

5 November 2007

Mr Alan Kirkland
Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

By Email: privacy@alrc.gov.au

Dear Mr Kirkland

Submission on Review of Australian Privacy Law: Discussion Paper 72

Thank you for the opportunity to comment on the issues raised by *Review of Australian Privacy Law: Discussion Paper 72 (Discussion Paper)*.

About the Arts Law Centre of Australia

The Arts Law Centre of Australia (**Arts Law**) was established in 1983 and is the national community legal centre for the arts.

Arts Law provides legal advice, publications, education and advocacy services each year to over 2500 Australian artists and arts organisations operating across the arts and entertainment industries.

About our clients

Our clients not only reside in metropolitan centres, but also contact us from regional, rural and remote parts of Australia, and from all Australian states and territories. Our client base is multi-cultural, and both Indigenous & non-Indigenous.

Arts Law supports the broad interests of artistic creators, the vast majority of whom are emerging or developing artists and the organisations which support them.

The comments that we make in this submission are informed by our clients' profile, which is that they are:

- new, emerging artists or established arts practitioners or arts organisations;
- creators of their own material and users of other artist's work;
- operating arts businesses;
- operating in all arts sectors;
- working in both traditional and digital media;
- on low incomes/ with limited funds;
- needing to be self-reliant in business;
- limited in their ability to enforce rights;
- eager for accessible legal information, although they typically have limited legal education; and
- at least professionally, legally compliant.

Arts Law's submission

We address below the proposals and questions raised in the Consultation Paper which directly affect artists and arts organisations in Australia. For the most part we have refrained from commenting on privacy issues around information collection or information processing. While we support the further development of privacy laws for specific privacy concerns we believe they must be developed on an individual basis using narrowly defined legislation as we strongly believe that a general statutory cause of action for invasion of privacy will be too broad and that any benefits would be outweighed by the detriments to artistic expression, the public interest and freedom of speech.

Arts Law is concerned by the lack of representation to date by artists and arts organisations in the privacy reviews. The proposals put forward fail to take into account the affects the proposed changes will have on the arts. Arts Law requests that the ALRC host a round table consultation for the arts industry to redress the situation.

In summary, Arts Law:

- calls for *sui generis* legislation to protect the privacy needs of Indigenous people as they relate to the protection of Indigenous cultural heritage and intellectual property;
- believes that government funding would be better spent developing *sui generis* legislation re Indigenous cultural and intellectual property rather than protocols as, without substantial penalties for failure to comply, the protocols will not deliver the required protection;
- rejects the proposal to introduce a statutory cause of action for invasion of privacy because it constitutes an unacceptable infringement on freedom of expression and will greatly impact photographers, film makers, visual artists and writers that generate artworks around public spaces;
- submits that if a statutory cause of action is introduced (which Arts Law does not support), then public spaces should not be considered 'private';
- recommends that the defences to a statutory cause of action include a defence that the invasion was in the public interest, or that the use of material that would otherwise be prohibited be allowed if it is for an artistic purpose, in the public interest or constitutes a fair dealing (eg reporting the news); and
- does not support the removal of the small business exemption but instead suggests the definition be changed so that a small business is one with a turnover of \$500,000 or less per year.

ARTS LAW'S RESPONSE TO THE DISCUSSION PAPER

Proposal 1-1

The Office of the Privacy Commissioner should, either on its own motion or where approached in appropriate cases, encourage and assist agencies and organisations, in conjunction with Indigenous and other ethnic groups in Australia, to create publicly available protocols that adequately respond to the particular privacy needs of those groups.

The Arts Law Artists in the Black (**AITB**) service provides advice and resources to Indigenous artists and arts organisations in Australia. Arts Law is in the unique position of being the only national community legal centre assisting Indigenous

artists. Our experience through providing telephone legal advice, case work and community education means that we are well aware of the large number of Indigenous artists and communities for whom existing laws provide insufficient protection.

A major focus of AITB is the extension of current legal protection to protect Indigenous culture and intellectual property (**ICIP**). Because art, including painting, music and dance, is an integral part of Indigenous culture, increased protection of Indigenous artists and artworks is an essential element to improving life for Indigenous communities generally. Arts Law supports investigation and research into how privacy law may have the potential to protect Indigenous cultural and intellectual property.

We support the introduction of *sui generis* legislation which deals with the protection of Indigenous cultural heritage and intellectual property. Such legislation could include provisions dealing with Indigenous privacy issues, to protect:

- the rights of Indigenous communities to maintain secrecy of Indigenous knowledge and other cultural practices;
- access to Indigenous sites, including sacred sites;
- control of, and access to, recordings of cultural customs and expressions, knowledge and skills of Indigenous communities; and
- control of, and access to, secret sacred knowledge of Indigenous communities.

We believe that piecemeal amendments to privacy laws, copyright laws and other intellectual property laws will fail to provide adequate and workable solutions to Indigenous people and their communities.

We are concerned that the development of privacy protocols for Indigenous groups will lead to a complicated series of provisions that are difficult for business and government to apply and that without enforcement mechanisms the protocols are unlikely to provide meaningful protection for Indigenous individuals or groups. We believe it is essential that all concerns are addressed with *sui generis* legislation to avoid this situation.

Arts Law believes government funding would be better spent developing appropriate *sui generis* legislation. We do not believe protocols can deliver the required protection and thus we do not support Proposal 1-1 unless there are substantial penalties for failure to comply with the protocols. If the government is serious about

meeting the privacy and intellectual property needs of Indigenous groups then it will create solutions that are enforceable and carry appropriate penalties where there is a failure to comply.

We note there are numerous existing protocols in the intellectual property and cultural fields in relation to Indigenous communities.¹ It has been our experience that these are insufficient and that Indigenous artists and communities receive little protection and are frequently exploited. None of the existing protocols are enforceable unless they are adopted in individual contracts. Where voluntary protocols are adopted, they are adopted by participants who are focussed on appropriate conduct. They are not adopted by individuals and organisations engaging in poor practices which are likely to harm Indigenous communities and have a deleterious effect on the Indigenous arts and crafts sector.

We believe the development of privacy protocols for Indigenous groups and communities will be plagued by difficulties in trying to make people aware of the protocols, and difficulties due to lack of enforcement mechanisms. It will create a complex web of protocols in relation to Indigenous communities that will be confusing for both Indigenous and non-Indigenous people and that this will deter compliance with such protocols.

Feedback from some preliminary consultation Arts Law has undertaken with Indigenous people indicates strong support for *sui generis* legislation, especially in the area of Indigenous cultural heritage and intellectual property.² Such legislation could address many privacy concerns for Indigenous individuals and groups. Additionally, there is a call to develop protocols for specific areas if these can provide meaningful improvements for Indigenous people, such as the health, credit and telecommunications industries. Recommendation 23 of the *Bringing Them Home Report* called for the development of 'common access guidelines to Indigenous

¹ These include:

- the Australia Council's ICIP protocols – available at: http://www.ozco.gov.au/arts_resources/publications/cultures_indigenous_protocol_guides
- the City of Melbourne's Code of Practice For Galleries and Retailers of Indigenous Art – available at: http://www.melbourne.vic.gov.au/opm/bc/CTEE/meetings/CSC_51_200606080700.pdf
- the NAVA Valuing Art, Respecting Culture: Protocols For Working With the Australian Indigenous Visual Arts and Craft Sector – available at: <http://www.visualarts.net.au/files/VARC.pdf>
- the development of protocols by the Australian Film Commission – information about the development of the protocols and an issues paper are available at: <http://www.afc.gov.au/funding/indigenous/icip/default.aspx>.

See also the Senate Standing Committee on Environment, Communications, Information Technology and the Arts, *Indigenous Art – Securing the Future: Australia's Indigenous visual arts and craft sector*, Senate Report (2007) recommendations 17, 18 and 19, which recommends the completion and implementation of a protocol for the Indigenous visual arts and crafts industry (the *Indigenous Art Commercial Code of Conduct*).

² Arts Law thanks Terri Janke and Robynne Quiggan for their input on this matter.

personal, family and community records as appropriate to the jurisdiction and in accordance with established privacy principles'.³ Arts Law does not make any recommendations regarding these issues as our expertise relates to Indigenous arts. Our experience in this area is that protocols are clearly inadequate to protect Indigenous artists and their communities.

Proposal 3-3

If the Privacy Act is amended to incorporate a cause of action for invasion of privacy, the name of the Act should remain the same. If the Act is not amended in this way, however, the Privacy Act should be renamed the Privacy and Personal Information Act.

Arts Law supports the recommendation that if the *Privacy Act* is not amended to incorporate a statutory cause of action for invasion of privacy then the *Privacy Act* should be renamed the *Privacy and Personal Information Act*. In our experience there is a high degree of misconception in the Australian community as to the extent of privacy law in Australia. We agree with renaming the Act to more accurately reflect the scope of the legislation.

Proposal 3-4

The Privacy Act should be amended to include an objects clause. The objects of the Act should be to:

- a) *implement Australia's obligations at international law in relation to privacy;*

³ Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, (1997). Recommendation 23 states in full:

'That the Commonwealth and each State and Territory Government establish and fund a Records Taskforce constituted by representatives from government and church and other non-government record agencies and Indigenous user services to,

1. develop common access guidelines to Indigenous personal, family and community records as appropriate to the jurisdiction and in accordance with established privacy principles,
2. advise the government whether any church or other non-government record-holding agency should be assisted to preserve and index its records and administer access,
3. advise government on memoranda of understanding for dealing with inter-State enquiries and for the inter-State transfer of files and other information,
4. advise government and churches generally on policy relating to access to and uses of Indigenous personal, family and community information, and
5. advise government on the need to introduce or amend legislation to put these policies and practices into place.'

- b) *promote the protection of individual privacy;*
- c) *recognise that the right to privacy is not absolute and to provide a framework within which to balance the public interest in protecting the privacy of individuals with other public interests;*
- d) *establish a cause of action to protect the interests that individuals have in the personal sphere free from interference from others;*
- e) *promote the responsible and transparent handling of personal information by agencies and organisations;*
- f) *facilitate the growth and development of electronic commerce, nationally and internationally, while ensuring respect for the right to privacy; and*
- g) *provide the basis for nationally consistent regulation of privacy.*

Arts Law supports the proposal to include an objects clause in the *Privacy Act*, however we do not support the proposed drafting set out in proposal 3-4.

We recommend that (b) be amended to state that objects of the Act are to promote the protection of 'personal information', rather than 'individual privacy'. We believe the *Privacy Act* should address issues around the handling of personal information and data and should not be extended to include a statutory cause of action.

We recommend that an object recognising the importance of freedom of expression be included. Arts Law is concerned that the wording of (c) does not provide sufficient direction as to how competing human rights are to be balanced and that further detail should be included to make it clear that the right to privacy does not take precedence over other human rights, such as the right to freedom of expression.

Arts Law submits that (d) should be deleted and that it is not appropriate to introduce a statutory cause of action for invasion of privacy. Please see our comments in relation to chapter 5 regarding our position on the statutory cause of action.

Proposal 5-1

The Privacy Act should be amended to provide for a statutory cause of action for invasion of privacy. The Act should contain a nonexhaustive list of the types of

invasion that fall within the cause of action. For example, an invasion of privacy may occur where:

- a) there has been an interference with an individual's home or family life;*
- b) an individual has been subjected to unauthorised surveillance;*
- c) an individual's correspondence or private written, oral or electronic communication has been interfered with, misused or disclosed; or*
- d) sensitive facts relating to an individual's private life have been disclosed.*

Summary

Arts Law does not support the proposal to introduce a statutory cause of action for invasion of privacy. The introduction of a statutory cause of action for invasion of privacy that gives individuals rights over the use of their name, likeness or voice is inappropriate because there are existing laws that provide protection against, and remedies for, the unauthorised use of a person's name, likeness or voice. To extend the law beyond the existing provisions is inappropriate and would have a disproportionate effect on:

- arts practitioners who create artworks that portray or capture images of people in public spaces (including photographers, painters, video artists and directors); and
- writers and journalists, whose freedom of expression is likely to be restricted by the proposed changes.

Such a right would be a significant expansion of existing rights and cannot be justified given:

- the existing laws are sufficient;
- it threatens freedom of speech and freedom of expression;
- the absence of a strong human rights framework in Australia;
- the detriment it would cause to our artistic, social and cultural heritage; and
- the likelihood that it will primarily benefit celebrities (and corporations if not excluded).

Arts Law is concerned that the proposed statutory cause of action will have unintended consequences and will be applied more broadly than is intended. We

note the ALRC statement, in the chapter on young people and privacy, that 'the ALRC is not proposing a blanket ban on the taking of images without consent. This is not seen as a practical or desirable option.'⁴ Arts Law submits that this should be made explicit in its proposal in relation to chapter 5 and that using a person's name, identity, likeness or voice without authority or consent is not an invasion of privacy.

Arts Law's position regarding the proposal to introduce a cause of action is:

1. it is unnecessary, will have unintended consequences and therefore should not be introduced;
2. if an action is introduced (which we do not support), there should be no reasonable expectation of privacy in public places;
3. failing that, there should be further defences provide to alleviate the detrimental effect the cause of action will have upon artists creating art in public places.

We provide below a detailed explanation of our reasons.

The existing laws are sufficient

Arts Law does not support the extension of privacy law to allow people to control the unauthorised use of their image beyond current controls as the existing raft of statutory and common law provisions are sufficient to protect people from unwarranted intrusions into their private lives and against inappropriate use of their name, identity, likeness or voice.

The NSW Law Reform Commission recognised the following protections that can protect various aspects of privacy:

- trespass to land;
- private nuisance;
- defamation;
- injurious falsehood;
- passing off;
- intentional infliction of harm;
- breach of confidence;

⁴ Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper 72 (2007), [59.112].

- property offences – eg where there is unauthorised access to private land; and
- criminal offences – eg offences under the *Summary Offences Act 1988* (NSW) which prohibit filming, or attempting to film, a person for indecent purposes.⁵

We draw the ALRC's attention to the following additional areas that may prevent the unauthorised use or publication of a person's name, identity, likeness or voice:

- section 35(5) of the *Copyright Act 1968* (Cth) (**Copyright Act**) – where a person is commissioned to take a photograph for a private or domestic purpose, or to draw a portrait or make an engraving of another person then the person commissioning the work will own the copyright in the work unless there is an agreement to the contrary. This means the commissioner will be able to control any future publication of the work because publication involves a reproduction of the work and this requires consent of the copyright owner;
- part XIA of the Copyright Act – under this part, performers are granted certain rights in relation to unauthorised recordings of their performances, thus enabling them to prevent various uses or publications of their likeness or voice. These provisions apply to sound, television and film recordings;
- section 22(3A) of the Copyright Act – a performer on a sound recording is a co-owner of the copyright in that recording (subject to other provisions of the Copyright Act). This means that an unauthorised use of a person's voice on a sound recording can be controlled by the person asserting their copyright interest in the recording. Since it is the copyright owner's right to reproduce the work, make the work public for the first time, communicate the work to the public, play the recording in public and transmit the recording to the public, the person's permission is required before the recording can be used in any of these ways; and
- *Trade Practices Act 1974* (Cth) (**TPA**) and state and territory fair trading legislation – section 52 of the TPA prohibits a corporation from engaging in conduct that is, or is likely to be, misleading or deceptive in trade or commerce. There are similar provisions under the state and territory acts which prohibit a person from engaging in the prohibited conduct. These laws can enable people, particularly celebrities, to prevent the unauthorised use of

⁵ New South Wales Law Reform Commission, *Invasion of Privacy*, Consultation Paper 1 (2007), [2.39] to [2.105].

their image. For example, Kieran Perkins successfully brought a section 52 action (amongst other claims) against Telstra when Telstra used his image in an advertisement campaign without Perkin's permission.⁶

The development of a general cause of action for invasion of privacy should be left to the common law, which has the flexibility to deal with specific instances of invasion of privacy and to reflect societal norms. Specific privacy concerns should continue to be protected by specific legislation at both the state and federal level, such as the protection of personal health information which is currently protected under the *Health Records and Information Privacy Act 2002* (NSW) and the handling of personal information as regulated under the *Privacy Act 1988* (Cth).

Freedom of speech, freedom of expression and the public interest

Freedom of expression is a fundamental human right. International instruments, such as Article 19 of the International Covenant on Civil and Political Rights (**ICCPR**), to which Australia is a signatory, provide:

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of article, or through any other media of his choice.

(3) The exercise of the right provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) for respect of the rights and reputations of others;
- (b) for the protection of national security or of public order, or of public health or morals.

Arts Law submits that the current regulations in Australia protect the rights and reputations of others without unnecessarily encroaching on the right to freedom of expression currently enjoyed by artists practising in public places. We see such artistic practice as important not just for its artistic merit, but also for its social and cultural merit as through such work artists can assist us in questioning the way we think and give meaning to our world. It also provides an important role in documenting our society and in providing highly valuable historical documentation.

Arts Law believes it is in the public interest to ensure freedom of speech. We are concerned that the proposed changes will be detrimental to visual artists, filmmakers, photographers, writers and journalists. We are concerned that investigative journalism is likely to suffer under the proposed new cause of action and we urge the

⁶ *Talmax Pty Ltd v Telstra Corporation Ltd* [1997] 2 Qd R 444; (1996) 36 IPR 46; (1996) ATPR 41-535; BC9605158.

ALRC to recognise the importance of investigative journalism in drawing important matters to the public's attention. Investigative journalists Bob Woodward and Carl Bernstein are renowned for their reporting which was instrumental in uncovering the Watergate scandal that led to President Richard Nixon's resignation. Australia also has a strong history of investigative journalism. For example, Chris Masters is a prominent investigative journalist best known for his exposé of police corruption in Queensland which led to the Fitzgerald royal commission. We believe it is essential that any development of privacy laws take into account the public interest in investigative journalism. We are highly concerned that the ALRC has indicated that the media exemption is not to apply for the proposed statutory cause of action.⁷

No human rights framework

Arts Law submits that the introduction of a statutory cause of action for invasion of privacy cannot be justified in the absence of a strong human rights framework. We note the NSW Law Reform Commission's statement that,

Jurisdictions that currently provide for a statutory cause of action for invasion of privacy generally do so within broader constitutional or human rights frameworks that recognise a 'right to privacy' alongside other rights and interests, such as freedom of speech and national security.⁸

Arts Law is concerned that a statutory cause of action for invasion of privacy would fail to operate fairly in the absence of a strong human rights framework. We note that in the Discussion Paper these problems were identified without offering a solution to how the balancing interests would be addressed in Australia and whether the result would be acceptable.⁹ The ALRC referred to the work of M Abrams, and noted that,

the status accorded to privacy, and in particular the status accorded to privacy in international and domestic human rights instruments, means that privacy interests will usually take precedence over less fundamental interests, such as economic choice and opportunity.¹⁰

It is not clear from this statement how a balance would be reached in protecting the right of privacy and the right of freedom of expression. Nor is there any indication as to which right, if any, should take precedence. We urge the ALRC to consider the significance of the strong human rights laws in countries where there is an existing statutory cause of action for invasion of privacy. Until such time as human rights are

⁷ Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper 72 (2007), [38.70].

⁸ New South Wales Law Reform Commission, *Invasion of Privacy*, Consultation Paper 1 (2007), [1.44].

⁹ Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper 72 (2007), [1.53] to [1.57].

¹⁰ Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper 72 (2007), [1.56].

strongly protected under Australian laws, it is inappropriate to introduce a statutory cause of action for invasion of privacy and instead it should be allowed to develop through case law.

Artwork depicting people in public spaces

Photographers such as Henri Cartier-Bresson, Alvarez Bravo, Robert Frank, Philip-Lorca diCorcia and Max Dupain characterise a movement and genre of 'candid' or 'street photography' which encapsulates photography as a record of history, reality and daily life, and explores how we see society and the world we live in. Since the introduction of photography, street photographers and photographers in general have created artistic work and historical documentation. Arts Law submits it is likely that this genre of photography will be severely curtailed if further restrictions are introduced. We include an example of this photography below.



Please do not spit, 1906 Sydney. From the Ferry Album Box. Harold Cazneau 1878-1953.

Many other forms or artworks also depict people in public spaces. These include film and radio documentary making. Long standing artforms, such as painting, sculpture and the decorative arts, that depict people in public places are likely to be curtailed if the privacy laws are expanded in the manner suggested by the ALRC. For example, iconic Australian artworks like many of those contained in John McDonald's

Federation: Australian Art & Society 1901 – 2001 could no longer freely be captured if the laws were changed.¹¹

Requiring artists to obtain a written consent for every person depicted in their artworks would create an administrative burden that would be a disincentive for the creation of the artwork. For example, the popular Australian film *Kenny* includes scenes that are shot around real events, including the Melbourne Cup and St Kilda Festival.¹² It would be rare for such scenes to be shot if the filmmaker was required to get the consent of every person who appears on the film.

Primarily of benefit to celebrities

Arts Law submits existing areas of law provide sufficient regulation and safeguards in relation to use of an individual's name, likeness or voice. We believe the proposed changes will be of limited benefit and will primarily benefit celebrities and companies if companies are granted rights under a statutory cause of action for privacy. We note the NSW Law Reform Commission concluded,

it is impossible to come away from a review of developments in the law in Australia, New Zealand, the United Kingdom and Europe without suspecting that a statutory cause of action for invasion of privacy is likely to be used mainly by celebrities or corporations in order to protect their commercial interests or, simply, to attempt to suppress freedom of speech.¹³

Politicians, celebrities and other public figures frequently engage with the media in their professional lives. Arts Law believes that for the sake of freedom of speech, freedom of expression and the public interest it is important to recognise that public figures may not be entitled to the same expectation of privacy as other individuals. Public figures should not be given the power to prevent the publication of information (in written, visual and aural form) that is in the public interest.

Arts Law recognises there are circumstances in which it would be reasonable for individuals to be entitled to claim an expectation of privacy. Privacy laws can protect fundamental human rights and are important in ensuring personal data is managed appropriately and personal surveillance is appropriately restricted. For this reason Arts Law supports the development of specific legislation aimed at preventing particular invasion of privacy concerns. Arts Law does not believe these concerns will be adequately protected by a general statutory cause of action against invasion of privacy.

¹¹ John McDonald, *Federation: Australian Art & Society 1901-2001*, (1st edition, 2000). This book contains images of approximately 270 works of painting, sculpture, photography and the decorative arts which are of both artistic and historical significance.

¹² *Kenny*. Directed by Clayton Jacobson. Produced by Thunderbox Films. Released 17 August 2006.

¹³ New South Wales Law Reform Commission, *Invasion of Privacy*, Consultation Paper 1 (2007), [1.54].

Proposal 5-2

The Privacy Act should provide that, in determining what is considered 'private' for the purpose of establishing liability under the proposed statutory cause of action, a plaintiff must show that in all the circumstances:

- a) there is a reasonable expectation of privacy; and*
- b) the act complained of is sufficiently serious to cause substantial offence to a person of ordinary sensibilities.*

Arts Law does not support the introduction of a statutory cause of action for invasion of privacy. If, however, such a cause of action is introduced, it is essential that the meaning of 'private' be well defined. The tests outlined above will be difficult to apply and uncertain and further detail is required.

We have direct experience in assisting artists to understand their legal rights and obligations when creating artwork that captures images taken in public spaces.¹⁴ As a result of our experience in this area and talking with artists we are concerned that community perception regarding privacy law in Australia does not reflect the true position. For example, Arts Law is aware that photographers who take photographs in public places are routinely stopped by members of the public who demand that the photographer stop taking photographs that may include them, or their family members, as they claim they have a right to privacy.

Arts Law is concerned that whether there is a 'reasonable expectation of privacy' will be difficult to determine. For this reason we submit that proposal 5-2 be amended to make it clear that the recording of a person in or from a public place, whether by visual, audio or audio-visual means, is not an infringement of that person's right to privacy or that the person should be taken to have consented to an invasion of privacy if the invasion occurs in a public space. For private land, Arts Law submits that a plaintiff should be taken to have consented to an invasion of privacy if the circumstances in which the invasion occurred are such that it could be implied that the plaintiff had consented to the invasion of his or her privacy. People will still be

¹⁴ Arts Law provides telephone legal advice to artists on this issue. We also have publications available for download on our website. Arts Law publications that address privacy matters include:

- Do I need a film location release? (information sheet – free publication)
- Street photographers rights (information sheet – free publication);
- Unauthorised use of your image (information sheet – free publication);
- Photography and the law (seminar paper – low cost publication);
- You talkin' bout me? Basing stories on peoples lives (article – free publication);
- Unauthorised photography on the internet (article – free publication);

able to stop inappropriate use of their image by using existing laws, including defamation and passing off.

Arts Law submits that it would be unnecessarily restrictive to require photographers, painters, directors or other artists to obtain the consent of individuals before using or publishing the person's likeness or voice. An expectation of privacy in public places would place undue restrictions upon artists who create art in public places. In the case of investigative journalism it is inappropriate to require consent as this would severely curtail the journalist's ability to report on the matter.

The following factors, which include public interest factors, should qualify an otherwise actionable invasion:

- the protection of artistic expression;
- the right to freedom of speech;
- the right to freedom of expression;
- the right of the public to know the truth;
- the creation of works and subject matter other than works (as defined in the Copyright Act) made for an artistic purpose or in the public interest; and
- works made for the purposes of criticism and review, parody or satire, reporting the news, and research and study (similar to fair dealing uses in the Copyright Act).

Proposal 5-3

The Privacy Act should provide that:

- a) only natural persons should be allowed to bring an action under the Privacy Act for invasion of privacy;*
- b) the action is actionable without proof of damage; and*
- c) the action is restricted to intentional or reckless acts on the part of the defendant.*

Natural persons only

Corporations should not be entitled to take action for invasion of privacy. Among the reasons for limiting the action to individuals we note:

- the fact that corporations lack ‘the sensibilities, offence and injury’ which Justices Gummow and Hayne saw as a ‘staple value’ for the development of a law of privacy;¹⁵ and
- uniform defamation laws provide that corporations are not entitled to take an action for defamation.

Arts Law submits that similar arguments as the ones raised for not allowing corporations to take action for defamation apply for not allowing corporations to sue for privacy. In the Second Reading Speech in the Legislative Council for the *Defamation Bill 2005 (NSW)*, it was noted that,

The submissions received by the State and Territory Attorneys General ... overwhelmingly supported a complete ban on corporations suing.... The simple fact is that corporations are not people, and they do not have personal reputations to protect—their interest is purely commercial. The commercial reputations they enjoy are often the product of expensive marketing campaigns, and there are other legal actions, including actions for injurious falsehood, that corporations can take to defend their interests.¹⁶

Actionable without proof of damage

No submission.

Intentional or reckless acts

Arts Law is concerned that a statutory cause of action for invasion of privacy is unnecessary and if introduced will have a disproportionate impact on artists, photographers, filmmakers and writers. We do not support the introduction of the cause of action. If it is introduced we agree that liability should be restricted to intentional acts only, however such a step will provide little protection for artists due to the difficulty in assessing whether or not an act was intentional or reckless. For example, will assessing whether something is intentional or reckless depend on the defendant's subjective understanding of what amounts to the privacy of the particular plaintiff in the particular context? Or does it mean simply an intention to do the particular act, such as the taking of a photograph?

Confusion and uncertainty will lead to a reduction in the amount of art being created as artists are likely to err on the side of caution to avoid legal action and fees that may result from an invasion of privacy claim. Accordingly, the proposed laws will be more likely to effect artists without financial resources who cannot afford to risk incurring fees for legal advice, let alone defending actions, regarding a potential

¹⁵ *Lenah Game Meats* (2001) 208 CLR 199 [125-126], referred to at pp 37 to 38 of the Consultation Paper.

¹⁶ NSW, Second reading speech, Legislative Council, 18 October 2005, The Hon. Henry Tsang.

invasion of privacy. An environment in which artists cannot be confident in the legal status of their work and the legal rights and obligations relevant to such work has a chilling effect on creativity, leading to works not being created.

There is also confusion as to the point at which the invasion of privacy occurs. Does it occur when the photo is taken, the scene filmed, the image drawn or painted, the conversation recorded, or the person's name is written down, or rather is it not until an artist 'uses' the person's name, image or likeness that the invasion occurs? It would appear logical that the invasion would occur during the use, such as the publication of the image or the broadcast of the film. The ALRC should turn its mind to this and should attempt to reduce uncertainty to the greatest extent possible. Well-drafted definitions to ensure that it is the use and not the capturing of the image, name or likeness would assist in this respect.

Proposal 5-4

The Office of the Privacy Commissioner should provide information to the public concerning the proposed statutory cause of action for invasion of privacy.

Arts Law does not support the proposal to introduce a statutory cause of action for invasion of privacy. If, however, such a cause of action is introduced then the Office of the Privacy Commission should provide information to the public concerning about the new laws. In our experience the public is misinformed about the extent of privacy rights in Australia and it is important this be addressed.

Proposal 5-5

The range of defences to the proposed statutory cause of action for invasion of privacy provided for in the Privacy Act should be listed exhaustively. The defences should include that the:

- a) act or conduct was incidental to the exercise of a lawful right of defence of person or property;*
- b) act or conduct was required or specifically authorised by or under law;*
- c) information disclosed was a matter of public interest or was a fair comment on a matter of public interest; or*
- d) disclosure of the information was, under the law of defamation, privileged.*

No submission. Please see our answer to question 5-1 regarding other defences that are required.

Question 5-1

In addition to the defences listed in Proposal 5–5, are there any other defences that should apply to the proposed statutory cause of action for invasion of privacy?

Arts Law does not support the introduction of a general cause of action for invasion of privacy. If such legislation is introduced then Arts Law submits there should be an exemption (or defence) in the new provisions for:

- works and subject matter other than works (as defined in the Copyright Act) made for an artistic purpose or in the public interest; and
- fair dealing uses similar to those in the Copyright Act, such as criticism and review, parody or satire, reporting the news, and research and study.

The terms ‘artistic purpose’ and ‘public interest’ are difficult to define and to apply and do not provide a perfect solution to the problems for artists that would be created by the introduction of the cause of action. As discussed in our response to Proposal 5-3 such uncertainty would have a chilling effect on the production of artistic works in Australia.

As discussed in our response to Proposal 5-1, Arts Law does not support the introduction of an enforceable civil right in relation to the use of an individual’s personal image, voice or name and we recommend such a right be specifically excluded from a cause of action for invasion of privacy. We are of the view that an invasion of privacy should not include photographing, filming, drawing or otherwise depicting people in public places. There is currently no prohibition of filming or photographing people on private land where the image is taken by someone situated on public land or who has permission to be on the private land. We believe it is unwarranted and inappropriate to extend the law in this regard and that the current sanctions will prevent inappropriate filming, use or publication of images captured in this way (see our comments above at Proposal 5-1 regarding the existing laws).

Proposal 5-6

To address an invasion of privacy, the court should be empowered by the Privacy Act to choose the remedy that is most appropriate in all the circumstances, free from the jurisdictional constraints that may apply to that remedy in the general law. For example, the court should be empowered to grant any one or more of the following:

- a) damages, including aggravated damages, but not exemplary damages;*
- b) an account of profits;*
- c) an injunction;*
- d) an order requiring the defendant to apologise to the plaintiff;*
- e) a correction order;*
- f) an order for the delivery up and destruction of material;*
- g) a declaration; and*
- h) other remedies or orders that the court thinks appropriate in the circumstances.*

Arts Law does not support the introduction of a statutory cause of action for invasion of privacy. Arts Law has specific concerns regarding the remedies proposed. For example, if a court could order the delivery up and destruction of material this could lead to the destruction of artworks, where the creation of those works involved an invasion of privacy under the proposed new laws. Arts Law is of the view that such a remedy is completely inappropriate.

Arts Law recommends the remedy of an injunction not be available at the interlocutory stage. In many cases, particularly those involving the media and freedom of speech, the decision whether or not to award an injunction is made at the interlocutory stage. It is common for plaintiffs to obtain an interlocutory injunction as they need only show they have an arguable case, which is a lower threshold than the one applied at final hearing. Once an interlocutory decision is made a defendant may be deterred by the cost and risk of a full trial and may decide not to press on to a full hearing. This means that injunctions may be issued without the court hearing all relevant arguments and evidence, which is of concern where the result has a chilling effect on freedom of speech and freedom of expression.

Proposal 5-7

Until such time as the states and territories enact uniform legislation, the state and territory public sectors should be subject to the proposed statutory cause of action for invasion of privacy in the Privacy Act.

No submission.

Proposal 15-2

The Privacy Act should be amended to consolidate the current Information Privacy Principles and National Privacy Principles into a single set of privacy principles—the Unified Privacy Principles (UPPs)—that would be generally applicable to agencies and organisations, subject to such exceptions as required.

Arts Law supports Proposal 15-2. We agree that the existing privacy laws are complex and that moves towards uniformity are desirable given many businesses operate across state and territory borders and deal with both government and non-government organisations.

Proposal 35-1

The Privacy Act should be amended to remove the small business exemption by:

- a) deleting the reference to ‘small business operator’ from the definition of ‘organisation’ in s 6C(1) of the Act; and*
- b) repealing ss 6D–6EA of the Act.*

Arts Law does not support the proposal to remove the small business exemption. Arts Law believes appropriate handling of private information and data is important and we are concerned by the figure that up to 94% of businesses may fall under the small business exemption.¹⁷

We recommend that instead of removing the small business exemption, the ALRC propose to amend the definition of small business so that the annual turnover is reduced from \$3 million or less in the previous financial year, to an amount of \$500,000 or less. This achieves a balance between protecting the privacy interests of individuals with the needs of small businesses.

¹⁷ Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper 72 (2007), [35.1].

The privacy rules, even under the proposal to introduce uniform privacy principles, are complex and create a regulatory compliance burden that can be difficult for businesses to meet. Most arts businesses, particularly not for profit organisations, operate on very low income and cannot afford the legal and administrative support that would be required to meet the privacy rules.¹⁸ Indeed, some arts organisations are run exclusively by volunteers, with others being run with very limited staff of between 2 to 5 people.

Proposal 35-2

Before the proposed removal of the small business exemption from the Privacy Act comes into effect, the Office of the Privacy Commissioner should provide support to small businesses to assist them in understanding and fulfilling their obligations under the Act, including by:

- a) establishing a national small business hotline to assist small businesses in*
- b) complying with the Act;*
- c) developing educational materials—including guidelines, information sheets, fact sheets and checklists—on the requirements under the Act;*
- d) developing and publishing templates for small businesses to assist in preparing Privacy Policies, to be available electronically and in hard copy free of charge; and*
- e) liaising with other Australian Government agencies, state and territory authorities and representative industry bodies to conduct programs to promote an understanding and acceptance of the privacy principles.*

If the small business exemption is removed then it will be essential that government provide support to assist organisations in understanding and fulfilling their obligations under the Act. We recommend that Proposal 35-2 be amended so that, in addition to providing support to small businesses, support also be provided for not for profit organisations.

In addition to providing free templates there should be support networks to assist people in adapting the templates for their needs. Arts Law sells low cost sample agreements for artists and arts organisations. Subscribers to Arts Law can have the

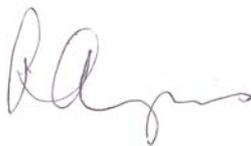
¹⁸ A significant proportion of Arts Law work is for arts organisations, the majority of which are Not for Profit organisations. In 2006 approximately 25% of the subscribers to Arts Law were Not for Profits, with many having an annual turnover of under \$100,000.

completed agreements reviewed by a lawyer. In our experience this second step is extremely helpful and enables the client to properly understand the agreement and ensure that it is suitable for the client's needs. We would recommend a similar system be funded to ensure that small businesses understand their privacy responsibilities and to ensure that all documents are drafted and completed in a manner that meets the needs of that business.

FURTHER INFORMATION

Please contact Robyn Ayres or Serena Armstrong if you would like us to expand on any aspect of this submission, verbally or in writing.

Yours faithfully



Robyn Ayres
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