

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

Organisation: Media Organisations - AAP, APN, ASTRA, Bauer Media,
Commercial Radio Australia, Fairfax Media, FreeTV, MEAA,
News Corp Australia, SBS, The Newspaper Works and West
Australian News

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The Director
Standing Committee on Law and Justice
Parliament House
Macquarie St
Sydney NSW 2000

By email: lawandjustice@parliament.nsw.gov.au

Dear Director,

The media organisations that are parties to this correspondence AAP, APN, ASTRA, Bauer Media, Commercial Radio Australia, Fairfax Media, FreeTV, MEAA, News Corp Australia, SBS, The Newspaper Works and West Australian News (the Media Organisations) – welcome the opportunity to make this submission to the Law and Justice Committee regarding its inquiry into remedies for the serious invasion of privacy in New South Wales.

The Media Organisations are not in favour of:

- introducing a statutory cause of action for privacy in NSW; or
- broadening the scope of breach of confidence remedies for serious invasions of privacy.

We outline our reasoning below.

Existing privacy protections are extensive

The Media Organisations agree with the views of the NSWLRC in its *Consultation Paper No 1 Invasion of Privacy*, May 2007, that:

‘An argument for the introduction of a statutory cause of action for invasions of privacy... must be based on the inadequacy of the protection currently afforded privacy by statute and common law’.

No inadequacy of protection by the existing framework has been demonstrated. The current privacy framework is extensive and provides strong protection for individuals. That framework consists of:

- Legislation protecting the use of personal information, including the *Privacy Act 1988* (Cth) and various State and Territory privacy and personal information acts;
- Surveillance and listening devices legislation and telecommunications interception legislation;
- Various legislative restrictions on the reporting of matters, including matters involving children, family law matters, adoptions, coronial inquiries, sexual offences, jurors, communication with prisoners and other detained persons;
- Specific legislative provisions that empower courts and tribunals to make suppressions orders prohibiting or restricting reporting of court proceedings;

- Specific provisions which restrict the reporting of particular events or matters.

In addition to these laws, there are also actions available at common law that operate to protect privacy and restrict the obtaining and publication of information, including:

- Trespass;
- Nuisance;
- Breach of confidence;
- Defamation law;
- Malicious falsehood; and
- Contempt.

The Media Organisations are of the view that these laws adequately address concerns regarding invasions of privacy. To the extent that specific issues have been cited in the Media Release accompanying the establishment of this inquiry, we would support an approach of investigating the specific issues, including whether or not the plethora of State and Commonwealth laws covering privacy and other issues (for example the *Criminal Code Act 1995*) already address these concerns, and engaging in further discussions about how a targeted and proportionate response might be best achieved.

A consistent national approach to privacy laws is desirable

As indicated above, the existing privacy framework is extensive and complex.

Media Organisations are of the view that introducing further privacy legislation, particularly in the absence of thorough consideration of how such legislation would interact with existing State and national legislation, would confuse and unnecessarily complicate the current privacy framework.

A new statutory cause of action in New South Wales would simply add an additional layer of regulation and complexity in this State, in circumstances where there is no gap or demonstrated need in the existing legal framework has been demonstrated and where the issue of whether such a cause of action will be introduced federally remains unresolved.

The impact on freedom of speech would be detrimental

Media Organisations are concerned that if a new cause of action for serious invasions of privacy were to be introduced in NSW, it would have an unjustified adverse effect on the freedom of the media to seek out and disseminate information of public concern, and would place undue weight on an individual's right to privacy at the expense of freedom of communication.

It is often argued that, because other jurisdictions, including the US and UK, have introduced a cause of action for serious invasions of privacy, Australia should follow suit. However, the legal frameworks in those jurisdictions contain fundamental protections that 'counterbalance' free speech.

Australia does not have a 'counterbalancing' statutory right of freedom of communication or freedom of the media to seek out and disseminate information of public concern. Any statutory cause of action would therefore not operate to 'harmonise' Australian laws with those of the UK or the US, which operate in the context of a bill of rights (in the case of the UK) and constitutional freedoms (in the case of the US), and which are strongly upheld in those jurisdictions.

In the context of the current regulatory framework, Media Organisations are concerned that a statutory cause of action would simply encroach upon freedom of speech and stop reporting in the public interest.

There would be adverse economic consequences without any benefit

Introducing a statutory cause of action for serious invasion of privacy will have a number of detrimental economic consequences for Media Organisations in circumstances where it is unclear what benefit the introduction of such an action would provide. It will:

- Increase the regulatory burden organisations, for example, they will need to increase their investment in protecting against such actions by way of reviewing current practices, staff training etc;
- Act as a disincentive to organisations to fully utilise new communications tools such as social media sites;
- Act as a disincentive to social media sites to innovate;
- Lead to an increase in the number of court actions, and in practice will mean that Media Organisations will have to make sure that they are insured for such actions;
- Require Media Organisations to invest significant resources in defending such actions if they are brought;
- Lead to an increase in frivolous or speculative actions.

Privacy expectations are changing and it is unclear how a cause of action 'fits'

In the context of an evolving technological and social media environment, individuals' expectations of privacy are changing and are highly variable from individual to individual.

This new environment makes it extremely difficult, from a public policy perspective, to determine what should constitute a serious invasion of privacy. It also consequently makes it very difficult for organisations to decipher what kind of conduct is being proscribed.

An over-arching statutory cause of action for serious invasions of privacy will not necessarily 'fit' this social context, given that it is becoming increasingly possible to ascertain what a particular person's reasonable expectations of privacy might be.

The current social media environment supports individual choice by giving consumers the ability to choose how they engage with social media, and what and with whom they communicate.

However, the cumulative effect of over-regulation or inappropriate regulation in the area of privacy will stifle social-media activities, discourage individual choices and act as a deterrent to engaging in this new environment.

Media Organisations do not think this is appropriate, particularly in a context where a statutory cause of action would only be available to the small number of individuals who are sufficiently financially well-off to pursue lengthy and expensive litigation.

Remedies for breach of confidence should be left to develop at common law

Media Organisations do not support the introduction of legislation to broaden the scope of breach of confidence remedies for serious invasions of privacy.

While very few cases of this nature have gone before the courts, the Australian development of equitable actions for breach of confidence was recognised by the Victoria Supreme Court of Appeal in *Giller v Procopets*¹ and was recently affirmed by the WA Supreme Court in the decision of *Wilson v Ferguson*.² In both cases, the cause of action was used to provide for monetary compensation for misuse of personal information. That case concerned precisely the set of circumstances foreshadowed by the Media Release to this inquiry and confirmed that the courts are open to awarding compensation for emotional distress in appropriate cases.

In this context, Media Organisations are of the view that equitable actions for breach of confidence should be left to develop at common law on a case by case basis and the introduction of legislation is unnecessary.

Next Steps

The Media Organisations would like to thank the Committee for the opportunity to make a submission. These matters are of great importance to Media Organisations and we would appreciate the opportunity to meet to discuss them further.



The West Australian



News Corp Australia

¹ *Giller v Procopets*, (2008) 24 VR 1

² *Wilson v Ferguson* [2015] WASC 15