

CIVIL REMEDIES FOR SERIOUS INVASIONS OF PRIVACY BILL 2016

First Reading

Bill introduced on motion by Mr Paul Lynch, read a first time and printed.

Second Reading

Mr PAUL LYNCH (Liverpool) (10:43): I move:

That this bill be now read a second time.

I have great pleasure on behalf of the Opposition to introduce the Civil Remedies for Serious Invasions of Privacy Bill 2016. The bill aims to implement the legislative recommendations of a report of the Legislative Council Standing Committee on Law and Justice. The report is entitled "Remedies for the Serious Invasion of Privacy in New South Wales", and was published in March 2016. The recommendations in that report that form the basis for the bill were adopted unanimously. They were bipartisan. The objects of the bill are to provide for the substantial adoption of the legislative proposals made in report No. 123 of 2014 by the Australian Legal Reform Commission concerning the creation of a statutory cause of action for serious invasion of personal privacy; to confer jurisdiction upon the NSW Civil and Administrative Tribunal [NCAT] to entertain proceedings for enforcement of such statutory actions, in addition to the existing jurisdiction of the District Court and the Supreme Court; and to confer power upon the Privacy Commissioner to receive and deal with complaints about the serious invasion of personal privacy, including the power to issue take-down orders.

In a pattern of melancholy consistency, the Government is yet to take action on the recommendations of the parliamentary committee. While the delay is not as acute as, for example, the three-year wait for action concerning racial vilification, this is still disappointing. The Government has issued a discussion paper. Issuing a discussion paper rather than actually doing something such as introducing legislation is another typical response from the Government. The discussion paper relates to the possible future introduction of a criminal offence aimed at the unauthorised release of intimate images—colloquially known as "revenge porn". That may be a good idea—I will need to see the legislation. However, it is not what the committee recommended. The discussion paper proposal for take-down mechanisms only follows a conviction. That may well take some time, especially with current delays in the District Court, and will be lengthy, more confronting, and more time consuming than the take-down provisions included in this bill. In addition, it deals with only part of the field covered by the committee report.

The Standing Committee on Law and Justice inquiry was established on 24 June 2015. Its report, released in March this year, contained a number of recommendations relevant to this debate. Recommendation 3 was to introduce a statutory cause of action for serious invasions of privacy. Recommendation 4 provided the statutory cause of action be based on the Australian Law Reform Commission model in its 2014 report. Recommendation 5 incorporates a fault element of intent, recklessness and negligence for governments and corporations, and a fault element of intent and recklessness for natural persons in a statutory cause of action. Recommendation 7 was to confer jurisdiction on the NCAT to enable it to hear claims, in addition to ordinary civil courts, arising out of the statutory cause of action. Recommendation 6 was to broaden the scope of the NSW Privacy Commissioner's jurisdiction, and to empower the NSW Privacy Commissioner to make determinations that involve non-financial forms of redress, including apologies, take-down orders, and cease-and-desist orders.

It also recommended that the NSW Privacy Commissioner be empowered to refer a complaint on behalf of a complainant to the NCAT for hearing for a statutory cause of action where there is a failure to act on a non-financial form of redress, including apologies, take-down orders and cease-

and-desist orders. There were several factors driving the committee's recommendations and this bill. The invasion of privacy is a profoundly serious issue for our society. There is very real and entirely reasonable community concern about the issue. That problem and the concern about it is increasing. Recent decades have seen the rapid development of technology, and the overwhelming presence of social media. Most spectacularly, that is manifested in the phenomenon colloquially known as "revenge porn", which is probably better described as unauthorised sharing of intimate images. However, the bill is broader than that.

There are several current legal avenues to deal with these issues. None is adequate. They are complex, uncertain and not effective. Left to its own devices, common law may evolve an adequate mechanism in due course. However, we do not need to wait for that. The legislature should intervene with its own solutions. Doctrines such as an equitable action for breach of confidence do not provide adequate recourse. Criminal sanctions are sometimes used in relation to intimate images. However, there are two problems with that approach. There is a conceptual problem with arguing that images are indecent when they are created between consenting parties. There is sometimes a certain reluctance in victims wanting to expose themselves to the full panoply of criminal proceedings. That is notoriously the case with sexual assault, which is under reported and has a lower rate of prosecution. Simply relying upon the criminal law to deal with these issues is inadequate.

Civil law remedies need to be reformed and improved. However, we need other remedies, which is why this bill, following the committee report, expands the role of the Privacy Commissioner. By the way, the Government should get on with appointing a person to that position because the term shortly expires. The impact of a breach of privacy can be catastrophic for the individual victim. This is graphically obvious in the case of victims of unauthorised sharing of intimate images. Current technological developments of other types have increased the level of concern and the frequency of incidents. This includes the increasing use of drones and the unauthorised release of personal data increasingly held by corporate and governmental entities.

The first element in this bill is the introduction of a statutory cause of action for a serious breach of privacy. There has been a long line of recommendations for the introduction of this type of remedy. These include the 2008 Australian Law Reform Commission report "For Your Information: Privacy Law and Practice"; the 2009 NSW Law Reform Commission report "Invasion of Privacy"; the 2010 Victorian Law Reform Commission reporting "Surveillance in Public Places"; and the 2014 Australian Law Reform Commission report "Serious Invasions of Privacy in the Digital Era". The first of these reports is now years old. The implications of the digital age and increasing public concern mean that it is time to take action. It is time to adopt the multiple recommendations for a separate cause of action. Slightly different models are proposed in the reports. The model recommended in the committee report and which I have adopted in this bill is that proposed in the 2014 ALRC report. This has the obvious virtue of encouraging national consistency.

This focuses on two categories of invasion of privacy. One is misuse of private information. The other is intrusion upon seclusion. This is the narrowest of the available models and certainly narrower than the New South Wales Law Reform Commission [LRC] formulation. There is a variance in the models in relation to the fault element. The committee solution with which I agree and which is contained in this bill is to incorporate a fault element of intent, recklessness and negligence for governments and corporations and a fault element of intent or recklessness for natural persons. The jurisdiction for such claims would be the Supreme Court and District Court. Principles of common law assessment of damages would apply.

There is also merit in looking beyond the traditional courts to hear these types of claims. That holds the hope of being simpler and at lower cost. For that reason the committee recommended the jurisdiction be extended to the NCAT to allow it to hear claims in this field. This bill proposes that as well. I note that the NCAT already has jurisdiction to consider other types of claims between private persons as well as dealing with non-solved disputes with government agencies.

The introduction of a statutory cause of action is a very important tool for people who have been the subject of a serious invasion of privacy. However, there also need to be other mechanisms

that are not simply aimed at recovering damages after injuries have been inflicted. There also needs to be a mechanism to cauterise the damage. For that reason the bill adopts the committee's unanimous recommendations concerning the Privacy Commissioner. This pursues a complaints mechanism rather than damage claims or indeed a criminal prosecution to provide redress. This will allow a private complaint to the Privacy Commissioner. That office will have to be adequately resourced. It will also need appropriate powers. The commission should be able to receive and determine complaints relating to a serious invasion of privacy. The commissioner should be able to deal with non-financial redress. This would include apologies, cease-and-desist orders and take-down orders.

Turning to the provisions of the bill, part 1 provides preliminary and definitional provisions. Part 2 establishes a cause of action for serious invasion of privacy. It makes clear that the statutory cause of action is an action in tort. People under 18 years of age are excluded as defendants. Limitation periods are controlled by currently existing law. Clause 9 makes clear that the invasion of privacy is either an intrusion upon seclusion or a misuse of private information. An action only lies under clause 10 where there is a reasonable expectation of privacy. Circumstances relevant to this are set out in 10 (2). Clause 11 sets out the fault element to which I earlier alluded. Clause 12 provides such actions must only involve serious breaches of privacy. Clause 13 importantly provides that a successful action must establish that the public interest in privacy outweighs any countervailing public interest. Clause 14 provides a single publication rule.

Division 3 of part 2 provides statutory defences against the statutory cause of action. These include lawful conduct, necessity and consent, protection of person or property, absolute privilege, publication of public document and fair report of proceedings of public concern, many of which already arise under the provisions of the Defamation Act. Division 4 provides for remedies in broad common law terms, subject to jurisdictional limits of the relevant court. Aggravated damages are prohibited. Exemplary damages are available in exceptional circumstances only. Non-economic loss damages are subject to the same limits as pursuant to the Defamation Act. The courts will also have power to issue injunctive and declaratory relief. The court may also order delivery and destruction of articles, documents or material. It may also make an order for the publication of a correction, the making of an apology or other non-monetary relief.

Division 5 clarifies the relationship of the cause of action to other rights and clause 21 ensures the cause of action does not survive for the plaintiff's estate. Part 3 establishes the jurisdiction for causes of serious invasion of privacy for the NCAT. The limitation periods are set out in clause 26. The provisions concerning the nature of the claim and defences follow those in part 2. The jurisdictional limits for monetary relief mirror those of the District Court. Part 4 of the bill deals with the role of the Privacy Commissioner. Clause 40 sets out the commissioner's role, including proceedings in the NCAT. Division 3 of part 4 provides for the making of complaints and how they are dealt with, including a preliminary assessment and conciliation.

Clause 47 sets out the mechanism for the determination of complaints. The commissioner can make various declarations including that the respondent must take specified steps, that the respondent must make an apology, or that relevant material be taken down. Should the declaration not be complied with, clause 48 provides that the determination can be enforced through the NCAT. Clause 54 provides the Act does not apply to invasion of privacy committed before the Act commences. Clause 55 provides for a statutory review of the Act five years after commencement. This bill responds to the unanimous bipartisan recommendations of a parliamentary committee in the way the Government should have but did not. I commend the bill to the House.

Debate adjourned.

The DEPUTY SPEAKER: I fix the resumption of this debate as an order of the day for a future day.