



AUSTRALIAN ATHLETES' ALLIANCE

**DEPARTMENT OF PRIME MINISTER AND CABINET  
ISSUES PAPER, SEPTEMBER 2011  
A COMMONWEALTH STATUTORY CAUSE OF ACTION FOR SERIOUS  
INVASION OF PRIVACY**

**Submission of Australian Athletes' Alliance Inc.**

The Australian Athletes' Alliance Inc (**AAA**) is the peak body of associations representing Australian athletes.

The current members of the AAA are the:

- Australian Cricketers' Association;
- AFL Players' Association;
- Australian Jockeys' Association;
- Australian Netballers' Association;
- Australian Swimmers' Association;
- Professional Footballers Association;
- Rugby League Players' Association; and
- Rugby Union Players' Association.

Our member associations represent over 3,000 of Australia's elite professional sportspeople.

As the peak body, we provide a unified voice on issues affecting Australian athletes.

The Department of Prime Minister and Cabinet Issues Paper, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, invited comments on whether Australia should introduce a statutory cause of action for privacy and, if so, what elements the statutory cause of action might include. The Paper invited responses to specific questions which it set out, as well as more general comments.

In this submission, we have first answered the general question of whether such a statutory cause of action should be introduced, then set out our proposed elements of such a cause of action and, finally, have responded to each of the 19 questions set out in the Issues Paper.

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## **SHOULD A STATUTORY CAUSE OF ACTION BE INTRODUCED?**

Before providing our specific proposal below, we note that our primary interest is in protecting the privacy of athletes, whose private lives are increasingly under inappropriate public scrutiny.

We acknowledge that many professional athletes benefit financially from their public profile. We believe, however, that professional athletes and other individuals with a public profile should still be entitled to lead their private lives with dignity, free from unreasonable interference into their personal space and from the substantial distress which may be caused by the dissemination of private information or other material.

Recent developments in technology make this an issue of growing concern.

We are in favour of a right of action that codifies the distinction between matters of legitimate public interest and matters of mere public curiosity. Such a right of action would not interfere with the public's interest in the athlete as a practitioner of his or her sport, but would protect the privacy of the athlete in his or her private life, outside the practice of sport. Moreover, we favour a cause of action that will provide a clear disincentive for any breach of suitable privacy standards by allowing a suit for damages.

## **PROPOSED ELEMENTS OF A STATUTORY CAUSE OF ACTION**

The AAA is broadly supportive of the approach taken by the Australian Law Reform Commission (**ALRC**),<sup>1</sup> but with some adjustments.

Under the ALRC approach, a cause of action could not be made out if an invasion of privacy was significant but did not meet the high standard of being "highly offensive".

We believe that this sets the bar too high and prefer the approach set out in the ALRC's earlier Discussion Paper.<sup>2</sup>

Based on the approach taken in the ALRC's earlier Discussion Paper, we propose that the primary elements of the cause of action would be made out if a plaintiff could show that:

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<sup>1</sup> Australian Law Reform Commission, *Report 108 – For Your Information: Australian Privacy Law and Practice* (2008).

<sup>2</sup> Australian Law Reform Commission, *Discussion Paper 72 – Review of Australian Privacy Law* (2007), [5.78] to [5.80] and [5.119].

- (a) there has been an invasion of the privacy of the plaintiff;
- (b) in circumstances where the plaintiff was reasonably entitled to expect his or her privacy to be respected; and
- (c) the interference complained of is sufficiently serious to be likely to cause substantial distress or concern to a person of ordinary sensibilities.

We believe that a non-exhaustive list of what may constitute an invasion of privacy, similar to that included in the ALRC Report and Discussion Paper should be included in any legislation.

We also support the inclusion of defences similar to those proposed in the ALRC final Report and Discussion Paper and would include public interest considerations among the available defences, rather than as an element of the cause of action.

## **RESPONSES TO QUESTIONS POSED IN ISSUES PAPER**

The following is the AAA's response to each of the questions posed in the Issues Paper.

### ***1. Do recent developments in technology mean that additional ways of protecting individuals' privacy should be considered in Australia?***

While we believe that an individual should be entitled to redress for an inappropriate interference with his or her privacy regardless of the technology used, there is no doubt that recent technological developments have increased the need for the law to respond in this area.

### ***2. Is there a need for a cause of action for serious breach of privacy in Australia?***

Australia is one of the only developed countries that does not recognise privacy as a basic civil or human right. In 1948, Australia voted in favour of the United Nations Declaration of Human Rights (UNDHR). It is time for our nation to implement article 12 of the UNDHR which states that "*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence... Everyone has the right to the protection of the law against such interference or attacks.*"

There is a need for a statutory cause of action to act as a disincentive to interfere with individuals' reasonable expectations of privacy and to provide a means of redress where those expectations are infringed in a significant way.

We note that self-regulation has not worked.

The Press Council's, Privacy Principle 1 states that "*journalists should seek personal information only in the public interest. In doing so, journalists should not unduly intrude on the privacy of individuals and should show respect for the dignity and sensitivity of people encountered in the course of gathering news*" and that "*public figures do not forfeit their right to privacy altogether. Intrusion into their right to privacy must be related to their public duties or activities.*"

In our experience, the Australian media has not met this standard.

For example, in the sport of Australian rules football alone, examples of inappropriate conduct by media outlets in recent years include a television network broadcasting contents of stolen medical records and newspapers publishing photographs of a player while an in-patient at a medical treatment facility.

**3. *Should any cause of action for serious invasion of privacy be created by statute or be left to develop at common law?***

The cause of action should be created by statute.

First, the protection is needed now. Creation through common law is a slow process given the adherence to precedent and the judicial restraint normally exhibited by courts. For instance, it was twenty-one years from the denial of native title in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 to the recognition of right of native title in *Mabo v State of Queensland* [1992] HCA 23.

Second, it is important that the law regarding privacy be certain and consistent. A statute would provide certainty immediately, while allowing the right to develop through case law is a slower process that would likely lead to inconsistent results until a case is finally decided by the High Court.

Third, it is unreasonable to require parties to incur the costs and time required in litigation to have this right recognised when their elected representatives can act on the issue.

Finally, the courts typically look to Parliament to act as primary law maker and unless Parliament acts to establish a cause of action, there is no guarantee that it would ever occur.

**4. *Is 'highly offensive' an appropriate standard for a cause of action relating to serious invasions of privacy?***

As noted earlier, we believe that the standard recommended in the ALRC's final Report sets the bar too high.

We believe that the test should be worded as follows (similar to what was proposed in the ALRC's earlier Discussion Paper):

*that the interference complained of is sufficiently serious to be likely to cause substantial distress or concern to a person of ordinary sensibilities.*

The purpose of the inclusion of such an element in the cause of action would be to exclude trivial cases.

By including an objective test of "substantiality", we believe that objective would be achieved.

On the other hand, we believe that raising the bar further to require that the relevant conduct be "highly offensive" to an ordinary person would be unfairly excluding a remedy in a number of substantial cases.

We also prefer the term "distress or concern" to "offensive", as we consider this more clearly captures the relevant standard as to the impact the relevant conduct is required to have upon an ordinary person in order to constitute a cause of action.

"Offensive" on one view may be understood as meaning "insulting" rather than "distressing", "concerning" or "upsetting".

**5. *Should the balancing of interests in any proposed cause of action be integrated into the cause of action (ALRC, NSWLRC) or constitute a separate defence (VLRC)?***

The balancing of interests should be a separate defence. The plaintiff should first establish that there was an invasion of privacy. The defendant could then argue that the public interest in the information obtained and/or in the breach itself outweighed the plaintiff's privacy interest. Consent would also be a defence. We agree with the VLRC that a plaintiff should not be required to prove a negative, such as the absence of a countervailing interest.

**6. How best could a statutory cause of action recognise the public interest in freedom of expression?**

The public interest in freedom of expression should be protected in two ways.

The first is by appropriately confining the elements of the cause of action.

Our earlier proposal was to confine the cause of action to circumstances where there has not just been an infringement of privacy, but the person infringed also had a reasonable expectation of privacy and the infringement would be likely to have a substantial impact.

The second is by the inclusion of a public interest defence, so that even if these elements are made out (and therefore a substantial invasion of privacy is established), this will not constitute an enforceable cause of action if it is justified in the public interest.

**7. Is the inclusion of "intentional" or "reckless" as fault elements for any proposed cause of action appropriate, or should it contain different requirements as to fault?**

In addition to intentional and reckless, there should be a fault element where the violation of someone's privacy is the result of a breach of a legal obligation of confidence.

For instance, a medical practice has the legal obligation to protect the medical information of patients. If they breach that obligation in any way, they should be jointly and severably liable for any breach of privacy that results. As an example, if a medical clinic's failure to protect its patient records allowed inappropriate access to a person and that person subsequently broadcasts the information in those patient records, the clinic would be liable for the breach of the patient's privacy even if the clinic did not, itself, broadcast the information.

**8. Should any legislation allow for the consideration of other relevant matters, and, if so, is the list of matters proposed by the NSWLRC necessary and sufficient?**

As proposed above, we believe that the circumstances of the interference with privacy and the likely effect on an ordinary person should be taken into account as part of the cause of action.

The only other relevant consideration should be an overriding compelling public interest, which should be incorporated into any legislation as a defence.

**9. *Should a non-exhaustive list of activities which could constitute an invasion of privacy be included in the legislation creating a statutory cause of action, or in other explanatory material? If a list were to be included, should any changes be made to the list proposed by the ALRC?***

We believe that the non-exhaustive list set out by the ALRC is sufficient with one minor change: we would modify the first example as follows to include a person's personal life, consistent with article 12 of the UNDHR:

a) *there has been an interference with an individual's, home, personal, or family life.*

**10. *What should be included as defences to any proposed cause of action?***

Defences should be: 1) consent; and 2) that there was a compelling public interest that outweighed the individual's right of privacy.

Compelling interests would include that the invasion of privacy was:

- incidental to the exercise of a lawful right to defend person or property;
- required or authorised by law;
- required for law enforcement; or
- for the purpose of informing the public on a matter within the public's legitimate interest.

**11. *Should particular organisations or types of organisations be excluded from the ambit of any proposed cause of action, or should defences be used to restrict its application?***

We agree with the VLRC conclusion that "*no organisations or classes of people be exempted from the proposed statutory causes of action. The defences adequately protect people engaged in legitimate activities from unmeritorious actions for serious invasions of privacy*".<sup>3</sup>

**12. *Are the remedies recommended by the ALRC necessary and sufficient for, and appropriate to, the proposed cause of action?***

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<sup>3</sup> Victorian Law Reform Commission, *Surveillance in Public Places: Final Report 18* (2010), [7.194].

We believe that the remedies recommended by the ALRC are generally appropriate and should be adopted with one modification: the court should be permitted to assess exemplary damages where appropriate.

**13. *Should the legislation prescribe a maximum award of damages for non-economic loss, and if so, what should that limit be?***

We agree with the VLRC and ALRC that there should not be a statutory cap for non-economic loss.

**14. *Should any proposed cause of action require proof of damage? If so, how should damage be defined for the purposes of the cause of action?***

We agree with the ALRC recommendation that claims under the proposed cause of action be actionable without proof of damage.

**15. *Should any proposed cause of action also allow for an offer of amends process?***

We would not be opposed to an offer of amends process so long as it did not afford the defendant a defence to the action.

**16. *Should any proposed cause of action be restricted to natural persons?***

We agree with the ALRC, NSWLRC<sup>4</sup> and VLRC. The right of privacy is a human right, thus should apply only to natural persons.

**17. *Should any proposed cause of action be restricted to living persons?***

We agree with the ALRC, NSWLRC and VLRC that the action should be restricted to living persons.

**18. *Within what period, and from what date, should an action for serious invasion of privacy be required to be commenced?***

We agree with the VLRC that a three-year limitation period is appropriate as it accords with the limitation period for personal injury actions as well as the outer limit for defamation actions. While defamation requires publication and is thus more

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<sup>4</sup> New South Wales Law Reform Commission, *Report 120: Invasion of Privacy* (2009).

immediately apparent, privacy may be breached without a public act and thus may take longer to uncover.

***19. Which forums should have jurisdiction to hear and determine claims made for serious invasion of privacy?***

Plaintiffs should have access to both Federal and state courts for claims regarding the invasion of their privacy.

**CONCLUSION**

We thank the Department for the opportunity to provide these comments.

We would be pleased to provide any further assistance which the Department requires.

For any further information or assistance, please contact:

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