New South Wales
Council for Civil Liberties

NSWCCL SUPPLEMENTARY SUBMISSION

RESPONSE TO QUESTIONS ON NOTICE

NSW LEGISLATIVE COUNCIL COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO REMEDIES FOR THE SERIOUS INVASION OF PRIVACY IN NEW SOUTH WALES

25/11/2015

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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Inquiry into Remedies for the Serious Invasion of Privacy in New South Wales:

Supplementary Submission of the New South Wales Council for Civil Liberties

Q1 Are there any models for a cause of action for invasion of privacy in overseas jurisdictions (for instance, Canada)?

According to the ALRC, there are civil causes of action for serious invasions of privacy in:

- New Zealand;
- the United Kingdom;
- the United States;
- California; and
- various Canadian provinces.[1]

However, not all of these jurisdictions can provide models for a statutory cause of action within in NSW, for the following reasons:

- **UK:** privacy causes of action in the UK stem from a 'bill or charter of rights' type instrument which confers many general rights, one of which is a right to privacy.[2] This instrument cannot readily be imported into NSW - at least, not without a much broader political debate extending far beyond the issue of privacy.
- **New Zealand:** privacy causes of action in New Zealand are at common law only.[3] Therefore, this cannot serve as a model for a statutory cause of action as we propose.
- **USA:** as in New Zealand, privacy causes of action in the USA are at common law only.[4] Therefore, this cannot serve as a model for a statutory cause of action as we propose. Furthermore, liability in tort is required to give way to the First Amendment (freedom of speech). This idiosyncrasy renders the American cause of action an inappropriate model for a statutory cause of action in NSW.

The remaining causes of action are those in the Canadian provinces (British Columbia, Manitoba, Newfoundland, Labrador, Quebec, Saskatchewan) and California (in the USA).

The causes of action in British Columbia, Saskatchewan, Newfoundland and Labrador require that a violation of privacy be done 'wilfully'.[5] Therefore, the fault element of these statutory causes of action is 'intention.' However, in our submission, we made clear that our preference is for the statutory cause of action to include 'negligence' and 'recklessness' as fault elements, in addition to

[1] ALRC (2014) *Serious Invasions of Privacy in the Digital Era (Final Report)*, [1.24].
[2] *Human Rights Act 1998* (UK). This act requires the courts to give effect to the protection of rights and freedoms in the *European Convention on Human Rights,* one of which is a broad right to privacy.
[3] *Hosking v Runting* (2005) 1 NZLR 1 (misuse of private information); *C v Holland* [2012] 3 NZLR 672 (intrusion).
[4] For a useful and brief summary of the tort, please see Des Butler (2005) *A tort of invasion of privacy in Australia?*, 29(2) MULR 339.
[5] ALRC (2014) *Serious Invasions of Privacy in the Digital Era (Final Report)*, [7.19] (which refers to *Privacy Act, RSBC 1996*, c 373 (British Columbia) s 1(1); *Privacy Act, RSNL 1990*, c P-22 (Newfoundland and Labrador) s 3(1); *Privacy Act, RSS 1978*, c P-24 (Saskatchewan) s 2.

'intention.'[6] Therefore, in our view, the statutory regimes in these four Canadian provinces are inappropriate to adopt wholesale in NSW.

The cause of action in Manitoba requires a violation of privacy be done 'substantially, unreasonably and without a claim of right.'[7] It subsequently provides a defence where the defendant neither knew, nor should have known, that the conduct would have violated the privacy of another. In effect, this defence ensures that a claim for invasion of privacy will only succeed in circumstances where it was intentional. We therefore revert to our criticism of the statutory regime in the other four Canadian provinces, as above.

The cause of action in California is limited to the following two situations:

- physical invasion of privacy (a form of trespass to land); and
- constructive invasion of privacy (where a person attempts to use a device, in a manner that is offensive to a reasonable person, to capture an image, video or other impression of a person engaging in a private, personal or familial activity).[8]

In our view, a cause of action limited to these two situations above is too limited. We favour a cause of action which captures a broader range of invasions of privacy than those contemplated by the Californian statute.

Finally, it is important to note that Article 1 of the Californian Constitution describes privacy as an 'inalienable right.' Therefore, the Californian statutory tort exists in a legal context which is significantly different to that in NSW.

In light of the above, the statutory cause of action that we have proposed differs in key respects from all other civil causes of action for invasions of privacy in other jurisdictions.

In this sense it is novel, and no other cause of action can serve as a 'model'. However, we note that our proposal is substantially similar to the Canadian models, but incorporates a broader fault element.

Q2 Should the statutory cause of action oust the common law breach of confidence or an equitable breach of confidence action? Should it exclude that so as public interest is always being considered in these cases?

CCL holds the view that a statutory cause of action should oust the common law breach of confidence or the equitable breach of confidence action and ensure the public interest is always considered in these cases by establishing an appropriate balance between the individual right to privacy and freedom of expression.[9]

[6] NSW Council for Civil Liberties (2015) *Submission to the NSW Legislative Council Committee on Law and Justice Inquiry into Remedies for the Serious Invasion of Privacy in NSW*, Appendix 1, p 7.
[7] ALRC (2014) *Serious Invasions of Privacy in the Digital Era (Final Report)*, [7.19] (which refers to *Privacy Act, CCSM 1996*, c P125 (Manitoba) ss 2(1), 5(1)(b)).
[8] *California Civil Code* § 1708.8, (a)-(b).
[9] See NSW Council for Civil Liberties, *Submission on Issues Paper: A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, Appendix 1, p 15.

CCL has long held the view that a statutory protection is to be preferred in the Australian context on the grounds of coherence and clarity, timeliness and accessibility.[10]

In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 ('*Lenah Game Meats*') Gummow & Hayne JJ at [132], with whom Gaudron J agreed at [58], reflected the development of a tort of invasion of privacy in the following equivocal terms:

It may be that development is best achieved by looking across the range of already established legal and equitable wrongs. On the other hand, in some respects these may be seen as representing species of a genus, being a principle protecting the interests of the individual in leading, to some reasonable extent, a secluded and private life, in the words of the *Restatement*, "free from the prying eyes, ears and publications of others". Nothing said in these reasons should be understood as foreclosing any such debate or as indicating any particular outcome. Nor, as already has been pointed out, should the decision in *Victoria Park*. (citations omitted)

Since *Lenah Game Meats* the common law has failed to evolve this state of the law.[11] Accordingly, there is wide agreement that common law in relation to a privacy tort in Australia is undeveloped and unlikely to progress significantly in the foreseeable future.[12] But in any case, a common law development would have to fit within existing types of action (e.g. breach of confidence), whereas the creation of a statutory cause of action would be both more certain and more exact.

All three Law Reform Commissions have examined these options in recent years and are unanimous in their recommendation of a statutory instrument. CCL agrees with the view that legislation 'may provide a clearer legal structure for the cause of action, and could provide for a more flexible range of defences and remedies than would be possible if the cause of action grew on a case-by-case basis within the common law.'[13]

CCL supports the inclusion of public interest as a defence (in a non-exhaustive list), and the inclusion of limiting definition of 'public interest 'from the expansive 'anything the public has an interest in' to 'matters of concern to the public interest'.[14]

Q3 You mentioned a threshold in relation to seriousness. Do you have a suggestion on that?

CCL holds the view that 'offensive' is an appropriate standard. This should be one of a number of matters to be taken into account- as proposed by the NSWLRC.[15]

CCL notes the divergence of views across the LRC's on this.[16] We agree that the standard must be sufficient to deter trivial or frivolous action. However, we share the view that there is a strong

[10] See further NSW Council for Civil Liberties, *Submission on Issues Paper: A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, Appendix 1, p 14.
[11] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 ('*Lenah Game Meats*') Gummow & Hayne JJ at [132], with whom Gaudron J agreed at [58]. For examples of lower court decisions seeking to enforce a tort of invasion of privacy see *Grosse v Purvis* Aus Torts Reports 81-706 at [421] – [447]; [2003] QDC 151 (Senior Judge Skoien); *Gee v Burger* [2009] NSWSC 149 at [53] (McLaughlin AsJ).
[12] Summarised in Issues Paper 2011, pp13ff; see also
[13] Issues Paper 2011, p 29.
[14] See discussion of VLRC position in Issues Paper 2011, p 37.
[15] See list of matters in response to question 8 of NSW Council for Civil Liberties, *Submission on Issues Paper: A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, Appendix 1.

probability that 'highly offensive' would skew the standard to the extreme end of 'offensiveness' and thereby result in an inappropriately limited definition of the standard.

The combination of 'serious invasion' of privacy and 'offensive' to a person with ordinary sensibilities is sufficient and appropriate and provides a reasonable and balanced criterion.

While not accepting the necessity, CCL would not object to a more moderate intensifier than 'highly offensive'. The ALRC had initially proposed 'substantial offence'.[17] This would effectively exclude the trivial and the offensive without seriously limiting the scope towards only the 'most' offensive of invasions.

4. Can NCAT be given jurisdiction to deal with claims for invasion of privacy? Would such jurisdiction be desirable, and are there any other alternatives?

During our public hearing before the Committee, some questions were raised as to whether NCAT could be given jurisdiction to hear claims for invasion of privacy arising out of a statutory tort. There was some uncertainty as to whether NCAT could be given jurisdiction to determine disputes between two private parties, as opposed to one private and one public party.

There is no obstacle to NCAT exercising jurisdiction over claims of serious invasions of privacy brought by private individuals. Its powers are not confined to cases involving a government agency.

Parliament could confer on NCAT jurisdiction to determine disputes between private parties in relation to an unlawful invasion of privacy. NCAT's foundational legislation is the *Civil and Administrative Tribunal Act 2013* (NSW) (***NCAT Act***). S 28 of the NCAT Act provides that:

> *(1) The Tribunal has such jurisdiction and functions as may be conferred or imposed on it by or under this Act or any other legislation.*
> *(2) In particular, the jurisdiction of the Tribunal consists of the following kinds of jurisdiction:*
> *(a) the general jurisdiction of the Tribunal,*
> *(b) the administrative review jurisdiction of the Tribunal,*
> *(c) the appeal jurisdiction of the Tribunal (comprising its external and internal appeal jurisdiction),*
> *(d) the enforcement jurisdiction of the Tribunal.*

S 29 of the NCAT Act provides that:

> *(1) The Tribunal has "general jurisdiction" over a matter if:*
> *(a) legislation (other than this Act or the procedural rules) enables the Tribunal to make decisions or exercise other functions, whether on application or of its own motion, of a kind specified by the legislation in respect of that matter, and*
> *(b) the matter does not otherwise fall within the administrative review jurisdiction, appeal jurisdiction or enforcement jurisdiction of the Tribunal.*

On the basis of these provisions NCAT can effectively be given any jurisdiction that Parliament decides to confer upon it by statute. There is nothing preventing Parliament from conferring on

[16] Summarised Issues Paper 2011, pp 32-3.
[17] This was the proposal in the ALRC Discussion Paper quoted ALRC Report p 32.

NCAT jurisdiction to hear private disputes. Such jurisdiction would fall within NCAT's general jurisdiction.

In fact, its biggest Division in terms of number of matters - the Consumer and Commercial Division - determines disputes between private parties. The source of NCAT's jurisdiction in this context is the *Fair Trading Act 1987* (NSW) s 79J, which confers on NCAT jurisdiction to hear "consumer claims." S 79E defines "consumer claim" as a claim that arises from the supply of goods or services. Such a claim may include a claim for misleading or deceptive conduct, or a claim for compensation for a faulty product.

Also, it is used to dealing with complaints by private individuals in which conciliation by a government agency has previously been attempted. This is the procedure required by the Anti-Discrimination Act 1977 (NSW).

Under this Act, NCAT's jurisdiction to grant remedies (they include damages up to $100,000 and the publication of an apology) is exclusive. But under other Acts, such as the Retail Leases Act 1994, it has concurrent jurisdiction with the courts. The most substantial cases under this Act are generally heard in the Supreme Court because NCAT may not award monetary relief exceeding $400,000. But other lesser cases almost always end up in NCAT, because there is a provision making it the primary decision-maker.

As a matter of fact, NCAT already has a privacy jurisdiction of sorts, under the Privacy and Personal Information Protection Act 1998. See s 55.

Any jurisdiction exercised by NCAT has to be conferred by statute. The task of defining its limits and specifying the extent to which it incorporates or alternatively supersedes common law principles calls for careful statutory drafting.

In the present context, there would be particular difficulties with regard to the existing common law and equitable remedies for breach of confidentiality. This cause of action would undoubtedly overlap with any new statutory cause of action for serious invasion of privacy. But it would not be the same, for reasons including those mentioned at the Standing Committee hearing. So the question would arise: should any privacy jurisdiction conferred on NCAT include statutory relief supplanting the existing common law and equitable remedies or should this new jurisdiction exist side by side with those remedies? If the latter, there would be the disadvantage that they would remain within the jurisdiction of courts, while the new statutory remedies would be primarily or wholly within the remit of NCAT.

In summary

Therefore, NCAT clearly has jurisdiction to determine private disputes provided Parliament enacts enabling legislation to that effect. If NSW were to legislate to introduce a statutory tort, there would be nothing preventing Parliament from conferring jurisdiction on NCAT to hear claims arising out of such a regime.

Having established that jurisdiction can be conferred upon NCAT, it is necessary to address a secondary issue: whether it *should* be. Although NCAT is intended to operate as a cheap, efficient and streamlined forum for dispute resolution, it is not without its critics.

Q5. Different fault elements for corporations and natural persons

We have been asked to comment on the following proposal: that corporations be liable for negligent, intentional or reckless invasions of privacy, whereas natural persons only be liable for intentional or reckless (but not negligent) invasions of privacy.

Our general position is that we support including negligence as a fault element. However, we are not strongly opposed to diluting the fault elements for natural persons only to intention or recklessness. All tort feasors which are not natural persons (including government agencies and corporate entities) should, in our view, be liable for negligent invasions of privacy.

By way of explanation: the defect in the proposal is that it only contemplates 'corporations' and 'natural persons.' It does refer to government agencies. We believe that individuals should have the maximum protection from government agencies invading their privacy (in absence of any other statutory authority to do so). Therefore, government agencies should be liable for negligent invasions of privacy in the same manner as corporations.