10. Forums, Limitations and Other Matters

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Summary

10.1 This chapter considers a number of details in the legal design of the statutory cause of action for serious invasion of privacy, including the appropriate forums to hear the cause of action, costs orders, and limitation periods.

10.2 The ALRC recommends that federal, state and territory courts should have jurisdiction to hear an action for serious invasion of privacy.

10.3 There may often be alternatives to bringing an action under the new tort, such as making a complaint to the Office of the Australian Information Commissioner (OAIC). Failing to pursue such alternative dispute resolution processes should not bar a plaintiff from bringing an action under the new tort. However, the ALRC recommends that the Act provide that, in determining any remedy, courts may take into account whether or not a party took reasonable steps to resolve the dispute without litigation and the outcome of any alternative dispute resolution (ADR) process.

10.4 The chapter then discusses who should have standing to sue for a serious invasion of privacy. The ALRC recommends that the plaintiff must be a natural person, rather than a company or other organisation. The ALRC also recommends that the new tort should not survive in favour of a plaintiff's estate or against a defendant's estate. These recommendations reflect the fact that privacy is a matter of personal sensibility.

10.5 The ALRC recommends a limitation period of either one year from the date on which the plaintiff became aware of the invasion of privacy or three years from the date on which the invasion of privacy occurred, whichever occurs first. In exceptional circumstances, the court may extend this limitation period, but the period should expire no later than six years from the date on which the invasion occurred. The ALRC also recommends that consideration be given to extending the limitation period where the plaintiff was under 18 years of age when the invasion of privacy occurred.

10.6 The ALRC recommends that consideration should be given to enacting a 'first publication rule', also known as a 'single publication rule'. This would limit the circumstances in which a person may bring an action in relation to the publication of private information, when that same private information had already been published in the past.

Forums

Recommendation 10–1 Federal, state and territory courts should have jurisdiction to hear an action for serious invasion of privacy under the Act. Consideration should also be given to giving jurisdiction to appropriate state and territory tribunals.

10.7 The ALRC recommends that jurisdiction to hear actions for serious invasions of privacy under the Act should be conferred upon federal, state and territory courts. This position was widely supported by stakeholders. The ALRC considers it inappropriate to restrict the particular state and territory courts that may hear these actions.

10.8 In reaching this recommendation, the ALRC has taken into account a range of factors, including: the importance of access to justice; the need to minimise confusion or inconsistency in the application of legislation across Australian jurisdictions; the range of available remedies; issues of costs of proceedings; relevant constitutional issues; and existing courts and tribunals.

10.9 The plaintiff's particular choice of court will likely depend on the jurisdictional limits of the various courts and the nature of the remedy sought by the plaintiff. The jurisdictions of the various courts are considered briefly below.

Federal courts

10.10 The power to vest judicial power in the Federal Court of Australia (FCA) and the Federal Circuit Court of Australia (FCCA) arises under s 71 of the *Australian Constitution*. The jurisdictions of the FCA and the FCCA are generally conferred by a wide range of Commonwealth Acts such as the *Bankruptcy Act 1966* (Cth), the

Migration Act 1958 (Cth), the Australian Consumer Law,[1] the *Corporations Act 2001* (Cth), the *Telecommunications Act 1997* (Cth) and the *Privacy Act 1988* (Cth) (*Privacy Act*). As the ALRC recommends in Chapter 4, the new tort should be located in a Commonwealth Act, and this statute could vest power to hear actions in the FCA and the FCCA.

10.11 Given that many serious invasions of privacy may involve parties in different states or territories, vesting the power to hear privacy actions in courts with jurisdiction across the entire country—such as the FCA and the FCCA—may reduce the costs and burden for plaintiffs.

10.12 Both the FCA and the FCCA have, in addition to jurisdiction granted to them by legislation, 'associated jurisdiction'[2] and 'accrued jurisdiction'[3] for matters, not otherwise within these courts' respective jurisdictions, that are related to matters which are within their respective jurisdictions. For example, while no statute confers jurisdiction on these courts for breach of contract actions, either court is able to hear a claim for breach of contract that is brought alongside a claim for misleading or deceptive conduct under the Australian Consumer Law. While associated and accrued jurisdiction would potentially mean that matters not currently within the jurisdiction of the FCA or FCCA could be heard by these courts, if brought alongside a privacy action, the ALRC does not consider this to be particularly problematic. Many related matters can already be brought before these courts—actions for defamation and negligence might be brought alongside an action arising under the *Privacy Act*, for instance.[4]

10.13 However, the ALRC considers that the FCA and the FCCA should not have exclusive jurisdiction[5] to hear actions under the Act, as in many cases it would be less costly for litigants to use state local courts or district or circuit courts to hear proceedings.

State and territory courts

10.14 State and territory courts include supreme courts, district or county courts, and local or magistrates courts. The Act, as a Commonwealth law, could vest federal jurisdiction in state and territory courts to hear the new cause of action.[6]

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1 *Competition and Consumer Act 2010* (Cth) sch 2.

2 *Federal Court of Australia Act 1976* (Cth) s 32; *Federal Circuit Court of Australia Act 1999* (Cth) s 18.

3 *Stack v Coastal Securities (No 9)* (1983) 154 CLR 261.

4 See, eg, *Dale v Veda Advantage Information Services and Solution Limited* [2009] FCA 305 (1 April 2009).

5 The power to grant exclusive jurisdiction to federal courts is provided to the Commonwealth under s 77(ii) of the *Australian Constitution*. For an example of exclusive jurisdiction of the Federal Court, see *Competition and Consumer Act 2010* (Cth) s 86.

6 This vesting of jurisdiction is possible under ss 71 and 77(iii) of the *Australian Constitution* and s 39 of the *Judiciary Act 1903* (Cth) (in the cases of states), and s 122 of the *Constitution* (in the case of territories): James Crawford and Brian Opeskin, *Australian Courts of Law* (Oxford University Press, 4th ed) 57. A state or territory court will only have the power to exercise federal jurisdiction in line with ss 35 and 122 of the *Australian Constitution* where that jurisdiction power derives from a Commonwealth Act, not a state or territory act.

10.15 Different powers are available to the different levels of state and territory courts. The supreme courts of the states and territories have general, unlimited jurisdiction.[7]

10.16 District and county courts (and the ACT Magistrates Court) generally have similar powers to supreme courts, including powers to grant injunctions and equitable remedies.[8] However, the jurisdiction of district and county courts is typically limited to certain values. For example, the County Court of Victoria may only hear claims up to $200,000; the District Courts of Queensland and Western Australia, may only hear claims up to $250,000; and the District Court of NSW may only hear claims up to $750,000.[9]

10.17 The powers of local and magistrates courts with respect to civil actions are often restricted in certain ways. For example, the Local Court of NSW does not have jurisdiction to hear defamation proceedings;[10] and the Magistrates Court of South Australia has powers limited to certain procedural functions, adjourning proceedings, certain statutory matters, and 'minor civil actions'.[11] Local and magistrates courts may have equitable jurisdiction and so may be able to hear breach of confidence actions, although this jurisdiction may be limited to cases where any relief claimed is an amount of money under a certain limit.[12] Local and magistrates courts typically do not have the power to grant an injunction.

10.18 While the jurisdictions of the local, magistrates, district and county courts of the states and territories may, in some cases, have restrictions that limit their effectiveness in dealing with some privacy actions, the ALRC does not consider that there is any reason to expressly exclude these courts as possible forums for privacy actions. There would also be considerable benefit in terms of providing wider access to justice in privacy claims if these courts could hear some privacy actions.

Cost management in courts

10.19 While proceedings in courts may result in substantial costs for parties, there are mechanisms available to minimise these costs. Courts are variously empowered to direct parties to mediation, conciliation and arbitration,[13] which are designed to offer cheaper and faster dispute resolution than litigation. Courts also have the power to waive fees and, in certain cases, fees are not payable.[14] While these mechanisms will not remove the costs for all litigants, they do temper the costs associated with court

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7 See, eg, *Supreme Court Act 1970* (NSW) s 23; *Constitution Act 1975* (Vic) s 85(1).

8 *District Court Act 1973* (NSW) ss 44, 46; *District Court of Queensland Act 1967* (Qld) ss 68, 69; *District Court Act 1991* (SA) s 8; *County Court Act 1958* (Vic) ss 37, 49; *District Court Act 1969* (WA) ss 50, 55; *Magistrates Court Act 1930* (ACT) ss 257, 258.

9 *County Court Act 1958* (Vic) ss 3, 37; *District Court of Queensland Act 1967* (Qld) s 68; *District Court Act 1969* (WA) s 50; *District Court Act 1973* (NSW) s 44.

10 *Local Court Act 2007* (NSW) s 33.

11 *Magistrates Court Act 1991* (SA) ss 8, 10, 15.

12 See, eg, *Magistrates Court (Civil Proceedings) Act 2004* (WA) s 6.

13 See, eg, the following provisions for the power to order mediation: *Federal Court of Australia Act 1976* (Cth) s 53; *Civil Procedure Act 2005* (NSW) s 26; *Civil Procedure Act 2010* (Vic) s 48(2)(c); *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 50.07.

14 *Civil Procedure Regulation 2012* No 393 (NSW) reg 11.

proceedings in some cases. The ALRC also suggests that courts be empowered to make a range of costs orders.[15]

Tribunals

10.20 Several states and territories have created tribunals that are able to hear civil matters, and which may be suitable forums for hearing privacy actions under the Act. These tribunals include the ACT Civil and Administrative Tribunal (ACAT); the NSW Civil and Administrative Tribunal (NCAT); the Queensland Civil and Administrative Tribunal (QCAT); the State Administrative Tribunal of Western Australia (SAT); and the Victorian Civil and Administrative Tribunal (VCAT).[16] These tribunals have a range of powers including, in some cases the power to grant injunctions.[17]

10.21 The appropriateness of these tribunals for dealing with privacy matters has been previously noted. For example, the Victorian Law Reform Commission recommended that jurisdiction for privacy actions should be vested exclusively in the VCAT:

> VCAT is designed to be more accessible than the courts. It seeks to be a speedy, low-cost tribunal where legal costs do not outweigh the issues at stake. The experience in other jurisdictions demonstrates that any damages awards in cases of this nature are likely to be relatively small. The sums of money involved do not justify the level of legal costs usually associated with civil litigation in the courts.[18]

10.22 There was general agreement among stakeholders that low-cost forums for hearing actions for serious invasions of privacy would be beneficial. Some stakeholders were in favour of state and territory tribunals being able to hear such cases. For example, the Redfern Legal Centre submitted that

> several states and territories have created tribunals that are able to hear civil matters. The advantage of these tribunals is that they provide a relatively efficient and cost-effective way to resolve disputes and thereby allow a wider section of the community to access justice. We believe, for example, that the [*Privacy and Personal Information Protection Act 1998* (NSW)] is much more effective in protecting the privacy rights of individuals in NSW because it includes a right of review in the NSW Civil and Administrative Tribunal (NCAT).[19]

10.23 Other stakeholders were less supportive of state and territory tribunals being empowered to hear actions for serious invasions of privacy. The Law Institute of Victoria, for example, submitted that they

> would be wary of establishing jurisdiction for (VCAT) to hear claims about serious invasions of privacy, because there is likely to be complex legal argument as the tort

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15 See Ch 12.

16 *South Australian Civil and Administrative Tribunal Act 2013* (SA). This Act provides for the establishment of the South Australian Civil and Administrative Tribunal (SACAT). However, at the time of writing, the SACAT had not begun operation.

17 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 22; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 123; *State Administrative Tribunal Act 2004* (WA) s 90 (interim injunctions only).

18 Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) [7.226].

19 Redfern Legal Centre, *Submission 94*.

> develops. Courts, and specifically judges, are best placed to hear and determine these types of disputes. Further, the rules of evidence do not apply in VCAT matters.[20]

10.24 The Domestic Violence Legal Service and the North Australian Aboriginal Justice Agency were similarly cautious about empowering tribunals to hear actions under the Act, noting that

> There may be some advantages in terms of cost and less formality for disadvantaged litigants in approaching a Tribunal rather than a Court, however, currently in the Northern Territory the Administrative Appeals Tribunal sits infrequently and so is not as readily accessible as the courts.[21]

10.25 The powers and nature of state and territory tribunals differ significantly, and any conferral of power on these tribunals would need to take these differences into account. State and territory governments would then be in a position to enact legislation, if necessary, to confer jurisdiction on appropriate tribunals.

The role of government regulatory bodies

10.26 The OAIC proposed that it should be able to hear complaints about serious invasions of privacy.[22] The OAIC's proposal received support from several stakeholders.[23]

10.27 The OAIC's proposal is discussed in greater detail in Chapter 16. The ALRC recommends that consideration be given to extending the powers of the Commissioner to allow investigations of complaints about serious invasions of privacy in general, in addition to the Commissioner's existing power to hear complaints about breaches of the *Privacy Act.*

Alternative dispute resolution processes

10.28 An individual should be able to bring an action for serious invasion of privacy under the Act regardless of whether or not the individual has already taken steps to resolve the complaint through an ADR process. However, a court may take into account any reasonable steps taken by either party to resolve a dispute without litigation, and the outcome of any ADR process. Stakeholders were generally supportive of this position.

10.29 Complaints about serious invasions of privacy may be made to statutory bodies. These include, in particular, to the OAIC, the Australian Communications and Media Authority (the ACMA), state and territory privacy commissioners and ombudsmen. The ALRC also recommends that the Australian Government give consideration to empowering the Privacy Commissioner to investigate complaints about invasions of

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20 Law Institute of Victoria, *Submission 96*.
21 Domestic Violence Legal Service and North Australian Aboriginal Justice Agency, *Submission 120*.
22 Office of the Australian Information Commissioner, *Submission 90*; Office of the Australian Information Commissioner, *Submission 66*.
23 Australian Privacy Foundation, *Submission 110*; Australian Communications Consumer Action Network, *Submission 106*; G Greenleaf, *Submission 76*.

privacy beyond those invasions currently falling within the *Privacy Act*.[24] Various industry bodies also provide ADR processes.

10.30 ADR processes offer several advantages over judicial proceedings. In particular, they may be cheaper and faster than judicial proceedings, and they may be less emotionally burdensome on the parties involved. The use of ADR may also reduce the case load of courts, which is desirable for the efficient administration of justice. However, the speed and availability of ADR processes may vary, depending on the allocation of public resources.

10.31 If a statutory cause of action for serious invasion of privacy were enacted, the availability of these existing dispute resolution processes should be recognised. Some possibilities include: requiring a complainant to pursue some other form of dispute resolution before commencing judicial proceedings; prohibiting judicial proceedings if ADR has been undertaken; or prohibiting ADR if judicial proceedings have been undertaken.

10.32 For reasons set out below, the ALRC has concluded that a complainant should not be required to pursue ADR before initiating judicial proceedings. Nor should they be barred from initiating judicial proceedings where ADR has previously been pursued. The ADR and judicial processes should remain independent. However, the ALRC suggests that courts should have a wide discretion, when determining any amount of damages, to take into account whether parties took reasonable steps the to avoid litigation.[25]

No requirement to pursue ADR

10.33 That the use of some form of ADR should be encouraged is widely acknowledged. However, stakeholders took different views on whether or not ADR prior to judicial proceedings should be mandatory. Several stakeholders supported mandatory ADR,[26] and a number supported only voluntary ADR.[27]

10.34 There would be several difficulties in requiring plaintiffs to pursue ADR before initiating judicial proceedings. Although there is a range of ADR options available, the various options are often limited to specific types of matters. For instance, the OAIC may investigate complaints relating to data protection under the *Privacy Act*; state and territory commissioners and ombudsmen may investigate complaints relating to state and territory agencies; and the ACMA may investigate complaints relating to media and communications organisations. There is at present no single ADR forum that is empowered to deal with all types of complaints that might lead to proceedings under a statutory cause of action for serious invasion of privacy. A requirement that potential

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24 See Ch 16.

25 See Ch 12 and in particular Rec 12–2.

26 Optus, *Submission 41*; Australian Bankers' Association, *Submission 27*; Law Institute of Victoria, *Submission 22*; Office of the Information Commissioner, Queensland, *Submission 20*.

27 SBS, *Submission 59*; Women's Legal Services NSW, *Submission 57*; Women's Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 48*; Electronic Frontiers Australia, *Submission 44*; Australian Privacy Foundation, *Submission 39*; Public Interest Advocacy Centre, *Submission 30*; B Arnold, *Submission 28*; C Jansz-Richardson, *Submission 24*; T Gardner, *Submission 3*.

plaintiffs pursue ADR before initiating judicial proceedings may therefore be too onerous, requiring them to research a complex and fragmented landscape to determine which ADR option would apply in their case.

10.35 Moreover, barring plaintiffs from initiating ADR without first pursuing non-judicial proceedings would present a significant restriction on plaintiffs' access to justice. This would be particularly problematic where the individual wished to seek an injunction, or where the defendant would be unlikely to engage in ADR in good faith—in either case, the plaintiff would be faced with additional time and financial costs with little chance of obtaining appropriate redress.

10.36 Mandatory ADR may also be inappropriate in cases where one party poses a serious threat, including a serious psychological or emotional threat, to the other party. Several stakeholders argued that this would be a particular problem in many privacy cases involving domestic violence.[28]

10.37 Rather than a general requirement that potential plaintiffs pursue ADR processes before initiating judicial proceedings, it is preferable to use existing court powers to refer matters to dispute resolution where appropriate (and other existing provisions relating to dispute resolution in court rules).[29] This would allow the courts to take into account the urgency of a matter, the relationship between the parties, and any other factors relevant to whether such an order should be made. However, possible administrative dispute resolution providers, such as the OAIC and the ACMA, may require specific powers in order to receive court-referred disputes. As the OAIC noted, under the current *Privacy Act*,

> It would not be appropriate for the OAIC to take on an alternative dispute resolution role in the absence of a complaints model being adopted. For example, the OAIC suggests it would not be workable for a court to refer matters to the OAIC for conciliation. In particular, this is because the OAIC relies to some extent on the investigative powers in Part V of the *Privacy Act* in order to successfully conduct its conciliations, and those investigative powers would not be triggered in such circumstances.[30]

No bar on judicial proceedings after ADR

10.38 The ALRC does not recommend that a complainant who has received a determination from an ADR process should be barred from initiating judicial proceedings about the same matter.

10.39 It is undesirable for individuals to 'double-dip' by receiving compensation through both court and ADR processes. However, a bar on individuals commencing court proceedings after ADR would present a serious limitation on access to justice and discourage the use of ADR processes.

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28 Women's Legal Services NSW, *Submission 57*; Women's Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 48*; Women's Legal Centre (ACT & Region) Inc, *Submission 19*.

29 See, eg, *Civil Procedure Act 2005* (NSW) pts 4, 5; *Civil Procedure Act 2010* (Vic) ch 5; *Federal Court of Australia Act 1976* (Cth) s 53A.

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

10.40 Furthermore, the risk of a complainant double-dipping is likely to be minimal. An unsuccessful ADR process would generally be a strong indicator that an action under the statutory cause of action would be unsuccessful as well.

Cause of action limited to natural persons

Recommendation 10–2 The new tort should only be actionable by natural persons.

10.41 The ALRC recommends that the statutory cause of action for serious invasion of privacy be limited to natural persons.[31] This means that corporations, government agencies or other organisations[32] would not have standing to sue for invasions of privacy. This recommendation was unanimously supported by previous law reform inquiries.[33]

Privacy action remedies a personal interest

10.42 An action in privacy is designed to remedy a personal, dignitary interest. It would be incongruous, therefore, to assign this interest to a corporation or other body. In *Australian Broadcasting Corporation v Lenah Game Meats,* Gummow and Hayne JJ held that any common law tort of unjustified invasion of privacy (were one to develop in Australian law), should be confined to natural persons as corporations lack the 'sensibilities, offence and injury … which provide a staple value for any developing law of privacy'.[34]

10.43 In support of this argument, Guardian News and Media Limited and Guardian Australia argued that

> Privacy is fundamentally an interest limited to natural persons. The parallel right for corporations and other non-natural entities is confidential information which is already sufficiently protected.[35]

10.44 Similarly, PIAC argued that 'it would be incongruous to assign this interest to a corporation or other body'.[36]

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31 Several stakeholders supported this recommendation: T Butler, *Submission 114*; Office of the Victorian Privacy Commissioner, *Submission 108*; Telstra, *Submission 107*; Public Interest Advocacy Centre, *Submission 105*; ASTRA, *Submission 99*; Australian Sex Party, *Submission 92*; Google, *Submission 91*; Australian Bankers' Association, *Submission 84*; S Higgins, *Submission 82*; Guardian News and Media Limited and Guardian Australia, *Submission 80*; Barristers' Animal Welfare Panel and Voiceless, *Submission 64*.

32 Including elected bodies: *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680.

33 Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) Rec 32; Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) Rec 74–3(a); NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) NSWLRC Draft Bill, cl 74(1).

34 *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [126].

35 Guardian News and Media Limited and Guardian Australia, *Submission 80*.

36 Public Interest Advocacy Centre, *Submission 105*.

10.45 Actions in defamation, which are analogous to privacy actions, are also, generally speaking, limited to living, natural persons.[37] Similarly, only individuals may bring a complaint under the *Privacy Act*.[38]

Non-survival of the cause of action

Recommendation 10–3 A cause of action for serious invasion of privacy should not survive for the benefit of the plaintiff's estate or against the defendant's estate.

10.46 The ALRC recommends that an action for serious invasion of privacy should not survive the death of a plaintiff.

10.47 This recommendation means that actions cannot survive for the benefit of a deceased person's estate, whether or not proceedings had been commenced before the death of the plaintiff. Furthermore, actions cannot subsist against the estate of a deceased person, whether or not proceedings had commenced before the death of the defendant. This recommendation has a similar effect to the provisions of the Uniform Defamation Laws.[39]

10.48 Several stakeholders supported this recommendation.[40] All previous law reform inquiries into a new privacy action recommended that a cause of action be restricted to living persons.[41]

Privacy action protects personal interests

10.49 The new tort is intended to remedy a wrong committed against a person's dignitary interests. The mischief to be remedied by a privacy action is the mental harm and hurt to feelings suffered by a living person.[42] The ALRC therefore considers that only the individual who has suffered loss or damage should be able to sue for relief, and that the action should be limited to living persons.[43] This position is in keeping with the common law rule of *actio personalis moritur cum persona* (a personal action dies with the plaintiff or the defendant).[44]

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37 See, eg, *Defamation Act 2005* (SA) 2005 s 9. Some small businesses (which employ fewer than 10 employees), and not for profit organisations have standing under the Act to sue for defamation.

38 *Privacy Act 1988* (Cth) s 36(1).

39 See, eg, *Defamation Act 2005* (NSW) 2005 s 10. The Tasmanian Act does not include this provision.

40 T Butler, *Submission 114*; Office of the Victorian Privacy Commissioner, *Submission 108*; Australian Bankers' Association, *Submission 84*; S Higgins, *Submission 82*; Guardian News and Media Limited and Guardian Australia, *Submission 80*.

41 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008); Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) Rec 32; NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) Draft Bill, cl 79.

42 Law Reform Commission of Hong Kong, *Civil Liability for Invasion of Privacy*, (2004) [29].

43 Several stakeholder supported this position: Telstra, *Submission 45*; Arts Law Centre of Australia, *Submission 43*; Insurance Council of Australia, *Submission 15*.

44 Rosalie Balkin and Jim Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) [11.53], [28.38]. This rule has been abrogated in relation to many claims.

10.50 PIAC noted that

> Most existing statutory causes of action for invasion of privacy lapse with the death of the person whose privacy has allegedly been invaded. This can be seen as flowing from the fact that the right to privacy is generally seen as a personal right. It has also been justified on the basis that because the main mischief of an invasion of privacy is the mental harm and injured feelings suffered by an individual, only living individuals should be allowed to seek relief.[45]

10.51 A statutory cause of action for serious invasion of privacy is analogous to an action in defamation, which does not survive the death of the person defamed, nor the person who published the defamatory matter.[46] The Law Institute of Victoria made the distinction between actions in defamation and actions for breach of confidence, arguing that a duty of confidence can persist after death.[47] However, breach of confidence actions protect quasi-proprietary interests, that is, the plaintiff's interest in the confidential information, which will often be commercial information. By contrast, privacy actions protect a personal interest in the plaintiff's privacy.

10.52 Even where actions currently survive for the benefit of an estate, the relevant legislation generally restricts the damages recoverable to special damages for the precisely calculated pecuniary losses suffered as a result of actual damage from injuries received, such as medical expenses or loss of earnings before death. It is generally not possible to recover damages for pain, suffering and the mental harms that would be the most likely result of a serious invasion of privacy.[48]

10.53 Some stakeholders submitted that the action could survive in some specific circumstances. For example, PIAC argued that the action should survive the death of a plaintiff where 'important systemic issues are involved'.[49] PIAC suggested that the value of privacy as a matter of public interest is akin to the public value in eliminating discrimination and should therefore survive the death of a complainant for the good of all society.

10.54 Some areas of anti-discrimination law recognise the survival of certain interests in certain circumstances. For instance, s 93(1) of the *Anti-Discrimination Act 1977* (NSW) provides that a discrimination complaint survives the death of the complainant. It could be argued, however, that any damages payable to an estate for an invasion of the privacy of a deceased person, would amount to a windfall to that person's estate to the benefit of beneficiaries who may not have been harmed in any way by an invasion of privacy.

Actions by affected parties

10.55 Given that a privacy action generates a personal right of action, it follows that an action should not be designed to remedy any secondary damage others might suffer—

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45 Public Interest Advocacy Centre, *Submission 30*.
46 See, eg, *Defamation Act 2005* (SA) s 10.
47 Law Institute of Victoria, *Submission 22*.
48 *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) s 2.
49 Public Interest Advocacy Centre, *Submission 30*. See, also, I Turnbull, *Submission 81*.

for example, a surviving family member who also suffered distress caused by the invasion of the deceased person's privacy while the latter was alive.[50]

10.56 There may be instances where the conduct of a defendant following the death of an individual may invade the privacy of surviving relatives or other parties who are closely involved.

10.57 Dr Ian Turnbull argued that the action should survive for the benefit of

> immediate relatives or individuals within relevant organisations, that can establish prima facie loss or damage to themselves, as a result of the disclosure of the information.[51]

10.58 However, in such cases it would be possible for family members or other parties to pursue their own actions for serious invasion of privacy where they meet the tests for actionability in their own right.[52] These actions may arise out of conduct indirectly involving a deceased person, such as where the privacy of a family member or other relevant party is invaded in a private moment of grief or mourning,[53] or in circumstances where a deceased's medical record is published to disclose a condition affecting surviving relatives. This position is generally in line with defamation law, where a family member may only bring an action in respect of a defamatory slur against a deceased family member where he or she has been personally defamed.[54]

10.59 PIAC and Dr Normann Witzleb argued that it may be appropriate to allow family members to pursue actions, but limit the remedies available. For instance, PIAC submitted that

> It is appropriate, however, to limit the remedies available to the estate. The Ireland Law Reform Commission proposed that the cause of action is extinguished only in relation to 'the remedy of damages or an account of profits so that injunctive relief, delivery up and other relief remain available.[55]

10.60 PIAC argued that an action should survive the death of a person in particularly egregious cases, such as where systemic issues are involved. In such cases, PIAC argued that the harm incurred extends beyond that experienced by the relevant individual or their family, and is therefore a societal harm:

> As an invasion of privacy is a societal (as well as an individual) wrong, the continuation of a cause of action for invasion of privacy after a person's death may assist in achieving the societal objects of the proposed legislation, regardless of whether or not it results in a personal remedy.[56]

10.61 Several stakeholders argued that privacy actions should survive the death of a plaintiff where the wrong involved an online invasion of privacy.[57] Due to the nature of

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50 I Turnbull, *Submission 81*.
51 Ibid.
52 SBS, *Submission 59*; NSW Young Lawyers, *Submission 58*; ASTRA, *Submission 47*.
53 NSW Young Lawyers, *Submission 58*; Public Interest Advocacy Centre, *Submission 30*.
54 *Krahe v TCN Channel Nine Pty Ltd* (1986) 4 NSWLR 536.
55 Public Interest Advocacy Centre, *Submission 105*.
56 Ibid.
57 N Witzleb, *Submission 116*; UNSW Cyberspace Law and Policy Community, *Submission 98*.

the internet, online invasions of privacy may be ongoing, compounding the harm caused by the initial invasion of privacy.

10.62 Witzleb argued that the

> The digital afterlife of a person can provide a fertile ground for disputes, including how a deceased person's private information should be handled. The new privacy tort should provide redress in these and other cases involving the privacy interests of a deceased person.[58]

10.63 To illustrate this problem, PIAC gave the example of the defacement of tribute pages on social media sites which are established in dedication of deceased persons.[59]

10.64 This example was also used by UNSW Cyberspace Law and Police Community when highlighting two circumstances surrounding death and serious invasions of privacy:

> (1) the potential for breaches of privacy to be directly linked to a person's cause of death through a variety of means, and (2) an increasing trend of harassment and defacement of on-line and off-line memorials which cause great distress and damage to families and loved ones. The outrage caused by the public defacement of online memorials in the Trinity Bates murder highlight the privacy tort as an additional or alternative avenue of legal redress. The suicide of Tyler Clementi in the US after secretly filmed footage of him kissing another man was posted online further emphasises the scope and impact of privacy threats in the digital era. For these reasons we consider it important that in line with earlier observations (ALRC Issues Paper 43 para [110]) that serious invasion of privacy action persist to the plaintiff's estate.[60]

10.65 The Arts Law Centre of Australia and the Law Institute of Victoria argued that an action should survive the death of the person whose privacy is invaded if that person identified as Aboriginal or Torres Strait Islander, given the specific cultural beliefs of those communities associated with mourning and death.[61] In these cases, it was suggested, a family or other affected party should be able to bring the claim on behalf of the deceased person.

10.66 Similarly, the Domestic Violence Legal Service and the North Australian Aboriginal Justice Agency argued that

> Family members of the deceased should be able to bring an action, for example, children of a deceased parent who is the subject of sexually explicit material posted online.[62]

10.67 The ALRC recommends a general principle of non-survival of the action, considering that in circumstances where a family member of an affected party experience an invasion of privacy in their own right, this will give rise to a separate action.

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58 N Witzleb, *Submission 116*.
59 Public Interest Advocacy Centre, *Submission 30*.
60 UNSW Cyberspace Law and Policy Community, *Submission 98*.
61 Arts Law Centre of Australia, *Submission 43*; Law Institute of Victoria, *Submission 22*.
62 Domestic Violence Legal Service and North Australian Aboriginal Justice Agency, *Submission 120*.

10.68 The Law Institute of Victoria submitted that remedies could be limited to 'those that protect the deceased's identity, for example, to allow corrective orders and declarations but not damages'.[63]

10.69 The Australian Privacy Foundation argued that a court may consider the financial circumstances of a deceased defendant when awarding remedies against their estate.[64] However these considerations would require valuation of a deceased's estate, and may lead to lengthy and costly legal disputes over the administration and distribution of a defendant's estate, tying up the estate and leaving creditors and beneficiaries waiting many years for distribution.

International consistency

10.70 Limiting the action for statutory invasion of privacy to living persons would, generally speaking, bring Australian law into line with international privacy law.[65] PIAC noted, however, the exception of French law which allows family members to bring civil privacy actions on behalf of a deceased relative.[66] An example is the 2007 case of *Hachette Filipacchi Associés (Paris-Match) v France*.[67] German and Italian law also allow some protection for the privacy interests of deceased persons.[68]

Representative and class actions

10.71 Several stakeholders raised the issue of representative or class actions, arguing that the availability of these mechanisms in the new statutory tort would strengthen access to justice.[69]

10.72 The ALRC makes no recommendations on the availability of representative or class actions, as the ALRC considers existing court mechanisms would apply to the statutory tort in the same way they apply to other civil actions. For instance, Part IVA of the *Federal Court Act 1976* (Cth) provides a framework for representative proceedings to the Federal Court. Rules also exist relating to representative and class actions, as well as the appointment of litigation guardians in circumstances where an individual does not have the capacity to commence or defend legal proceedings.[70] This would include the availability of litigation guardians for minors.

10.73 The *Australian Securities and Investments Commission Act 2001* (Cth) provides for a court to make orders that apply to a class of 'affected individuals', even where

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63 Law Institute of Victoria, *Submission 22*.
64 Australian Privacy Foundation, *Submission 39*.
65 See, eg, *Privacy Act*, RSBC 1996, c 373 (British Columbia) s 5.
66 Public Interest Advocacy Centre, *Submission 30*.
67 *Hachette Filipacchi Associés (Paris-Match) v France* (2009) 49 EHRR 515.
68 N Witzleb, *Submission 116*.
69 Office of the Australian Information Commissioner, *Submission 66*; B Arnold, *Submission 28*; Pirate Party of Australia, *Submission 18*.
70 Bernard Cairns, *Australian Civil Procedure* (Thomson Reuters (Professional) Australia, 8th ed, 2009) [9.580].

those individuals are not subject to the proceedings.[71] In consumer class actions or data breaches where plaintiffs can be easily identified, such a provision may well be useful. However, in the highly personal context of invasions of privacy, identifying relevant or affected parties to a representative action may be difficult.

10.74 The Law Society of NSW Young Lawyers' Committee on Communication, Entertainment and Technology recommended vesting power in the OAIC to bring actions on behalf of a deceased person.[72] This approach would require significant reform of the *Privacy Act* including, but not limited to, broadening the powers of the OAIC to consider privacy matters beyond information privacy and removing the various exemptions to the Act. It may also conflict with the independent and impartial role of the OAIC as conciliators of privacy complaints.

10.75 The Office of the Public Advocate (Queensland) submitted that the ALRC should consider ways to accommodate a litigation guardian to conduct legal proceedings on behalf of an adult with impaired decision-making capacity.[73] The ALRC also considers that this is an important issue concerning access to justice, but that it requires broader consideration than its application just to the new tort. At the same time as this Inquiry the ALRC is undertaking an inquiry into equality, capacity and disability in Commonwealth laws. That inquiry is considering, among other things, the role of litigation guardians in civil proceedings. Its recommendations will have relevance to any new statutory cause of action for serious invasion of privacy.[74]

Limitation periods

Recommendation 10–4 A person should not be able to bring an action under the new tort after the earlier of:

(a) one year from the date on which the plaintiff became aware of the invasion of privacy; or

(b) three years from the date on which the invasion of privacy occurred.

Recommendation 10–5 In exceptional circumstances, the court may extend this limitation period, but the period should expire no later than six years from the date on which the invasion occurred.

10.76 This recommendation aims to balance the interests of both parties to a proceeding, providing adequate time for a plaintiff to appreciate and manage the

71 *Australian Securities and Investments Commission Act 2001* (Cth) s 12GNB. The OAIC highlighted this provision in its submission as a possible model for matters which impacted on the privacy of a large group of individuals.

72 NSW Young Lawyers, *Submission 58*.

73 Office of the Public Advocate (Queensland), *Submission 12*.

74 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper 81 (2014).

emotional and financial repercussions of a serious invasion of privacy, while also providing certainty for defendants.

10.77 In most cases, a person whose privacy has been invaded will become aware of the invasion of privacy soon after it occurs. Intrusions upon physical seclusion will often be known immediately. If private information is published in popular media, again the subject of the information will usually know of its publication quite soon. If they wish to bring an action, they should generally do so within one year from the date on which they became aware of the invasion of privacy.

10.78 A reasonable but confined limitation period will protect defendants from claims relating to incidents that occurred years before and where witnesses may have difficulty recalling events. It would be burdensome on defendants if a longer limitation period led to uncertainty and anxiety as to whether they are likely to be sued. Preparing a defence case and calculating the likely cost of litigation and possible remedies may be more challenging the longer a plaintiff takes to initiate proceedings.

10.79 Professor Peter Handford outlines three policy rationales for limitation periods: to protect defendants from claims relating to incidents which occurred years before about which witnesses may have difficulty recalling events or finding records; to encourage quick resolution of litigation; and to provide finality for defendants.[75]

10.80 The recommendation is consistent with the one year limitation period prescribed for actions in defamation.[76] Consistency with the position in defamation law may avoid the risk that plaintiffs will bring multiple actions at different times for overlapping harm. Defamation actions are based on damage to a person's reputation, a harm which is complete on publication. In some cases, the same publication may be an invasion of privacy because it discloses private information.

10.81 In contrast to actions in defamation, actions in personal injury, which generally have a longer limitation period of three years,[77] are based on injury to the individual which may take longer to eventuate.

10.82 This recommendation is also consistent with the limitation periods in the *Privacy Act* with respect to when the OAIC can hear complaints.[78] A complaint of privacy interference by an APP entity can be made within 12 months from the date the applicant becomes aware of the relevant act or conduct.[79] The OAIC then has discretion as to whether or not to investigate a complaint of privacy interference made

75 Peter Handford, *Limitation of Actions: The Laws of Australia* (Thomson Reuters (Professional) Australia, 3rd ed, 2012) [5.10.120].

76 *Limitation Act 1969* (NSW) s 14B; *Limitation Act 1985* (ACT) s 21B(1); *Limitation Act 1981* (NT) s 12(2)(b); *Limitation of Actions Act 1974* (Qld) s 10AA; *Limitation of Actions 1936* (SA) s 37(1); *Defamation Act 2005* (Tas) s 20A(1); *Limitation of Actions Act 1958* (Vic) s 51(1AAA); *Limitation Act 2005* (WA) s 15.

77 See, eg, *Limitations of Actions Act 1958* (Vic) s 5(1AA); *Limitation Act 1969* (NSW) s 18A(2).

78 *Privacy Act 1988* (Cth) s 41(1)(c).

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

after this date. The OAIC supports the application of a similar limitation period to a statutory cause of action for serious invasion of privacy.[80]

10.83 Several stakeholders supported a one year limitation period, although some said a court should be able to extend the limitation period beyond three years.[81] The New South Wales Law Reform Commission proposed a one year limitation period.[82] Several stakeholders supported a one year limitation period, in line with defamation law.[83] ASTRA argued that a one year limitation period would provide certainty to defendants and encourage the timely and proper administration of justice.[84] Furthermore, ASTRA argued that a short limitation period would prevent plaintiffs from delaying bringing proceedings in order to gain a windfall in damages caused by the accumulation of hurt or distress.

10.84 In some circumstances, a person may not know for some time that their privacy has been breached.[85] Where a plaintiff does not know of an invasion of privacy for some time, the ALRC recommends that they have three years from the date on which the invasion of privacy occurred to bring an action.

10.85 A number of stakeholders said that a one year limitation period was too short,[86] and that the period should run from the date when the plaintiff first becomes aware of the action.[87] The Victorian Law Reform Commission proposed a three year limitation period, consistent with actions for personal injury.[88] Several stakeholders proposed a limitation period of three years from the date when the plaintiff becomes aware of the invasion, expiring no more than six years from the date on which the invasion occurs.[89] SBS said the limitation period should start from the 'initial publication or disclosure'.[90]

10.86 The limitation periods for the new tort should not start when damage accrued to the plaintiff. Commencing the limitation period from the date when a plaintiff experiences damage or harm as a result of the invasion of privacy, would require a plaintiff to demonstrate damage, thus conflicting with the ALRC's recommendation that the new privacy tort be actionable per se.

10.87 By way of comparison, defamation actions run from the date of publication.[91] Actions in personal injury commence from the date of discoverability. In NSW,

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80 Ibid.

81 T Butler, *Submission 114*; Office of the Victorian Privacy Commissioner, *Submission 108*; Public Interest Advocacy Centre, *Submission 105*; Australian Sex Party, *Submission 92*; Australian Bankers' Association, *Submission 84*; S Higgins, *Submission 82*; Guardian News and Media Limited and Guardian Australia, *Submission 80*.

82 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) [9.1].

83 Telstra, *Submission 107*; ASTRA, *Submission 99*; ABC, *Submission 93*; SBS, *Submission 59*.

84 ASTRA, *Submission 99*.

85 UNSW Cyberspace Law and Policy Community, *Submission 98*.

86 N Witzleb, *Submission 29*.

87 Ibid.

88 Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) [7.248] and Rec 33.

89 Law Institute of Victoria, *Submission 96*; Women's Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 48*; N Witzleb, *Submission 29*.

90 SBS, *Submission 59*.

91 See, eg, *Limitation Act 1969* (NSW) s 14.

'discoverability' is taken to be from when the plaintiff 'ought to have known' that the 'injury or death concerned has occurred'.[92]

10.88 Some stakeholders argued for much longer limitation periods. One pointed to the six year limitation period for those seeking remedial relief for unlawful interception under s 107B of the *Telecommunications (Interception and Access) Act 1979* (Cth). Some stakeholders suggested there should be no limitation period at all. However, the ALRC considers that it is important that there be a limitation period, and that concerns about unfairly denying a person the opportunity to bring an action may be met by allowing the court to extend the limitation period in exceptional circumstances.

Extending limitation period

10.89 The ALRC recommends that, in exceptional circumstances, the court should be able to extend the limitation period to six years, from the date when the serious invasion of privacy occurred.

10.90 Several stakeholders also argued that individuals may be too distressed to turn their minds to bringing legal action to redress the invasion of their privacy.[93] The Law Institute of Victoria (LIV) said that 'it takes time for people to realise that they have a legal right that has been breached, especially where they have been seriously affected by the breach itself'.[94] It was also submitted that victims of family violence may 'find it hard to gain the necessary strength and resources to bring an action within a short period.[95] These are some examples of the sort of exceptional circumstances in which a court may extend the limitation period.

10.91 Some stakeholders submitted that a court should only be able to extend the limitation period to three years.[96] Others said the court should be able to extend it further.[97] Some suggested that applications for time extensions were expensive and vigorously fought, and that it would therefore be better simply to make the standard limitation period longer.[98]

10.92 Limitation periods may be extended or postponed at the discretion of a court in a number of circumstances.[99] The *Limitation Acts* in all Australian jurisdictions allow for the grant of an extension where the plaintiff is a person living with a disability or where there is fraud or mistake. In NSW, most actions are subject to an ultimate bar of 30 years, with some exceptions for actions in wrongful death and personal injury.[100]

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92 Ibid s 50D.
93 Women's Legal Services NSW, *Submission 115*; Public Interest Advocacy Centre, *Submission 105*; Law Institute of Victoria, *Submission 22*.
94 Law Institute of Victoria, *Submission 96*.
95 Domestic Violence Legal Service and North Australian Aboriginal Justice Agency, *Submission 120*.
96 ABC, *Submission 93*.
97 Women's Legal Services NSW, *Submission 115*; Public Interest Advocacy Centre, *Submission 105*; N Witzleb, *Submission 29*.
98 See, eg, Law Institute of Victoria, *Submission 96*.
99 Handford, above n 75, [5.10.2150].
100 *Limitation Act 1969* (NSW) s 51(2).

10.93 Defamation law provides that a court may allow an extension of up to three years from the date of publication of the defamatory matter, 'if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date of the publication'.[101]

10.94 There are many circumstances where courts are asked to consider extensions where it is 'just and reasonable' to both parties to a proceeding.[102] Section 23A(3) of the *Limitation Act 1969* (NSW) includes a non-exhaustive list of matters that a court may reconsider when extending a limitation period for actions in personal injury. The matters include:

> (a) the length of and reasons for the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, there is or is likely to be prejudice to the defendant;
>
> (c) the extent, if any, to which the defendant had taken steps to make available to the plaintiff means of ascertaining facts which were or might be relevant to the cause of action of the plaintiff against the defendant;
>
> (d) the duration of any disability of the plaintiff arising on or after the date of the accrual of the cause of action;
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew that the act or omission of the defendant, to which the injury of the plaintiff was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

Young plaintiffs

Recommendation 10–6 Consideration should be given to extending the limitation period where the plaintiff was under 18 years of age when the invasion of privacy occurred.

10.95 This recommendation aims to assist plaintiffs who claim their privacy was invaded when they were under 18 years of age. Minors cannot generally be expected to make the difficult personal and financial decision to commence legal proceedings.[103] Limitation periods should therefore start from the date of their 18th birthday.

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101 Ibid s 56A; *Defamation Act 2005* (SA) 2005 s 56A.

102 *Limitation of Actions Act 1958* (Vic) s 27K(2)(b).

103 This recommendation is informed by the discussion in Ch 2 on the often acute effects of invasions of privacy on children and young people, particularly in the context of privacy invasions which occur online or through the use of mobile phones.

10.96 There are analogous provisions for the application of limitation periods on actions affecting minors in civil liability legislation in several Australian jurisdictions.[104]

First publication rule

> **Recommendation 10–7** Consideration should be given to enacting a 'first publication rule', also known as a 'single publication rule'. This would limit the circumstances in which a person may bring an action in relation to the publication of private information, when that same private information had already been published in the past.

10.97 Once private information has been wrongly published once, the subsequent publication of that information by the same person should not generally give rise to a new cause of action. The enactment of a 'first publication rule', also known as a 'single publication rule', would in effect focus the action on the first publication of the private information. It would also reduce the number of actions brought for serious invasions of privacy.

10.98 This rule may be particularly important for organisations that publish archives of material. If a newspaper invaded someone's privacy in 2014, the person generally should not be able to bring an action for invasion of privacy in 2020, merely because the material remains published in an archive on the newspaper's website.

10.99 Several stakeholders recommended the introduction of a single publication rule, but did not suggest a particular model or formulation of the principle.[105] Were such a rule to be introduced, it would be desirable for it to be consistent across defamation law and the new tort.

10.100 The 'first publication rule' diverges from the longstanding principle in defamation law that each publication of defamatory material gives rise to a separate cause of action, which is subject to its own limitation period (the 'multiple publication rule').[106] This multiple publication rule has been said to raise

> significant problems due to the possibility of 'continuous' or 'perpetual' publication in online archives. While internet material remains online and available to be accessed, whether directly or in archives, the limitation period is effectively open-ended, with a fresh limitation period starting to run each and every time defamatory material is accessed online.[107]

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104 For example, in some Australian jurisdictions, an action for personal injury where an injury or death occasioned to a minor was caused by a parent or guardian is 'discoverable' by the victim when the victim turns 25 years of age: *Limitation of Actions Act 1958* (Vic) s 27I; *Limitation Act 1969* (NSW) s 50E.

105 Media and Communications Committee of the Law Council of Australia, *Submission 124*; ABC, *Submission 93*.

106 See, eg, *Defamation Act 2005* (NSW) 2005 s 4. See, also, *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

107 Jennifer Ireland, 'Defamation 2.0: Facebook and Twitter' (2012) 56 *Media & Arts Law Review* 53, 66.

10.101 The UK legislature adopted a single publication rule in s 8 of the *Defamation Act 2013* (UK), which may provide a useful model for such a provision for the new tort, as well as for defamation law in Australia. The UK Act provides for a 'single publication rule' to prevent an action being brought in relation to republication of the same material by the same publisher after one year from the date of first publication. The cause of action is therefore treated for limitation purposes as accruing from the date of first publication. The limitation period may be set aside under the discretion allowed to the court.

10.102 The provision does not apply where the subsequent publication is 'materially different' from the first publication.[108] A court may consider, among other things, 'the level of prominence that a statement is given' and 'the extent of the subsequent publication', when determining whether a publication is materially different from the first publication.[109] The Explanatory Notes offer an example:

> where a story has first appeared relatively obscurely in a section of a website where several clicks need to be gone through to access it, but has subsequently been promoted to a position where it can be directly accessed from the home page of the site, thereby increasing considerably the number of hits it receives.[110]

10.103 If a first publication rule were enacted in Australia, care should be taken in its application to minors. If the privacy of a minor is invaded, the limitation period should start when the minor turns 18, not when the material is first published.

108 *Defamation Act 2013* (UK) s 8(4).
109 Ibid s 8(5)(a)–(b).
110 Explanatory Notes, Defamation Bill 2013 UK s 8.