Response from Professor Barbara McDonald, Sydney Law School:

A privacy action would apply to everyone- by no means just to the media. It would also protect everyone, including journalists, from unlawful intrusions into their privacy.

The ALRC was extremely mindful of the danger of a privacy action unduly limiting free speech. It therefore designed a privacy action with an in-built *up-front* protection of freedom of speech and the freedom of the media to investigate and report on matters of public interest. The recent descriptions I have seen in the media of the proposal fail to mention these very significant legislative protections.

The recommendations were:

> *Recommendation 9–1 The Act should provide that, for the plaintiff to have a cause of action, the court must be satisfied that the public interest in privacy outweighs any countervailing public interest.*
>
> *Recommendation 9–2 The Act should include the following list of countervailing public interest matters which a court may consider, along with any other relevant public interest matter:*
>
> *(a) freedom of expression, including political communication and artistic expression;*
>
> *(b) freedom of the media, particularly to responsibly investigate and report matters of public concern and importance;*
>
> *(c) the proper administration of government;*
>
> *(d) open justice;*
>
> *Etc , etc*

https://www.alrc.gov.au/publication/serious-invasions-of-privacy-in-the-digital-era-alrc-report-123/9-balancing-privacy-with-other-interests/the-balancing-exercise/

Public interest is not the same thing as public curiosity. The public may well be interested in or curious about aspects of people's private lives – particularly if they are a small time or big time celebrity- but that doesn't make these matters fit within "public interest" in a legal sense.

As my colleague Professor David Rolph points out, " the notion of 'press freedom' brings responsibilities- it is not a licence to publish whatever the media wants without consequence".

The ALRC was also mindful of the danger of people in public life using what you called SLAPP proceedings to shut down investigations or publications. How people conduct their business affairs (eg in a public company or in business affecting

consumers) or governmental duties or positions or contracts may well raise issues of genuine public interest. Again, we tried to build in protections for the media if a person sues for an injunction to restrain publication of matters of genuine public interest:

The ALRC report specifically recommended that :

> *Recommendation 12–8 The Act should provide that, when considering whether to grant injunctive relief before trial to restrain publication of private information, a court must have particular regard to freedom of expression and any other matters of public interest.*

So the courts would be *directed* to take matters of public interest, as set out above, into account.

However, we also have a law of breach of confidence and the operation of a tort of privacy and its balancing factors would not suddenly allow anyone to publish matters which are subject to a contractual or other obligation of confidence. Courts readily grant injunctions to restrain breach of confidence and there is no general defence of public interest in Australian law. Well-established examples of confidential information include someone's correspondence or private emails or details of their medical treatment or details of a settlement of a court case.

Applying all this to some of the examples you have put to me:

- The story about Rebel Wilson: a person's sexuality is clearly a private, no matter who they are- including celebrities or politicians- unless and until they choose to make this public themselves. It is difficult to imagine any countervailing public interest in revealing this.
- The story about a radio personality who checked herself into a clinic- again, medical matters and treatment are clearly purely private. And in my view, every new story about this story re-invades her privacy if she is identified. Unlike confidential information, private matters do not lose their quality of privacy just because someone has revealed them. Medical information is private unless possibly it has some bearing on the ability to perform a public office.
- The stories – how many!- about Barnaby Joyce when he was Deputy PM. Clearly there were many aspects of the issues surrounding Barnaby Joyce's conduct which are matters of public interest, relevant to the proper administration of the government. These include whether he holds himself up to the standards and views that he professes publicly and expects others to respect. That is not a licence to print anything and everything about him and the privacy of unwilling participants should be respected.
- The Barry Spurr case- essentially involved his email correspondence, which as I note above has long attracted protection as confidential information (and

copyright) unless there is some “iniquity” involved. There is no general defence of public interest to this.

Are there any other stories that you believe should be off limits?

Yes- close up photos of grieving family members, for a start. .. The pictures and footage of a drunk woman who is picked up by police to be taken home- as I saw recently. These are ordinary people who are just as entitled to privacy as any celebrity.

Remember too that sometimes the media want privacy protection- Annika Smethurst was unable to get back the data seized from her phone by the AFP during a raid under an invalid warrant. That was a clear and unlawful invasion of privacy but presumably her media employer was so desperate not to allow privacy law to develop that they didn’t *plead* an invasion of her privacy. She failed to get her private data back. A privacy action would help- I personally don’t think that there is any public interest in allowing the police to rely on an invalid warrant to seize private data.

And finally, what do you think the government will do?

The report suggests that the Federal AG talk to the states to ensure consistent laws around the country. Good luck with that..

And the Federal AG is , quite rightly, busy on other pressing constitutional issues at the moment.

....

In every case it would be a question of whether the person had a reasonable expectation of privacy – that is an objective test. And only if so, whether that outweighed any relevant public interest in the legal sense.

In some of those case the answer is obvious. In others less so.

A person would not generally have an expectation of privacy in public spaces but it depends on the circumstances: eg why should be a homeless person be photographed for the world to see? Why should someone be pursued and photographed entering an AA meeting or a clinic?