

The Executive Director
Australian Law Reform Commission
GPO Box 3708, Sydney NSW 2001

Via email to: privacy@alrc.gov.au

12th May 2014

Re: *Serious Invasions of Privacy Discussion Paper*

Dear Executive Director,

Electronic Frontiers Australia (EFA) appreciates the opportunity to provide this submission in relation to the Serious Invasions of Privacy Discussion Paper as published by the ALRC on 31st March 2014. EFA's submission is contained in the following pages. EFA is happy to provide further information, if required.

About EFA

Established in January 1994, EFA is a national, membership-based non-profit organisation representing Internet users concerned with on-line freedoms and rights.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting online civil liberties. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of computer based communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of computer based communications systems.

EFA's website is at: www.efa.org.au.

Yours sincerely,



Jon Lawrence
Executive Officer, on behalf of EFA's Policy and Research Standing Committee

Introduction

EFA supports the ALRC's proposal for a tort for serious invasion of privacy. If this type of law is enacted it will encourage those who hold private data to manage it responsibly and give Australians effective recourse if their privacy is not treated with respect.

The ALRC's discussion paper has described in detail the proposed implementation. In response, EFA would like to address some aspects in more detail.

Negligence and Emotional Distress

In the discussion paper the ALRC suggested that "[if] the new tort were to provide both that the damage for the new tort should include emotional distress and that fault should include negligence, the coherence of the law would be undermined."

The currently proposed fault element is limited to invasions that are either intentional or reckless. The Discussion Paper has also raised some recent discussion on the inclusion of Strict Liability or Negligence. EFA recommends that the new tort be extended to include negligent invasions of privacy.

In support, EFA turns the ALRC's attention to a number of supporting arguments, most of which have been raised in the Discussion Paper. Several stakeholders had raised the argument that negligent invasions of privacy can be just as damaging as intentional or reckless ones. The EFA is also of the same assertion, as was our former submission.

In paragraph 5.72, the ALRC retorts this assertion by putting forth the argument that any actual damage incurred by a plaintiff can still be claimed under a tort of negligence. EFA submits that such an argument is inadequate and impractical. Firstly, most invasions of privacy do not cause actual harm, thus leaving many claimants without relief under this approach. Secondly, a plaintiff's action in negligence for invasion of privacy is limited to established compensatory claims, such as pure economic loss or psychiatric illness. However, both of these carry high burdens of proof, and are unlikely to be relevant to the damage incurred for serious invasions of privacy.

The ALRC is, however, also proposing a remedy for compensatory damages for emotional distress, and is of the stance that actual damage is not required. EFA welcomes this approach. However, if the new tort were to exclude negligence as a fault element, it may serve to exclude all claimants that have incurred emotional distress only from having a cause of action, if the invasion was negligent.

Another argument in favour of the inclusion of a negligent fault element was put forth in paragraph 5.74 - that the omission of same would 'encourage indifference to privacy'. The omission of a negligent fault element would form a gaping hole in the protection of individual privacy, one in which tortfeasors are excused for their blindness, and only punished for their intentional or reckless acts.

In line with this argument, the omission of same may also run the risk of negligence forming a ‘quasi-defence’, whereby defendants can defend the second element of the tort by arguing that their conduct was negligent, rather than intentional or reckless. When coupled with a plaintiff who had not incurred actual damage, this would leave a legitimate victim unable to pursue an action under this tort for lack of fault, and unable to pursue an action under the tort of negligence for lack of actual damage. EFA stresses that such a predicament is not farfetched, and would leave many legitimate victims without an actionable claim or compensatory remedy.

Another argument for the inclusion of a negligent fault element was put forth in paragraph 5.76 - that, in fact, most invasions of privacy are done so unintentionally, rather than intentionally or recklessly. This argument, presented by the Law Institute of Victoria, neatly complements the above arguments, and adds another layer to the burden of proof held by the plaintiff. As mentioned in this paragraph, not only would the omission of same create a gaping hole in actionable claims, but it would also make legitimate claims burdensome due to the difficulty in proving intent.

The ALRC had also raised the argument that the inclusion of negligent invasions may cause an influx of claims. EFA rejects the notion that the inclusion of negligent invasions would ‘open the floodgates’ to over-litigation. A number of factors would counter-act the influx of claims. The first of these is the burden of ‘seriousness’ proposed in Proposal 7-1. By limiting claims to only those of ‘serious’ invasions of privacy, the tort would be able to filter any superfluous claims from the onset.

The second factor limiting an abundance of claims under this tort is the multitude of accompanying elements. The proposed tort has five elements that would need to be satisfied, placing a heavy burden upon the plaintiff and dissuading any claimants with trivial claims. In addition, any torts in negligence would also carry with them tortious elements, such as breach of duty, causation and remoteness.

In summary, the influx of claimants, as a result of the inclusion of a negligent fault element, would be counter-weighted by other factors and the burden of multiple elements.

Seriousness of invasions of privacy

EFA believes it is a wise decision to leave interpretation of seriousness ultimately in the hands of the courts, so that each case can be considered on its merits. Nonetheless the law should provide some guidance of what is a serious invasion of privacy. EFA shares the stated concern that restricting it to invasions of privacy that are likely to be “highly” offensive poses an unacceptable risk that the cause of action will be unattainable. Casual disregard for privacy should not be tolerated just because it is objectively only “moderately” offensive.

Acknowledging the lack of certainty that accompanies non-exhaustive lists, EFA continues to recommend that a non-exhaustive list of example of serious privacy invasions be included. This will provide guidance to the courts. Otherwise a conservative and narrow interpretation could make the tort useless for all but the most extreme invasions of privacy.

The law should include explicit confirmation that information about an individual that is spread over time or aggregated may amount to a serious invasion of privacy, even where each individual instance would not. For example, it is not a serious invasion of privacy to capture a photograph of pedestrians on a street; by comparison, a person wearing Google Glass might take photographs regularly in public. They could then use software to perform facial recognition and build profiles of others' movements over time. This would amount to surveillance and a serious invasion of privacy, unlike each individual photograph. The party who transforms simple photographs into privacy-invading material might not be the person who obtains the data.

Conclusion

The proposed tort stands to considerably empower Australians who are subjected to privacy invasions. It is important that it isn't rendered unavailable to victims by overly restricting the circumstances under which it can be applied.