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In support of a statutory privacy action in Australian law

Graham Greenleaf* Nigel Waters†

*University of New South Wales

†Cyberspace Law and Policy Centre, University of New South Wales

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In support of a statutory privacy action in Australian law

Graham Greenleaf and Nigel Waters

Abstract

As part of its ongoing Review of Australian Privacy Law, the Australian Law Reform Commission, in its Discussion Paper 72, proposed that a new statutory cause of action of for "invasion of privacy" be introduced into the Privacy Act 1988 (Cth). The New South Wales Law Reform Commission is also consulting on the introduction of a statutory action – often referred to as a 'privacy tort'. This submission supports the proposal from the ALRC that there should be a privacy action stated in general terms and with a non-exhaustive list of examples, but suggests that all of these examples clearly relate to 'private life'. The right should not apply to legal entities or to deceased persons, and should apply to negligent as well as intentional and reckless acts. If the right is to be limited by a requirement for 'proof of damage' it is essential that 'damage' include humiliation, emotional distress etc. The submission supports an exhaustive list of defences, but argues for a proportionality condition for all defences and for any 'authorised by law' defence to be restricted to specific authorisations.

Cyberspace Law and Policy Centre
A Centre for the Public Interest in Networked Transactions

In support of a statutory privacy action in Australian law

Submission to the Australian Law Reform Commission on the Review of Australian Privacy Law Discussion Paper 72, and to the New South Wales Law Reform Commission on Consultation Paper 1 'Invasion of Privacy'

Graham Greenleaf & Nigel Waters

Graham Greenleaf
Professor of Law
University of New South Wales

Nigel Waters
Principal Researcher, Interpreting Privacy Principles Project
Cyberspace Law & Policy Centre, UNSW Faculty of Law

Research Assistance

Abi Paramaguru, Research Assistant on the *Interpreting Privacy Principles Project*

21 January 2007

Note: our submissions number consecutively following on those in our separate submissions on the Unified Privacy Principles, on Promotion and Enforcement, Credit Reporting Provisions and Exemptions.

Research for this submission is part of the Interpreting Privacy Principles Project, an Australian Research Council Discovery Project

INTERPRETING PRIVACY PRINCIPLES

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Introduction

Structure of Submission

Both the Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission (NSWLRC) have recommended the enactment of a statutory action for infringement of privacy – often referred to as a 'privacy tort' (although neither law reform body regards this action as part of the law of torts). We will refer to such a proposed action, for the sake of brevity, as a 'privacy action', though it would more properly be described as an 'action for invasion of privacy' (as the NSWLRC puts it) or an 'action for interference with privacy'.

The following submissions to both of these law reform bodies are structured around the Proposals set out by the ALRC in its Discussion Paper 72 Chapter 5 'Protection of a Right to Personal Privacy' ('DP72'). Where necessary we have referred to proposals as phrased by the NSWLRC in its Consultation Paper 1 'Invasion of Privacy' ('CP1').

The NSWLRC identifies nine issues to be that need to be considered in determining the form and limits of the action (CP1, [7.2]). We agree with the NSWLRC's list, except we would add a further issue: 'the effect of any actions taken by the defendant to ameliorate potential harm'.

Background – the iPP Project

Research for this submission has been undertaken as part of a Discovery project funded by the Australian Research Council, 'Interpreting Privacy Principles'. The home page for the project, and other publications relating to the project, are at <http://www.cyberlawcentre.org/ipp/>. The *iPP Project* is based at the Cyberspace Law & Policy Centre at UNSW Law Faculty. The principal objective of this research is to conduct over the course of the project (2006-09) a comprehensive Australian study of (i) the interpretation of information privacy principles (IPPs) and 'core concepts' in Australia's various privacy laws, particularly by Courts, Tribunals and privacy regulators; (ii) the extent of current statutory uniformity between jurisdictions and types of laws, and (iii) proposals for reforms, in order to help obtain better uniformity, certainty, and protection of privacy.

1. Elements of the cause of action

> *Proposal 5–1 The Privacy Act should be amended to provide for a statutory clause of action for invasion of privacy. The Act should contain a non-exhaustive list of the types of invasion that fall with the cause of action.*

We agree with both the NSWLRC and the ALRC that there should be a privacy action stated in general terms, and that any list of types of actionable breaches of privacy should be non-exhaustive and by way of examples only. We also agree that the factors set out by the ALRC in Proposal 5-2 should be the general basis of the cause of action.

However, we question whether 'offence' (as in 'cause offence to' or 'be offensive to') is the best way to describe the reaction required to trigger the action. Accidental disclosure of a person's HIV status (as discussed by the ALRC) may cause a person

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extreme distress even if they accept that it was accidental and do not view the actions of the defendant with any opprobrium. To use 'offence' as the touchstone may not be appropriate if negligent acts or omissions are to attract liability (which we support). We suggest therefore that 'offence or distress' is a more appropriate wording.

> ***Submission DP72-231: We support the definition of the privacy action being in general terms, but including a non-exhaustive list of examples. We support the ALRC's suggestion that, outside the specific examples to be given, a plaintiff should be required to show that in all the circumstances:***
>
> ***(a) the plaintiff has in relation to conduct or information a reasonable expectation of privacy; and***
>
> ***(b) the act complained of is sufficiently serious to cause substantial offence or distress to a person of ordinary sensibilities.***

Examples

> *Proposal 5–1 (continued) For example, an invasion of privacy may occur where:*
>
> *(a) there has been an interference with an individual's home or family life;*
>
> *(b) an individual has been subjected to unauthorised surveillance;*
>
> *(c) an individual's correspondence or private written, oral or electronic communication has been interfered with, misused or disclosed;*
>
> *(d) sensitive facts relating to an individual's private life have been disclosed.*

The drafting of these examples does not seem to us to be adequate, except for (d).

We suggest rewording (a) as 'intrusion into an individual's home, family or otherwise private life'. The expression 'intrusion into' should preferably be used, so as to engage jurisprudence from other jurisdictions more readily. The expression 'home, family or otherwise private life' is also needed to give sufficient breadth: for example, it is needed to cover a situation where a third party intrudes into a hotel room to photograph two unmarried parties in a sexual relationship (not home, not family but definitely private).

All actions are subject to defences, so the word 'unauthorised' in (b) seems otiose – authorisation by or under law is a defence, and other authorisations are irrelevant. The simple reference to 'surveillance' may however be too broad: it does not seem desirable that this action should apply to every aspect of industrial espionage involves information about a person. On the other hand, it is desirable that the action should apply to workplace surveillance which is not otherwise covered by workplace surveillance legislation.

In (c), 'correspondence or' seems to add nothing, and might be taken to imply that the broad reference to media in 'written, oral or electronic communication' is not to be

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applied to 'correspondence'. It may be better to leave 'correspondence' out, or to insert 'other' before the reference to communications.

> ***Submission DP72-232: We support the inclusion of these examples provided they are re-worded so that all examples refer consistently to a person's private life (so as to engage proposal 5-2), and otherwise improved, by wordings such as:***
>
> ***(a) there has been an intrusion into an individual's home, family or otherwise private life;***
>
> ***(b) an individual has been subjected to surveillance in their home, family or otherwise private life;***
>
> ***(c) an individual's private written, oral or electronic communication has been interfered with, misused or disclosed;***
>
> ***(d) sensitive facts relating to an individual's private life have been disclosed***

'Private' as a touchstone

> ***Proposal 5–2*** *The* Privacy Act *should provide that, in determining what is considered 'private' for the purposes of establishing liability under the proposed statutory cause of action, a plaintiff must show that in all the circumstances:*
>
> *(a) there is a reasonable expectation of privacy; and*
>
> *(b) the act complained of is sufficiently serious to cause substantial offence to a person of ordinary sensibilities.*

We support this approach, but reiterate that, for it to be effective, not only the definition of the action, but all of the examples should desirably be phrased in terms of what is 'private'.

> ***Submission DP72-233: We support proposal 5-2, provided all grounds in Proposal 5-1 are re-worded to include the words 'private' or 'privacy'.***

Possible limitations on the action – standing, damage, and negligence

> ***Proposal 5–3*** *the* Privacy Act *should provide that:*
>
> *(a) only natural persons should be allowed to bring an action under the* Privacy Act *for invasion of privacy;*

We consider that a privacy action should only be available to individual plaintiffs who claim an interference with their own individual privacy interests. In some cases such interference may result from interferences with the interests of a corporation or business with which they are involved, a deceased associate or a relative. A privacy action should be flexible enough to recognise such indirectly occurring privacy interference, but that is all.

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> ***Submission DP72-234: We support 5-3 (a) because the separate interests of corporations and unincorporated associations are better protected by different actions, and to include them will distort how a privacy action is framed.***
>
> ***Submission DP72-235: A privacy action should not protect the interests of deceased persons or relatives of a plaintiff, but should only protect the privacy interests of the individual plaintiff.***
>
> ***Proposal 5–3*** *(cont) ….(b) the action is actionable without proof of damage; and*

As the ALRC points out, a privacy action without requirement of proof of damage will allow a remedy (including compensation) for humiliation and insult, as well as being consistent with this being a breach of a human right. It is essential that psychological harms including emotional distress should receive a remedy through a privacy action, and not only physical harm or economic loss. However, this can be achieved by the legislation specifically providing that emotional distress is actionable. The NSW information privacy legislation requires 'psychological … harm' (s55(4)(b)). The *Privacy Act 1988* (Cth) s52 (1A) goes further and specifies that '… loss or damage … includes injury to the complainant's feelings or humiliation suffered by the complainant'. The Hong Kong *Personal Data (Privacy) Ordinance* provides that compensable 'damage … may be or include injury to feelings' (s66(2)).

However, as the NSWLRC points out (CP1, [7.50]), a requirement of proof of damage does automatically limit the reach of the action at the outset. There is a danger that privacy actions can be brought into disrepute by trivial actions, and the lack of a requirement of damage also increases the extent of uncertainty of the tort. The risk of costs being awarded against the plaintiff is likely to have an effect of deterring some trivial claims if there is a requirement of damage. Provided that psychological distress is included within compensable damage, it may be preferable to limit the action by this means, if the alternative is to require intention or recklessness.

> ***Submission DP72-236: We support proposal 5-3 (b) because humiliation, insult and breach of human rights should be actionable per se. However, if it is necessary to build limiting factors into the privacy action, it is reasonable to require proof of damage, provided that damage expressly includes emotional distress and other psychological harms. This limitation is preferable to a restriction to intentional or (even) reckless acts.***
>
> ***Proposal 5–3*** *(cont) … (c) the action is restricted to intentional or reckless acts on the part of the defendant.*

The NSWLRC proposed to require intentional actions (CP1, [7.23-7.25]), but the ALRC broadens this to include reckless acts. A privacy action should not be one of strict liability, but in our view there should be liability for negligence as well as recklessness. Otherwise, a corporation or government agency could inflict significant harm to the privacy interests of many people through careless actions, but unless their actions met the higher standard of recklessness (on the ALRC's recommendation), or were covered by the UPPs, the individuals would have no grounds for compensation.

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Negligent acts which do not result in serious privacy breaches are unlikely to result in actions against a person because of the proposed limitation in 5-2(b) that 'the act complained of is sufficiently serious to cause substantial offence to a person of ordinary sensibilities'. This is a sufficient brake on the action without need to exclude negligence completely. The NSWLRC's main reason for requiring intention was to reduce the amount of uncertainty in the action, but this is also sufficiently dealt with by restricting the action to instances of more serious harms.

Liability for negligence is also more consistent with the UPPs, for many of which the failure to take 'reasonable steps' (similar to negligence) is the touchstone of liability. Consistency of a privacy action with the UPPs is desirable unless there are good reasons against it.

For these reasons, we argue against the approaches taken by both the ALRC and the NSWLRC. However, if this is not accepted, the ALRC's inclusion of reckless acts without need for prove intentional acts is preferable as giving greater protection to individuals.

> ***Submission DP72-237: We do not support 5-3 (c), and submit that it should be sufficient for the action if the defendant's negligence results in an otherwise actionable breach of privacy. Liability for negligence is also more consistent with the UPPs 'reasonable steps' standard, and consistency is desirable.***
>
> ***If liability for negligence is not accepted, then there should be liability for reckless actions as proposed by the Hong Kong Law Reform Commission and the ALRC, and contrary to the view of the NSWLRC.***

2. Roles of the Privacy Commissioner

> ***Proposal 5–4*** *The Office of the Privacy Commissioner should provide information to the public concerning the proposed statutory cause of action for invasion of privacy*

We support the Privacy Commissioner providing such information to the public, but suggest that the role of the Commissioner should go further than this. Concerning the suggested information-provision role, one problem with an action which can be taken at District Court level throughout Australia (as the ALRC suggests: see DP72 [5.110]), is that it will be extremely difficult for plaintiffs, defendants and their legal advisers to find what actions have already arisen, both successful and unsuccessful. In our view, the OPC should be required to use its best efforts to provide information about all cases which have been commenced under the proposed action.

> ***Submission DP72-238: The Privacy Commissioner should be required, as part of its information-provision function, to use its best endeavours to provide information about all cases which have been commenced under the proposed action.***

The ALRC implies, but does not state directly, that the proposed action would only be able to be pursued before a court, rather than (if the complainant chooses) by complaint to the Privacy Commissioner, even though it does discuss such a suggestion by the OPC (see DP72, [5.103]). We support complainants being able to

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bring breaches of the privacy action before the Privacy Commissioner (as an alternative to before a court), because (i) some of the UPPs involve legal interpretations as complex as those under the privacy action; (ii) breaches of the privacy action and of the UPPs will often overlap; (iii) mediation may be more easily achieved by this route; and (iv) costs may be kept lower for both parties. If such a course was adopted, there would need to be a provision whereby either party at any time could seek to have such a complaint removed from the Commissioner to a court, so that they could expedite the process of obtaining judicial interpretation of the statutory provisions.

The ALRC may decide to recommend that adjudication of the privacy action should be reserved to the courts, despite the merits in our view of allowing complaints to the Commissioner as an alternative to the direct route to the courts. If so, then it is even more important that the Commissioner has some opportunity to seek to use the expertise of his office to influence the numerous courts involved toward more consistent interpretations of the action. Such a right of standing is provided in relation to any interpretations of the NSW *Privacy and Personal Information Protection Act 1998* arising from any appeals, by s55(7) which provides 'The Privacy Commissioner has a right to appear and be heard in any proceedings before the Tribunal in relation to a review under this section'. The NSW Commissioner has made use of this right, to some effect.

> ***Submission DP72-239: The Privacy Commissioner should have standing to appear in any case before any Court exercising federal jurisdiction where the privacy action is in issue before the Court. In so doing, the Commissioner should not act on behalf of any party to the dispute. Similarly, the Privacy Commissioner should have standing to appear in any case where one of the UPPs is in issue.***

3. Defences, exemptions etc

> ***Proposal 5–5*** *The range of defences to the proposed statutory cause of action for invasion of privacy provided for in the Privacy Act should be listed exhaustively.*
>
> *That list should include that the:*

The main problem with the proposed defences is that they pay no regard to whether the interest protected by the defence, or the manner of its exercise, are out of proportion to the harm done to the plaintiff. For example, where information is disclosed, was the plaintiff informed of the disclosure so as to be able to correct any inaccurate information or put their side of contentious circumstances? Were the property interests protected in (a) trivial though legitimate? All of these defences need to be made conditional on a requirement of proportionality, or they will be open to abuse. This is consistent with our submissions in relation to proportionality in the context of the collection UPPs.

> ***Submission DP72-240: All of the defences proposed in Proposal 5-5 should be subject to the additional requirement (or condition) that, in the circumstances of the particular act or conduct or disclosure, the***

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> ***interest protected by the defence was proportionate to the harm (whether physical, economic or psychological) caused to the plaintiff.***
>
> ***Proposal 5–5*** *cont …(a) act or conduct was incidental to the exercise of a lawful right of defence of person or property;*
>
> ***Submission DP72-241: Unless the proposed proportionality requirement is adopted here, the defence in 5–5(a) should be restricted to actions 'necessary for', not merely 'incidental to' such defences of other rights.***
>
> ***Proposal 5–5*** *cont … (b) act or conduct was required or specifically authorised by or under law;*

Concerning (b), we suggest that the only forms of legal authorisation which should over-ride a statutory privacy action, should (preferably) be those that receive positive approval by Parliament, or (at the least) those which are legislative instruments and therefore subject to disallowance. So, documents given force of law by Parliament, or statutory instruments, should only come within (b) if they satisfy this requirement.

> ***Submission DP72-242: For an authorisation to come within 5-5(b), it should be one which (preferably) receives positive approval by Parliament, or (at the least) is a legislative instrument and therefore subject to disallowance.***
>
> ***Proposal 5–5*** *cont … (c) information disclosed was a matter of public interest or was a fair comment on a matter of public interest; or*

As the NSWLRC points out (CP1, [7.45ff]), consideration of proportionality will be achieved by this defence, but an overall requirement of proportionality for all these defences need not disrupt this. The recent New Zealand Supreme Court decision in *Rogers v TVNZ* [2007] NZSC 91 (16 November 2007) demonstrates the ability of courts to take a robust approach to protecting free speech interests within a privacy action.

> ***Proposal 5–5*** *cont … (d) disclosure of the information was, under the law of defamation, privileged.*

It is particularly important that the defences of absolute and qualified privilege in defamation law should be moderated by the 'proportionality' requirement proposed above. They often involve disclosures of information which may be unknown to the plaintiff (and therefore unable to be corrected or contradicted), but this lack of fairness does not affect the availability of the privilege.

> ***Question 5–1*** *In addition to the defences listed in Proposal 5-5, are there any other defences that should apply to the proposed statutory cause of action for invasion of privacy?*
>
> ***Submission DP72-243: The ALRC/NSWLRC should consider whether any of the exceptions to the Use and Disclosure Principle in the UPPs are relevant to this action. Consistency between this action and the UPPs is desirable where possible and justifiable.***

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We consider that consent should be a defence to a statutory action, rather than lack of consent being an element of the cause of action. The defendant should have the onus of proof that the plaintiff has consented. The plaintiff should not have to prove lack of consent, which (strictly speaking) is difficult or impossible to prove.

> ***Submission DP72-244: Consent should be a defence, rather than lack of consent being an element of the cause of action.***

The NSWLRC does not consider that the fact that information is in a public record, or otherwise could be considered to be in the 'public domain' from the perspective of other laws (such as breach of confidence) should preclude a privacy action (CP1, [7.18-7.22]). We agree for the reasons given by the NSWLRC that this issue should be left to the Courts to decide under the general principles of the action and in particular as part of a public interest defence.

> ***Submission DP72-245: The fact that information is in a public record or 'in the public domain' should not by itself constitute a defence to the action, but should be a relevant factor in a public interest defence.***

4. Remedies

> ***Proposal 5–6*** *To address an invasion of privacy, the court should be empowered by the* Privacy Act *to choose the remedy that is most appropriate in all the circumstances, free from the jurisdictional constraints that may apply to that remedy in the general law. For example, the court should be empowered to grant any one or more of the following:*
>
> *(a) damages, including aggravated damages, but not exemplary damages;*
>
> *(b) an account of profits;*
>
> *(c) an injunction;*
>
> *(d) an order requiring the defendant to apologise to the plaintiff;*
>
> *(e) a correction order;*
>
> *(f) an order for the delivery up and destruction of material;*
>
> *(g) a declaration; and*
>
> *(h) other remedies or orders that the court thinks appropriate in the circumstances*

The remedy of account of profits, while appropriate in disputes concerning commercial appropriate of reputation, is not appropriate in this separate action based on protection of the privacy of individuals

> ***Submission DP72-246: We support proposal 5–6 except we do not support remedy (b) 'an account of profits' which is more appropriate for the protection of commercial interests.***

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Limits on damages

The NSWLRC discusses various jurisdictional limits on damages (CP1, [8.18ff]), and arguments in their favour. We consider that there is an additional element in favour: that this is a desirable limiting device on the action, far preferable (for example) than excluding all actions for negligence, or limiting the action to a very narrow category of infringements. Limited damages help to reduce concerns about the uncertain scope of the action. So does the avoidance of any punitive damages.

The NSWLRC does not mention that the *Privacy and Personal Information Protection Act 1998* (NSW) s55(2) provides that when reviewing the conduct of the public sector agency, the NSW Administrative Decisions Tribunal may make an order requiring the public sector agency to pay to the applicant damages not exceeding $40,000 by way of compensation for any loss or damage suffered because of its conduct. Some other information privacy legislation, such as the Commonwealth *Privacy Act 1988* (s52) do not impose such monetary limits. Consistency with Australia's information privacy legislation should be a relevant factor in determining monetary limits for a privacy action.

Damages in privacy actions would only rarely (and perhaps inappropriately) be for physical harms, but would be for economic loss (including in particular severe damage to employment prospects), damage to family and other relationships, and for emotional distress, humiliation and embarrassment. Rights to compensation for such non-consequential economic losses and for emotional harms are still relatively limited in general tort law, so there is reasonable, and perhaps prudent, to consider placing limitations on them in this context as well.

> ***Submission DP72-247: A privacy action should only provide compensatory damages (including aggravated damages). If it is necessary to provide some limitation on the action, then a monetary limit on compensation is more acceptable than other means of limiting the action.***

5. Location of a privacy action

> ***Proposal 5–7*** *Until such time as the states and territories enact uniform legislation, the state and territory public sectors should be subjected to the proposed statutory cause of action for invasion of privacy in the* Privacy Act.

If a broad approach is adopted to drafting a privacy action, as the ALRC recommends, then that action together with the UPPs will start to resemble a comprehensive privacy code such as is attempted in the Asia-Pacific Privacy Charter. It would be very desirable if the basic principles of the privacy action could be presented as a separate part of the UPPs, so that the whole set of principles appeared together. It is possible (and desirable) that the UPPs will be adopted by State and Territory legislation for application to their own public sectors, for purposes of uniformity. Placing the privacy action in the UPPs would also make it convenient for State and Territory legislation to adopt it as well, and make such adoption more likely.

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> ***Submission DP72-248: We agree that the preferable location for a statutory privacy action is the Privacy Act 1988 (Cth). We further***

> ***suggest that the basic principles of such an action should be included as part of the UPPs. We agree that the state and territory public sectors should be subject to the statutory privacy action until they enact their own legislation on the subject.***

The danger of this approach is that, since it will also overlap the regulation of surveillance activities and probably other areas of State and Territory legislative competence, it could easily be used to diminish the ability of States and Territories to apply higher standards of protection against surveillance activities in the private sector than the Commonwealth is willing to provide. National consistency is preferred here, but not by Commonwealth *fiat* prohibiting higher standards at State level. As suggested by the ALRC (see DP72, [5.99]), the Commonwealth legislation should not exclude State or Territory legislation capable of operating concurrently.

> ***Submission DP72-249: Such Commonwealth legislation should preserve the right of States or Territories to enact higher standards of privacy protection. At the same time, national consistency by agreement should be sought.***

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Index of Submissions

Introduction

1. Elements of the cause of action

Submission DP72-231: We support the definition of the privacy action being in general terms, but including a non-exhaustive list of examples. We support the ALRC's suggestion that, outside the specific examples to be given, a plaintiff should be required to show that in all the circumstances:

(a) the plaintiff has in relation to conduct or information a reasonable expectation of privacy; and

(b) the act complained of is sufficiently serious to cause substantial offence or distress to a person of ordinary sensibilities.

Submission DP72-232: We support the inclusion of these examples provided they are re-worded so that all examples refer consistently to a person's private life (so as to engage proposal 5-2), and otherwise improved, by wordings such as:

(a) there has been an intrusion into an individual's home, family or otherwise private life;

(b) an individual has been subjected to surveillance in their home, family or otherwise private life;

(c) an individual's private written, oral or electronic communication has been interfered with, misused or disclosed;

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the dispute. Similarly, the Privacy Commissioner should have standing to appear in any case where one of the UPPs is in issue.

3. Defences, exemptions etc

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Submission DP72-241: Unless the proposed proportionality requirement is adopted here, the defence in 5–5(a) should be restricted to actions 'necessary for', not merely 'incidental to' such defences of other rights.

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Submission DP72-245: The fact that information is in a public record or 'in the public domain' should not by itself constitute a defence to the action, but should be a relevant factor in a public interest defence.

4. Remedies

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5. Location of a privacy action

Submission DP72-248: We agree that the preferable location for a statutory privacy action is the Privacy Act 1988 (Cth). We further suggest that the basic principles of such an action should be included as part of the UPPs. We agree that the state and territory public sectors should be subject to the statutory privacy action until they enact their own legislation on the subject.

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