9. Forums, Limitations and Other Matters

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Summary

9.1 This chapter considers a number of details in the legal design of the statutory cause of action for serious invasion of privacy, including the appropriate forums to hear the cause of action, costs orders, and limitation periods.

9.2 The ALRC proposes that federal, state and territory courts should have jurisdiction to hear an action for serious invasion of privacy. The ALRC also proposes that an action under the new tort should generally be brought within one year. This is consistent with the one year limitation period prescribed for actions in defamation. It will also encourage the proper and timely administration of justice.

9.3 The chapter then discusses who should have standing to sue for a serious invasion of privacy. The ALRC proposes that the plaintiff must be a natural person,

rather than a company or other organisation. The ALRC also proposes that the statutory cause of action for serious invasion of privacy should not survive in favour of a plaintiff's estate or against a defendant's estate. These proposals reflect the fact that privacy is a matter of personal sensibility.

9.4 There may often be alternatives to bringing an action under the new tort, such as making a complaint to the Office of the Australian Information Commissioner. Failing to pursue such alternative dispute resolution processes should not bar a plaintiff from bringing an action under the new tort. However, the ALRC proposes that the new Act provide that, in determining any remedy, courts may take into account whether or not a party took reasonable steps to resolve the dispute without litigation and the outcome of any alternative dispute resolution process.

Forums

Proposal 9–1 Federal, state and territory courts should have jurisdiction to hear an action for serious invasion of privacy under the new Act.

Question 9–1 If state and territory tribunals should also have jurisdiction, which tribunals would be appropriate and why?

9.5 The Terms of Reference require the ALRC to make recommendations concerning jurisdiction and access to justice. The ALRC has taken into account a range of factors including: the need to minimise confusion or inconsistency in the application of legislation across Australian jurisdictions; the range of available remedies; issues of costs of proceedings; relevant constitutional issues; and existing courts and tribunals.

9.6 In considering which forums would be appropriate to hear actions under the new tort, a number of considerations are relevant. First, is the importance of access to justice for a wide range of litigants in a wide range of circumstances. Both plaintiff and defendant interests must be considered. A number of stakeholders expressed concerns that litigation through the courts may be so expensive as to discourage plaintiffs who may be unable to afford legal representation. For example, PIAC submitted that:

> Accessibility is a key factor in considering which forum is appropriate to determine matters under a statutory cause of action for serious invasion of privacy. Otherwise, there is a risk that this type of action would become the sole preserve of those wealthy enough to afford to pay for legal representation and to run the risk of incurring an adverse costs order if they are unsuccessful.[1]

9.7 Other stakeholders similarly supported low-cost forums.[2] The ALRC notes the importance of actions for serious invasion of privacy not being prohibitively costly to the wide range of individuals who might seek redress.[3]

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1 Public Interest Advocacy Centre, *Submission 30*.

2 Women's Legal Services NSW, *Submission 57*; Arts Law Centre of Australia, *Submission 43*; Public Interest Advocacy Centre, *Submission 30*.

3 Women's Legal Services NSW, *Submission 57*; Arts Law Centre of Australia, *Submission 43*.

9.8 Secondly, decision-makers should be able to order appropriate remedies or relief to plaintiffs. As noted by a number of stakeholders,[4] one of the most effective ways to limit the harm of an invasion of privacy is to prevent the invasion before it occurs, or to limit the effects of the invasion after it has occurred. For these purposes, an injunction will often be the appropriate remedy. Injunctive relief, however, is not available from all courts.

9.9 Lower courts and tribunals are often limited in the amount of damages that they may award. This also affects whether a particular forum is appropriate to hear an action for serious invasion of privacy.

9.10 Thirdly, an action for the new tort will frequently be brought concurrently with other actions. Where an invasion of privacy occurs through the disclosure of private information there may, for example, also be an action for breach of confidence or defamation. If it involves physical intrusion, there may also be a trespass claim. For both the plaintiff and defendant, it is preferable that all the actions arising from a particular incident be dealt with in a single forum, rather than new proceedings being required for each action. Courts may be better placed to allow multiple actions to be heard concurrently. While courts have existing jurisdiction to deal with a wide range of actions, providing powers to tribunals or other bodies to hear all other complaints related to the privacy matter would require the enactment of additional laws.

9.11 In light of these considerations, and as detailed further below, the ALRC has proposed that power to hear actions for serious invasion of privacy under the new federal statute should be vested in the Federal Court, the Federal Circuit Court, and state and territory courts. These state and territory courts would include local courts and magistrates courts where the claim is within their jurisdiction and the remedy sought is within their powers.

9.12 The ALRC has also asked for feedback on which tribunals, if any, would be appropriate forums to hear privacy actions under the new Act. The powers of various tribunals to hear these actions, as well as the possible limitations of these tribunals with respect to the action under the new Act, are discussed in more detail in the following sections.

Federal courts

9.13 The power to vest judicial power in the Federal Court of Australia (FCA) and the Federal Circuit Court of Australia (FCCA) arises under s 71 of the *Australian Constitution*. The jurisdictions of the FCA and the FCCA are generally conferred by a wide range of federal Acts such as the *Bankruptcy Act 1966* (Cth), the *Migration Act 1958* (Cth), the Australian Consumer Law,[5] the *Corporations Act 2001* (Cth), the *Telecommunications Act 1997* (Cth), and the *Privacy Act 1988* (Cth) (*Privacy Act*). As proposed in Chapter 4, the new tort should be located in a federal statute, and this statute could vest power to hear actions in the FCA and the FCCA.

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4 National Children and Youth Law Centre, *Submission 61*; Google, *Submission 54*; Australian Privacy Foundation, *Submission 39*; B Arnold, *Submission 28*.

5 *Competition and Consumer Act 2010* (Cth) sch 2.

9.14 Given that many serious invasions of privacy may involve parties in different states or territories, vesting the power to hear privacy actions in courts with jurisdiction across the entire country—such as the FCA and the FCCA—may reduce the costs, time and burdens for plaintiffs.

9.15 Both the FCA and the FCCA have, in addition to jurisdiction granted to them by legislation, ‘associated jurisdiction’[6] and ‘accrued jurisdiction’[7] for matters, not otherwise within these courts’ respective jurisdictions, that are related to matters which *are* within their respective jurisdictions. Thus, for example, while no statue confers jurisdiction on these courts for breach of contract actions, either court is able to hear a claim for breach of contract that is brought alongside, for example, a claim for misleading or deceptive conduct under the Australian Consumer Law. While associated and accrued jurisdiction would potentially mean that matters not currently within the jurisdiction of the FCA or FCCA could be heard by these courts, if brought alongside a privacy action, the ALRC does not consider this to be particularly problematic. Many related matters can already be brought before these courts—actions for defamation and negligence might be brought alongside an action arising under the *Privacy Act*, for instance.[8]

9.16 However, the ALRC considers that the FCA and the FCCA should not have exclusive jurisdiction[9] to hear actions under the new Act, as in many cases it would be less costly for litigants to use state local courts or district or circuit courts to hear proceedings.

State and territory courts

9.17 State and territory courts include Supreme Courts, District or County courts, and Local or Magistrates Courts. The new Act, as a Commonwealth law, could vest federal jurisdiction in state and territory courts to hear the new cause of action.[10]

9.18 Different powers are available to the different levels of state and territory courts. The Supreme Courts of the states and territories have general, unlimited jurisdiction.[11]

9.19 District and County Courts (and the Magistrates Court of the ACT) generally have similar powers to Supreme Courts, including powers to grant injunctions and

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6 *Federal Court of Australia Act 1976* (Cth) s 32; *Federal Circuit Court of Australia Act 1999* (Cth) s 18.

7 *Stack v Coastal Securities (No 9)* (1983) 154 CLR 261.

8 See, eg, *Dale v Veda Advantage Information Services and Solution Limited* [2009] FCA 305 (1 April 2009).

9 The power to grant exclusive jurisdiction to federal courts is provided to the Commonwealth under s 77(ii) of the *Constitution*. For an example of exclusive jurisdiction of the Federal Court, see *Competition and Consumer Act 2010* (Cth) s 86.

10 This vesting of jurisdiction is possible under ss 71 and 77(iii) of the *Constitution* and s 39 of the *Judiciary Act 1903* (Cth) (in the cases of states), and s 122 of the *Constitution* (in the case of territories). James Crawford and Brian Opeskin, *Australian Courts of Law* (Oxford University Press, 4th ed) 57. A state or territory court will only have the power to exercise federal jurisdiction in line with ss 35 and 122 of the *Australian Constitution* where that jurisdiction power derives from a Commonwealth Act, not a state or territory act.

11 See, eg, *Supreme Court Act 1970* (NSW) s 23; *Constitution Act 1975* (Vic) s 85(1).

equitable remedies.[12] However, the jurisdiction of District and County Courts is typically limited to certain values. For example, the County Court of Victoria may only hear claims up to $200,000; the District Courts of Queensland and Western Australia, may only hear claims up to $250,000; and the District Court of NSW may only hear claims up to $750,000.[13]

9.20 The powers of Local and Magistrates Courts with respect to civil actions are often restricted in certain ways. For example, the Local Court of NSW does not have jurisdiction to hear defamation proceedings;[14] and the Magistrates Court of South Australia has powers limited to certain procedural functions, adjourning proceedings, certain statutory matter, and 'minor civil actions'.[15] Local and Magistrates Courts may have equitable jurisdiction and so may be able to hear breach of confidence actions, although this jurisdiction may be limited to cases where any relief claimed is an amount of money under a certain limit.[16] Local and Magistrates Courts typically do not have the power to grant an injunction.

9.21 While the jurisdictions of the Local, Magistrates, District and County Courts of the states and territories may in some cases have restrictions that limit their effectiveness in dealing with some privacy actions, the ALRC does not consider that there is any reason to expressly exclude these courts as possible forums for privacy actions. There would also be considerable benefit in terms of providing wider access to justice in privacy claims if these courts could hear some privacy actions.

Cost management in courts

9.22 While proceedings in courts may result in substantial costs for parties, there are mechanisms available to minimise these costs. Courts are variously empowered to direct parties to mediation, conciliation and arbitration,[17] which are designed to offer cheaper and faster dispute resolution than litigation. Courts also have the power to waive fees and, in certain cases, fees are not payable.[18] While these mechanisms will not remove the costs for all litigants, they do temper the costs associated with court proceedings in some cases.

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12 *District Court Act 1973* (NSW) ss 44, 46; *District Court of Queensland Act 1967* (Qld) ss 68, 69; *District Court Act 1991* (SA) s 8; *County Court Act 1958* (Vic) ss 37, 49; *District Court Act 1969* (WA) ss 50, 55; *Magistrates Court Act 1930* (ACT) ss 257, 258.

13 *County Court Act 1958* (Vic) s 3, 37; *District Court of Queensland Act 1967* (Qld) s 68; *District Court Act 1969* (WA) s 50; *District Court Act 1973* (NSW) s 44.

14 *Local Court Act 2007* (NSW) s 33.

15 *Magistrates Court Act 1991* (SA) ss 8, 10, 15.

16 See, eg, *Magistrates Court (Civil Proceedings) Act 2004* (WA) s 6.

17 See, eg, the following provisions for the power to order mediation: *Federal Court of Australia Act 1976* (Cth) s 53; *Civil Procedure Act 2005* (NSW) s 26; *Civil Procedure Act 2010* (Vic) s 48(2)(c); *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 50.07.

18 *Civil Procedure Regulation 2012* No 393 (NSW) reg 11.

9.23 The ALRC has asked a question in this Discussion Paper concerning possible additions to the powers of courts to grant costs orders.[19]

Tribunals

9.24 Several states and territories have created tribunals that are able to hear civil matters, and which may be suitable forums for hearing privacy actions under the new Act. These tribunals include the ACT Civil and Administrative Tribunal (ACAT); the NSW Civil and Administrative Tribunal (NCAT); the Queensland Civil and Administrative Tribunal (QCAT); the State Administrative Tribunal of Western Australia (SAT); and the Victorian Civil and Administrative Tribunal (VCAT). These tribunals have a range of powers including, in some cases, powers to grant injunctions.[20]

9.25 The usefulness of these tribunals has been noted before—for example, the Victorian Law Reform Commission recommended that jurisdiction for privacy actions should be vested exclusively in the VCAT:

> VCAT is designed to be more accessible than the courts. It seeks to be a speedy, low-cost tribunal where legal costs do not outweigh the issues at stake. The experience in other jurisdictions demonstrates that any damages awards in cases of this nature are likely to be relatively small. The sums of money involved do not justify the level of legal costs usually associated with civil litigation in the courts.[21]

9.26 However, the power of the federal Parliament to vest federal jurisdiction in state courts under s 77(iii) of the *Constitution* may not extend to vesting jurisdiction in the ACAT, NCAT, QCAT, SAT and VCAT,[22] unless these tribunals are determined to be 'courts', for constitutional purposes.

9.27 While the ALRC considers that these tribunals may offer a useful forum for hearing privacy actions, no specific proposal is made at this stage for granting jurisdiction to a tribunal. However, the ALRC is interested in submissions from stakeholders on which civil tribunals might be appropriate.

9.28 Although federal tribunals exist, these federal tribunals do not appear to be suitable for hearing privacy actions under the new Act. Federal tribunals are limited to administrative jurisdiction. They cannot, under the *Constitution*, be granted judicial powers.[23] Moreover, the majority of these tribunals have specific areas of focus, which do not include privacy—for example, the Australian Competition Tribunal; the Copyright Tribunal of Australia; and the Migration and Refugee Review Tribunals.

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19 See Question 11–1.

20 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 22; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 123; *State Administrative Tribunal Act 2004* (WA) s 90 (interim injunctions only).

21 Victorian Law Reform Commission, *Surveillance in Public Places*, Report No 2010) [7.226].

22 *Victorian Civil and Administrative Tribunal Act 1998* (Vic); *NSW Civil and Administrative Tribunal Act 2013* (NSW); *Queensland Civil and Administrative Tribunal Act 2009* (Qld); *South Australian Civil and Administrative Tribunal Act 2013* (SA).

23 *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

9.29 The Administrative Appeals Tribunal (AAT) was suggested as a possible forum for privacy actions by some stakeholders.[24] However, although the AAT has a wide range of functions and powers, including functions under the *Privacy Act*, the functions and powers are related to the review of decisions made by administrative bodies. Some invasions of privacy may give rise to both a complaint under the *Privacy Act* and an action under the statutory cause of action for serious invasion of privacy. However, a claim based on the statutory cause of action for serious invasion of privacy, by itself, would not usually arise out of a decision by an administrative body. The AAT would therefore not be an appropriate forum to determine liability, although the existence of a civil cause of action would not prevent the plaintiff otherwise challenging a decision by an administrative body.

The role of government regulatory bodies

9.30 In addition to courts and tribunals, complaints about serious invasions of privacy might be brought through administrative bodies. The Australian Information Commissioner, in particular, has power to receive complaints from individuals who consider that a government agency or private organisation has engaged in conduct amounting to an 'interference with the privacy of an individual' by breaching the APPs.[25] The Commissioner is empowered to make a determination, including a range of declarations, such as a declaration that the respondent pay the complainant an amount by way of compensation, or that the respondent take a specified action to redress any loss or damage suffered by the complainant.[26] Similar powers are granted to state and territory information privacy commissioners.[27]

9.31 While these complaints mechanisms provide a cheaper and potentially faster dispute resolution system than courts, the ALRC does not consider that these regulatory bodies are appropriate forums to hear complaints under the statutory cause of action for serious invasion of privacy. In the absence of significant reform, the remits of these administrative bodies are typically restricted to information privacy, and to particular entities such as government agencies or large businesses. Furthermore, the possible remedies available under these complaints mechanisms are generally more limited than those available through a court, and a complainant is typically required to seek a court order to enforce a determination arising from a complaint.

9.32 However, administrative dispute resolution processes continue to play a useful role in providing cheaper, faster, and otherwise less burdensome avenues for dispute resolution.

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24 Women's Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 48*; Public Interest Advocacy Centre, *Submission 30*.

25 *Privacy Act 1988* (Cth) s 40.

26 Ibid s 52(1A).

27 *Privacy and Personal Information Protection Act 1998* (NSW); *Information Privacy Act 2009* (Qld); *Premier and Cabinet Circular No 12* (SA); *Personal Information Protection Act 2004* (Tas); *Information Privacy Act 2000* (Vic); *Information Act* (NT).

Cause of action limited to natural persons

Proposal 9–2 The new Act should provide that the new tort be limited to natural persons.

9.33 The ALRC proposes that the statutory cause of action for serious invasion of privacy be limited to natural persons.[28] This means that corporations, government agencies or other organisations[29] would not have standing to sue for invasions of privacy. This was unanimously recommended by previous Australian law reform inquiries.[30] Actions in defamation, which are analogous to privacy actions, are also generally limited to living, natural persons.[31]

9.34 An action in privacy is designed to remedy a personal, dignitary interest. It would be incongruous to assign this interest to a corporation or other body. In *Australian Broadcasting Corporation v Lenah Game Meats,* Gummow and Hayne JJ suggested in obiter that any common law tort of privacy (were one to develop in Australian law), should be confined to natural persons as corporations lack the 'sensibilities, offence and injury … which provide a staple value for any developing law of privacy'.[32]

Non-survival of the cause of action

Proposal 9–3 A cause of action for serious invasion of privacy should not survive for the benefit of the plaintiff's estate or against the defendant's estate.

9.35 The ALRC proposes that a statutory cause of action for serious invasion of privacy be limited to living persons. The ALRC, VLRC and NSWLRC also previously recommended that a cause of action be restricted to living persons.[33] This proposal means that actions cannot survive for the benefit of a deceased person's estate, whether or not proceedings had been commenced before the death of the plaintiff. Actions also cannot subsist against the estate of a deceased person, whether or not proceedings had commenced before the death of the defendant.

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28 Barristers Animal Welfare Panel and Voiceless, *Submission 64*.

29 Including elected bodies: *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680

30 Victorian Law Reform Commission, *Surveillance in Public Places*, Report No 2010) Rec 32; ALRC, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) Rec 74–3(a); NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) NSWRC Draft Bill, cl 74(1).

31 *Defamation Act 2005* (SA) s 9. Some small businesses (which employ less than 10 employees) and not for profit organisations have standing under the Act to sue for defamation.

32 *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [126].

33 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008); Victorian Law Reform Commission, *Surveillance in Public Places*, Report No 2010) Rec 32; NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) Draft Bill, cl 79.

9.36 This provision has a similar effect to the provisions of the Uniform Defamation Laws.[34]

Privacy action protects personal interests

9.37 The new tort is intended to remedy the wrong to a person's dignitary interests. It should therefore be limited to living persons.[35] This position is in keeping with the common law rule of *actio personalis moritur cum persona* (a personal action dies with the plaintiff or the defendant).[36]

9.38 Given the personal nature of a privacy action, the ALRC considers that only the individual who has suffered loss or damage should be able to sue for relief. An action cannot therefore be commenced, or continued, by the legal personal representative of the deceased person.

9.39 The so-called 'mischief' to be remedied by a privacy action is the mental harm and hurt to feelings suffered by a living person.[37] PIAC noted that:

> Most existing statutory causes of action for invasion of privacy lapse with the death of the person whose privacy has allegedly been invaded. This can be seen as flowing from the fact that the right to privacy is generally seen as a personal right. It has also been justified on the basis that because the main mischief of an invasion of privacy is the mental harm and injured feelings suffered by an individual, only living individuals should be allowed to seek relief.[38]

9.40 A statutory cause of action for serious invasion of privacy is analogous to an action in defamation, which does not survive the death of the person defamed, nor the person who published the defamatory matter.[39] The Law Institute of Victoria made the distinction between actions in defamation and actions for breach of confidence, arguing that a duty of confidence can persist after death.[40] However, breach of confidence actions protect quasi-proprietorial interests, that is, the plaintiff's interest in the confidential information, which will often be commercial information. By contrast, privacy actions protect a personal interest in the plaintiff's privacy.

9.41 Several stakeholders, however, support the principle of the survival of the action.[41] However, even where actions survive for the benefit of an estate, the relevant legislation generally restricts the damages recoverable to special damages for the precisely calculated pecuniary losses suffered as a result of actual damage from injuries received, such as medical expenses or loss of earnings before death and does not allow damages for pain and suffering and the like.[42]

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34 Eg, *Defamation Act 2005* (NSW) s 10.The Tasmanian Act does not include this provision.

35 Several stakeholder supported this position: Insurance Council of Australia, *Submission 15*; Arts Law Centre of Australia, *Submission 43*; Telstra, *Submission 45*.

36 RP Balkin and JLR Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) [11.53], [28.38].

37 Law Reform Commission of Hong Kong, *Civil Liability for Invasion of Privacy*, (2004) [29].

38 Public Interest Advocacy Centre, *Submission 30*.

39 See, eg, *Defamation Act 2005* (SA) s 10.

40 Law Institute of Victoria, *Submission 22*.

41 Australian Privacy Foundation, *Submission 39*.

42 *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) s 2.

9.42 Some stakeholders submitted that the action could survive in some specific circumstances.[43] For example, PIAC argued that the action should survive the death of a plaintiff where 'important systemic issues are involved'.[44] By way of example, PIAC pointed to anti-discrimination complaints which, in NSW, survive the death of a complainant.[45] PIAC suggested that the value of privacy as a matter of public interest is akin to the public value in eliminating discrimination and should thus survive the death of a complainant for the good of all society. It could be argued, however, that any damages payable to an estate for an invasion of the privacy of a now deceased individual are a windfall to the estate and the beneficiaries who may not have been harmed in any way by an invasion of privacy.

Impact on family member's privacy

9.43 Given that a privacy action generates a personal right of action, it follows that an action should not be designed to remedy any secondary damage others might suffer—for example, a surviving family member who has suffered distress caused by the invasion of the deceased person's privacy while he or she was alive. However, there may be instances where the conduct of a defendant following the death of an individual may invade the privacy of surviving relatives or other parties who are closely involved. It is important to note that the non-survival of a deceased person's action does not mean that family members or other parties are unable to pursue their own actions for serious invasion of privacy where they meet the tests for actionability in their own right.[46] These actions may arise out of conduct indirectly involving a deceased person, such as where the privacy of a family member or other relevant party is invaded in a private moment of grief or mourning,[47] or in circumstances where a deceased's medical record is published to disclose a condition affecting surviving relatives.

9.44 Another example, outlined in PIAC's submission, is where a so-called tribute or dedication page to a deceased person established on a social media site such as Facebook reveals personal information about a third party.[48] These circumstances may generate a cause of action for the third party. This position is generally in line with defamation law where a family member may only bring an action in respect of a defamatory slur against a deceased family member where he or she has been personally defamed.[49]

Representative actions by affected parties

9.45 The Arts Law Centre of Australia and the Law Institute of Victoria argued that an action should survive the death of the person whose privacy is invaded if that person identified as being Aboriginal or Torres Strait Islander, given the specific cultural

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43 I Turnbull, *Submission 5*.
44 Public Interest Advocacy Centre, *Submission 30*.
45 *Anti-Discrimination Act* (NT) s 93(1).
46 SBS, *Submission 59*; NSW Young Lawyers, *Submission 58*; Australian Subscription Television and Radio Association, *Submission 47*.
47 NSW Young Lawyers, *Submission 58*; Public Interest Advocacy Centre, *Submission 30*.
48 Public Interest Advocacy Centre, *Submission 30*.
49 *Krahe v TCN Channel Nine Pty Ltd* (1986) 4 NSWLR 536.

beliefs of those communities associated with mourning and death.[50] In these cases, a family or other affected party would bring the claim on behalf of the deceased person. However, the ALRC considers that the wrong for which action may be brought is committed against the individuals whose privacy has been invaded.

9.46 There is some guidance at law about representative actions brought by affected parties. The *Australian Securities and Investments Commission Act* 2001 (Cth), for example, provides for a court to make orders that apply to a class of 'affected individuals', even where those individuals are not subject to the proceedings.[51] In consumer class actions or data breaches where plaintiffs can be easily identified, such a provision may well be useful. However, in the highly personal context of invasions of privacy, identifying relevant or affected parties to a representative action may be difficult.

9.47 The Law Institute of Victoria submitted that remedies could be limited to 'those that protect the deceased's identity, for example, to allow corrective orders and declarations but not damages'.[52] The Australian Privacy Foundation argued that a court may consider the financial circumstances of a deceased defendant when awarding remedies against their estate.[53] However these considerations would require valuation of a deceased's estate, and may lead to lengthy and costly legal disputes over the administration and distribution of a defendant's estate, tying up the estate and leaving creditors and beneficiaries waiting many years for distribution.

9.48 The Law Society of NSW Young Lawyers' Committee on Communication, Entertainment and Technology recommended vesting power to bring actions on behalf of a deceased person in the OAIC.[54] This approach would require significant reform of the operation of the *Privacy Act* including, but not limited to, broadening the powers of the OAIC to consider privacy matters beyond information privacy and removing the various exemptions to the Act. It may also conflict with the independent and impartial role of the OAIC as conciliators of privacy complaints.

International consistency

9.49 Limiting the action for statutory invasion of privacy to living persons would, generally speaking, bring Australian law into line with international privacy law.[55] PIAC noted, however, the exception of French law which allows family members to bring civil privacy actions on behalf of a deceased relative.[56] An example is the 2007 case of *Hachette Filipacchi Associés (Paris-Match) v France*.[57]

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50 Arts Law Centre of Australia, *Submission 43*; Law Institute of Victoria, *Submission 22*.

51 *Australian Securities and Investments Commission Act 2001* (Cth) s 12GNB. The OAIC highlighted this provision in its submission as a possible model for matters which impacted on the privacy of a large group of individuals.

52 Law Institute of Victoria, *Submission 22*.

53 Australian Privacy Foundation, *Submission 39*.

54 NSW Young Lawyers, *Submission 58*.

55 See, eg *Privacy Act*, RSBC 1996, c 373 s 5.

56 Public Interest Advocacy Centre, *Submission 30*.

57 *Hachette Filipacchi Associés (Paris-Match) v France* (2009) 49 EHRR 515.

Representative and class actions

9.50 Several stakeholders raised the issue of representative or class actions, arguing that the availability of these mechanisms in the new statutory tort would strengthen access to justice.[58] The ALRC supports the principle of access to justice, noting it is a Term of Reference for this Inquiry. However, the ALRC has not made a proposal on representative or class actions as existing mechanisms would apply to the statutory tort in the same way they apply to other civil actions. For instance, Part IVA of the *Federal Court Act* 1976 (Cth) provides a framework for representative proceedings to the Federal Court.

9.51 The Office of the Public Advocate (Queensland) submitted that the ALRC should consider ways to accommodate a litigation guardian to conduct legal proceedings on behalf of an adult with impaired decision-making capacity.[59] The ALRC also considers that this is an important issue concerning access to justice, but that it requires broader consideration than its application just to the proposed new statutory tort. The ALRC is currently undertaking an inquiry into equality, capacity and disability in Commonwealth laws. That inquiry is considering, among other things, the role of litigation guardians in civil proceedings. Its proposals would have relevance and application to any new statutory cause of action.[60]

Limitation period

Proposal 9–4 A person should not be able to bring an action under the new tort after either (a) one year from the date on which the plaintiff became aware of the invasion of privacy, or (b) three years from the date on which the invasion of privacy occurred, whichever comes earlier. In exceptional circumstances the court may extend the limitation period for an appropriate period, expiring no later than three years from the date when the invasion occurred.

9.52 The ALRC proposes a primary limitation period of one year from the date a plaintiff became aware of the invasion, with the discretion for a court to extend this period to up to three years from the date the invasion occurred.[61]

9.53 Previous law reform inquiries have diverged on this issue. The NSWLRC proposed a one year limitation period, in line with actions in defamation.[62] In contrast,

58 Office of the Australian Information Commissioner, *Submission 66*; B Arnold, *Submission 28*; Pirate Party of Australia, *Submission 18*.

59 Office of the Public Advocate (Queensland), *Submission 12*.

60 *Equality, Capacity and Disability in Commonwealth Laws* <www.alrc.gov.au/inquiries/legal-barriers-people-disability>.

61 Several stakeholders supported this proposal: SBS, *Submission 59*; Australian Subscription Television and Radio Association, *Submission 47*; ABC, *Submission 46*; Arts Law Centre of Australia, *Submission 43*; Optus, *Submission 41*; T Gardner, *Submission 3*.

62 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) Para. 9.1.

the VLRC proposed a three year limitation period, consistent with actions for personal injury.[63]

Ensure fairness and certainty to both parties to a proceeding

9.54 A one year limitation period will assist in providing fairness to both parties to a proceeding and encourage the proper and timely administration of justice. A relatively short limitation period will balance the interests of both parties to a proceeding, providing adequate time for a plaintiff to appreciate and manage the emotional and financial repercussions of a serious invasion of privacy, while also providing certainty and a timely opportunity to defend proceedings to defendants.

9.55 It would be burdensome on defendants if the existence of a longer limitation period led to uncertainty and anxiety as to whether they are likely to be sued. Preparing a defence case and calculating the likely cost of litigation and possible remedies may be more challenging the longer a plaintiff takes to initiate proceedings.

9.56 Some stakeholders have raised the concern that extending a limitation period beyond one year may encourage plaintiffs to delay bringing an action.[64] The Australian Subscription Television and Radio Association (ASTRA) argued that a plaintiff may be motivated to delay an action in order to exacerbate the damage caused by the invasion with a view to increasing a possible award of damages.[65] There is a legitimate policy rationale in designing law in a way that encourages plaintiffs to act reasonably quickly to initiate proceedings. This approach is also in the interests of plaintiffs who should seek to reduce the possibility of escalating or exacerbating an invasion of privacy by bringing an action as quickly as possible.

9.57 The ALRC considers a primary one year limitation period best balances the interests of plaintiffs (in being afforded sufficient time after discovering a breach to investigate and organise their claim) with the interests of defendants (in being able to arrange their affairs knowing that claims will not be brought against them after a particular period of time).

Consistency with comparable causes of action

9.58 This proposal is consistent with the one-year limitation period prescribed for actions in defamation.[66] Consistency with the position in defamation law may avoid the risk that plaintiffs will forum-shop between comparable actions. A one year limitation period is also consistent with the limitation period for defamation actions in the UK.[67]

9.59 The rationale for one year limitation periods in defamation is applicable to privacy actions. Defamation actions are based on damage to a person's reputation, a

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63 Victorian Law Reform Commission, *Surveillance in Public Places*, Report No 2010) Para. 7.248; ALRC, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008).

64 Australian Subscription Television and Radio Association, *Submission 47*; Arts Law Centre of Australia, *Submission 43*.

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

66 See, eg, *Limitation Act 1969* (NSW) s 14B.

67 *Limitation Act 1980* (UK) s 4A.

harm which is complete on publication. Arguably, the act of publication should be apparent to a litigant in defamation actions as the media has a significant and visible presence in contemporary life. The same logic can be applied to privacy actions, as a serious invasion of privacy is likely to be more apparent than in other civil causes of action. This is particularly compelling given the high threshold for actionability where a plaintiff must demonstrate a *serious* invasion of privacy. It is probable that a serious invasion of privacy will be immediately evident to a plaintiff. A short limitation period would not therefore hinder a plaintiff's capacity to commence proceedings.

9.60 In contrast to actions in defamation, actions in personal injury, which generally have a longer limitation period of three years, are based on injury to the individual which may take longer to eventuate.

9.61 This proposal is also consistent with the limitation periods in the *Privacy Act* with respect to when the OAIC can hear complaints.[68] A complaint of privacy interference by an APP entity can be made within 12 months from the date the applicant becomes aware of the relevant act or conduct.[69] The OAIC then has discretion as to whether or not to investigate a complaint of privacy interference made after this date. The OAIC supports the application of a similar limitation period to a statutory cause of action for serious invasion of privacy.[70]

9.62 Several stakeholders suggested that a longer time period, closer to the three year limitation period for personal injury actions,[71] would be more appropriate.[72] These stakeholders suggested that an individual whose privacy has been seriously invaded may be too distressed to consider legal avenues for redress within a one year period. The ALRC considers this to be an important consideration to be taken into account by a court when considering whether an extension on the limitation period is reasonable in all the circumstances.

Commencement of limitation period

9.63 The ALRC considers the limitation period should start when the complainant becomes aware of the invasion of privacy.[73] The OAIC submitted that applicants may be unaware they have experienced a serious invasion of privacy for some period after the event, due to advances in communication and surveillance technology.[74] These developments in technology mean that plaintiffs may not be immediately aware of the disclosure of their private information on the internet, or the use of covert and unlawful surveillance devices to monitor their private activities.

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68 *Privacy Act 1988* (Cth) s 41(1)(c).

69 Office of the Australian Information Commissioner, *Submission 66*.

70 Ibid.

71 See, eg, *Limitation Act 1969* (NSW) s 18A.

72 Law Institute of Victoria, *Submission 22*; Law Reform Commission of Hong Kong, *Civil Liability for Invasion of Privacy*, (2004) Rec 28.

73 N Witzleb, *Submission 29*.

74 Office of the Australian Information Commissioner, *Submission 66*.

9.64 SBS argued that the limitation period should commence from the date of disclosure or publication of the private information.[75] As previously outlined, this is in keeping with defamation law. Publication of an individual's private information in the mainstream media will, necessarily, be relatively obvious to a plaintiff. However, the ALRC considers it would be unfair to restrict individuals from pursuing a civil claim in privacy in circumstances where the invasion is less obvious, but still serious.

9.65 It is important to consider the interaction of the limitation period with other elements of the cause of action. The ALRC proposed that the tort for serious invasion of privacy should be actionable per se. Commencing the limitation period from the date when the plaintiff became aware of the invasion will not conflict with this element of the cause of action as a plaintiff will not have to demonstrate harm or damage suffered at a particular time.

Extension of limitation period

9.66 The ALRC's proposal provides a court with the discretion to extend a limitation period where there are reasonable circumstances for a plaintiff's delay in initiating proceedings. This proposal provides a degree of flexibility to courts and parties to a proceeding, ensuring protection for plaintiffs and allowing for the fair and timely resolution of meritorious claims.

9.67 This proposal is in keeping with the recommendations of the NSWLRC.[76] It is also consistent with defamation law which provides that a court may allow an extension of up to three years from the date of publication of the defamatory matter, 'if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date of the publication'.[77]

9.68 This position is also consistent with the UK's approach to defamation actions. Under the *Limitation Act* 1980 (UK),[78] a UK court may extend limitation periods where it would be 'prejudicial' to a plaintiff and/or to a defendant to restrict the period to one year. In making an order for an extension of time, a court must have regard to all the circumstances of the case and in particular to the length of the delay and the reasons for the delay.[79] The ALRC considers this a useful model for Australian courts.

9.69 There is precedent at common law and statute in Australian jurisdictions for courts to grant extensions on limitation periods. The factors a court may consider in granting an extension include: whether the justice of the case requires that the application be granted; whether a fair trial is possible by reason of the time that has elapsed since the events giving rise to the cause of action; the length of delay and any

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75 SBS, *Submission 59*.
76 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) [9.1].
77 *Limitation Act 1969* (NSW) s 56A; *Defamation Act 2005* (SA) s 56A.
78 *Limitation Act 1980* (UK) s 32A.
79 Ibid s 32A(2).

explanation for it are relevant considerations; and whether a respondent is prima facie prejudiced by being deprived of the protection of the limitation period.[80]

Alternative dispute resolution processes

Proposal 9–5 The new Act should provide that, in determining any remedy, the court may take into account:

(a) whether or not a party took reasonable steps to resolve the dispute without litigation; and

(b) the outcome of any alternative dispute resolution process.

9.70 Complaints about serious invasions of privacy may be made to statutory bodies. These include, in particular, to the Office of the Australian Information Commissioner (the OAIC), the Australian Communications and Media Authority (the ACMA), state and territory privacy commissioners and ombudsmen. Various industry bodies also provide alternative dispute resolution processes.

9.71 These alternative dispute resolution (ADR) processes offer several advantages over judicial proceedings. In particular, they may be cheaper and faster than judicial proceedings, and they may be less emotionally burdensome on the parties involved. The use of ADR may also reduce the case load of courts, which is desirable for the efficient administration of justice.

9.72 If a statutory cause of action for serious invasion of privacy is enacted, the availability of these existing dispute resolution processes should be recognised. Some possibilities include requiring a complainant to pursue some other form of dispute resolution before commencing judicial proceedings, prohibiting judicial proceedings if ADR has been undertaken, or prohibiting ADR if judicial proceedings have been undertaken.

9.73 For reasons set out below, the ALRC has concluded that a complainant should not be required to pursue ADR before initiating judicial proceedings. Nor should they be barred from initiating judicial proceedings where ADR has previously been pursued. The ADR and judicial processes should remain independent, although the fact that an individual has pursued one process might be taken into account in another process.

No requirement to pursue ADR

9.74 That the use of some form of ADR should be encouraged is widely acknowledged. However, stakeholders took different views on whether or not ADR prior to judicial proceedings should be mandatory. Several stakeholders supported mandatory ADR,[81] and a number supported only voluntary ADR.[82]

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80 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541.

81 Optus, *Submission 41*; Australian Bankers' Association, *Submission 27* 47; Law Institute of Victoria, *Submission 22*; Office of the Information Commissioner, Queensland, *Submission 20*.

9.75 There would be several difficulties in requiring plaintiffs to pursue ADR before initiating judicial proceedings. Although there is a range of ADR options available, the various options are often limited to specific types of matters. For instance, the OAIC may investigate complaints relating to data protection under the *Privacy Act*; state and territory commissioners and ombudsmen may investigate complaints relating to state and territory agencies; and the ACMA may investigate complaints relating to media and communications organisations. There is at present no single ADR forum that is empowered to deal with all types of complaints that might lead to proceedings under a statutory cause of action for serious invasion of privacy. A requirement that potential plaintiffs pursue ADR before initiating judicial proceedings may therefore be too onerous, requiring them to research a complex and fragmented landscape to determine which ADR option would apply in their case.

9.76 Moreover, barring potential plaintiffs from initiating ADR without first pursuing non-judicial proceedings would present a significant restriction on the potential plaintiffs' access to justice. This would be particularly problematic where the individual wished to seek an injunction, or where the defendant would be unlikely to engage in ADR in good faith—in either case, the plaintiff would be faced with additional time and financial costs with little chance of obtaining appropriate redress.

9.77 Mandatory ADR may also be inappropriate in cases where one party poses a serious threat, including a serious psychological or emotional threat, to the other party. Several stakeholders argued that this would be a particular problem in many privacy cases involving domestic violence.[83]

9.78 Rather than a general requirement that potential plaintiffs pursue ADR processes before initiating judicial proceedings, it is preferable to use existing court powers to refer matters to dispute resolution where appropriate (and other existing provisions relating to dispute resolution in court rules).[84] This would allow the courts to take into account the urgency of a matter, the relationship between the parties, and any other factors relevant to whether such an order should be made. However, possible administrative dispute resolution providers, such as the OAIC and the ACMA, may require specific powers in order to receive court-referred disputes. As the OAIC noted, under the current *Privacy Act*,

> It would not be appropriate for the OAIC to take on an alternative dispute resolution role in the absence of a complaints model being adopted. For example, the OAIC suggests it would not be workable for a court to refer matters to the OAIC for conciliation. In particular, this is because the OAIC relies to some extent on the investigative powers in Part V of the *Privacy Act* in order to successfully conduct its

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82 SBS, *Submission 59*; Women's Legal Services NSW, *Submission 57*; Women's Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 48*; Electronic Frontiers Australia, *Submission 44*; Australian Privacy Foundation, *Submission 39*; Public Interest Advocacy Centre, *Submission 30*; B Arnold, *Submission 28*; C Jansz-Richardson, *Submission 24*; T Gardner, *Submission 3*.

83 Women's Legal Services NSW, *Submission 57*; Women's Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 48*; Women's Legal Centre (ACT & Region) Inc., *Submission 19*.

84 See, eg, *Civil Procedure Act 2005* (NSW) pts 4, 5; *Civil Procedure Act 2010* (Vic) ch 5; *Federal Court of Australia Act 1976* (Cth) s 53A.

> conciliations, and those investigative powers would not be triggered in such circumstances.[85]

No bar on judicial proceedings after ADR

9.79 The ALRC has not proposed that a complainant who has received a determination from an ADR process should be barred from initiating judicial proceedings about the same matter.

9.80 While it may be undesirable to have individuals 'double-dipping' by receiving successful outcomes from a non-judicial process as well as judicial proceedings, a statutory bar on judicial proceedings after a non-judicial process would present a serious limitation on access to justice and discourage the use of non-judicial processes.

9.81 The risks of a complainant double-dipping would likely be minimal. An unsuccessful ADR process would generally be a strong indicator that an action under the statutory cause of action would be unsuccessful as well.

Courts empowered to take account of non-judicial proceedings

9.82 In order to encourage the use of ADR and to ensure that inappropriate double-dipping is kept to a minimum, courts should be empowered, when determining any remedies under the statutory cause of action for serious invasion of privacy, to take into account: (i) whether or not parties to proceedings have undertaken ADR in good faith; and (ii) the outcome of that non-judicial process, including the award of any monetary remedy.

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85 Office of the Australian Information Commissioner, *Submission 66*.