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The Executive Director
Australian Law Reform Commission

EMAIL: privacy@alrc.gov.au

Dear Sir / Madam

RE: ALRC DISCUSSION PAPER
SERIOUS INVASION OF PRIVACY IN THE DIGITAL ERA
(DP80)

The following submissions are made on behalf of our clients, Mr and Mrs Yewdall who previously made submissions to the Issues Paper, under cover of letter dated 7 November 2013.

3. Overview of Current Law

As pointed out in the Discussion Paper ("DP"), trespass to land is fraught with problems, and would not provide assistance relating to surveillance devices.

Litigation involving the law of nuisance is often complex, long-drawn out and is expensive. As discussed below, at **13**, a specific tort should be considered and introduced to protect the victims of invasion of privacy.

To argue *"nuisance"* in matters of surveillance devices would place an undue onus on victim of invasion of privacy, where although a surveillance device is blatantly obvious by its physical presence, providing proof by way of recordings can be almost impossible for the victim.

7. Seriousness and proof of damage

The suggestion at 7.9, not to impose a threshold for seriousness is strongly supported. The test for seriousness should examine the *"nature and offensiveness"* of the conduct (7.10).

If action by a victim is found to be frivolous, lacking merit, or does not meet the test of seriousness, the applicant/victim should be the subject of an adverse costs order, this, in itself, should defer frivolous and non-serious invasions of privacy.

Any proposed legislation should carefully consider the objective test and subjective elements constituting the gravity or otherwise of an invasion of privacy. Guidance should be provided in determining the objective test and subjective elements, rather than leaving those elements open to a decision maker in arriving at a conclusion. Decisions arrived at without legislative guidance throws into flux and confusion the fundamental elements of the objective test and subjective elements.

11. Remedies

Damages should be made available to victims of invasion of privacy. The remedy should not be available only in situations for serious invasions of privacy. The commission should avoid, if at all possible, the inclusion of the adjective *"serious"*.

To arrive at a definition of what is serious or to permit a Court determining what is serious can lead to uncertainty and injustice. The degrees of seriousness are manifest.

Peppered throughout the DP the ALRC recognises the *"serious harm to an individual"* arising from an invasion of privacy, in what ever form or manner. Unfortunately, no where is there any discussion of what constitutes *"serious harm"*.

As may be appreciated the invasion of privacy could range from a minor irritation to having severe psychological affects on the victim. The degree of seriousness can be extreme in domestic situations where a surveillance device is capable of recording activity on a neighbour's dwelling 24 hours a day. The seriousness is compounded when it is acknowledged recordings may be kept for an indefinite period. Such recordings may also record and affect members of the community, other than the permanent residents of the land, upon which a surveillance device is targeted. This situation arises when the surveillance device records entrances to private property within close proximity to the perpetrator's property or where properties benefit from rights of carriageway or the like.

If a tort for *"the invasion of privacy"* is introduced, the tort should incorporate a series of tests, similar to that used in defamation proceedings that must be met in successfully proving the commission of the tort.

Success should sound in damages. The range of remedies should include monetary and/or other, including an assurance the surveillance device no longer breaches the victim's privacy. Recordings by the surveillance device should be destroyed, within a specified timeframe. Orders should be made

accordingly. In particular circumstances, there made be need for the surveillance device to be removed in its entirety.

Where a victim succeeds in obtaining an award of damages, costs should be awarded against the perpetrator. Costs would send, to the community, a message that surveillance devices if not controlled within the parameters of the law will not be tolerated in our society.

13. Surveillance Devices

Question 13-1.

At the outset it is submitted, surveillance devices should incorporate all forms of such devices and not be restricted to devices installed on poles or the like. A surveillance device attached to the wall of a dwelling is capable of having the same effect as a mounted device.

It is doubtful whether the States and Territories would agree on the manner of regulating surveillance devices. In such an instance the Commonwealth is the only feasible option. However, in NSW the State can take the lead by making appropriate provisions to regulate such devices, but, as suggested below, it is doubtful whether the State would take the initiative and introduce such controls via existing legislation.

Question 13-2 asks whether local councils should be empowered to regulate the installation of surveillance devices by private individuals.

At 13.58 the ALRC suggest local councils are the appropriate authorities to regulate surveillance devices. The fundamental problem in granting councils the relevant power lies in the provisions of the *Act.* The *Act* leaves it up to councils to regulate the installation of surveillance devices.

For the reasons set out below, unless mandated by legislation local councils can exercise their discretion to regulate or not such devices. In our opinion, this suggestion is of no utility if not enforced by amendments to the *Environmental Planning & Assessment Act 1979* (*"Act"*) or by the Department of Infrastructure & Planning (NSW) advising all local councils that the installation of a surveillance device must be the subject of a development application to be introduced into **all** planning instruments.

Councils have always had the power to control the installation of surveillance devices. For reasons unknown councils do not consider surveillance devices as a land use/development requiring its approval, or more than likely have not put their minds to the subject. It is simply not a priority to local government.

Paragraphs 13.60 and 13.61 briefly allude to the submission of either a development application or classifying the particular land use as exempt development. These two options are mutually exclusive and discussed below.

Currently there are no councils in New South Wales that have any specific provision for addressing, *"the installation of surveillance devices"* as a discreet land use. Furthermore, it is suggested, local councils have not really considered this form of land use/development as being serious enough to regulate.

The Sutherland Shire Council is just one example of the attitude adopted by a local council. Its attitude was raised in our previous submissions.

The simplest method of regulating the installation of surveillance devices is for the State government to include the particular form of land use as Exempt development in the relevant State Environmental Planning Policy (SEPP). The form of exempt development would then need to comply with the strict standards of exempt development. Matters such as maximum height of the device, what is to be mounted on the device and, importantly, what/where the device is directed towards would govern the standards for exempt development. Any deviation from those standards would then necessitate an applicant filing a development application (DA) with the local council.

It is suggested the *"installation of surveillance devices"* has a land use classification has a complexity of variables that are not conducive for the purpose of exempt development.

In our opinion the better and more effective method would be by way of a DA. If the State adopts this measure then the Department of Infrastructure and Planning should advise all local government authorities that their planning instruments must now incorporate in all zones permitting dwellings of any kind, a land use described as *"installation of surveillance devices"*, as a form of development requiring development consent.

This is preferred over Exempt development because the latter requires no approval and no notification to neighbouring developments, whereas a DA is notified to neighbours, who are then in a position to make objections to the proposed development.

At 13.62, reference is made to the *Szann* case. It is suggested in the DP the City of Sydney Council regulates surveillance devices. With respect, this is not correct. The council does **not** in its planning instrument have, as a category of land use, *"the installation of surveillance devices"*. The council relied on the absence in the SEPP (Exempt and Complying Development Codes (2008)) and in its LEP 2008 for a land use relating to the installation of security cameras. The absence of such a land use in either document, it is suggested, is not common for all local councils. It is for such reason, as submitted above, the installation of surveillance devices should be incorporated into all planning instruments as a form of development/land use that is only permitted subject to council's consent.

At 13.63 the suggested s82A mechanism for review is misconceived. S82A is applicable only where *"a determination"* has been made by the council. The only way a determination can be made is by the submission of a development

application. If the council is of the opinion the installation of surveillance devices is a use or form of development not covered by the *EPA Act* (see previous submissions to the ALRC) then s82A is not invoked.
As in NSW a Victorian appeal can only be instituted *"against decisions of the planning and development applications"*. If no provision is made for the installation of surveillance devices it follows no application for review is applicable.

Proposal 13-5 suggests compensation to victims of unlawful surveillance. Compensation is strongly supported.

As the DP suggests, such compensation is unavailable under the NSW Compensation Scheme, dealing with victims of crime. Therefore, any such compensation will have to be introduced in either the new tort law or Commonwealth law or avenue to pursue both.

The introduction of a new tort for unlawful invasion of privacy would be one means of receiving compensation through damages. This would be the most appropriate

It should be noted, under the *EP&A Act* compensation is not available in Class 4 actions where, although development consent has been issued by a local council, the beneficiary of the consent notice breaches the terms of the consent. Class 4 actions do not provide damages as a remedy. Injunctions, declarations and orders form the substantive remedies in Class 4 actions. This in itself is a more compelling argument for a new tort for the unlawful invasion of privacy.

The other suggestion is to incorporate damages into appropriate Commonwealth legislation.

14. Harassment

Any invasion of privacy, by its very nature, is a form of intimidation. Put another way, intimidation, it could be argued, is the goal of those engaging in the invasion of privacy Just as in arriving at the level of seriousness of such an invasion, intimidation too is structured in varying degrees.

Rarely can one describe intimidation as a mere irritation where one's privacy is invaded, e.g. a surveillance device directed onto a person's property, effectively recording all activities to and from the property and within the property goes beyond a mere irritation.

Harassment is the enlivening component for any invasion of privacy and Commonwealth legislation should be considered and enacted, as opposed to leaving such legislation to the states and territories. This is borne out by New South Wales where no such protection is available, even though the means of enforcing such protection is readily available. The *EP&A Act*, has sufficient provisions to ensure the erection of a surveillance device can only be approved subject to a development application. However, as mentioned

above, no local government authority has seen fit to include such a land use in its planning instruments.

Yours faithfully
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