Final Report 4

March 2016

South Australian Law Reform Institute

A statutory tort for invasion of privacy

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the University of Adelaide Law School.

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This Report deals with the law as it was in December 2015 and may not necessarily represent the current law.

Government of South Australia
Attorney-General's Department

THE LAW SOCIETY
OF SOUTH AUSTRALIA

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Abbreviations

ALRC—means the Australian Law Reform Commission

ALRC Discussion Paper—means the Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper No 72 (2007)

ALRC 2008 Report—means the Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008)

ALRC 2014 Report—means the Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report No 123 (2014)

ALRC Issues Paper—means the Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Issues Paper No 43 (2013)

ALRC Privacy Reference (2013)—means the Terms of Reference: *Serious Invasions of Privacy in the Digital Era* <*http://www.attorneygeneral.gov.au/Mediareleases/Documents/Termsofreference120613.pdf*>

ASTRA—means Australian Subscription Television and Radio Association

Commonwealth Issues Paper—means the Commonwealth of Australia, Department of the Prime Minister and Cabinet, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, Issues Paper (September, 2011)

Institute—means the South Australian Law Reform Institute

IPPs SA—means the South Australian Information Privacy Principles

Issues Paper—means the South Australian Law Reform Institute, *Too Much Information: A Statutory Cause of Action for Invasion of Privacy*, Issues Paper 4 (December 2013) available at < *https://law.adelaide.edu.au/research/law-reform-institute/documents/privacy-issues-paper-4.pdf* >

LRC—means the Law Reform Committee of the Parliament of Victoria

NSWLRC—means the New South Wales Law Reform Commission

NSWLRC Consultation Paper—means the New South Wales Law Reform Commission, *Invasion of Privacy*, Consultation Paper 1 (2007)

NSWLRC Final Report—means the New South Wales Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009)

Report—means this report by the South Australian Law Reform Institute

SACAT—means the South Australian Civil and Administrative Tribunal

SALRC—means the (former) South Australian Law Reform Committee

VLRC—means the Victorian Law Reform Commission

VLRC Information Paper—means the Victorian Law Reform Commission, *Privacy Law: Options for Reform*, Information Paper (2010)

VLRC Final Report—means the Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report No 18 (2010)

PART 1

About this Report

This Report arose from the South Australian Law Reform Institute (Institute) initiating a review itself, after undertaking scoping work and noting that:

- it is not clear whether there is a tort of invasion of privacy at common law;
- the remedies available to those whose personal privacy is invaded are limited;
- modern technology makes it increasingly easy to invade personal privacy, to publish material or information so gained and to reach a wider audience than ever before, with often devastating and sometimes irreversible consequences;
- a statutory cause of action for invasion of privacy has been identified by comprehensive Australian and international reviews as a potentially valuable civil remedy for, and deterrent against, serious invasions of privacy; and
- there appear to be constitutional and political obstacles to establishing a national statutory cause of action for invasion of privacy.

In December 2013, the Institute released an Issues Paper[1] which discussed whether personal privacy would be better protected if South Australia had a statutory cause of action for invasion of privacy. It outlined the history of attempted reform in South Australia and the range of approaches recently recommended by other law reform bodies in Australia. It set out common arguments for and against statutory reform, considered the potential characteristics of a statutory cause of action and posed a number of questions for consideration.

The questions provided an opportunity for the legal profession, the media, interest groups and the public at large to make submissions on not only whether there should be a cause of action for invasion of privacy in South Australia, but if there is to be one, what it should look like.[2]

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1 South Australian Law Reform Institute, *Too Much Information: A Statutory Cause of Action for Invasion of Privacy*, Issues Paper 4 (December 2013) available at <https://law.adelaide.edu.au/research/law-reform-institute/documents/privacy-issues-paper-4.pdf> (referred to hereafter as the Issues Paper).

2 Invitations for submissions were sent to the Chief Justice of the Supreme Court, the Chief Judge of the District Court, Mr Stephen Wade MLC, Mr Robert Brokenshire MLC, Mr Dennis Hood MLC, Ms Ann Bressington MLC, Mr Mark Parnell MLC, the South Australian Bar Association, the Law Society of South Australia, the Privacy Committee of the Law Society of South Australia, the South Australian Council for Civil Liberties, the Australian Communications Consumer Action Network, the Internet Industry Association, the Internet Society of Australia, the Newspaper Works, the Privacy Committee of South Australia, the Legal Services Commission, the South Australian Commissioner for Victims' Rights, Victim Support Service, Dean of the Flinders University

The Institute received submissions from:

Australian Bankers' Association

Australian Privacy Foundation

Subscription Television Australia (ASTRA)

Free TV Australia

Law Society of South Australia

Media, Entertainment and Arts Alliance

Joint submission - media organisations[3]

News Corp Australia

SA NT Datalink

The Newspaper Works

SA Commissioner for Victims' Rights

Dr Normann Witzleb, Monash University

Some media organisations were represented through more than one submission. For example, ASTRA, FreeTV Australia and News Corporation all made individual submissions but were also party to a group submission with other media bodies. Despite this, the Institute has considered, and refers, in this Report, to each submission on a stand-alone basis.

While all submissions addressed the threshold question of whether or not a statutory cause of action should be enacted in South Australia, many did not specifically address the questions dealing with the characteristics of any new cause of action.

The Institute has considered the submissions and now reports its findings and recommendations to the Attorney-General of South Australia for his consideration.

Law School, Dean of the University of South Australia Law School, Northern Community Legal Service, Riverland Community Legal Service, Roma Mitchell Community Legal Centre, Central Community Legal Service, South East Community Legal Service, Southern Community Justice Centre, Westside Community Lawyers, Aboriginal Human Rights Movement, Associate Professor Melissa de Zwart (University of Adelaide Law School), Dr Benjamin Grindlay (Director of Marketing and Communications, University of Adelaide). A letter was also provided to the Law Society of South Australia for circulation to legal practitioners. It was published in the Law Society's electronic newsletter, *InBrief*, on 13 February 2014.

3 The joint submission was made by: Bauer Media Group, Free TV Australia, Fairfax Media, APN News & Media, Sky News, Australian Broadcasting Corporation, ASTRA Subscription Television Australia, Commercial Radio Australia, SBS and News Corp Australia.

Where appropriate to the context, the Report repeats the detail given in the Issues Paper. It comprises 15 parts. Each Part, where relevant, identifies the issue, addresses the submissions made by the respondents to the Issues Paper on that issue, and sets out the Institute's analysis and views before leading to a recommendation.

Part 1 provides the contextual background for the substantive issues considered in this Report. Part 2 considers the threshold question - whether there is need for reform - and concludes by recommending a limited statutory cause of action to address serious invasions of personal privacy.

Part 3 considers the concept of personal privacy. What should constitute, and the extent the cause of action should prescribe what will amount to, an invasion of privacy is addressed in Part 4. Part 5 considers how serious an invasion of personal privacy should be for a right of action to arise and what should be taken into account in assessing the seriousness of the invasion. Part 6 considers whether the cause of action should expressly balance countervailing public interests (such as freedom of expression) and, if so, whether such a test should form an element of the cause of action or a defence.

Part 7 considers whether in order to make a successful claim a plaintiff should be required to demonstrate, as an element of the cause of action, rather than for the purpose of awarding compensation, that they suffered actual damage as a result of the invasion of their privacy. Recommendations about the fault elements are made in Part 8. Part 9 considers whether only natural persons should be able to take action or whether corporations, Government agencies or other organisations should also have standing. Part 10 addresses the question about whether the cause of action should survive the death of the person whose privacy was invaded.

Part 11 considers how the cause of action should address the circumstance where the person whose privacy was invaded impliedly or expressly consented to the invasion. Part 12 makes recommendations in relation to defences and exemptions. Part 13 is concerned with remedies and considers the kinds of orders that a court should be able to make when it finds that an individual's privacy has been invaded. Part 14 is concerned with whether there should be a time limit on suing for invasions of privacy. Finally, Part 15 considers issues relevant to the accessibility and cost of running a privacy claim, addressing which courts or tribunals may hear proceedings and the rules regarding the award of costs.

The Issues Paper was researched and prepared by Kate Guy and edited by the late Helen Wighton. This Final Report was researched and prepared by Kate Guy and Emily Sims with the

early assistance of Helen Wighton and later with the editorial assistance of Professor John Williams, Dr Judith Bannister and Dr David Plater. The Institute also acknowledges the assistance of Louise Scarman, Mark Giddings, David Hunt, Daniel Ajak and Arista Kontos.

The Institute recognises that there has already been a substantial amount of research work undertaken on this topic in recent years and does not attempt to repeat it. The Institute acknowledges the work of the Australian Law Reform Commission (ALRC), the New South Wales Law Reform Commission (NSWLRC) and the Victorian Law Reform Commission (VLRC).[4] In relation to many issues canvassed in this Report, the Institute sets out in detail and relies on the work of these other law reform agencies. This approach is different to the usual approach taken by the Institute, but is appropriate because of the unique treatment in the last decade of privacy law reform across Australia.

[4] See also, New Zealand Law Commission, *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy: Stage 3*, Report No 113 (2010).

Introduction and Background[5]

A person may ask a court to declare someone else liable for the consequences of their actions only if there is a 'cause of action' available to them by law. Causes of action may arise from an act, a failure to perform a legal obligation, a breach of duty or the invasion of a right.

There is no relevant cause of action available in Australia which directly and completely offers remedies to an individual for breach of personal privacy by another. Although the courts have recognised its future potential, the development of a common law cause of action has gained little ground. Further, despite multiple reform recommendations over many decades, no legislature in Australia, including South Australia, has succeeded in establishing a statutory cause of action for invasion of personal privacy. This is in part because of concerns about competing public interests, including freedom of expression. There has also been historical concern that in a legal sense privacy is difficult to define. It means different things to different people, and the distinction between 'public' and 'private' changes over time.

Privacy is perhaps best described as involving the right of an individual to personal autonomy. Importantly, this autonomy not only encompasses privacy of personal information and communications, but also physical and territorial space. Privacy law in Australia, and in particular the *Privacy Act 1988* (Cth), has largely focused on information privacy or data protection. This protection has been principally limited to the collection, storage and use of certain personal information by Governments and organisations.

In 1973, the former South Australian Law Reform Committee (SALRC) recommended that a general right of privacy be created by this State.[6] The SALRC considered that only a very small segment of the total right of privacy was then properly protected and that the law should protect a general right of privacy inherent in the individual for the preservation of individual dignity.[7] Bills attempting to create a cause of action were introduced into the South Australian Parliament

5 With a particular focus on South Australia, the Issues Paper set out a timeline identifying the most significant court decisions, legislative initiatives and reform recommendations relating to personal privacy in Australia. The Institute will not repeat that here, but instead refers to and relies on the background provided in the Issues Paper at [44].

6 South Australian Law Reform Committee, *Regarding the Law of Privacy,* Interim Report (1973). The relevant parts of this Report are reproduced in *Appendix 2* to the Institute's Issues Paper.

7 Ibid [11].

in 1974[8] and again in 1991.[9] Both Bills were subject to fierce and lengthy debate but were ultimately defeated.[10]

Although many of the issues canvassed in the Institute's Issues Paper were considered in the earlier South Australian privacy reform debates of 1973 and 1991, the impetus for reform in 2015 is very different. The Institute confirms its view that this modern context should not be underestimated when considering this reform issue. We are now more vulnerable to invasions of privacy than ever before because of the ease with which our personal space can be invaded and our personal information in digital form can be found, accessed and disseminated. This stems from the fact that *individuals* are now able to use technology to invade personal space and deal with personal information in ways they were unable to in the past. One commentator has described the relationship between technology and privacy in the following way:

> The 21st century is a time of telephoto lenses, long-range parabolic microphones, and mobile phone cameras, as well as other technological advances such as the internet that provide easy means of dissemination of information to a worldwide audience. These advances mean that there is now nowhere on the planet that a person may retreat with an absolute assurance of being left alone. Also, access to means of widespread publicity is now at the fingertips of many rather than a few. [11]

That was over a decade ago, since then technology has continued to advance rapidly and objects such as mobile phone cameras have become even more prevalent.

Over recent years, three law reform bodies in Australia have recommended the introduction of a statutory cause of action for invasion of privacy: the ALRC in 2008,[12] the NSWLRC in 2009[13] and the VLRC in 2010.[14]

In September 2011, as part of its response to the ALRC's 2008 recommendation that a statutory cause of action for invasion of privacy be enacted in Commonwealth legislation, the Commonwealth Government released an Issues Paper[15] inviting submissions on the ALRC

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8 Privacy Bill 1974 (SA).

9 Privacy Bill 1991 (SA).

10 Attached as Appendix 1 to this Report is a summary of the history of those two bills, the models they proposed and their passage through the South Australian Parliament.

11 Des Butler, 'A Tort of Invasion of Privacy in Australia?' (2005) 29 *Melbourne University Law Review* 339, 364.

12 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice,* Report No 108 (2008).

13 New South Wales Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009).

14 Victorian Law Reform Commission, *Surveillance in Public Places: Final Report,* Report No 18 (2010).

15 Commonwealth of Australia, Department of the Prime Minister and Cabinet, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy* (September, 2011).

recommendation. In June 2013, having reviewed submissions to the Commonwealth Issues Paper and concluded that they showed little consensus on how a legal right to sue for breach of privacy should be created, or if it should be created at all, the then Commonwealth Attorney-General asked the ALRC to conduct another inquiry, this time into 'the protection of privacy in the digital era'.[16] The reference specifically included that the ALRC consider the detailed legal design of a statutory cause of action for serious invasions of privacy.

On 8 October 2013, the ALRC released its issues paper on 'Serious Invasions of Privacy in the Digital Era' as part of its response to the Commonwealth reference.[17] Since then, in March 2014, the ALRC published a Discussion Paper,[18] and in August 2014 it released its Final Report in which it recommended that if a cause of action for serious invasions of privacy is to be enacted, it should be enacted by the Commonwealth and should specifically deal with invasions of privacy by intrusion upon seclusion and by misuse of private information.[19]

Respondents to the South Australian Law Reform Institute's Issues Paper who opposed the introduction of a statutory cause of action in South Australia expressed concerns about South Australia introducing reform prior to the resolution of the issue at a national level. For example, Free TV Australia argued that it was difficult to identify the need for additional State protections when potential Commonwealth reforms had not yet been made.[20] While News Corp Australia submitted that if South Australia were to enact reforms prior to any Commonwealth response there was the risk of unnecessary duplication of regulation.[21]

In relation to the inquiry leading up to the ALRC 2014 Report, the current Commonwealth Attorney-General, Senator the Hon George Brandis QC, issued the following statement: 'The Government has made it clear on numerous occasions that it does not support a tort of

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16 The 'ALRC Privacy Reference (2013)'. See the media release by the Commonwealth Attorney-General, the Hon Mark Dreyfus QC, MP, *Protecting Privacy in the Digital Era,* 12 June 2013, <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Second%20quarter/12June2013-Protectingprivacyinthedigitalera.aspx> which includes the ALRC Terms of Reference entitled 'Serious Invasions of Privacy in the Digital Era' <http://www.attorneygeneral.gov.au/Mediareleases/Documents/Termsofreference120613.pdf>.

17 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Issues Paper No 43 (2013).

18 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Discussion Paper No 80 (2014).

19 Australian Law Reform Commission, *Serious Invasion of Privacy in the Digital Era*, Final Report No 123 (2014) Recommendations 4-1 and 5-1.

20 Free TV Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014, 6.

21 News Corp Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 17 February 2014, 3.

privacy'.[22] As at 22 January 2016, the Institute was not aware of any response by the Commonwealth Government to the recommendations made in that report.

Privacy in this context has, as recently as June 2015, attracted the interest of Australian reformers. A New South Wales Legislative Council Inquiry is currently underway and is inquiring into remedies for the serious invasion of privacy in New South Wales.[23]

The Institute does not consider that the work done at the Commonwealth level, and the recent recommendations made by the ALRC, should in any way delay or detract from the questions asked by the Institute. Further, the concerns about privacy protection have been widely expressed. The recent work of the ALRC, the proposed work in New South Wales and previous work by other State law reform bodies in the past decade demonstrate a growing interest in this targeted remedy. That growth has been stimulated in a large part by the fact that new technologies make it possible for individuals to invade privacy and inflict serious harm without the involvement of the mainstream media, Governments or large corporations.

Against this background, it is open to the individual States and Territories to offer remedies to their citizens. Absent any clear indication by the Commonwealth that it will enact a national statutory cause of action, there is room, in light of the growing concerns by the States and Territories, to address the deficiencies in the law identified not only by the ALRC, the VLRC and the NSWLRC, but also by this Institute.

It is important to note that from an international perspective, there have been a number of developments in the United States,[24] New Zealand,[25] Canadian provinces[26] and the United Kingdom[27] to allow greater protection of privacy (in a civil law context) through common law or statutory means. For example, in New Zealand, there is a limited common law tort of invasion of privacy[28] and in Canada a number of provinces have enacted statutory causes of action for

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22 As reported by Chris Merritt, 'Brandis rejects privacy tort call', *Australian*, 4 April 2014.

23 Law and Justice Committee, Remedies for the serious invasion of privacy in New South Wales (Inquiry), Parliament of New South Wales (2015) <*http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/53328E97515E48ECCA257E6F00292A7D > at 2 September 2015*>.

24 See Restatement of the Law, 2nd, Torts 1977 (US) at ss 652B-652E.

25 *C v Holland* [2012] 3 NZLR 672; *Hosking v Runting* [2005] 1 NZLR 1.

26 *Privacy Act 1996* RSBC c 373 (British Columbia); *Privacy Act* CCSM s P125 (Manitoba); *Privacy Act 1978* RSS c P-24 (Saskatchewan); *Privacy Act 1990* RSNL c P-22 (Newfoundland and Labrador).

27 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953); *Human Rights Act 1998* (UK). See the approach taken by the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457. See also, *Vidal-Hall & Ors v Google Inc* [2014] EWHC 13 (QB).

28 *C v Holland* [2012] 3 NZLR 672; *Hosking v Runting* [2005] 1 NZLR 1.

invasion of privacy.[29] Further, in other jurisdictions, like the Republic of Ireland, there have been attempts to implement a privacy right.[30]

In addition, recent amendments and proposed amendments to criminal laws in South Australia reflect the importance that the community places on protection of privacy interests.[31]

The Institute notes that the last Privacy Bill before the South Australian Parliament in 1992 ultimately floundered. The then Attorney-General, the Hon CJ Sumner, stated that the original Bill as introduced in 1991 had been 'emasculated' and that the Government had decided not to proceed with creating a general right of privacy and providing a remedy for a breach of that right. The Attorney-General's prophetic final remarks were as follows:

> I have no joy in taking this course of action, having spent an amount of time dealing with this issue, but I think that at this stage the Parliament is just not mature enough to grasp the issue. I repeat what I said: there is no doubt that at some time this issue will be dealt with, and some Government in the future will need to take up the issue and legislate on the issue of privacy in this State.[32]

The Institute considers that, in the absence of both judicial development and Commonwealth statutory intervention, it is now both timely and appropriate for South Australia to take up the suggestion raised by the Hon CJ Sumner.

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29 *Privacy Act 1996* RSBC c 373 (British Columbia); *Privacy Act CCSM* s P125 (Manitoba); *Privacy Act 1978* RSS c P-24 (Saskatchewan); *Privacy Act 1990* RSNL c P-22 (Newfoundland and Labrador).

30 Privacy Bill 2006 (Ireland); Privacy Bill 2012 (Ireland).

31 Later in this Report, the amendments to the *Summary Offences Act 1953* (SA) and the Surveillance Devices Bills 2012-2015 are detailed.

32 South Australia, *Parliamentary Debates*, Legislative Council, 28 October 1992, 595 (CJ Sumner).

Executive Summary

Part 1: About this Report

This Final Report completes the Institute's review of whether personal privacy would be better protected in South Australia if a statutory cause of action for invasion of privacy were enacted. The Institute makes 34 recommendations in this Report, having considered the 12 submissions received in response to its Issues Paper, as well the recent findings of Australian law reform agencies and other research.

The Institute considers that the reform recommended in this Report is justified and properly balances the competing interests surrounding the protection of privacy. The Institute hopes that the recommendations in this Report do not follow the pattern described by one privacy academic 20 years ago, a pattern which has continued in Australia since:

> The pattern is familiar. Private lives are made public spectacle by the tabloids. A general sense of unease ensues. Politicians appear to fret. Judges lament the incapacity of the common law to help. Committees are established. 'Privacy' legislation is proposed. Alarms are sounded by the quality press about the onslaught against freedom of speech. Inertia settles on politicians, reluctant to offend newspaper editors. The debate subsides until the next series of sensationalist disclosures.[33]

Part 2: The Need for Reform?

This part of the Report addresses the threshold issue of whether there is a need for a statutory cause of action in South Australia for invasion of privacy. The Institute has concluded that the protections presently available in South Australia for interferences with a person's privacy are inadequate. The Institute acknowledges that previous attempts at reform of this kind in South Australia were unsuccessful, but notes that the impetus for reform is now different as the people of South Australia are more vulnerable to invasions of privacy than ever before.

This vulnerability arises largely as a result of technological development and the consequent ease with which *individuals* (and not just well equipped Governments or organisations) can intrude into a person's private space and can collect, disclose and widely disseminate personal information. Consider, for example, how devastating it might be to an individual and his or her family if they were recorded or filmed without their knowledge in their own home and the film subsequently went viral on the Internet; or, if a tracking device was surreptitiously attached to a person's phone; or, if the fact that an individual was suffering from a serious illness or addiction

[33] Raymond Wacks, *Privacy and Press Freedom* (Blackstone Press Limited, 1995) 1.

and seeking treatment for it were to be widely published without the individual's consent; or, if a remote-controlled drone with a camera affixed was used to film an individual and his or her family in their backyard.

The Institute considers it unlikely that a common law privacy action will emerge through the courts in Australia in the foreseeable future. It is of the view that Parliament is best placed to build an effective cause of action which, at least in part, addresses the deficiencies in the current legal framework. Parliament is also best placed to introduce a cause of action which not only addresses the broad variety of factual circumstances in which interferences with a person's privacy can occur, but which also strikes an appropriate balance between the public interest in preventing and dealing with interferences with a person's dignitary interests and autonomy, and the strong public interest in competing matters such as freedom of expression.

The Institute recommends the enactment of a limited cause of action for serious invasions of personal privacy and further recommends that the statute should refer to it as a 'tort'. A flowchart depicting an overview of the cause of action recommended by the Institute is set out on page 25.

Although differing in some material and immaterial ways in conclusion and reasoning, the cause of action recommended in this Report is very similar to that recommended by the ALRC in its 2014 report.

The Institute has reached the view that the statutory model it proposes in this Report strikes the appropriate balance between competing interests and will not have a dampening effect on freedoms such as freedom of expression, but instead will cement and respect those freedoms while providing practical and effective remedies for South Australians who are aggrieved by an invasion or threatened invasion of their personal privacy. The Institute is confident in the ability and experience of the courts in undertaking the balancing exercises contained in this statutory cause of action.

Further, the Institute considers that the reform recommended in this Report would remain justified even if the Surveillance Devices Bill 2015 (SA) is enacted as that legislation would only partly address the deficiencies in the current legal framework.

Part 3: Personal Privacy

The Institute recognises that previous attempts in South Australia to introduce a statutory cause of action stalled not only on how privacy should be defined but also on whether the legislation

should include a definition of privacy and/or be prescriptive about what will constitute an invasion of privacy.

The cause of action recommended in this Report should extend to the protection of bodily privacy, territorial privacy, information privacy and communications privacy. The Institute believes that this protection can be achieved without expressly defining privacy, but instead by providing parameters around what will amount to an invasion of privacy, setting a threshold of seriousness and requiring that a plaintiff have a reasonable expectation of privacy in the circumstances. This part of the Report focuses on the third of these requirements and recommends that the statute should provide a non-exhaustive list of factors that a court may take into account in assessing whether a plaintiff had a reasonable expectation of privacy.

Part 4: The Invasion

The Institute recommends that the cause of action should cover intrusions upon a person's seclusion (to deal with bodily, territorial and communications privacy) and misuse of private information (to deal with information (or data) and communications privacy). The statute should include these two broad categories of invasion, rather than including a prescriptive list of invading conduct. However, the Institute is persuaded by the ALRC's approach on this issue and therefore recommends the inclusion of the following non-exhaustive guiding examples:

- For intrusion upon seclusion: by physically intruding into the plaintiff's private space or by watching, listening to or recording the plaintiff's private activities or private affairs.
- For misuse of private information: by collecting or disclosing private information about the plaintiff.

The Institute considers that the statutory cause of action should provide that 'private information' includes untrue information, but only if the information would be private if it were true.

Further, in respect of whether publication or dissemination of material is required in order to give rise to a cause of action, the Institute has answered this in the negative. The Institute recommends that a plaintiff should have a cause of action if their privacy has been invaded, even if the defendant did not further disclose or disseminate information or material obtained in the course of the invading act, because a plaintiff may suffer devastating consequences even if their private information or material is not widely distributed.

Part 5: Seriousness

The Institute considers that not all intrusions into a person's 'private' sphere should be actionable under a statutory cause of action for invasion of privacy. This part of the Report focuses on how serious the invasion of privacy should be for a cause of action to arise and what should be taken into account when assessing the seriousness of the invasion.

The Institute notes that some other Australian law reform agencies have recommended variations on the formulation that an invasion of privacy be 'highly offensive' to a 'reasonable person' of 'ordinary sensibilities'. However, the Institute is of the view that rather than provide for a plain offensiveness test, which may be restrictive and difficult to apply, the cause of action should simply require that the invasion be serious and then provide some express guidance on seriousness. The Institute finds the ALRC's approach in its 2014 report compelling and agrees that the cause of action should provide that in assessing whether or not the invasion meets the seriousness threshold, the court may have regard, among other things, to:

- (an objective test) the degree of offence, distress or harm to dignity that the invasion of privacy was likely to cause to a person of ordinary sensibilities in the position of the plaintiff;
- (a subjective test) whether the defendant was motivated by malice or knew the invasion of privacy was likely to offend, distress or harm the dignity of the plaintiff; and
- any other factor the court considers relevant.

The Institute considers that this recommendation will provide protection against trivial or otherwise non-serious invasions of privacy.

Part 6: Balancing Competing Interests – The Public Interest Test

A right to privacy should be weighed against other rights, such as freedom of individual, press and artistic expression. The issue considered in this part of the Report is whether there should be an express public interest test (requiring courts to make an assessment about whether or not the public interest in protecting the plaintiff's privacy in the circumstances of the case outweighs competing public interests) and, if so, whether it should be an element of or a defence to the cause of action.

The Institute recognises that there will be circumstances in which the public interest in protecting an individual's privacy will outweigh competing public interests. It also recognises that there will be circumstances in which, although an individual's privacy has been (or will be) invaded, the invasion is justified by a competing public interest, and in those circumstances, the plaintiff should not receive protection of the law. As mentioned above, striking an appropriate balance between competing rights and interests is critical to formulating the cause of action. The Institute considers that this can be achieved by including an express public interest test which is an element of the cause of action. In the event that the public interest in protecting the plaintiff's privacy is less than or equal to the competing public interests, a plaintiff's claim for an invasion of privacy should fail.

There is a range of valid public interests that may need to be considered. The Act should set out a non-exhaustive list of examples which a court may consider, along with any other relevant public interest matter. The list should be made having regard to the ALRC 2014 Report and the specific activities deemed to be of 'legitimate public purpose' in the 2012 amendments introducing the humiliating or degrading filming offence to the *Summary Offences Act 1953* (SA), taking into account any overlap and interplay with the other elements and defences recommended in this Report.

Part 7: Proof of Damage

The first issue considered in this part of the Report is whether, in order to make a successful claim, plaintiffs should be required to demonstrate, as an element of the cause of action rather than for the purpose of awarding compensation, that they suffered actual damage as a result of the invasion of their privacy. The Institute has reached the view that the cause of action should be actionable without proof of damage.

However, it does not automatically follow from this conclusion that all types of harm should result in an award of compensation. In relation to the issue of which types of harm or loss resulting from an invasion of privacy should be compensable, the Institute is of the view that they should be cast as broadly as possible and should at least include emotional distress. To conclude otherwise would undermine the effectiveness and aim of the cause of action.

Part 8: The Fault Element

Criminal offences and civil causes of action have physical elements and fault elements. The fault elements commonly include intention, recklessness or negligence. The Institute has reached the

view that the fault element for the cause of action recommended in this Report should include intention and recklessness but should not extend to negligence. This means that there must exist either an intention to invade someone's privacy or recklessness as to that fact. Recklessness in this context means where the defendant is aware of the risk of an invasion of privacy and is indifferent to whether or not an invasion of the plaintiff's privacy would occur as a result of the conduct. This view largely reflects the approach of other law reform bodies and is consistent with other torts and general principles of criminal liability.

Part 9: Natural Persons Only?

The Institute considered whether only natural persons should be able to bring an action for invasion of privacy or whether corporations, Government agencies or other organisations should also have standing. The Institute recommends that only natural persons should have standing to bring an action for invasion of privacy. This conclusion reflects the fact that privacy is a matter of *personal* autonomy and *personal* dignity.

Part 10: Living Persons Only?

The Institute considered whether the cause of action should survive a person's death and recommends that the cause of action should only be available to living persons, primarily because the suffering, damage or insult consequent on an invasion of privacy will not occur after death.

Part 11: Consent

Circumstances may arise where the plaintiff consents to the invading conduct, in which case, the defendant should not be liable for an invasion of privacy. Although it could be dealt with legislatively in a number of ways, the Institute is of the view that consent should be dealt with by inclusion as a complete defence to the cause of action. The Institute recommends that the statute should make it clear that consent may be expressly given or inferred, it must be freely given and it must be given to the particular disclosure or conduct constituting the invasion, including in the case of publication or dissemination, the extent of that publication or dissemination.

Part 12: Defences and Exemptions

This part addresses the other circumstances in which the Institute considers there should be a defence to an action for an invasion of privacy. It then addresses whether there should be any exemptions to the cause of action.

The Institute recommends that there should be a defence for conduct incidental to the exercise of a lawful right of defence of person or property where the defendant believes, on reasonable grounds, that the conduct was necessary, and where the defendant's conduct is proportionate to the perceived threat. This defence will provide protection to a person who invades the privacy of an individual while acting in self-defence, in defence of another person or in defence of property.

The Institute also recommends that the related but separate defence of necessity should apply to the cause of action. Although the factors related to this defence will be relevant to the public interest test and the question of whether a plaintiff has a reasonable expectation of privacy, the Institute considers that a separate complete defence of necessity should also be available to protect those acting in emergency situations where the defence recommended immediately above is unavailable.

There should also be a defence for conduct which was required or authorised by law and the statute should make it clear that simply because particular conduct is not expressly prohibited does not mean that it is authorised by law for the purposes of this defence. The Institute recommends that 'law' should be broadly defined and should mean the law as applicable in South Australia. The definition should include:

- the general law;
- Commonwealth Acts, regulations, legislative instruments and other instruments made under a Commonwealth Act;
- South Australian 'Acts' and 'statutory instruments' (as defined in the *Acts Interpretation Act 1915* (SA));[34]
- orders made by courts and tribunals;
- prerogative powers; and
- documents that have the force of law pursuant to an Act.

The Institute considers that the inclusion of this defence will ensure that Government bodies are not prevented from performing their functions (including their law enforcement functions). However, the Institute notes that if a defendant's conduct falls outside of the legal authorisation or requirement, or if the conduct was within the bounds of the lawful authorisation or requirement but was undertaken for an ulterior purpose, this defence should not arise.

[34] *Acts Interpretation Act 1915* (SA) s 4(1).

The Institute also considered a number of defences which are applicable to actions in defamation. The Institute recommends that there should be defences to an action for an invasion of privacy which are co-extensive with the following defences contained in the *Defamation Act 2005* (SA):

- the defence of fair report of proceedings of public concern;[35]
- the defence of innocent dissemination;[36]
- the defence for publication of public documents;[37] and
- the defence of absolute privilege.[38]

The Institute does not recommend any exemptions to the cause of action for invasion of privacy. It considers that the defences and its other recommendations (such as the public interest test, the requirements that the conduct be serious and that the plaintiff have a reasonable expectation of privacy) provide sufficient and appropriate protection for defendants against unmeritorious actions, meaning that there is no need to grant any exemptions.

However, the Institute is of the view that consideration should be given to exempting (or in some other way excusing) young persons from liability under the recommended cause of action. This is because of the increasing potential for young persons to access and therefore misuse technology to invade the privacy of other young persons.

Part 13: Remedies

Given the breadth of the circumstances in which an invasion of privacy could occur, the Institute considers that it is appropriate for a court to be able to choose from a broad variety of remedies to enable it to remedy an invasion of privacy in a way that is appropriate to the factual situation before it. The Institute recommends that the remedies available for an invasion of privacy should include accounts of profits, injunctions, orders of correction or apology, delivery up (including orders to take down), declarations, damages and any other relief that the court considers appropriate in the circumstances. The Institute considers that, to overcome the limits of the common law and equity, the statute should expressly permit courts to award as many of these remedies as required by the circumstances of the case.

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35 *Defamation Act 2005* (SA) s 27.
36 *Defamation Act 2005* (SA) s 30.
37 *Defamation Act 2005* (SA) s 26.
38 *Defamation Act 2005* (SA) s 25.

The Institute recognises that there is a particularly acute tension between, on the one hand, freedom of speech and, on the other, protecting privacy interests by the granting of an injunction. For example, the footage obtained for the recent television program exposing animal cruelty in the greyhound industry may, on the face of it, have been an invasion of the participants' privacy. However, there was arguably also a public interest in the information about the alleged animal cruelty being published. The same might be said for a newspaper that proposes to publish images of a person's backyard taken by a neighbour in circumstances where that person is a well-known dog breeder and the images depict the person's dogs being subject to cruelty. To address this tension, the Institute recommends that the statute expressly require courts to consider all relevant competing public interests prior to granting an injunction as a remedy for an invasion of privacy.

In relation to damages, the Institute recommends that the statute should require courts to draw on established principles of tort law when determining the appropriate award of damages (and to consider awards in analogous cases for other torts). In addition, consistent with the approach taken by the ALRC in its 2014 report, the Institute recommends that the statute should contain the following non-exhaustive list of considerations relevant to the determination of the award of compensatory damages:

(a) whether the defendant has made an appropriate apology to the plaintiff;

(b) whether the defendant has published a correction;

(c) whether the plaintiff has already recovered compensation, or has agreed to receive compensation in relation to the conduct of the defendant;

(d) whether either party has taken reasonable steps to settle the dispute without litigation; and

(e) whether the defendant's unreasonable conduct following the invasion of privacy, including during the proceedings, has subjected the plaintiff to particular or additional embarrassment, harm, distress or humiliation.[39]

The statute should expressly allow courts to award nominal damages and, in exceptional cases, exemplary damages. However, the statute should prevent courts from awarding aggravated damages as a separate head of damage.

[39] ALRC 2014 Report, Recommendation 12-2.

The Institute considered whether there should be a maximum amount of damages that may be awarded, and concludes that a cap should be imposed and it should be consistent with the maximum amount imposed by s 33(1) of the *Defamation Act 2005* (SA), which is currently $250,000. This cap is to apply to the combined sum of the award for non-economic loss and the award for exemplary damages (if any). It should not apply to economic loss and it should not affect the award of other remedies.

Part 14: Time Limitation of Action

Time limits on when legal proceedings can be commenced differ depending on the nature of the action. The Institute considers that a limitation period should balance the interests of plaintiffs (in being afforded sufficient time to discover a breach and 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 time period). In respect of a privacy cause of action, this balance is best achieved by requiring a plaintiff to bring a claim within one year from the date the plaintiff became aware of the invasion of privacy as long as the claim is commenced within six years of the date of the invasion. The Institute considers that this one year limitation should be open, in exceptional circumstances, to extension by the court, but not beyond six years from the date the invasion occurred.

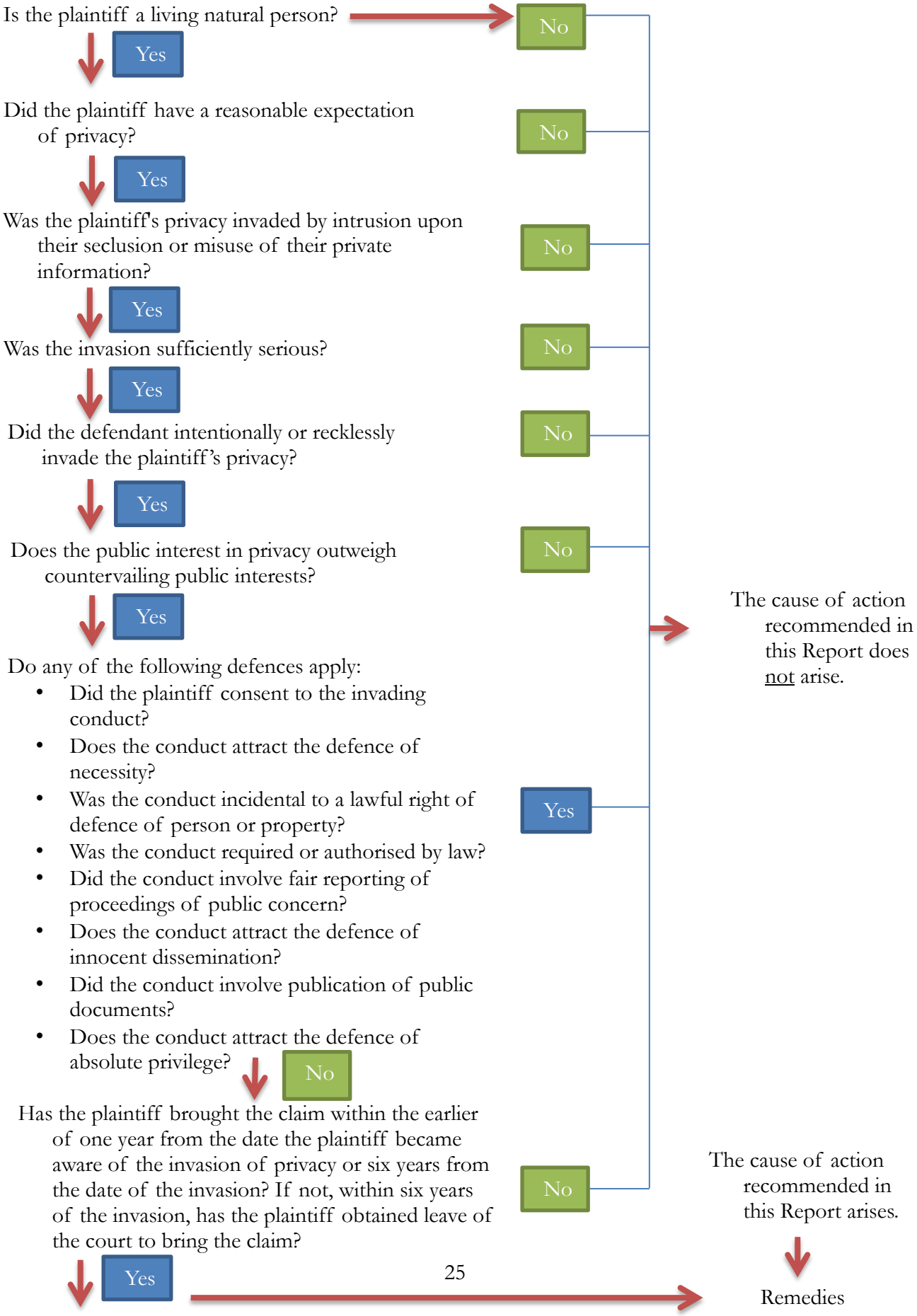
Part 15: Accessibility of the Action

The Institute recognises that there are several factors which will affect a person's ability to commence and run legal proceedings. In this part of the Report, the Institute considers the forums which should hear actions for invasion of privacy and the liability for costs for such actions.

The Institute recommends that a plaintiff should be able to bring an action for an invasion of privacy in the South Australian Magistrates, District or Supreme Court. Making these different forums available will provide the necessary flexibility for plaintiffs (given the wide range of circumstances in which an invasion of privacy can arise) and will allow plaintiffs to select the appropriate forum having regard to the value of the claim, the position of the plaintiff and the issues to be decided in the case.

The Institute further recommends that costs should be determined in accordance with the relevant rules of the court in which the matter is to be heard.

Flowchart of the Tort



Recommendations

Recommendation 1: The South Australian Parliament should enact a limited cause of action for serious invasions of personal privacy.

Recommendation 2: The statute should refer to the cause of action as a 'tort'.

Recommendation 3: The cause of action should extend to the protection of bodily privacy, territorial privacy, information privacy and communications privacy.

Recommendation 4: The cause of action should require that a plaintiff have a reasonable expectation of privacy in the circumstances. The statute should provide a non-exhaustive list of factors that a court may take into account in making that assessment. In developing this list, guidance should be taken from the list of factors recommended in the ALRC 2014 Report.

Recommendation 5: The statute should provide that the cause of action extend to intrusions upon a person's seclusion and misuse of a person's private information.

Recommendation 6: The statute should include the following non-exhaustive guiding examples:

- For intrusion upon seclusion: by physically intruding into the plaintiff's private space or by watching, listening to or recording the plaintiff's private activities or private affairs.
- For misuse of private information: by collecting or disclosing private information about the plaintiff.

Recommendation 7: The statutory cause of action should provide that 'private information' includes untrue information, but only if the information would be private if it were true.

Recommendation 8: The fact of invasion is sufficient; that is, a plaintiff would have a cause of action if their privacy was invaded, even if the defendant did not further disclose or disseminate information or material obtained in the course of the invading act.

Recommendation 9: The cause of action should provide that the invasion be serious. Whether the invasion is sufficiently serious to give rise to an action will be left for the court to decide, having regard to:

- (an objective test) the degree of any offence, distress or harm to dignity that the invasion of privacy was likely to cause to a person of ordinary sensibilities in the position of the plaintiff;

- (a subjective test) whether the defendant was motivated by malice or knew the invasion of privacy was likely to offend, distress or harm the dignity of the plaintiff; and
- any other factors the court considers relevant.

Recommendation 10: The Institute considers that a public interest test should be an element of the proposed cause of action. In determining whether a cause of action has been established, a court should be required to take into account whether the public interest in maintaining a plaintiff's privacy outweighs other issues of public interest. The statute should set out a non-exhaustive list of examples that a court may consider, along with any other relevant public interest matter. The list should be made having regard to the ALRC 2014 Report and the specific activities deemed to be of 'legitimate public purpose' in the 2012 amendments introducing the humiliating and degrading filming offences to the *Summary Offences Act 1953* (SA), taking into account any overlap and interplay with the other elements and defences listed in this Report.

Recommendation 11: The statute should expressly provide that the cause of action is actionable without proof of damage.

Recommendation 12: The kinds of harm or loss which are compensable should be cast as broadly as possible and should at least include emotional distress.

Recommendation 13: The cause of action for invasion of privacy should apply to conduct that is either intentional or reckless but not accidental or negligent. There must exist either an intention to invade someone's privacy or recklessness as to that fact. Recklessness in this context means where the defendant is aware of the risk of an invasion of privacy and is indifferent to whether or not an invasion of the plaintiff's privacy would occur as a result of the conduct.

Recommendation 14: The statute should provide that the cause of action only be available to natural persons.

Recommendation 15: The statute should provide that the cause of action be confined to living persons.

Recommendation 16: The consent (implied or inferred and freely given) of the plaintiff (or by an individual who has legal capacity to consent on their behalf) should be a complete defence to the action. The statute should make it clear that for the purposes of the defence, the consent must be to the particular disclosure or conduct constituting the invasion, including in the case of publication or dissemination, the extent of that publication or dissemination.

Recommendation 17: There should be a defence for conduct incidental to the exercise of a lawful right of defence of person or property, where:

- the defendant believes, on reasonable grounds, that the conduct was necessary; and
- the defendant's conduct is proportionate to the perceived threat.

Recommendation 18: There should be a defence of necessity.

Recommendation 19: There should be a defence for conduct which was required or authorised by law. For the purposes of this defence 'law' should be defined broadly and should mean the law as applicable in South Australia. The definition should include:

- the general law;
- Commonwealth Acts, regulations, legislative instruments and other instruments made under a Commonwealth Act;
- South Australian 'Acts' and 'statutory instruments' (as defined in the *Acts Interpretation Act 1915* (SA));[40]
- orders made by courts and tribunals;
- prerogative powers; and
- documents that have the force of law pursuant to an Act.

The statute should make it clear that the absence of a law prohibiting particular conduct should not, of itself, mean that that conduct is authorised by law.

Recommendation 20: There should be defences which are in similar terms to, and co-extensive with, the following defences to an action in defamation under the *Defamation Act 2005* (SA):

- the defence of fair report of proceedings of public concern;[41]
- the defence of innocent dissemination;[42]
- the defence for publication of public documents;[43] and
- the defence of absolute privilege.[44]

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40 *Acts Interpretation Act 1915* (SA) s 4(1).
41 *Defamation Act 2005* (SA) s 27.
42 *Defamation Act 2005* (SA) s 30.
43 *Defamation Act 2005* (SA) s 26.

Recommendation 21: It should not be a defence to the cause of action to prove that the information was in the public domain prior to the invasion.

Recommendation 22: The cause of action should not include any complete exemptions. However, consideration should be given to exempting (or in some other way excusing) young persons from liability.

Recommendation 23: The remedies available for an invasion of privacy should include:

- account of profits;
- injunctions;
- orders of correction or apology;
- delivery up (including orders to take down);
- declarations;
- damages; and
- any other relief that the court considers appropriate in the circumstances.

Recommendation 24: The statute should provide that a court may award as many different remedies for an invasion of privacy as it sees fit.

Recommendation 25: The statute should expressly require courts to consider all relevant competing public interests (including, but not limited to, freedom of expression) prior to granting an injunction as a remedy for an invasion of privacy.

Recommendation 26: The statute should require courts to draw on established principles of tort law when determining the appropriate award of damages (and should consider awards in analogous cases for other torts).

Recommendation 27: The statute should contain the following non-exhaustive list of considerations relevant to the determination of the award of compensatory damages:

(a) whether the defendant has made an appropriate apology to the plaintiff;

(b) whether the defendant has published a correction;

(c) whether the plaintiff has already recovered compensation, or has agreed to receive compensation in relation to the conduct of the defendant;

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44 *Defamation Act 2005* (SA) s 25.

(d) whether either party has taken reasonable steps to settle the dispute without litigation; and

(e) whether the defendant's unreasonable conduct following the invasion of privacy, including during the proceedings, has subjected the plaintiff to particular or additional embarrassment, harm, distress or humiliation.

Recommendation 28: The statute should prevent courts from awarding aggravated damages as a separate head of damage.

Recommendation 29: The statute should expressly allow courts to award exemplary damages in exceptional cases.

Recommendation 30: The statute should expressly allow courts to award nominal damages.

Recommendation 31: The statute should impose a maximum amount of damages that may be awarded for the combined sum of the award for non-economic loss and the award for exemplary damages (if any). The maximum amount should be consistent with the maximum imposed by s 33(1) of the *Defamation Act 2005* (SA), which is currently $250,000.

Recommendation 32: The statute should allow a plaintiff to bring a claim within the earlier of one year from the date the plaintiff became aware of the invasion of privacy or six years from the date of the invasion of privacy. The one year limitation should be open, in exceptional circumstances, to extension by the court, but not beyond six years from the date the invasion occurred.

Recommendation 33: A plaintiff should be able to bring an action for invasion of privacy in the Supreme Court of South Australia, the District Court of South Australia or the Magistrates Court of South Australia.

Recommendation 34: The costs should be determined in accordance with the relevant rules of the court in which the matter is heard.

PART 2

The Need for Reform?

The Issue

1. Personal privacy is a fundamental right and is synonymous with individual autonomy and integrity. The Issues Paper asked whether there should be a law introduced in South Australia to give people a right of action against an individual or organisation who invades their personal privacy.[45]

2. When considering whether there is a need for a statutory cause of action for invasion of personal privacy and if there is, how it might operate, it is important to examine what protections or remedies are currently available. This part of the Report identifies how South Australia's existing criminal and civil laws deal with conduct which might be considered to invade personal privacy, along with, by way of illustration, some examples of conduct that might commonly be thought to interfere with a person's privacy, analysed broadly in terms of protections and remedies.

Sources of current remedies

3. In South Australia, neither the common law[46] nor statute provides a cause of action directly concerned with the protection of personal privacy. The High Court has left open the opportunity for the development of a common law cause of action for invasion of privacy,[47] but there will need to be further specific authority from appellate courts before it can be said that a common law action of privacy is part of Australian law.[48] It seems very unlikely, however, that such a common law action will emerge through the Australian courts in the near future.[49] As the ALRC recently observed, 'No Australian appellate court has confirmed the existence of this tort, and the judgments of several courts suggest that

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45 This appeared as question 1 in the Issues Paper. It is also worth noting that question 3 of the Issues Paper asked 'What are the main considerations that inform your answer to Question 1?'.

46 For a timeline of the developments at common law and attempts at reform, see South Australian Law Reform Institute, *Too much information a statutory cause of action for invasion of privacy*, Issues Paper 4 (2013) [44].

47 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [107], [132] and [335].

48 See for example, *Sands v State of South Australia* [2013] SASC 44, [614].

49 See, for example, Des Butler, 'A Tort of Invasion of Privacy in Australia?' (2005) 29 *Melbourne University Law Review* 339; Mark Polden, 'A new tort of privacy: privacy sound goods, but ….' (2008) 46 *Law Society Journal* 11, 58-63.

the common law is unlikely to recognise the tort in the foreseeable future…The [relevant] cases suggest that the future development of the common law is, at best, uncertain'.[50]

4. There are, however, some statutes and common law rules which provide incidental privacy protection or which in some other way concern a person's 'sphere of inviolability'. The main examples are below.

Torts

5. There are several torts that protect aspects of privacy and provide a remedy of damages - for example, the intentional torts of battery and assault which protect 'bodily privacy' and mental well-being.[51] Further, the tort of private nuisance protects the use and enjoyment of land, and provides remedies in damages as well as injunctions to restrain the conduct.

6. However, these torts would be largely inadequate to provide remedies for much conduct which may be said to amount to an invasion of personal privacy. An example of this inadequacy is where there is mere surveillance or observation. This is because of the requirement of these torts that there be actual physical interference with a person or land.

Negligence

7. The law of negligence protects a variety of interests. Negligence is where a person does or fails to do something that a reasonable person in that situation would or would not do, and which causes another person reasonably foreseeable damage, injury or loss. In a negligence claim, the plaintiff must demonstrate that the defendant owed them a duty of care which was breached by negligent conduct, causing relevant damage, injury or loss to the plaintiff. A vast body of law has developed to give content to these elements of negligence.[52] The *Civil Liability Act 1936* (SA) governs the way liability for negligence claims and the remedy of damages are assessed.

8. Rarely would the circumstances giving rise to an invasion of personal privacy be able to satisfy all of the established elements of a negligence action. In particular, the consequences of many invasions of privacy would only result in emotional distress or embarrassment, falling short of the damage requirement of a negligence action.

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50 ALRC 2014 Report, 54-55 [3.54]-[3.56].

51 Conduct which constitutes a civil assault or battery may also be punished as a crime – see discussion under *Criminal offences* below.

52 It is beyond the scope of this Report to examine any further the complex law of tort. For further guidance see, for example, Julia Davis, *Connecting with Tort Law* (Oxford University Press, 2012).

Defamation

9. Defamation law protects a person's individual reputation. Defamation is the publication or broadcast of information or material that is capable of lowering a person in the estimation of others. Damages and injunctions are the remedies available in an action for defamation.[53]

10. The law of defamation protects against the dissemination of personal information that is untrue; that is, the truth defence will defeat a defamation action.[54] For this reason, an action in defamation would not be available for invasions of privacy where the depiction of the person or their personal information is accurate, which is likely to be the case in most invasion of privacy cases.

Trespass

11. Actions in trespass to land and goods have as their focus the protection of property rights, but also incidentally provide remedies against invasions into a person's space or 'territorial privacy'. Through an action in trespass to land or goods, a person can receive monetary damages or, in appropriate circumstances, an injunction. An action in trespass requires a direct physical interference with a plaintiff's exclusive possession of land or possession of goods by a voluntary and intentional (or negligent) act.[55] It could not be used to protect against invasions of privacy which do not meet this test, such as when the invasion occurs through the taking of photographs from a distance.

Breach of confidence

12. The common law and equity protect privacy of communications or personal information through an action in breach of confidence. Breach of the duty of confidence involves actual or threatened unauthorised use of confidential information which was communicated or obtained in circumstances which impose an obligation of confidence.[56]

13. An example of a situation where a duty of confidence will arise is where a person has voluntarily supplied confidential information to another only because of an express

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53 There is also an offence of criminal defamation, discussed below at paragraph 24.

54 In South Australia, see *Defamation Act 2005* (SA) s 23. Although Australia adopted uniform laws of defamation in 2006, some differences between jurisdictions still remain.

55 In this context, the VLRC has noted that the common law differentiates between privately owned land and public space, and that 'the common law does not protect people from having their activities or movements scrutinised in public places, even in areas where they have the expectation that they will not be observed, for example, in public toilets': Victorian Law Reform Commission, *Privacy Law: Options for Reform*, Information Paper (2001) 14.

56 *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, 437-438; *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47.

undertaking or implied commitment that it will be kept secret. This commonly occurs where an individual supplies medical records to their health professional.

14. A duty of confidence may arise through a contract between the parties (common law action) or by the way in which the parties have conducted themselves (equitable action). At common law, an action in breach of confidence is dependent upon the existence of a relationship between the two parties and cannot extend to protect against use of the information by third parties.[57]

15. However, the equitable action can arise where the confidential information has been surreptitiously or accidently obtained in circumstances where the recipient of the information learns of the confidentiality of the information.[58] It can also arise where the confidential information has been imparted in confidence[59] or where the way in which the information is communicated or obtained otherwise results in an obligation of confidence.[60]

16. Remedies for breach of confidence include compensation or an account of profits and injunctions. The remedy available will depend on whether a common law or equitable claim is made.

17. Although an action for breach of confidence protects against some invasions of privacy,[61] there are many invasions of privacy which it does not protect. For example some invasions of privacy:

    - Do not involve threatened or actual use of the information obtained.
    - Involve information which is private but which does not have the requisite nature of confidentiality for the purposes of an action in breach of confidence.
    - May occur in circumstances which do not give rise to the requisite obligation of confidence for the purpose of a breach of confidence claim.

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57 See *Fraser v Evans* [1969] 1 QB 349, 361-362.

58 *Johns v Australian Securities Commission* (1993) 178 CLR 408, 459-460; *Fraser v Evans* [1969] 1 QB 349, 361; See also, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 224.

59 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47-48.

60 *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414, 438. Unconscionably obtaining or taking confidential information in some circumstances may also give rise to a duty of confidence: *Sullivan v Sclanders* (2000) 77 SASR 419.

61 See, for example, the recent Western Australian decision of *Wilson v Ferguson* [2015] WASC 15. Mitchell J upheld the plaintiff's breach of confidence claim in circumstances where the defendant had posted explicit photographs and videos of the plaintiff on the defendant's Facebook page following the breakdown of their relationship. Mitchell J granted injunctive relief, as well as equitable compensation to compensate the plaintiff for the humiliation, anxiety and distress caused by the publication of the images.

18. Further, courts have generally been reluctant to award equitable compensation for non-economic loss resulting from a breach of confidence. It appears that on only two occasions, superior courts in Australia have recognised the availability of equitable compensation to compensate a plaintiff for emotional distress caused by a breach of confidence.[62] This means many plaintiffs may be left without appropriate redress because they have suffered harm which falls short of that required to succeed in a breach of confidence action (assuming that they can satisfy the other elements of such an action).

Other sources of protection

19. In addition to the above common law rules, individuals receive protection against some types of invasions of privacy through criminal offences, administrative instructions and existing statutes.

Criminal offences

20. There are a range of offences for conduct that involves an invasion of privacy, and this reflects the importance society attaches to the protection of privacy.

21. Some of these offences relate to bodily privacy – for example, assault,[63] offences of causing physical or mental harm,[64] rape and other sexual offences.[65] The offence of unlawful stalking, which might be seen as relating to both territorial and emotional privacy, also incidentally protects privacy interests.[66]

22. Conduct which constitutes a civil trespass to land or goods may also be punishable as a property offence or an offence of dishonesty.[67] Another relevant dishonesty offence is the offence of assuming a false identity.[68]

23. Communications and information privacy are incidentally protected by the computer offences[69] of unauthorised modification to computer data by anyone other than the person who brought the data into existence or stored the data on the computer,[70] and of unauthorised impairment of electronic communication[71] (when a person who is not entitled to control the communication prevents or delays the communication of electronic

62 *Giller v Procopets* (2008) 24 VR 1; *Wilson v Ferguson* [2015] WASC 15.
63 *Criminal Law Consolidation Act 1935* (SA) s 20.
64 *Criminal Law Consolidation Act 1935* (SA) pt 3, div 7A.
65 *Criminal Law Consolidation Act 1935* (SA) pt 3, div 11.
66 *Criminal Law Consolidation Act 1935* (SA) s 19AA.
67 *Criminal Law Consolidation Act 1935* (SA) pts 4 and 5.
68 *Criminal Law Consolidation Act 1935* (SA) pt 5A.
69 *Criminal Law Consolidation Act 1935* (SA) pt 4A.
70 *Criminal Law Consolidation Act 1935* (SA) s 86C.
71 *Criminal Law Consolidation Act 1935* (SA) s 86D.

information). Such interception is punishable only where the communication is actually prevented or delayed in reaching its destination.

24. There is also an offence of criminal defamation[72] for publishing defamatory material knowing that (or being recklessly indifferent as to whether) it was false and intending to (or being recklessly indifferent as to whether it would) cause serious harm. As with a civil defamation claim (discussed earlier) the defence of truth applies to the offence of criminal defamation.[73]

25. Some protection for the privacy of conversation is offered in offences for the intentional use of a listening device (other than in accordance with the *Listening and Surveillance Devices Act 1972* (SA)) to overhear, record, monitor or listen to any private conversation, whether or not the person is a party to the conversation, without the consent, express or implied, of the parties to that conversation.[74] However, the principal offence provision in that Act does not apply to visual, data or tracking surveillance devices.

26. In 2012, the Attorney-General, the Hon John Rau MP, introduced to the South Australian Parliament the Surveillance Devices Bill 2012 (SA) which sought, amongst other things, to extend the scope of protection afforded under the *Listening and Surveillance Devices Act 1972* (SA) beyond listening surveillance devices to optical (or visual) surveillance, data surveillance, and tracking devices.

27. In February 2013, the second reading debate for the Surveillance Devices Bill was adjourned by the motion to ask the Legislative Review Committee to inquire into and report on legislative amendments required to address the following issues:

    - The need to protect a person's privacy from the use of surveillance devices against that person without consent;
    - The circumstances in which persons should have the right to protect their lawful interest through the use of surveillance devices against another person without that person's consent.
    - The circumstances in which it may be in the public interest for persons to use a surveillance device against another person without that person's consent; and
    - The circumstances in which the communication or publication of information or material derived from the covert use of a surveillance device should be permitted.[75]

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72 *Criminal Law Consolidation Act 1935* (SA) s 257.
73 *Criminal Law Consolidation Act 1935* (SA) s 257(2).
74 *Listening and Surveillance Devices Act 1972* (SA) s 4.
75 South Australia, *Parliamentary Debates*, Legislative Council, 21 February 2013, 3231.

28. In November 2013, the Committee returned a report on the Bill.[76] The Committee first recommended that in the context of the ALRC's Inquiry into Serious Invasions of Privacy in the Digital Era, the Attorney-General consider developing legislation aimed at providing further remedies to persons who have their privacy interests affected by the covert use of a surveillance device. The Report concluded that while some of the reforms proposed in the Bill were necessary to fill gaps in the law, the Bill should be amended in a number of places to clarify and extend the defences and exemptions to the covert use of surveillance devices and the disclosure of information there obtained. The Bill lapsed in the Legislative Council when the Parliament was prorogued.

29. The Bill was reintroduced to the Legislative Council on 5 June 2014 as the Surveillance Devices Bill 2014.[77] The Bill faced criticism, especially from the media[78] and the Law Society.[79] The Bill received a hostile response from the Opposition and cross-benchers in the Legislative Council. It was asserted that the Bill undermined press freedom and would impede legitimate investigative journalism by requiring media organisations to obtain a court order before reporting news stories gathered by information gained from surveillance devices in the 'public interest' and the Bill would also undermine the ability to expose animal cruelty by prohibiting the use of covert devices to record activities relating to agricultural facilities or factory farming.[80] The Government's contention that these concerns were already addressed in the Bill or would be addressed by its planned amendments that would have allowed media organisations to communicate and publish information without a court order, [81] failed to convince a majority of the Legislative

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76 Legislative Review Committee, Parliament of South Australia, *Inquiry into Issues Relating to Surveillance Devices* (2013).

77 South Australia, *Parliamentary Debates*, Legislative Council, 5 June 2014, 374 (Hon Gail Gago).

78 See, for example, Angelique Johnson, 'Surveillance laws could outlaw most covert video use in South Australia', ABC News, 2 July 2014; Lauren Novak, 'South Australia Surveillance Devices Bill faces defeat in Parliament unless changes are made', *The Advertiser*, 2 July 2014; Bension Siebert, 'Surveillance Laws Threaten Press Freedom: Law Society', *In Daily* , 2 July 2015; Lauren Novak, 'Issues: South Australian laws that aim to restrict what you're allowed to see', *The Advertiser*, 3 July 2014. The following media groups opposed or expressed concern about the Bill: the AAP, the ABC, APN News and Media, Astra Subscription Television, Channel 7, Channel 10, Commercial Radio, Fairfax Media, Free TV, the Media, Entertainment and Arts Alliance, News Corp Australia, SBS and Sky News; see South Australia, *Parliamentary Debates*, Legislative Council, 1 July 2014, 519 (Hon Stephen Wade).

79 See Submission of Law Society of South Australia dated 4 July 2015, available at: <http://www.lawsocietysa.asn.au/pdf/Submissions/140704_Surveillance_Devices_Bill_2014.pdf>.

80 See, for example, South Australia, *Parliamentary Debates*, Legislative Council, 1 July 2014, 518-519 (Hon Stephen Wade); South Australia, *Parliamentary Debates*, Legislative Council, 1 July 2014, 520-523 (Hon Tammy Franks); South Australia, *Parliamentary Debates*, Legislative Council, 1 July 2014, 523-524 (Hon Kelly Vincent); South Australia, *Parliamentary Debates*, Legislative Council, 3 July 2014, 594-595 (Hon John Darley)

81 The Bill originally proposed to regulate the communication or publication of information derived from the use of a listening device or optical surveillance device where the device was used in the public interest and the communication and the publication of such information obtained in the public interest could only occur with a

Council. The Surveillance Devices Bill 2014 was defeated at its third reading in the Legislative Council on 23 September 2014.

30. On 10 September 2015, a revised Surveillance Devices Bill 2015 was introduced to State Parliament. The Attorney-General, the Hon John Rau MP, explained the Bill 'overhauls and brings up to date with modern technologies the law dealing with electronic surveillance' and that '[i]n general terms, the Bill proposes a replacement to the current *Listening and Surveillance Devices Act 1972*'.[82] As with previous iterations, the Bill applies to optical surveillance, data surveillance and tracking devices as well as listening surveillance devices. The Bill, in particular, includes revised protections to allay the various concerns that had been expressed in 2014.[83] The Bill requires a court order be obtained before using, communicating or publishing information gained from surveillance devices in circumstances where the device was used in the public interest.[84] However, the Bill departs from the 2014 version by providing express exceptions to the general rule that there must be a court order. Those exceptions arise where the device was used in the public interest and:

(a) the use, communication or publication of the information or material is made to a media organisation; or

(b) the use, communication or publication of the information or material is made by a media organisation and the information or material is in the public interest; or

(c) the information or material relates to issues of animal welfare and the use, communication or publication of the information or material is made to the RSPCA; or

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court order. The Government unsuccessfully argued that any such concerns would be allayed by its amendments to the 2104 Bill that would have allowed media organisations to communicate and publish information without a court order. The Government unsuccessfully argued that activities relating to agricultural facilities or factory farming exposing animal cruelty would be caught by the clear public interest exception that the Bill contemplated. See South Australia, *Parliamentary Debates*, Legislative Council, 7 August 2014, 801-802 (Hon Gail Gago); South Australia, *Parliamentary Debates*, Legislative Council, 23 September 2014, 972-974 (Hon Gail Gago).

82 South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2474 (Hon John Rau).

83 Ibid 2474-2483.

84 Surveillance Devices Bill 2015 (SA) s 10.

(d) the use, communication or publication of such information or material is made by the RSPCA and the information or material is in the public interest.[85]

31. The Bill gained bipartisan support in the House of Assembly[86] but it has received a more qualified response in the Legislative Council with various concerns being expressed, notably as to the scope of a 'media organisation' and the role of the RSPCA.[87] At the time of publication of this Report, these concerns have not been resolved and the Bill has not passed the Legislative Council.

32. In South Australia, Part 5A of the *Summary Offences Act 1953* (SA) creates 'filming offences' and specifically deals with 'humiliating or degrading filming', 'indecent filming' and 'invasive images'. A humiliating or degrading act means an assault or other act of violence against a person or an act that 'reasonable adult members of the community would consider to be humiliating or degrading' but more than moderately embarrassing.[88] 'Indecent filming' is not restricted to child victims, nor to private places, nor to images of sexual acts. It includes filming a person when they are 'in a state of undress in circumstances in which a reasonable person would expect to be afforded privacy' or 'engaged in a private act in circumstances in which a reasonable person would expect to be afforded privacy'. It also includes filming a person's 'private region in circumstances in which a reasonable person would not expect that the person's private region might be filmed'.[89] It is a defence to both the humiliating or degrading and the indecent filming offences that the film was taken with the consent of the person being filmed. In addition, exemptions apply for law enforcement personnel and legal practitioners, or their agents, acting in the course of law enforcement or legal proceedings.

33. Allied to these offences are the separate offences of distributing the humiliating or degrading film, or the indecent film.[90] To distribute such a film includes to communicate, exhibit, send, supply or transmit it, and to make it available for access by another.

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85 Surveillance Devices Bill 2015 (SA) cl 10; South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2477-2478 (Hon John Rau).

86 South Australia, *Parliamentary Debates*, House of Assembly, 15 October 2015, 3060 (Ms V Chapman).

87 South Australia, *Parliamentary Debates*, *Legislative Council*, 17 November 2015, 2061-2062 (Hon Andrew McLachlan); South Australia, *Parliamentary Debates*, *Legislative Council*, 1 December 2105, 2339-2346 (Hon Tammy Franks); South Australia, *Parliamentary Debates*, *Legislative Council*, 2 December 2015, 2366, 2366-2367 (Hon Andrew McLachlan).

88 *Summary Offences Act 1953* (SA) s 26A, 26B.

89 *Summary Offences Act 1953* (SA) s 26A, 26D.

90 *Summary Offences Act 1953* (SA) s 26B(2), 26D(3).

34. In respect of the humiliating or degrading filming, it is an offence to distribute the film knowing or having reason to believe that the victim does not consent to the distribution of the film. It is a defence that the conduct constituting the offence was for a legitimate public purpose. Conduct will only be taken to be for a 'legitimate public purpose' if the conduct was in the public interest having regard to:

    (a) whether the conduct was for the purpose of educating or informing the public;

    (b) whether the conduct was for a purpose connected to law enforcement or public safety;

    (c) whether the conduct was for a medical, legal or scientific purpose;

    (d) any other factor the court determining the charge considers relevant.[91]

35. A presumption arises that conduct engaged in, by or on behalf of a media organisation (as defined) was engaged in for a legitimate public purpose, unless the court, having regard to the matters set out above, finds that the conduct was not for a legitimate public purpose.[92]

36. In respect of indecent filming, it is a defence that the person who was filmed consented to the distribution or that the alleged distributor did not know and could not have been expected to have known that the film was taken without the person's consent or that the filming was undertaken by a licensed investigation agent within the meaning of the *Security and Investigation Industry Act 1995* (SA).

37. Finally, there is a separate offence of distribution of an 'invasive image', knowing or having reason to believe that the other person does not consent to distribution.[93] An 'invasive image' is a moving or still image of a person 'engaged in a private act' or 'in a state of undress such that the person's bare genital or anal region is visible'. A private act is in turn defined to mean a sexual act of a kind not ordinarily done in public or using a toilet. It is a defence that the distribution was for a purpose connected with law enforcement or was for a medical, legal or scientific purpose or that the image was filmed by a licensed investigation agent within the meaning of the *Security and Investigation Industry Act 1995* (SA). The same exemptions as for indecent and humiliating or degrading filming apply. The offence does not extend to images involving children under the age of 16 years (on the apparent basis that such conduct falls with the child exploitation offences in the *Criminal Law Consolidation Act 1935* (SA)).

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91 *Summary Offences Act 1953* (SA) s 26B(6).
92 *Summary Offences Act 1953* (SA) s 26B(7).
93 *Summary Offences Act 1953* (SA) s 26C.

The South Australian Information Privacy Principles

38. The South Australian Information Privacy Principles (IPPs SA) are administrative instructions in force in South Australia. The State public sector is required to comply with the IPPs SA.[94] The IPPs SA outline how Government and its employees can collect, use and disclose personal information. The Privacy Committee of South Australia oversees the application of the IPPs SA to South Australian Government agencies. The Committee reports to the Minister and provides general advice on privacy issues. There is no statutory basis for these privacy principles in South Australia, unlike most other Australian jurisdictions.[95]

Privacy Act 1988 (Cth)

39. The *Privacy Act 1988* (Cth) is aimed at safeguarding information or data privacy by establishing a set of Australian Privacy Principles that govern the way personal information should be handled by Commonwealth Government agencies and large private sector organisations.[96] The Act establishes a regime in which individuals can make complaints to an Information Commissioner about interferences with their privacy.[97] The Act provides the Information Commissioner with the capacity to conduct investigations into suspected interferences with privacy,[98] accept enforceable undertakings[99] and to seek, through order of a court, civil remedies on behalf of the Commonwealth where there has been serious and repeated privacy breaches.[100] The Act also addresses breach of confidence, imposing an obligation of confidence on a third person where that person knew or ought reasonably to have known that the person from whom he or she obtained the information was subject to an obligation of confidence.[101]

40. Although an object of the *Privacy Act 1988* (Cth) is to protect individuals against invasions of privacy,[102] there are many invasions of privacy which it does not protect because it

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94 Government of South Australia, Department of the Premier and Cabinet Circular, *Information Privacy Principles Instruction PC012* (16 September 2013) <http://dpc.sa.gov.au/premier-and-cabinet-circulars>.

95 *Privacy and Personal Information Protection Act 1998* (NSW); *Information Privacy Act 2009* (Qld); *Personal Information Protection Act 2004* (Tas); *Privacy and Data Protection Act 2014* (Vic); *Information Privacy Act 2014* (ACT); *Information Act 2003* (NT).

96 Generally not to small businesses: *Privacy Act 1988* (Cth) ss 6(1), 6C, 6D.

97 *Privacy Act 1988* (Cth) s 36.

98 *Privacy Act 1988* (Cth) Part V.

99 *Privacy Act 1988* (Cth) s 33E.

100 *Privacy Act 1988* (Cth) s 80W.

101 *Privacy Act 1988* (Cth) s 92.

102 *Privacy Act 1988* (Cth) s 2A(a).

contains broad exemptions[103] and, as mentioned above, its focus is on information or data protection and it only applies to Commonwealth Government agencies and large private sector organisations.

Examples of application of current protection and remedies

41. Set out below are some examples (some more serious than others) of conduct that might be thought to be an invasion of privacy and an explanation of how the current law may deal with that conduct.[104]

***A** publishes on Facebook a range of personal information and photographs to a small group of 'friends' including **B**.*

***B** provides that information to **C**.*

***C** publishes it generally.*

Example 1

If C does not know (and should not have known) that the information has been communicated to B in confidence, then A has no legal protection or remedies. C and A are not in a relationship of confidence that would prevent disclosure by C of the information C was given about A by B.

Often, information that is provided to a limited group is disseminated much more widely than was ever intended. Some might think that in giving information to this group A took the risk that it might be used for other purposes, and in this A is in the same position as someone who tells something to a gossip. Others might say that by sending it to a specific group A has at least demonstrated an intention to limit access to the information to members of that group. But this does not give A any legal way to get C to take down that information or to recover damages from B or C for any harm the publication might have caused.[105]

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[103] See for example, *Privacy Act 1988* (Cth) s 7B(1) which relates to individuals acting in a non-business capacity and s 7B(4) which relates to acts done by a media organisation in the course of journalism.

[104] The discussion around these examples is not intended to be exhaustive of all potential legal remedies. For example, one remedy that is not addressed in these examples, because it is complex and difficult to establish, is one that can arise if it can be shown that the criminal law was intended to provide a civil cause of action.

[105] The Facebook terms of service (Facebook Statement of Rights and Responsibilities) set out the contractual obligations between Facebook and its users. These terms do not apply between (and therefore are not enforceable between) users, in this case A, B and C, and therefore although they do seek to regulate conduct on the Facebook forum, these terms do not provide a relevant and direct remedy to A in these circumstances.

***A** successfully guesses **B**'s password and logs on to his email account. **A** reads **B**'s emails.*

Example 2

Part 10.7 of the *Criminal Code 1995* (Cth) and Part 4A of the *Criminal Law Consolidation Act 1935* (SA) create offences for unauthorised access to data on computers.

Whether these offences apply to A will depend on what A intended, what system A accessed and in some cases what A intends to do with the information obtained (for example, whether A intends to use it to harm B).

It would be difficult for B to recover civil damages from A for reading his emails. There is no specific cause of action and remedy in tort that would cover this interference with B's *privacy,* whatever A's purpose or subsequent conduct. A may be able to succeed in a claim against B in breach of confidence, but only if the information in the emails has the necessary quality of confidence. Information in a person's emails may be personal information that he or she would want to control, but may not be 'confidential information' for the purposes of an action in breach of confidence.

***A**, from a ladder positioned in a laneway over a back fence, takes a video of **B** and her family at lunch in their backyard.*

Example 3

If A had trespassed, there might be some way to protect B from this intrusion of privacy. But A's actions do not amount to trespass. Trespass protects private property rights associated with the ownership of land, giving land owners a right to exclude others from their land. A photographer filming another person while they are in their own backyard but from a vantage point *outside* that backyard does not commit trespass.

There being no action in trespass and likely no action in nuisance, B has no legal means of stopping A filming or preventing A publishing the film, and no way to recover damages from A for harm caused by the filming or publication.

Taking a video or photo of someone else will rarely be an offence. That is because in most cases taking a picture of something is no different, at law, from observing it directly. What makes taking a picture or film an offence is its subject matter. 'Indecent filming' and 'humiliating and degrading filming' are offences under Part 5A of the *Summary Offences Act 1953* (SA). These offences clearly involve intrusions of privacy because they are for filming or recording, without the subject's consent, very private activities. There are also serious offences

under Division 11A of the *Criminal Law Consolidation Act 1935* (SA) for filming that involves the production of child exploitation material, but these are more offences of exploitation than intrusion of privacy.

In this case, A commits no criminal offence by filming B having lunch in her backyard.

Similarly, if A instead was operating a remote-controlled drone with a camera affixed, taking photographs of B in her backyard and in her kitchen, through the windows, no offence would be committed under the *Criminal Law Consolidation Act 1935* (SA) or the *Listening and Surveillance Devices Act 1972* (SA).

Example 4

While it is being repaired, ***A*** *loads software onto* ***B****'s smartphone which, unknown to* ***B,*** *allows* ***A*** *to remotely activate the inbuilt camera and stream images via the internet.*

Part 10.7 of the *Criminal Code 1995* (Cth) and Part 4A of the *Criminal Law Consolidation Act 1935* (SA) create offences for the unauthorised manipulation of data. Installing software without consent is a manipulation of computer data because it involves an addition to the data on that computer. Whether A's conduct amounts to an offence depends on what A intended, what system is accessed by A and in some cases what A then does with the manipulation. These offences are only incidentally directed at protecting B's privacy. Their main aim is to prevent falsification of data.

A's conduct does not constitute a trespass to goods. The tort of conversion is mainly concerned with excluding dealings with goods by someone who has no lawful right to deal with them. In this case, A is not attempting to sell or deal with B's phone.

There is no other civil remedy that would make A liable to B for this conduct by reason of it being an interference with B's privacy.

***B**, a victim of violence and threatened with future violence, has taken many steps to ensure her residential address and contact details are not publicly available.*

***A** proposes to publish them.*

Example 5

A could be prevented from publishing if A had come by the information in a relationship of confidence. That would be the case if, for example, A was a pay clerk who had come by the information when B disclosed it to her employer for her pay records, or A was B's doctor or lawyer to whom B gave the information in confidence.

A might also be prevented from publishing B's details if the information had been disclosed to A in circumstances in which the *Privacy Act 1988* (Cth) applied - for example, if A was a corporation taking that information for a warranty, or A was a university taking the information for enrolment, or A was a public body that had collected the information under a law permitting that body to collect information.

However, A may have come by the information without any wrongdoing and without any expected need for confidentiality. A may have become aware of B's residential address by:

- having been invited as a guest to B's house or by going there with one of B's friends;
- having seen a letter addressed to B;
- overhearing the address in a conversation;
- finding the address in a record which is publicly accessible; or
- by observation.

In these circumstances, if A does not know (or ought not have known) that the information was confidential or if the information does not have the necessary quality of confidence, there is little B can do. That is so even though the publication could reasonably be thought to harm B.

***A** proposes to publish generally the little known fact of **B**'s infection with an incurable, but not life threatening disease.*

Example 6

A could be restrained from publishing the information by B if A had come by it in a relationship of confidence – for example, where A is B's medical practitioner, or is someone with access to B's health records, or where A is B's employer and has been told the information in confidence. A could also be restrained from publishing the information if A obtained the information surreptitiously or accidently and knew or ought to have known that the information was confidential. In protecting information held in confidence the law would also protect B's privacy.

B might also be protected if A was subject to the *Privacy Act 1988* (Cth) and therefore could only publish 'health information' for a purpose allowed by that Act. This law would cover situations where A was a body corporate and had collected that information for the purpose of treatment or providing insurance.

But otherwise, and particularly if it cannot be shown how A came by this information, there is nothing B can do to prevent it being published. There is nothing that B can do if A works out B's diagnosis by 'piecing it together' from a variety of sources or inferences.

The publication of the fact of B's disease is defamatory, but A has a defence if the fact published was true. B could not invoke the law of defamation to stop the publication of information about his infection and without a cause of action for an invasion of privacy he has no other way to get a court to stop it.

***A** publishes widely a little known fact that **B** is receiving in vitro fertilisation treatment.*

***B** suffers significant emotional distress and other consequences when her friends, family and employer discover that she is receiving this treatment.*

Example 7

B could bring a claim against A for an action in breach of confidence if A had come by the information in a relationship of confidence, for example, as B's medical practitioner. However, the law not being settled on this issue, it is not clear whether A would be entitled to compensation for her emotional distress in an action for breach of confidence. A may therefore not receive compensation for her emotional distress.

If A is a media organisation acting in the course of journalism, a State Government agency or some other organisation or individual not covered by the relevant provisions of the *Privacy*

Act 1988 (Cth), there will be no consequences for A under that Act.

Even if A is the subject of the *Privacy Act 1988* (Cth) (for example, a health professional covered by that Act and the *Personally Controlled Electronic Health Records Act 2012* (Cth)), the remedies directly available to B are very limited. B could bring a privacy complaint under the *Privacy Act 1988* (Cth) to the Information Commissioner who may decide to investigate the complaint. In order for the Information Commissioner to take the matter further and seek a civil penalty, the breach of privacy must be very serious or repeated. This is a high threshold. Even if obtained, however, the penalty would act as a fine against A and would not be in the form of compensation payable to B.

***A,** who is **B**'s landlord, installs a hidden camera in **B**'s kitchen prior to **B** moving into the rental property. Using that camera, **A** records **B** and **B**'s family.*

Example 8

It would be difficult for B to recover civil damages from A for installing and operating the camera and recording the images of B and B's family. There is no specific civil cause of action and remedy that would cover this interference with B's privacy. There is unlikely to have been a trespass and the elements of breach of confidence may be difficult to establish in the circumstances.

If the hidden camera recorded sound, A may have committed an offence under the *Listening and Surveillance Devices Act 1972* (SA). However, if the camera recorded only vision, A will not have committed an offence under that Act as the Act does not relevantly cover video surveillance devices.

A's conduct will only be an offence under the *Summary Offences Act 1953* (SA) if it can be shown that the camera captured images which amounted to 'humiliating or degrading filming' or 'indecent filming' within the meaning of that Act. This will depend on the facts but may be difficult to demonstrate where the images are taken from the kitchen as opposed to the bathroom or bedroom.

If either the *Listening Surveillance Devices Act 1972* (SA) or the *Summary Offences Act 1953* (SA) do apply, there may be criminal consequences for A, but no civil remedy for B (except for the limited compensation available to victims of crime, referred to in paragraph 56 of this Report).

Submissions: Should there be a statutory cause of action for invasion of privacy

42. The Institute received a number of responses in favour of introducing a statutory cause of action to protect personal privacy in South Australia. Those respondents all thought that current protections were inadequate. Two respondents thought that there was a heightened need for a new cause of action because recent technological developments placed added pressure on privacy. One respondent submitted that a statutory cause of action was needed because a cause of action at common law had failed to emerge. Another respondent considered that, while the judicial development of a cause of action remained possible, it would be a slow and difficult option. One submission also indicated that the lack of specific South Australian privacy legislation prevented the respondent from obtaining Commonwealth accreditation that would allow access to data for research.

43. The Institute received negative responses to this threshold question from a number of media organisations and interest groups. The most commonly given reasons were that there was insufficient evidence of the need for a new cause of action, a new cause of action would undermine freedom of expression, and the existing privacy regime afforded adequate protection.[106]

44. Respondent's both for and against introducing a new law for privacy relied on multiple reasons to support their position. These can be summarised as:

- the adequacy or inadequacy of current protections;
- evidence of a need for a new law;
- technological and social developments;
- the impact on free speech and the publication of information in the public interest;
- the potential for judicial development of a cause of action;
- the intrinsic value of privacy;
- the public interest in free speech;

[106] Having indicated their opposition to a statutory cause of action for protection or privacy, none of the opponents went on to make further submissions on the specific questions put by the Institute in its Issues Paper. However, in the general grounds of opposition, some of these respondents addressed aspects of the Issues Paper or relied on a previous submission to a similar enquiry. The Institute has therefore considered and taken into account those grounds and where relevant has made reference to them in this Report.

- the possibility of unintended negative consequences;
- the need to avoid inconsistency and fragmentation of privacy regulation; and
- the potential to update existing laws or industry codes.

45. The Institute considers that it is appropriate, in considering the threshold question about statutory reform, to set out and address each of these factors in turn.

Adequacy or inadequacy of current protections

Submissions

46. For those respondents who submitted that current protections were inadequate, existing protections were considered incomplete, outdated or to lack coherence such that many invasions of privacy fall outside the scope of existing laws. One submission argued that South Australia has the least behavioural privacy protection of any jurisdiction and that only Western Australia provides less data protection than South Australia. The same respondent considered that, even where protections existed, poor monitoring and enforcement regimes rendered these protections ineffective. The Law Society of South Australia was particularly concerned with the ineffectiveness of industry self-regulation in relation to handling digital content complaints,[107] while the submission of the Commissioner for Victims' Rights included case studies which suggested a gap in the current laws.[108]

47. All respondents opposing the cause of action thought that current protections were adequate. Most referred to existing legislation including the *Privacy Act 1988* (Cth) and actions available at common law such as trespass, nuisance and defamation. The joint submission described the current privacy laws as extensive and as providing a strong level of privacy protection for individuals.[109] Other submissions pointed out that current privacy protections include industry codes of practice and regulation.

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[107] Law Society of South Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 13 March 2014, 8-9.

[108] Commissioner for Victims' Rights, Submission to the South Australian Law Reform Institute, 25 February 2015, 5-6.

[109] Bauer Media Group, Free TV Australia, Fairfax Media, APN News & Media, Sky News, Australian Broadcasting Corporation, ASTRA Subscription Television Australia, Commercial Radio Australia, SBS and News Corp Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 17 February 2014, 2.

The South Australian Legislative Review Committee

48. In its 2013 report to Parliament into issues relating to surveillance devices in South Australia, the Legislative Review Committee concluded that both the common law and information privacy laws applicable in South Australia have limitations in their ability to protect individual privacy from covert surveillance.[110] The Committee formed the view that modern surveillance devices pose a greater threat to privacy than the devices that were in operation when the *Listening and Surveillance Devices Act 1972* (SA) commenced operation.[111] The Committee recommended, in the context of the ALRC's Inquiry into Serious Invasions of Privacy in the Digital Era, that the Attorney-General consider developing legislation aimed at providing further remedies to persons who have their privacy interests affected by the covert use of a surveillance device without their consent.[112]

Reform Agencies' Recommendations

49. Following extensive community consultation, the ALRC concluded in its 2008 report that there was strong support for the enactment of a statutory cause of action for a serious invasion of privacy in Australia[113] as the best way to protect people from unwanted intrusions into their private lives or affairs in a broad range of contexts.[114] It supported legislative reform because Australian courts had not been able to agree on whether such an action exists at common law and reform would avoid a lengthy period of uncertainty and inconsistency as the courts refine the law in that area.[115] The Commonwealth has not enacted this recommendation. It is apparent, despite the more recent and specific ALRC recommendations in 2014 supporting the introduction of a statutory cause of action to deal with intrusions upon seclusion and misuse of private information (explained further below), that the Commonwealth is highly unlikely to do so in the immediate future.

50. The NSWLRC, in its 2009 report, concluded that the best way to recognise the inherent value of privacy and to fill the gaps which manifest themselves in privacy protection would be to enact a broad statutory cause of action for invasion of privacy. The NSWLRC proposed a draft Bill to set the 'framework for a cause of action that generally protects

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110 Legislative Review Committee, Parliament of South Australia, *Inquiry into Issues Relating to Surveillance Devices* (2013) 8.
111 Ibid 72.
112 Ibid 9, 72.
113 ALRC 2008 Report, 2557 [74.85], citing a number of submissions it had received.
114 Ibid 2565 [74.117].
115 Ibid.

privacy in private law, and provides the trigger for the courts to develop a legal concept of privacy in that context'.[116] The recommended reform has not been enacted.

51. In its 2010 report, the VLRC concluded that Victorians should be able to take civil action 'in response to threatened or actual serious invasions of privacy'.[117] It recommended the enactment of two separate causes of action. One would deal with serious invasions of privacy by misuse of private information. The other would deal with serious invasions of privacy by intrusion upon seclusion. The recommended reform has not been enacted.

52. In May 2013, the Law Reform Committee of the Parliament of Victoria (LRC) published its *Report for the Inquiry into Sexting*.[118] The LRC found that the '[c]urrent laws for breach of confidence, copyright, intentional infliction of harm, defamation and sexual harassment are unsuited to provide victims of non-consensual sexting with legal remedies against a person who has disseminated, or threatens to disseminate, an intimate image of them without consent'.[119] The LRC went on to recommend that the Victorian Government consider introducing legislation to establish a cause of action for invasion of privacy by the misuse of private information, relying on the recommendations of the VLRC three years earlier.[120]

53. In its 2014 report, the ALRC was required to design a cause of action, rather than determine whether it is needed or desirable.[121] Ultimately, however, the ALRC concluded that there should be a statutory tort that deals with serious and intentional or reckless intrusions upon seclusion and misuses of private information. Having considered the various forms of existing legal regulation and remedies that protect privacy of people in Australia (from legislative privacy protection to the numerous existing common law causes of action) the ALRC concluded that the existing law contains significant gaps or uncertainties[122] and that the gap was becoming 'increasingly conspicuous'.[123] In the ALRC's view, 'the existing law is a patchwork, with some important pieces missing and

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116 NSWLRC Final Report, 21 [4.16].

117 VLRC Final Report 147 [7.113].

118 Parliament of Victoria, *Report of the Law Reform Committee for the Inquiry into Sexting*, Parliamentary Paper No. 230, Session 2010-2013 (May 2013). Sexting is defined in the report as 'the creating, sharing, sending or posting of sexually explicit messages or images via the internet, mobile phones or other electronic devices by people, especially young people': at pp. ix, 1.

119 Parliament of Victoria, *Report of the Law Reform Committee for the Inquiry Into Sexting*, Parliamentary Paper No. 230, Session 2010-2013 (May 2013) 177 (finding 8).

120 Parliament of Victoria, *Report of the Law Reform Committee for the Inquiry Into Sexting*, Parliamentary Paper No. 230, Session 2010-2013 (May 2013) 188 (recommendation 12). The LRC limited its inquiry to consideration of the form of a cause of action for invasion of privacy that would adequately protect people from sexting-related breaches of privacy: at p. 187.

121 ALRC 2014 Report, 20 [1.17].

122 Ibid 51 [3.50].

123 Ibid 28 [1.61].

inconsistencies between the others'.[124] The ALRC emphasised the inadequacies of existing common law actions and statutory protections to properly protect privacy interests.[125]

Institute's Views

54. The Institute considers that privacy protections presently available to South Australian citizens are inadequate. There is no law in South Australia directly concerned with privacy protection - certainly no law which gives rise to relevant private remedies for individuals. There are significant deficiencies which could, at least in part, be addressed by a statutory cause of action for serious invasion of personal privacy. In particular, the Institute notes:

- the torts of trespass to the person and to land are clearly inadequate to provide remedies for much conduct which may be said to amount to an invasion of privacy. For example, difficulties will arise where there is no actual physical interference with the person or the land and instead the invasion occurs by surveying remotely or from afar, where the test for interference with the person or with use and enjoyment of land is not met, or where the plaintiff does not have appropriate claim of title to the land.
- the law currently provides very little redress for plaintiffs for infliction of emotional distress that falls short of psychiatric illness. Many invasions of privacy, even of the most serious kind, would fall within this gap.
- an action in defamation would not be available in most cases involving invasion of privacy because of the defence of truth.

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[124] Ibid 41 [3.2].

[125] The ALRC's identified a number of gaps and uncertainties in the current privacy protection regime in Australia, including:

- The tort actions of trespass to the person, trespass to land and nuisance do not always provide protection from serious intrusions into a person's private activities: ALRC 2014 Report, 51 [3.50].
- Tort law does not adequately provide a remedy for intentional infliction of emotional distress which does not amount to psychiatric illness: ALRC 2014 Report, 51 [3.50] citing *Wainwright v Home Office* [2004] 2 AC 406; *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 417.
- Actions for breach of confidence do not provide clear protection where the plaintiff is seeking to recover for emotional distress or where a privacy breach does not involve the disclosure of private information: ALRC 2014 Report, 52 [3.50].
- Legislation dealing with surveillance and with workplace surveillance is not uniform throughout Australia, and is outdated in some States: ALRC 2014 Report, 52 [3.50].
- Legislation and common law protection against aerial and other surveillance may not provide sufficient protection against advances in technology that facilitate new types of invasion into personal privacy: ALRC 2014 Report, 52 [3.50].
- 'The [Privacy] Act does not generally apply to intrusions into personal privacy or to the behaviour of individuals or media entities, and does not generally apply to businesses with an annual turnover of less than $3 million.': ALRC 2014 Report, 53 [3.50] (footnotes omitted).
- People who make complaints about invasions of privacy to media or communication entities do not currently have a 'no regulatory avenue for monetary redress': ALRC 2014 Report, 53 [3.50].

- although an action in breach of confidence can have privacy as a focus, it only arises in relation to actual or threatened use of information that has the necessary quality of confidence and only where the information was imparted in circumstances of confidence or where the recipient obtained the information surreptitiously or accidently and learns of its confidentiality. It will not cover an intrusion into another's personal privacy unless these tests are met. The weakness of this action is explained earlier in this Report.[126]

- the *Privacy Act 1988* (Cth) and the SA IPPs are focused on data protection and deal only with how personal information is collected and used by Government agencies and particular organisations. The *Privacy Act 1988* (Cth) provides for only limited direct civil redress for aggrieved people (that is, by way of complaints made to the Australian Information Commissioner) and the SA IPPs provide no redress. In addition, the *Privacy Act 1988* (Cth) generally applies only to the conduct of Commonwealth Government agencies and large businesses and the SA IPPs only apply to the conduct of the State public sector and to certain organisations which contract with the State. Both have limited application to the conduct of individuals and the *Privacy Act 1988* (Cth) also contains an express exclusion for much of the media.[127]

- the *Listening and Surveillance Devices Act 1972* (SA) does not (in a relevant way) apply to visual surveillance devices, or to data or tracking surveillance. The 1972 Act is, as has been aptly observed in Parliament, 'completely antiquated' in light of technological advances.[128]

55. Some of the conduct that might constitute an invasion of privacy will also constitute a criminal offence – for example, an offence relating to intrusions of bodily privacy or interference with private property, goods, places or communications. The criminal law is not, however, a reliable or adequate source of remedies for invasions of privacy because its primary role is to determine liability and punish offenders, and it is independently prosecuted, on behalf of the State, rather than by or on behalf of a victim. The criminal law is not a substitute for a civil remedy.[129]

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126 See paragraphs 17-18.

127 Section 7B(4) of the *Privacy Act 1988* (Cth) establishes a journalism exemption.

128 South Australia, *Parliamentary Debates*, House of Assembly, 12 May 2015, 1179 (Hon John Rau).

129 This is reflected in the evidence and submissions received by the Legislative Review Committee into Issues Relating to Surveillance Devices in 2013 which demonstrated not only a gap in the criminal law in terms of

56. That said, victims of crime, including of crimes relating to invasions of privacy, can be compensated, indirectly and in a limited way, by criminal courts. Sentencing courts may order an offender to pay compensation for injury, loss or damage resulting from the offence.[130] Victims of crime may also claim limited amounts of compensation under the *Victims of Crime Act 2001* (SA).[131] The main limitation on criminal compensation is that the liability to pay such compensation arises from conduct that amounts to a criminal offence which requires a higher onus of proof. As the examples given earlier in this Report indicate, conduct that invades privacy does not have to be criminal to result in profound consequences, and for these types of conduct there may be neither criminal liability nor a clear or appropriate civil remedy. Also, sentencing courts are not required to award compensation – it is at their discretion[132] – and cannot require a defendant to pay compensation if satisfied that the defendant does not have the means to pay it.[133] Further, courts are reluctant to award compensation if difficulties proving the fact of loss or its quantum might undermine 'the proper evidentiary base' of assessment.[134] Difficulties of this kind may well arise when the crime involves an invasion of privacy because the consequences are often non-economic (arising from emotional distress), and prosecutors are rarely in a position to present the necessary expert evidence to support a proper assessment of such damages.

Evidence of a need for a new law

Submissions

57. It follows from the discussion above that given some respondents considered the existing laws to be inadequate, there were a number of them who thought that there was evidence of the need for a new law. Two respondents argued that privacy breaches occur frequently with few, if any, consequences for the persons responsible. For Dr Normann Witzleb, the need for a new law was evidenced by the fact that separate studies by the ALRC,

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surveillance devices, but also a lack of civil redress for people whose privacy is invaded by use of surveillance devices.

130 *Criminal Law (Sentencing) Act 1988* (SA) s 53.

131 Under that scheme, limited monetary compensation may be paid to people who are injured by a crime and for the dependant relatives of deceased victims of crime. Compensation can be for mental as well as physical injury, but not for property loss or damage resulting from a crime. The maximum amount payable is $50,000. The Victims of Crime (Compensation) Amendment Bill 2015 presently before the South Australian Parliament proposes to double this maximum limit.

132 *Criminal Law (Sentencing) Act 1988* (SA) s 53(1).

133 *Criminal Law (Sentencing) Act 1988* (SA) s 13(1).

134 *Vougamalis v Nixon* (1991) 56 SASR 574, 579.

NSWLRC and VLRC had all concluded that the current standard of protection in Australia is inadequate.[135]

58. In its submission, the Law Society of South Australia drew the Institute's attention to some specific examples of breaches requiring a new law, which included the unnecessary use of biometric procedures for identification, the collection of identifying-data of young school children and the publication of that data, the inadvertent breach of data privacy by a company supplying paternity and drug tests, and the use of surveillance drones by police and private individuals.[136]

59. The Australian Privacy Foundation provided general examples of types of privacy breaches, which included leaks of personal data from Government agencies and private-sector organisations, surveillance of an individual's actions, interference with a person's body through unjustified testing or measuring, and the abuse of powers by law enforcement and national security agencies.[137] The Foundation also drew particular attention to what it considered were 'all-too frequent' instances of serious breaches of privacy by the media. Examples of such breaches were given in relation to 'celebrities' and ordinary people.[138]

60. Many of the responses by opponents to the cause of action submitted that, as a general principle governing law reform, new laws are only justified if it is shown that there is evidence of a problem to be solved. It was submitted that there was insufficient evidence of legislative gaps or instances of serious breaches without remedy. One respondent submitted that in the absence of sufficient evidence, a new law would be too broad and untargeted. A different respondent, ASTRA, submitted that rather than introducing a statutory cause of action for invasions of privacy, any inadequacies in the current statutory regimes should be addressed by updating existing laws and industry codes.[139] It contended

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135 Dr Normann Witzleb, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 10 February 2014, 6-7.

136 Law Society of South Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 13 March 2014, 6-7.

137 Australian Privacy Foundation, Submission to Department of Prime Minister and Cabinet, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, 4 November 2011, 3-4, attached to and forming part of Australian Privacy Foundation, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.

138 Ibid 4-5.

139 ASTRA Subscription Television Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014, 3.

that introduction of a statutory cause of action would result in the creation of overlapping causes of action which would further complicate this area of law.[140]

61. Free TV Australia submitted that the examples of privacy breaches outlined in the Issues Paper did not demonstrate a gap in the existing privacy law framework.[141] In support of its position, it suggested that statistics showed that serious invasions of privacy by the television industry are infrequent. Free TV Australia stated that from 2008 to 2013 privacy complaints received by broadcasters represented 3.2% of overall complaints, whereas from 2011 to 2013 privacy complaints represented 1.8%. Further, in the period from 2012 to 2013, from 2178 inquiries and written complaints to the Australian Communications and Media Authority, there were only two breach findings relating to privacy, and three non-breach findings.[142]

Institute's Views

62. For the reasons set out at paragraphs 54 to 56 above, the Institute considers that there are deficiencies in the current legal framework in South Australia and does not accept that there is no evidence of the need for reform. Because of jurisdictional, practical and other constraints, these deficiencies cannot be rectified by the South Australian Parliament updating existing laws and industry codes.

63. The Institute agrees that an important function of law reform is to recommend new and different laws directed at solving existing problems or omissions. The Institute accepts that it has not been presented with a substantial body of examples of un-remedied serious privacy breaches by the Australian media.

64. However, the Institute notes the breadth of the review recently undertaken by the ALRC and the consultative process the ALRC undertook in that review into privacy in the digital era. In arriving at its conclusion that there should be a cause of action in a Commonwealth statute dealing with serious and intentional or reckless intrusions upon seclusion and misuses of private information, the ALRC reasoned that 'invasions of privacy' 'by intrusion or misuse of private information are known to occur in a wide variety of circumstances,' rejecting any suggestions that there is no evidence of invasions of privacy in Australia.[143] It particularly acknowledged that it is not necessarily the case that the

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140 Ibid.

141 Free TV Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014, 4-5.

142 Ibid 5.

143 ALRC 2014 Report, 21 [1.20].

Australian media never invades people's privacy,[144] and went on to observe that 'it may be that where [the media] has done so, and the plaintiff complains, they have settled the plaintiffs' claims to avoid litigation, publicity and the setting of a precedent'.[145]

65. When privacy is considered from the perspective of disclosures of personal information by the traditional media, the argument often made is that there has not been a sufficient number of privacy complaints to justify enactment of a cause of action. This is apparent in the submissions made, in particular by media organisations, to recent Australian enquiries. In the *Report of the Independent Inquiry into the Media and Media Regulation* delivered in March 2012, the Hon R Finkelstein QC noted that he had been informed that the complaints to the Australian Press Council (the principal body with responsibility for responding to complaints about Australian newspapers, magazines and associated digital outlets) concerning privacy represent only about 10 percent of total complaints.[146] In addressing a similar point, the ALRC in its 2008 report made two observations - with which the Institute agrees. First, the fact that no cause of action currently exists means that the numbers of those who have experienced a serious invasion of privacy cannot be known.[147] For this reason the number of formal privacy complaints made against the media does not provide an answer to the question of whether law reform is justified. Secondly, as stated by the ALRC in its 2008 report, 'effective law reform must respond not only to current problems and gaps in the law, but also anticipate where there are likely to be significant problems in the future that will require some kind of regulation'.[148]

66. This leads to a discussion about the role and function of law reform. Law reform is essentially a process of updating the law to accommodate social and technological developments. A standard definition of law reform emphasises the functions of examining,

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144 Similar conclusions were reached by the ALRC in 2008, the NSWLRC in 2009 and the VLRC in 2010.

145 ALRC 2014 Report, 21 [1.21]. The Institute also notes the examples which were brought to the attention of the South Australian Legislative Review Committee in its review of the Surveillance Devices Bill 2012, including video surveillance by neighbours of a person's house or backyard and the use of optical surveillance devices in the workplace (where the surveillance does not involve recording private conversations, filming private acts or filming individuals in a state of undress): Legislative Review Committee, Parliament of South Australia, *Inquiry into Issues Relating to Surveillance Devices* (2013) 44-45. A number of examples were also raised in the debates of the 2014 and 2015 iterations of the Bill.

146 Hon R Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation*, to the Minister for Broadband, Communications and the Digital Economy (February 2012) 118, citing a letter from Australian Press Council to the Independent Media Inquiry, 6 December 2011.

147 To put it another way, the limited remedies directly available to individuals mean that there is a currently unascertainable number of people who are aggrieved by invasions of privacy by Governments, private organisations (large and small) and individuals.

148 ALRC 2008 Report, 2571 [74.141].

consolidating, modernising, simplifying and repealing existing laws.[149] These functions are among those expressly identified by Australian law reform bodies, and are recognised as amongst the primary roles of these bodies.[150] However, it is equally recognised that law reform extends beyond mere 'housekeeping' or 'gap filling' to more substantive and proactive reform, which focuses on the identification and resolution of important social problems.[151]

67. In the field of privacy, this proactive role requires law reformers to look beyond the practices of the traditional media to the wider community and the conduct of individuals, Governments and the private sector in the context of constantly evolving technologies. Many of the responses to the Issues Paper focused on the conduct of the mainstream, traditional media, and the impact that a cause of action might have on the democratic role of the media in Australia. Whilst this is a fundamental concern, the Institute considers that it can be accommodated in the kind of reform that is introduced, by balancing the scope of proposed statutory rights against appropriate elements and defences. These concerns ought not to stifle reform that is needed to deal with the harm caused by some serious invasions of privacy, and particularly in circumstances where the concerns can be appropriately accommodated in that reform.

Technological and social developments

Submissions

68. Two respondents considered that technological developments have placed increased pressure on privacy laws and demonstrate the need for reform. Of particular concern for the Australian Privacy Foundation was:

- the rise of new online and telecommunication marketing practices;
- an increase in both intentional and inadvertent data breaches;

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149 See further Neil Rees, 'The Birth and Rebirth of Law Reform Agencies' (Speech delivered at Australasian Law Reform Agencies Conference, Vanuatu, 10 September 2008); Michael Tilbury, 'A History of Law Reform in Australia' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 3, 5.

150 See, for example, Law Reform Commission Act 1968 (Qld) s 10; South Australian Law Reform Institute, South Australian Law Reform Institute (6 March 2014) <http://www.law.adelaide.edu.au/research/law-reform-institute/>.

151 Marcia Neave, 'Law Reform and Social Justice' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 358, 360; Edward Caldwell, 'A Vision of Tidiness: Codes, Consolidations and Statute Law Revisions' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 40, 41, 52; see also Noel Lyon, 'Law Reform Needs Reform' (1974) 12 *Osgoode Hall Law Journal* 421, 430-431; Robert Samek, 'A Case for Social Law Reform' (1977) 55 *Canadian Bar Review* 409, 410.

- the capacity of the Internet for widespread and rapid dissemination of private information;
- the evolving sophistication, intrusiveness and pervasiveness of surveillance technologies; and
- the availability of affordable technologies enabling private individuals to collect, process and disseminate information.[152]

69. Conversely, some respondents submitted that developments in social media and the collection of commercial data mean that individuals have become more willing to share information about themselves. This was said by News Corp Australia to be evidenced by people's voluntary interaction and participation with a broad range of social media services.[153] In the context of social media, one respondent submitted that expectations of privacy vary significantly between different persons and different generations. As such there was risk that a new law would not be able to adequately define and establish a regime proscribing serious breaches of privacy.

70. One respondent thought that existing protections, including the *Privacy Act 1988* (Cth) and the *Commercial Television Industry Code of Practice*, had been drafted in a manner that was technology-neutral and did not need to be updated. However, other respondents thought that existing laws had become technologically outdated; laws dealing with surveillance devices being a particular example.

Institute's Views

71. Although the conceptual framework in this long running privacy debate has remained the same, recent technological and social developments give rise to a new and different reason to consider the question about reform in the nature of a statutory cause of action. The ease with which individuals can now, through the use of modern camera, phone and Internet technology, invade privacy and widely disseminate offending material, is obvious. This is confirmed by the submissions to the Issues Paper, and the recent findings of law reform bodies in Australia.

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[152] Australian Privacy Foundation, Submission to Australian Law Reform Commission, *Inquiry into Serious Invasions of Privacy in the Digital Era - Issues Paper*, November 2013, 12-15, attached to and forming part of Australian Privacy Foundation, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.

[153] News Corp Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 17 February 2014, 7.

72. In addition, the Institute notes that some laws have not kept up with technological advancements. Laws dealing with surveillance devices are an example highlighted by both the ALRC in its 2014 report and by respondents to the Institute's Issues Paper. In South Australia, this is particularly the case, where the surveillance law does not offer relevant protection in relation to visual, data or tracking devices.

The impact on free speech and the publication of information in the public interest

Submissions

73. Respondents from the media expressed concern that a statutory cause of action would threaten free speech and the publication of information in the public interest. It was pointed out that there was no relevant right to free speech or communication at the Commonwealth or State and Territory levels. It was further argued that, in the absence of such rights, free speech and reporting in the public interest would become secondary considerations. Two respondents contrasted the situation in Australia with that in the United States and the United Kingdom, where the United States Constitution, the *Human Rights Act 1998* (UK) and the Convention for the Protection of Human Rights and Fundamental Freedoms[154] protect these values.

74. Two respondents in favour of statutory cause of action also noted that protection of privacy must be balanced against the interests in freedom of expression and the legitimate role of the media.

Institute's Views

75. The Institute is of the view that, like any right, a right to privacy cannot be absolute. It is to be weighed against other rights such as freedom of individual, press and artistic expression. Any reform must not unduly impact on free speech and other public interests which compete with the public interest in privacy, particularly as freedom of expression also finds no relevant and direct protection in Australia. The Institute agrees that privacy protections must not, for example, obstruct the legitimate role of the media in holding to account Governments, corporations and individuals in positions of power. The Institute considers that reform should (and importantly, *can*) properly balance those competing interests. In the Institute's view, this can be achieved by careful drafting in relation to:

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154 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

- the requirement that a plaintiff have a reasonable expectation of privacy in the circumstances (refer to recommendation 4);
- the required seriousness of the conduct (refer to recommendation 9);
- ensuring that consideration of the 'public interest' is properly incorporated into the cause of action (refer to recommendation 10);
- the defences and exemptions which apply (refer to recommendations 17-22); and
- the requirement that courts consider all relevant competing public interests (including freedom of expression) prior to granting an injunction as a remedy for an invasion or threatened invasion of privacy (refer to recommendation 25).

76. With these balances in place, the Institute believes that there will be no undue impact on competing public interests, including freedom of expression. The Institute does not accept that such a cause of action would have a detrimental effect on the capacity of the media and others to act reasonably and in the public interest, and specifically would not have a dampening effect on freedom of expression.

The potential for judicial development of a cause of action

Submissions

77. Some respondents considered that development of a cause of action at common law is unlikely given that a common law cause of action has failed to develop despite 40 years of judicial discussion. One respondent submitted that the High Court's objection to law-making by intermediate appellate courts meant that an action could only be established through endorsement by the High Court, which in turn would require a plaintiff with sufficient resources to bring such an action. It was submitted by a different respondent that, as courts are limited to deciding matters on a case-by-case basis, development at common law would likely emerge in a 'piecemeal and unsatisfactory manner'.[155]

Recent ALRC Recommendations

78. In its 2014 report, the ALRC considered the advantages and disadvantages of either enacting the cause of action through Parliament or leaving it for development by the

[155] Australian Privacy Foundation, Submission to Department of Prime Minister and Cabinet, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, 4 November 2011, 7, attached to and forming part of Australian Privacy Foundation, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.

courts under the common law.[156] It acknowledged that the common law was bound to develop to provide legal redress to people whose privacy had been seriously breached, especially as other countries are ahead in offering such redress.[157] It took the view, however, that the direction of the development of the common law is difficult to predict.[158] It also considered that any significant development in the common law can be slow, requiring litigants with resources to initiate and follow proceedings through the appeal process[159] and with the determination to risk arguing uncertain or novel points of law.[160]

Institute's Views

79. The Institute considers that if the current trend continues, development at common law in Australia of a privacy action will be piecemeal, slow and uncertain. In any event, there are inherent limitations on judicial law making,[161] including that courts, unlike Parliaments, may not access wider research or consult and can use only existing common law and equitable remedies; and that superior, authoritative courts can consider the laws on protection of personal privacy only when a person with the resources to do so has brought the matter before them. There is also the very real prospect that the High Court will avoid such development and declare such a complex issue is better left to law reform agencies and Parliament.

80. Given the multifaceted nature of the concept of privacy and the many ways in which privacy can be invaded, piecemeal judicial development is undesirable. The Institute is of the view that Parliament is best placed to build an effective cause of action which takes into account and balances the relevant competing interests in this space.

The intrinsic value of privacy

81. Two respondents in favour of a new cause of action stated that privacy was a fundamental value that should be sufficiently protected. It was pointed out by the Law Society of South Australia that it is recognised as a fundamental human right under article 17 of the

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156 See ALRC 2014 Report, 23-24 [1.34] – [1.40].
157 Ibid 23 [1.33], 55 [3.58]
158 Ibid 23 [1.32], 55 [3.58].
159 Ibid 24 [1.35], 55 [3.56].
160 Ibid 55 [3.57].
161 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617, 633; see further Sir Anthony Mason, 'Law Reform and the Courts' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) ch 22, 314, 319.

International Covenant on Civil and Political Rights[162] and that the enactment of a statutory cause of action would provide additional protection.[163]

82. The fundamental value of privacy was recognised as a guiding principle by the ALRC in its latest report.[164] The Institute agrees that the fundamental value of privacy should guide consideration of statutory reform. It is also important to remember in any discourse about the public interest in this space, that as well as an acute public interest in freedom of expression, there is also a public interest in a right to be free from unjustified invasions of personal privacy.

The possibility of unintended negative consequences

Submissions

83. A number of respondents who opposed the cause of action suggested that a new statutory cause of action could have unintended negative consequences. The most common concern was that a new cause of action would overlap with other laws and would create uncertainty and complexity. It was suggested that overlapping laws would allow plaintiffs to selectively choose causes of action based on obtaining the best remedy and that this would lead to an increase in litigation and allow individuals to use the law for purposes other than the legitimate protection of privacy. It was suggested by News Corp Australia and the Newspaper Works that a negative development in the United Kingdom has been that actions to protect privacy have been used by celebrities and public figures to restrain individuals from going to the media with stories.[165] As to economic impacts, three submissions made the point that there would be added regulatory burdens and compliance costs for media organisations. One suggested there would be disincentives for organisations to fully utilise new communications and for social media sites to innovate.

Institute's Views

84. The Institute considers that a clearly constructed cause of action which requires the plaintiff to have a reasonable expectation of privacy, provides guidance about what will amount to an invasion, provides a sufficiently high threshold for seriousness and properly

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

[163] Law Society of South Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 13 March 2014, 9.

[164] ALRC 2014 Report, 30-32 [2.6]-[2.15].

[165] News Corp Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 17 February 2014, 7; The Newspaper Works, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014, 3.

balances other public interests, will largely avoid the consequences raised by these respondents, particularly as there are established principles of law to deal with the conduct of litigation and courts are well equipped to deal with vexatious litigation. The Institute does not consider that a statutory cause of action would generate unnecessary regulatory costs. This is mainly because organisations which are in compliance with the *Privacy Act 1988* (Cth) and applicable codes of conduct are unlikely to be in breach of the statutory cause of action proposed in this Report. In any event, regulatory and compliance burdens are frequently a justified by-product of laws which are aimed at protecting important interests.

The need to avoid inconsistency and fragmentation of privacy regulation

Submissions

85. Four submissions expressed a concern that a new cause of action would further complicate already complex protections for privacy. It was highlighted that, at present, organisations are regulated by privacy laws at the Commonwealth, State and Territory levels. Further, organisations that operate across more than one jurisdiction face complications in complying with differing State and Territory laws. It was suggested that legislative reform in South Australia would lead to greater inconsistency is these regards.

86. One respondent argued that it was difficult to identify the need for additional State protections when potential Commonwealth reforms had not yet been made. Another respondent argued that if South Australia were to enact reforms prior to any Commonwealth response there was the risk of unnecessary duplication or regulation.

87. By contrast, respondents in favour of a new cause of action thought that statutory reform, even if only at the State level, offered the chance to remedy some of the existing inconsistencies in the way the law deals with privacy breaches.

Recent Agencies' Recommendations

88. The ALRC has recognised the inconsistency and fragmentation that has characterised the regulation of information privacy across Australia.[166] For this reason, in its 2008 report, the ALRC concluded that although the precise method of regulation is a matter for Government, it is important that there is a consistent regime across Australia. To ensure uniformity, the ALRC recommended that a statutory cause of action for invasion of privacy should be in Commonwealth legislation (separate from the *Privacy Act 1988* (Cth))

[166] See, for example, ALRC 2008 Report, 2580-2582 [74.182]-[74.191].

and should cover Commonwealth agencies, organisations and individuals as well as State and Territory public sector agencies, subject to some constitutional limitations.[167]

89. The NSWLRC agreed with the ALRC's view that consistency should be a goal of privacy regulation. The NSWLRC also recognised that the province of private law is foremost a matter of State law, and for that reason recommended that the preferred model for achieving uniformity was for State and Territory legislatures to enact the draft Bill the NSWLRC proposed and annexed to its report.[168]

90. The VLRC noted that the Commonwealth may not implement the ALRC's recommendation for a Commonwealth statutory cause of action for serious invasions of privacy or may take some time to do so.[169] Against this background, the VLRC considered that there was scope for Victoria to be a leader in the area.

91. In its 2014 report, the ALRC again recommended that a statutory cause of action for serious invasion of privacy should be enacted in legislation by the Commonwealth rather than by the States and Territories; and that it preferably be located in a stand-alone Act, rather than the *Privacy Act 1988* (Cth).[170]

92. The ALRC concluded that locating the new action in a Commonwealth Act would ensure the consistent operation and availability of the cause of action throughout Australia.[171] It reasoned that achieving consistency across State and Territory legislation has proven slow and difficult[172] and that inconsistent legal regimes result in unnecessary costs to business,[173] jurisdictional challenges and a risk of forum shopping.[174]

93. The ALRC recommended a stand-alone Act for the new cause of action, for various reasons, one of them being that the *Privacy Act 1988* (Cth) contains a number of exemptions and limitations which should not apply to the new cause of action.[175] Further, a stand-alone Act would avoid confusion because the essential purposes and scope of the *Privacy Act 1988* (Cth) are different to the new cause of action. The former is concerned with the protection of personal data or information whilst the latter would also relate to

167 Ibid 2582 [74.189]-[74.191].
168 NSWLRC Final Report, 60 [11.1], 61 [11.3].
169 VLRC Final Report, 128 [7.2].
170 ALRC 2014 Report, 59-60 [4.1]-[4.5].
171 Ibid 59 [4.2], 60 [4.6].
172 Ibid 60 [4.7].
173 Ibid 59 [4.2].
174 Ibid 60 [4.7].
175 Ibid 59-60 [4.8]-[4.11].

other types of privacy such as territorial, communications and bodily privacy.[176] In addition, the *Privacy Act 1988* (Cth) creates a regulatory regime while the new action would offer civil remedies for the direct benefit of a plaintiff.[177]

94. The ALRC expressed the view that the Commonwealth had power under the Australian Constitution to legislate for the new tort, primarily on the basis of the external affairs power.[178] It took the view that the proposed legislation would not infringe the implied freedom of political communication, nor would it curtail the States' capacity to function as Governments.[179]

Institute's Views

95. As mentioned above,[180] the continuing work on a national statutory cause of action for invasion of personal privacy in Australia should encourage, rather than deter, an investigation into whether South Australia should unilaterally establish such a cause of action. The release of the ALRC's report in 2014 and previous work by Australian law reform bodies in the past decade demonstrate a growing interest in remedying privacy concerns prompted by advances in technology. Individual States and Territories may wish to offer remedies to their citizens now rather than wait for action at a national level.

96. In these circumstances, a local statute is likely to be of benefit and have some valuable work to do. Despite potential jurisdictional limitations, a South Australian statutory cause of action would still provide significant protection in this State against unacceptable invasions of personal privacy, and in enacting this legislation South Australia could provide leadership to other States and Territories.

97. The Institute acknowledges the advantages in a consistent national privacy regime, particularly given the nature of the subject matter. However, it would appear that it is unlikely (at least in the near future) that the Commonwealth will be legislating to establish a national regime. In those circumstances, the Institute is of the view that there is merit in enacting a South Australian statutory cause of action.

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176 Ibid 59-60 [4.8]- [4.9].

177 Ibid 50-60 [4.8]-[4.10].

178 Ibid 62-63 [4.16]-[4.19] citing *Australian Constitution* s 51(xxix) and *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS, art 17 (entered into force 23 March 1976); and see also [4.28]-[4.30] for other suggested constitutional powers.

179 ALRC 2014 Report 67 [4.36] and 67 [4.40] respectively.

180 See page 13.

The potential to update existing laws or industry codes

Submissions

98. Two respondents submitted that it would be better to address specific shortcomings by amending existing statutory regimes, in preference to introducing an umbrella cause of action. One submission also made the point that relevant industry codes of practice could be amended to address identified gaps. There was no further assistance provided in these submissions as to what sort of alternative reform should be considered.

Institute's View

99. The above submissions were made in response to a question in the Issues Paper which asked: 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?[181]

100. The Institute considers that, in light of its recommendation that Parliament should enact a limited cause of action for serious invasions of personal privacy, it is not necessary to address alternatives to this reform. In any event, the Institute is of the view that the type of reform raised by the two respondents risks leading to even more fragmentation of the law. The Institute is of the view that reform in the nature of a statutory cause of action is justified and will go a long way to rectifying the deficiencies identified in this Report. It is open to the South Australian Government, and ultimately the Parliament, to address personal privacy in other areas of the law in South Australia, as it sees fit.

Potential Reform - Surveillance Devices Bill 2015

101. The Institute considers that if the Surveillance Devices Bill 2015 (SA) becomes law, it would only partly address the deficiencies in the law that currently exist. This view was also expressed in the recent contributions to the debate on the Surveillance Devices Bill 2015 (SA) in the House of Assembly. The Deputy Leader of the Opposition raised the wider issue of privacy laws and commented it 'is not an easy area to deal with but it is one which does need to be addressed.'[182] The Member for Heysen noted that the Bill was not a

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[181] This appeared as question 25 in the Issues Paper. It also contained the following examples:
   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?

[182] South Australia, *Parliamentary Debates*, House of Assembly, 15 October 2015, 3060 (Hon Vickie Chapman).

substitute for privacy legislation in South Australia.[183] The Attorney-General observed 'that sooner or later we will have to tackle this issue because of the intrusion into the privacy of citizens by all forms of technology'.[184] The Institute is of the view that the privacy protections available to South Australian citizens would remain inadequate, even with the passage of the Surveillance Devices Bill 2105 (SA), and the reforms recommended in this Report would therefore remain justified. This is for a number of reasons including that, if enacted, the Act would deal only with criminal sanctions (which are not a substitution for a civil remedy) and the Act would provide broad exemptions, in particular to the media.

Should this be called a 'tort'

102. There is an issue about whether the statutory cause of action should be expressed to be a 'tort'. In the Issue's Paper, the Institute indicated that, at that stage, it was minded not to refer to the action as an action in tort.

Recent Agencies' Recommendations

103. The ALRC's 2014 Report recommended that the cause of action should be described as an action in tort. The ALRC reasoned that such approach would provide certainty as it would prevent disputes arising about ancillary issues, such as vicarious liability. The ALRC preferred reliance upon existing tort law over the establishment of an entirely separate legislative framework. The ALRC further reasoned that this approach would allow courts to draw on jurisprudence from other jurisdictions, that it would clearly differentiate the cause of action from actions in breach of confidence and that it would highlight the distinctions between the cause of action and other regulatory regimes, such as the *Privacy Act 1988* (Cth) and the *Broadcasting Services Act 1992* (Cth).[185]

104. However, because a tort involves limitations and complexities relating to remedies, the state of mind of the wrongdoer and the extent to which actual damage is required, both the NSWLRC and the VLRC concluded that any statutory cause of action for invasion of privacy should not be characterised as a tort.[186] The VLRC also supported this recommendation by making reference to a remark by Spigelman CJ in *Commissioner of Police v Estate of Russell*[187] in which the VLRC understood his Honour to be suggesting that

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183 Ibid 3067-3068 (Ms Redmond).
184 Ibid 3074 (Hon John Rau).
185 ALRC 2014 Report, Recommendation 4-2, 68-72 [4.41]-[4.54].
186 New South Wales Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009), 50-51 [5.55]-[5.57]; Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report No 18 (2010) 144 [7.97], [7.134].
187 *Commissioner of Police v Estate of Russell* (2002) 55 NSWLR 232.

"'torts" refer to rights or causes of action generally enforceable in courts'. As the VLRC had recommended that a tribunal (rather than a court) should have the jurisdiction to hear disputes about the new cause of action, the VLRC considered Spigelman CJ's remarks to support its recommendation that the cause of action should not be characterised as a tort.

Institute's Views

105. The Institute sees a significant benefit in drawing on established tort law jurisprudence, rather than establishing a completely new legislative framework. There will be, as the ALRC found, increased certainty gained from expressly naming the statutory cause of action a tort.

106. This conclusion is consistent with the approach taken in the 1974 and 1991 South Australian Privacy Bills, both Bills expressly naming the cause of action a tort.[188] It is also consistent with the recommendation of the SALRC in its 1973 report.[189]

107. The Institute is not persuaded by the reasoning of the NSWLRC and the VLRC on this issue. This is for two main reasons. First, because later in this Report the Institute expressly acknowledges the benefit of a statutory cause of action that includes tort law principles in relation to the state of mind of the wrongdoer,[190] particular defences[191] and damages.[192] Secondly, insofar as the Institute has arrived at the view that the position under this statute should depart from the position at common law in relation to a tort, it has made such a recommendation. This means that if the Institute's recommendations are adopted, the other two areas which were of concern to the NSWLRC and the VLRC − other remedies and the extent to which actual damage is required − would be specifically addressed in the proposed statute and would therefore not be constrained by tort law.[193]

108. The additional point made by the VLRC regarding the conferral of jurisdiction on a tribunal is not applicable to the model recommended in this Report. This is because the Institute recommends that a plaintiff should be able to bring an action for invasion of privacy in the Supreme Court, the District Court or the Magistrates Court, rather than in the SACAT or any other South Australian Tribunal.

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188 Privacy Bill 1974 (SA), cl 16(2) and Privacy Bill 1991 (SA), cl 4(1).
189 Law Reform Committee of South Australia, *Regarding the Law of Privacy,* Interim Report (1973).
190 See paragraph 227 of this Report.
191 See paragraphs 275 and 277 of this Report.
192 See recommendation 26 and paragraph 353 of this Report.
193 See recommendations 11, 23 to 25 of this Report.

109. For these reasons, as well as for those expressed by the ALRC, the Institute considers that the statute should refer to the cause of action recommended in this Report as a 'tort'.

Recommendation 1:

The South Australian Parliament should enact a limited cause of action for serious invasions of personal privacy.

Recommendation 2:

The statute should refer to the cause of action as a 'tort'.

PART 3

Personal Privacy

The Issue

110. Personal privacy is a concept that has proved difficult to define. A right to privacy has been termed 'the right to be let alone.'[194] Some say that it embraces a 'sphere of inviolability'.[195] A claim to privacy has been called a claim to 'individual personality'[196] or personal autonomy.[197] Privacy could also be seen as the ability to control the disclosure and communication of non-public aspects of one's personhood or personal autonomy, whether they be thoughts, behaviour, images or space.

111. The complex and elusive nature of privacy has obscured attempts in Australia to identify a right to privacy, whether at common law or by statute. Specifically in South Australia, previous attempts in 1974 and 1991 to introduce a statutory cause of action stalled not only on how privacy should be defined but also on whether the legislation should include a definition of privacy and/or be prescriptive about what will constitute an invasion of privacy.[198]

112. The four main aspects of personal privacy that are widely accepted as being capable of protection by law are:

- *bodily privacy*: unauthorised intrusions into a person's body, for example through DNA testing;
- *territorial privacy*: unauthorised intrusions into a person's physical space, for example a home premises;
- *information privacy*: unauthorised access to information held by Government or private sector organisations, for example information contained on public registers or private mailing lists;

194 T M Cooley, *Cooley on Torts* (2nd ed, 1888), 29.

195 For a discussion on the conceptual basis of privacy, see David Lindsay, 'An Exploration of the Conceptual Basis of Privacy and the Implications for the Future of Australian Privacy Law' (2005) 29 *Melbourne University Law Review* 131.

196 ALRC, *Unfair Publication: Defamation and Privacy*, Report No. 11 (1979), drawing on TS Eliot, *the Cocktail Party*, Act I, Sc I.

197 ALRC, *Unfair Publication: Defamation and Privacy*, Report No. 11 (1979).

198 Attached as Appendix 1 to this Report is a summary of the history of the two Bills introduced to the South Australian Parliament in 1974 and 1991, the models they proposed and their difficult passage in Parliament.

- *communications privacy*: unauthorised interception (or use) of private communications, for example telephone calls and emails.[199]

113. Surveillance is often specifically identified as a fifth aspect: the unauthorised use of surveillance devices such as video cameras in public and private places.[200]

114. The Issues Paper asked what personal privacy means in this context and whether it should be defined in any new law creating a cause of action to protect it.[201]

Submissions

115. Three respondents addressed the question about the meaning of personal privacy. One referred to privacy as an interest in sustaining a personal space free from interference. In this formulation an 'interest' in privacy was preferred over a 'right' to privacy in order to avoid distractions that result from the use of the term 'right.' This respondent also emphasised that privacy is frequently misused to refer to 'data privacy' alone, whereas in fact it also refers to privacy of the physical person, personal communications, personal data, personal behaviour and personal experience. For the purposes of another respondent, whose activities involve the collection and processing of personal information, privacy referred to 'information privacy'. However, this respondent acknowledged that the notion of personal privacy is wider than that and referred to the four aspects of privacy considered in the Issues Paper, which are dealt with further below. The third respondent noted that the concept of personal privacy is broad but would at least include an individual's personal and business affairs.

116. Three respondents thought that a definition could assist in defining the scope and application of a cause of action. One of these respondents submitted that any definition should not be inconsistent with article 17 of the *International Covenant on Civil and Political Rights*[202] dealing with the right to privacy. By contrast, one respondent also expressed the view that privacy is of very wide scope, dependent on context and that time spent on definitions would be wasted.

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199 These are the aspects of privacy as identified by the Victorian Law Reform Commission, *Privacy Law: Options for Reform*, Information Paper (2001) 1-2. The same aspects were identified in the ALRC 2008 Report [1.31] citing David Banisar, *Privacy and Human Rights 2000: An International Survey of Privacy Law and Developments Privacy International* <www.privacyinternational.org/survey/phr2000/overview.html> at 5 May 2008.

200 As identified by the Victorian Law Reform Commission, *Privacy Law: Options for Reform*, Information Paper (2001) 2. However, this has also been identified as a part of territorial privacy: see ALRC 2008 Report [1.31] citing David Banisar, *Privacy and Human Rights 2000: An International Survey of Privacy Law and Developments Privacy International* <www.privacyinternational.org/survey/phr2000/overview.html> at 5 May 2008.

201 These appeared as questions 2 and 7 in the Issues Paper.

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

Previously Recommended Approaches

117. An example of a statutory formulation which sought to address the multiple aspects of privacy is the model proposed in the Privacy Bill 1974 (SA), introduced in response to the SALRC's 1973 recommendation that a general right to personal privacy be protected in South Australia by a statutory cause of action.[203]

118. The Bill, which was unsuccessful, sought to protect the right to privacy as follows:

> 'Right of privacy' means the right of any person to be protected from intrusion upon himself, his home, his family, his relationships and communications with others, his property and his business affairs, including, without limiting the generality of the foregoing, such as an intrusion by
>
> (a) spying, prying, watching or besetting;
>
> (b) the unauthorized overhearing or recording of spoken words;
>
> (c) the unauthorized making of visual images;
>
> (d) the unauthorized reading or copying of documents;
>
> (e) the unauthorized use or disclosure of confidential information, or of facts (including his name, identity or likeness) calculated to cause him distress, annoyance or embarrassment, or to place him in a false light;
>
> (f) the unauthorized appropriation of his name, identity or likeness for another's gain.[204]

119. Other recommended statutory formulations have taken different approaches to all or some of the aspects of privacy which is discussed further in Part 4.[205]

120. In its 2014 report, the ALRC stated that the 'statutory cause of action would relate not only to the privacy of information but also to other types of privacy, such as territorial, communications and bodily privacy.'[206] The ALRC took the view that the Act should not attempt to define 'privacy,' reasoning that 'it is notoriously difficult to define' and citing the comments in this context of Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats*.[207] It recommended that, instead, the Act should adopt a test to determine whether there exists a reasonable expectation of privacy. It is worthwhile setting out in more detail the ALRC's consideration and recommendations on this issue.

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203 Law Reform Committee of South Australia, *Regarding the Law of Privacy*, Interim Report (1973) 3.
204 Privacy Bill 1974 (SA) (No 150).
205 Annexure 2 contains a table summarising statutory models previously proposed in Australia (excluding the model proposed by the ALRC in 2014 which is dealt with in the body of this Report).
206 ALRC 2014 Report, 61 [4.9].
207 Ibid 92 [6.6].

121. Specifically, the ALRC recommended that the new tort should be actionable only where a person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances.[208] This is an objective test, to be determined by considering the circumstances of the particular case. The subjective expectation of the plaintiff may be a relevant consideration, but it is not an essential element of the inquiry.[209] The ALRC also acknowledged that there will be overlap between on the one hand, the aspects of the case relevant in applying this test, and on the other hand, those relevant to the other elements and defences of the cause of action.[210]

122. The ALRC further recommended that the *plaintiff* be required to prove that they had a reasonable expectation of privacy in the circumstances, recommending that the Act include a non-exhaustive list of factors that a court may consider when making this determination.[211] It took the view that this should guide and assist the parties and the court, without limiting the matters a court might consider in a particular case.[212] The ALRC acknowledged that not all matters can be listed, but set out 'some of the more common or important matters'[213] that a court may consider.

The Institute's Views

123. Privacy is a fundamental right which the Institute believes should receive further protection of the law. One of the main drivers for reform is that although in a piecemeal way information or data privacy is protected in Australia, there is little direct protection for the many aspects of a personal, private space. For this reason, for any reform to be effective it must address the aspects of privacy beyond information or data privacy. The Institute therefore considers that the cause of action should extend to the protection of bodily privacy, territorial privacy, information privacy and communications privacy.

124. The Institute believes that this protection can be achieved without expressly defining privacy as a concept, but rather by:

    1. providing parameters around what will amount to an invasion of privacy, to make it a limited cause of action;

    2. setting a threshold of seriousness; and

208 Ibid Recommendation 6–1.
209 Ibid 91 [6.2], 92 [6.7]-[6.8].
210 Ibid 95-96 [6.23]-[6.25].
211 Ibid Recommendation 6–2.
212 Ibid 96 [6.26].
213 Ibid.

3. requiring that a plaintiff have a reasonable expectation of privacy in the circumstances.

125. The first two factors are addressed in Parts 4 and 5 of this Report. In short, the Institute considers that the action should specifically cover intrusions upon a person's seclusion (to deal with bodily, territorial and communications privacy) and misuse of private information (to deal with information (or data) and communications privacy). This is dealt with in Part 4. Further, the action should only be available where the invasion (i.e. the intrusion upon seclusion or misuse of information) meets the seriousness threshold described in Part 5.

126. The third factor listed above is also important. The Institute agrees with the ALRC, the NSWLRC and the VLRC that to succeed in an action for an invasion of privacy, the plaintiff must have a reasonable expectation of privacy in the circumstances.

127. The Institute takes the view that clarity and some certainty is vital in developing a cause of action designed to protect an interest which can often stand in competition with an interest in freedom of expression – an interest which itself has little direct legal protection in Australia. And while there may be no express definition of privacy recommended in this Report, that a plaintiff must prove they had a reasonable expectation of privacy in the circumstances, will (combined with the other recommended elements of the action) give sufficient guidance and certainty, while also allowing for changes in technology and in societal understanding and expectations about what is public and what is private.

128. This is consistent with the ALRC's recent recommendations on this issue. The ALRC's preference for this 'reasonable expectation' test, as opposed to a strict definition of privacy, was on the basis that this test was flexible and could adapt to changing community expectations over time and between cultures.[214] It said that the test must be flexible, but not uncertain, going on to note that courts are used to determining issues of reasonableness or even reasonable expectation in other contexts.[215] The ALRC also considered the benefits of using a test that has been used for some time in other jurisdictions, allowing Australian courts to draw on international jurisprudence.[216]

129. Further and importantly, the ALRC stated that '[a]lthough there is a separate element of the tort that explicitly confines the tort to "serious" invasions of privacy, the "reasonable

214 Ibid 93 [6.9].
215 Ibid 93 [6.12].
216 Ibid 94 [6.14].

expectation of privacy" test should also help ensure that non-serious privacy interests are not actionable under the tort.'[217]

130. The next question for the Institute, therefore, is whether the Act should provide guidance about what will amount to a reasonable expectation of privacy. The Issues Paper did not seek submissions specifically on this question. The Institute has nevertheless formed the view that there should be a non-exhaustive list of factors that a court may take into account in assessing whether or not a plaintiff has a reasonable expectation of privacy in the circumstances of the particular case. Guidance could be drawn from the list recently recommended by the ALRC after having undertaken significant community consultation on this and other issues:

- the nature of the private information, including whether it relates to intimate or family matters, health or medical matters, or financial matters;
- the means used to obtain the private information or to intrude upon seclusion, including the use of any device or technology;
- the place where the intrusion occurred, such as in the plaintiff's home;
- the purpose of the misuse, disclosure or intrusion;
- how the private information was held or communicated, such as in private correspondence or a personal diary;
- whether and to what extent the private information was already in the public domain;
- the relevant attributes of the plaintiff, including the plaintiff's age, occupation and cultural background; and
- the conduct of the plaintiff, including whether the plaintiff invited publicity or manifested a desire for privacy.[218]

131. The Institute considers that such a list would perform an important function in achieving the balance between certainty and flexibility referred to in the responses to the Issues Paper. Further, this list recognises that expectations of privacy may differ from one cultural or ethnic group to another. For example, it allows the particular cultural

[217] Ibid 94 [6.18].

[218] Ibid Recommendation 6–2. A detailed discussion of each consideration can be found at 97-107, [6.31]-[6.83] of the ALRC 2014 Report.

sensitivities associated with the knowledge, stories and images of Indigenous Australians to be considered in determining whether the plaintiff had a reasonable expectation of privacy.[219]

Recommendation 3: The cause of action should extend to the protection of bodily privacy, territorial privacy, information privacy and communications privacy.

Recommendation 4: The cause of action should require that a plaintiff have a reasonable expectation of privacy in the circumstances. The statute should provide a non-exhaustive list of factors that a court may take into account in making that assessment. In developing this list, guidance should be taken from the list of factors recommended in the ALRC 2014 Report.

[219] See, for example, ALRC 2008 Report, 343-351[7.22]-[7.50]; ALRC 2014 Report, 32 [2.14].

PART 4

The Invasion

The Issue

132. This Part discusses the concept of 'invasion' of privacy. It considers what should constitute, and the extent to which the cause of action should prescribe what will amount to, an invasion of privacy. On this topic, the Issues Paper sought responses to the following questions:

- 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?[220]
- Should there be a list in the Act of what amounts to an invasion of personal privacy?[221]
- If so, should it be a complete list or simply give examples?[222]
- If there is a list, should it at least include:
  - interference with personal home or family affairs?
  - unauthorised surveillance?
  - interference with, misuse or disclosure of correspondence or private communications?
  - disclosure of sensitive private facts?[223]

Submissions

133. A number of respondents addressed the conduct that should fall within a cause of action, identifying the following:

- leaks of personal data;
- invasive information collection by media organisations;
- unreasonable publicity given to another person's private life;
- surveillance of an individual's actions;

[220] This was question 4 in the Issues Paper.
[221] This was question 8 in the Issues Paper.
[222] This was question 9 in the Issues Paper.
[223] This was question 10 in the Issues Paper.

- intrusion upon the seclusion of another;
- interference with a person's body;
- abuse of powers by law enforcement and national security agencies, including unjustified arrest, unjustified humiliation, unjustified search and identification procedures and unjustified deprivation of liberty;
- unauthorised access of a person's computer and subsequent disclosure of any information obtained;
- a Government agency failing to comply with the SA IPPs;
- unauthorised disclosure of personal information;
- the attempted identification of de-identified personal data;
- the unauthorised access of personal information;
- the inadvertent disclosure of personal data to an unauthorised person.

134. In the submissions of four respondents, it was considered that a list of what amounts to an invasion of personal privacy could help to illustrate the scope of the action and give guidance to courts, especially in the Act's initial operation. It was noted that such an approach has proven successful in various contexts in Australia and overseas. However, it was stressed by the respondents that any list should be indicative rather than exhaustive; otherwise there would be the risk of excluding deserving claims and the cause of action becoming outdated.

135. Three respondents argued that the list should include interference with personal, home or family affairs; unauthorised surveillance; interference with, misuse or disclosure of correspondence or private communications; and, disclosure of sensitive private facts. One of those respondents submitted that these four items related to a person's private life and that this should be the focus of any action. A second respondent stated that these four items are sufficiently broad to capture the main instances of breach of privacy, but added that the publication of false information about a person's life was a possible further example that could be included. The third respondent emphasised with respect to unauthorised surveillance that such surveillance may be acceptable where there is a lawful justification.

136. One respondent was opposed to including a list, whether exhaustive or indicative. It was submitted that a list would have little regard to the balance to be struck based on both the particular circumstances of the case and the community standards at the relevant time. It was further submitted that even an indicative list could lead parties to focus on the list rather than the test for breach, possibly resulting in non-exhaustive examples becoming part of the cause of action.

The 1974 and 1991 South Australian Bills

137. It is worthwhile specifically noting the approach to this issue taken in the Privacy Bills introduced to the South Australian Parliament in 1974 and 1991.

138. Reflecting the earlier recommendations of the South Australian Legislative Review Committee,[224] the Privacy Bill 1974 (SA) set out the following 'intrusions':

> (a) spying, prying, watching or besetting;
>
> (b) the unauthorised overhearing or recording of spoken words;
>
> (c) the unauthorised making of visual images;
>
> (d) the unauthorised reading or copying of documents;
>
> (e) the unauthorised use or disclosure of confidential information, or facts (including his name, identity or likeness) calculated to cause him distress, annoyance or embarrassment, or to place him in false light;
>
> (f) the unauthorised appropriation of his name, identity or likeness for another's gain.[225]

139. The Privacy Bill 1991 (SA) provided an exhaustive list of 'infringements' of the proposed statutory right to privacy, which in summary were:[226]

- keeping another under observation;
- listening to conversations;
- intercepting communications;
- recording acts, images or words;
- interference with private correspondence or records or confidential business correspondence or records;
- keeping records of another's personal or business affairs;

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224 Law Reform Committee of South Australia, *Regarding the Law of Privacy*, Interim Report (1973), p 4-5.
225 Privacy Bill 1974 (SA) (No 150).
226 See, Privacy Bill 1991 (SA) cl 3(2).

- obtaining confidential personal or business information;
- publishing personal or business information, visual images of or words spoken or sounds produced by or private correspondence of another; and
- harassing another or interfering to a substantial and unreasonable extent in the personal or business affairs or with the property of another person so as to cause distress, annoyance or embarrassment and the harassment is not justified in the public interest.

Law Reform Agencies' Recommendations

140. In its 2008 review, rather than defining 'serious invasion of privacy', the ALRC thought it would be of more use to the courts for the legislation to set out a non-exhaustive list of the types of acts or conduct that might constitute an invasion of privacy. The following examples were suggested:

    1. there has been a serious interference with an individual's home or family life;
    2. an individual has been subjected to unauthorised surveillance;
    3. an individual's correspondence or private written, oral or electronic communication has been interfered with, misused or disclosed; and
    4. sensitive facts relating to an individual's private life have been disclosed.[227]

141. In its 2014 review, the ALRC took a different approach. It recommended that the Act should require the plaintiff to prove that his or her privacy was invaded in one of the following two ways:

    - by intrusion upon seclusion; or
    - by misuse of private information.[228]

142. The ALRC recommended that brief and general non-exhaustive examples of invasions falling within these two categories be included in the Act to provide additional guidance and certainty. [229] In respect of intrusion upon seclusion, it recommended:

> 'such as by physically intruding into the plaintiff's private space or by watching, listening to or recording the plaintiff's private activities or private affairs.'[230]

143. And in respect of misuse of private information it recommended:

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[227] ALRC 2008 Report, 2565 [74.119]
[228] ALRC 2014 Report, 73 [5.1].
[229] Ibid 85 [5.56].
[230] Ibid 85 [5.57].

'such as by collecting or disclosing private information about the plaintiff.'[231]

144. The ALRC reasoned that limiting the cause of action in this way would address most of the examples of invasion provided to it during its review and most of the invasion of privacy cases outside of Australia.[232] It further reasoned that these types of invasion are commonly reflected in formulations by commentators,[233] and that explicitly confining the tort to these would provide 'clarity, certainty and guidance'.[234] The ALRC took the view that more specific and descriptive examples should be avoided as they 'may risk distracting the court from the consideration of the distinct facts and circumstances of a particular case.'[235] The application of the tort to particular circumstances was said to be best left to the courts to consider on a case by case basis.[236]

145. The ALRC considered that, in regards to 'intrusion upon seclusion' there still remain gaps in Australia left by torts and other causes of action in terms of remedy for interferences with spatial or physical privacy, which could be filled by creating a statutory tort directed as intrusions upon seclusion.[237] The ALRC took the view that 'misuse of private information' was an obvious inclusion in the tort, being a widely recognised and already actionable type of invasion of privacy in international jurisdictions.[238]

146. The NSWLRC took a different approach in its review and did not propose a specific list of what would constitute an invasion of privacy. Instead, the NSWLRC model proposed a broad cause of action and provided the following non-exhaustive list of matters that the court should take into account when assessing whether or not there has been an invasion of privacy:

    1. the nature of the subject matter that it is alleged should be private;
    2. the nature of the conduct concerned (including the extent to which a reasonable person of ordinary sensibilities would consider the conduct to be offensive);
    3. the relationship between the individual and the alleged wrongdoer;
    4. the extent to which the individual has a public profile;

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231 Ibid 85 [5.58].
232 Ibid 74 [5.9].
233 Ibid 75 [5.11]-[5.12], 76 [5.14]-[5.15].
234 Ibid 74 [5.6], 74-75 [5.10], 75-76 [5.13] citing *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [41].
235 Ibid 87 [5.66].
236 Ibid 87 [5.66].
237 Ibid 76-77 [5.17]-[5.22].
238 Ibid 81 [5.36].

5. the extent to which the individual is or was in a position of vulnerability;

6. the conduct of the individual and of the alleged wrongdoer both before and after the conduct concerned (including any apology or offer to make amends made by the alleged wrongdoer);

7. the effect of the conduct concerned on the health, welfare and emotional well-being of the individual;

8. whether the conduct concerned contravened a provision of a statute of an Australian jurisdiction; and

9. any other matter that the court considers relevant in the circumstances.[239]

147. The VLRC recommended two causes of action: one dealing with 'misuse of private information' and the other 'intrusion upon seclusion', but made no recommendation in relation to specific examples of invading conduct.

Institute's Views

148. A useful American description of the kinds of conduct that could (at least notionally) make a person liable to another for breaching their privacy, and which has informed the recent debate in Australia (including the recommendations by Australian law reform bodies) is this:

> (a) …intentionally intrud[ing], physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns … if the intrusion would be highly offensive to a reasonable person;
>
> (b) …appropriat[ing] to [one's] own use or benefit the name or likeness of another …;
>
> (c) …giv[ing] publicity to a matter concerning the private life of another … if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public;
>
> (d) …giv[ing] publicity to a matter concerning another that places the other before the public in a false light …, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicised matter and the false light in which the other would be placed.[240]

149. These four matters have been described as the 'four Prosser limbs', Professor William Prosser being instrumental in the development and articulation of a right to privacy in the

[239] NSWLRC Final Report, 29-30 [5.21] and clause 74(3) of the Bill it proposed.
[240] *Restatement of the Law, 2nd, Torts* 1977 (US) ss 652B, 652C, 652D, 652E.

United States.[241] The *Second Restatement of the Law, Torts*, (set out above) is based on his taxonomy of privacy, which divides invasions into these four parts, often shortened to intrusion, disclosure, false light and appropriation.[242]

150. The Institute considers that two of the Prosser limbs - false light and appropriation - should not be the focus of the cause of action recommended in this Report. This means that the cause of action would not expressly provide remedies for an unauthorised use of a person's identity or likeness, or for placing a person in false light.[243] Instead, the cause of action recommended by the Institute would principally cover intrusions upon seclusion and misuse of private information – the focus of the other two Prosser limbs. The Institute considers that this protection will cover the invasions which caused the most concern to respondents in this review and, importantly, will cover the most serious of invasions for which the main gaps in remedies currently exist in the law applicable in South Australia. Other laws – principally the laws of defamation and passing off – provide significant protection for the false light and appropriation limbs and are better equipped to deal with those types of invasion.[244]

151. Therefore, the Institute considers that the action should specifically cover intrusions upon a person's seclusion (to deal with bodily, territorial and communications privacy) and misuse of private information (to deal with information (or data) and communications privacy). Limiting the cause of action to these two categories is broadly consistent with the recent reform recommendations of the ALRC, the NSWLRC and the VLRC, as well as with the approach taken internationally.

152. The Institute considers that the statute should include these two broad categories of invasion, rather than including a prescriptive list (either exhaustive or non-exhaustive) of invading conduct. This is for two main reasons. First, given the pace of technological innovation, it is difficult to predict what types of invading conduct may emerge in the future, meaning that a list may limit the lifespan of the cause of action. It could be argued, however, that including a list may provide more certainty and give helpful guidance to the

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241 Particularly famous for his article, William L Prosser, 'Privacy' (1960) 48 *California Law Review* 383. For a detailed analysis of the genesis of the right as articulated by Warren and Brandeis, and as later developed by William Prosser, see Neil M Richards and Daniel J Solove, 'Prosser's Privacy Law: A Mixed Legacy' (2010) 98 *California Law Review* 1887.

242 *Restatement of the Law, 2nd, Torts* 1977 (US) ss 652B, 652C, 652D, 652E.

243 However, such circumstances would be covered by the cause of action recommended in this Report if all of the other elements of the cause of action were met. See also, recommendation 7 in this Report.

244 This is consistent with the conclusions of the ALRC in its 2008 review: for further discussion see ALRC 2008 Report, 2565-2566; see also ALRC 2014 Report, 88 [5.73].

courts, but the Institute considers that the model it proposes in this Report provides that guidance and certainty in other ways. This is the second reason that a prescriptive list of invasive conduct should not be included in the cause of action. That certainty and guidance will in part be achieved by first, including a list of factors for the court to consider when assessing whether or not a plaintiff had a reasonable expectation of privacy in the circumstances (see Part 3) and secondly, by including a list of factors for the court to consider when assessing whether or not the invasion was sufficiently serious (see Part 5).

153. The next question is whether the cause of action should provide specific guidance on what could amount to an intrusion upon a person's seclusion or a misuse of their private information. One possible approach is that of the ALRC set out above, where it was recommended that for intrusion upon seclusion 'physically intruding into the plaintiff's private space or by watching, listening to or recording the plaintiff's private activities or private affairs' be included as a guiding example and for misuse of private information, 'collecting or disclosing private information about the plaintiff' be included.

154. The Institute is persuaded by the approach taken by the ALRC on this issue and its formulation of the guiding examples. The examples recommended by the ALRC provide clarity. Although the Institute supports the inclusion of the ALRC's examples, the Institute considers that the statute must make it clear that the examples are non-exhaustive and are for guidance only.

155. Another issue is whether the cause of action should address private information that is untrue. The ALRC recommended that the Act should provide that 'private information' includes untrue information, but only if the information would be private if it were true, reasoning that a person's privacy can in some cases be invaded by the disclosure of untrue information.[245] It gave the example that 'a court might consider that the fact that a particular person, an ordinary citizen, is suffering from a mental illness is private information which should not be disclosed in the press. If a newspaper disclosed that a particular person had a mental illness, and it turned out that the person did not, then an action for invasion of privacy should not be defeated merely on the basis that the information was incorrect'.[246] It said that this position is consistent with the *Privacy Act 1988* (Cth) and international jurisdictions and is supported by commentary.[247] The ALRC considered that often the disclosure of untrue information does not amount to

245 ALRC 2014 Report, Recommendation 5–2.
246 Ibid 83 [5.49].
247 See ibid 84 [5.51]-[5.54].

defamation, and thus does not provide 'adequate protection to individuals for information that is found to be incorrect.'[248] Therefore, it recommended that the new tort avoid the use of the word 'fact'.[249]

156. This issue was not addressed in the Issues Paper or any submissions the Institute has received. However, the Institute considers the reasoning of the ALRC on this point (and the specific example from the ALRC cited above) is persuasive. The Institute recommends that, although this may rarely arise, the statutory cause of action should nonetheless address private information that is untrue and should provide that 'private information' includes untrue information, but only if the information would be private if it were true.

157. The final issue to be considered in this part of the Report is whether publication or dissemination of material is required in order to give rise to a cause of action.[250] Only two of the respondents explicitly addressed this question. The Law Society of South Australia was of the view that a person should be able to take action irrespective of whether the private information obtained has not been and is not proposed to be disclosed to others.[251] This view was taken on the basis that the person might have already suffered harm via the method through which the information was obtained.[252] Although, it was considered that the fact that disclosure has not occurred would be a relevant consideration in determining an appropriate remedy.[253] Conversely, SA NT DataLink took the view that enabling an action in such circumstances may lead to abuse of the cause of action.[254]

158. The Institute considers that even the most egregious and serious invasions of privacy may involve the obtaining of private information without the further disclose of it to others. For this reason, the Institute is of the view that the cause of action should arise not only in circumstances of disclosure and dissemination of wrongly obtained information, but also where there is only the obtaining or collection of private information without disclosure and dissemination.

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248 Ibid 81 [5.54], reflecting a submission that made this point.

249 Ibid 83 [5.50].

250 Question 14 of the Issues Paper was in the following terms: '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'.

251 Law Society of South Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 13 March 2014, 17.

252 Ibid.

253 Ibid.

254 SA NT DataLink, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014, 13.

Recommendation 5: The statute should provide that the cause of action extend to intrusions upon a person's seclusion and misuse of a person's private information.

Recommendation 6: The statute should include the following non-exhaustive guiding examples:

- For intrusion upon seclusion: by physically intruding into the plaintiff's private space or by watching, listening to or recording the plaintiff's private activities or private affairs.
- For misuse of private information: by collecting or disclosing private information about the plaintiff.

Recommendation 7: The statutory cause of action should provide that 'private information' includes untrue information, but only if the information would be private if it were true.

Recommendation 8: The fact of invasion is sufficient; that is, a plaintiff would have a cause of action if their privacy was invaded, even if the defendant did not further disclose or disseminate information or material obtained in the course of the invading act.

PART 5

Seriousness

The Issue

159. Not all intrusions into a person's private sphere should be actionable under a statutory cause of action for invasion of privacy. For this reason, the formulation of the test for what is an actionable invasion of privacy (dealt with in Parts 3 and 4) is important. For the same reason it is also critical to develop an appropriate threshold beyond which conduct that invades privacy becomes actionable. Arriving at an appropriate test or threshold is a key aspect of formulating a statutory cause of action that properly balances the competing public interests in privacy and other freedoms, such as freedom of expression. This threshold is in part set by the requirement that the plaintiff demonstrate that he or she had a reasonable expectation of privacy in the circumstances, as recommended in Part 3 above. The Institute has also recommended that the cause of action provide guidance about that reasonable expectation by setting out a list of factors for the court to consider when assessing that element of the cause of action. The question remains, however, whether and to what extent the cause of action should deal with the question of seriousness, in addition to the reasonable expectation of privacy test.

160. The Issue Paper asked respondents for their views as to how serious the invasion of personal privacy should be for a right of action to arise[255] and what should be taken into account when assessing the seriousness of the invasion.[256]

Submissions

161. The Australian Privacy Foundation favoured a test of 'sufficiently serious to cause, to a person of ordinary sensibilities, substantial offence or distress, in the relevant context'.[257] This respondent indicated that the requirement for the invasion to be 'serious' would prevent trivial complaints for slight offence and embarrassment and avoid the action being

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255 This was question 5 in the Issues Paper. The question referred to the following examples:
(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?

256 This was question 6 in the Issues Paper, which also asked whether the Act should expressly provide for these factors.

257 Australian Privacy Foundation, Submission to Department of Prime Minister and Cabinet, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, 4 November 2011, 5, 7, attached to and forming part of Australian Privacy Foundation, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.

overly broad.[258] It was said that a higher threshold would exclude many privacy invasions that deserve redress. [259]

162. Two respondents preferred a test of 'highly offensive to a reasonable person', with one respondent explaining that this threshold would ensure that trivial invasions are not litigated.

163. Two respondents expressed concern that some of the potential tests would be too vague. Dr Normann Witzleb submitted that the term 'offensive' is not a good descriptor of seriousness as it may misdirect focus towards whether a person in the position of the plaintiff would consider the conduct 'affronting' or 'insulting'.[260] This does not, it was said, reflect the complete range of interests which a cause of action should be protecting, which includes a person's dignity and autonomy. This respondent submitted that it is preferable not to impose a threshold criterion for privacy claims.[261] Rather, where a claim is trivial, a person would generally be prevented from bringing a claim because they would be unable to show either that they had a reasonable expectation of privacy, or that their privacy interests outweigh competing interests.[262] This latter issue regarding a competing public interest test is considered in Part 6 of this Report.

164. ASTRA referred to its submission to the ALRC in which it proposed that a plaintiff should be required to show that:

- there was a breach of privacy which was unreasonable by reference to the standard of the ordinary and reasonable person; and
- that such serious breach of the person's privacy causes, or is reasonably likely intended to cause, serious harm.[263]

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258 Australian Privacy Foundation, Submission to Australian Law Reform Commission, *Inquiry into Serious Invasions of Privacy in the Digital Era - Issues Paper*, November 2013, 5, attached to and forming part of Australian Privacy Foundation, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.

259 Australian Privacy Foundation, Submission to Department of Prime Minister and Cabinet, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, 4 November 2011, 5, 7, attached to and forming part of Australian Privacy Foundation, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.

260 Dr Normann Witzleb, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 10 February 2014, 11.

261 Ibid.

262 Ibid 11-12.

263 ASTRA Subscription Television Australia, Submission to Australian Law Reform Commission, *Inquiry into Serious Invasions of Privacy in the Digital Era Issues Paper*, 20 November 2013, 8, referred to in ASTRA Subscription Television Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.

165. Regarding the question about what should be taken into account when assessing the seriousness of the invasion, one respondent was of the opinion that a non-exhaustive list may redress any perceived vagueness or imprecision in a cause of action and could provide some guidance to both complainants and lawyers. This respondent referred to the factors proposed by the NSWLRC,[264] which are set out at paragraph 146 above. Another respondent thought that some of the factors suggested by the NSWLRC were appropriate seriousness factors, but that others were more appropriately left to a defence.

166. One respondent suggested that the longevity of any physical, psychological, financial, familial or reputational impacts should be a relevant factor.

Law Reform Agencies' Recommendations

167. The ALRC (in 2008) and the VLRC thought an objective test of seriousness (that is, that the invasion of expected privacy be highly offensive to a person of ordinary sensibilities[265]) should be the test that a plaintiff is required to meet. The VLRC specifically considered that this stricter test of 'highly offensive' was necessary to ensure that minor or trivial invasions do not divert attention away from the serious cases.[266]

168. The NSWLRC, on the other hand, concluded that the strict test was (in principle) an unwarranted limitation or qualification of the requirement for there to be a 'reasonable expectation of privacy'.[267] Rather, the NSWLRC recommended that the statutory cause of action should require the court to take into account a number of matters and interests in determining whether there has been an actionable invasion of privacy. The non-exhaustive list of factors recommended by the NSWLRC are set out at paragraph 146 above.

169. In its 2014 review, the ALRC took a different approach, which it said would provide the court with more flexibility in its assessment of seriousness.[268] The ALRC considered that some offensive, distressing or harmful invasions of privacy will be serious, even when the invasion is not 'highly' offensive. It therefore recommended that the plaintiff should not be required to prove that the invasion was highly offensive, if it can otherwise be shown to be serious.

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264 New South Wales Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009), 35.
265 Or a formulation of words to the same or similar effect.
266 VLRC Final Report, 151 [7.142].
267 NSWLRC Final Report, 28 [5.11].
268 See further, ALRC 2014 Report, 135 [8.23]-[8.24], 137-138 [8.36]-[8.38].

170. The ALRC recommended that the Act should provide guidance and certainty on the meaning of serious.[269] It stated:

> 'Serious' can mean 'not trifling', 'weighty or important', 'important, demanding consideration, not to be trifled with, not slight'. These definitions may be helpful, but the ALRC recommends that the Act provide specific guidance to courts on the meaning of serious. This guidance should be in the form of a few important factors for the court to consider, along with any other relevant factor, when determining whether an invasion of privacy was serious.[270]

171. The ALRC recommended that the Act should provide that a court may have regard, among other things, to:

- the degree of any offence, distress or harm to dignity that the invasion of privacy was likely to cause to a person of ordinary sensibilities in the position of the plaintiff; and
- whether the defendant was motivated by malice or knew the invasion of privacy was likely to offend, distress or harm the dignity of the plaintiff.[271]

172. The ALRC considered that other matters may also be relevant, but that these are the most important.[272] This is an objective test – that is, it is concerned with whether the court, not the plaintiff, views the invasion as serious.[273]

173. The ALRC considered that its recommended threshold test of seriousness would provide an additional means of discouraging trivial actions and other non-serious breaches of privacy.[274] However, the ALRC also concluded that its threshold test of seriousness, in addition to the public interest balancing test (dealt with in Part 6 below), would further ensure the new tort does not unduly burden competing interests such as freedom of speech.[275]

The Institute's Views

174. The Institute is strongly of the view that invasions of privacy which are not sufficiently serious should not be actionable. Other elements of the cause of action recommended in this Report will work to that end, in particular the requirement that a plaintiff has a reasonable expectation of privacy in the circumstances and the public interest test

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269 Ibid 131 [8.2]-[8.3].
270 Ibid 134 [8.17] (footnotes omitted).
271 Ibid Recommendation 8–1.
272 Ibid 131 [8.3]. For a detailed discussion of each of the elements of these factors, see 134-137 [8.19]-[8.35].
273 Ibid 134 [8.18].
274 Ibid 131 [8.1], 132 [8.6], 134 [8.13].
275 Ibid 134 [8.15].

recommended later in this Report, along with the defences dealt with in Part 12. However, the Institute also considers that the cause of action should provide for an additional and separate threshold test of seriousness. This will provide further protection against trivial or otherwise non-serious invasions of privacy and accordingly, address the concerns of some of the respondents to the Issues Paper.

175. As can be seen from the discussion above, recent reform debates have suggested variations on the formulation that an invasion of privacy be 'highly offensive' to a 'reasonable person' of 'ordinary sensibilities'. A less stringent alternative is that it be 'sufficiently serious to cause substantial offence'.[276]

176. However, the Institute is of the view that rather than provide for a plain offensiveness test, which may be restrictive and difficult to apply, the cause of action should simply require that the invasion be serious and then provide some express guidance on seriousness. On this issue, the Institute finds the more recent approach of the ALRC, as set out at paragraphs 169 to 173 above, compelling. Accordingly, the Institute agrees that the cause of action should provide that in assessing whether or not the invasion meets the seriousness threshold, the court may have regard, among other things, to:

- the degree of any offence, distress or harm to dignity that the invasion of privacy was likely to cause to a person of ordinary sensibilities in the position of the plaintiff;
- whether the defendant was motivated by malice or knew the invasion of privacy was likely to offend, distress or harm the dignity of the plaintiff; and
- any other factors the court considers relevant.

Importantly, the first limb above is an objective assessment, and the second is subjective.

177. While the 'degree' or 'extent' of the offence caused by an invasion of privacy is an important factor to consider in assessing seriousness, so is the motivation of the defendant. However, in some cases, these will not be the only factors. For this reason, the court should also be able to take into account any other matters it considers relevant in determining whether the invasion was serious.

[276] ALRC 2008 Report, 2568 [74.134] referring to the ALRC Discussion Paper, [5.80].

178. The Institute considers that providing this guidance on the question of seriousness will help overcome some of the criticisms of the imprecision and vagueness of the causes of action proposed in the past,[277] while at the same time avoiding an inflexible list of factors.

Recommendation 9: The cause of action should provide that the invasion be serious. Whether the invasion is sufficiently serious to give rise to an action will be left for the court to decide, having regard to:

- (an objective test) the degree of any offence, distress or harm to dignity that the invasion of privacy was likely to cause to a person of ordinary sensibilities in the position of the plaintiff;
- (a subjective test) whether the defendant was motivated by malice or knew the invasion of privacy was likely to offend, distress or harm the dignity of the plaintiff; and
- any other factors the court considers relevant.

[277] For example, the Bills proposed in South Australia in 1974 and 1991.

PART 6

Balancing Competing Interests – the Public Interest Test

The Issue

179. Like any right, a right to privacy cannot be absolute. It should be weighed against other rights such as freedom of individual, press and artistic expression. Any qualification of one right must be justified by reference to competing rights.

180. There is of course a strong public interest in freedom of expression, whether this be a freedom to broadcast or publish information and opinions, to express oneself artistically or simply to speak one's mind without fear or favour. These interests are important to maintaining a civil and democratic society. It has been said that freedom of speech is the 'lifeblood of democracy'.[278] The need to balance these interests with competing interests is widely recognised,[279] and reflected in the submissions received in this review. The Institute recognises this and has, in its view, brought it into appropriate account in formulating the cause of action recommended in this Report.

181. Problems of (or concerns about) balance explain in part the failure of previous South Australian privacy Bills. They might also explain why more recent recommendations by Australian law reform bodies have not been implemented. The Institute therefore recognises that a proposal for a statutory right to protect personal privacy can only succeed if it does not unduly impede the right to freedom of expression. That right is said to be particularly vulnerable in Australia.[280] Although there is a constitutional implied freedom of political communication,[281] a wider right to freedom of expression has not been expressly recognised judicially or in legislation.

182. In the Issues Paper, the Institute asked the respondents about the ways in which a cause of action for breach of personal privacy should balance countervailing public interests, such

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278 *R v Secretary of the Home Department; Ex Parte Simms* [2000] 2 AC 115, 126. Further, the importance of the media to democratic process was recognised by the High Court in *Australian Capital Television v New South Wales* (1992) 177 CLR 1, where the remarks of Lord Simon in *Attorney-General v Times Newspapers Ltd* [1974] AC 273, 315 were accepted. See further the analysis in Hon R Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (2012), ch 2 and the references there cited.

279 See Hon R Finkelstein, Report of the Independent Inquiry into the Media and Media Regulation (2012), [2.47]-[2.51].

280 See, for example, the argument put by the Law Council for Australia, Submission No 55 to the Commonwealth Issues Paper, 6.

281 See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

as freedom of expression.[282] Although striking this balance is a concept considered in other parts of this Report, an issue arises about whether there should also be an express public interest test. This could either form an element of the cause of action or it could be a defence. If it forms an element, the onus of proof could fall on either the plaintiff or the defendant. If it forms a defence, the defendant would carry the onus.

Submissions

183. Opinion amongst the respondents was divided on this issue. A number of respondents answering this question were in favour of the balance being achieved by way of inclusion of a defence. This was for various reasons including that it would recognise the right of business to 'achieve their objectives efficiently',[283] would prevent unfairly placing the burden of proof on the plaintiff,[284] and would be consistent with breach of confidence, defamation and privacy laws in other jurisdictions such as Canada and New Zealand.[285] Some of these respondents were of the view that such a defence would be sufficient to protect countervailing interests.

184. On the other hand, one respondent preferred countervailing interests to be balanced via the inclusion of the public interest as an element of the cause of action. This was on the basis that the onus of proof should be on the plaintiff and further that the public interest would be relevant to establishing preliminary matters such as whether, in the circumstances, there was a reasonable expectation of privacy.

185. A different respondent submitted that no specific element or defence be included to deal with countervailing public interests because both rights can co-exist. Further, such interests

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[282] This was question 16 in the Issues Paper. Question 16 also included the following examples:
(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 person's privacy, was justifiable in terms of some other public interest?

[283] Australian Bankers' Association Inc, Submission to Australian Law Reform Commission, *Inquiry into Serious Invasions of Privacy in the Digital Era - Issues Paper*, 13 November 2013, 6, incorporated in Australian Bankers' Association, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 17 February 2014.

[284] Australian Privacy Foundation, Submission to Department of Prime Minister and Cabinet, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, 4 November 2011, 8, attached to and forming part of Australian Privacy Foundation, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014; Australian Privacy Foundation, Submission to Australian Law Reform Commission, *Inquiry into Serious Invasions of Privacy in the Digital Era - Issues Paper*, November 2013, 6, attached to and forming part of Australian Privacy Foundation, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.

[285] Dr Normann Witzleb, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 10 February 2014, 35.

should, in the submission of that respondent, be balanced as part of the court's assessment as to whether the conduct was sufficiently serious. It was submitted that there would be considerable difficulty in determining when the public interest would justify an invasion of privacy.

The 1991 South Australian Bill

186. On this issue it is worthwhile specifically considering the approach proposed in the Privacy Bill 1991 (SA). In that Bill, absence of justification in the public interest was an element of the cause of action.[286] The Bill required that, in determining whether or not the act was justified in the public interest, the court must have regard:

- 'to the importance in a democratic society of free inquiry and the free dissemination of information and opinions';[287] and
- if the defendant is a media organisation (as defined) or a person acting on behalf of one, 'the importance of the media in eliciting information and disseminating information and opinions and the importance of safeguarding the freedom of the media to continue to do so'.'[288]

187. The Bill also provided that the court may have regard to material relevant to whether or not an act was justified in the public interest, published by a responsible international organisation or Australian State or Commonwealth authorities.[289]

Law Reform Agencies' Recommendations

188. In its 2008 report, the ALRC concluded that in a statutory cause of action for invasion of privacy, other rights (and in particular, rights of freedom of the press and freedom of expression) would be best protected by making consideration of these rights an element of the cause of action rather than these rights becoming embedded in defences, 'to ensure that privacy interests are not privileged over other rights and interests'. [290] Thus, a court determining whether a cause of action had been established would have to take into account whether the public interest in maintaining the plaintiff's privacy outweighs other issues of public interest.[291]

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286 Privacy Bill 1991 (SA) cl (2)(a)(iii).
287 Privacy Bill 1991 (SA) cl 4(4)(a)(i).
288 Privacy Bill 1991 (SA) cl 4(4)(a)(ii).
289 Privacy Bill 1991 (SA) cl 4(4)(b).
290 ALRC 2008 Report 2572 [74.147].
291 Ibid 2575 [74.157].

189. The ALRC proposed that the interests to be balanced should include (but not be confined to):

- the public interest in maintaining a plaintiff's privacy;
- the interest of the public to be informed about matters of public concern; and
- the public interest in allowing and protecting freedom of expression.

190. The NSWLRC also concluded that a court, in considering a claim for invasion of privacy, should at the outset be required to determine whether the privacy interest asserted outweighs other public interests, and that the onus be on the plaintiff to establish this in their favour.[292] It suggested that the court should first consider the reasonableness of the expectation of the privacy, and then balance the competing public interests.

191. In contrast, the VLRC concluded that a consideration of the public interest should inform a defence to the action. The VLRC considered that to require the plaintiff to prove a negative would place too heavy a burden on the plaintiff and concluded that:

> [t]he defendant should carry the burden of proof in relation to the public interest defence. The defendant should be required to introduce evidence (if necessary) and satisfy the tribunal that it was in the public interest to engage in conduct that would otherwise be unlawful.[293]

192. Consistent with its 2008 report, the ALRC in 2014 recommended that, in order for a plaintiff to have a cause of action under a tort for serious invasion of privacy, the court must be satisfied that the public interest in privacy outweighs any countervailing public interest. A separate public interest defence would therefore be unnecessary.[294] This would mean that competing interests would be considered when determining actionability – as an element of the tort – as a plaintiff should not be able to claim that their privacy has been seriously invaded where there are strong public interest grounds justifying the invasion of privacy.[295] The ALRC expressed the view that the balancing of rights in this way would avoid privileging the right of privacy over others and making free expression and other rights a secondary concept considered as a defence.[296]

193. While it considered incorporating the consideration of public interest matters in the evaluation of a reasonable expectation of privacy, it took the view that in some

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[292] See cl 74(2) of the proposed legislation; see also NSWLRC Final Report, 33 [5.17]-[5.18].
[293] VLRC Final Report, 157 [7.180].
[294] ALRC 2014 Report, Recommendation 9–1.
[295] Ibid 143 [9.5].
[296] Ibid 161 [9.83].

circumstances this can be artificial and could detract from the importance of considering public interests.[297] For this reason, the ALRC took the view that a separate public interest test was justified.

194. While the ALRC concluded that there should be a clear process for balancing competing interests to ensure the new action does not privilege privacy over other important public interests,[298] it also took the view that no one interest should have automatic priority over a plaintiff's privacy interest,[299] that interest also being an important public interest.

195. The ALRC acknowledged that a range of public interests may need to be considered and not just freedom of expression.[300] It recommended that the Act set out the following non-exhaustive list of examples which a court may consider, along with any other relevant public interest matter:

    (a) freedom of expression, including political communication and artistic expression;

    (b) freedom of the media, particularly to responsibly investigate and report matters of public concern and importance;

    (c) the proper administration of Government;

    (d) open justice;

    (e) public health and safety;

    (f) national security; and

    (g) the prevention and detection of crime and fraud.[301]

196. The ALRC considered that this list may provide the parties and the court with useful guidance, making the cause of action more certain and predictable in scope. It said that this was preferable to including a restrictive definition of 'public interest' in the Act.

197. The ALRC recommended that the Act should provide that the defendant has the burden to adduce evidence of a countervailing public interest, as the defendant will generally be best placed to bring the court's attention to do so.[302] However, the Act should provide that the plaintiff bears the onus of satisfying the court that the public interest in privacy

297 Ibid 161-162 [9.86]-[9.88].
298 Ibid 144 [9.7].
299 Ibid 148-149 [9.27]-[9.29].
300 Ibid 146 [9.17]; see also 145 [9.12] for meaning of 'public interest'.
301 Ibid Recommendation 9–2, see also 150 [9.36].
302 Ibid Recommendation 9–3, 159 [9.77].

outweighs these other public interests.[303] The ALRC agreed with the NSWLRC in reasoning that legal principle requires that plaintiffs bear the onus of establishing their case.[304]

198. Finally, the ALRC concluded that, if a court considers that the privacy interests and public interests at stake in a particular case are evenly weighted, then the plaintiff should not have a cause of action, reasoning that privacy only needs protection if it outweighs competing public interests.[305]

The Institute's Views

199. The Institute recognises that there will be circumstances in which the public interest in protecting an individual's privacy will outweigh competing public interests, even where those competing public interests are clearly identified and compelling. The Institute also recognises that there will be circumstances in which although an individual's privacy has been (or will be) invaded, the invasion is justified by a competing public interest and in those circumstances the plaintiff should not receive protection of the law. Striking an appropriate balance between competing rights and interests is critical to formulating the statutory cause of action.[306] The Institute considers that to achieve this, the cause of action should contain an express public interest test; namely, the court should be required to make an assessment about whether or not the public interest in protecting the plaintiff's privacy in the circumstances of the case before it outweighs the competing public interests (but not matters which the public may merely be interested in). In the event that the public interest in protecting the plaintiff's privacy is equal to the competing public interests, a plaintiff's claim for an invasion of privacy should fail. Courts are well equipped to and experienced in identifying matters as public interests and balancing countervailing interests.

200. It is worth noting the 'legitimate public purpose' defence introduced in the 2012 amendments to the *Summary Offences Act 1953* (SA). The Act now provides that it is a

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303 Ibid.

304 Ibid 158-159 [9.74].

305 Ibid.

306 This was a concern expressed as recently as 2013 by interested parties providing submissions and evidence to the South Australian Legislative Review Committee into Issues Relating to Surveillance Devices. The Surveillance Devices Bill 2012 (SA) did not contain an express public interest exception. However, the South Australian Legislative Review Committee recommended that the Bill be amended to allow covert use of surveillance devices in circumstances that are so serious and urgent that the use of the device is in the public interest, but that information there obtained could not be further communicated or published in the public interest unless approved by judicial authority: Legislative Review Committee, Parliament of South Australia, *Inquiry into Issues Relating to Surveillance Devices* (2013) Recommendations 4 and 5. See also amendments made in later iterations of the Bill: Surveillance Devices Bill 2015 (SA). See also South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2474-83 (Hon John Rau).

defence to the humiliating or degrading filming offences if the defendant can demonstrate that the conduct constituting the offence was for a legitimate public purpose. Section 26B(6) in turn provides that conduct will only be taken to be for a 'legitimate public purpose' if the conduct was in the public interest having regard to the following:

> (a) whether the conduct was for the purpose of educating or informing the public;
>
> (b) whether the conduct was for a purpose connected to law enforcement or public safety;
>
> (c) whether the conduct was for a medical, legal or scientific purpose;
>
> (d) any other factor the court determining the charge considers relevant.

201. It is also worth noting that s 26B(7) goes on to provide that if the defendant establishes that the conduct allegedly constituting the offence was engaged in by or on behalf of a media organisation (as defined), the conduct will be taken to have been engaged in for a legitimate public purpose unless the court determining the charge finds that, having regard to the matters set out in subsection (6) above, the conduct was not for a legitimate public purpose.

202. The Institute considers that the public interest should be an element of the proposed cause of action. In other words, a plaintiff will need to establish on the balance of probabilities (as in any civil action) that the public interest in the particular case requires the plaintiff's privacy to be respected. However, the defendant should carry the burden of adducing evidence of a countervailing public interest.

203. The Institute considers this represents a fair and effective balance. A court determining whether a cause of action has been established should have to take into account whether the public interest in maintaining a plaintiff's privacy outweighs other issues of public interest such as the public interest in freedom of expression. It is important to include a clear process for balancing competing interests to ensure that the cause of action does not accord automatic priority to one public interest over another. The public interest in both freedom of expression and privacy are important public interests, but no one public interest should have automatic priority over another public interest.

204. There are a range of valid public interests that may need to be considered, not just freedom of expression and the public interest in privacy. The Act should set out a non-exhaustive list of examples which a court may consider, along with any other relevant public interest matter. Such a list will provide the parties and the court with useful guidance, making the cause of action more certain and predictable in scope. The list should

be made having regard to the ALRC 2014 Report and the specific activities deemed to be of 'legitimate public purpose' in the 2012 amendments introducing the humiliating or degrading filming offence to the S*ummary Offences Act 1953* (SA), taking into account any overlap and interplay with the other elements and defences listed in this Report.

Recommendation 10: The Institute considers that a public interest test should be an element of the proposed cause of action. In determining whether a cause of action has been established, a court should be required to take into account whether the public interest in maintaining a plaintiff's privacy outweighs other issues of public interest. The statute should set out a non-exhaustive list of examples that a court may consider, along with any other relevant public interest matter. The list should be made having regard to the ALRC 2014 Report and the specific activities deemed to be of 'legitimate public purpose' in the 2012 amendments introducing the humiliating and degrading filming offences to the *Summary Offences Act 1953* (SA), taking into account any overlap and interplay with the other elements and defences listed in this Report.

PART 7

Proof of Damage

The Issue

205. Another critical question raised in the Issues Paper was whether in order to make a successful claim, plaintiffs should be required to demonstrate as an element of the cause of action (rather than for the purpose of awarding compensation) that they suffered actual damage as a result of the invasion of their privacy.[307] The alternative is there be no need to prove that actual damage arose from the invasion of privacy (in other words, for the claim to be actionable 'of itself' or *per se*). This means that the invasion of privacy alone would be enough to bring a cause of action.

Submissions

206. The majority of the respondents addressing this question were of the view that the law should permit a person to take action for invasion of personal privacy of itself. The justifications given for this were many and varied including the possible difficulties in establishing harm, which may deter poorly resourced parties, consistency with other actions protecting similar interests, and to ensure that the right to privacy is taken seriously. On the other hand, some respondents were of the view that a '*per se* action' would be inappropriate given the probable breadth and imprecise nature of the cause of action and one submitted that it may encourage 'dubious' proceedings.

Other Approaches

207. The ALRC recommended that a plaintiff should not be required to prove actual damage to bring an action.[308] This is consistent with the Bills introduced to the South Australian Parliament in 1974 and 1991 and the Bills proposed in Ireland.[309] This is also consistent with the approach taken in New Zealand[310] and Canada.[311]

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307 Question 18 of the Issues Paper was in the following terms: '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?'

308 ALRC 2014 Report, Recommendation 8-2.

309 Privacy Bill 2006 (Ireland) s 2(2); Privacy Bill 2012 (Ireland) s 2(2).

310 *Hosking v Runting* [2005] 1 NZLR 1, [128].

311 See, for example, *Privacy Act 1996* RSBC c 373 s 1(1) (British Columbia); *Privacy Act CCSM* s P125 s 2(2) (Manitoba); *Privacy Act 1978* RSS c P-24 s 2 (Saskatchewan); *Privacy Act 1990* RSNL c P-22 s 3 (Newfoundland and Labrador).

The Institute's Views

208. The Institute is of the view that the cause of action should be actionable without proof of damage. If Parliament were to decide that proof of damage is required, the Institute is firmly of the view that damage should be defined as broadly as possible and should capture emotional distress (including humiliation and embarrassment).

209. The Institute agrees with the ALRC that the function of the statutory cause of action for serious invasions of privacy should be to affirm the fundamental importance of the right of privacy. For this reason, the fact of invasion alone should be enough to bring an action. If this were not the case, many serious invasions of privacy could go without remedy, undermining a key reason for introducing the cause of action.

210. In addition, many examples of invasions of privacy (even the most serious ones) may only result in emotional distress; that is, a consequence less than the harm required to establish many other causes of action at common law. For this reason, if proof of actual damage as recognised by the common law is required, this would deny redress to many victims and significantly undermine the value and purpose of the new cause of action.

211. As the ALRC observed, this conclusion is consistent with other intentional torts (for example, assault, battery and false imprisonment) concerned with the intangible, dignitary interests of the plaintiff where, in a sense, the wrong itself is the harm.[312]

212. The Institute is of the view that making the cause of action actionable *per se* will not give rise to trivial claims. Other important thresholds that must be met to establish the cause of action will protect against such claims.

213. It does not automatically follow from this conclusion that all types of harm should result in an award of compensation. The Issues Paper asked for submissions on the kinds of harm or loss resulting from an invasion of personal privacy that should be compensable.[313] The majority of the respondents that answered this question were of the view that the types of harm compensable should be cast broadly. Respondents referred to mental distress, embarrassment, humiliation, inconvenience, damage to reputation, financial loss,

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312 ALRC 2014 Report, 138-139 [8.40]-[8.42].

313 This was question 19 in the Issues Paper. Question 19 also asked whether they should 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?

physical damage and threats to personal safety. One respondent submitted that all types of loss or harm should be compensable as long as they were a reasonably foreseeable consequence of the invasion. The Institute considers that the kinds of harm or loss which are compensable should be cast as broadly as possible and should at least include emotional distress. To conclude otherwise would undermine the effectiveness and aim of the cause of action.

Recommendation 11: The statute should expressly provide that the cause of action is actionable without proof of damage.

Recommendation 12: The kinds of harm or loss which are compensable should be cast as broadly as possible and should at least include emotional distress.

PART 8

The Fault Element

The Issue

214. Criminal offences and civil causes of action have physical elements and fault elements. Physical elements include conduct, and fault elements include intention, recklessness or negligence. The Issues Paper asked whether it should be possible for a negligent breach of personal privacy to be actionable, or whether only intentional or reckless breaches should be actionable.[314]

215. In a separate but related question about defences, the Issues Paper also asked whether the following should be included as defences to the cause of action:

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

    (c) when the act or conduct was intentional but the person did not and could not have been expected to have foreseen its consequences?[315]

Submissions

216. Three respondents submitted that a negligent breach should be actionable. One respondent argued that, were liability confined to intentional and reckless breaches only, deserving plaintiffs could be left without redress. Moreover, excluding negligent breach would be inconsistent with general principles of liability for civil wrongs and the Australian Privacy Principles. Another respondent suggested that, even if negligence were actionable, the use of a seriousness threshold would prevent trivial or vexatious complaints. Two of the respondents in favour of including negligence stated that the remedies available for negligent breach should reflect the extent of the carelessness.

217. Some respondents were opposed to making negligent breaches of privacy actionable. The Australian Bankers' Association thought that the likely scope and imprecision of a cause of action made it inappropriate to extend the cause of action to include negligence.[316] ASTRA

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314 This appeared as question 11 in the Issues Paper.

315 This appeared as question 15(a) and (c) in the Issues Paper. The responses to question 15 of the Issues Paper are set out in more detail in Part 12 below.

316 Australian Bankers' Association Inc, Submission to Australian Law Reform Commission, *Inquiry into Serious Invasions of* Privacy *in the Digital Era - Issues Paper*, 13 November 2013, 6, incorporated in Australian Bankers' Association, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 17 February 2014.

thought that a negligence standard would make people unduly careful about sharing information in case they inadvertently breach someone's privacy.[317]

218. In relation to the question about defences and the intention of the defendant, a number of respondents were opposed to a defence where the act or conduct was not intended on the grounds that the fact that an invasion of privacy is reckless or negligent does not excuse the conduct and therefore should not be sufficient to deny the plaintiff redress. However, one respondent did, contrary to its view that negligent invasions of privacy should be actionable, support the inclusion of a defence for non-intentional breaches.

219. The respondents were also generally opposed to the inclusion of a defence for intentional conduct with unforeseen consequences. One such respondent justified this view on the basis of the ease with which content can be uploaded to the Internet and the risk that it subsequently 'goes viral'.[318] A different respondent preferred that the degree of fault be considered as an element of the cause of action rather than in the context of defences. The only respondent to expressly support this defence did not provide reasons.

Law Reform Agencies' Recommendations

220. The ALRC (in 2008 and again in 2014) recommended confining the fault element for a cause of action for invasion of privacy to conduct that is intentional or reckless, thereby excluding acts which were accidental or negligent.[319]

221. In its 2014 report, the ALRC reasoned that confining the tort in this way will ensure that the new tort would apply to the 'most objectionable types of invasion of privacy'.[320] It further reasoned that analogous torts protecting fundamental personal rights, such as assault and false imprisonment, also require proof of intent.[321] Finally, and importantly, confining the tort to intentional or reckless conduct is critical to the justification for the tort being actionable without proof of damage. The ALRC concluded that not requiring proof of actual damage will 'provide an important level of protection and vindication for

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317 ASTRA Subscription Television Australia, Submission to Australian Law Reform Commission, *Inquiry into Serious Invasions of* Privacy *in the Digital Era Issues Paper*, 20 November 2013, 9, referred to in ASTRA Subscription Television Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.

318 Law Society of South Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 13 March 2014, 18.

319 ALRC 2014 Report, 110 [7.7]; see also, ALRC 2008 Report, 2577 [74.164].

320 ALRC 2014 Report, 109 [7.2], [7.5].

321 Ibid 109 [7.3].

victims of intentional or reckless invasions of privacy, and will enhance the tort's deterrent and normative influence'.[322]

222. The ALRC recommended that a defendant's intention to invade the privacy of the plaintiff could encompass either:

- a subjective desire or purpose to intrude or to misuse or disclose the plaintiff's private information; or
- circumstances where such an intent may be imputed to the defendant on the basis that the relevant consequences—the intrusion, misuse or disclosure—were, objectively assessed, obviously or substantially certain to follow.[323]

223. The ALRC took the view that there should be no action where there was merely an intention to do an act which had the consequence of invading someone's privacy. There must exist intent to invade someone's privacy.[324]

224. The ALRC described recklessness as being where the defendant was aware of the risk of an invasion of privacy and was indifferent to whether or not an invasion of the plaintiff's privacy would occur as a result of the conduct. Recklessness may be described as reckless indifference to a result.[325]

225. The NSWLRC concluded that the appropriate fault element should be left to development in case law.[326] The NSWLRC took the view that 'liability will generally arise under the legislation [recommended in its report] only where the defendant has acted intentionally',[327] but went on to observe that 'there may be circumstances where the defendant ought to be liable for an invasion of privacy that is, for example, reckless or negligent'.[328]

226. The VLRC concluded that that although most actionable invasions will include intentional conduct, it was unnecessary to exclude negligent acts from the conduct which might fall within the two causes of action it proposed. It took the view that there might sometimes be circumstances where a defendant's actions were so grossly negligent that civil action

322 Ibid 109 [7.4], 117-118 [7.41]-[7.44].
323 Ibid 110 [7.7].
324 Ibid 115-116 [7.31]-[7.40].
325 Ibid 114 [7.27]-[7.28].
326 NSWLRC Final Report, [5.56].
327 Ibid [5.56].
328 Ibid [5.56].

was justified. It gave the example of where a medical practitioner leaves a patient's highly sensitive medical records on a train or tram.[329]

The Institute's Views

227. The Institute prefers the position taken by the ALRC over that of the NSWLRC or the VLRC. A cause of action for invasion of privacy should be confined to conduct that is either intentional or reckless. Conduct that is accidental or negligent should be excluded. Further, there should be no action where there is merely an intention to do an act which has the consequence of invading a person's privacy. There must exist either an intention to invade someone's privacy in one of the ways set out in the statute or recklessness as to that fact. Recklessness in this context means 'subjective recklessness'; namely, where a defendant is aware of the risk of an invasion of privacy and is indifferent to whether or not an invasion of the plaintiff's privacy would occur as a result of the conduct that he or she undertakes. The general law will apply to the fault element.

228. The Institute's position is consistent with both the analogous torts protecting personal rights and the presumption of the criminal law that also requires proof of intent or at least recklessness as the requisite mental fault element.[330] As the Institute is recommending a *per se* cause of action, a broad definition of 'privacy' and a non-exhaustive list of what will amount to an invasion, it would be a step too far to extend the cause of action to negligent conduct. The Institute notes that there would also be practical problems in extending the proposed action for invasion of privacy to negligent conduct. For example, such extension may require the introduction of a safe harbour scheme to exempt internet carriage providers from liability for invasions of privacy committed by third parties in circumstances where the carriage provider has no knowledge of the invasion.

229. There is some merit in the suggestion of the VLRC that there may be circumstances where a defendant's actions are so grossly negligent that civil liability for breach of privacy is justified. However, the Institute ultimately agrees with the earlier views of the NSWLRC

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329 VLRC Final Report 18, (2010), 152 [7.148].

330 There is a common law presumption that '*mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence' (*Sherras v De Rutzo* [1895] 1 QB 918, 921). Professors Ashworth and Horder write: 'The essence of the principle of *mens rea* is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and consequences' (Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 2013) 155). It is thought generally unfair to subject people to criminal liability for unintended actions or unforeseen consequences unless these resulted from an intention to do so or at least an unjustified risk (ie recklessness). See further *He Kaw Teh v The Queen* (1985) 157 CLR 523.

and the ALRC that to extend the cause of action to negligence, even gross negligence, 'would, arguably, go too far'.[331]

Recommendation 13: The cause of action for invasion of privacy should apply to conduct that is either intentional or reckless but not accidental or negligent. There must exist either an intention to invade someone's privacy or recklessness as to that fact. Recklessness in this context means where the defendant is aware of the risk of an invasion of privacy and is indifferent to whether or not an invasion of the plaintiff's privacy would occur as a result of the conduct.

[331] ALRC 2008 Report, 2577 [74.163]-[74.164] citing NSWLRC Consultation Paper (2007) [7.24].

PART 9

Natural Persons Only?

The Issue

230. A question arises as to who should be able to sue for invasion of privacy. The issue is whether only natural persons should be able to take action or whether corporations, Government agencies or other organisations should also have standing.[332]

Submissions

231. Three respondents thought that a cause of action should only be available to natural persons. Each of these respondents pointed out that alternate remedies are already available for organisations. One respondent thought that the status of privacy as a fundamental human right made it inappropriate for a cause of action for breach of privacy to be available to legal persons as opposed to natural persons. Another respondent thought that it was inappropriate as purely legal persons were incapable of suffering any psychological or emotional harm and that such harm should be a necessary element of a cause of action.

232. One respondent thought that a cause of action should not be limited only to natural persons, as there are circumstances in which a corporation should be able to bring a claim, particularly in relation to defending the privacy of its members, officers and other interested parties. A different respondent raised the possibility of allowing local and community groups and small incorporated associations to take action. Similarly, a third respondent submitted that not-for-profit associations should be able to take action, indicating that this would bring the proposed cause of action in line with defamation.

Other Law Reform Agencies' Recommendations

233. The ALRC (in 2008 and again in 2014), the NSWLRC and the VLRC have all concluded that notions of privacy attach to *individuals*, and that a cause of action for invasion of privacy should be restricted to natural persons. Specifically, the ALRC has concluded that because the desire to protect privacy is founded on notions of individual autonomy,

[332] Question 12 in the Issues Paper was in the following terms: 'Should only natural persons be able to take action for invasion of personal privacy?'.

dignity and freedom, extending the protection of a human right to an entity that is not human is inconsistent with the approach of Australian privacy law.[333]

The Institute's Views

234. The Institute agrees with the consistent approach of recent reform recommendations that only natural persons should have standing to sue for invasions of privacy. Corporations, Government agencies and other organisations (including incorporated associations and not-for-profit organisations) should not be able to bring an action. This conclusion reflects the fact that privacy is a matter of *personal* autonomy and *personal* dignity.

235. The approach recommended by the Institute is consistent with the approach that would be taken if an action in privacy were to develop at common law. In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, Gummow and Hayne JJ held that '[w]hatever development may take place in that field [referring to an emergent tort of invasion of privacy] will be to the benefit of natural, not artificial, persons'.[334] Further, it is consistent with the approach taken to complaints made under the *Privacy Act 1988* (Cth) about interferences with privacy, as such complaints can only be made by natural persons.[335] This conclusion is also generally in line with the position in New Zealand, Canada and the United States.

Recommendation 14: The statute should provide that the cause of action only be available to natural persons.

[333] ALRC Discussion Paper, 304 [5.112] and the ALRC 2008 Report, 2576 [74.160], drawing on observations in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199. This is consistent with the ALRC's approach in 2014: see ALRC 2014 Report, 171-172 [10.41]-[10.45].

[334] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [132].

[335] See, *Privacy Act 1988* (Cth) ss 6(1), 36(1).

PART 10

Living Persons Only?

The Issue

236. Under the law of defamation, only living persons are able to be plaintiffs in a cause of action and, accordingly, a cause of action that a plaintiff had against a defendant ceases when the plaintiff dies.[336] However, the general rule established by the *Survival of Causes of Action Act 1940* (SA) is that the cause of action survives the person's death, and personal representatives or family of that person are able to take legal action on their behalf.[337] At common law the rule is *actio personalis moritur cum persona* (a personal action dies with the plaintiff or the defendant).

237. The Issues Paper asked whether the cause of action should survive a person's death.[338]

Other Law Reform Agencies' Recommendations

238. The ALRC (in 2008[339] and again in 2014[340]), the NSWLRC and the VLRC each recommended that the causes of action be restricted to living persons, under the same rationale as for restricting defamation actions to living persons; namely, that the suffering, damage or insult consequent on a breach cannot occur after death.[341] It was generally considered by the ALRC that this conclusion was consistent with a cause of action designed to protect personal dignitary interests and remedy harm and hurt suffered by a living person.[342] Specifically, in its 2014 review, the ALRC cited previous law reform inquiries, stakeholder support and similar provisions of Uniform Defamation Laws,[343] as well as consistency with international privacy laws.[344] The NSWLRC thought that reform needed to be coherent with the law relating to the effect of death on other causes of action in all Australian jurisdictions.[345]

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336 See, *Survival of Causes of Action Act 1940* (SA) s 2(2); *Defamation Act 2005* (SA) s 10.
337 See, *Survival of Causes of Action Act 1940* (SA) s 2(1).
338 Question 13 in the Issues Paper was in the following terms: '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?'
339 Although the ALRC did not explicitly restrict the proposed cause of action to living persons, this paper proceeds on the assumption that this was its intention.
340 ALRC 2014 Report Recommendation 10–3.
341 For example, see VLRC Final Report, 166-167 [7.235]-[7.242].
342 See ALRC 2014 Report, 172 [10.49].
343 Ibid 172 [10.47]-[10.48].
344 Ibid 176 [10.70].
345 NSWLRC Final Report, 59-60 [10.1].

239. Further, the ALRC in its 2014 review expressed the view that '[g]iven 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'.[346] Where relatives or other parties are affected, the ALRC took the view that those persons could pursue their own actions where they meet the tests of actionability in their own right.[347]

Submissions

240. The majority of the respondents that answered this question were in favour of enabling the personal representatives or family of a deceased person to be able to take an action for an invasion of the deceased's privacy. In support of this, it was submitted that the fundamental nature of the right to privacy means that the action should be available after death 'so as to allow for the appropriate vindication of that right post-mortem',[348] and that the family of the deceased may have a continued interest in protecting against disclosure of private information relating to the deceased.[349]

241. However, several of these respondents suggested possible restrictions on the availability of this right. One respondent proposed that in order to be able to take action for an invasion of the deceased's privacy the person must establish that they are in fact a financial dependent of the deceased and that that person suffered psychological or emotional harm, which is causally linked to the conduct that gave rise to the cause of action. It was submitted, however, that were those requirements to be satisfied, the action would be available irrespective of whether or not the invasion took place during the deceased's lifetime. Another respondent proposed that the action should only be available post-mortem where a court authorises the action to be brought, following consideration of whether the invasion of privacy is sufficiently serious to those surviving. A further limitation suggested by a different respondent was that the remedies available in an action brought in this capacity should exclude compensatory damages, unless it can be established that those bringing the action have themselves had their privacy interest affected. This is on the basis that the rationale of compensatory damages − compensating for loss suffered − is removed by the death of the person involved.

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346 ALRC 2014 Report, 173-174 [10.55].

347 Ibid 174-175 [10.58]-[10.67].

348 Australian Privacy Foundation, Submission to Australian Law Reform Commission, *Inquiry into Serious Invasions of Privacy in the Digital Era - Issues Paper*, November 2013, 10, attached to and forming part of Australian Privacy Foundation, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.

349 Dr Normann Witzleb, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 10 February 2014, 22.

242. Taking a different view, ASTRA explicitly opposed the extension of the cause of action in this way. It noted that, consistent with the rationale underlying the corresponding limitation in defamation law, it is the 'privacy interests of the person harmed which should be protected; not unrelated parties like a person's estate'.[350]

The Institute's Views

243. On the one hand, limiting the cause of action to living persons arguably reflects the principal aim of the cause of action – to protect the person harmed from interferences with their dignitary interests; their personal autonomy. Alternatively, while consistency of laws (such as defamation law) may be important, some have argued (as can be seen from the submissions set out above) that there is a public interest in a limited extension of the cause of action to deceased persons.

244. The Institute finds the position consistently taken by other law reform bodies compelling. The cause of action should be confined to living persons because the suffering, damage or insult consequent on an invasion of privacy generally cannot occur after death. This will bring the cause of action in line with the law relating to the effect of death in most other causes of action in South Australia.

Recommendation 15: The statute should provide that the cause of action be confined to living persons.

[350] ASTRA Subscription Television Australia, Submission to Australian Law Reform Commission, *Inquiry into Serious Invasions of Privacy in the Digital Era Issues Paper*, 20 November 2013, 13, referred to in ASTRA Subscription Television Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.

PART 11

Consent

The Issue

245. The Issues Paper asked whether there should be a defence to an action for invasion of personal privacy in circumstances where the person whose privacy was invaded impliedly or expressly consented to the invasion.[351] However, whether the complainant consented to the invading conduct can be dealt with legislatively in a number of ways. Consent could be:

(a) an essential element of the cause of action;

(b) included as a consideration when determining whether there is a reasonable expectation of privacy in all of the circumstances;

(c) included as a consideration when determining whether the invasion meets the seriousness threshold;

(d) an exemption to the cause of action; or

(e) a defence to the cause of action.

246. If (a), (b) or (c) is adopted, the plaintiff would in the ordinary course carry the burden of proving that he or she did not consent to the invading conduct. If (d) or (e) is adopted, the defendant would in the ordinary course be required to prove that the plaintiff consented to the invading conduct.

Law Reform Agencies' Recommendations

247. In 2008, the ALRC considered that the issue of consent is best dealt with in terms of an essential element of the cause of action, and in particular, that consent should be considered when determining whether the act complained of was sufficiently serious to cause substantial offence to a person of ordinary sensibilities.[352]

248. However, the ALRC changed its approach to consent in its 2014 report, recommending that consent be a defence to the action. In order to satisfy the defence the following would need to be met:

[351] This formed part of question 15 of the Issues Paper.
[352] ALRC 2008 Report, 2575-2576 [74.159].

(a) Consent must be given by the person whose privacy has been invaded, or by an individual who has legal capacity to consent on their behalf.

(b) Consent may be given expressly or inferred from conduct and [in] the absence of written consent a defendant can rely on oral evidence, or conduct or the circumstances.

(c) Consent must be freely given: consent obtained by duress will not be deemed to be free consent.

(d) Consent must be to the particular disclosure or act complained of. Consent will be ineffective when the conduct performed by a defendant is of a materially different nature to the conduct to which the plaintiff consented. The plaintiff's consent must relate to the extent of actual publication.[353]

249. The ALRC considered that although consent is a relevant consideration in determining whether there is a reasonable expectation of privacy, it should be treated as a complete defence, to provide greater certainty to defendants who may rely on having obtained a person's consent prior to engaging in the specified conduct.[354] The ALRC also reasoned that by classifying consent as a defence, the defendant will bear the legal onus of proving consent, being the party best placed to provide such evidence.[355]

250. The VLRC also considered that consent ought to be included as a defence, rather than integrated into the cause of action, noting that consent was a common defence in other areas of the law, and had been used as a formal defence in the context of privacy in the United States and Canada.[356]

251. The NSWLRC arrived at a different conclusion, recommending that consent (express or implied) form an essential element of the cause of action. It acknowledged that while this would require the plaintiff to prove a negative, forcing the plaintiff to make his or her case on consent at the outset would allow the court to test whether the action has merit before

353 ALRC 2014 Report, 198 [11.61] (Footnotes omitted).
354 Ibid 197 [11.58].
355 Ibid 199 [11.68], 200 [11.70]-[11.72].
356 VLRC Final Report, 153-154 [7.151]-[7.154].

it proceeds further.[357] However, it is important to understand this conclusion in the context of the entire statutory model proposed by the NSWLRC.

Submissions

252. The opinion of respondents was divided as to the appropriateness of consent being a defence to the cause of action. While no reasons were provided by those in favour of such a defence, those opposed justified their opposition either on the basis that the extent or existence of consent may be unclear or that consent is better seen as informing whether a reasonable expectation of privacy exists. One respondent expressing the latter view suggested that in that context it would be for the defendant who seeks to rely on consent to establish it, thus negating the reasonableness of the expectation of privacy, unless the plaintiff could then establish incapacity to consent.

Institute's View

253. While the Institute considers that consent may be relevant in a general sense to determining whether or not a plaintiff had a reasonable expectation of privacy in all the circumstances, the Institute has formed the view that actual consent to the conduct constituting the invasion of privacy should be dealt with expressly in the cause of action. The Institute considers that there are sufficient mechanisms built into the cause of action recommended in this Report to deter unmeritorious actions. It is unnecessary, therefore, to add to those mechanisms by requiring the plaintiff to prove a lack of consent at the outset. For this reason, the Institute considers that rather than an element of the cause of action, consent should be dealt with by providing for a complete defence of consent; namely, that it will be a defence to the cause of action if the defendant can prove that the plaintiff impliedly or expressly consented to the conduct which constituted the invasion.

254. A plaintiff's *actual* consent being an express defence to the action will provide certainty to defendants, who are best placed to provide evidence of consent.[358] Although consent (generally) may be a relevant factor in the assessment of whether or not a plaintiff has a reasonable expectation of privacy in the circumstances, in many cases this will not be sufficient to protect plaintiffs. This distinction is best demonstrated by the approach of the ALRC in its 2014 report, where, in the context of considering the publication of private information limb of the tort, the ALRC concluded that implied or actual consent to an actual publication is a distinct question from the issue of whether the plaintiff had a

[357] NSWLRC Final Report, 48 [5.51].
[358] This is consistent with the ALRC's approach in its 2014 Report, 200 [11.70].

reasonable expectation of privacy. It went on to say, drawing on and referring to the experience in the United Kingdom, that 'the need to distinguish these two issues may arise where the plaintiff had previously released or allowed similar information to enter the public domain. … [T]here is increasing recognition that a more nuanced approach is appropriate than was arguably shown in older cases, and that the appropriate time to look at prior publicity or conduct is when determining whether the plaintiff had a reasonable expectation of privacy at the relevant time.'[359]

255. Finally, reflecting the general law of consent, the Institute agrees with the ALRC[360] that the statute should make it clear that consent may be expressly given or inferred, it must be freely given, and finally, it must be given to the particular disclosure or conduct constituting the invasion, including in the case of publication or dissemination, the extent of that publication or dissemination.

Recommendation 16: The consent (implied or inferred and freely given) of the plaintiff (or by an individual who has legal capacity to consent on their behalf) should be a complete defence to the action. The statute should make it clear that for the purposes of the defence, the consent must be to the particular disclosure or conduct constituting the invasion, including in the case of publication or dissemination, the extent of that publication or dissemination.

[359] ALRC 2014 Report, 198-199 [11.64].
[360] Ibid 198 [11.61].

PART 12

Defences and Exemptions

256. This part deals with two issues. It starts by addressing other circumstances in which there should be a defence to an action for an invasion of privacy. It then addresses whether there should be any exemptions to the cause of action expressly provided for by the statute.

Defences - the Issue

257. A defence is something which, if proved by the defendant, will have the effect of relieving the defendant, either partially or completely, of liability even though all the elements of the cause of action for an invasion of privacy are capable of being established.

258. The Issues Paper asked about the circumstances in which there should be a defence to an action for invasion of personal privacy. It asked whether the circumstances should 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?[361]

Questions (a), (c), (d) and (h) are addressed in Parts 6, 8 and 11 of this Report. The remaining questions are considered below in this part.

Law Reform Agencies' Recommendations

259. In its 2008 report, the ALRC recommended the following three defences to a statutory cause of action:

(a) [that the] act or conduct was incidental to the exercise of a lawful right of defence of person or property;

(b) [that the] act or conduct was required or authorised by or under law; or

(c) [that the] publication of the information was, under the law of defamation, privileged.[362]

260. The NSWLRC generally agreed with the defences in (a)[363] and (b) recommended by the ALRC in 2008, but recommended that (c) should specifically include the following defences under the law of defamation:

(a) absolute privilege;

(b) fair report of proceedings of public concern; and

(c) publication of information merely in the capacity, or as an employee or agent, of a subordinate distributor who neither knew, nor ought reasonably to have known, that the publication constituted an invasion of privacy.[364]

261. The VLRC proposed the same defences as those proposed by the ALRC in 2008, but in addition, proposed the following four defences:

(a) consent;

(b) where the defendant was a police or a public officer engaged in his or her duty and acted in a way that was not disproportionate to the matter being investigated and not committed in the course of a trespass;

(c) if involving a publication, the publication was privileged or fair comment; and

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361 This was question 15 in the Issues Paper.

362 ALRC 2008 Report, Recommendation 74-4.

363 Clause 75(1) of the Bill annexed to the NSWLRC's Final Report provided that: 'It is a defence to an action…for the invasion of a plaintiff's privacy if…the conduct of the defendant was done for the purpose of lawfully defending or protecting a person or property (including the prosecution or defence of civil or criminal proceedings)'.

364 See clause 75 of the Bill annexed to the NSWLRC Final Report.

(d) where the defendant's conduct was in the public interest, public interest being a limited concept and not any matter the public may be interested in.[365]

262. In its 2014 report, the ALRC expanded upon its 2008 findings by recommending additional defences. In addition to defences (a) and (b) from its 2008 report and set out above,[366] the ALRC recommended a defence of necessity[367] and a defence of consent.[368] In relation to the defences to an action in defamation, the ALRC recommended the inclusion of the defence of absolute privilege (as previously recommended), but also the defence for publication of public documents and the defence of fair report of public proceedings.[369] It did not recommend the inclusion of the defences of qualified privilege, truth, innocent dissemination and comment.[370]

Submissions

263. As the question about defences posed in the Issues Paper contained numerous sub-questions, many respondents chose to address each of the sub-questions separately. The Institute has also adopted this approach.

When The Act Or Conduct Was Reasonably Incidental To The Exercise Of A Lawful Right of Defence Of Person Or Property

264. All respondents addressing this question supported a defence for circumstances in which the conduct was reasonably incidental to the exercise of a lawful right of defence of person or property. The majority of those respondents considered a need to qualify this defence with a requirement of proportionality in order to prevent abuse of such a defence and the consequent undermining of a plaintiff's privacy that would entail. This proportionality requirement was variously expressed as requiring that the behaviour in question be proportionate, necessary and reasonable, that it was proportionate and necessary to achieve the legitimate objective of protecting a person or property or that it was necessary and reasonable to protect against a concrete threat.

When The Act Or Conduct Was Required Or Authorised By Law

265. Almost all of the respondents who addressed this question supported the inclusion of a defence for when the act or conduct was required or authorised by law, although, they

365 VLRC Final Report, 159 [7.189].
366 ALRC 2014 Report, Recommendations 11-1, 11-2.
367 Ibid Recommendation 11-3.
368 Ibid Recommendation 11-4.
369 Ibid Recommendations 11-5, 11-6, 11-7.
370 Ibid 186 [11.5].

differed as to its scope. The general justification provided was that such a defence is necessary to ensure that individuals are not subject to conflicting obligations. However, one respondent was concerned that this defence may be inconsistent with the common law view that individuals are free to act, subject to the provisions of the law. That same respondent expressed the need to give close consideration to this defence to ensure that it does not have the effect of subordinating the privacy cause of action to all other laws. Other respondents considered that this defence should be limited to cases where a specific law authorises the conduct rather than applying at large.

266. The Australian Bankers' Association gave particular consideration to a number of laws that should be included within the scope of this defence. These included where the disclosure does not breach the *Privacy Act 1988* (Cth), where the disclosure is justified pursuant to the business judgment rule contained in s 180(2) of the *Corporations Act 2001* (Cth) and where the disclosure does not breach the 'banker's duty of customer confidentiality'.[371]

Where Publication of the Information was Privileged Under the Law of Defamation

267. There was considerable support for the inclusion of a defence of privilege co-extensive with that provided under defamation law. Some of those in favour suggested that this defence would be necessary to facilitate frank discussion free from fear of liability where such discussion is in the public interest or to prevent a privacy cause of action being used to circumvent the defamation regime.

Where the Publication Would Attract Any Other Defences Under the Law of Defamation

268. A number of the respondents identified certain defences applicable under the law of defamation that should also apply in relation to a cause of action for invasion of privacy. ASTRA was of the view that all defences available under defamation law should be made available under the proposed cause of action to prevent plaintiffs circumventing the defamation regime.[372]

269. On the other hand, some of the respondents were opposed to the general translation of defamation defences to a cause of action for invasion of privacy. They were of the opinion

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371 Australian Bankers' Association Inc, Submission to Australian Law Reform Commission, *Inquiry into Serious Invasions of Privacy in the Digital Era - Issues Paper*, 13 November 2013, 7, incorporated in Australian Bankers' Association, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 17 February 2014.

372 ASTRA Subscription Television Australia, Submission to Australian Law Reform Commission, *Inquiry into Serious Invasions of Privacy in the Digital Era Issues Paper*, 20 November 2013, 10, referred to in ASTRA Subscription Television Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.

that as the actions protect different interests, the defences cannot simply be transplanted. For example, the Law Society of South Australia opposed the transplantation of the defence of truth to a cause of action for invasion of privacy.[373] Similarly, the Australian Privacy Foundation submitted that the defence of truth is not applicable to a cause of action for invasion of privacy.[374] The Australian Privacy Foundation further submitted that other defamation defences such as honest opinion and extended qualified privilege would fall within a broad public interest defence.[375]

Where the Information was Already in the Public Domain

270. The respondents were divided as to whether it should be a defence to assert that the information was already in the public domain. However, only those opposed to such a defence provided any justification for their views, noting that such a defence would be prone to abuse, difficult to administer − as it would require the scope of the 'public domain' to be determined − and inappropriate. Further, it was argued that such a defence would be unnecessary because the fact that information was already in the public domain would be relevant to the determination of whether there was a reasonable expectation of privacy.

Other

271. The Australian Bankers' Association proposed a defence to cover the situation where the person disclosing the information acted honestly, reasonably and in good faith, and ought fairly to be excused. This was on the basis that there are circumstances where an act or omission by an organisation may occur inadvertently or accidentally, but in good faith, which should be reflected in a defence.[376]

272. ASTRA proposed a number of defences including where:

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373 Law Society of South Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 13 March 2014, 19.

374 Australian Privacy Foundation, Submission to Department of Prime Minister and Cabinet, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, 4 November 2011, 8, attached to and forming part of Australian Privacy Foundation, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.

375 Ibid.

376 Australian Bankers' Association Inc, Submission to Australian Law Reform Commission, *Inquiry into Serious Invasions of Privacy in the Digital Era - Issues Paper*, 13 November 2013, 7, incorporated in Australian Bankers' Association, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 17 February 2014.

- the act was considered by the person acting to be reasonably necessary to eliminate or reduce a possible health, safety or security risk to themselves or another person;
- the act was a publication of the information for the purpose of exposing a public feud, misfeasance or corruption;
- the act was for the purpose of rebutting an untruth; and
- the disclosure was 'user generated content' and was removed by the defendant in a timely manner once it became aware of the disclosure.[377]

The Institute's Views

273. The Institute considers there are some circumstances in which a person should not be liable for an invasion of privacy, even though their conduct and the circumstances were sufficient to satisfy all the elements of the cause of action. The Institute's views about various potential defences are set out below.

When The Act Or Conduct Was Reasonably Incidental To The Exercise Of A Lawful Right of Defence Of Person Or Property

274. The Institute agrees with the respondents who made submissions about this defence as well as with the ALRC, the NSWLRC and the VLRC; namely, that there should be a defence for conduct incidental to the exercise of a lawful right of defence of person or property. This will provide protection to a person who invades the privacy of an individual while acting in self-defence, in defence of another person or in defence of property. There are clear public policy reasons for including this defence.

275. The Institute is strongly of the view that this defence should only arise where the defendant believes, on reasonable grounds, that the conduct was necessary. This reflects the position at common law in tort. Further, the defendant's conduct must also be proportionate to the perceived threat. The Institute considers that these requirements are necessary to prevent the defence from being abused, while still providing appropriate protection for defendants. The concept of proportionality is something with which South Australian courts are familiar. For example, the defences of self-defence and defence of property in the *Criminal Law Consolidation Act 1935* (SA) will only be established if the

[377] ASTRA Subscription Television Australia, Submission to Australian Law Reform Commission, *Inquiry into Serious Invasions of Privacy in the Digital Era Issues Paper*, 20 November 2013, 11, referred to in ASTRA Subscription Television Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.

conduct was, in the circumstances as the defendant genuinely believed them to be, *reasonably proportionate* to the threat that the defendant believed to exist.[378] Other South Australian laws also contain a proportionality principle. For example, under the *South Australian Public Health Act 2011* (SA) certain actions taken must be proportionate to the degree of public health risk.[379]

276. For these reasons, the Institute recommends that there be a defence for conduct incidental to the exercise of a lawful right of defence of person or property, where:

- the defendant believes, on reasonable grounds, that the conduct was necessary; and
- the defendant's conduct is proportionate to the perceived threat.

277. A related but separate defence is the defence of necessity which exists at common law in tort. The Institute recommends that there should be such a defence to the cause of action for invasions of privacy. Although the factors relevant to this defence will be relevant to the public interest test and the question of whether a plaintiff has a reasonable expectation of privacy, a separate complete defence should also be available to protect those acting in emergency situations where the defence recommended immediately above is unavailable. The defence should largely reflect that which exists at common law for many torts.

Where the Act or Conduct Was Required or Authorised by Law

278. The Institute considers that there should be a defence where the act or conduct was required or authorised by law. This is consistent with the submissions received on this point, as well as with the recommendations of the ALRC, NSWLRC and VLRC.

279. For the purposes of this defence 'law' should be broadly defined and should mean the law as applicable in South Australia. The definition should include:

- the general law;
- Commonwealth Acts, regulations, legislative instruments and other instruments made under a Commonwealth Act;
- South Australian 'Acts' and 'statutory instruments' (as defined in the *Acts Interpretation Act 1915* (SA));[380]

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[378] *Criminal Law Consolidation Act 1935* (SA) ss 15(1)(b), 15(2)(b), 15A(1)(c) and 15A(2)(c).
[379] *South Australian Public Health Act 2011* (SA) ss 6(2), 7, 14(5)(e).
[380] *Acts Interpretation Act 1915* (SA) s 4(1).

- orders made by courts and tribunals;
- prerogative powers; and
- documents that have the force of law pursuant to an Act.

280. The Institute considers that a person is 'required by law' where another law compels, demands or necessitates a person to carry out the conduct which amounts to the invasion of privacy. An example of this may be an obligation to disclose information under the *Freedom of Information Act 1991* (SA).

281. 'Authorised by law', on the other hand, extends to where another law authorises a person to carry out the conduct which amounts to the invasion of privacy but provides the person with a discretion as to whether he or she does so. For example, an agent licensed under the *Security and Investigation Industry Act 1995* (SA) would, if acting in accordance with that Act, be relevantly 'authorised by law' for the purposes of this defence. However, the Institute notes that the absence of a law prohibiting particular conduct should not of itself mean that that conduct is authorised.

282. This latter conclusion is relevant to the Australian Banker's Association submission referred to earlier in this Part, where the Association argued that conduct which does not breach certain laws (identified by the Association and applicable to it), should attract a defence. The Institute is firmly of the view that the fact that invading conduct 'does not breach' an existing law does not fall within the meaning of 'authorised' and would therefore not automatically enliven this defence. To do so would significantly undermine the scope of the cause of action.

283. The Institute notes that similar defences exist in South Australian law, for example:

- Conduct which would otherwise amount to an assault attracts a defence under s 20(2)(b) of the *Criminal Law Consolidation Act 1935* (SA) if the conduct was justified or excused by law.
- It is a defence pursuant to s 26C(2)(a)(i) of the *Summary Offences Act 1953* (SA) to the offence of distribution of an invasive image if the conduct constituting the offence was for a purpose connected to law enforcement.

- The *Transplantation and Anatomy Act 1983* (SA) prescribes numerous offences in relation to removal of tissue from the body of a person, but those offences do not apply to 'any other act authorised by law'.[381]

284. To determine whether the defence arises, a court must consider whether the defendant's conduct was authorised or required by law. If the conduct falls outside of the legal authorisation or requirement, or if the conduct was within the bounds of the lawful authorisation or requirement but was undertaken for an ulterior purpose, the defence should not arise.

285. The Institute recognises that arguably this defence in some instances would not (as a matter of law) be necessary where another law authorises or requires a person to do the thing that constitutes the invasion. However, the Institute considers that a clear defence is necessary to provide certainty to parties.[382] In particular, clarity is required to ensure that Government bodies are not prevented from performing their functions, including law enforcement functions.

Where the Information was Already in the Public Domain

286. The Institute considers that there is no need for a defence where the material or information was already in the public domain. The existence of material or information in the public domain prior to the invasion is best addressed as a consideration relevant to whether the plaintiff has a reasonable expectation of privacy.[383] In addition, there may be circumstances where, although the material or information was in the public domain, the defendant's conduct was so egregious or gratuitous that it should not justify an invasion of privacy. Having a complete defence would leave a plaintiff without redress in such circumstances. However, the Institute also considers that defendants will still be sufficiently protected from frivolous claims, as the fact that material or information is already in the public domain may also be relevant to the assessment of the seriousness of the conduct and, if the action gets to that stage, the assessment of damages and other remedies.

Where the Publication Would Attract Any Other Defences Under the Law of Defamation

287. There are numerous defences applicable under the law of defamation that could also apply in relation to a cause of action for an invasion of privacy, including the defences of:

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381 *Transplantation and Anatomy Act 1983* (SA) s 38(3)(c).

382 This is consistent with the ALRC's recent approach on this point: ALRC 2014 Report, 189 [11.23].

383 See Recommendation 4 of this Report.

(a) fair report of proceedings of public concern;[384]

(b) innocent dissemination;[385]

(c) honest opinion;[386]

(d) qualified privilege;[387]

(e) publication of public documents;[388]

(f) truth;[389]

(g) absolute privilege;[390] and

(h) triviality.[391]

The Institute has considered each of these defences in turn.

The Defence of Fair Report of Proceedings of Public Concern

288. This defence protects defendants who publish fair reports of proceedings of public concern and, in doing so, publish private information. This defence is provided for in s 27 of the *Defamation Act 2005* (SA) and includes the following within the meaning of 'proceedings of public concern':

> (a) any proceedings in public of a parliamentary body; or
>
> (b) any proceedings in public of an international organisation of any countries or of the governments of any countries; or
>
> (c) any proceedings in public of an international conference at which the governments of any countries are represented; or
>
> (d) any proceedings in public of—
>
> (i) the International Court of Justice, or any other judicial or arbitral tribunal, for the decision of any matter in dispute between nations; or
>
> (ii) any other international judicial or arbitral tribunal; or
>
> (e) any proceedings in public of a court or arbitral tribunal of any country; or

384 See, *Defamation Act 2005* (SA) s 27.
385 See, *Defamation Act 2005* (SA) s 30.
386 See, *Defamation Act 2005* (SA) s 29.
387 See, *Defamation Act 2005* (SA) s 28.
388 See, *Defamation Act 2005* (SA) s 26.
389 See, *Defamation Act 2005* (SA) ss 23-24.
390 See, *Defamation Act 2005* (SA) s 25.
391 See, *Defamation Act 2005* (SA) s 31.

(f) any proceedings in public of an inquiry held under the law of any country or under the authority of the government of any country; or

(g) any proceedings in public of a local government body of any Australian jurisdiction; or

(h) proceedings of a learned society, or of a committee or governing body of the society, under its relevant objects, but only to the extent that the proceedings relate to a decision or adjudication made in Australia about—

(i) a member or members of the society; or

(ii) a person subject by contract or otherwise by law to control by the society; or

(i) proceedings of a sport or recreation association, or of a committee or governing body of the association, under its relevant objects, but only to the extent that the proceedings relate to a decision or adjudication made in Australia about—

(i) a member or members of the association; or

(ii) a person subject by contract or otherwise by law to control by the association; or

(j) proceedings of a trade association, or of a committee or governing body of the association, under its relevant objects, but only to the extent that the proceedings relate to a decision or adjudication made in Australia about—

(i) a member or members of the association; or

(ii) a person subject by contract or otherwise by law to control by the association; or

(k) any proceedings of a public meeting (with or without restriction on the people attending) of shareholders of a public company under the Corporations Act 2001 of the Commonwealth held anywhere in Australia; or

(l) any proceedings of a public meeting (with or without restriction on the people attending) held anywhere in Australia if the proceedings relate to a matter of public interest, including the advocacy or candidature of a person for public office; or

(m) any proceedings of an ombudsman of any country if the proceedings relate to a report of the ombudsman; or

(n) any proceedings in public of a law reform body of any country; or

(o) any other proceedings conducted by, or proceedings of, a person, body or organisation of another Australian jurisdiction that are treated in that jurisdiction as proceedings of public concern under a provision of a law of the jurisdiction corresponding to this section;

289. The Institute acknowledges that the information in the reports of proceedings of public concern is information which is already in the public domain and, in accordance with recommendation 4, this is a factor likely to be considered when determining whether the plaintiff has a reasonable expectation of privacy. However, the Institute considers that

there is merit in expressly including the defence of fair report of proceedings of public concern as a complete defence to the cause of action for invasions of privacy, as the information contained within the reports of proceedings of public concern is vital to ensuring an open and transparent government and system of justice. The Institute recommends the inclusion of this defence to be co-extensive with s 27 of the *Defamation Act 2005* (SA), thereby incorporating the principles in relation to that defence.

The Defence of Innocent Dissemination

290. In the context of an invasion of privacy, the defence of innocent dissemination would protect defendants who are subordinate distributors and who have published information in circumstances where they did not know, nor ought reasonably to have known that the publication was an invasion of privacy. 'Subordinate distributor' is defined in s 30(2) of the *Defamation Act 2005* (SA) as follows:

> For the purposes of subsection (1), a person is a subordinate distributor of defamatory matter if the person—
>
> (a) was not the first or primary distributor of the matter; and
>
> (b) was not the author or originator of the matter; and
>
> (c) did not have any capacity to exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published.

291. The Institute considers that in many circumstances such a defence would be unnecessary in a privacy action because the conduct would likely fall short of the fault element requirements. However, for certainty and to ensure that the cause of action does not have unintended consequences, the Institute recommends the inclusion of the subordinate distributors defence to be co-extensive with s 30(2) of the *Defamation Act 2005* (SA).

Defence of Honest Opinion

292. The defence of honest opinion protects defendants who comment or express opinions on matters of public interest. This defence is aimed at protecting the right to speak freely. Under the *Defamation Act 2005* (SA), the defence of honest opinion protects defendants where the defendant can prove that:

- the defamatory matter was an expression of opinion rather than a statement of fact;
- the opinion related to a matter of public interest; and

- the opinion was based on proper material.[392]

293. The Institute considers that this defence should not be a defence to the cause of action for invasion of privacy as the cause of action already takes into account countervailing interests (such as the right to freedom of speech) through the public interest element of the cause of action, the onus of proving which rests on the plaintiff. Unless the invasion is relevantly in the public interest (and therefore captured by the public interest element of the cause of action), defendants should not be permitted to invade privacy on the basis that they are making a comment or opinion. Further and in any event, comment or opinion on matters of public interest may also be relevant to the assessments of whether a plaintiff had a reasonable expectation of privacy in the circumstances and whether the defendant's conduct was sufficiently serious. The combination of these factors means that defendants will be appropriately protected.

294. The Institute also considers that conduct giving rise to this defence is not likely to often arise in the privacy space as seclusions upon intrusion and misuse of private information do not generally arise from 'expressions of opinion'. This means that this defence does not have the same relevance to invasions of privacy as it does to defamation actions.

Defence of Qualified Privilege

295. The defence of qualified privilege for publication of a defamatory matter to a person (the recipient) arises under s 28(1) of the *Defamation Act 2005* (SA) in the following circumstances:

> (a) the recipient has an interest or apparent interest in having information on some subject; and
>
> (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
>
> (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

This defence only protects defendants who publish information without malice.[393]

296. The defence of qualified privilege was rejected by the ALRC in its 2014 report. In summary, the ALRC reasoned as follows:

- The cause of action recommended by the ALRC, like the cause of action recommended in this Report, only applies to intentional and reckless invasions of

[392] *Defamation Act 2005* (SA) s 29.
[393] *Defamation Act 2005* (SA) s 28(4).

privacy. Conversely, defamation is a tort of strict liability which requires a greater range of defences to ensure that it does not operate unfairly.[394]

- In the context of defamation law, complex questions arise in relation to the operation of the defence of qualified privilege. The ALRC considered it would be undesirable for the cause of action for invasion of privacy to be burdened by the complexities associated with this defence as it could result in lengthy arguments before the courts about how the common law principles about the defence of qualified privilege apply to the new cause of action. For this to be avoided, the statute would need to set out in detail the elements of the defence and address the complexities of this defence in defamation law.[395]

- Many invasions of privacy which may give rise to the application of this defence would not satisfy the reasonable expectation of privacy element of the new cause of action or meet the public interest element of the cause of action. They may also fall within another defence such as the defence of necessity or the defence of persons or property. The ALRC considered that if the defendant was not protected by those elements of the cause of action and defences, then the defendant should be liable for the invasion of privacy.[396]

297. The Institute finds the reasoning of the ALRC compelling and applicable to the cause of action recommended by the Institute here, and therefore considers that the defence of qualified privilege should not be included in the statute as a separate defence to the cause of action for invasion of privacy.

Defence for Publication of Public Documents

298. The defence for publication of public documents protects defendants from liability where the defendant publishes particular categories of public documents. In s 26 of the *Defamation Act 2005* (SA), 'public document' is defined to mean:

> (a) any report or paper published by a parliamentary body, or a record of votes, debates or other proceedings relating to a parliamentary body published by or under the authority of the body or any law; or
>
> (b) any judgment, order or other determination of a court or arbitral tribunal of any country in civil proceedings and including—

394 ALRC 2014 Report, 214 [11.136].
395 Ibid 214-215 [11.137].
396 Ibid 215 [11.138].

(i) any record of the court or tribunal relating to the judgment, order or determination or to its enforcement or satisfaction; and

(ii) any report of the court or tribunal about its judgment, order or determination and the reasons for its judgment, order or determination; or

(c) any report or other document that under the law of any country—

(i) is authorised to be published; or

(ii) is required to be presented or submitted to, tabled in, or laid before, a parliamentary body; or

(d) any document issued by the government (including a local government) of a country, or by an officer, employee or agency of the government, for the information of the public; or

(e) any record or other document open to inspection by the public that is kept—

(i) by an Australian jurisdiction; or

(ii) by a statutory authority of an Australian jurisdiction; or

(iii) by an Australian court; or

(iv) under legislation of an Australian jurisdiction; or

(f) any other document issued, kept or published by a person, body or organisation of another Australian jurisdiction that is treated in that jurisdiction as a public document under a provision of a law of the jurisdiction corresponding to this section.

299. The Institute considers that this defence is necessary to ensure an open and transparent justice system and Government and therefore should be included in the statute as a separate defence to an action for invasion of privacy. The defence should be co-extensive with the statutory and common law principles for this defence in defamation law.

Defence of Truth

300. The defence of truth arises in the context of defamation if the defendant is able to prove that 'the defamatory imputations carried by the matter of which the plaintiff complains are substantially true'.[397] The Institute is of the view that this defence is not relevant to a cause of action for an invasion of privacy, as almost all invasions of privacy by way of intrusion upon seclusion and misuse of information would involve true material or information.[398] A defence of truth would render the action almost pointless and therefore, should not be included as a defence. In any event, the Institute has recommended that untrue

[397] *Defamation Act 2005* (SA) s 23. See also, the defence of contextual truth provided for in s 24 of the *Defamation Act 2005* (SA).

[398] However, compare and note paragraph 155-156.

information be included within the scope of the cause of action.[399] For the same reasons, the defence of contextual truth set out in s 24 of the *Defamation Act* should not be translated into the cause of action for invasion of privacy.

Defence of Absolute Privilege

301. The defence of absolute privilege could protect defendants where they invade privacy through the disclosure of private information during court or parliamentary proceedings.[400] Although such an invasion may fall within the public interest element of the cause of action, the Institute has reached the view that there is benefit in expressly including this in the statute as a defence to the cause of action. Such a defence ensures that people participating in court and parliamentary proceedings are able to express themselves freely (and comply with orders or rulings) without being concerned about the need to protect themselves against civil liability.

302. This recommendation is consistent with the approach taken by the ALRC in its 2014 report. The Institute agrees with the ALRC that the rationale behind the defence of absolute privilege is equally applicable to defamation actions and the cause of action for an invasion of privacy recommended in this Report.[401] The Institute also agrees that the defence should be co-extensive with the statutory and common law principles for this defence in defamation law.[402]

Defence of Triviality

303. The defence of triviality protects defendants against trivial claims. The Institute considers that this defence is unnecessary in a privacy action as the seriousness threshold already provides this protection. Further, the Institute notes that s 31 of the *Defamation Act 2005* (SA) which provides for this defence is not applicable to the cause of action recommended in this Report because s 31 applies where 'the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm'. In Part 7 above, the Institute has recommended that the cause of action should be actionable without proof of harm. Such a defence is not appropriate in respect of the cause of action for an invasion of privacy recommended in this Report.

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399 See Recommendation 7.
400 See, *Defamation Act 2005* (SA) s 25(2).
401 ALRC 2014 Report, 203 [11.82].
402 Ibid 203 [11.82].

Other Defences

304. The Institute is not persuaded by the reasoning in support of any of the other defences proposed by respondents to the Issues Paper.

305. The Institute considers that the defence proposed by the Australian Bankers' Association to protect defendants who disclose private information whilst acting in good faith is too broad. The Institute is of the view that organisations that hold sensitive personal information need to be held to a high standard. This is consistent with the core principles underlying the *Privacy Act 1988* (Cth). In any event, the Institute is of the view that there are many circumstances that would fall within the Australian Bankers' Association's proposed defence which would not constitute an invasion of privacy under the cause of action recommended in this Report, as the fault element or the seriousness threshold would not be satisfied. However, where the circumstances are sufficient to meet all of the elements of the cause of action, the fact that the defendant was acting in good faith would be a relevant factor in determining the appropriate remedies.

306. In relation to some of the defences proposed by ASTRA, the Institute considers that ASTRA's concerns would, depending on the particular circumstances, be largely addressed by the primary defences recommended in this Report. For example, the proposed defence where the act was considered by the person to be reasonably necessary to eliminate or reduce a possible health, safety or security risk to themselves or another person, could fall within the defence described in recommendation 17 below. The publication of information for the purpose of exposing a public feud would be addressed by the public interest element of the cause of action. Also, the Institute does not support the inclusion of a defence for the purpose of rebutting a mistruth. The final defence raised by ASTRA is addressed by the defence of innocent dissemination contained in recommendation 20.

Recommendation 17: There should be a defence for conduct incidental to the exercise of a lawful right of defence of person or property, where:

- the defendant believes, on reasonable grounds, that the conduct was necessary; and
- the defendant's conduct is proportionate to the perceived threat.

Recommendation 18: There should be a defence of necessity.

Recommendation 19: There should be a defence for conduct which was required or authorised by law. For the purposes of this defence 'law' should be defined broadly and should mean the law as applicable in South Australia. The definition should include:

- the general law;
- Commonwealth Acts, regulations, legislative instruments and other instruments made under a Commonwealth Act;
- South Australian 'Acts' and 'statutory instruments' (as defined in the *Acts Interpretation Act 1915* (SA));[403]
- orders made by courts and tribunals;
- prerogative powers; and
- documents that have the force of law pursuant to an Act.

The statute should make it clear that the absence of a law prohibiting particular conduct should not, of itself, mean that that conduct is authorised by law.

Recommendation 20: There should be defences which are in similar terms to, and co-extensive with, the following defences to an action in defamation under the *Defamation Act 2005* (SA):

- the defence of fair report of proceedings of public concern;[404]
- the defence of innocent dissemination;[405]
- the defence for publication of public documents;[406] and
- the defence of absolute privilege.[407]

Recommendation 21: It should not be a defence to the cause of action to prove that the information was in the public domain prior to the invasion.

[403] *Acts Interpretation Act 1915* (SA) s 4(1).
[404] *Defamation Act 2005* (SA) s 27.
[405] *Defamation Act 2005* (SA) s 30.
[406] *Defamation Act 2005* (SA) s 26.
[407] *Defamation Act 2005* (SA) s 25.

Exemptions

The Issue

307. Another critical question is whether particular organisations or types of organisations or people engaged in particular types of activities should be excluded from the proposed cause of action.[408]

308. A common example given is that law enforcement bodies and officers, acting in accordance with lawful duties, should be automatically exempt from the cause of action. As a matter of policy and drafting, the question is whether this issue should be addressed by way of defence *and* an exemption. This means that although these law enforcement bodies and officers, if acting in accordance with their duties, may otherwise have available to them a *defence* (such as where the act or conduct was required or authorised by law) it may still be appropriate that they have the protection of a statutory *exemption*. The same may be said for media organisations acting properly in the public interest, or private investigators acting in accordance with the *Security and Investigation Industry Act 1995* (SA).

Law Reform Agencies' Recommendations

309. The ALRC in its 2008 report, the NSWLRC and the VLRC did not recommend exemptions for particular types of organisations or agencies. Nor did they recommend that persons engaged in a particular type of activity be exempt from the cause of action. In short, the use of threshold requirements (such as 'reasonable expectation of privacy' and 'highly offensive') combined with the proposed defences (such as actions taken by or under law), 'were said to provide a more appropriate means to ensure the cause of action does not capture behaviour that it should not.'[409]

310. In 2014, the ALRC reached a similar conclusion, but recommended that the Act should provide for an exemption or defence for children and young people.[410] The ALRC took the view that 'education on the risks and ethical dimensions of such behaviour is more appropriate than the imposition of civil liability on children and young people below a specified age'.[411]

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408 Question 17 of the Issues Paper was in the following terms: '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?'.

409 As observed in the Commonwealth Issues Paper, 44.

410 ALRC 2014 Report, Recommendation 8–1.

411 Ibid 211 [11.121].

311. Apart from this exemption (or defence) for young people, the ALRC did not recommend any other exemptions as it considered that the defences it had recommended were sufficient to provide protection for people committing invasions of privacy which were warranted in the circumstances.[412]

Previous South Australian Bills

312. South Australia's first Privacy Bill in 1974 was criticised as too vague and broad. As part of addressing this issue in the Privacy Bill in 1991, the Bill set out a number of exemptions from the application of the proposed new law. In summary, key features of the Bill included exemptions for:[413]

    (a) members of the police force;

    (b) any other person vested with powers of investigation of inquiry;

    (c) insurance agencies in the detection of fraud;

    (d) commercial organisations carrying out reasonable inquiries into the creditworthiness of a customer and in passing that information on to other commercial organisations;

    (e) action taken lawfully for the recovery of debt;

    (f) action taken in the course of medical research approved in accordance with the *Privacy Act 1988* (Cth); and

    (g) the making of any investigation, report, record or publication in accordance with a requirement imposed or authorisation conferred by or under statute.

Submissions

313. The respondents were largely of the view that no partial or total exemptions should be given to any organisations or activities, with only two respondents proposing specific exemptions. This general opposition to exemptions was expressed to be a consequence of the comprehensive range of defences supported by a majority of respondents, such as those for when the conduct is required or authorised by law or in the public interest, which would cover members of investigative agencies and those engaged in other legitimate activities. The submission was also made that exemptions would seriously undermine the scope of the action, particularly in light of the ability of investigative agencies, often

412 Ibid 217 [11.152]-[11.153].
413 Privacy Bill 1991 (SA) cl 3(4).

mentioned in connection with such exemptions, to access and disseminate highly sensitive private information.

314. In contrast, the SA NT DataLink submission identified the existence of an exemption for those authorised under State or Commonwealth law to undertake functions that necessitate a breach of privacy as an equally attractive alternative to an analogous defence.[414]

315. Further, ASTRA proposed that organisations subject to industry regulation, such as via an Australian Communications and Media Authority or Australian Subscription Television and Radio Association Code of Practice, that have already had a determination made in respect of them in relation to a breach of such a Code be exempt.[415]

The Institute's Views

316. The Institute recognises that the issue of exemptions (as well as defences) has been a significant and controversial issue in the debate around previous South Australian Privacy Bills as well as the more recent debates involving the 2012 amendments to the *Summary Offences Act 1953* (SA) and the Surveillance Devices Bills of 2012-2015.

317. The Institute notes that in recent debates, there have been calls for broad media exemptions from the ambit of any cause of action. It has been argued that the broadcast media should be exempt from the action for activities undertaken in the course of journalism. A common basis for this position is the limited number of privacy complaints against the media which is said to demonstrate that if there is to be a cause of action of the kind recommended in this Report, it should not apply to media organisations. These points were made in submissions to recent law reform inquiries a well as the Institute's inquiry.

318. However, the Institute is not persuaded by any of the submissions or arguments in favour of particular exemptions. The Institute considers that the defences it has recommended are adequate to protect from unmeritorious actions people who may otherwise be the subject of an exemption because they are engaged in legitimate activities. The Institute also

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414 SA NT DataLink, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014, 34.

415 ASTRA Subscription Television Australia, Submission to Australian Law Reform Commission, *Inquiry into Serious Invasions of Privacy in the Digital Era Issues Paper*, 20 November 2013, 11, referred to in ASTRA Subscription Television Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.

considers that its other recommendations provide sufficient and appropriate protection for defendants. In particular:

- the defence for conduct which was required or authorised by law (see recommendation 19) is sufficient to allow law enforcement agencies to properly exercise their functions and to allow others to freely act where given legal mandate or authority to do so;
- the defence for conduct incidental to the exercise of a lawful right of defence of person or property (see recommendation 17) will allow people to relevantly invade privacy (by acting in defence);
- the public interest test as an element of the proposed cause of action (see recommendation 10) is sufficient to protect people, including media organisations, who are acting properly in the public interest (having regard to the nature of the particular invasion of privacy).

319. Accordingly, the Institute does not recommend the inclusion of any exemptions. However, the Institute is of the view that consideration should be given to exempting (or in some other way excusing) young persons from liability under the recommended cause of action. This is because of the increasing potential for young persons to access and therefore misuse technology to invade the privacy of other young persons. The Institute has refrained from considering this issue in any detail given the ongoing complex policy and legislative development in this area in South Australia.

Recommendation 22: The cause of action should not include any complete exemptions. However, consideration should be given to exempting (or in some other way excusing) young persons from liability.

PART 13

Remedies

The Issue

320. The Issues Paper asked what kinds of orders a tribunal or court should be able to make when it finds that an individual's privacy has been invaded.[416] These orders are commonly known as remedies, and might include a step or an action that a defendant would be ordered to take, such as the payment of damages or the issuing of an apology, as well as steps or actions a defendant would be ordered to take or refrain from taking to prevent an invasion or to limit its effect. Therefore, the Issues Paper also specifically asked whether a court should be able to issue an injunction against a defendant or interested party to prevent an invasion of privacy or prevent the disclosure of information or material obtained through an invasion of privacy.[417]

Recent Law Reform Agencies' Recommendations

321. In its 2007 Consultation Paper (which preceded its 2009 final report), the NSWLRC discussed in detail the possible remedies available where there has been an invasion of privacy.[418] It concluded that a wide-reaching and non-exhaustive list of remedies in any proposed legislation was justified to 'enable the court to choose the remedy that is most appropriate in the fact situation before it, free from the jurisdictional restraints that may apply to that remedy in the general law.'[419] It proposed the following list:

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416 This appeared as question 22 in the Issues Paper. Question 22 also asked whether, for example, it should 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 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?

417 This appeared as question 23 in the Issues Paper.

418 NSWLRC Consultation Paper, Ch 8, 185-202 [8.1]-[8.49].

419 Ibid 186 [8.3].

- damages, including aggravated damages, but not exemplary damages;
- an account of profits;
- an injunction;
- an order requiring the respondent to apologise to the plaintiff;
- a correction order;
- an order for the delivery up and destruction of material;
- a declaration; and
- other remedies or orders that the Court thinks appropriate in the circumstances.[420]

322. This list informed the approach taken by the ALRC in its 2008 report. The ALRC agreed with the observations of the NSWLRC, concluding that given the wide range of circumstances in which an action for an invasion of privacy may be brought, it made sense to provide the court with the flexibility that such a list of remedies would provide.[421] The ALRC proposed a similar list of remedies.[422]

323. In its Final Report in 2009, and in formulating its draft Bill, the NSWLRC built on the list it had proposed in its 2007 Consultation Paper, set out above.[423] Its draft Bill contained the following clause:[424]

> (1) In an action under this Part for the invasion of a plaintiff's privacy, the court may (subject to any jurisdictional limits of the court) grant any one or more of the following remedies, whether on an interim or final basis, as the court considers appropriate:
>
> (a) an order for the payment of compensation,
>
> (b) an order prohibiting the defendant from engaging in conduct (whether actual, apprehended or threatened) that the court considers would invade the privacy of the plaintiff,
>
> (c) an order declaring that the defendant's conduct has invaded the privacy of the plaintiff,
>
> (d) an order that the defendant deliver to the plaintiff any articles, documents or other material, and all copies of them, concerning the plaintiff or belonging to the plaintiff that:

420 Ibid 202, Proposal 2.
421 ALRC 2008 Report, 2579 [74.176].
422 Ibid [74.180], recommendation 74-5.
423 NSWLRC Final Report, 56 [7.1].
424 Ibid 87, Schedule 1.

(i) are in the possession of the defendant or that the defendant is able to retrieve, and

(ii) were obtained or made as a result of the invasion of the plaintiff's privacy or were published during the course of the conduct giving rise to the invasion of privacy,

(e) such other relief as the court considers necessary in the circumstances.

(2) Without limiting subsection (1), the court may decline to grant a remedy under that subsection if it considers that an adequate remedy for the invasion of privacy exists under a statute of an Australian jurisdiction that is prescribed by the regulations.

324. The VLRC recommended that the remedies for both of the causes of action it proposed (intrusion upon seclusion and misuse of private information) should be compensatory damages, injunctions and declarations.[425] It did not refer to or consider the other possible remedies canvassed by the NSWLRC and the ALRC.

325. In its 2014 report, the ALRC recommended that courts should have the ability to award a range of non-monetary remedies, again reasoning that the consequences for plaintiffs of serious invasions of privacy are varied and that plaintiffs will have different objectives, experiences and circumstances in bringing a claim.[426] The ALRC recommended injunctive relief; an order requiring the defendant to apologise; a correction order; an order for the delivery up, destruction or removal of material and declaratory relief.[427] The ALRC considered that these remedies should not be mutually exclusive, should be able to be awarded in addition to monetary remedies and that their award should not necessarily reduce an award of damages.[428]

Submissions

326. The respondents that supported the cause of action agreed that a broad range of remedies should be available at the court's discretion. These remedies included declarations, monetary compensation (including exemplary damages), an account of profits, injunctions, retractions, corrections, apologies, delivery up of material obtained by or derived from the

425 VLRC Final Report, Recommendation 29, 163.
426 ALRC 2014 Report, 219 [12.1]-[12.2], 220 [12.8].
427 Ibid 220 [12.8].
428 Ibid.

invasion of privacy and forfeiture orders. Dr Normann Witzleb supported the inclusion of a provision for 'such other relief as the court considers necessary in the circumstances'.[429]

327. The Australian Privacy Foundation singled out the remedies of apologies and retractions as having a valuable function in acknowledging wrongdoing, and for this reason suggested that they be accompanied by a requirement of 'prominent publication'.[430]

328. The Law Society of South Australia noted the need for consideration to be given to the interaction between the ability of a court to order delivery up of material obtained by or derived from the invasion of privacy and emerging technologies.[431] For example, where material has been posted on a social media website, while it may not be possible to order the delivery up of the material (which is permanently retained), an effective remedy might be to order that the defendant 'remove from view' the offending material.[432]

329. The ability of the court to issue injunctions to prevent an invasion of privacy or the disclosure of information obtained via an invasion of privacy was supported by multiple respondents. However, one noted that, with respect to the latter, care would need to be taken to ensure that the interest in privacy is effectively balanced with the interest in freedom of expression. A respondent expressly opposed to this, ASTRA, was of the view that such a power is neither appropriate nor necessary on the basis that Subscription Television Broadcasters already face significant sanctions for breaches of privacy requirements.[433] However, as this reasoning does not apply beyond Subscription Television Broadcasters it would appear that such concerns are better considered either through an exemption or under a defence.

330. ASTRA also expressed opposition to the ability of the court to make a declaration of wrongdoing. This was on the basis that the Australian Communications and Media Authority already has powers to publish findings of breaches.[434] However, like ASTRA's

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429 Dr Normann Witzleb, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 10 February 2014, 41.

430 Australian Privacy Foundation, Submission to Australian Law Reform Commission, *Inquiry into Serious Invasions of Privacy in the Digital Era - Issues Paper*, November 2013, 9, attached to and forming part of Australian Privacy Foundation, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.

431 Law Society of South Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 13 March 2014, 25.

432 Ibid.

433 ASTRA Subscription Television Australia, Submission to Australian Law Reform Commission, *Inquiry into Serious Invasions of Privacy in the Digital Era Issues Paper*, 20 November 2013, 12, referred to in ASTRA Subscription Television Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.

434 Ibid 13.

injunction argument, this rationale does not extend beyond those subject to that and similar regimes. It would therefore appear that such concerns are better considered either through an exemption or under a defence.

331. Exemptions and defences are dealt with in Part 12 of this Report, and those recommended by the Institute are unlikely to address the conduct raised by ASTRA in the two submissions referred to above.

The Institute's Views

332. As the discussion set out earlier in this Report demonstrates, invasions of privacy can take many forms and the factual and legal circumstances in which they might arise are broad and difficult to define or predict. This is reflective of the very nature of dignitary interests and personal autonomy that the cause of action is directed at protecting, as well as the rapid pace of technological development. Given the breadth of the circumstances in which an invasion of privacy could occur, the Institute considers that it is appropriate for the court to be able to choose from a broad variety of remedies to enable it to remedy an invasion of privacy in a way that is appropriate to the factual situation before it. The courts are skilled in awarding remedies appropriate to the circumstances of the case.

333. The Institute considers that the statutory remedies available for an invasion of privacy should include:

- account of profits;
- injunctions;
- orders of correction or apology;
- delivery up (including an order to take down);
- declarations; and
- damages.

334. The statute should expressly include any other relief that the court considers appropriate in the circumstances. The Institute further considers the statute should expressly permit the court to award as many of these remedies as required by the circumstances of the case to overcome the limits of the common law and equity in this respect. The ordinary rules regarding the enforcement of judgments and service of subpoenas interstate under the *Service and Execution of Process Act 1992* (Cth) would apply.

335. The Institute discusses each of the above remedies in turn, except for damages, which are addressed separately later in this Report.

Account of profits

336. This is a remedy most commonly available and sought in actions for breach of confidence, breach of trust and fiduciary duty and infringement of intellectual property rights.[435] An order for account of profits requires a defendant to give up to the plaintiff the profit of his or her wrongdoing. The defendant is 'accounting' to the plaintiff for the profits of the wrong. There need not be any actual loss suffered by the plaintiff, only a profit gained by the defendant.[436] At general law, an account of profits is an alternative remedy to compensatory damage − a plaintiff must choose between the two.[437]

337. The Institute is of the view that this remedy should be available to provide protection to plaintiffs from invasions of privacy which generate a profit. It could be used where the profit obtained by the defendant from the invasion of privacy exceeds the plaintiff's loss.

Injunctions

338. Injunctions can be negative or positive. Negative injunctions restrain or prohibit a defendant doing a particular act or thing. Positive injunctions require or compel the defendant to do a particular act or thing. A further distinction is between interlocutory and final injunctions. An interlocutory injunction will preserve the *status quo* until the rights of the parties can be determined, however, at general law a plaintiff must *first* satisfy the court that there is a 'prima facie case' and then the court must consider whether 'the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.'[438] A final injunction will only be granted once the rights of the parties have been fully determined by a court.

339. An injunction may be one of the most effective ways for a plaintiff to protect their privacy rights. One example where it could be used would be to prevent a person from selling or posting on the internet sexually incriminating photographs of the plaintiff which were taken by the defendant. However, the Institute recognises that there is a particularly acute tension with freedom of speech in this space. For example, the footage obtained for the

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435 Wayne Covell, Keith Lupton and Jay Forder, *Principles of Remedies* (LexisNexis, 5th ed, 2012) 220-224 [6.1], [6.3]-[6.5].

436 See *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557.

437 Ibid 559.

438 *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618, 623.

recent television program exposing animal cruelty in the greyhound industry may, on the face of it, have been an invasion of the participants' privacy. However, there was arguably also a public interest in the information about the alleged animal cruelty being published. The same might be said for a newspaper that proposes to publish images of a person's backyard taken by a neighbour in circumstances where that person is a well-known dog breeder and the images depict the person's dogs being subject to cruelty.

340. In the Institute's view, this tension is best addressed by arming the courts with a wide range of remedies and allowing the courts to consider the competing interests as part of their determination of the appropriate remedy to award in the circumstances of the particular case. To ensure this occurs, the Institute recommends that the statute expressly require courts to consider all relevant competing public interests (including, but not limited to, freedom of expression) prior to granting an injunction as a remedy for an invasion of privacy. Consideration by the courts of the competing public interests will be particularly relevant where an injunction is sought prior to trial as the information may have lost its relevance or importance by the end of the trial. However, consideration of such interests is relevant to all injunctions and should, therefore, not be limited to injunctions sought before trial.

Orders of correction or apology

341. Statutes can empower courts to order that a defendant 'correct' a matter or 'apologise' to the plaintiff on the terms required by the court. The Institute considers that in the context of invasions of privacy, such orders may be an effective remedy to right the wrong. Such orders may vindicate the emotional distress caused by the invasion of privacy. Therefore, the statute should include that courts can order that the defendant publish a correction or provide an apology in relation to the invasion of privacy.

Delivery up

342. Delivery up is an equitable remedy involving the delivery of documents or other goods into the custody of the court for the purpose of cancellation or destruction.[439] It has been most commonly used to order delivery up and destruction of goods that infringe intellectual property where there has been a breach of confidence. It is evident that this remedy would be appropriate in some circumstances in which there has been an invasion of privacy, such as where a defendant is in possession of photographs or film which were

[439] Wayne Covell, Keith Lupton and Jay Forder, *Principles of Remedies* (LexisNexis, 5th ed, 2012) 392 [14.1].

obtained through an invasion of privacy, and where the defendant has indicated an intention to disseminate that material. The Institute agrees with the recommendation made by the ALRC in its 2014 report that this remedy should extend to an order to take down content from the internet.[440]

Declarations

343. A declaration is an order of the court that authoritatively states the legal rights and obligations between the parties to the dispute. In addition to providing the parties with certainty about their rights and obligations, such a remedy may be useful for a person whose privacy has been invaded, as it would act as a public declaration that they have been wronged by the defendant.

Recommendation 23: The remedies available for an invasion of privacy should include:

- account of profits;
- injunctions;
- orders of correction or apology;
- delivery up (including orders to take down);
- declarations;
- damages; and
- any other relief that the court considers appropriate in the circumstances.

Recommendation 24: The statute should provide that a court may award as many different remedies for an invasion of privacy as it sees fit.

Recommendation 25: The statute should expressly require courts to consider all relevant competing public interests (including, but not limited to, freedom of expression) prior to granting an injunction as a remedy for an invasion of privacy.

[440] ALRC 2014 Report, 251 [12.149].

Damages

344. Damages are a remedy granted by the court to compensate the plaintiff for injuries caused by the defendant's wrong.[441] The damages awarded are designed to place the plaintiff, insofar as money can, back in the position that he or she would have been in had the wrong not occurred.[442]

345. As the reviews of the ALRC, NSWLRC and the VLRC have reflected, it is widely recognised that damages would be a key remedy for a person aggrieved by an invasion of his or her privacy. This is also consistent with the submissions received in this review. However, there are two possible limitations to be placed on this remedy. First, whether a court should have power to order aggravated or exemplary damages (as a separate head of damage), and secondly, whether there should be a limit on the amount of damages that can be awarded by a court. It is also necessary to consider whether the statute should provide guidance to the court on *how* to assess damages in a particular case.

Types and Assessment of Damages

The Issue

346. There are four types of damages:

- Nominal damages - a token sum which is awarded as recognition of the wrong, generally in circumstances where the plaintiff cannot prove that he or she suffered harm.
- Compensatory damages - an amount awarded to compensate a plaintiff for his or her injury, loss or damage.
- Aggravated damages - a greater amount of compensation awarded where the damage done to the plaintiff was made worse (or aggravated) by the way it was done.
- Exemplary damages - an amount over and above the damages that would otherwise be awarded where the defendant's behaviour was so deliberately bad that the court considers that the amount the defendant must pay to the plaintiff should reflect a degree of punishment and deterrence as well as compensation.

[441] Wayne Covell, Keith Lupton and Jay Forder, *Principles of Remedies*, (LexisNexis, 5th ed, 2012) 12 [2.1].
[442] See *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39; *Haines v Bendall* (1991) 172 CLR 60, 63.

347. Damages can compensate for economic loss (monetary loss and expenditure incurred) and non-economic loss (injuries to the mind and body, such as pain and suffering, and humiliation).

348. The main exception to the rule that damages are intended to 'compensate' the plaintiff is the rare case where 'exemplary' or 'punitive' damages are awarded. Exemplary damages are not focussed on the plaintiff's loss but designed to punish the defendant and deter the defendant and others from future wrongdoing.

349. Generally it is only the criminal law which is concerned with punishment and deterrence, however in rare cases where a defendant's 'conscious wrongdoing'[443] has been so 'high-handed, insolent, vindictive or malicious'[444] exemplary damages have been awarded in civil matters. However, this has been strongly criticised as being unjust, because punishment is more appropriately left to the criminal law where the standard of proof is higher and where there are further safeguards for defendants.[445]

Submissions

350. In ASTRA's submission, it questioned the purpose of monetary awards for invasions of privacy as it said that such awards are unlikely to put the plaintiff in the position that the plaintiff would have been in had the invasion not occurred.[446] ASTRA submitted that if damages are to be included as a remedy, courts should reduce the award to take into account any remedial steps already taken by the defendant.[447]

351. Several respondents gave particular consideration to the issue of exemplary damages and supported the provision of a right to award such damages in exceptional circumstances. This was on the basis that such an award may be warranted in some exceptional cases and that therefore, not allowing such awards may leave gaps in the court's ability to provide redress in circumstances of egregious invasions of privacy. One respondent noted that exemplary damages would be appropriate where a defendant invaded the plaintiff's privacy with a profit-making motive, and an account of profits was unavailable.

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443 *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71, 77.

444 See *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 129, 138-139.

445 See further NSWLRC Consultation Paper, 190 [8.15] and the authorities there cited.

446 ASTRA Subscription Television Australia, Submission to Australian Law Reform Commission, *Inquiry into Serious Invasions of Privacy in the Digital Era Issues Paper*, 20 November 2013, 11, referred to in ASTRA Subscription Television Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.

447 Ibid.

Institute's Views

352. The Institute is of the view that damages are an essential remedy for actions for invasions of privacy. The Institute reiterates its recommendation 12 above, that the kinds of harm or loss which are compensable should be cast as broadly as possible and should at least include emotional distress. Accordingly, plaintiffs should be compensated for damage to property and other economic loss, as well as for non-economic loss, such as physical or psychological injury, emotional distress (including humiliation, anxiety, distress and embarrassment) and the award may be aimed, in certain circumstances, at vindication of the plaintiff's privacy rights.

353. The Institute considers that courts should draw on established principles of tort law when determining the appropriate award of damages (and should consider awards in analogous cases for other torts). In doing so, the Institute agrees with the ALRC's recommendation in its 2014 report that the statute should contain the following non-exhaustive list of considerations relevant to the determination of the award of compensatory damages:

> (a) whether the defendant [has] made an appropriate apology to the plaintiff;
>
> (b) whether the defendant [has] published a correction;
>
> (c) whether the plaintiff [has] already recovered compensation, or has agreed to receive compensation in relation to the conduct of the defendant;
>
> (d) whether either party [has taken] reasonable steps to settle the dispute without litigation; and
>
> (e) whether the defendant's unreasonable conduct following the invasion of privacy, including during the proceedings, [has] subjected the plaintiff to particular or additional embarrassment, harm, distress or humiliation.448

354. The Institute considers that including these considerations will address the concerns raised by respondents and will appropriately protect defendants.

355. Some of the above factors will increase the award (aggravating factors) and others will decrease the award (mitigating factors). The Institute is of the view that these aggravating and mitigating factors should be taken into account when determining the award of compensatory damages.

356. If aggravated damages are to have their own head of damage, in many cases there would be substantial overlap between the conduct considered in factor (e) to determine the award of compensatory damages and that considered to warrant an award of aggravated damages.

448 ALRC 2014 Report, Recommendation 12–2.

For this reason, the Institute does not support the inclusion of aggravated damages as a separate head of damage. This approach is consistent with that adopted by the NSWLRC[449] and by the ALRC in its 2014 report.[450]

357. In relation to the award of exemplary damages, the Institute is persuaded by the submissions it received on this point. The Institute acknowledges that, in the main, punishment is properly the province of the criminal law. However, circumstances do arise in which it is appropriate for the civil law to punish a defendant through the award of exemplary damages. Of course, exemplary damages also serve the purpose of deterring defendants from engaging in outrageous or grossly offensive conduct of a similar nature. The Institute therefore recommends that the statute should allow courts to award exemplary damages in exceptional cases. In making this recommendation, the Institute recognises that courts are experienced in assessing whether the circumstances of the case warrant such an award, usually where there is an intentional element to the harm suffered by the plaintiff. The Institute considers that such awards should, and will, be made rarely.

358. There is an argument that by recommending the availability of an award of exemplary damages, an inconsistency arises with defamation law (where exemplary damages are unavailable) thereby encouraging plaintiffs to 'jurisdiction shop'. However, later in this Report, the Institute has recommended that the maximum amount of damages for non-economic loss that can be awarded for an invasion of privacy should be consistent with the limit imposed by the *Defamation Act 2005* (SA).[451] The Institute recommends that in addition to non-economic loss, this limit should capture an award of exemplary damages. Such recommendation should reduce the likelihood of plaintiffs 'jurisdiction shopping' because plaintiffs would be unable to obtain a much higher award under the privacy cause of action. In any event, the Institute does not consider that 'jurisdiction shopping' is a significant issue given that many invasions of privacy would not be amenable to an action in defamation because of the complete defence of truth in defamation law and because actionable invasions of privacy are focussed on misuse of private information and intrusion upon seclusion, and not on the other aspects of privacy (being appropriation of someone's name or likeness, or painting someone in a false light).[452]

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449 NSWLRC Final Report, 50 [7.10].

450 ALRC 2014 Report, Recommendation 12-3.

451 See recommendation 31 of this Report.

452 Here the Institute is referring to the four limbs articulated by William Prosser in his taxonomy on the law of torts: William L Prosser, 'Privacy' (1960) 48 *California Law Review* 383.

359. In relation to nominal damages, the Institute considers that such damages should be available, but recognises that it is likely they will rarely be awarded. This is because most invasions of privacy which are sufficiently serious to be actionable under the cause of action recommended in this Report will result in some form of compensable harm.

Limits on Awards of Damages

The Issue

360. Ceilings are often placed on the amount that can be awarded to a plaintiff, particularly for non-economic loss.[453]

361. For example, in South Australia:

- section 33(1) of the *Defamation Act 2005* (SA), provides that the maximum amount of damages for non-economic loss that may be awarded in defamation proceedings is $250 000, subject to an order by the court under s 33(2). And s 32 of the Act provides that the court is to ensure that there is an 'appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded';
- although not strictly a 'cap', s 51 of the *Civil Liability Act 1936* (SA) provides that damages for non-economic loss will only be available in limited circumstances for personal injury claims in South Australia and s 52 operates to limit the damages that can be awarded. Those damages are strictly assessed according to a scale which provides for a compensable sum to be arrived at using a mathematical calculation by reference to the severity of the injury, on a scale of 0 to 60. A different scale, calculations and rules apply to damages awards for personal injuries arising from *Motor Vehicles Act 1959* (SA) claims. Further, s 53 imposes limitations on when damages can be awarded for mental harm, and s 54 limits the damages payable for loss of earning capacity;
- s 58 of the *Return to Work Act 2014* (SA) provides that non-economic loss is only compensable in relation to a permanent impairment, and is calculated in accordance with the rules set out in the Act and regulations.

[453] Section 4 of the *Return to Work Act 2014* (SA) and s 3 of the *Civil Liability Act 1936* (SA) both define 'non-economic loss' to mean pain and suffering, loss of amenities of life, loss of expectation of life and disfigurement. The definition in the *Return to Work Act 2014* (SA) also includes 'any other loss or detriment of a non-economic nature'.

362. The Issues Paper asked whether there should be a limit on the monetary compensation a person can be awarded in a successful action for invasion of personal privacy.[454]

Law Reform Agencies' Recommendations

363. In its 2008 report, the ALRC did not recommend a statutory cap on damages awards. In its review, the VLRC concluded that given 'the modest sums likely to be awarded in cases of this nature … a statutory cap on damages is unnecessary'.[455]

364. In contrast, the NSWLRC recommended that the maximum amount of compensation for non-economic loss that a court may order for invasion of privacy under its proposed Bill was to be $150,000.[456]

365. The ALRC in its 2014 report recommended a cap on damages. The ALRC recommended that the cap should apply to the sum of both damages for non-economic loss and any exemplary damages, but not to economic loss. The ALRC recommended that the cap should not exceed the cap on damages for non-economic loss in defamation.[457]

Submissions

366. The respondents were divided as to whether there should be limits on the monetary compensation awarded for a successful claim. Those respondents proposing a monetary cap did so either for the purpose of easing concerns that a privacy cause of action would give rise to actions motivated by greed rather than genuine harm, or in order to ensure consistency with defamation law. This latter reasoning led a respondent to propose a cap of $250,000 for non-economic loss.

367. On the other hand, several respondents were of the view that there is no need for limits on monetary compensation. One respondent submitted that this is due to the necessity of considering matters on a case-by-case basis, particularly given the breadth of circumstances which can give rise to an invasion of privacy. A different respondent considered that the rationale for limits in other areas of law − to rein in existing practices − does not exist in this area, as demonstrated by the moderate awards seen overseas.

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454 This was question 21 in the Issues Paper. Question 21 also asked: 'If so, what should they be and why?'.
455 VLRC Final Report, 163 [7.219].
456 NSWLRC Final Report, 51-52 [7.13].
457 ALRC 2014 Report Recommendation 12–5, [12.91].

Institute's Views

368. The Institute has arrived at the view that a cap on non-economic loss should be imposed. Awards of damages for non-economic loss resulting from invasions of privacy are likely to be calculated on a similar basis to interferences with reputational interests. The Institute therefore recommends that the cap on damages for non-economic loss should be consistent with the cap imposed by s 33(1) of the *Defamation Act 2005* (SA).

369. Such a cap would also prevent plaintiffs from choosing one jurisdiction over the other on the basis of the size of the award of damages in the rare circumstances that a plaintiff is able to seek redress under either defamation law or under the cause of action recommended in this Report.

370. For the reasons set out at paragraph 358 above, the Institute considers that the cap should apply to both the combined total of the award of non-economic loss and the award of exemplary damages (if any). However, the cap should not apply to economic loss and it should not affect the award of other remedies, such as injunctions and declarations.

Recommendation 26: The statute should require courts to draw on established principles of tort law when determining the appropriate award of damages (and should consider awards in analogous cases for other torts).

Recommendation 27: The statute should contain the following non-exhaustive list of considerations relevant to the determination of the award of compensatory damages:

(a) whether the defendant has made an appropriate apology to the plaintiff;

(b) whether the defendant has published a correction;

(c) whether the plaintiff has already recovered compensation, or has agreed to receive compensation in relation to the conduct of the defendant;

(d) whether either party has taken reasonable steps to settle the dispute without litigation; and

(e) whether the defendant's unreasonable conduct following the invasion of privacy, including during the proceedings, has subjected the plaintiff to particular or additional embarrassment, harm, distress or humiliation.

Recommendation 28: The statute should prevent courts from awarding aggravated damages as a separate head of damage.

Recommendation 29: The statute should expressly allow courts to award exemplary damages in exceptional cases.

Recommendation 30: The statute should expressly allow courts to award nominal damages.

Recommendation 31: The statute should impose a maximum amount of damages that may be awarded for the combined sum of the award for non-economic loss and the award for exemplary damages (if any). The maximum amount should be consistent with the maximum imposed by s 33(1) of the *Defamation Act 2005* (SA), which is currently $250,000.

PART 14

Time Limitation of Action

The Issue

371. The law provides time limits on when legal proceedings can be commenced. This is referred to as 'limitation of actions'. Different time limits apply depending on the nature of the claim. Most often, the time period commences from the time of the act or omission that the plaintiff is complaining about. Alternatively, the time period can commence from when the plaintiff became aware of the act or omission that constitutes the complaint, or from when the relevant harm or loss arose.

372. If the time period expires before a plaintiff commences an action in court, the plaintiff may be prevented from pursuing any action or seeking a remedy regardless of the merits of the claim. However, there is often a power for the court to extend the time limit in certain circumstances - usually where the plaintiff can demonstrate that there was good reason for the plaintiff not bringing the action within the time limit.

373. The Issues Paper asked whether there should be a time limit on suing for invasions of personal privacy.[458]

Recent Law Reform Agencies' Recommendations

374. The NSWLRC recommended that there be a limitation period of one year for its cause of action for invasion of privacy, with the court able to extend this to three years, mirroring the limitation periods for defamation.[459] The NSWLRC concluded that because damage was not an essential ingredient of its privacy cause of action, time should run from the time of the defendant's conduct.[460] Given that an invasion might generally be expected to affect the plaintiff immediately, and that if it were serious enough, the plaintiff should act quickly to avoid any escalation of the injury, there was no need for the standard limitation period to be longer than one year.[461] The NSWLRC noted that the ability to extend the period to three years should arise only where the court is satisfied that 'it was not reasonable in the circumstances' for the plaintiff to have taken action within that year.[462]

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458 This was question 20 in the Issues Paper. Question 20 also asked: 'If so, why, and what should that time period be and when should it start?'.

459 NSWLRC Final Report, 70-71 [9.1].

460 Ibid 71 [9.2].

461 Ibid.

462 Ibid.

375. By contrast, the VLRC proposed a three year limitation period, running from the date of the defendant's conduct, concluding that the period should be consistent with causes of action for personal injuries and with the outer limit of defamation proceedings.[463]

376. In its 2014 report, the ALRC recommended that a person should be able to bring a claim before either one year from the date the plaintiff became aware of the invasion of privacy or three years from the date on which the invasion of privacy occurred.[464] The ALRC also recommended that courts be given a discretion, in exceptional circumstances, to extend this limitation period but that the extension cannot go beyond six years from the date of the invasion.[465] The ALRC stated that these recommendations were aimed at balancing the interests of both parties to a proceeding by allowing plaintiffs adequate time to appreciate and manage the emotional and financial repercussions of a serious invasion of privacy, while providing certainty for defendants.[466]

Submissions

377. All respondents that addressed this question were in favour of the imposition of a time limit on actions for invasion of privacy, however, those respondents offered different reasons for the imposition of a limit. The vast majority of respondents identified the need for consistency with other actions, such as personal injury and defamation law, as the impetus for a time limitation. One respondent, however, was of the view that a time limitation was instead justified by the fact that genuine loss is likely to be felt reasonably immediately after any invasion.

378. The respondents also differed in terms of the length of the period and from when it should run. Three of the respondents proposed a limitation period of one year. Amongst these respondents two specified that the time limit should run from either the time the plaintiff becomes aware of the invasion or the time harm is suffered as a consequence of the invasion, whereas the third identified the relevant starting point as the time the invasion in fact occurs. The reasoning of the first two respondents was that persons might not become aware of an invasion until a considerable time has elapsed from the invasion and to ensure consistency with defamation law, respectively. The third position was justified on the basis that it would ensure that persons do not intentionally prolong the period of disclosure in an attempt to increase the potential damages claim.

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463 VLRC Final Report, 167 [7.248], Recommendation 33.
464 ALRC 2014 Report, Recommendation 10–4.
465 Ibid Recommendation 10-5.
466 Ibid 177-178 [10.76].

379. An alternative proposal was a three-year limitation period running from the time the plaintiff first becomes aware of the invasion of privacy. This was based on the need to ensure consistency with other actions, but also on the view that a time limit of one year may be too restrictive in some circumstances. Finally, one respondent failed to specify a time period but did note that whatever period was chosen should run from the date on which the person becomes aware of the invasion and should be extendable upon the court being satisfied that a reasonable and relevant claim still exists.

The Institute's Views

380. In South Australia, actions founded on contract and tort are generally to be commenced within six years.[467] However, there is a limitation of one year for defamation actions, with the ability of an extension to three years.[468] Actions in relation to personal injuries must be commenced within three years.[469] Generally, the time period will run from the date that the cause of action accrued.

381. The Institute considers that a limitation period should balance the interests of plaintiffs (in being afforded sufficient time to discover a breach and 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). Having considered the various approaches under the *Limitation of Action Act 1936* (SA) as well as those taken by the ALRC, the NSWLRC and the VLRC and those proposed by respondents to the Issues Paper, the Institute has reached the view that in respect of a privacy cause of action, this balance is best achieved by requiring a plaintiff to bring a claim within one year from the date the plaintiff became aware of the invasion of privacy (as long as the claim is commenced within six years of the date of the invasion). The Institute considers that this should be open, in exceptional circumstances, to extension by the court, but not beyond six years from the date the invasion occurred.

382. The Institute agrees with some respondents to the Issues Paper as well as with the observation of the ALRC, that in most cases of invasion of privacy a plaintiff will become aware that their privacy has been invaded soon after it occurs. [470] Providing a reasonable but limited time period of one year will avoid uncertainty for defendants and difficulties in

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467 *Limitation of Actions Act 1936* (SA) s 35.
468 *Limitation of Actions Act 1936* (SA) s 37.
469 *Limitation of Actions Act 1936* (SA) s 36.
470 ALRC 2014 Report, 178 [10.77].

preparing and running cases. A number of the available remedies will be most effective in the 12 months following an invasion of privacy.

383. For an action at common law in breach of confidence and trespass, the limitation period is six years from the date that the cause of action arose. The Institute considers that the cause of action recommended in this Report is more analogous to those causes of action than to an action in defamation, largely because in many circumstances giving rise to an action for an invasion of privacy, an action in defamation would be rendered futile due to the defence of truth. Therefore, the Institute considers that the extension period should be six rather than three years. The availability of an extension to up six years from the date of the invasion will allow plaintiffs to seek leave from the court to bring a cause of action in circumstances where they have been so distressed by the invasion that they have not been able to turn their mind to commencing legal proceedings within 12 months of them becoming aware of the invasion.[471]

384. The limitation period recommended by the Institute ensures protection for plaintiffs, such as those who have had their privacy invaded through covert surveillance, by allowing them a reasonable time to commence proceedings after becoming aware of the invasion rather than from the date of the invasion. Further, providing a six year cap from the date of the invasion on any claims creates certainty for defendants.

Recommendation 32: The statute should allow a plaintiff to bring a claim within the earlier of one year from the date the plaintiff became aware of the invasion of privacy or six years from the date of the invasion of privacy. The one year limitation should be open, in exceptional circumstances, to extension by the court, but not beyond six years from the date the invasion occurred.

[471] This is consistent with the approach of the ALRC at 180 [10.90] of its 2014 report.

PART 15

Accessibility of the Action

The Issue

385. The Institute recognises that for a cause of action for invasion of privacy to be effective, it needs to be made as accessible as possible. The Issues Paper sought submissions on what could be done to make this cause of action accessible and affordable to those whose personal privacy is invaded.[472]

386. There are a several factors which will affect a person's ability to commence and run legal proceedings. One factor is which courts or tribunals may hear those proceedings (the 'forum'). Another key factor is who is liable to pay the costs of the proceedings. This Part addresses these two issues.

The Forum

Recent Law Reform Agencies' Recommendations

387. Although the NSWLRC did not address this issue directly, the Bill it proposed did not expressly seek to limit the jurisdiction to hear claims to any particular court or tribunal.

388. The VLRC recommended that jurisdiction to hear claims for invasion of privacy should vest exclusively in the Victorian Civil and Administrative Tribunal (VCAT),[473] because the VCAT was designed to be more accessible than the courts, observing that the VCAT 'seeks to be a speedy, low-cost tribunal where legal costs do not outweigh the issues at stake.'[474] The VLRC considered that the experience in other jurisdictions suggested that damages awarded in cases of this nature were generally low, and that the sums involved did not justify the costs associated with civil litigation in the courts.[475]

389. In its 2014 report, the ALRC recommended that Commonwealth, State and Territory courts should have jurisdiction to hear an action for serious invasions of privacy.[476] The

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472 This was question 24 in the Issues Paper. Question 24 also contained the following examples:
(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?

473 Established under section 8 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic).

474 VLRC Final Report, 164 [7.226], Recommendation 31.

475 Ibid 164 [7.226].

476 ALRC 2014 Report, Recommendation 10–1.

ALRC considered that the court selected by the plaintiff is likely to depend on the jurisdictional limits of the various courts and the nature of the remedy sought.[477]

390. The ALRC also recommended that consideration should be given by State and Territory Governments to enacting legislation conferring jurisdiction to appropriate tribunals.[478] The ALRC considered that any conferral of power on state and territory tribunals would need to take into account their significantly varying powers and nature.[479]

Submissions

391. The Australian Privacy Foundation advocated for parties to have the maximum possible choice of forum to hear claims for invasion of privacy,[480] whilst ASTRA submitted that the courts would be the most appropriate forum.[481] The Australian Privacy Foundation, albeit in the context of a Commonwealth cause of action, noted that this would have the effect of minimising costs and procedural barriers.[482] The Law Society submitted that the appropriate forum should be determined dependent upon the value of the claim.[483] It also noted that there was also the possibility of matters being heard in SACAT, but (at the time of making the submission) it was too early to make any definitive statement regarding that avenue.[484]

The Institute's Views

392. The Institute believes that the selection of an authoritative body, be it a statutory officer, tribunal or court, to exercise the proposed jurisdiction is an important decision. The efficacy of the proposed tort, which involves the adjudication of the competing interests and right, requires the careful selection of the most appropriate body. In assessing the issue of what forum would be appropriate the Institute has considered speed, cost and the

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477 Ibid 164 [10.9].
478 Ibid Recommendation 10–1.
479 Ibid 168 [10.25].
480 Australian Privacy Foundation, Submission to Department of Prime Minister and Cabinet, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, 4 November 2011, 10, attached to and forming part of Australian Privacy Foundation, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.
481 ASTRA Subscription Television Australia, Submission to Australian Law Reform Commission, *Inquiry into Serious Invasions of Privacy in the Digital Era Issues Paper*, 20 November 2013, 14, referred to in ASTRA Subscription Television Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.
482 Australian Privacy Foundation, Submission to Department of Prime Minister and Cabinet, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, 4 November 2011, 10, attached to and forming part of Australian Privacy Foundation, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 14 February 2014.
483 Law Society of South Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 13 March 2014, 26.
484 Ibid.

overall capacity to enforce any determination. The latter point acknowledges the constitutional arrangements that surround the exercise of what would be judicial power.

In terms of flexibility and cost, an analogy could be drawn between the powers exercised by statutory officer holders, such as the Electoral Commissioner. Under the *Electoral Act 1985* (SA) the Commissioner can request that misleading or inaccurate material be removed.[485] Further, the Commissioner can apply to the Supreme Court to make orders to enforce breaches of the Act.[486] While this is an attractive option, especially in the case of requests to take down or remove material that seriously invades the privacy of an individual, there is currently no obvious statutory officer to whom this jurisdiction can readily be conferred.[487] The establishment of a Privacy Commissioner in South Australia would provide a partial solution though it would involve a significant commitment of resources. However, the establishment of a new statutory officer, or the conferral of jurisdiction on an existing office holder, would not overcome the constitutional limitations regarding the enforcement of non-consensual decisions.[488] While there may be merit in the establishment of a Privacy Commissioner, such a decision should not be seen as a precondition to the implementation of the primary recommendations in this Report.

An alternative to the statutory officer model is to confer the jurisdiction on SACAT.[489] That tribunal is a flexible forum which is able to adapt to the needs of the particular case. It seeks to resolve disputes as quickly as possible, while keeping costs to a minimum. These, and other objectives, recommend SACAT as a possible forum. However, there are important constitutional issues that need to be considered before this option is exercised. SACAT was not established as a Court.[490] It is not bound by the rules of evidence and may adopt practices consistent with the determination of the merits of the case before it.[491] The High Court of Australia has considered these and other features when determining whether a tribunal is or is not a court.[492] Undoubtedly the structure and authority of the body will provide some indication as to its status as either an executive body or a court exercising judicial power. Of some significance is the nature of the jurisdiction that is

485 *Electoral Act 1985* (SA) s113(4).
486 *Electoral Act 1985* (SA) s113(5).
487 The existing statutory officers in South Australia, such as the Ombudsman or the Independent Commissioner Against Corruption, deal with complaints against government agencies or exercise public power rather than matters that could exclusively involve private actors.
488 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 185 CLR 245
489 *South Australian Civil and Administrative Tribunal Act 2013* (SA).
490 South Australia, *Parliamentary Debates*, House of Assembly, 11 September 2013, 6849 (John Rau); South Australia, *Parliamentary Debates,* Legislative Council, 31 October 2013, 5505 (Gail Gago).
491 *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 39(1)(b).
492 See, for example, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

being conferred upon it.[493] Given these constitutional complexities, the existing and anticipated jurisdiction of SACAT, the Institute believes there are strong arguments against making SACAT the jurisdiction to hear claims for invasion of privacy.

393. Ultimately, on the question of which forum, the Institute agrees with ASTRA's submission that the courts are the most appropriate forum for the cause of action recommended in this Report. The Institute recommends that it should be open to a plaintiff to bring an action for an invasion of privacy in the South Australian Magistrates Court, District Court or Supreme Court. Making these different courts available will provide the necessary flexibility for plaintiffs given the wide range of circumstances in which an invasion of privacy can arise and will allow plaintiffs to select the appropriate court having regard to the value of the claim, the position of the plaintiff and the issues to be decided in the case.

Liability for Costs

The Issue

394. The question of how the costs of the parties to litigation are paid is often a difficult and complex question. The 'general rule' is that the losing party should pay the costs of the winning party. This can present a bar to some plaintiffs, where the potential sum of money to be awarded in damages is small compared to the potential costs of running the action. This can mean that sometimes only wealthy people are in a position to take the risk of exposing themselves to these adverse cost consequences. In some instances, this 'general rule' is statutorily displaced.

395. It is also worth noting that legal aid is generally not available in civil matters between two individuals. Under the current scheme, it is highly unlikely that a plaintiff in making a claim for an invasion of privacy would be granted legal aid funding. This is so even if the plaintiff is unable to afford to commence or run legal proceedings and even if the plaintiff had good prospects of success. In relation to issues involving State laws, most legal aid funding in South Australia is spent on criminal cases where there is a real possibility of the defendant going to gaol, and in child protection matters. Accordingly, the impact of high costs of commencing and running an action for invasion of privacy has extra significance and it becomes even more important that the forum, whatever it is, is accessible to plaintiffs.

[493] *Wainolu v New South Wales* (2011) 243 CLR 181. See also *Qantas Airways Limited v Lustig* [2015] FCA 253.

Recent Law Reform Agencies' Recommendations

396. The VLRC recommended that the 'general rule' be displaced for actions for invasions of privacy under the cause of action that it proposed.[494] The VLRC concluded:

> The fairest way to deal with costs in cases of this nature is to start from the position that each party should be responsible for their costs but to permit departures from this presumption when it is fair to do so. This rule guards against the abuse of legal process because the decision-maker can award costs against a plaintiff who takes frivolous proceedings and against a defendant who seeks to exhaust the resources of the plaintiff by unnecessarily prolonging the case.[495]

397. Although the ALRC in its 2014 report agreed that courts should have discretion in relation to awards of costs,[496] it took a different approach. The ALRC considered that two options would be appropriate for the court's power with respect to awards of costs:

- The ALRC proposed adopting a section similar to s 43(2) of the *Federal Court of Australia Act 1970* (Cth), which provides that, '[e]xcept as provided by any other Act, the award of costs is in the discretion of the Court or Judge', followed by a list of orders the judge may make.[497]
- Alternatively, the ALRC proposed adopting a section which states that awards of costs should be determined according to the enabling Act of each court or tribunal that is given jurisdiction to hear the action.[498] The ALRC considered that this would allow plaintiffs to consider the court or tribunal's particular powers with respect to costs when determining the forum in which they will bring their action.[499]

398. The ALRC based its recommendations on issues of access to justice, as well as acknowledging the purpose of cost orders to deter vexatious or unmeritorious claims. It further considered that actions under this tort should be dealt with consistently with actions brought in the forum for other intentional torts or other analogous actions.[500]

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494 VLRC Final Report, 163 Recommendation 30 which referred to s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).
495 VLRC Final Report, 163 [7.222].
496 ALRC 2014 Report, 258 [12.177]
497 Ibid 258 [12.178]-[12.179].
498 Ibid 259 [12.182].
499 Ibid 259 [12.182].
500 Ibid 259-260 [12.183]-[12.187].

Submissions

399. The Law Society of South Australia was of the view that costs should be determined in accordance with the relevant rules of the court or tribunal in which the matter is heard.[501]

Institute's Views

400. The Institute agrees with the Law Society of South Australia's submission on this issue. As plaintiffs have a variety of forums in which they can bring their claim, the Institute considers that the rules for the award of costs would be considered by plaintiffs in selecting the appropriate forum for their claims. An award of costs is always at the discretion of the courts which are experienced at exercising that discretion.

Recommendation 33: A plaintiff should be able to bring an action for invasion of privacy in the Supreme Court of South Australia, the District Court of South Australia or the Magistrates Court of South Australia.

Recommendation 34: The costs should be determined in accordance with the relevant rules of the court in which the matter is heard.

[501] Law Society of South Australia, Submission to South Australian Law Reform Institute, *A Statutory Cause of Action for Invasion of Privacy*, 13 March 2014, 26-27.

Appendices

1 A statutory cause of action for invasion of privacy: South Australian legislative history

This is a summary of attempts in South Australia to establish an actionable right of privacy.

The first attempt was initiated by recommendations of the South Australian Law Reform Committee in 1973.[502] These recommendations led to the South Australian Labor Government introducing its Privacy Bill on 10 September 1974: a Bill to create a right of privacy and to provide a right of action for an infringement of that right. The Bill was the subject of fierce debate.

The right proposed by the Bill was a right to be free from 'substantial and unreasonable' intrusion upon a person's private affairs, necessarily intending to exclude 'insubstantial and trivial incursions'.[503]

The Bill contemplated a broad concept of privacy 'to allow the law to keep pace with changing social needs'.[504] The definition of privacy was cast broadly enough to allow the courts to preserve a degree of flexibility and 'to decide from case to case, and from time to time, what should or should not enjoy the law's protection'.[505] The definition was criticised by the Liberal Opposition as being 'far too vague',[506] and likely to result in judges taking a subjective approach 'depending on the judge's view of social mores at the time in his opinion'[507] and lead to uncertainty in the law. However, the leader of the Opposition, Dr B Eastick, in opposing the Bill for this reason, appeared to do so with some regret:

> Doubtless, this is one of the most difficult Bills I have been called on to examine during the time I have been in this House. I intend to oppose it, but I will not do so out of hand. It is a measure that requires much consideration before a decision can be arrived at, and I have arrived at that decision because I believe the Bill is far too vague. Definition is so wide as to cause much concern to people in the community who will be affected by the provisions.[508]

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502 Law Reform Committee of South Australia, *Regarding the Law of Privacy,* Interim Report (1973).
503 South Australia, *Parliamentary Debates*, House of Assembly, 10 September 1974, 820 (LJ King).
504 Ibid.
505 Ibid.
506 South Australia, *Parliamentary Debates*, House of Assembly, 8 October 1974, 1334 (ER Goldsworthy).
507 Ibid.
508 South Australia, *Parliamentary Debates*, House of Assembly, 8 October 1974, 1335 (Dr BC Eastick).

A clause was included in the Bill to make it clear that given a choice between the public good and the assertion of a private right, the public good must prevail. The clause provided that in aid of this, the exercise of good faith by a person of any duty or obligation imposed on him or her by law would not be touched upon by the measure.[509] During his second reading speech, the Attorney-General, the Hon LJ King, discussed the need to balance the public interest against an individual's claim for privacy. He said:

> There can be no doubt as to the importance to be attached to truth in a civilised society. But that is not to say that the public is entitled to know all the truth about an individual or a group. Some areas of a man's life are his business alone. Thus the privacy this Bill is designed to protect is that area of a man's life which, in any given circumstances, a reasonable man with an understanding of the legitimate needs of the community would think wrong to invade.[510]

Agreeing with the leader of the Opposition's earlier remarks, another member of the Opposition made it clear that he did not think the proposition set forth by the Attorney-General justified establishing an actionable right of privacy in legislation because its main target would inevitably be the media, and, on balance, more harm than good would come of legislation that might curtail press freedom:

> It is pointless to say that this legislation has not been introduced with a mind to the press and the media generally, because this is the area in which it will have the maximum effect, and it is because it will have the maximum effect in this regard that we must consider what this effect will be, and balance up the possible good to be gained from it with the possible harm that will come from it.[511]

Along the same lines, although more alarmist, was this view expressed by another Opposition member:

> … in any democratic country, the press must have the right to report objectively, but I am fully aware, the same as are other members who have spoken in this debate, that members of the press in this country on various occasions have not acted as they should have acted. … I [cannot], without much reservation, support a measure of this nature. Once any Government takes control of the press, the people receive only the information the

[509] For further explanation see South Australia, *Parliamentary Debates*, House of Assembly, 10 September 1974, 820 (LJ King).
[510] South Australia, *Parliamentary Debates*, House of Assembly, 10 September 1974, 820 (LJ King).
[511] South Australia, *Parliamentary Debates*, House of Assembly, 8 October 1974, 1341 (DO Tonkin).

> Government wants them to receive; once they receive restricted information they cannot judge the facts properly.[512]
>
> When a political machine takes over the press, it takes virtually the first step toward totalitarian government …

It is clear from a reading of the debates that statutory protection of a right to privacy *per se* was generally not opposed by the members of the Opposition. In fact, it was largely supported. The basis for the ultimate opposition to the Bill, and the reason for its failure, was the perceived uncertainty of the Bill and the possible harm that (in the way the Bill was framed) could be done to the right to freedom of expression, and in particular, to the media.

Another difficulty the Opposition had with the Bill was with the remedy of compensatory damages:

> If a statement is made in the heat or on the spur of the moment, or has been inaccurately fed to a person, an honest, gentlemanly, face-to-face apology is more value than a monetary return. I do not see how one can ever be paid in money for an insult or slander that has occurred. I am not sure that a law that is supposed to protect one's right of privacy is adequate if a person is told that he can sue for a certain sum of money because a person took a photograph of him in a certain situation, told others of something that he did, took a voice recording and played it back to others, or printed something in the paper that invaded his right of privacy. I do not see how anyone can say to how much compensation one should be entitled for such an invasion of privacy.[513]

In response, a member of the Government said:

> The member for Fisher said that he believed the Government was advocating a monetary gain if a person's privacy was invaded and he was successful in a court action. However, I do not look at the legislation in that way. Instead, I consider it to be a deterrent; indeed, I hope that, if this Bill becomes law, even if in a slight different form from its current form, it will deter some of the actions that have necessitated its introduction. …[514]

Later in the debates, the Attorney-General defended the broad terms of the Bill and other criticisms that had been made of it, as follows:

> I believe it is the duty of legislators in this time and age to tackle this deficiency in our law and resolve the difficulties that attend on a solution. I do not deny that there are difficulties. The Leader based his opposition to the

[512] Ibid 1351 (GM Gunn).
[513] Ibid 1348 (SG Evans).
[514] Ibid 1349 (MV Byrne).

> Bill on several grounds, although much of what he said tended to support the objects of the Bill and, indeed, its principles … The Leader suggested that the Bill should confine itself to certain specific instances of invasion of privacy. He did not specify them, although I think he had in mind the provisions of the Bill that are given as instances of the general right to privacy.
>
> His contention, as I understood it, was that there should be some specific indication of what conduct constituted an invasion of privacy. I believe that this would be a great mistake. It is impossible for the Legislature to forecast the various ways in which the privacy of the citizen may be infringed. Really, the possibilities are very varied and they might even be regarded as infinite. There are innumerable ways in which privacy can be infringed… I do not believe it is possible for Parliament to lay down in advance, as an exhaustive list, specific instances of infringement of privacy. I believe it would be unwise to do so because the purpose of this Bill is to sow a new seed in the law.
>
> The object of this Bill is to give the law the impetus which it needs in this area to enable the courts to develop a new body of jurisprudence for the protection of the privacy of the citizen. This type of protection is the sort of protection that the courts are able to develop, and it is important that we leave the situation so that, whilst Parliament indicates the principles, the courts apply those principles to the specific cases that are brought before them. That is the way in which our law operates; indeed, that is the way in which our law has been developed…[515]

The Attorney-General later stated that the provisions of the Bill were no more vague than other general principles of law which govern the daily lives of South Australian citizens and which the courts have to apply to particular facts - such as the requirement that in the law of negligence people have an obligation to exercise reasonable care to ensure that their actions do not injure or cause damage to other people.[516]

It was generally recognised in the House of Assembly debate that the proposed measure did relate to important and fundamental democratic principles and ought to be the subject of a robust debate. For this reason, several members of the Opposition supported the Bill's second reading so that it could be referred to a Select Committee. A motion to refer the Bill to a Select Committee was defeated. The Bill then proceeded to a Non-Select Committee and was subjected to significant amendment and revision. Several iterations were printed. The third reading was carried by a majority of five in the House of Assembly.

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[515] South Australia, *Parliamentary Debates*, House of Assembly, 22 October 1974, 1610-1611 (LJ King).
[516] Ibid 1615 (LJ King).

Similarly lengthy debate ensued in the Legislative Council. Members of the Opposition opposed the Bill, principally because of its perceived effect on the media, having confidence instead in the 'genius of the common law' to further develop and improve the protection of privacy.[517] Particular emphasis was placed on the findings of the Younger Committee Report (UK),[518] which had recommended that a general tort of violation of privacy not be created. Further, strong criticism was made of the vagueness of the Bill, and that such vagueness was a 'surrender of the Parliamentary authority' to make laws in favour of the courts.[519]

Finally, on Wednesday 20 November 1974, the Legislative Council, by a majority of three, rejected the Privacy Bill.[520]

The next attempt to introduce a statutory cause of action for invasion of privacy came in 1990. The Hon Terry Groom MP had instructed Parliamentary Counsel to draft a Privacy Bill as a private member's bill. Mr Groom was then a member of the Labor Party. On 22 November 1990, Mr Groom moved that a Select Committee be established to consider the deficiencies or otherwise in the laws relating to privacy and to consider and return recommendations on the terms of the draft Privacy Bill he proposed and on protection of privacy more generally.[521] The long title of the draft Bill was 'an Act to create a right of privacy and to provide a right of action for an infringement of that right; and for other purposes.' The motion was carried, having the support of the Opposition,[522] and the Bill was referred to a Select Committee of the House of Assembly for consideration.

The terms of reference of the Select Committee were to consider the terms of the draft Bill, to examine and make recommendations about specific areas where citizens need protection against invasions of privacy and to propose practical means of providing protection against invasions of privacy.

The Select Committee took oral and written submissions from interested parties, and ultimately considered that the Bill should be adopted, with some amendments. The recommendations were as follows:

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517 See, for example, South Australia, *Parliamentary Debates*, Legislative Council, 31 October 1974, 1816 (JC Burdett).
518 Committee on Privacy (Chairman, the Hon K Younger) *Report of the Committee on Privacy*, (1972) (UK).
519 See, for example, South Australia, *Parliamentary Debates*, Legislative Council, 12 November 1974, 1853 (Sir AC Rymill).
520 South Australia, *Parliamentary Debates*, Legislative Council, 20 November 1974, 2100.
521 South Australia, *Parliamentary Debates*, House of Assembly, 22 November 1990, 2182-2183.
522 South Australia, *Parliamentary Debates*, House of Assembly, 13 December 1990, 2776.

1. that a general right of privacy and a right of action for an infringement of that right be created;
2. that the draft Privacy Bill 1990 be adopted in modified form;
3. that 'person' should be clearly defined to include bodies corporate;
4. that the proper detection and prevention of insurance fraud should not be impeded by the draft Bill and that an exemption for the insurance industry, such as that provided for police, bodies with certain statutory powers, financial institutions and credit providers, should be included in the draft Bill;
5. that a person who engages an agent should be vicariously liable for the authorised acts of that agent in the event that an action for invasion of privacy is proceeded with under the draft Bill;
6. that the exemption provided to police, bodies with certain statutory powers, financial institutions and credit providers acting in the ordinary course of business be widened to provide similar recognition to credit reporting agencies;
7. that privacy standards, similar to the Australian Journalists' Association's Code of Ethics, be incorporated into regulations to assist in determining whether a breach of privacy has occurred in matters involving both the electronic and print media;
8. that private nuisance should be included in the general concept of invasion of privacy;
9. that all courts should be vested with the power to grant injunctive relief in cases of private nuisance;
10. that an exemption should be included in the draft Bill in respect of sections 10 and 11 of the *Noise Control Act 1976*;
11. that the draft Bill should be limited to intrusions of privacy as defined in the draft Bill but that in the future it may be appropriate to broaden the legislation;
12. that the Privacy Committee of South Australia continue to operate and help individuals who claim that Government agencies have violated their privacy;
13. that the draft Bill should provide for regulations that would detail standards for the appropriate handling and storage of information;
14. that the defence of public interest in the draft Bill be amended to require a Court to have regard to the views of relevant bodies, that is, the Privacy Commissioner and policy statements of the Minister, in making an assessment of what the public interest requires in the circumstances of the case;
15. that the definition section in the draft Bill be extended to define invasion of privacy by electronic data processing and information technology; and
16. that the matters raised by the Disability Complaints Service be referred to a joint meeting of Commonwealth and State Ministers to arrive at a set of standards to ensure protection of aged, infirm or disabled individuals and that if this resolution is not forthcoming further consideration be given to amending the draft Bill.[523]

[523] As set out in South Australia, *Parliamentary Debates*, House of Assembly, 12 September 1991, 830-831.

As asserted by Mr Groom during second reading debate, the Select Committee made two unanimous policy decisions in relation to its report: first, that a journalist or media organisation acting within its code of ethics in relation to privacy would commit no intrusion of privacy, and second, that in respect of the media, no impediment or restriction should be placed upon the proper investigation of affairs of such bodies as 'Beneficial Finance, the State Bank, SGIC or any other legitimate target in the public or the private sphere.'[524]

The Bill was then re-introduced, incorporating the recommendations of the Select Committee. It provided for a tort, actionable without proof of special damage. Although based on the legislation proposed in 1974, similarly seeking to create a right of privacy and to specify the circumstances in which that right is infringed, this Bill differed from its predecessor in seeking, by creating exemptions for certain bodies, to overcome some of the criticisms of uncertainty that had contributed to the downfall of the earlier Bill.

The key features of the 1991 Bill, as re-introduced, were as follows:

- exemptions are provided for members of the Police Force and any other person vested with powers of investigation of inquiry. Exemptions are also provided for insurance agencies in the detection of fraud and commercial organisations carrying out reasonable inquiries into the creditworthiness of a customer and in passing that information on to other commercial organisations;
- the right of privacy created by the Bill can be infringed either by a natural person or a body corporate. (The wording of clause 3(5) is slightly different to that considered by the committee. The committee unanimously agreed that a company should be able to be sued if it infringes a person's privacy. It is felt that the slightly amended wording better reflects the committee's concerns in this respect);
- an action for infringement of a right of privacy must be commenced within two years from the date on which the infringement occurred;
- it is a defence to an action for infringement of a right of privacy to prove that the infringement was necessary for or reasonably incidental to the protection of the lawful interests of the defendant or the conduct of actual, contemplated or apprehended litigation. It is also a defence to show that the infringement was

[524] South Australia, *Parliamentary Debates*, House of Assembly, 12 November 1991, 1774.

justified in the public interest or that the defendant could have raised a defence of absolute or qualified privilege if the action had been for defamation; and

- the court may grant any remedy (including injunctive relief) available in an action for tort, award damages for distress, annoyance or embarrassment and order the delivery to the plaintiff of anything made or used for the infringement by the defendant or in the defendant's possession or control as a result of the infringement.[525]

The potential effect of the Bill on investigative journalism was strongly criticised by members of the Opposition.[526] As in 1974, the Opposition criticised this Bill for cutting into what, it was said, is properly the purview of the common law.[527] The Opposition also thought it inequitable and ineffective:

> I maintain that it is impossible for the State to legislative effectively in this field or, indeed, for any State in Australia to legislate effectively in this field. The national, indeed the international nature of the media and the nature of our Federal laws controlling the electronic media makes it impossible for any legislation enacted by a single State to have any real and comprehensive effect in fulfilling the purposes inherent in this Bill.
>
> In fact, it would be fair to say that this Bill is similar to a fence that goes only half way around a paddock. There are so many escape mechanisms for the national and international media. That simply means that this Bill will be applied inequitably. It means that, if this Bill were to become law, there would be an application to local media, and there would be no application to the national electronic media or, indeed, to the international media, which may well be publishing articles about South Australian citizens. The inequity of the application of this Bill is a primary reason for opposing it. The fact that legislation cannot be effective means that it should not be inflicted upon us.[528]

As in 1974, the examples given by proponents of the Bill in debate emphasised the role of the media in invasions of privacy at that time. One member gave the following example:

> Why are the members of the Opposition supporting the press, who go out with their telescopic lens and chase bodies in coffins? I saw a news flash the other day of an Irish immigrant woman in Sydney who had been taken from a club; she was taken to a private place and continually raped overnight. She was found in a car at the side of the road, and the press cameras were on her; the news reel

525 As set out in South Australia, *Parliamentary Debates*, House of Assembly, 12 September 1991, 831.
526 See, for example, South Australia, *Parliamentary Debates*, House of Assembly, 12 November 1991, 1773 (JL Cashmore).
527 South Australia, *Parliamentary Debates*, House of Assembly, 12 November 1991, 1778 (SJ Baker).
528 Ibid 1772 (JL Cashmore).

> cameras were on her and she had her face flashed across every television screen in the whole of Australia. If members opposite do not call that an invasion of privacy, what do they call it? All members of the Liberal Party are defending this situation. They are defending the fact that the press barons of Australia can destroy the privacy of defenceless people.[529]

This is not to say that the threats to privacy posed by technology, and in particular data collection capabilities, were not also highly relevant in the debate. One member of the Opposition said:

> In our society today we have a number of high tech devices that can be used in varying ways to threaten the privacy of an individual. We have seen the growth of new and expensive eavesdropping devices, growing networks of private and Government databases and increases in Government surveillance activities that are making it hard for the average citizen to fend off prying eyes and ears. …[530]

There was an apparent perception by those opposing the Bill that the proposed cause of action would be open to misuse and abuse. The drafting of the Bill was criticised by the Opposition for being vague and also for providing legal fodder for lawyers - making the use of the cause of action prohibitively expensive for many. One member observed:

> I am concerned about the definition of 'public interest' in the Bills. I believe that as drafted it would be a legal practitioner's paradise, because every time one believed one was being maligned, harassed or under surveillance, one could go to court and apply for an injunction. What kind of country are we living in when we have to keep seeking legal advice and going to courts to seek protection? We should not have to do that; it should not be necessary. That is why I am often suspicious of legislation such as this drafted in such a way that it has a vested interest from the legal profession. That is a tragedy, because it certainly divides the community into classes: those who can and who cannot afford justice. …[531]

In contrast, a member of the Government said this about the Bill's simplicity and the accessibility of the remedies it offered:

> This Bill is a very straightforward and simple measure and that is part of the beauty of it. Individuals are able to enforce that right in a very simple and direct manner and they are able to achieve remedies that are quite relevant ...[532]

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529 Ibid 1781 (DM Ferguson).
530 South Australia, *Parliamentary Debates*, House of Assembly, 13 November 1991, 1869 (WA Matthew).
531 South Australia, *Parliamentary Debates*, House of Assembly, 12 November 1991, 1784 (HT Becker).
532 South Australia, *Parliamentary Debates*, House of Assembly, 13 November 1991, 1870 (MJ Evans).

After a number of amendments made during the committee stage (the cause of action remaining) the Bill passed second reading and then third reading.

On 26 November 1991, the second reading was carried in the Legislative Council by a majority of one. During the committee stage, significant amendments to the Bill were tabled, prompting considerable public debate. Thirty-two pages of amendments were introduced by the Hon MJ Elliott, representing the Australian Democrats party.[533] The Government broadly supported the amendments, but followed with 13 pages of amendments to those proposed by the Hon MJ Elliott.

In introducing his amendments, the Hon MJ Elliott emphasised that erring in favour of freedom of speech was important when balancing that interest with privacy interests. He proposed to remove the concept of 'business affairs' from the Bill, stating that business privacy should not be handled by the tort. He proposed prescriptive definitions of terms such as 'personal affairs' and 'personal information'. He also proposed express exemptions for media organisations, journalists and certain public interest groups. These groups would be outside of the scope of the tort. Importantly, the amendments included the establishment of a statutory South Australian Privacy Committee which would not only be able to investigate (without coercive powers) alleged breaches of Information Privacy Principles by Government, but also allegations of violation of privacy in the private sector and by private citizens.

On 27 August 1992, a new iteration of the Bill was returned to the Council. The Bill represented an amalgam of the amendments of Hon MJ Elliott and the Government in relation to the Privacy Committee and the Information Privacy Principles. The Bill no longer contained any provisions creating a general right of privacy or making an infringement of the right of privacy actionable tort. The Bill as amended instead focussed on the use of private information by Government agencies, by placing Information Privacy Principles on a statutory basis.

Ultimately, the Bill was not passed. The Attorney-General, the Hon CJ Sumner, stated that the Government had decided not to proceed at that stage with creating a general right of privacy and providing a remedy for a breach of that right. Mr Sumner said that during the parliamentary process the Bill as introduced in 1991 had been 'emasculated'. Any further amendments to the Bill, he said, would have entirely removed the media from the ambit of the legislation.[534] The

533 South Australia, *Parliamentary Debates*, House of Assembly, 29 April 1992, 4522 (MJ Elliott).
534 South Australia, *Parliamentary Debates*, Legislative Council, 27 August 1992, 231 (CJ Sumner).

Attorney-General stated that developments towards uniform defamation legislation and developments in dealing with neighbour disputes in the Magistrates Court had also influenced the decision not to proceed with developing a cause of action.[535]

The Attorney-General's prophetic final remarks were as follows:

> I have no joy in taking this course of action, having spent an amount of time dealing with this issue, but I think that at this stage the Parliament is just not mature enough to grasp the issue. I repeat what I said: there is no doubt that at some time this issue will be dealt with, and some Government in the future will need to take up the issue and legislate on the issue of privacy in this State.[536]

[535] Ibid 232 (CJ Sumner).
[536] South Australia, *Parliamentary Debates*, Legislative Council, 28 October 1992, 595 (CJ Sumner).

2 Models for Statutory Causes of Action

Privacy Bill 1991 (SA)	*ALRC 2008 Report*	*NSWLRC Final Report & Bill*	*VLRC Final Report*
A statutory cause of action?			
Yes.	Yes.	Yes.	Yes - two separate causes of action.
Where?			
South Australian legislation.	Commonwealth legislation.	Uniform State and Territory legislation, based on the NSW proposed Bill.	Victorian legislation.
Limited to natural persons?			
Yes.	Yes.	Yes.	Yes.
Limited to living persons?			
Yes.	No explicit restriction to natural persons but generally taken to intend this.	Yes.	Yes.
Act defines an invasion of privacy?			
Yes. Intrusion on a person's personal or business affairs.	No.	No.	Yes. • Misuse of private information. • Intrusion upon seclusion.
Threshold			
Intrusion is, in the circumstances, substantial and unreasonable.	• Serious invasions only. • Reasonable expectation of privacy. • Highly offensive to a reasonable person of ordinary sensibilities.	Invasion of privacy that the person was 'reasonably entitled to expect in all the circumstances having regard to any relevant public interest'.	• Reasonable expectation of privacy. • Highly offensive to a reasonable person.
Act lists invading conduct?			
Yes. (1) Exhaustive list: • Keeping another under observation. • Listening to conversations. • Intercepting	Yes. Non-exhaustive list: • Interference with home or family life. • Unauthorised surveillance. • Interference, misuse or	No.	No.

Privacy Bill 1991 (SA)	*ALRC 2008 Report*	*NSWLRC Final Report & Bill*	*VLRC Final Report*
communications. • Recording acts, images or words. • Interference with private correspondence or records or confidential business correspondence or records. • Keeping records of another's personal or business affairs. • Obtaining confidential personal or business information. • Publishing personal or business information, private correspondence, visual images of or words spoken or sounds produced by another. (2) Where one harasses another or interferes to a substantial and unreasonable extent in the personal or business affairs or with the property of another person so as to cause distress, annoyance or embarrassment and the harassment is not justified in the public interest.	disclosure of private correspondence or communication. • Disclosure of sensitive private facts.		
Consideration of public interest			
Absence of justification in the public interest is an element of the cause of action. In determining whether or not an act was justified in the public interest: • Regard **must** be had to: o the importance of free inquiry and free dissemination of information and	Public interest must be taken into account and balanced when assessing whether there has been an invasion.	Public interest is relevant to the invasion threshold (see above).	The public interest, narrowly defined, is a defence.

Privacy Bill 1991 (SA)	*ALRC 2008 Report*	*NSWLRC Final Report & Bill*	*VLRC Final Report*
opinions; ○ if the defendant is a media organisation or a person acting on behalf of one, the importance of the media in eliciting information and disseminating information and opinions and the importance of safeguarding the freedom of the media to continue to do so; and • Regard **may** be had to material relevant to that issue published by responsible international organisation or Australian State or Commonwealth authorities.			
Act lists other considerations for determining whether there is an invasion of privacy?			
No.	No.	Yes. **Must** take into account: • Nature of subject matter. • Nature of conduct (including what a reasonable person of ordinary sensibilities would consider offensive). • Relationship between plaintiff and defendant. • Public profile of plaintiff. • Vulnerability of plaintiff. • Conduct of both parties before and after the invasion (including apologies or offers of amends). • The effect of the invasion of the health, welfare and emotional well-being of the plaintiff.	No.

Privacy Bill 1991 (SA)	*ALRC 2008 Report*	*NSWLRC Final Report & Bill*	*VLRC Final Report*
		• Whether the invasion contravened an Australian statute. **May** take into account any other relevant matter.	
Fault elements			
Intentional.	Intentional or reckless acts.	To be left to the courts to determine.	Intentional, reckless or negligent acts.
The role of consent			
Absence of consent is an element of the cause of action. However, if the circumstances are such that it would be reasonable to suppose that the person permitted the intrusion, the permission will be presumed.	Absence of consent is an element of the cause of action, and is to be considered when determining whether the act complained of was sufficiently serious to cause a substantial offence to a person of ordinary sensibilities.	Absence of consent is an element of the cause of action.	Consent is a defence.
Defences			
Exhaustive list: • Necessary for or reasonably incidental to protection of lawful interests of the defendant or a person on whose behalf the defendant was acting. • Necessary for or reasonably incidental to the conduct of litigation. • Where absolute or qualified privilege defences available under the law of defamation. • Where the defendant is a media organisation or a person acting on behalf of one, that the defendant acted in accordance with reasonable codes etc. dealing with the protection of privacy prepared or adopted by the Australian Journalists'	Exhaustive list: • Incidental to exercise of lawful right of defence of person or property. • Required or authorised by or under law. • Publication privileged under the law of defamation.	Exhaustive list: • Incidental to exercise of lawful right of defence of person or property. • Required or authorised by or under law (including orders of courts or tribunals). • Where absolute privilege, fair reporting and innocent dissemination defences available under the law of defamation. • The publication of matter where, as between the defendant publisher and the recipient of the information, there is a common interest or duty in giving and receiving information on the subject in question (defeated if publication actuated by malice).	Exhaustive list: • Consent. • Incidental to exercise of lawful right of defence of person or property and reasonable and proportionate to the threatened harm. • Required or authorised by law. • Defendant a police or public officer engaged in duty and acting proportionately to the matter being investigated. • Conduct was in the public interest.

Privacy Bill 1991 (SA)	*ALRC 2008 Report*	*NSWLRC Final Report & Bill*	*VLRC Final Report*
Association or the Australian Press Council.			
Proof of damage			
Actionable without proof of special damage.	Actionable without proof of damage.	Not necessary to express whether actionable without proof of damage, as it is expressed as a statutory cause of action, not a tort.	Not necessary to express whether actionable without proof of damage, as it is expressed as a statutory cause of action, not a tort.
Exemptions			
Yes. • Members of the police force. • Any other person vested with powers of investigation of inquiry. • Insurance agencies in the detection of fraud. • Commercial organisations carrying out reasonable inquiries into the creditworthiness of a customer and in passing that information on to other commercial organisations. • Action taken lawfully for the recovery of debt. • Action taken in the course of medical research approved in accordance with the *Privacy Act 1988* (Cth). • The making of any investigation, report, record or publication in accordance with a requirement imposed or authorisation conferred by or under statute.	No.	No.	No.
Limitation of action			
2 years.	Not discussed.	1 year with capacity to apply for extension to 3 years.	3 years.
Remedies			

Privacy Bill 1991 (SA)	*ALRC 2008 Report*	*NSWLRC Final Report & Bill*	*VLRC Final Report*
• Damages for injury, loss, distress, annoyance or embarrassment. • Injunction (but not against media organisations or their representatives). In determining a remedy, regard must be had to: • The effect or likely effect of the intrusion on the health, welfare and social, business or financial position of the plaintiff. • The conduct of both parties before and after the invasion (including apologies or offers of amends).	• Damages. • Account of profits. • Injunction. • Apology and correction orders. • Delivery up order. • Declaration.	• Damages. • Order to prevent invasion. • Declaration. • Delivery up order. • Any other order the court considers appropriate.	• Damages. • Injunction. • Declaration.
Exemplary damages?			
Not discussed.	No.	No.	No.
Cap on damages for non-economic loss?			
Not discussed.	Not discussed.	Yes - $150 000.	No.
Forum			
Not discussed.	Will depend on the circumstances of the case, but most likely State and Territory district and county courts.	Not discussed.	Exclusively in the Victorian Civil and Administrative Tribunal.
Costs rule			
Not discussed.	Not discussed.	Not discussed.	Each party to bear their own costs, subject to a contrary order by the Tribunal.

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