

## Serious Invasions of Privacy in the Digital Era – Telstra’s response to Issues Paper 43

November 2013

Please note Telstra’s previous submission on this area <http://www.ag.gov.au/Consultations/Documents/Righttosueforseriousinvasionofpersonalprivacy-issuespaper/32%20Telstra.PDF>

Question	Telstra’s response
<b>Principles guiding reform</b>	
<p><b>Question 1.</b> 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?</p>	<p>In terms of designing a statutory cause of action, we suggest the following be considered:</p> <ul style="list-style-type: none"> <li>• Clarity as to what may give rise to a cause of action;</li> <li>• No conflict or overlap with existing laws and regulations;</li> <li>• Maintenance of freedom of communication in Australia;</li> <li>• Ensuring that Australian media businesses are not disadvantaged relative to their overseas internet counterparts (including by ensuring that innovation, economic growth and global competition are not discouraged);</li> <li>• Ensuring that online businesses are not discouraged from having assets or a physical presence in Australia; and</li> <li>• Avoidance of a large range of privacy claims amongst individuals and against businesses and governments.</li> </ul>
<b>The impact of a statutory cause of action</b>	
<p><b>Question 2.</b> 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.</p>	<p>We are comfortable that the existing legal and regulatory framework together with our own internal compliance regime sufficiently address privacy matters, including the management of any concern raised by a customer or individual regarding a serious breach of their privacy. If there is any “gap” then it should be filled by way of a specific measure directed at the problem in question, not by way of the broad ranging cause of action proposed;</p> <p>We also make the following points:</p> <ul style="list-style-type: none"> <li>• The existing powers of the Australian Privacy Commissioner together with other legislative measures provide a sufficient level of protection to individuals whose privacy has been breached;</li> <li>• Key laws include defamation, breach of confidence, Part 13 of the</li> </ul>

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	<p><i>Telecommunications Act</i>, surveillance Acts (which prohibit publication of information obtained using unlawful surveillance), trespass, nuisance, criminal laws, statutory secrecy requirements and the <i>Privacy Act</i>;</p> <ul style="list-style-type: none"> <li>• In addition, although the common law appears to be developing following the decision in <i>Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd</i> (2001) 208 CLR 199 and consequent lower court decisions regarding privacy and breach of confidence, there has not been a subsequent increase in actions for breach of privacy and as such, it does not appear that the creation of a cause of action for breach of privacy (statutory or otherwise) is currently warranted; and</li> <li>• In any event, if a significant increase in invasion or breach of privacy claims does occur in the future, as Gummow and Hayne JJ noted in <i>Lenah</i>, the adaptation and development of recognised causes of action to meet new situations and circumstances may be the most appropriate method of addressing this issue, as finding 'specificity' in a cause of action for invasion of privacy is likely to be difficult (as can be evidenced from responses to later questions in this submission).</li> </ul>
<p><b>Question 3.</b> What specific types of activities should the ALRC ensure are not unduly restricted by a statutory cause of action for serious invasion of privacy?</p>	<p>The ARLC should consider:</p> <ul style="list-style-type: none"> <li>• Freedom of communication in Australia – both in the media and at an individual level;</li> <li>• Surveillance activities that are permitted under existing laws;</li> <li>• The legitimate operations of internet service providers and content hosts, including in delivering essential services to the community; and</li> <li>• Effective participation by business and individuals in the global digital economy</li> </ul>
<p><b>Invasion of privacy</b></p>	
<p><b>Question 4.</b> 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?</p>	<p>Although Telstra opposes the introduction of a cause of action for breach of privacy, if this action were to be taken then Telstra considers that a list of examples should be included in the Act to provide guidance to business. However, any list or example that is not exhaustive would mean that rights which the ALRC acknowledges should be excluded from the cause of action (such as damage to reputation and personality rights) could ultimately be included. Categories of conduct caught by any cause of action should be listed exhaustively, using unambiguous and objective terms, in order to reduce the uncertainty and impact that the introduction of such a cause of action</p>

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	would cause to businesses and service providers. However, such a list would still not address the key concerns Telstra has expressed in this submission.
<p><b>Question 5.</b> What, if any, benefit would there be in enacting separate causes of action for:</p> <ul style="list-style-type: none"> <li>- Misuse of private information; and</li> <li>- Intrusion upon seclusion?</li> </ul>	<p>Telstra opposes the introduction of a cause of action for breach of privacy, including by way of enacting separate causes of action for either misuse of private information and/or intrusion upon seclusion. We consider that the existing powers of the Australian Privacy Commissioner; together with other legislative measures, such as (in the case of intrusion upon seclusion) trespass and (in the case of misuse of private information) breach of confidence, as well as those measures listed in response to Question 2 provide a sufficient level of protection to individuals whose privacy has been breached. However, if such a cause of action is introduced, Telstra considers that separate causes of action (in combination with lists of examples, as noted in Question 4) would provide additional — though not necessarily sufficient — certainty to businesses and service providers.</p>
<p><b>Privacy and the threshold of seriousness</b></p>	
<p><b>Question 6.</b> 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?</p>	<p>Any cause of action for a serious invasion of privacy, if introduced, should be clearly and objectively defined to the extent possible and should only apply to clearly egregious cases. Telstra considers that:</p> <ul style="list-style-type: none"> <li>• An invasion of privacy must as a matter of course relate to circumstances that are 'private'. In the present context, Telstra agrees with the recommendations of the ALRC, NSWLRC and VLRC that a 'reasonable expectation of privacy' must exist for a matter to be considered 'private'.</li> <li>• In terms of the applicable threshold: <ul style="list-style-type: none"> <li>○ A seriousness threshold must be imposed, both in order to discourage trivial or minor claims, and in order to provide business and the community with a level of certainty and consistency in its application.</li> <li>○ The test should aim to reduce the inconsistency and unpredictability that may result from applying subjective standards of seriousness that may evolve and change over time or be subject to differing interpretation by different courts or judges.</li> <li>○ Australian courts have only ever considered a "highly offensive" test in considering invasion of privacy. This is also the test applicable in the US and New Zealand.</li> <li>○ The alternatives raised in the Issues Paper, including the "sufficiently serious", "substantial offence", or substantial "distress" or "harm" test</li> </ul> </li> </ul>

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	<p>raised will make the cause of action too easy to establish, leading to a greater likelihood of unmeritorious claims, and will have too great an effect on competing interests (discussed in the responses to Question 1 and 3 above).</p> <ul style="list-style-type: none"> <li>○ In addition, given that Telstra considers the level of privacy protection currently available at law to be sufficient (as discussed in the response to Question 2), any cause of action for a serious invasion of privacy must retain a high threshold of seriousness, in order to be as specific in its application as possible.</li> <li>○ The “highly offensive” test, if applied, must be objective to the extent possible (ie “highly offensive to a reasonable person of ordinary sensibilities”). Even so, an element of subjectivity will remain, and will be left in each case to the courts to determine whether it has been satisfied, so this test is likely to nevertheless be difficult to apply consistently and with certainty.</li> </ul> <ul style="list-style-type: none"> <li>● Public interest considerations should be taken into account as part of the test (see Question 7 below).</li> </ul>
<b>Privacy and public interest</b>	
<p><b>Question 7.</b> How competing public interests should be taken into account in a statutory cause of action? For example, should the Act provide that:</p> <ul style="list-style-type: none"> <li>- competing public interests must be considered when determining whether there has been a serious invasion of privacy; or</li> <li>- public interest is a defence to the statutory cause of action?</li> </ul>	<p>Every other jurisdiction with a cause of action for breach of privacy also has express and equal protection of competing rights. Telstra considers that competing public interests (including those interests identified in the responses to Questions 1 and 3 above) must, at minimum, be incorporated as part of the determination of whether a serious invasion of privacy has occurred. This balancing exercise should be undertaken as part of that initial assessment rather than as a defence to any claim, given that:</p> <ul style="list-style-type: none"> <li>● competing public interests may be of such significance as to ensure that no ‘reasonable expectation of privacy’ exists in the circumstances; and</li> <li>● given the seriousness of the cause of action and the potentially chilling effect it may have on business and service providers, the onus of proof should be on the plaintiff to ensure that their claim is sufficiently serious to outweigh public interest concerns at the outset.</li> </ul>
<p><b>Question 8.</b> What guidance, if any, should the Act provide on the meaning of ‘public interest’?</p>	<p>Telstra considers that any cause of action should provide clarity and guidance as to what constitutes the ‘public interest’, in order to ensure that the application of the relevant test by the courts is as consistent as possible. Noting that what constitutes the ‘public interest’ may differ depending on the context of the claim, Telstra</p>

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	<p>considers that a non-exhaustive list of examples (as distinct from a definition) would be the most appropriate method of achieving such consistency and clarity.</p> <p>Without limiting what may be included in this list of examples, Telstra notes that freedom of expression is not enshrined in the Australian Constitution (as is the case in other jurisdictions), other than in the case of the implied freedom of political communication. As such, the public interest in freedom of expression should be incorporated in any such list.</p>
<b>Fault</b>	
<p><b>Question 9.</b> 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?</p>	<p>Telstra considers that, as has previously been noted by the ALRC, NSWLRC and VLRC, an element of intent must be imposed in relation to any cause of action.</p> <p>In the ordinary course of commerce there may be inadvertent breaches of an individual's privacy due to factors beyond the control of the commercial entity. Such events may be covered by other privacy protections available at law and should not in any circumstances give rise to any cause of action.</p> <p>Further, given that Telstra considers the level of privacy protection currently available at law to be sufficient (as discussed in the response to Question 2), this intent should be determined by reference to the invasion of privacy and the harm to the complainant, rather than the conduct of the defendant, in order to be as specific and targeted in its application as possible.</p>
<b>Damage</b>	
<p><b>Question 10.</b> Should a statutory cause of action for serious invasion of privacy require proof of damage or be actionable <i>per se</i>?</p>	<p>A person's perception of what constitutes their "privacy" is most often a subjective consideration. Further, the ability to bring a claim for a serious invasion of privacy without any requirement to prove damage is likely to lead to a significant increase in claims and consequently, in costs to industry. Therefore, a person should be required to demonstrate both causation plus a clear element of compensable loss or damage before any cause of action could exist, consistent with existing and well-established legal principles.</p>
<p><b>Question 11.</b> 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)?</p>	<p>Refer to our comments for Q.10 above. We consider that the concept of damage or loss should not be broadened such as to include 'humiliation' or distress. Existing legal principles of loss or damage flowing from a breach should be maintained for clarity and certainty.</p>

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<b>Defence and exemptions</b>	
<p><b>Question 12.</b> 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?</p>	<p>Telstra agrees with the view of the ALRC, NSWLRC and VLRC that any conduct required or authorised by or under law, or any conduct incidental to or for the purpose of a lawful right of defence of persons or property should be included as a defence to any cause of action. Any qualifications to this defence should be specific, clear and objective in their application.</p>
<p><b>Question 13.</b> What, if any, defences similar to those to defamation should be available for a statutory cause of action for serious invasion of privacy?</p>	<p>Telstra considers that, given that the circumstances of the conduct giving rise to a claim for invasion of privacy may be similar to conduct giving rise to a claim for defamation (ie the publication or dissemination of private information), every defamation defence should be included as a defence to any cause of action.</p>
<p><b>Question 14.</b> What, if any, other defences should there be to a statutory cause of action for serious invasion of privacy?</p>	<p>If any cause of action were to be introduced, then wide-ranging defences would need to be incorporated in order to minimise (to the extent possible) the impact of the cause of action on the key interests noted in the responses to Questions 1 and 3 above. These include:</p> <ul style="list-style-type: none"> <li>• All of the defences proposed in the original ALRC report and the Issues Paper;</li> <li>• A defence in relation to publication of information which has already been published or is otherwise in the public domain;</li> <li>• A defence making it clear that surveillance is permitted under existing laws;</li> <li>• A defence reflecting the need to ensure that the cause of action does not provide a means of sidestepping existing planning processes and laws;</li> <li>• A defence allowing disclosure in the reasonable course of business;</li> <li>• Specific defences to take into account the broad range of circumstances in which the cause of action might be relied upon (as discussed in ALRC Report 22), including in the context of custody disputes, mental health and other health services; and</li> <li>• A defence for internet intermediaries or internet sites hosting material hosted by third parties (broadly phrased to ensure not limited to certain technological devices).</li> </ul>
<p><b>Question 15.</b> What, if any, activities or types of activities should be exempt from a statutory cause of action for serious invasion of privacy?</p>	<p>Telstra considers that in the circumstances, the provision of emergency services should be exempt from any cause of action, given the urgency involved. Rather than a defence it may also be preferable to exempt internet intermediaries or internet sites hosting material hosted by third parties (broadly phrased to ensure not limited to certain technological devices).</p>

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<b>Monetary remedies</b>	
<p><b>Question 16.</b> Should the Act provide for any or all of the following for a serious invasion of privacy:</p> <ul style="list-style-type: none"> <li>- a maximum award of damages;</li> <li>- a maximum award of damages for non-economic loss;</li> <li>- exemplary damages;</li> <li>- assessment of damages based on a calculation of a notional licence fee;</li> <li>an account of profits?</li> </ul>	<p>The proposed cause of action is in the nature of a public law duty. In such a context, damages are not available as it has been recognised that they are not an appropriate remedy.</p> <p>In the event that damages are available, however, then they should:</p> <ul style="list-style-type: none"> <li>• exclude exemplary damages; and</li> <li>• be subject to a cap to ensure they are commensurate with damages in personal injury and other actions. Such a limit exists for that reason under the uniform defamation Acts.</li> </ul>
<b>Injunctions</b>	
<p><b>Question 17.</b> 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 <i>Human Rights Act 1998</i> (UK)?</p>	<p>Telstra considers that the availability of injunctions in such actions should be carefully limited as:</p> <ul style="list-style-type: none"> <li>• Consideration should first be given to the operation of the existing defamation laws and care taken not to: <ul style="list-style-type: none"> <li>○ Undermine the balance so carefully achieved in defamation law; and</li> <li>○ Have a serious adverse effect on freedom of speech.</li> </ul> </li> <li>• Individuals should not be able to utilise any proposed remedies to a cause of action to sidestep a variety of other existing laws and principles (ie 'forum shopping'). For example, the availability of injunctions and correction orders could be exploited by plaintiffs who are unable to obtain injunctions under defamation, the <i>Privacy Act</i> and related laws.</li> <li>• In defamation cases, the courts have recognised these remedies are inappropriate as they are inconsistent with freedom of communication. The same reasoning applies in relation to privacy.</li> </ul> <p>If injunctions are available, then at minimum the special provision contained in s 12 of the <i>Human Rights Act 1998</i> (UK) should be incorporated in Australian legislation.</p>
<b>Other remedies</b>	
<p><b>Question 18.</b> Other than monetary remedies and injunctions, what remedies should be available for serious invasion of privacy under a statutory cause of action?</p>	<p>Telstra considers that, of the remedies proposed in the Issues Paper, an order that the defendant rectify its business or information technology practices should not be available, as a court order is not the appropriate mechanism for such remedial action.</p>

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<b>Who may bring a cause of action</b>	
<b>Question 19.</b> 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?	Telstra agrees with the positions of the VLRC and NSWLRC that any cause of action be restricted to living persons, and note that this is consistent with defamation law in most Australian jurisdictions and the <i>Privacy Act</i> .
<b>Question 20.</b> 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?	<b>No.</b>
<b>Limitation Period</b>	
<b>Question 21.</b> What limitation period should apply to a statutory cause of action for a serious invasion of privacy? When should the limitation period start?	Telstra considers that any cause of action should be subject to a limitation period that is consistent with similar causes of action. Consistent with defamation law and the <i>Privacy Act</i> , the limitation period should be one year [from the date upon which the plaintiff became aware of the cause of action].
<b>Location and Forum</b>	
<b>Question 22.</b> Should a statutory cause of action for serious invasion of privacy be located in Commonwealth legislation? If so, should it be located in the <i>Privacy Act 1988</i> (Cth) or in separate legislation?	The <i>Privacy Act</i> would potentially be a neater fit as it could then be informed by those existing provisions.
<b>Question 23.</b> Which forums would be appropriate to hear a statutory cause of action for serious invasion of privacy?	Formal courts consistent with the high degree of harm required to be established by a complainant.
<b>Question 24.</b> What provision, if any, should be made for voluntary or mandatory alternative dispute resolution of complaints about serious invasion of privacy?	We consider that existing complaints handling provisions we comply with (for example under the Telecommunications Consumer Protections Code), as well as the Industry Ombudsman processes, provide sufficient alternative dispute handling options.
<b>Interaction with existing complaints processes</b>	
<b>Question 25.</b> 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?	As noted above, the introduction of a cause of action for serious invasions of privacy is likely to lead to a significant overlap with other forms of privacy protection and the possibility of complainants attempting to 'forum shop'. Although this would not address Telstra's key concerns with the introduction of this cause of action, a limitation on claims where a determination has already been made through an existing complaints process should be imposed.



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<b>Other legal remedies to prevent and redress serious invasions of privacy</b>	
<p><b>Question 26.</b> If a stand-alone statutory cause of action for serious invasion of privacy is not enacted, should existing law be supplemented by legislation:</p> <ul style="list-style-type: none"> <li>- providing for a cause of action for harassment;</li> <li>- enabling courts to award compensation for mental or emotional distress in actions for breach of confidence;</li> <li>- providing for a cause of action for intrusion into the personal activities or private affairs of an individual?</li> </ul>	<p>Telstra refers to and repeats its comments in response to Question 2 above and makes no further submission to this Question.</p>
<p><b>Question 27.</b> In what other ways might current laws and regulatory frameworks be amended or strengthened to better prevent or redress serious invasions of privacy?</p>	<p>Telstra refers to and repeats its comments in response to Question 2 above and makes no further submission to this Question.</p>
<p><b>Question 28.</b> In what other innovative ways may the law prevent serious invasions of privacy in the digital era?</p>	<p>The challenge is always for the law to remain in step with current and future technological innovation. The <i>Privacy Act</i> for example was and continues to be drafted on the basis of principles which are intended to apply across technology. For a serious cause of action, however, specificity would be important for business certainty.</p>