Dear Attorney-General,

RE: Submission in response to the Privacy Act Review Issues Paper

The Arts Law Centre of Australia is pleased to comment on the Privacy Act Review Issues Paper published in October 2020 (Issues Paper), released in response to the recommendation of the Australian Competition and Consumer Commission (ACCC) in its Digital Platforms Inquiry that the Australian Government consider reform of the Privacy Act 1988 to better protect consumers.

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 in regional, rural and remote parts of Australia and in all Australian states and territories. Each year 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.

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;
- arts organisations operating as small businesses; and
- peak or professional organisations which represent the interests of the above clients.

By email: PrivacyActReview@ag.gov.au
The relevance of the Issues Paper to our clients is illustrated by the fact that 250 of the approximate 5,900 legal problems we have addressed in 2018–2019 related 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).


Summary of Arts Law’s position

**Objects of the Privacy Act:** Arts Law supports keeping the recognition in s 2A of the Privacy Act that privacy protections must be balanced against the interests of entities carrying out their functions and activities, noting that the interests of artists and arts businesses are not just commercial (Question 1).

**Exemptions from the Privacy Act:** Arts Law does not support making more arts businesses subject to the Privacy Act by narrowing the small business nor journalism exemptions (Questions 7–11, 17–19).

**A statutory tort of breach of privacy:** It is the longstanding position of Arts Law that the Government should not create a statutory cause of action for invasion of privacy because: it would have a chilling effect on freedom of speech, it would impede some forms of artistic expression, and existing remedies for serious invasion of privacy are sufficient (Questions 57–62).

**Harmonisation of privacy protections:** While acknowledging the advantages of harmonising privacy protections, Arts Law believes that industry and risk-specific privacy regulation is the most appropriate means of balancing the right to privacy with the public interest (Questions 66–67).

Arts Law does not express a view on all questions posed in the Issues Paper.

Further information

Please contact Robyn Ayres (Chief Executive Officer) at [Robyn Ayres] or Donna Robinson (Senior Solicitor) at [Donna Robinson] 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
Chief Executive Officer
Arts Law Centre of Australia

Donna Robinson
Senior Solicitor
Arts Law Centre of Australia
ARTS LAW'S RESPONSE TO THE QUESTIONS IN THE ISSUES PAPER

Question 1 – Should the objects outlined in section 2A of the Privacy Act be changed? If so, what changes should be made and why?

Arts Law does not support changing the wording of section 2A to remove the reference to striking a balance between the protection of privacy and the interests of entities carrying out their functions and activities. Artists are often motivated by more than just commercial gain, including the artistic merit of their work and the desire to convey a political message. We believe the existing legislation strikes an appropriate balance between individuals' right to privacy and artists' right to freedom of expression.

Although the proposed change to the objects of the Privacy Act 1988 could be seen as purely symbolic, we are concerned that changing the Act's objects could have an important impact on the way other provisions are interpreted, given that s 15AA of the Acts Interpretation Act 1901 requires that Acts be interpreted in a way that would best achieve their object or purpose. Especially in combination with proposed changes to the scope of the Privacy Act and the creation of a tort of invasion of privacy, Arts Law is concerned that removing the object of 'balance' from the Privacy Act would unreasonably limit freedom of artistic expression in Australia.

By contrast, Arts Law supports the inclusion of a new object in section 2A which recognises the interest of the Australian community in the free dissemination of information, including personal information, which the public has a legitimate interest in. The inclusion of an object in these terms would be especially important if the Act recognised a new statutory tort for serious invasion of privacy (which Arts Law opposes), as it would weigh into the court's assessment of whether a serious invasion of privacy is in the public interest.

Question 7 – Does the small business exemption in its current form strike the right balance between protecting the privacy rights of individuals and avoid imposing unnecessary compliance costs on small business?

Arts Law supports further consideration of the small business exemption in light of digital advances, but opposes any proposal to remove the exemption. Many artists and arts organisations currently fall under the definition of a 'small business' under s 6D of the Privacy Act. Arts Law has formed the view that bringing them under the ambit of the Privacy Act will impose an unreasonable burden in terms of compliance and monitoring relative to the risk posed to individual privacy.

Regulatory burden

In terms of privacy, the intention of regulation is to generate a net benefit for society that enhances privacy protections without compromising the ability of business to effectively operate. The high cost of time and resources in regulatory compliance in Australia is well documented and it is not unreasonable to be concerned about the ability of small businesses to meet these demands, particularly where the business consists of an individual or sole trader.

Contemporary privacy concerns
Arts Law is cognisant of the fact that certain types of small business, such as bars and nightclubs, may collect ‘sensitive information’ through the use of biometric scanners or QR code readers in their course of business. Arts Law also recognises the concern amongst the community about personal information being handled by third parties who may fall under the small business exemption. These privacy circumstances do not justify a blanket measure to remove the exemption that ignores the dissimilarities between these examples and the conduct of artists and art organisations and is not an equitable solution to privacy law in Australia.

Recommendations

In circumstances where the Privacy Act applies, the Office of the Australian Information Commissioner (OAIC) should be afforded broader reaching powers to investigate, conciliate and, if necessary, make determinations about complaints made about the handling of personal information.

Arts Law submits that consideration should be given to amending the Privacy Act to include further circumstances where the small business exemption does not apply. At present, a small business may be captured by the Privacy Act if, for example, it provides a health service to another individual and holds any health information except in an employee record under section 6D(4)(b) or if it discloses personal information about another individual to anyone else for a benefit, service of advantage under section 6D(4)(d). The scope is therefore available for prescribing further activities which may pose a threat to personal privacy, including negligent handling of personal information. Amending the Privacy Act in this way, resolves the need to lower the threshold for small businesses to fall under the exemption and instead holds accountable a small business’ action or conduct.

Arts Law considers that, provided suitable qualifications are in place, the Privacy Act should retain an exemption for small business.

Question 8 – Is the current threshold appropriately pitched or should the definition of small business be amended?

Arts Law believes that the current threshold is appropriately pitched and amending the monetary value of that threshold, if reduced, will impose unreasonable regulatory obligations on small businesses. Further, Arts Law does not believe that replacing the monetary threshold with another factor, such as asset value or employee count, will materially, or accurately, reflect a ‘small’ business definition or identify the types of businesses where an individual’s privacy may be at risk.

Question 9 – Are there businesses or acts and practices that should or should not be covered by the small business exemption?

As noted in the response to question 7, there is scope to further specify certain acts and practices that should be subject to the OAIC’s investigative powers and not be covered by the small business exemption.
Question 10 – Would it be appropriate for small businesses to be required to comply with some but not all of the APPs?

Arts Law does not believe that it will be appropriate for small businesses to be required to comply with some of the APPs, where the small business exemption applies.

Question 11 – Would there be benefits to small business if they were required to comply with some or all of the APPs?

The benefits which flow from compliance with some, or all, of the APPs are similar to the voluntary opt-in to the Privacy Act, such as reputational benefits to the business. Given the nature of these benefits, small businesses should retain their autonomy in deciding whether to opt-in to the Privacy Act.

Question 17 – Does the journalism exemption appropriately balance freedom of the media to report on matters of public interest with individuals’ interests in protecting their privacy?

The journalism exemption under the Privacy Act promotes the public interest in freedom of expression (see further, response to question 57) and enables access to information that is integral to our democratic society. Arts Law submits that the journalism exemption should be amended to provide a clear definition of journalism and impose stronger enforcement mechanisms in the sector to strike the balance between freedom of the media and privacy.

Invasion of privacy

Arts Law respects the importance of the media but recognises that the public interest in free press will not justify all invasions of privacy. Modern media does not always necessarily report on matters of public interest (such as national security and public health) and may instead report on lifestyle or celebrity news. While this type of information certainly serves a purpose, it is not information that should be weighted as heavily as the former in terms of media exemptions from scrutiny.

Recommendations

Arts Law proposes that 'journalism' be defined in the Privacy Act with a view to limit the scope of the journalism exemption so as to protect information where there is a recognisable public interest in disclosure. Shaping the definition in such a way ensures that the focus of the journalism exemption remains connected to public interest, while working to accommodate different media platforms where the dissemination of information can occur on.

Arts Law also submits that the standards imposed on journalism under s 7B(4), should be strengthened beyond an obligation to "deal with privacy" and should be framed in a requirement for active conduct.

Question 18 – Should the scope of organisations covered by the journalism exemption be altered?

Arts Law believes that a definition of journalism that is framed in terms of public interest in disclosure, is sufficient to capture the scope of organisations covered by the journalism
exemption while simultaneously excluding those to whom the exemption is not intended to cover. A definition centred around purpose is broad enough to apply into the future of information dissemination.

**Question 19 – Should any acts and practices of media organisations be covered by the operation of some or all of the APPs?**

Arts Law does not believe that it is appropriate for media organisations to be covered by the operation of some, or all, of the APPs. This is by virtue of the fact that media organisations tend to have robust sector self-regulation, such as the Media, Entertainment & Arts Alliance MEAA Journalist Code of Ethics. Arts Law believes that if the APPs are to apply to media organisations, consideration will need to be given to how competing obligations may operate in practice.

**Question 57 – Is a statutory tort for invasion of privacy needed?**

**Summary**

Arts Law does not support a general cause of action for invasion of privacy. Arts Law is of the view this would be too broad and is likely to impair:

- freedom of speech;
- freedom of expression;
- the public interest; and
- development of artwork depicting people in public spaces (including photographs, paintings, video art and films).

Arts Law believes the existing legislation is sufficient to protect many instances of unauthorised use or publication of a person’s name, identity, likeness or voice. We believe it is inappropriate to extend this right and oppose the introduction of a right of publicity or similar right that would prohibit the unauthorised use of a person’s image. Such a right would be a significant expansion of existing rights and cannot be justified in light of the detriment it would cause to our artistic, social and cultural heritage.

**Freedom of speech, freedom of expression and the public interest**

Freedom of expression is a fundamental human right. International instruments, such as Article 19 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a signatory, provide:

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of article, or through any other media of his choice.

(3) The exercise of the right provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) for respect of the rights and reputations of others;
(b) for the protection of national security or of public order, or of public health or morals.

Arts Law submits that the current regulations in Australia protect the rights and reputations of others without unnecessarily encroaching on the right to freedom of expression currently enjoyed by artists practising in public places. We see such artistic practice as important not just for its artistic merit, but also for its social and cultural merit as through such work artists can assist us in questioning the way we think and give meaning to our world.

Arts Law believes it is in the public interest to ensure freedom of speech. We are concerned that the proposed changes will be detrimental to artists, writers and journalists. We are concerned that investigative journalism is likely to suffer under the proposed new cause of action and we urge the Commission to recognise the importance of investigative journalism in drawing important matters to the public’s attention. Investigative journalists Bob Woodward and Carl Bernstein are renowned for their reporting which was instrumental in uncovering the Watergate scandal that led to President Richard Nixon’s resignation. Australia also has a strong history of investigative journalism. For example, Chris Masters is a prominent investigative journalist best known for his exposé of police corruption in Queensland which led to the Fitzgerald royal commission. We believe it is essential that any development of privacy laws take into account the public interest in investigative journalism.

**Artwork depicting people in public spaces**

Photographers such as Cartier Bresson, Alvarez Bravo, Robert Frank, Philip-Lorca di Corcia and Max Dupain characterise a movement and genre of ‘candid’ or ‘street photography’ which encapsulates photography as a record of history, reality and daily life, and explores how we see society and the world we live in. Since the introduction of photography, street photographers and photographers in general have created artistic work and historical documentation. Arts Law submits it is likely that this genre of photography will be curtailed or damaged if further restrictions are introduced.

Similarly, other artforms that depict people in public places are likely to be curtailed if the privacy laws are expanded. For example, iconic Australian artworks like many of those contained in John McDonald’s *Federation: Australian Art & Society 1901–2001* could no longer freely be captured if the laws were changed.

Whilst Arts Law concedes there should be a consideration of the competing interests of privacy versus freedom to take photos in public places, there should also be a consideration of how further restrictions on taking photographs in public privatises public space and limits the capacity of artists to make art in a public context. It would also interfere with the provisions of the *Copyright Act 1968* (Cth) (*Copyright Act*) that provide that it is the exclusive right of the copyright owner to reproduce, publish and communicate their work to the public. If individuals are given permission to control the use and reproduction of their image this will impinge upon the rights granted to the artist under the Copyright Act and

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would unnecessarily curtail production and dissemination of artistic works and works that
document the world in which we live.

**The existing legislation is sufficient**

Arts Law does not support the extension of privacy law to allow people to control the
unauthorised use of their image beyond current controls as the existing raft of statutory and
common law provisions are sufficient to protect people from unwarranted intrusions into their
private lives and against inappropriate use of their name, identity, likeness or voice.

The following laws may prevent, and give remedies against, unauthorised intrusions in an
individual’s personal sphere:

- trespass to land;
- private nuisance;
- defamation;
- passing off;
- breach of confidence;
- property offences – e.g. where the breach of privacy involves unauthorised access to
  private land; and
- criminal offences – such as those set out in the Issues Paper.

In addition, the following areas may prevent the unauthorised use or publication of a
person’s name, identity, likeness or voice, irrespective of any invasion of privacy:

- section 35(5) of the Copyright Act – where a person is commissioned to take a
  photograph for a private or domestic purpose, or to draw a portrait or make an
  engraving of another person then the person commissioning the work will own the
  copyright in the work unless there is an agreement to the contrary. This means the
  commissioner will be able to control any future publication of the work because
  publication involves a reproduction of the work and this requires consent of the
  copyright owner;

- part XIA of the Copyright Act – under this part, performers are granted certain rights in
  relation to unauthorised recordings of their performances, thus enabling them to
  prevent various uses or publications of their likeness or voice. These provisions apply
to sound, television and film recordings;

- section 22(3A) of the Copyright Act – a performer on a sound recording is a co-owner
  of the copyright in that recording (subject to other provisions of the Copyright Act). This
  means that an unauthorised use of a person’s voice on a sound recording can be
  controlled by the person asserting their copyright interest in the recording. Since it is
  the copyright owner’s right to reproduce the work, make the work public for the first
time, communicate the work to the public, play the recording in public and transmit the
  recording to the public, the person’s permission is required before the recording can
  be used in any of these ways; and

- Australian Consumer Law (Schedule 2 of the Competition and Consumer Act 2010
  Cth) and state and territory fair trading legislation – section 18 of the Australian
  Consumer Law prohibits a corporation from engaging in conduct that is, or is likely to
  be, misleading or deceptive in trade or commerce. There are similar provisions under
  the state and territory acts which prohibit a person from engaging in the prohibited
  conduct. These laws can enable people, particularly celebrities, to prevent the
unauthorised use of their image. For example, Kieran Perkins successfully brought a claim (under section 52 of the Trade Practices Act 1974 (Cth), as it then was) against Telstra when Telstra used his image in an advertisement campaign without Perkin's permission.\(^2\)

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

**Question 58 – Should serious invasions of privacy be addressed through the criminal law or through a statutory tort?**

Arts Law considers that the criminal law is a more appropriate vehicle than a statutory tort for addressing serious invasions of privacy of particular kinds, such as the sharing of intimate images. We do not support the creation of a general crime of serious invasion of privacy for the same reasons we do not support a tort of serious invasion of privacy. Indeed, if artists were subject to criminal sanctions rather than civil law remedies, the chilling effect on freedom of expression would be even more significant.

This is consistent with Arts Law’s longstanding position that Parliament should enact specific legislation to address particular privacy issues rather than creating a general statutory cause of action for serious invasion of privacy. The severity of the sanctions involved (criminal or civil) can be tailored according to the specific context in which the invasion of privacy occurs.

**Question 59 – What types of invasions of privacy should be covered by a statutory tort?**

Arts Law considers that a statutory cause of action for serious invasion of privacy is unnecessary and would have a disproportionate impact on artists, photographers, filmmakers and writers. If, however, such a cause of action became law, we generally agree with the Australian Law Reform Commission’s (ALRC) recommendation that it should target two types of invasion of privacy: intrusion upon seclusion and misuse of private information. Furthermore, we believe these two types of invasion of privacy should be contained in separate causes of action, with different remedies and defences available in respect of each.

Of the two causes of action, we believe intrusion upon seclusion has the greater potential for limiting freedom of artistic expression, particularly artwork which depicts people in public spaces. The construction of this cause of action (including its elements and defences) should be narrowly tailored to obviate this risk. For example, we agree with the ALRC’s recommendation that to be actionable an intrusion upon seclusion needs to be ‘highly offensive to a reasonable person’, not in the public interest, and committed in circumstances where the individual involved would have had a reasonable expectation of privacy.

**Question 60 – Should a statutory tort of privacy apply only to intentional, reckless invasions of privacy or should it also apply to breaches of privacy as a result of negligence or gross negligence?**

Arts Law considers that a statutory cause of action for serious invasion of privacy is unnecessary and would have a disproportionate impact on artists, photographers,
filmmakers and writers. If, however, such a cause of action became law, the legislation should include an element of intention.

Intention should be directed not only to the act or conduct complained of but also to the invasion of privacy itself, meaning that the defendant intended the act to seriously invade the plaintiff's privacy. This view is consistent with the purpose of the proposed legislation, being to address the mischief of serious invasions of privacy rather than the conduct that resulted in them. The introduction of a cause of action with a no-fault requirement or a threshold of fault lower than intention, is likely to have a chilling effect on artists because it would contribute to an environment in which artists do not feel confident in the rights and obligations as they relate to their creative ventures. As a result, they are likely to err on the side of caution by refraining to engage in artistic activities to avoid legal action and fees that may result from an unintended invasion of privacy.

**Question 61 – How should a statutory tort for serious invasions of privacy be balanced with competing public interests?**

Arts Law considers that a statutory cause of action for serious invasion of privacy is unnecessary and would have a disproportionate impact on artists, photographers, filmmakers and writers. If, however, such a cause of action became law, we submit that the proposed statutory tort should be balanced with competing public interests:

1. at the stage of considering whether a tort has been committed at all – that is, by requiring the invasion of privacy to be contrary to the public interest as an element of the action;
2. further or alternatively, as a defence to the tort;
3. further or alternatively, through the inclusion of a non-exhaustive list of examples of activities the Legislature considers not to be invasions of privacy.

**As an element of the action**

Arts Law's primary submission is that public interests should be considered at the point of determining whether there has been a serious invasion of privacy.

The placement of the public interest (specifically freedom of expression) criteria at the fore of the formulation means that: (i) the onus of proof is on the person asserting the right to privacy, or seeking redress for the alleged breach of the right against invasion of privacy; and (ii) unmeritorious claims are less likely, because of the need to balance factors at the outset. Given the absence of an express right to freedom of expression, a low benchmark or threshold for actionability of invasion of privacy may tip the competing interests of the parties unfairly if public interest was only considered by way of a defence.

The integration of the assessment of public interest matters as part of the cause of action is consistent with the approach adopted in other Commonwealth legislation. For example, under the Commonwealth *Criminal Code*, there must be a consideration of various criteria in assessing whether material is "child abuse material" on the basis of whether material is "offensive" and therefore subject to the Code. The artistic, literary or educational merit of the relevant material is to be taken into account when assessing whether it is offensive. This
exemplifies a common sense approach which excludes irrelevant material or conduct in the first instance as it would be contrary to the public interest to include it.

This "upfront" formulation would also be similar to the judicial construction of the doctrine of breach of confidence, which requires the balancing of a number of circumstances in establishing whether the defendant has a case to answer. It is also consistent with the approach taken by the ALRC to the definition of the proposed tort.³

As a defence

Depending on the formulation of the cause of action, considering the public interest at the outset, and then, in addition providing for a defence of freedom of expression or artistic expression could assist in ensuring that freedom of expression is protected. Whether this formulation is sensible of course depends on the way the legislation is constructed, including the way in which public interests are (or are not) defined.

As a list

A non-exclusive list of the types of privacy invasion that fall outside the proposed cause of action could also assist the judiciary to take into account the public interest. The excluded types of invasion of privacy would be invasions of privacy that the legislature decided it was in the public interest to exempt. Use of examples in this way has been used to expound broad statutory standards in other areas of the law, such as unconscionability under the Australian Consumer Law.

In summary, the legislation should afford paramount value to the public interest in allowing and protecting freedom of expression. An action for serious invasion of privacy should only succeed if its elements are satisfied and the claimant's right to privacy outweights, in the circumstances, competing public interests. Therefore, courts should be required to consider freedom of expression to determine whether an alleged invasion of privacy is actionable.

Question 62 – If a statutory tort for the invasion of privacy was not enacted, what other changes could be made to existing laws to provide redress for serious invasions of privacy?

Arts Law believes that Parliament should enact specific legislation to address particular privacy issues as they arise rather than creating a general statutory cause of action for serious invasion of privacy.

To the extent the ACCC’s Digital Platforms Inquiry Report identifies issues with how social media platforms deal with people’s personal information, Arts Law believes Parliament

should introduce specific legislation to deal with those issues. We do not think the Report provides a sound basis for the introduction of a broad, economy-wide right to privacy.

**Question 66 – Should there continue to be separate privacy protections to address specific privacy risks and concerns?**

While Arts Law appreciates the benefits of simplifying a complicated area of law, we believe the current legislative regime strikes the right balance between individuals' right to privacy and competing public interests. Inappropriate harmonisation could lead to laws which are not reasonably appropriate and adapted to dealing with the worst offenders while capturing a range of conduct, including art and journalism, which it is not in the public interest to regulate. Our response to the proposed statutory tort of serious invasion of privacy illustrates this issue.

Arts Law believes that Parliament should continue to enact specific legislation to address particular privacy issues as they arise rather than creating a general statutory cause of action for serious invasion of privacy.

**Question 67 – Is there a need for greater harmonisation of privacy protections under Commonwealth law?**

Arts Law refers to its response to Question 66 above.