A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy

Department of the Prime Minister and Cabinet

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Introduction

1. The Law Council of Australia is pleased to provide this submission in response to the Department of the Prime Minster and Cabinet’s Issues Paper: A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy (Issues Paper) of September 2011.

2. This submission has been prepared with input from the Media and Communications Committee, Privacy Committee and Intellectual Property Committee of the Business Law Section of the Law Council, the Law Institute of Victoria, the NSW Bar Association, the Law Society of South Australia and the South Australian Bar Association (the Working Party).

3. As outlined in Attachment A, the Law Council represents the Australian legal profession through the bar associations and law societies of each State and Territory and the large law firm group (the “constituent bodies” of the Law Council).

4. Given the breadth of the Inquiry, a number of differing views have been presented to the Law Council. In order to sufficiently represent the views of the legal profession, the Law Council has included all of these views in the comments provided below in response to the questions outlined in the Issues Paper.

5. As a result of the differing feedback received and the short timeframe for submissions, the Law Council does not adopt a final position on the threshold question of whether a statutory cause of action for privacy is warranted. Given the short timeframe for responses, it has not been possible for the Law Council Board of Directors to consider all of its constituent body views to try to reach a final position on the threshold question. Instead, the Law Council outlines the arguments for and against a statutory cause of action. The Law Council also responds to the remaining questions however, in the event that a cause of action is established. Should the government reach the view that a statutory cause of action for invasion of privacy will be established, the Law Council submits that thorough consideration should be given to the design of the statutory regime, in order to balance the relevant interests identified in this submission and avoid duplication or inconsistency with existing regulation.

6. The Law Council may wish to provide further comment if there is opportunity at any subsequent stages of this Inquiry or upon the release of any draft legislation.

Background and Context

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

7. The Law Council believes that technological developments and the consequent ease and extent to which privacy can be breached warrant the consideration of additional ways to protect individual privacy in Australia.

8. It has been submitted that developments in technology including the internet, mobile phones, easily accessible recording and surveillance equipment and the increased use of cameras in public spaces have the potential to blur the distinction between what is considered ‘private’ and ‘public’.
9. Developments in technology such as “cloud computing” increase the risk of Australian data being stored in overseas servers and databases, resulting in this data being subject to foreign laws of access.

10. Recent controversies involving phone hacking and publications on social media databases such as Facebook of private material have been the catalyst for public concern and renewed discussion about the need for further statutory protection of privacy in Australia.

11. Several own-motion investigations by the Australian Privacy Commissioner attest to the impact of technology on privacy protection, including the recent case involving Vodafone and breach of a privacy principle and the case involving Sony PlayStation where no privacy principle was breached. ¹

12. A statutory cause of action protecting private rights alone may not address the increased scope for dissemination of private material or information that has arisen from the combination of digital technology and the Internet.

13. Improved protection should be considered on a comprehensive basis, including the improvement of existing laws and regulatory frameworks and introduction of new legislation where necessary. This includes considering improvements to the Privacy Act 1988 (Cth) and the possible introduction of a statutory cause of action for privacy invasions.

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

14. The Law Council has not reached a position whether there is a need for a cause of action for serious invasion of privacy in Australia. There are differing views within the legal profession regarding whether private litigation is the most effective deterrent or remedy for breaches of individual privacy. The various arguments posed for and against a statutory cause of action are summarised below.

Arguments in Favour of a Statutory Cause of Action

15. The arguments for a statutory cause of action are as follows:

Inadequacy of existing regulation

(a) The existing laws and codes of conduct are piecemeal and inadequate in scope and force to provide the necessary protection for serious invasions of privacy. The existing framework offers limited remedies and insufficient incentives for compliance or for pursuing complaints. The number of privacy complaints is not an accurate indicator of the number of privacy invasions. Limited privacy complaints through the courts, regulators or industry regulators such as the Press Council could be attributed to the lack of statutory protections or penalties for invasion of privacy, lack of enforcement and resulting disincentives to launching a complaint.

Technological developments

(b) Following from the discussion above, mobile phone, internet and other technological advancements present an unprecedented scope for serious invasions of privacy, which may not be adequately addressed by the current common law and statutory framework. The management of personal

information by social networking sites and internet companies and the unauthorised use or ‘posting’ of photographs provide further opportunities for breaches of privacy.

**Lack of effective self-regulation**

(c) Confidence in industry self-regulation may have been undermined in recent times. For example, a federal government inquiry is currently examining the effectiveness of existing media codes of practice and considering “[w]ays of substantially strengthening the independence and effectiveness of the Australian Press Council, including in relation to online publications, and with particular reference to the handling of complaints”. The outcome of this media inquiry should be taken into account in assessing the effectiveness of self-regulation of the media from a privacy perspective.

**Human rights**

(d) Article 17 of the International Covenant on Civil and Political Rights (ICCPR) provides individuals with the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence. If enacted, a statutory cause of action for privacy invasions would provide an additional remedy for breaches of privacy and would be a practical additional mechanism for the protection and promotion of privacy in Australia, as required by Article 17.

**Balancing other rights**

(e) It is further argued that other rights including freedom of expression can be properly protected within the framework of any cause of action, for example by balancing the consequences of an invasion of privacy with the public interest. It has been submitted that suppression of public discourse can be addressed by establishing defences based on the countervailing public interest, consent, qualified privilege and other considerations, as discussed further in this submission. Similarly, concerns regarding interim ‘super’ injunctions should be considered and addressed in the design of any legislation.

**Arguments against a Statutory Cause of Action**

16. The arguments against a statutory cause of action are as follows:

**Regulation by the Privacy Commissioner is preferable and sufficient**

(a) A statutory cause of action for serious invasion of privacy may not provide adequate redress for individuals who are without sufficient means to institute private legal proceedings. Avenues for redress should be available to all Australian individuals on an equitable and cost effective basis. The experience, skills and complaints-handling processes of existing institutions such as the Privacy Commissioner and Press Council can be used to facilitate cost effective regulation for individuals of limited means.

(b) The current avenues of redress, including complaints processes administered by the Office of the Australian Information Commissioner (OAIC), the Press Council, and the Australian Communications and Media Authority (ACMA); the

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self-regulatory activities of major international operators of user generated content and social networking sites; the impact of public outcry and opprobrium; and other available causes of action may provide adequate redress for invasions of personal privacy.

**Unsettled international approaches**

(a) The overseas jurisprudence in this area is unsettled and, at best, embryonic. In its *Review of the Law of Privacy; Stage 3 Report*, the New Zealand Law Commission (NZLC) recommended that the tort of invasion of privacy, recognised by the New Zealand Court of Appeal in *Hosking v Runting* [2005] 1 NZLR 1 (CA), be left to develop at common law.

(b) The NZLC reasoned that the common law, rather than a statutory cause of action, was better suited to dealing with the particular circumstances of privacy cases. It was further noted that the elements of a statutory cause of action would need to be broadly drafted to ensure its ongoing relevance and that such a broad construction may do little to advance the common law position.\(^4\) The NZLC also noted a clear majority of submissions preferred the common law status quo and that there was "certainly no cry for codification".\(^5\)

**Social networking**

(c) While concern has been expressed over the absence of legal mandate for social networking site operators to address alleged serious invasions of privacy, the leading social media sites generally operate outside Australia and continue to progressively develop capabilities, systems and global policies to promptly address alleged infringements of personal privacy of Australian individuals.

**Literary and artistic works**

(d) It is submitted that a right of privacy may impinge on the freedom to create and disseminate literary and artistic works in addition to films and sound recordings, as the context in which such material is produced and disseminated may violate a statutory right of privacy.

**Freedom of expression**

(e) As Australia has no judicial or statutory protection of freedom of expression (beyond the Constitutional guarantee of political communication), it is argued that the creation of a statutory cause of action for serious invasion of privacy may adversely affect freedom of expression of journalism, professional media, non-professional media and semi-public discourse and debate through blogging, social networking and other internet sites and services.

### Statute or common law?

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<tr>
<th>Question</th>
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<td>3. Should any cause of action for serious invasion of privacy be created by statute or be left to development at common law?</td>
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17. If a cause of action for serious invasions of privacy is to be established, it should be created by statute rather than be left to development at common law.

18. There is currently no statutory cause of action for invasion of privacy in any Australian jurisdiction and there has been very little development at common law, with no appellate or High Court decisions recognising the existence or scope of a tort of invasion of privacy. There is also no certainty that any such case will reach the High Court for such a determination, given the significant cost of mounting a special leave application on a speculative question of law.

19. The common law evolves to accommodate individual cases and uncertainty as to the nature and scope of the law is likely to persist, as an individual might instead attempt to address breaches of privacy though established legislative frameworks, such as the Uniform Defamation legislation.

Jurisdictional Consistency

20. A Commonwealth Act that applies in the States and Territories would provide for national consistency in privacy protection. Any constitutional limitations on the Commonwealth’s powers to legislate with respect to the States and Territories could be addressed through parallel uniform legislation at the States and Territory levels.

21. The operation of the National Privacy Principles demonstrates that interaction between the Commonwealth, States and Territories creates complexity and confusion in the area of privacy. The National Privacy Principles are part of Privacy Act 1988 (Cth) (the federal Act) and apply to private organisations (with some exceptions). The Information Privacy Principles are also part of the federal Act and apply to Commonwealth Government agencies. Another set of Information Privacy Principles exist in some State legislation and apply to state government agencies. For example in Victoria the Information Privacy Act 2000 (Vic)) and the Health Records Act 2001 (Vic) protects health information handled by the Victorian public and private sectors. The Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic) includes a right to privacy that applies to public authorities but is not actionable in its own right. Each of the federal and State sets of Privacy Principles were developed at different times and differ in terms of scope and meaning, and are regulated by different commissioners or regulatory bodies at the federal and Victorian levels. Privacy matters addressed in other laws or on a voluntary basis by industry bodies further serve to complicate the area.6

22. If established, a statutory cause of action should apply to the private sector, individuals, federal agencies and State and Territory agencies. It should be drafted so as to override any inconsistent State or Territory legislation but it should not exclude any action at common law. Further consideration is required regarding the relationship between any act establishing a cause of action for privacy invasions and other existing and proposed Commonwealth laws, such as the Commonwealth exposure draft legislation for the personally controlled electronic health record (PCEHR) system.7

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Information and spatial privacy

23. A statutory cause of action could address both information and spatial privacy, where ‘information privacy’ refers to “control over access to private information or facts about ourselves” and ‘spatial privacy’ refers to “control over access to our persons and to private spaces”. Taking a photograph of an individual might be an invasion of spatial privacy in some circumstances whereas publishing the photograph might be an invasion of information privacy.

24. The Law Council notes the VLRC’s suggestion that it is not desirable for there to be one statutory cause of action for all serious invasions of privacy because the concept of privacy is too broad and imprecise for creating legal rights and obligations. The VLRC accordingly proposes the creation of two statutory causes of action: for misuse of information (information privacy); and interference in seclusion (spatial privacy).

25. While it is agreed that specificity is necessary to define the parameters of any cause of action, the Law Council notes that creating two parallel causes of action could cause confusion. A better option may be to provide a single cause of action and include in the definition of ‘privacy’ the concepts of spatial privacy and information privacy.

26. The developing nature of ‘privacy’ over time – as it is informed by changing social expectations – presents a challenge for any attempt to articulate a statutory cause of action. In particular, any definition of privacy must:

(a) be flexible enough to cover future concepts of privacy while providing certainty and clarity as to the scope of any cause of action in the current context;

(b) balance the right to freedom of expression, which is vital to a properly functioning democracy and should not be unduly limited; and

(c) ensure that the cause of action is not available only to public figures and other individuals with the resources to institute private legal proceedings. Adequate redress should be available to all Australian individuals on an equitable and cost effective basis.

Elements of the cause of action

Test for invasion of privacy

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

27. The Law Council does not express a concluded view as to whether ‘highly offensive’ is an appropriate element of a cause of action for serious invasions of privacy.

28. The ALRC and VLRC suggest that a cause of action for invasions of privacy should be based upon two limbs:

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(a) that there is a reasonable expectation of privacy; and

(b) that the invasion is ‘highly offensive’ to a person of ordinary sensibilities.

29. Some of the members of the Law Council have suggested that the formulation given in *Grosse v Purvis*\(^{10}\) could provide a reasonable and appropriate standard, which requires that the intrusion “be considered highly offensive to a reasonable person of ordinary sensibilities”. By avoiding strict definitions of the terms of each provision, such a formulation could ensure there is sufficient scope at common law to define each element of the civil wrong by reference to contemporary community standards. It is suggested that the element of “highly offensive” is necessary to mitigate any chilling effect of the cause of action on competing freedoms such as freedom of expression, including the ability to generate and disseminate literary and artistic works.

30. By contrast, the NSWLRC notes there should be no second limb for a cause of action for invasions of privacy, but rather that a number of matters and interests should be taken into account in determining whether a breach has occurred, including the nature of the invasion and whether it would be offensive to a person of ordinary sensibilities.

31. There is concern that the second limb noted above would unduly limit the action. A standard based on an invasion being ‘highly offensive’ could be unclear and liable to confuse the assessment of whether there is a reasonable expectation of privacy. It is noted that including a ‘highly offensive’ standard would not necessarily lead to a higher threshold for the offence, as posited by the ALRC, as the subjective nature of such a test could lead to the application of a threshold lower than one based on ‘a reasonable expectation of privacy’.

32. The term ‘highly offensive’ also focuses on the effect on the individual, rather than the person committing the breach, thereby introducing an element akin to damage. Breaches can be serious even where they do not have a large impact on an individual because the breach is the result of a systemic failure. A test which is dependent upon the offense taken by a hypothetical person also risks being unduly restricted by assumptions.

33. An alternative formulation that has been suggested is that a cause of action should be limited to ‘serious’ invasions of privacy. In determining whether an invasion is serious, a decision-maker could be instructed to take into account matters such as the consequences of the invasion for an individual or individuals, or the extent of the invasion in terms of the numbers of individuals affected. Other matters that might address the question of there being ‘a reasonable expectation of privacy’ and the ‘seriousness’ of any invasion are discussed below in question 8. Concerns about the pursuit of trivial actions may alternatively be allayed by providing a careful formulation of the ‘reasonable expectation’ test or appropriate defences.

**Balancing the public interest**

5. Should the balancing of interests in any proposed cause of action be integrated into the cause of action (ALRC or NSWLRC) or constitute a separate defence (VLRC)?

34. The Law Council does not express a view as to the better approach for the balancing of interests in any proposed cause of action. The determination of whether there is a right to relief will be based upon what are considered to be the

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\(^{10}\)[2003] QDC 151.
essential elements of the cause of action. That is essentially whether in the circumstances the plaintiff had a reasonable expectation of privacy which was breached in the required sense. Once that is established, the question arises whether any competing interests outweighed the asserted right to privacy, or whether the plaintiff’s own conduct led to there being no expectation of privacy (for example due to some form of consent, such as where a plaintiff acknowledges that his or her privacy may be compromised by engaging in the particular activity).

6. How best could a statutory cause of action recognise the public interest in freedom of expression?

35. Further to the comments above in response to question 5, it is submitted that the public interest defence should follow the framework of the statutory defence of qualified privilege as it appears in the Uniform Defamation legislation.\(^\text{11}\)

36. These provisions establish a defence to a claim in defamation for what can be described as “responsible journalism”. The non-exhaustive list of criteria used in these provisions involves weighing the private right to maintain and protect an individual’s reputation against the broader public interest. The same criteria are appropriate when considering the right to privacy against the broader public interest in disclosure of otherwise private material or information.

37. However, the Law Council notes the defence of qualified privilege may not be suitable for all forms of public interest defence, as the privilege may not be suitable to address the issue of whether publication of material to the ‘world at large’ is justified depending on the type of privacy invasion incurred. If a statutory cause of action is established, consideration should be given to how the public interest may be balanced in these circumstances.

38. This issue is further discussed below in response to questions 10, 11 and 12.

Fault element

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

39. The Law Council supports the view of the VLRC that any proposed cause of action should not be limited to intention and recklessness, and should include additional requirements as to fault, for example negligence.

40. Subjective fault elements such as ‘intentional’ or ‘reckless’ are generally applied in relation to criminal offences. The standard of proof is logically more stringent for criminal cases than civil cases. By contrast, the relevant standard in civil matters is generally negligence. It would be unusual to apply the criminal standard of fault to a civil wrong.

41. Many breaches of privacy do not stem from intentional acts, but rather from unintentional disclosures due to lack of understanding of privacy obligations; technological malfunction; human error; or systemic failures. Examples include inadvertent disseminations of information through an information technology (IT) business system malfunction; a procuring government department not properly investigating a proposed IT system (through independent consultants or auditors);

\(^\text{11}\) Defamation Act 2005 (SA) s 28; Defamation Act 2005 (NSW) s 30.
and Australian data being stored on foreign servers or databases that are not properly secured or maintained in accordance with the Australian Privacy Principles.

42. It is further submitted that intention or recklessness, as opposed to negligence, may be difficult to establish, particularly with respect to companies. A cause of action must be effective in relation to companies, which have greater resources and are more likely to collect, store, use and disclose large amounts of personal information.

43. The implications of extending a cause of action to negligence for internet intermediaries and internet hosts of user-generated content require further consideration. These entities should not be exempt from any cause of action in privacy, given their accountability to respect and protect the information privacy of their customers and users. However, where an individual breaches another individual’s privacy while using the service as a platform, it may be oppressive to hold the platform hosts liable for a breach of privacy. To do so may limit the openness of these platforms and the public interest in freedom of expression. The defences discussed in question 10 should be designed to provide appropriate protections for internet intermediaries and internet hosts of user-generated content.

44. It is further suggested that a provision should exist which deems a subordinate distributor to be liable where notice is given to that distributor that a serious invasion of privacy may have occurred, and where that distributor is or was involved in the dissemination of the material, for example on social networking sites. The subordinate distributor should have a defined period of time to respond to the notice, after which the subordinate distributor is deemed to have knowledge of the material constituting a serious invasion of privacy and would face liability for knowingly assisting in the breach. The framework for accessorial liability could be modelled on the framework in the *Competition and Consumer Act 2010* (CCA), formerly known as the *Trade Practices Act 1974* (TPA) and the *Broadcasting Services Act 1992*.

### Other relevant factors

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

45. The Law Council submits that it may be appropriate to include a non-exhaustive list of matters addressing the question of whether an invasion of privacy is actionable.

46. The statute should have sufficient scope to enable the elements to be informed by reference to contemporary community standards. Strict definitions of each of the terms used to create the statutory cause of action should be avoided.

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

47. The Law Council considers it inappropriate to include a non-exhaustive list of activities which could constitute an invasion of privacy in the legislation. A list of examples will rarely be helpful given that privacy is contextual and dependent on facts and circumstances. It would be of limited assistance to a court and may give the impression that conduct outside the parameters of the list does not constitute an

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12 CCA s75B.

13 Broadcasting Services Act 1992, Schedule 5, cl. 9(1).
invasion of privacy. If a list is incorporated into legislation, it should be on a non-exhaustive basis, to enable consideration of developments at common law and new forms of technology.

48. As discussed above in response to question 3, the VLRC recommended the introduction of two statutory causes of action for invasions of information privacy and spatial privacy. This was to address, in particular, misuse of material procured through surveillance devices used in public places. It has been noted that breaches of privacy occurring by use of surveillance devices are likely to be adequately addressed through a statutory cause of action, provided that inconsistent State and Territory legislation already governing surveillance in public places is repealed.

Defences

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

49. The Law Council considers the defences to a statutory cause of action proposed by the ALRC are appropriate, that is, that the:

(a) act or conduct was incidental to the exercise of a lawful right of defence of person or property;
(b) act or conduct was required or authorised by or under law; or
(c) publication of the information was, under the law of defamation, privileged¹⁴ whereby the statutory qualified privilege defence and public interest defence are as they appear in the Uniform Defamation legislation.¹⁵ The inclusion of ‘the public interest’ would serve to protect freedom of expression where appropriate, and also cover matters of national security where it is not otherwise covered by the defence of lawful excuse.

50. The VLRC has suggested that consent should also be included as a defence to any proposed cause of action. If consent were to be included as a defence, such consent should be informed as opposed to inadvertent consent. In practice, ‘consent’ has been used to effectively negate the application of the National Privacy Principles, whereby some businesses (including social networking and other websites) have taken consent to a single activity to be complete consent to invasions of privacy that are not proportionate or connected to the single activity for which consent was actually given.

51. For example, ticking an “I have read the Terms and Conditions” box on paper or online forms may not, in some circumstances, be an appropriate means of obtaining consent to invasions of privacy where the invasion is unnecessary or disproportionate to the context in which the product or services are acquired. Similarly, a notice at the entrance to a pub deeming the act of entry consent to scanning, retention and disclosure of a person’s driver licence information is not an appropriate means or basis for consent. If consent is included as a defence, consideration should be given to whether consent would be assessed subjectively or objectively, and whether express or implied consent is sufficient.

¹⁴ ALRC Report rec 74-4.
¹⁵ For example, Defamation Act 2005 (SA), s 28; Defamation Act 2005 (NSW), s 30.
52. Defences appropriate for internet intermediaries or hosts of user-generated content on the internet require further consideration.

### Exemptions

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

53. The Law Council supports the approach of the VLRC, that is:
   
   (a) no organisations or classes of individuals should be exempted from the proposed statutory causes of action; and
   
   (b) the defences provide adequate protection for those engaged in legitimate activities.

54. National security agencies, investigative or enforcement agencies and other branches of the Executive Government should not be exempted from the proposed cause of action. The actions of these bodies should be taken into account in the context of a lawful excuse or ‘public interest’ defence. The "Wood Royal Commission"\(^\text{16}\) and "Fitzgerald Inquiry"\(^\text{17}\) into police corruption have demonstrated that corrupt officials have in the past disseminated private or confidential information for illegal or improper purposes. Accordingly, it would be inappropriate for public officials or the agencies which employ them to receive any blanket exemption or immunity.

55. Small businesses should also not be exempt, as small businesses are capable of causing significant invasions of privacy.

56. Some organisations may be particularly susceptible to breaches of any statutory cause of action. For example, banks and other financial institutions hold large amounts of private information. It is appropriate to consider the impact of a statutory cause of action on the operation of such organisations when formulating the terms of the action. However, susceptibility to breaches is not a reason to limit the application of a statutory cause of action with respect to such organisations.

57. As discussed above in response to question 10, the defences should provide adequate protection for legitimate activities or justifiable breaches of privacy.

### Remedies

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

58. The Law Council generally supports the remedies recommended by the ALRC for a proposed cause of action, subject to the concerns identified below regarding apologies, exemplary damages and injunctions.

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Exemplary damages

59. It may be appropriate to allow an award of exemplary or ‘punitive’ damages “as punishment of the guilty, to deter from any such proceeding for the future, and as a proof of the detestation […] to the action itself”, as laid out in Lamb v Cotogno and cited in Giller v Procopets. However, exemplary damages should be awarded only in exceptional cases, given the potential effect on freedom of expression. Further to the discussion below in response to question 13, if exemplary damages are included as a remedy, it may be necessary to impose a statutory limit on awards of exemplary damages.

Injunctions

60. The use of interim ‘super’ injunctions to restrain publication is a contentious issue. In particular, there is conjecture around whether a conventional balance of convenience test should be applied to the grant of interim injunctions restraining publication of allegedly private material. The Law Council is advised that the granting of ‘super’ injunctions by the English courts has significantly constrained the reporting of facts about the behaviour of private individuals in public space. In May 2011 a Committee chaired by the Master of the Rolls, Lord Neuberger, published its findings on ‘super’ injunctions, finding that such a regime based upon a statutory mandate to balance a claimant’s right to respect for privacy and a publisher’s right to freedom of expression may lead to a chain of decisions that excessively limit media expression.

61. The scope of any injunctions granted may need to address the practical circumstances of the case. The relevance and possible impact of awarding a ‘super’ injunction, such as those awarded in the United Kingdom, requires further consideration. Any remedies may need to define an appropriate test to deter excessive growth of ‘super’ injunctions and consequent limitation on free expression and responsible reporting.

Apologies

62. The Law Council notes that an apology made only under compulsion is of limited substance and may be as demeaning to the person receiving it as to the person who is required to make it. An apology, by definition, involves regret and an acknowledgement of fault. Where a defendant has staunchly denied that his or her conduct involved any wrongdoing it may not be appropriate to require that an apology be made for that conduct even if a court or tribunal has found against the defendant on that issue.

63. An offer of amends process is an alternative mechanism that has been suggested to provide the defendant an incentive to deal with a privacy complaint expeditiously and where an apology may effectively be given of its own volition.

Damages

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

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64. The Law Council does not provide a conclusive view of whether damages should be limited for non-economic loss.

65. There is some support amongst Law Council members for the views of the ALRC and VLRC that there should be no cap for awards of damages for non-economic loss, as the courts are considered to have the ability to make an appropriate assessment of damages in the circumstances of each case.

66. There is also support, however, for a possible cap of $250,000 for awards of damages for non-economic loss, in accordance with the Uniform Defamation legislation.21

67. Consistent with uniform defamation legislation,22 it has been suggested that there should be a requirement that damages bear a ‘rational relationship’ to the harm, given the potential disconnect between actions and the resulting harm. Complainants should not be able to recover unreasonable amounts relative to the harm occasioned by the invasion of privacy. This should be subject to an assessment of the degree of the defendant’s culpability when determining whether to award exemplary damages for grossly negligent, reckless or intentional conduct.

68. As noted above, it may also be appropriate to impose a maximum award where exemplary damages are awarded given the potential lack of proportionality between harm and damage and the potential impact such damages may have on media freedom.

69. Consideration could be given to including a non-exhaustive list of considerations relevant to the assessment of damages for non-economic loss, such as the scope and nature of the breach; the nature of the privacy interest breached; the vulnerability of the individual; the effect on the individual and possibly other matters as discussed above in response to question 8.

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

70. The Law Council supports the view of the ALRC, that any cause of action should not require proof of damage, consistent with the torts of trespass and defamation.

71. Damages for non-economic loss are unlikely to be substantial in most cases, unless a recognised (and lasting) psychiatric or psychological injury is caused by the breach, adding to future pain and suffering. Damages for economic loss may well arise in circumstances where there has been a loss of employment or other income, or loss of opportunity, where the plaintiff should be required to prove a loss of earnings, profits or earning capacity.

72. If compensation for breach of privacy is to compensate for an injury to the complainant’s feelings or humiliation suffered, as set out, for example, in the Health Records Act 2001 (Vic)23 or the Information Privacy Act 2000 (Vic)24, it should not be limited to damage that can be the subject of proof. Compensation should be available for ‘mere distress’25 and for ‘hurt, distress, embarrassment, humiliation,

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21 Defamation Act 2005 (SA) s 33; Defamation Act 2005 (NSW) s 35.
22 Defamation Act 2005 (NSW) s 34.
23 S 78(1)(a)(iv).
24 S 43(1)(iiii).
shame and guilt caused by privacy invasions. It is noted, however, that establishing damage giving rise to actual compensable loss may be difficult, absent recognised psychiatric injury caused by the disclosure of otherwise confidential and private material or information.

Alternative dispute resolution

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

73. It would be appropriate to include an offer of amends process as a remedy. However, as with uniform defamation legislation, such an offer should not be a pre-condition for bringing an action for invasion of privacy, and any offer of amends should be taken into account in assessing whether the plaintiff suffered damage.

74. It is suggested that the offer of amends process mirror the Uniform Defamation Legislation. This process would provide the opportunity for parties to come to a mutually agreeable settlement of the matter prior to instituting proceedings, thereby avoiding the costs and risks of doing so. The process is also well suited to giving notice of the breach and to have the party in breach refrain from any further disclosure or dissemination of the otherwise private material or information. The process may also incorporate notice to a subordinate distributor of a breach, as discussed above in response to question 7.

Other issues

Natural persons

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

75. Consistent with the views of the ALRC, VLRC and NSWLRC, the cause of action should be restricted to natural persons, noting that the right to privacy under the ICCPR vests only in individuals.

76. Corporate entities have a variety of legal remedies to protect and restrain employees, competitors and others from the disclosure or misuse of confidential information. Moreover, corporate entities are incapable of suffering any psychological or emotional harm, which may be an element of the cause of action, for instance according to the formulation discussed above in Grosse v Purvis.29

77. As stated above, it is necessary to ensure that any cause of action is accessible to all individuals who are subject to a serious invasion of privacy as opposed to only individuals with a public profile and resources to launch a complaint. It may be appropriate, for example, to give an independent regulator such as the Privacy Commissioner the power to bring actions on behalf of an individual or groups of individuals as a means of ensuring those with limited resources have access to appropriate remedies. Enabling an independent regulator to bring actions would ensure accountability for financially insignificant breaches affecting individuals.

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27 Defamation Act 2005 (NSW) s 13, s 14.


29 [2003] QDC 151 at [444].
would also acknowledge the public as well as private elements of privacy breaches, as privacy breaches threaten the confidence of individuals and the community in transactions involving the provision or exchange of personal information.

78. The Law Council notes that any power given to an independent regulator to pursue actions would need to be carefully considered as this may result in a far more extensive system of privacy regulation that is essentially governed by a regulator and not by a private cause of action. Of additional concern is whether public regulation and private litigation of the same conduct is appropriate or potentially oppressive to those who breach privacy, particularly individuals and small companies with limited resources.

Deceased persons

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

79. The Law Council generally considers it appropriate to limit the cause of action to living persons who allege invasions of privacy, although recourse should be available to living persons associated with deceased persons whose privacy has been breached. For example, a living representative of a deceased person should have recourse to civil action where the telephone messages of a deceased person were intercepted. It is noted also that the protection of health information under the *Health Records Act 2001 (Vic)* extends to the health information of deceased persons.31

Limitation of actions

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

80. The Law Council supports a limitation period of one year, consistent with the time limits which apply under Uniform Defamation legislation,32 whereby the limitation period begins from the time the plaintiff first has notice of the breach, or alternatively from the time the plaintiff first suffers harm as a consequence of the invasion.

Jurisdiction

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

81. Jurisdiction to hear and determine actions for serious invasion of privacy should be vested in any Federal, State or Territory courts with power to grant both interim and permanent injunctions.

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31 S 95.
32 *Limitation of Actions Act 1936* (SA) s 37; *Limitations of Actions Act 1969* (NSW) s 14B and s 56A.
Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 56,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.