Too much information: A statutory cause of action for invasion of privacy

Issues Paper 4, December 2013

Below are some questions seeking your views about whether there should be a statutory cause of action for invasion of privacy.

This is a word document which you can complete electronically.

Please return your completed response by email to SALRI@adelaide.edu.au no later than Friday 14 February 2014.

INFORMATION ABOUT YOU

Your NAME (optional):  

Your ORGANISATION, if any (optional): 

Your CONTACT DETAILS, for follow up (optional):

Telephone:  

Email: 

DATE of this response: 

What is your interest in this area of law reform?

We may publish responses to this paper on our webpage with the Final Report.  

If you do NOT wish your submission to be published in this way, or if you wish it to be published anonymously, please let us know here:
QUESTIONNAIRE

Need for reform

**Question 1:** Should there be a law giving people a right of action against an individual or organisation who invades their personal privacy?

**Question 2:** What do you mean by personal privacy in this context?

**Question 3:** What are the main considerations that inform your answer to Question 1?

**Questions 4 - 25 are about the nature and scope of such a law (the Act), should it be legislated.**

**Question 4:** Are there any particular examples of kinds of invasions of personal privacy that you consider should fall within a cause of action for invasion of privacy?

Seriousness

**Question 5:** How serious should the invasion of personal privacy be for a right of action to arise?

For example:

(a) should the law require that the invasion be ‘sufficiently serious to cause substantial offence’ to a ‘reasonable person’; or

(b) should the law require that the invasion be ‘highly offensive’ to a ‘reasonable person’; or

(c) should there be some other test? If so, what?
Question 6: What should be taken into account when assessing the seriousness of the invasion?

Should the Act expressly provide for these considerations?

Invasion

Question 7: Should the Act define the concept of personal privacy?

Question 8: Should there be a list in the Act of what amounts to an invasion of personal privacy?

Question 9: If so, should it be a complete list or simply give examples?

Question 10: If there is a list, should it at least include:

(a) interference with personal home or family affairs?

(b) unauthorised surveillance?

(c) interference with, misuse or disclosure of correspondence or private communications?

(d) disclosure of sensitive private facts?
**Fault element**

**Question 11:** Should it be possible for a negligent breach of personal privacy to be actionable?

Or should only intentional or reckless breaches be actionable?

**Availability of the cause of action**

**Question 12:** Should only natural persons be able to take action for invasion of personal privacy?

**Question 13:** Should the personal representatives or family of a person who has died be able to take action for an invasion of that person’s privacy?

If so, in what circumstances?

Would it affect your answer whether the invasion took place during the person’s lifetime or afterwards?

**Question 14:** Where a person obtains personal information about another without their consent, should that other person be able to take action for an invasion of personal privacy even though the personal information has not been and is not proposed to be disclosed to others?

**Defences**

**Question 15:** In what circumstances should there be a defence to an action for invasion of personal privacy?
Should they include, for example:

(a) when the act or conduct was not intended?

(b) when the act or conduct was reasonably incidental to the exercise of a lawful right of defence of person or property?

(c) when the act or conduct was intentional but the person did not and could not have been expected to have foreseen its consequences?

(d) when the person whose privacy was invaded impliedly or expressly consented to the invasion?

(e) where the act or conduct was required or authorised by or under law?

If so, how should law be defined for this purpose?

(f) where publication of the information was privileged under the law of defamation?

(g) where the publication would attract any other defences under the law of defamation?

If so, which defences?

(h) where the invasion was in the public interest?
(i) where the information was already in the public domain?

The balancing of countervailing interests

**Question 16:** In what ways should a cause of action for breach of personal privacy balance countervailing public interests such as freedom of expression?

For example:

(a) *as an element of the cause of action?* That is, should the claimant first have to show that the public interest in the preservation of his or her personal privacy outweighed other relevant public interests in that case; or

(b) *as a defence to the cause of action?* That is, should it be possible to defend an action for breach of personal privacy by showing that one’s act, despite breaching another’s personal privacy, was justifiable in terms of some other public interest?

Exemptions

**Question 17:** Are there some people or organisations who, when performing certain functions, should not be liable for an action for breach of personal privacy?

If so, who should they be and what are the functions involved?

What can be compensated?

**Question 18:** Should the law permit a person to take action for an invasion of personal privacy, of itself, or should that right arise only where the invasion results in some kind of harm or loss?

**Question 19:** What kinds of harm or loss resulting from an invasion of personal privacy should be compensable?
Should they include, for example:

(a) mental distress?

(b) embarrassment or humiliation?

(c) inconvenience (for example, when the invasion results in identity theft or fraud)?

(d) damage to reputation?

(e) financial loss?

(f) physical damage or threats to personal safety arising from the invasion?

**Other limitations**

**Question 20:** Should there be a time limit on suing for invasion of personal privacy?

If so, why, and what should that time period be and when should it start?

**Question 21:** Should there be limits on the monetary compensation a person can be awarded in a successful action for invasion of personal privacy?

If so, what should they be and why?
Remedies

**Question 22:** What kinds of orders should a court be able to make when it finds that an individual’s personal privacy has been invaded?

For example, should it be able to:

(a) declare that the claimant has been wronged by the defendant?

(b) order the defendant to compensate the claimant for the effects of the invasion of privacy?

(c) if the invasion itself or what was done with the material or information obtained through that invasion was particularly heinous, increase the amount of compensation to reflect this (by way of punitive or exemplary damages)?

(d) order the defendant to pay to the claimant an amount equivalent to any benefit, whether direct or indirect, that the defendant has obtained as a result of the invasion of privacy?

(e) order the defendant to stop doing certain things or to do certain things?

For example, if the defendant has disclosed or disseminated material to others that has been obtained by invading a person’s privacy, should the court be able to order the defendant:

i. to cease disclosure or dissemination?

ii. to publish or disseminate a retraction or apology or correction?

iii. to deliver up material obtained by or derived from the invasion of privacy?
iv. to forfeit things used to invade the claimant’s privacy or obtained through it or derived from it?

v. to take any action the court believes will help return the claimant to the position he or she was in before the invasion of privacy?

Question 23: Should the Act also permit a court to issue an injunction against an individual or organisation to:

(a) prevent an invasion of personal privacy?

(b) prevent the disclosure of information or material obtained through an invasion of personal privacy?

Accessibility of the cause of action

Question 24: What could be done to make this cause of action affordable to those whose personal privacy is invaded?

For example:

(a) Should the legislation provide that a particular court or tribunal should be able to hear claims for invasion of privacy?

(b) Should each party have to pay their own legal costs, subject to a contrary order by the court?
Alternative options for reform

**Question 25:** If a separate statutory cause of action for invasion of privacy is not to be enacted, in what other ways could the law be changed to give individuals effective redress for invasions of personal privacy in South Australia?

For example:

(a) Legislating changes to existing causes of action so that their elements or remedies better accommodate invasions of personal privacy?

If so, how?

(b) Legislating to make certain criminal offences give rise to a liability in damages for invasion of personal privacy?

If so, how?

Thank you for taking the time to complete this questionnaire. **If you would like us to send you a copy of the Final Report when it is completed**, please indicate here:

By email YES / NO  
OR  
By post (if so please give postal address and postcode here): YES / NO

South Australian Law Reform Institute