

**RESPONSE TO VICTORIAN LAW REFORM COMMISSION
SURVEILLANCE IN PUBLIC PLACES DISCUSSION PAPER**

July 2009

EXECUTIVE SUMMARY

- The VLRC has raised a number of reform options in its discussion paper, one of which is introduction of a new statutory right to privacy, as recently proposed by the ALRC.
- Protection of privacy needs to be balanced against the public interest in allowing the free flow of information to the public and upholding freedom of speech.
- Balancing these public interests raises complex issues and is highly context dependent, particularly in the media sphere.
- A broad-based highly regulatory regime (as recommended by the ALRC) would fundamentally restrain the media's vital role in upholding freedom of speech and the free flow of information.
- Parliament which has recognised the highly context-dependent nature of privacy issues in respect to the media. The Commonwealth has adopted self-regulatory and co-regulatory approaches in relation to protection of privacy and personal information by the media which allows for efficient and inexpensive adjudication of media privacy issues and strikes the right balance between privacy rights and other rights.
- There will always be tension between the right to privacy and freedom of speech and some complaints are inevitable. However the small number of such complaints against the media suggests that the current system is striking an appropriate balance.

INTRODUCTION

The Right to Know Coalition is comprised of Australia's leading media organisations. Our members are News Limited, Fairfax Media, Free TV, Australian Subscription Television & Radio Association, Commercial Radio Australia (ASTRA), SBS, ABC, Sky News, Australian Associated Press (AAP), APN News and Media, Media Entertainment & Arts Alliance (MEAA) and The West Australian.

This submission is our response to the Victorian Law Reform Commission (the **Commission**) Consultation Paper Surveillance in Public Places (the **Paper**).

In particular, this response discusses the statement that in order to address concerns with unacceptable surveillance a reform option is to include a new statutory obligation to refrain from committing a serious invasion of privacy modelled on the statutory cause of action proposed by the ALRC in its recent report;

INTRODUCTION OF A STATUTORY RIGHT TO PRIVACY

The Paper discusses at length the current practice of surveillance, privacy, the risks and benefits of surveillance and how the current law in Victoria deals with surveillance.

The Commission comments that the existing regulatory regime is not well equipped to deal with the challenges posed by current and emerging surveillance technology and identifies a number of practices which it considers are unacceptable but are not covered by existing laws. A number of reform options are raised one of which is introduction of a new statutory right to privacy.

We oppose the introduction of a statutory cause of action for invasion of privacy in Victoria. If the government sees the need to implement reform, we urge the government to consider the other options of reform raised by the Commission, namely: a new role for an independent regulator to monitor, report and provide information, codes of practice, licensing and/or changes to the current legislation.

Key Public Policy Considerations

1.1 *Freedom of communication*

We acknowledge that individuals need appropriate privacy protection. However, protection of privacy needs to be balanced against the public interest in guaranteeing the free-flow of information to the public and the public interest in upholding freedom of communication. In the case of the media, balancing these two public interests is complex and requires a proper understanding of the benefits and drawbacks of each of the competing rights in each relevant context.

The Commission has relied on the Recommendation of the ALRC for a statutory right.

The ALRC acknowledges that freedom of communication is a key consideration in relation to any new privacy right. But, in our submission, the ALRC has not comprehensively examined the potential impact of its recommendation for a statutory right of privacy on the delicate balance between the public interests in privacy and in freedom of communication.

The introduction of a statutory right of privacy would substantially alter the balance, by placing fundamental restraints on the media's role in upholding freedom of communication.

The free flow of information and freedom of communication is one of the fundamental pillars of a free and open society.

The flow of information plays a role in our society which extends beyond giving the public information about matters that may be of interest to them. If citizens are to effectively participate in a democracy, form opinions freely and protect their rights and interests, they need access to information either directly, or via the media.

In some cases, information which individuals do not want disclosed should be available. Corrupt or questionable practices are often best avoided, exposed and managed by public disclosure. And often such practices only come to light as a result of the discovery of a string of facts each of which appears innocent on its own.

The value in ensuring the media has sufficient access to, and may publish, information is so well established that it has been recognised by the Courts.

The ability of the media to access information has been curtailed by a number of deficiencies including ineffective Freedom of Information (FOI) regimes and the inappropriate use of suppression orders to restrict public access to Court proceedings.

In FOI applications, privacy is all too often the reason cited for withholding information. In a number of instances this is inappropriate. Recent instances where privacy has been the basis of denying access to information include information to identify the models of taxpayer funded vehicles provided to Federal Ministers and information regarding the spending patterns of high security prisoners in NSW, despite an undertaking that the prisoners would not be identified publicly. Recent overhaul of the FOI regimes in Queensland, NSW and in the Commonwealth will hopefully reverse this trend in those jurisdictions.

In a number of instances, protection of privacy has been inappropriately cited in granting suppression orders preventing the naming of defendants because they are public figures and may be embarrassed.

We submit that striking the right balance in the field of privacy is also a critical community concern.

An individual's ability to communicate private information has changed considerably with developments in technology. It would be an extreme step to make disclosure of private information to family and friends actionable. Once, family and friends would hear about a person's life in face to face conversations. Individuals are now publishing on a large scale. Internet communities such as Facebook, MySpace and BigBlog enable individuals to publish information about themselves and their friends to the world at large. Potentially "private" information about one person is often also information of or about another person. Imposing restrictions on what people can say in such fora would be a very significant imposition on their freedom of communication (and could even arguably be an interference with their privacy). Yet these publications can reach millions of people. A common way of finding out about a person is now the practice of "googling" him or her (searching using his or her name on the Google search site). Even unpopular sites which contain private information about an individual can therefore quite easily be located. Individuals can easily mask their identities on the internet and can use internet cafes and internet service providers based outside Australia to avoid detection. And if an individual can publish to millions of people on the internet, and particularly to those with an interest in that individual (who are the ones that count), then there is a real question as to whether and in what circumstances media publication should also be restricted.

The ALRC noted in its consideration that Courts are reluctant to introduce privacy rights. There are good reasons for such reluctance. Technology may have changed the quantity of information available, but the fundamental issue is the same as it has always been: how to balance the harm which can flow from disclosure against the harm which can result from non-disclosure. Moreover, most relevant considerations, including the matters people wish to keep private, have not changed.

The existing balance reflects the experience of Courts as to the benefits and drawbacks of privacy and freedom of communication over a period of centuries. It results from experience not only of what can go wrong when information is disclosed, but also of what can go wrong when it is not. In many cases the latter consequences, which can include corruption, harm to individuals and social unrest, are more serious.

1.2 *Bill of Rights*

Privacy rights in key foreign jurisdictions, including Europe and New Zealand, flow from or form part of wider Bills of Rights. Those Bills of Rights give equal protection to a range of equally important and often competing rights, including for example prohibition of torture, the right to liberty and security, the right to a fair trial, freedom of conscience and religion, freedom of communication and freedom of assembly and association.

In the Australian context (where we do not have a Bill of Rights or equivalent legislation) the Commission acknowledges that additional protection of privacy would be likely to undermine competing rights including the rights to security and freedom of information. Nevertheless, it recommends additional protection without establishing that existing laws and regimes regulating the media do not already strike an appropriate balance, and without examining the potential impact of its recommendations on the balance between these important public interests.

1.3 *Consistency, reducing complexity and compliance costs*

In Victoria, surveillance is regulated by the Surveillance Devices Act 1999, and the Commonwealth and Victorian privacy Acts. If the government considers current law is inadequate it should be seeking to amend and improve existing law rather than introducing a broad statutory right of privacy which would add to the complexity of laws and shift the balance of competing rights in Australia.

The statutory tort of privacy proposed by the ALRC would only add an unhelpful layer of overlap and complexity to the already restrictive regulatory framework governing privacy and publication of communications.

Further complexity is not necessary or justified.

2 **Adequacy of existing privacy and publication laws**

In the case of privacy relating to publicity given to private facts, in 2001 an appropriate mechanism was included in the *Privacy Act 1988* (Cth), which requires media organisations to publicly commit to privacy standards in relation to journalism in order to trigger the journalism exemption. We have each committed to such standards, which are enforced by way of appropriate adjudication mechanisms. This regime is much less expensive and much more readily available to the public than litigation.

2.1 Overview

There is a system of regulation comprised of both general and specific prohibitions which together provide extensive privacy protection.

The general rules which apply to media organisations in relation to acts and practices in the course of journalism are privacy standards to which they have publicly committed in order to trigger the media exemption of the Commonwealth Privacy Act.

In relation to activities of media organisations other than in the course of journalism, the Nation Privacy Principles (NNPs) in the Privacy Act and their health and public sector near-equivalents provide general privacy protection. Those principles relate to "personal information", very broadly defined to mean any information or opinion relating to an individual who can be identified from the material in question.

These general standards are supplemented by bright line rules which apply to specific types of information in relation to which Parliament considers privacy interests should always prevail over competing interests. This prevents disclosure of categories of information such as: information obtained from illegal monitoring or recording of private conversations or activities, the identities of victims of sexual assault, and the identities of children involved in criminal, custody or guardianship proceedings. There are more than 30 such laws across Australia.

2.2 *In the course of journalism*

The current privacy regime was put in place as a result of a lengthy review and consultative process. Under section 7B of the Privacy Act, acts and practices engaged in by media organisations in the course of journalism are exempt from the operation of the Act provided that the organisation publicly commits to observe published standards that deal with privacy in the media context. The exemption for journalists' activities recognises the important role played by media organisations in upholding freedom of speech in a context that was directly dealing with individual rights to privacy in relation to personal information.

In the Explanatory Memorandum to the *Privacy Amendment (Private Sector) Bill 2000*, the reason given for including a media exemption is to:

Balance the public interest in providing adequate safeguards for the handling of personal information and the public interest in allowing the free flow of information to the public through the media. (p43)

And in relation to clause 3 which states the objects of the Act:

Recognises that there are important human rights and social interests which compete with privacy, such as the desirability of the free flow of information to the public through the media and otherwise. (p 29)

It was considered that a co-regulatory regime was the best way to balance different areas of public interest. Further, the exemption acknowledges that media organisations are already subject to a range of Federal and State laws which provide protection against inappropriate or unfair means of gathering or disclosing personal information and images. These include the laws of trespass, nuisance, breach of confidence, malicious falsehood, contempt, regulation of use of listening devices

and the myriad of laws restricting reporting of specific matters such as national security, adoption, juries and particular court proceedings.

The privacy regulatory regime in place which enables broadcasters and print media to obtain the journalists' exemption is a system of Codes and principles administered by industry bodies and underpinned by well defined and accessible complaints processes.

Broadcast material is co-regulated through a series of industry codes provided for in the Broadcasting Services Act. Broadcasting codes are developed by the relevant industry body and administered by the Australian Communications and Media Authority (ACMA)).

Additional and practical guidance for broadcasters and the public about issues relating to privacy are contained in an ACMA publication entitled "Privacy Guidelines for Broadcasters". The Guidelines are designed to assist broadcasters in balancing the use of material relating to a person's private affairs with an identifiable public interest reason for the material to be broadcast. The Guidelines also assist in raising the level of public awareness about privacy matters and the electronic media.¹

Regulation of broadcasters is overseen and administered by a federal regulator that has specific knowledge and understanding of broadcast media. They are, together with all the provisions of the various industry codes, subject to public consultation and review and can only be registered when ACMA is satisfied that community safeguards and expectations have been met.

Print media, through the Australian Journalists' Association and the Australian Press Council is regulated by The Australian Journalists' Association Code of Ethics, the Australian Press Council Statement of Principles and the Australian Press Privacy Standards.

Unlike the provisions of the Privacy Act, which are aimed at data protection, the provisions of the various industry codes of practice are specifically adapted to addressing issues of privacy in the media context.

The codes play an important role in informing the public about what to expect from the media and instructing journalists on what is expected from them when dealing with sensitive situations.

The benefits of a co-regulatory and self regulatory system include that:

- appropriate standards can be devised for each industry sector which takes into account the particular characteristics of that sector including existing self-regulation and co-regulation frameworks; standards can be updated and revised without the need for any new legislation; it is not necessary for

¹ ACMA's Privacy Guidelines can be found at http://www.acma.gov.au/WEB/STANDARD/pc=PC_100133

complainants to go to the expense of lawyers or to endure the expense and inconvenience of discovery; and

- they are enforced through industry complaints mechanisms which are faster, more cost effective and much more readily accessible for complainants than the Courts.

It is not clear why the ALRC has embraced a fundamentally different philosophical approach by advocating such a broad ranging tort of privacy. We do not think that such a contrary approach is either warranted or desirable.

3 HOW DOES AUSTRALIA COMPARE INTERNATIONALLY?

The question of whether or not Victoria should have new privacy law should depend upon whether there is a demonstrated need for one, and not upon the approach taken in foreign jurisdictions.

However, we consider that in any event Australian privacy protection is comparable to that in the other comparable jurisdictions.

When the international position is closely considered it is apparent that introduction of a broad privacy right in Victoria would put it out of step with comparable jurisdictions. Key considerations in relation to the international position include:

3.1 *ECHR Article 8 may be confined to public authorities*

There is uncertainty as to whether the ECHR extends to anyone other than public authorities. Article 8 expressly relates to the actions of public authorities, and statutes implementing it, such as the Human Rights Act 1998 (UK) also relevantly refer to the actions of public authorities.

The question of whether or not Article 8 has any application to anyone other than public authorities will no doubt ultimately be decided by the Grand Chamber of the European Court of Human Rights. The decision in *Von Hannover v Germany* (2005) 40 ECHR purported to extend it to the private sector by finding that German Courts had breached Article 8 by failing to injunct publication of photographs by a magazine. However, that decision does not sit easily with the wording of Article 8 and has been the subject of extensive criticism internationally. The World Association of Newspaper and The World Editors Forum petitioned Germany to appeal to the Grand Chamber. That association is a non-profit association which represents 76 national newspaper associations, 10 news agencies and 10 regional press organisations. Its membership extends to 18,000 publications on the five continents. Media law specialists also objected strenuously: see the article at www.olswang.com.

In those circumstances, the ECHR is highly relevant to privacy restrictions which might be imposed on public authorities in Australia. It is less relevant to the private sector. The public policy considerations applicable to government are very different to those which apply in relation to the private sector. This is particularly true in respect of certain specific rights. For example, governments which read private correspondence typically do so for the purposes of censorship, security or to identify and persecute political foes. In contrast, the media will normally only have access to such correspondence when it is given to them by a party to it, and the only

risk of them having it is that it will become public. The former risks are obviously much more serious and much more worthy of regulation than the latter.

3.2 US gives weight to freedom of communication when applying its laws

The US has acknowledged the fundamental importance of freedom of communication to a peaceful and democratic society by enshrining freedom of speech in the 1st amendment of the constitution.

As noted by the ALRC under US law, "freedom of expression trumps privacy to such an extent that the so called 'right to privacy' can be seen as a somewhat hollow one".

3.3 Other jurisdictions

We note in relation to other key jurisdictions:

- Canadian provinces have taken differing approaches, and Saskatchewan has a broad news gathering exemption from its privacy laws;
- The Irish Privacy Bill is yet to be enacted and specifically recognises the legitimacy of bona fide newsgathering and the importance of public discussion by providing a defence for newsgathering. In addition, privacy rights in the Irish Constitution appear to be aimed mainly at the actions of public authorities;
- The French Civil law system, culture and jurisprudence is so different from that of Australia that we query whether it is an appropriate model for Australia.

3.4 All other jurisdictions with right of privacy also have express right of freedom of communication

Every jurisdiction with an express right of privacy also has an express right of freedom of communication. Without an express right of freedom of expression, it is misleading and of little value to use the experience and law in other jurisdictions as a basis for reform in Australia.

4 CONCLUSION

There is no need for any additional privacy rights or remedies in Australia. If any need for an additional privacy right or remedy is identified in future, it should be very clearly and narrowly defined and there should be a broad media exemption.

The effect of the cause of action proposed would be to force the Courts into developing a wide ranging set of privacy rights giving rise to powerful remedies, without any clear guidance as to what should fall within those rights. It would be likely to undermine freedom of communication to the detriment of the community at large, and would result in prolonged and expensive litigation against media and government organisations.

In relation to the publication of private facts, the current system which allows for efficient and inexpensive adjudication of media privacy issues strikes the right balance between privacy rights and other rights, and allows industry specific factors to be taken into account. If any additional privacy rights are to be developed, they should be subject to a broad media exemption to allow that system to continue.