7. Fault

Contents

Summary

7.1 There are essentially three types of liability to consider when designing a cause of action for serious invasion of privacy: liability based on intention; liability based on negligence; and strict liability.

7.2 The ALRC recommends that, for an action under the tort to succeed, the invasion of privacy must be either intentional or reckless. Confining the tort in this way will ensure that the new tort applies to the most objectionable types of invasion of privacy.

7.3 Analogous torts protecting fundamental personal rights, such as assault and false imprisonment, also require proof of intent.

7.4 In addition, confining the tort to intentional or reckless conduct is critical to the justification for the tort being actionable without proof of damage. Not requiring proof of actual damage—essentially, allowing actions where there is 'only' emotional distress—will provide an important level of protection and vindication for victims of intentional or reckless invasions of privacy, and will enhance the tort's deterrent and normative influence.

7.5 The cause of action should not extend to negligent invasions of privacy, and should not attract strict liability. Negligence or strict liability would make the scope of the tort too broad.

7.6 This chapter also recommends that an apology should not be admissible as evidence of an admission of fault or liability.

Intentional or reckless invasions of privacy

Recommendation 7–1 The new tort should be confined to intentional or reckless invasions of privacy. It should not extend to negligent invasions of privacy, and should not attract strict liability.

7.7 The ALRC recommends that, in a cause of action for serious invasion of privacy, the defendant must be shown to have intended to invade the privacy of the plaintiff. This intention could encompass either:

- a subjective desire or purpose to intrude or to misuse or disclose the plaintiff's private information; or
- circumstances where such an intent may be imputed to the defendant on the basis that the relevant consequences—the intrusion, misuse or disclosure—were, objectively assessed, obviously or substantially certain to follow.

7.8 This approach to intent is consistent with the principles set out in *Fleming's Law of Torts* in relation to the tort of battery,[1] and with the *Restatement (Third) of Torts: Liability for Physical & Emotional Harm.*[2] As discussed further below, the defendant should also be liable if they were reckless.

7.9 It may be helpful for both intent and recklessness to be defined in the legislation. A definition of intent—including both subjective and imputed intent—could be modelled on the US Restatement definition, discussed below. The *Commonwealth Criminal Code* set out in the Schedule to the *Criminal Code Act 1995* (Cth) contains a definition of recklessness that could serve as a model for a definition of recklessness in the new tort. Alternatively, the provision could state that a person is reckless if they are aware of a substantial risk that an invasion of privacy will occur, and acts regardless of, or with indifference to, that risk.

7.10 Previous law reform reports have diverged on the issue of fault. In 2008, the ALRC recommended that liability for invasions of privacy should be limited to intentional or reckless conduct, with 'intentional' defined as being where the defendant 'deliberately or wilfully invades the plaintiff's privacy' and 'reckless' having the same meaning as in s 5.4 of the *Criminal Code* (Cth).[3] The ALRC said that 'including

1 'Battery is an intentional wrong: the offensive contact must have been desired, expected or known to be substantially certain to result': Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) [2.60].

2 'Section 1 provides a new general definition of intent. An "intent" to produce a consequence means either the purpose to produce that consequence or the knowledge that the consequence is substantially certain to result': Kenneth W Simons, 'A Restatement (Third) of Intentional Torts?' (2006) 48 *Arizona Law Review* 1061.

3 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) 2576. This report also cited in support: Law Reform Commission of Hong Kong, *Civil Liability for Invasion of Privacy*, (2004) [6.71].

liability for negligent or accidental acts in relation to all invasions of privacy would, arguably, go too far'.[4]

7.11 Neither the New South Wales Law Reform Commission (NSWLRC) nor the Victorian Law Reform Commission (VLRC) recommended a fault element as part of the recommended cause or causes of action, but the NSWLRC recommended a defence of innocent dissemination similar to that found in the *Defamation Acts*.[5] The NSWLRC explained why it had not suggested a fault element in its design:

> We prefer not to lay down an absolute rule [as to whether conduct must be intentional (that is, deliberate or wilful)]. Submissions generally favoured extending liability beyond intentional conduct. While our view is that liability will generally arise under the legislation only where the defendant has acted intentionally there may be circumstances where the defendant ought to be liable for an invasion of privacy that is, for example, reckless or negligent, as where a doctor is grossly negligent in disclosing the medical records of a patient. This is a matter that is appropriately left to development in case law.[6]

7.12 Many stakeholders agreed that the cause of action should be confined to intentional or reckless invasions of privacy.[7]

7.13 Some stakeholders suggested that requiring the plaintiff to prove intent or recklessness sets too high a bar for liability or is too difficult for plaintiffs.[8] However, although the burden of proving fault will be on the plaintiff,[9] it will not always be difficult for the plaintiff to prove that the defendant's conduct involves the first kind of intent above—that is, a subjective desire or purpose. A subjective intent may be obvious on the facts or readily inferred from the defendant's behaviour or statements.

7.14 The second kind of intent—one where the defendant is taken to have intended to invade the plaintiff's privacy—could be described as an 'imputed intent'.[10] In the ALRC's view, the notion of 'imputed intent' is consistent with the well-accepted principle that a person who acts with knowledge of a substantial certainty of a

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4 ALRC, *Review of Australian Privacy Law*, Discussion Paper 72 (2007) 2577. See also NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) 171.

5 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) [6.9].

6 Ibid [5.56].

7 ASTRA, *Submission 99*; ABC, *Submission 93*; Australian Bankers' Association, *Submission 84*; Guardian News and Media Limited and Guardian Australia, *Submission 80*; SBS, *Submission 59*; Google, *Submission 54*; Arts Law Centre of Australia, *Submission 43*.

8 Electronic Frontiers Australia *Submission 118*; Public Interest Advocacy Centre, *Submission 105*.

9 The ALRC considers that any statutory action should follow the basic principle that whoever asserts something should bear the onus of proving it: James Goudkamp, *Tort Law Defences* (Hart Publishing, 2013) 12. The ALRC does not consider that a statutory cause of action should follow the unusual, and contentious, position in relation to trespass off the highway that the onus of proving *lack* of fault should be on the defendant: see further Rosalie Balkin and Jim Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) 25–27.

10 It was such an imputed intent that Wright J found in the well-known case of *Wilkinson v Downton* when he said: 'It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed': *Wilkinson v Downton* (1897) 2 QB 57, 59. In this case, the defendant had, as a 'practical joke', told the plaintiff that her husband had been badly injured and needed her to collect him in a horse and cab. Mrs Wilkinson suffered a psychiatric illness as a result.

consequence will be *taken* to have intended that consequence. 'Imputed intent' is a short-hand term for this method of finding intent.

7.15 Therefore, a plaintiff would not necessarily have to prove that the defendant had a subjective intent (or purpose) to invade his or her privacy. An intent may be imputed from the circumstances: if an invasion of privacy is substantially or obviously certain to follow from certain conduct, then the defendant may be taken to have intended the invasion of privacy, even if the defendant in fact did not put his or her mind to invading the plaintiff's privacy.

7.16 There is little argument against the proposition that, if a statutory tort of invasion of privacy is to be enacted (or a common law tort developed), it should be actionable where the defendant has intentionally invaded the privacy of the plaintiff. Deliberate and unjustifiable invasions of an individual's privacy[11] are clearly culpable and beyond what any person should be expected to endure in the ordinary circumstances and exigencies of everyday life[12] or from their interactions with others in society.

7.17 Protection against intentional or reckless conduct is clearly within the protection intended by art 17 the *International Covenant on Civil and Political Rights*, which provides that*:* 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence'. Intentional or reckless invasions of privacy would be likely to be considered 'arbitrary interferences' for the purposes of art 17.

7.18 It is sometimes said that the purpose of a tort is to remedy the *harm* that is suffered by a plaintiff, and that the harm in an invasion of privacy is the interference with the plaintiff's dignity and autonomy, regardless of the type of conduct that causes that interference. However, it can also be argued that the purpose of a tort or statutory action is to remedy and prevent the *wrong* which the plaintiff suffers or may suffer, and that the nature of the conduct and the purpose or motives or state of mind of the actor are closely bound up with making that conduct wrongful.[13] 'Intentional wrongdoers are the worst type of tortfeasor, worse than merely reckless or negligent actors.'[14] This notion is also reflected in the 'seriousness' element, discussed in Chapter 8.

7.19 Most jurisdictions that have a tort or torts of invasion of privacy require that the conduct be intentional or reckless. The statutory torts in four Canadian provinces—British Columbia, Saskatchewan, Newfoundland and Labrador—all apply to a violation of privacy done 'wilfully'.[15] These statutory offences for violation of another's privacy do not distinguish between different types of conduct or invasion.

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11 That is, assuming that the requirement that there exists a reasonable expectation of privacy has been met.

12 Lord Goff enunciated a similar principle in relation to when a touching in the course of daily life will or will not amount to the tort of battery, in the case of *Collins v Wilcock* (1984) 1 WLR 1172.

13 That the 'mere touching of another in anger is a battery': *Cole v Turner* (1704) 6 Mod Rep 149. Anger or ill intent may turn what would otherwise be an everyday contact into a battery, while hostility is no longer *required* for touching to amount to battery: *Rixon v Star City Pty Ltd* (2001) 53 NSWLR 98, 112.

14 Simons, above n 2, 1079. The author does, however, go on to show how this simple hierarchy of fault is not the whole picture.

15 *Privacy Act*, RSBC 1996, c 373 (British Columbia) s 1(1); *Privacy Act*, RSNL 1990, c P-22 (Newfoundland and Labrador) s 3(1); *Privacy Act*, RSS 1978, c P-24 (Saskatchewan) s 2. Only Manitoba uses a different formulation which is that a person 'substantially, unreasonably and without a claim of

7.20 Torts of intrusion upon seclusion in other jurisdictions generally require intentional or reckless conduct. In the American Law Institute's *Restatement (Second) of Tort* (1977), which identifies four privacy torts,[16] only the formulation of the tort of 'intrusion upon seclusion', at s 652B includes the element of intention:

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

7.21 In 2012, the Ontario Supreme Court adopted the elements set out in the *Restatement (Second) of Tort*, to recognise a common law tort of intrusion. Sharpe JA, with whom Winkler CJO and Cunningham ACJ agreed, noted:

> the defendant's conduct must be intentional, within which I would include reckless... A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy.[17]

7.22 Similarly, in a New Zealand case about intrusion upon seclusion, *C v Holland*, Whata J said that the plaintiff must show an intentional intrusion, where intentional 'connotes an affirmative act, not an unwitting or simply careless intrusion'.[18]

7.23 The *Restatement (Second) of Tort* also identifies a tort relating to giving publicity to a matter concerning the private life of another person, in s 652D. There is no express reference in this tort to fault on the part of the actor.[19]

7.24 The ALRC considers that fault should be required for cases of invasion of privacy involving publication of private information. Intentional—or deliberate—or reckless publications are the primary mischief to which the tort should be directed, and there currently exists a gap in legal protection for such invasions of privacy. While fault is not a distinct element in the torts relating to invasion of privacy by wrongful use or disclosure of private information in other jurisdictions, most have involved deliberate disclosures,[20] either by the media or by individuals formerly in a personal relationship. Fault is rarely at issue, as the defendant's intent to publish or communicate the information about the plaintiff has been obvious. For example, in *Hosking v Runting*, the publication of a photograph of the plaintiff's infant children by the defendants, a photographer and media company, was clearly deliberate.

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right' violating the privacy of another, but then includes a defence that the defendant neither knew or should have known that the conduct would have violated the privacy: *Privacy Act*, CCSM 1996, c P125 (Manitoba) ss 2(1), 5(1)(b).

16 See Ch 5.

17 *Jones v Tsige* (2012) ONCA 32, [71]–[72]. The ALRC's recommendation on a threshold of seriousness in Ch 8 reflects the criterion of the invasion being 'significant'.

18 *C v Holland* [2012] 3 NZLR 672 ,[94]–[95] (Whata J).

19 The same formulation was adopted by the New Zealand Court of Appeal when it recognised a tort of invasion of privacy by publication of private information: *Hosking v Runting* (2005) 1 NZLR 1, [117] (Gault and Blanchard JJ), [259] (Tipping J).

20 K Barker, *Submission 126*.

7.25 Some stakeholders have suggested that the ALRC should distinguish between the fault required for intrusions upon seclusion and the fault required for wrongful use or disclosure of private information.[21] Others have argued that differing fault requirements for different kinds of invasions of privacy justify having two separate torts.[22] However, conduct invading privacy will often involve both types of invasion and the ALRC considers that the creation of two separate statutory torts would be undesirable. Further, for the reasons set out below, the ALRC considers that any liability under the new tort should be confined to intentional or reckless conduct, regardless of the type of invasion.

7.26 Data breaches caused by or contributed to by negligent conduct, omissions or poor security systems are discussed below. In most cases, if within the jurisdiction, they will attract significant regulatory consequences, which may now include civil penalties, and will give rise to a range of other legal remedies.

Recklessness

7.27 It is the ALRC's view that liability should be extended to situations where the defendant's conduct invaded the plaintiff's privacy recklessly: that is, where the defendant was aware of the *risk* of an invasion of privacy and was indifferent to whether or not an invasion of the plaintiff's privacy would occur as a result of the conduct.[23]

7.28 Recklessness may be described as reckless indifference to a result. In a case involving workplace bullying and harassment, Spigelman CJ said:

> Clearly something substantially more certain [than reasonable foreseeability] is required for the intentional tort ... However, a test of reckless indifference to a result will, in this context, satisfy the requirement of intention.[24]

7.29 Many stakeholders supported the proposal that fault should include recklessness.[25] However, some stakeholders opposed this. For example, Free TV submitted that:

> News and current affairs reporting takes place under strict time constraints that require rapid evaluation of material. In these circumstances, penalties for reckless

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21 Ibid.

22 Ibid.

23 Recklessness therefore looks to the subjective awareness of the *risk* of an invasion, whereas an imputed intention rests on the obvious or substantial certainty that the invasion would occur.

24 *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 417, [76]–[80]. While this statement seems to equate or subsume recklessness within intention, the ALRC considers it clearer to treat recklessness as a separate type of fault from subjective or imputed intention. Note also *Northern Territory v Mengel* (1995) 185 CLR 307, [60]: 'Principle suggests that misfeasance in public office is a counterpart to, and should be confined in the same way as, those torts which impose liability on private individuals for the intentional infliction of harm. For present purposes, we include in that concept acts which are calculated in the ordinary course to cause harm, as in *Wilkinson v Downton*, or which are done with reckless indifference to the harm that is likely to ensue, as is the case where a person, having recklessly ignored the means of ascertaining the existence of a contract, acts in a way that procures its breach.'

25 Insurance Council of Australia, *Submission 102*; ASTRA, *Submission 99*; ABC, *Submission 93*; Australian Bankers' Association, *Submission 84*; SBS, *Submission 59*; Telstra, *Submission 45*; Arts Law Centre of Australia, *Submission 43*.

> breaches would be likely to introduce a level of conservatism that may prevent or delay the reporting of news, because the test for 'recklessness' in law carries with it a necessary value judgment about what is a reasonable or unreasonable risk.[26]

7.30 The ALRC agrees that there are important public interest considerations involved here. The new tort addresses these concerns by providing that the public interest in the reporting of news on matters of public importance and concern is a matter that a court may take into account, when determining whether there has been an actionable invasion of privacy.[27] These considerations are not best addressed by excluding any liability for reckless conduct.

What conduct must the fault relate to?

7.31 The ALRC considers that the new tort should only be actionable where the defendant intended to invade the plaintiff's privacy in one of the ways set out in the legislation or was reckless as to that invasion. It should not be actionable where there is merely an intention to do an act that has the consequence of invading a person's privacy. In some cases, this distinction will be difficult to draw, such that the consequences of an act will be so inextricably linked to the act, or so substantially certain to follow,[28] that an intention to do the act will strongly suggest an intention to bring about the consequences of the act. But this will not always be the case. Furthermore, it may be quite common to intend an action that will have the consequence of invading someone's privacy, without intending to invade their privacy.

7.32 For example, if an absent-minded person walks into a neighbour's home, thinking it is their own home, the person may have invaded the neighbour's privacy. The action in walking through the front door may have been intended,[29] but the invasion of the neighbour's privacy was not. It would merely have been done negligently.

7.33 To take a more common example, a media entity may publish a story that has the effect of invading a person's privacy, but without any knowledge of the facts which would make it an invasion of that person's privacy.[30] An example would be interviewing a person about the fact that they were adopted as a baby: unknown to the journalist, the person's adoptive parents had not disclosed to their friends the fact that they had adopted their baby. The *publishing* of the story may have been intended, but not the consequences of the publication, namely, the invasion of the parents' privacy by the publication of this information.

7.34 Some stakeholders said the relevant intent should be an intent to invade the privacy of the plaintiff and not merely an intent to do an act which invades the privacy

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26 Free TV, *Submission 109*.
27 See Ch 9.
28 Sappideen and Vines, above n 1, 34.
29 Ibid 88.
30 As explained below, lack of knowledge of the facts that make the statement defamatory would not be an excuse to the strict liability under that tort.

of the plaintiff.[31] While Telstra considered current privacy protections sufficient, it submitted that, if there were a cause of action,

> intent should be determined by reference to the invasion of privacy and the harm to the complainant, rather than the conduct of the defendant, in order to be as specific and targeted in its application as possible.[32]

7.35 There is much confusion over the use of the term 'intention'. However, some points may clarify the ALRC's recommendation. The requirement does *not* mean that the defendant needs to intend to commit a legal wrong, or that he or she intends to fulfil the other ingredients for liability (seriousness, lack of public interest justification or defence). This would be too stringent a hurdle for the plaintiff to overcome.[33] It does mean that the defendant needs to have been aware of the facts from which it can be objectively assessed whether or not the plaintiff had a reasonable expectation of privacy and of the facts that an intrusion or disclosure would (or in the case of recklessness, may) occur.

7.36 Two examples may explain this last point. First, in relation to private information: some information is obviously private so that there would be no doubt that the defendant would have knowledge of the facts that support a reasonable expectation of privacy. For example, secretly filming a person in the shower, as in *C v Holland*,[34] or surreptitiously prying into someone's bank account, as in *Jones v Tsige*.[35]

7.37 However, in other cases, the defendant may have no knowledge of the facts that would make the disclosure an invasion of privacy. An example is a photographer who takes a photograph of a public event, without realising that the photograph captures a private activity, perhaps of people inside a building in the background to the event. The taking of the photograph in that case would not be an intentional or reckless intrusion into the privacy of the people involved.

Intend the harm?

7.38 Some may argue that requiring an intent to intrude into space or affairs that are private, or disclose information that is private, will remove liability for some conduct that results in a serious invasion of privacy. However, if it were sufficient merely to intend the act, and not the consequences of the act—being the invasion of privacy—then this would effectively impose either a negligence standard (in the sense that the defendant *ought* to have realised the invasion would occur and taken care that it not do so) or a strict liability standard as in defamation. In defamation, the publisher will be strictly liable if the publication defames the plaintiff, even if the defendant was unaware of the facts making it defamatory,[36] or even of the plaintiff's existence or

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31 See, eg, SBS, *Submission 59*; Telstra, *Submission 45*; Arts Law Centre of Australia, Submission No 15 to DPM&C Issues Paper, 2011.
32 Telstra, *Submission 45*.
33 N Witzleb, *Submission 116*.
34 *C v Holland* [2012] 3 NZLR 672.
35 *Jones v Tsige* (2012) ONCA 32.
36 *Cassidy v Daily Mirror* [1929] KB 331; *Lee v Wilson* (1934) 51 CLR 276.

circumstances.[37] For reasons discussed below, the ALRC considers that negligence should not be sufficient fault for an action for breach of privacy, and strict liability would be unduly burdensome and discouraging to other worthwhile competing interests.

7.39 It is also clear, by reference to the existing law on other intentional torts, that if the defendant intended the invasion of privacy (that is, to intrude upon the plaintiff's seclusion or to disclose private information), it would *not* be necessary, in order to prove intent, for the plaintiff to show that the defendant intended to offend, distress or harm the plaintiff by the conduct.[38] In an analogous tort, the tort of battery, the tort is made out by proof of an intent to touch, without the need to show an intent to inflict the actual personal injury that followed.[39] The question then becomes one of whether or not the particular damage claimed is too remote from the defendant's tort. In intentional torts, the test is whether the damage claimed was a natural and probable consequence of the tort.[40]

7.40 In some cases, a person will have intent to inflict harm or cause distress to the plaintiff. In such cases, this may satisfy the intent element for the tort,[41] but also amount to 'malice' in law that would aggravate the damages that could be claimed.[42] However, many invasions of privacy will not be motivated by malice towards the victim. If a media organisation invades a person's privacy, this may largely be motivated by a desire to inform the public, pursue a newsworthy story, attract more viewers or increase the sale of newspapers, rather than to harm the victim.

Fault and actionability per se

7.41 If the tort were not confined to intentional or reckless invasions of privacy, but was extended to include negligence or provide for strict liability, this would undermine an important justification for making the tort actionable without proof of damage. Rather, such an extension would require proof of actual damage to be consistent with other tort law.

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37 *Hulton v Jones* [1910] AC 20; *Mirror Newspapers Ltd v Fitzpatrick* (1984) 1 NSWLR 643. It is only if the fact of publication itself was accidental or could not have been foreseen that a defendant may escape liability: Sappideen and Vines, above n 1, 631. See also, Anthony Dugdale and Michael Jones (eds), *Clerk and Lindsell on Torts* (Sweet & Maxwell, Limited, 19th ed, 2006) 1311–1312.

38 This is described by Simons as a 'dual intent', required by courts in many states of the United States for battery, but he prefers as 'the only plausible interpretation of the case law', the 'single intent' requirement favoured by courts in other states: Simons, above n 2, 1067.

39 What injuries or damage flowing from the tort may be compensated in an intentional tort action is governed by the principles of remoteness of damage: whether the particular head of damage is a natural and probable result of the conduct: *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 417, [81].

40 *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388.

41 'If the only motive of the actor is a desire to harm the plaintiff, this fact becomes a very important factor. A motive of this sort is sometimes called a disinterested malevolence, to indicate that the defendant has no interests of his own to promote by his conduct, other than venting his ill will. It is sometimes said that an evil motive cannot make tortious an act that is otherwise rightful. The nature of the motive, however, may be a factor that tips the scale in determining whether the liability should be imposed or not': American Law Institute, *Restatement of the Law of Torts (Second)* (1977) s 870.

42 *Giller v Procopets* (2008) 24 VR 1.

7.42 It is not just the law of negligence that requires proof of actual damage. Usually the isolated remaining common law tort causes of action imposing strict liability also require damage, as in the case of liability for nuisance arising out of a positive conduct creating a nuisance.[43] Statutory strict liabilities, such as civil liability to pay compensation for misleading or deceptive conduct, or civil liability in relation to defective products, also only arise where the plaintiff proves loss.[44]

7.43 Defamation liability, which is strict, is a special case. It is actionable per se: there is no requirement that the plaintiff suffer 'actual' or 'special', that is, provable damage. However, it works slightly differently in that a *presumption* of 'general' damage to reputation is inherent in the tort itself.[45]

7.44 Overall, defamation is not a tort the ALRC considers should be used as a model for liability for invasions of privacy, even though some of its elements and defences provide a useful point of comparison. Although there will be no presumption of general damage where the new tort of invasion of privacy is made out—it will be for the plaintiff to persuade the court what emotional distress or other harm they have suffered—the ALRC considers that the combination of strict liability and actionability per se for a new tort of invasion of privacy would still be undesirably onerous on many organisations and individuals.

Negligence

7.45 The ALRC does not recommend that negligent invasion of privacy be actionable under the new tort. Negligence depends on whether the actor's conduct[46] measured up to an objective standard of what a reasonable person in the position of the defendant would or would not do in the circumstances. In this objective test, the intention of the defendant is not relevant, even if the defendant was well-meaning.[47]

7.46 A number of stakeholders submitted that liability for breach of privacy should be imposed for negligent invasions of privacy, in addition to reckless and intentional invasions of privacy.[48] As noted above, however, many stakeholders submitted or

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43 Sappideen and Vines, above n 1, 509.

44 See, eg, *Competition and Consumer Act 2010* (Cth) sch 2.

45 '[Special damages] are much less important than general damages, which are presumed to follow publication of the libel. The claimant does not have to prove the particular respects in which it has damaged his reputation or injured his feelings.': Eric Barendt et al, *Media Law: Text, Cases and Materials* (Pearson, 2013) 445; Sappideen and Vines, above n 1, 632–634. See also *Defamation Act 2005* (NSW) 2005 s 7(2).There are equivalent provisions in the other Australian uniform defamation laws which provide that 'the publication of defamatory matter of any kind is actionable without proof of *special* damage'. 'Special damage' refers to particular financial loss which the plaintiff proves was caused by the tort, such as cancellation of a sponsorship contract or loss of profits. See, also, Ch 8 and *Ell v Milne (No 8)* [2014] NSWSC 175 (7 March 2014).

46 In this context, 'conduct' might be comprised of an omission to do something. It could also refer to the actor's conduct in operating or maintaining a system, such as a data storage system.

47 *Blyth v Birmingham Waterworks Company* (1856) 11 Ex Ch 781; *Vaughan v Menlove* (1837) 132 ER 490 (CP).

48 See, eg, Office of the Australian Information Commissioner, *Submission 66*; Australian Privacy Foundation, *Submission 39*; Public Interest Advocacy Centre, *Submission 30*; B Arnold, *Submission 28*; T Gardner, *Submission 3*.

argued strongly that the requisite fault should not extend to negligence. Some argued that fault should be relevant only to damages, or that reasonable care should be a defence.[49]

7.47 There were two main arguments for extending liability to negligence: first the harm that may result from negligence; secondly, the deterrent or regulatory effect of negligence liability.

Harm caused by negligence

7.48 Some stakeholders who called for negligence-based liability stressed the harm that may be caused by unintentional invasions of privacy,[50] arguing that negligence can be just as damaging as, or even more damaging than, intentional or reckless conduct.[51]

7.49 Two possible types of harm need to be distinguished. First, where 'actual damage'—in the form of physical injury, psychiatric illness, property damage or financial loss—has been suffered by the plaintiff from the defendant's negligent invasion of privacy; and secondly, where the harm to the plaintiff is emotional distress only.

7.50 The first kind of harm may already be actionable under existing law. The ALRC considers that, because of this, the new cause of action should not extend to cover such situations. As the ALRC pointed out in the Discussion Paper, if actual damage is suffered beyond 'mere' emotional distress, it may well be the case that the plaintiff would already have a tort action in negligence because the defendant would be under a duty of care to the plaintiff.

7.51 Whether the defendant owed the plaintiff the necessary legal duty of care would depend on a range of factors, particularly the type of damage suffered by the plaintiff. It is straightforward to succeed in a negligence claim where a plaintiff has suffered physical injury or property damage due to another's negligence. If the harm is in the form of psychiatric illness, civil liability statutes in most states and territories impose extra requirements for recovery.[52] If the claim is for pure economic loss, then the requirements for liability are specific, but Australian courts do recognise such claims in limited circumstances. Much will depend on whether the defendant knew of the plaintiff and the risk of financial loss to that plaintiff, whether the defendant had made a representation to the plaintiff and whether the plaintiff was able to protect themself from the effects of the defendant's negligence.[53]

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49 See, eg, Office of the Privacy Commissioner NSW, Submission No 79 to DPM&C Issues Paper, 2011; Maurice Blackburn Lawyers, Submission No 45 to DPM&C Issues Paper, 2011.

50 See, eg, Women's Legal Services NSW, *Submission 57*; Electronic Frontiers Australia, *Submission 44*; Public Interest Advocacy Centre, *Submission 30*; C Jansz-Richardson, *Submission 24*; Office of the Information Commissioner, Queensland, *Submission 20*. 'In many cases, regardless of the intent of the invasion, the resultant consequences are the same, and the revelation that the circumstances were caused by negligence or a failure to act is likely to be cold comfort to the individual or group whose privacy has been breached': C Jansz-Richardson, *Submission 24*.

51 Electronic Frontiers Australia *Submission 118*.

52 See, eg, *Civil Liability Act 2002* (NSW) pt 3.

53 *Perre v Apand* (1999) 198 CLR 180.

7.52 This kind of negligence may occur in the privacy context in situations involving data breaches. In many cases of data breach, the parties are already known to each other through a series of transactions or contractual or licensing arrangements—the plaintiff may, for example, be a customer of the defendant.

7.53 In addition, or alternatively to tort liability, the plaintiff who has suffered actual loss as a result of a negligent data breach is likely in many cases to have a claim for breach of contract. It would not, it is suggested, be difficult to find an implied term that private information about the plaintiff should not be disclosed except for the purposes of the contract or in compliance with terms of the contract. Liability in contract may be strict or negligence-based. In addition, the plaintiff may also have a claim under the Australian Consumer Law or an equitable claim for breach of confidence, if the information was collected in confidence, as would often be the case.

7.54 In the second, and probably more common,[54] type of scenario, where the plaintiff has suffered only emotional distress, negligence liability would provide no remedy, nor would consumer protection laws. Contract law will only remedy mental distress when protection or freedom from such distress is a major or important purpose of the contract.[55] Compensation for distress may be awarded in appropriate contractual breach of confidence cases.[56]

7.55 Negligence law would provide no remedy, because the well-entrenched policy of the common law—and now the clear legislative policy across most Australian states and territories—is that liability for negligence generally does not extend to 'mere' emotional distress.[57] PIAC argued that this is not a convincing reason of principle as to why liability for invasion of privacy should not do so, as 'the nature of the breach is distinct and the facts are commonly if not invariably different from those involved in other forms of negligence'.[58] The Australian Privacy Foundation also argued that the new tort 'is discrete and stands alone, being designed to address specific forms of harm'.[59]

7.56 However, there are very many distressing situations in society caused by another's negligence, yet recovery is denied. If the new tort were to provide both that it should be actionable per se or should treat emotional distress as actual damage *and* that fault should extend to negligence, the coherence and overall consistency of the law in Australia would be undermined. Not only would the proposal conflict with clear legislative policy, but it is also difficult to see, as a matter of fairness, why a person should be able to recover for emotional distress caused by a negligent but unintentional invasion of privacy when another can recover nothing for emotional distress in a wide range of situations: the loss of a child's or other family member's life due to the

54 Leaving aside the common problem of fraud and identity theft where the plaintiff suffers actual financial loss.

55 *Farley v Skinner* (2002) 2 AC 750, 755; John W Carter, *Contract Law in Australia* (Lexis Nexis Butterworths, 6th ed, 2013) 855.

56 *Cornelius v de Taranto* [2001] EMLR 12, [69].

57 See, eg, *Civil Liability Act 2002* (NSW) s 31.

58 Public Interest Advocacy Centre, *Submission 105*.

59 Australian Privacy Foundation, *Submission 110*.

negligence of another person; from closely witnessing a terrifying event caused by negligence; or even from malicious conduct specifically aimed at distressing the plaintiff.[60]

7.57 Some stakeholders submitted that it would be consistent with the tort of 'negligent trespass', which is still recognised in Australia,[61] if a tort of invasion of privacy was actionable per se even where committed negligently.[62] However, the analogy is arguably inapt. While there are many case authorities, including in the High Court of Australia, which support an action of negligent trespass for direct physical impact and injury,[63] there is no case authority which supports the view that a trespass comprising an assault or false imprisonment and without any physical damage is actionable as a trespass (per se) on the basis of negligence. In fact there are numerous cases which analyse the requirement of intention in assault cases and whether intention was made out on the facts.[64] The ALRC suggests that the correct view is that assault and false imprisonment—and their actionability per se—are torts of intention or recklessness. Being concerned with intangible and dignitary interests of the plaintiff, these are the torts that are most analogous to an invasion of privacy.[65]

Deterrence and regulation

7.58 The second main argument advanced by stakeholders for extending liability to negligence, was the potential deterrent or regulatory effect of liability. Excluding negligence, it was argued, would encourage indifference to invasions of privacy.[66] Some argue that data breaches are often the result of negligence, and if the cause of action included negligence it would encourage companies to take steps to prevent such

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60 As in the United Kingdom, there is no tort in Australia of intentionally causing 'mere', even severe, emotional distress.

61 Unlike in England since the Court of Appeal decision of *Letang v Cooper* (1965) in which Lord Denning limited actions in trespass to intentional wrongs. This decision has been criticised in Australia: *NSW v Knight* [2002] NSWCA 393. This decision has also been criticised in the United Kingdom. See Ulele Burnham, 'Negligent False Imprisonment—Scope for Re-Emergence?' (1998) 61 *Modern Law Review* 573. But the real problem identified in that article seems to be not that a tort of false imprisonment cannot be brought on the basis of trespass if negligently committed, but that it is not clear if mere detention is to be treated as actual damage for the purposes of a negligence action. Further, in England, there is the difficulty of suing public authorities in negligence.

62 N Witzleb, *Submission 116*.

63 *Williams v Milotin* (1957) 97 CLR 465, 474.

64 Sappideen and Vines, above n 1, 35. Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 2012) 46. Cf Balkin and Davis, above n 9, 41. Luntz et al, notes the lack of case authority for the proposition that there can be a 'negligent assault': Harold Luntz et al, *Torts: Cases and Commentary* (Lexis Nexis Butterworths, 7th ed, 2013) 621. Lord Hope defined assault as 'any act by which the defendant, intentionally or recklessly, causes the claimant to apprehend immediate and unlawful personal violence', noting that 'this meaning is well vouched by authority': *R v Ireland* [1997] 4 All ER 255.

65 The same may well be true of battery, leaving the generic term 'negligent trespass' to apply only to negligent, direct, unauthorised, physical contact. Barker et al argue against the continuing role of negligent trespass. Barker et al, above n 64, 34. In *Marion's Case*, McHugh J described battery as follows: 'The essential element of the tort is an intentional or reckless, direct act of the defendant which makes or has the effect of causing contact with the body of the plaintiff': *Marion's Case* (1992) 175 CLR 218, 311.

66 Law Institute of Victoria, *Submission 22*.

breaches.[67] Bruce Arnold submitted that the action for negligence 'provides a necessary and appropriate incentive for Australian organisations to move towards best practice in information management'.[68]

7.59 The Law Institute of Victoria argued that '[i]ntentional privacy breaches, 'such as those alleged against News of the World in the United Kingdom, are not the norm':

> The larger threat comes from unintentional breaches caused by: a lack of understanding of privacy obligations; technological malfunction and human error; or systemic failures.[69]

7.60 PIAC also suggested that many systemic breaches of privacy may be due to negligence:

> Restricting liability to reckless or intentional acts may also discourage organisations from taking steps to ensure that their privacy management systems are adequate, and may encourage indifference to privacy protection.[70]

7.61 However, at least in respect of data breaches by government agencies and organisations with a turnover of more than $3 million, there is already considerable regulation to protect private information. Such entities are required to take such steps under the *Privacy Act* (and to some extent the *Telecommunications Act*), or under state and territory legislation.[71] Although it could be argued that these Acts have significant gaps, due to exemptions for most small businesses, for the media, and for most individuals, the new tort cause of action should not be designed as a remedy for deliberate exemptions in existing legislation. Instead, it may be more appropriate for that legislation to be reviewed, amended or strengthened.

7.62 Further, entities subject to the *Privacy Act* whose activities result in data breaches, whether caused negligently, accidentally or by systemic problems, will be subject to a range of remedial responses by the Privacy Commissioner. Since March 2014, this includes the possibility of substantial civil penalties.[72] While the advent of these reforms and new regulatory powers is not a reason, of itself, to stall the introduction of a tort directed at intentional invasions of individual privacy, as argued by some stakeholders,[73] they do counteract the argument that the existing law encourages indifference and negligence in systems maintenance. The ALRC considers that, in general, regulatory responses are a better way to deal with data breaches than a civil action for invasion of privacy, but as noted above, in any event many entities may be subject to a range of other civil legal liabilities.

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67 Electronic Frontiers Australia, *Submission 44*: 'Indeed, data breaches … are often the result of negligence. The cause of action should therefore be available for intentional, reckless and negligent invasions of privacy'.

68 B Arnold, *Submission 28*. See, also, Law Institute of Victoria, *Submission 22*. The Law Institute of Victoria submitted that, 'In the absence of a cause of action, there is little to no benefit or incentive for holders of private information in taking privacy obligations seriously'.

69 Law Institute of Victoria, *Submission 22*.

70 Public Interest Advocacy Centre, *Submission 30*.

71 See Ch 3.

72 *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth).

73 Interactive Games and Entertainment Association, *Submission 86*.

Too wide a liability

7.63 If the new tort extended to negligent invasions of privacy, there is a serious potential for a wide range of people to face liability for invading privacy by common human errors. While the ALRC agrees that human error is not synonymous with negligence,[74] and that negligence depends on an objective standard of the reasonable person, nevertheless the law of negligence does not consider degrees of negligence. A small degree of negligence, a momentary lapse of attention, may be adjudged to be negligence, and the extent of the harm is irrelevant to this issue. Further, in a negligence case, the defendant's conduct is also a breach of a pre-existing legal duty owed to the plaintiff or to a class to whom the plaintiff belongs: what may be expected of a defendant depends on the nature and scope of the duty of care. The proposed liability would not depend on a pre-existing duty of care.

7.64 A tort based on negligent invasion of privacy could capture many accidental or unintended occurrences. It is entirely conceivable that many legitimate activities may involve the unintended invasion of the privacy of a person unknown to the defendant. Street photography, CCTV cameras, drone usage or media activities may inadvertently capture footage or images of private activities or intrude into private spheres. Private information may be posted online or disclosed or lost in circumstances that a court could find to be negligent, even though that was done accidentally. If negligence were a basis of liability, it would be open for a plaintiff to argue that the defendant *should* have taken more precautions to ensure that these consequences did not happen.

7.65 It was suggested in the Canadian case, *Jones v Tsige,* that confining the tort to intentional and reckless conduct will help ensure the new tort will not 'open the floodgates' to privacy claims.[75]

7.66 While data breaches by commercial and government entities should be treated seriously by the law, there is a real risk, in the ALRC's view, that extending liability to negligence generally would lead to onerous and broad liability under the new tort, and in view of existing remedies and regulation outlined above, there is no compelling case to so extend it.

Chilling effect of negligence liability

7.67 Some stakeholders argued that extending liability to include negligence might lead people to be 'unduly careful about disclosing information'.[76] It may lead to excessive self-censorship[77] or too great a chilling effect on everyday activities that carry even a remote risk of unintentionally invading someone's privacy. The Arts Law Centre said that it would be concerned

> that creating a cause of action for negligence has the potential to create a great deal of uncertainty and discourage artists from engaging in activities that could accidentally

74 N Witzleb, *Submission 116*.
75 *Jones v Tsige* (2012) ONCA 32, [71]–[72].
76 ASTRA, *Submission 47*.
77 National Association for the Visual Arts Ltd, *Submission 78*.

> or inadvertently expose them to the risk of breaching the law. Inadvertent invasions will lead to self censorship, chilling effect.[78]

7.68 The Australian Privacy Foundation argues that a robust public interest defence, which protects freedom of speech, would obviate problems that negligence liability would chill or inhibit free expression or free speech.[79] However, it is implicit in the assertion of public interest that the conduct was deliberately done *in* the public interest.

Recklessness is a preferable standard to gross negligence

7.69 Some stakeholders, while accepting the argument that negligence may be too wide a liability, argued that 'gross negligence' should be sufficient fault to ground liability. The UNSW Cyberspace Law and Policy Community submitted that

> excluding negligence entirely provides minimal incentive to put in place procedures to protect privacy. The inclusion of a 'gross negligence' standard would provide such incentives, while avoiding liability for the 'absent-minded person' who 'walks into a neighbour's home'.... A gross negligence standard will increase the reach of the proposed tort.[80]

7.70 However, Australian tort law does not recognise a concept of gross negligence[81] and it could be a source of uncertainty.

7.71 In the ALRC's view, the inclusion of recklessness as a form of fault will come close to what some may have in mind when referring to 'gross negligence'. While negligence refers to unreasonable *inadvertence* to a risk, a situation where the actor *ought reasonably* to have foreseen but did not foresee a risk, recklessness refers to a subjective state of mind where the actor was aware of the risk but did not care whether or not it occurred.[82] In many situations involving serious data breaches, for example, the risk may be well-known in the industry so that it may be obvious or provable that the defendant was aware of the risk, providing the basis for a finding of recklessness, or even intent on an imputed basis.

Strict liability

7.72 The ALRC does not support the new tort imposing strict liability. Strict liability leads to liability regardless of fault. If the cause of action were one of strict liability,

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78 Arts Law Centre of Australia, *Submission 113*.

79 Australian Privacy Foundation, *Submission 110*. See also N Witzleb, *Submission 116*.

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

81 Sappideen and Vines, above n 1, 148. The criminal law has a standard of criminal negligence which tends to be higher than the civil standard of care in negligence. For example the *Criminal Code Act 1995* (Cth) sch, s 5.5 defines negligence as conduct that involves such a great falling short of reasonable care that the conduct merits criminal punishment.

82 See Lord Millet in *Three Rivers DC v Bank of England (No 3)* about the tort of misfeasance in public office: 'This is an intentional tort. It involves deliberate or reckless wrongdoing. It cannot be committed negligently or inadvertently. Accordingly it is not enough for the [claimants] to establish negligence, or even gross negligence, on the part of the [defendant]. They must establish some intentional or reckless impropriety': *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1 [179] (Lord Millet). See also, *Three Rivers DC v Bank of England* [2000] UKHL 33; *Bici v Ministry of Defence* [2004] EWHC 786 (QB).

then the defendant would be held liable even though they were not at fault, that is, the defendant's actions were not intentional, reckless or negligent.

7.73 The ALRC considers that strict liability would be too onerous and broad, and that it is inconsistent with modern trends in tort law to fault-based liability. Examples of statutory strict liability are directed at pecuniary loss or material damage in particular contexts, such as consumer protection or product liability, unlike claims for invasion of privacy which will arise in a wide variety of contexts and generally involve dignitary or intangible interests.

7.74 For similar reasons to those outlined in respect of negligence-based liability, it would not be appropriate to make a strict liability tort actionable per se, yet this feature of the new tort is an important protection of privacy from intentional or reckless invasion.

7.75 Strict liability is now relatively rare in Australian common law, outside contractual obligations and fiduciary obligations, both of which rest on relationships that, ordinarily, have been voluntarily entered into by the parties. In *Northern Territory v Mengel*, a majority of the High Court remarked that

> the recent trend of legal development, here and in other common law countries, has been to the effect that liability in tort depends on either the intentional or the negligent infliction of harm. That is not a statement of law but a description of the general trend.[83]

7.76 Defamation is one of the rare examples of a common law tort liability that is strict, and is complete on proof of publication of defamatory material. It is the fact of defamation, not the intention of the defendant, that generates liability. *Fleming's The Law of Torts* states that the

> justification for this stringent liability is presumably that it is more equitable to protect the innocent defamed rather than the innocent defamer (who, after all, chose to publish); another is that the publication, not the composition of the libel, is the actionable wrong, making the state of mind of the publisher, not the writer, relevant ... Does reputation deserve a higher level of protection than personal safety?[84]

7.77 The ALRC considers that the same may be said of privacy.

7.78 The *Uniform Defamation Laws* that came into force in the Australian states and territories in 2006 does provide for a defence of innocent dissemination,[85] so that an absence of fault may excuse the defendant. This defence is available where the defendant proves, among other things, that he or she 'neither knew, nor ought reasonably to have known, that the matter was defamatory'.[86] Nevertheless, liability arises upon publication.[87] It is not incumbent on the plaintiff to prove that the

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83 *Northern Territory v Mengel* (1995) 185 CLR 307, [341]–[342] (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

84 Sappideen and Vines, above n 1, 630.

85 See, eg, *Defamation Act 2005* (Qld) s 32.

86 Ibid s 32(1)(b). This is similar to the position in *Privacy Act*, CCSM 1996, c P125 (Manitoba) s 5(b).

87 The plaintiff must be identifiable from the publication. This may occur even where the plaintiff is not named. See, further, Sappideen and Vines, above n 1, 623.

defendant knew that the publication was defamatory of the plaintiff or even knew the circumstances that rendered the publication defamatory or that the defendant failed to take care in relation to the publication of the statement.[88]

7.79 Liability in defamation is notoriously onerous and is widely regarded as a significant limitation on freedom of speech in Australia,[89] and particularly burdensome on the media,[90] compared to the position in other countries such as the United States and the United Kingdom. The ALRC considers it undesirable to introduce a tort that would lead to a potential liability as onerous and as restrictive on freedom of speech as current liability in defamation.

7.80 Most strict liabilities now arise by statute[91] and provide a remedy for physical damage or financial loss. Important examples in Australian law are:

- statutory liability for (financial) losses caused by breach of the prohibition of misleading or deceptive conduct in trade or commerce imposed by the Australian Consumer Law and state and territory *Fair Trading Acts*;[92]
- statutory liabilities for physical damage caused by defective products;[93] and
- statutory liability for damage caused by aircraft.[94]

7.81 The Office of the Australian Information Commissioner (OAIC) noted that no fault element is required for complaints made to the OAIC for an interference with privacy under the *Privacy Act*, and that a finding of an interference with privacy can be made in relation to 'negligent and accidental acts, as well as those which are intentional or reckless'.[95] However, the *Privacy Act* regulates government agencies and corporations which have the resources to take precautions to avoid negligent data breaches. An action under the new tort, on the other hand, could be taken against natural persons, who will usually not have such resources. Further, liability and costs may potentially be greater under the new tort than as a result of the complaints process under the *Privacy Act*. The statutory cause of action potentially applies to a wider range of activities than the *Privacy Act.*

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88 'Publication' may even be comprised by a failure to remove a publication where there was power to do so: *Byrne v Deane* [1937] 1 KB 818.

89 David Rolph, 'Irreconcilable Differences? Interlocutory Injunctions for Defamation and Privacy' (2012) 17 *Media & Arts Law Review* 170, 195.

90 Australian defamation law does not include a principle such as that in *New York Times v Sullivan*, which requires public figures to show malice in order to sue for libel: *New York Times v Sullivan* [1964] 376 US 254. Nor does Australian defamation law provide for a responsible journalism defence, such as formulated in the UK in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127. Australian defamation law does not include a wide public interest defence such as in *Defamation Act 2013* (UK) s 4(6).

91 A statute imposing a strict liability may be the basis of a common law tort of breach of statutory duty: Sappideen and Vines, above n 1, 434.

92 *Competition and Consumer Act 2010* (Cth) sch 2, s 236. Each state and territory Fair Trading Act applies the Australian Consumer Law as a law of its jurisdiction: see, for example, *Fair Trading Act 1987* (NSW) s 28.

93 *Competition and Consumer Act 2010* (Cth) sch 2, ss 138–141.

94 See, for example, *Damage by Aircraft Act 1999* (Cth) s 10.

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

7.82 Some have argued that one reason why liability for invasions of privacy should be strict, at least with respect to wrongful disclosure of private information, is that this would be consistent with actions in defamation and breach of confidence.[96] However, the analogy with breach of confidence is imperfect. Breach of confidence arises where there was a pre-existing obligation which informs and binds the defendant's conscience, or knowledge that the information was imparted under that obligation.[97] There is therefore a stronger case for strict liability in such circumstances than under the new tort where a plaintiff merely has to show a reasonable expectation of privacy.

7.83 Further, given that the ALRC does not recommend that the new tort of invasion of privacy replace the action for breach of confidence, a plaintiff who can rely on a pre-existing obligation of confidence will still be able to sue in that equitable action, relying on strict liability.[98] Such plaintiffs would also, no doubt, wish to rely on the favourable principles underlying the remedy of an injunction in the equitable breach of confidence action.[99]

7.84 Some stakeholders suggested that some invasions of privacy should not attract liability where the conduct is not blameworthy. The Arts Law Centre of Australia submitted the example of a documentary maker 'filming in a public place which looks onto a private apartment where someone is getting undressed' and so accidentally invading someone's privacy.[100] Similarly, SBS noted:

> There are many ways in which footage, images or other material may breach someone's privacy in a way which is unintentional. A common example would be the kind of footage filmed for use in news broadcasts, often wide angle shots of crowds, or footage of incidental comings and goings out of buildings relevant to a news story. It is very possible that in such a story, a person or incident might be captured that the person considered a breach of their privacy.[101]

7.85 The Australian Bankers' Association submitted that 'the trend in legislation to more strict liability provisions associated with the imposition of civil penalties continues to be a major concern for the private sector':

> The cause of action given its likely scope and imprecision should not be cast in the tortious framework of negligence. Rather it should apply only to an intent to seriously interfere with a person's privacy or to do so with reckless indifference to that result and this has occurred.[102]

7.86 The ALRC agrees that strict liability would be too onerous.

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96 Normann Witzleb, 'A Statutory Cause of Action for Privacy? A Critical Appraisal of Three Recent Australian Law Reform Proposals' (2011) 19 *Torts Law Journal* 104, 118–119; *Cassidy v Daily Mirror* [1929] KB 331. See also K Barker, *Submission 126*.

97 *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] 1 WLR 1556.

98 See for example, *Candy v Bauer Media Limited* [2013] NSWSC 979 (20 July 2013).

99 See Ch 13.

100 Arts Law Centre of Australia, *Submission 43*.

101 SBS, *Submission 59*.

102 Australian Bankers' Association, *Submission 27*.

Effect of apology on liability

Recommendation 7–2 The Act should provide that an apology made by the defendant does not constitute an admission of fault or liability and is not relevant to the determination of fault or liability.

7.87 The ALRC recommends that any apology or correction of published material by a defendant should not be treated in evidence as an admission of fault. [103]

7.88 This recommendation is intended to encourage the early resolution of disputes without recourse to litigation. It is similar to provisions in state and territory legislation regulating civil liability,[104] and in defamation law.[105] There is a body of academic literature supporting the role of apologies in resolving disputes and such provisions as a mechanism for achieving justice between disputants. There was also strong stakeholder support for this proposal.

7.89 The ALRC considers that the definition of apology in the NSW *Civil Liability Act 2002* should apply to this recommendation:

> 'apology' means an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter.[106]

7.90 Apologies are often associated with an assumption or admission of guilt and are therefore seen to be 'highly prejudicial'.[107] This recommendation aims to encourage individuals to make apologies without the risk of liability:

> It would detract from any dispute resolution process of the parties were reluctant to offer an apology due to possible use as evidence of fault or liability.[108]

7.91 Encouraging defendants to make formal apologies may assist with the resolution of disputes as, in many circumstances, an apology may provide a sufficient response to

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103 Several stakeholders supported this recommendation: Domestic Violence Legal Service and North Australian Aboriginal Justice Agency, *Submission 120*; Australian Privacy Foundation, *Submission 110*; Office of the Victorian Privacy Commissioner, *Submission 108*; Telstra, *Submission 107*; Public Interest Advocacy Centre, *Submission 105*; Telecommunications Industry Ombudsman, *Submission 103*; Insurance Council of Australia, *Submission 102*; Australian Bankers' Association, *Submission 84*; S Higgins, *Submission 82*; I Turnbull, *Submission 81*; Guardian News and Media Limited and Guardian Australia, *Submission 80*; N Witzleb, *Submission 29*.

104 For example, *Civil Liability Act 2002* (NSW) s 69. See also: Prue Vines, 'The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena?' (2007) 1 *Public Space* 1; Prue Vines, 'The Apology in Civil Liability: Underused and Undervalued?' (2013) 115 *Precedent* 28; Robyn Carroll, 'Apologies as a Legal Remedy' (2013) 35 *Sydney Law Review* 317; Australian Treasury, 'Review of the Law of Negligence: Final Report' (2002).

105 *Defamation Act 2005* (NSW) 2005 s 20; *Defamation Act 2005* (Qld) 2005 s 20; *Defamation Act 2005* (SA) 2005 s 20; *Defamation Act 2005* (Tas) s 20; *Defamation Act 2005* (Vic) s 20; *Defamation Act 2005* (WA) s 20.

106 *Civil Liability Act 2002* (NSW) s 68.

107 Vines, 'The Apology in Civil Liability: Underused and Undervalued?', above n 104, 30.

108 Telecommunications Industry Ombudsman, *Submission 103*.

appease someone whose privacy has been invaded. Guardian News and Media Limited and Guardian Australia supported this point, arguing that

> Parties should be encouraged to resolve matters prior to or during litigation. The nature of invasions of privacy is that in many instances an apology, freely given, may be sufficient to resolve the matter. Accordingly, protecting the making of apologies is an important aspect of the ALRC's proposals.[109]

7.92 The Telecommunications Industry Ombudsman provided analysis of the positive role apologies play in the resolution of disputes under their complaints model:

> From our experience, consumers will request apologies to resolve privacy complaints and an apology genuinely made has the potential to encourage the early resolution of disputes. It would detract from any dispute resolution process if the parties were reluctant to offer an apology due to possible use as evidence of fault or liability. An apology can be an important part of resolving a dispute and it is one of several readily available remedies used in ADR processes. From our experience, apologies can help:
>
> - diffuse tension and create common ground between opposing parties
> - foster constructive discussion and even conciliation between parties
> - alleviate injury and distress caused to aggrieved parties, and
> - reduce the length and severity of disputes.[110]

7.93 Australian research shows that in medical negligence cases, apologies (not court-ordered apologies), can have psychological benefits to plaintiffs.[111]

7.94 Prior to the enactment of the *Uniform Defamation Laws* in 2005, there was a disincentive for a publisher to apologise for publishing defamatory matter since such an apology could be construed as an admission of liability.[112] Civil liability legislation stipulating that apologies should not be taken as admissions of fault reflects a similar concern:

> It was felt that if people apologise it was less likely that there would be litigation; and there is indeed some evidence for this proposition.[113]

7.95 Dr Ian Turnbull raised the concern that some defendants may use apologies as a vehicle to exacerbate the harm caused by the initial invasion, as publishing an apology may

> reconvey the private information to a wider audience as part of the apology. That is particularly so where media is used and, for example, a more prominent location within the website or paper is used for the apology.[114]

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109 Guardian News and Media Limited and Guardian Australia, *Submission 80*.
110 Telecommunications Industry Ombudsman, *Submission 103*.
111 Carroll, above n 104, 319.
112 Des A Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters (Professional) Australia Limited, 2011) [3.600].
113 Vines, 'The Apology in Civil Liability: Underused and Undervalued?', above n 104, 28.
114 I Turnbull, *Submission 81*.

7.96 To ameliorate this harm, Turnbull suggested the recommendation be qualified by a requirement that the apology be 'sincere' or 'genuine'.[115] The ALRC considers that it is more appropriate to consider the nature or quality of any apology when a court assesses an award of damages.

115 Ibid.