



**SERIOUS INVASION OF PRIVACY  
IN A DIGITAL AGE**

**Discussion Paper**

**SUBMISSION**

**MAY 2014**

## Executive Summary

The Australian Interactive Media Industry Association's (AIMIA) Digital Policy Group (Digital Policy Group) welcomes the opportunity to provide comment in response to the *Serious Invasions of Privacy in the Digital Era Discussion Paper* (Discussion Paper). The Digital Policy Group previously provided comment on the Issues Paper which we hope was useful in your consideration of this important matter.

Technological advances have provided significant productivity increases, increased growth and customers for small businesses, gives Australian households the ability to more easily connect, share, find important information and more efficiently make purchases to assist their day to day lives around the globe and directly here in Australia. Technological advances and the protection of privacy are not concepts which are mutually exclusive rather technology and privacy fit naturally together to ensure that consumers capture the benefits of technology whilst also retaining their privacy.

There is nothing more important to members of the Digital Policy Group than the safety and privacy of the people who use our services each and every day. Our industry provides a rigorous framework to put people who use our platforms in control. Our industry does this by investing heavily in securing our user's data, setting and explaining community standards and terms of service, providing easy to access resources on digital citizenship including key concepts such as safety and privacy and providing robust and easy to use tools.

Most leading digital platforms already enable a right of erasure by enabling people to remove information that they have contributed to a service and that, on request, that information should be deleted forever. On this basis it would seem that additional legislation to do the same is unnecessary. In addition some platforms also provide the ability to report and request removal of content about them that is published by others that are in breach of the platform's terms of service. These reporting processes are supported by 24 \* 7 teams and result in the rapid removal of content that constitutes harassment, intimidation or bullying.

More important however to producing positive online privacy outcomes for Australians is the promotion of good digital citizenship. Good digital citizenship skills require the combined efforts of government, industry and community. Law is not a major feature within this framework. The Family Online Safety Institute (FOSI) has observed that

Throughout the world, digital citizenship is gaining considerable momentum right across the multi-stakeholder spectrum. It provides an important framework in which to bring together and share both offline and online issues. Examples are shown throughout the regional editions in this report and indicate that it is becoming a benchmark approach for many citizens, communities and countries.<sup>1</sup>

The Digital Policy Group notes that the Australian Law Reform Commission (ALRC) has been asked to put forward a detailed design of a tort of privacy. On this basis we provide comment on key design elements of the tort including the establishment of suitably high thresholds to prevent courts dealing with trivial cases, appropriately constructed considerations that courts need to take account of when determining whether the plaintiff had a reasonable expectation of privacy and provision for a safe harbour for internet intermediaries to preserve the significant economic and societal benefits that online platforms deliver for the Australian economy and society.

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<sup>1</sup> Family Online Safety Institute, State of Online Safety Report, 2011 Edition GRID, Global Resource and Information Directory <http://www.fosi.org/images/stories/resources/State-of-Online-Safety-Report-2011-Edition.pdf>

## **THE SOCIAL, CULTURAL AND ECONOMIC CONTRIBUTION OF DIGITAL PLATFORMS**

As outlined previously the digital industry makes a significant social, cultural and economic contribution to Australia.

Deloitte Access Economics has estimated that the direct contribution of the internet to the Australian economy was worth approximately \$50 billion or 3.6 per cent of GDP in 2010<sup>2</sup>. That is expected to increase by at least \$20 billion over the next five years to \$70 billion.

Deloitte Access Economics also found that there were also wider economic benefits which are not fully captured through GDP calculations including \$27 billion in productivity increases to business and government and the equivalent in \$53 bn in benefits to households in the form of added convenience (eg online banking and bill paying) and access to an increased variety of goods and services and information.

Price Waterhouse Coopers (PwC) also recently identified that Australia's ad-supported internet ecosystem generated significant economic activity contributing \$17.1 billion directly to economic output (GDP) and providing over 162 000 jobs. The PwC report identified that this contribution is likely to grow to \$26.5 bn by 2017 with an annual average growth rate of 7.5 per cent<sup>3</sup>.

Access to these online services and content generates additional welfare benefits worth approximately \$70 bn on top of its contribution to economic output and jobs.

These benefits include

- Consumer value - \$43 bn in benefits from decreased transaction costs, ability to find products that better match preferences and availability of new products and services, access to information, access to products that are only available in other countries or different parts of Australia, access to entertainment, access to government / public services
- Producer value - \$27 bn in benefits from decreased production and research and development (R&D) costs, ability to find new markets and improved information flows
- Community value – substantial qualitative benefits from the strengthening of communities and access to information

Ad-supported ecosystems also provide a platform for social good where social investment, philanthropy and social enterprises are able to increase their reach and scope through technology. Such ecosystems are enabling increased efficiency in the not-for-profit sector through enhanced communications and providing platforms that allow donors to easily make donations via online platforms.

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<sup>2</sup> The Connected Continent: How the internet is transforming the Australian economy, Deloitte Access Economics, August 2011  
[https://www.deloitteaccesseconomics.com.au/uploads/File/DAE\\_Google%20Report\\_FINAL\\_V3.pdf](https://www.deloitteaccesseconomics.com.au/uploads/File/DAE_Google%20Report_FINAL_V3.pdf), page 2

<sup>3</sup> Price Waterhouse Coopers and Interactive Advertising Bureaux Australia, Digital Dollars, How internet advertising is fuelling the Australian economy & society, March 2013, page 2  
[http://www.iabaustralia.com.au/en/About\\_IAB/Media\\_Releases/2013\\_-\\_Internet\\_advertising\\_fuelling\\_Australian\\_GDP\\_to\\_value\\_of\\_17-1bn.aspx](http://www.iabaustralia.com.au/en/About_IAB/Media_Releases/2013_-_Internet_advertising_fuelling_Australian_GDP_to_value_of_17-1bn.aspx)

From a social perspective, research by the Cooperative Research Centre for Young People, Technology and Wellbeing (YAW-CRC) found that:

*There are a number of significant benefits associated with the use of social networking services (SNS) including: delivering educational outcomes; facilitating supportive relationships; identity formation; and, promoting a sense of belonging and self-esteem. Furthermore, the strong sense of community and belonging fostered by SNS has the potential to promote resilience, which helps young people to successfully adopt to change and stressful events.<sup>4</sup>*

## **COMMITMENT TO PRIVACY**

Our previous submission<sup>5</sup> outlined the many traditional and innovative ways our industry provides information and assistance to people who use our platforms.

Leading members of the digital industry universally provide the ability of users to control their data by providing mechanisms to request deletion of information that they have provided to a platform about themselves.

For example, closing an eBay account can be done online and destruction and anonymisation of personal information associated with that account will occur as soon as practicable after the request is made<sup>6</sup>.

Yahoo!7 also allows users to delete their account via online request<sup>7</sup>.

Facebook users who no longer want to use their account can request that their profile is permanently deleted. Additionally users are able to deactivate accounts which results in the immediate disappearance of the individual's timeline. People who use Facebook are also empowered through a number of tools via privacy settings which allow them to review their activities, control whether they are tagged in photos and remove and edit comments, posts.

Google also provides extensive tools to users to control their data and content by allowing them to amend or delete any data that they have created. Additionally Google users have the ability to delete all information associated with their account<sup>8</sup>.

Our industry has also pioneered content reporting mechanisms that permit individuals to report content that breaches the digital platform's terms of service as well as track progress of these requests. Our industry devotes round the clock, multilingual resources to deal with reported content of this nature. Our industry triages and addresses the most serious cases first and seeks to remove content rapidly. In addition serious cases will result in termination of accounts.

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<sup>4</sup> <https://s3.amazonaws.com/yawcrc/Publications/The-Benefits-of-Social-Networking-Services.pdf>

<sup>5</sup> [http://www.alrc.gov.au/sites/default/files/subs/56.org\\_aimia\\_digital\\_policy\\_group\\_submission.pdf](http://www.alrc.gov.au/sites/default/files/subs/56.org_aimia_digital_policy_group_submission.pdf)

<sup>6</sup> <http://pages.ebay.com.au/help/account/closing-account.html> and <http://pages.ebay.com.au/help/policies/privacy-policy.html#closing>

<sup>7</sup> <https://info.yahoo.com/privacy/au/yahoo/#5>

<sup>8</sup> <https://support.google.com/accounts/answer/32046?hl=en>

## **IMPORTANCE OF DIGITAL CITIZENSHIP SKILLS IN SECURING POSITIVE ONLINE SAFETY OUTCOMES FOR AUSTRALIANS**

Understanding how to behave online, stand up for others, use the tools and resources available to protect and manage content and data privacy are all key elements of digital citizenship.

As noted previously global research confirms that digital citizenship is the single most effective way of achieving positive online safety outcomes in a country<sup>9</sup>.

The Digital Policy Group welcomes the ALRC's view

That education has an important role to play in reducing and preventing serious invasions of privacy, particularly in assisting individuals to interact safely and effectively in online and electronic relationships<sup>10</sup>

Education is key because it allows individuals to know that when another individual is posting content about them that is not acceptable under the platform's policies<sup>11</sup>, enables them to act quickly by taking advantage of the reporting and social resolution tools<sup>12</sup> based on world leading research on conflict resolution<sup>13</sup> and obtain a speedy resolution.

## **PROPOSED STATUTORY CAUSE OF ACTION FOR SERIOUS INVASIONS OF PRIVACY**

The Digital Policy Group notes that the ALRC's terms of reference require it to make recommendations with respect to the detailed design of a new privacy tort. The Digital Policy Group provides comment on the design elements of the tort on this basis.

### **Proposals 6-1 and 6-2 A Reasonable Expectation of Privacy**

The requirement that the statutory cause of action for serious invasions of privacy should only be actionable where the plaintiff had a reasonable expectation of privacy in all circumstances is an important mechanism by which to ensure that only sensible and genuine privacy matters are able to access the courts and seek redress.

The Digital Policy Group welcomes the careful consideration given to the factors that are proposed to be taken into consideration by a court when considering whether a plaintiff had a reasonable expectation of privacy in all the circumstances.

These factors recognise that privacy is contextual in nature. The Digital Policy Group supports the specific inclusion of consent in these factors as it is a concept which is

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<sup>9</sup> Family Online Safety Institute, State of Online Safety Report, 2011 Edition GRID, Global Resource and Information Directory <http://www.fosi.org/images/stories/resources/State-of-Online-Safety-Report-2011-Edition.pdf>

<sup>10</sup> Australian Law Reform Commission, Serious Invasions of Privacy in the Digital Era Discussion Paper, page 40

<sup>11</sup> <https://www.facebook.com/legal/terms>, <http://info.yahoo.com/legal/au/yahoo/utos/en-au/>, <http://info.yahoo.com/legal/au/yahoo/utos/en-au/>, <https://www.google.com/policies/?hl=en>, <http://www.youtube.com/t/terms>, [http://www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines), <http://www.youtube.com/yt/policyandsafety/>,

<sup>12</sup> <http://au.safely.yahoo.com/>, <http://pages.ebay.com.au/help/account/safety.html>, <http://www.youtube.com/yt/policyandsafety/reporting.html>,

<sup>13</sup> [http://greatergood.berkeley.edu/article/item/can\\_science\\_make\\_facebook\\_more\\_compassionate](http://greatergood.berkeley.edu/article/item/can_science_make_facebook_more_compassionate)

integral to the concept of privacy and can have significant bearing in relation to whether an act constitutes a serious invasion of a breach of privacy or not.

For example, a picture taken of an adult who has consented to pose naked with 500 others in a public place for the purposes of art is unlikely to be considered a serious invasion of privacy. Whereas a photo of the same individual taken covertly in a dressing room of a public pool will most likely represent a serious invasion of privacy.

### **Proposal 7-1 Seriousness**

The Digital Policy Group agrees with the ALRC that an appropriately high threshold should be incorporated into a statutory cause of action for a serious invasion of privacy for two reasons.

First the courts' resources should only be used when a serious, non-trivial problem has occurred.

Second, a high bar is required to balance the countervailing public interests such as freedom of expression.

The Digital Policy Group submits that on this basis the statutory cause of action for serious invasions of privacy should require that the invasion of privacy was highly offensive, distressing or harmful to a person of ordinary sensibilities.

### **Proposal 8 – 1 Balancing Privacy and Other Interests**

Article 12 of the Universal Declaration of Human Rights allows

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour or reputation.

However Article 12 sits alongside Article 19 of the Universal Declaration of Human Rights which also allows

Everyone has the right to freedom of opinion and expression; this includes freedom to hold an opinion without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

It has been noted that

Freedom of speech has been, and still is, one of our most vital liberties. If we discard it we critically undermine the moral foundation of liberal democracy and lose our basic human individuality.<sup>14</sup>

The Digital Policy Group welcomes the inclusion of freedom of expression in the non-exhaustive list of public interest matters as being of vital importance for courts to consider. Notwithstanding the inclusion of the public interest test, there still remains a substantial risk that the new tort may likely have a chilling effect on individual communications. This may particularly be the case where individuals stop expressing their views and speaking freely for fear of being held liable for breaches of privacy perhaps due to having only a partial understanding or being uncertain of the nuances

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<sup>14</sup> Chris Berg, In Defence of Freedom of Speech, page 6

that apply with respect to the seriousness test or how the courts will determine whether the plaintiff had a reasonable expectation of privacy.

### **Question 10 – 3 Safe Harbour Scheme for Internet Intermediaries**

As highlighted above the economic, social and cultural benefits of digital platforms are significant. Platforms enable the free, unfettered and instantaneous communication between people throughout the world.

The imposition of an overly oppressive regime that introduces liability on internet intermediaries would result in potent potential consequences in terms of the free and open communications that digital platforms enable.

The Digital Policy Group agrees that internet intermediaries should not be held to be at fault in circumstances where communications that constitute a serious invasion of privacy are posted by a third party where the platform has no involvement except to provide the blank canvas upon which the third party communicates.

To impose a legal liability on internet intermediaries in this context would be both unreasonable and unjust. Therefore the Digital Policy Group strongly supports the inclusion of a safe harbour scheme for internet intermediaries from liability for serious invasions of privacy committed by third party users on their service.

### **Proposal 14-1 A Commonwealth Harassment Act**

The ALRC has proposed that a new Commonwealth harassment Act could be enacted to consolidate and clarify existing criminal offences for harassment and, if a new tort for serious invasion of privacy is not enacted, provide for a new statutory tort of harassment.

This new harassment Act or tort would cover a pattern of behaviour or course of conduct pursued by an individual designed to intimidate and distress another individual. Offences for harassment would include harassment both offline and online.

As noted previously, leading digital platforms terms of service either directly prohibit serious harassment or indirectly prohibit harassment through the prohibition of intimidation and/or bullying.

People who use our services are able to report, usually by one click, content that breaches a platform's terms of service. As discussed this action will result in the content being reviewed and removed (if found to be in breach of the terms of service).

It would seem that the introduction of a harassment Act or tort where the impetus for such a law was driven by an inquiry into online privacy where the result is that the law would not be required online due to platforms already managing this behaviour but would result in laws applying offline would be a very curious outcome and probably not one that would have a strong basis on which to proceed.

Such a proposal would also benefit from further consideration and inquiry before proceeding in any case.

## **Proposal 15-2 New Australian Privacy Principle**

A broad right that would entitle individuals to not only request the removal of information that they have published but also the information that other people have published about them raises complex issues that would require broader public debate before proceeding.

The advancement of our society and the fabric of our democracy rests upon the ability of individuals to think and express their thoughts freely.

Freedom of speech is itself generally defined as

the absence of coercion or restriction on expression by the state<sup>15</sup>

Moreover

A freedom of speech that only allows freedom of inoffensive or popular speech is no freedom at all – it is how society deals with the speech that is offensive or unpopular that reflects its liberal<sup>16</sup> values<sup>17</sup>.

The introduction of a legal right to suppress the communication of another should in all cases be examined with significant caution especially when dealing with the limitation of the publication of facts or opinions that are true.

Even the introduction of a countervailing public interest test does not solve the potential issues posed by a broad “right to be forgotten”. A broad right to deletion with a public interest test would likely uphold free speech on matters deemed to be in the public good, such as news reporting and criticism, but deny an ordinary individual the ability to express true opinion and convey correct facts about others (noting that defamation law is already available when incorrect opinions and facts are published). In sum it would hand power to an individual at the expense of another with the outcome being the imposition of censorship rules on the Australian population.

Moreover it jeopardises the ability of the broader community to know true facts about others such as whether a doctor has been guilty of malpractice or a politician has accepted bribes or more pedestrian claims that an individual has engaged in unpleasant behaviour.

There are also other considerations as well.

Online safety advocates have criticised the right to be forgotten on the basis that digital capability enables the copying, sharing and storing of information on a global scale. It is simply not possible to direct a single entity to be responsible for the deletion of unwanted facts across the entire internet.

In light of the above the Digital Policy Group supports the ALRC in seeking to confine the new privacy principle for deletion of personal information.

As noted earlier in this submission leading digital platforms provide people who use their services with the ability to delete information that is provided by the individual on request. On this basis we query whether the case for the creation of a new Australian Privacy Principle in relation to requests for deletion of information has been sufficiently made.

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<sup>15</sup> Chris Berg, In Defence of Freedom of Speech, Chapter 9, Individual Liberty and Freedom of Speech

<sup>16</sup> liberal in this context meaning willing to respect or accept behaviour or opinions different from one’s own

<sup>17</sup> Chris Berg, In Defence of Freedom of Speech, Chapter 3, Christianity and Freedom of Conscience



Nonetheless the Digital Policy Group would not oppose a new Australian Privacy Principle relating to the right to request deletion of information provided that it was limited to information that an individual supplies to an APP Entity.

### **About the Digital Policy Group**

The Digital Policy Group is the policy group of AIMIA that represents 460 digital players in the Australian digital industry. We represent large and small, local and global players that provide digital content services, applications and platforms. Our members and supporters include Australia Post, eBay, Facebook, Freelancer, Google, Pandora, Selz, and Yahoo!7.