

2. Guiding Principles

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Summary

2.1 The Issues Paper identified several principles for guiding the recommendations for reform in this Inquiry into serious invasions of privacy.

2.2 There was wide support by stakeholders for these principles. Some stakeholders suggested additional matters that should be incorporated into the principles; some argued that certain principles should be given greater emphasis or priority; others stressed that there should be no hierarchy or preference for certain interests.

2.3 The principle which elicited the strongest support was that the protection of privacy must be balanced with other fundamental freedoms and matters of public interest.

2.4 The Guiding Principles are not the only considerations that will underpin any legislative reforms, but they generally accord with established values and concepts that have been set out in discussions about the legal protection of privacy. The discussion of the value, importance and role of privacy in various contexts and from various perspectives—legal, philosophical, social, political, technical—is extensive. This Discussion Paper does not attempt to survey these discussions or the enormous body of literature on the topic. Rather, this chapter identifies some key considerations that will underpin the recommendations to be made in the Final Report.

2.5 The Guiding Principles draw on leading cases in Australia and other jurisdictions, international conventions, academic commentary on privacy and related fields, the Terms of Reference, and similar principles identified in earlier ALRC reports and submissions to this Inquiry.

Principle 1: Privacy is a fundamental value worthy of legal protection

2.6 Privacy is important to enable individuals to live a dignified, fulfilling, safe and autonomous life. It is an important element of the fundamental freedom of individuals that underpins their:

- ability to form and maintain meaningful and satisfying relationships with others, including intimate and family relationships;
- freedom of speech, thought and self-expression;
- freedom of movement and association;
- ability to engage in the democratic process;
- freedom to engage in secure financial transactions;
- freedom to develop and advance their own intellectual, cultural, artistic, property and physical interests; and
- freedom from undue interference or harm by others.

2.7 The right to privacy is recognised as a fundamental human right in the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* (ICCPR) and other international instruments and treaties.¹ Article 17 of the ICCPR, to which Australia is a signatory, provides:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.²

2.8 Many stakeholders stressed the importance of privacy to a person's autonomy and rights of self-determination.³ The Law Institute of Victoria, for example, noted that 'the protection of an individual's privacy is fundamental to their human dignity and is central to many other human rights such as the right of freedom of association, movement and expression'.⁴

2.9 Privacy also gives individuals greater freedom to pursue their cultural interests free from undue interference from others. This freedom may be particularly important for some ethnic, religious and cultural groups, such as Aboriginal and Torres Strait

1 *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 16; *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) art 14.

2 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.

3 See, eg, Electronic Frontiers Australia, *Submission 44*; A Johnston, *Submission 9*; I Pieper, *Submission 6*.

4 Law Institute of Victoria, *Submission 22*.

Islander people, who have particular cultural identity, knowledge and customs that bear on the privacy interests of individuals within the group.⁵

2.10 Some representative groups also stressed the importance of a right to privacy for protecting vulnerable individuals in the community from undue interference or harassment, or the fear of violence and harassment by others.⁶ Privacy plays an important role in ensuring personal safety and freedom from harassment.

2.11 As privacy is about individual freedoms, corporate entities, government organisations or agencies, and elected groups would not have a right of action to sue for invasion of privacy under the ALRC's proposals.⁷ This is consistent with the common law, which recognises that privacy is a matter of human dignity and sensitivity.⁸ This does not deny the possibility of invasions of the privacy of persons within a corporate entity or other organisation, nor the right of corporate entities to sue at common law for interference with their property rights.

Principle 2: There is a public interest in protecting privacy

2.12 This principle reflects the long-held acceptance by the law that the notion of public interest does not simply comprise matters in which the public as a whole has a communal interest, such as the proper administration of government or the proper administration of justice. Rather, there is also a public interest in the protection and enforcement of private freedoms and rights of individuals. This is embodied in the law's protection of information imparted under a contractual or equitable obligation of confidence.⁹ A similar concept underpins the protection of many property and possessory rights.¹⁰

2.13 It follows that in many cases involving the protection of privacy, the court will not only be concerned to provide a remedy that will protect the individual litigant. Courts will also be concerned to provide a remedy that will have a normative effect on the behaviour of others in the community, either by way of deterrent or example, so providing a measure of protection to a broader class of people. Legal rights can help set standards of behaviour, and may be valuable even if those rights are not often enforced.

2.14 Privacy, like confidentiality, underpins other important individual freedoms. Privacy and the ability to speak freely without fear of disclosure is important for social order and public health, private wellbeing, and the achievement of many social ideals and objectives. Without privacy and confidentiality, a person may feel unsafe or unable

5 Arts Law Centre of Australia, *Submission 43*.

6 Women's Legal Services NSW, *Submission 57*; Women's Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 48*.

7 NSW Young Lawyers, *Submission 58*; Blueprint for Free Speech, *Submission 26*.

8 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [43] (Gleeson CJ).

9 On the public interest in upholding confidences, see *Prince of Wales v Associated Newspapers Ltd* [2007] 3 WLR 222, [67]. See further Ch 12.

10 'If the courts of common law do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights': *Plenty v Dillon* (1991) 171 CLR 635, 655 (Gaudron and McHugh JJ).

to speak freely and honestly about an important matter, such as a suspicion about criminal activity, a problem about one's own or another person's activities, or a health concern about a condition, disease or substance addiction. There is also a public interest in the security of confidential information about an individual's financial and commercial interests.

2.15 The public interest in confidentiality and privacy is reflected in many legal principles, such as the defence of qualified privilege in defamation law, or in the approach of the courts in granting injunctions to constrain the breach of a contractual or equitable obligation of confidence.¹¹ It is also reflected in legislative provisions dealing with the confidentiality of medical records and medical information about a person.¹²

Principle 3: Privacy should be balanced with other important interests

2.16 The privacy of an individual is not an absolute value or right which necessarily takes precedence over other values of public interest. As stakeholders noted, it must be balanced with a range of other important values, freedoms and matters of public interest, including, in no particular order or hierarchy:

- freedom of speech,¹³ including the freedom of the media and the implied constitutional freedom of political communication;¹⁴
- freedom of artistic and creative expression and innovation in the digital era;¹⁵
- the proper administration of government and matters affecting the public or members of the public;
- the promotion of open justice;
- national security and safety;
- the prevention and detection of criminal and fraudulent activity and the apprehension of criminals;¹⁶

11 This point is discussed further in Ch 12.

12 See, eg, *Public Health Act 2010* (NSW) s 130.

13 In *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013) French CJ sets out a useful summary of the ways in which freedom of speech as a value underpins much of Australian common law and statute law.

14 RSPCA, *Submission 49*. The RSPCA submission referred to *ABC v Lenah Game Meats*, where Kirby J suggests that courts should give a wider interpretation than they have done to date on the matters falling within the implied freedom: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 286–287.

15 Facebook, *Submission 65*.

16 For example, in 2012–2013, information obtained under communications interception or stored communications warrants was used in 3,083 arrests, 6,898 prosecutions and 2,765 convictions: Attorney-General's Department, *Telecommunications (Interception and Access) Act 1979: Annual Report 2012–2013* (2013) 4. Other submissions referring to the importance of detecting criminal or fraudulent activity included Australian Federal Police, *Submission 67*; Google, *Submission 54*; CV Check, *Submission 23*; Insurance Council of Australia, *Submission 15*.

- the effective delivery of essential and emergency services in the community;¹⁷
- the protection of vulnerable persons in the community;
- national economic development and participation in the global digital economy;¹⁸ and
- the value of individuals being enabled to engage in digital communications and electronic financial and commercial transactions.¹⁹

2.17 This list is not an exhaustive list of public interest matters. Some stakeholders emphasised the need for a holistic approach to the balancing of interests in particular circumstances,²⁰ while others stressed the need for the balancing process to consider the degree to which any interference with one interest was necessary and proportionate to the protection of the other. This latter concept is stressed in privacy litigation in the United Kingdom since the introduction of the *Human Rights Act 1998* (UK), and is also relied upon in European case law dealing with the *European Convention on Human Rights*.²¹

2.18 There was widespread support among stakeholders for the articulation of this principle, and no stakeholders submitted that privacy should be regarded as an absolute right. Stakeholders suggested the following additions to the above list:

- the public's right to be informed on matters of public importance, in real time rather than after delay,²² and to have access to publicly available information and accurate historical records;²³
- the need for transparency in government, corporate and organisational dealings or operations that affect individuals,²⁴ and
- the desirability of Australian businesses being able to compete in the global economy and to encourage innovation and business in Australia.²⁵

17 Australian Communications and Media Authority, *Submission 52*.

18 Australian Bankers' Association, *Submission 27*.

19 CV Check, *Submission 23*.

20 Electronic Frontiers Australia, *Submission 714*; B Arnold, *Submission 28*.

21 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

22 Australian Subscription Television and Radio Association, *Submission 47*.

23 Arts Law Centre of Australia, *Submission 43*; Australian Institute of Professional Photography, *Submission 31*; Public Interest Advocacy Centre, *Submission 30*. It should be noted that some limitations on public access to historical records already exist. For example, under s 33(1)(g) of the *Archives Act 1983* (Cth) the National Archives of Australia is authorised to withhold information from public access if the release of that information would unreasonably disclose information relating to the personal affairs of an individual.

24 Pirate Party of Australia, *Submission 18*.

25 Google, *Submission 54*; Telstra, *Submission 45*; Optus, *Submission 41*.

Principle 4: Australian privacy laws should meet international standards

2.19 The protection of privacy in Australia should be consistent with Australia's international obligations, for example, under the ICCPR²⁶ and policies of the Organisation for Economic Co-operation and Development.²⁷ It should also take into account, as far as appropriate, international standards and legal developments in the protection of privacy.²⁸

2.20 Throughout this Discussion Paper, reference is made to developments in the legal protection of privacy in other jurisdictions, particularly but not limited to those jurisdictions with which Australia shares a common legal heritage. However, the Discussion Paper recognises that every jurisdiction's development of the law on privacy will depend on its constitutional framework, particularly its guarantees or protections of relevant interests or rights.²⁹ The need for statutory reform in a particular jurisdiction also depends on its common law at the time.

Principle 5: Privacy laws should be adaptable to technological change

2.21 The design of legislative protections of privacy should be sufficiently flexible to adapt to rapidly changing technologies and capabilities without the need for constant amendments. At the same time, they should be drafted with sufficient precision and definition to promote certainty as to their application and interpretation.

2.22 Several stakeholders stressed the need for law reform to be technologically neutral to avoid the risk of becoming outdated by rapid developments in technology.³⁰ For example, Google submitted that there is a need for flexible, forward-looking and adaptive data policies to ensure that society may benefit from the many beneficial uses of data analytics.³¹

Principle 6: Privacy laws should be clear and certain

2.23 A key concern in relation to the introduction of a statutory cause of action for serious invasion of privacy is uncertainty as to how the various provisions of a statute

26 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

27 Organisation for Economic Co-Operation and Development, *Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data*, 2013.

28 Australian Bureau of Statistics, *Submission 32*.

29 SBS, *Submission 59*.

30 Google, *Submission 54*; Australian Communications and Media Authority, *Submission 52*; Women's Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 48*; Optus, *Submission 41*; Australian Privacy Foundation, *Submission 39*; Australian Bureau of Statistics, *Submission 32*; C Jansz-Richardson, *Submission 24*; CV Check, *Submission 23*; Law Institute of Victoria, *Submission 22*.

31 Google, *Submission 54*.

would be interpreted and applied by courts in the future. Some stakeholders stressed the benefits of precision, clarity and certainty.³²

2.24 The ALRC agrees that, where possible, the law should be precise and certain, but also flexible and able to adapt to changes in social and technological conditions. The ALRC is also mindful, however, that Parliament cannot legislate precisely for all the different situations that may arise in the future and that certain issues must be left to the courts to determine in the light of all the circumstances of a particular case. Stakeholders pointed out that judges are used to deciding the types of issues that will arise in privacy cases, such as the existence and weight of public interest.³³ Where appropriate, the ALRC suggests some guidance on the relevant factors the court might or should consider.³⁴

2.25 The ALRC has specifically addressed the desirability of precision and certainty in its detailed legal design of the proposed statutory cause of action, but the principle underpins all of the ALRC's recommendations.

Principle 7: Privacy laws should be coherent and consistent

2.26 Any recommendation for a statutory cause of action for serious invasion of privacy (or other remedy) should promote coherence in the law and be consistent with other Australian laws or regulatory regimes. Recommendations should also promote uniformity or consistency in the law throughout Australian jurisdictions.

2.27 In its consultations and other occasions,³⁵ the ALRC has heard of widespread concern, uncertainty and confusion caused by notable differences in the law between the various states and territories. Two obvious examples relating to privacy are the inconsistency of legislation dealing with the use of surveillance devices and with harassment and cyber-bullying.

2.28 Inconsistent laws not only provide poor protection for privacy, but also inadequately protect countervailing interests—such as freedom of the media. Victims of unauthorised surveillance are poorly protected if they are unable to determine if a breach of a statute has occurred. The important activities of others, such as media entities, which operate nationally, may be overly restricted if it is unclear when and where they might be breaching a law.³⁶ The ALRC's recommendations are directed at achieving legal uniformity across Australia in relation to many different types of invasions of privacy.

32 Telstra, *Submission 45*; C Jansz-Richardson, *Submission 24*.

33 For example, B Arnold submitted that 'Australian jurisprudence regarding confidentiality, defamation and national security has demonstrated that courts are fully capable of identifying public interest and of dealing with tensions in claims regarding public good': B Arnold, *Submission 28*.

34 See, for example, Ch 8.

35 Standing Committee on Social Policy and Legal Affairs, *Roundtable on Drones and Privacy*, 28 February 2014, Parliament House, Canberra.

36 Australian Subscription Television and Radio Association, *Submission 47*; ABC, *Submission 46*.

2.29 The need for coherence and consistency also underlies the desirability of avoiding unnecessary overlap between legal regimes. Many stakeholders³⁷ expressed the view that any proposed remedial regime should not overlap or be inconsistent with the various regulatory schemes³⁸ and statutory prohibitions that already constrain the activities of certain organisations and render them subject to substantial compliance requirements, enforceable obligations, civil penalties, and private law remedies. This was a particular concern in view of the new compliance requirements imposed on entities as a result of amendments to the *Privacy Act 1988* (Cth) (*Privacy Act*) that came into force in March 2014.

2.30 However, regulation, the criminal law and the civil law can serve different purposes, even if they overlap in some ways. As discussed in Chapter 3, there are many different regulatory regimes, criminal laws and civil obligations and remedies protecting people from breaches or invasions of privacy either directly or indirectly. Any proposal for law reform should be considered in the context of the whole range of existing laws.

2.31 The consequence of a breach of a regulatory scheme or of the criminal law may not result in any personal remedy to a person affected by the breach. In some cases, this may be appropriate, as the person affected may be one of thousands of people affected and the individual may have not have suffered any material or serious harm. In this case, a more appropriate response may be a regulatory scheme that ensures that such a breach does not happen again. The breach may also lead to a criminal prosecution that may punish the perpetrator, and deter such conduct in the future.

2.32 Finally, legal reforms affecting civil liability for invasions of privacy should be consistent with legislative policy as it affects civil liability for wrongs to others generally,³⁹ and with other common law principles, unless there is an express and clear intent to override or distinguish them.

Principle 8: Justice to protect privacy should be accessible

2.33 The law should provide a range of means to prevent, reduce or redress serious invasions of privacy and it should facilitate appropriate access to justice for those affected.

37 Australian Federal Police, *Submission 67*; Google, *Submission 54*; ABC, *Submission 46*; Telstra, *Submission 45*; Optus, *Submission 41*.

38 The key existing regulatory schemes include those under the *Privacy Act 1988* (Cth), legislation dealing with health information, and state and territory legislation on data protection, outlined in Ch 3. In addition, commercial activities are regulated by the *Australian Competition and Consumer Act 2010* (Cth) and similar state legislation, and banks by various statutes and regimes that govern financial institutions. Further, such organisations are often subject to a range of civil obligations to their customers in contract, tort law or equitable principles, while tort and equitable obligations also arise where there is no contract between the parties.

39 For example, the policy implicit in the civil liability legislation in most states, and in the common law, limiting liability for negligently inflicted mental harm to plaintiffs suffering a recognised psychiatric illness.

2.34 Many stakeholders submitted that any statutory cause of action or other remedy for serious invasions of privacy should be accessible to people with limited means as well as to those who can more easily afford the high costs of litigation.⁴⁰ The law should also make appropriate provision for people with disability or others who require assistance in obtaining access to justice.⁴¹

2.35 There is also widespread support for an approach that will encourage or make available a range of flexible and accessible alternative dispute resolution mechanisms.⁴²

Principle 9: Privacy protection is an issue of shared responsibility

2.36 The notion of shared responsibility is an important consideration informing legislative frameworks for the protection of privacy. Provided they have the power and means to do so, individuals bear a measure of responsibility for the protection of their own privacy and the privacy of others. Organisations that collect, store, process, or disclose information have a responsibility to empower individuals to control their own personal information as much as practicable and appropriate, but also to take steps to protect the privacy of individuals. Legislative and non-legislative mechanisms are needed to ensure that individuals can and that organisations do adequately exercise their respective responsibilities to protect privacy.

2.37 The ALRC considers that capable adults should be encouraged to take reasonable steps to utilise the privacy tools and frameworks offered by service providers. Several stakeholders stressed the importance of personal responsibility. The Australian Federal Police, for example, argued that ‘individuals should take ownership of their own privacy’.⁴³ The National E-Health Transition Authority (NEHTA) advanced the concept of personal control, arguing that individuals can and should exercise control over their electronic health records. NEHTA explained that this control may be exercised through individuals setting controls over access to their health records; authorising others to access their records; and the capacity to make enquiries and complaints about the treatment of their online records.⁴⁴

40 Office of the Australian Information Commissioner, *Submission 66*; Australian Communications and Media Authority, *Submission 52*; Women’s Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 48*; Optus, *Submission 41*; Australian Bureau of Statistics, *Submission 32*; Public Interest Advocacy Centre, *Submission 30*; CV Check, *Submission 23*; Law Institute of Victoria, *Submission 22*; Office of the Information Commissioner, Queensland, *Submission 20*.

41 Office of the Public Advocate (Queensland), *Submission 12*. Representative actions are discussed in Ch 9.

42 Office of the Australian Information Commissioner, *Submission 66*; Women’s Legal Services NSW, *Submission 57*; ABC, *Submission 46*; Electronic Frontiers Australia, *Submission 44*; Arts Law Centre of Australia, *Submission 43*; Interactive Games and Entertainment Association, *Submission 40*; Australian Privacy Foundation, *Submission 39*; C Jansz-Richardson, *Submission 24*; Law Institute of Victoria, *Submission 22*; Office of the Information Commissioner, Queensland, *Submission 20*; Pirate Party of Australia, *Submission 18*; I Pieper, *Submission 6*. Alternative dispute resolution is discussed in Ch 9.

43 Australian Federal Police, *Submission 67*.

44 National E-Health Transition Authority, *Submission 8*.

2.38 However, personal responsibility can only be fully exercised when individuals are provided with the tools necessary to protect their privacy, and when the choices expressed by individuals are respected. Personal responsibility of individuals must therefore be balanced with the responsibility of organisations and service providers. Service providers should provide transparent and accessible methods to protect the privacy of their customers. This includes providing clear privacy policies, information about how to protect privacy, and privacy warnings, where relevant. Individuals need to be kept properly informed if privacy policies are not followed or are to be unilaterally changed.

2.39 Several stakeholders made submissions stressing the role of education as an essential and powerful tool to prevent invasions or breaches of privacy that might arise from the use of the internet or digital and mobile technologies.⁴⁵ Many people of all ages are unaware of the means available to protect their privacy, of the risks to privacy that arise in the digital era, and of the legal ramifications of some conduct.

2.40 The ALRC considers that education has an important role to play in reducing and preventing serious invasions of privacy, particularly in assisting individuals to interact safely and effectively in online and electronic relationships—whether they are personal or commercial in nature—and to respect the privacy of others. The ALRC considers that governments and industry have a responsibility to provide adequate education and assistance, particularly for vulnerable members of the Australian community, such as people with disability, children and some young people who may lack the capacity or knowledge to effectively protect their privacy in the digital era.

2.41 To that end, the ALRC highlights the responsibility of governments, relevant industries and industry groups representing entities that benefit from the advances of the digital era, to fund and support education programs which provide assistance and advocacy for individuals to manage their privacy. The ALRC has not made any proposals regarding education, as the ALRC's Terms of Reference for this Inquiry are limited to consideration of the ways in which the law may redress and reduce serious invasions of privacy.

45 Australian Federal Police, *Submission 67*; Facebook, *Submission 65*; Google, *Submission 54*. Google submitted that: 'The ALRC's Issues Paper is focused for the most part on what *legal* reforms are appropriate to protect privacy in the digital era. Google believes, however, it would be a missed opportunity for the ALRC not to consider the important role of non-legislative measures such as education in empowering individuals to protect their own privacy online'.