Office of the
Victorian Privacy
Commissioner

Office of the Victorian Privacy Commissioner

Submission to

Australian Law Reform Commission

on its

Discussion Paper 80: Serious Invasions of Privacy in the Digital Era

May 2014

The Acting Privacy Commissioner wishes to acknowledge the work of Emily Minter (Senior Policy Officer) in preparing this submission.

Office of the Victorian Privacy Commissioner (Privacy Victoria)
GPO Box 5057
10-16 Queen Street
Melbourne Victoria 3000
Australia
Phone: 1300-666-444
Fax: +61-3-8619-8700
Email: enquiries@privacy.vic.gov.au
Website: www.privacy.vic.gov.au

Contents

Proposals and Questions

4. A New Tort in a New Commonwealth Act

Proposal 4–1: A statutory cause of action for serious invasion of privacy should be contained in a new Commonwealth Act (the new Act).

We support the proposition that the law should provide for a cause of action for serious invasion of privacy.

We agree with the ALRC that to ensure uniformity and to avoid the problems associated with inconsistent legislation, the statutory cause of action should be contained in a new Commonwealth Act.

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

We believe the cause of action should be described as a statuary cause of action. We support the VLRC and the NSWLRC's arguments for describing the cause of action as a statutory cause of action, including that remedies should be able to be engaged without the requirement for proof of damage.

5. Two Types of Invasion and Fault

Proposal 5–1: First element of action: The new tort should be confined to invasions of privacy by:

> **(a) intrusion upon the plaintiff's seclusion or private affairs (including by unlawful surveillance); or**
>
> **(b) misuse or disclosure of private information about the plaintiff (whether true or not).**

We support this proposal.

Confining the cause of action in this way will provide more certainty about the precise nature of the legal rights and obligations created than those under a broader right to privacy.

A large number of individuals who contact the Office of the Victorian Privacy Commissioner seek redress for interferences with spatial or physical privacy for which there is currently no readily accessible remedy in Australian law, or seek to complain about interferences with personal information by other individuals, which are effectively beyond the jurisdiction or all current regulators. The proposed statutory cause of action will address these current gaps in the law.

The tort of intrusion upon seclusion is concerned with the protection of spatial privacy. Increasingly, people are becoming concerned about intrusions into their spatial privacy,

particularly given the rise in surveillance technologies. The Privacy Commission receives hundreds of complaints each year relating to spatial privacy. In many cases (e.g. in situations where surveillance is conducted by an individual or small business, or where information is not recorded) such intrusions will not be covered by current information privacy laws.

The tort of misuse of personal information is primarily concerned with the use of private information rather than how it is gathered or received. Use and disclosure allegations have consistently motivated most complainants to the Privacy Commission over the past five years. Last year complaints in this area comprised 71% of the total new complaints investigated by our office. This is closely followed by data security breaches, at 61%.

Proposal 5–2: Second element of action: 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.

We support the approach taken by the VLRC on this issue. The VLRC proposed that a cause of action should not be confined to intentional and reckless invasions of privacy, but should also be available to negligent invasions. Should this not be case, an individual affected by a negligently caused breach of privacy would continue to have no remedy under any legislation. While mere accidental intrusions should not give rise to an action, in our view, negligent actions should, especially where they give rise to potentially severe harm to an individual. Examples of such negligent intrusions may be a doctor leaving a clients' file on a tram or a train, or a police investigator leaving an investigation file in a crowded cafe.

The inclusion of negligent conduct in the cause of action would not be inconsistent with other laws. For example, existing privacy legislation does not require a 'fault' element. Neither does the law in a range of other contexts, including some criminal offences such as manslaughter.

Proposal 5–3: The new Act should provide that an apology made by or on behalf of a person in connection with any invasion of privacy alleged to have been committed by the person:

> **(a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter; and**
>
> **(b) is not relevant to the determination of fault or liability in connection with that matter.**

We support this proposal. The adoption of this proposal will encourage early resolution of disputes without recourse to litigation.

Proposal 5–4: Evidence of an apology made by or on behalf of a person in connection with any conduct by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

We support this proposal.

6. A Reasonable Expectation of Privacy

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

We support this proposal. Whether a plaintiff has a reasonable expectation of privacy is a useful and widely adopted test and is appropriate for the purpose of a civil cause of action for invasions of privacy. We believe this test will be flexible and adaptable to new circumstances.

Proposal 6–2: The new 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;**
>
> **(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 and occupation;**
>
> **(h) whether the plaintiff consented to the conduct of the defendant; and**
>
> **(i) the extent to which the plaintiff had manifested a desire not to have his or her privacy invaded**

We support this approach. We note that any list of matters to which a Court should have regard should be non-exhaustive and technology neutral.

7. Seriousness and Proof of Damage

Proposal 7–1: Fourth element of action: The new Act should provide that the new cause of action is only available where the court considers that the invasion of privacy was 'serious'. The new Act should also provide that in determining whether the invasion of privacy was serious, a court may consider, among other things, whether the invasion of privacy was likely to be highly offensive, distressing or harmful to a person of ordinary sensibilities in the position of the plaintiff.

We support this proposal.

Proposal 7–2: The plaintiff should not be required to prove actual damage to have an action under the new tort.

We support this proposal. Plaintiffs should not be called upon to prove damage as a threshold issue, given the nature of the interest sought to be protected by the cause of action. It should be sufficient that the plaintiff had a legitimate expectation of privacy in the circumstances and the conduct complained of would be offensive to a reasonable person.

8. Balancing Privacy with Other Interests

Proposal 8–1: Fifth element of action: The new Act should provide that the plaintiff only has a cause of action for serious invasion of privacy where the court is satisfied that the plaintiff's interest in privacy outweighs the defendant's interest in freedom of expression and any broader public interest. A separate public interest defence would therefore not be needed.

It is essential that a new cause of action takes account of the need to balance competing rights and interests. In this regard we broadly support the approach proposed by the VLRC. That is, a defendant would be required to raise any countervailing public interest as a defence and would bear the onus of establishing it.

Proposal 8–2: The new Act should include the following non-exhaustive list of public interest matters which a court may consider:

(a) freedom of expression, including political communication;

(b) freedom of the media to investigate, and inform and comment on matters of public concern and importance;

(c) the proper administration of government;

(d) open justice;

(e) public health and safety;

(f) national security;

(g) the prevention and detection of crime and fraud; and

(h) the economic wellbeing of the country.

We agree with this proposal, however please note our comments to Proposal 8-1.

9. Forums, Limitations and Other Matters

Proposal 9–1: Federal, state and territory courts should have jurisdiction to hear an action for serious invasion of privacy under the new Act.

We support this proposal.

Question 9–1: If state and territory tribunals should also have jurisdiction, which tribunals would be appropriate and why?

As we understand the Constitutional position, the jurisdiction to hear and determine disputes involving any new cause of action would vest in the Commonwealth judicial system. We suggest that consideration be given to ensuring that dispute resolution mechanisms be sufficiently flexible and cost effective so as to ensure that plaintiffs have adequate access to remedies.

Proposal 9–2: The new Act should provide that the new tort be limited to natural persons.

We support this proposal. Privacy is conceptualised as pertaining to individuals. There is not policy basis that supports the extension of privacy rights to any other legal persons.

Proposal 9–3: 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.

We support this proposal.

Proposal 9–4: A person should not be able to bring an action under the new tort after either (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, whichever comes earlier. In exceptional circumstances the court may extend the limitation period for an appropriate period, expiring no later than three years from the date when the invasion occurred.

We support this proposal.

Proposal 9–5: The new Act should provide that, in determining any remedy, the court may take into account:

> **(a) whether or not a party took reasonable steps to resolve the dispute without litigation; and**
>
> **(b) the outcome of any alternative dispute resolution process.**

We support this proposal.

10. Defences and Exemptions

Proposal 10–1: The new Act should provide a defence of lawful authority.

We support this proposal. As a starting point, we support the use of the wording proposed by ALRC (previously), NSWLRC and VLRC; 'authorised or required by law'.

Proposal 10–2: The new 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.

We support this proposal. We support this defence being limited to 'proportionate, necessary and reasonable' conduct, in order to ensure that the defence does not provide protection for conduct that goes beyond what is appropriate in the particular circumstances.

Proposal 10–3: The new Act should provide for a defence of absolute privilege for publication of private information that is co-extensive with the defence of absolute privilege to defamation.

We support this proposal.

Proposal 10–4: The new Act should provide for a defence of qualified privilege to the publication of private information where the defendant published matter to a person (the recipient) in circumstances where:

> **(a) the defendant had an interest or duty (whether legal, social or moral) to provide information on a subject to the recipient; and**
>
> **(b) the recipient had a corresponding interest or duty in having information on that subject; and**
>
> **(c) the matter was published to the recipient in the course of giving to the recipient information on that subject.**
>
> **The defence of qualified privilege should be defeated if the plaintiff proves that the conduct of the defendant was actuated by malice.**

We support this proposal.

Question 10–1: Should the new Act instead provide that the defence of qualified privilege is co-extensive to the defence of qualified privilege to defamation at common law?

No, the elements and defences of the new cause of action should be provided for in self-contained legislation.

Proposal 10–5: The new Act should provide for a defence of publication of public documents.

We support this proposal. We agree this supports a transparent and open government and judicial system.

We agree with the ALRC that the meaning of 'public documents' in defamation legislation is appropriate in this context.

Proposal 10–6: The new Act should provide for a defence of fair report of proceedings of public concern.

We support this proposal. We note the ALRC's proposal is modelled on the defence of fair report of proceedings of public concern in defamation legislation, and that 'fair' has the meaning as developed at common law.

Question 10–2: Should the new Act provide for a defence of necessity?

We are of the view that the defences proposed by ALRC are sufficient.

Proposal 10–7: The new Act should provide a safe harbour scheme to protect internet intermediaries from liability for serious invasions of privacy committed by third party users of their service.

We support this proposal.

Question 10–3: What conditions should internet intermediaries be required to meet in order to rely on this safe harbour scheme?

We agree with the ALRC's proposed conditions.

11. Remedies and Costs

Proposal 11–1: The new Act should provide that courts may award compensatory damages, including damages for the plaintiff's emotional distress, in an action for serious invasion of privacy.

We support this proposal. This would be in line with existing privacy legislation (including the *Privacy Act 1988* (Cth) and the *Information Privacy Act 2000* (Vic)), which provide for compensatory damages to be awarded, including damages for 'injury to the persons feelings or humiliation'.

Proposal 11–2: The new Act should set out the following non-exhaustive list of factors that may mitigate damages for serious invasion of privacy:

> **(a) that the defendant has made an appropriate apology to the plaintiff about the conduct that invaded the plaintiff's privacy;**
>
> **(b) that the defendant has published a correction of any untrue information disclosed about the plaintiff;**
>
> **(c) that the defendant has made an offer of amends in relation to the defendant's conduct or the harm suffered by the plaintiff;**
>
> **(d) that the plaintiff has already recovered compensation, or has agreed to receive compensation in relation to the conduct of the defendant;**
>
> **(e) that the defendant had taken reasonable steps to settle the dispute with the plaintiff in order to avoid the need for litigation; and**
>
> **(f) that the plaintiff had not taken reasonable steps to settle the dispute, prior to commencing or continuing proceedings, with the defendant in order to avoid the need for litigation.**

We support this proposal, but note that potential issues may arise with (f). While it can be argued that (f) will encourage plaintiff to settle the dispute with the defendant prior to

initiating a proceeding, there may be a range of reasons for the plaintiff not wishing to approach the defendant, including:

- a perceived power imbalance between the plaintiff and the defendant
- a lack of trust as a result of the breach of plaintiff's privacy
- the plaintiff being too emotionally distressed to approach the defendant.

In our view, (e) would serve as a sufficient incentive for the defendant to act in good faith when approached by the plaintiff. In addition, (a) outlined in Proposal 11-3 will also encourage the plaintiff to settle the dispute prior to initiating the proceeding.

In our view, in light of (e) and (a) in Proposal 11-3, (f) is unnecessary and may work as a detriment to a vulnerable plaintiff. A failure by the plaintiff for a proactive conduct should not be used against the plaintiff in favour of the defendant.

If (f) is to be preserved, at the very least it must be made clear that these factors in the list serve as a guidance only and discretion will be exercised with external factors taken into account.

Proposal 11–3: The new Act should set out the following non-exhaustive list of factors that may aggravate damages for serious invasion of privacy:

> **(a) that the plaintiff had taken reasonable steps, prior to commencing or continuing proceedings, to settle the dispute with the defendant in order to avoid the need for litigation;**
>
> **(b) that the defendant had not taken reasonable steps to settle the dispute with the plaintiff in order to avoid the need for litigation;**
>
> **(c) that the defendant's unreasonable conduct at the time of the invasion of privacy or prior to or during the proceedings had subjected the plaintiff to special or additional embarrassment, harm, distress or humiliation;**
>
> **(d) that the defendant's conduct was malicious or committed with the intention to cause embarrassment, harm, distress or humiliation to the plaintiff; and**
>
> **(e) that the defendant has disclosed information about the plaintiff which the defendant knew to be false or did not honestly believe to be true.**

We support this proposal.

Proposal 11–4: The new Act should provide that the court may not award a separate sum as aggravated damages.

We support this proposal, provided that exemplary damages as discussed in Proposal 11-5 will be provided for in the new Act.

Proposal 11–5: The new Act should provide that, in an action for serious invasion of privacy, courts may award exemplary damages in exceptional circumstances and where the court considers that other damages awarded would be an insufficient deterrent.

We support this proposal.

Proposal 11–6: The total of any damages other than damages for economic loss should be capped at the same amount as the cap on damages for non-economic loss in defamation.

We do not support the proposition that the total of any damages other than damages for economic loss should be capped at the same amount as the cap on damages for non-economic loss in defamation.

We are of the view that there should be no cap on damages, this would reflect the growing importance placed on privacy rights in Australia.

Proposal 11–7: The new Act should provide that a court may award the remedy of an account of profits.

We support this proposal.

Proposal 11–8: The new Act should provide that courts may award damages assessed on the basis of a notional licence fee in respect of the defendant's conduct, in an action for serious invasion of privacy.

We support the general proposition that the compensation awarded by a court should be commensurate with the loss and damage sustained by the plaintiff. In many cases a plaintiff will have difficulty establishing the full quantum of his or her loss. A similar case arises in intellectual property infringement where compensation is sought for damage to business reputation. We would accordingly support a notional licence fee approach as one of the remedies available to a plaintiff.

Proposal 11–9: The new Act should provide that courts may award an injunction, in an action for serious invasion of privacy.

We support this proposal.

Proposal 11–10: The new Act should provide that courts may order the delivery up and destruction or removal of material, in an action for serious invasion of privacy.

We support this proposal, including, where appropriate, in relation to online content.

Proposal 11–11: The new Act should provide that courts may make a correction order, in an action for serious invasion of privacy.

We support this proposal.

Proposal 11–12: The new Act should provide that courts may make an order requiring the defendant to apologise to the plaintiff, in an action for serious invasion of privacy.

We support this proposal.

Proposal 11–13: The new Act should provide that courts may make a declaration, in an action for serious invasion of privacy.

We support this proposal.

Question 11–1: What, if any, provisions should the ALRC propose regarding a court's power to make costs orders?

We support VLRC's recommendation that each party should bear their own costs in a proceeding unless ordered otherwise.

12. Breach of Confidence Actions for Misuse of Private Information

Proposal 12–1: 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 claimant's emotional distress.

We support this proposal. This would clarify the current common law position and strengthen an action for breach of confidence.

Proposal 12–2: Relevant court acts should be amended to provide that, when considering whether to grant injunctive relief before trial to restrain publication of private (rather than confidential) information, a court must have particular regard to freedom of expression and any other countervailing public interest in the publication of the material.

We support this proposal.

13. Surveillance Devices

Proposal 13–1: Surveillance device laws and workplace surveillance laws should be made uniform throughout Australia.

We support this proposal. There are significant inconsistencies in surveillance devices legislation across Australian jurisdictions. Surveillance device legislation is also little understood, and, in Victoria, very rarely prosecuted under. The creation of uniform laws should assist in raising awareness of surveillance laws and in the detection and prosecution of surveillance offences.

Proposal 13–2: Surveillance device laws should include a technology neutral definition of 'surveillance device'.

We support this proposal. As a starting point, We support the definition proposed by NSWLRC in 2001: 'any instrument, apparatus or equipment used either alone, or in conjunction with other equipment, which is being used to conduct surveillance'.

Proposal 13–3: Offences in surveillance device laws should include an offence proscribing the surveillance or recording of private conversations or activities without the consent of the participants. This offence should apply regardless of whether the person carrying out the surveillance is a participant to the conversation or activity, and regardless of whether the monitoring or recording takes place on private property.

We support this proposal. It is arguable that it is offensive in most circumstances to record a private conversation or activity to which a person is a party without informing the other participants. Without knowledge of the recording, people cannot refuse to be recorded or alter their behaviour.

However, we note some forms of 'participant monitoring' may be beneficial and consideration should be given to them continuing to be permitted. We suggest consideration be given to adopting the VLRC's proposal to create an exception along the lines of that in other jurisdictions. NSW, Tasmania, ACT, Western Australia and South Australia allow 'participant monitoring' by a principal party to the conversation or activity if it is reasonably necessary for the protection of that party's lawful interests. Should such an exception be provided for, it is our view that 'reasonably necessary for the protection of the lawful interests' be interpreted narrowly (as it has been by the NSW Court of Criminal Appeal).

Proposal 13–4: Defences in surveillance device laws should include a defence of responsible journalism, for surveillance in some limited circumstances by journalists investigating matters of public concern and importance, such as corruption.

We support this proposal in principle. However, any defence along these lines would need to be carefully drafted in order to ensure that it may not be construed too broadly, and therefore allow inappropriate surveillance to continue.

Question 13–1: Should the states and territories enact uniform surveillance laws or should the Commonwealth legislate to cover the field?

Our preference is that the states and territories should retain jurisdiction over surveillance devices but should act cooperatively through national fora to develop a consistent approach that is technology-neutral. Adoption of a regulatory regime that is further fragmented is highly undesirable.

Proposal 13–5: Surveillance device laws should provide that a court may make orders to compensate or otherwise provide remedial relief to a victim of unlawful surveillance.

We support this proposal.

Question 13–2: Should local councils be empowered to regulate the installation and use of surveillance devices by private individuals?

We do not support this proposal, as it would lead to further inconsistencies in the regulation of surveillance devices.

14. Harassment

Proposal 14–1: A Commonwealth harassment Act should be enacted to consolidate and clarify existing criminal offences for harassment and, if a new tort for serious invasion of privacy is not enacted, provide for a new statutory tort of harassment. Alternatively, the states and territories should adopt uniform harassment legislation

We support this proposition in principle, however the creation of a statutory cause of action for serious invasion of privacy is preferable.

15. New Regulatory Mechanisms

Proposal 15–1: The ACMA should be empowered, where there has been a privacy complaint under a broadcasting code of practice and where the ACMA determines that a broadcaster's act or conduct is a serious invasion of the complainant's privacy, to make a declaration that the complainant is entitled to a specified amount of compensation. The ACMA should, in making such a determination, have regard to freedom of expression and the public interest.

We are of the view that any extension to the ACMA's powers should be carefully considered. It is important that a decision of ACMA does not substitute for decision of the Courts.

This proposal raises a number of questions, namely:

- What would be the avenues for appeal of a decision of ACMA?
- How would the extension of ACMA's powers intersect with the proposed tort/ statutory cause of action, including:
    - would a plaintiff be barred from bringing an action under the proposed tort/ statutory cause of action following an ACMA determination?
    - would the remedies be the same as those available under the proposed tort/ statutory cause of action?

Proposal 15–2: A new Australian Privacy Principle should be inserted into the *Privacy Act 1988* (Cth) that would:

> **(a) require an APP entity to provide a simple mechanism for an individual to request destruction or de-identification of personal information that was provided to the entity by the individual; and**
>
> **(b) require an APP entity to take reasonable steps in a reasonable time, to comply with such a request, subject to suitable exceptions, or provide the individual with reasons for its non-compliance.**

We support this proposal.

Question 15–1: Should the new APP proposed in Proposal 15–2 also require an APP entity to take steps with regard to third parties with which it has shared the personal information? If so, what steps should be taken?

We support this proposal.

Question 15–2: Should a regulator be empowered to order an organisation to remove private information about an individual, whether provided by that individual or a third party, from a website or online service controlled by that organisation where:

> **(a) an individual makes a request to the regulator to exercise its power;**
>
> **(b) the individual has made a request to the organisation and the request has been rejected or has not been responded to within a reasonable time; and**
>
> **(c) the regulator considers that the posting of the information constitutes a serious invasion of privacy, having regard to freedom of expression and other public interests?**

We support this proposal.

Proposal 15–3: The Privacy Act 1988 (Cth) should be amended to confer the following additional functions on the Australian Information Commissioner in relation to court proceedings relating to interferences with the privacy of an individual:

> **(a) assisting the court as amicus curiae, where the Commissioner considers it appropriate, and with the leave of the court; and**
>
> **(b) intervening in court proceedings, where the Commissioner considers it appropriate, and with the leave of the court.**

We support this proposal.