

**Submission
No 10**

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

Organisation: Australian Lawyers Alliance

Date received: 4/09/2015

Remedies for the serious invasion of privacy in New South Wales

Submission to NSW Standing Committee on Law and Justice

Inquiry into remedies for the serious invasion of privacy in New South
Wales

4 September 2015



CONTENTS

Who we are	2
Introduction.....	3
The Scope of Privacy and the Present Inquiry	3
Legal Protections under Common Law and Equitable Principles	4
Is a New Tort for Serious Breach of Privacy Required?	5
Outline of the Tort for Serious Breach of Privacy	6
Conclusion.....	8
Appendix A – Recommendations of the Australian Law Reform Commission - <i>Serious Invasions of Privacy in the Digital Era</i>	10

WHO WE ARE

The Australian Lawyers Alliance is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The Australian Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

We are represented in every state and territory in Australia. More information about us is available on our website.¹

INTRODUCTION

1. The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the NSW Standing Committee on Law and Justice in its inquiry into remedies for the serious invasion of privacy in New South Wales.
2. We submit that existing causes of action are inadequate to protect against intrusion and disclosure of private facts are inadequate. We believe that the most effective protection would be in the form of enactment of a statutory tort of serious invasion of privacy.
3. The framework provided in the Australian Law Reform Commission Report 123 *Serious Invasions of Privacy in the Digital Age* is appropriate for the drafting of such a statute, subject to disclosure in the public interest being a defence available to the person making the disclosure and not a matter the plaintiff is required to negate. Other modifications include a longer limitation period and a different basis for determining any damages cap for non-economic loss.
4. We submit that New South Wales could take proactive steps on this initiative, and action is not first required from the Commonwealth or other States and Territories.
5. Adjustments to the existing common law and statutory provisions relating to privacy should be adopted if a statutory tort of serious invasion of privacy is enacted.

THE SCOPE OF PRIVACY AND THE PRESENT INQUIRY

6. Although privacy may be characterised in numerous ways, when considering legal liability for the serious invasion of privacy, the principal matters of concern are freedom from interference or intrusion (the "right to be left alone") and protection against misuse by disclosure of private information, which has the effect of impairing individual dignity and human personality.
7. Matters of information security, dignity and self-respect come under threat where readily available digital data collection, storage and dissemination, aerial devices and remote imaging technology are accessible and affordable at the household level. For those fundamental human interests, there is only piecemeal protection under common law, equitable principles and statute law.

Even if other rights of action are available in legal proceedings to vindicate a claimant's privacy interest, that vindication could not be regarded as adequate unless it is clearly identified and described as a privacy claim which has now been satisfied. This important practical matter has not been accorded sufficient weight in discussions of whether to have a legislated tort for serious invasion of privacy.

8. In the modern digital age the ability to protect privacy has become one that transcends jurisdictional borders and goes well beyond media practices and freedom of communication. In fact, the recent data breaches of the Ashley Madison website is testament to the complexities facing Australia, and the world, and would no doubt be a warning to all Australians and be considered at the height of public concern. The ALA notes that the Australian Government Office of the Australian Information Commissioner (OIA) is currently investigating these data breaches.² Despite these investigations, the cases outlined in this submission are testament to the difficulties an individual would face in seeking individual recourse as a result of serious privacy breaches.

LEGAL PROTECTIONS UNDER COMMON LAW AND EQUITABLE PRINCIPLES

9. Freedom from intrusion has been given a measure of protection under the common law through the action for trespass to land or nuisance. The trespass action was used successfully against a television crew in *Lincoln Hunt v Willesee*.³ But it would not be available to those who filmed or were otherwise subjected to surveillance from outside the property boundary, and a person wishing to film activities on property could avoid that head of liability altogether by using readily available technology to obtain video and sound without being physically on the property. It cannot protect hospital patients against paparazzi for the simple reason that the patient has no proprietary right.⁴
10. The nuisance action has been employed in an attempt to impose liability on those who conduct intrusions from off the observed premises, but the requirement that it interfere with the enjoyment of the land, so there has to be a substantial intrusion which would affect a person of normal sensitivity, means that it has extended to systematic telephone calls or surveillance, affecting ordinary human comfort or enjoyment of the premises.⁵ But it was not extended to prevent a race caller setting up an elevated platform to call races conducted on the plaintiff's property: *Victoria Park Racing Co v Taylor*.⁶ Appeals to a "right to privacy" in that case also were rejected, the implications of which for a

common law privacy tort will be further considered.

11. Moving to consideration of disclosure of private facts, the equitable action for breach of confidence has afforded protection to harmful matters. The action for breach of confidence has been developed from one where it is necessary that the information be imparted in confidence to one where the nature of the information is such as the recipient would regard it as confidential.⁷ In the era of major data storage such a requirement is essential to the action for breach of confidence to protect privacy. The High Court in *Australian Broadcasting Commission v Lenah Game Meats* indicated that the kinds of things which may be regarded as confidential include health, personal relationships, and finances. The effect of their disclosure on the claimant must be highly offensive to a person of normal sensibilities.⁸ Even if some of the conceptual limitations on the action for breach of confidence can be overcome, the basis of an award of damages is quite unclear and requires legislative action to avoid the difficult path which was followed to award damages in *Giller v Procopets*.⁹

IS A NEW TORT FOR SERIOUS BREACH OF PRIVACY REQUIRED?

12. Submissions to the Australian Law Reform Commission Reference on *Serious Invasions of Privacy in the Digital Era* were generally supportive of the introduction of a new tort covering serious invasions of privacy. Opposition to creation of a tort claimed that there was little evidence that invasion of privacy was a problem in Australia: media practices were not as intrusive as in the United Kingdom, and that there were no significant gaps in the law, and a privacy tort would inhibit freedom of communication.¹⁰
13. The sketch of current privacy protection given above shows that there have been numerous privacy claims made to make it an issue of public concern. However the Australian legal system has not addressed those public concerns in a systematic way to provide redress.
14. There was recognition of an independent tort of privacy by intermediate trial courts in Victoria and Queensland, with substantial awards of damages, but the proceedings were compromised on appeal and so there has been no endorsement of a privacy tort by an Australian appellate court. Further, the existence of a privacy tort in Australia was questioned in *Giller v Procopets*.¹¹ However, privacy torts have been recognised in New Zealand and Ontario, with the New Zealand case tellingly observing that privacy differed from breach of

confidence.¹²

15. It is clear from the sample of cases noted that there are complex legal problems facing Australian claimants under existing law on serious invasions of privacy. The relevant common law and equitable principles provide neither a complete coverage nor an easy-to-follow pattern for aggrieved persons. Freedom of communication has been emphasised as a balancing value for all privacy claims, and is an element in the Australian Law Reform Commission's proposed tort of serious invasion of privacy. Continuing reliance on existing causes of action by Australian courts leaves the law on this subject in a continuing state of uncertainty. The objections raised to a discrete statutorily defined tort of serious invasion of privacy are unpersuasive.
16. The Australian Lawyers Alliance considers that a tort of serious invasion of privacy should be enacted in New South Wales in substantial accordance with the Recommendations of the Australian Law Reform Commission.

OUTLINE OF THE TORT FOR SERIOUS BREACH OF PRIVACY

17. The Australian Law Reform Commission's recommendations are set out in Appendix A to this submission and are the subject of comment here. Recommendation 4, relating to a new tort in a new Commonwealth Act, is not directly applicable in the State context. It could be reframed by the present inquiry as referring to a new State Act, and that it should expressly be an action in tort to avoid some of the problems with an award of damages for breach of confidence.
18. As to New South Wales acting separately, it is noted that the Canadian provinces of British Columbia, Newfoundland, Saskatchewan, Quebec and Manitoba have acted to create a statutory privacy tort, without proceeding to national legislation or a provincial Uniform Law.
19. Recommendations 5, 6, 7 and 8 are consistent with the balancing exercise between privacy and freedom of expression that is necessary in this area.
20. We have a concern with Recommendation 9-1 to the extent that it requires the

court to determine the balance between a public interest in privacy over countervailing public interests before determining that a cause of action exists. An aggrieved individual is not well placed to make either specific submissions about the public interest in their claim, let alone the overall public interest. Public interest should be a matter of defence to a claim of this nature, and the person responsible for intrusion or misuse of private information who is asserting that there is a public interest should have to provide evidence and affirmatively prove that it was justified in the public interest. Efficiency in dispute resolution also points to this approach: a defendant may recognise that there is no public interest and not raise the matter, thereby saving time and expense on a non-issue in the dispute. This is a situation where the analogy to defamation is appropriate. That matter should be added to the defences in Recommendation 11, and the factors noted in relation to public interest considerations should be included under that heading.

21. Recommendation 10 has to be adapted to State courts, but the reference to Tribunal jurisdiction should not be proceeded with until it is seen whether the Courts, particularly the Local Court, can deal effectively with small claims. Recommendation 10-4 deals with limitation periods and adopts the one year from awareness of publication from defamation law. This is a highly restrictive approach based on policy considerations specific to that tort, and we suggest that three years from discoverability would provide a better balancing of interest in the privacy context. Otherwise, the principles contained in that recommendation should be adopted.
22. Subject to the matters raised in relation to Recommendation 9, the defences proposed in Recommendation 11 are well adapted to maintain a balance between privacy and freedom of expression.
23. Recommendation 12 provides a comprehensive list of remedies, which may be granted by a Court as appropriate where the tort of serious invasion of privacy is made out. The one issue we would take exception to here is the application of the defamation cap to non-economic loss referred to in Recommendation 12-5. The better analogy is with the civil liability context, where damages caps are not imposed where an intentional tort causes personal injury. Section 3B of the *Civil Liability Act* 2002 expressly excludes the damages cap in relation to intentional torts or sexual misconduct causing death or injury. It has been determined by the High Court that an action for false imprisonment is not an action for an injury: *New South Wales v Williamson*.¹³ The basis of that decision was that compensation was for deprivation of liberty and loss of dignity, the second element of which is directly applicable to an action for serious invasion of

privacy. The policy considerations in relation to intentional torts are relevant here, and a damages cap is inappropriate. If there is a damages cap, it should be framed by reference to considerations other than the defamation cap.

24. Recommendation 13-1, as a fall-back position if a serious invasion of privacy tort is not enacted to provide for damages for breach of confidence, is appropriate in light of the discussion of that problem in *Giller v Procopets* [2008] VSCA 236, noted above.
25. Recommendation 14, dealing with surveillance legislation, has useful technology-neutral suggestions for legislative reform which could be considered independently of the present reference with a view to a uniform national law.
26. Recommendation 15, as to enactment of a tort of harassment, is also an appropriate fall-back position having regard to the limitations of trespass and nuisance noted above.
27. Recommendation 16 could be adapted to provide a suitable role of intervention and limited remedial action on the New South Wales Information and Privacy Commissioner.

CONCLUSION

28. The state of the law on freedom from intrusion and disclosure of private information as found in court decisions is demonstrably inadequate to protect persons affected by serious invasions of privacy. That law has clear gaps in coverage, is difficult to access, does not enable access to remedial measures best adapted to right the wrong, and does not have privacy as its focus: it was developed in relation to other social interests. Development of those common law principles is dependent on decided cases. That requires an aggrieved individual setting out on what is now a hazardous course of trying to adapt these laws to their particular complaint.
29. Legislative reform relating to a tort of serious invasion of privacy provides considerably more certainty to the whole community, not just aggrieved individuals or potential defendants. It also confers the important element of vindication of a right of privacy, which is of itself an important issue for a privacy claimant. The Australian Law Reform Commission Report on Serious Invasion



of Privacy provides a clear and well-reasoned basis for enactment of a New South Wales Act providing for a tort of that nature. Its recommendations are, in the main, supported by the Australian Lawyers Alliance. We take issue with the question of public interest being an element of the cause of action by pointing out that those who assert public interest should have to establish it, and this may eliminate a time consuming and costly element from litigation in certain cases. We also question the very short limitation period which has been adapted from defamation law, where the policy issues differ, and the damages cap, drawn from the same source and subject to criticism on the same grounds. If the principal recommendations are not adopted, then the ancillary matters in Recommendations 14-16 should be considered as useful modifications to fill gaps in coverage of the existing law noted above.

30. Once again, we thank the Standing Committee on Law and Justice for this opportunity to contribute to this inquiry. If there are any matters arising from this submission that the Standing Committee would like us to address further, either at a session of the Committee or by way of supplementary submissions or materials, please contact us.

APPENDIX A – RECOMMENDATIONS OF THE AUSTRALIAN LAW REFORM COMMISSION - *SERIOUS INVASIONS OF PRIVACY IN THE DIGITAL ERA*

4. A New Tort in a New Commonwealth Act

Recommendation 4–1 If a statutory cause of action for serious invasion of privacy is to be enacted, it should be enacted by the Commonwealth, in a Commonwealth Act (the Act).

Recommendation 4–2 The cause of action should be described in the Act as an action in tort.

5. Two Types of Invasion

Recommendation 5–1 The Act should provide that the plaintiff must prove that his or her privacy was invaded in one of the following ways:

- (a) intrusion upon seclusion, such as by physically intruding into the plaintiff's private space or by watching, listening to or recording the plaintiff's private activities or private affairs; or
- (b) misuse of private information, such as by collecting or disclosing private information about the plaintiff.

Recommendation 5–2 The Act should provide that 'private information' includes untrue information, but only if the information would be private if it were true.

6. Reasonable Expectation of Privacy

Recommendation 6–1 The new tort should be actionable only where a person in the position of the plaintiff would have had a reasonable expectation of privacy, in all of the circumstances.

Recommendation 6–2 The Act should provide that, in determining whether a person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances, the court may consider, among other things:

- (a) the nature of the private information, including whether it relates to intimate or family matters, health or medical matters, or financial matters;
- (b) the means used to obtain the private information or to intrude upon seclusion, including the use of any device or technology;
- (c) the place where the intrusion occurred, such as in the plaintiff's home;
- (d) the purpose of the misuse, disclosure or intrusion;
- (e) how the private information was held or communicated, such as in private correspondence or a personal diary;
- (f) whether and to what extent the private information was already in the public domain;
- (g) the relevant attributes of the plaintiff, including the plaintiff's age, occupation and cultural background; and
- (h) the conduct of the plaintiff, including whether the plaintiff invited publicity or manifested a desire for privacy.

7. Fault

Recommendation 7–1 The new tort should be confined to intentional or

reckless invasions of privacy. It should not extend to negligent invasions of privacy, and should not attract strict liability.

Recommendation 7–2 The Act should provide that an apology made by the defendant does not constitute an admission of fault or liability and is not relevant to the determination of fault or liability.

8. Seriousness and Proof of Damage

Recommendation 8–1 The Act should provide that a plaintiff has an action under the new tort only where the invasion of privacy was ‘serious’, having regard, among other things, to:

- (a) the degree of any offence, distress or harm to dignity that the invasion of privacy was likely to cause to a person of ordinary sensibilities in the position of the plaintiff; and
- (b) whether the defendant was motivated by malice or knew the invasion of privacy was likely to offend, distress or harm the dignity of the plaintiff

Recommendation 8–2 The plaintiff should not be required to prove actual damage to have an action under the new tort.

9. Balancing Privacy with Other Interests

Recommendation 9–1 The Act should provide that, for the plaintiff to have a cause of action, the court must be satisfied that the public interest in privacy outweighs any countervailing public interest. A separate public interest defence would therefore be unnecessary.

Recommendation 9–2 The Act should include the following list of

countervailing public interest matters which a court may consider, along with any other relevant public interest matter:

- (a) freedom of expression, including political communication and artistic expression;
- (b) freedom of the media, particularly to responsibly investigate and report matters of public concern and importance;
- (c) the proper administration of government;
- (d) open justice;
- (e) public health and safety;
- (f) national security; and
- (g) the prevention and detection of crime and fraud.

Recommendation 9–3 The Act should provide that the defendant has the burden of adducing evidence that suggests there is a countervailing public interest for the court to consider. The Act should also provide that the plaintiff has the legal onus to satisfy the court that the public interest in privacy outweighs any countervailing public interest that is raised in the proceedings.

10. Forums, Limitations and Other Matters

Recommendation 10–1 Federal, state and territory courts should have jurisdiction to hear an action for serious invasion of privacy under the Act. Consideration should also be given to giving jurisdiction to appropriate state and territory tribunals.

Recommendation 10–2 The new tort should only be actionable by natural persons.

Recommendation 10–3 A cause of action for serious invasion of privacy should not survive for the benefit of the plaintiff’s estate or against the defendant’s estate.

Recommendation 10–4 A person should not be able to bring an action under the new tort after the earlier of:

- (a) one year from the date on which the plaintiff became aware of the invasion of privacy; or
- (b) three years from the date on which the invasion of privacy occurred.

Recommendation 10–5 In exceptional circumstances, the court may extend this limitation period, but the period should expire no later than six years from the date on which the invasion occurred.

Recommendation 10–6 Consideration should be given to extending the limitation period where the plaintiff was under 18 years of age when the invasion of privacy occurred.

Recommendation 10–7 Consideration should be given to enacting a ‘first publication rule’, also known as a ‘single publication rule’. This would limit the circumstances in which a person may bring an action in relation to the publication of private information, when that same private information had already been published in the past.

11. Defences and Exemptions

Recommendation 11–1 The Act should provide for a defence that the defendant’s conduct was required or authorised by law.

Recommendation 11–2 The Act should provide a defence for conduct incidental to the exercise of a lawful right of defence of persons or property, where that conduct was proportionate, necessary and reasonable.

Recommendation 11–3 The Act should provide for a defence of necessity.

Recommendation 11–4 The Act should provide for a defence of consent.

Recommendation 11–5 The Act should provide for a defence of absolute privilege.

Recommendation 11–6 The Act should provide for a defence of publication of public documents.

Recommendation 11–7 The Act should provide for a defence of fair report of proceedings of public concern.

Recommendation 11–8 The Act should provide for an exemption for children and young persons.

12. Remedies and Costs

Recommendation 12–1 The Act should provide that courts may award damages, including damages for emotional distress.

Recommendation 12–2 The Act should set out the following non-exhaustive list of factors that a court may consider when determining the amount of damages:

(a) whether the defendant had made an appropriate apology to the plaintiff;

- (b) whether the defendant had published a correction;
- (c) whether the plaintiff had already recovered compensation, or has agreed to receive compensation in relation to the conduct of the defendant;
- (d) whether either party took reasonable steps to settle the dispute without litigation;
- and
- (e) whether the defendant's unreasonable conduct following the invasion of privacy, including during the proceedings, had subjected the plaintiff to particular or additional embarrassment, harm, distress or humiliation.

Recommendation 12–3 The Act should provide that the court may not award a separate sum as aggravated damages.

Recommendation 12–4 The Act should provide that a court may award exemplary damages in exceptional circumstances.

Recommendation 12–5 The Act should provide for a cap on damages. The cap should apply to the sum of both damages for non-economic loss and any exemplary damages. This cap should not exceed the cap on damages for non-economic loss in defamation.

Recommendation 12–6 The Act should provide that a court may award an account of profits.

Recommendation 12–7 The Act should provide that the court may at any stage of proceedings grant an interlocutory or other injunction to restrain the threatened or apprehended invasion of privacy, where it appears to the court to be just or convenient and on such terms as the court thinks fit.

Recommendation 12–8 The Act should provide that, when considering whether to grant injunctive relief before trial to restrain publication of private information, a court must have particular regard to freedom of expression and any other matters of public interest.

Recommendation 12–9 The Act should provide that courts may order the delivery up and destruction or removal of material.

Recommendation 12–10 The Act should provide that courts may, where false private information has been published, order the publication of a correction.

Recommendation 12–11 The Act should provide that courts may order the defendant to apologise.

Recommendation 12–12 The Act should provide that courts may make a declaration.

13. Breach of Confidence Actions for Misuse of Private Information

Recommendation 13–1 If a statutory cause of action for serious invasion of privacy is not enacted, appropriate federal, state, and territory legislation should be amended to provide that, in an action for breach of confidence that concerns a serious invasion of privacy by the misuse, publication or disclosure of private information, the court may award compensation for the plaintiff's emotional distress.

14. Surveillance Devices

Recommendation 14–1 The Commonwealth Government should enact surveillance legislation to replace existing state and territory surveillance device laws.

Recommendation 14–2 Surveillance legislation should be technology neutral.

It should regulate surveillance through the use of listening devices, optical devices, tracking devices, data surveillance devices, and other devices and systems.

Recommendation 14–3 The Commonwealth Government should consider consolidating telecommunications surveillance laws with the new Commonwealth surveillance legislation.

Recommendation 14–4 Surveillance legislation should not contain a defence or exception for participant monitoring.

Recommendation 14–5 Surveillance legislation should provide a defence for responsible journalism relating to matters of public concern and importance.

Recommendation 14–6 Workplace surveillance laws should be made uniform throughout Australia.

Recommendation 14–7 Surveillance legislation should provide that a court may order remedial relief, including compensation, for a person subjected to unlawful surveillance.

Recommendation 14–8 State and territory governments should give jurisdiction to appropriate courts and tribunals to hear complaints about the installation and use of surveillance devices that can monitor neighbours on residential property.

15. Harassment

Recommendation 15–1 If a statutory cause of action for serious invasion of privacy is not enacted, state and territory governments should enact uniform legislation creating a tort of harassment.

16. New Regulatory Mechanisms

Recommendation 16–1 The Commonwealth Government should consider extending the Privacy Commissioner’s powers so that the Commissioner may investigate complaints about serious invasions of privacy and make appropriate declarations. Such declarations would require referral to a court for enforcement.

Recommendation 16–2 The following functions should be conferred on the Privacy Commissioner:

- (a) to assist a court as *amicus curiae*, where the Commissioner considers it appropriate, and with the leave of the court; and
- (b) to intervene in court proceedings, where the Commissioner considers it appropriate, and with the leave of the court.

REFERENCES

¹ Australian Lawyers Alliance (2015) <www.lawyersalliance.com.au>

² See <http://www.oaic.gov.au/news-and-events/statements/privacy-statements/ashley-madison-data-breach/ashley-madison-data-breach-investigation-commenced>.

³ (1986) 4 NSWLR 457

⁴ *Kaye v Robertson* [1991] FSR 62 (the injured actor Gordon Kaye)

⁵ C Sappideen and P Vines, *Fleming’s The Law of Torts*, 10th ed (Sydney,2011) pp 687-88

⁶ (1937) 58 CLR 479 (High Court)

⁷ C Sappideen and P Vines, *Fleming’s The Law of Torts*, 10th ed (Sydney,2011) pp 690

⁸ (2001) 208 CLR 199, 226 (Gleeson CJ)

⁹ [2008] VSCA 236

¹⁰ Australian Law Reform Commission, ALRC Summary Report 123 *Serious Invasions of Privacy in the Digital Era* (Canberra, 2014) para 1.19

¹¹ Australian Law Reform Commission, ALRC Summary Report 123 *Serious Invasions of Privacy in the Digital Era* (Canberra, 2014) para 1.32; [2008] VSCA 236 at [167], [447]-[452]

¹² Australian Law Reform Commission, ALRC Summary Report 123 *Serious Invasions of Privacy in the Digital Era* (Canberra, 2014) para 1.28, 1.30, *Giller v Procopets* [2008] VSCA 236 [449]

¹³ [2012] HCA 57 [21], [34]