

## Communications Entertainment & Technology Committee Human Rights Committee

### Serious Invasions of Privacy in the Digital Era – Issues Paper

29 November 2013

Submission to the Australian Law Reform Commission by the NSW Young  
Lawyers Communications, Entertainment & Technology Law Committee  
and Human Rights Committee

Australian Law Reform Commission  
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## About NSW Young Lawyers and the Communications, Entertainment & Technology Committee and the Human Rights Committee

1. NSW Young Lawyers (**NSWYL**) is the largest body of young and newly practising lawyers, and law students in Australia. NSWYL supports practitioners in their early career development in numerous ways, including by encouraging involvement in its 15 separate committees, each dedicated to a particular area of practice. Membership is automatic for all NSW lawyers under the age of 36 and/or in their first five years of practice, as well as law students.
2. The NSWYL Communications, Entertainment & Technology Law Committee (**CET**) aims to serve the interests of lawyers, law students and other members of the community concerned with areas of law relating to: information and communication technology (including technology affecting legal practice); intellectual property; advertising and consumer protection; confidential information and privacy; entertainment; and the media. As innovation inevitably challenges custom, CET promotes forward thinking, particularly about the shape of the law and the legal profession as a whole.
3. The NSWYL Human Rights Committee (**HRC**) comprises of a group of approximately 500 lawyers and law students interested in Australian and international human rights issues. The objectives of the Committee are to raise awareness about human rights issues and provide education to the legal profession and wider community about human rights. Members of the Committee share a commitment to effectively promoting and protecting human rights.
4. The views expressed in this submission are those of the authors and do not represent the views of their employers.
5. The Committees thank the Commission for the opportunity to comment on the Serious Invasions of Privacy in the Digital Era Issues Paper (**Issues paper**) and would be very pleased to provide further information or submissions as required.

## 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?**

1. The CET and HRC committees (the **Committees**) submit that the ALRC should consider principles including:
2. **Standing & Scope** – In many respects, Australian law already provides protections from many particular intrusions and invasions, which substantially

overlap with privacy. In NSW the *Surveillance Devices Act*<sup>1</sup> protects individuals from some intrusions into private conversations and activities. The *Defamation Act 2005* (Cth)<sup>2</sup> protects from intrusions to reputation, there are relevant criminal laws to protect dispersing private information, and in torts there are available actions in trespass<sup>3</sup> and breach of confidence that protect individuals from other kinds of privacy invasion. It should be noted that the Australian law has overlaps between the various state and territory jurisdictions, with their differing approaches to these protections.<sup>4</sup>

3. While some provisions extend to 'legal persons' or government bodies, they do not do so uniformly. The Committees submit that by restricting actions to only natural persons, the position achieved would be in line with previous government recommendations<sup>5</sup> and the current position in some other jurisdictions,<sup>6</sup> and would help ensure the preservation of competing aspects of public interest, meaning that enterprises or government agencies could not use an action as a shield to avoid public scrutiny, nor as a sword to silence opposition.
4. The Committees submit that any new statutory cause of action should supplement the objectives of the current *Privacy Act*<sup>7</sup>, so as to expand the scope of privacy protection in the Australian legislation (anti-discrimination legislation may also provide a touchstone for other areas of information people would wish to be private<sup>8</sup>). Further consideration will be given to this later in the response.
5. **Consent** – Consistent with the approach of the NSW Law Reform Commission (**NSWLRC**),<sup>9</sup> the Committees recommend that whether or not a party consents (either expressly or impliedly) to a relevant activity should be a principle that helps frame any offence for serious invasion of privacy. Consent is a principle that has substantial overlap with transparency of use, which should be evident in terms of service or other documentation from both government and private enterprises.
6. **Number and Frequency** – The Committees submit that the frequency of breaches, as well as the number of aggrieved parties involved in the alleged invasion should be a relevant consideration in determining the measures for a penalty associated with a breach. The frequency of breaches may also provide a basis to adjust the scale of damages, which could be used as a deterrent.
7. **Intention and Effect** – The Committees submit that any penalties in relation to an offending act of privacy should have regard for the intention and the effect of the breach. It must be treated more severely when it is intended to damage or it is conducted in pursuit of profit. The ALRC may also wish to consider whether reckless conduct or concurrent criminal conduct increases the severity of a breach.

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<sup>1</sup> *Surveillance Devices Act 2007* (Cth) s 7.

<sup>2</sup> *Defamation Act 2005* (Cth) s 6.

<sup>3</sup> For example, *State of New South Wales v Lepore* [2003] HCA 4.

<sup>4</sup> See, for example, the *Surveillance Devices Act 1998* (WA).

<sup>5</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) at 51.

<sup>6</sup> The particular form of this in Canada is unusual, see *Jones v Tsige* [2012] ONCA 32; *Privacy Act*, R.S.B.C. 1996, c. 373. In the NZ, the position for publication related infractions is established in *Hosking v Runting* [2005] 1 NZLR 1.

<sup>7</sup> *Privacy Act 1988* (Cth) Schedule 3.

<sup>8</sup> For example *Anti-Discrimination Act 1977* (Cth) ss 49A and 49ZG.

<sup>9</sup> New South Wales Law Reform Commission, *Protecting Privacy in New South Wales*, Report no 127 (2010) at 51.

8. **Public Interest** – The Committees submit that there should be a public interest ground to protect important behaviours including whistleblowing, academic purposes or legitimate news-gathering that contributes to public debate. These kind of defensible activities should be differentiated from the concept of exposing material that is merely “interesting to the public”, without satisfying another real purpose. This is much the same as the position of the Victorian Law Reform Commission (**VLRC**).<sup>10</sup>
9. Public Interest may also be used as a means to address some general concern that judicial approaches to these issues may reflect a relatively conservative attitude. If, for example, the statute provides a Commissioner or Ombudsman with an opportunity to bring proceedings thought to be in the “public interest”. This may be particularly appropriate where a class of persons have had their privacy breached, but in a manner that would not lend itself to the ordinary economies of litigation.
10. **Existing Laws** – An offence for serious breach of privacy ought not serve as a replacement for existing causes of action such as defamation, injurious falsehood, breach of confidence, trespass or breaches of laws relating to surveillance or listening devices.
11. **Reparations and Mitigating Conduct** – The Committees submit that the particulars of the action should consider any reparations or mitigating conduct engaged in by the party alleged to have conducted the serious breach. This might include prompt and voluntary disclosure of misused information, or attempts to limit distribution of offending material.

## The impact of a statutory cause 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.**

12. The Committees recommend focusing on existing causes of action to frame both the contexts in which people might feel their privacy has been seriously invaded, as well as the types of information which when either collected or disclosed could lead to a serious invasion of privacy. Such actions might include:
  - disclosure of private information (such as under the *Privacy Act*);
  - disclosure of information which may form the basis of discrimination (such as under anti-discrimination legislation);
  - unauthorised access to personal communications;
  - unauthorised surveillance of an individual (video or audio); and

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<sup>10</sup> Victorian Law Reform Commission, *Surveillance in Public Places, Report No 18* (2010) at 7.187.

- interference with rights to seclusion (as distinct from disclosure of private facts).<sup>11</sup>
13. The Committees submit that, irrespective of whether a right to seclusion is best framed as part of the same action, it is important that such criteria exists, as it potentially provides a means of mediating online surveillance and tracking, without resorting to technology-specific language or requiring that electronic intrusion be focused on matters such as online fraud, which are substantially dealt with under Commonwealth criminal code provisions.

### 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?**

14. The Committees submit that, on the basis of the public interest criteria, a non-exhaustive list of tasks such as law enforcement, court or other legal proceedings, academic purposes and legitimate news-gathering should not be hindered.
15. The Committees further submit that the offence should not be so broad as to inhibit technological innovation. In the EU, current regimes require disclosures by website operators about the use of cookies to store data about the user, which can be retrieved by a website.<sup>12</sup> Many sites use this for legitimate purposes, such as temporary authentication of users or to track saved orders. Some sites use them to track users, or to assist with targeting advertisements. While tracking cookies may have some substantial privacy implications, jurisdictional issues and difficulties with enforcement mean that a great number of individuals could continue to be tracked without notices, on the basis that no such requirement exists in the jurisdiction where the website is operated.
16. Domestic legislation cannot reasonably offer significant protection from such methods, particularly where they are already widely adopted. If the offence is too broad, we risk penalising domestic operators in a manner that does not effectively improve the privacy of the public.

## 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?**

17. In the interests of clarity for both claimants and decision-makers, the Committees support the inclusion of a non-exhaustive list which might include invasions such as:

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<sup>11</sup> There is some reference to this distinction in US law by JJ Gummow and Hayne in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 125.

<sup>12</sup> See *European Union Directive 2002/58/EC* Article 5(3) and Recital 25.

- (a) intrusion into home or family life;
- (b) assuming identity of another person; and
- (c) unauthorised access to services or accounts used to communicate privately or to store private information.

18. The Committees propose the above list for the reason that it considers they are the main problems the tort would be designed to overcome. Privacy is by its nature an amorphous and evolving concept, however, and to that extent there may be other contexts in which such a tort should be utilised. For that reason, and if the tort is to be implemented, the Committees consider that the list ought to be non-exhaustive so that there is a degree of judicial flexibility in making a determination as to a serious invasion of privacy. This should ensure the law is able to meet the requirements created by developing technologies and new modes of living.

## Question 5

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

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

19. The Committee members differ in their position on this issue and note that in some jurisdictions, historical contexts have led to separate causes of action across different aspects of breaches of privacy (as in the US and UK). This approach may potentially offer greater legislative clarity, but is not favoured in jurisdictions such as New Zealand, Canada and some parts of Europe, where a single “omnibus” cause of action is present. Such a cause of action might prove more adaptable to new technologies and changing public expectations.

## 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?**

20. The Committees broadly support the ‘reasonable expectation’ test, as the appropriate basis to formulate actionability. The benefit of the test is that it enables flexibility and the ability to adapt to changing community standards and expectations. The Committees note, however, that a further, subjective element was introduced by the Queensland District Court when it found a common law tort of invasion of privacy in *Gross v Purvis* [2003] QDC 151. There the Court found that it was necessary for the plaintiff to demonstrate some form of harm.

21. While an element of subject harm does not seem to be required on its face by the four Prosser Torts contained in statute in the United States of America, it does seem that the courts *in practice* require an element of harm in order to

pay damages. We note on the other hand that a subjective element has been rejected by comparable jurisdictions which have developed common law torts relating to privacy: notably Ontario<sup>13</sup>, New Zealand<sup>14</sup>, and the United Kingdom.<sup>15</sup>

22. Whether such a test should also be accompanied by a further requirement of seriousness depends on whether it would be appropriate to further constrain the use of the tort. The Committees note that Manitoba, New Zealand and the United States require the invasion to be 'serious' or 'highly offensive' to be actionable. On the other hand, many jurisdictions do not require this further step, including the British Columbia, Saskatchewan, Newfoundland and Labrador, and the United Kingdom. The Committees note that the Chief Justice of New Zealand recently questioned the requirement to demonstrate 'seriousness.'<sup>16</sup>

## Privacy and the 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?**

23. The Committees submit that the particular balance may vary, depending on whether the plaintiff, or the defendant is required to consider public interest in assessing whether there is a basis for a claim, or whether there is a defence to such a claim.
24. The Committees submit that, in either case, the decision-maker should be required to balance the cause of action in the act, against other public policy freedoms, such as freedom of the press and the public's right to information. The Committees consider that these interests, as well as freedom of expression, are most likely to come into conflict with the tort.
25. On balance, the Committees are of the view that a defence of public interest should be considered as a separate shield to the cause of action. This will ensure that the threshold for plaintiffs to bring an action is not too high and that the presence of such a cause of action offers a strong deterrent against invasions of privacy, where those invasions effect natural persons.
26. The Committees also consider that much of the material needed to either prove or disprove a genuine public interest will necessarily be in the possession of the defendant. There may be times, however, when this is not the case and in such instances it may be suitable to give the power to

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<sup>13</sup> *Jones v Tsiga* 2012 ONCA 32.

<sup>14</sup> *Hosking v Runting* (2005) 1 NZLR 1.

<sup>15</sup> *Campbell v MGN Ltd* [2004] 2 AC 457.

<sup>16</sup> *Rogers v Television New Zealand Ltd* [2008] 2 NZLR 277 at [25].

decision-makers to reverse the onus and require plaintiffs to overcome a *prima facie* public interest defence.

## Question 8

### **What guidance, if any, should the Act provide on the meaning of ‘public interest’?**

27. The Committees consider that the legislature should not define ‘public interest’ if it is incorporated as a separate defence. This should ensure that defendants have the widest possible scope for arguing to decision-makers that their actions can be justified and ought be protected.
28. If the ALRC is to support a statutory definition, the Committees consider that the definition offered by the Australian Press Council provided in the Issues Paper is flexible enough to ensure a wide defence to any proposed tort.
29. The Committees note that we have provided further comments on this topic in our response to question 17.

## 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?**

30. The Committees have not made a submission in response to this question.

## Damages

### Question 10

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

31. The Committees submit that a statutory cause of action for invasions of privacy should be actionable without proof of actual damage.
32. This approach is aligned to intentional torts, such as trespass. It would recognise that that the cause of action protects a fundamental human right. It would also allow the court to award a wider range of remedies to redress the invasion. This is in line with the NSWLRC and VLRC proposals which did require proof of damage for an invasion of privacy to be actionable.
33. The Committees recognise the concern that making the statutory cause of action actionable is often argued against because of a perception that it would encourage a proliferation of claims. However, the Committees consider that the benefit of protecting the right to privacy outweighs this concern.



34. If the cause of action is not to be actionable *per se*, then the alternative is that the action should provide for damages including emotional distress, as noted below.

## 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)?**

35. The Committees submit that proof of damage should include suffering humiliation or emotional distress within the definition of 'damage' for the purposes of the cause of action.
36. This approach is consistent with s 52 of the *Privacy Act*, which provides that the Privacy Commissioner may make a determination of an entitlement to compensation or other remedy, for the loss or damage resulting from an interference with the privacy of an individual, which 'includes injury to the complainant's feelings or humiliation suffered by the complainant'.
37. Such a position would assist in covering some ground not available for persons bringing proceedings for breach of confidence.
38. In making this submission, the Committees reiterate the above response to question 10 that a statutory cause of action for invasions of privacy should be actionable without proof of damage.

## 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?**

39. The Committees support such an exception, consistent with previous recommendations of the ALRC.<sup>17</sup>

### 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?**

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<sup>17</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) Rec 74–4(b); NSW Law Reform Commission, *Invasion of Privacy*, Report No 120, (2009) [6.2].

40. The Committees submit that the defences of absolute<sup>18</sup> and qualified<sup>19</sup> privilege which are defences under the Uniform Defamation Acts be available for a statutory cause of action for serious invasion of privacy, as these defences are an appropriate means of ensuring that the balance between a person's privacy and freedom of speech is maintained.
41. Alternately, the Committees submit that the defence of honest opinion in the Uniform Defamation Acts<sup>20</sup> should not be a defence to the cause of action. The crux of privacy invasion is the unauthorised observation of private life or the publication of private information. The cause of action itself is concerned with factual material. In defamation, the defence of honest opinion only applies to expressions of opinion, rather than statements of fact, and would not be appropriate as a defence for a serious invasion of privacy.

## Question 14

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

42. The Committees have not prepared a further response to this question, but note that the submissions set out in response to questions 8 and 17 may be of assistance.

## Question 15

### **What, if any, activities or types of activities should be exempt from a statutory cause of action for serious invasion of privacy?**

43. The Committees submit that there should be no exemption, with the previously noted defences acting as a sufficient deterrent to any claim that might be vexatious or without merit.

## 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;**

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<sup>18</sup> *Defamation Act 2005* (NSW), s 27.

<sup>19</sup> *Defamation Act 2005* (NSW), s 30.

<sup>20</sup> *Defamation Act 2005* (NSW) s 31.

- **an account of profits?**

44. The Committees submit that the Act provide for the same monetary remedies as currently provided under Australian defamation legislation. By stipulating a degree of uniformity in the law, this should dissuade those wishing to engage in forum shopping for privacy actions.
45. With this position in mind, it is suggested that the Act provide for an account of profits and place a cap on damages, including a cap for an award of damages for non-economic loss. Whilst it is difficult to express a view about what limit should be set, it is recommended that the limit be no more than that which is stipulated in the National Uniform Defamation Legislation.
46. However, as with defamation, the cap should have the ability to be exceeded in very exceptional circumstances; for example where the court is of the opinion that the serious invasion of privacy would have warranted an award of aggravated damages.
47. The Committees submit that consistent with the approach adopted by the National Uniform Defamation Legislation, exemplary damages should not be able to be awarded.

## 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)?**

48. The Committees have not made a submission in response to this question.

## 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?**

49. The Committees recommend that the following remedies be available, in addition to damages:
  - an order requiring the respondent to apologise to the applicant;
  - a correction order;
  - an order for the delivery up and destruction of material; and
  - a declaration.

50. Providing a selection of non-monetary remedies will, in the view of the Committees, better assist the courts in tailoring the appropriate remedy for a litigant. This is particularly important in privacy actions where a litigant may only seek an apology in a public forum, as opposed to financial compensation.

## 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?**

51. The Committees submit that a statutory cause of action for a serious invasion of privacy of a living person should not survive for the benefit of the estate. This submission is qualified by the response to question 20 below, where it is submitted that in limited circumstances, the Privacy Commissioner may be able to bring a cause of action on behalf of a deceased person.
52. Restricting the cause of action to living persons, however, must not limit the rights of individuals in circumstances where their privacy is indirectly invaded as a consequence of conduct or information relating to a deceased person. For example, it should be within the scope of the cause of action for a family member to have standing to bring a claim alleging a serious invasion of privacy in circumstances where another family member has died and that death attracts media interest. Even if that media interest focuses on the deceased, any coverage that indirectly constitutes a breach of the living family member's right to privacy; for example, inappropriate footage from a funeral or comments that indirectly relate to the living family member; should be actionable by that family member.<sup>21</sup> It is submitted that this is not inconsistent with the general proposition that a statutory cause of action for a serious invasion of privacy of a living person should not survive for the benefit of the estate.

### 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?**

53. The Committees submit that the Privacy Commissioner should be able to bring an action in respect of the serious invasion of privacy of an individual or individuals. However, the ability of the Privacy Commissioner to bring an action should be limited to certain circumstances and only extend to seeking non-pecuniary remedies.

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<sup>21</sup> For a consideration of these issues in relation to defamation see *Krache v TCN Channel Nine Pty Ltd* (1986) 4 NSWLR 536.

54. Actions by the Privacy Commissioner should be only permissible where it is in the public interest for a 'gap' to be filled in the liability regime for serious invasions of privacy. The Committees submit that for the Privacy Commissioner to bring a claim, the Commissioner should be required to make a determination that:
- The proceedings be in the public interest; and
  - That the person (or majority of persons) effected by the serious invasion would be unlikely to otherwise pursue a claim.
55. The Privacy Commissioner should be entitled to bring an action following recommendations or requests from members of the community, or of the Commissioner's own volition, as a result of independent investigations.
56. In the absence of laws relating to mandatory notification for data breaches, an alternative form of declaratory relief may well be an order that the infringers notify any affected persons. Were such legislation to be empowered under an act separate from the Privacy Act, this may also help assist with breaches of privacy effected by smaller businesses, without creating potentially onerous (or at least contentious) financial penalties.
57. These restrictions limit the ability of the Privacy Commissioner to bring an action, but allow an action to be brought in circumstances where there is a particularly significant invasion of privacy, including circumstances that suggest there are significant systemic failures in relation to how the privacy of certain individuals are being dealt with by a potential defendant.

## 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?**

58. The Committees submit that the duration of the limitation period does not matter, provided there is a catch-all provision, which allows for claims to be brought *outside* the limitation period, where it is in the interests of justice, to deal with circumstances where a person does not find out until (potentially) years later that the invasion has occurred.
59. The Committees further submit that any analogy between defamation proceedings and potential proceedings for serious invasion of privacy should consider the very different circumstances surrounding both causes of action. Defamation provides post-hoc reparations against publication of defamatory material, while at least part of the argument in favor of an action for privacy is predicated on the basis that privacy should be pro-actively protected. By limiting the availability of a claim, or hinging its likely use on quick discovery of the fact of a breach, the utility of the new cause of action would be, itself, limited.

## 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?

60. As previously recommended by the ALRC, it is submitted that a statutory cause of action for a serious invasion of privacy be enacted in a Commonwealth statute that is separate to the *Privacy Act*.<sup>22</sup> It is submitted that the proposed statutory cause of action would give standing to individuals who had a reasonable expectation of privacy, and who had their privacy seriously invaded.<sup>23</sup>
61. The Committees submit that the new cause of action be enacted in a separate statute to the *Privacy Act* to ensure a clear delineation between rules that dictate how private information should be managed, and a cause of action for breaches to a personal right. Notwithstanding, it is nonetheless submitted that the Office of the Privacy Commissioner would be the appropriate body to monitor such a statute that creates an actionable right to the protection of privacy.
62. Separate legislation could help clarify the applicability of the provisions in any new legislation to smaller business (including those with turnover under \$3 Million per year<sup>24</sup>) which would not be subject to the requirements of the Privacy Act more generally.

### Question 23

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

63. Federal Courts would have jurisdiction to hear a cause of action provided for in Commonwealth legislation and correspondingly under the uniform Commonwealth and State *Jurisdiction of Courts (Cross-Vesting) Act 1987*, State and Territory courts would also have jurisdiction to hear the cause of action.<sup>25</sup>
64. In addition to the jurisdiction of the state and federal courts, it is submitted that in certain circumstances, jurisdiction to hear a dispute arising out of the new cause of action could be vested with state or federal administrative review tribunals to hear a statutory cause of action.<sup>26</sup> Commencing the action

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1. Australian Law Reform Commission, For Your Information: Australian Privacy Law and Practice, Report No 108 (2008) Rec 74–1, 2582; Australian Constitution s 51(xxix); Australian Law Reform Commission, For Your Information: Australian Privacy Law and Practice, Report No 108 (2008) 195–198. Authority to provide this cause of action under federal legislation is derived from the Commonwealth Parliament's external affairs power contained in the Australian Constitution

<sup>23</sup> Australian Law Reform Commission, For Your Information: Australian Privacy Law and Practice, Report No 108 (2008).

<sup>24</sup> *Privacy Act 1988* (Cth) s 6D(1).

<sup>25</sup> See sections 71 and 77(ii) of the Australian Constitution.

<sup>26</sup> Issues Paper, para 125.

in a tribunal may increase each claimant's access to justice by reducing costs and enabling a quicker resolution.<sup>27</sup>

## Question 24

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

65. The Committees have not made a submission in response to this question.

## 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?**

66. The Committees have not made a submission in response to this question.

## 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?**

67. The Committees broadly support alternative measures, such as an action for harassment, or expansion of breach of confidence to cover damages arising from mental or emotional distress.

## Question 27

**In what other ways might current laws and regulatory**

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<sup>27</sup> Issues Paper, para 125.

**frameworks be amended or strengthened to better prevent or redress serious invasions of privacy?**

68. The Committees have not made a submission in response to this question.

### **Question 28**

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

69. The Committees have not made a submission in response to this question.

Sincerely,



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