

Privacy and FOI Policy Branch

Department of the Prime Minister and Cabinet
1 National Circuit
BARTON ACT 2600

By email: privacycauseofaction@pmc.gov.au

4 November 2011

Issues Paper: 'A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy'

Dear Department of Prime Minister and Cabinet

We welcome the opportunity to comment on the Issues Paper, 'A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy,' released by the Department of Prime Minister and Cabinet in September this year.

Community legal centres and our client base

The Federation of Community Legal Centres (Vic) Inc ('the Federation') is the peak body for 49 Victorian community legal centres (CLCs). The Federation leads and supports Victorian CLCs to make justice accessible for all. The Federation:

- provides information and referrals to people seeking legal assistance;
- initiates and resources law reform and policy work to develop a fairer legal system that better responds to the needs of the disadvantaged;
- works to build a stronger and more effective community legal sector;
- provides services and support to community legal centres; and
- represents community legal centres with stakeholders.

CLC clients include many people who are affected by financial hardship, homelessness, mental illness and disability. The most recent Commonwealth Government review of the community legal sector noted that 58% of CLC clients receive some form of income support, 82% earn less than \$26,000 per annum and almost 9% have some form of disability.¹

The need for a statutory cause of action

In 2009, the Federation made a detailed submission to the Victorian Law Reform Commission ('VLRC') consultation on *Surveillance in Public Places*. As we outlined in that submission, we support the introduction of a statutory cause of action for

¹ Attorney-General's Department, *Review of the Commonwealth Community Legal Services Program: March 2008*, 6, available at <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP6DE98B3437FEB6FDCA25742D007B0738> (last accessed 31 October 2011).

Level 3
225 Bourke Street
Melbourne
Victoria 3000

Tel: 03-9652 1500
Fax: 03-9654 5204
administration@fclc.org.au
www.communitylaw.org.au

Federation of
Community Legal Centres
(Victoria) Inc
Registration A0013713H
ABN 30 036 539 902

serious invasions of privacy.²

The casework of our member CLCs highlights that the clients that we serve are vulnerable to serious breaches of their privacy. Existing privacy cases, from the emerging Australian jurisprudence and overseas, demonstrate that a statutory cause of action for serious invasion of privacy could afford significant protection to disadvantaged Australians.

In particular, we are concerned to limit the impact of public place surveillance on vulnerable and marginalised members of society. CLC casework suggests that young people, the homeless and Aboriginal and Torres Strait Islander people are disproportionately affected by surveillance in public places.³ These groups often have limited access to private recreational spaces and are therefore frequent users of public space. Increasing levels of surveillance can have a significant effect on these groups' use and enjoyment of public spaces.⁴ We believe that everyone is entitled to a measure of privacy, even in public spaces. A statutory cause of action could do much to protect the rights of people who rely most heavily on public spaces.

Jurisdictional issues and access to justice for unrepresented parties

In our submission to the VLRC Inquiry, we endorsed the Law Institute of Victoria's proposal to give the Victorian Civil and Administrative Tribunal ('VCAT') jurisdiction over actions for invasion of privacy.⁵ Due to the VCAT's informality and low cost, it is generally the most appropriate jurisdiction for Victorian CLC clients and other low-income people. The VLRC agreed and recommended that '[j]urisdiction to hear and determine the causes of action for serious invasion of privacy... should be vested exclusively in the Victorian Civil and Administrative Tribunal.'⁶

We are aware that constitutional issues prevent the Commonwealth Government from conferring jurisdiction on the VCAT or other State tribunals. Although we agree with the VLRC that consistent, national laws in this area are desirable,⁷ it is vital that there be a suitable jurisdiction for the statutory cause of action.

² Federation of Community Legal Centres, Submission to the Victorian Law Reform Commission 2009 inquiry, *Surveillance in Public Places* ('VLRC Surveillance Inquiry'), available at <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/resources/5/6/56b7e080404a0a5f923efbf5f2791d4a/Submission+40+Federation+of+Community+Legal+Centres+%28Vic%29+Inc+31.07.09.pdf> (accessed 31 October 2011).

³ We refer to the submissions of our member centres (Youthlaw, the St Kilda Legal Service, the Victorian Aboriginal Legal Service and Fitzroy Legal Service) to the VLRC Surveillance Inquiry, available at <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/Surveillance+in+Public+Places/LAWREFORM+-+Surveillance+-+Received+Submissions> (accessed 31 October 2011).

⁴ See, eg, Chris Middendorp, 'Hot property: public space for fun and profit' (2006) 1 *Parity* 17 and Michael Sheehan, 'Nowhere to go: excluded from public and private spaces' (2006) 1 *Parity* 19.

⁵ Law Institute of Victoria, Submission to the VLRC Surveillance Inquiry, available at <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/resources/9/9/9978b900404a0a5d9226fbf5f2791d4a/Submission+27+Law+Institute+of+Victoria+06.07.09.pdf> (accessed 31 October 2011).

⁶ Victorian Law Reform Commission, *Surveillance in Public Places: Final Report* (2010), available at <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/Surveillance+in+Public+Places/LAWREFORM+-+Surveillance+in+Public+Places+-+final+report> (accessed 31 October 2011), 164.

⁷ *Ibid* 128.

While CLCs are able to provide initial legal advice in many areas of law including privacy, in most cases CLCs do not have the resources to represent their clients in court. Grants of legal aid are likewise very limited in civil and administrative law. Accordingly, in many cases, low income clients with meritorious privacy cases may be unable to access legal representation. Lack of legal representation is a significant disincentive to bringing proceedings and this disincentive is compounded if the jurisdiction is one where costs follow the event, ie; the losing party must pay some or all of the winning party's legal costs.

To address this, we strongly recommend that the Government:

- vest jurisdiction exclusively in the Federal Magistrates Court;
- provide that in proceedings alleging a serious invasion of privacy, each party bears their own legal costs (with the usual exceptions for unreasonable conduct etc); and
- provide targeted funding for permanent Self-Represented Litigant Coordinators in every Federal Magistrates Court in Australia. For several years the Victorian Supreme Court has employed a Self-Represented Litigant Coordinator. The Coordinator 'provides procedural guidance and assistance' to unrepresented parties,⁸ as well as referring parties to sources of free legal advice, including CLCs, Victoria Legal Aid and the Victorian Bar Pro Bono Scheme.

We believe that such support is vital, if the proposed statutory cause of action is to provide any tangible benefit for low-income and disadvantaged groups.

Recommendation 1:

The Commonwealth Government should create a statutory cause of action for serious invasion of privacy.

Recommendation 2:

The legislation should clearly state that unauthorised or improper use of surveillance in public places may constitute a serious invasion of privacy.

Recommendation 3:

Jurisdiction should be vested exclusively in the Federal Magistrates Court.

Recommendation 4:

In proceedings alleging a serious invasion of privacy, the parties should bear their own legal costs (subject to the usual exceptions).

Recommendation 5:

The Commonwealth Government should fund the appointment of permanent Self-Represented Litigant Coordinators in every Federal Magistrates Court in Australia. Among other things, these Coordinators should be required to assist unrepresented parties who wish to commence legal actions for serious invasion of privacy.

Thank you again for this opportunity to comment on the proposed statutory cause of action for serious invasion of privacy.

⁸Supreme Court of Victoria website, <http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/Home/About+the+Court/Court+Structure/Officers+of+the+Court/> (accessed 31 October 2011).

Should you wish to discuss any aspect of this submission, please don't hesitate to contact me on (03) 9652 1512 or via email at lucinda.obrien@fclc.org.au.

Sincerely

A handwritten signature in black ink, appearing to read 'Lucinda O'Brien', with a long horizontal flourish extending to the right.

Lucinda O'Brien
Policy Officer