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By Email: alison.playford@act.gov.au
CC: JACSLPP@act.gov.au

Re: Applicability and appropriateness of a new action in tort for serious invasions of privacy in the ACT

Thank you for the opportunity to provide comments on the Discussion Paper.

The Tenants' Union supports the introduction of an action in tort for serious invasions of privacy in the ACT. In the context of increased availability and use of technology capable of surreptitious recording, it is especially important to protect the privacy of vulnerable people. The availability of such an action would further protect a class of people who are particularly vulnerable to invasions of privacy, and act as a deterrent to potential perpetrators of privacy breaches.

I am happy to discuss the issues we raise below further.

Yours sincerely

Deborah Pippen
Executive Officer

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About the Tenants' Union ACT

The Tenants' Union (TU) is one of the primary providers of information, advice and education to people renting in the ACT.

The Tenants' Union membership consists of private, public and community housing tenants, occupants of other forms of accommodation as well as individuals interested in tenancy issues. The TU represents people renting in the ACT (private and community), works to promote the rights and interests of tenants and undertakes housing and tenancy-related projects.

The TU is a community legal centre providing tenancy advice, information and referral through the Tenants' Advice Service (TAS), and casework including Tribunal representation is conducted by our Principal Solicitor. The TAS provides information, advice and referral through its two advice workers and also undertakes community legal education: producing information, conducting workshops and presentations, and promoting tenant participation. The TU is funded through the Justice and Community Safety Directorate and by a proportion of the interest earned from bonds lodged with the Office of Rental Bonds.

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

Tenants are particularly vulnerable to violations of privacy. People renting have less control than owner-occupiers in relation to who may access their home and when. It is our experience that tenants are disempowered when it comes to asserting their rights to privacy as they are concerned about losing their housing or being subject to difficult or harassing behaviour by the lessor or real estate agent. The TU submits that a lessor illegally accessing a tenanted property should be considered a 'serious' invasion of privacy due to the lessor's position of power and the breach of their obligation not to interfere with the tenant's peace, comfort and privacy.

Protection under the Residential Tenancies Act

The *Residential Tenancies Act 1997* (RTA), which includes the Standard Residential Tenancy Terms (SRTT), states that the lessor must not cause or permit interference with the reasonable peace, comfort or privacy of the tenant in the use by the tenant of the premises (cl 52 SRTT). If this provision is breached, the tenant may seek redress in the form of orders that the behaviour shouldn't be repeated, rent reduction and/or compensation. Compensation awarded under the RTA is generally calculated with reference to actual loss suffered. However, the ACT Civil and Administrative Tribunal (ACAT) has also awarded compensation for non-economic loss such as emotional stress and upset and nuisance.

It is unclear whether conduct such as misuse, unauthorised disclosure or finding out of personal information would be covered by the RTA. The RTA does not include elements that must be satisfied in finding a breach of privacy or what ACAT must consider when determining compensation. Members of ACAT have significant discretion in relation to compensation for breaches of privacy and this leaves tenants uncertain as to their rights and entitlements.

Tenants can make a complaint to the Office of the Australian Information Commissioner about the handling of private information by real estate agents with an annual turnover of more than \$3 million. However, there is no mechanism for redress for misuse of private information by private lessors or smaller real estate agents.

Introduction of the tort would provide a significantly clearer and more comprehensive legal framework for addressing serious violations of privacy in the context of a tenancy than is offered by the RTA.

Occupants

The RTA governs accommodation agreements that are considered to be ‘occupancies’ rather than tenancy agreements in the ACT. The rights of occupants are derived from the individual occupancy agreement as well as the Occupancy Principles in section 71E of the RTA. The Occupancy Principles state that ACAT must have regard to the occupant’s entitlement to quiet enjoyment of the premises, but there is no mention of a right to privacy. In our experience, many occupancy agreements either do not address privacy or state that the grantor may enter the premises at any time.

There is currently no mechanism for redress for occupants who have experienced a serious invasion of privacy, and therefore little deterrent for grantors who do not respect occupants’ privacy. Occupants who have a reasonable expectation of privacy would benefit from introduction of the tort.

Deterrence

It is our experience that many lessors and grantors do not appreciate the seriousness of violating the privacy of tenants and occupants living in ‘their’ property. Private lessors, but also those who engage real estate agents, can hold the belief that they are entitled to access the property that they own at any time and for any reason despite the fact that they have a tenancy agreement. Introduction of the tort of privacy would impress upon lessors, grantors and real estate agents the gravity of the right of tenants to enjoy privacy in their home. The availability of damages for serious invasions of privacy would be a more serious deterrent than the current legislative provisions.

Access to justice

It is our experience that tenants do not feel empowered to take action against lessors in relation to violations of privacy. ACT tenants face many difficulties and much competition accessing properties and are rarely in a position of power when it comes to seeking accommodation. Tenants are fearful of losing their housing, being listed on tenancy databases and having their bond withheld.

A one year limitation period for serious invasions of privacy may be prohibitive for tenants or occupants who are still living in the property owned by the person who violated their privacy. It is not uncommon for tenants to have a fixed term tenancy of 12 or 24 months. These agreements are very difficult to terminate, and many tenants do not have the financial capacity to move. The ability of the court to extend the limitation period in exceptional circumstances does not address concerns about unfairly denying a tenant the opportunity to bring an action. It is currently unclear what would constitute ‘exceptional circumstances’ and there would be no certainty for tenants who are unable to bring an action within one year of the violation. The TU recommends that the limitation period be set at six years in line with the norm for civil actions.

The TU supports the proposal of vesting ACAT with a privacy tort jurisdiction, noting however, the amount that can be sought or awarded is currently capped at \$25,000. Many tenants are unwilling to bring an action against a lessor if there is a possibility of having costs awarded against them. Tenants commonly cannot afford legal representation and find ACAT less intimidating and easier to understand as a self-represented litigant.

Case studies

The TU provides a predominantly one-off telephone advice service and we are often unaware of the outcome of clients' matters. Below are some de-identified examples of privacy issues that our clients have experienced. These may not be scenarios where the tenants could bring the proposed action in tort, however they give a sense of the attitudes towards privacy in the rental market and the barriers faced by tenants in accessing justice.

Jacqui was given 8 weeks to vacate a property at the end of her fixed term as the lessor intended to sell. During an inspection, the real estate agent took photos of the property which included many of Jacqui's personal possessions. These photos were used to advertise the property on Allhomes. Jacqui considered this to be a gross invasion of her privacy and misuse of her personal information. When she objected, the real estate agent threatened to speed up the process of requiring her to vacate the premises.

Demelza lives alone and feels uncomfortable letting strangers into her house. When Demelza asked the agent for identification before allowing him to access the property, he became aggressive and prevented her from closing the door by putting his foot in the way. On a different occasion, Demelza's real estate agent took photos inside her kitchen and bedroom cupboards, under the bed and of walls hung with photos and diplomas. Demelza asked the agent to stop and the agent became aggressive. Demelza felt bullied by the agent and did not feel that she could apply to ACAT for remedies.

John and his partner Sally moved into a property with a large garden. A number of repair issues arose and there was some dispute with the lessor as to who was responsible to pay for a large invoice. John received several phone calls from the agent saying that the lessor had driven past the property on different occasions and believed the garden was not being maintained to an adequate standard. Sally was seven months pregnant and her doctor wrote a certificate stating she was suffering from high anxiety as a result of pressure from the lessor and agent. John and Sally decided to move out despite having to pay break lease compensation.

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;

In the context of residential tenancy or occupancy the TU does not consider that the proposed tort would impact on the lessor or grantor's rights including right of access to a property or freedoms of expression and movement. This is because the lessor or grantor would have the defence of legal right, and retain the ability to apply to ACAT for access to the property in appropriate circumstances.

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

This point has been addressed in point 1 above.