5. Two Types of Invasion and Fault

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Summary

5.1 In this chapter, the ALRC proposes two of the five elements of a new tort for serious invasion of privacy.

5.2 Firstly, the ALRC proposes that the new tort be confined to two types of invasion of privacy. The plaintiff must prove that the invasion of privacy occurred either by:

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

(b) misuse or disclosure of private information about the plaintiff.

5.3 These two types of invasion of privacy are widely considered to be the core of a right to privacy—and the chief mischief that needs to be addressed by a new action. Confining the tort to these two types of invasion of privacy will also make the scope of the tort more certain and predictable.

5.4 Secondly, this chapter considers the fault element of the new tort. The ALRC proposes that, for an action under the tort to succeed, the invasion of privacy must be either intentional or reckless. These fault elements are common to existing torts of trespass, such as assault and battery. The ALRC considers that other possible fault elements (such as negligence or strict liability) may make the scope of the new tort too broad.

A cause of action for two types of invasion of privacy

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

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

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

5.5 Misuse of private information and intrusion upon seclusion have been said to lie at the heart of any legal protection of privacy. Unwanted access to private information and unwanted access to one's body or personal space have been called the 'two core components of the right to privacy'.[1] Most examples of invasions of privacy given to support the introduction of a new cause of action, and most cases in other jurisdictions relating to invasions of privacy, fall into one of these two categories. To provide clarity, certainty and guidance about the purpose and scope of the new action, the ALRC proposes that the action be explicitly confined to these two types of invasion of privacy.[2] This means that invasions of privacy that do not fall into one of these two categories will not be actionable under the new tort.[3]

5.6 Although, as discussed below, many stakeholders said the Act should contain a non-exhaustive list of examples of conduct which may be an invasion of privacy, others noted the benefits of confining the action. Telstra submitted that a non-exhaustive list of examples would allow for the possibility of other types of invasion of privacy to be actionable, and that this would give rise to undesirable uncertainty:

> Categories of conduct caught by any cause of action should be listed exhaustively, using unambiguous and objective terms, in order to reduce the uncertainty and impact that the introduction of such a cause of action would cause to businesses and service providers.[4]

5.7 The two categories of invasion of privacy proposed above draw on the well-known categorisation of privacy torts in the United States, first set out by William Prosser in 1960, and followed in the US *Restatement of the Law Second, Torts*.[5] Prosser wrote that the law of privacy

> comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in

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1 M Warby et al, *Tugendhat and Christie: The Law of Privacy and The Media* (OUP Oxford, 2011) [2.07], cited with approval in *Goodwin v NGN* [2011] EWHC 1437 (QB) (09 June 2011) [85].

2 This is similar to the approach recommended by the VLRC. As discussed further below, the VLRC recommended two separate causes of action, though with very similar elements: one for intrusion upon seclusion and the other for misuse of private information.

3 As discussed below, such conduct may be actionable under other causes of action, such as defamation.

4 Telstra, *Submission 45*.

5 American Law Institute, *Restatement of the Law Second, Torts* (1977) § 652A. Professor Prosser was one of the reporters.

> common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, 'to be let alone'. Without any attempt to exact definition, these four torts may be described as follows:
>
> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
>
> 2. Public disclosure of embarrassing private facts about the plaintiff.
>
> 3. Publicity which places the plaintiff in a false light in the public eye.
>
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[6]

5.8 The ALRC considers that, in Australia, a new privacy tort should be confined to the first two of these four categories. In *ABC v Lenah Game Meats Pty Ltd*, Gummow and Hayne JJ said that 'the disclosure of private facts and unreasonable intrusion upon seclusion, perhaps come closest to reflecting a concern for privacy "as a legal principle drawn from the fundamental value of personal autonomy"'.[7] These two types of invasion of privacy are discussed further below.

Intrusion upon seclusion or private affairs

5.9 Intrusion upon seclusion is one of the two most commonly recognised categories of invasion of privacy. The ALRC considers it essential that the new tort capture this type of conduct.

5.10 The tort of intrusion upon seclusion, Prosser wrote in 1960, 'has been useful chiefly to fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights'.[8] These gaps remain in Australian protection of privacy from intrusion today.

5.11 Prosser cited a number of US cases involving intrusion upon seclusion, including cases in which the defendant intruded into someone's home, hotel room and 'stateroom on a steamboat', and upon a woman in childbirth. The principle was 'soon carried beyond such physical intrusion' and 'extended to eavesdropping upon private conversations by means of wire tapping and microphones' and to 'peering into the windows of a home'.[9] Prosser cited a case in which a creditor 'hounded the debtor for a considerable length of time with telephone calls at his home and his place of employment' and another case of 'unauthorized prying into the plaintiff's bank account'.[10]

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6 William L Prosser, 'Privacy' (1960) 48 *California Law Review* 383, 389.

7 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 251 (Gummow and Hayne JJ), quoting Sedley LJ in *Douglas v Hello!* [2001] 2 WLR 992, 1025.

8 Prosser, above n 6, 392.

9 Ibid 389–92; *Jones v Tsige* (2012) 108 OR (3rd) 241.

10 Prosser, above n 6, 389–92.

5.12 Section 652B of the US *Restatement of the Law Second, Torts* concerns intrusion upon seclusion, and states:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

5.13 The accompanying commentary in the *Restatement* reads:

> a. The form of invasion of privacy covered by this Section does not depend upon any publicity given to the person whose interest is invaded or to his affairs. It consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.
>
> b. The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined.[11]

5.14 The US tort of intrusion has been said to focus on 'the means of obtaining private information rather than on the publication of the information so gained. The core of the tort is the offensive prying into the private domain of another'.[12]

5.15 In the United Kingdom, there is no comparable tort for invasions of privacy by intrusion upon seclusion, falling short of trespass and nuisance.[13] The House of Lords in *Wainwright v Home Office*[14] 'expressly declined to recognize a general right to privacy which would extend to physical privacy interferences not involving the dissemination of information'.[15]

5.16 This apparent gap in the UK law may not be so concerning as it is in Australia, because the UK has a *Protection from Harassment Act 1997* (UK), which provides some legislative protection against invasions of privacy by intrusion into seclusion. In Chapter 14, the ALRC proposes the introduction of a statutory cause of action for harassment, in the event that the proposed privacy tort is not introduced.

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11 American Law Institute, *Restatement of the Law Second, Torts* (1977) § 652B.
12 Warby et al, above n 1, [3.68].
13 'Unlike US law, there is, as yet, no general tort of intrusion recognised by English law': Raymond Wacks, *Privacy and Media Freedom* (Oxford University Press, 2013) 186.
14 *Wainwright v Home Office* [2004] 2 AC 406.
15 Warby et al, above n 1, [10.04].

5.17 Although there is no tort for intrusion upon seclusion in the UK, courts have recognised the potential for intrusions to invade privacy and cause harm. The majority of the House of Lords in *Campbell v MGN Ltd* emphasised that the covert way in which private information about the model Naomi Campbell, later published, was obtained in that case, heightened the invasion of Campbell's privacy. Lord Hoffman said: 'the publication of a photograph taken by intrusion into a private place (for example, by a long distance lens) may in itself be such an infringement [of the privacy of the personal information], even if there is nothing embarrassing about the picture itself'.[16] Similarly, in *Murray v Express Newspapers,* Sir Anthony Clarke MR said that, '"the nature and purpose of the intrusion" is one of the factors which will determine whether the claimant had a reasonable expectation of privacy'.[17]

5.18 Further, in a number of recent cases, the English and European courts have begun to emphasise the intrusive aspects of the conduct under consideration, not only in the way the private information was collected,[18] but also in the effect the publication will have on the claimant's and related parties' lives after publication.[19] Intrusive behaviour by the UK media led to the Leveson Inquiry into the Culture, Practice and Ethics of the Press.[20]

5.19 Discussing the 'curious' resistance of the English courts to recognise a cause of action for intrusion, Raymond Wacks writes that nevertheless

> there are a number of *obiter dicta* that imply that the clandestine recordings of private matters does 'engage' Article 8, that the mere taking of a photograph of a child or an adult in a public place might fall within the category of 'misuse'. These pronouncements are either (uncharacteristic) judicial lapses or subtle, possibly even subconscious, acknowledgements of the present anomaly![21]

5.20 It remains to be seen whether a separate cause of action for intrusion upon seclusion will be recognised at common law in the UK.[22] The authors of *Gurry on Breach of Confidence* note that the case for recognising a separate *tort* of privacy, as opposed to an extended equitable action for disclosure of private information, will be stronger if the courts seek to protect against intrusions into private life as well.[23]

5.21 A New Zealand court has recognised a tort of intrusion upon seclusion, in a case about a man who installed a recording device in a bathroom and recorded his female flatmate showering. In this case, *C v Holland*, Whata J said that the 'critical issue I must determine is whether an invasion of privacy of this type, without publicity or the

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16 *Campbell v MGN Ltd* [2004] 2 AC 457, [75].

17 *Murray v Big Pictures (UK) Ltd* [2009] Ch 481, [36]. See also Warby et al, above n 1, [10.06].

18 See further NA Moreham, 'Beyond Information: The Protection of Physical Privacy in English Law' (2014) 73(2) *Cambridge Law Journal* (forthcoming). See also, *Tsinguiz v Imerman* [2010] EWCA Civ 908 [66] in which it was held that misuse of confidential information for the equitable cause of action may include intentional observation and acquisition of the information.

19 *Goodwin v News Group Newspapers Ltd* [2011] EWHC 1437 (QB); *Mosley v United Kingdom – 48009/08* [2011] ECHR 774; *A v United Kingdom – 35373/97* [2002] ECHR 811; [2003] EHRR 51.

20 See further *The Leveson Inquiry* <www.levesoninquiry.org.uk>.

21 Wacks, above n 13, 247 (citations omitted).

22 See further Moreham, above n 18.

23 Tanya Aplin et al, *Gurry on Breach of Confidence* (Oxford University Press, 2nd ed, 2012) [7.102].

prospect of publicity, is an actionable tort in New Zealand'.[24] The court concluded that it was:

> the similarity to the *Hosking* tort [discussed below] is sufficiently proximate to enable an intrusion tort to be seen as a logical extension or adjunct to it. This Court can apply, develop and modify the tort to meet the exigencies of the time.[25]

5.22 In defining the ingredients of the tort, Whata J drew guidance from the decision of the Ontario Court of Appeal in *Jones v Tsige*,[26] which had recognised a tort of intrusion into seclusion. Whata J stated:

> I consider that the most appropriate course is to maintain as much consistency as possible with the North American tort given the guidance afforded from existing authority. I also consider that the content of the tort must be consistent with domestic privacy law and principles. On that basis, in order to establish a claim based on the tort of intrusion upon seclusion a plaintiff must show:
>
> (a) An intentional and unauthorised intrusion;
>
> (b) Into seclusion (namely intimate personal activity, space or affairs);
>
> (c) Involving infringement of a reasonable expectation of privacy;
>
> (d) That is highly offensive to a reasonable person.[27]

5.23 Including intrusion as one of the categories of an actionable invasion of privacy in the new statutory action would remedy one of the key deficiencies in the Australian protection of privacy law identified in Chapter 3. It would enable people to take steps to prevent unjustifiable conduct or obtain some redress where they have been the target of deliberate and unjustifiable intrusions but where, often for historical or technical reasons, the circumstances do not fall within the protection of existing tort and other laws.

Misuse or disclosure of private information

5.24 The second type of invasion of privacy that the ALRC proposes should be covered by the new privacy tort is misuse or disclosure of private information about the plaintiff. It will be neither surprising nor contentious that a cause of action for invasion of privacy will in part concern the disclosure of private information. Lord Hoffmann has identified 'the right to control the dissemination of information about one's private life' as central to a person's privacy and autonomy.[28]

5.25 This is a widely recognised type of invasion of privacy, already actionable in the UK, the US, New Zealand, Canada and elsewhere. Most cases involving private information are concerned with unauthorised disclosure.

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24 *C v Holland* [2012] 3 NZLR 672 (24 August 2012) [1].

25 Ibid [86].

26 *Jones v Tsige* (2012) 108 OR (3rd) 241. There the defendant, who was in a relationship with the claimant's former husband, and who worked for the same bank as the claimant in different branches, used her workplace computer to gain access to the claimant's private banking records 174 times. Again there was no publication.

27 *C v Holland* [2012] 3 NZLR 672 (24 August 2012) [94]–[95] (Whata J).

28 *Campbell v MGN Ltd* [2004] 2 AC 457, [51].

5.26 The elements of the US tort, set out in the *Restatement of the Law Second, Torts*, are that publicity is given to a matter concerning the private life of another, and 'the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public'.[29] Publicity, the commentary to the *Restatement* says, 'means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge'.[30]

5.27 The disclosure of private information is now also a settled basis for action in the UK. The new or extended cause of action has developed out of the equitable cause of action for breach of confidence, as formulated in *Campbell v MGN Ltd*, since the enactment of the *Human Rights Act 1998* (UK), which incorporates elements of the *European Convention on Human Rights* (ECHR).[31] Article 8 of the ECHR provides, in part, that 'everyone has the right to respect for his private and family life, his home and his correspondence'. Although Article 8 is not confined to private information, the focus of the UK action on disclosure of private information may be partly attributed to its roots in the equitable doctrine of breach of confidence, which protects confidential information.

5.28 The New Zealand courts have recognised a new tort of invasion of privacy by giving publicity to private facts. Gault P and Blanchard J stated in *Hosking v Runting*:

> The elements of the tort as it relates to publicising private information set down by Nicholson J in *P v D* provide a starting point, and are a logical development of the attributes identified in the United States jurisprudence and adverted to in judgments in the British cases. In this jurisdiction it can be said that there are two fundamental requirements for a successful claim for interference with privacy:
>
> 1. The existence of facts in respect of which there is a reasonable expectation of privacy; and
>
> 2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.[32]

Whether true or not

5.29 The ALRC proposes that the new Australian tort refer to private 'information', rather than 'facts'. The use of the word 'fact' in this statutory tort may imply that the relevant private information must be true, for it to be the subject of the cause of action. The ALRC considers that a person's privacy can be invaded by the disclosure of untrue information, if it would be an invasion of privacy if the information were true.

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29 American Law Institute, *Restatement of the Law Second, Torts* (1977) § 652D.

30 Ibid (commentary on § 652D).

31 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

32 *Hosking v Runting* (2005) 1 NZLR 1, [117].

5.30 This is consistent with the *Privacy Act 1988* (Cth), in which personal information is defined in section 6 to include information or an opinion 'whether true or not'.[33] It is also the position in UK law, and is supported by the ALRC. Former judge of the UK High Court, David Eady has written that

> a claimant is not now expected to go through an article about (say) his or her sex life, or state of health, in order to reveal that some aspects are true and others false. That would defeat the object of the exercise and involve even greater intrusion. Any speculation or factual assertions on private matters, whether true or false, can give rise to a cause of action.[34]

5.31 This should be made clear in the new Act by adding the words 'whether true or not' after 'misuse or disclosure of private information about the plaintiff', as proposed above.

5.32 For the plaintiff to have an action, the untrue information must of course also be matters about which the plaintiff has a reasonable expectation of privacy and, as proposed below, the misuse or disclosure must be serious. This is not a proposal for an action for the publication of untrue information.

Misuse or disclosure

5.33 Daniel Solove has argued that privacy 'involves more than avoiding disclosure; it also involves the individual's ability to ensure that personal information is used for the purposes she desires'.[35]

5.34 Disclosure of personal information is perhaps the most common type of misuse of personal information that will invade a person's privacy. Wacks writes that the 'tort of misuse of private information obviously requires evidence of *misuse* which, in practice, signifies *publication* of such information'.[36]

5.35 It is important to note that many invasions of privacy that seem to involve misuse, but not publication, of private information, may better be considered intrusions into private affairs. For example, an employee of a company who, without authorisation, accesses private information of a customer may have intruded into the private affairs of that customer. Such an intrusion would be covered by the first category of invasion proposed by the ALRC. Nevertheless, the ALRC considers that it is reasonable not to confine this second type of invasion to disclosure as some other type of misuse of private information may invade a person's privacy.

Public disclosure

5.36 The ALRC proposes that a disclosure of private information need not be public, in the sense of wide publicity, to satisfy this element of the cause of action. The fact

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33 *Privacy Act 1988* (Cth).

34 David Eady, 'Injunctions and the Protection of Privacy' (2010) 29 *Civil Justice Quarterly* 411, 422: 'It soon became established in *McKennitt v Ash* [2006] and in *Browne v Associated Newspapers Ltd* [2007], also in the Court of Appeal, that a remedy will lie in respect of intrusive information irrespective of whether it happens to be true or false'.

35 Daniel J Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087, 1108.

36 Wacks, above n 13, 247, paraphrasing Lord Hoffmann in *Campbell v MGN Ltd* [2004] 2 AC 457, [51].

that the disclosure of personal information was to only one other person should not, in some circumstances, prevent the conduct being held to be actionable, if the circumstances are adjudged to be serious.

5.37 The US tort, on the other hand, is confined to public disclosures. The *Restatement of the Law Second, Torts*, states that publicity means 'the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge'.[37]

5.38 The New Zealand Court of Appeal seemed also to have in mind public disclosures when discussing the tort, in *Hosking v Runting*. In that case, Gault P and Blanchard J said: 'I see no reason why our courts should not develop the action for breach of confidence to protect personal privacy through the public disclosure of private information where it is warranted'.[38]

5.39 However, the ALRC proposes not to confine the action to public disclosures. The fact that a disclosure of personal information was not public may make it more difficult for a plaintiff to satisfy other elements of the action. For example, it may suggest the invasion of privacy was less serious than it might otherwise have been. Also, the plaintiff's expectation of privacy may not always extend to non-public disclosures of personal information. However, there may be some instances in which a plaintiff does have a reasonable expectation not to have personal information disclosed even within a small circle, and the disclosure will be adjudged serious.[39]

False light and appropriation

5.40 The ALRC considers that the third and fourth torts identified by Prosser should not be included in a new Australian tort for serious invasion of privacy. Discussing the four US torts, the Australian High Court has said that, in Australia, one or more of the four types of invasion of privacy would often 'be actionable at general law under recognised causes of action':

> Injurious falsehood, defamation (particularly in those jurisdictions where, by statute, truth of itself is not a complete defence), confidential information and trade secrets (in particular, as extended to information respecting the personal affairs and private life of the plaintiff, and the activities of eavesdroppers and the like), passing-off (as extended to include false representations of sponsorship or endorsement), the tort of conspiracy, the intentional infliction of harm to the individual based in *Wilkinson v Downton* and what may be a developing tort of harassment, and the action on the case for nuisance constituted by watching or besetting the plaintiff's premises, come to mind.[40]

5.41 The disclosure of private facts and unreasonable intrusion upon seclusion concern the key privacy interests, such as personal dignity and autonomy, whereas the

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37 American Law Institute, *Restatement of the Law Second, Torts* (1977).

38 *Hosking v Runting* (2005) 1 NZLR 1.

39 See, for example, *Giller v Procopets* (2008) 24 VR 1.

40 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 255 (Gummow and Hayne JJ).

other US torts arguably protect others' interests. Gummow and Hayne JJ stated in *ABC v Lenah Game Meats*:

> Whilst objection possibly may be taken on non-commercial grounds to the appropriation of the plaintiff's name or likeness, the plaintiff's complaint is likely to be that the defendant has taken the steps complained of for a commercial gain, thereby depriving the plaintiff of the opportunity of commercial exploitation of that name or likeness for the benefit of the plaintiff. To place the plaintiff in a false light may be objectionable because it lowers the reputation of the plaintiff or causes financial loss or both.[41]

5.42 Wacks has written that the 'false light' category 'seems to be both redundant (for almost all such cases might equally have been brought for defamation) and only tenuously related to the protection of the plaintiff against aspects of his or her private life being exposed'.[42] The ALRC has proposed some protection, if the falsity relates to matters as to which the plaintiff has a reasonable expectation of privacy.

5.43 Professor Michael Tilbury has written that, for the most part, the interests protected by the US torts of appropriation of the plaintiff's name or likeness and false light, 'can or ought to be restated as, respectively, the commercial interest (or property) that plaintiffs have in their identity and the interest that plaintiffs have in their reputation'.[43] However, although privacy may have a wider reach, at the 'heart of privacy law', Tilbury writes, are the torts of public disclosure of private facts and intrusion on seclusion.[44]

5.44 As Gummow and Hayne JJ foreshadowed, there could be some objection taken to appropriation of image or name on non-commercial grounds, thus outside the law of passing off and the like, and this risk has been heightened in the digital era. The ALRC considers that the two categories set out in the proposal should be sufficient to protect the privacy of the individual. Any further reform to the law relating to image rights would need to be considered in the context of Australia's existing intellectual property law.

Examples of invasions of privacy

5.45 Confining the new tort to these two broad and widely recognised categories of invasion of privacy is preferable to two other options that have been considered. The first option is to provide no statutory guidance on the meaning of invasion of privacy, and to leave this to be developed by the courts. A second option would be to include examples of invasion of privacy.

5.46 The ALRC considers that the new Act should provide as much certainty as possible on what may amount to an invasion of privacy. This will make the scope of the action more predictable, particularly as privacy itself is not defined in the new Act.

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41 Ibid, 256 (Gummow and Hayne JJ).
42 Wacks, above n 13, 181.
43 Michael Tilbury, 'Coherence, Non-Pecuniary Loss and the Construction of Privacy' in Jeffrey Berryman and Rick Bigwood (eds), *The Law of Remedies: New Directions in the Common Law* (Irwin Law, 2010) 127, 136.
44 Ibid 137.

As discussed above, the ALRC proposes that some certainty be provided by having the new Act describe, in general terms, the two categories of invasion of privacy to which the action would be confined.

5.47 However, another way to provide guidance might be to include in the new Act broad examples of invasions of privacy. This approach would make the cause of action more flexible, but at the cost of certainty. This was the approach favoured by the ALRC in its 2008 report, in which it recommended that the relevant Act contain the following non-exhaustive list of types of invasion that fall within the cause of action:

- there has been an interference with an individual's home or family life;
- an individual has been subjected to unauthorised surveillance;
- an individual's correspondence or private written, oral or electronic communication has been interfered with, misused or disclosed; or
- sensitive facts relating to an individual's private life have been disclosed.[45]

5.48 A number of stakeholders in the current Inquiry said a non-exhaustive list of examples should be included in the new provision,[46] stressing that this would provide courts, parties and business with some guidance and certainty.[47] Some of these stakeholders may prefer the greater certainty that confining the action in the way the ALRC proposes will provide. Some stakeholders said the examples should be general and flexible, so that that the action can 'evolve with social and technological developments'.[48]

5.49 Jansz-Richardson said the examples should be 'relatively general in nature to ensure their ability to translate over time'.[49] Public Interest Advocacy Centre (PIAC) submitted that examples should be 'open-ended and inclusive, which would build sufficient flexibility into the proposed cause of action for it to be appropriately adapted to changing social and technological circumstances'.[50] The Australian Privacy Foundation said 'the list should be clearly identified as non-exclusive and non-exhaustive, ie courts should be able to deal with serious invasions of privacy that fall outside the list'.[51]

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45 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) Rec 74–1.

46 Office of the Australian Information Commissioner, *Submission 66*; NSW Young Lawyers, *Submission 58*; Women's Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 48*; Telstra, *Submission 45*; Electronic Frontiers Australia, *Submission 44*; Optus, *Submission 41*; Australian Privacy Foundation, *Submission 39*; Public Interest Advocacy Centre, *Submission 30*; N Witzleb, *Submission 29*; C Jansz-Richardson, *Submission 24*; Office of the Information Commissioner, Queensland, *Submission 20*; Insurance Council of Australia, *Submission 15*.

47 Telstra, *Submission 45*; Australian Privacy Foundation, *Submission 39*; Public Interest Advocacy Centre, *Submission 30*; Insurance Council of Australia, *Submission 15*. Examples 'may be useful in guiding courts and more broadly in addressing unfounded anxieties about the purpose of the legislation or its scope': Australian Privacy Foundation, *Submission 39*. A 'list of examples should be included in the Act to provide guidance to business': Telstra, *Submission 45*.

48 Office of the Australian Information Commissioner, *Submission 66*.

49 C Jansz-Richardson, *Submission 24*.

50 Public Interest Advocacy Centre, *Submission 30*.

51 Australian Privacy Foundation, *Submission 39*.

5.50 Other stakeholders said that the cause of action should not include a list of examples.[52] Some were concerned the list would narrow the scope of the action, by implying that invasions of privacy not covered by an example would not be actionable.[53] It was also suggested that the examples in the list might become outdated.[54] Other stakeholders suggested that examples were unhelpful because privacy was 'contextual and depends on facts and circumstances'.[55] The ABC said there needs to be 'an intense focus on how the various interests at stake are implicated in the particular circumstances of each case'.[56] SBS submitted that 'the key for any statutory cause of action is flexibility':

> The more activities or matters that are included to 'assist' with the formulation of a breach of privacy action, the more likely it is that these tests will become rigid and inflexible. It is vital that courts consider each case on its facts.[57]

5.51 Some stakeholders suggested that more specific examples of invasion of privacy might be included in the Act. For example, Electronic Frontiers Australia submitted that there should be examples for data breaches, aggregated collections of data, and 'posting of photographs, audio-recordings, and video-recordings of personal spaces, activities, and bodies for which consent to post has not been expressly provided by the participant'.[58]

5.52 However, the ALRC considers that the application of the tort to more specific and particular circumstances is best left to the courts to consider on a case by case basis, but within the confines of the two categories specified. Specific examples may provide additional guidance, but they also carry a greater risk of distracting the court from the consideration of the distinct facts and circumstances of a particular case.

One cause of action, not two

5.53 The ALRC proposes that there be one cause of action covering the two broad types of invasion of privacy. A similar approach, recommended by the Victorian Law Reform Commission (VLRC), would be to enact two separate but 'overlapping' causes of action. However, enacting separate causes of action should only be necessary if the elements of each would be substantially different, which the ALRC considers is not the case. Separate actions should therefore not be necessary.

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52 SBS, *Submission 59*; Australian Subscription Television and Radio Association, *Submission 47*; ABC, *Submission 46*; Law Institute of Victoria, *Submission 22*; Pirate Party of Australia, *Submission 18*; P Wragg, *Submission 4*.

53 P Wragg, *Submission 4*; Law Institute of Victoria, *Submission 22*. Wragg submitted that this 'may be harmful to the longevity of the act to be too specific on the scope of its ambit since it may be read narrowly in order to prevent application to novel and unexpected technological developments as they arise.' The Law Institute of Victoria submitted that this 'might give would-be defendants the impression that conduct outside the parameters of the list does not constitute an invasion of privacy'.

54 Law Institute of Victoria, *Submission 22*. For example, the Law Institute of Victoria stated that: 'In the current technological age, it is likely that any examples in a list could be quickly superseded by other types of privacy invasions that might evolve in the future'.

55 Ibid.

56 ABC, *Submission 46*.

57 SBS, *Submission 59*.

58 Electronic Frontiers Australia, *Submission 44*.

5.54 The VLRC's reasons for recommending two causes of action largely relate to the widely recognised difficulty of defining privacy:

> Legislating to protect these broadly recognised sub-categories of privacy is likely to promote greater clarity about the precise nature of the legal rights and obligations that have been created than by creating a broad civilly enforceable right to privacy.[59]

5.55 The ALRC has come to a similar conclusion, which is one reason it proposes that the action be confined to two more precisely defined sub-categories of invasion of privacy. The categories proposed by the ALRC are broadly the same as the categories identified by the VLRC.

5.56 Although the ALRC and VLRC approaches are broadly consistent, the ALRC considers it important that there be only one cause of action. The availability of two causes of actions may cause unnecessary overlap and duplication in many cases in which both types of invasion arise. Dr Ian Turnbull submitted that one reason for having only one cause of action is that 'in most cases intrusion upon seclusion will be followed by misuse of the private information obtained by the intrusion'.[60]

5.57 The availability of two torts would increase the length and cost of proceedings and risk duplication in monetary damages. There will already be cases where the cause of action may overlap with other causes of action such as trespass or breach of contract or breach of confidence. It would be undesirable to risk inviting further duplication.

5.58 Many stakeholders favoured a single cause of action,[61] however, often because this was thought to make the action more flexible—that is, open to invasions other than by misuse of personal information or intrusion upon seclusion. Dr Normann Witzleb for example said the action should be formulated broadly, to leave its further development to the courts.[62] The Australian Privacy Foundation likewise said that introducing two torts may result in some privacy breaches not being covered.[63] However, the ALRC proposes that the new tort should not be broadly drafted to capture all invasions of privacy, but rather should be confined to the two more precisely defined types of invasion of privacy that are the key mischief that the cause of action is designed to remedy.

Fault—intentional or reckless

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

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59 Victorian Law Reform Commission, *Surveillance in Public Places*, Report No 18 (2010) [7.126].

60 I Turnbull, *Submission 5*.

61 Office of the Australian Information Commissioner, *Submission 66*; SBS, *Submission 59*; Electronic Frontiers Australia, *Submission 44*; Optus, *Submission 41*; Australian Privacy Foundation, *Submission 39*; N Witzleb, *Submission 29*; Law Institute of Victoria, *Submission 22*.

62 N Witzleb, *Submission 29*.

63 Australian Privacy Foundation, *Submission 39*.

5.59 The ALRC proposes that the cause of action be confined to intentional or reckless invasions of privacy, even though this will mean that a person whose privacy has been invaded may in some cases have no remedy under the new tort. If the new tort attracted strict liability, or extended to negligent invasions of privacy, this might expose a wide range of people to liability for common human errors. It might also inhibit expression in those who fear incurring liability for unintentionally invading someone's privacy.

5.60 Fault is a key element in any cause of action leading to personal liability to pay compensation for loss or damage caused to another person. Legislating to protect these broadly recognised sub-categories of privacy is likely to promote greater clarity about the precise nature of the legal rights and obligations that have been created than by creating a broad enforceable right to privacy.

5.61 The term 'fault' in a civil cause of action refers to either the state of mind of the relevant actor or the culpability of the actor's conduct on an objective measure. Torts, or other bases of liability, such as statutory liabilities or liabilities for breaches of equitable duties, tend to be divided into actions imposing fault-based liability or actions imposing strict liability.

5.62 There are essentially three types of fault to consider when designing a statutory cause of action for serious invasion of privacy:

- **Intentional or reckless:** The defendant must be shown to have intended to invade the privacy of the plaintiff. Intent may also be inferred if the defendant's actions were reckless.[64]
- **Negligent**: Negligence depends on whether the actor's conduct measured up to an objective standard of what a reasonable person in the position of the defendant would or would not do in the circumstances. This is an objective test, in which the intentions of the defendant are not relevant.[65]
- **Strict liability**: If the cause of action is one of strict liability, then the defendant may be liable even though the defendant's actions were not intentional, reckless or negligent.

5.63 Strict liability is now relatively rare in Australian common law outside contractual obligations and fiduciary obligations, both of which rest on relationships that, ordinarily, have been voluntarily entered into by the parties. In *Northern Territory v Mengel*, a majority of the High Court remarked that

> the recent trend of legal development, here and in other common law countries, has been to the effect that liability in tort depends on either the intentional or the negligent

64 *Wilkinson v Downton* (1897) 2 QB 57; *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 417, [80] (Spigelman CJ).

65 *Blyth v Birmingham Waterworks Company* (1856) 11 Ex Ch 781; *Vaughan v Menlove* (1837) 132 ER 490 (CP).

> infliction of harm. That is not a statement of law but a description of the general trend.[66]

5.64 Defamation is one of the rare examples of a common law tort liability that is strict, and is complete on proof of publication of defamatory material. It is the fact of defamation, not the intention of the defendant, that generates liability. *Fleming's The Law of Torts* states that the

> justification for this stringent liability is presumably that it is more equitable to protect the innocent defamed rather than the innocent defamer (who, after all, chose to publish); another is that the publication, not the composition of the libel, is the actionable wrong, making the state of mind of the publisher, not the writer, relevant. On the other hand, since one does not as a rule act at one's peril, why should the law demand that one publish at one's peril, especially when what one says is not defamatory on its face? Does reputation deserve a higher level of protection than personal safety?[67]

5.65 However, the uniform *Defamation Acts* that came into force in the Australian states and territories in 2006 provide for a defence of innocent dissemination,[68] which makes liability for defamation somewhat less strict. This defence is available where the defendant proves, among other things, that he or she 'neither knew, nor ought reasonably to have known, that the matter was defamatory'.[69]

5.66 Another example is the action in tort for breach of a statutory duty where the duty imposed by the statute is strict. Most strict liabilities now arise by statute. Important examples in Australian law are:

- the statutory liability for losses caused by breach of the prohibition of misleading or deceptive conduct in trade or commerce imposed by the Australian Consumer Law and state and territory Fair Trading Acts;[70]
- statutory liabilities for damage caused by defective products;[71] and
- statutory liability for damage caused by aircraft.[72]

5.67 Previous law reform reports have diverged on the issue of fault. In 2008, the ALRC recommended that liability should be limited to intentional or reckless conduct, with 'intentional' defined as being where the defendant 'deliberately or wilfully invades the plaintiff's privacy' and 'reckless' having the same meaning as in s 5.4 of

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66 *Northern Territory v Mengel* (1995) 185 CLR 307, [341]-[342] (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

67 C Sappideen and P Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 630.

68 See, eg, *Defamation Act 2005* (Qld) s 32.

69 Ibid s 32(1)(b).

70 *Competition and Consumer Act 2010* (Cth) sch 2, s 236. Each state and territory Fair Trading Act applies the Australian Consumer Law as a law of its jurisdiction: see, for example, *Fair Trading Act 1987* (NSW) s 28.

71 *Competition and Consumer Act 2010* (Cth) sch 2, ss 138-141.

72 See, for example, *Damage by Aircraft Act 1999* (Cth) s 10.

the *Criminal Code* (Cth).[73] The ALRC said that 'including liability for negligent or accidental acts in relation to all invasions of privacy would, arguably, go too far'.[74]

5.68 Neither the NSWLRC nor the VLRC recommended a fault element as part of the recommended cause or causes of action, but the NSWLRC recommended a defence of innocent dissemination similar to that found in the *Defamation Acts*.[75]

5.69 In a New Zealand case about intrusion upon seclusion, *C v Holland*, Whata J said that the plaintiff must show an intentional intrusion, where intentional 'connotes an affirmative act, not an unwitting or simply careless intrusion'.[76]

Negligent invasions

5.70 A number of stakeholders argue that liability for breach of privacy should be imposed either without proof of fault (strict liability), or at least for negligent invasions of privacy, in addition to reckless and intentional invasions of privacy.[77] Some argue that fault should be relevant only to damages, or that reasonable care should be a defence.[78]

5.71 Many stakeholders who called for strict liability or negligence stressed the harm that may be caused by unintentional invasions of privacy.[79] For example, Electronic Frontiers Australia submitted that negligent invasions 'are likely to be as damaging to the affected persons as intentional or reckless invasions, and in many cases may be more damaging'.[80]

5.72 The ALRC points out however, that if actual damage is suffered beyond emotional distress, it may well be the case that the plaintiff would have a tort action in negligence. Whether the defendant owed the plaintiff the necessary legal duty of care would depend on a range of factors, particularly the type of damage suffered by the plaintiff. It is much more straightforward to succeed in a negligence claim where a plaintiff has suffered physical injury or property damage due to another's negligence than where the harm is in the form of psychiatric illness or pure economic loss. However, Australian courts do recognise claims for negligently caused economic loss. Much will depend on whether the defendant knew of the plaintiff and the risk of loss,

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

74 ALRC, *Review of Australian Privacy Law*, Discussion Paper No 72 (2007) 2577. See also NSW Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009) 171.

75 NSW Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009) 55.

76 *C v Holland* [2012] 3 NZLR 672 (24 August 2012) [94]–[95] (Whata J).

77 See, eg, Office of the Australian Information Commissioner, *Submission 66*; Australian Privacy Foundation, *Submission 39*; Public Interest Advocacy Centre, *Submission 30*; B Arnold, *Submission 28*; T Gardner, *Submission 3*.

78 Eg, Office of the Privacy Commissioner NSW, Submission No 79 to DPM&C Issues Paper, 2011; Maurice Blackburn Lawyers, Submission No 45 to DPM&C Issues Paper, 2011.

79 Eg, Women's Legal Services NSW, *Submission 57*; Electronic Frontiers Australia, *Submission 44*; Public Interest Advocacy Centre, *Submission 30*; C Jansz-Richardson, *Submission 24*; Office of the Information Commissioner, Queensland, *Submission 20*. 'In many cases, regardless of the intent of the invasion, the resultant consequences are the same, and the revelation that the circumstances were caused by negligence or a failure to act is likely to be cold comfort to the individual or group whose privacy has been breached': C Jansz-Richardson, *Submission 24*.

80 Electronic Frontiers Australia, *Submission 44*.

whether the defendant had made a representation to the plaintiff and whether the plaintiff was able to protect him or herself from the effects of the defendant's negligence.[81]

5.73 The plaintiff who has suffered as a result of a negligent data breach may also have a claim for breach of contract in which liability will be strict or negligence based, a claim under the Australian Consumer Law or a claim for breach of confidence.

5.74 Some argue that data breaches are often the result of negligence, and if the cause of action included negligence it would encourage companies to take steps to prevent such breaches.[82] Arnold submitted that action for negligence 'provides a necessary and appropriate incentive for Australian organisations to move towards best practice in information management'.[83] PIAC submitted:

> Many systemic breaches of privacy may be due to negligence, rather than to reckless or intentional acts. ... Restricting liability to reckless or intentional acts may also discourage organisations from taking steps to ensure that their privacy management systems are adequate, and may encourage indifference to privacy protection.[84]

5.75 However, under the *Privacy Act* (and to some extent the *Telecommunications Act*) organisations are required to take such steps. Although it could be argued that these Acts have weaknesses, the cause of action should not be designed as a remedy for existing legislation where it would be better for that legislation to be amended or strengthened.

5.76 The Law Institute of Victoria submitted:

> Intentional privacy breaches, such as those alleged against News of the World in the United Kingdom, are not the norm. The larger threat comes from unintentional breaches caused by: a lack of understanding of privacy obligations; technological malfunction and human error; or systemic failures. … Furthermore, requiring intention, rather than negligence, may be difficult to prove against companies.[85]

5.77 If, on the other hand, the new tort were to provide both that the damage for the new tort should include emotional distress and that fault should include negligence, the coherence of the law would be undermined. The proposal would conflict with a clear legislative policy. As outlined above, the primary and most common form of harm suffered from an invasion of privacy is emotional distress. The well-entrenched policy of the common law, reflected in legislation across most Australian states and territories, is that liability for negligence should not extend to emotional distress.[86] If

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81 *Perre v Apand* (1999) 198 CLR 180.

82 Electronic Frontiers Australia, *Submission 44*: 'Indeed, data breaches … are often the result of negligence. The cause of action should therefore be available for intentional, reckless and negligent invasions of privacy'.

83 B Arnold, *Submission 28*. See also Law Institute of Victoria, *Submission 22*: 'In the absence of a cause of action, there is little to no benefit or incentive for holders of private information in taking privacy obligations seriously'.

84 Public Interest Advocacy Centre, *Submission 30*.

85 Law Institute of Victoria, *Submission 22*.

86 Eg, *Civil Liability Act 2002* (NSW) s 31.

the key type of harm that the new tort aims to avoid or redress is emotional distress, the new tort should be restricted to intentional or reckless conduct.

5.78 Further, entities subject to the *Privacy Act* whose activities result in data breaches, whether caused negligently, accidentally or by systemic problems, will be subject to a range of remedial responses by the Office of the Australian Information Commissioner. From March 2014, this includes the possibility of substantial civil penalties.[87] The ALRC considers that regulatory responses are a better way to deal with data breaches than a civil action for invasion of privacy, but as noted above, in any event many entities may be subject to a range of other civil legal liabilities.

Strict liability

5.79 Some have argued that one reason why liability for invasions of privacy should be strict is that this would be consistent with actions in defamation and breach of confidence.[88] Witzleb has written that the 'majority of torts intended to protect personality interests do not set the bar at reckless or intentional conduct'.[89]

5.80 However, the analogy between these causes of action is imperfect. Breach of confidence arises where there was a pre-existing obligation which informs and binds the defendant's conscience, or knowledge that the information was imparted under that obligation.[90] Defamation is about a narrower range of conduct than the new tort of invasion of privacy and has a wide range of defences including, by statute, the defence of innocent dissemination.

5.81 The OAIC also noted that 'no fault element is required for complaints made to the OAIC for an interference with privacy under the *Privacy Act*. A finding of an interference with privacy can be made in relation to negligent and accidental acts, as well as those which are intentional or reckless'.[91] However, the *Privacy Act* regulates government agencies and corporations which have the resources to take precautions to avoid negligent data breaches; an action under the new tort, on the other hand, could be taken against natural persons, who will usually not have such resources. Further, liability and costs may potentially be greater under the new tort than as a result of the complaints process under the *Privacy Act*. The statutory cause of action potentially applies to a wider range of activities than the *Privacy Act.*

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87 *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth).

88 'The majority of torts intended to protect personality interests do not set the bar at reckless or intentional conduct. Defamation is a strict liability tort but provides faultless defendants with a defence in some cases ... Likewise, liability under the principles in *Wilkinson v Downton* is now more commonly understood as requiring merely negligence, not intention or recklessness, in relation to the consequence of causing psychiatric harm. Lastly, the proposed Australian Privacy Principles ... impose objective obligations that are akin to a negligence standard, such as conduct must be 'reasonable', 'reasonably necessary', or based on a 'reasonable belief'': Normann Witzleb, 'A Statutory Cause of Action for Privacy? A Critical Appraisal of Three Recent Australian Law Reform Proposals' (2011) 19 *Torts Law Journal* 104, 118–119.

89 Ibid 118.

90 *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] 1 WLR 1556.

91 Office of the Australian Information Commissioner, *Submission 66*.

Intentional and reckless only

5.82 Other stakeholders, however, argued that the cause of action should be confined to intentional or reckless invasions of privacy.[92] The Australian Bankers Association, for example, submitted, the 'the trend in legislation to more strict liability provisions associated with the imposition of civil penalties continues to be a major concern for the private sector...'

> The cause of action given its likely scope and imprecision should not be cast in the tortious framework of negligence. Rather it should apply only to an intent to seriously interfere with a person's privacy or to do so with reckless indifference to that result and this has occurred.[93]

5.83 Other stakeholders suggested that some invasions of privacy should not attract liability because the conduct is not blameworthy. The Arts Law Centre of Australia submitted the example of a documentary maker 'filming in a public place which looks onto a private apartment where someone is getting undressed' and so accidentally invading someone's privacy.[94] Similarly, SBS submitted:

> There are many ways in which footage, images or other material may breach someone's privacy in a way which is unintentional. A common example would be the kind of footage filmed for use in news broadcasts, often wide angle shots of crowds, or footage of incidental comings and goings out of buildings relevant to a news story. It is very possible that in such a story, a person or incident might be captured that the person considered a breach of their privacy.[95]

5.84 Extending liability to include negligence might lead people to be 'unduly careful about disclosing information'.[96] It may lead to excessive self-censorship or too great a chilling effect on everyday activities that carry even a remote risk of invading privacy.

Intending the act, or intending to invade privacy?

5.85 An intention to invade a person's privacy may be distinguished from an intention to do an act that has the perhaps unintended consequence of invading a person's privacy. In some cases, the consequences of an act will be so inextricably linked to the act, or so substantially certain to follow,[97] that an intention to do the act will strongly suggest an intention to bring about the consequences of the act. But this will not always be the case. Furthermore, it may be quite common to intend an action that will have the consequence of invading someone's privacy, without intending to invade their privacy.

5.86 For example, if an absent-minded person walks into a neighbour's home, thinking it is his or her own home, then the person may have invaded the neighbour's

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92 SBS, *Submission 59*; Google, *Submission 54*; Australian Subscription Television and Radio Association, *Submission 47*; ABC, *Submission 46*; Telstra, *Submission 45*; Arts Law Centre of Australia, *Submission 43*; Australian Bankers' Association, *Submission 27*.

93 Australian Bankers' Association, *Submission 27*.

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

95 SBS, *Submission 59*.

96 Australian Subscription Television and Radio Association, *Submission 47*.

97 Sappideen and Vines, above n 67, 34.

privacy. The action in walking through the front door may have been intended,[98] but the invasion of his neighbour's privacy was not.

5.87 To take a more common example, a media entity may publish a story that in fact invades a person's privacy, but without any knowledge of the facts which would make it an invasion of that person's privacy. The publishing of the story may have been intended, but not the consequences of the publication, namely, the invasion of the person's privacy.

5.88 Some stakeholders said the relevant intent should be an intent to invade the privacy of the plaintiff and not merely an intent to do an act which invades the privacy of the plaintiff.[99] Telstra submitted that, given it considers current privacy protections sufficient, if there were a cause of action,

> intent should be determined by reference to the invasion of privacy and the harm to the complainant, rather than the conduct of the defendant, in order to be as specific and targeted in its application as possible.[100]

5.89 In the ALRC's view, the new tort should only be actionable where the defendant intended to invade the plaintiff's privacy. Some will argue that this will too often remove liability for serious breaches of privacy. However, if it were sufficient merely to intend the act, and not the consequences of the act in the sense of the invasion of privacy, then this would effectively impose a negligence or strict liability standard as in defamation. For reasons discussed above, the ALRC considers that negligence should not be sufficient fault for an action for breach of privacy, and strict liability would be unduly burdensome and discouraging to other worthwhile competing interests.

5.90 If the defendant intended the invasion of privacy, it would not be necessary, in addition, to show that the defendant intended to offend, distress or harm the plaintiff, for the plaintiff to have a cause of action. The question then becomes one of whether or not the particular damage claimed is too remote from the defendant's tort. In intentional torts, the test is whether the damage claimed was a natural and probable consequence of the tort.[101] If the defendant had an intent to inflict harm, this would amount to malice in law and would aggravate the damages that could be claimed. Many invasions of privacy will not be motivated by malice towards the victim. If a media organisation invades a person's privacy, presumably this will be largely motivated by a desire to attract more viewers or increase the sale of newspapers, rather than to harm the victim.

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98 This would still be a trespass because mistake is no defence to a trespass action: Sappideen and Vines, above n 66, 88.

99 Eg, SBS, *Submission 59*; Telstra, *Submission 45*; Arts Law Centre of Australia, Submission No 15 to DPM&C Issues Paper, 2011.

100 Telstra, *Submission 45*.

101 *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388.

5.91 It would not necessarily be the case that the plaintiff would have to prove that the defendant had a subjective intent to invade his or her privacy. Such an intent may be imputed.[102] If an invasion of privacy is substantially or obviously certain to follow from certain conduct, then the defendant may be taken to have intended the invasion of privacy, even if the defendant in fact did not put his or her mind to invading the plaintiff's privacy. This may also amount to recklessness.[103]

Effect of apology on liability

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

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

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

Proposal 5–4 Evidence of an apology made by or on behalf of a person in connection with any conduct by the person should not be admissible in any civil proceedings under the new Act as evidence of the fault or liability of the person in connection with that matter.

5.92 Any apology or correction of published material by a defendant should not be treated in evidence as an admission of fault.[104] This proposal is not intended to limit the operation of the proposals in Chapter 11 on the consideration of mitigating and aggravating factors in a court's assessment of damages.

5.93 This proposal is intended to encourage the early resolution of disputes without recourse to litigation. In many circumstances, an apology that something has occurred may provide a sufficient response to appease someone whose privacy has been invaded and people should feel free to make an apology without it affecting their ultimate or potential liability.

102 *Wilkinson v Downton* (1897) 2 QB 57.

103 *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 417.

104 This is similar to the following provision: *Civil Liability Act 2002* (NSW) s 69. See also: Prue Vines, 'The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena?' (2007) 1 *Public Space* 1; Prue Vines, 'The Apology in Civil Liability: Underused and Undervalued?' (2013) 115 *Precedent* 28; Robyn Carroll, 'Apologies as a Legal Remedy' (2013) 35 *Sydney Law Review* 317; 'Review of the Law of Negligence: Final Report' (2002).