ATTORNEY GENERAL; MINISTER FOR COMMERCE

Our Ref: 44-00463

Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Sir

SUBMISSION – ALRC ISSUES PAPER 43 – SERIOUS INVASIONS OF PRIVACY IN THE DIGITAL ERA

I refer to Issues Paper 43: *Serious Invasions of Privacy in the Digital Era*, dated October 2013. The Issues Paper is seeking submissions in relation to 28 questions which will guide the further work of the ALRC in the process of formulating draft recommendations regarding a possible Commonwealth statutory cause of action for serious invasions of privacy. These draft recommendations will be published in a Discussion Paper in 2014.

I note that the Issues Paper does not contain a specific question asking which entities should be subject to any Commonwealth statutory cause of action for serious invasions of privacy, and in particular whether any such statutory cause of action should apply to State and Territory agencies and instrumentalities. However, it appears that these issues may partly fall within the scope of Question 22, which asks:

> "Should a statutory cause of action for serious invasion of privacy be located in Commonwealth legislation? If so, should it be located in the *Privacy Act 1988* (Cth) or in separate legislation?"

The question of which entities should be subject to any statutory cause of action is an important question.

In this respect, I note that the *Privacy Act 1988* (Cth) (***Cth Privacy Act***) does not apply to State and Territory agencies and instrumentalities. Rather, the *Cth Privacy Act* only applies to the following entities:

(a) all Commonwealth public sector agencies;

(b) most private sector organisations (excluding, by way of example, all "small businesses", being those businesses with an annual turnover of less than $3,000,000); and

Level 10, Dumas House, 2 Havelock Street, West Perth Western Australia 6005
Telephone: +61 8 6552 5600 Facsimile: +61 8 6552 5601 Email: Minister.Mischin@dpc.wa.gov.au

(c) all private sector organisations which are health service providers (there is no small business exemption for health service providers).

Section 3 of the *Cth Privacy Act* also specifically states that it is not intended to affect the operation of a law of a State or of a Territory that makes provision with respect to the collection, holding, use, correction, disclosure or transfer of personal information and is capable of operating concurrently with the *Cth Privacy Act.*

I note that in August 2008, the ALRC released a report on privacy legislation entitled *For Your Information: Australian Privacy Law and Practice.* In that report, the ALRC recommended that Commonwealth legislation should provide for a statutory cause of action for serious invasions of privacy covering a broad range of entities, including State and Territory public sector agencies, subject to any constitutional limitations (paragraph [74.189]).

Further, in relation to the issue of national consistency, I note that the ALRC also accepted that the *Cth Privacy Act* should not be amended to apply to State and Territory agencies and instrumentalities. Instead, the ALRC recommended that national consistency be achieved by way of an intergovernmental agreement (recommendations 3-1 to 3-6). In so doing, the ALRC acknowledged the merit in the various submissions put forward in favour of State and Territories being able to regulate the handling of personal information in their public sectors, including:

(a) the benefits of having different levels of government to innovate or respond to local conditions;

(b) the need for State and Territory legislation to interact consistently with existing laws; and

(c) the advantages of having state and territory privacy regulators deal with complaints, provide advice and perform educational functions.

(paragraphs [3.12] and [3.67] of the 2008 report).

Consistently with this recommendation, the Commonwealth Parliament has not extended the application of the *Cth Privacy Act* to State and Territory agencies and instrumentalities. Rather, the Commonwealth Government's position has been that the *Cth Privacy Act* should continue to apply exclusively to the Commonwealth public sector agencies and the private sector, with the States and Territories maintaining jurisdiction over their own public sector.

In relation to national consistency, the focus has been on Commonwealth, State and Territory cooperation (through COAG, SCLJ and the Australian Health Ministers' Conference) with a view to developing consistent national benchmarks relating to the protection of personal information and to gain agreement that all jurisdictions will either ensure that their legislation is consistent with these benchmarks or, alternatively, enact such legislation. If a statutory cause of action is proposed, then cooperative Commonwealth, State and Territory legislation would be the more appropriate mechanism to achieve a nationally consistent approach.

Western Australia submits that if there is to be a new statutory cause of action for invasions of privacy (regardless of where it is located in Commonwealth legislation) it should only apply to the Commonwealth public sector and the private sector, and not to State and Territory agencies and instrumentalities.

This will ensure consistency with the scope and operation of the *Cth Privacy Act,* and the previously recommended (and adopted) approach to national consistency. Additionally, it is appropriate that the States and Territories retain jurisdiction over the conduct and operations of their public sector agencies and instrumentalities. This will enable the States and Territories to respond to local conditions and ensure consistency with existing legislation.

Individuals have the ability to bring an action for breach of confidence against State and Territory agencies and instrumentalities in appropriate circumstances. Further, there are a variety of restrictions on the use and disclosure of personal information by State and Territory agencies and instrumentalities, both in the form of specific legislative restrictions (see, for example, section 114 of *Taxation Administration Act 2003* (WA) and section 52 of the *Disability Services Act 1993* (WA)) and in the form of the common law restriction on the use of information obtained in the exercise of compulsive powers (see *Johns v Australian Securities Commission* (1993) 178 CLR 408).

At this stage, Western Australia does not propose making any submissions regarding the other questions in the ALRC Issues Paper, and will instead await the publication of the Discussion Paper in 2014.

Thank you for the opportunity to make a submission at this stage of your inquiry.

Yours faithfully

Hon. Michael Mischin MLC
ATTORNEY GENERAL; MINISTER FOR COMMERCE

12 NOV 2013