Submission No 26

INQUIRY INTO REMEDIES FOR THE SERIOUS INVASION OF PRIVACY IN NEW SOUTH WALES

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NSWCCL SUBMISSION

NSW LEGISLATIVE COUNCIL COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO REMEDIES FOR THE SERIOUS INVASION OF PRIVACY IN NEW SOUTH WALES

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About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The New South Wales Council for Civil Liberties ('CCL') is pleased to have the opportunity to make a submission to the NSW Legislative Council's Law and Justice Committee's inquiry into remedies for the serious invasion of privacy in New South Wales.

CCL strongly supports the introduction of legislation for a statutory cause of action. We have made this argument in the course of previous inquiries. We refer the Committee's attention to our most recent written submission to the Australian Law Reform Commission's 'Privacy Law and Practice' inquiry in 2011. We reaffirm the broad arguments put forward in this submission and will not repeat them here. We refer the Committee to the attached copy of this earlier submission. (appendix 1)

The CCL position enjoys widespread support. We note that the Australian Law Reform Commission ('ALRC')[1], the NSW Law Reform Commission ('NSWLRC')[2] and the Victorian Law Reform Commission[3] have each recommended the introduction of a cause of action for breach of privacy. Each Law Reform Commission gave detailed and careful consideration to how a statutory cause of action for serious invasion of privacy could be legislated to balance the various countervailing public interests, and produce a reasonable, fair and effective statutory remedy.

This submission addresses three discrete issues that will be relevant to the Committee's inquiry:

- Whether NSW should introduce the first privacy tort in Australia, when other jurisdictions have not indicated that they will do the same;
- The most appropriate legislative response to the issue of 'revenge porn'; and
- The current options available to someone whose privacy has been breached in NSW.

[1] Australian Law Reform Commission, Report 123: Serious Invasions of Privacy in the Digital Era (September 2014); Australian Law Reform Commission, Report 108: Australian Privacy Law and Practice (2008).
[2] New South Wales Law Reform Commission, *Report 120: Invasion of Privacy* (April 2009).
[3] Victorian Law Reform Commission, *Report 18: Surveillance in Public Places* (2010).

In summary, the CCL position is that:

- Although it would be preferable to have a uniform approach to privacy throughout Australia's various jurisdictions, in the current political climate NSW should take a leadership position. The fact that other jurisdictions do not have a statutory remedy for invasions of privacy should not deter NSW from introducing its own.
- The issue of revenge porn can be addressed with a statutory cause of action, even if a criminal offence is also introduced.
- The Committee should also consider making it easier for people to address breaches of their privacy outside the courtroom.

1. Should New South Wales move alone?

NSWCCL favours a national approach to privacy law reform. We agree with the ALRC's statement that "inconsistency and fragmentation in privacy regulation causes a number of problems, including unjustified compliance burden and cost, impediments to information sharing and national initiatives, and confusion about who to approach to make a privacy complaint."[4]

However, we recognise that national privacy law reform is unlikely to occur in the current political environment. In this regard, we note Commonwealth Attorney General George Brandis' comments to the effect that he would not be implementing the ALRC's recent recommendations.[5]

Against this background, we reiterate the position held by a number of organisations which made submissions to the ALRC's 2014 inquiry that, while national consistency is a valuable objective, it should not be pursued to the detriment of the level of protection afforded by privacy legislation.[6]

[4] Australian Law Reform Commission, *Report 108: For Your Information: Australian Privacy Law and Practice*, [3.13].
[5] Chris Merritt, 'Brandis rejects privacy tort call,' *The Australian*, 4 April 2015 < http://www.theaustralian.com.au/business/legal-affairs/brandis-rejects-privacy-tort-call/story-e6frg97x-1226873913819>.

A key issue, therefore, is whether NSW would be justified in engaging in privacy law reform in the absence of similar action at the federal level. A closely related issue is whether NSW should deprive its citizens of much-needed privacy protections while waiting for the federal government to drive a national privacy law reform agenda.

In answer to this question, we first draw the committee's attention to the following passage from the NSWLRC's 2007 Consultation Paper:

> *"...if New South Wales were to introduce a statutory cause of action for invasion of privacy, it would be the only jurisdiction in Australia to have such an action...The Commission is reluctant to promote any reform of the law that immediately results in a lack of uniformity between the laws of Australian jurisdictions. However, the following considerations should be borne in mind:*
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> - *There is already discrepancy between the laws of Victoria and the Australian Capital Territory on the one hand and the laws of other Australian jurisdictions on the other, to the extent to which Victoria and the ACT recognise privacy as a human right. While the Commission recognises that the context in which the human rights legislation of these jurisdictions is operative is limited, that legislation is at least indicative of a trend towards the greater protection of privacy within Australia. There is also significant divergence between the statutory laws of the various Australian jurisdictions dealing with privacy regulation.*
> - *It is possible that the enactment of a statutory cause of action for invasion of privacy in New South Wales would influence the development of the common law of Australia. If NSW were to enact a cause of action for invasion of privacy, the general law would continue to protect privacy incidentally in the actions mentioned above. However, in the course of deciding cases, courts in NSW would confront the relationship between the statutory cause of action and the general law. If the statutory right to protection of*

[6] Australian Law Reform Commission, *Report 108: For Your Information: Australian Privacy Law and Practice*, [3.11].

privacy were broadly based, this would likely provoke incisive analyses of the rationale and boundaries of the relevant general law causes of action. In turn, this may provide the impetus to the development of a more general action for invasion of privacy at common law, which, at least in theory, would have the potential to be more flexible, and perhaps more expansive, than the statutory right.

- *The context of this reference, which involves collaboration between the Commission and the ALRC, at least ensures that the objective of achieving consistency between New South Wales and federal statutory law is constantly in view."*

To these reasons we add the following:

- If NSW were to engage in privacy law reform, this would not necessarily pose an obstacle to national privacy law reform at some point in the future. This is especially true if the NSW legislative response adhered closely to the recommendations contained in the ALRC's 2014 report. The implementation of these recommendations in NSW may have the further effect of empowering other states to do the same, thus enabling a smoother path for national law reform in accordance with these recommendations in the future.
- The VLRC, in its 2010 report 'Surveillance in Public Places,' recommended *"the introduction of two statutory causes of action for serious invasions of privacy."* In doing so, the VLRC considered the desire for national legislative consistency as an encouraging factor weighing in favour of reform at the state level, rather than a discouraging factor favouring a conservative approach until the Commonwealth moves: *"As national harmony of privacy law is likely to be a long-term goal, Victoria is well placed to demonstrate leadership in this area."* Ultimately, the VLRC did not express any serious concerns about enacting privacy law reform before the Commonwealth.

2. Dealing with revenge porn: what is the best approach?

This inquiry has partly been prompted by the issue of revenge porn, a phenomenon of increasing concern in the digital age. The development of communications and surveillance technologies does not change the principles which would determine whether NSW should adopt a privacy tort, but they do

render the issue more pressing. Therefore, the context of this inquiry only serves to reinforce the primary CCL position, that we need a statutory cause of action to vindicate our right to privacy.

However, some legislatures have sought to address the problem of revenge porn through the criminal law. A private members bill has been proposed in the Commonwealth Parliament, which would amend the *Criminal Code* to introduce several offences relating to the use of a carriage service for private sexual material.[7] A similar amendment was made to the Victorian *Crimes Act* last year. In NSW, a sender of revenge porn might fall foul of s 545B of the *Crimes Act 1900* (NSW), which criminalises intimidation or annoyance used to compel someone to do something or to abstain from doing something.

CCL does not take a view on the introduction of criminal penalties for the use of revenge porn. However, it argues that criminal offences should not preclude civil remedies being made available to victims. The attraction of a civil cause of action is that it would offer the victim a remedy: either an injunction forcing the removal of the material, probably the greatest concern for the victim, or damages. A civil cause of action would also involve a less onerous standard of proof than a criminal offence. A statutory tort is also more responsive to the privacy considerations at play: Commonwealth Labor MP, who has proposed the Commonwealth Bill, has said that he does not see revenge porn as a privacy issue, but rather as a "consent issue and a respect issue".[8] While the latter considerations are certainly at play, a great deal of the harm of revenge porn comes from the exposure of traditionally private experiences to the public sphere: it is the violation of the victim's privacy that causes the hurt.

The law should act to vindicate this interest in privacy. In any case, CCL does not see any issue with revenge porn being dealt with both by criminal law and civil law. Were NSW to consider introducing a

[7] See https://d3n8a8pro7vhmx.cloudfront.net/australianlaborparty/pages/3047/attachments/original/1442179037/Exposure_Draft_-_Criminal_Code_Amendment_(Private_Sexual_Material)_Bill_....pdf?1442179037.

[8] See http://mobile.abc net.au/news/2015-09-03/labor-mps-propose-private-members-bill-banning-revenge-porn/6747764.

more targeted criminal offence to counter revenge porn that should not deter it from proceeding with a statutory privacy tort.

3. Existing methods of dealing with breaches of privacy – are they sufficient?

CCL considers that in light of the costs and stresses associated with litigation, it is crucial that the NSW response to privacy challenges also contemplates out-of-court mechanisms for resolving privacy breaches.

Citizens in NSW have a patchwork of options when they believe their privacy has been breached. In NSW, an affected person could turn to the Information and Privacy Commission, or to the Commonwealth's Office of the Australian Information Commissioner. Several concerns exist with respect to both organisations.

In relation to the Commonwealth OAIC:

- A large number of organisations are exempt from the *Privacy Act*, and any complaint regarding them will be rejected. This includes small businesses (those with $3 million or less in annual turnover), which constitute 94% of businesses.
- A finding by the Commissioner that the privacy principles have been breached is non-binding and must be taken to the Federal Court to be enforced.
- The process of making a complaint and having it resolved can be very drawn out and daunting.

In relation to the NSW IPC:

- The Commission can only deal with complaints about breaches of privacy by public sector agencies, local council, universities, or entities dealing with health information. That is, it can only deal with a small sub-section of privacy breaches.

- The outcome is non-binding unless a report is produced to carry on to the next step of applying to the NSW Civil and Administrative Tribunal.
- As with the OIAC, conciliation can be drawn out.

CCL suggests that the Committee consider the difficulties with access to justice, speed and efficiency that a victim of a privacy breach might face, whether they decide to litigate on the basis of a statutory tort, or elect to take a more informal route to vindicate their rights. As things stand, there are considerable barriers to a speedy resolution of a privacy breach, which a statutory tort would not solve.

CCL hopes this brief submission of our views is of assistance to the deliberations of the Committee. We would welcome an opportunity to expand on our views if the Committee holds public hearings as part of the Inquiry. This submission was written by Hannah Ryan, member of the NSWCCL Executive, on behalf of the NSWCCL.

Yours sincerely,

Dr Lesley Lynch
Secretary NSWCCL

NSW COUNCIL FOR CIVIL LIBERTIES SUBMISSION

ON

ISSUES PAPER: A COMMONWEALTH STATUTORY CAUSE OF ACTION FOR SERIOUS INVASION OF PRIVACY

General Comments

The NSW Council for Civil Liberties (CCL) applauds the Government's reactivation of the discussion on the obvious and pressing need for more effective protections for personal privacy in Australia.

It has been a source of disappointment that the Government has, to date, sidelined the 2008 recommendations of the Australian Law Reform Commission (ALRC) advocating a statutory remedy for serious breach of personal privacy.[9]The publication of this Issues Paper honours the Government's earlier commitment to return to these (and other) recommendations following work on a stage 1 implementation of the ALRC Report[10].

CCL is hopeful that the Government is acting in good faith and this time around will make a decision to act on the ALRC's recommendation that Australia should implement a cause of action for serious invasion of privacy and proceed quickly to implementation. We therefore welcome the opportunity to respond to the issues paper: **A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy (Issues Paper)[11]**and reaffirm our longstanding position supporting stronger privacy protections, including a statutory cause of action for serious breach of personal privacy.[12]

It is not, however, our intention to ague again the broad case for this. The arguments demonstrating the need for more effective protection of privacy, and specifically, for a statutory cause of action for serious invasion of personal privacy, have been extensively and repeatedly debated in recent years, including in

[9] Australian Law Reform Commission Report on Australian Privacy Law and Practice, 2008, Report 108 (ALRC Report 108) , chapter 74.
[10]Australian Government First Stage Response to Australian Law Reform Commission Report on Australian Privacy Law and Practice, 2008.Quoted in Issues Paper 2011, p.8
[11]Issues Paper: A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy, Department of the Prime Minister and Cabinet, Commonwealth of Australia, September 2011 (Issues Paper 2011)
[12] CCL made a submission to the ALRC Inquiry into Privacy Legislation in which we addressed this matter. We argued in support of a statutory cause for action then and our position remains the same NSWCCL Submission to the ALRC Inquiry into Privacy Legislation, 31 /1/2007 pp.3ff.

the context of three reviews by separate Law Reform Commissions (LRCs).[13] These reviews generated an enormous input of information and argument from interested groups/agencies and individuals across all sectors.

All three LRC's concluded that, all things considered, a statutory cause of action for serious invasion of privacy should be legislated in Australia and advised their governments accordingly. All three LRC reports gave detailed and careful consideration to how this could best be done so as to properly and wisely balance the various countervailing public interests and other relevant factors, and produce a reasonable, fair and effective statutory remedy.

It is clear that the substantive arguments have been made persuasively. What is now needed is the political will to take this forward.

Given the Australian Government's disappointing decision to reject the widely supported recommendation that it should legislate for a Human Rights Charter for Australia[14], it would be some compensation for the community to have an effective remedy for gross invasion of the fundamental right to privacy legislated in this term of government.

The current Issues Paper is sensibly drawn from the findings of the three LRC reviews and largely directs our attention to the matters of detail that need to be resolved to allow legislation to be drafted and enacted.

CCL agrees that this is the appropriate focus for what is hopefully the last round in the discussion of this important matter prior to Government action to bring forward appropriate legislation.

Summary of CCL Position on Major Issues for Resolution

CCL advocates:

- Legislation for a statutory cause of action for serious invasion of privacy to be drafted and enacted in this term of Government
- The balancing of interests aspects should constitute a separate defence
- Protection of the public interest in freedom of expression must be appropriately recognised by at least:
    - Inclusion of a limited definition of public interest in a non-exhaustive list of defences
    - The limited definition of public interest to cover 'matters of concern to the public interest'
    - No blanket exclusions of journalists/media organisations from the ambit of the legislation

[13] These reviews resulted in three reports: New South Wales Law Reform Commission, Report 120, Invasion of Privacy (2009); (NSWLRC Report); Victorian Law Reform Commission , Surveillance in Public Places: Final Report 18, 2010; (VLRC Report) and the ALRC Report 108 in 2008.

[14] This was the cornerstone recommendation of the National Human Rights Consultation Committee's Report September 2009.

- Serious consideration for separate legislation for the right to freedom of expression including freedom of the press.
- Complementary action to strengthen the powers of the Australian Information Commissioner

RESPONSE TO SPECIFIC QUESTIONS

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

   Yes. The need for additional protections has been well documented. It predates recent technological innovation. But recent advances in communication and surveillance technology make the need for stronger and additional protections for personal privacy increasingly urgent.

   The Issues Paper summarises the range, scope and impact of the major new technologies that are impinging on personal privacy. There is no doubt that the changes underway are dramatic and transformational.

   The Government's related Convergence Review reflects legitimate concern about the impact of new technology in the communications area. From a privacy perspective, these concerns also encompass the dramatic extension of surveillance capacity and practice in public and private spheres and of personal data capture and dissemination by an increasing range of small and large enterprises and government agencies.

   The challenge of modern technology to privacy is enormous and profound. The famous assertion by the founder of Facebook that privacy is no longer a 'social norm' was presumably meant to be a celebration of the erosion within the community of the concept and valuing of privacy. Given that Facebook's interests are self-evidently at odds with an individual's privacy interests, this was not a surprising perspective for the organsiation's founder to have taken. Facebook users are its product and it has an obvious commercial interest in acquiring and making available, as much information about its users as it can.

   This dismissive perspective on the continuing relevance of personal privacy in our modern, technologically advanced world, is expressed with growing frequency and often by people associated with organisations with an interest in limiting constraints on communication or surveillance technologies. For example, during a major, public debate on CCTV surveillance programs in Sydney in 2010, several prominent, speakers queried the continued relevance of personal privacy as a genuine concern in our modern hi-tech society. The then Victorian Commissioner of Police was blunt in her assertion that the expressions of concern by other speakers about the invasion of privacy through CCTV surveillance were exaggerated. Her position rested on the standard dismissive query: 'what do people have to hide?' But the Commissioner also asserted a critical generational change: younger people, with a lifetime experience of web based social media, instant information sharing and a myriad of cheap,

communication and recording devices, no longer cared about personal privacy. (IQ^2 Debate Series, Sydney 6/7/2010).

Countering this trend, there is much evidence that the community is increasingly aware of, and concerned by, the loss of control they have over personal information once it hits the world wide web or is captured by the myiad of government and commercial enterprises requiring some variation of our personal information.

One manifestation of this concern has been the growing demand for stronger controls over personal information on social networks. For example, despite the views expressed by its founder, Facebook has, in recent years, acted to significantly improve both user security and the privacy controls a user can utilise. (See different default levels of information sharing on Facebook from 2005 to 2010: http://mattmckeon.com/facebook-privacy/ and Summary of privacy options that may be set mid-2010: http://flowingdata.com/201005/17/facebook-privacy-options-untangled/)

This is, in part, a forced response to competition from Google, but is a clear signal that, even the giant social media corporations are registering that the public's demand to maintain control over personal and private information cannot be ignored.

CCL agrees that additional ways of protecting individuals' privacy are essential and urgent, given the profound and increasing impact of surveillance and communication technology. Additional statutory protections must be one element.

2. ***Is there a need for a cause of action for serious invasion of privacy in Australia?***
Yes.

While there is a range of existing protections/remedies relating to privacy in Australia, there are major weaknesses and gaps in this protection.

The existing privacy legislation at Commonwealth and State levels does not provide protection or remedy for many kinds of invasion of personal privacy. The focus of existing legislation is on data protection. Related legislation in the fields of defamation, breach of contract, trespass and telecommunications, only cover some aspects of invasion of privacy and leave other gross breaches without remedy.

As demonstrated in all three Law Reform Commission Reports on this topic, common law protection of personal privacy in Australia is undeveloped and unlikely to provide an effective route for appropriate protection in any reasonable timeframe.[15]

CCL agrees with the view that legislation 'may provide a clearer legal structure for the cause of action, and could provide for a more flexible range of defences and remedies than would be possible if the cause of action grew on a case-by-case basis within the common law.'[16]

[15] Summarised in Issues Paper 2011, pp13ff.
[16] Issues Paper 2011, p.29

NSWCCL's experience of privacy commissioners/agencies at state and commonwealth levels is consistent with the widespread perception that they lack adequate powers and resources. They have consequently tended to a greater timidity than some other public watchdog agencies in the interpretation of their role and practice. Conciliation has an important role in the remedying of privacy breaches, but the predominant and almost exclusive focus on conciliation cannot provide effective protection nor remedy for serious invasion of privacy.

Similar observations can be fairly made about the efficacy of the Press Council and the Australian Communications and Media Authority (ACMA) in relation to the protection of personal privacy.

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

By statute. (See response to 2)

CCL has long held the view that a statutory protection is to be preferred in the Australian context on the grounds of coherence and clarity, timeliness and accessibility.

There is wide agreement that common law in relation to a privacy tort in Australia is undeveloped and unlikely to progress significantly in the foreseeable future. But in any case, a common law development would have to fit within existing types of action (eg breach of confidence), whereas the creation of a statutory cause of action would be both more certain and more exact.

All three LRC's have examined these options in recent years and are unanimous in their recommendation of a statutory instrument.

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

No. Offensive is a more appropriate standard. This should be one of a number of matters to be taken into account- as proposed by the NSWLRC.[17]

CCL notes the divergence of views across the LRC's on this[18]. We agree that the standard must be sufficient to deter trivial or frivolous action.

But, we share the view that there is a strong probability that 'highly offensive' would skew the standard to the extreme end of 'offensiveness' and thereby result in an inappropriately limited definition of the standard.

The combination of 'serious invasion' of privacy and 'offensive' to a person with ordinary sensibilities is sufficient and appropriate and provides a reasonable and balanced criterion.

[17] See list of matters in response to question 8 below.
[18] Summarised Issues Paper 2011, pp 32-3.

While not accepting the necessity, CCL would not object to a more moderate intensifier than 'highly offensive'. The ALRC had initially proposed 'substantial offence'[19]. This would effectively exclude the trivial and the offensive without seriously limiting the scope towards only the 'most' offensive of invasions.

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)?***

The balancing of interests should constitute a separate defence.

CCL shares the views of the VLRC (and the initial view of the ALRC) that the most persuasive argument, and most important factor, in deciding this matter, is that the plaintiff should not have to prove a negative.

Conversely, CCL shares the view that it is appropriate that the defendant should have to prove the public interest defence for what would otherwise be an unlawful action. In addition, the defendant is more likely to have the evidence and is therefore better placed to bear the burden of proof.

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

CCL recognises this to be a pivotal issue. It is of central importance that the statutory cause of actions establishes an appropriate balance between the individual right to privacy and freedom of expressions –including freedom of the press and artistic expression. Both are necessary to a civil and democratic society.

Experience with defamation cases demonstrates that such countervailing interests can, with appropriate legislation, be wisely and appropriately balanced by the courts.

In addition, CCL considers the development of a legislative protection for freedom of speech, including freedom of the press, would be an appropriate and effective response to allay the fears that many people have about the possible, unintended effects on free speech and the free press of the proposed privacy tort. It would also be a significant strengthening of protection for a human right fundamental to democracy in Australia - given the lack of an Australian Bill of Rights or Human Rights Charter and the limitation of the implied constitutional right to freedom of 'political' expression[20].

CCL supports the following:

- Inclusion of public interest as a defence (in a non exhaustive list)
- Inclusion of limiting definition of 'public interest' from the expansive 'anything the public has an interest in' to 'matters of concern to the public interest[21]
- No exclusion of journalists, media organisations from the ambit of the legislation

[19] This was the proposal in the ALRC Discussion Paper quoted ALRC Report p32
[20] This position is argued in the submission to this Issues Paper by the Castan Centre for Human Rights Law , October 2011, pp13 ff.
[21] See discussion of VLRC position in Issues Paper 2011, p 37.

- Serious consideration for the separate legislation for a right to freedom of speech including freedom of the press.

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?

No. 'Negligent' should not be excluded as a fault element.

CCL notes the variety of views across (and within) the LRCs. We also recognise that 'reckless' can be interpreted expansively and may encompass a range of 'negligent' behaviour/acts. However, there would be unnecessary uncertainty as to coverage of a range of negligent actions which resulted in a serious invasion of privacy. There is no persuasive reason to exclude 'negligent'. On this we accept the line of argument put forward by the VLR that exclusion is unnecessary, and that it is likely there will be serious invasions of privacy in which the actions are so grossly negligent (but unintentional) breaches, that civil action ought be possible. [22]

The legislation should either include 'negligence' as well as 'intentional' and 'reckless' as specified fault elements or remain silent on this aspect. CCL is less certain about the merits of excluding 'accidental' but on balance thinks it probably wiser not to exclude it.

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?

Yes it would be useful to include other relevant matters.
Yes the matters included in NSWLRC draft bill are appropriate. They are:

- *is the subject matter of the complaint private or not ?*
- *is the nature of the invasion such as to justify an action?*
- *does the relationship between the parties affect actionability ?*
- *does the claimant's public profile affect actionability ?*
- *does the claimant's vulnerability affect actionability?*
- *does any other conduct of the claimant and the defendant affect actionability?*
- *what effect has the conduct had on the claimant?*
- *does the defendant's conduct contravene a statutory provision*

The list should be non-exhaustive.

As noted in our response to (5), public interest factors should be considered as defence not as basis for cause of action.

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?

[22] Quoted in Issues Paper 2011, p38. The VLRC gives the example of a medical practitioner leaving a patient's highly sensitive medical records on a train or tram.

CCL considers the inclusion of 'a non-exhaustive list of activities which could constitute an invasion of privacy' in the legislation as useful. A non-exhaustive list is not likely to limit other appropriate, actionable activities

CCL has no preference as to whether this list should be included in in the legislation or the explanatory material.

The ALRC list includes the obvious activities that should be covered.[23] Less obvious matters will be left to the court's judgement. Attempts to define possible, non-obvious activites would be not be useful.

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

CCL notes the different approaches of the LRC's to the defences that should be listed.

CCL considers that:

- public interest considerations should be included in the list of defences - see response to (5).
- Consent should also be considered as a defence and not integrated into the cause for action.

  For both these factors, CCL argues that it is not appropriate for the plaintiff to have to prove a negative.

Beyond these, the different lists/approaches of the LRCs all have merit and a high degree of commonality. CCL considers that at least the following should be included in a list of defences:

- Public interest considerations including at least
  - the implied constitutional freedom of political communication
  - freedom of expression and the related interest of the public to be informed about matter of public concern

  In supporting public interest considerations CCL supports the limiting definition of the VLRC:

  'not all matters of interest to the public are matters of public interest that ought to deprive a person of their right to privacy. In particular, the public interest defence ought not to extend to matters that satisfy a curiosity about the private lives of others, but serve no other purpose relevant to the common good'[24]
- Consent

[23] a) there has been an interference with an individual's home or family life; b) an individual has been subjected to unauthorised surveillance; c) an individual's correspondence or private written, oral or electronic communication has been interfered with, misused or disclosed; or d) sensitive facts relating to an individual's private life have been disclosed. Quoted in Issues Paper 2011, p41.

[24] VLRC Report , p157.

- Act or conduct was incidental to the exercise of a lawful right of defence of person or property
- Act or conduct was required or authorised by or under law
- Publication of the information was, under the law of defamation privileged

The list should be non-exhaustive and, as proposed by the ALRC, should be allowed to evolve over time.

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. There should be no exemptions for organisations or types of organisations.

The combination of threshold requirements and defences will provide adequate means of managing/blocking inappropriate actions.

CCL considers this to be a critically important issue. The source of a large proportion of serious privacy breaches are the kinds of organisations that will argue for exemption. Experience of other kinds of legislation (eg Freedom of Information) has demonstrated that these blanket exemptions can seriously undermine the effectiveness of the protection/right meant to be provided by the legislation.

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

Yes - noting that they are a non-exhaustive list.

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

No. CCL does not consider it necessary or appropriate to specify a maximum award for non-economic loss. It is not likely that damages will be excessive.

The legislation should provide a disincentive to breaching personal privacy. In the case of corporations, a maximum cap of $150,000 on damages, as the NSWLRC proposes, will weaken the disincentive power. Courts should be allowed flexibility to propose proportionate and reasonable damages.

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. This is consistent with torts of trespass and defamation and with privacy legislation in other jurisdictions.

It is difficult to quantify loss in the kinds of situations where breach of privacy has occurred, and the loss is not merely financial.

CCL considers the most persuasive argument rests on the fact that privacy is a fundamental human right. Serious breach of privacy should therefore be actionable at law regardless of whether or not damages have been incurred.

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

    Yes. CCL supports the option of settlement without litigation, consistent with the defamation process and, more broadly, consistent with the principle of the Civil Dispute Resolution Act 2011.

    It is important however, that there are checks to ensure that the plaintiff has voluntarily and genuinely accepted this process.

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

    Yes. Human rights are applicable only to natural persons and not to corporations.

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

    Yes. CCL accepts the arguments of all three LRC's on this matter.

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

    CCL notes the different views of the VLRC (three years to be consistent with period for personal injuries and outer limit of defamation) and the NSWLRC (one year with court discretion to extend to 3 years consistent with defamation law).

    CCL considers a one year period with court power to extend to three years to be appropriate.

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

    CCL supports single federal legislation applicable across Australia and jurisdiction could be conferred on the federal court and magistrates court.

    There would also be merit in considering the Administrative Appeals Tribunal as an appropriate forum. The AAT would be a speedier and certainly a more affordable and accessible forum.

This submission was prepared on behalf of the NSW Council for Civil Liberties by Dr Lesley Lynch in consultation with members of the NSWCCL Privacy Sub-Committee.

Dr Lesley Lynch

Assistant Secretary and Convenor Privacy Sub-Committee
NSW Council for Civil Liberties

18th November 2011.

NSW Council For Civil Liberties
The New South Wales Council for Civil Liberties (CCL) is committed to protecting and promoting civil liberties and human rights in Australia.

CCL is a Non-Government Organisation (NGO) in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people.