Law Council
OF AUSTRALIA
Business Law Section

The Executive Director
Australian Law Reform Commission
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14 May 2014

Attention: Professor Barbara McDonald

Dear Professor McDonald

Serious Invasions of Privacy in the Digital Era (DP 80)

This submission is made on behalf of the Media and Communications Committee of the Business Law Section of the Law Council of Australia.

The Media and Communications Committee commends the Commission for its comprehensive review as to elements of a possible cause of action for serious invasion of privacy. The Committee also appreciates the wide ranging consultations of the Minister and her team, including with this Committee, which we believe has stimulated the public debate and assisted to frame, refine and test the Commission's thinking. The Discussion Paper is focussed and draft recommendations and their rationale are well explained. The papers and consultations have enable debate as to the possible cause of action to progress beyond rhetoric and finally address the detail of any new cause of action. In particular, detailing possible balancing factors, defences and remedies has enabled a nuanced discussion about how any cause of action might be crafted to advance the objective of prompt, practical and affordable access of aggrieved individuals to justice. The Commission has also fulfilled its Terms of Reference through creative development of possible alternative legal remedies for redress for serious invasions of privacy.

It was inevitable that any proposed recommendation as to a broad new cause of action would be controversial, particularly in a deregulatory, anti-red tape environment. That controversy has been reflected in a broad range of views within the Business Law Section of the Law Council of Australia and within the Media and Communications Committee itself. The Media and Communications Committee has nonetheless found broad consensus around the following principles which we suggest should guide the Committee's final recommendations:

1. **There is no demonstrable need for a tortious cause of action to be made available against professional media organisations for serious invasion of privacy. Existing avenues of redress, available through co-regulatory media and broadcasting codes of practice, afford prompt, practical and affordable redress for individuals.**

   There has been a limited number of privacy related complaints under these codes: for example, on the ACMA's calculations as to operation of the broadcasting codes, there have been in aggregate 150 privacy related complaints against broadcasters since 2005, of which only 75 were considered sufficient to warrant investigation, resulting in 9 breach findings.

Whether because of an Australian media culture that is antithetical to excessive invasions upon private seclusion, or the relatively broad coverage of Australian media codes as to invasion of privacy as applied by the ACMA and the Australian Press Council, there have not been replication in Australia of the egregious invasions upon seclusion that have occurred in the United Kingdom.

The Australian media codes and the ACMA's *Privacy guidelines for broadcasters* (most recently in the December 2011 edition) already provide a clearly understood basis and methodology for determination of whether news and current affairs reporting activities of media organisations will constitute a serious invasion of privacy.

Notwithstanding controversy as to media self-regulation and the role and functions of the Australian Press Council, there has not been discernible public concern that Australian newspapers seriously invade personal privacy and 'get away with it'. We are not aware of any significant concern that the Australian Press Council undervalues individual's rights of seclusion. The Australian Press Council applies privacy principles which are congruent with the ACMA's *Privacy guidelines for broadcasters* and the principles underlying the Commission's draft recommendations. The development of ACMA jurisprudence through, for example, ACMA *Investigation Reports* 2431 2584, 2800 and 2813, illustrates that the decision making framework for complaints as to excessive invasions upon seclusion is principled but also robust and sufficiently predictable to ensure that where serious invasions are determined to have occurred, they are addressed and do not re-occur, and that newly emerging areas of concern can be addressed by application of principles.

2. Persons whose privacy is invaded by professional media generally want prompt, practical and affordable vindication through recognition that their rights have been infringed, whether through apology or ruling or both. This vindication is best provided through alternative dispute resolution, such as through existing modes of redress provided by the Australian Press Council and the ACMA.

There is no demonstrable need for the new cause of action to be created to ensure:

. continued availability of these modes of redress and appropriate future development of Australian Press Council and ACMA; and

. that effective remedies are available in relation to emerging areas of privacy concern arising out of activities of media organisations.

3. Any cause of action that enables actions to be brought against professional media requires very careful consideration of elements of the action and balancing of those elements, in order to ensure that there is no chilling effect upon freedom of the media.

The Commission recognises the need for careful balancing of multiple interests. However, the Commission appears to consider that the risk of a chilling effect upon freedom of the media is not sufficiently great as to outweigh any perceived desirability of general or uniform coverage of a new cause of action. The Media and Communications Committee submits that having regard to the history of complaints against the media and the continuing availability of alternative modes of redress against professional media for serious invasions of privacy, it is simply not worth the risk of over-reach by the courts in developing jurisprudence as to the new cause of action.

We acknowledge the argument that it would be better for media organisations if a new case of action for serious invasions of privacy is appropriately scoped and defined through statute rather than left the vagaries of development of judge made law in response to particular fact

scenarios. This Committee is concerned that absent any statutory cause of action, common law development of a tortious cause of action will likely be in response to highly egregious intrusions into an individual's seclusion or private affairs such as the facts in *Giller v Procopets* [2004] VSC 113, not involving the activities of media organisations.

We also recognise that judge made law may not be a predictable or reliable way to develop a comprehensive, multi-factor list of relevant considerations to be taken into account in balancing of private interests and public interests that is required in relation to any allegation of serious invasion of privacy.

The above noted, we consider that the prospective harm of over-reach by the courts in developing the new cause of action, whether that cause of action is developed from case law or from a statutorily defined tort, is sufficiently substantial that effective industry self-regulation with oversight by an appropriate regulator should remain the mechanism for prompt, practical and affordable redress for individuals in relation to any serious invasions of privacy to a professional media organisation. The ready potential for over-reach in injunctive relief is recognised by the Commission's comments as to the need for the public interest to be taken into account in consideration as to grant of injunctions against publication for alleged invasions of privacy. The consequence of this balance being lost is well illustrated by the United Kingdom experience with injunctions against publication in aid of celebrities and so called super-injunctions (injunctions which extend to publication of any report about the injunction against publication).

For the above reasons, we consider that current limited and qualified exception in section 7B(4) from the Privacy Act 1988 in relation to journalistic activities by professional media organisations that follow and observe codes of practice is appropriate, at least for so long as those codes are consistently applied and appropriate redress afforded to individual complainants. The limitations and qualifications attaching to this exception ensure that the Privacy Commissioner has a continuing role in reviewing the effectiveness of codes of practice of professional media organisations in providing appropriate redress to affected individuals.

4. If a statutory cause of action is to be enacted, it should be stated as a right of privacy within the *Privacy Act 1988*. That Act is generally understood by the public to be the definitive national code in relation to privacy and data protection. The Australian Privacy Commissioner is the appropriate independent oversight body in relation to invasions of privacy by intrusion upon seclusion and misuse or disclosure of private information, as well as his existing functions in relation to information privacy.

The Privacy Commissioner should be funded and empowered to deal with complaints by individuals as to serious invasions of privacy, including by making rulings against persons responsible for such invasions.

Siting the new right of privacy in the *Privacy Act 1988* would enables existing concepts to be applied and existing partial exemptions and qualifications, including the small business exemption and the partial exemption for journalistic activities by professional media organisations, to be extended in relation to the new right to the extent appropriate.

We note in this regard the decision of the Federal Governed in the 2014 Federal Budget to site the Australian Privacy Commissioner within the Australian Human Rights Commission. The Australian Human Rights Commission already has an active complaints and conciliation function into which the complaints and investigations functions of then Australian Privacy Commissioner can be integrated. We have taken this integration into consideration in

making our recommendation that the Privacy Commissioner be funded and empowered to deal with complaints by individuals as to serious invasions of privacy.

5. If a statutory cause of action is to be enacted, there should be clarity as to place of publication and the date of first publication.

Whether there is an actionable serious invasion of privacy should be determined by the law of the place of publication without the uncertainties and potentially absurd results generated by application of the multiple publication rule to internet based publication.

Given that the serious invasions of privacy cause of action should be an intention-based tort, whether a defendant should have understood an affected individual to have a reasonable expectation of privacy should be determined having regard to facts and circumstances at the time of first publication.

Time limits for action should be determined by the time of first publication, not any alleged re-publication by ongoing availability of archival material after time of first publication.

6. The Federal, State and territory laws governing surveillance devices, tracking devices, listening devices laws and unlawful surveillance are an inconsistent patchwork with no unifying principles of operation.

This is an existing 'red tape' cost to business. National laws should operate in this area and those laws should be based upon a coherent rationale for regulation.

The Media and Communications Committee welcomes the Commission's analysis (in Chapter 13 of the Discussion Paper) of the issues surrounding current regulation of surveillance devices and the Commission's recommendations for reform.

7. Ready availability of social media platforms and other internet based mechanisms for dissemination of seriously privacy invasive material creates possibilities for both intentional campaigns of individuals against others than can cause significant emotional distress and serious invasions of privacy through reckless indifference of some individuals to the legitimate privacy interests of other individuals. Individuals need appropriate, cost effective and fast remedies to address such clearly inappropriate and harassing behaviour.

Individuals may not have effective access to justice through the courts. The cost of justice may of itself act as a barrier to many litigants. In any event, damages awards for serious invasions of privacy in jurisdictions where the cause of action has been recognised (in varying but directly analogous forms) have been comparatively modest. In this context, it is worth noting the comments of leading English barrister Richard Spearman QC:

> In *Campbell v MGN Ltd* Naomi Campbell was awarded £2,500 by way of basic compensatory damages and a further £1,000 by way of aggravated damages (in respect of a follow-up article that likened her to a "chocolate soldier"), and neither side sought to disturb the level of the basic award on appeal. In *Douglas v Hello! Ltd (No 3)* the Douglases were awarded a total of £14,600 (including a "nominal award" on their claim under the Data Protection Act 1998), and, again, there was no appeal against the level of those awards in that case. In *McKennitt v Ash*, the personal claimant was awarded common general damages of £5,000 and (because they had not suffered any hurt feelings or distress) the corporate claimants were said to be entitled to no more than a nominal award. As the award that was made to the Douglases was described by the Court of Appeal as "unassailable in principle" but "not

> at a level which, when measured against the effect of refusing them an interlocutory injunction, can fairly be described as adequate or satisfactory", and as awards at this type of level are likely to be exceeded many times over by the shortfall between costs incurred by a successful party and the costs recoverable from the unsuccessful party (to say nothing of the costs implications for the claimant of losing the case entirely or in part), claims in this area seem likely to remain the preserve of wealthy claimants or those who can obtain funding on a conditional fee basis.[1]

We commend for the Commission's final recommendations further consideration of how to best advance the objective of prompt, practical and affordable access to justice for victims of serious invasions of privacy. Black and white cases of 'revenge porn' and other egregious harassment and blatantly intentional invasions are not common. Often consideration of balancing factors or consent or indeed whether there is any reasonable expectation of privacy in particular facts and circumstances will be nuanced and complex. Social networking increasingly conflates public and private space: users of social networking platforms will often have particular, often generation specific, group specific or context specific views about acceptable limits upon reuse or repurposing of images or information that those users elect to make available in semi-public places such as users' Facebook pages. Providers of social networking sites rightly point to the impossibility of patrolling user content and working out whether there is any reasonable expectation of privacy in particular facts and circumstances. Often it will even be difficult to work out whether there has been a serious invasion of an individual's privacy reactively in response to user's complaint.

In this difficult environment we commend:

. that if there is to be a new cause of action for serious invasions of privacy, that the Privacy Commissioner should be funded and empowered to deal with complaints by individuals as to serious invasions of privacy, including by making rulings against persons responsible for such invasion;

. that there be clear, national laws addressing harassment (as outlined by the Commission in chapter 14 of the Discussion Paper);

. that there be an appropriate safe harbour for internet intermediaries (as outlined by the Commission in section 10-7 of the Discussion Paper); and

. a consumer privacy education and awareness campaign with warnings as to the risk of posting private information and availability of mechanisms to enable individuals to remove private content that they have posted about themselves and reinforcing the shared responsibility principle (as outlined by the Commission in section 10-7 of the Discussion Paper).

We again acknowledge the Commission's extensive consultations on this reference and in particular thank Commissioner Barbara McDonald for her open consultations with the Media and Communications Committee of the Business Law Section of the Law Council of Australia.

[1] Richard Spearman QC, *The Law of Privacy,* paper delivered at Middle Temple CPD day, 18th November 2006, available at http://www.39essex.com/members/profile.php?id=144.

We would be very happy to discuss this submission with the Commission. Please contact Peter G Leonard, Chair of the Media and Communications Committee of the Business Law Section of the Law Council of Australia on 02-9263 4000 or via email: pleonard@gtlaw.com.au.

Yours sincerely,

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