



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: buslawREIb845503:

12 May 2014

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By email: privacy@alrc.gov.au

Dear Sir/Madam,

Serious Invasions of Privacy in the Digital Era – (DP80)

I write to you on behalf of the Business Law Committee (“BLC”) and the Human Rights Committee (“HRC”) of the Law Society of New South Wales to provide a submission on the Australian Law Reform Commission’s (“ALRC”) discussion paper *Serious Invasions of Privacy in the Digital Era* (“discussion paper”).

The BLC does not address each of the proposals made by the ALRC but offers the following comments:

Proposal 4 - A new tort in a new Commonwealth Act

The BLC supports the creation of an action in tort to be contained in a new Commonwealth Act that applies in the States and Territories so as to ensure national consistency in privacy protection. The creation of a tort action will establish clear limits of acceptable behaviour. The Committee supports the new cause of action as it will be, compared to the current situation, immediate, precise and technology neutral. Importantly, it recognises the human right to respect of privacy.

The BLC is concerned to ensure that the new right of action is accessible to all individuals who have been subject to a serious invasion of their privacy. To this end it agrees with the suggestion contained in the discussion paper (para 4.12) that the Office of the Australian Information Commissioner (“OAIC”) be given power under the *Privacy Act 1988* (“Privacy Act”) to determine complaints about conduct that falls within the proposed cause of action.

It should be expressly recognised in the legislation that the new tort does not impinge on the implied constitutional right to freedom of political communication about political matters and public affairs.

Serious consideration will need to be given in drafting the relevant provisions and in the implementation of the legislation to ensure that the adequate disclosure of “personal” information is not impeded so as to interfere with the efficiency of investigations in formal insolvency proceedings. It is the experience of Committee members who are insolvency practitioners that claims of privacy are periodically

made in order to frustrate the discharge of their duties. The processes of investigation and the transparent disclosure of information concerning the affairs of both companies and natural persons, such as, for example, their ownership of assets, their residential and business addresses, and the state of their health, all involve reference to and publication of information commonly regarded as "private". Practitioners have reported there has been uncertainty about compliance with duties under the existing legislation and would welcome the opportunity for certainty and clarity in any new legislation.

Proposal 7-1 Seriousness and proof of damage

The question to be asked by the courts in assessing the seriousness of the invasion of privacy is to ask whether the invasion of privacy was "likely" to have a serious effect on a person of ordinary sensibilities in the position of the plaintiff. In this context the ALRC has suggested that "likely" does not mean probably but instead means "a real possibility, a possibility that cannot be ignored having regard to the nature and gravity of the feared harm in the particular case". Given the degree of particularity ascribed to "likely" the BLC recommends that this detail be included in any legislation.

Proposal 8-1 – Onus of proof

The BLC notes that the proposal for the plaintiff to have the onus of proving that their interest in privacy outweighs any competing interest raised by the defendant may result in cost implications for the plaintiff. This is because it may enable the defendant to raise potentially spurious public interest issues and the plaintiff would have to show that each of those issues is outweighed by their interest in privacy.

Proposal 9-1 – Federal, State and Territory courts should have jurisdiction ... under the new Act

The BLC agrees with this proposal. In addition, the BLC suggests that State forums such as the NSW Civil and Administrative Tribunal could be utilised for non-injunctive relief and actions for smaller amounts of damages. However, if as suggested in the discussion paper the administrative costs of dealing with the constitutional issues are prohibitive then the Local and Magistrates Courts of the States and Territories should be vested with the jurisdiction to enable small damages claims to be dealt with in an administratively efficient manner.

Proposal 9-2 – The tort applies to natural persons

The BLC agrees with this approach. Corporations or other artificial persons should not be able to bring privacy cases. Privacy is a *human* right.

Proposal 9-3 – The cause of action should not survive for the benefit of the plaintiff's estate or against the defendant's estate

The BLC submits that it should be possible for an estate to complete an action for invasion of privacy that was commenced by a person prior to death. The protections in the Privacy Act only apply to living persons. In relation to deceased persons: a complaint cannot be brought under the Privacy Act in relation to the handling of an individual's personal information following the death of that individual, however, where a complaint was lodged prior to the individual's death, the OAIC can continue to deal with the complaint. To ensure consistency with this position, the BLC submits

that the cause of should be restricted to living persons, or privacy invasion actions commenced prior to an individual's death.

Representative actions (paras 9.50-51)

The BLC notes the comments contained in the discussion paper relating to representative or class actions and that the ALRC is undertaking a broader inquiry into equality, capacity and disability in Commonwealth laws which is considering among other matters, the role of litigation guardians in civil proceedings. The BLC submits that there needs to be an ability for an action to be brought on behalf of the plaintiff who is unable to commence proceedings on their own behalf.

Proposal 9-4 – Limitation periods

The discussion paper aligns its discussion of limitation periods for serious breaches of privacy with defamation actions as a comparable cause of action. The BLC does not dispute that there are some similarities, however, privacy is a human right and should be treated as such. The BLC supports the view of the OIAC that the limitation periods should mirror those contained in the Privacy Act, although, it does caveat its position with the comment that the decision to bring a court action with its attendant costs and stresses may involve a more lengthy decision making process than the decision to complain to the OIAC.

Proposal 10-2 A defence of necessity

The BLC agrees that a defence of necessity should be provided for in the legislation.

Proposal 10-6 Defence of fair report of proceedings of public concern

If a defence of "fair report of proceedings of public concern" is to be provided to enable individuals to report on public proceedings which may reveal private information that could otherwise amount to a serious invasion of privacy, the term "public concern" would need to be defined to prevent the media/paparazzi from exploiting this defence.

Proposal 11 Remedies and costs

The new Act should enable the courts to award compensatory damages including damages for emotional distress, in an action for serious invasion of privacy.

Question 11-1 Costs orders

The BLC is of the view that the general costs rules – being discretionary and usually following the event – should be retained so as to provide their usual check on plaintiff and defendant behaviour.

Proposal 13-4 Defences in surveillance device laws should include a defence of responsible journalism

The BLC is unclear how this defence would actually operate. In particular, it is unclear how "journalism" or "journalist" would be defined.

Surveillance Reform

The BLC agrees that there needs to be a uniform approach to surveillance regulation to ensure consistency of protections. With the objective of uniformity of privacy protection in mind, the BLC is not convinced that local authorities should be empowered to regulate the installation and use of surveillance devices by private individuals.

The HRC notes with concern recent reports in the media¹ of widespread collection in Australia of metadata by security agencies as well as the widespread surveillance of individuals by police and government agencies under the *Telecommunications (Interception and Access) Act 1979*. The HRC is of the view that such collection of data and surveillance is likely to be incompatible with Australia's obligations to protect the right to privacy under Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).

The HRC notes that the first scope of reference of this discussion paper reads "Ways in which law may reduce serious invasions of privacy in the digital era".

While there are many references in the discussion paper to human rights, the HRC notes that:

- (1) The absence of domestic legal protections for most human rights in Australia does not mean that Australia does not have international legal obligations in that regard;
- (2) There is no explicit discussion of the collection of metadata by security agencies in the discussion paper;
- (3) Insofar as there is discussion of use of surveillance devices in the discussion paper that discussion does not focus on bringing such surveillance within the bounds of what would not contravene Article 17 of the ICCPR; and
- (4) A large amount of the discussion paper concentrates on a discussion of a new statutory tort of privacy. Yet it is clear from the discussion of a proposed defence of lawful authority that such an action would not protect individuals from collection of metadata or surveillance by security or other government agencies that was authorised by legislation – which would appear to be the majority of such data collection and surveillance.

Given the above, the HRC submits that the ALRC's recommendation concerning serious invasions of privacy in the digital era should clearly address how the law might control collection of metadata by Australian security agencies as well as the surveillance of individuals by police and government agencies in a way that conforms with Australia's international human rights obligations.

¹ See for example David Wroe, "Revealed: internet surveillance rates," *Sydney Morning Herald*, 11 June 2013, available online: <http://www.smh.com.au/it-pro/government-it/revealed-internet-surveillance-rates-20130610-2o07f.html> (accessed 8 May 2014); Ross Coulthard, "Australia's Real Surveillance Scandal," *The Global Mail*, 13 December 2013, available online: <http://www.theglobalmail.org/feature/australias-real-surveillance-scandal/777/> (accessed 7 April 2014); Philip Dorling, "Big brother widens tabs on Australia's telecommunications", *The Canberra Times*, 13 December 2013

In relation to the discussion of the other elements of the proposed statutory tort of breach of privacy the HRC agrees with the comments of the BLC.

The Committees thank you for the opportunity to comment. If you have any questions please contact Liza Booth, policy lawyer for the Committee on liza.booth@lawsociety.com.au or (02) 99226 0256.

Yours sincerely,

A handwritten signature in black ink that reads "Ros Everett". The signature is written in a cursive, flowing style.

Ros Everett
President