Introduction

The issue of how best to protect privacy has recently been a matter of intense interest to Australian law reform commissions. Within the last five years, three law reform commissions have produced reports on the issue.[1] All three have recommended the introduction of a statutory cause of action in some form.[2] In response to part of the three volume Australian Law Reform Commission's report, *For Your Information: Australian Law and Practice*, the then responsible Minister,[3] the Minister for Privacy and Freedom of Information, the Hon. Brendan O'Connor, released an issues paper on 'a Commonwealth statutory cause of action for serious invasion of privacy'.[4] As part of the consultation process, the Minister received submissions from a wide range of individuals and organisations, including bar associations, law societies, media organisations, peak industry bodies, community legal centres, and academics. This consultation process represents the most recent development in privacy law reform in Australia, which may or may not result in the introduction of a statutory cause of action for serious invasion of privacy.

The purpose of this paper is to analyse the submissions made to the consultation process.[5] Given the number and variety of the arguments made in the submissions, it is not possible to analyse them exhaustively. This paper will focus on the most common and the most interesting arguments made for and against a statutory cause of action for serious invasion of privacy. The submissions provide useful insights into the state of the privacy debate in Australia, particularly the issues of whether there needs to be a cause of action for invasion of privacy recognised or introduced and, if so, what form it should take. They reveal that there is real division as to the need and the desirability of having some form of direct, comprehensive right to privacy in Australian law. Consequently, there is real doubt as to whether this proposal will be enacted. Indeed, given the pace of privacy law reform in Australia until now, it is questionable whether there will be any rapid developments in the near future.

The Current State of Australian Privacy Law

In order to understand the issues paper and the submissions made in response to it, it is necessary to have some context about the protection of personal privacy under Australian

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[1] Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) ('ALRC'); New South Wales Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009) ('NSWLRC'); Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report No 18 (2010) ('VLRC').

[2] ALRC, Recommendation 74-1; NSWLRC, Recommendation; VLRC, Recommendations 22-24. For an analysis of these three law reform proposals, see Normann Witzleb, 'A Statutory Cause of Action for Privacy? A Critical Appraisal of Three Recent Australian Law Reform Proposals' (2011) 19 *Torts Law Journal* 104.

[3] Following a Cabinet reshuffle in mid-December 2011, responsibility for privacy law reform was assigned to the Attorney-General, the Hon. Nicola Roxon.

[4] Commonwealth of Australia, Department of the Prime Minister and Cabinet, *Issues Paper: A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, September 2011: http://www.dpmc.gov.au/privacy/causeofaction/ ('*Issues Paper*').

[5] The submissions made in response to the *Issues Paper* can be found at http://www.ag.gov.au/Consultationsreformsandreviews/Pages/ACommonwealthStatutoryCauseofActionforSeriousInvasionofPrivacy.aspx.

law. For several decades, the High Court of Australia's decision in *Victoria Park Racing and Recreation Grounds Pty Ltd v Taylor* ('*Victoria Park Racing v Taylor*')[6] was cited, rightly or wrongly, as authority for the proposition that there was no common law right to privacy.[7] Privacy was incidentally protected by existing causes of action, such as trespass to land,[8] defamation[9] and breach of confidence.[10] Legislatures intervened to protect certain types of privacy, notably informational privacy,[11] or to proscribe certain types of conduct which tended to interfere with reasonable expectations of privacy, such as workplace surveillance.[12] However, there was no direct, comprehensive protection of privacy.

The High Court of Australia's decision in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* ('*ABC v Lenah Game Meats*')[13] raised the prospect that the seemingly well-established common law position might be revised. Notably, Gummow and Hayne JJ reasoned that, properly understood, *Victoria Park Racing v Taylor* stood for the somewhat paradoxical proposition that the tort of private nuisance did not protect privacy but that did not prevent the common law, outside the limits of that particular tort, from developing so as to protect privacy.[14] Gleeson CJ stated '[t]he law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy'.[15] Whilst there were *dicta* suggesting that the High Court would be willing to countenance recognising or developing an enforceable right to privacy in some form, there was equally the view expressed that such a right should be for the benefit of natural persons only, not artificial entities like Lenah Game Meats Pty Ltd.[16] This decision held out the prospect that, if the appropriate case presented itself, the High Court might be willing to recognise an enforceable right to privacy in some form. That prospect has not yet been realised.

The absence of a clear ratio on the issue of privacy in *ABC v Lenah Game Meats* has been productive of uncertainty. Two inferior courts found that *ABC v Lenah Game Meats* did indeed recognise that there was an enforceable right to privacy under Australian law and

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[6] (1937) 58 CLR 479.

[7] See, for example, *Cruise v Southdown Press Pty Ltd* (1993) 26 IPR 125 at 125 per Gray J; *Australian Consolidated Press Ltd v Ettingshausen* (unreported, CA40079/93, CA(NSW), Gleeson CJ, Kirby P and Clarke JA, 13 October 1993), at 9 per Kirby P; *GS v News Ltd* (1998) Aust Torts Reports ¶81-466 at 64,913-64,915 per Levine J.

[8] See, for example, *Plenty v Dillon* (1991) 171 CLR 635 at 647 per Gaudron and McHugh JJ; *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at 344 per Spigelman CJ.

[9] See, for example, *John Fairfax Publications Pty Ltd v Hitchcock* (2007) 70 NSWLR 484, 515; [2007] NSWCA 364, [124] (McColl JA).

[10] See, for example, *Hitchcock v TCN Channel Nine Pty Ltd* (2000) Aust Torts Reports ¶81-550; (2000) Aust Contracts R ¶90-108; *Australian Football League v The Age Co Ltd* (2006) 15 VR 419.

[11] See, for example, *Privacy Act 1988* (Cth); *Privacy and Personal Information Protection Act 1998* (NSW); *Information Privacy Act 2000* (Vic).

[12] See, for example, *Workplace Surveillance Act 2005* (NSW).

[13] (2001) 208 CLR 199.

[14] *ABC v Lenah Game Meats* (2001) 208 CLR 199 at 248-49. See also *ABC v Lenah Game Meats* (2001) 208 CLR 199 at 277 per Kirby J.

[15] *ABC v Lenah Game Meats* (2001) 208 CLR 199 at 225.

[16] *ABC v Lenah Game Meats* (2001) 208 CLR 199 at 256-58 per Gummow and Hayne JJ (Gaudron J agreeing). See also *ABC v Lenah Game Meats* (2001) 208 CLR 199 at 279 per Kirby J.

imposed liability for infringement of it.[17] By contrast, superior courts have tended to refuse to accept that was the effect of *ABC v Lenah Game Meats*,[18] or, to the extent that they have, they have considered breach of confidence as the appropriate vehicle by which to protect privacy.[19] The highest that has been claimed by superior courts for the effect of *ABC v Lenah Game Meats* was that it was arguable that such a cause of action might be recognised in the future.[20]

In the decade since the High Court's decision in *ABC v Lenah Game Meats*, there has not been any real development of direct privacy protection by the courts. There are a range of possible reasons for this. The lack of any development of the common law, following on from *ABC v Lenah Game Meats*, led to three law reform commissions being given references to investigate the issue of privacy. The ALRC conducted a comprehensive review of privacy, of which its recommendations about a statutory cause of action for invasion of privacy formed only a small part. In late 2011, in response to the recommendations by the ALRC, the Minister for Privacy and Freedom of Information released an issues paper and held a consultation as to whether Australia should introduce a statutory cause of action for serious invasion of privacy.

The Issues Paper

The *Issues Paper* is organised around a list of nineteen questions.[21] The threshold issue identified by the *Issues Paper* is whether a statutory cause of action for invasion of privacy is necessary. The Minister, in his foreword, makes it clear that the impetus for considering whether such a cause of action should be introduced is the intrusive potential of recent technological developments.[22] Characterising the place of privacy in contemporary Australian society, the *Issues Paper* observes that 'the privacy context is drastically different from that of 1937, and indeed the whole of the 20th century'.[23] In order to demonstrate the extent of the technological changes, the *Issues Paper* documents the levels of household access to computers; the rates of mobile phone ownership;[24] the extent of wired and wireless internet connection and usage;[25] and the rise of social media.[26] It then seeks views on whether 'recent developments in technology mean that additional ways of protecting individuals' privacy should be considered in Australia'.[27] The *Issues Paper* then canvasses the treatment of privacy under Australian, United States, European Union, United Kingdom, Canadian and

[17] *Grosse v Purvis* (2003) Aust Torts Reports ¶81-706; [2003] QDC 151; *Doe v Australian Broadcasting Corporation* [2007] VCC 281.
[18] *Kalaba v Commonwealth of Australia* [2004] FCAFC 326.
[19] See, for example, *Giller v Procopets* (2008) 24 VR 1 at 35-36 per Ashley JA.
[20] See, for example, *Gee v Burger* [2009] NSWSC 149 at [53]-[55] per McLaughlin AsJ; *Dye v Commonwealth Securities Ltd* [2010] FCA 720 at [290] per Katzmann J. See also *Chan v Sellwood* [2009] NSWSC 1335 at [37] per Davies J.
[21] For the full list of questions, see *Issues Paper*, pp. 52-53.
[22] *Issues Paper*, p. 3.
[23] *Issues Paper*, p. 9.
[24] *Issues Paper*, p. 9.
[25] *Issues Paper*, p. 10.
[26] *Issues Paper*, p. 11.
[27] *Issues Paper*, Question 1.

New Zealand law.[28] It then identified the related threshold issue as being whether, outside the concerns about intrusive technologies, there were additional reasons for or against the introduction of a statutory cause of action for invasion of privacy.[29] The *Issues Paper* canvassed arguments in favour of such a cause of action, including the inadequacy of existing privacy protections under Australian law; the need for comprehensive, rather than piecemeal, privacy protection; the need to 'fill the gaps'; the desire to create, in the words of Professor John Burrows, 'a climate of restraint', so as to prevent invasions of privacy from occurring in the first place (akin to a 'chilling effect'); and the need to give effect to Australia's human rights obligations.[30] It also canvassed arguments tending against the introduction of such a cause of action, including the notorious difficulty of defining privacy; the potential adverse impact on commercial activities, law enforcement and national security; and concerns about freedom of expression, freedom of the press and artistic freedom.[31]

If a cause of action for invasion of privacy were to be developed, the *Issues Paper* then asked whether it should be created under statute or whether it should be left to the courts to develop the common law.[32] If the cause of action were to be statutory, there was the additional issue of whether it should be enacted by the Commonwealth Parliament or by the States and Territories.[33] A federal statute would ensure that there was consistent, national legislation but there are constitutional constraints on the power of the Commonwealth Parliament to legislate for such a cause of action. The Commonwealth could attempt to have the States and Territories refer their legislative power to it but there was no guarantee that any or all of them would do so. If all of the States and Territories did not refer their legislative power to the Commonwealth, there would be legislative diversity, which would be an undesirable outcome. By contrast, there are no such constitutional limitations on the States and Territories to legislate such a cause of action but, without a co-ordinate scheme, there might end up being legislative diversity in an event. Even with such a co-ordinate scheme, a State or a Territory could elect to amend its own law, again creating legislative diversity.

The *Issues Paper* then addressed the elements of a potential statutory cause of action for serious invasion of privacy. The central questions were whether the standard of liability should be one of 'highly offensive to a reasonable person of ordinary sensibilities';[34] whether the public interest should be balanced against privacy at the level of liability or whether it should constitute a free-standing defence;[35] whether the fault element should be limited to intent and recklessness or whether it should extend to negligence;[36] and whether the legislation should include a range of factors or a non-exhaustive list of activities to illustrate

[28] *Issues Paper*, pp. 13-22.
[29] *Issues Paper*, Question 2.
[30] *Issues Paper*, pp. 23-26.
[31] *Issues Paper*, pp. 26-28.
[32] *Issues Paper*, Question 3.
[33] *Issues Paper*, p. 29.
[34] *Issues Paper*, Question 4.
[35] *Issues Paper*, Questions 5 and 6.
[36] *Issues Paper*, Question 7.

when liability might or might not be established.[37] It then sought views about what defences should be available;[38] whether certain organisations should be excluded from the operation of the cause of action;[39] what remedies should be available and, more particularly, whether a cap should be imposed on damages for non-economic loss;[40] whether the cause of action should be actionable without proof of damage;[41] whether there should be an offer of amends process;[42] whether the cause of action should be restricted to natural persons;[43] whether the cause of action should be restricted to living persons;[44] the appropriate limitation period for such claims;[45] and the proper forum in which such claims should be determined.[46]

The Arguments in Favour of a Statutory Cause of Action for Serious Invasion of Privacy

Given the constraints of space and the complexity of the issues raised by the *Issues Paper*, it is not possible to analyse in detail all of the arguments for and against a statutory cause of action for serious invasion of privacy. In looking at the submissions to the consultation process, there are some common themes which emerge.

The most prominent and interrelated arguments in support of a statutory cause of action for invasion of privacy were that the existing legal protections under Australian law were inadequate and that technological changes necessitated such a legislative change. The submissions varied in the extent to which they took these matters to be self-evident. For example, in its submission, the firm of plaintiff lawyers, Maurice Blackburn, argued that it was important for Australian law to keep pace with technological changes and that there was a role for government in improving the protection of individual privacy.[47] It noted that there were instances in which an individual could have his or her privacy invaded but be left without adequate legal redress. This highlights one of the major issues identified in the law reform process, namely whether the purpose of a statutory cause of action for invasion of privacy is to fill the gaps left by Australian law's existing protection of privacy or whether it is to provide a new, free-standing, comprehensive cause of action which will operate alongside and in addition to existing causes of action available to plaintiffs. If the purpose is to fill the gaps, then those gaps have to be identified and the legislative solutions need to be tailored to those gaps. Professor McDonald's paper deals with these issues in detail.

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[37] *Issues Paper*, Questions 8 and 9.
[38] *Issues Paper*, Question 10.
[39] *Issues Paper*, Question 11.
[40] *Issues Paper*, Questions 12 and 13.
[41] *Issues Paper*, Question 14.
[42] *Issues Paper*, Question 15.
[43] *Issues Paper*, Question 16.
[44] *Issues Paper*, Question 17.
[45] *Issues Paper*, Question 18.
[46] *Issues Paper*, Question 19.
[47] For other examples of submissions citing the inadequacy of existing legal protections in Australia and the challenges to privacy posed by technological developments, see the submissions by the Australian Privacy Foundation, the National Welfare Rights Network and the Public Interest Advocacy Centre.

Amongst those supporting the introduction of a cause of action for invasion of privacy, there were, in certain submissions, a strong preference for the legislature to intervene, rather than leaving the common law to be developed by the courts.[48] This was informed by an observation of the relative non-development of the common law in the decade after the High Court's decision in *ABC v Lenah Game Meats*.[49] Perhaps the most developed arguments in favour of the legislature rather than the common law was provided by the Public Interest Advocacy Centre ('PIAC'). It expressed the view that '[a]s a general principle, significant law reform should occur via the legislature'. PIAC then identified the benefits of a statutory cause of action: it provided greater certainty, clarity and predictability about rights, responsibilities and liabilities; the legislature was better placed than the courts to take into account the full range of countervailing rights and interests; the legislature was also better placed than the courts to be more flexible about remedies; and if the development of the law in this regard were left to the courts, there was no guarantee that reform would happen at all.

The benefits of the legislature, rather than the courts, developing a cause of action for invasion of privacy should not be overstated. For instance, even though all of the Australian law reform proposals recommend a statutory cause of action, the terms of the proposals are all so open-textured – understandably, given the diffuse nature of privacy as a concept – that the application of any of these proposals to concrete facts would require considerable judicial interpretation. This ultimate dependence upon judicial interpretation might lessen the certainty, clarity and predictability claimed for a statutory cause of action, for example. Nevertheless, this tension between the preference for a statutory or a common law development of a right to privacy highlights the centrality of questions of legal method in the privacy law reform debate.

A number of submissions supported the introduction of a statutory cause of action for serious invasion of privacy on the basis that it would implement Australia's obligations under the *International Covenant on Civil and Political Rights* ('*ICCPR*').[50] Australia is a signatory to the ICCPR but, to the extent that it has been enacted in domestic law under the *Privacy Act 1988* (Cth), does not provide a remedy for all forms of invasion of privacy, being directed instead to the protection of information privacy. Under Art 17, individuals have a right to be protected against 'unlawful and arbitrary interference with his (or her) privacy' and under Art 2(3), individuals are entitled to an 'effective remedy' in respect of such an interference.

In Australia, arguments based on human rights are unlikely to be given weight by legislators. Australia has no constitutional or statutory protection of human rights at a national level. In December 2008, under the former Labor Prime Minister, Kevin Rudd, a panel of eminent Australians were commissioned to conduct a consultation on the protection of human rights in Australia.[51] The National Human Rights Consultation Committee ('the NHRCC') reported

[48] See, for example, the submissions of Maurice Blackburn Lawyers and the Office of the Australian Information Commissioner.
[49] See, for example, the submission of Maurice Blackburn Lawyers.
[50] See, for example, Maurice Blackburn Lawyers; New South Wales Law Society Human Rights Committee.
[51] As to the panel members, see http://www.humanrightsconsultation.gov.au/Who/Pages/default.aspx.

to the then Attorney-General, the Hon. Robert McClelland, in late September 2009,[52] recommending the introduction of a Federal Human Rights Act.[53] In its terms, the report itself recognised that there already existed significant political opposition to such a development in Australia, thus made additional recommendations on the basis that comprehensive human rights legislation would not be introduced. The NHRCC was correct – opposition to the introduction of a Federal Human Rights Act from both major parties led to lesser measures being introduced, the most notable being the passage of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), which created the Parliamentary Joint Committee on Human Rights, with oversight of the compatibility of Commonwealth legislation with human rights, and the requirement that bills and certain legislative instruments be accompanied by a statement of compatibility, which statement is not binding on any court or tribunal and the absence of which did not affect their validity.[54]

At a State and Territory level, only the Australian Capital Territory and Victoria have comprehensive human rights legislation.[55] One of the enumerated rights protected is the right to privacy.[56] It is telling that, in both jurisdictions, notwithstanding the fact that human rights legislation has been in place for several years, the presence of a right to privacy has not been the stimulus for any development of the common law. There appears to have been no judicial consideration of the right to privacy. The status of the human rights legislation in Victoria is somewhat precarious. In April 2011, the newly elected Victorian State Government, under Liberal Premier, Ted Baillieu, commissioned a review of the Victorian *Charter of Rights and Responsibilities Act 2006*.[57] The report recommended the winding back of the legislation in important respects,[58] although not all of the recommendations were accepted by the Baillieu Government,[59] notwithstanding the fact that it had the majority of members on the review committee. There are no present, concrete plans to introduce human rights in any other Australian jurisdiction.[60]

Given the absence of direct, comprehensive human rights protections in Australia and the bipartisan political aversion to such protections, arguments in favour of a statutory cause of

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[52] The full report of the NHRCC can be found at http://www.humanrightsconsultation.gov.au/Report/Pages/default.aspx.

[53] NHRCC, Recommendation 18.

[54] As to the Federal Government's response to the NHRCC, see http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Pages/default.aspx.

[55] *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

[56] *Human Rights Act 2004* (ACT) s 12; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13.

[57] Under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 44, the Attorney-General was required to conduct a review of the first four years of operation of the legislation. As to the terms of reference of the review, see http://www.parliament.vic.gov.au/sarc/article/1448. Under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 45, a further review of the fifth to eighth years of operation of the legislation is also required.

[58] As to the report of the review committee, see http://www.parliament.vic.gov.au/sarc/article/1446.

[59] As to the government response to the recommendations made in the report of the review committee, see http://www.parliament.vic.gov.au/sarc/article/1446.

[60] A consultation process on the introduction of a *Charter of Human Rights and Responsibilities* in Tasmania appears not to have resulted in the presentation of a bill to the Tasmanian Parliament. As to the consultation process and the submissions received, see http://www.justice.tas.gov.au/corporateinfo/projects/human_rights_charter.

action for serious invasion of privacy based on human rights are unlikely to contribute significantly to any impetus for this proposed reform.

The Arguments against a Statutory Cause of Action for Serious Invasion of Privacy

Whilst one of the central arguments in favour of a statutory cause of action for invasion of privacy was that the existing protections of privacy under Australian law were inadequate, those opposed to the proposed reform took a different view. For example, the Special Broadcasting Service ('SBS'), Australia's national public multicultural broadcaster, submitted that there were already substantial protections of privacy under Commonwealth, State and Territory laws, as well as at common law and in equity. Therefore, in SBS' view, there was no need for an additional cause of action for invasion of privacy. Obviously, whether the existing protections of privacy under Australian law were adequate or inadequate is a matter about which different views might be expressed. However, SBS' submission indirectly suggests that there might be another useful way of analysing this issue, namely by asking whether the existing protections of privacy, as fragmentary and as overlapping as they are, are rational.

A related argument advanced by submissions opposing the introduction of a statutory cause of action for invasion of privacy was that the need for such a reform has not been demonstrated.[61] For instance, SBS and Free TV Australia, in their separate submissions, pointed out that there were few complaints received about invasion of privacy, from which they concluded that there was no substantial evidence to suggest that media intrusion upon personal privacy was a major issue in Australia. The Rule of Law Institute inferred from the lack of cases brought before Australian courts directed to developing the common law of privacy after the High Court's decision in *ABC v Lenah Game Meats* that there was little demand for such a cause of action. It went further, asserting that, to the extent that the impetus for the proposed reform was the *News of the World* phone hacking scandal, there was no evidence that Rupert Murdoch's Australian media outlets engaged in such practices. The inferences drawn in the submissions are not unproblematic. The failure by individuals to complain about intrusions upon privacy, let alone to litigate them, does not necessarily mean that no intrusions in fact occurred. There are a range of plausible reasons why people who feel that their privacy has been invaded by the media might not complain or sue. People might not complain to a media outlet because they do not feel that their complaint will be taken seriously and thus it will be a waste of their time and effort or that the outcome will not be satisfactory; people might not sue because litigation is expensive; the claim, if it is unable to be accommodated within an existing cause of action, is speculative, thereby heightening the inherent uncertainty of litigation; and litigation would give publicity to the intrusion upon privacy, thereby reinforcing the hurt and humiliation inflicted by the initial intrusion. This is not an exhaustive list but rather serves to demonstrate that the inferences drawn in these submissions about the level of concern about media intrusion upon personal privacy are not the only available ones. The other observation that can be made about these submissions is

[61] See, for example, the submissions of Free TV Australia, the Rule of Law Institute and S.B.S.

that they are underpinned by an implicit understanding that law reform is most justifiable when there is an empirically demonstrated need. Establishing or quantifying the extent of public concern about intrusive media practices might be a difficult task. Even if it were possible, it does not provide the only basis for law reform. Even if a need for this law reform cannot be empirically demonstrated, it might be justifiable on the basis of principle or rationality.

The strongest and most obvious argument against a statutory cause of action for serious invasion of privacy was a concern about the impact of the proposed law reform on freedom of expression and freedom of the press.[62] The concern is understandable, given the absence of any comprehensive constitutional or statutory protection of freedom of expression. Speech in relation to government or political matters may attract the protection of the implied freedom of political communication but, beyond that, freedom of expression is a value underlying Australian law which is not directly protected. It is a freedom which often yields to countervailing rights and interests. The largely unhappy experience of defendants in defamation proceedings in Australia attests to this. A concern about augmenting plaintiffs' rights, particularly in relation to the protection of dignitary interests, is understandable without effective guarantees of freedom of expression and freedom of the press.

The concern about the potential negative impact of a statutory right to privacy on freedom of expression and freedom of the press was not limited to those individuals and bodies which opposed such a right. For example, the trade union, the Media, Entertainment and Arts Alliance ('the MEAA') expressed no firm view on whether a statutory cause of action for invasion of privacy should be introduced but was emphatic that, if such a right were introduced, it should only occur if there were equal or stronger protections for freedom of expression introduced. The MEAA was concerned that freedom of expression is not adequately protected under Australian law and that any protection introduced as part of a statutory cause of action for invasion of privacy should not be serious and substantial, not a 'mere passing reference'. The New South Wales Council for Civil Liberties ('the NSWCCL') strongly supported the introduction of a statutory cause of action for invasion of privacy but equally supported the introduction of a right to freedom of expression, including freedom of the press. In order to give it proper weight, the NSWCCL recognised that such a countervailing right be enshrined in its own separate legislation, rather than being protected incidentally as part of a statutory cause of action for invasion of privacy.

Conclusion

[62] See, for example, the submissions of Free TV Australia, News Ltd, the Rule of Law Institute and S.B.S.

Predicting how Australian privacy law reform might proceed is difficult. A case which has the potential to become a test case for whether the common law of Australia recognises an enforceable right to privacy is currently before the Supreme Court of New South Wales. At the time of writing, Hall J has reserved judgment on an application to strike out a claim by a former Commonwealth Bank employee, Victoria Saad, against the bank for infringement of such a right. Saad claims that images of her were misused by the Commonwealth Bank and the security firm it uses, Chubb Security Australia, on a fake Facebook page. Whether the matter will survive the strike-out application and proceeds to final judgment remains to be seen. On the legislative front, the Federal Government has responded to the first part of the ALRC's recommendations about privacy law reform, which did not include the statutory cause of action for serious invasion of privacy. The Government has not responded to the consultation process. It finds itself in a difficult political position, which might make it hard for it to legislate such a reform, particularly given the concerted opposition of a number of media outlets to a cause of action for invasion of privacy. Interestingly, however, the Federal Government Whip, Joel Fitzgibbon MP, used a recent scandal involving allegations made against a parliamentarian about misuse of trade union funds to procure the services of prostitutes, amongst other expenses, as a basis for renewing calls for the introduction of a statutory cause of action for invasion of privacy. Whether this incident will provide the impetus for such a cause of action also remains to be seen. The treatment before the courts and the legislature in Australia has reached the position where there is a lot of interest but little action.