



15 November 2013

The Executive Director
Australia Law Reform Commission

Dear Professor McDonald,

The Arts Law Centre of Australia (**Arts Law**) is pleased to comment on the Australian Law Reform Commission (**ALRC**) Issues Paper 43, *Serious Invasion of Privacy in the Digital Era*, (**Issues Paper**).

Arts Law commends the ALRC's ongoing commitment to broader community engagement in relation to the questions raised in the Issues Paper. We have separated our response into Part A and Part B. Part A outlines our general position and Part B directly responds to questions raised in the Issues Paper.

Arts Law is mindful that the National Association of Visual Artists (NAVA) and Australian Institute of Professional Photographers (AIPP) have provided letters in support of this submission.

About the Arts Law Centre of Australia

The Arts Law Centre of Australia (**Arts Law**) is the national community legal centre for the arts. Established in 1983 with the support of the Australia Council for the Arts, Arts Law provides artists and arts organisations with:

- Specialist legal and business advice;
- Referral services;
- Professional development resources; and
- Advocacy.

Arts Law provides legal advice to over 2,500 Australian artists and arts organisations a year.

About our clients and their relevance to the privacy discussion

Arts Law works nationally to support the broad interests of artistic creators, the vast majority of whom are emerging or developing artists and the organisations which support them.

Arts Law makes this submission on behalf of our broad client base including those who practice as:

- visual artists including photographers;
- authors including journalists;
- film makers including documentary film makers; and
- peak or professional organisations which represent the interests of the above clients.

The relevance of the Issues Paper to our clients is illustrated by the fact that 250 of the approximate 4500 legal problems we have addressed in the last three years relate to:

- privacy (including of information, and personal privacy);
- defamation (including relating to the use of images and film or information about others);
- confidentiality (including of information about and images and film of others); and
- trespass (personal and property).

PART A – Our General Position

Our general position on the increased protection of privacy in Australia's digital era

Australia does not have a strong human rights framework which expressly protects the right to freedom of expression. Without this protection, the introduction of a statutory cause of action for invasion of privacy would inhibit the legitimate activities of our artistic

community. As a society we are reliant on the records and stories captured by artists to understand and connect to our past and present.

Arts Law acknowledges that there are a number of gaps in the current legislative framework. However, we do not agree that those gaps are properly addressed by the introduction of a broad cause of action for invasion of privacy. Rather, activities which are seen as offensive or harmful should be specifically prohibited by either:

1. Amending the existing framework (for example extending or harmonizing the operation of the surveillance devices legislation in each state and territory), and/or
2. Introducing laws which specifically address those activities (for example harassment laws) to effect a targeted approach in addressing specific gaps in the law.

It is Arts Law position that a broad cause of action for privacy should not be introduced because it will restrict the way in which we communicate information in a modern, democratic society.

Unless our documentation of Australian life through film and photography is protected, the public record of who we are as a nation could be irreparably eroded.

Balancing interests

Arts Law acknowledges the broad online landscape in which material can be accessed and disseminated, and recognises the importance of protecting confidential information within that sphere. However, we agree with the ALRC's general position that the protection of freedom of expression and freedom of artistic expression are fundamental pillars of a democratic and "free" society. Any increased privacy protection should be carefully balanced against those freedoms.

We note the potentially competing human rights of privacy (Article 17) and freedom of expression (Article 19) expressed in the International Covenant on Civil and Political Rights (ICCPR). We are mindful that as no general right to freedom of expression is enshrined at law artistic and creative activities ever more vulnerable to restriction, particularly if a these activities are not expressly carved out of a cause of action for invasion of privacy.

The chilling effect of a cause of action for serious invasion of privacy

Changes to the way privacy is currently protected could have a very serious chilling effect on the way our society is documented in photographs, films and writing.

Where laws are subjective in relation to certain artistic activities, artists generally avoid any activities which appear to be affected by those laws even when those activities are completely innocuous. This has been our observation in providing legal advice to both amateur and professional artists. For example, many photographers we now speak to will not photograph children in a public places because they are concerned that those images would be considered exploitative. As a result, our public record of the life and times of Australian children is now reduced. **Of these concerns, Michael Amendolia, renown Australian photographer says: “What I am most concerned about in any changes to the law regarding privacy is that the documentary photographer will be restricted in making authentic photographs of the daily life of our county, our state, our city and our suburb. The photographs of which fill our museums, libraries and archives.”**

This chilling effect will occur if a cause of action for invasion of privacy is introduced, particularly if there is ambiguity about whether the activities of photographers and film makers in the public space are prohibited. **Artists are our storytellers and they will not document our history or record the profile of our society if they believe they risk breaching the law. The knowledge of our history, culture, society and identity is built on the way artists document us.**

PART B - Response to ALRC Issues Paper questions

Question 1.

What guiding principles would best inform the ALRC’s approach to the Inquiry and, in particular, the design of a statutory cause of action for serious invasion of privacy? What values and interests should be balanced with the protection of privacy?

1.1 Arts Law agrees that privacy as a general societal value is important but not to the extent that it could unduly fetter with other public interests, including freedom of expression.

1.2 The ALRC's formulation of the balancing factors, including freedom of speech is important and we agree with all the factors listed for inclusion.

1.3 In addition to those factors suggested by the ALRC, Arts Law is of the view that the protection of Indigenous Cultural and Intellectual property (or Indigenous culture and heritage) as a further factor to consider. Australia has signed the United Nations Declaration on the Rights of Indigenous Peoples but not enacted an instrument to protect Indigenous culture and heritage. Any law protecting the privacy of individuals should also consider the confidential or culturally sensitive nature of cultural knowledge, stories, images of Indigenous Australians. At this stage, it appears that this consideration has been excluded from consideration by the ALRC and warrants consideration.

1.4 These interests could be better protected through the enactment of sui generis legislation protecting Indigenous cultural and intellectual property and do not require the enactment of a cause of action for invasion of privacy to be properly protected. However, were such a cause of action to be introduced, it must consider the special class of information which constitutes Indigenous traditional knowledge and cultural heritage.

1.5 The guiding principles should be amended to include a further dot point, reading:

- the protection of and respect for Aboriginal and Torres Strait Islander traditional knowledge and cultural heritage.

Question 2.

What specific types of activities should a statutory cause of action for serious invasion of privacy prevent or redress? The ALRC is particularly interested in examples of activities that the law may not already adequately prevent or redress.

2.1 While Arts Law acknowledges that there may be a number of activities which are not covered by the current legislative framework, we do not agree that they are properly addressed through the introduction of a broad cause of action. Rather, they should be specifically prohibited by either amending the existing framework (for example extending

or harmonizing the operation of the surveillance devices legislation in each state and territory), or introducing a very narrow cause of action for invasion of privacy which does not prohibit activities such as those identified in 3.2 below.

2.2 We understand that the activities which could be prohibited through specific targeted legislation include:

- the unauthorized or undisclosed use of business or personal information,
- the use of social media for unauthorized or undisclosed purposes,
- the unauthorized or undisclosed use of information available through applications on mobile devices,
- the use by employers of information made available by potential employees through social media to determine eligibility for employment,
- the use of drones, GPS tracking; and
- data aggregation including web browsing histories.

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?

3.1 The creation and publication of material created in respect of the activities listed below from 3.1.1 – 3.1.6 should be expressly excluded from any cause of action for serious invasion of privacy.

3.1.1 Photography or filming of people in a public place;

Legal advice example:

The Arts Law has dealt with many legal queries from individuals who express concerns about the potential implications of photographing or filming people or groups of people in public. This includes, for instance, taking photographs of local

sporting events occurring in a public place and taking candid photos of people commuting in trains. Concerns generally revolve around whether they would require permission to do so and a misguided belief that Australia has the same onerous protections as a number of other foreign jurisdictions including France, for example.

Our advice is generally that taking pictures of people in a public place is permitted because Australia does not have a legislative framework which gives an individual rights in their image, or a general right to privacy. Given the complex legal framework which artists already negotiate, requiring that they get consents from their subjects. Without this, many artists would simply not create the works that they do.

Artistic work example:

*This photograph, taken by **Dean Sewell**, entitled “**Cockatoo Island Ferry**” won the Moran Contemporary Photographic Competition in 2010. In relation to his photography, Dean comments that “Street photography can often be made on the run (both literally and metaphorically). Street photographers act upon nuance at a moment’s notice and traditionally do not choreograph life, rather, observe and record it. History should not be choreographed.”*



Documentary film making or photography;

Legal advice example:

In some instances, the Arts Law has been contacted by individuals who have raised concerns about filming and interviewing people on the street and then using and publishing those videos as a part of documentary films.

Generally, the advice given by Arts Law is that there is no general law or right of privacy in Australia and there is no need to obtain a person's consent to include them in a video.

Artistic work example:

*This photograph was taken by renown photographer, **Michael Amendolia**, of **Professor Fred Hollows** which was taken in Hanoi in Vietnam in 1992. The photograph has become the poster image for the Fred Hollows Foundation. This image deals with the medical treatment of children. The creation of powerful images like this, if taken in Australia is imperative to our social and political discourse.*



3.1.2 Journalistic or investigative photography, film making or reporting;

Legal advice example:

Our clients sometimes wish to create about and/or publish works which analyse, criticize, praise or otherwise comment on private or public figures, social, cultural, political or legal issues. They are often engaged in this activity in the interests of informing the broader public about issues of concern or relevance, but sometimes their creation of such a work is not for the purposes outlined above, but for the purpose of creating a work of art, or a document of our social climate or culture.

Artistic work example:

*Four Corners aired a documentary entitled “**Punch Drunk**” in March 2013, which depicted people (including young people) drinking or in a drunken state, becoming violent or aggressive in that state. A link to that documentary can be found here: <http://www.abc.net.au/4corners/stories/2013/02/25/3695353.htm> . If the law required the consent of the people filmed in this documentary, or made filming or publishing a film about them seriously invasive because of their vulnerable state, a documentary like this would not be possible. This example points to the importance that the public interest plays in balancing any potential rights to privacy against the right to freedom of expression and the right of the public to know about current political, social or cultural issues.*

3.1.3 Photography or filming of people on private premises for purposes such as education, journalism, artistic expression and documentary.

For example, the **Head On Photo Festival** this year celebrated the theme “**Backyard**”, encouraging the entry of mobile phone photographs inspired by this theme.

3.1.5 Photography or filming of personal property and of private premises for purposes such as education, journalism, artistic expression and documentary.

Artistic work example:

*This photograph by photographer **George Voulgaropoulos**, entitled “**Bankstown**” depicts the dash board of a car and, Voulgaropoulos says, tells us about the owner who “is proud of their religion, displaying memorabilia on the dashboard for all to see. The object of the photograph is that it introduces themes of religious freedom and multiculturalism which runs throughout my body of work.”*



3.1.6 Photography or filming of privately owned land or premises, or people on that premises, where the premises is accessible to the public.

Legal advice example:

The Arts Law has often been contacted by photographers seeking advice regarding taking photos of people on private property, particularly where that property is accessible by the public such as on transport systems, in galleries or places of worship. They are generally concerned about the legal consequences of publishing those photographs online or using the images for journalistic purposes such as submitting them to the local paper.

Artistic work example:

*This photograph entitled “**Punchbowl Billy Reyad**” was taken by **Andrew Quilty** at a mosque. While this premises is privately owned it is accessible to the public and exemplifies why photographic or filming activities in spaces like these are just as important as those on publicly owned space.*



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?

4.1 Generally, Arts Law does not support the introduction of a right in relation to the use of an individual's personal image. Arts Law submits that an individual's expectation of privacy should not extend to controlling images of themselves beyond the regulations and protections that currently exist. We are pleased to see that this position generally accords with the ALRC's view in *For Your Information; Privacy Law and Practice* (ALRC Report 108, 2008) at 74.136.

The list of examples proposed by the ALRC is, too broad and would lead to confusion about whether or not certain activities were or were not invasive of privacy. We are also concerned that the use of a list potentially broadens the application of any cause of action to a greater extent than a court would otherwise interpret invasions of privacy.

4.2 The first suggested protection where “there has been an interference with an individual’s home or family life” risks being very broadly interpreted if not properly balanced against other interests to exclude the creation, for example, of photographs of contemporary Australian family life.

4.3 We are also concerned that those examples suggested by the ALRC would, in numerous instances relate to laws which already protect the interests of the individuals in those situations. For example, an individual the subject of unauthorized surveillance may already have a cause for such an activity under the existing legal framework.

4.4 If examples are to be included, they must be narrow and well defined so that there is clarity for the Australian public about when a cause of action might arise. The list should expressly exclude the activities listed in 3.2.

4.5 It is essential to ensure that any list of examples is expressly subject to the balancing of the public interest, the right of freedom of expression, against any rights afforded by a new privacy framework.

For example, the below photograph, entitled **Wounded #26** by **Jesse Marlow** potentially discloses information about the individual's health and wellbeing. Of the photograph, the artist explains: "When a chance moment like this occurs, this to me sums up the beauty of street photography. People, place and the moment... This photo is part of a broader series of candid photos of people out on the street with visible superficial injuries which was turned into a book called *Wounded*. The series showcases the fact that despite people being affected by some kind of injury, they are getting on with their lives."



Question 5.

What, if any, benefit would there be in enacting separate causes of action for:

- *misuse of private information; and*
- *intrusion upon seclusion?*

5.1 Without knowing the shape that any proposed law may take, we can only comment generally on this question. It seems that separate causes of action could be beneficial due to the difference in the nature of protection sought in each tort. "Misuse of private information" might more properly be amalgamated into the current *Privacy Act 1988*

(Cth), whereas intrusion upon seclusion relates more specifically to a personal (at times, physical) right to privacy. In addition, the cause of action, and the damages sought in respect of each right could be quite differently fashioned so their constitution in two separate instruments may be advisable.

5.2 If these laws were introduced as two separate causes of action, it is imperative that any cause of action for seclusion upon intrusion is very narrowly constructed, so that it does not create a broad, unwieldy, unpredictable right to privacy in Australia.

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?

6.1 If a cause of action for serious invasion of privacy is introduced, Arts Law agrees with the ALRC that the plaintiff, in addition to establishing a reasonable expectation of privacy should also have to establish that the activity was "highly offensive to the reasonable person".

6.2 In addition to establishing that the activity was highly offensive, the plaintiff should also have to establish that the activity resulted in suffering or anguish (not simply financial loss) by the plaintiff.

6.3 The above approach would create a high threshold for establishing a cause of action, and weed out unmeritorious claims, or claims driven alone by the celebrities wishing to monetize their image.

Question 7.

How should competing public interests be taken into account in a statutory cause of action? For example, should the Act provide that:

competing public interests must be considered when determining whether there has been a serious invasion of privacy; or

public interest is a defence to the statutory cause of action?

7.1 Importantly, the “public interest” (depending on how that is formulated or defined) may not always be a motivation behind the creation of a work, film or photograph. This does not render the work, film or photograph irrelevant or unworthy of protection. For example, a photograph of a woman who is embracing her child on Bondi beach may not be “in the public interest”, but it is none the less an important social document of a moment in a family in 21st century Australia.

7.2 Public interest should be considered at the point of determining whether there has been an invasion of privacy.

7.3 The placement of the public interest (specifically freedom of expression) criteria at the fore of the formulation means that:

(i) the onus of proof is on the person asserting the right to privacy, or seeking redress for the alleged breach of the right against invasion of privacy; and

(ii) unmeritorious claims are less likely, because of the need to balance factors at the outset. Given the absence of an express right to freedom of expression, a low benchmark or threshold for actionability of invasion of privacy may tip the competing interests of the parties unfairly if public interest was only considered by way of a defence.

7.4 This “upfront” formulation would be similar to construction of the law of confidential information, which requires the balancing of a number of circumstances in establishing whether the defendant has a case to answer.

7.5 Depending on the formulation of the cause of action, considering the public interest at the outset, and then, in *addition* providing for a defence of freedom of expression or artistic expression could assist in ensuring that freedom of expression is protected.

Whether this formulation is sensible of course depends on the way in which public interest is (or is not) defined.

Question 8.

What guidance, if any, should the Act provide on the meaning of 'public interest'?

8.1 The Act should provide guidance on public interest to ensure that elements like “freedom of expression” and “freedom of artistic expression” are incorporated into any balancing of public interest against any privacy rights.

8.2 The guidance on public interest should include a non-exhaustive list of factors to consider, perhaps similar in form to the “guiding principles” drawn up by the ALRC.

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?

9.1 The cause of action should be confined to intentional or reckless invasions of privacy and not extend as far as negligent invasions.

9.2 Documentary film making, for example, may incidentally to the primary purpose of the film, invade a private moment (for example, filming in a public place which looks onto a private apartment where someone is getting undressed).

9.3 Arts Law would be concerned that creating a cause of action for negligence has the potential to create a great deal of uncertainty and discourage artists from engaging in activities that could accidentally or inadvertently expose them to the risk of breaching the law.

9.4 Inadvertent invasions will lead to self censorship, chilling effect.

Question 10.

Should a statutory cause of action for serious invasion of privacy require proof of damage or be actionable per se?

10.1 The statutory cause of action for serious invasion of privacy should be constructed so that proof of damage is an essential element of the cause of action.

- 10.2 Without requiring evidence of damage, the risk is that the cause of action will attract unmeritorious claims from claimants where no actual harm has been suffered by the allegedly invasive activity.
- 10.3 If the cause of action for serious invasion of privacy was actionable *per se*, the costs of determining these potentially unfounded or unmeritorious claims would fall upon:
- 10.3.1 our stakeholders and indeed the broader arts and media industries in defending the claims;
- 10.3.2 tax payers funding the forum for the resolution of the complaint, for example, court system, tribunals, commissions etc.

Question 11.

How should damage be defined for the purpose of a statutory cause of action for serious invasion of privacy? Should the definition of damage include emotional distress (not amounting to a recognised psychiatric illness)?

- 11.1 Damage may include nominal, ordinary damages. We do not support the inclusion of exemplary damages without further evidence of where these might be warranted. While “emotional distress” might properly be a factor in quantifying damage, it should be defined narrowly so that the mere taking of offence to a particular activity cannot be brought under such a definition.
- 11.2 The definition of “damages” should expressly exclude damage suffered as a result of lost opportunity to license one’s own image. This express exclusion is important, because in its absence, the risk is that this cause of action becomes one which creates a “celebrity right to image” instead of a right which recognizes the importance of personal privacy for all regardless of reputation.
- 11.3 Likewise, the definition should exclude the loss of reputation. Defamation law already deals with this and is the appropriate forum to address any reputational loss as a result of the defendant’s activities.

11.4 When quantifying damages, *either* account of profits *or* ordinary damages should be selected by the plaintiff, and not both.

Question 12.

In any defence to a statutory cause of action that the conduct was authorised or required by law or incidental to the exercise of a lawful right of defence of persons or property, should there be a requirement that the act or conduct was proportionate, or necessary and reasonable?

No submission.

Question 13.

What, if any, defences similar to those to defamation should be available for a statutory cause of action for serious invasion of privacy?

13.1 If freedom of expression is not expressly included as in formulating the cause of action in the first instance (as discussed at question 7) there should be a broad category of defences stemming from the right to freedom of expression. Those defences available at defamation law, including absolute or qualified privilege should form part of the broader freedom of expression (including artistic and creative expression) and freedom of speech defences.

Question 14.

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

14.1 If freedom of expression is not expressly included as in formulating the cause of action in the first instance (as discussed at question 7) there should be freedom of expression and speech defences available under any cause of action. In addition to the balancing of the “public interest” criteria in determining whether there is or is not a cause of action. Including these defences will help ensure the right to freedom of expression and speech is not unduly limited by a cause of action for invasion of privacy.

Question 15.

What, if any, activities or types of activities should be exempt from a statutory cause of action for serious invasion of privacy?

15.1 Those activities which are listed in 3.1 (3.1.1-3.1.6) should be exempt from a statutory cause of action.

Question 16.

Should the Act provide for any or all of the following for a serious invasion of privacy:

a maximum award of damages;

16.1 The Act should provide for a maximum award of damages.

a maximum award of damages for non-economic loss;

16.2 The Act should provide for a maximum award of damages for non-economic loss.

exemplary damages;

Exemplary damages should not be included.

assessment of damages based on a calculation of a notional licence fee;

16.4 The Act should expressly exclude damages based on a notional licence fee. The inclusion and calculation of damages on this basis would create a “celebrity right” and undermine the core guiding principle in relation to the privacy as a value.

an account of profits?

16.4 The Act should include a remedy for accounts of profit, provided that this is not defined, or used in such a way that it replaces the “nominal licence fee” model.

Question 17.

What, if any, specific provisions should the Act include as to matters a court must consider when determining whether to grant an injunction to protect an individual from a serious invasion of privacy? For example, should there be a provision requiring particular regard to be given to freedom of expression, as in s 12 of the Human Rights Act 1998 (UK)?

17.1 Before granting an injunction in respect of a serious invasion of privacy, a court should consider the freedom of expression and freedom of speech of the individual potentially enjoined from the activity complained of. A court should also consider whether enjoining the activity is in the public interest, and any potential loss that may be incurred if an injunction is/is not granted.

17.2 This balancing approach should assist in limiting unmeritorious injunctions and assist in protecting freedom of expression.

Question 18.

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

18.1 Remedies should include:

18.1.1 A private, public and/or published apology;

18.1.2 A restraining order in relation to specific invasive activities or within a certain distance of plaintiff (for example, where the use of drones is concerned, and order that the operator or entity benefiting from the use of the drone may not operate it within residential areas, or near a particular address) ;

18.1.3 An order requiring the destruction or removal of offending invasive material;

18.1.4 An order requiring the removal of the material online from any form of medium (including print, online);

18.1.5 In the case of entities dealing with (whether commercially or not) the information and identities of their users, including for example online service provision and social media platforms:

18.1.5.1 an order that the defendant must disclose to plaintiff, and user group of that platform, the nature of their breach, and where relevant, how they use the information or identities of its users and what changes they will now make following the decision of a court; (for example, where a social networking site allows the information of its users to be commercially exploited by third parties in various ways, that the users of that network are advised of the ways in which their material is being used)

and

18.1.5.2 an order that the entity register on a register of online service providers who have breached privacy so that consumers of digital services or products are aware of the breach and can assess how they wish to deal with that entity in future.

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?

19.1 Unless falling within the particular exemption below, no cause of action for serious invasion of privacy should survive the death of the individual who might otherwise have complained.

19.2 However, in the case of a deceased Aboriginal or Torres Strait Islander person, members of his or her community, should be able to bring an action for serious invasion of privacy, in circumstances where:

19.2.1 There has been a serious invasion of privacy which would cause offence to the reasonable person with an understanding of that culture; and

19.2.2 It results in cultural harm to the deceased person's community.

19.3 The extension of the cause of action to members of a deceased Aboriginal or Torres Strait Islander person's community recognises the unique situation of Aboriginal and Torres Strait Islander people in Australia and specifically

19.3.1 The cultural beliefs of many Aboriginal and Torres Strait Islander communities (people) in respect of use of photographs and film footage of deceased persons; and

19.3.2 The ensuing cultural harm which is caused by the publication of such images and footage.

Question 20.

Should the Privacy Commissioner, or some other independent body, be able to bring an action in respect of the serious invasion of privacy of an individual or individuals?

20.1 The Privacy commissioner should be able to bring action on behalf of an individual or a group of individuals provided those individuals are in fact harmed by the serious invasion of their privacy.

20.2 The standing of the Privacy Commissioner to bring such actions might operate similarly in practice to the standing of the Australian Competition and Consumer Commission in developing a body of case law in respect of breaches.

Question 21.

What limitation period should apply to a statutory cause of action for a serious invasion of privacy? When should the limitation period start?

21.1 There should be a limitation of twelve (12) months from the time in which the cause of action for serious invasion of privacy arose.

21.2 This mirrors the limitation period in respect of defamation and recognizes that in both instances, if harm occurs it is generally apparent fairly soon after the activity

takes place, and discourages claims from being made many years after the activity occurs.

Question 22.

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?

22.1 If a statutory cause of action for serious invasion of privacy is developed, it should be federal and only that aspect of the statutory cause in respect of the use of information should be included in an amended version of the *Privacy Act 1968 (Cth)*. The cause of action for invasion of privacy which relates to the physical privacy of an individual and their image should fall under a separate federal instrument.

Question 23.

Which forums would be appropriate to hear a statutory cause of action for serious invasion of privacy?

23.1 Low cost forums which support a self representation system.

Question 24.

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

24.1 Provision should be made for alternative dispute resolution as this could keep costs low for both the plaintiff and defendant (and the broader industries whose interests they may represent), but it would also recognise the value of privacy as a personal right, in a forum which is not constrained by rules, for example, rules of evidence.

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?

25.1 No. If a determination has already been made, then there should not be a cause of action for serious invasion of privacy as well. This approach would limit double dipping in respect of remedies and accord with the aim of any legislation giving a cause of action for serious invasion of privacy in addressing current gaps, rather than create a broader spectrum of remedies for causes of action which are already illegal.

Question 26.

If a stand-alone statutory cause of action for serious invasion of privacy is not enacted, should existing law be supplemented by legislation:

26.1 Arts Law favours the model of amending laws relating to specific areas of concern, or addressing specific areas of concern through the introduction of targeted, specific legislation.

providing for a cause of action for harassment;

26.2 A cause of action for harassment would control numerous activities identified as arguably breaching a potential cause of action for serious invasion of privacy. For example, camping outside someone's home to get a media interview where you aren't directly trespassing but are continually surveilling that person in their own home.

enabling courts to award compensation for mental or emotional distress in actions for breach of confidence;

26.3 The ALRC has identified the lack of recognition of emotional distress as a key gap in the current framework. Directly addressing this gap by broadening the scope of damages a plaintiff in breach of confidence can claim would specifically target this "gap" and is preferable to introducing a broader, wide reaching cause of action for serious

invasion of privacy which could have serious ramifications on freedom of speech and expression in Australia.

providing for a cause of action for intrusion into the personal activities or private affairs of an individual?

26.4 It is unclear how this cause of action would be very different to the one proposed by the ALRC, so we have no submission in this regard.

Question 27.

In what other ways might current laws and regulatory frameworks be amended or strengthened to better prevent or redress serious invasions of privacy?

27.1 One of the current criticisms of the legislative framework is a lack of clarity around the protections afforded in each state and territory. By harmonizing the way these laws operate, better regulation of the use of individuals private information (for example, surveillance) can be achieved.

27.2 Instruments like the *Privacy Act 1988 (Cth)* should be reviewed in light of the numerous technological and digital changes that have occurred in the way we communicate, store and use information gathered through the various digital platforms now available to Australians. That Act should then be amended to ensure that the communication, storage and use of information accords with current societal expectations, in particular, their expectations about how their information is used in the commercial context.

Question 28.

In what other innovative ways may the law prevent serious invasions of privacy in the digital era?

28.1 The law should develop a set of mandatory requirements in respect of providing a technological platform (including applications, social networks, websites) in Australia, which requires, for example complete disclosure on:

28.1.1 the information collected using that platform;

28.1.2 the way in which that information is stored; and

28.1.3 the way in which the information is used by the collecting party and any other third party it provides that information to.

Further consultation with Arts Law and its stakeholders

Please contact Robyn Ayres (Executive Director) or Suzanne Derry (Senior Solicitor) if you would like us to expand on any aspect of this submission, verbally or in writing. We are also pleased to be of any assistance in meeting with you prior to, or during the preparation of the final report.

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Yours faithfully



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