

## 5. Two Types of Invasion

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### Summary

5.1 The ALRC recommends that for an action under the new tort, a plaintiff must prove that their privacy was invaded in one of the following ways:

- (a) intrusion upon seclusion; or
- (b) misuse of private information.

5.2 Intrusion upon seclusion will usually involve watching, listening to, or recording someone's private activities or private affairs. It can also involve unwanted physical intrusion into someone's private space. Examples might include taking a photo of someone in a change room, reading their bank statements, tapping their phone calls, or hacking into their computer.

5.3 Misuse of private information will usually involve collecting or disclosing someone's private information. Examples might include publishing a person's medical records in a newspaper or posting sexually explicit photographs of someone on the internet, without their permission.

5.4 These two categories of invasion of privacy are widely considered to be the core of a right to privacy—and the chief mischief that needs to be addressed by a new cause of action.

5.5 The two types of invasion may sometimes overlap: taking a photo of a person in the bathroom may be both an intrusion into their seclusion, as well as a wrongful collection of private information. Perhaps more often, a misuse of private information will follow an intrusion upon seclusion: a photo will be wrongly published, after it was wrongly taken.

5.6 Confining the tort to these two types of invasion of privacy will make the scope of the tort more certain and predictable. Invasions of privacy that do not fall into one of these two categories of invasion will not be actionable under this statutory tort.

5.7 This first element of the tort cannot be considered in isolation, because much turns on the question of what is ‘private’. To determine what is private in a particular case, the second element of the tort must be considered, namely, whether a person in the position of the plaintiff would have a reasonable expectation of privacy. This is discussed in Chapter 6.

5.8 In other chapters of this Report, the ALRC recommends that the invasion of privacy must be committed intentionally or recklessly, must be found to be serious, and must not be justified by broader public interest considerations, such as freedom of speech.

### **A cause of action for two types of invasion of privacy**

**Recommendation 5–1** The Act should provide that the plaintiff must prove that his or her privacy was invaded in one of the following ways:

- (a) intrusion upon seclusion, such as by physically intruding into the plaintiff’s private space or by watching, listening to or recording the plaintiff’s private activities or private affairs; or
- (b) misuse of private information, such as by collecting or disclosing private information about the plaintiff.

5.9 Unwanted access to private information and unwanted access to one’s body or personal space have been called the ‘two core components of the right to privacy’.<sup>1</sup> Most examples of invasions of privacy given to support the introduction of a new cause of action, and most cases outside Australia relating to invasions of privacy, relate either to an intrusion upon seclusion or a misuse of private information.

5.10 To provide clarity, certainty and guidance about the purpose and scope of the new action, the ALRC recommends that the action be explicitly confined to these two

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1 M Warby et al, *Tugendhat and Christie: The Law of Privacy and The Media* (OUP Oxford, 2011) [2.07], cited with approval in *Goodwin v NGN* [2011] EWHC 1437 (QB) (09 June 2011) [85]. See also Michael Tilbury, ‘Coherence, Non-Pecuniary Loss and the Construction of Privacy’ in Jeffrey Berryman and Rick Bigwood (eds), *The Law of Remedies: New Directions in the Common Law* (Irwin Law, 2010) 127.

types of invasion of privacy.<sup>2</sup> This means that invasions of privacy that do not fall into one of these two categories will not be actionable under the new tort.<sup>3</sup> This should help address the common concern among some stakeholders that a new tort might be uncertain.<sup>4</sup>

5.11 The two categories of invasion of privacy recommended above draw on the well-known categorisation of privacy torts in the United States (US), first set out by William Prosser in 1960, and followed in the US *Restatement of the Law (Second) of Torts*.<sup>5</sup> Prosser wrote that the law of privacy

comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, ‘to be let alone’. Without any attempt to exact definition, these four torts may be described as follows:

1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.<sup>6</sup>

5.12 Prosser’s taxonomy focused on tort law, but there are other more general privacy taxonomies. US scholar Daniel Solove looked more broadly at ‘the different kinds of activities that impinge upon privacy’ and discovered ‘four basic groups of harmful activities’, each of which ‘consists of different related subgroups of harmful activities’:

- (1) **Information collection:** surveillance, interrogation;
- (2) **Information processing:** aggregation, identification, insecurity, secondary use, exclusion;
- (3) **Information dissemination:** breach of confidentiality, disclosure, exposure, increased accessibility, blackmail, appropriation, distortion;
- (4) **Invasion:** intrusion, decisional interference.<sup>7</sup>

5.13 Solove’s taxonomy highlights that many harmful activities may be characterised as invasions of privacy. A general legal action for invasion of privacy would therefore seem to be too broad and imprecise.<sup>8</sup> Gleeson CJ said in *ABC v Lenah Game Meats*

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

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

4 That privacy laws should be clear and certain is one of the ALRC’s guiding principles: see Ch 3.

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

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

7 Daniel J Solove, ‘A Taxonomy of Privacy’ (2006) 154 *University of Pennsylvania Law Review* 477.

8 This is discussed later in this chapter.

that ‘the lack of precision of the concept of privacy is a reason for caution in declaring a new tort of the kind for which the respondent contends’.<sup>9</sup>

5.14 Dr Nicole Moreham has identified two ‘overarching categories’ covering six different ways of breaching privacy.<sup>10</sup> The first overarching category is unwanted watching, listening, recording and disseminating of recordings—namely, intrusion. The second is obtaining, keeping and disseminating private information—which ‘have at their heart the misuse of private information’.<sup>11</sup>

5.15 The ALRC recommends that, in Australia, a new privacy tort should be confined to two broad categories of invasion of privacy, similar to the first two of Prosser’s four categories and similar to Moreham’s two overarching categories: (1) intrusion upon seclusion; and (2) misuse of private information. In *ABC v Lenah Game Meats Pty Ltd*, Gummow and Hayne JJ said that ‘the disclosure of private facts and unreasonable intrusion upon seclusion, perhaps come closest to reflecting a concern for privacy “as a legal principle drawn from the fundamental value of personal autonomy”’.<sup>12</sup> These two types of invasion of privacy are discussed further below.

5.16 It should be noted that this element of the tort cannot be satisfied without considering the second element of the tort, recommended in Chapter 6: whether a person in the position of the plaintiff would have a reasonable expectation of privacy, in all of the circumstances. The two elements will need to be considered together. In determining whether this element is satisfied, courts will usually consider whether there has been an intrusion into the *private* space, *private* activities or *private* affairs of the plaintiff, or a misuse of *private* information. The question of what is private in a particular case should be determined by asking whether a person in the position of the plaintiff would have had a reasonable expectation of privacy.

### **Intrusion upon seclusion**

5.17 Intrusion upon seclusion is one of the two most commonly recognised categories of invasion of privacy. It is essential that the new tort for serious invasions of privacy capture this type of conduct.

5.18 Intrusions upon seclusion usually refer to intrusions into a person’s *physical* private space. Watching, listening to and recording another person’s private activities are the clearest and most common examples of intrusion upon seclusion. They are the types of activities the ALRC intends should be captured by this limb of the tort. To make this clear, the ALRC recommends that these types of intrusion be specifically included in the Act, as examples of intrusion upon seclusion. The examples are intended to clarify, but not limit, the meaning of ‘intrusion upon seclusion’.

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9 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [41].

10 Nicole Moreham, ‘Beyond Information: The Protection of Physical Privacy in English Law’ (2014) 73(2) *Cambridge Law Journal* (forthcoming).

11 *Ibid.*

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

5.19 Intrusion upon seclusion aligns with Moreham's second overarching category of invasion of privacy. Moreham writes:

Peering through a person's bedroom window, following her around, bugging her home or telephone calls, or surreptitiously taking for one's own purposes an intimate photograph or video recording are all examples of this kind of intrusion.<sup>13</sup>

5.20 Although watching and listening to private activity may be an invasion of privacy, it might often not be serious. Recording a private activity is clearly less justifiable, and more likely to be a serious invasion of privacy. This is partly because the recording may later be distributed, although this may be considered a separate wrong. If the recording is not distributed, or shown to anyone else, it may nevertheless be watched or listened to later by the person who made the recording.

5.21 It is important not to look at these elements in isolation. To have an action, the plaintiff must also have a reasonable expectation of privacy, the intrusion must have been both intentional or reckless and serious, and the intrusion must not be in the public interest.

5.22 In many cases there is no legal redress in Australia for intrusions upon seclusion, because of the limitations of other tort actions.<sup>14</sup> The tort of intrusion upon seclusion, Prosser wrote in 1960 concerning US law, 'has been useful chiefly to fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights'.<sup>15</sup> These gaps in privacy protection remain in Australia today. The Office of the Victorian Privacy Commissioner submitted that a large number of individuals contact its office seeking redress for interferences with spatial or physical privacy, 'for which there is currently no readily accessible remedy in Australian law':

Increasingly, people are becoming concerned about intrusions into their spatial privacy, particularly given the rise in surveillance technologies. The Privacy Commission receives hundreds of complaints each year relating to spatial privacy. In many cases (eg, in situations where surveillance is conducted by an individual or small business, or where information is not recorded) such intrusions will not be covered by current information privacy laws.<sup>16</sup>

### **Intrusion in the United States**

5.23 Prosser cited a number of US cases involving intrusion upon seclusion, including cases in which the defendant intruded into someone's home, hotel room and 'stateroom on a steamboat', and upon a woman in childbirth. The principle was 'soon carried beyond such physical intrusion' and 'extended to eavesdropping upon private conversations by means of wire tapping and microphones' and to 'peering into the windows of a home'.<sup>17</sup> Prosser cited a case in which a creditor 'hounded the debtor for a considerable length of time with telephone calls at his home and his place of

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13 Moreham, above n 11, 1.

14 See Ch 3.

15 Prosser, above n 7, 392.

16 Office of the Victorian Privacy Commissioner, *Submission 108*.

17 Prosser, above n 7, 389–92; *Jones v Tsige* (2012) ONCA 32.

employment’ and another case of ‘unauthorized prying into the plaintiff’s bank account’.<sup>18</sup>

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

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

5.25 The accompanying commentary in the *Restatement* reads:

a. The form of invasion of privacy covered by this Section does not depend upon any publicity given to the person whose interest is invaded or to his affairs. It consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.

b. The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff’s room in a hotel or insists over the plaintiff’s objection in entering his home. It may also be by the use of the defendant’s senses, with or without mechanical aids, to oversee or overhear the plaintiff’s private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined.<sup>19</sup>

5.26 The US tort of intrusion has been said to focus on ‘the means of obtaining private information rather than on the publication of the information so gained. The core of the tort is the offensive prying into the private domain of another.’<sup>20</sup>

### **Intrusion in the United Kingdom**

5.27 The tort of invasion of privacy by intrusion upon seclusion is less clearly recognised in the United Kingdom (UK), but this appears to be changing.<sup>21</sup> Professor Chris Hunt has noted a recent trend in cases suggesting ‘English law is evolving to capture intrusions’.<sup>22</sup> After journalists intruded into the hospital room of the actor Gordon Kaye and took photos of the injured man, the English Court of Appeal in 1990 held that he had no right to privacy as such in English law. And in 2004, the House of Lords in *Wainwright v Home Office*<sup>23</sup> ‘expressly declined to recognize a general right

18 Prosser, above n 7, 389–92.

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

20 Warby et al, above n 2, [3.68].

21 ‘Unlike US law, there is, as yet, no general tort of intrusion recognised by English law’: Raymond Wacks, *Privacy and Media Freedom* (Oxford University Press, 2013) 186.

22 Chris Hunt, ‘Refining Privacy in Tort Law by Patrick O’Callahan’ (2014) 73 *Cambridge Law Journal* 178.

23 *Wainwright v Home Office* [2004] 2 AC 406.

to privacy which would extend to physical privacy interferences not involving the dissemination of information'.<sup>24</sup> But in a book review published in 2014, Hunt writes that it 'seems inevitable that English courts would in fact provide a remedy to a claimant in Kaye's situation if the case were decided today'.<sup>25</sup>

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

there are a number of *obiter dicta* that imply that the clandestine recordings of private matters does 'engage' Article 8 [of the *European Convention on Human Rights*], that the mere taking of a photograph of a child or an adult in a public place might fall within the category of 'misuse'. These pronouncements are either (uncharacteristic) judicial lapses or subtle, possibly even subconscious, acknowledgements of the present anomaly!<sup>26</sup>

5.29 UK courts have recognised the potential for intrusions to invade privacy and cause harm. The majority of the House of Lords in *Campbell v MGN Ltd* emphasised that the covert way in which private information about the model Naomi Campbell, later published, was obtained in that case, heightened the invasion of Campbell's privacy. Lord Hoffmann said: 'the publication of a photograph taken by intrusion into a private place (for example, by a long distance lens) may in itself be such an infringement [of the privacy of the personal information], even if there is nothing embarrassing about the picture itself'.<sup>27</sup> Similarly, in *Murray v Express Newspapers*, Sir Anthony Clarke MR said that, "the nature and purpose of the intrusion" is one of the factors which will determine whether the claimant had a reasonable expectation of privacy'.<sup>28</sup>

5.30 Further, in a number of recent cases, the English and European courts have begun to emphasise the intrusive aspects of the conduct under consideration, not only in the way the private information was collected,<sup>29</sup> but also in the effect the publication will have on the claimant's and related parties' lives after publication.<sup>30</sup> Intrusive behaviour by the UK media led to the Leveson Inquiry into the Culture, Practice and Ethics of the Press.<sup>31</sup>

5.31 It remains to be seen whether a separate cause of action for intrusion upon seclusion will be recognised at common law in the UK.<sup>32</sup> The authors of *Gurry on Breach of Confidence* note that the case for recognising a separate *tort* of privacy, as

24 Warby et al, above n 2, [10.04].

25 Hunt, above n 23.

26 Wacks, above n 22, 247 (citations omitted).

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

28 *Murray v Big Pictures (UK) Ltd* [2009] Ch 481, [36]. See, also, Warby et al, above n 2, [10.06].

29 See, further, Moreham, above n 11; *Tsinguiz v Imerman* [2010] EWCA Civ 908 in which it was held that misuse of confidential information for the equitable cause of action may include intentional observation and acquisition of the information.

30 *Goodwin v NGN Ltd* [2011] EWHC 1437 (QB); *Mosley v United Kingdom* [2011] ECHR 774; *A v United Kingdom* [2002] ECHR 811; [2003] EHRR 51.

31 See, further, *The Leveson Inquiry* <[www.levesoninquiry.org.uk](http://www.levesoninquiry.org.uk)>.

32 See, further, Moreham, above n 11.

opposed to an extended equitable action for disclosure of private information, will be stronger if the courts seek to protect against intrusions into private life as well.<sup>33</sup>

5.32 In any event, any gap in the UK law may not be as concerning as it is in Australia, because the UK has a *Protection from Harassment Act 1997* (UK), which provides some legislative protection against invasions of privacy by intrusion into seclusion.<sup>34</sup>

### Intrusions in New Zealand

5.33 A New Zealand court has recognised a tort of intrusion upon seclusion, in a case about a man who installed a recording device in a bathroom to record his female flatmate showering. In this case, *C v Holland*, Whata J said that the ‘critical issue I must determine is whether an invasion of privacy of this type, without publicity or the prospect of publicity, is an actionable tort in New Zealand’.<sup>35</sup> The court concluded that it was. An intrusion tort was a ‘logical extension or adjunct’ to the tort for misuse of private information.<sup>36</sup> Whata J said that the court ‘can apply, develop and modify the tort to meet the exigencies of the time’.<sup>37</sup>

5.34 In defining the ingredients of the tort, Whata J drew guidance from the decision of the Ontario Court of Appeal in *Jones v Tsige*,<sup>38</sup> which had recognised a tort of intrusion into seclusion. Whata J stated:

I consider that the most appropriate course is to maintain as much consistency as possible with the North American tort given the guidance afforded from existing authority. I also consider that the content of the tort must be consistent with domestic privacy law and principles. On that basis, in order to establish a claim based on the tort of intrusion upon seclusion a plaintiff must show:

- (a) An intentional and unauthorised intrusion;
- (b) Into seclusion (namely intimate personal activity, space or affairs);
- (c) Involving infringement of a reasonable expectation of privacy;
- (d) That is highly offensive to a reasonable person.<sup>39</sup>

5.35 This closely resembles the tort recommended in this Report. Including intrusion upon seclusion as one of the two types of actionable invasion of privacy in the new tort would remedy one of the key deficiencies in Australian law identified in Chapter 3.

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

34 In Ch 15, the ALRC recommends the introduction of a statutory tort of harassment, in the event that the privacy tort is not introduced.

35 *C v Holland* 3 NZLR 672, [1].

36 *Ibid* [86].

37 *Ibid*.

38 *Jones v Tsige* (2012) ONCA 32. In this case, the defendant, who was in a relationship with the claimant’s former husband, and who worked for the same bank as the claimant in different branches, used her workplace computer to gain access to the claimant’s private banking records 174 times. Again there was no publication.

39 *C v Holland* 3 NZLR 672, [94]–[95] (Whata J).



## Misuse of private information

5.36 The second type of invasion of privacy that the ALRC recommends should be covered by the new privacy tort is misuse of private information. This should be neither surprising nor contentious. Misuse of private information is a widely recognised type of invasion of privacy, already actionable in the UK, the US, New Zealand, Canada and elsewhere. No stakeholder suggested that if a new privacy tort were enacted in Australia, it should not cover misuse of private information.

5.37 Most cases involving private information are concerned with unauthorised disclosure. Lord Hoffmann has identified ‘the right to control the dissemination of information about one’s private life’ as central to a person’s privacy and autonomy.<sup>40</sup> But there are other ways of misusing private information, including wrongfully obtaining it. The ALRC recommends that the Act include the two most common types of misuse of private information as illustrative examples: collecting or disclosing private information.

5.38 This corresponds to the second of Moreham’s two overarching categories of invasion of privacy, under which Moreham found three sub-categories of invasion. It was a breach of privacy to:

- (1) ‘*find out* things about others that they wish to keep to themselves, by acquiring bank records, reading diaries, or hacking e-mails, for instance’;
- (2) ‘*keep* that private information either for one’s own future reference or to share it with others’; and
- (3) *disclose* private information to another, for example ‘by uploading it onto the internet, disseminating it in the media or passing it on through gossip’.<sup>41</sup>

5.39 ‘The objection in these cases,’ Moreham writes, ‘is to the fact that someone is finding out about you against your wishes. She is reading your private records, building up a file or dossier about you or, by disseminating private information, allowing others to do the same’.<sup>42</sup>

## Misuse in other jurisdictions

5.40 The elements of the US tort, set out in the *Restatement of the Law Second, Torts*, are that publicity is given to a matter concerning the private life of another, and ‘the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public’.<sup>43</sup> The commentary to the *Restatement* notes that publicity ‘means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge’.<sup>44</sup>

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

41 Moreham, above n 11, 3.

42 *Ibid.*

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

44 *Ibid* (commentary on § 652D).

5.41 The disclosure of private information is now also a settled basis for action in the UK. The new or extended cause of action has developed out of the equitable cause of action for breach of confidence, as formulated in *Campbell v MGN Ltd*, since the enactment of the *Human Rights Act 1998* (UK), which incorporates elements of the *European Convention on Human Rights* (ECHR).<sup>45</sup> Article 8 of the ECHR provides, in part, that ‘everyone has the right to respect for his private and family life, his home and his correspondence’. Although art 8 is not confined to private information, the focus of the UK action on disclosure of private information may be partly attributed to its roots in the equitable doctrine of breach of confidence, which protects confidential information.

5.42 The New Zealand courts have recognised a new tort of invasion of privacy by giving publicity to private facts.<sup>46</sup> There are two fundamental requirements for a successful claim. The first is the ‘existence of facts in respect of which there is a reasonable expectation of privacy’.<sup>47</sup> The second is ‘publicity given to those private facts that would be considered highly offensive to an objective reasonable person’.<sup>48</sup>

### **Misuse or disclosure?**

5.43 Solove has argued that privacy ‘involves more than avoiding disclosure; it also involves the individual’s ability to ensure that personal information is used for the purposes she desires’.<sup>49</sup>

5.44 Disclosure of personal information is perhaps the most common type of misuse of personal information that will invade a person’s privacy. Wacks writes that the ‘tort of misuse of private information obviously requires evidence of *misuse* which, in practice, signifies *publication* of such information’.<sup>50</sup>

5.45 It is important to note that many invasions of privacy that seem to involve misuse, but not publication, of private information, may better be considered intrusions into private affairs. For example, an employee of a company who, without authorisation, accesses private information of a customer (or fellow employee)<sup>51</sup> may have intruded into the private affairs of that customer. Such an intrusion would be covered by the first category of invasion recommended by the ALRC. Nevertheless, the ALRC considers that it is reasonable not to confine this second type of invasion to disclosure as some other type of misuse of private information may invade a person’s privacy.

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

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

47 *Ibid* [117] (Gault P and Blanchard J).

48 *Ibid*.

49 Daniel J Solove, ‘Conceptualizing Privacy’ (2002) 90 *California Law Review* 1087, 1108.

50 Wacks, above n 22, 247, quoting Lord Hoffmann in *Campbell*.

51 See, eg, *Jones v Tsige* (2012) ONCA 32.

5.46 Public disclosure of private information will be a common type of misuse, but the Act should not confine misuse to public disclosures. In some circumstances, the disclosure of personal information to one other person may be a serious invasion of privacy.<sup>52</sup>

5.47 The US tort, on the other hand, is confined to public disclosures. The *Restatement of the Law Second, Torts*, states that publicity means ‘the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge’.<sup>53</sup>

5.48 The fact that a disclosure of personal information was not public may make it more difficult for a plaintiff to satisfy other elements of the action. For example, it may suggest the invasion of privacy was less serious than it might otherwise have been. Also, the plaintiff’s expectation of privacy may not always extend to non-public disclosures of personal information. However, there may be some cases in which it is reasonable to expect one’s personal information not to be disclosed even within a small circle.<sup>54</sup>

### Untrue personal information

**Recommendation 5–2** The Act should provide that ‘private information’ includes untrue information, but only if the information would be private if it were true.

5.49 A person’s privacy can in some cases be invaded by the disclosure of untrue information, but perhaps this would only amount to an invasion of privacy if the information were true. For example, a court might consider that the fact that a particular person, an ordinary citizen, is suffering from a mental illness is private information which should not be disclosed in the press. If a newspaper disclosed that a particular person had a mental illness, and it turned out that the person did not, then an action for invasion of privacy should not be defeated merely on the basis that the information was incorrect.

5.50 This is one reason why the ALRC recommends that the new Australian tort refer to private ‘information’, rather than ‘facts’. The use of the word ‘fact’ in this statutory tort may imply that the relevant private information must be true for it to be the subject of the cause of action.

52 Further, disclosure is not the only type of misuse of private information.

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

54 See, eg, *Giller v Procopets* (2008) 24 VR 1.

5.51 This position is consistent with the *Privacy Act 1988* (Cth), in which personal information is defined in s 6 to include information or an opinion ‘whether true or not’.<sup>55</sup> It is also the position in UK law. Former judge of the UK High Court, Sir David Eady, has written that

a claimant is not now expected to go through an article about (say) his or her sex life, or state of health, in order to reveal that some aspects are true and others false. That would defeat the object of the exercise and involve even greater intrusion. Any speculation or factual assertions on private matters, whether true or false, can give rise to a cause of action.<sup>56</sup>

5.52 In *McKennitt v Ash*, Longmore LJ of the English Court of Appeal stated:

The question in a case of misuse of private information is whether the information is private, not whether it is true or false. The truth or falsity is an irrelevant inquiry in deciding whether the information is entitled to be protected and judges should be chary of becoming side-tracked into that irrelevant inquiry.<sup>57</sup>

5.53 Dr Normann Witzleb submitted that ‘the misuse or disclosure of untrue private information can be just as damaging as the misuse or disclosure of true private information’:

There is no reason to limit the protection to true information. Limiting the tort to true information would require a plaintiff to confirm or admit in court the veracity of information which she would not like to see in the public domain, at all. This would be likely to unfairly prejudice the plaintiff’s interests in protecting her private life from publicity.<sup>58</sup>

5.54 Sometimes the disclosure of untrue private information will amount to defamation, but often it may not. The ALRC does not consider, as one stakeholder suggested, that the law of defamation provides ‘adequate protection to individuals for information that is found to be incorrect’.<sup>59</sup>

5.55 Also, it should be stressed that for the plaintiff to have an action under the privacy tort in this Report, the other elements of the tort would of course have to be satisfied. The untrue information would have to be a matter about which the plaintiff had a reasonable expectation of privacy and the misuse would have to be serious.<sup>60</sup> The ALRC is not recommending a tort for the publication of untrue information or, as discussed below, a tort for placing a person in a ‘false light’.

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55 *Privacy Act 1988* (Cth).

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

57 *McKennitt v Ash* [2008] QB 73, [86]. This was quoted in N Witzleb, *Submission 116*.

58 N Witzleb, *Submission 116*.

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

60 See Chs 6 and 8.

## Examples

5.56 Examples of invasion of privacy should provide additional guidance and certainty. The ALRC recommends that brief and general examples of certain types of invasion of privacy be included in the Act.

5.57 For intrusion upon seclusion, the ALRC recommends the Act include the following: ‘such as by physically intruding into the plaintiff’s private space or by watching, listening to or recording the plaintiff’s private activities or private affairs’.

5.58 For misuse of private information, the ALRC recommends the Act include the following: ‘such as by collecting or disclosing private information about the plaintiff’.

5.59 A number of stakeholders in the current Inquiry said a non-exhaustive list of examples should be included in the new provision,<sup>61</sup> stressing that this would provide courts, parties and business with some guidance and certainty.<sup>62</sup> Some stakeholders said that the examples should be general and flexible, so that the action could ‘evolve with social and technological developments’.<sup>63</sup>

5.60 Candice Jansz-Richardson said the examples should be ‘relatively general in nature to ensure their ability to translate over time’.<sup>64</sup> The Public Interest Advocacy Centre (PIAC) submitted that examples should be ‘open-ended and inclusive, which would build sufficient flexibility into the recommended cause of action for it to be appropriately adapted to changing social and technological circumstances’.<sup>65</sup> The Australian Privacy Foundation said ‘the list should be clearly identified as non-exclusive and non-exhaustive, ie courts should be able to deal with serious invasions of privacy that fall outside the list’.<sup>66</sup>

5.61 Other stakeholders said that the cause of action should not include a list of examples.<sup>67</sup> Some were concerned the list would narrow the scope of the action, by implying that invasions of privacy not covered by an example would not be

61 N Witzleb, *Submission 116*; N Henry and A Powell, *Submission 104*; Office of the Australian Information Commissioner, *Submission 66*; NSW Young Lawyers, *Submission 58*; Women’s Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 48*; Telstra, *Submission 45*; Electronic Frontiers Australia, *Submission 44*; Optus, *Submission 41*; Australian Privacy Foundation, *Submission 39*; Public Interest Advocacy Centre, *Submission 30*; N Witzleb, *Submission 29*; C Jansz-Richardson, *Submission 24*; Office of the Information Commissioner, Queensland, *Submission 20*; Insurance Council of Australia, *Submission 15*.

62 Women’s Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 97*; Telstra, *Submission 45*; Australian Privacy Foundation, *Submission 39*; Public Interest Advocacy Centre, *Submission 30*; Insurance Council of Australia, *Submission 15*. Examples ‘may be useful in guiding courts and more broadly in addressing unfounded anxieties about the purpose of the legislation or its scope’: Australian Privacy Foundation, *Submission 39*. A ‘list of examples should be included in the Act to provide guidance to business’: Telstra, *Submission 45*.

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

64 C Jansz-Richardson, *Submission 24*.

65 Public Interest Advocacy Centre, *Submission 105*; Public Interest Advocacy Centre, *Submission 30*.

66 Australian Privacy Foundation, *Submission 39*.

67 ASTRA, *Submission 99*; P Wragg, *Submission 73*; SBS, *Submission 59*; ASTRA, *Submission 47*; ABC, *Submission 46*; Law Institute of Victoria, *Submission 22*; Pirate Party of Australia, *Submission 18*; P Wragg, *Submission 4*.

actionable.<sup>68</sup> It was also suggested that the examples in the list might become outdated.<sup>69</sup> Other stakeholders suggested that examples were unhelpful because privacy was ‘contextual and depends on facts and circumstances’.<sup>70</sup> The ABC said there needs to be ‘an intense focus on how the various interests at stake are implicated in the particular circumstances of each case’.<sup>71</sup> SBS submitted that ‘the key for any statutory cause of action is flexibility’, warning that:

The more activities or matters that are included to ‘assist’ with the formulation of a breach of privacy action, the more likely it is that these tests will become rigid and inflexible. It is vital that courts consider each case on its facts.<sup>72</sup>

5.62 Some stakeholders suggested that more specific examples of invasion of privacy might be included in the Act. For example, Electronic Frontiers Australia submitted that there should be examples for data breaches, aggregated collections of data, and ‘posting of photographs, audio-recordings, and video-recordings of personal spaces, activities, and bodies for which consent to post has not been expressly provided by the participant’.<sup>73</sup> Drs Nicola Henry and Anastasia Powell said examples in the Act should include ‘technology-facilitated sexual violence and harassment’.<sup>74</sup>

5.63 One Victorian legal service recommends the following examples:

a person’s online accounts such as their email account or social media account has been accessed, interfered with or misused; a person’s private information, including photographs or personal details, have been accessed or disclosed; an individual’s private email correspondence or telephone calls have been monitored or recorded; or an individual’s movements and locations have been monitored and tracked, for example via mobile technology.<sup>75</sup>

5.64 In its 2008 privacy report, the ALRC also recommended that examples be included in a statute providing for a cause of action for serious invasion of privacy; where

- there has been an interference with an individual’s home or family life;
- an individual has been subjected to unauthorised surveillance;
- an individual’s correspondence or private written, oral or electronic communication has been interfered with, misused or disclosed; or

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68 Law Institute of Victoria, *Submission 22*; P Wragg, *Submission 4*. The Law Institute of Victoria submitted that the inclusion of a list ‘might give would-be defendants the impression that conduct outside the parameters of the list does not constitute an invasion of privacy’.

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

70 *Ibid.*

71 ABC, *Submission 46*.

72 SBS, *Submission 59*.

73 Electronic Frontiers Australia, *Submission 44*.

74 N Henry and A Powell, *Submission 104*.

75 Women’s Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 97*.

- sensitive facts relating to an individual's private life have been disclosed.<sup>76</sup>

5.65 The ALRC considers many of the examples provided by stakeholders and in its past report to be good examples of serious invasions of privacy. Some would clearly be covered by the examples recommended above.

5.66 Some examples suggested above are more specific and descriptive. The ALRC considers that the application of the tort to particular circumstances is best left to the courts to consider on a case by case basis. Specific examples may provide additional guidance, but may risk distracting the court from the consideration of the distinct facts and circumstances of a particular case.

### **False light and appropriation**

5.67 The cause of action in this Report is not designed to capture the two other so-called 'privacy torts' in the United States, namely, 'publicity which places the plaintiff in a false light in the public eye' and 'appropriation, for the defendant's advantage, of the plaintiff's name or likeness'.<sup>77</sup>

5.68 Discussing the four US torts, the Australian High Court has said that, in Australia, one or more of the four types of invasion of privacy would often 'be actionable at general law under recognised causes of action':

Injurious falsehood, defamation (particularly in those jurisdictions where, by statute, truth of itself is not a complete defence), confidential information and trade secrets (in particular, as extended to information respecting the personal affairs and private life of the plaintiff, and the activities of eavesdroppers and the like), passing-off (as extended to include false representations of sponsorship or endorsement), the tort of conspiracy, the intentional infliction of harm to the individual based in *Wilkinson v Downton* and what may be a developing tort of harassment, and the action on the case for nuisance constituted by watching or besetting the plaintiff's premises, come to mind.<sup>78</sup>

5.69 The disclosure of private facts and unreasonable intrusion upon seclusion concern the key privacy interests, such as personal dignity and autonomy, whereas the other US torts arguably protect other interests. Gummow and Hayne JJ stated in *ABC v Lenah Game Meats*:

Whilst objection possibly may be taken on non-commercial grounds to the appropriation of the plaintiff's name or likeness, the plaintiff's complaint is likely to be that the defendant has taken the steps complained of for a commercial gain, thereby depriving the plaintiff of the opportunity of commercial exploitation of that name or likeness for the benefit of the plaintiff. To place the plaintiff in a false light may be objectionable because it lowers the reputation of the plaintiff or causes financial loss or both.<sup>79</sup>

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76 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) Rec 74–1.

77 Prosser, above n 7, 392.

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

79 *Ibid*, 256 (Gummow and Hayne JJ).

5.70 The tort of passing off does not provide full protection of people’s image rights,<sup>80</sup> but the ALRC considers that reform to the law relating to image rights would need to be considered more broadly and in the context of Australia’s intellectual property law.

5.71 Wacks has written that the ‘false light’ category ‘seems to be both redundant (for almost all such cases might equally have been brought for defamation) and only tenuously related to the protection of the plaintiff against aspects of his or her private life being exposed’.<sup>81</sup> Prosser himself wrote that the ‘false light cases obviously differ from those of intrusion, or disclosure of private facts’:

The interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation.<sup>82</sup>

5.72 In the US, Prosser’s formulation of appropriation as a privacy tort is contentious and often described as a ‘right of publicity’. The Supreme Court of Colorado has noted that Prosser’s formulation of the tort

subsumed the two types of injuries—personal and commercial—into one cause of action that existed under the misleading label of ‘privacy’. The privacy label is misleading both because the interest protected (name and/or likeness) is not ‘private’ in the same way as the interests protected by other areas of privacy law and because the appropriation tort often applies to protect well-known ‘public’ persons.<sup>83</sup>

5.73 It should be noted that putting someone in a false light or appropriating their name or likeness may, in some cases, also be a serious invasion of a person’s privacy under the tort designed in this Report. For example, the Domestic Violence Legal Service and the North Australian Aboriginal Justice Agency noted the ‘common scenario in domestic violence cases where the perpetrator hacks into the victim’s existing social media account or creates a false social media account in the name and or image of the victim and then posts material purporting to be authored by the victim’.<sup>84</sup> The ALRC considers that, depending on the circumstances, this may be both an intrusion into seclusion (hacking into a person’s social media account) and a misuse of private information (posting private photos). The tort in this Report is certainly not designed to deny relief where the plaintiff has been put in a false light, or had their name or likeness appropriated. But it is not intended to capture these other wrongs per se. Other causes of action will more directly relate to these wrongs.

### **An open-ended action?**

5.74 Some stakeholders submitted that the new tort should be framed more broadly—that it should not be confined to intrusions upon seclusion and misuse of private information. They favoured a single cause of action, often because this was thought to

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80 To have an action under the tort of passing off, the plaintiff or the plaintiff’s business must have ‘a certain goodwill or reputation’ and must suffer ‘injury in his trade or business’: *Fletcher Challenge Ltd v Fletcher Challenge Pty Ltd* (1981) 1 NSWLR 196, [204].

81 Wacks, above n 22, 181.

82 Prosser, above n 7, 400.

83 *Joe Dickerson & Associates, LLC v Dittmar 34 P3d 995 (Supreme Court of Colorado, 2001, Bender J)*.

84 Domestic Violence Legal Service and North Australian Aboriginal Justice Agency, *Submission 120*.



make the action more flexible—that is, open to invasions other than by misuse of personal information or intrusion upon seclusion.<sup>85</sup> Witzleb, for example, said the action should be formulated broadly, to leave its further development to the courts.<sup>86</sup> The Australian Privacy Foundation likewise said that introducing two torts may result in some privacy breaches not being covered.<sup>87</sup> The Office of the Australian Information Commissioner (OAIC) supported the enactment of ‘a single and comprehensive tort’, rather than one confined to intrusion upon seclusion and misuse of private information. The OAIC said that confining the tort ‘risks leaving gaps in privacy protection’ and makes the tort less flexible and adaptive to new technologies and practices’.<sup>88</sup>

5.75 Other stakeholders stressed the need for certainty. For example, Telstra submitted that the categories of conduct caught by any cause of action ‘should be listed exhaustively, using unambiguous and objective terms, in order to reduce the uncertainty and impact that the introduction of such a cause of action would cause to businesses and service providers’.<sup>89</sup>

5.76 The ALRC considers that the Act should provide as much certainty as possible on what may amount to an invasion of privacy. This will make the scope of the action more predictable and targeted. The ALRC recommends that the new tort should not be broadly drafted to capture all invasions of privacy, but rather should be confined to the two more precisely defined types of invasion of privacy that are the key mischief that the cause of action is designed to remedy. Arguing for even greater prescription and certainty than the ALRC recommends, Professor Kit Barker submitted that

generalised causes of action give great discretion and little guidance to judges. More discrete, lower-level rules provide higher levels of guidance and greater predictability. Joseph Raz is notorious for preferring rules to general principles for precisely these reasons. They give greater respect to the rule of law.<sup>90</sup>

5.77 As discussed below, greater guidance could, in theory, also be achieved by enacting two separate and tailored causes of action, but the ALRC considers this to be unnecessary.

### **One cause of action, not two**

5.78 The ALRC recommends that there be one cause of action covering the two broad types of invasion of privacy. A similar approach, recommended by the Victorian Law Reform Commission (VLRC), would be to enact two separate but ‘overlapping’ causes of action. However, enacting separate causes of action should only be necessary if the actions would be substantially different—that is, have different elements, defences and remedies. The ALRC considers that separate actions are not necessary.

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

86 N Witzleb, *Submission 29*.

87 Australian Privacy Foundation, *Submission 39*.

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

89 Telstra, *Submission 45*. However, Telstra opposes even a more confined privacy tort.

90 K Barker, *Submission 126*.

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

Legislating to protect these broadly recognised sub-categories of privacy is likely to promote greater clarity about the precise nature of the legal rights and obligations that have been created than by creating a broad civilly enforceable right to privacy.<sup>91</sup>

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

5.81 Although the ALRC and VLRC approaches are broadly consistent, the ALRC considers it important that there be only one cause of action. The availability of two causes of actions may cause unnecessary overlap and duplication in many cases in which both types of invasion arise. Dr Ian Turnbull submitted that one reason for having only one cause of action is that 'in most cases intrusion upon seclusion will be followed by misuse of the private information obtained by the intrusion'.<sup>92</sup>

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

5.83 Some stakeholders argued that there are important differences between intrusions upon seclusion and misuse of private information, and that these differences suggest there should be two separate and tailored causes of action. Barker submitted that there should be separate causes of action because they should have different fault elements.<sup>93</sup> However, as discussed in Chapter 7, the ALRC considers that they should have the same fault element—they should only be actionable where the conduct of the plaintiff was intentional or reckless.

5.84 Importantly, as Hunt has argued, having a single action also 'avoids the problem of discordant principles emerging between the two actions, which would be undesirable since they protect the same interest'.<sup>94</sup>

5.85 The ALRC considers the cause of action designed in this Report to be flexible enough to deal with both types of invasion of privacy, while providing sufficient guidance and certainty.

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91 Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) [7.126].

92 I Turnbull, *Submission 5*.

93 K Barker, *Submission 126*.

94 Chris DL Hunt, 'Privacy in the Common Law: A Critical Appraisal of the Ontario Court of Appeal's Decision in *Jones v Tsige*' (2012) 37 *Queen's LJ* 665, 673.