

Serious Invasions of Privacy in the Digital Era

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Principles guiding reform

Question 1. What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, the design of a statutory cause of action for serious invasion of privacy? What values and interests should be balanced with the protection of privacy?

Societal conceptions of privacy have changed significantly over the past two decades, particularly influenced by events such as 9/11, and the rapid adoption of new technologies, social media, cloud and location services into mainstream society. As current legislation largely predates the existence of contemporary technological options, notable gaps exist in its utility and function moving forward, leaving some without redress for what can reasonably be recognised as an invasion of privacy, and legal provisions against such invasions significantly lacking. A recent review and amendments to the Privacy Act go some way to ameliorate these circumstances.

While it may be easy to let moral panics or hysteria generated by the activities made possible by recent technological advances (e.g. aggregation of data, location tracking, covert surveillance) inform the ALRC's approach to the inquiry, a measured approach upholding the value of privacy is desirable to ensure the specificity, clarity, consistency and endurance of any new statutory causes of action under design. The types of breaches deemed to constitute a 'serious' invasion of privacy for a reasonable person with normal sensibilities would need to be ascertained and assessed, as well as some indication of the frequency at which these breaches currently occur in the Australian context.

The protection of privacy must be weighted against a number of competing interests, including civic rights, freedom of speech, the detection and prevention of criminal activity and the safety, health and security of citizens - particularly minors and other vulnerable populations. As in other areas of the law in Australia, serious breaches of privacy cannot be wholly prevented, however a statutory cause of action could assist symbolically in public recognition and understanding of the severity of consequences that can result from wilful or inadvertent acts of this nature, and offer some means of recourse to victims where previously this was not easily achieved.

The impact of a statutory case of action

Question 2. What specific types of activities should a statutory cause of action for serious invasion of privacy prevent or redress? The ALRC is particularly interested in examples of activities that the law may not already adequately prevent or redress.

While the outcomes of serious invasions of privacy are myriad, what constitutes them is also lacking in definition. While each case of privacy invasion is largely subjective in nature, as aforementioned minimum standards of what constitutes a 'serious' invasion by reasonable interpretation would need to be established in order for a statutory cause of action to be successful.

Some examples of activities that the law may not already adequately prevent or redress are the misuse of private data posted to social networking websites, including malicious dissemination or unauthorised manipulation for the purposes of sexting, embarrassment or other defamatory functions.

Accidental misdirection or unauthorised disclosure of personal information (e.g. health, rental, welfare or banking details) by an organisation charged with its care, as well as misrepresentation of or deviation from standard declarations of the access, use and storage of information should also carry varying levels of penalty and recourse.

While such acts may currently be punishable by law in some contexts to varying degrees, it can be difficult to seek recourse without firm guidelines on what options are available concerning breaches of privacy pertaining to one's own information or image, particularly for those with limited access to paid legal guidance, such as young people.

Question 3. What specific types of activities should the ALRC ensure are not unduly restricted by a statutory cause of action for serious invasion of privacy?

Any statutory cause of action must not unduly restrict civic rights or freedom of expression in order to garner acceptance by the Australian community. Allowances in this area can be difficult in the face of heightened emotions concerning the area of privacy, particularly with regard to children and young people in recent years.

Judgments need to be made in assessing the risk posed by serious invasions of privacy versus the consequences of unfairly impinging on existing rights without cause. In addition, when dealing with defendants who are minors or otherwise vulnerable, consideration of their ongoing wellbeing must also be made so as not to restrict future opportunities or cause lifelong stigma for the sake of punishing an unintentional, ill thought out or otherwise rash indiscretion.

Invasion of privacy

Question 4. Should an Act that provides for a cause of action for serious invasion of privacy (the Act) include a list of examples of invasions of privacy that may fall within the cause of action? If so, what should the list include?

Yes, examples would assist in ensuring the act is easily understood by the parties it governs, however these would need to be relatively general in nature to ensure their ability to translate over time. The list should include serious privacy breaches found to be those that commonly occur in the Australian context, for example, unauthorised surveillance or misuse of personal information. Making a summation of the pertinent points of the act publicly available (perhaps online) alongside FAQs and careful articulation of means of complaint and available restitution would further ensure its utility without detracting from official versions of the Act.

More detailed examples of serious privacy invasion could be sourced through de-identified data gleaned from common complaints received by privacy regulatory bodies, for example the Office of the Australian Information Commissioner (OAIC). These could be categorised and made available by the type of information released (e.g. health, financial, imagery) or the medium or forum through which the breach took place (e.g. online, workplace, service provider) for ease of navigation and comparison by members of the public.

Question 5. What, if any, benefit would there be in enacting separate causes of action for:

- **misuse of private information; and**
- **intrusion upon seclusion?**

It is my personal belief that the distinctions between these two facets of privacy are worth articulating separately within the act, as while they often occur separately in differing contexts (actionable in their own right), they can also occur in tandem, potentially warranting multiple charges or penalties under the provisions of the Act.

For example, inappropriate or undisclosed surveillance of employees in a change room on company premises would be a breach in its own right, however unauthorised display or dissemination of any footage or still imagery resulting from the surveillance would warrant further action than if the first act were committed in isolation.

Privacy and the threshold of seriousness

Question 6. What should be the test for actionability of a serious invasion of privacy? For example, should an invasion be actionable only where there exists a 'reasonable expectation of privacy'? What, if any, additional test should there be to establish a serious invasion of privacy?

While a 'reasonable expectation of privacy' is suitable for a baseline measure of whether the Act is actionable in a particular scenario, it is my belief that some leeway for case-by-case consideration of the facts (or differing baselines based on pre-determined criteria) should be permitted to ensure proportionate restitution and punitive measures are delivered, while not lessening understanding of the gravity of the situation.

For example, privacy invasions committed against minors or otherwise vulnerable individuals (e.g. those with a disability or those with particular sensitivities to subject matter relevant to the invasion) may have a more significant impact than if the same events transpired against a person of a more advanced age without similar impairments or sensitivities. In kind, allowances for the perpetrator, as well as their intent should also be taken into account, for example, a proven accidental invasion should not carry the same consequences as one committed with forethought or malicious intent, just as crimes committed by a minor should not generally be considered as equal to those committed by an adult of sound mind.

Privacy and public interest

Question 7. How should competing public interests be taken into account in a statutory cause of action? For example, should the Act provide that:

- **competing public interests must be considered when determining whether there has been a serious invasion of privacy; or**
- **public interest is a defence to the statutory cause of action?**

While there could be merit in stating that public interest alone is a defence to the statutory cause of action, the discretion to weight all interests in a invasion on a case-by-case basis should be granted to ensure that the most appropriate course of action is applied.

While similar scenarios may present themselves under any iteration of such an Act, it is likely that no two invasions will be identical, each requiring consideration of differing factors that may make an invasion more or less severe, or the general public interest more or less pertinent. For example, investigation of a situation where a child's safety has been brought into question may warrant increasingly invasive lines of inquiry as compared to the same situation occurring to an adult or property.

Question 8. What guidance, if any, should the Act provide on the meaning of 'public interest'?

As the act is required to govern people of varying levels of comprehension, further explanation of what constitutes the 'public interest' is warranted, as the concept does fall victim to some level of ambiguity. Examples that serve to illustrate this in a context the average Australian individual would

understand could also be of assistance (e.g. detention of an individual proven to be a danger to the public and prone to recidivism would be in the best interests of the public).

Fault

Question 9. Should the cause of action be confined to intentional or reckless invasions of privacy, or should it also be available for negligent invasions of privacy?

In many cases, regardless of the intent of the invasion, the resultant consequences are the same, and the revelation that the circumstances were caused by negligence or a failure to act is likely to be cold comfort to the individual or group whose privacy has been breached - for example, intentional filming that took place in a gym's showers vs. surveillance placed for security purposes in the area that incidentally captured private bathroom activity.

Both actions should be covered under the act for a number of purposes, most notably for the victims of such unwanted invasions, but also to discourage commission of invasions of privacy through negligence, and removal of negligence as an immediate 'go-to' defence when accused. However, differing punitive actions (as compared to murder vs. manslaughter) would be warranted.

Damage

Question 10. Should a statutory cause of action for serious invasion of privacy require proof of damage or be actionable *per se*?

While as aforementioned, minimum standards of what constitutes an invasion should be ascertained, not all are likely to cause the same level of damage or evoke similar levels of abhorrence depending on the nature and situation of the victim. Not all serious invasions are likely to be brought for action if considerable damages are not perceived to have been incurred. In some cases, proof of damage would be required when there is doubt that an invasion has taken place, or an issue of fault arises, for example an invasion concerning banking details when the individual in question has knowingly shared their password with others.

However, if the incident's severity would be sufficient to support action by virtue of its existing circumstances, automatic action could be warranted. For example, breaches of privacy committed against a child or young person who may not fully comprehend the events that took place or the consequences therein.

Question 11. How should damage be defined for the purpose of a statutory cause of action for serious invasion of privacy? Should the definition of damage include emotional distress (not amounting to a recognised psychiatric illness)?

Damages resulting from serious invasions of privacy are difficult to define, due to the subjective nature of contributing elements - unlike damage to physical property, which may be easier to recognise and classify.

Again, while baseline damages should be articulated (e.g. defamation, loss of income) reasonable consequences linked to emotions (e.g. distress, humiliation, insult) are also equally viable damages, regardless of the intent of the breach. Exacerbation of existing psychological conditions or the occurrence of new ones (such as post traumatic stress, anxiety or depression) may also be something to be considered, however without specific expertise in the field I cannot comment as to what extent.

Defences and exemptions

Question 12. In any defence to a statutory cause of action that the conduct was authorised or required by law or incidental to the exercise of a lawful right of defence of persons or property, should there be a requirement that the act or conduct was proportionate, or necessary and reasonable?

Yes, this would be where discussions of public interest outweighing an expectation of privacy come into play, albeit with the onus of proof to be borne by the defendant. For example, covert surveillance of a person of interest in the event he or she is linked to the disappearance of a child or terrorist activity may to some degree be warranted for the greater good.

The parameters around this would, however, need to be clearly defined to avoid abuse of such privileges or the disregarding of proper protocols concerning warrants and other rights of refusal on the part of the person the breach would impact.

Question 13. What, if any, defences similar to those to defamation should be available for a statutory cause of action for serious invasion of privacy?

I am unable to comment with authority in this area.

Question 14. What, if any, other defences should there be to a statutory cause of action for serious invasion of privacy?

A number of defences could be accepted for a serious invasion pending other factors, for example, a minor disseminating sexual images of another minor, while a serious invasion, could evoke a lesser action than if the same circumstance were to happen with an overage perpetrator.

In kind, to varying degrees, unintentional human error or systemic failure, public interest, negligence, incidental breach, misinterpretation of intent, the fact that the data was publicly accessible or contractual consent could also be used as defences against a statutory cause of action in this regard.

Question 15. What, if any, activities or types of activities should be exempt from a statutory cause of action for serious invasion of privacy? Aside from examples concerning public interest or surveillance for general safety (e.g. tracking devices placed on newborns in hospitals to prevent unauthorised removal from the premises), it is my belief that problematic invasions of privacy committed by minors by virtue of their age and implied immaturity (depending of course on the severity of the resulting consequences or recidivism of the offender) should not result in sanctions where possible.

Rather, such instances should be directed to alternative methods of punitive action (fines, community service or official apology) not resulting in a criminal record or register listing, for example being branded as a registered sex offender for taking, possessing or distributing explicit images of another minor.

Monetary remedies

Question 16. Should the Act provide for any or all of the following for a serious invasion of privacy:

- a maximum award of damages;
- a maximum award of damages for non-economic loss;
- exemplary damages;
- assessment of damages based on a calculation of a notional licence fee;
- an account of profits?

While not appropriately qualified to comment on all suggestions above, monetary resolutions for serious invasion of privacy could be warranted for the purposes of deterrence and in instances of a serious invasion where no other agreement could be reached – particularly one that resulted in economic loss or similar liability (e.g. defamation resulting in loss of employment/damage to professional reputation) for the claimant.

Monetary restitution for factors that are harder to measure, like pain and suffering could also be considered, as could exemplary measures, (should the seriousness of the invasion warrant it) but I am unable to comment as to what dollar value may be placed on such circumstances.

Injunctions

Question 17. What, if any, specific provisions should the Act include as to matters a court must consider when determining whether to grant an injunction to protect an individual from a serious invasion of privacy? For example, should there be a provision requiring particular regard to be given to freedom of expression, as in s 12 of the Human Rights Act 1998 (UK)?

I am unable to comment with authority in this area.

Other remedies

Question 18. Other than monetary remedies and injunctions, what remedies should be available for serious invasion of privacy under a statutory cause of action?

As in other areas of the Australian legal system, a range of remedies should be made available for use in the instance of a serious invasion of privacy. Aside from monetary remedies and injunctions, these could include community-based orders, mediation, conciliation, arbitration or other methods of alternative dispute resolution if the circumstances of the incident or involved parties permit it. In some cases where negligible damages have been experienced despite the seriousness of the invasion, a simple acknowledgement of fault, apology or change in business practices (e.g. re-training of culpable staff or departments) may suffice, preventing costs and lengthy delays if the matter were to proceed to court.

Who may bring a cause of action

Question 19. Should a statutory cause of action for a serious invasion of privacy of a living person survive for the benefit of the estate? If so, should damages be limited to pecuniary losses suffered by the deceased person?

I am unable to comment with authority in this area.

Question 20. Should the Privacy Commissioner, or some other independent body, be able to bring an action in respect of the serious invasion of privacy of an individual or individuals?

Whilst my expertise does not extend to the logistics of an independent body bringing such an action in respect to a serious invasion of privacy, such a body would likely be helpful at least as a point of first contact for advice regarding the rights of a claimant or defendant, similar in kind to Consumer Affairs when negotiating breach of a rental agreement.

While the Privacy and Information Commissioners may already perform some related functions (e.g. the hearing of privacy complaints covered by the Privacy Act), greater knowledge of services and redress available, and perhaps the provision of low-cost advice and/or advocacy between small claimants and large organisations (similar in kind to services offered at the Victorian Legal Aid service) could be helpful in empowering a claimant to pursue an outcome, rather than feeling nothing can be done and enduring the consequences, or believing that action would be too time consuming, difficult to prove, or expensive to pursue.

Limitation period

Question 21. What limitation period should apply to a statutory cause of action for a serious invasion of privacy? When should the limitation period start?

I am unable to comment with authority in this area.

Location and forum

Question 22. Should a statutory cause of action for serious invasion of privacy be located in Commonwealth legislation? If so, should it be located in the *Privacy Act 1988* (Cth) or in separate legislation?

I am unable to comment with authority in this area.

Question 23. Which forums would be appropriate to hear a statutory cause of action for serious invasion of privacy?

I am unable to comment with authority in this area.

Question 24. What provision, if any, should be made for voluntary or mandatory alternative dispute resolution of complaints about serious invasion of privacy?

I believe that the notion of alternate dispute resolution is an option that would be of particular merit in this area, providing a faster and more cost effective alternative to judicial proceedings. Varying degrees of discussion, restitution and penalty commensurate to the offense and its resultant effects should be explored in order to achieve both a satisfactory outcome for the claimant (e.g. an apology) and suitable punitive or rehabilitative options for the defendant, without unduly burdening the courts with an influx of cases of this nature.

It is important to note that despite the seriousness of a complaint, the rights of offenders who commit such acts are not extinguished completely, especially if the offender is under the age of 18, or otherwise vulnerable. A duty of care exists to ensure such offenders are treated with the appropriate consideration and presented with options to avoid sanctions that could lead to stigma or further criminality.

Interaction with existing complaints processes

Question 25. Should a person who has received a determination in response to a complaint relating to an invasion of privacy under existing legislation be permitted to bring or continue a claim based on the statutory cause of action?

I am unable to comment with authority in this area.

Other legal remedies to prevent and redress serious invasions of privacy

Question 26. If a stand-alone statutory cause of action for serious invasion of privacy is not enacted, should existing law be supplemented by legislation:

- providing for a cause of action for harassment;
- enabling courts to award compensation for mental or emotional distress in actions for breach of confidence;
- providing for a cause of action for intrusion into the personal activities or private affairs of an individual?

Yes. If the above-named circumstances pertaining to privacy are not covered by existing law and cannot be remedied or actioned through provisions made by a stand-alone statutory cause of action, supplementary legislation is required to cover the gaps that exist. Such amendments would assist in maintaining the currency and utility of existing legislation in this area.

Question 27. In what other ways might current laws and regulatory frameworks be amended or strengthened to better prevent or redress serious invasions of privacy?

Regulatory action in this area is promising, and would serve as public acknowledgement of the severity of this kind of invasion, especially when the information released or circumstances breached are unable to be effectively retracted. It also has the potential to provide victims of serious breaches with some form of redress and those who perpetrate such acts with some form of consequence – something that is difficult to ensure in the current climate, or at times taken far too lightly when a complaint of this nature is received.

This said, while such acts should be deterred, allowing for flexibility within any laws or regulatory frameworks to be implemented or amended (particularly in the case of young perpetrators) is required. This would aid in ensuring that notions of criminality or other stigma are not unfairly placed on individuals whose actions were not committed maliciously, or with a full understanding of the long-term consequences and implications of their actions (e.g. sensitive information shared via social media as a retaliatory action following a breakup or argument).

Question 28. In what other innovative ways may the law prevent serious invasions of privacy in the digital era?

With regard to concerns of privacy in the digital era (related to events transpiring electronically, over mobile devices and via social media), knee-jerk policy decisions inspired by fear or only a perfunctory analysis of the situations at hand are not the answer. Just as the digital area has gradually brought with it new challenges for privacy, so too must regulatory procedures and legislative solutions be formulated gradually that are considered, with the flexibility to grow and develop with the technologies and practices they are designed to govern. This will likely take time to formulate, assess and implement effectively.

Rising use of social media and its affordances by young people in particular has brought with it calls for action for the protection of their privacy, and abhorrence at the perceived lack of action by governments and the Australian criminal justice system on this issue to date. Despite this, it must be said that there is no magic bullet in the prevention of such breaches, and a statutory cause of action implemented now is not likely to have significant or immediate effect on the form and frequency of what are now firmly ingrained youth practices (e.g. sexting, online information disclosure) or the privacy-related consequences of such pursuits. Sufficiently funded educative options targeted at and involving young people may go further towards these ends than legislation alone, but again are unlikely to create a situation where problematic circumstances do not occur.