

NSW LAW REFORM COMMISSION

## REPORT 120

### Invasion of Privacy

April 2009

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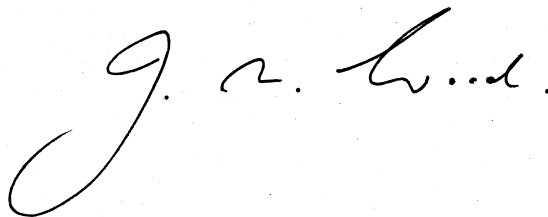
## Letter to the Attorney General

To the Hon John Hatzistergos  
Attorney General for New South Wales

Dear Attorney

### **Invasion of Privacy**

We make this Report pursuant to the reference to this Commission received 11 April 2006.

A handwritten signature in black ink, appearing to read "J. R. Wood". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke.

The Hon James Wood AO QC  
Chairperson

April 2009



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## TERMS OF REFERENCE

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In a letter to the Commission received on 11 April 2006, the Attorney General, the Hon R J Debus MP issued the following terms of reference:

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the Law Reform Commission is to inquire into and report on whether existing legislation in New South Wales provides an effective framework for the protection of the privacy of an individual. In undertaking this review, the Commission is to consider in particular:

- The desirability of privacy protection principles being uniform across Australia.
- The desirability of a consistent legislative approach to privacy in the *Privacy and Personal Information Protection Act 1998*, the *Health Records and Information Privacy Act 2002*, the *State Records Act 1998*, the *Freedom of Information Act 1989* and the *Local Government Act 1993*.
- The desirability of introducing a statutory tort of privacy in New South Wales.
- Any related matters.

The Commission should liaise with the Australian Law Reform Commission which is reviewing the *Privacy Act 1988* (Cth) as well as other relevant Commonwealth, State and Territory agencies.

PARTICIPANTS

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## Division Members

His Hon Judge Kevin O'Connor AM

Professor Michael Tilbury (Commissioner-in-charge)

The Hon James Wood AO QC

## International Advisory Panel

Hon Justice Patricia Bergin	Chief Judge in Equity, Supreme Court of New South Wales
Professor Andrew Kenyon	Director, Centre for Media and Communications Law, The University of Melbourne
Mr David Marr	Journalist, Sydney Morning Herald
Professor David Partlett	Dean, Emory University School of Law, Atlanta, USA
Professor Megan Richardson	Deputy Director, Centre for Media and Communications Law, The University of Melbourne
Rt Hon Lord Justice Sir Stephen Sedley	Court of Appeal of England and Wales
His Hon Judge Kenneth Taylor	District Court of New South Wales, and Privacy Commissioner, New South Wales
Professor Raymond Wacks	Emeritus Professor of Law and Legal Theory, <i>University of Hong Kong</i>

The recommendation in this report is that of the Commission and does not necessarily reflect the views of the International Advisory Panel.



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# Report

- Recommendation
- 1. Introduction
- 2. This report as part of a wider reference
- 3. Support for greater privacy protection
- 4. The need for, and nature of, a general cause of action protecting privacy
- 5. When should a general cause of action protect privacy?
- 6. Defences
- 7. Remedies
- 8. Relationship to other laws
- 9. Limitation of actions
- 10. Death
- 11. Uniformity



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**RECOMMENDATION**


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As part of a uniform law initiative in Australia, New South Wales should amend the *Civil Liability Act 2002* (NSW) to provide a cause of action for invasion of privacy in the terms of the draft legislation appended to this report.

## 1. INTRODUCTION

### Background

1.1 In our Consultation Paper, *Invasion of Privacy*, we raised the question whether there was support in New South Wales for the greater protection of the privacy of individuals; in particular, whether privacy should be protected through the introduction of a statutory cause of action for invasion of privacy.<sup>1</sup> To focus debate, we tentatively outlined a model of such a cause of action. Bearing in mind the impossibility of arriving at a satisfactory definition of “privacy” for the purposes of the statute, we envisaged that the statute would identify its objects and purposes and contain a non-exhaustive list of the types of invasion that fell within it.<sup>2</sup> A privacy invasion that did fall within the statute would empower the courts, in their discretion, to grant plaintiffs, from a non-exhaustive legislative list, the remedy that was the most appropriate in the circumstances.<sup>3</sup> We identified factors that would be relevant to the statutory cause of action (such as the need to establish a reasonable expectation of privacy in the circumstances, as well as to consider the force of public interest considerations in those circumstances),<sup>4</sup> and we invited submissions on the issues that we had raised.<sup>5</sup>

1.2 As part of a comprehensive review of privacy law in Australia, the Australian Law Reform Commission (“ALRC”) has now recommended that federal legislation should provide for a statutory cause of action for a serious invasion of the privacy of a natural person.<sup>6</sup> The statutory cause of action recommended by the ALRC is similar to that put forward in our Consultation Paper.<sup>7</sup> Its essence is that the legislation should identify, in a non-exhaustive way, the following types of invasion as falling within it: interference with an individual’s home or family life; subjecting an individual to unauthorised surveillance; interference with, misuse or disclosure of, an individual’s correspondence or private written, oral or electronic communication; and, disclosure of sensitive facts relating to an individual’s private life.<sup>8</sup> Liability would arise in these contexts if the claimant could show that, in the circumstances, there was a reasonable expectation of privacy; and that the act

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1. NSW Law Reform Commission, *Invasion of Privacy* Consultation Paper 1 (May 2007) [1.55]-[1.58] (“CP 1”).
  2. CP 1, ch 6.
  3. CP 1, ch 8.
  4. CP 1, ch 7.
  5. CP 1, p xi-xii.
  6. Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (May 2008) vol 3 ch 74, especially Recommendations 74-1, 74-3(a). (“ALRC, R 108”).
  7. ALRC, R 108, [74.83].
  8. ALRC, R 108, Recommendation 74-1.

or conduct complained of was highly offensive to a reasonable person of ordinary sensibilities. In determining whether these conditions had been met, the court would have to take into account whether the public interest in maintaining the claimant's privacy outweighed other matters of public interest (including the interest of the public in being informed about matters of public concern and the public interest in promoting freedom of expression).<sup>9</sup>

1.3 Additionally, the ALRC recommends that:

- actionability should not depend on proof of damage;<sup>10</sup>
- the action should be restricted to intentional or reckless acts on the part of the defendant;<sup>11</sup>
- an exhaustive range of defences should be provided;<sup>12</sup>
- the court should be able to choose the remedy that is the most appropriate in the circumstances;<sup>13</sup>
- any action at common law for invasion of a person's privacy should be abolished;<sup>14</sup> and
- the Office of the federal Privacy Commissioner should have a role in educating the public about the recommended statutory cause of action.<sup>15</sup>

1.4 While our review of privacy law is ongoing,<sup>16</sup> we have now reached conclusions on the desirability of introducing a statutory cause of action for invasion of privacy and on the form that such an action should take. We have, therefore, decided to report separately on that item in our terms of reference that requires us to consider "the desirability of introducing a statutory tort of privacy in New South Wales".<sup>17</sup> We do so by way of commentary on the *Civil Liability Amendment (Privacy) Bill 2009* (NSW) (the "Bill"), which appears as Appendix A to this report. The commentary in this report explains the reasons underlying the provisions in the Bill and can act as a guide to its interpretation.<sup>18</sup> The commentary should be read alongside our Consultation Paper and in the context of the recommendations in *For Your Information: Australian Privacy Law and Practice*, the ALRC's recent report into privacy law in Australia.

## Our processes

1.5 Our recommendation that the NSW Parliament should amend the *Civil Liability Act 2002* (NSW) to create a cause of action for invasion of privacy is informed by submissions

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9. ALRC, R 108, Recommendation 74-2.
  10. ALRC, R 108, Recommendation 74-3(b).
  11. ALRC, R 108, Recommendation 74-3(c).
  12. ALRC, R 108, Recommendation 74-4.
  13. ALRC, R 108, Recommendation 74-5.
  14. ALRC, R 108, Recommendation 74-6.
  15. ALRC, R 108, Recommendation 74-7.
  16. See para 2.1-2.3.
  17. The terms of reference are set out at p vii.
  18. See *Interpretation Act 1987* (NSW) s 34(2)(b).

received in response to our Consultation Paper,<sup>19</sup> as well as by the submissions made to,<sup>20</sup> and consultations undertaken by,<sup>21</sup> the ALRC as part of its recent inquiry into privacy law. We record our appreciation to those who made submissions to us, and to the ALRC for the access we have had to its submissions and to the records of its consultations.

1.6 We also record our appreciation to the International Advisory Panel that has assisted us in this reference. The Panel held a number of teleconferences that provoked penetrating and lively discussion and analysis of many issues in privacy law, focusing on the clauses of various drafts of our proposed legislation. We also benefited from correspondence with members of the Panel in the development of our proposals. The diversity of views expressed by the members of the Panel has been of the utmost help in formulating the recommendation that we make in this report. The views in this report and the recommendation are, of course, those of the Commission alone.

1.7 We express our thanks to Parliamentary Counsel's Office for drafting the *Civil Liability Amendment (Privacy) Bill 2009* (NSW) to give effect to this report. That Bill has proceeded through a number of drafts, and the active involvement of Parliamentary Counsel at all stages of the process has been of great help in the formulation and clarification of our final conclusions.

## This report

1.8 The views emerging in submissions and consultations and in the deliberations of our International Advisory Panel have confirmed our initial view that any proposed statutory cause of action should not attempt to define privacy or to develop a statutory tort, or torts, of privacy. They have, however, also persuaded us that a non-exhaustive statutory list of examples of privacy invasions could have the unintended effect of restricting the proper development of the action.<sup>22</sup> We therefore recommend only that the statute should identify the general conditions in which an invasion of privacy is actionable, allowing the contexts in which the action applies to respond to societal and technological change. We consider it integral to the making of that identification that relevant public interests are taken into account. These include the important public interest in freedom of expression or of speech. A major focus of this report is on how this can be achieved.<sup>23</sup>

1.9 This report endorses the proposal in our Consultation Paper that, in responding to an invasion of privacy, the courts should have at their disposal a range of remedies free from the jurisdictional and other restraints on remedies that exist at general law. However, for the reasons we identify, the Bill modifies the description of the remedies identified in the Consultation Paper.<sup>24</sup> Other issues considered in this report are the defences that ought to be available to the statutory cause of action,<sup>25</sup> the effect of death on, and the

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19. A list of submissions appears in Appendix B to this report.

20. See ALRC, R 108, vol 3, Appendix 1.

21. See ALRC, R 108, vol 3, Appendix 2.

22. See also Legal Aid Commission of NSW, *Submission*, 2.

23. See para 5.1-5.20.

24. See para 7.8.

25. See para 6.1-6.11.

limitation period applicable to, the statutory cause of action,<sup>26</sup> and the relationship of the cause of action to the general law, and to the statutory regimes that focus regulation principally upon information privacy in New South Wales.<sup>27</sup>

## 2. THIS REPORT AS PART OF A WIDER REFERENCE

2.1 This report deals only with the introduction of a general statutory cause of action for invasion of privacy. Our terms of reference require us to report more widely on the effectiveness of existing legislation in providing a framework for the protection of privacy, in particular, on the desirability of a consistent legislative approach to privacy in the most relevant statutes in New South Wales, and on the desirability of privacy protection principles being uniform across Australia.

2.2 In June 2008, the Commission published a Consultation Paper, *Privacy Legislation in New South Wales*.<sup>28</sup> The Paper addresses difficulties arising in the interpretation and implementation of the principal privacy legislation in New South Wales, particularly the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Protection Act 2002* (NSW). The Paper also considers the overall approach to the protection of privacy in those Acts and relevant legislation in New South Wales, and invites comments on the desirability of a more cohesive approach to such protection; on the content of the principles that ought to form the basis of privacy regulation; and on the relationship between particular statutory protection and any general statutory cause of action for invasion of privacy. Additionally, the Paper endorses the ALRC's approach to the desirability of achieving national consistency for privacy protection in Australia and for the need for structural reform of privacy principles.

2.3 The Commission intends to report separately on the issues raised in *Privacy Legislation in New South Wales*. We do, however, consider in this report aspects of the relationship between legislation regulating privacy in New South Wales and the proposed statutory cause of action.<sup>29</sup>

## 3. SUPPORT FOR GREATER PRIVACY PROTECTION

3.1 The ALRC's recent report into privacy involved the largest community consultation exercise in that Commission's 33-year history. Apart from public forums and a "National Privacy Phone-in", the ALRC conducted some 250 meetings with individuals, public sector agencies, private organisations, community groups and peak associations. In addition, the ALRC received 585 submissions. The ALRC's most general findings were that Australians mistakenly consider that they have a "right" to privacy;<sup>30</sup> lament its erosion as the

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26. See para 9.1-9.2, 10.1.

27. See para 5.44-5.45, 7.28-7.29, 8.1-8.3.

28. NSW Law Reform Commission, *Privacy Legislation in New South Wales* Consultation Paper 3 (May 2008) ("CP 3").

29. See para 5.44-5.45, 7.28-7.29, 8.3.

30. This is supported by studies commissioned by the Office of the Privacy Commissioner, Australia, to the extent to which they reveal that a growing number of



inevitable result of technological advance; but, at the same time, appreciate the benefits of the modern technologies that they use. The ALRC also found a “general community appreciation of the need to strike a common sense balance between privacy interests and practical concerns in a range of areas”, for example, to balance privacy interests with local and national security concerns, and to accommodate a strong need to keep health information private with the need for prompt access to it in the case of emergency.<sup>31</sup>

3.2 An abstract concern for privacy does not, of course, necessarily mean that there is support in the Australian community for a general cause of action for invasion of privacy. Nevertheless, based on its submissions and consultations, the ALRC noted “strong support” for the enactment of a statutory cause of action for a “serious” invasion of privacy as envisaged in the model cause of action proposed in its Discussion Paper.<sup>32</sup> That proposal would require the plaintiff to establish, as the general test of liability in such an action, that, in all the circumstances: (a) there was a reasonable expectation of privacy; and (b) the act complained of is sufficiently serious to cause substantial offence to a person of ordinary sensibilities.<sup>33</sup> Submissions made to us also express support for the introduction of a statutory cause of action for invasion of privacy, although that support is not restricted to “serious” invasions of privacy.<sup>34</sup> Our submissions argued that a general cause of action for invasion of privacy is warranted because it specifically recognises the value of privacy as such,<sup>35</sup> and fills gaps in the existing legal protection of privacy.<sup>36</sup>

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Australians (69% in 2007) are aware of the federal privacy laws, although they may be mistaken as to the organisations covered by them and the activities that constitute a contravention of them: see Wallis Consulting Group, *Community Attitudes to Privacy 2007*, 5-15, Office of the Privacy Commissioner <<http://www.privacy.gov.au/publications/rcommunity07.pdf>> at 8 January 2009.

31. ALRC, R 108, vol 1, 105-110, [1.82]-[1.93]. These findings are broadly compatible with survey findings in the US that show strong support for privacy rights: see Electronic Privacy Information Center, “Public Opinion on Privacy” <<http://www.epic.org/privacy/survey/default.html>> at 8 January 2009. At the same time, Americans indicated that they would compromise such rights within limits, eg to support measures aimed at national security provided that they are not regarded as extreme (as would, for example, allowing police to enter homes without a warrant): see Gallup, “Americans Reject Extreme Anti-Privacy Security Measures”, 8 August 2005 <<http://www.gallup.com/poll/1786>> at 8 January 2009.
32. ALRC, R 108, vol 3, [74.85].
33. ALRC, *Review of Australian Privacy Law* Discussion Paper 72, vol 1 (September 2007) [5.80], and Proposal 5-2 (“ALRC, DP 72”).
34. Mr Phillip Youngman, *Submission*; Office of the Privacy Commissioner, Australia, *Submission*; Redfern Legal Centre, *Submission*; Dr Normann Witzleb, *Submission*; Legal Aid Commission of NSW, *Submission*; Department of Corrective Services NSW, *Submission*; Kingsford Legal Centre, *Submission*; Public Interest Advocacy Centre, *Submission*; Ms Robyn Carroll, *Submission*; Cyberspace Law and Policy Centre, *Submission*. See also ALRC, R 108, vol 3, [74.85]-[74.87].
35. Office of the Privacy Commissioner, Australia, *Submission*, 2; Legal Aid Commission of NSW, *Submission*, 3; Kingsford Legal Centre, *Submission*, 3; Public Interest Advocacy Centre, *Submission*, 3-4, 5-7.

3.3 The ALRC pointed out,<sup>37</sup> and our submissions confirm, that there is also significant opposition to the introduction of a general cause of action for invasion of privacy.<sup>38</sup> That opposition comes primarily from media organisations, and is based principally on the threat that an action for invasion of privacy poses to freedom of expression (which includes freedom of the press),<sup>39</sup> a concern shared by those who regard the action as potentially hostile to artistic freedom.<sup>40</sup> A particular argument in support of this position is that, unlike the situation that tends to apply in human rights instruments where protection is afforded both to privacy and to freedom of expression, the provision of a statutory base for the protection of privacy alone would unfairly tilt the balance in favour of the interest in privacy at the expense of the interest in freedom of expression, which would not itself be protected by statute. The result would be that the individual interest in privacy would acquire a strength that would impede the free flow of information to the public on matters of public concern.<sup>41</sup> Other arguments against the introduction of a statutory cause of action for invasion of privacy centre on the impossibility of defining privacy with sufficient precision to create a legal wrong;<sup>42</sup> on the adequacy of existing causes of action,<sup>43</sup> and/or of existing regulatory regimes,<sup>44</sup> to protect privacy; on the desirability of leaving any

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36. Legal Aid Commission of NSW, *Submission*, 3-5; Kingsford Legal Centre, *Submission*, 3; Public Interest Advocacy Centre, *Submission*, 5-7.
37. See generally ALRC, R 108, vol 3, [74.85]-[74.104].
38. See Australia's Right to Know Coalition, *Submission*; Law Society of NSW, Litigation and Law Practice Committee and Business Committee, *Submission*; Arts Law Council of Australia, *Submission*; Australian Press Council, *Submission*; SBS Corporation, *Submission*; Associate Professor Mark Lunney, *Submission*; Law Council of Australia, Media and Communications Committee and Working Party on Privacy Law of the Business Law Section, *Submission*.
39. Australia's Right to Know Coalition, *Submission*, 6-8; Arts Law Council of Australia, *Submission*, 4-5; Australian Press Council, *Submission*, 3-5, 8; SBS Corporation, *Submission*; Associate Professor Mark Lunney, *Submission*; Law Council of Australia, Media and Communications Committee and Working Party on Privacy Law of the Business Law Section, *Submission*. See further ALRC, R 108, vol 3, [74.96]-[74.98].
40. Arts Law Council of Australia, *Submission*, 5. See also ALRC, R 108, vol 3, [74.95].
41. Australia's Right to Know Coalition, *Submission*, 22-24; Australian Press Council, *Submission*, 9; SBS Corporation, *Submission*, 6; Associate Professor Mark Lunney, *Submission*, 1-2.
42. Law Society of NSW, Litigation and Law Practice Committee and Business Committee, *Submission*, 1; Associate Professor Mark Lunney, *Submission*, 1, 2-3.
43. Australia's Right to Know Coalition, *Submission*, 10-22; Arts Law Council of Australia, *Submission*, 5-6; Australian Press Council, *Submission*, 5-6; SBS Corporation, *Submission*, 2-5.
44. Australian Press Council, *Submission*, 9-10; Law Council of Australia, Media and Communications Committee and Working Party on Privacy Law of the Business Law Section, *Submission* 1-9.

development of privacy protection to the common law;<sup>45</sup> and on the threat to uniformity of law in Australia posed by the introduction of such a cause of action at State level.<sup>46</sup>

3.4 We have carefully considered all these arguments. We ultimately agree with the ALRC that there ought to be a statutory cause of action for invasion of privacy in Australian law,<sup>47</sup> provided that its introduction is part of a uniform law exercise.<sup>48</sup> We articulate at appropriate parts of this report the reasons why we are unpersuaded by the arguments against the introduction of such an action. The report also addresses the ways in which the legitimate concerns of those opposing a general cause of action for invasion of privacy can appropriately be accommodated within the statutory action that we propose.

## 4. THE NEED FOR, AND NATURE OF, A GENERAL CAUSE OF ACTION PROTECTING PRIVACY

4.1 The support for the enactment of a statutory cause of action for invasion of privacy evidenced in consultations and submissions combines with the arguments advanced in our Consultation Paper to provide the justification for that enactment. The arguments in the Consultation Paper centred on the absence of any broad protection of privacy in civil law; the detrimental effects on privacy of an increasingly invasive social environment; the desirability of giving effect to Australia's obligations under international law; the need for more general protection of privacy suggested by consideration of the law of other jurisdictions, including other common law jurisdictions; and the recent weakening of privacy protection in defamation law.<sup>49</sup> We adhere to these arguments. However, we recognise, as we did in our Consultation Paper,<sup>50</sup> that support for a general cause of action for invasion of privacy needs to identify the gaps that such an action will fill in the existing law, where privacy is widely, but incidentally, protected in a number of tortious actions;<sup>51</sup> and where the equitable action for breach of confidence is at least capable of

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45. Law Society of NSW, Litigation and Law Practice Committee and Business Committee, *Submission*, 5-6; Arts Law Council of Australia, *Submission*, 7; Australian Press Council, *Submission*; SBS Corporation, *Submission*, 5-6; Law Council of Australia, Media and Communications Committee and Working Party on Privacy Law of the Business Law Section, *Submission*, 9-12.

46. Australia's Right to Know Coalition, *Submission*, 4; Law Society of NSW, Litigation and Law Practice Committee and Business Committee, *Submission*, 6-7; Arts Law Council of Australia, *Submission*; Australian Press Council, *Submission*, 7; Law Council of Australia, Media and Communications Committee and Working Party on Privacy Law of the Business Law Section, *Submission*, 12-15.

47. ALRC, R 108, vol 3, especially [74.112]-[74.118].

48. See para 11.1-11.3.

49. CP 1, [1.21]-[1.34].

50. CP 1, [1.12], [2.86]-[2.89].

51. CP 1, [2.39]-[2.76].

protecting privacy more generally.<sup>52</sup> Commonwealth and State laws also provide extensive regulation of information privacy.<sup>53</sup>

## The scope of privacy

4.2 The identification of the gaps that the statutory cause of action needs to fill in current law must proceed on an understanding of what it is that the statutory cause of action ought to protect. This raises the basal difficulty of delimiting privacy.<sup>54</sup> The complexities of satisfactorily describing the function and boundaries of privacy as a concept in moral discourse are widely acknowledged. The difficulties are exacerbated when a precise definition of the term is sought for legal purposes. At the heart of the difficulties lie the potential and tendency of the concept to be over-inclusive. Many diverse issues are capable of analysis in the language of privacy or of a claim to privacy. The most striking illustrations occur in the context of determining the constitutional validity of laws or their compliance with human rights instruments. For example, a law prohibiting the ability of a woman to have an abortion can be seen as an invasion of women's privacy;<sup>55</sup> while a law restricting sexual relations between consenting adult men can be seen as an invasion of the privacy of gay men.<sup>56</sup> Professor Wacks has pointed out that in this way privacy can become, and in the United States has become, "a forum for contesting ... the rights of women (especially in respect of abortion), the use of contraceptives, the freedom of homosexuals and lesbians, the right to obscene or pornographic publications, the problems generated by AIDS".<sup>57</sup> In short, "[p]rivacy seems to encompass everything, and therefore it appears to be nothing in itself".<sup>58</sup>

4.3 For the purposes of our Consultation Paper, we were content to assume that a statutory cause of action for invasion of privacy should generally aim to protect persons

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52. CP 1, [2.77]-[2.85], [3.3]-[3.29].

53. CP 1, [2.2]-[2.10].

54. See further CP 1, [1.12]-[1.18]. See also D Solove, *Understanding Privacy* (Harvard UP, 2008) ch 2.

55. *Roe v Wade* 410 US 113 (1973). But compare the dissenting judgment of Ginsburg J (with whom Stevens, Souter and Breyer JJ agreed) in *Gonzales v Carhart* 550 US 124 (2007): "[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship rights". See also *Planned Parenthood of Southeastern Pa v Casey* 505 US 833, 846 (1992).

56. *Toonen v Australia* (Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994)), where the United Nations Human Rights Committee found that the then Tasmanian law criminalising homosexuality between consenting adult men infringed the right to privacy in art 17 of the *International Covenant on Civil and Political Rights*.

57. R Wacks, "Why There Never Will be an English Common Law Privacy Tort" in A Kenyon and M Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge UP, 2006) 154, 175-6.

58. D Solove, *Understanding Privacy* (Harvard UP, 2008) 7.

from unwanted intrusions into their private lives or affairs in a broad range of contexts.<sup>59</sup> We can now be more specific. So far as relevant to this report, our terms of reference require us to investigate the potential role of privacy in private law, rather than in constitutional law or for the purposes of the statutory regulation of a particular area of activity.<sup>60</sup> Private law focuses on the circumstances in which one person can bring an action, generally for compensation, against another person. We consider that there are two elemental situations that call for privacy protection in such a context, namely, those in which the defendant has disclosed private information about the plaintiff (“information privacy”), and those in which the defendant has intruded on the plaintiff’s solitude, seclusion or private affairs (“seclusion”).<sup>61</sup> In American law, these two contexts generate two discrete privacy torts: the tort of public disclosure of private facts<sup>62</sup> and the tort of intrusion on seclusion.<sup>63</sup>

4.4 In Australia, there is a widespread understanding that the role of privacy in private law is to protect information privacy and seclusion. In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, Justices Gummow and Hayne (with whom Justice Gaudron agreed) noted that the American torts of public disclosure of private facts and of intrusion on seclusion “perhaps come closest to reflecting a concern for privacy ‘as a legal principle drawn from the fundamental value of personal autonomy’”.<sup>64</sup> Indeed, the pressure for the greater protection of privacy in private law has recently arisen, and succeeded, in Australian law, admittedly in first instance decisions, for the purpose of protecting information privacy and seclusion;<sup>65</sup> notwithstanding that, in one of those cases, other actions were available that adequately protected the plaintiff’s privacy interests.<sup>66</sup>

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59. CP 1, [1.20].

60. The terms of reference are set out at p vii. We are here referring to the dot point that mentions a “statutory tort of privacy”.

61. See generally New Zealand Law Commission, *Privacy: Concepts and Issues* Study Paper 19 (2008) ch 3; M Hickford, *A Conceptual Approach to Privacy* (New Zealand Law Commission, Miscellaneous Paper 19, 2007). See also Associate Professor Mark Lunney, *Submission*, 1-2.

62. See American Law Institute, *Restatement of the Law, Second, Torts 2d* (1977) vol 3, §652D, discussed in CP 1, [4.17]-[4.42].

63. See American Law Institute, *Restatement of the Law, Second, Torts 2d* (1977) vol 3, §652B, discussed in CP 1, [4.43]-[4.55].

64. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [125], quoting from the judgment of Sedley LJ in *Douglas v Hello! Ltd* [2001] QB 967, [126]. The American torts are discussed in CP 1, ch 4.

65. *Grosse v Purvis* [2003] QDC 151 (spatial privacy); *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281 (information privacy). On the status of these decisions, see *Kalaba v Commonwealth of Australia* [2004] FCA 763 (rejecting *Grosse v Purvis*); *Giller v Procopets* [2008] VSCA 236 [167]-[168] (Ashley JA); [447]-[452] (Neave JA).

66. *Jane Doe v Australian Broadcasting Corporation*, [2007] VCC 281, where the defendants were also liable to the plaintiff in breach of statutory duty ([70]-[81]), negligence ([82]-[100]) and breach of confidence ([101]-[145]). In contrast, the defendant in *Grosse v Purvis* [2003] QDC 151, [459]-[468], was liable in trespass, nuisance and battery only in respect of some instances of his conduct.

Unsurprisingly, the actual and hypothetical examples cited in submissions to demonstrate the inadequacy of privacy protection in existing law involved invasions of information privacy and intrusions on seclusion.<sup>67</sup> It is probable that this understanding of the scope of privacy is not confined to the potential role that it does, or might, play in private law.<sup>68</sup> Thus, a recent survey of community attitudes to privacy, undertaken for the Office of Privacy Commissioner, Australia, tends to show that Australians understand privacy law generally to be principally about information privacy and intrusion on seclusion.<sup>69</sup>

4.5 The common understanding of the scope of privacy law that we have just outlined would not, without more, support subsuming, within a general cause of action for invasion of privacy, the two other American torts protecting privacy. Those torts prevent the appropriation of the name or likeness of another (for example, where defendants, without the plaintiff's permission, use the plaintiff's image in advertising their products), and giving publicity to a matter that places the plaintiff before the public in a false light (for example, by publishing a picture of the plaintiff outside a rehabilitation centre for alcoholics that suggests that the plaintiff is there for treatment when he or she is not). In practice, the tort of appropriation is generally used in the United States to protect commercial interests (such as a celebrity's interest in his or her image) and is often equated to a property right. The false light tort is generally used to protect a plaintiff's reputation.<sup>70</sup> The statutory cause of action that we propose is designed to protect primarily the intangible interests that plaintiffs have in their welfare and emotional well-being, their freedom from mental distress;<sup>71</sup> not their commercial or proprietary interests, nor the interest that they have in their reputation (which is protected in the law of defamation). For this reason, the domain of the appropriation and false light torts cannot *generally* fall within the statutory cause of action that we propose,<sup>72</sup> even though there was some support in submissions for the inclusion of the appropriation tort in a general cause of action for invasion of privacy.<sup>73</sup>

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67. Kingsford Legal Centre, *Submission*, 2-3; Public Interest Advocacy Centre, *Submission*, 7.

68. See the taxonomy of privacy in D Solove, *Understanding Privacy* (Harvard UP, 2008) ch 5.

69. Wallis Consulting Group, *Community Attitudes to Privacy 2007*, 14-15, Office of the Privacy Commissioner <<http://www.privacy.gov.au/publications/rcommunity07.pdf>> at 8 January 2009 (85-88% of respondents correctly identified, as a contravention of the Privacy Act, businesses revealing customer information to other customers; while 54% of respondents incorrectly thought that spying by neighbours was also such a contravention).

70. See CP 1, [4.56]-[4.84]. See also *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [125] (Gummow and Hayne JJ).

71. See Bill cl 74(3)(a)(vii).

72. The ALRC agrees with this conclusion, though its exclusion of these two torts from the statutory cause of action for invasion of privacy is more general than ours: see ALRC, R 108, vol 3 [74.120]-[74.123].

73. See ALRC, R 108, vol 3 [74.102]. Other submissions supported neither the appropriation tort nor the false light tort: see Australia's Right to Know, *Submission*, 20-22; Arts Law Centre of Australia, *Submission*, 7; Australian Press Council, *Submission*, 6, 8; Law Council of Australia, Business Law Section, Media & Communications Committee and Working Party on Privacy Law, *Submission*, 9-10,

There is, however, no reason why the statutory cause of action should not embrace conduct that would, in American law, fall within the appropriation or false light torts where the purpose of the action is indeed aimed at guarding the personal feelings of an individual against mental distress.<sup>74</sup> In such cases, the action either falls clearly within the general understanding of privacy, or is clearly analogous to an intrusion into the private affairs of the plaintiff.<sup>75</sup>

## Gaps in the protection of information privacy and seclusion

4.6 The identification of gaps that exist in the legal protection of information privacy and seclusion needs to begin by recognising that the statutory regulation of privacy is generally limited in two ways. First, it normally applies only to information privacy.<sup>76</sup> The most important exception relates to the general power of the Privacy Commissioner to deal with a “privacy related complaint” under the *Privacy and Personal Information Protection Act 1998* (NSW).<sup>77</sup> The Privacy Commissioner is required to resolve any such complaint by conciliation.<sup>78</sup> Thus, while the power applies to “privacy” generally, it does not generate any cause of action cognisable in a court. Because its mission is essentially the protection of public sector data protection, and because it is a small agency with limited investigative and enforcement powers, Privacy NSW does not, in principle, support the retention of this general power in the Act.<sup>79</sup>

4.7 Secondly, the legislation regulating information privacy also generally fails to empower individuals to mount private law actions for invasions of privacy.<sup>80</sup> In particular, the legislation does not generally provide actions for monetary compensation for loss sustained as a result of an invasion of privacy.<sup>81</sup> The most general qualification of this is

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11-12; Cyberspace Law and Policy Centre, *Submission*, 3-5 (adopting the suggestions in ALRC, DP 72 regarding the scope of the action).

74. For examples, see American Law Institute, *Restatement of the Law, Second, Torts 2d* (1977) vol 3, §652C, comment (a), and the example in ALRC, R 108, vol 3 [74.102] (appropriation tort); CP 1, [4.68]-[4.75] (false light tort cases in which the matter is not defamatory). See also *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [125] where Gummow and Hayne JJ point out that appropriation cases may be mounted for reasons other than protecting the plaintiff’s commercial interests.

75. See further para 4.14.

76. See Legal Aid Commission of NSW, *Submission*, 4.

77. See *Privacy and Personal Information Protection Act 1998* (NSW) pt 4 div 3.

78. *Privacy and Personal Information Protection Act 1998* (NSW) s 49.

79. Privacy NSW, *Submission to CP 3*, 8; Privacy Commissioner, His Hon Judge Ken Taylor, *Letter*, 20 June 2008.

80. See generally CP 1, [2.2]-[2.15].

81. An exception is the *Telecommunications (Interceptions and Access) Act 1979* (Cth), which empowers courts to grant civil remedies for breaches of certain of its provisions. Section 107A (dealing with the communication or use of an intercepted communication) and s 165 (dealing with the contravention of provisions relating to accessing stored information) provide for a range of civil remedies, including

the power of the Administrative Decisions Tribunal to award compensation (not exceeding \$40,000) to an applicant where a public sector agency is guilty of conduct that has breached the applicant's information privacy under Part 5 of the *Privacy and Personal Information Protection Act 1998* (NSW). The applicant may only make such an application after the public sector agency has conducted an internal review of the relevant conduct and the applicant is dissatisfied with that review.<sup>82</sup> Apart from the obvious limits on the utility of this power that flow from its restriction to the conduct of public sector agencies, as well as the limitation placed on the amount of compensation, it has no application to intrusion on seclusion.

4.8 Case law illustrates the gaps, or potential gaps, that are likely to arise in the protection of privacy in a private law context. The first illustration is the recent decision of the Victorian Court of Appeal in *Giller v Procopets*.<sup>83</sup> In the context of the dissolution of their de facto relationship, the defendant published a video in which he had filmed, sometimes with the plaintiff's consent, their sexual activities. The Court of Appeal awarded the plaintiff damages in an action for breach of confidence for the mental distress she suffered as a result of the publication. Relying on English authority, the Court held that damages for mental distress alone could be the subject of a claim for breach of confidence,<sup>84</sup> the action into which the protection of privacy is now "shoe-horned"<sup>85</sup> in English law in order to give effect to the substance of relevant articles of the European Convention on Human Rights and Fundamental Freedoms.<sup>86</sup> While the plaintiff recovered damages in this case, we regard it as questionable whether, in Australian law, the equitable action for breach of confidence can be used generally to protect information that, while private (and hence confidential in ordinary speech), has not been obtained in circumstances that import a breach of a duty of confidentiality.<sup>87</sup> If it cannot, there will be many plaintiffs whose information privacy is invaded that will be without a remedy. For example, the publication of a photograph of a celebrity taken in a public street may reveal, by reference to its background location, that the celebrity is receiving treatment for a drug addiction. The publication may invade the celebrity's privacy,<sup>88</sup> but, at least if the photograph is taken openly and without knowledge of the colour that the background location gives it, there may be no breach of any obligation of confidentiality.

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damages (ss 107A(7), 165(7)), which, in this context, includes "punitive damages": ss 107A(10), 165(10).

82. *Privacy and Personal Information Protection Act 1998* (NSW) pt 5, especially s 55. Note that following an internal review, a public sector agency may take such remedial action as it thinks fit, and, except in defined cases (s 53(7A)), this can include the payment of monetary compensation: s 53(7)(c).
83. [2008] VSCA 236. See also *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281.
84. *Giller v Procopets* [2008] VSCA 236, especially [408]-[431] (Neave JA).
85. See *Douglas v Hello! Ltd (No 3)* [2006] QB 125, [53].
86. See *McKennitt v Ash* [2008] QB 73, [11].
87. See CP 1, [2.79]-[2.85].
88. Consider para 5.27, 5.33-5.34.



4.9 A second case is *Wainwright v Home Office*,<sup>89</sup> where the claimants, a mother and son, were the victims of an unlawful strip-search. The son was able to bring an action for damages in respect of the search because he had been touched during the search with the result that the case fell within the tort of battery. The mother, however, had not been touched, so the invasion of her bodily privacy was simply without remedy. The attempt to bring both cases within the principle of *Wilkinson v Downton*,<sup>90</sup> an old case which is sometimes thought to have created a tort of intentional infliction of harm, failed either because those conducting the strip-search lacked the necessary intention for the tort or because the tort was only actionable where the plaintiff suffered psychiatric damage. The same result would likely follow in Australian law.<sup>91</sup>

4.10 A third case is *Kaye v Robertson*.<sup>92</sup> The defendants subjected the plaintiff, a well-known television personality, to an exploitative interview, in which they took photographs, while he was lying ill in his hospital bed following a serious car accident. At trial, the plaintiff successfully obtained an injunction restraining the publication of an article based on the interview, and the publication or distribution of the photographs. The plaintiff's claim met the requirements of the action for malicious falsehood: the article's assertion that the plaintiff had consented to be interviewed was false and resulted in damage, namely, the potential loss of the plaintiff's right to sell the story of the accident and his recovery if the defendants were able to publish their article. A slight variation of the facts would mean that the plaintiff was without any remedy. If the defendants had intended to publish the photographs alongside the story telling their readers the truth, namely that their photographer had entered the plaintiff's hospital room uninvited and the photographs had been taken without the plaintiff's consent, no injunction could have been granted for malicious falsehood. And if the plaintiff were not a celebrity, the protection offered by the tort would be even more limited if the action for injurious falsehood is restricted in Australian law to statements about the plaintiff's goods or business.<sup>93</sup> The simple point is that the essence of the plaintiff's claim in this case was for what Lord Justice Bingham called the "monstrous" invasion of his privacy. His Lordship added, in words with which we entirely agree:<sup>94</sup>

*If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this*

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89. [2004] 2 AC 406. The European Court of Human Rights subsequently found a violation of art 8 of the *European Convention on Human Rights and Fundamental Freedoms: Wainwright v United Kingdom*, App. No. 12350/04, [2006] All ER (D) 125 (Sep). The case is discussed in detail in CP 1, [2.68]-[2.76].

90. [1897] 2 QB 57.

91. See para 4.12.

92. [1991] FSR 62. The case is discussed in detail in CP 1, [2.56]-[2.62].

93. A matter left open in *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388, [1] (Gleeson CJ), [60] (Gummow J). See also [154] (Hayne J), [192] (Callinan J). Compare [114] (Kirby J). See also *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 694 (Gleeson CJ); *Joyce v Sengupta* [1993] 1 All ER 897, 901 (Nicholls VC).

94. *Kaye v Robertson* [1991] FSR 62, 70. See also 71 (Leggatt LJ).

*invasion of his privacy which underlines the plaintiff's complaint. Yet it alone, however gross, does not entitle him to relief in English law.*

## Filling the gaps

4.11 The gaps in the protection of information privacy and seclusion that exist in private law can, in principle, be filled in one of three ways:

- First, existing actions can be used, by extension or interpretation, in such a way as to plug the gaps.
- Secondly, specific causes of action can be created that provide protection for information privacy and seclusion.
- Thirdly, a general cause of action for invasion of privacy can be created.

### *Extending existing causes of action*

4.12 The most generally relevant existing causes of action are found in the principle of *Wilkinson v Downton*<sup>95</sup> and, in the case of information privacy, in the action for breach of confidence. Neither is a satisfactory vehicle for the extended protection of seclusion or information privacy: *Wilkinson v Downton*, either because it has been subsumed in negligence,<sup>96</sup> or because its ingredients are difficult to pin down and its policy justifications insecure;<sup>97</sup> breach of confidence, because it is questionable whether the action can be used in a way to protect information that, while private, has not been obtained in circumstances that import a breach of a duty of confidentiality.<sup>98</sup> Moreover, there is always the danger that the extension, or expansive interpretation, of these causes of action, or those that have a narrower scope, will so skew them as to lead to a lack of internal coherence, having detrimental practical consequences.<sup>99</sup>

### *Creating causes of action protecting information privacy and seclusion*

4.13 A possible avenue of reform, espoused by the Hong Kong Law Reform Commission,<sup>100</sup> and supported in some submissions,<sup>101</sup> is to adopt into our law the

95. [1897] 2 QB 57.

96. *Magill v Magill* (2006) 226 CLR 551, [117] (Gummow, Kirby and Crennan JJ); *Tame v New South Wales* (2002) 211 CLR 317, [179] (Gummow and Kirby JJ). Compare *Nationwide News v Naidu* [2007] NSWCA 377, [76] (Spigelman CJ) [368]-[[370] (Basten JA); *Giller v Procopets* [2008] VSCA 236, [9]-[38] (Maxwell P), [454]-[478] (Neave JA); compare [161]-[166] (Ashley J).

97. See especially *Giller v Procopets* [2008] VSCA 236, [454]-[478] (Neave JA). And consider *Nationwide News v Naidu* [2007] NSWCA 377, [368]-[377], [397]-[411] (Basten JA).

98. See para 4.8; CP 1, [2.79]-[2.85]. See also J Beatson, S Grosz, T Hickman, R Singh and S Palmer, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008) [4-223]-[4-4225].

99. See especially *Hunter v Canary Wharf Ltd* [1997] AC 655, 691-92 (Lord Goff), and the discussion in CP 1, [2.87]-[2.89].

100 Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy Report* (2004) chs 6 and 7. Compare ch 10 (appropriation of name or likeness) and ch 11 (false light).

substance of the two discrete American torts of public disclosure of private facts and intrusion on seclusion. The appeal of this approach is that the existence of two specific torts whose boundaries are drawn by context lessens the uncertainty inherent in a cause of action protecting “privacy” as such. The suggested benefit is, however, largely illusory. As we have already pointed out, there is currently a general understanding in Australia that at least the core of privacy protection does, and ought to, centre on information privacy and seclusion.<sup>102</sup> This would inform courts’ immediate appreciation of the contexts of the statutory cause of action we propose. Not only would the reduction of those contexts to statutory form achieve little, it would also do nothing to identify the conduct, facts or matters that are “private” for the purposes of the two actions.<sup>103</sup> And it is the latter issue that generates the greatest uncertainty in determining whether or not an invasion of privacy should be actionable in private law.<sup>104</sup>

*Creating a general cause of action for invasion of privacy*

4.14 In our view, tampering with existing causes of action or developing specific torts would not provide a satisfactory basis for the ongoing development of the law of privacy in a climate of dynamic societal and technological change. Recognising the inherent value of privacy does provide such a basis. It also fills any gaps that manifest themselves in privacy protection. The statutory cause of action that we propose achieves both of these aims. While it assumes that, in current circumstances, its immediate application will be called for in cases of information privacy and intrusion on seclusion, it recognises that these two contexts cannot be taken as finally determining the boundaries of privacy, which will evolve continuously, initially by analogy to these contexts.<sup>105</sup>

4.15 Recent judgments suggest that values such as “autonomy”, “dignity” and “liberty” will inform, and be of importance to, this evolutionary process.<sup>106</sup> No doubt, these notions argue, at least very broadly, for a wider protection of individual personality than currently exists in private law. They do not, however, in themselves prescribe useful practical limits that ought to be drawn to privacy protection.<sup>107</sup> Their content is even less precisely

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101. See Arts Law Centre of Australia, *Submission*, 8; Associate Professor Mark Lunney, *Submission*, 4, 5.

102. See para 4.3-4.4.

103. In the US, the tort of disclosure of private facts naturally raises the question of what facts are private (see CP 1, [4.17]-[4.42], especially [4.22]-[4.26]), while the tort of intrusion on seclusion relates to an interference with the solitude or seclusion of a person or their private affairs or concerns: see CP 1, [4.43]-[4.55], especially [4.48]-[4.50].

104. See para 5.23-5.28.

105. Consider further the taxonomy of privacy proposed by D Solove, *Understanding Privacy* (Harvard UP, 2008) ch 5.

106. See eg, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [43] (Gleeson CJ); [125] (Gummow and Hayne JJ); *Campbell v MGN Ltd* [2004] 2 AC 457, [51] (Lord Hoffman); *Douglas v Hello! Ltd* [2001] QB 967, [126] (Sedley LJ). See also *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281, [148].

107. See M Hickford, *A Conceptual Approach to Privacy* (New Zealand Law Commission, Miscellaneous Paper 19, 2007) ch 6.

definable than that of privacy itself.<sup>108</sup> Moreover, in the context of contested claims between two individuals, their use may simply beg the question whether it is the autonomy, liberty or dignity of the plaintiff or of the defendant that needs protection in the circumstances. We explain below how the protection of privacy must be balanced against competing public interests, especially the interest in freedom of expression.<sup>109</sup> Yet freedom of expression can itself have similar objectives to privacy in terms of autonomy and liberty in so far as it “promotes the self-fulfilment of individuals in society”.<sup>110</sup> Where this is the case, a more incisive and targeted analysis of the legal and policy issues that arise is called for beyond appeals to general values.

## The proposed statutory cause of action

4.16 The statutory cause of action proposed in our draft Bill sets the framework for a cause of action that generally protects privacy in private law, and provides the trigger for the courts to develop a legal concept of privacy in that context. The Bill assumes that, within that context, “privacy” can, and should, speak for itself. This is no different to many other concepts in law. To suggest that it is impossible to protect privacy generally in the manner proposed in our Bill because the concept cannot be precisely defined is to succumb to what Lord Reid once described as “the perennial fallacy that because something cannot be cut and dried or lightly weighed or measured therefore it does not exist”.<sup>111</sup>

4.17 The argument, put forward in some submissions,<sup>112</sup> that this development should be left entirely to the courts, is simply unpersuasive in the light of the failure by the courts to date to develop a general cause of action for invasion of privacy. Moreover, the

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108. See C Doyle and M Bagaric, *Privacy Law in Australia* (Federation Press, 2005) ch 2.

109. See para 5.14-5.20.

110. *R v Secretary of State for the Home Department, Ex p Simms* [2002] 2 AC 115, 126 (Lord Steyn). See also *Campbell v MGN Ltd* [2004] 2 AC 457, [22] (Lord Nicholls).

111. *Ridge v Baldwin* [1964] AC 40, 64-65. His Lordship was dealing with the argument that natural justice is so vague as to be meaningless. He continued: “The idea of negligence is equally insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular circumstances are equally capable of serving as tests in law, and natural justice as it has been interpreted in the courts is much more definite than that”.

112. Arts Law Centre of Australia, *Submission*, 7; Law Society of NSW, Litigation Law and Practice and Business Law Committees, *Submission*, 5-6; Law Council of Australia, Business Law Section, Media and Communications Committee and Working Party on Privacy Law, *Submission*, 9-12. Other submissions argued that the development of a general cause of action for invasion of privacy should occur by statute: Office of the Privacy Commissioner, Australia, *Submission* 2-3; Associate Professor Mark Lunney, *Submission*, 3-4; Legal Aid Commission of NSW, *Submission*, 3; Public Interest Advocacy Centre, *Submission*, 8-10

argument overlooks both the doctrinal difficulties and the general undesirability of accommodating such an action within the law of torts<sup>113</sup> or as a breach of confidence.<sup>114</sup>

## 5. WHEN SHOULD A GENERAL CAUSE OF ACTION PROTECT PRIVACY?

### Introduction

5.1 Two matters are of central importance in determining whether or not a claim for invasion of privacy should lie. First, there must be facts in respect of which, in all the circumstance of the case, there is a reasonable expectation of privacy on the part of the plaintiff. Secondly, the claim to the protection of privacy must not, in all those circumstances, be of lesser value than the claim that some other competing public interest has to application in the same circumstances. The first matter, whose existence is a necessary condition to the action, focuses on the nature of the claim. The second balances that claim against competing interests.

5.2 Clause 74(2) of our proposed legislation requires the plaintiff to satisfy both matters before an action for invasion of privacy will lie. While the two matters are analytically distinct,<sup>115</sup> clause 74(2) does not require that consideration of reasonable expectation of privacy be made independently of the balancing exercise in determining actionability.<sup>116</sup> This recognises that the two matters are not always clearly separable. Thus, a competing public interest may be of such force in the circumstances that the case will focus principally on it in reaching a conclusion that no reasonable expectation of privacy arises.<sup>117</sup> Likewise, where there are no, or only weak, competing public interests, the case will focus on the existence of a reasonable expectation of privacy in determining actionability.

5.3 The inquiry into a reasonable expectation of privacy, as well as the evaluation of the force of competing interests, combine to place heavy emphasis on an incisive analysis of the circumstances of the particular case – frequently referred to in the English cases as

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113. See para 5.54-5.57.

114. See para 4.8, 4.12.

115. See especially R Wacks, *Personal Information: Privacy and the Law* (Clarendon Press, 1989), 158-9.

116. Compare the approach in English law within the framework of the *Human Rights Act 1998* (UK), which requires that the privacy rights in art 8 of the European Convention be balanced against the competing rights in freedom of expression contained in art 10: see *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221, art 10 (entered into force 3 September 1953). Balancing can take place only if art 8 is engaged in the first place, and it is to this question that the reasonable expectation of privacy test is directed: see *McKennitt v Ash* [2008] QB 73, [11]; *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, [24] (v).

117. Consider examples in American Law Institute, *Restatement of the Law, Second, Torts 2d* (1977) vol 3, §652D, comment (h).

an “intense focus” on the facts<sup>118</sup> – making it necessary to treat with caution generalisations about when an alleged invasion of privacy will, or will not, be actionable. Commenting on this in the context of balancing the right of privacy and the right of freedom of expression under the European Convention, Justice Eady has said:

*[The] modern approach of applying an “intense focus” is ... obviously incompatible with making broad generalisations of the kind to which the media often resorted in the past such as, for example, “Public figures must expect to have less privacy” or “People in positions of responsibility must be seen as ‘role models’ and set us all an example of how to live upstanding lives”. Sometimes factors of this kind may have a legitimate role to play when the “ultimate balancing exercise” comes to be carried out, but generalisations can never be determinative. In every case “it all depends” (i.e. upon what is revealed by the intense focus on the individual circumstances).<sup>119</sup>*

## A reasonable expectation of privacy

5.4 Clause 74(2) of the Bill makes a defendant liable where his or her conduct (which includes the publication of matter)<sup>120</sup> invades the privacy that the plaintiff was reasonably entitled to expect in all the circumstances. In our view, this formula embodies the objective test that most naturally states the general circumstance in which an individual’s privacy should be protected both as a matter of language and as a matter of common sense. The formula has the added advantage that it does not limit the protection of privacy to particular matters and is inherently flexible, a feature that is important in an area that must remain responsive to technological and social change.<sup>121</sup> It is a formula that features, either as the test, or as part of a test, of actionability in constitutional jurisprudence in the United States<sup>122</sup> and Canada;<sup>123</sup> in European human rights law;<sup>124</sup> and in private law cases in England,<sup>125</sup> New Zealand<sup>126</sup> and the United States.<sup>127</sup> Submissions supported the

118. The phrase comes from Lord Steyn’s speech in *Re S (a child)* [2005] 1 AC 593, [17].

119. *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [12]. See also at [98] where his Lordship makes a similar point about the reasonable expectation of privacy test.

120. Bill cl 73 (“conduct”).

121. Consider L Strahilevitz, “A Social Networks Theory of Privacy” (2005) 72 *University of Chicago Law Review* 919, 937. See also para 4.16.

122. Especially *Katz v United States* 389 US 347, 361 (1967) (Harlan J concurring) (for the purpose of identifying privacy interests protected by the Fourth Amendment).

123. *Hunter v Southam* [1984] 2 SCR 145 (for the purpose of interpreting the protection against “unreasonable search and seizure” in the Canadian Charter of Rights and Freedoms).

124. Eg, *Halford v United Kingdom* (1997) 24 EHRR 523, [45]. See also H Gómez-Arostegui, “Defining Private Life Under the European Convention of Human Rights by Referring to Reasonable Expectations” (2005) 35 *California Western International Law Journal* 153, 162.

125. Eg, *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, [35] (Clark MR, Laws and Thomas LJ) (summarising the approach in the principal English cases).

formula.<sup>128</sup> Moreover, it is probably the test that is applied by most media organisations in the United Kingdom to determine whether or not the publication of particular matter would invade an individual's privacy.<sup>129</sup>

5.5 The principal criticism levelled at the test, mainly in the United States, is that it does not address what the law *should* protect as private, as opposed to simply determining what *is* private. This, it is argued, carries the danger that the test will simply confirm existing expectations of privacy, which may be modest in a social environment that conditions people to accept privacy intrusions that ought not to be tolerated. A related criticism is that the determination of the existence of a reasonable expectation of privacy at any particular point of time or in any particular circumstance seems to call for an empirical (rather than a judicial) analysis of what society and people treat as private.<sup>130</sup> These criticisms are misplaced. The question whether there is a reasonable expectation of privacy involves a normative judicial finding focusing both on what the judge understands, in the light of claims currently pressed in court, as the current demand for the *legal* protection of privacy and on whether the *law* ought to protect privacy in the particular circumstances. This is undoubtedly a question of fact,<sup>131</sup> a “classic jury question”, as Justice Callinan, writing extra curially, has described it.<sup>132</sup> Its determination involves “the making of value judgments of the kinds that courts are regularly required to make in other fields of the law”<sup>133</sup> – such as the determination of the existence and breach of a duty of care in negligence, or of what amounts to misleading or deceptive conduct for the purposes of s 52 of the *Trade Practices Act 1974* (Cth).

*Should the test be qualified?*

5.6 A qualification of the reasonable expectation of privacy formula is suggested in a number of authorities, in particular *Hosking v Runting*,<sup>134</sup> in which the New Zealand Court of Appeal held that the common law of New Zealand recognises a tort of unauthorised publication of private and personal information. The Court held that the action is available if: (1) facts exist in respect of which there is a reasonable expectation of privacy; and (2)

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126. *Hosking v Runting* [2005] 1 NZLR 1, [117] (tort of public disclosure of private facts).

127. Eg, *Hoskings v Howard* 971 P 2d 1135, [10], [11] (1980) (torts of seclusion and public disclosure of private facts).

128. Associate Professor Mark Lunney, *Submission*, [4]-[5] regards it as probably the best test that can be devised. See also Public Interest Advocacy Centre, *Submission* [4.5]; Office of the Privacy Commissioner, Australia, *Submission* 3-4.

129. Mr John Battle (Media Lawyer with ITN, London), *Consultation* 15 November 2007.

130. See D Solove, *Understanding Privacy* (Harvard UP, 2008) 72-4, and literature there cited. The Legal Aid Commission of NSW, *Submission* 6-7, also expresses concerns that the objective test can lead courts to disregard too readily the results of public opinion surveys, but to accept too readily, and to acquiesce in, the inevitability of encroaching restrictions on privacy suggested by modern technology.

131. *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, [41].

132. I Callinan, “Privacy, Confidence, Celebrity and Spectacle” (2007) 7 *Oxford University Commonwealth Law Journal* 1, 12.

133. I Callinan, 12. See also *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB).

134. [2005] 1 NZLR 1.

publicity is given to those facts that would be considered highly offensive to an objective reasonable person.<sup>135</sup> The second part of the test is drawn from American jurisprudence.<sup>136</sup> In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,<sup>137</sup> Chief Justice Gleeson referred to the second half of the test as “in many circumstances a useful practical test of what is private”, rephrasing it as a “requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities”.<sup>138</sup>

5.7 However phrased, the second half of the test effectively qualifies a test based simply on a reasonable expectation of privacy. A reasonable expectation of privacy can exist even though the invasion is not highly offensive to a reasonable person. The decision of the High Court of New Zealand in *Andrews v TVNZ*<sup>139</sup> illustrates the point. Television New Zealand Ltd screened footage taken at the aftermath of a motor accident that had occurred on a public road. The victims of the accident were a husband and wife. The footage, which appeared in a program portraying the lives and daily work of fire fighters, included expressions of support and love that passed between the couple as they were being rescued. The couple, whose identify the footage sought unsuccessfully to obscure, were greatly distressed when they were forced to relive the trauma of the accident when they viewed the program, of which they had no notice, at a party with friends and other people who were not known to them. They sued for invasion of privacy. Justice Allan held that the couple had a reasonable expectation of privacy in respect of the intimate conversations that passed between them (in the sense that although the conversations were overheard by those in the immediate vicinity of the accident, they could reasonably expect that no additional publicity would be given to them). However, the subsequent publication of those conversations could not be regarded as highly offensive to an objective reasonable person (as they might have been if the program had mentioned that the driver of the vehicle was intoxicated). Therefore, no cause of action lay for invasion of privacy.

5.8 Following the approach of the New Zealand Court of Appeal, the ALRC, retreating from the position tentatively adopted in its Discussion Paper,<sup>140</sup> has recommended that a statutory cause of action for invasion of privacy should require a claimant to establish not only that, in the circumstances, there is a reasonable expectation of privacy, but also that the act or conduct complained of is highly offensive to a person of ordinary sensibilities.<sup>141</sup> The ALRC argues that qualifying the reasonable expectation of privacy in this way sets an appropriately high threshold for the cause of action, ensuring that it will only succeed where “the defendant’s conduct is thoroughly inappropriate and the complainant suffered

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135 *Hosking v Runting* [2005] 1 NZLR 1, [117].

136 American Law Institute, *Restatement of the Law, Second, Torts 2d* (1977) vol 3, §652B (intrusion on seclusion), 652D (publicity given to private life), 652E (false light).

137 (2001) 208 CLR 199, [42].

138. Rephrasing the requirement in this way follows W L Prosser, “Privacy” (1960) 48 *California Law Review* 383, 396-7: see *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [41].

139 Unreported, High Court of New Zealand, Allan J, 15 December 2006.

140. ALRC, R 108, [74.134]-[74.135]. See also ALRC, DP 72, [5.80], and Proposal 5-2.

141. ALRC, R 108, Recommendation 74-2.



serious harm as a result”.<sup>142</sup> The ALRC also sees advantages in the test in creating consistency with the common law of New Zealand;<sup>143</sup> and in allaying the fears of some its consultees (for example, street artists and photographers) who are concerned that, for example, a person captured in a painting or photograph of a street scene would be able to mount a cause of action.<sup>144</sup>

5.9 We do not support the particular qualification of the reasonable expectation of privacy test adopted by the New Zealand Court of Appeal and endorsed by the ALRC. Lord Hope explained in *Campbell v MGN Ltd*, that the purpose behind the qualification is to underline the point that “[t]he law of privacy is not intended for the protection of the unduly sensitive”.<sup>145</sup> The nature of the conduct that is asserted to constitute an invasion of privacy must, of course, always be relevant to the determination of whether, in all the circumstances, there is a reasonable expectation of privacy, which, as we have pointed out above, is an objective test.<sup>146</sup> The fact that a reasonable person of ordinary sensibilities would consider the conduct offensive is a factor relevant to that determination, as cl 74(3)(a)(ii) of the draft Bill makes clear. A plaintiff whose reaction to the defendant’s conduct arose principally out of undue sensitivity to that conduct would simply not, in our view, generally be able to show that a reasonable person of ordinary sensibilities would find the conduct offensive in the circumstances, and thus to establish a reasonable expectation of privacy. Such conduct would not support a claim for invasion of privacy because it would be “trivial in nature”.<sup>147</sup>

5.10 To underline this, we point out that we agree with the ALRC that the following are cases in which a plaintiff should be able to mount a claim for invasion of privacy, yet we reach that conclusion without having to rely on the “highly offensive” qualification:<sup>148</sup>

*“1. Following the break-up of their relationship, Mr A sends copies of a DVD of himself and his former girlfriend (B) engaged in sexual activity to Ms B’s parents, friends, neighbours and employer.*

*2. C sets up a tiny hidden camera in the women’s toilet at his workplace, capturing images of his colleagues that he downloads to his own computer and transmits to a website hosted overseas, which features similar images.*

142. ALRC, R 108, [74.135].

143. ALRC, R 108, [74.135]. But note that there is some indication that the Supreme Court of New Zealand is impatient with the test. In *Rogers v TVNZ* [2007] NZSC 91, McGrath J (who delivered the principal judgment) noted that the Supreme Court was prepared simply to accept, as had the parties, the existence of the privacy tort asserted by the majority of the Court of Appeal in *Hosking v Runting* [2005] 1 NZLR 1, while the dissenting judgments of Elias CJ and Anderson J suggest that *Hosking* cannot be regarded as settling the law in New Zealand: [23], [145]. Elias CJ in particular questioned the “highly offensive” qualification: [25].

144. ALRC, R 108, [74.136].

145. *Campbell v MGN Ltd* [2004] 2 AC 457, [94].

146. See para 5.5.

147. See *McKennitt v Ash* [2008] QB 73, [59]; *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, [43] (xi).

148. ALRC, R 108, [74.139] (footnotes omitted).

3. *D works in a hospital and accesses the medical records of a famous sportsman, who is being treated for drug addiction. D makes a copy of the file and sells it to a newspaper, which publishes the information in a front page story.*

4. *E runs a small business and uses F&Co Financial Advisers to handle her tax affairs and financial advice. Staff at F&Co decide to do a bit of 'spring cleaning', and a number of files are put out in a recycling bin on the footpath – including E's file, which contains her personal and contact details, tax file and ABN numbers, and credit card details. A passerby grabs the file and, unbeknown to E, begins to engage in identity theft: removing money from E's bank account, using her credit cards and applying for additional credit cards in E's name."*

5.11 More fundamentally, we regard any qualification of the "reasonable expectation of privacy" test as unwarranted in principle. The determination of an invasion of privacy must frequently be made in factual situations that require the privacy interest in question to be weighed in the balance against competing interests.<sup>149</sup> If, in the circumstances, the balancing of those interests favours the privacy interest as opposed to the other interest(s) in question, the privacy interest ought, in principle, to be protected. To diminish its importance by enacting that it cannot be actionable unless the invasion is highly offensive to a person of normal sensibilities may, arguably, be appropriate in the United States, at least where the competing interest is freedom of speech, in view of the strong protection afforded that freedom in the First Amendment. Arguably too, the same result is appropriate in New Zealand where freedom of expression, but not privacy, receives protection in the *New Zealand Bill of Rights Act 1990* (NZ).<sup>150</sup> Apart from the constitutional implication of freedom of political communication, which must necessarily override privacy (and other) interests where it applies,<sup>151</sup> we can think of no reason why in Australian law freedom of expression or any other interest should be privileged above privacy, just as we see no reason why privacy itself should be privileged above these other interests.

5.12 An argument, made in a number of submissions, is that the introduction of a statutory cause of action for invasion of privacy would have precisely the effect of privileging privacy in this way, diminishing, in particular, the force of freedom of expression.<sup>152</sup> This is because privacy would be recognised by, and enshrined in, legislation, while the same status would not be accorded to freedom of expression, as it generally is in human rights statutes. However, our draft legislation makes it clear both in its objects clause<sup>153</sup> and in its requirement that any relevant public interest must be taken

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149. See para 5.14-5.20.

150. *New Zealand Bill of Rights Act 1990* (NZ) s 14. See also *Hosking v Runting* [2005] 1 NZLR 1, [130] (asserting that limits on freedom of expression (which itself limits privacy protection) are only those justified in a free and democratic society, invoking the language of the *New Zealand Bill of Rights Act 1990* (NZ) s 5) (Gault and Blanchard JJ).

151. See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

152. See para 3.3, and ALRC, R 108, [74.91].

153. Bill, cl 72(a).

into account in determining whether or not there has been an invasion of privacy,<sup>154</sup> that privacy does not take precedence over freedom of expression (or any other public interest). Put simply, the two interests exist in a level playing field.

5.13 Moreover, legislation such as that we propose may be necessary to level the playing field between these two interests. This is because freedom of expression seems to have much greater force at common law than privacy. “Freedom of expression”, the phrase used in international conventional law,<sup>155</sup> broadly encompasses all aspects of free speech, including freedom of the press.<sup>156</sup> In this broad sense it is a liberty that “has long enjoyed special recognition at common law ... as ‘essential to the nature of a free State’”.<sup>157</sup> While freedom of expression has never been regarded as absolute,<sup>158</sup> it is a powerful force when balanced against other competing interests.<sup>159</sup> For example, in private law it has resulted in the near impossibility of obtaining an interlocutory injunction to restrain the publication of alleged defamatory matter,<sup>160</sup> and in the inability of local councils to sue in defamation.<sup>161</sup> Even if Lord Hoffman’s well-known aphorism that freedom of speech is “a trump card which always wins”,<sup>162</sup> which should not be taken out

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154. Bill, cl 74(2).

155. *Universal Declaration of Human Rights*, GA Res 217A(III), UN Doc A/811, art 19 (adopted 10 December 1948); *International Convention on Civil and Political Rights*, adopted 16 December 1966, 999 UNTS 171, art 19 (entered into force 23 March 1976); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221, art 10 (entered into force 3 September 1953).

156. See generally R Wacks, *Privacy and Press Freedom* (Blackstone Press, 1995) ch 2.

157. *Evans v State of New South Wales* [2008] FCAFC 130, [74] (French, Branson and Stone JJ), the embedded quotation coming from W Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1769) vol 4, 151. The historical background is summarised in *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57, [31] (Gleeson CJ and Crennan J). The freedom is sometimes spoken of as a “common law principle” (see *A v B plc* [2003] QB 195, [11] (iv) (Lord Woolf CJ)), but this may be too strong: see *Wainwright v Home Office* [2004] 2 AC 406, [31] (Lord Hoffman). See also T Allan, “The Common Law as Constitution: Fundamental Rights and First Principles” in C Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 146, especially 148 (identifying constitutional rights at common law).

158. Thus W Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1769) vol 4, 151-2, followed the passage quoted in n 155 with this: “Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity”.

159. For the contexts in which freedom of expression has operated, see M Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, 2000) 2-13.

160. See *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57.

161. *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680.

162. *R v Central Independent Television plc* [1994] Fam 192, 204 (Hoffman LJ).

of context,<sup>163</sup> is overstated,<sup>164</sup> we know of no examples at general law where privacy has, of itself, come up trumps in the same way as freedom of expression.<sup>165</sup>

## Balancing matters of public interest

5.14 The potential protection of privacy in a given situation may conflict with other fundamental values – such as security, safety, health, transparency, open justice and free speech – that have a claim to application in that particular situation. Such conflicts also occur in other areas of law. For example, in breach of confidence cases, claims to confidentiality may have to be determined in the face of competing claims to the disclosure of matters relating to national security,<sup>166</sup> the commission of criminal conduct,<sup>167</sup> potential wrongful convictions,<sup>168</sup> threats to public health,<sup>169</sup> or threats to public safety.<sup>170</sup> In such cases, the competing claims are set up as a defence to an obligation of confidence that is prima facie enforceable.<sup>171</sup>

5.15 In our Consultation Paper we drew a distinction between the operation of public interest as a defence in breach of confidence cases and the force of public interest in the determination of an invasion of privacy.<sup>172</sup> We pointed out that a statutory cause of action for invasion of privacy did not necessarily have to create a prima facie enforceable obligation, and that the statutory model that we had in mind was unlikely to do so. Rather, we expressed the view that in determining whether or not there had been an invasion of privacy for the purposes of our proposed cause of action, a court should be required at the outset to determine whether competing public interests outweighed the privacy interest asserted. Clause 74(2) gives effect to this view by providing that in determining whether an individual's privacy has been invaded for the purposes of an action for invasion of

163. *Douglas v Hello! Ltd* [2001] QB 967, [136]-[137] (Sedley LJ).

164. And, in the context of human rights legislation, dated: *Mosely v News Group Newspapers Ltd* [2008] EWHC 1777 [10] (the language of “trumping” is no longer used) (Eady J).

165. The nearest examples are the English cases in which the police, in excess of their statutory authority, have invaded private property and, in doing so, also invaded the plaintiff's privacy. However, the cases illustrate the strong long-standing protection given to a person's home rather than to his or her privacy, notwithstanding the references to the plaintiff's “right to privacy” in some judgments: see *Morris v Beardmore* [1981] AC 446, especially 464 (Lord Scarman); but compare *R v Kahn (Sultan)* [1997] AC 558.

166. See, eg, *A v Hayden (No 2)* (1984) 156 CLR 532. See also R Toulson and C Phipps, *Confidentiality* (2nd ed, Sweet & Maxwell, 2006) ch 5; R Meagher, D Heydon and M Leeming, *Meagher, Gummow and Lehane's Equity Doctrine and Remedies* (4th ed, LexisNexis Butterworths, 2002) [41-120].

167 See *A v Hayden (No 2)* (1984) 156 CLR 532; *Allied Mills Ltd v Trade Practices Commission* (1981) 55 FLR 125.

168. *Lion Laboratories Ltd v Evans* [1985] QB 526.

169. *W v Egdell* [1990] Ch 359.

170. *Hubbard v Vosper* [1972] 2 QB 84 (teachings of Scientology).

171. See R Toulson and C Phipps, *Confidentiality* (2nd ed, Thomson, 2006), ch 6.

172. CP 1, [7.47]-[7.48].

privacy, a court must have regard to any relevant public interest (including the interest of the public to be informed about matters of public concern).

5.16 Two consequences flow from this. First, the asserted interest in privacy is balanced against the force of relevant competing interests to determine which interest should, in the circumstances, be preferred to the other(s). As there is no general basis in Australian law for privileging any particular interest above others,<sup>173</sup> the balancing must start from the premise that no one interest takes precedence over others. Rather, an incisive analysis must be made of the comparative importance of the specific interests being claimed, taking into account the justifications for interfering with or restricting each interest, and having regard to the extent to which the application of each interest would, in the circumstances, be proportionate to its legitimate aim.<sup>174</sup> In invasion of privacy cases, a judge may approach this task by asking whether, in the circumstances, the degree of intrusion into the plaintiff's privacy was proportionate to the public interest that the intrusion supposedly serves.<sup>175</sup> For example, in *Shulman v Group W Productions Inc*, the defendants screened footage obtained at the aftermath of a serious road accident that left the plaintiff a paraplegic.<sup>176</sup> Although the plaintiff was only identified by her first name, the details of her condition were recorded as well as conversations between her and the rescue team, including a statement that she just wanted to die. The footage appeared in a television program that dealt with the challenges faced by emergency workers dealing with serious motor accidents. The Supreme Court of California held that the degree of intrusion into the plaintiff's privacy, which was essential to the narrative of the program, was not disproportionate to the public interest in the rescue and medical treatment of accident victims, a service that any member of the public may one day need. In contrast, in *Andrews v TVNZ*, which has been discussed in para 5.7 above, the public interest in the cost of road accidents and the impact of such accidents on rescue teams less clearly justified the intrusion into the plaintiffs' privacy in the aftermath of a road accident where the footage appeared in a television series that focused on the lives of fire fighters and their work and that was aimed at providing a level of entertainment. Nevertheless, had he

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173. See para 5.11.

174. This paraphrases a passage in Lord Steyn's speech in *Re S (a child)* [2005] 1 AC 593, [17], but necessarily refers to "interests" rather than "rights" and is not intended to make any assumption that a determination of a reasonable expectation of privacy will be made before the balancing exercise takes place (compare para 5.2, f 116). Although there is undoubtedly a danger in importing the notion of proportionality from constitutional and human rights contexts in which it more easily operates (consider *Roach v Electoral Commissioner* [2007] HCA 43, [17]-[20] per Gleeson CJ), it must be remembered that the notion of proportionality is used in a number of senses (see R Clayton and H Tomlinson, *The Law of Human Rights* (Oxford UP, 2000) [6.40]-[6.85]), and, as used here is capable of application at general law: see especially *Attorney General v Guardianship Newspapers Ltd (No 2)* [1990] 1 AC 109, 283 (interference with freedom of expression must be proportionate to the legitimate aim pursued both under the European Convention and in English law) (Lord Goff).

175. *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [14].

176. *Shulman v Group W Productions Inc* 955 P 2d 469 (1998).

been forced to decide the question, Justice Allan would have allowed the public interest to prevail since all it had to overcome in the circumstances was a weak interest in privacy.<sup>177</sup>

5.17 Secondly, because the asserted countervailing public interest is not a defence but needs to be put in the balance at the outset, the defendant does not bear the burden of establishing it. Rather, the onus rests on the plaintiff to establish that, in the circumstances, the privacy interest asserted outweighs the public interest asserted by the defendant.<sup>178</sup> Even in those systems of law in which public interest is a defence to an action for invasion of privacy, the defence applies to the extent to which it outweighs the privacy interests in question. Principles of proportionality thus remain relevant.<sup>179</sup>

5.18 Legal principle requires that plaintiffs bear the onus of establishing their case. It is appropriate, in our view, that, as part of establishing an invasion of privacy, plaintiffs should demonstrate at the outset that their claim to privacy is not outweighed by a competing public interest. Quite simply, privacy only needs protection if it is not outweighed, in the circumstances, by such a competing interest. A criticism of this approach is that it fails to give sufficient weight to privacy. The argument is that although privacy interests are theoretically weighed against competing public interests to determine which has the greater claim to application in the circumstances, competing public interests (particularly in freedom of expression) will always trump privacy by reason of their overpowering force.<sup>180</sup>

5.19 In our view, there are three answers to this. First, to the extent to which the argument is based on the inherent weakness of “private” interests as compared to “public” interests, it unjustifiably assumes a clear distinction between the two types of interest and puts a premium on the distinction.<sup>181</sup> Clause 72(a) of our proposed legislation makes it clear that the protection of individual privacy is both a societal and an individual interest, recognising that “[t]he modern perception is that there is a public interest in respecting personal privacy”.<sup>182</sup> Secondly, as already pointed out, the legislation makes it clear that privacy has no priority over other interests; nor do other interests have priority over

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177. See *Andrews v TVNZ* (Unreported, High Court of New Zealand, Allan J, 15 December 2006), [91]-[94]. Consider also *Rogers v Television New Zealand* [2007] NZSC 91 (where the public interest in open justice and freedom of expression overcame the attempt by a person acquitted of murder to suppress publication of his voluntary confession to the murder even where the confession was held inadmissible at trial, since a privacy interest in a voluntary confession can only be weak).

178. Consider *Venables v News Group Newspapers Ltd* [2001] Fam 430, [44] (onus of proving that freedom of expression should be restricted under the European Convention is firmly upon the applicant).

179. See especially *Hosking v Runting* [2005] 1 NZLR 1, [134] (Gault and Blanchard JJ), [257] (Tipping J).

180. See para 5.13.

181. See D Solove, *Understanding Privacy* (Harvard UP, 2008) 89-98. For general criticism of the restriction of rights by the public interest in human rights instruments, see D Meyerson, “Why Courts Should not Balance Rights against the Public Interest” (2007) 31 *Melbourne University Law Review* 873.

182. *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [130] (Eady J).

privacy.<sup>183</sup> In this respect, our proposed legislation approximates the position in English law.<sup>184</sup> Thirdly, the experience of English law is that privacy interests are not as a matter of course sacrificed to, for example, interests in freedom of expression.<sup>185</sup> Rather, the interests are weighed in a sophisticated balancing process.<sup>186</sup>

#### *Freedom of expression*

5.20 It is apparent from examples already given that, in determining whether an alleged invasion of privacy is actionable or not, a principal competing public interest that courts will often have to take into account, particularly where the invasion consists of the publication of information, is freedom of expression. A general factor relevant to its force in any case is the type of speech involved. Whether or not it falls within the constitutional implication of freedom of political communication,<sup>187</sup> information relating to the economic, social or political condition of the country, or reflecting on matters that relate to the performance of their functions by politicians – even if such matter would otherwise be “private” (such as the sexual preferences of the politician)<sup>188</sup> – is unlikely to be actionable as an invasion of privacy. The free flow of such information is essential to the maintenance of a democratic polity. Nor is “intellectual” or “educational” speech likely to be actionable in view of the role it plays in developing the potential of individuals to participate in a democratic society. The same is true of “artistic speech”, whose originality and creativity contributes to the “dynamic society” that we value.<sup>189</sup>

### Factors relevant to the determination of actionability

5.21 Clause 74(3)(a) lists the matters that the court must take into account in determining whether or not there has been an actionable invasion of an individual’s privacy. These matters direct attention to eight questions:

- is the subject matter of the complaint private or not (cl 74(3)(a)(i))?
- is the nature of the invasion such as to justify an action (cl 74(3)(a)(ii))?
- does the relationship between the parties affect actionability (cl 74(3)(a)(iii))?

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183. See para 5.11, 5.16.

184. Note that the English courts have rejected the argument that s 12 of the *Human Rights Act 1998* (UK) (which requires the court to have regard to certain matters where it is considering granting relief that could affect the Convention right to freedom of expression) has the effect of privileging freedom of expression above other Convention rights: see especially *Douglas v Hello! Ltd* [2001] QB 967, [136]-[137] (Sedley LJ); *Venables v News Group Newspapers Ltd* [2001] Fam 430, [34]-[44] (Butler-Sloss P).

185. Consider especially the decision of the English Court of Appeal in *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446.

186. See para 5.16.

187. See M Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, 2000) ch 2.

188. See para 5.33-5.34.

189. See *Campbell v MGN Ltd* [2004] 2 AC 457, [148] (Baroness Hale). Consider also *Von Hannover v Germany* (2004) 40 EHRR 1, [60], [63], [76].

- does the claimant's public profile affect actionability (cl 74(3)(a)(iv))?
- does the claimant's vulnerability affect actionability (cl 74(3)(a)(v))?
- does any other conduct of the claimant and the defendant affect actionability (cl 74(3)(a)(vi))?
- what effect has the conduct had on the claimant (cl 74(3)(a)(vii))?
- does the defendant's conduct contravene a statutory provision (cl 74(3)(a)(viii))?

These matters are not exhaustive. Clause 74(3)(b) provides that the court may also taken account of any other matter that it considers relevant in the circumstances.

5.22 In this section we give examples of how these factors are likely to be relevant to invasions of privacy.

*The nature of the subject matter of the complaint*

5.23 Clause 74(3)(a)(i) provides that the court must take account of “the nature of the subject matter that it is alleged should be private”. Like the definition of privacy itself,<sup>190</sup> this begs a question to which it is impossible to provide a clear cut general answer, since, as Chief Justice Gleeson has pointed out, “[t]here is no bright line between what is private and what is not”.<sup>191</sup> If this is borne in mind, along with the danger of stating generalisations in a context that is so dependent on the facts of each individual case,<sup>192</sup> it is, nevertheless, possible to give some examples of what is, or is not, *likely* to be private. Chief Justice Gleeson did precisely this in *Lenah Game Meats* both in respect of certain types of information and in respect of certain types of activity.<sup>193</sup>

5.24 As regards information, his Honour said that the following information about a person is easily identifiable as private: that relating to health, personal relationships or finance.<sup>194</sup> Thus a doctor who mistakenly reveals the medical condition of a patient may invade that patient's privacy, as well as being liable to the patient in breach of contract.<sup>195</sup> Likewise publication of the details of therapy sessions at a named self-help group attended by an individual in order to address a drug dependency, would invade the individual's privacy because the details of the therapy are akin to private information in medical records and their publication may prejudice the individual's recovery.<sup>196</sup> The public interest may, however, conceivably dictate the publication even of medical

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190. See para 4.2-4.5.

191. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42].

192. See para 5.3.

193. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42].

194. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42].

195. Consider *Cornelius v De Taranto* [2001] EMLR 329.

196. *Campbell v MGN Ltd* [2004] 2 AC 457.



information;<sup>197</sup> for example, in the absence of statutory regulation, to warn persons at risk of contracting it, of a fatal disease that the defendant has.<sup>198</sup>

5.25 As regards personal relationships, information about sexual relationships is generally private, at least in the case of consensual relationships between adults. This obviously applies where the parties are (or were) married or are (or were) in a de facto relationship.<sup>199</sup> It also generally applies to adulterous relationships,<sup>200</sup> and to situations where sexual services are paid for.<sup>201</sup> The information would not, however, be private if the public interest in disclosure of the sexual relationship outweighed the plaintiff's interest in privacy in the circumstances. Examples include where the relationship has led to corrupt favouritism,<sup>202</sup> where the Minister for War in the government shares a mistress with a diplomat or defence attaché of a foreign and hostile State,<sup>203</sup> and where the sexual practices in issue reveal an aspect of the claimant's character that is at odds with a previously stated public position and/or question the claimant's suitability for the public position that the claimant now occupies.<sup>204</sup> The public has no interest, however, in a publication that is at most titillating, such as the identification of the plaintiff as the victim of a rape.<sup>205</sup>

5.26 Activities that are likely to be private are, in a general sense, those that "a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved".<sup>206</sup> Examples of behaviour that would offend such standards include secretly observing or filming individuals having a shower<sup>207</sup> or

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197. Consider *Campbell v MGN Ltd* [2004] 2 AC 457, [157] (Baroness Hale).

198. Compare *PD v Harvey* [2003] NSWSC 487 (HIV status of a partner).

199. Consider *Giller v Procopets* [2008] VSC 236.

200. *CC v AB* [2006] EWHC 3083 (QB) (where a "celebrity" claimant obtained an interim injunction restraining publication of the details of his adulterous affair with the defendant's wife). Compare *A v B plc* [2003] QB 195 (where freedom of expression defeated the attempt of a professional footballer, a married man, to restrain the publication by two women of the short-term extra-marital affairs he had had with them).

201. *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB).

202. *Campbell v MGN Ltd* [2004] 2 AC 457, [60] (Lord Hoffman).

203. *CC v AB* [2006] EWHC 3083 (QB), [37] (Eady J, referring to the Profumo affair).

204. *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [122].

205. Consider *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281.

206. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42].

207. Consider *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443; *Ettingshausen v Australian Consolidated Press Ltd* (Unreported, Supreme Court of New South Wales, Common Law Division, No 12807/91, Hunt J, 10 February 1993) (defamatory publication of surreptitiously obtained photograph of a prominent sportsperson taking a shower). Compare *McNamara v Freedom Newspapers Inc* 802 SW 2d 901 (1991) (First Amendment protected publication of photograph of athlete whose genitals were accidentally exposed while playing soccer).

going to the toilet;<sup>208</sup> stalking the plaintiff,<sup>209</sup> and filming, from a hidden camera, underneath the skirts of female passengers on public transport.<sup>210</sup>

5.27 An activity is not private simply because it is not done in public, nor because it occurs on private property; rather, “it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford”.<sup>211</sup> For example, the installation of a video surveillance camera on private property to take pictures of what is happening in the backyard of an adjoining property is likely to invade the privacy of the adjoining landowner.<sup>212</sup> Nor does an activity lose its private nature simply because it occurs in a public place. While persons who appear in a published photograph of a crowd scene in a public place or appear incidentally in a photograph of that place cannot complain of an invasion of their privacy,<sup>213</sup> they will be able to do so where the public place simply formed the background of the photograph and they constitute the real subject matter of the photograph.<sup>214</sup>

5.28 There is a danger of assuming that some activity or matter is necessarily public. For example, it may seem obvious that a claim for invasion of privacy cannot arise from the publication of information that has already been disclosed or is already publicly available (as where it appears in a court record).<sup>215</sup> However, this fails to recognise that information in the public domain is still capable of remaining within the private sphere of the claimant. The disclosure of the information (by the claimant or a third party) may have been limited to a small circle of family or friends,<sup>216</sup> and the access to public records may be limited by logistical constraints and the requirement to pay a fee. We agree with the Hong Kong Law Reform Commission that the law should take account of the “practical obscurity” of personal information that is held in public registries<sup>217</sup> or that has already

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208. Consider *Workplace Surveillance Act 2005* (NSW) s 15.

209. See *Grosse v Purvis* [2003] QDC 151. Consider also *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13.

210. See CP 1, [1.51].

211. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42] (Gleeson CJ).

212. See *Raciti v Hughes* (1995) 7 BPR 14,837 (where the conduct amounted to an actionable nuisance).

213. Consider *Aubry v Éditions Vice-Versa Inc* [1998] 1 SCR 591, [58]-[59] (L’Heureux-Dubé, Gonthier, Cory, Iacobucci and Bastarache JJ), [27] (Lamer CJ, dissenting).

214. *Campbell v MGN Ltd* [2004] 2 AC 457, [122] (Lord Hope). Consider also *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, [50].

215. See Australia’s Right to Know, *Submission*, 24-25, arguing that publication of information in the public domain is fundamental and must be permitted; Arts Law Centre of Australia, *Submission*, 9.

216. As in *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281, [120]-[127] (where the issue was considered primarily in the context of a claim for breach of confidence).

217. Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy Report* (2004), [7.109].

been disclosed.<sup>218</sup> Therefore, the fact that information has already been disclosed or is publicly available should not of itself preclude a plaintiff from bringing a cause of action for invasion of privacy, a proposition supported in some submissions.<sup>219</sup> Thus, the United States Court of Appeals has held that information about an applicant's HIV status, contained in a discrimination claim lodged with the New York City Commission on Human Rights, did not become a matter of public record so as to bar an action for invasion of privacy when that information was disclosed in a press release.<sup>220</sup> Again, in *Tucker v News Media Ownership Ltd*,<sup>221</sup> the New Zealand Court of Appeal awarded an interim injunction preventing a magazine publisher from disclosing details of the plaintiff's prior criminal convictions: although publicly available, the information had become private in nature over time.<sup>222</sup>

#### *The nature of the invasion*

5.29 Clause 74(3)(a)(ii) of the draft legislation provides that a factor that the court must take into account in determining actionability is "the nature of the conduct concerned (including the extent to which a person of ordinary sensibilities would consider the conduct to be offensive)". For reasons outlined above, we are of the view that the plaintiff should not have to prove that the conduct is "highly offensive".<sup>223</sup> That view is supported in some submissions.<sup>224</sup>

5.30 Examples of conduct that may be offensive in the circumstances include:

- Harrassment;<sup>225</sup>
- The surreptitious nature of the defendant's conduct, such as publication of a photograph that has been taken furtively;<sup>226</sup>
- The improper use of the coercive power of the State.<sup>227</sup>

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218. See *Privacy Bill 2006* (Ireland) cl 4(3), which provides that the plaintiff's claim will not be defeated merely because, at the time of disclosure, the information was contained in a public register, or had already been disclosed. See also Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy Report* (2004), [7.139] (Recommendation 14).

219. Associate Professor Mark Lunney, *Submission*, 5-6 (pointing out that "public domain" is a relative concept); Public Interest Advocacy Centre, *Submission*, 15-16; Cyberspace Law and Policy Centre, *Submission*, 10.

220. *Doe v City of New York* 15 F 3d 264 (2d Cir. 1994).

221. *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716.

222. See Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy Report* (2004), [7.106].

223. See para 5.9-5.13.

224. Privacy Commissioner, Australia, *Submission*, 4; Public Interest Advocacy Centre, *Submission*, [4.6].

225. Consider *Grosse v Purvis* [2003] QDC 151.

226. Consider *Giller v Procopets* [2008] VSC 236; *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443; *Campbell v MGN Ltd* [2004] 2 AC 457.

227. Consider *Wainwright v Home Office* [2004] 2 AC 406.

*The relationship between the parties*

5.31 Clause 74(3)(a)(iii) requires the court to take into account in determining actionability the relationship between the parties to the action. The court may already have done so in identifying whether the subject matter of the complaint is private or not.<sup>228</sup> The matter is, however, usefully addressed separately because of its force in particular factual situations. We have already noted that the fact that the parties are in a domestic relationship affects the reasonable expectation of privacy that may arise in all the circumstances – for example, parties in a stable domestic relationship would ordinarily have an expectation of privacy in respect of a video they have made of their sexual activities. The nature of the parties' relationship may also affect the reasonable expectation of privacy that arises – for example, the fact that the parties are in an adulterous relationship.<sup>229</sup>

*The public profile of the claimant*

5.32 Clause 74(3)(a)(iv) requires the court to take into account in determining actionability the extent to which the claimant has a public profile. Like the relationship between the parties to the action, the court may already have considered the public profile of the claimant in identifying whether the subject matter of the complaint is private or not.<sup>230</sup> Again, however, the factor may usefully be addressed separately. It has featured prominently in recent case law overseas.

5.33 Plaintiffs who are in the public eye<sup>231</sup> will, obviously, not be able to mount successful claims for invasion of privacy that relate to the performance of their public role, whether the alleged invasion concerns the way in which a politician exercises his or her office, or the behaviour of a celebrity at an opening night. At the same time, “anyone, even if they are known to the public, must be able to enjoy a ‘legitimate expectation’ of protection of and respect for their private life”.<sup>232</sup> The controversial area in between these two extremes relates to the extent to which those in the public eye can claim that information about their everyday activities, ranging from simply walking down the street to going on a family outing, is private for the purposes of a cause of action protecting privacy.

5.34 The European Court of Human Rights regards such activities as generally protected by privacy law, while the position in English law (and perhaps in the laws of some of the member states of the European Union) is less clear.<sup>233</sup> Generally, and like

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228. See para 5.23-5.28.

229. See para 5.25.

230. See para 5.25.

231. It may be debatable whether or not the plaintiff is in the public eye or a “public figure”. Thus, the European Court of Human Rights would not consider Princess Caroline of Monaco such a figure since she is only the member of a reigning family, but has no relevant public functions (see *Von Hannover v Germany* (2005) 40 EHRR 1, [62], [72]-[75]). The English courts take a wider view: see *McKennit v Ash* [2008] QB 73, [65] (referring to clergymen, senior civil servants, surgeons and headmasters).

232. *Von Hannover v Germany* [2004] ERHR 1, [69].

233. See J Beatson, S Grosz, T Hickman, R Singh and S Palmer, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008) [4-237]-[4-238].

the ALRC,<sup>234</sup> we see no reason why there is anything essentially private in celebrities going about their everyday activities in public, as where, without more, they are photographed walking down a public street. In such a case, the celebrity's interest in publicity and the public's interest in what the celebrity wears or looks like justifies publication, even though, as Baroness Hale has said, "[i]t may not be a high order of freedom of speech".<sup>235</sup> The force of other factors may, however, dictate a different result, as, for example, where the photographer takes the picture surreptitiously in the course of conduct that amounts to harassment. Again, what look like "everyday activities" may well turn out to be an occasion (such as a family wedding) on which the celebrity ought to be able to protect his or her privacy. To adopt a different general starting point, as the European Court has done, is to assume that the press should only publish matter that contributes to a debate of general interest.<sup>236</sup> In our view, this goes too far.

*The vulnerability of the claimant*

5.35 Clause 74(3)(a)(v) requires the court to take into account in determining actionability the extent to which the claimant is or was in a position of vulnerability. A claimant may be vulnerable in respect of a claim for invasion of privacy for a number of reasons. For example, an intellectually disabled claimant may act in public in a manner that a person without such a disability would not. The publication of matter concerning that act may easily be seen to invade the claimant's privacy, as, for example, where an intellectually disabled claimant attempts to commit suicide in a public place.<sup>237</sup>

5.36 Children form a potentially vulnerable group of claimants. Australia has ratified the *Convention on the Rights of the Child*, which provides, in terms mirroring those of the *International Covenant on Civil and Political Rights*, that "[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy ...", the law being required to protect against such interference.<sup>238</sup> The Convention further states that the best interests of the child are a primary consideration in any action concerning children undertaken by a public institution, including a court.<sup>239</sup> We do not take this, or anything else in the Convention, to suggest that the cause of action for invasion of privacy proposed in our draft legislation will be inadequate to protect the privacy of children. In particular, and in agreement with the New Zealand Court of Appeal, we regard that action as flexible enough to accommodate the special vulnerability of children, whose private lives are seldom of concern to the public.<sup>240</sup>

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234. ALRC, R 108, [74.126].

235. *Campbell v MGN Ltd* [2004] 2 AC 457, [154] (Baroness Hale).

236. The European Court of Human Rights regards this as the "decisive factor": see *Von Hannover v Germany* [2004] ECHR 1, [60], [76].

237. Consider *Peck v United Kingdom* (2003) 36 EHRR 41.

238. *United Nations Convention on the Rights of the Child*, adopted 20 November 1989, 28 *International Legal Materials* 1448 (1989), art 16 (entered into force 2 September 1990).

239. *UN Convention on the Rights of the Child* art 3.

240. *Hosking v Runting* [2005] 1 NZLR 1, [130]-[147] (Gault and Blanchard JJ).

5.37 The issue has arisen in New Zealand and in England in cases with very similar facts, but different outcomes.<sup>241</sup> Both cases involved the claim by celebrity parents on behalf of their children to enjoin the publication of photographs taken of their children in a public street. A claim by an adult in these circumstances would not generally generate a reasonable expectation of privacy, even where that adult is a celebrity.<sup>242</sup> The New Zealand Court of Appeal could find nothing in such facts to compel a different result in the case of a child.<sup>243</sup> The English Court of Appeal disagreed, holding that “a child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication which the person who took or procured the taking of the photographs knew would be objected to on behalf of the child”.<sup>244</sup> The English Court of Appeal recognised that this general proposition would not apply where the child’s parents have courted publicity for the child to promote their own interest.<sup>245</sup> We agree with the approach of the New Zealand Court of Appeal as a starting point. However, we also recognise that there may be other circumstances, particularly circumstances related to the vulnerability of the child, that dictate a different conclusion, such as where there are concerns about the child’s physical safety.<sup>246</sup>

*The conduct of the claimant and the defendant*

5.38 Clause 74(3)(a)(vi) of the Bill provides that, in determining actionability, the court must take account of “the conduct of the individual and of the alleged wrongdoer both before and after the conduct concerned (including any apology or offer of amends made by the alleged wrongdoer)”. Two points need noting.

5.39 First, the clause requires the court to take account of the conduct of the parties before the conduct that constitutes the cause of action. The conduct preceding the cause of action may simply inform the instant cause of action. On the other hand, the preceding conduct may itself be independently actionable as an invasion of privacy. Take the case of an investigative journalist who obtains entry to the plaintiff’s house before publishing material that invades the plaintiff’s privacy. Where the publication and the prior entry to the plaintiff’s house both constitute invasions of the plaintiff’s privacy, the plaintiff’s claim will generally encompass both invasions. Where the publication constitutes an invasion, but the entry does not (because, for example, the plaintiff has consented to it) the entry may still constitute conduct that can inform the nature of the invasion constituted by the publication. However, where the publication itself is not actionable (because, for example, it is in the public interest that the material be published) the intrusion will also, no doubt, be in the public interest since it constituted the means by which the information was

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241. *Hosking v Runting* [2005] 1 NZLR 1; *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446.

242. See para 5.34.

243. *Hosking v Runting* [2005] 1 NZLR 1, especially [159]-[165].

244. *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, [57].

245. *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, [38].

246. *Hosking v Runting* [2005] 1 NZLR 1, [163].

obtained, although the intrusion may be actionable on other grounds (such as trespass).<sup>247</sup>

5.40 Secondly, the clause allows the court to take into account the conduct of the parties subsequent to the conduct that constitutes the cause of action. At common law the conduct that constitutes the cause of action completes that action and any subsequent conduct is generally relevant only to damages.<sup>248</sup> The clause specifically identifies offer of amends or apology as a factor potentially relevant to the defendant's liability. Offer of amends is relevant to liability in defamation in so far as refusal of a reasonable offer of amends provides the defendant with a defence to the action.<sup>249</sup> In contrast, an apology is only relevant in defamation in mitigation of damages,<sup>250</sup> and is otherwise irrelevant to the determination of civil liability at general law.<sup>251</sup> Whatever the strength of arguments that it should have a more general role in private law,<sup>252</sup> apology is, in our view, clearly a relevant factor in determining whether the defendant should be liable to a plaintiff under our proposed statutory cause of action, since an invasion of privacy constitutes the very type of non-economic injury that can in reality be cured, or substantially reduced, by an apology from the defendant.

5.41 Other examples of conduct that may be relevant for the purpose of this clause include:

- That the individual has acted in such a way that he or she has contributed to the invasion, for example by provoking it.<sup>253</sup>
- That the individual is, in all the circumstances, to be regarded as the author of his or her own misfortune;<sup>254</sup>
- That the defendant has acted out of spite or revenge<sup>255</sup> or for an improper motive.<sup>256</sup>

*The effect of the conduct on the health, welfare and emotional well-being of the individual*

5.42 Clause 74(3)(a)(vii) of the Bill requires the court, in determining actionability, to have regard to “the effect of the conduct concerned on the health, welfare and emotional

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247. Consider, for example, *TCN Channel Nine Pty Ltd v Ilvairy Pty Ltd* [2008] NSWCA 9 (where the publication did not give rise to a claim in defamation, but the intrusion was actionable as a trespass).

248. For example, an apology in defamation law: *Defamation Act 2005* (NSW) s 38(1)(a).

249. *Defamation Act 2005* (NSW) s 18.

250. *Defamation Act 2005* (NSW) s 38(1)(a).

251. *Civil Liability Act 2002* (NSW) pt 10, especially ss 69(1)(b), 69(2).

252. See especially P Vines, “Apologies to Avoid Liability: Cynical Civility and Practical Morality?” (2005) 27 *Sydney Law Review* 483; P Vines, “The Power of Apology: Mercy, Forgiveness and Corrective Justice in the Civil Law Arena?” [2007] 1, Article 5, *Public Space: The Journal of Law and Social Justice* <<http://epress.lib.uts.edu.au>>.

253. *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [224].

254. *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [225].

255. See, eg, *A v B plc* [2003] QB 195 (spurned lover).

256. Eg, to blackmail the plaintiff: consider *Giller v Procopets* [2008] VSCA 236.

well-being of the individual". This makes clear that the primary objective of an action for invasion of privacy is to protect the plaintiff from non-economic injury. Such injury can range widely from personal injury (including psychiatric damage), to physical inconvenience, to mental distress.<sup>257</sup> Mental distress itself is a wide notion that includes injury to feelings, grief, fear, annoyance and anxiety.<sup>258</sup>

5.43 Two points need noting. First, while the action protects principally against non-economic injury, this does not mean that other injuries are not also within the purview of the action. For example, an identity theft may protect plaintiffs' non-economic interests (for example, in freedom from physical inconvenience and distress) as well as their economic interests (for example, where the fraudulent use of their stolen identity results in financial loss to them). Secondly, as the court is only required to have regard to the health, welfare and emotional well-being of the individual as a factor in determining actionability, non-economic injury need not necessarily be present in those cases in which the court is simply concerned, for broad policy reasons, to protect privacy as such. For example, a child who is too young to be distressed by an invasion of privacy may still be entitled to a reasonable expectation of privacy in all the circumstances.<sup>259</sup>

*Where the conduct contravenes the provisions of a statute*

5.44 Clause 74(3)(a)(viii) of the Bill requires the court to consider whether the conduct in question also amounts to a contravention of a statutory provision of an Australian jurisdiction. If it does, this is potentially relevant in two ways. First, it may be of assistance to the court in determining whether the conduct in question should amount to an actionable invasion of privacy for the purposes of the proposed cause of action. For example, if the conduct contravenes the privacy information principles of major legislation protecting information privacy, such as the *Privacy and Personal Information Protection Act 1998* (NSW), this at least informs the court that the conduct is regarded as a breach of privacy in the context of other legislation. Whether that means that the conduct should, or should not, also trigger a private law action for invasion of privacy is necessarily dependent on all the other circumstances of the case.

5.45 Secondly, the clause alerts the court to the need to consider whether liability under the statutory provision in question is compatible with the imposition of more general liability for invasion of privacy under the statutory cause of action. It may not be, for example, where the claimant is criminally liable under the statute and Parliament has intended that liability to be exclusive of any liability in civil law,<sup>260</sup> or where the provision of a particular remedy for breach of the statutory obligation prevents the grant of any other

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257. See, eg, *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281 (psychiatric damage and mental distress); *Venables v News Group Newspapers Ltd* [2001] Fam 430 (threat of serious physical harm, though the case was not argued as an invasion of privacy). An example of physical inconvenience would be that of having to replace credit cards as a result of an identity theft that constituted an actionable invasion of privacy.

258. See H McGregor, *McGregor on Damages* (17th ed, Sweet & Maxwell, 2003) [3-002]-[3010].

259. *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, [37]-[38].

260. CP 1, [2.90]-[2.112] deals with the extent to which invasions of privacy give rise to criminal liability.



remedy.<sup>261</sup> In the latter case, even if the court finds that Parliament has not intended the remedy in question to be exclusive of any other, cl 76(2) of the proposed Bill empowers the court to refuse relief under the Bill if the court considers that remedy adequate in all the circumstances.<sup>262</sup>

## Consent

5.46 Clause 74(4) of the Bill makes it clear that a plaintiff cannot succeed in an action for invasion of privacy if the plaintiff has consented to the defendant's conduct. The legislation does not define consent, which therefore takes its meaning from the general law and its statutory context.<sup>263</sup> Consent may be express or implied. Whether express or implied, it must be free and informed, and given by individuals who have the capacity to do so.<sup>264</sup> So understood, consent is likely to arise as an issue in the statutory cause of action in at least four situations.<sup>265</sup>

5.47 First, in determining if the plaintiff has capacity to consent to the defendant's conduct for the purposes of the action. It is important to point out, as has the Public Interest Advocacy Centre, that there are a number of people who cannot meaningfully consent to an invasion of privacy, such as minors, people in detention, people with intellectual disability and people with mental illness.<sup>266</sup>

5.48 Secondly, in determining if the plaintiff's consent is, in all the circumstances, free and informed. Take, for example, the case of a prospective tenant, desperate for accommodation, who has signed, without reading it, a long tenancy application form consenting, among other matters, to the disclosure by the estate agent of personal information to the media, the prospective landlord, residential tenancy data bases and the local real estate industry body.<sup>267</sup>

5.49 Thirdly, in determining if the plaintiff's consent to the defendant's conduct can be implied from the plaintiff's conduct. For example, can the plaintiff's entry to a public place be taken as signifying the plaintiff's consent to being photographed in that place; or to the disclosure of statements made by the plaintiff in that place in the course of a conversation

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261. See D Pearce and R Geddes, *Statutory Interpretation in Australia* (6th ed, Butterworths, 2006) [5.35].

262. See para 7.28-7.29.

263. Associate Professor Mark Lunney, *Submission*, 5, thought it right that consent should be determined on the same principles as in other areas of private law.

264. The Commission has recently considered the meaning of consent in the context of young peoples' consent to health care: see NSW Law Reform Commission, *Young People and Consent to Health Care* Report 119 (2008), [1.5]-[1.12].

265. See Legal Aid Commission of NSW, *Submission*, 8-9; Public Interest Advocacy Centre, *Submission*, 14-15.

266. Public Interest Advocacy Centre, *Submission*, 14.

267. The example is a variation of that in ALRC, R 108, vol 1 [19.42].

surreptitiously recorded;<sup>268</sup> or to the disclosure of what the plaintiff did in that place, such as attempting suicide?<sup>269</sup>

5.50 Fourthly, and a particular variation on the third situation, in determining if the plaintiff's consent to the defendant's conduct for one purpose also constitutes an implied agreement that the defendant could invade his or her privacy for some other purpose. Take the example of the prospective desperate tenant in para 5.48, and assume that he or she reads the application form and questions the appropriateness of the information disclosure clause, whereupon the estate agent gives assurances that the information will only be disclosed to the landlord, but then in fact discloses it to the media and it is widely published.

5.51 Clause 74(4) of the Bill is directed to the first and second situations, which engage the general law relating to consent. As at general law, the function of the clause is to deny plaintiffs an action that they may otherwise have mounted.<sup>270</sup> It does so by making the issue of consent an essential element of the statutory cause of action, with the result that if there is consent, there is no invasion of privacy. While this puts the onus on the plaintiff to prove a negative (namely the absence of the plaintiff's consent),<sup>271</sup> forcing the plaintiff to make his or her case on consent at the outset allows the court to test whether the action has merit before it proceeds further. This, together with the focus of the clause on capacity and reality of consent, means that, before barring the plaintiff's action, the court must be satisfied that the plaintiff has truly agreed to the defendant's conduct.

5.52 The corollary is that the role of implied consent will be limited to situations where it is clear that the plaintiff has in reality agreed to the defendant's conduct. An example is: "[i]f a medical practitioner collects a specimen to send to a pathology laboratory for testing, it would be reasonable to consider that the individual is giving implied consent to the passing of necessary information to that laboratory".<sup>272</sup> It is right that "implied consent" should be interpreted narrowly for the purpose of cl 74(4). As the examples given in the third and fourth situations listed above demonstrate, a wider notion of implied consent would, potentially, overwhelm the protection of individual privacy that is the object of the proposed legislation.

5.53 This means that the third and fourth situations do not engage cl 74(4) at all: there is simply no consent for the purposes of the clause. The real question in those cases is rather whether the facts disclose that there is a reasonable expectation of privacy in all the

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268. Eg, the Arts Law Centre of Australia, *Submission*, 9 argues that "a plaintiff should be taken to have consented to an invasion of privacy if the invasion occurs in a public space and is for artistic purposes or is in the public interest".

269. Consider *Peck v United Kingdom* (2003) 36 EHRR 41.

270. See P Young, *The Law of Consent* (Law Book Co, 1986) 7. See further D Beyleveld and R Brownsword, *Consent in the Law* (Hart Publishing, 2007) ch 8.

271. Consider *Privacy Bill 2006* (Ireland) cl 3(c). For this reason, the Cyberspace Law and Policy Centre, *Submission*, 9-10 argues that consent should be a defence to an action for invasion of privacy. However, the argument loses force where consent has (as here) a narrow focus.

272. Office of the Privacy Commissioner, Australia, *Guidelines on Privacy in the Private Health Sector* (2001), [A.5.3].

circumstances. For example, and as already noted, this test would resolve the issue whether the disclosure of a photograph taken by the defendant of the plaintiff in a public place invades the plaintiff's privacy.<sup>273</sup> This approach is broadly consistent with the position in information privacy law. While the language of consent may be used, and implied consent understood, more widely in that context,<sup>274</sup> consent is not an independent privacy principle.<sup>275</sup> Rather, consent is considered in the application of other principles, such as notification, purpose specification and use limitation<sup>276</sup> – the very matters that, for the purposes of the proposed statutory cause of action, are likely to be relevant to the existence of a reasonable expectation of privacy in the circumstances of particular cases.

## A statutory cause of action, not a statutory tort

5.54 A statutory cause of action, such as the one proposed in the Bill, may be characterised as a “statutory tort”, especially where it gives rise to a potential claim for compensation or damages.<sup>277</sup> The legislation creating a cause of action for invasion of privacy in the Canadian Provinces puts the matter beyond doubt by expressly labelling the cause of action a “tort”.<sup>278</sup> Proposed legislation in Ireland is to the same effect.<sup>279</sup> Even in the absence of such specific characterisation, the cause of action may still be classified as tortious. The issue is dependent on the construction of the statute.<sup>280</sup> There is no simple general test for determining the issue, and, in the end, “the only answer may be to say that a compensation right is of a tortious character if it is generally regarded as tortious”.<sup>281</sup>

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273. See para 5.27.

274. See generally ALRC, R 108, vol 1 ch 19. Note that information privacy legislation generally refers simply to “consent”, although occasionally it requires “express consent”: see *Health Records and Information Privacy Act 2002* (NSW) sch 1, cl 4(4)(a); 15(1)(a).

275. The ALRC has recommended that consent should not be a discrete privacy principle: ALRC, R 108, vol 1 [19.69]-[19.77].

276. See generally CP 3, ch 6. See further NSW Law Reform Commission, *Surveillance: An Interim Report* Report 98 (2001), especially ch 4.

277. Conceiving tort as “a breach of a non-contractual duty which gives rise to a private law right to the party injured to recover compensatory damages at common law from the party causing the injury”: *R v Secretary of State for Transport, ex parte Factortame Ltd (No 7)* [2001] 1 WLR 942, [150] (Judge Toulmin QC).

278. British Columbia: *Privacy Act RSBC 1996 c 373 s 1(1)*; Manitoba: *Privacy Act RSM 1987 c P125 s 2(2)*; Newfoundland and Labrador: *Privacy Act RSN 1990 c P-22 s 3(1)*; Saskatchewan: *Privacy Act RSS 1978 c P-24 s 2*.

279. *Privacy Bill 2006* (Ireland) cl 2.

280. See, eg, *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, and authorities there cited (extent to which liability under, and remedies pursuant to, s 52 of the *Trade Practices Act 1974* (Cth) are informed by analogies to general law).

281 K Stanton, P Skidmore, M Harries and K Wright, *Statutory Torts* (Sweet & Maxwell, 2003) 6, where it is pointed out that indicia of the intention of Parliament include whether the cause of action is enforceable in the normal court system or supports a claim for damages assessed in accordance with common law principles.

5.55 Clause 72 of the Bill makes it clear that the objective of the legislation, realised in clause 74, is to create a statutory cause of action for invasion of privacy. Its intention is not to create a statutory tort. As we pointed out in our Consultation Paper, there are two principal reasons for this.<sup>282</sup> The first is that tortious causes of action do not generally require the courts to engage in an overt balancing of relevant interests (including the interest whose protection is sought in the action) in order to determine whether or not the elements of the cause of action in question are satisfied. Yet this is central to the determination of the existence or otherwise of a reasonable expectation of privacy in cl 74.<sup>283</sup> In short, the methodology of the Bill is not that of the law of torts. The second is that the statutory cause of action should not necessarily be constrained by rules or principles generally applicable in the law of torts. This second point has two important implications for the statutory cause of action we propose.

5.56 First, it becomes unnecessary to specify for the purposes of the cause of action whether or not the conduct of the defendant that invades the plaintiff's privacy must be intentional (that is, deliberate or wilful). If liability were tortious, it would be necessary to do so in order to clarify whether this were an intentional tort or not. We prefer not to lay down an absolute rule. Submissions generally favoured extending liability beyond intentional conduct.<sup>284</sup> While our view is that liability will generally arise under the legislation only where the defendant has acted intentionally,<sup>285</sup> there may be circumstances where the defendant ought to be liable for an invasion of privacy that is, for example, reckless or negligent – as where a doctor is grossly negligent in disclosing the medical records of a patient.<sup>286</sup> This is a matter that is appropriately left to development in case law.

5.57 Secondly, it is also unnecessary to specify for the purposes of the statutory cause of action whether the action is maintainable only on proof of damage. If the action were tortious, it would be necessary to decide the issue since torts are either actionable on proof of damage (as in negligence) or without proof of such damage (“per se”) (as in trespass). To the extent to which proof of damage means proof of some material loss,<sup>287</sup> the requirement is inapposite to the statutory cause of action,<sup>288</sup> which is designed

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282. CP 1, [1.7].

283. See para 5.11-5.20.

284. Legal Aid Commission of NSW, *Submission*, 6; Cyberspace Law and Policy Centre, *Submission*, 6-7 (recklessness and negligence); Associate Professor Mark Lunney, *Submission*, 6 (limit to intentional and perhaps reckless conduct); Public Interest Advocacy Centre, *Submission*, 16-17 (recklessness and negligence). Compare Arts Law Centre of Australia, *Submission*, 10 (limit to intentional acts).

285. The ALRC agrees with this but makes it an absolute rule: ALRC, R 108, vol 3 [74.164].

286. Consider *Cornelius v De Taranto* [2002] EMLR 112. Consider also Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy* Report (2004), [6.71] (extending liability to reckless conduct).

287. This is far from clear: see esp D Nolan, “New Forms of Damage in Negligence” (2007) 70 *Modern Law Review* 59.

288. The ALRC agrees (see ALRC, R 108, [74.165]-[74.168]), and submissions are supportive: Associate Professor Mark Lunney, *Submission*, 7-8; Public Interest Advocacy Centre, *Submission*, 19; Cyberspace Law and Policy Centre, *Submission*, 6.

primarily to protect the plaintiff from suffering non-economic loss, including mental distress.<sup>289</sup> To the extent to which there is no non-economic loss, the action will not generally be maintainable.<sup>290</sup>

## 6. DEFENCES

6.1 Clause 75 of the Bill creates a number of defences to an action for invasion of privacy. The burden of establishing the existence of any of these defences lies on the defendant. In so far as facts must be proved in order to establish the existence of any of these defences, the defendant must prove them on the balance of probabilities.

6.2 With the exception of public interest defences (which the Bill renders unnecessary by requiring, in cl 74(2), consideration of public interest at the outset), the defences in the Bill closely follow those that are currently available in other jurisdictions that have privacy legislation.<sup>291</sup> They apply where the offending conduct was:

- required or authorised by or under law; or
- done in lawful defence of person or property (not necessarily being “authorised” or “required” by or under law); or
- the publication of matter that would attract certain defamation defences; or
- the publication of matter where, as between the defendant publisher and the recipient of the information, there is a common interest or duty in giving and receiving information on the subject in question.

### Required or authorised by or under law

6.3 This defence mirrors exceptions to, or exemptions from, compliance with privacy principles in information privacy legislation. For example, s 25 of the *Privacy and Personal Information Protection Act 1998* (NSW) provides that a public sector agency is not required to comply with many of the principles relating to collection, access, use or disclosure of information to which the Act applies if: (a) the agency is lawfully authorised or required not to comply with the principle concerned; or (b) non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law. Provisions such as this are of importance in enabling governments to perform their functions, especially in areas of law enforcement and national security. The NSW Department of Corrective Services has drawn attention to the importance of this defence for agencies such as Corrective Services that are unable to carry out the functions, powers and duties conferred on them by Parliament, including those relating to the maintenance of security and order in correctional facilities and the effective and efficient

289. Consider *Grosse v Purvis* [2003] QDC 151, [444]; *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281, [163]-[164]. And see para 5.42.

290. See para 5.43 (children).

291. British Columbia: *Privacy Act RSBC 1996 c 373 s 2(2)-(4)*; Manitoba: *Privacy Act RSM 1987 c P125 s 5*; Newfoundland and Labrador: *Privacy Act RSN 1990 c P-22 s 5*; Saskatchewan: *Privacy Act RSS 1978 c P-24 s 4*. See also *Privacy Bill 2006* (Ireland) cl 5.

management of orders and sentences served in the community, without invading the privacy of individuals.<sup>292</sup>

*The meaning of “required” or “authorised”*

6.4 Conduct, which includes “the publication of matter”,<sup>293</sup> is “required” when the law in question “demands” or “necessitates” that it be undertaken,<sup>294</sup> a common example being a legislative requirement on a defendant to disclose personal information.<sup>295</sup> In contrast, conduct is “authorised” when the law in question permits it to be done but leaves it up to the person concerned to decide whether or not he or she will do it. Conduct is not, however, “authorised” simply because there is no law prohibiting it.<sup>296</sup>

*The meaning of “law”*

6.5 The Bill provides that the source of the requirement or authorisation of particular conduct may be found in Commonwealth or NSW statute (including the *Constitution*); the common law of Australia; an order of any Australian court or tribunal; or a process of such a court or tribunal.<sup>297</sup> While the precise reach of each of these sources is appropriately left to development in case law, having regard to the purposes of the statutory cause of action, the wide compass of sources is, in our view, appropriate. For example, it is capable of extending to disclosures in the public interest of confidential information (as where the public interest requires a health professional to disclose an otherwise confidential medical report), as well as to disclosures of personal information necessary to satisfy the requirements of procedural fairness (as where a statutory authority is required to disclose the general nature of a complaint to a professional whose activities it regulates).<sup>298</sup> This is consistent with the ALRC’s recommendation that the “required or authorised” exception in information privacy law should contain a wide definition of “law”.<sup>299</sup> It also addresses the principal concern of the Department of Corrective Services that the privacy of individuals must yield to the necessity of government agencies’ being able to perform their functions that necessarily invade individuals’ privacy.<sup>300</sup>

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292. Department of Corrective Services, *Submission*.

293. Bill cl 73.

294. See, eg, *Secretary to the Department of Premier and Cabinet v Hulls* [1999] 3 VR 331, [358] (Phillips JA).

295. See, eg, *Rahman v Ashpole* [2007] FCA 1067.

296. See, eg, *Caratti v Commissioner of Taxation* (1999) 99 ATC 5044, [27] (French J).

297. Bill cl 75(1)(a) read with the definitions in cl 73 of “Australian court or tribunal”, “Commonwealth law”, and “NSW law”.

298. Consider *KD v Registrar, NSW Medical Board* [2004] NSWADT 5 (Medical Board entitled to rely on the “required or authorised” exception in s 25 of the *Privacy and Personal Information Protection Act 1998* (NSW) where procedural fairness had required it to disclose to a medical practitioner the substance of a complaint that had been made to the Board against him).

299. ALRC, R 108, vol 1, [16.1]-[16.71], 585 (Recommendation 16-1).

300. NSW Department of Corrective Services, *Submission*, especially 3.

## Defamation defences

6.6 The law of defamation protects plaintiffs' interests in their reputation, not in their privacy. The two interests are separate. They give rise to independent causes of action that should not be confused. However, an action for invasion of privacy may consist of the publication of matter,<sup>301</sup> as does an action in defamation. Moreover, that publication may both injure the plaintiff's reputation and invade the plaintiff's privacy. This raises the question of the extent to which a defence that is available in a defamation action ought also to apply to an invasion of privacy that consists of the publication of matter. We have approached this issue by identifying at the outset two reasons for excluding the application of defamation defences in the statutory action for invasion of privacy.

6.7 First, we have excluded defences that are irrelevant to an action for invasion of privacy, simply because privacy and defamation protect different interests. This excludes from the action for invasion of privacy the defence of truth, a defence to an action in defamation at common law and under statute.<sup>302</sup> An invasion of privacy is such, whether the matter published is true or not. In contrast, truth is an appropriate defence in defamation since, if established, it justifies the defendant's conduct by reducing the plaintiff's reputation to its proper level.

6.8 Secondly, we have excluded defamation defences that involve a consideration of the public interest, since in the statutory cause of action that we propose that interest has already been taken into account in determining the actionability of the plaintiff's claim. This applies to the following defamation defences: the defence that the matter was contained in a public document;<sup>303</sup> the defence of honest opinion;<sup>304</sup> and the defence of extended qualified privilege at common law or under the *Defamation Act 2005* (NSW).<sup>305</sup> We need to stress that the exclusion of extended qualified privilege in no way interferes with the constitutional implication of freedom of speech in respect of governmental and political matters established in *Lange v Australian Broadcasting Corporation*.<sup>306</sup> An invasion within the constitutional implication would never satisfy the test of actionability under cl 74. Even if it did – and we do not see how it could – a defence would be available under cl 75(1)(a)(i) as the publication would at least be authorised by law.<sup>307</sup>

6.9 Where appropriate and with due alteration of detail, cl 75(1)(c) and (d) of the Bill make provision for the application of the following defamation defences to actions for invasion of privacy:

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301. Bill cl 73 (“conduct includes the publication of matter”).

302. *Defamation Act 2005* (NSW) ss 24, 25, 26.

303. *Defamation Act 2005* (NSW) s 28. And see para 5.28.

304. *Defamation Act 2005* (NSW) s 31.

305. See *Defamation Act 2005* (NSW) s 30.

306. (1997) 189 CLR 520.

307. See para 6.5 (noting that the definition of “Commonwealth law” in cl 73 includes the Constitution).

- the defence of absolute privilege under the law of defamation (either at common law or under s 27 of the *Defamation Act 2005* (NSW));<sup>308</sup>
- the defence of fair report of proceedings of public concern under s 29 of the *Defamation Act 2005* (NSW);<sup>309</sup> and
- the defence of innocent dissemination.<sup>310</sup>

6.10 The policy justifications dictating that an absolute privilege should attach to certain publications in the course of parliamentary or judicial proceedings apply equally to cases where the publication in question injures the plaintiff's reputation and to those where the publication invades the plaintiff's privacy. Similarly, the "free speech" policy justifications that dictate that a fair report of proceedings of public concern should defeat a claim in defamation apply equally to a claim for invasion of privacy. And we see no reason why liability should arise for invasion of privacy where the defendant is an innocent disseminator of the offending publication any more than it should where the plaintiff seeks to make the defendant liable in defamation.

### Where there is a corresponding interest or duty to give and have the published information

6.11 Clause 75(1)(e) allows the defendant to establish, as a defence to an action for invasion of privacy, that the publication constituting the invasion was made to the recipient in the course of giving the recipient information on a subject on which the defendant had a duty or interest to provide information to that recipient, who had a corresponding interest or duty to have the information. Clause 75(2) provides that the defence is defeated if the plaintiff proves that the publication was actuated by malice.

6.12 This defence mirrors the defence of qualified privilege in the law of defamation at least as it existed at common law before *Lange v Australian Broadcasting Corporation*.<sup>311</sup> We have noted above that it is unnecessary to list the "extended law of qualified privilege" as a defence to a claim for invasion of privacy.<sup>312</sup> However, we think it right that where the requirements of cl 75(1)(e) are satisfied, the defendant should have a defence to an action for invasion of privacy. An example would be where a defendant invaded the plaintiff's privacy by publishing in a reference to a prospective employer personal information about the plaintiff that is relevant to the job for which the plaintiff is applying.

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308. Bill cl 75(1)(c)(i).

309. Bill cl 75(1)(c)(ii).

310. Bill cl 75(1)(d).

311. (1997) 189 CLR 520, especially 573 (clarifying that the requirement of "reasonableness of conduct" in making the publication does not apply to situations in which, before *Lange*, the defence of qualified privilege was available).

312. See para 6.8.



## 7. REMEDIES

### A statutory scheme of remedies

7.1 In our Consultation Paper we proposed that if a court found that the defendant had invaded the plaintiff's privacy, the court should be able to grant the plaintiff the remedy that was the most appropriate in the circumstances of the case. The remedy would be selected, in the court's discretion, from a non-exhaustive statutory list. Clause 76 of the draft legislation builds on this approach, which was generally supported in submissions,<sup>313</sup> concerns being limited to the availability of particular remedies.<sup>314</sup>

7.2 Our approach to remedies seeks to achieve three objectives:

- First, by giving the court discretion to select the remedy, the Bill intends to overcome any jurisdictional restraints that apply to the remedy in question at general law, for example, restraints that flow from the legal or equitable nature of the remedy in question.<sup>315</sup>
- Secondly, by empowering the court to select the remedy that it considers the most appropriate in the circumstances of the particular case, the Bill endeavours to provide the framework for the identification over time of the remedies that should generally respond to particular categories of invasion of privacy.<sup>316</sup> This may have the result, for example, that a narrower range of remedies is available in intrusion cases than in cases of misuse of private information.<sup>317</sup>
- Thirdly, by identifying the remedies as orders that take their nature from the statute rather than from the general law, the legislation intends to empower courts to determine when the principles and rules applicable to analogous remedies at general law should apply and when they should be rejected.

7.3 While our Consultation Paper accepted the third of these considerations,<sup>318</sup> our continued use of the traditional language of "damages" and of "injunction" obscured the point. The Bill makes it clear that the remedies it authorises are an order for compensation (not damages) (cl 76(1)(a)) and a prohibitory order (not an injunction) (cl 76(1)(b)). Case law that develops under the legislation will determine the extent to which the principles of damages and injunctions at general law are relevant to these two statutory remedies.

7.4 It is true that cl 78 refers to orders "in the nature of exemplary or punitive damages". But it does so only for the purpose of prohibiting monetary awards in the nature of such damages in invasion of privacy cases. We adhere to the view expressed in our Consultation Paper that the difficulty of accommodating punitive awards in civil law, now supported by a clear statutory trend to abolish such awards in particular areas of law

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313. Robyn Carroll, *Submission*, 1-2; Associate Professor Mark Lunney, *Submission*, 9.

314. See para 7.23-7.27.

315. See CP 1, [8.3].

316. See CP 1, [8.4].

317. Associate Professor Mark Lunney, *Submission*, 9.

318. See CP 1, [8.10] (damages), [8.38] (injunctions).

(including defamation),<sup>319</sup> makes it undesirable to countenance such damages in invasion of privacy cases.<sup>320</sup>

## The range of remedies

7.5 Our Consultation Paper proposed the following list of statutory remedies:

- (a) Damages, including aggravated damages, but not exemplary damages;
- (b) An account of profits;
- (c) An injunction;
- (d) An order requiring the defendant to apologise to the plaintiff;
- (e) A correction order;
- (f) An order for the delivery up and destruction of material;
- (g) A declaration;
- (h) Other remedies or orders that the court thinks appropriate in the circumstances.<sup>321</sup>

7.6 Submissions expressed concerns about the availability, as remedies for invasion of privacy, of account of profits, injunctions, orders requiring the defendant to apologise and correction orders.<sup>322</sup> The ALRC was unpersuaded by these concerns and, except that its list of remedies does not include (h), has endorsed the list of remedies that we proposed in our Consultation Paper.<sup>323</sup>

7.7 We adhere to the view expressed in our Consultation Paper that the list of statutory remedies should be non-exhaustive. Clause 76(1)(e) therefore includes in the remedies that courts can make in response to an invasion of privacy “such other relief as the court considers necessary in the circumstances”. The importance of this clause is that it enables the court to draw on analogous common law and statutory law to fashion relief that is appropriate to the circumstances of the particular case, whether or not such relief is ancillary to other orders that the court can make under cl 76(1). Examples could include asset preservation orders and search orders,<sup>324</sup> or the sort of orders (such as varying a contract or ordering the return of property or money) that appear in s 87(2) of the *Trade*

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319. See *Defamation Act 2005* (NSW) s 37. See also *Civil Liability Act 2002* (NSW) s 21 (personal injury damages).

320. See CP 1, [8.11]-[8.15].

321. CP 1, 202 (Proposal 2).

322. See para 7.23-7.27. See also ALRC, R 108, vol 3 [74.105]-[74.108].

323. ALRC, R 108, vol 3 [74.176]-[74.180].

324. CP 1, [8.5].

*Practices Act 1974* (Cth).<sup>325</sup> The word “relief” in cl 76(1)(e) is intended to include, however described, appropriate “remedies”, “orders”, “ancillary orders” or procedural devices.

7.8 The retention of cl 76(1)(e) has drawn our attention to the overall structure of cl 76, leading us to question which remedies or orders should be specifically identified and which should simply be left to fall within cl 76(1)(e). We have decided that cl 76 should specifically list the remedies that are likely to be the focus of the courts’ attention in most invasion of privacy cases, leaving those that are not likely to feature frequently, or are in some sense exceptional, to be claimed under cl 76(1)(e). In our view, the remedies that will be most commonly sought in invasion of privacy cases are: compensation orders; prohibitory orders; declarations; and orders for delivery up.

## Compensation orders

7.9 The most common remedy that will be sought in invasion of privacy cases is, undoubtedly, a compensation order. While the principles and rules of damages will, no doubt, often apply appropriately to such orders, the necessity to distinguish statutory compensation from damages is important in invasion of privacy cases. This is because such cases will generally call for compensation for non-economic loss of a particular kind, that is, for mental or emotional distress, also referred to as injury to feelings.<sup>326</sup> Yet, except in defined categories of breach of contract cases,<sup>327</sup> the common law does not envisage the recovery of compensation for mental distress where that is the only loss claimed,<sup>328</sup> although the position may be different where the claim arises in equity.<sup>329</sup> As already noted, cl 74(3)(a)(vii) requires a court, in determining actionability, to take account of the effect of the conduct in question on the “health, welfare and emotional well-being of the individual”. This recognises that the plaintiff’s freedom from emotional harm or mental distress is sufficient to ground liability for invasion of privacy. A statutory order for compensation will, therefore, have no difficulty in redressing mental distress standing alone.

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325. CP 1, [8.6].

326. Consider *Privacy and Personal Information Protection Act 1998* (NSW) s 55(4)(b), which lists “psychological” harm as a type of loss flowing from an invasion of information privacy. On such damage generally, see P Handford, *Mullany and Handford’s Tort Liability for Psychiatric Damage* (2nd ed, Lawbook Co, 2006) ch 4.

327. P Handford, *Mullany and Handford’s Tort Liability for Psychiatric Damage* (2nd ed, Lawbook Co, 2006) [4.150]-[4.220].

328. See H McGregor, *McGregor on Damages* (17th ed, Sweet & Maxwell, 2003), [3-011]. Compare *Grosse v Purvis* [2003] QDC 151, [473], [475] (damages for wounded feelings not connected with post-traumatic stress disorder).

329. See *Giller v Procopets* [2008] VSCA 236; *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); and the cases in P Stanley, *The Law of Confidentiality: A Restatement* (Hart Publishing, 2008), 133 n 10. See also *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281, [145], [186] (compensation for “hurt, distress, embarrassment, humiliation, shame and guilt” awarded, in the context of wider recovery, in breach of confidence).

7.10 This requires a revision of the proposal in our Consultation Paper that an award of “damages” in invasion of privacy cases could include an award of “aggravated damages”.<sup>330</sup> Although their precise meaning is unclear,<sup>331</sup> it is sufficient to note that, at common law, “aggravated damages” are generally taken to refer to compensatory damages for injury to feelings that are attributable to the damage, or increased damage, that the plaintiff suffers as a result of the outrageous conduct of the defendant.<sup>332</sup> Whatever the technical justification for such damages at common law,<sup>333</sup> they would serve no purpose in a statutory compensation regime such as that under the proposed legislation. As we have just noted, that regime clearly encompasses compensation for injury to feelings or mental distress. To the extent to which the conduct of the defendant has increased the damage to the plaintiff, the plaintiff’s loss is simply the greater – a fact that will, obviously, be reflected in the size of the award.

7.11 Clause 77 of the Bill places a cap on the award of compensation for non-economic loss in invasion of privacy cases. The specification of statutory caps on compensation for non-economic loss (as well as for economic loss) is a common feature of such awards in New South Wales and Australia.<sup>334</sup> We can think of no reason why compensation for non-economic loss in invasion of privacy cases should be an exception to this. All submissions addressing this issue supported the imposition of a cap on compensation.<sup>335</sup>

7.12 The specification of an appropriate cap is a much more difficult matter. In determining the cap, we have had regard to the level of awards for non-economic loss in recent cases that protect plaintiffs’ privacy either as such or as a tort or breach of confidence.<sup>336</sup> A number of these cases have involved very serious invasions of privacy.

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330. CP 1, [8.16]-[8.17] and Proposal 2.

331. As pointed out in Law Commission of England and Wales, *Aggravated, Exemplary and Restitutionary Damages*, Law Com No 247 (1997), [2.1], and confirmed by a consideration of recent cases such as *NSW v Riley* (2003) 57 NSWLR 496 (CA); *NSW v Ibbett* (2005) 65 NSWLR 168 (CA) (affirmed in *NSW v Ibbett* [2006] HCA 57).

332. Consider *Lamb v Cotogno* (1987) 164 CLR 1, 8 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 149 (Windeyer J).

333. Consider Law Commission of England and Wales, *Aggravated, Exemplary and Restitutionary Damages*, Law Com No 247 (1997), [2.39]-[2.43] (which effectively equates aggravated damages with damages for mental distress).

334. See H Luntz, *Assessment of Damages for Personal Injury and Death* (4th ed, Butterworths, 2002) [11.2.1]-[11.2.22].

335. Phillip Young, *Submission*, 1; Arts Law Centre of Australia, *Submission*, 12; Associate Professor Mark Lunney, *Submission*, 10-11; Robyn Carroll, *Submission*, 2; Cyberspace Law and Policy Centre, *Submission*, 11; Public Interest Advocacy Centre, *Submission*, 25.

336. Consider the awards in *Giller v Procopets* [2008] VSCA 236, [443]-[446] (\$50,000 damages (including aggravated damages) for non-economic loss in breach of confidence); *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281 (\$110,000 for non-economic loss, comprising \$85,000 for post-traumatic stress disorder and \$25,000 for “hurt, distress, embarrassment, humiliation, shame and guilt”); *Grosse v Purvis* [2003] QDC 151 (\$108,000 for non-economic loss, comprising \$50,000 for post-traumatic stress disorder, \$20,000 for “upset, worry,

The highest awards in Australia have just exceeded \$100,000. We have also considered four statutory caps:

- First, that of \$40,000 which is awardable by the Administrative Decisions Tribunal in a review of the conduct of a public sector agency under s 55 of the *Privacy and Personal Information Protection Act 1998* (NSW), a review that will involve an invasion of information privacy.<sup>337</sup> This limit, which was set over a decade ago, applies to both the economic and non-economic loss suffered in the circumstances. In light of the awards made by courts in privacy or confidence cases, the limit seems inadequate to meet the significant non-economic loss beyond injury to feelings (such as psychiatric damage) that can be suffered in privacy cases.<sup>338</sup>
- Secondly, the \$100,000 limit on damages awardable by the Administrative Decisions Tribunal in proceedings relating to a complaint referred to it under the *Anti-Discrimination Act 1977* (NSW).<sup>339</sup> The cap encompasses the economic and non-economic loss that is the subject of any particular complaint.
- Thirdly, the \$280,500 “maximum damages amount” for non-economic loss in defamation law.<sup>340</sup> That cap can be exceeded if the court is satisfied that the circumstances of the publication of the defamatory matter are such as to warrant the award of aggravated damages,<sup>341</sup> a concept that, as we have already suggested, should have no place in the statutory cause of action.<sup>342</sup>
- Fourthly, the \$450,000 cap for non-economic loss in personal injury cases under the *Civil Liability Act 2002* (NSW).<sup>343</sup>

7.13 Having regard to the interests protected in the causes of action subject to these statutory caps, to the range of conduct that can constitute an invasion of privacy and to the level of awards in cases that have involved privacy invasions, cl 77(1) of the draft legislation sets the cap on the amount of compensation awardable for non-economic loss in invasion of privacy cases at \$150,000.<sup>344</sup> The amount is adjustable yearly in the same way as it is in the *Civil Liability Act 2002* (NSW) – that is, by the percentage change in the

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anger, embarrassment and annoyance”, \$25,000 for vindication). See also *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) (£60,000 for an invasion of privacy that ruined the claimant’s life).

337. *Privacy and Personal Information Protection Act 1998* (NSW) s 52.

338. The cap is criticised in Public Interest Advocacy Centre, *Submission*, 25.

339. *Anti-Discrimination Act 1977* (NSW) s 108(2)(a). This limit was set in *Administrative Decisions Tribunal Amendment Act 2008* sch 2.3 [3].

340. *Defamation Act 2005* (NSW) s 35(1); NSW Government Gazette No 72, 5482 (20 June 2008).

341. *Defamation Act 2005* (NSW) s 35(2).

342. See para 7.10.

343. *Civil Liability Act 2002* (NSW) ss 16, 17; NSW Government Gazette No 118, 9369 (19 September 2008).

344. The Public Interest Advocacy Centre, *Submission*, 25 favoured a limit of \$250,000.

amount estimated by the Australian Statistician of the average weekly total earnings of full-time adults over the preceding four quarters.<sup>345</sup>

7.14 In addition to damages for non-economic loss, invasion of privacy cases can, of course, also involve economic loss, such as loss of earning capacity. Such loss will be assessable by reference to common law principles, without the restrictions on the amounts recoverable for economic loss in personal injury cases.<sup>346</sup>

7.15 The Department of Corrective Services submitted that the legislation should contain a specific prohibition on the award of compensation equivalent to s 53(7A) of the *Privacy and Personal Information Protection Act 1998* (NSW).<sup>347</sup> This forbids a public sector agency from paying monetary compensation as remedial action following an internal review of its conduct where that compensation would go to current or former convicted inmates, their spouses, partners, relatives, friends or associates. The effect of such a provision in invasion of privacy cases would be to exclude a compensatory claim in the case of convicted and associated persons where the public sector agency's invasion of privacy involved conduct that fell outside the agency's statutory functions or that was not required or authorised by or under any law. In our view, the proposed legislation sufficiently deals with this issue, first, by investing a wide discretion in the court to grant the remedy that is the most appropriate in all the circumstances; and, secondly, by allowing the court to grant no remedy where an adequate remedy exists under a statute prescribed in the regulations.<sup>348</sup> As we indicate below, the *Privacy and Personal Information Protection Act 1998* (NSW) is just such a statute, and a court may well take the view that an internal review is the most appropriate course of action in all the circumstances.

## Prohibitory orders

7.16 Clause 76(1)(b) of the Bill provides for the grant of orders prohibiting the defendant from engaging in conduct that the court considers would invade the plaintiff's privacy. Such orders may be granted on a final basis after trial or, as a matter of greater or lesser urgency, on a temporary basis before trial in order to protect the positions of the parties pending the determination of the issue. Where an invasion of privacy is actionable under cl 74, it is likely that a prohibitory order will be granted after trial as a matter of course if the order has utility in preventing a threatened invasion of the plaintiff's privacy or otherwise containing the effect of an invasion that has already taken place. But where an order is sought before trial, the court will generally have to decide the issue before the parties have had an opportunity to present all the evidence in the case, and perhaps before all the evidence is available.

7.17 In our Consultation Paper we discussed the "organising principles",<sup>349</sup> derived from *Beecham Group Ltd v Bristol Laboratories Pty Ltd*,<sup>350</sup> that are generally regarded as

345. *Civil Liability Act 2002* (NSW) s 17(2)-(7).

346. *Civil Liability Act 2002* (NSW) pt 2 div 2.

347. Department of Corrective Services, *Submission*, 3.

348. See para 7.28.

349. The expression is that of Gleeson CJ and Crennan J in *Australian Broadcasting Commission v O'Neill* (2006) 227 CLR 57, [19].

relevant to the grant of interlocutory injunctive relief.<sup>351</sup> Allowing for variation in the details of their description, they concern the plaintiff's ability to demonstrate that: (1) he or she has a sufficiently strong case for final relief that the court can now justify granting interlocutory relief; (2) he or she is likely to suffer injury that cannot be adequately compensated if interlocutory relief is not granted; and (3) the balance of convenience favours the grant of interlocutory relief.<sup>352</sup> We suggest that these principles, which are "to be applied having regard to the nature and circumstances of the case", and "under which issues of justice and convenience are addressed",<sup>353</sup> will generally be relevant to the grant of temporary orders under the proposed legislation. Free speech concerns are likely to be central to considerations of justice and convenience, especially in cases of invasion of information privacy. This is because, independently of the force of freedom of expression in determining the strength of the plaintiff's case, a temporary order prohibiting publication of information pending the determination of suit would act as a restraint on the publication of such information before it had been adjudged an invasion of the plaintiff's privacy. Some submissions argued that the availability of temporary orders prohibiting publication in invasion of privacy cases could be exploited as a tool to obstruct freedom of expression.<sup>354</sup> The common law has, however, long frowned on such "prior restraint"<sup>355</sup> of publication.<sup>356</sup>

7.18 In defamation law, free speech considerations have resulted in interlocutory injunctive relief being exceptional.<sup>357</sup> This is unlikely to be so in respect of temporary prohibitory orders in invasion of privacy cases. Defamation protects the plaintiff's interest in reputation and an award of damages in such an action is said to "vindicate" the plaintiff's reputation, that is, to restore it to its previous (untarnished) state.<sup>358</sup> So, the reputation of a plaintiff who has been refused an interlocutory injunction to restrain the publication of matter that is allegedly defamatory, that is then published, and that turns out to be defamatory at trial, will be vindicated by an award of damages. An interest in privacy cannot, however, be vindicated in this sense. For example, if a temporary prohibitory order is not issued to restrain the publication of a photograph that, it is alleged, infringes a

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350. (1968) 118 CLR 618.

351. CP 1, [8.36]-[8.44].

352. See *Australian Broadcasting Commission v O'Neill* (2006) 227 CLR 57, [2], [19], (Gleeson CJ and Crennan J), [71]-[72] (Gummow and Hayne JJ).

353. *Australian Broadcasting Commission v O'Neill* (2006) 227 CLR 57, [19], (Gleeson CJ and Crennan J).

354. Australia's Right to Know Coalition, *Submission*, 29; Arts Law Centre of Australia, *Submission*, 4.

355. The expression is derived from American law: see *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, 16 (Lord Denning MR).

356. See especially W Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1769) vol 4, 151-52, and the analysis of it in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [260]-[268] (Heydon J dissenting).

357. See especially *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.

358. For the classic statements, see *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 150 (Windeyer J); *Associated Newspapers Ltd v Dingle* [1964] AC 371, 396 (Lord Radcliffe). See also *John Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131, 139 (Samuels JA), 142-43 (McHugh JA).

child's privacy, and the photograph is then published, an award of damages at trial does nothing to vindicate the child's privacy.<sup>359</sup> Quite simply, the privacy has been lost. Before trial, therefore, the fact that, in invasion of privacy cases, the plaintiff may suffer injury that cannot be adequately compensated if a temporary prohibitory order is not made, is likely to weigh heavily with the court. Its precise impact in any case will, however, be taken into account alongside "justice and convenience" considerations, including those relating to freedom of expression.

## Declaratory orders

7.19 A declaration is a court order that authoritatively states the legal relations between the parties. It is a useful general remedy where parties are in dispute as to their legal positions but are willing to accept them once they are certain what they are.<sup>360</sup> We asserted in our Consultation Paper that a declaration by a court authoritatively stating the legal relations between the parties may be all that is needed to bring an end to conduct that has invaded, or is invading, the plaintiff's privacy; to enable settlement of the conflict; or to act as an adequate remedy to the plaintiff in the circumstances.<sup>361</sup> No submissions took issue with this, and we remain of the view that declaratory orders should be available in the court's discretion in invasion of privacy cases.

7.20 The general law will no doubt remain relevant to the exercise of the court's discretion in so far as it instructs us that declaratory relief is only appropriate where a substantial question exists between the parties that one party has a real interest in raising and the other in opposing (rather than an abstract hypothetical question); and that the grant of declaratory relief will serve a useful purpose in all the circumstances.<sup>362</sup>

## Orders for delivery up

7.21 Clause 76(1)(d) empowers a court to order the defendant to deliver to the plaintiff any "articles, documents or other material" (or copies of them) that concern or belong to the plaintiff and that were obtained or made as a result of the invasion of the plaintiff's privacy or were published during the course of the conduct giving rise to the invasion of privacy. The items subject to the order must be in the possession of the defendant or the defendant must be able to retrieve them. While this provision resembles the remedy of delivery up for destruction or destruction on oath at general law, it does not envisage that the plaintiff must destroy the items that are delivered up, a necessary assumption at general law because the plaintiff has no property in the materials and so no right to their

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359. Consider *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446.

360. On the utility of the remedy, see R Meagher, D Heydon and M Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, Butterworths LexisNexis, 2002) [19-180]-[19-195].

361. CP 1, [8.49].

362. Consider *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson, Toohey and Gaudron JJ).



retention on delivery up.<sup>363</sup> The plaintiff would, of course, have the power to destroy any items delivered up.

7.22 The Arts Law Centre of Australia opposed this remedy because it could lead to the destruction of artworks where the creation of those works involved an invasion of the plaintiff's privacy.<sup>364</sup> The remedy is, however, discretionary and the likelihood of the destruction of such works would argue against the grant of the remedy in all but the most extreme cases.<sup>365</sup> This consideration would not, of course, apply to the delivery up of such ordinary items as publications that invade the plaintiff's privacy.

## Other relief

### *Account of profits*

7.23 The proposal in our Consultation Paper<sup>366</sup> to list account of profits as one of the remedies a court should be empowered to make pursuant to an invasion of privacy was both supported and opposed in submissions.<sup>367</sup> Those opposed to making the remedy available argued that it would be impossible to arrive at an account of profits against, for example, a media organisation whose publication invaded the plaintiff's privacy;<sup>368</sup> or that an account of profits was a more appropriate remedy in commercial cases, rather than cases that focussed on injury to an individual's feelings.<sup>369</sup> We agree with the ALRC that the first criticism is unfounded: the difficulty of taking an account (for example, where allowance has to be made for the defendant's skill in generating the profit), does not prevent an account being taken. The court will, as in damages, do the best that it can and, where relevant, make an appropriate apportionment of the profit between the plaintiff and the defendant.<sup>370</sup>

7.24 We do, however, accept that an account of profits is likely to be an exceptional remedy in invasion of privacy cases. In such cases, an account of profits ought, in principle, to be a remedy available to the courts. Such exceptional cases may involve circumstances in which the defendant deliberately set out to breach the plaintiff's privacy or, at least, to make a profit at the plaintiff's expense.<sup>371</sup> The identification of those circumstances ought, in our view, to be left to the courts, having regard to the purposes of this legislation against the background of the development of the remedy of account of profits at general law.

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363. *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37; *Ormonoid Roofing and Asphalts Ltd v Bitumenoids Ltd* (1931) 31 SR (NSW) 347.

364. Arts Law Centre of Australia, *Submission*, 3-4.

365. As it does where destruction results in economic waste at general law: see *Peter Pan Manufacturing Corporation v Corsets Silhouette Ltd* [1964] 1 WLR 96.

366. CP 1, [8.24]-[8.30].

367. In favour: N Witzleb, *Submission*; R Carroll, *Submission*, 3. Against: Cyberspace Law and Policy Centre, *Submission*, 10.

368. See ALRC, R 108, vol 3 [74.105].

369. Cyberspace Law and Policy Centre, *Submission*, 10.

370. ALRC, R 108, vol 3 [74.178].

371. See N Witzleb, *Submission*.

*Court-ordered apologies*

7.25 Statutes, particularly in areas of equal opportunity law, may empower courts or tribunals to order defendants to apologise to the plaintiff.<sup>372</sup> Whether made pursuant to a court order or not, such an apology is likely to go a long way to redress injury to the plaintiff's feelings if it is made willingly.<sup>373</sup> Where the defendant is unwilling to apologise, a court order to do so is, however, much more problematic. The moral value of an apology compelled by legal process is obviously questionable. Moreover, to compel the defendant to publish or utter words with which he or she does not agree is a clear interference with the defendant's freedom of expression.<sup>374</sup> Submissions also argued that the ability of courts to order apologies would act as a disincentive to out-of-court settlements because it would mean that the defendant was unable to offer the plaintiff something that the courts could not offer.<sup>375</sup>

7.26 In our Consultation Paper, we pointed out that, although the circumstances in which an apology would be ordered in practice would probably be rare, we saw no reason in principle why such orders should not be available.<sup>376</sup> We adhere to this view, strongly supported in some submissions.<sup>377</sup> Free speech considerations mean that orders to apologise in invasion of privacy cases will be exceptional. However, such considerations do not necessarily mean that an order to apologise should never be made. In all the circumstances of the case, the defendant's interest in freedom of expression may be outweighed when regard is had, in the words of the Court of Final Appeal of Hong Kong, to the "nature and aim of the legislation, the interests of the community, the gravity of the unlawful conduct and the plaintiff's circumstances, including the extent of the loss and damage suffered".<sup>378</sup> Moreover, we do not regard the court's ability to order apologies as a disincentive to settlement. As the ALRC has pointed out, "the main incentive for an out of court settlement is to save time, costs and the possible emotional trauma of a court hearing".<sup>379</sup> Indeed, the court's ability to order an apology may itself prove an incentive to settle for those defendants who wish to avoid such a remedy at all costs.<sup>380</sup>

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372. Eg, *Anti-Discrimination Act 1977* (NSW) s 108(2)(d) (court may order respondent to publish apology or retraction).

373. The Court of Final Appeal of Hong Kong has pointed out that the orders for apology made in Australia have assumed that the defendant is willing to apologise: see *Ma Bik Yung v Ko Chuen* [2001] HKCFA 56, [53].

374. Australia's Right to Know Coalition, *Submission*, 29-30. And see *Summertime Holdings Pty Ltd v Environmental Defender's Office Ltd* (1998) 45 NSWLR 291, 297 (refusal of specific performance of agreement to apologise because, among other matters, such a remedy would have a chilling effect on freedom of the press and of speech).

375. See ALRC, R 108, vol 3 [74.107].

376. CP 1, [8.45]-[8.46].

377. Robyn Carroll, *Submission*; P Youngman, *Submission*.

378. *Ma Bik Yung v Ko Chuen* [2001] HKCFA 56, [48] (Li CJ, Bokhary and Chan PJJ, and Nazareth and Sir Anthony Mason NPJJ agreeing).

379. ALRC 108, vol 3 [74.179].

380. Consider R Carroll, *Submission*, 4.

### Correction orders

7.27 Like court-ordered apologies, freedom of expression will make correction orders in invasion of privacy cases exceptional. However, since freedom of expression is not absolute, there is, once again, no reason in principle why such orders should never be made.<sup>381</sup> We therefore adhere to the view expressed in our Consultation Paper, and supported in submissions,<sup>382</sup> that the court should have power to make such orders.<sup>383</sup>

## Relevance of remedies under legislative regimes regulating privacy

7.28 Clause 76(2) of the proposed legislation provides that the court may decline to grant any remedy under the legislation where it is of the view that the claimant has an adequate remedy under a statute prescribed in the regulations. We envisage that the regulations will prescribe provisions regulating information privacy in New South Wales, the Commonwealth or other States and Territories, such as those in the *Privacy and Personal Information Protection Act 1998* (NSW), the *Health Records and Information Protection Act 2002* (NSW) and the *Privacy Act 1988* (Cth). A final determination of the legislation, or provisions of the legislation, that ought to be prescribed for the purposes of cl 76(2) must, obviously, await the legislative response that follows this review and the ALRC's review of privacy law.

7.29 Clause 76(2) recognises that the protection of privacy is achieved not only through the availability of a private cause of action but also through general public regulation. The two cannot be considered in isolation. Take, for example, the case of a plaintiff who seeks a remedy (say compensation) against a public sector agency whose conduct amounts both to an invasion of privacy under the proposed legislation and to a contravention of an information protection principle that applies to it under the *Privacy and Personal Information Protection Act 1998* (NSW). The court may take the view that, even though the defendant's liability to the plaintiff is not limited by the information protection legislation,<sup>384</sup> it is nevertheless more appropriate, in all the circumstances of the case, for the plaintiff to seek a review of the agency's conduct under Part 5 of that Act than pursue a private remedy under the proposed legislation,<sup>385</sup>

## 8. RELATIONSHIP TO OTHER LAWS

8.1 In *Lenah Game Meats*, the High Court left open the possibility that the common law of Australia would, in the future, give greater protection to privacy interests than it

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381. Consider *TV3 Network Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 436 (accepting that, in principle, a correction order in the form of a mandatory injunction could be made).

382. Robyn Carroll, *Submission*; P Youngman, *Submission*.

383. CP 1, [8.45]-[8.46].

384. See para 5.44-5.45.

385. An analogous argument would be that government contracting should be subject to judicial review, not simply to contractual remedies: see, eg, Justice P Finn, "The Fringes of the Law: Public or Private Functions" in A Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice B H McPherson CBE* (Supreme Court of Queensland Library, 2006) ch 26.

currently does either through the development of a tort of invasion of privacy or through the expansion of existing actions.<sup>386</sup> It is implicit in the decision that the common law does not currently recognise a tort of invasion of privacy,<sup>387</sup> notwithstanding the existence of two first instance decisions to the contrary.<sup>388</sup> Clause 80(1) of the Bill provides, out of abundance of caution, for the abolition of any such tort that may exist. It is undesirable for the common law to develop a tort of invasion of privacy if the statutory cause of action that we propose is enacted. The cause of action that we propose not only involves a more sophisticated balancing of privacy and other interests than may occur through a tortious action at common law, but also incorporates a more flexible remedial pattern. Further, a common law action could seriously undermine the statutory cause of action, for example, by evading the limits on the amount of compensation that can be awarded for non-economic loss (cl 77) or by countenancing awards of exemplary or aggravated damages (cl 78).

8.2 There will, of course, remain actions at general law that can protect interests in privacy, largely incidentally in awards of damages. Clauses 80(2) and (3) recognise that these actions will remain. The existence of the statutory cause of action for invasion of privacy should, however, remove the pressure on these actions to protect privacy interests, or to develop, perhaps inappropriately, in the direction of protecting such interests. In particular, we see no reason why the action for breach of confidence should transform itself into an action for the protection of private information.<sup>389</sup>

8.3 Of course, there will inevitably be situations where the statutory cause of action overlaps with existing statutory or common law actions. Where this is so, plaintiffs will generally be free to choose the basis (or bases) on which they put their case, subject to restrictions that may be put on that choice by the statute in question<sup>390</sup> or at common law.<sup>391</sup> Whatever the bases of their claims, plaintiffs will only be able to claim compensation once for losses that arise out of the same conduct.<sup>392</sup> Moreover, as we

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386. See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [39]-[43] (Gleeson CJ); [121]-[128] (Gummow and Hayne JJ); [185]-[189] (Kirby J dissenting); [313]-[336] (Callinan J dissenting).

387. See especially *Giller v Procopets* [2008] VSCA 236, [447]-452] (Neave JA).

388. *Grosse v Purvis* [2003] QDC 151; *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281.

389. See para 4.12.

390. See para 5.45.

391. The existence of a potential or concurrent claim in defamation will not prevent a plaintiff from mounting a claim for invasion of privacy. Notwithstanding possible interpretations of *Sullivan v Moody* (2001) 207 CLR 562 and *Tame v New South Wales* (2002) 211 CLR 317 (in which the Court would not erect a duty of care in negligence in relation to the provision of information to third parties that conflicted with an existing duty upon the person to provide the information), there is no rule that if a claim can be brought in defamation it must be: see *GS v News Ltd* (1998) Aust Tort Reports 81-466; *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281, [54]-[66].

392. However the result is described, the general law does not countenance double recovery: see A Burrows, *Remedies for Torts and Breach of Contract* (3rd ed, OUP, 2004) 14-17, 388-90. See also Bill cl 80(4).

have noted, the courts will have discretion under the proposed legislation to refuse a remedy to the plaintiff where he or she has an adequate remedy under a prescribed statute.<sup>393</sup>

## 9. LIMITATION OF ACTIONS

9.1 Schedule 2 of the Bill inserts Part 3 Division 2B into the *Limitation Act 1969* (NSW). Its effect is to apply a limitation period of one year to the statutory cause of action. The period runs from the date on which cause of action first accrues, and can be extended for up to three years from the date of accrual if, but only if, the court is satisfied “that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date on which the cause of action first accrued”.<sup>394</sup> The limitation regime mirrors that applicable to claims in defamation,<sup>395</sup> rather than that generally applicable to tort.<sup>396</sup>

9.2 The legislation does not specify when the cause of action first accrues. As damage is not an essential ingredient of the cause of action, the date of accrual will be the date of the defendant’s conduct (which includes the publication of matter).<sup>397</sup> The defendant’s invasion will normally impact on the plaintiff immediately, and its effect may be quickly spent. If the invasion is serious enough, the plaintiff will, and should, act promptly to avoid any escalation in the impact of the injury. A one-year limitation period, therefore, seems generally appropriate. The court’s ability to extend the period allows for cases where, for example, the plaintiff was unaware of the defendant’s conduct in that period. We do not, however, favour the accrual of the cause of action from the time at which the plaintiff first becomes aware of the invasion of privacy.<sup>398</sup> Such an approach would not cohere with the general approach to the law of limitations in Australia and would, we believe, be difficult to achieve as part of an exercise in uniformity of law in Australia.

## 10. DEATH

10.1 The effect of cl 79 of the Bill is that a cause of action for invasion of privacy does not survive the death of the complainant. While submissions generally supported this rule,<sup>399</sup> some exceptions to it were suggested (for example, in respect of economic loss suffered between the date of the defendant’s conduct and the date of the complainant’s death,<sup>400</sup> or where important systemic issues are involved).<sup>401</sup> In our view, the complexity

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393. See para 7.28-7.29.

394. Bill sch 2 [1], [2].

395. *Limitation Act 1969* (NSW) s 14B, Div 2A.

396. *Limitation Act 1969* (NSW) s 14(1)(b). Compare s 18A (personal injury).

397. Bill cl 73 (“conduct”).

398. This was the approach recommended by the Hong Kong Law Reform Commission, *Civil Liability for Invasion or Privacy Report* (2004) [12.21]-[12.23], and Recommendation 28.

399. Arts Law Centre of Australia, *Submission*, 11; Associate Professor Mark Lunney, *Submission*, 8-9.

400. Associate Professor Mark Lunney, *Submission*, 8.

that such qualifications would add to the law does not justify the displacement of a simple general rule, particularly in the context of reforms that need to cohere with the law relating to the effect of death on causes of action in all Australian jurisdictions. Clause 79 does not, of course, affect any claim that a person has against an invader who has died since the invasion, which would survive against the invader's estate.<sup>402</sup>

## 11. UNIFORMITY

11.1 The Commission agrees with the ALRC's view that national consistency should be one of the goals of privacy regulation.<sup>403</sup> A nationally operating privacy regime would do much to eliminate inconsistencies in the law between jurisdictions, and potential "forum-shopping". This would help reduce the costs and other burdens on organisations operating across State borders,<sup>404</sup> and more effectively regulate privacy invasion by trans-jurisdictional technologies, such as the Internet.

11.2 In keeping with this goal, we agree with the view put forcefully in our submissions that it is essential that a statutory cause of action such as we recommend be a part of the law of all Australian jurisdictions.<sup>405</sup> This could be achieved by means of federal legislation.<sup>406</sup> The ALRC had originally proposed that the cause of action be contained in the *Privacy Act 1988* (Cth),<sup>407</sup> but has now revised this view,<sup>408</sup> citing likely confusion, for example, as to whether the exemptions contained in that Act would also apply to the cause of action. The ALRC now recommends that the cause of action be enacted in a separate federal statute.<sup>409</sup> We agree that the *Privacy Act 1988* (Cth) is unsuitable due to its large number of exemptions, and its focus on the protection of information privacy. Nor do we consider any other current federal statute to be an appropriate location for such provisions.

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401. Public Interest Advocacy Centre, *Submission*, 20-21.

402. This is the effect of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(1). The common law rule that a personal action dies with the person ("*actio personalis moritur cum persona*") dictates a different result in the case of defamation: *Peek v Gurney* (1873) LR6HL 377; *Re Duncan* [1899] 1 Ch 387.

403. ALRC, DP 72, [4.14].

404. ALRC, DP 72, [4.11].

405. Office of the Privacy Commissioner, Australia, *Submission*, 3, 5; Australian Press Council, *Submission*, 7; Law Society of New South Wales, Litigation Law and Practice Committee and Business Committee, *Submission*, 6-8; Law Council of Australia, Business Law Section, Working Party on Privacy Law, *Submission*, 12-15.

406. Commonwealth *Constitution* s 51(xxix) authorises federal Parliament to make laws with respect to external affairs including the implementation of international treaty obligations: see especially *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1; *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 488-489. See also ALRC, R 108, vol 1 [3.17]-[3.28].

407. ALRC, DP 72, Proposal 5-1.

408. ALRC, R 108, vol 3 [74-195].

409. ALRC, R 108, vol 3 [74-195] (Rec 74-1).

11.3 Recognising that the province of private law is foremost a matter of State law within Australia's federal system, our preferred model for achieving uniformity is for State and Territory legislatures to enact the Bill attached to this report. This would necessitate agreement between all jurisdictions on the provisions of the statutory cause of action for invasion of privacy. Each jurisdiction would then incorporate substantially uniform provisions within its own legislation. To maintain uniformity into the future it would be desirable to provide an agreed mechanism by which amendments can be made, such as reaching consensus through the Standing Committee of Attorneys General (SCAG). The enactment of totally new legislation would be unnecessary in most, if not all, cases. In NSW, for example, the *Civil Liability Act 2002* (NSW) is an appropriate instrument in which to locate civil law privacy protection.





# Appendices

- Appendix A: Civil Liability Amendment (Privacy) Bill
- Appendix B: Submissions



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Civil Liability Amendment (Privacy) Bill 2009

Explanatory note

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Clause 2 provides for the commencement of the proposed Act on a day to be appointed by proclamation.

## **Schedule 1    Amendment of Civil Liability Act 2002 No 22**

### **Statutory cause of action**

Schedule 1 [3] inserts a Part 12 (Invasion of privacy) in the *Civil Liability Act 2002*. The proposed Part contains the following provisions:

**Proposed section 72** sets out the objects of the proposed Part. The principal object of the proposed Part will be to create a statutory cause of action for the invasion of an individual's privacy.

**Proposed section 73** defines certain terms and expressions that are used in the proposed Part.

**Proposed section 74** provides that an individual has a cause of action against another person under the proposed Part if the other person invades the individual's privacy.

The test for determining whether an individual's privacy has been invaded for the purposes of such an action is if the conduct of another person invaded the privacy that the individual was reasonably entitled to expect in all of the circumstances having regard to any relevant public interest (including the interest of the public in being informed about matters of public concern).

The proposed section also makes it clear that there is no actionable invasion of privacy in respect of conduct if the individual, or another person having lawful authority to do so for the individual, has expressly or impliedly consented to the conduct.

**Proposed section 75** provides for certain defences to an action brought under the proposed Part.

**Proposed section 76** provides for the remedies that a court may award for a successful action brought under the proposed Part. Remedies include orders for the payment of compensation and various other kinds of orders (including an order prohibiting conduct that would invade an individual's privacy).

**Proposed section 77** limits the amount of compensation that a court may order for non-economic loss in an action brought under the proposed Part. The initial maximum amount that may be awarded as compensation for non-economic loss will be \$150,000. The proposed section also provides for the indexation, by order of the Minister published in the Gazette, of the maximum amount that may be awarded as damages for non-economic loss.

**Proposed section 78** provides that a court cannot make a monetary order under proposed section 76 that is in the nature of exemplary or punitive damages.

**Proposed section 79** provides that an action brought by or on behalf of an individual under the proposed Part does not survive the individual's death.

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Civil Liability Amendment (Privacy) Bill 2009

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**Proposed section 80** provides for:

- (a) the abolition of any specific tort for the invasion or violation of a person's privacy to the extent that it exists at general law, and
- (b) the proposed Part to be read (except to the extent that it abolishes any specific tort at general law for the invasion or violation of a person's privacy) as providing additional remedies for invasions of privacy and not derogating from any other rights of action or remedies available apart from the proposed Part.

**Consequential amendments**

**Schedule 1 [1]** amends section 3B of the *Civil Liability Act 2002* to ensure that any invasion of privacy committed with an intent to cause injury is not excluded from the ambit of the proposed Part.

**Schedule 1 [2]** amends section 3B of the *Civil Liability Act 2002* to ensure that civil liability arising under the proposed Part cannot be excluded by a regulation made for the purposes of section 3B (3) of that Act.

**Savings and transitional provisions**

**Schedule 1 [4]** amends clause 1 of Schedule 1 to the *Civil Liability Act 2002* to enable the Governor to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

**Schedule 1 [5]** inserts a Part in Schedule 1 to the *Civil Liability Act 2002* that contains a transitional provision confirming that proposed Part 12 of the Act does not extend to any civil liability that arose before the commencement of the proposed Part.

**Schedule 2 Amendment of Limitation Act 1969 No 31**

**Schedule 2** amends the *Limitation Act 1969* to provide that, generally, an action for the invasion of an individual's privacy under the proposed Part 12 of the *Civil Liability Act 2002* must be commenced within 1 year following the first date on which the action accrues. However, a court must extend this limitation period to a period of up to 3 years if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced the action within the 1 year period.

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Civil Liability Amendment (Privacy) Bill 2009  
Explanatory note

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New South Wales

## **Civil Liability Amendment (Privacy) Bill 2009**

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New South Wales

## **Civil Liability Amendment (Privacy) Bill 2009**

No. , 2009

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### **A Bill for**

An Act to amend the *Civil Liability Act 2002* to create a statutory cause of action for the invasion of the privacy of an individual; to amend the *Limitation Act 1969* in relation to the limitation period for actions for invasions of privacy; and for other purposes.

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Clause 1 Civil Liability Amendment (Privacy) Bill 2009

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The Legislature of New South Wales enacts:

**1 Name of Act**

This Act is the *Civil Liability Amendment (Privacy) Act 2009*.

**2 Commencement**

This Act commences on a day to be appointed by proclamation.

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Civil Liability Amendment (Privacy) Bill 2009  
Amendment of Civil Liability Act 2002 No 22

Schedule 1

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**Schedule 1    Amendment of Civil Liability Act 2002  
                          No 22**

**[1]    Section 3B Civil liability excluded from Act**

Insert at the end of section 3B (1) (a) (iii):

, and

(iv)    Part 12 (Invasion of privacy),

**[2]    Section 3B (3)**

Insert “(other than Part 12)” after “this Act”.

**[3]    Part 12**

Insert after Part 11:

**Part 12    Invasion of privacy**

**72    Objects of Part**

The objects of this Part are:

- (a)    to recognise that it is important to protect the privacy of individuals, but that the interest of individuals in their own privacy must be balanced against other important interests (including the interest of the public in being informed about matters of public concern), and
- (b)    to create a statutory cause of action for the invasion of an individual’s privacy, and
- (c)    to provide for a number of different remedies to enable a court to redress any such invasion of privacy.

**73    Definitions**

In this Part:

*Australian court or tribunal* means:

- (a)    any court established by or under a NSW law, Commonwealth law or the law of another Australian jurisdiction (including a court conducting committal proceedings for an indictable offence or a person conducting a coronial inquest), and
- (b)    any other tribunal established by or under a NSW law, Commonwealth law or the law of another Australian jurisdiction that has the power to take evidence from witnesses before it on oath or affirmation (including a

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Civil Liability Amendment (Privacy) Bill 2009

Schedule 1 Amendment of Civil Liability Act 2002 No 22

Royal Commission or other special commission of inquiry).

*Australian jurisdiction* means the Commonwealth or a State or Territory.

*Commonwealth law* means any law of the Commonwealth, and includes the Commonwealth Constitution.

*conduct* includes the publication of matter.

*general law* means the common law and equity (as modified from time to time by legislation).

*NSW law* means any written or unwritten law in force in New South Wales (including a law of the British or Imperial Parliament) other than a Commonwealth law.

**74 Invasion of privacy actionable**

- (1) An individual has a cause of action against a person under this Part if that person's conduct invades the individual's privacy.
- (2) An individual's privacy is invaded for the purposes of an action under this Part if the conduct of another person invaded the privacy that the individual was reasonably entitled to expect in all of the circumstances having regard to any relevant public interest (including the interest of the public in being informed about matters of public concern).
- (3) Without limiting subsection (2), a court determining whether an individual's privacy has been invaded by the conduct (the *conduct concerned*) of another person (the *alleged wrongdoer*) for the purposes of an action under this Part:
  - (a) must take into account the following matters:
    - (i) the nature of the subject matter that it is alleged should be private,
    - (ii) the nature of the conduct concerned (including the extent to which a reasonable person of ordinary sensibilities would consider the conduct to be offensive),
    - (iii) the relationship between the individual and the alleged wrongdoer,
    - (iv) the extent to which the individual has a public profile,
    - (v) the extent to which the individual is or was in a position of vulnerability,
    - (vi) the conduct of the individual and of the alleged wrongdoer both before and after the conduct

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Civil Liability Amendment (Privacy) Bill 2009

Amendment of Civil Liability Act 2002 No 22

Schedule 1

- concerned (including any apology or offer to make amends made by the alleged wrongdoer),
- (vii) the effect of the conduct concerned on the health, welfare and emotional well-being of the individual,
  - (viii) whether the conduct concerned contravened a provision of a statute of an Australian jurisdiction, and
- (b) may take into account any other matter that the court considers relevant in the circumstances.
- (4) Conduct does not invade an individual's privacy for the purposes of an action under this Part if the individual, or another person having lawful authority to do so for the individual, expressly or impliedly consented to the conduct.

**75 Defences**

- (1) It is a defence to an action under this Part for the invasion of a plaintiff's privacy if the defendant proves any of the following:
- (a) that the conduct of the defendant was required or authorised:
    - (i) by or under a NSW law or Commonwealth law, or
    - (ii) by an Australian court or tribunal or a process of such a court or tribunal,
  - (b) that the conduct of the defendant was done for the purpose of lawfully defending or protecting a person or property (including the prosecution or defence of civil or criminal proceedings),
  - (c) that the conduct of the defendant was the publication of matter that, if it is assumed that the publication is defamatory, would attract any of the following defences to an action for defamation:
    - (i) the defence of absolute privilege (whether at general law or under section 27 of the *Defamation Act 2005*),
    - (ii) any of the defences of fair report of proceedings of public concern under section 29 of the *Defamation Act 2005*,
  - (d) that the conduct of the defendant was the publication of matter in circumstances where:
    - (i) the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor, and

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Civil Liability Amendment (Privacy) Bill 2009

Schedule 1 Amendment of Civil Liability Act 2002 No 22

- (ii) the defendant neither knew, nor ought reasonably to have known, that the publication of the matter constituted an invasion of privacy, and
- (iii) the defendant's lack of knowledge was not due to any negligence on the part of the defendant,
- (e) that the conduct of the defendant was the publication of matter to a person (*the recipient*) in circumstances where:
  - (i) the defendant has an interest or duty (whether legal, social or moral) to provide information on a subject to the recipient, and
  - (ii) the recipient has a corresponding interest or duty in having information on that subject, and
  - (iii) the matter is published to the recipient in the course of giving to the recipient information on that subject.
- (2) A defence under subsection (1) (e) is defeated if the plaintiff proves that the publication of the matter was actuated by malice.
- (3) In this section:  
*subordinate distributor* has the same meaning as in section 32 of the *Defamation Act 2005*.

**76 Remedies**

- (1) In an action under this Part for the invasion of a plaintiff's privacy, the court may (subject to any jurisdictional limits of the court) grant any one or more of the following remedies, whether on an interim or final basis, as the court considers appropriate:
  - (a) an order for the payment of compensation,
  - (b) an order prohibiting the defendant from engaging in conduct (whether actual, apprehended or threatened) that the court considers would invade the privacy of the plaintiff,
  - (c) an order declaring that the defendant's conduct has invaded the privacy of the plaintiff,
  - (d) an order that the defendant deliver to the plaintiff any articles, documents or other material, and all copies of them, concerning the plaintiff or belonging to the plaintiff that:
    - (i) are in the possession of the defendant or that the defendant is able to retrieve, and
    - (ii) were obtained or made as a result of the invasion of the plaintiff's privacy or were published during the

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Civil Liability Amendment (Privacy) Bill 2009

Amendment of Civil Liability Act 2002 No 22

Schedule 1

course of the conduct giving rise to the invasion of privacy,

- (e) such other relief as the court considers necessary in the circumstances.
- (2) Without limiting subsection (1), the court may decline to grant a remedy under that subsection if it considers that an adequate remedy for the invasion of privacy exists under a statute of an Australian jurisdiction that is prescribed by the regulations.

**77 Compensation for non-economic loss limited**

- (1) The maximum amount of compensation for non-economic loss that a court may order in an action for invasion of privacy under this Part is \$150,000 or any other amount adjusted in accordance with this section from time to time that is applicable at the time compensation is awarded.
- (2) The Minister is, on or before 1 July 2010 and on or before 1 July in each succeeding year, to declare, by order published in the Gazette, the amount that is to apply, as from the date specified in the order, for the purposes of subsection (1).
- (3) The amount declared is to be the amount applicable under subsection (1) (or that amount as last adjusted under this section) adjusted by the percentage change in the amount estimated by the Australian Statistician of the average weekly total earnings of full-time adults in Australia over the 4 quarters preceding the date of the declaration for which those estimates are, at that date, available.
- (4) An amount declared for the time being under this section applies to the exclusion of the amount of \$150,000 or an amount previously adjusted under this section.
- (5) If the Australian Statistician fails or ceases to estimate the amount referred to in subsection (3), the amount declared is to be determined in accordance with the regulations.
- (6) In adjusting an amount to be declared for the purposes of subsection (1), the amount determined in accordance with subsection (3) is to be rounded to the nearest \$500 (with the amounts of \$250 and \$750 being rounded up).
- (7) A declaration made or published in the Gazette after 1 July in a year and specifying a date that is before the date it is made or published as the date from which the amount declared by the order is to apply has effect as from that specified date.

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Civil Liability Amendment (Privacy) Bill 2009

Schedule 1 Amendment of Civil Liability Act 2002 No 22

**78 Monetary order in the nature of exemplary or punitive damages cannot be made**

A court cannot make a monetary order under section 76 that is in the nature of exemplary or punitive damages.

**79 Action does not survive death**

- (1) A cause of action for the invasion of an individual's privacy arising under this Part does not survive the individual's death.
- (2) Subsection (1) has effect despite section 2 of the *Law Reform (Miscellaneous Provisions) Act 1944*.

**80 Relationship of cause of action to other laws**

- (1) To the extent that the general law recognises a specific tort for the invasion or violation of a person's privacy, that tort is abolished.
- (2) Subject to subsection (1), the right of action for invasion of privacy under this Part and the remedies under this Part are in addition to, and not in derogation of, any other right of action or other remedy available otherwise than under this Part.
- (3) Without limiting subsection (2), subsection (1) does not operate to abolish or otherwise limit any of the following kinds of causes of action at general law to the extent that they provide for a remedy for the invasion or violation of an individual's privacy:
  - (a) an action for defamation,
  - (b) an action for trespass,
  - (c) an action for a breach of confidence,
  - (d) an action for negligence,
  - (e) an action for nuisance,
  - (f) an action for injurious falsehood,
  - (g) an action for passing off,
  - (h) an action for intentional infliction of harm,
  - (i) an action for breach of a statutory duty.
- (4) Nothing in this Part requires any compensation awarded in an action for invasion of privacy under this Part to be disregarded in assessing compensation or damages in any other proceedings arising out of the same conduct giving rise to the invasion of privacy.

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Civil Liability Amendment (Privacy) Bill 2009

Amendment of Civil Liability Act 2002 No 22

Schedule 1

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**[4] Schedule 1 Savings and transitional provisions**

Insert at the end of clause 1 (1):

*Civil Liability Amendment (Privacy) Act 2009*

**[5] Schedule 1**

Insert at the end of the Schedule (with appropriate Part and clause numbers):

**Part Provisions consequent on enactment of  
Civil Liability Amendment (Privacy) Act  
2009**

**Application of Part 12**

Part 12 (as inserted by the *Civil Liability Amendment (Privacy) Act 2009*) does not extend to any civil liability arising before the commencement of that Part.

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Civil Liability Amendment (Privacy) Bill 2009

Schedule 2      Amendment of Limitation Act 1969 No 31

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**Schedule 2      Amendment of Limitation Act 1969 No 31**

**[1] Section 14B**

Insert after section 14B:

**14C Invasion of privacy**

An action on a cause of action for an invasion of privacy under Part 12 of the *Civil Liability Act 2002* is not maintainable if brought after the end of a limitation period of 1 year running from the date on which the cause of action first accrues.

**[2] Part 3, Division 2B**

Insert after Division 2A:

**Division 2B Invasion of privacy**

**56E Extension of limitation period by court**

- (1) A person claiming to have a cause of action for invasion of privacy under Part 12 of the *Civil Liability Act 2002* may apply to the court for an order extending the limitation period for the cause of action.
- (2) A court must, if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date on which the cause of action first accrued, extend the limitation period mentioned in section 14C to a period of up to 3 years running from that date.
- (3) A court may not order the extension of the limitation period for a cause of action for invasion of privacy under Part 12 of the *Civil Liability Act 2002* other than in the circumstances specified in subsection (2).

**56F Effect of order**

If a court orders the extension of a limitation period for a cause of action under section 56E, the limitation period is accordingly extended for the purposes of:

- (a) an action brought by the applicant in that court on the cause of action that the applicant claims to have, and
- (b) section 26 (1) (b) in relation to any associated contribution action brought by the person against whom the cause of action lies.

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Civil Liability Amendment (Privacy) Bill 2009

Amendment of Limitation Act 1969 No 31

Schedule 2

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**56G Costs**

Without affecting any discretion that a court has in relation to costs, a court hearing an action brought as a result of an order under section 56E may reduce the costs otherwise payable to a successful plaintiff, on account of the expense to which the defendant has been put because the action was commenced outside the original limitation period.

**56H Prior expiry of limitation period**

An order for the extension of a limitation period, and an application for such an order, may be made under this Division even though the limitation period has already expired.

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## Appendix B: Submissions

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Mr Phillip Youngman, 2 August 2007

Australia's Right to Know Coalition, September 2007

Office of the Privacy Commissioner, September 2007

Law Society of New South Wales, Litigation Law and Practice Committee and Business Committee, 13 September 2007

Arts Law Council of Australia, 14 September 2007

Australian Press Council, 14 September 2007

SBS Corporation, 14 September 2007

Associate Professor Mark Lunney, 18 September 2007

Law Council of Australia, Media and Communications Committee and Working Party on Privacy Law of the Business Law Section, 18 September 2007

Redfern Legal Centre, 19 September 2007

Dr Norman Witzleb, 19 September 2007

Legal Aid Commission of NSW, 24 September 2007

Kingsford Legal Centre, 26 September 2007

Public Interest Advocacy Centre, 3 October 2007

Department of Corrective Services, NSW, 12 October 2007

Crown Solicitor's Office, NSW, 23 October 2007

Director of Public Prosecutions, NSW, 31 October 2007

Ms Robyn Carroll, 27 December 2007

Cyberspace Law and Policy Centre, 31 January 2008

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