



Australian Government

Australian Law Reform Commission

# Media Briefing Note 10

## ALRC Privacy Inquiry

11 August 2008

### **A statutory cause of action for serious invasions of privacy: getting the balance right**

To date, no Australian jurisdiction has legislated to allow an individual to take action in court for a serious invasion of privacy, although New Zealand courts have recognised the existence of a common law tort of privacy, as have two lower courts in Australia.

In Europe and the United Kingdom, however, a number of significant cases have established the existence of a cause of action for the unlawful publication of private information. Celebrities such as Naomi Campbell, Princess Caroline of Monaco, JK Rowling and, most recently, Max Mosley, have successfully sued over the publication of photographs and articles exposing aspects of their private lives.

Success in these cases generally has depended on plaintiffs establishing: (a) ‘a reasonable expectation of privacy’ in the circumstances; (b) the interference with their privacy was serious; and (c) there was not a greater public interest in the publication of the material.

ALRC President, Professor David Weisbrot, noted that “the Inquiry consistently heard strong support for the enactment of a statutory cause of action for serious invasions of privacy in Australia.

“While the debate overseas has focused mainly on the activities of ‘paparazzi’ photographers, interestingly most of the concerns expressed to the ALRC related more to the private sphere than to the mainstream media—and to the protection of ordinary citizens rather than celebrities.

“For example, the ALRC heard stories of people’s enormous distress at invasions of their privacy, such as photographic images being captured in toilets or dressing rooms with small digital cameras or phones, and then shown to others or posted on internet sites. People are extremely concerned about new technology and the ease with which their private personal images may be captured and disseminated”.

The possible introduction of a statutory cause of action for invasion of privacy was the subject of spirited debate during the ALRC’s Privacy Inquiry. Media proprietors and some organisations opposed such a development, arguing that it would hinder investigative journalism and potentially infringe freedom of expression, but there was strong support for the development of a cause of action from other sectors of the community, including among human rights and public interest advocacy organisations.

Commissioner in charge of the Privacy Inquiry, Professor Les McCrimmon, stated that it was clear from the ALRC’s community consultation that there is concern amongst Australians about unwanted intrusions into their private lives. “At the same time, privacy interests cannot be privileged over other important rights and interests, such as freedom of expression. The ALRC recommendations will require the court to balance the privacy claim against other rights and important public interests when determining whether the cause of action has been established”.

The ALRC recommends that federal legislation create a statutory cause of action for a serious invasion of privacy, including in circumstances in which:

- there has been an interference with an individual’s home or family life;
- an individual has been subjected to unauthorised surveillance;
- an individual’s correspondence or private communication has been interfered with; or
- sensitive facts about an individual’s private life have been disclosed.

**Media contact:** Vicki Jackson on 0413 167 329 or (02) 8238 6309 or via email at <[vicki.jackson@alrc.gov.au](mailto:vicki.jackson@alrc.gov.au)>.

The Privacy Report and detailed Briefing Notes on 10 key areas can be found at <[www.alrc.gov.au](http://www.alrc.gov.au)>

Professors Weisbrot and McCrimmon are available for interviews

## *A statutory cause of action for serious invasions of privacy: getting the balance right*

The cause of action should apply only where the individual had a reasonable expectation of privacy; and the act or conduct complained of is *highly offensive* to a reasonable person.

In addition, the court would be required to consider whether the public interest in maintaining the claimant's privacy outweighs other matters of public interest (including the interest in informing the public about matters of public concern and the interest in allowing freedom of expression). Courts should be empowered to tailor appropriate remedies, such as orders for damages, injunctions or apologies.

In the absence of any express protection of freedom of speech in the *Australian Constitution*, the High Court has held in a series of cases culminating in *Lange v ABC* (1997) that the *Constitution* must be read as impliedly protecting a particular category of expression—namely, political communication.

However, Professor Weisbrot noted that “In this Inquiry and in others (such as the review of federal sedition laws), the ALRC has argued for the adoption of a broader conception of freedom of expression than is found in the High Court cases. Protection should not be limited to political speech, nor should it be limited only to reporting by the media, since artistic and other creative works also fall within ‘freedom of expression’.

“A statutory cause of action provides an opportunity to ensure that the appropriate balance between the public interests in protection of privacy and freedom of expression (and other public interests) is struck. Recognising these other public interests simply reflects the fact that the right to privacy is not absolute—in appropriate circumstances, it will have to give way to other competing interests.

“The ALRC’s recommended formulation for the cause of action sets a high bar for plaintiffs, having due regard to the importance freedom of expression and other rights and interests in Australian society. However, there are outrageous cases in which an individual’s privacy has been trampled, and damages or an apology are warranted.”

### **Examples of the types of matters intended to fall within the ALRC’s recommended statutory cause of action for serious invasion of privacy include the following:**

- After the break-up of their relationship, Mr A sends copies of a DVD of himself and his former girlfriend (Ms B) engaged in sexual activity to B’s parents, friends, neighbours and employer;
- Mr C sets up a tiny hidden camera in the women’s toilet at his workplace, capturing images of his colleagues that he downloads to his own computer and transmits to a website hosted overseas, which features similar images; and
- Ms D works in a hospital and obtains access to the medical records of a famous sportsman, who is being treated for drug addiction. D makes a copy of the file and sells it to a newspaper, which publishes the information in a front page story.

For more information about the recommended statutory cause of action, see Chapter 74 of *For Your Information: Australian Privacy Law and Practice* (ALRC 108, 2008). The report is available electronically from the ALRC website <[www.alrc.gov.au](http://www.alrc.gov.au)>.