

Submission
No 15

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

Organisation: The Law Society of New South Wales

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THE LAW SOCIETY
OF NEW SOUTH WALES

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4 September 2015

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

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

Dear Chair,

Inquiry into remedies for the serious invasion of privacy in NSW

I am writing on behalf of the Human Rights Committee of the Law Society of NSW ("Committee"). The Committee is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly.

The Committee notes that the Standing Committee on Law and Justice ("Standing Committee") has been asked to inquire into and report on remedies for the serious invasion of privacy in NSW. The terms of reference include inquiry into the adequacy of existing remedies, including the equitable action of breach of confidence; whether a statutory cause of action for serious invasions of privacy should be introduced; and any other related matter.

The Committee has previously made submissions on these issues, most recently in relation to the review undertaken by the Australian Law Reform Commission ("ALRC") of serious invasions of privacy in the digital era. The Committee revisits these issues in this submission, noting the recommendations of the ALRC where relevant.

1. ALRC review of serious invasions of privacy in the digital era

The Committee notes that the ALRC carried out an extensive review of serious invasions of privacy in the digital era, and reported on this review in 2014.¹ In its Report, the ALRC made a number of recommendations relevant to this review. The Committee recommends

¹ The Committee refers the Standing Committee also to the report of the ALRC, Report 108 – "For Your Information: Australian Privacy Law and Practice" (2008) and generally supports the report's recommendations in respect of the introduction of such a statutory cause of action. The Committee recommends that any proposed legislation should follow those recommendations with certain qualifications, referred to below.

the ALRC's Report to the Standing Committee for consideration. That Report considers the essential elements and features of a cause of action in tort; limitation periods and other procedural and substantive matters; defences; and, particularly relevant to this inquiry, the ALRC considers remedies at Chapter 12 of that Report.

The ALRC recommended that a new statutory cause of action, described as a tort, should be enacted in a Commonwealth Act.² The cause of action should provide that the plaintiff must prove either that his or privacy was invaded in one of the following ways:

- 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 affairs; or
- Misuse of private information, such as by collecting or disclosing private information about the plaintiff. Such private information should include information that is untrue, but only if the information would be private if it were true.³

The ALRC recommended that the new tort should be actionable only where the plaintiff had a reasonable expectation of privacy, providing that the court consider all the circumstances including the nature of the private information, the means used to obtain the private information, the purpose of the misuse or disclosure or intrusion, the relevant attributes of the plaintiff and the conduct of the plaintiff.⁴

The Committee made submissions to the ALRC supporting the creation of a Commonwealth cause of action in tort for serious invasions of privacy. The Committees endorse the ALRC's recommendations in relation to the types of invasions of privacy that the new tort should cover, as set out in recommendations 5-1 and 5-2 of the ALRC's Report.

The ALRC made a number of recommendations in respect of remedies and costs, extracted and attached at "A". The Committee submits that these recommendations should be considered by the Standing Committee.

The Law Society's Injury Compensation Committee also supports the recommendations and the Committee's views, set out in further detail below.

2. A new tort

The Committee supports the creation of a cause of action in tort for serious invasions of privacy.

The Committee notes that Australia ratified the International Covenant on Civil and Political Rights ("ICCPR"), the main international human rights treaty, in 1980 and at that time adopted an obligation under international law to implement into our domestic laws, the provisions of that treaty

Article 17 of the ICCPR commits our governments to legislate to prevent a person being "subjected to arbitrary or unlawful interference with his privacy...". Further, Article 2(3) of the ICCPR provides that a person whose ICCPR rights are infringed should be provided with "an effective remedy". Given that there is no generally applicable cause of action in

² Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, ALRC Report 123,(2014) ("ALRC R123") Recommendations 4-1 and 4-2.

³ ALRC R123, Recommendations 5-1 and 5-2.

⁴ ALRC R123, Recommendations 6-1 and 6-2.

Australian common law for serious invasions of privacy, the Committee submits that a statutory cause of action should be introduced.⁵

While the Committee remains of the view that the new cause of action should be created in Commonwealth legislation, in the absence of Commonwealth legislation, the Committee would not oppose the creation of a NSW statutory cause of action in tort for the serious invasion of privacy. A tort will establish clear limits of acceptable behaviour. Compared to the current situation, a statutory cause of action is also likely to be immediate, precise and technology neutral. Importantly, it recognises the human right to respect of privacy. The Committee considers that the tort should only apply to natural persons, and that corporations or other artificial persons should not be able to bring privacy cases (see recommendation 10-2). In the NSW context, the Committee suggests that it may be appropriate for the NSW Information and Privacy Commission to be given power to determine complaints about conduct that falls within the proposed cause of action.

If a new tort is created, it should be expressly recognised in the legislation that the new tort is not intended to impinge on the implied constitutional right to freedom of governmental and political communication.

The Committee notes that the Standing Committee's terms of reference require consideration of the adequacy of existing remedies for serious invasions of privacy, including the equitable action of breach of confidence.

In this regard, the Committee notes that the ALRC Report canvassed this issue.⁶ The ALRC noted that in the UK, recommendations have been made against introducing a statutory cause of action. However, there have been significant and extensive common law developments in the UK, where the equitable action for breach of confidence has been extended,⁷ under the influence of its *Human Rights Act 1998* (UK). This Act requires courts to give effect to the protection of rights and freedoms in the European Convention on Human Rights. There is no equivalent legislative protection of human rights, either in NSW or in the Commonwealth. Given this, the Committee expresses doubt whether relying on the equitable action for breach of confidence would provide equivalent protections against serious invasions of privacy in NSW. The ALRC Report also notes that five Canadian provinces have enacted statutory torts for the invasion of privacy, and that they have been well established in the United States for many decades (subject to free speech limitations).⁸

3. Fault

While noting that the ALRC recommended that the cause of action should be confined to intentional or reckless invasions of privacy (recommendation 7-1), the Committee agrees with the Victorian Law Reform Commission's view in its 2010 report⁹ that the new cause of action should not be restricted to intentional or reckless acts but should, in appropriate cases, extend to grossly negligent acts.

5 The introduction of such a cause of action may conflict with the ICCPR right of freedom of expression (Article 19). The cause of action would therefore need to be tailored to balance that right with the new cause of action, to the extent they conflict.

6 ALRC R123 summary, at [1.25] – [1.26]

7 *Campbell v MGN Ltd* [2004] 2 AC 457 as cited by the ALRC in its Report.

8 ALRC R123 summary, at [1.30] – [1.31]

9 Victorian Law Reform Commission, *Surveillance in Public Places*: Final Report 18, (2010) 152.

4. Seriousness and proof of damage

The Committee notes recommendation 8-1 of the ALRC's Report that invasions of privacy should only be actionable if they are "serious", taking into account the degree of offence, distress or harm to dignity the invasion of privacy is likely to cause to a person of ordinary sensibilities in the position of the plaintiff; and whether the defendant was motivated by malice, or knew that the invasion of privacy would offend, distress or harm the dignity of the plaintiff.

The Committee recommends that a new legislative cause of action should make explicit what the term "likely" means. In the ALRC's review, it was suggested that "likely" should mean "a real possibility that cannot be ignored having regard to the nature and gravity of the feared harm in the particular case."¹⁰

The Committee agrees with the ALRC's recommendation 8-2 that the plaintiff should not be required to prove actual damage to have an action under the new tort.

5. Onus of proof

The ALRC recommended that the court must be satisfied that the public interest in privacy outweighs any countervailing public interest, making a separate public interest defence unnecessary (recommendation 9-1). The ALRC also recommended that the defendant should bear the burden of adducing evidence that suggests that there is a countervailing public interest for the court to consider, but that the plaintiff should have the legal onus to satisfy the court that the public interest in privacy outweighs any countervailing public interest raised in the proceedings (recommendation 9-3).

The Committee has some reservations in respect of recommendations 9-1 and 9-3. Requiring the plaintiff to have the legal onus of proving that their interest in privacy outweighs any competing interest raised by the defendant may result in cost implications for the plaintiff. This is because it may enable the defendant to raise potentially spurious public interest issues and the plaintiff would have to show that each of those issues is outweighed by their interest in privacy. The Committee submits that the Standing Committee should consider a public interest defence approach that would put the legal and evidentiary burden on the defendant to show a countervailing public interest.

6. Forums, limitations and other matters

6.1. Forums

The ALRC recommended that federal, state and territory courts should have jurisdiction to hear an action for serious invasion of privacy under the proposed Commonwealth cause of action (recommendation 10-1). The Committee supports this proposal.

6.2. The cause of action should not survive for the benefit of the plaintiff's estate or against the defendant's estate

The ALRC recommended that 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 10-3).

¹⁰ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* Discussion Paper 80 (2014) 101.

The Committee notes that the protections in the *Privacy Act 1988* (Cth) (*Privacy Act*) only apply to living persons. A complaint cannot be brought under the *Privacy Act* in relation to the handling of an individual's personal information following the death of that individual, unless the complaint was lodged prior to the individual's death.

To ensure consistency with this position, the Committee's view is that the cause of should be restricted to living persons, or privacy invasion actions commenced prior to an individual's death.

6.3. Representative actions

The Committee submits that there should be provision for an action to be brought on behalf of the plaintiff who is unable to commence proceedings on their own behalf by a guardian ad litem.

6.4. Limitation periods

The Committee is of the view that limitation periods should mirror those contained in the *Privacy Act*, acknowledging that the decision to bring a court action with its attendant costs and stresses may involve a more lengthy decision making process than, for example, the decision to make a complaint to the Office of the Australian Information Commissioner or its NSW counterpart.

7. Defences

The Committee submits that a defence of necessity should be provided for in the legislation, consistent with the ALRC recommendation 11-3.

Further, the ALRC recommended that provision should be made for a defence of "fair report of proceedings of public concern" (recommendation 11-7). If the Standing Committee is minded to make a similar recommendation, the Committee submits that "public concern" should be closely defined in order to prevent exploitation of this defence, for example by paparazzi or tabloid journalists.

The Committee supports the suggestion of the Victorian Law Reform Commission in its report that there should be a public interest defence to the proposed cause of action which would enable the balancing of the public interest in maintaining a claim in privacy with the interest of the public to be informed about matters of public concern and to allow and protect freedom of expression.¹¹

8. Remedies and costs

The Committee submits that compensatory damages should be available, including damages for emotional distress. This view is consistent with the ALRC's recommendation 12-1.

The Committee notes that the ALRC recommended also that there should be a cap on damages for both non-economic loss and any exemplary damages; and that the cap should not exceed the cap on damages for non-economic loss in defamation (recommendation 12-5).

¹¹ Victorian Law Reform Commission, *Surveillance in Public Places: Final Report 18* (2010), 156.

The NSW Law Reform Commission in its 2009 *Report 120: Invasion of Privacy*¹² recommended that damages for a statutory cause of action should be capped in relation to non-economic loss.

The Committee agrees that there should be a cap on damages for non-economic loss and exemplary damages. The cap should be tailored, as far as possible, to avoid different caps being prescribed for the proposed cause of action and actions for defamation, to prevent "cause of action shopping". However, the Committee cautions against a damages cap that is set too low such that the cause of action will not be fully compensatory.

9. Surveillance reform

The Committee notes that, since the ALRC's 2014 Report, the Commonwealth has legislated to allow for the collection and retention of metadata. The Committee has made submissions¹³ expressing its concerns that, given the breadth of the scheme, and the fact that judicial warrants are not generally required, this scheme is unlikely to be compatible with Australia's obligations to protect the right to privacy under Article 17 of the ICCPR. Insofar as it is constitutionally possible, the Committee submits that the Standing Committee should consider how a new tort might address the surveillance of individuals by police and government agencies (including in relation to the collection and retention of metadata) in a way that conforms with Australia's international human rights obligations.

The Committee thanks you for this opportunity to provide comments. Please direct any questions to [redacted] policy lawyer for the Committee, on [redacted] or by email to [redacted]

Yours sincerely,


John F Eades
President

¹² NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009), 50.

¹³ See <http://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/942145.pdf>

ATTACHMENT A – Remedies and Costs – ALRC recommendations

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.