

17 November 2011

Mr Sam Ahlin
Acting Assistant Secretary
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Department of the Prime Minister and Cabinet
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Dear Mr Ahlin

**ISSUES PAPER: A COMMONWEALTH STATUTORY CAUSE OF ACTION FOR SERIOUS
INVASION OF PRIVACY**

The Insurance Council of Australia (*Insurance Council*)¹, the representative body of the general insurance industry in Australia, welcomes the opportunity to provide this submission on the Issues Paper: A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy (the Issues Paper).

In the course of providing insurance and paying claims, it is necessary for insurers to collect, use and disclose personal information that ranges widely from names and addresses to sensitive health information. The general insurance industry has over many years invested a great deal of time and capital in developing systems, training staff, implementing policies and fostering a culture that respects and protects the privacy of individuals.

The Insurance Council takes no position on the advantages and disadvantages of a statutory cause of action for serious invasion of privacy. As we have consistently pointed out in submissions in relation to privacy reform², the Insurance Council is concerned by the impact that a statutory approach to a right to personal privacy may have on the ability of general insurers to undertake surveillance to assess a personal injury claim (particularly for Compulsory Third Party and workers compensation claims) and in the defence of any

¹ The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent more than 90 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. June 2011 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of \$34.3 billion per annum and has total assets of \$114.9 billion. The industry employs approx 60,000 people and on average pays out about \$95 million in claims each working day.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

² For example the Insurance Council's submission of 18 December 2007 to the Australian Law Reform Commission.

decision to decline a claim. Surveillance may also be used in investigating fraud or misrepresentation. While an insured's consent to surveillance can be obtained as part of the insurance contract, it may be that family members and others in the household who have not consented are also recorded.

As the Insurance Council does not take a position on the need for a statutory cause of action for serious invasion of privacy, we have not expressed a view on a number of questions raised in the Issues Paper. This submission only addresses those questions of concern to Insurance Council members.

3. Should any cause of action for serious invasion of privacy be created by statute or be left to development at common law?

As explained above, the Insurance Council does not take a position on the need for a statutory cause of action for serious invasion of privacy. However, if the Government elects to pursue a statutory cause of action for serious invasion of privacy, the Insurance Council submits it is crucial that workable defences are provided in order to avoid unwarranted interference with legitimate commercial interests such as those of insurers.

Furthermore, terms used in statute must be clearly defined. For example, the definition of "unauthorised surveillance" should explain how it applies to surveillance (and interviews) which may be undertaken in a public place and inadvertently collect enough information about third parties to make that information capable of reasonably identifying that person (third party).

4. Is 'highly offensive' an appropriate standard for a cause of action relating to serious invasions of privacy?

The seriousness or offensiveness test applied to a cause of action for serious invasion of privacy should set a high standard. Legal protections for invasion of privacy should be drafted to ensure that trivial invasions are not captured. The Insurance Council supports the recommendation of the Australian Law Reform Commission (ALRC) and Victorian Law Reform Commission (VLRC) that the plaintiff be required to demonstrate there was both a reasonable expectation of privacy and that the invasion of the expected privacy would be highly offensive to a person of ordinary sensibilities is appropriate. This will help discourage frivolous or vexatious claims.

7. Is the inclusion of 'intentional' or 'reckless' as fault elements for any proposed cause of action appropriate, or should it contain different requirements as to fault?

A cause of action for invasion of privacy should provide an avenue for remedy in only the most serious cases, where the behaviour of the respondent was clearly likely to invade the plaintiff's expectation of privacy. The legislation should be carefully drafted to discourage frivolous or vexatious claims. Therefore, in addition to requiring the plaintiff to demonstrate there was a reasonable expectation of privacy and that the invasion of the expected privacy would be highly offensive to a person of ordinary sensibilities, we strongly submit the plaintiff should be required to demonstrate that the action of the respondent was intentional or reckless.

10. What should be included as defences to any proposed cause of action?

Much of the debate in Australia over a 'right to privacy' has centred on the use of technology, emerging online social networks and the behaviour of the media. As noted in the Issues Paper, the right to privacy is often weighed against the countervailing public interest to know. Within the reports published by the ALRC, the NSW Law Reform Commission (NSWLRC) and the VLRC, there is very little discussion of what activities should be considered a 'legitimate' intrusion into someone's privacy.

The Insurance Council of Australia has consistently argued that the legitimate need of insurers to undertake surveillance should be preserved. In order to achieve this, a statutory cause of action should contain a list of activities which constitute a serious invasion of privacy as well as appropriate defences.

If a statutory actionable right to privacy is implemented, the Insurance Council suggests that the list of defences should include that the:

- act or conduct was incidental to the exercise of a lawful right of defence of person or property;
- act or conduct was made for the purpose of, and in the course of, rebutting the truth; or
- act or conduct for the purposes of investigating of potential fraud or misrepresentation.

It would be helpful if the Explanatory Memorandum introducing a statutory cause of action made specific reference to the ability of insurers to access these defences. In addition, recognition of implied, inferred or express consent as authorisation for the activities should be included as a defence.

12. Are the remedies recommended by the ALRC necessary and sufficient for, and appropriate to, the proposed cause of action?

The Insurance Council has no objection to the remedies recommended by the ALRC at recommendation 74-5.

14. Should any proposed cause of action require proof of damage? If so, how should damage be defined for the purposes of the cause of action?

The Insurance Council is concerned at the proposal for an actionable right to privacy which does not require proof of damage for an action to be brought. Coupled with the potential breadth of the proposed cause of action, this could result in a significant number of actions being commenced and the threat of such an action could have an adverse impact on dispute resolution processes.

15. Should any proposed cause of action also allow for an offer of amends process?

The Insurance Council supports an approach which encourages the resolution of disputes between the parties without reliance on the courts.

16. Should any proposed cause of action be restricted to natural persons?

The Insurance Council supports the recommendations of the ALRC, the NSWLRC and the VLRC that a cause of action only be available to natural persons. We submit it is not appropriate for privacy to apply to corporations, which would be the case if the broader concept of 'legal persons' is adopted.

17. Should any proposed cause of action be restricted to living persons?

The Insurance Council supports the recommendations of the ALRC, the NSWLRC and the VLRC that the proposed cause of action be limited to living persons.

If you require any further information, please contact Mr John Anning on (02) 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
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