

**Submission by Professor Dan Jerker B. Svantesson to the
Australian Law Reform Commission in relation to the Discussion
Paper *Serious Invasions of Privacy in the Digital Era***

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1. Summary of major points

In my view:

- Australia should introduce a statutory tort action for serious invasion of privacy;
- Such a development is in line with progress made in several countries sharing Australia's legal tradition;
- The benefits that would flow from this are important and beyond intelligent dispute;
- One, so far overlooked, benefit relates to the greater enforceability overseas of private law judgments (such as a tort judgment), compared to public, administrative and criminal law judgments (such as decisions under the *Privacy Act 1988* (Cth)); and
- In introducing a statutory tort action for serious invasion of privacy, the legislator must take care to make clear how existing private international law rules will be applied to such a tort.

2. Comments

1. I welcome the initiative taken by the Australian Law Reform Commission to further the discussion about this important topic.
2. My submission does not adopt the structure of the Discussion Paper. Rather it focuses on a selection of specific issues.
3. These submissions are intended to be made public.

3. Generally about a statutory tort action for serious invasion of privacy

4. Convincing arguments in favour of a statutory tort action for serious invasion of privacy have already been presented on a number of occasions. Indeed, the fact that Australia would benefit from implementing such a tort seems beyond intelligent dispute. In addition to the indisputable arguments in favour of a statutory tort action for serious invasion of privacy highlighted elsewhere, I would like to reiterate the gap-filling function a statutory tort action for serious invasion of privacy may have for Australian law.

5. During the 2012 *Inquiry into sexting* held by the Victorian Law Reform Committee, I gave the following evidence highlighting a gap in Australian law that suitably could be remedied by the introduction of a statutory tort action for serious invasion of privacy:

[O]ne of the submissions referred to a scenario where a boy and a girl met at a party, the girl had a video on her phone of herself in some sort of sexual conduct, the boy stole the phone, transferred the video to himself and then distributed it. I think no-one would doubt it or disagree with me if I were to say that is a violation of the girl's privacy. The funny thing then is that Australian privacy law does nothing to protect the girl in that situation. There is no way at all that the privacy law as it stands comes into play there. It is an obvious privacy violation, but the law is failing to respond. That brings us to what the Victorian Privacy Commissioner was calling for, which is a statutory cause of action for privacy violations. That is certainly one important step. It is not going to be the sort of silver bullet that takes care of sexting as such, but it is a vitally important component in addressing this matter.¹

6. This is just one example of why we need a statutory tort action for serious invasion of privacy.

¹ CORRECTED VERSION: LAW REFORM COMMITTEE, *Inquiry into sexting* (Melbourne — 10 December 2012), Witness: Professor D. Svantesson, Faculty of Law, Bond University. http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/isexting/transcripts/2012-12-10_Prof_Svantesson.pdf.

4. The overlooked private international law advantage of a tort action for serious invasion of privacy

7. Despite numerous and detailed discussions of a tort of, or other statutory cause of action for, privacy infringement, one important argument favouring such a cause of action has, to my knowledge, been consistently overlooked.

8. States are typically unwilling to recognise and enforce foreign judgments rendered within the ambits of administrative, public and criminal law.² Thus, the international effectiveness of actions taken under the *Privacy Act 1988* (Cth) may be limited indeed in most cases. However, states are much more accommodating of private law judgments, such as judgments rendered based on a tort action. Thus, from the perspective of international recognition and enforcement, such actions have a clear advantage over actions taken based on traditional data privacy laws such as the Australian *Privacy Act 1988* (Cth).

5. Regarding the private international law issues associated with the proposed tort

9. I am afraid the ALRC's Discussion Paper hints at a degree of naivety in how it approaches the private international law issues associated with the proposed tort. On page 58 it is observed that "At common law, the applicable law for intra-Australian and international torts depends on the place where the tort was committed". This is of course correct. What worries me is that it then goes on to conclude that:

Describing the action as a tort action will thus avoid many consequential questions arising once primary liability is established. The cause of action will be more fully integrated into existing laws than if it were simply described as a cause of action. This will also avoid the need for numerous specific provisions dealing with these ancillary issues, adding undesirable length to the legislation[.]³

² Recognition means basically that the foreign judgment is viewed as having the effect it has in its state of origin, while the enforcement of a foreign judgment means to "compel compliance [...] through means such as attachment, committal, fine, sequestration, or execution". (Nygh, P. and P. Butt, *Butterworths Concise Australian Legal Dictionary*, 2nd ed., Butterworths, Sydney, 1998.) Thus, as noted in *Dicey and Morris on The Conflict of Laws*, "while a court must recognize every foreign judgment which it enforces, it need not enforce every foreign judgment which it recognizes". (L. Collins et al. (eds.), *Dicey, Morris and Collins on the Conflict of Laws*, 14th ed., Sweet and Maxwell, London, 2006 [p. 567]).

³ Australian Law Reform Commission, Discussion Paper 80 *Serious Invasions of Privacy in the Digital Era* (March 2014), at para 4.27.

10. Applying existing private international law rules to the newly created tort will be far from a mechanical task even when the action is classed as a tort. For example, how do we identify the place where the statutory tort was committed? Can we use the same test to identify the place where the statutory tort was committed in relation to all types of privacy violations? Would we not need a different test where the violation is in relation to the collection of personal information, compared to e.g. where a privacy violation stems from online publications of personal information? And where is the tort committed when the abuse occurs in a cloud computing context? Do we, as has been done in Europe in relation to personality rights, adopt the ‘mosaic principle’⁴, with the addition of a ‘centre of interests test’⁵ for Internet situations?

11. It is clear that the application of private international law rules to the newly created tort will involve several value judgements that are better addressed prior to implementation, rather than being left to courts that all too often shy away from clarifying matters the legislator has left in limbo.⁶

6. Learning from *Vidal-Hall & Ors v Google Inc* [2014] EWHC 13 (QB)

12. *Vidal-Hall & Ors v Google Inc* [2014] EWHC 13 (QB) is an important data privacy case for several reasons. Most importantly, while an action for ‘misuse of personal information’ was established through a string of other judgments, *Vidal-Hall & Ors v Google Inc* dispelled any lingering doubt that may have existed as to the nature of such a tort in English law.

13. Through this case, England is the latest country to recognise the type of action under discussion in the ALRC Discussion Paper – a trend that Australia usefully can follow by implementing a statutory tort action for serious invasion of privacy. However, it is a different aspect of the case that I will focus on here. The Court was tasked with assessing whether the claimants could serve out of the jurisdiction at Google Inc’s Mountain View headquarters.

14. The procedural history of the matter was that the claimants had been granted permission by the Master on 12 June 2013 to serve the relevant claim on Google Inc in California. Two months later, Google sought an order “declaring that the English court has no jurisdiction to try these claims, and setting aside service of the claim form, and the order of the Master.”⁷

⁴ *Shevill et al v Presse Alliance SA*. (Case No. C-68/93 [1995] 2 WLR 499).

⁵ *Martinez v MGN Limited and X v eDate Advertising*. (C-509/09 and C-161/10).

⁶ Dan Svantesson, Rapid technological developments and slow legal developments – A call for judicial activism, *Alternative Law Journal* 36(1) (2011); pp. 33-35.

⁷ *Vidal-Hall & Ors v Google Inc* [2014] EWHC 13 (QB), at para 6.

15. The relevant conditions are outlined in the *Civil Procedure Rules*. More specifically, the Claimants sought to base their case on the following four grounds allowing for service out of the jurisdiction:

(2) A claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction.

(9) A claim is made in tort where (a) damage was sustained within the jurisdiction; or (b) the damage sustained resulted from an act committed within the jurisdiction.

(11) The whole subject matter of a claim relates to property located within the jurisdiction.

(16) A claim is made for restitution where the defendant's alleged liability arises out of acts committed within the jurisdiction.

16. The latter two grounds were added late in the proceedings and were dismissed by the Court.⁸ I will only highlight some aspects of the torts claim, which doubtlessly was the most complex matter before the Court; that is whether the Claimants could rely upon a claim in tort where either (a) damage was sustained within the jurisdiction or (b) the damage sustained resulted from an act committed within the jurisdiction. To understand the Court's reasoning on this point, it is necessary to say a few words about the dispute's background.

17. The claim was made by three users of Apple's Safari Internet browser, and related to Google having used cookies to collect personal information about the Claimants without their consent and in a manner contrary to the browser's privacy settings. Each of the Claimants stated that they had suffered distress and anxiety as a result of Google's conduct. In more detail, this discomfort had been caused by the fact that targeted advertisement revealing information about the Claimants had appeared on their screens as a result of the personal information collected by Google. As such advertisement may reveal numerous types of sensitive personal information, the risk of third persons, permitted to use their devices or view their screens, seeing the advertisement caused the said distress and anxiety.

18. Several issues were addressed such as whether the actions for 'misuse of personal information' could be dealt with as a tort despite originating in the equitable cause of action for breach of confidence, and whether damages in the context of ground (9)(a) encompasses the type of damages they claimed to have suffered. I will not address these issues here.

19. The Court concluded that the claim for 'misuse of private information' fell within ground (9)(a). It would have been valuable had the Court explored this dimension in

⁸ *Vidal-Hall & Ors v Google Inc* [2014] EWHC 13 (QB), at para 142.

some detail. After all, one can imagine situations where a focus on the place of damages may become controversial; e.g. where the advertisement deemed to cause the distress and anxiety is displayed on the Claimant's screen while outside the country of domicile (and perhaps geographically restricted so as to not appear in the country of domicile), but the brunt of the distress and anxiety being suffered in the country of domicile. Would it be acceptable for a claimant to take action in the country of domicile in such a case even though an attempt has been made to avoid the controversial advertisement appearing in that country?

20. While made in *obiter*, the Courts reasoning in relation to ground (9)(b) has potential implications for future disputes and deserves detailed scrutiny. In the context of identifying the location of the act committed resulting in the damage sustained, the Court foremost relied on traditions stemming from defamation law:

Damage is alleged to have arisen from what the Claimants, and potentially third parties, have, or might have, seen on the screens of each Claimant. That is what in libel is referred to as publication, and was referred to as publication by the Court of Appeal in *Douglas*, cited at para 61 above ("The cause of action is based on the publication in this jurisdiction and the complaint is that private information was conveyed to readers in this jurisdiction"). So publication to the Claimants plainly was effected in this jurisdiction.⁹

21. Here, too much is taken for granted. My chief concern is that the Court, without any explanation or reasoning, adopted defamation law principles to a non-defamation law situation that, in fact, is distinguished from defamation law in important regards.

22. Why should we attach significance to the same locus for the tort of 'misuse of personal information' – or as far as Australia is concerned, the statutory tort action for serious invasion of privacy – as we do for defamation? The answer might be that in these newer torts we focus on where the content is published to the data subject, in a manner similar to how defamation law focuses on the publication of the defamatory content to a third person. Thus, if the data subject brings up the content of concern on the computer screen while in England, the content is published in England.

23. The problem with this reasoning is that, like in defamation matters, the involvement of a third party is a necessary component of what was complained of in the case at hand – the damages were said to stem from the risk of a third person seeing the content. What if the advertisement only appeared while the Claimants were overseas, where they are known by no one? Further, the exact requirement of involvement of a third person must be analysed in detail. In defamation law, publication to a third person is a necessary component. However, in relation to the tort of 'misuse of personal information', the damages may, as in the case at hand,

⁹ *Vidal-Hall & Ors v Google Inc* [2014] EWHC 13 (QB), at para 77.

stem from the mere *risk* of such publication. Further, while publication to persons who do not previously know the victim may suffice in defamation matters, it seems hard to argue that the advertisement being seen by a by-passing stranger would be a sufficient ground for the tort of 'misuse of personal information' or of a statutory tort action for serious invasion of privacy.

24. Taken together, these important differences necessitate a detailed justification as to why defamation principles should be applied in determining the relevant locus for the privacy torts. Perhaps such a justification can be advanced. However, it can never be taken for granted.

25. Finally on the obiter text on ground (9)(b), without any comment on its validity, the Court also noted how Mr Tomlinson (acting for the Claimants) referred to *Ashton Investments Ltd v Rusal* [2006] EWHC 2545 (Comm) [2007] 1 Lloyd's Rep 311:

[S]ignificant damage occurred in England where the [claimant's] server was improperly accessed [from Russia] and the confidential and privileged information was viewed and downloaded... I also consider that substantial and efficacious acts occurred in London as well as in Russia. That is where the hacking occurred and where access to the server was achieved.¹⁰

26. If transferrable to the tort of 'misuse of personal information', this may support the notion that collection of information occur at the location of the source as well as at the location of the collecting party. However, in the case at hand the damage was not the collection but the risk of publication to relevant third persons. Thus, the relevant act for the sake of ground (9)(b) was not the collection but the presentation of the advertisement on the Claimant's screen.

27. The above must have made plain that the legislator needs to devote considerable efforts to making clear how the rules of private international law will apply to the proposed tort action for serious invasion of privacy.

7. Conclusion

28. Through this Discussion Paper the ALRC has taken a vital step towards providing Australians with better protection against serious invasions of privacy. I look forward to further opportunities for academics, civil society, the business community, the legal community and other interested parties contributing to the important work ahead.

¹⁰ Paras 62-63 of *Ashton Investments Ltd v Rusal* [2006] EWHC 2545 (Comm) [2007] 1 Lloyd's Rep 311as presented in *Vidal-Hall & Ors v Google Inc* [2014] EWHC 13 (QB), at para 78.