

Questions on Notice taken during the hearing

Mr DAVID SHOEBRIDGE: You might wish to come back to us with this on notice—if we were looking at the Australian Law Reform Commission's bill as the framework, are there some additional objects or provisions in it that you think would be important to ensure that the kinds of public interest points you have put forward, which I am pretty sure everyone on the Committee agrees are worthy and should be central to this investigation, are captured in the bill? For example, you might suggest there should be some further indicia that we consider when looking at what is a reasonable expectation of privacy of all the circumstances or a particular objective that it is not to unreasonably intrude on the freedom of expression and the like in the objects. Could you come back to us on that?

The Hon. DAVID CLARKE: I also invite you to comment about your concerns with respect to that draft bill.

The Hon. LYNDA VOLTZ: Would you take this question on notice. If there were legislation, in your view, what would need to be in that legislation to satisfy the arts community? What should the legislation say?

We refer to the above questions on notice by Mr David Shoebridge, The Hon. David Clarke and The Hon. Lynda Voltz which pertain to the Australian Law Reform Commission's (ALRC) 2014 Final Report on *Serious Invasions of Privacy in the Digital Era*¹ (**Final Report**). We note the report does not contain a draft bill as such and understand the intention of those questions was to seek the witness' views on the detailed set of recommendations contained in the Final Report.

¹ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014).

The Arts Law Centre of Australia (**Arts Law**) made submissions to both the ALRC's Serious Invasion of Privacy in the Digital Era Issues Paper² and Discussion Paper³. Arts Law remains unsupportive of the introduction of a cause of action for invasion of privacy as we are concerned that the proposed law would be detrimental to the development of artistic and cultural work in Australia and would reduce freedom of expression and, in particular, the development of artwork depicting people in public places.

While Arts Law remains opposed to the introduction of a right to privacy in Australia, we note that the relatively narrow construction of the recommended cause of action by the ALRC in its Final Report could limit the potential scope for liability under such a cause of action, the damages sought, and unmeritorious claims being brought. However, the Final Report also highlights some of the hurdles in legislating for, administering and regulating such a scheme. Any legislative and administrative changes require ongoing education of the public about the laws, processes or factors which 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. Our main comments and concerns on the ALRC's final recommendations are itemised below.

1. Public interest matters

1.1 We were very pleased to note the inclusion of 'artistic expression' in Recommendation 9-2 (a)⁴ as an interest which is to be balanced against any right to privacy. This was previously absent from the ALRC's Discussion Paper Proposal 8-2 (a). Arts Law had expressed concern that 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.

1.2 The ALRC also noted the importance of expressly recognising the right to freedom of speech given that Australia has no enshrined right to free speech in the way other democracies have.⁵ Given the importance of this within the matter of public interest for consideration by a court, we

² Arts Law Centre of Australia Submission in response to *Serious Invasions of Privacy in the Digital Era (IP 43)*, Submission 43.

³ Arts Law Centre of Australia Submission in response to *Serious Invasions of Privacy in the Digital Era (DP 80)*, Submission 113.

⁴ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014), 150.

⁵ Ibid 9.49 at 153.

suggest the ALRC's recommendation 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" in Recommendation 9-2 should be replaced with the words "a court must consider."

2 Non-survival cause of action

2.1 In relation to the ALRC's Recommendation 10-3, 'A cause of action for invasion of privacy should not survive for the benefit of the plaintiff's estate or against the defendant's estate'⁶, we agree that the action should be limited to living persons. 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:

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

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

2.2 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:

2.2.1 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

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

2.3 The ALRC in its Final Report considered that 'in circumstances where a family member of an affected party experience [sic] an invasion of privacy in their own right, this will give rise to a separate action.'⁷ Arts Law does not agree that a separate action would necessarily arise for the family or other affected party under the recommendations and submits that any proposed legislation should include this type of exception to the general rule.

⁶ Ibid 172.

⁷ Ibid 10.67 at 175.

3 Defences and exemptions

3.1 Absent from the ALRC's final recommendations in relation to defences and exemptions were the specific artistic activities Arts Law had suggested which we consider would provide clarity for the Australian public.

3.2 Arts Law maintains that the following activities should be exempt from a statutory cause of action for serious invasion of privacy:

- 3.2.1 photography or filming of people in a public place;
- 3.2.2 documentary film making or photography;
- 3.2.3 journalistic or investigative photography, film making or reporting;
- 3.2.4 photography or filming of people on private premises for purposes such as education, journalism, artistic expression and documentary;
- 3.2.5 photography or filming of personal property and of private premises for purposes such as education, journalism, artistic expression and documentary; and
- 3.2.6 photography or filming of privately owned land or premises, or people on that premises, where the premises is accessible to the public.

4 Surveillance devices

4.1 Arts Law has previously expressed concerns that surveillance legislation may make unlawful the legitimate activities of film makers, photographers and other artists whose work involves surveillance devices.

4.2 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) does not define "surveillance".. 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 one 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 any proposed legislation 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.

4.3 Alternatively, if any future proposed legislation forms the view that “surveillance” or “private activity” is not defined, then Arts Law submits that a specific defence of, or in relation to, ‘artistic activity’ is included similar to the exception in the recommendation 14-5⁸, for journalistic activities. However, this is not an ideal situation for Arts Law’s 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 Ibid 289.