



**Australian
Privacy
Foundation**

<http://www.privacy.org.au>

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<http://www.privacy.org.au/About/Contacts.html>

2 April 2017

Hon. John Robert Quigley MLA LLB, JP
Attorney General of Western Australia

Dear Mr Quigley

Re: Privacy Law

The Australian Privacy Foundation (APF) is the country's leading privacy advocacy organisation. A brief backgrounder is attached.

As you are no doubt well aware, Western Australia is one of the few jurisdictions left in the civilised world that has no data protection legislation in place.

We're writing to enquire whether your new Government will move to overcome that void.

We believe that this would be a valuable implementation of the ALP Platform commitment to "the advancement, maintenance and protection of ... fundamental human rights" and the protection of "human rights from abuse by government" (paras. 8 and 13, pp.156, 158).

Your State has the opportunity to take advantage of the considerable amount of knowledge that has been accumulated around the world over the last 45 years. It can establish a law that addresses the very substantial threats to personal security and privacy that arise from modern technologies and contemporary practices.

APF also draws to attention the opportunity for WA to take the lead on another vital element of privacy protection.

The other States and Territories have become gridlocked in relation to the establishment of a privacy right of action.

It is vital that a (carefully designed) tort be established through parliamentary rather than judicial channels, so that serious breaches of privacy by business entities, government agencies, not-for-profits and individuals can be litigated in the civil jurisdiction, but within a suitable framework.

Several Law Reform Commission Reports have presented sober assessments and proposals. APF's policy statement on the matter is attached.

APF looks forward to your response, and would be pleased to provide further assistance.

Thank you for your consideration.

Yours sincerely

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For the Board of the Australian Privacy Foundation
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Australian Privacy Foundation

Background Information

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. It 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.

The APF is open to membership by individuals and organisations who support the APF's Objects. Funding that is provided by members and donors is used to run the Foundation and to support its activities including research, campaigns and awards events.

The APF does not claim any right to formally represent the public as a whole, nor to formally represent any particular population segment, and it accordingly makes no public declarations about its membership-base. The APF's contributions to policy are based on the expertise of the members of its Board, SubCommittees and Reference Groups, and its impact reflects the quality of the evidence, analysis and arguments that its contributions contain.

The APF's Board, Committees and Reference Groups comprise professionals who bring to their work deep experience in privacy, information technology and the law.

The Board is supported by Patrons The Hon Michael Kirby and Elizabeth Evatt, and an Advisory Panel of eminent citizens, including former judges and former Ministers of the Crown.

The following pages provide access to information about the APF:

- Policies <http://www.privacy.org.au/Papers/>
- Resources <http://www.privacy.org.au/Resources/>
- Media <http://www.privacy.org.au/Media/>
- Current Board Members <http://www.privacy.org.au/About/Contacts.html>
- Patron and Advisory Panel <http://www.privacy.org.au/About/AdvisoryPanel.html>

The following pages provide outlines of several campaigns the APF has conducted:

- The Australia Card (1985-87) <http://www.privacy.org.au/About/Formation.html>
- Credit Reporting (1988-90) <http://www.privacy.org.au/Campaigns/CreditRpting/>
- The Access Card (2006-07) http://www.privacy.org.au/Campaigns/ID_cards/HSAC.html
- The Media (2007-) <http://www.privacy.org.au/Campaigns/Media/>



**Australian
Privacy
Foundation**

The association that campaigns for
privacy protections

**APF Policy
Statement re a
Privacy Right
of Action**

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Version of 21 July 2011

Background

The need for effective privacy protections has been well-understood for 40 years - since Sir Zelman Cowen's 'The Private Man' in 1969.

The courts have failed to develop a tort of privacy, and parliaments have provided only very limited and very weak legislation. Privacy Commissioners have not been provided with powers to solve problems, and in any case recent federal Privacy Commissioners do not have a strong record of working to protect people's privacy.

All 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 2008](#), [NSWLRC 2009](#), [VLRC 2010](#)). 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. See, in particular, [the ALRC's Recommendation No. 74](#).

Despite the LRCs' careful work, the media have mounted opposition campaigns against the proposal. There have been statements by proprietors and executives, and hysterical articles in the press – in some cases by otherwise steady and responsible reporters and commentators. As has been well-documented, politicians have long lived in fear of the media, particularly the Murdoch press. The proposal has accordingly sat on the back burner for a considerable time.

The revelations about serious misbehaviour by UK News Corporation reporters, and quite possibly by managers and executives, has revived interest in the right to action. On 21 July 2011, the Australian Government announced that it will release a Discussion Paper on the matter ([Media Release](#), mirrored [here](#)).

The APF's Position

Privacy protection in Australia is seriously inadequate. On the other hand, the privacy interest must always be carefully balanced against other important interests. In particular, privacy protections must not obstruct the legitimate role of the media in holding to account governments, corporations and individuals in positions of power.

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 ~~penalties~~ exemplary or punitive damages [clarified 24 Oct 2013]

- 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 2009. This includes what it believes to be an appropriate interpretation of the public interest. It will be submitting this to the Government for consideration.

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. 42](#).

Discussion Points


1. The privacy right of action is not specifically about the media; but it must apply to the media as well as every other individual and organisation
2. Media commentators originally reacted hysterically against the proposal, and have grossly misrepresented what it is, and what impact it would have
3. Media freedoms are crucial to a free society, and crucial to privacy interests. Privacy advocates are intent on ensuring that reasonable behaviour by journalists and publishers is supported, and is not prevented or constrained by the new right
4. The APF remains open to discussions with the media and other interested organisations about its [Policy Statement on 'Privacy and the Media'](#), with a view to the development of a common position on how the public interest should be defined

APF thanks its site-sponsor:



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