

## 10. Defences and Exemptions

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### Summary

10.1 The plaintiff's right to succeed under the new tort will be limited by appropriate defences. Defences reflect the need to protect important countervailing interests, whether they are interests of a personal or public nature. Defendants will bear the onus of proving that their conduct is subject to a defence or exemption.

10.2 This chapter begins with a defence of lawful authority. This defence will arise where, for example, law enforcement agencies rely on their statutory authority to carry out an act which would invade a person's privacy.

10.3 The ALRC also proposes a defence for conduct that was incidental to the exercise of a lawful right of defence of persons or property where the conduct was proportionate, necessary and reasonable.

10.4 This chapter considers the desirability of a defence of necessity. The ALRC has not made a proposal for this defence, instead posing a question to stakeholders.

10.5 The ALRC proposes a number of defences which are the same as, or analogous to, defamation defences: absolute privilege; qualified privilege; publication of public

documents; and fair and accurate reporting of public proceedings. These defences reflect the need to protect defendants in privacy actions from liability which would stifle legitimate reporting, debate and discussion.

10.6 There are some factors which the ALRC considers would be more appropriately considered when the court is determining whether a plaintiff has a reasonable expectation of privacy. The ALRC has not therefore proposed the following as defences: material in the public domain; consent; or public interest. As in the case of other intentional torts, contributory negligence will not be a defence.

10.7 This chapter includes a proposal for a safe harbour exemption for internet intermediaries which would exempt internet hosts and platform providers from liability provided they meet certain conditions. The ALRC is interested in stakeholder feedback on the form and content of a safe harbour exemption.

## Lawful authority

<p><b>Proposal 10–1</b> The new Act should provide a defence of lawful authority.</p>
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10.8 The defence of lawful authority provides government agencies, security and intelligence organisations, and law enforcement agencies with protection from liability for serious invasions of privacy where that conduct was consistent with their statutory powers.<sup>1</sup>

10.9 This defence is consistent with the principle that any licence for public bodies or officials to pursue conduct which may infringe the rights or interests of an individual must be clearly and unambiguously justified in legislation. In *Coco v R* a majority of the High Court of Australia explained this so-called principle of legality:

Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language...The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement of some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms and immunities, but also determined upon abrogation or curtailment of them.<sup>2</sup>

10.10 The analogous defence of statutory authority to intentional torts protects individuals and agencies from civil suits where a defendant's conduct was committed in order to prevent and detect crime; in exercise of powers of arrest; and in the provision of public utilities and services.<sup>3</sup>

1 A number of stakeholders supported this defence: SBS, *Submission 59*; NSW Young Lawyers, *Submission 58*; Women's Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 48*; ABC, *Submission 46*; Australian Bureau of Statistics, *Submission 32*; Public Interest Advocacy Centre, *Submission 30*; B Arnold, *Submission 28*.

2 *Coco v The Queen* [1994] HCA 15 (13 April 1994) [8]–[9] (Mason CJ, Brennan, Toohey, Gaudron and McHugh JJ).

3 RP Balkin and JLR Davis, *Law of Torts* (Butterworth Law, 5th ed, 2009) [6.49].

10.11 The NSWLRC noted that this defence is necessary to enable state agencies, such as the Australian Federal Police (AFP), to carry out their functions in a manner consistent with the protection of public interests such as security and public order.<sup>4</sup> The ALRC recognises that activities that may otherwise amount to an invasion of privacy may be justified where the invasion was necessary for law enforcement purposes.<sup>5</sup>

10.12 The AFP provided examples of legal requirements which may involve the authorised procurement of an individual's private information.<sup>6</sup> For example, the *Australian Federal Police Act 1979* (Cth)<sup>7</sup> requires the AFP to safeguard the interests of the Commonwealth, prevent crime and protect persons from injury, death and property damage. The AFP stated that

undertaking these activities will inevitably involve interfering with an individual's privacy on occasions. Where this does occur every effort is made to respect an individual's privacy by ensuring the information that is obtained is properly protected and dealt with whilst in the possession of the AFP. Indeed, the various Acts contain provisions which set out how the information can be used by law enforcement agencies and how it must be protected.<sup>8</sup>

10.13 The AFP submitted that their activities are already subject to a range of existing internal and independent 'accountability frameworks'.<sup>9</sup>

10.14 However, the ALRC considers the statutory cause of action would provide personal redress for individuals whose privacy has been invaded, where an agency acts outside their lawful authority.

10.15 The AFP raised the concern that the risk of liability may lead to unmeritorious litigation which could divert resources away from important law enforcement and security operations.<sup>10</sup> However, the ALRC considers that the thresholds built into the design of the statutory cause of action, including the requirement that the conduct was serious, will prevent unmeritorious claims proceeding to trial.

10.16 The AFP also raised the concern that not exempting law enforcement from liability may inhibit the legitimate and lawful activities of law enforcement and intelligence agencies, causing agencies to change established and efficient modes of operation.<sup>11</sup> Similarly, the process of having to adduce evidence of intelligence gathering methods may disclose the lawful, covert practices of law enforcement and intelligence organisations and may reveal the identity of individuals under surveillance

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4 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) 43.

5 Eg, closed-circuit television (CCTV) and mobile phone records may be valuable sources of evidence in criminal investigations: *The Queen v Bayley* [2013] VSC 313 (19 June 2013).

6 Australian Federal Police, *Submission 67*.

7 Australian Federal Police Act 1979 (Cth).

8 Australian Federal Police, *Submission 67*.

9 *Ibid.* These frameworks include s 180F of the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA Act) which requires the AFP to consider whether any interference with privacy may result through the disclosure of information. Similarly, s 46(2)(a) of the TIA Act requires a judge or AAT member to consider whether an individual's privacy would be interfered with by interception through the use of a warrant.

10 Australian Federal Police, *Submission 67*.

11 *Ibid.*

or investigation. The ALRC considers however, there are strong protections at current law to mitigate this risk. These protections include closed court proceedings and other measures provided by federal, state and territory court acts.<sup>12</sup>

***Meaning of ‘lawful authority’***

10.17 The ALRC has not provided guidance on the meaning of ‘lawful authority’, as this may well be a drafting issue. However, the ALRC welcomes stakeholder responses on the wording of this defence, with consideration to whether the exception should be clarified.

10.18 When considering the meaning of the phrase ‘required or authorised by or under law’ in its previous privacy Inquiry, the ALRC recommended that the defence include authority under Commonwealth, state and territory acts and delegated legislation; a duty of confidentiality under common law or equity; an order of a court or tribunal; and documents that are given the force of law by an Act, such as industrial awards’.<sup>13</sup>

10.19 In this Inquiry, the ALRC considers that ‘lawful’ should give effect to the above legislative and non-legislative instruments. ‘Lawful’ should also extend to documents which have the ‘force of the law’. The ALRC’s previous Inquiry found that a document may have the ‘force of law’ if it is an offence to breach its provisions, or it is possible for a penalty lawfully to be imposed if its provisions are breached.<sup>14</sup> This would include warrants obtained by law enforcement pursuant to a relevant act.

10.20 The term ‘authority’ implies discretion to pursue certain lawful conduct, and may apply to a wide range of acts or practices.<sup>15</sup>

10.21 Dr Normann Witzleb argued that the defence of lawful authority is unnecessary as where an authorised person exercises their statutory authority, they are necessarily authorised to commit that action.<sup>16</sup> However the ALRC considers clear legislative direction as to the interaction of a statutory cause of action for serious invasion of privacy with the activities of law enforcement agencies will provide certainty to parties.

10.22 The availability of a defence of lawful authority is consistent with previous law reform inquiries.<sup>17</sup>

10.23 In light of new technologies and recent revelations of surveillance and data sharing by public agencies, there is a strong community expectation that public agencies should not be exempt or immune from liability for serious invasions of privacy.

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12 Eg, *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

13 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) [13.44].

14 Ibid [16.22].

15 Ibid [16.72].

16 Witzleb, *Submission 29*.

17 Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) [7.194]; NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009); ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008).

## Incidental to lawful rights of defence

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

10.24 This defence protects individuals from liability where a serious invasion of privacy was necessary to prevent a threatened or actual harm, and where their response to that harm was reasonable.<sup>18</sup> This defence will arise where the defendant has reasonable grounds for apprehending a threat of harm to persons or property. The defence will arise in several circumstances: self-defence; defence of another person; and defence of property. The requirement that the conduct be proportionate, necessary and reasonable is an important qualification. At tort law, the question of whether a defendant's conduct was reasonable is a question of fact.<sup>19</sup>

10.25 This defence will protect an individual from liability where they act in self-defence. Civil liability legislation around the country provides an analogous protection for self-defence where the conduct to which the person is responding was unlawful and where:

(2) A person carries out conduct in self-defence if and only if the person considers the conduct is necessary:

- (a) to defend himself or herself or another person, or
- (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
- (c) to protect property from unlawful taking, destruction, damage or interference, or
- (d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,

and the conduct is a reasonable response in the circumstances as he or she perceives them.<sup>20</sup>

10.26 The defence will also protect individuals from liability where their conduct protects a third party from harm particularly where that third party is under the individual's care or responsibility, or where that third party is incapable of exercising self-defence. This may involve the protection of children and young people, vulnerable groups or animals. The defence of the person of another operates at tort law and has been codified in some Australian jurisdictions.<sup>21</sup> At common law, the defence extends

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18 Similar defences were recommended by the VLRC, ALRC and NSWLRC: Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) Rec 27b; NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) [6.2]; ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) Rec 74–4.

19 Balkin and Davis, above n 3, [6.15].

20 Eg *Civil Liability Act 2002* (NSW) s 52.

21 *Criminal Code* (Cth) cl 10.4.

to protection of an individual's household, employer, family members and even, in some circumstances, strangers.<sup>22</sup>

10.27 The defence would also protect individuals from liability where their conduct was incidental to the defence of property in situations where another person threatens to commit, or does commit, trespass to property. This is analogous to the defence for intentional torts where a defendant's conduct in response to the threat or harm to their property is reasonable.<sup>23</sup>

10.28 The defence that conduct was incidental to the defence of persons or property operates in Canadian law. It has been used in Canada to protect defendants from liability in the following situations: where an employer used covert surveillance to monitor an employee whom the employer reasonably suspected of stealing stock; and where an individual intercepted a neighbour's phone to gain evidence of blackmail.<sup>24</sup>

10.29 The Insurance Council of Australia proposed a defence that 'the act or conduct was for the purpose of investigating potential fraud or misrepresentation'.<sup>25</sup> However, the ALRC considers that individuals or organisations that pursue such conduct—where it is reasonable and proportionate—will already be protected from liability given the operation of the public interest balancing test proposed in Chapter 8. In that chapter, the ALRC proposes that 'the prevention and detection of crime and fraud' be included in a list of public interest factors to be considered by a court.<sup>26</sup>

10.30 Furthermore, in some instances, the power to investigate fraudulent insurance claims is authorised by statute. For example, s 116 of the *Motor Vehicle Compensation Act 1999* (NSW) requires a licensed insurer to 'take all such steps as may be reasonable to deter and prevent the making of fraudulent claims'.

### **Reasonable, proportionate and necessary**

10.31 The qualification that conduct be 'reasonable, proportionate and necessary' will provide a court with the opportunity to balance competing interests.<sup>27</sup> Privacy is a complex concept which necessarily involves analysis of competing interests and assessments of proportionality. The qualification that conduct be proportionate, necessary and reasonable acknowledges the fact that the circumstances leading to an invasion of privacy require careful consideration.

10.32 This balancing process is consistent with other elements of the cause of action, specifically the public interest test. Witzleb argued that requiring a balance of competing interests in the defence that conduct was incidental to the defence of person,

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22 Balkin and Davis, above n 3, [6.17].

23 This defence is codified in some Australian jurisdictions, for example: *Criminal Code Act 1899* (Qld) s 274.

24 These were pursued under the *Privacy Act*, RSBC 1996, c 373 (British Columbia).

25 Insurance Council of Australia, *Submission 15*.

26 See, Proposal 8-2.

27 Law Institute of Victoria, *Submission 22*.

property or interests ‘underlies the cause of action as a whole, in particular in relation to countervailing public interests’.<sup>28</sup>

10.33 The operation of this qualified defence relies on concepts of proportionality and reasonableness which are derived from human rights jurisprudence. Their inclusion in the new Act would make it more consistent with Australia’s international human rights obligations to appropriately balance the protection of privacy with free speech and other interests.<sup>29</sup> The UN Human Rights Committee has stated that proportionality is a fundamental test which is necessary to justify any restriction on human rights under the ICCPR.<sup>30</sup>

10.34 Some stakeholders may argue that this qualified defence shifts the burden of proof from the question of whether there has been a serious invasion of privacy, to whether there has been a *justifiable* invasion. Any such emphasis would not prevent an equitable outcome. A defendant will be required to show that there was at least an apprehended threat to their privacy interest and that the invasion of privacy was necessary and reasonable for the protection of his or her rights against that threat.

10.35 The ABC submitted that the qualification of proportionality is ‘appropriate’ and consistent with media guidelines including their Editorial Policies and Code of Practices.<sup>31</sup>

### Absolute privilege

**Proposal 10–3** The new Act should provide for a defence of absolute privilege for publication of private information that is co-extensive with the defence of absolute privilege to defamation.

10.36 The ALRC proposes that the defence of absolute privilege be available as a defence to the new tort.<sup>32</sup> This defence should be stated to be co-extensive with the defence of absolute privilege to defamation, so that it includes both statutory and common law defences of absolute privilege.<sup>33</sup>

28 N Witzleb, *Submission 29*.

29 *International Covenant on Civil and Political Rights*, Opened for Signature 16 December 1966, UNTS 171 (entered into Force 23 March 1976) Articles 17, 19.

30 UN Human Rights Committee, General Comment No 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

31 ABC, *Submission 46*.

32 The ALRC and the VLRC previously recommended of a defence of privilege to a statutory cause of action. Some stakeholders preferred the availability of a broad privilege defence: Office of the Australian Information Commissioner, *Submission 66*. The NSWLRC recommended the defence of absolute privilege, qualified privilege to protect a duty or interest, qualified privilege to protect the fair reporting of public proceedings and innocent dissemination. Several stakeholders supported the inclusion of this defence: Arts Law Centre of Australia, *Submission 43*; Law Institute of Victoria, above n 30; ABC, above n 1; Telstra, *Submission 45*; NSW Young Lawyers, above n 1; D Butler, *Submission 10*.

33 Eg *Defamation Act 2005* (SA) s 27; Des A Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters (Professional) Australia Limited, 2011) 67. See also NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) [6.9] and Draft Bill, cl 75.

10.37 Absolute privilege protects individuals who reveal personal information about another person in the course of public forums such as parliament and proceedings in a court or tribunal.<sup>34</sup> Publication on an occasion of absolute privilege provides a defendant with complete protection from liability in defamation. Rigorous debate in such proceedings may involve the revelation of personal information. Absolute privilege applies to statements made in these particular contexts in order to ‘protect and facilitate frank and fearless communication even if it is damaging to reputations because it is considered in the public interest to do so’.<sup>35</sup>

10.38 In *Mann v O’Neill* a majority of the High Court of Australia stated that absolute privilege attaches to statements made in the course of parliamentary proceedings for reasons of inherent necessity or, as to judicial proceedings, as an indispensable attribute of the judicial process.<sup>36</sup> This defence operates as a function of Australia’s democratic system by facilitating the free and fair exchange of debate in certain circumstances which may involve the disclosure of an individual’s private information.

10.39 The defence is in addition to other forms of privilege such as parliamentary privilege which attaches to statements made within the confines of a parliamentary chamber to protect members of parliament (MPs) from liability.<sup>37</sup>

## Qualified privilege

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

- (a) the defendant had an interest or duty (whether legal, social or moral) to provide information on a subject to the recipient; and
- (b) the recipient had a corresponding interest or duty in having information on that subject; and
- (c) the matter was published to the recipient in the course of giving to the recipient information on that subject.

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

**Question 10–1** Should the new Act instead provide that the defence of qualified privilege is co-extensive to the defence of qualified privilege to defamation at common law?

34 Legislation provides a non-exhaustive list of occasions which attract absolute privilege, for example, *Defamation Act 2005* (NSW) s 27. Schedule 1 of the uniform defamation laws extends absolute privilege to other occasions.

35 N Witzleb, *Submission 29*.

36 *Mann v O’Neill* [1997] HCA 28 (31 July 1997) 212 (Brennan CJ, Dawson, Toohey and Gaudron JJ).

37 *Parliamentary Privileges Act 1987* (Cth) s 16 and parallel state acts. See, Butler and Rodrick, above n 34, [3.700].



10.40 The ALRC is particularly interested in comments from stakeholders and legal practitioners as to the need for and practicability of a defence of qualified privilege for the publication of private information and the content of the defence.

10.41 This proposal is modelled on the proposal of the NSWLRC.<sup>38</sup>

10.42 There are three ways in which qualified privilege operates as a defence in defamation law. First, there is the defence at common law which operates on occasions of qualified privilege.<sup>39</sup>

The common law protects a defamatory statement made on an occasion where one person has a duty or interest to make the statement and the recipient of the statement has a corresponding duty or interest to receive it. Communications made on such occasions are privileged because their making promotes the welfare of society. But the privilege is qualified - hence the name qualified privilege - by the condition that the occasion must not be used for some purpose or motive foreign to the duty or interest that protects the making of the statement.<sup>40</sup> (footnotes omitted)

10.43 The duty which the common law protects may be a legal, social or moral duty.<sup>41</sup> The reciprocity of interest or duty is essential, thus the common law defence tends to apply only to publications that are limited in extent to individuals or groups with a particular common interest. Matters which the court will consider in deciding whether the occasion was one of qualified privilege include 'the nature of the defamatory communication, the status or position of the publisher, the number of recipients and the nature of any interest they had in receiving it, and the time, place and manner of, and reason for, the publication'.<sup>42</sup>

10.44 The fact that a matter was one of public interest does not of itself attract qualified privilege. The common law defence is therefore of little utility to the media because of the usually wide extent of publication, except in very limited circumstances such as the publication of a reply to an attack or the correction of previously published information. It does however provide important protections for statements made without malice on limited occasions.

10.45 Secondly, there is the defence of qualified privilege under s 30 of the uniform defamation laws of 2005 (UDL).<sup>43</sup> This requires the publication to have been made where the recipient of the information had an interest or apparent interest in having information; the matter was published to the recipient in the course of giving that information to the recipient; and the defendant's conduct in publishing the matter was reasonable in the circumstances. The UDL sets out a number of considerations which

38 NSW Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009), [6.11]-[6.12].

39 *Toogood v Spyring* (1834) 1 CM & R 181; 149 ER 1044; *Australian Broadcasting Corporation v Comalco Ltd* (1986) 12 FCR 510; *Harbour Radio Pty Ltd v Trad* [2012] HCA 44; *Atkas v Westpac Banking Corporation Ltd* [2010] HCA 25.

40 *Roberts v Bass* (2002) 212 CLR 1, [62] (Gaudron, McHugh and Gummow JJ).

41 *Adam v Ward* [1917] AC 309, 334.

42 *Bashford v Information Australia (Newsletters) Pty Ltd* [2004] HCA 5 (2004) [54] (McHugh J).

43 See, *Defamation Act 2005* (NSW); *Defamation Act 2005* (SA); *Defamation Act 2005* (WA); *Defamation Act 2006* (NT) 2006; *Defamation Act 2005* (Qld) 2005; *Defamation Act 2005* (Vic); *Defamation Act 2005* (Tas).

the court may take into account when determining whether the conduct of the defendant was reasonable, including the extent to which the published matter is in the public interest, the seriousness of the matter, and the source of the information.

10.46 The statutory defence in the UDL is modelled on s 22 of the *Defamation Act 1974* (NSW)<sup>44</sup> but includes additional factors. Because of, among other things, its inclusion of public interest as a relevant consideration, the statutory defence is more useful to the media than common law qualified privilege, although it also requires proof that the defendant acted reasonably, which may not be a conclusion that courts will draw without convincing proof. Like the common law defence, the defence is defeated where the publication was actuated by malice.

10.47 Essentially the value to defendants of the statutory defence over the common law was that it could be used to defend publications in the public interest. The ALRC considers that a defence in similar terms to s 30 of the UDL is unnecessary in view of the balancing of public interest required for actionability of the cause of action.

10.48 The third type of qualified privilege defence is the extended common law defence of qualified privilege which encompasses the implied constitutional freedom of communication on government and political matters, as formulated by the High Court of Australia in *Lange v Australian Broadcasting Corporation*.<sup>45</sup> The defence is defeated where the publication was actuated by malice. Again, because of the public interest required for actionability of the cause of action, the ALRC considers that there is no need to make special provision for this freedom. An invasion of privacy would not be actionable where this would infringe or unduly burden the implied freedom of political communication.

10.49 The proposal is then a statutory formulation only of the defence of qualified privilege at common law. The defence may be useful where a publication made under a relevant duty or interest is not protected by absolute privilege, by the public interest consideration in the cause of action, or by the defence of lawful authority set out above.

10.50 Examples may include where an individual shares a mutual interest with the recipient, such as in a tenancy or building matter involving a common landlord or neighbour; where the individual and recipient are co-employees or co-members of an association; or where a defendant is subject to a legal duty which necessitates the disclosure of private information such as where an individual provides a statement to police containing a third party's private information<sup>46</sup> or informs a professional body about the health or conduct of a member. The NSWLRC gave the example of a person providing an employment reference.<sup>47</sup> Without a defence of qualified privilege, individuals would have to rely on broader defences which may provide inadequate protection.

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44 Butler and Rodrick, above n 33, [3.1000–3.1050].

45 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013).

46 Law Institute of Victoria, *Submission 22*.

47 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) [6.12].

10.51 There are a number of similar defences in state and territory surveillance devices legislation relating to communications which are reasonably necessary to protect a defendant's interest, to protect the public interest, and are made in the course of legal proceedings.<sup>48</sup> These may act as a guide for legislators. So too may the range of defamation defences available at US tort law. These were canvassed in D Butler's submission.<sup>49</sup> At US law, qualified or conditional privilege is also understood as common interest privilege and extends to the protection of an interest of the recipient of a defamatory matter, or a third person.<sup>50</sup> In *Indianapolis Horse Patrol, Inc. v. Ward* (1966), 247 Ind. 519, 524, 217 N.E.2d, the Indiana Supreme Court held that:

The rule concerning a qualified privilege is that a communication made in good faith on any subject matter in which the party making the communication has an interest or in reference to which he has a duty either public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged.

10.52 Whilst supporting the defence of qualified privilege, SBS qualified this support by arguing that concepts of reasonableness and proportionality should affect the operation of the defence<sup>51</sup> and that guiding principles look at the conduct of the disclosing party (for example, was it reasonable? was it proportionate?). The ALRC has not included these particulars in its proposal, because the defence proposed is already limited by such factors.

## Publication of public documents

**Proposal 10–5** The new Act should provide for a defence of publication of public documents.

10.53 The defence should be similar in terms to the defence for publication of public documents in the UDL which attaches privilege to the publication of public documents including court judgements, and reports and papers tabled in Parliament, and Parliamentary voting records, where the copies are fair and accurate.<sup>52</sup> The ALRC considers the meaning of 'public documents' in defamation legislation would apply to this defence, though the ALRC leaves this task to drafters.

10.54 Access to public documents supports a transparent and open government and judicial system. This proposal is consistent with the ALRC's Terms of Reference for this Inquiry which requires consideration of the effect of a cause of action on the necessity of balancing privacy with fundamental values including freedom of expression and open justice.

10.55 The NSWLRC argued that the consideration of public interest in their recommended statutory cause of action provided adequate protection for publication of

48 Eg *Surveillance Devices Act 2007* (NSW) s 11(2); *Surveillance Devices Act 1998* (WA) s 9(2).

49 D Butler, *Submission 10*.

50 American Law Institute, *Restatement of the Law Second, Torts* (1977) §§ 595, 596.

51 SBS, *Submission 59*.

52 *Defamation Act 2005* (SA) s 28.

public documents and fair report of proceedings of public concern.<sup>53</sup> A number of media stakeholders expressed their support for the availability of this defence.<sup>54</sup>

### **Fair report of proceedings of public concern**

**Proposal 10–6** The new Act should provide for a defence of fair report of proceedings of public concern.

10.56 This proposal provides a defence for individuals who fairly report on public proceedings which may reveal private information that could otherwise amount to a serious invasion of privacy. This defence will be of particular significance to media organisations, court reporters and educational institutions.

10.57 The provision is modelled on the defence of fair report of proceedings of public concern in the UDL.<sup>55</sup> This statutory defence to defamation applies to the publication of defamatory matter contained in documents from public proceedings such as proceedings of a Parliamentary body, an international organisation, court or tribunal, inquiries including Royal Commissions, meeting of shareholders of a public company, and other public proceedings.

10.58 The ALRC considers that the meaning of ‘fair’ as it has developed at common law and in the interpretation of defamation statutes should apply to this proposal. In that context, *fair* refers to summaries of proceedings which intend to honestly convey to the reader the impression which the proceedings would have had.<sup>56</sup> Whether a report is fair will be a question of fact for a court.

### **Necessity**

**Question 10–2** Should the new Act provide for a defence of necessity?

10.59 The ALRC is not proposing a defence of necessity at this stage in the Inquiry, however the ALRC welcomes stakeholder responses to the question raised in this section.

10.60 A defence of necessity would protect individuals from liability where a situation of overwhelming urgency justifies a serious invasion of privacy.<sup>57</sup> This defence will arise in situations where a defendant is or feels compelled<sup>58</sup> to invade an individual’s

53 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) [6.8].

54 SBS, *Submission 59*; D Butler, *Submission 10*.

55 *Defamation Act 2005* (SA) s 29.

56 *Cook v Alexander* [1974] 1 QB 279 [288]; *Bashford v Information Australia (Newsletters) Pty Ltd* [2004] HCA 5 (2004); *Rogers v Nationwide News Pty Ltd* (2003) 201 ALR 184.

57 Telstra suggested the availability of an exemption for emergency services: Telstra, *Submission 45*. T Gardner, *Submission 3* was in favour of a defence of necessity.

58 The defence of necessity to intentional torts involves an assessment by the court that the steps taken by an individual to prevent imminent danger were reasonable. See, Balkin and Davis, above n 3, [6.21].

privacy in order to prevent or reduce the occurrence of a more serious harm. Situations of public emergency where emergency service professionals need to access the private information of at-risk or vulnerable persons may give rise to this defence. This necessity may arise for example, where an individual has indicated an intention to commit suicide and mental health professionals or emergency services require private information from another individual. Or where a doctor is called to a school and needs to reveal private information about vaccinations or a contagious disease or condition.<sup>59</sup>

10.61 The defence of necessity is an established defence to intentional torts to protect activities and conduct pursued to prevent a greater harm,<sup>60</sup> including in medical and other emergencies, and is recognised in criminal law.<sup>61</sup>

10.62 This defence differs from qualified privilege as it does not involve a mutual interest between two parties which necessitates the disclosure of private information or intrusion into someone's seclusion. Moreover, a defence of necessity provides more targeted protection than is offered by the public interest test as arguably public interest focuses on invasions carried out in the interests of public or community safety and wellbeing rather than that of an individual or smaller group. While there may be some overlap in defences, the ALRC does not consider this a problem.

### Safe harbour scheme for internet intermediaries

**Proposal 10–7** The new Act should provide a safe harbour scheme to protect internet intermediaries from liability for serious invasions of privacy committed by third party users of their service.

**Question 10–3** What conditions should internet intermediaries be required to meet in order to rely on this safe harbour scheme?

10.63 The ALRC proposes the introduction of a safe harbour scheme for internet intermediaries,<sup>62</sup> to protect them from liability for serious invasions of privacy committed by persons who use their services,<sup>63</sup> where the intermediary meets certain conditions. Where an intermediary meets these conditions, a plaintiff will only be able to pursue the third party, the primary tortfeasor. This defence will not apply to invasions of privacy that intermediaries themselves intentionally commit.

59 News Limited, Special Broadcasting Service, Submission No 76 to DPM&C Issues Paper, 2011.

60 Balkin and Davis, above n 3, [6.21].

61 *R v Loughnan* [1981] VR 443, [448].

62 The broad term 'internet intermediary' is commonly used to cover: carriage service providers, such as Telstra or Optus; content hosts, such as Google or Yahoo!; and search service and application service providers, such as Facebook, Flickr and YouTube: Peter Leonard, 'Safe Harbors in Choppy Waters—Building a Sensible Approach to Liability of Internet Intermediaries in Australia' (2010) 3 *Journal of International Media and Entertainment Law* 221, 226.

63 A safe harbour exemption was recommended by some stakeholders in response to the DPM&C's 2011 Issues Paper: Peter Leonard and Michael Burnett, Submission No 77 to DPM&C Issues Paper, 2011.

10.64 Special defences for internet intermediaries may be necessary for a number of reasons. Imposing liability on internet intermediaries for serious invasions of privacy by third parties may impose onerous obligations on platforms to review and moderate user-generated content. Given the quantity of material generated on these sites, and the instantaneous way in which online communications are sent and received, this may be oppressive and unreasonable. Facebook submitted that the cost to online businesses of reviewing third party content before it appears on their platforms would be prohibitive.<sup>64</sup>

10.65 While software may be used to detect pornography, using software to identify content that invades someone's privacy may be more difficult. Peter Leonard has written that 'such fact-based determinations require contextual analysis and, in many instances, additional facts'.<sup>65</sup>

10.66 Safe harbours are used in various contexts at Australian law including in classification and copyright law.<sup>66</sup> For instance, the *Broadcasting Services Act 1992* (Cth) provides immunity for online content platforms where the host was not aware of the nature of the relevant content.<sup>67</sup> Online content platforms must show a lack of awareness or knowledge of the offending content hosted on their site in order to access this provision.

10.67 There are comparable safe harbours at US and European law.<sup>68</sup> Section 230 of *Communications Decency Act 1996* (US) contains a particularly strong and broadly applicable<sup>69</sup> safe harbour scheme:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider...No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.<sup>70</sup>

10.68 Section 230 has been said to have 'flourished' in the United States.

It has been interpreted quite broadly to apply to any form of Internet intermediary, including employers or other companies who are not in the business of providing Internet access and even to individuals who post the content of another. And it has been uniformly held to create absolute immunity from liability for anyone who is not the author of the disputed content, even after they are made aware of the illegality of the posted material and even if they fail or refuse to remove it. The result is that Internet intermediaries need not worry about the legality of the content others post or

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64 Facebook, Submission 65.

65 Leonard, above n 62, 238.

66 *Copyright Act 1968* (Cth) s 116AG.

67 *Broadcasting Services Act 1992* (Cth) sch 5 cl 91.

68 *Communications Decency Act 1996, Title V of the Telecommunications Act 1996, 47 U.S.C.; EU Directive on Electronic Commerce (2000/31/EC)*. Articles 14 and 15 of the EU directive protect certain 'information society service providers' from liability for damages or other pecuniary remedy or any criminal sanction, though not from injunctive relief, in circumstances where information was disclosed with their knowledge or control.

69 M Lemley, 'Rationalizing Internet Safe Harbors' (2007) 6 *J. on Telecomm. & High Tech. L.* 101, 102.

70 *Communications Decency Act 1996, Title V of the Telecommunications Act 1996, 47 U.S.C.*

send through their system, with one significant exception: section 230 does not apply to intellectual property claims.<sup>71</sup>

10.69 Electronic Frontiers Australia supported the adoption in Australia of a model similar section 230.<sup>72</sup>

10.70 In the US case of *Barnes v Yahoo!*,<sup>73</sup> a woman unsuccessfully sued Yahoo! for its failure to remove compromising photographs of her—posted by a third party—from a Yahoo! message board which a Yahoo! employee had agreed to remove from its website. The US court of Appeals for the Ninth Circuit ruled that Yahoo! could not be sued in tort for invasion of privacy<sup>74</sup> because of the operation of s 230 of the *Communications Decency Act*:<sup>75</sup> a website cannot be treated as the ‘publisher or speaker’ of material posted online by a third party.

10.71 Arguably, section 230 provides too much protection from liability. As discussed below, it may be appropriate to require internet intermediaries to take reasonable steps to remove material that invades a person’s privacy, when given notice. This might be a condition of relying on a safe harbour scheme.

10.72 Similarly, the UK’s *Defamation Act 2013* provides a defence for ‘Operators of websites’.<sup>76</sup> The defence will be defeated if a claimant proves that: it was not possible for the claimant to identify the person who posted the statement; the claimant gave the operator a notice of complaint in relation to the statement; and the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations. Given the proposal of a safe harbour exemption for internet intermediaries, the ALRC has not proposed a defence of innocent dissemination.

10.73 The defence of innocent dissemination may be considered a type of safe harbour.<sup>77</sup> Innocent dissemination is a defence to the publication of defamatory matter, available where a defendant proves that they published the defamatory material merely in the capacity of a ‘subordinate distributor’. This means that they neither knew, nor ought reasonably to have known, that the matter was defamatory, and that their lack of knowledge was not due to any negligence.<sup>78</sup> As noted above, a number of stakeholders submitted that there should be a defence of innocent dissemination to any new Australian cause of action for serious invasion of privacy.

10.74 However, unlike the safe harbour scheme proposed above, a defence of innocent dissemination does not impose any additional conditions on the defendant. The ALRC considers that such additional conditions may be justified.

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71 Lemley, above n 69, 103.

72 Electronic Frontiers Australia, *Submission 44*.

73 *Barnes v Yahoo!, Inc* 570 F3d 1096 (9th Circ 2009).

74 Paul J Larkin, “‘Revenge Porn’, State Law and Free Speech’ (2014) 48 *Loyola of Los Angeles Law Review* (forthcoming).

75 *Communications Decency Act 1996*, Title V of the *Telecommunications Act 1996*, 47 U.S.C.

76 *Defamation Act 2003* (UK) 2013 s 5.

77 Leonard, above n 62, 235.

78 Eg *Defamation Act 2005* (NSW) s 32.

10.75 A safe harbour scheme may not be necessary if, as the ALRC proposes, the new tort is only actionable where the defendant has *intentionally or recklessly* invaded the privacy of the plaintiff. Internet intermediaries may rarely have this requisite fault when third parties use their services to invade someone's privacy.

10.76 However, argument may be raised as to whether they would be liable in some circumstances, for example, perhaps when given notice of a serious invasion of privacy that they have the power to prevent. The ALRC proposes the enactment of a safe harbour scheme to avoid doubt and provide the necessary certainty to internet intermediaries.

### **Conditions**

10.77 To rely on a safe harbour defence, internet intermediaries might be required to comply with certain conditions. For example, they might be required to do some or all of the following:

- remove, or take reasonable steps to remove, material that invades a person's privacy, when given notice;
- provide consumer privacy education or awareness functions, such as warnings about the risk of posting private information;
- comply with relevant industry codes and obligations under the *Privacy Act 1988* (Cth);
- provide individuals with a mechanism to remove private content they post on online platforms; and
- provide a privacy complaints system where the intermediary responds in a reasonable time to consumer complainants.

10.78 The ALRC is interested in stakeholder views on what conditions should be imposed on internet intermediaries, in order for them to be able to rely on a safe harbour defence to serious invasions of privacy.

## **Unnecessary defences**

### **Other defamation defences**

10.79 The ALRC is not proposing that all defences to defamation be replicated in the new tort. There are differences in the nature and application of the two causes of action which mean that not all defamation defences are appropriate in a privacy context.

10.80 First, the defence of truth is not relevant to a privacy tort. Most cases involving invasions of privacy by disclosure of information are brought to prevent or seek redress for disclosure of true information.

10.81 Secondly, a defence of fair comment as in defamation law<sup>79</sup> is arguably inappropriate for a privacy tort. Public interest will already have been considered as

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79 The *Privacy Act*, RSBC 1996, c 373 s 2 includes the defence of fair comment.



part of the actionability of the cause of action, so that a defence is unnecessary: the right to speak freely that is protected by the defence of fair comment in defamation law, both at common law and under the UDL, is limited to matters of public interest. Further, the relevant wrong in the invasion of privacy tort is the disclosure of information. Outside matters of public interest, a person should not be able to disclose private information about another under the guise of making a comment or opinion.<sup>80</sup> The VLRC recommended a defence of fair comment but such a defence was not recommended by the ALRC previously or by the NSWLRC.<sup>81</sup>

10.82 Thirdly, the defence of innocent dissemination<sup>82</sup> is inappropriate, as the statutory cause of action is limited to intentional acts. In any event, the ALRC has proposed a safe harbour scheme, which may provide a suitable defence for some innocent disseminators of material that invades privacy.

10.83 Lastly, the defence of triviality is unnecessary as the statutory cause of action is confined to *serious* invasions of privacy.<sup>83</sup>

### Material in the public domain

10.84 Several stakeholders supported the inclusion of a defence that the material was already in the public domain.<sup>84</sup> However the ALRC proposes that consideration of whether and to what extent material was in the public domain should be considered by a court when determining whether a plaintiff had a reasonable expectation of privacy.<sup>85</sup> This factor is therefore discussed more fully in Chapter 6. The ALRC recognises that there may be some circumstances where the widespread dissemination of an individual's private information may diminish their reasonable expectation of privacy. However a complete defence would be inappropriate as the extent and effect of a prior disclosure on an individual's privacy is variable. Moreover, unlike confidential information, private information does not necessarily lose its quality of privacy once it has been disclosed. PIAC argued that information may still be private in nature, despite the fact that it has been published.<sup>86</sup> Information such as a person's criminal record, certain health information such as their HIV status, or the fact that they were a victim of crime may no longer be of such public interest that publication outweighs the reasonable expectation of privacy.

### Public interest

10.85 The ALRC has proposed earlier in this Discussion Paper that a plaintiff only has a cause of action for serious invasion of privacy where a court is satisfied that the plaintiff's interest in privacy outweighs the defendant's interest in freedom of

80 N Witzleb, *Submission 29*.

81 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) [6.8].

82 Some stakeholders supported the inclusion of a defence of innocent dissemination, eg, Office of the Australian Information Commissioner, *Submission 66*; SBS, *Submission 59*. However the necessity of the defence flows from the fault element of the cause of action.

83 SBS, above n 21 supported the availability of the defence of triviality.

84 *Ibid*; ABC, *Submission 46*; D Butler, *Submission 10*; T Gardner, *Submission 3*.

85 N Witzleb, *Submission 29*.

86 Public Interest Advocacy Centre, *Submission 30*.

expression and any broader public interest.<sup>87</sup> A defence of public interest is therefore unnecessary. Public interest is discussed more fully in Chapter 8.

10.86 Several stakeholders favoured a defence of public interest.<sup>88</sup> Some stakeholders argued that a defence would provide greater accessibility to litigation for plaintiffs as defendants will often be in a better position to adduce evidence relevant to the question of whether there was a public interest in their conduct.<sup>89</sup> In the case of a media organisation for instance, this may be due to their experience in handling public interest similar matters such as submitting FOI requests to government agencies in the public interest.

10.87 Similar or analogous actions also provide for a public interest defence. For instance, qualified privilege under the UDL<sup>90</sup> provides that a court may consider public interest matters when assessing whether a defendant behaved reasonably when publishing a defamatory matter.

10.88 However, the ALRC considers that a balancing exercise is a more appropriate way to determine whether there is a public interest in the disclosure of the private information or the intrusion into an individual's seclusion. Expressly incorporating public interest into the actionability of a statutory cause of action will ensure that privacy interests are not unduly privileged over other rights and interests, particularly given that Australia does not have express human rights law protection for freedom of speech.

### **Consent**

10.89 Several stakeholders argued in favour of a defence of consent.<sup>91</sup> The ALRC proposes that whether the plaintiff has consented to the conduct of the defendant should be considered as a factor in whether the plaintiff had a reasonable expectation of privacy. The inclusion of consent in the test for actionability will provide an opportunity for the court to balance the quality and scope of a plaintiff's consent with the defendant's conduct and interests.

### **Contributory negligence**

10.90 The ALRC is not proposing a defence of contributory negligence. A defence of contributory negligence would have the effect of defeating a claim for serious invasion

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87 Several stakeholders supported this model: Office of the Australian Information Commissioner, *Submission 66*; Google, *Submission 54*; Australian Subscription Television and Radio Association, *Submission 47*; ABC, *Submission 46*; Telstra, *Submission 45*; Arts Law Centre of Australia, *Submission 43*.

88 NSW Young Lawyers, *Submission 58*; Electronic Frontiers Australia, *Submission 44*; Arts Law Centre of Australia, *Submission 43*; Australian Privacy Foundation, *Submission 39*; Public Interest Advocacy Centre, *Submission 30*; N Witzleb, *Submission 29*; Pirate Party of Australia, *Submission 18*; Law Institute of Victoria, *Submission 22*; D Butler, *Submission 10*; T Gardner, *Submission 3*.

89 Australian Privacy Foundation, *Submission 39*; Public Interest Advocacy Centre, *Submission 30*; D Butler, *Submission 10*.

90 *Defamation Act 2005* (SA) s 30.

91 Google, *Submission 54*; Australian Communications and Media Authority, *Submission 52*; ABC, *Submission 46*; Interactive Games and Entertainment Association, *Submission 40*; Australian Privacy Foundation, *Submission 39*; I Turnbull, *Submission 5*.

of privacy where a plaintiff's failure to take reasonable care contributed to the invasion of their privacy. Further, because contributory negligence is not to be a defence, there would also be no basis for arguing that the apportionment provisions in state and territory legislation<sup>92</sup> should apply.

10.91 A defence of contributory negligence would be inconsistent with the design of the cause of action which is limited to intentional conduct. The ALRC considers that where a defendant intends to invade another person's privacy, and cannot rely on one of the available defences, that conduct should not be excused or mitigated by any fault of the plaintiff. This approach is consistent with the law relating to other intentional torts law, such as conversion, battery and assault.<sup>93</sup>

### Other defences and exemptions

10.92 Several stakeholders expressed the view that no activity or organisation should be exempt from the statutory cause of action, arguing that defences would be sufficient to protect serious invasions of privacy which are nonetheless warranted.<sup>94</sup>

10.93 Stakeholders have raised a number of other possible exemptions and defences. However, the ALRC considers that many of these are appropriately captured by the defences proposed above. SBS favoured an exemption for journalists and media organisations, provided the serious invasion of privacy occurs whilst they are engaged in journalism.<sup>95</sup> This would operate in a similar fashion to the journalism exemption in the *Privacy Act 1988* (Cth).

10.94 Telstra favoured an emergency services exemption.<sup>96</sup> The Australian Bureau of Statistics (ABS) favoured an exemption for the use of official data for statistical and related purposes.<sup>97</sup> The Australian Bankers' Association argued that compliance with the *Privacy Act 1988* (Cth) should be a complete exemption to a statutory cause of action for serious invasion of privacy.<sup>98</sup>

10.95 Voiceless and the Barrister's Animal Welfare Panel Ltd submitted that there should be a defence for activities carried out 'for the purpose of, or resulted in, the procuring of evidence of an iniquity'.<sup>99</sup> The ALRC considers that such a defence would be much too extensive. The defence of lawful authority and the defence for conduct incidental to the exercise of a lawful right of defence of persons or property, both proposed above, are more appropriate.

92 Eg *Law Reform (Miscellaneous Provisions) Act 1956* (NT); *Personal Injuries (Liabilities and Damages) Act* (NT); *Civil Liability Act 2003* (Qld).

93 Cf *New South Wales v Riley* (2003) 57 NSWLR 496, [104].

94 Office of the Australian Information Commissioner, Submission 66; Law Society of NSW Young Lawyers Communications, Entertainment and Technology Committee and Human Rights Committee, Submission 58; Queensland Council of Civil Liberties, Submission 51; ABC, Submission 46; Australian Privacy Foundation, Submission 39; N Witzleb, Submission 29; Law Institute of Victoria, Submission 22.

95 SBS, *Submission 59*.

96 Telstra, *Submission 45*.

97 Australian Bureau of Statistics, *Submission 32*.

98 Australian Bankers' Association, *Submission 27*.

99 Barristers Animal Welfare Panel and Voiceless, *Submission 64*.

10.96 The Arts Law Centre of Australia<sup>100</sup> (supported by the National Association for the Visual Arts and the Australian Institute of Professional Photography) favoured the following exemptions: photography or filming in a public place; documentary film-making or photography; journalistic or investigative photography, film-making or reporting; photography or filming of privately owned land or premises, or people on those premises, where the premises are accessible to the public; and photography or filming of people on private premises for purposes such as education, journalism, artistic expression and documentary.

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100 Arts Law Centre of Australia, *Submission 43*.