

14. Harassment

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Summary

14.1 The Terms of Reference for this Inquiry require the ALRC to make recommendations as to other legal remedies to redress serious invasions of privacy and innovative ways in which the law may reduce serious invasions of privacy.

14.2 Many serious invasions of privacy—perhaps some of the most serious—will also amount to harassment. Harassment involves a pattern of behaviour or course of conduct pursued by an individual designed to intimidate and distress another individual. The behaviour must be genuinely oppressive and vexatious and not amount to a mere irritation or annoyance. Laws that target harassment will often also serve to protect people’s privacy.

14.3 The ALRC proposes that, if a new tort for serious invasion of privacy is not enacted, a Commonwealth harassment Act should be enacted that provides for a new tort of harassment. This Act would also consolidate and clarify existing criminal offences for harassment, including harassment using the internet.

14.4 This harassment legislation should be enacted by the Commonwealth. A federal Harassment Act will ensure consistent protection across Australia.

A Commonwealth harassment Act

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.

14.5 This new Commonwealth harassment Act should consolidate existing federal, state and territory criminal offences for harassment. The offences should relate to harassment, irrespective of whether it occurred through online or telecommunications platforms, or through other physical or personal means.

14.6 If a new tort for serious invasions of privacy is not enacted, the ALRC proposes that this harassment Act should also include a civil action for harassment. This will help deter and redress some egregious types of invasion of privacy that are not currently the subject of effective legal protection.

Nexus between harassment and privacy

14.7 A serious invasion of privacy may often also amount to harassment. Harassment involves deliberate conduct. It may be done maliciously, to cause anxiety or distress or other harm, or it may be done for other purposes. Regardless of the intention, harassment will often cause anxiety or distress. Harassment also restricts the ability of an individual to live a free life.

14.8 The following is a list of examples of conduct that may in some cases amount to both a serious invasion of privacy as well as harassment where the conduct is repeated, unwanted and intended to distress and demean an individual:

- following or keeping under surveillance;
- eavesdropping and wiretapping;
- reading private letters and other private communication;¹
- using surveillance devices to monitor, intimidate or distress someone, for example, through the use of cameras outside abortion clinics or aerial surveillance of private property using aircraft or unmanned aerial vehicles;²
- publishing personal data as a means of harassment, for example in the context of failed relationships or bullying or where incidents involving bullying are filmed and publicised as a means of further demeaning a victim;³
- pursuing a person in a sustained manner to track their private activities or to photograph them in private contexts, without their permission, including relentless pursuit by media or other parties; and
- communicating in a relentless and unwanted manner with an individual, such as through persistent telephone calls.⁴

1 Ruth Gavison, 'Privacy and the Limits of the Law' (1979) 89 *Yale Law Journal* 421, 429.

2 In *Howlett v Holding* [2006] EWHC 41 (QB) (25 January 2006) a UK court granted an injunction to restrain aerial surveillance under the *Protection from Harassment Act 1997* (UK). This case involved the defendant flying banners from private aircraft addressed to and referring to the plaintiff in derogatory terms, and dropping leaflets containing information about the plaintiff.

3 M Paterson, *Submission 60*.

4 Some of these are examples of conduct that has been the subject of claims under the *Protection from Harassment Act 1997* (UK).

Harassment Acts in other countries

14.9 Useful models for a Commonwealth Harassment Act include the UK's *Protection from Harassment Act 1997* and New Zealand's *Harassment Act 1997*.

14.10 The UK's *Protection from Harassment Act 1997* creates criminal offences when a person engages in a 'course of conduct' that amounts to harassment.⁵ It is an offence for a person to pursue a course of conduct which amounts to harassment of another and which they know or ought to know amounts to harassment.⁶ The Act defines harassment as having occurred if 'a reasonable person in possession of the same information would think the course of conduct amounted to harassment'.⁷

14.11 The Act provides for the award of civil remedies, including injunctions and damages to victims of harassment. The UK Act also creates the instrument of non-harassment orders. Where a person is convicted of the offence of harassment, a prosecutor may apply to the court to make a non-harassment order against the offender requiring them to refrain from 'such conduct in relation to the victim as specified in the order for such periods may be so specified'.⁸

14.12 New Zealand's *Harassment Act 1997* provides for harassment restraining orders and criminal penalties for harassment. The criminal offence of harassment applies where a person intends to cause fear to another person.⁹ A person who is prosecuted for harassment can face up to two years imprisonment.¹⁰ Plaintiffs can also apply to a court for a civil restraining order to prevent conduct amounting to harassment, breach of which will lead to penalties.¹¹ The New Zealand Act does not provide for compensation for victims. However, the common law has developed a tort of intrusion upon seclusion, which has been used to provide compensation for victims of harassment.¹²

14.13 A range of behaviours amounting to harassment have been successfully targeted through the UK and NZ harassment frameworks.¹³

14.14 Other comparable jurisdictions have enacted legislation to specifically target cyber-harms and so-called 'revenge pornography'.¹⁴ New Zealand's government is currently considering legislation to tackle 'harmful digital communications' by way of

5 *Protection from Harassment Act 1997* (UK) ss 1, 2. The UK Supreme Court recently discussed the complexity in interpreting the Act: *Hayes (FC) v Willoughby* [2013] UKSC 17.

6 *Protection from Harassment Act 1997* (UK) s 1.

7 *Ibid* s 1(2).

8 *Ibid* s 11.

9 *Harassment Act 1997* (NZ) s 8.

10 *Ibid*.

11 *Ibid* s 9.

12 *C v Holland* [2012] 3 NZLR 672 (24 August 2012).

13 For example, cases of workplace harassment: *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34; aerial surveillance over private property: *Howlett v Holding* [2006] EWHC 41 (QB); restraining media and paparazzi from following individuals: *Thomas v News Group Newspapers Ltd* [2002] EMLR 78.

14 Eg, New Jersey legislation criminalises the reproduction or disclosure of images of sexual contact without consent: *NJ Rev Stat* § 2C:14-9 (2013).

the Harmful Digital Communications Bill 2013. If enacted, the legislation would prohibit an individual from sending a message to another person—for example by text, online publication or email—where the conduct of that message is grossly indecent, obscene, menacing or knowingly false, and where the sender intends the message to cause emotional distress to the recipient.¹⁵ This offence would be punishable by up to three months imprisonment or a NZ\$2,000 fine.

14.15 Nova Scotia's *Cyber-Safety Act 2013* creates a tort of cyber-bullying so that 'a person who subjects another person to cyber-bullying commits a tort against that person'.¹⁶ Cyber-bullying is defined in this Act as using 'electronic communication through the use of technology, including ... social networks, text messaging, instant messaging, websites and electronic mail ... typically repeated or with continuing effect, that is intended or ought reasonably to be expected to cause fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional well-being, self-esteem or reputation'.¹⁷ In an action for cyber-bullying, a court may award damages including general, special, aggravated and punitive damages.¹⁸ A court may also issue an injunction¹⁹ or make an order that the court considers 'just and reasonable in the circumstances'.²⁰

Civil remedies

14.16 The courts in Australia have not recognised a common law cause of action for harassment. In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, Gummow and Hayne JJ referred to 'what may be a developing tort of harassment',²¹ citing the work of Professor Stephen Todd from New Zealand.²² New Zealand has now enacted the *Harassment Act 1997* (NZ) and the courts have recognised a tort of intrusion into seclusion.²³

14.17 In *Grosse v Purvis*²⁴ a Queensland District Court judge recognised an actionable right to privacy, after a finding that the defendant had persistently and intentionally stalked and harassed the plaintiff for six years. Because of his conclusion on the actionable right to privacy, there was no need to decide whether a tort of harassment should be recognised.

15 Harmful Digital Communications Bill 2013 (NZ) cl 19.

16 *Cyber-Safety Act*, SNS 2013, c 2 2013 s 3(b).

17 *Cyber-Safety Act 2013* (SNS) s 3(b).

18 *Ibid* s 22(1)(a).

19 *Ibid* s 22(1)(b).

20 *Ibid* s 22(1)(c).

21 *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [123].

22 Stephen Todd, 'Protection of Privacy' in Nicholas Mullany (ed), *Torts in the Nineties* (LBC Information Services, 6th ed, 1997).

23 *C v Holland* [2012] 3 NZLR 672 (24 August 2012).

24 *Grosse v Purvis* [2003] QDC 151 (16 June 2003); Des A Butler, 'A Tort of Invasion of Privacy in Australia?' (2005) 29 *Melbourne University Law Review* 352. Doubt has been expressed about the correctness of *Grosse v Purvis*: see Ch 3. The case was settled before the defendant's appeal was heard.

14.18 Many instances of harassment will involve a serious invasion of privacy and yet not give rise to an existing tort. As discussed in Chapter 3, this is a significant gap in the protection of privacy by the common law.²⁵

14.19 For example, the tort of trespass to land can be used only where there has been an unlawful intrusion *onto* property.²⁶ Surveillance or harassment from *outside* the property would not come within the tort. Further, the harassment may occur on property where the victim is not the occupier with the required title to sue for trespass.²⁷

14.20 The harassment may not involve any physical contact amounting to the tort of battery and may not involve a *threat* of physical contact which is necessary for a tort action in assault.²⁸

14.21 The tort of nuisance requires an interference with the lawful occupier's use and enjoyment of land.²⁹ Nuisance has been useful in limited cases such as where a CCTV camera is erected at a neighbour's backyard, prohibiting their use and enjoyment of the garden.³⁰ However, again, a person's right to sue is limited.³¹

14.22 The tort of wilful infliction of nervous shock³² is an inadequate remedy for many instances of harassment as a claimant must prove actual physical or psychiatric injury. Harassment, however, will often result only in emotional distress.

14.23 A new tort for harassment would provide for a targeted avenue for civil redress where the conduct is not redressed by existing torts.

Criminal offences

14.24 State, territory and federal laws provide a number of criminal offences relating to different forms of harassment across. There would be advantages in clarifying, consolidating and making uniform the range of criminal offences for harassment across Australia.

14.25 State and territory criminal laws criminalise harassment and stalking conducted through online or other forms of electronic communication. However, these offences vary considerably depending on the jurisdiction. For instance, legislation in Queensland criminalises harassment through all forms of electronic communication in the offence of stalking by 'otherwise contacting the victim'.³³ In Victoria, the definition of stalking extends to a course of conduct committed via 'electronic

25 See Barbara McDonald, 'Tort's Role in Protecting Privacy: Current and Future Directions' in James Edelman, James Goudkamp and Degeling (eds), *Torts in Commercial Law* (Thomson Reuters, 2011).

26 *Plenty v Dillon* (1991) 171 CLR 635.

27 *Kaye v Robertson* [1991] FSR 62.

28 RP Balkin and JLR Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) [3.16].

29 *Ibid* [14.1].

30 *Raciti v Hughes* (1995) 7 BPR 14837.

31 *Hunter and Others v Canary Wharf Ltd; Hunter and Others v London Docklands Corporation* [1997] UKHL 14.

32 *Wilkinson v Downton* (1897) 2 QB 57; *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 417.

33 *Criminal Code Act 1899* (Qld) s 395A(7)(b).

communications'.³⁴ The National Children's and Youth Law Centre supported the need to 'address the gaps' in the current legal frameworks for cyber-bullying and harassment.³⁵

14.26 The Commonwealth *Criminal Code*³⁶ provides for an offence of 'using a carriage service to menace, harass or cause offence'³⁷ and 'using a carriage service to make a threat'.³⁸ These would capture conduct amounting to harassment, for example, via the internet, including social media, and telephone.³⁹

14.27 There are also laws to protect victims of family violence from harassment, including harassment via electronic communications. For example, stalking is included in the definition of 'family violence' in the *Family Law Act 1975* (Cth).⁴⁰

14.28 The Australian Government Department of Communications is currently conducting a review into online safety for children.⁴¹ The Department has been asked to consider simplifying the meaning and application of s 474.17 of the *Criminal Code*. The Department's Discussion Paper suggested that 'the existing offence is worded in a way that people, particularly minors, would not understand'.⁴² The Department has outlined three options for reform. First, to retain the existing provision and implement education to raise awareness of its potential application. Secondly, to create a cyber-bullying offence with a civil penalty regime for minors, and thirdly, to create a take-down system and accompanying infringement notice scheme to regulate complaints about online content.

A Commonwealth Act or uniform legislation

14.29 There are a number of suitable constitutional heads of power which may enable the Commonwealth to enact legislation on harassment.⁴³ A new Commonwealth Harassment Act may be supported by the external affairs power.⁴⁴ It may be argued that harassment constitutes 'an arbitrary or unlawful interference with ... privacy,

34 *Crimes Act 1958* (Vic) s 21A(2)(b).

35 National Children and Youth Law Centre, *Submission 61*.

36 This point was made in: Department of Communications Australian Government, 'Enhancing Online Safety for Children: Public Consultation on Key Election Commitments' (January 2014).

37 *Criminal Code* (Cth) s 474.17.

38 *Ibid* s 474.15.

39 At the Bullying, Young People and the Law Symposium hosted by the Alannah and Madeline Foundation in Sydney from July 18-19 2013, delegates recommended that Australian governments introduce a specific, and readily understandable, criminal offence of bullying, including cyber-bullying, involving a comparatively minor penalty to supplement existing laws which are designed to deal with more serious forms of conduct.

40 *Family Law Act 1975* (Cth) s 4AB(2)(c).

41 The Department of Communications released a public discussion paper on 22 January 2014 and was awaiting submissions to that discussion paper by 7 March 2014. Australian Government 2014, 'Enhancing Online Safety for Children: Public Consultation on Key Election Commitments', discussion paper, Department of Communications. The Government has founded an Online Safety Consultative Working Group to provide advice to government on online safety issues.

42 *Ibid*.

43 See also the discussion of constitutional issues in Ch 4.

44 *Australian Constitution* s 51(xxix).

family, home or correspondence’,⁴⁵ or some other interference with fundamental liberties protected by the ICCPR.

14.30 Alternatively, a new Act may be supported by s 51(v) of the *Australian Constitution*. A court would likely hold that this head of power supports a law regulating harassment effected by postal, telegraphic and telephonic services, as well as online services. However, the new Act is intended to cover both online and offline forms of harassment. It is unlikely that the latter category would be supported by s 51(v).

14.31 By way of comparison, the sexual harassment provisions in the *Sex Discrimination Act 1984 (Cth)*⁴⁶ are supported by numerous heads of power including the external affairs power in relation to the *Convention on the Elimination of all Forms of Violence against Women*.⁴⁷

14.32 If the Commonwealth does not have the power to enact harassment legislation, covering both so-called ‘online’ and ‘offline’ harassment, the ALRC proposes that the states and territories adopt uniform harassment legislation. National consistency in privacy law is important as inconsistency can lead to fragmentation, poor protection for all individuals in Australia and can also burden business.⁴⁸

14.33 The ALRC welcomes stakeholder submissions on these constitutional issues, in addition to comments on the proposal overall.

45 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17(1).

46 *Sex Discrimination Act 1984 (Cth)*.

47 *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1980, 1249 UNTS (entered into force 3 September 1981).

48 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) 3.13.

