

6. Reasonable Expectation of Privacy

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Summary

6.1 The ALRC recommends that, to have an action, a plaintiff must prove that a person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances.

6.2 This is essentially an objective test used to answer the question ‘Is this private?’ The subjective expectation of the plaintiff may be a relevant consideration, but it is not the focus of the inquiry. The question is determined by the court, after close analysis of the particular circumstances of the case.

6.3 The ALRC also recommends that the Act include a non-exhaustive list of factors that a court may consider when determining whether a person would have had a reasonable expectation of privacy. This is intended to provide guidance and assistance to the parties and the court, without limiting the matters that might be considered in a particular case.

6.4 The recommended factors include: the nature of the private information; the means used to obtain the private information or to intrude upon seclusion; the place where the intrusion occurred; the purpose of the misuse or intrusion; how the private information was held or communicated; whether the private information was already in the public domain; the attributes of the plaintiff, such as their age; and the conduct of the plaintiff.

A test for what is private

Recommendation 6–1 The new tort should be actionable only where a person in the position of the plaintiff would have had a reasonable expectation of privacy, in all of the circumstances.

6.5 Whether a plaintiff has a reasonable expectation of privacy is a useful and widely adopted test of what is private, for the purpose of a civil cause of action for invasions of privacy. The ALRC recommends that, to have an action under the new tort, the plaintiff should be required to establish that a person in the plaintiff's position would have had a reasonable expectation of privacy, in all of the circumstances.

6.6 This is preferable to attempting to define 'privacy' in the Act as it is notoriously difficult to define. In *ABC v Lenah Game Meats*, Gleeson CJ said:

There is no bright line which can be drawn between what is private and what is not. Use of the term 'public' is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private.¹

6.7 The test recommended by the ALRC is an objective one. The court must consider, not whether the plaintiff subjectively expected privacy, but whether it would be reasonable for a person in the position of the plaintiff to expect privacy. The subjective expectation of the plaintiff may be a relevant consideration, particularly if that expectation was made manifest, but it is not the focus of the test, nor an essential element that must be satisfied.²

6.8 In determining whether a person would have a reasonable expectation of privacy, the court should consider 'all of the circumstances'. Some of these circumstances will relate to the position of the particular plaintiff, and therefore to this extent the test has a subjective element. More broadly, the phrase 'all of the circumstances' highlights that whether this test will be satisfied will depend very much on the facts of each particular case.

1 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42].

2 Expectation of privacy has for this reason been called a normative rather than a descriptive standard. 'Suggestions that a diminished subjective expectation of privacy should automatically result in a lowering of constitutional protection should therefore be opposed. It is one thing to say that a person who puts out the garbage has no reasonable expectation of privacy in it. It is quite another to say that someone who fears their telephone is bugged no longer has a subjective expectation of privacy and thereby forfeits the protection of s 8 [*Human Rights Act 1998* (UK)]. Expectation of privacy is a normative rather than a descriptive standard': *R v Tessling* [2004] 3 SCR 432 (Binnie J).

6.9 The ‘reasonable expectation’ test was supported by a number of stakeholders.³ It was said to be flexible and able to adapt to new circumstances.⁴ This is important, because community expectations of privacy will change between cultures and over time. The Office of the Information Commissioner, Queensland, submitted that the reasonable expectation of privacy test ‘would reflect both community standards and provide sufficient flexibility for the modern range of social discourses’.⁵ The Australian Interactive Media Industry Association submitted that the reasonable expectation requirement was ‘an important mechanism by which to ensure that only sensible and genuine privacy matters are able to access the courts and seek redress’.⁶

6.10 Similar tests have been recommended in reports of the ALRC, the NSW Law Reform Commission (NSWLRC) and the Victorian Law Reform Commission (VLRC).⁷ This test is also used in a number of other jurisdictions. It has been adopted in the United Kingdom (UK), New Zealand, and several Canadian provinces.⁸

6.11 In *Campbell v MGN*, Lord Nicholls said that ‘the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy’.⁹ Lord Hope said that the ‘question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity’.¹⁰

6.12 Some stakeholders opposed the use of a reasonable expectation test,¹¹ with some saying that the test was too vague.¹² In the ALRC’s view, the test must be flexible, but not uncertain. Courts are used to determining issues of reasonableness or even reasonable expectation in other contexts.¹³

3 Australian Interactive Media Industry Association (AIMIA), *Submission 125*; Domestic Violence Legal Service and North Australian Aboriginal Justice Agency, *Submission 120*; T Butler, *Submission 114*; Google, *Submission 91*; J Chard, *Submission 88*; S Higgins, *Submission 82*; Guardian News and Media Limited and Guardian Australia, *Submission 80*; Office of the Australian Information Commissioner, *Submission 66*; SBS, *Submission 59*; NSW Young Lawyers, *Submission 58*; Free TV, *Submission 55*; Queensland Council of Civil Liberties, *Submission 51*; ASTRA, *Submission 47*; Electronic Frontiers Australia, *Submission 44*; Arts Law Centre of Australia, *Submission 43*; Optus, *Submission 41*; Australian Privacy Foundation, *Submission 39*; Public Interest Advocacy Centre, *Submission 30*; B Arnold, *Submission 28*; C Jansz-Richardson, *Submission 24*; Law Institute of Victoria, *Submission 22*; Office of the Information Commissioner, Queensland, *Submission 20*; Women’s Legal Centre (ACT & Region) Inc, *Submission 19*; Insurance Council of Australia, *Submission 15*.

4 Office of the Victorian Privacy Commissioner, *Submission 108*; ASTRA, *Submission 99*.

5 Office of the Information Commissioner, Queensland, *Submission 20*.

6 Australian Interactive Media Industry Association (AIMIA), *Submission 125*.

7 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) Rec 74–2; Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) Recs 25, 26; NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) 20–26.

8 ‘A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy’ (Issues Paper, Department of the Prime Minister and Cabinet, 2011) 17–21.

9 *Campbell v MGN Ltd* [2004] 2 AC 457, [21].

10 *Ibid* [99].

11 Australian Bankers’ Association, *Submission 27*; P Wragg, *Submission 4*.

12 Australian Bankers’ Association, *Submission 27*.

13 *Rogers v Whitaker* (1992) 175 CLR 479. See, also, B Arnold, *Submission 28*.

6.13 Professor Eric Barendt has said the test is artificial.¹⁴ He wrote that in ‘many cases a claimant will have had no actual expectations at the time his privacy was infringed’.¹⁵ The ALRC considers that, although the subjective expectations of the plaintiff may sometimes be relevant, the focus of the test should be on whether a reasonable person would expect privacy, not whether the plaintiff in fact expected privacy. To make this clearer, the ALRC recommends that the Act refer to whether a ‘person in the position of the plaintiff’ would have a reasonable expectation of privacy.

6.14 The ALRC also considers that there are notable benefits in using a test that has been used for some time in other jurisdictions: in applying the test, Australian courts will be able to draw on jurisprudence from the UK, New Zealand and the United States (US).

6.15 Some stakeholders, while supporting a reasonable expectation of privacy test, nevertheless expressed some concern that expectations of privacy may be considered to have fallen, perhaps following common and unchallenged industry practices. The concern was that, because technologies and services would increasingly encroach into people’s private lives, people will then either actually expect less privacy, or it will increasingly seem unreasonable to expect the same level of privacy. There is a concern that privacy standards would erode.¹⁶

6.16 However, as noted above, other stakeholders considered that its ability to adapt to community standards to be one of the strengths of the reasonable expectation of privacy test. For example, the Australian Subscription Television and Radio Association (ASTRA) noted the ‘evolution of society’s understanding of what is a private matter since the advent of publicly available social media profiles’.¹⁷

6.17 Community expectations of privacy no doubt change, but the ALRC considers that a privacy tort must be able to adapt to such changes. Legislative privacy standards cannot be set in stone. But this does not mean the standards are infinitely flexible, or that it might soon be unreasonable to expect any privacy. Privacy has been valued by so many for so long that not only is it not dead, as some have dramatically claimed, but it should continue to be reasonable to expect privacy in many circumstances.

6.18 Although there is a separate element of the tort that explicitly confines the tort to ‘serious’ invasions of privacy,¹⁸ the ‘reasonable expectation of privacy’ test should also help ensure that non-serious privacy interests are not actionable under the tort.

14 Eric Barendt, ‘A Reasonable Expectation of Privacy?’ A Coherent or Redundant Concept?’ in Andrew Kenyon (ed) (forthcoming, 2014).

15 Ibid. Barendt raises other concerns. For example, he writes that courts might be tempted to consider matters when applying this test, when those matters should instead be considered when balancing privacy with freedom of expression: Ibid. The ALRC acknowledges the potential for overlap between this test and other elements and defences in the new tort.

16 See, eg. Australian Privacy Foundation, *Submission 110*.

17 ASTRA, *Submission 99*.

18 See Ch 8.

Highly offensive?

6.19 In *ABC v Lenah Game Meats*, Gleeson CJ proposed a different test for what is private:

Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.¹⁹

6.20 This passage was referred to, a number of times, in opinions of the House of Lords in *Campbell*. Lord Nicholls said this test should be used with care, for two reasons:

First, the ‘highly offensive’ phrase is suggestive of a stricter test of private information than a reasonable expectation of privacy. Second, the ‘highly offensive’ formulation can all too easily bring into account, when deciding whether the disclosed information was private, considerations which go more properly to issues of proportionality; for instance, the degree of intrusion into private life, and the extent to which publication was a matter of proper public concern. This could be a recipe for confusion.²⁰

6.21 Baroness Hale also preferred an objective reasonable expectation test, saying that it was ‘much simpler and clearer’ than an offensiveness test of privacy.²¹ Further, Baroness Hale said that it was apparent that Gleeson CJ did not intend for the ‘highly offensive’ test to be the only test,

particularly in respect of information which is obviously private, including information about health, personal relationships or finance. It is also apparent that he was referring to the sensibilities of a reasonable person placed in the situation of the subject of the disclosure rather than to its recipient.²²

6.22 The ALRC considers that the offensiveness of a disclosure or intrusion should be one matter able to be considered by a court in determining whether there is a reasonable expectation of privacy. It is more reasonable to expect privacy, where a breach of privacy would be considered highly offensive. As discussed in Chapter 8, offence may also be used to distinguish serious invasions of privacy from non-serious invasions of privacy.

Relationship with other elements and defences

6.23 Some matters will be relevant to the reasonable expectation of privacy test and also to other elements and defences of the tort.

19 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42].

20 *Campbell v MGN Ltd* [2004] 2 AC 457, [22].

21 *Ibid* [135].

22 *Ibid* [136].

6.24 For example, some public interest matters may be considered when determining whether the plaintiff had a reasonable expectation of privacy, even though the ALRC recommends that the tort feature a separate public interest test. In some cases, a public interest matter will be so conspicuous that it may not be sensible to ignore it when determining whether the plaintiff has a reasonable expectation of privacy.

6.25 Other matters may be the subject of a separate defence. For example, a separate defence for consent is recommended in Chapter 11. However, evidence of consent to the relevant conduct or related or similar conduct may also affect whether the plaintiff had a reasonable expectation of privacy.

Considerations

Recommendation 6–2 The 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, among other things:

- (a) the nature of the private information, including whether it relates to intimate or family matters, health or medical matters, or financial matters;
- (b) the means used to obtain the private information or to intrude upon seclusion, including the use of any device or technology;
- (c) the place where the intrusion occurred, such as in the plaintiff's home;
- (d) the purpose of the misuse, disclosure or intrusion;
- (e) how the private information was held or communicated, such as in private correspondence or a personal diary;
- (f) whether and to what extent the private information was already in the public domain;
- (g) the relevant attributes of the plaintiff, including the plaintiff's age, occupation and cultural background; and
- (h) the conduct of the plaintiff, including whether the plaintiff invited publicity or manifested a desire for privacy.

6.26 The ALRC recommends that this non-exhaustive list of considerations should be set out in the Act. It is designed to assist rather than confine the court, when the court assesses whether the plaintiff had a reasonable expectation of privacy. Not all matters can be listed, but the ALRC has listed some of the more common or important matters.

6.27 The NSWLRC recommended the inclusion of a comparable list of matters that would help a court determine whether a person's privacy has been invaded.²³

23 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) Draft Bill, cl 74(3)(a).

6.28 A number of stakeholders submitted that the Act should include a list of factors for a court to consider,²⁴ and many generally supported the factors recommended in the Discussion Paper.²⁵ Others suggested that the reasonable expectation of privacy test would remain uncertain even if such a list of factors were included.²⁶ However, the ALRC considers that the lack of a comprehensive definition of privacy should not be a reason for denying remedies to people whose privacy is clearly invaded in certain ways.

6.29 In *Murray v Big Pictures*, which concerned photographs taken of a child in the street for commercial publication, the High Court of England and Wales set out a non-exhaustive list of matters a court should consider when determining whether the plaintiff had a reasonable expectation of privacy:

They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purpose for which the information came into the hands of the publisher.²⁷

6.30 Other matters will be relevant in other cases, particularly in cases concerning intrusion upon seclusion. Professor Raymond Wacks has suggested that, in an action for intrusion upon seclusion, a court should take into account the following factors when determining whether the claimant had a reasonable expectation of privacy:

- (a) the place where the intrusion occurred (for example, whether the claimant is at home, in office premises or in a public place, and whether or not the place is open to public view from a place accessible to the public, or whether or not the conversation is audible to passers-by);
- (b) the object and occasion of the intrusion (for example, whether it interferes with the intimate or private life of the claimant); and
- (c) the means of intrusion employed and the nature of any device used (for example, whether the intrusion is effected by means of a high-technology sense-enhancing device, or by mere observation or natural hearing).²⁸

Different for misuse and intrusions

6.31 Before discussing the different factors, it should be noted that the factors that will be relevant to the reasonable expectation of privacy test may differ, depending on whether an invasion of privacy was by misuse of private information, or by intrusion

24 See, eg, Public Interest Advocacy Centre, *Submission 105*; Insurance Council of Australia, *Submission 102*; Office of the Victorian Privacy Commissioner, *Submission 108*.

25 See, eg, Public Interest Advocacy Centre, *Submission 105*; UNSW Cyberspace Law and Policy Community, *Submission 98*; Guardian News and Media Limited and Guardian Australia, *Submission 80*. AIMIA said the ALRC's factors 'recognise that privacy is contextual in nature': Australian Interactive Media Industry Association (AIMIA), *Submission 125*.

26 Eg, the Australian Bankers' Association submitted that a 'shopping list' of criteria would be 'of little use unless there is complete clarity about exactly what "privacy" is'... [T]his approach increases the risk of uncertainty for business and the community': Australian Bankers' Association, *Submission 84*.

27 *Murray v Big Pictures (UK) Ltd* [2009] Ch 481, [36].

28 Raymond Wacks, *Privacy and Media Freedom* (Oxford University Press, 2013) Appendix, Draft Bill, cl 2(2).

upon seclusion. As Associate Professor Paul Wragg submitted, a court's approach to determining whether a person in the position of the plaintiff would have a reasonable expectation of privacy is likely to be 'markedly different in intrusion claims than informational claims'.²⁹ Within these broad categories of invasion, there are sub-categories, and the factors may also differ in relevance between those categories too.

6.32 In fact, which factors are relevant may differ in every case. As noted above, the test very much depends on the particular circumstances of the case. Different lists of factors could no doubt be created, for different types of invasion of privacy. But the ALRC considers that one list that is not exhaustive or prescriptive will be sufficient. Courts may consider the matters on the list that are relevant to the particular case, ignore those that are not, and consider any other matter that is relevant that is not on the list.

Nature of the information

6.33 The nature of the information will often suggest whether or not it is private. Information concerning the plaintiff's intimate or family matters, health or medical matters,³⁰ and financial matters are all likely to be private. Gleeson CJ said in *Australian Broadcasting Corporation v Lenah Game Meats* that certain kinds of information about a person may be easy to identify as private, 'such as information relating to health, personal relationships, or finances'.³¹

6.34 Personal information taken from medical records, reports, or interviews is also generally considered private in English courts.³²

6.35 'The nature of the subject matter' was included in a list of matters the NSWLRC recommended should be considered in determining whether there has been an invasion of privacy.³³

6.36 The definition of 'sensitive information' in the *Privacy Act* may also be of some assistance to the courts, but should not be determinative of the question of whether the plaintiff had a reasonable expectation of privacy. 'Sensitive information' is defined to mean:

- (a) information or an opinion about an individual's:
 - i) racial or ethnic origin; or
 - ii) political opinions; or
 - iii) membership of a political association; or
 - iv) religious beliefs or affiliations; or

29 P Wragg, *Submission 73*.

30 Biometric data, such as a fingerprint, may also be private information. The OAIC submitted that the new tort should provide a remedy 'in the case of serious invasion of an individual's bodily privacy (such as in the case of unauthorised bodily testing)': Office of the Australian Information Commissioner, *Submission 90*.

31 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42].

32 M Warby et al, *Tugendhat and Christie: The Law of Privacy and The Media* (OUP Oxford, 2011) [5.35].

33 NSW Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009) Draft Bill, cl 74(3)(a)(i).

- v) philosophical beliefs; or
- vi) membership of a professional or trade association; or
- vii) membership of a trade union; or
- viii) sexual preferences or practices; or
- ix) criminal record;

that is also personal information; or

- (b) health information about an individual; or
- (c) genetic information about an individual that is not otherwise health information;
- (d) biometric information that is to be used for the purpose of automated biometric verification or biometric identification; or
- (e) biometric templates.³⁴

6.37 This definition serves a particular regulatory purpose. It should be stressed that the types of sensitive information included in the definition will not *necessarily* give rise to a reasonable expectation of privacy under the tort. Whether something is private under the tort will depend on context and other relevant factors.

6.38 In the UK, it has been said that the nature of the information itself ‘is plainly of considerable if not prime importance. It may even be decisive in the question of whether the claimant enjoys a reasonable expectation of privacy in respect of it’.³⁵

6.39 Intimate matters will often be sexual matters, widely considered to be private: ‘There are numerous general statements from English courts to the effect that sexual behaviour is an aspect of private life’.³⁶

6.40 However, intimate and family matters can extend beyond sexual matters. Professor Des Butler submitted that people are ‘entitled to expect privacy for anything non-criminal taking place in the home environment, including any conversations or disagreements occurring therein’.³⁷ Butler also noted that, ‘[e]ven where the plaintiff has courted publicity, it would normally be expected that his or her family would nevertheless be entitled to their privacy, especially when there are children of a vulnerable age who are involved’.³⁸

34 *Privacy Act 1988* (Cth) s 6.

35 M Warby et al, *Tugendhat and Christie: The Law of Privacy and The Media* (OUP Oxford, 2011) [5.28] (citation omitted).

36 *Ibid* [5.40]. A distinction is sometimes made between the details of a person’s sexual life, and the mere fact of a sexual relationship or sexual orientation, with the latter being sometimes considered less private than the former.

37 D Butler, *Submission 10*, citing *McKennitt v Ash* [2005] EWHC 3003 (QB) (21 December 2005) [137]; *Lee v News Group Newspapers Ltd* [2010] NIQB 106 [32], [43]; *Green Corns Ltd v Claverley Group Ltd* [2005] EWHC 958, [53].

38 D Butler, *Submission 10*.

Means used

6.41 The means used to obtain private information or to intrude upon seclusion will sometimes be relevant to whether or not there is a reasonable expectation of privacy. For example, the fact that the defendant used spyware, or hacked into the plaintiff's personal computer to take personal information, or used a long distance camera lens to peer into the plaintiff's home, may suggest the plaintiff's privacy has been invaded (regardless of what personal information or photograph is taken).

6.42 ASTRA submitted that it is 'difficult to see how a person could form an expectation of privacy based on a use of technology of which they are unaware'.³⁹ However, the ALRC considers that a person can quite reasonably expect not to be intruded upon, even if they do not turn their minds to the means that might be used to intrude upon their privacy. They may even reasonably expect privacy without even considering whether their privacy is remotely likely to be intruded upon at all.

6.43 Butler submitted that '[t]he fact that the information could only be obtained through surreptitious means should normally be an indication that in the circumstances there was a high expectation of privacy'.⁴⁰

Place of intrusion

6.44 The physical place in which a person's seclusion is intruded upon may have a bearing on whether they had a reasonable expectation of privacy in those circumstances. Most clearly, a person will have a greater expectation of privacy in the home than in a public place.

6.45 Although a person should generally have a lower expectation of privacy when in public, the ALRC considers that privacy may reasonably be expected in public places—in some circumstances.⁴¹

6.46 This has been recognised in a number of invasion of privacy cases outside Australia.⁴² In one US case in 1964, a woman was photographed at a country fair leaving a 'fun house' at the moment at which some air jets blew her dress up. The photo was published on the front cover of a newspaper. The fact that she was in public, did not mean that she had no right to privacy. Harwood J of the Supreme Court of Alabama said:

a purely mechanical application of legal principles should not be permitted to create an illogical conclusion. To hold that one who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right of privacy merely because she

39 ASTRA, *Submission 99*.

40 D Butler, *Submission 10*. Butler's submission cited *Shelley Films v R Features* [1994] EMLR 134; *Creation Records Ltd v News Group Newspapers Ltd* (1997) 39 IPR 1.

41 It is 'not possible to draw a rigid line between what is private and that which is capable of being witnessed in a public place by other persons': D Butler, *Submission 10*. Butler cited *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220.

42 *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB); *Murray v Express Newspapers* [2008] EWCA Civ 446.

happened at the moment to be part of a public scene would be illogical, wrong, and unjust.⁴³

6.47 In an English case that went to the European Court of Human Rights, CCTV footage of a man in a public street, taken moments after he had tried to commit suicide, were later broadcast on television. The Court found this was an invasion of his privacy.⁴⁴ The man ‘was in a public street but he was not there for the purposes of participating in any public event and he was not a public figure. It was late at night, he was deeply perturbed and in a state of some distress’.⁴⁵ The footage was ‘viewed to an extent which far exceeded any exposure to a passer-by or to security observation and to a degree surpassing that which the applicant could possibly have foreseen’.⁴⁶

6.48 In *Campbell*, Naomi Campbell was also in a public place when she was photographed leaving a Narcotics Anonymous meeting. The publication of that photograph in a newspaper was found to be an invasion of her privacy.⁴⁷ Although Lord Hoffmann thought there was ‘nothing embarrassing’ about the particular picture, he did say that the

the widespread publication of a photograph of someone which reveals him to be in a situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information.⁴⁸

6.49 These cases illustrate some of the circumstances that may suggest that a person may have a reasonable expectation of privacy, despite being in a public place.

6.50 There may be different expectations of privacy with respect to the taking of a photo and to its later publication. It may be unreasonable to expect not to be photographed, particularly when in public,⁴⁹ but quite reasonable to expect the photograph not to be published, particularly if the photo captures a clearly private or humiliating moment. The importance of this distinction was stressed by photographers.⁵⁰

6.51 Expectations of privacy may also vary between different types of public place. For example, a person may expect more privacy in a restaurant than when on the street.

6.52 Whether people can expect privacy at work is another interesting question. Although people should generally expect less privacy at work than at home, it is reasonable to expect some privacy at work. One case before the Supreme Court of California concerned whether a woman employed as a ‘telepsychic’ had invaded the privacy of one of her fellow employees—using, not her psychic powers, but a video camera hidden in her hat. The court found that the fact that other co-workers may have

43 *Daily Times Democrat v Graham*, 276 Ala 380 (1964) 478.

44 *Peck v United Kingdom* [2003] ECHR 44 (28 January 2003).

45 *Ibid* [62].

46 *Ibid*.

47 *Campbell v MGN Ltd* [2004] 2 AC 457.

48 *Ibid* [75].

49 Randerson J said the taking of photographs in a public place ‘must be taken to be one of the ordinary incidents of living in a free community’: *Hosking v Runting* (2005) 1 NZLR 1, [2003] NZHC 416, [138] (Randerson J).

50 Australian Institute of Professional Photography (AIPP), *Submission 95*.

witnessed the interactions and conversations did not mean the plaintiff could not have a reasonable expectation of privacy:

In an office or other workplace to which the general public does not have unfettered access, employees may enjoy a limited, but legitimate, expectation that their conversations and other interactions will not be secretly videotaped by undercover television reporters, even though those conversations may not have been completely private from the participants' co-workers.⁵¹

Purpose of intrusion

6.53 An intrusion into a person's seclusion for a particular purpose may invade that person's privacy, while the same intrusion for a different purpose would not. For example, a patient's reasonable expectation of privacy has not been invaded when a nurse enters the patient's hospital room to take their temperature, but may be invaded by a journalist entering the room to take photos of the patient for publication in a newspaper.⁵²

6.54 In *Murray v Big Pictures*, the High Court of England and Wales included, in a list of matters a court should consider when determining whether the plaintiff had a reasonable expectation of privacy, 'the nature and purpose of the intrusion' and 'the circumstances in which and the purpose for which the information came into the hands of the publisher'.⁵³ In that case, the court held that pictures had been

taken deliberately, in secret and with a view to their subsequent publication. They were taken for the purpose of publication for profit, no doubt in the knowledge that the parents would have objected to them.⁵⁴

6.55 *Tugendhat and Christie's The Law of Privacy and the Media* states, concerning the UK law, that this aspect of the law is 'relatively undeveloped' and it may be 'open to debate how the "purpose of the intrusion" is to be determined (including whether the "purpose" is objective or subjective), and what weight should be accorded to what purposes'.⁵⁵

6.56 The motivation of the defendant may also be relevant to an assessment of the seriousness of an invasion of privacy.⁵⁶

How information was held or communicated

6.57 This matter relates to the form in which information is held, stored or communicated. Information held in some forms—such as a personal diary—may more clearly suggest that there is a reasonable expectation of privacy with respect to the information than to the same information held in another form.

51 *Sanders v American Broadcasting Companies Inc* (1999) 85 Calif. Rep. 2d 909. See, also, *Saad v Chubb Security Australia Pty Ltd* [2012] NSWSC 1183.

52 See, eg, *Kaye v Robertson* [1991] FSR 62.

53 *Murray v Big Pictures (UK) Ltd* [2009] Ch 481, [36].

54 *Ibid* [50], quoted in Warby et al, above n 32, [5.124].

55 Warby et al, above n 32, [5.123].

56 A malicious invasion of privacy, for example, may be more offensive and more serious. See Ch 8 for a discussion of the recommended 'seriousness' threshold.

6.58 The authors of *Tugendhat and Christie's The Law of Privacy and the Media* have written that in some cases, 'the principal focus of the court has been on the repository of the information as one likely to contain confidential or private information':

Personal diaries, private correspondence, together with similarly private written communications, and conversations on the telephone have all been recognized as likely repositories of such information. More recently it has been held that information stored on a personal computer is *prima facie* confidential.⁵⁷

6.59 New digital technologies will raise other questions. Email correspondence is treated like private correspondence, but not all information sent by email will be private in nature.

6.60 That a password or some other form of personal identification is required to gain access to a digital location containing personal information should, in the ALRC's view, strongly suggest that the information is likely to be subject to a reasonable expectation of privacy.

6.61 Similar reasoning may apply to intrusions upon seclusion. A locked solid door suggest that those in the room behind the door expect complete privacy, but a glass door involves different expectations.

Information in the public domain

6.62 Whether and to what extent the information was in the public domain should be considered when determining if the plaintiff has a reasonable expectation of privacy.

6.63 There may be no clear line between what is in the public domain and what is not. In the context of confidential information, the public domain has been said to mean 'no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential'.⁵⁸ Private information differs from confidential information in that the former is often private because of its nature, whereas the latter is often confidential only because of the obligation under which it was imparted.

6.64 Information that is private in nature will not automatically cease to be private once it is in the public domain. A person's medical records, for example, do not cease to be private when someone wrongly publishes them on a website. Not only will the original publication to the internet be an invasion of privacy, but other subsequent uses of the records may also, in some cases, amount to an invasion of privacy. Eady J said in *McKennitt v Ash*:

there are grounds for supposing that the protection of the law will not be withdrawn unless and until it is clear that a stage has been reached where there is no longer anything left to be protected. For example, it does not necessarily follow that because personal information has been revealed impermissibly to one set of newspapers, or to

⁵⁷ Warby et al, above n 32, [5.80].

⁵⁸ *Attorney General v Guardian Newspapers Ltd (No 2)* (1990) 1 AC 109, 282 (Lord Goff). Cf *Prince of Wales v Associated Newspapers Ltd* [2007] 3 WLR 222.

readers within one jurisdiction, that there can be no further intrusion upon a claimant's privacy by further revelations. Fresh revelations to different groups of people can still cause distress and damage to an individual's emotional or mental well-being.⁵⁹

6.65 However, an expectation of privacy will usually decrease, the more widely a piece of information has been published by someone.

Attributes of the plaintiff

6.66 Some attributes of a plaintiff, such as age, may affect whether the person had a reasonable expectation of privacy. A young person may have an expectation of privacy in some circumstances where an older person does not. Butler submitted that where 'the plaintiff is a child of vulnerable age there would normally be a high expectation that he or she is entitled to a measure of privacy'.⁶⁰

6.67 The occupation of the plaintiff may also be relevant, particularly if the plaintiff is a 'public figure'. Persons in some occupations necessarily or traditionally invite or receive considerable attention from the public. A professional sportsperson or a politician, for example, cannot reasonably expect the same level of privacy as other members of the public, although they can reasonably expect some privacy.

6.68 'The extent to which the individual has a public profile' was included in a list of matters the NSWLRC recommended should be considered in determining whether there has been an invasion of privacy.⁶¹ People who are reluctantly or involuntarily put in the public spotlight, such as the victim of a crime, may however be distinguished from those who seek the limelight.⁶²

6.69 The NSWLRC also included in this list the 'extent to which the individual is or was in a position of vulnerability'.⁶³ Being in a position of vulnerability may not always be an attribute of the plaintiff, but the ALRC agrees that vulnerability may not only make an invasion of privacy more offensive and harmful, but will also sometimes suggest information is private, or that a person should not be intruded upon. A patient in a hospital would seem to have a reasonable expectation of privacy, for instance.⁶⁴

6.70 The culture and background of a plaintiff may also be relevant to whether they have a reasonable expectation of privacy. Some information may be considered to be more private in some cultures than in others. These expectations may be well-known in the community. For example, the cultural expectations of Aboriginal and Torres Strait Islander peoples and other cultural or ethnic groups may be relevant to the reasonable expectation of privacy in some circumstances. The Arts Law Centre of Australia

59 *McKennitt v Ash* [2005] EWHC 3003 (QB) (21 December 2005) [81].

60 D Butler, *Submission 10*. Butler cites *Murray v Big Pictures (UK) Ltd* [2009] Ch 481; *Hosking v Runting* (2005) 1 NZLR 1, [147]; *Lee v News Group Newspapers Ltd* [2010] NIQB 106, [44].

61 NSW Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009) Draft Bill, cl 74(3)(a)(iv).

62 *In re S* [2003] 3 WLR 1425; *Campbell v MGN Ltd* [2004] 2 AC 457, [142].

63 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) Draft Bill cl 74(3)(a)(v).

64 *Kaye v Robertson* [1991] FSR 62.

stressed the importance of considering the ‘confidential or culturally sensitive nature of cultural knowledge, stories, images of indigenous Australians’.⁶⁵

6.71 The Australian Privacy Foundation said ‘great care’ should be given in taking into account age, occupation and other like factors, because it may suggest some people warrant less protection from invasions of privacy than others.⁶⁶ The ALRC agrees that the various factors should be considered carefully, when determining whether the plaintiff had a reasonable expectation of privacy, but it seems clear that some attributes of a plaintiff should give rise to a greater, or lesser, expectation of privacy.

Conduct of the plaintiff

6.72 The conduct of the plaintiff may sometimes affect whether the plaintiff had a reasonable expectation of privacy.

6.73 Some conduct may undermine a person’s expectation of privacy. For example, if a plaintiff invited publicity about a particular matter, it may be less reasonable for them to expect the matter to be kept private. A person who runs naked on a football field can hardly expect not to be photographed.

6.74 A plaintiff cannot generally expect privacy where they have freely consented to the conduct that compromises their privacy.⁶⁷ In Chapter 11, the ALRC recommends that consent be a defence to this tort, but the plaintiff’s consent to certain conduct may also arise when determining whether the plaintiff had a reasonable expectation of privacy. Consent given to someone other than the defendant can also be relevant. A plaintiff who has consented to the publication of private information in one newspaper, may not always reasonably expect the information not to be published in another newspaper.

6.75 A court might also ask whether the plaintiff had ‘courted publicity on the relevant occasion’.⁶⁸ A person who has courted publicity cannot expect the same level of privacy as those who have not. However, care must be taken here, because it does not follow that such persons forgo any right to privacy, just as a person does not, by manifesting a desire for privacy, automatically become entitled to it. People should generally be able to set limits on how far the public may see into their private life. That a person reveals some facts about their private life certainly does not suggest that all aspects of their private life are then open to public attention. But if a person has invited publicity on a particular matter, it may generally be less reasonable for them to later say that the defendant went too far.

65 Arts Law Centre of Australia, *Submission 43*. See, also, Public Interest Advocacy Centre, *Submission 105*.

66 Australian Privacy Foundation, *Submission 110*.

67 ‘There is one basic principle which can be seen to underlie all the variously named versions of the defence of consent: it is “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’: Warby et al, above n 23, [12.08], quoting *Smith v Baker* [1891] AC 325, 360 (Lord Herschell).

68 D Butler, *Submission 10*. Butler cites *Hickey v Sunday Newspapers Ltd* [2010] IEHC 349.

6.76 A claim to privacy may also be more difficult to maintain where the plaintiff has been deceptive or hypocritical about the particular matter. Guardian News and Media Limited and Guardian Australia submitted that

a public figure who makes a public stand on a particular issue may then, inconsistently, seek to cloak particular facts relating to that issue in privacy: in such circumstances the Court should be entitled to consider those additional circumstances. Further it is often the case that plaintiffs' actual conduct can differ from and be inconsistent with their publicly stated views.⁶⁹

6.77 On this last point, it is interesting to compare the comments of Professor James Griffin, in his article *The Human Right to Privacy*:

a society is the healthier for combating certain forms of hypocrisy; it is certainly better for combating injustice. But a homosexual bishop who believes, even if misguidedly, that priests should not be active homosexuals is not necessarily abusing his power. Not all persons whose appearance differs from their reality are thereby hypocrites. A homophobe, whether homosexual or not, who acts hostilely towards homosexuals solely because they are homosexual is unjust. The injustice deserves exposure. *That* is the public interest. But if the homophobe is himself also homosexual, to publicize that further fact is protected neither by the outer's freedom of expression nor the public's right to information. On the contrary, it is an outrageous infringement of the homophobe's right to privacy. It is not that a person's sex life is never of public interest but that usually it is not.⁷⁰

6.78 Other conduct of the plaintiff may strengthen a plaintiff's claim that they had a reasonable expectation of privacy. Notably, it is more reasonable to expect privacy, if one has asked for it. The author of a document marked 'private' obviously thereby manifests some desire for the document to be treated as private. Similarly, a person who asks to sit in a private room of a restaurant may more reasonably expect privacy than a person who does not. Accordingly, the ALRC recommends that the Act refer to whether, and if so to what extent, the plaintiff had manifested a desire for privacy, in the list of relevant considerations. It was submitted that whether the plaintiff had been 'directly informed about how to manifest a desire not to have his or her privacy invaded' might also be relevant.⁷¹

6.79 The Australian Privacy Foundation (APF) said there was 'little utility' in this factor. A person should not 'need to express a desire not to be the subject of a tortious wrong'. The APF said that this factor is 'likely to be used by defendants who may use the lack of a demonstrated, overt desire as being a factor to be taken into account against a plaintiff'.⁷² The ALRC agrees that a person should not easily be taken to have forfeited their privacy, simply because they did not manifest a clear desire for privacy. But where such a desire for privacy is made manifest, it does seem more reasonable to expect privacy.

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

70 James Griffin, 'The Human Right to Privacy' (2007) 44 *San Diego Law Review* 697, 720.

71 S Higgins, *Submission 82*.

72 Australian Privacy Foundation, *Submission 110*. Telstra also submitted that whether someone has a manifest a desire not to have their privacy invaded is not relevant: Telstra, *Submission 107*.

Other matters

6.80 The list of factors is not exhaustive. A court may consider other matters when determining whether a person in the plaintiff's position would have a reasonable expectation of privacy.

6.81 For example, the nature of the relationship between the parties may also be relevant. There do not appear to be many cases in which a person has brought an action for invasion of privacy against his or her spouse, partner or other family member. It would generally not be reasonable to expect the same level of privacy from partners and family members. But when relationships break down, the expectation of privacy may then increase. In some cases, the expectation of privacy may even be higher with respect to a former intimate partner, than with others. Women's Legal Services NSW submitted that it is reasonable that victims of family violence should have a higher expectation of privacy.⁷³

6.82 Butler submitted a list of matters that should be considered. Many of these matters are included in the list recommended by the ALRC, but others include the intimacy of a sexual relationship; whether the disclosure would cause a risk of serious injury to the plaintiff; and whether the information is 'contained in a public record which is part of the public consciousness'.⁷⁴

6.83 It is not possible to list or analyse all of the factors that may affect whether a person in a particular case can reasonably expect privacy. This is why it is important that a list of relevant factors be non-exhaustive. A court should consider any other relevant factors. By adopting the widely used test of whether the plaintiff had a reasonable expectation of privacy, Australian courts may also draw on the analysis of courts in other countries.

73 Women's Legal Services NSW, *Submission 115*.

74 D Butler, *Submission 10*.

