

72. D Day

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Proposal 4.1:

Proposal 4-2 :

Proposal 5-1 :

Proposal 5-2 :

The Terms of Reference require the Australian Law Reform Commission (ALRC) to investigate, amongst other things, ways of preventing serious invasions of privacy. In responding to this requirement, the ALRC have in their Discussion Paper outlined a proposal that:

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.

I would like to use this submission to argue that in not extending to negligent invasions of privacy, any Statutory Cause of Action (SCA) for Serious Invasion of Privacy would be more limited in its effectiveness to achieve an aim than it should be. Any SCA should be designed such that it is able to effectively minimise harms from serious invasions of privacy that are caused by negligent behaviour. Excluding from the scope of any SCA certain behaviours and practices that produce or represent serious invasion of privacy is likely to significantly reduce the ability of the mechanism to be effective.

Where a person or organisation (party) has control or access to another party's private sphere—whether it is their personal information, seclusion or other—and they demonstrate an improper level of care with that control or access that results in a serious invasion of privacy to the latter party, it appears reasonable to suggest that it is sub-optimal for no redress to be provided the plaintiff, and perhaps more notably, for no deterrent to the defendant or on either that occasion or any future occasion, and additionally for no deterrent to be provided against the behaviour in general.

Where a party is entrusted or supplied with personal information for a commercial, legal or contractual purpose, or of a significant number of other parties, and where the information is sufficiently sensitive that unauthorised disclosure of it is likely to cause serious harm or distress to other parties, then there is a public interest in ensuring the handler is an appropriate party to do so, and is likely to have appropriate measures in place. Beyond respecting parties' right to privacy, the public interest being served is in having effective, trusted services and service providers available to citizens, consumers etc, and in providing for the services and service providers to evolve and enhance over time.

If, through demonstrating negligent behaviour, services and service providers aren't suitable for handling personal or sensitive information in ways that respect privacy, and there is no form of having this corrected, the situation is not optimal.

The ALRC's proposal to exclude negligent invasions of privacy from the SCA on the basis that people may otherwise be exposed to liability for common human error may be reasonable, but the result may be that many serious invasions of privacy may go unchecked. Consider a hypothetical situation wherein a journalist at a local newspaper reports on the death of a person, wherein there is no identifiable public interest in the death, without having confirmed if the family knew about the death. There may have been no intention to cause distress, but there should be strong incentives to ensure such a situation doesn't arise, and a privacy SCA may be able to play a useful role.

The ALRC's argument that including negligence in scope of any SCA may restrict freedom of expression may also be reasonable. However given that that any of the 'types of invasion' the Discussion Paper refers to could stem from negligence, the ALRC should either include negligent invasions of privacy as in scope, or demonstrate more clearly why it cannot be. Because where it is possible to deter negligent behaviour without unduly punishing common human errors or restricting freedom of expression, that would be an improvement on the current proposal.

One option for addressing potential harms caused by negligence could be that the ALRC investigate whether negligence could be used as a defence to an action for serious invasion of privacy. That is, a negligent invasion of privacy would be actionable where it is serious, but where a defendant demonstrates the behaviour was negligent rather than intentional, this should be taken into account as a mitigating factor by the court. The ALRC's reasoning for any SCA not being extended to negligent invasions of privacy does appear reasonable, but it is unlikely to be enough to say that it is easier to prove negligence in the case of physical injury etc than it is in the case of emotional distress etc, and then leave negligence—which may cause serious emotional distress etc—out of scope because it may be difficult to deal with. Investigation of other ways of addressing negligent behaviour that represent a serious invasions of privacy, beyond the context of fault, such as investigating whether negligence could be used as a defence to an action for serious invasion of privacy, it is critical to the ALRC's inquiry being a comprehensive and rigorous one.

Proposal 5-3 :

Proposal 5-4 :

Proposal 6-1 :

Proposal 6-2 :

Proposal 7-1 :

Proposal 7-2 :

Proposal 8-1 :

The ALRC should make a more compelling case for why the onus of proof in demonstrating a privacy infringement outweighs any public interest should be on the plaintiff. In a hypothetical scenario where an 18 year-old school student's privacy was invaded by journalist for a well-resourced media organisation, the balance would appear to be in the defendant's favour as to even comprehending what the public interest is.

Proposal 8-2 :

Proposal 9-1 :

Question 9-1 :

Proposal 9-2 :

Proposal 9-3 :
Proposal 9-4 :
Proposal 9-5 :
Proposal 10-1 :
Proposal 10-2 :
Proposal 10-3 :
Proposal 10-4 :
Question 10-1 :
Proposal 10-5 :
Proposal 10-6 :
Question 10-2 :
Proposal 10-7 :
Question 10-3 :
Proposal 11-1 :
Proposal 11-2 :
Proposal 11-3 :
Proposal 11-4 :
Proposal 11-5 :
Proposal 11-6 :
Proposal 11-7 :
Proposal 11-8 :
Proposal 11-9 :
Proposal 11-10 :
Proposal 11-11 :
Proposal 11-12 :
Proposal 11-13 :
Question 11-1 :

Proposal 12-1 :

In relation to proposal 12-1, it is not clear from the Discussion Paper whether the proposal depends on there being an expectation of a confidential agreement being in place between a defendant and plaintiff. If it does, this would not address a case where there is no such expectation – e.g. a journalist photographing an unsuspecting someone through that person's window may not be covered as the person is unaware of the action, let alone having an expectation of a confidential agreement being in place. As such, this should not be presented as an alternative to an SCA, but as a minor amendment to existing law that would offer limited improvement to privacy protection.

Proposal 12-2 :
Proposal 13-1 :
Proposal 13-2 :

To provide certainty as to behaviours, activities etc covered by any SCA, in addition to a definition of 'surveillance device' there should be clear guidance as to what constitutes 'surveillance.' As proposals 13-2 and 13-3 are written, taking a video without the consent of someone in the background could be interpreted as an invasion of privacy, and could well be considered 'serious' depending on what the recording is used for, what the unintended party was saying/doing and to who etc. If a robust definition of surveillance is not available then innocent behaviours could be stifled out of fear of unintentionally invading privacy.

It would further be useful for the ALRC to provide clarity as to how such a law would react with the idea that people do not have a right to not be photographed.

Proposal 13-3 :

Proposal 13-4 :

Question 13-1 :

Proposal 13-5 :

Question 13-2 :

Proposal 14-1 :

Proposal 15-1 :

Proposal 15-2 :

It's not made clear why an APP who has been directly supplied with private info would be the subject of a mechanism where they have to delete material, while an APP who has been supplied with info by a third party wouldn't be a subject of the same mechanism. It would further be of value for the ALRC to clarify whether parties who are not APP entities would be in scope. For instance would a gossip blogger earning less than \$3 million and not engaged in journalism be covered?

Question 15-1 :

Question 15-2 :

Proposal 15-3 :

Other comments:

File 1:

File 2: