11. Defences and Exemptions

Contents

Summary

11.1 The ALRC recommends a number of defences that would limit a plaintiff's right to succeed under the new tort. The defences reflect the need to protect, and in some cases privilege, important countervailing interests above a plaintiff's expectation of privacy. Defendants will bear the onus of proving that their conduct is subject to a defence or exemption. The recommended defences are:

- lawful authority to protect defendants from liability under the new privacy tort where their conduct was required or authorised by law;
- conduct incidental to the exercise of a lawful right of defence of persons or property, where that conduct was proportionate, necessary and reasonable, and where the defendant reasonably believed that the conduct was necessary to protect persons or property;

- necessity where a defendant acts in a reasonable belief that they were preventing an imminent and greater harm; and
- consent including express and implied consent.

11.2 The ALRC also recommends a number of defences which are the same as, or analogous to, defamation defences: absolute privilege; publication of public documents; and fair and accurate reporting of public proceedings.

11.3 This chapter discusses several matters that will not give rise to a defence because defences would be superfluous in view of the elements of the tort or actionability. Because the balancing test for actionability already protects public interest, a defence of public interest is unnecessary. There is also no need for a defence that the material was already in the public domain, because this issue will be considered when deciding at the outset whether the plaintiff has a reasonable expectation of privacy at the relevant time.

11.4 Contributory negligence will not be a defence to an intentional or reckless invasion of privacy.

11.5 The ALRC considers that a number of defences to defamation are inappropriate for an action for intentional or reckless invasion of privacy. These include the defences of qualified privilege, truth, innocent dissemination and comment.

11.6 This chapter includes a recommendation for a safe harbour scheme for internet intermediaries to exempt internet hosts and platform providers from liability provided they meet certain conditions.

Lawful authority

Recommendation 11–1 The Act should provide for a defence that the defendant's conduct was required or authorised by law.

11.7 The defence of lawful authority protects a defendant from liability for serious invasions of privacy where the conduct was required or authorised by law.[1] This defence will be especially important for government authorities that are required to maintain law, order, safety and governance in a manner consistent with their statutory powers. The exercise of their responsibilities will often, necessarily, encroach on private rights.

1 A number of stakeholders supported this defence: N Witzleb, *Submission 116*; T Butler, *Submission 114*; Office of the Victorian Privacy Commissioner, *Submission 108*; Telstra, *Submission 107*; Public Interest Advocacy Centre, *Submission 105*; Australian Sex Party, *Submission 92*; S Higgins, *Submission 82*; Guardian News and Media Limited and Guardian Australia, *Submission 80*; SBS, *Submission 59*; NSW Young Lawyers, *Submission 58*; Women's Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 48*; ABC, *Submission 46*; Australian Bureau of Statistics, *Submission 32*; B Arnold, *Submission 28*.

11.8 Statutory bodies whose roles and responsibilities are prescribed by state, territory and federal legislation, include government agencies and departments, security and intelligence organisations and law enforcement agencies. This defence is necessary to protect organisations from civil liability for performing legitimate activities pursuant to statutory authority, such as law enforcement agencies intercepting telephone conversations under warrant.

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

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

11.10 The defence of statutory authority to intentional torts provides that public bodies and officials do not have a licence to commit acts, which would otherwise be unlawful or tortious—unless authorised by statute.[3] This defence may protect individuals and agencies from civil suits where a defendant's conduct was performed under statutory authority to prevent and detect crime; in exercise of powers of arrest; and in the provision of public utilities and services.[4]

11.11 Areas of the criminal law also provide defences for lawful authority. For example, s 10.5 of the *Commonwealth Criminal Code 1995* provides that a person 'is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under law'.[5]

11.12 Previous law reform reports recommended a defence of lawful authority.[6] The New South Wales Law Reform Commission (NSWLRC) noted that the defence of statutory authority is necessary to enable agencies, such as the Australian Federal Police (AFP), to carry out their functions in a manner consistent with the protection of public interests such as security and public order.[7] Activities that may otherwise amount to an invasion of privacy have been shown to be very effective in the apprehension of offenders.[8]

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2 *Coco v R* (1994) 179 CLR 427, [8]–[9] (Mason CJ, Brennan, Toohey, Gaudron and McHugh JJ).
3 Rosalie Balkin and Jim Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) [6.49].
4 Ibid.
5 The Criminal Code is set out as the schedule to the *Criminal Code Act 1995* (Cth).
6 Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) [7.194]; NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009); Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008).
7 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) 43.
8 For example, closed-circuit television (CCTV) and mobile phone records may be valuable sources of evidence in criminal investigations: *The Queen v Bayley* [2013] VSC 313 (19 June 2013).

11.13 The AFP provided examples of statutory obligations authorising the procurement of an individual's private information.[9] For example, the *Australian Federal Police Act 1979* (Cth) requires the AFP to safeguard the interests of the Commonwealth, prevent crime and protect persons from injury, death and property damage. The AFP stated that

> undertaking these activities will inevitably involve interfering with an individual's privacy on occasions. Where this does occur, every effort is made to respect an individual's privacy by ensuring the information that is obtained is properly protected and dealt with whilst in the possession of the AFP. Indeed, the various Acts contain provisions which set out how the information can be used by law enforcement agencies and how it must be protected.[10]

11.14 The AFP submitted that its activities are already subject to a range of existing internal and independent 'accountability frameworks'.[11] However, the ALRC considers it is appropriate for the statutory cause of action to provide civil redress for individuals whose privacy has been invaded, in the event that an agency acts outside any lawful authority.[12]

11.15 The AFP raised the concern that any unmeritorious litigation could divert resources away from important law enforcement and security operations.[13] However, the ALRC considers that the thresholds built into the statutory cause of action and the defence of lawful authority will prevent unmeritorious claims proceeding to trial.

11.16 Similarly, the AFP was concerned that the process of having to adduce evidence of intelligence-gathering methods may disclose the lawful, covert practices of law enforcement and intelligence organisations and may reveal the identity of individuals under surveillance or investigation.

11.17 The ALRC considers, however, that there are strong protections in the court system to mitigate this risk. These protections include closed court proceedings and other protective measures provided by federal, state and territory legislation.[14]

Required by law

11.18 In the Discussion Paper, the ALRC proposed 'a defence of lawful authority'.[15] Several stakeholders submitted that any such defence should be extended to a defence

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9 Australian Federal Police, *Submission 67*.

10 Ibid.

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

12 Or a person for whose conduct it is vicariously liable: Australian Federal Police Act 1979 (Cth) s 64B; *Law Reform (Vicarious Liability) Act 1983* (NSW) Pt 4. See, further, Balkin and Davis, above n 3, 772.

13 Australian Federal Police, *Submission 67*.

14 See, eg, *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

15 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Discussion Paper 80 (2014) Proposal 10–1.

for actions 'required by law',[16] in order to capture the activities of statutory agencies and their officers who are legally mandated to undertake certain activities. For example, the National Archives argued that including 'required by law' would broaden the defence to include the use and release of records pursuant to the *Archives Act 1983* (Cth).

11.19 The term 'authority' includes circumstances where someone is empowered or has the discretion to pursue certain lawful conduct.[17] The term 'requires' indicates an imperative to take some specific action, without the exercise of discretion, and is narrower. Arguably, conduct which is 'required by law' will also fall within the term 'authorised by law'. However it is important to ensure that government bodies and other entities and individuals are not sued for carrying out activities they are legally obliged to undertake. Therefore the ALRC recommends that the defence should include the phrase 'required by law'.

Authorised by law

11.20 The term 'lawful' is intended to give effect to federal, state and territory legislative and non-legislative instruments. The defence should include authority given under: Commonwealth, state and territory acts and delegated legislation; an order of a court or tribunal; and documents that are given the force of law by an act, such as industrial awards.[18]

11.21 Under the defence, any act or course of conduct committed under statutory authority will be protected from liability. That authority, as canvassed by the High Court in *Coco v R*, must be 'express'.[19]

11.22 'Lawful' should also extend to documents which have the 'force of the law'. A document may have the 'force of law' if it is an offence to breach its provisions, or if it is possible for a penalty lawfully to be imposed if its provisions are breached.[20]

11.23 Dr Normann Witzleb argued that the defence of lawful authority is unnecessary: where an authorised person exercises their statutory authority, they are necessarily authorised to commit that action.[21] However, the ALRC considers a clear defence will provide certainty to parties.

11.24 The AFP also suggested that law enforcement agencies should have a total exemption from liability, because liability may inhibit the legitimate activities of law enforcement and intelligences agencies, causing agencies to change established and efficient modes of operation.[22] In the digital era, there is increasing community concern

16 Office of the Victorian Privacy Commissioner, *Submission 108*; National Archives, *Submission 100*; Australian Bankers' Association, *Submission 84*.
17 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) [16.72].
18 Ibid [13.44].
19 *Coco v R* (1994) 179 CLR 427.
20 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) [16.22].
21 N Witzleb, *Submission 116*; N Witzleb, *Submission 29*.
22 Australian Federal Police, *Submission 67*.

and debate over the extent of surveillance and data collection carried out by public agencies. The ALRC considers that it is not appropriate that public agencies should be exempt or immune from liability for serious invasions of privacy. However, a defence for conduct required or authorised by law will give appropriate protection.[23]

11.25 The Human Rights Committee of the Law Society of NSW was concerned that agencies could rely on the defence of lawful authority for the gathering of metadata. The Committee noted that the defence would mean that the new cause of action would not protect individuals from the collection of metadata or surveillance by security or other government agencies authorised by legislation—'which would appear to be the majority of such data collection and surveillance'.[24] Its concern was that legislation authorising the collection of metadata breaches Australia's human rights obligations. Some of the legislation the Committee refered to is the subject of other current inquiries.[25]

11.26 Some stakeholders argued that a qualification that the conduct was just, reasonable[26] and/or necessary[27] should attach to the defence to curb excesses of power. The UNSW Cyberspace Law and Policy Community argued that the defence is too 'broad', suggesting it should be qualified by 'elements of transparency, necessity, justification, effectiveness and proportionality'.[28] However, the ALRC considers that the only relevant question should be whether or not the conduct was authorised by law. In some cases, the legislation authorising the conduct will already build in qualifying matters such as that the conduct was reasonable or necessary, for it to be considered lawful.

11.27 It is also implicit in the defence that the conduct must have been for the purposes of the lawful authority and not for an ulterior purpose. This is illustrated by *Donnelly v Amalgamated Television Services Pty Ltd,* where Hodgson CJ in Eq said:

> If police, in exercising powers under a search warrant or of arrest, were to enter into private property and thereby obtain documents containing valuable confidential information... I believe they could in a proper case be restrained, at the suit of the owner of the documents, from later using that information to their own advantage, or to the disadvantage of the owner, or passing the information on to other persons for them to use in that way.[29]

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23 N Witzleb, *Submission 116*; T Butler, *Submission 114*; Office of the Victorian Privacy Commissioner, *Submission 108*; Telstra, *Submission 107*; Public Interest Advocacy Centre, *Submission 105*; Australian Sex Party, *Submission 92*; S Higgins, *Submission 82*; Guardian News and Media Limited and Guardian Australia, *Submission 80*; SBS, *Submission 59*; NSW Young Lawyers, *Submission 58*; Women's Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 48*; ABC, *Submission 46*; Australian Bureau of Statistics, *Submission 32*; B Arnold, *Submission 28*.

24 Law Society of NSW, *Submission 122*.

25 See Ch 1.

26 Australian Bankers' Association, *Submission 84*.

27 N Witzleb, *Submission 29*.

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

29 *Donnelly v Amalgamated Television Services Pty Ltd* (1998) 45 NSWLR 570, (Hodgson CJ in Eq). This was quoted by Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 230 [53].

11.28 The Business Law Committee of the Law Society of NSW referred to the concern of insolvency practitioners who are often met with objections on 'privacy' grounds when carrying out their investigations.[30] Investigations or requests for, or disclosures of, information would generally be authorised by contractual rights underpinning the process or the defence of lawful authority. The latter would operate where legislation provided for the relevant process, such as the *Corporations Act 2001* (Cth), in the case of corporate insolvency and administration, or the *Bankruptcy Act 1966* (Cth) for personal insolvency, or pursuant to an order of a court—for example, for the appointment of a trustee, receiver or liquidator.

Consequential amendments to existing legislation

11.29 The enabling acts of all statutory bodies should not need to be amended to protect their actions from liability when done as required or authorised by those acts. In some circumstances, however, it may be appropriate to amend specific legislation so that existing exemptions from civil liability extend to the new tort.

11.30 For example, s 57(1) of the *Archives Act 1983* (Cth) provides:

> Where, in the ordinary course of the administration of this Act, access is given to a record as being a record required by this Part to be made available for public access:
>
> (a) no action for defamation, breach of confidence or infringement of copyright lies, by reason of the authorizing or giving of the access, against the Commonwealth or any person concerned in the authorizing or giving of the access.

11.31 Although it may be unnecessary, given the defence of lawful authority, this provision could be amended by adding a reference to actions for serious invasion of privacy. While the defence that the conduct was authorised or required by law should be sufficient protection to authorised activities, consequential amendments to s 57 of the *Archives Act* may provide greater certainty and consistency.

Incidental to the exercise of a lawful right of defence of persons or property

Recommendation 11–2 The Act should provide a defence for conduct incidental to the exercise of a lawful right of defence of persons or property, where that conduct was proportionate, necessary and reasonable.

11.32 The defence will arise in several circumstances: self-defence; defence of another person; and defence of property.[31]

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30 Law Society of NSW, *Submission 122*.

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

11.33 The requirement that the conduct be proportionate, necessary and reasonable is an important qualification. In tort law, the question of whether a defendant's conduct was proportionate and reasonable is a question of fact.[32] The qualification that conduct be 'reasonable, proportionate and necessary' will provide a court with the opportunity to balance competing interests.[33] This qualification to the defence reflects concepts of proportionality and reasonableness found generally in tort law and in human rights jurisprudence.[34] As noted in Chapters 2 and 9, privacy is an interest which must be viewed in the context of competing interests and assessments of proportionality. The balancing process in this defence is consistent with other elements of the cause of action, specifically the reasonable expectation of privacy and the public interest test.[35]

11.34 The recommended defence to an invasion of privacy should arise only where the defendant has reasonable grounds for believing that the conduct was necessary, which is analogous to the position at common law in tort.[36] The ALRC considers that the objectivity of this condition is desirable in view of the wide range of conduct that may be involved in an invasion of privacy.

11.35 A defendant acting in an emergency would also have the defence of necessity in some of the circumstances that would come within this defence.

11.36 The defence will also protect individuals from liability where their conduct protects a third party from harm. The conduct is more likely to be considered necessary and reasonable where that third party is under the individual's care or responsibility, such as a member of their family, or where that third party is incapable of exercising self-defence, but the defence would not be limited to such circumstances. At common law, the defence extends to protection of an individual's household, employer, family members and even, in some circumstances, strangers.[37]

11.37 The defence would also protect individuals from liability where their conduct was in defence of property, although different weight is given to the defence of property compared with the defence of persons.[38] This is analogous to the defence for intentional torts where a defendant's conduct in response to a threat or harm to their property is reasonable.[39]

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

33 Law Institute of Victoria, *Submission 22*.

34 The UN Human Rights Committee has stated that proportionality is a fundamental test which is necessary to justify any restriction on human rights under the ICCPR: UN Human Rights Committee, General Comment No 29, UN Doc CCPR/C/21/Rev1/Add11 (2001).

35 The ABC submitted that the qualification of proportionality is 'appropriate' and consistent with media guidelines including their Editorial Policies and Code of Practice: ABC, *Submission 46*.

36 *Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975. In that case, it was held that a reasonable, though mistaken belief, in a threat of danger is sufficient to ground self-defence. Cf *Civil Liability Act 2002* (NSW) s 52.

37 Balkin and Davis, above n 3, [6.17]. The defence of another person in criminal law has been codified in some Australian jurisdictions: *Criminal Code Act 1995* (Cth) cl 10.4; *Civil Liability Act 2002* (NSW) s 52.

38 Balkin and Davis, above n 3, [6.18].

39 This defence in criminal law is codified in some Australian jurisdictions, for example: *Criminal Code Act 1899* (Qld) s 274. In tort law, civil liability legislation also applies to defences of property: see, eg, the *Civil Liability Act 2002* (NSW) s 52.

11.38 The defence that conduct was incidental to the defence of persons or property operates in the statutory causes of action for 'violation of privacy' in a number of Canadian provinces. The precise provisions vary:

- British Columbia,[40] Saskatchewan, Newfoundland and Labrador include a defence where conduct was 'incidental to the exercise of a lawful right of defence of person or property';[41] while
- Manitoba includes a defence where

> the act, conduct or publication was reasonable, necessary for, and incidental to, the exercise or protection of a lawful right of defence of person, property, or other interest of the defendant or any other person by whom the defendant was instructed or for whose benefit the defendant committed the act, conduct or publication constituting the violation.[42]

11.39 The ALRC considers that a specific defence is unnecessary to protect investigations into potential fraud or misrepresentation. The Insurance Council of Australia proposed such a defence.[43] It is in the interests of all policy holders that insurers have safeguards against fraudulent claims. Where they have reasonable grounds for suspecting fraudulent conduct, they or others on their behalf may often carry out investigations that could be viewed as invasions of privacy. The defence that the conduct was required or authorised by law is wide enough to cover these circumstances. For example, such conduct may be authorised by the statutory scheme under which the risk is insured, as in s 116 of the *Motor Vehicle Compensation Act 1999* (NSW), which requires a licensed insurer to 'take all such steps as may be reasonable to deter and prevent the making of fraudulent claims'. Alternatively, such conduct may already be expressly or impliedly authorised by the contract between the insurer and the insured.

11.40 In addition, the ALRC considers that individuals or organisations that engage in such conduct may be protected from liability under the public interest balancing test recommended in Chapter 9. In that chapter, the ALRC recommends that 'the prevention and detection of crime and fraud' be included in a list of public interest factors to be considered by a court.

Necessity

Recommendation 11–3 The Act should provide for a defence of necessity.

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40 A Canadian court dismissed this defence in *Watts v Klaemnt* (2007) BCSC 662, [31]. In that case, a judge held that interception, recording and publication of telephone calls went well beyond what could be regarded as incidental to the exercise of a lawful right of defence of persons or property.

41 *Privacy Act*, RSBC 1996, c 373 (British Columbia) s 2(2)(b); *Privacy Act*, RSS 1978, c P-24 (Saskatchewan) s 4(1)(b); *Privacy Act*, RSNL 1990, c P-22 (Newfoundland and Labrador) s 5(1)(b).

42 *Privacy Act*, CCSM 1996, c P125 (Manitoba) s 5(c).

43 Insurance Council of Australia, *Submission 15*.

11.41 The ALRC recommends a defence of necessity be available under the new tort to protect individuals and organisations from liability where they had a reasonable belief that their conduct in invading the plaintiff's privacy was necessary to prevent an imminent and greater harm,[44] and where that conduct was a reasonable response to the situation. This defence will usually arise where the conduct was a response to an imminent danger or emergency, but may also be based on a semi-permanent state of affairs, where no other action could reasonably be taken to prevent the harm. This defence should be in line with the common law defence of necessity.

11.42 The defence of necessity operates in existing areas of Australian tort and criminal law[45] and several stakeholders supported a defence of necessity.[46]

11.43 Situations of public emergency, where emergency service professionals need to access the private information of at-risk or vulnerable persons, may give rise to this defence.[47] This necessity may arise, for example, where an individual has indicated an intention to self-harm and mental health professionals or emergency services obtain or disclose private information. It may also arise where a doctor is called to a school and needs to reveal private information about a child's vaccination record or a contagious disease or condition in dealing with an urgent situation.

11.44 The Australian Subscription Television and Radio Association (ASTRA) argued that the defence should be formulated in the following way: that the conduct was 'considered by the person acting to be reasonably necessary to eliminate or reduce a possible health, safety or security risk to themselves or another person'.[48]

11.45 Guardian News and Media Limited and Guardian Australia noted that, while a defence of necessity would be unlikely to apply to media organisations, there may be some situations where such a defence may be required:

> There are nevertheless some times when the appropriate public or private body does not disclose information which it may be in the public interest to disclose in aid of public safety and the media discloses.[49]

11.46 Several stakeholders opposed the inclusion of a defence of necessity,[50] or were concerned at what conduct it might excuse. Australian Pork submitted that the inclusion of such a defence would mean 'that any person infringing the rights may do so on the basis of a value judgement rather than a legal or public good basis'.[51]

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44 Balkin and Davis, above n 3, 150.

45 *R v Loughnan* [1981] VR 443 [448].

46 T Butler, *Submission 114*; ABC, *Submission 93*; J Chard, *Submission 88*; S Higgins, *Submission 82*; Guardian News and Media Limited and Guardian Australia, *Submission 80*; News Limited and Special Broadcasting Service, Submission No 76 to DPM&C Issues Paper, 2011.

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

48 ASTRA, *Submission 99*.

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

50 Office of the Victorian Privacy Commissioner, *Submission 108*; Public Interest Advocacy Centre, *Submission 105*; Australian Pork Ltd, *Submission 83*.

51 Australian Pork Ltd, *Submission 83*.

11.47 However, existing law on the defence of necessity indicates that the belief of the defendant as to the necessity of their actions must be reasonable.[52] It has been suggested that the same latitude should be given to someone acting out of necessity as is given to someone acting in self-defence: that is, it will not matter if their belief in the necessity is mistaken, as long as it is reasonable.[53]

11.48 In the new tort, as with other intentional torts, the defence of necessity may apply in both public and private settings. Public necessity may involve 'invading the rights of private individuals in order to protect the community at large',[54] such as taking action to prevent a fire spreading.

11.49 A defence of private necessity would operate when the defendant commits a tort towards the plaintiff in order to protect persons or property (either their own, or a third party's) against the threat of imminent harm.[55] It does not matter if the altruist fails to achieve the objective, as long as the attempt was reasonable:

> Everyone who acts reasonably in a real emergency for the purpose of saving the goods of another from damage or destruction, whether he derives or is likely to derive any pecuniary advantage from the action or not, or is fulfilling any legal obligation.[56]

11.50 In the context of medical emergencies, courts have explained the proper function of the defence of necessity as justifying the administering of emergency procedures where a patient is not capable of providing consent.[57]

11.51 Considerations relevant to the defence may also be relevant to whether the plaintiff had a reasonable expectation of privacy and in relation to the public interest test, but the ALRC considers that a complete defence of necessity should be available to defendants as in other torts. This will be particularly important for emergency services, law enforcement officers and health professionals.[58]

Consent

Recommendation 11–4	The Act should provide for a defence of consent.

52 Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 2012) 63.
53 Ibid. This is in reference to *Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975.
54 Balkin and Davis, above n 3, [6.22].
55 Ibid. J Goudkamp argues that there is only public necessity and that private necessity is not a tort defence. He treats defence of others' property as a public justification: James Goudkamp, *Tort Law Defences* (Hart Publishing, 2013) 116.
56 *Proudman v Allen* [1954] SASR 336 [341] (Hannan AJ).
57 *Re F* [1990] 2 AC 1 [66].
58 The defence of necessity is not available where the defendant's negligence caused the situation: *Simon v Condran* [2013] NSWCA 338.

11.52 A defence of consent will provide protection and certainty to defendants where a plaintiff has provided consent to a particular act or conduct which would otherwise amount to a serious invasion of privacy.[59] Consent may be express or implied. To be valid as a defence to an intentional tort, it is not necessary that consent be 'fully informed', but it must be actual consent by a person capable of giving consent and must be freely given.[60]

11.53 In many instances, an individual will have manifested clear consent to conduct that may otherwise amount to a serious invasion of privacy. Like the defence of voluntary assumption of risk to a negligence claim, it reflects 'good sense and justice [that] one who has … assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong'.[61]

11.54 Consent is a defence to many intentional torts, including battery, trespass to land and defamation.[62] It is a defence to the new action of misuse of personal information in the United Kingdom (UK).[63] In actions for breach of confidence, consent to the release of an obligation of confidence may be either absolute or limited to certain recipients.[64]

11.55 The Victorian Law Reform Commission (VLRC) recommended that consent be a defence.[65] The NSWLRC, rather than including consent with other defences, recommended that express or implied consent would negate the cause of action:

> The function of clause [74(4) of the Draft Bill] is to deny plaintiffs an action that they may otherwise have mounted. It does so by making the issue of consent an essential element of the statutory cause of action, with the result that if there is consent, there is no invasion of privacy. While this puts the onus on the plaintiff to prove a negative (namely the absence of the plaintiff's consent), forcing the plaintiff to make his or her case on consent at the outset allows the court to test whether the action has merit before it proceeds further.[66]

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59 Several stakeholders support a defence of consent: Google, *Submission 54*; Australian Communications and Media Authority, *Submission 52*; ABC, *Submission 46*; Interactive Games and Entertainment Association, *Submission 40*; Australian Privacy Foundation, *Submission 39*; D Butler, *Submission 10*; I Turnbull, *Submission 5*.

60 Contractual consent and similar terms will be subject to contract law and consumer protection laws.

61 *Smith v Baker* 325 1981 AC.

62 Barker et al, above n 52, 36. There is some debate in relation to battery as to whether absence of consent is an element of the cause of action that must be established by the plaintiff, or whether consent is a defence, that must be pleaded and proved by the defendant. Barker et al, take the view that it is as a defence.

63 M Warby et al, *Tugendhat and Christie: The Law of Privacy and The Media* (OUP Oxford, 2011) [12.09].

64 Tanya Aplin et al, *Gurry on Breach of Confidence* (Oxford University Press, 2nd ed, 2012) [14.16].

65 Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) recs 27(a) and 28(a).

66 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) [5.51].

11.56 The formulation of consent as a defence is consistent with the approach in four Canadian provinces which have enacted a statutory cause of action and included consent as either a defence[67] or an exception.[68]

11.57 In the Discussion Paper, the ALRC proposed that a plaintiff's consent be included as a factor for a court's consideration of whether the plaintiff had a reasonable expectation of privacy.[69]

11.58 Although the ALRC agrees that the plaintiff's consent to the conduct is relevant to whether or not they had a reasonable expectation of privacy in the circumstances, the ALRC now considers that it is preferable for a plaintiff's *actual* consent to specific conduct to be treated as a complete defence.[70] This will provide greater certainty to defendants who may rely on having obtained a person's consent prior to engaging in the specified conduct.

11.59 Many industries and professional groups operate on the basis and necessity of participant consent, either as part of contracts or for voluntary services or licences, including banking and financial services; medical and allied health practitioners; and social media providers, including social networking and dating organisations. The National E-Health Transition Authority (NeHTA) explained that consent is central to the viability of online medical records.[71] Without a complete defence of consent, such bodies would be exposed to uncertain liability.

11.60 The issue of whether consent has been given can be complex. For instance, consent in some circumstances may be withdrawn, the scope of consent may be unclear, or consent may have been given to other behaviour of the defendant or to third parties for similar conduct, such as publishing similar or related information. The fact that a person has previously consented to *other* conduct of the defendant (not within the scope of the consent given), or of third parties, may be considered as part of the general circumstances that are relevant when determining whether the plaintiff had a reasonable expectation of privacy. However, the ALRC considers that if a defendant can prove, and the onus will be on the defendant to do so, that the plaintiff actually consented to the conduct that is the subject of the complaint, this should be a complete defence.

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67 *Privacy Act*, CCSM 1996, c P125 (Manitoba) s 5(a); *Privacy Act*, RSS 1978, c P-24 (Saskatchewan) s 4(a); *Privacy Act*, RSNL 1990, c P-22 (Newfoundland and Labrador) s 5(a).

68 *Privacy Act*, RSBC 1996, c 373 (British Columbia) s 2(a).

69 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Discussion Paper 80 (2014) Proposal 6–2(h). This proposal stated that 'the new Act should provide that, in determining whether a person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances, the court may consider whether the plaintiff consented to the conduct of the defendant'.

70 The ABC submitted that, while it is appropriate to look at the issue of consent in considering actionability, it is also appropriate for consent to be included as a complete defence where it is relevant to the circumstances of a particular case: ABC, *Submission 46*.

71 National E-Health Transition Authority, *Submission 8*.

Express and implied consent

11.61 Whether a plaintiff provided actual consent will be a matter of fact, which will depend on the construction of words and conduct. There are a number of conditions to be satisfied for the defence:

- Consent must be given by the person whose privacy has been invaded, or by an individual who has legal capacity to consent on their behalf.[72]
- Consent may be given expressly or inferred from conduct[73] and the absence of written consent a defendant can rely on oral evidence,[74] or conduct[75]or the circumstances.[76]
- Consent must be freely given: consent obtained by duress will not be deemed to be free consent.
- Consent must be to the particular disclosure or act complained of.[77] Consent will be ineffective when the conduct performed by a defendant is of a materially different nature to the conduct to which the plaintiff consented.[78] The plaintiff's consent must relate to the extent of actual publication.[79]

11.62 To be effective, consent need not be fully informed, in the sense that the plaintiff was told of all the risks and implications of the conduct before giving consent. It is sufficient if the plaintiff is advised and consents in broad terms to the conduct.[80]

11.63 In relation to the publication of private information, English courts have shown caution in implying consent from the fact that the plaintiff engaged in earlier publicity.[81] Passive non-objection is generally not sufficient to demonstrate implied consent in actions for breach of confidence in the UK.[82]

11.64 Whether there was implied, actual consent to an actual publication is a distinct question from the issue of whether the plaintiff had a reasonable expectation of privacy. The need to distinguish these issues may arise where the plaintiff had previously released or allowed similar information to enter the public domain. Courts

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72 Warby et al, above n 63, [12.10]; Aplin et al, above n 64, [14.07].
73 *Giller v Procopets* (2008) 24 VR 1.
74 Aplin et al, above n 64, [12.06].
75 Implied consent will be found where there has been positive action by a plaintiff which involves disclosure of their private information to another party: *Prout v British Gas plc and Another* [1992] FSR 478, (Ford J). The court in this case held that an application for a patent may be regarded as an implied release of the information into the public domain. This case was referred to in Aplin et al, above n 64, [14.15].
76 *Halliday v Neville* (1984) 155 CLR 1, [6] (Gibbs CJ, Mason, Wilson and Deane JJ).
77 Balkin and Davis, above n 3, [6.5].
78 Ibid.
79 *Campbell v MGN Ltd* [2004] 2 AC 457, [73]–[75] (Lord Hoffman). Lord Hoffman was referring to *Peck v United Kingdom* [2003] ECHR 44 (28 January 2003). See also, Warby et al, above n 63, [12.15].
80 *Rogers v Whitaker* (1992) 175 CLR 479, [490] (Brennan, Dawson, Toohey and McHugh JJ). Failure to fully inform a person of the risks involved does not vitiate consent but may constitute breach of any legal duty of care.
81 Warby et al, above n 63, [12.09].
82 Ibid [12.12].

in UK tort actions for misuse of private information have stipulated that if an individual courts public attention, 'they have less ground to object to the intrusion which follows'.[83] However, there is increasing recognition that a more nuanced approach is appropriate than was arguably shown in older cases, and that the appropriate time to look at prior publicity or conduct is when determining whether the plaintiff had a reasonable expectation of privacy at the relevant time.[84]

11.65 The digital era raises particular concerns in respect of consent to the publication of information. Commentators have questioned whether consent in online interactions and communications can be considered free and informed.[85] Online contracts and terms and conditions for online services such as internet banking and social media sites are often long, complex and are prone to frequent revision. Terms and conditions are often 'bundled'[86] without clear explanation of their meaning and consequences.[87] A situation may arise where a plaintiff consented, by agreeing to broad terms and conditions, to general conduct: the question of whether the specific conduct comes within the consent given will be a matter for the courts to construe.

11.66 Other stakeholders highlighted the difficulty for people to understand the nature, extent and legal effect of consent in intimate partner situations, both in ongoing relationships and in circumstances where the relationship breaks down.[88]

11.67 The ALRC considers that Australian courts are experienced in determining the scope and validity of a plaintiff's consent, whether express or implied, to particular conduct in a range of factual circumstances, such as online interactions and intimate partner situations.

Onus of proof

11.68 By classifying consent as a defence, the ALRC intends that a defendant will bear the onus of proving that a plaintiff consented to the defendant's conduct.

11.69 The question of who bears the onus of proving that a plaintiff consented to physical conduct for the tort of battery is contentious in English and Australian civil law. The plurality of opinions was highlighted in *Marion's case* by McHugh J:

> In England, the onus is on the plaintiff to prove lack of consent. That view has the support of some academic writers in Australia but it is opposed by other academic writers in Australia. It is opposed by Canadian authority. It is also opposed by

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83 A similar principle has been applied in breach of confidence cases: the court might hold that the information no longer has the quality of confidence if the plaintiff had previously spoken publicly about related matters: *Theakston v MGN Ltd* [2002] EMLR 398; *Lennon v News Group Newspapers Ltd* [1978] FSR 573; *Woodward v Hutchins* [1977] 1 WLR 760.

84 Warby et al, above n 63, 540. See, also, Ch 6.

85 See, eg, Daniel J Solove, 'Privacy Self-Management and the Consent Dilemma' (2013) 126 *Harvard Law Review* 1880.

86 Law Institute of Victoria, *Submission 22*.

87 Australian Privacy Foundation, *Submission 39*.

88 Women's Legal Centre (ACT & Region) Inc, *Submission 19*. This submission highlights the increasing incidence of 'revenge pornography' where an individual discloses a compromising, sexually explicit photograph of a former partner which was obtained consensually during their relationship. See, also, *Giller v Procopets* (2008) 24 VR 1.

> Australian authority. Notwithstanding the English view, I think that the onus is on the defendant to prove consent. Consent is a claim of 'leave and licence'. Such a claim must be pleaded and proved by the defendant in an action for trespass to land. It must be pleaded in a defamation action when the defendant claims that the plaintiff consented to the publication. The *Common Law Procedure Act 1852* also required any 'defence' of leave and licence to be pleaded and proved. However, those who contend that the plaintiff must negative consent in an action for trespass to the person deny that consent is a matter of leave and licence. They contend that lack of consent is an essential element of the action for trespass to a person. I do not accept that this is so. The essential element of the tort is an intentional or reckless, direct act of the defendant which makes or has the effect of causing contact with the body of the plaintiff. Consent may make the act lawful, but, if there is no evidence on the issue, the tort is made out. The contrary view is inconsistent with a person's right of bodily integrity. Other persons do not have the right to interfere with an individual's body unless he or she proves lack of consent to the interference.[89]

11.70 The ALRC considers that the defendant will be best placed to provide evidence and prove that the plaintiff consented to the conduct invading privacy. Consent is generally considered to be a defence to an invasion of privacy in the UK.[90]

11.71 Despite not bearing the legal onus, the plaintiff may bear a provisional or tactical burden in relation to consent.[91] However, this does not create a legal burden to disprove facts.[92] In other words, where consent is a defence, a plaintiff has a non-legal, tactical obligation to show they did not provide consent.

11.72 While the ALRC recommends that a defendant bear the legal onus of proving that a plaintiff consented to the invasion of their privacy, a plaintiff will clearly have a strategic onus of showing that that their consent did not extend to a defendant's specific conduct, and may need to plead facts in reply.[93]

Revocation and withdrawal of consent

11.73 The legal effect of a revocation or withdrawal of consent may be an important consideration in cases involving disclosure of private information, and particularly so in the digital era where online publications remain active indefinitely.

11.74 As a matter of law, it is clear that just as a person may consent expressly or impliedly to another's conduct, so they may expressly or impliedly revoke that consent,

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89 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218, [5] (McHugh J). (Citations omitted).

90 Warby et al, above n 63. This is despite the position in battery cases: *Freeman v Home Office (No 2)* [1984] QB 524. The English Court of Appeal held that in actions for battery, the burden of providing absence of consent is on the plaintiff as the tort redresses the 'unconsented to intrusion of anotherS' bodily integrity'.

91 This is a 'tactical obligation to lead counter-evidence placed upon a party against whom evidence has been adduced': J D Heydon, LexisNexis, *Cross on Evidence*, Vol 1 (at Service 164) [7005].

92 Ibid [7015].

93 'A plaintiff ought not, in the statement of claim, anticipate the defence and plead so as to meet the anticipated defence. The defence might not take the course reflected in the statement of claim, and useless material might be introduced into the pleadings … The statement of claim is limited to stating whatever material facts and points of law are necessary to show that the plaintiff has a right to relief': Bernard Cairns, *Australian Civil Procedure* (Thomson Reuters (Professional) Australia, 8th ed, 2009) [7.100].

provided reasonable notice is given to the other party.[94] Generally speaking, consent may be withdrawn at any time before the relevant conduct, despite a plaintiff having provided prior express consent.[95] However, it appears that a person cannot withdraw consent and expect the other party to act upon that revocation immediately if it would be unreasonable in the circumstances to expect them to do so.[96]

11.75 To revoke a consent given under contract—for example, for the publication of certain information or to appear on a television program—may of course be a breach of that contract. However, the other party would be entitled to damages, assessed on the usual basis, and should not be disentitled to revoke their consent. It would be difficult for the other party to obtain relief by either the equitable remedy of specific performance of the contract, or an injunction to restrain the (probably implied) promise not to breach it. Most cases would involve the media or other commercial publishers for whom damages would usually be adequate to remedy the harm done by the breach (either expense wasted in reliance on the contract going ahead or loss of the profits expected).[97]

11.76 In the UK, there is limited authority on the circumstances in which consent to the use or disclosure by the media of an individual's private information may be revoked.[98] Copyright law can provide some guidance here. A licence which is provided gratuitously can be revoked with notice at any time in circumstances where no stipulation for its duration has been made.[99]

11.77 In the privacy context, there are some other scenarios where the effect of revocation of consent will not be straightforward. One would be the online disclosure of personal information by a defendant, with the plaintiff's consent, during the course of an intimate relationship, which has subsequently ended and where the plaintiff no longer wants the information to be available to others. Another would be where a person has gratuitously consented to the publication of private facts by a journalist and then wishes to revoke the consent.

11.78 Subject to public interest matters, a revocation may certainly be effective to control future disclosures or publications. It would not be effective to counteract a publication, based on the consent that has already happened, such as in a book, magazine, newspaper or documentary film.

11.79 Another area of uncertainty is where prior consent was given to a publication of information, in the nature of a continuing publication. In a sense, all information available online is continually published: publication occurs every time the information is downloaded from a website.[100] So the question arises as to whether a person can

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94 *Cowell v Rosehill Racecourse Co Ltd* [1937] ALR 273.
95 Balkin and Davis, above n 3, [6.13].
96 This seems the better explanation, in modern times, for cases like *Herd v Weardale Steel Coal and Coke Co Ltd* [1915] AC 67. See also, Barker et al, above n 52, 79.
97 See further JW Carter, *Contract Law in Australia* (Lexis Nexis Butterworths, 6th ed, 2013) ch 40.
98 Warby et al, above n 63, [12.19].
99 Ibid.
100 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

effectively revoke actual consent that was given before or at the time of the posting, ask for the posting to be taken down, and if it is not, successfully assert that the *continuing* publication is a serious invasion of privacy.[101] If the plaintiff's actual consent is the only fact stopping the publication being an invasion of privacy, then it is arguable that the revocation should be effective. However, there are likely to be other considerations. While this issue will no doubt be argued, in Australia or elsewhere, the issue as it applies to privacy law is somewhat hypothetical and uncertain.[102]

11.80 The ALRC suggests that the best way to approach this issue would be to deal with it as part of the question of whether or not the plaintiff has a reasonable expectation of privacy at the time of the action, taking into account the revocation of prior consent, the reasonableness of the revocation and of the request for the posting to be taken down, the reasonableness or otherwise of the defendant's refusal or failure to do so, and the public interest in its continuing publication.[103]

Absolute privilege

Recommendation 11–5 The Act should provide for a defence of absolute privilege.

11.81 The ALRC recommends that the defence of absolute privilege[104] be available as a defence to the new tort to protect defendants from liability when their communications arise in a particular context.[105] Absolute privilege protects individuals who reveal personal information about another person in the course of public forums such as parliament and proceedings in a court or tribunal.[106]

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101 It should be noted that this scenario does not involve information posted by others without the subject's consent, which is another scenario raising the contentious and topical issue of whether there is some legal 'right to be forgotten', discussed in Ch 16.

102 Warby et al, above n 63, 537–538.

103 See Ch 6

104 Several stakeholders supported the availability of this defence under the new privacy tort: N Witzleb, *Submission 116*; T Butler, *Submission 114*; Office of the Victorian Privacy Commissioner, *Submission 108*; Australian Sex Party, *Submission 92*; J Chard, *Submission 88*; Australian Bankers' Association, *Submission 84*; Guardian News and Media Limited and Guardian Australia, *Submission 80*; N Witzleb, *Submission 29*.

105 The ALRC and the VLRC previously recommended a defence of privilege to a statutory cause of action: Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) rec 74–4(c); Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) rec 27(e).. Some stakeholders preferred the availability of a broad privilege defence: Office of the Australian Information Commissioner, *Submission 66*. The NSWLRC recommended the defence of absolute privilege, qualified privilege to protect a duty or interest, qualified privilege to protect the fair reporting of public proceedings and innocent dissemination. Several stakeholders supported the inclusion of this defence: Telstra, *Submission 107*; NSW Young Lawyers, *Submission 58*; ABC, *Submission 46*; Arts Law Centre of Australia, *Submission 43*; Law Institute of Victoria, *Submission 22*; D Butler, *Submission 10*.

106 Legislation provides a non-exhaustive list of occasions which attract absolute privilege, for eg, *Defamation Act 2005* (NSW) 2005 s 27.

11.82 The ALRC considers that this defence should be co-extensive with the defence of absolute privilege to defamation, so that it includes both statutory and common law defences of absolute privilege,[107] and so that the same principles would apply whether an action is brought for defamation or invasion of privacy by publication of private information. The rationale of absolute privilege is equally applicable to both actions.

11.83 For example, under s 27(2) of the *Defamation Act 2005* (NSW), a statement is published on an occasion of absolute privilege if:

> (a) the matter is published in the course of the proceedings of a parliamentary body, including (but not limited to):
>
> (i) the publication of a document by order, or under the authority, of the body, and
>
> (ii) the publication of the debates and proceedings of the body by or under the authority of the body or any law, and
>
> (iii) the publication of matter while giving evidence before the body, and
>
> (iv) the publication of matter while presenting or submitting a document to the body, or
>
> (b) the matter is published in the course of the proceedings of an Australian court or Australian tribunal, including (but not limited to):
>
> (i) the publication of matter in any document filed or lodged with, or otherwise submitted to, the court or tribunal (including any originating process), and
>
> (ii) the publication of matter while giving evidence before the court or tribunal, and
>
> (iii) the publication of matter in any judgment, order or other determination of the court or tribunal, or
>
> (c) the matter is published on an occasion that, if published in another Australian jurisdiction, would be an occasion of absolute privilege in that jurisdiction under a provision of a law of the jurisdiction corresponding to this section, or
>
> (d) the matter is published by a person or body in any circumstances specified in Schedule 1.

11.84 This defence recognises the importance of protecting certain communications or statements from liability in the interests of free speech and transparency. Rigorous debate in such proceedings may reveal personal information. Privilege in this context can be understood as a necessary restriction on privacy interests in a democratic society.

11.85 Wiztleb supported this principle, stating that

> the underlying rationale of all these defences is that a person should in that particular context be able to communicate freely and without fear of incurring civil liability …

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

> The privilege has the purpose of protecting and facilitating frank and fearless communication even if it is damaging to reputations because it is considered in the public interest to do so. This same reasoning can also be applied to the protection of privacy. It is therefore appropriate to create privileges for communications in which this rationale applies.[108]

11.86 In the defamation case, *Mann v O'Neill,* a majority of the High Court of Australia stated that absolute privilege attaches to statements made in the course of parliamentary proceedings for reasons of inherent necessity or, as to judicial proceedings, as an indispensable attribute of the judicial process.[109] This defence facilitates Australia's democratic system by enabling the free and fair exchange of debate in certain circumstances and which may involve the disclosure of an individual's private information.

11.87 The defence is in addition to other forms of privilege such as parliamentary privilege, which attaches to statements made within the confines of a parliamentary chamber to protect members of parliament from liability.[110]

11.88 Defences of privilege operate in Canadian privacy statutes.[111]

Publication of public documents

Recommendation 11–6 The Act should provide for a defence of publication of public documents.

11.89 This defence provides protection from liability for the publication of public documents which are relevant to an open and transparent political and legal system. Access to public documents supports the principle of open justice and accountability in our public institutions. This recommendation is consistent with the ALRC's Terms of Reference for this Inquiry which require consideration of the necessity of balancing privacy with fundamental values, including freedom of expression and open justice.

11.90 The ALRC recommends that this defence should be co-extensive with the defence of publication of public documents in s 28 of the Uniform Defamation Law (UDL) which provides a comprehensive list of the types of documents protected from defamation actions.[112] The use of this list will dispel any concerns about the scope of the defence by clearly defining the range of documents covered by the defence. Section 28 defines 'public document' as

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108 N Witzleb, *Submission 29*.

109 *Mann v O'Neill* (1997) 191 CLR 204, 212 (Brennan CJ, Dawson, Toohey and Gaudron JJ).

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

111 *Privacy Act*, RSBC 1996, c 373 (British Columbia) s 2(b).

112 The application of this provision in the new privacy tort was supported by the Office of the Victorian Privacy Commissioner, *Submission 108*.

(a) any report or paper published by a parliamentary body, or a record of votes, debates or other proceedings relating to a parliamentary body published by or under the authority of the body or any law, or

(b) any judgment, order or other determination of a court or arbitral tribunal of any country in civil proceedings and including:

(i) any record of the court or tribunal relating to the judgment, order or determination or to its enforcement or satisfaction, and

(ii) any report of the court or tribunal about its judgment, order or determination and the reasons for its judgment, order or determination, or

(c) any report or other document that under the law of any country:

(i) is authorised to be published, or

(ii) is required to be presented or submitted to, tabled in, or laid before, a parliamentary body, or

(d) any document issued by the government (including a local government) of a country, or by an officer, employee or agency of the government, for the information of the public, or

(e) any record or other document open to inspection by the public that is kept:

(i) by an Australian jurisdiction, or

(ii) by a statutory authority of an Australian jurisdiction, or

(iii) by an Australian court, or

(iv) under legislation of an Australian jurisdiction, or

(f) any other document issued, kept or published by a person, body or organisation of another Australian jurisdiction that is treated in that jurisdiction as a public document under a provision of a law of the jurisdiction corresponding to this section, or

(g) any document of a kind specified in Schedule 2.[113]

11.91 The NSWLRC argued that the consideration of public interest in its public documents and fair report of proceedings of public concern.[114] However, a complete defence would provide greater certainty.

11.92 A number of stakeholders expressed their support for the availability of this defence, many of whom highlighted the need to promote a transparent and open government and judicial system.[115]

113 See, for example, *Defamation Act 2005* (NSW) 2005 s 28(4).

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

115 T Butler, *Submission 114*; Office of the Victorian Privacy Commissioner, *Submission 108*; ASTRA, *Submission 99*; Australian Sex Party, *Submission 92*; Guardian News and Media Limited and Guardian Australia, *Submission 80*; SBS, *Submission 59*; D Butler, *Submission 10*.

Fair report of proceedings of public concern

Recommendation 11–7 The Act should provide for a defence of fair report of proceedings of public concern.

11.93 This recommendation provides a defence for individuals who publish or otherwise disclose fair reports of public proceedings which may, in the process, reveal an individual's private information. This defence will be of particular significance for media organisations, court reporters and educational institutions.

11.94 The ALRC recommends that this defence should be co-extensive with the defence of fair report of proceedings of public concern in the UDL.[116] This statutory defence applies to the publication of defamatory matter contained in documents from proceedings of a parliamentary body, an international organisation, court or tribunal, inquiries including Royal Commissions, meetings of shareholders of a public company, and other public proceedings as outlined in the relevant provision of the UDL.

11.95 The ALRC considers that the meaning of 'fair', as it has developed at common law and in the interpretation of the UDL, should apply to this recommendation. At common law, 'fair' refers to summaries of proceedings which intend to honestly convey to the reader the impression which the proceedings would have had if the reader had been present.[117] Whether a report is fair will be a question of fact for a court, to be determined objectively by comparing the report to the events or facts it described. The impression conveyed in the report must not be substantially different from the impression that someone would have gleaned had they been present at the relevant event.[118]

11.96 Several stakeholders supported this defence.[119] While the National Association for the Visual Arts (NAVA) supported the availability of the defence, it argued that it should be expanded to include artistic representations.[120] However, the ALRC considers that artistic expression is more appropriately considered in the public interest balancing test which is part of the actionability for the cause of action.

11.97 Stacey Higgins argued that the defence is unnecessary as publications which are already in the public domain will not be subject to liability.[121] The ALRC has recommended in Chapter 6 that, whether the material was already in the public domain should be taken into account when determining whether the plaintiff had a reasonable

116 See, for example, *Defamation Act 2005* (SA) 2005 s 29(4).
117 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366; *Cook v Alexander* [1974] 1 QB 279; *Rogers v Whitaker* (1992) 175 CLR 479.
118 *Waterhouse v Broadcasting Station TGB Pty Ltd* (1985) 1 NSWLR 58, [62]–[63].
119 T Butler, *Submission 114*; Office of the Victorian Privacy Commissioner, *Submission 108*; ASTRA, *Submission 99*; Australian Sex Party, *Submission 92*; J Chard, *Submission 88*.
120 National Association for the Visual Arts Ltd, *Submission 78*.
121 S Higgins, *Submission 82*.

expectation of privacy. However, the ALRC considers that the interests of open government, transparency and open justice require a complete defence.

11.98 The Public Interest Advocacy Centre (PIAC) argued that the publication of material which is already in the public domain, including public documents and reports of proceedings, should not be protected by a defence, as the publication of private information which is already publicly available can cause distress:

> the collection, use and disclosure of information about a person from publicly available sources can still have considerable privacy impacts. For example, information in the public domain would arguably include press clippings, which might contain inaccurate information, or accurate information that is open to misinterpretation. Information may still be private and personal to the plaintiff, despite the fact that it has been published, or is contained in a public record (for example, a person's criminal record, their HIV status, or the fact that they are a rape victim).[122]

11.99 The ALRC considers that this concern is addressed by the inclusion of the explanation that the defence is co-extensive with the defence to defamation. The definition of public documents in s 29 of the UDL provides a clear list of the proceedings which are subject to this defence. It also provides that the defence may be defeated if the matter was not published honestly for the information of the public or the advancement of education. The publication of some private information that is revealed in the course of open proceedings is also the subject of other specific legislation such as *Judicial Proceedings Acts* in the states and territories that prohibit the publication of private information in certain court proceedings. This includes the identity of protected classes of people such as jury members, children and the victims of sexual assault.[123] Publication would also be subject to any suppression order of the court.[124]

Safe harbour scheme for internet intermediaries

11.100 Internet intermediaries[125] should not be liable under the tort for invasions of privacy committed by third parties using their services, where they have no knowledge

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122 Public Interest Advocacy Centre, *Submission 105*.

123 See, eg, the *Judicial Proceedings Report Act 1985* (Vic). Provisions in this Act restrict the publication of certain information in specific judicial proceedings.

124 See, eg, *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 8. This provision empowers a court to make a suppression order 'where the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency)'.

125 The broad term 'internet intermediary' is commonly used to cover: carriage service providers, such as Telstra or Optus; content hosts, such as Google or Yahoo!; and search service and application service providers, such as Facebook, Flickr and YouTube: Peter Leonard, 'Safe Harbors in Choppy Waters-Building a Sensible Approach to Liability of Internet Intermediaries in Australia' (2010) 3 *Journal of International Media and Entertainment Law* 221, 226. There is also a comprehensive definition of 'carriage service provider' in the *Telecommunications Act 1997* (Cth) s 87. For the purposes of that Act, the provision defines a 'listed carriage service provider' as someone who provides carriage service to the public using a network owned by one or more carriers. This definition excludes online search engines and online vendors as they provide a platform for their customers, but not for the *public*. This definition restricts the scope of the safe harbour scheme.

of the invasion of privacy. Where they do have knowledge, there does not seem to be any justification to provide a complete exemption from liability. The ALRC therefore sees no need to recommend the enactment of a 'safe harbour' scheme, to protect internet intermediaries from liability under the tort.

11.101 There are two reasons why intermediaries are unlikely to be liable under this tort. First, the tort is targeted at positive conduct on the part of the defendant. It is difficult to characterise a failure to act as an 'invasion' of privacy. It is not intended to impose liability for mere omissions—that is, failing to act to stop an invasion of privacy by a third party.[126] Secondly, the tort is confined to intentional or reckless invasions of privacy.

11.102 A mere intermediary will rarely have this level of intent, when third parties use their service to invade someone's privacy. The operators of a social networking platform, for example, do not intend to invade someone's privacy, when one of its customers posts private information about another person on the platform.

11.103 In some circumstances, an intermediary *may* be found to have the requisite fault after they have been given notice of an invasion of privacy. They may be found to have intended an invasion of privacy, or been reckless, if they know that their service has been used to invade someone's privacy, and they are reasonably able to stop the invasion of privacy, but they choose not to do so.[127]

11.104 Considering these two reasons, the ALRC does not think it necessary to recommend that safe harbour schemes for internet intermediaries be extended to protect intermediaries from liability under the new tort.

11.105 However, if such a scheme were necessary, amending cl 91 of sch 5 of the *Broadcasting Services Act 1991* (Cth) may be one way of protecting intermediaries from liability under the tort. Clause 91 does not currently refer to laws under Commonwealth statutes. It provides that any law of a state or territory, or a rule of common law or equity has no effect to the extent to which it subjects an internet content host to liability in respect of hosting particular internet content.[128]

11.106 In copyright law, s 116AG of the *Copyright Act 1968* (Cth) limits the remedies a court may grant against carriage service providers for infringements of copyright that relate to their carrying out certain online activities. In order to access this scheme, a carriage service provider must meet conditions in s 116AH.

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126 Defamation is not limited to positive conduct in this way. The Court of Appeal of England and Wales, in *Byrne v Deane*, found the proprietors of a golf club liable for defamation, when someone anonymously posted a defamatory poem to the wall of the club. The club knew the defamatory poem was posted on the wall and could have taken it down, but did not: *Byrne v Deane* [1937] 1 KB 818. This principle has been applied to hold internet intermediaries liable as publishers in defamation where they have been given notice of defamatory matter present on their website, but fail to remove it within a reasonable time: *Godfrey v Demon Internet Ltd* [2001] QB 201; *Tamiz v Google Inc* [2013] 1 WLR 2151; *Trkulja v Google Inc LLC* [2012] VSC 533; *Rana v Google Australia Pty Ltd* [2013] FCA 60.

127 *Byrne v Deane* [1937] 1 KB 818.

128 *Broadcasting Services Act 1992* (Cth) Sch 5 cl 91(a).

11.107 In the Discussion Paper, the ALRC proposed the introduction of a safe harbour scheme, to protect internet intermediaries from liability under the new tort for which a third party was primarily responsible.[129] To rely on the defence, the intermediary might be required to meet certain conditions. The defence would not apply to invasions of privacy that intermediaries themselves intentionally or recklessly commit.

11.108 In the US, § 230 of the *Communications Decency Act 1996* (US) contains a broad safe harbour scheme.[130] The scheme exempts 'interactive computer services' from civil liability under US state and federal law where

> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1). [131]

11.109 The provision also imposes a series of obligations on interactive computer service providers:

> A provider of an interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.[132]

11.110 The EU safe harbour scheme provides that service providers are not under any 'general obligation to monitor' for illegal content.[133] Services will not be liable for third party content where the internet intermediary had no 'actual knowledge of illegal activity or information knowledge' and, 'upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information'.[134]

11.111 In the UK, the *Defamation Act 2013* (UK) provides a defence for 'operators of websites'.[135] It is a defence for the operator to show that it was not the operator who posted the statement on the website.[136] An operator of a website is understood as a

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

130 M Lemley, 'Rationalizing Internet Safe Harbors' (2007) 6 *Journal on Telecommunications and High Technology Law* 101, 102.

131 *Communications Decency Act 1996, Title V of the Telecommunications Act 1996, 47 USC*.

132 Ibid s 230(c)(d).

133 *EU Directive on Electronic Commerce* (2000/31/EC) art 15.

134 Ibid art 14.

135 *Defamation Act 2013* (UK) s 5. This defence is defeated if the defendant showed malice: Ibid s 5(11). The Explanatory Memorandum to the Act explain that malice may arise in circumstances where the operator of a website had 'incited the poster to make the posting or had otherwise colluded with the poster': Explanatory Notes, Defamation Bill 2013 (UK) [42].

136 *Defamation Act 2013* (UK) s 5(2).

person with effective control over the content of a website who is not the author, editor or publisher of the matter. There are differing degrees of control depending on the form and size of a platform.

11.112 Section 5(12) provides that the act of merely 'moderating' a site is not, in and of itself, sufficient to defeat the defence.

11.113 The defence is defeated if the claimant shows that

> (a) it was not possible for the claimant to identify the person who posted the statement,
>
> (b) the claimant gave the operator a notice of complaint in relation to the statement, and
>
> (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.

11.114 The provision sets out in some detail the scope of UK privacy regulations[137] that an internet service provider must adhere to, as well as the nature of a complaints system.[138]

11.115 This detailed defence is complemented by s 10 which provides that a court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.

Conditions

11.116 If a safe harbour scheme were enacted, internet intermediaries should be required to comply with certain conditions to rely on the defence. Examples of such conditions might include requiring internet intermediaries to

- remove, or take reasonable steps to remove, material that invades a person's privacy, when given notice;
- provide consumer privacy education or awareness functions, such as warnings about the risk of posting private information; and
- comply with relevant industry codes and obligations under the *Privacy Act 1988* (Cth).

11.117 Stakeholders suggested other conditions, including requiring internet intermediaries to

- reasonably cooperate with and assist the relevant regulator with locating and pursuing a wrongdoer;[139]

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137 Ibid s 5(5).
138 Ibid s 5(6).
139 Office of the Australian Information Commissioner, *Submission 90*.

- take action against individuals who are found liable for serious invasion of privacy, such as blocking their social media accounts;[140]
- block users who contravene these terms and conditions from uploading future content;[141] and
- show warnings about the risks and potential consequences of posting private information.[142]

11.118 While the ALRC recommends that a safe harbour scheme is unnecessary, if such a defence were to be enacted consideration should be given to these conditions.

Exemption or defence for children and young persons

Recommendation 11–8 The Act should provide for an exemption for children and young persons.

11.119 The ALRC recommends that the statutory cause of action should contain an exemption or defence where the invasion of privacy occurred when the defendant was a child or a young person under an age to be specified by the legislature.

11.120 This defence was not proposed in the Discussion Paper and the ALRC has not therefore received stakeholder comments. The ALRC nevertheless makes this recommendation in this Report, for a number of reasons.

11.121 In the digital era there is a significant potential for a child or a young person to misuse digital communications technology to invade the privacy of another child or young person while joining in with increasingly common forms of behaviour and social interaction. Although the ALRC recognises that substantial emotional distress may be caused by an invasion of privacy committed by a child or young person, the ALRC considers that education on the risks and ethical dimensions of such behaviour is more appropriate than the imposition of civil liability on children and young people below a specified age.

11.122 Available research indicates that age is a factor in how children and young people navigate online spaces.[143] Age plays a role in the risks that young people face, the risks they are willing to take, and in their understanding of the implications of the risks, from engaging in online platforms and other communications using apps and mobile phones. Research indicates that young people are generally aware of privacy

140 Women's Legal Services NSW, *Submission 115*.
141 Domestic Violence Legal Service and North Australian Aboriginal Justice Agency, *Submission 120*.
142 S Higgins, *Submission 82*. Other stakeholders also recommended possible conditions: UNSW Cyberspace Law and Policy Community, *Submission 98*; Australian Sex Party, *Submission 92*; Interactive Games and Entertainment Association, *Submission 86*; S Higgins, *Submission 82*; I Turnbull, *Submission 81*.
143 B Nansen et al, 'Children and Digital Wellbeing in Australia: Online Regulation, Conduct and Competence' (2011) 6 *Journal of Children and Media* 237, 237.

risks associated with some behaviour, such as sexting.[144] However this awareness varies significantly—and perhaps unsurprisingly—depending on their age and capacity.

11.123 Given the increased affordability, capacity and usage of digital and mobile technology, children and young persons may therefore be more likely than in previous eras to engage in intentional or reckless behaviour which could expose them to liability under the new tort.

11.124 At common law, a child or young person can be liable in tort. There are rare examples of successful action in the case of personal injury inflicted by a child.[145] Negligence law takes account of the age of a child in determining the standard of care that can be expected of a child of a similar age, experience and level of intellectual development.[146] There is usually no point suing children or young people where the injury is minor or because of their lack of assets, but different considerations apply if the conduct caused lasting or significant injury and if liability for negligence is covered by household or other insurance policies.

11.125 For intentional torts, a child must be of sufficient age to form the relevant intent. This principle would be relevant to the new tort if the recommended defence were not included.

11.126 Unlike liability for negligence, insurance does not usually cover liability for intentional wrongs, so there may be little point suing a minor at the time. Liability for a tort endures until the expiration of the relevant limitation period, which in the case of a plaintiff who is a minor may be some years after the conduct. The ALRC considers it would be undesirable for the legislation to allow a young person to be sued for something done, potentially, years before when they were under the specified age.

11.127 Parents of a child who has committed a tort are not vicariously liable to the plaintiff for the child's conduct. They can be liable if their lack of supervision amounts to a breach of their own duty of care in negligence to supervise or control their child,[147] or if they have failed to secure goods to which the child should not have had access, particularly dangerous goods.[148] Liability in negligence only arises where the plaintiff suffers actual damage. As the new tort of invasion of privacy is limited to intentional or reckless conduct, negligence by a parent in supervising a child would not give rise to liability under the new tort.

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144 S Walker, L Sanci and M Temple-Smith, 'Sexting: Young Women's and Men's Views on Its Nature and Origins' (2013) 52 *Journal of Adolescent Health* 697.

145 Balkin and Davis, above n 3, 830.

146 Twelve year old not liable in negligence for throwing a dart which hit the plaintiff child in the eye: *McHale v Watson* (1964) 111 CLR 384.

147 *Smith v Leurs* (1945) 70 CLR 256; *Curmi v McLennan* [1994] 1 VR 513.

148 Plaintiff injured in eye by another teenager using an airgun after defendant had left it in an unlocked cupboard on a houseboat which he allowed his teenage son and friends to occupy: *Curmi v McLennan* [1994] 1 VR 513.

11.128 Standards and provisions in other legislation provide a useful model for legislators when considering an appropriate age at, or under which, liability under the new tort should not exist.

11.129 Commonwealth criminal law provides that a child under 10 years of age cannot be liable for a criminal offence.[149] A child aged between 10 and 14 will only be liable if that child knows their conduct is wrong.[150] Other legislation assumes differing levels of understanding and capacity depending on a young person's age, for example, in NSW, the consent of a young person over the age of 14 years is effective consent to medical treatment to prevent which would otherwise be a battery.[151]

11.130 There is evidence in recent Australian literature and government inquiries that legislatures and others are concerned about criminalising the behaviour of children and young persons, with long term effects on a young person's record of behaviour. A number of other recent or current inquiries are being conducted into the age at which young people should be held liable for offences involving the use of communications networks or other criminal offensive or harmful behaviour.[152]

11.131 The ALRC recommendation does not specify an age under which a young person should not be liable but suggests that it should be consistent with other legislation reflecting analogous rationales. The ALRC's tentative view is that 16 would be an appropriate age under which a young person should not have a civil liability.

Defences unsuited to a privacy action

Other defamation defences

11.132 The ALRC considers that some defences to defamation are inappropriate or unnecessary for a privacy action, due to the differences in the nature, rationale and elements of the two causes of action.

11.133 **Truth.** The defence of truth or justification[153] is not relevant to a privacy tort. Most cases involving invasions of privacy by disclosure of information are brought to prevent or seek redress for disclosure of true information.

11.134 **Fair comment.** A defence of fair comment[154] is inappropriate for a privacy tort. The right to speak freely, that is protected by the defence of fair comment in defamation law, both under common law and the UDL, is limited to comment or opinions on matters of public interest. In the new tort, public interest will already have been considered as part of actionability, so that a defence is unnecessary. Further, the relevant wrong in the invasion of privacy tort is the disclosure of private information.

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149 *Crimes Act 1914* (Cth) s 4M.
150 Ibid s 4N(1).
151 See, eg, *Minors (Property and Contracts) Act 1970* (NSW) s 49(2).
152 For example, the Victorian Parliament's Law Reform Committee undertook an inquiry into sexting in 2013 that considered the impact of legislation that criminalises consensual criminalising sexting on minors: Parliament of Victoria Law Reform Committee, 'Report of the Law Reform Committee for the Inquiry into Sexting' (Parliamentary Paper 230, 2013).
153 See, for example, *Defamation Act 2005* (NSW) 2005 s 25.
154 *Privacy Act*, RSBC 1996, c 373 s 2 includes the defence of fair comment.

Outside matters of public interest, a person should not be able to disclose private information about another under the guise of making a comment or opinion.[155]

11.135 **Qualified privilege.** The ALRC has decided not to recommend a defence akin to that of qualified privilege in defamation law. Qualified privilege at common law protects defamatory statements where they are made without malice on an occasion of qualified privilege, that is, where a person has a legal, social or moral duty or interest in making the statement to someone with a reciprocal duty or interest in receiving it. The defence is lost if the defendant was actuated by an improper motive. The common law defence very rarely benefited the media, who had instead to rely on extended statutory or constitutional forms of the defence.[156] Although a defence similar to qualified privilege at common law was discussed and proposed in the Discussion Paper,[157] and some stakeholders supported it,[158] other expert commentators and legal practitioners, in consultations with the ALRC, questioned the need for or desirability of such a defence, given the elements of the cause of action and other defences.[159]

11.136 A number of considerations underpin the ALRC's decision not to recommend a defence of qualified privilege. First, the new tort would apply only to intentional or reckless invasions of privacy, so there is a need for compelling reasons to justify the invading conduct. Defamation, by contrast, is a tort of strict liability, therefore necessitating a greater range of defences for conduct in good faith to alleviate the potential harshness of the liability.

11.137 Secondly, commentators also pointed to the fact that complex questions arise as to the elements and operation of qualified privilege in defamation law. If there were a need for a similar defence to the common law defence, it would be undesirable to burden the new tort with that complexity and risk extended legal argument about how common law principles relevant to the defamation defence applied to the new tort. An

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155 N Witzleb, *Submission 29*. The VLRC recommended a defence of fair comment but such a defence was not recommended by the ALRC previously or by the NSWLRC. NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) [6.8]; Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) rec 27(e).

156 As set out in Discussion Paper 80 at [10.40]—[10.52], there are three categories of qualified privilege in defamation: qualified privilege at common law, qualified privilege under the UDL (see, eg, s 30 in the *Defamation Act 2005* (NSW)) and the *Lange* qualified privilege encompassing implied freedom of political communication.

157 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Discussion Paper 80 (2014).

158 Office of the Victorian Privacy Commissioner, *Submission 108*; Public Interest Advocacy Centre, *Submission 105*; Telecommunications Industry Ombudsman, *Submission 103*; ASTRA, *Submission 99*; UNSW Cyberspace Law and Policy Community, *Submission 98*; Australian Sex Party, *Submission 92*; J Chard, *Submission 88*; S Higgins, *Submission 82*; I Turnbull, *Submission 81*; Guardian News and Media Limited and Guardian Australia, *Submission 80*; Telstra, *Submission 45*; N Witzleb, *Submission 29*.

159 Office of the Information Commissioner Queensland, *Submission 127*; Public Interest Advocacy Centre, *Submission 105*; UNSW Cyberspace Law and Policy Community, *Submission 98*; Australian Privacy Foundation, *Submission 39*; T Gardner, *Submission 3*. The ALRC considers that the requirement for the plaintiff to have a reasonable expectation of privacy, the fault element of intentional or reckless conduct, the public interest balancing process as part of actionability and the defence of reasonable defence of persons, others or property will provide overall sufficient protection to conduct that would fall within a defence of qualified privilege.

entirely new defence would need to be drafted to deal with the situations intended to be protected.

11.138 Thirdly, a plaintiff would arguably not satisfy the actionability requirements for bringing an action in any of the circumstances that would attract the defence. Where a defendant acted in circumstances commonly included within occasions of qualified privilege at common law, the plaintiff would not usually have a reasonable expectation of privacy in relation to the information. Alternatively, any invasion of privacy would arguably be outweighed by public interest considerations relating to the circumstances.[160] Lastly, the defences of necessity or defence of persons or property may excuse the defendant. If not, an intentional and reckless invasion of privacy should be actionable.

11.139 **Innocent dissemination.** The defence of innocent dissemination[161] is inappropriate, as the statutory cause of action is limited to intentional acts. While several stakeholders supported the inclusion of a defence of innocent dissemination, this may have been on the basis that the fault elements of the action were not confirmed at that time.

11.140 Innocent dissemination is a defence to defamation in which liability is strict. A defendant has the defence if they published the defamatory material merely in the capacity of a 'subordinate distributor', and neither knew, nor ought reasonably to have known, that the matter was defamatory.[162] The defence of innocent dissemination may be considered a type of safe harbour.[163]

11.141 **Triviality.** The defence of triviality is unnecessary as the statutory cause of action is confined to *serious* invasions of privacy.[164]

11.142 **Information in the public domain.** The ALRC considers that a complete defence of 'information in the public domain'—or the application of the doctrine of waiver[165]—would be inappropriate, as the effect of a prior disclosure of an individual's (prima facie) private information is variable.

11.143 Private information does not necessarily lose its quality of privacy once it has been disclosed. PIAC argued that information may still be private in nature, despite the fact that it has been published.[166]

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160 Witzleb notes that: 'The privilege has the purpose of protecting and facilitating frank and fearless communication even if it is damaging to reputations because it is considered in the public interest to do so. This same reasoning can also be applied to the protection of privacy. It is therefore appropriate to create privileges for communications in which this rationale applies': N Witzleb, *Submission 29*.

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

162 See, eg, *Defamation Act 2005* (NSW) 2005 s 32.

163 Leonard, above n 125, 235.

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

165 Warby et al, above n 63, 539–542.

166 Public Interest Advocacy Centre, *Submission 30*.

11.144 Several stakeholders supported the inclusion of a defence that the information disclosed by the defendant was already in the public domain.[167]

11.145 However the ALRC recommends that, whether and to what extent information is in the public domain at the relevant time, as well the plaintiff's prior conduct in having a role in the earlier disclosure, will be a relevant factor to be considered by a court when determining whether a plaintiff had a reasonable expectation of privacy. This factor is discussed more fully in Chapter 6.

11.146 In making this recommendation, the ALRC recognises that there may be some circumstances where the previous widespread dissemination of an individual's private information may diminish their reasonable expectation of privacy, even if the facts do not support implied consent to that publication.[168] On the other hand, the fact that private information was once publicly or broadly known may not justify the defendant's revealing it at a later time. These matters are best considered by the court when determining whether the plaintiff has a cause of action.[169]

11.147 **Public interest.** A defence of public interest would be redundant because the ALRC recommends in Chapter 9 that a plaintiff only has a cause of action for serious invasion of privacy where a court is satisfied that the plaintiff's interest in privacy outweighs any countervailing public interest. A separate public interest defence would therefore not be needed.[170]

11.148 The ALRC considers that a balancing exercise is a more appropriate way to determine whether there is a public interest in the disclosure of the private information or the intrusion into an individual's seclusion. Expressly incorporating public interest into the actionability of a statutory cause of action will ensure that privacy interests are not unduly privileged over other rights and interests, particularly given that Australia does not have express human rights law protection for freedom of speech. The balancing of public interests is discussed more fully in Chapter 9.

Contributory negligence

11.149 A defence of contributory negligence is not appropriate for the new tort, which is limited to intentional or reckless conduct. This approach is consistent with the law relating to other intentional torts, such as conversion, battery and assault.[171]

11.150 Opening the new privacy tort up to defendant claims of contributory negligence would confuse the fault element of the tort by introducing consideration of negligent conduct. Contributory negligence now acts as a partial defence only to claims

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167 SBS, *Submission 59*; ABC, *Submission 46*; D Butler, *Submission 10*; T Gardner, *Submission 3*.

168 See the discussion of the defence of consent above.

169 This is also the case in breach of confidence actions where information must have the quality of confidence to be protected in equity. This may be lost if the information becomes known to a substantial number of people. Contractual obligations of confidence may endure even where the information has been publicly revealed. See, further, Aplin et al, above n 64, ch 5.

170 Several stakeholders supported this model: Office of the Australian Information Commissioner, *Submission 66*; Google, *Submission 54*; ASTRA, *Submission 47*; ABC, *Submission 46*; Telstra, *Submission 45*; Arts Law Centre of Australia, *Submission 43*.

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

in negligence, and statute authorises the reduction of damages where the plaintiff's own negligence was a material factor in the loss or harm suffered.[172]

11.151 The ALRC considers that, where a defendant intentionally or recklessly and unjustifiably invades another person's privacy, and cannot rely on one of the available defences, such conduct should not be excused or mitigated by mere carelessness on the part of the plaintiff. The plaintiff's conduct may be a consideration when the court is deciding whether the plaintiff had a reasonable expectation of privacy.

Other defences and exemptions

11.152 The ALRC considers that, other than in the case of young people, no activity, individual or organisation should be exempt from liability under the new tort. A number of stakeholders agreed, arguing that defences would be sufficient to protect serious invasions of privacy which are nonetheless warranted.[173]

11.153 Other stakeholders raised a number of other possible exemptions or defences to the new tort. However, the ALRC considers that many of these are appropriately captured by the recommended defences, such as lawful authority or necessity, or by the elements of the tort, including the requirement of a reasonable expectation of privacy and the public interest balancing process.

11.154 Telstra advocated an emergency services exemption.[174] The Australian Bureau of Statistics (ABS) sought an exemption for the use of official data for statistical and related purposes.[175]

11.155 SBS suggested an exemption for journalists and media organisations, provided the serious invasion of privacy occurs while they are engaged in journalism.[176] This would operate in a similar fashion to the journalism exemption in the *Privacy Act*. However, the fault requirement and the public interest balancing process already provide significant protection for the media.

11.156 The Australian Bankers' Association argued that compliance with the *Privacy Act* should be a complete exemption to a statutory cause of action for serious invasion of privacy.[177] This may have been more appropriate if the statutory cause of action could rest on negligence, where whether or not an entity had failed to follow proper practice would be relevant. However, a plaintiff would be unlikely to make out the elements of the tort where an entity's conduct complied with the requirements of the *Privacy Act*.

11.157 The Arts Law Centre of Australia (supported by NAVA and the Australian Institute of Professional Photography) favoured the following exemptions:

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172 See, eg, *Law Reform (Miscellaneous Provisions) Act 1965* (NSW).

173 Office of the Australian Information Commissioner, *Submission 66*; NSW Young Lawyers, *Submission 58*; Queensland Council of Civil Liberties, *Submission 51*; ABC, *Submission 46*; Australian Privacy Foundation, *Submission 39*; N Witzleb, *Submission 29*; Law Institute of Victoria, *Submission 22*.

174 Telstra, *Submission 45*.

175 Australian Bureau of Statistics, *Submission 32*.

176 SBS, *Submission 59*.

177 Australian Bankers' Association, *Submission 27*.

photography or filming in a public place; documentary film-making or photography; journalistic or investigative photography, film-making or reporting; photography or filming of privately owned land or premises, or people on those premises, where the premises are accessible to the public; and photography or filming of people on private premises for purposes such as education, journalism, artistic expression and documentary.[178] However, the reasonable expectation of privacy, the limited fault element and the public interest balancing test for actionability should provide significant protection for photographers in the range of situations for which exemptions are sought.

11.158 Voiceless and the Barristers' Animal Welfare Panel Ltd submitted that there should be a defence for activities carried out 'for the purpose of, or resulted in, the procuring of evidence of an iniquity'.[179] The ALRC considers that such a defence would be extremely wide, could extensively curtail and infringe civil liberties in a wide range of circumstances and would undermine the protection that the tort is designed to provide from invasive conduct exceeding lawful authority. The balancing test and the defences of lawful authority, necessity and for conduct incidental to the exercise of a lawful right of defence of persons or property, recommended above, more appropriately balance competing interests.

178 Arts Law Centre of Australia, *Submission 43*.
179 Barristers' Animal Welfare Panel and Voiceless, *Submission 64*.