



Australian Government

Issues Paper

A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy

Commonwealth of Australia
Department of the Prime Minister and Cabinet

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Foreword

Every day, many of us take actions to protect our privacy and that of our families, almost without thinking about it. We might close the curtains in our homes at night; ensure no one can see our PIN when we're at the ATM; or leave a meeting to take a personal phone call. Thankfully, simple actions are usually enough and serious invasions of privacy are infrequent.

Rapid advances in technology have changed the way we work, bank and shop, the way people engage with government, and the way we relate to friends, family and people we've never even met. New technology provides new opportunities, but it also provides new challenges – one of which is whether the laws relating to privacy have kept pace with these changes.



Smart phones allow us to take and instantly share photographs, without the knowledge or consent of the subject. A private email can be forwarded to thousands of addresses around the world, and footage posted on a video sharing website can go viral. Email and social networking sites can be hacked and personal details can be mined. Cloud computing offers great potential for more effective and efficient use of technology but its security must be assured.

We have seen recently, both in Australia and overseas, a number of high profile privacy breaches that have arisen, in part, because of the development of new and emerging technological capabilities.

In May 2008, the Australian Law Reform Commission (ALRC) concluded a 28-month inquiry into the effectiveness of the *Privacy Act 1988* and related laws as a framework for the protection of privacy in Australia. In its report, the ALRC made 295 recommendations for reform in a range of areas, including telecommunications, credit reporting information, health records, and privacy protection generally. The Government has responded to 197 of these recommendations.

One of the ALRC's recommendations was that the most serious invasions of privacy could best be addressed through the introduction of a statutory cause of action for privacy. The Victorian and New South Wales Law Reform Commissions have also recommended a statutory cause of action for privacy.

In responding to the ALRC recommendation, the threshold question that must be asked is whether the introduction of a statutory cause of action for privacy is warranted. This is a particularly important question in light of a cause of action for privacy developing case-by-case in the Australian courts. If there is to be a statutory cause of action, how do we make sure it gets the balance right between the public interest in the right to privacy and other important public

interests including freedom of expression? We cannot simply consider whether action is desirable without also considering how best to do it.

The Australian Government has prepared this Issues Paper for public consideration of these important questions. I encourage everyone with an interest to visit www.dpmc.gov.au/privacy/causeofaction/ to submit his or her views on this important debate.



The Hon Brendan O'Connor MP

Minister for Privacy and Freedom of Information

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Request for comments

The Commonwealth Government has developed this issues paper, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, to inform its response to the Australian Law Reform Commission's recommendations to introduce a statutory cause of action for serious invasions of privacy.

This paper invites comment upon whether Australia should introduce a statutory cause of action for privacy and, if so, what elements a statutory cause of action might include. It draws on the analysis of the Australian, Victorian and New South Wales Law Reform Commissions, and considers the policy context and current legal positions in Australia and comparable jurisdictions.

Submissions may address the particular questions contained in the paper, comment upon the proposed reform as a whole or upon any other relevant issue.

How to provide us with your comments and ideas

Responses are requested **by Friday, 4 November 2011**, though earlier responses are encouraged. Responses submitted in the form of an attachment to an email are preferred.

Responses may be submitted:

By email: privacycauseofaction@pmc.gov.au

By post: Privacy and FOI Policy Branch
Department of the Prime Minister and Cabinet
1 National Circuit
BARTON ACT 2600

Phone: 02 6271 5111

Fax: 02 6271 5542

Publication of Submissions

It will be assumed that submissions are not confidential and may be made publicly available on the website of the Department (<http://www.dpmc.gov.au/privacy/causeofaction/>).

If you would like your submission, or any part of it, to be treated as confidential, please indicate this clearly on the submission. A request made under the *Freedom of Information Act 1982* (Cth) for a submission marked confidential to be made available will be determined in accordance with that Act.

Introduction

Community concern about the right to and protection of privacy is growing as new technologies change the way we interact with business, government, and each other.

Australians are increasingly connected to the internet at home and work. Digital technologies are readily affordable and available. Online activity is growing and ways of communicating are more diverse. Recording devices in phones are becoming standard. These changes have significant advantages for Australian society, but they also pose commensurate risks to our privacy.

Images, sounds and other information can easily be recorded, and just as easily can be uploaded to the internet, or distributed via email and instant messaging – sometimes without a person’s consent or without their knowledge.

Social networking platforms allow extensive online networks to be created and maintained, for links and associations to be made, and for images and information to be widely shared. Once on the web it becomes increasingly difficult for an individual to control.

Privacy may be protected through a range of regulatory, administrative, educational, and legal mechanisms. In Australia, the Commonwealth *Privacy Act 1988*¹, along with privacy and personal information legislation in most States and Territories, seeks to protect the personal and sensitive information of individuals, primarily by requiring that such information be collected and handled appropriately. Laws relating to defamation, telecommunications, breach of confidence and trespass, amongst other things, also offer protection for aspects of the private lives of those resident in Australia.


In its 2008 Report, *For Your Information: Australian Privacy Law and Practice*, the Australian Law Reform Commission (**ALRC**) considered the range of privacy protections available in Australia and made a number of recommendations. As part of that report, the ALRC recommended that federal legislation should provide for a statutory cause of action (a right to sue created by law) for serious invasions of the privacy of natural persons.² The New South Wales³ and Victorian⁴ Law Reform Commissions have also recommended similar causes of action.

¹ The *Privacy Act 1988* (Cth), as amended, is available at <www.comlaw.gov.au/Series/C2004A03712>.

² Australian Law Reform Commission, *Report 108 – For Your Information: Australian Privacy Law and Practice* (2008), ch 74 and recs 74–1 to 74–7 (**ALRC Report**), available at <www.alrc.gov.au/publications/report-108>.

³ New South Wales Law Reform Commission, *Report 120: Invasion of Privacy* (2009) (**NSWLRC Report**) available at <[www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/R120.pdf/\\$file/R120.pdf](http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/R120.pdf/$file/R120.pdf)>.

⁴ Victorian Law Reform Commission, *Surveillance in Public Places: Final Report 18* (2010), ch 7 (**VLRC Report**) available at <www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/Surveillance+in+Public+Places/>.



In 2009, the Government responded to 197 of 295 recommendations of the ALRC Report. At that time, the Government announced that it would consider the ALRC's remaining recommendations, including a statutory cause of action, following work on the first stage reforms.⁵ Those first stage reforms are progressing: exposure draft legislation relating to new Australian Privacy Principles (APPs) and credit reporting has been referred to the Senate Finance and Public Administration Committee in June 2010 and January 2011 respectively. That Committee has now reported on the first of those references.

This paper asks whether Australia should introduce a statutory cause of action for privacy and, if so, what elements a statutory cause of action might include. This paper draws on the reports and analysis of the ALRC⁶, the New South Wales Law Reform Commission (**NSWLRC**)⁷ and the Victorian Law Reform Commission (**VLRC**)⁸, and considers the current legal position in other comparable jurisdictions. It begins with a review of some of the present context within which these privacy matters may be considered.

⁵ See *Australian Government First Stage Response to Australian Law Reform Commission Report 108: For Your Information: Australian Privacy Law and Practice* at 6:

We will start with reforming the foundations. Once these reforms have progressed, the Government will turn to considering the remaining recommendations of the ALRC. These recommendations include sensitive and complex questions around the removal of exemptions and data breach notices. To strike the right balance, reforms in these areas will require extensive consultation and input.

⁶ The ALRC recommendations are reproduced in Appendix A at page 54 below.

⁷ The draft bill recommended by the NSWLRC is reproduced in Appendix B at page 56 below.

⁸ The VLRC recommendations are reproduced in Appendix C at page 64 below.

The current privacy context

In 1937, the High Court 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 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.⁹

Today, the privacy context is drastically different from that of 1937, and indeed the whole of the 20th century. Developments in technology have meant that it is more difficult for individuals to take steps to protect their own privacy by the mere erection of a higher fence.

Some of the key technological developments that have changed the context for the protection of privacy in Australian society include:

- 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.

Technology is becoming affordable and accessible. Economies of scale, improvements in productivity, more efficient use of raw materials, and competition mean that a wide range of technology is cheaper for consumers and therefore more attainable. In the decade to 2008-09 household access to a computer increased from 44% to 78%.¹⁰ Improvements in storage technologies and hardware mean that images and videos can be stored in greater quantities or for longer periods.

Australia also has one of the highest rates of mobile phone ownership in the world.¹¹ Children have extensive access, with around a third of children between the ages of 5 and 14 having access to their own mobile phone.¹² Mobile phones themselves come with features including cameras to capture still and moving images, music players and recording capabilities. Their unobtrusiveness and prevalence means that it is possible for people to be photographed or recorded without their knowledge almost anywhere.

⁹ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 494 (Latham CJ).

¹⁰ Australian Bureau of Statistics, *Household Use of Information Technology, Australia, 2008-09* (catalogue no. 8146.0) (released 16 December 2009) available at <www.abs.gov.au> (viewed 16 August 2011).

¹¹ See Australian Government, *About Australia: Information and Communications Technology* (2008) available at <www.dfat.gov.au/facts/ict.html> (viewed 16 August 2011).

¹² See Australian Bureau of Statistics, above n 10.

Australians are increasingly connected to the internet at home and at work. At the end of 2010 there were more than 10 million internet connections with an Internet Service Provider (ISP), and unknown numbers of people at the end of those connections.¹³ This number of internet connections has increased by 16.7% between December 2009 and December 2010.¹⁴ In 2008-09 the Australian Bureau of Statistics (ABS) found that 72% of households had access to the internet at home.¹⁵ In only a decade it had more than quadrupled from 16%.¹⁶ Of the 2.7 million children aged 5 to 14 years in 2009, 79% used the internet.¹⁷

The Australian Bureau of Statistics has only recently started releasing data relating to wireless internet connections via a mobile handset, but between June 2010 and December 2010 there was a 21% increase in the number of mobile handset internet subscribers in Australia – some 8.2 million handsets.¹⁸

The proportion of Australian businesses with access to the Internet has also increased, from 71% to 87% over the five years from 2002-03 to 2007-08.¹⁹

Australians are demanding access to faster internet speeds. In December 2009, 89% of internet connections were broadband connections according to the OECD definition of exceeding 256kbps²⁰, and 63% of internet connections had speeds greater than 1.5mbps.²¹ A year later 81% of internet connections exceeded 1.5mbps.²² With the Government's commitment to build the National Broadband Network (NBN) to provide 93% of Australian homes and businesses with access to a high-speed fibre network capable of providing speeds of up to 1 gigabit per second, and increasing delivery of health, education and government services online – the take up of greater speeds is only going to increase.

As the NBN rollout continues, there will be **significant growth in the level of online activity**, both in terms of the time people spend online and the amount of data they consume.

Between June 2005 and June 2010, the number of Australians using the internet more than 15 hours per week, doubled.²³ The proportion of people who used the internet at home and used it every day grew from 51% in 2007-08 to 58% in 2008-09.²⁴ Amongst children, the ABS

¹³ Australian Bureau of Statistics, *Internet Activity, Australia, December 2010* (catalogue no 8153.0) (released 1 April 2011) available at <www.abs.gov.au> (viewed 16 August 2011).

¹⁴ Ibid.

¹⁵ See Australian Bureau of Statistics, above n 10.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ See Australian Bureau of Statistics, above n 13.

¹⁹ Australian Bureau of Statistics, *Year Book Australia, Use of Information Technology, Australia, 2009-10* (catalogue no. 1310.0) (released 4 June 2010) available at <www.abs.gov.au> (viewed 16 August 2011).

²⁰ Kilobits per second.

²¹ Megabits per second. See Australian Bureau of Statistics, above n 13.

²² See Australian Bureau of Statistics, above n 13.

²³ See Australian Bureau of Statistics, above n 13.

²⁴ See Australian Bureau of Statistics, above n 19, under *How Australia Accesses and Uses the Internet*.

found that only 42% of children who used the internet at home used it for less than 2 hours per week, 17% used it more than 10 hours per week, and 4% were online for more than 20 hours per week.²⁵

Between the December quarter 2009 and the December quarter 2010 there was a 50% increase in the amount of data downloaded.²⁶ The volume of data downloaded using mobile handsets increased by more than 500% from 717 (TB terabytes) in the June 2010 quarter to 4029 TB in the December 2010 quarter.²⁷ Mobile handset downloads also increased as a proportion of overall downloads from 0.5% in the June 2010 quarter to 2.1% in the December 2010 quarter.²⁸

The percentage of Australian businesses with a web presence is growing – from 23% in 2002-03 to 36% in 2007-08.²⁹ Businesses primarily use the internet for financial activities (including online banking, invoicing and making payments), and to enable people to work from home or other locations.³⁰

The recent proliferation of **social networking sites** allows extensive online networks to be created and maintained, for links and associations to be made, and for images and information to be widely shared.

The development of what has been called ‘Web 2.0’ or the ‘collaborative web’ has included the development of tools such as blogs, wikis and social networking platforms.³¹ These tools encourage or require greater levels of engagement and interactivity and allow for greater amounts of data and opinion to be published than ever before.

Images, sounds and other information that is readily able to be recorded and stored can be easily uploaded onto social media websites, posted on the internet by blogging or micro-blogging, distributed over email, or by instant messaging.

Over the last decade, technology has clearly become integral to our engagement with government, business and each other.

Just as the daily social interactions of Australians have been altered fundamentally by the pervasiveness of these digital technologies, so too has the landscape for the preservation of

²⁵ Australian Bureau of Statistics, *Children’s Participation in Cultural and Leisure Activities, Australia, 2009* (catalogue no. 4901.0) (released 28 October 2009) available at <www.abs.gov.au> (viewed 16 August 2011). See also Australian Bureau of Statistics, above n 10.

²⁶ See Australian Bureau of Statistics, above n 13.

²⁷ See Australian Bureau of Statistics, above n 13.

²⁸ *Ibid.*

²⁹ See Australian Bureau of Statistics, above n 23.

³⁰ Australian Bureau of Statistics, *Business Use of Information Technology, Australia, 2007-08* (catalogue no. 8129.0) (released 20 August 2009) available at <www.abs.gov.au> (viewed 16 August 2011).

³¹ See Australian Government, *Engage: Getting on with Government 2.0 – Report of the Government 2.0 Taskforce* (2009) available at <<http://gov2.net.au/report/>>.

individuals' privacy. The speed and reach of the internet has the potential to facilitate the transmission of personal information to a previously unheralded audience.

However, technology can also safeguard individuals' privacy in this digital age. Increasingly, entities and organisations are taking steps and instituting policies to respond to the threats to privacy posed by such technological and commercial developments. Just as there is a need to be aware of challenges posed by these developments, there is also a need to increase awareness of how to utilise technological safeguards to limit individuals' and entities' exposure to privacy breaches.

In many cases, recordings of private information or collections of data are also handled in ways consistent with an entity's privacy policy, with the Commonwealth Privacy Act or with equivalent laws. Technologies are also being rapidly developed to allow the better protection of personal information and to help remedy the effects of identity theft or privacy invasion.

Websites are increasingly collecting and storing a variety of information – information relevant to particular customers or to their customer base generally. That may include, for example, information on previous purchases, information on the frequency and association of particular internet search terms, data on the rate of 'click through' for particular blast email or website-elements, or information on the length of time spent viewing particular web pages. That information may then be used for a variety of purposes: for example to target advertising or as an asset to be sold to other entities.

While these new and developing technologies, tools and software are enriching the lives, work and study of Australians in many ways, they may simultaneously be enabling (or making more easy) the communication and transmission of personal or sensitive data, images, information, or other details of a person's private life.

It may reasonably be observed that more information is being recorded and stored, that people are increasingly using social networking and other websites, and that recording technologies and devices are becoming cheaper and widely available.

As technology that can more easily be used to invade privacy develops, it becomes all the more appropriate to ask whether current privacy laws are adequate to protect personal privacy.

In light of the current privacy context, this paper is seeking views about whether the Australian Government should create a right for individuals to seek redress from another person who seriously invades their privacy.

In the event that there is to be such a right, the paper also asks in what circumstances this right should apply, and what remedies should be available.

- 1. Do recent developments in technology mean that additional ways of protecting individuals' privacy should be considered in Australia?*

The present state of the law in Australia and other jurisdictions regarding a right to privacy

In Australia, there is no clear cause of action for invasion of privacy in statute or at common law. However, such a cause of action exists in New Zealand, the United States, Canada, the United Kingdom and the European Union, either in statute, or through development of the common law.³²

Present state of the Australian law

There is currently no statutory action for invasion of privacy in any Australian jurisdiction, and there is scant common law, with no appellate court recognising a tort of invasion of privacy.

The absence of the common law in this area can be traced back to 1937, where the High Court found in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*³³ that breach of privacy was not recognised in Australian law. This precedent was maintained by Australian courts for over 60 years. It was not until 2001 that the High Court, in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,³⁴ departed from this decision, clearly indicating that the decision in *Victoria Park* does not stand in the path of the development of a cause of action for invasion of privacy.³⁵ However, the High Court did not determine whether a cause of action exists, nor has it clearly articulated what the scope of such a cause of action might be.

Since the High Court considered the *Lenah Game Meats* case, the common law has remained undeveloped. Only two cases — *Grosse v Purvis*³⁶ and *Doe v Australian Broadcasting Corporation*³⁷ — have expressly recognised a common law right to an action for invasion of privacy.

In *Grosse v Purvis*, the Queensland District Court found a breach of privacy to have occurred as a result of the defendant stalking the plaintiff over a prolonged period. In this case, the court awarded aggravated compensatory damages and exemplary damages. After noting that the High Court in *Lenah Game Meats* had removed the barrier which the *Victoria Park* case posed, Skoien SDCJ took what he viewed as ‘a logical and desirable step’ and recognised ‘a civil action for damages based on the actionable right of an individual person to privacy’.³⁸

³² The text in this section includes extracts from and draws upon relevant sections of the ALRC Report, the VLRC Report and the NSWLRC Report.

³³ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

³⁴ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

³⁵ *Ibid* at [107] (per Gummow and Hayne JJ, with whom Gaudron J agreed).

³⁶ *Grosse v Purvis* [2003] QDC 151.

³⁷ *Doe v Australian Broadcasting Corporation* [2007] VCC 281.

³⁸ *Grosse v Purvis* [2003] QDC 151 at [442].

The Court in that case determined that the ‘essential elements’ of the action for invasion of privacy were:

- a) a willed act by the defendant;
- b) which intrudes upon the privacy or seclusion of the plaintiff;
- c) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities;
- d) 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 is lawfully entitled to do.³⁹

Skoien SDCJ also considered that while a public interest defence was available, it was not relevant in the particular case. The facts in this case meant that it was not necessary to consider whether a privacy cause of action would include negligent acts.

In *Doe v Australian Broadcasting Corporation*, the defendant broadcaster published in its afternoon and evening radio news bulletins information that identified a victim of a sexual assault – the plaintiff. In doing so, the defendant breached s 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. Hampel J in the County Court of Victoria 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. In this case, although Hampel J did not ‘attempt to formulate an exhaustive definition of privacy’⁴⁰ the ‘unjustified publication of personal information’⁴¹ was considered to constitute a breach of the plaintiff’s privacy.

The Australian Capital Territory and Victoria have introduced bill of rights legislation. Section 12 of the *Human Rights Act 2004* (ACT) and section 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) recognise a right to privacy and reputation, both stating that:

Everyone has the right —

- a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- b) not to have his or her reputation unlawfully attacked.

Both the ACT and Victorian legislation also recognise a right to freedom of expression. While there are mechanisms to promote the application of the legislation, neither of these Acts provide individuals with privacy protections that are able to be enforced in the same way as a cause of action would operate.

³⁹ Ibid at [444].

⁴⁰ *Doe v Australian Broadcasting Corporation* [2007] VCC 281 at [162].

⁴¹ Ibid at [164].



United States

Nearly all US states now recognise a right to privacy, either at common law or, in a few states, as a creation of statute.

The *Second Restatement, Torts* states that privacy tort protection exists where:

- 1 One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person;
- 2 One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy;
- 3 One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public;
- 4 One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.⁴²

The privacy torts are subject to the same defences that apply in the US to defamation. Such defences include an absolute parliamentary and court privilege; consent; and conditional privileges for other activities, such as reporting public proceedings and reasonable investigation of a claim against a defendant. The constitutional protections for freedom of speech and freedom of the press are also relevant in construing the US law.⁴³

A successful claim of invasion of privacy under common law entitles the plaintiff to recover damages on three bases: the harm from the loss of privacy; mental distress reasonably suffered; and when there is cause for ‘special damages’. It remains unclear whether damages can be awarded in the absence of proof of actual harm. Injunctions are not readily ordered.⁴⁴

⁴² See *Restatement of the Law, 2nd, Torts 1977* (US) at sections 652B-652D. The *Restatements* are expositions on the law on specific subjects (based on court decisions) published by the American Law Institute.

⁴³ See *Constitution of the United States*, First Amendment: ‘Congress shall make no law ... abridging the freedom of speech, or of the press ...’.

⁴⁴ See VLRC Report at 139.



European Union

The *European Convention on Human Rights (ECHR)* contains a right to private and family life, home and correspondence.

Article 8 of the *ECHR* is expressed in the following terms:⁴⁵

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In *Von Hannover v Germany* the European Court of Human Rights established the benchmark from which an analysis of the application of Article 8 must proceed.⁴⁶ The Court recognised the ‘fundamental importance of protecting private life from the point of view of the development of every human being’s personality’.⁴⁷ The Court noted that the protection ‘extends beyond the private family circle and also includes a social dimension ... anyone, even if they are known to the general public, must be able to enjoy a ‘legitimate expectation’ of protection of and respect for their private life’.⁴⁸

The extent of ‘private life’ remains unclear following the *Von Hannover* decision.

⁴⁵ *European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 8—Privacy)*.

⁴⁶ *Von Hannover v Germany* [2004] ECHR 294.

⁴⁷ *Ibid* at [69].

⁴⁸ *Ibid*.



United Kingdom

There is no freestanding right to privacy in the UK. The courts repeatedly have stated that ‘English law knows no common law tort of invasion of privacy’.⁴⁹

Instead, the cause of action for breach of confidence has been extended to encompass misuse or wrongful dissemination of private information. Extensive expansion of the law in this area has occurred in recent years; however the law concerning the elements, defences and remedies that apply to the cause of action for misuse of private information is not yet settled.

The developments in the UK have been influenced in recent years by the *ECHR* and the *Human Rights Act 1998* (UK). The *Human Rights Act* incorporates (to some extent) the *ECHR* into the domestic law of the UK. The *Human Rights Act* came into force in October 2000. Since that time, the courts in the UK have been influenced by Article 8 of the *ECHR*, and by the jurisprudence of the European Court of Human Rights interpreting that article.

Elements of the Tort

When analysing whether the elements of the tort have been established in a case of unlawful publication of private information (which, to date, constitutes the majority of the case law in the UK), the court engages in a two-part balancing exercise. The court first ascertains whether the information is private ‘in the sense that it is in principle protected by Article 8’. If the answer is ‘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’?⁵⁰

The courts in the UK have avoided setting too high a bar when determining what ‘private’ means within the context of Article 8.⁵¹ The elements of the cause of action appear to be, first, ‘whether the claimant had a reasonable expectation of privacy in relation to the particular information in question’ and, secondly, ‘whether there is some countervailing public interest such as to justify overriding that prima facie right’.⁵² Both issues are ‘essentially questions of fact’, but the courts have provided limited guidance about the matters to consider in resolving these questions of fact.⁵³

When considering the first limb of the test, the person alleging a breach of Article 8 must establish that interference with private life was of ‘some seriousness’ before the article is engaged.

⁴⁹ *OBG Ltd v Allan; Douglas v Hello! Ltd* [2007] 2 WLR 920 at [272].

⁵⁰ *Ash v McKennitt* [2007] 3 WLR 194 at [11].

⁵¹ ALRC Report at 2545.

⁵² *The Author of a Blog v Times Newspapers Limited* [2009] EWHC 1358 (QB) at [7] (Eady J). An act of the defendant that led to the publication of the information in question appears to be subsumed within these two elements.

⁵³ *Murray v Big Pictures (UK) Limited* [2008] EWCA Civ 446 at [36] (Clarke MR).

Once the information is identified as 'private', the court must then 'balance the claimant's interest in keeping the information private against the countervailing interest of the recipient in publishing it'.⁵⁴

Defences

The English courts have not yet articulated any defences to a claim for misuse of private information. It does appear, however, that consent is a defence, just as it is to most torts. There may also be a 'defence' that is quite similar to the defence of qualified privilege in defamation law. In *Campbell v MGN Limited*, all five Law Lords accepted that it was lawful for the newspaper in question to publish the fact that the appellant was a drug addict because she had made many public statements to the contrary.⁵⁵ Reporting that Narcotics Anonymous was treating her, and the details of that treatment, including a photograph of the plaintiff outside a Narcotics Anonymous premises, did, however, constitute an invasion of her privacy.

Proof of damages and remedies

It is not clear whether the wrong of misuse of private information requires proof of actual damage or whether, like the tort of trespass, it may be committed without proof of any damage. This lack of clarity has created uncertainty about the types of damages that may be awarded. Damages awards have generally been modest in these cases.⁵⁶ The British courts have also issued injunctions to prevent the initial publication, or continued publication, of material in some misuse of private information cases.

Even though damages awards have generally been quite small in misuse of private information litigation, costs awards have been more significant. The plaintiff in *Campbell* was awarded damages of £3 500 and costs of £1.08 million. In *Mosley v News Group Newspapers Limited* the plaintiff was awarded damages of £60 000 and costs of £850 000 when the defendant newspaper exposed his involvement in sexual activities involving a group of women and published details and video of the incident.⁵⁷ One man was awarded damages of £11 800 and costs of £18 075 for the broadcasting of CCTV footage of his suicide attempt.⁵⁸

There have been a number of recent high-profile injunctions in the UK, which prevent the publication of information about celebrities (including some sports stars) which is confidential or private, or the publication of information about the existence of the relevant injunction, proceedings or orders.

⁵⁴ *Campbell v MGN Ltd* [2004] 2 AC 457 at [137].

⁵⁵ *Campbell v MGN Limited* [2004] 2 AC 457.

⁵⁶ VLRC Report at 132.

⁵⁷ *Mosley v News Group Newspapers Limited* [2008] EWHC 1777 (QB).

⁵⁸ *Peck v United Kingdom* [2003] ECHR 44.



Canada

There is no common law tort of invasion of privacy in Canada. However, four provinces—British Columbia (1968), Manitoba (1970), Saskatchewan (1974), and Newfoundland and Labrador (1981)—have statutory causes of action for invasion of privacy.⁵⁹

Generally, the legislation provides that ‘it is a tort, actionable without proof of damage, for a person wilfully and without claim of right, to violate the privacy of another person’.⁶⁰

Elements of the Tort

The provinces have enacted three similar elements required to be proved to establish the tort. For example, the British Columbia Act states: ‘The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others’.⁶¹

Secondly, all but the Manitoba Act require proof that the defendant acted wilfully. This means that the defendant knew, or ought to have known, that an act would violate the privacy of the plaintiff, and was not merely negligent.

Thirdly, the statutes require the courts to consider a range of relevant factors such as the nature of the privacy invasion and the relationship between the parties. With the exception of the Manitoba Privacy Act, which stipulates that an invasion of privacy must be ‘substantial’, the legislation does not require the alleged invasion of privacy to be ‘serious’ or ‘highly offensive’.

Defences

All four Acts list exceptions or defences to the cause of action. The common exceptions or defences are:

- the plaintiff consented to the conduct;
- the defendant’s conduct was incidental to the exercise of a lawful right of defence of person or property;
- the defendant’s conduct was authorised or required by law;

⁵⁹ *Privacy Act 1996* RSBC c 373 (British Columbia); *Privacy Act CCSM* section P125 (Manitoba); *Privacy Act 1978* RSS c P-24 (Saskatchewan); *Privacy Act 1990* RSNL c P-22 (Newfoundland and Labrador).

⁶⁰ *Privacy Act 1978* RSS c P-24 (Saskatchewan) section 2. See also *Privacy Act 1996* RSBC c 373 (British Columbia) s 1(1); *Privacy Act CCSM* section P125 (Manitoba) section 2(1); *Privacy Act 1990* RSNL c P-22 (Newfoundland and Labrador) section 3(1). The British Columbia legislation differs from the statutes in force in the other provinces in that it also protects the unauthorised use of the name or portrait of another: *Privacy Act 1996* RSBC c 373 (British Columbia) section 3.

⁶¹ *Privacy Act 1996* RSBC c 373 section 1(2).

- the defendant is a police or public officer who was engaged in his/her duty and the conduct was neither disproportionate to the matter being investigated nor committed in the course of a trespass; and
- if the defendant's conduct involved publication, the publication was privileged, fair comment or was in the public interest.

The Saskatchewan Privacy Act also contains a defence of acting in the scope of newsgathering, while the Manitoba Act has a defence for a person who neither knows, nor reasonably should have known, that the act in question would violate the privacy of any person.

Proof of Damage and Remedies

The legislation creating a cause of action for invasion of privacy in the Canadian provinces expressly labels the cause of action a 'tort'. The statutes of British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador providing for the tort of violation all specify that the tort is actionable without proof of damage.

The Canadian statutes, other than the British Columbia Privacy Act, specify the remedies that a court may order for an unlawful invasion of privacy. Common remedies are: damages; an injunction; an order for the defendant to account to the plaintiff for profits in consequence of the violation; and an order for the defendant to deliver the documents obtained in consequence of the violation.

Charter of Rights and Freedoms

While the *Canadian Charter of Rights and Freedoms 1982* does not specifically guarantee a right to privacy, the Supreme Court of Canada has interpreted the right in section 8⁶² to include a reasonable expectation of privacy in relation to governmental acts. The province of Quebec has guaranteed 'a right to respect for ... personal life' in its *Charter of Human Rights and Freedoms*.⁶³

⁶² "Everyone has the right to be secure against unreasonable search or seizure."

⁶³ *Charter of Human Rights and Freedoms* RSQ c-12 (Quebec) section 5.



New Zealand

In *Hosking v Runting* a majority of the New Zealand Court of Appeal recognised a common law tort of privacy.⁶⁴

While the majority stressed that ‘the cause of action will evolve through future decisions as courts assess the nature and impact of particular circumstances’, the Court was prepared to extend tort protection to wrongful publicity given to private lives.⁶⁵ The Court was influenced by the third formulation of the United States privacy tort,⁶⁶ and the New Zealand tort is similar to that which falls within the UK extended cause of action for breach of confidence for misuse of private information.⁶⁷

The Court found that there are two fundamental requirements for a successful claim for interference with privacy:

- 1 [t]he existence of facts in respect of which there is a reasonable expectation of privacy; and
- 2 [p]ublicity given to those private facts that would be considered highly offensive to an objective reasonable person.⁶⁸

The majority 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’.⁶⁹ The use of the term ‘public concern’ rather than ‘public interest’ reflected the Court’s view of the difference between ‘matters of general interest or curiosity to the public, and matters which are of legitimate public concern’.⁷⁰

The precise status of the New Zealand tort of invasion of privacy by publishing private facts is uncertain because some members of that country’s highest court, the Supreme Court, have cast doubts upon its continued acceptance and content. In one case, Anderson J, who was one of the two dissenting judges in *Hosking v Runting*, said that, in his view, the existence of the tort and its scope were matters for debate in the Supreme Court.⁷¹ Chief Justice Elias queried the details of the tort, particularly the need for the second element concerning the ‘highly offensive’ nature of the publicity.⁷²

⁶⁴ *Hosking v Runting* [2005] 1 NZLR 1.

⁶⁵ *Ibid* at [118].

⁶⁶ See page 15.

⁶⁷ See pages 17-18.

⁶⁸ *Hosking v Runting* [2005] 1 NZLR 1 at [117].

⁶⁹ *Ibid* at [130].

⁷⁰ *Ibid* at [133] (Gault and Blanchard JJ). See further VLRC Report at 156-159.

⁷¹ *Rogers v Television New Zealand Ltd* [2008] 2 NZLR 277 at [144] (SC).

⁷² *Ibid* at [25].



There have been relatively few cases in New Zealand dealing with the tort of invasion of privacy by publishing private facts since developments started at the trial court level in the mid-1980s. The VLRC Report stated in 2010 that it ‘appears that ‘fifteen people have brought cases wholly or partly based on privacy, and many of them have been neither rich nor famous’. Damages were ordered in only two cases, with the highest award being NZ\$25 000. An injunction restraining publication was granted on five occasions.⁷³

The New Zealand Law Commission recently recommended that development of the tort recognised in *Hosking v Runting* should be left to the common law.⁷⁴ Although the Commission acknowledged that a statutory cause of action would make the law more accessible and certain, it referred to the absence of ‘evidence that the current state of the law is causing practical difficulties to anyone’.⁷⁵

⁷³ VLRC Report at 136 (citations omitted). Note also New Zealand Law Commission, *Invasion of Privacy: Penalties and Remedies Review of the Law of Privacy Stage 3*, Issues Paper No 14 (2009).

⁷⁴ New Zealand Law Commission, *Invasion of Privacy: Penalties and Remedies, Review of the Law of Privacy Stage 3*, Report No 113 (2010) at 91.

⁷⁵ *Ibid* at 90.

Is there a need for a statutory cause of action for serious invasion of privacy in Australia?

This section invites comment on whether a statutory cause of action for serious breach of privacy should be introduced in Australia.⁷⁶ It discusses the considerations the law reform commissions thought relevant to the question of whether such a reform was desirable. It then turns to whether evolution of the common law or new legislation provides the most appropriate vehicle for development of the law in this area.

The ALRC was the first Australian law reform commission to consider whether or not there was a need for a cause of action for serious invasion of privacy.⁷⁷ It considered this question in light of the recommended broader reforms to privacy law and practice.

Following an extensive community consultation exercise,⁷⁸ the ALRC recommended that the Government legislate for a right to sue, stating that there was ‘strong support for the enactment of a statutory cause of action for a serious invasion of privacy’ in Australia.⁷⁹

The NSWLRC⁸⁰ and VLRC⁸¹ came to the same conclusions (though the latter recommended two causes of action – for misuse of information and interference in seclusion).

This paper now turns to discuss some of the arguments in favour of and against a statutory cause of action.

Existing protections: comprehensiveness and adequacy

Some stakeholders have argued that existing laws and industry codes of conduct adequately protect privacy in Australia. However, the ‘gap-filling’ role of a statutory cause of action for the most serious privacy invasions has also been widely acknowledged.

Existing privacy (data protection) legislation in the Commonwealth, States and Territories, general law actions and remedies, industry codes of practice, and a range of voluntary privacy initiatives each play their part in the present privacy protection framework in Australia. However, as far as this framework does not cover every circumstance, or provides insufficient remedies, the ALRC concludes there are ‘gaps’ in the protection provided to individuals and their private lives.

⁷⁶ A cause of action may be understood as a legal right to sue another party to obtain particular ‘remedies’, such as damages or court declarations, in respect of an enforceable claim against that other party.

⁷⁷ See ALRC Report at 2564 *passim*.

⁷⁸ Which included, for example, some 250 meetings and the receipt of 585 submissions: see further NSWLRC Report at 7-8.

⁷⁹ ALRC Report at 2557.

⁸⁰ See NSWLRC Report at 8-10. See further NSWLRC Report at 7-22 and VLRC Report at 145-146.

⁸¹ See VLRC Report at 147.

Those gaps arise, for example, because the Commonwealth Privacy Act has as its focus information privacy and data protection, rather than privacy protection more broadly. That Act, and some State and Territory privacy legislation, also make only certain types of remedies available, or those remedies are available only against particular entities or types of entities, or only after particular procedural steps have been followed (eg after notification to the entity or to the Information Commissioner).

The tort of trespass, and statutory actions for defamation, have their own rules, requirements and exclusions. These limit the scope and application of these bodies of law where particular *privacy* invasions have occurred. To take one example referred to by the ALRC, the equitable action for breach of confidence is:

presently confined to cases involving the use of information of a private nature, whether in word or pictorial form. So, however strong and understandable may be the feeling of harassment of a person who is hounded by photographers when carrying out activities of a private nature, and however unacceptable the behaviour of the pack, there will be no cause of action until an intrusive photograph is published.⁸²

The VLRC pointed to a different kind of gap in its report:

There is a clear gap in the current regulatory regime. Although the criminal law deals with the most offensive invasions of privacy, there is no parallel civil cause of action for people harmed by that behaviour. ... The Victorian Privacy Commissioner informed the [VLRC] that people contact her office with complaints about interferences with spatial privacy or misuse of private information for which there is no redress under Victorian and Commonwealth law.⁸³

The Commonwealth Office of the Privacy Commissioner, in its 2007 submission to the ALRC consultation process, stated that:

a dedicated privacy based cause of action could serve to complement the already existing legislative based protections afforded to individuals and address some gaps that exist both in the common law and legislation.⁸⁴

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.

⁸² See ALRC Report at 2564, referring to the UK common law, and quoting Sir Roger Toulson, 'Freedom of Expression and Privacy' (Paper presented at the Association of Law Teachers Lord Upjohn Lecture, London, 9 February 2007), at 7.

⁸³ VLRC Report at 147.

⁸⁴ Office of the Privacy Commissioner, *Submission PR 499* [to the ALRC privacy review], 20 December 2007; cited in ALRC Report at 2557.

Prevention

Proponents of a statutory cause of action argue that a new civil cause of action may be useful in preventing privacy breaches in first place, with Professor John Burrows stating that the possibility of civil action: ‘can create a climate of restraint which ensures that serious breaches do not happen in the first place’.⁸⁵ If real and severe consequences flow from seriously breaching a person’s privacy, individuals and organisations may be more inclined to think twice before acting in a manner that would cause a breach in the first place.

Such a statutory cause of action may also help to establish social norms as to what is acceptable and unacceptable behaviour, particularly in relation to the use of new technologies.

Human rights

Australia is a party to the International Covenant on Civil and Political Rights (*ICCPR*). Article 17 of the *ICCPR* accords everyone the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence. What is arbitrary will be determined by the circumstances of each particular case. In order for an interference with the right to privacy not to be ‘arbitrary’, the interference must be consistent with the *ICCPR* and reasonable in the particular circumstances. Reasonableness, in this context, incorporates notions of proportionality, appropriateness and necessity.

A statutory cause of action to protect against serious invasions of privacy, if established, would provide an additional remedy for breaches of privacy and would be a practical additional mechanism for the protection and promotion of privacy in Australia as set out in Article 17 of the *ICCPR*.⁸⁶

⁸⁵ John Burrows, ‘Privacy and the Courts’ (Address to the Privacy Forum, Wellington, New Zealand, 27 August 2008) <www.privacy.org.nz/assets/Files/PAW/10.-Speaker-Professor-John-Burrows.doc> at 10 November 2009, as quoted in VLRC Report at 147.

⁸⁶ In relation to remedies, a topic to which this paper returns at page 45 below, Article 17 of the *ICCPR* may be read in conjunction with Article 2(3) of the *ICCPR*, which provides that:

Each State Party to the present Covenant undertakes:

- a) *To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
- b) *To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
- c) *To ensure that the competent authorities shall enforce such remedies when granted.*

The Office of the Commonwealth Privacy Commissioner has indicated that a statutory cause of action would ‘clearly establish that privacy is an important human right that warrants specific recognition and protection within the Australian community’.⁸⁷

Uncertainty

One argument against the introduction of a statutory cause of action for serious invasions of privacy includes the difficulty of defining privacy with sufficient precision to create a legal wrong.⁸⁸ The ALRC sought to remedy part of this problem by suggesting the inclusion of a list of types of invasion that would fall within the cause of action.⁸⁹ To the extent that such imprecision is unavoidable, it could cause confusion as to the state of the law and deter conduct or activities that were entirely legal.

Uncertainty is also an issue that arises in the context of the development of common law causes of action for invasion of privacy. Courts can only make decisions in response to the specific factual circumstances before them in a particular case.

Economic effects and interference in commercial activity

Arguments against a statutory cause of action also opine that it will have an impact on the commercial activities of Australian business.

Marketers and door-to-door salespersons made submissions to the ALRC that a cause of action would chill marketing campaigns, telemarketing and door-to-door sales. They also argue that certain economic or commercial activities, such as recovering debts and enforcing security rights, may also necessitate use of private information and ‘direct interaction with home and family’⁹⁰, and the introduction of a statutory cause of action would hamper those activities.

Other concerns have been raised in relation to the economic impact that enactment of a cause of action would have on those who may be subject to it. For example, an entity may reduce levels of certain types of economic activity in light of the potential for an award of damages against such an entity if such activity continues. If cases were to be commenced against such entities, the cost of litigation may also tend to divert resources from other economic activities or investment.

Law enforcement and national security

The public interest in effective law enforcement and the maintenance of national security is an important factor to consider in developing a cause of action. It is essential that certain agencies

⁸⁷ Office of the Privacy Commissioner, *Submission PR 499* [to the ALRC privacy review], 20 December 2007; cited in ALRC Report at 2557.

⁸⁸ NSWLRC Report at 9-10 (citations omitted).

⁸⁹ See below at page 41.

⁹⁰ ALRC Report at 2561.

can continue to appropriately exercise legitimate law enforcement, national security and related functions. Police, corrective services officers, intelligence agencies and similar entities have functions, powers and duties conferred on them by legislation for the purposes of enforcing the law and maintaining national security (including through international cooperation).

Account must be taken of these functions, duties and responsibilities in crafting any cause of action. This paper returns to this matter in the discussion of defences and exceptions below at page 42.

Freedom of expression, artistic freedom, and freedom of the press

An action for invasion of privacy is seen by some as posing a threat to free expression, artistic freedom, and freedom of the press. The NSWLRC summarised the position as follows:

A particular argument in support of this position is that, unlike the situation that tends to apply in human rights instruments where protection is afforded both to privacy and to freedom of expression, the provision of a statutory base for the protection of privacy alone would unfairly tilt the balance in favour of the interest in privacy at the expense of the interest in freedom of expression, which would not itself be protected by statute. The result would be that the individual interest in privacy would acquire a strength that would impede the free flow of information to the public on matters of public concern.⁹¹

The ALRC refers to a variety of submissions on this point⁹² and discusses the international instruments and Australian law protecting freedom of expression in various forms.⁹³

Freedom of expression is also a right recognised under the *ICCPR* and would need to be taken into account in developing the cause of action.⁹⁴ Under the *ICCPR*, freedom of expression can be limited by law where necessary for the respect of the rights (such as privacy rights) or reputations of others, amongst other reasons.⁹⁵

Concerns that a cause of action would impede artistic expression, particularly artistic expression based on representations of what is occurring ‘in public’, were described in the ALRC’s report.⁹⁶ Street artists and photographers, for example, may have concern that a cause of action which was cast in wide terms, or which did not include sufficient defences, may impose upon them unfair liabilities or expose them to costly legal action, each of which might tend to deter them from creating the art which they would otherwise produce.

⁹¹ NSWLRC Report at 9-10 (citations omitted).

⁹² ALRC Report at 2558-2560.

⁹³ ALRC Report at 2573-2575.

⁹⁴ The ALRC briefly considered Article 19 of the *ICCPR* at page 2573 of its report.

⁹⁵ See further Article 19 of the *ICCPR*.

⁹⁶ See ALRC Report at 2559.

The interaction between any proposed cause of action and laws protecting journalists from being required to disclose their sources—new rules of evidence often called ‘journalist shield laws’⁹⁷—is also an important matter that arises for consideration. While a privacy cause of action would not seek to alter the journalist shield protection, it may create additional causes of action to which this rule of evidence may have application.

The ALRC, NSWLRC and VLRC concluded that while there are significant benefits accruing to individuals and the Australian community at large from the introduction of such a cause of action, an important part of any such reform would be the balancing of the various public interests that the law should protect. This includes the interests in freedom of expression, in freedom of the press and in the free flow of information.⁹⁸

2. *Is there a need for a cause of action for serious invasion of privacy in Australia?*

Statutory cause of action or common law development?

As noted earlier in this paper, the general law in some parts of Australia and in some jurisdictions overseas is currently evolving to include certain protections against interference in private lives. Such evolution has taken place largely in the law of tort and of equity, and has been influenced by the introduction in some parts of the world of human rights instruments.

The various law reform commissions considered this evolution, and compared it with the development of a right of action through amendments to statute law (that is, through legislative change rather than development of the common law). They each concluded that statutory development was preferable.⁹⁹

In this regard, the VLRC noted the submission of the Victorian Privacy Commissioner:

Relying on the courts to recognise a cause of action for privacy may not be the best approach, given the inherent limitations associated with the courts only being able to consider particular matters brought before them by parties resourced to access justice at the requisite level. In addition, the courts would be limited by existing remedies developed within the common law or equity.

Legislators have a better opportunity to craft a cause of action that is more precisely targeted and which takes into account competing public interests. Moreover, protection of a fundamental human right such as privacy should not be dependent on the efforts of a particularly persistent and well resourced plaintiff, to take

⁹⁷ See, eg, *Evidence Amendment (Journalists’ Privilege) Act 2010* (Cth) and Part 3.10, Division 1A of the *Evidence Act 1995* (Cth).

⁹⁸ The various public interests are considered further below at pages 34-37.

⁹⁹ See, eg, NSWLRC Report at 22.

an action all the way to the High Court of Australia in order to definitively establish the existence of a cause of action.¹⁰⁰

The ALRC concluded that:

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. It forecloses the possibility of Australian courts adopting an action in breach of confidence as the primary vehicle to protect an individual's private life from invasion, and alleviates the necessity of judges taking the 'bold step'¹⁰¹ of formulating a new tort and a lengthy period of uncertainty and inconsistency as the courts refine the law in this area. Further, it does away with the distinction between equitable and tortious causes of action, and between the defences and remedies available under each.¹⁰²

Legislation may provide a clearer legal 'structure' for the cause of action, and could provide for a more flexible range of defences and remedies than would be possible if the cause of action grew on a case-by-case basis within the common law.

3. *Should any cause of action for serious invasion of privacy be created by statute or be left to development at common law?*

The creation of a statutory cause of action in Commonwealth law

If it is determined that a statutory cause of action should be legislated, the next question that arises is should it be established in Commonwealth, and/or State and Territory, law?

The ALRC stated its view that 'it is important to ensure that a consistent regime is enacted'¹⁰³ and recommended that its proposed cause of action be included in a Commonwealth Act (and in an Act separate from the existing Privacy Act).¹⁰⁴

The NSWLRC acknowledged the value in national consistency as follows:

The Commission agrees with the ALRC's view that national consistency should be one of the goals of privacy regulation. A nationally operating privacy regime would do much to eliminate inconsistencies in the law between jurisdictions, and potential 'forum shopping'. This would help reduce the costs and other burdens on organisations operating across State borders, and more effectively regulate privacy invasion by trans-jurisdictional technologies, such as the Internet.¹⁰⁵

¹⁰⁰ VLRC Report at 146.

¹⁰¹ *Doe v Australian Broadcasting Corporation* [2007] VCC 281 at [157].

¹⁰² ALRC Report at 2565.

¹⁰³ ALRC Report at 2582.

¹⁰⁴ ALRC Report at rec 74-1.

¹⁰⁵ NSWLRC Report at 72 (citations omitted).

Unlike the ALRC, however, the NSWLRC, ‘recognising that the province of private law is foremost a matter of State law within Australia’s federal system’, recommended that each State and Territory legislature enact parallel legislation in the terms it had recommended.¹⁰⁶ Such uniform laws would be enacted separately but concurrently by each jurisdiction (including, where necessary, the Commonwealth). Each jurisdiction would rely upon its own legislative powers. Uniformity would be achieved by enacting legislation simultaneously and in the same terms, and then by ensuring any amendments to such legislation over time were made simultaneously and in the same terms.

The Constitution and coverage of States and Territories

While the Commonwealth does not have an express legislative power with respect to the subject matter of ‘privacy’, it could rely on a number of legislative powers to regulate further this subject matter. A number of express and implied limitations on Commonwealth legislative power would also need to be taken into account in developing legislation.

The ALRC considered the constitutional sources of Commonwealth power and the express and implied constitutional limits on that power. The ALRC considered some of those limitations in the following terms:¹⁰⁷

- the state banking and state insurance provisions;¹⁰⁸
- the constitutional limitations relating to discrimination against a State or part of a State;¹⁰⁹
- the implied constitutional freedom of political communication; and
- the principle that a Commonwealth law cannot prevent a State from continuing to exist and function as an independent unit of the federation – the relevant question which arises in this context being whether the Commonwealth law affects the ‘existence and nature’ of the State body politic.¹¹⁰

In relation to the last of these limitations, a particular issue arises with respect to coverage of the states and territories under a statutory cause of action, and especially the coverage of employees and officers at the ‘higher levels’ of State Governments. The ALRC considered that in order for the proposed cause of action to be fully effective it would need to cover the private sector, individuals, federal agencies and State and Territory agencies. If it did not cover State and Territory agencies there would be a gap in coverage and potential for lack of uniformity. The ALRC therefore recommended that federal legislation should be enacted and that such


¹⁰⁶ NSWLRC Report at 73.

¹⁰⁷ See, eg, ALRC Report at 195-198.

¹⁰⁸ See *Australian Constitution* section 51(xiii) and 51(xiv).

¹⁰⁹ ALRC Report at 197.

¹¹⁰ See ALRC Report at 197, citing, *inter alia*, *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 78 and *Western Australia v Commonwealth* (1995) 183 CLR 373 at 480.



legislation should cover a broad range of entities, including ‘state and territory public sector agencies, subject to any of the constitutional limitations’ which may apply to ‘the Commonwealth’s constitutional power to legislate with respect to privacy.’¹¹¹

Given the existence and coverage of the present Commonwealth Privacy Act, Australia’s international obligations, and the need for uniformity of the law in this area, it may be appropriate and efficient for the Commonwealth to legislate to create a cause of action. It may be appropriate, however, to allow the States and Territories to provide for any statutory cause of action against their agencies or officers.

A further question that arises is what should be the relationship between any Commonwealth law and State and Territory laws in relation to the cause of action. The ALRC considered whether, if the Commonwealth legislated, it would or could seek to ‘cover the field’ and, through the operation of the ‘inconsistency’ rule in section 109 of the Constitution, thereby reduce or remove the States’ abilities to legislate with respect to these matters. Section 109 of the Constitution provides that:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Section 109 ensures that a Commonwealth law will prevail over an inconsistent State law. The Commonwealth may also enact legislation that aims to preserve the concurrent operation of various State and Territory laws. For example, section 3 of the present Commonwealth Privacy Act indicates the Commonwealth’s intention to preserve the concurrent operation of certain State and Territory laws with respect to the collection and handling of personal information.

¹¹¹ ALRC Report at 2582 and 195-198.

Elements of the cause of action

This section canvasses possible elements of a cause of action should the Government decide to legislate. It considers the proposal made by the ALRC along with different options considered by the NSWLRC and the VLRC. Those proposals address various and competing public interests, and who might bear the burden of proof. They also raise the question of whether a specific ‘fault element’ should be required, which would allow an action to proceed only against an intentional or reckless defendant.

The test for an invasion of privacy

All three law reform commissions recommended that the test for the cause of action require the plaintiff to show that there had been, in the circumstances, **a reasonable expectation of privacy**. There also appears to be general support, in decided case law, for the proposition that any proposed cause of action would usefully require a plaintiff to prove that he or she had (or at least that there was) a reasonable expectation of privacy.¹¹²

The ALRC and the VLRC further recommended that the plaintiff should also be required to meet an objective test of seriousness or offensiveness: **that the invasion of the expected privacy would be highly offensive to a person of ordinary sensibilities**.¹¹³

This test is a strict one, narrowing the range of circumstances in which a plaintiff could successfully pursue a cause of action. For example, it would arguably make it more difficult for a plaintiff to prove that publication of photos of an ordinary private social event constituted a serious invasion of privacy, as compared with the publication of photos including nudity or sexual intimacy.

A different test could require only that the invasion be ‘sufficiently serious to cause substantial offence’¹¹⁴ as proposed in the original ALRC discussion paper. The ALRC ultimately did not recommend this test as it concluded that a higher threshold was appropriate to ensure that

¹¹² See ALRC Report at 2567, NSWLRC at 24-31, VLRC at 152-153, and cases cited therein. A related question may also arise at this point as to who should be able to bring a claim. That is, whether the cause of action should be:

- (A) available only to the individual whose privacy has been infringed; or
- (B) available to that individual and also to other persons.

Even under option (B), a claimant would likely need to show that he or she had a sufficient interest or standing to bring a claim. The NSWLRC draft bill (cl 74) and VLRC recommendations 25(a) & 26(a) appear to have the effect of limiting the action along the lines of option (A). The ALRC recommendations do not seem, on their face, to preclude option (B).

¹¹³ While the final recommendation of the VLRC did not refer to ‘ordinary sensibilities’, the discussion of the recommendation did include those words: compare VLRC Report para 7.142 with VLRC recs 25 & 26.

¹¹⁴ ALRC Report at 2568.

‘the cause of action only will succeed where the defendant’s conduct is thoroughly inappropriate and the complainant suffered serious harm as a result’.¹¹⁵

The VLRC considered that:

... as legal protections for privacy develop, we should ensure that minor or trivial invasions do not divert attention away from the more significant cases. This is best done by including an element that a reasonable person of ordinary sensibilities must find the defendant’s conduct to be highly offensive. In other new areas of law, such as racial and religious vilification, there are intensifiers in the statutory language used to describe unlawful conduct. Sections 7 and 8 of the *Racial and Religious Tolerance Act 2001* (Vic) prohibit conduct that incites serious contempt for, or severe ridicule of, people on racial and religious grounds. Presumably, this language has been used with the aim of ensuring that important new social policies are not undermined by adverse community responses to inconsequential claims.¹¹⁶

The NSWLRC understood the ALRC’s ‘highly offensive test’ to be a limitation on the reasonable expectation of privacy, and considered ‘any qualification of the ‘reasonable expectation of privacy’ test [to be] unwarranted in principle’.¹¹⁷

Instead, the NSWLRC was of the view that the court should take account of a number of matters and interests in determining whether there had been an actionable invasion of an individual’s privacy. These matters would include the relationship between the parties, the vulnerability of the plaintiff, and the ‘nature of the invasion (including the extent to which a reasonable person of ordinary sensibilities would consider the conduct to be offensive)’.¹¹⁸ The NSWLRC did not include the intensifier ‘highly’. The remaining matters proposed by the NSWLRC are discussed further below.¹¹⁹

If the ‘highly offensive to a reasonable person of ordinary sensibilities’ limb were included as part of the test for whether or not a cause of action exists, the law in this area would limit the availability of the cause of action to the most egregious cases of invasion of privacy. Alternatively, the ‘highly offensive’ limb of the ALRC’s proposed test could be removed. Alternatively, offensiveness could form part of a broadened consideration of relevant matters exercise, along the lines described in clause 74(3) of the NSWLRC’s proposed legislation.¹²⁰

4. *Is ‘highly offensive’ an appropriate standard for a cause of action relating to serious invasions of privacy?*

¹¹⁵ Ibid.

¹¹⁶ See VLRC Report at 151-153 (and compare recs 25 & 26).

¹¹⁷ NSWLRC Report at 28 (emphasis added).

¹¹⁸ See NSWLRC draft bill at cl 74(3)(a) and compare discussion in NSWLRC Report at 27-46.

¹¹⁹ See ‘Should legislation specifically allow for a consideration of a range of relevant factors?’ at page 39 below.

¹²⁰ Reproduced in Appendix B at page 56 below.

Various public interests

Fundamental factors to be taken into account when considering a cause of action for serious invasion of privacy are:

- the public interest in protecting individuals' privacy and personal information;
- the implied constitutional freedom of political communication; and
- the broader public interest in maintaining freedom of expression (and the related interest of the public to be informed about matters of public concern).

The implied constitutional freedom of political communication was first recognised by the High Court in *Nationwide News Pty Ltd v Wills*¹²¹ and *Australian Capital Television Pty Ltd v Commonwealth*¹²². Essentially, the principle protects the freedom of the Australian people to communicate on governmental or political matters. In developing the details of a statutory cause of action to protect privacy, careful consideration would need to be given to ensuring compatibility with the implied constitutional freedom.

The following paragraphs discuss various approaches, which have been taken by the law reform commissions to consideration of the broad interests involved in a cause of action for serious invasion of privacy. These approaches focus on how courts might approach underlying public interest considerations. They do not deal in any detail with how a statutory cause of action might be formulated having regard to the implied constitutional freedom of political communication and other relevant interests.

Very broadly, the law reform commission proposals suggested that a court could consider public interest matters in a particular case in one of two ways: by integrating a consideration of the public interest as part of the cause of action or through consideration of a 'public interest defence' that would be put and proved by the defendant.

Integrated with the cause of action

One approach is to integrate an assessment of the range of public interests into the consideration of whether or not an actionable breach of privacy exists. The ALRC and NSWLRC both recommend variations of this approach.

ALRC

The ALRC proposed to impose a specific and overarching requirement upon the court in considering whether a cause of action exists – to determine whether the public interest in maintaining the claimant's privacy outweighs other matters of public interest.¹²³ The ALRC's test,

¹²¹ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

¹²² *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

¹²³ See ALRC Report at 2572-2575.

on its face, requires that various public interests be compared as part of any determination as to whether or not a plaintiff's privacy had been seriously invaded.

The plaintiff would have to establish that the privacy interest outweighs the public interest in disclosing the information or otherwise interrupting the plaintiff's privacy.¹²⁴ It would arguably permit a court to engage in a broader consideration of what constitutes 'privacy' in the circumstances of the case than the second approach discussed below (at pages 36-37). It would allow a court to do an assessment of all the public interests at the outset, rather than wait for the defendant to explain particular public interests as part of his or her defence.¹²⁵

As part of this exercise, the ALRC contemplated that a consideration of at least the following interests should be required by the legislation:

- the public interest in maintaining a claimant's privacy;
- the interest of the public to be informed about matters of public concern; and
- the public interest in allowing and protecting freedom of expression.

The ALRC did not suggest that this list of interests should be exhaustive; rather, the range of relevant considerations could evolve over time and be determined in light of the circumstances of the case.

Another public interest factor that may be relevant relates to handling of *particular types of information*. For example, should there be an entitlement to privacy in respect of information about serious criminal convictions, serious criminal offenders, or information about judicial proceedings? In balancing the public interests at stake in respect of such types of information, it may be appropriate to have regard to how the law currently regulates or restricts the handling of such information.

NSWLRC

While it acknowledged a similar range of public interests, the NSWLRC took a slightly different approach concerning how to balance these interests. The NSWLRC considered that competing public interests were relevant to a determination of whether or not a claim for invasion of privacy exists. This question was to be considered in a two-part process, commencing with a consideration of the reasonableness of the expectation and then moving on to a balancing of the interests.

The NSWLRC explained the basis of its proposed alternative approach as follows:

Two matters are of central importance in determining whether or not a claim for invasion of privacy should lie. First, there must be facts in respect of which, in all the circumstance of the case, there is a reasonable

¹²⁴ As to which, see discussion in VLRC Report at 157.

¹²⁵ This also reflects the law of equity, which includes a balancing exercise where claims are brought for breach of confidence. See, eg, *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.

expectation of privacy on the part of the plaintiff. Secondly, the claim to the protection of privacy must not, in all those circumstances, be of lesser value than the claim that some other competing public interest has to application in the same circumstances. The first matter, whose existence is a necessary condition to the action, focuses on the nature of the claim. The second balances that claim against competing interests.¹²⁶

The NSWLRC discussed the balancing of interests exercise as follows:

the asserted interest in privacy is [to be] balanced against the force of relevant competing interests to determine which interest should, in the circumstances, be preferred to the other(s). As there is no general basis in Australian law for privileging any particular interest above others, the balancing must start from the premise that no one interest takes precedence over others. Rather, an incisive analysis must be made of the comparative importance of the specific interests being claimed, taking into account the justifications for interfering with or restricting each interest, and having regard to the extent to which the application of each interest would, in the circumstances, be proportionate to its legitimate aim.¹²⁷

While the two steps were said to be ‘analytically distinct’¹²⁸ a consideration of reasonable expectation could nevertheless be made in light of (or need not be made independently of) the balancing exercise. Under the NSWLRC test, a judgement about the reasonableness of the expectation would be informed by the force (or weakness) of the competing public interests.¹²⁹

It also summarised the position with respect to the burden of proof:

because the asserted countervailing public interest is not a defence but needs to be put in the balance at the outset, the defendant does not bear the burden of establishing it. Rather, the onus rests on the plaintiff to establish that, in the circumstances, the privacy interest asserted outweighs the public interest asserted by the defendant.¹³⁰

Public interest defence

While it still required that there be a reasonable expectation of privacy, the VLRC proposal departed from the models of the ALRC and NSWLRC by not requiring explicitly that the public interest be considered at that point. Rather, it recommended that the defendant could put the existence of a public interest in the conduct, as a defence. Thus this second approach, as suggested by the VLRC, would be to create the cause of action and then allow a defendant to raise, subsequently and as a defence, that there was a countervailing public interest in the doing of the act which was the subject of the complaint, such that the defendant should not be liable for any invasion of privacy that may have resulted from that act.¹³¹

¹²⁶ NSWLRC Report at 22.

¹²⁷ NSWLRC Report at 32 (citations omitted).

¹²⁸ NSWLRC Report at 22 (citation omitted).

¹²⁹ See further NSWLRC Report at 22-23.

¹³⁰ NSWLRC Report at 33 (citation omitted). Compare VLRC Report at 153-159 and recs 25-28 (as discussed above).

¹³¹ This type of two-stage test was proposed in the ALRC’s original discussion paper; however, its eventual recommendation was put differently.

The VLRC preferred this approach and explained its rationale largely by reference to where the onus of proof should lie. It said:

a plaintiff should not have to prove a negative, such as the lack of a countervailing public interest. The defendant should carry the burden of proof ... [and] should be required to introduce evidence (if necessary) and satisfy the tribunal that it was in the public interest to engage in conduct that would otherwise be unlawful.¹³²

On a related but slightly different point, concerning the scope of the public interest defence it proposed, the VLRC stated that:

not all matters of interest to the public are matters of public interest that ought to deprive a person of their right to privacy. In particular, the public interest defence ought not to extend to matters that satisfy a curiosity about the private lives of others, but serve no other purpose relevant to the common good.¹³³

Such ‘purposes relevant to the common good’ might, for example, include that publicity given to a private matter provides: information needed by the public to evaluate a government official’s fitness for office; information for the exposure of crime, corruption or other wrongdoing in public life; or information affecting the public at large.¹³⁴ It could also relate to information that rebuts a lie by the plaintiff.

5. *Should the balancing of interests in any proposed cause of action be integrated into the cause of action (ALRC or NSWLRC) or constitute a separate defence (VLRC)?*
6. *How best could a statutory cause of action recognise the public interest in freedom of expression?*

Should a fault element be included?

The ALRC has also recommended that the cause of action require that the act or conduct of the respondent was intentional or reckless.¹³⁵ This would preclude actions brought where there has been only a negligent or accidental invasion of privacy, and would be broadly consistent with the

¹³² VLRC Report at 157, referring approvingly also to legal academic Dr David Lindsay’s ‘concern that requiring the plaintiff to establish that there is no countervailing public interest (such as freedom of expression) may be too high a burden because it requires the plaintiff to prove a negative.’

¹³³ VLRC Report at 157.

¹³⁴ VLRC Report at 157, citing Jennifer Mullaly, ‘Privacy: Are the Media a Special Case?’ (1997) 16(1) *Communications Law Bulletin* 10 at 11. The VLRC recommended that the defence be available where the defendant’s ‘conduct was in the public interest, where public interest is a limited concept and not any matter the public may be interested in’: VLRC Report rec 28(e).

¹³⁵ See ALRC Report at 2576-2577. Note section 5.4 and especially section 5.4(4) of the *Criminal Code* (Cth).

position in relevant Canadian legislation. The ALRC agreed with an early view expressed by the NSWLRC that including accidental or negligent acts ‘would, arguably, go too far’.¹³⁶

However, the NSWLRC, in its final report, does not appear to explicitly consider whether or not particular requirements in relation to fault should be included. Rather, its proposal requires only that the nature of the conduct of the alleged wrongdoer be considered as one of the matters to be taken into account in determining whether there had been an actionable invasion of privacy.¹³⁷ In the end, then, the NSWLRC did not comment on whether there should be a particular requirement of the type recommended by the ALRC¹³⁸. There is no explicit requirement for acts or conduct to be intentional or reckless in the NSWLRC proposed Bill.

The VLRC did discuss, however, the issue of whether or not a particular fault element should be required. It disagreed with the ALRC that negligence should be excluded. It said:

The [VLRC] is of the view that it is unnecessary to expressly exclude negligent acts from the conduct which might fall within the two statutory causes of action. Although it is highly likely that most serious invasions of privacy will involve intentional conduct, there may be circumstances in which a person’s actions were so grossly negligent that civil action ought to be possible. An example might be a medical practitioner who leaves a patient’s highly sensitive medical records on a train or tram.¹³⁹

It is important to note that the ALRC apparently recommended that it was *the act or conduct*, which resulted in the invasion of privacy that would need to be intentional or reckless, rather than *the invasion of privacy* itself.

7. *Is the inclusion of ‘intentional’ or ‘reckless’ as fault elements for any proposed cause of action appropriate, or should it contain different requirements as to fault?*

¹³⁶ See ALRC Report at 2577 citing NSWLRC, *Invasion of Privacy, Consultation Paper 1* (2007) at [7.24].

¹³⁷ See draft NSWLRC Bill s74(3)(a)(ii) and compare s74(3)(a)(vi). This paper returns to this ‘consideration of relevant matters’, as proposed by the NSWLRC, at page 39 below.

¹³⁸ ALRC Report rec 74–3(c).

¹³⁹ VLRC Report at 152 [para 7.148].

Should legislation specifically allow for a consideration of a range of relevant factors?

The NSWLRC constructed its cause of action with two main parts. First, as was discussed above, the NSWLRC proposal would require the plaintiff to prove that there was an expectation of privacy that was reasonable in the circumstances and in light of the various public interests at stake. The second part of the NSWLRC's test required that a court have regard to a range of other relevant matters in determining whether an invasion of privacy should be actionable in the circumstances.

The NSWLRC described the other matters relevant to the determination of actionability of the invasion of privacy, as follows:

Clause 74(3)(a) [of the NSWLRC's draft Bill] lists the matters that the court must take into account in determining whether or not there has been an actionable invasion of an individual's privacy. These matters direct attention to eight questions:

- i. is the **subject matter of the complaint** private or not (cl 74(3)(a)(i))?
- ii. is the **nature of the invasion** such as to justify an action (cl 74(3)(a)(ii))?
- iii. does the **relationship between the parties** affect actionability (cl 74(3)(a)(iii))?
- iv. does the claimant's **public profile** affect actionability (cl 74(3)(a)(iv))?
- v. does the claimant's **vulnerability** affect actionability (cl 74(3)(a)(v))?
- vi. does any other **conduct** of the claimant and the defendant affect actionability (cl 74(3)(a)(vi))?
- vii. what **effect** has the conduct had on the claimant (cl 74(3)(a)(vii))?
- viii. does the defendant's conduct **contravene a statutory provision** (cl 74(3)(a)(viii))?

These matters are not exhaustive. Clause 74(3)(b) provides that the court may also taken account of **any other matter** that it considers relevant in the circumstances.¹⁴⁰

Requiring consideration of a broad range of matters in this way could be a useful device by which to account for a variety of other matters and interests at stake which are relevant but which may not necessarily arise for consideration absent explicit legislative language. The NSWLRC's recommended approach may be a simpler and more legally comprehensive approach. It may make the cause of action available in a more appropriate range of situations. On the other hand, it may leave more to be determined in the individual circumstances of each case, and arguably provides less clear guidance to those who may wish to utilise, or may be subject to, the cause of action.

¹⁴⁰ NSWLRC Report at 35 (emphasis added). The NSWLRC draft bill is extracted in full at Appendix B. Clause 75(3) of the draft bill makes reference to offensiveness as follows: 'a court ... must take into account the following matters ... (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)'.

An explicit (but not necessarily exhaustive¹⁴¹) listing of factors that are relevant may assist courts, lawyers and litigants in understanding the scope of the law and in making decisions with respect to it.

8. *Should any legislation allow for the consideration of other relevant matters, and, if so, is the list of matters proposed by the NSWLRC necessary and sufficient?*

Interaction between the cause of action and other legislation

The interaction between any new cause of action and other legislation that applied in respect of privacy could be another matter that the court could consider in determining whether there has been an actionable breach of privacy.

The NSWLRC's proposal (cl 74(3)(a)(viii)) would require a court to have regard to the existence and applicability of other privacy-protective laws (such as State, Territory and Commonwealth privacy legislation). The existence of other, more appropriate, options might be a factor in a determination that an action did not lie against a particular defendant in particular circumstances.

The NSW draft bill also includes a similar provision relevant to **remedies**:

... the court may decline to grant a remedy ... if it considers that an adequate remedy for the invasion of privacy exists under a statute of an Australian jurisdiction that is prescribed by the regulations.¹⁴²

To ensure consistency between a new cause of action and existing provisions, any legislation for a Commonwealth cause of action could be drafted, for example, to require that the availability and applicability of other relevant law—and remedies under such law—be a consideration in the determination as to whether (a) a cause of action exists and (b) a remedy should be available.

¹⁴¹ See NSWLRC draft bill cl 74(3)(b).

¹⁴² See NSWLRC draft bill cl 76(2). Remedies are discussed further at page 45-46 below.

Should legislation list the types of invasion that fall within the cause of action?

The ALRC recommended that a non-exhaustive, or illustrative, list of activities, which would constitute serious invasions of privacy, be included in the legislation:¹⁴³

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.¹⁴⁴

The ALRC and NSWLRC considered that such a list would help those reading the legislation, and the courts applying it, construe the Parliament's intention as to the scope of activities that should give rise to an action for invasion of privacy. If a list were not included, courts would start with a relatively blank canvass and would define the notion of serious invasion of privacy by construing the statute and its words over time, against the background of the general law and evolving notions of privacy, and according to the facts of litigated cases. On the other hand, such a list could be criticised as partial, simplistic or misleading.

Alternatively, such a list could be included in explanatory material supporting the legislation rather than the legislation itself (for example in the Explanatory Memorandum).¹⁴⁵

The Government welcomes feedback on whether a list should be included as proposed, as well as on any changes to that list that may be necessary. In particular, it seeks feedback on whether item (d) above is defined sufficiently clearly as to be helpful in all the circumstances, or whether that item could be further refined.

9. *Should a non-exhaustive list of activities which could constitute an invasion of privacy be included in the legislation creating a statutory cause of action, or in other explanatory material? If a list were to be included, should any changes be made to the list proposed by the ALRC?*

¹⁴³ ALRC Report at 2565 and rec 74-1.

¹⁴⁴ ALRC Report rec 74-1.

¹⁴⁵ In this connection, regard may also be had to s 15AB of the *Acts Interpretation Act 1901* (Cth) which provides for the use of extrinsic material in the interpretation of an Act in some circumstances.

Defences and exemptions

The ALRC recommended that defences to the statutory cause of action should be listed exhaustively in the legislation.

The ALRC recommended that the defences should include at least 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.¹⁴⁶

The NSWLRC took a different approach to (c). Its draft bill made reference to particular defences in defamation law, including:

- absolute privilege, and fair reporting; and
- publication of information merely in the capacity, or as an employee or agent, of a subordinate distributor who neither knew, nor ought reasonably to have known, that the publication constituted an invasion of privacy.¹⁴⁷

The VLRC also proposed two defences with parallels to those proposed by the ALRC:

- where the defendant was a public officer engaged in his or her duty and acted in a way that was not disproportionate to the matter being investigated and not committed in the course of a trespass; and
- where [the defendant's] conduct was in the public interest, and if involving a publication, the publication was privileged or fair comment.¹⁴⁸

The VLRC also recommended a qualified defence related to self-defence: it further required that the conduct be a reasonable and proportionate response to the threatened harm.¹⁴⁹

Some stakeholders have seen additional defences as desirable. These could for example include a defence that information is already in the public domain; or a defence that disclosure has been made for the purpose of, and in the course of, rebutting an untruth.¹⁵⁰

¹⁴⁶ ALRC Report rec 74–4.

¹⁴⁷ NSWLRC draft bill cl 75.

¹⁴⁸ VLRC Report at 153; compare ALRC para (b) and (c).

¹⁴⁹ VLRC Report at 154.

¹⁵⁰ This defence may have overlaps with a broadly understood notion of self-defence, as to which see ALRC Report rec 74–4(a).

Consent

The ALRC and the NSWLRC were of the view that the issue of consent should be considered as part of the elements of the cause of action itself.

The ALRC stated that ‘consent should be considered when determining whether the claimant had a reasonable expectation of privacy in the circumstances or when determining whether the act complained of was sufficiently serious to cause substantial offence’.¹⁵¹

The NSWLRC’s proposed legislation explicitly requires a consideration of consent:

Conduct does not invade an individual’s privacy for the purposes of an action under this Part if the individual, or another person having lawful authority to do so for the individual, expressly or impliedly consented to the conduct.¹⁵²

On the other hand, the VLRC suggested that consent should provide a formal defence.¹⁵³ The VLRC noted that this is one of the most common defences in the US, UK and Canada. Consent is also a defence in many other areas of law.

Including consent as an element of the cause of action would mean that the burden is on the plaintiff to prove lack of consent. The VLRC concluded that consent should be included as an express defence because ‘to do otherwise is to force the plaintiff to engage in the difficult task of proving a negative’.¹⁵⁴

10. *What should be included as defences to any proposed cause of action?*

Law enforcement and national security

As noted above, it will be important to ensure that a statutory cause of action does not impede the ability of agencies to appropriately exercise, or provide support for, legitimate law enforcement, intelligence and related functions. These functions – and related duties and powers – are often conferred upon such agencies by legislation, with statutory protections included.

National security and law enforcement agencies are subject to a variety of internal or legislated oversight and integrity mechanisms. Such mechanisms are adapted to the particular

¹⁵¹ ALRC Report at 2575-2576.

¹⁵² Clause 74(4) of the NSWLRC draft bill. The NSWLRC considered the various elements of the notion of consent in its report (see NSWLRC Report at 46-49) but did not propose that consent be defined. Rather, it would take ‘its meaning from the general law and its statutory context’: NSWLRC Report at 46.

¹⁵³ VLRC Report at 153 *passim*. Consent, in this context, could be construed either as consent to the invasion of privacy or consent to the act or conduct.

¹⁵⁴ VLRC Report at 154.

characteristics of law enforcement and intelligence activities (eg as to the need for confidentiality at various points during investigations) and provide oversight and controls. These agencies would argue that given those oversight and integrity mechanisms, the particular characteristics of law enforcement and intelligence activities, and the public interest in the enforcement of the criminal law, there may be particular reasons to exempt such agencies from a statutory cause of action.

Any cause of action would need to ensure that these functions were not undermined by providing a means for individuals to identify whether or not they are the subject of covert operations, or by allowing sensitive operational capabilities to be exposed through legal proceedings.

Conclusions of the law reform commissions with regard to exemptions

After considering the arguments for exemptions, the VLRC concluded that:

no organisations or classes of people should be exempted from the proposed statutory causes of action. The defences adequately protect people engaged in legitimate activities from unmeritorious actions for serious invasion of privacy.¹⁵⁵

Nor did the ALRC or the NSWLRC recommend blanket exceptions for particular types of organisations or agencies.

Similarly, the law reform commissions did not recommend that persons engaged in particular *types of activities* be exempt from the ambit of the cause of action. The use of the threshold requirements for action (eg, reasonable expectation, offensiveness), in combination with the defences proposed (eg, actions taken by or under law), were said to provide a more appropriate means to ensure the cause of action does not capture behaviour it should not.

11. Should particular organisations or types of organisations be excluded from the ambit of any proposed cause of action, or should defences be used to restrict its application?

¹⁵⁵ VLRC Report at 160.

Remedies

The ALRC recommended that a broad range of flexible and adaptable remedies be provided for as part of the proposed statutory cause of action.

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) an 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.¹⁵⁶

The VLRC recommended that damages, injunctions and declarations be available.¹⁵⁷

The NSWLRC also supported a flexible and broad set of legislative provisions as to remedies.¹⁵⁸

12. Are the remedies recommended by the ALRC necessary and sufficient for, and appropriate to, the proposed cause of action?

Limitations to awards of damages

Some have suggested that there should be a limit on damages payable in respect of non-economic damage. The NSWLRC proposed that, 'the maximum amount of compensation for non-economic loss that a court may order in an action for invasion of privacy ... is \$150,000'.¹⁵⁹

The VLRC considered this matter in its report and summarised the position as follows:

Caps to the amount of compensation a court may award for non-economic loss are common in Australia. Their purpose is to ensure that awards are not too high, given that non-economic, as opposed to economic, loss cannot be precisely quantified. Under the *Defamation Act 2005* (Cth), for example, the maximum amount of damages that a court may award in defamation cases is generally \$250 000.

¹⁵⁶ ALRC Report at rec 74–5.

¹⁵⁷ See discussion in VLRC Report at 160-163.

¹⁵⁸ See NSWLRC draft bill cl 76 and discussion in NSWLRC Report at 56-69.

¹⁵⁹ NSWLRC draft bill at cl 77(1).

Damages awards in invasion of privacy and breach of confidence cases in Australia and elsewhere have not been excessive. In *Giller v Procopets*, the plaintiff was awarded \$50 000 damages (including aggravated damages) for non-economic loss; in *Jane Doe v ABC* the plaintiff was awarded \$110 000 for non-economic loss; and in *Grosse v Purvis* the plaintiff was awarded \$108 000 for non-economic loss.

Damages awards have ranged from small to moderate in both Canada and the UK. In the UK, *Mosley* attracted the largest award, £60 000.¹⁶⁰

The VLRC concluded that given ‘the modest sums likely to be awarded in cases of this nature ... a statutory cap on damages is unnecessary.’¹⁶¹ The ALRC, similarly, did not recommend a statutory cap. However, a decision not to cap damages in line with defamation law may create an incentive for those with a claim that could be brought under either the privacy cause of action or under defamation law to prefer the former. It may create inconsistency, and the opportunity for substitution into the privacy sphere of actions that should be pursued under the uniform defamation law.

13. *Should the legislation prescribe a maximum award of damages for non-economic loss, and if so, what should that limit be?*

Proof of Damage

The ALRC recommended that claims under the proposed cause of action be actionable without proof of damage – that is, that an invasion of privacy should be actionable *per se*, even if it has not caused a type of damage presently or fully recognised by the general law.¹⁶² In this regard, it would be consistent with the torts of trespass and defamation in Australia.¹⁶³

An alternative approach would be to construct a damage requirement more in line with the tort of negligence. In that case, ‘damage’ would need to have accrued to the plaintiff for the cause of action to exist. If that approach were taken, a broad definition of ‘damage’ could be considered, so that it includes economic and financial damage, as well as a range of non-economic damage such as mental anguish or distress.

14. *Should any proposed cause of action require proof of damage? If so, how should damage be defined for the purposes of the cause of action?*

¹⁶⁰ VLRC Report at 161 (citations omitted).

¹⁶¹ See VLRC Report at 163.

¹⁶² See ALRC Report at 2577 and rec 74–3(b).

¹⁶³ Note also that the Canadian statutory torts for invasion of privacy take this approach.

Resolving matters without resort to litigation

Offer of amends

It may also be appropriate to include in the remedies section of any cause of action legislation an appropriately adapted offer-of-amends process.¹⁶⁴ Such a process could include provision for the making of offers to redress the harm sustained by an aggrieved person, such as offers to pay expenses or compensation or provide an apology. It could also provide that making an offer of amends may afford the respondent a defence to the action for invasion of privacy, provided the court holds that the offer was reasonable in all the circumstances.

Such a process has obvious overlaps with the remedy in paragraph (d) at page 45 above. As such, it may complement the range of remedies contemplated by the ALRC. Such a process would give parties more opportunity and incentive to come to a mutually agreeable settlement of the matter prior to commencing litigation. It could help claimants obtain an apology, or indication of regret that an invasion occurred, where such a remedy was sought. It may also help avoid what may be costly or hard-fought or high profile litigation (litigation which may, consequently, be unattractive or unavailable to many of those whose privacy has been seriously invaded).

15. Should any proposed cause of action also allow for an offer of amends process?

It is also important to note here the requirements of the *Civil Dispute Resolution Act 2011* (Cth) (CDRA).¹⁶⁵ Parties in most proceedings in the Federal Court and the Federal Magistrates Court must now file a statement setting out what steps they have taken to resolve a dispute prior to institution of a proceeding. The court may take this into consideration in making case management or costs orders. This is designed to encourage parties to attempt to resolve disputes before litigation is commenced, using alternative dispute resolution or other means. Depending on which courts were conferred with jurisdiction to hear the proposed cause of action, these requirements could apply to actions brought for serious invasion of privacy.

¹⁶⁴ Similar to that which was created by recent reforms to the law of defamation and is now found in sections 12-19 of the Uniform Defamation Laws.

¹⁶⁵ The requirements of the Act commenced 1 August 2011.

Other issues

Natural persons

The ALRC, NSWLRC and VLRC recommend that the cause of action only be available to individuals—as opposed to the broader concept of ‘legal persons’ which would extend to corporations amongst others—and provide explanations as to why the cause should be so limited.

In explaining its recommendation the ALRC, for example, cites ‘notions of individual autonomy, dignity and freedom’¹⁶⁶ and chapter 7 of its Report ‘describes the reasons why privacy law are restricted to individuals, and supports the view that it is not appropriate to extend privacy protection to corporations and other commercial entities.’¹⁶⁷ The approach taken by the law reform commissions follows the model provided for by Canadian and US law, and is consistent with comment from the High Court of Australia.¹⁶⁸

16. *Should any proposed cause of action be restricted to natural persons?*

Deceased persons

The ALRC, NSWLRC and VLRC each recommend that their proposed privacy causes of action should be restricted to living persons (or, that estates of deceased persons should not have the capacity to bring proceedings). The NSWLRC draft bill, for example, provides that ‘a cause of action for the invasion of an individual’s privacy ... does not survive the individual’s death.’¹⁶⁹

The NSWLRC, in explaining its preference for this ‘simple general rule’, referred to the need for such reforms to be consistent with the law relating to the effect of death on other causes of action in all Australian jurisdictions. The VLRC explained that ‘the rationale for excluding deceased persons from a right of action for defamation or privacy is that deceased persons cannot suffer any insult to reputation or dignity and cannot incur the injury to feelings and mental distress that flows from these insults.’¹⁷⁰

17. *Should any proposed cause of action be restricted to living persons?*

¹⁶⁶ ALRC Report at 2576.

¹⁶⁷ Ibid.

¹⁶⁸ See, eg, *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199 at [43] (Gleeson CJ) and at [126] (Gummow and Hayne JJ).

¹⁶⁹ See NSWLRC draft bill at cl 79. Compare ALRC at 2576 and rec 74–3(a).

¹⁷⁰ VLRC Report at 166.

Limitation of action

The NSWLRC proposed that, to ensure consistency with elements of defamation law, there be a limitation period of one year from the date of the relevant conduct, which could be extended by the court to three years. The VLRC recommends a three-year limitation period to be consistent with causes of action for personal injuries, and with the outer limit of defamation proceedings.¹⁷¹

18. *Within what period, and from what date, should an action for serious invasion of privacy be required to be commenced?*

Jurisdiction of courts

Jurisdiction to hear cases on a new statutory cause of action could be conferred on the Federal Court, the Federal Magistrates Court or State and Territory courts.¹⁷²

19. *Which forums should have jurisdiction to hear and determine claims made for serious invasion of privacy?*¹⁷³

Representative proceedings and class actions


Class actions are a legal mechanism through which multiple, smaller, similar claims can economically be assembled together and heard together by a single court as part of a single set of legal proceedings. Part IVA of the *Federal Court Act 1976* (Cth), for example, allows for 'representative proceedings'. Other jurisdictions have similar provisions to those found in the *Federal Court Act*, and State and Territory Supreme Courts often have particular rules to allow for the efficient management of matters where plaintiffs or defendants have common interests or common issues.

Particular requirements often apply to such proceedings. The Federal Court provisions for 'representative proceedings' may be used where: there be at least seven persons with a claim against the same person; those claims arise out of similar or related circumstances; and those

¹⁷¹ VLRC Report at 166-167.

¹⁷² If a Commonwealth cause of action were created, this would not necessarily preclude a State or Territory court being given jurisdiction to hear cases brought under that Commonwealth legislation.

¹⁷³ This question is usefully considered in light of any answer that may be given to the question asked above (at page 45-46) as to a limitation upon the amount of damages payable for non-economic loss under such a cause of action.



claims give rise to a substantial common issue of law or fact.¹⁷⁴ There are also often particular requirements regarding how representative actions are pleaded, how settlements may be arrived at, and generally how such proceedings are managed by the Court.

Class action rules may have particular application in respect of claims that may arise under a statutory cause of action for serious invasion of privacy, as acts which could invade an individual's privacy may also invade the privacy of others.

¹⁷⁴ See, eg, *Federal Court Act 1976* (Cth) section 33C(1).




Conclusion

The Government welcomes comments and suggestions upon the issues and questions raised in this Issues Paper, and on any related matter relevant to the proposal for a new statutory cause of action for serious invasion of privacy.

Summary of questions

The Government welcomes comments and suggestions on the issues and questions raised in this Issues Paper, and on any related matter relevant to the proposal for a new statutory cause of action for serious invasion of privacy. The questions asked throughout the issues paper are also extracted below.

1. *Do recent developments in technology mean that additional ways of protecting individuals' privacy should be considered in Australia?*
2. *Is there a need for a cause of action for serious invasion of privacy in Australia?*
3. *Should any cause of action for serious invasion of privacy be created by statute or be left to development at common law?*
4. *Is 'highly offensive' an appropriate standard for a cause of action relating to serious invasions of privacy?*
5. *Should the balancing of interests in any proposed cause of action be integrated into the cause of action (ALRC or NSWLRC) or constitute a separate defence (VLRC)?*
6. *How best could a statutory cause of action recognise the public interest in freedom of expression?*
7. *Is the inclusion of 'intentional' or 'reckless' as fault elements for any proposed cause of action appropriate, or should it contain different requirements as to fault?*
8. *Should any legislation allow for the consideration of other relevant matters, and, if so, is the list of matters proposed by the NSWLRC necessary and sufficient?*
9. *Should a non-exhaustive list of activities which could constitute an invasion of privacy be included in the legislation creating a statutory cause of action, or in other explanatory material? If a list were to be included, should any changes be made to the list proposed by the ALRC?*
10. *What should be included as defences to any proposed cause of action?*

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11. *Should particular organisations or types of organisations be excluded from the ambit of any proposed cause of action, or should defences be used to restrict its application?*
 12. *Are the remedies recommended by the ALRC necessary and sufficient for, and appropriate to, the proposed cause of action?*
 13. *Should the legislation prescribe a maximum award of damages for non-economic loss, and if so, what should that limit be?*
 14. *Should any proposed cause of action require proof of damage? If so, how should damage be defined for the purposes of the cause of action?*
 15. *Should any proposed cause of action also allow for an offer of amends process?*
 16. *Should any proposed cause of action be restricted to natural persons?*
 17. *Should any proposed cause of action be restricted to living persons?*
 18. *Within what period, and from what date, should an action for serious invasion of privacy be required to be commenced?*
 19. *Which forums should have jurisdiction to hear and determine claims made for serious invasion of privacy?*

Appendix A – Australian Law Reform Commission recommendations

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.

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).

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.

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.

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) an 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.

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.

Recommendation 74–7 The Office of the Privacy Commissioner should provide information to the public concerning the recommended statutory cause of action for a serious invasion of privacy.¹⁷⁵

¹⁷⁵ The former Office of the Privacy Commissioner was integrated into the Office of the Australian Information Commissioner (**OAIC**), which was established under the *Australian Information Commissioner Act 2010* (Cth), on 1 November 2010. The OAIC is an independent statutory agency headed by the Australian Information Commissioner. The Information Commissioner is supported by two other statutory officers: the Freedom of Information Commissioner and the Privacy Commissioner. For further information, please see the OAIC website at <www.oaic.gov.au>.

Appendix B — NSW Law Reform Commission draft bill

[The draft bill below, drafted and proposed by the NSWLRC, appears in Appendix A to the NSWLRC Report.]

New South Wales *Civil Liability Amendment (Privacy) Bill 2009* Explanatory note

Overview of Bill

There is currently some uncertainty as to whether the general law recognises a cause of action for the invasion or violation of an individual's privacy.

The objects of this Bill are:

- (a) to amend the *Civil Liability Act 2002* to create a statutory cause of action for the invasion of the privacy of an individual, and
- (b) to amend the *Limitation Act 1969* to provide for a limitation period of 1 year for such causes of action running from the date on which the cause of action first accrues (subject to an extension, in limited circumstances, for a period of up to 3 years).

The Bill gives effect to the recommendations made by the New South Wales Law Reform Commission in its report entitled *Invasion of Privacy* (Report No 120).

[Explanation of specific provisions omitted.]

New South Wales *Civil Liability Amendment (Privacy) Bill 2009*

Contents

- 1 Name of Act
- 2 Commencement
- Schedule 1 — Amendment of *Civil Liability Act 2002* No 22
- Schedule 2 — Amendment of *Limitation Act 1969* No 31

A Bill for

An Act to amend the *Civil Liability Act 2002* to create a statutory cause of action for the invasion of the privacy of an individual; to amend the *Limitation Act 1969* in relation to the limitation period for actions for invasions of privacy; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Civil Liability Amendment (Privacy) Act 2009*.

2 Commencement

This Act commences on a day to be appointed by proclamation.

Schedule 1 Amendment of Civil Liability Act 2002 No 22

[1] Section 3B Civil liability excluded from Act

Insert at the end of section 3B (1) (a) (iii):

, and

(iv) Part 12 (Invasion of privacy),

[2] Section 3B (3)

Insert "(other than Part 12)" after "this Act".

[3] Part 12

Insert after Part 11:

Part 12 — Invasion of privacy

72 Objects of Part

The objects of this Part are:

- (a) to recognise that it is important to protect the privacy of individuals, but that the interest of individuals in their own privacy must be balanced against other important interests (including the interest of the public in being informed about matters of public concern), and
- (b) to create a statutory cause of action for the invasion of an individual's privacy, and
- (c) to provide for a number of different remedies to enable a court to redress any such invasion of privacy.

73 Definitions

In this Part:

Australian court or tribunal means:

- (a) any court established by or under a NSW law, Commonwealth law or the law of another Australian jurisdiction (including a court conducting committal proceedings for an indictable offence or a person conducting a coronial inquest), and
- (b) any other tribunal established by or under a NSW law, Commonwealth law or the law of another Australian jurisdiction that has the power to take evidence from witnesses before it on oath or affirmation (including a Royal Commission or other special commission of inquiry).

Australian jurisdiction means the Commonwealth or a State or Territory.

Commonwealth law means any law of the Commonwealth, and includes the Commonwealth Constitution.

conduct includes the publication of matter.

general law means the common law and equity (as modified from time to time by legislation).

NSW law means any written or unwritten law in force in New South Wales (including a law of the British or Imperial Parliament) other than a Commonwealth law.

74 Invasion of privacy actionable

(1) An individual has a cause of action against a person under this Part if that person's conduct invades the individual's privacy.

(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).

(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.
- (4) Conduct does not invade an individual's privacy for the purposes of an action under this Part if the individual, or another person having lawful authority to do so for the individual, expressly or impliedly consented to the conduct.

75 Defences

- (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.

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

(3) In this section:

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

76 Remedies

(1) In an action under this Part for the invasion of a plaintiff's privacy, the court may (subject to any jurisdictional limits of the court) grant any one or more of the following remedies, whether on an interim or final basis, as the court considers appropriate:

- (a) an order for the payment of compensation,
- (b) an order prohibiting the defendant from engaging in conduct (whether actual, apprehended or threatened) that the court considers would invade the privacy of the plaintiff,
- (c) an order declaring that the defendant's conduct has invaded the privacy of the plaintiff,
- (d) an order that the defendant deliver to the plaintiff any articles, documents or other material, and all copies of them, concerning the plaintiff or belonging to the plaintiff that:
 - (i) are in the possession of the defendant or that the defendant is able to retrieve, and
 - (ii) were obtained or made as a result of the invasion of the plaintiff's privacy or were published during the course of the conduct giving rise to the invasion of privacy,
- (e) such other relief as the court considers necessary in the circumstances.

(2) Without limiting subsection (1), the court may decline to grant a remedy under that subsection if it considers that an adequate remedy for the invasion of privacy exists under a statute of an Australian jurisdiction that is prescribed by the regulations.

77 Compensation for non-economic loss limited

(1) The maximum amount of compensation for non-economic loss that a court may order in an action for invasion of privacy under this Part is \$150,000 or any other amount adjusted in accordance with this section from time to time that is applicable at the time compensation is awarded.

(2) The Minister is, on or before 1 July 2010 and on or before 1 July in each succeeding year, to declare, by order published in the Gazette, the amount that is to apply, as from the date specified in the order, for the purposes of subsection (1).

(3) The amount declared is to be the amount applicable under subsection (1) (or that amount as last adjusted under this section) adjusted by the percentage change in the amount estimated by the Australian Statistician of the average weekly total earnings of full-time adults in Australia over the 4 quarters preceding the date of the declaration for which those estimates are, at that date, available.

(4) An amount declared for the time being under this section applies to the exclusion of the amount of \$150,000 or an amount previously adjusted under this section.

(5) If the Australian Statistician fails or ceases to estimate the amount referred to in subsection (3), the amount declared is to be determined in accordance with the regulations.

(6) In adjusting an amount to be declared for the purposes of subsection (1), the amount determined in accordance with subsection (3) is to be rounded to the nearest \$500 (with the amounts of \$250 and \$750 being rounded up).

(7) A declaration made or published in the Gazette after 1 July in a year and specifying a date that is before the date it is made or published as the date from which the amount declared by the order is to apply has effect as from that specified date.

78 Monetary order in the nature of exemplary or punitive damages cannot be made

A court cannot make a monetary order under section 76 that is in the nature of exemplary or punitive damages.

79 Action does not survive death

(1) A cause of action for the invasion of an individual's privacy arising under this Part does not survive the individual's death.

(2) Subsection (1) has effect despite section 2 of the *Law Reform (Miscellaneous Provisions) Act 1944*.

80 Relationship of cause of action to other laws

(1) To the extent that the general law recognises a specific tort for the invasion or violation of a person's privacy, that tort is abolished.

(2) Subject to subsection (1), the right of action for invasion of privacy under this Part and the remedies under this Part are in addition to, and not in derogation of, any other right of action or other remedy available otherwise than under this Part.

(3) Without limiting subsection (2), subsection (1) does not operate to abolish or otherwise limit any of the following kinds of causes of action at general law to the extent that they provide for a remedy for the invasion or violation of an individual's privacy:

- (a) an action for defamation,
- (b) an action for trespass,
- (c) an action for a breach of confidence,
- (d) an action for negligence,
- (e) an action for nuisance,
- (f) an action for injurious falsehood,
- (g) an action for passing off,
- (h) an action for intentional infliction of harm,
- (i) an action for breach of a statutory duty.

(4) Nothing in this Part requires any compensation awarded in an action for invasion of privacy under this Part to be disregarded in assessing compensation or damages in any other proceedings arising out of the same conduct giving rise to the invasion of privacy.

[Proposed savings and transitional provisions omitted.]

Schedule 2 Amendment of Limitation Act 1969 No 31

[1] Section 14C

Insert after section 14B:

14C Invasion of privacy

An action on a cause of action for an invasion of privacy under Part 12 of the *Civil Liability Act 2002* is not maintainable if brought after the end of a limitation period of 1 year running from the date on which the cause of action first accrues.

[2] Part 3, Division 2B

Insert after Division 2A:

Division 2B Invasion of privacy

56E Extension of limitation period by court

(1) A person claiming to have a cause of action for invasion of privacy under Part 12 of the *Civil Liability Act 2002* may apply to the court for an order extending the limitation period for the cause of action.

(2) A court must, if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date on which the cause of action first accrued, extend the limitation period mentioned in section 14C to a period of up to 3 years running from that date.

(3) A court may not order the extension of the limitation period for a cause of action for invasion of privacy under Part 12 of the *Civil Liability Act 2002* other than in the circumstances specified in subsection (2).

56F Effect of order

If a court orders the extension of a limitation period for a cause of action under section 56E, the limitation period is accordingly extended for the purposes of:

- (a) an action brought by the applicant in that court on the cause of action that the applicant claims to have, and
- (b) section 26 (1) (b) in relation to any associated contribution action brought by the person against whom the cause of action lies.



56G Costs

Without affecting any discretion that a court has in relation to costs, a court hearing an action brought as a result of an order under section 56E may reduce the costs otherwise payable to a successful plaintiff, on account of the expense to which the defendant has been put because the action was commenced outside the original limitation period.


56H Prior expiry of limitation period

An order for the extension of a limitation period, and an application for such an order, may be made under this Division even though the limitation period has already expired.

Appendix C – Victorian Law Reform Commission recommendations

CREATING STATUTORY CAUSES OF ACTION

22. There should be two statutory causes of action dealing with serious invasion of privacy caused by misuse of surveillance in a public place.
23. The first cause of action should deal with serious invasion of privacy by misuse of private information.
24. The second cause of action should deal with serious invasion of privacy by intrusion upon seclusion.
25. The elements of the cause of action for serious invasion of privacy caused by misuse of private information should be:
 - a. D misused, by publication or otherwise, information about P in respect of which he/she had a reasonable expectation of privacy; and
 - b. a reasonable person would consider D's misuse of that information highly offensive.
26. The elements of the cause of action for serious invasion of privacy caused by intrusion upon seclusion should be:
 - a. D intruded upon the seclusion of P when he/she had a reasonable expectation of privacy; and
 - b. a reasonable person would consider D's intrusion upon P's seclusion highly offensive.
27. The defences to the cause of action for serious invasion of privacy caused by misuse of private information should be:
 - a. P consented to the use of the information
 - b. D's conduct was incidental to the exercise of a lawful right of defence of person or property, and was a reasonable and proportionate response to the threatened harm
 - c. D's conduct was authorised or required by law
 - d. D is a police or public officer who was engaged in his/her duty and the D's conduct was neither disproportionate to the matter being investigated nor committed in the course of a trespass
 - e. if D's conduct involved publication, the publication was privileged or fair comment
 - f. D's conduct was in the public interest, where public interest is a limited concept and not any matter the public may be interested in.

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28. The defences to the cause of action for serious invasion of privacy caused by intrusion upon seclusion should be:
 - a. P consented to the conduct
 - b. D's conduct was incidental to the exercise of a lawful right of defence of person or property, and was a reasonable and proportionate response to the threatened harm
 - c. D's conduct was authorised or required by law
 - d. D is a police or public officer who was engaged in his/her duty and the D's conduct was neither disproportionate to the matter being investigated nor committed in the course of a trespass
 - e. D's conduct was in the public interest, where public interest is a limited concept and not any matter the public may be interested in.
 29. The remedies for both causes of action should be:
 - a. compensatory damages
 - b. injunctions
 - c. declarations.
 30. Costs should be dealt with in accordance with section 109 of the [*Victorian Civil and Administrative Tribunal Act 1998 (Vic)*].
 31. Jurisdiction to hear and determine the causes of action for serious invasion of privacy by misuse of private information and by intrusion upon seclusion should be vested exclusively in the Victorian Civil and Administrative Tribunal.
 32. These causes of action should be restricted to natural persons. Corporations and the estates of deceased persons should not have the capacity to take proceedings for these causes of action.
 33. Proceedings must be commenced within three years of the date upon which the cause of action arose.