

2. Guiding Principles

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Summary

2.1 The ALRC has identified nine principles to guide the recommendations for reform in this Inquiry. The principles are not designed to limit the scope of the Inquiry, but rather to assist the ALRC, governments and other stakeholders, by providing a policy framework in which to consider options for reform of the law.

2.2 The principles are not the only matters considered by the ALRC, but they generally accord with widely recognised values and concepts that have been set out in discussions about the legal protection of privacy.

2.3 Stakeholders expressed general support for these principles.¹ Some stakeholders suggested additional matters that should be incorporated; 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.

2.4 Discussion among government representatives, law practitioners, commentators, researchers and others into the value, importance and role of privacy in various contexts and from various perspectives—legal, philosophical, social, political, technical—is extensive. This chapter identifies key considerations from the literature that underpin the recommendations in this Final Report.

¹ ASTRA, *Submission 99*; SBS, *Submission 59*; Women’s Legal Services NSW, *Submission 57*; Google, *Submission 54*; Electronic Frontiers Australia, *Submission 44*; Australian Privacy Foundation, *Submission 39*; Australian Bureau of Statistics, *Submission 32*; Public Interest Advocacy Centre, *Submission 30*; Insurance Council of Australia, *Submission 15*.

2.5 The principles draw on leading cases in Australia and other comparable jurisdictions, international conventions, academic commentary on privacy and related fields, the Terms of Reference for this Inquiry, 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 fundamental to our understanding and appreciation of personal identity and freedom.² Privacy underpins:

- meaningful and satisfying interpersonal relationships, including intimate and family relationships;
- freedom of speech, thought and self-expression;
- freedom of movement and association;
- engagement in the democratic process;
- freedom to engage in secure financial transactions;
- freedom to pursue 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.³ 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.⁴

2.8 One challenge which arises when determining the boundaries for greater privacy protection is drawing the difficult distinction between the public and the private spheres. In *ABC v Lenah Game Meats*, Gleeson CJ stated that

There is no bright line which can be drawn between what is private and what is not. Use of the term ‘public’ is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private.⁵

2 Jon L Mills, *Privacy: The Lost Right* (Oxford University Press, 2008) 13.

3 *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.

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

5 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42].

2.9 There is no doubt that privacy is a complex concept, difficult to define at a conceptual level.⁶ It has even been said to be dogged by a ‘lack of precision’⁷ and possibly ‘more akin to a ‘bundle of rights’.⁸ However, privacy is not less valuable or deserving of legal protection simply because it is hard to define. The New South Wales Law Reform Commission said that to suggest that privacy is impossible to protect because it cannot be precisely defined is to ‘succumb to what Lord Reid once described as “the perennial fallacy that because something cannot be cut and dried or lightly weighed or measured therefore it does not exist”’.⁹

2.10 In 1890, Professors Samuel Warren and Louis Brandeis famously described privacy as the ‘right to be let alone’.¹⁰ In the United States (US), the development of privacy is also closely aligned with protection of autonomy,¹¹ and privacy has been understood to include the right to make choices and exercise personal liberties.¹²

2.11 There is debate about whether privacy should be expressed as a value, a right or an interest. The Office of the Australian Information Commissioner (OAIC) argued that privacy should be reframed as a right.¹³ In *ABC v Lenah Games Meats*, Gleeson CJ drew a distinction between legal ‘rights’ and ‘legal interests’, suggesting that

talk of ‘rights’ may be question-begging, especially in a legal system which has no counterpart to the First Amendment to the United States Constitution or to the *Human Rights Act 1998* of the United Kingdom. The categories that have been developed in the United States for the purpose of giving greater specificity to the kinds of interest protected by a ‘right to privacy’ illustrate the problem.¹⁴

2.12 Jurisprudence from the European Court of Human Rights has developed a broad understanding of privacy in the context of art 8 of the European Convention on Human Rights. Article 8 has been interpreted to protect an individual’s correspondence, including through modern communication techniques such as email,¹⁵ physical integrity,¹⁶ home,¹⁷ identity,¹⁸ personal autonomy¹⁹ and personal development.²⁰

2.13 Many stakeholders stressed the importance of privacy to a person’s autonomy and rights of self-determination.²¹ The Law Institute of Victoria, for example, noted

6 Raymond Wacks, ‘The Poverty of Privacy’ (1980) 96 *Law Quarterly Review* 73.
7 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [41] (Gleeson CJ).
8 Mills, above n 2, 4.
9 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) [4.16], quoting Lord Reid in *Ridge v Baldwin* [1964] AC 40, 64–65.
10 Samuel D Warren and Louis D Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193.
11 Mills, above n 2, 15.
12 *Ibid* 4.
13 Office of the Australian Information Commissioner, *Submission 66*.
14 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [41].
15 *Copland v UK* (2007) 45 EHRR 37.
16 *YF v Turkey* (2004) 39 EHRR 34.
17 *Keegan v UK* (2007) 44 EHRR 112.
18 *I v UK* (2003) 36 EHRR 53.
19 *Rotaru v Romania* (2000) 8 EHRR 449.
20 *Gaskin v UK* (1989) 12 EHRR 36. See, Ian Walden and Lorna Woods, ‘Broadcasting Privacy’ (2011) 3 *Journal of Media Law* 117, 125.
21 See, eg, Electronic Frontiers Australia, *Submission 44*; A Johnston, *Submission 9*; I Pieper, *Submission 6*.

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’.²²

2.14 Privacy also gives individuals freedom to pursue 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 Islander people, who have particular cultural identity, knowledge and customs that bear on the privacy interests of individuals within the group.²³

2.15 Some representative groups stressed the importance of a right to privacy for protecting vulnerable people in the community.²⁴ Associate Professor Moira Paterson emphasised the potential impact of surveillance on vulnerable people who may rely on public places as social, living and cultural spaces.²⁵ Protecting privacy can play an important role in ensuring personal safety and freedom from harassment.

Principle 2: There is a public interest in protecting privacy

2.16 While privacy must sometimes be set aside for broader public interests, privacy itself is also a vital public interest. The 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 protecting and enforcing private freedoms, rights and interests.²⁶ In *Plenty v Dillon*, Gaudron and McHugh JJ said:

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.²⁷

2.17 Contractual and equitable obligations of confidence also have public interest justifications.²⁸ In the *Spycatcher* case, Lord Goff noted that

the basis of the law’s protection of confidence is that there is a public interest that confidences should be preserved and protected by the law²⁹

2.18 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

22 Law Institute of Victoria, *Submission 22*.

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

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

25 M Paterson, *Submission 60*.

26 Australian Privacy Foundation, *Submission 110*; UNSW Cyberspace Law and Policy Community, *Submission 98*.

27 *Plenty v Dillon* (1991) 171 CLR 635, 655 (Gaudron and McHugh JJ).

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

29 *Attorney General v Guardian Newspapers Ltd (No 2) (Spycatcher)* [1988] 1988 UKHL 6, 29 (Lord Goff).

to speak freely and honestly about important private matters, such as private sexual or medical matters.

2.19 There is a public interest in the security of confidential information about an individual's financial and commercial interests. There is, for example, a public interest in the benefits that online trade and commerce can offer. Respecting privacy helps establish consumer trust in these services. The preamble to the Asia-Pacific Economic Cooperation Privacy Framework states that balancing and promoting effective information privacy protection and the free flow of information is 'a key part of efforts to improve consumer confidence and ensure the growth of electronic commerce'.³⁰

2.20 Protecting privacy also has an important role to play in protecting and promoting free speech—another vital public interest. Professor Eric Barendt has written:

One value of privacy, and a reason why it is recognised as a constitutional or legal right, is that it gives individuals the space to develop their own identity by themselves, and in communication and cooperation with friends and lovers, free from observation and interference by Big Brother or even by a liberal democratic state. Some privacy is essential to enable us to read, contemplate and formulate thoughts, and some confidentiality and security is similarly necessary to exchange ideas with friends and colleagues.³¹

2.21 Although privacy has been said to lie at the heart of liberty, and will often support other fundamental rights and freedoms, sometimes it must be balanced with other important interests.

Principle 3: Privacy should be balanced with other important interests

2.22 The privacy of an individual is not an absolute value or right that necessarily takes precedence over other values of public interest. As many stakeholders noted, it must be balanced with a range of other important values, freedoms and matters of public interest.³² These may include, in no particular order or hierarchy:

- freedom of speech,³³ including the freedom of the media and the implied constitutional freedom of political communication;³⁴
- freedom of artistic and creative expression and innovation in the digital era,³⁵

30 Asia-Pacific Economic Cooperation, APEC Privacy Framework (2005) [1].

31 Eric Barendt, 'Privacy and Freedom of Speech' in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press, 2006) 11, 30–31.

32 Australian Human Rights Commission, *Submission 75*; SBS, *Submission 59*; Google, *Submission 54*; ASTRA, *Submission 47*; Law Institute of Victoria, *Submission 22*; Office of the Information Commissioner, Queensland, *Submission 20*.

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

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

35 Facebook, *Submission 65*.

- the public’s right to be informed on matters of public importance, in real time rather than after delay;³⁶
- public access to information and accurate historical records;³⁷
- 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;³⁸
- the effective delivery of essential and emergency services in the community;³⁹
- the protection of vulnerable persons in the community;
- the right to be free from violence, including family violence;⁴⁰
- national economic development and participation in the global digital economy;⁴¹
- the social and economic value of analysing ‘big data’;⁴²
- the free flow of information and the right of business to achieve its objectives efficiently;⁴³ and
- the value of individuals being enabled to engage in digital communications and electronic financial and commercial transactions.⁴⁴

2.23 The importance of balancing privacy with other important public interests underpins all the recommendations in this Report. The ALRC does, however, recognise

³⁶ ASTRA, *Submission 47*.

³⁷ 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, 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: *Archives Act 1983* (Cth) s 33(1)(g).

³⁸ 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. See also Australian Federal Police, *Submission 67*; Google, *Submission 54*; CV Check, *Submission 23*; Insurance Council of Australia, *Submission 15*.

³⁹ Australian Communications and Media Authority, *Submission 52*.

⁴⁰ Women’s Legal Services NSW, *Submission 115*; Women’s Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 48*.

⁴¹ Google, *Submission 54*; Telstra, *Submission 45*; Optus, *Submission 41*; Australian Bankers’ Association, *Submission 27*.

⁴² See, eg, Malcolm Turnbull MP, ‘National Archives Conference Address—Open for Business in the Digital Economy’ (2 June 2014).

⁴³ Australian Bankers’ Association, *Submission 27*.

⁴⁴ CV Check, *Submission 23*.

that privacy should not be casually ‘traded off’ for the sake of other important interests.⁴⁵

Principle 4: Australian privacy laws should meet international standards

2.24 The protection of individual privacy in Australia should be consistent with Australia’s international obligations.⁴⁶ These include Australia’s obligations under the ICCPR⁴⁷ and policies of the Organisation for Economic Co-operation and Development.⁴⁸ It should also take into account, as far as appropriate, international standards and legal developments in the protection of privacy.⁴⁹ Human rights frameworks in Victoria and the ACT make specific reference to a person’s right to privacy.⁵⁰

2.25 Throughout this Report, reference is made to developments in the legal protection of privacy in other jurisdictions—particularly those with which Australia shares a common legal heritage. However, the ALRC 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.⁵¹ The need for statutory reform in a particular jurisdiction also depends on developments in the common law.

2.26 Women’s rights organisations highlighted the relevance of the International Covenant on the Elimination of All Forms of Violence Against Women (CEDAW)⁵² to a new privacy tort. The disclosure of sexually explicit images of people without their consent by current or former intimate partners—‘revenge pornography’—is one type of violence against women raised by several stakeholders.⁵³

2.27 The Arts Law Centre of Australia said Indigenous culture and intellectual property should be recognised in the guiding principles:

Any law protecting the privacy of individuals should also consider the confidential or culturally sensitive nature of cultural knowledge, stories, images of Indigenous Australians.⁵⁴

45 Public Interest Advocacy Centre, *Submission 30*.

46 One of the ALRC’s functions is to recommend reforms consistent with Australia’s international obligations: *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b).

47 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 17, 19.

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

49 Australian Bureau of Statistics, *Submission 32*.

50 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a); *Human Rights Act 2004* (ACT) s 12.

51 SBS, *Submission 59*.

52 *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1980, 1249 UNTS (entered into force 3 September 1981).

53 Women’s Legal Services NSW, *Submission 57*.

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

2.28 Some stakeholders noted the value in constructing privacy law which is consistent with best practice in international standards, particularly in the area of data protection.⁵⁵

2.29 International law recognises the importance of other rights and interests, such as freedom of speech. As noted in Principle 3, privacy must often be balanced with these other important rights and interests.

Principle 5: Privacy laws should be adaptable to technological change

2.30 The design of any legal privacy protection should be sufficiently flexible to adapt to rapidly changing technologies and capabilities, without needing constant amendments. At the same time, laws should be drafted with sufficient precision and definition to promote certainty as to their application and interpretation.

2.31 Several stakeholders stressed the need for law reform to be technologically neutral to avoid laws being rendered obsolete by rapid developments in technology.⁵⁶ 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:

policymakers need to understand the power of data, embrace its utility, and carefully address the challenges it raises without sacrificing the potential it offers.⁵⁷

2.32 The importance of flexibility and adaptability is reflected in the design of the statutory cause of action and the reforms to surveillance laws recommended in this Report.

Principle 6: Privacy laws should be clear and certain

2.33 The law should be precise and certain, while being flexible and adaptable to changes in social and technological conditions. This principle underpins all of the ALRC's recommendations. Many stakeholders stressed the benefits of precision, clarity and certainty.⁵⁸

2.34 The ALRC is mindful that Parliament cannot legislate precisely for all future situations. Courts will need to apply broader principles and weigh competing interests, in the light of all the circumstances of a particular case. Stakeholders pointed out that judges are familiar with deciding the types of issues that will arise in privacy cases,

55 Google, *Submission 54*.

56 Ibid; 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*.

57 Google, *Submission 54*.

58 ASTRA, *Submission 47*; ABC, *Submission 46*; Telstra, *Submission 45*; C Jansz-Richardson, *Submission 24*.

such as the existence and weight of public interests.⁵⁹ Where appropriate, the ALRC suggests some guidance on the relevant factors the court might or should consider.⁶⁰

2.35 The ALRC has specifically addressed the desirability of precision and certainty in its recommendations, particularly in relation to the design of a statutory cause of action and in relation to reforming Australia's fragmented surveillance laws.⁶¹

Principle 7: Privacy laws should be coherent and consistent

2.36 Coherence in the law and consistency with other Australian laws or regulatory regimes should be an important guiding force in any new privacy protection at law. In making recommendations in this Report, the ALRC aims to promote uniformity or consistency in the law throughout Australian jurisdictions.

2.37 Laws that are unnecessarily complex, fragmented and inconsistent impose an unnecessary regulatory burden on business. They also harm privacy. The ALRC heard concerns about differences in privacy-related laws—such as surveillance device laws—between the various states and territories.⁶² These differences can cause uncertainty and confusion, and make the law less effective.

2.38 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 and other businesses, which operate nationally, may be overly restricted if it is unclear when and where they might be breaching a law.⁶³

2.39 The need for coherence and consistency also underlies the desirability of avoiding unnecessary overlap between legal regimes. Stakeholders said that any proposed remedial regime should not overlap or be inconsistent with the various regulatory schemes and statutory prohibitions that already affect them.⁶⁴ This was a particular concern given the amendments to the *Privacy Act 1988* (Cth) that came into force in March 2014.

2.40 However, regulation, the criminal law and the civil law can serve different purposes, even if they overlap in some ways. For example, a criminal law may aim to punish the perpetrator and deter similar conduct, while a civil cause of action may aim to give victims a remedy.

59 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*.

60 See, eg, Ch 8.

61 See Ch 14.

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

63 ASTRA, *Submission 47*; ABC, *Submission 46*.

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

2.41 Furthermore, although there are many regulatory regimes, criminal laws and civil obligations and remedies that help protect people from breaches or invasions of privacy, there are also a number of notable gaps in these laws. This Report aims to fill some of these gaps.

2.42 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,⁶⁵ 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

2.43 The law should provide a range of means to prevent, reduce or redress serious invasions of privacy. Recommendations in this Report aim to facilitate access to justice for individuals affected by serious invasions of privacy. For the Women’s Legal Services NSW, access to justice means that

it must be fair, simple, affordable and easy to understand and navigate. It must also have pathways for early intervention to prevent further disadvantage.⁶⁶

2.44 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.⁶⁷ The law should make appropriate provision for people with disability or others who require assistance in obtaining access to justice.⁶⁸ The Terms of Reference for the ALRC’s Inquiry into Equality, Capacity and Disability in Commonwealth Laws—being conducted at the same time as this Inquiry—refer to ensuring that Commonwealth laws and legal frameworks are responsive to the needs of people with disability and to advance, promote and respect their rights, in the area of access to justice and legal assistance program.⁶⁹

2.45 The Productivity Commission has stated that a ‘well functioning justice system’:

means delivering fair and equitable outcomes as efficiently as possible and resolving disputes early, expeditiously and at the most appropriate level. A justice system which effectively excludes a sizable portion of society from adequate redress risks considerable economic and social costs.⁷⁰

65 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.

66 Women’s Legal Services NSW, *Submission 57*.

67 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*.

68 Office of the Public Advocate (Queensland), *Submission 12*. Representative actions are discussed in Ch 10.

69 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper 81 (2014).

70 ‘Access to Justice Arrangements’ (Draft Report, Productivity Commission, 2014) v.

2.46 In Chapter 16, the ALRC recommends that the Privacy Commissioner be empowered to hear complaints about serious invasions of privacy. This may be one way of increasing access to justice. Other recommendations also encourage, without compelling, people to pursue alternative dispute resolution mechanisms.⁷¹

Principle 9: Privacy protection is an issue of shared responsibility

2.47 Individuals must generally take some responsibility for the protection of their own privacy and the privacy of others. The exercise of personal responsibility should be encouraged, where possible. The ALRC considers that capable adults should be encouraged to take reasonable steps to use the privacy tools offered by service providers. Several stakeholders stressed the importance of personal responsibility.⁷²

2.48 However, government, corporations and small businesses that process personal information also have a responsibility to provide individuals with the necessary tools to protect their own privacy. Personal responsibility can only be fully exercised when individuals are provided with the education and tools necessary to protect their privacy, and when the choices expressed by individuals are respected.⁷³

2.49 Individual responsibility must therefore be balanced with the responsibility of organisations and service providers. These groups 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.

2.50 In some circumstances, individuals may not be empowered to exercise personal responsibility in a meaningful way. Professor Daniel Solove has written that, although privacy self-management is ‘certainly a laudable and necessary component of any regulatory regime’, it is being ‘tasked with doing work beyond its capabilities’.⁷⁴

2.51 The ALRC is asked to consider how the *law* may redress and reduce serious invasions of privacy. But the law is not a panacea, and education has an important role to play in reducing and preventing serious invasions of privacy.⁷⁵

2.52 In the ALRC’s view, governments and industry have a responsibility to provide adequate education and assistance, particularly for vulnerable members of the Australian community, such as people living with disabilities, children and some young people.

71 Several stakeholders supported voluntary alternative dispute resolution under the new privacy tort: 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*.

72 Australian Federal Police, *Submission 67*; Facebook, *Submission 65*; National E-Health Transition Authority, *Submission 8*.

73 Australian Privacy Foundation, *Submission 110*.

74 Daniel J Solove, ‘Privacy Self-Management and the Consent Dilemma’ (2013) 126 *Harvard Law Review* 1880, 1880.

75 Australian Federal Police, *Submission 67*; Facebook, *Submission 65*; Google, *Submission 54*.

2.53 The OECD's 2013 *Privacy Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data* highlighted the need for greater government investment in education about privacy awareness, particularly concerning online privacy protection. The Guidelines recognise that 'more extensive and innovative uses of personal data bring greater economic and social benefits, but also increase privacy risks'.⁷⁶

2.54 Education about privacy risks and management may be particularly important for children and young persons.⁷⁷ Research suggests that the use of privacy settings on social media is higher among older Australians. For instance, sixteen to seventeen year olds are significantly more likely to have their Facebook profiles set to private—limiting access to their private information to individuals whose online 'friendship' they have accepted—compared to twelve to fifteen year olds.⁷⁸ This is affirmed by evidence suggesting some young people believe the internet to be a 'necessity of life' and that 'it is better to take a beating from all your classmates than to be isolated from the Internet'.⁷⁹

2.55 This evidence may suggest the need for privacy awareness campaigns and other strategies targeted at younger Australians.

2.56 Drs Nicola Henry and Anastasia Powell underscored the importance of non-legal methods to reducing and redressing invasions of privacy which occur through the internet:

Service providers of online communities and social media networks can and should be proactive in addressing these issues by providing mechanisms for users to report hateful and/or harassing content and can dedicate sufficient resources towards monitoring and removing such content. Clear community guidelines, terms of use on internet sites, and agreement between police and service providers may also be effective. Educational initiatives are crucial in fostering an ethical digital citizenship and can do much to educate people about the right to privacy.⁸⁰

2.57 The overall balance of recommendations in this Report is informed by the principle that responsibility for protecting privacy must often be shared.

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

77 Facebook, *Submission 65*; National Children and Youth Law Centre, *Submission 61*.

78 Australian Communications and Media Authority Australian Government, 'Like, Post, Share—Short Report: Young Australians and Online Privacy' (May 2013).

79 Niels Baas, Menno de Jong and Constance Drossaert, 'Children's Perspectives on Cyberbullying: Insights Based on Participatory Research' (2013) 16 *Cyberpsychology, Behaviour and Social Networking* 248, 252.

80 N Henry and A Powell, *Submission 104*.