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The Honourable Brendan O'Connor MP
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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

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Submission in relation to *Issues Paper: Commonwealth statutory cause of action for serious invasion of privacy*

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 exposé 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).

¹ *Talmax Pty 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 CLR 199, *Grosse v Purvis* [2003] QDC 151, *Giller v Procopets* [2004] VSC 113, *Doe v Australian Broadcasting Corporation* [2007] VCC 281.

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 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.

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.

⁵ Australian Law Reform Commission, *Report 108: For Your Information: Australian Privacy Law and Practice* (20008), Recommendation 74-2.

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 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.

⁶ Australian Law Reform Commission, *Report 108: For Your Information: Australian Privacy Law and Practice* (20008), at p. 2572.

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 an 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 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.

⁷ See Australian Law Reform Commission, *Report 108: For Your Information: Australian Privacy Law and Practice* (20008), Recommendation 74-1(d).

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

⁸ Australian Law Reform Commission, *Report 108: For Your Information: Australian Privacy Law and Practice* (20008), 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.

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 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.

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

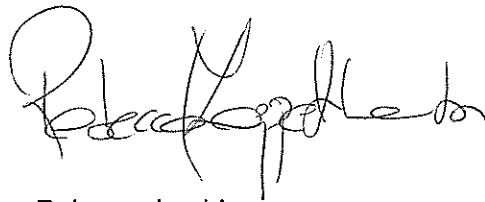
FURTHER INFORMATION

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



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