76. Professor Graham Greenleaf

Integrating the action for 'serious invasions of privacy' into the *Privacy Act 1988*

Submission to the Australian Law Reform Commission

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This submission concentrates on the relationship between the proposed cause of action for a 'serious invasion of privacy' and the *Privacy Act 1988*. I support fully the ALRC's proposal to create a new statutory cause of action. Much of the content of this submission will also be included in the Australian Privacy Foundation (APF) submission to the ALRC, but I wish to reiterate it in a separate personal submission the value and importance of making the new action more closely integrated with the existing Privacy Act structures than is currently proposed by the ALRC. On other matters I support the APF's submission but have not reiterated its points here. This submission is structured around the headings and questions used by the ALRC in its Discussion Paper.

4. A New Tort in a New Commonwealth Act

I submit that the cause of action for a 'serious invasion of privacy' should additionally be described as an 'interference with privacy' for the purposes of the *Privacy Act 1988*. This is discussed further under '9. Forums, Limitations and Other Matters' and '15. New Regulatory Measures'.

9. Forums, Limitations and Other Matters

The implication of my submissions on items 4 and 15 is that the Privacy Commissioner/AIC will also have jurisdiction, by virtue of the action also being an 'interference with privacy' for the purposes of the Privacy Act.

I support the ALRC proposal that Federal, State and Territory courts should have jurisdiction to hear a serious invasion of privacy action. The inclusion of lower levels of State and Territory courts is, in particular, supported because, as PIAC and others have submitted, '[a]ccessibility is a key factor in considering which forum is appropriate …'. I support complainants/plaintiffs having the option to take actions for interferences with privacy to the Courts, not only to the Privacy Commissioner, *a fortiori* in the case of a 'serious invasion of privacy'.

However, I consider that there are very strong reasons for providing the option to complainants/plaintiffs to take a 'serious invasion of privacy' complaint to the Privacy Commissioner. I also submit that there are no significant impediments in law or policy to this approach.

I submit that ALRC's reasons in [9.30]-[9.32] for rejecting complaints of a 'serious interference with privacy' being able to be brought before the Privacy Commissioner/AIC are not convincing, and should be reconsidered. The reasons for reconsideration are as follows:

(i) The mechanism of making a 'serious invasion of privacy' also an 'interference with privacy' for the purposes of the Privacy Act avoids any problem of vesting of judicial powers (a problem identified in vesting jurisdiction in Commonwealth tribunals).

(ii) This mechanism is a familiar part of federal legislative techniques, used in such areas as TFNs, and other examples in section 13 Privacy Act. It was used most recently in the *Privacy Amendment (Privacy Alerts) Bill* 2013, Schedule 1, item 3, which proposed

[1] The author is a member of the ALRC's Advisory Committee on this reference, and is also a Board member of the Australian Privacy Foundation. This submission is made separately from either of those roles.

insertion of a new section 13(4A) in the Privacy Act, to make contraventions of data breach notification requirement also an interference with privacy.

(iii) Some complaints over which the Privacy Commissioner already has jurisdiction under the APPs may already constitute 'serious invasions of privacy'. One example is APP 3.5, which prevents collection of personal information by unfair means. Various types of intrusive or deceptive information collection can also constitute the intrusion tort (Proposal 5-1(a)). Complaints under APP 3.5 could involve the most difficult issues of intrusive media conduct, and require balancing of privacy and free speech considerations. Privacy Commissioners in other jurisdictions, such as Hong Kong,[2] deal competently with such issues. If the Privacy Commissioner/AIC is going to have jurisdiction over the substance of *some* 'serious invasions of privacy', it would seem sensible for the Commissioner to be an alternative means of dispute resolution for *all* 'serious invasions of privacy', given that there are no constitutional impediments to this being achieved. It would also have significant advantages.

(iv) Referring to the Privacy Commissioner/AIC, ALRC says that 'In the absence of significant reform, the remits of these administrative bodies are typically restricted to information privacy, and to particular entities such as government agencies or large businesses' [9.31]. This is not a convincing argument. First, the intrusion tort will often be about intrusive collection of information, and the second branch of the proposed tort is solely about 'private information', so it is likely that most 'serious invasions of privacy' will in fact be about 'information privacy'. There is no obvious reason why a Privacy Commissioner would not have the skill set to deal with balancing privacy interests in relation to bodily privacy, communications privacy or spatial privacy, particularly because so many of those issues have significant overlaps with information privacy.

(v) The ALRC's reference to 'large businesses' implies that the Privacy Commissioner/AIC should have no role in relation to 'small business'. That exemption in the Australian federal law does not currently apply in the most serious instances of privacy interferences, where personal information is sold, bought or traded, so it is not anomalous if it does not apply in what are defined as 'serious invasions of privacy'. The Australian law is peculiar (along with Japan's law) in having a 'small business' exemption. All other overseas data protection authorities deal with complaints against small businesses. The ALRC has previously recommended abolition of the 'small business' exemption in the ALRC Report *For Your Information*.

(vi) The ALRC also implies that the Privacy Commissioner/AIC should have not investigate complaints about individuals. While the Privacy Act section 16 does exclude 'personal, family or household affairs' from the scope of the APPs, it does not exclude investigation of complaints against individuals in other contexts. There is no good policy reason why 'serious invasions of privacy' by individuals should not be investigated by the Privacy Commissioner/AIC. Many appropriate defences will apply, without need for any *a priori* exclusion of 'personal, family or household affairs'. In fact, it is in that context that many of the most egregious invasions of privacy occur, and

[2] Hong Kong's Privacy Commissioner for Personal Data interpreted 'fair' to include 'not intrusive' in two 2012 complaints. Each complaint concerned 'paparazzi' style photo-journalism using systematic surveillance and telescopic lens photography to take clandestine photographs of TV personalities within their private residences, over a period of three to four days. The Commissioner found both respondents in breach of DPP 1(2), and served enforcement notices directing the magazines to remedy their contraventions and the matters occasioning them. On appeal, the Administrative Appeals Board (AAB) dismissed all five grounds of appeal by each of respondents. The media respondents raised public interest arguments based on *Campbell v MGN* but that decision was distinguished on various grounds. In Hong Kong, 'public figures' are therefore able to protect some aspects of their private lives, through use of the privacy Ordinance. See *Face Magazine Ltd and the PCPD,* [2012] HKPCPDAAB 5; *Sudden Weekly Ltd and the PCPD,* [2012] HKPCPDAAB 6. The appeal decisions were handed down on 6 January 2014, and are available on HKLII and on the Commissioner's website.

where other individuals with few resources to run expensive litigation need the option of a remedy under the Privacy Act.

In short, the ALRC has not identified compelling policy reasons for excluding the Privacy Commission/AIC from dealing with 'serious invasions of privacy'.

The action would operate as an 'interference with privacy' in the Privacy Act as follows:

1. The existing wording of the *Privacy Act* is sufficiently flexible for the Privacy Commissioner to hear complaints about 'serious invasions of privacy' against all relevant parties, and to make such orders as are provided for by the Privacy Act. It does not seem that any further changes to the Act would be necessary, except possibly as noted in (4) below.
2. Appeals against determinations by the Commissioner could then be made to the AAT, and further appeals to the federal courts where necessary. The Privacy Act already provides in section 96(1)(c) for appeals concerning acts or practices of private sector bodies to go the AAT in relation to the AAPs, so there is now nothing unusual about this. As the ALRC notes, AAT appeals will still constitute 'review of decisions made by administrative bodies' [9.29], namely the Privacy Commissioner.
3. The proposed action for 'serious invasions of privacy' is not subject to exemptions for particular types of organisations, acts or practices, but instead is subject to various defences, as well as strict criteria for establishing the elements of the action. Consistent with this, the restrictions imposed by the definition of 'acts and practices' in section 7 of the Privacy Act, or sections 7B and 7C, should not apply to how it is defined as an 'interference with privacy'. I therefore submits that a new sub-section 13(6) should be added to the *Privacy Act 1988*: '(6) A serious invasion of privacy under the [title of new Commonwealth Act] is an interference with the privacy of an individual.'[3]
4. Despite the previous comment, it may reasonably be considered that it is not appropriate for the Privacy Commissioner to investigate the conduct of certain parties, such as some of those referred to in section 7(1)(a) and (b) of the Privacy Act. A new provision excluding those parties may be required. Nevertheless, complainants against such parties would still have the option of taking the matter before a court.

As well as there being no obvious impediments to the Privacy Commissioner/AIC having a new function of investigating complaints of 'serious invasion of privacy', there are numerous and considerable advantages, including the following:

(i) The accessibility advantages of being able to complain to the Privacy Commissioner are significant, and comparable with or better than most advantages of the lower levels of State or Territory courts. There are no court costs, or costs awarded against parties, but there is a high likelihood of many complaints being dismissed on the basis that the Commissioner considers there is not a 'serious invasion of privacy' (interference with privacy), or that the respondent has dealt with it adequately. Lower-level courts have more de-centralised physical distribution, and the advantage that plaintiffs usually have their 'day in court'. Each approach has different advantages in terms of accessibility, and the best result for complaints/plaintiffs is to have a choice.

(ii) The Privacy Commissioner is likely to have more experience and expertise in analysing the complex issues involved in a 'serious invasion of privacy' than will be the case for a lower level of State or Territory court.

[3] The wording cannot say 'An act or practice is an interference with the privacy of an individual if the act or practice is a serious invasion of privacy under the [title of new Commonwealth Act]', like the rest of s13, without the undesirable effect of bringing in most of the exemptions from the Privacy Act.

(iii) Until there are significant decisions by higher level courts, published decisions by the Privacy Commissioner and (on appeal) the AAT are likely to be more numerous, and to give all relevant parties some guidance on how the new action is being interpreted. Assuming these decisions are of good quality, this is also likely to encourage more consistent decisions.

(iv) The Privacy Act provides a very flexible range of remedies (particularly after the new amendments), including extensive resort to mediated settlements and enforceable undertakings.

(v) It will be undesirable if the Privacy Commissioner/AIC appears to be excluded from consideration of *serious* invasions of privacy,[4] with the risk that the APPs and the Privacy Commissioner comes to be perceived as only relevant to *non-serious* invasions of privacy. This would be likely to be detrimental to compliance with the Privacy Act. In addition, it would be detrimental to the professionalism and expertise of the OAIC if its Commissioners and staff consider that they have no role to play (and therefore no need to acquire expertise) in relation to what are perceived to be the most serious privacy invasions, and the public interest and other considerations required to resolve them.

I therefore submit that a new sub-section 13(6) should be added to the *Privacy Act 1988*: '(6) A serious invasion of privacy under the [title of new Commonwealth Act] is an interference with the privacy of an individual,' together with such limited consequential changes (if any) as are necessary to make the Privacy Act consistent with the new statutory action and the [title of new Commonwealth Act].

15. New Regulatory Mechanisms

I wish to support and propose improvements to the ALRC's three proposed mechanisms, and propose others.

Proposal 15–1: ACMA powers to award compensation

I support the proposed new power for ACMA to award compensation, and notes that the APF's previous submission that that the cause of action for a 'serious invasion of privacy' should also be an 'interference with privacy' under the *Privacy Act 1988* would have the result that the Privacy Commissioner/AIC would have such a power.

Proposal 15–2: New APP allowing an individual to request destruction/ de-identification

I support the new proposed new APP. In relation to Question 15–1, I submit that, when destruction or de-identification of the information does occur, an APP entity should be required to inform the individual that he or she is entitled to require the APP entity to inform any third parties to which it has provided the information that the information has been destroyed or de-identified, with a request from the APP entity that the third party do likewise, and to inform them that they have done so. The APP entity should be required to inform the individual of the answers from third parties that it receives.

In relation to Question 15-2, I submit that a regulator should be so empowered. Consistent with the APF's previous submission that that the cause of action for a 'serious invasion of privacy' should also be an 'interference with privacy' under the *Privacy Act 1988*, I submit that the Privacy Commissioner/AIC should be a regulator so empowered, subject to the right of appeal to the AAT. This is not a radical proposal in the Asia-Pacific: South Korea's data privacy law already has at least as strong a provision.

Related to this proposal, I want to support the APF's submission in response to Question 27 in the ALRC's Issues Paper, that 'the definition of "personal information" in the *Privacy Act 1988* (Cth)

[4] As noted earlier the Commissioner would in fact always have jurisdiction to hear some complaints of this nature.

should be amended so as to confirm that the information will remain personal information, despite any steps to anonymise it, if there is any significant possibility that it may be re-identified in future.'[5] Such a change is necessary if the proposed new APP is to be fully effective, and remain so in light of technological changes in re-identification methods.

Proposal 15–3: Amicus curiae or intervener role of the Privacy Commissioner/AIC

I support these two proposals but considers that they are too limited because they do not address the problem of litigants of limited means, and the deterrent against bringing an action where awards of costs against the plaintiff are possible. The APF's proposals that the Privacy Commissioner have jurisdiction to investigate and rule on complaints of 'serious invasions of privacy' would address this problem. If this proposal is not adopted, so that court actions are the only option then ALRC proposal needs to be strengthened by inclusion of changes such as are found in the 2012 amendments to Hong Kong's *Personal Data (Privacy) Ordinance*, allowing the Commissioner to grant appropriate applications to act on behalf of an plaintiff (or fund representation by counsel) in a compensation claim before a court. The costs of the Commissioner or counsel in such matters are a first charge on any compensation awarded.

Additional new regulatory measure: Individuation not just identification

I would also like to support theAPF's submission to the ALRC in in response to Question 27 in the ALRC's Issues Paper concerning 'individuation not just identification' as the basis of 'personal information':

> 'The definition of 'personal information' in the *Privacy Act 1988* (Cth) should be amended so that it no longer is restricted to information which has the capacity to identify an individual, but also includes information which provides the capacity (whether by itself or in conjunction with other information) for another entity to interact with an individual on an individualised or 'personal' basis. If an entity can send a person emails, SMS messages or the like, or configure their experience of a website or other digital facility, on the basis of information that depends upon their individual experience, history, preferences or other individuating factors, then such information should be regarded as personal information, and the interaction with them should be regarded as the use of such personal information. Such individuated/personalised interactions are now the basis of all marketing conducted on the Internet and via mobile telecommunications, and as such constitute one of most significant serious invasions of privacy in the digital era. Moreover, the Foundation considers that rapidly emerging marketing practices, including online behavioural advertising, psychographic profiling and predictive analytics, mean that this issue requires urgent attention. A change, along the lines suggested here, which is under consideration in current European law reform processes, would involve a major strengthening of privacy protection relevant to this reference.'

The title of the ALRC's reference refers to 'the digital era' and this proposed change would make the Privacy Act more resistant to irrelevance through technological change than any other, and would be likely to cause a significant reduction in serious invasions of privacy in the digital environment by requiring business practices to come within the scope of the Privacy Act.

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[5] APF supported this as follows: 'This change would have a profound effect, on an 'industrial' scale, as a response to the challenges to privacy posed by so-called 'big data' and the techniques of data analytics/data mining. These techniques are the foundations of the personalisation of interactions, sometimes known as 'mass personalisation', and the identification and re-identification of individuals in the Internet/mobile communications environments. In addition, practices such as the increasing potential for metadata to be matched with other data to identify an individual's online behaviour currently fall largely outside the regulatory net. A reform such as this would, accordingly, also involve a major strengthening of privacy protection relevant to this reference.'