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Date: 11 November 2013

The Executive Law Director  
Australian Law Reform Commission

By email: [privacy@alrc.gov.au](mailto:privacy@alrc.gov.au)

Dear Sir/Madam

I have read the "*Serious Invasion of Privacy in the Digital Era*" and wish to make the following submission.

With the rapid increase of digital surveillance equipment and technology, a statutory right to privacy is now necessary. In this submission I wish to focus on issues of privacy as they arise in relation to the use of closed circuit cameras in residential areas and the ability of those cameras to film neighbouring residences. Recent experience of a camera being installed on a neighbour's property has demonstrated the inadequacy of the existing laws to deal with the invasion of privacy.

In light of the increasing use of digital surveillance equipment, I support the establishment of a reasonable expectation of privacy, particularly in so far as it relates to private citizens in their homes. Sadly, in the suburb in which I live, one needs only to look around the streets to see that CCTV is increasingly becoming a mechanism by which individuals are choosing to protect their houses, this is despite the low crime rate for the area and the high proportion of residents who are professionals and high income earners. While one would have thought that the need for such cameras is low, they are, presumably, being erected in addition to and as an alternative to more traditional alarms with back to base systems. It is questionable whether appropriate consideration to neighbours' privacy and amenity impacts occurs.

The current privacy legislation does not apply to individuals and unlike requirements for public authorities there are no controls regarding the collection, use or disclosure of such information. There is no legal obligation on the part of the installer, when installing a camera, to ensure that it does not film other persons' property or to seek consent to such filming, to disclose when the camera is in operation, who has access to the information, how long the information will be stored, how the footage will be used, whether the footage is being viewed by a third party and if so how that third party is storing, using or disclosing the footage.

At present the only options available to a person who is faced with a CCTV camera looking into their property is:

- Speak to the police based upon a possibility of a voyeurism offence;
- Bring an action in nuisance
- Bring an action for breach of confidence

All of these are unsatisfactory and require the person who is being filmed to take costly action in the absence of possession of the footage. They also require proof of damage. Councils have no power to take action considering it a matter for the police and it does not assist neighbourly relations to be forced to call the police in on allegations of voyeurism.

It is submitted that consideration should be given to the use of a less onerous and costly system in relation to the use of CCTV cameras in residential areas between private properties. Filming from fixed cameras between properties should be prohibited.

I support the position that the plaintiff should not have to prove the negative and that rather than placing the onus on the person being filmed to demonstrate that the camera is filming their property and to take action, either via the courts or an alternative mechanism (both of which are costly to the average person and immediately place the wealthy at an advantage to those with lesser incomes), the onus should be on the person installing the optical surveillance camera to prove that it does not film other property. Why should a defendant be able to film a person's yard and internal living areas and the onus be on the plaintiff to prove damage or interference with the use and enjoyment of property? Further that why should the property owner be required to demonstrate that the conduct is 'highly offensive to the person of ordinary sensibilities'? The onus should be on the owner and/or operator of the camera to demonstrate that it does not film neighbouring property and does not interfere with a person's privacy.

In the circumstances being described, there is no basis upon which it is in the public interest for the onus of proof to be on the person being filmed. As to the public interest, I do not support a legislative definition of "public interest" as the public interest in a particular matter is too often a matter of judgment. The term "public interest" has existed undefined in legislation such as the *Environmental Planning and Assessment Act 1979* and the *Government Information (Public Access) Act 2010* and it can be seen from a review of the legislation in those statutes and the various cases decided under them that what constitutes the public interest is very wide and may differ depending upon the circumstances of a particular case.

While it may be appropriate to limit an action for privacy to a serious invasion of privacy in certain circumstances (for example in relation to the personal affairs of celebrities, politicians and others within the public arena) such a limitation is not justifiable in the circumstances being discussed in this letter.

### **Suggested ways forward**

It is submitted that the ALRC should investigate the following options:

- (a) *The Surveillance Devices Act NSW* should be amended to prohibit filming between properties without consent.
- (b) Prior to the commissioning any camera, the user of the camera should be required to provide a certificate from a licensed CCTV operator to the effect the camera does not film and cannot be altered to film other private property or if it does, consent to such filming has been obtained. This certificate should be registered with the local Council and it should be an offence to either film other property or

provide false or misleading information as to the operation of the camera. Additionally there should be a right for adjoining owners to bring civil actions. Council should have the power to bring a civil enforcement proceedings against a person who either improperly registers such a certificate or fails to register the certificate which enables the Council to issue orders to:

- (i) cease the operation of the camera,
- (ii) remove the camera, or
- (iii) for evidence to be provided to the Council as to the angle and scope of the camera.

(c) Whether the planning system is the appropriate mechanism by which to implement such a system, although the difficulty may be in defining the installation and use of a CCTV camera as 'development'.

Sincerely,



Sue Puckeridge (Radford)  
Solicitor