



15 January, 2007

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

By Email: privacy@alrc.gov.au

Dear Sir/Madam

**Review of Privacy
Issues Paper 31**

Thank you for the opportunity to comment on the issues raised by Issues Paper 31 concerning the *Review of Privacy (Issues 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.

In response to the proposals/questions set out in the Issues Paper

Arts Law is concerned that changes to Privacy laws in Australia may have a disproportionate effect on artists who create artworks that portray or capture images of people and public spaces, or are created in public spaces. Equally, Arts Law is concerned that the community perception of privacy and the extent to which privacy actually protects individuals is contrary to, and goes beyond, the current law. We are concerned that this incorrect community understanding has a detrimental effect on artists who create art that reflects life and activities in public spaces. For example, we are aware of a number of photographers who take photographs that fall within the genre of 'street photography'. Many of these photographers find they are prevented from taking photographs in public places by individuals who believe that their right to privacy is being infringed, when a photograph of them is taken in a public space.

We have addressed the some of the proposals/questions raised in the Issues Paper which directly affect artists and arts organisations in Australia.

1–1 Should the *Privacy Act* be amended to provide direct protection for groups such as: (a) Indigenous or other ethnic groups; or (b) commercial entities? If so, which groups or commercial entities should be covered by the Act?

The Arts Law *Artists in the Black* (AITB) service provides advice and resources to Indigenous artists and arts organisations in Australia. A major focus of AITB is the extension of current legal protection, with the object of protecting Indigenous Culture and Intellectual Property (ICIP), beyond the limited protections afforded by Australian Intellectual Property law.

As recommended by Terri Janke in *Our Culture Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*,¹ there is a need for detailed consideration of how privacy laws may strengthen ICIP rights.² Arts Law supports further investigation and research into the extension of privacy laws for the purpose of protecting ICIP. Any extension of privacy laws to protect Indigenous Australians could be used to govern the collection, access, use and disposal of ICIP. Arts Law supports the development of privacy laws to protect:

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

¹ Sydney: Michael Frankel & Co and Terri Janke, 1998.

² *Ibid.*, at p.96.

1–2 Should a cause of action for breach of privacy be recognised by the courts or the legislature in Australia? Is so, and if legislation is preferred, what should be the recognised elements of the cause of action, and the defences? Where should the cause of action be located? For example, should the cause of action be located in state and territory legislation or federal legislation? If it should be located in federal legislation, should it be in the *Privacy Act* or elsewhere?

Arts Law believes that there should be no action for breach of privacy in Australia and it should not be recognised by either the courts or the legislature. An expectation of privacy in public places, or while engaging in public activities drastically alters the current societal expectations as well as the current legal protections; it is as oxymoronic as it sounds. It would place undue restrictions upon artists who create art in public places or art that reflects public places and spaces.

The Issues Paper provides an example of Heath Ledger having his photograph taken by paparazzi and refers to the attitude of the paparazzi photographer who takes these photos.³ Arts Law submits that an overarching legislative reaction to the behaviour of paparazzi would have a detrimental effect on the work of artists, such as photographers, who create art in public places which reflects the people that occupy those public places. Last year it was reported that whilst photographing beach goers and bathers sleeping on the sands of Bondi Beach, in homage to his father's iconic *Sunbaker 1937*, Rex Dupain was surrounded by police officers who questioned him for almost half an hour. Rex Dupain stated: "Lifeguards and police are taking the law into their own hands; they regard anyone with a camera as a potential pervert. We sit at home and watch close-ups of people's lives on disturbing television reality shows but someone taking pictures at the beach is seen as a threat. Our days as a free society are over."⁴

Would an extended right to an action for breach of privacy prevent a painter producing a painting of a streetscape which depicts people walking down the street? What kind of restrictive environment is this creating? We are concerned that a cause of action for breach of privacy would limit the creativity and expression of the Australian artists whose work takes on a documentary focus and attempts to capture everyday life, people and public space. For example, iconic Australian artworks like those contained in John McDonald's *Federation: Australian Art & Society 1901 – 2001* (a catalogue based on the art exhibition of the same name) records iconic images of Australia's history that could not longer freely be captured if the laws were changed.

We submit that sufficient regulation addressing the use or publication of unauthorised images, such as photographs, taken in public places which are offensive, defamatory, misleading and deceptive, or a breach of confidence already exists.

It would be unnecessarily restrictive to require painters, photographers or documentary filmmakers to obtain the consent of individuals before making a painting, taking a photograph or filming in a public place, and then using or publishing this painting, photograph or film footage. Whilst in most cases it is industry practice for an artist to obtain a signed release from those who appear in their work, if the artist is seeking to capture real life, as it happens, this may not always be appropriate or practical. Arts Law believes that a right to privacy which prevents the use of a person's image is an unrealistic expectation for any society with a viable artistic community.

³ At [1.70].

⁴ D. D. McNicoll, 'Dupain's beach snaps draw police focus', *Weekend Australian*, 9-10 December 2006, p10.

Arts Law submits that areas of law such as defamation, the Federal Trade Practices Act, state and territory Fair Trading Acts, and the law of passing off may be used by individuals to prevent unauthorised use of their image in particular circumstances. These mechanisms, combined with criminal law, provide sufficient safeguards. The introduction of further requirements compelling a photographer to obtain consent for photographs taken of an individual based on a statutory or common law right to privacy would have undesirable effects on artistic practice and would curtail the freedom of individuals and artists to take photographs or paint images of public places.

Further, with reference to photography, the *Copyright Act 1968* (Cth) currently provides that, subject to section 35(5), the copyright owner of a photograph will be the author of the work. However, if the photograph is taken for a private or domestic purpose the commissioner shall be the author and copyright owner. Arts Law supports this provision and the exclusive rights owned by the author of the photograph to reproduce, publish and communicate the work to the public. Any introduction of an enforceable civil right in relation to the use of an individual's own image, beyond section 35(5), would unnecessarily curtail the artistic practice of photography and the photographer's ability and role to record life and history. The artist also plays an important role by questioning the way we think and give meaning to our world.

Whilst Arts Law concedes that there should be a consideration of the competing interests of privacy versus freedom of expression, there should also be a consideration of how any further restrictions on creating art, photographs or films in public further privatises public space, and limits the capacity of artists to make art in a public context. This genre of art is important as it reflects, records and explores public places and spaces and those people who inhabit them. 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 encroaching on the freedom of expression currently enjoyed by artists practising in public places and spaces and expressing their view of reality reflected in these public places and spaces. The number of restrictions placed on artists has already increased dramatically. The introduction of local council regulations, regulations governing areas such as the Sydney Harbour Foreshore Authority, public transport authority regulations and shopping centres already place further restrictions filming and photography and further erode freedom of expression.

Therefore, Arts Law submits that freedom of expression and artistic practice should be protected.

Accordingly, 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 protection that currently exists in Australia.

However, if a cause of action for breach of privacy were to be recognised by the courts or the legislature in Australia, an exception should be made for works or subject matter other than works (as defined in the *Copyright Act 1968* (Cth) made for an artistic purpose.

3–2 Insofar as the *Privacy Act* is primarily concerned with data protection, is the name of the *Privacy Act* accurate and appropriate?

Arts Law is concerned that there is a community perception that privacy law in Australia currently extends to the protection of the personal image. For example, Arts Law is aware that photographers who take photographs in public places are routinely stopped by members of the public who demand that the photographer stop taking photographs that may include them, or their family members, as they claim they have a right to privacy. Arts Law submits that as the *Privacy Act* is concerned with data protection, the title of the Act should be amended to reflect this and indicate more accurately the scope of the legislation. This would contribute to preventing a public misconception that there is a general right to privacy in Australia.

9–1 Should the protection of personal information for children and young people be dealt with expressly in the *Privacy Act*? If so, how should the Act be amended? For example, are there privacy issues arising in the areas of:

- child welfare, juvenile justice or family law;
- disclosure of health information to parents;
- information held by schools and child care centres;
- online consumer information;
- taking and publishing photographs;
- broadcasting of identifying images and information; or
- identification of children and young people in court records.

Arts Law would like to address two of the privacy issues raised in this question that have a direct impact on artists, namely taking and publishing photographs and broadcasting identifying images and information of children and young people.

This section of the Issues Paper refers to the Standing Committee of Attorneys-General (SCAG) discussion paper, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues*.⁵ Arts Law made a submission in response to this discussion paper. To date we have not received a response to our submission.

As above, in our response to question 1-2 of Issues Paper, Arts Law submits that areas of the law such as defamation, trade practices, fair trading, passing off and criminal law provide sufficient regulation and safeguards. Any further restrictions on artists who take and publish photographs of children or broadcast identifying images of children would have a detrimental impact on artists whose work depicts children. Arts Law submits that due to the nature of digital technology, introducing further regulations which restrict photography and filming of children will not have an effect upon those who do so surreptitiously, or as discussed in the SCAG discussion paper, take photographs and then place them on inappropriate websites. It will, however,

⁵ Discussion Paper, August 2005.

have a negative effect on artists who create art, using photography or film, in public places, or whose art reflects public places and spaces and depict children.

Conclusion

Arts Law looks forward to hearing the outcome of the ALRC proposals. We are prepared to expand on any aspect of this submission, verbally or in writing.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Robyn Ayres', with a long horizontal flourish extending to the right.

Robyn Ayres
Executive Director
Arts Law Centre of Australia