

AUSTRALIA'S RIGHT TO KNOW

RESPONSE TO NSW LAW REFORM COMMISSION PAPER 1
INVASION OF PRIVACY (MAY 2007)

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RIGHT TO KNOW COALITION
RESPONSE TO NSW LAW REFORM COMMISSION PAPER 1 INVASION OF
PRIVACY

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EXECUTIVE SUMMARY

- Protection of privacy needs to be balanced against the public interest in allowing the free flow of information to the public and upholding freedom of speech.
- Balancing these public interests raises complex issues and is highly context dependent, particularly in the media sphere.
- The Commission has not established that existing laws and regimes regulating the media are inadequate. Nor has the Commission examined the potential impact of its recommendations on the balance between these important public interests.
- The broad-based highly regulatory regime recommended by the Commission will fundamentally restrain the media's vital role in upholding freedom of speech and the free flow of information.
- The Commission's approach is directly contrary to that taken by the Commonwealth Parliament which has recognised the highly context-dependent nature of privacy issues in respect to the media. The Commonwealth has adopted self-regulatory and co-regulatory approaches in relation to protection of privacy and personal information by the media which allows for efficient and inexpensive adjudication of media privacy issues and strikes the right balance between privacy rights and other rights.
- There will always be tension between the right to privacy and freedom of speech and some complaints are inevitable. However the small number of such complaints against the media suggests that the current system is striking an appropriate balance.
- The tort of privacy suggested by the Commission would have the undesirable effects of making privacy protection principles less uniform across Australia; adding to the complexity of laws already protecting privacy; and shifting the balance of competing rights without justification.

1. INTRODUCTION

The Right to Know Coalition is comprised of Australia's leading media organisations. Our members are News Limited, Fairfax Media, Free TV, Australian Subscription Television & Radio Association, Commercial Radio Australia (ASTRA), SBS, ABC, Sky News, Australian Associated Press (AAP), APN News and Media, Media Entertainment and Arts Alliance (MEAA) and The West Australian.

This submission is our response to the NSW Law Reform Commission (the **Commission**) Consultation Paper 1 on Invasion of Privacy (the **Paper**).

The Terms of Reference directs the Commission to consider in particular:

- The desirability of privacy protection principles being uniform across Australia.
- The desirability of a consistent legislative approach to privacy in the *Privacy and Personal Information Protection Act 1998*, the *Health Records and Information Privacy Act 2002*, the *State Records Act 1998*, the *Freedom of Information Act 1989* and the *Local Government Act 1993*.
- The desirability of introducing a statutory tort of privacy in New South Wales (NSW).
- Any related matters.

We note the Paper is confined to the third of the particular Terms of Reference and this submission accordingly focuses on that issue. We will separately respond to the Commission's second paper, which we understand will be released later this year and will deal with the remaining Terms of Reference. We will also separately respond to the Australian Law Reform Commission (**ALRC**) paper released on 12 September 2007 entitled "Discussion Paper 72: Review of Australian Privacy Law" (the **ALRC Paper**).

We are concerned that the Paper does not address the first two issues given that introduction of a statutory tort of privacy as suggested by the Commission would have the undesirable affect of making privacy protection principles less uniform across Australia and the legislative approach to privacy less consistent in NSW. In this context, we note that the tort of privacy suggested by the Commission differs (in a range of respects) from the tort proposed by the ALRC.

In our view, the issues raised by the Terms of Reference are inextricably linked and cannot be considered in isolation. Some attention has therefore been given to the issues of uniformity and consistency in this submission.

1.1 INTRODUCTION OF A STATUTORY RIGHT TO PRIVACY

We oppose the introduction of a statutory cause of action for invasion of privacy in NSW.

At paragraph 1.12 of the Paper, the Commission states: "An argument for the introduction of a statutory cause of action for invasion of privacy in New South Wales must be based on the inadequacy of the protection currently afforded privacy by statute and common law."

The Commission has not demonstrated that the current protection is inadequate.

Each of the categories of privacy rights identified in the Paper is the subject of extensive and adequate protection under existing laws, which provide for appropriate remedies.

In the case of privacy relating to publicity given to private facts, in 2001 an appropriate mechanism was included in the *Privacy Act 1988* (Cth), which requires media organisations to publicly commit to privacy standards in relation to journalism in order to trigger the journalism exemption. We have each committed to such standards, which are enforced by way of appropriate adjudication mechanisms. This regime is much less expensive and much more readily available to the public than litigation.

The Paper appears to contemplate the introduction of a broad right of privacy for the purpose of filling any gaps in individual rights or remedies if they exist. However, the Paper does not adequately identify any gaps in privacy protection under existing laws.

This is not an adequate basis upon which to introduce a broad right which will add to the complexity of laws and shift the balance of competing rights in Australia.

If there are such gaps (which we do not consider there are), then they should be identified, and any legislation should be specifically adapted to meet the relevant gap.

It appears that an influencing factor in the Commission's recommendation for the introduction of a statutory cause of action is that damages are not available in respect of all existing causes of action. We consider the current situation to be appropriate: the laws in place provide a range of remedies in different circumstances according to the needs of each specific situation. In a media context these range from criminal sanctions (in relation to publication of matters such as the identity of sexual assault victims) to damages (for example in relation to defamation and breach of confidence) and adjudication mechanisms offering public vindication (for example under the media privacy standards).

The Paper correctly points out that privacy rights in key foreign jurisdictions, including Europe and New Zealand, flow from or form part of wider Bills of Rights. Those Bills of Rights give equal protection to a range of equally important and often competing rights, including for example prohibition of torture, the right to liberty and security, the right to a fair trial, freedom of conscience and religion, freedom of communication and freedom of assembly and association.

In the Australian context (where we do not have a Bill of Rights or equivalent legislation) the Commission acknowledges that additional protection of privacy would be likely to undermine competing rights including the rights to security and freedom of information. Nevertheless, it recommends additional protection without establishing that existing laws and regimes regulating the media do not already strike an appropriate balance, and without examining the potential impact of its recommendations on the balance between these important public interests. This is examined in more detail below.

2. KEY PUBLIC POLICY CONSIDERATIONS

2.1 Freedom of communication

We acknowledge that individuals need appropriate privacy protection. However, protection of privacy needs to be balanced against the public interest in guaranteeing the free-flow of information to the public and the public interest in upholding freedom of communication. In the case of the media, balancing these two public interests is complex

and requires a proper understanding of the benefits and drawbacks of each of the competing rights in each relevant context.

The Commission acknowledges that freedom of communication is a key consideration in relation to any new privacy right. But, in our submission, the Commission has not comprehensively examined the potential impact of its recommendation for a statutory right of privacy on the delicate balance between the public interests in privacy and in freedom of communication.

The introduction of a statutory right of privacy would substantially alter the balance, by placing fundamental restraints on the media's role in upholding freedom of communication.

The free flow of information and freedom of communication is one of the fundamental pillars of a free and open society.

The flow of information plays a role in our society which extends beyond giving the public information about matters that may be of interest to them. If citizens are to effectively participate in a democracy, form opinions freely and protect their rights and interests, they need access to information either directly, or via the media.

In some cases, information which individuals do not want disclosed should be available. Corrupt or questionable practices are often best avoided, exposed and managed by public disclosure. And often such practices only come to light as a result of the discovery of a string of facts each of which appears innocent on its own.

The value in ensuring the media has sufficient access to, and may publish, information is so well established that it has been recognised by the Courts. Some key decisions to that effect are summarised in Attachment 1.

However, the level and protection of freedom of communication in Australia has eroded over past years. Recent international surveys have ranked Australia 31st (Reporters Without Borders, see www.rsf.org) and 39th (Freedom House, see www.freedomhouse.org) in the world, respectively, for standards of freedom of communication.

The ability of the media to access information is being curtailed by a number of deficiencies including ineffective Freedom of Information (**FOI**) regimes and the inappropriate use of suppression orders to restrict public access to Court proceedings.

Increasingly, in FOI applications, privacy is the reason cited for withholding information. In a number of instances this is inappropriate. Recent instances where privacy has been the basis of denying access to information include information to identify the models of taxpayer funded vehicles provided to Federal Ministers and information regarding the spending patterns of high security prisoners in NSW, despite an undertaking that the prisoners would not be identified publicly.

In a number of instances, protection of privacy has been inappropriately cited in granting suppression orders preventing the naming of defendants because they are public figures and may be embarrassed.

We submit that striking the right balance in the field of privacy is also a critical community concern.

An individual's ability to communicate private information has changed considerably with developments in technology. It would be an extreme step to make disclosure of private

information to family and friends actionable. Once, family and friends would hear about a person's life in face to face conversations. Individuals are now publishing on a large scale. Internet communities such as Facebook, MySpace and BigBlog enable individuals to publish information about themselves and their friends to the world at large. Potentially "private" information about one person is often also information of or about another person. Imposing restrictions on what people can say in such fora would be a very significant imposition on their freedom of communication (and could even arguably be an interference with their privacy). Yet these publications can reach millions of people. A common way of finding out about a person is now the practice of "googling" him or her (searching using his or her name on the Google search site). Even unpopular sites which contain private information about an individual can therefore quite easily be located. Individuals can easily mask their identities on the internet and can use internet cafes and internet service providers based outside Australia to avoid detection. And if an individual can publish to millions of people on the internet, and particularly to those with an interest in that individual (who are the ones that count), then there is a real question as to whether and in what circumstances media publication should also be restricted.

The Paper indicates that Courts are reluctant to introduce privacy rights. There are good reasons for such reluctance. Technology may have changed the quantity of information available, but the fundamental issue is the same as it has always been: how to balance the harm which can flow from disclosure against the harm which can result from non-disclosure. Moreover, most relevant considerations, including the matters people wish to keep private, have not changed.

The existing balance reflects the experience of Courts as to the benefits and drawbacks of privacy and freedom of communication over a period of centuries. It results from experience not only of what can go wrong when information is disclosed, but also of what can go wrong when it is not. In many cases the latter consequences, which can include corruption, harm to individuals and social unrest, are more serious.

2.2 **Consistency, reducing complexity and compliance costs**

New South Wales has a range of general and specific legislation which already provide extensive privacy protection. The Commission has not demonstrated that there are 'gaps' in the existing regulation that need to be addressed. The adequacy of current regulation is considered in detail in section 3 below.

The statutory tort of privacy proposed by the Commission would only add an unhelpful layer of overlap and complexity to the already restrictive regulatory framework governing privacy and publication of communications.

Further complexity is not necessary or justified and would disadvantage Australian businesses.

Australia's regulatory regime already has a number of features which already put Australian businesses at a significant disadvantage relative to businesses operating in other key jurisdictions, such as the United States of America, including:

- (a) our defamation laws are more plaintiff friendly than those in the United States, in that they do not contain any "public figure" defence;
- (b) our Courts are more willing than Courts in the United Kingdom to hear actions brought in relation to publications which are predominantly read outside the jurisdiction;

- (c) our Courts are likely to more readily enforce foreign judgments in relation to matters affecting freedom of speech than US Courts.¹

This heavy regulatory burden is likely to have a number of adverse effects. They include:

- (d) making it very expensive to publish legally compliant non-fictional material (including news, current affairs and documentaries) in Australia;
- (e) discouraging new media organisations, and particularly online media businesses, from choosing to run their businesses from Australia;
- (f) making the laws difficult to understand and remember, which has the practical effect that many individuals and others without access to expert advice are likely to regularly publish non-compliant material. This is important in a context in which individuals are now publishing news and other material to each other on a large scale through internet sites such as MySpace and YouTube.

2.3 Other rights

In addition to freedom of communication, individual interests such as the interest in protection from intrusion upon seclusion compete with rights such as the right to security.

The likely impact of any broad privacy right on government is illustrated by the examples given in chapter 5 of the Paper of breach of Article 8 of the European Convention on Human Rights and Fundamental Freedoms (**ECHR**).

It can be expected, for example, that if the cause of action proposed is introduced then government departments, police, social workers and other bodies with responsibility for investigating offences and dealing with sensitive issues concerning families and the rights and safety of children (for example, in relation to domestic violence or guardianship issues), will be met with claims for breach of privacy by those adversely affected by the investigation or action taken (notwithstanding that the action taken is proper and genuinely motivated).

It is important that governments and others with responsibility for ensuring the safety and well being of the community and children are not unduly cautious or hesitant in carrying out their duties. A broad and uncertain basis for making civil claims based upon the actions of such individuals could well cause individuals to be more cautious and less effective in carrying out their roles. That possibility should be taken into account when considering whether any such cause of action can be justified from a public policy perspective.

The proposed right of privacy could also have other practical implications which need to be carefully considered. For example, it could affect the operation of planning laws, and the admissibility of evidence in proceedings. It could also operate to *prevent* the government from resisting freedom of information applications on privacy grounds: see *Gaskin v UK* (1989) 12 EHRR 36. All possible effects need to be carefully considered so that change only occurs where it is required.

¹ See Dawson & Kloczko, *Beyond Gutnick: Enforcement of foreign defamation judgments in Australia* (2003) 52 Computers & Law 1 and authorities cited therein.

3. ADEQUACY OF EXISTING PRIVACY AND PUBLICATION LAWS

The Paper fails to provide any evidence of any egregious conduct by the government, the media or any other person within Australia, relating to privacy, which should be unlawful but is not prohibited or actionable under existing laws.

The Commission's emphasis on the value of privacy protection being greater where it is direct rather than "incidental" is incorrect. From a public policy perspective, the only important question is whether the protection is adequate.

The suggestion in the Paper that privacy protection in Australia is currently "weak" is also incorrect. In fact, New South Wales and Australia as a whole have a mix of broad and specific laws which provide substantial and appropriate protection of privacy rights.

The privacy rights considered and proposed in the Paper are diverse. In order to determine whether there is any gap in Australian privacy protection, it is necessary to consider each category of privacy right separately. For that purpose, we have initially used the United States' categorisation of privacy rights and have commented on the specific categories suggested by the Commission at paragraph 6.32 of the Paper under heading S.4 below.

No	US Category
1	Public disclosure of private facts
2.	Intrusion upon the seclusion of another
3.	Publicity that places another person in a false light before the public
4.	Appropriation of the name or likeness of another

Each of these categories will be considered in turn.

3.1 Laws protecting against public disclosure of private facts

There is extensive legislation as well as common law and equitable principles which protect against public disclosure of private facts in NSW.

(a) Overview

There is a system of regulation comprised of both general and specific prohibitions which together provide extensive privacy protection.

The general rules which apply to media organisations in relation to acts and practices in the course of journalism are privacy standards to which they have publicly committed in order to trigger the media exemption of the Commonwealth Privacy Act.

In relation to activities of media organisations other than in the course of journalism, the Nation Privacy Principles (NNPs) in the Privacy Act and their health and public sector near-equivalents provide general privacy protection. Those principles relate to "personal information", very broadly defined to mean any information or opinion relating to an individual who can be identified from the material in question.

These general standards are supplemented by bright line rules which apply to specific types of information in relation to which Parliament considers privacy interests should always prevail over competing interests. This prevents disclosure of categories of information such as: information obtained from illegal monitoring or recording of private conversations or activities, the identities of victims of sexual assault, and the identities of children involved in criminal, custody or guardianship proceedings. There are more than 30 such laws across Australia.

Attachment 2 identifies the laws which address some key privacy concerns.

(b) **In the course of journalism**

The current privacy regime was put in place as a result of a lengthy review and consultative process. Under section 7B of the Privacy Act, acts and practices engaged in by media organisations in the course of journalism are exempt from the operation of the Act provided that the organisation publicly commits to observe published standards that deal with privacy in the media context. The exemption for journalists' activities recognises the important role played by media organisations in upholding freedom of speech in a context that was directly dealing with individual rights to privacy in relation to personal information.

In the Explanatory Memorandum to the *Privacy Amendment (Private Sector) Bill 2000*, the reason given for including a media exemption is to:

Balance the public interest in providing adequate safeguards for the handling of personal information and the public interest in allowing the free flow of information to the public through the media. (p43)

And in relation to clause 3 which states the objects of the Act:

Recognises that there are important human rights and social interests which compete with privacy, such as the desirability of the free flow of information to the public through the media and otherwise. (p 29)

It was considered that a co-regulatory regime was the best way to balance different areas of public interest. Further, the exemption acknowledges that media organisations are already subject to a range of Federal and State laws which provide protection against inappropriate or unfair means of gathering or disclosing personal information and images. These include the laws of trespass, nuisance, breach of confidence, malicious falsehood, contempt, regulation of use of listening devices and the myriad of laws restricting reporting of specific matters such as national security, adoption, juries and particular court proceedings.

The privacy regulatory regime in place which enables broadcasters and print media to obtain the journalists' exemption is a system of Codes and principles administered by industry bodies and underpinned by well defined and accessible complaints processes.

Broadcast material is co-regulated through a series of industry codes provided for in the Broadcasting Services Act. Broadcasting codes are developed by the relevant industry body and administered by the Australian Communications and Media Authority (ACMA)).

Additional and practical guidance for broadcasters and the public about issues relating to privacy are contained in an ACMA publication entitled "Privacy

Guidelines for Broadcasters”. The Guidelines are designed to assist broadcasters in balancing the use of material relating to a person’s private affairs with an identifiable public interest reason for the material to be broadcast. The Guidelines also assist in raising the level of public awareness about privacy matters and the electronic media.²

Regulation of broadcasters is overseen and administered by a federal regulator that has specific knowledge and understanding of broadcast media. They are, together with all the provisions of the various industry codes, subject to public consultation and review and can only be registered when ACMA is satisfied that community safeguards and expectations have been met.

Print media, through the Australian Journalists’ Association and the Australian Press Council is regulated by The Australian Journalists’ Association Code of Ethics, the Australian Press Council Statement of Principles and the Australian Press Privacy Standards.

Unlike the provisions of the Privacy Act, which are aimed at data protection, the provisions of the various industry codes of practice are specifically adapted to addressing issues of privacy in the media context.

The codes play an important role in informing the public about what to expect from the media and instructing journalists on what is expected from them when dealing with sensitive situations.

The benefits of a co-regulatory and self regulatory system include that:

- appropriate standards can be devised for each industry sector which takes into account the particular characteristics of that sector including existing self-regulation and co-regulation frameworks;
- standards can be updated and revised without the need for any new legislation;
- it is not necessary for complainants to go to the expense of lawyers or to endure the expense and inconvenience of discovery; and
- they are enforced through industry complaints mechanisms which are faster, more cost effective and much more readily accessible for complainants than the Courts.

Details of the regulation of media for each sector of print and broadcast media are set out in Attachment 3

It is not clear why the Commission has embraced a fundamentally different philosophical approach by advocating such a broad ranging tort of privacy. We do not think that such a contrary approach is either warranted or desirable.

² ACMA’s Privacy Guidelines can be found at http://www.acma.gov.au/WEB/STANDARD/pc=PC_100133

(c) **Operation of media privacy regulations**

The media privacy regime currently in place provides effective safeguard for the protection of private rights and interests and strikes an appropriate balance between the rights of individuals and the fundamental rights of freedom of expression and the need for free flow of information on matters of public concern. In our view, the current framework is effective and working well.

(i) **Newspaper publishers**

We have the benefit of having read the submission of the Australian Press Council in relation to privacy standards applicable to publishers. We endorse that submission. We note that Australian Press Council's membership includes appropriate community as well as industry representatives and this ensures that its adjudications are fair, balanced, and reflect community privacy expectations. We also note that adjudications are always published by the publisher the subject of the adjudication, which is an effective way of providing vindication to affected individuals.

(ii) **Commercial Television**

Commercial free to air television broadcasters are regulated through the Commercial Television Industry Code of Practice (the "Code"). The Code is developed by Free TV Australia and registered by ACMA provided ACMA is satisfied that broadcasters have undertaken appropriate public consultation and that the Code contains appropriate community safeguards.

The co-regulatory scheme sets out a specific complaints process for matters covered by the Commercial Television Industry Code of Practice. This provides a quick and effective mechanism by which public concerns about code breaches can be addressed.

At first instance written complaints are directed to the relevant broadcaster. A substantive written response must be provided within 30 working days. Where complaints disclose a possible breach of a privacy requirement, or any other code requirement, the relevant broadcaster will act on the complaint and take action to address the issue. Where the broadcaster is satisfied the complaint does not disclose a breach of the Code, it will respond explaining why that is the case.

If the complainant is not satisfied with the explanation it may refer the matter to ACMA for investigation and, if necessary, appropriate action. Where ACMA determines that a breach of the Code has occurred it will take action to ensure that broadcasters remedy the breach and/or put in place procedures to ensure that it does not recur. It may also impose conditions on a broadcaster's licence. Breaching a licence condition is a serious matter and can result in the imposition of fines and/or suspension/cancellation of a broadcaster's licence.

Free TV members are sensitive to privacy concerns and consider and weigh up the interest of the individual concerned before deciding to broadcast a story. All commercial television stations have agreed by their adoption of the Code, that certain private or personal matters should only be broadcast

where it is in the public interest to do so, or where it would not cause undue distress to victims' families.

The effectiveness of the current co-regulatory media privacy framework in ensuring sensitivity to privacy concerns is evidenced by the low number of privacy related complaints that commercial television broadcasters receive. Set out below are details of the complaints under the Code since 1996.³ The total number of complaints relating to privacy issues is extremely low.

Year	Total Complaints	Privacy Complaints	% All Complaints
1995/1996	937	8	0.9%
1996/1997	1,058	4	0.4%
1997/1998	831	5	0.6%
1998/1999	864	15	1.7%
1999/2000	1,041	12	1.2%
2000/2001	907	14	1.5%
2001/2002	745	9	1.2%
2002/2003	741	18	2.4%
2003/2004*	678	5	0.7%
2004/2005	997	11	1.1%
2005/2006	1,109	26	2.3%

*1 October 2003 – 30 June 2004

During this 10 year period, **126** privacy related complaints were lodged with commercial television broadcasters representing approximately **1.3%** of all complaints (**9,908**).

Some of these were referred to the ABA/ACMA for consideration. During the period, ACMA and the ABA before it conducted **51** privacy investigations representing approximately **7%** of all commercial television investigations. **19** investigations resulted in breach findings representing approximately **2.7%** of all breaches.

All ACMA investigation reports including breach and non breach findings relating to privacy are published and made publicly available on ACMA's website⁴

It is also relevant to note that the Office of the Privacy Commissioner (OPC) has received very few inquiries and complaints about media organisations. This indicates that the public is generally satisfied with the treatment of privacy in the media. We disagree that this indicates a widespread view that the media is above the law. In Free TV's experience, and as is evidenced by Free TV's complaints reporting to ACMA, the public has a keen interest in what is and is not shown on television and is vocal about raising its concerns with broadcasters and relevant regulators.

³ Annual periods for 1995-2003 run from 1 October to 30 September the following year. From 30 June 2004, annual periods run from 1 July to 30 June.

⁴ http://www.acma.gov.au/WEB/STANDARD/pc=PC_300384

(iii) **Subscription Television**

Subscription broadcast and narrowcast television, subscription narrowcast radio and open narrowcast television broadcasters are regulated through the various ASTRA Codes of Practice. As with all sectors of broadcasting the Code is developed by the relevant industry association, in this case the Australian Subscription Television and Radio Association (ASTRA) and registered by ACMA if it is satisfied that broadcasters have provided an adequate opportunity for public consultation, the Codes contain appropriate community safeguards and have been endorsed by the majority of service providers.

The ASTRA Codes cover Subscription Broadcast Television, Subscription Narrowcast Television, Open Narrowcast Television and Subscription Narrowcast Radio Services. The Codes provide clear and consistent information to enable consumers to make informed decisions about the nature of programming they elect to receive.

Additionally Subscription television operators are committed to the protection of subscribers' interests in all aspects of their service provider-subscriber relationships. These include issues relating to subscriber options, fault repair, subscriber privacy, credit management and billing, all of which are covered by the codes.

There are specific provisions for privacy under matters dealing with News and Current Affairs Programs including reference to ACMA's Privacy Guidelines for Broadcasters; Subscriber Privacy where collection of personal information is subject to the Privacy Act 1998 and the National Privacy Principles which form Attachment A to each of the Codes. There have been no breaches of the ASTRA Codes in relation to privacy in the past five year period.

As with other sectors the relevant industry codes cover complaints handling and under the co-regulatory regime the onus is on the broadcaster or narrowcaster in the first instance, to respond to complaints and resolve matters of community concern covered by the Codes. If a complaint is unresolved or the safeguards are proven inadequate then the regulatory authority, ACMA steps in as described above.

(iv) **Special Broadcasting Service (SBS)**

SBS operates under the *Special Broadcasting Services Act 1992* (SBS Act). Section 10(1)(j) of the SBS Act requires SBS to develop and publicise codes of practice relating to programming matters and notify them to ACMA.

Code 8 of the SBS *Codes of Practice* sets out the procedures for audience members to complain to SBS about SBS programs and content. A complaint that alleges that SBS has acted contrary to the Codes of Practice is treated as a formal complaint. Formal complaints are investigated by the SBS Audience Affairs Manager (AAM), a position that is independent of all SBS programming divisions. The AAM is required to undertake a proper and fair investigation of all complaints. Code 8 states that the AAM will endeavour to provide a written response to the complainant within 30 days of receipt of the complaint, but in any event must do within 60 days.

If a formal complaint is upheld, Code 8 provides that SBS, at its discretion, may take action including: acknowledging that a breach has occurred; apologising for the impact of the breach; placing a correction, retraction or apology on the SBS website; broadcasting the correct information; or broadcasting an apology for the impact of any breach.

A complainant who considers SBS's response to be inadequate may complain to ACMA (s.150, BSA). If ACMA is satisfied the complaint was justified it may recommend that SBS take action to comply with the relevant SBS Code (s.152, BSA). If SBS does not comply with the recommendation, ACMA may report to the Minister who must cause a copy of the report to be laid before Parliament (s.153, BSA).

Since 14 February 2005, when the current formal complaints handling system managed by the SBS Audience Affairs Manager was implemented, to end August 2007, SBS has received a total of 427 formal complaints. Of these, only four (1%) stated they were concerned with privacy, and only one (0.23%) was actually concerned with the complainant's own privacy. The other three complaints were concerned with what they considered to be the invasion of privacy of other individuals depicted in news reports and a documentary. All of these complaints were dismissed by the Audience Affairs Manager, and none were appealed to ACMA.

During the period 1999 to current, no complaints have been upheld by ACMA regarding breaches of SBS's privacy code⁵.

(v) **Australian Broadcasting Corporation (ABC)**

The ABC operates under the Australian Broadcasting Corporation Act 1983 (ABC Act). Section 8(1)(e) of the ABC Act requires the ABC Board to develop codes of practice relating to programming matters and notify these codes to the Australian Communications and Media Authority. The Board also sets the ABC's Editorial Policies, which set out in some detail the editorial and ethical principles fundamental to the ABC.

The ABC's complaints procedures are set out in detail in section 13 of the ABC Editorial Policies, and summarised in section 9 of the ABC Code of Practice 2007. These policies provide that where a written complaint alleges that the ABC has acted contrary to its Editorial Policies or Code of Practice, it must be referred to Audience & Consumer Affairs for investigation. Audience & Consumer Affairs is an independent investigative unit and is separate to program making areas within the ABC. Audience & Consumer Affairs seeks to provide complainants with a written response, indicating its finding on the complaint and the reason for that finding, within 28 days of the complaint being received by the ABC. In any case, however, the ABC must provide a substantive response to complaints alleging a breach of the ABC Code of Practice within 60 days. Privacy is a matter which is covered by the ABC's Code of Practice.

In each case where a complaint is upheld, the response to the complainant will acknowledge the error. Where appropriate, additional action is taken to

⁵http://www.acma.gov.au/WEB/STANDARD/1447247275/pc=PC_91717

rectify the mistake and/or ensure that the problem does not recur. Findings in response to upheld complaints can include the following: written apologies to complainants; on-air corrections and apologies; counselling or reprimanding of staff; amending programs for future broadcasts; and reviews of and improvements to procedures. On occasion, a complaint may be upheld for more than one reason.

Audience & Consumer Affairs publishes a quarterly report of all complaints it has upheld, as well as details of all complaints reviewed by the ABC's Complaints Review Executive. The Complaints Review Executive provides a level of internal review for complainants who are dissatisfied with the response they have received from Audience & Consumer Affairs. If a privacy complaint alleges serious unfair treatment, it may also be able to be reviewed by the Independent Complaints Review Panel, a body established by the ABC Board to provide a further level of review for those dissatisfied with the ABC's response to complaints. Ultimately, complaints about privacy issues can be referred to the government statutory authority, the Australian Communications and Media Authority, for independent review.

Over the past five years (1 July 2002 to 30 June 2005), ABC Audience & Consumer Affairs has received 76,817 complaints. Of these, 86 related to issues of intrusiveness or invasion of privacy. This accounts for less than one per cent of complaints received by the ABC in this time. Over this five year period, three complaints alleging intrusiveness or invasion of privacy have been upheld by Audience & Consumer Affairs. None of these complainants identified themselves as the actual subjects of the ABC's intrusiveness or invasion of privacy. Rather, the complaints were made by other listeners and viewers.

No complaint alleging intrusiveness or invasion of privacy in ABC content has been upheld by the Complaints Review Executive, the Independent Complaints Review Panel or the Australian Communications & Media Authority.

(vi) **Commercial Radio**

Commercial Radio broadcasters are regulated through the Commercial Radio Australia Code of Practice & Guidelines. The Code is developed by Commercial Radio Australia and registered by ACMA if it is satisfied the industry has provided adequate public consultation, it contains appropriate community safeguards.

In a similar manner to commercial television, complaints are directed to the relevant radio broadcaster in the first instance and to ACMA if the complaint is not resolved. Where ACMA determines there is a breach it has the power to ensure the broadcaster remedies the breach and has the ability to impose conditions on a broadcaster's licence. Breaching a licence condition can result in sanctions by ACMA.

Specific provisions relating to privacy are contained in *News and Current Affairs Programs* section of the Code. Commercial radio broadcasters have only received three complaints relating to privacy in the past two year period.

(d) **Existing laws provide adequate protection**

It is imperative that any new privacy right does not overlap with existing causes of action and standards. Providing a cause of action where one already exists will add unnecessary complexity to the law. Also, because the new cause of action would presumably differ from the existing cause of action in some way, the new cause of action would shift the balance between competing rights struck by the existing cause of action. It is likely that either the old or the new cause of action (whichever was less beneficial to plaintiffs) would fall into disuse.

At paragraph 2.54 of the Paper, the Commission comments that adoption of truth alone as a defence under the reformed defamation law, makes defamation less effective in providing privacy protection. Prior to the reform, some jurisdictions had public interest or public benefit requirements. The Commission suggests that this is an argument for introduction of a statutory right of privacy.

The Commission's comment ignores the fact the Australian jurisdictions reformed their defamation laws (including the defences) in the context of the existing privacy protection and in particular, the protection provided by the media codes of practice.

Defamation gives a right of action in respect of publicity given to private facts which are false where the publicity is likely to have an adverse effect on a person's reputation.

In respect to both the media and non-media context, very careful consideration needs to be given to whether *true facts* which adversely affect reputation should be regulated at all and, if so, in what circumstances. The obvious circumstances where the law should prevent someone from disclosing the truth such as where victims of sexual assault or children are involved are already covered by express statutory offences. In addition, in the media context, the privacy standards discussed above apply. The standards allow for people with appropriate knowledge and experience to determine in each case the proper balance between privacy and public interest.

The existing protections are more than adequate.

Restrictions on publication of true facts (both through injunctions and through the threat of recovery of damages) effectively allow people to prevent others from knowing the truth about them. Suppression of true facts can result in harm to the individual and to others. Unless any restriction on telling the truth is very carefully confined, there is also a risk that the comment of Picard in relation to the *Mitterand* decision quoted in paragraph 5.19 of the Paper will apply: the law will protect "the right of the subject of the invasion to reveal what he wishes about himself even if, as in this case, it was not the truth."

The remedies of adjudications and determinations applicable in respect of the media standards are appropriate in relation to true information. They are supplemented by laws such as the law of confidence and statutory restrictions on publication where appropriate. Introduction of an additional civil right would simply further complicate this area, and would be likely to make the remedy disproportionate to the harm.

In summary, there is extensive protection against publication of private facts in Australia. It is not appropriate to add an additional layer of protection and of complexity and accordingly we oppose introduction of any new privacy law.

However, if any new law is to be enacted it must contain a media exemption given that there is no gap in relation to media organisations, which are subject to appropriate general privacy standards as well as narrow and clear statutory restrictions on publication.

3.2 Intrusion upon seclusion/interference with home or family life

The Paper does not demonstrate any need in Australia for additional protection in relation to these matters. Our comments in relation to each of the categories of intrusion listed in paragraph 4.46 of the Paper covered by the US tort are as follows:

Physical intrusion	This is adequately covered by the law of trespass. As recognised in paragraph 2.40 of the Paper, the law of trespass imposes strict limits on newsgathering activities in Australia. For example, under Australian law, it is likely that a journalist can enter land to request permission to film, but cannot in fact film unless permission is given: <i>TCN Channel Nine Pt Ltd v Anning</i> (2002) 54 NSWLR 333.
Use of senses	<p>The example given in this category was of a prison window overlooking a home. In Australia, such privacy concerns are dealt with by way of planning laws, which generally require that people potentially affected by development be notified and be given an opportunity to object through local councils and appeal Courts.</p> <p>It would be undesirable to create an additional avenue of complaint with a new privacy right. This would complicate and detract from existing planning appeals processes which are already often lengthy and expensive for all concerned.</p>
Use of Surveillance devices	This is already comprehensively regulated by existing Commonwealth, State and Territory surveillance laws, listed in Attachment 2. Different jurisdictions deal with surveillance differently, and uniformity is desirable. However this should be achieved by way of uniform state and territory surveillance Acts, not by way of a new cause of action of privacy.
Others	<p>Many other examples are also covered by existing laws. For example:</p> <ul style="list-style-type: none"> • Opening sealed mail: <i>Australian Postal Corporation Act 1989</i>

	<ul style="list-style-type: none"> • Reading private documents, prying into a bank account: this is covered in various circumstances by the law of confidence (in that a person who reads correspondence which is obviously intended to be confidential is likely to be subject to a duty of confidence), and in some circumstances there may be an action for trespass to goods, conversion or detinue. • Publication of private facts: in relation to media organisations, the privacy standards and processes described under heading 3.1(c) above would apply. If the fact were such as to cause ordinary reasonable recipients to think less of the individual, then a cause of action for defamation would also be available.
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3.3 **Publicity that places another person in a false light before the public**

This cause of action as described in the Paper is very similar to the tort of injurious falsehood in Australia. In fact, it would be interesting to trace both torts back to see whether they flow from common English source. The only real difference is that it is necessary to prove special damage to establish a cause of action for injurious falsehood.

There would be no point in making this tort available in Australia. Defamation is much easier to establish than the three elements of this tort and would be relied upon instead.

It is unlikely that false light will make any matter actionable which would not be actionable in defamation. Like false light, defamation allows for the fact that ordinary reasonable readers and viewers "read between the lines". Under Australian law, a publication is defamatory if it would be likely to make ordinary reasonable people think less of the person *or* cause them to shun and avoid a person. It has been held, for example, that to say that someone is a rape victim is defamatory on the basis that a person might avoid her, even though they would not think less of her: *Youssouf v MGM Pictures Ltd* (1934) 50 TLR 581. It is difficult, if not impossible, to think of publication which was "highly offensive" which did not fit within one of those categories.

It is correct to say that the gist of defamation is damage to reputation: *Dow Jones v Gutnick* [2002] HCA 56. Compensatory damages (including aggravated compensatory damages) and special damages can be awarded in defamation actions. Compensatory damages have three purposes, which were described by the High Court in *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 as follows:

The three purposes are consolation for the personal distress and hurt caused to the appellant by the publication, reparation for the harm done to the appellant's personal and (if relevant) business reputation, and vindication of the appellant's reputation. The first two purposes are frequently considered together and constitute consolation for the wrong done to the appellant. Vindication looks to the attitude of others to the appellant: the sum awarded must be at least the minimum necessary to signal to the public the vindication of the appellant's reputation.

Introduction of a false light cause of action in Australia would therefore cause confusion and add to the cost and complexity of compliance (as people will have to find out about this cause of action to work out that it is not relevant to them) without any benefit.

The issue of whether to extend a right of action against the media in relation to representations which are misleading or deceptive but not defamatory was considered thoroughly and addressed when section 65A of the Trade Practices Act 1974 (Cth) was passed. Section 65A was introduced in 1984 and exempts prescribed information providers, which include all media organisations, from the operation of key provisions of the Trade Practices Act, including section 52, in relation to the publication of material other than advertisements and advertorials. As the Attorney-General described it in his second reading speech on the Statute Law (Miscellaneous Provisions) Bill, set out in the Hansard Report of Debates in the House of Representatives for 13 September 1984 at p.1296:

"..... Recent decisions of the Federal Court have suggested that a newspaper publisher may be taken to have engaged in conduct that is misleading or deceptive for the purposes of section 52 of the Trade Practices Act if the newspaper contains inaccurate information. The Government recognises the need to maintain a vigorous, free Press, as well as an effective and enforceable Trade Practices Act. In doing so, the Government recognises that, whilst the problem may have been highlighted by a defamation action, similar considerations apply in respect of actions for negligent mis-statement and actions for injurious falsehood. The Government also recognises that the difficulties in this area are experienced not only by the main newspaper, magazine and television publishers, but also by a wide range of other people who provide information....."

We note that the ALRC does not appear to support introduction of such a right for similar reasons: see paragraph 5.72 and proposal 5-1 in the ALRC Paper.

3.4 **Appropriation of name or likeness**

The Paper proposes that a statutory cause of action of privacy should extend to a cause of action for invasion of privacy based on use of a name, identity, likeness or voice without authority or consent.

Causes of action of this type in other jurisdictions operate to protect quasi proprietary rights. Thus, as noted in paragraph 4.60 of the Paper, to constitute an invasion of privacy rights in the US, the use of a name or likeness must be "for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or likeness..."

Australian laws provide extensive protection against use of a person's identity or brand. Relevant laws include:

- (a) copyright law;
- (b) trade practices law;
- (c) common law passing off;
- (d) offences for identity theft; and
- (e) offences for dishonesty, including fraud and obtaining a benefit by deception.

These laws operate to provide an appropriate level of protection in Australia. For convenient reference, we have included a discussion of the ways in which they operate to protect identity rights, including details of some relevant cases, in Attachment 4.

The existing Australian laws are formulated so that they provide protection in appropriate circumstances in which it is appropriate, such as where use of a person's name or likeness is misleading or deceptive and in trade and commerce, or is dishonest. We are concerned that any broader or more extensive right will operate to give individuals a right of veto over material they do not like. This would have a serious adverse effect on freedom of communication in Australia.

We are not aware of any call for extended personality and publicity rights in Australia. Nor would any such call be justified. Appropriate protection of commercial and other interests in identity rights is already provided under existing laws. The adequacy of laws in relation to the media is demonstrated by the fact that there is not a problem of misuse of identity rights in the media in Australia. Any such cause of action which applied to the media would therefore either have no substantive effect (which means that its overall effect would be the negative one of making New South Wales law more complex and confusing) or it would extend identity rights in a way that has not to date been considered necessary or appropriate under Australian law. Obvious misuses of identity information outside the media, such as misuse of identity details for the purpose of fraud or of stalking, are already illegal under Australian laws.

We note that the ALRC does not appear to support introduction of such a right: see paragraph 5.72 and proposal 5-1 in the ALRC Paper.

3.5 **Breach of statutory duties**

The Paper proposes that, to the extent that privacy interests are protected by criminal law or other regulatory offences, invasions of privacy should also be capable of generating civil responsibility and that a statutory cause of action is required on this basis. The Paper notes that compensation from the State is sometimes but not always available and civil remedies are appropriate in many cases, including to prevent the occurrence of the offending conduct. We note, however, that civil responsibility can already attach to many circumstances where a criminal or regulatory offence is committed which is focused on protecting the privacy of an individual by nature of the fact that a *duty* between parties is often created by that legislation in relation to the privacy of the individual.

Whether a statutory duty is imposed is a question of construction of the statute in question. The statutory duty must be mandatory in nature. However, if a statute confers an element of discretion this does not exclude the existence of a statutory duty.

If and to the extent that it is appropriate for the courts to award damages in respect of breaches of statutory restrictions on publication, it is open to them to do so. In some circumstances, it may not be appropriate for them to do so. For example, another cause of action may cover the field. It is appropriate that courts be left to consider this on a case by case basis.

4. **HOW DOES AUSTRALIA COMPARE INTERNATIONALLY?**

The question of whether or not New South Wales should have new privacy law should depend upon whether there is a demonstrated need for one, and not upon the approach taken in foreign jurisdictions.

However, we consider that in any event Australian privacy protection is comparable to that in the other jurisdictions discussed in the Paper.

As can be seen above, there are Australian laws which address each of the privacy concerns identified in the Paper.

When the international position is closely considered it is apparent that introduction of a broad privacy right in NSW would put it out of step with comparable jurisdictions discussed in the Paper. Key considerations in relation to the international position include:

(a) **ECHR Article 8 may be confined to public authorities**

There is uncertainty as to whether the ECHR extends to anyone other than public authorities. Article 8 expressly relates to the actions of public authorities, and statutes implementing it, such as the Human Rights Act 1998 (UK) also relevantly refer to the actions of public authorities.

The question of whether or not Article 8 has any application to anyone other than public authorities will no doubt ultimately be decided by the Grand Chamber of the European Court of Human Rights. The decision in *Von Hannover v Germany* (2005) 40 ECHR purported to extend it to the private sector by finding that German Courts had breached Article 8 by failing to injunct publication of photographs by a magazine. However, that decision does not sit easily with the wording of Article 8 and has been the subject of extensive criticism internationally. The World Association of Newspaper and The World Editors Forum petitioned Germany to appeal to the Grand Chamber. That association is a non-profit association which represents 76 national newspaper associations, 10 news agencies and 10 regional press organisations. Its membership extends to 18,000 publications on the five continents. Media law specialists also objected strenuously: see the article at www.olswang.com.

In those circumstances, the ECHR is highly relevant to privacy restrictions which might be imposed on public authorities in Australia. It is less relevant to the private sector. The public policy considerations applicable to government are very different to those which apply in relation to the private sector. This is particularly true in respect of certain specific rights canvassed in the paper. For example, governments which read private correspondence typically do so for the purposes of censorship, security or to identify and persecute political foes. In contrast, the media will normally only have access to such correspondence when it is given to them by a party to it, and the only risk of them having it is that it will become public. The former risks are obviously much more serious and much more worthy of regulation than the latter.

(b) **US gives weight to freedom of communication when applying its laws**

The US has acknowledged the fundamental importance of freedom of communication to a peaceful and democratic society by enshrining freedom of speech in the 1st amendment of the constitution.

At paragraph 4.85, the Paper concludes that under US law, "freedom of expression trumps privacy to such an extent that the so called 'right to privacy' can be seen as a somewhat hollow one".

(c) **Other jurisdictions discussed in the paper**

We note in relation to other key jurisdictions discussed in the paper:

- Canadian provinces have taken differing approaches, and Saskatchewan has a broad news gathering exemption from its privacy laws;
- The Irish Privacy Bill is yet to be enacted and specifically recognises the legitimacy of bona fide newsgathering and the importance of public discussion by providing a defence for newsgathering. In addition, privacy rights in the Irish Constitution appear to be aimed mainly at the actions of public authorities;
- The French Civil law system, culture and jurisprudence is so different from that of Australia that we query whether it is an appropriate model for Australia.

(d) **All other jurisdictions with right of privacy also have express right of freedom of communication**

As acknowledged in the Paper, every jurisdiction with an express right of privacy also has an express right of freedom of communication. Without an express right of freedom of expression, it is misleading and of little value to use the experience and law in other jurisdictions as a basis for reform in Australia.

5. CAUSE OF ACTION PROPOSED IN THE PAPER

5.1 General Comments

The cause of action proposed appears to have been devised with a view to ensuring there is no possibility of any gaps in privacy law.

It also appears to proceed on the basis that it is acceptable for there to be extensive overlap between a new right of action and existing laws. This is incorrect. Each existing relevant offence and cause of action, including all of the causes of action and offences listed in Attachment 2, reflects careful decisions as to the appropriate balance between competing rights. Any new cause of action which seeks to cover the same ground will either upset that balance or will be irrelevant on the basis that it is never used.

The proper approach is to identify the specific harms to be addressed, consider whether they are already adequately addressed elsewhere, then consider regulating any remainder. As discussed further below, the categories of circumstances which are specifically canvassed as examples of invasions of privacy are adequately regulated by other laws.

If there is to be any new right of privacy, then it should be narrowly confined to meet any demonstrated need, and should be subject to a media exemption and to clear defences in circumstances where the public interest in communication should always prevail over any privacy right.

5.2 Information in the public domain

One of the obvious defences should be for information in the public domain. The Commission discusses, but does not reach a position on, the availability of a public domain defence for the proposed action for invasion of privacy. Such defence would preclude a plaintiff from bringing an action for invasion of privacy if the personal information was already in the public domain.

Publication of information in the public domain is fundamental and must be permitted. If an action for invasion of privacy proceeds, a public domain defence must be embedded as a way to protect valid and legitimate publication of public information.

The Commission draws a distinction between "information in the public domain and information which, though published, remains within the private sphere of the claimant and is personal to him or her" (at paragraph 7.19). An example given is information about a person's HIV status disclosed in a discrimination claim. This example is a good one, in that open justice is, as discussed in Attachment 1, a fundamental principle which underpins our judicial system. In fact, it may well be constitutionally protected: see *"Seen to be Done: The Principle of Open Justice"* The Hon Spigelman JJ (200) 74 ALJR 290. The Courts may only generally suppress such information where it is necessary for the administration of justice to do so. There are good reasons for that: what if, for example, the person making the discrimination claim turned out to be the cousin of the judicial officer deciding the case? Or what if a key witness came forward as a result of publicity of the case, which changed the outcome? And what if the person had separately disclosed his or her HIV status on the internet? One circumstance in which suppression orders generally can be made is where an action would become futile if information were disclosed. The example given by the Commission could, depending upon the circumstances, fall within that category.

It is imperative that people be free to communicate information which is true and is already in the public domain. If there are particular circumstances in which information which is already public should not be publicised further, then it is likely that existing remedies (such as suppression powers) will suffice. If not, then specific measures should be put in place. A blunt instrument such as a general right to privacy should not be used for that purpose.

5.3 **General right with examples**

The Paper proposes a general right with non-exhaustive list of circumstances which are invasions of privacy. This approach is flawed. In particular:

- (a) as noted above, it does not make sense to protect a single right, being privacy, without also at the same time protecting other rights which are at least as important. As noted at paragraph 3.2 of the Paper, all common law countries surveyed in chapter 3 of the Paper which protect privacy also protect those other rights. If NSW implements the proposed cause of action it will be alone amongst key jurisdictions in choosing to give privacy priority over other important rights;
- (b) the general right essentially forces the Courts to implement a cause of action for invasion of privacy but leaves it to them to determine the scope of any cause of action. Parliament and not the Courts should determine the scope. The Courts do not have the same public policy information and consultation processes available to them as Parliament, and it is better for Parliament to make new law if it is needed;
- (c) it creates extensive uncertainty which will adversely affect communications in circumstances where the cause of action will not ultimately prevail as well as those communications which would ultimately be found to be invasions of privacy;
- (d) it creates an overlap between the cause of action and other key areas of law.

5.4 Examples suggested in paragraph 6.32 of the Paper

The examples suggested in paragraph 6.32 are extremely problematic and should not be included in any privacy cause of action. They provide clear examples of why a general right of action is inappropriate.

Category	Comment
<p>Interference with home or family life</p>	<p>This cause of action appears to be based upon international rights aimed at preventing unwarranted government intrusion into the home and family. For example, by way of unauthorised searches or by making incorrect guardianship and custody decisions.</p> <p>This cause of action would move power to make decisions about key issues such as children at risk from the executive to the Courts. The risk of liability could well hamper public servants when carrying out such difficult responsibilities.</p> <p>The Paper has not identified any specific harm which this right might address in Australia in relation to private citizens which is not already covered by existing laws. In those circumstances, there does not appear to be a basis for introducing this right.</p>
<p>Unauthorised surveillance</p>	<p>Surveillance is the subject of separate regulation in NSW. It is not clear whether the Commission is proposing to repeal the Listening Devices Act and the Workplace Surveillance Act and replace them with the proposed right, or it proposes to have two sets of co-existing rights.</p> <p>We consider that the current system of separate regulation of surveillance should continue. Surveillance is a specific type of privacy concern and has traditionally been the subject of specific laws in Australia. Reform efforts should focus on achieving national uniformity in this area.</p> <p>There are serious problems with the "deliberately circular" definition and certain other aspects of the proposals in NSWLRC Report 98 which have already been the subject of submissions to the Commission by the media. It is important that those concerns be met by way of appropriate changes to the drafting of any new surveillance legislation.</p>
<p>Interference with, misuse or disclosure of correspondence or private communications</p>	<p>This appears to be derived from the ECHR Article 8 case law relating to privacy of communications, which appears to be concerned mainly with government conduct.</p> <p>Interference with private communications is already regulated by surveillance, confidentiality, postal and other laws (see the discussion at heading 3.2). There is no need for any additional regulation.</p> <p>There is a great deal of uncertainty as to how this prohibition would apply in a private context. It has the potential to have a</p>

	<p>significant impact in a wide variety of contexts. For example, what constitutes a "misuse" of correspondence? And what if, for example, a mother reads her teenage child's email. Would this be actionable, and in what circumstances? What if she was checking to ensure that the child was not being targeted by online predators?</p> <p>In a media context, it is likely that this cause of action would be used as a means for resisting all production of documents to the media, and for seeking to injunct every negative story involving any correspondence. This is inappropriate. Media publication of correspondence should only be prohibited or actionable in the circumstances already covered by existing laws such as breach of confidence, trespass and computer crimes. Any such cause of action should therefore be subject to a broad media exemption.</p>
<p>Unlawful attack on honour/reputation</p>	<p>This element replicates and should be left to defamation law. It would either be otiose (on the basis that nobody would rely upon it), or in the absence of the defences available in defamation actions, would change the careful balance between protection of reputation and freedom of communication achieved by defamation law.</p> <p>In either event, it would destroy the national uniformity which governments and the media have been seeking in relation to defamation law for 25 years and which they achieved only last year.</p> <p>We note that the ALRC does not appear to support it: see paragraph 5.72 and proposal 5-1 of the ALRC Paper.</p>
<p>Places an individual in a false light</p>	<p>As discussed under heading 3.3, this cause of action would be pointless, in that defamation law provides greater protection.</p> <p>We note that the ALRC does not appear to support it: see paragraph 5.72 and proposal 5-1 of the ALRC Paper.</p>
<p>Discloses embarrassing facts relating to that person's private life</p>	<p>The privacy standards to which media organisations have committed together with the many additional laws listed in Annexure 2 provide appropriate protection. The standards are enforced using cost effective and appropriate mechanisms.</p> <p>Any additional regulation in this area should be tailored to particular needs and should be subject to a media exemption and to clear exceptions in relation to situations in which the public interest will always justify disclosure.</p>
<p>Uses name, identity likeness or voice without authority or consent</p>	<p>Based upon the approach taken by Courts in other jurisdiction, this cause of action is likely to mainly protect commercial interests in identity. Such a cause of action would mainly benefit celebrities. It is not clear why law reform is required to give this already very privileged group an additional source of revenue.</p> <p>It would impede news gathering to an inappropriate extent. As</p>

	<p>currently formulated, it would, for example, require that the media gave careful consideration to public interest considerations before publishing a photograph or an account of a celebrity or a politician or celebrity in a public place. It is likely that all individuals who receive publicity would try to use this element of the proposed cause of action to seek that only flattering photographs and references are published. This would very significantly distort the information received by the public and would cause the public to be misled about the individuals in question.</p>
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In the above circumstances, we oppose the introduction of a right to privacy in the form proposed.

6. COMMENTS IN RELATION TO PROPOSAL 2 (REMEDIES)

6.1 Proposed remedies

The Commission recommends a range of statutory remedies to be available for the action of invasion of privacy. They are proposed to take the form of a list, from which the Court may grant relief in its discretion.

Our submission focuses on the Commission's proposed remedies of damages, injunctions and correction orders. We have concerns about some of the other remedies proposed and will make additional submissions on the question of remedies if the proposal for a new right of action is progressed.

6.2 Damages

We are of the view that making provision for damages awards will have the effect of encouraging litigants whose aims are financial gain rather than protection of their privacy. We see monetary awards as encouraging speculative or vexatious claims and is not the best way to protect individual privacy.

The Commission's position, stated at paragraph 8.10, is that "an order for compensation will be one of the most important remedies to make available to a person aggrieved by an invasion of his or her privacy".

It is not clear that a right to damages is necessary or appropriate. The Paper identifies potential, undesirable consequences which may flow from the availability of a new, statutory cause of action for invasion of privacy. One such undesirable consequence is that a right of action "is likely to be used mainly by celebrities or corporations in order to protect their commercial interests or, simply, to attempt to suppress freedom of speech." At the core of this statement is the matter of damages, and whether it is, in fact, an appropriate remedy for the protection of individual privacy.

The interests of privacy are better served by the current complaints and resolutions regimes by which media organisations are required to address actual practices in the event of wrongful conduct. If formal litigation is made the principle avenue for recourse against alleged intrusions on privacy, there will be real implications for affordability of, and access to, justice. Individuals with legitimate concerns should be entitled to non-legalistic, accessible, inexpensive and direct resolution procedures. The existing complaints resolution scheme involving media organisations, industry bodies and statutory bodies delivers in all these regards. The existing system enables negotiated outcomes, with an

emphasis on the nature of the complaint, the expected standards of conduct, and the needs of the parties concerned. This is in contrast to a process predicated on substantial costs and the grant of monetary awards.

Those in a position to benefit from a new cause of action for invasion of privacy will be, in the main, celebrities or others who are financially equipped to commence proceedings. The priority for such litigants may be commercial interests.

6.3 Injunctions

The Commission states that "injunctions, including interlocutory injunctions, will often be the most important recourse that an individual has to protect his or her privacy rights" (paragraph 8.34).

Given the likely effect of any injunction right on freedom of communication injunctions should not be available to restrain the publication of private facts.

The Commission itself highlights this issue in the Paper (paragraphs 8.37 – 8.42). As discussed above, defamation is available as a cause of action in respect to any publication which is false and defamatory or a defence such as fair protected report is available. It is well established in defamation cases that injunctions are only available in the most exceptional of cases because of the overwhelming public interest in freedom of communication. The position was correctly summarised in the following passage from *National Mutual Life Association of Australasia v GTV Corp Pty Limited* [1989] VR 747:

In the case of an application to restrain a libel, however, the very great importance which our society and our law have always accorded to what is called free speech, means that equity exercises great care in granting injunctive relief and does so only where it is very clear that it should be granted. It has been said in high places, and said on high authority from the Bench, that it is by no means rarely a benefit to society that a hurtful truth be published. It has been felt, we think, that it is usually better that some plaintiffs should suffer some untrue libels for which damages will be paid than that members of the community generally, including the so-called news media, should suffer restraint of free speech.

The High Court recently affirmed these principles in *ABC v O'Neill* [2006] HCA 46. In that decision, the High Court confirmed (at paragraph 19) that in a defamation case free speech is the foremost consideration which dictates caution when determining whether the balance of convenience warrants an injunction.

The case against injunctions is even more compelling in relation to privacy cases, where allegations will generally be true, than in relation to defamation. Allowing people to prevent each other from making true statements in circumstances other than in relation to information received in confidence would be a dramatic and unwarranted step away from freedom of communication in Australia. It would be contrary to the hundreds of years of experience reflected in case law to the effect that in the long run it is better for an individual to occasionally suffer embarrassment than for society as a whole to suffer the atmosphere of suspicion and even corruption which can result from excessive secrecy.

6.4 Mandatory orders of correction or apology

In discussing mandatory orders of correction or apology, the Commission states (at paragraph 8.46):

Although the circumstances in which an apology or correction order is likely to be made available in practice in actions for invasion of privacy would be rare in view of the competing interest in freedom of expression, the Commission sees no reason why such orders should not be available in

principle. We are interested in receiving feedback on whether such orders should be listed in any statutory cause of action for invasion of privacy.

Our position is that mandatory orders of correction or apology constitute an unjustified incursion on freedom of speech. Such orders are wholly inappropriate as a form of relief for any action for invasion of privacy. The Commission's observations on the 'ill match' of such orders with the law of defamation (at paragraph 8.45) have equal resonance for the proposed statutory cause of action for invasion of privacy.

We submit that "compelling [a person] to publish, as his or her own statement, words which he or she may not believe to be true" cuts across freedom of expression and should not be permitted. If, as the Commission points out, the circumstances in which the making of a correction order would be rare, then there must be a compelling argument in favour of incorporating this form of relief. The Commission has not identified any basis or justification for mandatory orders of correction or apology.

7. **CONCLUSION**

There is no need for any additional privacy rights or remedies in Australia. If any need for an additional privacy right or remedy is identified in future, it should be very clearly and narrowly defined and there should be a broad media exemption.

The effect of the cause of action proposed would be to force the Courts into developing a wide ranging set of privacy rights giving rise to powerful remedies, without any clear guidance as to what should fall within those rights. It would be likely to undermine freedom of communication to the detriment of the community at large, and would result in prolonged and expensive litigation against media and government organisations.

In relation to the publication of private facts, the current system which allows for efficient and inexpensive adjudication of media privacy issues strikes the right balance between privacy rights and other rights, and allows industry specific factors to be taken into account. If any additional privacy rights are to be developed, they should be subject to a broad media exemption to allow that system to continue.

ATTACHMENT 1

FREEDOM OF COMMUNICATION CASES

There are many decisions in which the Courts have recognised the importance of freedom of speech to the maintenance of a liberal democracy and the role of the modern media in maintaining an appropriate level of transparency and communication. For example, the Courts have repeatedly recognised that the media should be free to publish fair contemporaneous reports of Court proceedings even where such reports adversely affect other rights, such as privacy. For example, the Full Federal Court in *R v Davis* (1995) 57 FCR 512 said at 513-514:

Whatever (the media's) motives in reporting, their opportunity to do so arises out of a principle that is fundamental to our society and method of government: except in extraordinary circumstances, the Courts of the land are open to the public. This principle arises out of the belief that exposure to the public scrutiny is the surest safeguard against any risk of the Court's abusing their considerable powers. As few members of the public have the time, or even the inclination, to attend to the Courts in person, in a practical sense this principle demands that the media be free to report what goes on in them. This includes the names of the parties to proceedings, which are ordinarily known to everyone in Court.

Likewise, in *John Fairfax and Sons v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, McHugh JA said (at 481):

Without the publication of the reports of Court proceedings, the public would be ignorant of the workings of the Courts whose proceedings would inevitably become the subject of the rumours, misunderstandings, exaggerations and falsehoods that are so often associated with secret decision making. The publication of fair and accurate reports of Court proceedings is therefore vital to the proposer working of an open and democratic society and to the maintenance of public confidence in the administration of justice.

Likewise, the High Court has held that freedom of communication about government and political matters is so fundamental to our system of government that it is constitutionally protected. In *Lange v Australian Broadcasting Corporation* 1997 189 CLR 520, the High Court found that:

Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be "directly chosen by the people" of the Commonwealth and the States, respectively (at 559) ...

Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation. While the system of representative government for which the Constitution provides does not expressly mention freedom of communication, it can hardly be doubted, given the history of representative government and the holding of elections under that system in Australia prior to federation, that the elections for which the Constitution provides were intended to be free elections (at 560) ...

That being so, s 7 and s 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. (at 560) ...

The importance of access to information relating to governments is also recognised in the Freedom of Information Acts. It is imperative that those Acts function effectively to give the media, and through the media the public, sufficient information to maintain the integrity of, and public confidence in, the executive.

The public is generally entitled to be informed of all aspects of such matters, including details relating to individuals. This is important. In many cases, personalising an account of an important event or development by reference to individual experiences provides the account with much greater impact than it would have without such information. For example, a program or article about the success or failure of a particular government program has much greater resonance and weight with members of the public if it features information about the individuals who have benefited or lost as a result of that success or failure. It is important that the media's remains able to include such important details in accounts relating to matter of public interest.

Exceptions are very narrow. For example, it is well established that embarrassment to an individual is not a proper basis for a suppression order.

The considerations which weigh strongly in favour of openness in relation to Courts and government and political matters also apply in respect of big business and other organisations with power or influence or both in modern society: it is important that the media can obtain and report information about them to maintain the integrity of our society and to maintain public confidence in it. This is clearly illustrated by the Enron scandal in the US, which was uncovered by a journalist.

As discussed further below, the specific cause of action canvassed in the paper would have a serious adverse impact on freedom of communication. Any additional privacy cause of action is likely to have some adverse effect on freedom of communication, especially to the extent its scope is uncertain. It is extremely important to ensure that impact is carefully weighed against any benefits of an additional privacy right before a decision is made to proceed with it. In addition, if a cause of action is to be introduced, then the plaintiff should bear the onus of proof of establishing that there is not any public interest which should prevail over his or her privacy right.

ATTACHMENT 2

EXAMPLES OF AUSTRALIAN LAWS PROTECTING AGAINST PUBLIC DISCLOSURE OF PRIVATE FACTS

Privacy Concern	Australian Laws	Comments
Protection of information about individuals (including information which is not confidential)	<i>Privacy Act 1988 (Cth)</i> (National Privacy Principles for organisations, and Information Privacy Principles for Commonwealth Agencies)	<p>The Privacy Act regulates collection, use, disclosure and storage of personal information in the private sector through 10 NPPs. It also requires organisations disclose information about their handling of privacy practices, and handling of personal information, and to give individuals access to information about themselves.</p> <p>Acts in the course of journalism by media organisations are governed by separate privacy standards which the organisations must commit to in order to be exempt from the NPPs.</p>
Protection against inappropriate disclosure by media of private facts	<p>Privacy Standards required by media exemption in the <i>Privacy Act 1988 (Cth)</i></p> <p>There is a broad range of Commonwealth and State legislation governing access to and the publication of information relating to individuals. Some of this legislation is outlined below.</p>	This is a very important source of protection, and provides a cheap and effective means of redress.
Confidential information	Common law and equitable causes of action for breach of confidence. In the case of government information and security information which is secret, there are also various statutory offences.	
State and Territory Government Information privacy	<p><i>Privacy and Personal Information Protection Act 1998 (NSW)</i></p> <p><i>Information Privacy Act 2000 (Vic)</i></p> <p><i>Personal Information Protection Act 2004 (Tas)</i></p> <p><i>Information Act 2002 (NT)</i></p>	In Queensland, a privacy scheme (Information Standard 42) and series of statutes impose privacy obligations on state government agencies and most statutory corporations. The scheme, based on the federal Information Privacy Principles, took effect in September 2001 and includes Information Standards and Privacy Guidelines which apply across public sector operations.

	<p>Various specific prohibitions on disclosure applicable to particular agencies. For example, the <i>Australian Security Intelligence Organisation Act 1979</i> (Cth), s 18.</p>	<p>In Western Australia, the <i>Information Privacy Bill 2007</i> is currently under consideration by the legislature, and received a second reading speech on 28 March 2007. Additionally, numerous statutes regulate privacy of personal information, including <i>Freedom of Information Act 1992</i>, <i>State Records Act 2000</i>, <i>Spent Convictions Act 1988</i>, <i>Surveillance Devices Act 1998</i>, <i>Telecommunications (Interception) Western Australia Act 1996</i>.</p> <p>In South Australia, the Government has issued an administrative instruction requiring its government agencies to generally comply with a set of Information Privacy Principles and has established a privacy committee.</p> <p>Unauthorised disclosure by a person of any information or matter that has come into that person's knowledge or possession by reason of him or her being, or having been, a staff member or contractor of ASIO is an offence punishable by up to 2 years imprisonment.</p>
Telecommunications privacy (general)	<p>Part 13 of the <i>Telecommunications Act 1997</i> (Cth)</p> <p><i>Telecommunications (Interception and Access) Act 1979</i> (Cth)</p>	<p>By operation of s 303B, Part 13 of the <i>Telecommunications Act 1997</i> (Cth) supplements National Privacy Principle 2 in relation to telecommunications carriers, carriage service providers, contractors and employees.</p> <p>The <i>Telecommunications (Interception and Access) Act 1979</i> (Cth) prohibits the interception of communications passing over a telecommunications system and prohibits access to stored communications (i.e. email, SMS and voice mail messages stored on a carrier's equipment) except where authorised in specified circumstances.</p>
Health Privacy	<p><i>Health Records and Information Privacy Act 2002</i> (NSW)</p> <p><i>Health Records Act 2001</i> (Vic)</p> <p><i>Health Records (Privacy and Access) Act 1997</i> (ACT)</p>	<p>These Acts protect the privacy of health information in both the private and the public sectors. They are subject to media exemptions which are in similar but not identical terms to that in the Privacy Act.</p>

<p>Identification of victims of sexual assault</p>	<p><i>Crimes Act 1900 NSW</i> s 578A</p> <p><i>Evidence (Miscellaneous Provisions) Act 1991 (ACT)</i></p> <p><i>Sexual Offences (Evidence and Procedure) Act (NT)</i>, ss 6, 7</p> <p><i>Criminal Law (Sexual Offences) Act 1978 (Qld)</i>, s 6, ss 7, 8</p> <p><i>Evidence Act 1929 (SA)</i> s 71A.</p> <p><i>Evidence Act 2001 (Tas)</i> s 194K</p> <p><i>Judicial Proceedings Act 1958 (Vic)</i>, s 4(1A), (1B)</p> <p><i>Evidence Act 1906 (WA)</i>, s 36C</p>	<p>In each State and Territory, there are restrictions on the publication of reports of the trial of sexual offences, which restrict the identification of the victim of the alleged offence. Additionally, some States prevent the publication of the accused person.</p> <p>In NSW, it is an offence to publish any matter identifying the victim, irrespective of whether the proceedings have been dispensed with. The provision is expressly in addition to other restrictions, however it does not apply to victims:</p> <ul style="list-style-type: none"> a) over 14 years who have consented; or b) under 14 years where a Court has authorised disclosure. <p>In the ACT, it is an offence to publish the name or any other identifying information of the victim, without the victim's consent.</p> <p>In the Northern Territory, it is prohibited to publish the name, address, school or place of employment of a complainant in a sexual offence proceeding, or other details likely to identify the complainant, unless a Court has authorised. It is also prohibited to published the defendant's name, unless a Court has authorised, or unless committed for trial or sentence.</p> <p>In Queensland, it is an offence to publish a report of a trial that reveals the name or other identifying information of the victim, and the accused, unless committed for trial.</p> <p>In South Australia, in proceedings involving a sexual offence, there are particular restrictions, at various stages of criminal and civil proceedings, preventing or restricting identification of the complainant and accused.</p> <p>In Tasmania, it is statutory contempt to name or publish other identifying information of the victim of the crime or another witness other than the accused (and the accused if the charge is for incest), unless the Court has authorised publication. The victim's consent is no defence to the</p>
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		contempt, <i>R v The Age Co Ltd</i> (2000) 113 A Crim R 181.
Identification of parties to and witnesses in family law proceedings	<i>Family Law Act 1975</i> (Cth), s 121	<p>s 121(1) prohibits any person from publishing any account of any proceedings or part of proceedings that identifies a party to proceedings, a person related to, or associated with, a party to proceedings, a person in any way concerned with the matter to which the proceedings relate, or a witness to proceedings. Ss (3) provides that identification is held to occur where the account includes a photograph or the identifiable voice of the person, or other prescribed particulars.</p> <p>Under ss (9), it is a defence to publication if Court authorised, or if directed by the Court.</p>
Identification of children involved in criminal proceedings	<p><i>Children (Criminal Proceedings) Act 1987</i> (NSW), s 11</p> <p><i>Crimes Act 1900</i> (NSW)</p> <p><i>Youth Justice Act 2007</i> (NT), ss 43 and 50</p> <p><i>Juvenile Justice Act 1992</i> (Qld), ss 301 and 234</p> <p><i>Young Offenders Act 1993</i> (SA)</p> <p><i>Crimes (Family Violence) Act 1987</i> (Vic), s 24</p>	<p>The <i>Children (Criminal Proceedings) Act 1987</i> (NSW) prohibits the identification of children involved in criminal proceedings, where the child is:</p> <ol style="list-style-type: none"> a person to whom criminal proceedings relate, or a witness in criminal proceedings, being a child when the offence was committed to which those proceedings relate; mentioned in criminal proceedings, in relation to something that occurred when the person was a child; otherwise involved in criminal proceedings when a child; or the brother or sister of the victim of criminal proceedings, the victim and the person being under 18 years when the offence was committed. <p>Under the Northern Territory legislation, it is an offence to publish information and details about the diversion of a youth, except in very limited circumstances (s 43). It is an offence to publish a report or information about proceedings in the Juvenile Court, or the result of proceedings against a youth, if the Court orders otherwise (s 50).</p> <p>Under the <i>Juvenile Justice Act 1992</i> (Qld), a report of criminal proceedings may not be</p>

		published if it includes any identifying information of a child charged with an offence (s 301), unless the Court makes an order to that effect (s 234).
Matching organ donors and donees	<i>Human Tissue Act 1983</i> (NSW) s 37	This section operates to prevent the disclosure of any information that causes the identity of a person that has given human tissue or blood, or will receive the same, to become publicly known.
Guardianship and Children's Court proceedings	<p><i>Children and Young Persons (Care and Protection) Act 1998</i> (NSW), s 105</p> <p><i>Children and Young People Act 1999</i> (ACT), s 61A</p> <p><i>Child Protection Act 1999</i> (Qld), ss 189 and 193</p> <p><i>Children's Court Act 1992</i> (Qld), s 20</p> <p><i>Children's Protection Act 1993</i> (SA), s 59A</p> <p><i>Children, Youth and Families Act 2005</i> (Vic), s 534</p> <p><i>Children's Court of Western Australia Act 1988</i> (WA), s 35</p> <p><i>Children, Young Persons and their Families Act 1997</i> (Tas), ss 40 and 103</p> <p><i>Magistrates Court (Children's Division) Act 1998</i> (Tas), s 12</p> <p><i>Youth Justice Act 1997</i> (Tas), ss 22, 30, 31, 45 and 108</p>	<p>In all States and Territories, there is either some statutory restriction, or statutory power to impose a restriction, on public hearings in Children's Courts. There are also restrictions on the publication of information from such proceedings.</p> <p>NSW legislation prohibits the publication of the name of a child or young person who:</p> <ol style="list-style-type: none"> appears (or is likely to appear) as a witness before the Children's Court; is involved (or likely to be involved) in any capacity in any non-Court proceedings; with respect to whom proceedings in the Children's Court are brought; who is (or is likely to be) mentioned in any non-Court or Children's Court proceedings; or who is the subject of certain reports. <p>ACT legislation restricts publication of an account or report of a Children's Court proceeding if it discloses the identity of a child or a family member, or allows their identity to be ascertained (s 61A).</p> <p>The <i>Child Protection Act 1999</i> (Qld) restricts publications identifying a child as being the subject of an investigation or order relating to harm or risk of harm under that Act, or as being harmed by a parent or family member (s 189). For sexual offence cases, there is a prohibition on reports identifying any child witness or victim unless the Court orders otherwise (s 193(1)).</p> <p>Under the <i>Children's Protection Act 1993</i> (SA), it is an offence to publish a report of proceedings in which a child is alleged to be at risk or in need of care or protection, if the</p>

		<p>Court prohibits any such report, or if the report publishes any identifying information of any child concerned in the proceedings, as a party or witness (s 59A).</p> <p>The <i>Children, Youth and Families Act 2005</i> (Vic) prohibits the publication of a report of Children's Court Proceedings without the permission of the President if it contains any identifying information of the venue, a child or other party to the proceedings, or a witness (s 534).</p> <p>In Western Australian, reports are prohibited of Children's Court proceedings (or appeal proceedings), or any proceedings on appeal from that Court, which contain any identifying information of a party, a witness or an alleged victim of an offence.</p> <p>In Tasmania, a person must not publish a decision of, any report relating to, or anything said or done at a family conference under the <i>Children, Young Persons and their Families Act 1997</i> (Tas). Under the <i>Magistrates Court (Children's Division) Act 1998</i> (Tas), a person must not (without the Court's permission) publish a report of proceedings of the Court if the report identifies, or contains information, that may lead to identification of a child the subject of, a party to or a witness in proceedings.</p>
Adoption proceedings	<p><i>Adoption Act 1993</i> (ACT), ss 4, 96, 97, 112, 112 and 114</p> <p><i>Adoption Act 2000</i> (NSW), ss 3, 119, 178, 179, 180, 186, 194 and 205</p> <p><i>Adoption of Children Act 1994</i> (NT), ss 3, 70, 71, 72 and 79</p> <p><i>Adoption of Children Act 1964</i> (Qld), ss 6, 44, 45, 58 and 59</p> <p><i>Adoption Act 1988</i> (SA), ss 4, 24, 31, 32 and 36</p> <p><i>Adoption Act 1988</i> (Tas), ss 3, 93, 100, 101, 108 and 109</p>	<p>Adoption hearings are always held in closed Court and Court records of the proceedings are not open to public inspection.</p> <p>In all States and Territories, it is an offence to publish without the authority of the Court (and, in Victoria, without the consent of the identified party), in relation to adoption proceedings, the name or any other matter likely to identify an applicant for adoption, the child or the parent or guardian of the child.</p> <p>It is an offence to publish any matter indicating that a person wishes to have a child adopted, that a person wishes to adopt a child, or that a person is willing to make arrangements with a view to adoption. In New South Wales, the prohibition is specifically applied to online advertising.</p>

	<p><i>Adoption Act 1984</i> (Vic), ss 4, 83, 107, 120 and 121</p> <p><i>Adoption Act 1984</i> (WA), ss 4, 84, 123, 124, 127 and 133.</p>	
Coroners' powers	<p><i>Coroners Act 1997</i> (ACT), s 40.</p> <p><i>Coroners Act 1980</i> (NSW), ss 44 and 45</p> <p><i>Coroners Act 1993</i> (NT), ss 3, 42 and 43</p> <p><i>Evidence Act 1939</i> (NT), ss 4 and 57</p> <p><i>Coroners Act 2003</i> (Qld), ss 41 and 43</p> <p><i>Evidence Act 1929</i> (SA), ss 4, 5, 68, 69 and 69A</p> <p><i>Coroners Act 1995</i> (Tas), ss 56 and 57</p> <p><i>Coroners Act 1985</i> (VIC), ss 47 and 58</p> <p><i>Coroners Act 1996</i> (WA), ss 45 and 49</p>	<p>In some States, a coroner has power to order that coronial proceedings be held in closed Court. The basis on which the coroner may make such an order is variously expressed in the legislation, including by reference to the interests of the administration of justice (ACT), national security (NSW, NT and Tas) and the interests of justice, the public or a particular person (Qld).</p> <p>In most jurisdictions, a coroner has power to order that there be no publication of some or all the evidence or of the coroner's report. Failure to comply with such an order is an offence.</p>
Juries	<p><i>Juries Act 1967</i> (ACT), s 42C</p> <p><i>Jury Act 1977</i> (NSW), ss 68, 68A and 68B</p> <p><i>Juries Act</i> (NT), ss 49A and 49B</p> <p><i>Jury Act 1995</i> (Qld), s 70</p> <p><i>Juries Act 2000</i> (Vic), ss 77 and 78</p> <p><i>Juries Act 1957</i> (WA), ss 56A, 56B, 56C, 56D, 56E and 57.</p>	<p>In the ACT and Western Australia, it is an offence to publish information that identifies or is likely to identify a person as a juror or particular proceedings.</p> <p>In Victoria, it is an offence to publish any information or image that identifies or is capable of identifying a person attending a jury service.</p> <p>In NSW, it is an offence to publish any information likely to lead to identification of a juror or former juror (except with the former juror's consent).</p> <p>In the Northern Territory, it is an offence to publish or otherwise disclose identifying information about a juror, during the course of proceedings, except with leave of the Court.</p>

		<p>In Western Australia, it is a contempt to take or publish any photo or other likeness of any juror empanelled for any proceedings.</p> <p>In some States and Territories, the solicitation of information from jurors and publication of jury deliberations is prohibited.</p>
<p>Statements that cannot be proved true, and which adversely affect a person's reputation or cause others to shun or avoid him or her</p>	<p><i>Defamation Act 2005</i> (NSW)</p> <p><i>Defamation Act 2005</i> (Qld)</p> <p><i>Defamation Act 2005</i> (SA)</p> <p><i>Defamation Act 2005</i> (Tas)</p> <p><i>Defamation Act 2005</i> (Vic)</p> <p><i>Defamation Act 2005</i> (WA)</p> <p><i>Civil Law (Wrongs) Act 2002</i> (ACT)</p> <p><i>Defamation Act 2005</i> (NT)</p>	<p>Uniformity was achieved in 2006.</p> <p>A decision was made in relation to the 2006 reforms to adopt the longstanding common law position that truth alone is a defence.</p> <p>A range of defences other than truth are available in circumstances in which it is important to ensure freedom of communication even where people get it wrong.</p>
<p>Online behaviour which is menacing harassing or offensive</p>	<p><i>Criminal Code Act 1995</i> (Cth) s 471.12</p>	<p>It is an offence to use a carriage service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.</p> <p>Publication of private facts may sometimes fall within this category.</p>
<p>Monitoring or recording of private conversations or activities</p>	<p><i>Workplace Surveillance Act 2005</i> (NSW)</p> <p><i>Listening Devices Act 1984</i> (NSW)</p> <p><i>Telecommunications (Interception) Act 1979</i> (Cth)</p> <p><i>Listening Devices Act 1992</i> (ACT)</p> <p><i>Surveillance Devices Act 2000</i> (NT)</p> <p><i>Surveillance Devices Act 1999</i> (Vic)</p> <p><i>Surveillance Devices Act 1998</i> (WA)</p>	<p>Each of these Acts prohibit use of a device to listen to, record or monitor certain private conversations or activities. All of them cover listening devices. Some extend to photography/video, tracking and/or data surveillance. In each case, the range of activities extend beyond "spy" like activities to activities such as use of an ordinary tape recorder to record a private conversation. All contain exceptions where the parties to the conversation or activity consent.</p> <p>All of these Acts contain prohibitions on use and disclosure of information obtained through the illegal use of a device.</p>

	<p><i>Listening Devices Act 1991 (Tas)</i></p> <p><i>Invasion of Privacy Act 1971 (Qld)</i></p> <p><i>Listening and Surveillance Devices Act 1972 (SA)</i></p>	
Spent Convictions	<p>Part VIIC of the <i>Crimes Act 1914</i> (Cth), the Commonwealth "Spent Convictions Scheme"</p> <p><i>Criminal Records Act 1991</i> (NSW)</p> <p><i>Criminal Records (Spent Convictions) Act</i> (NT)</p> <p><i>Criminal Law (Rehabilitation of Offenders) Act 1986</i> (Qld)</p>	<p>These Acts contain restrictions on use and disclosure of certain old ("spent") convictions.</p> <p>Part VIIC of the <i>Crimes Act 1914</i> (Cth) implements the Commonwealth "Spent Convictions Scheme".</p> <p>In both Queensland and the Northern Territory, it is an offence to disclose a spent conviction without the permission of the convicted person. In New South Wales it is an offence to disclose information concerning a spent conviction without lawful authority.</p>

This table is not exhaustive.

ATTACHMENT 3

JOURNALISM STANDARDS

1. Terms of journalism exemption

The mechanism for the journalism exemption is as follows:

- (i) Section 7B(4) of the Act provides that:

An act done, or practice engaged in, by a media organisation is *exempt* for the purposes of paragraph 7(1)(ee) if the act is done, or the practice is engaged in:

 - (A) by the organisation in the course of journalism; and
 - (B) at a time when the organisation is publicly committed to observe standards that:
 - (i) deal with privacy in the context of the activities of a media organisation (whether or not the standards also deal with other matters); and
 - (ii) have been published in writing by the organisation or a person or body representing a class of media organisations.
- (ii) Subsection 7(1)(ee) provides that a reference in the Act to an "act or practice" is a reference to an act done, or a practice engaged in, by an organisation, other than an exempt act or practice.
- (iii) The provisions of the Act which require organisations to comply with the NPPs, deal with interferences with privacy, and authorise the Commissioner powers to investigate and make determinations, apply to the acts and practices of organisations, but not to those of media organisations falling within the exemption: sections 13A, 16A, 27(1)(ab) and 36(1).
- (iv) The term "media organisation" is defined in section 6 of the Act to mean:
 - (A) an organisation whose activities consist of or include the collection, preparation for dissemination or dissemination of the following material for the purpose of making it available to the public:
 - (i) material having the character of news, current affairs, information or a documentary;
 - (ii) material consisting of commentary or opinion on, or analysis of, news, current affairs, information or a documentary.
- (v) The word "journalism" and "in the course of journalism" are not defined. We consider that they should be defined in a way that takes into account the wide variety of forms which journalism now takes, which ranges from internet postings by individuals on sites such as MySpace and YouTube to mass media broadcasts and articles.

2. Media Privacy Standards

The key Australian media privacy regulations are:

(a) Free TV Commercial Television Industry Code of Practice

In broadcasting news and current affairs programs, television licensees:

- 4.3.3 should have appropriate regard to the feelings of relatives and viewers when including images of dead or seriously wounded people. Images of that kind which may seriously stress or offend a substantial number of viewers should be displayed only when there is an identifiable public interest reason for doing so;
- 4.3.5 must not use material relating to a person's personal or private affairs, or which invades an individual's privacy, other than where there is an identifiable public interest reason for the material to be broadcast;
 - 4.3.5.1 for the purpose of this clause 4.3.5, licensees must exercise special care before using material relating to a child's personal or private affairs in the broadcast of a report of a sensitive matter concerning the child. The consent of a parent or guardian should be obtained before naming or visually identifying a child in a report on a criminal matter involving a child or a member of a child's immediate family, or a report which discloses sensitive information concerning the health or welfare of a child, unless there are exceptional circumstances or an identifiable public interest reason not to do so;
- 4.3.6 must exercise sensitivity in broadcasting images of or interviews with bereaved relatives and survivors or witnesses of traumatic incidents;
- 4.3.7 should avoid unfairly identifying a single person or business when commenting on the behaviour of a group of persons or businesses;
- 4.3.8 must take all reasonable steps to ensure that murder and accident victims are not identified directly or, where practicable, indirectly before their immediate families are notified by the authorities.
- 4.3.9 should broadcast reports of suicide or attempted suicide only where there is an identifiable public interest reason to do so, and should exclude any detailed description of the method used. The report must be straightforward and must not include graphic details of images, or glamorise suicide in any way.

The Code of Practice also contains an Advisory Note which provides additional guidance to broadcasters and the public on privacy issues.⁶

⁶ The Commercial Television Code of Practice can be found at http://www.freetv.com.au/Content_Common/pg-Code-of-Practice.seo

(b) **Subscription Broadcast Television Code of Practice**

In broadcasting news and current affairs programs, subscription broadcasting television licensees:

- (i) to the extent practicable, must display sensitivity in broadcasting images of, or interviews with, bereaved relatives and survivors or witnesses of traumatic incidents (section 2.2(b)(iii)); and
- (ii) must not use material relating to a person's personal or private affairs, or which invades an individual's privacy, other than where there are identifiable public interest reasons for the material to be broadcast.

Also Licensees will collect, use, disclose and store subscribers' personal information in accordance with the Privacy Act 1998 and the National Privacy Principles, as set out in Schedule 3 of the Privacy Act 1988 as amended. These principles are included at Attachment A (section 4.3).

(c) **ABC Code of Practice**

The section of the ABC Code of Practice dealing with privacy is as follows:

2.8 Privacy. The rights to privacy of individuals should be respected in all ABC content. However, in order to provide information which relates to a person's performance of public duties or about other matters of public interest, intrusions upon privacy may, in some circumstances, be justified.

ABC staff are also expected to adhere to the Corporation's Editorial Policies. Section 11.9 of the 2007 Editorial Policies deals with privacy in content:

11.9.1 The rights to privacy of individuals, including innocent third parties (for example, relatives of those convicted of crimes) should be respected in all ABC content. However, as the public also has a right to information about public figures relevant to their public duties, intrusions upon privacy may, in some circumstances, be justified. Investigative content is often concerned with activities or individuals which have an impact on other people. This may justify methods which could otherwise be seen as breaches of privacy.

11.9.2 The ABC is committed to protecting the privacy of users of ABC Online. Staff publishing online should be familiar with the ABC's privacy policy, available at <http://abc.net.au/privacy.htm>. This covers the collection, use and disclosure of personal information as well as providing advice to users about how to protect their privacy while interacting with ABC Online.

In addition, Section 4.2 of the Editorial Policies deals with the legal responsibilities of ABC broadcasters and content makers, including laws relating to copyright, defamation, contempt of court, suppression orders,

privacy, trespass and so on. Staff are required to refer all content matters with legal implications to ABC Legal Services for advice.

There are a number of other editorial policies that may impact upon privacy, such as those relating to the reporting of violence and suicide, and the use of hidden cameras (which the ABC does not use except in special circumstances and only after consultation with ABC Legal Services).

(d) **SBS Code of Practice**

The SBS Code of Practice The SBS *Codes of Practice* deal with privacy in Code 1, the ‘General Programming’ code:

1.9 Privacy

The rights of individuals to privacy should be respected in all SBS programs. However, in order to provide information to the public which relates to a person’s performance of public duties or about other matters of public interest, intrusions upon privacy may, in some circumstances, be justified.

Code 2.4 deals with ‘Violence and Distressing Events in News and Current Affairs’. The following provision is relevant to privacy:

SBS avoids sensationalised and exaggerated treatment of issues and events. In covering murders, accidents, funerals, suicides and disasters, SBS expects its program makers to exercise great sensitivity, particularly when approaching, interviewing and portraying people who are distressed.

Guideline 3, ‘Legal Responsibility’ of SBS’s internal *Editorial Guidelines* refers to the legal responsibilities of SBS broadcasters, journalists and program makers under the various State and Commonwealth laws, including those that relate to privacy such as: copyright; defamation; reporting restrictions in cases involving family law, children and sexual assault; secret recordings of private conversations or secret filming of private activities; and privacy.

(e) **Commercial Radio Codes of Practice**

In the preparation and presentation of current affairs programs, radio licensees must ensure that:

respect is given to each person’s legitimate right to protection from unjustified use of material which is obtained without an individual’s consent or other unwarranted and intrusive invasions of privacy (section 2.2(e) of Code of Practice 2: News and Current Affairs Programs).

(f) **ACMA “Privacy Guidelines for Broadcasters”**

The Privacy Guidelines for Broadcasters⁷ provides additional information and guidance for the public and for broadcasters on the following privacy issues:

⁷ ACMA’s Privacy Guidelines can be found at http://www.acma.gov.au/WEB/STANDARD/pc=PC_100133

1. material relating to a person's private affairs, including discussion of:
 - a. the distinction between public and private conduct;
 - b. the treatment of publicly available personal information;
 - c. the issue of consent;
 - d. the position with respect to public figures;
2. what constitutes Public Interest

The Guidelines are supplemented by a number of case studies and includes the relevant provisions from each of the broadcasting codes.

(g) **Australian Journalists' Association (AJA) Code of Ethics**

The AJA Code requires journalists to:

- (i) ... use fair, responsible, and honest means to obtain material ... Identify yourself and your employer before obtaining an interview ... (section 8); and
- (ii) ... respect private grief and personal privacy ... (section 11).

(h) **Australian Press Council Statement of Principles**

The Australia Press Council Statement of Principles states that:

Readers of publications are entitled to have news and comment presented to them honestly and fairly, and with respect for the privacy and sensibilities of individuals. However, the right to privacy should not prevent publication of matters of public record or obvious or significant public interest (section 3).

The Australian Press Council Privacy Standards supplement the core statement of principle on privacy articulated by the Council above.

ATTACHMENT 4

EXISTING PROTECTION OF PERSONALITY RIGHTS IN AUSTRALIA

(a) **Copyright law**

Copyright law in Australia currently provides protection for performers' rights and moral rights of authorship and of performance. The *Copyright Act 1968* (Cth) protects the following rights:

- (i) authors and performers' rights of attribution;
- (ii) authors' and performers' rights against false attribution; and
- (iii) rights of integrity against derogatory treatment of works in a way that prejudices the reputation of the author or performer;
- (iv) the right of a performer to authorise recording of performances by sound recording or film (whether directly from a live performance or indirectly from a broadcast or cable transmission);
- (v) the right of a performer to authorise the broadcast or rebroadcast a live performances; and
- (vi) the right of a performer to control further (knowing) distributions and uses of a recording.

(b) **Trade Practices law**

Section 52 of the *Trade Practices Act 1974* (Cth) (**TPA**) and corresponding provisions of the State and Territory fair trading laws prohibit corporation and individuals from, in trade or commerce, engaging in conduct that is misleading or deceptive or is likely to mislead or deceive. Section 53 of the TPA and corresponding provisions of the State and Territory fair trading laws also prohibit a corporation from, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, inter alia:

- (c) falsely representing that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;
- (d) representing that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have; or
- (e) representing that the corporation has a sponsorship, approval or affiliation it does not have.

Section 6 of the TPA extends the application of section 52 and 53 of the TPA to individuals where telecommunications facilities are utilised to send and receive information via the Internet. These laws therefore have a broad application to publication and broadcasting by individuals (which is mainly by way of the internet) as well as corporations.

The Courts have now considered the meaning of the words "in trade or commerce" in a very broad array of circumstances and have generally given an expansive meaning given to the phrase has influenced the development of the provision. The general limitation on the operation of the provision is that "in" in the phrase had particular significance, and stated at p 51,364:

"What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character." (High Court in Concrete Constructions (NSW) Pty Limited v Nelson (1990) ATPR ¶41-022)

These provisions have been successfully used in circumstances where a "personality" of a celebrity has been appropriated towards a particular commercial use which was not authorised.

In *Hogan & Ors v Pacific Dunlop Limited (1988) ATPR ¶40-914*, for example, advertisements in both television and billboard forms were designed as a "spoof" of a particular scene from the movie "Crocodile Dundee". The applicant, Paul Hogan, was the star of the movie and the character designed to feature in the advertisement. There was evidence that the public were unlikely to think that the actor in the advertisements was Hogan, but were likely to think that the advertisements could not have been made without his approval. The conduct was held to fall within the protection of the TPA provisions with the Federal Court of Australia treating the Paul Hogan –created 'Crocodile Dundee' character as simply an extension of Hogan's personality and dismissing a 'parody defence'. It was held that the advertising campaign was conceived and implemented with an appreciation that many persons would be aware in a general way of business practices whereby licences for reward were given for marketing of products in association with representations of well-known characters, and whereby persons in the public eye agree to associate themselves with the marketing of products.

Similarly, INXS has successfully prevented a T-shirt manufacturer from using images associated with the group (*INXS v South Sea Bubble Co Pty Ltd (1986) ATPR ¶40-667*).

They have also been used successfully to combat the practice of cyber squatting, in which a person registers a domain name closely associated with another person: see *ACCC v Purple Harmony Plates Pty Ltd [2002] FCA 407*; *Macquarie Bank Ltd v Seagle (2005) 146 FCR 400*; *CSR Ltd v Resource Capital Australia Pty Ltd [2003] FCA 279*.

The TPA and its State and Territory equivalents offer a broad range of remedies, including injunctions and damages (for example ss 80, 82, 87(2)(d) of the TPA). Generally, the measure of damages is the same as that applicable to deceit, that is, the sum which will compensate the plaintiff for the prejudice or disadvantage suffered as a result of having altered his or her position under inducement of the fraudulent representation or conduct. The measure of damages may include compensation for consequential losses resulting from the conduct and for resultant emotional suffering and nervous shock. To fall within the legislative prohibitions the conduct must have been of significance to the defendant.

2.2 Common law of passing off

The tort of passing off is also concerned with the misappropriation by deception of a person's reputation or goodwill. Originally, the action was confined to fraudulent attempts by traders to pass off their goods as those of another. It has since been extended to cover any representation that falsely suggests some connection with another person's product or business. In its expanded form, the modern tort of passing off is similarly said to extend to "promotional goodwill", that is, the ability to recommend or promote goods and services, or merchandising rights.

A claim in passing off can now be founded where a person's (generally, a celebrity or person with significant public reputation) image or name is used on a defendant's goods or services so as to deceive consumers that there is a 'business connection' between the person and the defendant. That is, the personality or image is misappropriated or used without consent or authority.

Remedies for passing off include but are not limited to compensation by way of damages.

2.3 Trade marks

Trade marks can also apply to protect some *uses* of elements of identity and personality (rather than the personality *per se*) which can be captured as a "trade mark". The uses protected are uses of the elements as a trade mark (namely, to indicate and distinguish origin as opposed to mere descriptive or comparative advertising).

The particular elements of identity and personality that may be trade marked could include:

- (a) portraits;
- (b) pictures and representations of individual;
- (c) surnames and famous names;
- (d) signatures;
- (e) slogans associated with the individual; and
- (f) sounds (which might capture voices) where they are capable of graphic representation,

so long as they are capable of distinguishing goods or services in the course of trade.

In this respect, trade mark registration can provide commercial protection for the significant elements of an identity or personality (such as name and likeness) when used in the form registered.

In this respect, trade mark law offers prospective protection and can assist with:

- (g) commercialising particular elements of an individual's personality and identity (through protection of something which can be licensed); and
- (h) taking action in relation to some unauthorised uses of elements of an individual's personality and identity.

Trade marks are also a form of personal property and are devisable by will and by operation of law. Trade marks are available to any person (including estates and

representatives) entitled to seek registration and, in the form of a renewal, to "...any person".

2.4 **Fraud and identity theft**

In addition to the misappropriation or unauthorised use of personality for commercial gain, other forms of unauthorised use or misappropriation of personality and identity are also protected by criminal laws.

A number of jurisdictions in Australia have offences for fraud and identity theft that can be used to prosecute some conduct associated with identity crime.

For example, Part 10.8 of the Criminal Code Act 1995 provides a Commonwealth offence of identity theft. It is an offence to 'dishonestly obtain (including possess or make) personal financial information or deal in personal financial information without consent' (Section 480.4). The definition of "personal financial information" is broad enough to include all identifiers except biometric identifiers.

State and Territory criminal legislation variously provides for offences of identity theft and/or fraudulent appropriation and false pretences.

In addition, proposals to introduce or extend these offences are currently undergoing review, for example, by the Model Criminal Law Officers' Committee of the Standing Committee of Attorneys-General April 2007 (**MCLOC**) and the Australasian Centre for Policing Research (the **ACPR**).