

9. Balancing Privacy with Other Interests

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Summary

9.1 Privacy is an important public interest, but it must be balanced with, and sometimes give way to, other rights and interests.

9.2 Although respecting privacy will promote free expression and the free media necessary for effective democracy, privacy can sometimes conflict with these and other important public interests. Where breaching someone's privacy is justified for an important public interest, privacy must give way.

9.3 In this chapter, the ALRC recommends that, in order for a plaintiff to have a cause of action under a tort for serious invasion of privacy, the court must be satisfied that the public interest in privacy outweighs any countervailing public interest.

9.4 The ALRC also recommends that the Act provide guidance on the meaning of 'public interest', by setting out a list of public interest matters. These include freedom of expression, freedom of the media, public health and safety, and national security.

9.5 The ALRC recommends that competing interests be considered when determining whether the plaintiff has a cause of action. It should be an element of the tort, rather than a defence. A plaintiff should not be able to claim that a wrong has been committed—that their privacy has been seriously invaded—where there are strong public interest grounds justifying the invasion of privacy.

9.6 The defendant will generally be best placed to bring the court's attention to any evidence of countervailing public interests. The ALRC therefore recommends that the

Act should provide that the defendant has the burden to adduce such evidence. The court must then be satisfied that the public interest in privacy outweighs these other public interests. The Act should provide that the plaintiff bears the onus of satisfying the court of this.

The balancing exercise

Recommendation 9–1 The Act should provide that, for the plaintiff to have a cause of action, the court must be satisfied that the public interest in privacy outweighs any countervailing public interest. A separate public interest defence would therefore be unnecessary.

9.7 Privacy is an important public interest, but of course there are other important public interests.¹ Sometimes, these other interests should prevail over a person's interest in privacy. There should be a clear process for balancing competing interests, to ensure the new action does not privilege privacy over other important public interests.

9.8 Although there was some disagreement about how and when the balancing exercise should be carried out, stakeholders agreed that a broader public interest may sometimes justify an invasion of privacy, and that this should be recognised in any tort for serious invasion of privacy.²

9.9 In *Hosking v Runting*, Gault P and Blanchard J of the New Zealand Court of Appeal discussed how the law should reconcile competing values:

Few would seriously question the desirability of protecting from publication some information on aspects of private lives, and particularly those of children. Few would question the necessity for dissemination of information albeit involving information about private lives where matters of high public (especially political) importance are involved. Just as a balance appropriate to contemporary values has been struck in the law as it relates to defamation, trade secrets, censorship and suppression powers in the criminal and family fields, so the competing interests must be accommodated in respect of personal and private information.³

9.10 The ALRC in 2008 recommended including a balancing exercise as an element of the tort. This was similar to the approach recommended by the New South Wales Law Reform Commission (NSWLRC) in 2009.⁴

1 For privacy as a public interest, see Ch 2.

2 The point of disagreement was generally whether it should be an element of the tort, with the plaintiff having the legal onus of proof, or a defence, with the defendant bearing the onus. This is discussed further later in the chapter.

3 *Hosking v Runting* (2005) 1 NZLR 1, [116].

4 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) Rec 74–2; NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) 26–29.

9.11 In *Hogan v Hinch*, French CJ said that the ‘term “public interest” and its analogues have long informed judicial discretions and evaluative judgments at common law’:

Examples include the enforceability of covenants in restraint of trade, claims for the exclusion of evidence on grounds of public interest immunity, governmental claims for confidentiality at equity, the release from the implied obligation relating to the use of documents obtained in the course of proceedings, and in the application of the law of contempt.⁵

9.12 What is the public interest? In *Reynolds v Times Newspaper*, Bingham CJ said that by ‘matters of public interest to the community’, he meant:

matters relating to the public life of the community and those who take part in it, including within the expression ‘public life’ activities such as the conduct of government and political life, elections ... and public administration, but we use the expression more widely than that, to embrace matters such as (for instance) the governance of public bodies, institutions and companies which give rise to a public interest in disclosure, but excluding matters which are personal and private, such that there is no public interest in their disclosure.⁶

9.13 Some of the more notable public interest matters that a court might consider when applying the balancing test recommended by the ALRC are discussed further below. But it may be useful first to consider how this balancing exercise should be carried out.

9.14 The ALRC recommends that Australian courts use a balancing approach similar to that identified by the House of Lords in *Campbell*.⁷ In the United Kingdom (UK), rights to privacy and to freedom of expression, in arts 8 and 10 of the European Convention on Human Rights, have been incorporated into domestic law by the *Human Rights Act 1998* (UK). Both must be considered when determining whether a cause of action for misuse of private information has been established. In making this determination, two questions are asked:

First, is the information private in the sense that it is in principle protected by article 8? If ‘no’, that is the end of the case. If ‘yes’, the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by article 10?⁸

9.15 It is in answering this second question that the balancing exercise is carried out. The correct approach to this balancing exercise, Baroness Hale said in *Campbell*,

involves looking first at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering with or restricting each of those rights; and applying the proportionality test to each.⁹

5 *Hogan v Hinch* (2011) 243 CLR 506, [31] (French CJ).

6 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, [19]. This was cited with approval by Lord Phillips in *Flood v Times Newspapers Ltd* [2012] UKSC 12, [33].

7 *Campbell v Mirror Group Newspapers* [2002] EWHC 499 (QB) (2002).

8 *McKennitt v Ash* [2008] QB 73, [11].

9 *Campbell v Mirror Group Newspapers* [2002] EWHC 499 (QB) (2002), [141]. Gavin Phillipson has written that he had advocated a ‘dual exercise in proportionality’ or ‘parallel analysis’ approach, which

9.16 In *Re S*, Lord Steyn said that four propositions emerge clearly from the opinions in the House of Lords in *Campbell*:

First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.¹⁰

9.17 The balancing exercise recommended by the ALRC above is similar to this UK approach. However, although freedom of expression may be the most common interest at stake in actions for serious invasion of privacy, a range of public interests may need to be considered when carrying out this balancing exercise. As recommended below, examples of these many public interests should be set out in the Act.

9.18 Courts also ‘balance’ public interests for other purposes.¹¹ The following section briefly outlines three other situations in which courts balance competing public interests.

Other balancing tests

Right to a fair trial

9.19 A person’s right to a fair trial is another important public interest that must be balanced against freedom of expression. The classic statement of the relevant principles was made by Jordan CJ in the *Bread Manufacturers* case:

It is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a court of justice from having his case tried free from all matter of prejudice. But the administration of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested; and if in the course of the ventilation of a question of public concern matter is published which may prejudice a party in the conduct of a law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product,

was used in *Campbell*, and under which, ‘rather than assigning one right a prior position as a mere exception to the other, the courts would have to consider the matter from the point of view of each Convention right in turn. Such an approach requires courts to assess the weight, in Convention terms, of both rights and ask not only whether the restriction that the applicant sought to lay on the press is greater than necessary to protect his or her legitimate privacy interests, but also, conversely, whether the story goes further, in terms of intrusive detail, than is necessary to fulfil the media’s legitimate function’: Gavin Phillipson, ‘The “Right” of Privacy in England and Strasbourg Compared’ in Andrew T Kenyon and Megan Richardson (eds), *New dimensions in privacy law: international and comparative perspectives* (Cambridge University Press, 2006) 184, 214.

¹⁰ *Re S* [2005] 1 AC 593, [17].

¹¹ Private interests must also sometimes be balanced by courts. For example, tort actions in private nuisance frequently require the courts to balance the interests of the plaintiff with those of the defendant in their respective use of their land.

cause some likelihood of prejudice to a person who happens at the time to be a litigant.¹²

9.20 Australian civil and criminal courts balance competing public interests in proceedings for contempt of court. The public interest in fair trials is usually weighed against the public interest in freedom of speech. This was made clear by the High Court of Australia in *Hinch v Attorney General (Vic)*, which concerned radio broadcasts about a man charged with various sexual offences, and whether the broadcasts were in contempt of court. There may have been an important public interest in the public being informed about the man's prior conviction and imprisonment, but Toohey J said that these and other considerations 'must in the end be placed in the balance against a precept quite fundamental to our society, that a person charged with an offence is entitled to receive a fair trial':

The Court is not the arbiter of good taste or literary merit but it must consider the entire content of the broadcasts and ask itself whether their prejudicial effect outweighs the public interest they seek to serve.¹³

9.21 Wilson J said that this balancing exercise 'does not leave editors and publishers at the mercy of discretionary decisions of individual judges':

[A] decision which is the outcome of the balancing process is not a discretionary judgment. It is the result of an evaluation, consistently with accepted judicial principle, of competing matters of fact.¹⁴

9.22 Discussing *Hinch*, Spigelman CJ in the NSW Court of Appeal has said that the 'task of balancing conflicting public interests involves the making of a judgment by a process of evaluation':

It is distinguishable from the making of a finding of fact. It is also distinguishable from the exercise of a discretion, in the sense of a choice between alternative courses of action. Although distinguishable, a process of evaluation will be found, for many jurisprudential purposes, to have a close analogy with fact finding and the exercise of a discretion.¹⁵

Nuisance

9.23 Tort actions in private nuisance frequently require the courts to balance the interests of the plaintiff with those of the defendant in their respective uses of their

12 *Ex parte Bread Manufacturers Ltd; Re Truth & Sportsman Ltd* (1937) 37 SR (NSW) 242, 249–250.

13 *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, [54] (Toohey J) (Gaudron and Deane JJ also favoured a balancing approach).

14 *Ibid* [19] (Wilson J). ('The criminal justice system supplies a number of situations where a similar process takes place; for example, the evaluation of negligent conduct causing death to determine whether the negligence is so gross as to justify a verdict of manslaughter, or the consideration of a defence of provocation to a charge of murder. These are not discretionary decisions, any more than the decision whether a publication which would otherwise constitute a contempt of court is saved from punitive consequences because of the circumstances in which it occurred. If the court is left with any reasonable doubt about the answer to that question then of course the prosecution will fail.')

15 *Attorney General (NSW) v X* (2000) 49 NSWLR 653.

land.¹⁶ Nuisance law famously rests on ‘a rule of give and take, live and let live’, according to the well-known aphorism of Baron Bramwell in *Bamford v Turner* in 1860.¹⁷

9.24 In *Sedleigh Denfield v O’Callaghan*, Lord Wright made a point that would be apt in many cases involving alleged invasions of privacy and the balancing of individuals’ rights:

A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society.¹⁸

Breach of confidence in the UK

9.25 In the UK, even before the enactment of the *Human Rights Act 1998* (UK), the public interest in preserving confidences would be balanced with freedom of expression. In the *Spycatcher* case, Lord Goff said that,

although the basis of the law’s protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply... to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.¹⁹

9.26 Lord Griffiths referred to cases in which it was found to be in the public interest that confidential information be disclosed:

This involves the judge in balancing the public interest in upholding the right to confidence, which is based on the moral principles of loyalty and fair dealing, against some other public interest that will be served by the publication of the confidential material.²⁰

No trump card

9.27 It is important to recognise that no one interest should have automatic priority over the privacy interest of the plaintiff. That there may be some important public interest in allowing a serious invasion of privacy should not mean that the plaintiff’s interest in privacy may then automatically be ignored. For example, there is an important public interest in a free media, particularly a free media that reports on

16 Compare ‘equitable principles are best developed by reference to what conscionable behaviour demands of the defendant not by “balancing” and then overriding those demands by reference to matters of social or political opinion’: *Smith Kline and French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* 22 FCR 73, 111 (Gummow J).

17 *Bamford v Turner* (1860) 3 B & S 62; 122 ER 25, [83]–[84].

18 *Sedleigh Denfield v O’Callaghan* [1940] AC 880, 903. See also, Rosalie Balkin and Jim Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) [14.19].

19 *Attorney General v Guardian Newspapers Ltd (No 2)* (1990) 1 AC 109, 282 (Lord Goff).

20 *Ibid* 268–269 (Lord Griffiths).

matters of public concern. However, even when reporting on matters of public concern, the media must show some respect for privacy.

9.28 For example, information about a government minister's health will be private, but the minister's interest in privacy may in some cases be outweighed by the public interest in being informed about the health of a person responsible for important public functions. However, even if there is a greater public interest in knowing about the minister's health, this would not mean that a person should be free to use a surveillance device to follow the minister into their doctor's room, or eavesdrop on conversations between the minister and her spouse about the minister's health. There will be limits to how far a person may justifiably invade another person's privacy, even for a genuine public purpose.

9.29 In other words, even important public interests will not always outweigh a plaintiff's privacy interest, because privacy itself is a public interest.

No thumb on the scales

9.30 Is the balance tilted, before the exercise starts? It was submitted by one stakeholder that, considering Australia does not have a right to free speech, then enacting a privacy tort, even with a balancing exercise, will favour privacy interests over freedom of expression. News Corp submitted that the statutory cause of action

does in fact give 'precedence' to the right to privacy—as it is privacy that has the 'protected' status—by virtue of the statute and the structure of such. Fundamental freedoms and matters of public interest—including freedom of speech and freedom of the press, will therefore be secondary considerations, regardless of the 'balancing' exercise that has been incorporated into the statute. It is therefore difficult to see how elements of a cause of action—for example privacy and freedom of speech—which don't have the same legal status can be truly 'balanced'.²¹

9.31 The tort designed in this Report does not privilege privacy over other public interests. If anything, by requiring the plaintiff to satisfy the court that the public interest in privacy *outweighs* any countervailing public interest, the scales may be tilted slightly in favour of free expression and other public interests. In the presumably rare cases in which a court considers the competing interests are perfectly balanced, this element of the tort will not be satisfied.

Criticisms of balancing

9.32 There are some critics of the process of 'balancing' rights or interests, in the context of privacy claims and in other contexts. Some argued that certain rights and interests should not be qualified. In a paper on the principles of open justice, Spigelman CJ wrote:

For persons who are advocates of particular interests, or hold a particular intellectual perspective, the terminology of balancing is not always acceptable. The reason is

21 News Corp Australia, *Submission 112*.

obvious. Balancing necessarily results in occasions when the particular interest or perspective takes second place to some other right or principle.²²

9.33 Calling something a right is of little value if the right is too readily ‘balanced away’. But it is inevitable that rights and values will sometimes clash, so there would seem to be no alternative to qualifying the rights in some respects. Once it is accepted that privacy and freedom of speech are both important rights and will sometimes clash, then it seems inevitable that each right must sometimes be qualified.

9.34 Some also argue that the right balance between competing interests should be found by Parliament, not the courts. However, it is impossible for Parliament to legislate for every situation that may arise. Inevitably, courts will have to make value judgments when adjudicating disputes. In balancing privacy with other public interests, often much will depend on the particular circumstances of the case, so this must be considered by the courts.

9.35 Finally, it should be noted that the balancing test is not an exercise in logic. Rather, it involves evaluating and weighing competing and often incommensurable rights, interests and values.

Public interest matters

Recommendation 9–2 The Act should include the following list of countervailing public interest matters which a court may consider, along with any other relevant public interest matter:

- (a) freedom of expression, including political communication and artistic expression;
- (b) freedom of the media, particularly to responsibly investigate and report matters of public concern and importance;
- (c) the proper administration of government;
- (d) open justice;
- (e) public health and safety;
- (f) national security; and
- (g) the prevention and detection of crime and fraud.

9.36 The ALRC recommends that the Act include a non-exhaustive list of public interest matters that a court may consider when considering whether an invasion of the plaintiff’s privacy was justified, because it was in the public interest. The list would not be exhaustive, but may provide the parties and the court with useful guidance, making the cause of action more certain and predictable in scope (which may in turn reduce

22 James Spigelman, ‘The Principle of Open Justice: A Comparative Perspective’ (2006) 29 *UNSWLJ* 147, 158.

litigation). This is preferable to including a restrictive definition of ‘public interest’ in the Act, and to not providing any statutory guidance.

9.37 In *Hogan v Hinch*, French CJ stated that when ‘public interest’ is used in a statute, ‘the term derives its content from “the subject matter and the scope and purpose” of the enactment in which it appears. The court is not free to apply idiosyncratic notions of public interest’.²³

9.38 In a 2012 report, a UK Joint Committee on Privacy and Injunctions said that the ‘worst excesses of the press have stemmed from the fact that the public interest test has been too elastic and has all too often meant what newspaper editors want it to mean’.²⁴ The Committee emphasised that ‘the decision of where the public interest lies in a particular case is a matter of judgment, and is best taken by the courts in privacy cases’.²⁵

9.39 Including a non-exhaustive list of public interest matters seems more helpful than attempting a definition of public interest, which might necessarily have to be overly general or overly confined and inflexible.²⁶

9.40 Community expectations of privacy change over time. This is another reason to include a non-exhaustive list of public interest matters for a court to consider, rather than a definition of public interest. It will allow the scope of public interest to develop in line with changing community attitudes and developments in technology.

9.41 There is precedent in Australian law and in regulation for providing guidance on the meaning of ‘public interest’, for example in the public interest exemptions in the *Freedom of Information Act 1982* (Cth).²⁷

9.42 A number of stakeholders expressed support for including a non-exhaustive list of factors in the Act.²⁸ However, the Law Institute of Victoria submitted that the Act should not provide guidance on the meaning of public interest:

This is a phrase commonly used in legislation and one with which courts are familiar. ‘Public interest’ is a broad concept that is flexible enough to respond to the facts and

23 *Hogan v Hinch* (2011) 243 CLR 506, [31] (French CJ). This passage follows directly on from the passage quoted earlier in this chapter.

24 Joint Committee on Privacy and Injunctions, *Privacy and Injunctions*, House of Lords Paper No 273, House of Commons Paper No 1443, Session 2010–12 (2012) 19.

25 Ibid. The Committee also recommended that all relevant regulatory bodies ‘adopt a common definition of what is meant by the public interest that should be reviewed and updated regularly’.

26 The Australian Press Council defines public interest as ‘involving a matter capable of affecting the people at large so they might be legitimately interested in, or concerned about, what is going on, or what may happen to them or to others’: Australian Press Council, *General Statement of Principles*.

27 ‘Factors favouring access to the document in the public interest include whether access to the document would do any of the following: (a) promote the objects of this Act ...; (b) inform debate on a matter of public importance; (c) promote effective oversight of public expenditure; (d) allow a person to access his or her own personal information’: *Freedom of Information Act 1982* (Cth) s 11B(3).

28 Office of the Australian Information Commissioner, *Submission 66*; ABC, *Submission 46*; Telstra, *Submission 45*; Electronic Frontiers Australia, *Submission 44*; Arts Law Centre of Australia, *Submission 43*; Public Interest Advocacy Centre, *Submission 30*.

circumstances of any particular case. Given that privacy is fact and context specific, it is appropriate to keep concepts such as ‘public interest’ broad and flexible.²⁹

9.43 Alternatively, broad concepts which go to the meaning of public interest could go in the objects section or the preamble of the Act.

Which public interests should be listed?

9.44 The ALRC recommends that the Act set out public interest matters that are both important and that might sometimes conflict with privacy interests. The list should include: freedom of expression, freedom of the media, the proper administration of government, open justice, public health and safety, national security, and the prevention and detection of crime and fraud. Freedom of expression and freedom of the media are perhaps the interests that will most commonly conflict with a privacy interest, so these are discussed further below.

9.45 Many of these matters are also referred to in the list of exceptions to the right to respect for private and family life in art 8 of the *European Convention on Human Rights*. Article 8 provides that there should be no interference by a public authority with the exercise of this right:

except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.³⁰

9.46 The following section discusses two public interests that may sometimes conflict with privacy.

Freedom of expression

9.47 The public interests that will perhaps most commonly conflict with privacy are freedom of expression and freedom of the media.³¹

9.48 The vital importance of free speech and free expression is of course now rarely seriously disputed in democratic countries, and the subject of a vast legal and philosophical literature. Article 19 of the *International Covenant on Civil and Political Rights* provides, in part:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.³²

29 Law Institute of Victoria, *Submission 22*.

30 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 8(2).

31 For many purposes, these may be the same. ‘... the traditional view in English law has been that freedom of the press and the freedom of individual writers are substantially the same. ... However, this perspective may fail to do justice to the complexity of media freedom ...’: Eric Barendt et al, *Media Law: Text, Cases and Materials* (Pearson, 2013) 18–19.

32 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Art 19(2).

9.49 Those who oppose the introduction of a new privacy tort commonly appeal to the fundamental right to freedom of expression, and argue that the tort will impede free speech and a free media. The ALRC is particularly concerned that the tort recommended in this Report does not have that effect. The public interest in freedom of speech and freedom of the press should be expressly recognised in an Act providing for a new privacy tort. This may be particularly important, given Australia has not enshrined a right to free speech in its law in the way other democracies have, such as the United States in the First Amendment to its *Constitution*, and the United Kingdom in its *Human Rights Act 1988* (UK).

9.50 That it will sometimes be justified to limit free speech to protect people's privacy is implicit in a tort for invasion of privacy. But the public interest in free speech should not easily be outweighed by privacy interests. Lord Hoffmann has said that

a freedom which is restricted to what judges think to be responsible or in the public interest is not freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible.³³

9.51 The public interest balancing exercise recommended in this chapter is designed to ensure that privacy interests give way to free speech, when this is in the public interest.

9.52 Nevertheless, freedom of speech is not absolute, and must be balanced against certain other public interests, including the public interest in privacy.³⁴ Chief Justice Mason of the High Court of Australia said in *Australian Capital Television v Commonwealth*:

In most jurisdictions in which there is a guarantee of freedom of communication, speech or expression, it has been recognized that the freedom is but one element, though an essential element, in the constitution of 'an ordered society' or a 'society organized under and controlled by law'. Hence, the concept of freedom of communication is not an absolute. The guarantee does not postulate that the freedom must always and necessarily prevail over competing interests of the public.³⁵

9.53 When balancing an interest in privacy with a public interest in freedom of expression, the nature of the expression will be relevant. Not all speech is of equal value to the public. In *Campbell*, Baroness Hale said that there are 'undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others':

Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the

33 *R (Mrs) v Central Independent Television Plc* [1994] Fam 192, 202–203.

34 Lord Hoffmann said that many impressive and emphatic statements about free speech in the law reports are 'often followed by a paragraph which begins with the word "nevertheless". The judge then goes on to explain that there are other interests which have to be balanced against press freedom.' Lord Hoffmann suggests that these exceptions are sometimes made too hastily. But he also said freedom of speech is 'subject only to clearly defined exceptions laid down by common law or statute'.

35 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, [45] (Mason J).

country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life.³⁶

9.54 Professor Eric Barendt has said that there are dangers in discriminating between more and less worthy speech, but ‘lines and distinctions have to be drawn, unless the privacy right is to be altogether eviscerated’.³⁷

9.55 The speech that is most privileged in Australian law is political communication. It is, to use Baroness Hale’s words, ‘top of the list’ of speech deserving protection, because it is crucial to any democracy. The Australian High Court has found that freedom of political communication is implied in the *Australian Constitution*. In *Lange v ABC*, the High Court said:

Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be ‘directly chosen by the people’ of the Commonwealth and the States, respectively. At federation, representative government was understood to mean a system of government where the people in free elections elected their representatives to the legislative chamber which occupies the most powerful position in the political system ... Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation.³⁸

9.56 It is clear that political communication should be given considerable weight in the balancing exercise recommended by the ALRC. It may be that only rarely will the public interest in privacy outweigh the public interest in free and open political discourse. The ALRC recommends that the Act make clear that the public interest in political communication is to be given considerable weight in the balancing exercise, by including the words ‘political communication’ after ‘freedom of expression’ in the list of public interest matters. In any case, courts would no doubt give particular weight to political communication. Chief Justice French of the High Court has said that freedom of expression

can inform the construction and characterisation, for constitutional purposes, of Commonwealth statutes. It can also inform the construction of statutes generally and the construction of delegated legislation made in the purported exercise of statutory powers. As a consequence of its effect upon statutory construction, it may affect the scope of discretionary powers which involve the imposition of restrictions upon freedom of speech and expression.³⁹

36 *Campbell v MGN Ltd* [2004] 2 AC 457, [148].

37 ‘It makes sense to say that free political speech is of prime importance and that, therefore, the media are entitled to report that a minister is having an extra-marital affair and so trump her privacy right. It makes much less sense to make this claim, when the claimant is a footballer or film star’: Eric Barendt, ‘Privacy and Freedom of Speech’ in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press, 2006) 11, 20.

38 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559–60.

39 *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [44].

9.57 What is political communication? In *Theophanous v The Herald and Weekly Times*, Mason CJ, Toohey and Gaudron JJ said that political discussion includes:

discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office. The concept also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, eg, trade union leaders, Aboriginal political leaders, political and economic commentators. Indeed, in our view, the concept is not exhausted by political publications and addresses which are calculated to influence choices.⁴⁰

9.58 The judges then quoted Barendt, who wrote that

‘political speech’ refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.⁴¹

9.59 It should be noted, however, that even freedom of political communication is not absolute in Australia. Legislation will only be invalid on account of the freedom ‘where it so burdens the freedom that it may be taken to affect the system of government for which the *Constitution* provides and which depends for its existence upon the freedom’.⁴²

9.60 Politicians and others in public office are of course entitled to some degree of privacy. Not all invasions of the privacy of public figures can be characterised and justified as political speech. Much will depend on whether a particular communication can be properly characterised as political communication in the first place.

9.61 Other types of expression are of course also very important, and should sometimes not be restricted, even where the expression invades someone’s privacy. Stakeholders including the ABC, the Arts Law Centre and the National Association for the Visual Arts submitted that ‘artistic expression’ be specifically mentioned in the list of public interest matters.⁴³ In discussing the relative merits of different types of speech, Baroness Hale also referred to the importance of intellectual, educational and artistic expression.⁴⁴

40 *Theophanous v The Herald and Weekly Times* (1994) 182 CLR 104, 124.

41 *Ibid*, [14].

42 ‘In *Lange*, it was also said that the freedom of political communication is limited to what is necessary for the effective operation of the system of representative and responsible government provided for by the Constitution. ... The Court was there explaining that the freedom is not absolute ... In *APLA Ltd v Legal Services Commissioner* (NSW), Gleeson CJ and Heydon J observed that the freedom was not a general freedom of communication of the kind protected by the United States Constitution. The point sought to be made in *Lange* and in *APLA* was that legislation which restricts the freedom is not invalid on that account alone’: *Unions NSW v State of New South Wales* (2013) 88 ALJR 227, [18]–[19].

43 Arts Law Centre of Australia, *Submission 113*; ABC, *Submission 93*; National Association for the Visual Arts Ltd, *Submission 78*.

44 ‘Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals’ potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made’: *Campbell v MGN Ltd* [2004] 2 AC 457, [148].

Freedom of the media

9.62 The ALRC recommends that the list of public interests should include the freedom of the media to investigate, and inform and comment on matters of public concern and importance. This is intended to highlight the vital public interest in responsible journalism on matters of genuine public interest. In his book on freedom of speech, Barendt wrote:

The media provide readers, listeners, and viewers with information and that range of ideas and opinion which enables them to participate actively in a political democracy. Put shortly, the media perform a vital role as the ‘public watchdog’. As the ‘eyes and ears of the general public’ they investigate and report the abuse of power. So the argument from democracy, overall the most persuasive rationale for the free speech principle, justifies the coverage of mass media communications.⁴⁵

9.63 However, the public interest in a free press will not justify all invasions of privacy. In fact, invasions of privacy by the media may sometimes be harder to justify than a similar invasion by someone else, because of the harm that might come from the greater publicity. Barendt has written that ‘[m]edia gossip is quite different in its impact from village gossip’:

I do not suggest that the argument for a free press and media is not a strong one, or that it is not entitled to great weight in privacy as in other civil and criminal proceedings. But press freedom is parasitic to some extent on the underlying free speech rights and interests of readers and listeners, and the role which the press and other media play in informing them. It is not the same as a free speech argument, and that should be borne in mind when we consider how much weight should be attached to the freedom when it conflicts with the right to privacy which certainly is a fundamental human right.⁴⁶

9.64 It is sometimes argued that, because freedom of speech and the media is so fundamental to democracy, anything that limits the media is necessarily harmful to democracy. However, modern day media organisations have a very wide spectrum of activities and interests. On the same website on which may be found news and analysis of important political and social matters, may often be found photos of celebrities at the beach. Publishing such photos may be justified on some grounds, but hardly in the name of democracy. Courts when balancing a person’s privacy interests with the public interest should naturally give relatively little weight to a newspaper’s interest in publishing entertaining gossip, but considerable weight to the importance of newspapers publishing material on matters of genuine public concern.⁴⁷

45 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 417–8.

46 Eric Barendt, ‘Privacy and Freedom of Speech’, in Andrew T Kenyon and Megan Richardson, *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press, 2006) 23.

47 Des Butler expressed a related concern about ‘embellished’ reporting. He submitted that in ‘neither the case of a statutory cause of action nor uniform surveillance laws should free rein be given to sloppy or embellished reporting under the cover of the public interest’: D Butler, *Submission 74*.

Other matters

9.65 Other matters that should be included in the non-exhaustive list of public interest matters are: the proper administration of government; open justice; public health and safety; national security; and the prevention and detection of crime and fraud.

9.66 These matters attracted relatively little comment in submissions to the Discussion Paper. Some stakeholders said that the ‘proper administration of government’ is too broad.⁴⁸ The UNSW Cyberspace Law and Policy Community said that proper administration should ‘privilege key personal rights and interests such as privacy over mere administrative convenience’.⁴⁹ The National Archives suggested instead: ‘the proper administration of government including administrative responsibilities pursuant to any laws’.⁵⁰

9.67 The ABC and the Law Institute of Victoria questioned whether ‘national security’ should be included, considering that invasions of privacy necessary for national security would be protected by the separate defence for ‘lawful activity’.⁵¹

9.68 Guardian News and Media Limited and Guardian Australia also expressed concern about ‘national security’ and ‘economic wellbeing of the country’:

While these are clearly important public interests, it is important to ensure that their recognition in this context does not permit avoidance by governments of other laws which require appropriate processes, such as the obtaining of valid search or surveillance warrants by police, to protect privacy and guard the important protections provided by due process.⁵²

9.69 In the Discussion Paper, the ALRC included in the proposed list of public interest matters, ‘the economic wellbeing of the country’. Although no doubt this will sometimes be a public interest, it is perhaps too general, and therefore unhelpful, to include in the list.⁵³

9.70 The Australian Privacy Foundation expressed concern about the ‘excessive generality, scope and difficulty in definition of matters particularly around administration of government, the economic wellbeing of the country, and the defence of “legal authority”’. These are not appropriate or appropriately narrowly limited, and so could seriously undermine the effectiveness of the proposed cause of action’.⁵⁴

48 Australian Privacy Foundation, *Submission 110*; National Archives, *Submission 100*; UNSW Cyberspace Law and Policy Community, *Submission 98*.

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

50 National Archives, *Submission 100*.

51 Law Institute of Victoria, *Submission 96*; ABC, *Submission 93*.

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

53 See, eg, Australian Privacy Foundation, *Submission 110*; UNSW Cyberspace Law and Policy Community, *Submission 98*; Australian Human Rights Commission, *Submission 75*. Concerning ‘the economic wellbeing of the country’, the Australian Human Rights Commission said that depending on how it is interpreted, it ‘could be used to dismiss privacy for legitimate private information, commercial or others, or for potentially unjustified and perceived interest for the public that may not amount to legitimate public interest’.

54 Australian Privacy Foundation, *Submission 110*.

9.71 Telstra submitted, with respect to ‘national security’ and ‘the prevention and detection of crime and fraud’, that they ‘should be extended to include all law enforcement activities, for example investigation, prevention, detection and prosecution of crime and fraud’.⁵⁵ Telstra also said that ‘the protection of public revenue could also be considered’.⁵⁶

Private interests

9.72 In the Discussion Paper, the ALRC proposed that a court should be satisfied that ‘the plaintiff’s interest in privacy outweighs the defendant’s interest in freedom of expression and any broader public interest’.⁵⁷ However, the ALRC now recommends that the focus be on balancing the *public interest in privacy* with any countervailing public interests. Privacy is not merely a private interest, but also an important public interest.⁵⁸ The private interests of the parties, such as in privacy or free expression, will generally reflect the broader public interests at stake. But the focus of this element of the tort should be on the public interest—the question of whether this *type* of invasion of privacy may be justified on public interest grounds.

Onus of proof

Recommendation 9–3 The Act should provide that the defendant has the burden of adducing evidence that suggests there is a countervailing public interest for the court to consider. The Act should also provide that the plaintiff has the legal onus to satisfy the court that the public interest in privacy outweighs any countervailing public interest that is raised in the proceedings.

9.73 Should the plaintiff be required to prove that the public interest in privacy outweighs any countervailing public interest? Or should the defendant be required to prove that the public interest outweighs the privacy interest? This was one of the more difficult questions raised in this Inquiry.

9.74 The ALRC has concluded that, if a court considers that the privacy interests and public interests at stake in a particular case are evenly weighted, then the plaintiff should not have a cause of action. The plaintiff should be required to satisfy the court that the public interest in privacy outweighs any countervailing public interests. The ALRC agrees with the NSWLRC when it stated in its report:

Legal principle requires that plaintiffs bear the onus of establishing their case. It is appropriate, in our view, that, as part of establishing an invasion of privacy, plaintiffs should demonstrate at the outset that their claim to privacy is not outweighed by a

⁵⁵ Telstra, *Submission 107*.

⁵⁶ *Ibid.*

⁵⁷ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Discussion Paper 80 (2014) Proposal 8–1.

⁵⁸ See Ch 2.

competing public interest. Quite simply, privacy only needs protection if it is not outweighed, in the circumstances, by such a competing interest.⁵⁹

9.75 The alternative approach of making public interest a defence carries a risk that the cause of action would be used to stifle or ‘chill’ activities that are socially desirable, particularly the operations of the media.

9.76 Some stakeholders said that the plaintiff should have the onus of proof. Telstra submitted that:

given the seriousness of the cause of action and the potentially chilling effect it may have on business and service providers, the onus of proof should be on the plaintiff to ensure that their claim is sufficiently serious to outweigh public interest concerns at the outset.⁶⁰

9.77 To make this decision, a court must have some evidence before it. Although the ultimate legal burden will remain with the plaintiff, the ALRC recommends that the Act provide that the defendant has the burden of adducing any evidence of public interest.⁶¹ The defendant should usually be in a better position to provide evidence that the invasion of privacy was in the public interest.⁶² A newspaper, for example, will generally be better placed to bring evidence of the public interest in free speech than a person whose privacy the newspaper has invaded. The Law Institute of Victoria submitted that evidence will be required, for example, ‘about why the privacy breach occurred and why the defendant acted in the way they did—evidence that can only be provided by the defendant’.⁶³

9.78 In some cases, the public interest will be obvious or raised in the plaintiff’s pleadings. In other cases, where no evidence is raised of countervailing public interests, the court may not need to balance competing interests, and this element of the tort will

59 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) 28. This was also the approach recommended by the ALRC in 2008: Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) [17.157].

60 Telstra, *Submission 45*. See also, SBS, *Submission 59*; ASTRA, *Submission 47*.

61 This is the evidential burden—ie, ‘the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue, due regard being had to the standard of proof demanded of the party under such obligation’: Dyson Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2012) [7105] (citations omitted). The legal burden of proof, on the other hand, is ‘the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved (or disproved) either by a preponderance of the evidence or beyond reasonable doubt, as the case may be’: *Ibid* [7010]. On the distinction between the legal onus of proof and the evidentiary or strategic onus of proof, see also Bob Williams, ‘Burdens and Standards in Civil Litigation’ (2003) 25 *Sydney Law Review* 165.

62 Law Institute of Victoria, *Submission 96*. Dr Normann Witzleb: ‘the defendant will often be in a better position, and have the greater interest, to adduce the evidence necessary for establishing the weight of the public interest in his or her conduct’: 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, 121–122. See also Australian Privacy Foundation, *Submission 39*; Public Interest Advocacy Centre, *Submission 30*; D Butler, *Submission 10*.

63 Law Institute of Victoria, *Submission 96*. However, in making this point, the LIV also said that ‘the defendant should not be required to put on evidence until the cause of action has been established; that is, as a defence to a serious invasion of privacy’. The ALRC considers that the evidentiary and legal burden can be separated, so that the defendant has the onus to adduce evidence, but the plaintiff the onus to prove on the balance of probabilities that the privacy interest outweighs any public interest.

be satisfied. The plaintiff will not have to separately plead and prove the non-existence of public interests that have not been raised.

9.79 Although some stakeholders submitted that a balancing exercise should be carried out when determining actionability,⁶⁴ as the ALRC has recommended, others submitted that there should instead be a public interest defence, and that the defendant should bear the burden of proof.⁶⁵ Associate Professor Moira Paterson submitted:

the plaintiff already has the onus of establishing that he or she had a reasonable expectation of privacy which was breached in a serious way. The requirement that a privacy breach needs to be serious to justify litigation itself acknowledges that there is a competing interest in transparency that should always trump where the privacy breach is trivial in nature. In those circumstances it is not unreasonable to require the defendant to prove that a serious breach was nevertheless in the public interest because of the strong public interest in freedom of expression (or some other competing interest).⁶⁶

9.80 The Victorian Law Reform Commission (VLRC) argued that the burden of proving the existence of a countervailing public interest should lie with the defendant. The VLRC argued that a plaintiff ‘should not have to prove a negative, such as the lack of a countervailing public interest’.⁶⁷

9.81 New Zealand has a defence of ‘legitimate public concern’ to invasions of privacy.⁶⁸ The Court of Appeal of New Zealand stated, in *Hosking v Runting*, that it was ‘more conceptually sound’ for the absence of legitimate public interest to be treated as a defence, rather than as an element of the tort itself, ‘particularly given the

64 Arts Law Centre of Australia, *Submission 113*; S Higgins, *Submission 82*; I Turnbull, *Submission 81*; Guardian News and Media Limited and Guardian Australia, *Submission 80*; National Association for the Visual Arts Ltd, *Submission 78*; Google, *Submission 54*; ASTRA, *Submission 47*; ABC, *Submission 46*; Telstra, *Submission 45*.

65 Women’s Legal Services NSW, *Submission 115*; Office of the Victorian Privacy Commissioner, *Submission 108*; UNSW Cyberspace Law and Policy Community, *Submission 98*; Australian Sex Party, *Submission 92*; Office of the Australian Information Commissioner, *Submission 66*; NSW Young Lawyers, *Submission 58*; Electronic Frontiers Australia, *Submission 44*; Arts Law Centre of Australia, *Submission 43*; Australian Privacy Foundation, *Submission 39*; Public Interest Advocacy Centre, *Submission 30*; N Witzleb, *Submission 29*; B Arnold, *Submission 28*; Australian Bankers’ Association, *Submission 27*; Law Institute of Victoria, *Submission 22*; Pirate Party of Australia, *Submission 18*; D Butler, *Submission 10*; T Gardner, *Submission 3*. (Stakeholders generally did not distinguish between a legal and evidentiary burden).

66 M Paterson, *Submission 60*.

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

68 In relation to the publication of private information, see: *Hosking v Runting* (2005) 1 NZLR 1, [129]. In relation to intrusion upon seclusion, see: *C v Holland* 3 NZLR 672, [96].

parallels with breach of confidence claims'.⁶⁹ There are also public interest defences to privacy torts in Canada.⁷⁰

9.82 In supporting a public interest defence, the law firm Maurice Blackburn has noted that a similar approach has been used for other statutory causes of action in Australia. Under the *Racial Discrimination Act 1975* (Cth), 'it is for the defendant to show that their conduct should be exempted because it has been done reasonably and in good faith for particular specified purposes'; and 'under the *Racial and Religious Tolerance Act 2001* (Vic) the defendant must demonstrate that conduct which would otherwise be racial or religious vilification was justified because it was in the public interest'.⁷¹

9.83 However, the ALRC considers that it is preferable to consider the public interest when determining actionability at the outset, and that the plaintiff should bear the legal onus of proof on matters going to actionability. This should better ensure that privacy interests are not unduly privileged over other important rights and interests. Privacy is an interest that is relative, and the context and circumstances of the conduct are critical factors: the balancing at this stage of the action reflects this.

A discrete exercise

9.84 The ALRC has recommended a discrete public interest balancing exercise. Another option is to have public interest matters considered when determining whether the plaintiff had a reasonable expectation of privacy.⁷²

9.85 Public interest matters will sometimes be relevant to the question of whether the plaintiff had a reasonable expectation of privacy. For example, if private information is published about a politician, the fact that the information is about a politician may be relevant both to the question of whether the politician had a reasonable expectation of privacy, and to whether the publication of the information is in the public interest.

9.86 At other times, it may be artificial to consider public interest matters when determining whether the plaintiff had a reasonable expectation of privacy.

9.87 The NSWLRC argued that the two issues of whether or not a matter is legitimately private, and the significance of competing interests, are not always clearly separable.

69 *Hosking v Runting* (2005) 1 NZLR 1, [129]. See, also, [130]: 'Furthermore, the scope of privacy protection should not exceed such limits on the freedom of expression as is justified in a free and democratic society. A defence of legitimate public concern will ensure this. The significant value to be accorded freedom of expression requires that the tort of privacy must necessarily be tightly confined. In *Douglas v Hello!* Brooke LJ formulated the matter in the following way (at para [49]): "[A]lthough the right to freedom of expression is not in every case the ace of trumps, it is a powerful card to which the courts of this country must always pay appropriate respect."

70 Where the act of invasion was a publication, the four Canadian provinces that have enacted statutory causes of action for invasion of privacy provide a defence where the publication was in the public interest: see, eg *Privacy Act*, RSBC 1996, c 373 s 2(3)(a).

71 Maurice Blackburn Lawyers, Submission No 45 to DPM&C Issues Paper, 2011 (citations omitted).

72 That the plaintiff must have a reasonable expectation of privacy is another element of the cause of action: Rec 8-1.

Thus, a competing public interest may be of such force in the circumstances that the case will focus principally on it in reaching a conclusion that no reasonable expectation of privacy arises.⁷³

9.88 However, given the importance of considering competing public interests, the ALRC considers that there should be a clear and discrete public interest element in the cause of action.

73 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) 19.