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Law Commission

Level 19

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New Zealand

Via Email: EMorris@lawcom.govt.nz

SPADA'S SUBMISSION: Law Commission Issues Paper: Invasion of Privacy –

Penalties and Remedies

Preliminary

1. The Screen Production and Development Association (**SPADA**) welcomes the opportunity to respond to the Law Commission's Stage 3 review of the Law of Privacy - Invasion of Privacy; Penalties and Remedies.

2. Formed in 1982, SPADA is a non-profit, membership-based organisation with three full-time staff.

3. SPADA represents a large body of broadcast media companies, including many of the largest and longest standing companies who supply programmes to all New Zealand broadcasters.

4. SPADA's contact person for this submission is:

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EXECUTIVE SUMMARY

5. SPADA would like to start by making some general comments before responding to questions raised on topics related to media law.

6. Firstly, SPADA is of the general opinion that New Zealand's media law and jurisprudence functions reasonably well, and in regard to privacy, we have yet to see any cases that involve notable miscarriages of justice. By and large, privacy cases that are dealt with through the BSA, or in the few cases that have reached the Courts, are done so fairly and skillfully.

7. SPADA is wary of any moves that would upset this balance and particularly of any that would have suppressive effects on media freedom. The body of knowledge that has been built up at the BSA, and the broadcasting industry's understanding of how to respond to and integrate those decisions in ongoing work, is significant positives. It is both an established forum for complaint, and a system that provides disincentives that are appropriate for the functioning of a healthy, independent media, as a much lower cost than court processes.

8. We note that in the Digital Broadcasting Review, which has now been put on hold, a question was raised about whether anomalies are increasing between different standards authorities (Broadcasting Standards, Advertising Standards and the Press Council) covering different media activities. What is the difference when all major newspapers and broadcasters are internet publishers, and broadcasters provide text news services while

newspapers incorporate video? As noted in this Law Commission paper, the issue of who is responsible for guarding privacy (and any other standard) on the internet, remains unresolved.

9. In responding to the Digital Broadcasting Review, SPADA took the view that a combined body that dealt with media standards across all publishing and broadcasting 'channels', likely modeled on the BSA, would be a reasonable step to deal with media fragmentation, and we reiterate that view here. The Digital Broadcasting Review also suggested the idea of an agency to support media 'literacy' and we would have expected one of its functions to include educating internet users about potential damage from unthinking or indiscriminate use of what is essentially a vast public domain. Had either of those suggestions been carried forward they would have effectively dealt with some of the concerns that are raised by the Law Commission issues paper.

10. That said, SPADA is very cautious about the establishment of a large body or tribunal whose full-time job it is to monitor what is effectively a media freedom, and that would include a permanent privacy tribunal or some other form of lower tier court system. The nature of privacy is such that the bulk of a tribunal's work would involve the media, and such bodies tend to promote growth of their own scope and influence. This (as the dissenting judgements in Hosking note as a serious danger) argues very unreasonably against the incredible importance of media 'freedom'.

11. To this end we draw a strong distinction between organised media networks and programme suppliers, as against private corporations and individuals. Breach of confidence seems to be much more suited to the publishing of private fact where people's dignity is affected by social networking on the internet, or careless or malicious use of company information. It is the function of news gatherers, documentary makers, consumer affairs programmes and the like, to make inquiries on behalf of the public and anything that inhibits those inquiries is to be viewed very seriously.

12. SPADA will now respond to specific questions raised in the issues paper.

CHAPTER 7 - Disclosure

Q1 Is there value in a tort of invasion of privacy by publicity given to private facts? If so, what is that value?

SPADA suggests that its value lies only in extreme cases, with potentially egregious effects, where an injunction may be sought, and perhaps in cases where the defendant is a private corporation or individual. We believe that the court is generally the wrong place to discuss media freedoms.

Q2 Do you think it would be sensible to abolish the tort without replacing it? If it is to be replaced, what should replace it?

As noted above and stated in the Law Commission paper, there are inconsistencies in both the application of privacy standards and remedies available. However, as we discussed in our opening comments, those inconsistencies could be remedied by bringing the BSA, ASA, and Press Council together under one roof to have the standards for privacy in the media (with the addition of the internet) applied consistently by a single authority. It does not require a new tribunal, or a revision of privacy laws, simply a re-organisation of existing functions.

However, we do not believe that is appropriate for an entity such as an expanded BSA to have injunctive powers or the power to award substantial damages. It is better for healthy debate in society and the functioning of democracy, that a few complainants feel their grievance is not satisfied, than the converse scenario, in which responsible media are cowed and constrained by facing constant costly litigation for routine news-gathering decisions.

We suggest that both the volume of case law and the mood of the public suggest there is no case shown for a tribunal with wide powers in privacy. We therefore contrast this with the field of human rights, where there are many well organised lobby groups and NGOs, a very significant history of public protest, and a great deal of government policy to support the notion that discrimination is a great concern to the New Zealand public. We see no comparable weight of opinion or concern that would justify a tribunal in the field of privacy, especially not one with the serious powers afforded the Human Rights Tribunal.

Q3 If there is to be a tort, is it better to codify it in statute, or leave it to evolve by case law?

If the tort is codified, we are very concerned this would upset the balance that has been established through the long history of decisions by the BSA, which will throw media into disarray until a new set of decisions can be relied upon. Court proceedings are expensive, so that will form an unnecessary cost and restraint on the media, especially until new precedents are established.

It is noted that case law will evolve only slowly as there is little call on the tort as it stands, so we take the view that the plaintiff must be very committed to a cause of action and this is appropriate, especially where media freedoms are involved.

If there were to be anything 'gained' from codifying the tort, we would want to see 'public concern' replaced with 'public interest' as the BSA's jurisprudence on public interest could then be used on to maintain a more consistent approach. While not in favour of legislation, if enacted its reach must be very strictly limited to reflect the common law as it stands, as decisions to date have generally been fair and considered, especially insofar as the law has not been used to stop publication of matters concerning either public safety or public policy. While many might think it 'unfair' that photographs of the Hosking twins be published, as judges in that decision noted strongly, that is far from sufficient grounds to create law that might have very serious consequences in the future. In general, we would prefer that parliament is only called in to enact legislation, if the courts in future begin to restrict media freedom in an unwarranted fashion, and that on the face of it, a new law is not currently warranted.

The Elements of the Tort

Q5 Should the "highly offensive" test remain as a separate element of the tort? (paras 6.52-6.61)

In our view this is of critical importance, and is appropriate. While it is a high hurdle, media freedom is such an important social good that to lower the hurdle would be very alarming.

Q6 & Q7 Is "reasonable expectation of privacy" a useful test? Would it be possible in a statute to give more precise definition, or to list considerations to be taken into account in determining whether that expectation exists? In what circumstances can there be a reasonable expectation of privacy in relation to things which happen in a public place? Is it possible to devise a test to clarify this issue? (paras 6.27-6.32)

While in general we prefer not to have conditions listed in legislation, in this example it would be possible to define 'reasonable expectation' more precisely. For example, if a person has taken

deliberate steps to protect the privacy of information (drawing the curtains, using passwords for computerised information, holding their conversation in a private space) then they would be allowed to reasonably expect privacy.

The paper raises the issue of what would happen where a person is, through not fault of their own, embarrassed in a public space. We strongly believe that a statute that tries to set conditions, under which information disclosed in a public domain can be used by the media, would stray into an extremely dangerous grey area.

For the very few cases where widespread publication of such information or footage might occur (for the most part it would irrelevant to the public, or be limited by fairness, taste or decency standards) it is far better that media freedoms are maintained than unjust limitations are placed on news-gatherers.

Q8 To what extent is the degree of privacy that public figures can reasonably expect less than that of the general population? Does any reduced expectation of privacy on the part of public figures also apply to their families? (paras 6.33-6.35)

In general, it is less. To the extent that family members can expect reduced levels of privacy, the BSA test assumes that disclosure of private information must be in the best interest of the child. It is appropriate that children receive special protections. However, the fact that there are so few cases in this area suggests again that there may be no need for change. New Zealand does not have the paparazzi and highly self obsessed celebrity culture that creates the excesses which are seen in other countries such as England and the United States.

Q9 In what circumstances can there be a reasonable expectation of privacy in relation to something which has already been published? (paras 6.40-6.42)

It is acknowledged that public facts may become private again after the passage of time, although this is a highly subjective area and is subject perhaps to a test of relevance. If a matter of current public concern is supported or affected by a historical fact, even a private one, then there ought to be no limit on re-publication of that fact.

Q10 At what time should the expectation of privacy be assessed: the time of the occurrence of the facts in question, or the time of their projected publication? (para 6.43)

At the time of publication.

Q11 How far should plaintiff culpability be relevant to reasonable expectation of privacy? Is it possible to frame a statutory test to deal with plaintiff culpability? (paras 6.44-6.51)

We strongly support the view that privacy law cannot arbitrarily contradict defamation law. In defamation law, truth is a complete defence. To allow no test for the culpability of the plaintiff would be argue directly against that very important principle, a point referred to by Allan J in *Andrews*. For example if a private fact was not of legitimate public concern or the person would not otherwise have come to public attention, there may be no good reason to breach their privacy and publication might be said to be malicious. In all other cases, where media are disproving a publicly made statement or revealing relevant information about an individual who is publicly identifiable (for example the *Campbell* case in England), the right to publish must be paramount.

The defence of legitimate public concern

Q12 Would it be helpful, in a statute, to give examples of matters which are normally of legitimate public concern? (paras 6.62-6.73)

We would say that if the tort is codified (which we disagree with) it must refer as the BSA does, to legitimate 'public interest' as that follows the majority of jurisprudence in this area. The BSA uses a non-exhaustive list of areas of public interest which are useful and appropriate, and has case history already that refers to the difference between public interest and 'of interest to the public'. As the judges noted in *Andrews*, it is very hard to inform the public if reports or programmes are so stripped of all colour and activity as to make them entirely dry and academic. That will be the major problem with a codified 'public concern' limitation. This could quickly turn into an unjust limitation which would effectively allow courts to tell media the manner and style in which it is allowed to broadcast or publish.

The worst possible outcome would be a codified narrow list of areas of public concern, as this will be used to restrict media freedom.

Q13 Should the statute require only reasonable grounds for belief that the matter is of legitimate public concern, or should the test be an objective one? (para 6.71)

While this would certainly work in favour of media freedom, we take no strong view. An objective test perhaps does more to promote responsible decision-making, and we would expect and

judgement handed down under an objective test would take into account the efforts made by media to ascertain the public concern or interest during the decision to publish or broadcast.

Q14 Other than legitimate "public concern", what defences Q14 should there be to a cause of action for publicity given to private facts? (paras 6.91-6.92)

While reiterating that 'public interest' is a better standard than public concern, this is not specifically a media issue and we make no further comment.

Q16 Is it possible, or desirable, to list considerations to be taken into account in assessing damages? (paras 6.74-6.76)

We believe it is not desirable to list of considerations. We note that it would poorly serve New Zealanders if plaintiffs of a gold digging or litigious nature were able to scare publishers or broadcaster with the threat of large or exemplary damages awarded against them in court.

Q17 Should it be possible to obtain a remedy in this privacy tort (or cause of action) if some or all the statements made about the plaintiff are untrue? (paras 6.85-6.87)

We believe, as is noted in the issues paper, that defamation law has the advantage of case history that provides precedents which stand separately from privacy law – a distinction which it would be unwise to upset. If the plaintiff is wronged on two counts, and brings an action under both privacy and defamation, we would expect judges to naturally take into account the total affect on the plaintiff of the publication or broadcast. But to allow a crossover, as the question states, when 'all' of the statements are untrue, confuses privacy and defamation.

Q18 Should wide publicity be required to ground a cause of action or might publication to a small group be enough in some cases? (para 6.89-6.90)

While this is question is less likely to arise in a media case, we noted that the examples given in the issues paper seem more suited to breach of confidence.

Q19 Should it ever be possible to obtain a remedy for invasion of the privacy of a deceased person? (paras 6.95-6.96)

Where the media are concerned, this would be at odds with defamation law, and both privacy and defamation are concerned with the dignity of a person (who now cannot feel and injury to that dignity), this would be a retrograde step and our answer is 'no'. We also note again that the worst excesses of some foreign media environments are generally avoided in New Zealand, so the kind of sensation seeking media behaviour that might warrant considering such an cause of action do not currently exist.

Q20 Should corporations, or other artificial persons, be able to bring an action for invasion of privacy? (para 6.94)

No, we don't believe so.

Q21 Is it possible to lay down a statutory test to clarify the special position of children? (paras 6.36-6.39)

We refer to the BSA's case history on this matter, and suggest that the special position of children is clearly protected in that environment, and to a high standard. Any statutory protection should not add further restrictions, as the requirement that an invasion of the privacy of a child 'must be in the best interests of the child', is already a high hurdle. For example, it does not allow any right the child might have, even in exceptional circumstances, to make that decision for themselves.

Q22 Might it ever be possible for a person to succeed in an action for publicity given to private facts if that person was not identified in that publicity? To whom would the person need to be identified? (paras 6.97-6.99)

We think not, and that TVNZ vs BA very adequately frames this point.

Q23 What mental element should be required to found liability in a defendant? (paras 6.100-6.101)

This question does not greatly affect the media and we make not comment at this stage.

Questions 24 – 28 concerning criminal offences.

As these questions concern criminal matters that should not apply to media, we have no specific comments to make. However we would like to reiterate our firm belief that jurisdiction over news and current affairs media is such an important, fundamental corner-stone of democratic society, that privacy law for the media must be kept separate from commercial or domestic matters.

Therefore, on matters concerning surveillance, we would like to see, at the very least, the current BSA guidelines regarding the use of hidden cameras is the minimum allowance given to professional media. Ensuring that a recognised current affairs or consumer affairs programme, news or documentary provider uses hidden cameras with legitimate intentions to inform the public interest by exposing wrong-doing or even demonstrating proper practices, would be entitled to do so.

Any legislative reference to surveillance must therefore exclude media.

In Summary

To summarise SPADA's response to Chapter 7 on matters of disclosure of personal information, while we recognise that individuals should have recourse to the courts in exceptional circumstances, we believe that cases will be very rare. While there are some elements of the tort that we would prefer were balanced more in favour of the media and which could be addressed by legislation, on the whole, the case history is fair. We see no reason and no public appetite for legislation, and are happy for disclosure of privacy disclosure to remain a common law tort.

CHAPTER 8 - SURVEILLANCE

Questions 29 – 57 concerning surveillance

Again, we respond to these questions as a group, with some broad comments.

As the case studies in this section illustrate, there are some inconsistencies in how the standards that affect media are applied. We again submit the opinion, that this suggests benefit would be gained from a single media standards authority, similar to (or an expansion of) the BSA, which would include the Press Council, Advertising Standards Authority and be responsible for internet services – which is currently a black hole in the landscape of jurisdiction.

Such a body should deal uniformly with media surveillance, and not allow newsgathering to be tied up in a bundle with corporate, law enforcement or criminal surveillance.

It is appropriate that media are treated separately. The occasional discomfort of a public figure or celebrity is a small downside when surveillance techniques, more often than not, are used by consumer affairs programmes to expose wrong-doings: news programmes and documentaries that uncover scams: and current affairs programmes that are often concerned with criminal behaviour.

In general, the use of surveillance techniques (such as hidden cameras) by media could be strengthened. Currently, as applied by the BSA, weekly news and current affairs programmes have a greater freedom than other types of programme to use such devices. While consistent with the Privacy Act, it would be prejudicial to investigative documentaries and consumer affairs programmes.

CHAPTER 11 - INTRUSION

We refer to comments made in summary in this section of the issues paper.

Firstly that the Privacy Act does not apply to news media in news-gathering activities. We say this is very appropriate, and must remain at the heart of privacy laws, for reasons outlined above.

Secondly, we concur that “the gaps are not sufficiently serious [and] involve matters that arise too infrequently to warrant new laws”.

Q 61 – Are there any new civil remedies (apart from a possible intrusion tort) needed to deal with intrusion?

In our view, remedies are adequately dealt with in the media arena with by standards authorities such as the BSA, and that while there are some gaps, a standards authority is the appropriate mechanism do so.

Q 63 – Should there be an intrusion tort?

No. The issues paper notes that 'law already provides many protections against intrusion" and that to the extent there are gaps, they could be plugged without the need to create a new general cause of action. Another argument against such a tort is that there are very few cases in which there is 'a serious intrusion without subsequent publicity given to the private facts'. We agree.

We add further that the considerable jurisprudence on intrusion that has been established by the BSA counts as an argument against the need for a new cause of action. Remedies are available, and parameters under which media operate, are well defined and generally fair. There is simply no need for the uncertainty and re-negotiation of criteria that would inevitably follow if intrusion were to become a new tort for media to consider during their newsgathering activities.

Q64 – Should the development of an intrusion tort be left to the common law or should it be introduced by statute?

As noted, we do not see a need for such a tort, however, it is preferable if the courts take a lead thus building on existing jurisprudence. We do not believe there is a need for parliament to create legislation at this point.

Q65 If an intrusion tort is to be introduced by statute, what should be its elements? Specifically:
·· Should it refer to intrusions on "solitude and seclusion", and would this necessarily suggest that it applies only in private places?

Yes. And that intrusion must be 'highly offensive', in line with current standards.

·· Should it include intrusions into personal or private affairs and concerns, or should it be limited to intrusions into spatial privacy (unwanted access to our persons and private spaces)?

It should be limited to spatial privacy. Again, in line with current standards.

·· Should it include examples?

No.

Q66 Would your answers to questions 5-8 and 11 from chapter 7 differ for the intrusion tort from the answers you gave with respect to the disclosure tort?

No.

Q67 If the statute was to give examples of matters of public concern, would the examples for the intrusion tort differ in any respects from those for the disclosure tort?

No. Especially where it involves the media, disclosure is where the offence really lies. Truly unacceptable intrusions would commonly be dealt with as trespass.

Q68 With respect to the intrusion tort, should the statute require only reasonable grounds for belief that the intrusion was for the purpose of obtaining information in the public interest or about matters of legitimate public concern, or should the test be an objective one?

While we disagree with the need for the statute, if drafted, a reasonable grounds test is imperative for intrusion. Otherwise the normal function of an inquiring, investigative media is severely and unnecessarily restricted, and may be penalised for investigating a story which it does not then broadcast or publish. In other words, penalised for doing its job properly.

Q69 Would your answers to questions 14-16, 19-21 and 23 from chapter 7 differ for the intrusion tort from the answers you gave with respect to the disclosure tort?

No.

Q70 What do you think should be the relationship between the disclosure and intrusion torts if both were to be put on a statutory basis?

There will be few cases in which the intrusion itself is 'highly offensive'. As New Zealand media, does not indulge in paparazzi style or tabloid tactics, there is ample protection of privacy at the point of publication – with the existing limits on disclosure of private facts. In most cases, media intrude with a reasonable expectation that they will find facts that are relevant to the public interest. Therefore, it is hard to imagine much use for an intrusion tort used separately from disclosure.

We note also that in judgements from the BSA on privacy, an unnecessary or egregious intrusion will certainly count against a defendant who is already 'losing' a case brought about disclosure. We imagine that judges dealing in the future with the disclosure tort will likely make similar considerations. This deals with intrusion in its proper place, separate from disclosure.

Q71 Should there be a mechanism for dealing with intrusion at a lower level as an alternative to proceeding through the courts? If so, what form should this take? Should intrusion and disclosure both be dealt with at the same level?

Disclosure is a more serious case, and it is more appropriate for such cases to be dealt with (in the worst of circumstances) through the court. Intrusion is a nuisance similar to trespass and we do not see them in the same light at all.

Q72 Should the media be subject to any greater, or lesser, legal restrictions concerning surveillance and other intrusions than other members of the public?

Clearly media must have greater freedoms, and fewer restrictions, or its ability to fulfill its role in the proper functioning of a democratic society is affected. The Privacy Act and Bill Of Rights affirms this position.

Q73 Does the current framework of content regulation by the BSA and the Press Council provide adequate protection against intrusions by the media? Alternatively, does it go too far in limiting media freedom?

As noted throughout this submission, in general, these bodies adequately perform their functions. We have concerns with some recent decisions that unnecessarily restrict media freedom, the most recent of which is TVWorks Ltd and O'Connell - 2007-067. However, in general the balance struck between remedies for plaintiffs and the development of media standards is wholly appropriate, and must remain with an independent crown entity such as the BSA.

Q74 To what extent should the media be exempted from laws dealing with surveillance and other intrusions (either current laws, or options for reform discussed in this issues paper)?

Media laws are important, their scope is fundamental to the function of democracy, and presumably that is why they have been empowered by the Bill Of Rights and excluded from the Privacy Act.

Once again, a flexible, responsible independent crown entity is the correct place for most media issues to be dealt with, not the courts. The board of such a crown entity will have more flexibility to consider wider factors, the public mood, and to receive a greater range of community inputs which speak specifically to media roles and restrictions. A number of comments made in the

issues paper suggest an attempt to protect against situations that may or may not arise in the future, and we believe that legislation is generally inflexible and poorly equipped to deal with a media landscape that does change quickly and constantly.

Q75 What form should any exemptions for the media take? Should they be restricted to newsgathering, and if so, how should newsgathering be distinguished from entertainment?

The exemptions should be absolute and include a wider range than simply newsgathering, as current affairs, consumer affairs and investigative documentary programming fulfil the same roles of informing the public interest.

Conclusion

As noted, SPADA is of the general opinion that New Zealand's media law and jurisprudence functions reasonably well, and in regard to privacy, we have yet to see any cases that involve notable miscarriages of justice. By and large, privacy cases that are dealt with through the BSA, or in the few cases that have reached the Courts, are done so fairly and skillfully.

SPADA would once again like to thank the Law Commission for this opportunity to comment on its Stage 3 review of the Law of Privacy - Invasion of Privacy; Penalties and Remedies. If you would like to discuss any aspects of this submission please contact us on +64 4 939 6934.

Yours sincerely

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