The United Kingdom phone hacking controversy centred upon the now defunct British tabloid *News of the World* became the catalyst for renewed discussion in Australia about whether we need a new private right of action for invasion of privacy protection. The Minister for Privacy and Freedom of Information, the Hon Brendan O’Connor MP, invoked the spectre of phone hacking and ‘other recent mass breaches of privacy, both at home and abroad’ in his announcement of the Federal Government’s intention to consult the public on the introduction of a statutory cause of action for serious invasions of privacy in Australia. This consultation was apparently fast-tracked to the head of queue of the Federal Government’s timetable for staged consultation as to reform of privacy legislation. The Commonwealth of Australia’s consultation document, *Issues Paper: A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, was issued in September 2011. The consultation period was later extended (on 4 November 2011) until Friday 18 November 2011.

Chris Merritt of *The Australian* characterised the *Issues Paper* as follows:

> It is now clear that the Gillard government is preparing to expose business to a wave of class actions in order to step up its vendetta against the media. The media barely rates a mention in the issues paper on privacy law that was made public yesterday. But that fools nobody. This privacy plan, like the federal inquiry into the media, is another part of the government's hamfisted attempt to bring the media to heel. From the government's perspective, the privacy plan would have the great advantage of imposing a chilling effect on the press. It confirms that federal Labor is no longer the party of free speech.

Justin Quill of Kelly Hazell Quill Lawyers, said a statutory right to privacy would ‘certainly lessen free speech in Australia. Claiming we need a statutory right to privacy is just wrong. Australia already has an enormous number of laws that protect people's privacy … Introducing a statutory right to privacy will affect the balance the law currently strikes between protecting people's privacy and freedom of speech.’ In July 2011, Justin Quill argued the suggestion that a court might order in a particular case that a media organisation publish that it had been found to have engaged in a serious invasion of privacy would ‘force media outlets to publish material with which they disagreed’, ‘the equivalent of taking away the media's right to express its point of view … It is the ultimate in anti-free speech.’

Clearly, strong feelings are in play in the media sector. This paper considers the arguments for and against the statutory cause of action for serious invasion and privacy, sensible design criteria for any such cause of action, and the dilemma of appropriate remedies. We suggest that the problem is two-fold:

- **the cause of action**: if it is concluded that Australia should have a cause of action, devising a right of action or other redress which addresses the increasing threats to personal privacy while not unduly constraining freedom of expression. Of course, defamation, contempt and privacy causes of action are all restraints upon freedom of expression — the appropriate question is how much restraint is too much? And in answering that question, it is important to bear in mind that Australia has no Constitutional guarantee of, or even protection of, freedom of expression or the media, beyond the relatively narrow High Court implied Constitutional doctrine of freedom of political discourse.

- **the practical remedies**: devising practical and affordable remedies for aggrieved persons while not chilling development of new media and outlets and opportunities for public discourse.
It is also important to not get ahead of ourselves: *do we need a right of action enforceable by private suit through the courts, or are other modes of redress more appropriate?* For example, the armoury of powers enjoyed by the Office of the Australian Information Commissioner could be expanded to include a power to require particular sections of industry (such as print or electronic media) to develop and adhere to industry codes, which provide appropriate remedies, a power to impose fines or to require remedial action to be taken, failing which remedial orders might be made (which might or might not include acknowledgements and apologies). As the *Issues Paper* states:

Other legal remedies or mechanisms may provide more appropriate methods to protect privacy or influence behaviour than a civil mechanism such as the proposed cause of action. For example, criminal laws (and sanctions such as imprisonment), or data protection laws (and sanctions such as monetary fines), may be more appropriate to deter particular types of conduct than a civil cause of action.

**Judge made law on privacy: Australia**

In 1937, the High Court of Australia in *Victoria Park Raceway* was asked to decide whether Australians had a right to privacy. In finding that no such right existed under Australian common law, Chief Justice Latham then stated:

> Any person is entitled to look over the plaintiff’s fence and to see what goes on in the plaintiff’s land. If the plaintiff desires to prevent this, the plaintiff can erect a higher fence.

Over 60 years later, the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, had the opportunity to again inspect the fence, and by majority indicated that the decision in *Victoria Park Raceway* does not stand in the path of the development of a cause of action for invasion of privacy. However, the High Court declined to go further, neither determining whether a cause of action exists, nor what the scope of such a cause of action might be. Gleeson CJ suggested an extended action for breach of confidence may be available to protect information that is private, where:

> The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.

Judicial activism then moved to district and county court level, where two judges — Skoien SDCJ in the Queensland District Court in *Grosse v Purvis*, and then Hampel J in the County Court of Victoria in *Doe v Australian Broadcasting Corporation* — expressly recognised a common law right to an action for invasion of privacy.

In *Grosse v Purvis*, a breach of privacy was found to have occurred as a result of the defendant stalking the plaintiff over a prolonged period. The court awarded aggravated compensatory damages and exemplary damages, expressly recognising ‘a civil action for damages based on the actionable right of an individual person to privacy’, and determining that the ‘essential elements’ of the action for invasion of privacy were:

- an intentional (willed) act by the defendant;
- which intrudes upon the privacy or seclusion of the plaintiff;
- in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities; and
- which causes the plaintiff detriment in the form of mental psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she/he is lawfully entitled to do.
Skoien SDCJ stated that a public interest defence was available, although it was not relevant in the particular case. On the facts in this case, the court did not have to consider whether an unintentional but negligent act by a defendant should give rise to a privacy cause of action.

In *Doe v Australian Broadcasting Corporation*, the ABC published in its afternoon and evening radio news bulletins information that identified the plaintiff as a victim of a sexual assault. As Hampel J concluded, this was a clear breach by the ABC of section 4(1A) of the *Judicial Proceedings Reports Act 1958* (Vic), which makes it an offence in certain circumstances to publish information identifying the victim of a sexual offence. However, Hampel J went on to hold held that, in addition to breaching a statutory duty owed to the plaintiff by virtue of the *Judicial Proceedings Reports Act*, the defendant broadcaster and two of its employees were liable to the plaintiff in equity for breach of confidence, and in tort for invasion of privacy. Hampel J did not attempt to formulate a comprehensive definition of the cause of action but held that the ‘unjustified publication of personal information’ breached the plaintiff’s privacy.

**Judge made law on privacy: New Zealand**

Across the Tasman Sea, the New Zealand courts had been more active, culminating in a decision by the New Zealand Court of Appeal in *Hosking v Runting* recognising a common law tort of privacy. The Court found that there are two fundamental requirements for a successful claim for interference with privacy:

- the existence of facts in respect of which there is a reasonable expectation of privacy; and
- publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

The majority judgements of the Court in *Hosking v Runting* suggested that there should be a defence of legitimate public concern in order to ensure that ‘the scope of privacy protection should not exceed such limits on the freedom of expression as is justified in a free and democratic society’. The Court used the term ‘public concern’ rather than ‘public interest’ reflecting a difference between ‘matters of general interest or curiosity to the public, and matters which are of legitimate public concern’.

Later statements in the New Zealand Supreme Court have been more equivocal. Anderson J, one of the two dissenting judges in *Hosking v Runting*, said that the existence of the tort and its scope were properly matters for further debate in the Supreme Court. Elias CJ queried the formulation of the cause of action and in particular whether there was a need for the relevant publicity to be ‘highly offensive’.

**Judge made law on privacy: the United Kingdom**

The position in the United Kingdom is more complicated. Although in the United Kingdom the courts have repeatedly held that ‘English law knows no common law tort of invasion of privacy’, entry into operation of the *Human Rights Act 1998* brought the *European Convention on Human Rights* into UK law. Subsequent court decisions have involved a balancing of the right to privacy afforded by Article 8 of the *European Convention on Human Rights* (ECHR) and the right of freedom of expression conferred on a publisher by Article 10. The elements of the cause of action have been stated as:

- ‘whether the claimant had a reasonable expectation of privacy in relation to the particular information in question’;
- whether the interference with private life by the act of the defendant was of ‘some seriousness’; and
‘whether there is some countervailing public interest such as to justify overriding the prima facie right’ to confidentiality.\(^2^9\)

In other words, if the answers to the questions ‘is the information confidential information, and was the breach sufficiently serious’ are yes, the court then asks, ‘in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by Article 10’?\(^3^0\)

As a result there have been a number of celebrated cases where 'misuse of private information' has been found. The two leading cases are those involving Naomi Campbell and Max Mosley.

In the *Campbell* case,\(^3^1\) well-known model Naomi Campbell was photographed leaving a rehabilitation clinic, following public denials that she was a recovering drug addict. The majority in the House of Lords held (Lords Nicholls and Hoffman dissenting), that MGN was liable. Lord Hoffman and Lord Nicholls dissented on the ground that, printing the pictures of Naomi Campbell leaving her Narcotics Anonymous meeting was within the margin of appreciation of the editors as they were allowed to state that she was an addict and receiving treatment for her addiction. The majority, however, believed that the picture added something of ‘real significance'.

In the *Mosley* case,\(^3^2\) the former President of the Fédération Internationale de l’Automobile (FIA), Max Mosley, challenged the *News of the World*, which had exposed his involvement in a sadomasochistic sex act involving several female prostitutes. The News of the World published a video of the incident recorded by one of the women and published details of the incident in their newspaper. Mosley claimed that the portrayal of sadomasochistic activities was inherently private in nature and that there had been a pre-existing relationship of confidentiality between the participants. The principal factual dispute between the parties was whether there was any ‘Nazi’ or ‘death camp’ element to the incident. The claimant denied this, as did four of the prostitutes: the lawyers representing Mosley contended that the video represented a ‘standard' S-and-M prison scenario’. On the fourth day of the trial, News Group stated that it would place no further reliance on ‘Woman E’, the prostitute who had recorded the incident and received £20,000 for doing so. The defendant argued that the newspaper's right to freedom of expression should prevail due to the public interest in knowing the individual was involved in Nazi role play and, irrespective of the Nazi element, the public had a right to know, as the individual was the President of the FIA. Mr Justice Eady suggested that equating everything German with Nazism was offensive. His Honour went on to observe that even in cases of adultery, sadomasochistic behaviour was generally not a matter of public interest but that there could be a public interest if the behaviour involved the mocking of Jews or the Holocaust. The court ruled that there was no evidence of a Nazi element to the sex act and Mosley was awarded £60,000.

**Gagging injunctions and super-injunctions**

Even more controversially, the English Courts on a number of occasions granted injunctions restraining media publication of allegedly privacy invasive material on application by a number of high profile plaintiffs.\(^3^3\) In England, as in many jurisdictions, an injunction can be used as a gagging order, in which certain details of a legal case, including identities or actions, may not be published. These orders were initially created to protect people whose lives might be at risk if their details were made public, such as child offenders. Following the *European Convention on Human Rights* entering into UK law, judges began to use these gagging injunctions to cover cases where 'misuse of private information' was alleged. The London tabloid newspapers railed against gagging injunctions and in early 2011 published stories about anonymous celebrities, omitting details that could not legally be published. In April and May 2011, users of non-UK hosted websites, including Twitter, began posting material connecting various British celebrities who had taken out gagging injunctions relating to alleged and titillatingly scandalous activities. Details of the alleged activities by those who had taken out the gagging orders were also published in non-English media, including in Scotland, where the injunctions had no legal force. The English courts sought to control disclosures
about allegedly anonymous celebrities, where the identity of those celebrities become known through other means, through what became informally known as a ‘super-injunction’: an injunction whose existence and details may not be published, in addition to the facts or allegations injuncted. This in turn lead to a broader controversy as to freedom of the press, freedom of speech, online censorship, the effect of European treaties on the UK legal systems and constitutional issues regarding parliamentary privilege and the relation between the judiciary and parliament. A judicial committee led by Master of the Rolls, Lord Neuberger, was constituted and reported\textsuperscript{34} in May 2011 making a number of recommendations and observations, including:

- that the media be given advance notice of any super-injunction to be passed (but not that the media should inform those to whom the allegations refer);
- that contrary to assertions by the media, the judiciary had not created laws independent of parliament (a ‘privacy law’) but that super-injunctions were being used too frequently and should be more time-limited; and
- that reporting of statements made in the House of Commons or Lords, or in parliamentary committee, may not be covered by parliamentary privilege unless it can be proved they were published ‘in good faith and without malice’.

Intriguingly, the Master of the Rolls’ Report made no mention of the internet or social media, and did not include and discussion of how the English courts might propose to enforce injunctions against non-UK publishers and non-UK hosted websites. Commenting on the judicial committee’s report, the Lord Chief Justice, Lord Judge, stated that ways would be found ‘similar to those used against child pornography’ to prevent the ‘misuse of modern technology’, thereby raising further concerns as to possible blocking of internet sites and other forms of online censorship. Lord Judge has also commented on related technological challenges to the legal system such as use of Twitter in court and use of search engines by juries.\textsuperscript{35}

**Damages and costs**

Damages awards in both the New Zealand cases and the English cases have generally been relatively small, notwithstanding the high profile of a number of the English plaintiffs.\textsuperscript{36} But costs awards have been more significant. The plaintiff in *Campbell* was awarded damages of £3,500 and costs of £1.08 million. In *Mosley* the plaintiff was awarded damages of £60,000 and costs of £850,000.

The high costs awards are indicative of the financial costs of pursuing strongly contested privacy actions against the media, which has the practical effect that a private right of action through the courts is of limited practical utility to the vast majority of prospective private litigants. Just as actions for damages for defamation have been increasingly limited to the well-off or those not averse to high stakes litigation risks, so too the costs barrier is likely to limit availability of damages as a remedy to only a small group of prospective privacy litigants.

**Design criteria for the privacy cause of action and associated remedies**

The difficulty then is two-fold:

- **the cause of action**: devising a right of action which addresses the increasing threats to personal privacy while not unduly constraining freedom of expression. Of course, defamation, contempt and privacy causes of action are all restraints upon freedom of expression — the question is how much restraint is too much.

- **the practical remedies**: devising a right of action which provides practical and affordable remedies for aggrieved persons while not chilling development of new media and outlets and opportunities for public discourse.
Much debate centres upon the formulation of the cause of action. There has been relatively little informed debate as to the practicalities of enforcing any new privacy cause of action in a world where private litigation is increasingly denied to the vast majority of prospective litigants and where social media has multiplied the opportunities for invasions of privacy of persons otherwise outside the media spotlight. The debate needs to re-focus towards enhancing quick, practical and cheap remedies, just as defamation law reform has increasingly focussed upon creating the right incentives for media defendants to make an offer of amends, such as prompt publication of a correction or apology.

Has the privacy landscape really changed? The Commonwealth’s *Issues Paper* identified the key technological developments that have changed the context for the protection of privacy in Australian society as including:

- greater access to technology;
- increased connection to the internet;
- faster internet speeds;
- growth in the level of online activity; and
- the expansion of online social networks.

However, there have been relatively few examples of engaged public debate as to privacy rights in Australia as compared to comparable jurisdictions. Why is that so?

Firstly, the Australia has not had a tradition of sensationalist tabloid print media exposés of the personal lives of public figures. Such public discussion as there has been as to print media reporting on the private activities — often in public places — of public figures has generally been as to whether the media should elect to report such matters, not whether those individuals should have a cause of action or as to the need for a cause of action to define the limits of acceptable journalism. There have been remarkably few complaints to the Australian Press Council alleging invasions of privacy of either public figures or private figures, notwithstanding that the Council’s *Statement of Privacy Principles* (that the Press Council will apply in respect of complaints against its members) is more restrictive as to news gathering and use of privacy invasive material than the general privacy law in Australia at present. Intriguingly, commercial current affairs television programs have been significantly more aggressive in privacy intrusive reportage as to both public and private persons, although still significantly more constrained than the London tabloid press. Australian society appears less tolerant of media and public intrusion into private space — intrusions behind the figurative ‘white picket fence’ — than appears to be the case in some other countries. There appears to be a broad public consensus that actions in the private space of ordinary individuals are generally not of legitimate public interest or concern, and a commonly accepted view, if not a consensus, that there is no legitimate public interest in a public figure’s private activities if they bear no relation to the performance of his or her public role, or their competence to perform that role. Of course, such broad statements mask difficult distinctions and boundary lines:

- as to public figures and ordinary individuals;
- between private actions which bear a relation to the performance of a public role and other private actions;
- as to truly public space, and space that is ‘behind the white picket fence’ so to speak. Of course, some private actions occur in public space, with a reasonable expectation that such actions will not be exposed to the world at large.

The difficulty in drawing boundary lines are well illustrated by the distinctions drawn in the *Mosley* case, where a public figure was involved in activities completely unrelated to his public role and
where the court found it necessary to distinguish between an alleged ‘Nazi’ or ‘death camp’ element (in which case freedom of expression would prevail over privacy) and a proven ‘standard’ S-and-M prison scenario’ albeit with Germanic overtones (a private activity). Closer to home, the difficulty is well illustrated by the resignation of former Minister David Campbell from the NSW Government, about the time of a Seven Nightly News expose of the Minster videoed on a public street after leaving a gay club in Kensington. There the ACMA was required to consider whether the report breached clause 4.3.5 of the then relevant Code, which provided that licensees ‘must not use material relating to a person’s personal or private affairs, or which invades an individual’s privacy, other than where there is an identifiable public interest reason for the material to be broadcast’. The then ACMA Guidelines stated that broadcast of private material about a public figure may be considered reasonable where ‘the person has actively drawn media attention to material that would usually be considered private, and can thus be held to have consented to its broadcast’. Although the ACMA found that the Minister had not taken any step prior to the broadcast that might be construed as consent to broadcast, or otherwise drawing attention to his personal or private affairs, the ACMA concluded that ‘a relevant and legitimate public interest arose’ as a result of a number of factors, being: existing public criticism of the Minister, prior questioning as to his performance in discharge of his office, his ‘sensitive public role’ (as Minister for Transport and Roads), the suddenness of his resignation and ‘the lack of insight that his explanation (‘for personal reasons’) provided as to his resignation’.

The ACMA’s findings might be considered an appropriate application of a Code provision which did not require a determination that the public interest in freedom of expression out-weighed Mr Campbell’s right to privacy, instead requiring the finding of ‘an identifiable public interest reason for the material to be broadcast’. However, it does seem a remarkable outcome that private gay sexual inclinations of a Minister who had not actively asserted his heterosexuality, had not improperly used public resources in his private activities, and discharging a public role that had nothing to do with his personal sexual preferences, should be of sufficient ‘relevant and legitimate public interest’ to outweigh personal privacy. It also seems remarkable that a failure to provide an explanation beyond ‘personal reasons’ for a resignation that was perhaps precipitated by disclosure should be a justification for exposing the nature of those personal reasons. In the writers’ view, a different result might well have been reached if the ACMA had been called upon to apply a balancing test, such as that required to be used under the European Convention and used in the Mosley case.

Whatever test is adopted, the determination of boundary lines should be acknowledged as difficult and contentious. Lawmakers should be cautious to attempt to define bright lines which are not flexible to adapt to changing community attitudes and values and which have the potential to chill public discourse and debate. Lawmakers should be even more cautious at placing distribution platforms such as social media sites at legal jeopardy by requiring the providers of these platforms to attempt to determine privacy complaints made in relation to user postings. The jurisprudence in this area is clearly unsettled, contentious and still developmental. In its Stage 3 Report, the New Zealand Law Commission (NZLC) recommended, among other things, that the tort of invasion of privacy, as recognised by the New Zealand Court of Appeal in Hosking v Runting [2005] 1 NZLR 1 (CA), be left to develop at common law. The NZLC reasoned that the common law, rather than a statutory cause of action, was better suited to dealing with the particular circumstances of privacy cases. Further, it was noted that the elements of a statutory cause of action would need to be broadly drafted to ensure its ongoing relevance and that such a broad construction may be ‘little advance on the common law position’. Interestingly, the NZLC also noted that a clear majority of submissions preferred the common law status quo and that there was ‘certainly no cry for codification’. In our view, the analysis by the NZLC should rightly be taken into account by the Australian Governments in considering any statutory cause of action: New Zealand has been something of a pioneer on protection of personal privacy, and legal analysis in both Australia and New Zealand is largely unaffected by convention or constitution (convention fundamentally shapes European court
decisions as to personal privacy, and constitution the decisions of courts in the United States).

Further, we venture to suggest that there is a close cultural affinity of Australia and New Zealand as to public expectations of respect for personal privacy. In summary, there is a significant risk that statutory definition of the elements of a cause of action and associated penalties and remedies would be overtaken by developing public concerns or international norms, thereby creating a substantial mismatch between Australia and comparable jurisdictions and potentially damaging development of Australian professional media and social networking and blogging internet sites and services. There is also a significant risk that the armoury of remedies available to a court finding in favour of a plaintiff will be used to over-reach, as has clearly been the case in the grant of allegedly dozens of super-injunctions in the United Kingdom to ban newspapers from printing stories about celebrities’ sex lives.

Second, where there has been a real question as to the appropriate limits to reportage or commercial intrusion into private space, either concern by the alleged infringer as to public outcry and opprobrium, or actual public pressure for an appropriate response to an alleged excessive intrusions into personal privacy, has generally functioned to cause effective, prompt and adequate remedial action. Examples include the planting of electronic bugs outside Nicole Kidman’s home, the circulation of photographs of Laura Bingle and the publication of photographs alleged to be Paula Hanson in lingerie. In each case there has been swift and extensive media analysis and comment, and expressions of public concern followed by remedial action. Occasionally concern is expressed as to the absence of legal mandate upon operators of social networking sites to address alleged serious invasions of privacy. However, in many such cases the alleged invasion of privacy has not been readily apparent: often there has been a need for detailed input from a complainant to understand and evaluate the basis for an allegation of infringement of privacy and whether remedial action is required. Further, in the case of publication of seriously privacy invasive material on Facebook and the other leading social media sites, the operators of those sites are generally outside Australia. Leading social media sites have progressively developed capabilities, systems and global policies to promptly address alleged infringements of personal privacy of Australian individuals.

Third, the few Australian reported cases in this area are of such egregious invasions of privacy that judges have not been called upon to make fine distinctions as to the appropriate boundary lines between private activities and matters of legitimate public interest. Fine distinctions require careful consideration of the appropriate boundary in terms of public legitimate interest in a legal environment where ‘rights’ of freedom of expression in the media are not given legal substance outside the narrow field of freedom of political discourse. By contrast, the English jurisprudence has developed within the operation of the European Convention on Human Rights, which has been interpreted to require a balancing of a claimant’s right under Article 8 to respect for confidence as to private life and a publisher’s right under Article 10 to freedom of expression. That balance has been difficult to find both as to the substantive elements of the cause of action, leading to application of proportionality analysis, (i.e. whether the potential for the disclosure to cause harm outweighed the public interest in freedom of expression) and debate as to remedies.

The debate is most acute in relation to the use of interim ‘super-injunctions’ to restrain publication: for example, should a conventional balance of convenience test be applied to the grant of interim injunctions restraining publication of allegedly privacy invasive material, or is this too chilling of public discourse? The experience of the English courts in granting super-injunctions that significantly constrained the reporting as to facts about behaviour in public space of private individuals shows how even a regime based upon a statutory mandate to balance a claimant’s right to respect for confidence as to private life and a publisher’s right to freedom of expression may lead to a chain of decisions that, upon independent judicial review, were found to be excessively chilling of media expression. As Australia has no judicial or statutory protection of freedom of expression (beyond the narrow political discourse doctrine), there is a real likelihood that creation of a statutory cause of action for serious invasion of privacy may chill freedom of expression of journalism and professional media and non-professional media and semi-public discourse through blogging, social
networking and other internet sites and services. Further, the potential operation of a statutory cause of action for serious invasion of privacy and remedies, including injunctive relief, in conjunction with the extensive operation of defamation law needs to be considered. There is already a case to be made that Australian defamation law overreaches the appropriate bounds of freedom of expression and requires reform to reduce its chilling effect upon media expression.

In summary, reasonable conclusions may be:

- that there is not a pressing, present requirement for introduction of a statutory cause of action for serious invasion of personal privacy;
- that introduction of a statutory cause of action has the potential to seriously chill non-political public and semi-public discourse and media expression, without fulfilling a current need that is not already addressed either through the impact of public outcry and opprobrium, the activities of the Office of the Australian Information Commissioner, the Press Council and the ACMA, the self-regulatory activities of major international operators of user generated content and social networking sites, or other available causes of action;
- that the introduction of a statutory cause of action for serious invasion of privacy is much more likely to stifle freedom of the media in Australia through the suit of rich individuals than to provide an avenue of redress for the vast majority of Australians who are without sufficient means to institute private legal proceedings. Any cause of action would need to include significantly discretionary and inherently subjective proportionality and balancing factors, both in respect of the seriousness of any invasion of privacy and the balancing of other factors including freedom of expression; and
- available remedies should preclude the grant of interim injunctions or define an appropriately high hurdle to deter growth of super-injunctions.

The above noted, a well crafted statutory cause of action may:

- create certainty,
- prevent over-reaching of any developing common law jurisprudence as to privacy,
- ensure national uniformity of the law as to serious invasion of personal privacy,
- allow for rationalisation of a range of inconsistent Federal, State and Territory laws governing listening devices and unlawful surveillance; and
- make available affordable, practical remedies for prospective claimants, and

However, any such cause of action would also need to provide appropriate safe harbours to protect secondary publishers from liability where they are not actually aware that third party content available through their secondary publication would amount to a serious invasion of personal privacy. Modes of secondary publication include publication in social media such as social networking sites, user generated content sites, or user comment or user feedback spaces on other internet sites.

If a statutory cause of action for invasion of privacy is to be created, the cause of action and associated remedies needs to meet the following objectives:

- address those cases and situations where there has been a serious invasion of personal privacy for which public outcry and opprobrium followed by remedial action to address that outcry and opprobrium, or other available remedies, are insufficient;
- ensure that appropriate consideration of the countervailing legitimate public concern with freedom of expression is integral to establishment of the cause of action;
provide uniform national operation, by covering the field and overriding inconsistent State and Territory statute and common law, including tort law and laws governing listening devices and unlawful surveillance, within the ambit of the cause of action;

- not increase, and preferably reduce, the complexity of regulation;

- availability to Australian individuals, including those of limited means, on an equitable and cost effective basis;

- leverage the experience, skills and processes of existing institutions and experienced bodies such as the Privacy Commissioner and Press Council to the extent reasonably practicable to facilitate availability of remedies to Australian individuals of limited means of cost effective remedies;

- appropriately couple internet user education as to acceptable public and semi-public discourse, so that restrictions imposed on professional journalism are not simply circumvented and rendered ineffective by publication on non-professional public and semi-public internet sites based within Australia, or international internet sites that are not readily susceptible to Australian jurisdiction and court orders;

- not undermine the incentives for providers of social networking platforms, or other internet sites where non-professional comment or material may be hosted, to progressively continue to develop capabilities, systems and global policies to promptly address on a responsive, case by case basis, alleged infringements of personal privacy of Australian individuals and take appropriate remedial action. Those incentives are likely to be heightened by qualified or conditioned safe harbours that support responsive, case by case, action, than any blanket causes of action that diminish the incentive of the service provider to develop knowledge in a particular case and to take, or facilitate the taking by an uploader of, appropriate remedial action; and

- create barriers to the growth of ‘super-injunctions’ or other remedies that would unduly chill freedom of media expression.

A difficulty in the current debate is that we do not yet know the full armoury of powers and enforcement options that will be available to the Privacy Commissioner under the Privacy Act as that Act will be substantially replaced following the current consultations. The current review appears to be too early in the staged consideration of a new privacy regime. Given the relatively few privacy complaints made under current Codes, there does not appear to be a case of accelerating consideration of the cause of action ahead of working out detail as to the Privacy Commissioner’s investigation powers and the enforcement regime for the new privacy regulatory framework.⁴⁶

A public interest?

As noted above, the few Australian reported cases in this area are of such egregious invasions of privacy that judges have not been called upon to make fine distinctions as to the appropriate boundary lines between private activities and matters of legitimate public interest. The ACMA’s determination in the David Campbell case may well be the exception where such a fine distinction was required to be drawn, and was drawn applying a test that was not optimal. The fine boundary line distinctions are even more important when one moves outside news reporting by professional journalists regulated by Codes to consider the creation of a right of privacy in relation to non-professional, often robust at best and inflammatory at worst, postings to social networking sites and many other new media applications.

There have been statements of concern in the media about intrusions upon children’s privacy by re-use of material posted about them (or even by the child that is the subject) on Facebook and other social networking sites by reporters using such material in news reports, or by other ‘non-media’ uses by persons that are not reporters, such as in blogs or by employers to vet prospective employees. However, these statements of concern have rarely translated into calls for greater legal
protection of personal privacy. It is possibly the case that ‘it is all too early’, but it also appears to be the case that many infractions are addressed by the posting party taking down the content without formal request to the network operator for takedown. In addition, when complaints or concerns have been escalated to the operators of more popular social networking sites, those operators appear often to have exercised take-down discretions in relation to Australian postings, notwithstanding availability of broad safe harbours for operators that operate from the U.S.A. under provisions such as section 230 of the *Communications Decency Act*. Social networking has not yet generated sufficient concern in a broad consistency as to amount to significant public pressure for a statutory cause of action for breach of personal privacy. It may be reasonably asked: if the public pressure is not there for a solution, is there a problem that is now to be fixed?

The counter view is that the current Federal statute, the *Privacy Act 1988*, is too narrowly focussed to address both growing media interest in ‘human interest’ stories and public concern about social networking internet applications. As to the latter, it is suggested that personal material about an individual that is posted to a social networking or other user generated content site may be impossible to effectively pull-down (as a result of operation and availability of historical web trackers and archives), may not be pulled down at the request of the affected individual or their parent or guardian, and that this material may be used in a manner that is not contemplated by the subject when the information was posted. The example that is commonly cited is where a minor — say, a twelve year old — posts material about himself, herself or a friend or social rival to a social networking site and ten years later that material is exhumed by the prospective employer when that subject applies for employment, or by the public media when that subject (for any reason, however unrelated) comes into the public eye. Today, news reports of individuals that have been caught up in disasters or calamities are often accompanied by images or so-called human interest background information hauled up by a reporter’s trawl of social networking sites. There have been instances of some reporters seeking to become a friend of a Facebook user or that user’s friends in order to secure details for a human interest story about a data subject. Many parents are concerned that their children will never understand the need to protect their privacy until it is too late. Some parents are concerned that privacy-invasive material about their children will not be taken down by an operator of a social networking site if they so request, and that in the absence of a clearly articulated legal right of privacy, some less responsible operators of social networking sites may simply ignore reasonable requests for privacy invasive material to be pulled down.

**Law Reform Commissions and a statutory cause of action**

There have also been a number of parliamentarians with an active and continuing interest in privacy policy and issues. These politicians, a number of prominent academics and privacy advocates and advocacy organisations, have advocated law reform to create a legal right of protection of personal privacy.

As a result of this advocacy, two Law Reform Commissions in Australia — the (Federal) Australian Law Reform Commission (ALRC) and the (State of) New South Wales Law Reform Commission (NSWLRC) — were briefed to report as to whether there should be a legal right of protection of personal privacy and if so, what form that protection should take. These Commissions released consultation papers and conducted public enquiries and each has now formulated a statutory cause of action for invasion of privacy in Australia. The two Law Reform Commissions developed their recommendations by reference to the interim reports of each other — the draft reports of each Commission are cited in the final report of the other. As the NSWLRC was the last to release its final report, the NSWLRC’s final report includes a detailed discussion as to the ALRC’s reasoning and conclusions. It is therefore interesting to note that there are important and stark differences between their respective formulations of the statutory cause of action, notwithstanding that the NSWLRC’s explanations as to the differences seek to downplay the extent of those differences between the respective Commission’s conclusions.
In the writers’ view, the recommendations of the NSWLRC (if implemented) would effect a substantial expansion of the rights of individuals to protection of privacy over both the position at common law and the recommendations of the ALRC. The writers suggest that the recommendations of the NSWLRC (if enacted) would significantly lower the bars both as to what is private and what is an invasion of privacy that would entitle an affected individual to obtain legal relief.

In any event, the writers consider that, to the extent that the Federal Parliament can exercise Constitutional authority to cover the field of protection of personal privacy, Federal legislation and administration by a Federal Privacy Commissioner is strongly preferable to a State and Territory based approach, whether the latter was in the form of uniform statutes in each State and Territory or not. The internet enabled new media is global, and the audience for most electronic media including online newspapers is at least national. To the extent that a statutory cause of action is considered desirable, there is a compelling case for Federal legislation.

Four contending visions

The NSWLRC’s final report is about 100 pages in length and includes a draft Bill that if accepted by the NSW Government and enacted by the NSW Parliament would enact the NSWLRC’s suggested statutory cause of action and exclude the common law. Although the NSWLRC provided its final report to the then NSW Government in April 2009, the report was not released by Government until 14 August 2009 and neither the then or new NSW Government has stated its intentions in relation to this review.

The ALRC report, at 2500 plus pages, covers many privacy topics. The discussion and recommendations of the statutory tort appears in the final chapter, Chapter 74.

The Commissions substantially differ as to the formulation of that cause of action. The NSWLRC underplays the extent of the differences between the Commissions in its commentary on the ALRC’s recommendations, but the differences are significant. However, close analysis suggests that any implementation of the NSWLRC’s formulation would result in a significant expansion of the statutory tort over the recommendations of the ALRC and the nascent tort of invasion of privacy as that tort is tentatively developing in Australia.

Following the completion of the ALRC and NSWLRC’s inquiries, the Victorian Law Reform Commission (VLRC) handed down its report Surveillance in Public Places. As at the date of writing (November 2011) the Victorian Government had not formally responded to the VLRC’s recommendations.

Drawing upon both the recommendations of the ALRC and NSWLRC, the VLRC recommended the introduction of two statutory causes of action dealing with serious invasions of privacy caused by the misuse of surveillance in a public place. The first cause of action would deal with serious invasions of privacy by misuse of private information. According to the VLRC, this cause of action is primarily concerned with the use, or rather misuse, of private information rather than how it is gathered or received. The second cause of action would deal with serious invasions of privacy by intrusion upon seclusion or spatial privacy. Its concern is with the surreptitious use of surveillance devices to view ‘parts of a person not open to public gaze’ or to monitor conduct that a person believes to be private.

The VLRC’s causes of action are, in some respects, hybrids of the approaches adopted by the ALRC and NSWLRC. For example, the elements of the two VLRC’s causes of action are similar to the ALRC formulation in that they include an objective test as to whether a reasonable person would find the defendant’s conduct to be ‘highly offensive’. The VLRC departs from the ALRC, however, in not expressly excluding negligent acts from the conduct that might fall within the causes of action. This is consistent with the approach adopted by the NSWLRC.
However, the VRLC departs from both the ALRC and NSWLRC position in relation to the manner in which the public interest is to be considered. Rather than including a consideration of the public interest in the elements of the causes of action, the VLRC recommends the creation of a specific public interest defence to the cause of action, reasoning that the defendant should bear the burden of proof as to whether there is countervailing public interest at play.

At the same time as these Commissions have been active in Australia, the New Zealand Law Commission (NZLC) sought public comment on a comprehensive Issues Paper Invasion of Privacy: Penalties and Remedies. The NZLC released its report in four stages, with the publication of its 4th and final report on 2 August 2011. As already noted, in its stage 3 report the NZLC recommended, among other things, that the tort of invasion of privacy be left to develop at common law. The NZLC reasoned that the common law, rather than a statutory cause of action, was better suited to dealing with the particular circumstances of privacy cases. Further, it was noted that the elements of a statutory cause of action would need to be broadly drafted to ensure its ongoing relevance and that such a broad construction may be little advance on the common law position.

Do the State Commissions’ views really matter?

In a word, ‘yes’. Statutory protection of privacy of personal information in Australia today is principally through a Federal statute, the Privacy Act 1988. A new, national approach to creation of a statutory cause of action for invasion of privacy could be taken in either of two ways: federal legislation which ‘covers the field’ and thereby displaces any operation of inconsistent State and Territory legislation and the common law; or a ‘cooperative Federalist approach’ with each State and Territory enacting similar statutes. The NSWLRC appears to contemplate the latter, using its suggested legislation as the template for statutes in each State and Territory. The VLRC proposes introduction of specific surveillance offences under Victorian law. Although there continues to be a strong push from the States and Territories towards a cooperative Federalist approach and against ‘centralism’, it is fair to say that State and Territory based legislation is a cumbersome mechanism. For example, the NSWLRC recommends that the Civil Liability Act 2002 (NSW) be amended to provide a cause of action for invasion of privacy. The corresponding legislation to the Civil Liability Act 2002 (NSW) in other States and Territories already differs in significant respects, and accordingly any ‘uniform implementation’ would probably start from non-uniform enabling legislation. It is also reasonable to state that the history of State and Territories first agreeing to uniform statutes, and then maintaining that uniformity over time, is not encouraging. The exigencies of State politics inevitably create pressures for divergence — perhaps because the data subjects whose personal activities are in the media are often State parliamentarians.

Regardless of whether one is an advocate of cooperative Federalism or of the Commonwealth ‘covering the field’ to the exclusion of the State and Territory legislatures, the recommendations of the NSWLRC may well influence the development of any Commonwealth legislation. Notwithstanding the Federal Government’s commitment to commence a public consultation process, it has not committed to implementation of the statutory cause of action at all, or any particular formulation, and may well re-formulate the action before instructing Parliamentary Counsel to draft legislation.

Key differences in the findings of the Commissions

Both the ALRC and the NSWLRC argue that certain actions in public places are entitled to privacy protection. Neither expressly refers to whether the action takes place in a public or private place in the formulation of the statutory right.

In considering why the statutory cause of action was necessary, both Commissions noted the dangers of judge made law being driven to find solutions to gross privacy violations and the further problem of lack of predictability as to future cases. Both Commissions also noted the advantage of a
clearly formed statutory formulation that is based upon general principles that recognise the need to balance freedom of expression against protection of personal privacy. The ALRC expressly considered the issues that can be associated with user generated content or social networking sites, where content is sometimes posted by users that may be regarded as invading the personal privacy of other people that have not consented to the posting of material about them: the ALRC referred to research indicating that there are at least 100 websites that contain images of people caught showering or undressing. The ALRC suggested that there were practical limitations in ‘using ‘take-down’ notices where a person is posting information on the internet in a personal capacity’ and suggested that ‘the utility of establishing an Australian take-down notice scheme is also questionable, given the ease of moving internet content to a website hosted in another jurisdiction. In these cases, [the ALRC suggests that] a more appropriate remedy would be available through a statutory cause of action for a serious invasion of privacy’. The NSWLRC did not expressly consider use of the internet and the utility of take-down notices in the discussion in its report as to the rationale for its recommendation as to introduction of the statutory cause of action.

The NSWLRC recommendations are wider than the ALRC recommendations in at least the following respects:

- The ALRC argues that for the purpose of establishing liability under the statutory cause of action for invasion of privacy, a claimant must show that in the circumstances (a) there is a reasonable expectation of privacy; and (b) the act or conduct complained of is highly offensive to a reasonable person of ordinary sensibilities. The NSWLRC would only require that the individual was reasonably entitled to expect privacy in all of the circumstances having regard to any relevant public interest (including the interest of the public in being informed about matters of public concern). It should be noted that the NSWLRC suggests that, in practice, the difference in the formulations is unlikely to be material: a Court may well determine that in applying the public interest balance, an individual was only reasonably entitled to expect protection of privacy where the invasion of her or his privacy was so egregious that it was ‘highly offensive’. The NSWLRC nevertheless thought that the specific ‘superaddition’ of the requirement for the invasion to be ‘highly offensive’, as well as there being a reasonable expectation of privacy, was superfluous and confusing and may prompt a Court to set the bar too high.

- The ALRC formulation would require the court to take into account whether the public interest in maintaining the claimant’s privacy outweighs other matters of public interest (including the interest of the public to be informed about matters of public concern and the public interest in allowing freedom of expression). The NSW formulation is ‘privacy that the individual was reasonably entitled to expect in all of the circumstances having regard to any relevant public interest, including the interest of the public in being informed about matters of public concern’.

- The ALRC recommendation is that the cause of action only arise in relation to an intentional or reckless act by a respondent. Simple negligence would not suffice. The ALRC does not state who should bear the onus of establishing intention or recklessness. This leads to the question: would the applicant carry the affirmative burden, or would absence of intention or recklessness be a defence that must be established by the respondent if the applicant was successful in establishing an invasion of privacy? By contrast, the NSWLRC formulation would require the Court to form a view as to whether the invasion of privacy outweighed all other matters of public interest.

- The ALRC recommendation is that the cause of action only arise in relation to an intentional or reckless act by a respondent. Simple negligence would not suffice. The ALRC does not state who should bear the onus of establishing intention or recklessness. This leads to the question: would the applicant carry the affirmative burden, or would absence of intention or recklessness be a defence that must be established by the respondent if the applicant was successful in establishing an invasion of privacy? By contrast, the NSWLRC recommendations do not require any fault element: the NSWLRC states that this matter is ‘appropriately left to development in case law’, noting further (at paragraph 5.56) that ‘while our view is that liability will generally only arise under the legislation [being the draft Bill that the NSWLRC proposes] where the
defendant has acted intentionally, there may be circumstances where a defendant ought to be liable for an invasion of privacy that is, for example, reckless or negligent — as where a doctor is grossly negligent in disclosing the medical records of a patient’. As the example is in any event an example of recklessness that would be within the ALRC formulation, the reasoning for the NSWLRRC in broadening the action further does not appear to be justified.

- The issue of intention also arises because the NSWLRRC proposes an ‘innocent disseminator’ defence. This does not become necessary for consideration in relation to the ALRC formulation as intention or recklessness would be a necessary part of the cause of action. The NSWLRRC proposes that this defence is framed in similar terms to the corresponding defence to defamation actions, enacted in New South Wales as section 32 of the Defamation Act 2005. To establish this defence, the respondent must establish that (1) it published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor, and (2) the defendant neither knew, nor ought reasonably to have known, that the publication of the matter constituted an invasion of privacy, and (3) the defendant’s lack of knowledge was not due to any negligence on the part of the defendant. All three elements would need to be proved by a respondent, including absence of (simple) negligence and that it ‘ought [not] reasonably to have known’. This is a high hurdle for an innocent disseminator and hardly a reliable ‘safe harbour’. Firstly, many relevant electronic publications through web 2.0 applications made available by a defendant would not be subordinate distribution by that defendant: the operation of a social networking site or provision of a blog might be said to be an act of first or primary distribution and accordingly not within the defence at all. Secondly, even where the defendant is a subordinate distributor, simple negligence may be asserted through failure to monitor or otherwise act pro-actively to ensure that defamatory matter was not posted to a social networking site or a blog, negating the defence. Of course, negligence must be more than ‘mere inadvertence’. However, actionable negligence is often found in circumstances where a respondent was not aware that a particular event may occur or had occurred but on reasonable diligence the defendant could have taken reasonable steps to reduce the possibility of occurrence of the event, including by placement of a warning notice, appropriate education, monitoring, blocking or implementation of other risk mitigation strategies.

- Both Commissions argue that express or implied consent of the person whose personal privacy had been invaded should defeat the claim to invasion of privacy. However, express or implied consent is formulated as a defence in NSWLRRC, and therefore the onus would be on the defendant to establish express or implied consent of the person whose personal privacy had been invaded. By contrast, under the ALRC formulation any consent to publication — for example, by the data subject uploading the content to a public place, or engaging in an activity in a public place (in the knowledge or with the expectation that it would be observed) — would be relevant to whether the data subject could later claim that he or she had ‘a reasonable expectation of privacy’. Although a plaintiff would not have an affirmative burden of proof that he or she had not consented to the publication, any electronic posting by that person of relevant material to a public website would clearly be relevant to consideration of whether that individual had a reasonable expectation of privacy.

- The menu of remedies that the ALRC recommend to be available to a Court to award a successful applicant includes an order requiring the defendant to apologise to the claimant and/or publication by the respondent of a correction order. The NSWLRRC do not include these remedies ‘on the menu’, although noting in the list of factors to be taken into account by a court in determining whether an individual’s privacy has been invaded by the conduct, ‘the conduct of the individual and of the alleged wrongdoer both before and after the conduct concerned (including any apology or offer to make amends made by the alleged wrongdoer)’. So any action taken by a defendant facing a claim of invasion of privacy to address the ill by apologising to the claimant or publishing a correction order or both may affect both successful prosecution of the cause of action by the plaintiff and availability of a remedy to the plaintiff.
The recommendations of the Commissions as to the statutory cause of action for invasion of privacy are another important development in the march towards a broadening of protection of individuals from privacy intrusive activities by others. The potential breadth of operation of the New South Wales recommendations is of particular note and represents a new high water mark for privacy advocates, significantly more protective of personal privacy than the law in any comparable jurisdiction. The writers consider that these recommendations should be regarded with caution and concern. We have already noted the apparent absence of any significant electorate interest in better privacy protection through implementation of expanded rights of action, notwithstanding the recent and highly publicised incidents of phone hacking in the UK and the continuing demands of privacy advocates for increased protection of personal privacy. The case has not been made to fundamentally change the rules for dealing with serious invasions of personal privacy or for otherwise lowering the bar in the manner suggested by the New South Wales Law Reform Commission.

An alternative vision

The writers’ suggest an alternative vision for consideration. In outline, the alternative vision is as follows:

- Instead of a court enforceable private right of action, an individual is entitled to make a complaint to the Australian Privacy Commissioner in respect of publication of subject matter where in all the circumstances there is a reasonable expectation of privacy of that individual and the act or conduct complained of is highly offensive to a reasonable person of ordinary sensibilities.

- A right of an individual, public or private, to privacy in respect of their personal affairs should be balanced against consideration of legitimate public concern: if legitimate public concern outweighs a reasonable expectation of privacy of that individual, freedom of expression should prevail, unless the publication is malicious or manifestly excessive.

- The Australian Privacy Commissioner is also empowered to institute ‘own motion’ investigations in respect of publication of subject matter where in all the circumstances there is a reasonable expectation of privacy of one or more individuals and the act or conduct complained of is highly offensive to a reasonable person of ordinary sensibilities, regardless of whether a complaint is lodged by an affected individual or not.

- The Australian Privacy Commissioner is empowered to accept and accredit published privacy complaint handling codes from industry representative bodies (i.e. the Australian Press Council or analogous body) and published privacy complaint handling protocols or procedures from individual media publishers and providers of distribution platforms.

- The Australian Privacy Commissioner exercise regulatory forbearance in respect of handling of complaints under accredited codes or accredited complaint handling protocols or procedures unless and until the Australian Privacy Commissioner forms the view (either following complaint or of own motion) that the complaint is not being appropriately addressed in accordance with the accredited code or accredited complaint handling protocol or procedure.

- A safe harbour should also extend to action taken in good faith in compliance with an accredited code or accredited complaint handling protocol or procedure.

- Providers of social networking platforms or other internet sites where non-professional comment or material may be hosted should have a safe harbour in respect of material posted by third parties on those platforms or sites. Clause 91 of Schedule 5 to the Broadcasting Services Act is a useful model, subject of course to the safe harbour provision extending to privacy law.

- The Australian Privacy Commissioner institutes a user education program as to invasion of personal privacy, in consultation with stakeholders.
The fact that ‘own motion’ investigation or investigation of a complaint has been instituted by the Australian Privacy Commissioner, and the identity of the person complained of, to be public, subject to redaction or ‘anonymising’ as reasonably required to protect any individual’s privacy.

Determinations by the Australian Privacy Commissioner to be public, but these determinations may be subject to redaction or ‘anonymising’ as reasonably required to protect any individual’s privacy.

The Australian Privacy Commissioner is empowered to investigate and resolve privacy complaints, and enforce determinations (including by application to a Court for imposition of civil penalties) in the manner outlined by the Federal Government in its First Stage Response.54

The Office of the Australian Information Commissioner in its annual report express the Australian Privacy Commissioner’s views as to the adequacy of codes and dispute handling protocols and procedures both in respect of their operation in respect of covered organisations and gaps in coverage.

The Office of the Australian Information Commissioner report to the Federal Parliament in three years time as to whether the framework has operated satisfactorily and as to whether a civil right of action enforceable in the courts should be considered.

The above framework has uniform national operation by covering the field and overriding inconsistent State and Territory statute and common law, including tort law and laws governing listening devices and unlawful surveillance, within the ambit of the framework.

This paper expresses the personal views of the authors and does not state the views of Gilbert + Tobin Lawyers or any client of Gilbert + Tobin Lawyers.

Background to ALRC and the NSWLRC proposals for a statutory cause of action for invasion of privacy in Australia

Extracts from the reports

ALRC reasoning — some key extracts

‘74.117 Individuals should be protected from unwanted intrusions into their private lives or affairs in a broad range of contexts, and it is the ALRC’s view that a statutory cause of action is the best way to ensure such protection.

74.124 Circumstances giving rise to the cause of action should not be limited to activities taking place in the home or in private places. Clear lines demarcating areas in which privacy can be enjoyed should not be drawn in advance, since each claim will have to be judged in its particular context. The appropriate test is whether the circumstances give rise to a reasonable expectation of privacy, regardless of whether the activity is in public or private.

74.134 In DP 72, the ALRC expressed concern that adopting the phrase ‘highly offensive to a reasonable person of ordinary sensibilities’, used by Gleeson CJ in Lenah Game Meats, [185] may be too high a threshold, and suggested that the test should be whether the act in question was ‘sufficiently serious to cause substantial offence’. [186]

74.135 After further consultation and reflection, however, the ALRC now accepts that the higher bar is preferable for the statutory cause of action. Setting a high threshold to establish a serious invasion of privacy is consciously intended to ensure that freedom of expression is respected and not unduly curtailed in the great run of circumstances — the cause of action only will succeed where the defendant’s conduct is thoroughly inappropriate and the complainant suffered serious harm as a result. This formula also offers a number of other advantages, including simplifying the law and
providing courts with some guidance on its application — particularly given that the statutory test will be consistent with developments in the common law in Australia and New Zealand.

74.142 In Chapter 11 [of the ALRC’s Report], the ALRC discusses the many submissions this Inquiry received about the permanence of personal information published on the internet by individuals. As well as sites such as Facebook and YouTube, where individuals can post photographs or videos, there are at least 100 websites that contain images of people caught showering or undressing. The ALRC notes the limitations of using ‘take-down’ notices where a person is posting information on the internet in a personal capacity. The utility of establishing an Australian take-down notice scheme is also questionable, given the ease of moving internet content to a website hosted in another jurisdiction. In these cases, a more appropriate remedy would be available through a statutory cause of action for a serious invasion of privacy.

74.145 The ALRC agrees with the APC that the public interest in allowing freedom of expression is an essential criterion to be used to determine ‘the balance between privacy rights for individuals and the public’s right to the free flow of information on matters of public concern’.

74.147 Rather than attempt to protect other rights through a defence, the ALRC agrees it would be better in principle and in practice to add an additional element to the cause of action for a serious invasion of privacy. This would ensure that privacy interests are not privileged over other rights and interests.

74.164 The ALRC agrees with the NSWLRC, and recommends that the fault element of the cause of action for invasion of privacy should be restricted to intentional or reckless acts on the part of the respondent.

74.186 For the reasons outlined in Chapter 3, the ALRC considers that the federal government has the constitutional power to enact a statutory cause of action for serious invasion of privacy, to the exclusion of state and territory legislation. The federal government could decide, however, to include a provision that provides that the federal Act is not intended to exclude or limit the operation of a law of a state or territory that is capable of operating concurrently with the federal Act. If the latter policy option prevails, it is essential to ensure that the states and territories enact uniform legislation. Failure to do so would give rise to the fragmentation and inconsistency that has characterised the regulation of information privacy to date.'

The ALRC recommendations

ALRC Recommendation ‘74–1 Federal legislation should provide for a statutory cause of action for a serious invasion of privacy.

The Act should contain a non-exhaustive list of the types of invasion that fall within the cause of action.

For example, a serious invasion of privacy may occur where:

(a) there has been an interference with an individual’s home or family life;
(b) an individual has been subjected to unauthorised surveillance;
(c) an individual’s correspondence or private written, oral or electronic communication has been interfered with, misused or disclosed; or
(d) sensitive facts relating to an individual’s private life have been disclosed.

ALRC Recommendation 74–2 Federal legislation should provide that, for the purpose of establishing liability under the statutory cause of action for invasion of privacy, a claimant must show that in the circumstances:

(a) there is a reasonable expectation of privacy; and
(b) the act or conduct complained of is highly offensive to a reasonable person of ordinary sensibilities.
In determining whether an individual’s privacy has been invaded for the purpose of establishing the cause of action, the court must take into account whether the public interest in maintaining the claimant’s privacy outweighs other matters of public interest (including the interest of the public to be informed about matters of public concern and the public interest in allowing freedom of expression).

**ALRC Recommendation 74–3** Federal legislation should provide that an action for a serious invasion of privacy:

(a) may only be brought by natural persons;
(b) is actionable without proof of damage; and
(c) is restricted to intentional or reckless acts on the part of the respondent.

**ALRC Recommendation 74–4** The range of defences to the statutory cause of action for a serious invasion of privacy provided for in federal legislation should be listed exhaustively. The defences should include that the:

(a) act or conduct was incidental to the exercise of a lawful right of defence of person or property;
(b) act or conduct was required or authorised by or under law; or
(c) publication of the information was, under the law of defamation, privileged.

**ALRC Recommendation 74–5** To address a serious invasion of privacy, the court should be empowered to choose the remedy that is most appropriate in the circumstances, free from the jurisdictional constraints that may apply to that remedy in the general law. For example, the court should be empowered to grant any one or more of the following:

(a) damages, including aggravated damages, but not exemplary damages;
(b) account of profits;
(c) an injunction;
(d) an order requiring the respondent to apologise to the claimant;
(e) a correction order;
(f) an order for the delivery up and destruction of material; and
(g) a declaration.

**ALRC Recommendation 74–6** Federal legislation should provide that any action at common law for invasion of a person’s privacy should be abolished on enactment of these provisions.

**NSWLRC reasoning — some key extracts**

5.9 We do not support the particular qualification of the reasonable expectation of privacy test adopted by the New Zealand Court of Appeal and endorsed by the ALRC.

5.11 More fundamentally, we regard any qualification of the ‘reasonable expectation of privacy’ test as unwarranted in principle. The determination of an invasion of privacy must frequently be made in factual situations that require the privacy interest in question to be weighed in the balance against competing interests ... The fact that a reasonable person of ordinary sensibilities would consider the conduct offensive is a factor relevant to that determination, as cl 74(3)(a)(ii) of the draft Bill makes clear. A plaintiff whose reaction to the defendant’s conduct arose principally out of undue sensitivity to that conduct would simply not, in our view, generally be able to show that a reasonable person of ordinary sensibilities would find the conduct offensive in the circumstances, and thus to establish a reasonable expectation of privacy. Such conduct would not support a claim for invasion of privacy because it would be ‘trivial in nature’.
5.10 To underline this, we point out that we agree with the ALRC that the following are cases in which a plaintiff should be able to mount a claim for invasion of privacy, yet we reach that conclusion without having to rely on the ‘highly offensive’ qualification …

5.12 An argument, made in a number of submissions, is that the introduction of a statutory cause of action for invasion of privacy would have precisely the effect of privileging privacy in this way, diminishing, in particular, the force of freedom of expression. This is because privacy would be recognised by, and enshrined in, legislation, while the same status would not be accorded to freedom of expression, as it generally is in human rights statutes. However, our draft legislation makes it clear both in its objects clause and in its requirement that any relevant public interest must be taken into account in determining whether or not there has been an invasion of privacy, that privacy does not take precedence over freedom of expression (or any other public interest). Put simply, the two interests exist in a level playing field.

5.15 In our Consultation Paper we drew a distinction between the operation of public interest as a defence in breach of confidence cases and the force of public interest in the determination of an invasion of privacy. We pointed out that a statutory cause of action for invasion of privacy did not necessarily have to create a prima facie enforceable obligation, and that the statutory model that we had in mind was unlikely to do so. Rather, we expressed the view that in determining whether or not there had been an invasion of privacy for the purposes of our proposed cause of action, a court should be required at the outset to determine whether competing public interests outweighed the privacy interest asserted. Clause 74(2) gives effect to this view by providing that in determining whether an individual’s privacy has been invaded for the purposes of an action for invasion of privacy, a court must have regard to any relevant public interest (including the interest of the public to be informed about matters of public concern).

5.27 An activity is not private simply because it is not done in public, nor because it occurs on private property; rather, ‘it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford’. For example, the installation of a video surveillance camera on private property to take pictures of what is happening in the backyard of an adjoining property is likely to invade the privacy of the adjoining landowner. Nor does an activity lose its private nature simply because it occurs in a public place. While persons who appear in a published photograph of a crowd scene in a public place or appear incidentally in a photograph of that place cannot complain of an invasion of their privacy, they will be able to do so where the public place simply formed the background of the photograph and they constitute the real subject matter of the photograph.

5.28 There is a danger of assuming that some activity or matter is necessarily public. For example, it may seem obvious that a claim for invasion of privacy cannot arise from the publication of information that has already been disclosed or is already publicly available (as where it appears in a court record). However, this fails to recognise that information in the public domain is still capable of remaining within the private sphere of the claimant. The disclosure of the information (by the claimant or a third party) may have been limited to a small circle of family or friends, and the access to public records may be limited by logistical constraints and the requirement to pay a fee. We agree with the Hong Kong Law Reform Commission that the law should take account of the ‘practical obscurity’ of personal information that is held in public registries or that has already been disclosed.

6.9 Where appropriate and with due alteration of detail, cl 75(1)(c) and (d) of the Bill make provision for the application of the following defamation defences to actions for invasion of privacy:

- the defence of absolute privilege under the law of defamation (either at common law or under s 27 of the Defamation Act 2005 (NSW));
- the defence of fair report of proceedings of public concern under s 29 of the Defamation Act 2005 (NSW); and
• the defence of innocent dissemination.

Extracts from draft cl. 74 (2) and (3) of the NSWLRC’s draft Civil Liability Amendment (Privacy) Bill 2009

‘74(2) An individual’s privacy is invaded for the purposes of an action under this Part if the conduct of another person invaded the privacy that the individual was reasonably entitled to expect in all of the circumstances having regard to any relevant public interest (including the interest of the public in being informed about matters of public concern).

74(3) Without limiting subsection (2), a court determining whether an individual’s privacy has been invaded by the conduct (the conduct concerned) of another person (the alleged wrongdoer) for the purposes of an action under this Part:

(a) must take into account the following matters:

(i) the nature of the subject matter that it is alleged should be private,
(ii) the nature of the conduct concerned (including the extent to which a reasonable person of ordinary sensibilities would consider the conduct to be offensive),
(iii) the relationship between the individual and the alleged wrongdoer,
(iv) the extent to which the individual has a public profile,
(v) the extent to which the individual is or was in a position of vulnerability,
(vi) the conduct of the individual and of the alleged wrongdoer both before and after the conduct concerned (including any apology or offer to make amends made by the alleged wrongdoer),
(vii) the effect of the conduct concerned on the health, welfare and emotional well-being of the individual,
(viii) whether the conduct concerned contravened a provision of a statute of an Australian jurisdiction, and

(b) may take into account any other matter that the court considers relevant in the circumstances.’

Extracts from draft cl. 75(1) of the NSWLRC’s draft Civil Liability Amendment (Privacy) Bill 2009

‘75(1) It is a defence to an action under this Part for the invasion of a plaintiff’s privacy if the defendant proves any of the following:

(a) that the conduct of the defendant was required or authorised:

(i) by or under a NSW law or Commonwealth law, or
(ii) by an Australian court or tribunal or a process of such a court or tribunal,

(b) that the conduct of the defendant was done for the purpose of lawfully defending or protecting a person or property (including the prosecution or defence of civil or criminal proceedings),

(c) that the conduct of the defendant was the publication of matter that, if it is assumed that the publication is defamatory, would attract any of the following defences to an action for defamation:

(i) the defence of absolute privilege (whether at general law or under section 27 of the Defamation Act 2005),
(ii) any of the defences of fair report of proceedings of public concern under section 29 of the Defamation Act 2005,

(d) that the conduct of the defendant was the publication of matter in circumstances where:

(i) the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor, and
(ii) the defendant neither knew, nor ought reasonably to have known, that the publication of the matter constituted an invasion of privacy, and

(iii) the defendant’s lack of knowledge was not due to any negligence on the part of the defendant,

e) that the conduct of the defendant was the publication of matter to a person (the recipient) in circumstances where:

(i) the defendant has an interest or duty (whether legal, social or moral) to provide information on a subject to the recipient, and

(ii) the recipient has a corresponding interest or duty in having information on that subject, and

(iii) the matter is published to the recipient in the course of giving to the recipient information on that subject.

75(2) A defence under subsection (1) (e) is defeated if the plaintiff proves that the publication of the matter was actuated by malice.

75(3) In this section:

subordinate distributor has the same meaning as in section 32 of the Defamation Act 2005.’

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1 See http://www.dpmc.gov.au/privacy/reforms.cfm
2 Available at http://www.dpmc.gov.au/privacy/causeofaction/
3 As back issues of The Australian are now behind a paywall, the relevant part of the article is more conveniently accessed through Peter Timmins’ Open and Shut blog, at http://foi-privacy.blogspot.com/2011/09/australians-unique-insight-into-privacy.html.
5 There is currently an exemption from relevant provisions of the Privacy Act 1988 for (professional) ‘media organisations’ so long as the act is in the course of journalism and the organisation is publicly committed to observe published standards that deal with privacy: sections 7C(4), 7(1)(ee), 7B(1) and the definition of ‘media organisation’ in section 6 of the Privacy Act 1988.
8 See for example the Australian Communications and Media Authority’s Review of the privacy guidelines for broadcasters. The Privacy Guidelines for Broadcasters 2005 were made by the ACMA in August 2005 ‘to assist broadcasters to better understand their obligations relating to privacy as set out in the various broadcasting industry codes of practice.’ The ACMA’s proposed revision of the Guidelines is available at http://www.acma.gov.au/WEB/STANDARD/pc=PC_410123.
9 Op cit (fn 1), p. 24; see also the discussion as to remedies at pp. 45–47.
10 Victoria Park Racing and Recreation Grounds Co Ltd v Taylor (1937) 58 CLR 479 at 494 (Latham CJ).
11 Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 185 ALR 1; (2001) 208 CLR 199.
12 Ibid at [107] (per Gummow and Hayne JJ, with whom Gaudron J agreed).
13 (2001) 185 ALR 1 at 13. Gleeson CJ’s reasoning was considered by the House of Lords in the Naomi Campbell decision referred to below: see David Lindsay, Naomi Campbell in the House of Lords: Implications for Australia [2004] PLPR 20.
16 Grosse v Purvis [2003] QDC 151 at [442].
17 Ibid at [444].
18 Ibid at [164].
20 Hosking v Runting [2005] 1 NZLR 1 at [117].
21 Ibid at [130].
As is well analysed and summarised by the New Zealand Law Commission in
\textit{ACMA}, the Australian Press Council’s Annual Reports, available at


Although it is to be noted that the Privacy Act 1988 was enacted in partial fulfilment of Australia’s obligations as an acceding party to the International Covenant on Civil and Political Rights, as attached as Schedule 2 to the Australian Human Rights Commission Act 1986 (http://www.comlaw.gov.au/Details/C2011C00579). Pursuant to Article 17 of the Covenant, Australia undertakes to adopt such legislative measures as may be necessary to give effect to the rights of persons not to be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence.


See in particular Part F, pp. 83–98.