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Submission to ALRC
Serious Invasions of Privacy – Discussion Paper 80

1. Summary

1.1 The following submission focuses mainly (but not exclusively) on potential disputes between plaintiff and defendant where freedom of expression is said to be at stake. In doing so, it is recognised that such issues may not arise in the paradigm case involving unauthorised collection, storage and use of personal information by individuals and organisations.

1.2 Given the ALRC's view that the UK's established jurisprudence may assist the Australian courts in deciding cases under the proposed statute, [6.12], the following comments on the ALRC's proposals in light of the UK's experience.

1.3 Overall, the ALRC's proposals for the introduction of a statutory privacy tort are persuasive and admirable. The report offers a solution to the problem that is coherent, comprehensive and workable. Moreover, it recognises the value of leaving certain concepts to the judiciary to develop. As will become clear, the main criticism offered in this submission relates to whether, in striking the necessary balance between privacy and public interest concerns, the apprehensions of potential defendants have been accorded too much weight.

1.4 As the ALRC recognises, in the UK both the Joint Committee on Privacy and Injunctions and the Leveson Inquiry concluded that a privacy statute was unnecessary and unworkable and, instead, decided that judges were best placed to reconcile the privacy/public interest dichotomy through piecemeal developments to the common law. Whilst this strategy has obvious appeal, not least in the capacity of the judiciary to articulate key concepts in a more expansive fashion than statute can, it also has obvious drawbacks given the judicial constraint that cases are decided solely upon the disputed facts (rather than hypothetical issues), thus restricting the opportunity for a coherent and comprehensive solution to emerge. The ALRC is right to question the veracity of claims that a statute would inevitably require satellite legislation to determine the scope of the key concepts underpinning it.

1.5 Consequently, guiding principle 6 (that privacy laws should be clear and certain) is particularly important. Overall, the ALRC's report achieves this principle admirably. However, it is perhaps worth stressing that (some) uncertainty is inevitable in this area of law – particular where the privacy/public interest dichotomy arises – due to the prominence of a range of philosophical concepts that are contested and contestable, in both principle and practice, since these will act as unpredictable variables. The presence of notions such as 'autonomy', 'human dignity' and 'freedom of expression', which animate the key provisions of the proposed statute, inevitably creates an environment of unpredictability in the way that the statute will be developed should it become law. This unpredictability impacts on the prospects of successfully preventing or else curing serious privacy invasion since the project will collapse if the courts interpret autonomy and human dignity narrowly and public interest generously.

1.6 One strategy for managing this unpredictability, and enhancing the prospects of the project succeeding, may be to provide more detailed guidance on those animating provisions so as to construct narrower boundaries within which to situate concepts like freedom of expression. The following suggests areas where further elaboration might be of assistance.

1.7 In summary, it will be argued that:

a) since the two types of action (intrusion claims and information claims) are likely to be developed differently, according to different standards, presumptions and justifications, the principle that they are the same cause of action may be unsustainable;

b) in determining and/or developing the seriousness standard, a) there is a risk that the Australian courts might understand the Australian system of privacy law to involve tougher standards than the UK system; b) the relevance of context (and not just the plaintiff's characteristics) to the determination of this standard is important and might be recognised more explicitly;

c) the conception of freedom of expression in proposal 8-2 a) is a particular source of unpredictability and would benefit from greater explanation, especially as to i) the distinction between individual and press freedom (if any) and ii) the underlying justification or justifications at work

d) the burden of proof in determining the public interest in the privacy-invading action or expression ought to be neutral since the responsibility for determining this factor is the court's. The public interest is not served by leaving this task to the plaintiff (or defendant).

e) the ALRC may wish to offer more guidance to the courts on how to determine the weight of the public interest claim (particularly where expression is at stake). Whereas the UK courts have developed a sophisticated approach to determining the weight of the privacy claim, the approach to free speech is less intricate and more reminiscent of a 'zoning' approach in which claims (and elements of claims) succeed or fail dependent upon whether public interest expression is at stake or not.

1.8 Overall, the submission seeks to argue that in the privacy/public interest dichotomy the liberal tradition of distinguishing action from expression is particularly important. Consequently, it will be argued, the proposed statute is on its surest footing where it reflects the principles that privacy-invading action is rarely justified by the public interest, including the public interest in expression, and interferences with privacy-invading expression are rarely justified by the public interest, including the public interest in privacy.

2. Two types of invasion

2.1 The ALRC's decision to explicitly protect physical interferences with privacy beyond those arising from communication of personal information is a commendable improvement upon the present system operating in the UK. Following the House of

Lords' decision in *Wainwright v Home Office*[1] that there is no general right to privacy under Article 8 ECHR (and so the right did not apply to compulsory strip searches in a prison), the UK law offers no right to protection from intrusion into seclusion *per se* (albeit, as the ALRC notes, there have been occasions when the UK case law has come close to recognising such protection). As the ALRC also notes, the Protection from Harassment Act 1997 provides some protection from intrusion although its applicability is limited by the requirement under s 1 that the harassment must occur on at least two occasions before it will amount to a 'course of conduct' (unless more than one person is involved in the behaviour (s 7(3)).

2.2 The ALRC's view that the provisions should be drafted without including indicative examples is sensible. In the case of intrusion into seclusion, this seems particularly important to allow judges to develop the law so as to accommodate emerging technologies. It also allows for the inclusion of a broad range of circumstances where privacy-invading behaviour may occur such as in particular places where an individual ought to expect privacy (such as the home, hospital, solicitor's office (or other professional services), *etc*) and specific spaces in public places (lavatories, changing rooms, confessional) as well as circumstances where clandestine devices are used to capture information. Alternatively, there may be nothing private about the surroundings but the plaintiff's circumstances justify protection from privacy-invasion, for example, because the plaintiff is in a state of grief or shock or has been the victim of a sexual assault.

2.3 The ALRC recommends one cause of action for both types of privacy invasion [5.53]-[5.58]. It is, however, arguable, that the basis of each claim is different and that this may require the judiciary to modify this principle or else apply differential standards to the different elements of the tort, particularly the third, fourth and fifth.

2.4 In *Campbell v MGN Ltd*[2] the House of Lords stated that the misuse of private information cause of action 'focuses upon the protection of human autonomy and dignity' which it defined as 'the right to control dissemination of information about one's private life and the right to the esteem and respect of other people'.[3] These are terms whose meaning let alone application are highly contested in principle and practice.[4] The editors of *The Law of Privacy and the Media* suggest a distinction based upon autonomy as the 'right to determine whether and in what circumstances others have access to one's personal affairs'[5] whilst dignity, they suggest, may be conceived in Kantian terms to convey the intrinsic worth of individuals as fellow human beings.[6]

2.5 Although the point should not be overstated, there is a sense in which the intrusion into seclusion and misuse of private information claims employ different blends of these values such that intrusion claims may involve human dignity more than autonomy and *vice versa* with misuse of private information. This is not to say that human dignity

[1] [2003] UKHL 53
[2] [2004] UKHL 22
[3] *Ibid*, [51].
[4] See C. McCrudden 'Human dignity and judicial interpretation of human rights' (2008) *EJIL* 655 for general discussion of the problem.
[5] Warby *et al*, *The Law of Privacy and the Media*, 2nd edn. (OUP, 2011), 79.
[6] *Ibid.*, 77.

might not be at stake in information claims – an expose relating to an affair may disclose the fact of adultery as well as salacious details and since the former removes the choice from the adulterer it undermines autonomy whereas the latter affronts human dignity.

2.6 The possibility that these two claims are different in nature follows from Wacks's views that privacy is an umbrella term capturing a broad range of activities and that this accounts for the numerous contexts in which Article 8 ECHR has been applied both in the UK and in Europe, from landlord and tenant disputes to assisted suicide cases.[7] However, for the purposes of articulating principles to determine these two claims – intrusion claims and information claims – the distinctive nature of each is significant. Intrusion claims are likely to have more in common with the dignitary torts of battery, assault and false imprisonment[8] given that the chief mischief at stake results from the violation of physical space that has occurred. Information claims, though, are more closely related to defamation and breach of confidence (of course) with the chief mischief being the effect of disclosure upon reputation and self-worth. It should be anticipated that this will be reflected in the principles that the courts use to determine cases.

2.7 This distinction reflects the different nature of paradigmatic claims. Intrusion claims are more likely to involve action rather than expression and information claims *vice versa*. For example, intrusion claims may relate to intimidation, harassment, door-stepping, unauthorised photography, persistent telephoning, pursuit, interception of communications, *etc*. Information claims, meanwhile, relate to expression. This is not to say that there may not be some overlap between claims – information claims may involve an element of action and expression in relation to how the information was obtained and expression in relation to the dissemination of that information. However, the ALRC's description of the claims suggests that the action element would fall under intrusion into seclusion and the expression element within misuse of information. For example, if a newspaper should discover an extra-marital affair through covert surveillance or interception of communications then this aspect would constitute intrusion into private affairs and the disclosure of the affair through publication would fall under misuse. Consequently, the courts could dissect claims into their discrete areas such that the newspaper may be penalised for the intrusion into seclusion but not for the misuse of information on the basis that whereas the public interest justified the expression it did not justify the action preceding it.

2.8 As a result of these distinctions, though, different presumptions and different justifications for each type of claim are likely to appear as the case law develops. This may present difficulties for the purposes of establishing precedents. Discounts and accommodations may be required where a plaintiff seeks to rely upon the principles established in one context so as to apply them to another. This prospect reinforces the need for clarity in defining the nature of the two claims. Some further guidance at

[7] R. Wacks, *Privacy and Media Freedom*, (OUP, 2013)
[8] Warby, *The Law of Privacy and the Media*, n 5, 367.

proposals 6-2, 7-1, 8-2 and 11-1 might address this. The following embellishes on the distinctions between the two claims at each of these stages.

2.9 Proposal 6-2: Although the point should not be overstated (particularly because it seems to be recognised by the ALRC albeit perhaps not as explicitly as it might be), the court's approach to determining the second element (reasonable expectation of privacy) is likely to be markedly different in intrusion claims than information claims. In the UK, in misuse of information claims, the case law demonstrates that the courts place particular emphasis on the nature of the information or activity at issue, the form in which the information is kept and the effect on the claimant of its disclosure.[9]

2.10 However, these techniques are likely to be of less value in an intrusion context. For example, in *Kaye v Robertson*,[10] (surely) a paradigmatic example of intrusion into seclusion, the plaintiff, a well-known actor complained when a journalist and photographer entered his hospital room without permission in order to take photographs and conducted an interview with him shortly after brain surgery following a serious road traffic accident. Nothing meaningful can be deduced about the reasonableness of Kaye's expectation of privacy, though, from considering the information that the journalists gained as a result or the effect on the plaintiff (Kaye was in no fit state to conduct an interview and had no recollection of it shortly afterwards).

2.11 Instead, the court must consider whether the plaintiff's physical space – his security and integrity – had been interfered with (and the standard for this would need to be lower than that required for trespass or trespass to the person if those other claims are to remain distinct), whether this interference occurred in a location where the plaintiff would ordinarily expect to enjoy privacy and whether anything said by the defendant removed or mitigated this expectation. In Kaye's case, this could have been achieved if the defendants had obtained proper authority to conduct the interview and take photographs.

2.12 Consequently, although all these techniques are included within proposal 6-2, it is doubtful whether all of them are as equally applicable to each claim. For example, (c) (and possibly (b)) seems to have little or no connection to misuse of information claims and *vice versa* with (a), (e), (f).

2.13 Moreover, whilst the effect on the plaintiff may go to the amount of damages recovered (although the ALRC suggests not [11.34], which is surely sensible), it is an irrelevant consideration for establishing the reasonableness of his expectation of privacy. This is particularly pronounced in Kaye's case – since he had no memory of the encounter, it could hardly be said to have affected him. Although generalisations should be avoided in privacy contexts, it may be said that in intrusion cases the mischief arises where individuals breach expected standards of conduct in society whereas in information cases other considerations apply such that effect is an important factor.

2.14 Proposal 7-1: Similarly, it follows from the preceding discussion that the criteria of seriousness may mean something different in intrusion cases than information cases. In Kaye's case, the seriousness related to the act of defying common social standards of

[9] *Ibid*, 232

[10] [1991] FSR 62. This case is mentioned by the ALRC at [11.34] (and tacitly at [7.29]).

conduct – that a patient recovering from major surgery in a private hospital bed is entitled to privacy. Whilst the seriousness of the interference with this convention might be relevant for the purposes of calculating damages, it is much less relevant (and arguably irrelevant) to determining liability. There will be a category of intrusions that meet (or ought to meet) the standard based on the fact of intrusion and regardless of the nature of it. Consequently, in intrusion cases the court is likely to develop a presumption to this effect in a manner that would not apply in information cases. In some contexts (in intrusion cases), this criteria may well become redundant.

2.15 Proposal 8-2: employing the liberal tradition that actions are different to expression (and that 'no one pretends that actions should be as free as opinions'[11]) the courts' approach to determining whether the public interest justified the interference with privacy will be (or at least, should be) markedly different depending upon whether it is an intrusion or information case at stake. Arguably, the approach should be diametrically opposed: interference with privacy-invading action is usually justified by public interest considerations unless warranted by the harm to others caused by the plaintiff whereas interference with privacy-invading expression is rarely justified on public interest grounds unless the harm to the plaintiff warrants it. In all cases, though, harm should be afforded a high threshold.[12]

2.16 Moreover, the liberal tradition suggests that whereas the principle of free speech justifies privacy-invading expression on the basis that there should be a high level of freedom for the expression of opinions about others, the same principle does not justify a high level of protection for action.[13]

2.17 Proposal 11-1: The ALRC proposes a broad power to allow the courts to make a range of damages awards. It follows from the preceding discussion that the object of an award for intrusion is different, in principle, to that for information claims. Whereas in information claims the award reflects the effect of the expression on the plaintiff's reputation, an award for intrusion is reflective of the violation involved (and, as the ALRC recognises, the effect may be of little relevance). The effect of this might be that the element of damages in information claims is calculated differently to intrusion claims. Moreover, the conflict with freedom of expression with awards based on intrusion rather than misuse of information is lessened since the speaker is being penalised (in principle at least) not for their opinion but the means by which they obtained information leading to the opinion.

2.18 In summary, therefore, different approaches to intrusion and information claims are likely to arise not only because of the fact-sensitive nature of privacy claims but also because different underlying principles, assumptions and justifications are at work. As a consequence, the claim that the two types of action are the same cause of action may be difficult to sustain. This is problematic only to the extent it impacts on the guiding principles concerning certainty and clarity. This problem, such as it is, might be

[11] J.S. Mill, "On Liberty", in J.M. Robson, ed., *Collected Works of John Stuart Mill*, vol. XVIII, (University of Toronto Press, 1977), 260
[12] See, *eg,* J. Feinberg, *Harm to Others* (OUP, 1984)
[13] Mill, *On Liberty*, n 11, 261. Mill defends this proposition through the use of his well-known corn-dealer example.

lessened through recognition of the causes of action as being separate but related and/or further guidance in the proposal on the different assumptions and rationales that apply to each claim.

3. The standard of seriousness required

3.1 The ALRC's rationale for introducing the seriousness standard is understandable given its mandate although whether a separate element is required for this is debatable. In the UK, it has been suggested that the law contains a triviality doctrine to guard against non-serious intrusions being actionable (albeit not one that is fully worked out yet).[14] This is apparent, *eg*, from Baroness Hale's 'popping out for a pint of milk' example in *Campbell*:

> 'Readers will obviously be interested to see how [Naomi Campbell] looks if and when she pops out to the shops for a bottle of milk. There is nothing essentially private about that information nor can it be expected to damage her private life. It may not be a high order of freedom of speech but there is nothing to justify interfering with it'[15]

This standard was applied by the High Court in *John v Associated Newspapers Ltd*[16] in respect of a photograph showing Sir Elton John walking from a car, parked outside his home, to his front door. The court found that the photograph disclosed nothing essentially private about the well-known singer:

> '…there is no question of the photograph revealing information which touches upon or is relevant to [his] health. Nor is there any information about social or personal relationships or… sexual relationships. …Here it seems to me that the circumstances are much more akin to 'popping out for a pint of milk'. In other words, it is simply an individual leaving his car and going to his front gate'.[17]

3.2 In *Wood v Commissioner of Police for the Metropolis* [2010] EMLR 1 the Court of Appeal identified three safeguards against an unreasonably wide reading of Article 8 (right to respect to privacy) developing in the misuse of private information case law:[18]

a) 'the alleged threat or assault to the individual's personal autonomy must attain "a certain level of seriousness"';
b) the 'reasonable expectation of privacy' requirement; and
c) the broad scope of exceptions listed in Article 8(2) to justify the interference with the claimant's rights to (respect for) privacy.

3.3 In light of these safeguards in the UK case law and in light of the ALRC's reasoning that the replication of the UK's 'reasonable expectation' test and balancing approach to resolving privacy/public interest disputes is preferable since it provides an established jurisprudence for the Australian courts to draw upon [6.12] there is a danger of the seriousness standard being applied twice if not three times: first through the 'reasonable

[14] See discussion in M. Warby QC, *The Law of Privacy and the Media*, n 5, 256-258.
[15] *Campbell*, n 2, [154]
[16] [2006] EMLR 27
[17] *Ibid*, [15]
[18] *Wood v Commissioner of Police for the Metropolis* [2010] EMLR 1, [22]

expectation of privacy' test where the UK standard (which already excludes non-serious intrusions) is taken as the benchmark; secondly, as a means of limiting interferences to those that not only satisfy the reasonable threshold standard but also may be said to be a serious breach of that standard (so as to be highly offensive, *etc*) and thirdly (potentially) through the use of the balancing approach where the intrusion must not only be serious but also so serious as to outweigh everyone else's rights (*ie*, the public interest at stake). Whilst the point should not be overstated (given that these problems ought not to arise in obvious cases), there is a definite risk that the courts conclude that the Australian system offers (and is intended to offer) more limited protection for privacy-invasion than the UK system. The Australian judiciary might resolve this issue through an early declaration that the UK jurisprudence should be understood as encompassing seriousness within the two stages of the *Campbell* test, *ie*, that the Australian system does in five stages what the *Campbell* test does in two.

3.4 The ALRC makes a valid point at [7.9] that unmeritorious claims may be a problem although this issue might be dealt with by early, active case management by the courts. There is a danger that in seeking to guarantee that such claims are not launched that the statute strikes the wrong balance between privacy and public interest concerns. In any event, as the case law develops, the prospect of unmeritorious claims ought to reduce as it becomes apparent that the threshold of 'reasonable expectation' excludes trivial interferences.

3.5 The ALRC's recognition that the standard of seriousness (and reasonableness of expectation to privacy) should take account of the individual's circumstances is important. As the ALRC notes, privacy intrusions involving individuals who are not used to the limelight may have more profound emotional and psychological impact on victims than for seasoned celebrities and public figures. It is also inherent within the test, though, that there should be some opportunity for civic voices to find expression. There may be circumstances in which the interference is especially troubling yet the plaintiff is particularly robust. It is one thing for the court to conclude that the claim should fail because the individual belongs to a certain category of individual (say, a politician) but another to say that the claim fails because the individual is particularly thick-skinned or extrovert.

3.6 Consider the hypothetical example of the peeping Tom taking photographs using a telephoto lens of lady undressing in her bedroom. Unbeknownst to him, the lady is an exotic dancer. Conceivably the court might conclude the standard of seriousness is not met because the actions are not highly offensive, harmful or distressing to the plaintiff in light of her occupation (she is used to desperate men watching her undress). To some extent, this possibility is tempered by the ALRC's recognition that the test is an objective one (as discussed in [7.15]) but perhaps more explicit recognition that seriousness is judged not only in respect of the plaintiff's characteristics but the broader context of the defendant's actions is called for. To that end, proposal 7-1 could be amended to make it explicit that the context of the invasion also counts (or may count) when considering the seriousness of the invasion and that the seriousness of the context ought to be determinative.

3.7 Similarly, the ALRC might also consider whether, in cases involving multiple defendants, the seriousness standard must be established against each or whether it can be established accumulatively. For example, an individual might claim intrusion into seclusion following requests from multiple media outlets for interviews, the physical presence of the media outside the plaintiff's home, *etc*. If seriousness is judged by its effect on the plaintiff then presumably this threshold might be met even though the individual actions of each defendant would not (or might not) of themselves reach this standard.

4. The meaning of public interest expression

4.1 The ALRC's approach to public interest freedom of expression at proposal 8-1 is sensible albeit that the question of whether this should be treated as a defence or not is debatable. However, this submission is more interested in the conception of free speech underpinning the ALRC's proposal and, in particular, the meaning of the term appearing at a) in proposal 8-2.

4.2 Overall, the ALRC's commentary, particularly the discussion from [8.44] to [8.50] and the list in proposal 8-2, suggests a narrow reading of the term 'public interest expression', reminiscent of the popular theory that freedom of expression is most (or only, depending on which theory is applied) justified where expression contributes to an individual's participation in a democratic society.

4.3 Admittedly, freedom of expression is a highly contested term, as is apparent not only from the academic commentary but also the case law. Consequently, not only is the scope and meaning of the democratic participation theory contested but also the question of whether this is the only or dominant theory that judges should have regard to when determining the value of free expression.

4.4 As is well-known the democratic participation theory can be read narrowly so as to justify only expression that is directly concerned with democracy, such as information valuable for voting or information highlighting abuses of power.[19] It can be read slightly more broadly than that to include information that enables citizen to play their part in the democratic process, including, most obviously, educational materials.[20] Alternatively, it can be read more broadly still to include information valuable not only for public decision-making but also personal decision-making, such as commercial advertising that aids citizens in deciding which seller to buy products from.[21] Alternatively, it has been said that the conception must include information about moral issues[22] and visions of the good life[23] so that citizens can shape the way that society is governed and develops. From this brief analysis, it becomes apparent that defining 'political expression' and information in the public interest is not straightforward and that there are numerous ways the concept can be interpreted. For this reason it has been

[19] See, *eg*, R. Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 Ind. L.J. 1, 23
[20] See, *eg*, A. Meiklejohn, 'The First Amendment is an Absolute' [1961] Supreme Court Review 245
[21] See, *eg*, M. Redish, 'The Value of Free Speech' (1982) 130 U. Pa. L. Rev. 591
[22] See, *eg*, M. Perry, 'Freedom of Expression: An Essay on Theory and Doctrine' (1984) 78 Nw. U.L. Rev. 1137
[23] See, *eg*, J. Raz, 'Free Expression and Personal Identification' (1991) 11 OJLS 303

argued that terms such as 'political expression' are largely meaningless[24] and too dependent upon the moral outlook of the observer[25] (in this case, the judiciary). This reasoning would apply to 'public interest expression' as well.

4.5 The flexibility of the term 'freedom of expression' is also apparent in the common law. Lord Steyn's explication of the term in *Ex Parte Simms* is well-known:

> 'Freedom of expression is...intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), 'the best test of truth is the power of thought to get itself accepted in the competition of the market'... Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate.' [26]

4.6 This account includes not only the democracy argument but also broader theories such as Mill's argument from truth, the argument from self-fulfilment and the argument from autonomy (which values freedom of expression intrinsically).

4.7 The court's treatment of freedom of expression under Proposal 8-2 a), therefore, is vitally important to the success or otherwise of the project to prevent or cure serious invasions of privacy. If interpreted too broadly, the project may collapse (particularly if privacy concerns are treated sceptically).

4.8 The ALRC rightly refers to Baroness Hale's powerful speech in *Campbell* concerning the differential value of speech and, similarly, reference might be made to her discussion in *Jameel v Wall Street Journal* that public interest expression is something

> 'very different from saying that it is information which interests the public – the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it.'[27]

4.9 However, distinguishing between real public interest concerns and that which interests the public has become more complicated in the UK due to judicial recognition that which might be categorised as celebrity gossip may be public interest expression. There are three ways in which this classification may arise.

4.10 First, expression may be treated as being in the public interest where it reveals inconsistencies between private behaviour and public statements or actions. In *Campbell*, the House of Lords recognised that the public has the right not to be misled. In *Ferdinand v MGN Ltd* the divisional court applied this principle to a press story revealing that Premier League footballer Rio Ferdinand was not the reformed character he claimed to be in his biography and had cheated on his wife. The court concluded that the newspaper was entitled to correct the public's misperception.[28]

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[24] K. Greenawalt, *Speech, Crime and the Uses of Language* (OUP, 1989), 45

[25] L. Alexander, *Is There a Right of Freedom of Expression?* (CUP, 2005), 59-60.

[26] *R v Secretary of State for the Home Department ex p. Simms* [2000] 2 AC 115, 126

[27] *Jameel v Wall Street Journal* (2007) 1 AC 359, [147]

[28] *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) [86]

4.11 Secondly, on similar grounds, there is a public interest in revealing an individual is acting inconsistently with their role model status. In *A v B plc*[29] the Court of Appeal spoke of the higher standards of behaviour that the public can expect from role models and found that the press was entitled to criticise role models when their behaviour fell below these standards. Although this is a controversial and, in many ways, problematic view,[30] this aspect of the decision remains good authority and was applied in *Ferdinand* to justify the privacy-invading expression at stake.[31]

4.12 Thirdly, the judiciary has found that the press enjoys the freedom to criticise the moral choices and behaviour of others as part of its public watchdog role. This view was outlined in *Terry v Persons Unknown*[32] and described by the Court of Appeal in *Hutcheson v News Group Newspapers Ltd*[33] as 'powerful'. The Court went on to apply this reasoning and find that a story about the father-in-law of infamous celebrity chef Gordon Ramsey, which commented on a public disagreement between the two by referring to the fact that Hutcheson had maintained a second family (which he kept secret from his first for a long time), was a matter of public interest outweighing any corresponding interference with Hutcheson's private life.

4.13 This approach to press freedom – in which opinions about the moral choices and behaviour of individuals is generally protected despite any attendant interference with privacy – is also apparent in the Press Complaint Commission's reasoning in its adjudications. For example, the PCC refused to uphold a complaint that an insensitive and hostile comment piece in the Daily Mail concerning (and immediately following) the death of Stephen Gately (a pop singer), and which attracted around 25,000 complaints from the public, had not breached the Editor code of conduct on accuracy, intrusion into grief or shock and discrimination because of press freedom. The PCC stated that:

> 'as a general point, the Commission considered that it should be slow to prevent columnists from expressing their views, however controversial they might be. The price of freedom of expression is that often commentators and columnists say things with which other people may not agree, may find offensive or may consider to be inappropriate. Robust opinion sparks vigorous debate; it can anger and upset. This is not of itself a bad thing. Argument and debate are working parts of an active society and should not be constrained unnecessarily (within the boundaries of the Code and the law).'[34]

4.14 The possibility of such a broad reading of freedom of expression impacting on the effectiveness of the ALRC's proposed statute depends upon a) the court's approach to determining the meaning of freedom of expression (and, therefore, it may be useful to be more explicit about this meaning – albeit there are political sensitivities in governments determining the concept of free speech to be applied by the law), b) whether the court applies (or should apply) a distinction between press freedom and individual freedom of expression and c) the court's approach to determining the weight

[29] *A v B plc* [2003] QB 195
[30] See discussion in H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (OUP, 2006)
[31] *Ferdinand*, n 28, [87]
[32] *Terry v Persons Unknown* [2010] EWHC 119 (QB), [104]
[33] *Hutcheson v News Group Newspapers Ltd* [2011] EWCA Civ 808, [29]
[34] http://www.pcc.org.uk/news/index.html?article=NjIyOA==

of public interest expression for the purposes of the balancing test described in Proposal 8-1.

4.15 In respect of the overall conception employed, and as is well-established in the academic commentary, the term 'freedom of expression' does not point to anything specific or indisputable but, instead, refers to a general political principle, the parameters of which will need to be mapped out. Although this is (probably) a judicial task, the ALRC may assist by staking out the markers that identify the preferred scope and limits of the right and the guiding principles at work. Leveson's approach to this issue in his report on the practice and culture of the press (at pp 61-63) serves a template (albeit his conclusions may be contested).

4.16 The following addresses the issues arising in respect of the judicial approach to press freedom as a distinctive right and the balancing test.

5. Press freedom as freedom of expression

5.1 As the ALRC will be aware, Lord Justice Leveson recently suggested that the justification underpinning press freedom is different to that underpinning individual freedom of expression. Whereas individual freedom of expression 'has its roots in a very personal conception of what it is to be human' and so encompasses individual self-fulfilment and Mill's classic argument from truth, [35] such arguments have 'no direct relevance to press freedom…because, put simply, press organisations are not human beings with a personal need to be able to self-express'.[36] Moreover, Mill's view about the connection between speech and truth-discovery are similarly discounted because '[a] free press will not necessarily provide an effective "market-place for ideas"'. Since certain sections of the press have the power to dominate discussion and since it cannot be assumed that these sections of the press would not work against truth-discovery where it suited their own interests or worldview there is a risk of press distortion that would 'impair…[the]…capacity to facilitate informed debate'.[37]

5.2 Instead, Leveson claims that press freedom is protected to the extent that specific democratic functions are at stake. These functions are: first, to hold power to account (not only political power but also private and public institutional power) [38] and, secondly, to provide information valuable to democratic decision-making and so allow citizens to make 'intelligent political choices'.[39] In this regard, the press serves as 'a conduit for the information as well as a forum for public debate'.[40]

5.3 For this reason, Gavin Phillipson has argued that Leveson's view of press freedom allows for 'rigorous analysis of how far [the expression] promotes the audience-based informational benefits that are so important to democracy'.[41] Consequently, he argues that when the proposed new regulator (or regulators) is appointed and required to assess

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[35] Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (HC 780, 2012), [3.3], 62

[36] *Ibid*, [3.3], 62

[37] *Ibid*, [3.5]-[3.6], 63

[38] *Ibid*, [4.3]-[4.4], 65

[39] *Ibid*, [4.2], 64

[40] *Ibid*, [4.2], 64

[41] G. Phillipson, 'Leveson, the Public Interest and Press Freedom' (2013) 5(2) *JML* 220, 230.

the press freedom claim against competing interests, 'it must [do so] only by reference to instrumental, audience-based justifications [and] must be prepared to find that, where a particular story does not serve those justifications, it is of very low value in speech terms and thus quite easily outweighed by competing rights'.[42]

5.4 Translating this to the Australian context would have two consequences: first, it would allow interference where it cannot be shown that a particular privacy-invading story furthers democratic participation, either by holding the powerful to account or by providing information that enables public decision-making, or that this contribution outweighs the attendant interference with competing rights then the regulator should penalise that member of the press.

5.5 Secondly, it would mean that the press could not claim a public interest in freedom of expression itself whereas an individual might. Consequently, an individual might be able to claim there is some public interest in objectively valueless expression such as venting, ranting or conversely.[43] For example, some of the individuals mentioned by the ALRC at p 22 might fall into this category: the jilted lover who complains bitterly about his former partner online or the indignant home-owner who posts mean-spirited pictures revealing the shocking state of his neighbour's lawn. Whilst there may be nothing objectively valuable about this expression, the law might still recognise the value of self-expression as a vital aspect of human autonomy, to be weighed against the corresponding intrusion into privacy (this is not to say that these speech claims should succeed).

5.6 Irrespective of principled objections that might be made about this approach there is mixed support for this differential treatment in the case law. The UK case law does not provide much support for this generous approach to individual freedom of expression and instead reflects a readiness to interfere with expression that harms or offends others,[44] prompting Andrew Geddis to argue that the law promotes a pro-civility standard of public behaviour. Conversely, the courts have tended to adopt a more restrained approach toward the press. Memorably, Lord Hoffmann stated that:

> 'Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which "right-thinking people" regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute'[45]

However, more recently, the High Court, in *Miranda v Secretary of State for the Home Department*,[46] hinted at a distinction between press freedom and individual freedom of expression such that the former is valued for instrumental reasons and the latter for instrumental and intrinsic reasons.

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[42] *Ibid.*, 231.
[43] J. Rowbottom, 'To rant, vent and converse: protecting low level digital speech' (2012) CLJ 355
[44] See, eg, *Abdul v DPP* [2011] EWHC 247; *Connolly v DPP* [2007] EWHC 237 (Admin)
[45] *R v Central Independent Television plc* [1994] Fam 192, 203
[46] *Miranda v Secretary of State for the Home Department* [2014] EWHC 255 (Admin), [41]-[47]

5.7 Yet these statements conflict with principles expressed elsewhere. The European Court of Human Rights has previously denied that the press requires special treatment[47] while Sir John Donaldson MR in the Court of Appeal in *Attorney General v Guardian Newspapers Ltd*[48] stated that the right of the press 'to publish is neither more nor less than that of the general public'.

6. Balancing and the weight of public interest expression

6.1 As the ALRC notes, the process of balancing rights is familiar territory for the judiciary. However, for the purposes of the statute, the approach that the court adopts to this approach will be pivotal to its success in providing meaningful protection to privacy interests. Further guidance on how this balance is to be achieved or ought to be achieved would be valuable.

6.2 As the ALRC also notes, the courts in the UK are required to resolve disputes in a manner which interferes with rights proportionately. The UK courts have developed a range of principles that enable the weight of the privacy claim to be determined with some precision, including the nature of the information or activity, the form in which it is kept and the effect on the plaintiff and plaintiff's family.[49]

6.3 However, the court's approach to determining the weight and nature of the free speech claim is less intricate. The courts are yet to identify a technique that would allow them to determine the strength of the public interest in the expression. Instead, the court seems to limit its task to determining if there is a public interest at stake or not and, if so, to determine the claim in favour of the expression.

6.4 As the ALRC notes, the test to determine misuse of private information claims is derived from the leading decision in *Campbell v MGN Ltd*[50] in which it was held that, in order to be successful, it must be established that the contested information at stake discloses, first, a reasonable expectation of privacy (the threshold test) and, secondly, that the public interest in the expression does not outweigh that privacy interest.

6.5 In *Campbell* itself, the House of Lords found (by a majority of three to two) that notwithstanding the minimal public interest in knowing that Naomi Campbell was addicted to drugs despite her public claim that she did not take drugs (unlike other models), the publication of details of her treatment for drug addiction was an unjustified invasion of her privacy. Thus, the *Campbell* test treats the public interest in the privacy-invading expression as a quantifiable value which may be compared to the privacy claim itself (another quantifiable value) to determine which is greater and expects future courts to take this approach.

6.6 However, it is arguable that the current approach to the *Campbell* test evident in recent decisions does not adopt this methodology: indeed, it may be said the overwhelming majority, if not all, of the cases following *Campbell* either in the Queens Bench or Chancery divisions (or in respective appellate cases) apply a different methodology; and, moreover, that the judgments in *Campbell* itself do not consistently apply the

[47] *Steel & Morris v United Kingdom* [2005] EMLR 15, [89]-[90]
[48] *AG v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 183
[49] See discussion in Warby, *The Law of Privacy and the Media*, n 5, 233-268
[50] *Campbell*, n 2

Campbell methodology despite assertions from dissenting judges Lords Hoffmann and Nicholls that the differences between the judges are not methodological. The current approach to the *Campbell* test does not treat the public interest as a continuum in which some expression is of higher value to society than others but rather adopts a more absolutist, binary approach in which privacy-invading expression is classified either as being of public interest or not.

6.7 By analysing the post-*Campbell* cases in this way, a trend arises: in cases where the courts have identified a public interest in the expression at stake, the claim to privacy fails in respect of the information revealed in that expression[51] whereas in cases where the privacy claim succeeds there is a finding that no public interest arises in the information concerned;[52] there appear to be no cases in which the claim to misuse of private information succeeds *despite* the existence of a public interest in that information.[53]

6.8 Thus, the case law suggests that rather than 'balancing' the two competing claims through the assignment of a value to each (as the courts say they do), the courts have adopted a zonal approach to determining the claims, with public interest expression within the zone of protection *regardless* of its privacy-invading nature and non-public interest speech outwith *because* of its privacy-invading nature.

6.9 The recent Court of Appeal decision in *AAA v Associated Newspapers Ltd*[54] is paradigmatic. Here, the Court was faced with an appeal from a first instance decision concerning the publication of information about the paternity of the claimant (a minor) and photographs of the claimant. At first instance,[55] it was decided that there was no misuse of private information by these revelations since it concerned a prominent public official and, therefore, revealed a matter of public interest:

> 'the claimant is alleged to be the second such child conceived as a result of an extramarital affair of the supposed father. It is said that such information goes to the issue of recklessness on the part of the

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[51] *Tillery Valley Foods v Channel Four Television* [2004] EWHC 1075 (Ch); *Response Handling Ltd v BBC* [2007] CSOH 102; *Long Beach v Global Witness* [2007] EWHC 1980; *Leeds City Council v Channel Four Television* (2007) 1 FLR 678; *BKM Ltd v BBC* [2009] EWHC 3151 (Ch); *Author of a Blog v Times Newspapers Ltd* [2009] EWHC 1358 (QB); *Terry v Persons Unknown* [2010] EWHC 119 (QB); *Goodwin v News Group Newspapers Ltd* ("NGN") [2011] EWHC 1437 (QB); *Hutcheson v NGN* [2011] EWCA Civ 808; *Ferdinand v NGN* [2011] EHWC 2454 (QB); *Trimingham v Associated Newspapers Ltd & ors* [2012] EWHC 1296 (QB); *Spelman v Express Newspapers Ltd* [2012] EWHC 355 (QB); *McClaren v NGN* [2012] EWJC 2466 (QB)

[52] *Greencorns Ltd v Claverley Group Ltd* [2005] EWHC 958 (QB); *CC v AB* [2006] EWHC 3083 (QB) [36]-[37], [44]; *McKennitt v Ash* [2006] EWCA Civ 1714; *Mosley v NGN* [2008] EWHC 1777 (QB); *AMM v HXW* [2010] EWHC 2457 (QB) [16]; *CDE v MGN Ltd* [2010] EWHC 3308 (QB) [44]-[52], [73]; *Ntuli v Donald* [2010] EWCA Civ 1276 [19], [25]; *DFT v TFD* [2010] EWHC 2335 (QB) [24]; *KGM v NGN* [2010] EWHC 3145 (QB) [39]; *AMP v Persons Unknown* [2011] EWHC 3454 (TCC); *CTB v NGN* [2011] EWHC 1232 (QB) [25]-[26]; *ETK v NGN* [2011] EWCA Civ 439 [21]-[23]; *JIH v NGN* [2011] EWHC Civ 42*; MJN v NGN* [2011] EWHC 1192 (QB) [7]; *MNB v NGN* [2011] EWHC 528 [6]; *OPQ v BJM* [2011] EWHC 1059 (QB) [5], [25]; *TSE v NGN* [2011] EWHC 1308 (QB) [7]; *Contostavlos v Mendahun* [2012] EWHC 850 (QB)*; SKA PLM v CRH* [2012] EHWC 2236 (QB) [22], [64]; *RockNRoll v NGN* [2013] EWHC 24 (Ch) [33]-[35].

[53] Perhaps *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57 is an exception although the Court of Appeal takes such a dismissive approach to the public interest at stake in the Prince's private journals that when they say there is 'minimal' public interest in them (at 126), they are really saying there is none at all (see discussion at 91, [136]-[137], which the Court of Appeal endorsed, at 126).

[54] [2013] EWCA Civ 554.

[55] [2012] EWHC 2103 (QB)

> supposed father, relevant both to his private and professional character, in particular his fitness for public office. I find that [it does].'[56]

6.10 On the photographs of the claimant, however, the court found that this did amount to a misuse of private information:

> '...I do not regard the publication of any of the photographs as being reasonable nor do I accept that the defendant's reasoning would constitute "exceptional public interest" sufficient to justify publication. The articles provided sufficient information, no more was required...'[57]

Thus, there was a public interest in the private information being disclosed, and so that portion of the claim failed, but no public interest in the photographs and so that portion of the claim succeeded. On appeal, the appellants contested the finding concerning the private information; the award of £15,000 in respect of the published photographs was not contested by the respondents. On the question of whether the first instance judge had erred in finding the public interest in the expression outweighed the privacy interest, the Court of Appeal found that 'the judge had performed a difficult and sensitive balancing exercise'.[58]

6.11 However, the Court of Appeal's judgment reveals little of substance to support this finding. The Court identifies those findings made at first instance on the specific privacy claim (that the claimant's mother had wanted to retain control over dissemination to the child but that this privacy interest must be discounted because of certain disclosures the mother had made to others about the child's paternity) and there is also brief discussion of whether the information could have been expressed in a less intrusive manner, such as by discussing the politician's 'infidelities and philandering' without mentioning the fact of the claimant (the Court concludes that since the public interest in the expression concerned the politician's 'recklessness' – this being, allegedly, his second illegitimate child – the information was directly relevant to the question of his fitness for office).[59] From this limited discussion, the Court of Appeal reaches its conclusion that the first instance court had conducted the balancing act appropriately.

6.12 Yet neither within the Court of Appeal's judgment nor that at first instance is there any discussion which evidences the mechanics of this balancing act at work and nothing which evidences the respective weights of these two claims; the findings are entirely summary. Although there is a finding that the privacy claim is to be 'discounted', there is nothing to indicate the weight of the privacy claim prior to this deduction and nothing to indicate the weight of the discount; all that can be said definitively about the privacy value is that it is sub-optimal but that says very little at all.

6.13 Similarly, there is nothing conclusively said about the value of the expression. Although both courts are satisfied that it is public interest expression, there is no calculation of the projected value of this information to public deliberations: the fact of

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[56] *AAA*, n 54, [118]
[57] *Ibid*, [122]
[58] *Ibid*, [45]
[59] *Ibid*, [38] - [45]

the public official's illegitimate child and public perceptions about his fitness for office are two phenomena that are not explicitly or conclusively linked.

6.14 Moreover, whatever the Court of Appeal might say, there is simply no 'balancing' taking place – there is no discussion to show how the weighing up of these two apparently incommensurate values has been or is to be achieved so the question of why the social value of knowing of the politician's illegitimate child is of a higher order than the social value of concealing a child's genealogy from public scrutiny is not identified and, therefore, cannot be tested. Similarly, the finding at first instance that the publication of the photographs disclosed no public interest suffers from the same defects.

6.15 Instead, the Court's reasoning at both levels reveals different rules at work: that the finding of a public interest informs the superiority of the press freedom claim to the privacy claim. This apparent departure from *Campbell* is consistent with dicta in a different Court of Appeal decision that the public interest in the privacy-invading expression is the 'determinative factor'[60] and the Supreme Court's view in *Re Guardian* that where there is a public interest at stake Article 10(2) 'scarcely' permits interference.[61]

6.16 Moreover, the courts approach reflects an obvious practical concern: it is understandable that judges should feel uncomfortable about interfering with expression where a public interest arises since the law is ill-equipped to demarcate with precision the point at which public interest discussion exceeds its legitimacy; as Lord Hoffmann cautioned in *Campbell*, 'judges are not newspaper editors…the practical exigencies of journalism demand that some latitude must be given'.[62]

6.17 Indeed, in *Campbell*, it is arguable that despite Lord Hoffmann's claim that there is no 'significant difference' in the articulation of the underlying principles both Lord Hoffmann's and Lord Nicholls's approach to the specific claim suggests a zonal approach: having identified the public interest in the expression, both Lordships broadly agree that 'editorial discretion' should prevail to justify any corollary invasion of privacy albeit Lord Nicholls couches his judgment in rhetoric that speaks more clearly to a balancing approach, though in rather dismissive terms.[63]

6.18 The difficulty with the court's approach to balancing may be further illustrated by considering the (very brief) example that Lord Hoffmann provides in *Campbell* concerning an affair between a politician and someone whom she has appointed to public office:

> 'there is a public interest in the disclosure of the existence of a sexual relationship … but the addition of salacious details or intimate photographs is disproportionate and unacceptable. The latter, even if accompanying a legitimate disclosure of the sexual relationship, would be too intrusive and demeaning'

[60] *ETK*, n 52, [23]
[61] *In Re Guardian News and Media Ltd & Others* [2010] UKSC 1, [51]
[62] *Campbell*, n 2, [59] & [62]
[63] *Ibid*, [24]-[28]; [30]-[32]; [53]-[66]

6.19 Arguably, this example does not evidence the balancing act at work. As *AAA* shows, the court would most likely treat the different categories of information as separate claims: *ie*, the private information detailing the affair and the accompanying photographs. Since the public interest in the story relates to the inferred abuse of power the courts could approach these items in an absolutist manner: either the text and/or photographs convey this public interest and 'salacious details' add colour to the story or the story is really intended to appeal to prurient tastes and therefore the public interest claim is so insubstantial as to be non-existent.

6.20 Indeed, this approach can be seen in two other decided cases. *Trimingham* v *Associated Newspapers Ltd* is an example of the former approach: the publication of a series of articles detailing the extra-marital affair between Chris Huhne and his press secretary Carina Trimingham was found to be a legitimate public interest discussion in which quotes attributed to Trimingham describing sex with Huhne as 'wild, incredible, amazing'[64] were a matter of editorial judgement so far as the court was concerned. *Mosley v NGN*, of course, is an example of the latter approach (albeit in a different context) since it involved discussion concerning nothing more than his unusual sex life. In other words, the process is not about evaluating the strengths of the competing claims in relation to each other but rather it is about testing the credibility of the public interest claim and using that narrow criterion as the primary means of determining the overall outcome.

6.21 The UK case law, therefore, does not disclose any obvious techniques by which to determine the extent of public interest such that some forms of expression are said to be of low value and others of high value. This position is defensible to the extent it recognises the obvious difficulties that a court faces in determining the value of expression and its beneficial effect on an audience. As one commentator puts it, any such valuation relies too heavily upon the moral and political outlook of the observer.[65] However, the UK courts approach is problematic from a proportionality perspective since it gives public interest expression a priority over privacy interests that it might not otherwise deserve.

6.22 To avoid or else limit the possibility of this approach being adopted by the Australian courts it might be useful for the ALRC to suggest techniques for determining the value of expression and to endorse the use of the 'high value' and 'low value' taxonomy to make it explicitly clear that not only is it true that not all speech is of equal value but also that not all public interest expression is of equal value either.

7. The public interest and burden of proof

7.1 The ALRC notes that the plaintiff would have the burden of proof in establishing that the privacy claim outweighs any competing public interest. Arguably, this is a misstep for two reasons: first, it undermines (or else risks undermining) the importance of the public interest test; secondly, it undermines (or else risks undermining) the purpose of the statute by placing too much of a burden on the plaintiff.

[64] *Trimingham*, n 51, [306] & [308].
[65] N 25

7.2 The ALRC explains its position at p 114 by stating that the plaintiff should have the burden of proving their case since the public interest aspect forms part of that claim rather than the defendant's defence. It further suggests that the question of who bears the onus of proof should not be overstated and refers to Normann Witzleb's submission that, in practice, it may be the defendant is better placed to advance such an argument in any event and will do so to enhance the prospects of the claim failing. Yet this approach arguably underestimates the significance of what is at stake. Whilst the defendant undoubtedly has a vested interest in avoiding liability, his interest in the public interest is only partial and is shared with the general public. The general public, though, is unrepresented in these proceedings. Leaving the burden of proof to the plaintiff or defendant is problematic to the extent that this third party interest may not find voice. This dynamic has been recognised by the UK courts. In situations where neither the plaintiff nor the defendant provides a public interest argument (which the parties may do in order to fight the case solely on the merits of the privacy claim),[66] the court has stated that its obligations under the Human Rights Act 1998 are such that it must determine whether there is a public interest in the expression or not regardless of the parties' position on the question. Similarly the courts will not award interim non-disclosure orders simply because the parties agree since the court must consider the impact on the public's freedom of expression rights.[67]

7.3 Secondly, the ALRC's position on access to justice (guiding principle 8) also provides reason to reconsider the position on burden of proof. The ALRC makes a powerful case for the connection between accessibility and meaningful privacy protection at pp 34-35 of the report. However, the proposed statute places a significant burden on the plaintiff, regardless of any financial constraints that the plaintiff may have, in terms of workload given the high threshold for privacy (this will require argument and evidence in the form of witness statements attesting to, amongst other things, the effect of the intrusion/misuse on the plaintiff and others affected by it) and the need to demonstrate either the absence of, or inferior value of, the public interest in the offending action/expression. This burdensome workload will make applications costly for the represented plaintiff. This, combined with the (likely) vulnerability of the plaintiff whose privacy has been seriously interfered with, may well dissuade prospective plaintiffs from complaining. Meanwhile, the defendant has very little to do and may do nothing albeit it would be in their interests to advance argument that the interference with privacy is minimal and the effect on public interest great. Whilst the ALRC is right to note the corresponding financial and administrative burden that prospective defendants would face, these interests are already protected by the requirement that the expectation of privacy is reasonable and that the interference is serious. By placing the burden all on one side, the proposal creates the unintended impression of viewing all plaintiffs suspiciously if not dismissively.

7.4 Arguably a better way to achieve the delicate balance between interests would be to ensure that the burden of proof in public interest matters is not placed on the plaintiff.

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[66] See *TSE v NGN Ltd* [2011] EWHC 1308 (QB), [7], [23], [27].

[67] *JIH v NGN Ltd* [2011] EWCA Civ 42, [21]; Practice Guidance (Interim Non-Disclosure Orders) [2012] 1 WLR 1003

Instead, the burden of proof on public interest could be treated as neutral. The use of a neutral burden can be seen in the UK in the court's approach to determining questions under s. 98(4) Employment Rights Act 1996 of whether an employee's dismissal was fair in all the circumstances. This approach would guarantee that the public's interest in the scope and limits of privacy protection were recognised.

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