23.\_org\_ CV Check Pty Ltd

**From:** Australian Law Reform Commission [mailto:web@alrc.gov.au]
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**To:** Marie-Claire Muir
**Subject:** Online submission to IP43: CV Check Pty Ltd

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Submitted by user: CV Check Pty Ltd

Submitted values are:

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This submission is:

On behalf of an organisation

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CV Check Pty Ltd

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Question 1:

## Introduction to CVCheck

CV Check Pty Ltd is an online screening and verification company. It provides services to individuals as well as large and small businesses in order to provide third party verification in a wide range of contexts, including applications for employment and tenancy applications. In the CVCheck business model, following an application from an individual, personal information is verified at source and record of that verification is retained on a secure website. The individual is provided with the means to control access to that site, which the individual can then share as she or he sees fit.

The nature of the services provided require that protection of privacy be at the core of CVCheck's business practices. The information verified at source can be, for example, an individual's criminal record. CVCheck's systems have been designed accordingly, with emphasis on obtaining an individual's informed consent, providing security of information, and delivering control over access back into the hands of the relevant individual. Nonetheless, the nature of the information handled means that CVCheck remains at risk of finding itself in a dispute concerning breach of privacy. Accordingly, it has a close interest in legal developments in this area; and in ensuring that consideration is given to the ramifications of the proposals beyond potential impact on the more sensational examples of tabloid journalism.

CVCheck welcomes the opportunity to contribute to ALRC's consideration of the development of a very important area of the law.

## Question 1

### Balancing of privacy with other values and interests

As noted in [24] of the Issues Paper, whilst it is important, the privacy of an individual cannot, without undesirable consequences, be given absolute precedence over other values of public interest.

#### Interests of justice

This comment does not directly relate to CVCheck, but is sufficiently important to merit mention. Although "promotion of open justice" is listed within the issues paper, it is possible to envisage circumstances in which a dogged adherence to the principle of upholding an individual's right to privacy could undermine, or conflict with, the proper administration of justice and/or the upholding of confidence in the legal system as a whole.

We accept that it might have been thought that the balancing required in this respect is so obvious as to not need to be stated, or that this concept is thought to be within "the proper administration of government and matters affecting the public".

#### Prevention and detection of criminal and fraudulent activity

The doctrine of legal professional privilege exists because Courts have recognised that truly effective administration of justice is not the responsibility solely of the Courts themselves. Every lawyer has a role to play in that administration by providing the correct advice; and legal professional privilege exists to provide a context in which the best advice can be given. Similarly, the prevention and detection of fraudulent activity should not be viewed as something concerning only the police authorities. Any regulation enshrining privacy protection should be framed in such a manner as to recognise a balance that will allow a consumer to protect herself against fraud by a potential scammer without fear of being sued for infringing that salesman's right to privacy; or an employer's ability to know and trust her workforce; or a landowner's ability to have confidence that her property is about to be rented by reliable tenants.

#### Digital economy - effective delivery of services, participation by individuals and economic growth

There is a clear need to balance the protection of privacy with the way the "digital economy" may facilitate each of these items into the future. The speed of changes of behaviour and practice in this area are well known to all. Whilst there is some risk of legal protections being "left behind" if no changes are made, there are equally risks of impediments being built if a framework is built to deal with a situation that is being left behind.

Care should be taken to keep protections simple and general, and avoid the temptation to be overly prescriptive. In a rapidly changing environment such as the digital economy, the future cannot be accurately predicted. Rather than prescribe details in legislation that will rapidly become outdated, a far better approach is to outline general principles, and then trust the Courts to interpret more detailed requirements in the light of changing circumstances.

Question 2:

Question 3:

It is important that privacy laws should not interfere with the free flow of information between informed, consenting individuals and the individuals or organisations with whom those individuals are dealing in the course of their lawful business activities and personal affairs.

Question 4:

Question 5:

It appears to us that, although related, the two situations will give rise to different legal issues. Any attempt to create a single cause of action applicable to both scenarios is likely to create anomalies and difficulties in one or the other.

Question 6:

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Question 14:

### Good faith inquiries

We repeat our submission in answer to Question 1 that the prevention and detection of fraudulent activity should not be viewed as something concerning only the police authorities. Any regulation enshrining privacy protection should be framed in such a manner as to recognise a balance that will allow a consumer to protect herself against fraud by a potential scammer without fear of being sued for infringing that salesman's right to privacy; or an employer's ability to know and trust her workforce; or a landowner's ability to have confidence that her property is about to be rented by reliable tenants.

To that end, we submit that there it should be a defence to a statutory cause of action for invasion of privacy that the alleged invasion of privacy has arisen solely because a person or organisation has made bona fide inquiries to verify an express or implicit representation made to that person or organisation by the individual concerned. That defence should also be available to the agents of the person or organisation to whom the representation has been made.

We have suggested that an implicit representation should justify the defence to avoid any scope for argument about whether the "applicant" has or has not represented, for example, that she or he is of good character, or will be a suitable ambassador for the business or has disclosed everything that the organisation needs to know to make a suitably informed decision.

We have suggested that there be a requirement that the representation be made specifically to the person or organisation (and not to the world at large) because we are not persuaded it would be appropriate for this defence to be available for a news agency to justify "character assassination" of an individual who is deemed, for the moment, to be newsworthy.

We have suggested that the defence extend to agents of the person or organisation because as a matter of practice, the person or organisation seeking to verify information will need to act through third parties. It would be unfair for the defence to be unavailable to those third parties.

We note that this proposed defence differs from the possible defence noted in [73] of the Issues Paper of "disclosure made for the purpose of rebutting an untruth" in the following respects:

* a defence relating only to a disclosure made can only be available to an entity that already has the private information; and
* the defence noted in [73] is only available to an entity that already knows the true (and untrue) state of the facts; it is not available to an entity that is ignorant, but wishes to verify the truth.

### Waiver or consent

Paragraph [73] of the Issues Paper notes a possible defence of the existence of a contractual waiver.

We respectfully suggest that this proposed defence is far too narrow. Rather, a defence should be available to any action that the act complained of was conducted with the express or implied consent of the individual concerned (or, in the case of an individual lacking capacity to consent, her or his guardian); and contractual waiver should be but one example of the form which that consent might take. If consent has been given to the act concerned, then whether or not that consent forms part of the factual matrix necessary for the formation of a contract should be irrelevant.

### Other appropriate defences

CVCheck supports the inclusion of the possible defences noted in [73] of the Issues Paper. In particular, if information is already in the public domain, it is hard to see that any serious invasion of privacy has taken place at all. Whilst it is likely that the elements of the action will not be made out, the availability of this proposed defence would provide another level of security against the cause of action being misused or applied in unintended circumstances.

Question 15:

Question 16:

Question 17:

Question 18:

Question 19:

Question 20:

Prima facie, the hearing of any action for a serious breach of an individual's privacy must involve the close participation (and presumably evidence) of that individual. The individual must be central to it. The action is fundamentally different from that concerning, say, a misleading and deceptive advertising campaign by a corporation. As such, we respectfully suggest there is no advantage in seeking to establish a means for proceedings in respect of other persons.

Question 21:

We submit that a limitation period consistent with that of a defamation action is appropriate. There seems little reason to extend the period beyond 12 months (or up to 3 years if it was not reasonable to have commenced proceedings within that year).

By definition, a serious invasion of privacy is unlikely to go unnoticed. Legislation to require the mandatory reporting of serious data breaches is presently before Commonwealth parliament and likely to be passed soon. From a philosophical viewpoint, privacy is usually linked to the present: Official Secrets are customarily revealed without waiver after a certain period of time; old information is rejected as no longer news; private affairs or indiscretions of our youth are openly discussed around the dinner table.

Question 22:

Location within Commonwealth legislation would be preferable. History and past experience indicates how unlikely it is for all States to enact and maintain consistent legislation.

Question 23:

Question 24:

Effective use of ADR is to be encouraged.

Question 25:

Question 26:

Question 27:

Question 28:

Other comments:

File 1:

File 2:

The results of this submission may be viewed at:

<http://www.alrc.gov.au/node/5505/submission/5173>