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Request for submission on the Issues Paper: A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy

Thank you for the opportunity to provide a submission on the Issues Paper: A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy (the Issues Paper). Thank you also for allowing an extended period of time in which to provide this submission.

While we broadly support the development of a statutory cause of action for invasion of privacy, (a privacy cause of action), it is possible that the elements of such a cause of action proposed might be provided for in existing privacy law and the power to hear such matters be given to Privacy Commissioner's across Australia[1]. This approach stems from the fact that in New South Wales the *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act) provides the NSW Privacy Commissioner with a residual discretion and limited jurisdiction to investigate physical privacy matters and other privacy matters that do not only relate to personal or health information or data protection generally. Section 36 (2) of the PPIP Act provides that the Privacy Commissioner is able to 'receive investigate and conciliate complaints about privacy related matters' and 'to conduct such enquiries and make such investigations into privacy-related matters as the Privacy Commissioner thinks appropriate'. As noted in our Annual report for 2010-11, the discretion to investigate privacy matters, which go beyond the Information Protection Principles (IPPs) in the PPIP Act or Health Privacy Principles (HPPs) in the *Health Records and Information Privacy Act 2002* (HRIP Act), is exercised sparingly and only in circumstances where there does not appear to be another more appropriate remedy for the complaint in question. In the absence of any privacy standard in the PPIP Act, the Privacy Commissioner applies relevant privacy standards to determine whether or not a 'violation or interference with' a person's privacy has occurred. Complaints about physical privacy (physical, bodily, territorial) or surveillance are measured against

[1] Our submission to the Australian Law Reform Commission (ALRC) on Discussion Paper 72 was noted by the ALRC in its Final Report 108, 'For your Information: Australian Privacy Law and Practice' at 74.87.

general fair information processing standards[2], specific laws or widely accepted guidelines or policies governing the specific conduct, or broader tests that go more to the nature of the harm suffered such as those developed by American academic William Prosser:

- the intrusion upon a person's seclusion or solitude or personal affairs,
- public disclosure about embarrassing facts about a person,
- publicity which places the person in a false light in the public eye, or
- the appropriation of a person's name or likeness[3].

As noted in our submissions to the Australian Law Reform Commission on Issues Paper 31 and Discussion Paper 72 we believe that the scope of the *Privacy Act 1988* (Cth) (the Privacy Act) could be broadened to include physical privacy, communications and territorial privacy[4]. The benefits of doing so are firstly, that agencies and organisations would be bound to refrain from conduct, which would otherwise interfere with the privacy of the individual in the manner proscribed. The existence of a statutory privacy regime has a deterrent effect and gives a degree of certainty to the expectation of privacy in individuals whose personal and/or health information is subject to protection under those laws. The second benefit of including these other elements would be that it would be a simple, low cost way for individuals to bring complaints to the Privacy Commissioner and to seek damages for proven breaches. The third benefit would be consistency in the application of privacy law, a stated goal of the ALRC's review. A fourth and very important benefit would be that it would lessen the likelihood of further publicising the interference with privacy[5].

We acknowledge that this position differs from that put forward in the Issues Paper, but we have raised it as a possible alternative to the development of a statutory cause of action prosecutable through the courts. Notwithstanding this suggestion, we acknowledge that this is likely to be a minority view and in light of this we welcome the opportunity to address the questions raised in the Issues Paper about the privacy cause of action models and elements. In our view the model which offers the greatest clarity and which is more likely to encompass the broad nature of privacy invasions is that proposed by the Victorian Law Reform Commission. Our reasons for coming to this view are discussed later in this submission.

Questions & Answers

[2] The Privacy Commissioner has formally adopted the Data Protection Principles (DPPs) for this purpose: http://www.lawlink.nsw.gov.au/Lawlink/privacynsw/ll_pnsw.nsf/pages/privacy_dpps

[3] For an example of the application of the Prosser Tests by the NSW Privacy Commissioner in the context of a Special Report to Parliament see p39 at: http://www.lawlink.nsw.gov.au/Lawlink/privacynsw/ll_pnsw.nsf/pages/privacy_specialreportparli

[4] See: http://www.lawlink.nsw.gov.au/lawlink/privacynsw/ll_pnsw.nsf/pages/privacy_publications#16

[5] Nothwithstanding the possibility of a suppression order.

1. Do recent developments in technology mean that additional ways of protecting individual's privacy should be considered in Australia?

In our view it is not just the evolving nature of new technologies which pose an increasing risk to privacy, but the multifarious, and in some cases nefarious, uses to which those technologies (and the information generated) which expose individuals to more and more public scrutiny and lead to the significant diminution of the expectation of their privacy[6]. The digitisation of information about individuals has and will continue to see a rise in the number of privacy complaints arising from those uses. But it is not just the rise in the number of complaints or the emerging technologies themselves which require greater privacy protection but, in our view it is the fact that the existing means of redress, namely State, Territory and Commonwealth privacy laws do not adequately address the gaps in the national privacy patchwork. We note that the 'technological growth' ground was one of the five major reasons for the NSW Law Reform Commission to determine that there was a need for more general protection of Privacy (in NSW at least) in their May 2007 Consultation Paper. This ground was expressed under the heading 'A more invasive environment'.

2. Is there a need for a cause of action for serious invasion of privacy in Australia?

On 8 November 2011 it was reported in The Australian newspaper that a Unisys survey found that 47 percent of Australians polled for its Australia Security Index would take legal action against organisations 'if they became aware that their information had been accessed by unauthorised people' and that of the eleven countries surveyed, Australians were the 'most likely to expose the issue'[7]. From this it might be construed that a significant proportion of Australians would be likely to support measures which would enable them to take legal action for breaches of privacy flowing from unauthorised access to, and possibly for other misuses, of their personal information. Notwithstanding the existing criminal sanctions against such egregious privacy invasions eg: voyeurism and up-skirting or property offences, it is clear that the civil law needs to 'catch up' and deal with the gaps in privacy law.

Because this Office has jurisdiction to deal with privacy matters generally, as noted above, complaints which might otherwise give rise to civil action (possibly as nuisance or defamation actions) have to a limited extent, been

[6] The consistent feature of the various privacy principles in Australia is that they are technologically neutral. This neutrality allows organisations and government agencies to adapt privacy principles to a range of circumstances in which personal information is collected and used and provides a consistent platform for the protection of privacy and the adjudication of privacy complaints. While some technology-specific laws go to the protection of privacy, in general the broad ranging nature and the concomitant expectation of privacy means that privacy law should to be as technologically neutral as possible in order to ensure that there are as few gaps as possible in the privacy law landscape.

[7] http://www.unisyssecurityindex.com/usi/australia

investigated and in some cases resolved by this Office[8]. This and the well documented cases involving celebrities and sports personalities in Australia indicate that there are genuine matters which involve incursions into the privacy of individuals and which raise the possibility that a cause of action is required and for which a remedy should be made available.

3. Should any cause of action for serious invasion of privacy be created by statute or left to development at common law?

Notwithstanding our view that existing NSW privacy law could encompass provisions to enable individuals to prosecution allegations about incursions into privacy through amendments to existing privacy law and the development of such in jurisdictions where none exists, we would prefer that a privacy cause of action be created by statute rather than left to juridical evolution. We endorse the view put by the NSW Law Reform Commission that the States and Territories enact uniform legislation providing for a cause of action[9].

We favour the proposed model put forward by the Victorian Law Reform Commission (VCRC), in which it is proposed that there be two separate causes of action, one for misuse of private information and one for intrusion upon seclusion [10]. While it could be argued that this is an artificial distinction, in our view matters which could be incorporated in an action for intrusion upon the seclusion of the individual tend to get less attention and be treated with less seriousness that matters relating to the misuse of personal information. In the VLRC model they are put on equal footing.

The VLRC model requires that plaintiffs be able to demarcate the boundaries of their complaint to that which is either a misuse of their information or an intrusion upon their seclusion. It is possible that a matter might give rise to both actions, such circumstances in which a television crew thrusts a camera into the face of a motor accident victim and the footage of the victim is later broadcast. However because both require the plaintiff to firstly establish that they had a reasonable expectation of privacy and that a reasonable person in those circumstances would be highly offended[11]. It would not be difficult to deal with both concurrently.

4. Is 'highly offensive' an appropriate standard for a cause of action relating to serious invasions of privacy?

[8] See the Information and Privacy Commissioner Annual Report 2010-11 at p 46: http://www.ipc.nsw.gov.au/lawlink/privacynsw/ll_pnsw.nsf/vwFiles/IPC_annualreport2011.pdf/$file/IPC_annualreport2011.pdf

[9] http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/R120.pdf/$file/R120.pdf

[10] Victorian Law Reform Commission, Surveillance in Public Places: Final Report 18 (2010) (VLRC Report) at p147-149

[11] We believe that the qualification 'highly' is too high a test. This is discussed with respect to question 4.

There is no qualification to the requirement in NSW privacy laws for bringing complaints about dealings with personal or health information and we suggest that the 'highly offensive' test is too high. In this regard we concur with the NSW Law Reform Commission's (NSWLRC) view that this test would undercut the meaning of the reasonable expectation of privacy[12].

In our view such a test would result in few matters proceeding to trial. Instead we suggest that it be applied to determine the degree of harm in a consideration of damages once an invasion of privacy had been established. This approach is consistent with the practice in civil courts and tribunals whereby threshold issues are only relevant in that they are gateways to payment of either statutory compensation or damages, and of themselves are inconsequential findings unless they are liked to some coercive order against the 'offending' party. This is in contrast to the criminal law whereby findings of 'guilt' arising from an adjudication that an offence has been made out, become part of the outcome of the proceedings irrespective of what sentence (if any) is determined.

5. Should the balancing of interests in any proposed cause of action be integrated into the cause of action (ALRC or NSWLRC) or constitute a separate defence?

In our experience in dealing with and oversighting the review of privacy complaints by NSW public sector agencies, the balancing of interests is an exercise which is best undertaken once the facts and the possible breach of privacy have been identified. As pointed out by the VLRC[13], to impose this test at the outset places an unfair burden on plaintiffs to prove a negative. In our view the balancing of interests should occur in the context of the raising of defences.

6. How best could a statutory cause of action recognise the public interest in freedom of expression?

Whilst there is a public interest component of the notion of freedom of expression, in the absence of any Bill or Charter of Rights, such issues are notions. Whilst the Commonwealth Constitution provides implied rights concerning association, belief, and (within the parameters of the law) – expression, it would appear unnecessary and problematic for a statutory cause of action to need to recognise this aspect (of freedom of expression) when one has regard to the general range of competing public interests.

Freedom of expression is a concept which needs to be balanced against other, often competing interests. As such it is an expectation rather than a

[12] New South Wales Law Reform Commission (NSWLRC) Report 120 'Invasion of Privacy' at pp27-28.
[13] VLRC Report at 7.180.

right and should therefore be treated as a defence, or part of a public interest defence.

7. Is the inclusion of intentional or reckless as fault elements for any proposed cause of action appropriate, or should it contain different requirements as to fault?

In New South Wales, certain criminal offences are expressed in a manner which has regard to their 'elements' of the offence. Eg: section 94 of the *Crimes Act 1900* NSW refers to 'Robbery or stealing from the person'. Section 95 refers to 'same in circumstances of aggravation'. Some offences make provision for such notions as 'circumstances of aggravation', the offence being 'committed in company' etc. In some instances these become separate offences, and in others they become elements of the offence. Many criminal offences include provisions for the offence occurring in circumstances which would constitute 'aggravation'. These 'circumstances' (which go to the elements of those criminal offences) have regard to the ordinary apprehension (and in aggravated circumstances – increased apprehension) either against the victim or the society. The criminal law does not go to motive, but merely circumstances and extent of impact / damage. There are also other considerations relating to 'seriousness' of the offence etc, and these go to general societal views and perceptions, and become relevant in the penalty regime and deterrent value of sentencing.

With a privacy cause of action it would be preferable for the conduct to be the driving element of the claim rather than the circumstances. The circumstances would be captured through the extent of damage. The basis for the conduct may be a consideration in determining the circumstances, but otherwise would seem to be a lesser consideration in the broader picture. In order to establish the effect of the conduct, such a proof does not require evidence of the motive / intent. The motive of the transgressor is not an essential element of any cause of action. It may be one of the relevant factors to take into account by the court or tribunal. An examination of what a 'wrong-doer' had in their mind is within their own 'peculiar' knowledge making it a difficult evidentiary issue for a complainant to overcome. This issue appears to be a significant consideration in privacy and discrimination law, not making or requiring motive as an element of the cause of action.

8. Should any legislation allow for the consideration of other relevant matters and, if so, is the list of matters proposed by the NSWLRC necessary and sufficient?

In our view the utility of such a list would be to assist in determining whether the expectation of privacy in the circumstances is made out but in our view it should not be exhaustive and its consideration by a court should not be mandatory.

9. Should a non-exhaustive list of activities which could constitute an invasion of privacy, be included in cause of action legislation or in other explanatory material? Should the list be the same as that proposed by the ALRC?

In respect of the proposed list, it would be worth considering whether at item (b) 'unauthorised surveillance' means or includes 'illegal surveillance'. Much of the current camera surveillance which takes place in our communities in public places is either notionally authorised, or it's legality remains a live issue awaiting testing. The various cases which provided outcomes of some benefit to the plaintiff/ applicants (other than *Khorasandjian – v – Bush [1993] QB 727)* were all concerned with proprietary interests in land, and focused on existing torts of nuisance or similar actionable causes. This situation was further entrenched when ultimately the House of Lords overturned Khorasandjian in 1997 for that very reason. Item (d) which refers to 'sensitive facts' could be problematic by its very interpretation. Whilst some guidance may well be useful, broadly any list includes considerations which can guide and inform a decision maker when examining threshold issues. Importantly however, as any actions succeed or fail (after overcoming the threshold issues), on the basis of establishing damage as a result of the conduct / action, such a list is informative and not determinative.

We support the inclusion of a non-exhaustive list of activities which could constitute an invasion of privacy.

10. What should be included as defences to any proposed cause of action?

As noted above, we suggest that the model put forward by the VLRC for a privacy cause of action should be preferred over the ALRC and NSWLRC model. Likewise we prefer the more extensive suggested list of defences proposed by the VLRC which for the most part incorporates those matters put forward by the NSWLRC and the ALRC.

11. Should particular organisations be excluded from the ambit of any proposed cause of action, or should defences be used to restrict its application?

In our view there should be no exclusion for particular organisations from the ambit of a privacy cause of action. We recognise that certain law enforcement or national security bodies may need to operate in secret in certain limited circumstances (such as in controlled operations), however total exclusions provide too much leeway for organisations to act without regard to the privacy of individuals and there is a danger that an exemption could result in a creeping surveillance culture in which information is collected and stored for

purposes outside of that which is required for the particular security or law enforcement purpose on the basis that it may be required in future.

In our view the recognition of circumstances in which security or law enforcement bodies are required to operate in secret and in ways which would otherwise constitute an invasion or privacy should be limited to a defence to be considered once the standing, the elements and the invasion of privacy had been established.

12. Are the remedies recommended by the ALRC necessary and sufficient for, and appropriate to, the proposed cause of action?

Broadly the list of remedies proposed by the ALRC appears sufficient in a system which is conceptual in nature at this stage. There would need to be a system whereby the suite of remedies could be reviewed by legislative review so as to ascertain their effectiveness in practice. Importantly, adjudicating bodies should have the power to make such ancillary orders as the court or tribunal thinks appropriate, as well as general civil procedure provisions relating to considering questions of costs.

13. Should the legislation prescribe a maximum award of damages or non-economic loss, and if so, what should that limit be?

The general experience is that damages are payable (in Courts with unlimited jurisdiction) from ‘one penny to infinity’. Just as there is no upper cap, so too the ‘lower cap’ is set at the minimum calculable amount. Bearing in mind that the New South Wales Administrative Decisions Tribunal has an upper limit of $40,000.00 per claim, it would seem appropriate that there should be an upper limit and that such a limit be along the lines of the figure proposed by the NSW Law Reform Commission. In addressing this question it is necessary to examine whether the limit is proposed in respect of each breach, or each claim or proceedings. In any event we support a system whereby claimants would not engage in a process of ‘shopping for a relevant cause of action, because the potential rewards provided an incentive to file in one jurisdiction or another.

Limits can provide certainty in respect of risk, and prevent unsubstantiated upper awards leading to defendant appeals on quantum.

14. Should any proposed cause of action require proof of damage? If so, how should damage be defined for the purposes of the cause of action?

The general entitlements to damages require evidence (or proof) of damage. In examining whether proof of damage is an entitlement to availing oneself of the cause of action, it is necessary to understand what is sought to be

achieved by the overall proposal. If the process is intended to provide a greater protection to individuals, and at the same time instil 'privacy best practice' in other individuals, corporations, agencies etc, then damages is only part of the equation.

However, the general view that as a starting point of a 'serious interference', there would be some scope or ground for damage to be implied. Often damage can only be demonstrated by evidence adduced after a finding of liability or some other threshold issue in the proceedings has been passed.

For these reasons we are more comfortable with the view put forth as the 'alternative approach' in the discussion paper.

15. Should any proposed cause of action also allow for an offer of amends process?

In the modern era of litigation, all domestic civil jurisdictions provide for a process of some method of alternative dispute resolution. (ADR). Coupled with ADR are processes of early neutral evaluation (ENE), conciliation, mediation and arbitration. Ordinarily in the lead up to litigation there is a process of the aggrieved party raising their concerns with the other party, initially in an informal or conciliatory manner. Letters of demand, time to respond, notice of foreshadowed proceedings and pre-litigation discovery are all practices undertaken by plaintiff / applicant's and respondents to different extents to resolve or settle issues quickly without excessive delay or expense.

Any such regime must contemplate the ability for parties to resolve matters between themselves prior to or without resorting to formal legal proceedings.

In this regard an 'offer of amends' remedy from a suite of available remedies is both a necessary and practical solution which can assist in resolving the dispute.

16. Should any proposed cause of action be restricted to natural persons?

The right to privacy in Australia has its roots in Article 17 of the International Covenant on Civil and Political Rights (1966)[14] and as noted by Australian courts,[15] is clearly a concept which attaches to individuals rather than to entities. In most privacy complaints brought to our Office complainants speak of being embarrassed, angered, humiliated or shamed by the conduct at issue. It is not logical to argue that an entity has experienced such feelings, as 'feelings' can only be measured in human terms. In our view if a corporation or an entity were to be able bring a privacy cause action the

[14] http://treaties.un.org/doc/db/survey/CovenantCivPo.pdf
[15] Most notably in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199

concept of privacy would dissolve into meaninglessness. In our view there is already sufficient protection for the protection of information relating to entities in contract, corporations and the general law without recourse to privacy law.

17. Should any proposed cause of action be restricted to living persons?

While we acknowledge that the privacy principles in the PPIP Act and the HRIP Act provide protection for personal information up to 30 years post-mortem, it is clear that certain of those principles are unworkable in the case of a deceased person, such as the requirement that information only be collected from the individual to whom it relates. Complaints made by authorised on behalf of deceased persons can be difficult to resolve especially in considering how to assess damages. We therefore support the view expressed by the ALRC, the NSWLRC and the VLRC that the proposed cause of action should be limited to living persons.

18. Witihin what period and from what date should an action for serious invasion of privacy be required to be commenced?

We support the view put forward by the VLRC that the period of time for bringing a privacy cause of action should be as consistent as possible with those for similar causes of action, such as personal injury and defamation arising in the relevant jurisdiction. In general we suggest that the period of time should run from the date on which the person became aware of the matters giving rise to the cause of action. A reasonable extension of time should be made for individuals who are able to establish that they have been unable to bring the matters within that time.

19. Which forums should have jurisdiction to hear and determine claims made for serious invasion of privacy?

In New South Wales the majority of causes of action which would constitute 'Tortious actions', are now dealt with at the District Court or similar level (eg: the ADT). The Victorian equivalent to the District Court is the County Court. This judicial level hears the largest amount of matters whereby common law assessment of damages apply. It would be important to determine what provisions were envisaged concerning how damages would be determined prior to settling the mechanisms of how and where matters would be heard.

We note the VLRC's proposal that the Victorian Civil and Administrative Tribunal should have exclusive jurisdiction to hear and determine matters arising under a Victorian privacy cause of action statute[16].

[16] VLRC Report at pp. 163-164.

In our view this is a practical solution to the argument that only wealthy individuals are likely to benefit from a privacy cause of action. We recognise that most individuals do not have the resources to prosecute an invasion of their privacy. The NSW Administrative Decisions Tribunal currently deals with external review matters arising under the PPIP Act and HRIP Act and for most part it provides a low cost, informal way for individuals to pursue their privacy complaints. We therefore endorse the suggestion by the VLRC that a privacy cause of action could be brought to and determined by a tribunal

Thank you for the opportunity to provide a submission on this important matter. I hope these comments are of assistance to you. If you have any further queries regarding this letter please contact Ms Jenner at of my Office on (02) 8019 1603.

Yours sincerely

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