

**Submission  
No 30**

**INQUIRY INTO REMEDIES FOR THE SERIOUS INVASION  
OF PRIVACY IN NEW SOUTH WALES**

**Name:** A/Prof Dr Normann Witzleb  
**Organisation:** Faculty of Law, Monash University  
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## Inquiry into remedies for the serious invasion of privacy in New South Wales

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

**September 2015**

**by A/Prof Dr Normann Witzleb, Monash University, Faculty of Law**

- 1 In September 2014, the Australian Law Reform Commission's (ALRC)'s report on *Serious Invasions of Privacy in the Digital Era* (hereafter, ALRC Report 123) was tabled in the Australian Parliament. The ALRC recommended the introduction of a statutory cause of action for serious invasions of privacy. This proposal re-affirms the ALRC's earlier proposals for a statutory cause of action,<sup>1</sup> as well as similar calls for law reform made by the New South Wales Law Reform Commission<sup>2</sup> and the Victorian Law Reform Commission.<sup>3</sup>
- 2 Unfortunately, the ALRC's recommendations for a statutory privacy tort appear to have fallen on barren ground at the Commonwealth level. The current coalition government has on numerous occasions stated its position that it does not support the introduction of a statutory privacy tort.<sup>4</sup>
- 3 Against this background, I welcome that the NSW Legislative Council decided to inquire into the remedies for serious invasions of privacy and seeks public submissions.
- 4 My submission builds on my academic work on privacy law,<sup>5</sup> including submissions made in response to Issues Paper 43 and Discussion Paper 80 of the Australian Law Reform Commission.

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<sup>1</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108, 2008.

<sup>2</sup> NSW Law Reform Commission, *Privacy*, Report 120, 2009.

<sup>3</sup> Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report 18, 2010. See further N Witzleb, 'A statutory cause of action for privacy? A critical appraisal of three recent Australian law reform proposals' (2011) 19 *Torts Law Journal* 104.

<sup>4</sup> See, for example, *The Guardian online*, 'Law Reform Commission seeks right to sue for victims of privacy violations', 3 September 2014, <http://www.theguardian.com/world/2014/sep/03/law-reform-commission-seeks-right-to-sue-for-victims-of-privacy-violations> (last accessed 25 September 2015).

<sup>5</sup> See Annex.

- 5 This is a personal submission and does seek to represent the views of Monash University.

### **The inadequacy of existing remedies for serious invasions of privacy**

- 6 The reports on the major law reform inquiries on privacy by the Australian Law Reform Commission, the NSW Law Reform Commission and the Victorian Law Reform Commission have agreed on the need for stronger protections of privacy and more robust remedies. A privacy tort would be an integral part of such reforms. The need for Australia is now virtually unique among major common law jurisdictions in not recognising a legally enforceable right to privacy. In most comparable jurisdictions, privacy protections have been developed through the courts, often prompted by human rights legislation that guarantees a right to respect for private life alongside other fundamental freedoms, including the right to freedom of expression. This has been the case in the United Kingdom, New Zealand and, most recently, in Canada. In all these countries, a *Bill of Rights* or other human rights legislation has provided a framework for the judicial development of a cause of action to protect privacy. The absence of a federal human rights instrument in Australia has stultified the development of a common law right to privacy. It is that gap in the law that a statutory privacy tort would close.
- 7 At present, the right to privacy is only protected incidentally, when the invasion of privacy can be shoehorned into an existing cause of action. Civil wrongs that can provide incidental protection to privacy interests, although they are primarily designed to protect other legal interests, include trespass to the person, trespass to land, nuisance, defamation and the equitable cause of action for breach of confidence.
- 8 Where the alleged privacy invasion involves information handling, the victim can also lodge a complaint with the Office of the Australian Information Commissioner, provided that the alleged privacy invasion constitutes a breach of the *Privacy Act 1988* (Cth). On receiving a complaint, the Privacy Commissioner will consider whether to investigate the matter and, if he does and regards the complaint as well-founded, will usually seek to resolve it through conciliation. The Commissioner also has the power to make formal decisions, which can include orders to apologise, pay compensation or change privacy practices, but such determinations are rare. On the whole, the redress available under the *Privacy Act* is in many respects more limited than that under a privacy tort.

### **The ALRC recommendations for a statutory privacy tort as a useful blueprint for reform**

- 9 The ALRC Report 123 contains a careful consideration of the various interests that collide in cases of privacy invasions. It also evaluates in some detail whether the legal development should be left to the courts or whether legislative reform is preferable.

The Report comes to the conclusion that a tort against serious invasion of privacy should be introduced through statute.

10 I support this conclusion. A statutory cause of action would provide a reliable basis from which the courts could decide individual cases and develop the finer detail of the law. The alternative of leaving the development of the law in the hands of judges would create more uncertainty and higher costs to litigants, and any incremental change to the law on a case-by-case basis is unlikely to reflect community expectations as closely as the proposed statutory tort.

11 The ALRC proposes federal legislation creating a new tort of serious invasion of privacy with the following characteristics:

- a. The tort should focus on 'intrusion into seclusion' and 'misuse of private information'. 'Intrusion' includes activities such as physically intruding into the plaintiff's private space or by watching, listening to or recording the plaintiff's private activities or private affairs. A "misuse" occurs by activities such as collecting or disclosing private information about the plaintiff.
- b. The new tort should be actionable only where a person in the position of the plaintiff would have had a reasonable expectation of privacy, in all of the circumstances.
- c. The tort should be confined to intentional or reckless invasions of privacy, so that merely negligent invasions of privacy would not become actionable.
- d. The scope of the tort would be further limited by introducing a threshold requirement that the invasion must be serious.
- e. Lastly, it is proposed that an action could only succeed if the court is satisfied that the public interest in privacy outweighs any countervailing public interests. This requirement for a balancing exercise would ensure that conflicting interests such as freedom of speech, freedom of the media, public health and safety, and national security would not be disproportionately curtailed.

12 If a plaintiff establishes that the ALRC tort has occurred, a defendant could rely on a number of defences and exemptions, such as consent, necessity, absolute privilege, and fair report of proceedings of public concern. ALRC Report 123 recommends that a broad range of remedies should be available to successful privacy claimants. These include traditional torts remedies such as damages, including compensation for emotional distress, injunctions and an account of profits. However, the report also recommends giving the court power to make orders that are more specifically directed at remedying privacy harms, such as declarations, orders for apologies and corrections.

13 The recommendations of the ALRC are the result of extensive community consultation and take into account comparative research into the law in other

jurisdictions. The introduction of the proposed cause of action would ensure that Australia's privacy protection no longer lags behind internationally accepted standards. The proposed elements of the cause of action do not differ greatly from their counterparts in other common law jurisdictions, but where they do, they tend to define the tort somewhat more tightly than elsewhere.

### **Should New South Wales introduce a statutory privacy tort?**

14 Ideally, there would be a nationally consistent approach towards privacy protection in Australia, such as through a cause of action created in Commonwealth legislation or uniform state legislation. However, in light of the unwillingness of the current federal government to legislate on the issue, I support the introduction of statutory tort for serious invasion of privacy in New South Wales only. If Australia's most populous state successfully implements a statutory privacy tort, it may well lead the other Australian jurisdictions to re-appraise the advantages of such protections and to adopt similar, or identical, reforms.

15 I submit that the NSW Parliament should enact a statutory privacy tort broadly in the form recommended by the ALRC.

16 In particular, I submit that:

- a. The action should be described as an action in tort.
- b. The new tort should only be actionable where a person in the position of the plaintiff would have had a reasonable expectation of privacy, in all of the circumstances.
- c. The plaintiff should not be required to prove actual damage to have an action under the new tort.
- d. The new Act should provide that the plaintiff only has a cause of action for serious invasion of privacy where the court is satisfied that the plaintiff's interest in privacy outweighs the defendant's interest in freedom of expression and any broader public interest; and that the new Act should include the following non-exhaustive list of public interest matters which a court may consider.
- e. That the defendant should have the defences as in Recommendations 11-1 to 11-7 of ALRC Report 123.
- f. The new Act should provide for the remedies as in Recommendations 12-1 to 12-12 of ALRC Report 123.

17 My main concern about the ALRC tort is that it may have been formulated too narrowly. This applies in particular to following elements of the proposed cause of action:

- (a) scope of the cause of action;

- (b) the 'fault' element; and
- (c) the element of 'seriousness'.

18 These qualifications are the focus of my submission.

### **The scope of protection: Preference for a broad formulation**

19 The protracted history of Australian law reform inquiries into privacy demonstrates that statutory law reform in the area of privacy is very difficult to achieve. Once a statutory privacy tort is enacted, it is likely to remain unchanged for many years to come. As recognised in the press release for the present inquiry, technological and social advances have increased the need for effective protection of privacy, and they are likely to do so well into the future. This makes it imperative to define the scope of protection in a way that enables courts to provide effective protection in a wide range of changing circumstances.

20 For that reason, I favour a broad formulation of the cause of action that provides redress against all presently recognised forms of privacy infringement and allows for future development of the law by the courts if and when new forms of privacy infringement arise.<sup>6</sup>

21 This stands in contrast to ALRC Report 123, which recommends to 'confine'<sup>7</sup> the cause of action to the categories of 'intrusion' and 'misuse/disclosure'. Specifically, the tort proposed by the ALRC is –

not designed to capture the two other so-called "privacy torts" in the United States, namely, "publicity which places the plaintiff in a false light in the public eye" and "appropriation, for the defendant's advantage, of the plaintiff's name or likeness".<sup>8</sup>

22 At the same time, ALRC Report 123 suggests:

The tort in this Report is certainly not designed to deny relief where the plaintiff has been put in a false light, or had their name or likeness appropriated. But it is not intended to capture these other wrongs per se. Other causes of action will more directly relate to these wrongs.<sup>9</sup>

23 I submit that this recommendation lacks clarity. Furthermore, an approach that relies on the incidental protection of some privacy interests through other causes of action carries the risk that privacy invasions may go unremedied.

### **False light claims**

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<sup>6</sup> I explained my reasons in detail in my submission to ALRC Discussion Paper 80 (DP80), which is accessible from the ALRC website at [https://www.alrc.gov.au/sites/default/files/subs/116\\_n\\_witzleb.pdf](https://www.alrc.gov.au/sites/default/files/subs/116_n_witzleb.pdf) (last accessed 25 September 2015). The present submission reproduces some of the material of the ALRC submission.

<sup>7</sup> ALRC, Rep 123, [1.4].

<sup>8</sup> ALRC, Rep 123, [5.67].

<sup>9</sup> ALRC Report 123, [5.70].

- 24 The cause of action proposed by the ALRC appears to provide incidental protection where a false light or appropriation claim can be subsumed under the ‘intrusion’ or ‘misuse/disclosure’ labels. In relation to the ‘false light tort’, this follows from recommendation 5-2 that “‘private information’ includes untrue information, but only if the information would be private if it were true’.
- 25 I endorse the extension of the cause of action to include ‘false privacy’ claims because the misuse or disclosure of untrue private information can be just as damaging as the misuse or disclosure of true private information. It would be inappropriate to limit the protection to true information. Limiting the tort to true information would require a plaintiff to confirm or admit in court the veracity of information which he or she would not like to see in the public domain, at all. This would be likely to unfairly prejudice the plaintiff’s interests in protecting her private life from publicity.
- 26 Not requiring the plaintiff to establish the truth of the information disclosed or misused is also in line with the law in other jurisdictions, most notably the UK. In *McKennitt v Ash*,<sup>10</sup> the defendant argued that the plaintiff could not have a reasonable expectation of privacy in relation to false statements. The Court of Appeal rejected this argument. Longmore L.J. stated:
- The question in a case of misuse of private information is whether the information is private, not whether it is true or false. The truth or falsity is an irrelevant inquiry in deciding whether the information is entitled to be protected.<sup>11</sup>
- 27 While it is appropriate that the proposed cause of action would provide redress for conduct involving untrue information relating to a person’s private life, this raises some doubt in relation to the ALRC’s declared preference not to include ‘false light’ wrongs in the statutory tort.

### **Misappropriation claims**

- 28 Similar concerns arise in relation to the ‘misappropriation tort’. While ALRC Report 123 does not wish to deny relief for such wrongs, it does not clarify in what circumstances the misappropriation of a plaintiff’s name, image or other characteristics would constitute a ‘misuse’. ALRC Report 123 explains the reluctance to legislate for misappropriation wrongs with the following consideration stated by Gummow and Hayne JJ stated in *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 255:

Whilst objection possibly may be taken on non-commercial grounds to the appropriation of the plaintiff’s name or likeness, the plaintiff’s complaint is likely to be that the defendant has taken the steps complained of for a commercial gain, thereby depriving the plaintiff of the opportunity of commercial exploitation of that name or likeness for the benefit of the plaintiff.

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<sup>10</sup> *McKennitt v Ash* [2008] QB 73; [2006] EWCA Civ 1714.

<sup>11</sup> *Ibid*, [86].

29 Whilst misappropriation of a person's name or likeness may indeed often primarily be commercially motivated or affect the plaintiff's commercial interests,<sup>12</sup> this does not exclude that it may also constitute an invasion of privacy. A recent US-example illustrates the point: Harris Faulkner, a well-known journalist and Fox News anchor has filed a lawsuit against Hasbro, a large toy manufacturer, which sells a hamster doll under the name of Harris Faulkner.<sup>13</sup> The packaging of the hamster warns that the toy is a choking hazard for young children. According to the suit, the hamster also bears physical resemblance to Ms Faulkner's traditional professional appearance, in particular tone of its complexion, the shape of its eyes, and the design of its eye makeup. Ms Faulkner seeks damages on the basis that the toy hamster produced by Hasbro wrongfully appropriates her name and distinctive persona. She also alleges that she was "extremely distressed" to have her name attached to a potential choking hazard. The suit is based on liability for false endorsement and violation of Ms Faulkner's right of publicity. In the absence of a broad privacy wrong, an Australian plaintiff in the same position would be likely to seek protection under the torts of passing off and defamation. The former only protects against commercial losses, such as damage to business reputation or goodwill, but does not protect against the emotional distress arising from an unauthorised use of one's name and likeness in an embarrassing context. A defamation claim may provide a measure of protection against the loss of personal reputation, including emotional distress, but not against the loss of autonomy and dignity of having one's name and likeness wrongfully appropriated and ridiculed. The latter harm goes to the core of one's personality and should be protected directly through a cause of action in privacy, rather than indirectly and incidentally through other causes of action, which may not provide complete protection against the harm suffered.

30 If a misappropriation were to constitute a misuse of personal information, it would be actionable just like other privacy invasions under the proposed tort, i.e. where the plaintiff has a reasonable expectation of privacy in relation to the information in question, where the invasion is serious and where the plaintiff's interest in privacy is not outweighed by the defendant's interest in freedom of expression and any broader public interest. Some of the proposed remedies available for an invasion of privacy, in particular an account of profit and a notional license fee, also indicate that the cause of action intends to target conduct engaged in for financial gain. Both of these gain-based remedies aim at ensuring that a defendant who benefits financially from breaching the plaintiff's privacy will not be able to retain the proceeds of the wrong.

### **A broad cause of action improves clarity and provides comprehensive protection**

31 In formulating the scope of the cause of action, the ALRC has been guided by the concern that the 'Act should provide as much certainty as possible on what may amount to an invasion of privacy'.<sup>14</sup> The considerations above seek to explain why I

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<sup>12</sup> These interests are affected when the defendant's conduct prejudices the plaintiff's ability to commercialise aspects of their personality, such as a product endorsement or a paid 'exclusive' on a significant life events.

<sup>13</sup> *BBC News*, 'Fox News anchor Harris Faulkner sues Hasbro over hamster toy' (2 September 2015), <http://www.bbc.com/news/world-us-canada-34133723> (last accessed 25 September 2015).

<sup>14</sup> ALRC, Rep 123, [5.76].



have concerns about whether the recommendations in ALRC Report 123 achieve this objective.

32 I submit that that the two branches of the tort proposed by the ALRC can be understood as being broad enough to cover conduct that, in the classification of the US Restatement, would fall under the false light and misappropriation torts. For the sake of clarity, it would therefore be useful to state expressly that ‘false light’ and ‘misappropriation’ claims are not excluded from the ambit of the new tort but that these are actionable if the defendant’s conduct satisfies the requisite elements of the cause of action. It should be clarified that ‘private information’ includes untrue information if the information would be private if it were true. It should further be clarified that an ‘appropriation of the plaintiff’s name, likeness and other characteristics’ may constitute a ‘misuse’ of personal information.

### **The ‘fault’ element: Liability for intentional and negligent conduct**

33 ALRC Report 123 recommends that that new tort should be confined to intentional or reckless invasions of privacy. I do not support this recommendation and submit that a serious invasion of privacy should be actionable if the defendant was at ‘fault’. This would extend liability to include simple negligence. In my view, limiting liability to intent and recklessness would set the bar too high. It would leave plaintiffs without redress in some circumstances where they deserve protection. It is also out of step with the general principles of liability for civil wrongs protecting dignitary interests.

#### **Bar too high**

34 I submit that the limitation to intentional and reckless privacy invasions would leave inappropriate gaps in the protection of privacy. The case of *Jane Doe v ABC*<sup>15</sup> provides a striking example of why limiting liability to intentional and reckless acts would exclude some deserving cases. In that case, the Australian Broadcasting Corporation reported in three radio news broadcasts that the plaintiff’s husband had been convicted of raping her. In two of these broadcasts, her estranged husband was identified by name and the offences were described as rapes within marriage. In another broadcast, Jane Doe was additionally identified by name. In all three broadcasts, the journalist and sub-editor breached the *Judicial Proceedings Act 1958* (Vic), which makes it an offence to publish information identifying the victim of a sexual offence. Expert evidence established that the plaintiff was particularly vulnerable at the time of the broadcasts and that the reporting exacerbated her trauma symptoms and delayed her recovery. The defendants were thus guilty of a serious invasion of privacy with grave and long-lasting consequences for the plaintiff. Yet the trial judge, Hampel J, found that the breach of the plaintiff’s privacy was the result of the defendants’ failure to exercise reasonable care ‘rather than [being] wilful’.<sup>16</sup> If the ALRC recommendations were enacted, a person in the position of the

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<sup>15</sup> *Jane Doe v ABC* [2007] VCC 281. Hampel J found nonetheless in favour of the plaintiff because her Honour formulated the cause of action as an ‘unjustified, rather than wilful’ (at [163]) publication of private facts.

<sup>16</sup> *Ibid*, [163].

plaintiff in *Jane Doe v ABC* would presumably not be able to rely on the statutory cause of action. This would severely curtail the protection for privacy that the law should provide for.

- 35 Other examples where negligent invasions of privacy can cause significant harm are data breaches. A data breach occurs, according to the definition used by the Office of the Australian Information Commissioner,<sup>17</sup> when personal information held by an agency or organisation is lost or subjected to unauthorised access, modification, disclosure, or other misuse or interference. Examples include the accidental publication in February 2014 of the personal details of almost 10,000 asylum seekers by the Australian Department of Immigration on its website<sup>18</sup> or the publication of user data obtained by hackers from Ashley Madison, a commercial dating website enabling extramarital affairs.<sup>19</sup> ALRC Report 123 suggests that a range of remedies against negligent data breaches is already currently available, including contractual remedies or regulatory action under the *Privacy Act 1988* (Cth).
- 36 However, both contractual remedies and regulatory remedies are limited in their availability and scope. Contractual liability for negligently causing emotional distress is now subject to the restrictions in the civil liability legislation. This legislation generally regulates personal injury awards based on negligence even when the cause of action relied upon is breach of contract.<sup>20</sup> Under s 11 of the *Civil Liability Act 2002* (NSW) ('CLA'), personal injury includes 'impairment of a person's physical or mental condition'. The NSW Court of Appeal held that this term includes mere anxiety, distress and inconvenience, ie injury to feelings,<sup>21</sup> even when it does not result from physical injury.<sup>22</sup> Section 16 CLA excludes damages for 'non-economic loss'<sup>23</sup> except 'where the severity of the non-economic loss is at least 15% of a most extreme case'. It will be a rare case in which the emotional harm that is triggered by a data breach, such as anxiety over identity theft or potential embarrassment about the disclosure of private information, will reach this threshold. While it has been persuasively argued that contractual claims for disappointment and distress ought not to be caught by the provisions of the CLA,<sup>24</sup> this jurisprudence is currently entrenched in NSW. Contrary to

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<sup>17</sup> Office of the Australian Information Commissioner, *Data breach notification guide: A guide to handling personal information security breaches*, August 2014, p 2.

<sup>18</sup> See Office of the Australian Information Commissioner, *Department of Immigration and Border Protection: Own motion investigation report*, <http://www.oaic.gov.au/privacy/applying-privacy-law/commissioner-initiated-investigation-reports/dibp-omi> (last accessed 25 September 2015).

<sup>19</sup> See Office of the Australian Information Commissioner, *Ashley Madison data breach – investigation commenced*, <http://www.oaic.gov.au/news-and-events/statements/privacy-statements/ashley-madison-data-breach/ashley-madison-data-breach-investigation-commenced> (last accessed 25 September 2015).

<sup>20</sup> Section 11A(2) CLA applies those provisions to most claims for personal injury damages "regardless of whether the claim for the damages is brought in tort, in contract, under statute or otherwise".

<sup>21</sup> *New South Wales v Ibbett* (2005) 65 NSWLR 168; [2005] NSWCA 445, Ipp JA at [124], Basten JA at [211]-[212]; *Insight Vacations Pty Ltd v Young* (2010) 78 NSWLR 641; [2010] NSWCA 137.

<sup>22</sup> *Flight Centre Ltd v Louw* (2011) 78 NSWLR 656; [2011] NSWSC 132.

<sup>23</sup> Section 3 of the Act defines non-economic loss to include (a) pain and suffering (b) loss of amenities of life (c) loss of expectation of life and (d) disfigurement.

<sup>24</sup> S Walker and K Lewins, 'Dashed expectations? The impact of civil liability legislation on contractual damages for disappointment and distress' (2014) 42 *Australian Business Law Review* 465.

the views expressed in ALRC Report 123, ordinary contract liability therefore does not generally sufficient redress in cases of data breaches.

- 37 Regulatory action by the Australian Privacy Commissioner likewise has limited reach. As acknowledged by ALRC Report 123, the *Privacy Act 1988* (Cth) is subject to a range of broad exemptions. For example, the Privacy Commissioner does not generally have jurisdiction over breaches of the *Privacy Act 1988* (Cth) committed by private sector organisations with an annual turnover of \$3 million or less or that fall within one other exemptions, such as those granted to the media, political parties, individuals or in relation to employee records. The limited reach of existing remedies indicates real gaps in the protection against negligent data breaches. These can only be addressed through a statutory cause of action against serious invasions of privacy that is based on a fault-based standard, rather than one that requires intention or recklessness.

### **Tort liability for causing emotional distress**

- 38 I submit that the reasons provided by ALRC Report 123 for limiting liability to intentional or reckless conduct are not persuasive. The Report puts forward the view that –

‘assault and false imprisonment – and their actionability per se – are torts of intention or recklessness. Being concerned with intangible and dignitary interests of the plaintiff, these are the torts that are most analogous to an invasion of privacy’.<sup>25</sup>

- 39 In arriving at this conclusion, the ALRC sought to draw a distinction between battery, on the one hand, and assault and false imprisonment, on the other hand. These three torts are directed at different forms of interference with the person. While battery is concerned with actual physical conduct, assault protects against wrongfully causing the apprehension of physical contact and false imprisonment protects from wrongful physical confinement. Yet, all three torts are recognised as different types of trespass to the person and, because of their common origin, share much, if not all, of their legal characteristics.
- 40 While most claims in trespass are based on intentional acts, it is recognised that, in Australian law, all three trespassory torts can, as a matter of principle, be committed intentionally or negligently.<sup>26</sup> In fact, other than in highway cases, a plaintiff is not required even to establish fault.<sup>27</sup> Instead, if the plaintiff can establish the interference, the onus is on the defendant to disprove fault,<sup>28</sup> such as that the trespass was the result of an inevitable accident. In the case of *Ruddock v Taylor*, Kirby J observed:

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<sup>25</sup> ALRC Report 123, [7.57].

<sup>26</sup> See, eg. RP Balkin & JLR Davis, *Law of Torts*, 5<sup>th</sup> ed, 2013, [3.2]; *Williams v Milotin* [1957] HCA 83, (1957) 97 CLR 465; *New South Wales v Lepore* [2003] HCA 4; (2003) 212 CLR 511, [270] (Gummow and Hayne JJ); *Stingel v Clark* [2006] HCA 37; (2006) 226 CLR 442, [13] (Gleeson CJ, Callinan, Heydon and Crennan JJ).

<sup>27</sup> *Venning v Chin* (1974) 10 SASR 299; *Platt v Nutt* (1988) 12 NSWLR 231.

<sup>28</sup> *Ibid.*

Wrongful imprisonment is a tort of strict liability. Lack of fault, in the sense of absence of bad faith, is irrelevant to the existence of the wrong. [...] At common law it is the defendant who must then show lawful justification for his or her actions.<sup>29</sup>

A privacy cause of action that was limited to intention and recklessness can therefore not be supported with an analogy to the assault and false imprisonment.

41 ALRC Report 123 identifies a ‘well-entrenched policy of the common law – and now the clear legislative policy across most Australian states and territories – ... that liability for negligence generally does not extend to “mere” emotional distress.’<sup>30</sup> However, this statement is only correct for the tort of ‘negligence’, not for ‘negligence’ as a fault standard. Torts other than negligence allow for the recovery of emotional distress even in the absence of intention or recklessness: There are no bars to recovery for emotional distress where a trespass to the person was committed negligently. In defamation, emotional harm will likewise be compensated through an award of general damages, even in the absence of intention or recklessness. These torts protect specific personality interests, such as bodily safety and integrity (in the case of trespass) and reputation (in the case of defamation). In these dignitary torts, emotional distress is recoverable even in the absence of intention or negligence because it is the typical consequence of invading the protected interest. The situation is different where a plaintiff claims under a tort that is not designed to protect a specific legal interest but which attaches liability to a specific conduct, as in the case of the tort of negligence and the *Wilkinson v Downton* tort.<sup>31</sup>

42 In the tort of negligence, emotional harm can be either ‘mere’ or ‘consequential’, and its recoverability depends on this classification. *Mere* emotional harm (i.e. where no other legally protected interest of the plaintiff is affected) is, indeed, not recoverable unless it reaches the threshold of a recognised psychiatric injury. *Consequential* emotional harm, on the other hand, is generally recoverable in negligence as well. If a defendant negligently causes physical injury and this injury causes emotional distress in the form of pain and suffering, such consequential emotional distress is recoverable.<sup>32</sup> Damages for pain and suffering do not depend on the defendant acting with intention or recklessness; it is uncontroversial that they are recoverable on proof of simple negligence. Likewise under the *Wilkinson v Downton* tort, where the defendant’s conduct causes no more than emotional harm, such harm is, in Australian law,<sup>33</sup> generally not recoverable unless it amounts to a recognised psychiatric injury.<sup>34</sup> The reason for this is that these torts are not rights-based but conduct-based. Attaching liability to a breach of the standard of care (negligence) or

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<sup>29</sup> *Ruddock v Taylor* [2005] HCA 48; (2005) 222 CLR 612, Kirby J at 650 ([140]); see also *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1; 316 ALR 1, Crennan J at [63].

<sup>30</sup> ALRC Report 123, [7.55].

<sup>31</sup> *Wilkinson v Downton* [1897] 2 QB 57.

<sup>32</sup> This is now subject to the restrictions under the civil liability legislation: see above at [32].

<sup>33</sup> The situation differs in the US. The *Restatement of the Law (3rd) Torts: Liability for Physical and Emotional Harm* (American Law Institute Publishers, St Paul, Minnesota, 2011), s 45 provides: “An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional disturbance to another is subject to liability for that emotional disturbance and, if the emotional disturbance causes bodily harm, also for the bodily harm.”

<sup>34</sup> *Giller v Procopets* [2008] VSCA 236; 24 VR 1, Ashley JA at [164] and Neave JA at [462]; but also see the dissenting opinion of Maxwell P at [28]-[31].

to the intentional infliction of harm (*Wilkinson v Downton*) leads to liability that is potentially very broad. Limiting recovery to a recognised psychiatric injury is a control device to ensure that liability is not unreasonably expanded.

- 43 The critical distinction for recoverability of emotional harm is therefore not the degree of the defendant's fault but whether the plaintiff claims redress for 'mere emotional harm' or harm that is 'consequential', i.e. a (typical) consequence of invading the right or interest which the wrong protects. In trespass and defamation, the plaintiff's emotional harm is consequential on violation of physical integrity or reputation.

#### **Coherence with other wrongs protecting dignity**

- 44 On this analysis, it is the policy of the common law to deny recovery for negligently caused emotional harm where the plaintiff has suffered 'mere mental distress', i.e. where there is no violation of another legally protected interest. In other cases, where the emotional harm is consequential on invading another legally protected interest, the fault standard of negligence is a sufficient basis for liability. A cause of action to protect privacy falls into this latter category. A privacy tort is intended to protect the legally recognised interest in privacy and emotional harm is the typical consequence of an invasion of privacy. It would be incoherent with common law policy to allow recovery for negligently caused emotional distress in trespass and defamation, but not to allow such recovery following a privacy invasion. There is no dignitary wrong in the common law which requires intention or recklessness for recovery of emotional harm.
- 45 ALRC Report 123 reasons that '[if] the new tort extended to negligent invasions of privacy, [this might expose] a wide range of people to face liability for invading privacy by common human errors'.<sup>35</sup> However, negligence liability does not lead to liability simply for a human error. Liability arises only for those errors that are the result of a failure to take precautions against a risk of harm that a reasonable person would have taken in the circumstances.<sup>36</sup> Liability for a failure to take reasonable care is pervasive in the law of torts and an expression of the community expectation that everyone should generally conduct their affairs with due regard for the rights and interests of others. Privacy is a core value in Western societies<sup>37</sup> and based on fundamental human interests such as respect for dignity and autonomy.<sup>38</sup> This suggests that privacy should enjoy the same measure of protection as other fundamental interests, such as the property and physical integrity, which are also protected against negligent invasion.
- 46 The concern that this might extend liability too wide can be countered with the specific restrictions built into the privacy tort. Unlike most other interests protected by torts law, privacy invasions are only actionable if it is found that the defendant's and public interests do not outweigh the privacy interest of the plaintiff. This provides a sufficient protection to defendants against undue encroachment of their rights and

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<sup>35</sup> ALRC Report 123, [7.63].

<sup>36</sup> See, e.g., *Civil Liability Act 2002* (NSW), s 5B.

<sup>37</sup> See, eg. Article 17 of the International Covenant on Civil and Political Rights.

<sup>38</sup> *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63, 208 CLR 199.

liberties. It would be extending these protections too far if negligent invasions of privacy were excluded from the ambit of a privacy tort.

47 ALRC Report 123 points out that ‘if actual damage is suffered beyond “mere” emotional distress, it may well be the case that the plaintiff would have a tort action in negligence’.<sup>39</sup> However, it is doubtful whether a privacy invasion would remain actionable under the tort of negligence if a statutory privacy tort were enacted. In *Sullivan v Moody*,<sup>40</sup> the High Court denied to apply the law of negligence to a case where the ‘core of the complaint’ was that the plaintiff was ‘injured as a result of what he, and others, were told’.<sup>41</sup> It considered that ‘the law of defamation ... resolves the competing interests of the parties through well-developed principles about privilege and the like. To apply the law of negligence in the present case would resolve that competition on an altogether different basis’.<sup>42</sup> It is likely that the High Court would express similar concerns about legal coherence in the intersection between a statutory privacy tort and negligence law. The proposed privacy tort likewise resolves the conflicting interests of plaintiff and defendant on a basis that is altogether different than the tort of negligence. If conduct did not satisfy the elements of the statutory privacy tort (for example, because it would not be intentional or reckless), it would be unlikely that a plaintiff were allowed to proceed on the basis of negligence. Similar to *Sullivan v Moody*, this would be likely to be seen as an attempt to circumvent the requirements of the statutory tort, which provides its own set of guiding principles, elements, defences and remedies.

## Conclusion

48 For these reasons, the limitation to intentional or reckless conduct, as proposed by the ALRC, should be rejected. Such a limitation was also not contained in the reports by the NSW and Victorian Law Reform Commissions.<sup>43</sup> Those Reports recommended that courts must take the degree of fault into account in the overall assessment of whether there was an actionable invasion of privacy. This approach is to be preferred. It allows actions to be brought where a negligent invasion of privacy has serious consequences and gives the court the flexibility to deny relief where the defendant’s invasion of the plaintiff’s privacy was merely the result of inadvertence and did not cause particularly harmful consequences.

49 The Australian Privacy Principles (APP), which form the basis of regulatory action by the Australian Privacy Commissioner under the *Privacy Act 1988* (Cth), likewise imposes objective obligations that are akin to a negligence standard, such as that conduct must be ‘reasonable’,<sup>44</sup> ‘reasonably necessary’,<sup>45</sup> or based on a ‘reasonable

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<sup>39</sup> ALRC Report 123, [7.50].

<sup>40</sup> *Sullivan v Moody* [2001] HCA 59; 207 CLR 562; see also *Tame v New South Wales* [2002] HCA 35, (2002) 211 CLR 317.

<sup>41</sup> *Ibid.*, at [54].

<sup>42</sup> *Ibid.*

<sup>43</sup> NSW Law Reform Commission, *Privacy*, Report 120, [5.56]; Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report 18, [7.148].

<sup>44</sup> *Eg.*, APP 1, APP 4, APP 5, APP 8, APP 10, APP 11.

<sup>45</sup> *Eg.*, APP 3, APP 6, APP 8, APP 9.

belief'.<sup>46</sup> There is no sufficient justification to set a much higher bar of intention or recklessness in the context of a civil law action. Such subjective fault elements are more appropriate in criminal law rather than for civil law liability.

- 50 The cause of action should also be available for negligent invasions of privacy. A fault standard would align the statutory cause of action to protect privacy with other wrongs that protect dignitary interests and with the Australian Privacy Principles under the *Privacy Act 1988* (Cth). It is necessary to give plaintiffs protection in cases where a negligent invasion of privacy causes serious harm for the plaintiff. The interests of defendants are sufficiently protected by other elements of the cause of action, in particular the requirement for balancing privacy with competing interests and the defences.

### Seriousness

- 51 I acknowledge that the terms of reference of the inquiry are concerned with the adequacy of the current law in relation to serious invasions of privacy. I submit, however, that it would be preferable not to impose a threshold criterion of seriousness for privacy claims. Instead, the severity of the intrusion should be merely a factor in the assessment of whether the privacy wrong, even after considering countervailing interests, is actionable. ALRC Report 123 regards a seriousness threshold as a means of excluding undeserving claims. However, if a claim is trivial, it will be rare for a plaintiff to go to court considering that legal proceedings are costly and likely to give the privacy invasion even more publicity. If a claim is trivial, it will also be difficult for a plaintiff to maintain that he or she had a reasonable expectation of privacy or that the privacy interests outweigh competing interests. The NSWLRC Report 120 suggests,<sup>47</sup> and I concur, that these factors are sufficient to exclude undeserving claims. It should be noted that the four Canadian provinces which legislated for a statutory cause of action for invasion of privacy also did not introduce a threshold of seriousness.<sup>48</sup>

- 52 I submit that, if the Committee preferred to recommend a seriousness threshold, it should be in the form recommended by the ALRC in Report 123. The Report recommended that in determining seriousness, regard should be had, among other things, to:

- (a) the degree of any offence, distress or harm to dignity that the invasion of privacy was likely to cause to a person of ordinary sensibilities in the position of the plaintiff; and
- (b) whether the defendant was motivated by malice or knew the invasion of privacy was likely to offend, distress or harm the dignity of the plaintiff.

- 53 This formulation avoids some of the difficulties associated with using 'offensiveness' as a threshold criterion alongside the 'reasonable expectation of privacy', as under

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<sup>46</sup> Eg., APP 3, APP 6, APP 8, APP 12.

<sup>47</sup> NSWLRC Report 120, above n 2, [5.9]–[5.11].

<sup>48</sup> Privacy Act, RSBC 1996, c 373 (British Columbia); Privacy Act, CCSM 1996, c P125 (Manitoba); Privacy Act, RSNL 1990, c P-22 (Newfoundland and Labrador); Privacy Act, RSS 1978, c P-24 (Saskatchewan).

New Zealand law and as recommended in the ALRC Report 108 and the VLRC Report.<sup>49</sup> Under ALRC Report 123, the ‘degree of offence, distress or harm to dignity’ is merely a factor that a court needs to consider to establish the seriousness of the defendant’s conduct. This partly addresses the difficulty that the standard of ‘highly offensive’, which was adopted in 2008 ALRC report and the VLRC report, is inherently vague and therefore problematic to use as an exclusionary test.

- 54 The reference to ‘offence, distress or harm to dignity ... to a person of ordinary sensibilities’ also appropriately shifts the focus from emotional distress of the plaintiff to the degree of harm that is objectively likely. This broader perspective appropriately allows for protection also in those cases in which a plaintiff, perhaps because of their young age<sup>50</sup> or mental condition, is unable to feel offence or distress.
- 55 There remains, however, another problem with a seriousness threshold, in particular one that makes the ‘degree of any offence, distress or harm to dignity’ the marker of seriousness. The degree of offensiveness of behaviour is always dependent on its specific context. It is difficult to determine the degree to which conduct is likely to be offensive or distressing unless the totality of circumstances, including potential justifications for that conduct, is considered.<sup>51</sup> This creates the problem that the defendant’s interest in freedom of expression and any broader public interest in the information, as well as other defences, may become enmeshed in the enquiry of whether the invasion of privacy was serious.<sup>52</sup>
- 56 In my view, it creates unnecessary complexity in the law that the ‘threshold’ issue of seriousness can only be answered in light of all the circumstances of the case, including those relating to the defendant. Under the approach adopted by UK courts, offensiveness is relevant only at the proportionality stage, i.e. for the decision where the balance between privacy and freedom of expression should be struck.<sup>53</sup>

## Conclusion

- 57 I submit that it would be preferable not to impose a threshold criterion for privacy claims. Whenever a person’s privacy interest outweighs other public and private interests, the invasion was unwarranted, and there is no reason of principle why that person should not be entitled to defend his right to privacy in court.

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<sup>49</sup> ALRC Report 108, above n 1, Rec 74-1; VLRC Final Report 18, above n 3, Rec 23 and 24.

<sup>50</sup> See, eg, *AAA v Associated Newspapers Ltd* [2012] EWHC 2103 (QB).

<sup>51</sup> See also G Phillipson, ‘Privacy in England and Strasbourg compared’ in AT Kenyon and M Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives*, CUP, Cambridge, 2006, 184, 199 (supporting the use of the ‘offensiveness’ test for assessing the ‘overall impact of the entire publication’ rather than as a threshold test); CDL Hunt, ‘Privacy in the Common Law: A Critical Appraisal of the Ontario Court of Appeal’s Decision in *Jones v. Tsige*’ (2012) 37 *Queen’s Law Journal* 661, 688.

<sup>52</sup> See also Lord Nicholls in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, [22]; M Warby, N Moreham, I Christie (ed), *Tugendhat and Christie: The Law of Privacy and the Media*, 2<sup>nd</sup> ed, OUP, Oxford, 2011, [5.09].

<sup>53</sup> Lord Nicholls in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, [22]; *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481, [26] (Sir Anthony Clarke MR).



58 If it were thought that a person should not have a right to sue for a privacy invasion unless it was serious, I support that a court should be given broad discretion to determine whether an invasion was serious. I also support that 'offensiveness' is not used as an exclusionary device but identified as one possible indicator to distinguish serious from less serious invasions of privacy.

59 I submit that the appropriate indicators are that the privacy invasion was 'offensive, distressing or otherwise harmful' to the individual concerned.

## Annex

I also submit for the Committee's consideration copies of my following academic publications:

- 'Interim Injunctions for Invasions of Privacy: Challenging the Rule in *Bonnard v. Perryman*?', in N Witzleb, D Lindsay, M Paterson and S Rodrick (eds), *Emerging Challenges in Privacy Law: Comparative Perspectives*, Cambridge University Press, 2014
- 'Exemplary damages for invasions of privacy' (2014) 6 *Journal of Media Law* 69-93
- 'A statutory cause of action for privacy? A critical appraisal of three recent Australian law reform proposals' (2011) 19 *Torts Law Journal* 104-134
- 'Giller v Procopets: Australian Privacy Law Shows Signs of Improvement' (2009) 17 *Torts Law Journal* 121-129
- 'Justifying Gain-Based Remedies for Privacy Breaches' (2009) 26 *Oxford Journal of Legal Studies* 325-363
- 'Monetary Remedies for Breach of Confidence in Privacy Cases' (2007) 27 *Legal Studies* 430