

27 January 2016

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Dear Mr Jorgensen,

Comments on the Tort for Serious Invasions of Privacy

Thank you for the opportunity to comment on the tort for serious invasion of privacy proposed by the ALRC. Legal Aid ACT would like to submit comment on the three questions raised by JACS.

1. The applicability and need for the tort proposed by the ALRC in the ACT legal context and circumstances.

Legal Aid ACT believes that a statutory tort of serious invasion of privacy would be appropriate for the ACT. The current legal regime is insufficient to comprehensively protect privacy rights. A statutory tort would give effect to the guarantee of a right to privacy in section 12(a) in the *Human Rights Act* (2004).

1.1. Does the current legal framework protect a right to privacy in the ACT?

The current legal framework within the ACT provides piecemeal and limited protection of a right to privacy. Privacy is a multifaceted concept, meaning that legislation and common law has developed in a way that addresses some aspects of privacy while neglecting others. Information privacy is the most developed area of privacy law but is still often unclear and uneven.¹ There is no unifying law that can be looked to as a consistent statement of rights.

Many causes of action that could be brought under a privacy have recourse under the current regime. A statutory tort would however 'fill the gaps' by capturing a number of types of privacy invasion that currently do not attract a legal remedy. Below is a non-exhaustive list of laws that currently protect a right to privacy. Some laws that are not listed, for example defamation or the tort of intentional

¹ Carolyn Doyle and Mirko Bagaric, *Privacy Law in Australia* (Federation Press, 2005) 98.

infliction of emotional distress, may indirectly protect privacy in certain circumstances, but are not a reliable form of remedy.

ACT Privacy Legislation

The *Information Privacy Act* currently provides individuals certain rights with regard to the collection and storage of personal information by public bodies. These protections include the right to:

- Request access to and information about personal information held by a public agency
- Complain about mishandled private information
- Choose to not be identified or to use a pseudonym

While the Act provides a positive form of privacy accountability enforceable against ACT Government agencies, the protection clearly does not address privacy breaches by private entities.

Section 61B of the *Crimes Act 1900* makes it an offence to observe with a device or capture visual data where the content observed is in all the circumstances an invasion of privacy and indecent. This does not provide protection from the improper disclosure of content that was captured by consent, nor does it capture an invasion of privacy that was not recorded.

Federal Privacy Legislation

The *Privacy Act 1998* (Cth) regulates the collection and handling of personal information by public agencies and large private organisations with turnover greater than \$3 million. Breaches occur when entities act in violation of 'Australian Privacy Principles', giving rise to complaint to the Australian Information Commissioner, who may then make a declaration enforceable by the Federal Court. Health and genetic information is given greater protection under the Act.

The *Privacy Act* in effect gives similar protections to the *Information Privacy Act* in the ACT. The intention of the statute is to regulate the conditions in which public bodies and large private entities use private information. It does not ensure that privacy rights are protected between individuals or smaller entities; nor does it restrict breaches of privacy by APP entities not relating to information privacy, e.g. an unduly intrusive media investigation.

The *Telecommunications Act 1997* (Cth) prohibits disclosure of private information by telecommunications corporations. Metadata is collected and disclosed to law enforcement and national security agencies. Exceptions may exist allowing disclosure of information where a warrant is obtained. Similarly, the *Telecommunications (Interception and Access) Act 1979* prevents phone-hacking or other interception of telecommunications unless under lawful authority.

Torts of Trespass and Nuisance

The tort of trespass to land is actionable *per se* and restricts any invasion of privacy that might occur upon private property. However, trespass can only be enforced by someone who has title over the land. This means that a licensee, visitor, or a person in a public space does not have any recourse to

protect against an invasion of privacy. In the English case of *Kaye v Robertson*,² Lord Justice Glidewell noted the inadequacy of trespass to provide protection against an intrusion of privacy when the victim does not have a right to exclusive possession of the premises.

Possession of airspace is limited to that necessary for ordinary use and enjoyment of the land. This is unlikely to restrict aerial recording such as via a drone.³

Trespass does not extend to observation or surveillance that may occur outside the vicinity of the premises. An action in the tort of nuisance may arise where there is constant surveillance amounting to harassment; however casual observation, filming or recording will not normally constitute either trespass or nuisance. Action in nuisance can only be taken by someone with exclusive possession of the land.

Equitable Breach of Confidence

Breach of confidence may sometimes be used to address breaches of privacy. The action protects information which is confidential or relatively secret, or that is imparted in circumstances that would imply an obligation of confidence.⁴ The elements of equitable breach of confidence mean that often it is an inadequate remedy for privacy breaches:

- a) The information must be specifically identified,⁵ meaning not a general invasion of privacy;
- b) The information must have the necessary qualities of confidentiality,⁶ including that it is not obvious or commonly known, or trivial. This clearly excludes many cases where information may be sensitive but not of sufficient gravity to be confidential for the purposes of equitable action;
- c) A reasonable person would believe that an obligation of confidence is imposed on the recipient of information.⁷ This may extend to a situation where information is obtained improperly through intrusion into seclusion.
- d) There must be actual or threatened misuse of information,⁸ with knowledge that that information was confidential.⁹ This means obtaining private information alone will not necessarily give rise to equitable action (for example, ongoing surveillance will not attract remedy). Further, if the information is passed to a third party who is not aware of its confidential status (an innocent recipient), they cannot be restrained until notice is given.¹⁰

² *Kaye v Robertson* [1991] FSR 62

³ *Bernstein v Skyviews and General Ltd* [1978] 1 QB 479, 489.

⁴ *Gummow J, Coors Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 74 ALR 428 [437]

⁵ *Mason J, O'Brien v Komesaroff* (1982) 150 CLR 310.

⁶ *Gaudron J, Johns v Australian Securities Commission* (1993) 178 CLR 408 [460]-[461].

⁷ *Mense v Milenkovic* [1973] VR 784

⁸ *Gaudron J, Johns v Australian Securities Commission* (1993) 178 CLR 408 [460]-[461].

⁹ *Wheatley v Bell* [1982] 2 NSWLR 544.

¹⁰ *Gaudron J, Johns v Australian Securities Commission* (1993) 178 CLR 408 [460].

- e) There must be detriment to the plaintiff.¹¹ It is unclear whether this requires actual loss or if some breaches are acknowledged as damaging *per se*.¹²

Recent developments in common law indicate a willingness to broaden equitable breach of confidence into a tool to protect privacy. In *Giller v Procopets* the Victorian Court of Appeal found that while no recognisable psychiatric injury had occurred, damages should be awarded on the basis of mental distress.¹³ The Supreme Court of Western Australia supported this finding in *Wilson v Ferguson*.¹⁴ This reflects a tort of invasion of privacy in that it recognises that an invasion of privacy is damaging *per se*.

In *ABC v Lenah Game Meats Pty Ltd*, the High Court has indicated that equitable action for breach of confidence may be able to protect some types of private activity from publication. Gleeson CJ suggests that private conduct may by definition impart an obligation of confidence:

“If the activities filmed were private, then the law of breach of confidence is adequate... But the lack of precision of the concept of privacy is a reason for caution...”¹⁵

Read in line with *Giller v Procopets* and *Wilson v Ferguson*, this would imply that illicitly obtained information may give rise to action in breach of confidence, despite there being no pre-existing relationship of confidence between the two parties. It is unclear how this will interact with the current construction of confidential information as ‘not obvious, commonly known, or trivial,’¹⁶ given that private information may often be commonly known or trivial but nevertheless sensitive.

Ultimately, the development of confidence into a pseudo privacy tort risks undermining both concepts. ‘Not all private activity is necessarily confidential,’¹⁷ so creating privacy law out of an essentially fiduciary obligation of confidence is ‘fitting a square peg in a round hole.’¹⁸ The ALRC caution that extending action for equitable breach of confidence will create a much stricter standard of liability for defendants, is unlikely to have a clear ‘seriousness’ threshold, and may not give sufficient weight to countervailing public interests.¹⁹ Even if equity were to be extended to an action in privacy, it has limited capacity to restrict intrusions into seclusion.

¹¹ *Commonwealth of Australia v John Fairfax & Sons* (1980) 147 CLR 39 per Mason J at paragraph 51-52

¹² *Giller v Procopets* (2008) 24 VR 1

¹³ *Giller v Procopets* (2008) 24 VR 1

¹⁴ *Wilson v Ferguson* [2015] WASC 15

¹⁵ *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 205 [38] to [41]

¹⁶ Gaudron J, *Johns v Australian Securities Commission* (1993) 178 CLR 408 [460]-[461]

¹⁷ New South Wales Law Reform Commission, *Invasion of Privacy*, Consultation Paper 1, above n 98, 54 [2.80].

¹⁸ Johnston, Mark, ‘Should Australia force the square peg of privacy into the round hole of confidence or look to a new tort?’ (2007) 12 *Media and Arts Law Review* 441.

¹⁹ ALRC *Report on Serious Invasions of Privacy in the Digital Era*, Report 123 (2014)[1.40]

1.2. Gaps in privacy protection

The cumulative effect of the current framework is that privacy rights are often enforceable only where they can be shoehorned into another cause of action. Some types of serious invasion of privacy do not attract any relief. Cases that would become unlawful under a statutory tort include:

- An individual has been subject to unauthorised surveillance, having had their movement and location tracked by mobile technology;
- An individual's online accounts (including email or social media) have been accessed, interfered with or misused;²⁰
- A severely injured individual is photographed in a hospital bed and the images are published;²¹
- A media organisation publishes CCTV footage of a man attempting suicide. He is clearly visible and his colleagues and friends recognise him;²²
- A man is visiting his brother in prison. He is unnecessarily strip searched by prison guards, resulting in post-traumatic stress syndrome.²³

A cohesive tort of privacy would give clarity to individuals who are seeking to enforce their legal rights and ensure that the development of privacy protections is comprehensive.

1.3. Is a statutory tort appropriate for the ACT?

In Legal Aid ACT's view, a statutory tort of serious invasion of privacy is the best way to protect a right to privacy in the ACT.

The ALRC recommends that a tort of serious invasion of privacy is implemented as a Commonwealth act. There is a risk that enacting territory legislation will create an inconsistent regime across states, one that may be further exacerbated if the Commonwealth later legislates its own privacy framework. A tort of serious invasion of privacy would represent a substantial change to the existing legal framework, meaning that there may be a burden on businesses and individuals in meeting their privacy obligations across borders.

This being said, the current privacy framework is already rife with uncertain and unclear obligations. The patchwork nature of the framework means that people are unlikely to understand their privacy entitlements. This is particularly so where emergent technology may result in invasions of privacy that fall outside the scope of current legislation. In this sense, a statutory tort legislated by the ACT would be better than the status quo.

While federal legislation would be preferable, the current federal government has noted that they do not support any statutory tort for invasions of privacy. There is no indication that a tort will be legislated federally in the near future. An ACT scheme might create inconsistencies with other jurisdictions, but it is a critical tool in giving effect to the guarantee of a right to privacy within the *Human Rights Act 2004*. On this basis, we believe that a statutory tort is appropriate within the ACT.

²⁰ ALRC *Report on Serious Invasions of Privacy in the Digital Era*, Report 123 (2014), 86.

²¹ *Kaye v Robertson* [1991] FSR 62.

²² *Peck v United Kingdom* (2003) 36 EHRR 41.

²³ *Wainwright v Home Office* [2003] UKHL 53.

1.4. Jurisdiction

A tort of serious invasion of privacy should be actionable at the ACT Civil and Administrative Appeals Tribunal.

Actions in serious invasion of privacy should be able to be heard in an accessible forum. The Victorian Law Reform Commission recommend that jurisdiction for hearing a privacy tort should be vested in state and territory tribunals, as the scale of damages awarded are likely to be too low to justify expensive civil litigation in the courts.²⁴ The ALRC note that stakeholders generally agreed that it was necessary to have a low-cost forum for hearing actions.²⁵

In the experience of Legal Aid ACT, victims of serious breaches of privacy are frequently in a vulnerable position. Victims of domestic violence often suffer sustained breaches of privacy, including GPS tracking, home surveillance, having private information shared and social media accounts monitored.²⁶ Formal court proceedings would create difficulty for vulnerable plaintiffs to access the tort. Vesting jurisdiction in ACAT for the tort would support access for the people most likely to need privacy protection.

2. The balance between the protections of privacy offered by the new cause of action and the impact on other rights and freedoms set out in the *Human Rights Act 2004*, including the freedoms of expression and movement.

Legal Aid ACT believes that a tort of serious invasion of privacy as proposed by the ALRC appropriately balances the right to privacy against other rights and freedoms in the *Human Rights Act 2004*. Some of the countervailing interests as listed in the ALRC proposal may be too broad, restricting the effective use of the privacy tort.

The tort as proposed by the ALRC would require the mandatory consideration of public interest factors. The defendant would be required to adduce any evidence of a public interest that should be considered, after which the plaintiff would be required to establish that the interest in privacy outweighs the countervailing interest.

The statute would provide a list of countervailing public interest matters that the court may consider. The list would not be exhaustive, but instead provide some guidance to the court on countervailing public interests that could be considered. The statutory tort should directly recognise the *Human Rights Act 2004* to ensure the consideration of rights and freedoms within the Act.

²⁴ Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) [7.226].

²⁵ ALRC *Report on Serious Invasions of Privacy in the Digital Era*, Report 123 (2014) [10.22].

²⁶ DVRCV, WESNET, Women's Legal Services NSW, *ReCharge: Women's Technology Safety, Legal Resources, Research and Training*. National Study Findings (2014). 5-10.

2.1. Is the balancing test appropriate?

Reconciling competing values or rights necessarily requires a judgement of their respective importance. Ensuring the protection of particular rights could be codified in statute or in the explanatory memorandum. The balancing approach recommended by the ALRC is taken from the English case *Campbell v Mirror Group Newspapers*,²⁷ as described in *McKennit v Ash*:

‘In all circumstances, must the interest of the owner of the private information yield to the [other] right or freedom?’²⁸

This involves:

‘Looking first at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering with or restricting each of those rights; and applying the proportionality test to each’²⁹

This form of balancing demands that no interest is automatically prejudiced over another. There may be inequality in the balancing of interests as the proposed statute requires that the interest in privacy *outweighs* other countervailing interests or rights.

The ALRC recommends that it is not the individual interest in privacy, but the general *public* interest in privacy that is to be balanced against other interests. The relevant question is then whether an invasion of privacy *of this type* is justifiable on public interest grounds.

2.2. Freedom of expression and the media

Common law has established that there are more and less worthy forms of speech. Political communication is first among these,³⁰ and it is in very few circumstances that a privacy right would outweigh the public interest in freedom of political communication:

‘where [the freedom of political communication] so burdens the freedom that it may be taken to affect the system of government for which the Constitution provides and which depends for its existence upon the freedom’³¹

This is a significant threshold to outweigh, and it is unlikely that privacy rights will put any undue strain on expression. Artistic expression also holds a privileged status among speech, principally for its role in ‘fostering both individual originality and creativity and the free-thinking and dynamic society we so much value.’³² Broadly speaking, the public interest test will likely consider the importance of the speech in contributing to a democratic society.

²⁷ *Campbell v Mirror Group Newspapers* [2002] EWHC 499 (QB) (2002).

²⁸ *McKennit v Ash* [2008] QB 73, 11

²⁹ *Campbell v Mirror Group Newspapers* [2002] EWHC 499 (QB) (2002) [141]

³⁰ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559–60

³¹ *Unions NSW v State of New South Wales* (2013) 88 ALJR 227, [18]–[19].

³² Baroness Hale in *Campbell v MGN Ltd* [2004] 2 AC 457, [148]

The ALRC propose that both political speech and artistic expression should be expressly noted as a category of freedom of expression as a public interest.

The public interest in freedom of media is primarily that of the freedom of media to investigate, inform and comment on matters of public importance. The ALRC recommends that the freedom of the media interest exist not as a general justification for invasion of privacy but as a protection for media investigation in matters of genuine public interest. Media freedom to publish ‘entertaining gossip’ would be given less weight as public interest than publishing material on matters of ‘genuine public concern.’

Paul Wragg notes that a statutory tort is likely to enhance press freedom.³³ He suggests that should a statutory tort be legislated, the courts would incorporate jurisprudence from *Campbell v Mirror Group Newspapers*,³⁴ ensuring a broad interpretation of public interest that reaches beyond an implied right of political communication. In this way, the media would be granted an extended right of expression by engaging in the more generous UK treatment of freedom of communication. Given the statutory tort would codify the right to freedom of the press, this would surely protect this interest better than any organic common law development in the protection of privacy.

2.3. Freedom of movement

Improving privacy protections is likely to support freedom of movement. Unsolicited surveillance may have a chilling effect on rights:

“surveillance is harmful because it can chill the exercise of our civil liberties. With respect to civil liberties, consider surveillance of people when they are thinking, reading, and communicating with others in order to make up their minds about political and social issues. Such intellectual surveillance is especially dangerous because it can cause people not to experiment with new, controversial, or deviant ideas.”³⁵

By allowing the enforcement of privacy rights, a tort of serious invasion of privacy would ensure that individuals could move and associate as they consider appropriate, without the fear of repercussion stemming from surveillance.

Freedom of movement may be limited to the extent that a person’s attempting to invade another person’s privacy may be limited. This would be subject to the balancing test within the tort. In most cases, Legal Aid ACT would consider this a justifiable limitation on freedom of movement.

³³ Paul Wragg, ‘Enhancing Press Freedom through Greater Privacy Law: A UK Perspective on an Australian Privacy Tort [2014] 36 Sydney Law Review 619

³⁴ *Campbell v MGN Ltd* [2004] 2 AC 457

³⁵ Neil Richards, ‘The Dangers of Surveillance’ [2013] *Harvard Law Review* 1934, 1935.

2.4. Proper administration of government; national security; and prevention and detection of crime and fraud

The ALRC suggests these factors are listed as a public interest to ensure that privacy protections do not create undue restrictions on the operation of government. Community stakeholders have argued that they represent too broad a counterbalance.

Legal Aid ACT agrees that the definition ‘proper administration of government’ gives scope for ‘mere administrative convenience’³⁶ to override key privacy interests. If this interest is included in the statute, it should be reformulated to have a higher threshold.

The ‘national security’ interest may be too broad. Lawful authority is proposed as a defence for the tort – this would presumably protect the lawful invasion of privacy where necessary in the interest of national security, which is provided broad powers under other legislation. Similarly, lawful authority would allow for valid search and surveillance by police and other law enforcement agencies. Stakeholders have raised concerns that these interests may provide the scope for invasion of privacy without due process.³⁷

2.5. Onus of proof

Under the tort proposed by the ALRC, the defendant has the onus of adducing evidence of any countervailing public interest. This is a procedural requirement to avoid the difficulty of a plaintiff pleading and proving the non-existence of a public interest, especially in cases where there is no indication that the public interest would be raised. This step is appropriate as the defendant is best placed to demonstrate why their actions were within the public interest.

Once a public interest has been established, the plaintiff has the legal burden to demonstrate that the interest in privacy outweighs the adduced public interest.

We believe that the shifting onus of proof best ensures that the public interest will be addressed. Balancing privacy against other public interests should remain an element of the tort and not a defence. This would ensure that privacy interests are not unduly privileged – it is an essential part of the tort that the tort can only be made out where the privacy interest outweighs any other.

³⁶ UNSW Cyberspace Law and Policy Community, Submission 98 to ALRC report 123.

³⁷ Guardian News and Media Limited and Guardian Australia, Submission 80 to ALRC report 123.

3. The nature, accessibility and appropriateness of any other legal remedies for redress of serious invasions of privacy in the ACT.

Legal Aid ACT believes that a tort of serious invasion of privacy represents the best legal remedy for redress of serious invasions of privacy. The alternative legal remedies provided by ALRC would improve privacy protection in the ACT, but represent an incomplete and piecemeal solution.

3.1. Statutory breach of confidence

The ALRC recommends that in the absence of a statutory tort, reform of equitable breach of confidence should be legislated to allow compensation for emotional distress. Many privacy invasions do not give rise to quantifiable damages, however result in humiliation, shame or guilt. This would essentially codify the findings of *Giller v Procopets* and *Wilson v Ferguson*. This change would both extend the reach of equity to address invasions of privacy and promote coherence in current privacy law.

Expansion of equity would however still leave significant holes in privacy protection. Confidence clearly does not provide the capacity to restrict intrusion on seclusion. This was a key aspect of the ALRC's tort design - informational privacy is only one facet of privacy. The current definition of 'confidential' information is also restrictive, although this may be open to be expanded as of *ABC v Lenah Game Meats*. Significantly, statutory reform may signal to the courts that it is open to stretch equity to further cover privacy rights:

'[equity has] inherent flexibility and capacity to adjust to new situations by reference to mainsprings of the equitable jurisdiction'³⁸

What this would mean for future development of privacy rights is uncertain. As we noted in 1.1., the common law development of confidence-based privacy rights is unlikely to consider countervailing public interest. Obligations of confidence are overlapping but distinct from privacy rights; as a result we believe that this option is inferior to a statutory tort of privacy.

3.2. Surveillance Legislation Reform

The ACT does not have laws regulating optical, data or tracking surveillance. In the absence of a tort of serious invasion of privacy, the ACT privacy regime could be improved through the implementation of an act regulating surveillance devices outside of a law enforcement context. The ACT government could look to similar acts in other jurisdictions.³⁹ Some examples of technology not currently captured by surveillance laws include:

- Mobile phone tracking;
- Data surveillance that can monitor information passing in and out of a computer system;

³⁸ RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) 415 [12-045]

³⁹ Surveillance Devices Act 1999 (Vic)

- Unmanned aerial drones;
- Optical surveillance that captures private conversations through lip-reading software.

A defence of public interest could be available under the legislation. The ALRC recommends a ‘responsible journalism’ defence. Remedial relief, including compensation, should be available to people who have been subject to unlawful surveillance.

Concerns have been raised around whether a ‘technology neutral’ construction will properly capture emergent technologies.⁴⁰ The Australian Privacy Foundation note that the distinction between different types of devices will often give rise to specific concerns, or may be relevant in determining what falls within the purview of the law.⁴¹ This being said, it is critical that surveillance legislation is flexible enough to provide protection against new technology. In this sense, a tort of serious invasions of privacy would be preferable as it allows a generalised protection of privacy, rather than one tied to specific technology.

The ACT surveillance legislation framework is currently inadequate to restrict a number of types of unsolicited surveillance. Broadening the legislation would address this concern. However, it would only address one category of privacy, and would not necessarily give rise to damages for a person who has had their privacy invaded.

3.3. Tort of Harassment

The ALRC alternatively proposes a tort of harassment defined as ‘a course of conduct, linked by a common purpose and subject-matter, intentionally committed to cause distress and intimidation.’⁴² The tort would be subject to a seriousness threshold so that the tort does not capture conduct that is simply irritating or disturbing. The tort may apply where there has been:

- Repeated following or ongoing surveillance
- Intrusion on or publishing of private communications
- Taking photos in a private context
- Persistent, unwanted contact

Defences include a ‘responsible journalism’ justification, however the tort would not involve a public interest balancing test. Some stakeholders have expressed the opinion that this could unduly infringe on freedom of media.⁴³

The design of the tort proposed by ALRC still requires elaboration. It could theoretically address many of the privacy concerns that a tort of serious invasion of privacy intends to, although less directly. The requirement of a ‘course of conduct’ may render it unable to address one-off invasions of privacy or disclosures of sensitive information. Similarly, an invasion of privacy may be egregious, but not intending to distress or intimidate a person, and so not it would not amount harassment. Legal Aid ACT

⁴⁰ UNSW Cyberspace Law and Policy Community, Submission 98 to ALRC Report 123.

⁴¹ Australian Privacy Foundation, Submission 110 to ALRC Report 123.

⁴² ALRC *Report on Serious Invasions of Privacy in the Digital Era*, Report 123 (2014) [15.19].

⁴³ Guardian News and Media Limited and Guardian Australia, Submission 80 to ALRC Report 123.

believes that the tort of invasions of privacy would more comprehensively protect privacy rights than a tort of harassment.