



Express law

fast track information for clients

12 SEPTEMBER 2014

Serious invasions of privacy in the digital era: ALRC tables final report

Following a complex inquiry that involved 2 consultation papers, 134 submissions and 69 face-to-face consultations with stakeholders, the Australian Law Reform Commission (ALRC) tabled in Parliament its final report on [*Serious invasions of privacy in the digital era \(Report 123, 2014\)*](#) on 3 September 2014.

The report is the result of a reference given to the ALRC in June 2013. The ALRC makes a number of recommendations on both the prevention of, and remedies for, serious invasions of privacy. The core task given to the ALRC under the Terms of Reference for the inquiry was to consider the detailed legal design of a statutory cause of action for serious invasions of privacy.

Key recommendations

A new statutory cause of action

The report sets out and analyses a detailed legal design of a statutory civil cause of action for serious invasion of privacy. The ALRC has recommended that the cause of action should be included in a new, stand-alone Commonwealth Act and described as an action in tort.

A plaintiff would be required to prove that his or her privacy had been invaded in one of the following ways:

- intrusion upon seclusion
- misuse of private information.

The report also recommends a number of defences and exemptions for the new tort. Recommended defences include the following:

- the conduct was required or authorised by law
- express or implied consent has been given
- absolute privilege
- the publication of public documents
- fair reporting of proceedings of public concern.

The ALRC also recommended that there should be an exemption for children and young persons under an age to be specified in legislation.

The report recommends monetary and non-monetary remedies for an action for serious invasion of privacy, including damages, an account of profits, injunctions and the delivery up and destruction or removal of material.

Other recommendations

The ALRC also made a number of other recommendations that would strengthen the privacy of individuals in the digital environment, including the following:

- amending legislation to enable a court to award compensation for emotional distress in an action for breach of confidence that concerns a serious invasion of privacy in certain circumstances, if a statutory cause of action for serious invasion of privacy is not enacted
- enacting Commonwealth surveillance legislation to replace existing State and Territory surveillance device laws to ensure consistency throughout Australia
- enacting uniform State and Territory legislation to create a tort of harassment, if a statutory cause of action for serious invasion of privacy is not enacted
- extending the Privacy Commissioner's powers to investigate complaints about serious invasions of privacy and to make appropriate declarations.

While not the subject of a formal recommendation, the ALRC has also suggested that the current small business exemption under the *Privacy Act 1988* be reviewed or that alternative measures be considered to encourage the protection of personal information by small business.

For further information please contact:

Tara McNeilly

Senior General Counsel
T 02 6253 7374
tara.mcneilly@ags.gov.au

Elena Arduca

Senior Executive Lawyer
T 03 9242 1473
elena.arduca@ags.gov.au

Justin Davidson

Senior Executive Lawyer
T 02 6253 7240
justin.davidson@ags.gov.au

Justin Hyland

Senior Executive Lawyer
T 02 6253 7417
justin.hyland@ags.gov.au

Jane Lye

Senior Executive Lawyer
T 07 3360 5736
jane.lye@ags.gov.au

Important: The material in *Express law* is provided to clients as an early, interim view for general information only, and further analysis on the matter may be prepared by AGS. The material should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this message.

This message may contain confidential or legally privileged information. Only the addressee has the right to use or disseminate this information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS. Find out more about AGS at <http://www.ags.gov.au>.

If you do not wish to receive similar messages in the future, please reply to:
<mailto:unsubscribe@ags.gov.au>