Submission to Commonwealth Government, Department of Premier and Cabinet

A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy

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A. Executive Summary

The Australian Law Reform Commission (2008), the New South Wales Law Reform Commission (2009) and the Victorian Law Reform Commission (2010) all concluded, after in-depth consultations with the community, that the current standard of privacy protection in Australia is inadequate and recommended the introduction of a statutory cause of action for privacy.

My submission will evaluate the recommendations made in the reports and set out for each issue of the inquiry the approach that I submit should be preferred.

In response to the questions identified in the Issues Paper, my submission is in summary that–

1. Privacy protections in Australia need to be strengthened;

2. A cause of action against invasions of privacy should be recognised in Australian law;

3. A statutory cause of action is to be preferred over development of the common law;

4. In line with all three proposals and UK case law, the ‘touchstone’ of liability should be that the plaintiff had a reasonable expectation of privacy in relation to the relevant information. The additional criterion proposed by the ALRC and the VLRC that the defendant’s conduct was offensive to a reasonable person of ordinary sensibilities is not suitable to distinguish serious from trivial invasions of privacy. It should not be used as a threshold criterion for actionability.
5. If the privacy interest is outweighed by public interests, in particular freedom of expression, the plaintiff’s privacy claim should not succeed. Following the proposal of the VLRC, the onus of establishing the facts underlying the public interest defence should fall on the defendant. The proposals of the ALRC and the NSWLRC, which would effectively require the plaintiff to satisfy the courts that the privacy interest outweighs countervailing public interests, have the potential to cause procedural unfairness.

6. The legislation should clarify that any limitation of privacy needs to be proportionate to the aim of protecting public interests, such as the interest in freedom of speech, and vice versa.

7. The limitation of the cause of action to intentional and reckless conduct, as proposed by the ALRC, should be rejected. Instead, the approach advocated by the NSW Law Reform Commission and the Victorian Law Reform Commissions is to be preferred. It would require courts to take the degree of fault into account in the overall assessment of whether there was an actionable invasion of privacy. Following the NSW law reform proposal, a defence of innocent dissemination should also be introduced.

8. The cause of action should not be limited to intrusion into seclusion and misuse of personal information but be formulated broadly to make the law ‘future-proof’ and to enable other forms of privacy infringement to be accommodated, if and when they arise.

9. Apart from the public interest defence, the interests of defendants should be protected as follows:
   a. There is no need for a separate defence of consent. The ALRC and the NSWLRC are rightly of the view that a plaintiff who consents to an invasion of privacy will generally no longer be able to establish a reasonable expectation of privacy. Following the VLRC, however, the existence of consent should be pleaded and, if necessary, proven by the defendant.
   b. A proportionality requirement needs to be added to the defence that an ‘act or conduct was incidental to the exercise of a lawful right of defence of person or property’.
   c. The scope of the defence ‘required or authorised by or under law’, as discussed by the law reform commissions, is overly broad and ought to be reconsidered.
   d. The defence of ‘fair comment’ proposed by the VLRC is unnecessary.

10. The proposals of the ALRC and NSWLRC which give the court a wide discretion to grant the remedy that is most appropriate in the circumstances, are preferable over the more restrictive approach of the VLRC. In particular, the courts should have the power to award gain-based remedies where the defendant acts with a profit motive.
B. Responses to the Questions in the Issues Paper

1. *Do recent developments in technology mean that additional ways of protecting individuals’ privacy should be considered in Australia?*

   Yes.

2. *Is there a need for a cause of action for serious invasion of privacy in Australia?*

   Yes. Australian appellate courts continue to show little inclination to recognise a common law right to privacy. An invasion of privacy is therefore only actionable where a defendant can establish some other cause of action that applies incidentally. Three Australian law reform commissions concluded in as many years that this standard of protection is inadequate and recommended the introduction of a statutory cause of action.

3. The reports of the Australian Law Reform Commission (2008), the New South Wales Law Reform Commission (2009) and the Victorian Law Reform Commission (2010) show a remarkable degree of consensus as to the main features of this proposed statutory cause of action. These features include that the privacy action should focus on intrusion into seclusion and misuse of personal information as the main forms of privacy complaints. Furthermore, the commissions were acutely aware that privacy will often conflict with legitimate interests of the defendant or the public at large, and therefore proposed robust mechanisms for withholding protection from plaintiffs unless the court is satisfied that the privacy interest outweighs countervailing interests. Under the proposals, a successful plaintiff can seek compensatory damages, injunctions and declarations as potential remedies, but not exemplary damages.

4. The ALRC points out that its recommended cause of action ‘sets a high bar for plaintiffs, having due regard to the importance of freedom of expression and other rights and interests’. Indeed, there are a number of areas in which the Australian law reform proposals for a cause of action against serious invasion of privacy fall short of the standard of protection now prevailing in the United Kingdom. There is no doubt that the strength of privacy protection in the UK over the last decade is largely owed to the fact that the *Human Rights Act 1998* (UK) enshrines a guarantee of the right to respect for private life into domestic law. As there is no similar guarantee in domestic Australian law, it is particularly important that the cause of action provides a solid framework for privacy protection in this country.

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3. **Should any cause of action for serious invasion of privacy be created by statute or be left to development at common law?**

5 The cause of action for the protection of privacy should be introduced by statute law. For many years, the development of a general right to privacy was hampered by the decision of the High Court in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* that no such right existed.\(^2\) In 2001, the High Court held in *Lenah Game Meats Pty Ltd v Australian Broadcasting Corporations* that there are no obstacles to the recognition of a privacy tort in Australia.\(^3\) Even though some High Court justices in that decision were prepared to improve the protection of privacy at common law,\(^4\) the Court held that the particular plaintiff in that case, a corporation, would in any event be unable to benefit from any recognition of privacy rights and that therefore the issue was not ripe for decision.\(^5\)

6 In the decade since *Lenah*, a small number of first instance courts have taken the bold step of recognising an actionable right to privacy.\(^6\) In *Giller v Procopets*,\(^7\) the only recent appellate decision dealing with the right to privacy, the Victorian Court of Appeal in 2008 again did not decide the issue. In that case, Mr Procopets sought to harass and humiliate Ms Giller, his former de facto partner, by distributing video recordings depicting them engaged in sexual intercourse. The Victorian Court of Appeal accepted that Ms Giller had a claim in breach of confidence and awarded her $40,000 for injury to feelings, including $10,000 aggravated damages. On that basis, the Court was content to leave for another day the question of whether Australian law should recognise a common law right to privacy.

7 While such a tort remains a possibility for Australian law, its recognition would presumably require a case in which the plaintiff suffered serious harm to her privacy interests and could not rely on any established cause of action. In light of the High Court’s strong objection against law-making by intermediate appellate courts,\(^8\) such a tort could furthermore only be regarded as established after it had been endorsed by Australia’s highest court. This is likely to be a long and arduous way of achieving privacy protection. It furthermore depends on the fortuitous circumstance of the ‘right case’ coming to the court, brought by a plaintiff who has sufficient resources and resilience to fight a case with uncertain prospects.

8 The development of a statutory cause of action furthermore has the advantage that it

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\(^2\) *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479; (1937) HCA 45.

\(^3\) *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63.


will be the result of a process of intense community consultation. In the inquiry leading to the publication of its landmark report ‘For Your Information: Australian Privacy Law and Practice’ (ALRC Report 108), the ALRC engaged in one of the largest community consultation programs in its history. The New South Wales Law Reform Commission and the Victorian Law Reform Commission based their findings similarly on input from a wide cross-section of the community.

9 The fact that law reform inquiries at federal level as well as in Australia’s two most populous states reached a consensus on the appropriate way forward suggests that the issue is now ripe for decision. The federal Government should accept the general thrust of the proposals of the Law Reform Commissions and implement a statutory cause of action.

10 The variations between the proposals in relation to scope and content are relatively minor. My submission below to the further questions in the Issues paper explains how I consider the proposed statutory cause of action should be formulated.

4. Is ‘highly offensive’ an appropriate standard for a cause of action relating to serious invasions of privacy?

The proposals

11 There are differences between the proposals of the three Law Reform Commissions in relation to the threshold at which a privacy invasion becomes actionable. Both the ALRC and the VLRC recommend that only ‘serious’ invasions of privacy should be actionable. To that aim, their proposals contain a two-pronged test of actionability requiring that in the circumstances –

- there is a reasonable expectation; and
- the act or conduct complained of is highly offensive to a reasonable person of ordinary sensibilities.

12 The second of these criteria is intended to create an ‘objective test of seriousness’. The ‘highly offensive’ criterion has originated in the US but has been accepted by Gleeson CJ in Lenah Game Meats Pty Ltd v Australian Broadcasting Corporations as a ‘useful practical test of what is private’. While the ALRC Discussion Paper expressed

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9 ALRC Report, Rec 74-1; VLRC Report, Rec 23 and 24.
10 This is the formulation in the ALRC Report, Rec 74-1; with almost identical wording, but in relation to each proposed cause action, see also VLRC Report, Rec 25 and 26.
11 ALRC Report, at [74.133].
12 See Restatement (Second) of the Law of Torts, 625D.
13 Lenah Game Meats Pty Ltd v Australian Broadcasting Corporations (2001) 208 CLR 199; [2001] HCA 63, at [42]. The reception of this test in the UK has been largely critical: in Campbell v MGN Ltd [2004] 2 AC 457; [2004] UKHL 22, Baroness Hale and Lord Nicholls were critical, while Lord Hope approved of its use “in cases where there is room for doubt” (at [94]); Douglas v Hello! Ltd (No. 3) [2003] 3 All ER 996; [2003] EWHC 786 (Ch), [189]-[192] (Lindsay J); Gavin Phillipson, ‘Transforming Breach of Confidence? Towards a
the concern that the phrase might be setting the bar too high, it changed its view during the consultations and accepted it as appropriate in its Final Report. The ALRC recommends that a plaintiff should only be able to succeed ‘where the defendant’s conduct is thoroughly inappropriate and the complainant suffers serious harm as a result’.

The VLRC pointed to other areas of law, such as racial and religious vilification, where liability is likewise limited to more serious cases.

In contrast to these views, the NSWLRC proposal merely requires that the defendant invaded the privacy that the plaintiff was reasonably entitled to expect in all the circumstances having regard to any relevant public interest. The nature of the defendant’s conduct, including the extent to which a reasonable person would have regarded the conduct to be ‘offensive’ is one of the factors that the court must take into account in deciding whether there was such a privacy invasion. The NSWLRC expressed the view that its draft provision is sufficient to eliminate trivial claims and also objected on principle to an approach that appears to favour freedom of expression over privacy.

Comment

It is common ground that the plaintiff needs to have had a reasonable expectation of privacy in relation to the matter concerned. This criterion is also accepted in the UK and in New Zealand. In *Campbell v MGN Ltd*, both the ‘reasonable expectation’ and the ‘offensiveness’ tests received some support from their Lordships. While Lord Nicholls regarded a reasonable expectation of privacy as the ‘touchstone’ of whether a fact concerned the claimant’s private life, Lord Hope and Baroness Hale expressed some attraction (also) to the ‘offensiveness’ test. Subsequent cases show, however, that the reasonable expectation test has now become dominant in UK law. In *Hosking v Runting*, on the other hand, the New Zealand Court of Appeal favoured the cumulative application of both criteria to define the cause of action. It is this latter approach that the ALRC and VLRC recommend to adopt for Australia’s statutory cause of action.

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The two-pronged test proposed by the ALRC and the VLRC is intended to raise the threshold for privacy claims. However, there are at least four reasons why the specific formulation of the test chosen raises concerns. First, the test of ‘highly offensive’ is inherently vague. While this may not be problematic as long as courts are able to give adequate and consistent content to the test, its vagueness makes it difficult to use this criterion as an exclusionary device. Second, the tests of ‘reasonable expectation of privacy’ and ‘highly offensive’ are partly overlapping. Where conduct is likely to cause substantial offence, it can be reasonably expected that the defendant will not engage in it and respect the plaintiff’s privacy. Both of these points are also borne out when Gleeson CJ’s statement in Lenah about the suggested use of that criterion is considered in full:

Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.23

It becomes evident that, in that passage, Gleeson CJ was concerned with identifying when information or conduct was private, rather than whether disclosure or observation should be actionable. Furthermore, Gleeson CJ did not propose a two-pronged test that required both a reasonable expectation of privacy as well as offensiveness of the defendant’s conduct. Instead, his Honour identified the ‘highly offensive’ criterion a useful guide to ascertain whether information or conduct was private. This differs from the recommendations by the ALRC and the VLRC to use it as a threshold criterion to identify the seriousness of a privacy invasion.

Thirdly, the offensiveness of behaviour is always dependent on its specific context. It is difficult to determine the degree to which conduct is offensive unless the totality of circumstances, including potential justifications for that conduct, are also considered. This creates the difficulty that the public interest in the information or other defences may become enmeshed in the enquiry of whether the defendant seriously interfered with the plaintiff’s privacy. Whether a privacy breach was serious or not, can realistically only be determined in light of all the circumstances, including those relating to the defendant.24 This is the reason why English courts consider the test to be relevant.

25 See also Gavin Phillipson, ‘Privacy in England and Strasbourg compared’ in Andrew T Kenyon and Megan Richardson (eds), New Dimensions in Privacy Law: International and Comparative Perspectives, CUP, Cambridge, 2006, 184, at 199 (supporting the use of the ‘offensiveness’ test for assessing the ‘overall impact of the entire publication’ rather than as a threshold test).
to the proportionality stage, i.e. for the decision where the balance between privacy and freedom of expression should be struck.\textsuperscript{26}

18 Finally, even if it were accepted that the seriousness of the invasion can be established without having regard to the defendant’s countervailing interests, the term ‘offensive’ is probably not the best descriptor for seriousness. It appears to focus attention on whether a person in the position of the plaintiff would have considered the conduct to be ‘affronting’ or ‘insulting’. This may not necessarily be the case where conduct lacks a personal dimension, such as where the defendant did not act intentionally or where the wrong was committed by an amorphous organisation, rather than identifiable individuals. It has been suggested that the words ‘distress’ or ‘humiliation’ might be more appropriate.\textsuperscript{27} But even these terms are not without problems. While the word ‘distress’ may be more neutral in describing the emotional effect of a privacy invasion, the seriousness of a privacy invasion is not determined by its emotional effect alone. Privacy protects a person’s dignity and autonomy. These interests are not solely concerned with freedom from emotional distress.

19 For these reasons, the offensiveness test should not be used to distinguish serious from less serious invasions of privacy. If it were thought that a person should not have a right to sue for a privacy invasion unless it was serious, it would be more appropriate for the legislation to provide for this more clearly and directly. It could do so by requiring that the privacy invasion was ‘offensive, distressing or otherwise harmful’ to the individual concerned. Overall, however, it appears preferable not to impose a threshold criterion for privacy claims. Instead, the severity of the intrusion should be considered merely as a factor in the assessment of whether the privacy wrong, even after considering countervailing interests, should be actionable. If a claim is trivial, it will generally be difficult for a plaintiff to maintain that she had a reasonable expectation of privacy or that her privacy interests overcomes competing interests. The NSWLRC Report suggests that this is sufficient to exclude undeserving claims.\textsuperscript{28} On the other hand, where a person’s privacy interest outweighs other public and private interests, that person should in principle be entitled to defend his right to privacy in court.

5. \textit{Should the balancing of interests in any proposed cause of action be integrated into the cause of action (ALRC or NSWLRC) or constitute a separate defence (VLRC)?}

The proposals


\textsuperscript{27} Nicole Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 LQR 628, 655; cf. G Greenleaf & N Waters, ‘In support of a statutory privacy action in Australian law’ (2008) \textit{University of New South Wales Faculty of Law Research Series} 33 suggest the formulation ‘distress or offence’ (3-4). This is how the criterion was understood by Gault P. and Blanchard J in \textit{Hosking v Runting} [2005] 1 NZLR 1, [2004] NZCA 34: ‘truly humiliating and distressful or otherwise harmful to the individual concerned’, at [126].

\textsuperscript{28} NSWLRC Report, at [5.9]. See also \textit{Lee v News Group Newspapers Ltd} [2010] NIQB 106, at [31] (Gillen J).
Both the ALRC and the NSWLRC were concerned to ensure that the privacy interest was not privileged over other rights and interests. This led them to incorporate the consideration of countervailing interests into the cause of action. The ALRC proposes that in determining whether the cause of action was made out, the court must ‘take into account whether the public interest in maintaining the claimant’s privacy outweighs other matters of public interest’. It is worth noting that the proposals do no limit the public interest defence to the implied freedom of political communication, as developed in High Court jurisprudence, but instead adopt a broad understanding of the public interest. In the formulation of the NSWLRC, a privacy invasion is actionable if it ‘invaded the privacy 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).

Public interest considerations are also central to the issue of liability in the VLRC cause of action. However, the VLRC proposal creates a defence where the defendant’s conduct is in the public interest. In doing so, the onus of proof is cast on the defendant.

Comment

There is no doubt that the interest in privacy cannot enjoy absolute protection. In many situations, countervailing interests will outweigh the plaintiff’s desire for privacy and, if that is the case, the defendant should not be liable for conduct that interferes with the plaintiff’s privacy. The statutory cause of action therefore needs to provide a suitable framework for balancing these competing considerations.

Some commentators have concluded from the differences in wording between the ALRC and the NSWLRC proposals (i.e. that privacy ‘outweighs... the public interest’ as opposed to ‘having regard to ... public interest’) that the NSWLRC formulation sets a lower standard. However, both proposals require a balancing between the interest in privacy and countervailing public interest. It is not likely that a plaintiff will be granted a remedy where the privacy interests are less deserving of protection than the public interest matters invoked by the defendant.

The main point of distinction between the proposals is the onus of proof. In contrast to the ALRC and the NSWLRC, the VLRC expressed the view that the plaintiff should not have to prove a lack of countervailing public interest. It was concerned that this would involve the difficult task of proving a negative. Imposing this onus on the defendant also

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29 ALRC Report, at [74.147].
30 ALRC Report, Rec 74-2. This differs from the ALRC Discussion Paper which suggested a defence for information disclosed as a matter of public interest, see Australian Law Reform Commission, Review of Australian Privacy Law, Discussion Paper 72, 2006, Proposal 5.5(c).
32 NSW Draft Bill, cl 74(2). Similarly, ALRC Report, Rec 74-2; and at [74.157].
33 VLRC Report, at [7.180].
coincides with the structure of the breach of confidence action, which also recognises a public interest defence, and the public interest defences in defamation law. It is also in line with the Canadian privacy laws and the privacy tort in New Zealand. In the United Kingdom, there has been little explicit consideration in privacy claims of who has the onus of adducing the evidence relevant to the public interest considerations but some dicta suggest that the onus is on the defendant. The rights-based approach prevailing in the UK identifies and balances all competing interests before deciding whether a misuse of personal information has been made out, making it doubtful whether it still remains appropriate to speak of a 'public interest defence'. Even assuming that the privacy actions in the United Kingdom, Canada and New Zealand all regard public interest considerations as a defence, this structure does not appear to affect the weight attributed to the competing interests. In the UK, it is expressly recognised that in the conflict between privacy and freedom of expression neither interest has precedence over the other. Against this background, it appears unnecessary to impose the onus on the plaintiff to establish that there was no countervailing public interest in order 'to ensure that privacy interests are not privileged over other rights and interests'.

25 Despite the fact that Australia lacks a domestic human rights framework at federal level, the proposals for a statutory privacy action adopt a structure not dissimilar to the UK cause of action. Unlike established common law actions, a privacy claim under the proposals is not made out unless any competing public interest considerations are of lesser weight. This will, in many cases, prompt the plaintiff to provide evidence that is relevant to the public interest considerations in the balancing process. In practice, however, the defendant will often be in a better position, and have the greater interest, to adduce the evidence necessary for establishing the weight of the public interest in his or her conduct.

26 This makes it appropriate that the privacy claim should succeed if there is a lack of evidence on this issue. As indicated above, however, the international experience suggests that the question of who has the onus of proof in relation to the public interest may well not be as significant as the Australian reports surmise.

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36 Such as honest opinion/fair comment, or absolute and qualified privilege.
39 In the context of interim injunctions, A v B [2003] QB 195, [2002] EWCA Civ 337, at [119(viii)] assumes that the ‘public interest in publication is relied on to oppose the grant of an injunction’, which suggests that the onus is on the defendant; see also Cream Holdings Limited v Banerjee [2005] 1 AC 253; [2004] UKHL 44; cf Theakston v MGN Ltd [2002] EMLR 398, [2002] EWHC 137 (QB): ‘onus of proving that freedom of expression must be restricted is firmly upon the claimant’ (412, Ouseley J).
40 Tugendhat & Christie, above n 60, at [12.129].
42 ALRC Report, at [74.147]; NSWLRC Report, at [5.11].
6. How best could a statutory cause of action recognise the public interest in freedom of expression?

27 In my response to the previous question, I submitted that the defendant should bear the onus of proving that there was (or was not) a public interest in the privacy-invasive conduct. Further issues relevant in relation to freedom of expression are:

- What comprises the public interest?
- How should it be balanced against competing public interests, in particular the public interest in respecting privacy?

28 These issues are addressed now.

The proposals

29 In relation to the scope of the defence, the VLRC recommends that the legislation clarify that the public interest ‘is a limited concept and not any matter the public is interested in’. The ALRC and the NSWLRC expressly identify the interest to be informed about matters of public concern as a relevant public interest.

30 In relation to methodology, the ALRC recommended that the legislation should require the consideration of relevant public interests but did not identify how this balancing should occur. The ALRC identified the following interests but emphasised that this list was not exhaustive:

- the public interest in maintaining a claimant’s privacy;
- the interest of the public to be informed about matters of public concern; and
- the public interest in allowing and protecting freedom of expression.

31 While not spelt out in the recommendations, the reports assume that courts would assess the comparative value of each interest in each particular case.

Comment

32 The High Court has recently held that the term ‘public interest’ derives its content from ‘the subject matter and the scope and purpose’ of the enactment in which it appears. In the context of publications, in particular by the media, freedom of expression will be a particularly prominent interest. Other issues of public interest that may outweigh the plaintiff’s privacy rights include national security, public health, and the requirements of law enforcement etc.

Freedom of expression is regarded as a fundamental human right but does likewise not enjoy absolute protection. Where freedom of speech and privacy collide in a particular case, achieving an optimal balance between both interests will often involve considerations of proportionality so that the limitation of each interest is justified, and goes no further than required by, the demands of the other. Adopting such a ‘sophisticated balancing process’, the courts would ask whether ‘in the circumstances, the degree of intrusion into the plaintiff’s privacy was proportionate to the public interest that the intrusion supposedly serves’.

Unlike the European human rights jurisprudence that affects UK privacy law by virtue of the Human Rights Act 1998 (UK), Australian law does not expressly adopt the concept of proportionality where private causes of action affect the parties’ human rights. It would therefore be appropriate for any privacy bill to clarify the methodology of the balancing process, in particular the need for proportionality. It would then fall to the courts to adopt this framework and to refine the statutory methodology for balancing the competing interests through case law.

7. Is the inclusion of ‘intentional’ or ‘reckless’ as fault elements for any proposed cause of action appropriate, or should it contain different requirements as to fault?

The proposals

The ALRC recommends that the cause of action should be restricted to ‘intentional’ and ‘reckless’ acts on part of the defendant. It defines an act as intentional if the defendant wilfully or deliberately invades the plaintiff’s privacy. In relation to recklessness, the ALRC report refers to the definition of recklessness in the Commonwealth Criminal Code, which distinguishes between recklessness ‘with respect to a circumstance’ and recklessness ‘with respect to a result’. In both cases, recklessness requires an awareness of a substantial risk (that the circumstance exists, or will exist, or that the risk will occur, respectively) and further that it is unjustifiable to take that risk.

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45 For example, International Covenant of Civil and Political Rights, art. 19(2); European Convention on Human Rights, art. 10; Charter of Human Rights and Responsibilities Act 2006 (Vic), s 15, and Human Rights Act 2004 (ACT), s 16.
46 NSWLRRC Report, at [5.19].
47 NSWLRRC Report, at [5.16]; see also VLRC Report, at [7.21].
49 But see Charter of Human Rights and Responsibilities Act 2006 (Vic), s 7(2); considered in Momcilovic v The Queen [2011] HCA 34; generally, on proportionality and related concepts in Australian law, Rowe v Electoral Commissioner [2010] HCA 46, at [424]-[466] (Kiefel J).
50 ALRC Report, at [74.164].
51 Section 5.4 (1) and (2) Criminal Code (Cth).
The ALRC does not provide any arguments why the privacy action should be limited in that way.\textsuperscript{52} It merely refers to the Consultation Paper of the NSWLRC, which suggested that liability for negligent or accidental acts in relation to all privacy invasions ‘would, arguably, go too far’\textsuperscript{53} However, in its final report the NSWLRC no longer recommends such a limitation. The VLRC likewise regards it as unnecessary expressly to exclude negligent acts.\textsuperscript{54} The NSWLRC proposal now provides that, for a finding of liability, the court must take into account, amongst other things, ‘the nature of the conduct concerned (including the extent to which a reasonable person of ordinary sensibilities would consider the conduct to be offensive)’\textsuperscript{55} and ‘the conduct of the individual and the alleged wrongdoer both before and after the conduct concerned (including any apology or offer to make amends made by the alleged wrongdoer)’.\textsuperscript{56} As a court may also take into account any other matter it considers relevant, this would allow for the degree of fault (if any) of the wrongdoer to be taken into account. In addition, the NSWLRC recommends a defence of innocent dissemination,\textsuperscript{57} which is familiar from the law of defamation.

\textbf{Comment}

There are two difficulties with the recommendation of the ALRC that only intentional and reckless invasions of privacy should be actionable. Firstly, its intended meaning is unclear. Secondly, it is difficult to justify on policy grounds. In relation to meaning, the ALRC report does not make clear with respect to which elements of the cause of action the defendant must have acted recklessly or intentionally. The ambiguity stems from the fact that the ALRC recommends that reckless or intended ‘acts’ are actionable but an invasion of privacy is a composite cause of action with multiple elements. These elements are that the plaintiff has a reasonable expectation of privacy, that the act or conduct complained of is highly offensive to a person of ordinary sensibilities and that, on balance, the plaintiff’s privacy interest outweighs countervailing public interest considerations.

It is widely acknowledged that there is much confusion in the use of the terms intention and recklessness.\textsuperscript{58} In torts law, there are some torts where the defendant’s conduct needs to have been intended and others where that conduct’s consequences for the plaintiff need to have been intended.\textsuperscript{59} Even though the proposed privacy action is not a tort, there needs to be clarity with regard to which elements of the cause of action the defendant must have had mens rea. At its simplest, it could be argued that recklessness only needs to exist in relation to the ‘act or conduct’ element of the cause

\textsuperscript{52} ALRC Report, at [74.164].
\textsuperscript{53} NSWLRC, \textit{Invasion of Privacy}, Consultation Paper 1, 2007, at [7.24].
\textsuperscript{54} VLRC Report, at [7.148].
\textsuperscript{55} NSW Draft Bill, cl 74(3)(a)(ii).
\textsuperscript{56} NSW Draft Bill, cl 74(3)(a)(vi).
\textsuperscript{57} NSW Draft Bill, cl 75(1)(d).
\textsuperscript{59} See, eg, F Trindade, P Cane and M Lunney, ibid, 269-270.
of action. This would mean that a defendant needs to have been reckless in relation to the risk that his or her act would be highly offensive to a reasonable person of ordinary sensibilities, whereas the defendant does not need to have been reckless in relation to the plaintiff’s reasonable expectation of privacy nor of the fact that the plaintiff’s privacy interest outweighed countervailing public interest considerations.  

39 Understood in that way, a recklessness standard would require the plaintiff to show that the defendant was subjectively aware of the offensiveness of their conduct and chose to disregard this risk. Even if such a limited awareness of the defendant would be all that the plaintiff is required to prove, it must be questioned whether such a fault requirement is appropriate or whether it erects too high a hurdle for plaintiffs. If the requirement for recklessness were extended to the other elements of the cause of action, it would be even harder for plaintiffs to establish the requisite mental element.

40 The limitation to intentional and reckless acts should be rejected. It would leave inappropriate gaps in the protection of privacy and also appears to be out of step with the general principles of liability for civil wrongs. The case of Jane Doe v ABC provides a striking example of why limiting liability to intentional and reckless acts would exclude some deserving cases. In that case, the Australian Broadcasting Corporation reported in three radio news broadcasts that the plaintiff’s husband had been convicted of raping her. In two of these broadcasts, her estranged husband was identified by name and the offences were described as rapes within marriage. In another broadcast, Jane Doe was additionally identified by name. In all three broadcasts, the journalist and sub-editor breached the Judicial Proceedings Act 1958 (Vic), which makes it an offence to publish information identifying the victim of a sexual offence. Expert evidence established that the plaintiff was particularly vulnerable at the time of the broadcasts and that the reporting exacerbated her trauma symptoms and delayed her recovery. The defendants were thus guilty of a serious invasion of privacy with grave and long-lasting consequences for the plaintiff. Yet the trial judge, Hampel J, found that the breach of the plaintiff’s privacy was the result of the defendants’ failure to exercise reasonable care ‘rather than [being] wilful’. If the ALRC proposal was enacted, a person in the position of the plaintiff in Jane Doe v ABC would not be able to rely on the statutory cause of action. This severely curtail the protection for privacy that the law should provide for.

41 General principles of civil liability likewise do not provide a sufficient rationale for limiting liability to intentional or reckless conduct. While the ALRC expressly provides that the statutory cause of action is not a tort, it is desirable that differences in the protection of comparable interests are justified on policy grounds. The majority of torts intended to protect personality interests do not set the bar at reckless or intentional conduct. Defamation is a strict liability tort but provides faultless defendants with a defence in some cases. At common law and under the (Australian) Uniform Defamation
Acts, the defence of ‘innocent dissemination’ is available to subordinate publishers, provided they establish that they neither knew nor had reason to suspect that they were handling defamatory materials. Similarly, under the Lange defence for government and political matters and the statutory qualified privilege in the (Australian) Uniform Defamation Acts, defendants can also claim a privilege where they can establish ‘reasonableness’ in the publication of the matter. These two defences protect defendants who can establish that they have met an objective standard of conduct. Likewise, liability under the principle in Wilkinson v Downton is now more commonly understood as requiring merely negligence, not intention or recklessness, in relation to the consequence of causing psychiatric harm. Lastly, the proposed Australian Privacy Principles (APP), which will form the basis of regulatory action by the Australian Privacy Commissioner, impose objective obligations that are akin to a negligence standard, such as conduct must be ‘reasonable’, ‘reasonably necessary’, or based on a ‘reasonable belief’. There is no sufficient justification to set a much higher bar in the context of a private law action and to require recklessness or intention. Such subjective fault elements are more appropriate in the context of criminal law rather than private law liability.

For this reason, the limitation proposed by the ALRC should be rejected. The approach of the NSW and Victorian Law Reform Commissions that would require courts to take the degree of fault into account in the overall assessment of whether there was an actionable invasion of privacy is to be preferred.

8. Should any legislation allow for the consideration of other relevant matters, and, if so, is the list of matters proposed by the NSWLRC necessary and sufficient?

The proposals

The ALRC and VLRC reports only provide a limited amount of guidance for deciding when the publication of private information is genuinely of public interest. The NSWLRC proposal, on the other hand, lists eight matters that the court must take into account in balancing the competing interests and further allows the court to take into account any other matter it considers relevant.

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63 For example, Defamation Act 2005 (NSW), s 32; Defamation Act 2005 (Vic), s 32.
65 For example, Defamation Act 2005 (NSW), s 30(1)(c); Defamation Act 2005 (Vic), s 30(1)(c).
66 Wilkinson v Downton [1897] 2 QB 57.
68 Eg., Draft APP 1, APP 4, APP 5, APP 8, APP 10, APP 11.
69 Eg., Draft APP 3, APP 6, APP 8, APP 9.
70 Eg. Draft APP 3, APP 6, APP 8, APP 12. See also G Greenleaf & Nigel Waters, above n 63, p 7.
71 NSW Draft Bill, cl 74(3).
Comment

44 The list proposed by the NSWLRC is apt to provide guidance as to whether the defendant’s conduct should be considered to be an actionable breach of privacy. However, owed to the specific conception of a privacy claim under the NSWLRC proposal which integrates the consideration of a reasonable expectation of privacy and countervailing public interests, the list combines issues that affect the reasonableness of the expectation of privacy as well as countervailing public interest in publication.

45 Provided that the legislation clarifies that the onus of proof in relation to some of these matters falls on the defendant, as explained in my submission to question 5 above, such an indicative list of matters to be considered is useful and should form part of the legislation.

9. Should a non-exhaustive list of activities which could constitute an invasion of privacy be included in the legislation creating a statutory cause of action, or in other explanatory material? If a list were to be included, should any changes be made to the list proposed by the ALRC?

The proposals

46 An immediately apparent distinction between the proposals is that the NSWLRC and ALRC envisage a single cause of action, whereas the VLRC recommends the introduction of two overlapping causes of action. The ALRC proposes a single cause of action for serious invasions of privacy and recommends that the Act contain a non-exhaustive list of the types of invasion that fall within the cause of action. The list refers to situations that evidently amount to invasions of privacy, such as interferences with a person’s home or family life, or correspondence, unauthorised surveillance, and the disclosure of sensitive facts. In its Consultation Paper, the NSWLRC had provisionally also recommended a non-exhaustive list of the types of invasion that fall within the cause of action. However, in its final report the Commission no longer regarded it as necessary to include such a list but retained the approach of a having single cause of action covering all cases where a ‘person’s conduct invades the individual’s privacy’. For further guidance, the NSW proposal now lists a number of matters that the court must take into account in determinining whether privacy has been invaded, including the nature of the subject-matter, the nature of the conduct of both parties, the plaintiff’s public profile and vulnerability, and the effect of the defendant’s conduct on the plaintiff.

47 In contrast, the VLRC proposes the introduction of two overlapping causes of action for serious invasions of privacy. One action is aimed at the misuse of personal information and the other at intrusion upon seclusion. As a result of its focus on
surveillance in public places, the VLRC did not expressly deal with other forms of privacy invasions. Its report nonetheless expressed reservations against broadly expressed rights to privacy.\(^{75}\)

**Comment**

48 Despite these variations, closer inspection reveals that the differences between the various proposals relate to legislative style and drafting, rather than to the substance and scope of the proposed privacy action. Referring to obiter comments in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,\(^ {76}\) all three commissions recommend that the statutory cause of action be limited to the misuse of personal information and unauthorised intrusion into the plaintiff’s private life. This means in particular that those invasions that, in US law, are classified as ‘publicity which places a person into a false light in the public eye’ and ‘appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness’ would not be covered by the statutory cause of action.\(^ {77}\)

49 However, while there is thus consensus on the recommended scope of the privacy action, there are differences in relation to the stringency with which such other forms of privacy invasion are excluded. The VLRC proposes the clearest form of exclusion because it recommends that only serious invasions of privacy by misuse of personal information and by intrusion upon seclusion should become actionable. Other forms of privacy invasion would be actionable only where they happen to fulfil the criteria of the two specified causes of action, or are picked up by existing statutory or general law. Any privacy protection in those cases would thus be incidental. The ALRC proposal is less straightforward. Its list of typical scenarios of privacy infringements is intended to be ‘useful in indicating to the courts the scope of the action’.\(^ {78}\) The existence of this list will presumably make it more difficult to persuade a court to accept a privacy action where the conduct does not fit any of the statutory scenarios, but considering that the list is non-exhaustive its normative effect is likely to be limited. Neither the Recommendations nor the Report suggest in what circumstances a court should find a privacy infringement in a scenario omitted from the list. The Report merely suggests that it is ‘questionable’ whether placing a person into a false light or using a person’s name, identity, likeness or voice without authority for commercial gain is properly regarded as an invasion of privacy\(^ {79}\) and that it is ‘undesirable’\(^ {80}\) to include the latter scenario in the list. Such an approach causes uncertainty and is likely to require litigation to achieve further clarification.

50 In a similar vein, the report of the NSWLRC refers to a ‘widespread understanding [in Australia] that the role of privacy in private law is to protect information privacy and

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\(^{75}\) VLRC Report, at [7.123].

\(^{76}\) *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63.


\(^{78}\) ALRC Report, at [74.119].

\(^{79}\) Ibid, at [74.120].

\(^{80}\) Ibid, at [74.123].
and that the scenarios of the two other United States privacy torts, misappropriation and false light, should therefore not, without more, be subsumed within the general cause of action. In light of the still fairly limited engagement with privacy in Australian law, assuming such a consensus may perhaps overstate the position. Even conceding that judicial, academic and public opinion has so far focused on information privacy and seclusion, this may merely indicate that these are the areas in most urgent need of regulation but not necessarily that other forms of privacy invasion should be disregarded in a comprehensive reform as it is now envisaged. Like the ALRC, the NSWLRC adopts a somewhat curious compromise position. It submits that the misappropriation and false light torts will not generally fall within the statutory cause of action, but that such conduct can be encompassed where the purpose of the action is ‘aimed at guarding the personal feelings of an individual’. The reason given for this limitation is that the proposed cause of action protects primarily the plaintiff’s intangible interest in freedom from emotional distress, whereas the false light tort is said to protect the interest in reputation and the tort of wrongful misappropriation is said to protect commercial or proprietary interests.

There are a number of problems with this position. The draft privacy bill that forms part of the NSW Report (the NSW Draft Bill) recognises, in its objects clause (cl 72), the importance of protecting the privacy of individuals generally, but it does not limit this protection to situations where the privacy invasion affects their emotional well-being. Likewise, cl 74(3)(a)(vii) of the NSW Draft Bill merely requires the court to take into account ‘the effect of the conduct concerned on the health, welfare and emotional well-being of the individual’ but does not make such an effect a necessary condition of protection. In any event, it would create a false dichotomy to say that the information privacy and seclusion wrongs protect primarily the plaintiff’s emotional well-being, whereas the false light tort is generally used to protect a plaintiff’s reputation. First, the protection of reputation and of emotional wellbeing are not mutually exclusive. Reputational wrongs, including the tort of defamation, also protect the plaintiff from emotional harm. As the protracted debate over the role and reach of the Wilkinson v Downton tort shows, freedom from emotional distress is not itself recognised as a legal interest. Emotional distress is usually only actionable where it is the result of

81 NSWLRC Report, at [4.4].
85 Ibid, at [4.5].
86 The Bill would be enacted as an amendment of the Civil Liability Act 2002 (NSW).
wrongful harm to a recognised legal interest, such as bodily integrity,\textsuperscript{89} reputation, or, potentially, privacy. It is therefore a little misleading to suggest that the false light tort is concerned with protecting reputation, rather than freedom from emotional distress. Indeed, the false light tort protects the plaintiff where a publication is untrue but not damaging to the plaintiff’s reputation. It thus fills a gap left by the law of defamation. Rather than protecting reputation, it protects the plaintiff’s interest in not having untruths published about them. This is an interest properly falling within the domain of a privacy action. A false light tort is therefore also unlikely to undermine the distinction between privacy and defamation.

52 In light of the ongoing debate on the appropriate scope of privacy protection, it is appropriate to formulate the cause of action broadly and leave its further development to the courts. Statutory law reform in the area of privacy is notoriously difficult to achieve. This makes it imperative to make the law ‘future-proof’ and to enable new forms of privacy infringement to be accommodated, if and when they arise. While the recommendation of the VLRC has clarity on its side, it closes the door to future development of the law. This makes the more open-textured proposals of the ALRC and the NSWLRC preferable. Even though the two proposals are likewise not intended to address the full range of potential privacy invasions, they at least do not rule out that other privacy wrongs may become actionable under the statutory tort.

53 Notwithstanding the fact that information privacy and intrusion into seclusion are the areas that are likely to be dominant in practice, the cause of action should not exclude cases in which a plaintiff is placed into a false light. This is important not least for practical reasons because the various phenomena of privacy invasions will often overlap in practice. \textit{McKennitt v Ash}\textsuperscript{90} was a case of breach of confidence, in which Ms Ash made allegations about the private life of Ms Kennitt, a renowned folk musician, which were both invasive and untrue. Ms Ash had been a close friend of Ms Kennitt. When the friendship ended acrimoniously, Ms Ash published a book that detailed Ms Kennitt’s personal and sexual relationships, including her feelings after the death of her fiancé, her health and diet and much other personal and private information. The book also contained Ms Ash’s account of a property dispute that had arisen between the parties. At trial, Ms Ash sought to justify publicising this dispute with the public interest in revealing Ms Kennitt’s true character as a vindictive person. The trial judge found, however, that most of Ms Ash’s allegations concerning the dispute were untrue and that their publication was therefore not in the public interest. Ms Ash then sought to seize on this finding of falsity and argued that Ms Kennitt could not have a reasonable expectation of privacy in relation to false statements. The Court of Appeal rejected this argument. Longmore L.J. stated:

\begin{quote}
The question in a case of misuse of private information is whether the information is private, not whether it is true or false. The truth or falsity is an
\end{quote}

\textsuperscript{89} This includes negligence (damages for pain and suffering, loss of amenities) as well as assault and battery (general damages).

\textsuperscript{90} \textit{McKennitt v Ash} [2008] QB 73; [2006] EWCA Civ 1714.
irrelevant inquiry in deciding whether the information is entitled to be protected.\textsuperscript{91}

54 It would be desirable if the Australian privacy cause of action had a similar scope and effect. Considering that the term ‘privacy’ has not been defined in the ALRC and the NSW proposals, it can readily be understood to include a person’s reasonable expectation that no untrue information is published about himself or herself.

55 The misappropriation of a person’s name, likeness or other characteristics for financial gain raises issues that are beyond the scope of this submission. These wrongs affect a plaintiff’s personality interest but also his or her commercial and proprietary interests. As long as the proper limit of protection in relation to these phenomena continues to be uncertain,\textsuperscript{92} it is preferable that statutory reform adopts a cautious approach. To that extent, it may be appropriate for the statute to deal with the privacy aspects of these wrongs and leave the proprietary considerations to further developments in the courts.

56 The current formulations of both the ALRC and NSWLRC allow for this flexibility and should therefore be preferred over the VLRC recommendation for two separate causes of action.

57 The ALRC recommends the inclusion of a non-exhaustive list of typical privacy infringements, while the NSWLRC proposal contains no such list. Such a list at best provides some limited and initial guidance to interpreting the statute. As soon as a body of jurisprudence develops, the list is likely to become obsolete. This, combined with the doubtful normative value of a non-exhaustive list, suggests that it may be unnecessary to include it in the legislation.

10. What should be included as defences to any proposed cause of action?

A. Consent

The proposals

58 The NSWLRC proposal provides that conduct that has been expressly or impliedly consented to does not invade an individual’s privacy.\textsuperscript{93} The NSWLRC thus makes consent an ‘essential element of the cause of action’\textsuperscript{94} and requires the plaintiff to

\textsuperscript{91} McKennitt v Ash [2008] QB 73; [2006] EWCA Civ 1714, [86]. Buxton LJ indicated that it may be an abuse of process when falsity was the nub of the claimant’s complaint and breach of confidence were relied on in order to avoid the rules relating to defamation ([78]-[80]). See also WER v REW [2009] EMLR 304; [2009] EWHC 1029 (QB).


\textsuperscript{93} NSW Draft Bill, cl 74(4).

\textsuperscript{94} NSWLRC Report, at [5.51].
prove the absence of consent before the action can proceed further.95 The ALRC regards the defence of consent as unnecessary96 on the basis that a plaintiff who consents to the defendant’s conduct is unlikely to satisfy the elements of the cause of action, in particular that he or she had a reasonable expectation of privacy or that the act complained of was sufficiently serious to cause substantial offence to a person of ordinary sensibilities.97 These two approaches share a common rationale: Persons should not need to defend themselves against allegations of privacy invasion if the plaintiff agreed to the very conduct complained of. Despite differing legislative techniques, both approaches are therefore likely to lead to similar outcomes in practice. They require that plaintiffs plead and, if necessary, prove facts that allow an inference that they did not give consent to the privacy encroachment.

59 The VLRC goes a different way by establishing that consent is a defence to the cause of action. Creating a defence, rather than making consent an element of the cause of action, is likely to lead to different outcomes where there is an evidentiary non liquet. Just as in the context of public interest, the VLRC was concerned that requiring the plaintiff to prove a negative (i.e. the absence of consent) would impose a difficult task on them.98 The NSWLRC acknowledges the potential difficulty but submits that the focus of the inquiry into consent should be about capacity and ‘reality’ of consent, i.e. the questions of whether the plaintiff was in a fit state to consent and the consent was, in all the circumstances, free and informed.99

Comment

60 Imposing the onus of proving consent on the defendant aligns the statutory privacy action with other civil wrongs, in particular the law of trespass. In Australian and Canadian law, the onus of proving consent to trespass to the person100 or trespass to land101 is on the defendant.102 It has been suggested that this approach is consistent with the significance of a person’s fundamental rights in their bodily integrity, liberty and property.103 Where the defendant directly interferes with these interests, a prima facie violation of the plaintiff’s rights is made out. However, this argument does not translate into area of privacy, because, unlike the bodily integrity, liberty and property, our interest in privacy is not protected per se, regardless of circumstances. Whether a wrongful invasion of privacy occurred in a given case depends on a balancing of competing

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95 But see Leonhard, above n 92, who considers that the onus of establishing consent would be on the defendant (at 46).
96 ALRC Report, at [74.174].
97 Ibid, at [74.159].
98 VLRC Report, at [7.154].
99 NSWLRC Report, at [5.51].
100 Secretary, Department of Health and Community Services v JWB (Marion’s case) (1992) 175 CLR 218; [1992] HCA 15, at 310 (McHugh J, obiter).
101 Proprietors of SP 20297 v G & S Developments Pty Ltd [2008] NSWSC 257.
102 This is also the position in Canada: Non-Marine Underwriters, Lloyd’s of London v Scalera [2000] 1 SCR 551. In English law, it is unclear where the onus of proof is on the plaintiff (Freeman v Home Office [No 2] [1984] 2 QB (524)) or on the defendant (cf. Ashley v Chief Constable of Sussex Police [2007] 1 WLR 398, [2006] EWCA Civ 1085, at [31]: ‘open to doubt’ (Sir Anthony Clarke); not considered in Ashley v Chief Constable of Sussex [2008] 1 AC 962; [2008] UKHL 25.
103 Non-Marine Underwriters, Lloyd’s of London v Scalera [2000] 1 SCR 551, at [10], [15].
interests, including the public interest in the free flow of information. There are no prima facie entitlements in this area. The ALRC acknowledges this fundamental difference between privacy and the interests protected by trespass. Rather than providing for a separate defence of consent, it considers the existence (or absence) of consent as a circumstance that affects a person’s reasonable expectation of privacy and the offensiveness of the defendant’s conduct.

61 Even though consent should therefore not technically be regarded as a defence, it is appropriate to expect the defendant to plead and, if necessary, to prove that the plaintiff consented. In the majority of cases, the parties agree on the factual matrix underlying the consent issue, i.e. on what the plaintiff may have said or done before the invasion occurred, but differ merely on the legal significance of this conduct, in particular whether it is sufficient to infer consent. For these cases, it will not matter whether ‘consent’ is regarded as an ‘essential element of the cause of action’ or a defence.

62 However, proof of the facts constituting consent (or lack thereof) will sometimes remain a live issue. In these cases, the NSW proposal is problematic because it turns the absence of consent into a threshold issue that the plaintiff needs to establish before his or her action can succeed. In *Cornelius v de Taranto*, for example, Mrs Cornelius commissioned Dr de Taranto, a consultant forensic psychiatrist, to prepare a medico-legal report on her. The defendant prepared the report and then sent copies of it to the plaintiff’s GP and a consultant psychiatrist. The plaintiff claimed that the defendant breached her confidence by disseminating the report without her consent. The issue of whether the plaintiff had indeed given consent to the dissemination of the report was the ‘crucial question of fact’ in a trial that lasted six days and then went onto appeal.

63 Even though this case was concerned with a breach of confidence, there is no reason for the privacy action not to follow these established principles on consent. The onus would then be on a defendant who wishes to rely on consent to plead and, if necessary, prove it. Indeed, as the NSWLRC recommends that the new statutory privacy action should not affect breach of confidence and other causes of action at general law, it is easily imaginable that a plaintiff in the situation of Mrs Cornelius may seek redress under both causes of action. If the onus in relation to consent differed between both causes of action and there was insufficient evidence on consent, a plaintiff would win the confidence claim but lose the privacy action. There does not appear to be any good reason for such a divergence. The more appropriate approach would be to require a defendant who seeks to rely on consent to establish the relevant facts and, following the ALRC proposal, to consider the existence of consent in the context of whether the plaintiff had a reasonable expectation of privacy.

104 This is also the approach followed in the UK: *Murray v Express Newspapers Plc and Big Picture (UK)* [2008] 3 WLR 1360; [2008] EWCA Civ 446, at [36] (Sir Anthony Clarke MR).
105 ALRC Report, at [74.159].
108 At trial, the claimant was awarded £3,750 to compensate her for the injury to feelings resulting from the unauthorised disclosure, and the appeal against this decision was dismissed.
109 NSW Draft Bill, cl 80.
Somewhat different considerations apply in relation to proving incapacity to consent. To that extent, the NSW recommendation that the onus should lie on the plaintiff is appropriate. The well-known case of Kaye v Robertson\(^{110}\) provides an illustration. In that case, the plaintiff, a well-known television personality, was recovering from brain surgery in a hospital and journalists of a tabloid newspaper entered the plaintiff’s hospital room uninvited, took photographs and published these to accompany an ‘interview’ that the plaintiff was alleged to have given to the defendants from his hospital bed. In reality, the plaintiff was not in a fit state to give or withhold consent. It would be preferable to require the defendant to plead and prove that the plaintiff consented and to put the onus on the plaintiff to establish that any consent he gave was vitiated by incapacity or other defect.

Implied consent plays a role in a fair number of privacy cases, where a plaintiff had courted publicity but the media then make further publications which are not welcome to the plaintiff. Usually in those cases, the defendant will argue that a plaintiff invited public discussion of his or her life and therefore ‘waived’ privacy also in relation to subsequent publications.\(^{111}\) However, the idea of blanket waiver for public figures has been decisively rejected by the House of Lords in Campbell v MGN Ltd.\(^{112}\) Strictly speaking, these cases are not concerned with consent because the plaintiff will generally not have consented to the subsequent invasion or publication. The better argument in many cases will be that a plaintiff who fanned media interest in the past may in some circumstances have a reduced expectation of privacy. Where a person’s private life, through their voluntary revelations, has become a matter of legitimate public concern, the court will take this into account in the consideration of any countervailing public interest. In these circumstances, it becomes particularly apparent that claims of alleged consent can be difficult to separate from the wider issue of whether the plaintiff had a reasonable expectation of privacy. This confirms the view expressed above that questions of consent are best considered in the context of the cause of action.

B. ‘Act or conduct was incidental to the exercise of a lawful right of defence of person or property’

The Proposals

All three proposals establish a defence for conduct that was ‘incidental’\(^{113}\) or ‘for the purpose’\(^{114}\) of lawfully defending personal or property rights.

Comment


\(^{111}\) See, for example, Theakston v MGN Ltd [2002] EMLR 398, [2002] EWHC 137 (QB).

\(^{112}\) Campbell v MGN Ltd [2004] 2 AC 457; [2004] UKHL 22, at [57] (Lord Hoffmann); see also Douglas v Hello! (No. 3) [2003] 3 All ER 996; [2003] EWHC 786 (Ch), at [226] (Lindsay J).

\(^{113}\) ALRC Report, at [74-169].

\(^{114}\) NSW Draft Bill, cl 75(1)(b).
The reports contain little information on what this defence would add to the defence that allows privacy invasions where they are ‘required or authorised by or under law’. It may well be argued that where a person exercises a ‘lawful right’ of defence of person or property, their conduct will be authorised by or under law. A more significant difficulty with this defence is, however, that it does not appear to require a balancing between the plaintiff’s interest in privacy and the defendant’s interest in pursuing his or her legal rights.

This defence lacks a requirement that the defendant’s conduct was necessary and reasonable. On its face, the defence would allow a person to engage in serious invasions of privacy provided that that conduct was engaged in with a view to protecting person or property. For example, an employer may seek to rely on this defence to justify the installation of hidden cameras in change rooms for the prevention of theft. A licensed venue may publish on its home page the photos of patrons who have been banned from the premises for unruly behaviour in order to protect other patrons or prevent re-entry onto the premises. The VLRC report suggests that defence also encompasses conduct undertaken for the purpose of prosecuting or defending criminal or civil proceedings. However, the defence should not provide a blanket permission on the use of private investigators, regardless of the circumstances giving rise to a potential civil or criminal dispute and the invasiveness of the conduct engaged in. If the defence did not contain a reasonableness requirement, it would be open to abuse and fail to give the plaintiff’s privacy the protection it deserves in the circumstances of each case.

Requiring a balancing of the competing interests underlies the cause of action as a whole, in particular in relation to countervailing public interests. It would be surprising if no such balancing were required if the defendant acted in the protection of private rights. It may be possible that the reference to a ‘lawful right of defence or property’ is intended to import such a limitation. However, rather than relying on this tautological expression, it would be preferable if the defence expressly provided the circumstances in which the defence of the defendant’s private rights allowed for intrusions into the plaintiff’s privacy. The defence should not be wider than equivalent defences at common law, eg. in the law of trespass. On that basis, the defendant should be required to show that there was at least a concrete threat to his right and that the invasion of privacy was necessary and reasonable for the protection of his or her rights against that threat. Such a proportionality requirement would ensure that the intended protection of the defendant’s private rights could not be the basis for egregious privacy invasions.

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115 VLRC Report, at [7.156].
116 In Watts v Klaemt, 2007 BCSC 662, 71 BCLR (4th) 362, a neighbourhood dispute, Bruce J disallowed the defence under the Privacy Act RSBC 1996 c 373, s2(2)(b), which the proposed defence is modelled upon, where the defendant’s privacy invasions were ‘out of all proportion to the potential danger’ presented by the plaintiff and her family. On the defence of ‘lawful purpose’ in s 17 Harassment Act 1997 (NZ) and whether it imports a proportionality requirement, see also New Zealand Law Commission, Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy: Stage 3, Report 113, 2010, at [5.13]-[5.17].
117 For example, Fontin v Katapodis (1962) 108 CLR 177; [1962] HCA 63.
C. ‘Required or authorised by or under law’

The Proposals

70  All three reports recommend a defence for conduct ‘required or authorised by or under law’. The reports explain that this defence is important for government agencies, in particular in relation to law enforcement and national security.118

Comment

71  The defence for conduct ‘required or authorised by or under law’ is familiar from the existing the Information Privacy Principles and National Privacy Principles in the Privacy Act 1988 (Cth).119 It concerns the relationship of privacy with other areas of law and seeks to ensure that the legal order does not impose conflicting demands on the addresses of privacy obligations. Because of its potentially very wide ambit, this defence raises a large number of considerations, including the questions of what amounts to ‘authorisation’ and when a requirement or authorisation is contained in ‘law’.120

72  One concern with this proposed defence, which originated in public law, is that its implications in the context of private law may not have been fully considered. The defence needs to apply differently to government agencies and to private sector organisations. The statement in the NSWLRC report that conduct is not authorised simply because there is no law prohibiting it,121 may be apposite in the context of government agencies which can only exercise the powers that are granted to them. However, in relation to private organisations and individuals, it contradicts the axiom of common law that ‘everyone is free to do anything, subject only to the provisions of the law’.122

73  This defence is significant because it deals with the interaction of the privacy action and other areas of law. If conduct that is authorised by any other law, was by virtue of the defence taken not to be unlawful, the defence would subordinate the privacy cause of action to all other laws. A defence of potentially such wide ambit would need to be considered more deeply than in the reports before it is enacted.

D. ‘Fair Comment’

118 VLRC Report 18, at [7.158]; NSWLRC Report, at [6.3].
119 VLRC Report, Rec 28(c). This defence is also contained in the Canadian Privacy Acts.
The Proposals

74 The VLRC recommends that ‘fair comment (honest opinion)’ should be a defence to the cause of action.\textsuperscript{123} Originating from the law of defamation, the defence of ‘honest opinion’\textsuperscript{124} in the (Australian) Uniform Defamation Acts is the statutory equivalent of the defence of fair comment at common law. A successful defence requires that (a) the matter published was an expression of opinion of the person making it, rather than a statement of fact, (b) that the opinion relates to a matter of public interest, and (c) that the opinion is based on proper material, i.e. material that is substantially true or published on an occasion of privilege etc.

Comment

75 The fact that, in the law of defamation, the defence of honest opinion only applies to expressions of opinion, rather than statements of fact, raises doubts as to whether it is suited to intrusions into private life or the disclosure of private information. The essence of these privacy invasions is the unauthorised observation of private life or the publication of private information. In both cases, the cause of action is concerned with factual material. While an expression of opinion about someone’s private life may follow an intrusion or be linked to a disclosure of private information, such expressions of opinions do not fall within the confines of the privacy action. When it is lawful for a person to ascertain or publish private facts about another, privacy cannot be invoked to prevent that person from expressing an opinion on those facts. In other words, there is no reasonable expectation that a person does not express an opinion on the private life of another. This makes it unnecessary to create a defence of fair comment (honest opinion).

11. Other Relevant Matters

In this section, I will consider which remedies should be available for breach of the statutory cause of action for invasion of privacy.

The proposals

76 There is also some disparity between the proposals in relation to the available remedies. The VLRC adopts the most conservative position and recommends that the remedies be restricted to compensatory damages, injunctions and declarations.\textsuperscript{125} The NSWLRC and ALRC proposals, on the other hand, give the court an open-ended

\textsuperscript{123} The ALRC and NSWLRC exclude ‘honest opinion’ as a defence because it requires the consideration of the public interest, which, in their recommendation, should be undertaken in the context of the cause of action: ALRC Report, at [74.170]; NSWLRC Report, at [6.8].

\textsuperscript{124} For example, Defamation Act 2005 (NSW), s 31; Defamation Act 2005 (Vic), s 31.

\textsuperscript{125} VLRC Report, Rec 29.
discretion to grant the remedy that is most appropriate in the circumstances.\textsuperscript{126} The latter two proposals recommend that the legislation contain a non-exhaustive list of the most common orders, but that the court can also fashion other relief. In addition, both proposals envisage that the court’s discretion in relation to remedies should not be limited by jurisdictional restraints that may apply at general law.\textsuperscript{127}

77 The ALRC and the NSW proposals vary in relation to the orders that have been included in the non-exhaustive list. The NSW proposes that a court may grant any one or more of the following remedies:

- compensatory damages;
- prohibitive injunctions;
- declarations;
- delivery up; and
- ‘such other relief as the court considers necessary in the circumstances’.\textsuperscript{128}

78 Beyond this, the ALRC also specifically refers to an account of profit, an order requiring the defendant to apologise to the plaintiff and a correction order.\textsuperscript{129}

79 None of the proposals support the availability of exemplary damages.\textsuperscript{130}

**Comment**

80 Allowing remedial flexibility was one of the reasons why the ALRC and the NSWLRC preferred a statutory cause of action over judicial development of the law or the enactment of a statutory privacy tort.\textsuperscript{131} Australian courts have proven in the context of other major statutes\textsuperscript{132} that they are able to apply extremely broad remedial provisions with sensitivity and fairness. The High Court has emphasised repeatedly that, in fashioning the appropriate relief under statute, the primary task will be ‘construing the relevant provisions of the Act’ rather than attempting to draw an analogy with remedial principles of general law.\textsuperscript{133} Where the plaintiff applies for a statutory injunction, the court will thus take into account whether the injunction would have some utility or would

\textsuperscript{126} ALRC Report, Rec 74-5.
\textsuperscript{127} Ibid, Rec 74-5; NSWLRC Report, at [7.2].
\textsuperscript{128} NSW Draft Bill, cl 76(2).
\textsuperscript{129} ALRC Report, Rec 74-5.
\textsuperscript{130} Ibid, Rec 74-5; NSW Draft Bill, cl 78; VLRC Report, at [7.218]
\textsuperscript{132} For example, s 232 of the *Australian Consumer Law* (ACL) and s 1324 of the *Corporations Act 2001* (Cth) give the court an unfettered discretion to grant an injunction where a person has engaged, or is proposing to engage, in a contravention of specified provisions of the ACL or the *Corporations Act*, respectively.
\textsuperscript{133} See *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494; [1998] HCA 69; *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 [2004] HCA 3, (both in relation to the remedies in Part VI of the *Trade Practices Act 1974* (Cth), which are now largely contained in the *Australian Consumer Law* set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)).
serve some purpose within the contemplation of the relevant statute. Against this background of developed jurisprudence, there are no concerns to grant remedial powers of similarly wide ambit to courts enforcing the proposed privacy action, like those envisaged by the NSWLRC and the ALRC.

81 Strictly speaking, the NSWLRC and the ALRC proposals do not curtail a plaintiff’s remedial options, as both lists are intended merely to provide examples of orders and the court is free to make the most appropriate order. However, including them expressly in the legislation is likely to address any concerns a court might hold on whether it is legitimate to make the orders listed. For that reason, the ALRC proposal goes furthest in removing obstacles to the making of orders that are not currently available under general law.

82 The ALRC proposes that aggravated damages should be available to plaintiffs. At common law, aggravated damages are awarded where the defendant’s conduct was outrageous and an increased award is therefore called for to compensate the injury to ‘the plaintiff’s proper feelings of dignity and pride’. The NSW Law Reform Commission does not see a need to avert to aggravated damages in the Draft Bill because it regards these as merely another form of damages for injury to feelings. These variations reflect differences between the Commissions on whether the label of aggravated damages should be retained but do not affect the recoverability of increased compensation where the defendant’s manner of invading the plaintiff’s privacy has caused the plaintiff additional hurt. Quite appropriately, the plaintiff’s injury to feelings is compensable in the same way as comparable harm arising in other contexts, such as defamation or breach of confidence. The only substantial difference between both proposals is therefore that the NSW Draft Bill caps the amount of compensatory damages for non-economic loss at (an adjustable) $150,000.

83 At common law, Australian courts allow exemplary awards more freely than their English counterparts. In particular, the restrictions on exemplary damages to the categories identified in the decision of the House of Lords in Rookes v Barnard have not been accepted by the Australian High Court. On the other hand, Australian law withholds punitive awards for breaches of equitable obligations. This is particularly relevant in the context of privacy breaches, as the equitable doctrine of breach of

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135 Rookes v Barnard [1964] AC 1129, 1221 (Lord Devlin).


137 The VLRC proposes that compensatory damages should not be capped: VLRC Report, at [7.219]. The ALRC does not address this issue.


confidence has so far often assumed the role of Australia’s quasi-privacy tort. Recently, the Victorian Court of Appeal in Giller v Procopets denied the plaintiff exemplary damages.\textsuperscript{141} Relevant English authorities, on the other hand, are conflicting. While Lindsay J in Douglas v Hello! (No. 3) was ‘content to assume, without deciding, that exemplary damages (or equity’s equivalent) are available in respect of breach of confidence’,\textsuperscript{142} Eady J held to the contrary in the more recent case of Mosley v News Group Newspapers.\textsuperscript{143}

However, as the statutory privacy action is intended to transcend any doctrinal restraints that may exist at general law, these considerations are likely to have carried less weight than the trend in recent Australian torts legislation to prohibit or restrict exemplary damages. The NSWLRC report expressly refers to the civil liability reforms of the early 2000s that excluded exemplary damages for non-intentional personal injuries\textsuperscript{144} and, importantly, the (Australian) Uniform Defamation Acts that also exclude claims for exemplary damages.\textsuperscript{145}

The exclusion of exemplary damages can be supported with the argument that punitive sanctions are anomalous and do not have a proper place in private law. However, it has been widely acknowledged that exemplary damages, in particular in defamation cases, rather than being truly punitive, often aim at the disgorgement of profits made by defendants who cynically calculate that the ‘tort will pay’ even if they are held liable for compensatory damages.\textsuperscript{146} Disallowing exemplary damages risks leaving plaintiffs without adequate protection where media defendants engage in privacy breaches with a profit-making motive. The availability of a remedy that has regard to the defendant’s profit is critical in these cases to achieve sufficient deterrence.\textsuperscript{147} The ALRC and the NSWLRC consider that the availability of gain-based relief, such as an account of profit, will provide sufficient protection to plaintiffs. This is in contrast to the VLRC proposal, which allows for neither punitive nor gain-based damages, and therefore lacks teeth. While the VLRC does not propose to cap damages for non-pecuniary harm, more generous awards of such damages would be the wrong way to address a profit-making motive. Notwithstanding that a privacy invasion with a profit-making motive is likely to be more hurtful than an unintentional invasion, there is only a lose connection in most cases between the defendant’s profit-making motive and the plaintiff’s harm. It would therefore be unprincipled to inflate damages for non-pecuniary harm to achieve disgorgement of the defendant’s profit. The proposals of the ALRC and NSWLRC, which allow at least a gain-based measure of damages, where appropriate, are therefore to be preferred, even though it could be argued that an exemplary measure of damages may in some exceptional cases be needed to provide sufficient deterrence against gross and deliberate invasions of privacy.


\textsuperscript{142} Douglas v Hello! (No. 3) [2003] 3 All ER 996; [2003] EWHC 786 (Ch), at [273].

\textsuperscript{143} Mosley v News Group Newspapers [2008] EMLR 20, [2008] EWHC 1777 (QB), at [172]-[197].

\textsuperscript{144} Civil Liability Act 2002 (NSW), s 21.

\textsuperscript{145} For example, Defamation Act 2005 (NSW), s 37; Defamation Act 2005 (Vic), s 37.

\textsuperscript{146} For example, Cassell v Broome [1972] AC 1027; John v MGN Ltd [1997] QB 586.