



**Australian
Privacy
Foundation**

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Australian Human Rights Commission

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RE: Issues Paper: Free and Equal: An Australian conversation on human rights (“Issues Paper”).

This submission from the Australian Privacy Foundation (APF) responds to the Issues Paper. The APF is the leading public voice on privacy in Australia. Further information about our work can be found at the end of this submission and on our website at www.privacy.org.au.

The APF consents to this submission being published by the Australian Human Rights Commission.

The APF has read the submission to this “conversation” from the Human Rights Law Centre. The APF supports the submission and the need for a Charter of Rights in Australia.

Human rights legislation is needed in Australia

The APF has publicly and repeatedly advocated for enshrined and enforceable human rights protections in Australia. The UK, USA and Canada all have comprehensive human rights protections either in their constitution or in legislation. Australia does not have these same protections enshrined in legislation or our constitution. A conversation about the adequacy of human rights in Australia is long overdue and we commend the Australian Human Rights Commission for beginning this process.

The APF strongly supports enshrining comprehensive and justiciable human rights into the Australian Constitution. At a minimum there should be comprehensive Commonwealth Human Rights legislation in Australia. We would recommend even if there is a move towards human rights legislation across the Australian jurisdictions there should still be a goal of enshrining those rights in the Australian Constitution¹. For the purposes of this submission we will refer to comprehensive human rights protection within legislation or in the Constitution as a justiciable Charter of Rights. That Charter will provide substantive protection for rights, in contrast to existing legislation that is aspirational (in other words does not restrict the various legislatures), that does not provide readily accessible causes of action and that features numerous carve-outs. The right to privacy must be included in any Charter of Rights.

This submission will provide further detail about privacy as a human right that must be included in a Charter of Rights and complemented through vigorous timely action by entities that have the capability to act on behalf of individuals/groups whose privacy has been disregarded by public/private sector bodies.

The urgent need for a Charter of Rights

A Charter of Rights is needed in Australia urgently. The lack of a comprehensive and enforceable Charter of Rights has meant that the citizens of Australia have difficulty seeking legislative review of laws that arguably breach human rights. It also means that the national, state and territory governments remain free to pass legislation that egregiously disregards rights. Australia has also missed out on decades of judicial review based on a Charter of Rights.

International human rights and privacy

The *International Covenant on Civil and Political Rights (ICCPR)* specifies a wide range of protections relevant to privacy including:

- Privacy of the physical person – Articles 6, 7, 8, 9, 10 and 11
- Privacy of personal behaviour – Articles 12, 16, 17, 19, 21 and 22

¹ It is noted that Canada went through a process of moving from legislated human rights (Canadian Bill of Rights) to enshrining human rights into their constitution as the Canadian Charter of Rights and Freedoms. See https://en.wikipedia.org/wiki/Canadian_Charter_of_Rights_and_Freedoms.

- Privacy of personal communications – Article 17
- Privacy of personal data – Article 17
- Privacy of personal experience – Articles 18, 19, and 22

Some further rights have been expressed, in particular in the International Covenant on Economic, Social and Cultural Rights (ICESCR) – nominally in force in Australia since 1976, the UN Convention on the Rights of the Child – nominally in force in Australia since 1991, the UN Convention on the Rights of Persons with Disabilities – since 2008, and the UN Declaration on the Rights of Indigenous Peoples of 2007 – which Australia voted against. Whereas the ICCPR has been acceded to by the large majority of countries, the other conventions are less widely adopted.

Australia acceded to the ICCPR in 1972. Articles. 2 and 17.2 create express obligations on all Australian Parliaments to ensure that all human rights expressed in the document are protected, with effect from 1980, and that they are enforceable and enforced.

However, there has been an ongoing failure by the Australian Government to fulfil all of its obligations under the ICCPR. That failure is evident at the state/territory level. This is why a Charter of Rights is urgently required, so that all Australians are in a position to identify and give effect to their rights, which on occasion includes scope for legitimately holding governments to account. That accountability is one thing that differentiates Australia from what we see overseas, in for example Hong Kong, Malaysia and Syria.

Any Charter of Rights should at a minimum cover the ICCPR human rights.

Existing human rights laws in ACT and Victoria

The APF remains concerned that the human rights laws already enacted in the ACT and Victoria lack meaningful enforcement measures. They are aspirational and on occasion are expressly disregarded by the Government of the day under the rubric of law enforcement, anti-terrorism or simply bureaucratic inconvenience. Piecemeal state based human rights legislation is not sufficient to protect all Australians. We note that several Australian jurisdictions still do not have an information privacy statute and that statutes in other Australian jurisdictions are fundamentally weakened by large-scale exceptions.

Comprehensive, non-discriminatory, enforceable and enforced

A Charter of Rights must be comprehensive, non-discriminatory, enforceable and enforced. Enforceability continues to be a major issue for human rights in Australia. Even if there are

possible legislative or common law human rights, those rights are difficult or impossible to enforce. Enforceability is a key way to ensure that individual Australians can question the actions of its governments and hold those governments to account. It is the test of the separation of powers being effective. People must be able to have human rights and enforce those human rights through judicial review.

A privacy right of action

A key human right must be the ability to take action for a breach of privacy. Three Law Reform Commissions have recognised that the time has come to enable people to take legal action against unreasonable behaviour by companies, governments and other individuals. (ALRC 2008², NSWLRC 2009³, VLRC 2010⁴). They have framed the new right so as to avoid the risk of a chilling effect on media freedom, by including a 'public interest defence' and a relatively high threshold of 'serious intrusion' that is offensive to a reasonable person.

The APF strongly supports the introduction of a right of action that has the following characteristics:

it must be available to individuals, but not to legal persons such as companies

it must enable a court to grant injunctions, award damages, and impose exemplary or punitive damages

it must require the court to balance the privacy interests of the litigant against other important interests, including and especially 'the public interest'

it must provide a clear framework and criteria for evaluating a defence that an invasion of privacy is justified in the public interest

The APF published its Policy Statement on 'Privacy and the Media' in March 2009⁵. This includes what it believes to be an appropriate interpretation of the public interest. It will be submitting this to the Government for consideration.

² Australian Law Reform Commission Report 108 *For Your Information: Australian Privacy Law and Practice* See Recommendation 74 available at <https://www.alrc.gov.au/publication/for-your-information-australian-privacy-law-and-practice-alrc-report-108/>

³ NSW Law Reform Commission Report 120 *Invasion of Privacy* April 2009 Available at <https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-120.pdf>.

⁴ Victorian Law Reform Commission *Surveillance in Public Places* Final Report 18 2010 Available at http://www.lawreform.vic.gov.au/sites/default/files/Surveillance_final_report.pdf.

⁵ Available at <https://privacy.org.au/Papers/Media-0903.html#Fmwk>.

In addition, the APF strongly supports the removal of the media exemption from the existing provisions of the Privacy Act, as per the ALRC's carefully drafted Recommendation No. 42⁶.

If you have any questions please do not hesitate to contact Kat Lane.

Yours sincerely



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⁶ Australian Law Reform Commission Report 108 *For Your Information: Australian Privacy Law and Practice*
See Recommendation 74 available at <https://www.alrc.gov.au/publication/for-your-information-australian-privacy-law-and-practice-alrc-report-108/>.
Recommendation 42 is available at <https://www.alrc.gov.au/publication/for-your-information-australian-privacy-law-and-practice-alrc-report-108/list-of-recommendations-5/part-e-exemptions/>.

About the Australian Privacy Foundation

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions. The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems.

The APF makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters. Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance. When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.