

Serious Invasions of Privacy in the Digital Era

**Submission to Australian Law Reform Commission Inquiry**

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**Responses to the Questions in Issues Paper 43[[1]](#footnote-1)\***

**Invasion of privacy**

Question 4. Should an Act that provides for a cause of action for serious invasion of privacy (the Act) include a list of examples of invasions of privacy that may fall within the cause of action? If so, what should the list include?

Question 5. What, if any, benefit would there be in enacting separate causes of action for:

• misuse of private information; and

• intrusion upon seclusion?

1. I will respond to both of these questions together because both raise issues relating more to legislative style and drafting than to the substance and scope of the proposed privacy action.

**Summary of the previous law reform proposals**

1. The NSW Law Reform Commission (NSWLRC) and the Australian Law Reform Commission (ALRC) envisaged a single cause of action,[[2]](#footnote-2) whereas the Victorian Law Reform Commission (VLRC) recommended the introduction of two overlapping causes of action.[[3]](#footnote-3) The ALRC proposed a single cause of action for serious invasions of privacy and recommended that the Act contain a non-exhaustive list of the types of invasion that fall within the cause of action. The list referred 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.[[4]](#footnote-4) 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.[[5]](#footnote-5) 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’.[[6]](#footnote-6) For further guidance, the proposed NSW cause of action listed a number of matters that the court must take into account in determining 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.
2. 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.[[7]](#footnote-7)
3. Referring to obiter comments in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,[[8]](#footnote-8) all three commissions recommended that the statutory cause of action focus on the misuse of personal information and unauthorised intrusion into the plaintiff’s private life. This means in particular that the statutory cause of action would not be intended to cover situations which, 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’.[[9]](#footnote-9) However, while there was thus consensus on the primary focus of the privacy action, there were differences in relation to the stringency with which such other forms of privacy invasion are excluded. The VLRC proposed the clearest form of exclusion because it recommended 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 cases outside the disclosure and intrusion scenarios would thus be incidental. The ALRC proposal was 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’.[[10]](#footnote-10) The existence of this list would 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 suggested in what circumstances a court should find a privacy infringement in a scenario omitted from the list. The Report merely suggested 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[[11]](#footnote-11) and that it is ‘undesirable’[[12]](#footnote-12) to include the latter scenario in the list.
4. In a similar vein, the report of the NSWLRC referred to a ‘widespread understanding [in Australia] that the role of privacy in private law is to protect information privacy and seclusion’[[13]](#footnote-13) 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[[14]](#footnote-14), academic[[15]](#footnote-15) and public[[16]](#footnote-16) 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 currently envisaged.
5. Like the ALRC, the NSWLRC adopted a somewhat curious compromise position. It submitted that the misappropriation and false light torts would 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’.[[17]](#footnote-17) The reason given for this limitation was that the proposed cause of action protects primarily the plaintiff’s intangible interest in emotional well-being and 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.
6. There are a number of problems with this position. The draft privacy bill[[18]](#footnote-18) 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 disclosure 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. Reputation and emotional wellbeing are not mutually exclusive. Reputational wrongs, including the tort of defamation, also protect the plaintiff from emotional harm.[[19]](#footnote-19) As the protracted debate over the role and reach of the *Wilkinson v Downton* tort shows,[[20]](#footnote-20) freedom from emotional distress is not itself recognised as a legal interest. Emotional distress is usually only actionable where it is the result of wrongful harm to a recognised legal interest, such as bodily integrity,[[21]](#footnote-21) 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 about their private life published. 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.

**Submission**

1. 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 also do not expressly address the full range of potential privacy invasions, at least they do not rule out that other privacy wrongs may become actionable under the statutory cause of action.
2. 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. *McKennitt v Ash*[[22]](#footnote-22) 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:

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.[[23]](#footnote-23)

1. It would be desirable if the Australian privacy cause of action also provided redress for these so-called ‘false privacy’ claims. 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 his or her private life.
2. The misappropriation of a person’s name, likeness or other characteristics for financial gain raises more difficult issues. This wrong affects a plaintiff’s personality interest but also their commercial and proprietary interests. As long as the proper limit of protection in relation to these phenomena continues to be uncertain,[[24]](#footnote-24) it is preferable that statutory reform adopts a cautious approach. To that extent, it may be appropriate for the statute to deal with the non-commercial aspects of these wrongs and leave the proprietary considerations to further developments in the courts. 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.
3. A broad based statutory cause of action would give the courts a mandate to develop the protection of privacy interests in accordance with future societal needs as and when they arise. To that extent, it could be compared to the introduction of *Human Rights Act 1998* (UK), which had a similar effect on the development of privacy protection in the United Kingdom. As a result of the *Human Rights Act 1998* (UK), courts were required to act compatibly with the UK’s obligations under the *European Convention of Human Rights*. As far as privacy is concerned, this has meant in particular that the courts are now mandated to develop the common law in a way that gives equal effect to both Art. 8 of the European Convention on Human Rights (the protection of private life) and its Art. 10 (the protection of freedom of speech). Through a broad based enactment, the Australian Parliament would likewise acknowledge that it wishes to protect privacy interests comprehensively. Adopting a broad understanding of privacy would make the statutory framework, including its mechanisms for the protection of countervailing interests, available across the whole spectrum of privacy invasions. Adopting a narrower cause of action would leave it to the courts to develop the protection of privacy interests that fall outside the scope of the statutory action. A broad based cause of action would therefore also contribute to a consistent protection of countervailing interests. It would provide more certainty and predictability for the future development of privacy claims.
4. Statutory descriptions of the protected privacy interests, and their appropriate limitations, provide the framework for analysis but they still require application in each case. Both the assessment of whether conduct affects a person’s privacy and of whether the affected privacy interest is deserving of legal protection in light of countervailing public interests, are matters that are best left to the discretion of the court. Even in civil law jurisdictions, which traditionally prefer a statute-based approach, legislatures tend to tread lightly by providing merely a general framework for protection of privacy and leaving it to the courts to develop and apply this framework from case to case.[[25]](#footnote-25)
5. 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 may provide some guidance to interpreting the statute in the early years but it should be made clear that the list is truly no-exhaustive.

**Privacy and the threshold of seriousness**

Question 6. What should be the test for actionability of a serious invasion of privacy? For example, should an invasion be actionable only where there exists a ‘reasonable expectation of privacy’? What, if any, additional test should there be to establish a serious invasion of privacy?

**Summary of the previous law reform commission proposals**

1. All three Law Reform Commission proposals require, as a necessary condition of liability, that the defendant intrude into a situation where the plaintiff has a ‘reasonable expectation of privacy’. At the same time, none of the proposals attempts to define the concept of ‘privacy’ or when a person has a ‘reasonable expectation of privacy’. There are differences between the three proposals in relation to whether the cause of action should include further threshold requirements. Both the ALRC and the VLRC recommended that only ‘serious’ invasions of privacy should be actionable.[[26]](#footnote-26) To that aim, their proposals contained 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.[[27]](#footnote-27)

1. The second of these criteria is intended to create an ‘objective test of seriousness’.[[28]](#footnote-28) The ‘highly offensive’ criterion has originated in the US[[29]](#footnote-29) 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’.[[30]](#footnote-30) While the ALRC Discussion Paper had expressed the concern that the phrase might be setting the bar too high, the ALRC changed its view during the consultations and accepted it as appropriate in its Final Report. It recommended 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’.[[31]](#footnote-31) The VLRC pointed to other areas of law, such as racial and religious vilification, where liability is likewise limited to more serious cases.[[32]](#footnote-32)
2. In contrast to these views, the NSWLRC consider any qualification of the ‘reasonable expectation of privacy’ test as unwarranted in principle.[[33]](#footnote-33) Under its proposal, a privacy action was actionable if the defendant invaded the privacy that the plaintiff was reasonably entitled to expect in all the circumstances having regard to any relevant public interest.[[34]](#footnote-34) The nature of the defendant’s conduct, including the extent to which a reasonable person would have regarded the conduct to be ‘offensive’ was included in the list of factors that the court must take into account in deciding whether there was such a privacy invasion.[[35]](#footnote-35) The NSWLRC expressed the view that its draft provision was sufficient to eliminate trivial claims and also objected on principle to an approach that appears to favour freedom of expression over privacy.[[36]](#footnote-36)

**Submission**

1. 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.[[37]](#footnote-37) 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.[[38]](#footnote-38) Subsequent cases show, however, that the reasonable expectation test has now become dominant in UK law.[[39]](#footnote-39) 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.[[40]](#footnote-40) It is this latter approach that the ALRC and VLRC recommend to adopt for Australia’s statutory cause of action.
2. 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,[[41]](#footnote-41) 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.[[42]](#footnote-42)

1. 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.
2. 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.[[43]](#footnote-43) 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.[[44]](#footnote-44) This is the reason why English 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.[[45]](#footnote-45)
3. 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.[[46]](#footnote-46) 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.
4. 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 outweigh competing interests. The NSWLRC Report suggests that this is sufficient to exclude undeserving claims.[[47]](#footnote-47)
5. Put another way, 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.

**Privacy and public interest**

Question 7. How should competing public interests be taken into account in a statutory cause of action? For example, should the Act provide that: • competing public interests must be considered when determining whether there has been a serious invasion of privacy; or • public interest is a defence to the statutory cause of action?

**Summary of the previous law reform commission proposals**

1. Both the ALRC and the NSWLRC were concerned to ensure that the privacy interest was not privileged over other rights and interests.[[48]](#footnote-48) This led them to incorporate the consideration of countervailing interests into the cause of action. The ALRC proposed 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’.[[49]](#footnote-49) Public interest considerations were also central to the issue of liability in the VLRC cause of action. However, the VLRC proposal created a defence where the defendant’s conduct is in the public interest. This would cast the onus of proof on the defendant.[[50]](#footnote-50)

**Submission**

1. 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.
2. 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 set a lower standard.[[51]](#footnote-51) However, both proposals required a balancing between the interest in privacy and countervailing public interest. Under neither formulation would it be 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.
3. 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 coincides with the structure of the breach of confidence action, which also recognises a public interest defence,[[52]](#footnote-52) and the public interest defences in defamation law.[[53]](#footnote-53) It is also in line with the Canadian privacy laws[[54]](#footnote-54) and the privacy tort in New Zealand.[[55]](#footnote-55) 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.[[56]](#footnote-56) 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’.[[57]](#footnote-57) 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.[[58]](#footnote-58) 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’.[[59]](#footnote-59)
4. 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.
5. This makes it appropriate that the plaintiff’s 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.

Question 8. What guidance, if any, should the Act provide on the meaning of ‘public interest’?

1. In my response to the previous question, I submitted that the defendant should bear the onus of proving that there was 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?

1. These issues are addressed now.

**Summary of the previous law reform commission proposals**

1. Under all three previous proposals the privacy interest will not be protected where it is outweighed by public interests, in particular freedom of expression, as well as where certain other defences are made out.
2. The previous law reform proposals do no limit the public interest defence to the implied freedom of political communication, as developed in High Court jurisprudence[[60]](#footnote-60), but instead adopt a broad understanding of the public interest. In the formulation of the NSWLRC, a privacy invasion would be 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).[[61]](#footnote-61)
3. The VLRC recommended that the legislation clarify that the public interest ‘is a limited concept and not any matter the public is interested in’.[[62]](#footnote-62) The ALRC and the NSWLRC expressly identify the interest to be informed about matters of public concern as a relevant public interest.
4. 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.

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

**Submission**

1. 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.[[63]](#footnote-63)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.
2. It is appropriate not to define the concept of public interest in the proposed legislation. Attempts to provide an *exhaustive* definition would run the risk of becoming under-inclusive over time, when new legal or social developments call for consideration. A list of *examples* of matters of public interest may provide some guidance to the courts but it can be questioned whether this is necessary. Courts are well equipped to identify matters of public interest in a particular case because this concept is familiar from a wide range of contexts.
3. Freedom of expression is regarded as a fundamental human right[[64]](#footnote-64) 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’,[[65]](#footnote-65) 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’.[[66]](#footnote-66)
4. Unlike the European human rights jurisprudence that affects UK privacy law by virtue of the *Human Rights Act 1998* (UK),[[67]](#footnote-67) Australian law does not expressly adopt the concept of proportionality where private causes of action affect the parties’ human rights.[[68]](#footnote-68) 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 refine the statutory methodology for balancing the competing interests through case law.

**Fault**

Question 9. Should the cause of action be confined to intentional or reckless invasions of privacy, or should it also be available for negligent invasions of privacy?

**Summary of the previous law reform commission proposals**

1. The ALRC recommended that the cause of action should be restricted to ‘intentional’ and ‘reckless’ acts on part of the defendant.[[69]](#footnote-69) It defined an act as intentional if the defendant wilfully or deliberately invaded the plaintiff’s privacy. In relation to recklessness, the ALRC report referred 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’.[[70]](#footnote-70) 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.
2. The ALRC did not provide any arguments why the privacy action should be limited in that way.[[71]](#footnote-71) It merely referred to the Consultation Paper of the NSWLRC, which had suggested that liability for negligent or accidental acts in relation to all privacy invasions ‘would, arguably, go too far’.[[72]](#footnote-72) However, in its final report the NSWLRC no longer recommended such a limitation. The VLRC likewise regarded it as unnecessary expressly to exclude negligent acts.[[73]](#footnote-73) The cause of action proposed by the NSWLRC provided 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)’[[74]](#footnote-74) 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)’.[[75]](#footnote-75) 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 recommended a defence of innocent dissemination,[[76]](#footnote-76) which is familiar from the law of defamation.

**Submission**

1. Invasions of privacy should be actionable if the defendant was at fault. Strict liability would be too stringent a standard, while liability only for intent and recklessness would leave plaintiffs without redress in some circumstances where they deserve protection.
2. The limitation to intentional and reckless privacy invasions 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[[77]](#footnote-77)* 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’.[[78]](#footnote-78) 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 would severely curtail the protection for privacy that the law should provide for.
3. General principles of civil liability likewise do not provide a sufficient rationale for limiting liability to intentional or reckless conduct. While the ALRC expressly provided 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,[[79]](#footnote-79) 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[[80]](#footnote-80) 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.[[81]](#footnote-81) 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*[[82]](#footnote-82) is now more commonly understood as requiring merely negligence, not intention or recklessness, in relation to the consequence of causing psychiatric harm.[[83]](#footnote-83) Lastly, the new *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’,[[84]](#footnote-84) ‘reasonably necessary’,[[85]](#footnote-85) or based on a ‘reasonable belief’.[[86]](#footnote-86) 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.
4. The recommendation of the ALRC that only intentional and reckless invasions of privacy should be actionable also lacked clarity. The ALRC report did 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 recommended that reckless or intended ‘acts’ are actionable but it formulated a composite cause of action with multiple elements. These elements were 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. This makes it doubtful in relation to which of these elements the defendant must have had the requisite mental element.
5. It is widely acknowledged that there is much confusion in the use of the terms intention and recklessness.[[87]](#footnote-87) 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.[[88]](#footnote-88) 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 intention or recklessness only needs to exist in relation to the ‘act or conduct’ element of the cause of action, i.e. the conduct that constituted the disclosure or intrusion. This would mean that a privacy invasion would not be actionable where, for example, a person unintentionally, but carelessly, discloses private information, e.g. negligently publishes on a social media site a nude picture of another person rather than a harmless holiday snap.
6. This is also the position that applies to the intrusion tort under the US *Restatement (Second) of Torts (2010)*, The tort is defined as:

One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.[[89]](#footnote-89)

This formulation makes clear that the defendant must have intended the conduct element of the tort, i.e. the act or conduct which constitutes the ‘intrusion into solitude’. In contrast, the US disclosure tort is not limited to intention so that negligent disclosures are also actionable.

1. If intention or recklessness was to be introduced as the mental element of an Australian statutory cause of action for the protection of privacy, the legislation would need to make clear which the elements of the cause of action the defendant need to have intended or been reckless about. For example, if it was part of the cause of action that the defendant’s conduct breached the plaintiff’s reasonable expectation of privacy[[90]](#footnote-90) or, as under the ALRC and NSWLRC recommendations, that it was not justified by countervailing public interest considerations, it must be clarified whether the defendant’s intention or recklessness must include these elements of the cause of action.[[91]](#footnote-91)
2. Considering that the onus of establishing all elements of the cause of action is on the plaintiff, such a fault requirement may raise formidable hurdles 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.
3. For these two reasons (inappropriate gaps and lack of clarity), the limitation proposed by the ALRC 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.

**Damage**

Question 10. Should a statutory cause of action for serious invasion of privacy require proof of damage or be actionable per se?

1. All three previous proposals envisage liability without proof of actual damage. This is in line with the Canadian provincial statutes that provide for a privacy wrong actionable without proof of damage.[[92]](#footnote-92) There is also no requirement under UK law that a privacy claimant establishes actual damage.
2. This position is appropriate. The new cause of action should be actionable per se. The damage that will typically flow from an invasion of privacy will be intangible, and consist in humiliation, distress and other injury to feelings. This harm will often be obvious but difficult to establish through evidence. Other causes of actions that protect comparable interests, such as defamation or trespass to the person, also do not depend on proof of actual damage.
3. Where a tort is actionable per se, some loss will be presumed and an award of general damages to cover these presumed losses will be made to the plaintiff.

Question 11. How should damage be defined for the purpose of a statutory cause of action for serious invasion of privacy? Should the definition of damage include emotional distress (not amounting to a recognised psychiatric illness)?

1. If the statutory cause of action were actionable per se (see question 10), any definition of damage would not form an element of the cause of action but would only be needed to define the heads (types) of losses for which compensation can be claimed. This would mean that the plaintiff would not be required to demonstrate loss in order to succeed with her action, but would need to prove actual loss to receive special damages.
2. There should, in principle, be no restriction on the types of losses for which damages can be claimed. An invasion of privacy can cause various kinds of losses, including economic losses, personal or psychiatric injury or non-economic losses in the form of injury to feelings. All losses that are a reasonably foreseeable result of an invasion of privacy should in principle be compensable.
3. In particular, the statute establishing the privacy action should clarify that pecuniary and non-pecuniary loss, including emotional distress, are compensable. Emotional distress (not amounting to a recognised psychiatric illness) is the loss that is most likely to flow from an invasion of privacy. Data protection statutes, including the *Information Privacy Act 2009* (Qld),[[93]](#footnote-93) the *Personal Data (Privacy) Ordinance* (Hong Kong)[[94]](#footnote-94) and the *Data Protection Act 1998* (UK) [[95]](#footnote-95) similarly clarify that the losses for which compensation can be claimed include injury to feelings and humiliation.
4. The need to allow a victim of an invasion of privacy to recover for the emotional harm suffered was also recognised in the decision in *Giller v Procopets*.[[96]](#footnote-96) In this action, Ms Giller claimed monetary relief for the distress, annoyance and embarrassment she suffered at the hands of her former de facto partner, Mr Procopets, who had sought to harrass her by showing and distributing videotapes to her family and friends which had been taken during the relationship and showed the couple engaging in sexual activity.
5. Ms Giller’s claims for breach of confidence, intentional infliction of mental harm and breach of privacy failed at first instance.[[97]](#footnote-97) Despite finding that the defendant had breached an equitable obligation of confidence, Gillard J held that mental distress falling short of psychiatric injury was not compensable in equity. Overturning this decision, the Victorian Court of Appeal recognised that mental distress is compensable under the action for breach of confidence. The Court engaged with complex jurisdictional questions on whether such awards are properly made as ‘equitable compensation’ or ‘damages under the Lord Cairns’ Act’. As a result of the wording of the specific wording of the Victorian version of Lords Cairns’ Act,[[98]](#footnote-98) the Court was ultimately able to leave this question open. Neave JA held that compensation for mere distress could be claimed both as equitable compensation and as damages under Lord Cairns’ Act. Similarly, Ashley JA held that both principle and authority supported such awards and referred to a number of recent English authorities in which privacy claimants had recovered for mental distress under the breach of confidence doctrine. The Court awarded Ms Giller $40,000 for injury to feelings, including $10,000 as aggravated damages because Mr Procopet’s breach of confidence was committed deliberately to humiliate, embarrass and distress Ms Giller.
6. While *Giller v Procopets* was the first appellate decision in Australia to endorse such awards, it followed first instance decisions and overseas authorities which, without providing the same degree of doctrinal analysis, had already adopted a similar approach. The unfairness of denying Ms Giller any effective remedy at first instance despite the blatant disregard for her privacy illustrates why this extension of the law was necessary.
7. Making emotional distress actionable was logical and appropriate because the breach of confidence doctrine has since its inception[[99]](#footnote-99) been held to protect personal as well as commercial secrets. This aspect of the decision in *Giller v Procopets* has not yet been applied in Australia, and some commentators have suggested that the Victorian provision of Lords Cairns’ Act, on which the decision had partly rested, should be regarded as ‘exceptional’ in the Australian context.[[100]](#footnote-100) This shows that there are still some doubts surrounding the availability of compensation for emotional distress where the defendant’s invasion of privacy constituted a breach of an equitable obligation of confidence. These doctrinal uncertainties demonstrate that existing law cannot fully be relied upon to provide compensation for emotional distress and strengthen the case that such awards should be available if a statutory cause of action was introduced.
8. To provide effective redress, a cause of action against invasion of privacy also need to afford adequate protection against emotional distress.

**Defences and exemptions**

Question 12. In any defence to a statutory cause of action that the conduct was authorised or required by law or incidental to the exercise of a lawful right of defence of persons or property, should there be a requirement that the act or conduct was proportionate, or necessary and reasonable?

**Summary of the previous law reform commission proposals**

1. All three previous proposals establish a defence for conduct that was ‘incidental’[[101]](#footnote-101) or ‘for the purpose’[[102]](#footnote-102) of lawfully defending personal or property rights.

**Submission**

1. 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.
2. 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.[[103]](#footnote-103) 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.
3. 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.[[104]](#footnote-104) 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.[[105]](#footnote-105) 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.

Question 13. What, if any, defences similar to those to defamation should be available for a statutory cause of action for serious invasion of privacy?

**Summary of the previous law reform commission proposals**

1. The VLRC recommended that ‘fair comment (honest opinion)’ and ‘privilege under the law of defamation’ should be a defence to the cause of action.[[106]](#footnote-106) Originating from the law of defamation, the defence of ‘honest opinion’[[107]](#footnote-107) 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. The ALRC also recommended a defence where the disclosure was, under defamation law, privileged.[[108]](#footnote-108) The ALRC and NSWLRC excluded fair comment/honest opinion as a defence because it would require the consideration of the public interest, which they recommended should be undertaken in the context of the cause of action.[[109]](#footnote-109) On the same basis, the NSW Law Reform Commission also excluded all other defamation defences that involve a consideration of the public interest.[[110]](#footnote-110)
2. The privacy statutes of Canada also contain defences that derive from defamation law. For example, the defence applicable under s 2 of the *Privacy Act 1996* (British Columbia) provides:

[…] (3) A publication of a matter is not a violation of privacy if

(a) the matter published was of public interest or was fair comment on a matter of public interest, or

(b) the publication was privileged in accordance with the rules of law relating to defamation.

(4) Subsection (3) does not extend to any other act or conduct by which the matter published was obtained if that other act or conduct was itself a violation of privacy.[[111]](#footnote-111)

**Submission**

1. The fact that, in the law of defamation, the defence of fair comment/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 most 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).
2. The matter is different in relation to absolute and qualified privilege. These defences do not turn on the characterisation of published matter as fact or opinion but create a defence where publication occurs in a particular context (eg. in Parliament, in court, within one’s family etc). The underlying rationale of all these defences is that a person should in that particular context be able to communicate freely and without fear of incurring civil liability. Depending on the significance of the occasion and context of this communication, the privilege is either absolute (regardless of circumstances) or qualified (unavailable if the speaker is actuated by malice).
3. The privilege has the purpose of protecting and facilitating frank and fearless communication even if it is damaging to reputations because it is considered in the public interest to do so. This same reasoning can also be applied to the protection of privacy. It is therefore appropriate to create privileges for communications in which this rationale applies.

Question 14. What, if any, other defences should there be to a statutory cause of action for serious invasion of privacy?

1. The ALRC Issues Paper 43 lists a number of other possible defences which had been suggested in submissions to earlier inquiries. These suggestions include defences that:

• there is another remedy available in respect of the invasion of privacy;

• the information was already in the public domain;

• the disclosure of information was made for the purpose of rebutting an

untruth.

1. A defence that there is another remedy available in respect of the invasion of privacy would subordinate the privacy action to all other forms of legal redress. It is unclear why any overlap between privacy and other rights should be resolved by recourse through other forms of action, rather than the privacy claim. In line with general principles on concurrent liability, it would seem appropriate that each cause of action depends on its own terms and that, where conduct contravenes more than one cause of action, a plaintiff can choose which action to rely on.
2. A defence that information was already in the public domain is unnecessary. It would also be difficult to administer. When formerly private information has become freely available, a plaintiff may no longer have a reasonable expectation of privacy. If that was the case, a plaintiff would not be able to establish a cause of action and a defendant would not require a defence. Furthermore, when information has been very widely published, a court may deny injunctive relief on the basis that such an order has become futile.[[112]](#footnote-112) However, in most cases, information will be known to some people but not others. In such a case, it would be difficult to decide whether the information was ‘in the public domain’ and it would be better not to use the concept of ‘public domain’ as a basis for denying liability: As long as a plaintiff still has a legitimate interest in preventing, or being compensated for, the defendant’s further dissemination of private information, the law should provide the plaintiff with the opportunity to protect his privacy.
3. Suggestions for a defence that disclosure was made for the purposes of rebutting an untruth reveal a misunderstanding of the nature of a privacy claim. Privacy is protected because, in principle, each person should have a right to control what private information others publish about them. In *McKennitt v Ash*, 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.[[113]](#footnote-113)

1. Truth or untruth of the information disclosed can also not be the basis of a defence against privacy invasion. However, current law already acknowledges that a plaintiff who has deliberately created a false image about themselves, may be less deserving of privacy protection than a plaintiff who has not made a particular private matter the subject of prior public disclosure.[[114]](#footnote-114) These circumstances are generally better considered in the context of a ‘reasonable expectation of privacy’ and the public interest analysis, rather than form the basis of a discrete defence. A defence of rebutting an untruth would not allow for consideration of where an untruth originated from, how widely it is disseminated and how significant the public interest in rebutting this untruth is. All these factors would however, affect whether a plaintiff has a reasonable expectation of privacy in relation to the matter concerned and whether there is a public interest in allowing a defendant to publish information that is likely to rebut the untruth about the plaintiff.

Question 15. What, if any, activities or types of activities should be exempt from a statutory cause of action for serious invasion of privacy?

1. In line with the recommendation of the VLRC,[[115]](#footnote-115) I submit that no organisations or classes of individuals should be exempt from the proposed statutory cause of action. There is also no need for exemptions for specific activities or types of activities. The defences, in particular the public interest defence and the defence for conduct ‘required or authorised by or under law’ provide adequate protection for those engaged in legitimate activities.

**Monetary remedies**

Question 16. Should the Act provide for any or all of the following for a serious

invasion of privacy:

• a maximum award of damages;

• a maximum award of damages for non-economic loss;

• exemplary damages;

• assessment of damages based on a calculation of a notional licence fee;

• an account of profits?

**Caps on Damages**

1. Despite caps in other civil liability legislation[[116]](#footnote-116) and a proposal for a cap on the amount of compensatory damages for non-economic loss in the NSW Draft Bill,[[117]](#footnote-117) it is not necessary to stipulate a maximum award of damages or a maximum award of damages for non-economic loss in legislation for a cause of action to protect privacy. The caps in other legislation were introduced as measures of reining in existing practices in relation to damages assessment.[[118]](#footnote-118) There is no prior case law on compensation for invasions of privacy in Australia because the right to privacy has not yet been recognised in Australia. Overseas experience also suggests that damages awards for privacy invasions are moderate[[119]](#footnote-119) so that any concern that courts will be tempted to make excessive awards under a privacy statute have no basis.

**Aggravated damages**

1. 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’.[[120]](#footnote-120) 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.[[121]](#footnote-121) 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.
2. Quite appropriately, the plaintiff’s injury to feelings is considered to be compensable in the same way as comparable harm arising in other contexts, such as defamation or breach of confidence.

**Gain-based awards**

1. Privacy is an intangible interest and therefore more vulnerable to infringement than many other legal interests. The harm caused by an invasion of privacy will often also be intangible so that any provable loss is likely to be small. An award limited to compensating material loss will therefore often be insufficient to counteract the wrong. Effective redress requires that the plaintiff can also claim compensation for intangible losses, such as injury to feelings. The fact that a plaintiff will be likely to suffer largely intangible losses must also affect the availability of injunctive relief. However, even if both these concerns are taken into account, compensation and injunctive relief alone will often be insufficient to fully protect the plaintiff’s interest in retaining the privacy of their personal information.
2. A particular concern is that privacy is susceptible to commercialisation by a defendants acting with a profit-making motive. A media organisation that is considering to publish private information merely to increase its revenue, rather than to serve public interests, will often not be sufficiently deterred from doing so if a plaintiff was limited to a compensatory remedy or injunctive relief. Compensatory relief will be insufficient in particular where the gains to be made from the publication are likely to exceed any compensation that is likely to be payable or if the person concerned can be expected not seek compensation. Injunctive relief will not provide a sufficient deterrent where a repeat publication is not to be expected and an injunction is therefore unlikely to be granted.
3. Commercially motivated defendants can only be effectively prevented from invading people’s privacy where profit-stripping remedies are made available.[[122]](#footnote-122)  Profit-stripping remedies have in common that they focus on the defendant’s gain rather than the plaintiff’s loss. Such non-compensatory awards come in two forms: they may be truly gain-based (such as restitutionary damages or an account of profit) or they may aim at punishing the defendant by stripping her of the profit she made (such as exemplary damages).
4. Both measures of relief intend to create a disincentive for potential wrongdoers who engage in a calculation that, even if the harm has to be compensated for, a wrong will return a profit. Whereas gain-based awards and exemplary damages coincide in their focus on the defendant they differ in their purpose. A gain-based award is concerned only with removing an unjust enrichment, whereas an exemplary award aims primarily at punishing the defendant for a particularly reprehensible invasion of another’s rights but, in doing so, will strip the defendant of any profit made.
5. Where a profit has been made and can be assessed, a gain-based remedy provides the best deterrent against such interferences. It is targeted directly at removing the enrichment and its upper limit is determined by the defendant’s actual profit. It is therefore less intrusive than exemplary damages, where the amount necessary for the defendant’s punishment lies in the court’s discretion and is therefore more indeterminate. On that basis, gain-based relief should be the preferred defendant-focused remedy in privacy cases. Depending on the circumstances, a defendant’s enrichment can call for an account of profits or damages based on a calculation of a notional licence fee. This would also coincide with proposals for statutory torts against privacy invasion in other common law jurisdictions. The Irish Privacy Bill 2006 empowers the court to order that the defendant pay damages equal to any, or any likely, financial gain accruing to the defendant as a result of the breach but also allows for exemplary or punitive damages.[[123]](#footnote-123)
6. The VLRC proposal allows for neither punitive nor gain-based damages, and therefore lacks teeth when publications are profit-motivated. 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 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.

**Exemplary damages**

1. None of the previous proposals support the availability of exemplary damages.[[124]](#footnote-124) In its Consultation Paper, the NSW Law Reform Commission expressed ‘substantial doubts as to whether punitive damages have a proper role in civil law’[[125]](#footnote-125) because they lack appropriate safeguards for defendants and constitute a windfall to plaintiffs. The Commission also referred to the trend in legislation to make exemplary damages unavailable.[[126]](#footnote-126) However, there are also some recent statutes that expressly provide for exemplary damages.[[127]](#footnote-127)
2. In exceptional circumstances, a court should be able to sanction an invasion of privacy with an award of exemplary damages. Disallowing exemplary damages risks gaps in the protection of plaintiffs against particular egregious invasions of privacy. Exemplary damages may be appropriate where a defendant engaged in a privacy invasion with a profit-making motive but a gain-based award is unavailable in the circumstances. This can be the case where defendant intended to make a profit from the invasion but failed to do so or where the facts make it difficult to assessment the profit made from a privacy invasive publication (e.g. where a privacy-invasive article is published in a magazine and it is impossible to attribute any increase in sales to that particular article).
3. A statutory power to award exemplary damages would be in line with Australian common law, which gives courts the discretion to award exemplary damages wherever the defendant’s tort constituted a ‘conscious and contumelious disregard for the plaintiff’s rights’[[128]](#footnote-128) and it is necessary ‘to punish the wrongdoer, deter him and others from committing like conduct again, to provide vindication to the victim and to denounce the wrongdoer's behaviour’.[[129]](#footnote-129)Australian law does not, however, allow punitive awards for breaches of contract or of equitable obligations.[[130]](#footnote-130) This is particularly relevant in the context of privacy breaches, as the equitable doctrine of breach of 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 for a breach of confidence.[[131]](#footnote-131) However, as the statutory privacy action is intended to transcend any doctrinal restraints that may exist at general law, these considerations should not carry determinative weight.
4. A statutory power to award exemplary damages for invasions of privacy is now also contained in ss 34-42 of the *Crime and Courts Act 2013* (UK).[[132]](#footnote-132) With this Act, the UK government implemented the recommendation in the Leveson Report that ‘exemplary damages should be available in actions for breach of privacy, breach of confidence and similar media torts as well as for libel and slander’. [[133]](#footnote-133) A similar call for exemplary damages in privacy cases had been made earlier in 2012 by the Joint Committee of the House of Lords and House of Commons on Privacy and Injunctions.[[134]](#footnote-134) In its support of exemplary damages, the Leveson Report adopted the analysis contained in the 1997 Law Reform Commission Report on non-compensatory damages,[[135]](#footnote-135) which had recommended the retention, and limited expansion of the availability, of exemplary damages.
5. Prior to the *Crime and Courts Act 2013* (UK), there were conflicting dicta on the availability of exemplary damages for invasions of privacy. 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’,[[136]](#footnote-136) Eady J held to the contrary in the more recent case of *Mosley v News Group Newspapers*.[[137]](#footnote-137)
6. The availability of exemplary damages should be tightly regulated. They should only be available where a publication was in outrageous disregard of the plaintiff’s rights and, in the court’s view, is deserving of punishment. They should only be available as a last resort, i.e. where no other remedy would be a sufficient response to the wrong committed by the defendant. The enactment should also provide statutory guidelines on their assessment. Sections ss 34-42 of the *Crime and Courts Act 2013* (UK) can serve as a useful model for the formulation of a carefully circumscribed provision on the availability and assessment of exemplary damages.

**Injunctions**

Question 17. What, if any, specific provisions should the Act include as to matters a court must consider when determining whether to grant an injunction to protect an individual from a serious invasion of privacy? For example, should there be a provision requiring particular regard to be given to freedom of expression, as in s 12 of the Human Rights Act 1998 (UK)?

1. Injunctive relief to prevent the publication of private information will be the primary concern for most plaintiffs. Most applications for interim injunctions are made *quia timet*, i.e. because a publication is feared. If granted *before* publication, an injunction will protect the information from being disclosed and thereby preserve the plaintiff’s privacy. If disclosure has already occurred, the plaintiff will be concerned to ensure that publication will not be allowed to continue or be repeated.[[138]](#footnote-138) If there has already been some disclosure, courts will scrutinise whether the information is still sufficiently private and only intervene where the injunction can still prevent further damage to the plaintiff’s privacy interests. If information has reached the public domain to such an extent that a court order would be futile, an injunction will not be granted.[[139]](#footnote-139)

**The position in the UK**

1. The UK courts have developed a substantial body of case law on the availability of interim relief to protect privacy.[[140]](#footnote-140) Apart from the tort of misuse of personal information, interim relief is also available for other causes of action at general law that protect privacy interests incidentally, such as breach of confidence, defamation, breach of contract and malicious falsehood. Statutory causes of action that may provide a basis for injunctive relief are available for breaches of data protection law,[[141]](#footnote-141) harassment,[[142]](#footnote-142) and copyright infringements.[[143]](#footnote-143)
2. Before the *Human Rights Act 1998* (UK) came into force, privacy claimants most often had to rely on breach of confidence as the relevant cause of action. Where a breach of confidence was threatened, injunctive relief preserved the status quo until trial. Defendants could successfully resist an injunction where their interest in publication, supported by freedom of expression, outweighed the claimant’s confidentiality interest, particularly in cases in which there was a public interest in disclosure, e.g. to expose ‘iniquity’[[144]](#footnote-144) (serious misconduct) or to prevent the public from being misled.[[145]](#footnote-145) However, because confidentiality, once lost, cannot be regained the balance of convenience often favoured the claimants in applications for interim relief.

*Section 12 of the Human Rights Act 1998 (UK)*

1. To address unease in particularly expressed by the media about the impact of the *HRA* on their work, s. 12 of the *HRA* erects additional hurdles to obtaining a remedy that could affect freedom of expression.[[146]](#footnote-146) Applying to final remedies as well as to interim orders, s. 12(4) stipulates that when considering whether to grant relief which, if granted, might affect the exercise of the *Convention* right to freedom of expression, the court must have particular regard to the importance of that right. This formulation of ‘particular regard’ is somewhat curious as the ECHR is based on presumptive equality of all *Convention* rights. However, this formulation appears to have been chosen to signal to the courts that publication interests should be given more weight than under existing jurisprudence relating to breach of confidence, rather than constitute a direction that it be given more weight than other *Convention* rights.
2. Section 12(3) provides that ‘no … relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed’. This was a deliberate deviation from the general approach governing applications for interim injunctions established in *American Cyanamid* v. *Ethicon Ltd*,[[147]](#footnote-147) which regarded it as outside the court’s functions at that stage to decide issues of conflicting evidence or difficult questions of law.[[148]](#footnote-148) The approach in *American Cyanamid* requires the applicant to establish merely that there is a ‘serious question to be tried’, before the court will examine whether the ‘balance of convenience’ lies in granting or denying interim relief. Under the higher threshold in s. 12(3), the court must consider the likely outcome of the trial before examining the balance of convenience. When introducing the Human Rights Bill into Parliament, the (then) Home Secretary, Jack Straw, explained that the function of s. 12(3) was:

that the courts should consider the merits of an application when it is made and should not grant an interim injunction simply to preserve the status quo ante between the parties.[[149]](#footnote-149)

1. Section 12(3) was authoritatively discussed in *Cream Holdings Ltd v* *Banerjee*.[[150]](#footnote-150) The case concerned an interim injunction to restrain the disclosure of confidential information relating to allegedly illegal conduct of the claimant companies. Applying the *American Cyanamid* test, the trial judge granted, and the Court of Appeal upheld, an injunction. On further appeal, the House of Lords rejected this general test as incompatible with s. 12(3) and outlined a new approach. Interpreting the words ‘likely to establish’ in s. 12(3), Lord Nicholls suggested in the leading speech that the applicant must establish that his or her prospects of success at trial are ‘sufficiently favourable’ to justify an interim restraint order.[[151]](#footnote-151) Lord Nicholls suggested as a general approach to the required degree of likelihood that it must be ‘more likely than not’ that the applicant’s claim will succeed at trial.[[152]](#footnote-152) This means that, in a standard case, the burden of proof rests with the applicant to establish the likelihood of his or her prospects of success at trial and, if he or she fails to do so, that publication will generally not be restrained.[[153]](#footnote-153)
2. To gauge the likelihood of success at trial, the court needs to consider whether the claimant will be able to establish a reasonable expectation of privacy and, if so, whether the defendant will be able to succeed with a defence, in particular whether his or her art. 10 rights are likely to prevail in the ultimate balancing test. A prognosis of the likely outcome at trial is difficult at the interim stage because it is, by necessity, based on incomplete and untested evidence, particularly when the claimant applies for ex parte relief.[[154]](#footnote-154)
3. Once the claimant establishes his or her likelihood of success at trial, he or she will further need to satisfy the court that the ‘balance of convenience’ comes down in favour of an injunction. The balance of convenience test is concerned with the issue of who will suffer the greater irreparable harm if the interim decision turns out at trial to have been wrongly made. The court will compare the harm likely to be suffered by the defendant if an interim injunction is granted but no final order is made at trial, with the harm likely to be suffered by the claimant if an interim injunction is denied but the trial establishes that publication should not have been allowed.

1. For the most part, the basic principles discussed in the preceding section are now ‘well-settled’.[[155]](#footnote-155) The jurisprudence on s. 12 of the *HRA* has particular regard to the case law of the *European Court of Human Rights*. On this basis, the conflicting rights in arts. 8 and 10, and the effect of giving or withholding relief on both parties, must be carefully balanced by reference to the evidence available at that stage of the proceedings. The relative generality of the principles can mean, however, that judges may attribute different weight to individual factors or differ in their approaches to dealing with the uncertainty of the evidence.

***The position in Australia***

1. There are a number of differences between Australian law and UK law on interlocutory injunctions which may make the introduction of a provision requiring that particular regard be given to freedom of expression unnecessary.
2. With regard to the law of defamation, the High Court re-affirmed in *ABC v O’Neill*[[156]](#footnote-156)the orthodox position that prior restraint on freedom of speech should be very much the exception. The case concerned an application for an interlocutory injunction by a man who was serving a life sentence for murder. He sought to restrain the ABC from showing a film that imputed or implied that he had committed other murders, including the notorious murder of the Beaumont children. The plaintiff brought the action because he was concerned that the screening of this film would jeopardize his chances at an upcoming parole hearing to secure an early release.
3. By a 5 : 2 majority, the High Court allowed an appeal against the decision of the trial judge to grant an injunction, which was confirmed by the Full Court of the Supreme Court of Tasmania. Gummow and Hayne JJ, who delivered a joint judgment,[[157]](#footnote-157) affirmed the test in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*.[[158]](#footnote-158) According to *Beecham*, a plaintiff needs to establish ‘a prima facie case’, which was explained by Gummow and Hayne JJ as a ‘sufficient likelihood of success […] to justify the preservation of the status quo pending the trial’.[[159]](#footnote-159) Compared to the UK, this test sits somewhat in between the lower threshold of ‘serious question to be tried’ from *American Cyanamide* and the higher threshold under s 12 of the *Human Rights Act 1998* (UK) for cases involving freedom of expression that the claimant must establish that success at trial is ‘more likely than not’.[[160]](#footnote-160)
4. Until *O’Neill*, the Australian case law on interlocutory injunctions in defamation cases had not adopted a uniform approach, and decisions were often categorized as applying either rigid or flexible rules.[[161]](#footnote-161) Gummow and Hayne JJ rejected to associate themselves with these categorisations. Instead, they said that the test was whether the plaintiff’s case was sufficiently strong having regard to the strength of the defendant’s case and the caution with which the jurisdiction to impose a prior restraint is normally exercised.[[162]](#footnote-162) Gleeson CJ and Crennan J likewise expressed the agreement with proceeding cautiously when deciding applications for interlocutory injunctions in defamation cases.[[163]](#footnote-163)
5. These four judges agreed that the defendant’s case against the grant of an injunction was very strong[[164]](#footnote-164) and found by majority against the plaintiff. They emphasized the particular importance of protecting freedom of speech from prior restraint and held that the lower courts granting the injunction were wrong in regarding it as determinative that an injunction was necessary to prevent a ‘trial by media’.[[165]](#footnote-165) In relation to the balance of convenience, the majority also gave weight to the general character of the plaintiff. They considered that the applicant’s conviction as a child murderer and confession of another murder may well have lead a court to award no more than nominal damages even if the defendant could not justify the allegation that he has committed further murders.[[166]](#footnote-166)
6. The case of *ABC v O’Neill* shows that applications for an interlocutory injunction will be approached with great caution by Australian courts where the injunction could act as a fetter on freedom of expression. The enactment of a provision requiring particular regard to be given to freedom of expression (as in s 12 of the *Human Rights Act 1998* (UK)) may therefore not be strictly necessary but it may assist to assuage concerns by the media that courts may too readily grant relief against privacy invasions where such an order affects freedom of expression.
7. If such a provision was enacted, it would need to be carefully drafted to ensure that it does not have the unintended effect of providing a ‘trump card’ in favour of freedom of expression. In line with the requirements of the cause of action that both the interest in privacy and countervailing public interest need to be carefully balanced and the *Beecham* test requiring a ‘sufficient likelihood of success […] to justify the preservation of the status quo pending the trial’,[[167]](#footnote-167) the legislation should make clear that no interest assumes automatic priority or that the grant of an interlocutory injunction is not exceptional but that each depends on its own facts.

**Other remedies**

Question 18. Other than monetary remedies and injunctions, what remedies should be available for serious invasion of privacy under a statutory cause of action?

**Summary of the previous law reform commission proposals**

1. There is some disparity between the proposals in relation to the remedies that should be available to a successful plaintiff. The VLRC adopts the most conservative position and recommends that the remedies be restricted to compensatory damages, injunctions and declarations.[[168]](#footnote-168) The NSWLRC and ALRC proposals, on the other hand, give the court an open-ended discretion to grant the remedy that is most appropriate in the circumstances.[[169]](#footnote-169) 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.[[170]](#footnote-170)
2. 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’.[[171]](#footnote-171)

1. 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.[[172]](#footnote-172)

**Submission**

1. Allowing remedial flexibility was one of the reasons why the ALRC and the NSWLRC preferred a statutory cause of action over judicial expansion of existing causes of action or the enactment of a statutory privacy tort.[[173]](#footnote-173) Australian courts have proven in the context of other major statutes[[174]](#footnote-174) 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.[[175]](#footnote-175) Where the plaintiff applies for a statutory injunction, the court will thus take into account whether the injunction would have some utility or would serve some purpose within the contemplation of the relevant statute.[[176]](#footnote-176) 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.
2. 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.
3. In line with the proposals of the ALRC and the NSWLRC, I submit that the remedial provisions of a statutory cause of action should give the Court a wide discretion in making the appropriate orders. Apart from injunctions and monetary remedies, it should make the following remedies available:

* a declaration,[[177]](#footnote-177)
* an order for the delivery up and destruction of material,[[178]](#footnote-178)
* an order requiring the defendant to apologise to the plaintiff,[[179]](#footnote-179)
* a correction order,[[180]](#footnote-180) and
* ‘such other relief as the court considers necessary in the circumstances’.[[181]](#footnote-181)

1. In addition to these, the ALRC Issues Paper 43 considers that ‘an order that the defendant rectify its business or information technology practices’ may be appropriate in some circumstances.[[182]](#footnote-182) I support the reasoning underlying this suggestion. Such an order would, like a correction order or an order to apologise, be an example of a mandatory injunction. As such, it would be available as ‘other relief’ even if it were not mentioned in the non-exhaustive list of possible orders.[[183]](#footnote-183)
2. However, expressly providing for it may signal to the court that Parliament has specifically envisaged the availability of such an order where the business or IT practices of an organisation falls short of same information handling practices.

**Who may bring a cause of action**

Question 19. Should a statutory cause of action for a serious invasion of privacy of a living person survive for the benefit of the estate? If so, should damages be limited to pecuniary losses suffered by the deceased person?

1. For reasons of simplicity and coherence with other areas of law, the NSWLRC proposed that a cause of action for invasion of privacy does not survive the death of the complainant.[[184]](#footnote-184) The Victorian LRC likewise proposed that the estates of deceased persons should not have the capacity to take action for invasion of privacy.[[185]](#footnote-185)
2. While under common law personal actions generally do not survive the plaintiff, this rule has been reversed by statute to a large extent. It would be appropriate that a cause of action for the protection of privacy likewise survive the death of the person concerned because the family or estate of the deceased may have a continued interest in bringing proceedings to protect private information relating to the deceased. It should be noted that the privacy interest of a deceased 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.
3. 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’[[186]](#footnote-186) so that injunctive relief, delivery up and other relief remained available.
4. This position deserves support as far as the availability of injunctive relief, delivery up and other relief, as well as the non-availability of compensatory damages, are concerned. In most cases, an injunction will be the most appropriate remedy. In particular, there is no need to award damages for non-pecuniary losses arising from the invasion of privacy. 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. However, an order for an account of profits and exemplary damages should remain available. Both of these remedies are defendant-oriented. Their rationale is not affected by the death of the person whose privacy interest has been interfered with.[[187]](#footnote-187) 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.

**Limitation period**

Question 21. What limitation period should apply to a statutory cause of action for a serious invasion of privacy? When should the limitation period start?

1. In line with limitation periods for other torts, I submit that the limitation period for the proposed statutory cause of action should be three years. The time limit of one year, which applies under the Uniform Defamation legislation,[[188]](#footnote-188) may be too short in some circumstances, in particular where the privacy invasion does not involve publication or disclosure. The limitation period should begin from the time the plaintiff first knows of the invasion of privacy.

1. \* This submission makes use of a number of published and unpublished papers, including:

   N Witzleb, ‘Interim injunctions for invasions of privacy: challenging the rule in *Bonnard v. Perryman*?’ in N Witzleb, D Lindsay, M Paterson, S Rodrick (eds), *Emerging Challenges in Privacy Law: Comparative Perspectives* (Cambridge University Press) (due to be published 2014)

   N Witzleb, ‘*Exemplary Damages for Invasions of Privacy*’, Eighth Remedies Discussion Forum, 10-11 June 2013, Monash Prato Centre, Prato/Italy

   N Witzleb, ‘A statutory cause of action for privacy? A critical appraisal of three recent Australian law reform proposals’ (2011) 19 *Torts Law Journal* 104

   R Carroll and N Witzleb, ‘“It’s not just about the money” – Enhancing the Vindicatory Effect of Private Law Remedies’ (2011) 37 *Monash University Law Review* 216

   N Witzleb, ‘“Equity Does Not Act in Vain”: An Analysis of Futility Arguments in Claims for Injunctions’ (2010) 32 *Sydney Law Review* 503

   N Witzleb and R Carroll, ‘The role of vindication in torts damages’ (2009) 17 *Tort Law Rev*iew 16

   N Witzleb, ‘Justifying Gain-based Remedies for Invasions of Privacy’ (2009) 26 *Oxford Journal of Legal Studies* 325

   N Witzleb, ‘Giller v Procopets: Australian Privacy Law Shows Signs of Improvement’ (2009) 17 *Torts Law Journal* 121

   N Witzleb, ‘Monetary remedies for breach of confidence in privacy cases’ (2007) 27 Legal Studies 430

   All papers are annexed to this submission. [↑](#footnote-ref-1)
2. Australian Law Reform Commission (ALRC), *For Your Information: Privacy Law and Practice*, Report 108 (‘ALRC Report’); New South Wales Law Reform Commission (NSWLRC), *Invasion of Privacy*, Report 120 (‘NSWLRC Report’). [↑](#footnote-ref-2)
3. Victorian Law Reform Commission (VLRC), *Surveillance in Public Places*, Final Report, August 2010 (‘VLRC Report’). [↑](#footnote-ref-3)
4. ALRC Report, recommendation 74-1. [↑](#footnote-ref-4)
5. NSWLRC, *Invasion of Privacy*, Consultation Paper 1, 2007, [6.31]-[6.33] and Proposal 1. [↑](#footnote-ref-5)
6. NSW Draft Bill, cl 74(1). [↑](#footnote-ref-6)
7. VLRC Report, [7.123]. [↑](#footnote-ref-7)
8. Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63, (2001) 208 CLR 199. [↑](#footnote-ref-8)
9. W Prosser, ‘Privacy’ (1960) 48 *California Law Review* 383, 388-389; American Law Institute, *Restatement (Second) of Torts*, § 652B (2010). [↑](#footnote-ref-9)
10. ALRC Report, [74.119]. [↑](#footnote-ref-10)
11. Ibid, [74.120]. [↑](#footnote-ref-11)
12. Ibid, [74.123]. [↑](#footnote-ref-12)
13. NSWLRC Report, [4.4]. [↑](#footnote-ref-13)
14. Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63, (2001) 208 CLR 199. [↑](#footnote-ref-14)
15. For example, M Tilbury, ‘Coherence, Non-Pecuniary Loss and the Construction of Privacy’ in J Berryman and R Bigwood (eds), *The Law of Remedies: New Directions in the Common Law*, Irwin Law, Toronto, 2010, 127, 136-137; B McDonald, ‘Right of Privacy’, in C Sappideen and P Vines (eds), *Fleming’s Law of Torts*, 10th ed, Lawbook Co, Pyrmont, 2011, 686-692; B McDonald, ‘A statutory action for breach of privacy: Would it make a (beneficial) difference?’ (2013) 36 *Aus Bar Review* 241, 244-253. Outside Australia: Raymond Wacks, *Personal Information: Privacy and the Law*, Oxford, Clarendon Press, Oxford, 1993. [↑](#footnote-ref-15)
16. The NSW Law Reform Commission refers to a community attitude survey undertaken by the Privacy Commissioner: NSWLRC Report, [4.4] fn. 69. [↑](#footnote-ref-16)
17. ALRC Report, Rec 74-1; VLRC Report, Rec 23 and 24. [↑](#footnote-ref-17)
18. The Bill was proposed to be enacted as an amendment of the *Civil Liability Act 2002* (NSW). [↑](#footnote-ref-18)
19. See *Jones v Pollard* [1997] EMLR 233*,* 243 (CA); *Uren v John Fairfax & Sons Pty Ltd* (1965-66) 117 CLR 118; [1966] HCA 40, 150 (CLR) (Windeyer J). [↑](#footnote-ref-19)
20. More recently, also *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236. For a detailed summary, see P Handford, *Mullany and Handford’s Tort Liability for Psychiatric Damage*, 2nd ed, Lawbook Co, Pyrmont, 2006, ch 4. [↑](#footnote-ref-20)
21. This includes negligence (damages for pain and suffering, loss of amenities) as well as assault and battery (general damages). [↑](#footnote-ref-21)
22. *McKennitt v Ash* [2008] QB 73; [2006] EWCA Civ 1714. [↑](#footnote-ref-22)
23. *Ibid*, [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). [↑](#footnote-ref-23)
24. For a comprehensive analysis of English law, see S Smith, *Image, Persona and the Law*, 2nd ed, Sweet & Maxwell, London, 2008. [↑](#footnote-ref-24)
25. See further G Brüggemeier, A Colombi Ciacchi & P O'Callaghan, *Personality Rights in European Tort Law* (2010), ch 2. [↑](#footnote-ref-25)
26. ALRC Report, Rec 74-1; VLRC Report, Rec 23 and 24. [↑](#footnote-ref-26)
27. 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. [↑](#footnote-ref-27)
28. ALRC Report, [74.133]. [↑](#footnote-ref-28)
29. See Restatement (Second) of the Law of Torts, 625D (2010). [↑](#footnote-ref-29)
30. *Australian Broadcasting Corporations v* *Lenah Game Meats Pty Ltd* [2001] HCA 6, (2001) 208 CLR 1993, [42]. The reception of this test in the UK has been largely critical: in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, 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] EWHC 786 (Ch), [2003] 3 All ER 996, [189]-[192] (Lindsay J); G Phillipson, ‘Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act’ (2003) 66 *Modern Law Review* 726, 733-734 (suggesting that the test does not give proper effect to Art. 8 ECHR). [↑](#footnote-ref-30)
31. ALRC Report, [74.136]. [↑](#footnote-ref-31)
32. VLRC Report, [7.142]. [↑](#footnote-ref-32)
33. NSWLRC Report, [5.11]. [↑](#footnote-ref-33)
34. NSW Draft Bill, cl 74(2). [↑](#footnote-ref-34)
35. NSW Draft Bill, cl 74(3)(a)(ii). [↑](#footnote-ref-35)
36. NSWLRC Report, [5.9]-[5.11]. [↑](#footnote-ref-36)
37. See, eg., *Hosking v Runting* [2005] 1 NZLR 1 (CA); *G v Holland* [2012] NZHC 2155. [↑](#footnote-ref-37)
38. *Campbell v MGN Ltd* [2004] 2 AC 457; [2004] UKHL 22, [50], see also at [21] (Lord Nicholls), [84] but cf [92] (Lord Hope), [134]-[136] (Baroness Hale). For detailed analysis, see N Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 LQR 628, 630-634, 646-648. [↑](#footnote-ref-38)
39. Mosley v News Group Newspapers Ltd [2008] EWHC 1777 (QB), [2008] EMLR 20, [7] (Eady J); Murray v Express Newspapers Plc and Big Picture (UK) [2008] EWCA Civ 446, [2008] 3 WLR 1360; HRH Prince of Wales v Associated Newspapers Ltd [2008] EWCA Civ 1776, [2008] Ch 57, [34]. [↑](#footnote-ref-39)
40. *Hosking v Runting* [2004] NZCA 34, [2005] 1 NZLR 1, [117] (Gault P and Blanchard J). Tipping J intermeshed the two elements suggesting that ‘whether the plaintiff has a reasonable expectation of privacy depends largely on whether publication … would … cause substantial offence to a reasonable person’, [259]; see also [256]. This was followed in *G v Holland* [2012] NZHC 2155. [↑](#footnote-ref-40)
41. See generally, J Dietrich, ‘Giving Content to General Concepts’ (2005) 29 *Melbourne University Law Review* 218. [↑](#footnote-ref-41)
42. Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 6, (2001) 208 CLR 1993 [42]. [↑](#footnote-ref-42)
43. 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]. [↑](#footnote-ref-43)
44. 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. [↑](#footnote-ref-44)
45. Lord Nicholls in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, [22]; *Murray v Express Newspapers plc* [[2008] EWCA Civ 446](http://www.lexisnexis.com.ezproxy.lib.monash.edu.au/au/legal/search/runRemoteLink.do?langcountry=AU&linkInfo=F%23GB%23EWCA+Civ%23year%252008%25page%25446%25sel1%252008%25&risb=21_T11740546735&bct=A&service=citation&A=0.8880846025509119), [2009] Ch 481, [26] (Sir Anthony Clarke MR). [↑](#footnote-ref-45)
46. N 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) *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 *Hosking v Runting* [2005] 1 NZLR 1, [2004] NZCA 34: ‘truly humiliating and distressful or otherwise harmful to the individual concerned’, [126]. [↑](#footnote-ref-46)
47. NSWLRC Report, [5.9]. See also *Lee v News Group Newspapers Ltd* [2010] NIQB 106, [31] (Gillen J); similar also CDL Hunt, ‘New Zealand’s New Privacy Tort in Comparative Perspective’ (2013) 13 *Oxford University Commonwealth Law Journal* 157, 165. [↑](#footnote-ref-47)
48. ALRC Report, [74.147]. [↑](#footnote-ref-48)
49. 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). [↑](#footnote-ref-49)
50. VLRC Report, [7.180]. [↑](#footnote-ref-50)
51. P G Leonhard, ‘Proposals for a statutory cause of action for invasion of privacy in Australia: A brief comparison’ (2010) 6 *Privacy Law Bulletin* 42, 46. [↑](#footnote-ref-51)
52. *A-G v Guardian Newspapers Ltd (No. 2)* (‘Spycatcher’) [1990] 1 AC 109, 282 (Lord Goff). [↑](#footnote-ref-52)
53. Such as honest opinion/fair comment, or absolute and qualified privilege. [↑](#footnote-ref-53)
54. Aubry v Éditions Vice-Versa [1998] 1 SCR 591. [↑](#footnote-ref-54)
55. *Hosking v Runting* [2005] 1 NZLR 1; [2004] NZCA 34, [129] (Gault and Blanchard JJ, expressly overriding *P v D* [2000] 2 NZLR 591 (HC), [37]), [257] (Tipping J). [↑](#footnote-ref-55)
56. In the context of interim injunctions, *A v B* [2003] QB 195, [2002] EWCA Civ 337, [119(viiii)] 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). [↑](#footnote-ref-56)
57. Tugendhat & Christie, above n 42, [12.129]. [↑](#footnote-ref-57)
58. *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457; *Re S (A Child) (Identification: Restriction on Publication)* [2004] UKHL 47, [2005] 1 AC 593, [17] (Lord Steyn); *Browne v Associated Newspapers Ltd* [2007] EWCA Civ 295, [2008] QB 103 (CA), [38]. [↑](#footnote-ref-58)
59. ALRC Report, [74.147]; NSWLRC Report, [5.11]. [↑](#footnote-ref-59)
60. Nationwide News Pty Ltd v Wills [1992] HCA 46, (1992) 177 CLR 1; Lange v Australian Broadcasting Corporation [1997] HCA 25, (1997) 189 CLR 520. [↑](#footnote-ref-60)
61. NSW Draft Bill, cl 74(2). Similarly, ALRC Report, Rec 74-2; and at [74.157]. [↑](#footnote-ref-61)
62. Ibid, Rec 28. [↑](#footnote-ref-62)
63. *Hogan v Hinch* [2011] HCA 4, (2011) 243 CLR 506, [31] (French CJ); *O'Sullivan v Farrer* [1989] HCA 61, (1989) 168 CLR 210, [13] (Mason CJ, Brennan, Dawson, Gaudron JJ). [↑](#footnote-ref-63)
64. For example, International Covenant on 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. [↑](#footnote-ref-64)
65. NSWLRC Report, [5.19]. [↑](#footnote-ref-65)
66. NSWLRC Report, [5.16]; see also VLRC Report, [7.21]. [↑](#footnote-ref-66)
67. *Kassai v Hungary* 5380/07 [2009] ECHR 1974; *Mosley v UK* 48009/09 [2011] ECHR 774; on the UK approach to proportionality in Convention cases, *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, [20]-[22] (Lord Nicholls); *R (on the application of Begum) v Denbigh High School* [2006] UKHL 15, [2005] 2 AC 246. [↑](#footnote-ref-67)
68. But see *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(2); considered in *Momcilovic v The Queen* [2011] HCA 34, (2011) 245 CLR 1; generally, on proportionality and related concepts in Australian law, *Rowe v Electoral Commissioner* [2010] HCA 46, (2010) 243 CLR 1, [424-[466] (Kiefel J). [↑](#footnote-ref-68)
69. ALRC Report, [74.164]. [↑](#footnote-ref-69)
70. Section 5.4 (1) and (2) *Criminal Code* (Cth). [↑](#footnote-ref-70)
71. ALRC Report, [74.164]. [↑](#footnote-ref-71)
72. NSWLRC, *Invasion of Privacy*, Consultation Paper 1, 2007, [7.24]. [↑](#footnote-ref-72)
73. VLRC Report, [7.148]. [↑](#footnote-ref-73)
74. NSW Draft Bill, cl 74(3)(a)(ii). [↑](#footnote-ref-74)
75. NSW Draft Bill, cl 74(3)(a)(vi). [↑](#footnote-ref-75)
76. NSW Draft Bill, cl 75(1)(d). [↑](#footnote-ref-76)
77. *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. [↑](#footnote-ref-77)
78. *Ibid*, [163]. [↑](#footnote-ref-78)
79. For example, *Defamation Act 2005* (NSW), s 32; *Defamation Act 2005* (Vic), s 32. [↑](#footnote-ref-79)
80. Lange v Australian Broadcasting Corporation [1997] HCA 25, (1997) 189 CLR 520. [↑](#footnote-ref-80)
81. For example, *Defamation Act* *2005* (NSW), s 30(1)(c); *Defamation Act 2005* (Vic), s 30(1)(c). [↑](#footnote-ref-81)
82. Wilkinson v Downton [1897] 2 QB 57. [↑](#footnote-ref-82)
83. *Magill v Magill* [2006] HCA 51, (2006) 226 CLR 551, [20] (Gleeson CJ), referring to Lord Hoffmann’s analysis in *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406; *Carrier v Bonham* [2002] 1 Qd R 474; [2001] QCA 234, [22]-[28] (McPherson JA, McMurdo P and Moynihan J agreeing). For a contrary view, see S Wotherspoon, ‘Resuscitating the Wilkinson v Downton tort in Australia’ (2011) 85 *Australian Law Journal* 37. [↑](#footnote-ref-83)
84. Eg., APP 1, APP 4, APP 5, APP 8, APP 10, APP 11. [↑](#footnote-ref-84)
85. Eg., APP 3, APP 6, APP 8, APP 9. [↑](#footnote-ref-85)
86. Eg. APP 3, APP 6, APP 8, APP 12. See also G Greenleaf & Nigel Waters, above n 45, p 7. [↑](#footnote-ref-86)
87. 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. [↑](#footnote-ref-87)
88. See, eg, F Trindade, P Cane and M Lunney, *ibid*, 37-38. [↑](#footnote-ref-88)
89. This formulation was adopted in *Jones v Tsige* 108 O.R. (3d) 241, 2012 ONCA 32, [70]-[71], however, Sharpe J clarified that he would include recklessness. [↑](#footnote-ref-89)
90. 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). [↑](#footnote-ref-90)
91. The US intrusion tort makes clear that the offensiveness is not a consequence, but a threshold requirement for liability (‘if’). [↑](#footnote-ref-91)
92. RSBC c 373 (British Columbia), s 1(1); *Privacy Act*, RSNL 1990, c P-22 (Newfoundland and Labrador), s 3; *Privacy Act 1978* RSS CP-24 (Sakatchewan), s 2; *Privacy Act*, CCSM c P125 (Manitoba), s 2(2). [↑](#footnote-ref-92)
93. Section 178 (a)(v) of the *Information Privacy Act 2009* (Qld): ‘loss or damage suffered by the

    complainant because of the act or practice complained of, including for any injury to the

    complainant’s feelings or humiliation suffered by the complainant’. [↑](#footnote-ref-93)
94. Section 66(2) of the *Personal Data (Privacy) Ordinance* (Hong Kong, Cap 486), E.R. 1 of 2013: ‘For the avoidance of doubt, it is hereby declared that damage referred to in subsection (1) may be or include injury to feelings.’ [↑](#footnote-ref-94)
95. Section 13 of the *Data Protection Act 1998* (UK). [↑](#footnote-ref-95)
96. *Giller v Procopets* [2008] VSCA 236, (2008) 24 VR 1. [↑](#footnote-ref-96)
97. *Giller v Procopets* [2004] VSC 113. [↑](#footnote-ref-97)
98. Supreme Court Act 1986 (Vic), s 38. [↑](#footnote-ref-98)
99. *Prince Albert v Strange* (1849) 2 De Gex & Sim 652, 41 ER 1171. [↑](#footnote-ref-99)
100. M Leeming, ‘Confidential Information: Same problems, different resolutions in the United Kingdom and Australia’, *Sydney Law School Legal Studies Research Paper*, No. 11/70, October 2011, <http://ssrn.com/abstract=1942069>, p 6; critical about the reliance on UK authorities also: M Tilbury, ‘Remedies for Breach of Confidence in Privacy Contexts’ (2010) 15 *Media and Arts Law Review* 290, 291. [↑](#footnote-ref-100)
101. ALRC Report, [74-169]. [↑](#footnote-ref-101)
102. NSW Draft Bill, cl 75(1)(b). [↑](#footnote-ref-102)
103. VLRC Report, [7.156]. [↑](#footnote-ref-103)
104. 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 of the *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, [5.13]-[5.17]. [↑](#footnote-ref-104)
105. For example, *Fontin v Katapodis* (1962) 108 CLR 177; [1962] HCA 63. [↑](#footnote-ref-105)
106. VLRC Report, [7.165]-[7.167]. [↑](#footnote-ref-106)
107. For example, *Defamation Act 2005* (NSW), s 31; *Defamation Act 2005* (Vic), s 31. [↑](#footnote-ref-107)
108. ALRC Report, Recommendation 74–4 . [↑](#footnote-ref-108)
109. ALRC Report, [74.170]; NSWLRC Report, [6.8]. [↑](#footnote-ref-109)
110. NSWLRC Report, ibid. [↑](#footnote-ref-110)
111. RSBC c 373; similarly, *Privacy Act*, RSNL 1990, c P-22 (Newfoundland and Labrador). Some variations exist in the other provinces: *Privacy Act 1978* RSS CP-24 (Sakatchewan), s 4 (defence where reasonable grounds for belief that matter was of public interest and fair comment and where privileged under defamation law); *Privacy Act*, CCSM c P125 (Manitoba), s 5 (defence where matter is public interest, fair comment or privileged – but no equivalent to limitation s 2(4) of the *Privacy Act 1996* RSBC c 373). [↑](#footnote-ref-111)
112. *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB) denying an injunction because information had ‘entered the public domain to the extent that there [was], in practical terms, no longer anything which the law [could] protect’ [36]; see further N Witzleb, ‘”Equity Does Not Act in Vain”: An Analysis of Futility Arguments in Claims for Injunctions’ (2010) 32 *Sydney Law Review* 503. [↑](#footnote-ref-112)
113. *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73, [86]. [↑](#footnote-ref-113)
114. *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457. [↑](#footnote-ref-114)
115. VLRC Report, [7.194]. [↑](#footnote-ref-115)
116. For example, in general civil liability legislation, such as the *Wrongs Act 1958* (Vic), following the recommendations of the Ipp Report or in the uniform Defamation Acts. [↑](#footnote-ref-116)
117. Clause 77(1) of NSW Draft Bill. The VLRC proposes that compensatory damages should not be capped: VLRC Report, [7.219]. The ALRC does not address this issue. [↑](#footnote-ref-117)
118. See, eg, Ipp Report (Panel for the Review of the Law of Negligence, Review of the Law of Negligence, *Final Report*) (2002); Australian Government Attorney-General’s Department, *Revised outline of a possible national defamation law* (July 2004). [↑](#footnote-ref-118)
119. [↑](#footnote-ref-119)
120. *Rookes v Barnard* [1964] AC 1129, 1221 (Lord Devlin). [↑](#footnote-ref-120)
121. The Law Commission for England and Wales recommended that they be amalgamated with damages for mental distress: *Aggravated, Exemplary and Restitutionary Damages*, Report No 247 (1997), [2.42], Recommendations 1 and 2. See further N Witzleb and R Carroll, ‘The role of vindication in torts damages’ (2009) 17 *Tort Law Rev*iew 16, 23-26. [↑](#footnote-ref-121)
122. N Witzleb, ‘Justifying Gain-based Remedies for Invasions of Privacy’ (2009) 26 *Oxford Journal of Legal Studies* 325; S Harder, ‘Gain-Based Relief for Invasion of Privacy’ (2011) (1) DICTUM Victoria L. Sch. J. 1 [↑](#footnote-ref-122)
123. Privacy Bill 2006 (Ireland) (No. 44 of 2006), s 8(c). [↑](#footnote-ref-123)
124. Ibid, Rec 74-5; NSW Draft Bill, cl 78; VLRC Report, [7.218]. [↑](#footnote-ref-124)
125. NSWLRC, *Invasion of Privacy*, Consultation Paper (CP 1), 2007, [8.15]. [↑](#footnote-ref-125)
126. Statutes banning exemplary damages include recent torts enactments, such as general civil liability legislation as well as the Australian Uniform Defamation Acts 2005-6, e.g. *Defamation Act 2005* (NSW), s 37, but also regulatory statutes on anti-discrimination or surveillance. [↑](#footnote-ref-126)
127. *Copyright Act 1968* (Cth) s 115(4); *Water Act 2000* (Qld), s 788(2)(b); *Dust Diseases Act 2005* (SA), s 9(2) – on which see further, *BHP Billiton Limited v Parker* [2012] SASCFC 73. [↑](#footnote-ref-127)
128. *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 471 (Brennan J); referred to in *Lamb v Cotogno* (1987) 164 CLR 1, 9 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ);see also *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 129 (Taylor J); *Gray v Motor Accident Commission* (1998) 196 CLR 1. [↑](#footnote-ref-128)
129. *James v Hill* [2004] NSWCA 301, [69] (Tobias JA). [↑](#footnote-ref-129)
130. *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 210, (2003) 56 NSWLR 298. [↑](#footnote-ref-130)
131. *Giller v Procopets* [2008] VSCA 236, (2008) 24 VR 1. See further N Witzleb, ‘Giller v Procopets: Australian Privacy Law Shows Signs of Improvement’ (2009) 17 *Torts Law Journal* 121. [↑](#footnote-ref-131)
132. For detailed consideration, see ‘*Exemplary Damages for Invasions of Privacy*’, Eighth Remedies Discussion Forum, 10-11 June 2013, Monash Prato Centre, Prato/Italy (annexed). [↑](#footnote-ref-132)
133. Lord Justice Leveson, *The Culture, Practices and Ethics of the Press*, Report, HC 780 (London: TSO, 2012), p. 1512 [5.12]. [↑](#footnote-ref-133)
134. House of Lords and House of Commons, Joint Committee on Privacy and Injunctions, *Privacy and injunctions*,2012, HL Paper 273 HC 1443, [134]. [↑](#footnote-ref-134)
135. Law Commission, Aggravated, Exemplary and Restitutionary Damages, Report No. 247. [↑](#footnote-ref-135)
136. *Douglas v Hello! (No. 3)* [2003] 3 All ER 996; [2003] EWHC 786 (Ch), [273]. [↑](#footnote-ref-136)
137. *Mosley v News Group Newspapers* [2008] EMLR 20, [2008] EWHC 1777 (QB), [172]-[197]. [↑](#footnote-ref-137)
138. E.g.: *Mosley* v. *News Group Newspapers Ltd* [2008] EWHC 687 (QB). [↑](#footnote-ref-138)
139. See further, N Witzleb, ‘“Equity does not act in vain”: An analysis of futility arguments in claims for injunctions’ (2010) 32 *Sydney Law Review* 503. [↑](#footnote-ref-139)
140. For detailed consideration, see N Witzleb, ‘Interim injunctions for invasions of privacy: challenging the rule in *Bonnard v. Perryman*?’ in N Witzleb, D Lindsay, M Paterson, S Rodrick (eds), *Emerging Challenges in Privacy Law: Comparative Perspectives* (Cambridge University Press) (annexed). [↑](#footnote-ref-140)
141. *Data Protection Act 1998* (UK) s. 32. See, e.g., Sunderland Housing Company Ltd v Baines [2006] EWHC 2359 (QB). [↑](#footnote-ref-141)
142. *Protection from Harassment Act 1997* (UK) ss. 1 and 4. See, e.g.*, ZAM* v. *CFW* [2011] EWHC 476 (QB); *Sunderland Housing Company Ltd* v. *Baines* [2006] EWHC 2359 (QB). [↑](#footnote-ref-142)
143. Copyright, Designs and Patents Act 1988 (UK) s. 96(2). [↑](#footnote-ref-143)
144. British Steel v Granada [1980] 3 WLR 774; Francome v Mirror Group Newspapers Ltd [1984] 1 WLR 892 (CA); Lion Laboratories v Evans [1985] QB 526 (CA); A-G v Guardian Newspapers (No. 2) [1990] 1 AC 109 (‘Spycatcher’). [↑](#footnote-ref-144)
145. *Initial Services Ltd* *v Putterill* [1968] 1 QB 396; *Woodward* *v* *Hutchins* [1977] 1 WLR 760; *Hyde Park Residences Ltd* *v* *Yelland* [2000] EWCA Civ 37, [2001] Ch 143 (copyright). [↑](#footnote-ref-145)
146. For further consideration of the legislative purpose, see House of Lords and House of Commons, Joint Committee on Privacy and Injunctions, *Privacy and injunctions*,2012, HL Paper 273 HC 1443, [51]-[58]. [↑](#footnote-ref-146)
147. [1975] AC 396 (HL). [↑](#footnote-ref-147)
148. *Ibid*, 408. [↑](#footnote-ref-148)
149. United Kingdom, *Parliamentary Debates*, House of Commons, 2 July 1998, vol 315, col 536 (Jack Straw). [↑](#footnote-ref-149)
150. [2004] UKHL 44, [2005] 1 AC 253. [↑](#footnote-ref-150)
151. *Ibid*, [22]. [↑](#footnote-ref-151)
152. *Ibid*. [↑](#footnote-ref-152)
153. The House of Lords accepted that a lesser degree of likelihood may be sufficient in some exceptional cases, e.g. in the period before a decision on whether to grant interlocutory relief can be made (i.e. short term emergency injunctions) or where the disclosure might have extremely serious consequence for the claimant, such as the threat of serious personal injury: *ibid*. [↑](#footnote-ref-153)
154. Section 12(2) of the *HRA* deals with the circumstances in which ex parte relief should be granted. [↑](#footnote-ref-154)
155. *Ntuli* *v Donald* [2010] EWCA Civ 1276, [2011] EMLR 10; *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439, [2011] 1 WLR 1827, [10]. [↑](#footnote-ref-155)
156. [2006] HCA 46, (2006) 227 CLR 57. [↑](#footnote-ref-156)
157. Gleeson CJ and Crennan J, who delivered a joint judgment, agreed with this: *ibid*, [19]. [↑](#footnote-ref-157)
158. (1968) 118 CLR 618. [↑](#footnote-ref-158)
159. *ABC v O’Neill* [2006] HCA 46, (2006) 227 CLR 57, [65]. [↑](#footnote-ref-159)
160. *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2005] 1 AC 253 [↑](#footnote-ref-160)
161. Cf. *ABC v O’Neill* [2006] HCA 46, (2006) 227 CLR 57, [76-83] (Gummow and Hayne JJ). See also, eg., D Butler & R Rodrick, *Australian Media Law*, 2nd ed, 2004, [2.10.15]. [↑](#footnote-ref-161)
162. *Ibid*, [85]. [↑](#footnote-ref-162)
163. Ibid, [16], [19]. [↑](#footnote-ref-163)
164. Ibid, [93] (Gummow and Hayne (JJ). [↑](#footnote-ref-164)
165. Ibid, [85]. [↑](#footnote-ref-165)
166. Ibid, [33] (Gleeson CJ and Crennan J); [↑](#footnote-ref-166)
167. Ibid, [65]. [↑](#footnote-ref-167)
168. VLRC Report, Rec 29. [↑](#footnote-ref-168)
169. ALRC Report, Rec 74-5. [↑](#footnote-ref-169)
170. Ibid, Rec 74-5; NSWLRC Report, [7.2]. [↑](#footnote-ref-170)
171. NSW Draft Bill, cl 76(2). [↑](#footnote-ref-171)
172. ALRC Report, Rec 74-5. [↑](#footnote-ref-172)
173. New South Wales Law Reform Commission, *Invasion of Privacy*, Consultation Paper 1, 2007, [1.5]-[1.8], Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper 72, 2006, [5.69]-[5.70]. [↑](#footnote-ref-173)
174. 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. [↑](#footnote-ref-174)
175. See *Marks v GIO Australia Holdings Ltd* [1998] HCA 69, (1998) 196 CLR 494; *Murphy v Overton Investments Pty Ltd* [2004] HCA 3, (2004) 216 CLR 388 (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)). [↑](#footnote-ref-175)
176. In relation to s 80 of the *Trade Practices Act 1974* (Cth), now s 232 of the Australian Consumer Law, see, for example, *ACCC v 4WD Systems Pty Ltd* (2003) 200 ALR 491; [2003] FCA 850 (Selway J); *ICI Australia Operation Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248, 268 (French J). In relation to s 1324 of the Corporations Act 2001 (Cth), see, for example, *ASIC v Mauer-Swisse Securities Ltd* (2002) 42 ACSR 605; [2002] NSWSC 741. [↑](#footnote-ref-176)
177. ALRC Report, Rec 74-5; NSWLRC Report [7.19]-[7.20], NSW Draft Bill, cl. 76 [↑](#footnote-ref-177)
178. ALRC Report, *ibid*; NSWLRC Report [7.21]-[7.22], NSW Draft Bill, cl. 76. [↑](#footnote-ref-178)
179. ALRC Report, ibid; NSWLRC Report [7.25]-[7.26], NSW Draft Bill, cl. 76. On apologies as a legal remedy, see R Carroll, ‘Apologies as a Legal Remedy’ (2013) 35 *Sydney Law Review* 317. [↑](#footnote-ref-179)
180. NSWLRC Report, [7.27], NSW Draft Bill, cl. 76(1)(e). [↑](#footnote-ref-180)
181. NSW Draft Bill, cl. 76(1)(e). [↑](#footnote-ref-181)
182. Issues Paper, [98]. [↑](#footnote-ref-182)
183. The NSWLRC Report only mentioned prohibitive injunctions, whereas the ALRC Report simply provided that the court should be empowered to order ‘injunctions’. Nothing turns on this difference because both proposals envisaged the list of orders to be non-exhaustive. [↑](#footnote-ref-183)
184. NSWLRC Report, [10.1]. [↑](#footnote-ref-184)
185. VLRC Report, Rec 32. [↑](#footnote-ref-185)
186. Ireland Law Reform Commission, Privacy: Surveillance and the Interception of Communications, Report 57 (1998), 141-2. [↑](#footnote-ref-186)
187. 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*, 2005, 128-9. [↑](#footnote-ref-187)
188. E.g. Limitation of Actions Act 1958 (Vic), s 5 (1AAA). [↑](#footnote-ref-188)