

## 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'.<sup>85</sup> 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*.<sup>86</sup>

<sup>85</sup> 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](http://www.privacy.org.nz/assets/Files/PAW/10-Speaker-Professor-John-Burrows.doc)> at 10 November 2009, as quoted in VLRC Report at 147.

<sup>86</sup> 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'.<sup>87</sup>

#### 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.<sup>88</sup> 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.<sup>89</sup> 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'<sup>90</sup>, 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

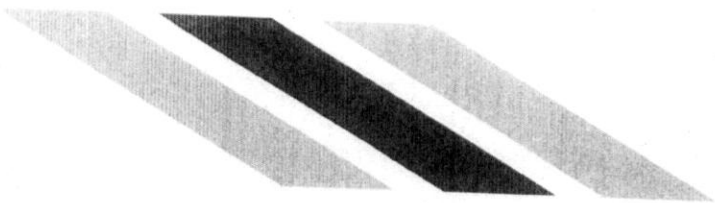
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<sup>87</sup> Office of the Privacy Commissioner, *Submission PR 499* [to the ALRC privacy review], 20 December 2007; cited in ALRC Report at 2557.

<sup>88</sup> NSWLRC Report at 9-10 (citations omitted).

<sup>89</sup> See below at page 41.

<sup>90</sup> 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.<sup>91</sup>

The ALRC refers to a variety of submissions on this point<sup>92</sup> and discusses the international instruments and Australian law protecting freedom of expression in various forms.<sup>93</sup>

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.<sup>94</sup> 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.<sup>95</sup>

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.<sup>96</sup> 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.

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<sup>91</sup> NSWLRC Report at 9-10 (citations omitted).

<sup>92</sup> ALRC Report at 2558-2560.

<sup>93</sup> ALRC Report at 2573-2575.

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

<sup>95</sup> See further Article 19 of the *ICCPR*.

<sup>96</sup> 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'<sup>97</sup>—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.<sup>98</sup>

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.<sup>99</sup>

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

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

<sup>98</sup> The various public interests are considered further below at pages 34-37.

<sup>99</sup> 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.<sup>100</sup>

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'<sup>101</sup> 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.<sup>102</sup>

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'<sup>103</sup> and recommended that its proposed cause of action be included in a Commonwealth Act (and in an Act separate from the existing Privacy Act).<sup>104</sup>

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.<sup>105</sup>

<sup>100</sup> VLRC Report at 146.


<sup>101</sup> *Doe v Australian Broadcasting Corporation* [2007] VCC 281 at [157].

<sup>102</sup> ALRC Report at 2565.

<sup>103</sup> ALRC Report at 2582.

<sup>104</sup> ALRC Report at rec 74-1.

<sup>105</sup> 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.<sup>106</sup> 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:<sup>107</sup>

- the state banking and state insurance provisions;<sup>108</sup>
- the constitutional limitations relating to discrimination against a State or part of a State;<sup>109</sup>
- 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.<sup>110</sup>

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

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<sup>106</sup> NSWLRC Report at 73.

<sup>107</sup> See, eg, ALRC Report at 195-198.

<sup>108</sup> See *Australian Constitution* section 51(xiii) and 51(xiv).

<sup>109</sup> ALRC Report at 197.

<sup>110</sup> 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.'<sup>111</sup>

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.

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<sup>111</sup> 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.<sup>112</sup>

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**.<sup>113</sup>

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'<sup>114</sup> 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

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<sup>112</sup> 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).

<sup>113</sup> 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.

<sup>114</sup> 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'.<sup>115</sup>

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.<sup>116</sup>

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'.<sup>117</sup>

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)'.<sup>118</sup> The NSWLRC did not include the intensifier 'highly'. The remaining matters proposed by the NSWLRC are discussed further below.<sup>119</sup>

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.<sup>120</sup>

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

<sup>115</sup> Ibid.

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

<sup>117</sup> NSWLRC Report at 28 (emphasis added).

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

<sup>119</sup> See 'Should legislation specifically allow for a consideration of a range of relevant factors?' at page 39 below.

<sup>120</sup> 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*<sup>121</sup> and *Australian Capital Television Pty Ltd v Commonwealth*<sup>122</sup>. 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.<sup>123</sup> The ALRC's test,

<sup>121</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

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

<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup>

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

<sup>124</sup> As to which, see discussion in VLRC Report at 157.

<sup>125</sup> 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.<sup>126</sup>

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.<sup>127</sup>

While the two steps were said to be 'analytically distinct'<sup>128</sup> 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.<sup>129</sup>

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.<sup>130</sup>

#### 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.<sup>131</sup>

<sup>126</sup> NSWLRC Report at 22.

<sup>127</sup> NSWLRC Report at 32 (citations omitted).

<sup>128</sup> NSWLRC Report at 22 (citation omitted).

<sup>129</sup> See further NSWLRC Report at 22-23.

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

<sup>131</sup> 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.<sup>132</sup>

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.<sup>133</sup>

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.<sup>134</sup> 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.<sup>135</sup> This would preclude actions brought where there has been only a negligent or accidental invasion of privacy, and would be broadly consistent with the

<sup>132</sup> 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.'

<sup>133</sup> VLRC Report at 157.

<sup>134</sup> 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).

<sup>135</sup> 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'.<sup>136</sup>

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.<sup>137</sup> In the end, then, the NSWLRC did not comment on whether there should be a particular requirement of the type recommended by the ALRC<sup>138</sup>. 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.<sup>139</sup>

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?

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

<sup>137</sup> 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.

<sup>138</sup> ALRC Report rec 74-3(c).

<sup>139</sup> 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:

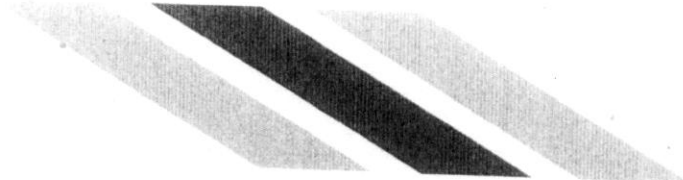
Clause 74(3)(a) [of the NSWLRC's draft Bill] lists the matters that the court must take into account in determining whether or not there has been an actionable invasion of an individual's privacy. These matters direct attention to eight questions:

- 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.<sup>140</sup>

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.

<sup>140</sup> 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 exhaustive<sup>141</sup>) 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.<sup>142</sup>

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.

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<sup>141</sup> See NSWLRC draft bill cl 74(3)(b).

<sup>142</sup> 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:<sup>143</sup>

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.<sup>144</sup>

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).<sup>145</sup>

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?*

<sup>143</sup> ALRC Report at 2565 and rec 74-1.

<sup>144</sup> ALRC Report rec 74-1.

<sup>145</sup> 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.<sup>146</sup>

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.<sup>147</sup>

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.<sup>148</sup>

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.<sup>149</sup>

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.<sup>150</sup>

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<sup>146</sup> ALRC Report rec 74-4.

<sup>147</sup> NSWLRC draft bill cl 75.

<sup>148</sup> VLRC Report at 153; compare ALRC para (b) and (c).

<sup>149</sup> VLRC Report at 154.

<sup>150</sup> 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'.<sup>151</sup>

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.<sup>152</sup>

On the other hand, the VLRC suggested that consent should provide a formal defence.<sup>153</sup> 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'.<sup>154</sup>

### 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

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<sup>151</sup> ALRC Report at 2575-2576.

<sup>152</sup> 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.

<sup>153</sup> 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.

<sup>154</sup> 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 oversights 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.<sup>155</sup>

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?*

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<sup>155</sup> 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.<sup>156</sup>

The VLRC recommended that damages, injunctions and declarations be available.<sup>157</sup>

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

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'.<sup>159</sup>

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.

<sup>156</sup> ALRC Report at rec 74-5.

<sup>157</sup> See discussion in VLRC Report at 160-163.

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

<sup>159</sup> 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.<sup>160</sup>

The VLRC concluded that given 'the modest sums likely to be awarded in cases of this nature ... a statutory cap on damages is unnecessary.'<sup>161</sup> 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.<sup>162</sup> In this regard, it would be consistent with the torts of trespass and defamation in Australia.<sup>163</sup>

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?

<sup>160</sup> VLRC Report at 161 (citations omitted).

<sup>161</sup> See VLRC Report at 163.

<sup>162</sup> See ALRC Report at 2577 and rec 74-3(b).

<sup>163</sup> 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.<sup>164</sup> 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).<sup>165</sup> 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.

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<sup>164</sup> 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.

<sup>165</sup> 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'<sup>166</sup> 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.'<sup>167</sup> 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.<sup>168</sup>

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.'<sup>169</sup>

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.'<sup>170</sup>

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

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<sup>166</sup> ALRC Report at 2576.

<sup>167</sup> Ibid.

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

<sup>169</sup> See NSWLRC draft bill at cl 79. Compare ALRC at 2576 and rec 74-3(a).

<sup>170</sup> 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.<sup>171</sup>

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.<sup>172</sup>

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

## 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.

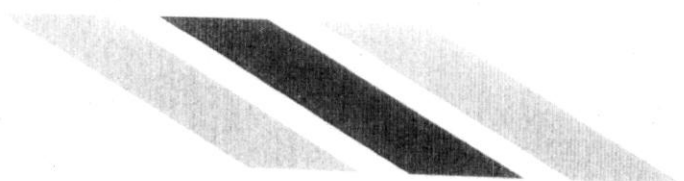
Particular requirements often apply to such proceedings. The Federal Court provisions for 'representative proceedings' may be used where: there be at least seven persons with a claim against the same person; those claims arise out of similar or related circumstances; and those

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<sup>171</sup> VLRC Report at 166-167.

<sup>172</sup> 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.

<sup>173</sup> 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.<sup>174</sup> 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.

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<sup>174</sup> 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.

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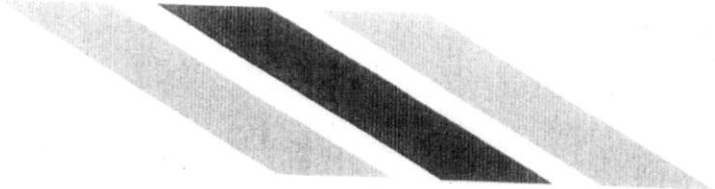


## Summary of questions

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?
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## 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.<sup>175</sup>

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<sup>175</sup> 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](http://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