

Submission to Discussion Paper DP80 on "Serious Invasions of Privacy"

My view is that the proposed draft bill is a good approach to dealing with the issue.

This submission concerns release of private information, however obtained, whether or not involving surveillance.

To the proposals and questions in DP80 I provide the following comments which are in bold italics after each relevant proposal.

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).

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

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).

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.

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.

Whilst I agree with the principles behind Proposal 5-3(a) and (b) my concern is that they will be used by defendants annoyed at being sued to reconvey the private information to a wider audience as part of the apology. That is particularly so where media is used and, for example, a more prominent location within the website or paper is used for the apology. Perhaps words such as "genuine" or "sincere" should qualify "apology".

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.

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.

There should be a presumption that the plaintiff had a reasonable expectation of privacy and the onus should be on the defendant to establish otherwise or rebut that presumption. It should be for the defendant to place evidence before the Court that none of the grounds in Proposal 6-2(a) to (i) are available to the plaintiff to prevent the presumption from being overridden.

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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

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.

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

I agree with proposal 7-2 but suggest that the plaintiff should be required to show that a reasonable person in the situation of the plaintiff would, on the balance of probabilities, suffer at least some level of mental anguish and that no benefit flowed to the plaintiff as a result of the disclosure.

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.

I support the concept in proposal 8.1 of including the public interest component in the cause of action. However, there appear to me to be two serious problems here. First, a preliminary determination of public interest by the Court will be required. Secondly, that means that the onus in relation to public interest is reversed so that the plaintiff must show no public interest before proceeding with the action instead of the defendant having to defend the breach after it is established in the cause, by establishing a greater public interest

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; *Proposals and Questions 11*

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

I support the use of the phrase "public concern and importance". These terms should be defined or clarified to exclude matters of mere curiosity or passing notice to limited members of the public.

- (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.

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.

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

Some of these matters might best be dealt with by tribunals such as the federal Administrative Appeals Tribunal and in Victoria by the Victorian Civil and Administrative Appeals Tribunal. Alternatively a new tribunal might be established. These tribunals are suited to these types of action because of their lower costs, ease of access, evidence and procedure, and convenience. My view is that where the issue is a personal right, as here, it is unfair to require a plaintiff to suffer the cost and stress of trying to enforce a right through protracted and adversarial litigation in superior courts.

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

I do not entirely support proposal 9-3. I would allow a cause of action to survive where a person whose private information has been disclose, and particularly where the information disclosed was false, and that person was deceased at the time of the disclosure or has died since, whether or not during an action against a defendant. A cause of action for breach of privacy should exists for those persons, such as immediate relatives or individuals within relevant organisations, that can establish prima facie loss or damage to themselves, as a result of the disclosure of the information.

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.

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.

I support proposal 9.5 but suggest that particular emphasis should be on the defendant, particularly corporate defendants such as media organizations, because they often have the power and resources to intimidate an individual plaintiff.

10. Defences and Exemptions

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

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.

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.

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.

In proposal 10-4(c) I would delete " ...an interest or duty (whether legal, social or moral) ..." and replace it with " ... a legal duty ..." The original phrase is too subjective and evidentially problematic. One person's view of their social or moral responsibilities can be quite different from another person's.

I strongly support the reference to malice and would add " ... whether or not malice was the sole or main reason for the invasion of privacy."

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 proposed action is not the same as defamation.

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

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

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

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.

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

Any safe harbour scheme to protect internet intermediaries must provide that the intermediary: (1) Properly administered its site and has acted in the public interest; (2) Required users to comply with appropriate privacy guidelines; (3) Regularly monitored its site for material likely to breach privacy and provided a means whereby it could be advised of such breaches; and (4) Immediately removed material likely to be a serious invasion of privacy upon becoming aware of it.

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.

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; *Proposals and*

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- (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.

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.

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

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.

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.

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

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.

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

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.

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

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.

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

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

I would include to the effect that where malice or vindictiveness on the part of the defendant is established then it is open to the Court to award indemnity costs.

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.

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.

13. Surveillance Devices

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

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

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.

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.

I would like to see the concept of "responsible journalism" in disclosure of private information and not just surveillance.

When determining whether or not a journalist has acted responsibly in publishing private information about a person the Court must consider:

- 1. That a realistic and reasonable attempt was made by the defendant to seek comment from the plaintiff prior to publication;***
- 2. That any response by the plaintiff was properly considered at the appropriate level within the media organisation;***
- 3. That the defendant objectively balanced the possible damage to the plaintiff against the public interest before publishing the information;***
- 4. That the defendant determined, on reasonable grounds, that the person providing the information was not motivated solely or primarily out of malice towards the plaintiff.***

Further, where at a preliminary stage of the proceeding the Court finds that the defendant has a prima facie case to answer and malice is a likely motive, then the defendant must disclose the source of the private information to the plaintiff.

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

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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.

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

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

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.

I strongly agree with this proposal 15-1.

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.

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?

I agree with proposal 15-2 and suggest that, in the age of emails and sms, organisations be obligated to make reasonable attempts to advise individuals that private information that was provided to the organisation will be provided to a third party and allow a set time for the individual to raise any objection.

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?

Yes. Individuals must have a right to control disclosure of their private information. That is what this is all about. That is best done through a regulator with powers to order removal from web sites.

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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

I agree with proposal 15-3.

11 May 2014
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