

NSW privacy law and the new tort of serious invasion of privacy

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Key points

- In 2025, the Australian Parliament introduced a new statutory tort enabling individuals to sue for serious invasions of privacy. The new tort will provide greater protection of individual privacy under Australian law and bring Australian law closer to that in other jurisdictions.
- The concept of privacy is multifaceted and encompasses personal privacy, information privacy, and communication privacy. Rights to privacy are rarely absolute and must be balanced against other rights and interests, such as freedom of speech and protection of the public.
- The common law, statutory data protection and criminal laws all play a role in protecting aspects of privacy, often incidentally to the protection of other interests, but previously there was no general civil right of action for invasions of privacy.
- The new tort is specifically targeted at serious and deliberate misuse of private information or intrusion into an individual's seclusion, in situations where there is a reasonable expectation of privacy and where there is no countervailing public interest to justify the conduct.
- Exemptions for journalists engaged in collecting and publishing news and current affairs reduce the protection that the new law provides for individuals. Exemptions for law enforcement and other government agencies also prevent the new law protecting individuals from excessive or unlawful use of their powers.
- New technologies have enabled new ways for privacy to be invaded: hacking of databases; appropriation and use of images, including 'deepfake' images; facial recognition software; sophisticated surveillance devices. While previous laws and the new tort may remedy some of this conduct, lawmakers may also consider specifically targeted new laws.

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1. Introduction

Privacy laws around the world have been under the spotlight in recent decades as advances in technology have created greater scope for invasions of personal privacy. Australian laws were widely seen as lagging behind developments in other countries which share a common legal heritage.

On 10 June 2025, a new statutory tort for serious invasions of privacy came into operation throughout Australia under the *Privacy Act 1988* (Cth).¹ The new tort gives individuals a right to sue another person or entity for damages where they have been subject to a serious invasion of their privacy by way of deliberate or reckless conduct consisting of misuse of private information or an intrusion into their private space. The right to sue will only arise in circumstances where the person had a reasonable expectation of privacy and where there was no countervailing public interest in the actor's conduct. The new tort will fill some gaps in privacy protection. However, there are important exemptions that will limit its effectiveness in providing redress in some situations.

Because 'privacy' is a term that is evoked in a wide range of interactions and legal and social contexts, it can be challenging and confusing for someone to discover and understand just how and when our laws protect an individual's privacy and, importantly, when they do not. The purpose of this paper is to:

- Explain the concept of privacy, and the extent to which pre-existing laws protect personal, informational and communications privacy
- Outline the background to the new tort, summarising its elements, defences, remedies and exemptions, and contrast remedies under existing laws and the new tort
- Briefly discuss current privacy law issues, including remedies for data breaches, use of facial recognition software, and deepfake images.

¹ The new tort was enacted by the [Privacy and Other Legislation Amendment Act 2024](#) (Cth) which amended the [Privacy Act 1988](#) (Cth). The provisions enacting the tort are set out in the new [Schedule 2](#) of the [Privacy Act 1988](#) (Cth).

2. The concept of privacy

The concept of privacy relates to many different aspects of an individual's life.² It is generally used to refer to privacy of information, privacy of communications and personal privacy, with the last aspect being the most general and undefined in scope. Breaches of an individual's privacy may thus take many forms and may breach more than one aspect of privacy. In recent years, the world's digital revolution has provided new mechanisms for invading another's privacy with corresponding difficulty for individuals to protect themselves from intrusions, surveillance and disclosures, and misuse of private information.

The right to privacy is recognised in the *Universal Declaration of Human Rights* and the *International Covenant of Civil and Political Rights 1966* (ICCPR),³ which was ratified by Australia in 1980.⁴ Article 17 of the ICCPR provides that:

1. No one should be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Despite the protection of individual privacy in international conventions, privacy as a concept or value has not itself been specifically defined in law and the meaning of the term 'privacy' varies according to context.

The right to privacy co-exists with and underpins a number of other relevant rights, such as rights to freedom of opinion, freedom of thought and expression, and freedom of movement.⁵

Ultimately, privacy underpins individuals' ability to live fulfilled lives by allowing them to develop autonomy, forge family and other relationships, develop independent thoughts and opinions, obtain assistance when necessary, and communicate with others on matters of social, personal and democratic importance.

2.1 Personal privacy

Personal privacy encompasses bodily privacy and privacy in physical places. Bodily privacy underpins physical safety, integrity and personal dignity. Privacy in physical spaces underpins personal security and safety as well as freedom of movement and association. Personal privacy may also be said to encompass the rights to a family life which are recognised in international covenants.

Examples of invasions of personal privacy include:

² The Australian Law Reform Commission (ALRC) noted [4 aspects of privacy](#): information privacy; communication privacy; bodily privacy; and territorial privacy. Its 2003 report, *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108), was primarily concerned with information privacy.

³ International Covenant on Civil and Political Rights, [Art 17](#).

⁴ However, 'the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions': *Dietrich v The Queen* (1992) 177 CLR 292 at 305.

⁵ International Covenant on Civil and Political Rights, [Art 19](#).

- Filming of a person in a vulnerable state, for example, while naked or in the shower,⁶ or in a state of undress during a police raid in their home⁷
- Filming or photographing a person in a public or semi-public place where they may still reasonably expect privacy, such as a patient during a medical incident after an accident, while receiving medical care, or in their hospital room⁸
- A neighbour setting up a surveillance camera that enables filming of the victims' activities inside their own home or in their garden and those of their family or guests;⁹ or using a drone to film a neighbour's activities¹⁰
- The media or professional photographers taking and publishing photographs of the family of a celebrity in their daily or ordinary life.¹¹

2.2 Informational privacy

Informational privacy refers to privacy over information or data, in whatever form, about a person, including their relationships, their activities and their movements. It may or may not be classed as confidential information, depending on the circumstances. It includes health information and personal financial information. It overlaps with other aspects of privacy as disclosure of private information about a person can affect their relationships, dignity, security and freedoms.

Examples of invasions of informational privacy include:

- Snooping into another's private records such as tax files, bank files,¹² medical files and Centrelink data
- Revealing confidential medical information such as sexually transmitted infections, treatment for drug addiction,¹³ or mental health conditions

⁶ *C v Holland* [2012] NZHC 2155; [2012] 3 NZLR 672 (defendant set up a webcam to film his flatmate in the shower): the New Zealand court recognised a new tort of invasion of privacy by deliberate intrusion into seclusion where the victim had a reasonable expectation of privacy. In Australia, a well-known sports player photographed his girlfriend as she was coming out of the shower, despite her protests, and texted the image to his friends, with it then becoming available on the internet.

⁷ *Donnelly v Amalgamated Television Services Pty Ltd* (1998) 45 NSWLR 570 (footage broadcast of man in his underpants during a police search of his home).

⁸ N May, [Sydney Harbour shark bite: NSW Ambulance apologises after staffer leaked photo of victim's injuries](#), *Guardian Australia*, 1 February 2024; S Scott, [Sydney nurse who took explicit photo of patient under anaesthetic still practising in NSW](#), *ABC News*, 6 November 2015; *Kaye v Robertson* [1991] FSR 62; (1990) 19 IPR 147 (well-known actor photographed by press photographers while lying in a coma in hospital bed).

⁹ *Raciti v Hughes* (1995) 7 BPR 14; *Au v Berlach* [2022] NSWSC 81; see also *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4 (Tate Modern constructed rooftop viewing platform enabling visitors to photograph and film neighbours in their apartments).

¹⁰ Such conduct is unlikely to be protected by the [Civil Liability Act 2002](#) (NSW) [s 72](#), but remote surveillance is also not proscribed by the [Surveillance Devices Act 2007](#) (NSW).

¹¹ *Von Hannover v Germany* (2005) 40 EHRR 1 (paparazzi harassment of Princess Caroline of Monaco and her family); *Murray v Express Newspapers plc* [2008] EWCA Civ 446 (photographs of JK Rowling's infant son on family outing); *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (photographs of infant son of rock star at a café); cf *Hosking v Runting* (2005) 1 NZLR 1.

¹² In *Jones v Tsige* 2012 ONCA 32: the claimant sued her partner's former partner, a fellow bank employee, who snooped into the claimant's bank records.

¹³ *Campbell v MGN* [2004] 2 AC 457 (Supermodel Naomi Campbell photographed outside a Narcotics Anonymous meeting); *Australian Football League v The Age Company Ltd* [2006] VSC 308 (newspaper publishing confidential details of player's drug addiction).

- Hacking into databases containing personal private or sensitive information;¹⁴ or publicly revealing private personal information that has been hacked by posting it online
- Revealing someone's sexuality or personal relationships without their consent¹⁵
- Publishing images of victims taken from private social media accounts (examples in the media have included victims of the bus crash in the Hunter Valley, victims of the Westfield Bondi Junction attack, and the family of a suicide victim in Queensland).¹⁶

2.3 Communications privacy

Communications privacy refers to all manners and forms in which a person or entity may communicate with others, and may include draft or unsent communications. It overlaps with informational and personal privacy due to the human interaction involved in, and the content of communications. Examples might relate to personal correspondence between people in a relationship or closed group, or between a professional advisor and patient or client. The digital revolution and technological advances providing new ways to communicate have also opened up new ways to invade communications and other aspects of privacy.

Examples of invasions of communications privacy include:

- Opening an envelope addressed to someone else and reading the letter it contained without consent; or communicating the content of the letter to third parties
- Using a smart phone or new age sunglasses¹⁷ to secretly record a conversation with another person
- Posting a secret recording to social media or quoting it in a media article
- Intercepting a telephone call or using a listening device placed next to a telephone to record a private telephone conversation, or intercepting an internet conversation over a computer.¹⁸

¹⁴ For example, recent hacking into databases maintained by Optus, Medicare and Qantas Frequent Flyer program.

¹⁵ A Hornery, [I made mistakes over Rebel Wilson, and will learn from them](#), *Sydney Morning Herald*, 13 June 2022; L Foschia, [Minister quits over gay sex club visit](#), *ABC News*, 20 May 2010.

¹⁶ Kim Lyall, [Journalists taking dead people's photos from social media without permission inflames the wound of powerlessness](#), *The Guardian*, 18 June 2023; M Whitbourn, [Dawn Singleton's family launch legal action against Nine](#), *Sydney Morning Herald*, *Sydney Morning Herald*, 9 April 2025; R Innes, S Bulloch, K Lang, Elite Brisbane school rocked by sudden death of student, *Courier Mail*, 22 July 2025. See further, [Hollow headlines](#), *ABC Media Watch*, 1 September 2025.

¹⁷ C Al-Khouri, [US content creator secretly filmed Sydney women with covert sunglasses camera lens](#), *ABC News*, 25 March 2025.

¹⁸ BBC News, [Royal hoax call inquest: Nurse 'very upset' after prank](#), *BBC News*, 11 September 2014.

3. Existing privacy laws

Despite the recognition of the right to personal privacy in international covenants to which Australia is a signatory, it was widely recognised that Australian law lagged behind recent developments in other countries with which Australia shares a common legal inheritance.

After the courts of the United Kingdom were charged by the *Human Rights Act 1998* (UK) with upholding the *European Convention of Human Rights*, they began to develop explicit protection of privacy, balanced with other convention rights such as freedom of expression. In 2004 the House of Lords' judgment in the landmark case of *Campbell v MGN Ltd*, brought by supermodel Naomi Campbell after publication of photographs of her coming out of a Narcotics Anonymous meeting, established a new legal basis for protection of personal privacy in the United Kingdom.¹⁹ The phone-hacking scandals involving Britain's tabloid media sparked 2 decades of litigation for invasions of privacy, still continuing.²⁰ In New Zealand, courts have developed both a common law tort of misuse of private information and a tort of intrusion into seclusion.²¹ In Canada, some provinces enacted statutory torts of invasion of privacy, while others developed a common law tort.²²

Before these developments, the courts in the United Kingdom, Australia and elsewhere had denied the existence of a freestanding common law action for invasion of privacy.²³ Despite encouraging statements in the High Court of Australia in 2001 that earlier decisions did not stand in the way of further protection of individual privacy,²⁴ the common law of Australia has not kept up with the law developed elsewhere. Further, the absence of Australia-wide human rights legislation such as in the United Kingdom or New Zealand has no doubt meant that the springboard for the courts to develop private remedies is also absent.

Nevertheless, incidental protection of personal privacy was often a side-effect of the common law protection of property rights in land and goods and of rights protecting a person from bodily interference and violence. In addition, criminal laws and other federal and state statutes dealing with surveillance and data protection provide some protection of personal privacy, adding to what is often described as a patchwork of protection.

A brief summary of the legal landscape prior to the introduction of the new statutory tort is presented in this section. This summary helps inform consideration of the extent to which the new statutory tort strengthens privacy protection in NSW.

¹⁹ *Campbell v Mirror Group Newspapers* [2004] UKHL 22.

²⁰ *Gulati v Mirror Group Newspapers Ltd* [2015] EWHC 1482 (Ch); [2015] EWCA Civ 1291; as at the time of writing (May 2026), judgment has been reserved in the High Court of England and Wales in a claim by several high profile claimants including the Duke of Sussex and Elton John against Associated Newspapers for invasions of privacy by phone hacking and other conduct.

²¹ *Hosking v Runting* [2005] 1 NZLR 1; [2004] NZCA 34; *C v Holland* [2012] 3 NZLR 672; [2012] NZHC 2155.

²² For example, *Privacy Act RSBC 1996, c 373*; *Jones v Tsige* 2012 ONCA 32.

²³ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479; *Wainwright v Home Office* [2004] AC 406. Now see *Campbell v Mirror Group Newspapers* [2004] UKHL 22; *Jones v Tsige* 2011 ONCA 32.

²⁴ *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199.

3.1 Common law

3.1.1 Torts relating to bodily interference and threats but not photography

Bodily privacy is protected in the common law by the torts of trespass to the person (which includes battery, involving non-consensual physical interference) and assault (which involves threats of imminent violence). The criminal law also prohibits such conduct. However, these tort actions provide no protection against indirect interferences such as visual snooping or photography or filming of a person without consent, nor against the use or communication of such footage.

While there are certain criminal offences for photography or filming of a person's private parts or for illicit or indecent purposes,²⁵ there is no general civil action against a person for taking a photograph of another person or their property without their consent.²⁶

Where a person has engaged in a deliberate course of conduct with intent to shock, harass or distress a person, an action may arise at common law but only if psychiatric illness ensues. 'Mere' emotional distress is not sufficient for this action, even if the distress is caused deliberately.²⁷

In extreme circumstances, a person may be charged with the criminal offence of outraging public decency: a man in Victoria who filmed a severely injured police officer following a collision with his car after a police chase was convicted and imprisoned on this charge.²⁸

3.1.2 Torts of trespass to land and nuisance

It has long been recognised that a person's home is their 'castle', no matter how small.²⁹

Any unlawful entry is clearly a trespass to land. While there is implied permission to enter for a range of lawful purposes, an entry for a purpose outside those lawful purposes will be treated as trespass and a person in breach of the entry conditions may become a trespasser. Media crews have been sued for trespass in such cases.³⁰

There is no general defence of public interest to a trespass, even for police.³¹ So too, for example, animal liberationists invading a farm to take footage of animals or an abattoir to post footage online could not claim public interest as a defence to a trespass action. A controversial issue is whether the occupier can restrain the use of the images taken, particularly use by third parties.³²

²⁵ See [Crimes Act 1900](#) (NSW) [s 91P](#) (recording an intimate image without consent); [s 91L](#) (filming a person's private parts).

²⁶ See the discussion in *Bathurst City Council v Saban* (1985) 2 NSWLR 704. Note that an occupier of premises can place restrictions on photography etc. as a condition of entry, and a person breaching these conditions will become a trespasser: *Roy v O'Neill* [2020] 272 CLR 291. For an example of preventing customers filming employees, see: S Iqbal, [This Insta-Famous Bakery Was Forced To Ask Customers To Stop Filming Staff W/O Their Consent](#), 30 April 2024.

²⁷ *Wilkinson v Downton* [1897] 2 QB 57; *Nationwide News Pty Ltd v Naidu* [2007] NSWCA 377.

²⁸ *DPP v Pusey* [2021] VCC 478.

²⁹ *Plenty v Dillon* (1991) 171 CLR 635, 639 per Mason CJ, Brennan and Toohey JJ, citing *Entick v Carrington* (1765) 19 St Tr 1029 at 1066.

³⁰ *TCN Channel Nine Pty Ltd v Anning* [2002] NSWCA 82.

³¹ *Plenty v Dillon* (1991) 171 CLR 635.

³² *Farm Transparency International Ltd v The Game Meats Company of Australia Pty Ltd* (High Court of Australia Case No M105/2025) on appeal from [2024] FCA 1455.

A limitation of existing law is that only the occupier with exclusive possession could sue for trespass. A person filmed using a gym might feel that their privacy is invaded, yet they are not the occupier of the gym. Someone occupying a hospital bed or room,³³ a guest in a hotel, the host or guest at a private function³⁴ or a participant at a meeting disturbed by an intruder would not have 'title to sue' the trespasser.

The tort of private nuisance protects an occupier's quiet enjoyment of their land and premises from a substantial interference caused by the extraordinary activities of a neighbour or other person outside the land.³⁵ In a NSW case, *Raciti v Hughes*, the claimants obtained an injunction on the basis of nuisance to stop their neighbours illuminating and recording their activities in their own backyard.³⁶ That behaviour was described as deliberate snooping but it would be more difficult to complain of nuisance where the overlooking is incidental to the neighbour's other purposes, such as their own security. Again, nuisance protects only the lawful occupier, not others who live on the property, such as family members or guests.

3.1.3 Action for breach of confidence

Confidential information—information imparted under an obligation to keep it confidential—has long been protected by the courts, ever since Prince Albert obtained an injunction to stop the publication of descriptions of Queen Victoria's private etchings of their family life which had been entrusted just for personal copies to be made.³⁷

Where photography is taken in an intimate context it is an actionable breach of confidence, remedied by an injunction and/or damages, to communicate those images or recordings to third parties without consent.³⁸ In addition, criminal laws prohibit circulating intimate images of a person without her or his consent.³⁹

However, the law on confidential information may not necessarily protect private information fully: it may not have been imparted under an obligation to keep it confidential; it may have become publicly or widely known (and yet still be private in nature); and the law on breach of confidence is usually more concerned with preventing misuse or disclosure than remedying injured feelings after the breach.⁴⁰

³³ *Kaye v Robertson* [1991] FSR 62.

³⁴ A guest in a hotel or wedding reception venue or club, where an intruder crashes the wedding to obtain footage or photographs without consent, See *Douglas v Hello! Ltd* (No 3) [2005] EWCA Civ 595.

³⁵ A majority of the High Court of Australia has recently set out what in their opinion is the central element of a claim for private nuisance: that the interference with the plaintiff's occupation of the land must arise from a use by the defendant of its land that was not common and ordinary: *Hunt Leather Pty Ltd v Transport for New South Wales* [2025] HCA 53.

³⁶ *Raciti v Hughes* (1995) 7 BPR 14; *Au v Berlach* [2022] NSWSC 81; see also *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4 (Tate Modern constructed rooftop viewing platform enabling visitors to photograph and film neighbours in their apartments).

³⁷ *Prince Albert v Strange* (1849) 1 Mac & G 25 [41 ER 1171].

³⁸ *Giller v Procopets* [2008] VSCA 236; *Wilson v Ferguson* [2015] WASC 15.

³⁹ *Crimes Act 1900* (NSW) s 91P and s 91Q.

⁴⁰ Compare *PJS v News Group Newspapers Ltd* [2016] UKSC 26. Cf *Giller v Procopets* [2008] VSCA 236.

3.2 Surveillance devices legislation

The primary source of protection of the privacy of communications in the modern era is found in Commonwealth and state and territory legislation dealing with, respectively, interception of telephonic and electronic communications, and the use of optical, listening, tracking or data surveillance devices. However, a striking feature of Australia's state and territory laws on optical and other surveillance is the significant variation between state and territory regimes, making the law difficult to understand for any person or entity operating across state boundaries. This inconsistency was the subject of substantial analysis by the Australian Law Reform Commission (ALRC) in its 2014 *Report on Serious Invasions of Privacy in the Digital Era*.⁴¹

3.2.1 Commonwealth

The *Telecommunications Interception and Access Act 1979* (Cth) applies to communications using telecommunications. Section 7 prohibits the interception of a communication passing over a telecommunications system and makes it unlawful to authorise or permit or enable another person to intercept such a communication. It only applies to interceptions during the passage of communications over a network. It does not, for example, apply by placing a tape recorder beside the telephone receiver (although state legislation may then apply).⁴² There is also a ban on communicating to another person a record of any information obtained by the interception. A breach of the Act is an indictable offence punishable by fine or imprisonment.

Notably, the Commonwealth Act empowers the court to grant to an aggrieved person who was a party to the intercepted communication such relief as the court considers appropriate, including the payment of damages.⁴³

3.2.2 NSW

The relevant legislation in NSW is the *Surveillance Devices Act 2007* (NSW) which provides important, but not complete, protection for personal and communication privacy. This Act provides that a person must not knowingly install, use or maintain a listening device to overhear, record, monitor or listen to a private conversation. Among the exceptions is where all principal parties consent to the recording.⁴⁴

A private conversation is defined as a conversation carried on in circumstances that may reasonably be taken to indicate that any of the parties' desire to be heard only by themselves or by someone to whom they have given consent. It does not include a conversation in which the parties ought reasonably to expect that it may be overheard by someone else.⁴⁵ There are exceptions, for example, for the reasonable protection of lawful interests.⁴⁶

⁴¹ Australian Law Reform Commission, [14: Surveillance Devices](#), in *Serious Invasions of Privacy in the Digital Era (ALRC Report 123)*, September 2014.

⁴² S Rodrick, B Clift, J Ireland, and L Power, *Australian Media Law* 6th ed, Thomson Reuters Law Book Co, 2021, [8.110] and cases cited therein (hereafter 'Rodrick et al.').

⁴³ *Telecommunications Interception and Access Act 1979* (Cth) [s 107A](#).

⁴⁴ *Surveillance Devices Act 2007* (NSW) [s 7\(3\)](#).

⁴⁵ *Surveillance Devices Act 2007* (NSW) [s 4](#).

⁴⁶ *Surveillance Devices Act 2007* (NSW) [s 7\(3\)](#).

With regard to optical devices, a person must not knowingly install, use or maintain an optical surveillance device on or within premises or a vehicle to record visually or observe the carrying on of an activity where that involves entry on the premises or a vehicle without the consent of the owner or occupier or interference with the vehicle.⁴⁷ This provision does not therefore apply where the optical device is installed or operated *outside* the subject's premises, for example a drone, even where the device can record the private activities of the subject on his or her own premises. It is now a common complaint that neighbours have installed so-called security cameras which record their neighbours' activities on their own premises or their coming and going to or from their own premises. As discussed in [section 3.1.2](#), in such cases the aggrieved neighbour had to fall back on a private nuisance claim.

The *Surveillance Devices Act 2007* (NSW) also includes prohibition on the installation and use of tracking devices to determine a person's or object's geographical location without consent,⁴⁸ and on the installation and use of data surveillance devices to record input or output of a computer where that involves entry without consent or interference without consent.

There is a further prohibition on a person communicating or publishing a record or report of a private conversation or a private activity that has come to the person's knowledge as a direct or indirect result of the use of a listening or surveillance device in contravention of the Act.⁴⁹ There are exceptions for law enforcement and exceptions where the conduct is in protection of a lawful interest or in response to an imminent threat of violence.⁵⁰ There is no special protection or exception for the media.

The consequences of a breach of the Act will generally be a penalty and/or up to 5 years imprisonment.⁵¹ Importantly for the individual who is the subject of unlawful surveillance, and in contrast to the *Telecommunications Interception and Access Act 1979* (Cth) discussed in [section 3.2.1](#), there is no provision in the NSW Act for the court to grant relief or order compensation to the aggrieved party.

3.3 Informational privacy legislation

A major and important source of legal protection of informational privacy is to be found in Commonwealth and state and territory legislation which creates extensive regulation over the collection, storage, disclosure, handling and use of 'personal information' or data about individuals by certain entities. In many countries such laws are more accurately called 'data protection' laws. Australian lawmakers have continued to call these laws 'privacy' laws, even though they only deal with information and may extend to information about an individual which may be widely or publicly known or advertised, such as telephone numbers.

⁴⁷ [Surveillance Devices Act 2007](#) (NSW), s 8.

⁴⁸ [Surveillance Devices Act 2007](#) (NSW), s 9. Note that tracking a person's movements even with ostensible consent may arguably be part of a course of conduct amounting to unlawful coercive control in NSW under new criminal provisions: [Crimes Act 1900](#) (NSW) s 54D.

⁴⁹ [Surveillance Devices Act 2007](#) (NSW), s11.

⁵⁰ For example, [Surveillance Devices Act 2007](#) (NSW) s 11 (2) and (3).

⁵¹ For example, [Surveillance Devices Act 2007](#) (NSW) s 7(1).

3.3.1 Commonwealth

The *Privacy Act 1988* (Cth) regulates the use of personal information by Commonwealth and other government entities, commercial entities or corporations with an annual turnover of more than \$3 million, and small business entities that deal in personal or health information. Other small business entities holding personal information are not regulated by the Act. Personal information is defined as 'information or opinion about an identified individual, or an individual who is reasonably identifiable, whether or not true and whether or not in material form'.⁵² Information about an individual may come within the definition even though it is not, in fact, what would be considered to be private or confidential information. The Privacy Commissioner, as a member of the Office of the Australian Information Commissioner (OAIC), is charged with overseeing and enforcing the operation of the *Privacy Act 1988* (Cth), including the *Australian Privacy Principles* (APPs) contained in that Act.⁵³

The consequence of an entity not complying with, for example, the *Australian Privacy Principles* or other provisions of the *Privacy Act 1988* may be an adverse determination by the Commissioner. The entity may seek a review of that determination by the Administrative Review Tribunal or commence judicial review proceedings. Orders to enforce the Commissioner's determination may be made by the Federal Court of Australia.⁵⁴ Any monetary penalty, like a fine imposed after a crime, would be payable to the Australian Government. While the Commissioner may make a determination that the entity pay compensation to a complainant for conduct in breach of the APPs constituting an interference with privacy, that determination is not conclusive or binding on either party and must be enforced in the Federal Courts.⁵⁵ Representative complaints on behalf of other individuals who have similar complaints following a breach may also be made, with consequential determinations.⁵⁶

Other Australian Government bodies have powers and responsibilities that may complement those of the Privacy Commissioner and the OAIC, including the E-Safety Commissioner, the Australian Consumer and Competition Commission, the Australian Communications and Media Authority, and the National Children's Commissioner.

On 31 March 2026, the OAIC released an exposure draft of a new *Privacy (Children's Online Privacy) Code 2026* for public consultation with a view to the code being in force by the end of 2026. Breach of the code will constitute an interference with privacy under the *Privacy Act 1988* (Cth) in the same way as a breach of the APPs. The new code will regulate any online service that is likely to be accessed by children.⁵⁷

⁵² [Privacy Act 1988](#) (Cth) s 6.

⁵³ The *Australian Privacy Principles* are set out in [Schedule 1](#) of the [Privacy Act 1988](#) (Cth).

⁵⁴ See for example, *Australian Information Commissioner v Australian Clinical Labs Limited (No 2)* [2025] FCA 1224, where an agreed penalty of \$5.8 million was imposed.

⁵⁵ [Privacy Act 1988](#) (Cth) s 52(1)(b)(iii); s 52(1B); s 55A. The need for the Commissioner's determination to be enforced by court arises from the doctrine of separation of powers under the federal Constitution.

⁵⁶ [Privacy Act 1988](#) (Cth) s 36; s 38.

⁵⁷ Office of the Australian Information Commissioner, [Children's Online Privacy Code](#), 19 March 2026.

3.3.2 NSW

The NSW Information and Privacy Commission is charged with overseeing and enforcing the operation of the *Privacy and Personal Information Protections Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW) with regard to both privacy of personal information and access to information. The Commission regulates NSW government agencies and departments, local councils, universities in NSW, state-owned corporations and some private health service providers. Individuals may make a complaint to the Commission, which will conduct a review as to whether an entity has complied with their privacy obligations. The NSW Privacy Commissioner can make a determination on a complaint. This can be reviewed and enforced in the NSW Civil and Administrative Tribunal which may also award compensation.⁵⁸

3.3.3 Limitations of this legislation

While these laws provide regulatory mechanisms to enhance the privacy of personal information, there are 2 striking features of these privacy statutes.

The first is the lack of a private or direct remedy in the courts for an individual who has been adversely affected by a breach of the legislation, rather than the indirect and time-taking route of seeking a determination to be enforced in federal courts. Importantly, this omission also reduces the availability of class actions which may be a more economical route than individual actions for a group of people adversely affected by a breach.

A review of the *Privacy Act 1988* (Cth) in 2022 by the Attorney-General's Department recommended the introduction of a direct right of action for any individual or group of individuals whose privacy has been interfered with by an entity which is subject to the *Australian Privacy Principles*. This would include representative groups bringing claims on behalf of members who have been affected by breaches of the Act, with their consent. However, the Australian Government has so far only legislated some of the reforms recommended by the report, and it is not yet clear whether any direct right of action for breach of the *Privacy Act 1988* will be included in any second tranche of reforms, or even whether there will be a second tranche of reforms in the immediate future.⁵⁹

A second striking feature of the regulatory regime under the *Privacy Act 1988* (Cth) is the exemption for media organisations for acts and practices carried out 'in the course of journalism'; with the latter term not being defined.⁶⁰ To be protected by this exemption, the media organisation must show itself to be bound by a code of practice, a form of self-regulation. It has been commented that the 'level of protection [of personal privacy] that these codes provide in practice is questionable.'⁶¹ That will continue to be so, given that the exemption for journalists and media organisations under the new tort, as discussed in the next section, does not depend on their compliance with industry codes of conduct.⁶²

⁵⁸ *Privacy and Personal Information Protections Act 1998* (NSW) ss 53–55: compensation of up to \$40,000 may be ordered.

⁵⁹ Attorney-General's Department, *Privacy Act Review*, Report 2022, [Chapter 26](#), p 272 ff, especially Proposal 26.1.

⁶⁰ *Privacy Act 1988* (Cth) s 7B(4).

⁶¹ Rodrick et al., *Australian Media Law*, 6th ed, Thomson Reuters, 2021, [8.1190] p 698.

⁶² The exemption applies regardless of whether the journalist complied with the code of conduct to which he or she is subject: *Privacy Act 1988* (Cth) [Schedule 2, cl 15\(4\)](#).

4. The new tort

4.1 Background

It cannot be said that the 2024 legislation enacting the new tort was created in a hurry.⁶³ The ALRC first recommended such an action in 2008, followed by the NSW Law Reform Commission in 2009.⁶⁴ The ALRC was tasked with designing a new statutory action in its 2013–2014 inquiry and did so in its *Report 123* in 2014.⁶⁵ Soon afterwards, the NSW Legislative Council Standing Committee of Law and Justice recommended the implementation of the ALRC proposals in NSW with some adjustments to broaden the potential liability of corporations.⁶⁶ Successive national inquiries recommended the enactment of the ALRC model.⁶⁷ The action as finally enacted is largely based on the recommendations of the ALRC in its 2014 report but includes important exemptions which were not recommended by the ALRC or by any other public body.

When introducing the bill into the Australian Parliament to enact the new tort, Attorney General Mark Dreyfus stated:

A statutory tort applying to breaches of privacy has been talked about in Australia for a long, long time—as early as 1969, when Sir Zelman Cowen, then Vice-Chancellor of the University of New England, endorsed legislation to create an actionable right to seek redress for breaches of privacy.

There is currently no tortious right of action for invasion of privacy under the act or any other Commonwealth, state or territory statute.

In its 2014 report, the [ALRC] stated the creation of a statutory tort would ‘fill an increasingly conspicuous gap in Australian law, helping to protect the privacy of Australians, while respecting and reinforcing other fundamental rights and values, including freedom of expression’.

There are parts of our lives that we reasonably expect to be able to keep to ourselves. The freedom to enjoy a private and family life, and express ourselves and our beliefs in safety, is critical to our wellbeing and dignity.

Ensuring that individuals have a clear right to seek a legal remedy against people or entities who seriously invade their privacy is a key part of ensuring that our privacy laws keep pace with community expectations and advances in technology.⁶⁸

⁶³ The new statutory action for serious invasion of privacy is set out in [Schedule 2](#) of the [Privacy Act 1988](#) (Cth), inserted in 2024 by the [Privacy and Other Legislation Amendment Act 2024](#) (Cth).

⁶⁴ Australian Law Reform Commission, [Invasion of Privacy \(ALRC Report 120\)](#), April 2009.

⁶⁵ Australian Law Reform Commission, [Serious Invasions of Privacy in the Digital Era \(ALRC Report 123\)](#), September 2014.

⁶⁶ Legislative Council Standing Committee on Law and Justice, [Remedies for the serious invasion of privacy in New South Wales](#) (Report No. 57), Parliament of NSW, March 2016, Recommendations 3, 4, 5 and 6. The committee recommended that liability extend to negligence in the case of corporations, rather than be limited to intentional or reckless conduct.

⁶⁷ See, for example, House of Representatives Standing Committee on Social Policy and Legal Affairs, [Eyes in the Sky: Inquiry into drones and the regulation of air safety and privacy](#), Report, Parliament of Australia, July 2014, Recommendation 3; The Senate Legal and Constitutional Affairs References Committee, [Phenomenon colloquially referred to as 'revenge porn'](#), Report, Parliament of Australia, February 2016, Recommendation 6; Australian Human Rights Commission, [Human Rights and Technology](#), Discussion Paper, December 2019, Proposal 4; Australian Competition and Consumer Commission, [Digital Platforms Inquiry](#), Final Report, June 2019, Recommendation 19.

⁶⁸ M Dreyfus, [Privacy and Other Legislation Amendment Bill 2024, second reading](#), *Commonwealth of Australia Hansard: House of Representatives debates*, 12 September 2024.

4.2 Elements of the cause of action

Schedule 2 of the *Privacy Act 1988* (Cth) sets out the new tort. It provides that an individual (the plaintiff) has a cause of action against another person⁶⁹ (the defendant) if:

- (a) The defendant invaded the plaintiff's privacy by:
 - (i) intruding upon the plaintiff's seclusion and/or
 - (ii) misusing information that relates to the plaintiff, and
- b) a person in the position of the plaintiff would have had a reasonable expectation of privacy in all the circumstances, and
- (c) the invasion of privacy was intentional or reckless, and
- (d) the invasion of privacy was serious, and
- (e) the public interest in the plaintiff's privacy outweighed any countervailing public interest.⁷⁰

Only where all 5 elements are satisfied will the plaintiff have an action against the defendant. If those 5 elements are satisfied, the plaintiff does not additionally need to prove what the law regards as 'damage' (for example, psychiatric illness) to succeed in his or her action but can claim for emotional distress falling short of a psychiatric illness.⁷¹

Each of the elements is further defined, sometimes in a restrictive way, and sometimes leaving the issue more open.

4.2.1 Invasive conduct

First, there are 2 types of conduct that may comprise an actionable invasion of privacy—misuse of private information and intrusion into the plaintiff's seclusion—with both defined in a non-exclusive manner:⁷²

- 'Misusing information' includes collecting, using or disclosing information about the plaintiff⁷³
- 'Intruding upon the seclusion' of an individual includes physically intruding into the person's private space or watching, listening to or recording the person's private activities or private affairs.

⁶⁹ The term 'person' includes a corporate entity: *Acts Interpretation Act 1901* (Cth) s 2C.

⁷⁰ *Privacy Act 1988* (Cth), Schedule 2, cl 7.

⁷¹ *Privacy Act 1988* (Cth), Schedule 2, cl 7(2). See Australian Law Reform Commission, 8: *Seriousness and Proof of Damage*, [8.39]–[8.54], in *Serious Invasions of Privacy in the Digital Era (ALRC Report 123)*, September 2014. The ALRC explained that the rationale behind this provision is that most invasions of privacy result in injury to feelings or emotional distress which falls short of damage by psychiatric or physical illness. If the latter were required, the action would be of little use to most victims of serious, intentional invasions of privacy.

⁷² This stands in contrast to the recommendations of the NSWLRC in its 2009 *Report 120 Invasion of Privacy* that the cause of action be simply 'where a person's conduct invades [an] individual's privacy', without specifying the manner or ways in which that might occur.

⁷³ *Privacy Act 1988* (Cth), Schedule 2, cl 6.

These 2 broad types of invasions of privacy have been the subject of most complaints—and the most litigated—in overseas jurisdictions with more advanced privacy protection than Australia.⁷⁴ It is always open to Parliament to add new forms of invasion of privacy if desired. For example, there is now a much greater focus on misuse of a person's image as a potential invasion of privacy compared to when the new tort was originally designed by the ALRC. This issue is discussed in [section 5.3](#).

4.2.2 Reasonable expectation of privacy

Secondly, the plaintiff must have had a 'reasonable expectation of privacy'. In assessing this, the court may consider a range of factors, including, for example, the means (including the use of any device or technology) used to invade the plaintiff's privacy, the plaintiff's age or cultural background, whether the plaintiff invited publicity or manifested a desire for privacy, and the place and nature of the intrusion.⁷⁵

4.2.3 Requisite fault of the defendant

Thirdly and importantly, the invasion of privacy must have been committed intentionally or recklessly.⁷⁶ The ALRC noted that 'if ... the new tort extended to negligent invasions of privacy, there is a serious potential for a wide range of people to face liability for invading privacy by common human errors'.⁷⁷ Mere negligence on the part of the defendant, such as emailing the wrong recipient with private information about the plaintiff, losing private documents or failing to secure private information, will not be sufficient fault to base an action, although a high degree of negligence could potentially amount to recklessness.⁷⁸

4.2.4 Invasion must be serious

When assessing whether the invasion of privacy was 'serious' the court may consider a number of factors, including the likely degree of distress or harm to a person of ordinary sensibilities and whether the defendant knew of the plaintiff's particular sensitivity or was malicious.⁷⁹

4.2.5 Competing public interests

A final and important pre-condition for the plaintiff to have an action for invasion of privacy is the fifth element: that the public interest in the plaintiff's privacy outweighed any countervailing public

⁷⁴ Australian Law Reform Commission, [5: Two types of Invasion](#), in [Serious Invasions of Privacy in the Digital Era \(ALRC Report 123\)](#), September 2014.

⁷⁵ [Privacy Act 1988](#) (Cth), [Schedule 2, cl 6](#). See also *Murray v Express Newspapers Plc* [2008] 3 WLR 1364, 1376 [36]; and *Bloomberg v ZXY* [2022] UKSC 5 [52].

⁷⁶ 'Reckless' is defined in [cl 6](#) as having the same meaning as in the [Criminal Code](#) (Cth).

⁷⁷ Australian Law Reform Commission, [7: Fault](#), [7.63], in [Serious Invasions of Privacy in the Digital Era \(ALRC Report 123\)](#), September 2014. The limitation of the action to intentional or reckless conduct was somewhat controversial, with some submissions to the ALRC favouring a broader base of liability, either negligence-based or even strict liability where liability would attach without any fault on the defendant's part. The New South Wales Legislative Council Standing Committee Law and Justice Committee favoured corporations being liable on a negligence basis.

⁷⁸ Persons holding other's private information or small businesses may need to give greater attention to the manner in which they collect, use and disclose the private information of individuals to avoid being held to be reckless. Small business are generally not already subject to the [Australian Privacy Principles](#) under the [Privacy Act 1988](#) (Cth).

⁷⁹ [Privacy Act 1988](#) (Cth), [Schedule 2, cl 7\(6\)](#). Malice is difficult to prove as it usually requires proof of a subjective intent to harm.

interest.⁸⁰ This requirement reflects 2 matters: first, that protection of personal privacy is often important not just to the plaintiff personally but also to the proper functioning of society more generally, such as in the fields of law enforcement,⁸¹ medical and welfare systems, education, and information gathering by government. Secondly, it rests on the general acceptance that the right to privacy is not absolute in modern society and must be balanced against many other matters of countervailing public interest. The Act sets out some of the matters a court may consider, including freedom of expression, including political communication and artistic expression, freedom of the media, the proper administration of government, and the prevention and detection of crime and fraud.⁸²

4.3 Defences

A number of defences to the action are provided:⁸³ that the invasion of privacy was required or authorised by law; consent; necessity to prevent serious threat to life, health or safety; self-defence; and certain privileges (such as the absolute privilege that is provided to members of parliament against liability in defamation for statements made in parliamentary proceedings).

4.4 Remedies

The legislation authorises the court to give a range of different remedies where appropriate in the particular circumstances.⁸⁴ The 2 key remedies that would be sought by someone who is the victim of an invasion of privacy would be an award of damages after the incident or an injunction to stop the conduct where an invasion of privacy is threatened or continuing.

4.4.1 Injunctions

The court is empowered to grant an injunction at any stage of the proceedings to restrain the defendant from invading the plaintiff's privacy.⁸⁵ In the first application of the new tort, Judge Gibson in the District Court of NSW ordered an interlocutory injunction to restrain a defendant from publishing on his website various photographs and information about the plaintiff and his wife.

⁸⁰ Australian Law Reform Commission, 9: [Balancing Privacy with Other Interests](#), in [Serious Invasions of Privacy in the Digital Era \(ALRC Report 123\)](#), September 2014. While some privacy advocates were concerned that this last element places too high a burden on claimants, the ALRC's recommendation was based on the view, first, that the balancing of competing public interests is a matter of judgment, so that no party will have a higher burden of proof of fact than the other on this issue; secondly, that requiring a court to consider the balancing of privacy and other public interest at the outset of the claim will prevent the new privacy tort from having a chilling effect on freedom of expression and the media to report on matters of serious public concern, on the proper functioning of government and the appropriate functioning of other vital interests and institutions in modern society. Requiring the court to weigh the public interest at the actionability stage puts the new action in stark contrast to defamation claims.

⁸¹ *Bloomberg LP v ZXC* [2022] UKSC 5 [154]: The Supreme Court of the United Kingdom noted the public interest in criminal investigations not being prejudiced by early public disclosures.

⁸² [Privacy Act 1988](#) (Cth), [Schedule 2, cl 7\(3\)](#).

⁸³ [Privacy Act 1988](#) (Cth), [Schedule 2, cl 8](#).

⁸⁴ [Privacy Act 1988](#) (Cth), [Schedule 2, cl 12](#): including a declaration, a correction order, an order that the defendant apologise, an order that relevant material be destroyed, delivered up or dealt with in some way. An account of profits could be useful where a defendant has deliberately invaded the plaintiff's privacy with a view to profit; for example, selling the information or visual images.

⁸⁵ Injunctions are usually 'prohibitory' in the sense that they order the defendant to stop doing something—for example, stop flying a drone over the plaintiff's home—but can also be 'mandatory', in the sense of ordering positive conduct. A mandatory injunction could, for example, order the defendant to remove a surveillance device or take down something posted on social media or on a website.

These had been published as part of a campaign of alleged intimidation and extortion arising out of a dispute over a development application.⁸⁶

To prevent the action for invasion of privacy having a chilling effect on freedom of expression and freedom of the media to report on matters of public concern, the legislation specifically directs the court to have 'particular regard to the public interest in the publication of the information when considering whether to grant an injunction' to restrain the defendant from publishing information about the plaintiff.⁸⁷

4.4.2 Damages

The court is empowered to award a range of damages, including damages for emotional distress. No separate award for aggravated damages—for conduct involving special humiliation and aggravation of injury—is available because any such conduct and effect on the plaintiff will already have been taken into account by the court when assessing damages for emotional distress. A court may take into account a range of matters when determining the amount of damages, many of which encourage de-escalation and early settlement of a dispute out of court, including apologies or failure to apologise, corrections, settlement offers and aggravating conduct.⁸⁸

Damages may include exemplary damages (also known as punitive damages) in exceptional circumstances. Exemplary damages may be awarded at common law where the defendant has acted deliberately in outrageous disregard of the plaintiff's rights.⁸⁹

The total of damages, including exemplary damages, is capped at \$478,550.⁹⁰ It is worth noting that in early claims for invasion of privacy in the United Kingdom, damages were modest amounts, but have risen considerably in response to claims arising out of media phone hacking.⁹¹ Given the exemptions discussed below, most claims are likely to be against private individuals, not media corporations or governments, and it would be expected that damages would be more modest than this cap implies.

⁸⁶ *Kurraba Group Pty Ltd & Anor v Williams* [2025] NSWDC 396. See further, K Jones et al, [Putting the privacy tort to the test: First application for relief under the statutory tort for serious invasions of privacy](#), 5 November 2025.

⁸⁷ *Privacy Act 1988* (Cth), [Schedule 2, cl 9](#). See Australian Law Reform Commission, [12: Remedies and Costs](#), [12.118]–[12.146], in *Serious Invasions of Privacy in the Digital Era (ALRC Report 123)*, September 2014. This provision does not require the court to give greater weight to the defendant's freedom of expression than the plaintiff's privacy but does reinforce Parliament's recognition of the importance of freedom of expression and emphasises the need for the court to identify and balance the 2 competing interests when granting an injunction. [Schedule 2, cl 9](#) is partly modelled on [s 12\(4\)](#) of the *Human Rights Act 1998* (UK).

⁸⁸ *Privacy Act 1988* (Cth), [Schedule 2, cl 11](#).

⁸⁹ Exemplary damages are usually awarded in cases of physical assault, false imprisonment or trespass to land, including such conduct by the media or police. See *New South Wales v Ibbet* [2006] HCA 57; *TCN Channel Nine Pty Ltd* [2002] NSWCA 82. They are intended to show the court's disapproval of the defendant's conduct and deter others, as well as punishing the defendant where a criminal punishment has not ensued. *Gray v Motor Accident Commission* [1998] HCA 70.

⁹⁰ *Privacy Act 1988* (Cth), [Schedule 2, cl 11](#). Or, if greater, the same level as damages for non-economic loss in defamation claims.

⁹¹ *Gulati v Mirror Group Newspapers* [2015] EWHC 1482 (Ch); [2015] EWCA Civ 1291.

4.5 Exemptions

4.5.1 Media exemption

While expert legal commentators have noted that ‘the media are often the focus of concerns regarding the invasion of privacy’,⁹² a key feature of the new tort is that it provides for an exemption for journalists and related persons or entities where the invasion of privacy involves the collection, preparation for publication or publication of ‘journalistic material’.

Attorney General Dreyfus, when introducing the legislation, explained the exemptions for journalists and law enforcement thus:

These exemptions are important to protect press freedom, and ensure that legitimate activities of government can be delivered effectively. ...

The journalism exemption also operates in addition to the requirement that a court balance the public interest in the plaintiff’s privacy with other public interests. This may involve consideration of the public interest in freedom of the media, or freedom of expression.⁹³

‘Journalistic material’ is material that ‘has the character of news, current affairs or a documentary’; commentary or opinion on or analysis of news, current affairs or a documentary; or editorial content relating to news, current affairs or a documentary.⁹⁴

There is an unresolved issue of statutory interpretation as to what ‘news or current affairs’ may or may not encompass. While there is no limitation in the exemption that the journalistic material must be on a matter of public interest or of serious public concern, it is possible that such a requirement may be held by the courts to be implicit, to distinguish ‘news or current affairs’ from mere title tattle, gossip or the dredging up of old facts or allegations about a person.

The issue has been raised in Victoria in the Federal Court. Brittany Groth, wife of the deputy leader of the Opposition in Victoria in 2025, and a former competitive swimmer coached by her husband years previously, brought a claim against the *Herald Sun* for invasion of privacy. The newspaper had published speculation about the couple’s early relationship, questioning whether he had breached laws about sexual activities with a minor under his supervision. A key issue was whether the exemption to the new tort applied: did the story have the character of ‘news’ or ‘current affairs’? A preliminary hearing was set down to consider the meaning of these words in their statutory context and, among other things, whether they implied some requirement of legitimate public interest in the subject matter before the exemption could apply. The claim was settled without a decision on this important point of interpretation, with the *Herald Sun* publishing an apology as part of the settlement.⁹⁵

⁹² Rodrick et al., *Australian Media Law*, 6th ed, Thomson Reuters, 2021, [8.10] p 604.

⁹³ M Dreyfus, [Privacy and Other Legislation Amendment Bill 2024, second reading](#), *Commonwealth of Australia Hansard: House of Representatives debates*, 12 September 2024.

⁹⁴ [Privacy Act 1988](#) (Cth), [Schedule 2, cl 15](#).

⁹⁵ The issue of what constitutes news or current affairs was described as ‘not simple’ by McElwaine J in the Federal Court, see K Rooney, [Sam and Brittany Groth settle legal battle against Herald Sun](#), *The Age*, 16 November 2025.

If the exemption does not apply, the media may still try to rely on their work satisfying the public interest element of the action and outweighing the public interest in protecting the plaintiff's privacy.⁹⁶

The exemption protects only professional journalists who are subject to standards of professional conduct or a code of practice that applies to journalists.⁹⁷ Yet, paradoxically, it is stated to be immaterial whether the invasion of privacy breaches the standards or the code of practice to which the journalist is subject.⁹⁸ This does seem to undermine common media arguments that they are already highly regulated and that people's privacy is already well protected by industry codes of conduct.⁹⁹

4.5.2 Law enforcement and other agency exemptions

There is also a broad exemption in favour of a range of law enforcement and other public entities from liability for serious invasions of privacy. These exemptions apply to:

- An agency or a state or territory authority to the extent that the agency or authority, or a staff member, invades an individual's privacy in good faith in the performance of a function or exercise of a power
- Law enforcement bodies and staff in the performance of duties or involving disclosures of information to or by a law enforcement body¹⁰⁰
- Intelligence agencies, agents, staff and affiliates, (including invasions of privacy involving disclosures of information to or by an intelligence agency).¹⁰¹

4.5.3 Persons under 18 and deceased persons

The new tort does not apply to an invasion of privacy by a person who is under 18 years of age.¹⁰² Note, however, that some invasions of privacy may be ongoing. For example, a young person may upload a private image of another individual on their social media site and leave it there until they have turned 18: they would then arguably be subject to an action.

No action can be commenced, continued or enforced in respect of an invasion of privacy of a person who is deceased.¹⁰³

⁹⁶ [Privacy Act 1988](#) (Cth), [Schedule 2, cl 7\(1\)\(e\)](#).

⁹⁷ [Privacy Act 1988](#) (Cth), [Schedule 2, cl 15\(2\)](#).

⁹⁸ [Privacy Act 1988](#) (Cth), [Schedule 2, cl 15\(4\)](#).

⁹⁹ The exemption is not dependant on the journalist acting lawfully and would apply even if the journalist was in breach of a criminal law, for example, the unlawful use of a listening device, or surveillance or tracking device under the [Surveillance Devices Act 2007](#) (NSW).

¹⁰⁰ [Privacy Act 1988](#) (Cth), [Schedule 2, cl 16B](#).

¹⁰¹ [Privacy Act 1988](#) (Cth), [Schedule 2, cl 17](#). These exemptions were not recommended by the ALRC nor by other law reform reports or regulatory bodies.

¹⁰² [Privacy Act 1988](#) (Cth), [Schedule 2, cl 18](#).

¹⁰³ [Privacy Act 1988](#) (Cth), [Schedule 2, cl 20](#). So, a cause of action for invasion of privacy will not survive for the benefit of the estate of a deceased person under [s 2](#) of the [Law Reform \(Miscellaneous Provisions\) Act 1944](#) (NSW).

4.6 Examples of invasions of privacy

Table 1 contains some hypothetical examples or examples taken from real life of arguable invasions of personal privacy, contrasting the remedies or lack of remedies under existing laws with possible remedies under the new tort (see [section 3](#)). Sometimes the new tort adds to existing remedies, while sometimes it provides a remedy where the existing law did not. Due to the exemptions under the new tort for journalists and law enforcement bodies, it may be that the only available remedies against such entities will be under the existing law.

Table 1: Examples of invasions of privacy and how they would be dealt with under existing law and the new tort

Example	Existing law	The new tort
Filming or photographing a person in a vulnerable or private state	No civil action in Australia against someone for taking a photograph without consent. ¹⁰⁴ Criminal laws may however apply.	A possible invasion of privacy by collecting private information or intruding into seclusion (unless by a journalist or law enforcement agency protected by an exemption).
Secretly recording a private telephone conversation	Breach of <i>Surveillance Devices Act 2007</i> (NSW) s 7 but no civil action for compensation available.	The new tort is actionable for misuse of private information and intrusion where elements met (subject to journalism and law enforcement exemptions).
Keeping a neighbour or person on private property under surveillance	Tort of private nuisance may be made out for substantial interferences; ¹⁰⁵ but this is actionable only by occupier, not family or customers or visitors on property.	The new tort is actionable where there is a deliberate intrusion into seclusion and elements are met (subject to journalism and law enforcement exemptions). No requirement of title in the property.
A drone or helicopter takes footage of private property and activities	Not a breach of the <i>Surveillance Devices Act 2007</i> (NSW). Trespass to land if within airspace and intrusion amounts to more than mere passage through airspace, e.g. prolonged hovering, at unreasonable height. ¹⁰⁶	The new tort would protect against intrusions into private space (subject to journalism and law enforcement exemptions, e.g. journalists gathering news or current affairs material.)
Journalists and photographers camp outside a person's home to get interviews and photographs.	No action for nuisance unless the media pack prevented access or egress or interfered with quiet enjoyment inside the home.	A possible invasion of privacy by intrusion but journalists have an exemption from the new tort for news and current affairs.
Revealing an actor's or politician's sexuality where that is not already publicly known. ¹⁰⁷	No action at common law unless the source was confidential.	The new tort would be made out as a misuse of private information subject to other elements, but a journalism exemption may apply: query if this would be judged to be 'news' or 'current affairs'.

¹⁰⁴ *Bathurst City Council v Saban* (1985) 2 NSWLR 704. Compare *C v Holland* [2012] NZHC 2155; [2012] 3 NZLR 672.

¹⁰⁵ *Raciti v Hughes* (1995) 7 BPR 14837; *Au v Berlach* [2022] NSWSC 81.

¹⁰⁶ Cf *Civil Liability Act 2002* (NSW) s 72.

¹⁰⁷ A Hornery, *I made mistakes over Rebel Wilson, and will learn from them*, *Sydney Morning Herald*, 13 June 2022; L Foschia, *Minister quits over gay sex club visit*, *ABC News*, 20 May 2010.

5. Some current privacy issues and the role of the new tort

The new tort is explicitly directed at and limited to certain types of conduct which may invade the privacy of individuals, where all the elements of the action, as set out in the statute, are satisfied. In summary, the new tort targets deliberate and unjustifiable intrusions and misuse of private information. Interferences with the privacy of individuals may however occur in ways that may not be targeted or captured by the statute in its current form, including by novel technologies used in novel, often unpredictable, ways over time. This section describes 3 phenomena currently raising privacy concerns, noting existing provisions and discussing whether the new tort would provide any assistance. It also notes some potential for limited law reform in NSW so that a victim of an invasion of privacy by criminal means would not need to launch proceedings under the new tort in order to receive compensation. Finally, it suggests an alternative way for local councils to regulate invasive use of technology by neighbours.

5.1 Data breaches

In the last decade, there have been a number of major breaches of personal data held by large corporate entities and organisations that raise serious concerns among individuals affected. A data breach occurs when personal information is accessed or disclosed without authority, usually by untraceable hackers, often based offshore. Personal information may include financial information and passport information.

Breaches of individuals' personal data held by large organisations such as Optus¹⁰⁸, Medibank¹⁰⁹, and Qantas¹¹⁰ raise real concerns of potential identity theft and fraud, and result in, at the very least, expense to individuals in replacing identity documents and securing accounts, and at worst, access to an individual's resources. Mandatory reporting of certain 'notifiable data breaches'—those that are likely to cause serious harm—is now in force to encourage swift remediation and prevention of further problems.¹¹¹ The Office of the Australian Information Commissioner (OAIC), has limited resources and so pays particular attention to systemic problems or repeated incidents, serious non-compliance by entities, and an organisation's response to a data breach. Reforms to the *Privacy Act 1988* in 2024 included enhanced enforcement powers for the OAIC.¹¹²

As noted earlier, the Australian government has not, as yet, introduced the second tranche of reforms to the *Privacy Act 1988* (Cth) to give a direct right of action to individuals and groups whose privacy has been interfered with by an entity subject to the *Australian Privacy Principles*. In the meantime, individuals may apply to the Federal Court for injunctive relief against an entity or complain to the OAIC and have a determination awarding compensation or other remedies enforced

¹⁰⁸ Office of the Australian Information Commissioner, [Australian Information Commissioner takes civil penalty action against Optus](#), 8 August 2025.

¹⁰⁹ Office of the Australian Information Commissioner, [Medibank data breach: alleged timeline](#), n.d.

¹¹⁰ Office of the Australian Information Commissioner, [Statement on Qantas cyber incident](#), 24 July 2025.

¹¹¹ *Privacy Act 1988* (Cth), Part IIIC—Notification of eligible data breaches.

¹¹² *Privacy and Other Legislation Amendment Act 2024* (Cth).

in the federal courts.¹¹³ Data breaches arising from contraventions of NSW information privacy laws have also led to substantial awards of compensation.¹¹⁴

While the new tort would apply to the actions of malicious actors who hack into databases to access and misuse an individual's private or confidential information, such people can rarely be identified or located. As to the organisations which collect, store and secure the individual's personal information in databases in the course of their business or operations, liability under the new tort would be unlikely. The new tort requires the privacy invading conduct to be intentional or reckless. A one-off data breach caused by malicious actors may have occurred without fault on the organisation's part. Even if the organisation had been negligent in its security of data, this may fall short of the level of recklessness required for liability under the new tort. However, the prospect of liability under the new tort may encourage organisations to adopt enhanced security protocols to avoid being judged reckless in their collection, care and use of individual's information.

5.2 Facial recognition software

Other technological advances such as facial recognition software and online tracking may also increase the collection of personal information—a person's image and their whereabouts—and challenge individuals' privacy.¹¹⁵

A person's facial image and other biometric data is classed as sensitive information under the *Privacy Act 1988* (Cth) and generally can only be collected with the consent of the person. Collecting sensitive information without consent would be a breach of the *Australian Privacy Principles*. The Bunnings Group of hardware stores in Victoria and NSW was the subject of a determination by the Privacy Commissioner after it used facial recognition software, without giving its customers notice, to screen customers as they entered stores between 2018 and 2021. Despite this being well-intentioned to protect staff and customers from previously violent individuals, the Commissioner held that the stores were in breach of the Act. However, this determination was overturned by the Administrative Review Tribunal, bearing in mind the fleeting capture of the data if no match with a known miscreant was identified, and noting that more notice should be given to customers on entering the store of the use of the technology.¹¹⁶

The OAIC has issued guidelines for organisations proposing to use facial recognition technology.¹¹⁷

¹¹³ Attorney-General's Department, [Privacy Act Review](#), Report 2022. G Greenleaf, [Australia's Privacy Payouts Escalate \(but will they pass the Pub Test?\)](#), *Privacy Laws & Business International Report*, 2025, 198: 14–18.

¹¹⁴ *FMM v Nominal Insurer* [2023] NSWCATAD 114.

¹¹⁵ See further, Attorney-General's Department, [Privacy Act Review](#), Report 2022, [Chapter 6](#), (collection of biometric data by small businesses) and [Chapter 13](#), (high risk practices attracting more stringent regulation, particularly [13.1.3] 'Facial recognition technology and biometrics').

¹¹⁶ Office of the Australian Information Commissioner, [OAIC statement on Administrative Review Tribunal's Bunnings decision](#), 4 February 2026.

¹¹⁷ Office of the Australian Information Commissioner, [Facial recognition technology: a guide to assessing the privacy risks](#), 19 November 2024.

Whether or not the collection of a person's image and whereabouts by the use of facial recognition software would amount to an actionable invasion of privacy under the new tort would depend very much on the context, but may well amount to an actionable invasion of privacy in some situations. One of the proscribed ways of invading privacy, 'misusing information', is defined for the purposes of the tort as including, but not being limited to 'collecting, using or disclosing information about an individual'. It would seem obvious that a person's image is information about an individual. Whether or not the person had a reasonable expectation of privacy in the circumstances would depend on the location, purpose and proposed use of the collection of the person's image, and whether the person was taken to have consented to the collection and use, for example, by having been given notice and having a choice as to whether to proceed in the light of that notice. The disclosure of that information could be a separate form of invasion of privacy, not necessarily covered by the consent given. However, to claim under the new tort the person's expectation of privacy would need to be balanced against any public interest in the proposed use and disclosure of the information—for example, public safety and law enforcement.

5.3 AI deepfakes and other uses of a person's image

There is now, in 2026, a much greater concern about the misappropriation of a person's image than there was in 2014 when the ALRC Report, on which the new tort is largely based, was written.¹¹⁸ This concern is due to new technologies, including AI programs, enabling the creation of 'deepfake' imagery for a range of nefarious purposes, including humiliation and bullying, defamation, harassment, pornography, identity theft and fraud, and misinformation about political figures.¹¹⁹

New criminal provisions have been enacted in NSW to criminalise the creation and communication of sexually explicit deepfakes,¹²⁰ and in the federal Criminal Code to criminalise using a carriage service to transmit sexual material, including deepfakes, without consent.¹²¹

Creating and disseminating a deepfake using a person's image could amount to 'misuse of information that relates to the plaintiff' and thus within the actionable conduct under the new tort for a claim by a private individual against the perpetrator for serious invasion of privacy.¹²²

Deepfake sexualised images of public figures, including politicians, are clearly illegal under the criminal law and may also be defamatory.¹²³ But often the result of the fake image will be humiliation of the person and serious distress, rather than damage to reputation, so that invasion of privacy is the more appropriate action. The fact that a professed intimate or sexualised image is fake and not

¹¹⁸ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era (ALRC Report 123)*, September 2014.

¹¹⁹ J Maley, *Meet Albo, the high-vis, small-biz raider – and other deepfakes*, *Sydney Morning Herald*, 24 May 2026; See further, L Roth and T Gotsis, *Political deepfakes and the new laws in NSW*, NSW Parliamentary Research Service, April 2026.

¹²⁰ For background to the new laws, see T Gotsis, *Sexually Explicit deepfakes and the criminal law in NSW*, NSW Parliamentary Research Service, April 2025. See further, T Talas and M Kearney, *Diving into the Deep End: Regulating Deepfakes Online*, *Communications Law Bulletin*, 2019, 38(3):11-13.

¹²¹ *Criminal Code Act 1995* (Cth), Schedule: Criminal Code s 474.17A.

¹²² M Lewis, *A new kind of drama is set to unfold with changed privacy laws*, *Sydney Morning Herald*, June 10, 2025.

¹²³ *Sarah Hanson-Young v Bauer Media Ltd* [2013] NSWSC 1306.

true will not prevent it being held an invasion of privacy: the new tort specifically provides that it is immaterial whether the information that relates to the plaintiff was untrue.¹²⁴

Fake images of celebrities, experts or other well-known business and political leaders, deployed for fraudulent purposes such as soliciting money or investments into a sham fund, raise different issues. While a highly objectionable use of a person's image and unlawful on many other grounds, it may be problematic to see this sort of conduct as an invasion of the figure's *privacy*, when their image is already highly publicised.¹²⁵

The use by the media of a victim's image which has been trawled from a private social media account has become regrettably common in Australia after tragic events. An action for breach of copyright may be avoided by the 'fair dealing' defence.¹²⁶ With regards to the new tort, the 'news' and 'current affairs' exemptions for journalists would seemingly protect them from the use of images in a contemporaneous report. Whether such uses by the media would also be protected by the exemption once the event and its consequences are long since passed is debatable: cases in other countries have grappled with whether a person's image and identity remain newsworthy long after a brief moment of unsought fame.¹²⁷

Whether or not the new tort *should* extend to appropriations or uses of a person's image, and whether Australian law should generally be more protective of image rights is an issue ripe for consideration in the light of technological advances and practices. The issue would need to be considered alongside Australia's copyright laws, a matter for the Australian Government. For example, consideration could be given to whether copyright protection over a person's image should be extended to the person photographed as well as to the photographer, such as can be found in some European countries¹²⁸ or whether broader personality rights should be explored.¹²⁹

5.4 Other considerations for NSW

There are some avenues that the NSW Government could explore to strengthen an individual's remedies for invasions of privacy in a cost effective and efficient way, without necessitating a victim launching separate proceedings under the new tort. For instance, courts could be empowered to order that a person who has been convicted of offences under the *Surveillance Devices Act 2007* (NSW) pay compensation to the victim.¹³⁰ Similarly, courts could be empowered to award damages

¹²⁴ [Privacy Act 1988](#) (Cth), [Schedule 2, cl 7\(7\)](#). See further, Australian Law Reform Commission, [Misuse of private information: 5.49: Untrue personal information](#), [5.49] ff, in [Serious Invasions of Privacy in the Digital Era \(ALRC Report 123\)](#), September 2014.

¹²⁵ Government of Western Australia, [Commissioner's Blog: AI scams – The new face of deception](#), 14 August 2024.

¹²⁶ M Whitbourn, [Singleton family agree to judgment in favour of Nine in landmark court battle](#), *Sydney Morning Herald*, 7 July 2025.

¹²⁷ *Sidis v FR Pub Corporation* 113 F 2d 806 (2d Cir 1940) (a former child prodigy who had disappeared into obscurity challenged a *New Yorker* article that sought him out as an adult, claiming the magazine had invaded his privacy. His action failed; he was still a 'public figure' under U.S. law which prioritises freedom of speech under the First Amendment to the US Constitution). A related issue is whether privacy information laws should recognise a 'right to be forgotten' or a right of erasure: See further Attorney-General's Department, [Privacy Act Review](#), Report 2022, [18.5] 'Right to erasure' and recommendation 18.3.

¹²⁸ For example, Article 226-8 Code Civil, France. See further, Government of France, [Protect your image rights](#), 7 August 2024.

¹²⁹ W Potter, [AI deepfakes threaten democracy and people's identities. 'Personality rights could help](#), *The Conversation*, 5 March 2025.

¹³⁰ There is a precedent for this measure in [s 107A](#) of the [Telecommunications Interception and Access Act 1979](#) (Cth). The ALRC made this recommendation in [Report 123](#), Recommendation 14-7.

to victims of intimate image offences (including offences involving sexually explicit deepfakes).¹³¹ Finally, modern security cameras and software often have the potential to collect and store private information about a neighbour and intrude into a neighbour's privacy. They are unfortunately a common source of anxiety, distress and disputation. Consideration could be given to empowering local councils to regulate the use of security cameras and the like to avoid these consequences.¹³²

¹³¹ [Crimes Act 1900](#) (NSW), [pt 3, div 15C](#) (recording and distributing intimate image or audio material). The court is already empowered to make orders directing the convicted person to take reasonable remedial steps such as removing or deleting the images: [s 91S\(1\)](#) and [\(2\)](#).

¹³² See further, Australian Law Reform Commission, [14: Surveillance Devices](#), Recommendation 14.8 and discussion on this issue [14.90]–[14.95], in [Serious Invasions of Privacy in the Digital Era \(ALRC Report 123\)](#), September 2014.

6. Conclusion

The new tort provides a valuable level of legal protection against invasions of privacy in many social contexts, either by the misuse of private information about an individual or by intrusions in some form into an individual's personal space and seclusion. It is specifically directed at protecting privacy, unlike pre-existing laws which tended to protect privacy only incidentally while directed at protecting other interests, such as bodily safety, property rights, communication security or rights to reputation. The new tort also extends protection to all 3 forms of privacy identified at the outset of this paper: personal privacy, information privacy and communication privacy.

The protection of privacy is not, however, absolute. The new tort protects only against intentional or reckless conduct, not against negligence; it is concerned only with serious invasions, judged objectively; and the claim for protecting the plaintiff's privacy must be weighed against other countervailing public interests. Further, the protection does not operate where there is an exemption, either for law enforcement and public agencies or for journalists. The journalism exemption gives the mainstream media in Australia a privilege to engage in privacy invading conduct, possibly regardless of whether or not the material is relevant to a matter of serious public interest or concern, and regardless of whether the journalist is abiding by the criminal law or industry or professional codes of conduct. This exemption places Australian law in stark contrast to the privacy laws of other countries and lessens the overall protection of individual privacy that the new tort can provide.

**NSW privacy law and the new tort of
serious invasion of privacy**

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This image comes from 'Our Colours of Country', which was created for the Parliament of NSW by Wallula Bethell (Munro) a Gumbaynggirr/Gamilaroi artist born and raised in Tamworth who has spent time living on Dunghutti Country and is currently living in Western Sydney on Darug Country with her husband and son.

