

AUSTRALIAN PRIVACY FOUNDATION – NSW PARLT INQUIRY INTO REMEDIES FOR SERIOUS INVASIONS OF PRIVACY

This document by the Australian Privacy Foundation (APF) responds to the supplementary questions by the Standing Committee on Law & Justice regarding its 2015 inquiry into Remedies for the Serious Invasion of Privacy in New South Wales.

Background information and detailed comment on particular issues (eg breaches of health data and the effectiveness of responses by regulators such as the Office of the Australian Privacy Commissioner and Australian Communications & Media Authority) and technologies such as drones is available on the APF site at privacy.org.au.

Supplementary Question for All Witnesses – Fault element

If the committee were to recommend a statutory cause of action for serious invasions of privacy, one option might be to recommend that a fault element encompassing negligence (as well as intent and recklessness) apply to corporations; while recommending a more limited fault element (intent and recklessness only) that would apply to natural persons.

Do you have any concerns or comments in regards to this?

The APF considers that there is no sound legal or policy basis for limiting the scope of the action to either intentional or reckless acts rather than incorporating negligent acts.

In its 12 May 2014 submission regarding the Australian Law Reform Commission's Serious Invasions of Privacy discussion paper the APF noted that restricting the action to intentional or reckless acts will mean there are instances where individuals will have **no** remedy. The absence of a remedy is inappropriate and, importantly, was acknowledged by the ALRC.

The APF stated for those who suffer harm as a result of privacy invasions, irrespective of whether the harm is attributable to a corporation or individual, there

is little consolation that the tort will reduce rather than remove a recognised gap in the law. It is poor policy ... to claim that if a plaintiff suffers loss as a consequence of negligent acts which breach his or her privacy that the appropriate recourse should be to make a claim in negligence or contract. This would represent a cumbersome and unnecessary segmentation of what should be a seamless and broad protection, aimed at redressing a recognised gap in the law. More importantly, breaches of privacy involve discrete issues which are not suited to a claim in negligence or contract.

The APF submits that the proposed tort should be based on the correct policy question, namely what elements of the cause of action are best adapted to address the harms arising from serious invasions of privacy? In its 2014 submission it stated

That the legislature may give an individual the right to recover general damages for negligent acts arising out of a privacy breach will not, as a matter of law, alter the common law position regarding other forms of negligence. The nature of the breach is distinct and the facts are commonly, if not invariably, different from those involving other forms of negligence. A statutory cause of action involving breach of privacy is discrete and stands alone, being designed to address specific forms of harm. Moreover, the ALRC does not rely upon evidence to demonstrate that recognising a cause of action for negligent invasions of privacy would

influence, undermine or detract from the operation and development of other discrete common law causes of action.

Concerns that negligent actions may inhibit expression, chill free speech and expose those to liability for unintentionally invading someone's privacy should be obviated by a robust public interest defence which adequately protects freedom of expression.

Having a broader scope for actionable conduct with a proper, carefully defined, robust defence would avoid the need for arcane and overly-complex arguments as to whether conduct is reckless rather than negligent.

Supplementary Question 1 (p 56) for Foundation – Surveillance Statutes

do you think the existing surveillance laws are adequate? If not, what should be done? What improvements need to be made that you would you recommend to this Committee?

The APF considers that there is scope to enhance both NSW law and law in other jurisdictions through change that emphasises outcomes (ie proportionate privacy protection) rather than emphasising particular technologies.

In its submission to the Committee and testimony by the APF representatives reference was made to inconsistencies and thence inadequacies in Australian law. It is of concern to law enforcement personnel, private investigators, consumers and others that legislation across the country is both inconsistent and technology specific. In some instances that means that privacy-invasive use of a surveillance device is not addressed by law because the device is not recognised (eg the statute deals with sound recording devices rather than digital imaging systems), because a specific feature of the device was not used (eg the video camera captured images but not sound) or because the device was stand-alone rather than networked.

The APF suggests that the Committee focus on three issues.

The first is an effort to increase the comprehensibility of the statutes for people in the private/public sectors who might be using surveillance devices or affected by that use. A positive and practical step would be inclusion in the statutes of objects clauses that are 'pro-privacy'. Such an inclusion will go some way to fostering cultural change and will be consistent with the recognition of privacy as something entirely consistent with, rather than subservient to, law enforcement. Bureaucratic convenience should not override respect for privacy and the accountability of people undertaking (or contemplating) surveillance activity.

The second is to emphasise technological neutrality, ie recognise that the disrespect for an individual's privacy and the harms attributable to that disrespect are not restricted to a particular surveillance tool.

The third is to explicitly recognise that a statutory cause of action, as advocated by the APF and by the succession of law reform bodies noted in the APF testimony, is likely to effectively address instances of privacy invasion that are inadequately covered by existing surveillance statutes. New South Wales, for example, does not need a Privacy Invasions By Drone enactment if there is a technology-neutral statute dealing with invasions.

Supplementary Question 2 (p 58) for Foundation – 'Serious Invasions'

Mention has been made of the definition of "serious invasion". Do you have a view on that?

The APF, consistent with past reports by for example the Victorian Law Reform Commission, notes that there is no 'bright line' readily demarcating 'serious' and 'non-serious' invasions.

The APF in its 2014 submission commented that the remedy for invasion of privacy , whether in the form of injunctive relief, damages or other relief, should reflect the seriousness of the breach –

To that extent establishing a threshold of “serious in all the circumstances” is unnecessary. Similarly delineating conduct as “highly offensive” rather than merely “offensive” is also unnecessary. Offensive conduct is a sufficiently high threshold if there is to be one. Furthermore, the distinction between "highly offensive" and "offensive" at law and in practice is not entirely clear. Clearly the former behaviour is worse than the latter. ...

The APF suggests that the legislation should centre on the circumstances of the invasion and on the impact on the affected individual (or individuals) rather than on an arbitrary differentiation between “offensive” and “highly offensive” conduct. That emphasis will address concerns that semantics will result in a vigorous dispute between plaintiffs and defendants along the wide and blurred fault line between “offensive” and “highly offensive” conduct. It will also address concerns regarding habituation, ie invasions in particular instances becoming so common as to be construed as reasonable and thus outside the cause of action.

The APF suggests that the egregiousness of the conduct, if found to constitute a breach, should be reflected in the scope and, where appropriate, quantum of damages.