# 8. Balancing Privacy with Other Interests

## Contents



## Summary


8.1 This chapter considers the fifth element of the new tort. The ALRC proposes that in order for a plaintiff to have a cause of action, the court must be satisfied that the plaintiff's interest in privacy outweighs the defendant's interest in freedom of expression and any broader public interest.

8.2 This proposal recognises that privacy is not an absolute right, and that other interests may, in some cases, outweigh a plaintiff's interest in privacy.

8.3 The ALRC also proposes that the new Act should provide guidance on the meaning of 'public interest', through the inclusion of a list of public interest matters including, but not limited to, freedom of expression, freedom of the media, public health and safety, and national security.

8.4 Since the weighing of privacy interests against other interests is an element of the cause of action, a separate public interest defence is not required.


## Balancing with freedom of expression and the public interest

**Proposal 8–1** **Fifth element of action:** The new Act should provide that the plaintiff only has a cause of action for serious invasion of privacy where the court is satisfied that the plaintiff's interest in privacy outweighs the defendant's interest in freedom of expression and any broader public interest. A separate public interest defence would therefore not be needed.

8.5 As set out in Chapter 2, privacy is an important public interest, but of course it is not the only public interest. Sometimes, other interests should prevail over a person's interest in privacy. It is particularly important to give proper weight to competing public interests, given that Australia does not have a statutory human rights framework

or express constitutional protection of freedom of speech. Without a clear process for balancing competing interests, the new action might privilege privacy over other important interests.

8.6 Two related categories of interest are likely to compete with the plaintiff's privacy: the defendant's interest in free expression and the broader public interest.[1]

8.7 It is widely accepted that the public interest must be considered at some stage in an action for breach of privacy. What this public interest is, and how it should be considered, is discussed below. However, it is also important to note that people have a personal interest in free expression, and that this is not always less important than other people's interest in privacy. Toulson and Phipps wrote:

> Freedom of expression includes the right of people not only to express their own views but to talk about their own experiences (regardless of any general public interest), provided that it does not involve breaking a trust or confidence.[2]

8.8 The interest in free expression is a personal interest, as well as a public interest. It may have value independent of any benefit the public might have in hearing the speech. For example, a person speaking on television about their experience of being raised as an adopted child may breach the privacy of his or her parents. In such a case, it is not clear that the privacy interests of the parents necessarily outweigh the interests of the child in speaking freely about his or her life.[3]

8.9 The ALRC proposes that these competing interests be considered as part of a balancing exercise, when determining whether the plaintiff has a cause of action. The defendant's interest in freedom of expression and the broader public interest would therefore be considered at an early stage in a cause of action. Where the court considers that these interests outweigh the plaintiff's interest in privacy, the cause of action will fail.

8.10 In contrast, having a public interest as a defence would prolong the length of time an unmeritorious claim is heard. Some stakeholders noted the advantage of courts hearing the public interest issues early in proceedings. The Australian Subscription Television and Radio Association (ASTRA) submitted:

> having public interest go towards a defence is likely to prolong the length of time during which an unmeritorious claim is heard.[4]

8.11 Further, leaving public interest to be dealt with as a defence would give rise to the risk that a plaintiff could more easily use the court proceedings to stifle legitimate exposure of matters of public concern on the basis that they had a prima facie case of invasion of privacy without any consideration of the public interest at that point.

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1 'An individual's interest in not having information about his private life published has to be set against the freedoms of others, particularly the right to freedom of expression under Art. 10, and the interests of the general public': RG Toulson and CM Phipps, *Confidentiality* (Sweet & Maxwell, 2012) [7–045].

2 Ibid [7-047].

3 Although of course it will also not necessarily be the case that the freedom of a person to tell his or her own story will necessarily outweigh the plaintiff's privacy interest. See *McKennitt v Ash* [2008] QB 73.

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

8.12 This was the approach recommended by the ALRC in 2008 and is similar to the approach recommended by the NSWLRC in 2009.[5]

8.13 A similar balancing exercise is carried out in the UK, where rights to privacy and to freedom of expression, in Arts 8 and 10 of the European Convention on Human Rights, have been incorporated into domestic law by the *Human Rights Act 1998* (UK). Both must be considered when determining whether a cause of action for misuse of private information has been established. In making this determination, two questions are asked:

> First, is the information private in the sense that it is in principle protected by article 8? If "no", that is the end of the case. If "yes", the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by article 10?[6]

8.14 Toulson and Phipps wrote that in *Re S,* Lord Steyn 'reiterated that neither Art 8 nor Art 10 as such has priority over the other':

> When both are engaged, 'an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary'. The justifications for interfering with each right must be taken into account and an ultimate balancing exercise carried out.[7]

8.15 The balancing exercise proposed by the ALRC above is also similar to the UK approach. However, the ALRC considers that, rather than focus only on freedom of expression, a range of public interests should be considered when carrying out this balancing exercise. As proposed below, examples of these many public interests should be set out in the new Act. No one interest should have automatic priority over the privacy interest of the plaintiff.

## Onus of proof

8.16 A number of stakeholders submitted that a balancing exercise should be carried out when determining actionability.[8] Others said there should instead be a public interest defence, considered later in proceedings.[9] Under the proposal above, with a balancing exercise when determining actionability, a plaintiff will have the onus of proving that their interest in privacy outweighs any competing public interests that are raised. On the other hand, if there were a public interest defence, a defendant would have the onus to prove that the defence was made out.

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5 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) Rec 74–2; NSW Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009) 26–29.

6 *McKennitt v Ash* [2008] QB 73, [11].

7 Toulson and Phipps, above n 1, [7–062], quoting *Re S (a child)* (2005) 1 AC 593, [17] (Lord Steyn).

8 Google, *Submission 54*; Australian Subscription Television and Radio Association, *Submission 47*; ABC, *Submission 46*; Telstra, *Submission 45*.

9 In favour of a public interest defence: 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*; Australian Bankers' Association, *Submission 27*; Law Institute of Victoria, *Submission 22*; D Butler, *Submission 10*; Pirate Party of Australia, *Submission 18*; T Gardner, *Submission 3*.

8.17 The question of who should bear the onus of proof was often the main reason given by stakeholders for either supporting a public interest test in the cause of action, or a public interest defence. Many stakeholders said it was more appropriate for the defendant to bear the burden of proof, and that therefore there should be a public interest defence.[10] For example, Professor Moira Paterson submitted:

> the plaintiff already has the onus of establishing that he or she had a reasonable expectation of privacy which was breached in a serious way. The requirement that a privacy breach needs to be serious to justify litigation itself acknowledges that there is a competing interest in transparency that should always trump where the privacy breach is trivial in nature. In those circumstances it is not unreasonable to require the defendant to prove that a serious breach was nevertheless in the public interest because of the strong public interest in freedom of expression (or some other competing interest).[11]

8.18 Similarly, Peter Clarke has written that requiring consideration of the public interest when determining actionability presupposes that there must always be a public interest at stake. He writes that this is not logical and puts the cart before the horse:

> The protection of one's privacy should be separate and independent of such concerns whereas a defence may have regard to the public interest justifying such a breach. The burden should be upon the Defendant/Respondent to show there is a public interest in the intrusion. The benefit of the Victorian [Law Reform Commission's] approach is that the defence is a matter that can be considered discretely and for the defendant to crystallise what public interest is in issue.[12]

8.19 The VLRC based its recommendation that public interest should be a defence to an invasion of privacy largely upon its assessment that the burden of proving the existence of a countervailing public interest should lie with the defendant. The VLRC argued that a plaintiff 'should not have to prove a negative, such as the lack of a countervailing public interest'.[13]

8.20 There is a public interest defence in New Zealand and Canada. New Zealand has a defence of 'legitimate public concern' to invasions of privacy.[14] The Court of Appeal of New Zealand stated, in *Hosking v Runting*:

> There should be available in cases of interference with privacy a defence enabling publication to be justified by a legitimate public concern in the information. In *P v D*, absence of legitimate public interest was treated as an element of the tort itself. But it is more conceptually sound for this to constitute a defence, particularly given the parallels with breach of confidence claims, where public interest is an established defence. Moreover, it would be for the defendant to provide the evidence of the

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10 Eg, Australian Privacy Foundation, *Submission 39*; Public Interest Advocacy Centre, *Submission 30*; B Arnold, *Submission 28*; Law Institute of Victoria, *Submission 22*.

11 M Paterson, *Submission 60*.

12 Peter A Clarke, Submission No 69 to DPM&C Issues Paper, 2011.

13 Victorian Law Reform Commission, *Surveillance in Public Places*, Report No 18 (2010) 157, Recs 27, 28.

14 In relation to the publication of private information, see: *Hosking v Runting* (2005) 1 NZLR 1, [129]. In relation to intrusion upon seclusion, see*: C v Holland* [2012] NZHC 2155 (24 August 2012) [96].

> concern, which is the appropriate burden of proof if the plaintiff has shown that there has been an interference with his or her privacy of the kind we have described.[15]

8.21 Where the act of invasion was a publication, the four Canadian provinces that have enacted statutory causes of action for invasion of privacy provide a defence where the publication was in the public interest.[16]

8.22 In supporting a public interest defence, the law firm Maurice Blackburn has noted that a similar approach has been used for other statutory causes of action in Australia. Under the *Racial Discrimination Act 1975* (Cth), 'it is for the defendant to show that their conduct should be exempted because it has been done reasonably and in good faith for particular specified purposes'; and 'under the *Racial and Religious Tolerance Act 2001* (Vic) the defendant must demonstrate that conduct which would otherwise be racial or religious vilification was justified because it was in the public interest'.[17]

8.23 The defendant may be in a better position to provide evidence that the invasion of privacy was in the public interest. A newspaper, for example, would seem better placed to bring evidence of its own interest in free expression and the public's interest in free speech, than an individual may be to provide evidence that these interests do not outweigh the plaintiff's privacy.

8.24 However, the ALRC considers that it is preferable to consider the public interest when determining actionability, and that the plaintiff should bear the legal onus of proof on matters going to actionability. This should better ensure that privacy interests are not unduly privileged over other important rights and interests. Privacy is an interest that is relative, and the context and circumstances of the conduct are critical factors: the balancing at this stage of the action reflects this. As noted above, this approach was supported by some stakeholders. For example, Telstra submitted that

> given the seriousness of the cause of action and the potentially chilling effect it may have on business and service providers, the onus of proof should be on the plaintiff to ensure that their claim is sufficiently serious to outweigh public interest concerns at the outset.[18]

8.25 Under Proposal 8-1, the plaintiff will have the onus to prove that their privacy interest outweighs any competing public interest and the interest of the defendant in free speech. This is consistent with the general principle of law that 'a plaintiff bears

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15 *Hosking v Runting* (2005) 1 NZLR 1, [129]. See also [130]: 'Furthermore, the scope of privacy protection should not exceed such limits on the freedom of expression as is justified in a free and democratic society. A defence of legitimate public concern will ensure this. The significant value to be accorded freedom of expression requires that the tort of privacy must necessarily be tightly confined. In *Douglas v Hello!* Brooke LJ formulated the matter in the following way (at para [49]): "[A]lthough the right to freedom of expression is not in every case the ace of trumps, it is a powerful card to which the courts of this country must always pay appropriate respect."'

16 Eg *Privacy Act*, RSBC 1996, c 373, s 2(3)(a).

17 Maurice Blackburn Lawyers, Submission No 45 to DPM&C Issues Paper, 2011 (citations omitted).

18 Telstra, *Submission 45*. See also, SBS, *Submission 59*; Australian Subscription Television and Radio Association, *Submission 47*.

the burden of proving the ingredients of the cause of action', while the 'defendant bears the burden of proving the requisite elements of the defence'.[19]

8.26 The ALRC agrees with the NSWLRC when it stated in its report:

> Legal principle requires that plaintiffs bear the onus of establishing their case. It is appropriate, in our view, that, as part of establishing an invasion of privacy, plaintiffs should demonstrate at the outset that their claim to privacy is not outweighed by a competing public interest. Quite simply, privacy only needs protection if it is not outweighed, in the circumstances, by such a competing interest.[20]

8.27 However, the importance of the question of who bears the onus of proof should not be overstated and Witzleb has suggested that the question of who bears the onus of proof may not have significant practical implications. Where public interest considerations are considered as part of establishing the cause of action, Witzleb considers that this

> will, in many cases, prompt the plaintiff to provide evidence that is relevant to the public interest considerations in the balancing process. In practice, however, the defendant will often be in a better position, and have the greater interest, to adduce the evidence necessary for establishing the weight of the public interest in his or her conduct.[21]

8.28 In practice, facts as pleaded by the plaintiff may raise no public interest issues. It is not the case that the plaintiff would have to separately and exhaustively plead and prove the non-existence of each and every possible matter of public interest that may arise in any case involving privacy.

8.29 There is also the well-known distinction between the legal onus of proof and the evidentiary or strategic onus of proof.[22] While in general a plaintiff bears the onus of proof as to the elements of the cause of action asserted, a strategic or evidentiary onus may pass to a defendant to bring forward evidence to rebut any inferences that may be drawn from the plaintiff's case. If it does not do so, the defendant runs the strategic risk that the court may choose to draw an inference argued by the plaintiff.

## A discrete exercise

8.30 The ALRC has proposed a discrete public interest balancing exercise. Another option might be to have public interest matters considered when determining whether the plaintiff had a reasonable expectation of privacy.[23]

8.31 Public interest matters will no doubt be relevant to the question of whether the plaintiff had a reasonable expectation of privacy. For example, the fact that the

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19 C Sappideen and P Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 355.

20 NSW Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009) 28.

21 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, 121–122.

22 Sappideen and Vines, above n 19, 356; CR Williams, 'Burdens and Standards in Civil Litigation' (2003) 25 *Sydney Law Review* 165.

23 That the plaintiff must have a reasonable expectation of privacy is another element of the cause of action: Proposal 8-1.

information is about a politician will be relevant to whether there is public interest in the information.

8.32 However, it may sometimes be artificial to consider public interest matters in the context of an expectation of privacy. Sometimes, a person's expectation of privacy may seem perfectly reasonable, even though the strength of a competing public interest, perhaps unknown to many reasonable people, suggests that the invasion of privacy should not be actionable.

8.33 The NSWLRC argued that the two issues of whether or not a matter is legitimately private, and the significance of competing interests

> are not always clearly separable. Thus, a competing public interest may be of such force in the circumstances that the case will focus principally on it in reaching a conclusion that no reasonable expectation of privacy arises.[24]

8.34 Given the importance of considering competing public interests, the ALRC considers that there should be a clear and discrete public interest element in the cause of action.

## Meaning of public interest

**Proposal 8–2** The new Act should include the following non-exhaustive list of public interest matters which a court may consider:

(a) freedom of expression, including political communication;

(b) freedom of the media to investigate, and inform and comment on matters of public concern and importance;

(c) the proper administration of government;

(d) open justice;

(e) public health and safety;

(f) national security;

(g) the prevention and detection of crime and fraud; and

(h) the economic wellbeing of the country.

### Should public interest be defined?

8.35 'Public interest' should not be defined, but a list of public interest matters could be set out in the new Act. The list would not be exhaustive, but may provide the parties and the court with useful guidance, making the cause of action more certain and predictable in scope. This may in turn reduce litigation.

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24 NSW Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009) 19.

8.36 In *Hogan v Hinch*, French CJ stated that when 'used in a statute, the term [public interest] derives its content from "the subject matter and the scope and purpose" of the enactment in which it appears'.[25]

8.37 In the UK, the Joint Committee on Privacy and Injunctions concluded that there should not be a statutory definition of the public interest, as 'the decision of where the public interest lies in a particular case is a matter of judgment, and is best taken by the courts in privacy cases'.[26]

8.38 Including a non-exhaustive list of public interest matters seems more helpful than a definition of public interest, which might necessarily have to be overly general or overly confined and inflexible.[27]

8.39 Community expectations of privacy change over time. This is another reason to include a non-exhaustive list of public interest matters for a court to consider, rather than a definition of public interest. It will allow the meaning of public interest to develop in line with changing community attitudes and developments in technology.

8.40 There is precedent in Australian law and in regulation for providing guidance on the meaning of 'public interest', including the public interest exemptions in the *Freedom of Information Act 1982* (Cth).[28]

8.41 A number of stakeholders expressed support for including a non-exhaustive list of factors in the Act.[29]

8.42 Other stakeholders said that the Act should not provide guidance on the meaning of public interest.[30] The Law Institute of Victoria submitted:

> This is a phrase commonly used in legislation and one with which courts are familiar. 'Public interest' is a broad concept that is flexible enough to respond to the facts and circumstances of any particular case. Given that privacy is fact and context specific, it is appropriate to keep concepts such as 'public interest' broad and flexible.[31]

8.43 Alternatively, broad concepts which go to the meaning of public interest could go in the objects section or the preamble of the Act.

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25 *Hogan v Hinch* (2011) 243 CLR 506, [31] (citation omitted).

26 Joint Committee on Privacy and Injunctions, *Privacy and Injunctions*, House of Lords Paper No 273, House of Commons Paper No 1443, Session 2010–12 (2012) 19. See also B Arnold, *Submission 28*.

27 The Australian Press Council defines public interest as 'involving a matter capable of affecting the people at large so they might be legitimately interested in, or concerned about, what is going on, or what may happen to them or to others': Australian Press Council, *General Statement of Principles*.

28 *Freedom of Information Act 1982* (Cth) s 11B.

29 Office of the Australian Information Commissioner, *Submission 66*; ABC, *Submission 46*; Telstra, *Submission 45*; Electronic Frontiers Australia, *Submission 44*; Arts Law Centre of Australia, *Submission 43*; Public Interest Advocacy Centre, *Submission 30*.

30 Law Institute of Victoria, *Submission 22*.

31 Ibid.

## Which public interests should be listed?

8.44 Article 8 of the European Convention on Human Rights, which recognises the right to respect for private and family life, provides that there should no interference by a public authority with the exercise of this right:

> except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[32]

8.45 The public interests that will perhaps most commonly conflict with a plaintiff's interest in privacy are the public interest in freedom of speech and in a free media.[33]

8.46 Many who oppose a new cause of action for privacy fear that it will impede freedom of speech and the freedom of the media. In the absence of a human rights legal framework in Australia, it seems important for the statutory cause of action for serious invasion of privacy to give express recognition to the public interest in freedom of speech and freedom of the press.

8.47 When balancing an interest in privacy with a public interest in freedom of expression, the nature of the expression will be relevant. Not all speech is of equal value to the public. Political communication, for example, should be given considerable weight in the proposed balancing exercise, particularly considering that freedom of political communication is implied in the Australian Constitution.[34]

8.48 In *Campbell,* Baroness Hale LJ said that there are 'undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others':

> Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made.[35]

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32 *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) art 8(2).

33 For many purposes, these may be the same: 'the traditional view in English law has been that freedom of the press and the freedom of individual writers are substantially the same. … However, this perspective may fail to do justice to the complexity of media freedom…' Eric Barendt et al, *Media Law: Text, Cases and Materials* (Pearson, 2013) 18–19.

34 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

35 *Campbell v MGN Ltd* [2004] 2 AC 457, [148]. Part of this passage was quoted by SBS, who stressed the importance of respecting the public interest in the 'free exchange of information and ideas': SBS, *Submission 59*.

8.49 Other matters of public interest may also conflict with privacy interests. The ALRC has listed some of these in Proposal 8-2.

8.50 Finally, it should be noted that privacy is also a public interest, not merely a personal interest. Although it is not included in the list proposed above which deals with *countervailing* matters of public interest, the ALRC considers that the public interest in respecting privacy should be considered in the proposed balancing exercise.