

SUBMISSION TO ALRC ISSUES PAPER: SERIOUS INVASIONS OF PRIVACY IN THE DIGITAL ERA

15 NOVEMBER 2013

INTRODUCTION

News Corp Australia welcomes the opportunity to make a submission to the Australian Law Reform Commission's Issues Paper: *Serious Invasions of Privacy in the Digital Era* (the Issues Paper).

As we have stated in previous inquiries and consultations regarding this matter, News Corp Australia is opposed to the introduction of a cause of action for serious invasions of privacy.

We note that the ALRC has indicated it does not consider it useful to ask again whether or not a statutory cause of action should be introduced. However, News Corp Australia considers that this threshold issue is what should be considered – to the extent that this Inquiry is being undertaken – as this threshold has not yet been discharged. It could therefore be said that the proposed cause of action is a solution in search of a problem.

The introduction of a cause of action will unacceptably impact the right to freedom of speech and related interests, to the detriment of the Australian public and Australia's democracy. The threat to freedom of speech and communication posed by a cause of action would undermine our ability to report in the public interest. As Australia does not have a legal right to freedom of speech and communication, this lack of counterbalance means in practice that freedom of speech and communication would be a secondary consideration (at best) in any actions brought under this proposed law. This is not something that News Corp Australia can support.

To summarise, our view remains that:

- No case has been made for a new statutory cause of action;
 - The 'problem' is ill-defined and lacks evidence;
 - The response is disproportionate;
- A cause of action poses a significant threat to freedom of speech and communication;
- There are unintended consequences of a cause of action ;
- Existing protections are adequate;
- International experiences are undesirable; and
- People's expectations of privacy are changing.

NEWS CORP AUSTRALIA'S OVERARCHING CONCERNS REGARDING A NEW STATUTORY CAUSE OF ACTION FOR SERIOUS INVASION OF PRIVACY

As stated above, News Corp Australia is opposed to the introduction of a cause of action for serious invasions of privacy.

We note that the Terms of Reference set out and limit the scope of the ALRC Inquiry – to provide a detailed design of a statutory cause of action for serious invasion of privacy; and also recommend other legal remedies and innovative ways the law could prevent or redress serious invasions of privacy. We are concerned that this is the course that has been charted, and that as a consequence of the narrow Terms of Reference, the ALRC has taken the view that *'it is not useful to ask again, in this Issues Paper, whether respondents support or oppose a statutory cause of action.'*¹

While it is the case that various stakeholders – including News Corp Australia – have made submissions and participated in previous consultation and expressed opposition to the introduction of a new cause of action, it is important that these views be expressed again in the context of this Issues Paper – particularly as it remains unclear what the 'problem' is that the cause of action is attempting to 'solve'.

It also critical to state at the outset of this submission that a proposed tort of privacy represents a threat to freedom of the press, that would undermine our ability to report in the public interest.

NO CASE HAS BEEN MADE FOR A NEW STATUTORY CAUSE OF ACTION

In News Corp Australia's view, the case for the introduction of a cause of action for serious invasion of privacy has not been made, including that there is a lack of evidence of a 'problem' requiring such a broad and untargeted response.

It seems that this process of legislative development has not been borne of sound policy processes and is not based on robust policy principles.

The 'problem' is ill-defined and lacks evidence

The Issues Paper makes reference to 'notable gaps'² in the existing legislation and common law actions which provide protection for individual privacy. However, the report does not focus on these gaps, and only makes reference to these at paragraph 162 of the Issues Paper, and poses a specific question regarding this at Question 26. It is relevant that we acknowledge the limitations placed on the ALRC by the Terms of Reference for this Inquiry, and that the ALRC has been asked to recommend a detailed legal design for a statutory cause of action for serious invasion of privacy in the digital era in the absence of a lack of evidence.

The Issues Paper notes the four other inquiries into privacy law or related issues undertaken by law reform commissions and Government in Australia since 2006³. The most recent of those was the Department of Prime Minister and Cabinet (DPM&C) Issues Paper: A

¹ ALRC Issues Paper: Serious Invasions of Privacy in the Digital Era, para 14, p12
http://www.alrc.gov.au/sites/default/files/pdfs/publications/issues_paper_43.pdf

² ALRC Issues Paper, para 21, p13

³ ALRC Issues Paper, paras 6 – 10, p10-11

Commonwealth Statutory Cause of Action for Serious Invasion of Privacy, September 2011⁴. The forward to that DPM&C Issues Paper was written by Hon Brendan O'Connor, then Minister for Privacy and Information. The forward acknowledges that individuals take actions every day to protect our privacy, and states that:

*'...serious invasions of privacy are infrequent...'*⁵

It also states that:

*'In responding to the ALRC recommendation⁶, the threshold question that must be addressed is whether a statutory cause of action is warranted.'*⁷

Detailed submissions were made to that Issues Paper in 2011, including by News. The Government did not issue a report in response to the Issues Paper.

In March 2012 the Government introduced a package of legislation into the Parliament regarding media 'reforms'. The then Attorney-General, Mark Dreyfus QC, announced that a reference would go to the ALRC regarding a statutory cause of action for serious invasion of privacy. This occurred without the Government having issued a report in response to the 2011 DPM&C Issues Paper – and without discharging the 'threshold question' put by Minister O'Connor, as to 'whether a statutory cause of action is warranted'.

On 12 June 2013 the then Attorney-General, Mark Dreyfus QC, announced the terms of reference⁸ for an ALRC inquiry into a cause of action for serious invasion of privacy in the digital era.

In the press release accompanying the release of the terms of reference, previous consultations by ALRC and Government were referenced. It said:

'Earlier consultation by the Australian Law reform Commission in 2008, and responses to the Government's 2011 discussion paper, showed little consensus on how a legal right to sue for breach of privacy should be created, or whether it should be created at all.'

The terms of reference request the ALRC to recommend a 'detailed design of a statutory cause of action for serious invasions of privacy' – and still the threshold question of 'whether or not a cause of action is warranted' has not been discharged.

We therefore remain of the view that a clear rationale for why a new cause of action is needed has not been identified in the reports of law reform commissions – including the Issues Paper – or Government since 2006.

⁴ <http://www.ag.gov.au/consultations/pages/Righttosueforseriousinvasionofpersonalprivacyissuespaper.aspx>

⁵ <http://www.ag.gov.au/Consultations/Documents/Righttosueforseriousinvasionofpersonalprivacy-issuespaper/Issues%20Paper%20-%20Statutory%20Cause%20of%20Action%20-%20Serious%20Invasion%20of%20Privacy%20-%20PDF.pdf>, p3

⁶ ALRC Report 108, (2008) recommended that a statutory cause of action for serious invasion of privacy should be introduced

⁷ Opcit, p3

⁸ <http://www.alrc.gov.au/inquiries/invasions-privacy/terms-reference>

The response is disproportionate

Given that a clear rationale for why a news cause of action warranted has not been identified, it is difficult to understand why a cause of action for serious invasion of privacy is being considered as an appropriate and proportionate 'response'.

Previous proposed actions have been very broad and would likely capture all sorts of actions – including, for instance, the installation of security cameras on a property that may spill into a neighbour's property. Such a breadth of the action is unwarranted – as is a cause of action in and of itself.

A CAUSE OF ACTION POSES A SIGNIFICANT THREAT TO FREEDOM OF SPEECH

The proposed tort of privacy represents a threat to freedom of speech and communication – and therefore freedom of the press – and would undermine our ability to report in the public interest.

Arguments have been made that other jurisdictions, including the US and UK, have introduced a cause of action for privacy and that therefore so should Australia. However, it is essential to note that in the UK, the right to privacy is balanced by s12 of the *Human Rights Act* which protects free speech. Similarly, in the US, the right to privacy is balanced by the protection of freedom of speech contained in the First Amendment of the United States' Constitution and enacted by state and federal laws.

Australia does not have a comparable legal right to freedom of speech. This lack of counterbalance in Australia means in practice that freedom of speech and communication would be a secondary consideration at best – depending on the design of the cause of action – as it is not a legal right. Therefore the introduction of a cause of action will unacceptably impact the right to freedom of speech and related interests, to the detriment of the Australian public and Australia's democracy.

For example, it is highly likely that were a cause of action for privacy have existed, it would be used to stop reporting which is in the public interest (and which later may be proved to have been the case). Examples include, but are not limited to, the recent matters before the NSW Independent Commission Against Corruption regarding a swathe of former NSW politicians.

THERE ARE UNINTENDED CONSEQUENCES OF A CAUSE OF ACTION

Again, our submissions to previous consultations have addressed the unintended consequences that could flow from a statutory cause of action for serious invasion of privacy. However, due to the extensive potential negative impacts of a cause of action, we list some of those here:

- The impact on freedom of communications and an informed community
- Complication of the legal process by the overlap of laws
- The ability for individuals to use the law for purposes other than legitimate protection of their privacy
- Inappropriate limitations placed on the actions of individuals

To explain the complication of the legal process resulting from overlapping laws further, it is likely that such an overlap with existing laws and will lead to confusion in court cases and extended hearings. In practice therefore, parties will be tied up in hearings attempting to determine which

action/s are available to them – which would likely mean extending court hearings and increasing costs. Another consequence is that potentially aggrieved parties may also cherry-pick an avenue for action based on the remedies available. Additionally, the (we believe misguided) consideration of monetary damages associated with a cause of action for serious invasion of privacy further exacerbates this issue.

In short, these are all sub-optimal outcomes resulting from legislative overlap and judicial complexity that would result from the introduction of a cause of action.

EXISTING PROTECTIONS ARE ADEQUATE

Australia already has an extensive body of privacy laws that provides Australians with adequate protections, including:

- Commonwealth *Privacy Act 1988* which has recently been amended and due to come into force in March 2014;
- State and Territory privacy and personal information legislation ;
- Surveillance and listening devices legislation; and
- Various statutory restrictions on publication.

In addition to these laws, there are actions available at common law that deal with conduct and acts which could affect privacy, including:

- Trespass;
- Nuisance;
- Defamation law; and
- Breach of confidence.

We believe that the current statutory and common laws are able to address concerns regarding invasion of privacy. There is also opportunity, should the need be identified, for common law or amendment to specific statutes to address specific problems. Such an approach – where it is evidenced to be warranted and a targeted and proportionate response – would be more appropriate than a broad cause of action which, due to its breadth and lack of specificity, incorporates significant risk of unintended consequences (as outlined in this submission).

Lastly, members of the public are able to seek redress regarding newspaper/online coverage via the Australian Press Council. News Corp Australia publishes over 2.5 million stories a year. The Australian Press Council received 65 complaints about containing privacy matters in 2011/2012 (7 per cent of all complaints) – which covered every newspaper of every publisher. Four of those complaints were mentioned in adjudications, and only one of the four was upheld.

INTERNATIONAL EXPERIENCES ARE UNDESIRABLE

As we outlined above, it has been suggested by many that a cause of action for privacy should be introduced in Australia as other jurisdictions, including the UK, has done so. We take the opportunity to briefly draw attention to the situation that has been developing in the UK.

Specifically, we observe that the action in the UK has predominantly been used by public figures, celebrities and sports stars, largely to restrain people (including ex-partners) from going to the

media with stories. As we noted in the News response to the DPM&C Issues Paper, we query whether it is worthy for Australia to introduce a right that could be used in such a way by such people.

Additionally, there has been the making of 'super injunctions' in the UK, to prevent publication of the identity of claimants, the details of the information of the claim and the matter of the injunction itself. This is a matter of concern as it undermines the freedom of speech and communication – taking the NSW ICAC example above, it would clearly be an issue.

Further, the utility of such injunctions is a live question in the digital era. For example, there have been a number of cases where injunction and anonymity orders were made, and details have been spread via social media, which, in the Ryan Giggs case, was preceded by being named in Parliament by a Member under parliamentary privilege.

PEOPLE'S EXPECTATIONS OF PRIVACY ARE CHANGING

Over the last few years we have seen an explosion in the availability of social media, and people's voluntary interaction and participation with, and take-up of, a broad range of social media services. During this time people have also become more willing to share information about themselves – both about their 'private' lives and their personal information. This has, and continues to shape the notion of 'private'. As a result attitude to privacy is evolving, and people are becoming more willing to share information that they may have been seen as private or personal.