

**Submission  
No 5**

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

**Name:** Mr Seppy Pour

**Date received:** 31/08/2015

---

---

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

---

**NSW PARLIAMENT LEGISLATIVE COUNCIL**

**STANDING COMMITTEE ON LAW AND JUSTICE**

**September 2015**

# Table of Contents

<b>1. Terms of reference</b>	<b>3</b>
<b>2. Adequacy of existing protections and remedies</b>	
<i>Existing statutory protections</i>	<b>4</b>
<i>Existing common law remedies for invasion of privacy</i>	<b>7</b>
<i>The equitable action of breach of confidence</i>	<b>9</b>
<b>3. The need for a statutory cause of action</b>	
<i>Introduction</i>	<b>10</b>
<i>The common law position for a breach of privacy</i>	<b>11</b>
<i>The need to augment existing protections and remedies</i>	<b>12</b>
<b>4. Necessary features of a statutory tort</b>	
<i>Introduction of a new act</i>	<b>14</b>
<i>Express classification as a tort</i>	<b>15</b>
<i>Categories of invasion</i>	<b>16</b>
<i>Certainty vs flexibility</i>	<b>16</b>
<i>Reasonable expectation of privacy</i>	<b>17</b>
<i>Intention and recklessness</i>	<b>17</b>
<i>Seriousness</i>	<b>18</b>
<i>Taking into account other interests</i>	<b>18</b>
<i>Defences</i>	<b>19</b>
<i>Remedies</i>	<b>20</b>

# ***1. Terms of Reference***

That the Standing Committee on Law and Justice inquire into and report on remedies for the serious invasion of privacy in New South Wales, and in particular:

(a) the adequacy of existing remedies for serious invasions of privacy, including the equitable action of breach of confidence

(b) whether a statutory cause of action for serious invasions of privacy should be introduced, and

(c) any other related matter.

## **2. Adequacy of existing protections and remedies**

### ***Existing statutory protections***

#### Telecommunications:

Telecommunications providers are barred from disclosing certain information under the *Telecommunications Act 1997* (Cth).<sup>1</sup> s 276(3) of the Act makes such conduct punishable by up to two years imprisonment.<sup>2</sup>

The *Telecommunications (Interception and Access) Act 1979* (Cth) provides a number of exemptions, including disclosure to the Australian Federal Police. Further exemptions allow for disclosures to an 'authorised officer' of an enforcement agency,<sup>3</sup> however these situations limit disclosure to communications data, i.e. metadata.<sup>4</sup> An authorised officer must have regard to whether any interference with the privacy of any person or persons that may result from the disclosure.<sup>5</sup>

The *Telecommunications (Interception and Access Act 1979* (Cth) expressly bars access to communications without a warrant.<sup>6</sup> Similarly, the Act prohibits the interception of communications over a telecommunications system without a warrant.<sup>7</sup> When issuing a

---

<sup>1</sup> *Telecommunications Act 1997* (Cth) pt 13.

<sup>2</sup> *Ibid* s 276(3).

<sup>3</sup> *Telecommunications (Interception and Access) Act 1979* (Cth) ss 171–182.

<sup>4</sup> *Ibid* s 172.

<sup>5</sup> *Ibid* s 180F.

<sup>6</sup> *Ibid* ss 110-132.

<sup>7</sup> *Ibid* ss 9-18, 34-61A.

warrant for either of these purposes the privacy or the persons affected must be considered.<sup>8</sup>

Personal information:

The *Privacy Act 1988* (Cth) lists 13 Australian Privacy Principles (APPs) that regulate the retainment and handling of personal information.<sup>9</sup> The APPs apply to Australian Government agencies, private sector organisations with a turnover of over \$3 million, and small businesses that provide health services or disclose personal information for a benefit, service or advantage.<sup>10</sup>

Serious or repeated breaches of an APP in relation to personal information about an individual are punishable by a civil penalty of 2,000 penalty units.<sup>11</sup> Personal information is defined as information or an opinion about an identified individual, or an individual who is reasonably identifiable whether the information or opinion is true or not and whether the information or opinion is true or not.<sup>12</sup>

An apparent breach of an APP can be reported to the Australian Information Commissioner.<sup>13</sup> Following an investigation by the Commissioner,<sup>14</sup> the Commissioner may make a determination as to the culpability of the conduct and the action the respondent must

---

<sup>8</sup> Ibid ss 116(2), 46(2), 46A(2).

<sup>9</sup> *Privacy Act 1988* (Cth) sch 1.

<sup>10</sup> Ibid ss 6(1), 6D.

<sup>11</sup> Ibid s 13.

<sup>12</sup> Ibid s 6(1).

<sup>13</sup> Ibid s 36.

<sup>14</sup> Ibid s 40.

take.<sup>15</sup> Such determinations may be taken to the Federal Court or Federal Circuit Court to enforce the Commissioner's determination.<sup>16</sup> Additionally, the Federal Court or Federal Circuit Court may order an injunction where a person is or threatens to commit a potential breach of the *Privacy Act*.<sup>17</sup>

The *Privacy and Personal Information Protection Act 1998* (NSW) confers powers upon the NSW Privacy Commissioner to hear complaints in a similar fashion to the *Privacy Act*.<sup>18</sup>

#### Surveillance:

The *Surveillance Devices Act 2007* (NSW) prohibits the installation, use and maintenance of listening, optical surveillance, tracking, and data surveillance devices.<sup>19</sup> It further prohibits the possession, communication or publication of private conversations or recordings of activities.<sup>20</sup>

Under the Act, law enforcement agencies must ensure that every record or report obtained is kept in a secure place that is not accessible to people who are not entitled to deal with the record or report, and must destroy the record or report if satisfied that it is not likely to be required in connection with a relevant offence.<sup>21</sup>

#### Harassment:

---

<sup>15</sup> Ibid s 52.

<sup>16</sup> Ibid s 55A.

<sup>17</sup> Ibid s 98.

<sup>18</sup> *Privacy and Personal Information Protection Act 1998* (NSW) div 3.

<sup>19</sup> *Surveillance Devices Act 2007* (NSW) ss 7-10.

<sup>20</sup> Ibid ss 11-12.

<sup>21</sup> Ibid ss 40-41.

The *Criminal Code Act 1995* (Cth) imposes offences regarding harassment via a communications service. Such offences include using a telecommunications network with intention to commit a serious offence,<sup>22</sup> using a carriage service to make a threat,<sup>23</sup> and using a carriage service to menace, harass or cause offence.<sup>24</sup>

## ***Existing common law remedies for invasion of privacy***

### Physical Invasions:

Physical invasions are remediable by an action of trespass to the person or trespass to land. General damages can be awarded without the need to establish a recognised form of damage (e.g. psychiatric illness), with the potential for aggravated damages available where there is added humiliation to the plaintiff. Similarly, punitive damages can be awarded where there exists maliciousness or careless disregard for the plaintiff's rights by the defendant.<sup>25</sup>

Generally speaking, trespass to the person and trespass to land both require a physical interference or a threat of physical interference. Therefore, this raises application issues in cases where such interference does not exist. Furthermore, trespass to land is only available to an individual who possesses exclusive possession of the premises. As such, those who hire a venue for an event<sup>26</sup> would not have standing to sue for trespass to land. Similarly, an invasion of a private event held on public property such as a national park would not give rise to an action in trespass to land.

---

<sup>22</sup> *Criminal Code Act 1995* (Cth) s 474.14.

<sup>23</sup> *Ibid* 474.15.

<sup>24</sup> *Ibid* 474.17.

<sup>25</sup> *XI Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448.

<sup>26</sup> *Douglas v Hello! Ltd* [2005] EWCA Civ 595 (18 May 2005).



### Conduct amounting to a nuisance:

The tort of nuisance may in some circumstances cover what most individuals would consider to be an invasion of privacy. For example, a surveillance camera situated on a shop front which peers onto another individual's private residence may be found liable in an action for nuisance.<sup>27</sup> However, like in the case of trespass to land, only the occupier of the land may sue in nuisance.

### Photography:

A right to not be photographed without consent in a public place does not generally exist under the law.<sup>28</sup> The law also does not disallow the filming of private property from public premises without the conduct constituting another unlawful act, for example peeping or prying.<sup>29</sup>

### Defamation:

Claims in defamation provide a remedy for individuals whose reputation has been negatively affected by publication of certain information. This remedy has become much more limited in scope since the introduction of the Uniform Defamation Laws in 2005. Prior to 2005, some states required defendants to demonstrate that a defamatory publication was published in the public interest in addition to being true.<sup>30</sup> Due to these changes, defamation claims have become less effective in privacy protection.

---

<sup>27</sup> *Raciti v Hughes* (1995) 7 BPR 14 837.

<sup>28</sup> *R v Sotheren* [2001] NSWSC 204 (16 March 2001) [25].

<sup>29</sup> *Crimes Act 1900* (NSW) s 547C.

<sup>30</sup> *John Fairfax Publications Pty Ltd v Hitchcock* [2007] NSWCA 364 (14 December 2007) [124].

## ***The equitable action of breach of confidence***

The disclosure of confidential information has traditionally been covered by the equitable action of breach of confidence. Confidential information is information which is publicly unknown and specifically confined to a certain group of individuals.

The action arose from contractual principles, whereby a contract conveyed the implication that certain information overseen by the contract was of a confidential nature. While general contractual remedies flowed to breach of such a contract, the courts of equity recognised an obligation outside contract to maintain confidence. Australian law now recognises an obligation of confidence where an individual discovers information which he or she knows, or ought to know, is of a confidential nature.<sup>31</sup>

While the equitable action of breach of confidence effectively protects individuals from the unauthorised disclosure of confidential information, questions exist regarding what remedies are available in such an action.

---

<sup>31</sup> *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 224.

### ***3. The need for a statutory cause of action***

#### ***Introduction***

Justification of a statutory cause of action for serious invasion of privacy generally stems from perceived gaps in the current privacy protection regime. Such gaps can leave victims of invasion with little to no remedy. This is especially true amidst technological advancement and the increasing interconnectedness of individuals who utilise such technologies. On the other hand, opposers of a statutory cause of action cite the potential to unreasonably and unnecessarily hinder legitimate activities due to privacy concerns.

A well tailored statutory cause of action for serious invasion of privacy could accommodate both of these views. Lawmakers should begin by targeting particular conduct which is often cited for being overlooked by privacy law. Similarly, lawmakers should invite comment on specific conduct that any statutory regime should avoid unnecessarily hindering.

A 2008 report by the Australian Law Reform Commission (ALRC) provided an inclusive list of activities that should be considered an invasion of privacy for the purposes of a statutory cause of action. This list included conduct which:

- subjected individuals to unauthorised or non-consensual surveillance;
- misuses or discloses an individual's private correspondence; or
- discloses facts regarding an individual's private life.<sup>32</sup>

This list provides an example of the kind of conduct lawmakers should target.

---

<sup>32</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) Rec 74–1.

## ***The common law position for a breach of privacy***

At present, a common law action for invasion of privacy is largely undecided in Australia. Despite the High Court's decision in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*<sup>33</sup> in 2001 which left the door open to such a development, more recent lower court decisions have failed to reach appellate jurisdiction.<sup>34</sup>

Certain cases have recognised the potential for a common law action:

- *Gee v Burger*. McLaughlin J considered the notion “arguable”,<sup>35</sup>
- *Saad v Chubb Security Australia Pty Ltd*. Hall J opined “that the cause of action for breach of confidence based on invasion of the plaintiff’s privacy would be futile or bad law”;<sup>36</sup>
- *Doe v Yahoo!7 Pty Ltd*. Smith J recognised “an arguable case of invasion of privacy” and felt “very hesitant to strike out a cause of action where the law is developing and is unclear”;<sup>37</sup> and
- *Dye v Commonwealth Securities Ltd*. Katzmann J stated “that it would be inappropriate to deny someone the opportunity to sue for breach of privacy on the basis of the current state of the common law.”<sup>38</sup>

On the other hand, opinions of other courts have demonstrated a reluctance to acknowledge the basis for such an action:

---

<sup>33</sup> *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

<sup>34</sup> See *Grosse v Purvis* [2003] QDC 151 (16 June 2003) and *Doe v Australian Broadcasting Corporation* [2007] VCC 281 (2007).

<sup>35</sup> *Gee v Burger* [2009] NSWSC 149 (13 March 2009) [53].

<sup>36</sup> *Saad v Chubb Security Australia Pty Ltd* [2012] NSWSC 1183 [183].

<sup>37</sup> *Doe v Yahoo!7 Pty Ltd* [2013] QDC 181 (9 August 2013) [310]–[311].

<sup>38</sup> *Dye v Commonwealth* [2010] FCA 720 [290].

- *Kalaba v Commonwealth of Australia*: Heerey J surmised that legal authority was against the proposition that such a tort action existed at common law;<sup>39</sup>
- *Giller v Procopets*: The Victoria Court of Appeal declined to consider whether the tort existed at common law, instead finding in favour of the plaintiff's equitable action for breach of confidence;<sup>40</sup> and
- *Sands v State of South Australia*: Kelly J said that "the ratio decidendi of the decision in *Lenah* is that it would require a further development in the law to acknowledge the existence of a tort of privacy in Australia".<sup>41</sup>

The only prognostication which can be derived with certainty from these relevant authorities is that a common law action in invasion of privacy is unlikely to be recognised in the near future. As such, it is vitally important the NSW legislature consider introducing a statutory cause of action for serious invasions of privacy.

### ***The need to augment existing protections and remedies***

While some invasions of privacy are currently accounted for, noticeable gaps do exist in the current framework. Following are some examples:

- Tort law does not, except in certain circumstances such as defamation, remediate for intentional application of emotional distress which does not amount to a recognised psychiatric illness.<sup>42</sup> The introduction of a tort for serious invasions of privacy would allow for the recovery of damages for emotional distress.

---

<sup>39</sup> *Kalaba v Commonwealth of Australia* [2004] FCA 763 (8 June 2004) [6].

<sup>40</sup> *Giller v Procopets* (2008) 24 VR 1.

<sup>41</sup> *Sands v State of South Australia* [2013] SASC 44 (5 April 2013) [614].

<sup>42</sup> *Wainwright v Home Office* [2004] 2 AC 406; *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 417.

- Actions for trespass to the person and trespass to land fail to provide remedy in various situations: for an action in trespass to the person, bodily contact or a threat of bodily contact is required to be made out; an action in trespass to land requires intrusion onto the land and, even then, only seeks to remedy the occupier or the land. A statutory cause of action for invasion of privacy would supplement these established grounds of action.
- Protections provided by the *Privacy Act 1998* (Cth), while expansive, do not apply to individuals and business with a turnover of less than \$3 million.
- NSW (and Australia at large) lacks a significant deterrent against and remedy for cyber-stalking and cyber-bullying. Overseas jurisdictions have introduced legislation or amended existing harassment laws to accommodate for technological advances.

An identifiable need for a general cause of action certainly exists.

## **4. Necessary features of a statutory tort**

### ***Introduction of a new act***

A new statutory cause of action should be inserted into the established *Privacy Act 1988* (Cth) rather than enshrined under a new act. This would likely avoid confusion which could arise from the implementation of a whole new statute dealing with privacy.

s 2A of the *Privacy Act* defines the objects of the act as being:

- (a) to promote the protection of the privacy of individuals; and
- (b) to recognise that the protection of the privacy of individuals is balanced with the interests of entities in carrying out their functions or activities; and
- (c) to provide the basis for nationally consistent regulation of privacy and the handling of personal information; and
- (d) to promote responsible and transparent handling of personal information by entities; and
- (e) to facilitate an efficient credit reporting system while ensuring that the privacy of individuals is respected; and
- (f) to facilitate the free flow of information across national borders while ensuring that the privacy of individuals is respected; and
- (g) to provide a means for individuals to complain about an alleged interference with their privacy; and
- (h) to implement Australia's international obligation in relation to privacy.

Each and every one of these objects coincides with the purpose of implementing a new statutory cause of action for serious invasion of privacy. As such it seems appropriate to insert the new provisions into the established legislation rather than to create a new act.

## ***Express classification as a tort***

The new statutory provision should be expressly referred to as a tort for several reasons.

Firstly, classification as an action in tort clarifies incidental issues which would otherwise arise in applying the statute. Issues that could arise include:

- jurisdictional issues based on where a tort was committed;<sup>43</sup>
- vicarious liability where the tort-feasor is an employee acting in the course of their employment;<sup>44</sup> and
- the application of statutory provisions which reference torts. For example, s 5 of *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) applies strictly to joint and several tort-feasors and thus would only apply if the statutory cause of action was considered an action in tort.

Secondly, classification of the statutory action as a tort would allow Australian courts to utilise relevant case law from jurisdictions with similar invasion of privacy laws. For example, New Zealand courts have recognised actions in tort against invasions of privacy and thus their judgments could be considered for guidance.<sup>45</sup>

Finally, classifying the statutory cause of action as a tort expressly differentiates it from the equitable action of breach of confidence.

---

<sup>43</sup> *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

<sup>44</sup> Lewis Klar, 'Vicarious Liability' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) ch 19.

<sup>45</sup> *Hosking v Runting* (2005) 1 NZLR 1; *C v Holland* [2012] 3 NZLR 672.



## ***Categories of invasion***

### Intrusion upon seclusion:

Intrusion upon seclusion is a major branch of privacy invasion. Seclusion generally involves the invasion of an individual's private space and the interference of an individual's private activities. The statutory provision should expressly include intrusion upon seclusion as grounds for a claim.

### Misuse of private information:

The other category of invasion of privacy is the misuse of private information. Misuse of private information should cover the improper collection, maintenance and disclosure of private information.

## ***Certainty vs flexibility***

The introduction of a new statutory action requires a discussion of the specificity with which the relevant provision(s) should be drafted. A broadly drafted provision would allow for Australian courts to develop the law, while a provision drafted with specificity can ensure certainty in its application.

A new statutory cause of action should be as clear as possible on what constitutes a serious invasion of privacy. Generalised causes of action provide little guidance to judges in their application and undermine a key component of the rule of law. The action should be defined to cover the two aforementioned categories of invasion of privacy.

## ***Reasonable expectation of privacy***

A statutory cause of action for serious invasion of privacy should require a reasonable expectation of privacy on the part of the plaintiff. The test for such an element would need to be objective given the nature of the cause of action, effectively raising the question “would a person in the circumstances have had a reasonable expectation of privacy?” The test would be determined on a case-by-case basis which would depend on individual facts of each case. The burden of proof that a reasonable expectation of privacy existed would be on the plaintiff.

The statutory provision should contain a non-exhaustive list of factors which should be taken into account in determining whether there was a reasonable expectation of privacy. By way of example, some factors include:

- the way in which the information was original obtained;
- the intended purpose of the disclosure or misuse;
- the way in which the private information was disclosed or misused; and
- whether there was any other malicious conduct by the defendant.

## ***Intention and recklessness***

An action for serious invasion of privacy should be predicated on the invasion being intentional or reckless. Intention and recklessness is an element in most torts of this nature. Additionally, necessitating intent or recklessness allows for an action in serious invasion of privacy to be used where there is only emotional distress as a head of damage. Treating the cause of action in this way fills a large void in the existing law and increases the deterrent effect of the cause of action.

## ***Seriousness***

The cause of action should only target invasions of privacy which are objectively deemed to be serious. Therefore, the seriousness of an alleged invasion of privacy should be an element of the tort, independently determined by the court.

‘Serious’ should be defined in the provision. A non-exhaustive list of factors which should be considered in determining whether an invasion of privacy was ‘serious’ should be listed within the provision. Some relevant factors include:

- the likelihood of the invasion causing offence or harm;
- whether the defendant acted with malice or animosity; and
- whether the defendant had acted in a similar manner previously.

## ***Taking into account other interests***

While the protection of individual privacy is a hugely important public interest, it must nevertheless be weighed up against other interests. An action in serious invasion of privacy should be considered in the context of competing public interests. Therefore, the court must be satisfied that the right to privacy outweighs the competing public interests which apply to that invasion.

A non-exhaustive list of public interest considerations should be outlined in the provision.

Examples of some common considerations include:

- freedom of speech;
- national security; and
- public safety.

If the application of one or more of these considerations outweighs the public interest in privacy, then the plaintiff would not have a cause of action under a tort for serious invasion of privacy.

While arguing that competing interests outweigh the public interest in privacy is not an affirmative defence, the defendant would most likely be in the best position to argue the case. As such, the cause of action should require that the defendant bear the onus of adducing such evidence.

## ***Defences***

There certainly exist situations where a plaintiff's right to privacy must be overruled by a competing factor. For this reason, a number of defences must exist in relation to an action for serious invasion of privacy. These defences are:

- Conduct required by law: where the conduct was undertaken in an attempt to comply with a lawful order;
- consent: where the conduct complained of was consensual. This includes implied consent;
- necessity: where the defendant acted based on a reasonable belief that they were preventing an imminent and greater harm; and
- self defence: where the invasion was necessary and reasonable in the protection of a person or property.

The basic concept of absolute privilege would apply to the new statutory tort.

## ***Remedies***

The statutory tort should be versatile in its potential remedies. Outlined below are the potential awards:

- Courts should be able to award damages, taking into account aggravating and mitigating factors;
- exemplary damages should be awarded in exceptional cases;
- in cases where the defendant has profited from an invasion, an account of profits should be awarded;
- injunctive relief should be awarded in cases where financial compensation is not a sufficient remedy, e.g. where an ongoing invasion needs to be stopped.