

**Issues Paper 4**

December 2013

**South Australian Law Reform Institute**

# **Too much information**

**A statutory cause of action for invasion of privacy**

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the Adelaide University Law School.

Postal address: SA Law Reform Institute  
Adelaide Law School  
University of Adelaide  
Australia 5005

Telephone: (08) 8313 5582

Email: [SALRI@adelaide.edu.au](mailto:SALRI@adelaide.edu.au)

Webpage: [www.law.adelaide.edu.au/reform/](http://www.law.adelaide.edu.au/reform/)

SALRI publications, including this one, are available to download free of charge from

[www.law.adelaide.edu.au/reform/publications/](http://www.law.adelaide.edu.au/reform/publications/)

If you are sending a submission to SALRI on this Issues Paper, please note:

- the closing date for submissions is **Friday 14 February 2014**;
- to make it easier to respond to the questions asked in the paper, there is a questionnaire in downloadable form at [www.law.adelaide.edu.au/reform/publications/](http://www.law.adelaide.edu.au/reform/publications/)
- we would prefer you to send your submission by email;
- we may publish responses to this paper on our webpage with the Final Report. If you do not wish your submission to be published in this way, or if you wish it to be published anonymously, please let us know in writing with your submission.



Government of South Australia  
Attorney-General's Department



THE LAW SOCIETY  
OF SOUTH AUSTRALIA

# Contents

|   |           |
|---|-----------|
| TERMS OF REFERENCE .....  | 3         |
| PARTICIPANTS .....  | 3         |
| ACKNOWLEDGEMENTS .....  | 4         |
| DISCLAIMER .....  | 4         |
| ABBREVIATIONS .....   | 4         |
| <b>OVERVIEW .....</b>   | <b>5</b>  |
| <b>WHAT IS PRIVACY? .....</b>   | <b>8</b>  |
| BROAD NOTIONS AND REFORM .....  | 8         |
| RIGHT TO PERSONAL PRIVACY .....   | 10        |
| COUNTERVAILING RIGHTS AND INTERESTS .....                                   | 11        |
| TECHNOLOGY AND PRIVACY .....  | 14        |
| <b>A BRIEF HISTORY OF THE COMMON LAW AND ATTEMPTS AT REFORM .....</b>       | <b>14</b> |
| <b>A SNAPSHOT OF PRIVACY CAUSES OF ACTION IN THE COMMON LAW WORLD .....</b> | <b>25</b> |
| <i>New Zealand</i> .....  | 26        |
| <i>Canada</i> .....   | 26        |
| <i>United Kingdom</i> .....   | 27        |
| <i>Ireland</i> .....  | 27        |
| <i>United States</i> .....  | 27        |
| <b>CURRENT REMEDIES FOR BREACH OF PRIVACY .....</b>                         | <b>28</b> |
| SOURCES OF CURRENT REMEDIES .....   | 28        |
| <i>Torts</i> .....  | 28        |
| <i>Negligence</i> .....   | 29        |
| <i>Defamation</i> .....   | 29        |
| <i>Trespass</i> .....   | 29        |
| <i>Breach of confidence</i> .....   | 29        |
| <i>Criminal offences</i> .....  | 30        |
| EXAMPLES OF APPLICATION OF CURRENT REMEDIES .....                           | 34        |
| <b>FUTURE REMEDIES .....</b>  | <b>40</b> |
| COMMON LAW DEVELOPMENT? .....   | 41        |
| A STATUTORY CAUSE OF ACTION? .....  | 42        |
| <i>Introduction</i> .....   | 42        |
| <i>What is a cause of action?</i> .....                                     | 44        |
| <i>Who should be able to bring the action?</i> .....                        | 45        |
| <i>Seriousness</i> .....  | 47        |

|   |           |
|---|-----------|
| <i>Invasion</i> .....   | 48        |
| <i>Fault elements</i> .....   | 50        |
| <i>The role of consent</i> .....  | 51        |
| <i>Defences</i> .....   | 52        |
| <i>Proof of damage</i> .....  | 56        |
| <i>Exemptions</i> .....   | 57        |
| <i>Limitation of action</i> .....   | 59        |
| <i>Court powers</i> .....   | 60        |
| <i>Access to this remedy</i> .....  | 66        |
| <b>MODELS FOR STATUTORY CAUSES OF ACTION</b> .....  | <b>68</b> |
| <b>QUESTIONS</b> .....  | <b>75</b> |
| <b>APPENDICES</b> .....   | <b>80</b> |
| 1 A STATUTORY CAUSE OF ACTION FOR INVASION OF PRIVACY: SOUTH AUSTRALIAN LEGISLATIVE HISTORY ..... | 80        |
| 2 SA LAW REFORM COMMITTEE, INTERIM REPORT (1973) - EXTRACT .....                                  | 90        |
| 3 ALRC PRIVACY REFERENCE 2013 .....   | 99        |
| 4 BIBLIOGRAPHY .....  | 101       |

## **Terms of reference**

This review was initiated by the Institute itself, after noting:

- that it is not clear whether there is a tort of invasion of privacy at common law;
- that the remedies available to those whose personal privacy is invaded are limited;
- that modern technology makes it increasingly easy to invade personal privacy, to publish material or information so gained and to reach a wider audience than ever before, with often devastating and sometimes irreversible consequences;
- that a statutory cause of action for invasion of privacy has been identified by comprehensive Australian and international reviews as a potentially valuable civil remedy for, and deterrent against, serious invasions of privacy; and
- that there appear to be constitutional and political obstacles to establishing a national statutory cause of action for invasion of privacy.

The aim of the review is to investigate whether there is scope for South Australia to legislate its own statutory cause of action for invasion of privacy. After canvassing the views of South Australia's legal profession, media, interest groups and the public at large, the Institute will report its findings and recommendations to the Attorney-General of South Australia.

## **Participants**

### **South Australian Law Reform Institute**

#### *Director*

Professor John Williams

#### *Deputy Director*

Helen Wighton

#### *Administrative Officer*

Louise Scarman

#### *Advisory Board*

Professor John Williams (Chair)

The Hon David Bleby QC

Terry Evans

The Hon Justice Tom Gray

Ingrid Haythorpe

Professor Rosemary Owens

Jonathan Wells QC

## Acknowledgements

This Issues Paper was researched and prepared by Kate Guy and edited by Helen Wighton. The Institute thanks the South Australian Attorney-General's Department for its generosity in seconding Kate Guy to the Institute for this work. Louise Scarman provided proofing and bibliographic assistance.

The Institute acknowledges and relies upon previous research on this topic, and in particular upon the work of the Australian Law Reform Commission, the New South Wales Law Reform Commission, the Victorian Law Reform Commission and the New Zealand Law Commission.

## Disclaimer

This paper deals with the law as it was on 7 November 2013 and may not necessarily represent the current law.

## Abbreviations

**ALRC Discussion Paper**—Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper No 72 (2007)

**ALRC Final Report**—Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008)

**ALRC Issues Paper**—Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Issues Paper No 43 (2013)

**ALRC Privacy Reference (2013)**—Terms of Reference: *Serious Invasions of Privacy in the Digital Era* <<http://www.attorneygeneral.gov.au/MediaReleases/Documents/Termsofreference120613.pdf>>

**Commonwealth Issues Paper**—Commonwealth of Australia, Department of the Prime Minister and Cabinet, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, Issues Paper (September, 2011)

**NSWLRC Consultation Paper**—New South Wales Law Reform Commission, *Invasion of Privacy*, Consultation Paper 1 (2007)

**NSWLRC Final Report**—New South Wales Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009)

**NZLC Report**—New Zealand Law Commission, *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy: Stage 3*, Report No 113 (2010)

**SA Law Reform Committee Report**—Law Reform Committee of South Australia, *Regarding the Law of Privacy*, Interim Report (1973)

**The Institute**—South Australian Law Reform Institute

**VLRC Information Paper**—Victorian Law Reform Commission, *Privacy Law: Options for Reform*, Information Paper (2001)

**VLRC Final Report**—Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report No 18 (2010)

## Overview

---

1. Questions of what is privacy and what should be done by the State to protect it are live and complex in the 21st century. The pace of technological development and the changing ways in which we use technology to interact with each other necessitates a discussion about the way the law protects personal privacy.
2. This paper discusses whether our privacy would be better protected if South Australia had a statutory cause of action for invasion of privacy.<sup>1</sup> It outlines the history of attempted reform in South Australia and the range of approaches recently recommended by other law reform bodies in Australia. It sets out broadly the arguments for and against statutory reform, considers the characteristics of a statutory cause of action and poses questions for discussion.
3. The Institute recognises that there is already a substantial amount of work on this topic and does not attempt to repeat it. In particular, the Institute refers to and relies on the following sources and encourages those seeking further information to go to these sources:

ALRC Discussion Paper <<http://www.alrc.gov.au>>

ALRC Final Report <<http://www.alrc.gov.au>>

ALRC Issues Paper <<http://www.alrc.gov.au>>

NSWLRC Consultation Paper <<http://www.lawreform.lawlink.nsw.gov.au>>

NSWLRC Final Report <<http://www.lawreform.lawlink.nsw.gov.au>>

VLRC Information Paper <<http://www.lawreform.vic.gov.au>>

VLRC Final Report <<http://www.lawreform.vic.gov.au>>

Commonwealth Issues Paper <<http://www.dpmc.gov.au>>

4. Forty years ago, the South Australian Law Reform Committee recommended that a general right of privacy be created by this State.<sup>2</sup> Bills attempting to create a cause of action were introduced into the South Australian Parliament in 1974 and again in 1991.

---

<sup>1</sup> In this paper, we refer to a statutory cause of action rather than a tort, adopting the approach taken by the New South Wales Law Reform Commission (NSWLRC) and the Victorian Law Reform Commission (VLRC) on this point. There is an issue about whether any statutory cause of action should be expressed to be a 'tort'. Because a tort involves limitations and complexities relating to remedies, the state of mind of the wrongdoer and the extent to which actual damage is required, both the NSWLRC and the VLRC concluded that any statutory cause of action for invasion of privacy should not be characterised as a tort: New South Wales Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009), 51 [5.57]; Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report No 18 (2010) 144 [7.97] (the 'VLRC Final Report').

<sup>2</sup> Law Reform Committee of South Australia, *Regarding the Law of Privacy*, Interim Report (1973) (the 'SA Law Reform Committee Report'). The relevant parts of this Report are reproduced in *Appendix 2* to this paper.

Each was defeated after fierce and lengthy debate. A summary of the history of those Bills and the debate surrounding them is set out in *Appendix 1* to this paper.

5. In as many years, three law reform bodies in Australia have recommended the introduction of a statutory cause of action for invasion of privacy, given that there is doubt about whether one exists or will develop at common law: the Australian Law Reform Commission (ALRC) in 2008,<sup>3</sup> the New South Wales Law Reform Commission (NSWLRC) in 2009<sup>4</sup> and the Victorian Law Reform Commission (VLRC) in 2010.<sup>5</sup>
6. In New Zealand, where there is a limited common law tort of invasion of privacy, a review of privacy laws led to a recommendation by the New Zealand Law Commission in 2010<sup>6</sup> that there be no statutory enactments and that the tort be left to develop at common law.
7. In September 2011, as part of its response to the 2008 ALRC Final Report, the Commonwealth Government released an Issues Paper<sup>7</sup> inviting submissions on the ALRC recommendations for a Commonwealth cause of action for serious invasion of privacy.
8. In June 2013, having reviewed submissions to the Commonwealth Issues Paper and concluded that they showed little consensus on how a legal right to sue for breach of privacy should be created, or if it should be created at all, the Commonwealth Attorney-General asked the ALRC to conduct another inquiry, this time into ‘the protection of privacy in the digital era’.<sup>8</sup> A copy of those terms of reference is in *Appendix 3* to this paper.
9. On 8 October 2013, shortly before publication of this paper, the ALRC released its Issues Paper on ‘Serious Invasions of Privacy in the Digital Era’ as part of its response to the Commonwealth reference.<sup>9</sup>

---

<sup>3</sup> Australian Law Reform Commission, Report No 108, *For Your Information: Australian Privacy Law and Practice* (2008) (the ‘ALRC Final Report’).

<sup>4</sup> New South Wales Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009) (the ‘NSWLRC Final Report’).

<sup>5</sup> Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report No 18 (2010).

<sup>6</sup> New Zealand Law Commission, *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy: Stage 3*, Report No 113 (2010) (the ‘NZLC Report’). See in particular Chapter 7: Tort of invasion of privacy.

<sup>7</sup> Commonwealth of Australia, Department of the Prime Minister and Cabinet, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy* (September, 2011) (the ‘Commonwealth Issues Paper’).

<sup>8</sup> The ‘ALRC Privacy Reference (2013)’. See the media release by the Commonwealth Attorney-General, the Hon Mark Dreyfus QC, MP, *Protecting privacy in the digital era*, 12 June 2013, <<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Second%20quarter/12June2013-Protectingprivacyinthedigitalera.aspx>> which includes the ALRC Terms of Reference entitled ‘Serious Invasions of Privacy in the Digital Era’ <<http://www.attorneygeneral.gov.au/Mediareleases/Documents/TermsOfReference120613.pdf>>.

<sup>9</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Issues Paper No 43 (2013) (the ‘ALRC Issues Paper’).



10. At the core of the privacy debate is the tension between a right to privacy on the one hand and a right to freedom of expression on the other. Key international human rights instruments, to which Australia is a party, recognise a right to privacy along with other rights such as freedom of expression. These human rights stand equally, although often in competition. There is a strong argument that a democratic society should not shirk from giving effect to one human right simply because it is difficult to reconcile it with another.
11. In Australia, concerns about freedom of expression have so far defeated attempts to introduce direct protection of privacy by a statutory cause of action. The development of a common law right to privacy in Australia has also gained little ground.
12. This is in part because privacy is a concept that is difficult to define. It means different things to different people, and the distinction between ‘public’ and ‘private’ changes over time. Privacy is perhaps best described as involving the right of an individual to personal autonomy.<sup>10</sup> This autonomy not only encompasses privacy of personal information and communications, but also physical and territorial space. Privacy law in Australia, and in particular the *Privacy Act 1988* (Cth), has largely focused on information privacy. This protection is principally limited to the collection, storage, use and disclosure of certain personal information by Governments and corporations.
13. A useful American description of the kinds of conduct that should make a person liable to another for breaching their privacy,<sup>11</sup> and which has informed the recent debate in Australia, including the recommendations by Australian law reform bodies, is this:
  - (a) ...intentionally intrud[ing], physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns ... if the intrusion would be highly offensive to a reasonable person;
  - (b) ... appropriat[ing] to [one’s] own use or benefit the name or likeness of another ...;
  - (c) ... giv[ing] publicity to a matter concerning the private life of another ... if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public;
  - (d) ... giv[ing] publicity to a matter concerning another that places the other before the public in a false light ..., if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to

---

<sup>10</sup> This was an expression used by the ALRC in Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979) 109 (the ‘ALRC Unfair Publication Report’).

<sup>11</sup> *Restatement of the Law, 2nd, Torts* 1977 (US) §§ 652B, 652C, 652D, 652E.

the falsity of the publicised matter and the false light in which the other would be placed.

14. This paper asks whether there is a gap in our laws to be filled by a statutory cause of action for invasion of privacy and, if so, what that cause of action might look like.
15. Although these questions were considered in earlier South Australian reform debates, the impetus for reform in 2013 is very different. We are now more vulnerable to invasions of privacy than ever before because of the ease with which *individuals* can now find, access, disseminate or broadcast information and material. In the digital age, new ways to pierce a person's 'sphere of inviolability' are being discovered and developed at an unprecedented pace.
16. Privacy is protected, directly and indirectly, by various State and Commonwealth civil and criminal laws, industry codes of conduct and administrative instructions. The recent recommendations of the ALRC, the NSWLRC and the VLRC for the enactment of a statutory cause of action for invasion of privacy formed part of a wider review of privacy protection more generally afforded by these laws, codes and instructions. The Institute does not at this stage intend to replicate these reviews but rather to draw from them in its inquiry into whether a general right to personal privacy should be protected in South Australia by a statutory cause of action.

## **What is privacy?**

---

### **Broad notions and reform**

17. Personal privacy is a concept that has proved difficult to define. A right to privacy has been termed 'the right to be let alone.'<sup>12</sup> Some say that it embraces a 'sphere of inviolability'.<sup>13</sup> A claim to privacy has been called a claim to 'individual personality'<sup>14</sup> or personal autonomy.<sup>15</sup> Privacy could also be seen as the ability to control the disclosure and communication of non-public aspects of one's personhood or personal autonomy, whether they be thoughts, behaviour, images or space.
18. The complex and protean nature of privacy has clouded attempts in Australia to identify a right to privacy at common law or by statute. In South Australia, attempts to introduce a statutory cause of action have stalled not only on how privacy should be defined but

---

<sup>12</sup> T M Cooley, *Cooley on Torts* (2nd ed, 1888) 29.

<sup>13</sup> For a discussion on the conceptual basis of privacy, see David Lindsay, 'An Exploration of the Conceptual Basis of Privacy and the Implications for the Future of Australian Privacy Law' (2005) 29 *Melbourne University Law Review* 131.

<sup>14</sup> ALRC Unfair Publication Report, above n 10, drawing on TS Eliot, *the Cocktail Party*, Act I, Sc I.

<sup>15</sup> ALRC Unfair Publication Report, above n 10.

also on whether the legislation should include a definition of privacy and/or be prescriptive about what will constitute an invasion of privacy.

19. The lessons that can be learned from previous attempts at statutory reform and by the development of the common law in Australia expose the challenges of this topic and remain relevant for current law reformers. These challenges informed the ALRC, the NSWLRC and the VLRC in their recent reports, in which each body concluded that privacy was inadequately protected in their jurisdiction and recommended that a statutory cause of action for invasion of privacy be enacted (each slightly different, as it happens). That such recommendations were made demonstrates that the challenges should not be seen as a bar to useful reform. As one commentator has observed, theoretical debates<sup>16</sup> about the incoherence and ‘chaotic mix of values which coalesce under the “privacy umbrella”’<sup>17</sup> do not necessarily present an insurmountable roadblock to drafting workable law.
20. Combined with these challenges, the reluctance of Australian courts to develop a common law action would seem to suggest that Parliament, rather than the courts, is best equipped to remedy any gaps in privacy protection. It is generally accepted that personal privacy should be protected by the law because the kinds of harm inflicted by invasions of privacy can be serious and enduring. The debate should no longer be about whether but about how that should be achieved.
21. There is a contemporary resonance in what the forefathers of the concept of a right to privacy in modern America, S D Warren and L D Brandeis, wrote in their 1890 article *The Right to Privacy*:

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.<sup>18</sup>
22. Consider, for example, how devastating it might be to you and your family if you were filmed without your knowledge while showering naked and the film subsequently went viral on the internet; or if the fact that you were suffering from a serious illness or addiction and seeking treatment for it were to be widely published without your consent;

---

<sup>16</sup> For an analysis of these debates, see Roderick Bagshaw, *Obstacles on the Path to Privacy Torts*, ch 6 in P Birks (ed), *Privacy and Loyalty* (Clarendon Press, 1997).

<sup>17</sup> Bagshaw, above n 16, 135 citing the following work of Raymond Wacks: R Wacks, ‘The Poverty of Privacy’ (1980) 96 *Law Quarterly Review* 73; R Wacks, ‘Introduction’, *The International Library of Essays in Law and Legal Theory: Privacy 1 & 2* (Dartmouth, 1993); R Wacks, *Privacy and Press Freedom* (OUP, 1995).

<sup>18</sup> S D Warren and L D Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193, 196.

or if a remote-controlled drone with a camera affixed was used to film you and your family in your backyard.

## Right to personal privacy

23. The four main aspects of personal privacy that are widely accepted as being capable of protection by law are:
- *bodily privacy*: unauthorised intrusions into a person's body, for example through DNA testing;
  - *territorial privacy*: unauthorised intrusions into a person's physical space, for example a home premises;
  - *information privacy*: unauthorised access to information held by government or private sector organisations, for example information contained on public registers or private mailing lists;
  - *communications privacy*: unauthorised interception (or use) of private communications, for example telephone calls and emails.<sup>19</sup>
24. Surveillance is often specifically identified as a fifth aspect: the unauthorised use of surveillance devices such as video cameras in public and private places.<sup>20</sup>
25. An example of a statutory formulation which sought to address these aspects of privacy is the model proposed in the Privacy Bill 1974 (SA), introduced in response to the South Australian Law Reform Committee's recommendation that a general right to personal privacy be protected in South Australia by a statutory cause of action.
26. The Bill, which was unsuccessful, sought to protect the right to privacy as follows:
- 'Right of privacy' means the right of any person to be protected from intrusion upon himself, his home, his family, his relationships and communications with others, his property and his business affairs, including, without limiting the generality of the foregoing, such as an intrusion by
- (a) spying, prying, watching or besetting;
  - (b) the unauthorized overhearing or recording of spoken words;
  - (c) the unauthorized making of visual images;
  - (d) the unauthorized reading or copying of documents;

---

<sup>19</sup> These are the aspects of privacy as identified by the Victorian Law Reform Commission, *Privacy Law: Options for Reform*, Information Paper (2001) (the 'VLRC Information Paper'). The same aspects were identified in the ALRC Final Report [1.31] citing D Banisar, *Privacy and Human Rights 2000: An International Survey of Privacy Law and Developments Privacy International* <[www.privacyinternational.org/survey/phr2000/overview.html](http://www.privacyinternational.org/survey/phr2000/overview.html)> at 5 May 2008.

<sup>20</sup> As identified by the VLRC Information Paper. However, this has also been identified as a part of territorial privacy: see ALRC Final Report [1.31] citing D Banisar, *Privacy and Human Rights 2000: An International Survey of Privacy Law and Developments Privacy International* <[www.privacyinternational.org/survey/phr2000/overview.html](http://www.privacyinternational.org/survey/phr2000/overview.html)> at 5 May 2008.

- (e) the unauthorized use or disclosure of confidential information, or of facts (including his name, identity or likeness) calculated to cause him distress, annoyance or embarrassment, or to place him in a false light;
- (f) the unauthorized appropriation of his name, identity or likeness for another's gain.<sup>21</sup>

27. Other statutory formulations which address all or some of the aspects of privacy are referred to elsewhere in this paper.

### **Countervailing rights and interests**

28. Like any right, a right to privacy cannot be absolute. It should be weighed against other rights such as freedom of individual, press and artistic expression. Any intrusion into one right must be justified by reference to competing rights.
29. There is an acute public interest in freedom of expression, whether this be a freedom to broadcast or publish information and opinions, to express oneself artistically or simply to speak one's mind without fear or favour. It has been argued<sup>22</sup> that these interests must be protected to maintain a civil and democratic society. It has been said that freedom of speech is the 'lifeblood of democracy'.<sup>23</sup> The need to balance these interests with competing interests is also widely recognised.<sup>24</sup>
30. Problems of balance largely explain the failure of previous South Australian privacy Bills. It might also explain why more recent recommendations by Australian law reform bodies have not been implemented.
31. A proposal for a statutory right to protect personal privacy can only succeed if it does not unduly fetter the right to freedom of expression. That right is particularly vulnerable in Australia.<sup>25</sup> Although there is a constitutional implied freedom of political communication,<sup>26</sup> a wider right to freedom of expression has not relevantly been expressly recognised judicially or in legislation.
32. In constructing a statutory cause of action for invasion of privacy, the ALRC preferred a test that the relevant behaviour be 'highly offensive to an ordinary person of reasonable

---

<sup>21</sup> Privacy Bill 1974 (SA) (No 150).

<sup>22</sup> See, for example, NSW Council of Civil Liberties, Submission No 62 to the Commonwealth Issues Paper, 6.

<sup>23</sup> *R v Secretary of the Home Department; Ex Parte Simms* [2000] 2 AC 115, 126 (Lord Steyn). Further, the importance of the media to democratic process was recognised by the High Court in *Australian Capital Television v New South Wales* (1992) 177 CLR 1, where the remarks of Lord Simon in *Attorney-General v Times Newspapers Ltd* (1974) AC 273, 315 were accepted. See further the analysis in Hon R Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (2012) ch 2 and the references there cited.

<sup>24</sup> See Hon R Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (2012) [2.47]-[2.51].

<sup>25</sup> See the argument put by the Law Council for Australia, Submission No 55 to the Commonwealth Issues Paper, 6.

<sup>26</sup> See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

sensibilities'. A high threshold like this, it said, would ensure that freedom of expression is respected and not unduly curtailed and that:

the cause of action will only succeed where the defendant's conduct is thoroughly inappropriate and the complainant suffered serious harm as a result.<sup>27</sup>

33. The ALRC concluded that, in a statutory cause of action for invasion of privacy, other rights (and in particular, rights of freedom of the press and freedom of expression) would be best protected by making consideration of these rights an element of the cause of action rather than these rights becoming embedded in defences, 'to ensure that privacy interests are not privileged over other rights and interests'.<sup>28</sup>
34. Thus a court determining whether a cause of action had been established would have to take into account whether the public interest in maintaining the plaintiff's privacy outweighs other matters of public interest.<sup>29</sup>
35. The ALRC proposed that the interests to be balanced should include (but not be confined to):
  - (a) the public interest in maintaining a plaintiff's privacy;
  - (b) the interest of the public to be informed about matters of public concern; and
  - (c) the public interest in allowing and protecting freedom of expression.
36. The NSWLRC also concluded that a court, in considering a claim for invasion of privacy, should at the outset be required to determine whether other public interests outweighed the privacy interest asserted, and that the onus was on the plaintiff to establish this in their favour.<sup>30</sup> It suggested that the court should first consider the reasonableness of the expectation of the privacy, and then balance the competing public interests.
37. In contrast, the VLRC concluded that a consideration of the public interest should inform a defence to the action. The VLRC considered that to require the plaintiff to prove a negative would place too heavy a burden on the plaintiff and concluded that:

[t]he defendant should carry the burden of proof in relation to the public interest defence. The defendant 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>31</sup>

---

<sup>27</sup> ALRC Final Report 2568-2569, but it is to be noted that the cause of action proposed was actionable without damage.

<sup>28</sup> Ibid 2572 [74.147].

<sup>29</sup> Ibid 2575 [74.157].

<sup>30</sup> See cl 74(2) of the Bill proposed by the NSWLRC in the NSWLRC Final Report.

<sup>31</sup> VLRC Final Report, 157 [7.180].

38. The submissions made in response to the Commonwealth Issues Paper on this topic were divided. Some argued that a plaintiff wishing to establish a cause of action should bear the onus of displacing the public interest when proving their case.<sup>32</sup> Others argued that a public interest defence is more appropriate.<sup>33</sup>
39. Clearly, striking an appropriate balance between competing rights and interests will be the most difficult task in crafting any statutory cause of action. For example, to require a plaintiff to establish, at the outset, that his or her privacy interests outweigh all other competing interests may be to place such a heavy burden on people seeking redress for serious invasions of personal privacy that the cause of action is not used and there is effectively no redress. On the other hand, the cause of action should be constructed in such a way that it cannot be used capriciously.
40. The reasons for the findings of the Australian Communications and Media Authority ('ACMA') in relation to a recent complaint about a breach of privacy illustrate the kind of balancing process involved in considering a claim for breach of privacy.<sup>34</sup> ACMA is a Commonwealth statutory authority responsible for regulating broadcasting, the internet, radio communications and telecommunications. This includes overseeing compliance with several codes of practice. In this case the code of practice was the *Commercial Television Industry Code of Practice 2010* and the relevant guidelines were ACMA's *Privacy Guidelines for Broadcasters 2011*. A man had complained to ACMA about a news program which he said contained footage and information about himself and his family without their consent and without concern for their privacy. The focus of the news item was home birth. The footage showed the complainant and his family at their home while his wife was giving birth there as well as details about the location of their home. ACMA found that the broadcaster had breached the obligation in the Code of Practice not to
- use material relating to a person's personal or private affairs, or which invades an individual's privacy, other than where there is an identifiable public interest reason for the material to be broadcast.<sup>35</sup>
41. In arriving at this conclusion, ACMA was satisfied that the footage depicting the complainant and his family outside their home and through a window of their home was not proportionate or relevant to the public interest in other aspects of the news story.

---

<sup>32</sup> See, for example, Special Broadcasting Service (SBS), Submission No 8 to the Commonwealth Issues Paper, 4; Free TV Australia Limited, Submission No10 to the Commonwealth Issues Paper, 8; and Privacy Committee of South Australia Submission No 50 to the Commonwealth Issues Paper, 4.

<sup>33</sup> See, for example, Australian Privacy Foundation, Submission No 7 to the Commonwealth Issues Paper, 8; and NSW Council of Civil Liberties, Submission No 62 to the Commonwealth Issues Paper, 5.

<sup>34</sup> Australian Communications and Media Authority, *Investigation Report—Channel Nine News Broadcast by NWS on 16 February 2012* (No 2813, 6 November 2012).

<sup>35</sup> Commercial Television Industry Code of Practice (2010) cl 4.3.5.

## Technology and privacy

42. Technological development has undoubtedly enriched and improved our lives but, as observed in the Commonwealth Issues Paper, these new and developing technologies and capacities, tools and software:

may simultaneously be enabling (or making more easy) the communication and transmission of personal or sensitive data, images, information, or other details of a person's private life.<sup>36</sup>

43. The capabilities of digital and online technology create new ways in which privacy can be infringed. Computer technology and the Internet now have an extraordinary capacity to provide access to, organise, collate, search and disseminate personal information, with relative ease and little expense or know-how. Importantly, an *individual* is now able to disseminate information as never before. These new capabilities require new solutions to protect privacy.

## A brief history of the common law and attempts at reform

---

44. What follows is a timeline identifying the most significant court decisions, legislative initiatives and reform recommendations relating to personal privacy in Australia.<sup>37</sup>

**1937:** *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*<sup>38</sup>

This High Court decision has often been cited as the impediment to recognition of a right to privacy at common law in Australia.

The defendant owned land near a racecourse, which was owned by the plaintiff. The defendant had constructed a platform on his land which overlooked the racecourse, to allow members of the radio media to call the races. The plaintiff complained that this action had resulted in a loss of patronage, and argued, amongst other matters, that the defendant had infringed a right of privacy, recognised by the common law.

By a three-two majority, the plaintiff lost its appeal in the High Court, Latham CJ observing:

The claim under the head of nuisance has also been supported by an argument that the law recognizes a right of privacy which has been infringed by the defendant. However desirable some limitation upon invasions of

---

<sup>36</sup> Commonwealth Issues Paper, 12.

<sup>37</sup> With a particular focus on South Australia. This timeline is not intended to be exhaustive of all relevant events or reforms.

<sup>38</sup> *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.



privacy might be, no authority was cited which shows that any general right of privacy exists. ...<sup>39</sup>

**1973: LRCSA Interim Report Regarding the Law of Privacy**<sup>40</sup>

In this report, the Law Reform Committee of South Australia recommended that a general right of privacy be created in South Australia to cover all serious invasions of privacy, the wrongful use of private information and the wrongful appropriation of a person's name, likeness or professional reputation for commercial or other advantage. Further recommendations of the Committee related to the use of surveillance techniques, computers, data banks and similar electronic inventions of the (then) present day.

**1973: Morison Report on the Law of Privacy**

Following a resolution of the Standing Committee of Commonwealth and State Attorneys-General, Professor W L Morison was asked, with particular reference to the sufficiency of the existing law and possible legislative changes, to report on:

... the question of the protection of the privacy of an individual, having regard to the increased means of collecting, storing, retrieving and disseminating information.<sup>41</sup>

The Morison Report identified a deficiency in privacy protection and recommended the creation of a statutory body to facilitate reform in the area, but rejected the introduction of a general tort of invasion of privacy. The reasons given for this rejection included the potential for abuse of the action, the difficulty for the courts in balancing the competing interests, the cost of litigating the action and the inadequacy of damages as a remedy.<sup>42</sup>

**1974: Privacy Bill 1974 (SA)**

This Bill, introduced to the South Australian Parliament by the then Attorney-General, the Hon LJ King, proposed to create a right to be free from 'substantial and unreasonable' intrusion upon a person's private affairs. A broad concept of privacy was included in the Bill. The Bill included a clause making it clear that the action could not succeed if the intrusion was justified in the public interest. The Bill did not pass. Further history about this Bill's passage through Parliament is summarised in *Appendix 1* to this paper.

---

<sup>39</sup> Ibid 495-496.

<sup>40</sup> SA Law Reform Committee Report.

<sup>41</sup> Morison, *Report on the Law of Privacy to the Standing Committee of Commonwealth and State Attorneys-General*, No 170 (1973).

<sup>42</sup> Ibid. For further analysis see G Tucker, *Information Privacy Law in Australia* (Longman Professional, 1992).

**1979: ARLC Unfair Publication: Defamation and Privacy<sup>43</sup>**

In this report, the ALRC concluded that there should be legislation to afford some protection against privacy-invading publications. It concluded that the legislation should specify a 'protected area' rather than create a general right to privacy. The ALRC proposed a tort of 'unfair publication'. The tort was designed to protect from publication the details of an individual's 'sensitive private facts' and prevent the appropriation of a person's name, identity, reputation or likeness for commercial or political purposes.<sup>44</sup> The focus was on the protection of individual relationships - people's home, family and private lives. It was recommended that for a publication to be actionable, it should relate to these areas and be such as to cause distress, embarrassment or annoyance upon an objective view of the position of the person concerned.<sup>45</sup>

**1980: Australia ratifies the International Covenant on Civil and Political Rights**

Article 17 of the ICCPR provides:<sup>46</sup>

1. No person shall be subjected to arbitrary or unlawful interferences 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.<sup>47</sup>

**1980: OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data**

The publication of these Guidelines by the Organisation for Economic Co-operation and Development (OECD) in 1980 formed the basis of the data protection regimes that followed.

**1980: LRCSA Report on data protection<sup>48</sup>**

In this Report the Law Reform Committee of South Australia, against the background of a series of developments in the United Kingdom, made a number of recommendations in relation to data protection and computers. The LRCSA stated that data protection in this context meant:

---

<sup>43</sup> ALRC Unfair Publication Report, above n 10.

<sup>44</sup> Ibid [250].

<sup>45</sup> Ibid [235]-[236].

<sup>46</sup> The same text is found in the Universal Declaration of Human Rights (UDHR) adopted by the General Assembly of the United Nations on 10 December 1948: *United Nations Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

<sup>47</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976). See also Article 19, which protects freedom of expression.

<sup>48</sup> South Australian Law Reform Committee, *Regarding Data Protection*, Report No 50 (1980).

... the protection of a person's privacy from unwarranted invasion as the result of misuse or abuse of information respecting that person, which is collected, stored or retrieved in an information system in which a computer (or other data bank) is normally involved.<sup>49</sup>

**1983: ALRC Report on Privacy**

In this report the ALRC rejected the formation of a general tort of invasion of privacy, reporting that 'such a tort would be too vague and nebulous'.<sup>50</sup>

**1988: Privacy Act 1988 (Cth)**

This Act safeguarded information privacy by establishing a set of Information Privacy Principles (IPPs) applicable to Commonwealth Government Agencies, and a set of National Privacy Principles (NPPs) applicable to the private sector (but not to individuals). The IPPs and NPPs are not prescriptive, but rather offer principles about the way in which personal information should be handled. Each agency or organisation needs to apply those principles to its own situation.<sup>51</sup>

During the Bill's passage the Senate passed an amendment to introduce a limited action for 'interferences with the privacy of an individual', with remedies of damages, injunctions, an order to deliver to the plaintiff any documents brought into existence in the course of the interference with privacy, or any other order that the court considered just.<sup>52</sup> The House of Representatives rejected that amendment and the Act was enacted without it.

Amendments to this Act were proposed as part of the Commonwealth Government's response to the ALRC Final Report. Some of those amendments are addressed later in this timeline.

**1989: South Australian Information Privacy Principles introduced**

Administrative instructions require the State public sector to comply with the South Australian Information Privacy Principles (IPPs SA).<sup>53</sup> The IPPs SA outline how Government and its employees can collect, use and disclose personal information. The Privacy Committee of South Australia oversees the application of the IPPs SA to

---

<sup>49</sup> Ibid 3-4.

<sup>50</sup> Australian Law Reform Commission, *Privacy*, Report No 22 (1983) [1081].

<sup>51</sup> See further the Office of the Australian Information Commissioner <<http://www.privacy.gov.au>>.

<sup>52</sup> Parliament of Australia, Senate, *Schedule of the Amendments Made by the Senate to Privacy Bill 1988 (1987-88)* (1988) cl 63A.

<sup>53</sup> The reference for the current version is Government of South Australia, Department of the Premier and Cabinet Circular, *Information Privacy Principles Instructions PC012* (16 September 2013) <<http://dpc.sa.gov.au/premier-and-cabinet-circulars>>.

South Australian Government agencies. The Committee reports to the Minister and provides advice on privacy issues.

**1991: Privacy Bill 1991 (SA)**

The Bill sought to introduce a similar cause of action for serious invasions of privacy to the one proposed in the 1974 Bill, but with more emphasis on the exemptions to the cause of action. The Bill did not pass. The further history of this Bill's passage through Parliament is summarised in *Appendix 1* to this paper.

**2001: Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd<sup>54</sup>**

This decision of the High Court left open the opportunity for the development of a common law cause of action for invasion of privacy. Gummow and Hayne JJ, with whom Gaudron J agreed, stated that the decision in *Victoria Park Racing* 'did not stand in the path [of such development]'.<sup>55</sup>

Hidden cameras had been placed by unknown persons at an abattoir in Tasmania which processed live brush-tail possums, filming the possums being stunned and then having their throats cut. The footage was retrieved and given to an animal liberation group, which in turn gave the footage, or part of it, to the Australian Broadcasting Corporation (the ABC). The ABC planned to broadcast the footage on *The 7.30 Report*. Lenah Game Meats sought to prevent the broadcast by interlocutory injunction. It was unsuccessful at first instance in the Supreme Court of Tasmania, but succeeded before the Full Court. The ABC were granted leave to appeal to the High Court, and issues of privacy and the nature of interlocutory injunctions fell to be considered by the Court on appeal.

The key passage from the judgment of Gummow and Hayne JJ, with whom Gaudron J agreed, is as follows:

...It may be that development [of the law in the area of invasion of privacy] is best achieved by looking across the range of already established legal and equitable wrongs. On the other hand, in some respects these may be seen as representing species of a genus, being a principle protecting the interests of the individual in leading, to some reasonable extent, a secluded and private life, in the words of the *Restatement*, 'free from the prying eyes, ears and publications of others'. Nothing said in these reasons should be understood as foreclosing any such debate or as indicating any particular outcome. Nor, as already has been pointed out, should the decision in *Victoria Park*.<sup>56</sup>

---

<sup>54</sup> *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 ('*Lenah*').

<sup>55</sup> *Ibid* [107].

<sup>56</sup> *Ibid* [132] (emphasis added, footnote omitted).

Callinan J expressed a number of tentative views, including:

It seems to me that, having regard to current conditions in this country, and developments of the law in other common law jurisdictions, the time is ripe for consideration whether a tort of invasion of privacy should be recognised in this country, or whether the legislatures should be left to determine whether provisions for a remedy for it should be made. ...<sup>57</sup>

**2003: *Grosse v Purvis***<sup>58</sup>

In this case, the District Court of Queensland concluded that the prolonged stalking of the plaintiff by the defendant gave rise to a ‘civil action for damages based on the actionable right of an individual person to privacy’<sup>59</sup> and awarded aggravated compensatory damages and exemplary damages. In doing so, the Court considered it a ‘logical and desirable step’ to follow the decision in *Lenah*, and identified four essential elements of the action:

- 1 a willed act by the defendant;
- 2 which intrudes upon the privacy or seclusion of the plaintiff;
- 3 in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities; and
- 4 which causes the plaintiff detriment in the form of mental psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.<sup>60</sup>

**2004: *Kalaba v Commonwealth of Australia***<sup>61</sup>

The plaintiff had been a prisoner in a concentration camp in Hungary in 1941 to 1942. He claimed that the Commonwealth of Australia had breached his privacy by asking the Australian Mission to the United Nations in Geneva to obtain records of his confinement.

Heerey J of the Federal Court held that there was no tort of privacy in Australia and observed that the weight of authority was against the proposition set out in *Grosse v Purvis*.<sup>62</sup> The Judge went on to observe that even if a tort did exist in Australia similar to that in the United States, the conduct complained of would not in ordinary terms involve any breach of privacy.<sup>63</sup>

---

<sup>57</sup> Ibid [335] (footnote omitted).

<sup>58</sup> *Grosse v Purvis* [2003] QDC 151 (Skoien SDCJ).

<sup>59</sup> Ibid [442].

<sup>60</sup> Ibid [444].

<sup>61</sup> *Kalaba v Commonwealth of Australia* [2004] FCA 763.

<sup>62</sup> Ibid [6] referring to *Grosse v Purvis* [2003] QDC 151.

<sup>63</sup> Ibid [9].

**2006:** Commonwealth Attorney-General refers the topic of protection of privacy to the ALRC

The terms of reference were for an inquiry into the extent to which the *Privacy Act 1988* and related laws continue to provide for an effective framework for the protection of privacy in Australia.

**2007:** ALRC Review of Australian Privacy Law: Discussion Paper (the 'ALRC Discussion Paper')<sup>64</sup>

The Discussion Paper sought community feedback on 301 proposals for reform of privacy law and related practices.

**2007:** *Doe v Australian Broadcasting Corporation*<sup>65</sup>

The ABC published information that identified the plaintiff as a victim of a sexual assault. The two ABC employees responsible for the news bulletins were charged with and pleaded guilty to a relevant offence under the *Judicial Proceedings Reports Act 1958* (Vic). The plaintiff then brought an action for damages against the ABC and its two employees for, among other things, breach of statutory duty and a breach of privacy.

Hampel J in the County Court of Victoria concluded that the defendants were liable for breach of a statutory duty, in equity for breach of confidence and in tort for invasion of privacy. In respect of the latter, her Honour considered it was an appropriate case to respond, 'although cautiously', to the invitation held out by the High Court in *Lenah*. Her Honour determined that the relevant invasion of privacy amounted to an actionable wrong giving rise to a right to recover damages according to the ordinary principles governing recovery of damages in tort.<sup>66</sup> Her Honour considered that although it was not appropriate for her to formulate an exhaustive definition of privacy, it being an imprecise concept, she was prepared to take the next, incremental step in the development of the recognition of the right to protection against or provide remedy for breach of privacy by 'seeking to identify the principle applicable to the facts of [that] case.'<sup>67</sup>

Her Honour concluded that the relevant breach was an 'unjustified publication of personal information',<sup>68</sup> observing:<sup>69</sup>

---

<sup>64</sup> Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper No 72 (2007) (the 'ALRC Discussion Paper').

<sup>65</sup> *Doe v Australian Broadcasting Corporation* [2007] VCC 281 ('Doe').

<sup>66</sup> Ibid [157]-[158].

<sup>67</sup> Ibid [162].

<sup>68</sup> Ibid [164].

<sup>69</sup> The ABC initially sought to appeal the decision, but the appeal was subsequently settled.

The wrong that was done here was the publication of personal information, in circumstances where there was no public interest in publishing it, and where there was a prohibition on its publication. ... In my view, a formulation of unjustified, rather than wilful, in these circumstances provides a fair balance between freedom of speech and the protection of privacy. For the reasons I have already canvassed when considering breach of confidence, the information is personal or confidential information which the plaintiff had a reasonable expectation would remain private, and clearly private. Its disclosure was plainly something which an individual was entitled to decide for herself.<sup>70</sup>

**2008:** *ALRC For Your Information - Australian Privacy Law and Practice (the 'ALRC Final Report')*<sup>71</sup>

In the ALRC Final Report the ALRC returned 295 recommendations for reform. One of those recommendations was that federal legislation should provide for a statutory cause of action for serious invasions of the privacy of natural persons, actionable without proof of damage.<sup>72</sup>

**2008:** *Giller v Procopets*<sup>73</sup>

A number of complaints were made by the appellant against the respondent, her former *de facto* partner. One of those complaints related to the distribution and attempted distribution by the respondent of videotapes he had recorded of the former couple engaging in a variety of sexual activities, sometimes recorded surreptitiously and sometimes with the appellant's knowledge.

The Court took the view that because it had concluded that the appellant had a right to compensation on other grounds (breach of confidence), it was not necessary to consider whether a generalised tort of invasion of privacy should in that case be recognised.<sup>74</sup> Ashley JA noted that the development of such a tort would require the resolution of substantial definitional problems. His Honour observed that a cause of action for invasion of privacy might not extend to cases where breach of confidence was the appropriate action.<sup>75</sup>

---

<sup>70</sup> *Doe* [2007] VCC 281, [163].

<sup>71</sup> ALRC Final Report.

<sup>72</sup> *Ibid* ch 74, 2584-2586.

<sup>73</sup> *Giller v Procopets* (2008) 24 VR 1 ('*Giller*').

<sup>74</sup> See *Giller* (2008) 24 VR 1, [452] (Neave JA with whom Maxwell P agreed) and [168] (Ashley JA).

<sup>75</sup> *Giller* (2008) 24 VR 1, [168].

**2009: NSWLRC Invasion of Privacy ('the NSWLRC Final Report')<sup>76</sup>**

In this report the NSWLRC recommended a statutory cause of action for invasion of privacy in NSW. The recommendations in this report are dealt with in detail elsewhere in this paper.

**2009: Commonwealth first stage response to the 2008 ALRC Report**

The Commonwealth Government responded to 197 of the ALRC Report's 295 recommendations. This did not include a response to the recommendation for a statutory cause of action.<sup>77</sup>

**2010: Surveillance in Public Places ('the VLRC Final Report')<sup>78</sup>**

In this report the VLRC recommended two statutory causes of action for invasion of privacy in Victoria. The recommendations in this report are dealt with in detail elsewhere in this paper.

**2011: *Maynes v Casey*<sup>79</sup>**

A Shire Council had alleged that the plaintiffs were in arrears in payment of rates relating to the plaintiffs' property and tried to serve the plaintiffs with a summons to commence proceedings in court for the recovery of the unpaid rates. The plaintiffs then began proceedings against the Council's solicitor and the process server on the

---

<sup>76</sup> NSWLRC Final Report.

<sup>77</sup> The Commonwealth Government announced that its response to the 2008 ALRC Final Report would be in two stages. So far, it has embarked on stage one and in part on stage two. Stage one addresses the recommendations relating to:

- developing a single set of Privacy Principles;
- redrafting and updating the structure of the *Privacy Act*;
- addressing the impact of new technologies on privacy;
- strengthening and clarifying the Privacy Commissioner's powers and functions;
- introducing a comprehensive credit reporting and enhanced protections for credit reporting information; and
- enhancing and clarifying the protections around the sharing of health information and the ability to use personal information to facilitate research in the public interest.

Stage two addresses the recommendations relating to:

- proposals to clarify or remove certain exemptions from the *Privacy Act*;
- introducing a statutory cause of action for serious invasion of privacy;
- serious data breach notifications;
- privacy and decision making issues for children and authorised representatives;
- handling of personal information under the *Telecommunications Act 1997*; and
- national harmonisation of privacy laws (partially considered in stage one).

See Australian Government, Department of Prime Minister and Cabinet website, at <<http://www.dpmc.gov.au/privacy/reforms.cfm>>, and Commonwealth, *Australian Government First Stage Response to the Australian Law Reform Commission Report 108 For Your Information: Australian Privacy Law and Practice*, Cabinet, October 2009, 5 (Joe Ludwig).

<sup>78</sup> VLRC Final Report.

<sup>79</sup> *Maynes v Casey* [2011] NSWCA 156 ('*Maynes*').



basis of trespass to land, assault and breach of privacy, for their conduct in entering the plaintiff's land to serve process. Those proceedings were later extended to refer to the defendants' conduct in attending at the property to collect evidence (in the nature of photographs and film) to defend the trespass claim made against them.

In considering the question of invasion of privacy on appeal, the New South Wales Court of Appeal considered the decisions in *Lenah*<sup>80</sup> and *Giller*<sup>81</sup> and observed that those cases may well lay the basis for development of liability for unjustified intrusion on personal privacy, whether or not involving breach of confidence.<sup>82</sup> However, the trial judge in *Maynes*<sup>83</sup> had made the following finding:

I accepted that the defendants went legitimately to Bullfrog Road, a public road, for the purpose of investigating the serious claims made against them by the plaintiffs. Their investigation necessarily involved inspection of the access road leading to the house paddock.

I did not consider their conduct in undertaking these investigations to be an undue or serious invasion of any right to privacy possessed by the plaintiffs or to be highly offensive to a reasonable person of ordinary sensibility.

The appeal court concluded that the plaintiffs had 'failed to demonstrate any plausible basis upon which such findings of fact could be challenged', going on to observe that the case, therefore 'provides an inappropriate vehicle to consider any possible developments of the law with respect to intentional invasion of privacy'.<sup>84</sup>

Special leave to appeal to the High Court was subsequently refused.<sup>85</sup>

**2011: A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy (the 'Commonwealth Issues Paper')**<sup>86</sup>

This paper was prepared by the Commonwealth Government in response to the recommendation for a national cause of action for serious invasion of privacy made in the ALRC Final Report. Published in September 2011, it called for responses by November 2011.

**2012: Report of the Independent Inquiry into the Media and Media Regulation**

In this report, the Hon R Finkelstein concluded that the mechanisms regulating news media in Australia were not sufficient to achieve the degree of accountability desirable

---

<sup>80</sup> *Lenah* (2001) 208 CLR 199.

<sup>81</sup> *Giller* (2008) 24 VR 1.

<sup>82</sup> *Maynes* [2011] NSWCA 156, [34] (Basten JA, with whom Allsop P agreed).

<sup>83</sup> *Maynes v Casey* [2010] NSWDC 285.

<sup>84</sup> *Maynes* [2011] NSWCA 156, [36].

<sup>85</sup> *Maynes* [2011] HCASL 173.

<sup>86</sup> Commonwealth Issues Paper.

in a democracy, and that, amongst other things, a new body, a News Media Council, should be established to set journalistic standards for the news media (print, online, radio and television) in consultation with the industry and to handle complaints made by the public when those standards are breached.<sup>87</sup>

**2012:** *Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth)*

The Act, passed on 29 November 2012, provides that from 12 March 2014, the Australian Privacy Principles (APPs) will replace the NPPs and IPPs (referred to earlier) and will apply to organisations and Australian Government agencies.

**2013:** *The OECD Guidelines are updated*

The OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data were updated for the first time since their introduction in 1980. A number of new concepts were introduced including a focus on national privacy strategies, privacy management programmes and data security breach notifications.<sup>88</sup>

**2013:** *Commonwealth reference to the ALRC to conduct an inquiry into 'the protection of privacy in the digital era'*

This reference, made after the Commonwealth had received responses to its 2011 Issues Paper, asked the ALRC to make a recommendation on the detailed legal design of a statutory cause of action for serious invasions of privacy.

**2013:** *Sands v State of South Australia*<sup>89</sup>

The plaintiff alleged that a person within South Australia Police (SAPOL) published copies of or the existence of a forensic procedures application and supporting affidavit naming the plaintiff under the *Criminal Law (Forensic Procedures) Act 1998* (SA) to a newspaper which subsequently published related stories. The plaintiff asserted, amongst other things, that a duty of confidence and privacy flowed from the terms of *Criminal Law (Forensic Procedures) Act*.

Kelly J held that SAPOL had not disclosed any private information about the plaintiff in the context of making the application under the Act and that the only disclosures made by SAPOL were in the course of taking a lawful step in the course of the investigation.<sup>90</sup>

---

<sup>87</sup> Hon R Finkelstein, above n 24, 7.

<sup>88</sup> For more information about the Guidelines and the update, see Organisation for Economic Co-operation and Development, <<http://www.oecd.org/>>.

<sup>89</sup> *Sands v State of South Australia* [2013] SASC 44 ('Sands').

<sup>90</sup> *Ibid* [616].

The plaintiff had sought to rely on *Doe v Australian Broadcasting Corporation*<sup>91</sup> to assert the existence of a tort of privacy and a breach of that right by the actions of SAPOL. Kelly J distinguished the decision in *Doe* from the facts in the case before her, going on to observe:

In my respectful view, the reliance by the Court in *Doe* on *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* is misplaced. The *ratio decidendi* of the decision in *Lenah* is that it would require a further development in the law to acknowledge the existence of a tort of privacy in Australia. In my view, the statements of the majority in *Lenah* do not support the suggestion that the High Court in *Lenah* held out any invitation to intermediate courts in Australia to develop the tort of privacy as an actionable wrong.<sup>92</sup>

**2013:** ALRC releases its *Issues Paper: Serious Invasions of Privacy in the Digital Era* (the 'ALRC Issues Paper')

On 8 October 2013, shortly before publication of this paper, the ALRC released its Issues Paper on 'Serious Invasions of Privacy in the Digital Era' as part of its response to the 2013 ALRC Privacy Reference. The Issues Paper calls for submissions in relation to a statutory cause of action for serious invasions of privacy in Commonwealth legislation and also in relation to other legal remedies to prevent and redress serious invasions of privacy.<sup>93</sup>

45. From this brief history, we now turn to developments in the common law world.

## **A snapshot of privacy causes of action in the common law world**

---

For some time now, law reform commissions, commissions of inquiry, and legislatures in various parts of the world have concerned themselves with the question of the preservation of personal privacy.<sup>94</sup>

46. These words, spoken in 1974 by the then South Australian Attorney-General, the Hon. LJ King, when introducing a Bill to create an actionable right to personal privacy, evidently still hold true. Since then attempts have been made in many common law countries, not only by Parliaments but also in the courts, to protect personal privacy. What follows is a snapshot of the different statutory causes of action and common law torts relating to personal privacy that have emerged in the common law world.

---

<sup>91</sup> *Doe* [2007] VCC 281.

<sup>92</sup> *Sands* [2013] SASC 44, [614] (footnote omitted).

<sup>93</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Issues Paper No 43 (2013).

<sup>94</sup> South Australia, *Parliamentary Debates*, House of Assembly, 10 September 1974, 819 (LJ King, Attorney-General).

## New Zealand

47. In New Zealand there is a common law tort of invasion of privacy which first developed to protect private facts and recently to protect seclusion. The first aspect of the tort is wrongful publicity given to private facts where there is a reasonable expectation of privacy and where the publicity would be highly offensive to a reasonable person.<sup>95</sup> The protection was extended recently by the High Court when it held that an action for intrusion upon seclusion was also recognised as part of the common law of New Zealand.<sup>96</sup> A comprehensive review of privacy laws led to a recommendation by the New Zealand Law Commission in 2010<sup>97</sup> that there be no statutory enactments and that the tort be left to continue develop at common law.
48. It is also worthwhile noting a recent and related development in New Zealand. In 2012, as part of a wider review into new media in the digital age,<sup>98</sup> the New Zealand Law Commission produced a Ministerial briefing paper entitled 'Harmful Digital Communications: The adequacy of the current sanctions and remedies'.<sup>99</sup> The Commission, noting that the distinguishing feature of electronic communication is that it has the capacity to 'spread beyond the original sender and recipient, and envelop the recipient in an environment that is pervasive, insidious and distressing',<sup>100</sup> returned a number of recommendations relating to bullying or harassment behaviour conducted through digital communications. A number of the recommendations were taken up by the Government in the Harmful Digital Communications Bill 2013 (NZ), introduced to Parliament on 5 November 2013. The Bill seeks to create a new civil enforcement regime to deal with harmful digital communications, create new criminal offences to deal with the most serious harmful digital communications, and to amend various existing laws to clarify their application to digital communications and cover technological advances.<sup>101</sup>

## Canada

49. Statutory causes of action for invasion of privacy have been enacted in the Canadian provinces of British Columbia, Manitoba, Saskatchewan, Newfoundland and Labrador, generally providing that:

---

<sup>95</sup> Established by the Court of Appeal in *Hosking v Runting* [2005] 1 NZLR 1, [119]. For a detailed analysis of the *Hosking* case, see Ursula Cheer, 'The Future of Privacy - Recent Developments in New Zealand' (2007) 13 *Canterbury Law Review* 169.

<sup>96</sup> *C v Holland* [2012] 3 NZLR 672 (Whata J).

<sup>97</sup> NZLC Report. Note in particular Chapter 7: Tort of invasion of privacy.

<sup>98</sup> New Zealand Law Commission, *The News Media meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age*, Issues Paper No 27 (2012).

<sup>99</sup> New Zealand Law Commission, *Harmful Digital Communications: The adequacy of the current sanctions and remedies*, Ministerial Briefing Paper (2012).

<sup>100</sup> *Ibid* [54].

<sup>101</sup> It is to be noted that in Australia the Commonwealth *Criminal Code Act* makes it an offence to use a carriage service (for example the internet or a mobile telephone) in a way which a reasonable person would regard as being, in all the circumstances, menacing, harassing or offensive: see *Criminal Code Act 1995* (Cth), s 474.17.

it is a tort, actionable without proof of damage, for a person wilfully and without claim of right, to violate the privacy of another person.<sup>102</sup>

### United Kingdom

50. In the United Kingdom invasions of personal privacy has been dealt with by common law extensions of the action for breach of confidence and the incorporation into the common law of Articles 8 and 10 (the right to privacy and the right to freedom of expression, respectively) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>103</sup>
51. There is no separate cause of action for invasion of privacy.<sup>104</sup> Despite this, most of the relevant cases have involved alleged unlawful publication of private information. Generally the approach has been to consider whether the information is ‘private’, and then, if it is, to determine whether the interests of the owner of that private information outweigh the interests in the recipient publishing the information. This is in part the court balancing Articles 8 and 10 of the ECHR.<sup>105</sup>

### Ireland

52. The right to privacy is impliedly recognised in the Irish Constitution and is further protected through the application of the ECHR (see above).
53. In 2007 and 2012, attempts to establish a statutory cause of action for wilful violations of privacy without lawful authority failed.<sup>106</sup> The Bills had provided that an individual was entitled to a privacy which is reasonable in all the circumstances having regard to ‘the rights of others and to the requirements of public order, public good and the common good’.<sup>107</sup>

### United States

54. Professor William Prosser was instrumental in the development and articulation of a right to privacy in the United States.<sup>108</sup> The *Second Restatement of the Law, Torts*, is based on

---

<sup>102</sup> *Privacy Act 1996* RSBC c 373 (British Columbia); *Privacy Act CCSM* section P125 (Manitoba); *Privacy Act 1978* RSS c P-24 (Saskatchewan); *Privacy Act 1990* RSNL c P-22 (Newfoundland and Labrador). This footnote is as set out in the Commonwealth Issues Paper, 19.

<sup>103</sup> Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953). See the approach taken by the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457.

<sup>104</sup> For example, see *Wainwright v Home Office* [2003] 3 WLR 1137; *OGB Ltd v Allan*; *Douglas v Hello! Ltd* [2007] 2 WLR 920, [272].

<sup>105</sup> For example, see the approach taken in *Ash v McKennitt*; *Campbell v MGN Ltd* [2004] 2 AC 457; [2007] 3 WLR 194; *Murray v Big Pictures (UK) Limited* [2008] EWCA Civ 446; *The Author of a Blog v Times Newspapers Limited* [2009] EWHC 1358 (QB). See further the analysis in the Commonwealth Issues Paper.

<sup>106</sup> Privacy Bill 2006 (Ireland); Privacy Bill 2012 (Ireland).

<sup>107</sup> Privacy Bill 2006 (Ireland), cl 3(1); Privacy Bill 2012 (Ireland), cl 3(1).

<sup>108</sup> Particularly famous for his article, William L Prosser, ‘Privacy’ (1960) 48 *California Law Review* 383. For a detailed analysis of the genesis of the right as articulated by Warren and Brandeis, and as later developed by William Prosser, see Neil M Richards and Daniel J Solove, ‘Prosser’s Privacy Law: A Mixed Legacy’ (2010) 98 *California*

his taxonomy of privacy, which divides invasions into four parts, affectionately shortened to intrusion, disclosure, false light and appropriation.<sup>109</sup> The *Restatement* is set out earlier in this paper. It is well understood that the constitutionally-entrenched right to freedom of expression has limited the effectiveness of these privacy torts in the United States. In some States there is a limited statutory cause of action which reflects or modifies one of the common law torts.<sup>110</sup>

## **Current remedies for breach of privacy**

---

55. When considering whether there is a need for a statutory cause of action for invasion of personal privacy and if so, how it might operate, it is important to explore what remedies are currently available. This part of the paper identifies how South Australia's criminal and civil laws deal with conduct which might be considered to invade personal privacy. By way of illustration, some examples of conduct that might commonly be thought to interfere with a person's privacy are analysed broadly in terms of remedy.

### **Sources of current remedies**

56. In South Australia neither the common law<sup>111</sup> nor statute provides a cause of action directly concerned with the protection of personal privacy. There are, however, some statutes and common law rules which provide incidental privacy protection or which in some other way concern a person's 'sphere of inviolability'. The main examples are below.

#### **Torts**

57. There are several torts that protect aspects of privacy and provide a remedy of damages - for example, the intentional torts of battery and assault which protect 'bodily privacy' and mental well-being. (Conduct which constitutes a civil assault or battery may also be punished as a crime – see discussion under *Criminal offences* below.).
58. Further, the tort of private nuisance protects the use and enjoyment of land, and gives not only a remedy in damages but also by way of injunction to restrain the conduct.

---

*Law Review* 1887.

<sup>109</sup> *Restatement of the Law, 2nd, Torts* 1977 (US) §§ 652B, 652C, 652D, 652E.

<sup>110</sup> For example in Virginia, Illinois and New York: see further analysis in the New South Wales Law Reform Commission, *Invasion of Privacy*, Consultation Paper 1 (2007) [4.8] (the 'NSWLRC Consultation Paper').

<sup>111</sup> Although it is not entirely clear, it appears to be very unlikely that a cause of action will develop at common law in the near future.

## **Negligence**

59. The law of negligence protects a variety of interests. Negligence is where a person does or fails to do something that a reasonable person in that situation would or would not do, and which causes another person reasonably foreseeable damage, injury or loss. In a negligence claim, the plaintiff must demonstrate that the defendant owed them a duty of care which was breached by negligent conduct, causing relevant damage, injury or loss to the plaintiff. A vast body of law has developed to give content to these elements of negligence. The *Civil Liability Act 1936* (SA) governs the way liability for negligence claims and the remedy of damages are assessed.

## **Defamation**

60. Defamation law protects a person's individual reputation. Defamation is the publication or broadcast of information or material that is capable of lowering a person in the estimation of others. Damages and an injunction are the remedies available in an action for defamation. (There is also an offence of criminal defamation, discussed below under *Criminal offences*).
61. The law of defamation protects against the dissemination of personal information that is untrue; that is, the truth defence will defeat a defamation action.<sup>112</sup> For this reason, an action in defamation would not be useful for the many invasions of privacy where the depiction of the person or their personal information is accurate.

## **Trespass**

62. Actions in trespass to land and goods have as their focus the protection of property rights, but also incidentally provide remedies against invasions into a person's space or 'territorial privacy'. Through an action in trespass to land or goods, a person can receive monetary damages or an injunction (where relevant) for unauthorised interference with their land or goods. An action in trespass requires a direct physical interference with a plaintiff's exclusive possession of land or possession of goods by a voluntary and intentional (or negligent) act.<sup>113</sup>

## **Breach of confidence**

63. The common law and equity protect privacy of 'communications' or 'personal information' through an action for breach of confidence. An example of a situation

---

<sup>112</sup> In South Australia, see *Defamation Act 2005* (SA) s 23. It is to be noted that although Australia adopted uniform laws of defamation in 2006, some differences between jurisdictions still remain.

<sup>113</sup> In this context, the VLRC has noted that the common law differentiates between privately owned land and public space, and that 'the common law does not protect people from having their activities or movements scrutinised in public places, even in areas where they have the expectation that they will not be observed, for example, in public toilets': VLRC Information Paper, 14.

where a duty of confidence will arise is where a person has voluntarily supplied confidential information to another only because of an express undertaking or implied commitment that it will be kept secret. A duty of confidence may arise through a contract between the parties (common law action) or by the way in which the parties have conducted themselves (equitable action). Breach of that duty involves actual or threatened unauthorised use of the information to the detriment of the party communicating it. Remedies for breach of the obligation of confidence include compensation or an account of profits, a declaration and an injunction. The remedy available will depend on whether a common law or equitable claim is made. The limitations of this action in terms of the protection of privacy are illustrated in some of the examples given below.

### **Criminal offences**

64. Some of the conduct that might constitute a serious invasion of privacy will also constitute a criminal offence – for example, an offence relating to intrusions of bodily privacy or interference with private property, goods, places or communications.
65. The criminal law is not, however, a reliable or adequate source of remedies for invasions of privacy because its primary role is to determine liability and punish offenders, and it is prosecuted independently, on behalf of the State, rather than by or on behalf of a victim.
66. That said, victims of crime, including of crimes relating to invasions of privacy, can be compensated, indirectly and in a limited way, by criminal courts. Sentencing courts may order an offender to pay compensation for injury, loss or damage resulting from the offence.<sup>114</sup>
67. Victims of crime may also claim limited amounts of compensation under the *Victims of Crime Act 2001* (SA).<sup>115</sup>
68. The main limitation on these ‘remedies’ is that the liability to pay compensation arises from conduct which amounts to a criminal offence. As the examples given later indicate, conduct that invades privacy does not have to be criminal to result in dire consequences, and for these types of conduct there may be neither a criminal liability nor a clear or appropriate civil remedy. Also, sentencing courts are not required to award compensation – it is at their discretion<sup>116</sup> - and may not require a defendant to pay compensation if satisfied that the defendant does not have the means to pay it.<sup>117</sup>

---

<sup>114</sup> *Criminal Law (Sentencing) Act 1988* (SA) s 53.

<sup>115</sup> Under that scheme, limited monetary compensation may be paid to people who are injured by a crime and for the dependant relatives of deceased victims of crime. Compensation can be for mental as well as physical injury, but not for property loss or damage resulting from a crime. The maximum amount payable is \$50 000.

<sup>116</sup> *Criminal Law (Sentencing) Act 1988* (SA) s 53(1).

<sup>117</sup> *Ibid* s 13(1).



Further, courts are reluctant to award compensation if difficulties proving the fact of loss or its quantum might undermine ‘the proper evidentiary base’ of assessment.<sup>118</sup>

Difficulties of this kind may well arise when the crime involves an invasion of privacy because the consequences are often non-economic (arising from emotional distress), and prosecutors are rarely in a position to present the necessary expert evidence to support a proper assessment of such damages.

69. There is a range of offences for conduct that involves a serious invasion of privacy, and this reflects the importance society attaches to protecting privacy.
70. Some of these offences relate to bodily privacy – for example, assault,<sup>119</sup> offences of causing physical or mental harm,<sup>120</sup> rape and other sexual offences.<sup>121</sup> The offence of unlawful stalking, which might be seen as relating to both territorial and emotional privacy, incidentally protects privacy interests.<sup>122</sup>
71. Conduct which constitutes a civil trespass to land or goods may also be punishable as a property offence or an offence of dishonesty.<sup>123</sup> Another relevant dishonesty offence is the offence of assuming a false identity.<sup>124</sup>
72. Communications and information privacy are incidentally protected by the computer offences<sup>125</sup> of unauthorised modification to computer data by anyone other than the person who brought the data into existence or stored the data on the computer,<sup>126</sup> and of unauthorised impairment of electronic communication<sup>127</sup> (when a person who is not entitled to control the communication prevents or delays the communication of electronic information). Such interception is punishable only where the communication is actually prevented or delayed in reaching its destination.
73. There is also an offence of criminal defamation<sup>128</sup> for publishing defamatory material knowing that (or being recklessly indifferent as to whether) it was false and intending to (or being recklessly indifferent as to whether it would) cause harm. As with a civil defamation claim (discussed earlier) the defence of truth applies to the offence of criminal defamation.

---

<sup>118</sup> *Vougamalis v Nixon* (1991) 56 SASR 574, 579.

<sup>119</sup> *Criminal Law Consolidation Act 1935* (SA) s 20.

<sup>120</sup> *Ibid* pt 3, div 7A.

<sup>121</sup> *Ibid* pt 3, div 11.

<sup>122</sup> *Ibid* s 19AA.

<sup>123</sup> *Ibid* pts 4 and 5.

<sup>124</sup> *Ibid* pt 5A.

<sup>125</sup> *Ibid* pt 4A.

<sup>126</sup> *Ibid* s 86C.

<sup>127</sup> *Ibid* s 86D.

<sup>128</sup> *Ibid* s 257.

74. Some protection for the privacy of conversation is offered in offences for the intentional use of a listening device (other than in accordance with the *Listening and Surveillance Devices Act 1972* (SA)) to overhear, record, monitor or listen to any private conversation, whether or not the person is a party to the conversation, without the consent, express or implied, of the parties to that conversation.<sup>129</sup>
75. In 2012, the Surveillance Devices Bill 2012 (SA) was introduced to the South Australian Parliament by the Attorney-General. The Bill seeks, amongst other things, to repeal the *Listening and Surveillance Devices Act* and regulate the use of surveillance devices. The Bill seeks to limit the installation, use and maintenance of surveillance devices, and to prohibit, in some circumstances, the communication or publication of information or material derived from the unlawful use of surveillance devices. The Bill seeks to extend the scope of protection afforded under the *Listening and Surveillance Devices Act* and would apply to optical, listening and data surveillance devices.
76. In February 2013, second reading debates for the Surveillance Devices Bill were adjourned by the motion to refer the Legislative Review Committee to inquire into and report on legislative amendments required to address the following issues:
- The need to protect a person's privacy from the use of surveillance devices against that person without consent;
  - The circumstances in which persons should have the right to protect their lawful interest through the use of surveillance devices against another person without that person's consent.
  - The circumstances in which it may be in the public interest for persons to use a surveillance device against another person without that person's consent; and
  - The circumstances in which the communication or publication of information or material derived from the covert use of a surveillance device should be permitted.<sup>130</sup>
77. At the time of writing the Issues Paper, the Committee had not returned a report on the Bill.
78. In South Australia, Part 5A of the *Summary Offences Act 1953* (SA) creates 'filming offences' and specifically deals with 'humiliating or degrading filming', 'indecent filming' and 'invasive images'. A humiliating or degrading act means an assault or other act of violence against a person or an act that 'reasonable adult members of the community would consider to be humiliating or degrading' but more than moderately

---

<sup>129</sup> Listening and Surveillance Devices Act 1972 (SA) s 4.

<sup>130</sup> South Australia, *Parliamentary Debates*, Legislative Council, 21 February 2013, 3231.

embarrassing.<sup>131</sup> 'Indecent filming' is not restricted to child victims, nor to private places, nor to images of sexual acts. It includes filming a person when they are 'in a state of undress in circumstances in which a reasonable person would expect to be afforded privacy' or 'engaged in a private act in circumstances in which a reasonable person would expect to be afforded privacy'. It also includes filming a person's 'private region in circumstances in which a reasonable person would not expect that the person's private region might be filmed.'<sup>132</sup> It is a defence to both of the humiliating or degrading and the indecent filming offences that the film was taken with the consent of the person being filmed. In addition, exemptions apply for law enforcement personnel and legal practitioners, or their agents, acting in the course of law enforcement or legal proceedings.

79. Allied to these offences are the separate offences of distributing the humiliating or degrading or the indecent film.<sup>133</sup> To distribute such a film includes to communicate, exhibit, send, supply or transmit it, and to make it available for access by another.
80. In respect of the humiliating or degrading filming, it is an offence to distribute the film knowing or having reason to believe that the victim does not consent to the distribution of the film. It is a defence that the conduct constituting the offence was for a legitimate public purpose. Conduct will only be taken to be for a 'legitimate public purpose' if the conduct was in the public interest having regard to:
- (a) whether the conduct was for the purpose of educating or informing the public;
  - (b) whether the conduct was for a purpose connected to law enforcement or public safety;
  - (c) whether the conduct was for a medical, legal or scientific purpose;
  - (d) any other factor the court determining the charge considers relevant.<sup>134</sup>
81. A presumption arises that conduct engaged in by or on behalf of a media organisation (as defined) was engaged in for a legitimate public purpose, unless the court, having regard to the matters set out above, finds that the conduct was not for a legitimate public purpose.<sup>135</sup>
82. In respect of indecent filming, it is a defence that the person who was filmed consented to the distribution or that the alleged distributor did not know and could not have been expected to have known that the film was taken without the person's consent or that the

---

<sup>131</sup> Summary Offences Act 1953 (SA) s 26A, 26B.

<sup>132</sup> Ibid 26A, 26D.

<sup>133</sup> Ibid 26B(2), 26D(3).

<sup>134</sup> Ibid 26B(6).

<sup>135</sup> Ibid 26B(7).

filming was undertaken by a licensed investigation agent within the meaning of the *Security and Investigation Agents Act 1995* (SA).

83. Finally, there is a separate offence of distribution of an 'invasive image', knowing or having reason to believe that the other person does not consent to distribution.<sup>136</sup> An 'invasive image' is a moving or still image of a person 'engaged in a private act' or 'in a state of undress such that the person's bare genital or anal region is visible'. A private act is in turn defined to mean a sexual act of a kind not ordinarily done in public or using a toilet. It is a defence that the distribution was for a purpose connected with law enforcement or was for a medical, legal or scientific purpose or that the image was filmed by a licensed investigation agent within the meaning of the *Security and Investigation Agents Act*. The same exemptions as for indecent and humiliating or degrading filming apply.

### **Examples of application of current remedies**

84. Set out below are some examples (some more serious than others) of conduct that might be thought to be an invasion of privacy and an explanation of how the law may deal with that conduct.
85. The discussion around these examples is not intended to be exhaustive of all potential legal remedies. For example, one remedy that is not addressed in these examples, because it is complex and difficult to establish, is one that can arise if it can be shown that the criminal law was intended to provide a civil cause of action. In addition, the discussion does not refer to the possible effects of the Surveillance Devices Bill, should it be enacted.

---

<sup>136</sup> Ibid 26C.

*B, a victim of violence threatened with future violence, has taken many steps to ensure her residential address and contact details are not publicly available.*

*A proposes to publish them.*

### **Example 1**

A could be prevented from publishing if A had come by the information in a relationship of confidence. That would be the case if, for example, A was a pay clerk who had come by the information when B disclosed it to her employer for her pay records, or A was B's doctor or lawyer to whom B gave the information in confidence.

A might also be prevented from publishing B's details if the information had been disclosed to A in circumstances to which the *Privacy Act 1988* (Cth) applied - for example, if A was a corporation taking that information for a warranty, or A was a university taking the information for enrolment, or A was a public body that had collected the information under a law permitting that body to collect information.

However, A may have come by the information without any wrongdoing and without any expected need for confidentiality. A may have become aware of B's residential address by

- having been invited as a guest to B's house or by going there with one of B's friends;
- having seen a letter addressed to B;
- overhearing the address in a conversation;
- finding the address in a record which is publicly accessible;  
or
- by observation.

In these circumstances there is little B can do. That is so even though the publication could reasonably be thought to harm B.

*A proposes to publish generally the little known fact of B's infection with an incurable, but not life threatening disease.*

### **Example 2**

A could be restrained from publishing the information by B if A had come by it in a relationship of confidence – for example, where A is B's medical practitioner, or is someone with access to B's health records, or where A is B's employer and has been told the information in confidence. In protecting information held in confidence the law would also protect B's privacy.

B might also be protected if A was subject to the *Privacy Act* and therefore could only publish 'health information' for a purpose allowed by that Act. This law would cover situations where A was a body corporate and had collected that information for the purpose of treatment or providing insurance.

But otherwise, and particularly if it cannot be shown how A came by this information, there is nothing B can do to prevent it being published. There is nothing B can do if A works out B's diagnosis by 'piecing it together' from a variety of sources or inferences.

The publication of the fact of B's disease is defamatory, but A has a defence if the fact published was true. B could not invoke the law of defamation to stop the publication of information about his infection and without a cause of action for invasion of privacy he has no other way to get a court to stop it.

*A publishes on Facebook a range of personal information and photographs to a small group of 'friends' including B.*

*B provides that information to C.*

*C publishes it generally.*

### **Example 3**

A has no legal protection here. C and A are not in a pre-existing relationship of confidence that would prevent disclosure by C of the information C was given about A by B, nor do the circumstances appear to otherwise give rise to a duty of confidence.

Often, information that is provided to a limited group is disseminated much more widely than was ever intended. Some might think that in giving information to this group A took the risk that it might be used for other purposes, and in this A is in the same position as someone who tells something to a gossip. Others might say that by sending it to a specific group A has at least demonstrated an intention to limit access to the information to members of that group. But this does not give A any legal way to get C to take down that information or to recover damages from B or C for any harm the publication might have caused.<sup>137</sup>

*A successfully guesses B's password and logs on to his email account. A reads B's emails.*

### **Example 4**

Part 10.7 of the *Criminal Code 1995* (Cth) and Part 4A of the *Criminal Law Consolidation Act 1935* (SA) create offences for unauthorised access to data on computers.

Whether these offences apply to A will depend on what A intended, what system A accessed and in some cases what A intends to do with the information obtained (for example, whether A intends to use it to harm B).

It would be difficult for B to recover civil damages from A for reading his emails. There is likely to be no specific cause of action and remedy in tort that would cover this interference with B's *privacy*, whatever A's purpose or subsequent conduct.

---

<sup>137</sup> The Facebook terms of service (Facebook Statement of Rights and Responsibilities) set out the contractual obligations between Facebook and its users. These terms do not apply (and therefore are not enforceable between) users, in this case A, B and C, and therefore although they do seek to regulate conduct on the Facebook forum, these terms do not provide a relevant and direct remedy to A in these circumstances.

*A, from a ladder positioned in a laneway over a back fence, takes a video of B and her family at lunch in their backyard.*

### **Example 5**

If A, the photographer, had trespassed, there might be some way to protect B from this intrusion of privacy. But A's actions do not amount to trespass. Trespass protects private property rights associated with the ownership of land, giving land owners a right to exclude others from their land. A photographer filming another person while they are in their own backyard but from a vantage point *outside* that backyard does not commit trespass.

There being no action in trespass, B has no legal means of stopping A filming or preventing A publishing the film, and no way to recover damages from A for harm caused by the publication or filming.

Taking a video or photo of someone else will rarely be an offence. That is because in most cases taking a picture of something is no different, at law, from observing it directly. What makes taking a picture or film an offence is its subject matter. 'Indecent filming' and 'humiliating and degrading filming' are offences under Part 5A of the *Summary Offences Act 1953* (SA). These offences clearly involve intrusions of privacy because they are for filming or recording, without the subject's consent, very private activities. There are also serious offences under Division 11A of the *Criminal Law Consolidation Act 1935* (SA) for filming that involves the production of child pornography, but these are more offences of exploitation than intrusion of privacy.

In this example, A commits no criminal offence by filming B having lunch in her backyard.

Similarly, if A instead was operating a remote-controlled drone with a camera affixed taking photographs of B in her backyard and in her kitchen (through the windows) no offence would be committed under the *Criminal Law Consolidation Act* or the *Listening and Surveillance Devices Act*. In some limited circumstances, however, it may amount to a trespass to land.



*While it is being repaired, **A** loads software onto **B**'s smartphone which unknown to **B** allows **A** to remotely activate the inbuilt camera and stream images via the internet.*

**Example 6**

Part 10.7 of the *Criminal Code 1995 (Cth)* and Part 4A of the *Criminal Law Consolidation Act 1935 (SA)* create offences for the unauthorised manipulation of data. Installing software without consent is a manipulation of computer data because it involves an addition to the data on that computer. Whether A's conduct amounts to an offence depends on what A intended, what system is accessed by A and in some cases what A then does with the manipulation. These offences are only incidentally directed at protecting B's privacy. Their main aim is to prevent falsification of data.

A's conduct does not constitute a trespass to goods. The tort of conversion is mainly concerned with excluding dealings with goods by someone who has no lawful right to deal with them. In this case, A is not attempting to sell or deal with B's phone.

There is no other civil remedy that would make A liable to B for this conduct by reason of its being an interference with B's privacy.

## Future remedies

---

86. In Australia, incidental privacy protection is available from laws such as those providing remedies for assault and battery, nuisance, negligence, defamation, passing off, trespass to land and goods, as well as the criminal law. None of these laws has as its focus the protection of a right to privacy—a right to be let alone—but instead defends another interest or right, such as a property right.
87. Although an action for breach of confidence does have privacy as a focus, it arises in relation to information that has the necessary quality of confidence and only where there is a relationship of confidence, where the information was imparted in circumstances of confidence or where the information was ‘improperly or surreptitiously obtained’.<sup>138</sup> It will not cover an intrusion into another’s personal privacy unless one of these tests is met (as demonstrated in the preceding examples).
88. Following extensive community consultation, the ALRC concluded in its 2008 report that there was ‘strong support for the enactment of a statutory cause of action for a serious invasion of privacy’ in Australia<sup>139</sup> as ‘the best way’ to protect people from ‘unwanted intrusions into their private lives or affairs in a broad range of contexts’.<sup>140</sup> It supported legislative reform because Australian courts have not been able to agree on whether such a tort exists at common law or been willing to develop the law any further in this area.<sup>141</sup>
89. The VLRC concluded that, privacy being a value of increasing importance, Victorians should be able to take civil action ‘in response to threatened or actual serious invasions of privacy by the use of surveillance in a public place.’<sup>142</sup> It recommended the enactment of two separate causes of action. One would deal with serious invasions of privacy by misuse of private information. The other would deal with serious invasions of privacy by intrusion upon seclusion.
90. The NSWLRC concluded that the best way to recognise the inherent value of privacy and to fill the gaps which manifest themselves in privacy protection would be to enact a broad statutory cause of action for invasion of privacy. The NSWLRC proposed a draft Bill to set the ‘framework for a cause of action that generally protects privacy in private law, and provides the trigger for the courts to develop a legal concept of privacy in that

---

<sup>138</sup> *Lenah* (2001) 208 CLR 199, 224 (Gleeson CJ); *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 50 (Mason J).

<sup>139</sup> ALRC Final Report, 2557 [74.85], citing a number of submissions it had received.

<sup>140</sup> *Ibid* 2565 [74.117].

<sup>141</sup> *Ibid*.

<sup>142</sup> VLRC Final Report, 146, [7.113].

context.<sup>143</sup> The Commission considered that ‘privacy’ in that context should speak for itself, and rejected arguments that privacy was a notion too difficult to define.<sup>144</sup>

91. Developments such as social media and cloud computing, and the increasing use of biometrics, CCTV and mobile devices<sup>145</sup> are just some of the reasons people think there is a need for further privacy protection in Australia. In its submission to the Commonwealth Issues Paper, the Australian Privacy Foundation argued that there were three further reasons why a statutory cause of action should be enacted:
1. The increasing privacy-invasive behaviour of organisations, whether or not the behaviour is motivated or enabled by the availability of new technologies.
  2. The clear gaps that already exist in the privacy protection offered by existing information privacy and other laws.
  3. The failure of a common law tort to emerge, despite four decades of public concern and earnest analysis in law journals.<sup>146</sup>
92. On the other hand, some argue that although there should be better legal protection against invasions of privacy, it should not be at the cost of the spread of new developments and technologies. Similarly, it has been argued that a new cause of action runs the significant risk of stifling innovation and community engagement in evolving forms of social media.<sup>147</sup>
93. Without denying the strength of these arguments, others have stressed that public interest considerations should play a part in the development of new technologies. Fifteen years ago, when reflecting extra-judicially about the growth of the Internet, Justice Michael Kirby observed that the Internet should ‘develop in a way respectful to fundamental human rights and democratic governance’ and that ‘[i]ts expansion should reflect global values and human diversity.’<sup>148</sup>
94. Further, others say that the *Privacy Act* and industry codes of practice give adequate protection against intrusions involving the media.<sup>149</sup> Some argue more broadly that existing laws and codes adequately protect privacy of individuals in Australia.

### **Common law development?**

95. As the decided cases set out earlier in this paper make plain, it is very unlikely that a common law privacy tort will emerge in Australia in the foreseeable future. If the current

---

<sup>143</sup> NSWLRC Final Report, 21 [4.16].

<sup>144</sup> Ibid 21 [4.16].

<sup>145</sup> Australian Privacy Foundation, Submission to Commonwealth Issues Paper, 7.

<sup>146</sup> Ibid.

<sup>147</sup> For example, see Special Broadcasting Service, Submission to Commonwealth Issues Paper, 1.

<sup>148</sup> M Kirby, ‘Privacy in Cyberspace’ (1998) 21 *University of New South Wales Law Journal* 324, 333.

<sup>149</sup> For example, see Free TV Australia, Submission to Commonwealth Issues Paper 2; Commercial Radio Australia, Submission to Commonwealth Issues Paper, 2.

trend continues, any development will be piecemeal and slow. Many argue<sup>150</sup> that relying on the courts to recognise a cause of action for privacy is not the best approach. There are inherent limitations on judicial law making,<sup>151</sup> including that courts, unlike Parliaments, may not access wider research or consult and can use only existing common law and equitable remedies; and that superior, authoritative courts can consider the laws on protection of personal privacy only when a person with the resources to do so has brought the matter before them.

96. Given the multifaceted nature of the concept of privacy and the many ways in which privacy can be invaded, piecemeal judicial development may be undesirable and the legislature may be better placed to build an effective cause of action. As the Victorian Privacy Commissioner has observed:

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 an action all the way to the High Court of Australia in order to definitively establish the existence of a cause of action.<sup>152</sup>

## **A statutory cause of action?**

### **Introduction**

97. The ALRC has recognised the inconsistency and fragmentation that has characterised the regulation of information privacy across Australia.<sup>153</sup> For this reason, in the ALRC Final Report, the ALRC concluded that although the precise method of regulation is a matter for Government, it is important that there is a consistent regime across Australia. To ensure uniformity, the ALRC recommended that a statutory cause of action for invasion of privacy should be in federal legislation (separate from the *Privacy Act*) and should cover federal agencies, organisations and individuals as well as State and Territory public sector agencies, subject to some constitutional limitations.<sup>154</sup>
98. The NSWLRC agreed with the ALRC's view that consistency should be a goal of privacy regulation. The NSWLRC also recognised that the province of private law is foremost a matter of State law, and for that reason recommended that the preferred model for

---

<sup>150</sup> See, for example, Victorian Privacy Commissioner, Submission to Commonwealth Issues Paper, 6.

<sup>151</sup> As to which, see Sir Anthony Mason, 'Law Reform and the Courts' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) ch 22, 314, 319.

<sup>152</sup> Victorian Privacy Commissioner, Submission to Commonwealth Issues Paper, 6.

<sup>153</sup> See, for example, ALRC Final Report, 2580-2582.

<sup>154</sup> Ibid 2582 [74.189]-[74.191].

achieving uniformity was for State and Territory legislatures to enact the draft Bill the Commission proposed and annexed to its Report.<sup>155</sup>

99. The VLRC noted that the Commonwealth may not implement the ALRC's recommendation for a Commonwealth statutory cause of action for serious invasions of privacy or may take some time to do so.<sup>156</sup> Against this background, the VLRC considered that there was scope for Victoria to be a leader in the area.
100. The absence of a response by the Commonwealth to the submissions to its 2011 Issues Paper and its recent reference to the ALRC for an inquiry into 'the protection of privacy in the digital era', suggested that there may be no Commonwealth statutory cause of action for serious invasions of privacy enacted in the near future. However, shortly before publication of this paper, the ALRC released its Issues Paper on 'Serious Invasions of Privacy in the Digital Era' as part of its response to the 2013 ALRC Privacy Reference, calling for submissions on, amongst other things, a Commonwealth cause of action for serious invasions of privacy.
101. The continuing work on a national statutory cause of action for invasion of personal privacy in Australia should encourage, rather than deter, an investigation of whether South Australia should unilaterally establish such a cause of action. The recent release of the ALRC and Commonwealth Issues Papers on the topic (in particular the very recent ALRC Issues Paper) and previous work by other State law reform bodies in the past decade demonstrate a growing interest in this remedy. That growth has been stimulated in large part by the fact that new technologies make it possible for individuals to invade privacy and inflict serious harm without the involvement of the mainstream media or large corporations. Individual States and Territories may wish to offer remedies to their citizens now rather than to wait for potential constitutional and political barriers to a national statutory cause of action to be overcome.
102. In these circumstances a local statute may have some valuable work to do. There is no doubt that the South Australian Parliament is competent to pass laws that regulate conduct with a connection to South Australia. However, the question of territorial reach will need to be addressed. If a statutory cause of action is to be enacted, consideration will need to be given to the formulation of an appropriate jurisdictional clause and the relevant 'territorial nexus'. This is not something that State Parliaments and courts are unfamiliar with.
103. Despite potential jurisdictional limitations, a South Australian statutory cause of action could still provide protection in this State against unacceptable invasions of personal

---

<sup>155</sup> NSWLRC Final Report, 72-73 [11].

<sup>156</sup> VLRC Final Report, 128 [7.2].

privacy, and in enacting this legislation South Australia could provide leadership to other States and Territories.

104. Like any right, a right to privacy cannot be absolute. It is to be weighed against other rights such as freedom of individual, press and artistic expression. Statutory reform can only succeed if the statutory right to protect one's privacy does not unduly fetter the right to freedom of expression. This balance can be struck through careful drafting in relation to, for example:
- (a) the required seriousness of the conduct;
  - (b) where and how consideration of the 'public interest' and other competing interests are placed in the cause of action; whether as elements, express 'relevant considerations', or defences; and
  - (c) what, if any, exemptions apply.
105. Ultimately, a critical consideration in drafting a statutory cause of action will be to ensure that people can go about their daily lives knowing what conduct is lawful and what is not.

#### **What is a cause of action?**

106. A person may ask a court or tribunal to declare someone else liable for the consequences of their actions and to order that person to compensate them for resulting loss or damage only if there is a 'cause of action' available to them by law.
107. There are many different kinds of causes of action. They may arise from an act, a failure to perform a legal obligation, a breach of duty, or the invasion of a right.
108. To litigate a cause of action, the party seeking redress (the plaintiff or complainant) sues the alleged wrongdoer (the defendant or respondent). The plaintiff must prove the 'elements' of the cause of action: that there existed, in the circumstances of this particular case, the kinds of conduct ('physical' elements) and the intention, recklessness or negligence behind that conduct ('fault' elements) that are required for that cause of action. The plaintiff must convince the court that it was more probable than not that every one of these elements existed in that case. The plaintiff's cause of action will then succeed unless the defendant can prove that it was more probable than not that he or she had a legitimate defence to the cause of action or, if the cause of action exempts certain kinds of people or conduct, that he or she was exempt. If so, the cause of action will fail, and the defendant will not be liable to the plaintiff.
109. This part of the paper considers which elements and defences should constitute a possible statutory cause of action for invasion of personal privacy and discusses the scope and operation of that cause of action.

## Who should be able to bring the action?

### *Natural persons only?*

110. The ALRC, the NSWLRC and the VLRC have all concluded that notions of privacy attach to *individuals*, and that a cause of action for invasion of privacy should be restricted to natural persons. This is generally consistent with the position in Canada and the United States.
111. In both the ALRC Discussion Paper and the ALRC Final Report, the ALRC concluded that because the desire to protect privacy is founded on notions of individual autonomy, dignity and freedom, extending the protection of a human right to an entity that is not human is inconsistent with the approach of Australian privacy law.<sup>157</sup> This is in line with the observations of Gleeson CJ and Gummow and Hayne JJ in *Lenah*.<sup>158</sup> In their joint judgment, Gummow and Hayne JJ went on to conclude:

*Lenah's* reliance upon an emergent tort of invasion of privacy is misplaced. Whatever development may take place in that field will be to the benefit of natural, not artificial, persons. It may be that development is best achieved by looking across the range of already established legal and equitable wrongs. On the other hand, in some respects these may be seen as representing species of a genus, being a principle protecting the interests of the individual in leading, to some reasonable extent, a secluded and private life, in the words of the Restatement, 'free from the prying eyes, ears and publications of others.'<sup>159</sup>

### *Living persons only?*

112. The ALRC,<sup>160</sup> the NSWLRC and the VLRC each recommended that the causes of action be restricted to living persons, under the same rationale as for restricting defamation actions to living persons: namely, that the suffering, damage or insult consequent on a breach cannot occur after death.<sup>161</sup> The NSWLRC also thought that reform needed to be coherent with the law relating to the effect of death on other causes of action in all Australian jurisdictions.<sup>162</sup>
113. However, a few have argued that there is a public interest in at least a limited extension of the cause of action to deceased persons. For example, in a submission to the

---

<sup>157</sup> ALRC Discussion Paper, 304 [5.112] and the ALRC Final Report, 2576 [74.160], drawing on observations in *Lenah* (2001) 208 CLR 199.

<sup>158</sup> *Lenah* (2001) 208 CLR 199, [43] (Gleeson CJ) and [126]-[132] (Gummow and Hayne JJ).

<sup>159</sup> *Ibid* [132].

<sup>160</sup> Although the ALRC did not explicitly restrict the proposed cause of action to natural persons, this paper proceeds on the assumption that this was its intention.

<sup>161</sup> For example, see VLRC Final Report, 166-167.

<sup>162</sup> NSWLRC Final Report, [10.1].

Commonwealth Issues Paper, the Victorian Privacy Commissioner made the following points:

- A cause of action for privacy breaches may be more comparable to equitable actions like breach of confidentiality than to actions such as defamation. While a right to recover damages for defamation ceases upon death, a duty of confidentiality can persist after death.
- Special sensitivities may arise when disclosing information about deceased persons to the world at large, as is recognised in many Indigenous cultures.
- Protecting information privacy after death may affect how people act during their lifetime. Individuals may be less inclined to reveal their information, particularly sensitive or intimate details, if they are concerned that those details might be revealed or otherwise used as soon as they die.
- There are a number of overseas cases giving rise to community debate about the handling of personal information after a person has died, or in respect of a deceased person. These include requests by the press for autopsy photographs of child victims of sexual and violent crime and the collection by coronial staff of autopsy photographs of famous and gruesome cases which were used to create personal scrapbooks and to show at cocktail parties. In this latter case, the court recognised a privacy interest which was grounded in maintaining the dignity of the deceased.
- Disclosure of a deceased person's information may impact the living. A disclosure may cause distress to the survivors and records relating to the deceased individual may contain details of the living, as in the case of coronial records. The information relating to the deceased individual may also be about a group or family, as is particularly the case with genetic data.
- Ready access to a deceased person's biographical and other data may facilitate the creation of fraudulent or stolen identities.<sup>163</sup>

114. These are cogent arguments. The question of whether maintaining consistency in Australian laws about the survival of causes of action is more important than protecting personal privacy or confidentiality in the circumstances described by the Privacy Commissioner merits further consideration in this review.<sup>164</sup>

---

<sup>163</sup> Victorian Privacy Commissioner, Submission to Commonwealth Issues Paper 13 (footnotes omitted).

<sup>164</sup> It is notable that South Australia has recognised a public interest in protecting the privacy of the deceased in laws that prevent access, through investigative or prosecuting agencies, to photographs of people after death. It is an offence for a public official to facilitate such access: see *Evidence Act 1929* (SA), Pt 7, Div 10 (Sensitive Material), in particular see section 67H(1)(c).



## Seriousness

115. Not all intrusions into a person's 'private' sphere should be actionable under a statutory cause of action for invasion of privacy. Critical to this is two things. First, the formulation of the test for what is an actionable invasion of privacy and secondly, the threshold beyond which conduct that invades privacy becomes actionable.
116. A common formulation is that the invasion of privacy be 'highly offensive' to a 'reasonable person' of 'ordinary sensibilities'. A less stringent alternative might be 'sufficiently serious to cause substantial offence'.<sup>165</sup> Having discussed the difficulty in defining privacy and in demarcating 'private' from 'public', Gleeson CJ in *Lenah* observed:
- The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.<sup>166</sup>
117. The ALRC, the NSWLRC and the VLRC have all recommended that a plaintiff be required to demonstrate that in the circumstances of their claim they held a 'reasonable expectation of privacy'. This requirement appears to have been supported by the decided cases.<sup>167</sup> Further, the ALRC and the VLRC thought an objective test of seriousness (that is, that the invasion of expected privacy be highly offensive to a person of ordinary sensibilities<sup>168</sup>) should be the test that a plaintiff is required to meet.
118. The ALRC considered that the circumstances giving rise to the cause of action should not be limited to activities taking place in the home or in private places, but rather that the appropriate test was 'whether the circumstances give rise to a reasonable expectation of privacy, regardless of whether the activity is in public or private'.<sup>169</sup> The ALRC thought that it should be for the courts to determine when a reasonable expectation of privacy arises, but supported a more narrow view of when a public act will give rise to a reasonable expectation of privacy.<sup>170</sup>
119. As mentioned above, both the ALRC and the VLRC supported the stricter test of 'highly offensive'. The VLRC considered that this stricter test was necessary to ensure that minor or trivial invasions do not divert attention away from the serious cases.<sup>171</sup> The NSWLRC on the other hand concluded that the strict test was (in principle) an unwarranted limitation or qualification of the requirement for there to be a 'reasonable

---

<sup>165</sup> ALRC Final Report, 2568 [74.134] referring to the ALRC Discussion Paper, [5.80].

<sup>166</sup> *Lenah* (2001) 208 CLR 199, [42].

<sup>167</sup> ALRC Final Report, 2567, NSWLRC Final Report, 24-31, VLRC Final Report, 152-153 and cases cited therein, as set out in the Commonwealth Issues Paper.

<sup>168</sup> Or a formulation of words to the same or similar effect.

<sup>169</sup> ALRC Final Report, 2566-2567.

<sup>170</sup> Such, it was said, as that expressed in *Campbell v MGN Ltd* [2004] 2 AC 457.

<sup>171</sup> VLRC Final Report, 151 [7.142].

expectation of privacy'.<sup>172</sup> Rather, the NSWLRC recommended that the statutory cause of action should require the court to take into account a number of matters and interests in determining whether there has been an actionable invasion of privacy. The Commission recommended the following non-exhaustive list of matters:

1. the nature of the subject matter that it is alleged should be private,
2. the nature of the conduct concerned (including the extent to which a reasonable person of ordinary sensibilities would consider the conduct to be offensive),
3. the relationship between the individual and the alleged wrongdoer,
4. the extent to which the individual has a public profile,
5. the extent to which the individual is or was in a position of vulnerability,
6. 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),
7. the effect of the conduct concerned on the health, welfare and emotional well-being of the individual,
8. whether the conduct concerned contravened a provision of a statute of an Australian jurisdiction, and
9. any other matter that the court considers relevant in the circumstances.<sup>173</sup>

120. On the one hand, such an express list of matters may help overcome some of the criticisms of the imprecision and vagueness of the causes of action proposed in the past.<sup>174</sup> On the other hand, a list, even if expressed to be non-exhaustive, may still be taken to exclude matters not in the list. Either way, there is a risk that some conduct may be excluded. This is particularly so given that developing technology has already affected our notions of privacy and will continue to change the way people choose to relate to each other, making it difficult to predict what a future 'sphere of inviolability' may look like.

121. Arriving at an appropriate test or threshold is an important aspect of crafting a statutory cause of action that properly balances the public interest in a right to privacy with the public interest in protecting freedoms such as freedom of expression.

### **Invasion**

122. Rather than defining 'serious invasion of privacy', the ALRC thought it would be of more use to the courts for the legislation to set out a non-exhaustive list of the types of acts or conduct that might constitute an invasion of privacy. The following examples were suggested:

---

<sup>172</sup> NSWLRC Final Report, 28 [5.11].

<sup>173</sup> NSWLRC Final Report, 35 [5.21] and clause 74(3) of the Bill it proposed. For a detailed discussion of these factors, see 35-46 of the Report.

<sup>174</sup> For example, the Bills proposed in South Australia in 1974 and 1991.

1. there has been a serious interference with an individual's home or family life;
  2. an individual has been subjected to unauthorised surveillance;
  3. an individual's correspondence or private written, oral or electronic communication has been interfered with, misused or disclosed; and
  4. sensitive facts relating to an individual's private life have been disclosed.<sup>175</sup>
123. The ALRC concluded that the cause of action should not penalise use of a person's identity or likeness without consent and nor should it protect against unlawful attack on a person's honour and reputation, placing a person in false light or using a person's name, identity, likeness or voice without authority or consent. As set out earlier,<sup>176</sup> these are the third and fourth limbs of the American formulation of the privacy torts.<sup>177</sup> The ALRC was clearly persuaded by arguments that the laws of defamation and passing off were better equipped to deal with this type of conduct.<sup>178</sup>
124. The NSWLRC and the VLRC took a different approach and did not propose a list of what would constitute an invasion of privacy. Instead, the NSWLRC model proposed a broad cause of action and set out a list of matters that the court should take into account when assessing whether or not there has been an invasion of privacy. As mentioned earlier, the VLRC recommended two causes of action: one dealing with 'misuse of private information' and the other 'intrusion upon seclusion'.
125. A different approach was taken in the Privacy Bill introduced to the South Australian Parliament in 1974, reflecting the earlier recommendations of the SALRC. The Bill set out the following 'intrusions':
- (a) spying, prying, watching or besetting;
  - (b) the unauthorised overhearing or recording of spoken words;
  - (c) the unauthorised making of visual images;
  - (d) the unauthorised reading or copying of documents;
  - (e) the unauthorised use or disclosure of confidential information, or facts (including his name, identity or likeness) calculated to cause him distress, annoyance or embarrassment, or to place him in false light;
  - (f) the unauthorised appropriation of his name, identity or likeness for another's gain.<sup>179</sup>
126. The Privacy Bill introduced to the South Australian Parliament in 1991<sup>180</sup> provided an exhaustive list of 'infringements' of the proposed statutory right to privacy, which in summary were:

---

<sup>175</sup> ALRC Final Report, 2565 [74.119].

<sup>176</sup> Ibid [13].

<sup>177</sup> *Restatement of the Law, 2nd, Torts* 1977 (US) §§ 652B, 652C, 652D, 652E.

<sup>178</sup> For further discussion see ALRC Final Report, 2565-2566.

<sup>179</sup> Privacy Bill 1974 (SA) (No 150).

<sup>180</sup> Privacy Bill 1991 (SA) as introduced following Select Committee reference and recommendations: South

- keeping another under observation;
  - listening to conversations;
  - intercepting communications;
  - recording acts, images or words;
  - interference with private correspondence or records or confidential business correspondence or records;
  - keeping records of another's personal or business affairs;
  - obtaining confidential personal or business information;
  - publishing: personal or business information, visual images of or words spoken or sounds produced by or private correspondence of another; and
  - harassing another or interfering to a substantial and unreasonable extent in the personal or business affairs or with the property of another person so as to cause distress, annoyance or embarrassment and the harassment is not justified in the public interest.
127. Given the fast pace of technological innovation, it is difficult to predict what types of invading conduct may emerge in the future. Equally, given the cultural and generational aspects of the concept of privacy it is also difficult to predict what kinds of conduct will, in the future, be offensive to a 'reasonable person'. Accordingly, while listing invasive conduct may provide more certainty and give guidance to the courts, it may also limit the lifespan of a statutory cause of action.

#### **Fault elements**

128. Criminal offences and civil causes of action have physical elements and fault elements. Physical elements include conduct, and fault elements include intention, recklessness or negligence.
129. The ALRC recommended confining the fault element for a cause of action for invasion of privacy to conduct that is intentional or reckless,<sup>181</sup> thereby excluding acts which were accidental or negligent. The Commonwealth Issues Paper took note of the fact that the ALRC considered that the fault element of intention or recklessness should attach to the act or conduct which resulted in the invasion, rather than to the invasion itself.<sup>182</sup>

---

Australia, *Parliamentary Debates*, House of Assembly, 12 September 1991, 831.

<sup>181</sup> ALRC Final Report, 2576-2577.

<sup>182</sup> Commonwealth Issues Paper, 38, referring to ALRC Final Report.

130. The ALRC agreed with the NSWLRC comment that to include accidental or negligent acts ‘would, arguably, go too far’.<sup>183</sup> However, the NSWLRC does not appear to have explicitly considered whether or not particular fault requirements should be included. It merely proposed that the nature of the alleged invading conduct be a factor to be considered when determining whether there has been an actionable invasion.<sup>184</sup>
131. The VLRC concluded that although most actionable invasions will include intentional conduct, it was unnecessary to exclude negligent acts from the conduct which might fall within the two causes of action it proposed. It thought there might sometimes be circumstances where a defendant’s actions were so grossly negligent that civil action was justified. It gave the example of where a doctor leaves a patient’s highly sensitive medical records on a train or tram.<sup>185</sup> A more modern example of this might be where a doctor inadvertently shares professional medical photographs publicly through a cloud storage application.

#### **The role of consent**

132. Whether the plaintiff expressly or impliedly consented to the invading conduct can be dealt with legislatively in a number of ways. If consent forms part of the elements of the cause of action, the plaintiff will carry the burden of proving that he or she did *not* consent to the invading conduct. If it constitutes a defence to the cause of action, the defendant will have to prove that the plaintiff consented to the invading conduct.
133. The ALRC pointed out the following options:<sup>186</sup>
- be included as an essential element of the cause of action—for example, to use ‘letters, diaries or other personal documents of a person ... *without the consent, express or implied, of the person or some other person who has the lawful authority to give the consent*’, may in a variety of circumstances constitute an invasion of privacy;<sup>187</sup>
  - be considered when determining whether there was a reasonable expectation of privacy in all the circumstances, or as a circumstance in determining whether the act complained of meets the test of ‘sufficiently serious to cause substantial offence to a person of ordinary sensibilities’;
  - operate as an exception to the general cause of action;<sup>188</sup> or
  - be a defence to an action.<sup>189</sup>

---

<sup>183</sup> ALRC Final Report, 2577 citing NSWLRC Consultation Paper (2007), [7.24].

<sup>184</sup> As observed in the Commonwealth Issues Paper, 38, citing cl 74(3)(a)(ii) and (vi) of the legislation proposed by the NSWLRC.

<sup>185</sup> VLRC Final Report 18, (2010), 152 [7.148].

<sup>186</sup> ALRC Final Report, 2575 [74.158].

<sup>187</sup> *Privacy Act 1978* RSS c P–24 (Saskatchewan) s 3(d) (this is the footnote given in the ALRC Final Report).

<sup>188</sup> *Privacy Act 1996* RSBC c 373 (British Columbia) s (2)(a) (this is the footnote given in the ALRC Final Report).

134. The ALRC considered that the issue of consent is best dealt with in terms of an essential element of the cause of action, and in particular that consent should be considered when determining whether the act complained of was sufficiently serious to cause a substantial offence to a person of ordinary sensibilities.<sup>190</sup>
135. The Bill proposed by the NSWLRC expressly required consideration of consent as follows:
- 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>191</sup>
136. However, some argue that consent ought to be included as a defence, rather than integrated into the cause of action, on the basis that it is not appropriate for the plaintiff to have to prove a negative.<sup>192</sup> This was also the conclusion of the VLRC. In arriving at this conclusion, the VLRC noted that consent was a common defence in other areas of the law, and had been used as a formal defence in the context of privacy in the United States and Canada.<sup>193</sup>

### Defences

137. The main defences suggested in recent debates loosely fall into three categories:
- (a) *Where the act or conduct was incidental to the exercise of a lawful right of defence of person or property.* This appears in the recommendations of the ALRC, the NSWLRC and the VLRC, and in the Canadian privacy Acts.<sup>194</sup> An example of this defence being used under the Canadian privacy Acts is where an employer took privacy invasive action to prevent an employee stealing stock.<sup>195</sup>
- (b) *Where the act or conduct was required or authorised by or under another law.* This also appears in the recommendations of the ALRC, the NSWLRC and the VLRC, and in the Canadian privacy Acts.<sup>196</sup>

---

<sup>189</sup> *Privacy Act 1990* RSNL c P-22 (Newfoundland and Labrador) s 5(1)(a); *Privacy Act 1978* RSS c P-24 (Saskatchewan) s 4(1)(a); *Privacy Act CCSM* s P125 (Manitoba) s 5(a). See also, Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy* (2004), recs 4, 9 (this is the footnote given in the ALRC Final Report).

<sup>190</sup> ALRC Final Report, 2575-2576 [74.159].

<sup>191</sup> Clause 74(4) of the Bill proposed by the NSWLRC in the NSWLRC Final Report.

<sup>192</sup> For example, see, New South Wales Council for Civil Liberties, Submission to Commonwealth Issues Paper, 8.

<sup>193</sup> VLRC Final Report, 153-154.

<sup>194</sup> Ibid 154 [7.155].

<sup>195</sup> Example used in VLRC Final Report, 154 [7.156] referring to *United Food and Commercial Workers, Local 1400 v Saskatoon Co-operative Assn Ltd* (1992) 101 Sask R 1 (QB).

<sup>196</sup> VLRC Final Report, 154 [7.158].

- (c) Where the act or conduct might otherwise attract a defence under the law of defamation.
138. The ALRC recommended the following three defences to a statutory cause of action:
- (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>197</sup>
139. The ALRC considered that the defence of disclosure in the public interest or fair comment on a matter of public interest should, rather than being a stand-alone defence, form part of the elements of the cause of action as part of the ‘public interest’ test. In making this recommendation the ALRC considered that it had overcome the need to include other defences about balancing competing interests that had been included by other jurisdictions and recommended by stakeholders.
140. The NSWLRC generally agreed with the ALRC defences (a) and (b), but recommended that (c) should specifically include the following defences under the law of defamation:
- (a) absolute privilege;
  - (b) fair reporting; and
  - (c) 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>198</sup>
141. These three defamation defences, respectively known as ‘the defence of absolute privilege’,<sup>199</sup> ‘the defence of fair report of proceedings of public concern’<sup>200</sup> and ‘the defence of innocent dissemination’,<sup>201</sup> represent and ‘defend’ a public interest in publication in those circumstances.
142. The NSWLRC justified these ‘defamation defences’ in the following way:
- The policy justifications dictating that an absolute privilege should attach to certain publications in the course of parliamentary or judicial proceedings apply equally to cases where the publication in question injures the plaintiff’s reputation and to those where the publication invades the plaintiff’s privacy. Similarly, the ‘free speech’ policy justifications that dictate that a fair report of proceedings of public concern should defeat a claim in defamation apply

---

<sup>197</sup> ALRC Final Report, 2585 [rec 74.4]

<sup>198</sup> See clause 75 of the Bill proposed by the NSWLRC in the NSWLRC Final Report.

<sup>199</sup> Defamation Act 2005 (SA) s 25.

<sup>200</sup> Ibid s 27.

<sup>201</sup> Ibid s 30.

equally to a claim for invasion of privacy. And we see no reason why liability should arise for invasion of privacy where the defendant is an innocent disseminator of the offending publication any more than it should where the plaintiff seeks to make the defendant liable in defamation.<sup>202</sup>

143. The NSWLRC also recommended a defence apply where the offending conduct was:

the publication of matter where, as between the defendant publisher and the recipient of the information, there is a common interest or duty in giving and receiving information on the subject in question.<sup>203</sup>

144. For this defence it gave the example of a defendant invading the plaintiff's privacy by publishing in a reference to a prospective employer personal information about the plaintiff that was relevant to the job for which the plaintiff is applying.<sup>204</sup>

145. As can be seen, both the ALRC and the NSWLRC, although taking slightly different approaches, took the view that rather than 'public interest' being a stand-alone defence to an action, it was better placed as an element of the action.

146. The VLRC proposed the same defences as the ALRC, but in addition, proposed the following three further defences:

(a) consent;

(b) 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

(c) where [the defendant's] conduct was in the public interest, and if involving a publication, the publication was privileged or fair comment.<sup>205</sup>

147. As mentioned above, the VLRC considered that 'consent' and 'public interest' should operate as stand-alone defences rather than comprising elements of the cause of action. In respect of the public officer exception, the VLRC took the view that although the conduct of a public officer acting in the course of his or her duty could be described as being 'conduct that is required or authorised by or under another law' and may thereby fall within the broader 'public interest' defence, it was nevertheless important to provide police and public officers with a specific exception when engaged in their duties.

148. It remains to consider the defence of 'authorised by or required under law'. A well-crafted defence for when an act or conduct which invades the privacy of another was authorised by or required under law, should strike an appropriate balance between,

---

<sup>202</sup> NSWLRC Final Report, 55 [6.10].

<sup>203</sup> Clause 75(1)(e) of the Bill proposed by the NSWLRC in NSWLRC Final Report.

<sup>204</sup> NSWLRC Final Report, 55 [6.12].

<sup>205</sup> VLRC Final Report, 159 [7.189].



on the one hand, an individual's right to personal privacy and, on the other, the public interest in a defendant's right to undertake either conduct *required* by the law or conduct *authorised* by the law - that is, when it is otherwise lawful conduct.

149. This defence would mirror exemptions to compliance with privacy principles under information privacy legislation.<sup>206</sup> For a long time, the exception of a disclosure or act being 'required or authorised by or under law' has existed in the *Privacy Act*. This exception, and in particular what is meant by the words 'required' and 'authorised' and 'law', is discussed in detail in Chapter 16 of the ALRC Final Report.<sup>207</sup>
150. The ALRC said that the *Privacy Act* generally should not fetter a government's discretion to require or authorise that personal information be handled in a particular way and that the same should apply to any separate cause of action for serious invasion of privacy. Accordingly, it concluded that a requirement that the act or conduct was 'required or authorised by or under law' should always be a defence to a statutory cause of action for invasion of privacy. It recommended that 'law' for this purpose should include Commonwealth and State and Territory Acts and delegated legislation as well as duties of confidentiality under common law or equity. The NSWLRC also recommended a wide compass of sources for the meaning of 'law' for this defence. This is an important issue which merits further consideration in this review.
151. A number of further specific defences were suggested by respondents to the Commonwealth Issues Paper, including for example:
- that it was a 'fair dealing use' similar to those in the *Copyright Act*, such as criticism and review, parody or satire, reporting the news, and research and study;<sup>208</sup>
  - that it was a particular kind of surveillance that was permitted under existing laws;<sup>209</sup>
  - that the disclosure occurred in the reasonable course of business;<sup>210</sup>
  - that it was an act of journalism along the lines of the journalism defence under the *Privacy Act*;<sup>211</sup>
  - that the defendant reasonably considered the act or conduct to be necessary for the purpose of reducing or eliminating a possible security risk or a possible health

---

<sup>206</sup> See, for example, *Privacy and Personal Information Protection Act 1988* (NSW), s 25, and *Privacy Act 1988* (Cth). It is worth noting that the concept of an exception for conduct or disclosure which is 'required or authorised by or under law' will be retained in the *Privacy Act* when the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth) comes into effect on 12 March 2014.

<sup>207</sup> ALRC Final Report; see also NSWLRC Final Report, 52-53.

<sup>208</sup> Arts Law Centre of Australia, Submission to Commonwealth Issues Paper, 14.

<sup>209</sup> Telstra Corporation Ltd, Submission to Commonwealth Issues Paper, 3.

<sup>210</sup> Ibid.

<sup>211</sup> Commercial Radio Australia, Submission to Commonwealth of Issues Paper, 7.

or safety risk to a person or persons;<sup>212</sup>

- that the action is an abuse of process because there are other more appropriate causes of action (such as defamation) or because it is being used to avoid other laws;<sup>213</sup>
- that publication of the information was for the purpose of and in the course of rebutting an untruth;<sup>214</sup>
- that publication of the information was for the purpose of exposing a fraud, public misfeasance and/or corruption;<sup>215</sup> and
- that the information was already in the public domain.<sup>216</sup>

152. These defences were suggested by particular stakeholders in response to the Commonwealth Issues Paper, and reflect their particular concerns. However, in the most part these suggested defences fall within the more general defences proposed by the ALRC, the NSWLRC and the VLRC, or otherwise are dealt with by the causes of action proposed.

#### **Proof of damage**

153. Another critical question is whether, in order to make a successful claim, a plaintiff should be required to demonstrate that they suffered damage as a result of the invasion of their privacy. The alternative is for there to be no need to prove that any actual damage arose from the invasion of privacy (in other words, for the claim to be actionable ‘of itself’ or *per se*).
154. Many of the Canadian statutory privacy torts are actionable without proof of damage. The Bills proposed in Ireland also provided for a cause of action that was actionable without proof of damage, as did the Bills introduced to the South Australian Parliament in 1974 and 1991.
155. The tort of negligence requires proof of damage as an essential element of the tort. The actions of defamation and trespass, however, are actionable without proof of damage.
156. Allowing the cause of action to be actionable without proof of damage will allow a court to award compensation for insult and humiliation. It would also allow the court to award

---

<sup>212</sup> News Limited and Special Broadcasting Service, Further Joint Submission to Commonwealth Issues Paper, 12.

<sup>213</sup> Ibid.

<sup>214</sup> Free TV Australia, Submission to Commonwealth Issues Paper, 10; Optus, Submission to Commonwealth Issues Paper, 4; News Limited and Special Broadcasting Service, Further Joint Submission to Commonwealth Issues Paper, 13.

<sup>215</sup> News Limited and Special Broadcasting Service, Further Joint Submission to Commonwealth Issues Paper, 13.

<sup>216</sup> For example, see Free TV Australia, Submission to Commonwealth Issues Paper, 10; Telstra Corporation Ltd, Submission to Commonwealth Issues Paper, 3; Optus, Submission to Commonwealth Issues Paper, 4; Australian Broadcasting Corporation, Submission to Commonwealth Issues Paper, 7.

a wider range of remedies - for example, orders for apologies.<sup>217</sup> If proof of damage were required, it would need to be defined quite broadly if the cause of action were still to achieve its primary goal of remedying hurt, distress and embarrassment.<sup>218</sup>

157. The ALRC makes the point that enacting a *per se* action would ‘recognise that the cause of action protects a fundamental human right, which should not be dependent on proof of damage flowing from the breach’.<sup>219</sup>

### Exemptions

158. Another critical question is whether particular organisations or types of organisations or people engaged in particular types of activities should be excluded from a proposed cause of action.
159. Neither the ALRC nor the NSWLRC nor the VLRC recommended exemptions for particular types of organisations or agencies. Nor did they recommend that persons engaged in a particular type of activity be exempt from the cause of action. In short, the use of threshold requirements (such as ‘reasonable expectation of privacy’ and ‘highly offensive’) combined with the proposed defences (such as actions taken by or under law), ‘were said to provide a more appropriate means to ensure the cause of action does not capture behaviour that it should not.’<sup>220</sup> 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>221</sup>

160. It is worth noting that in response to strong criticism of this aspect of South Australia’s first Privacy Bill in 1974, its 1991 Privacy Bill<sup>222</sup> expanded the exemptions available. The Bill included exemptions for:
- (a) members of the police force;
  - (b) any other person vested with powers of investigation of inquiry;
  - (c) insurance agencies in the detection of fraud;
  - (d) commercial organisations carrying out reasonable inquiries into the creditworthiness of a customer and in passing that information on to other commercial organisations;

---

<sup>217</sup> See further, ALRC Final Report, 2577 [74.167].

<sup>218</sup> For example, see *Privacy Act 1988* (Cth), s 52.

<sup>219</sup> Ibid 2577 [74.168].

<sup>220</sup> As observed in the Commonwealth Issues Paper, 44.

<sup>221</sup> VLRC Final Report, 160 [7.194].

<sup>222</sup> As introduced following select committee reference and recommendations: South Australia, *Parliamentary Debates*, House of Assembly, 12 September 1991, 831.

- (e) action taken lawfully for the recovery of debt;
  - (f) action taken in the course of medical research approved in accordance with the *Privacy Act 1988* (Cth); and
  - (g) the making of any investigation, report, record or publication in accordance with a requirement imposed or authorisation conferred by or under statute.
161. In recent debates, there have been calls for broad media exemptions from the ambit of any cause of action.<sup>223</sup> It has been argued that the broadcast media should be exempt from the action for activities undertaken in the course of journalism, reasoning that the few number of privacy complaints against the media demonstrate that there is no need for individuals in Australia to have an action to protect their reasonable expectation of privacy in respect of conduct by the media.<sup>224</sup>
162. Further, some have argued that online platforms, email providers and more traditional forms of communications services should be excluded from the ambit of any proposed cause of action.<sup>225</sup> Others have submitted that:
- where an organisation is subject to a set of privacy conditions or guidelines required by legislation and enforced by an industry regulator if escalated by a complainant, such organisations should be exempted from the operation of any proposed cause of action.<sup>226</sup>
163. It is generally accepted that a statutory cause of action for invasion of privacy should not impede the ability of law enforcement agencies to properly exercise their functions and related duties and powers. As set out in the Commonwealth Issues Paper:
- 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 characteristics of law enforcement and intelligence activities (e.g. 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

---

<sup>223</sup> See for example, VLRC Final Report, 159 [7.190] referring to the submission that it received from Australia's Right to Know.

<sup>224</sup> See Free TV Australia, Submission to Commonwealth Issues Paper, 11; Special Broadcasting Service, Submission to Commonwealth Issues Paper, 4.

<sup>225</sup> Optus, Submission to Commonwealth Issues Paper, 4.

<sup>226</sup> Australian Subscription Television and Radio Association, Submission to Commonwealth Issues Paper, 7.

they are the subject of covert operations, or by allowing sensitive operational capabilities to be exposed through legal proceedings.<sup>227</sup>

164. However, as a matter of policy and drafting, the question is whether this issue should be addressed by way of defence *and* an exemption. Although these law enforcement bodies and officers, if acting in accordance with their duties, may otherwise have available to them a *defence* (such as where the act or conduct was ‘required or authorised by or under another law’) it may still be appropriate that they have the protection of a statutory *exemption*. Further consideration should be given in this review to whether or not such an exemption should be pursued, its potential scope, and how it would operate.

#### **Limitation of action**

165. The law provides time limits on when legal proceedings can be commenced. This is referred to as ‘limitation of actions’. Different time limits apply depending on the nature of the claim. Most often, the time period commences from the time of the act or omission that the plaintiff is complaining about. An alternative is where the time commences from the time when the plaintiff becomes aware of the wrong. If the time period expires before a plaintiff commences an action in court, the plaintiff may be prevented from pursuing any action or seeking a remedy regardless of the merits of the claim. However, there is often a mechanism for the court to extend the time limit in certain circumstances - usually where the plaintiff can demonstrate that there was good reason for them not bringing the action within the time limit.
166. A limitation period should balance the interests of plaintiffs (in being afforded sufficient time to discover a breach and to investigate and organise their claim) with the interests of defendants (in being able to arrange their affairs knowing that claims will not be brought against them after a particular period of time).
167. The NSWLRC recommended that there be a limitation period of one year for its cause of action for invasion of privacy, with the court able to extend this to three years,<sup>228</sup> mirroring the limitation period for defamation. The Commission concluded that because damage was not an essential ingredient of its privacy cause of action, time should run from the time of the defendant’s conduct. Given that an invasion might generally be expected to affect the plaintiff immediately, and that if it were serious enough, the plaintiff should act quickly to avoid any escalation of the injury, there was no need for the standard limitation period to be longer than one year. The Commission noted that the ability to extend the period to three years should arise only where the court is

---

<sup>227</sup> Commonwealth Issues Paper, 43-44.

<sup>228</sup> NSWLRC Final Report, 70-71 [9.1].

satisfied that ‘it was not reasonable in the circumstances’ for the plaintiff to have taken action within that year.<sup>229</sup>

168. By contrast, the VLRC proposed a three year limitation period, running from the date of the defendant’s conduct, concluding that the period should be consistent with causes of actions for personal injuries and with the outer limit of defamation proceedings.<sup>230</sup>
169. In South Australia, actions founded on contract and tort are generally to be commenced within six years.<sup>231</sup> However, there is a limitation of one year for defamation actions, with the ability of an extension to three years.<sup>232</sup> Actions in relation to personal injuries must be commenced within three years.<sup>233</sup>

### **Court powers**

170. This section of the paper sets out the possible remedies available to a plaintiff aggrieved by an invasion of his or her privacy. In this context, a remedy is a step or an action that a defendant would be ordered to take, such as the payment of damages or the issuing of an apology, once a court or tribunal finds that the defendant unlawfully invaded the plaintiff’s privacy.<sup>234</sup> A remedy might also include steps or actions a defendant would be ordered to take or refrain from taking to prevent an invasion, to stop it continuing or to limit its effect. Remedies are an important aspect of any proposed statutory cause of action, and the Institute would be aided by submissions on the topic.
171. In chapter 8 of its 2007 Consultation Paper, the NSWLRC discussed in detail the possible remedies available where there has been an invasion of privacy.<sup>235</sup> It concluded that a wide-reaching and non-exhaustive list of remedies in any proposed legislation was justified

to enable the court to choose the remedy that is most appropriate in the fact situation before it, free from any jurisdictional constraints that may apply to that remedy in the general law.<sup>236</sup>

172. It proposed the following list:

- damages, including aggravated damages, but not exemplary damages;
- an account of profits;
- an injunction;

---

<sup>229</sup> NSWLRC Final Report, 71 [9.1].

<sup>230</sup> VLRC Final Report, 167 [7.248].

<sup>231</sup> Limitation of Action Act 1936 (SA) s 35.

<sup>232</sup> Ibid s 37.

<sup>233</sup> Ibid s 36.

<sup>234</sup> See VLRC Final Report, 160.

<sup>235</sup> NSWLRC Consultation Paper, ch 8. See also the discussion in the NSWLRC Final Report, 56-69.

<sup>236</sup> NSWLRC Consultation Paper, 186 [8.3].

- an order requiring the respondent to apologise to the claimant;
- a correction order;
- an order for the delivery up and destruction of material;
- a declaration; and
- other remedies or orders that the Court thinks appropriate in the circumstances.<sup>237</sup>

173. This list informed the approach taken a year later by the ALRC in its Final Report. The ALRC agreed with the observations of the NSWLRC, concluding that given the wide range of circumstances in which an action for invasion of privacy may be brought under its proposed statute, it made sense to provide the court with the flexibility that such a list of remedies would provide.<sup>238</sup> The ALRC proposed the same remedies.<sup>239</sup>

174. In its Final Report in 2009, and in crafting its draft Bill, the NSWLRC built on the list it had proposed in its 2007 Consultation Paper, set out above.<sup>240</sup> It is useful to consider clause 76 of the proposed Bill:

- (1) In an action under this Part for the invasion of a plaintiff's privacy, the court may (subject to any jurisdictional limits of the court) grant any one or more of the following remedies, whether on an interim or final basis, as the court considers appropriate:
  - (a) an order for the payment of compensation,
  - (b) an order prohibiting the defendant from engaging in conduct (whether actual, apprehended or threatened) that the court considers would invade the privacy of the plaintiff,
  - (c) an order declaring that the defendant's conduct has invaded the privacy of the plaintiff,
  - (d) an order that the defendant deliver to the plaintiff any articles, documents or other material, and all copies of them, concerning the plaintiff or belonging to the plaintiff that:
    - (i) are in the possession of the defendant or that the defendant is able to retrieve, and
    - (ii) were obtained or made as a result of the invasion of the plaintiff's privacy or were published during the course of the conduct giving rise to the invasion of privacy,

---

<sup>237</sup> Ibid 202.

<sup>238</sup> ALRC Final Report, 2579 [74.176].

<sup>239</sup> Ibid [74.180], [rec 74-5].

<sup>240</sup> NSWLRC Final Report, 56-69.

(e) such other relief as the court considers necessary in the circumstances.

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

175. The VLRC recommended that the remedies for both of the causes of action it proposed should be compensatory damages, injunctions and declarations.<sup>241</sup> It did not refer to or consider the other possible remedies canvassed by the NSWLRC.

#### *Damages*

176. Damages are an award of money by the court designed to compensate the plaintiff for injuries caused by the defendant's wrong.<sup>242</sup> The damages awarded are designed to place the plaintiff, insofar as money can, back in the position that he or she would have been in had the wrong not occurred.<sup>243</sup>
177. Sometimes, if the damage done to the plaintiff was made worse (or aggravated) by the way it was done, the defendant will be required to pay a greater amount of compensation—'aggravated' damages—to the plaintiff. Sometimes, if the defendant's behaviour was so deliberately bad that the court considers that the amount the defendant must pay to the plaintiff should reflect a degree of punishment and deterrence as well as compensation, the court can make an order for 'exemplary' damages over and above the damages that would otherwise have been awarded.
178. Damages can compensate for economic loss (monetary loss and expenditure incurred) and non-economic loss (injuries to the mind and body, such as pain and suffering, and humiliation).
179. It is widely recognised<sup>244</sup> that damages would be a key remedy for a person aggrieved by an invasion of his or her privacy. However, there are two possible limitations on this remedy that should be considered in this review. First, whether a court should have power to order exemplary damages, and second, whether there should be a limit on the amount of damages that can be awarded by a court.

#### *Exemplary Damages*

180. The main exception to the rule that damages are intended to 'compensate' the plaintiff is the rare case where 'exemplary' or 'punitive' damages are awarded. Exemplary damages

---

<sup>241</sup> VLRC Final Report, 163.

<sup>242</sup> Covell and Lupton, *Principles of Remedies* (LexisNexis, 3rd ed, 2005), 10 [2.0].

<sup>243</sup> See *Livingstone v Ranjards Coal Co* (1880) 5 App Cas 25, 39; *Haines v Bendall* (1991) 172 CLR 60, 63 (Mason CJ, Dawson, Toohey and Gaudron JJ).

<sup>244</sup> For example, see NSWLRC Consultation Paper, 188 [8.10].



are not focussed on the plaintiff's loss but designed to punish the defendant and deter the defendant and others from future wrongdoing.

181. Generally it is only the criminal law which is concerned with punishment and deterrence, however in rare cases where a defendant's 'conscious wrongdoing'<sup>245</sup> has been so 'high handed, insolent, vindictive or malicious'<sup>246</sup> exemplary damages have been awarded in civil matters. However, this has been strongly criticised as being unjust, because punishment is more appropriately left to the criminal law where the standard of proof is higher and where there are further safeguards for defendants.<sup>247</sup>
182. It is worth noting that a plaintiff cannot be awarded exemplary or punitive damages for defamation.<sup>248</sup>
183. The ALRC, the NSWLRC and the VLRC all excluded exemplary damages in their final reports.

#### *Limits on damages awards*

184. Ceilings are often placed on the amount that can be awarded to a plaintiff, particularly for non-economic loss.<sup>249</sup>
185. For example, in South Australia:
- section 33(1) of the *Defamation Act 2005* (SA), provides that the maximum amount of damages for non-economic loss that may be awarded in defamation proceedings is \$250 000, subject to an order by the court under section 33(2). And section 32 of the Act provides that the court is to ensure that there is an 'appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded';
  - although not strictly a 'cap', section 51 of the *Civil Liability Act 1936* (SA) provides that damages for non-economic loss will only be available in limited circumstances for personal injury claims in South Australia and section 52 operates to limit the damages that can be awarded. Those damages are strictly assessed according to a scale which provides for a compensable sum to be arrived at using a mathematical calculation by reference to the severity of the injury, on a scale of 0 to 60. A different scale, calculations and rules apply to damages awards for personal injuries

---

<sup>245</sup> *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71, 77 (Knox J).

<sup>246</sup> See *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 129 (Taylor J).

<sup>247</sup> See further NSWLRC Consultation Paper, 190 [8.15] and the authorities there cited.

<sup>248</sup> *Defamation Act 2005* (SA) s 35.

<sup>249</sup> Section 3 of the *Workers Rehabilitation and Compensation Act 1986* (SA) and section 3 of the *Civil Liability Act 1936* (SA) both define 'non-economic loss' to mean pain and suffering, loss of amenities of life and loss of expectation of life. The *Civil Liability Act* also includes disfigurement in that definition, and the *Workers Rehabilitation and Compensation Act* includes 'any other loss or detriment of a non-economic nature'.

arising from *Motor Vehicles Act 1959* (SA) claims. Further, section 53 imposes limitations on when damages can be awarded for mental harm, and section 54 limits the damages payable for loss of earning capacity;

- section 43 of the *Workers Rehabilitation and Compensation Act 1986* (SA) provides that non-economic loss is only compensable in relation to a permanent disability, and is calculated in accordance with the rules set out in the Act.

186. The ALRC did not recommend a statutory cap on damages awards in its Final Report. 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>250</sup> By contrast, the NSWLRC recommended that the maximum amount of compensation for non-economic loss that a court may order for invasion of privacy under its proposed Bill was to be \$150 000.
187. There is an argument that not aligning a cap for damages with the cap in defamation law may create an incentive for people to bring an action under invasion of privacy, when the more appropriate action is defamation.<sup>251</sup>
188. A potential cap or other limitation on damages and what that cap or limitation should be are important issues that require further consideration in this review.

#### *Account of profits*

189. This is a remedy most commonly available and sought in actions for breach of confidence, breach of fiduciary duty and infringement of intellectual property rights.<sup>252</sup> An order for account of profits requires a defendant to give up to the plaintiff the profit of his or her wrongdoing. The defendant is ‘accounting’ to the plaintiff for the profits of the wrong. There need not be any actual loss suffered by the plaintiff, only a profit gained by the defendant.<sup>253</sup> Therefore, an account for profits in an alternative remedy to compensatory damage - a plaintiff must choose between the two.<sup>254</sup>
190. The NSWLRC accepted that although an account of profits may be an exceptional remedy in invasion of privacy cases, it should still be available to the courts - for example, where a defendant deliberately set out to make a profit at the plaintiff’s expense.<sup>255</sup>

---

<sup>250</sup> VLRC Final Report, 163 [7.219].

<sup>251</sup> As set out in Commonwealth Issues Paper, 46.

<sup>252</sup> Covell and Lupton, above n 242, 189 [6.0].

<sup>253</sup> See *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

<sup>254</sup> Ibid 559.

<sup>255</sup> NSWLRC Final Report, 66 [7.24].

### *Injunctions*

191. Injunctions can be negative or positive. Negative injunctions restrain or prohibit a defendant doing a particular act or thing. Positive injunctions require or compel the defendant to do a particular act or thing. A further distinction is between interlocutory and final injunctions. An interlocutory injunction will preserve the status quo until the rights of the parties can be determined, however a plaintiff must *first* satisfy the court that there is a 'prima facie case' and then the court must consider whether 'the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.'<sup>256</sup> A final injunction will only be granted once the rights of the parties have been fully determined by a court.
192. On the one hand, an injunction may be one of the most effective ways for a plaintiff to protect their privacy rights. It could be used, for example, to prevent a person from posting on the internet or selling naked photographs of the plaintiff which were surreptitiously taken by the defendant. However, there is a particularly acute tension with freedom of speech in this space. As observed by the NSWLRC:

...[T]here is an issue, which should be opened up to debate, as to the extent to which courts should be prepared to prevent publication and circulation of material rather than compensate harm by an award of damages. Before publication is prevented, the courts must consider very carefully the resulting interference with freedom of speech. This issue becomes particularly acute where an interim injunction is sought: if granted, freedom of speech is curtailed even though there has been no final adjudication of the alleged invasion of privacy.<sup>257</sup>

### *Orders of correction or apology*

193. Statutes can empower courts to order that a defendant 'correct' a matter or 'apologise' to the plaintiff on the terms required by the court. It is apparent that in the context of invasions of privacy, such orders may be an effective remedy to right the wrong. However, where the defendant resists such a remedy, is it equally apparent that such orders can cut across principles of freedom of speech. Despite this, both the ALRC and the NSWLRC could see no reason in principle why such orders should not be available in cases of invasion of privacy - even though those cases where it is used would be exceptional.<sup>258</sup>

---

<sup>256</sup> *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1969) 118 CLR 618, 623 (Kitto, Taylor, Menzies and Owen JJ).

<sup>257</sup> NSWLRC Consultation Paper, [8.34]. See also the observations of the High Court in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.

<sup>258</sup> NSWLRC Consultation Paper, 67-68.

#### *Delivery up*

194. Delivery up is an equitable remedy by which documents or other goods are delivered to the custody of the court for the purpose of cancellation or destruction.<sup>259</sup> It has been most commonly used to order delivery up and destruction of goods that infringe intellectual property where there has been a breach of confidence.
195. The ALRC and the NSWLRC both recommended a version of this remedy. The NSWLRC recommended that its statutory formulation of the remedy should not require the plaintiff to destroy the goods delivered up.<sup>260</sup> It noted the concerns expressed by a stakeholder that the remedy could lead to the destruction of artworks where the creation of those works involved an invasion of the plaintiff's privacy. It concluded however, that because the remedy is discretionary, such orders would be unlikely in all but the most extreme cases.<sup>261</sup>

#### *Declarations*

196. A declaration is an order of the court that authoritatively states the legal rights and obligations between the parties to the dispute. Such a remedy may be useful for a person whose privacy has been invaded, as it would act as a public declaration that they have been wronged by the defendant. The ALRC, the NSWLRC and the VLRC all recommended this remedy.

#### **Access to this remedy**

197. The Institute recognises that for a cause of action for invasion of privacy to be effective, it needs to be made as accessible as possible. There are a several factors which will affect a person's ability to commence and run legal proceedings. One key factor is which courts or tribunals may hear those proceedings (the 'forum'). Another factor is who is liable to pay the costs of the proceedings.

#### *Forum*

198. The court or tribunal with jurisdiction to hear a claim is an important factor because the costs of commencing and running an action can differ between different courts and tribunals. The general rule is the higher the court in the hierarchy, the more expensive it is. In South Australia, it is theoretically possible that a claim for invasion of privacy could be heard in the Magistrates Court, the District Court or the Supreme Court.

---

<sup>259</sup> Covell and Lupton, above n 242, 310 [12.0].

<sup>260</sup> NSWLRC Final Report, 65 [7.21].

<sup>261</sup> Ibid 66 [7.22].

199. The VLRC recommended that jurisdiction to hear claims for invasion of privacy should vest in the Victorian Civil and Administrative Tribunal (VCAT),<sup>262</sup> because the VCAT was designed to be more accessible than the courts, observing that the VCAT ‘seeks to be a speedy, low-cost tribunal where legal costs do not outweigh the issues at stake.’<sup>263</sup> The Commission considered that the experience in other jurisdictions suggested that damages awarded in cases of this nature were generally low, and that the sums involved did not justify the costs associated with civil litigation in the courts.
200. Although the NSWLRC did not appear to address these issues directly, the Bill proposed by the NSWLRC did not seek to limit the jurisdiction to hear claims to any particular court or tribunal. The ALRC took the view that although it will depend on the circumstances of the case, the most likely forum would be State and Territory district and county courts, ‘given the scope of their jurisdiction, the cost of litigating in those courts and the expertise of the judges in hearing comparable matters, such as tort actions.’<sup>264</sup>
201. On 31 October 2013, the South Australian Civil and Administrative Appeals Tribunal Bill 2013 (SA) passed through Parliament. The Bill seeks to establish a tribunal with jurisdiction to review certain administrative decisions and to act with respect to certain disciplinary, civil or other proceedings, with similar objectives to the VCAT.<sup>265</sup> This may be an appropriate forum for claims for invasion of privacy.

#### *Liability for costs*

202. Next is the question of how the costs of the parties to litigation are paid. This is often a difficult and complex question. The ‘general rule’ is that the losing party should pay the costs of the winning party. This can present a bar to some plaintiffs, where the potential sum of money to be awarded in damages is small compared to the potential costs of running the action. This can mean that sometimes only wealthy people are in a position to take the risk of exposing themselves to these adverse cost consequences.
203. In some instances, this ‘general rule’ is statutorily displaced. For example, section 109 of the *Victorian Civil and Administrative Appeals Tribunal Act 1998* (Vic) provides that each party should bear its own costs unless the Tribunal orders one party to pay all or part of the costs of the other party. This section would apply to actions for invasion of privacy under the cause of action proposed by the VLRC. The VLRC concluded:

The fairest way to deal with costs in cases of this nature is to start from the position that each party should be responsible for their costs but to permit departures from this presumption when it is fair to do so. This rule guards

---

<sup>262</sup> Established under the Victorian Civil and Administrative Appeals Tribunal Act 1998 (Vic).

<sup>263</sup> VLRC Final Report, 164 [7.226].

<sup>264</sup> ALRC Final Report, 2583 [74.197].

<sup>265</sup> See, for example, South Australian Civil and Administrative Appeals Tribunal Bill 2013 (SA) cl 8.

against the abuse of legal process because the decision-maker can award costs against a plaintiff who takes frivolous proceedings and against a defendant who seeks to exhaust the resources of the plaintiff by unnecessarily prolonging the case.<sup>266</sup>

204. It is worth noting that clause 57(1) of the South Australian Civil and Administrative Appeals Tribunal Bill also provides that '[u]nless otherwise specified in this Act, a relevant Act, or an order of the Tribunal under this section, parties bear their own costs in any proceedings before the Tribunal.'
205. The issue of accessibility, including both forum and costs, is an important issue, and further consideration should be given to it in this review.
206. It is also worth noting that legal aid is generally not available in civil matters between two individuals. It is highly unlikely that a plaintiff in making a claim for invasion of privacy would be granted legal aid funding. This is so even if the plaintiff was unable to afford to commence or run legal proceedings and even if the plaintiff had good prospects of success. In relation to issues involving State laws, most legal aid funding in South Australia is spent on criminal matters where there is a real possibility of the defendant going to gaol, and in child protection matters. Accordingly, the impact of high costs of commencing and running an action for invasion of privacy has extra significance and it becomes even more important that the forum, whatever it is, is accessible to plaintiffs.

## **Models for statutory causes of action**

---

207. Set out in the following pages is a table<sup>267</sup> comparing the components of various models for a statutory cause of action for invasion of privacy:
- the model proposed in the unsuccessful Privacy Bill 1991 (SA);<sup>268</sup>
  - the model proposed by the ALRC Final Report in 2008;
  - the model proposed by the NSWLRC Final Report in 2009; and
  - the model proposed by the VLRC Final Report in 2010.

---

<sup>266</sup> VLRC Final Report, 163 [7.222].

<sup>267</sup> This table does not contain direct quotes from the proposed models, rather summaries of each proposal.

<sup>268</sup> As introduced following select committee reference and recommendations: South Australia, *Parliamentary Debates*, House of Assembly, 12 September 1991, 831.

| <i>Privacy Bill 1991 (SA)</i>   | <i>ALRC Final Report</i>  | <i>NSWLRC Final Report &amp; Bill</i>   | <i>VLRC Final Report</i>   |
|---|---|---|--|
| <b>A statutory cause of action?</b>   |   |   |  |
| Yes.  | Yes.  | Yes.  | Yes - two separate causes of action.   |
| <b>Where?</b>   |   |   |  |
| South Australian legislation.   | Federal legislation.  | Uniform State and Territory legislation, based on the NSW proposed Bill.  | Victorian legislation.   |
| <b>Limited to natural persons?</b>  |   |   |  |
| Yes.  | Yes.  | Yes.  | Yes.   |
| <b>Limited to living persons?</b>   |   |   |  |
| Yes.  | No explicit restriction to natural persons but generally taken to intend this.  | Yes.  | Yes.   |
| <b>Act defines an invasion of privacy?</b>  |   |   |  |
| Yes.<br>Intrusion on a person's personal or business affairs.   | No.   | No.   | Yes.<br><ul style="list-style-type: none"> <li>• Misuse of private information.</li> <li>• Intrusion upon seclusion.</li> </ul>            |
| <b>Threshold</b>  |   |   |  |
| Intrusion is, in the circumstances, substantial and unreasonable.   | <ul style="list-style-type: none"> <li>• Serious invasions only.</li> <li>• Reasonable expectation of privacy.</li> <li>• Highly offensive to a reasonable person of ordinary sensibilities.</li> </ul>   | Invasion of privacy that the person was 'reasonably entitled to expect in all the circumstances having regard to any relevant public interest'. | <ul style="list-style-type: none"> <li>• Reasonable expectation of privacy.</li> <li>• Highly offensive to a reasonable person.</li> </ul> |
| <b>Act lists invading conduct?</b>  |   |   |  |
| Yes.<br>(1) Exhaustive list: <ul style="list-style-type: none"> <li>• Keeping another under observation.</li> <li>• Listening to conversations.</li> <li>• Intercepting communications.</li> <li>• Recording acts, images or words.</li> <li>• Interference with private correspondence or records or confidential business correspondence or records.</li> </ul> | Yes.<br>Non-exhaustive list: <ul style="list-style-type: none"> <li>• Interference with home or family life.</li> <li>• Unauthorised surveillance.</li> <li>• Interference, misuse or disclosure of private correspondence or communication.</li> <li>• Disclosure of sensitive private facts.</li> </ul> | No.   | No.  |

| <i>Privacy Bill 1991 (SA)</i>   | <i>ALRC Final Report</i>  | <i>NSWLRC Final Report &amp; Bill</i>                                     | <i>VLRC Final Report</i>                                    |
|---|---|---|---|
| <ul style="list-style-type: none"> <li>• Keeping records of another's personal or business affairs.</li> <li>• Obtaining confidential personal or business information.</li> <li>• Publishing personal or business information, private correspondence, visual images of or words spoken or sounds produced by another.</li> </ul> <p>(2) Where one harasses another or interferes to a substantial and unreasonable extent in the personal or business affairs or with the property of another person so as to cause distress, annoyance or embarrassment and the harassment is not justified in the public interest.</p>  |   |   |   |
| <b>Consideration of public interest</b>   |   |   |   |
| <p>Absence of justification in the public interest is an element of the cause of action.</p> <p>In determining whether or not an act was justified in the public interest:</p> <ul style="list-style-type: none"> <li>• Regard <b>must</b> be had to: <ul style="list-style-type: none"> <li>○ the importance of free inquiry and free dissemination of information and opinions;</li> <li>○ if the defendant is a media organisation or a person acting on behalf of one, the importance of the media in eliciting information and disseminating information and opinions and the importance of safeguarding the freedom of the media to continue to do so; and</li> </ul> </li> </ul> | <p>Public interest must be taken into account and balanced when assessing whether there has been an invasion.</p> | <p>Public interest is relevant to the invasion threshold (see above).</p> | <p>The public interest, narrowly defined, is a defence.</p> |



| <i>Privacy Bill 1991 (SA)</i>   | <i>ALRC Final Report</i>  | <i>NSWLRC Final Report &amp; Bill</i>   | <i>VLRC Final Report</i>                 |
|---|---|---|--|
| <ul style="list-style-type: none"> <li>Regard <b>may</b> be had to material relevant to that issue published by responsible international organisation or Australian State or Federal authorities.</li> </ul> |   |   |  |
| <b>Act lists other considerations for determining whether there is an invasion of privacy?</b>  |   |   |  |
| No.   | No.   | Yes.<br><b>Must</b> take into account: <ul style="list-style-type: none"> <li>Nature of subject matter.</li> <li>Nature of conduct (including what a reasonable person of ordinary sensibilities would consider offensive).</li> <li>Relationship between plaintiff and defendant.</li> <li>Public profile of plaintiff.</li> <li>Vulnerability of plaintiff.</li> <li>Conduct of both parties before and after the invasion (including apologies or offers of amends).</li> <li>The effect of the invasion of the health, welfare and emotional well-being of the plaintiff.</li> <li>Whether the invasion contravened an Australian statute.</li> </ul> <b>May</b> take into account any other relevant matter. | No.                                      |
| <b>Fault elements</b>   |   |   |  |
| Intentional.  | Intentional or reckless acts.   | Not expressly set out. The nature of the conduct is, however, a relevant consideration.   | Intentional, reckless or negligent acts. |
| <b>The role of consent</b>  |   |   |  |
| Absence of consent is an element of the cause of action. However, if the circumstances are such that it would be reasonable to suppose that the person  | Absence of consent is an element of the cause of action, and is to be considered when determining whether the act complained of was | Absence of consent is an element of the cause of action.  | Consent is a defence.                    |

| <b>Privacy Bill 1991 (SA)</b>   | <b>ALRC Final Report</b>   | <b>NSWLRC Final Report &amp; Bill</b>   | <b>VLRC Final Report</b>   |
|---|--|---|--|
| permitted the intrusion, the permission will be presumed.   | sufficiently serious to cause a substantial offence to a person of ordinary sensibilities.   |   |  |
| <b>Defences</b>   |  |   |  |
| <p>Exhaustive list:</p> <ul style="list-style-type: none"> <li>• Necessary for or reasonably incidental to protection of lawful interests of the defendant or a person on whose behalf the defendant was acting.</li> <li>• Necessary for or reasonably incidental to the conduct of litigation.</li> <li>• Where absolute or qualified privilege defences available under the law of defamation.</li> <li>• Where the defendant is a media organisation or a person acting on behalf of one, that the defendant acted in accordance with reasonable codes etc. dealing with the protection of privacy prepared or adopted by the Australian Journalists' Association or the Australian Press Council.</li> </ul> | <p>Exhaustive list:</p> <ul style="list-style-type: none"> <li>• Incidental to exercise of lawful right of defence of person or property.</li> <li>• Required or authorised by or under law.</li> <li>• Publication privileged under the law of defamation.</li> </ul> | <p>Exhaustive list:</p> <ul style="list-style-type: none"> <li>• Incidental to exercise of lawful right of defence of person or property.</li> <li>• Required or authorised by or under law (including orders of courts or tribunals).</li> <li>• Where absolute privilege, fair reporting and innocent dissemination defences available under the law of defamation.</li> <li>• The publication of matter where, as between the defendant publisher and the recipient of the information, there is a common interest or duty in giving and receiving information on the subject in question (defeated if publication actuated by malice).</li> </ul> | <p>Exhaustive list:</p> <ul style="list-style-type: none"> <li>• Consent.</li> <li>• Incidental to exercise of lawful right of defence of person or property and reasonable and proportionate to the threatened harm.</li> <li>• Required or authorised by law.</li> <li>• Defendant a police or public officer engaged in duty and acting proportionately to the matter being investigated.</li> <li>• Conduct was in the public interest.</li> </ul> |
| <b>Proof of damage</b>  |  |   |  |
| Actionable without proof of special damage.   | Actionable without proof of damage.  | Not necessary to express whether actionable without proof of damage, as it is expressed as a statutory cause of action, not a tort.   | Not necessary to express whether actionable without proof of damage, as it is expressed as a statutory cause of action, not a tort.  |
| <b>Exemptions</b>   |  |   |  |
| <p>Yes.</p> <ul style="list-style-type: none"> <li>• Members of the police force.</li> <li>• Any other person vested with powers of investigation of inquiry.</li> <li>• Insurance agencies in the detection of fraud.</li> </ul>   | No.  | No.   | No.  |

| <i>Privacy Bill 1991 (SA)</i>   | <i>ALRC Final Report</i>   | <i>NSWLRC Final Report &amp; Bill</i>  | <i>VLRC Final Report</i>  |
|---|--|--|---|
| <ul style="list-style-type: none"> <li>Commercial organisations carrying out reasonable inquiries into the creditworthiness of a customer and in passing that information on to other commercial organisations.</li> <li>Action taken lawfully for the recovery of debt.</li> <li>Action taken in the course of medical research approved in accordance with the <i>Privacy Act 1988</i> (Cth).</li> <li>The making of any investigation, report, record or publication in accordance with a requirement imposed or authorisation conferred by or under statute.</li> </ul> |  |  |   |
| <b>Limitation of action</b>   |  |  |   |
| 2 years.  | Not discussed.   | 1 year with capacity to apply for extension to 3 years.  | 3 years.  |
| <b>Remedies</b>   |  |  |   |
| <ul style="list-style-type: none"> <li>Damages for injury, loss, distress, annoyance or embarrassment.</li> <li>Injunction (but not against media organisations or their representatives).</li> </ul> <p>In determining a remedy, regard must be had to:</p> <ul style="list-style-type: none"> <li>The effect or likely effect of the intrusion on the health, welfare and social, business or financial position of the plaintiff.</li> <li>The conduct of both parties before and after the invasion (including apologies or offers of amends).</li> </ul>               | <ul style="list-style-type: none"> <li>Damages.</li> <li>Account of profits.</li> <li>Injunction.</li> <li>Apology and correction orders.</li> <li>Delivery up order.</li> <li>Declaration.</li> </ul> | <ul style="list-style-type: none"> <li>Damages.</li> <li>Order to prevent invasion.</li> <li>Declaration.</li> <li>Delivery up order.</li> <li>Any other order the court considers appropriate.</li> </ul> | <ul style="list-style-type: none"> <li>Damages.</li> <li>Injunction.</li> <li>Declaration.</li> </ul> |
| <b>Exemplary damages?</b>   |  |  |   |
| Not discussed.  | No.  | No.  | No.   |

| <i>Privacy Bill 1991 (SA)</i>                | <i>ALRC Final Report</i>  | <i>NSWLRC Final Report &amp; Bill</i> | <i>VLRC Final Report</i>   |
|--|---|---------------------------------------|--|
| <b>Cap on damages for non-economic loss?</b> |   |                                       |  |
| Not discussed.                               | Not discussed.  | Yes - \$150 000.                      | No.  |
| <b>Forum</b>                                 |   |                                       |  |
| Not discussed.                               | Will depend on the circumstances of the case, but most likely State and Territory district and county courts. | Not discussed.                        | Exclusively in the Victorian Civil and Administrative Appeals Tribunal.          |
| <b>Costs rule</b>                            |   |                                       |  |
| Not discussed.                               | Not discussed.  | Not discussed.                        | Each party to bear their own costs, subject to a contrary order by the Tribunal. |

## Questions

---

The Institute would appreciate submissions on this review to inform its Final Report, including your answers to the following questions. This questionnaire may be downloaded in word format from our webpage: [www.law.adelaide.edu.au/reform/publications/](http://www.law.adelaide.edu.au/reform/publications/)

### Need for reform

- 1 Should there be a law giving people a right of action against an individual or organisation who invades their personal privacy?
- 2 What do you mean by personal privacy in this context?
- 3 What are the main considerations that inform your answer to question 1?

*Questions 4 - 25 are about the nature and scope of such a law (the Act), should it be legislated.*

- 4 Are there any particular examples of kinds of invasions of personal privacy that you consider should fall within a cause of action for invasion of privacy?

### Seriousness

- 5 How serious should the invasion of personal privacy be for a right of action to arise? For example:
  - a. should the law require that the invasion be ‘sufficiently serious to cause substantial offence’ to a ‘reasonable person’; or
  - b. should the law require that the invasion be ‘highly offensive’ to a ‘reasonable person’; or
  - c. should there be some other test? If so, what?
- 6 What should be taken into account when assessing the seriousness of the invasion? Should the Act expressly provide for these considerations?

### Invasion

- 7 Should the Act define the concept of personal privacy?
- 8 Should there be a list in the Act of what amounts to an invasion of personal privacy?
- 9 If so, should it be a complete list or simply give examples?

- 10 If there is a list, should it at least include:
- a. interference with personal home or family affairs?
  - b. unauthorised surveillance?
  - c. interference with, misuse or disclosure of correspondence or private communications?
  - d. disclosure of sensitive private facts?

### **Fault element**

- 11 Should it be possible for a negligent breach of personal privacy to be actionable? Or should only intentional or reckless breaches be actionable?

### **Availability of the cause of action**

- 12 Should only natural persons be able to take action for invasion of personal privacy?
- 13 Should the personal representatives or family of a person who has died be able to take action for an invasion of that person's privacy? If so, in what circumstances? Would it affect your answer whether the invasion took place during the person's lifetime or afterwards?
- 14 Where a person obtains personal information about another without their consent, should that other person be able to take action for an invasion of personal privacy even though the personal information has not been and is not proposed to be disclosed to others?

### **Defences**

- 15 In what circumstances should there be a defence to an action for invasion of personal privacy? Should they include, for example:
- a. when the act or conduct was not intended?
  - b. when the act or conduct was reasonably incidental to the exercise of a lawful right of defence of person or property?
  - c. when the act or conduct was intentional but the person did not and could not have been expected to have foreseen its consequences?
  - d. when the person whose privacy was invaded impliedly or expressly consented to the invasion?
  - e. where the act or conduct was required or authorised by or under law? If so, how should law be defined for this purpose?

- f. where publication of the information was privileged under the law of defamation?
- g. where the publication would attract any other defences under the law of defamation? If so, which defences?
- h. where the invasion was in the public interest?
- i. where the information was already in the public domain?

### **The balancing of countervailing interests**

- 16** In what ways should a cause of action for breach of personal privacy balance countervailing public interests such as freedom of expression? For example:
- a. *as an element of the cause of action?* That is, should the claimant first have to show that the public interest in the preservation of his or her personal privacy outweighed other relevant public interests in that case; or
  - b. *as a defence to the cause of action?* That is, should it be possible to defend an action for breach of personal privacy by showing that one's act, despite breaching another's personal privacy, was justifiable in terms of some other public interest?

### **Exemptions**

- 17** Are there some people or organisations who, when performing certain functions, should not be liable for an action for breach of personal privacy? If so, who should they be and what are the functions involved?

### **What can be compensated?**

- 18** Should the law permit a person to take action for an invasion of personal privacy, of itself, or should that right arise only where the invasion results in some kind of harm or loss?
- 19** What kinds of harm or loss resulting from an invasion of personal privacy should be compensable? Should they include, for example:
- a. mental distress?
  - b. embarrassment or humiliation?
  - c. inconvenience (for example, when the invasion results in identity theft or fraud)?
  - d. damage to reputation?

- e. financial loss?
- f. physical damage or threats to personal safety arising from the invasion?

### **Other limitations**

- 20 Should there be a time limit on suing for invasion of personal privacy? If so, why, and what should that time period be and when should it start?
- 21 Should there be limits on the monetary compensation a person can be awarded in a successful action for invasion of personal privacy? If so, what should they be and why?

### **Remedies**

- 22 What kinds of orders should a court be able to make when it finds that an individual's personal privacy has been invaded? For example, should it be able to:
  - a. declare that the claimant has been wronged by the defendant?
  - b. order the defendant to compensate the claimant for the effects of the invasion of privacy?
  - c. if the invasion itself or what was done with the material or information obtained through that invasion was particularly heinous, increase the amount of compensation to reflect this (by way of punitive or exemplary damages)?
  - d. order the defendant to pay to the claimant an amount equivalent to any benefit, whether direct or indirect, that the defendant has obtained as a result of the invasion of privacy?
  - e. order the defendant to stop doing certain things or to do certain things? For example, if the defendant has disclosed or disseminated material to others that has been obtained by invading a person's privacy, should the court be able to order the defendant:
    - i. to cease disclosure or dissemination?
    - ii. to publish or disseminate a retraction or apology or correction?
    - iii. to deliver up material obtained by or derived from the invasion of privacy?
    - iv. to forfeit things used to invade the claimant's privacy or obtained through it or derived from it?
    - v. to take any action the court believes will help return the claimant to the position he or she was in before the invasion of privacy?



- 23** Should the Act also permit a court to issue an injunction against an individual or organisation to:
- a. prevent an invasion of personal privacy?
  - b. prevent the disclosure of information or material obtained through an invasion of personal privacy?

**Accessibility of the cause of action**

- 24** What could be done to make this cause of action affordable to those whose personal privacy is invaded? For example:
- a. Should the legislation provide that a particular court or tribunal should be able to hear claims for invasion of privacy?
  - b. Should each party have to pay their own legal costs, subject to a contrary order by the court?

**Alternative options for reform**

- 25** If a separate statutory cause of action for invasion of privacy is not to be enacted, in what other ways could the law be changed to give individuals effective redress for invasions of personal privacy in South Australia? For example:
- a. Legislating changes to existing causes of action so that their elements or remedies better accommodate invasions of personal privacy? If so, how?
  - b. Legislating to make certain criminal offences give rise to a liability in damages for invasion of personal privacy? If so, how?

## Appendices

---

### 1 A statutory cause of action for invasion of privacy: South Australian legislative history

This is a summary of attempts in South Australia to establish an actionable right of privacy.

The first attempt was initiated by recommendations of the South Australian Law Reform Committee in 1973.<sup>269</sup> These recommendations led to the South Australian Labor Government introducing its Privacy Bill on 10 September 1974: a Bill to create a right of privacy and to provide a right of action for an infringement of that right. The Bill was the subject of fierce debate.

The right proposed by the Bill was a right to be free from ‘substantial and unreasonable’ intrusion upon a person’s private affairs, necessarily intending to exclude ‘insubstantial and trivial incursions’.<sup>270</sup>

The Bill contemplated a broad concept of privacy ‘to allow the law to keep pace with changing social needs.’<sup>271</sup> The definition of privacy was cast broadly enough to allow the courts to preserve a degree of flexibility and ‘to decide from case to case, and from time to time, what should or should not enjoy the law’s protection.’<sup>272</sup> The definition was criticised by the Liberal Opposition as being ‘far too vague’,<sup>273</sup> and likely to result in judges taking a subjective approach ‘depending on the judge’s view of social mores at the time in his opinion’<sup>274</sup> and lead to uncertainty in the law. However, the leader of the Opposition, Dr B Eastick, in opposing the Bill for this reason, appeared to do so with some regret:

Doubtless, this is one of the most difficult Bills I have been called on to examine during the time I have been in this House. I intend to oppose it, but I will not do so out of hand. It is a measure that requires much consideration before a decision can be arrived at, and I have arrived at that decision because I believe the Bill is far too vague. Definition is so wide as to cause much concern to people in the community who will be affected by the provisions.<sup>275</sup>

---

<sup>269</sup> SA Law Reform Committee Report.

<sup>270</sup> South Australia, *Parliamentary Debates*, House of Assembly, 10 September 1974, 820 (LJ King).

<sup>271</sup> Ibid.

<sup>272</sup> Ibid.

<sup>273</sup> South Australia, *Parliamentary Debates*, House of Assembly, 8 October 1974, 1334 (ER Goldsworthy).

<sup>274</sup> Ibid.

<sup>275</sup> South Australia, *Parliamentary Debates*, House of Assembly, 8 October 1974, 1335 (Dr BC Eastick).

A clause was included in the Bill making clear that given a choice between the public good and the assertion of a private right, the public good must prevail, and that in aid of this, the clause provided that the exercise of good faith by a person of any duty or obligation imposed on him or her by law would not be touched upon by the measure.<sup>276</sup> During his second reading speech, the Attorney-General, the Hon LJ King, discussed the need to balance the public interest against an individual's claim for privacy. He said:

There can be no doubt as to the importance to be attached to truth in a civilised society. But that is not to say that the public is entitled to know all the truth about an individual or a group. Some areas of a man's life are his business alone. Thus the privacy this Bill is designed to protect is that area of a man's life which, in any given circumstances, a reasonable man with an understanding of the legitimate needs of the community would think wrong to invade.<sup>277</sup>

Agreeing with the leader of the Opposition's earlier remarks, another member of the Opposition made it clear that he did not think the proposition set forth by the Attorney-General justified establishing an actionable right of privacy in legislation because its main target would inevitably be the media, and, on balance, more harm than good would come of legislation that might curtail press freedom:

It is pointless to say that this legislation has not been introduced with a mind to the press and the media generally, because this is the area in which it will have the maximum effect, and it is because it will have the maximum effect in this regard that we must consider what this effect will be, and balance up the possible good to be gained from it with the possible harm that will come from it.<sup>278</sup>

Along the same lines, although more alarmist, was this view expressed by another Opposition member:

... in any democratic country, the press must have the right to report objectively, but I am fully aware, the same as are other members who have spoken in this debate, that members of the press in this country on various occasions have not acted as they should have acted. ... I [cannot], without much reservation, support a measure of this nature. Once any Government takes control of the press, the people receive only the information the

---

<sup>276</sup> For further explanation see South Australia, *Parliamentary Debates*, House of Assembly, 10 September 1974, 820 (LJ King).

<sup>277</sup> South Australia, *Parliamentary Debates*, House of Assembly, 10 September 1974, 820 (LJ King).

<sup>278</sup> South Australia, *Parliamentary Debates*, House of Assembly, 8 October 1974, 1341 (DO Tonkin).

Government wants them to receive; once they receive restricted information they cannot judge the facts properly.<sup>279</sup>

When a political machine takes over the press, it takes virtually the first step toward totalitarian government ...

It is clear from a reading of the debates that statutory protection of a right to privacy *per se* was generally not opposed by the members of the Opposition. In fact, it was largely supported. The basis for the ultimate opposition to the Bill, and the reason for its failure, was the perceived uncertainty of the Bill and the possible harm that (in the way the Bill was framed) could be done to the right to freedom of expression, and in particular, to the media.

Another difficulty the Opposition had with the Bill was with the remedy of compensatory damages:

If a statement is made in the heat or on the spur of the moment, or has been inaccurately fed to a person, an honest, gentlemanly, face-to-face apology is more value than a monetary return. I do not see how one can ever be paid in money for an insult or slander that has occurred. I am not sure that a law that is supposed to protect one's right of privacy is adequate if a person is told that he can sue for a certain sum of money because a person took a photograph of him in a certain situation, told others of something that he did, took a voice recording and played it back to others, or printed something in the paper that invaded his right of privacy. I do not see how anyone can say to how much compensation one should be entitled for such an invasion of privacy.<sup>280</sup>

In response, a member of the Government said:

The member for Fisher said that he believed the Government was advocating a monetary gain if a person's privacy was invaded and he was successful in a court action. However, I do not look at the legislation in that way. Instead, I consider it to be a deterrent; indeed, I hope that, if this Bill becomes law, even if in a slight different form from its current form, it will deter some of the actions that have necessitated its introduction. ...<sup>281</sup>

Later in the debates, the Attorney-General defended the broad terms of the Bill and other criticisms that had been made of it, as follows:

I believe it is the duty of legislators in this time and age to tackle this deficiency in our law and resolve the difficulties that attend on a solution. I do not deny that there are difficulties. The Leader based his opposition to

---

<sup>279</sup> Ibid 1351 (GM Gunn).

<sup>280</sup> Ibid 1348 (SG Evans).

<sup>281</sup> Ibid 1349 (MV Byrne).

the Bill on several grounds, although much of what he said tended to support the objects of the Bill and, indeed, its principles ... The Leader suggested that the Bill should confine itself to certain specific instances of invasion of privacy. He did not specify them, although I think he had in mind the provisions of the Bill that are given as instances of the general right to privacy.

His contention, as I understood it, was that there should be some specific indication of what conduct constituted an invasion of privacy. I believe that this would be a great mistake. It is impossible for the Legislature to forecast the various ways in which the privacy of the citizen may be infringed. Really, the possibilities are very varied and they might even be regarded as infinite. There are innumerable ways in which privacy can be infringed... I do not believe it is possible for Parliament to lay down in advance, as an exhaustive list, specific instances of infringement of privacy. I believe it would be unwise to do so because the purpose of this Bill is to sow a new seed in the law.

The object of this Bill is to give the law the impetus which it needs in this area to enable the courts to develop a new body of jurisprudence for the protection of the privacy of the citizen. This type of protection is the sort of protection that the courts are able to develop, and it is important that we leave the situation so that, whilst Parliament indicates the principles, the courts apply those principles to the specific cases that are brought before them. That is the way in which our law operates; indeed, that is the way in which our law has been developed...<sup>282</sup>

The Attorney-General later stated that the provisions of the Bill were no more vague than other general principles of law which govern the daily lives of South Australian citizens and which the courts have to apply to particular facts - such as the requirement that in the law of negligence people have an obligation to exercise reasonable care to ensure that their actions do not injure or cause damage to other people.<sup>283</sup>

It was generally recognised in the House of Assembly debate that the proposed measure did go to important and fundamental democratic principles and ought to be the subject of a robust debate. For this reason, several members of the Opposition supported the Bill's second reading so that it could be referred to a Select Committee. A motion to refer the Bill to a Select Committee was denied. The Bill then proceeded to Non-Select Committee and was subjected to significant amendment and revision. Several iterations were printed. The third reading was carried by a majority of five in the House of Assembly.

---

<sup>282</sup> South Australia, *Parliamentary Debates*, House of Assembly, 22 October 1974, 1610-1611 (LJ King).

<sup>283</sup> Ibid 1615 (LJ King).

Similarly lengthy debate ensued in the Legislative Council. Members of the Opposition opposed the Bill, principally because of its perceived effect on the media, having confidence instead in the 'genius of the common law' to further develop and improve the protection of privacy.<sup>284</sup> Particular emphasis was placed on the findings of the Younger Committee Report (UK),<sup>285</sup> which had recommended that a general tort of violation of privacy not be created. Further, strong criticism was made of the vagueness of the Bill, and that such vagueness was a 'surrender of the Parliamentary authority' to make laws in favour of the courts.<sup>286</sup>

Finally, on Wednesday 20 November 1974, the Legislative Council, by a majority of three, rejected the Privacy Bill.<sup>287</sup>

The next attempt to introduce a statutory cause of action for invasion of privacy came in 1990. The Hon Terry Groom MP had instructed Parliamentary Counsel to draft a Privacy Bill as a private member's bill. Mr Groom was then a member of the Labor Party. On 22 November 1990, Mr Groom moved that a Select Committee be established to consider the deficiencies or otherwise in the laws relating to privacy and to consider and return recommendations on the terms of the draft Privacy Bill he proposed and on protection of privacy more generally.<sup>288</sup> The long title of the draft Bill was 'an Act to create a right of privacy and to provide a right of action for an infringement of that right; and for other purposes.' The motion was carried, having the support of the Opposition,<sup>289</sup> and the Bill was referred to a Select Committee of the House of Assembly for consideration.

The terms of reference of the Select Committee were to consider the terms of the draft Bill, to examine and make recommendations about specific areas where citizens need protection against invasions of privacy and to propose practical means of providing protection against invasions of privacy.

The Select Committee took oral and written submissions from interested parties, and ultimately considered that the Bill should be adopted, with some amendments. The recommendations were as follows:

1. that a general right of privacy and a right of action for an infringement of that right be created;
2. that the draft Privacy Bill 1990 be adopted in modified form;
3. that 'person' should be clearly defined to include bodies corporate;

---

<sup>284</sup> See, for example, South Australia, *Parliamentary Debates*, Legislative Council, 31 October 1974, 1816 (JC Burdett).

<sup>285</sup> Committee on Privacy (Chairman, the Hon K Younger) *Report of the Committee on Privacy*, (1972) (UK).

<sup>286</sup> See, for example, South Australia, *Parliamentary Debates*, Legislative Council, 12 November 1974, 1853 (Sir AC Rymill).

<sup>287</sup> South Australia, *Parliamentary Debates*, Legislative Council, 20 November 1974, 2100.

<sup>288</sup> South Australia, *Parliamentary Debates*, House of Assembly, 22 November 1990, 2182-2183.

<sup>289</sup> South Australia, *Parliamentary Debates*, House of Assembly, 13 December 1990, 2776.

4. that the proper detection and prevention of insurance fraud should not be impeded by the draft Bill and that an exemption for the insurance industry, such as that provided for police, bodies with certain statutory powers, financial institutions and credit providers, should be included in the draft Bill;
5. that a person who engages an agent should be vicariously liable for the authorised acts of that agent in the event that an action for invasion of privacy is proceeded with under the draft Bill;
6. that the exemption provided to police, bodies with certain statutory powers, financial institutions and credit providers acting in the ordinary course of business be widened to provide similar recognition to credit reporting agencies;
7. that privacy standards, similar to the Australian Journalists' Association's Code of Ethics, be incorporated into regulations to assist in determining whether a breach of privacy has occurred in matters involving both the electronic and print media;
8. that private nuisance should be included in the general concept of invasion of privacy;
9. that all courts should be vested with the power to grant injunctive relief in cases of private nuisance;
10. that an exemption should be included in the draft Bill in respect of sections 10 and 11 of the *Noise Control Act 1976*;
11. that the draft Bill should be limited to intrusions of privacy as defined in the draft Bill but that in the future it may be appropriate to broaden the legislation;
12. that the Privacy Committee of South Australia continue to operate and help individuals who claim that Government agencies have violated their privacy;
13. that the draft Bill should provide for regulations that would detail standards for the appropriate handling and storage of information;
14. that the defence of public interest in the draft Bill be amended to require a Court to have regard to the views of relevant bodies, that is, the Privacy Commissioner and policy statements of the Minister, in making an assessment of what the public interest requires in the circumstances of the case;
15. that the definition section in the draft Bill be extended to define invasion of privacy by electronic data processing and information technology; and
16. that the matters raised by the Disability Complaints Service be referred to a joint meeting of Commonwealth and State Ministers to arrive at a set of standards to ensure protection of aged, infirm or disabled individuals and that if this resolution is not forthcoming further consideration be given to amending the draft Bill.<sup>290</sup>

As asserted by Mr Groom during second reading debate, the Select Committee made two unanimous policy decisions in relation to its report: first, that a journalist or media organisation acting within its code of ethics in relation to privacy would commit no intrusion of privacy, and second, that in respect of the media, no impediment or restriction should be placed upon the proper investigation of affairs of such bodies as 'Beneficial Finance, the State Bank, SGIC or any

---

<sup>290</sup> As set out in South Australia, *Parliamentary Debates*, House of Assembly, 12 September 1991, 830-831.

other legitimate target in the public or the private sphere.<sup>291</sup>

The Bill was then re-introduced, incorporating the recommendations of the Select Committee. It provided for a tort, actionable without proof of special damage. Although based on the legislation proposed in 1974, similarly seeking to create a right of privacy and to specify the circumstances in which that right is infringed, this Bill differed from its predecessor in seeking, by creating exemptions for certain bodies, to overcome some of the criticisms of uncertainty that had contributed to the downfall of the earlier Bill.

The key features of the 1991 Bill, as re-introduced, were as follows:

- exemptions are provided for members of the Police Force and any other person vested with powers of investigation of inquiry. Exemptions are also provided for insurance agencies in the detection of fraud and commercial organisations carrying out reasonable inquiries into the creditworthiness of a customer and in passing that information on to other commercial organisations;
- the right of privacy created by the Bill can be infringed either by a natural person or a body corporate. (The wording of clause 3 (5) is slightly different to that considered by the committee. The committee unanimously agreed that a company should be able to be sued if it infringes a person's privacy. It is felt that the slightly amended wording better reflects the committee's concerns in this respect);
- an action for infringement of a right of privacy must be commenced within two years from the date on which the infringement occurred;
- it is a defence to an action for infringement of a right of privacy to prove that the infringement was necessary for or reasonably incidental to the protection of the lawful interests of the defendant or the conduct of actual, contemplated or apprehended litigation. It is also a defence to show that the infringement was justified in the public interest or that the defendant could have raised a defence of absolute or qualified privilege if the action had been for defamation; and
- the court may grant any remedy (including injunctive relief) available in an action for tort, award damages for distress, annoyance or embarrassment and order the delivery to the plaintiff of anything made or used for the infringement by the defendant or in the defendant's possession or control as a result of the infringement.<sup>292</sup>

The potential effect of the Bill on investigative journalism was strongly criticised by members of

---

<sup>291</sup> South Australia, *Parliamentary Debates*, House of Assembly, 12 November 1991, 1774.

<sup>292</sup> As set out in South Australia, *Parliamentary Debates*, House of Assembly, 12 September 1991, 831.



the Opposition.<sup>293</sup> As in 1974, the Opposition criticised this Bill for cutting into what, it was said, is properly the purview of the common law.<sup>294</sup> The Opposition also thought it inequitable and ineffective:

I maintain that it is impossible for the State to legislative effectively in this field or, indeed, for any State in Australia to legislate effectively in this field. The national, indeed the international nature of the media and the nature of our Federal laws controlling the electronic media makes it impossible for any legislation enacted by a single State to have any real and comprehensive effect in fulfilling the purposes inherent in this Bill.

In fact, it would be fair to say that this Bill is similar to a fence that goes only half way around a paddock. There are so many escape mechanisms for the national and international media. That simply means that this Bill will be applied inequitably. It means that, if this Bill were to become law, there would be an application to local media, and there would be no application to the national electronic media or, indeed, to the international media, which may well be publishing articles about South Australian citizens. The inequity of the application of this Bill is a primary reason for opposing it. The fact that legislation cannot be effective means that it should not be inflicted upon us.<sup>295</sup>

As in 1974, the examples given by proponents of the Bill in debate emphasised the role of the media in invasions of privacy at that time. One member gave the following example:

Why are the members of the Opposition supporting the press, who go out with their telescopic lens and chase bodies in coffins? I saw a news flash the other day of an Irish immigrant woman in Sydney who had been taken from a club; she was taken to a private place and continually raped overnight. She was found in a car at the side of the road, and the press cameras were on her; the news reel cameras were on her and she had her face flashed across every television screen in the whole of Australia. If members opposite do not call that an invasion of privacy, what do they call it? All members of the Liberal Party are defending this situation. They are defending the fact that the press barons of Australia can destroy the privacy of defenceless people.<sup>296</sup>

This is not to say that the threats to privacy posed by technology, and in particular data collection capabilities, were not also highly relevant in the debate. One member of the

---

<sup>293</sup> See, for example, South Australia, *Parliamentary Debates*, House of Assembly, 12 November 1991, 1773 (JL Cashmore).

<sup>294</sup> South Australia, *Parliamentary Debates*, House of Assembly, 12 November 1991, 1778 (SJ Baker).

<sup>295</sup> Ibid 1772 (JL Cashmore).

<sup>296</sup> Ibid 1781 (DM Ferguson).

Opposition said:

In our society today we have a number of high tech devices that can be used in varying ways to threaten the privacy of an individual. We have seen the growth of new and expensive eavesdropping devices, growing networks of private and Government databases and increases in Government surveillance activities that are making it hard for the average citizen to fend off prying eyes and ears. ...<sup>297</sup>

There was an apparent perception by those opposing the Bill that the proposed cause of action would be open to misuse and abuse. The drafting of the Bill was criticised by the Opposition for being vague and also for providing legal fodder for lawyers - making the use of the cause of action prohibitively expensive for many. One member observed:

I am concerned about the definition of 'public interest' in the Bills. I believe that as drafted it would be a legal practitioner's paradise, because every time one believed one was being maligned, harassed or under surveillance, one could go to court and apply for an injunction. What kind of country are we living in when we have to keep seeking legal advice and going to courts to seek protection? We should not have to do that; it should not be necessary. That is why I am often suspicious of legislation such as this drafted in such a way that it has a vested interest from the legal profession. That is a tragedy, because it certainly divides the community into classes: those who can and who cannot afford justice. ...<sup>298</sup>

In contrast, a member of the Government said this about the Bill's simplicity and the accessibility of the remedies it offered:

This Bill is a very straightforward and simple measure and that is part of the beauty of it. Individuals are able to enforce that right in a very simple and direct manner and they are able to achieve remedies that are quite relevant ...<sup>299</sup>

After a number of amendments made during the committee stage (the cause of action remaining) the Bill passed second reading and then third reading.

On 26 November 1991 the second reading was carried in the Legislative Council by a majority of one. During the committee stage, significant amendments to the Bill were tabled, prompting considerable public debate. Thirty-two pages of amendments were introduced by the Hon MJ Elliott, representing the Australian Democrats party.<sup>300</sup> The Government broadly supported the

---

<sup>297</sup> South Australia, *Parliamentary Debates*, House of Assembly, 13 November 1991, 1869 (WA Matthew).

<sup>298</sup> South Australia, *Parliamentary Debates*, House of Assembly, 12 November 1991, 1784 (HT Becker).

<sup>299</sup> South Australia, *Parliamentary Debates*, House of Assembly, 13 November 1991, 1870 (MJ Evans).

<sup>300</sup> South Australia, *Parliamentary Debates*, House of Assembly, 29 April 1992, 4522 (MJ Elliott).

amendments, but followed with 13 pages of amendments to those proposed by the Hon MJ Elliott.

In introducing his amendments, the Hon MJ Elliott emphasised that erring in favour of freedom of speech was important when balancing that interest with privacy interests. He proposed to remove the concept of 'business affairs' from the Bill, stating that business privacy should not be handled by the tort. He proposed prescriptive definitions of terms such as 'personal affairs' and 'personal information'. He also proposed express exemptions for media organisations, journalists and certain public interest groups. These groups would be outside of the scope of the tort. Importantly, the amendments included the establishment of a statutory South Australian Privacy Committee which would not only be able to investigate (without coercive powers) alleged breaches of Information Privacy Principles by Government, but also allegations of violation of privacy in the private sector and by private citizens.

On 27 August 1992, a new iteration of the Bill was returned to the Council. The Bill represented an amalgam of the amendments of Hon MJ Elliott and the Government in relation to the Privacy Committee and the Information Privacy Principles. The Bill no longer contained any provisions creating a general right of privacy or making an infringement of the right of privacy an actionable tort. The Bill as amended instead focussed on the use of private information by Government agencies, by placing Information Privacy Principles on a statutory basis.

Ultimately, the Bill was not passed. The Attorney-General, the Hon CJ Sumner, stated that the Government had decided not to proceed at that stage with creating a general right of privacy and providing a remedy for a breach of that right. He said that during the parliamentary process the Bill as introduced in 1991 had been 'emasculated'. Any further amendments to the Bill, he said, would have removed the media entirely from the ambit of the legislation.<sup>301</sup> The Attorney-General stated that developments towards uniform defamation legislation and developments in dealing with neighbour disputes in the Magistrates Court had also influenced the decision not to proceed with developing a cause of action.<sup>302</sup>

The Attorney-General's final remarks were as follows:

I have no joy in taking this course of action, having spent an amount of time dealing with this issue, but I think that at this stage the Parliament is just not mature enough to grasp the issue. I repeat what I said: there is no doubt that at some time this issue will be dealt with, and some Government in the future will need to take up the issue and legislate on the issue of privacy in this State.<sup>303</sup>

---

<sup>301</sup> South Australia, *Parliamentary Debates*, Legislative Council, 27 August 1992, 231 (CJ Sumner).

<sup>302</sup> Ibid 232 (CJ Sumner).

<sup>303</sup> South Australia, *Parliamentary Debates*, Legislative Council, 28 October 1992, 595 (CJ Sumner).

## 2 SA Law Reform Committee, Interim Report (1973) - Extract

### INTERIM REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA REGARDING THE LAW OF PRIVACY

To: The Honourable L. J. King, QC, MP,  
Attorney-General for South Australia.

Sir,

Your predecessor referred to us the question of whether the privacy of the individual ought to be protected by Statute to a greater extent than it now is in South Australia.

We think that it should and the Report which follows of necessity falls into two parts. First the creation of a nominate tort relating to the loss of or violation to a person's privacy, and secondly what is divisible into partly private law and partly public law, namely the use of surveillance techniques, computers, data banks and similar electronic inventions of the present day.

We should state at the outset that the following have been used in preparing this Report out of a much larger mass of materials read and studied by the Committee.

1. 'The Development of the Right of Privacy in New York' by Mr. Justice Hofstadter of the Supreme Court of the State of New York (Grosby) 1954.
2. 'The Eavesdroppers' by Dash Schwartz and Knowlton (Rutgers) 1959.
3. 'Privacy - The Right to be let alone' by Ernst and Schwartz (Macmillan) 1962.
4. An article in 25 Modern Law Review 393 (1962) named 'Protection of Privacy' by Neill.
5. Fleming on the Law of Torts 3rd Edition (1965) pages 568-575.
6. 'Privacy and Freedom' by Westin (Bodley Head) 1967.
7. 'The Common Law Protection of Privacy' by Dworkin 2 U.Tas. L. Rev. (1967) 418.
8. 'Privacy and the Law' - a report by Justice (1970).
9. Several shorter articles in the Law Journal Newspaper: 119 L.J.N. 133, 157, 205 and 633 and 120 L.J.N. at pages 70 and 76.
10. The 1968 Report of the Ontario Law Reform Commission on Protection of Privacy.
11. A 1968 Act of the Parliament of British Columbia creating a right of privacy and defining its content; a copy of which is appended to this Report.
12. Acts No. 7804 of 1969 of the Parliament of Victoria, 70 of 1969 of the Parliament of New South Wales and 27 of 1960 of the Parliament of the Commonwealth dealing with listening devices and the interception or recording of telephonic communications.

13. A bill on rights of privacy prepared by Lord Mancroft in 1961 and introduced by him, which failed to become law.
14. A bill introduced into the House of Commons in 1969 to prevent the invasion of privacy through the misuse of computer information which failed to become law. The Government of the day set up a Committee under the Chairmanship of Sir Kenneth Younger to consider and report on the matter. The Committee has not at this date presented its Report.
15. An article in 34 Modern Law Review commencing at page 288.

We also had the benefit of the views of Superintendent Lenton who attended the Committee and gave evidence on behalf of the Police Force in this State.

In addition to the matters to which we have referred, we think we should also refer to the Universal Declaration of Human Rights and the United Nations Covenant on Civil and Political Rights and the conclusions which were drawn from those by the Nordic Conference of the International Commission of Jurists. These comments are taken from Mr Dworkin's argument at pages 427-429.

Whereas Article 12 of the Universal Declaration of Human Rights and Article 17 of the United Nations Covenant on Civil and Political Rights of December, 1966 have provided that 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation' and that 'everyone has the right to the protection of the law against such interference or attacks'.

And whereas Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms has provided that 'everyone has the right to respect for his private and family life, his home and his correspondence'.

And recalling that the International Commission of Jurists has at its first International Congress held at Athens in 1955 stressed that the Rule of Law requires that the private lives of individuals be inviolable.

And considering that the increasing complexity of modern society makes it desirable to protect the Right to Privacy with greater particularity than hitherto ...

The matters which were suggested required protection were as follows: -

*(a) Intrusion upon a person's solitude, seclusion or privacy.*

An unreasonable intrusion upon a person's solitude, seclusion or privacy, which the intruder can foresee will cause serious annoyance, whether by the intruder's watching and besetting him, following him, prying on him or continually telephoning him or writing to him or by any other means, should

be actionable at civil law; and the victim should be entitled to an order restraining the intruder. In aggravated cases, criminal sanctions may also be necessary.

*(b) Recording, photographing, and filming.*

The surreptitious recording, photographing or filming of a person in private surroundings or in embarrassing or intimate circumstances should be actionable at law. In aggravated cases, criminal sanctions may also be necessary.

*(c) Telephone-tapping and concealed microphones.*

(i) the intentional listening into private telephone conversations between other persons without consent should be actionable at law.

(ii) the use of electronic equipment or other devices-such as concealed microphones-to overhear telephone or other conversations should be actionable both in civil and criminal law.

*(d) The use of material obtained by unlawful intrusion.*

The use, by publication or otherwise, of information, photographs or recordings obtained by unlawful intrusion should be actionable in itself. The victim should be entitled to an order restraining the use of such information, photograph or recording, for the seizure thereof and for damages.

*(e) The use of material not obtained by unlawful intrusion.*

(i) The exploitation of the name, identity or likeness of a person without his consent is an interference with his right to privacy and should be actionable.

(ii) The publication of words or views falsely ascribed to a person, or the publication of his words, views, name or likeness in a context which places him in a 'false light' should be actionable, and entitle the person concerned to the publication of a correction.

(iii) The unauthorized disclosure of intimate or embarrassing facts concerning the private life of a person, published where the public interest does not require it, should in principle be actionable.

The right to be let alone as it has been described has not received in the law the protection which in our opinion it ought to have and before proceeding with suggestions for reform of the law it may be as well to list quite shortly the areas where the law does give some protection and what protection is so given.

1. *Pope v. Curl* Cas. Temp. Hard. 342 (1741).

The facts of this case shortly were that the defendant Curl was a bookseller who had got into his possession certain personal letters passing between various literary figures, two of whom were Alexander Pope and Jonathan Swift. He published the letters as a book without consent and

Pope moved for an injunction to prevent his selling the book. Lord Chancellor Hardwicke held that the writer of a letter had a property right in his words and therefore that property right could be invoked in order to justify an injunction preventing publication. This case was followed by Lord Chancellor Eldon in *Gee v. Pritchard* (181 8) 2 Swan. 402; 36 E.R. 670.

2. This protection was extended to unpublished lectures in the case of *Abernethy v. Hutchinson* (1825) 3 L.J. Ch. 209; 47 E.R. 1313.

3. A different idea was pursued in *Yovatt v. Winyard* (1820) 1 J. & W. 394 where Yovatt was what we would now call a veterinary surgeon and Winyard was a former employee. He set himself up using Yovatt's medicines which Yovatt had kept in a book and Winyard had copied. Lord Chancellor Eldon in that case compelled the ex-employee to stop using the remedies which he had obtained in breach of trust because it was in effect a breach of confidence.

4. The case which follows is of great importance, not for what it decides in itself but because it was used as the foundation of the epoch making article by Warren and Brandeis in 1890 wherein they first set out a general claim that there ought to be a general right of privacy. The case is *Prince Albert v. Strange* which is reported in 1 Mac. & G. page 25; 2 De G. and Smith 652; 64 E.R. 293.

The facts were that Prince Albert had produced certain etchings largely for the interest of the Royal Family and in fact the originals were kept under lock and key by the Queen. Nevertheless some of the impressions got into the hands of Strange who was a publisher and he produced a catalogue of these etchings and Prince Albert took proceedings against him for an injunction to prevent the publication. Vice-Chancellor Knight Bruce granted the injunction and said at page 698 -

I think, therefore, not only that the Defendant here is unlawfully invading the Plaintiff's right, but also that the invasion is of such a kind and affects such property as to entitle the Plaintiff to the preventive remedy of an injunction; and if not the more, yet certainly not the less, because it is an intrusion - an unbecoming and unseemly intrusion-an intrusion not alone in breach of conventional rules, but offensive to that inbred sense of propriety natural to every man - if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life - into the home (a word hitherto sacred amongst us), the home of a family whose life and conduct form an acknowledged title, though not their only unquestionable title, to the most marked respect in this country.

The Vice-Chancellor's judgment was taken on appeal and was affirmed on appeal See *1 Mac. & G.* 25: 41 E.R. 1171.

5. The next case is *Pollard v. The Photographic Company* 40 Ch.D. 345 a judgment of North J. A photographer contracted to take the plaintiff's photograph and then exhibited it and tried to sell copies of it and was enjoined from doing so on the ground that firstly it was a breach of an

implied term in the contract and on the further ground that it was a breach of confidence.

6. In 1890 in Volume IV Number 5 of the Harvard Law Review appeared the article 'The Right to Privacy' by Warren and Brandeis which is the foundation of the present American law on the subject and which as Dean Roscoe Pound said on a later occasion did nothing less than add a chapter to the law.

The authors said -

These considerations lead to the conclusion that the protection afforded to thought, sentiments, and emotions expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed.

In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed-and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.

7. The next advance was in 1894 when *Monson v. Tussaud's* was decided in 1894 1 Q.B. 671 and that was to put a wax model of a person in close proximity to that of three criminals in immediately adjoining a chamber of horrors was a form of libel and therefore actionable. The law of libel was similarly extended where the reputation of an amateur golfer was at stake in *Tolley v. Fry* 1931 A.C. 333 where the innuendo was that the golfer, a well known amateur, had become a professional by reason of his photograph appearing on an advertisement inserted by Fry's, the chocolate manufacturers.

8. The most important decision from an Australian point of view is the next which is *Victoria Park Racing Company v. Taylor* (1937) 58 C.L.R. 479 where Latham C. J. stated categorically at page 496 that no general right of privacy exists and the action was dismissed.

9. The next extension of the law came in New Zealand in 1957 in *Furniss v. Fitchett* 1958 N.Z.L.R. 396 where a doctor gave a certificate to a husband relating to his wife at a time when the husband and wife were in marital discord which certificate amongst other things suggested that the wife exhibited symptoms of paranoia. The wife took proceedings against the doctor and was awarded damages by the then Chief Justice of New Zealand.

10. The question of damages for mental shock as parasitic on a breach of copyright was



recognized in *Williams v. Settle* (1960) 1 W.L.R. 1072; (1960) 2 All E.R. 806.

11. The breach of confidence cases were extended to include a breach of marital confidence by disclosing communications made during the currency of the marriage. See *Duchess of Argyll v. The Duke of Argyll and Others* (1965) 2 W.L.R. 790.

These cases when taken together show that only a very small segment of the total right of privacy is now protected and that Chief Justice Sir John Latham's comment in the Victoria Park Racecourse case is amply justified.

We think, however, that that should not be the law and that the law should protect a right of privacy - a general right inherent in the individual for the preservation of individual dignity.

Speaking first in general terms we recommend that a general right of privacy be created by Statute to cover all serious invasions of privacy, the wrongful use of private information and the wrongful appropriation of a person's name, likeness or professional reputation or for commercial or other advantage.

The following defences should exist in relation to such an action:-

- (a) Innocent unintended infringement.
- (b) Consent.
- (c) Fair comment on a matter of public interest.

The third is the most difficult of the defences and it may well be thought that the defence should cover not only publication but as is suggested in 120 L.J.N. (1970) at page 70 the process of research and enquiry as well as the process of publication. This defence would have to be drawn so as to cover the case where the facts in question concerned a man's public life as distinct from his purely private life.

- (d) The present defences of absolute and qualified privilege in the same circumstances in which they now exist in the law of defamation.
- (e) Legal authority.

Here it is to be noted that Section 11 of the 1969 English bill binds the Crown. We think this should not be incorporated in our legislation. We think, however, that there should be a Section stating who is to be the authorizing person or body in cases of police surveillance, state security and investigations into non-criminal matters such as insanity and infirmities caused by such agencies as liquor drugs and hallucinogens.

- (f) What is reasonable and necessary for the protection of another man's competing business interests. This, however, would have to be narrowly construed or it would almost take away the right of privacy. The example given in the 'Justice' Report of a closed circuit television circuit to deter shoplifters is a good example of the narrow sphere which should be given to such a defence.

The remedies given should be damages, an injunction, or as in industrial property violations, an account of profits and delivery up of the matters which are proved to invade privacy. We think that a power ought to be inserted to allow the award of exemplary damages in a proper case. If so, as this is the creation of a new tort, it would have to be expressly stated in the legislation. In the case of representational invasions of privacy, that is invasions by representation in one of the forms of news media, there is a distinction to be drawn between the case where the representation is true or substantially true or being false does not bring the plaintiff into hatred, ridicule or contempt and the case where the representation is false and is now actionable in libel or slander so that the plaintiff might recover damages both under the proposed law and under the existing law of defamation and provision should be inserted to prevent double recovery of damages.

It will be seen that in relation to the creation of right of privacy we agree with the recommendations of the Justice Committee on 'Privacy and the Law'. They gave as appendix J to their report a draft right of privacy bill and we have appended a copy of it to this Report. The 'Justice' bill was, with few changes, the bill introduced in the House of Commons in 1969. Our views on this part of the topic however have been modified by a consideration of the British Columbia Act and Lord Mancroft's bill. We set out our recommendations on this part of the topic as follows:-

- (1) There should be a declaratory section stating that notwithstanding any doctrine of the common law or anything contained in any Statute, every person has a right of privacy. This is necessary to overcome the decision of the High Court in *Victoria Park Racing Company v. Taylor* (supra).
- (2) The right of privacy should be defined to include the matters set out in paragraph 9 of the 'Justice' bill. Sub-clause (f) of that paragraph should be amended by substituting 'use' for 'appropriation' and 'advantage' for 'gain'.
- (3) The right of action should follow paragraphs 1 and 9 of the 'Justice' bill. We think that this action should not lie as between husband and wife in relation to events occurring while they were living together as man and wife.
- (4) The defences should be those listed in paragraph 3 of the Justice bill except that -
  - (a) subparagraphs (c) and (d) should be modified to include a defence of fair comment in the public interest;
  - (b) subparagraph (3) (1) (b) of the British Columbia Act should be substituted for subparagraph (d) of the Justice bill with the addition of the words 'or to the proper prosecution or defence of existing or impending litigation'.
  - (c) In the last line of subparagraph (e) of paragraph 3 of the Justice bill the words 'for the public benefit' should be deleted and the words 'in the public interest' inserted.
- (5) The Ontario Report refers to a special action of industrial espionage and unauthorized use of records (page 96). The Committee were divided on this and make no

recommendation but simply draw your attention to this matter and to its dual aspect: first, as a civil matter either in breach of confidentiality or in the wrongful appropriation of another's ideas; secondly, in its criminal aspect as being akin to a species of theft, as it is in fact dealt with in the American model Penal Code.

- (6) Remedies: The Committee preferred Section 4 of the Justice bill with the following amendments:-
  - (i) There ought to be a power vested in a Judge to order a stay of proceedings where-
    - (a) the invasion was unintentional; and
    - (b) the defendant had made a sufficient tender of amends and a sufficient apology (including where appropriate publication thereof);
  - (ii) As this is a new clause of action the power to grant exemplary damages in a proper case ought to be specifically stated.
- (7) Period of Limitation: The Committee preferred Section 5 of the Justice bill substituting 'two' for 'three'. Except for proven special damage the cause of action should abate on death.
- (8) Use of evidence illegally obtained: The Committee considered that paragraph 8 of the Justice bill should be adopted with the words added at the end 'except where it is tendered by the plaintiff in an action for breach of privacy'. The Solicitor-General thought that the Court should have a discretion to admit or reject such evidence in other cases. The majority thought that rather than introducing the rules relating to evidence illegally obtained it might be better if some rule be spelt out, such as that where its admission is unjust or unfair the evidence should be excluded and that on the argument as to admissibility the onus should be on the party seeking to adduce the evidence to justify why the evidence should be admitted rather than on the party objecting to support its exclusion.
- (9) Courts having jurisdiction: The Committee recommends that such actions be brought in the Supreme Court or the Local Court according to the amount of the claim.
- (10) Rules of Court: A rule making power should be conferred in terms similar to those contained in Section 22 of the *Guardianship of Infants Act 1940*.
- (11) There should be a general provision as in paragraph 6 of the Justice bill that the rights conferred by this Act are in addition to and not in derogation of those given by the common law or any other Statute.
- (12) There should be a special provision enabling the Court to sit in private where necessary and to prohibit the publication of evidence or identifying particulars of parties or witnesses in proper cases.

*[Omitted here is the part of the Report dealing with surveillance devices and data banks]*

Professor Westin also suggests that there should be an independent State agency to co-ordinate the protection of privacy which would make annual public reports on its findings and could recommend necessary legislative or administrative changes. This again would appear to us to be a

valuable protection to the citizen and we draw it to your attention.

It is impossible to foresee all the ways in which privacy may be violated but we feel that if these matters were regulated by Statute the individual would have a far greater protection than he now has and we accordingly recommend the alterations both in private and in public law which we have set out above.

The Committee desires to express its appreciation to the Honourable Mr Justice Hogarth and to Mr J. W. Perry for acting as commentators in relation to this paper.

We have, contrary to our usual practice, referred to this as an interim, rather than a final report. The Committee has been through a very large mass of material and has done its utmost in the time available to produce a report which may assist the consideration of this new and relatively uncharted area of the law. However we are very conscious of the fact that new material is appearing all the time-one new book on the subject has in fact been published in April, which we have been unable to get from Michigan in the time available - and also of the fact that the deliberations in other places have produced a great deal more material already than we have been able to read and digest.

More important, it is very difficult on a subject such as this to combine flexibility in the scope of the legislation with a reasonable degree of certainty and to be sure that the language chosen by the draftsman when imposing new restraints or duties upon the public would not have consequences which are unintended and perhaps undesirable. Accordingly, if it becomes necessary and you so desire we shall be pleased to do further research later into the matter.

We have the honour to be

HOWARD ZELLING

B. R. COX

K. P. LYNCH

JOHN KEELER

The Law Reform Committee of South Australia.

30th July, 1971.

### 3 ALRC Privacy Reference 2013

#### Terms of Reference

##### SERIOUS INVASIONS OF PRIVACY IN THE DIGITAL ERA

I, Mark Dreyfus QC MP, Attorney-General of Australia, having regard to:

- the extent and application of existing privacy statutes
- the rapid growth in capabilities and use of information, surveillance and communication technologies
- community perceptions of privacy
- relevant international standards and the desirability of consistency in laws affecting national and transnational dataflows.

REFER to the Australian Law Reform Commission for inquiry and report, pursuant to s20(1) of the *Australian Law Reform Commission Act 1996*, the issue of prevention of and remedies for serious invasions of privacy in the digital era.

#### Scope of the reference

The ALRC should make recommendations regarding:

1. Innovative ways in which law may reduce serious invasions of privacy in the digital era.
2. The necessity of balancing the value of privacy with other fundamental values including freedom of expression and open justice.
3. The detailed legal design of a statutory cause of action for serious invasions of privacy, including not limited to:
  - (a) legal thresholds
  - (b) the effect of the implied freedom of political communication
  - (c) jurisdiction
  - (d) fault elements
  - (e) proof of damages
  - (f) defences
  - (g) exemptions
  - (h) whether there should be a maximum award of damages
  - (i) whether there should be a limitation period

- (j) whether the cause of action should be restricted to natural and living persons
  - (k) whether any common law causes of action should be abolished
  - (l) access to justice
  - (m) the availability of other court ordered remedies.
4. The nature and appropriateness of any other legal remedies for redress for serious invasions of privacy.

The Commission should take into account the *For Your Information* ALRC Report (2008), relevant New South Wales and Victorian Law Reform Commission privacy reports, the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* and relevant Commonwealth, State, Territory legislation, international law and case law.

### **Consultation**

In undertaking this reference, the Commission will identify and consult relevant stakeholders including the Office of the Australian Information Commissioner, and relevant State and Territory bodies.

### **Time frame**

The ALRC will provide its final report to the Attorney-General by June 2014.

Dated 12 June 2013.

## **4 Bibliography**

### **Articles and books**

- Arnold, B, 'Coming here? The Canadian privacy tort: Jones v Tsige [2012] ONCA 32 (CA)' (2012) 8 *Privacy Law Bulletin* 80
- Bagshaw, R, 'Obstacles on the Path to Privacy Torts' in P Birks (ed), *Privacy and Loyalty* (Clarendon Press, 1997)
- Barendt, E, 'Privacy and Freedom of Speech' in A Kenyon and M Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press, 2006)
- Bartlett, P, 'A Statutory Privacy Tort' (2012) 17 *Media and Arts Law Review* 220
- Butler, D, 'A Tort of Invasion of Privacy in Australia?' (2005) 29 *Melbourne University Law Review* 339
- Caldwell, J, 'Protecting Privacy Post Lenah: Should the Courts Establish a New Tort or Develop Breach of Confidence?' (2003) 26 *University of New South Wales Law Journal* 90
- Cheer, U, 'The Future of Privacy - Recent Developments in New Zealand' (2007) 13 *Canterbury Law Review* 169
- Cooley, TM, *Cooley on Torts* (2nd ed, 1888)
- Covell, A and K Lupton, *Principles of Remedies* (LexisNexis, 3<sup>rd</sup> ed, 2005)
- Doyle, C and M Bagaric, *Privacy Law in Australia* (The Federation Press, 2005)
- Dworkin, G, 'The Common Law Protection of Privacy' (1967) 2 *University of Tasmania Law Review* 418
- Ernst, M and A Schwartz, *Privacy: The Right To Be Let Alone* (MacGibbon and Kee, 1968)
- Heath, W 'Possum Processing, Picture Pilfering, Publication and Privacy: Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd' (2002) 28 *Monash University Law Review* 162
- Jackson, M, *Hughes on Data Protection in Australia* (Lawbook Co, 2001)
- Kercher, B, 'Debt Collection Harassment in Australia Part 1' (1978) 5 *Monash University Law Review* 87
- Kidd, CJF, 'Freedom from Unwanted Publicity' in J W Bridge et al (eds), *Fundamental Rights* (Sweet & Maxwell, 1973)
- Kirby, M, 'The Computer, the Individual and the Law', essay in M Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (Oxford University Press, 1983)

- Kirby, M, 'Privacy in Cyberspace' (1998) 21 *University of New South Wales Law Journal* 324
- Kirby, M, 'Publication privacy: action at last?' (2012) 17 *Media and Arts Law Review* 202
- Lindsay, D, 'An Exploration of the Conceptual Basis of Privacy and the Implications for the Future of Australian Privacy Law' (2005) 29 *Melbourne University Law Review* 131
- Mason, Sir Anthony, 'Law Reform and the Courts' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005)
- Michael, J, *Privacy and Human Rights* (UNESCO Publishing, 1994)
- O'Brien, DM, 'Privacy and the Right of Access: Purposes and Paradoxes of Information Control' (1978) 30 *Administrative Law Review* 45
- Parker, RB, 'A Definition of Privacy' (1974) 27 *Rutgers Law Review* 275
- Penk, S and R Tobin, 'The New Zealand tort of invasion of privacy: Future directions' (2011) 19 *Torts Law Journal* 191
- Prosser, WL, 'Privacy' (1960) 48 *California Law Review* 383
- M N Richards and D J Solove, 'Prosser's Privacy Law: A Mixed Legacy' (2010) 98 *California Law Review* 1887
- Restatement (Second) of Torts* (The American Law Institute, 1977)
- Rolph, D, 'Irreconcilable differences? Interlocutory injunctions for defamation and privacy' (2012) 17 *Media and Arts Law Review* 170
- Solove, D, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (Yale University Press, 2007)
- Stewart, P and A Stuhmcke, *Australian Principles of Tort Law* (The Federation Press, 2<sup>nd</sup> ed, 2009)
- Stickley, A, 'Common Law Tort of Privacy - Faltering Steps?' (2004) 25 *Queensland Lawyer* 81
- Storey, H, 'Infringement of Privacy and its Remedies' (1973) 47 *Australian Law Journal* 498
- Tapper, C, *Computer Law* (Longman, 4<sup>th</sup> ed, 1989)
- Taylor, G and D Wright, 'Australian Broadcasting Corporation v Lenah Game Meats: Privacy, Injunctions and Possums: An Analysis of the High Court's Decision' (2002) 26 *Melbourne University Law Review* 707
- Tucker, G, *Information Privacy Law in Australia* (Longman Professional, 1992)
- Wacks, R, 'The Poverty of Privacy' (1980) 96 *Law Quarterly Review* 73



- Wacks, R, 'Introduction', *The International Library of Essays in Law and Legal Theory: Privacy 1 & 2* (Dartmouth, 1993)
- Wacks, R, *Privacy and Press Freedom* (Blackstone Press, 1995)
- Wacks, R, 'Michael Kirby: Privacy Pioneer' (2012) 17 *Media and Arts Law Review* 216
- Warren, SD and L D Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193
- Westin, F, *Privacy and Freedom* (Atheneum, 1967)

### **Cases**

- Abernethy v Hutchinson* (1825) 3 LJ Ch 209
- Asb v McKennitt; Campbell v MGN Ltd* [2004] 2 AC 457
- Attorney-General v Times Newspapers Ltd* (1974) AC 273
- Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199
- Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57
- Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106
- Australian Capital Television v New South Wales* (1992) 177 CLR 1
- Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1969) 118 CLR 618
- Bui v Police* [2012] SASC 72
- C v Holland* [2012] 3 NZLR 672
- Campbell v MGN Ltd* [2004] 2 AC 457
- Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39
- Doe v Australian Broadcasting Corporation* [2007] VCC 281
- Duchess of Argyll v The Duke of Argyll & Ors* (1965) 2 WLR 790
- Entick v Carrington* (1765) 19 St Tr 1029
- Furniss v Fitchett* (1958) NZLR 396
- Gee v Pritchard* (1818) 2 Swan 402
- Giller v Procopets* (2008) 24 VR 1
- Grosse v Purvis* [2003] QDC 151
- Haines v Bendall* (1991) 172 CLR 60
- Hosking v Runting* [2005] 1 NZLR 1
- Kalaba v Commonwealth of Australia* [2004] FCA 763
- Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520

- Livingstone v Ranyards Coal Co* (1880) 5 App Cas 25
- Maynes v Casey* [2010] NSWDC 285
- Maynes v Casey* [2011] NSWCA 156
- Monson v Tussaud's* (1894) 1 QB 671
- Murray v Big Pictures (UK) Limited* [2008] EWCA Civ 446
- OGB Ltd v Allan; Douglas v Hello! Ltd* [2007] 2 WLR 920
- Pollard v Photographic Group* (1888) 40 Ch D 345
- Pope v Curl* (1741) 2 Atk 342
- Prince Albert v Strange* (1849) 1 Mac & G 25
- R v Riddle* [2012] SASCF 82
- R v Secretary of the Home Department; Ex Parte Simms* [2000] 2 AC 115
- Sands v State of South Australia* [2013] SASC 44
- The Author of a Blog v Times Newspapers Limited* [2009] EWHC 1358
- Tolley v Fry* (1931) AC 333
- United Food and Commercial Workers, Local 1400 v Saskatoon Co-operative Assn Ltd* (1992) 101 Sask R 1
- Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118
- Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479
- Von Hannover v Germany* [2004] ECHR 294
- Vougamalis v Nixon* (1991) 56 SASR 574
- Wainwright v Home Office* [2003] 3 WLR 1137
- Warman International Ltd v Dwyer* (1995) 182 CLR 544
- Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71
- Williams v Settle* [1960] 1 WLR 1072
- Yovatt v Winyard* (1820) 1 J & W 39

#### **Legislation**

- Civil Liability Act 1936* (SA)
- Criminal Code 1995* (Cth)
- Criminal Law Consolidation Act 1935* (SA)
- Criminal Law (Sentencing) Act 1988* (SA)
- Defamation Act 2005* (SA)
- Judicial Proceedings Reports Act 1958* (Vic)

*Limitation of Action Act 1936* (SA)  
*Listening and Surveillance Devices Act 1972* (SA)  
*Motor Vehicles Act 1959* (SA)  
*Privacy Act CCSM c P125* (Manitoba)  
*Privacy Act 1978 RSS c P-24* (Saskatchewan)  
*Privacy Act 1988* (Cth)  
*Privacy Act 1990 RSNL c P-22* (Newfoundland and Labrador)  
*Privacy Act 1996 RSBC c 373* (British Columbia)  
*Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth)  
*Privacy and Personal Information Protection Act 1988* (NSW)  
*Privacy Bill 1974* (SA)  
*Privacy Bill 1991* (SA)  
*Privacy Bill 2006* (Ireland)  
*Privacy Bill 2012* (Ireland)  
*Security and Investigation Agents Act 1995* (SA)  
*South Australian Civil and Administrative Appeals Tribunal Bill 2013* (SA)  
*Summary Offences Act 1953* (SA)  
*Surveillance Devices Bill 2012* (SA)  
*Telecommunications Act 1997* (Cth)  
*Victims of Crime Act 2001* (SA)  
*Victorian Civil and Administrative Appeals Tribunal Act 1998* (Vic)  
*Workers Rehabilitation and Compensation Act 1986* (SA)

#### **Reports**

Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008)  
Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper No 72 (2007)  
Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Issues Paper No 43 (2013)  
Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979)

D Banisar, *Privacy and Human Rights 2000: An International Survey of Privacy Law and Developments Privacy International*

<[www.privacyinternational.org/survey/phr2000/overview.html](http://www.privacyinternational.org/survey/phr2000/overview.html)>

Committee on Privacy (Chairman, the Hon K Younger) *Report of the Committee on Privacy (1972) (UK)*

Commonwealth of Australia, Department of the Prime Minister and Cabinet, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, Issues Paper (September, 2011)

Hon R Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation (2012)*

Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy (2004)*

Joint Committee of Privacy and Injunctions, *Privacy and Injunctions*, HL Paper No 273 and HC Paper No 143 (2012) (UK)

Law Reform Commission of Saskatchewan, *Renewing the Privacy Act*, Final Report (2012) (Canada)

Law Reform Committee of South Australia, *Regarding the Law of Privacy: Interim Report (1973)*

Law Reform Committee of South Australia, *Regarding Data Protection*, Report No 50 (1980)

Morison, *Report on the Law of Privacy to the Standing Committee of Commonwealth and State Attorneys-General*, No 170 (1973)

New South Wales Law Reform Commission, *Invasion of Privacy*, Consultation Paper 1 (2007)

New South Wales Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009)

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

New Zealand Law Commission, *The News Media meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age*, Issues Paper No 27 (2012)

New Zealand Law Commission, *Harmful Digital Communications: The adequacy of the current sanctions and remedies*, Ministerial Briefing Paper (2012)

Victorian Law Reform Commission, *Privacy Law: Options for Reform*, Information Paper (2001)

Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report No 18 (2010)

**Other**

ALRC Terms of Reference: *Serious Invasions of Privacy in the Digital Era*

<<http://www.alrc.gov.au/inquiries/invasions-privacy/terms-reference>>

Australian Government, Department of Prime Minister and Cabinet website

<<http://www.dpmc.gov.au/privacy/reforms.cfm>>

Commonwealth of Australia, Cabinet, *Australian Government First Stage Response to the Australian Law Reform Commission Report 108 For Your Information: Australian Privacy Law and Practice* (October 2009)

Submissions to Commonwealth of Australia, Department of the Prime Minister and Cabinet, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, Issues Paper (September, 2011)

<<http://www.ag.gov.au/consultations/pages/Righttosueforseriousinvasionofpersonalprivacyissuespaper.aspx>>

Commonwealth Attorney-General, the Hon Mark Dreyfus QC, MP, *Protecting privacy in the digital era*, Media Release, 12 June 2013,

<<http://www.alrc.gov.au/inquiries/invasions-privacy>>

Commercial Television Industry Code of Practice (2010)

Government of South Australia, Department of the Premier and Cabinet Circular, *Information Privacy Principles Instructions PC012* (16 September 2013)

<<http://dpc.sa.gov.au/premier-and-cabinet-circulars>>

*International Covenant on Civil and Political Rights*, 16 December 1966 [1980] ATS 23, (entered into force generally on 23 March 1976)

Office of the Australian Information Commissioner

<<http://www.privacy.gov.au>>

Organisation for Economic Co-operation and Development

<<http://www.oecd.org/>>

Privacy Rights Clearinghouse, *Privacy Today: A Review of Current Issues* (August 2011) <<https://www.privacyrights.org>>

South Australia, *Parliamentary Debates*, House of Assembly, 10 September 1974, 819-820 (LJ King, Attorney-General)

South Australia, *Parliamentary Debates*, House of Assembly, 8 October 1974, 1334 (ER Goldsworthy)

South Australia, *Parliamentary Debates*, House of Assembly, 8 October 1974, 1335 (Dr BC Eastick)

South Australia, *Parliamentary Debates*, House of Assembly, 8 October 1974, 1341 (DO Tonkin)

- South Australia, *Parliamentary Debates*, House of Assembly, 8 October 1974, 1348 (SG Evans)
- South Australia, *Parliamentary Debates*, House of Assembly, 8 October 1974, 1349 (MV Byrne)
- South Australia, *Parliamentary Debates*, House of Assembly, 8 October 1974, 1351 (GM Gunn)
- South Australia, *Parliamentary Debates*, House of Assembly, 22 October 1974, 1610-1611 (LJ King)
- South Australia, *Parliamentary Debates*, House of Assembly, 22 October 1974, 1615 (LJ King)
- South Australia, *Parliamentary Debates*, House of Assembly, 22 November 1990, 2182-2183 (T Groom)
- South Australia, *Parliamentary Debates*, House of Assembly, 13 December 1990, 2776
- South Australia, *Parliamentary Debates*, House of Assembly, 12 September 1991, 830-831
- South Australia, *Parliamentary Debates*, House of Assembly, 12 November 1991, 1773 (JL Cashmore)
- South Australia, *Parliamentary Debates*, House of Assembly, 12 November 1991, 1774 (T Groom)
- South Australia, *Parliamentary Debates*, House of Assembly, 12 November 1991, 1778 (SJ Baker)
- South Australia, *Parliamentary Debates*, House of Assembly, 12 November 1991, 1772 (JL Cashmore)
- South Australia, *Parliamentary Debates*, House of Assembly, 12 November 1991, 1781 (DM Ferguson)
- South Australia, *Parliamentary Debates*, House of Assembly, 12 November 1991, 1784 (HT Becker)
- South Australia, *Parliamentary Debates*, House of Assembly, 13 November 1991, 1869 (WA Matthew)
- South Australia, *Parliamentary Debates*, House of Assembly, 13 November 1991, 1870 (MJ Evans)
- South Australia, *Parliamentary Debates*, House of Assembly, 29 April 1992, 4522 (MJ Elliott)
- South Australia, *Parliamentary Debates*, Legislative Council, 31 October 1974, 1816 (JC Burdett)

South Australia, *Parliamentary Debates*, Legislative Council, 12 November 1974, 1853 (Sir AC Rymill)

South Australia, *Parliamentary Debates*, Legislative Council, 20 November 1974, 2100

South Australia, *Parliamentary Debates*, Legislative Council, 27 August 1992, 231-232 (CJ Sumner)

South Australia, *Parliamentary Debates*, Legislative Council, 28 October 1992, 595 (CJ Sumner)

South Australia, *Parliamentary Debates*, Legislative Council, 21 February 2013, 3231  
TS Eliot, *The Cocktail Party*

*United Nations Declaration on Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948)