

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

Organisation: Arts Law Centre of Australia

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4 September 2015

The Director
Standing Committee on Law and Justice
Parliament House
Macquarie St
Sydney NSW 2000

Dear Standing Committee on Law and Justice,

**RE: SUBMISSION IN RELATION TO INQUIRY INTO REMEDIES FOR THE SERIOUS INVASION
OF PRIVACY IN NEW SOUTH WALES**

The Arts Law Centre of Australia (**Arts Law**) is pleased to comment on the NSW Inquiry into Serious Invasions of Privacy.

About the Arts Law Centre of Australia

Arts Law is the national community legal centre for the arts. Established in 1983 with the support of the Australia Council for the Arts, Arts Law provides artists and arts organisations with:

- Specialist legal and business advice;
- Referral services;
- Professional development resources; and
- Advocacy.

About our clients and their relevance to the privacy discussion

Arts Law works nationally to support 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 not only in metropolitan centres, but also contact us from regional,

rural and remote parts of Australia and from all Australian states and territories. Arts Law provides expert legal and business advice, publications, education and advocacy services to more than 4,000 Australian artists and arts organisations operating across the arts and entertainment industries each year.

Arts Law makes this submission on behalf of our broad client base including those who practice as:

- visual artists including photographers;
- authors including journalists;
- film makers including documentary film makers; and
- peak or professional organisations which represent the interests of the above clients.

The relevance of the Discussion Paper to our clients is illustrated by the fact that 250 of the approximate 4500 legal problems we have addressed in 2011 - 2014 relate to:

- privacy (including of information, and personal privacy);
- defamation (including relating to the use of images and film or information about others);
- confidentiality (including of information about and images and film of others); and/or
- trespass (personal and property).

It is the general position of Arts Law that there is no need to introduce a statutory cause of action for serious invasion of privacy. Further Arts Law believes that the existing remedies for a serious invasion of privacy are sufficient.

Arts Law has made numerous submissions on the issue of invasion of privacy from 2007 to 2014. The purpose of this letter is to summarise that position, with reference to previous submissions, and illustrate their relevance to the current Terms of Reference posed by the Standing Committee on Law and Justice.

1 (a) The Adequacy of Existing Remedies

The existing remedies for serious invasions of privacy are sufficient. The clearest expression of this can be found in Arts Law's 2011 submission on the Commonwealth Government's Issues Paper, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy (2011 Submission)*¹. Arts Law's 2011 Submission at pages 6-8 detail 11 different statutory and equitable means by which an individual may protect their privacy and seek remedies for a serious invasion of privacy.

Further, *Wilson v Ferguson* [2015] WASC 15, a recent decision of the Supreme Court of Western Australia further illustrates the adequacy of the equitable action of breach of confidence and its adaptability to new technological developments facilitating serious invasions of privacy.

In the media release accompanying the current call for submissions, Committee Chair, the Hon Natasha Maclaren-Jones MLC commented² that the increased availability of affordable surveillance drones is impacting privacy. Arts Law notes the current *Civil Aviation Safety Regulations 1998* (Cth) that prohibit the flying of drones over populated areas and include a clear penalty regime provide adequate remedies for individuals that have had their privacy invaded by this technology. We also note the ongoing review and development of this area of regulation.

1 (b) Should a statutory cause of action for serious invasions of privacy be introduced?

Arts Law does not support the introduction of a statutory cause of action for serious invasion of privacy. Aside from the adequacy of remedies currently in place, Arts Law submits that a statutory cause of action would have detrimental effects on the arts community that would substantially outweigh any other benefits. Arts Law's 2011 Submission, in addition to the 2014 Submission on the Serious Invasions of Privacy in the

¹ See Appendix 1 - Arts Law Centre of Australia submission in relation to Issues Paper: '*A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*' 2011.

² New South Wales Legislative Council, Standing Committee on Law and Justice, 'Serious Invasions of Privacy in New South Wales – How Adequate are our Remedies?' (Media Release, 6 July 2015).

Digital Era Discussion Paper (**2014 Submission**)³ and 2013 Submission on the ALRC's Serious Invasion of Privacy in the Digital Era Issues Paper (**2013 Submission**)⁴, echo Arts Law's concerns about protecting freedom of expression (2014 Submission pages 3-5) and the chilling effect a statutory cause of action would have on the arts community (2013 Submission page 4). Further due to Australia's lack of a strong human rights framework with express protections for freedom of expression, Arts Law does not support further limits on artistic freedoms without the balance of an enshrined right to freedom of expression (2014 Submission page 3). Finally, Arts Law submits that the creation of a statutory cause of action in NSW would lead to a discrepancy between the laws of NSW and those of other states and territories (Arts Law's **2007 Submission**⁵ on the NSWLRC Consultation Paper on Invasion of Privacy at page 3).

Further consultation with Arts Law and its stakeholders

Please contact Robyn Ayres (Executive Director) at

if you would like us to expand on any aspect of this submission, verbally or in writing. We are also pleased to be of any assistance in meeting with you prior to, or during the preparation of the final report.

Yours faithfully

Robyn Ayres

Executive Director

Arts Law Centre of Australia

³ See Appendix 2 - Arts Law Centre of Australia Submission in relation to *'Serious Invasions of Privacy in the Digital Era Discussion Paper'* 2014.

⁴ See Appendix 3 – Arts Law Centre of Australia Submission in relation to Issues Paper 43: *'Serious Invasion of Privacy in the Digital Era'* 2013

⁵ See Appendix 4 – Arts Law Centre of Australia submission in relation to *Consultation Paper 1: Invasion of Privacy* 2007.