



office of the
privacy
commissioner
new south wales



The Hon Natasha Maclaren-Jones MLC
Chair
Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

25 NOV 2015

Dear Mrs Maclaren-Jones *Natasha,*

Inquiry into remedies for the serious invasion of privacy in NSW.

Thank you again for the opportunity to appear before the Inquiry on 30 October 2015.

I have reviewed the hearing transcript and can confirm it accurately reflects my testimony on the day. Due to time constraints, I was unable provide my entire opening statement. I provide a copy of my full intended statement, for the Committee's consideration.

During my testimony, I took two questions from Committee members on notice. I now enclose my response to those questions, along with my response to a supplementary question posed by the Committee.

During the formation of these responses, I consulted with a number of legal academics, including Associate Professor David Lindsay from the Faculty of Law at Monash University. Dr Lindsay is an expert in the field of international privacy law and has advised he would be happy to assist the Committee in their deliberations on the issues being considered as part of the Inquiry. He can be contacted at David.Lindsay@monash.edu.

I note the Committee also determined to refer to me testimony from 'Witness A', initially given in-camera, but which has now been made available and published on the NSW Parliament website. I have reviewed the transcript and have also spoken to Witness A's legal representative. It is my view that, based on the evidence presented to me, the remedies available under NSW privacy legislation are inadequate for these circumstances.

I have suggested to Witness A and her legal representative that the best chance for some determinative decision and prescribed actions, including recompense, are through the Commonwealth Privacy Commissioner and the legislation he oversees. I would be more than happy to discuss these issues further with the Committee, should you so wish.

If I can be of any further assistance to the Committee on any other matters, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink that reads "Elizabeth Coombs".

Dr Elizabeth Coombs
NSW Privacy Commissioner

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STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO REMEDIES FOR SERIOUS INVASIONS OF PRIVACY

DR ELIZABETH COOMBS – NSW PRIVACY COMMISSIONER

QUESTIONS ON NOTICE – 30 OCTOBER 2015

Question

The Hon. DAVID CLARKE: *Dr Coombs, you support the development of a statutory cause of action. Is there a jurisdiction in the world that you would point to as providing a good model for this?*

Dr COOMBS: *I will come back to you on that, but I would like to make a couple of points if you would not mind? It was Professor Witzleb who pointed out that Australia is standing virtually unique amongst those countries that have common law tradition not to have a legal remedy of a statutory cause of action for serious invasions of privacy. He does say that where there are existing human rights bills you need to look at the context. That is a summary of some of the major points that he was making. I would like to come back to you on that.*

Question

The Hon. DAVID CLARKE: *You said that Australia's privacy laws should meet international standards. Is there a gold standard of what those international standards should be? Where do we find these international standards?*

Dr COOMBS: *A variety of mechanisms have produced standards—APEC, OECD and the Apple ones as well. In terms of the particular statutory cause of action, in attachment D to the submission that I have provided to the Committee there is a comparison of various models that have been put forward by different law reform commissions. When we look at those we need to be looking at: What is the need of the ordinary person and that person's ability to access those? The advantage that I see this inquiry has is that the Committee has those reports that are very strongly researched. That will give this Committee the ability to pick up elements which will best meet the situation needed here in New South Wales. I would be very happy though to take that on notice and come back to you on that question.*

The Hon. DAVID CLARKE: *Are you going to take on notice what the international standard is?*

Dr COOMBS: *Yes.*

Answer:

I understand the Committee's commitment to identifying existing best practice models for a statutory cause of action and best practice international standards for privacy law.

Accordingly, since the hearing I have consulted various legal experts and academics on these issues. The response has been consistently that it is difficult to point to one jurisdiction as an exemplary model. The reason for this is jurisdictional comparisons of models for privacy law and statutory causes of action need to take into account the nature of the legal context and related law within each jurisdiction.

Experts in this area have all stressed the need to look beyond the legislation establishing a statutory cause of action for privacy, to other complementary legislation and the common law in each

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jurisdiction; these other two factors would have interacted to influence the particular form of the statutory cause of action. Basically, it was stated that the legal context of each jurisdiction is integral to the particular privacy law in each jurisdiction. I recall this point was made by A/Professor Normann Witzleb of Monash University in his submission.

Following from this consultation, it remains that the best guidance as to what model is appropriate in Australia and NSW is to be taken from the well-researched reports of the various Law Reform Commissions.

Ideally, any statute would:

- have a broad scope to cover any circumstances;
- cover corporations, small business and natural persons and appropriately determined fault elements and provide for exemptions for those below the age of criminal responsibility, as per section 5 of the *Children (Criminal Proceedings) Act 1987* or those with a diagnosed cognitive impairment; and
- weigh privacy interests against countervailing interests such as artistic freedoms, media freedoms and freedom of speech more broadly.

It is recommended this be complemented by a complaints model, broadening the role of Privacy Commissioner to allow allegations to be investigated and appropriate determinations made. Determinations could be referred to a court or tribunal for review. The NSW Civil and Administrative Tribunal could play an important role in contested disputes.

In my submission I raised the elements that I considered worthy of consideration, if not inclusion, in a statutory cause of action. I now make the following additional points, having heard and read the further material provided during the Inquiry's hearings:

- Australia is out of step with the rest of the world where increasing numbers of countries have introduced privacy law. The vast majority of these countries have access to the court and privacy law to address invasions of privacy.¹
- In the commercial sphere, awareness of privacy management as a corporate responsibility and asset is growing. Companies small and large are interacting globally through the internet and are familiar with privacy requirements, particularly with European countries.
- Existing NSW privacy law addresses personal information but has limited options for the broader concept of privacy that goes beyond personal information to the concept of being 'left alone' or attacks upon 'honour and reputation' as captured by the relevant articles of the 1948 Declaration of Human Rights and the later International Covenant on Civil and Political Rights'.
- In relation to possible amendments of the existing legislation, my 2015 report to the Parliament on the operation of the Privacy and Personal Information Protection Act, 1998 provides recommendations on legislative improvements² (see Recommendations 3, 4, 8, 9, 10, 12, 13, 32, 33, 34 and 35).
- Further, the ability for the Privacy Commissioner to make determinations in relation to serious invasions of privacy which are reviewable by the NSW Civil and Administrative Tribunal is worthy of consideration and adoption by the Inquiry.

¹ Professor Graham Greenleaf, Law School, University of NSW puts the figure at 109 countries (20 November 2015).

² A copy of my report can be accessed at

http://www.ipc.nsw.gov.au/sites/default/files/file_manager/20150212_Privacy%20Commissioners%20Report_FINAL_low-res.pdf

Supplementary questions from the Committee: Responses from Dr Henry and Dr Powell

1. If the committee were to recommend a statutory cause of action for serious invasions of privacy, one option might be to recommend that a fault element encompassing negligence (as well as intent and recklessness) apply to corporations; while recommending a more limited fault element (intent and recklessness only) that would apply to natural persons.

Do you have any concerns or comments in regards to this?

We support a fault element that is confined to intentional and reckless invasions of privacy for natural persons, and support an extension of the fault element to encompass negligence for corporations (in addition to intent and recklessness).

In so-called “revenge pornography” cases where Person A is negligent with Person’s B’s image, which Person C accesses and distributes without consent, it would be unfair to attribute civil liability to Person A. For instance, Person A leave his or her mobile phone lying around and Person C finds a sexually explicit image of Person B (that has been consensually shared with Person A) and then distributes it to another person or posts it online. Should a statutory cause of action for serious invasions of privacy be introduced, Person C, who has intentionally or recklessly invaded the privacy of Person B, would be liable, provided there was a reasonable expectation of privacy and that such an act constituted a “serious” invasion of privacy.

On the other hand, if a corporation (e.g. law enforcement; news media) negligently releases or distributes a sexually explicit image of Person B, but not intentionally or recklessly, we believe that they should be held accountable should a statutory cause of action for serious invasions of privacy be introduced.