

## Privacy Update

# Serious Invasions of Privacy in the Digital Era

### WHAT YOU NEED TO KNOW

- The Australian Law Reform Commission has released a discussion paper on a proposed statutory cause of action for serious invasions of privacy.
- The scope of the proposed statutory cause of action for serious invasions of privacy is broad and has the potential to materially alter the privacy obligations of Australian organisations in a broad range of sectors.
- The ALRC is seeking submissions to the discussion paper from interested organisations and members of the community by **12 May 2014**.

### ALRC Discussion Paper

As part of its inquiry into the protection of privacy in the digital era, the Australian Law Reform Commission has released a discussion paper proposing that a statutory cause of action for serious invasions of privacy be contained in new Federal legislation.

The proposed statutory tort could materially alter the privacy obligations of Australian organisations in a broad range of sectors, including media, government, telecommunications and property.

The ALRC report is available [here](#). The ALRC is seeking submissions to the discussion paper from interested organisations and members of the community by **12 May 2014**.

### The Current Legal Landscape

There are currently a range of laws which are designed or can operate to protect the privacy of individuals. The handling of personal information (including sensitive information) is regulated by both Federal and State-based legislation. Various types of physical invasions of privacy can be protected by common law torts, such as trespass, the tort of nuisance and defamation. There is also legislation in each State and Territory governing the use of surveillance devices.

However, the ALRC has suggested that there are gaps and deficiencies in the existing legal framework and that a new statutory tort for serious invasions of privacy is necessary to fill such gaps.

### Elements of the Proposed New Tort

The ALRC has suggested that the following 5 elements should be satisfied before a plaintiff is able to succeed under the proposed new tort:

1. The invasion of privacy must occur by intrusion upon seclusion or private affairs (including by unlawful surveillance) or misuse or disclosure of private information about a plaintiff.
2. The invasion of privacy must be either intentional or reckless.
3. A person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances.
4. The court must consider that the invasion of privacy was 'serious', in all the circumstances, having regard to, among other things, whether the invasion was likely to be highly offensive, distressing or harmful to a person of ordinary sensibilities in the position of the plaintiff.
5. The court must be satisfied that the plaintiff's interest in privacy outweighs the defendant's interest in freedom of expression and any broader public interest in the defendant's conduct.

A range of defences is proposed, including defences based on defamation such as absolute and qualified privilege, fair protected report and a defence for fair reports of public documents. The ALRC has also proposed a defence of lawful authority to protect government and law enforcement agencies against

liability when acting within the scope of their authority, as well as a defence for conduct incidental to lawful rights of defence (eg. conduct amounting to self-defence or defence of property). Further, the ALRC has suggested a safe harbour scheme for internet providers to protect them from liability for the acts of third party users of their services. The ALRC has sought comment on whether a defence of necessity should be available.

## Key issues

### Potential broad application

The scope of the tort means that it could affect many types of agencies and organisations.

The private facts element of the proposed tort would affect the media and anyone (including individuals) who publishes material (including on the internet).

The intrusion upon seclusion aspect of the proposed tort could have an impact across a wide range of government agencies, private sector organisations and individuals. The ALRC expressly contemplates that it would in some circumstances be available to subjects of surveillance. It could also be available in respect of a wide range of law enforcement and investigation activities if and to the extent that acts which affect individual seclusion are carried out other than with lawful authority.

The ALRC proposes that the tort be available in respect of publication of private information to one person where this is properly characterised as a serious interference with privacy. In view of this, the tort will be relevant to every agency and organisation which holds information about the personal affairs of individuals.

### Similar causes of action overseas

Jurisdictions such as Canada and certain states in the United States of America have already recognised a tort of invasion of privacy. Cases in these jurisdictions as well as decisions of the European Court of Human Rights illustrate the potentially broad reach of a tort of invasion of privacy.

- The concept of intrusion into seclusion or private affairs has been interpreted to extend beyond physical intrusion to the use of senses to observe secluded or private affairs. For example, the Court of Appeals in Indiana held that jail windows overlooking the plaintiff's home constituted an invasion of privacy.
- US courts have also found that intrusions into private affairs can occur in public places. For example, the Supreme Court of Alabama held that

publication (without consent) by a newspaper of a photograph of a plaintiff with her dress blown up in a public place constituted an invasion of the plaintiff's right of privacy. The Court held that incidentally photographing an individual as part of a public scene in his or her "ordinary status" would not constitute an invasion of privacy. However, once an individual's "status was changed without her volition to a status embarrassing to an ordinary person of reasonable sensitivity", the individual cannot be deemed to forfeit their right to protection from "indecent and vulgar intrusions" of her right of privacy.

- The European Court of Human Rights found that the publication by various German magazines of photographs of Princess Caroline von Hannover in scenes from her daily life amounted to an interference with her right to respect for private life. In balancing the interests between the protection of private life and freedom of expression in this case, the Court's key consideration was whether the photos made a contribution to a debate of general interest. Given the photos were of a purely private nature of a person who exercised no official function, the Court considered the publication of the photos had not made a contribution to a debate of general interest.
- The Supreme Court of California found that TV producers and others had invaded a plaintiff's privacy by equipping a nurse involved in the rescue of the plaintiff with a microphone and recording communications between the plaintiff and her rescuers. The Court clarified that a cameraman would not intrude into privacy by being present at the scene or filming an accident. However, the plaintiff was entitled to a degree of privacy in conversations with medical rescuers and therefore the amplification and recording of such conversations constituted an invasion of privacy.
- In Ontario, Canada, a judge refused to strike out a plaintiff employee's claim for breach of privacy where the defendant employer had conducted a credit check without the employee's permission.
- A US court denied a motion to dismiss a claim that police had invaded the privacy of a plaintiff by entering her apartment after she refused to grant entry. In that case, the police had threatened to break down the door but ultimately gained entry by procuring the property manager to open the door.

## Other Proposals

### ***Surveillance***

The ALRC also proposes that Australia should have uniform surveillance laws. It has sought comment on whether this should be done by way of co-operation between the states and territories or by way of Commonwealth legislation that covers the field.

The ALRC suggests implementing a uniform surveillance law that would, subject to exceptions, prohibit use of surveillance to observe or record private activities. The prohibition would apply regardless of whether the person conducting the surveillance was a party to the recorded conversation or activity (which would be a change for some Australian jurisdictions). The proposed exceptions include an exception for investigative journalism which is not available under current laws.

### ***The right to be deleted***

The ALRC received submissions which argued that the harm caused by a serious invasion of privacy can be compounded by the persistence of private data in the public sphere. The ALRC proposes a new Australian Privacy Principle requiring APP entities (ie. organisations subject to the *Privacy Act 1988* (Cth)) to provide a simple mechanism for an individual to request destruction or de-identification of personal information that was provided to the entity by the individual. Currently, an APP entity is only required to 'take such steps as are reasonable in the circumstances' to destroy or de-identify personal information if the entity no longer needs the information for any purpose for which the information may be used or disclosed by the entity in accordance with the APPs.

The idea that individuals should have a right to require the deletion of their personal data (often called the 'right to be forgotten') has gained momentum in other parts of the world, including the US and EU. Opponents to the 'right to be forgotten' have argued that the right would be costly and impractical for business and could be misused by individuals attempting to erase or re-write their history.

### ***Damages for breach of confidence***

The ALRC proposes that, if a tort of privacy is not introduced, then legislation should be amended to allow for the recovery of damages for emotional distress in breach of confidence cases involving serious invasions of privacy. This would be a significant development as there is only one Australian case in which such damages have been awarded.

### ***Tort of harassment***

In the event that a tort of privacy is not introduced, the ALRC proposes the enactment of a Commonwealth statute which provides for a new statutory tort of harassment, and which makes existing criminal offences for harassment uniform across the country.

## Government Response

According to a media report, Attorney-General Brandis has said that "[T]he government has made it clear on numerous occasions that it does not support a tort of privacy".

In those circumstances, it is doubtful whether the ALRC proposals will be enacted in the short to medium term.

Submissions to the ALRC are due by **12 May 2014**.

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We hope you enjoy this *Privacy Update*.

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