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Liberty Victoria Response to

Commonwealth Issues Paper:

Statutory Cause of Action for Serious Invasion of Privacy

Liberty believes that the right to privacy is a fundamental human right and one which deserves protection in Australia. The International Covenant on Civil and Political Rights (ICCPR) is a cornerstone of international civil liberties. Like most developed nations, Australia is a signatory. Article 17 of the ICCPR states:

17.1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

17.2. Everyone has the right to the protection of the law against such interference or attacks.

To date that protection with has been lacking with no recognized right to privacy in Australia. The current legislative framework is inadequate and Liberty welcomes the Commonwealth's proposal to introduce a statutory cause of action for serious invasion of privacy.

The following comments are made in response to the *Commonwealth Issues Paper on a Commonwealth Statutory Cause of Action for Serious Invasion of Privacy* ("**Issues Paper**") which was released in September 2011 and which follows a series of reports by Australia's law reform commissions into privacy in Australia.¹ Fundamental to the Issues Paper was the question of whether Australia needs a legislated cause of action and if so, what form it should take. Liberty's response to the Issues Paper has been grouped into the following sections:

¹ Australian Law Reform Commission, Report 108: *For Your Information: Australian Privacy Law and Practice* (2008) ("**ALRC Report**"); New South Wales Law Reform Commission, Report 120: *Invasion of Privacy* (2009) ("**NSWRC Report**"); Victorian Law Reform Commission Report, Report 18: *Surveillance in Public Places: Final Report* (2010) ("**VLRC Report**").

- Current position and the need for change;
- Elements and circumstances of a cause of action;
- Defences and exclusions;
- Remedies;
- Conclusion and Recommendations

Like most non-profit organizations, Liberty's resources are limited and our submission is necessarily brief. However should the Minister wish to discuss any aspect of our submission further, we would be pleased to do so.

Current Position and the Need for Change

Exceptions under the existing *Commonwealth Privacy Act 1988* mean that the Commonwealth Act is limited in scope. Moreover State and Territory privacy legislation is typically restricted to the public sector (and their contractors). As a result, there are vast areas unprotected by any form of privacy legislation. Extension of the common law to cover privacy has also proven problematic. As recommended by the ALRC, NSWLRC and VLRC, a federal statutory cause of action for serious invasions of privacy is now required.

Question 1: Do recent developments in technology mean that additional ways of protecting individuals' privacy should be considered in Australia?

Developments in technology over the last ten years have radically changed how we interact with each other. Moreover the increasing use and reliance on these technologies mean that there are significant amounts of personal information being recorded about our everyday activities. For example²:

The Internet with cookies and spyware mean that our activities online are often being recorded, whether we are aware of it or not. The rise of social networking sites and a general willingness by users to upload personal information (i.e. photos, addresses, social activities, etc) provide a wealth of personal information.

Mobile phones with GPS and applications that collect personal information mean that not only are our movements tracked, but our activities (sms, browsing, games, etc) at the time are also logged;

Smartcards used for toll roads, public transport, credit cards, building access cards, etc all collect movement information which can be tied to activities at the time;

CCTV and the emergence of facial recognition software means that our movements can be tracked even when we walk down the street (regardless of whether we have any other tracking enabled technologies on our person);

Protective legislation introduced in recent years mean authorities are regularly provided with information about any suspicious activity or activity that falls into certain categories (whether legal or not) in financial, medical or even social situations;

² See also the opinion piece by Michael Pearce SC in *The Age* on 27 July, 2011 (<http://www.theage.com.au/opinion/politics/legislate-the-right-to-privacy-20110726-1hyi9.html>).

These technologies and other developments bring with them many benefits and it would be futile to attempt to stop their spread. However, that spread must be balanced by a strengthening in the legal protection of privacy otherwise very little will be left.

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

The existing patchwork approach to privacy protection in Australia is inadequate and has been the subject of numerous inquiries and reports which have recommended that Australia recognize (whether legislatively or through the common law) a general right to privacy. The proposal to introduce a statutory cause of action is to be commended although the Issues Paper description of it as a 'gap filling' role for the most serious privacy invasions is of concern (Issues Paper at 23). Any cause of action limited to only the most egregious of privacy invasions would be symptomatic of Australia's ad hoc approach to privacy protection. A comprehensive and uniform approach is required; anything less will continue to confuse the issue and require future legislative reform at the expense of our privacy.

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

There is no guarantee that if left to the common law a privacy tort would emerge any time soon. Particularly so since any development could only be made by the High Court, requiring a well resourced and determined litigant.³ Furthermore, it would take several cases to reach a settled position, taking many years and playing a reactive role to continued developments in technology and its use in society.

For this reason and for those set out in the Issues Paper (at p28-29), a legislated cause of action for privacy offers better prospects for protecting privacy in Australia than the development of a privacy tort. The Parliament is far better placed to determine the right to privacy than leaving it to what would be a long and uncertain process by the courts. This conclusion is predicated on a well drafted statutory cause of action: sufficiently broad scope and not artificially limited to the grossest of privacy invasions.

Elements and Circumstances

Liberty agrees with the ALRC, NSWLRC and VLRC that any cause of action for invasion of privacy be predicated on a reasonable expectation of privacy in the circumstances. Moreover, it should be open to anyone with sufficient interest or standing to bring a claim (to allow those indirectly affected to seek redress).⁴

Question 4: Is 'highly offensive' an appropriate standard for a cause of action relating to serious invasion of privacy?

³ Which depending on the circumstances of the case, may affect the scope and nature of the emergent right.

⁴ For instance where the invasion of one person's privacy results in the invasion of another's such as someone living at the same address or closely related.

The statutory cause of action should be reserved for serious invasions of privacy. However a too strictly worded test, such as 'highly offensive', may prevent plaintiffs taking action against invasions of privacy which are serious but do not meet the 'highly offensive' test. The original ALRC Discussion Paper posed one potential test as whether the invasion was '*sufficiently serious to cause substantial offence*' (although this was not ultimately recommended). Bearing in mind that the first element of the proposed cause of action would be the requirement that there was a reasonable expectation of privacy, Liberty agrees with the NSWLRC Report (at 28) that a 'highly offensive' test is an undue qualification of the reasonable expectation of privacy test.

Accordingly Liberty argues that the more appropriate test of whether there has been a serious invasion of privacy is whether substantial offence has been caused.

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)?

There are reasonable arguments for both possibilities. Integrating various public interests into the cause of action effectively places the burden on the plaintiff whilst a public interest defence becomes an issue for the defendant.

The proposed cause of action is in response to recommendations by the ALRC, NSWRLC and VLRC and a public demand for the right to sue for serious invasions of privacy. Accordingly that right must be accessible to the public and not so complicated that it is only available to well resourced litigants. The ALRC and NSWLRC proposal to integrate a public interest test into the cause of action runs the risk of doing exactly that. Therefore Liberty agrees with the VLRC that the public interest may be relied upon as a defence.

Question 6: How best could a statutory cause of action recognize the public interest in freedom of expression?

Liberty is a strong advocate of freedom of expression, but also recognizes that it must be weighed against other civil liberties such as privacy. Liberty believes that the correct balance can be struck by confining the right to sue to cases of serious invasion of privacy and by providing for a public interest defence.

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?

Liberty is of the view that any cause of action be limited to invasions of privacy caused by intentional or reckless conduct. This is an appropriate limitation as it will prevent actions against those who have accidentally or unwittingly invaded the privacy of others.

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?

In general terms, Liberty supports the inclusion of additional matters the court must take into account when considering whether or not there has been an invasion of privacy. However such lists should not be exhaustive as the circumstances of each case are likely to vary considerably. On such a basis, Liberty supports the list of matters proposed by the NSWLR (NSWLRC Report at 35, cited in the Issues Paper at 39).

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?

A non-exhaustive list of activities constituting a serious invasion of privacy may provide guidance but also risks unnecessarily limiting the scope of the cause of action. The inclusion of such a list in the Explanatory Memorandum (EM) should provide sufficient guidance whilst not prescribing what may or may not be considered an invasion of privacy.

Defences and Exclusions

As with all causes of action, it is equally important that well drafted defences are open to those who have acted innocently, within the law or to defend against trivial and vexatious claims. Moreover, there may be some circumstances in which defendants are immune when exercising their official functions.

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

The ALRC and NSWLRC took the view that the question of consent should form part of the cause of action rather than providing a formal defence (as suggested by the VLRC). The issue of consent is relevant to determining whether there was a reasonable expectation of privacy in the circumstances. However it may be prudent to include a specific defence of consent.

The ALRC proposed defences are too broadly drafted and Liberty takes the view that the NSWLRC and VLRC provide a better balance between the rights of the plaintiff and those of the defendant. In particular, the use of terms such as 'fair', 'reasonable' and 'proportionate' require the defendant to show they acted reasonably in the circumstances. Thus Liberty supports the inclusion of defences such as where the act or conduct was:

- a) expressly or impliedly consented to by the plaintiff or a person lawfully authorized to do so on their behalf.
- b) required or authorized by law and reasonable in the circumstances;
- c) in the public interest and if involving publication, privileged or fair comment;
- d) necessary to the exercise of a lawful right of defence of person or property;

In all cases, the act or conduct must be reasonable and proportionate in the circumstances.

Question 11: Should particular organization or types of organizations be excluded from the ambit of any proposed cause of action, or should defences be used to restrict its application?

One of the greatest problems with Australia's current privacy regime is its failure to provide consistent protection. There are numerous exceptions under the Privacy Act 1988 (Cth) which greatly detract from its efficacy. At present journalists, political parties and employment records are all exempt under the Act. This has given rise to significant problems in the past. Liberty takes the view that there should not be any exclusions from the ambit of the proposed cause of action. Rather, persons or organizations which have acted reasonably and proportionately, whether in the public interest or some other lawfully authorized circumstance will have a valid defence. Liberty strongly advocates that there should not be any exclusions or exceptions to the proposed cause of action.

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

Privacy is a fundamental human right and as such, should be restricted to natural persons. Organizations and agencies have no need of privacy protection (breach of confidence, contract law, etc provide adequate remedies) and may well use such a cause of action as a tool to dissuade legitimate investigation of, and public comment on, their activities.

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

It is appropriate that the proposed cause of action be restricted to living persons. Liberty agrees with the ALRC, NSWLRC and VLRC that a deceased person's estate should not have the capacity to bring proceedings as any harm caused to the deceased by the serious invasion of privacy cannot survive their death. Nonetheless, it should also be recognized that the serious invasion of privacy of one individual may also, depending on the circumstances, be a serious invasion of privacy of another. For instance, the collection and publication of genetic information about a deceased person may be equally invasive to the privacy of an immediate relative. In such circumstances, it should be open to those who have also had their privacy seriously invaded to also bring an action.

Question 18: Within what period, and from what date, should an action for serious invasion of privacy be required to be commenced?

In line with other causes of action such as personal injuries and defamation, three years from becoming aware of the serious invasion of privacy would be an appropriate time limitation. Any shorter timeframe may place too much pressure on a potential plaintiff, particularly those who have suffered significant trauma as a result of the act or conduct constituting the serious invasion of privacy.

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

As with other causes of action, it is appropriate for both the federal courts (including Federal Magistrates' Court) and State and Territory courts to have jurisdiction. In line with the recommendation that general damages be capped at \$100,000, it is envisaged that most actions would be heard before a Magistrate. It is also noted that a jury is often best placed to determine questions such as whether the invasion was serious, whether the act or conduct was reasonable or proportionate or in the public interest. Consequently Liberty recommends that provision be made for a plaintiff or defendant to elect for a trial by jury.

Remedies

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

Liberty supports a flexible and broad set of legislative provisions as to remedies such as those listed by the ALRC Report (reproduced in the Issues Paper at 45).

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

Both the NSWLRC and VLRC have recommended a cap on non-economic damages be imposed. Liberty generally agrees with this recommendation as a means of ensuring that compensation is kept at a reasonable level in line with community expectations. A cap of \$100,000 for general damages (pain and suffering) plus any special damages (e.g. the cost of changing address or a phone number etc.) would be appropriate.

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?

By its nature, any serious invasion of privacy will have caused psychological harm to the plaintiff at the very least. However it may depend on how damage is defined as to whether it is recognized under the proposed cause of action. The ALRC was mindful that the harm caused may take many forms and may not be fully recognized by the general law, hence its recommendation that a serious invasion of privacy be actionable without proof of damage. It is foreseeable that there could be instances where an action should be brought even where no 'serious' or 'substantial damage' has resulted but the act or conduct is so egregious that it should be punished, even if only by way of a declaration against the defendant.⁵

If a broad definition of damage is adopted, such as one which includes non-economic harm such as mental anguish and distress, then proof of damage may be appropriate. Similarly to trespass (where the trespass itself constitutes the damage), proof of substantial offence to the plaintiff would constitute the damage. If not then proof of

⁵ For example a hidden camera in someone's bedroom which is discovered before more serious damage is done.

damage is more relevant the question of quantum than as an element of the cause of action itself.

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

As a general rule, Liberty supports any mechanism that allows parties to conciliate their differences. However unlike defamation cases where an apology may help restore a plaintiff's reputation, it is unlikely that any offer of amends will undue to the serious invasion of privacy. Nonetheless, offer of amends by way of payment of damages or changing of procedures may be taken into account by the court when considering what orders to make.

Conclusion

Australia's privacy regime is long overdue for reform. To date the approach to privacy protection has been ad hoc, rife with exemptions and often poorly enforced. Technological advances have left privacy protection behind. The advent and ubiquitous adoption of mobile computing, personalized internet use, various tracking devices (GPS, RFID, CCTV, etc) offer great advantages to their users, but also mean that unless privacy protection is strongly protected, it will continue to be eroded. Moreover is apparent that self regulation in this area does not work and that the best mechanism of protection is to give Australians the right to take direct action against those who invade their privacy. A strong and well drafted statutory cause of action offers exactly that possibility. Liberty strongly endorses the Commonwealth's proposal to introduce such a legislated right. However we remain concerned that unless it is done in a comprehensive and uniform manner, it may fail to achieve its purpose. It is hoped that any ensuing draft legislation is subject to further public comment before going before the Parliament.