Chapter 7

Statutory Causes of Action

CONTENTS

128 Introduction

128 Civil action for serious invasions of privacy

141 Other law reform commission recommendations

145 Should Australia enact a cause of action for invasion of privacy?

147 The commission’s recommendation: two statutory causes of action

167 Conclusion
Chapter 7

Statutory Causes of Action

INTRODUCTION

7.1 One of the options discussed in our Consultation Paper is a statutory cause of action for a serious invasion of privacy. In the interests of national consistency, we suggested that the cause of action for a serious invasion of privacy recommended by the Australian Law Reform Commission (ALRC) in 2008 could be used as the model for any new Victorian law.

7.2 The ALRC recommended that its proposed cause of action be included in Commonwealth legislation. Any such legislation would probably remove Victoria’s ability to enact a similar cause of action because of constitutional restrictions. However, as the Commonwealth may not implement the ALRC’s recommendation, or may take some time to do so, Victoria is still in a position to provide leadership in this area.

7.3 Since the release of the ALRC report, the NSW Law Reform Commission (NSWLRC) has recommended a different version of a statutory cause of action for invasion of privacy. Consequently, national harmony in this field may be a long-term goal.

7.4 This chapter begins with a summary of the relevant law in Australia and other comparable jurisdictions. We then discuss the views of those who made submissions about our Consultation Paper proposal. The Consultation Paper proposal attracted support and opposition. Some supporters also suggested different causes of action to that proposed by the ALRC.

7.5 We recommend the introduction of two statutory causes of action for serious invasions of privacy: the first dealing with misuse of private information, the second with intrusion upon seclusion. Although our focus is an appropriate legal response to the misuse of surveillance in public places, these new causes of action would not necessarily be limited to conduct that occurred in a public place or that involved the use of a surveillance device. We have drawn upon the work of the ALRC and the NSWLRC when devising these causes of action.

7.6 Our recommendations deal with the legal characterisation of these causes of action, their elements, the defences, the remedies, the people granted rights by the law, the limitations period, and the tribunal that should hear these cases.

CIVIL ACTION FOR SERIOUS INVASIONS OF PRIVACY

THE LAW IN AUSTRALIA

7.7 The right of a person to take civil action for a serious invasion of privacy by use of a surveillance device in a public place is unclear. There are no relevant statutory causes of action for invasion of privacy in any Australian jurisdiction. No appellate court has acknowledged the existence of a common law tort of invasion of privacy. The availability of general law causes of action, such as a claim for breach of confidence, which has been used in other countries to seek redress for a serious invasion of privacy in a public place, is untested.

7.8 The common law regulates some surveillance activities, but does so indirectly when protecting other interests, most particularly those in property. The interest most directly and immediately affected by surveillance activities—privacy—has not received much attention from the common law. Danuta Mendelson has written:

Our right to privacy is relatively modern, and has received scant protection at common law. However, as society ascribes to it more value, it is possible either that a new tort protecting privacy will be recognised or that existing torts will be expanded to encompass aspects of the right to privacy.
Development of an Australian body of common law to protect the growing interest in privacy may have been hindered by the fact that ‘there is no easy, embracing formula for dealing with all the different practices involved’ and because the proper balance to be struck between the diverse interests ‘varies greatly and demands individualised solutions’. Former Chief Justice of the Australian High Court Murray Gleeson has referred to ‘the lack of precision of the concept of privacy’ and to ‘the tension that exists between interests in privacy and interests in free speech’. The limited capacity of the traditional common law remedies to deal with the damage caused by invasion of privacy may have also contributed to the fact that there have been few privacy cases to assist in the formulation of broad principles.

Although no decision of the High Court, or of any Australian intermediate appellate court, has confirmed the existence of an Australian tort of invasion of privacy, in 2001 various members of the High Court observed that there is no barrier to the creation of such a tort. As two members of the New Zealand Court of Appeal subsequently pointed out, ‘the High Court of Australia has not ruled out the possibility of a common law tort of privacy, nor has it embraced it with open arms’.

Since 2001, two Australian trial courts have recognised a tort of invasion of privacy. In Grosse v Purvis a judge in the Queensland District Court concluded that a prolonged course of stalking and harassment was an unlawful invasion of the plaintiff’s privacy. The Court decided that the conduct in question was unlawful because it amounted to a breach of ‘the actionable right of an individual person to privacy’.

1 A cause of action is a right to sue another person.
3 Ibid.
4 S 109 of the Constitution renders a state law inoperative when it is inconsistent with a Commonwealth law. A state law may be inconsistent with a Commonwealth law when the Commonwealth law seeks to be the sole law covering a particular activity. In these circumstances, the Commonwealth law covers the field.
5 On 14 October 2009 Cabinet Secretary Senator Joe Ludwig released the Commonwealth Government’s response to the ALRC’s Report 108. The Commonwealth Government has neither accepted nor rejected the ALRC’s recommendations concerning a statutory cause of action for serious invasions of privacy. It announced that the relevant recommendations will be considered later (Australian Government, Enhancing National Privacy Protection: First Stage Response to the Australian Law Reform Commission Report 108 ‘For Your Information: Australian Privacy Law and Practice’, October 2009).
7 See Chapter 3 for a brief discussion of compensation awards for information privacy breaches.
8 See Australian Broadcasting Corporation v Lenah Game Meats Pty Limited (2001) 208 CLR 199 [132].
Chapter 7

Statutory Causes of Action

7.12 The court determined that the essential elements of an action for invasion of privacy are

a. a willed act by the defendant
b. which intrudes upon the privacy or seclusion of the plaintiff
c. in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities
d. and which causes the plaintiff detriment in the form of mental, psychological or emotional harm or distress, or because it prevented or hindered her from doing an act which she was lawfully entitled to do.

7.13 In *Doe v Australian Broadcasting Corporation* a Victorian County Court judge held that the publication of the name of a rape victim entitled her to damages for breach of confidence, negligence, breach of statutory duty and invasion of privacy. Judge Hampel observed that the ‘development of a tort of invasion of privacy is intertwined with the development of the cause of action for breach of confidence’ and that both causes of action are concerned with ‘a recognition of the value of, and importance of the law recognising and protecting human dignity’. Although Judge Hampel did not consider it appropriate to formulate an exhaustive description of the elements of the cause of action for invasion of privacy, she concluded that the wrong done in the case was ‘the publication of personal information, in circumstances where there was no public interest in publishing it, and where there was a prohibition on its publication’.

Possible common law developments

7.14 Despite these trial court decisions, development of a broad ranging tort of invasion of privacy is likely to take a very long time because of the way the common law develops. Although the courts may ‘reformulate existing legal rules and principles to take account of changing social conditions’, there is widespread judicial acceptance of the proposition that ‘in a democratic society, changes in the law that cannot logically or analogically be related to existing common law rules and principles are the province of the legislature’.

7.15 In the short term, the Australian High Court may follow the lead of the House of Lords and the New Zealand Court of Appeal, which have both declined to develop a broad tort of invasion of privacy, but have recognised a more limited cause of action for misuse of private information. In order for this step to occur appropriate cases would need to make their way through the legal system to the High Court.

THE LAW IN THE UK

Misuse of private information

7.16 In 2004 the House of Lords declared that there is no common law tort of invasion of privacy in the UK. However, the equitable action for breach of confidence, which was originally concerned with the wrongful disclosure of information obtained in a confidential relationship, is evolving into a wider action concerned with misuse of private information. The elements and reach of this cause of action, described by one Law Lord as a tort, are developing slowly on a case-by-case basis.
7.17 In Campbell v MGN Ltd—an a case concerning disclosure by a newspaper that model Naomi Campbell had attended a Narcotics Anonymous meeting—the House of Lords confirmed that the action for breach of confidence ‘has now firmly shaken off the limiting constraint of the need for an initial confidential relationship’. The court held that the obligation to respect the confidentiality of information extends to a person who knows, or ought to know, that information that he or she receives is confidential. The essence of the action for breach of confidence is now misuse of private information. It seeks to protect ‘two different interests: privacy and secret (confidential) information’.

7.18 Human rights principles were a catalyst for the common law developments in Campbell. In 2003, the European Court of Human Rights had found that public disclosure of CCTV footage of a man who had attempted suicide in an English street breached his right to privacy. Moreover, it had found that English law provided him with ‘no effective remedy in relation to the violation of his right to respect for his private life guaranteed by Article 8 of the Convention’. When Campbell was decided in 2004, all of the members of the House of Lords considered European human rights issues. Lord Nicholls said that ‘the values enshrined in articles 8 and 10 [of the European Convention on Human Rights] are now part of the cause of action for breach of confidence’ and that change has been achieved ‘by absorbing the rights protected by articles 8 and 10 into this cause of action’. Article 8 of the European Convention is concerned with privacy while article 10 is concerned with freedom of expression. Lord Nicholls went on to say:

The values embodied in articles 8 and 10 are as much applicable in disputes between individuals or between an individual and a non-governmental body such as a newspaper as they are in disputes between individuals and a public authority.

Elements

7.19 The law concerning the elements, defences and remedies that apply to the cause of action for misuse of private information is embryonic. The elements of the cause of action appear to be, first, ‘whether the claimant had a reasonable expectation of privacy in relation to the particular information in question’ and, secondly, ‘whether there is some countervailing public interest such as to justify overriding that prima facie right’. Both issues are ‘essentially questions of fact’. The English courts have provided limited guidance about matters to consider, or steps to take, when resolving these questions of fact.

7.20 The first element—a reasonable expectation of privacy—involves an objective evaluation of the expectation of ‘a reasonable person of ordinary sensibilities ... placed in the same position as the claimant and faced with the same publicity’. The Court of Appeal has recently listed a number of factors that can be considered when deciding whether the claimant had a reasonable expectation of privacy. These include the attributes of the claimant, the nature of the activity he or she was engaged in, the place where it occurred, the nature and purpose of any intrusion, the presence or absence of consent, how the information came into the possession of the publisher, and the effect of publication on the claimant. Although the courts have warned against generalisations about the sort of behaviour that attracts a reasonable expectation of privacy, in those cases where the claimant has been successful, ‘the information in question has been of a strictly personal nature concerning, for example, sexual relationships, mental or physical health, financial affairs, or the claimant’s family or domestic arrangements’.  

20 Grosse v Purvis [2003] QDC 151 [444].
21 [2007] VCC 281. Although an appeal was lodged against the decision, the case was settled before the appeal was heard.
22 [2007] VCC 281 [148].
23 [2007] VCC 281 [163].
25 Ibid.
28 Wainright v Home Office [2004] 2 AC 406 [35].
29 The elements of the traditional action for breach of confidence were explained by Megarry J in Coco v N Clark (Engineers) Ltd [1969] RPC 41.
30 Campbell v MGN Ltd [2004] 2 AC 457 [13] (Lord Nicholls). There is uncertainty about whether the cause of action is properly described as a tort, as a majority of the House of Lords in Campbell did not formally adopt Lord Nicholls’ characterisation (See eg, Mosley v News Group Newspapers Limited [2008] EWHC 177 [184] (QB)).
33 Campbell v MGN Ltd [2004] 2 AC 457, [14]–[15].
34 Campbell v MGN Ltd [2004] 2 AC 457, [14]–[15].
35 Peck v United Kingdom [2003] ECHR 44.
38 Although the House of Lords was divided (3–2) on the question of whether the plaintiff should succeed on the facts of the case, all five Law Lords supported the development of the cause of action for misuse of private information.
39 Campbell v MGN Ltd [2004] 2 AC 457 [17].
40 Article 8 of the European Convention deals with ‘respect for private and family life’ and Article 10 with ‘freedom of expression’.
41 Campbell v MGN Ltd [2004] 2 AC 457 [17].
42 The Author of a Blog v Times Newspapers Limited [2009] EWHC 1358 (QB) [7] (Eady J). An act of the defendant that led to the publication of the information in question appears to be subsumed within these two elements.
43 Murray v Big Pictures (UK) Limited [2008] EWCA Civ 446 [41] [Clarke MR].
44 Campbell v MGN Ltd [2004] 2 AC 457 [99] (Lord Hope); Murray v Big Pictures (UK) Limited [2008] EWCA Civ 446 [35] (Clarke MR).
Chapter 7

Statutory Causes of Action

7.21 The second element involves striking a balance between an individual’s right to privacy and a publisher’s right to publish. Resolving ‘the tension between privacy and freedom of expression’ is not easy, as the result in Campbell demonstrates. The House of Lords divided 3–2 in favour of the plaintiff on this point. Although no appellate court has yet identified a list of factors to be considered when seeking to strike this balance, it appears that an evaluation of the worth or value of the private information disclosed has been significant in some cases. In addition, the ‘difficult question of proportionality may arise’ when considering how to assess any interference with one person’s right to privacy or another’s freedom of expression. What this may mean is, for example, that an act done to further one person’s right to freedom of expression must not have a disproportionate impact upon another’s right to privacy.

Defences

7.22 The English courts have not yet articulated any defences to a claim for misuse of private information. It does appear, however, that consent is a defence, just as it is to most torts. There may also be a ‘defence’ that is quite similar to the defence of qualified privilege in defamation law. In Campbell all five Law Lords accepted that it was quite lawful for the newspaper in question to publish the fact that Naomi Campbell was a drug addict because she had made many public statements to the contrary. Lord Nicholls said that ‘where a public figure chooses to present a false image and make untrue pronouncements about his or her life, the press will normally be entitled to put the record straight’.54

Remedies

7.23 It is not clear whether the wrong of misuse of private information requires proof of actual damage or whether, like the tort of trespass, it may be committed without proof of any damage. This lack of clarity has created uncertainty about the types of damages that may be awarded.55

7.24 Damages awards have generally been modest in these cases, perhaps because the courts have been asked to order compensation for injury that is difficult to assess and quantify. The cause of action seeks ‘to protect such matters as personal dignity, autonomy and integrity’, and ‘damages for such an infringement cannot ever be effectively compensated by a monetary award’. In Mosley v News Group Newspapers Limited, which attracted the largest damages award of £60 000, Eady J said ‘an infringement of privacy cannot ever be effectively compensated by a monetary award’. He also noted that ‘once privacy has been infringed, the damage is done and the embarrassment is only augmented by pursuing a court action’. When concluding that £60 000 was the appropriate sum in the case, Eady J stated that Mr Mosley ‘is hardly exaggerating when he says that his life was ruined’.59

7.25 The British courts have also issued injunctions to prevent the initial publication, or continued publication, of material in some misuse of private information cases. Injunctions have prevented publication of the addresses of convicted murderers once they have been released from prison, the details of the extra-marital sex life of a football player, the private life of a musician, and the musings of Prince Charles in his diary.

7.26 By contrast, in the recent case of John Terry v Persons Unknown, the court rejected an application for an injunction to prevent the media from publishing information about an affair between the English football captain and a then-unidentified woman. Justice Tugendhat concluded that disclosing the existence of the relationship was not of itself highly intrusive, and that there was room for argument about the social utility of publishing this information.
Costs

7.27 Even though damages awards have generally been quite small in misuse of private information litigation, costs awards have been quite extraordinary in some of the more notorious cases. Naomi Campbell was awarded damages of £3500 and costs of £1.08 million.67 Max Mosley was awarded damages of £60,000 and costs of £850,000.68 Costs orders have also outstripped damages awards in some of the significant European Court of Human Rights cases. One man was awarded damages of £11,800 and costs of £18,075 for the broadcasting of CCTV footage of his suicide attempt.69

Criticism of the cause of action

7.28 Viewed from one perspective, many of the more prominent English misuse of private information cases are ‘little more than legal actions by celebrities to suppress inconvenient truths. For example, English Law Lord, Baroness Hale, described the Campbell case as ‘a prima donna celebrity against a celebrity-exploiting newspaper’,70 noting that ‘each in their time has profited from the other. Both are assumed to be grown-ups who know the score’.71 The New Zealand Law Commission referred to ‘the more highly-developed celebrity culture, and the more aggressive nature of the media, in Britain’ when commenting upon the differences between the types of cases that had arisen in the UK and New Zealand.72

7.29 Some British cases have provided an effective forum, however, to determine the limits that should be placed upon the publication of information obtained by use of surveillance devices. Although people must expect to be observed in many public places, recent UK cases have illustrated conduct that may fall beyond the limits of reasonable exposure to the gaze of others, or to the use of information obtained by the use of a surveillance device in a public place. Is it acceptable, for example, to broadcast CCTV footage of a man who has just slashed his wrists in the street,73 or to publish a photo of a small child—whose mother happens to be a famous author—being pushed down the street in a stroller?74

7.30 The English courts have been criticised for distorting settled legal principle because they have been content to develop existing legal rules in response to new situations rather than devise entirely new common law rules as their New Zealand counterparts have done. Butler has questioned the legitimacy of the theoretical transformation of an equitable doctrine, based on a confidante’s obligations of good conscience and for which an injunction is the major discretionary remedy, into what is studiously referred to by several judges as the ‘action’ for breach of confidence but which is evidently a tort protecting an aspect of human dignity, the major remedy for which is substantive damages.75

7.31 There is some power to this criticism. Private information may be quite different to confidential information. The traditional equitable action for breach of confidence dealt with the wrongful use of information acquired in the course of a confidential relationship. This cause of action sought to preserve the element of trust that forms part of any confidential relationship. Privacy, however, is concerned with control of information that may never be revealed to anyone. Preservation of human dignity lies at the core of privacy protection. As two members of the New Zealand Court of Appeal said in a leading case:

Privacy and confidence are different concepts. To press every case calling for a remedy for unwarranted exposure of information about private lives into a cause of action having as its foundation trust and confidence will be to confuse those concepts.76

51 Lord Nicholls suggested that this issue may fall within one of the elements of the cause of action because it may affect the ‘reasonableness’ of the claimant’s expectation of privacy (Campbell v MGN Ltd (2004) 2 AC 457 [24]).
52 See Patrick George, Defamation Law in Australia (2006).
53 The case was ultimately fought over the issue of whether it was lawful for the newspaper to publish a photo of Naomi Campbell, covertly taken and at a distance, in a public street, leaving a Narcotics Anonymous meeting as well as details of what occurred at those meetings (Campbell v MGN (2004) 2 AC 457 [23]–[25]).
55 See eg, Mosley v News Group Newspapers Limited (2008) EWHC 177 (QB) [214].
63 Associated Newspapers Ltd v HH Prince of Wales [2008] Ch 105.
65 [2010] EWHC 119 (QB) [68].
66 [2010] EWHC 119 (QB) [102]–[105].
69 Peck v United Kingdom [2003] ECHR 44.
70 Campbell v MGN Ltd [2004] 2 AC 457 [143].
71 Campbell v MGN Ltd [2004] 2 AC 457 [143].
73 Peck v United Kingdom [2003] ECHR 44.
74 Murray v Big Pictures (UK) Limited [2008] EWCAs Civ 446.
76 Hosking v Huntig (2005) 1 NZLR 148 (Gault P and Blanchard J).
7.32 The response to this criticism by one Law Lord has been to observe that the action for breach of confidence has split in two. Lord Nicholls said that ‘the law has developed’ so that ‘breach of confidence, or misuse of confidential information, now covers two distinct causes of action, protecting two different interests: privacy and secret (“confidential”) information’.77

7.33 The continued development of that branch of the breach of confidence cause of action that protects privacy may be troublesome, however, because as Lord Walker has observed, its ‘uncontrolled growth’ may ‘tend to bring incoherence into the law of intellectual property’.78

Intrusion upon seclusion

7.34 UK common law has not yet developed a cause of action to protect what is referred to as ‘intrusion upon seclusion’ in United States tort law,79 even though British courts have referred to a relevant gap in the law on a number of occasions over the past 20 years. The core of this wrong is an unjustifiable intrusion into a person’s private space, such as the use of a camera to engage in ‘upskirting’ or a hidden device to record a private conversation.

7.35 In 1991 the English Court of Appeal found that there was no remedy for invasion of any privacy interest when a journalist and a photographer entered the hospital room of a celebrity without permission and took his photograph.80 All three members of the Court of Appeal encouraged the development of legislation that would protect the privacy of a person in these circumstances.81

7.36 In Campbell Lord Nicholls referred to this issue when he observed that an ‘individual’s privacy can be invaded in ways not involving publication of information’ and that ‘strip searches are an example’.82 This is what happened in Wainwright v Home Office, in which a woman and her son were strip searched before being permitted to visit a family member in prison.83 The House of Lords found that the common law had no remedy for them even though the prison officers did not have any statutory authority to conduct the strip searches. In this case the court was unable to fill any ‘perceived gap’ in the law by ‘judicious development of an existing principle’.84

THE LAW IN NEW ZEALAND

A tort of invasion of privacy by publishing private facts

7.37 The New Zealand courts have developed a tort of breach of privacy by giving publicity to private and personal information.85 The tort concerns conduct that is similar to that which falls within the UK extended cause of action for breach of confidence by misuse of private information. Despite this similarity, the majority of the New Zealand Court of Appeal chose to acknowledge the existence of a new tort rather than follow the approach of the UK courts. They did this in order to ‘allow the law to develop with a direct focus on the legitimate protection of privacy, without the need to be related to issues of trust and confidence’.86 The majority judges observed that as privacy and confidence are different concepts, it could be confusing to ‘press every case calling for a remedy for unwarranted exposure of information about the private lives of individuals into a cause of action having as its foundation trust and confidence’.87
The majority judges said that it is up to the legislature to develop ‘any high-level and wide tort of invasion of privacy’. In developing the new tort the majority referred to New Zealand’s international human rights obligations and observed that the ‘intrusiveness of the long-range lens and listening devices and the willingness to pay for and publish the salacious are factors in modern society of which the law must take account’. They went on to say that it is ‘the very process of the common law’ for the courts to devise new civil remedies in response to these developments.

Elements

The elements of this new tort of invasion of privacy by publicising private information are

- the existence of facts in respect of which there is a reasonable expectation of privacy
- publicity given to those private facts that would be considered highly offensive to a reasonable person.

In Hosking v Runting the New Zealand Court of Appeal concluded that these elements were not made out by a celebrity couple who were seeking to prevent publication of photographs taken on a public street of their 18-month-old twins. The court found that the photographs did not publicise a fact in respect of which there was a reasonable expectation of privacy, and that their publication was not one that a person of ordinary sensibilities would find highly offensive or objectionable. The court held that the photographs only disclosed what any member of the public in that area could see on the particular day, and there was no harm in publication of the photographs, even though they were of children.

The second element of the New Zealand tort—that the publicity given to private facts is highly offensive to a reasonable person—is not found in the UK action for breach of confidence. The majority judges in Hosking v Runting explained the reasoning that led to the adoption of this test drawn from US privacy law. After acknowledging that people give up expectations of complete privacy and seclusion by living in communities, they said they were concerned with ‘wide-spread publicity of very personal and private matters’ which is ‘truly humiliating and distressful or otherwise harmful to the individual concerned’.

The result in Hosking v Runting is different to that reached in a very similar recent UK case involving the publication of photographs of the infant son of noted children’s author J K Rowling, taken by a professional photographer with a long-range lens. The two courts reached different conclusions about whether there was a reasonable expectation of privacy in relation to photographs of a child of a celebrity taken in a public street. The English Court of Appeal held that J K Rowling’s action on behalf of her son should be permitted to proceed because the law should … protect children from intrusive media attention, at any rate to the extent of holding that a child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication which the person who took or procured the taking of the photographs knew would be objected to on behalf of the child.
Chapter 7

Statutory Causes of Action

Defences

7.43 The majority judges in *Hosking v Runting* suggested that there should be a defence of legitimate public concern in order to ensure that ‘the scope of privacy protection should not exceed such limits on the freedom of expression as is justified in a free and democratic society’.

99 They used the term ‘public concern’ rather than public interest to differentiate ‘matters of general interest or curiosity to the public, and matters which are of legitimate public concern’.

100 They acknowledged that this might require judges to balance interests by considering ‘community norms, values and standards’.

7.44 Although the New Zealand courts have had few opportunities to develop the defences to this new cause of action, the New Zealand Law Commission has suggested that consent should be a defence, as it is to all torts.

102 The Commission has also pointed out that it should be possible to rely upon a defence that an act was privileged, or performed under legal authority, if it did not fall within the broad defence of legitimate public concern identified in *Hosking v Runting*.

Remedies

7.45 The majority judges said that the ‘primary remedy upon a successful claim will be an award of damages’ and that ‘injunctive relief may be appropriate in some circumstances’.

104 They said actual damage in the sense of ‘personal injury or economic loss’ is unnecessary and that the ‘harm to be protected against is in the nature of humiliation and distress’.

105 Proof of recognised psychiatric harm is unnecessary.

7.46 When dealing with the availability of injunctive relief, the majority judges acknowledged legitimate concerns about ‘prior restraint’ of material the media wish to publish.

107 They suggested an injunction should not be granted to restrain publication unless there is ‘compelling evidence of most highly offensive intended publicising of private information and there is little legitimate public concern in the information’.

Comment

7.47 The precise status of the New Zealand tort of invasion of privacy by publishing private facts is uncertain because some members of the country’s new highest court, the Supreme Court, have cast doubts upon its continued acceptance and its content. In a recent case Justice Anderson, who was one of the two dissenting judges in *Hosking v Runting*, said that, in his view, the existence of the tort and its scope were matters for debate in the Supreme Court.

111 Chief Justice Elias queried the details of the tort, particularly the need for the second element concerning the ‘highly offensive’ nature of the publicity.

7.48 There have been relatively few cases in New Zealand dealing with the tort of invasion of privacy by publishing private facts since developments started at the trial court level in the mid 1980s. It appears that ‘fifteen people have brought cases wholly or partly based on privacy, and many of them have been neither rich nor famous’.

113 The New Zealand Law Commission has published brief details of all of these cases. Damages were ordered in only two cases, with the highest award being NZ$25,000. An injunction restraining publication was granted on five occasions.
The New Zealand Law Commission has recently recommended that development of the tort recognised in Hosking v Runting should be left to the common law.

Although the Commission acknowledged that a statutory cause of action would make the law more accessible and certain, it referred to the absence of ‘evidence that the current state of the law is causing practical difficulties to anyone’.

Intrusion upon seclusion

The majority of the Court of Appeal in Hosking v Runting said that they were dealing with only one of the four strands of the US privacy tort—wrongful publicity given to private lives—and that the scope of the cause of action should be left to incremental development by the courts. They stated that it was unnecessary to decide ‘whether a tortious remedy should be available … for unreasonable intrusion into a person’s solitude or seclusion’.

In its Issues Paper, the New Zealand Law Commission argued for the introduction of a separate intrusion upon seclusion tort, suggesting that some intrusions upon spatial privacy may be regarded as unacceptable invasions of privacy, regardless of whether they are accompanied by unwanted disclosure of private information.

The New Zealand Law Commission ultimately recommended that any recognition and development of a tort of intrusion into seclusion should be left to the common law. The Commission concluded that ‘the development of such a tort deserves serious consideration’ and said that the ‘real question is whether it should be introduced by statute, or whether it should be left to develop at common law’. Because of its support for the common law tort of invasion of privacy by publishing private facts, the Commission was content to leave development of an intrusion tort to the courts.

THE LAW IN THE UNITED STATES

Nearly all US states now recognise a right to privacy, either at common law or, in a few states, as a creation of statute. There are four types of invasion of privacy:

- intrusion of seclusion
- appropriation of name or likeness
- publicity given to private life
- publicity placing a person in a false light.

Although most plaintiffs in privacy cases rely on more than one of the privacy torts, the two causes of action most relevant to surveillance are intrusion upon the seclusion of, and publicity given to, private life. These are also the two privacy torts most concerned with ‘the fundamental value of personal autonomy’.

Tort of intrusion upon seclusion

Elements

According to the Restatements of the Law, published to give judges greater clarity about the law, ‘one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person’. The tort includes physical intrusions, as well as ‘sensory intrusions such as eavesdropping, wiretapping, and visual and photographic spying’.

[99] Hosking v Runting [2005] 1 NZLR 1
[100] Hosking v Runting [2005] 1 NZLR 1
[101] Hosking v Runting [2005] 1 NZLR 1
[102] New Zealand Law Commission, Invasion of Privacy: Penalties and Remedies Stage 3 Report No 113 [6.91]
[103] Ibid.
[104] Hosking v Runting [2005] 1 NZLR 1
[105] Hosking v Runting [2005] 1 NZLR 1
[106] Ibid.
[107] Hosking v Runting [2005] 1 NZLR 1
[108] Hosking v Runting [2005] 1 NZLR 1
[109] Rogers v Television New Zealand Ltd [2008] 2 NZLR 277 (SC)
[110] [2005] 1 NZLR 1.
[118] Ibid 90.
[119] [2005] 1 NZLR 1.
[121] Hosking v Runting [2005] 1 NZLR 1
[123] New Zealand Law Commission, above n 102, 93.
[124] Ibid 92.
[125] Ibid 93.
Chapter 7

Statutory Causes of Action

7.56 The tort has two elements:
- intrusion into a private place, conversation or matter; and
- in a manner highly offensive to a reasonable person.\(^{132}\)

7.57 The requirement that the intrusion upon seclusion be ‘highly offensive to a reasonable person’ means that the interference with seclusion must be substantial and involve conduct that would elicit strong objection from a reasonable person.\(^{133}\) An often-cited example is a press photographer who enters the hospital room of a woman who has a rare illness and takes her photograph, even though she previously objected to giving an interview.\(^{134}\)

7.58 The intrusion itself subjects the defendant to liability, regardless of whether he or she has published information gained from the intrusion.\(^{135}\) According to Andrew McClurg: ‘this is important because it insulates the tort of intrusion from many of the free speech obstacles that infiltrate the other privacy torts, most notably the tort of public disclosure of private facts’.\(^{136}\)

7.59 The US Supreme Court has held that the First Amendment to the US Constitution prohibits actions for invasion of privacy where the published matter is truthful and lawfully obtained information of legitimate public concern.\(^{137}\) By contrast, the US Constitution provides only a limited right to gather information, which is the right more directly implicated by intrusions into seclusion.\(^{138}\) Further, because the ‘public interest test’ does not apply in the tort of intrusion, ‘it is technically irrelevant whether the subject of intrusion is a public figure and/or whether information acquired during the intrusion is a matter of public interest’.\(^{139}\)

Application in public places

7.60 The tort of intrusion has been of limited use to people whose privacy has been invaded in public places. This is due to what has been described as the ‘stubborn principle’ in US tort law that privacy cannot be invaded in or from a public place.\(^{140}\) William Prosser wrote in his 1960 article:

*On the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see.*\(^{141}\)

7.61 The principle also appears in the Restatements, which adopted his view that the tort of intrusion generally cannot occur in public places.\(^{142}\) According to the Restatements, there is no ‘liability for observing … or even taking [a plaintiff’s] photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye’.\(^{143}\)

7.62 The Restatements acknowledges a narrow exception to the rule where the intrusion concerns a matter that is not normally exhibited to the public gaze, such as details of a person’s undergarments.\(^{144}\) Similarly, there may be privacy in public with respect to a matter that is very personal in nature or implicates a person’s ‘emotional sanctum’.\(^{145}\) A number of cases have also said unreasonable, harassing or persistent surveillance of individuals in public places can be unlawful.\(^{146}\)
Tort of publicity given to private life

Elements

7.63 The Restatements defines the tort of publicity given to private life in the following terms:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that

• would be highly offensive to a reasonable person, and
• is not of legitimate concern to the public.147

7.64 Thus, like the tort of intrusion upon seclusion, the tort of publicity given to private life requires that the information publicised is highly offensive to a reasonable person.148 In contrast to the tort of unreasonable intrusion, however, publication is a necessary element of the tort of unreasonable publicity.

7.65 The further requirement that the matter publicised is not of legitimate concern to the public stems from concerns with freedom of the press, and the privilege under the common law to giving publicity to news, and other matters of public interest.149 According to the Restatements, ‘when the matter to which publicity is given is true, it is not enough that the publicity would be highly offensive to a reasonable person’.150 The US Supreme Court has found that the First Amendment to the US Constitution prohibits actions for invasion of privacy where the matter publicised is truthful and was lawfully obtained.151

Application in public places

7.66 Like the tort of seclusion, the tort of publicity is generally not available when the information in question was gathered in a public place. According to the Restatements

there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye. Thus he normally cannot complain when his photograph is taken while he is walking down the public street and is published in the defendant’s newspaper.152

Defences

7.67 Leading commentators suggest that consent may be the only defence in actions for invasion of privacy.153 Consent may not in fact be a true defence because one element of the tort—an offensive invasion of privacy—could not be established if the plaintiff had consented to the conduct in question.154

Remedies

7.68 In the US, a successful claim of invasion of privacy under common law entitles the plaintiff to recover damages on three bases:

• the harm from the loss of privacy
• mental distress reasonably suffered
• when there is cause for ‘special damages’.155

7.69 It remains unclear whether damages can be awarded in the absence of proof of actual harm.156 Injunctions are not readily ordered.157
Chapter 7

Statutory Causes of Action

THE LAW IN CANADA

Statutory causes of action for invasion of privacy

There is no common law tort of invasion of privacy in Canada. However, four provinces—British Columbia, Manitoba, Saskatchewan, and Newfoundland and Labrador—have statutory causes of action for invasion of privacy. British Columbia enacted the first Privacy Act in 1968, followed by Manitoba (1970), Saskatchewan (1974), and Newfoundland and Labrador (1981).

Elements of the statutory causes of action

All of the provincial statutes create broadly defined causes of action. In British Columbia, for example, it is a tort, without proof of damage, ‘for a person, wilfully and without claim of right to violate the privacy of another’. The elements of the statutory causes of action are similar. First, the plaintiff’s expectation of privacy must be reasonable. For example, the British Columbia Act provides that ‘the nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others’. Among the factors the courts look at to determine reasonableness is the location of the privacy invasion and, in the case of surveillance, whether it was conspicuous, together with its extent, thoroughness and duration.

Secondly, all but the Manitoba Act require proof that the defendant acted wilfully. This means that the defendant knew, or ought to have known, that an act would violate the privacy of the plaintiff, and was not merely negligent.

Thirdly, the statutes require the courts to consider a range of relevant factors such as the nature of the privacy invasion and the relationship between the parties. With the exception of the Manitoba Privacy Act, which stipulates that an invasion of privacy must be ‘substantial’, the legislation does not require the alleged invasion of privacy to be ‘serious’ or ‘highly offensive’.

The Canadian provincial statutes include three of the four US privacy torts. Cases brought under these laws have found liability for intrusion into seclusion and disclosure of embarrassing private facts. The Canadian Acts also explicitly provide for a right of action for misappropriation of personality.

Defences

All four Acts list exceptions or defences to the cause of action. The common exceptions or defences are:

- the plaintiff consented to the conduct
- the defendant’s conduct was incidental to the exercise of a lawful right of defence of person or property
- the defendant’s conduct was authorised or required by law
- the defendant is a police or public officer who was engaged in his/her duty and the conduct was neither disproportionate to the matter being investigated nor committed in the course of a trespass
- if the defendant’s conduct involved publication, the publication was privileged, fair comment or was in the public interest.
The Saskatchewan Privacy Act also contains a defence of acting in the scope of newsgathering, while the Manitoba Act has a defence for a person who neither knows, nor reasonably should have known, that the act in question would violate the privacy of any person.

**Remedies**

The Canadian statutes, other than the British Columbia Privacy Act, specify the remedies that a court may order for an unlawful invasion of privacy. Common remedies are:

- damages
- an injunction
- an order for the defendant to account to the plaintiff for profits in consequence of the violation
- an order for the defendant to deliver the documents obtained in consequence of the violation.

In British Columbia, damages are the only remedy that has been ordered by the courts.167

**Comment**

There have been relatively few privacy cases in Canada. By 2001, there had been no more than 25 privacy cases under the four provincial statutes.168 Most of those cases had been taken under the British Columbia Privacy Act.169

The small number of cases may be due in part to the cost of litigation. For example, in British Columbia, jurisdiction is vested solely in the Supreme Court, where the high cost of bringing an action is a disincentive to litigation.170

**OTHER LAW REFORM COMMISSION RECOMMENDATIONS**

**AUSTRALIAN LAW REFORM COMMISSION**

The ALRC proposed a new statutory cause of action for serious invasion of privacy in its report about protection of privacy in Australia.171 When the Australian Government announced its intention to implement many of the ALRC’s recommendations in a document published in October 2009, it indicated it would not respond to the recommendations concerning a new cause of action until an unspecified later date.172

The ALRC recommended a broad statutory cause of action for serious invasion of privacy.173 Although the ALRC did not seek to define ‘serious invasion of privacy’, it did provide a non-exhaustive list of the circumstances that could give rise to the cause of action. They were:

- if there has been an interference with an individual’s home or family life
- if an individual has been subjected to unauthorised surveillance
- if an individual’s correspondence or private written, oral or electronic communication has been interfered with, misused or disclosed
- if sensitive facts relating to an individual’s private life have been disclosed.174
Statutory Causes of Action

7.84 The ALRC concluded that a statutory cause of action was ‘the best way’ to protect people from ‘unwanted intrusions into their private lives or affairs in a broad range of contexts’. It supported legislative intervention because of concern about ‘a lengthy period of uncertainty and inconsistency as the courts refine the law in this area’. The ALRC suggested that a statutory cause of action would overcome “the distinction between equitable and tortious causes of action, and between the defences and remedies available under each”.

Elements of the cause of action

7.85 The ALRC recommended that the elements of the cause of action should be that:

- the claimant had a reasonable expectation of privacy in the circumstances
- the act or conduct complained of is highly offensive to a reasonable person of ordinary sensibilities.

These elements are similar to those adopted by the New Zealand Court of Appeal when devising the tort of misuse of private information. The ALRC cause of action, however, extends to a much broader range of activities because it seeks to deal with a serious invasion of privacy in any circumstances.

7.86 The ALRC proposed that a court undertake a balancing of interests when considering the two elements of the cause of action. The court would be required to consider whether ‘the public interest in maintaining the claimant’s privacy’ outweighs ‘other matters of public interest’, such as being informed about matters of public concern and freedom of expression. This balancing exercise, which is very similar to the second element of the UK cause of action for misuse of private information, requires the court to consider those ‘other matters of public interest’ when considering both elements of the cause of action.

7.87 The ALRC argued that including the public interest test within the elements of the cause of action recognises the importance of freedom of expression. If freedom of expression were merely a defence, claims without merit could proceed with defendants having to wait until the defence case to raise their public interest defence.

7.88 The ALRC’s recommended cause of action requires conduct that is either deliberate or reckless, and not merely negligent. Negligent acts were excluded because ‘including liability for negligent or accidental acts in relation to all invasions of privacy would, arguably, go too far’.

Defences

7.89 The ALRC recommended that there be three defences to the proposed statutory cause of action for serious invasion of privacy:

- where the act or conduct is incidental to the exercise of a lawful right of defence of person or property
- where the act or conduct is required or authorised by or under law
- where publication of the information is subject to privilege under the law of defamation.

7.90 The ALRC suggested that defences that are commonly recognised in other countries—such as consent, information in the public domain, and disclosure to rebut an untruth—are subsumed within the elements of the cause of action. For example, a person who consented to a particular course of conduct could not have a reasonable expectation of privacy and nor could the defendant’s actions be highly offensive to an ordinary person of reasonable sensibilities.
Remedies

7.91 The ALRC’s proposed cause of action does not require proof of actual damage. This means that proof of physical or economic harm is unnecessary and that the cause of action extends to conduct that causes insult or humiliation. The ALRC suggested that a successful plaintiff should have access to a wide range of remedies, including ordinary and aggravated damages (but not exemplary damages), an account of profits, an injunction, an order requiring the respondent to apologise to the claimant, a correction order, an order for the delivery up and destruction of material, and a declaration. The ALRC did not recommend any limits to the amount of damages that could be awarded. Although the ALRC did not directly address the matter, it seems apparent that the Federal Court and the Federal Magistrates Court would exercise jurisdiction in these cases.

NSW LAW REFORM COMMISSION

7.92 In 2009 theNSWLRC recommended a statutory cause of action for invasion of privacy. Like the ALRC, the NSWLRC recommended that it be a broad cause of action for ‘invasion of privacy’ generally. Although declining to define ‘privacy’, the NSWLRC said that its proposed cause of action seeks to protect two interests: invasions of information privacy and intrusions on seclusion. It suggests that the courts will develop and refine the cause of action over time. Unlike the ALRC, it did not limit the cause of action to serious invasions of privacy.

Elements of the cause of action

7.93 There are two elements to the NSWLRC’s proposed cause of action. The first element is that the individual concerned (P) had a reasonable expectation of privacy in the circumstances having regard to any relevant public interest and that P’s privacy was invaded by the conduct of the alleged wrongdoer (D). It is also necessary for P to prove, as a second element, that he or she did not consent to the conduct in question.

7.94 The NSWLRC rejected the second element in the ALRC’s model cause of action—that the act or conduct complained of is highly offensive to a reasonable person of ordinary sensibilities—because it concluded that it is ‘unwarranted in principle’. The NSWLRC said that the ‘highly offensive’ test amounts to a qualification of the ‘reasonable expectation of privacy test’ which would unnecessarily privilege other interests, such as freedom of expression, over protection of privacy.

7.95 The NSWLRC recommended that in order to balance P’s interests with any other relevant interests, a court should be legislatively required to consider nine matters when deciding whether there has been an invasion of privacy. Those matters are:

- the nature of the subject matter alleged to be private
- the nature of the conduct concerned, including the extent to which a person of ordinary sensibilities would consider the conduct offensive
- the relationship between P and D
- the extent to which P has a public profile
- the extent to which P was in a position of vulnerability
- the conduct of P and D before and after the event, including any apology by D
- the effect of D’s conduct on P’s health and welfare
- whether D’s conduct contravened any Australian statute
- any other matter the court considers relevant.
Statutory Causes of Action

7.96 The NSWLRC suggested that the proposed cause of action should be characterised as a statutory action rather than as a tort for two reasons. First, it reasoned that the methodology of the cause of action is not that usually associated with torts because they ‘do not generally require the courts to engage in an overt balancing of relevant interests … in order to determine whether or not the elements of the cause of action in question are satisfied’. Secondly, it argued that the proposed cause of action ‘should not necessarily be constrained by rules or principles generally applicable in the law of torts’.193

7.97 The NSWLRC identified two tort rules or principles that were of concern: the state of mind of the wrongdoer and the extent to which actual damage forms part of the cause of action. If the cause of action were characterised as a tort it would be necessary to determine whether the wrongdoer’s conduct was intentional in order to attract liability. Although the Commission was of the view that liability should generally arise only where the conduct in question was intentional, it preferred to leave the matter to the courts because there might be circumstances in which a person should be held liable for reckless or negligent conduct, such as when a doctor negligently discloses medical records. If the cause of action were characterised as a tort it would also be necessary to determine whether it was a tort that is actionable without proof of damage, such as trespass, or whether actual proof of damage is necessary, as in the tort of negligence. The Commission was of the view that this requirement of tort law ‘is inapposite to the statutory cause of action, which is designed primarily to protect the plaintiff from suffering non-economic loss, including mental distress’.194

Defences

7.98 The NSWLRC recommended that there should be five statutory defences to the cause of action for invasion of privacy. These defences are similar to those found in the Canadian provinces that have statutory causes of action. The defendant bears the burden of proof in relation to the statutory defences, which are:

- D’s conduct was required or authorised by law
- D’s conduct was done in lawful defence of a person or property
- D’s conduct involved publication of information in circumstances where under defamation law D could rely upon the defences of absolute privilege or fair reporting
- D’s conduct involved publication of information as an employee or agent of a subordinate distributor and D could not have reasonably known that the publication constituted an invasion of privacy
- D’s conduct involved publication of information in circumstances similar to those that attract the defence of qualified privilege in defamation law and D’s conduct was not actuated by malice.195

7.99 There are no public interest defences in the draft legislation prepared by the NSWLRC. Rather, in determining whether an individual’s privacy has been invaded for the purposes of the action, a court must consider any relevant public interest, including the interest of the public in being informed about matters of public concern.196
Remedies

7.100 The NSW Commission proposes that a court be permitted to order a range of statutory remedies, including compensatory damages, injunctive style prohibitory orders and orders of a declaratory nature. The draft legislation caps the amount of compensation that may be awarded for non-economic loss at $150,000, with this maximum figure being adjusted on an annual basis. Exemplary or punitive damages are specifically excluded.

Jurisdiction

7.101 The NSWLRC proposed that the cause of action be created by state legislation as part of a uniform national law project. Jurisdiction should be vested in a state court of competent jurisdiction.

7.102 The cause of action is available only to living ‘individuals’ or natural persons. Any cause of action would not survive the death of the complainant. Proceedings must be commenced within 12 months of the date upon which the cause of action accrues unless a court extends that limitation period. Any extension cannot exceed three years from the date upon which the cause of action accrued.

SHOULD VICTORIA ENACT A CAUSE OF ACTION FOR INVASION OF PRIVACY?

7.103 In our Consultation Paper, we suggested that consideration be given to whether Victoria should have a statutory cause of action for serious invasions of privacy modelled on the recommendations in the ALRC’s Privacy Report.197

7.104 The commission received a range of views about the proposed cause of action. There was broad support for a statutory cause of action,198 although it was carefully qualified in a number of instances.199 A number of organisations also expressed direct opposition to the proposal.200

7.105 Support for a cause of action was often accompanied by the suggestion that it would fill a gap in the protection of privacy in Victoria. For example, some groups supported the cause of action because of its capacity to deal with once-off or intermittent use of surveillance by individuals where other forms of regulation might fail.201 Others took a slightly broader view. The Victorian Privacy Commissioner, for example, wrote:

A large number of individuals who contact the Office of the Victorian Privacy Commissioner … seek redress for interferences with spatial or physical privacy for which there is currently no readily accessible remedy in Australian law, or seek to complain about interferences with personal information by other individuals, which are effectively beyond the jurisdiction of all current privacy regulators.202

7.106 The Law Institute of Victoria noted that the protection afforded the right to privacy by section 13 of the Charter of Human Rights and Responsibilities Act 2006 (the Charter) is limited because it ‘does [not] give rise to a direct cause of action for invasions of privacy and it is limited to acts of public authorities’.203 A statutory cause of action might fill this gap.
Chapter 7

Statutory Causes of Action

7.107 In some instances, submissions expressed the view that the introduction of a statutory cause of action is preferable to waiting for the courts to develop the cause of action as part of the common law. For example, the Victorian Privacy Commissioner wrote:

Relying on the courts to recognise a cause of action for privacy may not be the best approach, given the inherent limitations associated with the courts only being able to consider particular matters brought before them by parties resourced to access justice at the requisite level. In addition, the courts would be limited by existing remedies developed within the common law or equity.

Legislators have a better opportunity to craft a cause of action that is more precisely targeted and which takes into account competing public interests. Moreover, protection of a fundamental human right such as privacy should not be dependent on the efforts of a particularly persistent and well resourced plaintiff, to take an action all the way to the High Court of Australia in order to definitively establish the existence of a cause of action.

7.108 Similarly, the Law Institute of Victoria noted that the evolution of common law protection for privacy was ‘too slow and too limited’ to provide protection from new surveillance technologies and other pressures on privacy protection such as counter-terrorism.

7.109 A number of submissions referred to the limited capacity of a cause of action for serious invasions of privacy to control misuse of public place surveillance, especially when compared to other regulatory measures. The Fitzroy Legal Service, for example, acknowledged that a cause of action for serious invasions of privacy could protect the rights of individuals, but also noted that it would not address systemic discrimination, racial profiling, or harassment in the context of surveillance in public places.

7.110 The capacity of the proposed statutory cause of action to be useful to the average person was questioned by some people. Some expressed concern that the cause of action would probably assist only those individuals able to afford the high cost of litigation. On the other hand, several people suggested that judicial consideration of the cause of action would set useful precedents for the entire community even if proceedings were taken only by the wealthy. It was suggested that a high profile case would send an educative message about acceptable use of surveillance in public places.

7.111 Although there was considerable support for a statutory cause of action, some organisations opposed the proposal that there be a cause of action for serious invasions of privacy. For example, some noted that a cause of action for invasion of privacy is best established at the federal level. One submission suggested that the cause of action would alter the balance between privacy and competing rights, including freedom of communication. Other organisations said that the introduction of a statutory cause of action is ‘excessive’ and that current regulation of the media sufficiently protects any potential infringement of an individual’s privacy.

7.112 The federal Privacy Commissioner, who supports development of a statutory cause of action for invasion of privacy, encouraged ‘national consistency in the regulation of surveillance’ and ‘ongoing collaboration between governments to propose a cause of action that could be uniformly applied across all jurisdictions’.
THE COMMISSION’S RECOMMENDATION: TWO STATUTORY CAUSES OF ACTION

7.113 The commission is of the view that Victorians should be able to take civil action in response to threatened or actual serious invasions of privacy by the use of surveillance in a public place. Privacy is a value of increasing importance to the entire community because it recognises and promotes human dignity. The preamble to the Charter acknowledges that ‘all people are born free and equal in dignity and rights’.

7.114 The reach of current privacy law is limited. There are Commonwealth and state laws that regulate how public authorities and some larger businesses deal with matters concerning information privacy. The Surveillance Devices Act 1999 (Vic) (SDA) and the Summary Offences Act 1966 (Vic) regulate the most flagrant invasions of privacy by use of a surveillance device. The extent to which the common law protects privacy is unclear.

7.115 Although the commission believes the introduction of proper guidelines, coupled with appropriate education about their implementation, will be an effective means of promoting responsible use of public place surveillance, new civil causes of action are warranted because, inevitably, some people will choose not to follow the guidelines. The possibility of civil action ‘can create a climate of restraint which ensures that serious breaches do not happen in the first place’, and can provide a unique response in particularly serious cases which require ‘an injunction to stop an offensive publication happening in the first place’.218

7.116 There is a clear gap in the current regulatory regime. Although the criminal law deals with the most offensive invasions of privacy, there is no parallel civil cause of action for people harmed by that behaviour. There is also no right of action for serious misuse of a surveillance device that falls short of criminal conduct. The Victorian Privacy Commissioner informed the commission that people contact her office with complaints about interferences with spatial privacy or misuse of private information for which there is no redress under Victorian and Commonwealth law.

7.117 Events in other comparable countries suggest that the courts will face increasing pressure to develop a response to misuse of surveillance devices in a public place unless there is appropriate legislation. The developments in other common law countries, most notably the UK and New Zealand, suggest it will take a long time before a reasonably clear body of law emerges. Until that time, many people and organisations with a direct interest in the evolution of privacy causes of action will face substantial legal compliance costs to satisfy themselves that their proposed activities are lawful. The UK experience suggests a few pioneering plaintiffs, and some media organisations, will outlay significant sums of money in legal costs to develop the general law through the courts. This means of developing an important aspect of our law should be avoided if possible.

7.118 It is open to both the High Court and the Victorian Court of Appeal to recognise causes of action for wrongful publication of private information and for intrusion upon seclusion in the absence of any legislative action. This outcome could be achieved by following long recognised principles about the process by which the common law evolves. It is important to note that both the House of Lords and the New Zealand Court of Appeal were influenced by human rights principles when developing a cause of action for wrongful publication of private information.219 The Victorian Court of Appeal may follow a similar course.220 That Court might be asked to consider what effect, if any, the right to privacy in the Victorian Charter221 should have upon the common law as that body of law responds to changing social conditions.222

209 Consultation 5; Submission 19.
210 Submission 5; Consultation 5.
211 Consultation 5.
212 Submissions 19, 28.
213 Submissions 16, 21, 24.
214 Submission 28.
215 Submission 19.
216 Submission 28.
217 Submission 35.
220 The remedies available in the general law action for breach of confidence were recently clarified by the Victorian Court of Appeal in Giller v Procopets [2008] 40 Fam LR 378. This decision is discussed in Robert Dean, ‘Sex, Videotape and the Law’ (2009) 83.08 Law Institute Journal 52.
222 While the Charter does not contain any express provision that directs the courts to consider human rights when developing the common law in light of changing social conditions (cf section 32 of the Charter, which deals with interpretation of statutory provisions), the courts could quite properly consider ‘the human rights that Parliament specifically seeks to protect and promote’ (section 7(1) of the Charter) when doing so.
Statutory Causes of Action

7.119 Former High Court Chief Justice Sir Anthony Mason has suggested that a human rights charter guaranteeing a right to privacy ‘could provide a platform for the development of a common law right’. Although the extent to which the High Court should, or may, consider the rights in the Victorian Charter when developing the Australian common law is a complex question, it can consider the right to privacy in international human rights instruments ratified by the Australian Government when doing so.

7.120 The commission believes there should be two overlapping statutory causes of action for some serious invasions of privacy caused by misuse of a surveillance device in a public place. As national harmony of privacy law is likely to be a long-term goal, Victoria is well placed to demonstrate leadership in this area. The Charter is a useful catalyst for legislative action because ‘privacy’ is one of the human rights that ‘Parliament specifically seeks to protect and promote’.

7.121 The evidence from within Australia and other comparable countries suggests that there is unlikely to be a flood of litigation in response to the creation of any new causes of action for invasion of some privacy interests. There have been very few Australian cases in the eight years since the High Court indicated in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* that there were no common law barriers to the development of a cause of action for invasion of privacy. In New Zealand there have been approximately 15 privacy cases since 1985 and Sir David Eady, the English High Court judge who has presided in some of the most significant privacy cases in that country, has recently written that after an early flurry of activity ‘things seem to have settled down to a large extent’. He suggests this may mean ‘that journalists and their lawyers have developed a feel for what is now acceptable to the general public (and to the courts) and what is not’.

7.122 The commission believes that access to any causes of action for invasion of privacy should not be restricted to the few wealthy people who can afford the legal fees involved in court proceedings and have the financial capacity to accept the risk involved in any litigation. At the same time, senior judicial officers who have experience in weighing competing interests and shaping the law should hear the more difficult cases. The Victorian Civil and Administrative Tribunal (VCAT) is an ideal forum for these purposes because it is a low cost jurisdiction comprised of a broad range of judicial officers headed by a Supreme Court judge.

7.123 The commission believes it is not desirable for there to be one statutory cause of action for all serious invasions of privacy because the concept of privacy is too broad and imprecise to be of use when creating legal rights and obligations. Many appellate court judges and academic commentators have warned of the difficulty in devising a workable legal definition of privacy. In *Lenah Game Meats* Gleeson CJ said that ‘the lack of precision of the concept of privacy is a reason for caution in declaring a new tort’, while Justices Gummow and Hayne referred to the ‘difficulties in obtaining in this field something approaching definition rather than abstracted generalisation’. Members of the House of Lords and the New Zealand Court of Appeal made similar comments when rejecting invitations to devise a broad tort of invasion of privacy.
Two internationally recognised academic commentators on privacy law, Daniel Solove and Raymond Wacks, make similar points. Solove suggests that while 'privacy is an issue of profound importance around the world', it is 'a concept in disarray' because 'nobody can articulate what it means'. He argues that because 'we should understand privacy as a set of protections against a plurality of distinct but related problems' it is advisable to identify particular types of privacy problems when considering regulation. Two of Solove’s privacy problem areas—information dissemination and invasion—are of particular relevance when considering new statutory causes of action involving misuse of surveillance devices. According to Solove, 'information dissemination involves the transfer and publicizing of personal data' and 'invasion involves interference with one’s personal life'.

Wacks suggests that one of the reasons why a tort of privacy has not evolved as part of the English common law is the lack of a coherent and consistent meaning of the notion of privacy. He argues that it is more constructive to identify the specific interests the law ought to protect and suggests that 'at the core of the preoccupation with the “right to privacy” is protection against the misuse of personal, sensitive information'.

The commission believes there should be two overlapping statutory causes of action concerning the privacy interests most likely to be adversely affected by the misuse of public place surveillance. Those causes of action should deal with misuse of private information and what is often referred to as intrusion upon seclusion, or unwarranted interference with spatial privacy. Legislating to protect these broadly recognised sub-categories of privacy is likely to promote greater clarity about the precise nature of the legal rights and obligations that have been created than by creating a broad civilly enforceable right to privacy.

RECOMMENDATION
22. There should be two statutory causes of action dealing with serious invasion of privacy caused by misuse of surveillance in a public place.

MISUSE OF PRIVATE INFORMATION
7.127 The first new cause of action should deal with serious invasion of privacy by misuse of private information. This cause of action is primarily concerned with the use of private information rather than with how it is gathered or received. It is similar in effect to the tort developed by the New Zealand courts and to the extended action for breach of confidence which is evolving in the UK courts.

7.128 Whether the information in question is private is best determined by the application of an objective test rather than by relying solely on the views of the person to whom the information relates. This approach means that the tribunal should consider values and attitudes widely held throughout the community before deciding whether the plaintiff had a reasonable expectation of privacy about the information in question. Examples of the sort of information obtained by the use of public place surveillance, which could fall within this cause of action because the plaintiff had a reasonable expectation of privacy, include footage of a person entering a medical clinic or a gay bar.
Chapter 7

Statutory Causes of Action

7.129 The gist of this cause of action is the misuse of private information. In most, but not necessarily all, cases the misuse of private information will involve some form of publication. This may range from photocopying documents and distributing them to others, to broadcasting footage on television or posting it on the internet. Whether the private information in question has been misused is best determined by the application of an objective test rather than by relying solely upon the views of the person to whom the information relates. Again, this approach means that the tribunal should consider values and attitudes widely held throughout the community before deciding whether the use of the private information was highly offensive. Examples of the sort of behaviour that could fall within this cause of action because the use of the private information was highly offensive to a reasonable person include publishing footage of a person entering an abortion clinic or a hospice for the dying.

RECOMMENDATION

23. The first cause of action should deal with serious invasion of privacy by misuse of private information.

INTRUSION UPON SECLUSION

7.130 The second cause of action should deal with what is often referred to as intrusion upon seclusion or spatial privacy. This cause of action is primarily concerned with the use of a surveillance device, often surreptitiously, to view parts of a person not open to public gaze or to monitor conduct that a person believes to be private. Although this cause of action has not yet been developed by the courts in New Zealand and the UK, it may emerge in time because there can be serious invasions of privacy without any publication of personal information.

7.131 The act of intruding upon a person’s seclusion or invading their private space is in itself objectionable conduct. Whether a person had an entitlement to seclusion is best determined by the application of an objective test rather than by relying solely on the views of the person to whom the information relates. This approach means that the tribunal should consider values and attitudes widely held throughout the community before deciding whether the plaintiff had a reasonable expectation of privacy. Examples of the sort of things about which a person could have reasonable expectations of privacy are intimate parts of their body that are clothed and conversations that appear to be taking place well out of the earshot of others.

7.132 The gist of this cause of action is the intrusion upon a person’s seclusion or private space. Whether the intrusion is unacceptable is best determined by the application of an objective test rather than by relying solely upon the views of the person seeking seclusion. Again, this approach means that the tribunal should consider values and attitudes widely held throughout the community before deciding whether the conduct was highly offensive. Examples of the sort of behaviour that could fall within this cause of action because the intrusion upon seclusion was highly offensive to a reasonable person include engaging in ‘upskirting’ on public transport or covertly listening to a conversation between people sitting on an isolated park bench.

7.133 Both examples in the previous paragraph involve criminal conduct. Although the wrongdoer may be prosecuted for a criminal offence, there is no civil cause of action open to a person harmed by conduct of this nature. An action for breach of statutory duty is not available in these cases because of the limited reach of that cause of action.
24. The second cause of action should deal with serious invasion of privacy by intrusion upon seclusion.

STATUTORY CAUSES OF ACTION

7.134 The commission believes that any new causes of action should be statutory causes of action rather than torts. As the NSWLRC pointed out, there is little to be gained—and many complex rules of law to be navigated—if any new cause of action is characterised as a tort. Integration within the law of torts would involve classification of the cause of action as one that is either actionable without proof of damage or that requires proof of damage. It would also involve incorporation of the detailed rules that have arisen in tort concerning remedies and the various types of liability that may attach to actual wrongdoers and to those persons who are legally liable for the actions of others.

7.135 Chief Justice Spigelman of the NSW Supreme Court has suggested that ‘torts’ refer to rights or causes of action generally enforceable in courts. As the commission recommends that jurisdiction in these new causes of action be vested solely in a tribunal, this observation about the ‘usual’ venue for torts is another reason why it is preferable to characterise them as statutory causes of action rather than torts.

ELEMENTS

7.136 A number of submissions and consultations supported the creation of a cause of action for serious invasions of privacy but criticised aspects of the model proposed by the ALRC.

Should the conduct be ‘highly offensive’?

7.137 An important issue common to both proposed causes of action is the seriousness of the invasion of privacy. The ALRC and the NSWLRC differed on this point. The second element of the ALRC cause of action is that ‘the act or conduct complained of is highly offensive to a reasonable person of ordinary sensibilities’. The NSWLRC disagreed with this approach because, in its view, this element set the bar too high. It concluded that this element unnecessarily favoured other interests, most notably, freedom of expression, over privacy.

7.138 The ALRC recommended that the conduct in question be objectively highly offensive because this would help limit the cause of action to ‘egregious circumstances’ and ensure that the important countervailing interest of ‘freedom of expression is respected and not unduly curtailed in the great run of circumstances’. The ALRC suggested that the requirement helps ensure that the law does not protect ‘unduly sensitive’ plaintiffs; a plaintiff will succeed only where the defendant’s conduct is thoroughly inappropriate and the complainant suffered serious harm as a result.

7.139 A number of individuals and organisations suggested that the requirement in the ALRC cause of action that the conduct complained of be ‘highly offensive to a reasonable person of ordinary sensibilities’ set the bar too high for the plaintiff.

7.140 The Law Institute of Victoria (LIV), for example, submitted that the requirement ‘could be too restrictive and too subjective to lead to consistent outcomes’. It suggested that this second element be amended to require that ‘the act complained of [be] unreasonable’, with additional guidance concerning the factors that should be taken into account in determining what is ‘unreasonable’. The LIV argued that this would be consistent with interpretations of reasonableness under the United Nations Human Rights Committee and the Victorian Charter.
Chapter 7

Statutory Causes of Action

7.141 According to the LIV, the application of the concept of reasonableness together with the public interest test ‘would provide appropriate limits on the cause of action, such as the right to freedom of expression’.252

7.142 The commission believes that as legal protections for privacy develop, we should ensure that minor or trivial invasions do not divert attention away from the more significant cases. This is best done by including an element that a reasonable person of ordinary sensibilities must find the defendant’s conduct to be highly offensive. In other new areas of law, such as racial and religious vilification, there are intensifiers in the statutory language used to describe unlawful conduct. Sections 7 and 8 of the Racial and Religious Tolerance Act 2001 (Vic) prohibit conduct that incites serious contempt for, or severe ridicule of, people on racial and religious grounds. Presumably, this language has been used with the aim of ensuring that important new social policies are not undermined by adverse community responses to inconsequential claims.

7.143 The commission believes that the elements of the cause of action for serious invasion of privacy caused by misuse of private information should be:

- D (the defendant) misused, by publication or otherwise, information about P (the plaintiff) in respect of which he/she had a reasonable expectation of privacy; and
- a reasonable person would consider D’s misuse of that information highly offensive.

7.144 Similarly, the commission believes the elements of the cause of action for serious invasion of privacy caused by intrusion upon seclusion should be:

- D intruded upon the seclusion of P when he/she had a reasonable expectation of privacy; and
- a reasonable person would consider D’s intrusion upon P’s seclusion highly offensive.

Intentional, reckless and negligent acts

7.145 The ALRC’s recommended cause of action requires conduct that is deliberate or reckless, and not simply negligent. The inclusion of an element of wilfulness is consistent with the Canadian statutory privacy torts.253

7.146 The ALRC approach of excluding negligent acts was supported in one submission. The author of this submission supported the cause of action only if it was limited to deliberate and reckless conduct and did not extend to negligence.254

7.147 The LIV noted one possible concern with the ALRC ‘state of mind’ requirement. It queried whether there must be an intent to act, or an intent to invade privacy. The LIV submitted that it appears the ALRC contemplated an intent to invade privacy.

7.148 The commission is of the view that it is unnecessary to expressly exclude negligent acts from the conduct which might fall within the two statutory causes of action. Although it is highly likely that most serious invasions of privacy will involve intentional conduct, there may be circumstances in which a person’s actions were so grossly negligent that civil action ought to be possible. An example might be a medical practitioner who leaves a patient’s highly sensitive medical records on a train or tram.
RECOMMENDATIONS

25. The elements of the cause of action for serious invasion of privacy caused by misuse of private information should be:
   a. D misused, by publication or otherwise, information about P in respect of which he/she had a reasonable expectation of privacy; and
   b. a reasonable person would consider D’s misuse of that information highly offensive.

26. The elements of the cause of action for serious invasion of privacy caused by intrusion upon seclusion should be:
   a. D intruded upon the seclusion of P when he/she had a reasonable expectation of privacy; and
   b. a reasonable person would consider D’s intrusion upon P’s seclusion highly offensive.

DEFENCES

7.149 Our Consultation Paper proposal for a statutory cause of action for serious invasions of privacy listed the three defences recommended by the ALRC, namely:
   - where the act or conduct is incidental to the exercise of a lawful right of defence of person or property
   - where the act or conduct is required or authorised by or under law
   - where publication of the information is subject to privilege under the law of defamation.

7.150 Having considered the law in other jurisdictions and the recommendations made by other law reform commissions, we believe that additional defences are desirable. They are:
   - consent
   - where the defendant was a public officer engaged in his or her duty and acted in a way that was not disproportionate to the matter being investigated and not committed in the course of a trespass
   - where D’s conduct was in the public interest, or if involving a publication, the publication was privileged or fair comment.

Consent

7.151 In the US and the UK, consent is one of the most commonly used defences in privacy actions. Consent is also an important defence in the Canadian Privacy Acts.

7.152 The ALRC did not include consent as a defence to its proposed cause of action because it believed it was unnecessary to do so. It reasoned that if a ‘claimant had consented to the invasion of his or her privacy … it is unlikely that the elements of the cause of action would be satisfied’ as there would be no reasonable expectation of privacy and the conduct of the defendant would not be highly offensive.

7.153 The NSWLRC included lack of consent as an element of its proposed cause of action. This means that the plaintiff would bear the burden of proof in relation to the issue of consent.
Chapter 7

Statutory Causes of Action

7.154 The commission is of the view that consent should be an express defence to both proposed causes of action. The defendant, rather than the plaintiff, should carry the burden of proving that his or her conduct was justified by the plaintiff’s consent. To do otherwise is to force the plaintiff to engage in the difficult task of proving a negative.

Protection of person or property

7.155 The defence that a person’s conduct was incidental to a lawful right of defence of person or property appears in the Canadian Privacy Acts and in the recommendations of the NSWLRC and the ALRC.

7.156 Examples of this defence from the Canadian Acts include an employer taking privacy invasive action to prevent employee pilferage of stock, and a defendant arguing (unsuccessfully) that his interception of his neighbour’s cordless telephone conversations was protection of person since the neighbour had repeatedly threatened him. The defence also encompasses conduct undertaken for the purpose of prosecuting or defending civil or criminal proceedings such as private investigations.

7.157 The commission’s view is that if a person’s conduct was incidental to a defence of person or property it should be a defence to the proposed causes of action if the conduct is a reasonable and proportionate response to the threatened harm.

Authorised or required by law

7.158 The defence that a person’s action was authorised or required by law also appears in the Canadian Privacy Acts and in the recommendations of the NSWLRC and the ALRC. This defence is important for government actors, particularly in the areas of law enforcement and national security, as it acknowledges that other laws, such as the SDA, permit them to engage in some invasions of privacy when their actions are appropriately authorised.

7.159 The commission is of the view that it should be a defence to the recommended causes of action that the defendant’s conduct was authorised or required by law.

Public officer engaged in duty

7.160 The defence of being a police or public officer engaged in duties appears in the Canadian Privacy Acts. The officer must also be acting in a manner not disproportionate to the matter being investigated, and not committing a trespass.

7.161 Although the defence of a police or public officer engaged in his or her duties may fall within a broad public interest defence, the commission believes it is important to provide police and public officers with a specific exception when engaged in their duties. This defence does not give police and public officers a licence to invade people’s privacy. As in Canada, the conduct should be reasonable, proportionate to the duties of the officer and not involve a trespass in order to fall within the defence.

Privilege, fair comment (honest opinion) and public interest

7.162 The defences of privilege and fair comment derived from defamation law are also commonly available in privacy causes of action in other jurisdictions. So too is the defence of public interest.

7.163 Although defamation is concerned with the protection of reputation, rather than privacy, the motivation for plaintiffs in a defamation action is often the desire to protect privacy or to gain compensation for an invasion of privacy. In Victoria, the Defamation Act 2005 (Vic) has replaced aspects of the common law tort of defamation.
7.164 As the defences in defamation law seek to strike a balance between protection of a plaintiff’s reputation and freedom of speech, they may also be usefully employed when seeking to strike a balance between privacy and freedom of speech.

Privilege

7.165 A privilege can be absolute or it can be qualified. Examples of absolute privilege include statements made by a member of parliament and by participants in court proceedings. By contrast, a qualified privilege requires the defendant to show that he or she had a legitimate duty and interest to publicise the private matter. The law protects such revelations because they promote the welfare of society. Sections 27 and 30 of the Defamation Act 2005 (Vic) provide for a defence of absolute and qualified privilege, respectively, in any cause of action for defamation in Victoria.

7.166 Privilege is a defence in the Canadian Privacy Acts, and the NSLRC and ALRC proposed causes of action. It is a defence to the Law Reform Commission of Ireland’s proposed tort of disclosure of information obtained by privacy invasive surveillance. A 'defence' similar to the defence of qualified privilege in defamation law may be available in the UK cause of action for misuse of private information. Finally, the New Zealand Law Commission has suggested that actions that are privileged should be a defence to the New Zealand tort if they do not fall within the broad defence of legitimate public concern recognised in Hasking v Runtting.

Fair comment (honest opinion)

7.167 In the interests of protecting the freedom to discuss matters of public concern, the common law developed the defence of fair comment in actions for defamation. The fair comment defence applies when there is

1. comment based on fact
2. about a matter of public interest
3. recognisable as comment (versus fact)
4. ‘fair’ in the sense that ‘an honest person could express the opinion, even if it is exaggerated, prejudiced or obstinate’.

The defence may be defeated, however, by proof of malice.
Chapter 7

Statutory Causes of Action

7.168 The Defamation Act 2005 (Vic) provides for a defence of honest opinion, which, though largely intended to reflect the common law, differs in some respects from the defence of fair comment.285

7.169 Fair comment is a defence in the Canadian Privacy Acts286 and the NSWLRC proposal.287 By contrast, the ALRC proposal does not include fair comment as a separate defence, as it is subsumed within the public interest test that is an element of the proposed cause of action.288

Public interest

7.170 In contrast to privilege and fair comment, where the primary concern is protection of communications, the defence of public interest may involve other matters of community concern that might justify an intrusion into privacy. The Law Reform Commission of Ireland lists the following four specific, but non-exhaustive, strands in their public interest defence:

- the detection and prevention of crime
- the exposure of illegality or serious wrongdoing
- informing the public on a matter of public importance
- preventing the public from being misled by the public utterances of public figures (broadly defined) where private beliefs and behaviour are directly at variance with the same.289

7.171 Freedom of expression remains a central reason for any public interest defence.290 For example, the New Zealand tort of invasion of privacy by publication of private facts includes the defence that the publication concerned a matter of legitimate public concern.291

7.172 The public interest defence appears in other existing and proposed statutory causes of action for invasion of privacy. In the case of the Canadian Privacy Acts,292 and the proposal of the Law Reform Commission of Ireland, the defence is limited to where there has been a publication, and so may not apply where there is surveillance without publication of the material. By contrast, in the proposals of the NSWLRC and the ALRC, where the cause of action is not limited to publication of private matters, the defence would likely apply to mere surveillance activities.293

7.173 The commission is of the view that, when devising new causes of action concerning invasion of privacy, it is important to protect revelations that would fall within the defences of privilege and honest opinion (fair comment) in defamation law. If some statements merit protection because of their value to the community, even when they are defamatory, it is strongly arguable that they should be similarly protected, even when they are invasive of privacy. Because the defences of privilege and fair comment are concerned with the publication of information, they would apply only to the proposed cause of action concerned with misuse of private information.

7.174 The public interest in protecting revelations of particular forms of conduct, such as abuse of the powers associated with public office, is widely acknowledged, even when it involves some invasion of privacy. The public interest defence should apply to both recommended causes of action. It is not logical to limit this defence to those cases that involve publication of private information because otherwise people would be encouraged to publish everything they discover that may be invasive of privacy in order to avail themselves of the defence. There will be occasions in which it ought to be possible for investigative journalists, and others, to rely upon a defence of public interest when their conduct would otherwise be an intrusion upon a person’s seclusion.
7.175 There are different approaches to the question of which party should bear the burden of proof when the public interest is a relevant issue in a privacy dispute.

7.176 In an action under the New Zealand tort, the defendant bears the onus of establishing there is a legitimate public concern in the publication of otherwise private facts.\(^{294}\) The defendant also bears the onus of proof of public interest under the Canadian Privacy Acts and the Law Reform Commission of Ireland proposal.

7.177 In the US the plaintiff bears the burden of proof in actions for the tort of publicity given to private life. A plaintiff must show that the matter publicised is highly offensive to a reasonable person, and that it is not of legitimate concern to the public.\(^{295}\) Although the public interest is not a defence to the UK cause of action offensive to a reasonable person, and that it is not of legitimate concern to the given to private life. A plaintiff must show that the matter publicised is highly offensive to a reasonable person, and that it is not of legitimate concern to the public.\(^{296}\) The defence that publicity given to a private matter is justified because it concerns a matter of public interest begs the question: What is a matter of public interest? There are different approaches to the question of which party should bear the burden of proof when the public interest is a relevant issue in a privacy dispute.\(^{297}\)

7.178 As both the ALRC and NSWLRRC proposals treat the public interest as an element of their causes of action—the plaintiff bears the burden of proof in relation to this matter. For example, under the NSWLRCC proposed cause of action, a court is required to consider 'any relevant public interest (including the interest of the public in being informed about matters of public concern)' when deciding whether an individual's privacy has been invaded.\(^{298}\) In the case of the ALRC proposal, a court must take into account 'whether the public interest in maintaining the claimant's privacy outweighs other matters of public interest (including the interest of the public to be informed about matters of public concern and the public interest in allowing freedom of expression)'.\(^{299}\)

7.179 The submission from legal academic David Lindsay expressed concern that requiring the plaintiff to establish that there is no countervailing public interest (such as freedom of expression) may be too high a burden because it requires the plaintiff to prove a negative.\(^{300}\)

7.180 The commission believes that a plaintiff should not have to prove a negative, such as the lack of a countervailing public interest. The defendant should carry the burden of proof in relation to the public interest defence. The defendant should be required to introduce evidence (if necessary) and satisfy the tribunal that it was in the public interest to engage in conduct that would otherwise be unlawful.

7.181 In Canada and New Zealand the defendant has the burden of proof in relation to the public interest. In other areas of law involving statutory causes of action the defendant carries the burden of proof with respect to public interest considerations. Vilification law is an example in point. Under section 11 of the \textit{Racial and Religious Tolerance Act 2001} (Vic) the defendant must establish that conduct which would otherwise be racial or religious vilification was justified because it was in the public interest. In the law of defamation, public interest considerations are dealt with as a defence rather than as one of the elements of the cause of action that must be negatived by the plaintiff.\(^{301}\)

7.182 The defence that publicity given to a private matter is justified because it concerns a matter of public interest begs the question: What is a matter of public interest? There is no settled and clear definition of public interest.\(^{302}\) Rather, more commonly, there are categories believed to cover what may fall within public interest,\(^{303}\) including:

- information needed by the public to evaluate a government official’s fitness for office
- information for the exposure of crime, corruption and other wrongdoing in public life
- other information affecting the public at large.\(^{304}\)
There are different perspectives about whether publication of any matter of interest to the public should constitute a defence to invasion of privacy. The approach of treating any subject matter that is of interest to the public as a matter of public concern is seen in the United States, where the law regards whatever the media consider to be worthy of print or broadcast as ‘newsworthy’. This approach does not distinguish between speech about celebrities’ lives and the lives of politicians, and speech about public figures and people cast into the public spotlight.

Supporters of the approach of equating all speech with matters of public interest can point to several justifications for their stance. These include: the difficulty of distinguishing between speech of a ‘public interest’ nature and that which is not; the fact that there may never be consensus on what constitutes the public interest; the fact that information about celebrities’ lives could serve a social function, because people can model their lives on the choices celebrities make; and finally, if there is no consensus on what constitutes the public interest, who should be assigned the task of deciding what it is?

An alternative approach avoids equating the public interest with matters that may interest the public. A notable example is the 2004 decision of the European Court of Human Rights in Von Hannover v Germany. In this case, the Court concluded that Princess Caroline of Monaco’s right to private life had been breached following publication of photographs of her in public places engaged in activities such as shopping and practising sport. The Court deemed the freedom of interest values at stake to be minimal: the photos did not contribute to any debate of general interest to society, but merely satisfied the curiosity of readers about her private life.

Some existing and proposed causes of action for invasion of privacy attempt to exclude matters that are merely of interest to a public curious about the private lives of others from the ambit of the defence of public interest. For example, the draft legislation proposed by the Law Reform Commission of Ireland states that a disclosure ‘is not in the public interest merely because the object of such surveillance, or such information or material, is or would be newsworthy’.

The commission is of the view that the legislation should contain an exhaustive list of defences. Consent should be a defence to the proposed causes of action. The issue of the reasonableness of the defendant’s conduct is best dealt with as an element of both causes of action.
RECOMMENDATIONS

27. The defences to the cause of action for serious invasion of privacy caused by misuse of private information should be:
   a. P consented to the use of the information
   b. D’s conduct was incidental to the exercise of a lawful right of defence of person or property, and was a reasonable and proportionate response to the threatened harm
   c. D’s conduct was authorised or required by law
   d. D is a police or public officer who was engaged in his/her duty and the D’s conduct was neither disproportionate to the matter being investigated nor committed in the course of a trespass
   e. if D’s conduct involved publication, the publication was privileged or fair comment
   f. D’s conduct was in the public interest, where public interest is a limited concept and not any matter the public may be interested in.

28. The defences to the cause of action for serious invasion of privacy caused by intrusion upon seclusion should be:
   a. P consented to the conduct
   b. D’s conduct was incidental to the exercise of a lawful right of defence of person or property, and was a reasonable and proportionate response to the threatened harm
   c. D’s conduct was authorised or required by law
   d. D is a police or public officer who was engaged in his/her duty and the D’s conduct was neither disproportionate to the matter being investigated nor committed in the course of a trespass
   e. D’s conduct was in the public interest, where public interest is a limited concept and not any matter the public may be interested in.

EXEMPTIONS?

7.190 In their submissions to the commission, some organisations suggested that they, or their members, should be exempted from any new causes of action. For example, Australia’s Right to Know, a coalition of major media organisations, wrote:

   *There is no need for any additional privacy rights or remedies in Australia. If any need for an additional privacy right or remedy is identified in future, it should be very clearly and narrowly defined and there should be a broad media exemption.*

7.191 The LIV opposed a media exemption, arguing that the balancing test in the cause of action was sufficient to protect media activities.

7.192 The Insurance Council of Australia argued that exemptions were required for the legitimate need of insurers to undertake surveillance. According to the Council, its ‘members have a vital interest in being able to undertake surveillance in public places, for example to assess a personal injury claim (particularly for Compulsory Third Party and workers’ compensation claims) and in defence of a decision to decline a claim’.
Chapter 7

Statutory Causes of Action

7.193 Another group seeking an exemption was Victoria Police, who suggested police officers acting for a lawful purpose in the course of their duties should be protected from liability.322

7.194 The commission’s view is that no organisations or classes of people should be exempted from the proposed statutory causes of action. The defences adequately protect people engaged in legitimate activities from unmeritorious actions for serious invasion of privacy.

REMEDIES

7.195 A remedy is a step or an action that a defendant is ordered to take, such as the payment of damages, once a court or tribunal finds that a wrong has been committed.

Damages

7.196 The most common remedy in civil actions is an order for the payment of damages. In the law of torts, damages means a court order that the defendant compensate the plaintiff monetarily for the harm caused by the defendant’s wrongful conduct.323 Damages are usually awarded to restore a plaintiff, to the extent money can do so, to the position he or she would have been in had the wrong not been committed.324 Damages of this nature are compensatory.

By contrast, exemplary (or punitive) damages are designed to punish the defendant for particularly reprehensible conduct and to deter him or her (and others) from acting in this way in the future.325

7.197 Although exemplary damages are part of Australian law, they are rarely awarded, and only if the defendant engaged in conscious wrongdoing in flagrant disregard of the plaintiff’s rights.326 Exemplary damages also raise unresolved concerns, such as whether the criminal law, with its safeguards for defendants, might be the more appropriate forum for punishing a wrongdoer and whether their award may amount to an unfair windfall for the plaintiff.327

7.199 Exemplary damages have been awarded at common law in defamation cases.328 However, section 37 of the Defamation Act 2005 (Vic) now provides that exemplary damages cannot be awarded in defamation actions. As the NSW Court of Appeal recently noted:

Parliament has tended to cut down exemplary damages at common law. Secondly, in the fields where Parliament has created new rights or developed existing rights, it has generally not conferred a right to exemplary damages.329

7.200 Neither the ALRC nor the NSWLRC proposed that causes of action for invasion of privacy provide for exemplary damages.

Proof of actual damage

7.201 Some torts, such as assault, trespass and defamation, are actionable per se,330 meaning that the plaintiff may be awarded ‘damages at large’ without the need to prove any actual injury or economic loss caused by the defendant’s wrongdoing.331 In cases of this nature damages may be awarded to compensate the plaintiff for infringement of his or her dignity, honour or decorum.332 The practical effect is to allow the plaintiff to be compensated for insult and humiliation,333 without the need to prove injury or economic loss, which is necessary when actual damage forms part of the cause of action.
7.202 In most of the jurisdictions we reviewed proof of actual damage is unnecessary in privacy actions. The Court of Appeal in Hosking v Ruting made it clear that under the New Zealand privacy tort, proof of actual damage in the sense of ‘personal injury or economic loss’ is unnecessary and the ‘harm to be protected against is in the nature of humiliation and distress’. Similarly, proof of damage is unnecessary under the Canadian Privacy Acts, and in the proposal of the Law Reform Commission of Ireland for a tort of privacy-invasive surveillance. The ALRC and NSWLRC proposals for a cause of action for invasion of privacy are also actionable without proof of damage.

Limits to the amount of damages

7.203 Caps to the amount of compensation a court may award for non-economic loss are common in Australia. Their purpose is to ensure that awards are not too high, given that non-economic, as opposed to economic, loss cannot be precisely quantified. Under the Defamation Act 2005 (Cth), for example, the maximum amount of damages that a court may award in defamation cases is generally $250,000.

7.204 Damages awards in invasion of privacy and breach of confidence cases in Australia and elsewhere have not been excessive. In Giller v Procopets, the plaintiff was awarded $50,000 damages (including aggravated damages) for non-economic loss; in Jane Doe v ABC the plaintiff was awarded $110,000 for non-economic loss; and in Grosse v Purvis the plaintiff was awarded $108,000 for non-economic loss.

7.205 Damages awards have ranged from small to moderate in both Canada and the UK. In the UK, Mosley attracted the largest award, £60,000.

7.206 The NSWLRC proposal places a cap on the award of damages for non-economic loss at $150,000, adjustable yearly based on average weekly total earnings of full-time adults over the preceding four quarters. This is the form of adjustment when released from prison, the details of the extra-marital sex life of a football player, the private life of a musician, and the musings of Prince Charles in his diary.

Injunctions

7.207 An injunction is a remedy that may have an important role to play in some invasion of privacy cases. We use the term ‘injunction’ broadly to mean any order of a tribunal or court that compels specified conduct. In some instances, an injunction may be sought to prevent the initial publication of material, while in others it may be sought to prevent its ongoing publication in forums such as websites. Sometimes it may be appropriate to direct a person to publish an apology in response to the wrongful publication of private information, or to apologise privately for an intrusion upon seclusion.

7.208 An injunction may be sought to stop the threatened publication of private information. This step is particularly challenging in cases involving privacy interests because of the irreparable consequences of publication. Justice Eady suggested in Mosley that ‘an infringement of privacy cannot ever be effectively compensated by a monetary award’, and observed that ‘once privacy has been infringed, the damage is done and the embarrassment is only augmented by pursuing a court action’.

7.209 The British courts have issued injunctions to prevent the initial publication, or continued publication, of material in some misuse of private information cases. Injunctions have prevented publication of the addresses of convicted murderers when released from prison, the details of the extra-marital sex life of a football player, the private life of a musician, and the musings of Prince Charles in his diary.
Chapter 7

Statutory Causes of Action

7.210 Importantly, there have also been high profile cases in which the courts have declined to restrain publication of material that may be invasive of privacy. In *John Terry v Persons Unknown*, Tugendhat J rejected an application for an injunction against the media to prevent publication of information about an affair involving the captain of the English football team. The judge was not satisfied that the plaintiff was likely to succeed in defeating a defence that it would be in the public interest for there to be publication.

7.211 A number of law reform bodies have discussed the importance of injunctions as a remedy for privacy invasion cases. For example, because the British Columbia Privacy Act, unlike the other three Canadian Privacy Acts, does not deal with remedies expressly, the British Columbia Law Institute recently recommended that the Act be amended to confer power on the courts to grant remedies other than damages. In particular, the Institute noted the importance of injunctions ‘to make civil privacy legislation useful in curbing a privacy violation of a persistent nature’.

7.212 Similarly, the Law Reform Commission of Ireland recommended an injunction, or ‘privacy order’, be a remedy for its proposed torts. The Commission has written that injunctions are ‘a key feature in any strategy to enhance the protection of privacy, as privacy is a highly perishable commodity’.

7.213 Because injunctions impede media freedom, the common law has generally disfavoured ‘prior restraint’ on publication. In the US, injunctions may not be readily awarded in privacy invasion cases. In *Hosking v Ruting* members of the New Zealand Court of Appeal referred to the legitimate concerns of the media with respect to injunctions and ‘prior restraint’. The justices in the majority suggest that an injunction should not be granted to restrain publication unless there is ‘compelling evidence of most highly offensive intended publicising of private information and there is little legitimate public concern in the information’.

Declarations

7.214 A declaration is an order of a court or tribunal that contains a statement about the legal rights and obligations of a party to a dispute. In some cases involving misuse of private information or intrusion upon seclusion, the plaintiff may seek little more than a public finding, by way of declaration, that he or she has been wronged. For example, a court or tribunal could declare that the publication in a newspaper of the naked image of an identifiable person, originally obtained by the use of a wave scanner, was a wrongful use of private information. In some instances a declaration of this nature may be sufficient solace for the wronged person.

7.215 We received only one submission about the remedies that should be available when there has been a serious invasion of privacy.

7.216 The LIV suggested there may be circumstances in which exemplary damages would be appropriate. Specifically, the LIV would ‘prefer to leave it to the adjudicator’s discretion as to whether exemplary damages should be awarded’.

7.217 The commission is of the view the remedies for the two proposed causes of action should be

- compensatory damages
- injunctions
- declarations.
7.218 We do not include exemplary damages. It is our view that the available damages should be compensatory only. Criminal proceedings and civil penalty proceedings should be the sole means of punitive action against any person for grossly offensive behaviour falling within either of the proposed statutory causes of action.

7.219 Further, in view of the modest sums likely to be awarded in cases of this nature, the commission believes that a statutory cap on damages is unnecessary. It should be possible for the plaintiff to be compensated for insult and humiliation without the need to prove injury or economic loss.

COSTS

7.220 The question of who should be responsible for paying the costs of any civil legal proceedings is often complicated. The usual costs rule in the courts—that the losing party should be required to pay the costs of the winning party—can be a strong disincentive to the vindication of legal rights when the sum of money that may be awarded in damages to a successful plaintiff is small. A simple risk:benefit analysis will often lead to the conclusion that it is not worth the risk of litigating, especially when an adverse legal costs order may be much greater than any award of damages. Only the wealthy can afford the risk in these circumstances.

7.221 Two leading English cases illustrate this point. Supermodel Naomi Campbell risked over £1 million in costs for a damages award of £3500,361 while motor racing impresario Max Mosley succeeded in gaining £60,000 in damages and £850,000 in legal costs.362 Litigation of this nature is beyond the reach of ordinary members of the community.

7.222 The fairest way to deal with costs in cases of this nature is to start from the position that each party should be responsible for their costs but to permit departures from this presumption when it is fair to do so. This rule guards against the abuse of legal process because the decision-maker can award costs against a plaintiff who takes frivolous proceedings and against a defendant who seeks to exhaust the resources of the plaintiff by unnecessarily prolonging the case.

7.223 Costs should be dealt with in accordance with section 109 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic). That section provides that each party is to bear their own costs in the proceeding, unless the Tribunal orders one party to pay all or a part of the costs of the other party, if that would be fair to do so.363

RECOMMENDATION

29. The remedies for both causes of action should be:
   a. compensatory damages
   b. injunctions
   c. declarations.

30. Costs should be dealt with in accordance with section 109 of the VCAT Act.

JURISDICTION

7.224 It is necessary to consider which body should have jurisdiction to hear cases involving the proposed new causes of action for misuse of private information and intrusion upon seclusion.
7.225 A number of submissions in response to our Consultation Paper supported giving jurisdiction to VCAT rather than to the courts. Among them, the LIV argued:

*Giving powers to the Victorian Privacy Commissioner or the Victorian Civil and Administrative Tribunal to adjudicate actions for privacy invasions could make the action more accessible to people and therefore more appropriate than actions in the courts.*

7.226 The commission agrees with this view. VCAT is designed to be more accessible than the courts. It seeks to be a speedy, low-cost tribunal where legal costs do not outweigh the issues at stake. The experience in other jurisdictions demonstrates that any damages awards in cases of this nature are likely to be relatively small. The sums of money involved do not justify the level of legal costs usually associated with civil litigation in the courts. The costs associated with the high profile UK cases involving Naomi Campbell and Max Mosley could be replicated in Victoria if there were to be protracted litigation in the Supreme Court.

7.227 The likely nature of cases concerning the two proposed statutory causes of action also supports the view that jurisdiction should be vested in VCAT rather than the courts. Courts are well equipped to conduct civil litigation involving complex issues of law or fact. Court rules concerning pleadings are designed to identify contested questions of law and fact so that the parties and the court can direct their attention to matters that require adjudication. Court rules concerning the admissibility and use of evidence seek to ensure that contested issues of fact are determined as fairly as possible.

7.228 Cases concerning the two proposed statutory causes of action are unlikely to involve contested and complex issues of law or fact. They may involve judgment, however, about contested issues of privacy and community standards. VCAT is well placed to undertake these tasks because of its experience in exercising jurisdiction under the [Information Privacy Act 1999](https://www.dielectricgroup.com.au) (Vic) and because of the broad range of members upon which it may draw to hear cases of this nature. There will be some opportunity for input by the courts because the Supreme Court hears appeals from VCAT on questions of law.

### RECOMMENDATION

31. Jurisdiction to hear and determine the causes of action for serious invasion of privacy by misuse of private information and by intrusion upon seclusion should be vested exclusively in the Victorian Civil and Administrative Tribunal.

### AVAILABILITY OF THE CAUSE OF ACTION TO CORPORATIONS AND DECEASED PERSONS

7.229 It is important to consider whether corporations and deceased persons, as well as living individuals, should have the right to take action for misuse of private information or intrusion upon seclusion.

**Corporations**

7.230 Although the law has assigned many of the attributes of individuals to corporations, it does not make all causes of action available to corporations, and sometimes restricts the claims they can make. For example, while a corporation could sue for defamation at common law, it could not claim injury to feelings and was restricted to a claim for financial loss. Under section 9 of the [Defamation Act 2005](https://www.dielectricgroup.com.au) (Vic), corporations no longer have a cause of action for defamation, unless they are small businesses or not-for-profit organisations.
7.231 Some members of the High Court have suggested that any common law tort of invasion of privacy should not be available to corporations. In Lenah Game Meats,365 Gummow and Hayne JJ said that the plaintiff was an ‘artificial legal person [which] lacks the sensibilities, offence and injury to which provide a staple value for any developing law of privacy’.366 In the same case Gleeson CJ said that because the concept of privacy involves the protection of human dignity, it ‘may be incongruous when applied to a corporation’.367

7.232 As the NSWLRC recently noted, jurisdictions with existing privacy causes of action typically allow only ‘natural persons’ (that is, human beings) to bring the action.368 For example, the Restatements of US law states that, other than in actions for appropriation of one’s name or likeness, an action for invasion of privacy can only be brought by a living individual.369 The Privacy Act of the Canadian province of Newfoundland and Labrador limits the cause of action to natural persons,370 and the British Columbia Law Institute has recently recommended that the British Columbia Act be amended to make it clear that it does not confer a right of action upon corporations for any violation of privacy.371

7.233 Other law reform commissions have favoured limiting proposed privacy rights of action to natural persons. The ALRC proposed cause of action for an invasion of privacy is not available to corporations.372 The ALRC has reasoned that ‘extending the protection of a human right to an entity that is not human is inconsistent with the fundamental approach of Australian privacy law’.373 The Law Reform Commission of Ireland has similarly observed that corporate bodies do not have personal space that can be invaded in the same way as individuals, and no human rights objectives, such as dignity or autonomy, compel the application of the protections offered by their proposed torts to corporations.374 The NSWLRC draft legislation for a cause of action for invasion of privacy also limits the action to humans by using the term ‘individual’ when describing the right of action.375

7.234 Corporations may have some privacy-related interests. The British Columbia Law Institute has observed that ‘corporations have their secrets and may suffer economic damage from disclosure of certain kinds of information, such as the details of an unpatented process or competitively sensitive production cost data’.376 However, according to the Institute, a right of action for invasion of privacy is best restricted to natural persons, because corporations have other remedies available to them, such as causes of action for breach of contract, breach of fiduciary duty, trespass, and nuisance by which they may enforce confidentiality agreements or prevent physical or electronic intrusion onto their premises.377

Deceased persons

7.235 Both the NSWLRC and the ALRC have recommended that any causes of action for invasion of privacy should be restricted to living persons. Clause 79 of the draft legislation proposed by the NSWLRC for a statutory cause of action for invasion of an individual’s privacy states that the action does not survive the death of the individual.378 The ALRC’s proposed cause of action for a serious invasion of privacy is limited to ‘natural persons’,379 and in the context of the Privacy Act 1988 (Cth), the ALRC has written that the right to privacy ‘attaches to the individual and should not survive the death of the individual’.380

7.236 Deceased persons have no right of action under defamation law. At common law, a deceased person’s estate or family members have no right to sue for defamation on that person’s behalf.381 Section 10(a) of the Defamation Act 2005 (Vic) prohibits a person from asserting, continuing, or enforcing a cause of action for defamation in relation to the publication of defamatory matter about a deceased person.
Chapter 7

Statutory Causes of Action

7.237 The rationale for excluding deceased persons from a right of action for defamation or privacy is that deceased persons cannot suffer any insult to reputation or dignity and cannot incure the injury to feelings and mental distress that flows from these insults.

7.238 It is arguable, however, that in some instances deceased persons may have an interest in the privacy of their personal information past death. For example, under the Law Reform Commission of Ireland’s proposed privacy torts, a right of action is available to representatives of deceased persons, where the remedy sought is a privacy order, rather than damages or an account of profits. The former would allow the family or estate of a deceased person to seek delivery of materials, such as private or confidential documents, from a defendant.

7.239 Similarly, the ALRC has recommended amendments to the Privacy Act 1988 (Cth) to protect the personal information of persons who have been dead for 30 years or less where the information is held by an organisation. According to the ALRC, the protections provided by the Privacy Act are analogous to the protections offered by legal duties of confidentiality, which do survive the death of an individual. The reforms they suggest aim to ensure that ‘living individuals are confident to provide personal information, including sensitive information, in the knowledge that the information will not be disclosed in inappropriate circumstances after they die’.

7.240 The commission is of the view that the causes of action for misuse of private information and intrusion upon seclusion should be available to natural persons only, and not to corporations or deceased people.

7.241 Limiting privacy rights of action to living human beings is consistent with other jurisdictions, the views expressed by some High Court judges, defamation law, and the recommendations of other law reform commissions. This approach is also consistent with the Charter, which stipulates that human rights, such as the right to privacy, are applicable to human beings only.

7.242 Although there may be some legitimate reasons for protecting the privacy of people’s personal information past death, these interests are best protected by implementing the ALRC’s recommendations with respect to the Privacy Act 1988 (Cth) rather than conferring a right of action upon the estate of a deceased person.

RECOMMENDATION

32. These causes of action should be restricted to natural persons. Corporations and the estates of deceased persons should not have the capacity to take proceedings for these causes of action.

LIMITATION OF ACTION

7.243 A plaintiff in a defamation action has one year from the date of publication of the defamatory matter to bring the action. A court can extend this limitation period to up to three years if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced the action within one year of publication.

7.244 The NSWLRc’s proposal for a cause of action for invasion of privacy takes a similar approach. There is a limitation period of one year, running from the date of the defendant’s conduct, and an extension of the limitation period to up to three years from the date of the defendant’s conduct if the court is satisfied it was not reasonable in the circumstances for the plaintiff to have commenced the action within the year.
According to the NSWLRC, a one-year limitation period is generally appropriate because ‘if the invasion is serious enough, the plaintiff will, and should, act promptly to avoid any escalation in the impact of the injury’. Moreover, the court’s ability to extend the limitations period to up to three years allows for cases where, for example, a plaintiff was not aware of the defendant’s conduct during that one year period.

However, the NSWLRC did not favour a general rule that the cause of action accrue from the time the plaintiff first became aware of the invasion of privacy. According to the NSWLRC:

Such an approach would not cohere with the general approach to the law of limitations in Australia and would, we believe, be difficult to achieve as part of an exercise in uniformity of law in Australia.

By contrast, the Law Reform Commission of Ireland recommended that under its proposed statutory torts, an action be barred after a period of three years commencing from the date the plaintiff became aware (or ought reasonably to have become aware) of the tort and of the identity of the defendant.

The commission is of the view that a plaintiff should bring the action within three years of the date the cause of action arose, that being the date of the defendant’s conduct. This step would ensure actual consistency with causes of action for personal injuries and practical consistency with causes of action for defamation where the limitation period can be extended to up to three years if the reason for the delay in not commencing proceedings within 12 months can be reasonably explained.

**RECOMMENDATION**

33. Proceedings must be commenced within three years of the date upon which the cause of action arose.

**CONCLUSION**

We have recommended the introduction of two statutory causes of action in response to serious invasions of privacy: the first dealing with misuse of private information, the second with intrusion upon seclusion.

Although our focus has been to establish an appropriate legal response to the misuse of surveillance in public places, these new causes of action would not be limited to surveillance practices and conduct in public places. Rather, they would apply to all instances of misuse of private information and intrusion upon seclusion.

Evidence from other jurisdictions with similar causes of action suggests that their availability is unlikely to lead to a flood of litigation and increased expense for users of public place surveillance.