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9 May 2014

Dear Sir,

Re: ALRC Submission for Guardian News & Media Limited and Guardian Australia

Please find enclosed a written submission by Guardian News & Media Limited and Guardian Australia in response to the Serious Invasions of Privacy in the Digital Era Discussion Paper.

Yours faithfully,

PP

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ALRC Submission for Guardian News & Media Limited and Guardian Australia

Introduction

Guardian News & Media Limited (**GNM**) and Guardian Australia (**GA**) (together **The Guardian**), welcome the opportunity to provide this written submission in response to the Serious Invasions of Privacy in the Digital Era Discussion Paper (**Discussion Paper**) on what is a very important issue to Australians and to the Guardian in its activities in Australia.

Development of new technologies has made it much easier for individuals, corporations and governments to engage in activities which obviously have the ability to invade another's privacy. Previously this capacity has largely been in the hands of governments (through policing and security and through agencies that administer tax, welfare, health and public education), skilled individuals with technology savvy, corporations and, to some extent, the mass media.

In addition to now having the ability to invade privacy relatively easily, individuals and corporations also have direct, unfettered access to what are effectively broadcast platforms, which enable dissemination of private information in a manner which was previously almost the exclusive provenance of the mass media.

The Guardian is of the view that in Australia:

(a) by and large the media have engaged in successful self regulation in the area of privacy;

(b) there is little evidence that the media abuses its formerly privileged position of having the means to record private information and the method of dissemination - for example, nothing like the phone hacking by parts of the UK media has been found in Australia; and

(c) if the issue is solely that of the media's conduct, then reform would not be necessary.

However, The Guardian notes that the ALRC's view that law reform is required in this area is heavily based on non-media considerations and would not dispute that the media's perspective is not the sole perspective, and that these other broader social considerations do provide a strong argument in favour of the introduction of a privacy cause of action in Australia. The information supplied by Edward Snowden, in the disclosure of which The Guardian took a leading role, has recently illustrated the extent to which government agencies appear to have invaded privacy, including governments of the Five Eyes group of nations to which Australia belongs.

The Guardian has a strong commitment to the protection of privacy. The Guardian's publicly available editorial policies provide evidence of that commitment and the strong ethic of self-regulation demonstrated in The Guardian's journalistic activities. In the UK, the position is of course different in that the courts have already developed a cause of action for misuse of private information, which in conjunction with the regime provided for by the Data Protection Act (which operates in similar territory to the Australian Privacy Acts, which of course has a wide exemption for journalism), and as far as the media are concerned, the ethical standards laid down by the Press Complaints Commissions' Code of Conduct, means that many of the

concerns expressed by the ALRC are covered in the UK. The revelations that have been made as a result of the Edward Snowden matter, which publicised the mass surveillance programmes run by a number of national security and intelligence agencies, have shown how widespread privacy invasions can go.

Whilst The Guardian does not perceive that the introduction of the proposed cause of action would have a significant impact on its activities, nevertheless at the level of principle, The Guardian does not support the introduction of the cause of action.

However, if one were to be introduced, then it needs to happen properly and carefully, with particular regard and consideration given to its impact on the media and freedom of expression more generally. In particular, if one is to be introduced, then it is important to recognise and protect the very important role of responsible journalism in the conduct of a democratic society and the public interests served by journalistic activities. Distinctions drawn between freedom of speech and freedom of the press often disguise the important role the media and journalists fulfil of collecting, editing and disseminating information relevant to the social, economic and democratic interests of the public.

The role of editing is significant in this context of privacy. It is in the editing process that media often make decisions protective of the privacy of individuals, while still ensuring that the public is informed of matters of public interest.

Set out below are The Guardian's comments on the proposals in light of the above.

Proposal 4.1 :

A statutory cause of action for serious invasion of privacy should be contained in a new Commonwealth Act (the new Act).

As noted above, The Guardian opposes as a point of principle the introduction of the proposed cause of action. If it is to be introduced, The Guardian has no particular views on whether it should be in a Commonwealth act or in uniform state and territory legislation, but The Guardian does urge that whatever method is chosen should result in consistency among the federal, state and territory jurisdictions. As with defamation so with privacy: lack of consistency in this technological age would create major difficulties.

Proposal 4–2 :

The cause of action should be described in the new Act as an action in tort.

For the reasons identified by the ALRC, The Guardian agrees that the cause of action, if it is to be introduced, should be an action in tort.

Proposal 5–1 :

First element of action: The new tort should be confined to invasions of privacy by:

a. intrusion upon the plaintiff's seclusion or private affairs (including by unlawful surveillance); or
b. misuse or disclosure of private information about the plaintiff (whether true or not).?

The Guardian broadly supports the formulation of the first element of the action.

However, The Guardian contend that the use of the phrase "*whether true or not*" with respect to the misuse or disclosure of information is inappropriate. The Guardian submits that uniform defamation laws provide adequate protection to individuals for information that is found to be incorrect.

Also, the ALRC has specifically rejected the false light form of privacy invasion. The proposal in its current form effectively opens the door to this form of a cause of action to be enlivened.

Proposal 5–2 :

Second element of action: The new tort should be confined to intentional or reckless invasions of privacy. It should not extend to negligent invasions of privacy, and should not attract strict liability.

The Guardian agrees that the tort should be confined to intentional or reckless acts. It is very important in The Guardian's view that the tort not apply to unintentional acts. Further, the creation of a duty of care style obligation in the nature of negligence is particularly not appropriate when considering journalistic activities.

Proposal 5–3 and 5.4 :

The new Act should provide that an apology made by or on behalf of a person in connection with any invasion of privacy alleged to have been committed by the person:

a. does not constitute an express or implied admission of fault or liability by the person in connection with that matter; and

b. is not relevant to the determination of fault or liability in connection with that matter.

The Guardian broadly agrees with this proposal. Parties should be encouraged to resolve matters prior to or during litigation. The nature of invasions of privacy is that in many instances an apology, freely given, may be sufficient to resolve the matter. Accordingly protecting the making of apologies is an important aspect of the ALRC's proposals.

Proposal 6–1 :

Third element of action: The new tort should only be actionable where a person in the position of the plaintiff would have had a reasonable expectation of privacy, in all of the circumstances.

The Guardian agrees that the third proposed element of the new tort is appropriate.

Proposal 6–2 :

The new Act should provide that, in determining whether a person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances, the court may consider, among other things:

a. the nature of the private information, including whether it relates to intimate or family matters, health or medical matters, or financial matters;

b. the means used to obtain the private information or to intrude upon seclusion, including the use of any device or technology;

c. the place where the intrusion occurred;

d. the purpose of the misuse, disclosure or intrusion;

e. how the private information was held or communicated, such as in private correspondence or a personal diary;

f. whether and to what extent the private information was already in the public domain;

g. the relevant attributes of the plaintiff, including the plaintiff's age and occupation;

h. whether the plaintiff consented to the conduct of the defendant; and

i. the extent to which the plaintiff had manifested a desire not to have his or her privacy invaded

Broadly speaking The Guardian agrees that the ALRC's non-exhaustive list of things relevant to the circumstances surrounding a reasonable expectation of privacy are appropriate. The Guardian submits that a useful addition to the list would be the conduct of the plaintiff. While category (g) captures certain aspects of the plaintiff, The Guardian believes that the conduct of the plaintiff is equally relevant as to whether the plaintiff should have had a reasonable expectation of privacy. The relevance of the plaintiff's conduct extends beyond consent or a manifested desire not to have privacy invaded. For example, a public figure who makes a public stand on a particular issue may then, inconsistently, seek to cloak particular facts relating to that issue in privacy: in such circumstances the Court should be entitled to consider those additional circumstances. Further it is often the case that plaintiffs' actual conduct can differ from and be inconsistent with their publicly stated views. A list that does not expressly ensure consideration of the conduct of the plaintiff will unreasonably limit the weight that ought to be given to public interest journalism. On item (h), on consent, the phrase 'the conduct of the defendant' is too limiting. In practice in privacy cases, consent may occur in circumstances wider than 'consent to the conduct of the defendant' and the defendant needs to be able to point to that.

Proposal 7–1 :

Fourth element of action: The new Act should provide that the new cause of action is only available where the court considers that the invasion of privacy was 'serious'. The new Act should also provide that in determining whether the invasion of privacy was serious, a court may consider, among other things, whether the invasion of privacy was likely to be highly offensive, distressing or harmful to a person of ordinary sensibilities in the position of the plaintiff.

The Guardian agrees that an invasion has to rise to a serious level before it is actionable and that it is important that the threshold test is objectively based.

However, The Guardian regards the formulation by the Australian High Court of "highly offensive" as the appropriate threshold. The additional considerations identified by the ALRC of "distressing or harmful to a person of ordinary sensibilities" is, in The Guardian's view, too low a threshold.

There is no doubt that the introduction of a new tort has the capacity to have an impact on free speech and journalistic activities. It is also accepted that free speech is not an unqualified right.

However, given the potential impact and the potential serious consequences which would flow from an infringement of the proposed cause of action, The Guardian regards the higher threshold as an important component in striking an appropriate balance.

Proposal 7–2 :

The plaintiff should not be required to prove actual damage to have an action under the new tort.

The Guardian has no comment on this proposal.

Proposal 8–1 :

Fifth element of action: The new Act should provide that the plaintiff only has a cause of action for serious invasion of privacy where the court is satisfied that the plaintiff's interest in privacy outweighs the defendant's interest in freedom of expression and any broader public interest. A separate public interest defence would therefore not be needed.

Subject to its later comments about how the public interest concept is approached in any statute, The Guardian agrees with the approach by the ALRC to integrate the consideration of the public interest as part of the cause of action (rather than as a defence), thereby requiring the plaintiff to establish that the privacy interest outweighs the public interest in disclosure.

The Guardian also agrees with the inclusion of a non-exhaustive list of considerations to provide the courts with guidance. In the absence of an explicit human rights legal framework in Australia, it is critical for the statutory cause of action for serious invasion of privacy to give express recognition to the public interest in freedom of speech and freedom of the press.

To in effect compensate for the absence of an explicit human rights framework, The Guardian submits that the Objects of the enabling legislation should contain a statement to the following effect:

> *to ensure that the law of serious invasion of privacy does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest.*

Finally, The Guardian is concerned with the specific formulation of the fifth element which refers to "the defendant's interests in freedom of expression". It is critically important in The Guardian's view that it be recognised that in undertaking responsible journalistic activities, the media is serving the public interest. Freedom of expression is important and should be explicitly protected.

However, The Guardian is concerned that the expression "the defendant's interest in freedom of expression" is capable of being misconstrued as referring to an interest in freedom of expression of the defendant only. It is facilitative of the wider public's freedom of expression that media publish and discuss matters of public interest. This understanding follows from the language of Article 19 of the Universal Declaration of Human Rights –

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers."

In the balancing exercise required of a court in privacy cases, the right to freedom of expression needs to receive its proper, wider recognition.

Proposal 8–2 :

The new Act should include the following non-exhaustive list of public interest matters which a court may consider:

a. freedom of expression, including political communication;
b. freedom of the media to investigate, and inform and comment on matters of public concern and importance;
c. the proper administration of government;
d. open justice;
e. public health and safety;
f. national security;
g. the prevention and detection of crime and fraud; and
h. the economic wellbeing of the country.

Broadly, The Guardian agrees with the non-exhaustive list of matters of public interest set out in the Discussion Paper.

Nevertheless, The Guardian also has concerns with respect to the references to "national security" and "economic wellbeing of the country". While these are clearly important public interests, it is important to ensure that their recognition in this context does not permit avoidance by governments of other laws which require appropriate processes, such as the obtaining of valid search or surveillance warrants by police, to protect privacy and guard the important protections provided by due process.

The Guardian does not understand that it is the intent of the ALRC's recommendation that such undermining would occur but believes that it is important to ensure that this is not the case.

Proposal 9–1 :

Federal, state and territory courts should have jurisdiction to hear an action for serious invasion of privacy under the new Act.

The Guardian has no particular view on which courts should have jurisdiction, other than in the case of matters involving the media, it would be preferable if matters are heard by superior courts (e.g. Supreme Courts of states and territories) rather than the lower courts, given the delicate balance of interests which are likely to be required in cases which reach hearing involving the media.

Question 9–1 :

If state and territory tribunals should also have jurisdiction, which tribunals would be appropriate and why?

See response to Proposal 9.1.

Proposal 9–2 :

The new Act should provide that the new tort be limited to natural persons.

The Guardian agrees with this proposal. Privacy is fundamentally an interest limited to natural persons. The parallel right for corporations and other non-natural entities is confidential information which is already sufficiently protected.

Proposal 9–3 :

A cause of action for serious invasion of privacy should not survive for the benefit of the plaintiff's estate or against the defendant's estate.

The Guardian agrees with this proposal. Extending the cause of action to survive for estates would divorce the right from the interests that it is designed to protect.

Proposal 9–4 :

A person should not be able to bring an action under the new tort after either (a) one year from the date on which the plaintiff became aware of the invasion of privacy, or (b) three years from the date on which the invasion of privacy occurred, whichever comes earlier. In exceptional circumstances the court may extend the limitation period for an appropriate period, expiring no later than three years from the date when the invasion occurred.

The Guardian has no comment on this proposal other than to say that the limitation periods should not exceed those contained in the proposal.

Proposal 9–5 :

The new Act should provide that, in determining any remedy, the court may take into account:

a. whether or not a party took reasonable steps to resolve the dispute without litigation; and

b. the outcome of any alternative dispute resolution process.

The Guardian broadly supports the notion of encouraging resolution of disputes prior to the commencement of proceedings or trials, which are both costly for those involved and impose a burden on public funds. However, it is important to ensure that parties are not required to disclose without prejudice material and the legislation should not abrogate the protection afforded to that material in ways which would discourage the obtaining of legal advice.

Proposals 10–1, 10.2, 10.3, 10.4, 10.5, 10.6 :

The Guardian agrees with the proposals relating to the proposed defences.

Question 10–1 :

Should the new Act instead provide that the defence of qualified privilege is co-extensive to the defence of qualified privilege to defamation at common law?

The Guardian is of the view that the common law version of the defence which exists in defamation should also be introduced as the two versions of the qualified privilege defence are not identical and both recognise important interests which are to be protected

Question 10–2 :

Should the new Act provide for a defence of necessity?

The defence of necessity is unlikely to apply to the media in any circumstances where one of the above defences would not be available. But there are nevertheless some times when the appropriate public or private body does not disclose information which it may be in the public interest to disclose in aid of public safety and the media discloses. Personal privacy may in this context be invaded. In such circumstances the requisite reciprocal duty/interest may not be present, but the media ought not be without a defence to run.

Proposal 10–7, Question 10.3 :

The new Act should provide a safe harbour scheme to protect internet intermediaries from liability for serious invasions of privacy committed by third party users of their service.

The Guardian does not wish to make a submission regarding intermediaries but notes that the word "third" is superfluous in the context of the proposed defence. In order to provide submissions The Guardian would need to see the particular form of the defence as this will be critical to its operation.

Proposal 11-1 :

The new Act should provide that courts may award compensatory damages, including damages for the plaintiff's emotional distress, in an action for serious invasion of privacy.

The Guardian agrees that if it is determined by the government that the proposed tort should be introduced, this proposal is appropriate.

Proposal 11–2 :

The new Act should set out the following non-exhaustive list of factors that may mitigate damages for serious invasion of privacy:

a. that the defendant has made an appropriate apology to the plaintiff about the conduct that invaded the plaintiff's privacy;
b. that the defendant has published a correction of any untrue information disclosed about the plaintiff;
c. that the defendant has made an offer of amends in relation to the defendant's conduct or the harm suffered by the plaintiff;
d. that the plaintiff has already recovered compensation, or has agreed to receive compensation in relation to the conduct of the defendant;
e. that the defendant had taken reasonable steps to settle the dispute with the plaintiff in order to avoid the need for litigation; and
f. that the plaintiff had not taken reasonable steps to settle the dispute, prior to commencing or continuing proceedings, with the defendant in order to avoid the need for litigation.

The Guardian agrees with this proposal.

Proposal 11–3 :

The new Act should set out the following non-exhaustive list of factors that may aggravate damages for serious invasion of privacy:

a. that the plaintiff had taken reasonable steps, prior to commencing or continuing proceedings, to settle the dispute with the defendant in order to avoid the need for litigation;
b. that the defendant had not taken reasonable steps to settle the dispute with the plaintiff in order to avoid the need for litigation;
c. that the defendant's unreasonable conduct at the time of the invasion of privacy or prior to or during the proceedings had subjected the plaintiff to special or additional embarrassment, harm, distress or humiliation;
d. that the defendant's conduct was malicious or committed with the intention to cause embarrassment, harm, distress or humiliation to the plaintiff; and
e. that the defendant has disclosed information about the plaintiff which the defendant knew to be false or did not honestly believe to be true.

The Guardian agrees with this proposal but repeats the comments regarding the protection of without prejudice communication contained above with respect to proposal 9.5.

Proposal 11–4 :

The new Act should provide that the court may not award a separate sum as aggravated damages.

To the extent that aggravated damages are accepted as also being appropriate to award, The Guardian is concerned that this proposal makes it more difficult to understand the basis upon which aggravated damages are awarded in particular cases. Amalgamation of compensatory damages and aggravated damages does not assist parties understand the basis of judgements or more broadly the principles of open justice. The Guardian submits that, where appropriate to award, aggravated damages should be separately identified.

Proposal 11–5 :

The new Act should provide that, in an action for serious invasion of privacy, courts may award exemplary damages in exceptional circumstances and where the court considers that other damages awarded would be an insufficient deterrent.

The Guardian does not agree with this proposal. Damages should be compensatory. The imposition of exemplary damages is very likely to have a chilling effect on the journalistic activities of media companies.

In Australia it is already the case that the legal costs of defamation proceedings (by way of example) often outweigh the amounts of damages involved and the cost of proceedings sufficiently incentivises media organisations to avoid defamation where possible. Given that there is little evidence that indicates that the media are insufficiently concerned with protecting privacy and the fact that exemplary damages are likely to be visited upon media corporations on the basis of their resources, The Guardian strongly objects to this proposal.

The Guardian notes that the ALRC refers to the recommendations of the Leveson Inquiry. However, those recommendations have been the source of much criticism. It is worth noting that Lord Justice Leveson neither invited nor received submissions on exemplary damages during his Inquiry and the recommendations in the Report on exemplary damages are based on an out of date Law Commission report which was prepared before the Human Rights Act 1998 was passed. In the UK, the advice from three eminent QCs, Lord Pannick QC, Antony White QC and Desmond Browne QC, in a Joint Opinion commissioned by the Media, is that Lord Justice Leveson's proposal to extend exemplary damages is (i) inconsistent with authority, (ii) incompatible with Article 10 of the European Convention on Human Rights, and (iii) objectionable in principle.

The Guardian also notes that exemplary damages are not available in respect of defamation or breach of confidence matters.

Proposal 11–6 :

The total of any damages other than damages for economic loss should be capped at the same amount as the cap on damages for non-economic loss in defamation.

The Guardian agrees with this proposal.

Proposal 11–7 and 11-8 :

The new Act should provide that a court may award the remedy of an account of profits.

The Guardian objects to these proposals. The nature of these remedies is not appropriate for a tort. Further, the availability of those heads of damage are likely to convert the action to one of protection of an economic right used by celebrities rather than protection of true privacy.

To the extent that a particular plaintiff suffers a demonstrable loss because a disclosure results in the breach of a contract, that loss will be recoverable under normal principles of damage for tortious conduct.

Proposal 11–9 :

The new Act should provide that courts may award an injunction, in an action for serious invasion of privacy.

Further consideration by the ALRC regarding the court's ability to provide injunctive relief is required. Care should be exercised in relation to the use of injunctions to ensure that they do not unduly restrain open justice or freedom of expression.

Courts already have the power to make non-publication orders. The Guardian submits that this is the appropriate method for restricting what can be reported. The Guardian considers that no additional restrictions should be applied to publishing reports of court proceedings or on publishing reports of parliament and other proceedings of public concern.

As noted below, provisions similar to those contained in Chapter 12 of the *UK Human Rights Act* should be adopted to ensure a proper balance is struck between the freedom of expression and privacy.

Proposal 11–10 :

The new Act should provide that courts may order the delivery up and destruction or removal of material, in an action for serious invasion of privacy.

Subject to knowing the detail of what is meant by 'removal' in this context, The Guardian agrees with this proposal.

Given the speed and breadth of dissemination of digital material, and the potential time and cost involved in trying to have material taken down by third-party entities, any defendant should be required only to take reasonable steps to remove digital material from online spaces over which it can exercise control.

Proposal 11–11 and 11-12 :

The new Act should provide that courts may make a correction order, in an action for serious invasion of privacy.
The new Act should provide that courts may make a declaration, in an action for serious invasion of privacy.

The Guardian is concerned with the proposals for corrections and apologies. The new tort, if adopted, is likely to change the balance of free speech. Requiring media organisations to correct or apologise will constituted a further and unnecessary restriction on free speech.

The Guardian notes that the ALRC refers to the power of tribunals in Australian to order corrections or apologies. However, similar to the position of a plaintiff, once a correction or apology is broadcast, it cannot be undone if it later turns out that on appeal the relevant tribunals decision is overturned.

Moreover, unlike in defamation where a correction may be meaningful, in privacy contexts a correction may in practice require prominent repetition of that which caused embarrassment or humiliation in the first place. In practice it is difficult to make a published correction comprehensible to readers unless you say what was initially incorrect.

The Guardian submits that these proposals should not be included in the final report. A requirement that a declaration by the court be published may be appropriate, but the defendant ought not be prevented from placing on record the fact that it defended the action and disagrees with the outcome.

Question 11–1 :

What, if any, provisions should the ALRC propose regarding a court's power to make costs orders?

The Guardian is of the view that the normal cost consequences should follow in respect of the successful prosecution or defence of a breach of the proposed tort. While there are no cost jurisdictions with respect to some legislation in Australia, there are examples of cases being brought by plaintiffs without standing or prospects of success.

Proposal 12–1 :

If a statutory cause of action for serious invasion of privacy is not enacted, appropriate federal, state, and territory legislation should be amended to provide that, in an action for breach of confidence that concerns a serious invasion of privacy by the misuse, publication or disclosure of private information, the court may award compensation for the claimant's emotional distress.

The Guardian is of the view that it would be preferable for the proposed statutory cause of action to be introduced rather than the modification of an existing cause of action. Attempts to "shoehorn" an established action to cover an adjacent or similar situation result in the twisting of the original cause of action and fail to appropriately balance the relevant interests.

In this regard it is worth noting that privacy interests traditionally have been protected by a range of legal doctrines that go well beyond breach of confidence. Trespass, nuisance, copyright and defamation may all be invoked, in different circumstances, to try to protect what is, at its core, a privacy interest.

Proposal 12–2 :

Relevant court acts should be amended to provide that, when considering whether to grant injunctive relief before trial to restrain publication of private (rather than confidential) information, a court must have particular regard to freedom of expression and any other countervailing public interest in the publication of the material.

The Guardian broadly agrees with the thrust of this proposal.

As noted by the ALRC, Australia does not have any legislation similar to the UK *Human Rights Act* and no relevant legislation in Australia contains the types of protections embodied in sections 12(2) and 12(3) of the *Human Rights Act*. The proposal, in a broad sense, reflects section 12 (4).

In The Guardian's view there is significant utility in the incorporation of provisions similar to sections 12(2) and (3) of the UK *Human Rights Act*. In particular, it would assist in ensuring that the media were not subjected in Australia to a period of "super injunctions" as a result of the introduction of the new tort, as occurred in the UK.

As recognised by the UK judicial committee chaired by the then Master of the Rolls, Lord Justice Neuberger in its report on its findings on super-injunctions, anonymity injunctions and open justice (http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf), in May 2011, there was justifiable concern, when the Committee was formed, that super-injunctions were being applied for and granted far too readily. The UK Parliament's intention in passing section 12 of the *Human Rights Act*, was particularly concerned with maintaining a proper balance between privacy and freedom of

expression, not least where interim injunctions were concerned. As Jack Staw MP, then Home Secretary, put it in the Parliamentary debates during the Act's passage through Parliament, ' . . . we have always believed that the Bill would strengthen rather than weaken freedom of the press.' One way in which this was to be achieved was through the *Human Rights Act* s12, which the government introduced into the Act as a particular safeguard for the Article 10 right. As Jack Straw MP went on to say, ' . . . the provision (*Human Rights Act* s12) is intended overall to ensure ex parte injunctions are granted only in exceptional circumstances. Even where both parties are represented, we expect that injunctions will continue to be rare, as they are at present.' This was to be achieved because the courts were to take account of the *Human Rights Act* s12, particularly subsections (2) and (4), when finding the balance between Articles 8 and 10. The Committee recognised in particular the importance of preserving a right for the media to be properly notified in advance where interim injunctions were being sought, and that proper notice was a central aspect not only of the right to fair trial but also is a prerequisite of the right to be heard. S12 sets a higher threshold test before the court can grant injunctive relief where an Order would impact on free speech rights.

Proposal 13–1, 13-2, 13-3 :

Surveillance device laws and workplace surveillance laws should be made uniform throughout Australia.

Surveillance device laws should include a technology neutral definition of 'surveillance device'.

Offences in surveillance device laws should include an offence proscribing the surveillance or recording of private conversations or activities without the consent of the participants. This offence should apply regardless of whether the person carrying out the surveillance is a participant to the conversation or activity, and regardless of whether the monitoring or recording takes place on private property.

The Guardian agrees with these proposals, subject to the comments below.

Proposal 13–4 :

Defences in surveillance device laws should include a defence of responsible journalism, for surveillance in some limited circumstances by journalists investigating matters of public concern and importance, such as corruption.

The Guardian is of the strong view that investigative journalism is a very important activity which is clearly in the public interest. Accordingly The Guardian considers that this value should be recognised in the protection for journalists in the conduct of investigative activities. The Guardian accepts that these protections should be available for investigation of serious matters such as corruption, serious criminal conduct and similar matters. However it would be necessary for the defence to be articulated for further comment to be provided.

Question 13–1 :

Should the states and territories enact uniform surveillance laws or should the Commonwealth legislate to cover the field?

The Guardian does not have a view on this issue provided that there is uniformity.

Proposal 13–5 :

Surveillance device laws should provide that a court may make orders to compensate or otherwise provide remedial relief to a victim of unlawful surveillance.

The Guardian does not agree with this proposal. The proposed tort is the appropriate method to provide redress for the use of surveillance devices and will contain the appropriate balances to be considered where there is a breach of privacy through the use of a surveillance device. Part of the rationale for a privacy tort is to provide a synthesis of the many doctrines which traditionally have been used for what is actually privacy protection – see 12-1 above. It would not make sense to begin immediately a process of proliferation.

Question 13–2 :

Should local councils be empowered to regulate the installation and use of surveillance devices by private individuals?

The Guardian notes that this proposal does not directly impact its activities. However, given the intrusive nature of the use of surveillance devices and the potential for misuse by law enforcement authorities, The Guardian does not believe that it is appropriate to empower local councils to regulate this conduct. It is highly unlikely in The Guardian's view that local councils will have the expertise or resources to undertake this important obligation appropriately.

Proposal 14–1 :

A Commonwealth harassment Act should be enacted to consolidate and clarify existing criminal offences for harassment and, if a new tort for serious invasion of privacy is not enacted, provide for a new statutory tort of harassment. Alternatively, the states and territories should adopt uniform harassment legislation

The Guardian is of the view that it would be preferable to introduce the proposed tort than modify existing laws relating to harassment. There is a significant potential for an harassment style of action or crime to significantly impact on bona fide journalistic activities. It does not appear that this proposal contemplates the balances contained in the proposal relating to the tort which are important to protect the public interest.

Proposal 15–1 :

The ACMA should be empowered, where there has been a privacy complaint under a broadcasting code of practice and where the ACMA determines that a broadcaster's act or conduct is a serious invasion of the complainant's privacy, to make a declaration that the complainant is entitled to a specified amount of compensation. The ACMA should, in making such a determination, have regard to freedom of expression and the public interest.

The Guardian is not at present affected by this proposal but regards the extension of the ACMA's power in the manner contemplated as undesirable. Courts are best placed to make the important judgements required in applying the proposed tort.

Proposal 15–2, Question 15-1, 15-2 :

A new Australian Privacy Principle should be inserted into the *Privacy Act 1988* (Cth) that would:

a. require an APP entity to provide a simple mechanism for an individual to request destruction or de-identification of personal information that was provided to the entity by the individual; and

b. require an APP entity to take reasonable steps in a reasonable time, to comply with such a request, subject to suitable exceptions, or provide the individual with reasons for its non-compliance.

The Guardian does not wish to make a submission on this proposal or these questions.

Proposal 15–3 :

The Privacy Act 1988 (Cth) should be amended to confer the following additional functions on the Australian Information Commissioner in relation to court proceedings relating to interferences with the privacy of an individual:

a. assisting the court as amicus curiae, where the Commissioner considers it appropriate, and with the leave of the court; and

b. intervening in court proceedings, where the Commissioner considers it appropriate, and with the leave of the court.

The Guardian does not oppose the concept of the Australian Information Privacy Commissioner having standing. However, The Guardian is of the view that media organisations should also have standing as amicus curiae with respect to proceedings involving important matters of public interest.

Guardian News & Media and Guardian Australia would be very happy to expand on the material provided in this submission as the ALRC might find useful.

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