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Dear Ms Wynn

### **ISSUES PAPER: SERIOUS INVASIONS OF PRIVACY IN THE DIGITAL ERA**

The Insurance Council of Australia<sup>1</sup> (**Insurance Council**), the representative body of the general insurance industry in Australia, welcomes the opportunity to provide this submission on the Australian Law Reform Commission's (ALRC) *Issues Paper: Serious Invasions of Privacy in the Digital Era* (the Issues Paper).

As you would be aware, in the course of providing insurance and paying claims, it is necessary for insurers to collect, use and disclose personal information that ranges widely from names and addresses to sensitive health information. The general insurance industry continues to invest time and capital in systems, training and policies to promote a culture that respects and protects privacy. We note that the Australian Information Commissioner's (OAIC) 2013 *Community Attitudes to Privacy - survey results* observed an increase in trust since 2007 in the way insurance companies handle personal information.<sup>2</sup>

We have previously contributed to ALRC and Department of Prime Minister and Cabinet (DPM&C) inquiries in relation to proposals for a statutory cause of action. We note that this Issues Paper does not consider it useful to canvass views in support or opposition to a statutory cause of action as this may depend on the precise legal content proposed by the ALRC. We agree with this approach and have previously taken no position on the development of a statutory cause of action.

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<sup>1</sup> The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent more than 90 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. June 2013 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of \$39.9 billion per annum and has total assets of \$118.1 billion. The industry employs approximately 60,000 people and on average pays out about \$106 million in claims each working day.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

<sup>2</sup> OAIC (2013) *Community Attitudes to Privacy - survey results* up from 46% in 2007 to 54% in 2013 (page 5).

Our comments in the **Attachment** reflect previous Insurance Council submissions<sup>3</sup> and address those questions raised by the Issues Paper of key interest to our members, for example the provision of defences to adequately address the ability for general insurers to undertake surveillance activities to assess and defend a claim decision.

If you require any further information, please contact Mr John Anning on (02) 9253 5121 or [janning@insurancecouncil.com.au](mailto:janning@insurancecouncil.com.au).

Yours sincerely



Robert Whelan  
Executive Director and CEO

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<sup>3</sup> For example, ICA submissions dated 17 November 2011 to DPM&C and 18 December 2007 to ALRC.

**The impact of a statutory cause of action**

***Question 3. What specific types of activities should the ALRC ensure are not unduly restricted by a statutory cause of action for serious invasion of privacy?***

The Insurance Council is concerned the proposals may impact on the ability of general insurers to undertake surveillance to assess a personal injury claim (for example in relation to Compulsory Third Party and workers compensation claims) and in the defence of any decision to decline a claim. Surveillance may also be used, for example, in investigating suspected fraud or misrepresentation.

It is crucial that workable defences are provided in order to avoid unwarranted interference with legitimate commercial interests, such as those of insurers. We outline in our response to question 14 below, defences which should be included to preserve insurers' ability to undertake surveillance.

**Invasion of privacy**

***Question 4. Should an Act that provides for a cause of action for serious invasion of privacy (the Act) include a list of examples of invasions of privacy that may fall within the cause of action? If so, what should the list include?***

The Insurance Council submits that for commercial certainty, a list of activities likely to constitute a serious invasion of privacy would be useful. For further comment, see response to Question 14.

**Privacy and the threshold of seriousness**

***Question 6. What should be the test for actionability of a serious invasion of privacy? For example, should an invasion be actionable only where there exists a 'reasonable expectation of privacy'? What, if any, additional test should there be to establish a serious invasion of privacy?***

The Insurance Council considers the recommendation of the Australian Law Reform Commission (ALRC) and Victorian Law Reform Commission (VLRC) that the plaintiff be required to demonstrate there was both a reasonable expectation of privacy and that the invasion of the expected privacy would be highly offensive to a person of ordinary sensibilities is appropriate. This will help discourage frivolous or vexatious claims. For further suggested requirements, refer to questions 9 and 10 below.

**Fault**

***Question 9. Should the cause of action be confined to intentional or reckless invasions of privacy, or should it also be available for negligent invasions of privacy?***

In addition to requiring the plaintiff to demonstrate there was a reasonable expectation of privacy and that the invasion of the expected privacy would be highly offensive to a person of ordinary sensibilities, the Insurance Council submits the plaintiff should be required to demonstrate that the action of the respondent was intentional or reckless. A cause of action for invasion of privacy should provide an avenue for remedy where the behaviour of the respondent was clearly likely to infringe the plaintiff's expectation of privacy. The legislation should discourage frivolous or vexatious claims.

### Damage

#### **Question 10. Should a statutory cause of action for serious invasion of privacy require proof of damage or be actionable per se?**

The Insurance Council would be concerned at any proposal for an actionable right to privacy which does not require proof of damage for an action to be brought. This could result in a significant number of actions being commenced and the threat of such an action could have an adverse impact on dispute resolution processes.

### Defences and exemptions

#### **Question 14. What, if any, other defences should there be to a statutory cause of action for serious invasion of privacy?**

The Insurance Council submits that the legitimate need of insurers to undertake surveillance should be recognised. In order to achieve this, a statutory cause of action should contain a list of activities which constitute a serious invasion of privacy as well as appropriate defences.

If a statutory actionable right to privacy is implemented, the Insurance Council suggests that the list of defences should include that the:

- act or conduct was incidental to the exercise of a lawful right of defence of person or property;
- act or conduct was made for the purpose of, and in the course of, ascertaining the truth;
- act or conduct for the purposes of investigating potential fraud or misrepresentation;
- act or conduct by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his/her own affairs and the person who received the information has a corresponding interest or duty to receive it.

In addition, recognition of implied, inferred or express consent as authorisation for the activities should be included as a defence.

We submit it would also be helpful if the Explanatory Memorandum introducing a statutory cause of action made specific reference to the ability of insurers to access these defences.

### Monetary remedies

#### **Question 16. Should the Act provide for any or all of the following for a serious invasion of privacy:**

- **a maximum award of damages;**
- **a maximum award of damages for non-economic loss;**
- **exemplary damages;**
- **assessment of damages based on a calculation of a notional licence fee;**
- **an account of profits?**

The Insurance Council has no objection to the remedies recommended by the ALRC in its report, *For Your Information: Australian Privacy Law and Practice* (recommendation 74-5):

- damages, including aggravated damages, but not exemplary damages;
- an account of profits;
- an injunction;
- an order requiring the respondent to apologise to the claimant;

- a correction order;
- an order for the delivery up and destruction of material; and
- a declaration.

#### Other remedies

**Question 18. Other than monetary remedies and injunctions, what remedies should be available for serious invasion of privacy under a statutory cause of action?**

See response to question 16 above.

#### Who may bring a cause of action

**Question 19. Should a statutory cause of action for a serious invasion of privacy of a living person survive for the benefit of the estate? If so, should damages be limited to pecuniary losses suffered by the deceased person?**

The Insurance Council supports the recommendations of the ALRC, the NSWLRC and the VLRC that the proposed cause of action be limited to living persons. Further, we support the recommendations of the ALRC, the NSWLRC and the VLRC that a cause of action only be available to natural persons.

#### Location and Forum

**Question 24. What provision, if any, should be made for voluntary or mandatory alternative dispute resolution of complaints about serious invasion of privacy?**

In general, we support provision in the regime for a process of alternative dispute resolution between the parties without reliance on the courts. However, detail on the design of either a mandatory or voluntary scheme is necessary before further comment could be made.

#### Interaction with existing complaints processes

**Question 25. Should a person who has received a determination in response to a complaint relating to an invasion of privacy under existing legislation be permitted to bring or continue a claim based on the statutory cause of action?**

The Insurance Council submits for certainty, a person who has received a determination under existing legislation, or an alternative dispute process, should not be permitted to bring or continue a claim based on a statutory cause of action.