

Table of contents

1. Executive summary	1
2. List of proposals	5
Part 1: Scope and application of the Privacy Act	17
3. Objects of the Act	18
4. Personal information, de-identification and sensitive information	23
5. Flexibility of the APPs	47
6. Small business exemption	52
7. Employee records exemption	64
8. Political exemption	72
9. Journalism exemption	84
Part 2: Protections	93
10. Privacy policies and collection notices	94
11. Consent and online privacy settings	102
12. Fair and reasonable test	110
13. Additional protections	122
14. Research	133
15. Organisational accountability	140
16. Children's privacy	146
17. People experiencing vulnerability	158
18. Rights of the individual	166
19. Automated decision-making	188
20. Direct marketing, targeting and trading	194
21. Security, Destruction and Retention of Personal Information	221
22. Controllers and processors of personal information	230
23. Overseas data flows	234
24. Cross-Border Privacy Rules and domestic certification	247
Part 3: Regulation and enforcement	251
25. Enforcement	252
26. A direct right of action	272
27. A statutory tort for serious invasions of privacy	280
28. Notifiable data breaches scheme	288
29. Interactions with other schemes	299
30. Further review	304
Attachment A – Consultation	305
Attachment B – Terms of Reference	311

Abbreviations

2020 ACAP survey	OAIC Australian Community Attitudes to Privacy Survey 2020
7-Eleven determination	Commissioner initiated investigation into 7- Eleven Stores Pty Ltd (Privacy) [Corrigendum dated 12 October 2021] [2021] AICmr 50 [29 September 2021]
AAT	Administrative Appeals Tribunal
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ACCI	Australian Chamber of Commerce and Industry
ACL	Australian Consumer Law
ACMA	Australian Communications and Media Authority
ACT	Australian Capital Territory
ACSC	Australian Cyber Security Centre
ADMA	Association for Data-driven Marketing & Advertising
ADHA	Australian Digital Health Agency
ADM	Automated Decision-Making
Adtech final report	ACCC Digital advertising services inquiry: Final Report
AFCA	Australian Financial Complaints Authority
AFP	Australian Federal Police
AGD	Attorney-General's Department
AHRC	Australian Human Rights Commission
AHRC Report	AHRC Human Rights and Technology: Final Report
AI	Artificial Intelligence
AIC Act	Australian Information Commissioner Act 2010 (Cth)
ALRC	Australian Law Reform Commission
ALRC Report 108	ALRC, For your Information: Australian Privacy Law and Practice (Report No 108, 12 August 2008)
ALRC Report 123	ALRC, Serious Invasions of Privacy in the Digital Era (Report No 123, 3 September 2014)
APC	Australian Press Council
APEC	Asia-Pacific Economic Cooperation
APP Guidelines	Australian Privacy Principles Guidelines (July 2019)
APPs	Australian Privacy Principles
ASIC	Australian Securities and Investments Commission
Bill C-27	Bill C-27 Digital Charter Implementation Act 2022 (Canada)
CAIDE and MLS	Centre for AI and Digital Ethics and Melbourne Law School
Castan Centre	Castan Centre for Human Rights Law and the Centre for Commercial Law and Regulatory Studies, Monash University
CBPR	Cross-Border Privacy Rules
CCA	Competition and Consumer Act 2010 (Cth)

CCPA	California Consumer Privacy Act of 2018
CDR	Consumer Data Right
Clearview determination	Commissioner initiated investigation into Clearview AI, Inc. (Privacy) [2021] AICmr 54 (14 October 2021)
CSIRO	Commonwealth Scientific and Industrial Research Organisation
Cyber Security Strategy	2023-2030 Australian Cyber Security Strategy
DAT Act	Data Availability and Transparency Act 2022 (Cth)
DNCR Act	Do Not Call Register Act 2006 (Cth)
DPIA	Data protection impact assessments
DPI Report	ACCC Digital Platforms Inquiry: Final Report
DPI response	Government Response and Implementation Roadmap for the Digital Platforms Inquiry
EDR	External Dispute Resolution
Enhancing Privacy Protection Bill	Privacy Legislation Amendment (Enhancing Privacy Protection) Bill 2012
ED	Emergency Declaration
EDPB	European Data Protection Board
EU	European Union
FCFCOA	Federal Circuit and Family Court of Australia
FOI Act	Freedom of Information Act 1982 (Cth)
FPO	Federal Privacy Ombudsman
FRT	Facial Recognition Technology
GDPR	General Data Protection Regulation (European Union)
HREC	Human Research Ethics Committee
IAB	Interactive Advertising Bureau
IC	Information Commissioner
ICCPR	International Covenant on Civil and Political Rights
IGEA	Interactive Games and Entertainment Association
IGIS	Inspector-General of Intelligence and Security
IMC	Independent Media Council
IoT	Internet of Things
IP address	Internet Protocol address
MHR Act	My Health Records Act 2012 (Cth)
MIGA	Medical Insurance Group Australia
MoU	Memorandum of Understanding
NDB scheme	Notifiable Data Breaches scheme
NHMRC	National Health and Medical Research Council

NZ Privacy Act	Privacy Act 2020 (NZ)
OAIC	Office of the Australian Information Commissioner
OECD	Organisation for Economic Co-operation and Development
ONDC	Office of the National Data Commissioner
Online Safety Act	Online Safety Act 2021 (Cth)
OP Bill	Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021
OP code	Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 sch 1.
OPC (Canada)	Office of the Privacy Commissioner of Canada
PIA	Privacy Impact Assessment
PIPEDA	Personal Information Protection and Electronic Documents Act, SC 2000, c 5 (Canada)
Privacy Enforcement Bill	Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022
Privacy Enforcement Act	Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022
SCCs	standard contractual clauses
Spam Act	Spam Act 2003 (Cth)
SOCI Act	Security of Critical Infrastructure Act 2018 (Cth)
the Act	Privacy Act 1988 (Cth)
UK	United Kingdom
UK ICO	Information Commissioner's Office (UK)

1. Executive summary

This Report is the culmination of two years of extensive consultation and review of the *Privacy Act 1988* (Cth) (Review of the Act). The Review was instigated following the Australian Competition and Consumer Commission's (ACCC) 2019 *Digital Platforms Inquiry* final report (DPI Report) which made several privacy recommendations. The Review commenced in October 2020 with the release of an [Issues Paper](#), followed by a [Discussion Paper](#) in 2021 which put forward proposals for reforming the Act for consultation. The Review has considered whether the Act and its enforcement mechanisms are fit for purpose in an environment where Australians now live much of their lives online¹ and their information is collected and used for a myriad of purposes in the digital economy.

While the digital economy has generated significant benefits, including consumer convenience,² improved efficiencies³ and new employment opportunities,⁴ it has also resulted in large amounts of information about people being generated, used, disclosed and stored. These troves of information may be used beneficially to improve government services, innovate new commercial services and modes of delivery, market goods and services and facilitate communication.

Throughout the Review, the vulnerability of people's information in the digital age has been highlighted, including recently in relation to several high-profile data breaches, exposing millions of Australians to privacy risks including identity fraud, reputational damage and blackmail.⁵ These harms challenge the community's trust in new applications of technology, which the Productivity Commission recently noted 'is critical for future uptake, as businesses and governments need to maintain their social licence to deliver digital and data-enabled services.'⁶

The challenge of realising the benefits of data-driven technology while protecting individuals' privacy is one that countries are grappling with globally. While different countries take different approaches to privacy and data protection regulation, there have been significant developments in data protection laws internationally in recent years to respond to the technological developments in personal information handling. These include the European Union (EU),⁷ the United Kingdom (UK),⁸ Brazil,⁹ Japan,¹⁰ Singapore¹¹ and California.¹² Canada's federal parliament is also currently considering significant reforms to its data protection laws.¹³ The proposals in this Report are designed to better align Australia's laws with global standards of information privacy protection and properly protect Australians' privacy. The Review considers that these proposed changes are likely to enhance cross border data flows with Australia as a trusted trading partner, and have resultant economic benefits for Australian businesses and the economy.

The proposals in this Report draw from stakeholder feedback (refer Attachment A for details) and analysis of other sources, including research papers, international data protection and privacy laws and reports which consider privacy issues. Consideration of the benefits and limitations and costs associated with proposals put forward in the Discussion Paper led to some proposals being reworked, some not being pursued and, in other cases, new proposals being put forward. As such, some proposals have not had the benefit of stakeholder feedback and will require further consultation prior to implementation. Where wording is suggested in particular proposals, the legislative drafting process would determine the precise wording of any amendments to the Act.

1 Consumer Policy Research Centre, [Data and Technology Consumer Survey](#) (Report, December 2020); ABS, [Household Use of Information Technology Survey](#) (Report, March 2018); ACMA, [Communications Report 2018-19](#) (Report, February 2020) 23; ACCC, [DPI Report](#) 379; OECD, [Data-Driven Innovation Big Data for Growth and Well-Being](#) (Report, October 2015) 20; IDC, [The Digitization of the World From Edge to Core](#) (Report, November 2018); ACCC, [Internet Activity Report](#) (Report, June 2021) 1.

2 Productivity Commission, [Data Availability and Use](#) (Final Report, May 2017), Chapter 2.

3 OECD, [The Economics of Personal Data and Privacy: 30 Years after the OECD Privacy Guidelines](#) (Report, December 2010) 8-9; Consumer Policy Research Centre, [Consumer Data and the Digital Economy](#) (Report, July 2018) 20; Productivity Commission, [Data Availability and Use](#) (Final Report, May 2017), Chapter 2.

4 World Economic Forum, [Future of Jobs Report 2020](#) (Report, October 2020).

5 Josh Taylor, 'Optus reveals at least 2.1 million ID numbers exposed in massive data breach', [The Guardian](#) (online, 3 October 2022); Jake Lapham 'Sydney teenager charged after allegedly blackmailing 93 Optus customers affected by data breach', [ABC](#) (online, 6 October 2022); Colin Kruger and Nick Bonyhady, 'Medibank cyberattack could be costly 'on multiple fronts'', [The Sydney Morning Herald](#) (online, 22 October 2022); Emilia Terzon, 'Australian Clinical Labs accused of 'sitting on' hack that saw patient data posted to the dark web', [ABC](#) (online, 28 October 2022).

6 Productivity Commission, [5-year Productivity inquiry: Australia's data and digital dividend](#) (Interim Report, August 2022).

7 The General Data Protection Regulation ('GDPR') came into force in the EU and the UK on 2 May 2018, updating Directive 95/46/EC and harmonising data protection laws across the EU. See also, the [Digital Services Act 2022](#) (EU) and European Commission, [Proposal for an Artificial Intelligence Act 2022](#) (EU).

8 [Data Protection Act 2018](#) (UK).

9 [General Data Protection Law](#), Law No. 13.709/2018 (Brazil).

10 [The Act on the Protection of Personal Information](#), Act No. 57 of 2003 as amended in 2020 (Japan).

11 [Personal Data Protection Act 2012](#) (Singapore).

12 [California Consumer Privacy Act 2018](#) (California) ('CCPA').

13 [An Act to enact the Consumer Privacy Protection Act, the Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts \(Digital Charter Implementation Act 2022\)](#), 1st session, 44th Parliament (Canada) ('[Bill C-27](#)').

26. A direct right of action

The avenues available to individuals to litigate a claim for breach of their privacy under the Act are limited. Individuals may make a complaint to the IC about an alleged interference with their privacy²³⁴⁹ and where a determination is made, it may be enforced in the Federal Court and FCFCOA.²³⁵⁰ Individuals may apply to the Federal Court and the FCFCOA for injunctive relief for contraventions of the Act.²³⁵¹ The Act also allows a person who has suffered loss or damage as a result of contravention of certain credit reporting provisions to apply for a compensation order after the Federal Court or FCFCOA has made a civil penalty order or the entity has been found guilty of an offence.²³⁵² There is otherwise no mechanism by which a breach of the Act may be directly actioned by an individual in the courts.²³⁵³

The DPI Report recommended that individuals be given a direct right to bring actions and class actions against APP entities in court to seek compensatory damages as well as aggravated and exemplary damages (in exceptional circumstances) for the financial and non-financial harm suffered as a result of an interference with their privacy under the Act.²³⁵⁴

26.1 A right to directly enforce the Act in the courts

The Discussion Paper sought feedback on the following model for a direct right of action:

- The action would be available to any individual or group of individuals whose privacy has been interfered with by an APP entity.
- The action would be heard by the Federal Court or the FCFCOA.
- The claimant would first need to make a complaint to the OAIC or Federal Privacy Ombudsman and have their complaint assessed for conciliation either by the OAIC or a recognised EDR scheme such as a relevant industry ombudsman.
- The complainant could then elect to initiate action in court where the matter is deemed unsuitable for conciliation, conciliation has failed, or the complainant chooses not to pursue conciliation. The complainant would need to seek leave of the court to make the application.
- The OAIC would have the ability to appear as *amicus curiae* to provide expert evidence at the request of the court.
- Remedies available under this right would be any order the court sees fit, including any amount of damages.

A majority of the submissions to the Discussion Paper that addressed this issue supported introducing a direct right of action. These submitters included academics,²³⁵⁵ regulators and complaints bodies,²³⁵⁶ civil society and consumer groups,²³⁵⁷ professional services,²³⁵⁸ unions,²³⁵⁹ and finance groups.²³⁶⁰ They considered that a direct right of action would provide consumers with greater control over their personal information, whilst also creating additional incentives for APP entities to comply with their obligations under the Act.²³⁶¹

2349 Ibid s 36.

2350 Ibid s 55A.

2351 Ibid s 80W; *Regulatory Powers (Standard Provisions) Act 2014* (Cth) s 121.

2352 Privacy Act ss 25 and 25A.

2353 *Day v Lynn* [2003] FCA 879, [50].

2354 ACCC, [DPI report](#) Recommendation 16(e), 473.

2355 Submissions to the Discussion Paper: [Castan Centre](#), 33; [Professor John V Swinson](#), 9; [Eckstein et al](#), 3; [Michael Douglas, UWA Law School](#), 4; [Graham Greenleaf, UNSW Sydney](#), 7; [Dr Katharine Kemp, UNSW Sydney](#), 19.

2356 Submissions to the Discussion Paper: [OAIC](#), 206; [Telecommunications Industry Ombudsman](#), 5; [Office of the Information Commissioner Queensland](#), 4.

2357 Submissions to the Discussion Paper: [NSW Council for Civil Liberties](#), 39; [CHOICE](#), 18; [Public Interest Advocacy Centre](#), 14; [Digital Rights Watch](#), 20; [Digital Law Association](#), 18; [Access Now](#), 5; [Australian Privacy Foundation](#), 18.

2358 Submissions to the Discussion Paper: [Calabash Solutions](#), 26; [elevenM](#), 67; [Privacy 108](#), 47.

2359 Submission to the Discussion Paper: [ACTU](#), 4.

2360 Submissions to the Discussion Paper: [Financial Services Council](#), 11; [Financial Rights Legal Centre and Financial Counselling Australia](#), 21.

2361 Submissions to the Discussion Paper: [Castan Centre](#), 33; [OAIC](#), 206; [Office of the Information Commissioner Queensland](#), 4; [NSW Council for Civil Liberties](#), 39.

Submitters opposed to introducing a direct right of action included digital platforms,²³⁶² telecommunications companies,²³⁶³ media organisations,²³⁶⁴ technology industry groups,²³⁶⁵ industry bodies,²³⁶⁶ fundraising organisations,²³⁶⁷ medical indemnity insurers,²³⁶⁸ a credit reporting agency,²³⁶⁹ and a consulting firm.²³⁷⁰ These submitters were generally opposed on the basis that a direct right of action would burden the courts²³⁷¹ and adversely impact business.²³⁷² Some considered that the current framework in which the IC deals with complaints and enforces the Act should enable issues to be addressed.²³⁷³ One submitter thought that a direct right of action would mainly benefit wealthy litigants.²³⁷⁴

26.2 Introduction of a direct right of action

The potential benefits for individuals and for compliance with the Act justify introducing a direct right of action into the Act. Such a right would be an important measure to enhance individuals' control of their personal information, and reflect current community expectations. 78 per cent of respondents to the 2020 ACAP survey believed they should have the right to seek compensation in the courts for a breach of privacy.²³⁷⁵

A direct right of action would increase the avenues available to individuals who suffer loss as a result of an interference with privacy to seek compensation. Empowering individuals in this way may also serve to increase consumers' bargaining power with businesses that collect and use their personal information.²³⁷⁶ Introducing a direct right of action into the Act would give Australians comparable rights to those available to individuals under overseas data protection laws including in the EU, New Zealand and Singapore.²³⁷⁷

The possibility of litigation could also encourage compliance with the Act. Michael Douglas noted that 'It is only if offending entities believe there will be serious consequences for interfering with individuals' privacy that they will be sufficiently motivated to not interfere'.²³⁷⁸ Additionally, given the relatively limited judicial consideration of the Act,²³⁷⁹ judicial interpretation of the Act in claims brought by individuals under a direct right of action would benefit individuals and APP entities by clarifying the application of the Act.²³⁸⁰

While there would be costs associated with a direct right of action, including costs associated with defending claims and resourcing the courts, these may be mitigated by ensuring that the design of a right of action strikes an appropriate balance between improving individuals' access to the courts, discouraging unmeritorious claims and efficient use of court resources.

26.2.1 Who could exercise the right?

The Discussion Paper proposed that the right would be available to both individuals and representative proceedings for classes of individuals who have suffered an alleged interference with their privacy.

2362 Submissions to the Discussion Paper: [Snap Inc](#), 8; [DIGI](#), 28; [Meta](#), 10.

2363 Submissions to the Discussion Paper: [Telstra](#), 28; [Optus](#), 35; [Free TV Australia](#), 32.

2364 Submissions to the Discussion Paper: [ABC](#), 9; [SBS](#), 12.

2365 Submissions to the Discussion Paper: [Information Technology Industry Council](#), 4; [Communications Alliance Ltd](#), 19; [ACT | The App Association](#), 5; [BSA | The Software Alliance](#), 12.

2366 Submissions to the Discussion Paper: [Australian Chamber of Commerce and Industry \(ACCI\)](#), 19; [Business Council of Australia](#), 10; [Ai Group](#), 21; [Federal Chamber of Automotive Industries](#), 30; [FinTech Australia](#), 16.

2367 Submissions to the Discussion Paper: [Fundraising Institute Australia and Public Fundraising Regulatory Association](#), 11; [International Fund for Animal Welfare Australia](#), 4.

2368 Submissions to the Discussion Paper: [Medical Insurance Group Australia \(MIGA\)](#), 11; [Avant Mutual](#), 20.

2369 Submissions to the Discussion Paper: [Equifax](#), 5.

2370 Submission to the Discussion Paper: [KPMG](#), 31.

2371 Submissions to the Discussion Paper: [Optus](#), 35; [Meta](#), 10; [Telstra](#), 28; [Equifax](#), 5.

2372 Submissions to the Discussion Paper: [Australian Chamber of Commerce and Industry \(ACCI\)](#), 19; [Free TV Australia](#), 32; [ACT | The App Association](#), 5; [Experian Australia](#), 24; [Optus](#), 35.

2373 Submissions to the Discussion Paper: [Free TV Australia](#), 33; [KPMG](#), 31; [Business Council of Australia](#), 10; [ABC](#), 9; [Telstra](#), 28; [BSA | The Software Alliance](#), 12; [Optus](#), 35; [Meta](#), 53; [Ai Group](#), 21.

2374 Submission to the Discussion Paper: [Free TV Australia](#), 32.

2375 OAIC, [Australian Community Attitudes to Privacy Survey 2020](#) (Report, September 2020) 67.

2376 Submission to the Discussion Paper: [CHOICE](#), 18.

2377 Submission to the Discussion Paper: [Castan Centre](#), 34; GDPR art 82; [Privacy Act 2020 \(NZ\)](#) s 98; [Personal Data Protection Act 2012 \(Singapore\)](#) s 480.

2378 Submission to the Discussion Paper: [Michael Douglas, UWA Law School](#), 4.

2379 Submissions to the Discussion Paper: [Castan Centre](#), 34; [Graham Greenleaf, UNSW Sydney](#), 8.

2380 Submissions to the Discussion Paper: [OAIC](#), 206; [Public Interest Advocacy Centre](#), 15; [Privacy 108](#), 47.

Proposal – Direct Right of Action

The Act should be amended to permit individuals to apply to the courts for relief in relation to an interference with privacy with the following design elements:

- (a) The action would be available to any individual or group of individuals who have suffered loss or damage as a result of privacy interference by an APP entity. This would include claims by representative groups on behalf of members affected by breaches of the Act.
- (b) Loss or damage would need to be established within the existing meaning of the Act, including injury to the person's feelings or humiliation.
- (c) The action would be heard by the Federal Court or the FCFCOA.
- (d) The claimant would first need to make a complaint to the OAIC and have their complaint assessed for conciliation either by the OAIC or a recognised EDR scheme.
- (e) Where the IC or an EDR is satisfied there is no reasonable likelihood that the complaint will be resolved by conciliation or the IC decides a complaint is unsuitable for conciliation, the complainant would have the option to pursue the matter further in court.
- (f) In cases where the IC has decided that a complaint is unsuitable for conciliation on the basis that the complaint does not involve an interference with privacy or is frivolous or vexatious, the complainant should be required to seek leave of the court to bring an application in the court.
- (g) The OAIC would have the ability to appear as *amicus curiae* or to intervene in proceedings instituted under the *Privacy Act*, with leave of the court.
- (h) Remedies available under this right would be any order the court sees fit, including any amount of damages.

Appropriate resources should be provided to the Courts to deal with these new functions.

26.1 Amend the Act to allow for a direct right of action in order to permit individuals to apply to the courts for relief in relation to an interference with privacy. The model should incorporate the appropriate design elements discussed in this chapter.

27. A statutory tort for serious invasions of privacy

The Act regulates the handling of personal information by APP entities. It does not regulate information-handling by non-APP entities (such as individuals and most small businesses) and does not provide protections in relation to bodily or territorial privacy. Invasions of bodily privacy may be serious physical invasions during unnecessary medical treatment²⁴⁴² or spying and recording private affairs.²⁴⁴³ Invasions of territorial privacy could include invasion in a search of a person's home or property.²⁴⁴⁴ A number of previous inquiries in Australia have recommended introducing a statutory cause of action for serious invasions of privacy, including ALRC Report 108, the ACCC's DPI Report, and the AHRC's Human Rights and Technology Final Report.²⁴⁴⁵ Several state review processes have also recommended introducing a statutory cause of action for invasion of privacy.²⁴⁴⁶

The Discussion Paper considered whether there are serious invasions of privacy for which victims are currently unable to seek compensation under the Act and reviewed avenues available in comparable jurisdictions for seeking redress for such actions. It proposed four possible options to provide a legal avenue for compensation for individuals who suffer serious invasions of privacy in Australia.

- **Options involving a statutory tort:**
 1. The statutory tort model recommended in the ALRC Report 123.
 2. A minimalist tort that leaves the scope and application of the tort to be developed by the courts.
- **Options not involving a statutory tort:**
 3. Extending the application of the Act to individuals in a non-business capacity for collection, use or disclose of personal information which would be highly offensive to an objective reasonable person.
 4. States and territories could consider legislating that damages for emotional distress are available in actions for equitable breach of confidence.

Most submitters who addressed this issue supported introducing a statutory tort, with the overwhelming majority preferring the ALRC Report 123 model. Supporters of a statutory tort included academics,²⁴⁴⁷ privacy and consumer advocates,²⁴⁴⁸ the Law Council of Australia,²⁴⁴⁹ the OAIC,²⁴⁵⁰ and the Office of the Information Commissioner Queensland.²⁴⁵¹ A significant minority of submitters opposed any tort, largely from media,²⁴⁵² the health industry,²⁴⁵³ and some businesses.²⁴⁵⁴ Others did not oppose a tort, but expressed caution about its operation and submitted that it would require exceptions.²⁴⁵⁵ The information technology industry was split between supporters²⁴⁵⁶ and opponents.²⁴⁵⁷

There was far less engagement with options 3 and 4 in submissions, although two APP entity submitters who opposed a tort supported extending the Act to individuals.²⁴⁵⁸

²⁴⁴² AHRC, *Ensuring health and bodily integrity: towards a human rights approach for people born with variations in sex characteristics* (Report, October 2021) 40-41.

²⁴⁴³ ALRC Report 123, 74.

²⁴⁴⁴ Ibid, 142.

²⁴⁴⁵ Ibid rec 74-1; ACCC, *DPI Report*, rec 19; AHRC, *Human Rights and Technology* (Final Report, March 2021) rec 21.

²⁴⁴⁶ NSW: New South Wales Law Reform Commission, *Invasion of Privacy* (Report 120, April 2009) 4 – and further in the Standing Committee on Law and Justice, Parliament of New South Wales, *Inquiry into remedies for the serious invasion of privacy in New South Wales* (Final Report, March 2016) 10. South Australia: South Australian Law Reform Institute, *A statutory tort for invasion of privacy* (Final Report 4, March 2016) rec 1 – this report resulted in the Civil Liability (Serious Invasions of Privacy) Bill 2021 (SA) to introduce a statutory cause of action in tort, tabled for consideration in the 54th South Australian Parliament. Queensland: Crime and Corruption Commission Queensland, *Operation Impala: Report on misuse of confidential information in the Queensland public sector* (February 2020) 19.

Victoria: Victorian Law Reform Commission, *Surveillance in Public Places* (Final Report 18, May 2010) rec 22 – although the discussion was of a statutory tort generally, the recommendation was directed specifically at statutory causes of action for misuse of surveillance.

²⁴⁴⁷ Submissions to the Discussion Paper: [Professor John V Swinson](#), 10; [Eckstein et al.](#), 3; [Kimberlee Weatherall](#), [Tom Manousaridis](#), [Melanie Trezise](#), 6-7; [Prof Barbara McDonald and Prof David Rolph](#), University of Sydney, 3; [Professor David Lindsay](#), 26; [Graham Greenleaf](#), UNSW Sydney, 8; [Dr Katharine Kemp](#), UNSW Sydney, 19.

²⁴⁴⁸ Submissions to the Discussion Paper: [Privacy 108](#), 47-48; [Access Now](#), 4; [Australian Communications Consumer Action Network](#), 20; [Financial Rights Legal Centre and Financial Counselling Australia](#), 21; [elevenM](#), 71-72; [Australian Council on Children and the Media](#), 11; [Centre for Media Transition](#), 4, 11; [Castan Centre](#), 44-48; [Australian Privacy Foundation](#), 18-19.

²⁴⁴⁹ Submission to the Discussion Paper: [Law Council of Australia](#), 20-21.

²⁴⁵⁰ Submission to the Discussion Paper: [OAIC](#), 211-215.

²⁴⁵¹ Submission to the Discussion Paper: [Office of the Information Commissioner Queensland](#), 4.

²⁴⁵² Submissions to the Discussion Paper: [Commercial Radio Australia](#), 3; [Australia's Right to Know](#), 1; [SBS](#), 9-10, 12-13; [Optus](#), 36-37; [ABC](#), 10-12.

²⁴⁵³ Submissions to the Discussion Paper: [Ramsay Health Care Australia](#), 10; [Australian Medical Association](#), 19; [Medical Insurance Group Australia](#), 12.

²⁴⁵⁴ Submissions to the Discussion Paper: [Business Council of Australia](#), 10-11; [Australian Collectors & Debt Buyers Association](#), 14.

²⁴⁵⁵ Submissions to the Discussion Paper: [Snap Inc.](#), 8-9; [Governance Institute of Australia](#), 8; [Federal Chamber of Automotive Industries](#), 31; [AFP](#), 8-9; [Google](#), 7.

²⁴⁵⁶ Submissions to the Discussion Paper: [Meta](#), 54; [Electronic Frontiers Australia](#), 18; [ADIA](#), 8.

²⁴⁵⁷ Submissions to the Discussion Paper: [Communications Alliance Ltd](#), 20; [Information Technology Industry Council](#), 4; [Internet Association of Australia](#), 4; [BSA | The Software Alliance](#), 12.

²⁴⁵⁸ Submissions to the Discussion Paper: [DIGI](#), 28-29; [Australian Collectors & Debt Buyers Association](#), 14.

27.1 The need for a tort of privacy

The Discussion Paper cited examples given in submissions of the sorts of behaviour that a tort for invasion of privacy would address that are not covered by the Act. The Discussion Paper did not express a view on whether a statutory tort for invasions of privacy is needed and indicated that the issue would continue to be considered following responses to the Discussion Paper.

Salinger Privacy and Privacy 108 submitted that as a tort had been recommended by several inquiries the need for it did not need to be relitigated.²⁴⁵⁹ The OAIC considered that a statutory tort would provide greater coverage and protection to individuals in line with Article 17 of the *International Covenant on Civil and Political Rights*,²⁴⁶⁰ which provides that:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

In particular the OAIC considered the Act would not protect the following invasions of privacy:²⁴⁶¹

- peering over a back fence to take a video of someone in their backyard, or other place where there is an expectation of privacy (for example, in a public bathroom)
- recording a private conversation with someone without their knowledge or consent
- interfering with, misusing or disclosing an individual's private correspondence or private written, oral or electronic communication
- disclosing or disseminating sensitive facts relating to an individual's private life
- misusing personal information about another person that was accessed in breach of an employment contract, but for which the employer is not liable because it was misused for a personal purpose (for example blackmail or Family Court proceedings)
- a data breach experienced by a small business or individual not covered by the Act.

In contrast, most submitters opposed to the tort contended that current laws (such as surveillance and family law statutes, or existing torts (including defamation), and breach of confidence) and complaint mechanisms provide adequate protection of individual privacy.²⁴⁶² Media organisations submitted that the co-regulatory regime established by section 123 of the *Broadcasting Services Act 1992* (Cth), which requires industry groups to develop codes of practice, is sufficient.²⁴⁶³ However, these codes, discussed in greater detail in Chapter 9, do not provide for causes of action for individuals to protect their privacy or seek compensation in a court. Others that considered the current protections in the Privacy Act to be sufficient submitted that, if enacted, a tort should only cover entities which are not already regulated by the Act.²⁴⁶⁴

Salinger Privacy highlighted that a broader range of circumstances would be actionable under a statutory tort than would be captured by the Privacy Act, including through any direct right of action for compensation relying on a breach of the Act (See Chapter 26). A tort could extend to actions by:²⁴⁶⁵

- i. entities which are not covered by the Act (e.g. individuals acting in a personal capacity, most small businesses, registered political parties (subject to the removal or modification of exemptions))
- ii. respondents which are covered by the Act but the conduct at issue is exempt from the APPs (e.g. acts or practices subject to an exemption, such as those performed as a contracted service provider to a State or Territory authority)
- iii. rogue employees acting beyond the scope of their authority and whose employers may not be liable under the Act for such conduct
- iv. State and Territory authorities not covered by privacy laws or where the compensable harm exceeds statutory compensation caps (e.g. South Australian and Western Australian state and local government entities, or e.g. NSW public sector agencies are only liable for up to \$40,000 for privacy complaints brought under the *Privacy and Personal Information Protection Act 1998* (NSW), respectively).

²⁴⁵⁹ Submissions to the Discussion Paper: [Salinger Privacy](#), 46-47; [Privacy 108](#), 48.

²⁴⁶⁰ Submission to the Discussion Paper: [OAIC](#), 212.

²⁴⁶¹ *Ibid.*

²⁴⁶² Submissions to the Discussion Paper: [Ai Group](#), 23; [Governance Institute of Australia](#), 8; [ABC](#), 11; [Guardian Australia](#), 21.

²⁴⁶³ Submissions to the Discussion Paper: [SBS](#), 12-13; [Commercial Radio Australia](#), 4.

²⁴⁶⁴ Submission to the Discussion Paper: [Medical Insurance Group Australia](#), 12.

²⁴⁶⁵ Submission to the Discussion Paper: [Salinger Privacy](#), 46.

Submitters in support of a statutory tort did not consider that other laws or causes of action currently available provide redress for the wrong of a serious invasion of privacy. Breach of confidence is concerned with protecting confidentiality in the context of a relationship of confidence. It has been found to extend to intimate images shared in a personal romantic relationship.²⁴⁶⁶ However, it does not protect a person from an invasion of their privacy in the absence of any relationship of confidence such as unwanted observation, or dishonestly obtaining private information from the person under the obligation of confidence.²⁴⁶⁷

The tort of defamation may allow an individual to receive compensation for a defamatory misuse of personal information. However, the complete defence of 'truth',²⁴⁶⁸ means that the law of defamation will only provide protection for private information that is untrue.²⁴⁶⁹ In a privacy setting, it is likely that true information will be more harmful. The ALRC further considered that the law of defamation does not even provide adequate protection for all information that is incorrect.²⁴⁷⁰ If untrue information is misused, but that misuse is not defamatory, the tort of defamation will provide no remedy.

A complaint to the IC may result in an investigation by the IC under section 40 of the Privacy Act and a determination by the IC under section 52, which may include a declaration that the complainant is entitled to an amount by way of compensation. As discussed in Chapters 25 and 26, a determination under section 52 is enforceable in the court.²⁴⁷¹ A direct right of action would allow a more direct route to the court for a breach of the Act than is currently available. However, in either case, the right of an individual to go to court to protect their privacy would be limited by the scope of the Act which does not cover certain entities and does not extend to aspects of 'intrusion upon seclusion' or physical privacy, as the proposed tort would.

Finally, State and Territory surveillance laws do not cover the field in terms of physical privacy. To the extent of overlap (such as installing a device to film someone without their knowledge), most of these statutes criminalise certain conduct and do not provide avenues to seek compensation in the form of damages.²⁴⁷²

An examination of existing frameworks indicates clear gaps in current privacy protection, and the ability of an individual to take steps to protect themselves and seek compensation for invasion of privacy. These gaps would be best addressed through a single privacy tort designed to cover the field.

27.2 Preferred option – ALRC Report 123 model

The OAIC considered that the statutory tort recommended by the ALRC Report 123 would be an important addition to the suite of regulatory measures needed to address gaps in the existing privacy protection framework and current and emerging privacy risks and harms.²⁴⁷³

Professor Barbara McDonald, former ALRC Commissioner who led the Inquiry into Serious Invasions of Privacy in the Digital Era, noted that the model recommended in Report 123 was the culmination of significant targeted research, consultation, analysis, negotiation and compromise.²⁴⁷⁴ The majority of submitters considered that the ALRC's recommended model and reasoning as set out in Report 123 effectively balanced competing interests.²⁴⁷⁵

Many submitters noted the lack of development of the common law in Australia since *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* raised the potential for a tort of privacy in Australia over 20 years ago.²⁴⁷⁶ In *Smethurst v Commissioner of Police*,²⁴⁷⁷ the High Court appeared open to the possibility of the common law recognising a tort of privacy in the future (at [90]), however as the plaintiffs (a *Sunday Telegraph* journalist and the newspaper's publisher) did not raise the question, the Court did not answer it.

²⁴⁶⁶ *Wilson v Ferguson* [2015] WASC 15; *Giller v Procopets* [2008] VSCA 236.

²⁴⁶⁷ Submission to the Discussion Paper: [Dr Jelena Gligorijevic, ANU College of Law](#), 5.

²⁴⁶⁸ *Defamation Act 2004* (NSW) s 25; *Defamation Act 2005* (Qld) s 25; *Defamation Act 2006* (NT) s 22; *Defamation Act 2005* (SA) s 23; *Defamation Act 2005* (Tas) s 25; *Defamation Act 2005* (Vic) s 25; *Defamation Act 2005* (WA) s 25.

²⁴⁶⁹ [ALRC Report 123](#), 84.

²⁴⁷⁰ *Ibid* 84.

²⁴⁷¹ *Privacy Act* s 55A.

²⁴⁷² Submission to the Issues Paper: [New South Wales Information and Privacy Commission](#), 4, discussing the *Crimes Act 1900* (NSW) and the *Surveillance Devices Act 2007* (NSW).

²⁴⁷³ Submission to the Discussion Paper: [OAIC](#), 213.

²⁴⁷⁴ Submission to the Discussion Paper: [Prof Barbara McDonald and Prof David Rolph, University of Sydney](#), 1.

²⁴⁷⁵ Submissions to the Discussion Paper: [Kimberlee Weatherall, Tom Manousaridis, Melanie Trezise](#), 7; [elevenM](#), 72.

²⁴⁷⁶ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] 208 CLR 199.

²⁴⁷⁷ *Smethurst v Commissioner of Police* [2020] HCA 14.

Australia would not be the first jurisdiction to enact a statutory tort of privacy. The Canadian provinces of British Columbia,²⁴⁷⁸ Manitoba,²⁴⁷⁹ Newfoundland and Labrador,²⁴⁸⁰ Quebec²⁴⁸¹ and Saskatchewan²⁴⁸² have enacted statutory torts; as has the State of California in the US.²⁴⁸³

Submitters considered that the lack of development by the courts and lack of litigants raising the prospect of a tort warranted legislative intervention to set the boundaries of the tort and avoid further decades of uncertainty.²⁴⁸⁴

27.2.1 Essential features of the ALRC Report 123 model

The ALRC Report 123 examined the civil causes of action for serious invasion of privacy in New Zealand, the UK, the USA and Canada.²⁴⁸⁵ The model for a statutory tort was recommended in light of analysis of the torts in comparable jurisdictions, with particular focus on the UK and New Zealand.²⁴⁸⁶

The essential features of the ALRC Report 123 tort of serious invasion of privacy cause of action

- the invasion of privacy must be either by:
 - intrusion into seclusion, or
 - misuse of private information
- it must be proved that a person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances
- the invasion must have been committed intentionally or recklessly – mere negligence is not sufficient
- the invasion must be ‘serious’
- the invasion need not cause actual damage, and damages for emotional distress may be awarded, and
- it is subject to a ‘balancing exercise’ – the court must be satisfied that the public interest in privacy outweighs any countervailing public interests.²⁴⁸⁷

Recommended defences

- a defence of lawful authority
- a defence where the conduct was incidental to defence of persons or property
- a defence of consent
- a defence of necessity
- a defence of absolute privilege
- a defence for the publication of public documents, and
- a defence for fair reporting of public proceedings.²⁴⁸⁸

Recommended remedies for a plaintiff

- damages, including for emotional distress and, in exceptional circumstances, exemplary damages
- an account of profits
- injunctions
- delivery up, destruction and removal of material
- correction and apology orders, and
- declarations.²⁴⁸⁹

As noted by the ALRC, adopting similar concepts and tests to overseas jurisdictions would enable Australian courts to draw from jurisprudence from the UK, New Zealand and the US.²⁴⁹⁰

²⁴⁷⁸ *Privacy Act*, RSBC 1996, c 373 (British Columbia).

²⁴⁷⁹ *Privacy Act*, CCSM 1996, c P125 (Manitoba).

²⁴⁸⁰ *Privacy Act*, RSNL 1990, c P-22 (Newfoundland and Labrador).

²⁴⁸¹ *Civil Code of Quebec*, SQ 1991, c 64 ss 3, 35–37.

²⁴⁸² *Privacy Act*, RSS 1978, c P-24 (Saskatchewan).

²⁴⁸³ *California Civil Code* § 1708.8.

²⁴⁸⁴ Submissions to the Discussion Paper: [DIGI](#), 28–29; [Ai Group](#), 23; [Prof Barbara McDonald and Prof David Rolph, University of Sydney](#), 3; [elevenM](#), 72; [NSW Council for Civil Liberties](#), 41–42; [Kimberlee Weatherall, Tom Manousaridis, Melanie Trezise](#), 6–7; [Michael Douglas, UWA Law School](#), 4–5.

²⁴⁸⁵ [ALRC Report 123](#), *inter alia* 22–23; 76–82; 93–94; 112–113; 160–161; 288.

²⁴⁸⁶ *Ibid* 76–82; Chapter 5 generally; 93–94.

²⁴⁸⁷ *Ibid* 123, 19.

²⁴⁸⁸ [ALRC Report 123](#), 19–20.

²⁴⁸⁹ *Ibid* 20.

²⁴⁹⁰ *Ibid* 94.

27.2.2 A fault element of recklessness not negligence

The ALRC recommended that the fault element of the tort of serious invasion of privacy be intention or recklessness.²⁴⁹¹ The OAIC submitted in its response to the Issue Paper that the fault element should include negligence to avoid unnecessarily limiting the application of the tort to different circumstances that may result in serious privacy invasions.²⁴⁹² elevenM in response to the Discussion Paper queried whether it would be appropriate to give further consideration to an additional fault element of negligence.²⁴⁹³ The Public Interest Advocacy Centre and Castan Centre submitted negligence should be part of the fault element of the tort.²⁴⁹⁴ Castan Centre considered that the ALRC model would set the bar too high and noted that the NSW Law Reform Commission and the Victorian Law Reform Commission did not specify fault standards in their recommendations for causes of action in privacy.²⁴⁹⁵ PIAC was concerned to ensure that a victim would have legal recourse for a negligent act, such as negligence in information handling resulting in release of information. PAIC considered some negligent releases of information would not reach the threshold of 'reckless' but may have an equally serious impact.²⁴⁹⁶

The ALRC considered the privacy harms which may be caused by negligence in its Report 123.²⁴⁹⁷ A cause of action in negligence may still be available to plaintiff for these acts if they can demonstrate a duty of care. But absent a relationship establishing a duty of care, extending fault for a serious invasion of privacy to negligence or gross negligence risks being too broad, potentially resulting in organisations adopting an overly cautious approach to many information disclosure activities.²⁴⁹⁸ Adopting a fault element of intention and recklessness would allow an action in tort without proof of damage in line with the torts of assault and false imprisonment. Extending the fault element to negligence would undermine an important justification for making the tort actionable without proof of damage.²⁴⁹⁹ Proof of damage is an essential element of the tort of negligence.

Consistent with the conclusion of the ALRC in Report 123,²⁵⁰⁰ intention or recklessness is considered the appropriate standard of fault. Recklessness would capture circumstances where the parties do not have a pre-existing relationship, but where risk of invasion is known or foreseen.²⁵⁰¹

27.3 Other options are unsuitable

The other options proposed in the Discussion Paper in the alternative to the ALRC Report 123 model tort would not be suitable to adequately address the gap in the law.

27.3.1 A minimalist tort

A small number of academic submitters preferred a minimalist statutory tort as proposed in Option 2 in the Discussion Paper on the basis that it would leave greater room for it to develop through the common law.²⁵⁰² For example, through successive cases it could potentially extend into other areas of privacy interests such as those recognised in the US like 'false light' and dignity.²⁵⁰³ The ALRC considered that what is commonly called 'false light' and 'approbation' could potentially be captured by the Report 123 statutory tort, but those wrongs were not intended to be captured per se. The ALRC noted those wrongs may be addressed by other causes of action and in Australian law should be considered broadly, including in the context of intellectual property law.²⁵⁰⁴

2491 Ibid 110.

2492 Submission to the Issues Paper: [OAIC](#), 136. The OAIC did not repeat this submission in response to the Discussion Paper.

2493 Submission to the Discussion Paper: [elevenM](#), 72.

2494 Submissions to the Discussion Paper: [Public Interest Advocacy Centre](#), 21-22; [Castan Centre](#), 56-57.

2495 Submission to the Discussion Paper: [Castan Centre](#), 56-57, referring to Victorian Law Reform Commission, *Surveillance in Public Places* (Final Report 18, May 2010) and New South Wales Law Reform Commission, *Invasion of Privacy* (Report 120, April 2009).

2496 Submission to the Discussion Paper: [Public Interest Advocacy Centre](#), 21.

2497 [ALRC Report 123](#), 119.

2498 Ibid; Submission to the Discussion Paper: [Ai Group](#), 23.

2499 [ALRC Report 123](#), 117-118.

2500 Ibid 124.

2501 Ibid 110.

2502 Submission to the Discussion Paper: [Dr Jelena Gligorijevi](#), [ANU College of Law](#), 3.

2503 Submission to the Discussion Paper: [Dr Anna Bunn](#), 1-2.

2504 [ALRC Report 123](#), 87-88.

A broad range of other submitters argued that a minimalist tort would result in decades of uncertainty with consequential privacy, business and legal costs.²⁵⁰⁵

27.3.2 Extending the Act to individuals

Two industry submitters considered that the Act should be extended to individuals as per Option 3 of the Discussion Paper as the preferred way of addressing any gap in the law.²⁵⁰⁶ Professor Graham Greenleaf submitted that Option 3 could be introduced in addition to the ALRC statutory tort to enable intimate image abuse and similar misuse of personal information to be addressed under the Act.²⁵⁰⁷ This would provide greater options for a victim including making a complaint to the OAIC or applying to the courts under the direct right of action (see Chapter 26) rather than litigating a tort.

The *Online Safety Act* regulates intimate image abuse and certain other types of conduct which may involve misuse of personal information in online contexts. Extending the Privacy Act into this area runs the risk of increasing complexity for individuals seeking redress in relation to this type of conduct. It may be appropriate to consider the feasibility of a mechanism to enable individuals to seek compensation against perpetrators as part of the eSafety framework to achieve a less fragmented approach.

27.3.3 Damages for emotional distress for equitable breach of confidence

Damages for emotional distress were recognised by the Victorian Court of Appeal in *Giller v Procopets*.²⁵⁰⁸ The ALRC in Report 123 proposed this option in 2014 as an alternative in the event a tort of privacy was not enacted.²⁵⁰⁹ No submitters to the Discussion Paper preferred this option. Submitters who opposed a statutory tort also opposed states and territories legislating that damages for emotional distress should be available for equitable breach of confidence.²⁵¹⁰

Michael Douglas, a senior lecturer at UWA, noted that courts in various jurisdictions had already followed or cited *Giller v Procopets* favourably in equitable breach of confidence cases.²⁵¹¹ It is considered unnecessary for this report to propose that state and territory legislatures enact relevant provisions where the common law is already developing in that direction and, for some states a suitable case may simply not yet have come before the courts.

27.4 Balancing freedom of expression

Media industry submitters were opposed to all options for a statutory tort on the basis that it would have a detrimental or 'chilling' effect on freedom of expression and journalism in Australia.²⁵¹² The Guardian Australia and SBS considered that the privacy benefits of a tort for invasions of privacy would be outweighed by the detriment of negative consequences for transparency and accountability.²⁵¹³ The Guardian Australia also considered that the cost of pursuing litigation is significant and out of reach for many Australians, the tort may therefore likely benefit only a small number of high profile individuals, and pointed to high profile litigation in other jurisdictions.²⁵¹⁴

2505 Submissions to the Discussion Paper: [elevenM](#), 72; [Federal Chamber of Automotive Industries](#), 31; [Michael Douglas, UWA Law School](#), 5; [DIGI](#), 28-29; [Prof Barbara McDonald and Prof David Rolph, University of Sydney](#), 3; [Insurance Council of Australia](#), 18-19.

2506 Submissions to the Discussion Paper: [DIGI](#), 28-29; [Australian Collectors & Debt Buyers Association](#), 14.

2507 Submission to the Discussion Paper: [Graham Greenleaf, UNSW Sydney](#), 8.

2508 *Giller v Procopets* [2008] VSCA 236.

2509 [ALRC Report 123](#), 265, rec 13-1.

2510 Submissions to the Discussion Paper: [DIGI](#), 29; [Medical Insurance Group Australia](#), 12; [ABC](#), 12.

2511 Submission to the Discussion Paper: [Michael Douglas, UWA Law School](#), 5; *Wilson v Ferguson* [2015] WASC 15; *Champions Ride Days Pty Ltd v McFarlane* [2019] QDC 236 at [126].

2512 Submissions to the Discussion Paper: [Australia's Right to Know](#), 1; [Guardian Australia](#), 21; [SBS](#), 12-13; [Commercial Radio Australia](#), 3.

2513 Submissions to the Discussion Paper: [Guardian Australia](#), 21; [SBS](#), 12-13.

2514 Submission to the Discussion Paper: [Guardian Australia](#), 21.

However, the ALRC Report 123 model would expressly require a plaintiff to demonstrate to the satisfaction of a court that the public interest in privacy, in the circumstances of the case, outweigh any countervailing public interest.²⁵¹⁵ Such public interests were expressly considered to include freedom of the media, particularly to responsibly investigate and report matters of public concern and importance.²⁵¹⁶ As the ALRC pointed out, its model slightly preferences other public interests over the public interest in privacy as the test requires that privacy outweigh other interests. Where the public interests are balanced, the test is not met.²⁵¹⁷

Furthermore, the ALRC also recommended defences analogous to defamation defences. These defences would include 'fair report of proceedings of public concern' which the ALRC considered should be co-extensive with the defence in the Uniform Defamation Law.²⁵¹⁸

This means that under the ALRC statutory tort model, a plaintiff would need to prove that the public interest in privacy in their case outweighs the public interest of a particular invasion of privacy by the media done in the interests of transparency or freedom of expression. Further, if a plaintiff's claim did outweigh other public interests, a media defendant could plead a defence on the basis of fair reporting of proceedings of public concern. The protections for journalism in the ALRC model are extensive and any chilling effect on journalism is hoped to be minimal while media familiarise themselves with the content of the tort and the avenues to defend a claim and put a plaintiff to proof.

27.5 Information Commissioner as *amicus curiae*

The statutory tort's protection against 'misuses of private information' would not rely on the definition of 'personal information' in the Act. What is 'private information' for the purpose of the tort would be developed by courts. The Act may provide relevant context for the court when considering this aspect of the tort, but it would not determine the existence of a serious invasion of privacy.

However, because litigation involving the statutory tort may involve circumstances governed by the Act or personal information, the OAIC's submitted that it should be able to assist the court where appropriate.²⁵¹⁹ This submission has merit. The IC should be given the power to seek leave to appear as *amicus curiae* in court proceedings where proceedings have the potential to impact the evolution of the Act and privacy jurisprudence and policy.²⁵²⁰ This power to seek leave would be appropriately located in the *Australian Information Commissioner Act 2010* (Cth). While this reform has been prompted by the statutory tort, the power should not be limited to only such proceedings. This reform would complement the *amicus curiae* role proposed for the Direct Right of Action in Chapter 26.

27.6 Consultation with the States and Territories

A number of state inquiries have considered and recommended introducing a statutory tort. The NSW Standing Committee on Law and Justice and the South Australian Law Reform Institute have recommended enactment of statutory torts of privacy in recent years.²⁵²¹ The Qld Crime and Corruption Commission also recently recommended that a statutory tort for invasion of privacy be introduced.²⁵²² In South Australia, a statutory tort in the Civil Liability (Serious Invasions of Privacy) Bill 2021 was tabled in the South Australian Parliament for consideration in September 2021. The South Australian Bill was based on the 2016 SALRI report which proposed a very similar model to the ALRC Report 123.²⁵²³

2515 [ALRC Report 123](#), 144.

2516 *Ibid* 150, rec 9-2.

2517 *Ibid* 149.

2518 *Ibid* 206.

2519 Submission to the Issues Paper: [OAIC](#), 134.

2520 Submission to the Issues Paper: [OAIC](#), 135; Submission to the Discussion Paper: [OAIC](#), 213.

2521 Standing Committee on Law and Justice, Parliament of New South Wales, [Inquiry into remedies for the serious invasion of privacy in New South Wales](#) (Final Report, March 2016) rec 3; South Australian Law Reform Institute, [A statutory tort for invasion of privacy](#) (Final Report 4, March 2016) rec 1, 2.

2522 Crime and Corruption Commission Queensland, [Operation Impala: Report on misuse of confidential information in the Queensland public sector](#) (February 2020) rec 17.

2523 South Australian Law Reform Institute, [A statutory tort for invasion of privacy](#) (Final Report 4, March 2016) 16.

The ALRC recommended that a statutory tort be enacted in a standalone Commonwealth Act rather than the Privacy Act in the interests of consistency throughout Australia.²⁵²⁴ A statutory tort for serious invasions of privacy would not be limited to APP entities or Commonwealth agencies. It would extend to individuals and state and territory agencies. The ALRC considered the tort would not infringe the implied limitation on the Commonwealth's power to legislate to impose a burden on the exercise of powers and function of the states. In view of the ALRC Report 123 model's defence of lawful authority, government agencies would be immune from liability where conduct is consistent with their statutory powers. The tort would therefore not place any greater burden on a state (or states) than on the Commonwealth itself.²⁵²⁵

An action in the statutory tort should also be able to be commenced in both federal and state and territory courts through cross-vesting of federal jurisdiction.²⁵²⁶ Courts may have variable associated litigation costs and variable jurisdictional limits to hear claims above certain amounts. The ALRC considered there would be considerable benefit for access to justice if these courts could hear privacy actions.²⁵²⁷ The plaintiff would be able to litigate their action in the most appropriate court having regard to the circumstances of their claim.

Consultation should be undertaken with the states and territories given the consideration and steps taken toward introducing statutory torts for invasions of privacy by the states, the need to ensure state agencies have the required lawful authorisations for activities which may be covered by the tort, and potential impacts on state and territory court resourcing.

27.1 Introduce a statutory tort for serious invasions of privacy in the form recommended by the ALRC in Report 123.

Consult with the states and territories on implementation to ensure a consistent national approach.

²⁵²⁴ [ALRC Report 123](#), 59.

²⁵²⁵ *Ibid* 67.

²⁵²⁶ *Ibid* 165.

²⁵²⁷ *Ibid* 166.