

QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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The Executive Director
Australian Law Reform Commission

By Email: privacy@alrc.gov.au

Dear Madam/Sir

Kindly accept this submission in relation to the Serious Invasions of Privacy in the Digital Era issues paper.

We will address each of the questions in the discussion paper.

Question 1

Privacy is essentially about our right to control how we are presented to the world, the extent to which we are the subject of attention and the extent to which people have physical access to us.¹ What aspects of ourselves we are prepared to share with people, and to what extent, will vary from person to person.

Privacy is essential to how we develop as human beings. Privacy is then, in fact, an aspect of the public interest. So it is not simply a case of private versus public.

Privacy advocates accept that the public interest in privacy has to be weighed against other public interests. Unfortunately, some people too readily set the value of privacy at nought, before the process of weighing has even begun.

Question 2

What is clear is that threats to our privacy (however we may define it) are ever-increasing – through terrorism laws, growing police surveillance powers, business practices associated with information mining and marketing, the internet, through the tracking of mobile phones, through things like the Go-Card, CCTV, the pernicious behaviour of Facebook.

In our view, two of the most egregious examples of the inadequacy of our current privacy laws are those relating to the ‘Hanson pictures’ and the outing of the former Minister in the New South Wales Government, David Campbell.

Currently, we have a patchwork of protections for privacy, but there are

¹ Ruth Gavison “*Privacy and the Limits of the Law*” 1980 89 Yale LJ 421

Watching them while they are watching you!

many gaps. Those gaps are becoming bigger every day, particularly in the area of information privacy. The law needs an adaptable instrument to meet the changing threat posed to our privacy by developing technology.

In our submission the challenge of modern technology to privacy is enormous and profound.

Contrary to the assertions of many there is not a diminishing interest in privacy issues. There is much evidence that the community is increasingly aware of and concerned by the loss of control they have over personal information once it hits the World Wide Web or is captured by the myriad of government and commercial enterprises requiring some personal information.

One manifestation of this concern has been a growing demand for the struggle of controls of personal information in social networks.

The bottom line is that privacy is about our right to control how we are presented to the world, the extent to which we are subject of attention and the extent to which people have physical access to us. It is trite to say that the answers that individuals give to these questions will vary from individual to individual. The fundamental proposition is that some people will be more concerned about privacy than others but most people will have some aspect of themselves which they wish to keep private. The fundamental proposition is that the law needs to enable individuals to decide for themselves which aspects of themselves they wish to keep private and which they do not. This decision should not be left in the hands of government or private corporations who are at the very best in a situation of a conflict of interest when it comes to these matters and more often than not in fact their interest is served by the reduction in privacy.

Question three

The interest which most would argue needs to be protected from a statutory cause of action for the serious invasion of privacy is that of free speech. We certainly agree with that proposition. However, we believe that an appropriate balance can be arrived at and we will address that issue further.

It is also important that the cause of action is drafted so far as is possible in clear terms so that it does not stray or have unintended consequences.

Question 4

We would agree with the proposals of the Australian Law Reform Commission in this regard.

Question 5

Our preference would be for a single statutory cause of action for breach of privacy.

As we said one of the principal benefits of a statutory cause of action is that it provides a flexible instrument enabling the courts to deal with the gaps which exist in the current privacy laws. Misuse of private

information is largely dealt with by existing privacy legislation. It seems to us that any deficiencies in that legislation should be dealt with within that legislative framework for example removing the small business exception.

Question 6

The ALRC in its report favoured a statutory test consisting of:

1. There is a reasonable expectation of privacy; and
2. The act or complaint was highly offensive to a reasonable person of ordinary sensibilities.

The QCCL in its submission supported this test. The NSWCCCL took the view that highly offensive set the bar at too high in terms of deterring trivial or frivolous actions.

For the purposes of this submission the QCCL had decided to support a more moderate intensifier namely that initially proposed by the ALRC of "substantial offence".

Question 7

In its submission the QCCL took the view that public interest should be weighed when determining whether there has been a serious invasion of privacy as proposed by the ALRC.

Having considered the views of the New South Wales Council's submission QCCL is persuaded to adopt their position and it is accordingly QCCL that the public interest should be a defence to the statutory cause of action for the reason that the Plaintiff should not have to prove a negative and that the Defendant is more likely to have the evidence and is therefore better placed to have the burden of proof.

Question 8

The concept of the public interest is a notoriously broad and vague one. In the circumstances it would be our preference that there is some guidance given as to the concept of public interest. There should be an open ended definition of the public interest.

We would indeed see that the principles guiding reform could form the basis for such a definition and particularly:

1. Privacy is important for individuals to live a dignified, fulfilling, autonomous life;
2. There is a public interest in the protection of individual privacy and confidentiality;
3. Privacy is not an absolute and must be balanced against other important values, freedoms and matters of public interest including:
 - a. Freedom of speech;
 - b. Freedom of artistic and creative expression;

- c. The proper administration of government;
- d. The promotion of open justice;
- e. The prevention and detection of criminal and fraudulent activity;
- f. The effect of the delivery of essential services;
- g. The protection of vulnerable individuals.

Question 9

In our view the negligence should not be excluded as a fault element.

We repeat the position taken by the New South Wales Council for Civil Liberties in its submission adopting the view of the Victorian Law Reform Commission that exclusion is unnecessary and that it is likely there will be serious invasions of privacy in which the actions are so grossly negligent (but unintentional) breaches that civil action ought to be possible. The example cited in that submission was of a medical practitioner who leaves a patient's highly sensitive medical records on a train or a bus is particularly apposite.

Question 10

It is our submission that the cause of action should be actionable without proof of damage. As the ALRC noted in its report that will amount to a recognition that the cause of action protects a fundamental right which should not be dependant on proof of damage flowing from the breach.

Question 11

The cause of action should allow for damages for insult and humiliation which would include most levels of stress not amounting to a psychiatric illness.

Question 12

Traditionally, privacy rights have been protected by property rights. It is important therefore that defence of property is a defence to an invasion of privacy claim. However, we would accept that property rights are not absolute and it would be inappropriate to qualify that defence by a requirement that it be shown that it was proportionate to the circumstances.

Question 13

In our view the only defence available in defamation that should be available in relation to a breach of privacy is that of privilege as recommended by the Australian Law Reform Commission.

Question 14

We do not consider that any further defences are necessary. It is our view that the range of defences described in the question in the discussion paper are adequately covered by the considerations to be listed in the cause of action.

Question 15

It would be our submission that no activities should be exempt for the cause of action.

The defences provided for in the cause of action should be sufficient to accommodate the interests of any organisation or the requirements of any activity.

Question 16

Subject to our comments in relation to damages for insult and humiliation, it is our submission that the list of remedies as proposed by the Australian Law Reform Commission is appropriate with the following comments:

Given the very limited circumstances in which exemplary damages can be awarded we see no reason why that should not be permissible. It seems to us that in an appropriate case punishment should be meted out.

Question 17

We would support a provision requiring the Court to have regard to freedom of speech when issuing an injunction similar to that contained in section 12 of the *Human Rights Act 1998* (UK) as being a measure necessary for addressing concerns about the effect of this law on freedom of speech.

Question 18

Please see our comments in answer to question 16.

Question 19

It would be our submission that for the same reason that defamation actions do not survive death it is not appropriate for a privacy cause of action to survive death. These cause of actions relate to humiliation and hurt to individuals. The purpose of the cause of action is to vindicate the harm they have suffered. A payment made to the estate of a deceased person can hardly be said to fulfil that purpose.

Question 20

We support the notion that the Privacy Commissioner should be able to bring actions on behalf of those of limited means or where there have been systemic breaches of privacy affecting a large number of individuals. This would enable claims which would not otherwise be possible to be brought and as a consequence hopefully result in systematic changes to prevent the future breaches of privacy.

Question 21

We support the New South Wales Law Reform Commission's proposal in relation to the limitation period.

Question 22

We would support the statutory cause of action being contained in the *Commonwealth Privacy Act*.

Question 23

In our view all courts both State and Federal should have jurisdiction to deal with this cause of action.

Question 24

We see no need for compulsory alternative dispute resolution procedures.

Question 25

It would in our view be appropriate to prevent any persons who have made use of non-judicial complaint processes from taking proceedings in the courts. Except in the case where of course the complaint in the non-judicial process has failed for some want of jurisdiction or power.

Question 26

We have made it clear that our support is for the introduction of a statutory cause of action for serious invasions of privacy. Of the alternative proposals in the paper it seems to us that the one which is most likely to be effective is to enable courts to award compensation for mental and emotional distress in actions of breach of confidence. Such statutory recognition might encourage the development and use of this remedy in Australian courts. We note that so far its application has been quite limited with some commentators still harbouring doubts about its status in Australian law.

Questions 27 and 28

We address these questions together. Once again having regard to our earlier comment that we object to a piecemeal approach to these issues. The benefit of a statutory cause of action serious breach of privacy is that it will provide a comprehensive instrument by which gaps in the law can be filled.

All of the proposals mentioned in the discussion paper have merit. They are however piecemeal in nature.

Some concern must be expressed about a right to be forgotten or to have the information erased.


It is disappointing to note the failure of the Privacy Commissioner to implement do not track arrangements as recommended by the Senate Environment and Communications References Committee.

Certainly we support controls on the use of meta data and restrictions on the aggregation of data.

Moreover, we certainly agree that employer requests for access to employees' private social media accounts should be prohibited.

We trust this is of assistance to you in your deliberations.

Yours faithfully



Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
22 November 2013