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

Supplementary questions on notice – hearing on 30 October 2015

Questions for the Australian Law Reform Commission

Question 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?

There are two aspects of the suggested option about which we have concerns or comments.

a) *Extending the fault element to encompass negligence.*

In our *Report 123: Serious Invasions of Privacy in the Digital Era*, the Australian Law Reform Commission ("the ALRC") was asked to provide a detailed legal design for a statutory action for serious invasions of privacy. We recommended the various essential elements of a statutory action. At paragraph 1.10 of the Executive Summary, we noted that "the overall structure and elements of the cause of action should be read together, as each element depends in many ways on the existence of the others." There is a particular relationship between the fault element and the issue of whether actual damage is required, as we now explain briefly. Our longer explanation on the reasons for the recommended fault element is set out in Chapter 7 of our Report.

Emotional distress, falling short of psychiatric illness, appears to be the most common result of a serious invasion of privacy. However, in our legal system, it is not generally possible to recover damages for mere distress except in a few longstanding actions dealing with fundamental breaches of personal and property rights, such as assault, battery, false imprisonment, malicious prosecution or trespass to land. Our courts have rejected a general action for infliction of emotional distress, even when inflicted intentionally.

Further, when the fault involved is negligence rather than intent, civil liability legislation around the country, has entrenched the common law position by providing

that there can be no recovery for pure mental harm caused by negligence unless it consists of a recognized psychiatric illness. This is found in the Civil Liability Act 2002 (NSW) s 31. This section is a significant limitation on the rights of claimants who have suffered as a result of the negligence of others. An example is where a child is negligently injured or killed: there is no action by the parents for their emotional distress, no matter how gross the defendant's negligence, unless their distress develops into a recognised psychiatric illness.

The ALRC was of the view that it was important for any statutory action for invasion of privacy to be consistent and coherent, in the light of the general approach to civil liability in Australia.

Despite the general approach to recovery of mere emotional distress, we recommended in Chapter 8 that a serious, intentional or reckless invasion of privacy, where the claimant had a reasonable expectation of privacy and where there was no countervailing public interest, *should* be actionable without proof of actual damage (that is, damage in the form of personal injury, psychiatric illness, property damage or economic loss.) This would allow claimants to recover general damages for the fact that their privacy had been invaded and would allow the court to take into account their emotional distress.

The ALRC felt that satisfaction of the threshold requirements would both justify making an invasion of privacy an exception to the general rules on the damage requirements and also be sufficient to prevent trivial or unmeritorious actions to be brought. The design would align a serious invasion of privacy with the other civil actions that arise out of an encroachment on fundamental liberties of the person such as assault and battery.

If the fault element were extended to include negligence, then, in the ALRC's view, the new law would need to be consistent with the general approach to damage and require proof of actual damage for negligent conduct, unless of course that general approach were overturned.

While it would be possible to have different damage elements according to the type of fault proved, this may be undesirably complex and lead to prolonged litigation and uncertainty. The ALRC was of the view that the highest priority should be to provide a remedy for unjustifiable, serious, intentional or reckless invasions of privacy and the legislation should be as clear as possible to allow this.

We noted at paragraph 7.19 that the statutory torts in four Canadian provinces require the conduct to be willful.

b) Extending the fault element to negligence for corporations only.

Whether the defendant is a private citizen or a corporation, the same comments as in a) above apply with respect to the difficulties of allowing a claim for negligent invasion of privacy to be actionable without proof of "actual damage". In current civil actions for negligence, the defendant will often be a corporation (being sued for "personal" negligence or on the basis of its vicarious liability for its employees' negligence) and yet the law generally disallows recovery of mere distress negligently or even intentionally caused by a corporation, even in the case of gross negligence.

In addition, drawing a distinction between the liability of corporations and the liability of persons with respect to fault may lead to some difficult legal issues and create uncertainty if these were not dealt with in the legislation. What size would the corporation need to be to attract this liability? Would the liability extend to family run companies with small shareholdings created for tax or other organizational reasons? Should the distinction be consistent with other laws, such as the Privacy Act 1988 (Cth) which applies only to corporations with a large turnover or those dealing with personal information? Would there be exemptions for certain types of corporations?

How would the distinction operate where a claimant sued a corporation because of the activities of its employees in the course of employment? Would it then only be liable for intentional wrongdoing by those employees?

The justification for making corporations liable for negligent invasions of privacy, such as those, for example, arising from a breach of security over personal data held by a corporation (with or without the consent of the subject), must be considered in the context of existing laws and in the context of the many public interests that must be balanced with individual privacy. Some of these are listed under Principle 3 of the Guiding Principles at paragraph 2.22 of the ALRC Report. The free flow of information is important for keeping the public informed on matters of public interest and importance, for national economic development and to enable participation of Australian people and businesses in the global digital economy. While these countervailing interests should not, of course, give corporations a free hand to be lax with people's personal information, the ALRC considers that the range of other remedies against these corporations for negligent (or innocent) data breaches must be considered. Those who have been harmed by breaches of their confidential information may have remedies for breach of confidence (where liability is strict), for breach of contract, in negligence if loss is caused, under consumer protection laws, under financial regulation laws, and also may have the ability to complain under the

Privacy Act 1988 (Cth). That Act also now allows the Commissioner to take action and issue penalties for breaches of the Act.

Legislation extending to negligent data breaches would also face considerable opposition by many businesses, making it less likely to win the substantial community support needed for new law. The ALRC considers that it would be undesirable for legislation aimed at remedying serious, unjustifiable, intentional or reckless invasions of privacy to be delayed while consideration is given to the uncertainties and complications that arise from the legislation extending to negligent conduct.

2. The ALRC supported a statutory cause of action for serious invasions of privacy, and further that the cause of action be described as a tort.

What impact would it have should any statutory cause of action be recommended *without* it being described as an action in tort?

This issue is discussed in Chapter 4 from paragraphs 4.41, and the reasons are set out there as to why the ALRC considers it desirable for the action to be described at the outset as a tort. Many ancillary legal rules, such as the law on vicarious liability of employers and choice of law rules for interstate or international events, depend on the classification of the particular action. It also allows courts to draw on analogous case law when determining issues such as damages awards.

The objection that calling the action a tort would limit the remedies available is inappropriate given that the legislation would set out the remedies that could be considered or awarded by the relevant court or tribunal.

While the ALRC does not consider it essential that the action be described as a tort, to do so would avoid a number of these issues of uncertainty arising, lessening the need for the courts to engage in statutory interpretation and for extensive disputes and litigation for claimants and defendants.

An alternative would be to include provisions on various ancillary rules in the legislation but this would make the legislation undesirably and arguably unnecessarily complex and lengthy.

Most jurisdictions now consider the action, whether common law based or statutory, to be a tort action. The ALRC's recommendation and discussion of the

"tort" nomenclature was noted recently by the Court of Appeal of England and Wales in the case of *Google v Vidal-Hall*[1] when it considered how privacy actions in the United Kingdom should now be classified.

Professor Barbara McDonald on behalf also of

Professor Rosalind Croucher, President, and Mr Jared Boorer, Principal Legal Officer, of the Australian Law Reform Commission

December 2015

Response to questions on notice to Professor McDonald (see transcript).

The Chair: What would happen in a situation where you have residents whose privacy has been breached and they reside in New South Wales but the act of downloading or transferring the images occurred in another State or Territory?

Response of Professor McDonald: Please note that I am not an expert on private international law, which includes the law dealing with the applicable law in multi-jurisdiction disputes, nor on constitutional law which deals with the extra-territorial application of state statutes. I therefore make only the following general comments.

Generally the common law is that the court applies the law of the place where a tort was committed (*John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503. For torts like defamation it has been held that the tort is committed where the publication was received. In the internet age, this means the place where a defamatory statement was downloaded (*Dow Jones & Co v Gutnick (2002)* 210 CLR 575. Each publication founds a cause of action. The uniform state *Defamation Acts* of 2005 make specific provision for choice of law rules for Australia -wide defamations which overrides the common law rules for publications.

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[1] *Google v Vidal-Hall* [2015] EWCA Civ 311, [2015] 3 WLR 409, [44]. Permission to appeal to the United Kingdom Supreme Court was granted in part on 28 July 2015, but the Court refused permission on 'the issue whether the claim is in tort) because this ground does not raise an arguable point of law': https://www.supremecourt.uk/news/permission-to-appeal-decisions-28-july-2015.html.

The application of the common law rule would be that an invasion of privacy by means of a publication of private information would generally occur and be governed by the law of the state or territory where it was downloaded. It would of course depend on the facts of a particular incident and the public curiosity in the information, but because an internet publication could easily be downloaded in NSW as well as in other states, it would probably follow that a claimant could choose to sue in NSW for the invasion of his or her privacy in that state, even though the information might have been uploaded or transferred in another state. This would be particularly relevant to the media and other large scale websites or social media platforms, such as Twitter, where information is quickly passed on. On the other hand, if an invasion of privacy also involved an intrusion of some sort – eg snooping, recording or the collecting of private information - in NSW, then it would be arguable that the tort occurred in NSW.

It should be noted that at common law a NSW resident may bring a claim in NSW in respect of tort committed elsewhere according to the law of that place. However, there are constitutional limits on state legislative powers giving its own statutes extra-territorial application, as explained in *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418. See also *Kolsky v Mayne Nickless* (1970) 72 SR (NSW) 437

The Hon. Lynda Voltz: When you take that question on notice would you look at the New South Wales legislation regarding commercial surrogacy which is exactly that—extra territorial offences for residents of New South Wales?

I am not sufficiently familiar with the current law on the extra-territorial operation of NSW criminal laws and feel that a constitutional or criminal law expert would be better qualified to answer this question.

Professor Barbara McDonald

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