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12 May 2014

Professor Barbara McDonald
Commissioner
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By Email to: info@alrc.gov.au

Dear Ms McDonald

Inquiry into Serious Invasions of Privacy in the Digital Era

The Law Institute of Victoria (LIV) welcomes the opportunity to provide comment on the Serious Invasions of Privacy in the Digital Era Discussion Paper 80.

Please find attached our submission.

If you would like to discuss any of the matters raised in this submission please do not hesitate to contact me or Laura Helm, Administrative Law and Human Rights Section Lawyer on (03) 9607 9380 or lhelm@liv.asn.au.

Yours sincerely

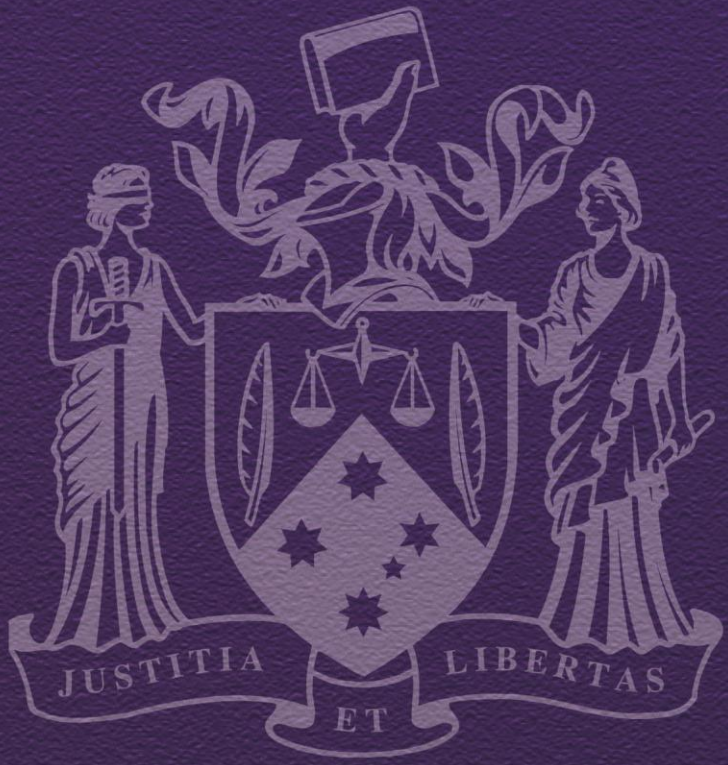
Geoff Bowyer
President
Law Institute of Victoria

LAW INSTITUTE VICTORIA

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

To: Australian Law Reform Commission

Date: 12 May 2014



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Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to make this submission to the Australian Law Reform Commission (the Commission) in response to Discussion Paper 80 - Serious Invasions of Privacy in the Digital Era (the Discussion Paper).

The LIV has long been a proponent for a statutory cause of action for serious invasions of privacy. A full list of the LIV's submissions on privacy related issues can be found in the LIV's submission to the Commission of 11 November 2013 (the LIV response to Issues Paper 43).[1]

The LIV is pleased that many of the proposals in the Discussion Paper are consistent with the LIV's response to Issues Paper 43. We therefore limit our comments in this submission to select proposals, where we would like to provide further comments.

This submission is made further to our discussions with the Commission by teleconference on 17 April 2014. Paragraph references below relate to paragraph numbering in the Discussion Paper, unless otherwise indicated.

Proposal 5–2: Negligent invasions of privacy as a fault element

Contrary to Proposal 5-2, the LIV believes that the new tort should include negligent invasions of privacy in addition to intentional and reckless invasions of privacy.

The LIV is concerned to ensure that breaches by omission (for example, mass data braches) are actionable where there is otherwise a serious invasion of privacy. The Commission has proposed that recklessness be defined according to s5.4 of the *Criminal Code* 1995 (Cth), which requires that a person is aware of a substantial risk and having regard to the circumstances known to him or her, it is unjustifiable to take the risk.[2] The mental element of recklessness therefore involves a degree of intention, by 'choosing' to take an unjustifiable risk. This may not therefore cover situations where a person fails to take reasonable care in the circumstances. Under s5.5 of the *Criminal Code*, negligent conduct involves a "great falling short of the standard of care that a reasonable person would exercise in the circumstances".

The LIV does not agree with the Commission's assertion [at 5.59] that if the new tort extended to negligent invasions of privacy, this might expose a wide range of people to liability for common human errors**.** The mental element of negligence under s5.5 of the *Criminal Code* requires assessment of the height of risk so that the conduct merits criminal punishment. A similar provision could be drafted regarding whether the invasion of privacy should be actionable.

Further, we do not agree with the Commission's suggestion [at 5.78] that mass data breaches can now be remedied sufficiently by provisions for civil penalty orders under Part VIB of the *Privacy Act* 1988 (Cth). Negligence laws can have an important normative effect and experience shows that developments in negligence law have led to significant improvements through training and other proactive initiatives, for example, in workplace health and safety.

A statutory cause of action for serious invasions of privacy should set out a specific test for negligently causing a serious invasion of privacy. Setting out a specific test would address the Commission's concern about including damages for emotional distress as a remedy for the proposed new tort. The Act could make it clear that the statutory cause of action is not an action in negligence. It could also be clarified, for the

[1] LIV sbmissions are available on our website at http://www.liv.asn.au/For-Lawyers/Sections-Groups-Associations/Practice-Sections/Submissions.
[2] Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) 2576.

avoidance of doubt, that restrictions on recovery of damages for non-economic loss (for example, under Part VBA of the *Wrongs Act* 1958 (Vic)) do not apply.

Significant harm can be caused by unintentional invasions of privacy and victims should not be deprived of a remedy because a tortfeasor was negligent.

Proposal 8-1: Balancing privacy and the public interest

Contrary to proposal 8-1, the LIV supports the Victorian Law Reform Commission (VLRC) recommendation that the burden of proving the existence of a countervailing public interest should lie with the defendant. We agree with the VLRC that the plaintiff "should not have to prove a negative, such as the lack of a countervailing public interest".[3]

The LIV considers that there would be a number of benefits from including consideration of countervailing public interest as a defence, rather than as part of the cause of action.

1. **The defendant is more likely to be able to provide evidence that the invasion of privacy was in the public interest**

The Commission argues [at 8.29] that the evidentiary or strategic onus of proof may in any case shift to the defendant, if the plaintiff bears the legal onus in relation to proving that in the circumstances, privacy outweighs any other countervailing public interest. The LIV suggests that if assessment of countervailing public interest is included as an element of the cause of action, the defendant will almost always be required to adduce evidence, because the public interest cannot be argued in the abstract. Evidence will be required, for example, about why the privacy breach occurred and why the defendant acted in the way they did – evidence that can only be provided by the defendant. The LIV submits that the defendant should not be required to put on evidence until the cause of action has been established; that is, as a defence to a serious invasion of privacy.

2. **The plaintiff is vindicated that there has been a serious invasion of privacy**

If each element of the cause of action is made out, including that the plaintiff had a reasonable expectation of privacy, the plaintiff is vindicated that there has been a serious invasion of their privacy. A defendant may not be found liable for the breach because there is a public interest that outweighs the plaintiff's privacy. This would have the symbolic importance of recognising that there has been a serious invasion of privacy, but that on the particular facts, a competing public interest outweighed the plaintiff's right to privacy. That is, the serious invasion of privacy was justified in the public interest.

3. **Defendants would be encouraged to respect privacy and consider whether their actions are justified**

If public interest must be weighed against privacy as an element of the action, there will be no serious invasion of privacy *because* of the countervailing public interest. This could have the effect of seriously narrowing the scope of the tort by effectively narrowing the situations where a person has a reasonable expectation of privacy. This could weaken the normative effect of the tort on defendants, by reducing opportunities for the tort to promote respect for privacy and change potential defendants' behaviour by encouraging them to consider whether their actions are justified.

Requiring the plaintiff to balance privacy against other countervailing public interests paradoxically focuses the normative effect of the tort on potential plaintiffs, requiring them to consider whether they have a reasonable expectation of privacy given competing public interests.

[3] ALRC DP 80 at [8.19], fn 13; Victorian Law Reform Commission, Surveillance in Public Places, Report No 18 (2010) 157, Recs 27, 28.

4. **Cost consequences could flow where a plaintiff makes out the cause of action but a defendant succeeds in a public interest defence**

   The Act could provide the court with discretion as to costs, but establish a general rule that each party bears their own costs where a plaintiff establishes the necessary elements of the tort but a defendant succeeds with a public interest defence. This general rule might not apply, for example, if the plaintiff seeks interlocutory relief in the form of an injunction. If a plaintiff succeeds in obtaining an injunction prior to trial, and the defendant successfully argues that the invasion of privacy was in the public interest, the plaintiff would be liable for costs.

The LIV does not agree with the Commission's claim [at 8.10] that having public interest as a defence would prolong the length of time an unmeritorious claim is heard. On the contrary, the LIV is concerned that including consideration of the public interest as an element of the cause of action could prolong claims by encouraging defendants to bring summary dismissal claims, which would require the court to consider the public interest issue in isolation. If a plaintiff's expectation of privacy is dependent on circumstances, then the court can make decisions about liability only when it has all of the evidence; that is, at trial. Unsuccessful summary dismissal applications would merely increase the length and expense of a matter.

Generally, a plaintiff and defendant are required to file pleadings and a defence prior to a hearing.[4] Under the *Civil Procedure Act* 2010 (Vic), parties have numerous obligations to try to resolve a matter prior to trial.[5] Unless an application for summary dismissal is brought, the court will hear from both parties prior to making judgment. Where a defendant seeks to rely on public interest to justify a serious invasion of privacy, it is likely that they will lead evidence about this, regardless of whether it is an element of the cause of action or a defence. Further, the existence of a countervailing public interest does not necessarily meant that the claim is 'unmeritorious'. Rather, it may mean that a serious invasion of privacy is justified on other grounds.

A 'public interest defence' could expressly require a defendant to act reasonably and in good faith, along the lines of s18D of the *Racial Discrimination Act* 1975 (Cth). This requirement would ensure that a defendant acting unreasonably or in bad faith could not 'hide behind' a countervailing public interest when committing a serious invasion of someone's privacy. Even if a good faith or reasonableness requirement is not adopted, the court will need to consider the conduct of the defendant when balancing privacy and any other public interests, because both privacy and public interest must be considered in context, rather than in the abstract. In doing so, the court will be required to look at whether the public interest, in the particular case, justified the serious invasion of the plaintiff's privacy. This assessment would require the court to consider the conduct of the defendant and whether the way in which free of speech was exercised outweighed the plaintiff's right to privacy.

Proposal 8–2: Non-exhaustive list of public interest matters

The LIV has some concerns about the breadth of the proposed non-exhaustive list of public interest matters in proposal 8-2. We would be concerned if the proposed list had the effect of narrowing when a person has a reasonable expectation of privacy, by creating an overly permissive approach to public interest.

For example, the 'economic wellbeing of the country' could be interpreted very broadly. During our teleconference on 17 April 2014, the Commission clarified that this example is intended to ensure that organisations can comply with international legal obligations. The LIV suggests that this type of public interest should be framed instead as "compliance with international legal obligations".

The LIV is also concerned that "national security" should be arguable by government agencies only, and not, for example, the media or other private bodies. We note, however, that government agencies engaged in national security activities are permitted to act only within lawful authority and therefore the defence of "lawful authority" (in proposal 10-2) should be sufficient to protect national security interests.

[4] See eg *Supreme Court (General Civil Procedure) Rules* 2005 (Vic).
[5] Eg Overarching obligation to use reasonable endeavours to resolve dispute, s22 *Civil Procedure Act* 2010 (Vic).

Proposal 9–1: VCAT should not have jurisdiction to hear an action for serious invasion of privacy

The LIV agrees with the Commission that the Federal Court, the Federal Magistrates Court and State and Territory courts should be vested with jurisdiction to hear actions for serious invasions of privacy.

We also agree a low-cost alternative is required to ensure that plaintiffs can access remedies, even where the extent of damages is small. Our preference would be for the Privacy Commissioner to provide dispute resolution, similar to the jurisdiction of the Victorian Equal Opportunity and Human Rights Commission,[6] or alternatively, for actions under a specified sum.[7] Under this type of model, the Privacy Commissioner would be providing alternative dispute resolution services, rather than making a finding about the claim. If the dispute is not resolved, the plaintiff would be required to pursue the claim through the courts.

The LIV would be wary of establishing jurisdiction for VCAT to hear claims about serious invasions of privacy, because there is likely to be complex legal argument as the tort develops. Courts, and specifically judges, are best placed to hear and determine these types of disputes. Further, the rules of evidence do not apply in VCAT matters.[8] We also note that appropriate dispute resolution is also promoted (and sometimes required) in courts in any case.[9]

Proposal 9-4: Limitation period should be three years from date of discovery

The LIV does not support the Commission's proposal 9-4, that would require plaintiffs to bring an action within one year from the date on which the plaintiff became aware of the serious invasion of privacy, or three years from the date on which the invasion of privacy occurred. Our members report that often, it takes time for people to realise that they have a legal right that has been breached, especially where they have been seriously affected by the breach itself.

We do not consider that extension of time applications will sufficiently protect plaintiffs who have not initiated an action within a year, because these types of applications are generally hard fought and vigorously opposed by defendants, adding thousands of dollars to legal costs. Our members report that limitation periods often operate to stifle legitimate claims, because 'no-win, no-fee' firms are often not willing to take the case on.

The LIV considers that three years from discovery of the serious invasion of privacy is a more appropriate limitation period, in line with personal injury claims.[10] If the Commission is concerned specifically about publication, akin to defamation, a shorter limitation period could be imposed on particular remedies, such as an application to remove a publication. An application to remove a publication could be limited to one year from discovery, but awards of damages could be made within three years.[11]

The 'clock' should stop for the purposes of calculating time under any applicable limitation periods, while any internal complaints handling or investigations process, or alternative dispute resolution process, is being undertaken – consistent with practice in areas such as medical negligence, where we understand it is

[6] See Part 8, *Equal Opportunity Act* 2010 (Vic).
[7] For example, the Victorian Legal Services Commissioner can receive and conciliate complaints where the total legal costs charged are less than $25,000; see Part 4.3, *Legal Profession Act* 2004 (Vic).
[8] *Victorian Civil and Administrative Tribunal Act* 1998 (Vic), s98(1)(b).
[9] Eg pursuant to Rule 50.07 of Chapter I of the *Supreme Court Rules*, the Court may at any stage of a proceeding (with or without the consent of the parties) order a proceeding to mediation.
[10] See eg *Limitations of Action Act* 1958 (Vic), s 23A.
[11] See eg different time periods for bringing applications for mandamus and certiorari (two and six months respectively) under the *HighCourt Rules* 2004 (Cth), regs 25.07.2 and 25.06.1.

common for insurers to agree to 'stop the clock' during investigations by the Health Services Commissioner.[12]

The LIV further recommends that defendants should be required to make reasonable attempts in good faith to notify plaintiffs when they become aware that there has been a misuse or disclosure of personal information. Whether the defendant has made all reasonable attempts to notify the plaintiff of a breach should be taken into account when determining when the limitation period has started to run. It could also be relevant to the question of exemplary damages.

[12]See further LIV submission, *Review of the Health Services (Conciliation and Review) Act* 1987 (Vic) (17 August 2012) www.liv.asn.au/submissions.