation would increase the regulation of innocuous artistic activities we do not support it.

8. Proposal 13-3

8.1 Arts Law strongly opposes proposal 13-3 as it, on its face, could make unlawful those activities of legitimate film makers and photographers in numerous situations. It could, in a nutshell achieve the large scale restriction of photographic and filming activity in both public and private that the ALRC seems diligently to have avoided in its proposal for a cause of action for serious invasion of privacy.

8.2 One significant improvement required for the surveillance devices laws is to better define what “surveillance” means, and what “activities” are private. For example, in NSW, the *Surveillance Devices Act 2007* (NSW), “surveillance” itself is not defined. This, in combination with the ALRC’s proposed broadening of the

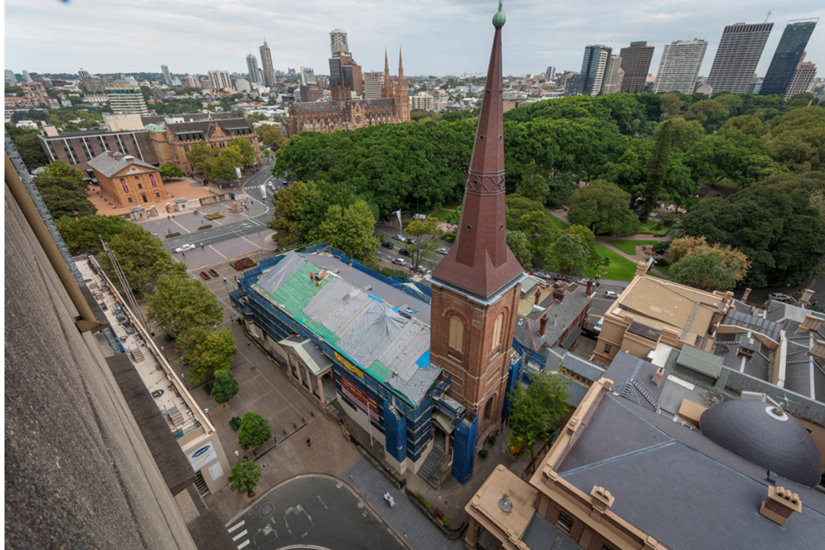
surveillance devices laws could lead to the unintended consequence of limiting and in some cases, stopping legitimate filming and photography in public. For example, capturing a streetscape in time lapse, where various activities by those using that space within a 1 week period take place are captured. Some may argue those activities are "private" because they relate to intimate or family matters although they occur in public, for example. We submit that the ALRC should consider a formulation which is more clearly and narrowly defined in its application. One option is to define surveillance by virtue of the purpose of the recording activity, or intended or actual use of the recording.

8.3 Unless "private activities" under respective state and territory Surveillance Devices by definition, exclude activities which occur in public, claimants engaged in intimate or family activity (for example) in public might claim that those are "private activities" and that the recording of those activities therefore falls foul of the law.

8.4 Local government (including councils) and public and private organisations, as well as artist photographers and film makers would be unjustifiably affected by a whole scale broadening of the scope of surveillance devices laws. Often, these entities and individuals may wish to document a place or its people, and if surveillance devices laws are too broadly drafted this may not be possible. For example, this image (and numerous others) was taken by Chris Shain, a Sydney photographer, engaged to document the progress of the renovation of St James Cathedral in Sydney. In the event that he had captured (or 'recorded') activities in that photograph which were considered private by their actors, even though they were incidental to the primary photographic purpose, might those individuals claim that he was "surveilling" them? We ask that the ALRC carefully considers the possible practical implications of the broadening of the scope of these laws, and whether this achieves the result motivating the recommendation.

8.5 For example, a well regarded Sydney photographer, Chris Shain, is sometimes commissioned by councils, public and private enterprise to create time lapse photography of their project, development or environment. If the proposed broadening of surveillance device legislation is not limited in its application, it

could risk classing this type of activity as "surveillance". An individual captured in this sort of photography should have no claim that they were engaged in a "private activity" even though they were in public, therefore deeming the photography "surveillance". Below is an example of photography which Mr Shain created documenting the recent restoration of St James Cathedral.



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8.6 In the event that the ALRC forms the view that "surveillance" or "private activity" is not defined, Arts Law submits that a specific defence of or in relation to 'artistic activity' is included as per 13-4 for journalistic investigation. This is not an ideal solution for our stakeholder group as it places the onus on the artist responding to a potentially very serious criminal charge to prove their activities were artistic.

8.7 Given the five step test proposed for assessing whether or not an invasion of privacy has occurred, if the surveillance devices instruments are to be harmonised and broadened, caution is required to ensure that the broader surveillance devices instruments do not create an unintended lower threshold test for "privacy" which a claimant can rely on in the event that they could not otherwise make out a cause of action for invasion of privacy.

9. Question 13-2

9.1 Empowering local councils to regulate the installation and use of surveillance devices is, in our view, likely to risk:

(a) Incorrect assessments of whether activities even fall within the ambit of the Surveillance Devices legislation, whether conversations or activities are properly categorised as "private" by rangers who lack the training, legal knowledge or time to properly assess whether the relevant individual artist falls foul of the Surveillance Devices Act in that state or territory;

(b) Pursuant to (a), increased regulation of innocuous artistic activities which are not, in fact, private;

(c) Inconsistent regulatory approaches on a council by council, and ranger by ranger basis;

(d) Increased pressure placed on local councils to regulate in an environment of constant technological change and limited council funding;

(e) A chilling effect where artists decide, on the basis of increased local regulation that they will no longer take photographs or film *just in case* the activity they wish to capture is considered "private" by the ranger on the day.

9.2 Numerous photographer and film maker clients we have advised have had first-hand experience with council rangers seeking to stop legitimate photographic and filming activities by warning, threatening to fine, or threatening to call the police in relation to their activities. Where various circumstantial elements are to be balanced, we do not, for the reasons set out above believe local council are suitably placed to make this assessment.

10. Question 15-2

10.1 Arts Law is not *per se* opposed to empowering a regulator to order the removal of information from an online platform. However, where a regulator has the power to order the removal of material, it is essential that the individual or organisation posting the material in the first instance is given the opportunity to respond to the removal request within a reasonable time. For example, if a photographer includes photographs of their subjects on the photographer's website, and the subject complains of the inclusion of their image on the site,

the photographer should have an opportunity to respond in relation to the complaint prior to any order in relation to the removal of the material.

10.2 Arts Law notes the inclusion of "freedom of expression" as a balancing factor in assessing the public interest of the posting of the information, but if this assessment is made only with the evidence provided by the complainant, the regulator may not be able to afford due consideration to (amongst the other public interests) the freedom of expression (and more specifically freedom of artistic expression) of the individual posting the material, or the organisation hosting the material posted by the individual.

11. Conclusion

11.1 Arts Law remains opposed to the introduction to a right to privacy in Australia. Further to our support for support for freedom of expression generally, and artistic expression specifically, the Discussion Paper has highlighted some of the severe hurdles in legislating for, administering and regulating such a scheme. There are a number of issues identified in the Discussion Paper which require further consideration by the ALRC, not least of all how, and if, "freedom of expression" given the vital role its characterisation plays in working out what is in our public interest.

11.2 Arts Law notes the likely chilling effect that the introduction of a cause of action for invasion of privacy is likely to have. This must be balanced in any recommendations by the ALRC and considerations by Government.

11.3 Any legislative and administrative changes require ongoing education of the public about how those laws, processes or factors might affect them. This education should be free and readily accessible so that artists including film makers and photographers can access this information with ease and without cost.

11.4 Arts Law respectfully requests that the ALRC specifically consider that any recommendations in relation to the handling of complaints, delivery of legal advice to and the education of the public are accompanied by recommendations

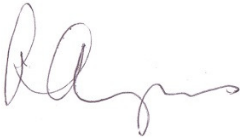
dealing specifically with indications of where funding and resources will be required in order that this is possible.

Further consultation with Arts Law and its stakeholders

Please contact Robyn Ayres (Executive Director) or Suzanne Derry (Senior Solicitor) if you would like us to expand on any aspect of this submission, verbally or in writing.

We can be contacted at rayres@artslaw.com.au or sderry@artslaw.com.au or on (02) 9356 2566.

Yours faithfully



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