Redfern Legal Centre

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

12 May 2014

Attention: The Executive Director

Please find attached our policy submission: "*Ensuring Access to Justice for Serious Invasions of Privacy in the Digital Era*" in response to your inquiry into Serious Invasions of Privacy in the Digital Era".

We would welcome the opportunity to meet with you to further discuss our submission.

Yours faithfully,

Redfern Legal Centre

Jacqui Swinburne
Acting Chief Executive Officer

Redfern Legal Centre

SUBMISSION: ENSURING ACCESS TO JUSTICE FOR SERIOUS INVASIONS OF PROVACY IN THE DIGITAL ERA

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1. Introduction: Redfern Legal Centre

Redfern Legal Centre (**RLC**) is an independent, non-profit, community-based legal organisation with a prominent profile in the Redfern area.

RLC has a particular focus on human rights and social justice. Our specialist areas of work are domestic violence, tenancy, credit and debt, employment, discrimination and complaints about police and other governmental agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

2. RLC's work in Privacy

RLC has extensive experience in assisting clients to exercise their existing privacy protections under Commonwealth and New South Wales (**NSW**) legislation. This includes those rights currently afforded under the *Privacy Act 1988* (Cth), *Privacy and Personal Information Protection Act 1998* (NSW) (**PPIP Act**) and *Health Records and Information Privacy Act 2002* (NSW) (**Health Records Act**) in relation to the use (or misuse) of personal information collected, used and disclosed by government and certain private bodies. We also have experience in representing clients in private disputes where there has been an intrusion (including by unlawful surveillance) upon their seclusion or private affairs whether in the workplace, home or elsewhere. Some examples of where our clients have suffered serious invasions of their privacy include the following:

Claude (not his real name) had been a Housing NSW tenant for over ten years. He is in his 50s and suffers from a mental illness. Claude received a Notice of Termination from Housing NSW after he experienced an acute schizophrenic episode and caused damage to his property. Claude was a long-time patient of a Mental Health Clinic and RLC requested a letter of support from one of the Clinic's doctors. Later, RLC discovered that the same letter, with the addition of extra information that could prejudice Claude's case to keep his tenancy, had been sent unsolicited to Housing NSW.

Claude was at risk of losing his tenancy but luckily, RLC was able to successfully negotiate with Housing NSW for a transfer to another, more suitable property without the need to go to the Consumer, Trader and Tenancy Tribunal. In the absence of such an agreement, it is very likely that the improper sharing of information between the Clinic with Housing NSW would have severely disadvantaged Claude and caused him to lose his tenancy and become homeless.

Katherine (not her real name) has a chronic medical condition that requires regular treatment. She obtained a interim Apprehended Domestic Violence Order (ADVO) because of the intimidating behavior of her former partner. When the matter was before the Local Court, the defendant's solicitor tendered a letter from Katherine's treating physician which improperly disclosed information relating to her health and treatment without her knowledge or consent. This was a serious invasion of Katherine's privacy which caused her to suffer considerable emotional distress.

RLC filed an application in the Administrative Decisions Tribunal NSW alleging breaches of the PPIP Act and HRIP Act after the relevant health agency failed to respond to her complaint. Our client sought an apology and compensation. The matter was ultimately

settled.

Many of our clients, like those in the two examples set out above, are from socio-economically disadvantaged backgrounds, suffer from disabilities or are otherwise in a vulnerable position within society. They are often unaware of their legal rights or do not have the means to enforce these rights. Privacy law, in particular, is an area in which the average person's expectation of legal protection is not necessarily reflected in the practice and procedure of the relevant courts and tribunals.

3. RLC's view in summary

RLC welcomes the opportunity to comment on the discussion paper circulated by the Australian Law Reform Commission (**ALRC**) proposing a new Commonwealth Act that creates a statutory cause of action for serious invasions of privacy. It is our position that a statutory cause of action for serious invasions of privacy is a necessary and overdue legislative reform that enhances and protects an individual's right to privacy in the 21st century.

Our main concern is that the proposed statutory scheme should ensure that all individuals within society are given a realistic opportunity to protect their legislative rights. Although a statutory tort provides a mechanism to protect an individual's right to privacy (or remedy a breach of that right), that mechanism must be easily accessible if it is to fulfill its stated objectives. Accordingly, whilst it is proposed that federal, state and territory courts be given jurisdiction to hear an action for serious invasion of privacy under the new Act, it is important to keep in mind that the high cost of commencing litigation may result in only certain classes of people having the means to protect their privacy rights. It is therefore submitted that any statutory mechanism should contain safeguards that ensure all individuals are able to access the available mechanisms necessary to enforce their statutory rights.

4. RLC's recommendations

These recommendations are discussed in response to the following proposals and questions contained in the ALRC's Discussion paper.

Section 9 - Forums

Proposal 9–1: Federal, state and territory courts should have jurisdiction to hear an action for serious invasion of privacy under the new Act.

It is our experience that it is often people from socio-economically disadvantaged backgrounds that are the victims of privacy violations. These people are already in a vulnerable position in society and have difficulty in accessing formal and informal mechanisms to either prevent their privacy from being violated or taking the necessary steps to remedy any such violation. Accordingly, it is vital that any statutory mechanism that creates a cause of action for serious invasions of privacy also ensures that there is a low-cost forum that can be accessed by those from socio-economically disadvantaged backgrounds. This concern is discussed in more detail below in response to **Question 11-1** put forward by the ALRC.

As the ALRC recognises, several states and territories have created tribunals that are able

to hear civil matters. The advantage of these tribunals is that they provide a relatively efficient and cost-effective way to resolve disputes and thereby allow a wider section of the community to access justice. We believe, for example, that the PPIP Act is much more effective in protecting the privacy rights of individuals in NSW because it includes a right of review in the NSW Civil and Administrative Tribunal (**NCAT**).

We accept that the there are Constitutional and other difficulties in the Commonwealth vesting judicial power in administrative bodies at either the state or federal level. Accordingly, as the ALRC suggests, the jurisdiction to hear actions for serious invasions of privacy under the new federal statute should be vested in the federal and state courts.

At the federal level, the most appropriate forum to hear such matters would be the Federal Circuit Court (**FCC**). We do not consider that there is a need for the Federal Court of Australia (**FCA**) to also be vested with original jurisdiction to hear matters at first instance as there already exists a right of appeal from the FCC to the FCA as well as the power of the FCC to transfer a matter to the FCA in appropriate cases.[1]

It is also our view that any statutory scheme must facilitate affordable preliminary discovery or other means of determining the identity of the person/agency who committed the breach in order to establish proof of parties involved. It is our experience that it is often difficult for individuals to ascertain the identity of the person, group or organisation who violated their privacy, particularly when it involves personal information that is contained in a website or other electronic platform. A cost-effective mechanism for preliminary discovery would assist individuals in identifying the appropriate parties and reduce the risk of misdirected proceedings being commenced.

The costs and complexities involved in litigation are discussed in more detail in section 15 below relating to new regulatory mechanisms.

Section 11 - Remedies and costs

Proposal 11–1: The new Act should provide that courts may award compensatory damages, including damages for the plaintiff's emotional distress, in an action for serious invasion of privacy.

We agree with the ALRC's proposal that courts be given the power to award compensatory damages for serious invasions of Privacy. This would be consistent with the approach taken in NSW in relation to breaches of the PPIP Act, which allows NCAT to award damages.[2]

In our view, it is essential that courts also be given the power to award damages for an individual's emotional distress as a result of a serious invasion of privacy. As the ALRC recognises, serious invasions of privacy commonly cause emotional distress or harm to a person's dignitary interests irrespective of whether there was also an economic loss. For our clients, many of who are socio-economically disadvantaged or marginalised, there may be little economic loss arising from a breach of their privacy as they are unemployed and/or have incapacitating disabilities and rely solely on government benefits for support.

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[1] See s 39 of the Federal Circuit Court Act 1999 (Cth)
[2] See s 52(2)(a) of the PPIPA Act

Nor may they experience an injury that is either physical or amounting to a psychological disorder. It is the emotional damage or loss to their dignity and the hurt and loss of trust caused by the privacy breach that is their greatest concern and one that in our view often necessitates an award of damages to compensate for this loss.

Our experience in relation to the compensation regime under the PPIP Act is that NCAT places too much focus on whether a breach of privacy has caused a person economic harm and injury. The ALRC's proposal will not only provide a statutory basis for damages arising from emotional distress but will also raise awareness of the importance in assessing emotional loss arising from a breach of privacy.

Proposal 11–6: The total of any damages other than damages for economic loss should be capped at the same amount as the cap on damages for non-economic loss in defamation

We agree with the ALRC's view that any cap on damages, other than damages for economic loss, should be consistent with the cap on damages for non-economic loss in defamation. Serious invasions of privacy have the potential to cause significant harm to an individual and require a remedy that is more than superficial or tokenistic.

Our view is that a number of the statutory regimes currently in place that seek to protect an individual's right to privacy provide inadequate compensation schemes. For example, in relation to alleged breaches of the *Health Records and Information Privacy Act 2002* (NSW), NCAT only has the power to award damages not exceeding $40,000 if the respondent is a body corporate, or not exceeding $10,000 in any other case, by way of compensation for any loss or damage suffered by reason of the respondent's conduct. Our experience is that the maximum amount of damages is rarely (if ever) awarded, meaning that a victim is insufficiently compensated for serious breaches of their privacy under this regime.

Question 11–1 What, if any, provisions should the ALRC propose regarding a court's power to make costs orders?
One consequence arising from the proposal to vest federal and state courts (instead of federal and/or state tribunals)[3] with jurisdiction to hear matters in connection with the proposed statutory tort, is the potential for individuals to be discouraged from taking action to enforce their privacy rights due to the costs of commencing proceedings and the risk of an adverse costs order if the application is unsuccessful. This is particularly the case for individuals from socio-economically disadvantaged backgrounds.

For general law matters commenced in the FCC, an unsuccessful applicant is likely to have to pay the respondent's costs in an amount exceeding $5000.[4] It is significant to note that the majority of general law matters heard by the FCC involve commercial disputes.

By contrast, there are no adverse costs consequences for the majority of applicants who commence proceedings in the FCC under the *Fair Work Act 2009* (Cth) (**FWA**), as costs are only to be awarded if the proceedings were instituted vexatiously or without reasonable

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[3] For example, parties before NCAT is to pay their own costs: s 60(1) of the *Civil and Administrative Tribunal 2013* (Cth)
[4] See Schedule 1 to the Federal Circuit Court Rules 2001 (Cth)

cause.[5] This protection plays an important role in encouraging persons whose employment rights have been infringed to access a forum to enforce those rights.

It is our view that proceedings arising from a serious invasion of privacy are more akin to proceedings under the FWA than the commercial disputes heard by the FCC. Commercial disputes often involve parties of equal bargaining power, that is rarely the case in employment or breach of privacy matters. Accordingly, any statutory mechanism that creates an action in tort for a serious invasion of privacy should also include a provision specifying that costs are only to be awarded if the proceedings were instituted vexatiously or without reasonable cause. This will largely overcome the concern noted by the ALRC that actions for serious invasion of privacy should not be prohibitively costly to the wide range of individuals who might seek redress.

Alternatively, costs should be capped at an amount that would not discourage individuals from commencing proceedings.

Section 13 - Surveillance devices

We agree with the ALRC's view that there is utility in surveillance device laws and workplace surveillance laws being made uniform throughout Australia. These laws are critical for protecting the privacy rights of employees in circumstances where electronic devices and surveillance are becoming more prevalent in the workplace. Some examples of where our client's have had their privacy rights violated in the workplace are set out below.

Julie (not her real name) was employed as a digital editor. Julie worked mostly at home. She submitted a timesheet to her employer each week that showed the hours she worked at home.

Julie's employer summarily dismissed her, over the phone. In their phone conversation, Julie's employer told her that he had asked a fellow employee to watch her home over the past week. The fellow employee had reported seeing Julie stop working from time to time to have a coffee, check her post, etc. The employer formed the view on this basis that Julie had been incorrectly recording her hours, and that this warranted the termination of her employment.

Julie was traumatised, not only by the sudden loss of her employment but also by the sense of violation that she felt upon knowing that her personal activities had been monitored without her knowledge for several days.

Jane (not her real name) was employed as an administrative assistant. She had been subjected to ongoing bullying in the workplace, as a result of which she began to experience symptoms of anxiety. She consulted her GP, who referred her to a psychologist, suggested that she take one week's sick leave, and provided her with a medical certificate to give to her employer. The medical certificate did not indicate the nature of Jane's medical issue but confirmed that she was unable to work for one week for medical reasons.

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[5] See s 570 of the *Fair Work Act 2009* (Cth)

Jane provided the medical certificate to her employer and took one week's sick leave. During Jane's period of sick leave, Jane's manager called her GP and asked for information about Jane's medical condition. When he refused to provide that information, Jane's manager accessed her email and Facebook accounts from an office computer. She found that Jane had been communicating with friends on Facebook while she had been on sick leave. Jane's manager terminated Jane's employment while she was still on sick leave.

Our concern is that uniform laws often result in the lowest common denominator being adopted and an erosion of the rights that may already exist under particular state or territory legislation. Any uniform laws should therefore enhance existing workplace and privacy rights rather than seek to limit them.

Section 15 - New regulatory mechanisms

Question 15–2 Should a regulator be empowered to order an organisation to remove private information about an individual, whether provided by that individual or a third party, from a website or online service controlled by that organisation where:

(a) the individual makes a request to the regulator to exercise its power;

(b) the individual has made a request to the organisation and the request has been rejected or has not been responded to within a reasonable time; and

(c) the regulator considers that the posting of the information constitutes a serious invasion of privacy, having regard to freedom of expression and other public interests?

We have had a number of clients who have had intimate photos or videos posted on line, or who have been threatened with this. The most notable case we have had in this regard is set out below.

Nina, not her real name, left her partner. Intimate photographs of her and he ex-partner were posted on the internet and posters of the photographs (clearly showing her face but not the face of the ex-partner) were taped up in public areas close to where she lived.

The ex-partner was charged with acts of indecency, intimidation and using a carriage service to intimidate our client. Although the defendant was found guilty of the charges against him, he managed to make a very good case to discredit the police case and claim that the videos were stolen and posted to the YouTube site by someone else. When police found CDs containing evidence at the defendant's house, he claimed he had been burgled and copies of the CDs had been stolen, requiring the Police to go to the expense of getting an IT specialist to trace the provenance of the postings, and to provide expert evidence to the court explaining how the posting of the photos/videos could be traced back to the defendant. The victim in this case was a very vulnerable twenty-one year old of Lebanese background who was terrified about her family seeing the photos.

The above case illustrates the utility in providing a regulator with the power to order an organisation to remove private information about an individual from a website or other online service. The cost, delay and complexities involved in court proceedings often mean

that litigation is an inappropriate mechanism in situations such as the one outlined above. This is particularly the case for young and/or vulnerable individuals, who are often the victims of the unauthorised online publication of sensitive material. Accordingly, we share the ALRC's view that a take-down system operated by a regulator (such as the Australian Communications and Media Authority or Office of the Australian Information Commissioner) would potentially be a cheaper and quicker alternative to requiring individuals to apply for a court injunction.