



TheNewspaperWorks

**Submission to ALRC Issues Paper:
*Serious Invasions of Privacy in the Digital Era***

22 November 2013

Professor Barbara McDonald,
Commissioner
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

By email: privacy@alrc.gov.au

Dear Prof. McDonald,

The Newspaper Works appreciates the opportunity to make a submission to the Australian Law Reform Commission's (ALRC) Issues Paper: *Serious Invasions of Privacy in the Digital Era* (the Issues Paper).

About The Newspaper Works

The Newspaper Works is a not-for-profit body established to promote the newspaper industry in Australia. It was founded in 2006 by Fairfax Media, News Corp Australia, APN News & Media and West Australian Newspapers to pursue a number of industry objectives, including the promotion of newspapers as a powerful and influential medium. The organisation also provides research and marketing tools to fulfil its objectives. It is an advocate of strong, independent journalism, freedom of expression and freedom of the press.

Executive Summary

A cause of action for serious invasions of privacy remains unwarranted and unjustified.

The risk to freedom of speech and, in turn, press freedom is unpalatable to members of The Newspaper Works. We oppose actions that prevent or fetter communication in the public interest.

We argue this proposed cause of action is unfounded. The threshold question – *is it actually warranted?* – remains unanswered. No policy should be formed and / or proposed until this most fundamental question has been addressed, and the answer proven.

This submission focuses on the substantive reasons why a cause of action is opposed and does not consider the questions posed in the Issues Paper.

Cause of action not proven

We are concerned the Terms of Reference requires the ALRC to recommend

- (i) a detailed legal design of a statutory cause of action for serious invasion of privacy; and
 - (ii) other legal remedies and innovative ways the law could prevent or redress serious invasions of privacy
- without providing reasons for why this proposed action is being pursued.

A process of greater rigour is required when the stakes include undermining democratic (but un-legislated) citizen freedoms, such as freedom of speech and expression, and the principal and practice of press freedom that underpins a democratic society.

The Issues Paper notes four separate inquiries have been commissioned into privacy law or related issues by law reform commissions and government since 2006¹.

The most recent of those was the Department of Prime Minister and Cabinet (DPMC) Issues Paper: *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, September 2011². The introduction to that Paper was written by the then Minister for Privacy and Information, Hon Brendan O'Connor, who acknowledged that *'...serious invasions of privacy are infrequent...'*³

Importantly, the Minister said that, *'[I]n responding to the ALRC recommendation⁴, the threshold question that must be addressed is whether a statutory cause of action is warranted.'*⁵

Many parties made submissions to that Paper, including media companies and members of The Newspaper Works, yet government did not report on the matter. The *'threshold question'*, as posed by Minister O'Connor, was not discharged.

In March 2012, the then Government announced a package of measures to progress its media reform agenda. This package included that a reference would go to the ALRC regarding a statutory cause of action for serious invasion of privacy. The *'threshold question'* was still not discharged.

On 12 June 2013, the then Attorney-General, Mark Dreyfus QC, announced terms of reference⁶ for an ALRC inquiry into a cause of action for serious invasion of privacy in the digital era. The press release accompanying those Terms of Reference 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.'

Terms of Reference directed the ALRC to develop a *'detailed design of a statutory cause of action for serious invasions of privacy'* – yet the *'threshold question'* had still not been discharged.

¹ ALRC Issues Paper, paras 6 – 10, p10-11

² <http://www.ag.gov.au/consultations/pages/Righttosueforseriousinvasionofpersonalprivacyissuespaper.aspx>

³ <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

⁴ ALRC Report 108, (2008) recommended that a statutory cause of action for serious invasion of privacy should be introduced

⁵ Opcit, p3

⁶ <http://www.alrc.gov.au/inquiries/invasions-privacy/terms-reference>

Government is unable to define the problem yet continues to ask for a “fix”. This appears an illogical sequence of process. Surely, the very nature of the problem, and its impact on society, should be established and articulated before a solution is contemplated.

Consequently, the lack of substantive reason(s) as to why a cause of action is warranted exists. A new cause of action cannot reasonably be assessed to be appropriate or proportionate without definition of the problem such action might seek to address.

Without restating materials submitted to previous inquiries, some scenarios listed by the ALRC in 2008 as examples that would lack remedy without the introduction of a statutory cause of action are actionable under existing laws⁷. Previously, law reform commissions have not sufficiently acknowledged criminal action and remedies are more appropriate in some circumstances.

Threat to freedom of speech and freedom of communication

The proposed cause of action will likely threaten journalism in the public interest. A legislated cause of action that would take primacy would relegate freedom of speech and communication, and other public interests. This would be dangerous for the flow of legitimate information in our society.

One can conjure many examples of news gathering and publication of articles in the public interest that person(s) involved might wish to suppress. A statutory cause of action would likely provide an avenue to stifle such public interest communication. Recent examples include the various matters considered by the NSW Independent Commission Against Corruption regarding some former NSW politicians and business figures.

A cause of action without the counter-balance of a right to freedom of speech is unconscionable, especially as a case for any action has not been made. No evidence exists of systemic issues, and there is no or insufficient recognition of freedom of speech in this process. Consequently, The Newspaper Works believes any action is likely to be disproportionate and will have unintended consequences.

Unintended consequences of a cause of action

Unintended consequences include but are not limited to

- Limitations on freedom of communication; overlap of laws creating uncertainty and complexity; and
- A prospective law would be used for purposes other than the legitimate protection of their privacy.

These are all undesired outcomes that could result from an inappropriately derived cause of action.

⁷ News Limited submission to Department of Prime Minister and Cabinet 2011 Issues Paper, p4

Lengthy and costly hearings

Concern exists that a cause of action for serious invasion of privacy is likely to overlap with existing laws and will lead to confusion in court cases. This will extend hearings, manifesting in longer court hearings and increased costs to parties to the action and the public purse. Time and money will be wasted in determining which action(s) are available to relevant parties if multiple actions are pursued under multiple laws.

Cherry-picking paths for action

Parties may cherry-pick an avenue for action based on the remedies available – which would be further exacerbated by any possibility of the availability monetary damages as a remedy.

International experience

International experience illustrates the unintended consequences – even when freedom of speech is inherent in the process. It has been suggested the introduction of a statutory cause of action for privacy in Australia would “harmonise” with international jurisdictions, such as those of the United Kingdom.

In the UK, it is observed that the action has predominantly been used by public figures, celebrities and sports stars to restrain individual citizens from informing media. We do not believe a parallel process, therefore, is appropriate if it prevents freedom of expression in such a way.

“Super injunctions” now exist 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, especially in areas of society where privilege does exist.

Effect in the Digital Era

The use of injunctions in the digital era raises additional questions. The possibility exists that an injunction might be made to apply to traditional media but exclude so-called “new” media, which constantly increases in diversity and is borderless in nature. Such services could include channels such as Twitter, Google+, YouTube, Facebook, SnapChat and many other services that exists or have not yet been conceived.

While members of The Newspaper Works may be restricted from communicating in the public interest because of an injunction, non-traditional/social media may not, especially if such services have computer servers and businesses residing overseas but publishing information accessible to Australians.

Existing protections are far reaching and adequate

Australia has an extensive body of privacy laws that provide adequate protection, including the 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, there are actions available at common law to deal with conduct and acts which could affect privacy, such as trespass, nuisance, defamation and breach of confidence.

It is also the case that members of the public are able to seek redress regarding newspaper/online coverage via the Australian Press Council. 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, except WA Newspapers.

Four of those complaints were mentioned in adjudications, and only one of the four was upheld.

Expectations of Privacy are Changing

Consideration should also be given to citizens' perception of privacy.

Over the last few years we have seen an explosion in social media, and incredible leaps in the capture of corporate or business-related data and information. Citizens have become more willing to share information about themselves, which in turn has shifted the perception of what is, and is not, private.

The Newspaper Works looks forward to interacting with the ALRC regarding this matter.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'M Hollands', with a horizontal line underneath.

Mark Hollands
Chief Executive Officer