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

Response to the Australian Law Reform Commission (ALRC) Privacy Report 108, Parts A-C, F & I-K

Submission to the Australian Government

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This submission is to the Department of Prime Minister and Cabinet as part of of its post-ALRC consultation on privacy law reform. The submission covers all the parts of the ALRC report which are not covered separately in the Centre's three other submissions - on the Unified Privacy Principles (UPPs); on Credit Reporting, and on Health & Research Privacy. The submission reserves comment on those matters – Exemptions and a Private Right of Action – which the government has expressly deferred to a second round of changes, sometime after 2010.

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Part A—Introduction		
3. Achieving National Consistency		
	Recommendation 3–1 The *Privacy Act* should be amended to provide that the Act is intended to apply to the exclusion of state and territory laws dealing specifically with the handling of personal information by organisations. In particular, the following laws of a state or territory would be excluded to the extent that they apply to organisations: (a) *Health Records and Information Privacy Act 2002* (NSW); (b) *Health Records Act 2001* (Vic); (c) *Health Records (Privacy and Access) Act 1997* (ACT); and (d) any other laws prescribed in the regulations.	Support, provided this preemption does not interefere with the ability of States and Territories to legislate for specific controls on surveillance, or require any weakening of existing surveillance laws, that apply to organisations.
	Recommendation 3–2 States and territories with information privacy legislation that purports to apply to organisations should amend that legislation so that it no longer applies to organisations.	Support, but State & Territories need to ensure that protection is not lost for handling of personal information (and specifically health information) by unincorporated entities that the Commonwealth law cannot cover (e.g. individual GPs?)
	Recommendation 3–3 The *Privacy Act* should not apply to the exclusion of a law of a state or territory so far as the law deals with any 'preserved matters' set out in the Act. The Australian Government, in consultation with state and territory governments, should develop a list of 'preserved matters'. The list should only include matters that are not covered adequately by an exception to the model Unified Privacy Principles or an exemption under the *Privacy Act*.	It is important that the list of 'preserved matters' should be as short as possible, as a long list could seriously undermine the objective of simple consistent and effective national privacy law.
	Recommendation 3–4 The Australian Government and state and territory governments, should develop and adopt an intergovernmental agreement in relation to the handling of personal information. This agreement should establish an intergovernmental cooperative scheme that provides that the states and territories should enact legislation regulating the handling of personal information in the state and territory public sectors that: (a) applies the model Unified Privacy Principles (UPPs), any relevant regulations that modify the application of the UPPs and relevant definitions used in the *Privacy Act* as in force from time to time; and (b) contains provisions that are consistent with the *Privacy Act*, including at a minimum provisions:	Support. However, changes to the Privacy Act should proceed in advance of and irrespective of any such agreement.

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	(i) allowing Public Interest Determinations and Temporary Public Interest Determinations; (ii) regulating state and territory incorporated bodies (including statutory corporations); (iii) regulating state and territory government contracts; (iv) regulating data breach notification; and (v) regulating decision making by individuals under the age of 18.	
	Recommendation 3–5 To promote and maintain uniformity, the Standing Committee of Attorneys-General (SCAG) should adopt an intergovernmental agreement which provides that any proposed changes to the: (a) model Unified Privacy Principles and relevant definitions used in the *Privacy Act* must be approved by SCAG; and (b) new *Privacy (Health Information) Regulations* and relevant definitions must be approved by SCAG, in consultation with the Australian Health Ministers' Conference. The agreement should provide for a procedure whereby the party proposing a change requiring approval must give notice in writing to the other parties to the agreement, and the proposed amendment must be considered and approved by SCAG before being implemented.	Support, subject to generic coments about the need for any Regulations under the Act to be subject to public consultation requirements. If Regulations are able to weaken the protection offered by the Act it is essential that any proposed changes are not dealt with behind the closed doors of SCAG meetings and then by only the normal Regulation making mechanisms, which offer little opportunity for public debate. The Commonwealth should not give up its prerogative to make changes to the Privacy Act in the event that agreement cannot be reached in SCAG or AHMC within a reasonable period of time.
	3.146 While the ALRC agrees that the amendment of the UPPs and the *Privacy (Health Information) Regulations* only should occur after consultation with relevant stakeholders, it is not necessary to establish an expert advisory committee to assist SCAG. Such a committee is unnecessary and may add to bureaucratic complexity.	The ALRC's initial proposal for an expert advisory committee adds a desirable extra safeguard against future weakening of the privacy protection regime. Adequate resources should be allocated to ensure that all members have equal capacity to participate in all meetings.
	Recommendation 3–6 The Australian Government should initiate a review in five years from the commencement of the amended *Privacy Act* to consider whether the recommended intergovernmental cooperative scheme has been effective in achieving national consistency. This review should consider whether it would be more effective for the Australian Parliament to exercise its legislative power in relation to information privacy to cover the field, including in the state and territory public sectors.	Support
5. The *Privacy Act*: Name, Structure and Objects		
	Recommendation 5–1 The regulation-making power in the *Privacy Act* should be amended to provide that the Governor-General may make regulations, consistent with the Act, modifying the operation of the model Unified Privacy Principles (UPPs) to impose	Regulations under the Act should only be able to strengthen privacy protection, or make neutral administrative changes. Derogation from the UPPs should only be possible (a) by statutory amendment, or (b) through the Part VI Public Interest Determination process.

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	different or more specific requirements, including imposing more or less stringent requirements, on agencies and organisations than are provided for in the UPPs.	Allowing the weakening of the default level of statutory privacy protection by Regulation is dangerous and open to abuse by future governments – it being too easy to have Regulations accepted by Parliament, often without adequate scrutiny. If Regulations are able to weaken privacy protection, there should be requirements for a process of public consultation, modelled on Part VI.
	Recommendation 5–2 The *Privacy Act* should be redrafted to achieve greater logical consistency, simplicity and clarity.	Support in principle, but must be alert to any unintended weakening of protection, or increased ambiguity that could allow for negative interpretations of obligations.
	Recommendation 5–3 The *Privacy Act* should be renamed the *Privacy and Personal Information Act*. If the *Privacy Act* is amended to incorporate a cause of action for invasion of privacy, however, the name of the Act should remain the same.	It would not make sense to change the name of the Act unless adding a statutory cause of action was unequivocally ruled out – otherwise a change back would be likely in a few years. If the name were to be changed, then 'Privacy ***of*** Personal Information Act' would be even clearer as to the limited scope of the law without a cause of action.
	Recommendation 5–4 The *Privacy Act* should be amended to include an objects clause. The objects of the Act should be specified to: (a) implement, in part, Australia's obligations at international law in relation to privacy; (b) recognise that individuals have a right to privacy and to promote the protection of that right; (c) recognise that the right to privacy is not absolute and to provide a framework within which to balance that right with other human rights and to balance the public interest in protecting the privacy of individuals with other public interests; (d) provide the basis for nationally consistent regulation of privacy and the handling of personal information; (e) promote the responsible and transparent handling of personal information by agencies and organisations; (f) facilitate the growth and development of electronic transactions, nationally and internationally, while ensuring respect for the right to privacy; (g) establish the Australian Privacy Commission and the position of the Privacy Commissioner; and (h) provide an avenue for individuals to seek redress when there has been an alleged interference with their privacy.	Support in principle – an objects clause is desirable but as proposed this is a collection of disparate objectives or caveats, not all of equal 'weight'. Promoting the protection of individuals' privacy should be elevated as the primary objective, with the others as subordinate objectives or qualifiers. Objects (a) and (h) should be at the top of any list.

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6. The *Privacy Act*: Some Important Definitions		
	Recommendation 6–1 The *Privacy Act* should define 'personal information' as 'information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified or reasonably identifiable individual'.	This recommendation fails to ensure that the Act covers an increasingly important category of information which, while not in itself identifying an individual, allows interaction with persons on an individualised basis, or the imparting of consequences on an individualised basis. A broader definition is necessary partly to respond to technological change – see comments on Part B below. Replacing "reasonably identifiable" with "potentially identifiable" would go some way towards remedying this deficiency, but is not in itself adequate.
	Recommendation 6–2 The Office of the Privacy Commissioner should develop and publish guidance on the meaning of 'identified or reasonably identifiable'.	Support subject to our comments on the definition above. We generally caution against placing too much reliance on Privacy Commissioner guidance which if not binding is of limited value.
	Recommendation 6–3 The Office of the Privacy Commissioner should develop and publish guidance on the meaning of 'not reasonably identifiable'.	As above.
	Recommendation 6–4 The definition of 'sensitive information' in the *Privacy Act* should be amended to include: (a) biometric information collected for the purpose of automated biometric verification or identification; and (b) biometric template information.	Biometric information is inherently sensitive as it always contains the potential for verification or identification (and often for other inferences e.g. about health). It should be included in the definition of 'sensitive information' without the qualifying words 'collected for the purpose of ...'.
	Recommendation 6–5 The definition of 'sensitive information' in the *Privacy Act* should be amended to refer to 'sexual orientation and practices' rather than 'sexual preferences and practices'.	Support
	Recommendation 6–6 The definition of 'record' in the *Privacy Act* should be amended to make clear that a record includes: (a) a document (as defined in the *Acts Interpretation Act 1901* (Cth)); and (b) information stored in electronic or other format.	Ideally, the Act should be simplified by removing the concept of 'record', which complicates and in some cases limits the application of the Act to personal information which should be protected. If the restriction to information in records is maintained, the enactment of a private right of action becomes even more important and a firm timetable should be set for a legislative response to the ALRC's recommendations in Part K of its report.
	Recommendation 6–7 The definition of 'generally available publication' in the *Privacy Act* should be amended to clarify that a publication is 'generally available' whether or not a fee is charged for access to the publication.	Support

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7. Privacy Beyond the Individual		
protocols, Indigenous	**Recommendation 7–1** The Office of the Privacy Commissioner should encourage and assist agencies and organisations to develop and publish protocols, in consultation with Indigenous groups and representatives, to address the particular privacy needs of Indigenous groups.	Support
Indigenous cultural rights	**Recommendation 7–2** The Australian Government should undertake an inquiry to consider whether legal recognition and protection of Indigenous cultural rights is required and, if so, the form such recognition and protection should take.	No comment – outside the scope of a law dealing with protection of individual privacy.
8. Privacy of Deceased Individuals		
	Recommendation 8–1 The *Privacy Act* should be amended to include provisions dealing with the personal information of individuals who have been dead for 30 years or less where the information is held by an organisation. The Act should provide as follows: (a) Use and Disclosure Organisations should be required to comply with the 'Use and Disclosure' principle in relation to the personal information of deceased individuals. Where the principle would have required consent, the organisation should be required to consider whether the proposed use or disclosure would involve an unreasonable use or disclosure of personal information about any person, including the deceased person. The organisation must not use or disclose the information if the use or disclosure would involve an unreasonable use or disclosure of personal information about any person, including the deceased person. (b) Access Organisations should be required to provide third parties with access to the personal information of deceased individuals in accordance with the access elements of the 'Access and Correction' principle, except to the extent that providing access would have an unreasonable impact on the privacy of other individuals, including the deceased individual. (c) Data Quality Organisations should be required to comply with the use and disclosure elements of the 'Data Quality' principle in relation to the personal information of deceased individuals. (d) Data Security Organisations should be required to comply with the 'Data Security' principle in relation to	Support in principle, but requires further consideration in relation to changes to FOI law applying to agencies. Provisions for organisations and agencies should be as similar as possible. 30 years is arguably unnecessarily long, but the period should be at least the 7 years for which many records have to be kept by law. The requirement in (a) should be to not make unreasonable use or dsclosure. A mere requirement 'to consider' is too weak and will in practice be abused. The Privacy Commissioner could issue guidance on the meaning of 'reasonable' in this context.

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	the personal information of deceased individuals.	
	Recommendation 8–2 The *Privacy Act* should be amended to provide that the content of National Privacy Principle 2.1(ea) on the use and disclosure of genetic information to genetic relatives—to be moved to the new *Privacy (Health Information) Regulations* in accordance with Recommendation 63–5—should apply to the use and disclosure of genetic information of deceased individuals.	Support in principle subject to general comments both on Regulation making processes and on Health privacy
	Recommendation 8–3 Breach of the provisions relating to the personal information of a deceased individual should be considered an interference with privacy under the *Privacy Act*. The following individuals should have standing to lodge a complaint with the Privacy Commissioner: (a) in relation to an alleged breach of the use and disclosure, access, data quality or data security provisions—the deceased individual's parent, child or sibling who is aged 18 or over, spouse, de facto partner or legal personal representative; and (b) in relation to an alleged breach of the access provision—the parties in paragraph (a) and any person who has made a request for access to the personal information of a deceased individual where that request has been denied.	Support in principle, but requires further consideration in relation to changes to FOI law applying to agencies. Provisions for organisations and agencies should be as similar as possible.
Part B—Developing Technology		
10. Accommodating Developing Technology in a Regulatory Framework		
technologically neutral	**Recommendation 18–1** The privacy principles in the *Privacy Act* should be drafted to pursue, as much as practicable, the following objectives:… (b) the privacy principles should be technology neutral; [10.2] Several mechanisms that will ensure that the privacy regulatory framework remains technology *aware* are recommended.	Support in principle.
	[10.108] Mandating standards in regulations could have unintended consequences in the face of rapid technological development. The proposed standards-making mechanism is likely to be too inflexible, with the regulations fast becoming outdated. Compliance with	Notwithstanding these reasonable concerns, the ALRC's initial proposal (DP72 7-2) for mandating 'standards' had merit and should be re-considered. Some 'standards' are so well established, valuable and accepted that mandating compliance could make a significant

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	the proposed regulations is also likely to impact negatively on the availability of technical systems in Australia.	contribution to overall compliance with privacy principles.
	Recommendation 10–1 In exercising its research and monitoring functions, the Office of the Privacy Commissioner should consider technologies that can be deployed in a privacy-enhancing way by individuals, agencies and organisations. [10.40] The ALRC notes that the OPC is already required by the *Privacy Act* to research and monitor technological developments to ensure that any adverse effects of such developments on the privacy of individuals are minimised.	The Privacy Commissioner should be required to actively and regularly research and monitor new technologies with privacy implications. In particular, these inquiries should be directed to whether technologies claimed to have privacy enhancing characteristics do so, or are themselves a hazard in practice. The Commissioner should be required to report publicly on these matters at least annually.
	Recommendation 10–2 The Office of the Privacy Commissioner should develop and publish educational materials for individuals, agencies and organisations about specific privacy-enhancing technologies and the privacy-enhancing ways in which technologies can be deployed.	Support - The Privacy Commissioner needs to be much more active in promoting privacy enhancing technologies, particularly by becoming pro-active in discussions, both domestically and internationally, at the design stage of new technologies.
	Recommendation 10–3 The Office of the Privacy Commissioner should develop and publish guidance in relation to technologies that impact on privacy. This guidance should incorporate relevant local and international standards. Matters that such guidance should address include: (a) developing technologies such as radio frequency identification (RFID) or data-collecting software such as 'cookies'; (b) when the use of a certain technology to collect personal information is not done by 'fair means' and is done 'in an unreasonably intrusive way'; (c) when the use of a certain technology will require agencies and organisations to notify individuals at or before the time of collection of personal information; (d) when agencies and organisations should notify individuals of certain features of a technology used to collect information (for example, how to remove an RFID tag contained in clothing; or error rates of biometric systems); (e) the type of information that an agency or organisation should make available to an individual when it is not practicable to provide access to information in an intelligible form (for example, the type of biometric information that is held as a biometric template); and (f) when it may be appropriate for an agency or organisation to provide human review of a decision made by automated means.	Support – as above, but subject to our generic caution about placing too much reliance on Privacy Commissioner guidance, which unless binding has limited value. Any guidance issued by the Commissioner also needs to make a clear distinction between what the Commissioner thinks the law requires, and simply 'best practice' advice. Guidance issued to date by the Office of the Privacy Commissioner (and by privacy regulators in other jurisdictions) typically confuses the two types of guidance. The Commissioner should draw on the substantial body of material available from privacy regulators in other jursidictions, including in particular the work of the European Union's Article 29 Working Committee and of the Council of Europe. In relation to recommendation 10-3(e), express reference to the need to provide access in an intelligible form where practicable should be included in UPP 9 (see separate Submission). In relation to recommendation 10-3(f) the presumption should be that an organisation or agency should take reasonable steps to avoid making a decision adverse to the interests of an individual based on automated processing, without the prior review of that decision by a human.

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	Recommendation 10–4 The Office of the Privacy Commissioner should develop and publish guidance for organisations on the privacy implications of data-matching.	This is an inadequate response. Data-matching in both the public sector and the private sector should be subject to mandatory rules, as recommended repeatedly by Parliamentary Committees as well as by former Privacy Commissioners.
11. Individuals, the Internet and Generally Available Publications		
	[11.21] It is not practical or desirable to expand the scope of the *Privacy Act* to regulate individuals acting in a non-commercial capacity. There are other methods that could deal more appropriately with situations where an individual acting in a personal capacity interferes with another individual's privacy.	This is an inadequate response. The Act does not deal with the increasingly common phenomenon of individuals posting details of other individuals, without their consent, on the Internet (User generated content). The private right of action proposed in Part K would act as some deterrent, but would not be an accessible remedy in most circumstances. We suggest that the UPPs should apply to individuals where they make personal information about third parties available to the general public or to a signficant sub-set of the public.
	Recommendation 11–1 The Office of the Privacy Commissioner should develop and publish guidance that relates to generally available publications in an electronic format. This guidance should: (a) apply whether or not the agency or organisation is required by law to make the personal information publicly available; (b) set out the factors that agencies and organisations should consider before publishing personal information in an electronic format (for example, whether it is in the public interest to publish on a publicly accessible website personal information about an identified or reasonably identifiable individual); and (c) clarify the application of the model Unified Privacy Principles to the collection of personal information from generally available publications for inclusion in a record or another generally available publication.	Support - subject to our generic caution about placing too much reliance on Privacy Commissioner guidance, which unless binding has limited value. Such guidelines should encourage a presumption that organisational and individual means to avoid posting fully identified PI on websites should be adopted unless all alternatives have been explored and rejected as not feasible, or the competing social interests clearly justify such a level of Internet publication. We also support a presumption of the highest level of notification that one's PI material will go on the Internet, and the provision of alternative means to avoid this, or means for the subject to easily challenge a decision to post such information, prior to its posting (and also remedies after posting).
	11.56 The ALRC notes that courts and tribunals that publish judgments and decisions in the online environment have developed internal policies and guidelines that deal with particular issues that arise in the relevant jurisdiction. In the ALRC's view, the content of court and tribunal records should remain within the purview of the court or tribunal in question. The ALRC also notes that SCAG is considering the issue of online publication of criminal records in relation to spent convictions.	We support a separate enquiry into publication of electronic court records and decisions, coordinated between all jurisdictions, with the aim of achieving greater consistency.
	Recommendation 11–2 The Australian Government should ensure that federal legislative instruments establishing public registers containing personal information set out clearly any restrictions on the electronic publication of that information.	Support, provided individuals as well as the agencies responsible, are given the means to seek enforcement of the restrictions.

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Part C—Interaction, Inconsistency and Fragmentation		
14. The Costs of Inconsistency and Fragmentation		
	[14.53] The ALRC notes that information sharing already is the subject of guidance published by the OPC, such as the *Plain English Guidelines to Information Privacy Principles* and *Guidelines to the National Privacy Principles*. [14.54] Rather than making a separate recommendation for guidance, in the ALRC's view, the OPC should consider including some additional matters in existing guidance.	Support – the Privacy Commissioner should be more proactive in advising agencies and organisations on information sharing – in particular taking steps to identify proposed sharing schemes before they are implemented, opening these up to public consultation, and seeking to ensure that sharing is justified and proportional, and that there is maximum respect for privacy in the design of such schemes.
	Recommendation 14–1 Agencies that are required or authorised by legislation, a code or a Public Interest Determination to share personal information should, where appropriate, develop and publish documentation that addresses the sharing of personal information; and publish other documents (including memorandums of understanding and ministerial agreements) relating to the sharing of personal information.	Support, subject to adequate provision for public consultation.
	[14.75] As noted above, the ALRC encourages information-sharing opportunities that are in the public interest and lessen compliance burdens on agencies, businesses and the community. The ALRC is not of the view, however, that the Australian Government should convene an inter-agency working group of senior officers to identify circumstances where it would be appropriate to share or streamline personal information. [14.76] In the ALRC's view, it is not appropriate or necessary to convene such a working group. The ALRC agrees with the OPC that any proposal for sharing information between agencies should be considered and assessed on its own merits with a view to the necessary legislative requirements and obligations governing the handling of the information.	It is outside ALRCs terms of reference to 'support' information sharing, but we support its view that proposals should be considered on their merits without any special working group to identify opportunities.

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	Recommendation 14–2 The Australian Government, in consultation with: state and territory governments; intelligence agencies; law enforcement agencies; and accountability bodies, including the Office of the Privacy Commissioner, the Inspector-General of Intelligence and Security, the Australian Commission for Law Enforcement Integrity, state and territory privacy commissioners and agencies with responsibility for privacy regulation, and federal, state and territory ombudsmen, should: (a) develop and publish a framework relating to interjurisdictional sharing of personal information within Australia by intelligence and law enforcement agencies; and (b) develop memorandums of understanding to clarify the existing roles of accountability bodies that oversee interjurisdictional information sharing within Australia by law enforcement and intelligence agencies.	Support – an overall principled framework is desirable and should help to ensure that interjurisdictional sharing of personal information is properly justified and proportional, with due respect for privacy values.
	[14.116] The definitions of 'contracted service provider' and 'State contract' under the *Privacy Act* are adequate.	No reason to disagree.
15. Federal Information Laws		
	15.11 The ALRC acknowledges that a number of stakeholders addressed proposals to clarify the relationship between s41 of the FOI Act and the *Privacy Act*. It is the ALRC's view, however, that these issues should be considered as part of the ALRC's review of the FOI Act. Section41 primarily relates to access to personal information about third parties and not an individual's access to his or her personal information. It is therefore more appropriate for this issue to be considered in the context of the FOI Act. The ALRC therefore makes no recommendations in relation to s41 in this Report.	ALRC has not addressed an important issue – will need to be addressed in FOI reform – s41 provides important protection of privacy in relation to FOI requests primarily targeting non-personal information.
	Recommendation 15–1 The *Freedom of Information Act 1982* (Cth) should be amended to provide that disclosure of personal information in accordance with the *Freedom of Information Act* is a disclosure that is required or authorised by or under law for the purposes of the 'Use and Disclosure' principle under the *Privacy Act*.	This requires further consideration in the context of FOI reform proposals.
	15.48 The right to access and correct personal information held by an agency should not be dealt with solely under the *Privacy Act*. The existing arrangements whereby individuals have rights to obtain access to, and correction of, personal information under both the *Privacy Act* and the FOI Act should remain. In the ALRC's view, however, the provisions that deal with the interaction between the access and correction provisions under both Acts should be modified. 15.49 An agency's obligation to provide access to, and to correct, an individual's own personal information should not be dealt with under a separate Part of the *Privacy Act*. The ALRC agrees with stakeholders that such a proposal contradicts the aim of creating a	Agree with ALRC that there should be a single 'access and correction' regime for agencies and organisations, and that it needs to be made consistent with relevant provisions in FOI law. Further consideration is required in the context of FOI reform proposals. See also separate submission on the UPPs.

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	single set of privacy principles to cover both agencies and organisations and could create confusion for agencies. 15.50 Instead the 'Access and Correction' principle should set out the requirements applicable to agencies in respect of personal information that they hold. It also is preferable that a single regime applies to access to, and correction of, personal information in the public and private sector. The 'Access and Correction' principle is discussed in detail in Chapter 29.	
	15.51 Further, Part V of the FOI Act should be retained. As noted above, the ALRC has received Terms of Reference to review the operation of the FOI Act and related laws. This review could consider amending the FOI Act so that it no longer regulates access to, and correction of, personal information and is limited to regulating access to information about third parties and the deliberative processes of government. The ALRC notes that this model operates effectively under the *Privacy Act 1993* (NZ) and the *Official Information Act 1982* (NZ) 15.52 The FOI Act also could be amended to provide a simpler and more user-friendly process for obtaining access to, and correction of, personal information. Other options for consideration include amendment of the exemptions under the FOI Act to deal with requests to obtain access to personal information and expansion of the correction rights under the FOI Act to accord with those under the *Privacy Act*	The government withdrew the ALRC's FOI reference. See above – further consideration required.
	15.53 While the ALRC is of the view that the current overlap of the access and correction provisions under the *Privacy Act* and the FOI Act should remain, the ALRC has concluded that the provisions that cover the interaction between the *Privacy Act* and the FOI Act require some amendment. In particular, an individual's right to correct his or her personal information under the *Privacy Act* should no longer be subject to the limitations that exist under the FOI Act. This view is reflected in the recommended 'Access and Correction' principle outlined in Chapter 29.	Support – see separate submission on UPPs
	Recommendation 15–2 The Australian Government should undertake a review of secrecy provisions in federal legislation. This review should consider, among other matters, how each of these provisions interacts with the *Privacy Act*.	Support
	Recommendation 15–3 Part VIII of the *Privacy Act* (Obligations of confidence) should be repealed.	No reason to disagree, but repeal should accompany the introduction of a private right of action.

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16. Required or Authorised by or Under Law		
	Recommendation 16–1 The *Privacy Act* should be amended to provide that 'law', for the purposes of determining when an act or practice is required or authorised by or under law, includes: (a) Commonwealth, state and territory Acts and delegated legislation; (b) a duty of confidentiality under common law or equity (including any exceptions to such a duty); (c) an order of a court or tribunal; and (d) documents that are given the force of law by an Act, such as industrial awards.	Support recommendation in respect of (a), (c) and (d), but (b) requires further consideration – duties of confidentiality are notoriously unclear and may need some limitations in this context. See also separate submission on UPPs re need for 'specifically' in most 'required or authorised ' exceptions.
	Recommendation 16–2 The Office of the Privacy Commissioner should develop and publish guidance to clarify when an act or practice will be required or authorised by or under law. This guidance should include: (a) a list of examples of laws that require or authorise acts or practices in relation to personal information that would otherwise be regulated by the *Privacy Act*; and (b) a note to the effect that the list is intended to be a guide only and that omission from the list does not mean that a particular law cannot be relied upon for the purposes of a 'required or authorised by or under law' exception in the model Unified Privacy Principles.	Support - subject to our generic caution about placing too much reliance on Privacy Commissioner guidance, which unless binding has limited value.
	[16.150] In the event that the exemption under the *Privacy Act* that applies to registered political parties and political acts and practices is not removed, however, the *Commonwealth Electoral Act* should be amended to provide that prescribed individuals, authorities and organisations, to whom the AEC must give information in relation to the electoral roll and certified lists of voters, must take reasonable steps to: • protect the information from misuse and loss and from unauthorised access, modification or disclosure; and • destroy or render the information non-identifiable if it is no longer needed for a permitted purpose.	Given that the exemptions are not to be addressed in the first round of privacy law reform, the ALRC's recommendation for amendments to the Commonwealth Electoral Act should be enacted in parallel with the first round changes.

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	Recommendation 16–3 The Australian Electoral Commission and state and territory electoral commissions, in consultation with the Office of the Privacy Commissioner, state and territory privacy commissioners and agencies with responsibility for privacy regulation, should develop and publish protocols that address the collection, use, storage and destruction of personal information shared for the purposes of the continuous update of the electoral roll.	Support – see analysis for the Victorian Privacy Commissioner at http://www.vec.vic.gov.au/files/ElectoralEnrolmentInformationCollectionandDisclosurePractices.pdf which shows many inconsistencies
	Recommendation 16–4 The review under s251 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) should consider, in particular, whether: (a) reporting entities and designated agencies are handling personal information appropriately under the legislation; (b) the number and range of transactions for which identification is required should be more limited than currently provided for under the legislation; (c) it remains appropriate that reporting entities are required to retain information for seven years; (d) the use of the electoral roll by reporting entities for the purpose of identification verification is appropriate; and (e) the handling of information by the Australian Transaction Reports and Analysis Centre is appropriate, particularly as it relates to the provision of access to other bodies, including bodies outside Australia.	Support
	16.189 The ALRC is concerned about the number of designated agencies that have been granted access to AUSTRAC data collected under the AML/CTF Act and the limited protection offered by s126(3) of the Act. Due to the amount of personal information that will be made available to such agencies, it is appropriate that these agencies comply with the model UPPs. 16.190 This is most appropriately addressed by the ALRC's recommendation that the states and territories should enact legislation regulating the handling of personal information in that state or territory's public sector that applies the model UPPs.[267] Further, the ALRC recommends that the Australian Government initiate a review in five years from the commencement of the amended *Privacy Act* to consider whether the recommended intergovernmental cooperative scheme has been effective in achieving national consistency. 16.191 Until such a cooperative scheme is in place, when AUSTRAC provides a state or territory agency with access to AUSTRAC data collected under the AML/CTF Act, it should ensure that a memorandum of understanding or other arrangement is in place to	Support

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	ensure compliance with the privacy requirements of the AML/CTF Act. The OPC should monitor compliance with the privacy requirements of the AML/CTF Act by such state and territory agencies. This is consistent with the general approach recommended by the ALRC.	
17. Interaction with State and Territory Laws		
	Recommendation 17–1 When an Australian Government agency is participating in an intergovernmental body or other arrangement involving state and territory agencies that handle personal information, the Australian Government agency should ensure that a memorandum of understanding or other arrangement is in place to provide for the appropriate handling of personal information.	Support
	Recommendation 17–2 State and territory privacy legislation should provide for the resolution of complaints by state and territory privacy regulators and agencies with responsibility for privacy regulation in that state or territory's public sector.	Support
	Recommendation 17–3 The Office of the Privacy Commissioner should develop and publish memorandums of understanding with each of the bodies with responsibility for information privacy in Australia, including state and territory bodies and external dispute resolution bodies with responsibility for privacy. These memorandums of understanding should outline: (a) the roles and functions of each of the bodies; (b) when a matter will be referred to, or received from, each of the bodies; (c) processes for consultation between the bodies when issuing Public Interest Determinations and Temporary Public Interest Determinations, approving codes and developing rules; and (d) processes for developing and publishing joint guidance.	Support
Part D—The Privacy Principles		

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18. Structural Reform of the Privacy Principles		
	Recommendation 18–1 The privacy principles in the *Privacy Act* should be drafted to pursue, as much as practicable, the following objectives: (a) the obligations in the privacy principles generally should be expressed as high-level principles; (b) the privacy principles should be technology neutral; (c) the privacy principles should be simple, clear and easy to understand and apply; and (d) the privacy principles should impose reasonable obligations on agencies and organisations.	Support
	Recommendation 18–2 The *Privacy Act* should be amended to consolidate the current Information Privacy Principles and National Privacy Principles into a single set of privacy principles, referred to in this Report as the model Unified Privacy Principles.	Support
19. Consent		
	19.61 Amending the *Privacy Act* to set out in detail what is required to obtain the requisite consent in the many contexts in which it may be sought is problematic. This approach would require a very large number of prescriptive rules that attempt to cover the wide variety of situations in which an agency or organisation may seek consent to deal with an individual's personal information. Such an approach would be inconsistent with the ALRC's view that a principles-based approach should continue to be at the heart of the *Privacy Act*.. Moreover, such an approach would be doomed to fail because it would be very difficult, if not impossible, to cover every relevant context. 19.62 The merits of amending the definition of consent in the *Privacy Act* to include, for example, the elements of consent, are also questionable. The concept of consent is not peculiar to privacy law. The common law has an important role to play in determining the elements of consent. A statutory definition is unable to capture nuances in the evolution of the common law and may have unintended consequences. The definition may be interpreted too restrictively, creating an undesirable restriction on the flow of information. Significantly, it tends to be civil law jurisdictions that possess a detailed statutory definition of consent. In these jurisdictions, such a process of codification may be more desirable, given that there is less scope to develop the law through the process of statutory	The ALRC does not adequately address what is one of the most significant weaknesses in the current Act – the ability to interpret 'consent' in ways which completely undermine the effect of many of the principles. The definition of 'consent' should be amended to deal with a number of key issues concerning consent, specified in the following submission, rather than leaving them to OPC guidance. Other aspects of consent should be dealt with where possible in the Explanatory Memorandum, and only otherwise by OPC guidance. To the extent that the Privacy Commissioner has a role in relation to the issue of guidelines on 'consent', they should be required to issue those guidelines within one year.

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	interpretation by courts and others. **Recommendation 19–1** The Office of the Privacy Commissioner should develop and publish further guidance about what is required of agencies and organisations to obtain an individual's consent for the purposes of the *Privacy Act*. This guidance should: (a) address the factors to be taken into account by agencies and organisations in assessing whether consent has been obtained; (b) cover express and implied consent as it applies in various contexts; and (c) include advice on when it is and is not appropriate to use the mechanism of 'bundled consent'.	
	See above…and: 19.63 In assessing the merits of legislative amendment to the definition of consent, the ALRC has considered how consent has been dealt with in other pieces of federal legislation. Examples of expansion of the concept of consent in federal legislation appear in very specific circumstances. … 19.65 The above survey highlights the fact that, while it may be possible to resort to legislation to define or explain consent in a particular context, providing a statutory definition that applies across a wide variety of contexts remains problematic.	Either the definition of 'consent' or the explanatory memorandum should state that consent,whether express or implied, must be clear and unambiguous, and should expressly state that a failure to opt out is not by itself to constitute unambiguous consent. The government should give further consideration to the implications of the confusion caused by the lack of any distinction in the Privacy Act between uses or disclosures justified by consent and those justified by acknowledgment of notification. At the least, the Act or the Explanatory Memorandum should state that where a person has no choice but to provide personal information in order to obtain a benefit, no consent to any uses of the information beyond the express purpose of collection may be implied. In such circumstances of 'involuntary consent', only express consent should apply. The definition of 'consent' needs to be amended in order to prevent abuse of the practice of 'bundled consent'. In particular, wherever consent is applicable to the operation of a privacy principle, separate consent should be required for each proposed purpose of use.
20-32 – specific UPPs		See separate submission at http://www.cyberlawcentre.org/ipp/publications/CLPC%20Submission%20on%20UPPs%20final.pdf
Part E—Exemptions		Comment reserved given the government's decision not to address exemptions in the first round of privacy law reform.
Part F—Office of the Privacy Commissioner		

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46. Structure of the Office of the Privacy Commissioner		
	Recommendation 46–1 The *Privacy Act* should be amended to change the name of the 'Office of the Privacy Commissioner' to the 'Australian Privacy Commission'.	Support
	Recommendation 46–2 The *Privacy Act* should be amended to provide for the appointment by the Governor-General of one or more Deputy Privacy Commissioners. The Act should provide that, subject to the oversight of the Privacy Commissioner, the Deputy Commissioners may exercise all the powers, duties and functions of the Privacy Commissioner under the Act or any other enactment.	Support
	Recommendation 46–3 The *Privacy Act* should be amended to provide that the Privacy Commissioner must have regard to the objects of the Act, as set out in Recommendation 5–4, in the performance of his or her functions and the exercise of his or her powers.	Support, but see comments on the objects clause
	Recommendation 46–4 The *Privacy Act* should be amended to make the following changes in relation to the Privacy Advisory Committee: (a) expand the number of members on the Privacy Advisory Committee, in addition to the Privacy Commissioner, to not more than seven; (b) require the appointment of a person who has extensive experience in health privacy; and (c) replace 'electronic data-processing' in s82(7)(c) with 'information and communication technologies'.	Support, but the process of selection and appointment of members of the PAC should be made more transparent and accountable, with a public call for nominations and a short-listing panel independent of the Privacy Commissioner and the government.
	Recommendation 46–5 The *Privacy Act* should be amended to empower the Privacy Commissioner to establish expert panels, at his or her discretion, to advise the Privacy Commissioner.	Support
47. Powers of the Office of the Privacy Commissioner		
	Recommendation 47–1 The *Privacy Act* should be amended to delete the word 'computer' from s27(1)(c).	Support
	Recommendation 47–2 The *Privacy Act* should be amended to reflect that, where guidelines issued or approved by the Privacy Commissioner are binding, they should be renamed 'rules'. For example, the following should be renamed to reflect that a breach of	Support clearer distinction between binding rules and advisory guidance – including by renaming these four sets of binding Guidelines as Rules.

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	the rules is an interference with privacy under s13 of the *Privacy Act*. (a) Tax File Number Guidelines issued under s17 of the *Privacy Act* should be renamed the *Tax File Number Rules*; (b) Privacy Guidelines for the Medicare Benefits and Pharmaceutical Benefits Programs (issued under s 135AA of the *National Health Act 1953* (Cth)) should be renamed the *Privacy Rules for the Medicare Benefits and Pharmaceutical Benefits Programs*; (c) Data-Matching Program (Assistance and Tax) Guidelines (issued under s12 of the *Data-Matching Program (Assistance and Tax) Act 1990* (Cth)) should be renamed the *Data-Matching Program (Assistance and Tax) Rules*; and (d) Guidelines on the Disclosure of Genetic Information to a Patient's Genetic Relative should be renamed the *Rules for the Disclosure of Genetic Information to a Patient's Genetic Relative*.	Also, even where guidance is non-binding, there shoul d be a clearer distinction between 'compliance guidelines' (the Commisisioner's view as to what the Act requires, albeit subject to court or tribunal confirmation), and 'best practice guidelines' which are merely advisory recommendations.
	Recommendation 47–3 Subject to the implementation of Recommendation 24–1, requiring agencies to develop and publish Privacy Policies, the *Privacy Act* should be amended to remove the requirement in s 27(1)(g) to maintain and publish the Personal Information Digest.	The ALRC takes the view that agencies need no longer be required to submit a document to the OPC for the purposes of compiling a Personal Information Digest, as currently required by IPP 5.4(b). We disagree. We accept that there has been relatively little use of the Commonwealth (and ACT) Personal Information Digests over the 17 years they have been published. However, they remain a potentially valuable resource for the media and public interest groups to make comparisons and hold governments to account. This potential could be realised much more easily if the Commissioner used innovative ways of presenting the material and making it searchable/browsable, and readily re-publishable. Agencies will have to prepare the equivalent of a Digest entry in any case to satisfy UPP4, so the marginal cost is only that of annual submission and the compilation by the Privacy Commissioner. Now that these processes are established, the savings from removing the obligation would be very small, while a potentially extremely valuable resource would be lost. We do not suggest extending this obligation to private sector organisations. (From separate submission on UPPs – UPP 5)
	Recommendation 47–4 The *Privacy Act* should be amended to empower the Privacy Commissioner to: (a) direct an agency to provide to the Privacy Commissioner a Privacy Impact Assessment in relation to a new project or development that the Privacy Commissioner considers may have a significant impact on the handling of personal information; and (b) report to the ministers responsible for the agency and for administering the *Privacy Act* on the agency's failure to comply with such a direction.	Support
	Recommendation 47–5 The Office of the Privacy Commissioner should develop and publish Privacy Impact Assessment Guidelines tailored to the needs of organisations.	Support - subject to our generic caution about placing too much reliance on Privacy Commissioner guidance, which unless binding has limited value.

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	A review should be undertaken in five years from the commencement of the amended *Privacy Act* to assess whether the power in Recommendation 47–4 should be extended to include organisations.	Support
	Recommendation 47–6 The *Privacy Act* should be amended to empower the Privacy Commissioner to conduct 'Privacy Performance Assessments' of the records of personal information maintained by organisations for the purpose of ascertaining whether the records are maintained according to the model Unified Privacy Principles, privacy regulations, rules and any privacy code that binds the organisation.	Support
	Recommendation 47–7 The Office of the Privacy Commissioner should publish and maintain on its website a list of all the Privacy Commissioner's functions, including those functions that arise under other legislation.	Support
	Recommendation 47–8 The *Privacy Act* should be amended to empower the Privacy Commissioner to refuse to accept an application for a Public Interest Determination where the Privacy Commissioner is satisfied that the application is frivolous, vexatious or misconceived.	Support, provided the Commissioner is required to publish notice of receipt of the application (as under s74) together with reasons for refusing to accept it.
Reporting		The Commissioner's powers to report are unnecessarily circumscribed, in particular in those powers in s27 which only allow reports to be made to Ministers. The Commissioner should have an additional explicit power under s27 to report to the public, or make a special report to the Parliament, on all of the matters listed in s27, excepting only those matters dealing with national security or involving equivalent considerations of confidentiality. The Commissioner should have an additional duty, under s27, to provide to Parliament a document, to be tabled by the Minister on the next sitting day after receipt, wherever the Commissioner considers that proposed legislation or regulations might significantly interfere with privacy, and stating whether such interferences would be justified or not in the Commissioner's view.
48. Privacy Codes		
	Recommendation 48–1 Part IIIAA of the *Privacy Act* should be amended to specify that a privacy code: (a) approved under Part IIIAA operates in addition to the model Unified Privacy Principles (UPPs) and does not replace those principles; and (b) may provide guidance or standards on how any one or more of the model UPPs should be applied, or are to be complied with, by the organisations bound by the code, as long as such guidance or standards contain obligations that, overall, are at least the equivalent of all the obligations set out in those principles. (c)	Support – this would significantly change the role of Codes under the Act from 'replacement' of the principles to additional guidance and detail on application of the UPPs in particular contexts. This is a more appropriate role – substantive changes to the UPPs should only be able to be effected by: (a) statutory amendments; (b) Regulations (subject to our general comments about Regulations and Regulation making processes; and (c) Public Interest Determinations

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		However, the status of Codes needs to be clarified – we assume the ALRC to mean that the additional guidance in Part IIIA Codes would continue to be binding, and support this. Note that this means the advisory 'Code' proposed to deal with matters of detail under the Credit Reporting regime (see separate submission on Part G) should be renamed to avoid confusion about its status..
		We support the ALRC's initial proposal (DP72 – proposal 44-10) **that** Part IIIAA of the *Privacy Act* should be amended to empower the Privacy Commissioner to: (a) request the development of a privacy code to be approved by the Privacy Commissioner pursuant to s 18BB; and (b) develop and impose a privacy code that applies to designated agencies and organisations.
		The option of a Code introducing a Code Adjudicator as a first stage of external dispute resolution should remain, subject to the existing right of appeal to the Privacy Commissioner under s18BI.
49. Investigation and Resolution of Privacy Complaints		
	Recommendation 49–1 The *Privacy Act* should be amended to provide that, in addition to existing powers not to investigate, the Privacy Commissioner may decide not to investigate, or not to investigate further, an act or practice about which a complaint has been made, or which the Commissioner has accepted under s 40(1B), if the Commissioner is satisfied that: (a) the complainant has withdrawn the complaint; (b) the complainant has not responded to the Commissioner for a specified period following a request by the Commissioner for a response in relation to the complaint; or (c) an investigation, or further investigation, of the act or practice is not warranted having regard to all the circumstances.	The case has not been made for any additional powers to dismiss complaints on proposed ground (c) – if anything, experience is that successive Commissioners have been too ready to dismiss complaints that should have been followed through. Section 41 already contains a wide range of grounds for dismissal. The discretion to discontinue on such broad grounds as (c) is too great – at least without an obligation to publish reasons, which would not be compatible with the private nature of many privacy complaints. The ability to close an investigation where the complainant has withdrawn (a) or not responded within a reasonable time (b) is implicit already – making this express would do no harm.
	Recommendation 49–2 The *Privacy Act* should be amended to empower the Privacy Commissioner to decline to investigate a complaint where: (a) the complaint is being handled by an external dispute resolution scheme recognised by the Privacy Commissioner; or (b) the Privacy Commissioner considers that the complaint would be more suitably handled by an external dispute resolution scheme recognised by the Privacy	Support – provided the scheme can offer remedies substantially similar to those provided by the Privacy Commissioner. A recognised EDR scheme could be one established under a Part IIIAA Code or a scheme meeting national benchmarks for Industry-Based Customer Dispute Resolution Schemes: http://www.anzoa.com.au/docs/National%20Benchmarks.pdf.

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	Commissioner, and should be referred to that scheme.	ASIC approval may also be a desirable criterion.
delegate to a state or territory	**Recommendation 49–3** The *Privacy Act* should be amended to empower the Privacy Commissioner to delegate to a state or territory authority all or any of the powers in relation to complaint handling conferred on the Commissioner by the Act.	Support, provided the authority has adequate powers and resources – it should be required to at least meet the national benchmarks or equivalent standards. The Privacy Commissioner should be required to publish an assessment of the adequacy of the powers and resources of an authority before delegating complaint handling powers to it.
functions	**Recommendation 49–4** The *Privacy Act* should be amended to clarify the Privacy Commissioner's functions in relation to complaint handling and the process to be followed when a complaint is received.	Support
conciliation	**Recommendation 49–5** The *Privacy Act* should be amended to include new provisions dealing expressly with conciliation. These provisions should give effect to the following: (a) If, at any stage after accepting the complaint, the Commissioner considers it reasonably possible that the complaint may be conciliated successfully, he or she must make reasonable attempts to conciliate the complaint. (b) Where, in the opinion of the Commissioner, reasonable attempts to settle the complaint by conciliation have been made and the Commissioner is satisfied that there is no reasonable likelihood that the complaint will be resolved by conciliation, the Commissioner must notify the complainant and respondent that conciliation has failed and the complainant or respondent may require that the complaint be resolved by determination. (c) Evidence of anything said or done in the course of a conciliation is not admissible in a determination hearing or any enforcement proceedings relating to the complaint, unless all parties to the conciliation otherwise agree. (d) Subparagraph (c) does not apply where the communication was made in furtherance of the commission of a fraud or an offence, or in the commission of an act that would render a person liable to a civil penalty.	Support – while conciliation is desirable, the right for a complainant to insist on a Determination, where conciliation has failed in their eyes, is an essential safeguard against lax enforcement. It is only fair that respondents should enjoy the same right to insist on a determination. Individuals must have the the right to insist on a determination even where the Commissioner thinks their complaint has been adequately dealt with by respondent (or dismisses it for any other reason).
order	**Recommendation 49–6** The *Privacy Act* should be amended to empower the Privacy Commissioner, in a determination, to prescribe the steps that an agency or respondent must take to ensure compliance with the Act.	Support – this is an essential power which, whilst arguably implicit in s52, Commissioners have felt unable to exercise, and it should therefore be made express.
merits review	**Recommendation 49–7** The *Privacy Act* should be amended to provide that a complainant or respondent can apply to the Administrative Appeals Tribunal for merits review of a determination made by the Privacy Commissioner.	Support – it is essential that the Commissioner not be the final arbiter of compliance with the principles.
complaint-handling policies and procedures.	**Recommendation 49–8** The Office of the Privacy Commissioner should develop and publish a document setting out its complaint-handling policies and procedures.	Support

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class member to withdraw	**Recommendation 49–9** The *Privacy Act* should be amended to allow a class member to withdraw from a representative complaint at any time if the class member has not consented to be a class member.	Support
preliminary enquires	**Recommendation 49–10** The *Privacy Act* should be amended to permit the Privacy Commissioner, in accepting a complaint or determining whether the Commissioner has the power to accept a complaint, to make preliminary inquiries of third parties as well as the respondent. The Privacy Commissioner should be required to inform the complainant that he or she intends to make inquiries of a third party.	Support
compulsory conference	**Recommendation 49–11** Section 46(1) of the *Privacy Act* should be amended to empower the Privacy Commissioner to compel parties to a complaint, and any other relevant person, to attend a compulsory conference.	Support
collect personal information	**Recommendation 49–12** The *Privacy Act* should be amended to allow the Privacy Commissioner, in the context of an investigation of a privacy complaint, to collect personal information about an individual who is not the complainant.	Support
without oral submissions	**Recommendation 49–13** The *Privacy Act* should be amended to provide that the Privacy Commissioner may direct that a hearing for a determination may be conducted without oral submissions from the parties if the Privacy Commissioner is satisfied that the matter could be determined fairly on the basis of written submissions by the parties.	Support
reform procedures		The Privacy Commissioner should be required to reform procedures for reporting privacy complaints along the following lines: (i) adhering to publicly-stated criteria of seriousness of which complaints are reported; (ii) confirmation in each Annual Report that these criteria for reporting have been adhered to; (ii) naming complainants who elect to be named; (iv) naming private sector respondents where the interests of other potential complainants or the public interest justifies this; (v) naming all public sector respondents except where this would cause serious harm to the interests of the complainant or another person; and (vi) providing sufficient detail in complaint summaries for them to be useful to interested parties. There has been useful cooperation between privacy and data protection authorities on publication standards, and these should be followed.by the Australian Commissioner.
statistics provisions used to dispose		Publication of statistics of which provisions are used to dispose of complaints should be

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		continued, and expanded to provide additional details. For example, it would be simple but informative to list the laws relied upon under s 41(e), and in the Table 'Grounds for Declining to Investigate Complaints Further Following an Investigation' a further column could note how many of each category of dismissal were the subject of published complaint summary.
statistics of remedies		The Privacy Commissioner should continue to publish, at least annually, statistics of the remedies obtained where complaints are settled with some remedy being provided to the complainant, including statistics of the numbers of cases in which compensation was paid and the amounts of compensation paid. OPC should continue to improve its reporting practices, for example by noting in the Table 'Nature of Remedies in Complaints Closed as Adequately Dealt With After Investigation' how many examples of each category of remedy were the subject of published complaint summaries
50. Enforcing the *Privacy Act*		
Own motion investigations	**Recommendation 50–1** The *Privacy Act* should be amended to empower the Privacy Commissioner to: (a) issue a notice to comply to an agency or organisation following an own motion investigation, where the Commissioner determines that the agency or organisation has engaged in conduct constituting an interference with the privacy of an individual; (b) prescribe in the notice that an agency or organisation must take specified action within a specified period for the purpose of ensuring compliance with the *Privacy Act*; and (c) commence proceedings in the Federal Court or Federal Magistrates Court for an order to enforce the notice.	Support – this is a very significant component of the 'enforcement pyramid' currently missing from the Act. In addition, own motion investigations should generally be the subject of public notice by the Commissioner, and should have procedures developed for appropriate intervention by other interested parties (such as NGOs in the relevant area). The Commissioner should be able to make a special report to Parliament of the results of an own motion investigation. There may be some circumstances in which an own-motion investigation needs to be conducted in private, but even then a final report should generally be published.
civil penalty	**Recommendation 50–2** The *Privacy Act* should be amended to allow the Privacy Commissioner to seek a civil penalty in the Federal Court or Federal Magistrates Court where there is a serious or repeated interference with the privacy of an individual.	Support - this is a very significant component of the 'enforcement pyramid' currently missing from the Act.
enforcement guidelines	**Recommendation 50–3** The Office of the Privacy Commissioner should develop and publish enforcement guidelines setting out the criteria upon which a decision to pursue a civil penalty will be made.	Support
	Recommendation 50–4 The *Privacy Act* should be amended to empower the Privacy Commissioner to accept an undertaking that an agency or organisation will take specified action to ensure compliance with a requirement of the *Privacy Act* or other enactment under which the Commissioner has a power or function.	Support - this is a very significant component of the 'enforcement pyramid' currently missing from the Act.

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	Where an agency or organisation breaches such an undertaking, the Privacy Commissioner may apply to the Federal Court for an order directing the agency or organisation to comply, or any other order the court thinks appropriate.	
51. Data Breach Notification		See separate UPP Submission
Part G—Credit Reporting Provisions		See separate Submission
Part H—Health Services and Research		See separate Submission
Part I—Children, Young People and Adults Requiring Assistance		
67. Children, Young People and Attitudes to Privacy		
	Recommendation 67–1 The Australian Government should fund a longitudinal study of the attitudes of Australians, in particular young Australians, to privacy.	Support
	Recommendation 67–2 The Office of the Privacy Commissioner should develop and publish educational material about privacy issues aimed at children and young people.	Support
	Recommendation 67–3 The Office of the Privacy Commissioner, in consultation with the Australian Communications and Media Authority, should ensure that specific guidance on the privacy aspects of using social networking websites is developed and incorporated into publicly available educational material.	Support
	Recommendation 67–4 In order to promote awareness of personal privacy and respect for the privacy of others, state and territory education departments should incorporate education about privacy, including privacy in the online environment, into school curriculums.	Support

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68. Decision Making by and for Individuals Under the Age of 18		We have no expertise in this area, and defer to submissions from those with practical experience of transactions with young people.
	Recommendation 68–1 The *Privacy Act* should be amended to provide that where it is reasonable and practicable to make an assessment about the capacity of an individual under the age of 18 to give consent, make a request or exercise a right of access under the Act, an assessment about the individual's capacity should be undertaken. Where an assessment of capacity is not reasonable or practicable, then an individual: (a) aged 15 or over is presumed to be capable of giving consent, making a request or exercising a right of access; and (b) under the age of 15 is presumed to be incapable of giving consent, making a request or exercising a right of access.	
	Recommendation 68–2 The *Privacy Act* should be amended to provide that where an individual under the age of 18 is assessed or presumed to not have capacity under the Act, any consent, request or exercise of a right in relation to that individual must be provided or made by a person with parental responsibility for the individual.	
	Recommendation 68–3 The *Privacy Act* should be amended to provide that, in order to rely on the age-based presumption, an agency or organisation is required to take such steps, if any, as are reasonable in the circumstances to verify that the individual is aged 15 or over.	
	Recommendation 68–4 The Office of the Privacy Commissioner should develop and publish guidance for applying the new provisions of the *Privacy Act* relating to individuals under the age of 18, including on: (a) the involvement of children, young people and persons with parental responsibility in decision-making processes; (b) situations in which it is reasonable and practicable to make an assessment regarding capacity of children and young people; (c) practices and criteria to be used in determining whether a child or young person is capable of giving consent, making a request or exercising a right on his or her own behalf, including reasonable steps required to verify the age of an individual; (d) the provision of reasonable assistance to children and young people to understand and communicate decisions; and (e) the requirements to obtain consent from a person with parental responsibility for the	

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	child or young person in appropriate circumstances.	
	Recommendation 68–5 Agencies and organisations that regularly handle the personal information of individuals under the age of 18 should address in their Privacy Policies how such information is managed and how the agency or organisation will determine the capacity of individuals under the age of 18.	
	Recommendation 68–6 Agencies and organisations that regularly handle the personal information of individuals under the age of 18 should ensure that relevant staff receive training about issues concerning capacity, including when it is necessary to deal with third parties on behalf of those individuals.	
69. Particular Privacy Issues Affecting Children and Young People		
	Recommendation 69–1 Schools subject to the *Privacy Act* should clarify in their Privacy Policies how the personal information of students will be handled, including when personal information: (a) will be disclosed to, or withheld from, persons with parental responsibility and other representatives; and (b) collected by school counsellors will be disclosed to school management, persons with parental responsibility, or others.	Support
	Recommendation 69–2 The Ministerial Council on Education, Employment, Training and Youth Affairs should consider the handling of personal information in schools, with a view to developing uniform policies across the states and territories consistent with the *Privacy Act*.	Support
70. Third Party Representatives		
	Recommendation 70–1 The *Privacy Act* should be amended to include the concept of a 'nominee' and provide that an agency or organisation may establish nominee arrangements. The agency or organisation should then deal with an individual's nominee as if the nominee were the individual.	Support
	Recommendation 70–2 The *Privacy Act* should be amended to provide for nominee arrangements, which should include, at a minimum, the following elements:	Support, subject to satisfactory criteria for an agency or organisation being able to revoke a nomination if the individual and the nominee wish it to continue.

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	(a) a nomination can be made by an individual or a substitute decision maker authorised by a federal, state or territory law; (b) the nominee can be an individual or an entity; (c) the nominee has a duty to act at all times in the best interests of the individual; and (d) the nomination can be revoked by the individual, the nominee or the agency or organisation.	
	Recommendation 70–3 The Office of the Privacy Commissioner should develop and publish guidance for dealing with third party representatives, including in relation to: (a) the involvement of third parties, with the consent of an individual, to assist the individual to make and communicate privacy decisions; (b) establishing and administering nominee arrangements; (c) identifying and dealing with issues concerning capacity; and (d) recognising and verifying the authority of substitute decision makers authorised by a federal, state or territory law.	Support
	Recommendation 70–4 Agencies and organisations that regularly handle personal information about adults with limited or no capacity to provide consent, make a request or exercise a right under the *Privacy Act*, should ensure that relevant staff are trained adequately in relation to issues concerning capacity, and in recognising and verifying the authority of third party representatives.	Support
Part J— Telecommunications		
71. Telecommunications Act		
	Recommendation 71–1 Part 13 of the *Telecommunications Act 1997* (Cth) should be redrafted to achieve greater logical consistency, simplicity and clarity.	Support
	Recommendation 71–2 The Australian Government should initiate a review to consider whether the *Telecommunications Act 1997* (Cth) and the *Telecommunications (Interception and Access) Act 1979* (Cth) continue to be effective in light of technological developments (including technological convergence), changes in the structure of communication industries and changing community perceptions and expectations about communication technologies. In particular, the review should consider:	Support, although we would expect the terms of reference for such a review to be limited to privacy, civil liberties and related consumer protection issues, and those parts of telecommunications law which address these issues (The recommendation suggests a much wider review of the whole of telecommunications law).

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	(a) whether the Acts continue to regulate effectively communication technologies and the individuals and organisations that supply communication technologies and communication services; (b) how these two Acts interact with each other and with other legislation; (c) the extent to which the activities regulated under the Acts should be regulated under general communications legislation or other legislation; (d) the roles and functions of the various bodies currently involved in the regulation of the telecommunications industry, including the Australian Communications and Media Authority, the Attorney-General's Department, the Office of the Privacy Commissioner, the Telecommunications Industry Ombudsman, and Communications Alliance; and (e) whether the *Telecommunications (Interception and Access) Act* should be amended to provide for the role of a public interest monitor.	
	Recommendation 71–3 The *Telecommunications Act 1997* (Cth) should be amended to provide that a breach of Divisions 2, 4 and 5 of Part 13 of the Act may attract a civil penalty in addition to a criminal penalty. The Australian Communications and Media Authority should develop and publish enforcement guidelines setting out the criteria upon which a decision to pursue a civil or a criminal penalty is made.	Support
	Recommendation 71–4 The Australian Communications and Media Authority, in consultation with the Office of the Privacy Commissioner, Communications Alliance, the Telecommunications Industry Ombudsman, and other relevant stakeholders, should develop and publish guidance that addresses privacy issues raised by new technologies such as location-based services, voice over internet protocol and electronic number mapping.	Support
	Recommendation 71–5 Section 117(1)(k) of the *Telecommunications Act 1997* (Cth) should be amended to provide that the Australian Communications and Media Authority cannot register a code that deals directly or indirectly with a matter dealt with by the *Privacy Act*, or an approved privacy code under the *Privacy Act*, unless it has consulted with, and taken into consideration any comments or suggested amendments of, the Privacy Commissioner.	Support
	Recommendation 71–6 Section 134 of the *Telecommunications Act 1997* (Cth) should be amended to provide that the Australian Communications and Media Authority cannot determine or vary an industry standard that deals directly or indirectly with a matter dealt with by the *Privacy Act*, or an approved privacy code under the *Privacy Act*, unless it has consulted with, and taken into consideration any comments or suggested amendments of, the Privacy Commissioner.	Support

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72. Exceptions to the Use and Disclosure Offences		
	Recommendation 72–1 Sections 280(1)(b) and 297 of the *Telecommunications Act 1997* (Cth) should be amended to clarify that the exception does not authorise a use or disclosure that would be permitted by the *Privacy Act* if that use or disclosure would not be otherwise permitted under Part 13 of the *Telecommunications Act*.	Support
	Recommendation 72–2 The *Telecommunications Act 1997* (Cth) should be amended to provide that a use or disclosure of information or a document is permitted if a person has reason to suspect that unlawful activity has been, is being, or may be engaged in, and uses or discloses the personal information as a necessary part of its investigation of the matter or in reporting its concerns to relevant persons or authorities.	Support
	Recommendation 72–3 The *Telecommunications Act 1997* (Cth) should be amended to provide that a telecommunications service provider may use or disclose 'personal information' as defined in the *Privacy Act* about an individual who is an existing customer aged 15 or over for the purpose of direct marketing only where the: (a) individual would reasonably expect the organisation to use or disclose the information for the purpose of direct marketing; (b) organisation provides a simple and functional means by which the individual may advise the organisation that he or she does not wish to receive any further direct marketing communications; and (c) the information does not relate to the contents of a communication carried, or being carried, by a telecommunications service provider; or carriage services supplied or intended to be supplied by a telecommunications service provider.	Support
	Recommendation 72–4 The *Telecommunications Act 1997* (Cth) should be amended to provide that a telecommunications service provider may use or disclose 'personal information' as defined in the *Privacy Act* about an individual who is an existing customer and is under 15 years of age for the purpose of direct marketing only in the following circumstances: (a) either the: (i) individual has consented; or (ii) information is not sensitive information and it is impracticable for the organisation to seek the individual's consent before that particular use or disclosure; and (b) the information does not relate to the contents of a communication carried, or being	Support, but see our comments on UPP 6.2 in our separate submission.

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	carried, by a telecommunications service provider; or carriage services supplied or intended to be supplied by a telecommunications service provider; (c) in each direct marketing communication, the organisation draws to the individual's attention, or prominently displays a notice advising the individual, that he or she may express a wish not to receive any further direct marketing communications; (d) the organisation provides a simple and functional means by which the individual may advise the organisation that he or she does not wish to receive any further direct marketing communications; and (e) if requested by the individual, the organisation must, where reasonable and practicable, advise the individual of the source from which it acquired the individual's personal information.	
	Recommendation 72–5 The *Telecommunications Act 1997* (Cth) should be amended to provide that in the event that an individual makes a request of an organisation not to receive any further direct marketing communications, the organisation must: (a) comply with this requirement within a reasonable period of time; and (b) not charge the individual for giving effect to the request.	Support
	Recommendation 72–6 A note should be inserted after s280 of the *Telecommunications Act 1997* (Cth) cross-referencing to Chapter 4 (Access to telecommunications data) of the *Telecommunications (Interception and Access) Act 1979* (Cth).	Support
	Recommendation 72–7 Sections 287 and 300 of the *Telecommunications Act 1997* (Cth) should be amended to provide that a use or disclosure by a 'person', as defined under the Act, of information or a document is permitted if: (a) the information or document relates to the affairs or personal particulars (including any unlisted telephone number or any address) of another person; and (b) the person reasonably believes that the use or disclosure is necessary to lessen or prevent a serious threat to a person's life, health or safety.	We submit that it is unhelpful to continue the separate concept of 'affairs or personal particulars' – the Telecommunications Act should use the same definition of 'personal information' (which, if our submission on Recommendation 6-2 is accepted, would unambiguously include telephone numbers)
	Recommendation 72–8 Section 289 of the *Telecommunications Act 1997* (Cth) should be amended to provide that a use or disclosure by a 'person', as defined under the Act, of information or a document is permitted if the information or document relates to the affairs or personal particulars (including any unlisted telephone number or any address) of another person; and (a) the other person has consented to the use or disclosure; or (b) the use or disclosure is made for the purpose for which the information or document	As above

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	came to the person's knowledge or into the person's possession (the primary purpose); or (c) the use or disclosure is for a purpose other than the primary purpose (the secondary purpose); and (i) the secondary purpose is related to the primary purpose, and if the information or document is sensitive information (within the meaning of the *Privacy Act*), the secondary purpose is directly related to the primary purpose; and (ii) the other person would reasonably expect the person to use or disclose the information.	
	Recommendation 72–9 Part 13 of the *Telecommunications Act 1997* (Cth) should be amended to provide that 'consent' means 'express or implied consent'.	Support, subject to our comments about the need to define consent to prohibit 'bundled' consent, in our submission on Chapter 19.
	Recommendation 72–10 Part 13 of the *Telecommunications Act 1997* (Cth) should be amended to provide that use or disclosure by a person of credit reporting information is to be handled in accordance with the *Privacy Act.*	Support
	Recommendation 72–11 The *Telecommunications Act 1997* (Cth) should be amended to clarify when a use or disclosure of information or a document held on the integrated public number database is permitted.	Support, subject to adoption also of Recommendation 72-16
	Recommendation 72–12 Clause 3 of the *Carrier Licence Conditions (Telstra Corporation Limited) Declaration 1997* (Cth) should be amended to provide that 'enforcement agency' has the same meaning as that provided for in the *Telecommunications (Interception and Access) Act 1979* (Cth).	Support
	Recommendation 72–13 Section 285 of the *Telecommunications Act 1997* (Cth) should be amended to provide that a disclosure of an unlisted number is permitted if the disclosure is made to another person for purposes connected with dealing with the matter or matters raised by a call to an emergency service number.	Support
	Recommendation 72–14 The Australian Government should amend s 285(3) of the *Telecommunications Act 1997* (Cth) to provide that before the Minister specifies a kind of research for the purpose of the use or disclosure of information or a document contained in the Integrated Public Number Database, the Minister must be satisfied that the public interest in the relevant research outweighs the public interest in maintaining the level of protection provided by the *Telecommunications Act* to the information in the Integrated Public Number Database.	Support, although the provisions relating to research use of IPND data require further consideration to avoid uses which would not meet public expectations.
	Recommendation 72–15 The *Telecommunications (Integrated Public Number Database Scheme—Conditions for Authorisations) Determination 2007 (No 1)* should be amended	Support

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	to provide that an authorisation under the integrated public number database scheme is subject to a condition requiring the holder of the authorisation to notify the Privacy Commissioner, as soon as practicable after becoming aware: (a) of a substantive or systemic breach of security that reasonably could be regarded as having an adverse impact on the integrity and confidentiality of protected information; and (b) that a person to whom the holder has disclosed protected information has contravened any legal restrictions governing the person's ability to use or disclose protected information.	
	Recommendation 72–16 The *Telecommunications Act 1997* (Cth) should be amended to provide that directory products that are produced from data sources other than the Integrated Public Number Database should be subject to the same rules under Part 13 of the *Telecommunications Act* as directory products which are produced from data sourced from the Integrated Public Number Database.	Support
	Recommendation 72–17 The *Telecommunications Act 1997* (Cth) should be amended to prohibit the charging of a fee for an unlisted (silent) number on a public number directory.	Support
73. Other Telecommunications Privacy Issues		
	Recommendation 73–1 Section 79 of the *Telecommunications (Interception and Access) Act 1979* (Cth) should be amended to provide that the chief officer of an agency must cause a record, including any copy of a record, in the possession of an agency, made by means of an interception to be destroyed when it is no longer needed for a permitted purpose.	Support
	Recommendation 73–2 Section 79 of the *Telecommunications (Interception and Access) Act 1979* (Cth) should be amended to require the destruction of non-material content intercepted under a B-Party warrant.	Support
	Recommendation 73–3 The *Telecommunications (Interception and Access) Act 1979* (Cth) should be amended to provide that the Australian Security Intelligence Organisation and enforcement agencies must destroy in a timely manner irrelevant material containing accessed telecommunications data which is no longer needed for a permitted purpose.	Support
	Recommendation 73–4 Sections 151 and 163 of the *Telecommunications (Interception and Access) Act 1979* (Cth) should be amended to provide for reporting requirements relating to the use of stored communication warrants that are equivalent to the	Support

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	interception warrant reporting requirements under Part 2–7 and s 102 of the Act.	
	Recommendation 73–5 The Australian Government Attorney-General's Department should develop and, where appropriate, publish guidance on the interception and access of information under the *Telecommunications (Interception and Access) Act 1979* (Cth), that addresses: (a) the definition of the term 'telecommunications data'; (b) when voluntary disclosure of telecommunications data to the Australian Security Intelligence Organisation and other enforcement agencies is permitted; and (c) timeframes within which agencies should review holdings of information and destroy information.	Support
	Recommendation 73–6 The *Telecommunications (Interception and Access) Act 1979* (Cth) should be amended to provide expressly that where the Ombudsman has reason to believe that an officer of an agency is able to give information relevant to an inspection of the agency's records relating to access to a stored communication, the Ombudsman may: (a) require the officer to give the information to the Ombudsman and to attend a specified place in order to answer questions relevant to the inspection; and (b) where the Ombudsman does not know the officer's identity, require the chief officer, or a person nominated by the chief officer, to answer questions relevant to the inspection.	Support
	Recommendation 73–7 The Australian Communications and Media Authority should add the Office of the Privacy Commissioner as a member of the Law Enforcement Advisory Committee.	Support
	Recommendation 73–8 The Office of the Privacy Commissioner, the Telecommunications Industry Ombudsman and the Australian Communications and Media Authority should develop memorandums of understanding, addressing: (a) the roles and functions of each of the bodies under the *Telecommunications Act 1997* (Cth), *Spam Act 2003* (Cth), *Do Not Call Register Act 2006* (Cth) and *Privacy Act*; (b) the exchange of relevant information and expertise between the bodies; and (c) when a matter should be referred to, or received from, the bodies.	Support
	Recommendation 73–9 The document setting out the Office of the Privacy Commissioner's complaint-handling policies and procedures (see Recommendation 49–8), and its enforcement guidelines (see Recommendation 50–3) should address: (a) the roles and functions of the Office of the Privacy Commissioner,	Support

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	Telecommunications Industry Ombudsman and the Australian Communications and Media Authority under the *Telecommunications Act 1997* (Cth), *Spam Act 2003* (Cth), *Do Not Call Register Act 2006* (Cth) and *Privacy Act*; and (b) when a matter will be referred to, or received from, the Telecommunications Industry Ombudsman and the Australian Communications and Media Authority.	
	Recommendation 73–10 The Australian Communications and Media Authority, in consultation with relevant stakeholders, should develop and publish guidance relating to privacy in the telecommunications industry. The guidance should: (a) outline the interaction between the *Privacy Act*, *Telecommunications Act 1997* (Cth), *Spam Act 2003* (Cth) and *Do Not Call Register Act 2006* (Cth); (b) provide advice on the exceptions under Part 13 of the *Telecommunications Act*, *Spam Act* and the *Do Not Call Register Act*; and (c) outline what is required to obtain an individual's consent for the purposes of the *Privacy Act*, *Telecommunications Act*, *Spam Act* and *Do Not Call Register Act*. This guidance should cover consent as it applies in various contexts, and include advice on when it is, and is not, appropriate to use the mechanism of 'bundled consent'.	Support In relation to (c) see our submission on the meaning of consent in Chapter 19.
	Recommendation 73–11 The Australian Communications and Media Authority, in consultation with relevant stakeholders, should develop and publish educational material that addresses the: (a) rules regulating privacy in the telecommunications industry; and (b) various bodies that are able to deal with a telecommunications privacy complaint, and how to make a complaint to those bodies.	Support
Part K—Protection of a Right to Personal Privacy		Comments reserved, given the government's decision not to address this part of the ALRC Report in the first stage of privacy law reform. In principle, provision for a statutory cause of action for serious invasion of privacy is a desirable complement to the information privacy protection currently provided by the Privacy Act.