MONASH University

Submission to NSW Legislative Council, Standing Committee on Law and Justice

Inquiry into remedies for the serious invasion of privacy in New South Wales

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Questions on notice during the hearing on 16 November 2015

1 In the hearing of 16 November 2015, I took the following questions on notice:

A. How should a proposed statutory cause of action apply to interstate and international matters?

B. Do you have any specific recommendations as to how interlocutory aspects should be designed?

2 The answer to question A is complex. In answering it I have sought the assistance of a colleague specialising in the area of conflicts of law, Dr Sirko Harder. Dr Harder is a Reader in Law in the School of Law, Politics and Sociology of the University of Sussex (United Kingdom). He was previously a Senior Lecturer in the Faculty of Law of Monash University. His research focus is on Australian and European private law, in particular remedies, and private international law. His recent publications include: *Remedies in Australian Private Law* (CUP 2014), co-authored with Katy Barnett; and "Recognition and Enforcement of Foreign Judgments in Australia" (2013/14) 15 *Yearbook of Private International Law* 255-289.

3 In response to the Committee's question A, we have produced a joint working paper entitled 'A possible NSW privacy tort and private international law – evaluating the options'. It is attached to this submission.

4 My answer to question B is below at paras [7]–[14].

Supplementary questions on notice

5 Subsequent to the meeting, the Committee asked me to take the following supplementary questions on notice:

C. If the committee were to recommend a statutory cause of action for serious invasions of privacy, one option might be to recommend that a fault element encompassing negligence (as well as intent and recklessness) apply to corporations; while recommending a more limited fault element (intent and recklessness only) that would apply to natural persons. Do you have any concerns or comments in regards to this?

D. What is the difference between a statutory cause of action and a statutory tort?

6 My answer to question C is below at paras [15]-[46]. My response to question D is below at paras [47]-[56].

Response to Question B (interlocutory matters)

7 Privacy, once lost, cannot be regained. Obtaining injunctive relief to prevent an intrusion into seclusion, or the publication of private information, will therefore be the primary concern for most plaintiffs. The availability of interlocutory relief, i.e. relief pending trial, has particular importance for victims of privacy invasion when the invasion of privacy is imminent or still ongoing. If some damage has already occurred, an application for an injunction can be combined with a claim for damages.

8 Most applications for interlocutory injunctions are made *quia timet*, i.e. because a publication is feared. If granted before publication, the injunction will protect the information from being disclosed and thereby preserve the claimant's privacy. If disclosure has already occurred, the plaintiff will be concerned to ensure that publication will not be allowed to continue or be repeated. If there has already been some disclosure, courts will scrutinise whether the information is still sufficiently private and only intervene where the injunction can still prevent further damage to the plaintiff's privacy interests. If information has reached the public domain to such an extent that a court order would be futile, an injunction will not be granted.

9 While an interlocutory injunction can be a highly effective means of protecting individual privacy, it also interferes with the defendant's rights and possibly with the public interest. For example, a ban on publication before trial curtails a defendant's freedom of speech in circumstances where it is not clear whether the publication is indeed wrongful. When an interlocutory injunction is granted but then lifted after trial, a defendant would become free to publish the information but it may by then have lost its topicality or relevance. This may affect not only the defendant but also the general public who had an interest in receiving the information in question.

10 In its Report 123, the Australian Law Reform Commission (ALRC) provides a very careful consideration of the relevant interests and how regulation should be drafted to balance them appropriately.[1] There is very little for me to add to this.

[1] Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report 123 (2014) (ALRC Report 123), 12.118]-[12.146].

11 The ALRC recommends:

> Recommendation 12–7 The Act should provide that the court may at any stage of proceedings grant an interlocutory or other injunction to restrain the threatened or apprehended invasion of privacy, where it appears to the court to be just or convenient and on such terms as the court thinks fit.
>
> Recommendation 12–8 The Act should provide that, when considering whether to grant injunctive relief before trial to restrain publication of private information, a court must have particular regard to freedom of expression and any other matters of public interest.

12 I support these recommendations and the rationale which underlies them. Recommendation 12-7 puts beyond doubt that the court has the power to award interlocutory and other injunctions for invasions of privacy falling under the proposed statutory cause of action. The standard to be applied coincides with general principles.

13 Recommendation 12-8 clarifies that the decision to grant, or not to grant, an injunction affects matters of public interest, including freedom of expression, and that a court should therefore have appropriate regard to these matters before making its decision.

14 The Report also makes clear that interlocutory relief in privacy cases should neither follow the (strict) requirements for defamation nor the (more relaxed) requirements for breach of confidence. Legislation can do no more than provide a general framework. The decision of individual cases must be left to the exercise of judicial discretion. In each case, the court must consider all circumstances and balance the competing interests so as to ensure that the fundamental rights and interests of the parties are curtailed no more than is necessary and proportionate.

Response to Question C (fault)

15 The Committee considers recommending differing fault standards for corporations and natural persons so that corporations would be liable for invasions of privacy if they acted with intention, recklessness or negligence, whereas natural persons would be liable for intentional and reckless invasions of privacy only.

16 I understand the reference to corporations to include government agencies.

Current situation

17 As explained in my submission, the Australian Law Reform Commission recommended that its statutory cause of action should be limited to intentional and reckless invasions of privacy.[2] In contrast, neither the VLRC[3] nor the NSWLRC[4] recommended in their reports on privacy to establish a fault standard that excluded

[2] Ibid, Recommendation 7-1.
[3] Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report 18 (2009).
[4] NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009), at [6.9].

negligence. While both commissions anticipated that most actionable invasions of privacy would be committed with intention or recklessness they preferred to retain the option that, in exceptional cases, a negligent invasion of privacy could also be actionable. The question of varying fault standards, depending on the whether the defendant was a natural person or a corporation, was not considered in the reports.

18 The *Privacy Act 1988* (Cth), which deals with the principles of proper information handling, puts in place special provisions for natural persons. Two interrelated provisions seek to exclude the handling of personal information for personal (i.e. non-business) use from the operation of the Act. Sub-section 7B(1) exempts 'acts done or practices engaged in by individuals where those acts are done, or practices are engaged in, other than in the course of business'. Section 16E confirms that the Australian Privacy Principles do not apply to the handling of personal information by an individual 'for the purposes of, or in connection with, his or her personal, family or household affairs'. The Revised Explanatory Memorandum to the Privacy Amendment (Private Sector) Bill 2000, which extended the reach of the Privacy Act 1988 to the private sector and introduced sections 7B and 16E, suggests that these two provisions operate consistently with one another. The Revised Explanatory Memorandum states in relation to sub-section 7B(1), which creates the exemption for acts by natural persons other than those done in the course of business, that the Privacy Act is not intended to affect the way an individual handles personal information 'in the course of his or her personal, family or household affairs'.[5] Conversely, in the context of section 16E, the Memorandum explains that an act done for the purposes of, or in connection with, personal, family or household affairs is an act 'that is, done other than in the course of business'.[6]

Advantages of the proposed distinction

19 **Protect individuals from liability for carelessness**: Limiting the liability of individuals to intentional and reckless conduct protects individuals who invade another's privacy through lack of care. This takes account of the concern expressed in submissions to the Australian Law Reform Commission, and accepted by it, that liability for negligent or accident acts would create '[t]oo wide a liability'.[7] The ALRC Report made its recommendation to limit liability to intentional and reckless conduct after evaluating the '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'.[8] The Report came to the conclusion that many forms of 'actual harm' (which the ALRC defined as harms other than mere emotional distress) are already actionable in other ways and that negligence liability for mere emotional distress would be inconsistent with established principles of torts law.[9] In relation to the second argument in favour of negligence liability (deterrent or regulatory effect), the Report referred to the regulatory powers in the *Privacy Act 1988* (Cth) against

[5] Parliament of Australia, Revised Explanatory Memorandum to Privacy Amendment (Private Sector) Bill 2000 - C2004B00628, at [106].
[6] Ibid, at [164].
[7] See ALRC Report 123, above n 1, [7.63]-[7.66].
[8] Ibid, [7.47].
[9] I submitted to the Committee that the reasoning of the Report on these issues is open to doubt: Submission No 30, [33]-[50].

some forms of negligent privacy invasions, in particular data breaches committed by organisations subject to the Act.

20 The ALRC came to the following conclusion:

> 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.[10]

21 Excluding liability for careless or accidental invasions of privacy would mean that an individual would not incur liability if, say, he or she unintentionally encroaches into another's private sphere or thoughtlessly posts on social media sites of photographs depicting friends, family or strangers in embarrassing situations.

22 **Maintain higher standards for corporations:** Limiting this carve-out for negligence to individuals would, however, ensure that corporations would be held to a higher standard. Corporate actors would remain liable for conduct that fails to comply with a standard of reasonable care. In that way, media organisations would be required to engage in responsible journalism that has proper regard to legitimate claims for privacy. Government entities would incur liability when they fail to put in place reasonable security safeguards to protect private information against unauthorised access or loss.[11] A differentiation between individuals and corporations would also respond to the concern acknowledged by the ALRC that there should be adequate deterrence, and remedies, against data breaches by commercial and government entities. With the greater potential of many business and government entities to commit significant privacy breaches, they should also have greater responsibilities to guard against them. In addition, corporations will often have better resources to make sure (e.g. through training of officers and employees or seeking professional advice) that their practices comply with accepted standards and community expectations on privacy safeguards. Corporations will also generally find it easier to carry the burden of liability for breach, such as through public liability insurance, professional indemnity insurance or pricing mechanisms.

23 **Difficult distinction between recklessness and negligence would matter less:** Lastly, the proposed distinction would also reduce the number of cases in which the difficult distinction between negligent and intentional/reckless conduct becomes determinative. While the ALRC has responded to criticisms made during the consultation process that its proposals need to be made clearer what elements of the cause of action the intention and recklessness requirements need to relate to, the distinction between both fault standards is likely to remain difficult to draw in borderline cases.

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[10] ALRC Report 123, [7.66].

[11] See, for example, Office of the Australian Information Commissioner, *Department of Immigration and BorderProtection: Own motion investigation report,* http://www.oaic.gov.au/privacy/applying-privacylaw/commissioner-initiated-investigation-reports/dibp-omi (last accessed 5 January 2016).

Disadvantages of the proposed distinction

24 **Not common in other torts:** The establishment of different fault standards for individuals and corporations is not common in the law of torts. Generally, liability rules do not distinguish between different classes or types of defendants. In the law of negligence, the personal characteristics of the defendant do not generally affect the standard of care. This means that lack of personal ability, lack of experience or limited financial resources do generally not result in the application of a lower standard of care.[12] While the new cause of action for serious invasion of privacy should be identified as a cause of action in tort,[13] this does not preclude variations in the applicable fault standards. Parliament is free to deviate from established principles of the common law but should consider carefully its reasons for doing so.

25 **Some practices by individuals may not need or deserve the protection:** Protecting individuals from liability that is perceived to be too onerous can be a legitimate reason for differential treatment of individuals and corporations. However, care needs to be taken to ensure that the proposed differentiation is consistent with its rationale. There are situations when individuals are not in need of, or not deserving, protection from negligence liability.[14]

26 The assumption that liability for careless invasions of privacy would be too onerous on individuals may not apply in certain contexts, in particular when individuals act in a business or professional capacity. As identified above, it is appropriate to expect business corporations and government entities to exercise reasonable care in relation to other person's privacy and these organisations generally also have better means to protect themselves from liability or to shift or spread the burden of liability. The same considerations apply to most individuals acting in their professional or business capacities.

27 Unless they conduct their professional activities through incorporated bodies, professional persons such as medical practitioners, legal practitioners, accountants, engineers, architects will engage in all or most of their professional activities as individuals or in partnership with other professionals. However, there does not seem to be any reason to privilege professionals acting in a sole practice or in a partnership, over professionals acting through an incorporated practice.

28 Similarly, it is not evident why individuals acting in the course of business should not operate under the same liability rules as business corporations. Regardless of whether business is conducted by a sole trader, through a business partnership or a business corporation, the activities are engaged in with a profit-making motive. Furthermore, regardless of business structure, all persons conducting business activity that carries a risk of privacy invasion can be expected to seek, if needed, appropriate professional advice on how to conduct this activity safely, and they will

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[12] The exception to this are children who are held to the standard of foresight and prudence as is ordinarily to be expected of a child of the relevant age, rather than a reasonable (adult) person: *McHale v Watson* (1966) 115 CLR 199.

[13] See below, [47]-[56].

[14] Conversely, it would need to be considered whether indeed no corporation should enjoy that protection.

generally be in a comparable position to one another, through insurance or pricing, to shift or spread losses caused by negligence. It follows that individuals acting in a professional or business capacity do not deserve to be in a privileged position compared to corporations.

29 As referred to above, the private sector provisions in the *Privacy Act 1988* (Cth) acknowledge this concern. Any NSW enactment of a statutory action for serious invasion of privacy which seeks to differentiate between individuals and corporations should follow this example and maintain a negligence standard for individuals acting in a business (non-personal) capacity.

30 **Difficulties of attaching vicarious liability:** An employer is vicariously liable for wrongs committed by an employee in the course of employment. Vicarious liability is a common law doctrine that aims to protect the victim of a tort because it allows a suit not only against the wrongdoer but creates another potential defendant with deeper pockets, usually the employer. Imposing vicarious liability in employment relationships can be justified with the consideration that those who employ others for an activity and stand to benefit economically from it, must accept legal responsibility for a wrongful act occurring in the course of that employment.

31 There has been a long-standing controversy over the nature of the employer's vicarious liability. Sometimes, under the so-called 'master's tort' theory, it is assumed that employers are vicariously liable because they have breached a personal duty owed to the plaintiff. Under this theory, the employee's conduct (rather than his or her tort) is attributed to the master. More commonly, under the so-called 'servant's tort' theory, it is thought that vicarious liability is based on the employee's wrongful act and the result of public policy considerations. As stated by Fullagar J in *Darling Island Stevedoring & Lighterage Co Ltd v Long*:[15]

> The liability is a true vicarious liability; that is to say, the master is liable not for a breach of duty resting on him and broken by him, but a breach of duty resting on another and broken by another.

32 Which theory is to be preferred is usually a moot point because, in most cases, the duties imposed on employer and employee are co-extensive, so that the loss-causing conduct will fall short of the standard of behaviour expected both of the employee and the employer. For example, when an employee negligently causes a motor accident while on company business, it does not matter whether the employer's vicarious liability is conceptualised as derivative liability for a tort committed by the employee (servant's tort theory) or personal liability for fault of the employer, committed by an act of the employee that is attributed to the employer (master's tort theory) – the conduct engaged in by the employee fell short of the standard of reasonable care expected both of the employee and the employer. While both theories have variously been accepted by the High Court,[16] the servant's tort theory

[15] (1957) 97 CLR 36, at 57.

[16] In *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36, Kitto J (with whom Taylor J and, possibly, Webb J agreed) preferred the master's tort theory, while Fullagar J

appears now generally preferred,[17] because it dispenses with the fiction that the employer acts through its employees.

33 The differences between both theories may come to the fore, however, if the employer and the employee are subject to different duties. This would likely be the case if a statutory cause of action with differing fault standards would be introduced. If the employee, say a journalist or hospital receptionist, committed an act that negligently invaded another's privacy, she would not be liable under the proposed tort because, acting in an individual capacity, she would not be liable for negligence.[18] The question then arises whether the employer, say an incorporated media organisation or a hospital operator, could be held vicariously liable for the negligent invasion for which the employee is not liable. Under the servant's tort theory, vicarious liability is conditional on the employee having committed a tort – the employer cannot be vicariously liable for conduct of employees for which the employees themselves are not liable. Under the master's tort theory, the employee's conduct would be attributed to the employer. The employee's negligent invasion of privacy will be treated as if it was the employer's own conduct, and the employer, as a corporation, would therefore be vicariously liable for the employee's negligence.

34 This situation is the reverse of the situation more commonly encountered in the case law, where the employee is liable for breach of a statutory duty but the employer (usually unsuccessfully) seeks to deny its vicarious liability on the basis that the statute imposes a duty only on the employee.[19]

35 While the servant's tort theory is generally preferred, it seems inappropriate that – as would follow under this theory – an incorporated employer should be able to escape liability for a negligent invasion of privacy committed by an employee on the basis that the employee is not personally liable. There is no reason why the protection against negligence liability afforded to individuals should extend to their employers.

36 There are legislative provisions in other contexts which deal with the effect of immunities and exemptions on vicarious liability. For example, section s 3C of the *Civil Liability Act 2002* (NSW) provides that an exclusion or limitation of liability enjoyed by the primary tortfeasor under that Act may also be taken advantage of by a person vicariously liable for that person's tort. (This result follows automatically under

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preferred the servant's tort theory (Williams J not expressing an opinion). Barwick CJ in *Ramsay v Pigram* (1968) 118 CLR 271 also adopted the master's tort theory.

[17] See the discussion in *Commonwealth of Australia v Griffiths* [2007] NSWCA 370, Beazley JA (with whom Mason P and Young CJ in Eq agreed), [100]-[116]; *New South Wales v Lepore* [2003] HCA 4, 212 CLR 511, Kirby J at [299]. See also *Majrowski v Guy's and St. Thomas' NHS Trust* [2006] UKHL 34, [2007] 1 AC 224.

[18] It is assumed that conduct engaged by an employee in the course of employment is not, or should not be, regarded as conduct in the course of business. The rationale of the carve-out for business (non-personal) conduct discussed above does not appear to apply. While it could be said that the employee's activity is engaged in with a commercial objective, the motive of earning a wage is different to the profit-making motive of a business entity. Likewise, an employee will usually lack the financial means or sophistication to seek professional advice on safe practices and will be unable to shift or spread the burden of liability if sued.

[19] *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36; *Majrowski v Guy's and St. Thomas' NHS Trust* [2006] UKHL 34, [2007] 1 AC 224.

the 'servant's tort' theory, as noted by Beazley JA in *Commonwealth of Australia v Griffiths*. [20]) Conversely, the *Law Reform (Vicarious Liability) Act 1983* (NSW) preserves vicarious liability of the master even when the wrongdoer enjoys a statutory exemption from liability.[21] It is unlikely that the differing fault standards of statutory cause of action would be regarded as exclusions, limitations or exemptions from liability as understood in these statutes, but the existence of the provisions referred to shows that the doctrine of vicarious liability may require legislative attention when the duties imposed on master and servant differ in their extent or scope.

37 **Limited liability of individuals for damages only:** A further option not alluded to in the question on notice is that the higher fault standard for individuals would be limited to certain remedies only, in particular damages. A general limitation has the consequence that the victim of a negligent invasion of privacy would be prevented from seeking any of the broad range of monetary and non-monetary remedies provided for in the proposed statute. For example, if an individual carelessly posts privacy-invasive photographs on social media, the person affected would not only be unable to sue for damages but also be denied an injunction, an order for delivery up, destruction or removal of the material, a correction order (in the case of a false attribution) or a declaration that his or her privacy was wrongfully invaded. Depending on the facts, one or more of these non-monetary remedies might provide highly suitable (and often, the only effective) redress for the victim of a privacy invasion, while imposing little, if any, financial expense on the plaintiff.[22]

38 The rationale for a higher fault standard for individuals that is based on avoiding liability that is too onerous would therefore operate less strongly in the case of these non-monetary remedies.[23] Consideration should therefore be given to providing that only a claim for damages against an individual requires that the privacy invasion was intentional or reckless, whereas all other remedies are available whenever the defendant acted (at least) with negligence.

Recommendation

39 ALRC Report 123 does not consider the option of differing fault standards for individuals and corporations. However, it appears that this suggestion provides a suitable compromise between the position that seeks to limit liability to intentional and reckless conduct and the position that, in some circumstances at least, negligent invasions of privacy should also be actionable.

40 Although the ALRC favoured the position that only intentional and reckless conduct should be actionable, it acknowledged that negligent data breaches by corporations and government entities required a strong response by the law. The proposed

[20] *Commonwealth of Australia v Griffiths* [2007] NSWCA 370.
[21] See, for example, s 10 of the *Law Reform (Vicarious Liability) Act 1983* (NSW).
[22] The remedy of an account of profit is a monetary remedy but requires the giving up of profits made through the wrongful act so as to avoid the defendant's unjust enrichment. This remedy is therefore also not onerous in the sense of imposing on the plaintiff a financial loss.
[23] Liability for cost should be disregarded in this context because it only arises where a defendant resists a legitimate claim by the plaintiff and requires the plaintiff to initiate legal proceedings.

differentiation is preferable over the proposal that only intentional and reckless invasions of privacy should be actionable because it provides protection to victims whose privacy has been invaded through the negligent conduct of corporations.

41 This provides a deterrent against corporate carelessness, while also dealing with the concern that imposing liability on individuals for simple lack of care may have undesirable consequences. However, as discussed above, there are contexts in which careless individuals should also be held liable. That is the case in particular where the privacy invasion occurs in the course of the individual's business or professional activities.

42 I submit that, following the model adopted in the *Privacy Act 1988* (Cth), the statutory cause of action should exclude negligence liability of individuals only to the extent to which they engage in personal (non-business) activities. The *Privacy Act 1988* (Cth) uses two formulations for this carve-out, which were intended to be mutually exclusive and cover the whole field of individual activity. However, it may be doubted whether it is indeed correct to regard that all activities that are not 'business' fall under the rubric of 'personal, family and household affairs'. Such a rigid dichotomy does not appear to consider the handling of personal information that occurs for societal or civic purposes, such as in the context of political or other public affairs. These matters in the civic sphere cannot be equated with 'business', but they are also not readily subsumed under 'personal affairs'.

43 These definitional difficulties can be sidestepped if the proposed cause of action chooses just one or the other of the formulations used in the *Privacy Act 1988* (Cth). I submit that the carve-out should apply to conduct engaged in 'in the course of business'. This takes account of the fact that such conduct is engaged in for a profit-making motive, that it is conduct which individuals can be expected only to engage in after obtaining appropriate professional advice, if necessary, and which may readily be covered by professional indemnity or other third party liability insurance.

44 The carve-out for conduct 'in the course of business' is narrower than the alternative formulation in the sense that it privileges conduct that may not strictly constitute 'personal, family or household affairs', such as conduct for societal or civic purposes. This would include activities such as social blogging, engagement in sporting or other associations, volunteering and other community activities. Exempting this conduct from negligence liability would appropriately foster conduct in the public arena that might otherwise be stifled through fear of exposure to liability.

45 If a higher fault standard is recommended for individuals, I submit that the Committee should also recommend a clarification that a corporation may incur vicarious liability even if the individual who committed the invasion of privacy is not personally liable because his or her conduct was merely negligent.

46 I submit that the Committee should give consideration to recommending that only claims for damages (but not for other remedies) require intention or recklessness of defendant individuals.

Response to Question D (statutory tort or cause of action)

47 In its Report on *Invasion of Privacy*, the New South Wales Law Reform Commission recommended the introduction of a statutory cause of action for serious invasion of privacy, not a statutory privacy tort.[24]

48 The NSWLRC identified two reasons for this, which were discussed in some detail in the Consultation Paper[25] preceding its Report:

a. Torts do not traditionally require the courts to 'engage in an overt balancing of relevant interests', whereas this was the methodology the NSWLRC proposed for the statutory cause of action it recommended.

b. The NSWLRC was of the view that the 'statutory cause of action should not necessarily be constrained by rules or principles generally applicable in the law of torts'.[26] A more flexible approach was held to have two important implications for the cause of action proposed by the NSWLRC. First, the Commission preferred not to specify whether the statutory cause of action required that the defendant's conduct to be intentional, whereas the enactment of a tort would have required identification of the relevant fault standard (e.g. intention, intention or negligence, strict liability etc). The second implication was that it would not have been necessary to specify whether the action is also maintainable without proof of damage.

49 The Victorian Law Reform Commission agreed with this approach and suggested that 'any new causes of action should be statutory causes of action rather than torts'.[27] It considered that there was little to be gained by the wholesale incorporation of the complex rules of torts law into this new cause of action.

50 In contrast to the NSWLRC and VLRC, the ALRC recommended that the 'cause of action should be described in the Act as an action in tort'.[28] In its view, 'describing the action as a tort will encourage courts to draw on established principles of tort law, when deciding a number of ancillary issues. This will provide a measure of certainty, consistency and coherence to the law'.[29]

51 I agree with the view taken by the ALRC and submit that the cause of action be identified as an action in tort. First, it is perhaps not as uncommon as the NSWLRC suggests for the law of torts to require a balancing of competing interests. As noted by the ALRC, the tort of nuisance is the primary example for a tort to adopt such an approach. A nuisance is committed when the defendant commits an unreasonable interference with the plaintiff's use and enjoyment of land, usually by using their own neighbouring land in an unjustifiable way. As such, the tort of nuisance requires a balancing between competing uses of neighbouring land.

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[24] NSW Law Reform Commission, above n 4, [5.54]-[5.57].
[25] NSW Law Reform Commission, *Invasion of Privacy*, Consultation Paper 1 (2007), [1.5]-[1.8].
[26] NSW Law Reform Commission, above n 4, [5.55].
[27] Victorian Law Reform Commission, above n 3, [7.134].
[28] ALRC Report 123, above n 1, Recommendation 4-2.
[29] Ibid, [1.9].

52 Second, the NSWLRC and the ALRC also differed on whether it would be desirable to determine in the privacy legislation itself that the rules that developed for torts should in principle be applicable to the privacy wrong. A new privacy wrong, even if enacted in specific legislation, would not exist in isolation. It would become part of the fabric of the law of civil wrongs as well as other neighbouring areas of law. This is not only necessary to maintain the law's internal coherence and consistency but also because it would be both impractical and unnecessary to provide in the legislation itself all legal rules that might possibly apply to the cause of action for privacy invasion.

53 There are numerous contexts in which other statutes or common law rules make reference to a 'tort' having been committed. These include: 'common law principles settled in analogous tort claims, particularly in relation to fault, defences and the award of damages and assessment of remedies',[30] as well as the principles of vicarious liability, apportionment legislation in cases of multiple wrongdoers, the statutes of limitation, and the principles applying to survival of actions and to conflicts of law.

54 For each of these areas, it is necessary to decide whether the general rules, as they form part of the common law or are contained in relevant statutes, should also apply to the new cause of action for serious invasion of privacy. The general rules would not apply to the extent to which the privacy statute itself contains the relevant law. For example, the ALRC Report recommends that the privacy legislation should identify the fault standard; the defences; the range, availability and assessment of damages; the survival of actions as well as the limitation periods. Explicit statements of the applicable rules in the privacy legislation have priority over general law principles in common law or other legislation. The general principles will remain relevant, however, to the extent that the statutes leaves intentional or unintentional gaps, for example, where it does not define legislative terms (e.g. 'intention') or does not contain some of the finer detail (e.g. does the principle of mitigation apply to the assessment of damages? when can an interlocutory injunction be granted?[31] etc.).

55 In reality, the matter of whether the statutory cause of action is identified as a tort, or not, is not as significant as a reading of the reports of either Commission might suggest. The reason for this is as follows: A court is neither precluded from applying a rule that makes reference to a 'tort' when dealing with a statutory cause of action not expressly identified as a statutory tort.[32] Nor will a court automatically and unquestioningly apply to a statutory privacy wrong a rule that makes reference to a 'tort' solely because the statutory action is described in the Act as a tort. In either case, the court will be guided in its application of the law by principles of statutory interpretation as well as the doctrine of precedent.

56 In summary, I submit that it would make the courts' task of applying the new privacy legislation easier to describe the cause of action as a tort. The designation of the action as a tort would integrate it 'into the existing legislative and common law

[30] Ibid, [4.46].
[31] See further above, [7]–[14].
[32] See, for example, *Lew Footwear Holdings Pty Ltd v Madden International Ltd* [2014] VSC 320, [159]-[197].

framework of tort law'[33] and thereby clarify that Parliament considered it as the default position that statute law and common law principles applicable to torts generally should also be applied to the new privacy wrong. This approach requires, however, that Parliament consider as far as possible whether it is appropriate for each of these rules to apply to the statutory privacy wrong. Where Parliament regards a general rule to be inapposite, the legislation should provide which rules should apply instead. Where Parliament fails to provide a special rule but a court considers after a process of statutory interpretation that a general rule is inapposite, the court has the power (and obligation) not to apply the general rule but to devise, and apply, a more appropriate principle.

[33] ALRC Report 123, [4.54].