

Submission to Australian Law Reform Commission Inquiry Serious Invasions of Privacy in the Digital Era

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Response to Discussion Paper 80

Preliminary observations

- 1 ALRC Discussion Paper 80 (DP80) provides a careful analysis of the need for a statutory action to protect privacy. I support its general thrust and most of its proposals.
- 2 My main concern is that the ALRC may have formulated some elements of the cause of action too narrowly. This applies in particular to the element of 'fault' and the element of 'seriousness'. I also favour that the privacy tort be enacted as part of the Privacy Act 1988 (Cth) and that the cause of action survives the death of the complainant.
- 3 The protracted history of Australian law reform inquiries into privacy demonstrates that statutory law reform in the area of privacy is very difficult to achieve. If the present proposal becomes law, it is likely to remain unchanged for many years to come. Further technological and social advances are likely to increase the need for effective protection of privacy well into the future. This makes it imperative to define the scope of protection in a way that enables courts to provide effective protection in a wide range of changing circumstances.

4. A New Tort in a New Commonwealth Act

Proposal 4-1 A statutory cause of action for serious invasion of privacy should be contained in a new Commonwealth Act (the new Act).

- 4 I support the proposal for a new statutory cause of action, but I submit that the provisions on the statutory cause of action should be inserted as a new part of the Privacy Act 1988 (Cth), rather than contained in a separate Act. In my view, it is likely to avoid, rather than create, confusion if there was only one piece of Commonwealth legislation dealing with privacy.
- 5 The objects of the Privacy Act 1988 (Cth), as defined in s 2A, are:

- (a) to promote the protection of the privacy of individuals; and
- (b) to recognise that the protection of the privacy of individuals is balanced with the interests of entities in carrying out their functions or activities; and
- (c) to provide the basis for nationally consistent regulation of privacy and the handling of personal information; and
- (d) to promote responsible and transparent handling of personal information by entities; and
- (e) to facilitate an efficient credit reporting system while ensuring that the privacy of individuals is respected; and
- (f) to facilitate the free flow of information across national borders while ensuring that the privacy of individuals is respected; and
- (g) to provide a means for individuals to complain about an alleged interference with their privacy; and
- (h) to implement Australia's international obligation in relation to privacy.

- 6 Most, if not all, of these objects will also be promoted by the proposed statutory cause of action. On that basis, it seems appropriate to insert the new provisions into this existing legislation rather to create a separate new Act.
- 7 DP80 considers that the different scope of the data protection regime in the existing Privacy Act and the proposed privacy tort is another reason for not including the privacy tort in the existing Act.¹ However, broadening the scope of the Privacy Act beyond data protection would contribute to the Act more accurately reflecting its title.² Appropriate drafting could easily ensure that differences between the regulatory data protection regime and the privacy tort are maintained and clearly labelled.
- 8 A further argument for including the provisions into the Privacy Act is that the Australian Information Commissioner is to be given additional functions in relation to court proceedings relating to interferences with the privacy of an individual, as envisaged in Proposal 15-3.

Proposal 4-2 The cause of action should be described in the new Act as an action in tort.

- 9 I support this proposal.

5. Two Types of Invasion and Fault

Proposal 5-1 First element of action: The new tort should be confined to invasions of privacy by:

(a) intrusion upon the plaintiff's seclusion or private affairs (including by unlawful surveillance); or

(b) misuse or disclosure of private information about the plaintiff (whether true or not).

¹ DP80, [4.8].

² See also ALRC, *Review of Australian Privacy Law*, DP 72 (2007), [5.107].

- 10 As I explained in my submission to ALRC Issues Paper 43 (IP43), I favour a broad formulation of the cause of action that allows for future development of the law by the courts if and when new forms of privacy infringement arise. The open-textured proposals in ALRC Report 108 and NSWLRC Report 120 which do not restrict the cause of action to specific conduct, but provide examples to illustrate the scope of protection, provide this flexibility. Even though these two proposals also do not expressly address the full range of potential privacy invasions, they do not rule out that other privacy wrongs may become actionable under the statutory cause of action.
- 11 In contrast, the proposal in DP80 seeks to ‘confine’ the cause of action to the categories of ‘intrusion’ and ‘misuse/disclosure’. In formulating the scope of the cause of action, the ALRC has been guided by the concern that the ‘new Act should provide as much certainty as possible on what may amount to an invasion of privacy’.³
- 12 I have some concerns whether this objective has been achieved. The Discussion Paper proposes that the ‘false light’ and ‘appropriation of the plaintiff’s name and likeness’ torts, as identified by Prosser and in the US Restatement of the Law of Torts (Second) ‘should not be included in a new Australian tort for serious invasion of privacy’.⁴ Yet, it appears that the proposed cause of action provides at least incidental protection where a false light or appropriation claim can (also) be subsumed under the ‘intrusion’ or ‘misuse/disclosure’ labels.
- 13 In relation to the tort described in the US as ‘publicity which places the plaintiff in a false light before the public’,⁵ this seems to follow from the clarification in Proposal 5-1 (b) that the tort applies to private ‘information whether true or not’. Furthermore, under Proposal 11-3 it is a factor aggravating the damage if the disclosed information about the plaintiff was information ‘which the defendant knew to be false or did not honestly believe to be true’.⁶ Lastly, the proposed remedy of a correction order under proposal 11-1 is only necessary when the private information disclosed is incorrect.⁷ All these Proposals imply that the misuse or disclosure of untrue information will be actionable.
- 14 I endorse the extension of the cause of action to include ‘false privacy’ claims because the misuse or disclosure of untrue private information can be just as damaging as the misuse or disclosure of true private information. There is no reason to limit the protection to true information. Limiting the tort to true information would require a plaintiff to confirm or admit in court the veracity of information which she would not like to see in the public domain, at all. This would be likely to unfairly prejudice the plaintiff’s interests in protecting her private life from publicity.
- 15 Not requiring the plaintiff to establish the truth of the information disclosed or misused is also in line with the law in other jurisdictions, most notably the UK. In

³ ALRC, DP 80, [5.46].

⁴ ALRC, DP 80, [5.40].

⁵ Restatement (Second) of Torts, §§ 652A(2)(d), 654.

⁶ ALRC, DP 80, Proposal 11-3 (e).

⁷ See also ALRC, DP 80, [11.11].

McKennitt v Ash,⁸ the defendant argued that the plaintiff could not have a reasonable expectation of privacy in relation to false statements. The Court of Appeal rejected this argument. Longmore L.J. stated:

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 irrelevant inquiry in deciding whether the information is entitled to be protected.⁹

- 16 While it is to be welcomed that the proposed cause of action appears to provide redress for conduct involving untrue information relating to a person's private life, this raises some doubts in relation to the ALRC's declared preference for not including the 'false light' tort.
- 17 Similar concerns arise in relation to the tort described in the US as 'appropriation of a person's name, likeness or other characteristics for financial gain'. This wrong protects a plaintiff's personality interest but may also protect the plaintiff's commercial and proprietary interests. These latter interests are affected when the defendant's conduct prejudices the plaintiff's ability to commercialise aspects of their personality, such as provide a magazine a paid 'exclusive' on their wedding or other significant life events. DP80 does not clarify whether the appropriation of a plaintiff's name, image or other characteristics constitutes a 'misuse' even though the reference to Daniel Solove's statement that privacy 'involves the individual's ability to ensure that personal information is used for the purposes she desires' may be taken to suggest so.¹⁰
- 18 If a misappropriation were to constitute a misuse, it would presumably be actionable under the general requirements of the proposed tort, i.e. where the plaintiff has a reasonable expectation of privacy in relation to the information in question, where the invasion is serious and where the plaintiff's interest in privacy is not outweighed by the defendant's interest in freedom of expression and any broader public interest. Some of the proposed remedies available for an invasion of privacy, in particular an account of profit and a notional license fee, also indicate that the cause of action intends to target conduct engaged in for financial gain. Both of these gain-based remedies aim at ensuring that a defendant who benefits financially from breaching the plaintiff's privacy will not be able to retain the proceeds of the wrong.
- 19 In light of these considerations, I submit that that the two branches of the proposed tort can be understood as being broad enough to cover conduct that, in the classification of the US Restatement, would fall under the third and fourth tort. This is to be supported. If this is correct, it would be useful, however, to clarify that the ALRC does not wish to exclude 'false light' and 'appropriation' claims from the ambit of the new tort but that these are actionable if the defendant's conduct satisfies the elements of the cause of action.

⁸ *McKennitt v Ash* [2008] QB 73; [2006] EWCA Civ 1714.

⁹ *Ibid*, [86].

¹⁰ DP80, [5.33].

20 In relation to misuse, I submit that it should be clarified in the legislation that an ‘appropriation of the plaintiff’s name, likeness and other characteristics’ may constitute a ‘misuse’ of personal information.

Proposal 5-2 Second element of action: The new tort should be confined to intentional or reckless invasions of privacy. It should not extend to negligent invasions of privacy, and should not attract strict liability.

21 I do not support the proposal that new tort should be confined to intentional or reckless invasions of privacy. I submit the invasions of privacy should be actionable if the defendant was at fault. Negligent invasions of privacy should be actionable. In my view, limiting liability to intent and recklessness would set the bar too high. It would leave plaintiffs without redress in some circumstances where they deserve protection. Under the current proposal, it is also not clear enough how intention or recklessness will be determined in a particular case.

Bar too high

22 I submit that the limitation to intentional and reckless privacy invasions should be reconsidered. It would leave inappropriate gaps in the protection of privacy and also is out of step with the general principles of liability for civil wrongs. The case of *Jane Doe v ABC*¹¹ 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’.¹² If the ALRC proposal were enacted, a person in the position of the plaintiff in *Jane Doe v ABC* would presumably not be able to rely on the statutory cause of action. This would severely curtail the protection for privacy that the law should provide for.

23 I submit that the reasons provided by DP80 for limiting liability to intentional or reckless conduct are not persuasive.

¹¹ *Jane Doe v ABC* [2007] VCC 281. Hampel J found nonetheless in favour of the plaintiff because her Honour formulated the cause of action as an ‘unjustified, rather than wilful’ (at [163]) publication of private facts.

¹² *Ibid*, [163].

- 24 DP80 suggests that ‘these fault elements [i.e. intention or recklessness] are common to existing torts of trespass, such as assault and battery’.¹³ However, this appears to overlook that trespass can be committed negligently under Australian law.¹⁴ In fact, other than in highway cases, a plaintiff is not required even to establish fault.¹⁵ Instead, if the plaintiff can establish the interference, the onus is on the defendant to disprove fault,¹⁶ such as that the trespass was the result of an inevitable accident. A privacy cause of action that was limited to intention and recklessness can therefore not be supported with an analogy to the law of trespass.
- 25 DP80 reasons that ‘[if] the new tort ... extended to negligent invasions of privacy, this might expose a wide range of people to liability for common human errors’. However, negligence liability does not lead to liability simply for a human error. Liability arises only for those errors that are the result of a failure to take precautions against a risk of harm that a reasonable person would have taken in the circumstances.¹⁷ Liability for a failure to take reasonable care is pervasive in the law of torts and an expression of the community expectation that everyone should generally conduct their affairs with due regard for the rights and interests of others. Privacy is a core value in Western societies¹⁸ and based on fundamental human interests such as respect for dignity and autonomy.¹⁹ This suggests that privacy should enjoy at least the same measure of protection as other fundamental interests, such as the property and physical integrity, which are also protected against negligent invasion. Unlike most other interests protected by torts law, privacy invasions are only actionable if it is found that the defendant’s and public interests do not outweigh the privacy interest of the plaintiff. This provides a sufficient protection to defendants against undue encroachment of their rights and liberties. It would be extending these protections too far if negligent invasions of privacy were excluded from the ambit of a privacy tort.
- 26 DP80 points out that ‘if actual damage is suffered beyond emotional distress, it may well be the case that the plaintiff would have a tort action in negligence’. However, it is doubtful whether a privacy invasion would be actionable under the tort of negligence if a statutory privacy tort were enacted. In *Sullivan v Moody*,²⁰ the High Court denied to apply the law of negligence to a case where the ‘core of the complaint’ was that the plaintiff was ‘injured as a result of what he, and others, were told’.²¹ It considered that ‘the law of defamation ... resolves the competing interests of the parties through well-developed principles about privilege and the like. To apply the law of negligence in the present case would resolve that competition on an altogether different basis’.²² It is likely that the High Court would express similar

¹³ DP80, [5.4].

¹⁴ *Williams v Milotin* [1957] HCA 83, (1957) 97 CLR 465; *New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511, [270] (Gummow and Hayne JJ); *Stingel v Clark* [2006] HCA 37, (2006) 226 CLR 442, [13] (Gleeson CJ, Callinan, Heydon and Crennan JJ).

¹⁵ *Venning v Chin* (1974) 10 SASR 299; *Platt v Nutt* (1988) 12 NSWLR 231.

¹⁶ *Ibid.*

¹⁷ See, e.g., Wrongs Act 1958 (Vic), s. 48.

¹⁸ See, eg. Article 17 of the International Covenant on Civil and Political Rights.

¹⁹ *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63, 208 CLR 199.

²⁰ *Sullivan v Moody* [2001] HCA 59; 207 CLR 562; see also *Tame v New South Wales* [2002] HCA 35, (2002) 211 CLR 317.

²¹ *Ibid.*, at [54].

²² *Ibid.*

concerns about legal coherence in the intersection between a statutory privacy tort and negligence law. The proposed privacy tort likewise resolves the conflicting interests of plaintiff and defendant on a basis that is altogether different than the tort of negligence. If conduct did not satisfy the elements of the statutory privacy tort, it would be unlikely that a plaintiff were allowed to proceed on the basis of negligence. Similar to *Sullivan v Moody*, this would be likely to be seen as an attempt to circumvent the requirements of the statutory tort, which provides its own set of guiding principles, elements, defences and remedies.

27 DP80 identifies a 'well-entrenched policy of the common law, reflected in legislation across most Australian states and territories, ... that liability for negligence should not extend to emotional distress.'²³ However, this statement is only correct for the tort of 'negligence', not for 'negligence' as a fault standard. Torts other than negligence allow for the recovery of emotional distress even in the absence of intention or recklessness: Liability for assault and battery extends to emotional distress also where the trespass is committed negligently. In defamation, distress is recoverable even in the absence of negligence. These torts protect specific legal interests, such as bodily safety and integrity (in the case of trespass) and reputation (in the case of defamation). In these dignitary torts, emotional distress is recoverable even in the absence of intention or negligence because it is the typical consequence of invading the protected interest. The emotional harm suffered by the plaintiff in such cases could therefore be called 'consequential emotional harm'. The situation is different where a plaintiff claims under a tort that is not designed to protect a specific legal interest but which attaches liability to a specific conduct, as in the case of the tort of negligence and the *Wilkinson v Downton* tort.²⁴ In these latter cases, where the defendant's conduct merely causes emotional harm, such harm is generally not recoverable unless it amounts to a recognised psychiatric injury. The reason for this is that these torts are not rights-based but conduct-based. Attaching liability to a breach of the standard of care (negligence) or to the intentional infliction of harm (*Wilkinson v Downton*) leads to liability that is potentially very broad. Limiting recovery to significant mental harm (i.e. a recognised psychiatric injury) is a control device to ensure that liability is not unreasonably expanded.

28 The critical distinction for recoverability of emotional harm is not the degree of the defendant's fault but whether the plaintiff claims redress for 'consequential emotional harm' or 'mere emotional harm'. In trespass and defamation, the plaintiff's emotional harm is consequential on violation of the dignitary interest protected by the tort and always recoverable. In the tort of negligence, emotional harm can be either mere or consequential, and its recoverability depends on this classification. *Mere* emotional harm (i.e. where no other interest of the plaintiff is affected) is not recoverable unless it reaches the threshold of a recognised psychiatric injury. *Consequential* emotional harm, on the other hand, is generally recoverable in negligence as well. If a defendant negligently causes physical injury and this injury causes emotional distress in the form of pain and suffering, such consequential emotional distress is recoverable. Damages for pain and suffering do not depend on the defendant acting with intention or recklessness; it is uncontentious and a 'well-

²³ DP 80, [5.77].

²⁴ *Wilkinson v Downton* [1897] 2 QB 57.

entrenched policy' of the common law that they are recoverable on proof of simple negligence.

29 On this analysis, it seems more accurate to describe the policy of the common law as denying recovery for negligently caused emotional harm where the plaintiff has suffered 'mere mental distress', i.e. where there is no violation of any other legally protected interest. In other cases, where the emotional harm is consequential on invading a legally protected interest, the fault standard of negligence is a sufficient basis for liability. A cause of action to protect privacy falls into this latter category. A privacy tort is intended to protect the interest in privacy and emotional harm is the typical consequence of an invasion of privacy. It would be incoherent with common law policy to allow recovery for negligently caused emotional distress in trespass and defamation, but not following a privacy invasion. There is no dignitary wrong in the common law which requires intention or recklessness for recovery of emotional harm.

30 DP80 suggests that the analogy with other causes of action is 'imperfect'.²⁵ In relation to defamation, it is stated that this cause of action is 'about a narrower range of conduct than the new tort of invasion of privacy and has a wide range of defences including, by statute, the defence of innocent dissemination'.²⁶ However, it is not quite clear why the wide range of defences available in defamation justifies imposing a higher fault standard in the proposed privacy tort. The existence of the defence of innocent dissemination is intended to ameliorate the harshness of the 'strict liability' standard in defamation. Such a defence is not necessary for a cause of action that applies a fault standard. Even apart from innocent dissemination, the proposed privacy tort provides defendants with much wider protections than defamation law. Instead of providing defences, it is proposed that countervailing considerations need to be considered in every single case, not only when argued by the defendant. Furthermore, the defendant's state of mind can assume relevance already in the context of establishing the cause of action: Proposal 6-2(e) identifies the purpose of the invasion as a relevant circumstance in determining whether the plaintiff had a reasonable expectation of privacy – this circumstance can only apply to cases of intentional conduct. The defendant's state of mind is also relevant in relation to the seriousness criterion because an invasion that is unintentional is less likely to be 'highly offensive' than an intentional invasion. This makes it a little misleading to point to differences in the range of defences, when comparing defamation and privacy, as a justification to impose a higher fault standard for the latter. In truth, it is the privacy tort that has much the wider range of protections for the defendant.

31 In summary, I submit that the justifications given for setting the bar at intentional and reckless conduct are not sufficient. A fault standard would align the statutory cause of action to protect privacy with other wrongs that protect dignitary interests. It is necessary to provide plaintiffs protection in cases where a negligent invasion of privacy causes serious harm for the plaintiff. The interests of defendants are sufficiently protected by other elements of the cause of action, in particular the requirement for balancing privacy with competing interests and the defences.

²⁵ DP80, [5.80].

²⁶ *Ibid.*

Lack of clarity

- 32 The proposal that only intentional and reckless invasions of privacy should be actionable (second element of the cause of action) lacks clarity. DP80 explains that element of the cause of action requires more than merely the intent to do an act which invades the privacy of the plaintiff²⁷ but that it is not necessary to show that the defendant intended to offend, distress or harm the plaintiff.²⁸ Beyond this, DP80 does not explain how the plaintiff is to establish this element of the cause of action.
- 33 DP80 proposes that the 'invasion of privacy' must be reckless or intended without further elaborating on the meaning of the term 'invasion of privacy'. In particular, it is left open with respect which elements of the cause of action are comprised in this term.
- 34 Proposal 5-1 uses the term 'invasion of privacy' but does not define it. It provides that an invasion can be committed by 'intrusion upon the plaintiff's seclusion or private affairs' or 'misuse or disclosure of private information about the plaintiff'. This seems to suggest that a defendant who intends to intrude upon the plaintiff's seclusion or to misuse or disclose private information about the plaintiff, or was reckless in this regard, would be exposed to liability.
- 35 There seems to be a problem with simply equating an intention to invade privacy with an intention to intrude upon the plaintiff's seclusion or an intention to misuse the plaintiff's private information. Both terms, 'intrude' and 'misuse', are evaluative and connote wrongfulness. This raises the question of whether a defendant who intends to 'use' the plaintiff's private information but feels justified in doing so, has an intent to 'misuse' information. In other words, does intent to misuse require knowledge of the absence of justifying circumstances?
- 36 It is widely acknowledged that there is much confusion in the use of the terms intention and recklessness.²⁹ In the common 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.³⁰ There needs to be clarity with regard to which elements of the cause of action the defendant must have had *mens rea*. The illustrations given in DP80 appear to exclude cases in which intention or recklessness existed merely in relation to the 'act or conduct' element of the cause of action, i.e. the conduct that constituted the disclosure or intrusion.³¹
- 37 If the classification between conduct and consequences is applied to the proposed privacy tort it could be said that the *conduct* element is the interference with the

²⁷ DP80, [5-88]-[5.89].

²⁸ DP80, [5-88]

²⁹ See, eg, K Barker, P Cane, M Lunney and F Trindade, *The Law of Torts*, 5th ed (Oxford: OUP), 2012, 38; P Cane, 'Mens Rea in Tort Law' (2000) 4 *Oxford Journal of Legal Studies* 533; S Yeo, 'Comparing the Fault Elements of Trespass, Action on the Case and Negligence' (2001) 5 *Southern Cross University Law Review* 142.

³⁰ See, eg, K Barker et al, *ibid*, 37-38.

³¹ DP80, [5.86]-[5.87].

plaintiff's private life or the use/disclosure of the plaintiff's private information but that the *consequence* is the invasion of privacy that is resulting from that conduct.

- 38 If this is right, it raises the question of how an intent (or recklessness) to invade the plaintiff's privacy is to be established. More precisely, must a defendant have been aware (or been reckless) that the plaintiff had a reasonable expectation of privacy (the third element of the cause of action)?³² Must a defendant have been aware (or been reckless) that the plaintiff's interest in privacy outweighs the defendant's interest in freedom of expression and any broader public interest (the fifth element of the cause of action)?³³
- 39 If the plaintiff was required to establish intention and recklessness also with regards to these further elements of the cause of action, it would be exceedingly hard for actions to succeed. In order to impute intention, a plaintiff would need to establish that the privacy invasion was at least 'substantially or obviously certain to follow from certain conduct'.³⁴ In relation to recklessness, DP80 does not provide a further elaboration of what needs to be established. However, ALRC Report 108 suggested that the definition in s. 5.4(2) of the Criminal Code (Cth) should apply.³⁵ It provides that a 'person is reckless with respect to a result if: (a) he or she is aware of a substantial risk that the result will occur; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk'.
- 40 As the UK case law demonstrates, defendants will nearly always argue that they believed that the plaintiff did not have a reasonable expectation of privacy in relation to the information in question,³⁶ or that publication was justified in light of overriding interests,³⁷ or – in many cases – both.³⁸ Proof of awareness of a substantial risk that a privacy invasion will occur would be akin to disproving that such belief in the conduct's lawfulness was held or was reasonable. This would be very onerous to demonstrate, because the assessments of whether there was a reasonable expectation of privacy or whether there were overriding public interests in favour of publication are highly fact-specific. It is easy to come to differing assessments in relation to these issues, which also the numerous cases in the UK in which courts were divided³⁹ or in which first instance decisions were reversed on appeal⁴⁰ attest to. If it is difficult to establish that the defendant must have known that there was a substantial risk of a privacy invasion, it will in turn also be difficult to establish that it was 'unjustifiable' for a defendant to take the risk.

³² In *Campbell v MGN Ltd* [2004] 2 AC 457; [2004] UKHL 22, a negligence standard was applied in relation to the reasonable expectation of privacy: see [85] (Lord Hope).

³³ Conceivably, intention and recklessness may even need to be established in relation to seriousness (the fourth element of the cause of action).

³⁴ DP80, [5.91].

³⁵ ALRC, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), 2576.

³⁶ *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481.

³⁷ *AAA v Associated Newspapers Ltd* [2012] EWHC 2103 (QB).

³⁸ *Campbell v MGN Ltd* [2004] 2 AC 457; *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73; *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439.

³⁹ *Campbell v MGN Ltd* [2004] 2 AC 457.

⁴⁰ *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481; *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439.

41 One specific example demonstrates the demands that this would make on the plaintiff: In *Mosley v News Group Newspapers Ltd*,⁴¹ the defendant gave extensive publicity to highly offensive material, which included clandestine video recordings relating to the claimant's participation in a private sex party. The defendant alleged that the party had a Nazi theme and submitted that this made the publication a matter of public interest and relevant to the claimant's suitability for his position as President of the FIA (the formula 1 racing organisation). Eady J found that there was no Nazi theme and no public interest in the publicising the material. He accepted that the claimant was 'hardly exaggerating when he says that his life was ruined' by the publication⁴² and ordered the defendant to pay £60,000 in damages to Mr Mosley, the highest award made in the United Kingdom for an invasion of privacy.

42 Yet, even though a more damaging and outrageous invasion of privacy is difficult to imagine, Eady J held on the available evidence:

I am not in a position to accept the submission that any of the relevant individuals must have known at the time that the publication would be unlawful (in the sense that no public interest defence could succeed). ... Nor can I conclude that one or other of them was genuinely indifferent to whether there was a public interest defence (a state of mind that could be equated to recklessness). They may not have given it close analysis and one could no doubt criticise the quality of the journalism which led to the coverage actually given, but that is not the same as genuine indifference to the lawfulness of this conduct.⁴³

43 In *Mosley's* case, the claimant's failure to establish intention or recklessness led to a denial of exemplary damages. However, under the proposal in DP80, it would presumably mean that a claimant in the position of Mr Mosley had no redress whatsoever in Australian privacy law. Creating a privacy tort that would not operate to protect a plaintiff in such stark circumstances could not be described as providing effective protection of privacy. If it was intended that the privacy tort would operate in a case such as this one, the operation of the intention/recklessness requirement would need to be made clearer than in the present proposal.

Conclusion

44 I submit that the limitation to intentional and reckless conduct proposed in DP80 should be rejected. The cause of action should also be available for negligent invasions of privacy. 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. Such an approach allows actions to be brought where a negligent invasion of privacy has serious consequences and gives the court the flexibility to deny relief where the defendant's invasion of the plaintiff's privacy was merely the result of inadvertence and did not cause particularly harmful consequences.

⁴¹ [2008] EWHC 1777 (QB).

⁴² *Ibid*, [236].

⁴³ *Ibid*, [208].

45 If the limitation to intentional and reckless conduct was retained, its operation would need to be clarified. I submit that DP80 does not make clear enough which elements of the cause of action the defendant needs to have intended or been reckless about. If it was required that the defendant had the requisite state of mind in relation to the 'reasonable expectation of privacy' and the 'countervailing public interests', it would be exceedingly hard to succeed in a privacy claim. If this was not required, it needs to be made clearer what amounts to an invasion of privacy, in particular if this is a 'conduct' or a 'consequence'. If the latter, it would need to be made clear whether 'intrusion' or 'misuse' require an understanding of the wrongfulness of the conduct.

Proposal 5-3 The new Act should provide that an apology made by or on behalf of a person in connection with any invasion of privacy alleged to have been committed by the person:

(a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter; and

(b) is not relevant to the determination of fault or liability in connection with that matter.

Proposal 5-4 Evidence of an apology made by or on behalf of a person in connection with any conduct by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

46 I support proposals 5-3 and 5-4.

6. A Reasonable Expectation of Privacy

Proposal 6-1 Third element of action: The new tort should only be actionable where a person in the position of the plaintiff would have had a reasonable expectation of privacy, in all of the circumstances.

Proposal 6-2 The new Act should provide that, in determining whether a person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances, the court may consider, among other things:

(a) the nature of the private information, including whether it relates to intimate or family matters, health or medical matters, or financial matters;

(b) the means used to obtain the private information or to intrude upon seclusion, including the use of any device or technology;

(c) the place where the intrusion occurred;

(d) the purpose of the misuse, disclosure or intrusion;

(e) how the private information was held or communicated, such as in private correspondence or a personal diary;

(f) whether and to what extent the private information was already in the public domain;

(g) the relevant attributes of the plaintiff, including the plaintiff's age and occupation;

(h) whether the plaintiff consented to the conduct of the defendant; and

(i) the extent to which which the plaintiff had manifested a desire not to have his or her privacy invaded.

47 I support proposals 6-1 and 6-2 for the reasons given in my submission to IP43, [15]-[24].

7. Seriousness and Proof of Damage

Proposal 7-1 Fourth element of action: The new Act should provide that the new cause of action is only available where the court considers that the invasion of privacy was 'serious'. The new Act should also provide that in determining whether the invasion of privacy was serious, a court may consider, among other things, whether the invasion of privacy was likely to be highly offensive, distressing or harmful to a person of ordinary sensibilities in the position of the plaintiff.

48 I maintain the view expressed in my submission to IP43 that it would be preferable not to impose a threshold criterion for privacy claims. Instead, the severity of the intrusion should be merely a factor in the assessment of whether the privacy wrong, even after considering countervailing interests, is actionable. If a claim is trivial, it will be rare for a plaintiff to go to court considering that legal proceedings are costly and likely to give the privacy invasion even more publicity. If a claim is trivial, it will also be difficult for a plaintiff to maintain that she had a reasonable expectation of privacy or that her privacy interests outweigh competing interests. The NSWLRC Report suggests, and I concur, that these factors are sufficient to exclude undeserving claims.

49 I submit that, if a seriousness threshold was introduced, the proposal in DP80 would be preferable to previous proposals even though it could also be further improved upon.

50 The proposal in DP80 avoids some of the difficulties associated with using 'offensiveness' as a threshold criterion alongside the 'reasonable expectation of privacy', as under New Zealand law and under proposal in the 2008 ALRC report and the VLRC report.⁴⁴ First, DP80 does not propose to use 'offensiveness' as an exclusionary device. It is now just one criterion that a court *may* consider to establish the seriousness of the defendant's conduct. This partly addresses the difficulty that the standard of 'highly offensive' is inherently vague and therefore problematic to use as an exclusionary test. Second, using 'offensiveness' as a mere indicator of

⁴⁴ ALRC Report, Rec 74-1; VLRC Report, Rec 23 and 24.

seriousness also deals with the difficulty that ‘a reasonable expectation of privacy’ and ‘offensiveness’ are partly overlapping criteria.

51 There remain, however, some other problems with a seriousness threshold, in particular a threshold that uses ‘highly offensive’ as a marker of seriousness. The first is that 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, is considered. This creates the problem that the defendant’s interest in freedom of expression and any broader public interest in the information, or other defences, may become enmeshed in the enquiry of whether the invasion of privacy was serious.⁴⁵ 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.⁴⁶ This is the reason why UK courts consider the test to be relevant to the proportionality stage, i.e. for the decision where the balance between privacy and freedom of expression should be struck.⁴⁷

52 The second problem lies in the wording of Proposal 7-1. It empowers a court to consider whether conduct was ‘highly offensive, distressing or harmful to a person of ordinary sensibilities in the position of the plaintiff’. It seems not to be quite clear whether the qualification of ‘highly’ applies to ‘offensive’ (only), or also to ‘distressing’ and ‘harmful’ so that the indicators of seriousness are set at ‘*highly* offensive’, ‘*highly* distressing’ or ‘*highly* harmful’. My view, as expressed in my submission to IP43, is that, if a seriousness threshold were introduced, it should be set at ‘offensive, distressing or harmful’. I believe that it would be setting the bar much too high if a privacy invasion was actionable only if it was, or was likely to be, ‘highly distressing’ or ‘highly harmful’. In my view, a privacy invasion that is distressing or harmful to a reasonable person in the position of the plaintiff is sufficiently serious to warrant legal redress. It also introduces unnecessary vagueness into the cause of action to limit it to conduct that is likely to have ‘highly distressing’ or ‘highly harmful’ consequences.

Conclusion

53 I submit that it would be preferable not to impose a threshold criterion for privacy claims. Whenever a person’s privacy interest outweighs other public and private interests, the invasion was unwarranted, and there is no reason of principle why that person should not be entitled to defend his right to privacy in court.

⁴⁵ See also Lord Nicholls in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, [22]; M Warby, N Moreham, I Christie (ed), *Tugendhat and Christie: The Law of Privacy and the Media*, 2nd ed, OUP, Oxford, 2011, [5.09].

⁴⁶ See also G Phillipson, ‘Privacy in England and Strasbourg compared’ in AT Kenyon and M Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives*, CUP, Cambridge, 2006, 184, 199 (supporting the use of the ‘offensiveness’ test for assessing the ‘overall impact of the entire publication’ rather than as a threshold test); CDL Hunt, ‘Privacy in the Common Law: A Critical Appraisal of the Ontario Court of Appeal’s Decision in *Jones v. Tsige*’ (2012) 37 *Queen’s Law Journal* 661, 688.

⁴⁷ Lord Nicholls in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, [22]; *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481, [26] (Sir Anthony Clarke MR).

54 If it were thought that a person should not have a right to sue for a privacy invasion unless it was serious, I support that a court should be given broad discretion to determine whether an invasion was serious. I also support that 'offensiveness' is not used as an exclusionary device but identified as one possible indicator to distinguish serious from less serious invasions of privacy.

55 I submit that the appropriate indicators are that the privacy invasion was 'offensive, distressing or otherwise harmful' to the individual concerned. I do not support the set the threshold at 'highly offensive', let alone at 'highly distressing' or 'highly harmful'. I submit that Proposal 7-1 be clarified so privacy invasions that are distressing or harmful are actionable.

Proposal 7-2 The plaintiff should not be required to prove actual damage to have an action under the new tort.

56 I support this proposal for the reasons given in my submission to IP43, [53]-[55].

8. Balancing Privacy with Other Interests

Proposal 8-1 Fifth element of action: The new Act should provide that the plaintiff only has a cause of action for serious invasion of privacy where the court is satisfied that the plaintiff's interest in privacy outweighs the defendant's interest in freedom of expression and any broader public interest. A separate public interest defence would therefore not be needed.

Proposal 8-2 The new Act should include the following non-exhaustive list of public interest matters which a court may consider:

(a) freedom of expression, including political communication;

(b) freedom of the media to investigate, and inform and comment on matters of public concern and importance;

(c) the proper administration of government;

(d) open justice;

(e) public health and safety;

(f) national security;

(g) the prevention and detection of crime and fraud; and

(h) the economic wellbeing of the country.

57 I support proposals 8-1 and 8-2 for the reasons given in my submission to IP43, [25]-[41].

9. Forums, Limitations and Other Matters

Proposal 9-3 A cause of action for serious invasion of privacy should not survive for the benefit of the plaintiff's estate or against the defendant's estate.

58 It is submitted that the proposed cause of action for invasion of privacy should survive the death of the complainant. The family or estate of a deceased person may have a legitimate interest in bringing proceedings to protect private information relating to the deceased. It should be noted that the privacy interest of a deceased person will often not need to be protected as extensively as the privacy of a living person so that the balancing of the countervailing interests may more often come down in favour of the defendant. However, where there is a gross invasion of the privacy interest of a deceased person, legal redress should be available to the estate. The availability of such redress is likely to increase in importance considering that many people now leave a significant amount of personal information in online repositories and social network. The digital afterlife of a person can provide a fertile ground for disputes, including how a deceased person's private information should be handled. The new privacy tort should provide redress in these and other cases involving the privacy interests of a deceased person.

59 It is appropriate, however, to limit the remedies available to the estate. The Ireland Law Reform Commission proposed that the cause of action is extinguished only in relation to 'the remedy of damages or an account of profits'⁴⁸ so that injunctive relief, delivery up and other relief remain available.

60 With one limitation, this position deserves support. There is no need to award damages for non-pecuniary losses arising from the invasion of privacy. After death, such damages can no longer fulfil their aim of providing compensation to the person whose privacy has been invaded. Where family members have suffered emotional distress, they should be able to obtain redress only if they can establish that their own privacy interests have been affected. In most cases, an injunction will be the most appropriate remedy. In cases of the disclosure of untrue information about a deceased person, a correction order may also provide appropriate redress. However, in contrast to the Ireland Law Commission proposal, I submit that an account of profits should remain available. This remedy, as well as the remedies of delivery up and exemplary damages, are defendant-oriented. Their rationale is not affected by the death of the person whose privacy interest has been interfered with. It is appropriate that a defendant who makes a profit from interfering with the privacy of a deceased person may be required to give up the profit made and disgorge it for the benefit of the estate. Likewise, it is appropriate (although such cases will be rare, indeed), that a court retains the discretion to award exemplary damages against a defendant who is deserving of punishment because of the particularly egregious nature of the privacy invasion.

⁴⁸ Ireland Law Reform Commission, *Privacy: Surveillance and the Interception of Communications*, Report 57 (1998), 141-2.

61 DP80 suggests that non-survival of the cause of action would be consistent with international privacy laws with the exception of France. However, Italian law and German law likewise recognise a limited post mortem protection of the right to privacy.⁴⁹ Under German law, the legal successors of a deceased person can seek injunctions to protect the non-commercial aspects of the deceased person's personality interest against interference and also have limited rights to damages, with the exception of damages for non-material loss.⁵⁰

Proposal 9-4 A person should not be able to bring an action under the new tort after either (a) one year from the date on which the plaintiff became aware of the invasion of privacy, or (b) three years from the date on which the invasion of privacy occurred, whichever comes earlier. In exceptional circumstances the court may extend the limitation period for an appropriate period, expiring no later than three years from the date when the invasion occurred.

62 I adhere to the view expressed in my submission to IP43, [122].

10. Defences and Exemptions

Proposal 10-1 The new Act should provide a defence of lawful authority.

Proposal 10-2 The new Act should provide a defence for conduct incidental to the exercise of a lawful right of defence of persons or property where that conduct was proportionate, necessary and reasonable.

Proposal 10-3 The new Act should provide for a defence of absolute privilege for publication of private information that is co-extensive with the defence of absolute privilege to defamation. 12 Serious Invasions of Privacy in the Digital Era

Proposal 10-4 The new Act should provide for a defence of qualified privilege to the publication of private information where the defendant published matter to a person (the recipient) in circumstances where:

(a) the defendant had an interest or duty (whether legal, social or moral) to provide information on a subject to the recipient; and

⁴⁹ Ray D. Madof, *Immortality and the Law: The Rising Power of the American Dead* (Yale, 2010), 128-9.

⁵⁰ See also the Marlene Dietrich-decision of the German Federal Court of Justice: BGHZ 143, 214; for further discussion: H Beverley-Smith, A Ohly, A Lucas-Schloetter, *Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation* (Cambridge, 2005), 128-9. For ten years following the death of a person, an unlawful exploitation of a person's name or image after their death can be pursued with an action for damages for material loss, including restitutionary damages: BGH, NJW 2007, 684 – Klaus Kinski.

(b) the recipient had a corresponding interest or duty in having information on that subject; and

(c) the matter was published to the recipient in the course of giving to the recipient information on that subject.

The defence of qualified privilege should be defeated if the plaintiff proves that the conduct of the defendant was actuated by malice.

63 I support proposals 10-1 to 10-4 for the reasons expressed in my submission to IP43, [64]-[77].

11. Remedies and Costs

Proposal 11-1 The new Act should provide that courts may award compensatory damages, including damages for the plaintiff's emotional distress, in an action for serious invasion of privacy.

Proposal 11-2 The new Act should set out the following non-exhaustive list of factors that may mitigate damages for serious invasion of privacy:

(a) that the defendant has made an appropriate apology to the plaintiff about the conduct that invaded the plaintiff's privacy;

(b) that the defendant has published a correction of any untrue information disclosed about the plaintiff;

(c) that the defendant has made an offer of amends in relation to the defendant's conduct or the harm suffered by the plaintiff;

(d) that the plaintiff has already recovered compensation, or has agreed to receive compensation in relation to the conduct of the defendant;

(e) that the defendant had taken reasonable steps to settle the dispute with the plaintiff in order to avoid the need for litigation; and

(f) that the plaintiff had not taken reasonable steps to settle the dispute, prior to commencing or continuing proceedings, with the defendant in order to avoid the need for litigation.

Proposal 11-3 The new Act should set out the following non-exhaustive list of factors that may aggravate damages for serious invasion of privacy:

(a) that the plaintiff had taken reasonable steps, prior to commencing or continuing proceedings, to settle the dispute with the defendant in order to avoid the need for litigation;

(b) that the defendant had not taken reasonable steps to settle the dispute with the plaintiff in order to avoid the need for litigation;

(c) that the defendant's unreasonable conduct at the time of the invasion of privacy or prior to or during the proceedings had subjected the plaintiff to special or additional embarrassment, harm, distress or humiliation;

(d) that the defendant's conduct was malicious or committed with the intention to cause embarrassment, harm, distress or humiliation to the plaintiff; and

(e) that the defendant has disclosed information about the plaintiff which the defendant knew to be false or did not honestly believe to be true.

Proposal 11-4 The new Act should provide that the court may not award a separate sum as aggravated damages.

Proposal 11-5 The new Act should provide that, in an action for serious invasion of privacy, courts may award exemplary damages in exceptional circumstances and where the court considers that other damages awarded would be an insufficient deterrent.

Proposal 11-6 The total of any damages other than damages for economic loss should be capped at the same amount as the cap on damages for non-economic loss in defamation.

Proposal 11-7 The new Act should provide that a court may award the remedy of an account of profits.

Proposal 11-8 The new Act should provide that courts may award damages assessed on the basis of a notional licence fee in respect of the defendant's conduct, in an action for serious invasion of privacy.

Proposal 11-9 The new Act should provide that courts may award an injunction, in an action for serious invasion of privacy.

Proposal 11-10 The new Act should provide that courts may order the delivery up and destruction or removal of material, in an action for serious invasion of privacy.

Proposal 11-11 The new Act should provide that courts may make a correction order, in an action for serious invasion of privacy.

Proposal 11-12 The new Act should provide that courts may make an order requiring the defendant to apologise to the plaintiff, in an action for serious invasion of privacy.

Proposal 11-13 The new Act should provide that courts may make a declaration, in an action for serious invasion of privacy.

64 I support proposals 11-1 to 11-5 and 11-7 to 11-13 for the reasons expressed in my submission to IP43, [80]-[107]. I adhere to the view that a cap on damages is unnecessary, for the reasons expressed in my submission to IP43, [79].