



4 September 2015

The Director
Standing Committee on Law and Justice
Parliament House
Macquarie St
Sydney NSW 2000

Dear Standing Committee on Law and Justice,

RE: SUBMISSION IN RELATION TO INQUIRY INTO REMEDIES FOR THE SERIOUS INVASION OF PRIVACY IN NEW SOUTH WALES

The Arts Law Centre of Australia (**Arts Law**) is pleased to comment on the NSW Inquiry into Serious Invasions of Privacy.

About the Arts Law Centre of Australia

Arts Law is the national community legal centre for the arts. Established in 1983 with the support of the Australia Council for the Arts, Arts Law provides artists and arts organisations with:

- Specialist legal and business advice;
- Referral services;
- Professional development resources; and
- Advocacy.

About our clients and their relevance to the privacy discussion

Arts Law works nationally to support the broad interests of artistic creators, the vast majority of whom are emerging or developing artists and the organisations which support them. Our clients reside not only in metropolitan centres, but also contact us from regional,

rural and remote parts of Australia and from all Australian states and territories. Arts Law provides expert legal and business advice, publications, education and advocacy services to more than 4,000 Australian artists and arts organisations operating across the arts and entertainment industries each year.

Arts Law makes this submission on behalf of our broad client base including those who practice as:

- visual artists including photographers;
- authors including journalists;
- film makers including documentary film makers; and
- peak or professional organisations which represent the interests of the above clients.

The relevance of the Discussion Paper to our clients is illustrated by the fact that 250 of the approximate 4500 legal problems we have addressed in 2011 - 2014 relate to:

- privacy (including of information, and personal privacy);
- defamation (including relating to the use of images and film or information about others);
- confidentiality (including of information about and images and film of others); and/or
- trespass (personal and property).

It is the general position of Arts Law that there is no need to introduce a statutory cause of action for serious invasion of privacy. Further Arts Law believes that the existing remedies for a serious invasion of privacy are sufficient.

Arts Law has made numerous submissions on the issue of invasion of privacy from 2007 to 2014. The purpose of this letter is to summarise that position, with reference to previous submissions, and illustrate their relevance to the current Terms of Reference posed by the Standing Committee on Law and Justice.

1 (a) The Adequacy of Existing Remedies

The existing remedies for serious invasions of privacy are sufficient. The clearest expression of this can be found in Arts Law's 2011 submission on the Commonwealth Government's Issues Paper, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy (2011 Submission)*¹. Arts Law's 2011 Submission at pages 6-8 detail 11 different statutory and equitable means by which an individual may protect their privacy and seek remedies for a serious invasion of privacy.

Further, *Wilson v Ferguson* [2015] WASC 15, a recent decision of the Supreme Court of Western Australia further illustrates the adequacy of the equitable action of breach of confidence and its adaptability to new technological developments facilitating serious invasions of privacy.

In the media release accompanying the current call for submissions, Committee Chair, the Hon Natasha Maclaren-Jones MLC commented² that the increased availability of affordable surveillance drones is impacting privacy. Arts Law notes the current *Civil Aviation Safety Regulations 1998* (Cth) that prohibit the flying of drones over populated areas and include a clear penalty regime provide adequate remedies for individuals that have had their privacy invaded by this technology. We also note the ongoing review and development of this area of regulation.

1 (b) Should a statutory cause of action for serious invasions of privacy be introduced?

Arts Law does not support the introduction of a statutory cause of action for serious invasion of privacy. Aside from the adequacy of remedies currently in place, Arts Law submits that a statutory cause of action would have detrimental effects on the arts community that would substantially outweigh any other benefits. Arts Law's 2011 Submission, in addition to the 2014 Submission on the Serious Invasions of Privacy in the

¹ See Appendix 1 - Arts Law Centre of Australia submission in relation to Issues Paper: '*A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*' 2011.

² New South Wales Legislative Council, Standing Committee on Law and Justice, 'Serious Invasions of Privacy in New South Wales – How Adequate are our Remedies?' (Media Release, 6 July 2015).

Digital Era Discussion Paper (**2014 Submission**)³ and 2013 Submission on the ALRC's Serious Invasion of Privacy in the Digital Era Issues Paper (**2013 Submission**)⁴, echo Arts Law's concerns about protecting freedom of expression (2014 Submission pages 3-5) and the chilling effect a statutory cause of action would have on the arts community (2013 Submission page 4). Further due to Australia's lack of a strong human rights framework with express protections for freedom of expression, Arts Law does not support further limits on artistic freedoms without the balance of an enshrined right to freedom of expression (2014 Submission page 3). Finally, Arts Law submits that the creation of a statutory cause of action in NSW would lead to a discrepancy between the laws of NSW and those of other states and territories (Arts Law's **2007 Submission**⁵ on the NSWLRC Consultation Paper on Invasion of Privacy at page 3).

Further consultation with Arts Law and its stakeholders

Please contact Robyn Ayres (Executive Director) at rayres@artslaw.com.au or (02) 9356 2566 if you would like us to expand on any aspect of this submission, verbally or in writing. We are also pleased to be of any assistance in meeting with you prior to, or during the preparation of the final report.

Yours faithfully



Robyn Ayres

Executive Director

Arts Law Centre of Australia

³ See Appendix 2 - Arts Law Centre of Australia Submission in relation to '*Serious Invasions of Privacy in the Digital Era Discussion Paper*' 2014.

⁴ See Appendix 3 – Arts Law Centre of Australia Submission in relation to Issues Paper 43: '*Serious Invasion of Privacy in the Digital Era*' 2013

⁵ See Appendix 4 – Arts Law Centre of Australia submission in relation to *Consultation Paper 1: Invasion of Privacy* 2007.

Appendix 1 - Arts Law Centre of Australia submission in relation to Issues Paper: 'A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy' 2011.

4 November 2011

The Honourable Brendan O'Connor MP

Minister for Privacy and Freedom of Information Department of the Prime Minister and Cabinet Privacy and FOI Policy Branch

1 National Circuit

Barton ACT 2600

By Email: privacycauseofaction@pmc.gov.au

The Hon Brendan O'Connor MP

The Arts Law Centre of Australia (Arts Law) is pleased to comment on the Commonwealth Government's Issues Paper, A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy, (Issues Paper) released in response to the recommendations of the Australian Law Reform Commission (ALRC) to introduce a statutory cause of action for serious invasions of privacy (ALRC's recommendations). Arts Law commends the Federal Government's commitment to invite the broader community, including the arts, to make submissions on the issues and questions raised in the Issues Paper.

About the Arts Law Centre of Australia

The Arts Law Centre of Australia (Arts Law) is the national community legal centre for the arts. Arts Law was established in 1983 with the support of the Australia Council for the Arts to provide specialist legal and business advice and referral services, professional development resources and advocacy for artists and arts organisations. We provide legal advice to over 2,500 Australian artists and arts organisations a year, operating across the arts and entertainment industries from literature and visual arts to music and film.

Arts Law envisages an arts community in which members understand their legal rights, have sufficient business and legal skills to achieve financial security, and carry out their arts

practice in a non-exploitive and culturally aware environment. Over the years, we have made numerous submissions dealing with law and policy reform issues affecting the arts.

About our clients

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. Our clients reside in all Australian states and territories.

The comments that we make in this submission are informed by our clients' profile; Our clients are usually:

- earning low/limited incomes;
- both Indigenous and non-Indigenous, and rural, remote or urban
- limited in their ability to enforce their rights (and as a result increasingly vulnerable to the abuse of those rights);
- dedicated to the creation of art across all disciplines;
- either new, emerging artists or established arts practitioners or arts organisations;
- operating arts businesses;
- working in both traditional and digital media;
- self-reliant in business; and
- eager for accessible legal information, although they typically have limited legal education.

As an independent organisation giving legal advice to artists and arts organisations across Australia, Arts Law is well placed to comment on the legal and policy issues affecting the arts community from a national perspective.

SUBMISSION ON THE ALRC'S RECOMMENDATIONS GENERALLY

No support for the introduction of a statutory cause of action for serious invasion of privacy

Arts Law does not support the recommendation to introduce a statutory cause of action for invasion of privacy. In summary, Arts Law believes that such a cause of action:

- would have a negative effect on artists and writers without any of its possible benefits outweighing the detrimental effect on artists and writers;

- would undermine and diminish artistic expression, freedom of expression and the public interest in circumstances where those fundamental freedoms have no express legislative protection;
- is unnecessary because current regulations and safeguards are sufficient;
- cannot be justified in the absence of a strong human rights framework in Australia; and
- would primarily benefit celebrities (and corporations if not excluded).

The chilling effect of a cause of action for serious invasion of privacy

Arts Law is particularly concerned that the changes recommended by the ALRC and considered in the Issues Paper would have a negative effect on:

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

Arts Law is concerned that the proposed law would be detrimental to the development of artistic and cultural works in Australia and would reduce freedom of expression within the media and literary publications more generally.

Arts Law argues that, if regulation of certain acts is held necessary, specific legislation aimed at particular problems should be developed instead of a general statutory cause of action for invasion of privacy. In particular Arts Law does not support the introduction of an enforceable civil right in relation to the use of an individual's personal image. Arts Law submits that an individual's expectation of privacy should not extend to controlling images of themselves beyond the regulations and protections that currently exist.

Need for a strong human rights framework

Arts Law further 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, in particular in the absence of an express and enforceable general legal right to freedom of expression and of a specific right to freedom of artistic expression.

We address below the questions raised in the Issues Paper that directly affect artists and arts organisations in Australia. Our submission does not comment on privacy issues around information collection or information processing.

RESPONSES TO QUESTIONS

Question 1

Do recent developments in technology mean that additional ways of protecting individuals' privacy should be considered in Australia?

Recent developments in technology have essentially changed the way private information is communicated, collected and processed. Laws dealing with the collection of information by government and corporate bodies, which are not covered in our submission, should respond to the challenges, if any, resulting from technological developments.

Question 2

is there a need for a cause of action for serious invasion of privacy in Australia?

Summary

Arts Law does not believe there is a need for, and does not support the introduction of, a general cause of action for serious invasion of privacy. Arts Law considers such a cause of action would be contrary to the public interest and likely to impair:

- freedom of speech, in particular the implied constitutional freedom of political communication;
- freedom of expression; and
- the development of artwork depicting people in public spaces (including photographs, paintings, video art and films).

Arts Law believes the existing legislation is sufficient to protect many instances of unauthorised use or publication of a person's name, identity, likeness or voice. It is unnecessary to create causes of action that would, in effect, introduce a right akin to a right of privacy prohibiting the unauthorised use of a person's image. Such a right would be a

significant expansion of existing rights and cannot be justified in light of the detriment it would cause to Australia's artistic, social and cultural heritage.

Freedom expression and the public interest

The Issues Paper reminds that Australia is a party to the International Covenant on Civil and Political Rights (ICCPR), which protects freedom of expression under Article 19 in the following terms:

(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.

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. Such artistic freedom is important not just for its artistic merit, but also for its social and cultural value: through such work artists can assist people in questioning the way they think and give meaning to their world.

Whilst Arts Law acknowledges that the exercise of the right of freedom of expression can be limited, for example to ensure the respect of the rights or reputation of others as provided under Article 19(3) of the ICCPR, we believe it is in the public interest to restrict any such limitations to what is indispensable. A relevant example of how the proposed changes may detrimentally impact on those freedoms is that of investigative journalism. The introduction of a statutory cause of action for invasion of privacy is likely to restrict journalists' ability to gather information and images for fear of an action for invasion of privacy. The importance of investigative journalism in drawing important matters to the public's attention should, however, remain an important consideration. Australia also has a strong history of investigative journalism. For example, Chris Masters is a prominent investigative journalist best known for his expose of police corruption in Queensland which led to the Fitzgerald royal commission. Arts Law believed it is essential that any development of privacy laws take into account the public interest in investigative journalism.

Artwork depicting people in public spaces

Photographers such as Cartier Bresson, Alvarez Bravo, Robert Frank, Philip-Lorca diCorcia and Max Dupain characterise a movement and genre of "candid" or "street photography" that 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 believes that the introduction of a statutory cause of action for invasion of privacy risks curtailing or damaging this genre of photography because of the confusion such legislation might cause as to what is permissible.

In addition, the introduction of a statutory cause of action for invasion of privacy would interfere with the provisions of the Copyright Act 1968 (Cth) (**Copyright Act**) that provide that copyright owners have the exclusive right to reproduce, publish and communicate their work to the public. If individuals are afforded rights to control the use and reproduction of their image by taking action against a creator when they consider their privacy has been invaded, this will impinge upon the rights granted to copyright owners under the Copyright Act and would unnecessarily curtail production and dissemination of artistic works and works that document the world in which we live.

The existing legislation is sufficient

Arts Law does not believe that there is a need for a statutory cause of action for serious invasions of privacy 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 following laws may prevent, and give remedies against, unauthorised intrusions in an individual's private sphere:

- Trespass to land;
- Private nuisance;
- Defamation;
- Passing off;
- Breach of confidence;
- Property offences

- Criminal offences, for example under legislation in every state on surveillance devices that make recording of people's conversation without consent illegal, or other offences under state legislation such as the Summary Offences Act 1988 (NSW) that prohibit filming, or attempting to film, a person for indecent purposes.

In addition, the following areas may prevent the unauthorised use or publication of a person's name, identity, likeness or voice, irrespective of any invasion of privacy:

- Section 35(5) of the 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 requiring the copyright owner's consent;
- 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 his/her 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 Australian Consumer Law (ACL): section 18 (Vol. 3) of the Competition and Consumer Act 2010 prohibits a corporation or person from engaging in conduct that is, or is likely to be, misleading or deceptive in trade or commerce. Statutory protections against misleading and deceptive conduct enable people, particularly celebrities, to prevent the unauthorised use of their image. For example, swimmer Kieran Perkins successfully brought an action under section 52 of the Trade Practices Act 1974

(Cth) (the predecessor of section 18 ALC) against Telstra when Telstra used his image in an advertisement campaign without Perkin's permission.¹

Question 3

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

Arts Law does not believe there is a need for, and does not support the introduction of, a general cause of action for serious invasion of privacy. Should, however, such a cause of action be introduced, its development 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. This position is consistent with judicial developments in Australian courts in recent years allowing actions for breach of privacy.²

Specific privacy concerns should continue to be protected by specific legislation, such as the protection of personal health information which is currently protected under the Health Records and Information Privacy Act 2002 (NSW).

Question 4

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

Arts Law does not support the introduction of a general cause of action for invasion of privacy, whether or not the invasion is qualified of "serious" and irrespective of any objective test of seriousness or offensiveness. If, however, such legislation were to be introduced, Arts Law considers it essential that the cause of action be subject to a threshold such that the cause of action would be only available to the most egregious cases of invasion of privacy, as mentioned in the Issues Paper.³ This will ensure that the ALRC's recommendation is implemented, following which the proposed action should only "succeed where the defendant's conduct is thoroughly inappropriate and the complainant suffered serious harm as a result"⁴ Such a threshold would also provide a mechanism to

¹ *Ta/max Ply Ltd v Telstra Corporation Ltd* [1997]2 Qd R 444; (1996) 36 IPR 46.

² See *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 eLR 199, *Grosse v Purvis*

³ Issues Paper, p. 33

⁴ Australian Law Reform Commission, Report 108: For Your Information: Australian Privacy Law and Practice (20008), at pp. 2568-2569.

ensure that a right to privacy is balanced against the strong public interest in freedom of expression.

Through the provision of legal advice to artists in relation to issues such as classification, censorship or working with children Arts Law has, in recent years, noticed that most artists have a limited understanding of the law as it might affect their freedom of expression. As a result, they are likely to err on the side of caution by refraining to engage in an artistic venture to avoid the risk of legal action and related costs. Therefore, the introduction of a statutory cause of action for invasion of privacy is likely to have a chilling effect on creativity irrespective of the stipulation of any threshold. However, in the event a right of action against serious invasions of privacy was introduced, an objective test under which the alleged invasion of privacy must be "highly offensive to a reasonable person of ordinary sensibilities"⁵ is essential to provide objective directions and reduce the detrimental impact of the proposed law on artistic ventures.

Question 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 (VLRC)?

Arts Law does not support the introduction of a general cause of action for invasion of privacy. If, however, the Commonwealth introduced such a cause of action, the public interests at stake, in particular the public interest in freedom of expression and in free speech should be integrated into the elements to the cause of action, as recommended by the ALRC.⁶ An approach such as that proposed by the Victorian Law Reform Commission, following which public interest could be raised as a defence to the cause of action, would amount to the creating a right of privacy; The law would operate in a manner such that that right would be absolutely protected once the elements of the action were satisfied, unless the defendant succeeded in proving that the act complained of was justified by a prevailing public interest. Arts Law understands that the ALRC's recommendation is not for the introduction of a positive right of privacy but for the introduction of a cause of action to

⁵ Australian Law Reform Commission, Report 108: For Your Information: Australian Privacy Law and Practice (2008), Recommendation 74-2.

⁶ Australian Law Reform Commission, Report 108: For Your Information: Australian Privacy Law and Practice (2008), at p. 2572.

protect against serious invasions of an individual's private sphere. As a result, consideration of a public interest defence would be contrary to the intent behind the proposed scheme. The proposed integration of the assessment of public interest matters as part of the cause of action is consistent with the approach adopted in other Commonwealth legislation. For example, under the Commonwealth Criminal Code Act 1995, there must be a consideration of various criteria in assessing whether material is "child abuse material" on the basis of whether material is "offensive" and therefore subject to the Criminal Code Act 1995. The artistic, literary or educational merit of the relevant material is to be taken into account when assessing whether it is offensive. This exemplifies a common sense approach which excludes irrelevant material or conduct in the first instance as it would be contrary to the public interest to include it.

Question 6

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

Arts Law does not support the introduction of a general cause of action for invasion of privacy but stresses that, should such a cause of action be introduced, the legislation should afford paramount value to the public interest in allowing and protecting freedom of expression. As a result, an action should only succeed if its elements are satisfied and the claimant's privacy outweighs, in the circumstances, matters of public interest. Therefore, courts should have to consider freedom of expression to determine whether the alleged invasion of privacy is actionable. We refer to our comments to question 6.

Furthermore, Arts Law submits that a non-exclusive list of the types of privacy invasion that fall outside the proposed cause of action would assist the judiciary to take into account the public interest. The excluded types of invasion would be invasions that the legislature decided it was in the public interest to exempt.

Question 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?

Arts Law considers that a statutory cause of action for serious invasion of privacy is unnecessary and would have a disproportionate impact on artists, photographers, filmmakers and writers. If, however, such a cause of action became law, the legislation should include an element of intention; Further, intention should be directed not only to the act or conduct complained of but also to the invasion of privacy itself, meaning that the respondent intended the act to seriously invade the claimant's privacy. This view is consistent with the intention behind the proposed legislation, being to address the mischief of serious invasions of privacy rather than the conduct that resulted in them. The introduction of a cause of action with no fault requirement or a threshold of fault lower than intention, is likely to have a chilling effect on artists because it would contribute to an environment in which artists do not feel confident in the rights and obligations relative to their creative ventures. As a result, they are likely to err on the side of caution by refraining to engage in artistic activities to avoid legal action and fees that may result from an alleged invasion of privacy.

Question 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?

Arts Law considers that a statutory cause of action for serious invasion of privacy is unnecessary and would have a disproportionate impact on artists, photographers, filmmakers and writers. If, however, such a cause of action were introduced, Arts Law believes it essential that the legislation should allow for consideration of a range of relevant matters to determine whether an invasion of privacy should be actionable in the circumstances.

The list of matters proposed by the NSWLRC is not sufficient, as it does not mention the context in which the alleged invasion has occurred. In particular, one of the relevant matters the court should consider is whether the activity complained of has occurred:

- (a) in the development, performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in the dissemination of news or current.

Question 9

Should a non-exhaustive list of activities which could constitute an invasion of privacy be included in the legislation creating a statutory cause of action, or in other explanatory material? If a list were to be included, should any changes be made to the list proposed by the ALRC?

Arts Law does not support the introduction of a general cause of action for invasion of privacy. Should, however, such a cause of action be introduced, Arts Law believes that the legislation should specify the types of conduct that would be actionable by listing the activities constituting serious invasions of privacy.

Arts Law regards the inclusion of a list of activities such as that recommended by the ALRC as an appropriate means of achieving a greater degree of certainty as to the ambit of the proposed legislation. Such a list would enable artists to know what conduct might expose them to a claim, and facilitate the task of advising artists with greater certainty as to their rights and obligations. Arts Law considers that the list should aim at being exhaustive rather than non-exhaustive. In addition, the legislation should avoid using uncertain or subjective terms, such as "interference", or "sensitive".⁷ Finally, it is essential that the list should be included in any legislation itself and not in explanatory material in order to ensure that it has force of law and that it is easily accessible. Most of the artists Arts Law assists have limited legal education and cannot be expected to consult explanatory material that is typically used by jurists to construe the legislature's intention. An exhaustive statutory list of narrowly and precisely defined actionable activities would reduce the risk of the legislation having unintended consequences, such as the restriction of artistic expression, freedom of speech and freedom of expression. We refer to the comments we made in response to questions 4 and 7 in relation to the chilling effect on artistic creativity of laws that are drafted in broad or in unclear terms.

Arts Law contends that a list of activities constituting serious invasions of privacy should exclude any activity that could amount to creating an enforceable civil right in relation to

⁷ See Australian Law Reform Commission, Report 108: For Your Information: Australian Privacy Law and Practice (2008), Recommendation 74-1(d).

the use of an individual's personal information; An invasion of privacy should not include photographing or filming people from public places, even if the people being filmed or photographed are on private land. 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. We refer to our comments to question regarding the existing protections.

Question 10

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

Arts Law does not support the introduction of a general cause of action for invasion of privacy. If, however, such a cause of action were introduced, the legislation should provide for defences 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.

Question 11

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

No submission.

Question 12

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

No submission.

Question 13

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

No submission.

Question 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?

No submission.

Question 15

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

No submission

Question 16

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

Corporations should not be entitled to take action for invasion of privacy. Among the reasons for limiting the action to individuals Arts Law notes:

- the fact that, as the ALRC outlines, "the desire to protect privacy is founded on notions of individual autonomy, dignity and freedom"⁸ The ALRC refers to the decision of the High Court of Australia in *Australian Broadcasting Corporation v Lenah Game Meats*⁹ where Justices Gummow and Hayne mentioned "the sensibilities, offence and injury" that they saw as a "staple value" for the development of a law of privacy;¹⁰ and
- that defamation laws provide that corporations are not entitled to take an action for defamation.

In the Second Reading Speech in the Legislative Council for the Defamation Bill 2005 (NSW), it was noted that,¹¹

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

⁸ Australian Law Reform Commission, Report 108: For Your Information: Australian Privacy Law and Practice (2008), at p. 2576.

⁹ (2001) 208 CLR 199.

¹⁰ *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199 [125-126].

¹¹ NSW, Second reading speech, Legislative Council, 18 October 2005, The Hon. Henry Tsang.

marketing campaigns, and there are other legal actions, including actions for injurious falsehood, that corporations can take to defend their interests.

Similar arguments apply generally for not allowing corporations to sue for privacy.

Question 17

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

An action for invasion of privacy should come to an end with the death of the person whose privacy has allegedly been invaded. This position is consistent with the view related in the NSWLRC Consultation Paper 1: Invasion of privacy, that any action for invasion of privacy is to address the mental harm and injured feelings suffered by an individual, with the result that only living persons suffering such mischief should be allowed to seek relief.¹²

Furthermore, this position is consistent with defamation law in most Australian states and territories.

Question 18

Within what period, and from what date, should an action for serious invasion of privacy be required to be commenced?

No submission.

Question 19

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

No submission.

FURTHER INFORMATION

Please contact Robyn Ayres or Rebecca Laubi if you would like us to expand on any aspect of this submission, verbally or in writing. We can be contacted at artslaw@artslaw.com.au or on (02) 9356 2566.

Yours faithfully

¹² NSW Law Reform Commission, Consultation Paper 1: Invasion of Privacy (2007), at pp. 181-182

Robyn Ayres

Executive Director

Arts Law Centre of Australia

Rebecca Laubi

Senior Solicitor

Arts Law Centre of Australia

Appendix 2 - Arts Law Centre of Australia Submission in relation to 'Serious Invasions of Privacy in the Digital Era Discussion Paper' 2014.

12 May 2014

By email: privacy@alrc.gov.au

Dear Professor McDonald,

The Arts Law Centre of Australia (**Arts Law**) is pleased to comment in writing on the Serious Invasions of Privacy in the Digital Era Discussion Paper (**Discussion Paper**) and is grateful for your time on the telephone on 6 May 2014 where we raised a number of these issues for discussion.

Arts Law commends the ALRC's ongoing commitment to broader community engagement in relation to the issues raised in the Discussion Paper and we are pleased to comment on the Discussion Paper. We have provided feedback throughout the Privacy review, most recently in relation to the Serious Invasions of Privacy in the Digital Era Issues Paper (IP 43). We will set out the general position briefly (Part A), and then move to addressing some but not all of the proposals and questions posed by the ALRC in the Discussion Paper (Part B).

About the Arts Law Centre of Australia

The Arts Law Centre of Australia (**Arts Law**) is the national community legal centre for the arts. Established in 1983 with the support of the Australia Council for the Arts, Arts Law provides artists and arts organisations with:

- Specialist legal and business advice;
- Referral services;
- Professional development resources; and
- Advocacy.

About our clients and their relevance to the privacy discussion

Arts Law works nationally to support the broad interests of artistic creators, the vast majority of whom are emerging or developing artists and the organisations which support them. Arts Law provides over 2,500 legal advice 'services' to Australian artists and arts organisations a year. This includes telephone and face to face legal advice, referrals and document reviews.

Arts Law makes this submission on behalf of our broad client base including those who practice as:

- visual artists including photographers;
- authors including journalists;
- film makers including documentary film makers; and
- peak or professional organisations which represent the interests of the above clients.
- The relevance of the Discussion Paper to our clients is illustrated by the fact that 250 of the approximate 4500 legal problems we have addressed in the last three years relate
- to:
- privacy (including of information, and personal privacy);
- defamation (including relating to the use of images and film or information about others);
- confidentiality (including of information about and images and film of others);
- and/or
- trespass (personal and property).

PART A – Our General Position

Our general position on the increased protection of privacy in Australia’s digital era

Arts Law, and numerous stakeholders it has consulted in the preparation of this response, remains unsupportive of the introduction of a cause of action for invasion of privacy. Our engagement with both the Australian Institute of Professional Photographers and the National Association for the Visual Arts reinforces this view. Despite the ALRC’s Proposal 4-1, we are pleased to note that the relatively narrow construction of the recommended cause of action by the ALRC in its Discussion Paper could limit the potential scope for liability under such a cause of action, the damages sought, and unmeritorious claims being brought.

We agree with the ALRC’s general position that the protection of freedom of expression and freedom of artistic expression are fundamental pillars of a democratic and “free” society and that any increased privacy protection should be carefully balanced against those freedoms.

We note the potentially competing human rights of privacy (Article 17) and freedom of expression (Article 19) expressed in the International Covenant on Civil and Political Rights (ICCPR). We are mindful that as no general right to freedom of expression is enshrined at law, artistic and creative activities ever more vulnerable to restriction, particularly if a these activities are not expressly carved out of a cause of action for invasion of privacy.

Part B – Our response to specific proposals or questions in the Discussion Paper

1. Proposal 8-1

Arts Law strongly supports the “up-front” inclusion of freedom of expression in formulating any cause of action for serious invasion of privacy. This places the onus on the applicant and not on the respondent artist (for example, filmmaker or photographer) to establish their interest in freedom of expression as a defence,

incurring the potential financial, reputational and time cost of doing so after proceedings are commenced.

2. Proposal 8-2

2.1 Arts Law strongly agrees the inclusion of “freedom of expression” within the matters of public interest for consideration by a court is necessary and notes the significant importance given by the ALRC to the balancing of private and public interests. As such, Proposal 8-2 should direct a court to consider the various public interest criteria, rather than invite it to do so. As such, the words “a court may consider”, should be replaced with the words “a court must consider”.

2.2 If the ALRC wishes for the court to have the discretion to consider any other matters which it thinks relevant to the public interest, in addition to the factors proposed by the ALRC at Proposal 8-2, the ALRC could recommend that the list of factors at 8-2 includes a new subsection (i); “any other interests the court deems in the public interest.”

2.3 Arts Law is concerned that until “freedom of expression” generally, and “freedom of artistic expression” more specifically, is enshrined at law in Australia, that the interpretation of these terms by a court is uncertain unless they are defined in a new statutory cause of action. Unless artistic expression is specifically identified as an interest which is to be balanced against any right to privacy, art and the creation of it, risks (unacceptably) falling outside the scope of factors to be considered. We are concerned, that proposal 8-2 (a), suggests a definition of “freedom of expression” which is possibly more limited than one a court might otherwise construct because the inclusion of “political communication” might suggest a definition of “freedom of expression” which does not consider freedom of “artistic expression”.

2.4 This lack of predictability around the way that “freedom of expression” is interpreted could be managed by including “freedom of artistic expression” as a freedom a court should consider in balancing the interests of the plaintiff and the public interest. Arts Law believes that “freedom of expression” ought to expressly include “artistic expression” so a court is specifically required to consider that freedom in any claim.

2.5 We therefore suggest that the list of public interest matters which a court may consider is amended as follows:

(a) Freedom of expression, including political communication and artistic expression

2.6 Alternatively, if the words “and artistic expression” are not included, the term “freedom of expression” should not be followed by the words “including political communication” and should be left entirely undefined for interpretation by the courts.

3. Question 9-1

This question seeks input on state and territory bodies, specifically. In the event that a federal cause of action was enacted, a federal forum regulating any complaints made under the new cause of action would surely be more appropriate. It would seem that the Office of Australian Information Commissioner (OAIC) could be an appropriate forum for managing complaints because it already deals with complaints or matters in relation to privacy (rights conferred under the Privacy Act 1988), freedom of information and government policy. Given the nature of the proposed cause of action, but we are unable to comment whether it, or a newly formed body might be more capable of interpreting “freedom of artistic expression” with the appropriate level of understanding and respect for, the role that art and the documentation of our society, plays. In any event, it is essential that any forum which deals with complaints is funded

and properly educated in relation to the ambit of its responsibilities and the importance of maintaining freedom of expression, in particular, freedom of artistic expression.

4. Proposal 9-4

Arts Law does not agree with the tiered test proposed for statute barring by the ALRC, nor the time period within which claims may be brought. A person should not be able to bring an action for invasion of privacy beyond a year from:

- (a) the date the serious invasion of privacy occurred; or
- (b) the date that material created in the course of that serious invasion of privacy was first published or communicated.

5. Question 10-1

It is unclear from the submission what point of difference Proposal 10-4 could strike compared to the current defence of qualified privilege at common law and our concern is that aligning a proposed defence in a cause of action for serious invasion of privacy with that of defamation may be fraught with difficulty because the causes of action bear some significant differences and the applicable defences should too. We would be interested in considering any other alternatives that the ALRC may have considered, including the possible combination of defences (potentially of the kind described in Proposal 10-2 and 10-4).

6. Proposal 11-2

Arts Law supports the mitigating factors set out in this proposal.

7. Proposal 13-1

We agree in principle that the harmonisation of the various state and territory surveillance devices instruments (collectively, **surveillance devices laws**) would lead to

further clarity, provided that aspects of the surveillance devices laws are also better defined. However, if the ALRC proposes that Proposal 13-3 is adopted, and laws are harmonised in accordance with this proposal, we do not support this proposal. That is, to the extent that harmonisation would increase the regulation of innocuous artistic activities we do not support it.

8. Proposal 13-3

8.1 Arts Law strongly opposes proposal 13-3 as it, on its face, could make unlawful those activities of legitimate film makers and photographers in numerous situations. It could, in a nutshell achieve the large scale restriction of photographic and filming activity in both public and private that the ALRC seems diligently to have avoided in its proposal for a cause of action for serious invasion of privacy.

8.2 One significant improvement required for the surveillance devices laws is to better define what “surveillance” means, and what “activities” are private. For example, in NSW, the Surveillance Devices Act 2007 (NSW), “surveillance” itself is not defined. This, in combination with the ALRC’s proposed broadening of the surveillance devices laws could lead to the unintended consequence of limiting and in some cases, stopping legitimate filming and photography in public. For example, capturing a streetscape in time lapse, where various activities by those using that space within a 1 week period take place are captured. Some may argue those activities are “private” because they relate to intimate or family matters although they occur in public, for example. We submit that the ALRC should consider a formulation which is more clearly and narrowly defined in its application. One option is to define surveillance by virtue of the purpose of the recording activity, or intended or actual use of the recording.

8.3 Unless “private activities” under respective state and territory Surveillance Devices by definition, exclude activities which occur in public, claimants engaged in

intimate or family activity (for example) in public might claim that those are “private activities” and that the recording of those activities therefore falls foul of the law.

8.4 Local government (including councils) and public and private organisations, as well as artist photographers and film makers would be unjustifiably affected by a whole scale broadening of the scope of surveillance devices laws. Often, these entities and individuals may wish to document a place or its people, and if surveillance devices laws are too broadly drafted this may not be possible. For example, this image (and numerous others) was taken by Chris Shain, a Sydney photographer, engaged to document the progress of the renovation of St James Cathedral in Sydney. In the event that he had captured (or ‘recorded’) activities in that photograph which were considered private by their actors, even though they were incidental to the primary photographic purpose, might those individuals claim that he was “surveilling” them? We ask that the ALRC carefully considers the possible practical implications of the broadening of the scope of these laws, and whether this achieves the result motivating the recommendation.

8.5 For example, a well regarded Sydney photographer, Chris Shain, is sometimes commissioned by councils, public and private enterprise to create time lapse photography of their project, development or environment. If the proposed broadening of surveillance device legislation is not limited in its application, it could risk classing this type of activity as “surveillance”. An individual captured in this sort of photography should have no claim that they were engaged in a “private activity” even though they were in public, therefore deeming the photograph “surveillance”. Below is an example of photography which Mr Shain created documenting the recent restoration of St James Cathedral.



© Chris Shain www.shain.com.au

8.6 In the event that the ALRC forms the view that “surveillance” or “private activity” is not defined, Arts Law submits that a specific defence of or in relation to ‘artistic activity’ is included as per 13-4 for journalistic investigation. This is not an ideal solution for our stakeholder group as it places the onus on the artist responding to a potentially very serious criminal charge to prove their activities were artistic.

8.7 Given the five step test proposed for assessing whether or not an invasion of privacy has occurred, if the surveillance devices instruments are to be harmonised and broadened, caution is required to ensure that the broader surveillance devices instruments do not create an unintended lower threshold test for “privacy” which a claimant can rely on in the event that they could not otherwise make out a cause of action for invasion of privacy.

9. Question 13-2

9.1 Empowering local councils to regulate the installation and use of surveillance devices is, in our view, likely to risk:

- (a) Incorrect assessments of whether activities even fall within the ambit of the Surveillance Devices legislation, whether conversations or activities are properly categorised as “private” by rangers who lack the training, legal knowledge or time to properly assess whether the relevant individual artist falls foul of the Surveillance Devices Act in that state or territory;
- (b) Pursuant to (a), increased regulation of innocuous artistic activities which are not, in fact, private;
- (c) Inconsistent regulatory approaches on a council by council, and ranger by ranger basis;
- (d) Increased pressure placed on local councils to regulate in an environment of constant technological change and limited council funding;
- (e) A chilling effect where artists decide, on the basis of increased local regulation that they will no longer take photographs or film just in case the activity they wish to capture is considered “private” by the ranger on the day.

9.2 Numerous photographer and film maker clients we have advised have had first-hand experience with council rangers seeking to stop legitimate photographic and filming activities by warning, threatening to fine, or threatening to call the police in relation to their activities. Where various circumstantial elements are to be balanced, we do not, for the reasons set out above believe local council are suitably placed to make this assessment.

10. Question 15-2

10.1 Arts Law is not per se opposed to empowering a regulator to order the removal of information from an online platform. However, where a regulator has the power to order the removal of material, it is essential that the individual or organisation posting the material in the first instance is given the opportunity to respond to the removal request within a reasonable time. For example, if a photographer includes photographs

of their subjects on the photographer's website, and the subject complains of the inclusion of their image on the site, the photographer should have an opportunity to respond in relation to the complaint prior to any order in relation to the removal of the material.

10.2 Arts Law notes the inclusion of "freedom of expression" as a balancing factor in assessing the public interest of the posting of the information, but if this assessment is made only with the evidence provided by the complainant, the regulator may not be able to afford due consideration to (amongst the other public interests) the freedom of expression (and more specifically freedom of artistic expression) of the individual posting the material, or the organisation hosting the material posted by the individual.

11. Conclusion

11.1 Arts Law remains opposed to the introduction to a right to privacy in Australia. Further to our support for support for freedom of expression generally, and artistic expression specifically, the Discussion Paper has highlighted some of the severe hurdles in legislating for, administering and regulating such a scheme. There are a number of issues identified in the Discussion Paper which require further consideration by the ALRC, not least of all how, and if, "freedom of expression" given the vital role its characterisation plays in working out what is in our public interest.

11.2 Arts Law notes the likely chilling effect that the introduction of a cause of action for invasion of privacy is likely to have. This must be balanced in any recommendations by the ALRC and considerations by Government.

11.3 Any legislative and administrative changes require ongoing education of the public about how those laws, processes or factors might affect them. This

education should be free and readily accessible so that artists including film makers and photographers can access this information with ease and without cost.

11.4 Arts Law respectfully requests that the ALRC specifically consider that any recommendations in relation to the handling of complaints, delivery of legal advice to and the education of the public are accompanied by recommendations dealing specifically with indications of where funding and resources will be required in order that this is possible.

Further consultation with Arts Law and its stakeholders

Please contact Robyn Ayres (Executive Director) or Suzanne Derry (Senior Solicitor) if you would like us to expand on any aspect of this submission, verbally or in writing.

We can be contacted at rayres@artslaw.com.au or sderry@artslaw.com.au or on (02)9356 2566.

Yours faithfully



Robyn Ayres Suzanne Derry

Executive Director Senior Solicitor

Arts Law Centre of Australia Arts Law Centre of Australia

Appendix 3 – Arts Law Centre of Australia Submission in relation to Issues Paper 43: ‘*Serious Invasion of Privacy in the Digital Era*’ 2013

15 November 2013

The Executive Director

Australia Law Reform Commission

Dear Professor McDonald,

The Arts Law Centre of Australia (**Arts Law**) is pleased to comment on the Australian Law Reform Commission (**ALRC**) Issues Paper 43, *Serious Invasion of Privacy in the Digital Era*, (**Issues Paper**).

Arts Law commends the ALRC’s ongoing commitment to broader community engagement in relation to the questions raised in the Issues Paper. We have separated our response into Part A and Part B. Part A outlines our general position and Part B directly responds to questions raised in the Issues Paper.

Arts Law is mindful that the National Association of Visual Artists (NAVA) and Australian Institute of Professional Photographers (AIPP) have provided letters in support of this submission.

About the Arts Law Centre of Australia

The Arts Law Centre of Australia (**Arts Law**) is the national community legal centre for the arts. Established in 1983 with the support of the Australia Council for the Arts, Arts Law provides artists and arts organisations with:

- Specialist legal and business advice;
- Referral services;
- Professional development resources; and
- Advocacy.

Arts Law provides legal advice to over 2,500 Australian artists and arts organisations a year.

About our clients and their relevance to the privacy discussion

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

Arts Law makes this submission on behalf of our broad client base including those who practice as:

- visual artists including photographers;
- authors including journalists;
- film makers including documentary film makers; and
- peak or professional organisations which represent the interests of the above clients.

The relevance of the Issues Paper to our clients is illustrated by the fact that 250 of the approximate 4500 legal problems we have addressed in the last three years relate to:

- privacy (including of information, and personal privacy);
- defamation (including relating to the use of images and film or information about others);
- confidentiality (including of information about and images and film of others); and
- trespass (personal and property).

PART A – Our General Position

Our general position on the increased protection of privacy in Australia's digital era

Australia does not have a strong human rights framework which expressly protects the right to freedom of expression. Without this protection, the introduction of a statutory cause of action for invasion of privacy would inhibit the legitimate activities of our artistic community. As a society we are reliant on the records and stories captured by artists to understand and connect to our past and present.

Arts Law acknowledges that there are a number of gaps in the current legislative framework. However, we do not agree that those gaps are properly addressed by the introduction of a broad cause of action for invasion of privacy. Rather, activities which are seen as offensive or harmful should be specifically prohibited by either:

1. Amending the existing framework (for example extending or harmonizing the operation of the surveillance devices legislation in each state and territory), and/or
2. Introducing laws which specifically address those activities (for example harassment laws) to effect a targeted approach in addressing specific gaps in the law.

It is Arts Law position that a broad cause of action for privacy should not be introduced because it will restrict the way in which we communicate information in a modern, democratic society.

Unless our documentation of Australian life through film and photography is protected, the public record of who we are as a nation could be irreparably eroded.

Balancing interests

Arts Law acknowledges the broad online landscape in which material can be accessed and disseminated, and recognises the importance of protecting confidential information within that sphere. However, we agree with the ALRC's general position that the protection of freedom of expression and freedom of artistic expression are fundamental pillars of a democratic and "free" society. Any increased privacy protection should be carefully balanced against those freedoms.

We note the potentially competing human rights of privacy (Article 17) and freedom of expression (Article 19) expressed in the International Covenant on Civil and Political Rights (ICCPR). We are mindful that as no general right to freedom of expression is enshrined at law artistic and creative activities ever more vulnerable to restriction, particularly if a these activities are not expressly carved out of a cause of action for invasion of privacy.

The chilling effect of a cause of action for serious invasion of privacy

Changes to the way privacy is currently protected could have a very serious chilling effect on the way our society is documented in photographs, films and writing.

Where laws are subjective in relation to certain artistic activities, artists generally avoid any activities which appear to be affected by those laws even when those activities are completely innocuous. This has been our observation in providing legal advice to both amateur and professional artists. For example, many photographers we now speak to will not photograph children in a public places because they are concerned that those images would be considered exploitative. As a result, our public record of the life and times of Australian children is now reduced. **Of these concerns, Michael Amendolia, renown Australian photographer says: “What I am most concerned about in any changes to the law regarding privacy is that the documentary photographer will be restricted in making authentic photographs of the daily life of our county, our state, our city and our suburb. The photographs of which fill our museums, libraries and archives.”**

This chilling effect will occur if a cause of action for invasion of privacy is introduced, particularly if there is ambiguity about whether the activities of photographers and film makers in the public space are prohibited. **Artists are our storytellers and they will not document our history or record the profile of our society if they believe they risk breaching the law. The knowledge of our history, culture, society and identity is built on the way artists document us.**

PART B - Response to ALRC Issues Paper questions

Question 1.

What guiding principles would best inform the ALRC’s approach to the Inquiry and, in particular, the design of a statutory cause of action for serious invasion of privacy? What values and interests should be balanced with the protection of privacy?

1.1 Arts Law agrees that privacy as a general societal value is important but not to the extent that it could unduly fetter with other public interests, including freedom of expression.

1.2 The ALRC's formulation of the balancing factors, including freedom of speech is important and we agree with all the factors listed for inclusion.

1.3 In addition to those factors suggested by the ALRC, Arts Law is of the view that the protection of Indigenous Cultural and Intellectual property (or Indigenous culture and heritage) as a further factor to consider. Australia has signed the United Nations Declaration on the Rights of Indigenous Peoples but not enacted an instrument to protect Indigenous culture and heritage. Any law protecting the privacy of individuals should also consider the confidential or culturally sensitive nature of cultural knowledge, stories, images of Indigenous Australians. At this stage, it appears that this consideration has been excluded from consideration by the ALRC and warrants consideration.

1.4 These interests could be better protected through the enactment of sui generis legislation protecting Indigenous cultural and intellectual property and do not require the enactment of a cause of action for invasion of privacy to be properly protected. However, were such a cause of action to be introduced, it must consider the special class of information which constitutes Indigenous traditional knowledge and cultural heritage.

1.5 The guiding principles should be amended to include a further dot point, reading:

- the protection of and respect for Aboriginal and Torres Strait Islander traditional knowledge and cultural heritage.

Question 2.

What specific types of activities should a statutory cause of action for serious invasion of privacy prevent or redress? The ALRC is particularly interested in examples of activities that the law may not already adequately prevent or redress.

2.1 While Arts Law acknowledges that there may be a number of activities which are not covered by the current legislative framework, we do not agree that they are properly addressed through the introduction of a broad cause of action. Rather, they should be

specifically prohibited by either amending the existing framework (for example extending or harmonizing the operation of the surveillance devices legislation in each state and territory), or introducing a very narrow cause of action for invasion of privacy which does not prohibit activities such as those identified in 3.2 below.

2.2 We understand that the activities which could be prohibited through specific targeted legislation include:

- the unauthorized or undisclosed use of business or personal information,
- the use of social media for unauthorized or undisclosed purposes,
- the unauthorized or undisclosed use of information available through applications on mobile devices,
- the use by employers of information made available by potential employees through social media to determine eligibility for employment,
- the use of drones, GPS tracking; and
- data aggregation including web browsing histories.

Question 3.

What specific types of activities should the ALRC ensure are not unduly restricted by a statutory cause of action for serious invasion of privacy?

3.1 The creation and publication of material created in respect of the activities listed below from 3.1.1 – 3.1.6 should be expressly excluded from any cause of action for serious invasion of privacy.

3.1.1 Photography or filming of people in a public place;

Legal advice example:

The Arts Law has dealt with many legal queries from individuals who express concerns about the potential implications of photographing or filming people or groups of people in public. This includes, for instance, taking photographs of local sporting events occurring in a public place and taking candid photos of people commuting in trains. Concerns generally revolve around whether they would require permission to do so and a misguided belief

that Australia has the same onerous protections as a number of other foreign jurisdictions including France, for example.

Our advice is generally that taking pictures of people in a public place is permitted because Australia does not have a legislative framework which gives an individual rights in their image, or a general right to privacy. Given the complex legal framework which artists already negotiate, requiring that they get consents from their subjects. Without this, many artists would simply not create the works that they do.

Artistic work example:

This photograph, taken by **Dean Sewell**, entitled **“Cockatoo Island Ferry”** won the Moran Contemporary Photographic Competition in 2010. In relation to his photography, Dean comments that “Street photography can often be made on the run (both literally and metaphorically). Street photographers act upon nuance at a moment’s notice and traditionally do not choreograph life, rather, observe and record it. History should not be choreographed.”



Documentary film making or photography;

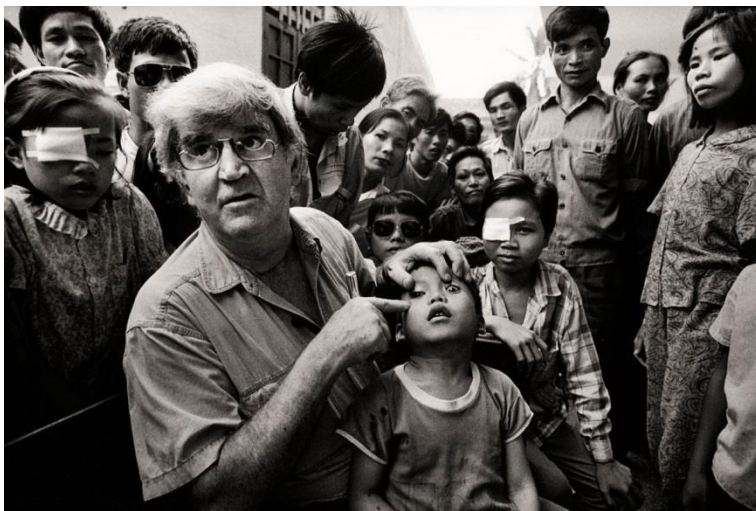
Legal advice example:

In some instances, the Arts Law has been contacted by individuals who have raised concerns about filming and interviewing people on the street and then using and publishing those videos as a part of documentary films.

Generally, the advice given by Arts Law is that there is no general law or right of privacy in Australia and there is no need to obtain a person's consent to include them in a video.

Artistic work example:

This photograph was taken by renowned photographer, **Michael Amendolia**, of **Professor Fred Hollows** which was taken in Hanoi in Vietnam in 1992. The photograph has become the poster image for the Fred Hollows Foundation. This image deals with the medical treatment of children. The creation of powerful images like this, if taken in Australia is imperative to our social and political discourse.



3.1.2 Journalistic or investigative photography, film making or reporting;

Legal advice example:

Our clients sometimes wish to create about and/or publish works which analyse, criticize, praise or otherwise comment on private or public figures, social, cultural, political or legal issues. They are often engaged in this activity in the interests of informing the broader public about issues of concern or relevance, but sometimes their creation of such a work is not for the purposes outlined above, but for the purpose of creating a work of art, or a document of our social climate or culture.

Artistic work example:

Four Corners aired a documentary entitled **“Punch Drunk” in March 2013**, which depicted people (including young people) drinking or in a drunken state, becoming violent or aggressive in that state. A link to that documentary can be found here:

<http://www.abc.net.au/4corners/stories/2013/02/25/3695353.htm> . If the law required the

consent of the people filmed in this documentary, or made filming or publishing a film about them seriously invasive because of their vulnerable state, a documentary like this would not be possible. This example points to the importance that the public interest plays in balancing any potential rights to privacy against the right to freedom of expression and the right of the public to know about current political, social or cultural issues.

3.1.3 Photography or filming of people on private premises for purposes such as education, journalism, artistic expression and documentary.

For example, the **Head On Photo Festival** this year celebrated the theme **“Backyard”**, encouraging the entry of mobile phone photographs inspired by this theme.

3.1.5 Photography or filming of personal property and of private premises for purposes such as education, journalism, artistic expression and documentary.

Artistic work example:

This photograph by photographer **George Voulgaropoulos**, entitled **“Bankstown”** depicts the dash board of a car and, Voulgaropoulos says, tells us about the owner who “is proud of their religion, displaying memorabilia on the dashboard for all to see. The object of the photograph is that it introduces themes of religious freedom and multiculturalism which runs throughout my body of work.”



3.1.6 Photography or filming of privately owned land or premises, or people on that premises, where the premises is accessible to the public.

Legal advice example:

The Arts Law has often been contacted by photographers seeking advice regarding taking photos of people on private property, particularly where that property is accessible by the public such as on transport systems, in galleries or places of worship. They are generally concerned about the legal consequences of publishing those photographs online or using the images for journalistic purposes such as submitting them to the local paper.

Artistic work example:

This photograph entitled **“Punchbowl Billy Reyad”** was taken by **Andrew Quilty** at a mosque. While this premises is privately owned it is accessible to the public and exemplifies why photographic or filming activities in spaces like these are just as important as those on publicly owned space.



Question 4.

Should an Act that provides for a cause of action for serious invasion of privacy (the Act) include a list of examples of invasions of privacy that may fall within the cause of action? If so, what should the list include?

4.1 Generally, Arts Law does not support the introduction of a right in relation to the use of an individual's personal image. Arts Law submits that an individual's expectation of privacy should not extend to controlling images of themselves beyond the regulations and protections that currently exist. We are pleased to see that this position generally accords with the ALRC's view in *For Your Information; Privacy Law and Practice* (ALRC Report 108, 2008) at 74.136.

The list of examples proposed by the ALRC is, too broad and would lead to confusion about whether or not certain activities were or were not invasive of privacy. We are also concerned that the use of a list potentially broadens the application of any cause of action to a greater extent than a court would otherwise interpret invasions of privacy.

4.2 The first suggested protection where "there has been an interference with an individual's home or family life" risks being very broadly interpreted if not properly balanced against other interests to exclude the creation, for example, of photographs of contemporary Australian family life.

4.3 We are also concerned that those examples suggested by the ALRC would, in numerous instances relate to laws which already protect the interests of the individuals in those situations. For example, an individual the subject of unauthorized surveillance may already have a cause for such an activity under the existing legal framework.

4.4 If examples are to be included, they must be narrow and well defined so that there is clarity for the Australian public about when a cause of action might arise. The list should expressly exclude the activities listed in 3.2.

4.5 It is essential to ensure that any list of examples is expressly subject to the balancing of the public interest, the right of freedom of expression, against any rights afforded by a new privacy framework.

For example, the below photograph, entitled **Wounded #26** by **Jesse Marlow** potentially discloses information about the individual's health and wellbeing. Of the photograph, the artist explains: "When a chance moment like this occurs, this to me sums up the beauty of street photography. People, place and the moment... This photo is part of a broader series of candid photos of people out on the street with visible superficial injuries which was turned into a book called *Wounded*. The series showcases the fact that despite people being affected by some kind of injury, they are getting on with their lives."



Question 5.

What, if any, benefit would there be in enacting separate causes of action for:

- misuse of private information; and
- intrusion upon seclusion?

5.1 Without knowing the shape that any proposed law may take, we can only comment generally on this question. It seems that separate causes of action could be beneficial due to the difference in the nature of protection sought in each tort. "Misuse of private information" might more properly be amalgamated into the current Privacy Act 1988

(Cth), whereas intrusion upon seclusion relates more specifically to a personal (at times, physical) right to privacy. In addition, the cause of action, and the damages sought in respect of each right could be quite differently fashioned so their constitution in two separate instruments may be advisable.

5.2 If these laws were introduced as two separate causes of action, it is imperative that any cause of action for seclusion upon intrusion is very narrowly constructed, so that it does not create a broad, unwieldy, unpredictable right to privacy in Australia.

Question 6.

What should be the test for actionability of a serious invasion of privacy? For example, should an invasion be actionable only where there exists a 'reasonable expectation of privacy'? What, if any, additional test should there be to establish a serious invasion of privacy?

6.1 If a cause of action for serious invasion of privacy is introduced, Arts Law agrees with the ALRC that the plaintiff, in addition to establishing a reasonable expectation of privacy should also have to establish that the activity was "highly offensive to the reasonable person".

6.2 In addition to establishing that the activity was highly offensive, the plaintiff should also have to establish that the activity resulted in suffering or anguish (not simply financial loss) by the plaintiff.

6.3 The above approach would create a high threshold for establishing a cause of action, and weed out unmeritorious claims, or claims driven alone by the celebrities wishing to monetize their image.

Question 7.

How should competing public interests be taken into account in a statutory cause of action? For example, should the Act provide that:

competing public interests must be considered when determining whether there has been a serious invasion of privacy; or public interest is a defence to the statutory cause of action?

7.1 Importantly, the “public interest” (depending on how that is formulated or defined) may not always be a motivation behind the creation of a work, film or photograph. This does not render the work, film or photograph irrelevant or unworthy of protection. For example, a photograph of a woman who is embracing her child on Bondi beach may not be “in the public interest”, but it is none the less an important social document of a moment in a family in 21st century Australia.

7.2 Public interest should be considered at the point of determining whether there has been an invasion of privacy.

7.3 The placement of the public interest (specifically freedom of expression) criteria at the fore of the formulation means that:

(i) the onus of proof is on the person asserting the right to privacy, or seeking redress for the alleged breach of the right against invasion of privacy; and

(ii) unmeritorious claims are less likely, because of the need to balance factors at the outset. Given the absence of an express right to freedom of expression, a low benchmark or threshold for actionability of invasion of privacy may tip the competing interests of the parties unfairly if public interest was only considered by way of a defence.

7.4 This “upfront” formulation would be similar to construction of the law of confidential information, which requires the balancing of a number of circumstances in establishing whether the defendant has a case to answer.

7.5 Depending on the formulation of the cause of action, considering the public interest at the outset, and then, in addition providing for a defence of freedom of expression or artistic expression could assist in ensuring that freedom of expression is protected. Whether this

formulation is sensible of course depends on the way in which public interest is (or is not) defined.

Question 8.

What guidance, if any, should the Act provide on the meaning of 'public interest'?

8.1 The Act should provide guidance on public interest to ensure that elements like "freedom of expression" and "freedom of artistic expression" are incorporated into any balancing of public interest against any privacy rights.

8.2 The guidance on public interest should include a non-exhaustive list of factors to consider, perhaps similar in form to the "guiding principles" drawn up by the ALRC.

Question 9.

Should the cause of action be confined to intentional or reckless invasions of privacy, or should it also be available for negligent invasions of privacy?

9.1 The cause of action should be confined to intentional or reckless invasions of privacy and not extend as far as negligent invasions.

9.2 Documentary film making, for example, may incidentally to the primary purpose of the film, invade a private moment (for example, filming in a public place which looks onto a private apartment where someone is getting undressed).

9.3 Arts Law would be concerned that creating a cause of action for negligence has the potential to create a great deal of uncertainty and discourage artists from engaging in activities that could accidentally or inadvertently expose them to the risk of breaching the law.

9.4 Inadvertent invasions will lead to self censorship, chilling effect.

Question 10.

Should a statutory cause of action for serious invasion of privacy require proof of damage or be actionable per se?

10.1 The statutory cause of action for serious invasion of privacy should be constructed so that proof of damage is an essential element of the cause of action.

10.2 Without requiring evidence of damage, the risk is that the cause of action will attract unmeritorious claims from claimants where no actual harm has been suffered by the allegedly invasive activity.

10.3 If the cause of action for serious invasion of privacy was actionable per se, the costs of determining these potentially unfounded or unmeritorious claims would fall upon:

10.3.1 our stakeholders and indeed the broader arts and media industries in defending the claims;

10.3.2 tax payers funding the forum for the resolution of the complaint, for example, court system, tribunals, commissions etc.

Question 11.

How should damage be defined for the purpose of a statutory cause of action for serious invasion of privacy? Should the definition of damage include emotional distress (not amounting to a recognised psychiatric illness)?

11.1 Damage may include nominal, ordinary damages. We do not support the inclusion of exemplary damages without further evidence of where these might be warranted. While “emotional distress” might properly be a factor in quantifying damage, it should be defined narrowly so that the mere taking of offence to a particular activity cannot be brought under such a definition.

11.2 The definition of “damages” should expressly exclude damage suffered as a result of lost opportunity to license one’s own image. This express exclusion is important, because in its absence, the risk is that this cause of action becomes one which creates a “celebrity right to image” instead of a right which recognizes the importance of personal privacy for all regardless of reputation.

11.3 Likewise, the definition should exclude the loss of reputation. Defamation law already deals with this and is the appropriate forum to address any reputational loss as a result of the defendant’s activities.

11.4 When quantifying damages, either account of profits or ordinary damages should be selected by the plaintiff, and not both.

Question 12.

In any defence to a statutory cause of action that the conduct was authorised or required by law or incidental to the exercise of a lawful right of defence of persons or property, should there be a requirement that the act or conduct was proportionate, or necessary and reasonable?

No submission.

Question 13.

What, if any, defences similar to those to defamation should be available for a statutory cause of action for serious invasion of privacy?

13.1 If freedom of expression is not expressly included as in formulating the cause of action in the first instance (as discussed at question 7) there should be a broad category of defences stemming from the right to freedom of expression. Those defences available at defamation law, including absolute or qualified privilege should form part of the broader freedom of expression (including artistic and creative expression) and freedom of speech defences.

Question 14.

What, if any, other defences should there be to a statutory cause of action for serious invasion of privacy?

14.1 If freedom of expression is not expressly included as in formulating the cause of action in the first instance (as discussed at question 7) there should be freedom of expression and speech defences available under any cause of action. In addition to the balancing of the “public interest” criteria in determining whether there is or is not a cause of action. Including these defences will help ensure the right to freedom of expression and speech is not unduly limited by a cause of action for invasion of privacy.

Question 15.

What, if any, activities or types of activities should be exempt from a statutory cause of action for serious invasion of privacy?

15.1 Those activities which are listed in 3.1 (3.1.1-3.1.6) should be exempt from a statutory cause of action.

Question 16.

Should the Act provide for any or all of the following for a serious invasion of privacy:
a maximum award of damages;

16.1 The Act should provide for a maximum award of damages.

a maximum award of damages for non-economic loss;

16.2 The Act should provide for a maximum award of damages for non-economic loss.

exemplary damages;

Exemplary damages should not be included.

assessment of damages based on a calculation of a notional licence fee;

16.4 The Act should expressly exclude damages based on a notional licence fee. The inclusion and calculation of damages on this basis would create a “celebrity right” and undermine the core guiding principle in relation to the privacy as a value.

an account of profits?

16.4 The Act should include a remedy for accounts of profit, provided that this is not defined, or used in such a way that it replaces the “nominal licence fee” model.

Question 17.

What, if any, specific provisions should the Act include as to matters a court must consider when determining whether to grant an injunction to protect an individual from a serious invasion of privacy? For example, should there be a provision requiring particular regard to be given to freedom of expression, as in s 12 of the Human Rights Act 1998 (UK)?

17.1 Before granting an injunction in respect of a serious invasion of privacy, a court should consider the freedom of expression and freedom of speech of the individual potentially enjoined from the activity complained of. A court should also consider whether injuncting the activity is in the public interest, and any potential loss that may be incurred if an injunction is/is not granted.

17.2 This balancing approach should assist in limiting unmeritorious injunctions and assist in protecting freedom of expression.

Question 18.

Other than monetary remedies and injunctions, what remedies should be available for serious invasion of privacy under a statutory cause of action?

18.1 Remedies should include:

18.1.1 A private, public and/or published apology;

18.1.2 A restraining order in relation to specific invasive activities or within a certain distance of plaintiff (for example, where the use of drones is concerned, and order that the operator or entity benefiting from the use of the drone may not operate it within residential areas, or near a particular address) ;

18.1.3 An order requiring the destruction or removal of offending invasive material;

18.1.4 An order requiring the removal of the material online from any form of medium

(including print, online);

18.1.5 In the case of entities dealing with (whether commercially or not) the information and identities of their users, including for example online service provision and social media platforms:

18.1.5.1 an order that the defendant must disclose to plaintiff, and user group of that platform, the nature of their breach, and where relevant, how they use the information or identities of its users and what changes they will now make following the decision of a court; (for example, where a social networking site allows the information of its users to be commercially exploited by third parties in various ways, that the users of that network are advised of the ways in which their material is being used)

and

18.1.5.2 an order that the entity register on a register of online service providers who have breached privacy so that consumers of digital services or products are aware of the breach and can assess how they wish to deal with that entity in future.

Question 19.

Should a statutory cause of action for a serious invasion of privacy of a living person survive for the benefit of the estate? If so, should damages be limited to pecuniary losses suffered by the deceased person?

19.1 Unless falling within the particular exemption below, no cause of action for serious invasion of privacy should survive the death of the individual who might otherwise have complained.

19.2 However, in the case of a deceased Aboriginal or Torres Strait Islander person, members of his or her community, should be able to bring an action for serious invasion of privacy, in circumstances where:

19.2.1 There has been a serious invasion of privacy which would cause offence to the reasonable person with an understanding of that culture; and

19.2.2 It results in cultural harm to the deceased person's community.

19.3 The extension of the cause of action to members of a deceased Aboriginal or Torres Strait Islander person's community recognises the unique situation of Aboriginal and Torres Strait Islander people in Australia and specifically

19.3.1 The cultural beliefs of many Aboriginal and Torres Strait Islander communities (people) in respect of use of photographs and film footage of deceased persons; and

19.3.2 The ensuing cultural harm which is caused by the publication of such images and footage.

Question 20.

Should the Privacy Commissioner, or some other independent body, be able to bring an action in respect of the serious invasion of privacy of an individual or individuals?

20.1 The Privacy commissioner should be able to bring action on behalf of an individual or a group of individuals provided those individuals are in fact harmed by the serious invasion of their privacy.

20.2 The standing of the Privacy Commissioner to bring such actions might operate similarly in practice to the standing of the Australian Competition and Consumer Commission in developing a body of case law in respect of breaches.

Question 21.

What limitation period should apply to a statutory cause of action for a serious invasion of privacy? When should the limitation period start?

21.1 There should be a limitation of twelve (12) months from the time in which the cause of action for serious invasion of privacy arose.

21.2 This mirrors the limitation period in respect of defamation and recognizes that in both instances, if harm occurs it is generally apparent fairly soon after the activity takes place, and discourages claims from being made many years after the activity occurs.

Question 22.

Should a statutory cause of action for serious invasion of privacy be located in Commonwealth legislation? If so, should it be located in the Privacy Act 1988 (Cth) or in separate legislation?

22.1 If a statutory cause of action for serious invasion of privacy is developed, it should be federal and only that aspect of the statutory cause in respect of the use of information should be included in an amended version of the Privacy Act 1988 (Cth). The cause of action for invasion of privacy which relates to the physical privacy of an individual and their image should fall under a separate federal instrument.

Question 23.

Which forums would be appropriate to hear a statutory cause of action for serious invasion of privacy?

23.1 Low cost forums which support a self representation system.

Question 24.

What provision, if any, should be made for voluntary or mandatory alternative dispute resolution of complaints about serious invasion of privacy?

24.1 Provision should be made for alternative dispute resolution as this could keep costs low for both the plaintiff and defendant (and the broader industries whose interests they may represent), but it would also recognise the value of privacy as a personal right, in a forum which is not constrained by rules, for example, rules of evidence.

Question 25.

Should a person who has received a determination in response to a complaint relating to an invasion of privacy under existing legislation be permitted to bring or continue a claim based on the statutory cause of action?

25.1 No. If a determination has already been made, then there should not be a cause of action for serious invasion of privacy as well. This approach would limit double dipping in respect of remedies and accord with the aim of any legislation giving a cause of action for serious invasion of privacy in addressing current gaps, rather than create a broader spectrum of remedies for causes of action which are already illegal.

Question 26.

If a stand-alone statutory cause of action for serious invasion of privacy is not enacted, should existing law be supplemented by legislation:

26.1 Arts Law favours the model of amending laws relating to specific areas of concern, or addressing specific areas of concern through the introduction of targeted, specific legislation.

providing for a cause of action for harassment;

26.2 A cause of action for harassment would control numerous activities identified as arguably breaching a potential cause of action for serious invasion of privacy. For example, camping outside someone's home to get a media interview where you aren't directly trespassing but are continually surveilling that person in their own home.

enabling courts to award compensation for mental or emotional distress in actions for breach of confidence;

26.3 The ALRC has identified the lack of recognition of emotional distress as a key gap in the current framework. Directly addressing this gap by broadening the scope of damages a plaintiff in breach of confidence can claim would specifically target this "gap" and is preferable to introducing a broader, wide reaching cause of action for serious invasion of privacy which could have serious ramifications on freedom of speech and expression in Australia.

providing for a cause of action for intrusion into the personal activities or private affairs of an individual?

26.4 It is unclear how this cause of action would be very different to the one proposed by the ALRC, so we have no submission in this regard.

Question 27.

In what other ways might current laws and regulatory frameworks be amended or strengthened to better prevent or redress serious invasions of privacy?

27.1 One of the current criticisms of the legislative framework is a lack of clarity around the protections afforded in each state and territory. By harmonizing the way these laws operate, better regulation of the use of individuals private information (for example, surveillance) can be achieved.

27.2 Instruments like the Privacy Act 1988 (Cth) should be reviewed in light of the numerous technological and digital changes that have occurred in the way we communicate, store and use information gathered through the various digital platforms now available to Australians. That Act should then be amended to ensure that the communication, storage and use of information accords with current societal expectations, in particular, their expectations about how their information is used in the commercial context.

Question 28.

In what other innovative ways may the law prevent serious invasions of privacy in the digital era?

28.1 The law should develop a set of mandatory requirements in respect of providing a technological platform (including applications, social networks, websites) in Australia, which requires, for example complete disclosure on:

28.1.1 the information collected using that platform;

28.1.2 the way in which that information is stored; and

28.1.3 the way in which the information is used by the collecting party and any other third party it provides that information to.

Further consultation with Arts Law and its stakeholders

Please contact Robyn Ayres (Executive Director) or Suzanne Derry (Senior Solicitor) if you would like us to expand on any aspect of this submission, verbally or in writing. We are also pleased to be of any assistance in meeting with you prior to, or during the preparation of the final report.

We can be contacted at rayres@artslaw.com.au or sderry@artslaw.com.au or on (02) 9356 2566.

Yours faithfully



Robyn Ayres



Suzanne Derry

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Arts Law Centre of Australia Arts Law Centre of Australia

Acknowledgements of assistance:

Arts Law wishes to thank Henry Davis York lawyers Jillian Mitford-Burgess Haley McEwan, Donna Short and; Arts Law volunteer Maiko Sentina, photographers Chris Shain, Jesse Marlow, Andrew Quilty, Dean Sewell and George Voulgaropoulos for their invaluable photographs, and the support of NAVA and the AIPP.

**Appendix 4 – Arts Law Centre of Australia submission in relation to
*Consultation Paper 1: Invasion of Privacy 2007.***

14 September 2007

Mr Peter Hennessy
Executive Director
NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

By Email: nsw_lrc@agd.nsw.gov.au

Dear Mr Hennessy

Submission on Consultation Paper 1: Invasion of Privacy

Thank you for the opportunity to comment on the issues raised by *Consultation Paper 1: Invasion of Privacy (Consultation 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 RESPONSE TO THE CONSULTATION PAPER Summary

Arts Law does not support the proposal to introduce a statutory cause of action for invasion of privacy. In summary, we believe it:

- will have a disproportionate effect on artists and writers;
- fails to protect artistic expression, freedom of expression and the public interest;
- is unnecessary because the current regulations and safeguards are sufficient;
- will create a discrepancy between NSW law and the laws of other states and territories;
- cannot be justified in the absence of a strong human rights framework in Australia; and
- will primarily benefit celebrities (and corporations if not excluded) and that the benefits do not outweigh the detrimental effect on artists and writers.

Further information

Arts Law is particularly concerned that the changes being considered by the NSW Law Reform Commission (Commission) will have a disproportionate effect on:

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

We believe the laws will be detrimental to the development of artistic and cultural works in Australia and will reduce freedom of expression within the media and literary publications more generally.

Arts Law submits existing areas of law provide sufficient regulation and safeguards. We believe the proposed changes will be of limited benefit and we note the Commission itself admits to, 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.¹

If further regulation is found to be required then Arts Law argues for the development of specific legislation aimed at particular problems instead of a general statutory cause of action for invasion of privacy. In particular Arts Law does not support the introduction of an enforceable civil right in relation to the use of an individual's personal image. Arts Law submits that an individual's expectation of privacy should not extend to controlling images of themselves beyond the regulations and protections that currently exist.

Arts Law is also concerned that the proposed changes will increase the discrepancy between the laws of NSW and the laws of the other states and territories of Australia. Given it is common for artists to work across state and territory borders this would create difficulties for artists and arts organisations when working or touring outside of their home state or territory.

Arts Law further submits that the introduction of a broad statutory cause of action for invasion of privacy cannot be justified in the absence of a strong human rights framework. We believe the Commission should place significance on its 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

¹ Consultation Paper, p 24.

recognise a “right to privacy” alongside other rights and interests, such as freedom of speech and national security.²

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. Whilst we support the development of privacy laws for these specific types of privacy issues 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.

RESPONSE TO PROPOSALS Proposal 1

Arts Law does not support the introduction of a statutory cause of action for invasion of privacy. If, however, the Commission recommended a statutory cause of action be introduced, then Arts Law believes the negative effects on free speech and artistic expression might be diminished by:

- requiring the courts to weigh up the competing interests of freedom of speech against the privacy interests of the individual;
- requiring courts to consider the public interest generally and the public interest in knowing the truth;
- recognising the value for society in artists being able to freely engage in artistic practices without unnecessary restrictions and making specific exemptions to ensure artistic practices are not effected; and
- including a non-exclusive list of the types of privacy invasions that fall outside

² Consultation Paper, p 160.

- the cause of action.

Proposal 2

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. Once a decision is made, it is common for the matter not to continue to a final 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.

RESPONSE TO QUESTIONS Question 1

Should there be a general cause of action for invasion of privacy? Why or why not?

Summary

Arts Law does not support a general cause of action for invasion of privacy. Arts Law is of the view this would be too broad and is likely to impair:

- freedom of speech;
- freedom of expression;
- the public interest; and

- development of artwork depicting people in public spaces (including photographs, paintings, video art and films).

Arts Law believes the existing legislation is sufficient to protect many instances of unauthorised use or publication of a person's name, identity, likeness or voice. We believe it is inappropriate to extend this right and oppose the introduction of a right of publicity or similar right that would prohibit the unauthorised use of a person's image. Such a right would be a significant expansion of existing rights and cannot be justified in light of the detriment it would cause to our artistic, social and cultural heritage.

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.

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 artists, writers and journalists. We are concerned that investigative journalism is likely to suffer under the proposed new cause of action and we urge the Commission 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.

Artwork depicting people in public spaces

Photographers such as 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 curtailed or damaged if further restrictions are introduced.

Similarly, other artforms that depict people in public places are likely to be curtailed if the privacy laws are expanded in the manner suggested in the Consultation Paper. 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.³

Whilst Arts Law concedes there should be a consideration of the competing interests of privacy versus freedom to take photos in public places, there should also be a consideration of how further restrictions on taking photographs in public privatises public space and limits the capacity of artists to make art in a public context. It would also interfere with the provisions of the *Copyright Act 1968* (Cth) (Copyright Act) that provide that it is the exclusive right of the copyright owner to reproduce, publish and communicate their work to the public. If individuals are given permission to control the use and reproduction of their image this will impinge upon the rights granted to the artist under the Copyright Act and would unnecessarily curtail production and dissemination of artistic works and works that document the world in which we live.

The existing legislation is 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

³ 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.

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.

In the Consultation Paper the Commission recognised the following protections that may prevent the unauthorised use of a person's image:

- trespass to land;
- private nuisance;
- defamation;
- passing off;
- breach of confidence;
- 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.

We draw the Commission'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 – 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 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.⁴

If there should, how should the boundaries of the cause of action be drawn?

⁴ *Talmax Pty Ltd v Telstra Corporation Ltd* [1997] 2 Qd R 444; (1996) 36 IPR 46; (1996) ATPR 41-535; BC9605158.

Arts Law does not support the introduction of a general cause of action for invasion of privacy. If, however, such legislation were to be introduced then Arts Law believes it is vital that the boundaries of the cause of action be carefully and precisely drawn to provide certainty and to ensure the legislation does not have unintended consequences.

It is essential that the legislation recognise the public interest, freedom of speech and freedom of expression. In addition, there should be an exemption from 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.

As discussed in our response to question 1, Arts Law does not support the introduction of an enforceable civil right in relation to the use of an individual's personal image 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 or filming people from public places, even if the people being filmed or photographed are on private land. 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 question 1 regarding the existing protections). We remind the Commission of the example set out in the Consultation Paper, in which Justice Young found the law of private nuisance enabled the plaintiff to obtain an

injunction against her neighbour to prevent him from operating video surveillance equipment which looked into the plaintiff's backyard.⁵

We note that the Commission sets out an example of some of the privacy violations that might give rise to a cause of action.⁶ Arts Law is particularly concerned by the last example, that a person would be liable for invading the privacy of another if he or she 'uses that person's name, identity, likeness or voice without authority or consent'. This would have a detrimental effect on artistic practice in Australia. We would only see such a right as being appropriate in the context of commercial advertisements. Moreover we note that existing laws already provide a degree of protection in the scenario outlined – for a discussion of the specific laws, see our response to question 1 under the subheading 'the existing legislation is sufficient'.

Question 3

Should the development of a cause of action for invasion of privacy be left to the common law, or should a statutory cause of action be created?

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, such as the protection of personal health information which is currently protected under the *Health Records and Information Privacy Act 2002* (NSW).

If there should be a statutory cause of action for invasion of privacy, do you agree with the Commission's preferred statutory model (Proposal 1)? Why or why not? Are there

⁵ Consultation Paper, p 43.

others that would be more effective (for example, the creation of a statutory tort or torts)?

Arts Law does not support a statutory cause of action for invasion of privacy. Of the four models examined in the Consultation Paper, Arts Law is of the view that the fourth model, which proposes the introduction of 'several narrower and separate causes of action based on various distinct heads of privacy', would be the most appropriate.⁷ The fourth model would offer the greatest degree of certainty and because it would be narrowly defined there would be a reduced risk that the legislation would have unintended consequences, such as the restriction of artistic expression, freedom of speech and freedom of expression.

We believe the most appropriate and effective model is to develop specific legislation to address identified privacy concerns. Please see our comments in response to question 3. See also our comments under the heading 'response to proposals'.

Question 5

When should plaintiffs be entitled to claim an expectation of privacy?

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.

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. 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.

What type of invasion should attract the protection of the proposed cause of action?

No submission.

However, please note our comments at question 2 in relation to the boundaries that would need to be drawn for the proposed cause of action.

Question 7

When should the plaintiff be taken to have consented to an invasion of privacy?

Arts Law recommends that a plaintiff should be taken to have consented to an invasion of privacy if the invasion occurs in a public space and is for artistic purposes or is in the public interest. 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.

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.

Question 8

Should liability for invasion of privacy in relation to disclosure of information be restricted to information not already in the public domain, and, if so, how should the concept of public domain be construed?

Arts Law submits that there should be no liability for invasion of privacy in relation to disclosure of information that is in the public domain. The exception to this would be where the information was in the public domain as a result of the breach of the

plaintiff's rights and the person disclosing or using the information knew that the plaintiff's rights had been breached, for example in the case of unauthorised release of private health records.

With regards to information available at court proceedings, the media plays an important role in reporting on judicial decisions and processes. We note that courts sometimes now employ specialist media advisors, which appears to us to imply recognition by the courts of the role of the media in the judicial process. Moreover, we have a long history of recognition of the importance of open justice and the part the media can play within this. For example, Jeremy Bentham in 1825 stated,

Publicity is the very soul of justice. It is the keenest spur to exertion and surest of all guards against improbity. It keeps the judge himself, while trying, under trial. It is to publicity, more than to everything else put together that the English system of procedure owes its being the least bad system as yet extant, instead of being the worst.⁶

There are existing mechanisms by which the court can suppress the publication of information of legal proceedings and these mechanisms do not require expansion through the development of a statutory cause of action for invasion of privacy.

Should liability for a cause of action for invasion of privacy be restricted to intentional acts only, or extend to reckless and/or negligent acts?

⁶ Jeremy Bentham, *Judicial Evidence* (1925) at 67, reproduced in Des Butler and Sharon Rodrick, *Australian Media Law* (1st ed, 1999) p 189.

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. Liability should be restricted to intentional acts only.

If liability was extended to reckless and/or negligent acts then it 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. Accordingly, the laws would 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 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.

Question 10

How should a cause of action for invasion of privacy take account of the public interest?

Arts Law does not support the introduction of a cause of action for invasion of privacy. If, however, such a cause was introduced, then Arts Law submits that it is essential the individual's right to privacy be balanced against the public interest. The legislation should include an express process by which the judiciary, when deciding privacy cases, is required to balance the competing public interest against the individual's rights.

Arts Law submits that a non-exclusive list of the types of privacy invasion that fall outside the cause of action would be one step in assisting the judiciary to take into account the public interest. The excluded types of invasion would be invasions that the legislature decided it was in the public interest to exempt.

For further ways in which the public interest could be protected, please see our response to questions 1 and 2.

Question 11

What public interest factors should qualify an otherwise actionable invasion?

- 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
- 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.

We reiterate our comments to the proposals, questions 1-2 and question 10 regarding the importance of the protection of the public interest.

Should the plaintiff be required to prove loss or damage in order to bring an action for invasion of privacy?

No submission.

Question 13

Should an action for invasion of privacy be available only to natural persons or should it be available to corporations as well? If so, when?

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;⁹ and that NSW’s defamation laws provide that corporations are not entitled to take an action for defamation.

In the Second Reading Speech in the Legislative Council for the *Defamation Bill 2005* (NSW), it was noted that,⁷

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.

Similar arguments apply for not allowing corporations to sue for privacy.

Question 14

Should an action for invasion of privacy come to an end with the death of the person whose privacy is alleged to have been invaded?

An action for invasion of privacy should come to an end with the death of the person whose privacy is alleged to have been invaded. Arts Law refers to pages 182 and

⁷ NSW, Second reading speech, Legislative Council, 18 October 2005, The Hon. Henry Tsang.

183 of the Consultation Paper and supports the reasons given there for not allowing the action to be continued past death. The fact that this contrasts with the position under the *Privacy and Personal Information Protection Act 1998* (NSW) simply highlights the complexity of privacy issues and the fact that privacy issues are best dealt with by narrow and specific legislation, rather than by introducing a general cause of action for invasion of privacy. Arts Law reiterates that it considers it likely that a general cause of action will have unintended consequences and will limit freedom of speech, freedom of expression and artistic practices generally.

Question 15

How should invasion of privacy deal with “relational claims”?

No submission.

Do you agree with the Commission’s approach to the remedies that should be available in response to an invasion of privacy (Proposal 2)?

Arts Law does not agree with the Commission’s approach to the remedies that should be available. Please see our comments above under the heading ‘proposal 2’, which sets out our concerns regarding the remedies.

Question 17

Should there be thresholds and ceilings on the amount of damages that can be awarded in proceedings brought for invasion of privacy? If so, what should they be?

Arts Law supports the Commission’s reasoning for limiting the damages recoverable for an invasion of privacy, as set out at page 192 of the Consultation Paper.

Question 18

Should exemplary damages be available for invasion of privacy? Why or why not?

No submission.

Question 19

Should account of profits be available in response to an invasion of privacy? Why or why not?

No submission.

Question 20

Should the courts be able to order apologies and make correction orders in response to an invasion of privacy? If so, when?

No submission.

FURTHER INFORMATION

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

Yours faithfully



Robyn Ayres

Executive Director

Arts Law Centre of Australia