



QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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3 November, 2011

Privacy & FOI Policy Branch
Department of the Prime Minister and Cabinet
1 National Circuit
BARTON ACT 2600

Email: privacycauseofaction@pmc.gov.au

Dear Sir/Madam

Submission to Discussion Paper on Privacy Cause of Action

The Council for Civil Liberties warmly welcomes the Government's release of the Issues Paper on a Commonwealth Cause of Action for Serious Invasion of Privacy.

About the Council

The Council is a voluntary organisation which was established in 1967 and has as one of its principal objectives the implementation in Queensland of the Universal Declaration of Human Rights.

Article 12 of the Declaration provides:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attack upon his honour and reputation. Everyone has the right of the protection of the law against such interference or attacks.

In short, it is the Council's submission that Australian law currently does not fulfil the obligations contained in that Article of the Declaration. A statutory cause of action will be a substantial step to meeting that obligation.

Submissions

Privacy is essentially about our right to control how we are presented to the world, the extent to which we are the subject of attention and the extent to which people have physical access to us.¹ What aspects of ourselves we are prepared to share with people, and to what extent, will vary from person to person.

¹ Ruth Gavison "Privacy and the Limits of the Law" 1980 89 Yale LJ 421

What is clear is that threats to our privacy (however we may define it) are ever-increasing – through terrorism laws, growing police surveillance powers, business practices associated with information mining and marketing, the internet, through the tracking of mobile phones, through things like the Go-Card, CCTV, the pernicious behaviour of Facebook.

Cardinal Richlieu understood the value of surveillance when he said, “If one could give me six lines written by the hand of the most honest man, I would find something in them to have him hanged.” Privacy protects us from abuses by those in power of their surveillance power.

In the Council’s view, two of the most egregious examples of the inadequacy of our current privacy laws are those relating to the ‘Hanson pictures’ and the outing of the former Minister in the New South Wales Government, David Campbell.

Currently, we have a patchwork of protections for privacy, but there are many gaps. Those gaps are becoming bigger every day, particularly in the area of information privacy. The law needs an adaptable instrument to meet the changing threat posed to our privacy by developing technology.

The Council would support the views of those who have argued that the Australian Privacy Commission, particularly under the previous Commissioner, had an approach to the implementation of the Act which was far too business-friendly. As at 2007², the Federal Privacy Commission had made only eight formal complaint determinations in 17 years. A statutory cause of action will provide an instrument that will fill these gaps, by enabling citizens to take their own actions when government instrumentalities are not prepared to do so.

The most common objection to a right to privacy is that private interests will prevail over the public interest.

Privacy is essential to how we develop as human beings. Privacy is then, in fact, an aspect of the public interest. So it is not simply a case of private versus public.

Privacy advocates accept that the public interest in privacy has to be weighed against other public interests. Unfortunately, some people too readily set the value of privacy at nought, before the process of weighing has even begun.

The Australian Law Reform Commission has proposed a model statutory cause of action for privacy, which explicitly requires a Court, when considering whether a person’s right to privacy has been violated, to weigh up the other public interests.

Many object that the concept of privacy is too vague to be legally enforced. We do not accept this. Our laws involve many concepts which are vague, including the right to procedural fairness, the law of negligence, and the ubiquitous creature known as “the reasonable person”. As Lord Reid put it, the fact that something cannot be weighed or measured does not mean it cannot exist.,

Others say a statutory cause of action for privacy is a threat to freedom of speech.

That proposition flies in the face of the evidence. Almost all developed countries,

² Nigel Waters ‘Have privacy laws delivered’ Precedent Volume 78 Page 13

except Australia, have a right to privacy. Most also enjoy robust rights to freedom of speech, including the United States, and our nearby neighbour, New Zealand.

The Council for Civil Liberties, a traditional civil liberties organisation, is firmly of the view that freedom of speech is a first-order liberty that holds a degree of preference over other liberties.

The Australian Law Reform Commission, in developing its proposal for a statutory cause of action for privacy, has developed a model which is highly respectful of the right to freedom of speech. That model does not represent any threat to freedom of speech in this country.

Turning now to the specific issues raised in a discussion paper.

The Council supports the model as proposed by the Australian Law Reform Commission.³

We would however make the following additional comments and qualifications:

1. On page 26, reference is made to potential difficulties that privacy may cause for the collection of debts. Council accepts that this is a concern. However, the Council considers that in many cases the concern is overstated because all privacy legislation accepts that the information may be used for the purposes for which the person expressly consents but also for purposes they impliedly consent or which are necessarily connected with the purpose for which the information was originally collected. It seems clear that when a person borrows money, they will expressly or impliedly consent to the collection and use of personal information to the extent it is necessary to recover the debt. In the Council's view in those circumstances the claims of debt collection agencies are overstated and alternatively can be remedied by consent documents.
2. On page 35, there is a reference to privacy of information in respect of serious criminal convictions, serious criminal offenders or information about judicial proceedings. The Council has a long standing policy of supporting policies which foster rehabilitation. Certainly, in our view, existing spent convictions legislation should be considered in this area. However spent convictions legislation is not necessarily the end of the matter. It seems to us, that even in the most serious cases, the passage of time may generate some new privacy interest, see for example *Tucker v News Media Ownership Limited* [1986] 2 NZLR 716.
3. Should particular organisations or types of organisations be excluded? We no doubt expect that entities such as the police will seek to be excluded from the coverage of this legislation. In our view, they should not be. In our view, the exemptions that have been given to the Queensland Police from the *Queensland Information Privacy Act* have allowed them to carry out highly dubious practices such as street checks. The Police should not be given a blank cheque to release or collect private information simply on the basis of their own assessment or whether it is in the public interest.
4. Question 18 – on the question of the limitation period we would agree with the

³ Having said that the Council considers that the New South Wales Law Reform Commission report more cogently argues the case for reform. But we support the model put forward by the Australian Law Reform Commission.

view of the New South Wales' Law Reform Commission.

5. Question 19 – in our view all courts should be given jurisdiction to hear and determine claims for serious invasion of privacy.

The Council would endorse the views of the former Prime Minister, Paul Keating, in his address to the Centre for Advanced Journalism at the University of Melbourne on 4 August 2010 where he said:

I believe we are stronger in society when each of us are stronger. By stronger I mean not having important liberties shorn from us in some revelatory information "free for all".

The special contract we are the subject of involves a surrendering of certain rights in exchange for other societal benefits and protection. But at the core of that contract, there cannot be, and must never be, derogations such that the notion of individuality is materially or permanently compromised. The essence of the dignity of each of us goes to our individuality and our primary need to be ourselves. Not ourselves, shared with billions of others, not ourselves x-rayed by the new intrusive technologies, not ourselves ground to an amorphous mass of human sameness.

We trust this is of assistance to you in your deliberations.

Yours faithfully,

Michael Cope
President
For and on behalf the
Queensland Council for Civil Liberties
4 November 2011