NSW LAW REFORM COMMISSION

Consultation Paper 1

Invasion of Privacy

May 2007

New South Wales. Law Reform Commission.

Sydney 2007

ISSN 1834-6901 (Consultation paper)

National Library of Australia

Cataloguing-in-publication entry

Invasion of Privacy.

Bibliography

ISBN 978-0-7347-2629-2

1. Privacy, Right of - New South Wales. 2. Causes of actions - New South Wales. 3. Human rights - New South Wales. I. New South Wales. Law Reform Commission. (Series : Consultation paper (New South Wales Law Reform Commission) ; 1).

342.0858

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TERMS OF REFERENCE

In a letter to the Commission received on 11 April 2006, the Attorney General, the Hon R J Debus MP issued the following terms of reference:

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the Law Reform Commission is to inquire into and report on whether existing legislation in New South Wales provides an effective framework for the protection of the privacy of an individual. In undertaking this review, the Commission is to consider in particular:

- The desirability of privacy protection principles being uniform across Australia.
- The desirability of a consistent legislative approach to privacy in the *Privacy and Personal Information Protection Act 1998*, the *Health Records and Information Privacy Act 2002*, the *State Records Act 1998*, the *Freedom of Information Act 1989* and the *Local Government Act 1993*.
- The desirability of introducing a statutory tort of privacy in New South Wales.
- Any related matters.

The Commission should liaise with the Australian Law Reform Commission which is reviewing the *Privacy Act 1988* (Cth) as well as other relevant Commonwealth, State and Territory agencies.

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SUBMISSIONS

The Commission invites submissions on the issues relevant to this review, including but not limited to the issues and questions raised in this Consultation Paper.

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The closing date for submissions is 14 September 2007.

Confidentiality and use of submissions

In preparing further papers on this reference, the Commission will refer to submissions made in response to this Issues Paper. If you would like all or part of your submission to be treated as confidential, please indicate this in your submission. The Commission will respect requests for confidentiality when using submissions in later publications.

Copies of submissions made to the Commission will also normally be made available on request to other persons or organisations. Any request for a copy of a submission marked "confidential" will be determined in accordance with *the Freedom of Information Act 1989* (NSW).

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LIST OF PROPOSALS

PROPOSAL 1 - *see page 160*

If a cause of action for invasion of privacy is enacted in New South Wales, the statute should identify its objects and purposes and contain a non-exhaustive list of the types of invasion that fall within it.

PROPOSAL 2 - *see page 202*

The statute should provide that where the court finds that there has been an invasion of the plaintiff's privacy, the Court may, in its discretion, grant any one or more of the following:

- damages, including aggravated damages, but not exemplary damages;
- an account of profits;
- an injunction;
- an order requiring the defendant to apologise to the plaintiff;
- a correction order;
- an order for the delivery up and destruction of material;
- a declaration;
- other remedies or orders that the Court thinks appropriate in the circumstances.

LIST OF QUESTIONS

1. **Should there be a general cause of action for invasion of privacy? Why or why not?**
2. **If there should, how should the boundaries of the cause of action be drawn?**
3. **Should the development of a cause of action for invasion of privacy be left to the common law, or should a statutory cause of action be created?**
4. **If there should be a statutory cause of action for invasion of privacy, do you agree with the Commission's preferred statutory model (Proposal 1)? Why or why not? Are there others that would be more effective (for example, the creation of a statutory tort or torts)?**
5. **When should plaintiffs be entitled to claim an expectation of privacy?**
6. **What type of invasion should attract the protection of the proposed cause of action?**
7. **When should the plaintiff be taken to have consented to an invasion of privacy?**
8. **Should liability for invasion of privacy in relation to disclosure of information be restricted to information not already in the public domain, and, if so, how should the concept of public domain be construed?**
9. **Should liability for a cause of action for invasion of privacy be restricted to intentional acts only, or extend to reckless and/or negligent acts?**
10. **How should a cause of action for invasion of privacy take account of the public interest?**
11. **What public interest factors should qualify an otherwise actionable invasion?**
12. **Should the plaintiff be required to prove loss or damage in order to bring an action for invasion of privacy?**
13. **Should an action for invasion of privacy be available only to natural persons or should it be available to corporations as well? If so, when?**

14. Should an action for invasion of privacy come to an end with the death of the person whose privacy is alleged to have been invaded?

15 How should invasion of privacy deal with "relational claims"?

16. Do you agree with the Commission's approach to the remedies that should be available in response to an invasion of privacy (Proposal 2)?

17. Should there be thresholds and ceilings on the amount of damages that can be awarded in proceedings brought for invasion of privacy? If so, what should they be?

18. Should exemplary damages be available for invasion of privacy? Why or why not?

19. Should account of profits be available in response to an invasion of privacy? Why or why not?

20. Should the courts be able to order apologies and make correction orders in response to an invasion of privacy? If so, when?

1. Introduction

- This inquiry
- Statutory tort or statutory cause of action?
- The significance of a statutory cause of action
- What should a statutory cause of action protect?
- Is there need for more general protection of privacy in New South Wales?
- Should development of an action for invasion of privacy be left to the common law?
- Considerations underlying the case for reform
- The next step

THIS INQUIRY

1.1 In recent years, a demand for the recognition and development of a general law of privacy has emerged in common law countries.[1] Two factors in particular have contributed to it.[2] First, the emergence since 1945 of human rights law, both international[3] and national,[4] that usually includes recognition of a right to privacy. Secondly, the occurrence of notorious and egregious violations of privacy that breach perceived societal norms. Whether perpetrated by the media, or occurring in other contexts, such as law enforcement, private investigation or workplace monitoring, these violations are sometimes facilitated by the use of advanced technology, including surveillance devices. The Commission has already recommended a comprehensive regime to regulate surveillance in New South Wales.[5] In doing so, we regarded the protection of personal privacy as a paramount consideration underpinning the regulatory regime, given the pervasive incidence of surveillance in modern society.[6]

1.2 The Commission is now asked to consider the more general question whether existing legislation in New South Wales is effective in protecting individual privacy.[7] One particular issue to which our terms of reference direct us is the desirability of introducing a "statutory tort of privacy" in New South Wales. This is the broadest, and most difficult, matter that the Commission must confront in this

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1. In our review of defamation, we recommended that urgent consideration be given to the development of privacy laws: NSW Law Reform Commission, *Defamation,* Report No 75 (1995), [2.36] (Recommendation 1).
2. See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 1, [188] (Kirby J) ("*Lenah Game Meats*").
3. Especially, *Universal Declaration of Human Rights*, <www.unhchr.ch/udhr> at 10 January 2007, art 12 (1948); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] *Australian Treaty Series* 23, art 17, (generally entered into force for Australia 13 November 1980) ("ICCPR"); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, <www.echr.coe.int> at 10 January 2007, art 8 (entered into force on 3 September 1953) ("ECHR").
4. *Charter of Human Rights and Responsibilities Act 2006* s 13(a) (Vic); *Human Rights Act 2004* s 12(a) (ACT). See also *Human Rights Act 1998* Sch 1, Pt 1, art 8 (UK). Compare *New Zealand Bill of Rights Act 1990* (NZ), which contains no reference to privacy.
5. NSW Law Reform Commission, *Surveillance: An Interim Report*, Report No 98 (2001).
6. NSW Law Reform Commission, *Surveillance: An Interim Report*, Report No 98 (2001), [1.3]-[1.13], [2.4]-[2.7].
7. Terms of Reference are set out at p vii.

reference. Our response to it potentially influences our approach to the other particular topics to which our terms of reference direct attention, including the statutory regulation of privacy in New South Wales and the content of privacy protection principles. It is obviously desirable that the legislative statement of privacy protection principles as well as the way in which privacy is dealt with in the particular pieces of legislation listed in our terms of reference, should be consistent with a more general statutory cause of action protecting privacy if one is to be introduced.

1.3 The Commission's first response to this reference is, therefore, to publish this Consultation Paper, which addresses only the question whether or not a statutory cause of action for invasion of privacy should be introduced in New South Wales. Its purpose is to serve as a basis for community consultation on, and generally to promote public debate of, that issue. Such consultation will also provide a background to, and context for, further consultations focussing on other aspects of this reference. We propose to release a second consultation paper on those aspects of the reference in the second half of 2007.

1.4 In conducting this reference, the Commission is specifically required to liaise with the Australian Law Reform Commission ("ALRC"), which is currently reviewing the federal law of privacy and its relationship with relevant State laws.[8] The Commissions have agreed to work closely in conducting their respective inquiries. Our decision to focus attention initially on the desirability of the development of a statutory cause of action for invasion of privacy in New South Wales was made in consultation with the ALRC. While our terms of reference and those of the ALRC substantially overlap, the ALRC is not specifically asked whether a cause of action for invasion of privacy should be recognised in Australia. The ALRC will, however, deal with this issue in its final Report.[9]

STATUTORY TORT OR STATUTORY CAUSE OF ACTION?

1.5 The Commission refers throughout this Paper to a "statutory cause of action for invasion of privacy" rather than to a "statutory tort of privacy", the expression used in our terms of reference. Our choice of terminology is deliberate.

1.6 The expression "tort" embraces a number of individual causes of action in which, generally, damages are sought in respect of a breach of duty recognised at common law. It is difficult to define the common

8. For the ALRC's terms of reference, see ALRC, *Review of Privacy*, Issues Paper No 31 (2006), at 5-6.
9. See *Review of Privacy*, [1.68]-[1.69], [1.87].

core of these causes of action.[10] Yet to transfer the description "tort" from common law to a statutory cause of action implies that the particular action is linked in some way to this imprecise common core.[11] There is a general risk of incoherence in doing this, bearing in mind the large number and variety of obligations and duties created by statute. In the context of privacy, the risk is magnified by the difficulties associated with defining the basis and scope of the cause of action for invasion of privacy.[12]

1.7 The reason for categorising a statutory cause of action as a tort is to make applicable to that cause of action rules or principles applicable to torts generally, such as the provisions of apportionment legislation or statutes of limitation.[13] The Commission is of the view that an attempt to develop a statutory cause of action for invasion of privacy should not be constrained at the outset by an assumption that rules otherwise applicable to torts generally should necessarily apply to the statutory cause of action for invasion of privacy.[14] Further, a cause of action for invasion of privacy may involve consideration of competing interests, including the public interest, that have not traditionally been relevant in the development of tortious causes of action.[15]

1.8 In any event, the description of a statutory cause of action as "tortious" is not necessarily conclusive of its legal categorisation, which, in respect of any particular issue, must occur principally by reference to the statute itself. The purposes and provisions of the statute determine the applicability of any general rules and principles of tort, as well as the underlying rationale of those rules and principles themselves.[16]

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10. See F Trindade, P Cane and M Lunney, *The Law of Torts in Australia* (4th ed, OUP, 2007) ch 1.
11. See K Stanton, P Skidmore, M Harris and J Wright, *Statutory Torts* (Sweet & Maxwell, 2003) ch 1.
12. See para 1.12-1.18.
13. Stanton, Skidmore, Harris and Wright, [1.002]. See also *Douglas v Hello! Ltd (No 3)* [2006] QB 125, [96] (categorisation for purposes of private international law).
14. Compare the statutory actions for violation of privacy in some Canadian Provinces, where the violation is expressly a tort: See *Privacy Act,* RSNL 1990, c P-22 (Newfoundland and Labrador) s 3(1); *Privacy Act,* RSS 1978, c P-24 (Saskatchewan) s 2; *Privacy Act,* CCSM c P125 (Manitoba) s 2(2); *Privacy Act,* RSBC 1996, c 373 (British Columbia) s 1(1).
15. See especially para 7.27-7.48.
16. Just as a statutory "injunction" takes its content from the provisions of the statute in question: see *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, [28]-[29] (Gaudron, McHugh, Gummow and Callinan JJ); *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199, [89]

THE SIGNIFICANCE OF A STATUTORY CAUSE OF ACTION

1.9 If broadly based, the enactment of a statutory cause of action for invasion of privacy would constitute the first legislative attempt in New South Wales to protect privacy *generally*. Depending on its terms, the legislation would also be the first to give individual plaintiffs clear-cut access to a range of civil remedies (including damages) for invasions of their privacy. This is in contrast to the piecemeal protection of privacy currently provided by the statute law of New South Wales. Apart from invasions of privacy that attract criminal responsibility,[17] the characteristics of such protection are that it tends to be limited to particular types of privacy invasion (for example, information privacy); to apply only in certain contexts (for example, in the public sector); and not to yield a private right of action (for example, to compensation) at the instance of the aggrieved party.[18]

1.10 A statutory cause of action for invasion of privacy in New South Wales would potentially fill a gap or gaps in the common law, which has no conception of privacy that leads to the general imposition of civil liability on a person who invades the privacy of another. At common law, privacy is protected in a number of tortious causes of action. These have included, or could possibly include, trespass to land, private nuisance, defamation, injurious falsehood, passing off and the intentional infliction of harm.[19] More recently, breach of confidence, which has come to be largely an equitable doctrine, has emerged as the most likely vehicle for the more general protection of privacy.[20]

1.11 It is essential to understand that when we say that privacy is protected in several causes of action, we are not saying that these causes of action protect privacy *as such*. Rather, privacy is sometimes protected in these causes of action because, in the circumstances of the particular case, the invasion of privacy satisfies the elements of the cause of action in question. The protection of privacy in the particular cause of action is, therefore, incidental. For example, a newspaper that is responsible for covertly taking a photograph of a nude plaintiff

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(Gummow and Hayne JJ). Consider also the relationship between the general law and the scope of s 52 of the *Trade Practices Act 1974* (Cth) and the remedies supporting it: especially *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470, 503-507 (Lockhart and Gummow JJ); *Marks v GIO Holdings Ltd* (1998) 196 CLR 494.

17. See para 2.90-2.112.
18. See para 2.8-2.15.
19. See para 2.39-2.76.
20. See para 2.79-2.85.

having a shower and then publishing that photograph is liable to the plaintiff in defamation because the publication may impute that the plaintiff "deliberately permitted a photograph to be taken of him with his genitals exposed (that is shown) for the purposes of reproduction in a publication with a widespread readership",[21] thereby lowering the plaintiff's reputation in the eyes of right-thinking members of the community; or simply that "the plaintiff is a person whose genitals have been exposed to the readers of … a publication with a widespread readership", thereby damaging the plaintiff's reputation by exposing him to less than trivial ridicule.[22] From a legal point of view, it is irrelevant that the action in defamation incidentally protects the plaintiff's privacy, even though the protection of his privacy is likely to have been the principal motivation for the plaintiff bringing the action. In a situation such as this, the right that is protected is not a right to privacy.

WHAT SHOULD A STATUTORY CAUSE OF ACTION PROTECT?

1.12 An argument for the introduction of a statutory cause of action for invasion of privacy in New South Wales must be based on the inadequacy of the protection currently afforded privacy by statute and common law. The argument that the current law is inadequate is itself necessarily founded on some understanding of what the statutory cause of action ought to protect. This involves identifying both what privacy *is* and the circumstances in which its invasion ought to generate a civil cause of action. But there is an immediate problem, acknowledged by the High Court in *Australian Broadcasting Corporation v Lenah Game Meats* ("*Lenah Game Meats*"),[23] and identified in a vast literature:[24] the difficulty of pinning down the meaning of the "abstract and contentious notion"[25] of privacy.

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21. See *Ettingshausen v Australian Consolidated Press Ltd* (Supreme Court of New South Wales, Common Law Division, No 12807/91, 10 February 1993, Hunt J, unreported). Earlier proceedings are reported at (1991) 23 NSWLR 443.
22. *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443, 447-449.
23. (2001) 208 CLR 199, [41] (Gleeson CJ), [116] (Gummow and Hayne JJ).
24. For two recent contributions, see C Doyle and M Bagaric, *Privacy Law in Australia* (Federation Press, 2005) ch 2; B Mason, *Privacy Without Principle: The Use and Abuse of Privacy in Australian Law and Public Policy* (Australian Scholarly Publishing, 2006) pt 1.
25. See Roger Clarke, *Introduction to Dataveillance and Information Privacy, and Definitions of Terms* (1997) Australian National University <www.anu.edu.au/ people/Roger.Clarke/DV/Intro.html> at 10 Janaury 2007. And see especially Raymond Wacks, "The Poverty of Privacy" (1980) 96 *Law Quarterly Review* 73.

1.13 The difficulty has provoked an extensive search for a definition of the term.[26] Illustrative of the futility of the search is the most famous attempt at definition, Warren and Brandeis's "right to be let alone".[27] So stated, privacy is both meaningless (criminals have no "right to be let alone" to pursue their criminal activities) and difficult to distinguish from other concepts (victims of an assault suffer not only an attack on their bodily integrity but also on their "right to be let alone"). Similar comments can be made about the understanding of privacy underpinning decisions of courts in various jurisdictions where "privacy" has been found to have the capacity to resolve disputes involving: a woman's right to make personal choices regarding her body in the first six months of pregnancy;[28] the validity of laws placing restrictions on the availability of contraception to married couples;[29] the compatibility of laws criminalising homosexual activity with human rights norms;[30] the right to refuse unwanted medical treatment;[31] and the corresponding right to die.[32] While

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26. For some attempts, see United Kingdom, *Report of the Committee on Privacy and Related Matters* Cmnd 1102 (1990), [3.7] ("Calcutt Report"); United Kingdom, *Report of the Committee on Privacy* Cmnd 5012 (1972), [38] ("Younger Report"). See also Edward Bloustein, "Privacy as an Aspect of Human Dignity" (1964) 39 *New York University Law Review* 962, 971; Alan F Westin, *Privacy and Freedom* (Bodley Head, 1970), 7; Roger Clarke, *Introduction to Dataveillance and Information Privacy, and Definitions of Terms* (1997) Australian National University <www.anu.edu.au/people/Roger.Clarke/DV/Intro.html> at 10 Janaury 2007.
27. S Warren and L Brandeis, "The Right to Privacy" (1890) 4 *Harvard Law Review* 193 at 193 and 195. Warren and Brandeis credit Judge Cooley with coining the term in his publication *Torts* (2nd ed, 1888), 29. For many, the "right to be let alone" remains one of the "simplest and most meaningful answers to the question of 'what is privacy?'": see M Crompton, "Privacy, Technology and the HealthCare Sector", *The Australian Financial Review 4th Annual Health Congress 2002*, Background Paper, <www.privacy.gov.au/news/speeches/ sp79notes. html> at 10 January 2007.
28. *Roe v Wade* 410 US 113, 116 (Justice Blackmun) (1973) (dealing with the concept of personal liberty in the Fourteenth Amendment).
29. *McGee v Attorney General* [1974] IR 284 (such laws held an arbitrary interference with the right to privacy).
30. In 1994, the United Nations Human Rights Committee found that Tasmanian laws criminalising homosexuality infringed the right to privacy contained in Article 17 of the ICCPR: see *Toonen v Australia* (Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994)).
31. *In the matter of Quinlan* (1976) 70 NJ 10 (regarding turning off life support equipment). Compare *Re BWV* (2003) 7 VR 487.
32. *Schiavo v Jeb Bush, Governor of the State of Florida, and Charlie Crist, Attorney General of the State of Florida* (Florida Circuit Court, Pinellas County, Civil Case No. 03-008212-CT-20-UCN522003CA008212CICI, 6 May 2004). Terry Schiavo's right to die was founded on Article 1, s 23 of the Florida Constitution, which provides that "every natural person has the

normal speech, in which privacy is capable of applying to almost every aspect of the human experience,[33] would endorse this broad usage of privacy,[34] the danger becomes that "[p]rivacy seems to be about everything, and therefore it appears to be nothing".[35]

1.14 One way in which theorists seek to avoid this result is by identifying the reasons why privacy is protected and then attempting to refine and particularise the meaning of the notion by reference to those reasons. The two reasons most commonly identified, especially in the context of privacy in human rights discourse,[36] are the "inherent dignity" of every individual and respect for the "autonomy" of the individual.[37] Yet the identification of either "dignity" or "autonomy" as the basis of privacy is highly problematic. Their role as essential or even desirable attributes of personhood or of the human condition is usually bare assertion. More significantly, their meaning varies from writer to writer and remains essentially indeterminate.[38] As a result they are of little use in determining the boundaries of privacy protection. This point becomes even more apparent when the reasons for the protection of privacy are widened beyond "dignity" and "autonomy" to include "freedom", "the ability to control one's life"

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right to be let alone and free from governmental intrusion into the person's private life".

33. See Australian Privacy Charter,<www.privacy.org.au/About/PrivacyCharter. html> at 10 January 2007. See also the Global Internet Liberty Campaign, "Privacy and Human Rights: An International Survey of Privacy Laws and Practice", <www.gilc.org/privacy/survey/intro.html> at 10 January 2007; and Privacy International, "Overview of Privacy" <www.privacyinternational.org> at 10 January 2007.
34. See Australian Law Reform Commission, *Privacy,* Report No 22 (1983), vol 2 [20] (adopting an ordinary language approach to the meaning of privacy).
35. Daniel J Solove, "A Taxonomy of Privacy" (2006) 154 *University of Pennsylvania Law Review* 477, 479.
36. For example, *United Nations Convention on the Protection of Migrant Workers and Members of their Families*, opened for signature 18 December 1990, <www.ohchr.org/english/bodies/cmw> at 10 January 2007, preamble (entered into force 1 July 2003); *United Nations Convention on the Rights of the Child*, opened for signature 10 November 1989, <www.ohchr.org/english/countries/ratitication> at 10 January 2007, preamble (entered into force for Australia 16 January 1991).
37. See especially *Australian Braodcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [43] (Gleeson CJ); *Douglas v Hello! Ltd* [2001] QB 967, [126] (Sedley LJ).
38. See Doyle and Bagaric, 32-35 ("dignity"), 35-38 ("autonomy"). See also J Berryman, "Reconceptualizing Aggravated Damages: Recognizing the Dignitary Interest and Referential Loss" 41 *San Diego Law Review* 1521 (2004).

(including decision making and information control) and "consent".[39] Moreover, focus on any of these concepts tends to promote a notion of privacy that is too absolute, one that fails to account for the importance of other factors, such as security and freedom of speech, in the development of the human person and of society.[40]

1.15 A more pragmatic approach identifies categories of privacy in order to imbue the term with a workable meaning. For example, Privacy International identifies the following categories of privacy:

- Information privacy, or data protection;
- Bodily privacy, including protection against invasive procedures and DNA testing;
- Privacy of communications, covering security of electronic and standard mail and telephone communications; and
- Territorial privacy, covering surveillance and protection against other intrusions into people's physical space.[41]

1.16 German privacy law, buttressed by a constitutional right to the free development of the human personality, has recognised three spheres of personality, namely, the "intimate", the "private" and the "individual", each of which receives different levels of protection:[42]

- The "intimate sphere" deals with the "inner world of thoughts and feelings and their expression through media such as confidential private letters or personal diaries".[43] The intimate sphere involves information about the most private aspects of life, and may therefore be revealed only with the subject's consent.[44] A subset of rights falls within the intimate sphere and includes the right to privacy of medical reports, and of personal mail; the right not to

39. See Daniel J Solove, "A Taxonomy of Privacy" (2006) 154 *University of Pennsylvania Law Review* 477, 485-486; Australian Law Reform Commission, *Privacy*, Report No 22 (1983), vol 2 [1032]-[1033]; Kate Foord, *Defining Privacy* (Victorian Law Reform Commission, Occasional Paper, 2002), 2.
40. See Doyle and Bagaric, ch 2.
41. See Privacy International, *Overview of Privacy* 2004 www. privacyinternational .org/article.shtml at 17 January 2007.
42. See N Nolte and JDR Craig, "Privacy and Free Speech in Germany and Canada: Lessons for an English Privacy Tort" (1998) 2 *European Human Rights Law Review* 162; Rosalind English, "Protection of Privacy and Freedom of Speech in Germany" in Madeleine Colvin (ed) *Developing Key Privacy Rights* (Hart Publishing, 2002) at 77.
43. Nolte and Craig, 174.
44. Nolte and Craig, 174.

have one's conversations recorded covertly; and the right not to be photographed without consent.[45]

- The "private sphere" covers personal matters "which are not by their very nature of public interest, but cannot be characterised as intimate or secret".[46] This category includes information concerning one's family and home life. Invasions into the private sphere may be justified if some special public interest can be established.
- The "individual sphere" relates to the "public, economic and professional life of the individual", and receives the least protection.[47]

1.17 Solove advocates a different approach to categorising aspects of privacy, based on the manner of its invasion. He maintains that the need for privacy is a socially created one: that without society, there would be no need for an individual to assert a "right to be let alone". Solove argues that it makes sense, therefore, to isolate the points of social friction, or the activities that create privacy problems, in order to obtain a better understanding of what privacy means and how the law should address it.[48] He has identified the following four basic groups of related activities with the potential to harm privacy:

- information collection, including surveillance and interrogation;
- information processing;
- information dissemination; and
- intrusion.[49]

1.18 Solove notes that the first three activities take information progressively out of the subject's control. However, the fourth involves an action done to the subject that interferes with his or her privacy, either through direct physical or other intrusion, or indirectly by means of arbitrary decision-making that impacts on individual autonomy or control.

The Commission's view

1.19 The Commission's task is a limited one: to determine whether or not there should be a statutory cause of action in New South Wales that protects privacy. Within that limited framework, we can at least say that the indeterminate nature of privacy means that a statutory

45. English, 81.
46. Nolte and Craig, 174.
47. Nolte and Craig, 174.
48. Solove, 483-485.
49. Solove, 488-489.

cause of action for invasion of privacy could not, at least at this stage in the development of the law, embrace a general free standing *right* to privacy, such as those found in human rights instruments.[50] This does not mean, however, that more particularised rights of privacy, or that identified privacy interests and values, should not attract statutory protection and generate civil liability.

1.20 For the purposes of this Issues Paper, the Commission is content to assume that a statutory cause of action for invasion of privacy should generally aim to protect persons from unwanted intrusions into their private lives or affairs in a broad range of contexts,[51] such as those identified by Privacy International, in German law and by Solove.[52] A more precise identification of the boundaries of a possible cause of action for invasion of privacy, of the contexts in which it operates and of the bases from which it is drawn, can only be made after we have had the benefit of community consultation. That is therefore a task left to our final Report.

IS THERE NEED FOR MORE GENERAL PROTECTION OF PRIVACY IN NEW SOUTH WALES?

1.21 The Commission has identified five reasons that argue for the introduction of a statutory cause of action for invasion of privacy in New South Wales.

No broad protection of privacy in civil law

1.22 First, and most obviously, the law of New South Wales may not protect privacy as broadly as it should, at least outside the criminal law.[53] As noted above, the protection of privacy is incidental at common law, and legislation affords protection principally to information privacy.[54] If privacy is to protect a broader range of

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50. Which usually place the duty to respect the right on a public authority (rather than on individuals), although the horizontal effect of the instrument may be to create or influence private rights: see R Clayton and H Tomlinson, *The Law of Human Rights* (Oxford University Press, 2000), [5.38]-[5.99].
51. This is a variation of the "concept" of privacy in Sedley LJ's judgment in *Douglas v Hello! Ltd* [2001] QB 967, [126]. The variation is made to allow for context and so that corporations are not necessarily precluded from having access to the cause of action: see *Lenah Game Meats* (2001) 208 CLR 199, [328] (Callinan J).
52. See para 1.15-1.18.
53. The extent to which the criminal law protects privacy is discussed at paras 2.90-2.112.
54. See para 1.9-1.11.

interests, as our discussion of its nature and scope may suggest,[55] reform of the law of New South Wales is necessary.[56]

A more invasive environment

1.23 Secondly, there is at least a widespread perception of an "increasingly invasive social environment"[57] that calls for the greater protection of privacy. In a case in the United States Supreme Court concerning publication in the media of an unlawfully intercepted telephone conversation, Chief Justice Rehnquist said:

> **Technology now permits millions of important and confidential conversations to occur through a vast system of electronic networks. These advances, however, raise significant privacy concerns. We are placed in the uncomfortable position of not knowing who might have access to our personal and business emails, our medical and financial records, or our cordless and cellular telephone conversations.[58]**

1.24 Chief Justice Gleeson cited this passage in *Lenah Game Meats* in the context of calling for the law to show a greater astuteness than in the past "to identify and protect interests of a kind which fall within the concept of privacy".[59]

1.25 One matter that the Commission will address in consultations is the extent to which the social environment in New South Wales is actually more invasive than it has been in the past. In doing so, we will be mindful of the potential of new technologies to enhance privacy rather than simply to act as a threat to it.[60]

Giving effect to Australia's international obligations

1.26 Thirdly, the introduction of a broadly based statutory cause of action for invasion of privacy in New South Wales would implement Australia's international obligations, in particular, article 17 of the ICCPR, which provides:

> **1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.**

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55. See para 1.12-1.18.
56. This accords with views expressed by the Centre for Law and Genetics, *Submission to the ALRC's Review of Privacy*, January 2007 (Professor Margaret Otlowski, Associate Professor Dianne Nicol, Professor Don Chalmers); and by the Australian Government Office of the Privacy Commissioner, *Submission to the ALRC's Review of Privacy – Issues Paper 31*, February 2007, [22]-[31].
57. *Douglas v Hello! Ltd* [2001] QB 967, [111] (Sedley LJ).
58. *Bartnicki v Vopper* 532 US 514, 541 (2001).
59. *Lenah Game Meats* (2001) 208 CLR 199, [40].
60. Doyle and Bagaric, 175-176.

> 2. Everyone has the right to the protection of the law against such interference or attacks.[61]

1.27 Other human rights instruments are to similar effect, including the *Universal Declaration of Human Rights*,[62] the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ("the ECHR"),[63] the *United Nations Convention on the Protection of the Rights of all Migrant Workers and Members of their Families*,[64] and the *United Nations Convention on the Rights of the Child*.[65]

1.28 Interpreting article 17 of the ICCPR, the United Nations Human Rights Committee has stated that privacy includes a "sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone".[66]

1.29 In 1991 Australia acceded to the First Optional Protocol to the ICCPR,[67] which allows individuals subject to the jurisdiction of a State Party to take a complaint concerning a human rights breach by that State to the Human Rights Committee.[68] The complaints procedure is only available after all domestic remedies have been exhausted. The Human Rights Committee then issues a decision on the complaint but the findings and recommendations by the Committee are not binding on federal or State Governments. It is up to the State Party to decide

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61. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] *Australian Treaty Series* 23, art 17 (generally entered into force for Australia 13 November 1980) ("ICCPR").
62. *Universal Declaration of Human Rights*, <www.unhchr.ch/udhr> at 10 January 2007, art 12 (1948).
63. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, <www.echr.coe.int> at 10 January 2007, art 8 (entered into force on 3 September 1953) ("ECHR").
64. United *Nations Convention on the Protection of the Rights of all Migrant Workers and Members of their Families*, opened for signature 18 December 1990, <www.ohchr.org/english/bodies/cmw> at 10 January 2007, art 14 (entered into force 1 July 2003) ("ICMW").
65. *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, <www.ohchr.org/english/countries/ratification/11.htm> at 10 January 2007, art 16 (entered into force 2 September 1990, and for Australia on 16 January 1991) ("CROC").
66. *Coeriel and Aurik v The Netherlands* United Nations Human Rights Committee, 52nd sess, UN Doc CCPR/C/52/D/453/1991, [10.2] (1991).
67. Optional Protocol to the ICCPR, opened for signature 16 December 1966, [1980] *Australian Treaty Series* 39 (entered into force for Australia 25 December 1991).
68. The Human Rights Committee is established under Part IV of the ICCPR to monitor the compliance of State Parties with their human rights obligations under the ICCPR.

how it will respond, so there may be little or no practical benefit for complainants.

1.30 In 1994 the Human Rights Committee opined that Tasmania's laws criminalising homosexual activity between consenting adults violated the complainant's right to privacy under Article 17 of the ICCPR.[69] The Commonwealth and Tasmanian governments subsequently legislated to correct the offending law.[70] Although the ICCPR does not form part of Australian law since it has not been incorporated into domestic law by Parliament,[71] this case demonstrates that it can be indirectly influential. Moreover, like other treaties and conventions, its provisions can be used as an aid in statutory interpretation,[72] in the development of the common law[73] and (less securely) as giving rise to a "legitimate expectation" in administrative law.[74]

1.31 A right to privacy, reflecting the human rights norms outlined above, is contained in the *Charter of Human Rights Act 2006* (Vic) and the *Human Rights Act 2004* (ACT). Both Acts provide that a person has the right:

- not to have his or her privacy, family, home or correspondence unlawfully interfered with; and
- not to have his or her reputation unlawfully attacked.[75]

The experience of other countries

1.32 Fourthly, the experience of other jurisdictions suggests the need for a more general protection of privacy than that currently given by the law of NSW.[76] Although the nature of privacy dictates that the way in which privacy is protected in Australia is peculiarly a question for Australians and Australian law to determine,[77] our historically

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69. *Toonen v Australia* Communications No 488/1992, UN Doc CCPR/C/50/D488/1992 (1994).
70. *Human Rights (Sexual Conduct) Act 1994* (Cth); *Criminal Code Act 1924* (Tas) as amended by Act No 12 of 1997.
71. *Dietrich v The Queen* (1992) 177 CLR 292, 305 (Mason CJ and McHugh J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286 (Mason CJ and Deane J); *Re Minister of Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, [120] ("*Lam*").
72. *Lam* (2003) 214 CLR 1, [100] (McHugh and Gummow JJ).
73. *Lam* (2003) 214 CLR 1, [100] (McHugh and Gummow JJ).
74. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. But see *Lam* (2003) 214 CLR 1, [84]-[102] (McHigh and Gummow JJ).
75. *Charter of Human Rights Act 2006* (Vic) s 13 and *Human Rights Act 2004* (ACT) s 12.
76. See Chapters 3-6.
77. *Lenah Game Meats* (2001) 208 CLR 199, [332] (Callinan J dissenting).

close ties with the United Kingdom, and perhaps especially with New Zealand, suggest that the traditional approach of our law at least requires reconsideration. While it is true that the laws of both these jurisdictions now have to take account of a human rights framework, this does not mean that developments in those jurisdictions are totally irrelevant to Australia. In particular, it is worth noting that the weak protection given to privacy at common law has not prevented the development of a tort of invasion of privacy in New Zealand, notwithstanding the absence of right to privacy in the *New Zealand Bill of Rights Act 1990* (NZ).[78] In addition, it is arguable that the increased protection afforded to privacy in English law is attributable to a natural development in the common law, rather than to a "shift in the centre of gravity" in the doctrine of breach of confidence prompted by the *Human Rights Act 1998* (UK).[79]

1.33 The developments in common law and other jurisdictions provide extensive information and background – in case law, legislation, law reform reports, government inquiries and academic commentary – from which the ingredients of a cause of action for invasion of privacy can be derived.[80] Chapters 3-5 of this Issues Paper give an overview of, and analyse, these developments to inform and facilitate our consultations on this issue.

The weakening of privacy protection in defamation law

1.34 Fifthly, legislation has removed the indirect protection afforded to privacy in the law of defamation. Before 1 January 2006, defendants could justify the publication of a defamatory imputation on the ground that it was true *and* that it related to a matter of public interest.[81] The linkage of truth and public interest prevented a defendant escaping liability in defamation simply by proving that what had been published of and concerning the plaintiff was true. The object was to protect privacy interests by discouraging the publication of private facts. For example, if the defendant published a statement that the 60 year old plaintiff was a thief, and the evidence was that the plaintiff had been convicted of shop lifting when he was 18, the defendant may not have been able to raise a defence of justification. Even though the statement was true, it may not have related to a matter of public interest. In short, it may simply have invaded the

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78. *Hosking v Runting* [2005] 1 NZLR 1.
79. See *Campbell v MGN Ltd* [2004] 2 AC 457, [86] per Lord Hope, doubting Lord Hoffman's assertion to the contrary: at [51].
80. See Centre for Law and Genetics, *Submission to the ALRC's Review of Privacy*, January 2007 (Professor Margaret Otlowski, Associate Professor Dianne Nicol, Professor Don Chalmers).
81. *Defamation Act 1974* (NSW) s 15(2).

plaintiff's privacy.[82] The *Defamation Act 2005* (NSW), enacted as part of a uniform law initiative, now enables the defendant in these circumstances to rely only on the substantial truth of the matter published.[83]

SHOULD DEVELOPMENT OF AN ACTION FOR INVASION OF PRIVACY BE LEFT TO THE COMMON LAW?

1.35 The arguments in favour of the more general protection of privacy leave open the question whether a cause of action for invasion of privacy should be developed by statute or at common law. At common law, such a development could occur through the expansion or transformation of one or more of the existing actions that currently protect privacy interests, breach of confidence being the most likely candidate. For reasons that we explain elsewhere, we regard this approach as unsatisfactory.[84] This leaves the possibility of the development of a common law tort of invasion of privacy, there being nothing in the common law of Australia to prevent such a development.[85]

1.36 The development of such an action may arguably have advantages in comparison to the enactment of a statutory cause of action. The action could evolve to address identified issues and respond to specific needs as they came before the courts. Judges are well placed to know the types of privacy claims that are being litigated, and the gaps in the current law that cause injustice by failing to prevent serious incursions into privacy from being remedied appropriately. Over the course of time, the scope and substance of the tort action would be carefully developed on a case by case basis, other competing interests and considerations being carefully balanced against the right to bring the action for invasion of privacy. Such common law evolution would be appropriate given the nebulous nature of privacy as a concept, and the difficulty any legislature would undoubtedly have in precisely pinning it down.[86]

82. See NSW Law Reform Commission, *Defamation* Report No 75 (1995), [2.33].
83. *Defamation Act 2005* (NSW) s 25.
84. See para 2.79-2.85, 2.86-2.89.
85. *Lenah Game Meats* (2001) 208 CLR 199, [107], [132] (Gummow and Hayne JJ, with whom Gaudron J agreed); [187] (Kirby J); [316]-[320] (Callinan J dissenting). For a full consideration of this case, see para 2.19-2.25.
86. See par 2.19.

1.37 However, with few exceptions,[87] Australian judges, like their English counterparts, have shown a marked reluctance to find a tort of invasion of privacy in the common law.[88] The reasons are easy to understand. Finding such a tort means generalising the specific instances of privacy protection in the common law by asserting that the common law has now reached a stage of development that justifies the articulation of a general principle of privacy from which it is appropriate that the further development of the law should take place.[89] Apart from the difficulty of articulating the general principle,[90] most judges obviously doubt that the common law has reached that stage of development. In such circumstances, judges are naturally reluctant to elevate a value, currently protected incidentally[91] and weakly,[92] in other torts or causes of action into a "right" that everyone is then under a duty to respect as such, and, if they do not do so, to become subject to civil liability. To go down this path before litigation clearly establishes the need for such a right and corresponding duty would involve making assumptions about the nature of contemporary society and the demands of its citizens. Making those assumptions prematurely would expose the courts to the charge of usurping the role of the legislature to make new law. Even judges sympathetic to the development of a cause of action for invasion of privacy have questioned whether it ought to be established by the courts rather than by Parliament.[93]

1.38 The Commission is of the view that left to the common law, a cause of action for invasion of privacy is unlikely to develop in the foreseeable future.[94] Even if a majority of judges were favourably disposed to the development of a common law tort, they would need to wait for the appropriate case to come before the courts, leaving the statutory path to reform of the law potentially swifter and surer.

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87. See *Grosse v Purvis* [2003] QDC 151; *Jane Doe v Australian Broadcasting Commission* [2007] VCC 281. See para 2.26-2.31.
88. *Lenah Game Meats* (2001) 208 CLR 199. See also *Wainwright v Home Office* [2004] 2 AC 406. Compare *Hosking v Runting* [2005] 1 NZLR 1.
89. *Lenah Game Meats* (2001) 208 CLR 199, [132] (Gummow and Hayne JJ).
90. See para 1.12.
91. See para 1.11.
92. See especially P Stein and J Shand, *Legal Values in Western Society* (Edinburgh University Press, 1974) ch 8, esp 200-201.
93. See *Lenah Game Meats* (2001) 208 CLR 199, [335]-[336] (Callinan J dissenting).
94. A pessimism shared by Justice Callinan: see *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27, [216]. See also R Wacks, "Why there will Never be an English Common Law Privacy Tort" in A Kenyon and M Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge UP, 2006) 182.

1.39 However, the Commission acknowledges three potential problems with introducing a cause of action for invasion of privacy by statute, rather than allowing one to develop at common law. Our preliminary view is that none of these provides a convincing reason for rejecting the statutory path to reform.

1.40 The first difficulty is that, as we have already noted,[95] privacy is almost impossible to pin down definitively in a meaningful or accurate way. Potentially this leaves the field of operation of any proposed cause of action extremely uncertain, making it difficult for those who wish to know whether or not an action for invasion of privacy exists, and, perhaps more significantly, for those who are unsure whether their actions may constitute a breach.

1.41 The position is different in those systems of law that have a statutory cause of action for invasion of privacy but also have human rights legislation and a significant body of case law on aspects of privacy. This has helped to guide and contextualise the meaning of privacy in those jurisdictions.[96] In New South Wales, the absence of such a context potentially leaves the scope and operation of a legally enforceable right to privacy too uncertain. The danger is reduced if the courts develop a tort of invasion of privacy incrementally from case to case without having to articulate the boundaries of the cause of action at the outset.[97]

1.42 The Commission does not underestimate the difficulty of achieving sufficient certainty in any statutory reform of privacy law. An extreme response is possible: the creation of a cause of action that narrowly protects a particular aspect of privacy and carefully defines it – for example, a civil action against defendants who have appropriated plaintiffs' identities.[98] A broader cause of action is, however, needed if privacy is to be protected more generally. There are many examples of the creation of broadly based statutory obligations whose essential meaning remains undefined, or defined in such an indeterminate way, that their application to particular fact situations is necessarily left to subsequent case law. Examples are the requirement of "fair conduct" (however described) in trade practices and fair trading legislation[99] or the prohibition of "discrimination" in

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95. See para 1.12-1.13.
96. See Chapters 3-5.
97. See par 1.11.
98. For example, *Privacy Act,* RSBC 1996 c 373, s 3(2) (British Columbia), discussed at para 3.42, 5.15-6.17.
99. See *Trade Practices Act 1974* (Cth) pt V; *Fair Trading Act 1987* (NSW) pt 5.

equal opportunity legislation.[100] The courts' interpretation of such statutory obligations in their application to the facts of particular cases resembles the incremental development of the common law. However, the courts' interpretation of these obligations is at least directed by context, however broadly stated – for example, "trade and commerce" in the case of fair trading legislation[101] or the identification of the areas in which equal opportunity legislation is to operate.[102] By contrast, in the case of privacy, there is simply no given context.

1.43 A statute enacting a broadly based statutory cause of action for invasion of privacy must, therefore, at least identify the contexts in which it is intended to apply. Moreover, in an environment where the primary objective of statutory interpretation is to give effect to the purposes of the statute,[103] the statute should also ideally clarify its purposes. To the extent to which it identifies its purposes and contexts, the lack of specificity in the notion of privacy is not necessarily an insurmountable problem. In Chapter 6, the Commission, noting that statutory causes of action for breach of privacy have been developed or recommended in other common law jurisdictions,[104] addresses the possible ways in which this may be achieved.

1.44 A second difficulty with the development by statute of a cause of action for invasion of privacy is the practical and symbolic effect that the creation of such a cause of action would have on other rights and interests that lack a legislative basis. Jurisdictions that currently provide for a statutory cause of action for invasion of privacy generally do so within broader constitutional or human rights frameworks that recognise a "right to privacy" alongside other rights and interests, such as freedom of speech and national security. Without privileging one over another,[105] courts in these jurisdictions engage in a delicate balancing act, giving appropriate weight to the various rights and interests based on the facts at hand. This is important not only for the sake of clarity, but for balancing countervailing rights and interests,

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100. See NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977*, Report No 92 (1999) ch 2.
101. See especially *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; C Lockhart, *The Law of Misleading or Deceptive Conduct* (2nd ed, LexisNexis Butterworths, 2003), 37-57.
102. See *Anti-Discrimination Act 1977* (NSW) pt 4.
103. *Interpretation Act 1987* (NSW) s 33.
104. See para 3.42-3.63, 6.2-6.23.
105. Because "qualified" rights are here in issue. Human rights (such as the right to life) may also be "unqualified", in which case they are not weighed against other rights: see R Clayton and H Tomlinson, *The Law of Human Rights* (Oxford University Press, 2000), [6.86]-[6.104].

such as freedom of speech and national security, which are arguably more readily definable than privacy, and may, therefore, be more easily established.[106] Apart from the limited freedom of political communication implied in the Constitution,[107] there is no broad *legislative* protection or recognition of rights applicable to New South Wales that could counterbalance privacy. While any cause of action for privacy violation that is statutorily based and is not a code, would necessarily recognise and balance other competing common law interests (such as freedom of speech),[108] the creation of a statutorily based right of action for invasion of privacy alone runs the risk of creating the impression that privacy rights automatically take precedence unless competing interests are sufficient to displace them.

1.45 The implication is that a statutory cause of action for invasion of privacy should carefully consider the weight that ought to be given to relevant countervailing interests.[109] In particular, the legislation should consider whether such interests ought to feature in the formulation of the elements of the cause of action itself, or should be available as defences to the statutory right. The practical importance relates to the burden of proof: if a matter is an element of the cause of action, the plaintiff must establish it as part of his or her case; but if it is a defence, the burden of establishing it rests on the defendant.[110] Putting the burden of the countervailing consideration on the defendant rather than the plaintiff could, for example, give undue weight to privacy at the expense of that countervailing consideration.

1.46 Thirdly, if New South Wales were to introduce a statutory cause of action for invasion of privacy, it would be the only jurisdiction in Australia to have such an action. This would create a lack of uniformity in the laws of the several Australian jurisdictions that would not occur if the change occurred as part of the development of the common law of Australia. The Commission is reluctant to promote any reform of the law that immediately results in a lack of uniformity between the laws of Australian jurisdictions. However, the following considerations should be borne in mind:

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106. This point was recognised by the High Court in *Lenah Game Meats* (2001) 208 CLR 199, [181], [207].
107. See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. The implied freedom creates no private right of action: at 575.
108. An important interest at common law: see *Lange*, 564-565.
109. This point was made in relation to respect for artistic freedom by the Arts Law Centre of Australia, *Submission to the ALRC's Review of Privacy*, 15 January 2007.
110. See paras 7.47-7.48.

- There is already discrepancy between the laws of Victoria and the Australian Capital Territory on the one hand and the laws of other Australian jurisdictions on the other, to the extent to which Victoria and the ACT recognise privacy as a human right.[111] While the Commission recognises that the context in which the human rights legislation of these jurisdictions is operative is limited,[112] that legislation is at least indicative of a trend towards the greater protection of privacy within Australia. There is also significant divergence between the statutory laws of the various Australian jurisdictions dealing with privacy regulation.[113]
- It is possible that the enactment of a statutory cause of action for invasion of privacy in New South Wales would influence the development of the common law of Australia. If NSW were to enact a cause of action for invasion of privacy, the general law would continue to protect privacy incidentally in the actions mentioned above.[114] However, in the course of deciding cases, courts in NSW would confront the relationship between the statutory cause of action and the general law. If the statutory right to protection of privacy were broadly based, this would likely provoke incisive analyses of the rationale and boundaries of the relevant general law causes of action. In turn, this may provide the impetus to the development of a more general action for invasion of privacy at common law, which, at least in theory, would have the potential to be more flexible, and perhaps more expansive, than the statutory right.
- The context of this reference, which involves collaboration between the Commission and the ALRC, at least ensures that the objective of achieving consistency between New South Wales and federal statutory law is constantly in view.

The Commission's conclusion

1.47 The Commission's provisional conclusion is that, if a cause of action for invasion of privacy is to be introduced into the law of New South Wales, it is preferable to do so by statute rather than by leaving it to common law development.[115]

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111. See para 1.31.
112. See, for example, *Charter of Human Rights and Responsibilities Act 2006* (Vic) pt 3 (defining the public context in which the legislation applies).
113. See ALRC, *Review of Privacy*, Issues Paper No 31 (2006), ch 2.
114. See para 1.11. See also para 2.39-2.89.
115. See R Wacks, "Why there will Never be an English Common Law Privacy Tort" in A Kenyon and M Richardson (eds), *New Dimensions in Privacy Law* (Cambridge UP, 2006) 154, 182-183.

CONSIDERATIONS UNDERLYING THE CASE FOR REFORM

1.48 Four factors need to be borne in mind in considering any proposal for the introduction of a statutory cause of action for invasion of privacy in New South Wales.

The constitutional implication of freedom of political communication

1.49 The introduction of a statutory cause of action for invasion of privacy in New South Wales will take effect subject to the constitutional implication of freedom of political communication, which invalidates State legislation to the extent to which it operates as a burden on the freedom.[116] While the scope of the implication is probably limited,[117] its potential application means that it is necessarily crucial to the formulation of any statutory cause of action in New South Wales.

The criminal law and privacy

1.50 Privacy interests are protected to some extent in the criminal law, and the availability of criminal sanctions could conceivably negate the need for the development by statute of a civil action for invasion of privacy. In Chapter 2, we outline the extent to which criminal responsibility is imposed on offenders for breach of privacy interests.

1.51 Our tentative conclusion is, first, that the protection of privacy interests in the criminal law of New South Wales is not as widespread as may be appropriate; secondly, and in any event, that, depending on circumstance, invasions of privacy should be capable of generating civil or criminal responsibility, or both. For example, if a defendant has, for the purposes of sexual gratification, used equipment hidden on his body to film underneath the skirts of female passengers on public transport over a period of time,[118] it is right that he should be

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116. See especially *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 523.
117. For the scope of the implication, see M Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, 2000) ch 2.. See also A Stone, "Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication" (2001) 25 *Melbourne University Law Review* 13; G Taylor, "Why the Common Law Should be only Indirectly Affected by Constitutional Guarantees; A Comment on Stone" (2002) 26 *Melbourne University Law Review* 623; D Meagher, "What is Political Communication? The Rationale and Scope of the Implied Freedom of Political Communication" (2004) 28 *Melbourne University Law Review* 438.
118. In Melbourne, a man was caught using hidden cameras in his sneakers secretly to film underneath the skirts and dresses of female train and tram commuters: see "Camera 'shot up skirts'", *The Australian* (Sydney), 18 January 2007, 5. In a separate case, a man was charged with several

criminally responsible for his conduct, which may have affected countless unknown "victims". If such a defendant is criminally liable in New South Wales,[119] criminal responsibility would not be an adequate response if one of his victims became aware that she was being filmed and, as a result, suffered distress and humiliation. In our view, such a victim ought to have access to civil remedies to seek redress for the invasion of her privacy.

1.52 It is true that, if the conduct in question were to give rise to criminal responsibility, the victim might be able to obtain compensation from the State or pursuant to an order of the sentencing court.[120] However, victims of privacy invasion may be unable to bring themselves within the provisions of the legislation, which, relevantly, does not provide compensation for mere distress and humiliation,[121] and limits compensation to crimes of violence in the case of State compensation.[122] Moreover, limits (generally $50,000) are placed on the amount of compensation that can be awarded under the legislation.[123] In any event, compensation may be inadequate to address the conduct in question. For example, victims of peeping Toms[124] may need access to civil remedies (such as injunction) to prevent future instances of the occurrence of the offending conduct.

Integrating a statutory cause of action within the current privacy framework

1.53 Existing mechanisms for the protection of privacy in NSW, such as those in the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW),[125] have a different focus and offer different remedies from the cause of action discussed in this paper. Determining how a cause of

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offences after he was caught filming women showering in a backpackers' hotel in Melbourne and taking an "upskirt" photo of a woman at the Australian Open tennis tournament: see "New laws on the way to tackle perverts", *The Australian* (Sydney), 26 January 2007, 1.

119. Consider *Summary Offences Act 1988* (NSW) s 4, Compare s 21G. And see further, paras 2.90-2.112.
120. *Victims Support and Rehabilitation Act 1996* (NSW) pt 2 (State compensation), pt 4 (court ordered payments).
121. *Victims Support and Rehabilitation Act 1996* (NSW) pt 2 div 1 and 2, and "compensable injury" in sch 1 (State compensation); s 71(1), read with the definitions of "aggrieved persons" in s 70(a) and "injury" in the Dictionary (court ordered payments).
122. For example to "compensable" injury in the case of State compensation and to $50,000 in the case of court-ordered compensation: see, respectively, *Victims Support and Rehabilitation Act 1996* (NSW) Sch 1; s 71.
123. *Victims Support and Rehabilitation Act 1996* (NSW) s 19(1) (State compensation); s 77(1) (court ordered payments). Compare s 77C(b).
124. See *Crimes Act 1900* (NSW) s 547C.
125. These are discussed in para 2.8-2.9.

action for invasion of privacy will be integrated with the existing statutory regulation of information privacy is a challenge that the Commission needs to address during the course of this reference.

Potential undesirable consequences of a statutory cause of action

1.54 The Commission is conscious that the availability of a statutory cause of action for invasion of privacy can operate in practice in an undesirable way. In particular, it is impossible to come away from a review of developments in the law in Australia, New Zealand, the United Kingdom and Europe without suspecting that a statutory cause of action for invasion of privacy is likely to be used mainly by celebrities or corporations in order to protect their commercial interests or, simply, to attempt to suppress freedom of speech. Whatever the exact relationship between privacy and freedom of speech in any particular context,[126] and regardless of whether or not there are circumstances in which privacy ought to protect commercial interests,[127] the Commission regards it as axiomatic that a statutory cause of action should aim to make its protection available to all members of the community whose privacy is relevantly breached. Any reform proposal must, therefore, investigate the overall regulatory framework in which privacy will develop. Within that framework, expensive litigation ought not to be the only means of establishing a relevant invasion.[128] As part of its overall reference, the Commission will, therefore, be examining the regulatory framework of privacy in New South Wales and possible avenues for redress other than through litigation in the courts.

THE NEXT STEP

1.55 Whether or not there is a case for the introduction of a statutory cause of action in New South Wales needs to be tested in community consultation. The challenge of consultation is to close the gap between the law and policy revealed in cases and the literature, which this Paper discusses, and the current sentiment in the New South Wales community as to whether or not privacy stands in need of greater protection in the civil law.

126. See para 7.38-7.42.
127. See para 7.51-7.55.
128. See Sir Stephen Sedley, "Towards a Right to Privacy" *London Review of Books* (London), 8 June 2006, 20, 22-23.

The Commission's approach

1.56 We make two proposals in this Issues Paper. On the assumption that a statutory cause of action for invasion of privacy should be introduced in New South Wales, we propose that the statute should take a particular form.[129] In addition, we propose that a range of remedies should be available in response to the cause of action.[130]

1.57 These proposals are put forward simply for the purpose of providing a framework for the discussion of the issues that arise if a statutory cause of action should be introduced. They represent a model of a statutory cause of action for invasion of privacy that the Commission, at this stage of its inquiry, views as, overall, the most suitable for adoption in the law of NSW. They do not represent a provisional view on whether or not a statutory cause of action should be introduced in New South Wales. Nor, assuming that a statutory cause of action for invasion of privacy should be introduced in NSW, do they represent our final view on the model that the statutory cause of action should take.

1.58 To facilitate community consultation, the Commission poses a number of questions that focus on the major issues that relate to the introduction of a statutory cause of action for invasion of privacy. These questions are listed at pages x-xi. The Commission invites submissions on these questions and other issues raised in this Consultation Paper.

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129. See p 160 (Proposal 1).
130. See p 202 (Proposal 2).

2. Privacy in Australian law

- Introduction
- Statutory regulation
- The common law of Australia
- The criminal law and privacy

INTRODUCTION

2.1 This chapter surveys the current law of privacy in Australia. It has three particular objectives:

- to give an overview of the various federal and New South Wales statutes relating to privacy, which generally establish regulatory regimes concerned with "information privacy", rather than provide causes of action for invasion of privacy;
- to assess the adequacy of the common law of Australia, which does not provide a general civil cause of action for invasion of privacy, but which protects privacy interests in specific causes of action; and
- to examine the scope of protection of privacy in criminal law.

STATUTORY REGULATION

Commonwealth

2.2 The main federal privacy statute is the *Privacy Act 1988* (Cth) ("*Privacy Act*"). It regulates the handling of an individual's personal information, which is defined as "information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion."[1]

2.3 Initially, the *Privacy Act* applied exclusively to the Commonwealth and Australian Capital Territory ("ACT") public sectors. Commonwealth and ACT public sector agencies are required to comply with Information Privacy Principles (IPPs) relating to the collection, storage, use and disclosure of personal information.

2.4 In 1990, the coverage of the *Privacy Act* was extended to consumer credit reporting. Provisions were added for the purpose of regulating the handling by credit reporting agencies and credit providers of credit reports and other information on the creditworthiness of individuals.[2]

2.5 In 2000, amendments to the *Privacy Act* established a further set of privacy principles, known as the National Privacy Principles (NPPs), which apply to the private sector entities that fall within its

1. *Privacy Act 1988* (Cth) s 6(1).
2. *Privacy Act 1988* (Cth) pt IIIA.

definition of "organisation". It defines "organisation" as an individual, body corporate, partnership, or any other unincorporated association or trust that is not exempt from the operation of the *Privacy Act*.[3] Among those that are exempt are small businesses (defined as those that had an annual turnover of $3 million or less in the previous financial year)[4], registered political parties[5] and media organisations.[6]

2.6 There are a number of other federal statutes relating to dealings with personal information. For example, the handling of tax file numbers is regulated by various statutes, such as the *Income Tax Assessment Act 1936* (Cth), *Taxation Administration Act 1953* (Cth) and *Data-matching Program (Assistance and Tax) Act 1990* (Cth).[7]

2.7 Other significant federal statutes relating to privacy include the following:

- The *Freedom of Information Act 1982* (Cth) grants every person a right to access documents held by government agencies or Ministers, including information about the person who is seeking access. The Act provides for exemptions, such as documents relating to national security, defence or international relations, cabinet documents, internal working documents of government agencies and Ministers, documents subject to legal professional privilege, documents affecting personal privacy, etc.[8] The Act also provides a right for an individual to have personal information relating to him or her amended by the relevant government body.[9] Similar access and amendments rights are provided by the *Privacy Act* and the parallel State information privacy statutes.

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3. *Privacy Act 1988* (Cth) s 6C(1).
4. *Privacy Act 1988* (Cth) s 6D(1).
5. *Privacy Act 1988* (Cth) s 6C(1).
6. *Privacy Act 1988* (Cth) s 7B(4).
7. There are provisions under other federal legislation that require or authorise certain acts involving the collection, use and disclosure of personal information. For example, the *Census and Statistics Act 1905* (Cth) and the *Commonwealth Electoral Act 1918* (Cth) require or authorise the collection of large amounts of personal information. Other Acts require or authorise the disclosure of personal information in a range of circumstances, such as the *Australian Passports Act 2005* (Cth), *Corporations Act 2001* (Cth), *Telecommunications Act 1997* (Cth) and *Migration Act 1958* (Cth).
8. See *Freedom of Information Act 1982* (Cth) pt IV (exempt documents). For a recent decision illustrating one class of exempt documents (internal working doucments of govenrment agencies or Ministers), see *McKinnon v Secretary, Department of Treasury* [2006] HCA 45.
9. See *Freedom of Information Act 1982* (Cth) pt V (amendment and annotation of personal records).

This is the main area of overlap between freedom of information and information privacy statutes.[10]

- The *Telecommunications (Interception and Access) Act 1979* (Cth) safeguards the privacy of individuals when using the telecommunications system, telephones in particular. It does this by making it an offence to intercept communications passing over the telecommunications system, while balancing this with Australia's law enforcement and national security interests. It specifies the circumstances in which it is permissible for law enforcement agencies and the Australian Security Intelligence Organisation to intercept communications under the authority of a warrant, subject to reporting and accountability mechanisms.
- The *Australian Postal Corporation Act 1989* (Cth) safeguards the privacy of individuals when using the postal services system. It does this by making it an offence to open or examine articles while they are in the course of the post and under the control of the Australian Post.[11]

New South Wales

2.8 In New South Wales, the *Privacy and Personal Information Protection Act 1998* (NSW) is the main privacy statute. It regulates the handling of personal information (excluding health information)[12] by New South Wales public sector agencies. Unlike the Commonwealth *Privacy Act*, it does not cover the private sector. It sets out Privacy Protection Principles ("PPPs") that are similar, but not identical, to the IPPs found in the Commonwealth Act.[13] It defines personal information as "information

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10. There are at least two areas of potential friction or conflict. The first is where a document subject to protection from disclosure under an information privacy statute is required to be disclosed under freedom of information legislation. The second is where a person who has rights of access and amendment under information privacy laws has similar rights which are subject to differently worded exceptions under freedom of information legislation: see M Paterson, *Freedom of Information and Privacy in Australia* (Butterworths, 2005), [1.46]-[1.51].
11. See *Australian Postal Corporation Act 1989* (Cth) pt 7B (dealing with articles and their contents).
12. *Privacy and Personal Information Protection Act 1998* (NSW) s 4A.
13. There are a number of differences between the federal IPPs and the New South Wales PPPs. For example, in relation to the principle relating to storage and security of personal information, the NSW Act provides that the relevant public sector agency must not keep information longer than necessary. Further the agency must ensure secure disposal of personal information, in accordance with retention and disposal requirements:

or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion."[14]

2.9 In addition to the *Privacy and Personal Information Protection Act 1998* (NSW), the following are some of the most significant New South statutes relating to privacy:

- The *Health Records and Information Privacy Act 2002* (NSW) protects the privacy of an individual's health information.[15] It does this by requiring those who handle health information to comply with 15 Health Privacy Principles.[16] It covers New South Wales public sector agencies and any "private sector person", which is defined as a natural person (for example a GP, physiotherapist, optometrist, etc), a body corporate, a partnership, a trust or any unincorporated association or body. Small businesses, as defined by the *Privacy Act*, are exempt.[17]
- The *Workplace Surveillance Act 2005* (NSW) prohibits the surveillance by employers of their employees, except where the employer notified the employees about the surveillance, or where the employer has a covert surveillance authority granted by a Supreme Court judge. The forms of surveillance that are regulated by the Act are: (1) camera surveillance; (2) computer surveillance (including the sending and receipt of emails and the

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Privacy and Personal Information Act 1998 (NSW) s 129(a) and (b). The Commonwealth IPPs are silent on this matter

14. *Privacy and Personal Information Protection Act 1998* (NSW) s 4(1). The wording is similar to the definition in the Commonwealth *Privacy Act.* However, the main difference between the two definitions is that the New South Wales Act contains a list of exceptions. It excludes from the definition, among other things, information about an individual who has been dead over 30 years, that is contained in a publicly available publication and information arising out of various Acts such as the *Witness Protection Act 1995* (NSW): *Privacy and Personal Information Act1998* (NSW) s 4(3).
15. The Act defines health information as personal information or an opinion about an individual's physical or mental health or disability, an individual's express wishes about the future provision of health services to him or her, or a health service provided to an individual. It also includes other personal information collected in providing a health service, or other personal information about an individual collected in connection with the donation of an individual's body parts, organs or body substances. Further, it includes genetic information about an individual arising from a health service provided to the individual in a form that is or could be predictive of the health of the individual or any of his or her siblings, relatives or descendants: *Health Records and Information Privacy Act 2002* (NSW) s 6.
16. See *Health Records and Information Privacy Act 2002* (NSW) sch 1.
17. *Health Records and Information Privacy Act 2002* (NSW) s 4.

accessing of internet websites); and (3) tracking surveillance (such as the use of a Global Positioning System tracking device).[18]

- The *Listening Devices Act 1994* (NSW) prohibits the use of a listening device to listen to or record a private conversation, unless such use falls within one of the exceptions specified by the Act, or is authorised by a warrant granted by a judge of the Supreme Court.
- The *Crimes (Forensic Procedures) Act* 2000 (NSW), which identifies the circumstances in which forensic procedures can be performed on certain persons and makes provision for a DNA database, contains the general statement that forensic procedures "must be carried out in circumstances affording reasonable privacy to the suspect".[19] The Act also contains a general prohibition on the disclosure of information revealed by a forensic procedure or stored on the DNA database,[20] and provides that a recording of a forensic procedure must be stored so as to protect it against unauthorised access.[21]
- The *Freedom of Information Act 1989* (NSW) gives every person a right to obtain information held as records by New South Wales government agencies, Ministers, local government and other public bodies. Like its federal counterpart, the Act grants access and amendment rights to an agency's records or documents.[22] The *States Records Act 1998* (NSW) and the *Local Government Act*

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18. *Workplace Video Surveillance Act 2005* (NSW) s 3. A question arises as to the continuing operation of the *Workplace Surveillance Act 2005* (NSW) by reason of recent amendments to the *Workplace Relations Act 1996* (Cth). As amended, the *Workplace Relations Act 1996* (Cth) applies to the exclusion of State or Territory industrial laws, including an Act of a State or Territory that applies to employment generally and has as one or more of its main purposes (among others): regulating workplace relations (including industrial matters) or providing for the terms and conditions of employment: *Workplace Relations Act 1996* (Cth) s 4, 16. The *Workplace Relations Act 1996* (Cth) identifies matters covered by State or Territory laws which it does not exclude ("non-excluded matters"), such as workers compensation, occupational health and safety, child labour, long service leave, etc: *Workplace Relations Act 1996* (Cth) s 16(3). The matters dealt with in the *Workplace Surveillance Act 2005* (NSW) do not appear do come under the "non-excluded matters" under the *Workplace Relations Act 1996* (Cth). The High Court has upheld the validity of s 16 of the *Workplace Relations Act 1996* (Cth): *New South Wales v Commonwealth* [2006] HCA 52.
19. *Crimes (Forensic Procedures) Act 2000* (NSW) s 44(a).
20. *Crimes (Forensic Procedures) Act 2000* (NSW) s 109.
21. *Crimes (Forensic Procedures) Act 2000* (NSW) s 110(2). The recording must generally be electronic: s 57(1).
22. See *Freedom of Information Act 1989* (NSW) pt 3 (access to documents), pt 4 (amendment of records).

1993 (NSW) also provide rights of access to New South Wales government records.[23]

The nature of statutory regulation

2.10 The various federal and New South Wales privacy statutes are regulatory and prescriptive in nature in the sense that they govern conduct by government agencies and the private sector when dealing with the subject matter of the relevant legislation. They provide penalties for contravention of their provisions, such as criminal fines or imprisonment.[24] Some of them provide for the remedy of injunction.[25] As a general rule, they do not provide for civil liability for breach of their provisions. Those that do contain civil liability provisions have complex requirements and do not allow parties to go directly to the courts for a remedy.[26]

2.11 The Commonwealth *Privacy Act*, for example, does not provide for direct civil action by individuals against agencies or organisations that breach the Act. The only compensation available to complainants is through the Privacy Commissioner's power to make a declaration that a complainant is entitled to a specified amount by way of compensation for any loss or damage suffered by reason of the act or practice the subject of the complaint.[27] Such a determination is not binding on the parties. This is because Commonwealth judicial power can only be exercised by a court in accordance with Chapter III of the *Constitution*.[28] However, the Privacy Commissioner's determination may be enforced through proceedings in the Federal Court or the Federal Magistrates Court.[29] Since the commencement of the *Privacy*

23. See *States Records Act 1998* (NSW) pt 6 (public access to State records after 30 years); *Local Government Act 1993* (NSW) pt 2 (access to information).
24. See *Privacy and Personal Information Protection Act 1998* (NSW) s 62; *Listening Devices Act* 1984 (NSW) s 11; *Workplace Video Surveillance Act* 1998 (NSW) ss 15-9.
25. See, for example, *Privacy Act 1988* (Cth) s 98(1); *States Records Act 1998* (NSW) s 72.
26. The *Telecommunications (Interception and Access) Act 1979* (Cth) is an exception in expressly granting courts the power to give civil remedies for breaches of certain of its provisions. Section 107A (dealing with the communication or use of an intercepted communication) and s 165 (dealing with the contravention of provisions relating to accessing stored information) provide for a range of civil remedies, including damages (s 107A(7), 165(7)), which, in this context, include "punitive damages": s 107A(10), 165(10).
27. *Privacy Act 1988* (Cth) s 52(1)(b)(iii).
28. See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.
29. *Privacy Act 1988* (Cth) s 55A.

Act in 1989, the Privacy Commissioner has made only 2 determinations containing compensation for loss or damage.[30]

2.12 The *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW) currently provide for a system of complaints and review concerning privacy related matters.[31] Under those Acts, there are two avenues of redress for those who feel their privacy has been invaded. The first is by way of complaint to Privacy NSW.[32] The Privacy Commissioner may decide either to investigate and conciliate the complaint, refer it to a more appropriate agency,[33] or decline to investigate the matter.[34]

2.13 The other method of complaint can occur where a person believes his or her privacy has been invaded by a NSW public sector organisation. In such a case, the person can direct the organisation to conduct an internal review of the conduct that led to the complaint.[35] Privacy NSW is responsible for overseeing internal reviews. Should an individual be unhappy with the outcome of a public sector agency's internal review, he or she may take the matter to the Administrative Decisions Tribunal ("the ADT"). The ADT has the power to order the agency to change its practices and policies, to apologise to the complainant, or to take steps to remedy the damage caused. Compensation is available in limited circumstances where the complainant has suffered financial loss, or physical or psychological damage, up to a maximum of $40,000. The option of review by the ADT is not available for complainants who elect to have the Privacy Commissioner deal with the matter.

2.14 While the existing complaints mechanisms offer some redress for invasions of privacy, they do not provide complete coverage. For

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30. See <http://www.privacy.gov.au/act/casenotes/index.html#comdet> at 1 December 2006. Both cases involved disclosure of personal information by government agencies. The Privacy Commissioner determined $2,643.00 in one case and $5,000 in the other as appropriate compensation.
31. See para 2.8-2.9 for further discussion.
32. See *Privacy and Personal Information Protection Act 1998* (NSW) Part 4, and *Health Records and Information Privacy Act 2002* (NSW) Parts 3 and 6.
33. For example, the NSW Ombudsman, the Health Care Complaints Commission or the Anti-Discrimination Board.
34. For example, the Privacy Commissioner may decide not to investigate a complaint if he considers it to be lacking in substance, vexatious or frivolous. The Acting Privacy Commissioner estimates that approximately 20 per cent of enquiries and complaints made to Privacy NSW are not investigated for these reasons: letter from John Dickie, Acting Privacy Commissioner, Privacy NSW, to the NSWLRC, 21 February 2007.
35. See *Privacy and Personal Information Protection Act 1998* (NSW) Part 5 and *Health Records and Information Privacy Act 2002* (NSW) Part 3.

example, the option of directing an agency to conduct an internal review, with the possibility of review by the ADT, is an effective one. However, it is only available in relation to complaints against NSW public sector organisations. The alternative option of lodging a complaint with the Privacy Commissioner can be used in relation to a broader range of complaints made against individuals or private sector agencies, but lacks an external review component, and is only effective in cases where conciliation is possible.

2.15 The various privacy statutes deal mainly with privacy interests relating to personal information, personal communications, and work-related behaviour. They do not cover many other forms of privacy, for example, the interest in freedom from interference with one's person or "personal space", other than in the employer-employee context. The remedies they provide, including their narrow civil liability provisions, would only be available for the incursions of specific privacy interests regulated by the statutes. For civil liability arising from invasions of privacy in general, one must look to the general law, which is the repository of various doctrines governing liability for causing harm to others.

THE COMMON LAW OF AUSTRALIA

2.16 This section addresses the scope of protection that the common law of Australia offers to privacy. In doing so, it draws not only on Australian case law but also on relevant English case law. It does so where there is a dearth of Australian authority. Except historically, English law is no more a source of the common law of Australia than any other system of law.[36] The persuasiveness of the reasoning in many of the English cases leads us to believe, however, that the solutions proposed in those cases could be adopted as part of the common law of Australia. Further, there are indications that aspects of the English approach to the causes of actions that are discussed in this section may be followed in Australia.[37]

No general action for breach of privacy

Victoria Park Racing and Recreation Grounds Co Ltd v Taylor

2.17 The question whether a cause of action for breach of privacy might, or should, be recognized at common law has been the subject of judicial consideration in Australia. For example, in *Church of Scientology Inc v Woodward*, Justice Murphy identified "unjustified

36. *Cook v Cook* (1986) 162 CLR 376, 390 (Mason, Wilson, Deane and Dawson JJ), 394 (Brennan J).
37. See para 2.68-2.76; 2.22.

invasion of privacy" as a developing tort.[38] However, the development of privacy law has been regarded as restricted by the decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*,[39] where the High Court expressly rejected, in dicta, the recognition of a tort based on invasion of privacy.

2.18 The case concerned an attempt by the plaintiff, who owned a racecourse, to prevent the defendants from observing the races from a raised platform on adjacent land and broadcasting commentary on the races through a radio station. In the course of rejecting the plaintiff's claim on various grounds, including nuisance, Chief Justice Latham declared:

> The claim under the head of nuisance has also been supported by an argument that the law recognizes a right of privacy which has been infringed by the defendant. However desirable some limitation upon invasions of privacy might be, no authority was cited which shows that any general right of privacy exists.[40]

Lenah Game Meats

2.19 For more than 60 years, *Victoria Park* was regarded as authority for the proposition that Australian common law does not recognise a general right to privacy.[41] However, in the more recent case of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* ("*Lenah Game Meats*"),[42] the High Court indicated that the judgment in *Victoria Park* does not preclude the recognition of a cause of action for invasion of privacy in Australia.

2.20 The facts in *Lenah Game Meats* were as follows: Lenah Game Meats Pty Ltd ("Lenah") is a corporation engaged in the processing and supply of game meat. A person or persons broke into and installed hidden cameras in Lenah's possum abattoir in Tasmania. The film was handed over to Animal Liberation Ltd, which in turn gave a copy to the Australian Broadcasting Corporation ("ABC") so the latter could broadcast it. The Supreme Court of Tasmania, at first instance, refused Lenah's application for an interlocutory injunction to prevent

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38. *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 68.
39. *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 ("*Victoria Park*").
40. *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 496.
41. See for example *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, 444-446; *Northern Territory v Mengel* (1995) 185 CLR 307, 354 (Brennan J). See also *Cruise and Kidman v Southdown Press Pty Ltd* (1993) 26 IPR 125, 125 (Gray J) and *Australian Consolidated Press Ltd v Ettingshausen* (1991) NSWLR 443, 449 (Hunt J).
42. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 ("*Lenah Game Meats*").

the ABC from broadcasting the film footage. On appeal, the Full Court of the Supreme Court granted the interlocutory injunction. The defendant then appealed to the High Court.

2.21 Lenah argued, among others matters, that the High Court should recognise the existence of a tort of invasion of privacy and hold that it had a prima facie cause of action on that basis.

2.22 Chief Justice Gleeson considered the privacy claim only briefly since he considered that breach of confidence would have adequately covered the case had the activities filmed been private. He acknowledged that "[t]he law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy." [43] However, he said courts should be cautious in declaring a new privacy tort for two reasons: first, the lack of precision of the concept of privacy; and secondly, the tension that exists between the interests in privacy and interests in free speech.[44] He also expressed the opinion that the basis of privacy is human dignity, so that a right to privacy might be inapplicable to corporations.[45]

2.23 Justices Gummow and Hayne (with whom Justice Gaudron agreed) held that "the decision [in *Victoria Park*] does not stand for the proposition respecting the existence or otherwise of a tort identified as unjustified invasion of privacy." [46] They examined recent developments in England and the established torts in the United States to identify a rationale for the legal protection of privacy interests as distinct from other interests, such as reputation or commercial interests. They concluded that it was to be found in the fundamental value of personal autonomy, a value that could only be invoked by natural persons, not corporations.[47] Consequently, their Honours considered that as Lenah was an artificial legal person, the case was the wrong vehicle to examine the contours of privacy law. Their Honours outlined two ways in which privacy protection may develop in the common law:

> It may be that development is best achieved by looking across the range of already established legal and equitable wrongs. On the other hand, in some respects these may be seen as representing species of a genus, being a principle protecting the interests of the individual in leading, to some reasonable extent, a secluded and private life, in the words of the *Restatement*, "free from the prying eyes, ears and publication of others". Nothing said in

43. *Lenah Game Meats* (2001) 208 CLR 199, [40].
44. *Lenah Game Meats* (2001) 208 CLR 199, [41].
45. *Lenah Game Meats* (2001) 208 CLR 199, [43].
46. *Lenah Game Meats* (2001) 208 CLR 199, [109].
47. *Lenah Game Meats* (2001) 208 CLR 199, [125]-[126].

> these reasons should be understood as foreclosing any such debate or as indicating any particular outcome. [48]

2.24 Justice Kirby said that it might be that more has been read into the decision in *Victoria Park* than the actual holding required.[49] However, he preferred to postpone answering the "difficult question" of whether the court should declare an actionable wrong of invasion of privacy, since he had found that equity and statute law could be used as a basis for granting the interlocutory injunction sought by Lenah.[50] His Honour said that the fact that Lenah is a corporation was a further reason for not resolving the issue in that particular case, expressing doubts about whether an artificial person would be entitled to a common law right to privacy.[51]

2.25 Justice Callinan did not find it necessary to resolve the privacy issue since Lenah's application for an interlocutory injunction could be granted based on other grounds. Nevertheless, he expressed his views on the matter. He described the "conservative views" of the three judges in the majority in *Victoria Park* as "having the appearance of anachronism, even by the standards of 1937".[52] He examined the law in other jurisdictions, such as the United States, England and New Zealand, and opined that corporations and government agencies might be able to enjoy similar rights to privacy as natural persons.[53] Further, he made the following observation:

> Having regard to current conditions in this country, and developments of the law in other common law jurisdictions, the time is ripe for consideration whether a tort of invasion of privacy should be recognised in this country, or whether the legislatures should be left to determine whether provisions for a remedy for it should be made. [54]

Two first instance decisions

2.26 Subsequent to *Lenah Game Meats*, Senior Judge Skoien of the District Court of Queensland, in *Grosse v Purvis*, held that a tort of invasion of privacy does exist in Australia.[55]

2.27 The plaintiff in *Grosse v Purvis* alleged that she had suffered psychological harm as a result of a prolonged course of stalking and harassment by the defendant after she ended their sexual

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48. *Lenah Game Meats* (2001) 208 CLR 199, [138].
49. *Lenah Game Meats* (2001) 208 CLR 199, [187].
50. *Lenah Game Meats* (2001) 208 CLR 199, [189].
51. *Lenah Game Meats* (2001) 208 CLR 199, [190].
52. *Lenah Game Meats* (2001) 208 CLR 199, [318].
53. *Lenah Game Meats* (2001) 208 CLR 199, [328].
54. *Lenah Game Meats* (2001) 208 CLR 199, [335].
55. *Grosse v Purvis* [2003] QDC 151.

relationship. The plaintiff based her action on the following conduct by the defendant: persistent loitering at or near the plaintiff's places of residence, work and recreation; unauthorised entry into her home; offensive phone calls at home, work and on her mobile phone; and use of offensive and insulting language towards herself. The plaintiff's action was based on a number of causes of action, including invasion of privacy, harassment, trespass to land, private nuisance, intentional infliction of harm, and negligent infliction of psychiatric damage.

2.28 On the invasion of privacy claim, Senior Judge Skoien, after examining the judgments in *Lenah Game Meats* and acknowledging the boldness of his decision,[56] held that there is in Australia an actionable right of an individual person to privacy. For purposes of this particular case, his Honour identified the essential elements of the tort as:

- a willed act by the defendant,
- which intrudes upon the privacy or seclusion of the plaintiff,
- in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities,
- and which causes the plaintiff detriment in the form of mental, psychological, emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.[57]

2.29 The judge held that the plaintiff was able to prove the elements of the tort and awarded $178,000 by way of damages.

2.30 Judge Hempel, sitting in the County Court of Victoria, has recently handed down another "bold" privacy decision in *Jane Doe v Australian Broadcasting Corporation*.[58] In a radio broadcast, the defendant Corporation had negligently identified the plaintiff as the victim of a rape, for which her estranged husband had been convicted. It is an offence under Victorian law to publish information identifying the victim of a sexual assault.[59] Both the journalist and sub-editor responsible for the broadcast, having pleaded guilty to this offence, were dealt with in criminal proceedings. As a result of the rape, the plaintiff suffered psychiatric injury and post traumatic stress disorder, which was exacerbated by the radio broadcast. The plaintiff instituted civil proceedings against the Corporation for breach of statutory duty, negligence, breach of confidence and breach of privacy. The plaintiff successfully made out the ingredients of each cause of action. In

56. *Grosse v Purvis* [2003] QDC 151, [442].
57. *Grosse v Purvis* [2003] QDC 151, [444].
58. *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281.
59. See *Judicial Proceedings Reports Act 1958* (Vic) s 4(1A).

respect of her claims in breach of statutory duty, negligence, and breach of privacy, she recovered damages for economic loss (loss of earnings and medical expenses) and non-economic loss (chronic symptoms with the psychiatric injury). She also recovered compensation for breach of confidence, which comprised the same element of non-economic loss as in the other claims, but with an additional amount for the "hurt, distress, embarrassment, humiliation, shame and guilt" experienced as a result of the broadcasts.[60] The plaintiff's claim for aggravated and exemplary damages failed. Judgment was entered for the plaintiff in the sum of $234,190, comprising totals of $124,190 for economic loss and $110,000 for non-economic loss.

2.31 While recognising that the privacy claim in this case differed from that in *Grosse v Purvis*, Judge Hempel nevertheless upheld it on the basis that, in the circumstances, the defendant had invaded the plaintiff's privacy by unjustifiably publishing personal information, that is information that the plaintiff had a reasonable expectation would remain clearly private. This amounted to an "actionable wrong which gives rise to a right to recover damages according to the ordinary principles governing damages in tort".[61] Unlike many situations in which privacy claims are potentially generated, her Honour pointed out that it was not necessary in this case to resolve any tension between privacy and freedom of speech, since the Victorian Parliament had made publication of the material here in issue a criminal offence.[62]

Other case law after Lenah Game Meats

2.32 The precedential value of the judgments in *Gross v Purvis* and *Jane Doe* will depend on their acceptance by superior courts. In a number of cases since *Lenah Game Meats* superior courts have rejected privacy claims.

2.33 In *Giller v Procopets*,[63] the defendant videotaped his sexual encounters with the plaintiff, his former de facto wife, who was not aware of the filming until the sixth occasion. The defendant showed the videotapes to some people and distributed copies to others, including relatives and friends of the plaintiff. One of the causes of action pleaded by the plaintiff was a claim for invasion of privacy. The Supreme Court of Victoria rejected this claim, holding that "the law

60. *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281, [186].
61. *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281, [157].
62. *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281, [156].
63. *Giller v Procopets* [2004] VSC 113.

has not developed to the point where the law in Australia recognises an action for breach of privacy."[64]

2.34 In *Milne v Haynes*,[65] the plaintiff was engaged in family law proceedings as a result of his marriage breakdown. A niece of the plaintiff's former wife visited his house and, in his absence, obtained information from a woman about his plans to travel overseas. The niece swore an affidavit to this effect, which became the basis of the ex-wife's application for orders from the Family Court to restrain the plaintiff from leaving the country. The plaintiff sued his former wife and her niece, among others, for alleged violation of his privacy. The Supreme Court of New South Wales dismissed this claim and held that "[t]here is, as yet, no recognition in the courts of this state of a tort of breach of privacy."[66]

2.35 In *Moore-Mcquillan v Work Cover Corporation*,[67] the Supreme Court of South Australia considered the appellant's claim for breach of privacy in being kept under video surveillance by a private investigator engaged by Work Cover. The Court accepted that the current law was stated in *Lenah Game Meats*.

2.36 None of the judgments in these cases considered *Grosse v Purvis*. However, the Federal Court, in *Kalaba v Commonwealth of Australia*,[68] expressly refused to adopt *Grosse v Purvis* and concluded that the weight of authority indicates that a cause of action for breach of privacy does not currently exist in Australia.

2.37 The plaintiff in *Kalaba* had been a prisoner of war in World War II in Hungary and requested the Commonwealth Government to assist him to obtain compensation from the Hungarian Government. The request was initially refused. Subsequently, the Commonwealth Government requested the Australian Permanent Mission to the United Nations to obtain, through the UN High Commissioner for Human Rights, records relating to the plaintiff's confinement, allegedly without the plaintiff's knowledge or consent. The plaintiff argued that this breached his right to privacy. Rejecting this argument, Justice Heerey said that, at the moment, the weight of authority was against the recognition of a cause of action for breach of privacy.

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64. *Giller v Procopets* [2004] VSC 113, [188]. In *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281, [160]-[161] Judge Hempel distinguished *Giller* on the basis that the courts were not then ready to recognise a "right to privacy".
65. *Milne v Haynes* [2005] NSWSC 1107.
66. *Milne v Haynes* [2005] NSWSC 1107, [19].
67 *Moore-Mcquillan v Work Cover Corporation* SA [2007] SASC 55.
68. *Kalaba v Commonwealth of Australia* [2004] FCA 763.

2.38 The recent High Court case of *Batistatos v Roads and Traffic Authority of New South Wales*[69] did not involve any issue relating to privacy. Nevertheless, Justice Callinan, obiter, reiterated his statement in *Lenah Game Meats* that the time was ripe for the consideration at least of the recognition by the law of a cause of action for invasion of privacy. He, acknowledged, however, that since his opinion in *Lenah Game Meats* had been only a dissenting one, "it is difficult to see how an advocate in New South Wales could seek to bring this matter before the courts now even though the law is moving in that direction in the United Kingdom."[70]

Other causes of action

2.39 While the weight of authority has not recognised a cause of action for breach of privacy in Australia, there are a number of causes of action under the general law that can provide a measure of protection for various aspects of privacy. They include the following.

Trespass to land

2.40 Trespass to land occurs where a person directly, unlawfully and either intentionally or negligently, enters and/or remains on, or causes any physical matter to come into contact with, another person's land, in respect of which that person is entitled to exclusive possession.[71] The tort is capable of providing protection against invasions of privacy by those who enter private property to install surveillance equipment,[72] photograph, film, and record or interview the occupants of the land,[73] other than in accordance with due authority arising, for example, under warrant or statutory power.

2.41 The requirement that there be a direct interference with the plaintiff's land limits the capacity of this tort to protect invasions of privacy, since it provides a remedy only where there is physical intrusion upon that land. Moreover, unless the plaintiff can make out

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69. *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27.
70. *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27, [216], citing the decisions in *Douglas v Hello! Ltd* [2001] QB 967, [2003] 1 All ER 1087 and [2006] QB 125; and *HRH Prince of Wales v Association of Newspapers Ltd* [2006] EWHC 522 (Ch).
71. See F Trindade, P Cane and M Lunney, *The Law of Torts in Australia* (4th ed, OUP, 2007), 132-150.
72. *Greig v Greig* [1966] VR 376.
73. See *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457, 465 (Young J); *Emcorp Pty Ltd v Australian Broadcasting Corporation* [1988] 2 Qd R 169, 176 (Williams J); *Whiskisoda Pty Ltd v HSV Channel 7 Pty Ltd* (Victoria, Supreme Court, McDonald J, 9417/93, 5 November 1993, unreported).

a case for aggravated[74] or exemplary[75] damages or for the repair or reinstatement of any physical damage occasioned by the trespass, the damages recoverable may be confined to a nominal award. Otherwise, the only remedy may be an injunction to restrain an apprehended breach or repetition of the breach.

Private nuisance

2.42 Private nuisance has been defined as "unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it".[76]

2.43 While this action is directed at interference with recognised rights in property, it may be used in situations where the plaintiff is seeking to protect some privacy interest. For example, in a case in the Queen's Bench Division in 1977, Justice Griffiths (obiter) recognised that although mere observation from a neighbouring property does not of itself constitute nuisance, harassment by constant surveillance of a person's house from the air, accompanied by the photographing of his or her every activity, might constitute an actionable nuisance.[77]

2.44 In *Raciti v Hughes*[78] the Supreme Court of New South Wales granted the plaintiffs' application for an injunction against an adjoining occupant to prevent the operation of video surveillance equipment, which overlooked their backyard. In granting the injunction, Justice Young, while recognising the "general rule that what one can see one can photograph without it being actionable",[79] stated in relation to the instant case:

> On the evidence before me at the moment there is a deliberate attempt to snoop on the privacy of a neighbour and to record that on video tape. It seems to me that this is an actionable nuisance.[80]

2.45 Private nuisance offers limited protection against breaches of privacy. It does not give protection against casual observation, filming or recording from outside the property or from the airspace above it,

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74. As in *Greig v Greig* [1966] VR 376 (where the act of trespass involved entering the plaintiff's flat and installing a listening device to record the plaintiff's private conversations).
75. *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457; *Coles-Smith v Smith* [1965] Qd R 494.
76. *Hargrave v Goldman* (1963) 110 CLR 40, 59 (Windeyer J).
77. *Lord Bernstein v Skyviews and General Limited* [1977] 2 All ER 902, 909 (Griffiths J).
78 *Raciti v Hughes* (1995) 7 BPR 14,837, 14,840.
79. Citing *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457, among others.
80. *Raciti v Hughes* (1995) 7 BPR 14,837, 14,840.

which falls short of the sustained and deliberate snooping or the watching and besetting that is required for the tort.[81]

2.46 Further, private nuisance has traditionally been regarded as available only to persons who hold an interest in the land entitling them to exclusive possession, not to mere licensees.[82] Hence, where a husband and wife reside in a house that is owned by the wife, the husband is a licensee only and cannot sue for nuisance to the premises.[83] This rule restricts the class of people who can have standing to sue for nuisance.

2.47 Some courts have used the action for private nuisance to deal with telephone harassment that is invasive of a person's privacy.[84] In *Khorasandjian v Bush*, the English Court of Appeal held that harassment by telephone is an actionable interference and is within the scope of the principles of private nuisance.[85] The case concerned a young woman who, after ending her friendship with the defendant, was followed around and threatened by the latter and pestered with telephone calls to her parents' home and at her grandmother's to such an extent that the telephone numbers had to be changed. The decision is of interest because the court (by majority) held that the fact that the plaintiff did not have a proprietary interest in the premises to which the calls were made, was not fatal to the plaintiff's entitlement to an injunction.

2.48 However, in *Hunter v Canary Wharf Ltd*,[86] the House of Lords effectively overruled *Khorasandjian* and similar cases. Lord Hope said that the *Khorasandjian* case was "concerned with the invasion of the plaintiff's person, not the invasion of any interest in land … the solution to the case ought not to have been found in the tort of nuisance, as her complaint of the effects on her privacy of the defendant's conduct was of a kind which fell outside the scope of the tort".[87] Lord Goff was of similar opinion, observing that the decision in *Khorasandjian* has used the law on private nuisance "to create by the back door a tort of harassment", which he suggested was an unsatisfactory approach to the development of the law.[88] These

81. See *Lord Bernstein v Skyviews and General Limited* [1977] 2 All ER 902, 909 (Griffiths J); *Raciti v Hughes* (1995) 7 BPR 14,837.
82. *Malone v Laskey* [1907] 2 KB 141; *Hunter v Canary Wharf Ltd* [1997] AC 655.
83. *Oldham v Lawson* [1976] VR 654.
84. See *Motherwell v Motherwell* (1976) 73 DLR (3d) 62 (Supreme Court of Alberta); *Stoakes v Brydss* [1958] QWN 5 (Supreme Court of Queensland).
85. *Khorasandjian v Bush* [1993] QB 727.
86. *Hunter v Canary Wharf Ltd* [1997] AC 655.
87. *Hunter v Canary Wharf Ltd* [1997] AC 655, 722.
88. *Hunter v Canary Wharf Ltd* [1997] AC 655, 692.

passages underline the limitations of the use of private nuisance to address claims of invasions of privacy.

Defamation

2.49 In broad terms, defamation is the publication of a statement that has a tendency to injure a person's reputation in the estimation of others, usually by bringing the person into hatred, ridicule or contempt. The aim of the civil action for defamation is "to vindicate and to protect the reputation of the person defamed".[89]

2.50 It may also, in certain situations, incidentally provide a remedy for breach of privacy. For example, in *Ettingshausen v Australian Consolidated Press Limited,*[90] a photograph of a well-known Rugby League player was taken while he was in the shower and published in a magazine with wide readership. The New South Wales Supreme Court held that the published photograph was capable of subjecting the plaintiff to a more than trivial degree of ridicule and therefore capable of defaming him.

2.51 In New South Wales, the defence of justification has provided, until recently, some protection for privacy. Unlike the common law, which provides a complete defence if a defamatory imputation is true, section 15 of the *Defamation Act 1974* (NSW) required the defendant to show that the imputation was not only substantially true, but also (amongst other matters) that it related to a matter of "public interest". Legislation in the Australian Capital Territory, Queensland and Tasmania also rejected the notion that truth alone could justify a defamatory publication by requiring that the publication not only be true but also for the "public benefit".[91] Neither the "public interest" nor the "public benefit" test justified the publication of information that was merely "of interest to the public". The published material "must be seen as relevant to promoting the public good rather than simply pandering to a desire for scandal or invading the legitimate privacy of an individual."[92]

2.52 The "public interest" or "public benefit" requirement was characterised as involving "the weighing of the right to privacy against the public interest of free discussion of matters of public

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89. *Packer v Meagher* [1984] 3 NSWLR 486, 492 (Hunt J).
90. *Ettingshausen v Australian Consolidated Press Limited* (1991) 23 NSWLR 443.
91. *Defamation Act 1901* (ACT) s 6; *Defamation Act 1889* (Qld) s 15; *Defamation Act 1957* (Tas) s 15.
92. *Johnston v Australian Broadcasting Commission* (1993) FLR 307, 312 (Higgins J).

concern."[93] It has also been described as "the closest the law of defamation comes, as presently framed, to protect privacy, at least in those jurisdictions which so limit the defence of truth."[94] In one case, responding to criticism by the plaintiff, a Member of Parliament, of "salacious pictures and disgusting letterpress" published by the defendant newspaper, the defendant published a statement, derived from an allegation made in divorce proceedings by his ex-wife, that the plaintiff was a "brutal wife basher". The court held that plaintiff could not justify: the mere fact that a Member of Parliament had criticised the newspaper did not make it a matter of public benefit to publish "something that took place between himself and his wife some three or four years ago", even if the facts were truly stated.[95]

2.53 In our review of the law of defamation in 1995, the Commission recognised the importance of the defence of justification in providing limited privacy protection and concluded that:

> [U]ntil such time as there is a thorough review of the desirability of introducing a tort of invasion of privacy, the law of defamation should continue to provide limited protection for persons' privacy even if such protection ought not, in itself, to be a goal of the law of defamation. In particular, the Commission is concerned about the potentially serious threat to individuals' privacy which would result from amendment of the current defence of justification.[96]

2.54 However, from 1 January 2006, the defence of justification in New South Wales has been changed so that truth alone constitutes a defence under the new *Defamation Act*.[97] The new provision was adopted as part of uniform defamation legislation among the States and Territories.[98] This makes defamation less effective in providing privacy protection.

Injurious falsehood

2.55 Where a false statement (whether defamatory or not), calculated to cause, and producing, actual damage to the plaintiff, is maliciously

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93. *Cohen v Mirror Newspapers Ltd* [1971] 1 NSWLR 623, 628 (Jacobs and Manning JJA).
94. *Johnston v Australian Broadcasting Commission* (1993) FLR 307, 312 (Higgins J).
95. *Mutch v Sleeman* (1928) 29 SR (NSW) 125, 136–137. See also *Myerson v Smiths' Weekly Publishing Co Ltd* (1923) 24 SR (NSW) 20, 28–29.
96. NSW Law Reform Commission, *Defamation*, Report No 75 (1995) [1.24].
97. *Defamation Act 2005* (NSW) s 25.
98. See *Civil Law (Wrongs) Act 2002* (ACT) s 135; *Defamation Act 2006* (NT) s 22; *Defamation Act 2005* (Qld) s 25; *Defamation Act 2005* (SA) s 23; *Defamation Act 2005* (Tas) s 25; *Defamation Act 2005* (WA) s 25; *Defamation Act 2005* (Vic) s 25.

published, the plaintiff may have an action for injurious falsehood.[99] For example, an action may lie for a publication that the plaintiff has ceased to carry on or has closed down his or her business[100] or was not available for future employment.[101] Injurious falsehood is variously referred to as "malicious falsehood" or "trade libel".[102]

2.56 In England, malicious falsehood was effectively used in *Gordon v Kaye*[103] to protect the privacy of the plaintiff. The plaintiff was a well-known actor and the star of a popular television comedy series. He had a car accident that resulted in severe head and brain injuries, for which he was placed on a life support machine and intensive care for a few days. Subsequently, he was moved to a private room. For fear that his recovery might be hindered if he had too many visitors and to lessen the risk of infection, the hospital authorities took steps to restrict visits. There was, for example, a list of authorised visitors and there were signs at the entrance of the ward and on the plaintiff's door regarding the restrictions.

2.57 The defendants were the editor and publisher of a publication described as having a lurid and sensational style. A journalist and a photographer for the publication, ignoring the warnings regarding the visitation restrictions, surreptitiously entered the plaintiff's room. They interviewed him and took photographs, including some showing substantial scars to his head. The defendants claimed that the plaintiff agreed to be interviewed, but medical evidence was later presented that showed that the plaintiff was not fit to be interviewed or to consent to the interview. In fact, a quarter of an hour after the journalists left him, the plaintiff had no recollection of the incident.

2.58 On an application made on behalf of the plaintiff, the trial court granted an injunction restraining the defendants from publishing or distributing the photographs and any statements made by the plaintiff at the interview. The judge also ordered the defendants to deliver up any tape-recording, notes of interview and photographs that they had taken during the interview. The defendants appealed against the judge's order.

2.59 The Court of Appeal held that there was no right to privacy in English law. Lord Justice Glidewell said:

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99. See A M Dugdale (gen ed), *Clerk & Linsell on Torts* (18th ed, Sweet & Maxwell, 2000), [23-02].
100. *Hall-Gibbs Mercantile Agency Ltd v Dun* (1910) 12 CLR 84.
101. *Bride v KMG Hungerfords* (1991) 109 FLR 256, 280 (Murray J).
102. See *Joyce v Sengupta* [1993] 1 All ER 897, 901 (Lord Nicholls).
103. *Gordon v Kaye* [1991] FSR 62 ("*Kaye*").

> It is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.[104]

2.60 Characterising the defendant's conduct as a "monstrous" invasion of the plaintiff's privacy, Lord Justice Bingham added:

> If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlines the plaintiff's complaint. Yet it alone, however gross, does not entitle him to relief in English law.[105]

2.61 In the absence of such a right to relief, the plaintiff invoked the following causes of action: trespass to the person, passing off, libel, and malicious falsehood. The court granted an injunction based on malicious falsehood. The article's claim that the plaintiff had consented to be interviewed was false and resulted in damage, namely, the potential loss of the plaintiff's right to sell the story of the accident and his recovery if the defendants were able to publish their article.

2.62 The injunction granted on the basis of malicious falsehood afforded only limited protection. If the defendant had intended to publish the photographs alongside the story telling their readers the truth, namely that their photographer had entered the plaintiff's hospital room uninvited and the photographs had been taken without the plaintiff's consent, then no injunction could have been granted for malicious falsehood. The protection that the tort offers to privacy would be even more limited if the action for injurious falsehood is limited to statements about the plaintiff's goods or business.[106]

Passing off

2.63 The appropriation of the name, image or likeness of a person without his or her consent is arguably a form of invasion of privacy to the extent that his or her interest in the exclusive use of his or her

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104. *Kaye*, 66 (Glidewell LJ).
105. *Kaye*, 70. See also 71 (Leggatt LJ).
106. A matter left open in *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388, [1] (Gleeson CJ), [60] (Gummow J). See also [154] (Hayne J), [192] (Callinan J). Compare [114] (Kirby J). See also *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 694 (Gleeson CJ); *Joyce v Sengupta* [1993] 1 All ER 897, 901 (Nicholls VC).

own identity is infringed.[107] The action for passing off may be useful in this context. One form of passing off is the use of the name or image of some well-known person without his or her consent by someone who promotes goods or services by suggesting that the person whose name or image is being used approves of or has some connection with the goods or services.

2.64 An example of a New South Wales case is *Henderson v Radio Corporation Pty Ltd* where the plaintiffs, two well-known professional ballroom dancers, succeeding in obtaining an injunction to restrain the defendants from releasing a record of ballroom dancing music, which displayed their photograph on the cover without their consent. The Supreme Court held that the plaintiffs' potential to exploit the goodwill in their names and reputation could be damaged by the defendant's conduct.[108]

2.65 The elements of passing off are: (1) the plaintiff has goodwill or a reputation in a business or specific trade; (2) misrepresentation, by the defendant, of a connection between the defendant or the defendant's goods or services or business, and the plaintiff or the plaintiff's business; and (3) damage, or the threat of it, usually in the form of diversion of custom, lost sponsorship fees or tarnished reputation.[109]

2.66 It is apparent from these requirements that the purpose of the action is to protect a commercial or proprietary interest – that is, the plaintiff's goodwill or reputation – which the defendant has benefited from without compensation to the plaintiff. Passing off will not apply where the person whose name or image was used does not possess a reputation capable of being commercially exploited and no relevant injury resulting from the use of his or her name or image is suffered.

2.67 Consider, for example, this hypothetical example. A couple with two young children were buying a house and land package from a property developer and the selling agent took their photographs in front of the house they had chosen. Without their consent, one of the photographs was used in the property developer's marketing campaign. The couple objected to the unwanted publicity, especially since it involved their young children, and were unhappy that their

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107. See, for example, para 4.56-4.65. Note that where information about a person has commercial value, he or she may have sufficient control over it to impose an obligation of confidence on others: *Douglas v Hello! Ltd* [2007] UKHL 21,especially [124] (Lord Hoffman)

108. *Henderson v Radio Corporation Pty Ltd* [1960] SR (NSW) 576.

109. *ConAgra Inc v McCain Food (Aust) Ltd* (1992) 33 FCR 302, 355-356 (Gummow J); *TGI Friday's Australia Pty Ltd v TGI Friday's Inc* (1999) 45 IPR 43.

place of residence had been disclosed to the general public. They would not be able to use the tort of passing off since they are not able to "cash in" on a celebrity status by endorsing the defendant's services. In essence, they are seeking to protect their family's privacy, and it is unlikely that the tort of passing off will be extended to protect a "right to endorse" in every individual.[110]

The intentional infliction of harm

2.68 In the 1897 English case of *Wilkinson v Downton*,[111] the defendant, by way of a practical joke, told the plaintiff that her husband, while returning in a wagonette from a race meeting, had met with an accident and had both legs broken, and that she had to go at once in a cab with two pillows to fetch him home. The plaintiff suffered a violent shock to her nervous system producing vomiting and serious physical consequences, for which the defendant was held liable in damages. The basis of the decision is that "[i]f a person deliberately does an act of a kind calculated to cause physical injury for which there is no lawful justification or excuse and in fact causes injury to that other person, he is liable in damages".[112] Two aspects of the rule in *Wilkinson v Downton* potentially limit its application to cases involving invasions of privacy.

2.69 The first relates to its uncertain scope, particularly the identification of the intention necessary to satisfy it.[113] The rule extends to conduct "calculated to cause", and causing, damage for which there is "no lawful justification or excuse". But what conduct falls within this? The bad joke in *Wilkinson v Downton* did, as did many of the acts of the spurned lover in *Grosse v Purvis*.[114] But an unauthorised strip-search in *Wainwright v Home Office*[115] did not. A mother and son were strip-searched for drugs on a prison visit. The search was conducted in breach of prison rules – for example, the son, who was mentally impaired, was poked on the armpit, his penis handled and his foreskin pulled back. The incident caused humiliation and distress, and with respect to the son, post-traumatic stress syndrome. The House of Lords held that there was no liability under

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110. See F Trindade, P Cane and M Lunney, *The Law of Torts in Australia* (4th ed, Oxford University Press, 2007), 292-293.
111. *Wilkinson v Downton* [1897] 2 QB 57 approved in *Janvier v Sweeney* [1919] 2 KB 316.
112. See *Bunyan v Jordan* (1937) 57 CLR 1, 10 (Latham CJ, though leaving open the possibility that the principle is too broadly stated: at 11). See also *Northern Territory v Mengel* (1995) 185 CLR 307, 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).
113. See further para 2.76
114. *Grosse v Purvis* [2003] QDC 151, [453].
115. *Wainwright v Home Office* [2004] 2 AC 406.

Wilkinson v Downton.[116] The prison guards who had ordered the plaintiffs to strip had acted in good faith, believing that they were correctly following established procedures for the search in question and not intending to increase the humiliation and distress necessarily involved in a strip-search.[117] Their conduct simply lacked the objectionable qualities of the conduct found in _Wilkinson v Downton_ and _Grosse v Purvis_.

2.70 Secondly, the plaintiff must show that his or her reaction to the defendant's conduct is accompanied by some "physical injury". This clearly includes psychiatric injury.[118] Mere distress will not, however, suffice.[119] This was another reason why the mother's claim failed in _Wainwright v Home Office_.[120] In contrast, because he had suffered a recognisable psychiatric injury, the son would have succeeded on the basis of _Wilkinson v Downton_ if the other elements of the tort had been present. Many invasions of privacy will not result in psychiatric damage. Unless extended to mental distress, _Wilkinson v Downton_ may, therefore, prove of limited use in the context of privacy.

2.71 Such an extension was hinted at in the New Zealand case of _Tucker v News Media Ownership Ltd_.[121] The plaintiff, who had a serious heart problem, embarked on a successful fund-raising campaign for a heart transplant operation to be performed in Australia after the operation originally planned in New Zealand fell through by reason of a change in government policy concerning the availability of this form of surgery. A newspaper reporter informed the plaintiff that his newspaper had received information that the plaintiff had been convicted of criminal offences involving indecency. The plaintiff successfully applied for interim injunctions restraining several media organisations from publishing details of his convictions. In his proceedings for permanent injunctions, the plaintiff pleaded causes of action based on intentional infliction of distress and the American tort of invasion of privacy.

2.72 A doctor gave evidence that the plaintiff was very sick, that further stress could be fatal and publication by the media of his previous convictions could cause extreme emotional shock. In the meantime, the plaintiff lost funding for the heart transplant

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116. Because he had been touched, the son was able to maintain an action in battery.
117. _Wainwright v Home Office_ [2004] 2 AC 406, [45].
118. _Wilkinson v Downton_ [1897] 2 QB 57; _Wong v Parkside Health NHS Trust_ [2003] 3 All ER 932.
119. See especially _Giller v Procopets_ [2004] VSC 113, [177]-[186].
120. _Wainwright v Home Office_ [2004] 2 AC 406.
121. _Tucker v News Media Ownership Ltd_ [1986] 2 NZLR 716.

operation. Upon the defendant's application to discharge the injunctions, the High Court accepted that there was a serious question to be tried in relation to the application of the tort of intentional infliction of emotional distress or physical damage.

2.73 In the course of examining this issue, Justice McGechan made it clear that he supported the "introduction into the New Zealand common law of a tort covering invasion of personal privacy at least by public disclosure of private facts". After referring to the American tort of invasion of privacy by public disclosure of private facts, Justice McGechan said:

> I do not think it beyond the common law to adapt the *Wilkinson v Downton* principles to significantly develop the same field and meet the same needs. [122]

2.74 The injunctions were, however, discharged as the publication of the same information by other organisations had led to a shift in the status quo, such that the continuation of the injunctions would be an exercise in futility. As a result, the issue whether the plaintiff could have successfully made out his claims as a matter of law was left undecided.

2.75 However, in *Wainwright v Home Office* Lord Hoffman (with whom the whole House agreed) was prepared to extend *Wilkinson v Downton* to cases of "mere distress" only on the understanding that the intention necessary to establish the tort is that "[t]he defendant must actually have acted in a way which he knew to be unjustifiable and either intended to cause harm or at least acted without caring whether he caused harm or not".[123] Indeed, even if this test were applied, his Lordship was still doubtful that there should be liability for the intentional infliction of mere distress or humiliation.[124] Lord Scott was more firmly of the view that such conduct ought not, as a matter of policy, to give rise to liability at common law.[125]

2.76. The decision of the House of Lords in *Wainwright v Home Office*[126] is, potentially, of even greater significance in heralding the demise of the rule in *Wilkinson v Downton.* After holding that there is no common law cause of action for invasion of privacy,[127] the House expressed the opinion that *Wilkinson v Downton* has no leading role in modern law.[128] The reason centres on the "imputed intention"

122. *Tucker v New Media Ownership Ltd* [1986] 2 NZLR 716, 733.
123. *Wainwright v Home Office* [2004] 2 AC 406, [45].
124. *Wainwright v Home Office* [2004] 2 AC 406, [46].
125. *Wainwright v Home Office* [2004] 2 AC 406, [62].
126. *Wainwright v Home Office* [2004] 2 AC 406.
127. *Wainwright v Home Office* [2004] 2 AC 406, [15]-[35].
128. *Wainwright v Home Office* [2004] 2 AC 406, [41].

formulated by Justice Wright in *Wilkinson v Downton* as an ingredient of the tort.[129] The formulation was a response to the refusal to recognise nervous shock or psychiatric injury as "damage" in the law of negligence.[130] Once this difficulty had been overcome, the law of negligence could subsume the rule in *Wilkinson v Downton*,[131] and, arguably, has done so if "intention" for the purposes of the rule means no more than it does in negligence.[132] There is weighty support for such an analysis in Australia.[133] At most, the tort of intentional infliction of harm would seem capable of applying to invasions of privacy that are deliberate and, perhaps, possess some element of vindictiveness.[134]

Breach of confidence

2.77 A broad understanding of this action is that defendants breach a duty of confidence where they disclose or use information obtained directly or indirectly from a plaintiff with knowledge or notice that the information is confidential, or where they use confidential information that has been obtained improperly or surreptitiously.[135] A breach of confidential information can often be viewed as a breach of privacy. In the famous case of *Prince Albert v Strange*, the defendant was a publisher who had obtained copies of private etchings made by the Prince Consort of members of the royal family at home. The publisher obtained them from an employee of a printer to whom the Prince had entrusted the plates. Vice-Chancellor Knight-Bruce, in granting an injunction restraining the publication of a catalogue containing descriptions of the etchings, said that it was

> an intrusion - an unbecoming and unseemly intrusion … offensive to that inbred sense of propriety natural to every man -

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129. *Wilkinson v Downton* [1897] 2 QB 57, 59.
130. *Victorian Railways Commission v Coultas* (1888) 13 App Cas 222.
131. *Wainwright v Home Office* [2004] 2 AC 406, [40], [44]. Just as negligence has subsumed *Rylands v Fletcher* (1868) LR 3 HL 330, [1861-73] All ER Rep 1: see *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.
132. See especially the analysis in *Carrier v Bonham* [2002] 1 Qd R 474, [25]-[27] (McMurdo P).
133. See *Magill v Magill* [2006] HCA 51, [20] (Gleeson CJ, referring to Lord Hoffman's analysis in *Wainwright v Home Office* [2004] 2 AC 406), [117] (Gummow, Kirby and Crennan JJ, citing *Tame v New South Wales* (2002) 211 CLR 376, [179] (Gummow and Kirby JJ)).
134. See D Butler, "A Tort of Invasion of Privacy in Australia?" (2005) 29 *Melbourne University Law Review* 339, 365. Compare, P Watson, "Searching the Overfull and Cluttered Shelves: *Wilkinson v Downton* Rediscovered" (2004) 23 *University of Tasmania Law Review* 265.
135. See *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 281 (Lord Goff); *Douglas v Hello! Ltd* [2007] UKHL 21; *Lenah Game Meats* (2001) 208 CLR 199, [34], [36] (Gleeson CJ).

> if, intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life - into the home (a world hitherto sacred among us) … [136]

2.78 English courts, responding to the need to give effect to the privacy rights embodied in the *European Convention on Human Rights* and incorporated into English law by the *Human Rights Act 1998* (UK), have seized on the capacity of a developing action for breach of confidence to act as a vehicle for the greater protection of privacy.[137] The action will now reach the disclosure of information that the defendant knows, or ought to know, is private because such disclosure is a wrongful invasion of privacy.[138]

2.79 In the Commission's view, the common law of Australia is unlikely to follow the English example of transforming breach of confidence in this way. Nor, in our view, ought it to do so. Subsuming privacy in breach of confidence leads inevitably to "conceptual artificiality and distortion",[139] as some of the leading English authorities acknowledge.[140] The Commission agrees with the New Zealand Court of Appeal that clear legal analysis requires separate actions for breach of confidence and invasion of privacy.[141] There are at least three reasons why this is so.

2.80 First, confidentiality and privacy are simply different concepts. While most confidential acts and information could arguably be described as private, not all private activity is necessarily confidential. Before information can be considered confidential for the purpose of breach of confidence, it must be inaccessible to the public.[142] Yet this may be an inappropriate test in the context of invasion of privacy. *Lenah Game Meats* highlights the point. In that case, covert filming (following a trespass) of the possum slaughtering operations inside Lenah's processing plant was considered not to have the necessary quality of confidence to satisfy an action for breach of confidence, but could, arguably, have satisfied Chief Justice Gleeson's test of what

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136. *Prince Albert v Strange* (1849) 2 De Gex & Sim 652, 64 ER 293; (on appeal) (1849) 1 Mac & G 25, 41 ER 1171. A modern version is *Associated Newspapers Ltd v HRH the Prince of Wales* [2006] EWCA 1776.
137. For a full discussion of English law, see para 3.3-3.29.
138. See *Douglas v Hello! Ltd (No 3)* [2006] QB 125, [54]-[82]; *Ash v McKennitt* [2006] EWCA 1714, [8]-[11] (in both of which the English Court of Appeal summarises the current law).
139. J Caldwell, "Protecting privacy post *Lenah*: Should the courts establish a new tort or develop breach of confidence?" (2003) 26 *University of New South Wales Journal* 90, 121.
140. For example, *Campbell v MGN Ltd* [2004] 2 AC 457, [14] (Lord Nicholls).
141. *Hosking v Runting* [2005] 1 NZLR 1, [35] (Gault P and Blanchard J); [245]-[246] (Tipping J).
142. See F Gurry, *Breach of Confidence* (Clarendon Press, 1984) ch IV.

constitutes "private", namely, the disclosure or observation of information or conduct that would be highly offensive to a reasonable person of ordinary sensibilities.[143] However, as such an action does not exist in Australian law, and the High Court did not take the opportunity to develop an action at common law, Lenah failed on all counts.

2.81 Secondly, the doctrine of breach of confidence, developed primarily in the exclusive jurisdiction of equity,[144] seems an unsuitable vehicle for the introduction and development of greater privacy protection. Equity intervened to protect confidential information by reason of the circumstances in which that information was obtained. As Meagher, Gummow and Lehane put it:[145]

> The fundamental notion is that the defendant placed trust and confidence (as used in the nineteenth century cases)[146] in the plaintiff or that the defendant obtained surreptitiously or improperly that which he could otherwise have obtained either not at all or only on a limited basis.

2.82 In other words, equitable intervention does not fasten on the intrinsic value of the information itself.[147] Yet that is exactly what an action for invasion of privacy would do. However described, protection would be confined to information that is "private" because it ought not to be disclosed.[148]

2.83 The transformation that this requires in the action for breach of confidence has been achieved in England either by appealing to the human rights framework in which the action is developing,[149] or by regarding the action as having transformed itself into a *tort* of misuse of private information.[150] The first approach is irrelevant in Australia. The second involves a fusion of common law and equity that the common law of Australia is unlikely to embrace.[151] Indeed, even if an action for invasion of privacy were kept strictly within the bounds of

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143. *Lenah Game Meats* (2001) 208 CLR 199, [42].
144. See R P Meagher, J D Heydon, M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, Butterworths Lexis Nexis, 2002) [41-005]-[41-040] ("Meagher, Gummow and Lehane").
145. Meagher, Gummow and Lehane, [41-045].
146. Where "trust' and "confidence' were used interchangeably: Meagher, Gummow and Lehane, [41-035].
147. Meagher, Gummow and Lehane, [41-045].
148. H Delany, "Breach of confidence or breach of privacy: the way forward" (2005) 27 *Dublin University Law Journal* 151, 166.
149. See the approaches of Lords Hoffman, Hope and Carswell and Baroness Hale in *Campbell v MGN Ltd* [2004] 2 AC 457.
150. See *Campbell v MGN Ltd* [2004] 2 AC 457, [14], [15] (Lord Nicholls).
151. Meagher, Gummow and Lehane, ch 2.

breach of confidence, other difficulties arising from the fusion of common law and equity would potentially remain – such as the range of available remedies.[152] Whatever the merits of the fusion argument,[153] it is difficult not to agree with Lord Bingham that protecting privacy through the breach of confidence doctrine is likely to do "impermissible violence to the principles upon which that cause of action is founded".[154]

2.84 Thirdly, although the legal notion of confidence is not necessarily restricted to the disclosure of "information" in any technical sense, it is unclear to what extent breach of confidence would be useful beyond situations involving the unjustified publication of private information. Yet the pressure to recognise an action for invasion of privacy is not limited to this situation, but extends to circumstances, such as those involving an interference with the plaintiff's person or personal space, where it may be impossible to apply the breach of confidence doctrine. Thus, it is difficult to see how the plaintiffs who were unlawfully strip-searched in *Wainwright v Home Office*,[155] or the woman who was a victim of stalking and harassment by a former lover in *Grosse v Purvis,*[156] would have an action in breach of confidence. If a cause of action for invasion of privacy is warranted in such situations, there is the danger, as in *Lenah Game Meats*, that the attempt to fit privacy into breach of confidence will simply result in the plaintiff being left without redress.

2.85 In summary, the Commission's view is that the English approach of extending, or transforming, the action of breach of confidence fails to give adequate recognition to privacy as such. This not only arguably diminishes the significance and effectiveness of privacy as a legal concept, but means that invasion of privacy is in danger of always remaining the "missing cause of action" referred to in *Lenah Game Meats*.[157]

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152. See P Young, "Recent cases" (2001) 75 *Australian Law Journal* 303; L Clarke, "Remedial responses to breach of confidence: the question of damages" (2005) 24 *Civil Justice Quarterly* 316.
153. For recent discussions, see S Degeling and J Edelman, *Equity in Commercial Law* (Lawbook Co, 2005), Introduction and Pt 1; D Hughes, "A classification of fusion after *Harris v Digital Pulse*" (2006) 29(2) *University of New South Wales Law Journal* 38.
154. T Bingham, "Should there be a law to protect rights of personal privacy?" (1996) 5 *European Human Rights Law Review* 450 ,457.
155. *Wainwright v Home Office* [2004] 2 AC 406.
156. *Grosse v Purvis* [2003] QDC 151.
157. *Lenah Game Meats* (2001) 208 CLR 199, [38] (Gleeson CJ).

Conclusion

2.86 The above survey demonstrates that there are a number of causes of action in which privacy interests are currently protected, or which can be developed to protect such interests. One obvious way in which the law of privacy could evolve, therefore, is through the further and appropriate development of all these actions, the combined effect of which would be to cover all aspects of privacy that need protection.[158] In his study of Canadian tort law, Professor Klar argued that the existence of these causes of action made a separate tort of invasion of privacy unnecessary:

> The concept of privacy is too ambiguous and broad to be able to be covered adequately in one cause of action. It is desirable to have the different aspects of privacy protection dealt with in separate torts which more clearly can focus on the interests at hand. Gaps in the law which cannot be filled by extending traditional principles can be dealt with as they arise, either through the expansion of the common law or by legislative intervention.[159]

2.87 This extract effectively identifies the real drawback to this approach: the danger of "gaps" in privacy protection. While common law always develops in response to changing circumstances, there is a point beyond which the extension of an existing cause of action destroys, or runs the risk of destroying, the very coherence of the action, carefully developed over a long period of time. Harassment, as the House of Lords indicated in *Hunter v Canary Wharf*,[160] is simply beyond the scope of protection of an action in private nuisance, which cannot be transformed from a tort to land into a tort to the person. And, the protection of private information in England through the action for breach of confidence now necessarily raises questions about the ingredients of an action for breach of confidence in its traditional areas of operation (such as trade secrets). [161]

2.88 From the Commission's point of view, the argument from coherence is not about the proper development of legal doctrine: it is about sensible law reform. Lord Goff gave a good example in his criticism of the attempt by the English Court of Appeal in

158. For example, *Hosking v Runting* [2005] 1 NZLR 1, [200]-[207] (Keith J dissenting); [268]-[270] (Anderson P dissenting). Consider also *Lenah Game Meats* (2001) 208 CLR 199, [132] (Gummow and Hayne JJ).
159. L N Klar, *Tort Law* (Carswell, Toronto, 1991) at 56.
160. *Hunter v Canary Wharf* [1997] AC 655, discussed at para 2.48.
161. Para 3.4-3.7.

Khorasandjian v Bush, which we have discussed above,[162] to extend the tort of private nuisance to encompass abusive telephone calls:

> If a plaintiff, such as the daughter of the householder in *Khorasandjian v Bush*, is harassed by abusive telephone calls, the gravamen of the complaint lies in the harassment which is just as much abuse, or indeed, an invasion of her privacy, whether she is pestered in this way in her mother's or her husband's house, or she is staying with a friend, or is at a place of work, or even in her car with a mobile phone. In truth, what the Court of Appeal appears to have been doing was to exploit the law of private nuisance in order to create by the back door a tort of harassment which was only partially effective in that it was artificially limited to harassment which takes place in her home.[163]

2.89 Likewise, to extend any of the causes of action that we have surveyed in this section would only partially address situations in which the essence of the plaintiff's complaint is an invasion of privacy. The Commission is potentially concerned with all such cases in any legislative reform of the law of privacy. Reform of one or more of the causes of action considered in this Chapter is not therefore an obvious answer to this reference.

THE CRIMINAL LAW AND PRIVACY

2.90 In addition to the general systems of privacy regulation, there are a number of areas where criminal sanctions might punish or deter invasions of privacy. The focus of the criminal law is, of course, different from any proposed private cause of action for breach of privacy. Nevertheless, the existence of criminal offences that impact on certain aspects of privacy needs to be acknowledged and recognised as part of the overall regulation of privacy in New South Wales.

2.91 In Chapter 1, we discussed the meanings and dimensions of privacy. Some of the concepts associated with the meaning of privacy include personal dignity and autonomy, and the right to control decisions regarding one's life, including one's body and possessions. In many ways, the criminal law protects the most basic aspects of human privacy, by creating offences that prohibit injury, or threats of harm, to people or damage to land or property.

2.92 The criminal law also creates offences to prevent intrusions into human dignity by means of unauthorised prying, or interference with personal communications. As noted earlier in this chapter,

162. See para 2.47-2.48.
163. *Hunter v Canary Wharf Ltd* [1997] 1 AC 655, 691-692.

Commonwealth and State laws respectively prohibiting the unauthorised interception of telecommunications and the use of listening devices generally, and of surveillance devices in the workplace, contain criminal offences and penalties.[164] This section discusses some other areas where conduct that may amount to an invasion of privacy may be prosecuted under the criminal law.

Property offences

2.93 Offences against private property impinge on personal privacy insofar as they interfere with a person's legal and moral proprietary rights. While the criminal law abounds with property offences, a few are discussed here by way of example. In addition to the common law action for trespass discussed at paragraph 2.40, criminal offences for unauthorised entry onto land also exist. For example, the *Inclosed Lands Protection Act 1901* (NSW) makes it an offence to enter onto inclosed lands without lawful excuse and without the consent of the owner, and to remain on those lands after being requested to leave.[165] A further offence will be committed if a person remains on the land after being requested to leave, and behaves in an offensive manner.[166]

2.94 Part 4 of the *Crimes Act 1900* (NSW) deals specifically with property offences, including robbery, theft, extortion, larceny, sabotage and malicious damage to property. So far as property containing personal information is concerned, the interception and taking away of a postal article from a private mail box after delivery by Australia Post may constitute a larceny.[167] Rummaging through a garbage bin left in the street, and taking documents or photographs from it, including those of a private nature, would seemingly not give rise to an offence of larceny if the taker believed they had been abandoned.[168] However, a contrary view has been expressed that a person who deposits garbage in a sealed receptacle retains a proprietary interest in it until it is taken up by the authorised collector and mixed with other collected refuse.[169]

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164. See para 2.7-2.9.
165. *Inclosed Lands Protection Act 1901* (NSW) s 4.
166. *Inclosed Lands Protection Act 1901* (NSW) s 4A.
167. Subject to proof that the item had come into the possession of the person to whom it was addressed, that it was taken without that person's consent, and without claim of right made in good faith, and with the intent permanently to deprive them of it: see *Crimes Act 1900* (NSW) s 117.
168. *Donoghue v Coombe* (1987) 45 SASR 330.
169. J G Starke, "Current Topic: The privacy of garbage" (1988) 62 *Australian Law Journal* 582.

Offences against the person

Assaults

2.95 Personal privacy is directly violated by acts causing, or threatening to cause, physical harm, including assault and sexual assault.[170] As was pointed out in *Marion's Case*,[171] the corollary of the provisions creating an offence of assault, which embodies the notion that, prima facie, any physical contact or threat of it is unlawful, is:

> a right in each person to bodily integrity. That is to say, the right in an individual to choose what occurs with respect to his or her own person.[172]

Stalking and intimidation

2.96 The *Crimes Act 1900* (NSW) also makes it an offence to stalk or intimidate another person, with the intention of causing him or her to fear physical or mental harm.[173] "Intimidation" is defined as conduct amounting to harassment or molestation, or the making of repeated telephone calls, or any conduct that causes a person to have a reasonable apprehension of injury to him or herself or to anyone with whom he or she has a domestic relationship, or of violence or damage to any person or property.[174]

Peeping or prying

2.97 The *Crimes Act 1900* (NSW) creates an offence of peeping or prying applying to a person who is in or on or near a building without reasonable cause with intent to peep or pry upon another person.[175]

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170. See offences contained in *Crimes Act 1900* (NSW) Part 2, Divisions 8, 9 and 10.
171. *Secretary, Department of Health and Community Services v JWB and SWB (Marion's Case)* (1992) 175 CLR 218.
172. *Secretary, Department of Health and Community Services v JWB and SWB (Marion's Case)* (1992) 175 CLR 218, 233. The law in this area is, however, subject to qualification in relation to the extent to which parents, or guardianship tribunals, or the courts, or even medical practitioners, can carry out medical procedures without the individual's consent; and the extent to which law enforcement agencies can lawfully obtain forensic samples, including intimate samples, in circumstances which might otherwise constitute battery: see, for example, *Crimes (Forensic Procedures) Act 2000* (NSW) Part 4 (non-consensual samples) and Part 7 (intimate samples), and *Crimes Act 1914* (Cth) Part 1D.
173. *Crimes Act 1900* (NSW) s 562AB.
174. *Crimes Act 1900* (NSW) s 562A.
175. *Crimes Act 1900* (NSW) s 547C.

The publication of false or embarrassing information

2.98 Although the common law misdemeanour of criminal libel has been abolished, the *Crimes Act 1900* (NSW) preserves the offence of criminal defamation. A person commits criminal defamation if he or she, without lawful excuse, publishes matter defamatory of another living person, knowing the matter to be false and with intent to cause serious harm to that person or any other person, or being reckless as to whether such harm is caused.[176]

2.99 While somewhat peripheral, the *Crimes Act* also makes it an offence to tender for insertion or to cause to be inserted in any newspaper any bogus advertisement, that is, one which contains any material false statement or representation with respect to the personal particulars of another person.[177]

2.100 In addition, a person commits an offence if he or she conveys information that he or she knows to be false or misleading and that is likely to make the recipient fear for the safety of any person.[178]

Invasion of personal privacy through photography

Summary offences

2.101 The *Summary Offences Act 1988* (NSW) creates a number of offences of relevance. The first relates to the filming or attempted filming of a person for indecent purposes, that is, for a sexual purpose or sexual gratification, without that person's consent, where that person was in a state of undress, or was engaged in a private act, or was in circumstances in which a reasonable person would reasonably expect to be afforded privacy.[179] The second offence is ancillary to the first offence, and relates to the installation of a device, or the construction or adaptation of the fabric of a building or other structure to facilitate the installation or operation of such a device, with the intention of enabling the commission of the first offence.[180]

2.102 There have also been at least two successful prosecutions of persons charged with offensive behaviour in a public place as the result of photographing topless sunbathers on Sydney beaches without their consent.[181] Two Sydney councils attempted, in 2005, to impose a

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176. *Crimes Act 1900* (NSW) s 529.
177. *Crimes Act 1900* (NSW) s 545A.
178. *Crimes Act 1900* (NSW) s 93IH. That is, in circumstances parallel to those in *Wilkinson v Downton* [1897] 2 QB 57.
179. *Summary Offences Act 1988* (NSW) s 21G.
180. *Summary Offences Act 1988* (NSW) s 21H.
181. *Summary Offences Act 1988* (NSW) s 4.

ban on the unauthorised photography of children on beaches or at council-conducted swimming pools. Each was forced to withdraw the ban following public protests and/or a realisation of the lack of authority to take such action in respect of people on public property.[182]

The public/private distinction

2.103 As the law currently stands, there is a distinction between the filming of persons while they are on public lands and on privately owned lands respectively. As a general principle, there is no restriction upon the filming of people on public lands, or requirement for their consent. Where they are on privately owned lands, however, the owner of those lands can take steps to prohibit any such activity, upon pain of the photographer being compelled to leave the premises.

2.104 In each instance, the relevant conduct can only be prosecuted if it falls within the provisions of the *Summary Offences Act 1988* (NSW), or the *Workplace Surveillance Act 1998* (NSW), or involves child pornography within the reach of the relevant State or Commonwealth criminal legislation.[183] In these respects, the law in New South Wales does not go as far as provisions recently introduced in Queensland, making it an offence to observe or visually record another person in circumstances where a reasonable person would expect to be afforded privacy without their consent.[184]

2.105 This topic is the subject of ongoing consideration by the Standing Committee of Attorneys General, which published a Discussion Paper in 2005 canvassing questions relating to the taking of unauthorised images of children, the use or publication of unauthorised photographs/images taken in public places, and the requirement of consent for the use of photographs for particular purposes.[185] It also makes reference to the creation of some possible offences and of a civil right in relation to the unauthorised use of one's image.

Information protection

2.106 There is a significant body of legislation restricting access to or release of personal information held by government agencies, as well

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182. Waverley and Randwick Councils.
183. *Crimes Act 1900* (NSW) Part 3 Division 15; *Criminal Code Act 1995* (Cth) s 474.19 and s 474.20.
184. *Criminal Code* (Qld) s 227A(1) and see also s 227A(2).
185. Australia, Standing Committee of Attorneys General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues*, Discussion Paper (2005).

as to information maintained by private individuals or bodies, the breach of which attracts criminal sanctions.

2.107 For example, there are offences that relate to:

- unauthorised access to, or modification of, data held in a computer with intent to commit a serious indictable offence;
- unauthorised modification of data with intent to cause impairment;
- unauthorised impairment of electronic communications to or from a computer; and
- unauthorised access to or modification of restricted data held in a computer, that is, data to which access is restricted by an access control system.[186]

2.108 The legislation follows upon the cooperative approach of the majority of States to introduce uniform legislation in terms similar to those inserted into the Commonwealth Criminal Code by the *Cybercrime Act 2001* (Cth).

2.109 There are restrictions on the supply of DNA material, and the use of information on DNA database systems, the breach of which gives rise to criminal sanctions.[187]

2.110 In addition, there are restrictions on accessing and/or releasing or using information of a confidential nature, with associated penalties for unauthorised access and use, for example, in relation to:

- income tax records;[188]
- credit reporting information;[189]
- protected social security information;[190]
- communications carried by telecommunications carriers or service providers;[191]
- health information;[192] and
- personal information available to public sector officials.[193]

186. *Crimes Act 1900* (NSW) Part 6 and *Criminal Code Act 1995* (Cth) Part 10.7.
187. See: *Crimes Act 1900* (NSW); *Crimes Act 1914* (Cth) Part 1D Division 8A and Division 11A; and *Criminal Code Act 1995* Part 10.7.
188. *Taxation Administration Act 1953* (Cth) s 3C(2).
189. *Privacy Act 1988* (Cth) s 18K, 18L, 18N, 18Q, 18S and 18T.
190. *Social Security (Administration) Act 1999* (Cth) s 204-206.
191. *Telecommunications Act 1997* (Cth) s 276 and s 277.
192. *Health Records and Information Privacy Act 2002* (NSW) s 68.
193. *Privacy and Personal Information Protection Act 1998* (NSW) s 62.

2.111 It is unlikely that the taking of confidential or personal information from an employer or other body concerning another person would be punishable as a larceny, because of the requirements for the article taken to be a specific, moveable item, and for the existence of an intention to permanently deprive the owner of it.[194]

Workplace privacy

2.112 There are also prohibitions and offences in relation to some forms of workplace surveillance, for example, surveillance of employees in change rooms, toilet facilities and bathrooms.[195] Additionally, there are restrictions on the use and disclosure of workplace surveillance records, with penalties for breaches.[196] Covert surveillance of a workplace is also prohibited unless it is authorised by a covert surveillance authority,[197] although that too is subject to certain exceptions for law enforcement agencies, correctional centres, courts and casinos,[198] and to a defence that the surveillance was for the security of the workplace.[199] There are also provisions concerning the secure storage and the permitted use and disclosure of covert surveillance records, the breach of which constitutes an offence.[200]

194. See *R v Lloyd* [1985] QB 829 and *R v Withers* [1975] AC 842.
195. *Workplace Surveillance Act 2005* (NSW) s 15.
196. *Workplace Surveillance Act 2005* (NSW) s 18.
197. *Workplace Surveillance Act 2005* (NSW) s 19.
198. *Workplace Surveillance Act 2005* (NSW) s 21.
199. *Workplace Surveillance Act 2005* (NSW) s 22.
200. *Workplace Surveillance Act 2005* (NSW) s 36 and s 37.

3. Approaches to privacy in other common law countries

- Extending breach of confidence
- Developing a tort of invasion of privacy
- Statutory intervention

3.1 This chapter examines the treatment of privacy in common law jurisdictions other than those of the United States (which is considered in the next chapter). The common laws of the countries considered in this chapter are in many respects the same as the common law of Australia. To that extent, the laws of those countries are not considered in this chapter. Rather, the focus of this chapter is on the various approaches that the common laws of these countries have taken to give greater protection to privacy. There are three such approaches:

- Extending breach of confidence to invasions of privacy (associated particularly with English law);
- Developing a common law tort of privacy (associated with the common law of New Zealand); and
- Enacting a cause of action for invasion of privacy (associated with some Canadian Provinces and recommended in Ireland).

In considering these approaches, a particular objective of the chapter is to give examples from the case law of these jurisdictions of privacy claims that are currently being litigated.

3.2 It needs to be stressed that all jurisdictions whose law is surveyed in the chapter have human rights instruments of one type or another. England and New Zealand have human rights statutes,[1] while the Canadian and Irish constitutions contain guarantees of rights.[2] Any proposed privacy legislation in New South Wales would, of course, take effect in the absence of such legislation, but subject to the constitutional implication of freedom of political speech.[3]

EXTENDING BREACH OF CONFIDENCE

3.3 There is a public interest in the maintenance of confidences.[4] The common law recognises this where the confidence arises, expressly or impliedly, out of contract[5] or, less clearly, out of a right of

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1. See *Human Rights Act 1998* (UK) and *New Zealand Bill of Rights Act 1990* (NZ) (which does not, however, contain an express right of privacy).
2. See *Canadian Charter of Rights and Freedoms* (where a general privacy right is derived from specific sections of the *Charter*, especially s 2, 7 and 8: for a recent example, see *Ruby v Canada* [2002] 4 SCR 4); and *Constitution* (Ireland) (where a right of privacy is again implied from other specific constitutional provisions: see Law Reform Commission of Ireland, *Privacy: Surveillance and the Interception of Communications*, Report No 57 (1998), [3.20]-[[3.34]).
3. See para 1.49.
4. *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281 (Lord Goff).
5. See F Gurry, *Breach of Confidence* (Clarendon Press, 1984), 28-35.

property.[6] Breach of confidence is not, however, traditionally seen as a "wrong" at common law that generates liability in tort.[7] Equity, however, protects confidences independently of contract or property in situations creating, very broadly, "an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained".[8] The English authorities have tended to generalise the basis on which equity intervened to protect confidences into a "broad general principle" underlying the protection of all confidential information.[9] In *Attorney-General v Guardian Newspapers Ltd (No 2)* Lord Goff, while disclaiming any attempt at being definitive, stated that principle as follows:

> [A] duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing that information to others.[10]

3.4 In an earlier and influential judgment, Justice Megarry had identified three elements in this principle that generated an action for breach of confidence:

- the information must have the necessary quality of confidence about it;
- the information must be communicated in circumstances importing an obligation of confidence; and

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6. Gurry 46-56. The famous case of *Prince Albert v Strange* (1849) 2 De Gex & Sim 652, 64 ER 293; (on appeal) (1849) 1 Mac & G 25, 41 ER 1171, discussed in para 2.77, was founded on property and equity.
7. Gurry 56-57. In 1981, the Law Commission proposed a statutory tort of breach of confidence: see England and Wales, Law Commission, *Breach of Confidence*, Report No 110 (Cmnd 8388, 1981) [6.5]. The influence of tort on breach of confidence is now increasingly recognised in England (see A Dugdale (gen ed), *Clerk & Linsdell on Torts* (18th ed, Sweet & Maxwell, 2000) ch 27), and in *Ash v McKennitt* [2006] EWCA 1714, [8], the Court of Appeal refers to the "tort of breach of confidence".
8. *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, 438 (Deane J). See also *Seager v Copydex Ltd* [1967] 1 WLR 923, 931 (Lord Denning MR).
9. Gurry ch 2. The source of the duty in question may still be important in Australian law: see R Meagher, D Heydon and M Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, Butterworths LexisNexis, 2002) [41-035] ("Meagher, Gummow and Lehane").
10. *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281.

- there must be an unauthorised use or disclosure of the information.[11]

3.5 The precise meaning of each of these ingredients is open to debate.[12] However, two points about their place in the overall development of the law of breach of confidence are important for our purposes. The first is that the "public interest" (for example, where the defendant claims that disclosure of particular information is required because it involves an "iniquity") is taken into account either as a defence or, more usually, as a factor relevant to the determination of the content of the obligation of confidence itself. In the latter case, "public interest" is a limitation permeating the three elements of the action and is to be balanced against the competing public interest(s) in question. As Lord Goff explained:

> [A]lthough the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply … to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.[13]

3.6 Secondly, at least in cases of invasions of privacy, Justice Megarry's second requirement has effectively been abandoned in English law. Recognising "the artificiality of distinguishing between confidential information obtained through the violation of a confidential relationship and similar information obtained in some other way",[14] the emphasis has shifted from an examination of the circumstances that justify the conclusion of an initial obligation of confidence to a recognition that an obligation of confidence may arise from the nature of the information in question. Lord Nicholls summarises this aspect of the revised doctrine of breach of confidence as follows:

> This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature … Now the law imposes a

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11. *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47. For the position in Australia, see *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Cummunity Services and Health* (1990) 22 FCR 73, 87 (Gummow J).
12. For Australian understandings, see Meagher, Gummow and Lehane, [41-050].
13. *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 282.
14. *Campbell v MGN Ltd* [2004] 2 AC 457, [46] (Lord Hoffman).

> "duty of confidence" whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. [15]

3.7 Lord Nicholls expressly drew attention to the fact that his use of quotation marks in this passage acknowledged the artificiality of continuing to refer to "private" information as "confidential" information. As the Commission has already observed, the potential differences between the identification of "private" and "confidential" information suggest that the action for breach of confidence is not necessarily a suitable vehicle for the protection of both types of information.[16]

3.8 This second development is attributable to the incorporation into English law of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ("ECHR")[17] by the *Human Rights Act 1998* (UK) in October 2002. Article 8 of the ECHR guarantees to everyone "the right to respect for his private and family life, his home and his correspondence". The effect of this article is to require the protection of private information even in litigation between private parties, rather than only in litigation against the State.[18] The English courts do this by using the action for breach of confidence to remedy the unjustified publication of personal information. The result, is that:

> Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.[19]

3.9 Article 10 of the ECHR also guarantees to everyone "the right to freedom of expression". English courts must now balance the right to respect for private and family life in article 8 against this right to freedom of expression in article 10. In *Campbell v Mirror Group Newspapers Ltd*, Lord Hope observed that, while this involves essentially the same exercise as balancing the traditional

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15. *Campbell v MGN Ltd* [2004] 2 AC 457, [14]. See also at [44], [46]-[48] (Lord Hoffman).
16. See para 2.79-2.85.
17. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, <www.echr.coe.int> at 10 January 2007 (entered into force on 3 September 1953).
18. *Campbell v MGN* [2004] 2 AC 457, [50] (Lord Hoffman).
19. *Campbell v MGN* [2004] 2 AC 457, [51] (Lord Hoffman).

requirements of breach of confidence against public interest,[20] the modern approach is "more carefully focussed and more penetrating".[21]

3.10 In its recent decision in *Ash v McKennitt*, the Court of Appeal said that the rules of the English law of breach of confidence are now found in the jurisprudence of articles 8 and 10 of the ECHR.[22] This means that, although there is no tort of invasion of privacy,[23] where a complainant brings an action in respect of wrongful publication of private information, the court has to decide, first, if the information is private such that it is in principle protected by article 8. If it is, then, secondly, the court must decide if "the interest of the owner of the private information" must "yield to the right of freedom of expression conferred on the publisher by article 10".[24] The second inquiry involves the balancing of articles 8 and 10, to which the following principles apply:

> i) Neither article has as such precedence over the other.
>
> ii) Where conflict arises between the values under Articles 8 and 10, an "intense focus" is necessary upon the comparative importance of the specific rights being claimed in the individual case.
>
> iii) The court must take into account the justifications for interfering with or restricting each right.
>
> iv) So too, the proportionality test must be applied to each.[25]

3.11 Two recent important cases demonstrate the position English courts currently take to protecting privacy rights within the framework of Convention rights. These cases are *Douglas v Hello! Ltd* ("*Douglas*")[26] and *Campbell v Mirror Group Newspapers Ltd* ("*Campbell*").[27]

Douglas and Others v Hello! Ltd

3.12 Proceedings were originally commenced in the High Court, which granted an interim injunction to Michael Douglas and Catherine Zeta-Jones preventing the defendants, the publishers of

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20. See para 3.5.
21. *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457, [86] (Lord Hoffmann).
22. *Ash v McKennitt* [2006] EWCA 1714 ("*Ash*").
23. *Ash* [8].
24. *Ash* [11].
25. *Ash* [46], applying the approach of Eady J at first instance: *McKennitt v Ash* [2005] EWHC 3003, [48]. In *Douglas v Hello! Ltd* [2001] QB 867 at [137] Sedley LJ indicated that "the outcome … is determined principally by considerations of proportionality".
26. *Douglas v Hello! Ltd* [2001] QB 967; [2003] EWHC 786; [2006] QB 125.
27. *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457.

Hello! magazine, from publishing photographs of their "celebrity" wedding. The injunction was granted by Justice Buckley and continued by Justice Hunt. The reasons for granting the injunction included the finding that publication of the photographs would constitute a breach of confidence. The plaintiffs had given exclusive rights to *OK!* magazine to publish articles and photographs of their wedding and had taken meticulous steps to ensure that no unauthorised photos could be taken. Despite the stringent security measures put in place, a free-lance photographer managed to take unauthorised photos, which he sold to *Hello!*. The defendants appealed the granting of the injunction.

3.13 On appeal, the Court of Appeal discharged the injunction. Although the Court agreed with Justice Hunt that a cause of action in breach of confidence would probably succeed at trial, the injunction was discharged on the grounds that the balance of convenience favoured publication, and that damages or an account of profits would be sufficient remedy for the plaintiffs in the event they were successful.[28]

3.14 In the course of its judgment discharging the injunction, the Court considered the question, "Is there today a right of privacy in English law?". Lord Justice Sedley gave the strongest support to a separate right of privacy:

> The courts have done what they can, using such legal tools as were to hand, to stop the more outrageous invasions of individuals' privacy; but they have felt unable to articulate their measures as a discrete principle of law. Nevertheless, we have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy.[29]

3.15 At the subsequent substantive High Court trial,[30] Justice Lindsay questioned Lord Justice Sedley's position. Justice Lindsay acknowledged that Lord Justice Sedley's judgment provided a powerful case for the existence of free-standing law of privacy, but relied on later decisions of *Wainwright v Home Office*[31] and *A v B*[32] to cast doubt on the existence of a general "blockbuster" tort of invasion of privacy.[33] It would only have been necessary for Justice Lindsay to express a concluded view on this issue if he found that the absence of a

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28. *Douglas v Hello! Ltd* [2001] QB 967 (Brooke, Sedley and Keene LJJ).
29. *Douglas v Hello! Ltd* [2001] QB 967, [110]. See also Keene LJ, [166].
30. *Douglas v Hello! Ltd (No 3)* [2003] EWHC 786.
31. *Wainwright v Home Office* [2004] 2 AC 406. See para 2.68-2.76.
32. *A v B* [2003] QB 195.
33. *Douglas v Hello! Ltd (No 3)* [2003] EWHC 786, [229].

tort of privacy in English law meant that the Douglases rights to private and family life were accorded inadequate protection under the ECHR. But, in this case, the Douglases were entitled to the protection of the law of confidence, which yielded the same recovery as would a law of privacy.[34] The High Court found that the Douglases were entitled to damages. At the hearing on quantum, the sum of £3,750 each was awarded for distress, a further £7,000 for both for costs and inconvenience, and nominal damages of £50 for breach of the *Data Protection Act 1998* (UK). The defendants appealed to the Court of Appeal and the plaintiffs cross-appealed on quantum.

3.16 The Court of Appeal held that the *Human Rights Act 1998* (UK) did not create any new cause of action between private persons for breach of privacy.[35] Nonetheless, the Court held that, "in so far as private information is concerned", the "cause of action formerly described as breach of confidence" had to be adopted as a vehicle for giving effect to rights arising under Articles 8 and 10 of the ECHR.[36] This was required by the *Human Rights Act 1998* (UK). It held that the court's proper course was to develop the common law to protect rights of privacy under Article 8, even if that was at a cost of some restriction on the defendant's right to freedom of speech under Article 10. The Court commented that they could not pretend that they found it satisfactory "to shoehorn within the cause of action of breach of confidence claims for publication of unauthorised photographs of a private occasion".[37]

3.17 The Court of Appeal also reaffirmed that, for a duty of confidence to arise, the information had to be confidential in nature and either imparted in circumstances carrying a duty of confidence or plainly confidential or private; and that the test was whether the defendant knew or ought to have known that the plaintiffs had a reasonable expectation that the information would remain private.[38] Private information included personal information not intended to be made public. The Court also held that special considerations attached to photographs, which would not necessarily cease to be "confidential information" once in the public domain.[39]

3.18 The plaintiffs' cross-appeal on quantum was dismissed for the reason that any damages based on a notional licence fee payable by

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34. *Douglas v Hello! Ltd (No 3)* [2003] EWHC 786, [229].
35. *Campbell v Mirror Group Newspapers* Ltd [2004] 2 AC 457,
36. *Douglas v Hello! Ltd (No 3)* [2006] QB 125, [52]-[53].
37. *Douglas v Hello! Ltd (No 3)* [2006] QB 125, [54].
38. *Douglas v Hello! Ltd (No 3)* [2006] QB 125, [104]-[105].
39. *Douglas v Hello! Ltd (No 3)* [2006] QB 125, [106]-[107]. See also N Moreham, "Privacy in Public Places" [2006] *Cambridge Law Journal* 606, 613-617.

the defendant would result in unjust enrichment. They would have been entitled, however, to an account of profits if the defendant had made a profit on the unauthorised publication of the photos.[40]

3.19 The *Douglas* series of decisions are important in English law as illustrating:

- the disinclination to establish any stand-alone right of privacy in English law;[41] and
- the movement away from the requirement of the traditional breach of confidence action that personal information must have been imparted or obtained in circumstances importing an obligation of confidence. As Lord Justice Sedley held:
- [T]he law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.[42]

3.20 Hence, *Douglas* illustrates that breach of confidence as now developed in England protects privacy against "the world at large", so long as there are circumstances in which a reasonable person ought to have known that the information was confidential or private. The obligation may arise from the nature of the material or may be inferred from the circumstances in which it has been obtained.[43]

3.21 *Venables v News Group Newspapers Ltd*[44] is a further illustration of this second point. In that case, Dame Elizabeth Butler-Sloss granted an injunction against "all the world", preventing publication of information about the identity of the two boys convicted of the widely publicised murder of James Bulger. The duty of confidence arose in equity independently of a transaction or relationship between the parties. The claimants sought to continue reporting restrictions after they had turned 18 years of age. The defendants were three large news groups, News Group Newspapers, Associated Newspapers and MGN, who, Dame Elizabeth Butler-Sloss commented, did not represent the newspaper industry nor the media generally.

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40. *Douglas and Others v Hello! Ltd (No 3)* [2006] QB 125, [247]-[249]. By majority, the House of Lords reversed the decision of the Court of Appeal so far as it related to the claim by OK! against Hello!: see *Douglas and Others v Hello! Ltd* [2007] UKHL 21.
41. See R Mulheron, "A potential framework for privacy? A reply to *Hello!*" (2006) 69 *Modern Law Review* 679, 679.
42. *Douglas and Others v Hello! Ltd* [2001] QB 967, [126].
43. *Douglas and Others v Hello! Ltd* [2001] QB 967, [166] (Keene LJ).
44. *Venables v News Group Newspapers Ltd* [2001] 1 All ER 908.

Campbell v Mirror Group Newspapers Ltd

3.22 In *Campbell v Mirror Group Newspapers Ltd*, the plaintiff brought an action for breach of confidence, on the basis of disclosure of private facts.[45] The defendant published photographs showing the plaintiff, "supermodel" Naomi Campbell, leaving a Narcotics Anonymous meeting and an accompanying article, referring to her battle to overcome drug addiction. Ms Campbell conceded that, because she had lied about her drug use, the *Mirror* was entitled to publish the fact that she was a drug addict and receiving treatment for her addiction.[46] Her claim for damages for breach of confidence and compensation under the *Data Protection Act 1998* (UK) related only to the additional information conveyed by the articles and the photographs. She argued that information that the therapy was being obtained through Narcotics Anonymous and the details of her attendance at meetings "were private and confidential matters and that there was no overriding public interest justifying their publication".[47]

3.23 At the trial in the Queen's Bench Division,[48] Lord Justice Morland found that the source of the information was either a member of the plaintiff's staff or entourage, or someone attending Narcotics Anonymous and therefore must have been imparted in circumstances importing an obligation of confidence. In determining whether the details published had "the necessary quality of confidence about them" for the action to succeed, his Lordship applied the test of what is private laid down by Chief Justice Gleeson in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.[49] Accordingly, his Lordship found that information revealing details of the plaintiff's attendance at Narcotics Anonymous meetings was easily identifiable as "private" and that "disclosure of that information would be highly offensive to a reasonable person of ordinary sensibilities".[50] He gave weight to the

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45. *Campbell v Mirror Group Newspapers Ltd* [2002] EWHC 499.
46. *Campbell v Mirror Group Newspapers Ltd* [2002] EWHC 499, [4].
47. *Campbell v Mirror Group Newspapers Ltd* [2002] EWHC 499, [4].
48. *Campbell v Mirror Group Newspapers Ltd* [2002] EWHC 499.
49. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199) [42]: "The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private" (Gleeson CJ).
50. *Campbell v Mirror Group Newspapers Ltd* [2002] EWHC 499, [40]. His Lordship also relied on the guideline test given by Lord Woolf CJ in *A v B plc* [2003] QB 195 in finding that "there existed a private interest worthy of protection". The Court of Appeal in *Campbell v Mirror Group Newspapers Ltd* [2003] QB 633, [40] commented that "when Lord Woolf spoke of the public having 'an understandable and so a legitimate interest in being told'

fact that the plaintiff had deliberately misled the public in denying that she used drugs and that therefore the *Mirror* was entitled to put the public record straight.[51] Nevertheless, in striking a balance between Article 8 of the ECHR (protection of privacy) and article 10 (freedom of speech), he found in favour of the plaintiff that there had been a breach of confidentiality.[52]

3.24 On appeal by the *Mirror*, the Court of Appeal reversed this decision.[53] The respondent again conceded that, because she had publicly claimed not to take drugs, publication of the facts of her drug addiction was justified in the public interest, so as to correct the public record. Given that concession, the Court held that the peripheral disclosure of the respondent's attendance at Narcotics Anonymous meetings was not, in its context, sufficiently significant to amount to a breach of duty of confidence owed to her. The Court did not consider that "a reasonable person of ordinary sensibilities, on reading that Miss Campbell was a drug addict, would find it highly offensive, or even offensive, that the *Mirror* also disclosed that she was attending meetings of Narcotics Anonymous".[54]

3.25 The Court observed that in the line of cases since the *Human Rights Act* came into force, information has been described as "confidential" not where it has been confided by one person to another, but where it relates to an aspect of a person's private life that he or she does not choose to make public. The Court considered that "the unjustifiable publication of such information would better be described as breach of privacy rather than breach of confidence".[55]

3.26 Ms Campbell appealed the Court of Appeal's decision to the House of Lords.[56] By a majority of three to two, the House of Lords reversed the decision of the Court of Appeal and restored the order of Justice Morland. The House of Lords observed that the traditional classification of breach of confidence as a form of unconscionable conduct, similar to a breach of trust, is now misleading and outdated. It affirmed that the courts will protect wrongful use of private

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information, even including trivial facts, about a public figure, he was not speaking of private facts which a fair-minded person would consider it offensive to disclose".

51. *Campbell v Mirror Group Newspapers Ltd* [2002] EWHC 499 (QB), [68]-[69].
52. The Court also found for the plaintiff in respect of her alternative cause of action brought under the *Data Protection Act 1998* (UK).
53. *Campbell v Mirror Group Newspapers* Ltd [2003] QB 633.
54. *Campbell v Mirror Group Newspapers* Ltd [2003] QB 633, [54]. The Court made it clear that the fact that a person is famous does not mean that his or her private life can be laid bare by the media: at [41].
55. *Campbell v Mirror Group Newspapers* Ltd [2003] QB 633, [70].
56. *Campbell v Mirror Group Newspapers* Ltd [2004] 2 AC 457.

information, even though the information is not "confidential" in the sense that it has been disclosed by one person to another in circumstances importing an obligation of confidence.[57] It is only necessary for the duty of confidence to arise that a person subject to the duty has received information that he or she knows, or ought to know, is fairly and reasonably to be regarded as confidential and the subject of the information can reasonably expect his or her privacy to be protected.[58] Lord Nicholls, who dissented from the majority judgment on the facts, considered the continuing use of the phrase "duty of confidence" and the description of the information as "confidential" to be awkward and that "[t]he essence of the tort is better encapsulated now as misuse of private information".[59] Nevertheless, the majority of the Court was not prepared to hold that a separate cause of action for invasion of privacy exists in English law. Their Lordships were, however, agreed that, once information is identified as "private",[60] it was necessary for the court to balance the rights of privacy and freedom of expression in the ECHR, neither right having pre-eminence over the other.[61]

3.27 In doing so, a majority of the House held that, on the facts, the balance came down in favour of Ms Campbell. The majority agreed that the press must be free to expose the truth and put the record straight, particularly where a matter of serious public concern was involved such as the possession and use of illegal drugs.[62] However, they held that it was not necessary for those purposes to publish any further information, especially if that might jeopardise the continued success of Ms Campbell's treatment for drug addiction. The "right of the public to receive information about the details of her treatment was of a much lower order than the undoubted right to know that she was misleading the public when she said that she did not take drugs."[63] Reporting the fact that drug addiction treatment was being

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57. *Campbell v Mirror Group Newspapers* Ltd [2004] 2 AC 457, [13] (Lord Nicholls).
58. *Campbell v Mirror Group Newspapers* Ltd [2004] 2 AC 457, [14] (Lord Nicholls), [47] (Lord Hoffman), [85] (Lord Hope).
59. *Campbell v Mirror Group Newspapers* Ltd [2004] 2 AC 457, [14] (Lord Nicholls). This draws upon the tort of wrongful publication of private facts developed in the United States of America.
60. *Campbell v Mirror Group Newspapers* Ltd [2004] 2 AC 457, [137] (Baroness Hale), based on a test of whether the plaintiff had had a "reasonable expectation of privacy".
61. See para 3.10.
62. *Campbell v Mirror Group Newspapers* Ltd [2004] 2 AC 457, [151]-[152] (Baroness Hale).
63. *Campbell v Mirror Group Newspapers* Ltd [2004] 2 AC 457, [117] (Lord Hope). Lord Hope referred to *Dudgeon v United Kingdom* (1981) 4 EHRR 149, [52] where the European Court said that the more intimate the aspects

provided by Narcotics Anonymous and details of that treatment, "went significantly beyond the publication of the fact that she was receiving therapy or that she was engaged in a course of therapy with NA".[64]

3.28 The majority held that the breach of privacy was compounded by the publication of photographs accompanying the article and was "more than enough to outweigh the right to freedom of expression" that the defendants were asserting in the case.[65] The photographs contributed both to the revelation and the harm that might be done, having the potential to deter Ms Campbell, and possibly others, from continuing treatment. The potential for the disclosures to cause harm was seen as "an important factor to be taken into account in the assessment of the extent of the restriction that was needed to protect Ms Campbell's right to privacy".[66] The House held that the tests that courts must apply are whether publication of the material pursues a legitimate aim and whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to privacy.[67]

Current approach to privacy in English law

3.29 In summary, while there is no domestic tort of invasion of privacy in English law,[68] "confidentiality" and "privacy" are now both protected in the action breach of confidence. This action is firmly within the framework of Articles 8 and 10 of the ECHR.[69] Notwithstanding the contrary view of the English Court of Appeal,[70] there now seems to be "two quite distinct versions of the tort of breach of confidence" in English law[71] – one the traditional version linked to

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of private life which are being interfered with, the more serious must be the reasons for doing so before the interference can be legitimate.

64. *Campbell v Mirror Group Newspapers* Ltd [2004] 2 AC 457, [117] (Lord Hope).
65. *Campbell v Mirror Group Newspapers* Ltd [2004] 2 AC 457, [125] (Lord Hope), [154] (Baroness Hale), [165] (Lord Carswell).
66. *Campbell v Mirror Group Newspapers* Ltd [2004] 2 AC 457, [118] (Lord Hope).
67. *Campbell v Mirror Group Newspapers* Ltd [2004] 2 AC 457, [113] (Lord Hope).
68. *Wainwright v Home Office* [2004] 2 AC 406; *Ash v McKennitt* [2006] 1714, [8].
69. *Associated Newspapers Ltd v HRH the Prince of Wales* [2006] EWCA 1776, [64]-[74]; *Ash v McKennitt* [2006] EWCA 714, [11]. For discussion of the jurisprudence of the ECHR, see para 5.36-5.63.
70. See *Associated Newspapers Ltd v HRH The Prince of Wales* [2006] EWCA 1776, [65].
71. *Hosking v Runting* [2003] 3 NZLR 285, [42] (Gault and Blanchard JJ). See also R Toulson and C Phipps, *Confidentiality* (2nd ed, Sweet & Maxwell, 2006) [2-006] ("significantly different types of cause of action"). This is

Coco v AN Clark (Engineers) Ltd,[72] the other the expanded action in cases like *Campbell*. The first version "reflects the historical approach to the law of torts with the focus on wrongful conduct whereas the second reflects more the impact of a developing rights-based approach".[73]

DEVELOPING A TORT OF INVASION OF PRIVACY

New Zealand

3.30 In New Zealand, privacy is protected at common law and by statute.[74] Unlike England, the common law of New Zealand recognises the existence of a separate cause of action for invasion of privacy by giving publicity to private and personal information. The action is generally referred to as a "tort". The leading decision is that of the Court of Appeal in *Hosking v Runting* ("*Hosking*") in 2004.[75]

Hosking v Runting

3.31 The proceedings in *Hosking* were first brought in the New Zealand High Court.[76] The complaint arose from the photographing of the appellants' infant daughters on a public footpath, without the appellants' consent. The cause of action pleaded was a breach of the children's right of privacy. The hearing focused on whether a tort of invasion of privacy exists in New Zealand and, if so, whether it covered the particular facts.

3.32 Justice Randerson reviewed a number of New Zealand authorities that had "cautiously recognised a separate tort of invasion of privacy".[77] His Honour ultimately found that these decisions were difficult to support and held that the law in New Zealand did not recognise a privacy tort. He concluded that existing remedies were likely to be sufficient to meet most claims to privacy based on public disclosure of private information and that any gaps in privacy law

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implicit in *Douglas v Hello!* Ltd [2007] UKHL 21, esp [255] (Lord Nichols dissenting)

72. *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47 (Megarry J). See para 3.4.
73. *Hosking v Runting* [2003] 3 NZLR 285, [42] (Gault and Blanchard JJ).
74. See, for example, the *Privacy Act 1993* (NZ), which deals primarily with the collection and disclosure of personal information by an "agency", as defined in s 2(1); and the *Broadcasting Act* 1989 (NZ), under which broadcasting media organisations must meet standards consistent with the privacy of the individual.
75. *Hosking v Runting* [2005] 1 NZLR 1.
76. *Hosking v Runting* [2003] 3 NZLR 285.
77. *Hosking v Runting* [2005] 1 NZLR 1, [34].

should be addressed by legislation. He was also influenced by the fact that the *Bill of Rights* had deliberately excluded a broad protection of privacy rights. His Honour took the view that the approach taken by the legislature on privacy issues suggests caution towards "creating new law in this field". In the course of his judgment, Justice Randerson indicated his approval of the United Kingdom approach of developing the action for breach of confidence to protect personal privacy through the public disclosure of private information where it is warranted.[78] The Court found in favour of the defendants and the plaintiffs appealed to the Court of Appeal.

3.33 The Court of Appeal reviewed Justice Randerson's conclusion that a free-standing tort of invasion of privacy does not exist in New Zealand. The Court also analysed the United Kingdom breach of confidence cases. It concluded that it made more sense to recognise that confidence and privacy, while capable of overlapping, are essentially different concepts:

> Breach of confidence, being an equitable concept, is conscience based. Invasion of privacy is a common law wrong which is founded on the harm done to the plaintiff by conduct which can reasonably be regarded as offensive to human values.[79]

3.34 It was therefore "legally preferable and better for society's understanding of what the Courts are doing" to remedy breaches of privacy "under a self contained and stand-alone common law cause of action to be known as invasion of privacy".[80]

3.35 The Court emphasised, however, that it was not thereby to be taken as establishing "a general cause of action encompassing all conduct that may be described as invasion of privacy".[81] In its opinion, there could be "no such broad ground of liability."[82] If a "high-level and wide tort of invasion of privacy" were to be introduced, this should be at the instigation of the legislature, not the courts.[83]

3.36 Rather, the Court held that a case had been made for "a right of action for breach of privacy by giving publicity to private and personal information".[84] This view was reached on the following grounds:

78. *Hosking v Runting* [2003] 3 NZLR 285, [158].
79. *Hosking v Runting* [2005] 1 NZLR 1, [45].
80. *Hosking v Runting* [2005] 1 NZLR 1, [246] (Tipping J).
81. *Hosking v Runting* [2005] 1 NZLR 1, [45].
82. *Hosking v Runting* [2005] 1 NZLR 1, [45].
83. *Hosking v Runting* [2005] 1 NZLR 1, [110] (Gault and Blanchard JJ).
84. *Hosking v Runting* [2005] 1 NZLR 1, [148] (Gault P and B;lanchard J), [244] (Tipping J).

- It is essentially the position reached in the United Kingdom under the breach of confidence cause of action.
- It is consistent with New Zealand's obligations under the International Covenant and UNCROC.
- It is a development recognised as open by the Law Commission.
- It is workable as demonstrated by the experience of the Broadcasting Standards Authority and similar British tribunals.
- It enables competing values to be reconciled.
- It can accommodate interests at different levels so as to take account of the position of children.
- It avoids distortion of the elements of the action for breach of confidence.
- It enables New Zealand to draw upon extensive United States experience.
- It will 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.[85]

3.37 While the Court stated that future courts should leave the scope of the tort to incremental development,[86] it identified two fundamental requirements for a successful claim for invasion of privacy:[87]

> 1. The existence of facts in respect of which there is a reasonable expectation of privacy; and
> 2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

3.38 A "reasonable expectation of privacy" would depend largely on "whether publication of the information or material about the plaintiff's private life would in the particular circumstances cause substantial offence to a reasonable person".[88] A defence of there being legitimate public concern in the information or material to justify publication is available.[89] Whether there is sufficient public concern to make out a successful defence would depend on "whether in the

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85. *Hosking v Runting* [2005] 1 NZLR 1, [1148] (Gault P and Blanchard J).
86. *Hosking v Runting* [2005] 1 NZLR 1, [117].
87. Gault and Blanchard JJ stated that the elements of the tort as it relates to publicising private information set down by Nicholson J in *P v D* [2000] 2 NZLR 591 "provide a starting point, and are a logical development of the attributes identified in the United States jurisprudence and adverted to in judgments in the British cases": *Hosking v Runting* 2005] 1 NZLR 1, [117].
88. *Hosking v Runting* [2005] 1 NZLR 1, [259] (Tipping J).
89. *Hosking v Runting* [2005] 1 NZLR 1, [129]-[130] (Gault P and Blanchard J), [259] (Tipping J).

circumstances those to whom the publication is made can reasonably be said to have a right to be informed about it".[90]

3.39 On the facts of this case, the Court held that neither the Hoskings, nor the children themselves, had a reasonable expectation of privacy in the photographs, taken as they were in a public place, and because they disclosed nothing more "than could have been observed by any member of the public in Newmarket on that particular day".[91] The Court was not convinced that "a person of ordinary sensibilities would find the publication of [the] photographs highly offensive or objectionable even bearing in mind that young children are involved".[92] The Court was also of the view that the action would be "overwhelmed" by the right of freedom of expression; and, further, that there was no evidence to suggest that the Hoskings' children would be placed at serious risk by their photographs being published.[93] Accordingly, the plaintiffs' appeal was dismissed.

Bill of Rights

3.40 Unlike Australia, New Zealand has a Bill of Rights. The New Zealand *Bill of Rights Act 1990* (NZ) was enacted to give effect to the rights recognised in the *International Covenant on Civil and Political Rights* (ICCPR),[94] to which New Zealand is a signatory. However, the *Bill of Rights* omits the provisions of Article 17 of the ICCPR, which protects rights to privacy. In *Hosking* Justices Gault and Blanchard found this omission to be pragmatic and no reflection on the importance attributed to privacy rights in New Zealand law:

> We do not accept that omission from the *Bill of Rights Act* can be taken as legislative rejection of privacy as an internationally recognised fundamental value. It is understandable that, in an enactment focussed more on processes than substantive rights, privacy law, which has a very wide scope, would be left for incremental development … Issues of definition, scope of protection and relationship with other societal values clearly would have been such as to defeat any attempt to comprehensively delineate the legal principle.[95]

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90. *Hosking v Runting* [2005] 1 NZLR 1, [259] (Tipping J).
91. *Hosking v Runting* [2005] 1 NZLR 1, [164] (Gault P and Blanchard J), [260] (Tipping J).
92. *Hosking v Runting* [2005] 1 NZLR 1, [164] (Gault P and Blanchard J).
93. *Hosking v Runting* [2005] 1 NZLR 1, [159]-[160] (Gault P and Blanchard J), [260]-[261] (Tipping J).
94. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] *Australian Treaty Series* 23 (generally entered into force for Australia 13 November 1980) ("ICCPR")
95. *Hosking v Runting* [2005] 1 NZLR 1, [92].

3.41 Their Honours noted that when a *Bill of Rights* was proposed, Parliament indicated that it did not want "to entrench a vague and uncertain privacy right in the current New Zealand social climate".[96]

STATUTORY INTERVENTION

Privacy legislation in the Canadian Provinces

3.42 Four Canadian Provinces, British Columbia, Manitoba, Saskatchewan and Newfoundland have enacted *Privacy Acts*, establishing a cause of action for invasion of privacy.[97] All four *Privacy Acts* create a tort of "violation of privacy", actionable without proof of damage. The British Columbia legislation takes a slightly different approach. Its *Privacy Act* creates two separate torts: violation of privacy[98] and unauthorised use of the name or portrait of another[99] (with no mention of appropriation of voice of another). The other three jurisdictions include the appropriation of name, likeness or voice within the general tort of violation of privacy.[100] All four statutes are relatively brief and straightforward.

3.43 The Manitoba regime differs from the other three in the elements of the violation of privacy that will found an action in tort. In Manitoba, the violation must be substantial, unreasonable and without a claim of right. In the other three provinces, the violation must be wilful and without a claim of right. The British Columbia Court of Appeal has interpreted "claim of right" to mean "an honest belief in a state of facts which, if it existed, would be a legal justification or excuse".[101]

3.44 Whereas the Manitoba statute positions considerations of reasonableness in relation to the conduct of the violator of privacy, in British Columbia, and Newfoundland, "reasonableness" is a measure of a person's entitlement to privacy. The *Privacy Acts* of these two Provinces provide that the nature and degree of privacy to which a

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96. *Hosking v Runting* [2005] 1 NZLR 1, [93].
97. British Columbia: *Privacy Act,* RSBC 1996, c 373; Manitoba: *Privacy Act,* CCSM 1987, c P125; Saskatchewan: *Privacy Act,* RSS 1978, c P-24; Newfoundland: *Privacy Act,* RSNL 1996, c P-22; A fifth province, Quebec, also has a statutory cause of action of invasion of privacy, enacted in the *Civil Code of Quebec*. This is discussed separately in paras 5.32-5.35.
98. *Privacy Act,* RSBC 1996, c 373, s 1.
99. *Privacy Act*, RSBC 1996, c 373, s 3.
100. Saskatchewan, *Privacy Act,* RSS 1978, c P-24, s 3(c); Manitoba*: Privacy Act,* CCSM 1987, c P-125, s 3(c); Newfoundland: *Privacy Act,* RSNL 1990, c P-22, s 4 (c).
101. *Hollinsworth v BCTV* (1998) 59 BCLR (3d) 121 (CA).

person is entitled is that which is reasonable in the circumstances having regard to the lawful interests of others.[102] Saskatchewan does not include the concept of reasonableness at all in its *Privacy Act.*

3.45 Without limiting the general nature of the tort, all four statutes give examples of what might constitute a violation of privacy. Manitoba, Saskatchewan and Newfoundland cite as examples: surveillance; listening to or recording a conversation; unauthorised use of a person's name, likeness or voice; and use of personal documents.[103] British Columbia cites as examples of violation of privacy eavesdropping and surveillance.[104]

3.46 In the British Columbia *Privacy Act*, rather than providing defences to the tort of violation of privacy, the legislation excepts certain acts or conduct from amounting to actionable violations of privacy. An act or conduct is not a violation of privacy if it was: consented to; incidental to defending person or property; required by law or court process or order; or done by a peace officer or public officer in the course of duty.[105] Unless the material was obtained by violating privacy; publishing material is not itself a violation of privacy if it was: of public interest; fair comment on a matter of public interest; or privileged.[106]

3.47 The Manitoba, Saskatchewan and Newfoundland *Privacy Acts* provide defences to the tort. In all three, it is a defence to show that: there was express or implied consent; defence of person, property or other interest was involved; the defendant acted under lawful authority; or the defendant was a peace officer or public officer acting in the course of duty.[107] Manitoba also makes it a defence to show that the defendant neither knew, nor should reasonably have known, that the act, conduct or publication would have violated privacy.[108] The Saskatchewan statute provides an additional defence that the violation was necessary for, and incidental to, newsgathering, and reasonable in the circumstances.[109]

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102. British Columbia: *Privacy Act,* RSBC 1996, c 373, s 1(2); Newfoundland: *Privacy Act,* RSNL, 1990, c P-22, s 3(2).
103. Manitoba: *Privacy Act,* CCSM 1987, c P125 s 3; Saskatchewan: *Privacy Act,* RSS 1978, c P-24 s 3; Newfoundland: *Privacy Act, RSNL* 1990, c P-22, s 4.
104. *Privacy Act,* RSBC 1996, c 373, s 1(4).
105. *Privacy Act,* RSBC 1996, c 373, s 2(2).
106. *Privacy Act,* RSBC 1996, c 373, s 2(3).
107. Manitoba: *Privacy Act,* CCSM 1987, c P125, s 5(a), (c)-(e). Saskatchewan: *Privacy Act* RSS 1978 c P-24 s 4(1)(a)-(d); Newfoundland: *Privacy Act,* RSNL 1990, c P-22, 55 (d).
108. Manitoba: *Privacy Act,* CCSM 1987, c P125, s 5(b).
109. Saskatchewan: *Privacy Act,* RSS 1978, c P-24, s 4(1)(e).

3.48 In addition, where the violation related to publication, it is a defence in all three jurisdictions to show that the publication was: in the public interest; fair comment on a matter of public interest; or privileged.[110] Saskatchewan and Newfoundland, but not Manitoba, qualify these publication defences by providing that the material published must not have been obtained by violating privacy.[111]

3.49 There have been relatively few actions brought under the *Privacy Acts*, with British Columbia recording the most number of cases.[112] In three out of every four cases, the defendant has successfully defended the action[113] and in those cases where the plaintiff has been successful, by and large, damage recovery has been "staggeringly low".[114] Cases successfully defended include:[115] actions brought against a statutory tribunal or regulatory body investigating an individual in good faith, and in the course of its duties;[116] televised material of picketing in front of the plaintiff's business, obtained from the plaintiff's parking lot;[117] placement of a tracking device on a husband's car to obtain evidence for the wife in divorce proceedings;[118] the defendant's circulation of a topless photo of the plaintiff, found in his jacket pocket, to mutual acquaintances;[119] and video surveillance of a plaintiff to obtain evidence testing her credibility in a personal injury case.[120]

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110. Manitoba: *Privacy Act,* CCSM 1987, c P125, s 5(f); Saskatchewan: *Privacy Act,* RSS 1978, c P-24, s 4(2); Newfoundland: *Privacy Act,* RSNL 1990, c P-22, s 5(2).
111. Newfoundland: *Privacy Act,* RSNL 1990, c P-22, s 5(2).
112. C Chester, J Murphy and E Robb, "Zapping the paparazzi: is the tort of privacy alive and well?" (2003) 27 *Advocates' Quarterly* 357 at 364. See *Insurance Corp of British Columbia v Somosh* (1983) 51 BCLR 344 (SC); *C (PR) v Canadian Newspaper Co* (1993) 16 CCLT (2d) 275 (BCSC); *Hollinsworth v BCTV* (1998) 59 BCLR (3d) 121 (CA); *F (JM) v Chappell* (1998) 158 DLR (4th) 430; and *Malcolm v Fleming* (Unreported, April 10, 2000, BCSC, Doc No S17603, Downs J).
113. C Chester, J Murphy and E Robb, "Zapping the paparazzi: is the tort of privacy alive and well?", 365.
114. Chester, Murphy and Robb, 366-368.
115. Referred to in Chester, Murphy and Robb, 366.
116. *Cottrell v Manitoba (Workers Compensation Board)* (1997) 119 Man R (2d) 294; *Walker v British Columbia College of Dental Surgeons* (Unreported, 19 February, 1997, BCSC, Doc No C946856, Sinclair Prowse J); and *K (SJ) v Chapple* (1999) 179 Sask R 124 (QB).
117. *Silber v British Columbia Television Broadcasting System ltd* (1985) 25 DLR (4th) 345.
118. *Davis v McArthur* (1970) 17 DLR (3d) 760.
119. *Milton v Savinkoff* (1993) 18 CCLT (2d) 288 (BCSC).
120. *Druken v RG Fewer & Associates Inc* (1998) 171 Nfld & PEIR 312.

3.50 In the case involving televising the picketing of the plaintiff's business, the Court held that the "character of the property where the act or conduct complained of took place is highly relevant to the question of what constitutes a reasonable expectation of privacy."[121] Justice Lysyk, dismissing an action for alleged invasion of privacy by the camera crew, emphasised that the filming had occurred during daylight, in a parking lot exposed to the passing thoroughfare of a busy commercial neighbourhood. This was held to justify a finding that the plaintiff had no reasonable expectation of privacy in the circumstances.

Ireland

3.51 The *Privacy Bill 2006*, when passed, will establish in Irish law a statutory "tort of violation of privacy" of an individual.[122] It was presented in the Irish Parliament on 7 July 2006, but no date for the Second Stage of the passage of this legislation through parliament has yet been set. The Bill reflects the recommendations of a Working Group on Privacy, constituted in 2005 to review Ireland's law of privacy.[123] The Working Group concluded that it was undesirable not to have any clearly defined and comprehensive cause of action in order to provide a definite remedy for invasions of privacy interests. The Working Group also concluded that without a clearly defined cause of action, it was difficult for people to predict whether their conduct would give rise to legal liability for invasion of privacy. The Working Group was influenced in their recommendations by the protection of privacy provided by Article 8 of the ECHR, and the development of these protections by the European Court of Human Rights.[124]

3.52 The Working Group observed that the Constitution of Ireland conferred rights to privacy, and that this constitutional protection had been widely regarded as providing the most likely foundation for the development of a common law tort of breach of privacy.[125] The Working Group concluded that Irish law, "by virtue of these constitutional protections, affords clear and established remedies

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121. *Silber v BCTV Broadcasting Systems Ltd* (1986) 69 BCLR 34.
122. See <http://www.oireachtas.ie/viewdoc.asp?DocID=1&StartDate=1+January +2006&CatID=59> at 22 March 2007.
123. B Murray, L O'Daly, B MacNamara and C O'Hobain, *Report of WorkingGroup on Privacy* (2006),<http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ6REJMU-en/$File/WkgGrpPrivacy.pdf> at 22 March 2007 ("*Working Group Report*").
124. Ireland has not incorporated the protections of the *Convention* into domestic law.
125. *Working Group Report* at [2.33].

against the State for intrusions on privacy interest”.[126] However, it also concluded that the nature and extent of the remedies remains unclear.[127] In particular, the Working Group was troubled by the lack of clarity as to whether a cause of action for breach of constitutional rights to privacy would be confined to intentional interferences with privacy or would encompass negligent interferences, or whether the defendant’s bona fide belief that he or she was not acting unlawfully in intruding on another’s private affairs would afford a defence.[128]

3.53 The Working Group also felt that difficulties were created by the fact that the *Irish Constitution*, unlike many other Bills of Rights, imposes obligations on individual citizens, not just the State and its representatives. The effect of this is that private persons could be the subject of a claim for injunctive relief or damages for breach of constitutional rights to privacy. The Working Group observed that there are no reported cases, in either the High Court or the Supreme Court, in which a cause of action for violation of privacy interests against private persons has succeeded. The precise principles governing this cause of action therefore remain unclear and make it difficult to define the circumstances in which invasions of privacy may be justified.[129] For example, the Working Group conjectured that reasonable actions taken in reporting on matters of public importance or exposing iniquity would most likely be immune from claims by private individuals that their privacy had been violated. However, this is not clear and “the precise constitutional route to that conclusion is a matter of some potential debate”.[130]

3.54 The Working Group concluded that “the calculation of the proper balance between the rights of citizens who assert breaches of their privacy against the State, and those who seek to recover damages for such breaches against other citizens, may involve quite different considerations”.[131] It further concluded that an individual cannot presently reliably predict whether his or her actions would be found to be in breach of the constitutional right to privacy.[132]

3.55 This uncertainty, together with the uncertainty attendant on many aspects of statutory and common law protections of privacy in Irish law, led the Working Group to recommend the introduction of a statutory tort of invasion of privacy. It recommended that such a

126. *Working Group Report*, [2.36].
127. *Working Group Report*, 8.
128. *Working Group Report*, [2.37].
129. *Working Group Report*, [2.39].
130. *Working Group Report*, [2.39].
131. *Working Group Report*, [2.40].
132. *Working Group Report*, [2.42].

statutory cause of action be limited in its scope to conduct that was deliberate and intentional, and that it be combined with a statutory description of defences available in response to a claim of violation of privacy.

3.56 The tort as formulated in the *Privacy Bill* would be actionable without proof of special damage[133] but limited in its scope to conduct that was deliberate and intentional, and without lawful authority.[134] In general terms, the privacy to which an individual is entitled is "that which is reasonable in all the circumstances having regard to the rights of others and to the requirements of public order, public morality and the common good".[135] These latter three phrases are not defined and will no doubt be judicially interpreted in cases brought under the Act if passed.

3.57 Specific situations are prescribed in the Bill as violations of privacy. These include:

- subjecting a person to surveillance (whether or not effected by trespassing on the person's property);[136]
- disclosing the fruits of surveillance;[137]
- using the identity of a person without his or her consent in advertising or other promotional actions; or for financial gain;[138] and
- disclosing personal records concerning the individual or information gained from them.[139]

3.58 The Bill provides that in deciding whether a violation of privacy has occurred, a court must have regard to the nature of the act or disclosure and all relevant circumstances. These include: the place and occasion of the act; matters relating to any office or position held by the aggrieved person; the purpose for which the material obtained as a result of the act was used (or intended to be used); matters relating to any trespass involved; and whether an offence was committed.[140] In the case of disclosure of material, relevant circumstances include: whether the disclosure is, wholly or partly, of sensitive or intimate private facts; concerns the person's private, home or family life; or contravenes the duty of a public body not to disclose;

133. *Privacy Bill 2006* cl 2(2).
134. *Privacy Bill 2006* cl 2(1).
135. *Privacy Bill 2006* cl 3(1).
136. *Privacy Bill 2006* cl 3(2)(a) and s 1.
137. *Privacy Bill 2006* cl 2(2)(b).
138. *Privacy Bill 2006* cl 2(2)(c).
139. *Privacy Bill 2006* cl 2(2)(d).
140. *Privacy Bill 2006* cl 4(1).

and the manner and extent of the disclosure.[141] The Bill does not propose as a defence to disclosure in a privacy action that: the material was in a register, or similar, to which the public had access; the person had already disclosed the material to family or friends; there had been a prior unlawful disclosure; or that the disclosure related to an event in a public place, or that was visible to the public.[142]

3.59 There are a number of defences identified in the Bill as being available to a privacy action where the defendant can prove that the act in question:

- **was done lawfully to defend or protect a person or property;**
- **was authorised or required by law or by a court;**
- **was that of a public servant acting, or reasonably believing themselves to be acting, in the course of his or her duties; or**
- **involved the installation or operation of a surveillance system for a lawful purpose or for protection, or for prevention or detection of a crime.[143]**

3.60 In addition, the *Privacy Bill* recognises the legitimacy of bona fide newsgathering and the importance of facilitating public discussion, where there is both a benefit and an interest in such discussion taking place. Clause 5(e) provides a defence if the act in breach of privacy was an act of newsgathering, by the media, provided that any disclosure of material obtained was done in good faith; was for the purpose of discussing a subject of public importance; was for the public benefit; and was fair and reasonable in all of the circumstances.

3.61 A conference on journalism organised by the National Union of Journalism revealed that the industry holds some fears as to the effect the new privacy laws will have on it. Such fears include that: "tight new rules could lead to prosecution of investigative journalists seeking information"; "journalists who persistently phone or 'doorstep' people as part of their investigations could face prosecution for violation of privacy"; "day -to-day journalistic activities - including telephone calls, emails and direct approaches to subjects of articles - could also lead to allegations of harassment and trespass against journalists".[144] Andrea Martin, a media law specialist who addressed the conference, stated that the Bill would make newsgathering much more complicated and had the potential to inhibit "legitimate journalistic investigation and

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141. *Privacy Bill 2006* cl 4(2).
142. *Privacy Bill 2006* cl 4(3) and(4).
143. *Privacy Bill 2006* cl 5(1).
144. *Irish Independent,* (18 September 2006)

the exercise of the right to freedom of expression, due to the lack of clarity and failure of the bill to set out comprehensively the public interest factors".[145]

3.62 Geraldine Kennedy, editor of the *Irish Times*, told the conference that the Bill would act as a "gagging writ" on "good investigative journalism". She argued that the courts should continue to deal with breaches of privacy on a case-by-case basis rather then enact legislation that "could have unforeseen effects on the effective functioning of the media" and "the rightful exercise of the right to freedom of expression".

3.63 Another point of contention among journalists was the provision in the Bill allowing a court hearing any action in tort to order that the hearing be closed to the public, for the purpose of protecting a person's privacy.[146] The Chair of the Irish Executive Council of the National Union of Journalists, Ronan Brady, described this as "a serious threat to democracy".

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145. A Martin, "Privacy Bill 2006: A Legal Perspective", paper presented at the National Union of Journalists Conference, *Journalism and the Law: New Threats and Challenges* (Dublin, 16 September 2006).
146. *Privacy Bill 2006* cl 13.

4. Privacy in the United States

- Introduction
- Public disclosure of private facts
- Intrusion upon seclusion
- Appropriation of name or likeness
- False light
- Conclusion

INTRODUCTION

4.1 This chapter examines the law in the United States, which has a long history of protecting privacy. At common law, that protection occurs principally in four tortious causes of action:

- Public disclosure of the private life of another;
- Intrusion upon the seclusion of another;
- Appropriation of the name or likeness of another; and
- Publicity that places another person in a false light before the public.

The main features of each of these actions, which may overlap, are surveyed in this chapter.

Background

4.2 The protection of privacy in the law of the United States has its modern origins in a famous article published in 1890 by Warren and Brandeis,[1] who canvassed particularly English cases that appeared to protect privacy and asserted that these cases were based on a broader principle. They coined the expression the "right to privacy" to describe the principle, and the expression has endured in the United States, sometimes with acknowledgement of its imprecision.[2] Warren and Brandeis argued that the law should provide a remedy for invasions of privacy beyond that provided through actions in contract and tort. They were concerned about new technologies that facilitate the surveillance of people's private lives and argued that the growing intrusion by the media into private affairs made greater legal protection of privacy necessary to protect individuals against the unjustifiable infliction of mental distress. They wrote:

> Instantaneous photographs and newspaper enterprises have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house tops." …
>
> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is

1. Samuel Warren and Louis Brandeis, "The Right to Privacy" (1890) 4 *Harvard Law Review* 193.
2. For example, *Cordell v Detective Publications* 419 F 2d 989, 990 (1958) (US Court of Appeals, Sixth Circuit). See also *Restatement (Second) Torts* §652A contrasting "interests" in (1) with the "right" in (2).

> pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.[3]

4.3 The courts did not immediately embrace the Warren and Brandeis thesis. In 1902, in *Roberson v Rochester Folding Box Co*,[4] the plaintiff, a young woman, sought the aid of the courts to enjoin the further circulation of lithographic prints containing her portrait, which the defendants used without her consent to advertise flour with the caption "The Flour of the Family". The New York Court of Appeals held, by a narrow majority, that the plaintiff could not recover. She could not establish a cause of action by appealing to the "so-called 'right of privacy'", which "has not yet found an abiding place in our jurisprudence".[5] The Court reasoned that there was no precedent for such an action, and if the doctrine were adopted, the attempts to apply it logically would necessarily result in a vast amount of litigation, and in litigation bordering upon the absurd.

4.4 Three years later, a similar question arose in *Pavesich v New England Life Insurance*.[6] The defendant, an insurance company, used the plaintiff's name and photograph in an advertisement without his consent, including a false endorsement of the company. The plaintiff claimed damages alleging that the publication was a "trespass upon the plaintiff's right of privacy, and was caused by breach of confidence and trust reposed". In a unanimous decision, the Supreme Court of Georgia rejected the ruling in *Roberson* as representative of "the feeling of conservatism in a judge who faces a proposition which is novel".[7] It stated that the absence, for a long period of time, of a precedent for an asserted right is not conclusive evidence that the right did not exist. It observed that where the case is new in principle, the courts cannot give a remedy; but where the case is new only in

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3. Samuel Warren and Louis Brandeis, "The Right to Privacy" (1890) 4 *Harvard Law Review* 193, 195-196. Warren, who had a law firm and was married to the daughter of a prominent politician, lived in an exclusive section of Boston. He and his family were well-known in social circles and frequently organised elaborate parties. A local paper reported their activities in lurid details. This annoyed Warren who took the matter up with Brandeis. The result was their was influential article: see Edward J Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 *New York University Law Review* 962, 966, citing a biography of Brandeis.
4. 64 NE 442 (Court of Appeals of New York, 1902).
5. *Roberson v Rochester Folding Box Co* 64 NE 442, 447 (1902).
6. 50 SE 68 (Supreme Court of Georgia, 1905).
7. *Pavesich v New England Life Ins Co* 50 SE 68, 78 (1905).

instance, it is the duty of the courts to give relief by the application of recognised principles. It further observed that a "right of privacy" is derived from natural law, recognised by municipal law, and its existence can be inferred from expressions used by commentators and writers on the law as well as by judges in decided cases. The court declared that the "right" is embraced within the absolute rights of personal security and personal liberty. The court said:[8]

> [A] violation of the right of privacy is a direct invasion of a legal right of the individual. It is a tort, and it is not necessary that special damages should have accrued from its violation in order to entitle the aggrieved party to recover.

4.5 *Pavesich* became the leading American authority on privacy, and, over subsequent decades, courts in most United States jurisdictions afforded increasing protection to privacy interests.[9] When Professor William Prosser surveyed this case law in a famous article in 1960, he found "not one tort, but a complex of four".[10] Prosser wrote:

> The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by a common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff … "to be let alone".[11]

4.6 Prosser described the "four torts" as: intrusion upon seclusion, public disclosure of private facts, false light, and appropriation.[12] The Restatement has adopted Prosser's classification of the privacy torts.[13]

Widespread recognition

4.7 A majority of the States protect privacy in one form or another at common law.[14] Courts generally conform to the Restatement's classification of four distinct privacy torts to protect different privacy

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8. *Pavesich v New England Life Ins Co* 50 SE 68, 73 (1905)
9. See D Dobbs, R Keeton and D Owen, *Prosser and Keeton on Torts* (5th ed, West Publishing, 1984), 851.
10. William Prosser, "Privacy" (1960) 48 *California Law Review* 383, 389.
11. Prosser , 389.
12. Prosser, 383.
13. See *Restatement (Second) of Torts* §652A. The Restatements of the Law, published by the American Law Institute, are comprehensive expositions of the law on specific subjects, such as contracts or torts. A Restatement is based on court decisions but is formulated like a statute. It is essentially a synthesis of court decisions into clear, consistent and concise language.
14. Currently, only five states refuse to recognise a common law right to privacy, namely, Virginia, Minnesota, Rhode Island and Wisconsin, while Nebraska does not recognise a cause of action for the tort of appropriation: see Am Jur 2d, Privacy, § 4.

interests. There is, however, no uniformity across all jurisdictions on the elements of the torts. For example, while most courts identify offensiveness as an element in three of the four torts, some courts require the higher test of outrageous conduct. Further, while the public interest principle (which relates to the publication of matters that are of legitimate concern to the public) is a defence to liability in some jurisdictions, it is an element of the relevant torts in other jurisdictions. The general principles laid out in this Chapter may, therefore, vary across the different jurisdictions.

4.8 Some States have statutory causes of action that recognise or modify one[15] or more[16] of the common law torts. The New York statute creating a right of action for the unauthorised use of a person's name or picture for advertising or other trade purposes is one of the most litigated.[17] It was adopted when the courts in that State rejected the "right to privacy" based on the appropriation of name or likeness.[18]

A personal action

4.9 The "right to privacy" in American law generates an action only at the instance of the person whose privacy has been invaded, or, as it is sometimes put, it generates only a "personal right". Three consequences in particular flow from this.

4.10 First, the action lapses with the death of the person who enjoyed it.[19]

4.11 Secondly, a plaintiff must show an invasion of his or her own privacy before recovery can be had. There is no "relational right of privacy", that is, a plaintiff cannot bring an action for invasion of privacy by alleging that he or she suffers "injury" from publicity given to another person simply by reason of a relationship to that person.[20] For example, a husband has no claim to invasion of his privacy

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15. See Code of Virginia §§ 8-650, c 671 (unauthorised use of name or picture of any person); 765 Illinois Consolidated Statutes 1075/10 9 (right of publicity).
16. See Neb Rev Stat §§ 20-204 and 20-205; Wis Stat § 995.50.
17. New York State Consolidated Laws, Civil Rights, § 50. It superseded NY Sessions Laws (1903) ch 132 § 1-2.
18. See *Roberson v Rochester Folding Box Co* 64 NE 442 (Court of Appeals New York, 1902). See para 4.3.
19. *Maritote v Desilu Productions Inc,* 345 F 2d 418, 420 (United States Court of Appeals, 7th Circuit, 1965); *Young v That Was The Week That Was,* 423 F 2d 265 (United States Court of Appeals, 6th Circuit, 1970). For qualification in respect of the appropriation tort, see para 4.61-4.62.
20. *Jack Metter v Los Angeles Examiner,* 95 P 2d 491 (District Court of Appeal of California, 1939); *Moore v Charles B Pierce Film Enterprises Inc,* 589 SW 2d 489 (Court of Civil Appeals of Texas, 1979).

against a newspaper for the unhappiness that he suffers as a result of the newspaper publishing a picture of his deceased wife in connection with a story of the wife committing suicide.[21] While the Restatement states that this rule does not apply in relation to the appropriation of a person's name or likeness,[22] courts have, in a number of cases, dismissed cases brought by relatives or representatives of a dead person to recover damages for the invasion of privacy resulting from posthumous publicity involving the deceased's name or likeness.[23]

4.12 Thirdly, a corporation[24] or partnership[25] has no cause of action for any of the four forms of invasion of privacy because it has no personal right to privacy. One case allowed an unincorporated association to bring a privacy tort action on behalf of its members.[26]

Relationship to breach of confidence

4.13 The close connection between privacy and confidentiality in other common law systems has already been noted.[27] United States case law recognises that "[t]heir common denominator is that both

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21. *Jack Metter v Los Angeles Examiner,* 95 P 2d 491 (Court of Appeal of California, 1939).
22. *Restatement (Second) of Torts* § 652I.
23. For example, the Seventh Circuit Court of Appeals affirmed the dismissal of an action brought by the widow, son and administratrix of Al Capone against the producers of the television drama series "The Untouchables", which were televised more than twelve years after the death of Al Capone. The court held that the plaintiffs could not recover damages for the alleged appropriation of the name and likeness of Al Capone where they were not named or referred to in any of the television broadcasts at issue: *Maritote v Desilu Productions Inc,* 345 F 2d 418 (United States Court of Appeals, 7th Circuit, 1965). Again, the widow and son of the movie actor Bela Lugosi, who played the title role in the 1930 film "Dracula", were not entitled to recover for an alleged invasion of privacy by the defendant movie company's licensing of the use of the Count Dracula character (as portrayed by Bela Lugosi's and therefore including his face and likeness) to commercial films, since the right to exploit ones' name and likeness is personal to the artist and must be exercised, if at all, by the artist during his or her lifetime: *Lugosi v Universal Pictures,* 10 ALR 4th 1150 (Supreme Court of California, 1979).
24. *Warner-Lambert Co v Execuquest Corp,* 691 NE 2d 545 (Supreme Judicial Court of Massachusetts, 1998); *Austin Eberhardt & Donaldson Corp v Morgan Stanley Dean Witter Trust,* US Dist LEXIS 1090 (United States District Court for the Northern District of Illinois, 2001).
25. *Rosenwasser v Ogoglia,* 158 NYS 56 (Supreme Court of New York, 1916).
26. *Socialist Workers Party v Attorney General of the United States,* 444 US 903 (United States Supreme Court, 1978).
27. See para 2.22 (Australia), 3.33.29 (England), 3.30-3.41 (New Zealand).

assert a right to control information".[28] However, the case law also acknowledges that confidential information is not always private (for example, commercial or governmental secrets); and that only a person who holds confidential information can breach confidentiality, whereas (theoretically) anyone can tortiously invade another's privacy.[29] Thus, in *Humphers v First Interstate Bank of Oregon,*[30] the defendant doctor wrote a letter containing false information to a hospital to enable an adopted person, whom he had delivered at birth, to find out the identity of her birth mother, the plaintiff. The hospital held sealed medical records, not open to the public, concerning the adopted person's birth, and these were released to the adopted person on production of the defendant's letter. The records enabled the adopted person to trace the plaintiff, who was distressed when located. The plaintiff sued the doctor for invasion of privacy and breach of confidence. The plaintiff succeeded in breach of confidence but not in the tort of intrusion upon the plaintiff's seclusion (the plaintiff alleging that the defendant had offensively pried into personal matters that she had reasonably sought to keep private). While the plaintiff's action had assisted the adopted person in the quest for her birth mother, that quest in itself did not invade the plaintiff's privacy. Nor had the plaintiff pried into a confidence: he had simply failed to keep one. And for this he was liable.

4.14 The existence of a contractual or professional relationship between the parties will mean that the disclosure of information connected with the relationship will often result in a preference for the action for breach of confidence over an action based on one of the privacy torts. However, there are cases, particularly relating to the disclosure by hospitals or medical professionals of the plaintiff's HIV status, where United States courts have invoked either breach of confidence or one of the privacy torts as the basis of liability.[31]

Constitutional protection of privacy

4.15 The privacy torts identified by Prosser were not anchored in any constitutional guarantees. However, in 1965 the US Supreme Court held, in *Griswold v Connecticut*, that, although the US Constitution does not contain an express right of privacy, several fundamental

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28. *Humphers v First Interstate Bank of Oregon* 696 P 2d 527, 529 (Supreme Court of Oregon, 1985). This reflects the views of A F Westin, *Privacy and Freedom* (Atheneum, 1967).
29. *Humphers v First Interstate Bank of Oregon* 696 P 2d 527, 529 (Supreme Court of Oregon, 1985).
30. 696 P 2d 527.
31. See V E Schwartz, K Kelly and D F Partlett, *Prosser, Wade and Schwartz's Torts* (10th ed, Foundation Press, 2000), 954-955.

constitutional guarantees create zones of privacy that, in appropriate cases, were entitled to protection.[32] In *Griswold* itself, a State law criminalising the use of contraception was held unconstitutional since it violated marital privacy. The constitutional protection of privacy has since extended to a vast range of activities involving the most intimate and personal choices a person can make in his or her lifetime: it gives "constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education."[33]

4.16 The constitutional protection of privacy is directed against unlawful governmental invasion. If a court finds that a constitutional right is breached, the general result is a court declaration that the action by the State is invalid.[34] Hence, to obtain damages for invasion of privacy by a public official, the victim will generally have to use the

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32. 381 US 479 (United States Supreme Court, 1965). Justice Douglas, writing for the court, explained the basis of the constitutional right to privacy: "[T]he Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one …. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people'": *Griswold v Connecticut* 381 US 479, 484 (United States Supreme Court, 1965).
33. *Lawrence v Texas*, 539 US 558, 573-574 (United States Supreme Court, 2003) citing *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 851 (United States Supreme Court, 1992). See also *Roe v Wade*, 410 US 113 (United States Supreme Court, 1973) (procreation); *Eisenstadt v Baird*, 405 US 438 (United States Supreme Court, 1972) (contraception). For the view that the Supreme Court may depart from the established constitutional approach to the protection of privacy, see Cass R Sunstein, *Radicals in Robes* (Basic Books, 2005) ch 3.
34. See, however, *Bivens v Six Unknown Federal Narcotics Agents* (United States Supreme Court, 1971) where the plaintiff was awarded damages for an unreasonable search of his home and his person that had been carried out by federal narcotics agents in violation of the US Bill of Rights. The Constitution was the basis of the cause of action in damages. In Australia, the High Court has refused to recognise a cause of action for breach of the Constitution: *Kruger v Commonwealth* (1997) 190 CLR 1. See also *British American Tobacco Australia Ltd v The State of Western Australia* (2003) 217, 30, 53 (McHugh, Gummow and Hayne JJ); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 245 (Gummow and Hayne JJ).

general law (such as a privacy tort) and his or her action will only be entertained by a court if the defendant public official does not have immunity from suit.[35]

PUBLIC DISCLOSURE OF PRIVATE FACTS

4.17 This tort has are three basic elements:

- there must be a public disclosure ("publicity");
- the facts disclosed must be private rather than public ones; and
- the matter made public must be one the publication of which would be offensive and objectionable to a reasonable person of ordinary sensibilities.

4.18 In addition to these elements, the Restatement states that the matter publicised must be of a kind that is not of legitimate concern to the public.[36] There are judgments in some jurisdictions that apply this proposition.[37]

Public disclosure

4.19 As a general rule, the requirement of public disclosure, or "publicity," connotes publicity in the sense of communication to the public or to a large number of persons, as distinguished from one individual or a few. The simple disclosure of private information to one other person or a small group is not sufficient to support a claim for the public disclosure of private facts.[38]

4.20 However, although the disclosure necessary to support a claim for invasion of privacy in the nature of unreasonable publicity given to one's private life must be made to the general public or to a large

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35. See 42 USC § 1983 (authorising civil damage actions against those who under colour of State law deprive others of constitutional rights).
36. *Restatement (Second) of Torts* § 652D.
37. See, for example, *The Star-Telegram Inc v Doe,* 915 SW 2d 471 (Supreme Court of Texas, 1995).
38. In these cases, the publicity was held insufficient because it was made to one person or a small group of people: *Olson v Red Cedar Clinic,* 273 Wis 2d 728 (Court of Appeals of Wisconsin, 2004) (a clinic's disclosure to a school psychologist of information concerning a mother contained in her child's counselling records); *Porten v The University of San Francisco,* 64 Cal App 3d 825 (Court of Appeals California, 2004) (disclosure by a university of a student's marks to the State Scholarship and Loan Commission); *Seinton Creek Nursery v Edisto Farm Credit,* 334 SC 469 (Supreme Court of South Carolina, 1999) (a lender's disclosure of a borrower's financial information to a third party who sought a loan from the lender in order to purchase the borrower's business).

number of persons, there is no threshold number that constitutes a large number of persons. The size of the audience that receives the communication, though an important consideration, is not dispositive of the issue as to whether a public disclosure of a private fact has been made. Rather, whether such a disclosure satisfies the publicity element depends upon the particular facts of the case and the nature of plaintiff's relationship to the audience who received the information.[39]

4.21 If a plaintiff has a special relationship with the individuals to whom the matter was disclosed, the publicity requirement may be satisfied by disclosure to a small number of people. The rationale behind this rule is that the disclosure may be just as devastating to the person even though the disclosure was made to a limited number of people.[40]

Private facts

4.22 In an action for invasion of privacy based on public disclosure of private facts regarding the plaintiff, the information disclosed must actually be of a private nature.[41] For example, the fact that the plaintiff had Acquired Immune Deficiency Syndrome (AIDS) was held to be private.[42]

4.23 The Restatement gives the following illustrations of private facts:

> Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many

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39. *Ozer v Borquez,* 940 P 2d 371, 378 (Supreme Court of Colorado, 1997). *Karch v Baybank FSB*, 794 A 2d 763, 774 (Supreme Court of New Hampshire, 2002).
40. *Chisholm v Foothill Capital Corp,* 3 F Supp 2d 925, 940 (United States District Court for the Northern District of Illinois, 1998). For illustrations on the application of the rule, see *Pachowitz v LeDoux*, 666 NW 2d 88 (Court of Appeals of Wisconsin, 2003); *Kinsey v Macur,* 107 Cal App 3d 265 (Court of Appeal of California, 1980); *Karch v Baybank FSB*, 147 NH 525 (Supreme Court of New Hampshire, 1999).
41. *Howard v Des Moines Register And Tribune Company,* 283 NW 2d 289 (Supreme Court of Iowa, 1979) (Under Iowa *Freedom of Information Act*, documents reviewing plaintiff's sterilization were public and information which they contained was in the public domain, so that disclosure of plaintiff's sterilization was not actionable.)
42. *Multimedia WMAZ Inc v Kubach,* 212 Ga App 707 (Court of Appeals of Georgia, 1994).

> unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget.[43]

4.24 If facts are already known to many people or information is already in the public domain, such facts are not considered private and no liability will accrue for their disclosure. There is no liability for giving publicity to facts about the plaintiff's life that are matters of public record, such as the date of birth, the fact of marriage, military record, the fact that he or she is admitted to the practice of medicine or is licensed to drive a taxicab, or the pleadings that he or she has filed in a lawsuit.[44]

4.25 Hence, the publication of a newspaper article containing excerpts from a complaint in an estate dispute, which portrayed the plaintiffs as having taken advantage of the deceased before her death, was held not to be an invasion of plaintiffs' privacy since one's private affairs may become public when litigation ensues.[45]

4.26 In another case, a letter from an employer reprimanding an employee was held to be in the public domain prior to its appearance in a news publication because, by the time of the letter's publication, it had already been circulating both within a government agency and among industry sources.[46]

Offensiveness

4.27 A key element of the tort of public disclosure of private facts is that the matter made public must be one that would be offensive or objectionable to a reasonable person of ordinary sensibilities.[47]

4.28 The Restatement summarises this element as follows:

> The protection afforded to the plaintiff's interest in his or her privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens. Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part. Thus, he must expect the more or less casual

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43. *Restatement (Second) of Torts* § 652D comment b.
44. *Restatement (Second) of Torts* § 652D comment b.
45. *Hurley v Northwest Publications Inc*, 273 F Supp 967 (United States District Court for the District of Minnesota, 1967).
46. *Reuber v Food Chemical News Inc*, 925 F2d 703 (United States Court of Appeals, 4th Circuit, 1990).
47. *Loe v Town of Thomaston,* 600 A 2d 1090 (Supreme Judicial Court of Maine, 1991).

> observation of his neighbors as to what he does, and that his comings and goings and his ordinary daily activities, will be described in the press as a matter of casual interest to others. The ordinary reasonable person does not take offence at a report in a newspaper that he has returned from a visit, gone camping in the woods or given a party at his house for friends. Even minor and moderate annoyance, as for example through public disclosure of the fact that the plaintiff has clumsily fallen downstairs and broken an ankle, is not sufficient to give him a cause of action. It is only when the publicity given to him is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises.[48]

4.29 Examples of public disclosure of private facts found by the courts to be offensive or objectionable to a reasonable person under the circumstances include:

- The facts relating to the sexual abuse of a minor allegedly perpetrated by her father;[49]
- Details of the sexual relations of the two plaintiffs;[50]
- A person's transexuality where she made efforts to conceal this fact.[51]

4.30 In contrast, in the following situations, the facts revealed by the defendant were found to be not sufficiently offensive or objectionable:

- An article in a sports magazine regarding body surfing that focused on the plaintiff and his particular style of body surfing. It included such facts as the plaintiff's penchant for putting out cigarettes in his mouth, diving off stairs to impress women, hurting himself in order to collect unemployment benefits so as to have time for body surfing during summer, participating in gang fights as a youngster, and eating insects. The court held that although the facts published about the plaintiff were generally unflattering and perhaps embarrassing, they were simply not offensive. In fact, they connoted nearly as strong a positive image as a negative one, since the plaintiff could be seen as "an

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48. *Restatement (Second) of Torts* § 652D comment c.
49. *Morgan v Celender*, 780 F Supp 307 (United States District Court for the Western District of Pennsylvania, 1992) (While the facts of the crime were considered offensive, it was held that the news media had a right to publish those items that constituted elements of the offence despite plaintiff's claim of invasion of privacy.)
50. *Garner v Triangle Publications,* 97 F Supp 546 (United States District Court for Southern District of New York, 1951).
51. *Diaz v Oakland Tribune*, 139 Cal App 3d 118 (Court of Appeal of California, 1983).

aggressive maverick, an archetypal character occupying a respected place in the American consciousness".[52]

- Newspaper articles which disclosed the plaintiff's resignation for personal reasons as secretary and bookkeeper of a town, and which mentioned the $10,000 settlement reached between her and the town, and the fact that the town's books were in disarray. The court held that the publications were not of a kind that would be offensive to a reasonable person.[53]
- The disclosure of the scores of a teacher, who had done well on a teacher certification test, which were erroneously mailed to another teacher, by the computer company that had been hired to report the scores. The court held that there was no "publicity" because the disclosure was made only to a one person. Further, the disclosure was not of a highly objectionable kind since only one other person found out that the plaintiff had done well on the test.[54]

First Amendment considerations

4.31 The tort of public disclosure of private facts is subject to the First Amendment of the US Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

4.32 The "right" to keep information private may obviously clash with freedom of speech and of the press, and the courts have to undertake a balancing of these competing rights and interests. In the leading cases of *Cox Broadcasting Corp v Cohn*[55] and *Florida Star v BJF*,[56] the balance favoured freedom of speech and of the press over privacy.

4.33 In *Cox Broadcasting Corp v Cohn*, a reporter for a television station broadcast the name of a deceased rape victim. The reporter obtained the name from court records. The victim's father brought a damages action against the corporation that owned the television station based on a Georgia statute making it an offence to broadcast a

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52. *Vrigil v Sports Illustrated,* 424 F Supp 1286, (United States District Court for Southern District of California, 1967).
53. *Loe v Town of Thomaston*, 600 A 2d 1090 (Supreme Judicial Court of Maine, 1991).
54. *Wood v National Computer Systems Inc, 814* F 2d 544 (United States Court of Appeals, 8th Circuit, 1987).
55. 420 US 469 (United States Supreme Court, 1975).
56. 491 US 524 (United States Supreme Court, 1989).

rape victim's name. The plaintiff claimed that his right to privacy had been invaded by the broadcast of his daughter's name. The trial court found for the plaintiff and rejected the defendant's argument that the broadcast was privileged under the First Amendment.

4.34 On appeal, the Georgia Supreme Court held that the trial court had erred in construing the statute as granting a civil cause of action for invasion of privacy. However, it found that the plaintiff had a cause of action under the common law tort of disclosure of private information. It agreed with the trial court's ruling that the First Amendment did not require judgment for the defendant.

4.35 The United States Supreme Court overturned the judgment of the Georgia Supreme Court. It held that a State may not, consistently with the First Amendment, impose sanctions on the accurate publication of a rape victim's name obtained from public records. The Court held that the commission of a crime, and proceedings arising from prosecutions, are events of legitimate concern to the public and fall within the responsibility of the press to report the operations of government. It declared that "the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record."[57]

4.36 In *Florida Star v BJF*, a reporter lawfully obtained the name of a rape victim from an erroneously released police report. The name was subsequently included in a newspaper article. A significant difference from *Cox Broadcasting Corp* is the fact that the reporter in *Florida Star* did not obtain the name of the rape victim from a public record. No court proceedings in relation to the alleged rape had commenced.

4.37 The victim argued that the newspaper had violated a Florida statute that made it unlawful to publish in any instrument of mass communication the name of the victim of a sexual offence. She argued that a rule punishing publication furthers three closely related interests, namely, the privacy interest of victims of sexual offences; the physical safety of such victims, who may be targeted for retaliation if their names become known to their assailants; and the goal of encouraging victims to report these offences without fear of exposure.

4.38 The United States Supreme Court reversed the State court's judgment in favour of the plaintiff. It held that the award of damages

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57. *Cox Broadcasting Corp v Cohn*, 420 US 469, 494 (United States Supreme Court, 1975).

against the defendant newspaper, pursuant to the Florida statute, violated the First Amendment. The court said:

> We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offence. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order ... [58]

4.39 In a dissent joined by Chief Justice Rehnquist and Justice O'Conner, Justice White stated:

> By holding that only 'a state interest of the highest order' permits the State to penalize the publication of truthful information, and by holding that protecting a rape victim's right to privacy is not among those state interests of the highest order, the Court accepts appellant's invitation … to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts.[59]

4.40 In contrast to the ruling by the majority in *Florida Star*, the Colorado Supreme Court, in the more recent case of *People v Bryant*,[60] found that the State interest in protecting the privacy of sexual assault victims was, in the context of that particular case, of the highest order.

4.41 *People v Bryant* was not an action for invasion of privacy. However, the decision forms part of the debate relating to the balancing of competing rights to privacy and freedom of speech. The case, widely covered by the media, involved the criminal prosecution for sexual assault of a famous professional basketball player. Pursuant to the State's "rape shield" law, the alleged victim testified in camera. A court reporter mistakenly transmitted the transcripts of the in camera hearings, including private and sensitive testimony, to members of the media. The trial court made an order preventing further release of the contents of the in camera transcripts. Members of the media filed a petition before the Supreme Court of Colorado to invalidate the trial court's order on the ground that it violated the First Amendment.

4.42 The Supreme Court upheld the trial court's order. After discussing the cases of *Florida Star*, *Cox Broadcasting Corp* and other

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58. *Florida Star v BJF*, 491 US 524, 541 (United States Supreme Court, 1989).
59. *Florida Star v BJF*, 491 US 524, 550 (United States Supreme Court, 1989).
60. 94 P 3d 624 (Supreme Court of Colorado, 2004).

relevant cases, the Supreme Court held that the State had interests of the highest order in a rape victim's privacy interest, as well as in the reporting and prosecution of this and other sexual assault cases.

INTRUSION UPON SECLUSION

4.43 The Restatement provides that a person "who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or [their] private affairs or concerns, is subject to liability to the other for invasion of [their] privacy, if the intrusion would be highly offensive to a reasonable person".[61]

4.44 The thrust of this tort is that a person's private, personal affairs should not be pried into. The converse of this principle is, of course, that there is no wrong where the defendant did not actually delve into the plaintiff's concerns, or where the plaintiff's activities were already public or known.[62]

4.45 The tort contains three elements:

- **an intentional intrusion by the defendant;**
- **into a matter which the plaintiff has a right to keep private; and**
- **by the use of a method which is highly objectionable to the reasonable person.[63]**

Intentional intrusion: physical or otherwise

4.46 The intrusion, which must be intentional, may consist of any or a combination of the following methods:

- **Physical intrusion. The uninvited and unauthorised entry into the plaintiff's home, room or living quarters may constitute an invasion of privacy. Illustrative examples include the unauthorised entry into these places by a stranger,[64] landlord,[65] employer[66] or creditor.[67]**

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61. *Restatement (Second) of Torts* § 652B.
62. *Bisbee v John C Conover Agency Inc,* 452 A 2d 689, 691 (Superior Court of New Jersey, 1982).
63. *Lewis v Dayton Hudson Corp,* 339 NW 2d 857 (Court of Appeals of Michigan, 1983).
64. *Byfield v Candler,* 125 SE 905 (Court of Appeals of Georgia, 1924) (A male passenger entered a female passenger's stateroom in a steamboat at night and attempted to have sex with her.)
65. *Welsh v Roehm,* 241 P 2d 816 (Supreme Court of Montana, 1952) (A landlord, after serving an invalid notice to terminate even though rent had been paid, moved into the leased home with his wife, and occupied the living

- **Use of senses.** Intrusion may consist of the use of the defendant's senses to observe or overhear the plaintiff's private affairs.[68]
- **Use of surveillance devices.** Intrusion extends to eavesdropping upon private conversations by means of surveillance devices, such as wiretaps, microphones[69] and tracking devices.
- **Others.** The intrusion may also consist of other forms of investigations into the plaintiff's private affairs, such as the opening, reading, copying of sealed mail[70] or private documents, such as a political association's membership lists.[71] It may also consist of the unauthorised prying into a private bank account,[72] or repeated telephone calls at unreasonable hours.[73]

4.47 This tort covers a broader range of acts than trespass to land, which requires that the defendant has unlawfully entered and/or remained on, or caused physical matter to come into contact with,

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room for seventeen days and nights, interfering with the tenants' home life and offending tenants' sensibilities.)

66. *Love v Southern Bell Telephone & Telegraph Company,* 263 So 2d 460 (Court of Appeals of Louisiana, 1972) (The plaintiff's work supervisor, and another supervisor, came to the plaintiff's home when he did not report for work. They knocked on his trailer, but left when there was no response. They later returned with a locksmith, who opened the door.)
67. *B-W Acceptance Corp v Callaway,* 162 SE 2d 430 (Supreme Court of Georgia, 1968) (The plaintiff's husband entered into a purchase agreement with the defendant for some household furniture. Shortly thereafter, the plaintiff's husband deserted her. The defendant harassed the plaintiff constantly with threatening notices, abusive telephone calls at all hours, personal visits to her home which included entering therein over her protests.)
68. It has been suggested that under certain circumstances, an overlooking window might be enjoined as a violation of the right to privacy. In *Pritchett v Board of Commissioners* 85 NE 32 (Court of Appeals of Indiana, 1908), a county jail constructed adjacent to a home and kept in such manner that the criminals could look through the jail windows into the home and yard of the home owner, continually annoying such owner, his family and guests was held to constitute a nuisance. The court also found the plaintiff's right to privacy had been invaded. The court ordered the county officials to close the jail windows on the side next to plaintiff's home.
69. *Hamberger v Eastman*, 206 A 2d 239 (Supreme Court of New Hampshire, 1964).
70. *Brinbaum v US,* 588 F 2d 319 (United States Court of Appeals, 2nd Circuit, 1978) (The plaintiffs' mail to and from the USSR was opened and read by CIA agents.)
71. *Socialist Workers Party v Attorney General of the United States,* 444 US 903 (United States Supreme Court, 1978).
72. *Zimmerman v Wilson,* 81 F 2d 847 (United States Court of Appeals, 3rd Circuit, 1936).
73. *Donnell v Lara,* 703 SW 2d 257 (Court of Appeals of Texas, 1985).

another person's land. Thus, while eavesdropping upon private conversations by wiretaps or spying into windows of a private home would not constitute trespass to land, they can be actionable as invasions of privacy.[74]

Private matter

4.48 There must be an intrusion into a private place, conversation or matter. Hence, a magazine was held liable for invasion of privacy when its reporter photographed the plaintiff in his home.[75] In contrast, persons have no right to be let alone on the public street or other public place and it is not an invasion of their privacy to do no more than follow them about and watch them there.[76] Neither is it an invasion of privacy to take a person's photograph in a public place.[77] However, even in a public place, there can be some happenings that are still private, so that a woman who was photographed with her dress unexpectedly blown up in a "fun house" in a country fair was found to have suffered an invasion of her privacy.[78]

4.49 The essence of this element of the tort of unreasonable intrusion is an objectively reasonable expectation of privacy. In *Shulman v Group W Productions Inc*,[79] television producers equipped a helicopter rescue team nurse with a microphone and filmed the rescue of plaintiff. When the rescue team and camera crew arrived on the scene,

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74. *Hamberger v Eastman,* 206 A 2d 239 (Supreme Court of New Hampshire, 1964) (The defendant landlord installed and concealed a listening and recording device in the bedroom of tenant plaintiffs. This device was connected to the defendant's adjacent residence by wires capable of transmitting and recording any sounds and voices originating in the bedroom of the plaintiffs.)
75. *Dietemann v Time, Inc,* 284 F Supp 925 (United States District Court for the Central District of California, 1968).
76. *Forster v Manchester,* 189 A 2d 147 (Supreme Court of Pennsylvania, 1963) (The plaintiff was involved in a car accident with another person. The other person's insurer obtained the assistance of the private detective who assigned a team of two men to conduct surveillance of the plaintiff.)
77. *Gill v Hearst Publishing Co,* 253 P2d 441 (Supreme Court of California, 1953) (The defendant's photographer photographed plaintiffs while they were seated in an affectionate pose at their place of business, a confectionery and ice cream concession in the Farmers' Market in Los Angeles); *Berg v Minneapolis Star & Tribune Co,* 79 F Supp 957 (United States District Court for the District of Minnesota, 1977) (A newspaper photographer photographed the defendant in a courtroom and published the picture with a newspaper article.)
78. *Daily Times Democrat v Graham*, 162 So 2d 474 (Supreme Court of Alabama, 1964).
79. *Shulman v Group W Productions Inc* 955 P 2d 469 (Supreme Court of California, 1998).

the plaintiff was being extricated from an overturned car and had very serious injuries. The court said:

> The courts ask first whether defendants intentionally intruded, physically or otherwise, upon the solitude or seclusion of another, that is, into a place or conversation private to a plaintiff. There is no liability for the examination of a public record concerning the plaintiff, or for observing him or even taking his photograph while he is walking on the public highway. To prove actionable intrusion, the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source.[80]

4.50 The court found that the cameraman's mere presence at the accident scene and filming of the events could not be deemed either a physical or sensory intrusion on the plaintiffs' seclusion. However, it held that the plaintiff was entitled to a degree of privacy in her conversations with the nurse and other medical rescuers at the accident scene, and in the nurse's conversations conveying medical information regarding the plaintiff to the hospital base. The court also found that there was at least a triable issue of fact as to whether the plaintiff had a reasonable expectation of privacy in the interior of the rescue helicopter. It observed that although the attendance of reporters and photographers at the scene of an accident is to be expected, there is no law or custom permitting the press to ride in ambulances or enter hospital rooms during treatment without the patient's consent. The cameraman perhaps did not intrude into the plaintiff's zone of privacy merely by being present at a place where he could hear such conversations without artificial assistance. But by placing a microphone on the nurse's person, amplifying and recording what she said and heard, the defendants may have listened in on conversations that the parties could reasonably have expected to be private.[81]

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80. *Shulman v Group W Productions Inc,* 955 P 2d 469, 490 (Supreme Court of California, 1998). See also *Sanders v American Broadcasting Companies,* 978 P 2d 67, 69 (Supreme Court of California, 1999).
81. For illustrative cases applying the decision in the *Shulman* case, see *Sanders v American Broadcasting Companies,* 978 P 2d 67 (Supreme Court of California, 1999); *Turnbull v American Broadcasting Companies,* 32 Media L Rep 2442 (United States District Court for the Central District of California, 2004).

Offensiveness

4.51 There is no liability for intrusion unless the interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable person. The question of what kinds of conduct would be regarded as highly offensive intrusions is largely a matter of social convention and expectation.[82] A court determining the existence of offensiveness would consider the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he or she intrudes, and the expectations of those whose privacy is invaded.[83]

4.52 Thus there is no liability for knocking at the plaintiff's door, or for calling him or her on the telephone on one occasion or even two or three, to demand payment of a debt. It is only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff that becomes a substantial burden to his existence, that his or her privacy is invaded.[84]

4.53 In a case involving debt collection, the court said that a reasonable person should expect that a company charged with collecting a delinquent account would display a certain degree of persistence when the person on the other end of the telephone denies responsibility for a debt. However, where, as in that case, the plaintiffs advised the company that they did not owe any money and the defendant subsequently received reliable confirmation of the inaccuracy of its records, the court held that a reasonable person could regard the defendant's continued persistence, culminating in a repossession attempt at the plaintiffs' home, as highly offensive conduct.[85]

Newsgathering

4.54 Some of the cases on intrusion upon seclusion involve newsgathering activities. Since newsgathering is within the protective

82. *PETA v Bobby Berosini Ltd*, 895 P 2d 1269 (Supreme Court of Nevada, 1995).
83. *Miller v National Broadcasting Co,* 187 Cal App 3d 1463 (Court of Appeal of California, 1986).
84. *Restatement (Second) of Torts* § 652B, comment d. See also Chicarella v Passan, 494 A 2d 1109, 1114 (Superior Court of Pennsylvania, 1985).
85. *Bauer v Ford Motor Credit Company*, 149 F Supp 2d 1106 (United States District Court for the District of Minnesota, 2001).

ambit of the First Amendment of the Constitution,[86] an important question in those cases is whether the First Amendment provides "a wall of immunity protecting newsmen from any liability for their conduct while gathering news."[87] The weight of authority holds that the interest in a free media is not absolute and may sometimes yield to other interests, such as privacy.[88]

4.55 In *Miller v National Broadcasting Co*,[89] the court held that the First Amendment has never been construed to grant newsgatherers immunity from torts or crimes committed during the course of newsgathering. It held that a television network's constitutional right to gather news did not preclude a widow's cause of action against the network for invasion of privacy resulting from a camera crew's accompanying paramedics into the widow's apartment and filming the paramedics' unsuccessful efforts to revive the widow's spouse who had suffered a heart attack. On the assumption that public education about paramedics, as well as about the use of cardiopulmonary resuscitation (CPR), qualified as "news", the court stressed that the constitutional protection for newsgathering was limited, rather than absolute. The court concluded that the obligation not to make unauthorized entry into the private premises of individuals did not place an impermissible burden on newsgatherers, nor was it likely to have a chilling effect on the exercise of First Amendment rights. It said that others besides the media have rights, and those rights prevailed when considered in the context of the events surrounding that particular case.[90]

APPROPRIATION OF NAME OR LIKENESS

4.56 The Restatement provides that a person "who appropriates for his [or her] own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy".[91]

4.57 The elements of the tort are:

- the defendant used the plaintiff's name or likeness;

86. "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated": *Branzburg v Hayes* 408 US 665, 681 (United States Supreme Court, 1972) .
87. *Gallela v Onassis*, F 2d 986, 995 (United States Court of Appeals, 2nd Circuit, 1973).
88. For a survey of cases, see Edward L Raymond, "Intrusion by news-gathering entity as invasion of right of privacy", 69 ALR.4th 1059 (2006).
89. 69 ALR 4th 1027 (Court of Appeal of California, 1986).
90. See also *Dietemann v Time, Inc* 449 F 2d 245 (United States Court of Appeals, 9th Circuit, 1971).
91. *Restatement (Second) of Torts* § 652C.

- **the use of the plaintiff's name or likeness was for the defendant's own purposes or benefit, commercially or otherwise;**
- **the plaintiff suffered damages; and**
- **the defendant caused the damages incurred.[92]**

Name, likeness and identity

4.58 While the use of the plaintiff's "name or likeness" from unwarranted intrusion or exploitation is generally stated as the principal ingredient of the tort,[93] it is clear that the interest protected in the tort is capable of more general statement as the plaintiff's identity.[94] Provided that what has been published clearly refers to the plaintiff,[95] the tort occurs when defendants use the plaintiff's name or likeness for their purposes by intrusion on or exploitation of the plaintiff's character, reputation or standing. "Likeness" includes such things as pictures and the use of a singer's distinctive voice.[96] But the mere use of the same name as the plaintiff does not give rise to liability in tort without some appropriation of that name (as, for example, where defendants pass themselves off as the plaintiff).[97]

Advertising, commercial or other purpose

4.59 The typical appropriation tort occurs where defendants use the plaintiff's name or likeness for the purpose of advertising their products or services. Indeed, statutes in some State limit liability for appropriation of name or likeness to advertising or other commercial

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92. *Joe Dickerson & Associates, LLC v Dittmar,* 34 P 3d 99 (Supreme Court of Colorado, 2001).
93. See *Lugosi v Universal Pictures* 603 P 2d 425, 431 (Supreme Court of California, 1979) ("The protection of name and likeness from unwarranted intrusion or exploitation is the heart of the law of privacy").
94. *Restatement (Second) of Torts* § 652C, comment a. See also *Felsher v University of Evansville,* 755 NE 2d 589, 601 (Supreme Court of Indiana, 2001).
95. *Branson v Fawcett Publications,* 124 F Supp 429 (United States District Court for the Northern District of Illinois, 1953) (the use of a photograph of a racing accident which showed an automobile, but showed no identifying marks or numbers, and did not show the driver of the vehicle, did not violate the driver's privacy). Compare *Motschenbacher v RJ Reynolds Tobacco Co* 498 F 2d 821 (US Court of Appeals, 9th Cir, 1974) (where the plaintiff, a well-known racing car driver was identifiable from the car used in the advertisement to promote to defendant's cigarettes).
96. *Maxwell v NW Ayer, Inc,* 605 NYS 2d 174 (Supreme Court of New York, 1993).
97. *Restatement (Second) of Torts* § 652C, comment c.

purposes.[98] At common law, the tort is not in principle so limited. It applies whenever defendants makes use of the plaintiff's name or likeness for their purposes and benefit, whether that use is commercial or not.[99]

Incidental use of the plaintiff's name or likeness

4.60 To constitute an invasion of privacy, the use of a name or likeness must amount to a "meaningful or purposeful use" of the name of a person, not a merely incidental use.[100] This means that the use must be "for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy invaded".[101] For example, a court held that the use of a medical resident's photograph in a hospital's recruiting brochure was incidental to the main purpose of the document, which was to provide information about the hospital's programs to prospective interns and residents.[102]

Privacy or property interest?

4.61 A controversial issue is whether the appropriation tort vindicates the privacy of a person or protects a separate property right, and is therefore a form of intellectual property.[103] If the latter, it is, in principle, alienable and survives death. The courts are divided on this issue.[104]

98. See, for example, NY [Civil Rights] LAW § 50. See also the Florida law, which prohibits the use of a person's name or likeness to directly promote a product or service: FLA STAT ch 540.08 (2006).
99. *Restatement (Second) of Torts* § 652C, comment (c).
100. *Moglen v Varsity Pajamas, Inc*, 213 NYS 2d 999, 1001 (Supreme Court of New York, 1961) (dealing with a cause of action under Civil Rights Law).
101. *Restatement (Second) of Torts* § 652C, comment (d).
102. *D'Andrea v Rafla-Demetrious*, 146 F 3d 63 (United States Court of Appeals, 1998).
103. See especially R Zapparoni, "Propertising Identity: Understanding the United States Right of Publicity and its Implications -- Some Lessons for Australia" (2004) 28 *Melbourne University Law Review* 690.
104. See *Lugosi v Universal Pictures,* 10 ALR 4th 1150 (Supreme Court of California, 1979); *Memphis Development Foundation v Factors Etc, Inc*, 616 F 2d 956 (United States Court of Appeals, 6th Circuit, 1980); *Carson v Here's Johnny Portable Toilets, Inc*, 698 F 2d 831 (United States Court of Appeals, 6th Circuit, 1983) (the right does not survive death). Compare *Martin Luther King Jr Center for Social Change v American Heritage Products,* 296 SE 2d 697 (Supreme Court of Georgia, 1982); *Reid v Pierce County*, 136 P 2d 333 (Supreme Court of Washington, 1998).

4.62 Originally, the tort was aimed at protecting the personal feelings of individuals against mental distress,[105] but when it came to be applied to public figures or celebrities who use their identities as commodities, it was sometimes regarded as a proprietary right, a view adopted in the Restatement.[106] This has led some jurisdictions in the United States to develop a "right of publicity" that is either distinct from the appropriation tort or replaces it.[107] The "right of publicity" refers to a celebrity's right to the exclusive use of his or her name and likeness. Unlike the appropriation tort, the "right to publicity" survives the death of its owner (even if the owner had not commercially exploited the "right" before death),[108] and is based squarely on damage to the plaintiff's economic interests.[109] However, some courts do not distinguish between the appropriation tort and the "right to publicity", but use the two concepts interchangeably.[110]

Public interest considerations

4.63 The tort will not be maintainable where the plaintiff's name or likeness is appropriated through the publication of material that is newsworthy or of public concern. A newspaper article discussing a public figure, or a biography of a public figure, is, therefore, able to use names or photographs relevant to the article or biography.[111]

4.64 Commercial speech will, however, generally raise fewer free speech concerns than other speech. Thus a State law providing for a "right to publicity" will generally not offend the First Amendment since the law furthers an economic interest (rather than an interest in feelings or reputation) that the owner of the interest will seek to promote in order to obtain a commercial advantage, rather than to suppress.[112] The Supreme Court of the United States has upheld a State law allowing the plaintiff to claim damages in circumstances

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105. *Restatement (Second) of Torts* § 652C, comment (a).
106. *Restatement (Second) of Torts* § 652C, comment (a).
107. See D B Dobbs, *The Law of Torts* (West Publishing, 2001) vol 2, 1198-1199. The origin of the "right to publicity" is generally said to be the decision of the US Court of Appeals for the Second Circuit in *Haelan Laboratories Inc v Topps Chewing Gum Inc* 202 F 2d 866 (1953); cert denied 346 US 816 (1953).
108. *Martin Luther King Jr Center for Social Change v American Heritage Products,* 296 SE 2d 697 (Supreme Court of Georgia, 1982).
109. *People for the Ethical Treatment of Animals v Bobby Berosini Ltd*, 867 P 2d 1121 (Supreme Court of Nevada, 1994).
110. See J W Wade, V E Schwartz, K Kelly and D F Partlett, *Prosser, Wade and Schwartz's Torts* (10th edition, Foundation Press, 1994) 942.
111. See D B Dobbs, *The Law of Torts* (West Publishing, 2001) vol 2, 1199-1200, and authorities there cited.
112. *Zacchini v Scripps-Howard Broadcasting Co* 433 US 562, 573-574 (1977) (comparing the objects of the appropriation and false light torts).

where the defendant had, without permission, broadcast a film of the whole of the plaintiff's "human cannonball act", an act that the plaintiff performed as a commercial entertainer. The question here is simply who should benefit from the publication, the plaintiff or the defendant. The Court held that relevant constitutional privileges (including the First Amendment) "do not immunize the media when they broadcast a performer's entire act without his consent".[113]

FALSE LIGHT

4.65 A person "who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of [his or her] privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicised matter and the false light in which the other would be placed".[114]

4.66 The elements of the tort are:

- the defendant gave publicity to a matter concerning the plaintiff that placed the plaintiff before the public in a false light;
- the false light in which the plaintiff was placed would be highly offensive to a reasonable person; and
- the defendant had knowledge of, or acted with reckless disregard as to, the falsity of the publicised matter and the false light in which the plaintiff would be placed.[115]

Matter concerning the plaintiff

4.67 The false light tort requires a showing that the statement is understood to be "of and concerning" the plaintiff. If statements can reasonably be construed as referring to somebody other than the plaintiff, then they are not "of and concerning" the plaintiff, and cannot state a claim for the tort of false light invasion of privacy.[116] For example, a court held that given the existence of over one million hunters in the State of Michigan, a television documentary, allegedly

113. *Zacchini v Scripps-Howard Broadcasting Co* 433 US 562, 575 (1977).

114. *Restatement (Second) of Torts* § 652E.

115. *Stien v Marriott Ownership Resorts, Inc*, 944 P 2d 374 (Court of Appeals of Utah, 1997); *Mitchell v Griffin Television* LLC, 60 P 3d 1058 (Court of Civil Appeals of Oklahoma, 2002).

116. *Muzikowski v Paramount Pictures Corp*, 322 F 3d 918 (United States Court of Appeals, 7th Circuit, 2003); *Kitt v Capital Concerts Inc*, 742 A 2d 856 (District of Columbia Court of Appeals, 1999).

portraying hunters in general and Michigan hunters in particular as bloodthirsty killers, was not actionable by any individual Michigan hunter on a theory of false light invasion of privacy, where no such individual was specifically identified in the broadcast.[117]

Falsity

4.68 The matter to which publicity was given must in fact be false as to the plaintiff, or at least have the capacity to give rise to a false public impression as to the plaintiff.[118]

4.69 In *Brown v Capricorn Records*, the court held that the photograph on a record album cover of a rock and roll music group which showed the plaintiff, a blind street singer, on a public street in front of a liquor store, did not place the plaintiff in a false light in the public eye where he was in fact associated with the liquor store and with rock and roll music.[119]

4.70 Another example is *Hart v City of Jersey City*, where a police officer's one-day suspension was published in the in-house police department bulletin. The court dismissed his claim for damages under the false light tort because he failed to prove the contested publicity was untrue. The court found that the notice in the bulletin regarding his suspension, which was limited to the bare fact of its occurrence and the date, was in fact true.[120]

4.71 The focus of the tort of false light invasion of privacy is not on the truth or falsity of a particular statement, but instead is whether what has been said leads others to believe something about the plaintiff that is false.[121]

4.72 In *Dean v Guard Publishing Co*, the defendant newspaper ran a story about the opening of an alcohol rehabilitation centre and included a picture of the plaintiff at the centre's alcohol aversion

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117. *Michigan United Conservation Clubs v CBS News,* 485 F Supp 893 (United States District Court for the Western District of Michigan, 1980).
118. *Howard v Antilla,* 294 F 3d 244 (United States Court of Appeals, 1st Circuit, 2002); *Steele v The Spokesman Review*, 138 Idaho 249 (Supreme Court of Idaho, 2002); *Zarach v Atlanta Claims Association*, 231 Ga App 685 (Court of Appeals of Georgia, 2002); *Association Services Inc v Smith*, 249 Ga App 629 (Court of Appeals of Georgia, 2001); *Kitt v Capitol Concerts Inc* 742 A 2d 856 (District of Columbia Court of Appeals, 1999).
119. *Brown v Capricorn Records* 136 Ga App 818 (Court of Appeals of Georgia, 1975).
120. *Hart v City of Jersey City* 308 N J Super 487 (Superior Court of New Jersey, 1998).
121. *Phillips v Lincoln County School District,* 161 Pr App 429 (Court of Appeals of Oregon, 1999).

treatment facility. The plaintiff asserted that he was at the facility only to attend an open house, but the picture suggested that he was there for treatment. The paper argued that it could not be liable because, in fact, the plaintiff was an alcoholic. The court held that the point was not that the plaintiff was an alcoholic, but that the paper had published a picture that suggested falsely that he currently was undergoing alcohol aversion treatment.[122]

4.73 Even a statement which is technically true in itself may lead to a false impression in the mind of a member of the public when it is published without explanatory facts and circumstances which, when added to the bald individual fact, would tend to create a less objectionable public impression about the plaintiff.[123]

4.74 In *Memphis Publishing Co v Nichols*, a newspaper article stated that the plaintiff had been treated for a bullet wound in her arm after a shooting at her home; that the police were holding a 40-year-old woman in connection with the shooting; and that the suspect had also fired a shot at her own husband, after she had arrived at the plaintiff's home and found her husband with the plaintiff. The court found that the article created a reasonable inference that the plaintiff had been caught in an "affair" with the suspect's husband. However, the evidence showed that at the time of the shooting, the plaintiff and the suspect's husband were with two other neighbours and were engaged in an innocent social gathering. The court held that notwithstanding the essential truth of the facts reported, the failure of the article to mention the full circumstances of the shooting was sufficient to sustain a jury finding of a false inference of misconduct on the plaintiff's part.[124]

4.75 There are, however, cases that have decided that recovery for a false light tort cannot be had against a media defendant on the basis that it failed to include additional facts which might have cast the plaintiff in a more favorable or balanced light. To permit recovery in such circumstances, according to these cases, would violate the First Amendment of the Constitution on freedom of speech and of the press, since choice of material and decisions made as to size limitations of

122. 88 Or App 192 (Court of Appeals of Oregon, 1987).
123. *Memphis Publishing Co v Nichols*, 569 SW 2d 412 (Supreme Court of Tennessee, 1978). See also *Strickler v National Broadcasting Company*, 167 F Supp 68 (United States District Court for the Southern District of California, 1958).
124. *Memphis Publishing Co v Nichols*, 569 SW 2d 412 (Supreme Court of Tennessee, 1978).

the publication constitute the exercise of editorial control for which no court may substitute its own judgment.[125]

Offensiveness

4.76 In a false light tort, the matter communicated to the public must be one that would be highly offensive to a reasonable person. This element is met when a defendant knows that a plaintiff, as a reasonable person, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity.[126] Minor mistakes in reporting, even if made deliberately, or false facts that offend a hypersensitive individual will not be sufficient to constitute false light invasion of privacy.[127]

Actual malice

4.77 In false light torts, it is generally said that there can be no recovery without showing by clear and convincing evidence that the defendant has publicised the private information about the plaintiff with actual malice, that is, with actual, subjective knowledge that the material in question is false as to the plaintiff, or with a reckless disregard of whether or not it is false. This was established by the United States Supreme Court in *Time, Inc v Hill*[128] reversing a decision of the New York Court of Appeals holding Time magazine liable under a New York statute. Time had published an account of a play relating to an incident where the plaintiff and his family had been held hostage by escaped convicts. The magazine portrayed the play as a re-enactment. The plaintiff, asserting a false light privacy tort, alleged that the article gave a false impression that the play depicted the incident. The Supreme Court held that liability under this tort could be consistent with the First Amendment only if the inaccurate portrayal were recklessly or knowingly false.

4.78 It follows from *Time, Inc v Hill* that negligence does not support a false light tort. In *Zeran v Diamond Broadcasting Inc*,[129] the plaintiff was a victim of an internet hoax when his business phone number was placed on internet electronic bulletin boards, which advertised items

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125. *Machleder v Diaz*, 801 F 2d 46 (United States Court of Appeals, 2nd Circuit, 1986); *Goodrich v Waterbury Republican-American Inc*, 448 A 2d 1317 (Supreme Court of Connecticut, 1982).
126. *Kolegas v Heftel Broadcasting Corporation*, 607 NE 2d 201 (Supreme Court of Illinois, 1992).
127. *Kumaran v Brotman,* 617 NE 2d 191 (Appellate Court of Illinois, 1993).
128. *Time, Inc v Hill* 385 US 374 (United States Supreme Court, 1967).
129. *Zeran v Diamond Broadcasting Inc* 203 F 3d 714 (United States Court of Appeals, 10th Circuit, 2000).

with slogans glorifying the bombing of the Okalahoma City federal building. A radio talk show host read the plaintiff's phone number over air and encouraged listeners to call, and as a result, the plaintiff received numerous abusive, unpleasant and threatening calls. The court dismissed the plaintiff's action for invasion of privacy against the radio station because he failed to prove that the radio station's employees either knew that the internet postings of his phone number were false, or acted recklessly, which, according to the court, requires poof of "actual knowledge of probable falsity". The court held that the negligence of the station's employees in failing to verify the authenticity of the internet postings of plaintiff's phone number was insufficient basis for an invasion of privacy claim.

4.79 It is important to note, however, that the actual malice standard applied in these cases reflects the rule, derived from the Supreme Court's decision in *New York Times v Sullivan*,[130] that a plaintiff who is a public figure or public official can, consistently with the First Amendment, only succeed in defamation if he or she can prove that the defendant published the defamatory matter in issue knowing that it was false or with reckless indifference to its truth. Subsequently, the Supreme Court held, in *Gertz v Welch*,[131] that a private figure in a defamation claim need only prove "some fault" (such as negligence). The decision in *Time, Inc v Hill* predates *Gertz v Welch*. Because of the close connection between the false light tort and defamation,[132] it is now arguable that the actual malice standard employed in *Time, Inc v Hill* requires modification, consistently with *Gertz v Welch*, where the plaintiff is a private figure.[133]

Distinguished from defamation

4.80 In the United States, the false light tort is closely allied with defamation since similar considerations apply to each.[134] For both actions, the matter publicised must be false; it must be "published" or communicated to third parties; and the publication must be made with some degree of fault on the part of the defendant.

4.81 They differ, however, in three ways. First, the false light tort is not limited to matters actually defamatory, either on their face or in

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130. *New York Times Co v Sullivan* 376 US 254 (1964).
131. *Gertz v Robert Welch, Inc* 418 US 323 (1974).
132. See para 4.80-4.84.
133. See V E Schwartz, K Kelly and D F Partlett, *Prosser, Wade and Schwartz's Torts* (10th ed, Foundation Press, 2000), 963. And see, eg, *West v Media General Convergence Inc*, 53 SW 3d 640 (Supreme Court of Tennessee, 2001)
134. *Stien v Marriott Ownership Resorts, Inc*, 944 P 2d 374 (Court of Appeals of Utah, 1997).

context, but may be brought for any highly offensive false portrayal before the public, based on the sensitivities of a reasonable person.

4.82 Secondly, any publication of the subject matter to one person suffices to give rise to a defamation action, while the subject matter of a false light tort is usually required to come to the notice of a substantial portion of the general public, or at least to be of such character and subject to such dissemination as to be reasonably certain of such exposure.

4.83 Finally, while the essence of a defamation action is injury to reputation, the gist of a false light tort is the subjective suffering, embarrassment, and outrage of the subject of the depiction, and the interest to be protected is the plaintiff's own peace of mind.[135] Hence, a false statement about, or depiction of, an individual might, if highly offensive to a reasonable person, be actionable as a false light tort, even if it could not be found to be defamatory.[136]

4.84 There are commentators who are of the view that the overlap between defamation and the false light tort is so substantial as to call into question the need for the false light tort. They argue that that many of the issues characterised as questions of false light may be resolved by the law of defamation.[137]

CONCLUSION

4.85 While the protection afforded privacy in the United States may seem extensive, freedom of expression trumps privacy claims to such an extent that the so-called "right to privacy" can be seen as "a somewhat hollow one".[138] A comparatively small volume of litigation suggests that the causes of action associated with privacy lack vitality.[139]

4.86 Nevertheless, the protection afforded privacy in the United States has proved influential in other common law jurisdictions. New Zealand embraces a tort of wrongful publication of private information

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135. *Flowers v Carville,* 310 F 3d 1118 (United States Court of Appeals, 9th Circuit, 2002).
136. *Perere v Louisiana Television Broadcasting Corp,* 721 So 2d 1075 (Court of Appeal of Louisiana, 1998).
137. See Harry Kalven, "Privacy in tort law - Were Warren and Brandeis wrong?" (1966) 31 *Law and Contemporary Problems* 326, 339-341; Raymond Wacks, *The Protection of Privacy* (Sweet & Maxwell, London, 1980), 171.
138. See *Hosking v Runting* [2005] 1 NZLR 1, [73] (Gault and Blanchard JJ).
139. Consider D Bedingfield, "Privacy or Publicity? The Enduring Confusion Surrounding the American Tort of Invasion of Privacy" (1992) 55 *Modern Law Review* 111.

modelled on the US tort of public disclosure of private facts,[140] and one first instance decision in Australia supports the existence of a similar "wrong".[141] Another first instance decision in Australia supports a tort patterned after the US tort of intrusion upon the seclusion of an individual.[142] The Hong Law Reform Commission supported the adoption in Hong Kong of both of these torts (unwarranted publicity given to an individual's private life and intrusion upon the solitude or seclusion of another).[143]

4.87 Other common law jurisdictions have created more general statutory torts of invasion of privacy.[144] The influence of American law is evident in these jurisdictions. The relevant statutes enumerate classes of behaviour as examples of privacy invasions that reflect the various torts in the United States. They include:

- subjecting an individual to surveillance or harassment, or listening to or recording of private conversations,[145] which would come under the American tort of intrusion upon seclusion;
- disclosure of private information, including letters, diaries, medical records or other concerning an individual;[146] and
- use of name or likeness or an individual.[147]

4.88 Even if the Commission's provisional rejection of a statutory tort of privacy is accepted,[148] privacy law in the United States can still provide useful guidance in the development of the law of New South Wales. The case law generated by the four torts in the United States provides illustrations of the types of situations in which a cause of

140. *Hosking v Runting* [2005] 1 NZLR 1, especially [117]-[118] (Gault and Blanchard JJ). For a discussion of this case, see para 3.30-3.41.

141. *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281, especially [157], [161]-[163] (3 April 2007). For a discussion of this case, see para 2.30-2.31.

142. *Grosse v Purvis* 2003] QDC 151, especially [430]-[432]. For a discussion of this case, see para 2.26-2.29.

143. Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy* (Report, 2004).

144. See para 3.42-3.50 (Canadian Provinces). See also para 3.51-3.63 (Ireland).

145. *Privacy Act,* RSBC 1996, c 373, s 1(4); *The Privacy Act,* RSM, c P-125, s 3 (a) and (c); *Privacy Act,* RSNL, c P-22, s 4(a) and (b); *The Privacy Act,* RSS 1978, s 3(a) and (b). See also *Privacy Bill 2006* (Ireland) cl 3(2)(d).

146. *The Privacy Act,* RSM, c P-125, s 3 (d); *Privacy Act,* RSNL, c P-22, s 4(d); *The Privacy Act,* RSS 1978, s 3(d). See also *Privacy Bill 2006* (Ireland) cl 3(2)(a) and (e).

147. *The Privacy Act,* RSM, c P-125, s 3 (c); *Privacy Act,* RSNL, c P-22, s 4(c); *The Privacy Act,* RSS 1978, s 3(c). See also *Privacy Bill 2006* (Ireland) cl 3(2)(c). Contrast British Columbia, where the unauthorised use of name or likeness is stand-alone tort: *Privacy Act,* RSBC 1996, c 373, s 3.

148. See para 1.5-1.20, Chapter 6.

action for invasion of privacy may apply. Further, the principles developed in the United States in the last one hundred years could prove helpful in resolving issues generated by the new cause of action for invasion of privacy – for example, the standard developed by the American courts in determining whether certain information is private (the "reasonable expectation" test);[149] or the interaction of privacy with other competing rights and interests, such as free speech.[150] It is, of course, important that the adoption of any aspect of the American law be made in the light of the different social climate and constitutional framework of the Australian legal system.[151]

149. Consider *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [41], [42] (Gleeson CJ), [120]-[128], [132] (Gummow and Hayne JJ).
150. See para 7.38-7.48.
151. See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [332] (Callinan J).

5. European approaches to privacy

- France
- Quebec
- The case law of the European court of human rights

5.1 This chapter gives an overview of the protection of privacy in French law and in the European Union, so far as the law of the Union is embodied in the European Convention on Human Rights and Fundamental Freedoms ("ECHR").[1] In addition, the chapter briefly mentions the law of Quebec, an offspring of French law.

5.2 We have chosen to include a discussion of French law as illustrative of the greater protection that civilian systems of law generally give to privacy in comparison with common law systems.[2] That protection is more extensive even than in the common law jurisdictions of the United States, which, as we have seen in Chapter 4, traditionally protect privacy more robustly than other common law systems. One commentator has observed that:

> [i]n the law of privacy …, the contrast between Europe and the United States is stark and is growing starker. In the name of dignity, Europeans have aggressively tried to guarantee that individuals control all uses and appearances of their names and images. Nothing of the kind is true in the United States.[3]

5.3 Protection of privacy in civilian systems of law is found almost entirely in the law of delict (the equivalent of the law of torts in common law systems), which extends to protect plaintiffs against invasions of personality rights and interests. German lawyers, responding to the need to bring the law of delict into line with the requirements of the *Basic Law* of 1949,[4] speak generally of invasions of a single right of personality,[5] itself classified in the context of privacy into three spheres ("intimate", "private" and "individual"). In contrast, French lawyers tend to concentrate on the identification of more specific rights of personality, such as the "right to confidentiality of correspondence", the "right to privacy of domestic life" or the "right to a person's name".[6]

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1. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, <www.echr.coe.int> at 10 January 2007 (entered into force on 3 September 1953) ("ECHR").
2. And because of the accessibility of relevant material in English, on which our description of French law is largely based.
3. J Whitman, "The neo-Romantic Turn" in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge UP, 2003), 330.
4. M Reiman and R Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006), 1021.
5. "*Verletzungen des Persönlichkeitsrechts*": see K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd ed, Oxford University Press, 1998), 687 ("Zweigert and Kötz").
6. Zweigert and Kötz, 694.

FRANCE

Privacy protection in delict

5.4 The French *Code Civile* ("Civil Code") or *Napoleonic Code* of 1804, provides for all forms of delictual liability in only five articles. The general delictual principle, in Articles 1382 and 1383, is that everyone whose act or omission causes damage to another by "fault" must compensate the harmed person. In Article 1384(1), the Code also imposes liability on persons for harm caused by things in their use, direction or control, which since 1930 has resulted in the imposition of strict liability on a wide scale.[7]

5.5 An early case of breach of privacy decided on general delictual principles exemplifies the particular mindset underlying French privacy law. This case is also seen as the birth in French law of the right to one's image.[8] The *Rachel* decision involved an action to destroy lifelike sketches made from a photograph of the plaintiff's sister, a famous actor, taken on her deathbed expressly for the plaintiff's personal records only. The court found that the right to oppose the reproduction was absolute and that the action came under general strict liability principles. The defendant's mental state was therefore irrelevant.[9]

5.6 The Tribunal held that:

> No one may, without the express consent of the family, reproduce and make available to the public the features of a person on his deathbed, however famous this person has been and however public his acts during his lifetime have been; the right to oppose this reproduction is absolute; it flows from the respect the family's pain commands and it should not be disregarded; otherwise the most intimate and respectable feelings would be offended.[10]

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7. See generally J Bell, S Boyron and S Whittaker, *Principles of French Law* (OUP, 1998), 354-391 ("Bell, Boyron and Whittaker").
8. H Beverley-Smith, A Ohly and A Lucas-Schloetter, *Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation* (Cambridge University Press, 2005), 147 ("Beverley-Smith, Ohly and Lucas-Schloetter").
9. J Hauch, "Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris" (1994) 68 *Tulane Law Review* 1219, 1233 ("Hauch"), citing Judgment of June 16, 1858, Trib pr inst de la Seine, 1858 DP III 62.
10. Beverley-Smith, Ohly and Lucas-Schloetter, 147, citing Judgment of June 16, 1858, Trib pr inst de la Seine, 1858 DP III 62.

5.7 Hauch argues that the *Rachel* decision highlights a number of themes that continue to run through French privacy law.[11] First, in actions to enforce privacy rights, courts have a tendency to find for the plaintiff without much discussion of the reasonableness of the defendant's conduct. Secondly, courts focus on the subjective emotional suffering of the plaintiff, without an apparent need to prove objective offensiveness.[12] Thirdly, courts prefer to grant specific relief for breach of privacy, rather than award damages.

Other sources of privacy protection

5.8 The jurisprudence (or case law) generated by the application of general delictual principles to privacy was thought to be too imprecise and, in 1970, the Civil Code was amended in Article 9 to include the provision that:

> Everyone has the right to respect for his private life.
>
> Without prejudice to compensation for injury suffered, the court may prescribe any measures, such as sequestration, seizure and others, appropriate to prevent or put an end to an invasion of personal privacy; in case of emergency those measures may be provided for by interim order.[13]

5.9 While this provision is itself hardly more precise, it is clear that the effect of the various Code provisions is that the notion of "fault" in relation to the various rights to a private life is illusory: fault is found as soon as another person's privacy has not been respected.[14] The plaintiff need not prove injury, as emotional injury is presumed;[15] and it is not necessary to establish foreseeability of harm.[16]

5.10 Although not specifically mentioned in the Constitution, the *Conseil constitutionnel* (Constitutional council) has judged privacy a constitutional right under the umbrella of the right to freedom.[17]

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11. Hauch, 1233-1235.
12. "This subjective view of injury, coupled with the French notion that personality rights are inalienable" have led the courts to find for the plaintiff even where there has been prior disclosure with the plaintiff's knowledge or consent: Hauch, 1234. There must be express and specific authorization for subsequent use of previously revealed facts.
13. See B Starck, *Droit Civil: Introduction* (Librairies Techniques, 1972), [170], [171].
14. Bell, Boyron and Whittaker, 369.
15. If emotional suffering is shown there is no requirement to proved that the revelation was objectively offensive.
16. Hauch, 1250.
17. See E Picard, "The right to privacy in French law" in B S Markesinis (ed) *Protecting Privacy* (The Clifford Chance Lectures, vol 4) (Oxford University Press, 1999), 49, 51-52 ("Picard").

Further sources of the right to privacy in French law are: international instruments, specifically the *International Covenant on Civil and Political Rights*; the ECHR; community law; and "General Principles of Law", such as those applied by the administrative courts.[18]

Article 9

5.11 The right given by Article 9 "encompasses more than a mere right to secrecy of one's private activities, because 'respect' means more than secrecy". The right extends to all aspects of an individual's spiritual and physical being.[19] It has been said to protect "the right in one's name, one's image, one's voice, one's intimacy, one's honour and reputation, one's own biography, and the right to have one's past transgressions forgotten."[20] Case law illustrates that Article 9 will also extend to: personal health;[21] health of close family members; private repose and leisure; parental and marital status;[22] family life; way of life in general;[23] intimate interpersonal relations, including relations with children and romantic attachments; inner emotions, such as suffering and despair;[24] sexual orientation;[25] political and religious beliefs; true names; and residences.[26]

5.12 Gigante makes three other points about the right given by Article 9. First, it is a right that survives the death of the aggrieved

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18. See Picard, 76.
19. A Gigante, "Ice patch on the information superhighway: foreign liability for domestically created content" (1996) *Cardozo Arts and Entertainment Law Journal* 523, 543 ("Gigante"), 543.
20. Hauch, 1238, note 89, citing Judgment of May 15, 1970, Cour d'appel de Paris, 1970 DS Jur 466, 468. See also, Picard, 84.
21. Neither pregnancy (Hauch 1247, note 134) nor being in labour (Hauch, 1247, note 134) can be disclosed without consent.
22. The following may not be disclosed without the parties' consent: plans for a divorce (Hauch, 1248, note 139); a second secret marriage (Hauch, 1248, note 140); plans of a woman for another marriage after obtaining a divorce (Hauch, 1248, note 141); a change of circumstances of conjugal and extra conjugal life (Hauch, 1248, note 142); allegation that the husband of a woman is not the father of her child (Hauch, 1247, note 137).
23. This includes a person's home, the houses or goods he or she may use and the images of these things, the places the person goes and stays, the people he or she meets, and the debts he or she incur: Picard, 88.
24. Hauch, 1248, note 145.
25. Hauch, 1254, note 181.
26. For example: magazine invaded privacy of actor Jean-Louis Trintignant when it published authorised photographs of Trintignant and family in conjunction with an unauthorised article about his past romance with Brigitte Bardot (Gigante, 543, note 111); publication of address of country home of individual in public life a breach of privacy: Hauch, 1246, note 125).

and may be enforced by family of the deceased.[27] Secondly, an individual can claim a vicarious breach of privacy where a disclosure relates to a close family member.[28] Thirdly, every individual has the exclusive power to define the boundaries of his or her private life and the circumstances under which private information may be divulged publicly, including the timing, circumstances, and context of the disclosure of any facts about his or her private life.[29] For this reason, a person may subsequently claim privacy rights for personal information previously divulged,[30] even where they themselves were responsible for the prior disclosure.[31]

5.13 The most well known case illustrating this last point is the *Gunther Sachs* case, in which Gunther Sachs, husband of Brigitte Bardot, sued the magazine *Lui* for publishing details of his sex life under the heading “Sexy Sachs”.[32] The published material had previously appeared in other magazines with the express or tacit consent of the plaintiff. All *Lui* did was to summarise and edit this material to form a complete story. The *Cour de cassation*, the final court of review in private law, commercial law and criminal law matters in France, held that the fact that the plaintiff had previously

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27. See Gigante, 543, note 113. Although, Picard argues that Article 9 of the Civil Code should not apply to dead persons, unless what is involved is a violation of one’s right to exploit commercially one’s image, which is in fact a patrimonial right that can be passed on to heirs; or if the invasion of the deceased’s privacy affects living persons, who can defend infringements in their own right. Picard notes that, despite the view he takes of Article 9, some judgments have allowed legal protection of a deceased’s privacy, in order, for example to defend his or her “memory”, or where a general interest is involved. The latter justified preventing the publication of a photograph of the remains of President Mitterrand: Picard, 80-81.
28. For example, a book’s revelations about former President Mitterrand’s health invaded the privacy of Mitterrand’s wife and children (Gigante, 543, note 114); articles about Princess Caroline of Monaco also invaded the privacy of Prince Rainier and Princess Grace (Gigante, 543, note 114).
29. For example, publication of Charlie Chaplin’s autobiography did not place Chaplin’s private life in the public domain and Chaplin accordingly could object to subsequent, unauthorised disclosure of same facts in a magazine (Gigante, 543).
30. Gigante, 542, note 107; 544, note 118.
31. For example, a person who marched in a demonstration in support of homosexuals could nevertheless oppose the publication of his image, because he had a right to demand that the “secret” be kept from his family and professional colleagues: Hauch, 1255, note 182. However, Picard argues that “where a person has himself confided about his private life, then he loses his right to protection if the newspapers merely repeat what is already well known”: Picard, 92.
32. Beverley-Smith, Ohly and Lucas-Schloetter, 152, citing Cass civ 2.1.1971, D 1971, jur, 263.

tolerated reports, and even his consent to their publication, did not mean that he had irrevocably and without limit authorised republication.[33] This prerogative given by French privacy law to revoke prior consent to publication of personal information can be understood in the light of privacy rights being treated in France as analogous to moral property.

Public figures

5.14 Despite being exposed to public scrutiny, public officials and public figures enjoy the same protection of their right to privacy as private individuals, although only in relation to those aspects of private life not connected to the conduct of the public activities.[34] In an action brought by the Aga Khan, the *Cour de cassation*, affirming the lack of distinction in French privacy law between public and private figures, held that "each individual, whatever his status, his birth, his wealth, his present or future position, has the right to require respect for his privacy."[35]

5.15 Gigante argues that the broad right of privacy given to public officials and figures means that French courts will often protect disclosure of information in matters that other jurisdictions would treat as issues of legitimate public interest. Gigante cites the action brought by the former French President, Valéry Giscard d'Estaing, to prevent the publication of a deposed African dictator's autobiography deemed invasive of Giscard's privacy, as illustrating the extent to which French privacy law limits the scope of debate even in the political arena. In that case, it was said that:

> [P]olitical combat … to be exercised within the context of freedom of the press and freedom of information, must leave outside the field of battle any fact or event directly related to the intimacy of personal or family life; the fact that the person targeted engages in an activity of a public figure cannot authorize or justify an

33. Beverley-Smith, Ohly and Lucas-Schloetter, 152.
34. For example, photographs taken of actress Isabelle Huppert in public place, disclosure of her companion's name and age and revelation that the companion was the father of her child, all constituted invasions of Huppert's privacy; photographs of Brigitte Bardot in slip and bra on private property taken with telephoto lens were an invasion of Bardot's privacy, notwithstanding Bardot's long prior tolerance of 'more lascivious' photographs; but not a person's hobbies or vacations, such as photographing the president on vacation on a yacht: Gigante, 544, note 116.
35. Hauch, 1253, note 174, citing Judgment of Oct. 23, 1990, Cass civ 1re, 1990 Bull Civ I 158, No. 222.

> intrusion into what constitutes the "private life" that "each person has the right" to have respected. [36]

Limitations and exceptions

5.16 As noted in paragraph 5.38 below, Article 10 of the ECHR guarantees freedom of expression. The *Cour de cassation* has decided that there is no conflict between Article 9 of the Civil Code and Article 10 of the ECHR.[37] The basis for this conclusion is that Article 9 and its attendant jurisprudence are justifiable limits falling within the qualifications to the right to freedom of expression contained in cl 2 of Article 10. This seems to reflect a national character trait that places a high value on free exchange of thoughts and sentiments between individuals, and the development of intellectual and spiritual personal freedom, which is likely to be inhibited by public knowledge of personal communications.[38]

5.17 Picard observes that the right to privacy is subject to three general limitations: the plaintiff's consent; other person's rights; and the requirements of public order (including public safety and justice[39]) or general public interest.[40] In the latter category, despite the status of Article 9 of the Civil Code alongside Article 10 of the ECHR, Picard states that the public's "legitimate interest to be informed" can take precedence over an individual's right to privacy.[41] Likewise, Picard points out that "the right to criticism concerning matters of public interest has traditionally been well protected in France".[42] Beverley-Smith, Ohly and Lucas-Schloetter add that the information must also be useful, which, in this context, means necessary: "[t]he disclosure of private facts or the publication of the image must be directly linked to the [recounted] event and has to occur for the purpose of informing the public".[43]

5.18 It becomes apparent from the case law, however, that "different types of public interest may allow diverse interferences with the right to privacy",[44] and that the case-law is not always clear as to what will

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36. Gigante, 545, note 123, citing Judgment of May 14, 1985, Trib gr inst 2 GP 608 (1985).
37. Hauch, 1284-1286, citing Judgment of January 31, 1989, Cass civ 1re, LEXIS Pourvoi No 87-15.139
38. Hauch, 1223, referring to P Kayser, *La Protection de la Vie Privée* (Economica et Presses Universitaires d'Aix-Marseille, Paris, 1984), 9-13.
39. Beverley-Smith, Ohly and Lucas-Schloetter, 172.
40. E Picard, 89.
41. Picard, 94.
42. Picard, 95.
43. Beverley-Smith, Ohly and Lucas-Schloetter, 177.
44. Picard, 94.

fall within the ambit of the right of the public to be informed and to what extent the right to privacy should prevail.

5.19 For example, the French Press have been permitted to publish a list of the "hundred richest French people", with an account of their wealth, on the basis that the position of these persons in the business world deserves to be known. The Court remarked that the publication did not affect the intimacy of the private lives of these persons. By contrast, in the case of *Francois Mitterand*, the author of the book, *Le Grand Secret*, was prevented from publishing his story of the illness of the former French President before he died, even though the matter of the President's health was undoubtedly a matter of public interest. The defendant did not, however, rest his defence on "public interest", relying instead on his right to "freedom of expression". The Court took the view that details of the President's illness involved the most "intimate" aspect of privacy. Given that the President himself had issued regular bulletins about his health, Picard has argued that what actually prevailed in the Court's decision was "the right of the subject of the invasion to reveal what he wishes about himself even if, as in this case, it was not the truth".[45]

5.20 The courts have also permitted incursions into the private lives of individuals in a number of specific circumstances. For example, the courts will allow limited publication of personal financial information if the reporting is confined to finance and "excludes all allusion to the life and personality of the individual".[46]

5.21 An exception is also allowed for historians to write reports intended to serve as a historical source, about the private lives of individuals without their consent, if the facts are relevant to the historical record and "related with objectivity and without the intention to cause harm, and if they have been … already placed within the public domain by accounts of court records in the local press".[47]

5.22 The decision in the *Chaplin* case appears to have established a "fair use" exception when private facts are published for historical or critical debate. In that case, Charlie Chaplin sued *Lui* magazine for breaches of Articles 1382 and 9 of the Code. The central issue was the control a person has over previously revealed private facts. Chaplin had consented, two years previously, to an interview with him being published by the Asa-Presse agency. Asa-Presse sold the rights to the article to the magazine *Lui*, which published it in a changed form

45. Picard, 95.
46. Hauch, 1260-1261.
47. Hauch, 1258. This is the "re-reporting of public records" exception: at 1259.

(changing it from a narrative to a question-and-answer format), giving the impression that Chaplin had granted *Lui* a recent and exclusive interview. Chaplin sued *Lui* magazine, arguing that the changed depiction of the interview constituted a civil wrong under Article 1382 and the republication of private facts without consent violated Chaplin's right to privacy under Article 9.[48]

5.23 The *Cour d'appel de Paris* (Court of Appeal of Paris) held that where an individual publishes private facts concerning her life "she does so in the terms which please her, and in a context chosen by her, and thus decides with complete information concerning what she will make public and the conditions under which she will do so."[49] On appeal, *Lui* magazine argued that Chaplin had to show that the defendant had "mischaracterised the private facts in republishing them"[50] in order to succeed in the action for breach of privacy. The *Cour de Cassation* rejected this argument but at the same time indicated that not all cases of republication of private facts would attract liability. It held that "the findings and conclusions [of the lower courts] do not imply that when a person has consented to the publication of facts relating to her private life she has an unlimited power to oppose the republication of those same facts."[51]

5.24 The *Cour d'appel de Paris* had distinguished between historical or critical works of a serious nature, and those that are not, suggesting that the former could contain a republication of private facts without liability. The *Cour de Cassation* impliedly accepted this distinction by saying that it did not affect the Court's decision as *Lui* "could make no serious pretension to scholarly status".[52] Hauch has argued that the decision can be interpreted as allowing a "fair-use kind of exception" to the right to oppose republication of private facts, when the facts are used for historical or critical debate.[53] According to Hauch, "if the *Lui* article had been a Sorbonne thesis on the effect of the artist's private life on his humor, presumably Chaplin's rights would have been trumped by free-debate-type concerns".[54] Hauch's summary of the effect of the *Chaplin* decision is less ambiguous on the question of an individual's right to control the circumstances of disclosure of private information:

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48. Hauch, 1266-1269 citing Judgment of Nov 14, 1975, Cass. civ. 2e, 1976 DS Jur 421.
49. Hauch, 1267, citing Judgment of Dec. 17, 1973, 1976 DS Jur. 120, 121-122.
50. Hauch, 1268.
51. Hauch, 1268, citing Judgment of Dec. 17, 1973, 1976 D.S. Jur. 120, 121-122.
52. Hauch, 1268.
53. Hauch, 1269.
54. Hauch, 1269.

> Under the view of the *Lui* court, individuals have an absolute and indefeasible right to control use of private facts, even when those facts have been previously revealed. Society may "borrow" those facts when their use is for the general public good.[55]

5.25 A further exception relates to photographs taken in a public place of a landscape or public event that include people. These are exempt from actions for breach of privacy provided that the person whose image appears is represented only incidentally and is not recognisable (or steps are taken to obscure his or her features).[56]

Underpinnings of privacy protection

5.26 Hauch argues that privacy rights in France need to be "interpreted against a backdrop of firmly entrenched personality rights", or, going one step further, that privacy rights are in fact part of a package of personality rights.[57] Personality rights are "the rights whose subject is the component elements of the personality considered under its manifold aspects, physical and moral, individual and social".[58]

5.27 In the *Mistinguett* case, the actor Jeanne Mistinguett entered into a contract for the film rights for her autobiography.[59] The contract contained explicit waivers of the actor's moral rights as an author and her right of privacy. The Court held that these waivers were invalid. Hauch has argued that the rationale for the Court's decision was that "[s]ince private facts or events are an extension of an individual's personality, to strip them from the individual's control is as unthinkable to the French mind as is the truncation of an artist's moral control over the destiny of his work".[60]

5.28 Also underpinning French privacy law is the concept of privacy as moral property, or "moral patrimony",[61] similar to literary and artistic property (or copyright).[62] This is illustrated by the decision in the

55. Hauch, 1269.
56. Beverley-Smith, Ohly and Lucas-Schloetter, 173.
57. Hauch, 1228.
58. Beverley-Smith, Ohly and Lucas-Schloetter, 149, citing Dabin, "Le droit subjectif", Dalloz 1952, 169.
59. Hauch, 1261-1262, note 205, citing Judgment of May 27, 1959, Trib gr inst de la Séine, 24 RIDA 149, 152 (1959).
60. Hauch, 1262
61. Beverley-Smith, Ohly and Lucas-Schloetter, 151.
62. Hauch argues that "[a]n examination of the application of the French right to privacy in recent decisions indicates a marked tendency to treat private facts as private property": Hauch, 1245.

Dietrich case.[63] Marlene Dietrich sought damages against *France-Dimanche* for the unauthorised publication of her memoirs, allegedly told to a (fictitious) German journalist. The Court held that "the memories of each person's private life belong to his moral patrimony" and hence unauthorised publication, "even without malicious intent", is a breach of privacy.[64] In addition, Beverley-Smith, Ohly and A Lucas-Schloetter point out that, since the beginning of the 1990s, French courts have expressly affirmed in many decisions the existence of a patrimonial right to one's image, distinct from the traditional personality right to one's image.[65]

Remedies

5.29 As well as needing to weigh rights to privacy against the freedom of expression guaranteed by Article 10, French courts considering suppressing material *prior* to publication, must consider Article 1 of the French *Press Law* of 1881, which guarantees "liberty of diffusion" to the printed press, and Article 11 of the *Declaration of the Rights of Man* of 1789, which guarantees "liberty of expression". These liberties are recognised in the French Constitution of 1958 as fundamental guarantees that can only be altered by positive law. In spite of this, the French judiciary has shown itself ready to grant injunctive relief to prevent violations of privacy, even in curtailment of freedom of expression. [66]

5.30 For example, in the *Gerard Philipe* case, against the objections of the publisher of the magazine, the *Cour d'appel de Paris* ordered seizure of all copies of the magazine, *France-Dimanche*, containing an article reporting the medical problems of the plaintiff's son and removal of posters from news-kiosks promoting the article. The publishers appealed to the *Cour de cassation*, arguing that the injunction constituted "a penalty violating the liberty of the press". The Court held that once the trial judge had found "an intolerable intrusion into private life", he had the power to pre-empt potential damage by ordering the seizure of the offending publication, pending final determination of the parties' respective rights at trial.

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63. Hauch, 1237, citing Judgment of March 16, 1955 Cour d'appel de Paris, 1955 DS Jur, 295.
64. Beverley-Smith, Ohly and Lucas-Schloetter, 152, citing Judgment of March 16, 1955 Cour d'appel de Paris, 1955 DS Jur, 295. In defining the right to privacy in Article 9, the "right in one's biography" has been explicitly included: Hauch, 1238, footnote 89, citing Judgment of May 15, 1970, Cour d'appel de Paris, 1970 DS Jur 466, 468.
65. Beverley-Smith, Ohly and Lucas-Schloetter, 156.
66. Hauch, 1239-1242.

5.31 The addition of Article 9 to the Civil Code replaced the judicial "intolerable intrusion" formula for injunctive relief with the notion of a "violation of the intimacy of private life." It has been argued that the change in language "invites the case law to distinguish from private life itself, … the intimacy thereof, that is the most secret part of private life; the violation of this latter part alone permits the courts to prescribe measures limiting the freedom of expression."[67] Hauch argues that, as a result, "mere" violations of private life in general should be remedied by damages after trial, whereas revelations concerning "the intimate core of private life" justify pre-trial injunctive relief. He notes that the *Cour de Cassation* has continued to endorse broad injunctive relief. Hauch also points out that French courts have prescribed a wide variety of specific remedies to prevent or palliate privacy violations, including sequester or seizure of publications, suppression of offending scenes of films or passages of books, inclusion of disclaimers, alteration of character names, and the publication of judicial decisions in or with the offending work.[68]

QUEBEC

5.32 Quebec's legal system is unique in Canada in that it is a civil law system based on French law, whereas the law of the other Canadian jurisdictions is based on English common law. Supreme Court decisions on appeal from Quebec have no binding effect on the common law provinces. The other distinguishing feature of the development of Quebec's privacy laws is that s 5 of its *Charter of Human Rights and Freedoms* ("*Quebec Charter*") explicitly guarantees every person "a right to respect for his private life".[69] In *Gazette v Valiquette*, the Quebec Court of Appeal held that the right comprises "a right to anonymity and privacy, a right to autonomy in structuring one's personal and family life, and a right to secrecy and confidentiality".[70] The Supreme Court of Canada has also held that s 5 protects a narrow sphere of personal autonomy within which decisions relating to choices that are of a fundamentally private or inherently personal nature are made.[71]

5.33 Personal autonomy includes the ability of a person to control his or her identity. In *Aubry v Éditions Vice-Versa*, the Supreme Court of Canada held that a photograph taken without the plaintiff's consent

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67. Hauch, 1243, citing I P Kayser, *La Protection de la Vie Privée* (1984), 140.
68. Hauch, 1235.
69. *Quebec Charter of Human Rights and Freedoms* s 5.
70. *Gazette v Valiquette* [1997] RJQ 30, 36. See also *Aubry v. Éditions Vice-Versa* [1998] 1 SCR 591.
71. *City of Longueuil v Godbout* (1997) 152 DLR (4th) 577, [97]-[98].

and published in a magazine was a breach of s 5 of the *Quebec Charter*, on the grounds that the right to one's image must be included in the right to respect for one's private life, since it relates to the ability of a person to control his or her identity.[72] The Court also held that it is irrelevant to the question of breach of s 5 whether the image is in any way reprehensible, or has injured the person's reputation.[73]

5.34 The right to respect for one's private life guaranteed by s 5 must be balanced against the right to freedom of expression guaranteed by s 3 of the *Quebec Charter*. The right to freedom of expression also underpins the public's right to information (the public interest), which places limits on the privacy right in certain circumstances.[74] For example, "it is generally recognized that certain aspects of the private life of a person who is engaged in a public activity or has acquired a certain notoriety can become matters of public interest".[75]

5.35 Quebec has also expressly legislated in the *Civil Code of Quebec* a right to protection of privacy and respect for reputation.[76] Section 35 provides that "[e]very person has a right to the respect of his reputation and privacy" and that "[n]o one may invade the privacy of a person without the consent of the person unless authorized by law". Section 36 provides examples of what may be considered as invasions of privacy:

- **entering or taking anything in a person's dwelling;**
- **intentionally intercepting or using a person's private communications;**
- **appropriating or using a person's image or voice while that person is in private premises;**
- **keeping a person's private life under observation by any means;**
- **using a person's name, image, likeness or voice for a purpose other than the legitimate information of the public; and**
- **using a person's correspondence, manuscripts or other personal documents.**

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72. *Aubry v. Éditions Vice-Versa* [1998] 1 SCR 591, [52]-[53].
73. *Aubry v. Éditions Vice-Versa* [1998] 1 SCR 591, [54].
74. *Aubry v. Éditions Vice-Versa* [1998] 1 SCR 591, [57].
75. *Aubry v. Éditions Vice-Versa* [1998] 1 SCR 591, [58]. "Another situation where the public interest prevails is one where a person appears in an incidental manner in a photograph of a public place": [59].
76. *Civil Code of Quebec* RSQ, chapter C-1991.

THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

5.36 The European Court of Human Rights, and the European Commission of Human Rights, were established by Article 19 of the ECHR to ensure observance of the provisions of the ECHR.

5.37 Articles 45 and 48 of the ECHR provide that the jurisdiction of the European Court of Human Rights extends to all cases concerning the interpretation and application of the ECHR referred to it and that a party bringing a case before the European Court of Human Rights is subject to the compulsory jurisdiction of the Court. A party to the ECHR can declare that it recognizes as compulsory, without the need for special agreement, the jurisdiction of the Court.[77] Article 50 provides that if the European Court of Human Rights finds that a decision or a measure taken by a legal, or other, authority of a signatory country, is in conflict with the obligations arising from the ECHR, and if the internal law of that country allows only partial reparation to be made for the offending decision or measure, the plaintiff can obtain full reparation from an order of the European Court of Human Rights. Article 55 provides that the signatory countries will abide by decisions of the European Court of Human Rights in any case to which they are parties. Many of the signatory countries have also passed legislation giving force to the provisions of the ECHR in domestic law.[78]

5.38 The provisions of the ECHR relevant to the law of privacy are Articles 8 and 10. Article 8 states:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

5.39 Article 10 provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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77. ECHR, article 46.
78. See, for example, the *Human Rights Act 1998* (UK) s 3 and 6.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

5.40 There is a large body of jurisprudence from the European Court of Human Rights interpreting and applying Article 8 of the ECHR. The decisions of this court are also affecting and influencing the development of privacy law in other jurisdictions. In the New Zealand case of *Nicholls v Registrar of the Court of Appeal*, for example, the court commented that decisions from the European Court of Human Rights can be important in helping develop New Zealand jurisprudence.[79]

5.41 In *Campbell v Mirror Group Newspapers Ltd*, Lord Hoffman observed that developments in human rights law had prompted "a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information".[80] The underlying value that the law protects has become less about a duty of good faith and more about "the protection of human autonomy and dignity - the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people".[81] Lord Hoffman observed that these changes brought about under the influence of European Court of Human Rights jurisprudence had implications for the future development of the law:

> They must influence the approach of the courts to the kind of information which is regarded as entitled to protection, the extent and form of publication which attracts a remedy and the circumstances in which publication can be justified. [82]

5.42 One of the key motifs to emerge from the European Court of Human Rights case law is the lengths to which the Court will go to give effect to the Article 8 protections of privacy, family life, home and

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79. *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385, 397 (Eichelbaum CJ), cited with approval in *Hosking v Runting* [2005] 1 NZLR 1, [53] (Gault and Blanchard JJ).
80. *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457 [51] (Lord Hoffman).
81. *Campbell* [51] (Lord Hoffman).
82. *Campbell* [52] (Lord Hoffman).

correspondence. These rights are clearly more expansive than a mere right to privacy given in other statutory and international instruments or at common law in some jurisdictions. Even so, the breadth and diversity of circumstances to which Article 8 has been applied is surprising. The ramifications of Article 8 have been far-reaching, perhaps to an extent not foreseen when the provision was first enacted.

5.43 The European Court of Human Rights has stated that "private life" in Article 8 "is a broad term not susceptible to exhaustive definition".[83] It has held that Article 8 protects "a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature".[84] Elements of the personal sphere that is protected by Article 8 include gender identification, name, sexual orientation and sexual life.[85] As examples, the Court found an interference with the right to a private life guaranteed by Article 8 in the following cases:

- enforcement of legislation prohibiting homosexual acts committed in private between consenting males;[86]
- enforcement of legislation providing for a higher age of consent for homosexual men;[87]

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83. *PG and JH v the United Kingdom* 44787/98 [2001] Eur Court HR 550 (25 September 2001), [56]; *Peck v The United Kingdom*44647/98 [2003] Eur Court HR 44 (28 September 2003), [57].
84. *Peck v The United Kingdom* 44647/98 [2003] Eur Court HR 44 (28 September 2003), [57]. See, for example, *Burghartz v Switzerland*, 16213/90 [1994] Eur Court HR 2 (22 February 1994); *Friedl v Austria*, 15225/89 [1995] Eur Court HR 1 (31 January 1995); *Niemietz v Germany*, 13710/88 [1992] Eur Court HR 80 (16 December 1992); and *Halford v. the United Kingdom* 20605/92 [1997] Eur Court HR 32 (25 June 1997).
85. See, for example, *B v France*, 13343/87 [1992] Eur Court HR 40 (25 March 1992); *Burghartz v Switzerland* 16213/90 [1994] Eur Court HR 2 (22 February 1994); *Dudgeon v the United Kingdom*, 7525/76 [1981] Eur Court HR 5 (22 October 1981); and *Laskey, Jaggard and Brown v the United Kingdom*, 21627/93; 21826/93; 21974/93 [1997] Eur Court HR 4 (19 February 1997).
86. *Dudgeon v The United Kingdom*7525/76 [1981] Eur Court HR 5 (22 October 1981): The right affected by the impugned legislation was held to protect an essentially private manifestation of the human personality: [60]. See also *Norris v Ireland* 10581/83 [1988] Eur Court HR 22 (26 October 1988); *Modinos v Cyprus* 15070/89 [1993] Eur Court HR 19 (22 April 1993).
87. *Sutherland v UK* 25186/94 [2001] Eur Court HR 234 (27 March 2001); *L and V v Austria* 39392/98; 39829/98 [2003] Eur Court HR 20 (9 January 2003); *S L. v Austria* 45330/99 [2003] Eur Court HR 22 (9 January 2003); *Ladner v Austria* 18297/03 [2005] Eur Court HR 57 (3 February 2005).

- discharging male and female homosexuals and bisexuals from the military forces because of their sexuality;[88]
- refusing to award custody of a child to the applicant because of his homosexuality.[89]

5.44 To illustrate the diversity of conduct that the European Court of Human Rights has been prepared to find violates Article 8, the following wide-ranging cases were heard in 2004 and 2005 alone:

- the placement of microphones by police in a private residence in order to gather evidence in a criminal investigation;[90]
- forcing a student to shave off his beard in order to be allowed to complete his university year;[91]
- surgical interventions on persons suspected of drug trafficking after having swallowed packets with drugs;[92]
- use in court proceedings of medical reports concerning the applicant without his consent or without the intervention of a medical expert;[93]
- retention of fingerprints and DNA samples of suspects even when no guilt had been established and when the investigation had been discontinued;[94]
- refusal of a court to establish paternity of a still-born child and allow a change of surname and patronym from that of mother's former husband;[95]

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88. *Lustig-Prean and Beckett v UK* 31417/96; 32377/96 [1999] Eur Court HR 71 (27 September 1999); *Smith and Grady v UK* 33985/96; 33986/96 [1999] Eur Court HR 72 (27 September 1999), *Perkin and R v UK* 43208/98;44875/98 [2002] Eur Court HR 690 (22 October 2002) and *Beck, Copp and Bazeley v UK* 48535/99; 48536/99; 48537/99 [2002] Eur Court HR 684 (22 October 2002).
89. *Salgueiro Da Silva Mouta v Portugal* 33290/96 [1999] Eur Court HR 176 (21 December 1999).
90. *Vetter v France* 59842/00 [2005] Eur Court HR 350 (31 May 2005). The surveillance was not done in accordance with, nor clearly authorised by, the covering domestic law, the *Code of Criminal Procedure* and the common law. Accordingly, the Court held that the applicant had not enjoyed the minimum degree of protection to which citizens were entitled under the rule of law in a democratic society.
91. *TIG v Turkey* 8165/03 [2005] Eur Court HR.
92. *Komba v Portugal* 18553/03 [2005] Eur Court HR*; Bogumil v Portugal* 35228/03 [2005] Eur Court HR.
93. *Le Lann v France* 7508/02 [2006] Eur Court HR (10 October 2006).
94. *S and Marper v United Kingdom* 30562/04 and 30566/04 [2007] Eur Court HR (16 January 2007).
95. *Znamenskaya v Russia* 77785/01 [2005] Eur Court HR (2 June 2005).

- absence of legal basis for interception and recording of conversations between the detainee and members of his family;[96]
- failure of authorities to take adequate measures to protect the applicant from the effects of severe pollution in the vicinity of steelworks;[97]
- administration of medical treatment without consent during a compulsory psychiatric confinement;[98]
- classification of the applicant as a security risk and withdrawal of his access card for sensitive areas of an airport;[99]
- confiscation of the applicant's passport and refusal to return it during lengthy criminal proceedings;[100]
- search of a lawyer's office and seizure of privileged material;[101]
- use in criminal proceedings of transcripts of telephone conversations recorded in the context of separate criminal proceedings;[102]
- the absence of effective procedures for obtaining disclosure of information about tests carried out on servicemen;[103]

5.45 There were many other cases heard by the European Court of Human Rights in 2004-2005 in which the Court held that there had been a violation of the rights to respect for home, family or correspondence.[104]

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96. *Wisse v France* 71611/01, [2005] Eur Court HR 897 (20 December 2005).
97. *Fadeyeva v Russia* 55723/00, [2005] Eur Court HR 376 (9 June 2005).
98. *Storck v Germany* 61603/00 [2005] Eur Court HR (16 June 2005).
99. *Novoseletskiy v Ukraine* 47148/99 [2005] Eur Court HR (22 February 2005).
100. *Iletmus v, Turkey* 29871/96 [2005] Eur Court HR (6 December 2005).
101. *Sallinen v Finland* 50882/99 [2005] Eur Court HR (27 September 2005).
102. *Matheron v France* 57752/00 [2005] Eur Court HR (29 March 2005).
103. *Roche v UK* 32555/96 [2005] Eur Court HR (19 October 2005).
104. *Kalanyos & Others v Romania* 57884/00 [2005] Eur Court HR (failure of the authorities to prevent the burning of houses belonging to Roma villagers); *MA v United Kingdom* 35242/04 [2005] Eur Court HR (deficient judicial process resulting in father's contact with his daughter being greatly minimised and negatively affected); *Zawadka v Poland* 48542/99 [2005] Eur Court HR 421 (23 June 2005); *Bove v Italy* 30595/02 [2005] Eur Court HR 30 June 2005; *Reigado Ramos v Portugal* 73229/01 [2005] Eur Court HR (22 November 2005) (measures taken to enforce a father's right of access to his child); *Monary v Romania and Hungry* [2005] 71099/01 Eur Court HR (5 April 2005); *Karadzic v Croatia* [2005] 35030/04 Eur Court HR (15 December 2005) (measures taken by authorities to enforce court decisions ordering the return of children. to a parent); *Shofman v Russia* 74826/01 [2005] Eur Court HR (24 November 2005) (the impossibility of refuting paternity after expiry of one-year time-limit from date of registration notwithstanding evidence from DNA testing); *Niedzwiecki v Germany* 58453/00 [2005] Eur

Some leading cases on the right to respect for private and family life

PG and JH v The United Kingdom

5.46 In *PG and JH v the United Kingdom*,[105] the European Court of Human Rights held that the use of covert listening devices by police to record the applicants' conversations at a flat, and while they were detained in a police station, breached Article 8. The interference with the applicants' privacy could not be justified under cl 2 of Article 8 as being "in accordance with the law", as there was no domestic law regulating the use of covert listening devices at the relevant time.

5.47 In relation to the recording of the applicants' voices at the police station, the UK Government submitted that the recordings were made to obtain voice samples (to match with the recordings of voices in the flat) and not to obtain any private or substantive information. It

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Court HR (25 October 2005) (denial of child benefit to foreigners not in possession of an unlimited residence permit); *Sisojeva v Latvia* 60654/00 [2005] Eur Court HR (16 June 2005) (prolonged refusal of authorities to regularise the applicant family's stay in the respondent state notwithstanding the length of time the family had spent there and its close links with that state); *Tuquabo Tekle &Ors v Netherlands* 60665/00 [2005] Eur Court HR (1 December 2005) (refusal to allow a daughter to join her foreign parent in the country where the latter was legally resident); *Ostrovar v Moldova* 35207/03 [2005] Eur Court HR (13 September 2005); *Baginski v Poland* 37444/97 [2004] Eur Court HR (11 October 2004) (denial of visit to prison by members of the prisoner's family); *Xenides Arestis v Turkey* 46347/99 [2005] Eur Court HR (22 December 2005) (denial of access to home); *LM v Italy* 60033/00 [2005] Eur Court HR (8 February 2005) (search of home); *Moldovan and others v Romania* (No 2) 41138/98; 64320/01 [2005] Eur Court HR (12 July 2005) (failure of authorities to ensure adequate living conditions for families whose homes were burned by a mob including police officers); *Novoseletskiy v Ukraine* 47148/99 [2005] Eur Court HR (22 February 2005) (adequacy of measures taken to return an apartment to the tenant after unlawful occupation by a third party during the tenant's absence); *Ostrovar v Moldova* 35207/03 [2005] Eur Court HR 596 (13 September 2005); *Jankavskas v Lithuania* 59304/00 [2005] Eur Court HR (24 February 2005); *Argenti v Italy* 56317/00 [2005] Eur Court HR (10 November 2005); *Salvatore v Italy* 42285/98 [2005] Eur Court HR (6 December 2005); *Wasilewski v Poland* 63905/00 [2005] Eur Court HR (6 December 2005); *Drozdowski v Poland* 20841/02 [2005] Eur Court HR (6 December 2005); *Zappia v Italy* 77744/01 [2005] Eur Court HR (29 September 2005) (interference with prisoners' correspondence); *Forte v Italy* 77986/04 [2005] Eur Court HR (10 November 2005); *Goffi v Italy* 55984/00 [2005] Eur Court HR (24 March 2005) (restriction on a bankrupt's receipt of correspondence); *Keles v Germany* 32231/02 [2005] Eur Court HR (27 October 2005) (expulsion of a foreign national after a lengthy period of residence in the expelling country).

105. *PG and JH v the United Kingdom* 44787/98 [2001] Eur Court HR 550 (25 September 2001). (*PG and JH*).

argued that the "aural quality of the applicants' voices was not part of private life but was rather a public, external feature".[106] It further argued that as the recordings were made while the applicants were being formally charged with a criminal offence, it did not concern the applicants' private life and there could be no expectation of privacy in that context.[107]

5.48 In responding to this submission, the European Court of Human Rights emphasised that "private life is a broad term not susceptible to exhaustive definition"[108] and held that there is a "zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'".[109] One significant, though not necessarily conclusive, factor in determining whether conduct outside a person's home or private premises impinges on his or her private life is the person's reasonable expectations as to privacy.[110] This will be particularly relevant when people knowingly or intentionally involve themselves in activities that are, or may be, recorded or reported in a public manner.[111] The European Court of Human Rights held that once any systematic or permanent record comes into existence of material from the public domain, private-life considerations may arise. They would arise, for example, where material had been recorded by security services, even if no intrusive or covert information gathering method had been used.[112]

5.49 The European Court of Human Rights has held on numerous occasions that covert taping of telephone conversations breaches Article 8.[113] The fact that the taping was done not for the content of the conversation, but for voice samples does not take it outside the scope of the protection afforded by Article 8. A permanent record was made of the voices, and the analysis of those voices was directly relevant to identifying individuals in the context of other personal data. The Court held that this recording and analysis must be regarded as concerning the processing of personal data.[114] Accordingly, although it took place while the applicants were being charged and

106. *PG and JH,* [54].
107. *PG and JH,* [54].
108. *PG and JH,* [56].
109. *PG and JH,* [56].
110. *PG and JH,* [57].
111. *PG and JH,* [57].
112. *PG and JH,* [57].See also *Rotaru v Romania* 28341/95 [2000] Eur Court HR 192 (4 May 2000).
113. *PG and JH,* [59].
114. *PG and JH,* [59].

when in their police cell, it was an interference with their right to respect for private life within the meaning of Article 8.[115]

Peck v The United Kingdom

5.50 In *Peck v The United Kingdom*,[116] the applicant had been filmed by CCTV operated by the local council in a main street of his hometown with a knife in his hands. What was not caught on camera was that Peck had a moment earlier tried to commit suicide by cutting his wrists. The council later disclosed photographs and extracts from the video footage to the media. The photographs were published in newspapers and the footage broadcast on national television in a documentary program about the Council's CCTV system. In each case the appellant's face was unmasked, or inadequately masked, and he was clearly recognisable. The journalistic angle taken by each of the publications was the usefulness of the Council's CCTV system in minimising and detecting crime.

5.51 Both the Broadcasting Standards Commission and the Independent Television Commission found that there had been an unwarranted infringement of Peck's privacy.[117] The High Court, however, rejected Peck's application for judicial review of the Council's decision to release the CCTV footage on the basis that the Council was acting within its authority under the *Criminal Justice and Public Order Act 1994* in promoting the effectiveness of its CCTV system in deterring crime. The Court recognised that there may be on occasion (this being one) an undesirable invasion of privacy in the use of CCTV systems but placed their documented usefulness in crime prevention and detection above this.[118] The Court stated that "[u]nless and until there is a general right of privacy recognised by English law … reliance must be placed on effective guidance being issued by Codes of practice or otherwise, in order to try and avoid such undesirable invasions of a person's privacy".[119]

5.52 Peck lodged an application with the European Court of Human Rights alleging that the disclosure of the CCTV footage constituted a disproportionate interference with his right to respect for private life guaranteed by Article 8. The Government contended that the incident did not form part of Peck's private life as it was already in the public domain.[120] That is, the applicant had waived his rights to privacy by

115. *PG and JH,* [60].
116. *Peck v The United Kingdom* 44647/98 [2003] Eur Court HR 44 (28 September 2003) ("*Peck*").
117. *Peck,* [24], [26].
118. *Peck,* [32].
119. *Peck,* [32].
120. *Peck,* [53].

choosing to do what he did, where he did, and the respondent simply distributed a public event to a wider public. It also contended that the applicant had waived his rights by not complaining about being filmed (to which argument Peck countered that, first, he was unaware of the camera and, secondly his complaint was not about the filming but the release of the footage to the public). The applicant pointed out that the jurisprudence on Article 8 had established that "the occurrence of an event in a public place was only one element in the overall assessment of whether there was an interference with private life, other relevant factors including the use made of the material obtained and the extent to which it was made available to the public".[121]

5.53 The Court agreed with the applicant's submission, affirming what it had said in *PG and JH v the United Kingdom* that some activities occurring in a public context, may yet fall within the scope of "private life".[122] The Court also restated what was held in *PG and JH v the United Kingdom*[123] that once a permanent record is made of CCTV footage, or other observation of a person in a public place, private life considerations may arise.[124] In this case, it found that the disclosure of the footage of Peck by the Council constituted a serious interference with Peck's right to respect for his private life.[125]

5.54 However, the Court next had to consider whether the interference was justified pursuant to cl 2 of Article 8. It held that the disclosure: had a basis in law pursuant to the *Criminal Justice and Public Order Act 1994* (UK) and the *Local Government Act 1972* (UK); was foreseeable; and pursued the legitimate aim of public safety, the prevention of disorder and crime and the protection of the rights of others.[126] Finally, in determining whether the disclosure was "necessary in a democratic society in the interests of national security" the Court considered whether the measures were proportionate to the legitimate aims pursued. It pointed out that, while it should be left to the competent national authorities to strike a fair balance between public and private interests, this must be subject to European supervision and must depend on factors such as the nature and seriousness of the interests at stake and the gravity of the interference.[127]

121. *Peck,* [56].
122. *Peck,* [57].
123. *Peck,* [57].
124. *Peck,* [58].
125. *Peck,* [63].
126. *Peck,* [67].
127. *Peck,* [77], affirming *Z v Finland*, 22009/93 [1997] Eur Court HR 10 (25 February 1997).

5.55 The Court weighed the nature and seriousness of the interference with Peck's private life against the strong interest of the State in detecting and preventing crime. It found that the Council had other options available to it to achieve the same objectives, including obtaining Peck's consent to disclosure or properly concealing his identity. It finally found for the applicant, holding that the disclosure constituted a disproportionate, and therefore unjustified, interference with his private life, in violation of Article 8.[128] The Court commented that whether the interference with the applicant's right answered a pressing social need or was proportionate to the aims pursued were principles that lie at the heart of the Court's analysis of complaints under Article 8.[129]

5.56 In the New Zealand case of *Hosking & Hosking v Runting & Anor*, the Court commented that the facts in *Peck v United Kingdom* highlight the limitations with the English approach to privacy law, namely using the breach of confidence action to protect privacy interests, even under the broadest form of the action.[130] The European Court of Human Rights was not convinced that, on the facts, the domestic courts would have found that the images "had the necessary quality of confidence" about them or that the information was "imparted in circumstances importing an obligation of confidence" so as to succeed in an action for breach of confidence.[131]

5.57 In *McKennitt v Ash*, Justice Eady observed that in the light of *Peck v United Kingdom* (and also *PG and JH v United Kingdom*[132]):

> [A] trend has emerged towards acknowledging a "legitimate expectation" of protection and respect for private life, on some occasions, in relatively public circumstances. It is no longer possible to draw a rigid distinction between that which takes place in private and that which is capable of being witnessed in a public place by other persons. [133]

Von Hannover v Germany

5.58 Another recent leading case offering guidance on the approach to privacy rights is *Von Hannover v Germany*.[134] The case demonstrates the width of the notion of "private life" that the European Court of Human Rights is now prepared to recognise. The applicant, Caroline

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128. *Peck,* [87].
129. *Peck,* [106].
130. *Hosking & Hosking v Runting & Anor* [2005] 1 NZLR 1, [51] (Gault and Blanchard JJ).
131. *Peck,* [111].
132. *PG and JH.*
133. *McKennitt & Ors v Ash & Anor* [2005] EWHC 3003 (QB), [50].
134. *Von Hannover v Germany* 59320/00 (2005) 40 EHRR 1, ("*Von Hannover*")

von Hannover, more widely recognised as Princess Caroline of Monaco, complained that the publication by various German magazines of photographs of her in her daily life, some showing her alone and some with friends or family, violated her rights under Article 8.

5.59 Princess Caroline has had her personal life discussed, and photos of her and her family published, in the media many times and over many years. She is, in other words, in some respects a very public person. Even bearing in mind the extent of her media exposure, the Court found that her right to respect for her private life had been breached. It reiterated that the concept of private life, as protected by Article 8, extends to aspects of personal identity, including a person's name and a person's picture.[135] The Court went on to hold that "private life" includes a person's physical and psychological integrity; and that Article 8 is primarily intended to ensure the development, without outside interference, of every human being's personality. That protection extends beyond the private family circle and includes a social dimension.[136] Once again, the Court affirmed the statement that it had originally made in *PG and JH v the United Kingdom*,[137] and again in *Peck v The United Kingdom*[138] that "there is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'".[139].

5.60 These three case, *PG and JH*, *Peck* and *Von Hannover*, establish that everyone, even if they are known to the general public, must be able to enjoy a "legitimate expectation" of protection of and respect for their private life[140] and that "it is no longer possible to draw a rigid distinction between that which takes place in private and that which is capable of being witnessed in a public place by other persons".[141]

5.61 The Court in *Von Hannover* also had to consider whether cl 2 of Article 8 only protected against interference by a public authority with the exercise of an individual's right to privacy, or extended to omissions that affected that right. Princess Caroline had not complained of an action by the State, but of a lack of adequate State protection of her private life and image. The Court held that Article 8

135. *Von Hannover,* [50].
136. *Von Hannover,* [69].
137. *PG and JH v the United Kingdom* 44787/98 [2001] Eur Court HR 550 (25 September 2001).
138. *Peck v The United Kingdom* 44647/98 [2003] Eur Court HR 44 (28 September 2003).
139. *Von Hannover,* [50].
140. *Von Hannover,* [69].
141. *McKennitt & Ors v Ash & Anor* [2005] EWHC 3003 (QB), [50] (Eady J).

does not merely compel public authorities to abstain from interference with the rights it guarantees, but may impose positive obligations.[142] "These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."[143]

5.62 At the same time, a balance must be struck between the competing interests of an individual's right to privacy and freedom of expression.[144] In that regard, the Court acknowledged the essential role of the media in a democratic society to provide information and ideas on matters of public interest, even accommodating a degree of exaggeration or provocation. This freedom of expression extends to the publication of photographs, as well as articles. The Court stated, however, that the protection of a person's rights and reputation takes on particular importance in the area of photos.

5.63 In this case, the published photos showed Princess Caroline engaged in activities of a purely private nature. They did not involve dissemination of ideas but revealed very personal, even intimate, information about the people in the images.[145] Hence, the Court found that the publication of the photos could not be justified under the umbrella of freedom of speech. The Court held that "the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest."[146] In this case, the photos made no such contribution but were published solely to satisfy curiosity. There is no entitlement in the public to know everything about public figures.[147]

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142. *Von Hannover*, [57]. See also *Z v Finland* 22009/93 [1997] Eur Court HR 10 (25 February 1997): protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private life. The domestic law must therefore afford appropriate safeguards to prevent any such disclosure as may be inconsistent with the guarantees in Article 8.
143. *Von Hannover,* [57].
144. *Von Hannover,* [57]-[58].
145. *Von Hannover,* [58]-[59], [61].
146. *Von Hannover,* [76]; see also [63].
147. *Von Hannover,* [67], [77].

6. Options for reform

- Possible statutory models
- Identifying privacy interests
- Proposal 1

6.1 This chapter explores the options for developing a statutory cause of action for invasion of privacy. In attempting to work out what a cause of action for invasion of privacy might look like, the Commission has studied examples of relevant statutes, case law and constitutional jurisprudence in other jurisdictions. As noted earlier in this paper, most jurisdictions that provide for a cause of action for invasion of privacy also have a constitutionally entrenched, or at least a legislative, human rights framework. In looking at the various models that create statutory and common law privacy rights in other jurisdictions, it is important to remember that their operation and interpretation, and the way that privacy is balanced with other rights and interests, is integral to the human rights frameworks in which they exist.

POSSIBLE STATUTORY MODELS

6.2 The Commission has identified four broad models that could form the basis for a statutory cause of action for invasion of privacy. The legal systems from which these models are drawn differ, markedly in some respects, from our own. Therefore, while it is helpful to examine how other jurisdictions have approached the issue of a privacy cause of action, it is not suggested that any particular model should be slavishly copied in New South Wales.

6.3 The four models are:

1. One general, non-specific right to seek redress for invasion of personal privacy.
2. A general cause of action for invasion of privacy, supplemented by a non-exhaustive list of the circumstances that could give rise to the cause of action.
3. A general cause of action for invasion of privacy, together with other specific statutory causes of action, for example, in respect of unauthorised surveillance activity.
4. Several narrower and separate causes of action based on various distinct heads of privacy.

A single general cause of action

6.4 Several European countries have very broad, open-ended provisions establishing a right to privacy with remedies available for breach of that right. For example, the French Civil Code states that "everyone has the right to respect for his private life". The courts are empowered to order compensation for injury suffered, and may prescribe "any measures, such as sequestration, seizure and others,

appropriate to prevent or put an end to an invasion of personal privacy; in case of emergency those measures may be provided for by interim order".[1] This provision draws on Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ("ECHR"),[2] and is balanced by the right of freedom of expression contained in Article 10 of the ECHR, and Article 11 of the Declaration of Human Rights 1789, as quoted in the preamble to the French Constitution of 1958.[3]

6.5 In Germany, the Constitution places a duty on State authorities to have respect for and protect human dignity, as well as recognising the right to "the free development of … personality insofar as it does not infringe the rights of others or offend against the constitutional order or the moral code".[4] German courts have held that this personality right is actionable under the general delictual provision in the German Civil Code.[5] The Constitution balances the personality right with that of freedom of expression.[6]

6.6 While the terms "private life" and "personality" are not defined, European courts have said that they refer to the plaintiff's right to solitude and "autonomous space" for private acts and decisions.[7] The terms have also been held to include references to the plaintiff's identity, love life, health, religion, sexuality, family relationships and business and financial details, as well as photographs depicting people in the course of their ordinary activities (for example, shopping), or for commercial gain without their consent.[8] Whether or not a remedy of damages or an injunction applies will depend on the circumstances of each case.

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1. Article 9, inserted by law No 70-643 of July 17, 1970, discussed at para 5.8, 5.11-5.13.
2. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, <www.echr.coe.int> at 10 January 2007, (entered into force on 3 September 1953) ("ECHR").
3. See <www.assemblee-nationale.fr/english/8ab.asp#PREAMBLE> at 10 January 2007. See further para 5.10-5.26.
4. *Grundgesetz* (1949) Articles 1 and 2.
5. *Bürgerliches Gesetzbuch*, Article 823(1) provides that "a person who wilfully or negligently injures the life, body, health, freedom, property or other right of another contrary to law is bound to compensate him for any property arising therefrom".
6. See *Grundgesetz* (1949) Article 5. See also N Nolte and JDR Craig, "Privacy and Free Speech in Germany and Canada: Lessons for an English Privacy Tort" (1998) 2 *European Human Rights Law Review* 162, 162.
7. *Lebach* case, 35 BVerfGE 202, 5 June 1973.
8. See, eg, *Von Hannover v Germany* (2005) 40 EHHR 1; *Herrenreiter* case, 26 Zivilsachen 349, 14 February 1958. See also Taylor Wessing, *Defamation and Privacy Law and Procedure in England, Germany and France*, 2006 (accessed at <www.taylorwessing.com>). See further para 5.37 – 5.64.

Advantages

6.7 The major advantage of such a general cause of action is its inclusiveness. As such, there is no danger of genuine and clear invasions of privacy lacking a basis to bring an action. Being reliant on context rather than legislative proscription keeps the cause of action fluid and relevant, and more readily able to adapt to changes in jurisprudential thinking and advances in technologies. It also avoids the difficult task of determining in legislation exactly what constitutes an invasion of privacy, since this can be assessed on a case by case basis.

Disadvantages

6.8 If a broad statutory cause of action along the lines of European models were to be introduced in New South Wales, the primary obstacle would be the lack of certainty that it would generate. Legislation providing only for a bald statement of the ability to bring an action for invasion of privacy or private life would make it extremely difficult to know when, and how, conduct would give rise to liability. The difficulty would be pronounced particularly if, as is likely,[9] no satisfactory definition of privacy could be found for inclusion in the legislation. Although legislation may create broad statutory obligations, whose scope is determined by subsequent case law, the context of the legislation usually assists in that determination. The mere legislative statement of a broad principle of privacy would lack that context.[10]

6.9 Reflecting a different relationship between case law and legislation, the lack of legislative precision is neither problematic nor unusual in the civil law systems of Europe. It is common in those systems of law for broad principles of law to be set out in legislation, particularly in codes, whose exact meaning and import are worked out subsequently. Thus, the general principle of French law that "everyone has the right to respect for his private life" does not mean that every conceivable breach of privacy contravenes this provision. The provision supplies merely a guiding principle whose meaning is only understood in the light of more general legal principles and of "common sense notions about what civil liability is about" – an inquiry informed by the jurisprudence ("case law") and "doctrine" (commentary) that surrounds it.[11]

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9. See para 1.12-1.18.
10. See para 1.43.
11. See G Wagner, "Comparative Tort Law" in M Reimann and R Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford UP, 2006) 1003, 1006-1007.

6.10 Moreover, a substantial body of privacy-specific case law has developed in most European countries and in the European Court of Human Rights that now enables the contours of privacy to be drawn in those countries with some specificity.[12]

General action with examples of privacy violation

6.11 Existing laws in the Canadian provinces of Manitoba, Saskatchewan, Newfoundland and Labrador, and British Columbia,[13] and proposed legislation in Ireland, provide for a general statutory tort actionable when a person wilfully, and without claim of right or lawful authority, violates the privacy of another.[14] While none of these statutes define privacy, they all contain a non-exhaustive list of examples of the type of conduct that may constitute a breach of privacy. For example, it would be a prima facie violation of personal privacy under those laws to:

- **subject someone to aural or visual surveillance,[15] whether or not accompanied by trespass;[16]**

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12. See para 5.37-5.64.
13. A Privacy Bill has also been proposed in the Canadian province of New Brunswick. The Bill, similar to the legislation in the other provinces, has been under consideration by the Law Amendments Committee since 2000: see New Brunswick, Department of Justice, *A Commentary on the Privacy Act* (December 2000) and «www.inter.gov.nb.ca/legis/index-e.htm». Note that the Uniform Law Conference of Canada has also developed a Uniform Privacy Act based on the provincial legislation: see «www.ulcc.ca.en.us».
14. See *Privacy Act,* RSNL 1990, c P-22 (Newfoundland and Labrador) s 3(1); *Privacy Act,* RSS 1978, c P-24 (Saskatchewan) s 2; *Privacy Act,* CCSM c P125 (Manitoba) s 2(2); *Privacy Act,* RSBC 1996, c 373 (British Columbia) s 1(1); and *Privacy Bill 2006* (Ireland) cl 2(2). Note that the Manitoba statute requires that the conduct be substantial and unreasonable, but does not specify wilful conduct. For further discussion, see para 3.42-3.58.
15. Surveillance is variously defined as eavesdropping or spying on, watching, besetting or following an individual, and listening to, intercepting or recording a communication, whether by electronic means or not: see *Privacy Act,* RSS 1978, c P-24 (Saskatchewan) s 3(a)-(b); *Privacy Act,* RSNL 1990, c P-22 (Newfoundland and Labrador) s 4(a)-(b); *Privacy Act,* CCSM, c P125 (Manitoba) s 3(a)-(b); and *Privacy Bill 2006* (Ireland) cl 1. Note that the Manitoba, Saskatchewan and Newfoundland and Labrador laws permit recording of a conversation or message by a party to a conversation, whereas the Irish Bill does not.
16. *Privacy Act,* CCSM c P125 (Manitoba) s 3(a)-(b); *Privacy Act,* RSNL 1990, c P-22 (Newfoundland and Labrador) s 4(a)-(b); *Privacy Act,* RSS 1978, c P-24 (Saskatchewan) s 3(a)-(b); *Privacy Act,* RSBC 1996, c 373 (British Columbia) s 1(4); and *Privacy Bill 2006* (Ireland) cl 3(2)(a).

- disclose information or material obtained as a result of surveillance, even if the person disclosing the information did not conduct the surveillance;[17]
- use, with the intention to exploit, the name, likeness or voice of an identifiable individual for profit or gain without that person's consent;[18] or
- use a person's letters, diaries or other personal documents without consent.[19]

6.12 In determining whether an action or disclosure amounts to a violation of privacy, courts have regard to the circumstances surrounding the nature, incidence and occasion of the act. For example, courts will look at the relationship between the parties to the action; the age and occupation of the respondent; the effect on the health and welfare, social, business or financial position of the person or his or her family; whether the disclosure concerned intimate or sensitive facts about a person's private, home or family life; and whether the respondent has apologised or offered to make amends.[20]

Advantages

6.13 This approach has similar advantages to the first model, in that it is open-ended and inclusive, thereby allowing the courts, rather than the legislature, to determine the circumstances in which alleged invasions of privacy should succeed. However, it has the additional benefit of giving context to the cause of action, and hence guidance as to when it might arise. This would allow the law to develop fluidly, as social and technological changes alter views on privacy and the means of its violation, within the structure provided by the legislation. This also helps to overcome the problems associated with developing a workable definition of privacy.[21]

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17. *Privacy Bill 2006* (Ireland) cl 3(2)(b). Note that this would cover the facts in *Lenah Game Meats*, where the ABC broadcast the surveillance footage, but did not film it.
18. *Privacy Act,* CCSM c P125 (Manitoba) s 3(c); *Privacy Act,* RSS 1978 c P-24 (Saskatchewan) s 3(c); *Privacy Act,* RSNL 1990 c P-22 (Newfoundland and Labrador) s 4(c); and *Privacy Bill 2006* (Ireland) cl 3(2)(c).
19. *Privacy Act,* CCSM c P125 (Manitoba) s 3(d); *Privacy Act,* RSS 1978 c P-24 (Saskatchewan) s 3(c); *Privacy Act,* RSNL 1990 c P-22 (Newfoundland and Labrador) s 4(c); and *Privacy Bill 2006* (Ireland) cl 3(2)(d). Note that the Irish Bill also refers to medical records.
20. See *Privacy Act,* RSS 1978 c P-24 (Saskatchewan) s 6(2); *Privacy Act,* RSBC 1996 c 373 (British Columbia) s 1(3); and *Privacy Bill 2006* (Ireland) cl 4, for a complete list of the factors that courts must take into account.
21. This was the rationale adopted by the Irish Working Group: see B Murray, L O'Daly, B MacNamara and C O'Hobain, *Report of Working Group on Privacy* (2006), <http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ6REJMU-

Disadvantages

6.14 Although more structured than the first model, there is still an element of uncertainty, especially since none of the above examples contain a definition of privacy.

General action plus other specific causes of action

6.15 The third model for a statutory cause of action is the one adopted in the Canadian province of British Columbia. In addition to the general cause of action discussed above, the British Columbian Privacy Act also has a further cause of action for the unauthorised use of the name or portrait of another. Specifically, it is a tort, actionable without proof of damage, for a person to "use the name or portrait[22] of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose".[23]

Advantages

6.16 Once again, this model has the same advantage of inclusiveness as the previous two, with the additional certainty of providing for specific areas that may have presented themselves as privacy concerns. In this way, Parliament could legislate to include specific causes of action for invasion of privacy to reflect developments in the courts, but also have the general catch-all provision for cases that fall outside the scope of those specific causes of action, ensuring that genuine violations of any aspect of privacy would be actionable. This would offer a degree of clarity in terms of the particular causes of action that had been identified, while incorporating the flexibility to cover unforeseen developments that may threaten privacy.

Disadvantages

6.17 Although this model offers a more solid and definite framework by providing for one or more specific causes of action, the element of uncertainty remains regarding the general, catch-all provision. In fact, this uncertainty becomes more apparent when compared with the proscription of the specific cause of action. There is also the problem of identifying one or more specific causes of action. While this would be less of a problem if it occurred naturally as a common law

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en/$File/WkgGrpPrivacy.pdf> at 22 March 2007 ("*Working Group Report*") at [7.12].

22. "Portrait" means a likeness, still or moving, and includes a likeness of another deliberately disguised to resemble the plaintiff, and a caricature: see *Privacy Act,* RSBC 1996 c 373 (British Columbia) s 3(1).
23. *Privacy Act,* RSBC 1996 c 373 (British Columbia) s 3(2).

development, it may seem somewhat arbitrary if specific causes of action were statutorily created without any empirical evidence of the privacy concerns that warrant protection.

Several distinct causes of action

6.18 As noted in Chapter 4, the United States' *Restatement (Second) of Torts* sets out distinct categories of privacy tort, based on the classifications developed by William Prosser in 1960.[24] Prosser believed that an action for invasion of privacy was contextual, and represented not one, but a number of distinct actions. To recap, he identified the following four causes of action for breach of privacy following an analysis of existing case law:[25]

1. **Public disclosure of embarrassing private facts about the plaintiff.**
2. **Intrusion upon the plaintiff's seclusion or solitude, or into the plaintiff's private affairs.**
3. **Appropriation for the defendant's advantage of the plaintiff's name or likeness.**
4. **Publicity that places the plaintiff in a false light in the public eye.**

6.19 These four categories of United States tort law have been influential in other jurisdictions. For example, the specific tort in the British Columbian Privacy Act of appropriating the name or portrait of another,[26] draws on the third category of United States tort.

6.20 The Law Reform Commission of Hong Kong recommended the legislative enactment of the first and second torts.[27] However, the Commission decided against recommending that the remaining torts of appropriating someone's name or likeness, and portraying an individual in a false light, be incorporated into Hong Kong law. The Commission was of the view that such torts involve marginal privacy issues at best, may represent undue restriction on freedom of speech,

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24. W Prosser, "Privacy" (1960) 48 *California Law Review* 383.
25. See *Restatement (Second) of Torts* § 652B-652E. The law is analysed fully in ch 4.
26. Discussed at para 6.15 above.
27. See Law Reform Commission of Hong Kong, Sub-Committee on Privacy, *Consultation Paper on Civil Liability for Invasion of Privacy*, August 1999 (hereafter referred to as "Hong Kong LRC Consultation Paper"), [7.48] (Recommendation 1), [8.38]-[8.39] (Recommendation 3).

and that existing actions such as defamation, breach of copyright and malicious falsehood provided adequate remedies.[28]

Advantages

6.21 The key advantage of this approach is that it can be truly contextual: each cause of action can be tailored to a specific privacy right and its violation. This tailoring provides for more certainty in scope and operation. Since this provides for a series of specific causes of action rather than one general over-arching one, there is no real need to grapple with a comprehensive definition of privacy. Distinctions can also be made between personal and information privacy, providing more focus and clarity, and different elements can apply to each cause of action. It was these advantages, together with the difficulties associated with definition and enforcement, that led the Law Reform Commission of Hong Kong to decide against a general tort of privacy invasion.[29] That Commission's preferred approach was to "isolate and specify the privacy concerns in which there is an undoubted claim for protection by the civil law".[30]

Disadvantages

6.22 While there is not the problem of having to define privacy as such, this model requires the identification and isolation of the privacy right or rights that are significant enough to warrant a specific cause of action. In the United States, Prosser categorised the four torts based on an extensive body of existing causes of action. They were not imposed arbitrarily. Since there is no recognised legal right or distinct common law cause of action for privacy in New South Wales, such a body of jurisprudence does not exist. This would make the task of classifying and identifying the causes of action more difficult in New South Wales. While the United States classifications may serve as a model, the substantial differences between American and Australian jurisprudence make it undesirable to import all aspects of their law protecting privacy.

6.23 It is also possible, depending on the type of causes of action chosen and how they were framed, that conduct warranting redress could fall between the gaps.

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28. Hong Kong LRC Consultation Paper, [9.29] (Recommendation 7), [10.16] (Recommendation 8); Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy* (Report, 2004) [10.38], [11.57].
29. Hong Kong LRC Consultation Paper, [6.19].
30. Hong Kong LRC Consultation Paper, [6.19].

The Commission's preferred approach

6.24 If a cause of action for invasion of privacy is considered desirable in New South Wales, the Commission's preliminary view is to prefer the second option: that of a general statutory cause of action supported by a non-exhaustive list of examples of invasion. We hold this tentative view as we believe that option to be the most suitable of the four, considering the legal landscape in NSW. The absence of a human rights context and an established body of privacy jurisprudence would make the application and operation of the first model far too vague and uncertain. Similarly, the lack of privacy case law makes it difficult to decide on specific causes of action that characterise models three and four. While these could be determined by statute, this runs the risk of being an arbitrary exercise. We consider the preferable path to be the enactment of a general but structured cause of action that could guide the future development of the law.

6.25 Of course, the success of this legislative model would depend on how it is framed. The type of examples of privacy violation that may be included is an issue related to definition, and is discussed in the paragraphs that follow. The elements, balancing considerations and defences would also need to be carefully stated, and are examined in Chapter 7.

6.26 We emphasise that this preferred view is tentative only. It is based on our research and analysis to date. We consider consultation on this issue to be of the utmost importance in exploring alternative approaches or options.

IDENTIFYING PRIVACY INTERESTS

Possible approach

6.27 The formulation of a comprehensive and meaningful definition of privacy has eluded legislatures and commentators for centuries.[31] Statutory attempts at definition tend to be either self-referential (using the term privacy to define the concept), so vague as to be meaningless, or circumscribed to be more relevant, which can render them arbitrary. This may not be so problematic in jurisdictions with a significant body of privacy jurisprudence in which to house a statutory cause of action for invasion of privacy, but may present difficulties for NSW.

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31. See para 1.13.

6.28 The Commission acknowledges the difficulties inherent in the task of defining privacy. While the formulation of the ultimate definition for such a nebulous and over-arching concept would be satisfying, it may be of questionable value in setting the scope for a statutory cause of action.[32] However, we believe that, if there is to be a cause of action for invasion of privacy, this must be accompanied by a statement of some kind that clearly articulates the rights and interests that such an action aims to protect, the values that support and propel the action, and the dangers it seeks to avoid. This could, perhaps, be best achieved through a two-pronged approach, namely:

1. an objects clause providing a general statement of legislative intent, and the values inherent in the concept of privacy; and
2. a more pragmatic, non-exhaustive list of examples of invasions of privacy.

6.29 The second element accords with the Commission's preferred statutory model, as discussed at paragraph 6.24 above.

An objects clause

6.30 While a broad, general statement concerning privacy would not be an adequate definition on its own, the Commission holds the provisional view that such a statement could form part of an objects clause. This could help clarify the purpose of the cause of action, and specify the underlying values. As we have already indicated,[33] the traditional values underlying privacy will almost certainly require elaboration or need to be stated in some alternative way. Subject to this reservation, the following is an example of how the legislation establishing the cause of action might encapsulate its purposes:

> This Act enables an individual to bring an action before the courts seeking redress of an invasion of his or her privacy. Privacy is recognised as an important human right and social value, interpreted most succinctly as the "right to be let alone".
>
> Privacy is a broad concept based on individual autonomy, dignity, liberty, and the freedom to make choices that affect one's personal life. Privacy also has an important social dimension, since a society is characterised by the rights and freedoms enjoyed by its citizens.
>
> However, like all rights and freedoms, privacy is not absolute, but must be balanced against other interests, values and human rights in the context of the merits of each case.

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32. In this respect, we agree with the comments of the Australian Law Reform Commission, *Review of Privacy*, Issues Paper No 31 (2006), [1.115].
33. See para 1.43.

Examples of privacy violation

6.31 While such broad and general statements may be suitable for an objects clause, a more solid foundation is needed for an actionable right of action for invasion of privacy backed up by remedies to support it. To achieve this, the Commission is of the provisional view that a non-exhaustive list should be developed of the privacy invasions that the statutory cause of action seeks to remedy. This approach accords with that taken in Ireland and the Canadian provinces, as outlined in paragraph 6.11 above.

6.32 An example may be as follows:

> A person would be liable under this Act for invading the privacy of another, if he or she:
>
> (a) interferes with that person's home or family life;
>
> (b) subjects that person to unauthorised surveillance;[34]
>
> (c) interferes with, misuses or discloses that person's correspondence or private written, oral or electronic communications;
>
> (d) unlawfully attacks that person's honour and reputation;
>
> (e) places that individual in a false light;
>
> (f) discloses irrelevant embarrassing facts relating to that person's private life;
>
> (g) uses that person's name, identity, likeness or voice without authority or consent.
>
> This list should be interpreted as illustrative and not exhaustive.

6.33 At this preliminary stage, the Commission considers that privacy is most easily defined in context, with that context being most readily determined by the circumstances in which privacy is invaded. We therefore put forward this tentative approach to identifying privacy interests for consultation.

PROPOSAL 1

If a cause of action for invasion of privacy is enacted in New South Wales, the statute should identify its objects and purposes and contain a non-exhaustive list of the types of invasion that fall within it.

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34. The Commission proposes that the definition of surveillance would be the same as that recommended by us in NSW Law Reform Commission, *Surveillance: An Interim Report* Report 98 (2001), [2.36], [2.39] (Recommendations 1, 2 and 3).

7. Formulating a statutory cause of action

- Introduction
- The essential elements
- Consent
- Information in the public domain
- Fault
- Public interest
- Damage
- Corporations
- Death
- A personal claim

INTRODUCTION

7.1 In Chapter 6, the Commission discusses a number of models for a statutory cause of action. We indicate our preferred position to be the adoption of a general cause of action for invasion of privacy, supplemented by a non-exhaustive list of the circumstances that could give rise to the cause of action.[1] We prefer this approach since our provisional view is that it can best accommodate the contextual nature of invasions of privacy. The contexts in which claims to privacy may arise are, of course, extremely diverse. So, consequently are the factors relevant to determining whether, in any particular case, a cause of action for privacy invasion should lie.

7.2 There are, however, a number of issues that must usually, or always, be addressed in determining whether or not an action for invasion of privacy should be competent. We now identify those issues, and the treatment they could be accorded in any proposed legislation for the purpose of inviting further discussion. The issues concern:

- The identification of the essential elements of the cause of action.
- The circumstances in which the plaintiff should be taken to have consented to an invasion of privacy.
- The extent to which an invasion of privacy can occur in relation to information already in the public domain.
- The extent to which a cause of action for invasion of privacy should depend on fault.
- The effect of public interest factors in a claim for invasion of privacy.
- Whether or not damage should be an element of the action for invasion of privacy.
- Whether or not the cause of action should be limited to natural persons.
- The effect of death on the action.
- The extent to which the plaintiff should be able to mount a claim for invasion of privacy by relying on the invasion of another person's privacy.

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1. See para 6.24.

THE ESSENTIAL ELEMENTS

7.3 Essentially, a cause of action for invasion of privacy seeks to protect the plaintiff from intrusion upon some matter (activity, circumstance, situation or information) that is "private". A simple distinction between "private" and "public" in relation to such matter would not, however, be a sufficient description of when a cause of action for invasion of privacy should generally be competent. This is because the matter may well be "private" (for example, the plaintiff's HIV status) without being the appropriate subject of a cause of action for breach of privacy (because, for example, the plaintiff's HIV status requires disclosure for public interest reasons relating to public safety). Again, a matter may be "public" (for example, it is contained in a court record) but may still require protection in a cause of action for invasion of privacy (for example, the court record may contain the name of a rape victim that should be suppressed from further disclosure). Some other description of the general circumstances in which a cause of action for breach of privacy should lie is therefore necessary.

7.4 On the one hand, that description could be stated very broadly in legislation. The privacy statutes in the Canadian provinces of Saskatchewan, British Columbia, and Newfoundland and Labrador provide that the "nature and degree of privacy to which an individual is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, due regard being given to the lawful interests of others".[2] The Irish Privacy Bill is in similar terms, but adds that regard must also be had to the "requirements of public order, public morality and the common good".[3]

7.5 On the other hand, it may be possible to be more precise than this. The case law and literature examined in Chapters 2-5 of this Consultation Paper suggest two possible approaches. An invasion of privacy could be determined as made out where:

- the plaintiff had, in all the circumstances, a reasonable expectation of privacy in relation to the relevant conduct or information; and/or

2. *Privacy Act,* RSS 1978, c P-24 (Saskatchewan) s 6(1); *Privacy Act,* RSBC 1996, c 373 (British Columbia) s 1(2); and *Privacy Act*, RSNL 1990, c P-22 (Newfoundland and Labrador) s 3(2).
3. *Privacy Bill 2006* (Ireland) cl 3(1).

- the defendant's invasion of that privacy in relation to that conduct or information, is, in all the circumstances, offensive (or highly offensive) to a reasonable person of ordinary sensibilities.4

7.6 These two approaches to describing the circumstances in which a cause of action for invasion of privacy lies, may often be two sides of the same coin. They are not necessarily mutually exclusive. The fact that the invasion would be offensive (or highly offensive) to a reasonable person of ordinary sensibilities may establish the existence of a reasonable expectation of privacy.[5] However, it is possible that the plaintiff may have a reasonable expectation of privacy where the defendant's invasion is not highly offensive to a reasonable person of ordinary sensibilities; for example, where the defendant, a medical practitioner, reveals the plaintiff's HIV status by mistake.

7.7 For the purposes of consultation, we have decided to separate the two descriptions of the essential element of the cause of action for invasion of privacy. We recognise that in any final definition of the cause of action, some greater degree of specificity will be required.

Expectation of privacy

7.8 The Hong Kong Law Reform Commission describes the concept of a reasonable expectation of privacy as being at the "core" of a tort of privacy intrusion.[6] The Irish Law Reform Commission similarly recommended that any tort of privacy should protect a reasonable expectation of privacy. It proposed that, "in determining whether the privacy of a person has been invaded by means of surveillance, the Court should consider the extent to which that person was reasonably entitled to expect that he [or she] should not be subjected to such surveillance having regard to all the relevant circumstances".[7]

7.9 Determining the circumstances in which a reasonable expectation of privacy exists can be far from straightforward. Factors such as the relationship between the parties, and the place where the alleged invasion occurred, may be relevant to establishing whether or not the plaintiff's expectation of privacy was reasonably held. For example, if the plaintiff was involved in a contractual relationship

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4. Especially *Hosking v Runting* [2005] 1 NZLR 1, [117] (Gault and Blanchard JJ).
5. See para 7.8.
6. Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy* (Report, 2004) [6.26]. See also the first element of the cause of action for public disclosure of private facts in *Hosking & Hosking v Runting & Another* [2005] 1 NZLR 1, [117].
7. See Law Reform Commission of Ireland, *Report on Privacy* (1998, ch 10, Head 1(3)(i) at 121.

with the defendant, the expectation of privacy in relation to the terms of the contract and its performance would generally be higher than would apply to communications between them as merely casual acquaintances.[8] However, whether an activity is done in public or private is not definitive of whether the expectation of privacy is reasonable or not. As Chief Justice Gleeson noted in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, "an activity is not private simply because it is not done in public".[9] Nor should it be assumed that an action undertaken in the public view would never have the necessary characteristics of a reasonable expectation of privacy sufficient to ground an action.[10]

Nature of the invasion

7.10 The second way of describing the circumstances in which a cause of action for invasion of privacy approach should generally be available, focuses on the circumstances of the invasion itself. It has been variously described as the "reasonable person" test, meaning that an activity or information could be regarded as requiring privacy protection if invasion into that activity or information would be regarded as offensive or "highly offensive to a reasonable person of ordinary sensibilities".[11] The type of "unreasonable" invasion that would be capable of grounding an action would depend on the nature of the privacy interests at stake. For example, in some circumstances, the invasion alone may be so offensive to a person of ordinary sensibilities as to be sufficient to establish a cause of action, as where the defendant deliberately and without lawful justification discloses

8. R Mulheron, "A Potential Framework for Privacy? A Reply to Hello!" (2006) 69 *Modern Law Review* 679, [705]-[706]; D Butler, "A Tort of Invasion of Privacy in Australia? (2005) 29 *Melbourne University Law Review* 339. This would, of course, depend on the terms of the contract.
9. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42].
10. This point is reflected in case law and in legislation: see, eg, *Campbell v MGN Ltd* [2004] 2 AC 457; *Privacy Bill 2006* (Ireland) cl 4(4), which provides that "the claim of a plaintiff in a privacy action brought in respect of a disclosure shall not be defeated by reason only of the defendant's proving that the disclosure related to an event or occurrence that happened in a public place or a place that, at the time of the disclosure, was visible to members of the public".
11. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42] (Gleeson CJ) (though it seems clear from the context that the Chief Justice did not intend this statement as a test of liability). Similar wording has been adopted by the New Zealand Court of Appeal in *Hosking v Runting* [2005] 1 NZLR 1, [117]. See also *Restatement (Second) of Torts* §652B, §652D, and §652E.

the plaintiff's HIV status.[12] In other cases, the form of the invasion may not be offensive in itself but may become so because it involves, for example, disclosure to a large number of people[13] or unreasonable or excessive persistence in otherwise justifiable conduct,[14] or because it is productive of some harm peculiar to the person affected.

Factors determining reasonableness

7.11 "Reasonableness" is relevant to establishing the existence of a reasonable expectation of privacy, the nature of the invasion, or both. Legislation and academic commentary offers some guidance on the factors that a court should take into account when determining reasonableness. Examples include:

- the nature, incidence, and occasion of the act, conduct or publication;
- the relationship, whether domestic or other, between the parties;
- the effect of the act, conduct or publication on the health and welfare, or the social, business or financial position, of the plaintiff or his family or relatives;
- the conduct of the plaintiff and of the defendant both before and after the act, conduct or publication, including any apology or offer or amends made by the defendant;
- the place where, and the occasion on which, the act was committed;
- the age of the parties;
- any office or position held by the plaintiff or defendant and the extent (if any) to which the act pertains to either office or position;
- the purpose for which information, documentation or other material (if any) obtained as a result of the act was, or was intended to be, used;
- whether the defendant, in doing the act, intentionally or recklessly trespassed on the property of another, and whether he or she, in doing the act, committed an offence; and
- if information was disclosed, whether:
  - it consisted of sensitive or intimate private facts concerning the plaintiff, or the plaintiff's private, home or family life;
  - it contravened a duty of a public body not to disclose information; and

12. Consider para 4.29..
13. Consider para 4.20.
14. Consider para 4.52.

- the manner and extent of the disclosure.[15]

CONSENT

7.12 Consent by a plaintiff to the actions of a defendant, which would otherwise be actionable at common law, will, in most instances, provide an answer to any civil claim. A cause of action for invasion of privacy should seemingly be no different. Lack of consent by the plaintiff could be stipulated as an essential element of the cause of action.[16] Otherwise, it could be an element to consider when assessing the reasonableness of the circumstances. Alternatively, consent could operate either as an exception to a general cause of action,[17] or as a defence to an action for invasion of privacy.[18]

7.13 Regardless of how it is treated legislatively, the question of consent by the plaintiff raises a number of issues that would need to be determined by the courts. The most difficult of these issues is likely to be that of determining whether the consent is given genuinely and freely, obtained without fraud or duress, and demonstrates actual agreement between the parties.[19]

7.14 Sometimes the existence of the plaintiff's consent is more readily apparent than in other circumstances. For example, a participant in a reality show who invites cameras into his or her home and reveals intimate details knowing that such information could be circulated or published in a newspaper, might reasonably be precluded from

15. *Privacy Act*, RSNL 1990, c P-22 (Newfoundland and Labrador) s 3(2); *Privacy Act,* RSBC 1996, c 373 (British Columbia) s 1(3); *Privacy Act,* RSS 1978, c P-24 (Saskatchewan) s 6(2); *Privacy Bill* (2006) cl 4(1) and cl 4(2). See also Law Reform Commission of Ireland, *Report on Privacy* (1998), Ch 10, Head 1(3)(i) at 121.
16. See, for example, *Privacy Bill 2006* (Ireland) cl 3(c).
17. As is the case in British Columbia: see *Privacy Act RSBC 1996 c 373* (British Columbia) s 2(a). In NSW, the *Listening Devices Act 1984* (NSW) s 6(2)(a), and the *Workplace Surveillance Act 2005* (NSW) s 14, recognise consent as exceptions to the general prohibition against surveillance.
18. See *Privacy Act,* CCSM c P125 (Manitoba) s 5(a); *Privacy Act,* RSNL 1990, c P-22 (Newfoundland and Labrador) s 5(1)(a); *Privacy Act,* RSS 1978, c P-24 (Saskatchewan) s 4(1)(a). See also Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy* (Report, 2004) [6.89]-[6.91] and [7.48]-[7.50].
19. A related, and more esoteric question, is whether it is indeed possible to refuse consent in some circumstances. For example, it is not possible to refuse to consent to being subjected to video surveillance when entering a bank or a service station, or using an ATM. For a more detailed discussion of consent in the context of surveillance, see NSWLRC, *Surveillance: An Interim Report*, Report No 98 (2001), [2.83]-[2.85].

bringing an action for invasion of privacy on the basis that he or she had invited and consented to the defendant's actions.[20]

7.15 Consent may be given expressly or may be implied through the conduct of the plaintiff. The type of conduct that should be able to be interpreted as amounting to consent has been debated in courts and by commentators.[21] This can be particularly problematic in the case of public figures who, it could be argued, impliedly consent in certain circumstances to invasions of their privacy due to their celebrity status. In some cases, celebrities have failed to substantiate their claims of privacy invasion due to the fact that they had courted publicity in the past, so that the alleged incident was seen to have occurred in circumstances where there was a low expectation of privacy.[22] In *Campbell v Mirror Group Newspapers Ltd*,[23] the House of Lords expressed the view that the mere fact of being a celebrity does not amount to an implied consent to invasions of privacy. However, in Ms Campbell's case, publication of photographs of her attending a Narcotics Anonymous meeting could be justified in the public interest of setting the record straight, since Ms Campbell had previously denied any drug use.[24]

7.16 In other cases, public figure status has not precluded a celebrity plaintiff's success in actions involving privacy issues.[25] The *Douglas* litigation notes that the actions of public figures are more open to scrutiny by the media, and that they may have fewer grounds on which to object to privacy invasions, particularly where they have courted media attention.[26] However, the plaintiffs in that case had made it clear by their actions that they intended their wedding to be a private event, and could not be said to have consented to the unauthorised photography, and publication of it.

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20. See D Butler, "A Tort of Invasion of Privacy in Australia?" (2005) 29 *Melbourne University Law Review* 339.
21. See discussions in *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443 and *Campbell v Mirror Group Newspapers* Ltd [2004] 2 AC 457. See also J Caldwell, "Protecting Privacy Post *Lenah*: Should the Courts Establish a New Tort or Develop Breach of Confidence?" (2003) 26(1) *University of New South Wales Law Journal* 90, 101; D Butler, "A Tort of Invasion of Privacy in Australia?" (2005) 29 *Melbourne University Law Review* 339.
22. *Hosking & Hosking v Runting & Another* [2005] 1 NZLR 1.
23. *Campbell v Mirror Group Newspapers* Ltd [2004] 2 AC 457.
24. *Campbell v Mirror Group Newspapers* Ltd [2004] 2 AC 457, [57]-[58].
25. *Von Hannover v Germany* (2005) 40 EHRR 1. For full discussion, see para 5.59-5.64.
26. *Douglas and Others v Hello! Ltd* [2001] QB 967. For full discussion, see para 3.12-3.20.

7.17 While the question of the plaintiff's consent was examined in each of these cases, it was only one of a number of factors taken into consideration by the courts in determining whether the action should succeed.

INFORMATION IN THE PUBLIC DOMAIN

7.18 Where personal information has already been released, or forms part of a public record, should a plaintiff be precluded from bringing an action for invasion of privacy based on the release, or re-release, of that information? At first glance, the logical answer would appear to be in the affirmative, since its public availability would negate any claim of privacy the plaintiff may have. However, the situation may not be so clear cut.

7.19 There is a distinction to be drawn between information in the public domain and information which, though published, remains within the private sphere of the claimant and is personal to him or her. This is different from the issue of whether the information itself is confidential or has the "necessary quality of confidence" for the purpose of a claim based on breach of confidence. When information is published it loses the quality of confidence. However, it can still be private and personal. This is particularly so in the case of public records which are intended for a specific and limited purpose.

7.20 The question whether information contained in a public record could generate an action for privacy is one for the courts to decide. The mere fact that information is, or has been, contained in a public record will not automatically rob that information of its private nature.[27] For example, the United States Court of Appeals has held that information about an applicant's HIV status, contained in a discrimination claim lodged with the New York City Commission on Human Rights, did not become a matter of public record so as to bar an action for invasion of privacy when that information was disclosed in a press release.[28]

7.21 The private status of court records and criminal convictions also needs to be determined. In *Tucker v News Media Ownership Ltd*,[29] the

27. The Irish Privacy Bill provides that the plaintiff's claim will not be defeated merely because, at the time of disclosure, the information was contained in a public register, or had already been disclosed: see *Privacy Bill 2006* (Ireland) cl 4(3). This has also been recommended in the Hong Kong Law Reform Commission's Report at [7.139] (Recommendation 14).
28. *Doe v City of New York* 15 F 3d 264 (2d Cir. 1994).
29. *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716. For a full discussion, see para 2.71-2.74.

New Zealand Court of Appeal awarded an interim injunction preventing a magazine publisher from disclosing details of the plaintiff's prior criminal convictions. The Hong Kong Law Reform Commission is of the view that this suggests that matters of court record, although publicly available, could become private in nature over time.[30]

7.22 In deciding against a public domain defence, the Hong Kong Law Reform Commission considered that the fact that information is contained in a public register or record should not of itself preclude a plaintiff from bringing a cause of action for invasion of privacy. The Commission noted that, although technically able to be accessed by the public, access to many public records is limited by logistical constraints and the requirement to pay a fee: referred to as the "practical obscurity" of personal information held in public registries.[31] The Commission suggested that the law should facilitate opening government records to those with a legitimate interest in the contents, but not at the expense of privacy interests. Anyone wishing to defend an action of invasion of privacy by claiming that the information was already in the public domain, should first have to prove that the publication of the information was in the public interest.[32]

FAULT

7.23 If a statutory cause of action is created, the question arises whether it should be restricted to wilful or intentional invasions of privacy or should extend at least to reckless acts. Legislation in some jurisdictions defines the cause of action as confined to acts committed "wilfully".[33] The United States tort of intrusion into seclusion also requires the act of intrusion to be intentional. In these jurisdictions, the plaintiff must prove as an element of the cause of action that the defendant's actions were intentional. The plaintiff need not prove that the defendant acted maliciously.[34] This is contrasted with the approach taken in Manitoba, where it is a defence to show that that

30. Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy* (Report, 2004), [7.106].
31. Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy* (Report, 2004),[7.109].
32. Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy* (Report, 2004), [7.110]-[7.111].
33. *Privacy Act,* RSNL 1990,c P-22(Newfoundland and Labrador) s 3 (1)*; Privacy Bill 2006* (Ireland) cl 2(1).
34. See para 4.46-4.47. Compare para 4.77-4.79.

the defendant "neither knew nor reasonably should have known" that the act, conduct or publication would violate the plaintiff's privacy.[35]

7.24 The advantage of restricting the fault element to intentional acts on the part of the defendant is that it would help to define the scope of the cause of action, and to negate some of the uncertainty inherent in the concept of a general right to privacy.[36] Including liability for negligent or accidental acts in relation to all invasions of privacy would, arguably, go too far.

7.25 However, in recommending a cause of action for intrusion into the solitude, seclusion or private affairs of another person, the Law Reform Commission of Hong Kong was of the view that the remedy should extend to reckless acts as well as intentional acts. The Commission considered that since "indifference to the consequences of an invasion of privacy is as culpable as intentionally invading another's privacy, we consider that an intrusion must be either intentional or reckless before the intruder could be held liable".[37]

PUBLIC INTEREST

7.26 Courts and tribunals are often required to consider the public interest in making decisions in a variety of contexts. Of its nature, the statutory cause of action for invasion of privacy proposed in Chapter 6 requires that consideration of the public interest.[38]

What is the public interest?

7.27 "Public interest" is not capable of clear definition. A broad understanding of the term, provided by Lord Denning MR in the context of the defence of fair comment in defamation, is that it refers to "a matter that is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others … ".[39] As his Lordship pointed out, the most common way of delimiting the concept is to provide examples of it. Since there is no law of privacy as such, examples in

35. *Privacy Act,* CCSM c P125 (Manitoba) s 5(b).
36. See Ireland, *Report of the Working Group on Privacy*, March 2006, [8]. The Irish Working Group also considered that, in the context of alleged violations of Constitutional rights generally, and of privacy in particular, the courts would find that the "legitimate countervailing factors" would justify restricting causes of action to intentional acts only: at [7.08].
37. Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy* (Report, 2004) [6.71].
38. See para 6.25.
39. *London Artists Ltd v Littler* [1969] 2 QB 375 at 391 (Lord Denning MR).

this context are to be found either in areas of law that currently advance or protect privacy interests or in comparative law.

7.28 The area of law that protects privacy interests and that is of particular relevance is breach of confidence, not only because public interest is clearly established as a factor relevant to the scope of the doctrine or as a defence,[40] but also because, like privacy, it is capable of engaging the public interest in a wide variety of contexts. Breach of confidence cases suggest that "public interest" needs to be precisely focused. In contrast, comparative law suggests that freedom of expression is likely to be the broader public interest to which appeal is made in privacy cases.[41]

Should legislation particularise the public interest?

7.29 In breach of confidence cases, the public interest in the maintenance of confidences is sometimes outweighed by a countervailing public interest that requires disclosure.[42] The countervailing public interest was originally described the disclosure of "iniquity",[43] which Justice Ungoed-Thomas elaborated as follows:

> The defence of public interest clearly covers and, in the authorities does not extend beyond, disclosure, which … must be disclosure justified in the public interest, of matters carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public and doubtless other misdeeds of similar gravity.[44]

7.30 Approving this formulation in *Castrol Australia Pty Ltd v EmTech Associates Pty Ltd,* Justice Rath noted that its importance is the emphasis it places on the gravity of the conduct necessary to give rise to the defence.[45] His Honour added that:

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40. See F Gurry, *Breach of Confidence* (Clarendon Press, 1984) ch XV; R Toulson and C Phipps, *Confidentiality* (2nd ed, Thomson, 2006) ch 6; R Meagher, D Heydon and M Leeming, *Meagher Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, LexisNexis Butterworths, 2002) ch 41.
41. See para 3.3-3.28, 4.13-4.14, 4.31-4.41, 4.63-4.64.
42. *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 282 (Lord Goff). See para 3.3-3.5.
43. *Gartside v Outram* (1857) 26 LJ Ch (NS) 113, 114 (Wood VC) ("there is no confidence as to the disclosure of iniquity").
44. *Beloff v Pressdram* [1973] 1 All ER 241, 260.
45. *Castrol Australia Pty Ltd v EmTech Associates Pty Ltd* (1980) 51 FLR 184, 213-214.

> [T]he court, in considering whether just cause for breaking confidence exists, must have regard to matters of a more weighty kind than a public interest in the truth being told.[46]

7.31 The weight of Australian authority supports this approach to public interest in breach of confidence cases.[47] This renders controversial two particular developments in English law that occurred before breach of confidence was transformed into an action that encompasses invasion of privacy.[48]

7.32 The first applied public interest as a relevant factor in breach of confidence cases in situations where there was a "just cause or excuse" for breaking the confidence in question. In *Malone v Metropolitan Police Commissioner*, Megarry VC said:

> There may be cases where there is no misconduct or misdeed but yet there is a just cause or excuse for breaking confidence. The confidential information may relate to some apprehension of an impending chemical or other disaster, arising without misconduct, of which the authorities are not aware, but which ought in the public interest to be disclosed to them.[49]

7.33 In *Lion Laboratories Ltd v Evans*,[50] the English Court of Appeal refused to restrain the publication of information contained in an internal and confidential memo of the plaintiff company that cast doubts on the accuracy of a breathalyser manufactured by the plaintiffs and used by the police. The court emphasised that a disclosure that did not reveal misconduct would be justified if it advanced the public interest in the prevention of harm, which was clearly satisfied here because the disclosure concerned a faulty device that, if used, could have led to the wrongful conviction of a number of people.

7.34 The second development originates in Lord Denning's statement that in "cases of confidential information it is a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth".[51] This changes the nature of the exercise from an inquiry into grave misconduct (or just cause or

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46. *Castrol Australia Pty Ltd v EmTech Associates Pty Ltd* (1980) 51 FLR 184, 215.
47. For an analysis of the authorities, see *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464, [173]-[191] (Campbell J).
48. See para 3.3-3.5.
49. *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 362.
50. *Lion Laboratories Ltd v Evans* [1985] QB 526.
51. *Woodward v Hutchins* [1977] 1 WLR 760, 764. This is the approach now effectively required by the *Human Rights Act 1998* (UK): see especially *Associated Newspapers Ltd v HRH the Prince of Wales* [2006] EWCA 1776, esp [67]-[69].

excuse), into an unstructured balancing exercise, effectively allowing the courts "a general discretion whether or not to enforce confidentiality".[52] As Justice Gummow has pointed out, this means that "the so-called public interest defence is not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence".[53]

7.35 This important critique of the use of public interest in confidentiality cases does not apply to the statutory cause of action for invasion of privacy that the Commission proposes in this Consultation Paper. Our proposal does not create a right of privacy that, like an obligation of confidence, prima facie requires protection. Moreover, the statutory cause of action for invasion of privacy is not necessarily burdened by the force of contractual obligations from which confidences often arise; nor, in cases that arise in the exclusive equitable jurisdiction, by the necessity of considering whether the defendant received the information in circumstances importing an obligation of confidence.[54] Rather, an invasion of privacy will only ground liability under the statutory cause of action if, in all the circumstances, it is not justified by some competing public interest(s), especially freedom of expression. Justices Gault and Blanchard identified the policy underlying this in *Hosking v Runting*:

> [T]he scope of privacy protection should not exceed such limits on the freedom of expression as is justified in a free and democratic society … The significant value to be accorded freedom of expression requires that the tort of privacy must necessarily be tightly confined.[55]

7.36 Given the wide variety of contexts in which privacy can arise, there is no reason why public interest should be narrowly focused, as it is in breach of confidence cases. Both the more precise manifestations of public interest in breach of confidence cases and the more general public interest in freedom of speech that comparative law suggests is likely to be the primary focus of public interest in privacy cases, are, therefore, potentially relevant to the statutory cause of action that we propose in this Consultation Paper.

Public interest apart from freedom of expression

7.37 Privacy cases are capable of raising the "heads" of public interest associated with the iniquity doctrine in breach of confidence cases. As

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52. R Toulson and C Phipps, *Confidentiality* (2nd ed, Thomson, 2006), [6-017].
53. *Smith Klein Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73, 111.
54. See para 2.77- 2.85.
55. *Hosking v Runting* [2005] 1 NZLR 1, [129] (Gault and Blanchard JJ).

in breach of confidence cases, the public interest may require the disclosure of matters relating to national security,[56] the commission of criminal conduct[57] or threats to public health[58] or safety.[59] However, the limitations placed on the disclosure of iniquity in breach of confidence cases will not necessarily apply in privacy cases simply because, as pointed out above, the starting point is not the protection of the particular obligation of confidence, but the determination of whether or not privacy should be protected in the circumstances, which necessitates balancing the privacy interest in issue against the relevant public interest. For example, in the context of breach of confidence, the statement that the "public interest in the disclosure (to the appropriate authority or perhaps the press) of iniquity will always outweigh the public interest in the preservation of private and confidential information",[60] is probably too wide since "iniquity" may need to be confined to serious crime[61] or wrongdoing.[62] By contrast, in the context of invasion of privacy, the statement is open to objection because it fails to accommodate the necessity of assessing, in all the circumstances of the case, the value of the public interest asserted against the value of the privacy interest asserted.

Freedom of expression

7.38 Freedom of expression encompasses such broad principles as the "right" to the free flow of information, the public's "right" to know, and, incidentally, freedom of the press.[63] Subject to clearly established exceptions (such as restrictions arising from the law of defamation or the law protecting confidences), the common law has long recognised that the public interest requires the maintenance of freedom of expression. However, its scope needs careful delineation. In particular, "there is a wide difference between what is interesting to the public

56. Consider *A v Hayden* (1984) 156 CLR 532. See further R Toulson and C Phipps, *Confidentiality* (2nd ed, Thomson, 2006) ch 5; R Meagher, D Heydon and M Leeming, *Meagher Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, LexisNexis Butterworths, 2002) [41-120].
57. See *A v Hayden* (1984) 156 CLR 532; *Allied Mills Ltd v Trade Practices Commission* (1981) 55 FLR 125.
58. *W v Egdell* [1990] Ch 359.
59. *Hubbard v Vosper* [1972] 2 QB 84 (teachings of Scientology).
60. *Allied Mills Ltd v Trade Practices Commission* (1981) 55 FLR 125, 166 (Sheppard J).
61. *A v Hayden* (1984) 156 CLR 532, 545-546 (Gibbs CJ). See also *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1980) 51 FLR 184.
62. Consider *Allied Mills Ltd v Trade Practices Commission* (1981) 55 FLR 125.
63. See Lord Wilberforce's classic speech in *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1168-1169. Consider also *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, <www.echr.coe.int> at 12 April 2007, art 10 (entered into force on 3 September 1953) ("ECHR").

and what it is in the public interest to make known."[64] It is only the latter that is of relevance in determining the scope of invasion of privacy.

7.39 In New Zealand, this is accommodated in the defence of "legitimate public concern", which applies to the tort of invasion of privacy by public disclosure of private facts created in *Hosking v Runting*, where Justices Gault and Blanchard said:

> The word 'concern' is deliberately used, so as to distinguish between matters of general interest or curiosity to the public, and matters which are of legitimate public concern … A matter of general interest or curiosity would not, in our view, be enough to outweigh the substantial breach of privacy harm the tort presupposes. The level of legitimate public concern would have to be such as outweighs the level of harm likely to be caused. For example, if the publication was going to cause a major risk of serious physical injury … a very considerable level of legitimate public concern would be necessary to establish the defence.[65]

7.40 This does not, of course, identify some bright line between "matters of general interest to the public" and "matters of legitimate public concern". On this Justices Gault and Blanchard preferred "an approach that takes into account in each individual case community norms, values and standards",[66] citing with approval the following passage from the Restatement:

> The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. The limitations, in other words, are those of common decency, having regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will done to him by the exposure.[67]

7.41 This would not, however, appear to capture the general approach in the United States, which, driven by the First Amendment, permits the publication of "newsworthy" information.[68] This seems to require no more than that the matter is one of "genuine, if more or less deplorable, popular appeal",[69] often involving the public disclosure of

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64. *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1168 (Lord Wilberforce).
65. *Hosking v Runting* [2005] 1 NZLR 1, [133]-[134].
66. *Hosking v Runting* [2005] 1 NZLR 1, [135].
67. *Restatement (Second) of Torts* § 652D comment h.
68. See also para 4.31-4.42, 4.54-4.55, 4.63-4.64.
69 William Prosser, "Privacy" (1960) 48 *California Law Review* 390, 412.

private facts. What exactly is "newsworthy" is not easy to determine because most stories will have a newsworthy component and the media are well placed to generate public interest. However, the following three factors have been addressed in deciding whether a matter is newsworthy:

- the social value of the facts published;
- the depth of the intrusion into ostensibly private affairs; and
- the extent to which the party voluntarily acceded to a position of public notoriety.[70]

7.42 As previously indicated, the main problem with this approach is that it runs the risk of privileging free speech over privacy, with the consequence that privacy is not adequately protected in practice.[71]

Competing public interests

7.43 More than one public interest may be operative in a privacy case. For example, while a public interest in disclosure may, in the circumstances, prima facie be sufficient to outweigh an asserted privacy interest, a countervailing public interest (for example, in the provision of a fair trial to an accused person) may itself outweigh the public interest in disclosure. In *Hinch v Attorney-General*, a case dealing with a contempt of court, Justice Gaudron gave the following example:

> [T]he public interest to which the appellants relate their conduct is the public interest in disseminating information on the subject of child abuse, and the risk to children consequent upon the occupation in positions of authority and influence in youth organizations by persons convicted and/or charged with sexual offences against young people. That is a public interest which may (other relevant factors being established) outweigh the public interest in the individual's right to privacy, in so far as that right exists, and to reputation. However, the public interest identified by the appellants is of a different order from those great and fundamental matters touching the maintenance of our democratic processes, and the maintenance of free and open society, which matters may, even in the abstract, take precedence over the public interest in protecting the administration of justice from risk of interference. The public interest in the integrity of the criminal justice system also is a matter of fundamental importance …. [T]he law regards as fundamental to the preservation of the rights and freedoms necessary for the maintenance of an open and democratic society that a person should not be convicted of a serious criminal

70. 62A Am Jur 2d , Privacy, s 187.
71. See para 4.85.

> offence save by the verdict of a jury given after a fair trial upon the evidence presented at that trial.[72]

7.44 This passage highlights the fact that some public interests (such as the public interest in a fair trial) can, if applicable to the facts, trump other public interests. Of course, the public interest will require the disclosure of matters that the law specifically requires to be disclosed.[73]

Balancing privacy and the public interest

7.45 The English courts balance the privacy rights listed in Article 8 of the *European Convention on Human Rights and Fundamental Freedoms* against the rights in freedom of expression contained in Article 10. In a speech in which the other members of the House agreed, Lord Steyn recently described the process of doing so as follows:

> First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.[74]

7.46 In New Zealand, proportionality is achieved by requiring that the force of freedom of expression in any case be related to the extent of legitimate public concern in the information publicised,[75] so that "the more value to society the information imparted or the type of expression in question may possess, the heavier will be the task of showing that the limitation [of freedom of expression] is reasonable and justified".[76]

7.47 The statutory cause of action for invasion of privacy proposed in this Consultation Paper will require courts in New South Wales to approach privacy in much the same way as the English courts. This suggests that the proposed legislation should simply list "public interest" as a factor to be taken into account by the courts in the determination of whether, in the circumstances of the case, the plaintiff's privacy has been invaded. This has the effect of putting the legal burden on plaintiffs of establishing that, in the circumstances of

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72. *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, 86.
73. For example, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 27 (mandatory reporting where child at risk of harm).
74. *In re S (a child)* [2005] 1 AC 993, [17] (Lord Steyn).
75. *Hosking v Runting* [2005] 1 NZLR 1, [132] (Gault and Blanchard JJ).
76. *Hosking*, [235] (Tipping J).

the particular case, the privacy interest they assert outweighs any public interest that defendants assert. No doubt, some evidential burden will generally rest on defendants in such cases.

7.48 The Commission notes that privacy legislation[77] and case law[78] considered throughout this Paper usually identify public interest as a defence to an action for invasion of privacy, or at least as exempting a matter of public interest from falling within the scope of such an action.[79] This is, however, in the context of the existence of a statutory or common law tort of privacy.

DAMAGE

7.49 Most of the privacy causes of action discussed in this Paper are actionable without proof of damage.[80] That is to say, a plaintiff will not be barred from bringing an action solely on the basis of an inability to demonstrate an injury or loss of the kind that the law considers an essential precondition of liability.[81] In *Grosse v Purvis*, Senior Judge Skoien suggested that the violation of privacy with which he was concerned in that case must be one that "causes the plaintiff, emotional, physiological or mental distress, or prevents or hinders the plaintiff from doing something he or she is lawfully entitled to do".[82] This imports into the cause of action for invasion of privacy a requirement of some torts, particularly negligence.[83]

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77. For example, *Privacy Act,* RSNL 1990, c P-22 (Newfoundland and Labrador) s 5(2); *Privacy Act,* RSS 1978, c P-24 (Saskatchewan) s 4(2); *Privacy Act,* CCSM c P125 (Manitoba) s 5(f).
78. *Hosking v Runting* [2005] 1 NZLR 1, especially [129] (Gault and Blanchard JJ).
79. *Privacy Act*, RSBC 1996, c 373 (British Columbia) s 2(3).
80. See especially *Privacy Act 1990* (Newfoundland and Labrador) s 3(1); *Privacy Act 1978* (Saskatchewan) s 2; *Privacy Act* (Manitoba) s 2(2); *Privacy Act 1996* (British Columbia) s 1(1); and *Privacy Bill 2006* (Ireland) cl 2(2); *Privacy Act 1990* (Newfoundland and Labrador) s 4; and *Privacy Act 1978* (Saskatchewan) s 3, discussed at para 6.11-6.17. The American tort of appropriation of name or likeness is an exception: see para 4.56-4.58.
81. The requirement to prove loss before a matter may be actionable is separate from looking at the extent of loss or damage when determining an appropriate remedy or assessing damages.
82. *Grosee v Purvis* [2003] QDC 151, [444]. Compare *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281, [163]-[164] (Judge Hampel), where the relevant wrong or tort was actionable without proof o damage.
83. Where damage must be capable of being described in terms that make that measurement possible: see *Harriton v Stephens* [2006] HCA 15 (a "wrongful life" case, where it was impossible to prove "damage" by comparing a life with disabilities with non-existence). See further D Nolan, "New Forms of Damage in Negligence" (2007) 70 *Modern Law Review* 59.

7.50 The decision as to whether or not a general statutory cause of action for invasion of privacy should require a damage element is a matter of policy. On the one hand, it could be argued that, in a general statutory cause of action for invasion of privacy that made no attempt to define the concept of privacy except contextually, a "damage" requirement would perform the useful function of narrowing the potential reach of the cause of action at the outset. It would do this by limiting the availability of the action to cases in which plaintiffs could prove harm of a particular type (for example, harm to their dignity, reputation or economic interests). On the other hand, the Irish Working Group noted that it was especially important that a breach of privacy should be actionable without proof of damage given that it is a vindication of a constitutional, as well as a human, right.[84] Although there is no constitutional basis for protection of privacy in Australia, it may be argued that any general cause of action for breach of privacy would need to incorporate the human rights perspective of viewing privacy as a right in itself that should be protected against invasion, regardless of the type of damage that generally followed its breach.[85]

CORPORATIONS

7.51 Most legislative or tortious causes of action for invasion of privacy restrict that action to natural persons, either explicitly or by implication.[86] This is perhaps not surprising, given that the genesis of most of these causes of action was the desire to protect individual autonomy, dignity and freedom, or to assert the "right to be let alone".[87] Other causes of action based on property rights, contractual obligations, breach of confidence, and injurious falsehood have been relied on to protect the privacy interests of corporations.[88]

7.52 When considering whether the right should also be afforded to corporations, the Report of the Working Group on Privacy in Ireland

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84. Ireland, *Report of the Working Group on Privacy*, March 2006, [7.09].
85. While the absence of demonstrable loss or damage may not be a barrier to initiating an action for breach of privacy, it could be a factor in calculating the type of remedy and/or quantum of damages: see Chapter **8**.
86. See *Privacy Act 1990* (Newfoundland and Labrador) s 2; *Privacy Bill 2006* (Ireland) cl 1. The *Privacy Act 1978* (Saskatchewan) refers to violating the privacy of a "person" without defining the term.
87. See Chapters **3**-**5** for an outline of the existing causes of action for privacy in other jurisdictions.
88. See C Doyle and M Bagaric, "The Right to Privacy and Corporations" (2003) 31 *Australian Business Law Review* 237. See, more generally, H Beverley-Smith, A Ohly and A Lucas-Schloetter, *Privacy, Property and Personality: Commercial Law Perspectives on Commercial Appropriation* (Cambridge University Press, 2005).

("the Irish Working Group") noted that bodies corporate are undoubtedly entitled to confidentiality, and that those interests were adequately protected under the current law of breach of commercial confidence. However, the Irish Working Group's conclusion that privacy legislation should be introduced in Ireland was based on considerations of autonomy, dignity and individual sensibility, that are inherently personal in nature.[89] The Australian Law Reform Commission also took this view in its 1983 Report on Privacy.[90]

7.53 In *Lenah Game Meats*, the High Court discussed the issue of whether, in the event of a tort of invasion of privacy being developed, it could be relied upon only by individuals, or by corporations as well.[91] Five out of the six High Court judges suggested that any cause of action based on a right to privacy could, and should, only be enjoyed by individuals.[92] Their Honours assumed that an action for invasion of privacy would be based on, or at least influenced by, principles such as dignity and personal autonomy, as distinct from commercial or property interests. Gleeson CJ observed that it would be "incongruous" to apply privacy rights to corporations,[93] while Gummow and Hayne JJ (with Gaudron J concurring) noted that, "by necessity" a corporation, being an artificial legal person, lacked the "sensibilities, offence and injury…..which provide a staple for any developing law of privacy".[94] Justice Callinan alone suggested the view that a tort of privacy would be capable of extending to protect corporations or governments, but did not specify the rationale for this view.[95]

7.54 By analogy, a corporation generally has no cause of action for defamation,[96] since corporations are not people with reputations to protect, but corporate entities with commercial interests at stake, that

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89. Ireland, *Report of the Working Group on Privacy*, March 2006, [7.06].
90. Australian Law Reform Commission, *Privacy*, Report No 22 (1983) vol 1, [27].
91. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.
92. This view was obiter only.
93. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [43]. On the same issue, Justice Kirby noted the influence of Article 17 of the ICCPR on the development of privacy law, stating that it appears to "relate only to the privacy of the individual": at [190].
94. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [126].
95. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [328].
96. *Defamation Act 2005* (NSW) s 9(1), reflecting provisions originally inserted in 2002: see *Defamation Amendment Act 2002* (NSW) s 8A.

would be better addressed through other available remedies.[97] Exceptionally, corporations that are not public bodies and that are either not-for-profit corporations or employ less than 10 persons and not related to other corporations, can sue in defamation.[98] The "small business" exception was included following concerns that owners of small businesses, particularly family businesses, were so closely connected with their organisations that their reputations would inevitably suffer should their business be defamed.[99]

7.55 Ultimately, the answer to this question will be determined by the decision as to what are the core privacy values sought to be protected under the proposed cause of action. If the action is to rest on fundamentally personal values of freedom, autonomy and dignity, then it seems most logical to restrict the action to individual plaintiffs.

DEATH

7.56 A related issue is the question of when the right to bring a cause of action for invasion of privacy should end. Most existing statutory causes of action for invasion of privacy end with the death of the person whose privacy has allegedly been invaded.[100] This is also the position under the *Defamation Act 2005* (NSW), which provides that "a person (including a personal representative of a deceased person) cannot assert, continue or enforce a cause of action for defamation in relation to:

(a) the publication of defamatory matter about a deceased person (whether published before or after his or her death), or

(b) the publication of defamatory matter by a person who has died since publishing the matter".[101]

7.57 In recommending that an action for privacy should not continue beyond the death of the plaintiff, the Hong Kong Law Reform Commission considered that as "the mischief of an invasion of privacy

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97. See New South Wales, *Parliamentary Debates*, Legislative Council, 18 October 2005, 18681 (The Hon Henry Tsang, MLC), during debate on the *Defamation Act 2005* (NSW).
98. *Defamation Act 2005* (NSW) s 9(2)-(4).
99. See discussion and amendments moved in Committee in New South Wales, *Parliamentary Debates*, Legislative Council, 5 December 2002, 7772ff.
100. *Privacy Act 1996* (British Columbia) s 5; *Privacy Act 1990* (Newfoundland and Labrador) s 11; *Privacy Act 1978* (Saskatchewan) s 10; and *Privacy Bill 2006* (Ireland) cl 15.
101. *Defamation Act 2005* (NSW) s 10.

is the mental harm and injured feelings suffered by an individual, only living individuals should be allowed to seek relief".[102]

7.58 This position is contrasted with that in the *Privacy and Personal Information Protection Act 1998* (NSW), which continues to regulate the collection, storage, use and disclosure of personal information held by government agencies for thirty years after an individual's death.[103] While the regulation of personal information and the creation of a right to bring an action for invasion of privacy are very different concepts, it is relevant to note the divergent approaches.

A PERSONAL CLAIM

7.59 An issue related to the previous two issues is the so-called "relational right of privacy" in the law of the United States. We have seen that the "right to privacy" in United States law gives rise only to a personal claim in the sense that a plaintiff cannot succeed in an action for invasion of privacy simply by relying on the invasion of the privacy of some other person with whom he or she has or had a close relationship, for example a close family member. Rather, the plaintiff must establish an invasion of his or her own privacy.[104] In contrast, French law sometimes permits a plaintiff to assert the privacy right of another (for example, where that person is dead), and seems to take a more expansive approach to the circumstances in which the invasion of another person's privacy is also an invasion the plaintiff's.[105]

7.60 The Commissions seeks submissions on the approach that ought to be taken in New of South Wales if a statutory cause of action for invasion of privacy is enacted.

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102. Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy* (Report, 2004)., Recommendation 29, [12.24].
103. *Privacy and Personal Information Protection Act 1998* (NSW) s 4 (definition of "personal information").
104. See para 4.11. See especially *Restatement (Second) of Torts* § 652I.
105. See para 5.13.

8. Remedies

- The Commission's provisional view
- Damages
- Account of profits
- Injunctions
- Delivery up and destruction
- Declarations
- Proposal 2

8.1 This chapter explores what remedies should be available to a person aggrieved by an invasion of his or her privacy, including whether currently available common law and equitable remedies should be limited or qualified in any way under the proposed statutory cause of action.[1] The principal remedies are likely to be injunctions and damages. Other remedies that need to be considered include an account of profits, correction orders, and delivery up and destruction of material.

THE COMMISSION'S PROVISIONAL VIEW

8.2 In this chapter, the Commission describes the principal remedies available at common law and in equity in order to facilitate a debate as to which of these might be suitable as responses to a proposed statutory cause of action for invasion of privacy. As well, the description of the various remedies, with the accompanying discussion, is intended to elucidate why the Commission is leaning towards recommending making a range of remedies available, an approach described by Justice Mason in *Akron Securities v Iliffe* as a "remedial smorgasbord".[2]

8.3 The justification for providing a list of remedies in the proposed legislation is to enable the court to choose the remedy that is most appropriate in the fact situation before it, free from the jurisdictional restraints that may apply to that remedy in the general law. These restraints have their historical origin in the institutional separation of the courts of equity and the courts of law. For example, an equitable remedy (say, an injunction) is available in support of both equitable rights and legal rights, but, traditionally, is only available in aid of the latter where the legal remedy (usually damages) is "inadequate".[3] By making injunctive relief available as a statutory remedy, it is available free of the restraints that apply to it as an equitable remedy.

8.4 The Commission proposes that the list of remedies should be kept simple, with no statutory prescriptions as to the relationship between them.[4] This would give the courts the scope to identify and

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1. See Proposal 1, p 160.
2. *Akron Securities v Iliffe* (1997) 41 NSWLR 353 (Mason P), 364.
3. See M Tilbury, M Noone and B Kercher, *Remedies: Commentary and Materials* (4th ed, Lawbook Co, 2004), [1.85]. The court of equity determines whether the remedy is inadequate.
4. See, for example, the intellectual property statutes such as the *Copyright Act 1968* (Cth), the *Patents Act 1990* (Cth), the *Trade Marks Act 1955* (Cth) and the *Designs Act 2003* (Cth). Compare the *Trade Practices Act 1974* (Cth), in which the range of monetary and non-monetary remedies available under the statute are contained in different sections, in particular s 82 and s 87.

develop in case law the circumstances in which individual remedies should be awarded. This is a proper approach to take in an area as new to NSW law as conferring a statutory cause of action for invasion of privacy on individuals. With time and experience, courts will be in a better position to discern which remedies are most appropriate and constructive in addressing particular categories of invasion of privacy.

8.5 The Commission also proposes that the statutory remedies would operate within the framework of the general law. This means that, as well as the statutory range of remedies made available to the court, all ancillary orders, such as property preservation orders and search orders, would be available. It would also mean that the procedural rules of the general law relating to remedies would apply.

8.6 Although much of the subject matter covered by the *Trade Practices Act 1974* (Cth) does not correlate with privacy law, the Act nevertheless provides a good example of the "smorgasbord" approach to providing statutory relief for breaches of that statute. Under the *Trade Practices Act 1974* (Cth), the consequences of a contravention of the Act vary according to which Part of the Act has been contravened. Part V governs consumer protection and is the Part that most nearly gives rise to "tort liability" under the Act.[5] For contraventions of Part V, the Court may grant an injunction under s 80, make an order in an action for damages brought under s 82 or s 87 and/or make such other orders pursuant to s 87 as it thinks appropriate to compensate a person who suffers loss or damage as a result of contraventions of that Act, or that will prevent or reduce the loss or damage. Subsection (2) of s 87 sets out a list of orders from which the Court can choose. These include: a declaration that the contract at the centre of the loss or damage is void; an order varying the contract; an order refusing to enforce any or all of the provisions of the contract; an order for refund of money, return of property and/or compensation for the loss or damage; an order to repair, or to supply parts for, goods at the defendant's own expense; an order to supply services at the defendant's own expense; and an order to execute an instrument varying or terminating the creation or transfer of an interest in land.

8.7 The approach that the Commission proposes would not be without constraints. While the court is given wide discretion to select an appropriate remedy, or combination of remedies, from the available range, general principles would preclude the duplication of relief that

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The exact relationship between the sections is not clear and is a matter of legal debate: see, for example, *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109.

5. This is particularly so in relation to s 52, misleading or deceptive conduct.

would result in a windfall to the plaintiff. For example, a plaintiff would be required to elect between damages and an account of profits[6]

DAMAGES

8.8 An order for damages is an order that the defendant pay to the plaintiff as compensation a sum of money assessed by the court. Damages can be awarded for economic as well as for non-economic loss. Damages for economic loss compensate actual monetary loss suffered, and expenditure incurred, by the plaintiff, both past and future. The amount can often be precisely computed, although it can also include compensation for economic loss that cannot be calculated with certainty, such as loss of future earnings. Damages for non-economic loss are not capable of precise calculation and compensate injuries to mind and body, such as pain and suffering, embarrassment, humiliation and injury to feelings.

8.9 It is said that the main function of tort law is to provide compensation if liability is established.[7] It is well settled that the goal of compensation is to place the person who has been injured, or who has suffered, through the defendant's fault in the same position (to the extent that money can achieve this) as he or she would have been had the wrong not occurred.[8]

8.10 Without doubt, an order for compensation will be one of the most important remedies to make available to a person aggrieved by an invasion of his or her privacy. While the Commission proposes recommending that damages be one of the remedies available under the proposed legislation, the appropriate application and any restrictions on this remedy need to be worked out. Two principal questions arise:

- Should courts have the power to award exemplary and aggravated damages?
- Should there be a threshold and/or statutory limit on the amount of damages able to be awarded?

Exemplary damages

8.11 As explained above, the purpose of damages is, generally, to restore the plaintiff's position, as far as is possible, to that occupied

6. For example, *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514.
7. *Harriton v Stephens* [2006] HCA 15, [264] (Crennan J). See also *Skelton v Collins* (1966) 115 CLR 94, 128-129 (Windeyer J).
8. *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39.

before the wrong occurred. An exception to this purpose is when a court sees fit to award exemplary, or punitive, damages. Exemplary damages are awarded not to compensate the plaintiff, but rather to punish the defendant and deter him or her (and others) from future violations. According to the High Court, the reason for awarding exemplary damages in civil proceedings is to "assuage any urge for revenge felt by victims and to discourage any temptation to engage in self-help likely to endanger the peace."[9] Hence, the focus of exemplary damages is the defendant's conduct, not the plaintiff's loss.

8.12 Normally, punishment and deterrence is the province of the criminal courts. However, there are occasions when the defendant's wrongdoing has been so reprehensible that an award of exemplary damages is called for. The level of seriousness has been held by the High Court to be conduct that is "high-handed, insolent, vindictive or malicious or [has] in some other way exhibited a contumelious disregard for the plaintiff's rights".[10] It "might also properly include behaviour in wanton or reckless disregard of the plaintiff's welfare".[11]

8.13 What is regarded as the definitive formula, "conscious wrongdoing in contumelious disregard of another's rights", was first adopted by Justice Knox in *Whitfield v De Lauret & Co Ltd.*[12] However, in *Gray v Motor Accident Commission*, the High Court expressed doubts as to whether a single formula could adequately describe the boundaries of conduct justifying exemplary damages, because the cases in which they have been awarded, ranging from abuse of governmental power, through defamation to assault, are so varied.[13] The Court held in that case that exemplary damages are available in negligence provided the tortfeasor is guilty of "conscious wrongdoing".[14]

8.14 In our review of anti-discrimination law, the Commission observed that the availability of exemplary damages under statute is diminishing in New South Wales[15] and that their availability in civil actions generally has been criticised.[16] The Commission concluded that exemplary damages should not be available under the *Anti-*

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9. *Lamb v. Cotogno* (1987) 164 CLR 1, 9-10.
10. *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 129 (Taylor J).
11. *Backwell v AAA* [1997] 1 VR 182, [202].
12. *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71, 77.
13. *Gray v Motor Accident Commission* (1998) 196 CLR 1, [14].
14. *Gray v Motor Accident Commission* (1998) 196 CLR 1, [22].
15. New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report No 92 (1999), [10.44] ("NSWLRC R92").
16. NSWLRC R92, [10.43].

Discrimination Act 1977 (NSW).[17] We similarly concluded in our interim report on surveillance that exemplary damages should not be available under surveillance legislation.[18]

8.15 There are substantial doubts as to whether punitive damages have a proper role in civil law. The defendant is punished upon proving a wrongdoing on the civil standard of "balance of probabilities", which is a lower standard of proof than the criminal one of "beyond reasonable doubt". This result is considered to be inappropriate and unjust. Critics argue that punishment is more appropriately left to the criminal justice system, which contains appropriate safeguards for defendants.[19] Exemplary damages are also criticised as amounting to an unfair windfall to the plaintiff.[20] Consequently, the general trend is to make them unavailable, a trend reflected by the 2002 *Civil Liability Act*.[21] We also note that the *Defamation Act 2005* (NSW)[22] does not allow awards of exemplary or punitive damages. On the other hand, we note that Ireland's *Privacy Bill 2006* proposes allowing an award of exemplary damages.[23]

Aggravated damages

8.16 The purpose of aggravated damages is to compensate the plaintiff, as opposed to punishing the defendant. Their focus is therefore on the consequences for the plaintiff of the defendant's wrongdoing. Aggravated damages are a separate head of compensatory damages and must be specifically pleaded. They are awarded when the harm done to the plaintiff by a wrongful act is aggravated by the manner in which it was done, resulting in injury to the plaintiff's feelings.[24] As the High Court explained in *Lamb v Cotogno*:

> Aggravated damages, in contrast to exemplary damages, are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like. Exemplary damages, on the other hand, go beyond compensation

17. NSWLRC R92, [10.45].
18. New South Wales Law Reform Commission, *Surveillance*, Interim Report No 98 (2001), [10.56] ("NSWLRC R98").
19. M Thornton, "Remedying discriminatory harms in the workplace" in R Naughton (ed), *Workplace Discrimination and the Law* (Centre for Employment and Labour Relations Law, University of Melbourne, 1995), 72.
20. NSWLRC R92, [10.43].
21 See *Civil Liability Act 2002* (NSW) s 21.
22 *Defamation Act 2005* (NSW) s 37.
23. *Privacy Bill* cl 8(4).
24 See *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 149 (Windeyer J).

> and are awarded "as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself".[25]

8.17 Being compensatory in purpose rather than punitive, the same arguments put forward in opposition to allowing an award of exemplary damages do not apply. It is difficult to justify a refusal to allow a plaintiff to claim aggravated damages where the harm done to the plaintiff has been exacerbated by the manner in which his or her privacy was breached. The Commission notes that the *Defamation Act 2005* (NSW) allows an award of aggravated damages exceeding the statutory damages limit of $250,000 if the court rules that the circumstances of the defamation warrant it.[26] The Commission also notes that Ireland's *Privacy Bill 2006* proposes allowing an award of aggravated damages.[27]

Jurisdictional limit on damages

8.18 Should there be a ceiling on the amount of damages, at least for non-economic loss, that can be awarded for invasions of privacy in an action brought under proposed privacy legislation? There are a number of Acts in related areas, and in other jurisdictions, that have taken this approach.

8.19 The *Defamation Act 2005* (NSW), for example, limits damages for non-economic loss to $250,000, unless the court otherwise orders.[28] Section 34 of that Act provides that there must be "an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded".

8.20 The Commission recommended in its report on surveillance, Report 98, that the amount of damages that the Administrative Decisions Tribunal ("ADT") should have the power to grant under the proposed Surveillance Act be limited to $150,000, except in cases where the panel has a District Court judge as its presidential member where the limit should reflect the jurisdiction of the District Court.[29] The jurisdictional limit of the District Court is $750,000.

8.21 New Zealand's *Privacy Act 1993* (NZ) governs personal information held by an agency, rather than enacting a statutory tort of privacy. Nonetheless, it is interesting to examine the approach taken

25. *Lamb v. Cotogno* (1987) 164 CLR 1, 8.
26. *Defamation Act 2005* (NSW) s 35(2).
27. *Privacy Bill 2006* (Ireland) cl 8 (4).
28. *Defamation Act 2005* (NSW) s 35.
29. NSWLRC R98, Recommendation 12.

under that Act. The Human Rights Review Tribunal[30] is empowered to award damages arising from a breach of privacy under the Act for pecuniary loss, loss of any benefit, and humiliation, loss of dignity or injury to feelings[31] to a limit of $200,000.[32]

8.22 More generally, the *Civil Liability Act 2002* (NSW) stipulates that the maximum amount of personal injury damages that can be awarded for non-economic loss is $350,000, and this only for "a most extreme case".[33] Compelling grounds for imposing a jurisdictional limit on damages for invasion of privacy derive from the fact that Parliament has seen fit to impose this limit non-economic loss in personal injury cases. It is difficult to envisage a situation where a person hurt by an invasion of his or her privacy suffers greater loss than the amount awarded for pain and suffering to a person who has (taking an example of a case at the extreme end of the spectrum) been made a quadriplegic as a result of the defendant's negligence.

8.23 The Commission also notes that statutory thresholds have been imposed in relation to work injuries and motor accident claims. The existence of a threshold can help to discourage frivolous or trivial claims and perhaps should be considered in actions for invasion of privacy. This is an issue on which the Commission would welcome feedback.

ACCOUNT OF PROFITS

8.24 An order for an account of profits gives to the plaintiff any profit the defendant has made from his or her wrongdoing. Justice Windeyer explained the difference between an account of profits and damages in *Colbeam Palmer v Stock Affiliates Pty Ltd* in terms of the defendant's gain as opposed to the plaintiff's loss:

> [B]y the former the infringer is required to give up his ill-gotten gains to the party whose rights he has infringed: by the latter he is required to compensate the party wronged for the loss he has suffered.[34]

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30. Proceedings can be brought before the Human Rights Review Tribunal in respect of an alleged interference with privacy: *Privacy Act 1993* (NZ) s 82.
31. *Privacy Act 1993* (NZ) s 88.
32. The jurisdiction of the Human Rights Tribunal is limited to that of the District Court: *Human Rights Act 1993* (NZ) s 92Q. The jurisdiction of the District Court is limited to $200,000: *District Court Act 1947* (NZ) s 29.
33. *Civil Liability Act 2002* (NSW) s 16(2).
34. *Colbeam Palmer v Stock Affiliates Pty Ltd* (1970) 122 CLR 25, 32.

8.25 Hence, in obtaining an order for an account of profits, it is not necessary that the plaintiff have actually suffered any loss.[35] The plaintiff must elect between claiming compensation for loss and an account of profits as the two remedies are alternative, not cumulative.[36]

8.26 There is no exhaustive judicial categorization of the wrongs that will give rise to an account of profits, but the principal application of the remedy is in equity for breach of confidence, breach of fiduciary duty and infringement of intellectual property.[37]

8.27 Within the exclusive jurisdiction of equity, there is no doubt that an account of profits is available for breach of confidence, at least where the defendant knowingly committed the breach. (Although it is less certain whether the remedy is available for inadvertent or "innocent" breaches of confidence.[38])

8.28 The purpose of an account of profits is not to punish the defendant, but to prevent his or her unjust enrichment.[39] However, in *Warman International Ltd v Dwyer*, the High Court drew a distinction between the purpose of an account of profits for intellectual property infringement and for breach of fiduciary duty.[40] While the former focuses on unjust enrichment, in the latter, there appears to be greater emphasis on precluding "the fiduciary from being swayed by considerations of personal interest and from accordingly misusing the fiduciary position for personal advantage".[41]

8.29 In our Report, *Defamation*, we noted that the availability of the remedy of an account of profits in defamation cases had never been put to the test in Australian law.[42] We also noted that there was some support for making the remedy available, especially where the defendant has deliberately calculated that the profits to be made from publication outweigh any damages it may have to pay to the plaintiff.

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35. *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 394; *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557; *Attorney-General v Blake* [2001] 1 AC 268, 280.
36. See *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514.
37. G Jones (ed), *Goff and Jones: The Law of Restitution* (7th ed, Thomson Sweet & Maxwell, 2006), 34-012.
38. See G Jones, "Restitution of benefits obtained in breach of another's confidence" (1970) 86 *Law Quarterly Journal* 463, 487; and see W Covell and K Lupton, *Principles of Remedies*, (3rd ed, Lexis Nexis Butterworths, Sydney, 2005), [6.11].
39. *Dart Industries Inc v Décor Corp Pty Ltd* (1993) 179 CLR 101, 114.
40. *Warman International Ltd v Dwyer* (1995) 182 CLR 544.
41. *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557-8.
42. See NSW Law Reform Commission, *Defamation,* Report No 75 (1995), [6.57] ("NSWLRC R75").

Nevertheless, the Commission concluded that, in defamation cases, it should not be generally available because it is not addressed to the purpose of vindicating the plaintiff's reputation. Further, the Commission considered that the difficulty in calculating quantum introduced uncertainties that could (like large awards of damages) have a chilling effect on freedom of speech.[43]

8.30 Actions for breach of privacy will not, of course, have as a primary purpose the vindication of the plaintiff's reputation. Moreover, under our proposed statutory cause of action, freedom of speech will, where relevant, be a factor taken into account not only in the imposition of liability for invasion of privacy but also in the determination of the appropriateness of the remedy in the particular case.[44] In such a case, the Commission can see no reason why, if it is otherwise appropriate, an account of profits should not be available to the plaintiff. An example may be where a publisher has deliberately calculated that the profits to be made from magazine, newspaper or television revelations about the private life of a particular person outweigh any damages that the publisher may be ordered to pay to the plaintiff. We note that Ireland's *Privacy Bill 2006* includes an account of profits remedy, allowing the court to order that the defendant pay damages equal to any, or any likely, financial gain accruing to the defendant as a result of the breach.[45]

INJUNCTIONS

8.31 Injunctions are remedies usually given in equity or by statute. An injunction is most commonly negative, prohibiting or restraining the defendant from engaging in certain conduct; but can also be positive, requiring the defendant to take some action. In equity, the remedy is not available as of right upon proof of certain elements but is granted in the court's discretion. An injunction must enforce a legal or equitable cause of action[46] and "ought to make clear what it is that the defendant is required to do or not to do".[47]

8.32 The traditional view was that injunctive relief would only be granted if damages are an inadequate remedy.[48] Lord Justice Lindley

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43. See NSWLRC R75, [6.57].
44. See para 7.38-7.42.
45. *Privacy Bill 2006* (Ireland) cl 8.
46. *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.
47. *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337, 348; see also *Redland Bricks Ltd v Morris* [1970] AC 652, 666.
48. *Irving v Emu & Prospect Gravel & Road Metal Co Ltd* (1909) 26 WN (NSW) 137 (Street J).

in *London &Blackwell Railway Co v Cross* stated that "prima facie you do not obtain injunctions to restrain actionable wrongs for which damages are the proper remedy".[49] There are now doubts as to whether this is an accurate view, even regarding the prima facie position. It is accepted that, in many areas of law, the prima facie remedy for a breach of the plaintiff's rights will be an injunction. In *Beswicke v Alner*, the Full Court of the Supreme Court of Victoria held that:

> we should give effect to the rule that where the plaintiff has established the invasion of a common law right, and there is ground for believing that without an injunction there is likely to be a repetition of the wrong, he is, in the absence of special circumstances, entitled to an injunction against such repetition.[50]

8.33 Lord Justice Sachs in *Evans Marshall & Co Ltd v Bertola SA* revised the question for the court to determine, quite simply, as: "Is it just, in all the circumstances, that the plaintiff should be confined to his remedy in damages?".[51] This reduces the inadequacy of the remedy at law to "a discretionary consideration inextricably related to the determination of the appropriate remedy".[52]

8.34 Injunctions, including interlocutory injunctions, will often be the most important recourse that an individual has to protect his or her privacy rights. In France, for example, with its fierce protection of privacy, courts tend to prefer to grant specific relief to limit publication and release of information, rather than award damages.[53] Irish courts will be given wide injunctive powers when the *Privacy Bill 2006* is passed. A court will have the power to grant an order prohibiting the defendant doing anything that it considers would violate the privacy of the plaintiff.[54] Nonetheless, there is an issue, which should be opened up to debate, as to the extent to which courts should be prepared to prevent publication and circulation of material rather than compensate harm by an award of damages. Before publication is prevented, the courts must consider very carefully the resulting interference with freedom of speech. This issue becomes

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49. *London &Blackwell Railway Co v Cross* (1886) 31 Ch D 354, 369.
50. *Beswicke v Alner* [1926] VLR 72, 76-77; approved by Dixon CJ (obiter) in *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428, 451. Owen CJ added that "[f]or this purpose there is no difference between continuance and repetition".
51. *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349, 379.
52. M Tilbury, M Noone and B Kercher, *Remedies: Commentary and Materials*, [8.147]. See *Bristol City Council v Lovell* [1998] 1WLR 446, 453 (Lord Hoffman), cited with approval by Gaudron, McHugh, Gummow and Callinan JJ in *Cardile v LED Builders Pty Ltd* (1999) 162 ALR 294, 304-305.
53. See para 5.29-5.31.
54. *Privacy Bill 2006* (Ireland) cl 8.

particularly acute where an interim injunction is sought: if granted, freedom of speech is curtailed even though there has been no final adjudication of the alleged invasion of privacy.

Interlocutory injunctions

8.35 Interlocutory injunctions may be granted to preserve the status quo until the final hearing if the defendant's alleged wrongdoing, or threatened wrongdoing, will cause irreparable damage to the plaintiff. In *American Cyanamid Co v Ethicon Ltd*, Lord Diplock said that the purpose of interlocutory injunctions is "to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial."[55]

8.36 Before it will grant an interlocutory injunction, the court must be satisfied of two things:[56]

- **First, the plaintiff must show that there is a sufficient likelihood[57] that he or she will succeed at trial to justify in the circumstances preserving the status quo pending trial (a "prima facie case").[58] The High Court stated, in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*, that the nature of the rights being asserted by the plaintiff and the likely practical consequences of an injunction will determine how strong the probability of success at trial needs to be.[59]**

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55. *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, 406. The plaintiff must therefore show that irreparable harm or damage could result if the injunction is refused. Sir Frederick Jordan wrote: "The purpose of an interlocutory injunction is to keep matters in *status quo* until the rights of the parties can be determined at the hearing of the suit." Sir Frederick also stated that the power to grant an interlocutory injunction is exercised according to principle, not unguided discretion: F Jordan, *Chapters on Equity in New South Wales* (6th ed by F C Stephen, Sydney, 1945), 146.
56. *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1969) 118 CLR 618.
57. Not that it is "more probable than not": *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46, [65] (Gummow and Hayne JJ
58. *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46, [65] (Gummow and Hayne JJ, with whom Gleeson CJ and Crennan J agreed: at [19]), citing and explaining the use of "prima facie case" in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1969) 118 CLR 618, 622 (Kitto, Taylor, Menzies and Owen JJ).
59. *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1969) 118 CLR 618, 622 (Kitto, Taylor, Menzies and Owen JJ); *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46, [19] (Gleeson CJ and Crennan J), [65] (Gummow and Hayne JJ).

- Secondly, the court must be satisfied that "the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted."[60] Some of the key factors that the court will take into account in establishing this balance include: the strength of the plaintiff's case; hardship that might result to either party, or to a third party; the possibility of irreparable damage or harm to the plaintiff if the injunction is refused; the sufficiency of the plaintiff's undertaking as to damages should the interlocutory injunction be dissolved; and any delay in applying for the injunction.[61]

Freedom of expression

8.37 The public interest in freedom of expression is potentially important in any proceedings for an interlocutory injunction in cases of invasion of privacy. It may be relevant to the plaintiff's demonstrating a sufficient likelihood of success at trial to justify in the circumstances the preservation of the status quo. This is particularly so if the statutory cause of action for invasion of privacy requires the court to balance at the outset the asserted privacy interest against the public interest in freedom of speech.[62] It may also be relevant to the balance of convenience where the grant of an interlocutory injunction would have the effect of acting as a restraint on freedom of expression.

8.38 In *Australian Broadcasting Corporation v O'Neill* ("*O'Neill*"),[63] the High Court recently considered the effect that prior restraint of publication has on the grant of interlocutory injunctions in defamation cases. The case established that the general principles applicable to interlocutory injunctions, as stated in *Beecham*, apply in defamation cases.[64] However, in practice, it will always be difficult to obtain an interlocutory injunction that, in a given factual situation, restrains freedom of speech. In the context of defamation, the application of the organising principles established in *Beecham* "will require particular attention to the considerations which courts have identified as

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60. *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1969) 118 CLR 618, 623 (Kitto, Taylor, Menzies and Owen JJ).
61. W Covell and K Lupton, *Principles of Remedies*, [8.53].
62. See para 7.45-7.48
63. *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 ("*O'Neill*").
64. *O'Neill* [2006] HCA 46, [19] (Gleeson CJ and Crennan J), [73]-[83] (Gummow and Hayne JJ). See also *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153; *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd* [1989] VR 747; and *Jakudo Pty Ltd v South Australian Telecasters Ltd* (1997) 69 SASR 440.

dictating caution. Foremost among those considerations is the public interest in free speech."[65]

8.39 In *O'Neill*, the appellant sought an order from the High Court to have an interlocutory injunction granted in the Supreme Court of Tasmania, and upheld by the Full Court of the Supreme Court, lifted. The injunction was granted in defamation proceedings to restrain the broadcast of allegedly defamatory material. This material was a television program titled "The Fisherman", which implied that O'Neill, a convicted child killer, was responsible for the unsolved kidnap and murder of the Beaumont children, and the murder of other children. One of the key issues in the appeal was the role of freedom of speech in interlocutory proceedings of this nature.

8.40 Although truth alone is now a defence to defamation under the *Defamation Act 2005* (Tas),[66] this appeal had to consider the law as it was under the *Defamation Act 1957* (Tas). That Act provided the defendant with a defence in a defamation action where the defendant could establish that the defamatory matter in issue was true *and* published for the public's benefit.[67]

8.41 The High Court disagreed with the decisions of the Tasmanian courts to grant an interlocutory injunction in this case for two reasons.[68] First, the courts below had failed to give proper account of the public interest in free speech that is basic to the caution with which courts approach prior restraint of publication.[69] Although they had considered the likelihood of the appellant succeeding at trial by establishing that the defamatory matter was true and was published for the public benefit, the courts below had concluded that it was not for the public benefit, and is contrary to the public interest, for there to be "trial by media". This, the High Court pointed out, was an error. The criminal trial is not the only context in which matters of the kind in question in the instant case could be discussed. Indeed, it would have been open to a tribunal of fact to find that public discussion of

65. *O'Neill* [2006] HCA 46, [19] (Gleeson CJ and Crennan J). See also at [80]-[82] (Gummow and Hayne JJ).
66. *Defamation Act 2005* (Tas) s 25: "It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true". The change in defamation legislation to allow for truth alone as a defence may have provided an additional reason for not continuing to restrain the broadcast of the documentary in *O'Neill* [2006] HCA 46, [36] (Gleeson CJ and Crennan J). Compare at [92] (Gummow and Hayne JJ).
67. *Defamation Act 1957* (Tas) s 15.
68. *O'Neill* [2006] HCA 46, [34] (Gleeson CJ and Crennan J).
69. *O'Neill* [2006] HCA 46, [20]-[32] (Gleeson CJ and Crennan J), [84]-[88] (Gummow and Hayne JJ).

the unsolved disappearance of the Beaumont children, O'Neill's confession to another murder with which he has never been charged, the possibility of his having committed other unsolved murders and of re-offending, and the controversies concerning release on licence or parole of serious offenders, is for the public benefit.[70] In any event, "[t]he public interest in free speech goes beyond the public benefit that may be associated with a particular communication".[71] Once this is realised, it was difficult to understand how suppression of public discussion of the matters in issue in this case could serve the public interest.[72]

8.42 Secondly, in view of his general character or reputation as a convicted child killer, O'Neill could get no more than nominal damages even if he succeeded in the defamation action. This made any order that curtailed freedom of the press less justifiable and hence, on the balance of convenience, the case against a grant of an interlocutory injunction in O'Neill's favour was even stronger.[73]

Undertaking as to damages

8.43 In order to obtain an interim injunction, the plaintiff must also give "the usual undertaking as to damages", meaning that the plaintiff agrees to submit to an order of the court to pay compensation to any person (not restricted to a party to the action) affected by the injunction if, at the final hearing, it is determined that it should not have been granted.

8.44 The plaintiff's undertaking to recompense a defendant, or others, affected by an interim injunction if it transpires that it should not have been given, is a practical requirement not to be overlooked. An aspect of the litigation in *Douglas and Others v Hello! Ltd* illustrates its importance.[74] In 2000, the plaintiffs were granted an interim injunction restraining unauthorised publication of photographs of their wedding. This injunction was discharged on appeal.[75] In 2005, the English Court of Appeal found the decision to lift the injunction had been wrong for two reasons.[76] First, the Douglases had a very strong case for relief. Secondly, insufficient weight had been given to

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70. *O'Neill* [2006] HCA 46, [20]-[29] (Gleeson CJ and Crennan J), [84]-[85] (Gummow and Hayne JJ).
71. *O'Neill* [2006] HCA 46, [31] (Gleeson CJ and Crennan J). See also at [86] (Gummow and Hayne JJ).
72. *O'Neill* [2006] HCA 46, [24], [31]-[32] (Gleeson CJ and Crennan J), [84]-[88] (Gummow and Hayne JJ).
73. *O'Neill* [2006] HCA 46, [33], (Gleeson CJ and Crennan J), [89] (Gummow and Hayne JJ).
74. See *Douglas and Others v Hello! Ltd* [2006] QB 125, [251]-[259].
75. *Douglas and Others v Hello! Ltd* [2001] QB 967.
76. *Douglas and Others v Hello! Ltd* [2006] QB 125.

the likely modest level of damages that the Douglases would recover if an interlocutory injunction were refused and publication of the unauthorised photographs went ahead. In fact, the modest damages of £14,600 awarded at trial to the Douglases, while unassailable in principle, were essentially an inadequate remedy for their mental distress (and were no real deterrent to a publisher determined to infringe their privacy). At the interlocutory level, therefore, this likely outcome argued in favour of the grant of an interlocutory injunction as the only satisfactory protection of the Douglases' privacy. In contrast, "the interests of Hello! at the interlocutory stage, which were essentially only financial, could have been protected by an appropriate undertaking in damages by the Douglases".[77]

Mandatory orders of correction or apology

8.45 A mandatory injunction could be framed to require a defendant to apologise to the plaintiff or to issue a correction relating to material that has been published. There is a traditional reluctance to make such orders in the law of defamation since compelling the defendant to publish, as his or her own statement, words which he or she may not believe to be true obviously runs into free speech considerations.[78] However, the New Zealand Court of Appeal has recognised the correction orders may, in principle, be made in cases of injurious falsehood and defamation.[79]

8.46 Although the circumstances in which an apology or correction order is likely to be made available in practice in actions for invasion of privacy would probably be rare in view of the competing interest in freedom of expression,[80] the Commission sees no reason why such orders should not be available in principle. We are interested in receiving feedback on whether such orders should be listed in any statutory cause of action for invasion of privacy.

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77. *Douglas and Others v Hello! Ltd* [2005] 4 All ER 128, [259].
78. See NSW Law Reform Commission, *Defamation*, Report No 75 (1995), [6.55].
79. *TV3 Network Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 436. Compare *Defamation Act 2005* (NSW), which makes no provision for correction orders or apology as court-ordered remedies.
80. See para 7.26-7.48. Compare J G Fleming, "Retraction and Reply: Alternative Remedies for Defamation" (1987) 12 *University of British Columbia Law Review* 15.

DELIVERY UP AND DESTRUCTION

8.47 The availability of an order for the delivery up and destruction of material published in violation of a person's privacy could have a particular usefulness in the area of privacy. The remedy of delivery up is an equitable remedy administered according to equitable principles.[81] It has commonly been used to order the delivery up and destruction of goods that infringe intellectual property but is also available for breach of confidence. There appears to be no reason why the remedy could not be made available in breach of privacy cases. As is noted in Chapter 5, French privacy law has a long history of offering a similar remedy to persons aggrieved by breaches of their privacy.

8.48 Ireland's *Privacy Bill 2006* empowers the court to make an order that the defendant deliver to the plaintiff any documents, articles, photographs or other material obtained or made as a result of the violation of the plaintiff's privacy.[82]

DECLARATIONS

8.49 Courts can, in their discretion, make declaratory orders, which must, however, "be directed to the determination of legal controversies and not to answering abstract or hypothetical questions".[83] The plaintiff must have a "real interest" in seeking declaratory relief and the declaration must produce foreseeable consequences for the parties.[84] The Commission is provisionally of the view that there is a place for this remedy in actions for invasion of privacy. A declaration that the defendant's conduct is an interference with the privacy of the plaintiff could, in some cases, be all that is needed to bring about an end to that conduct, or enable settlement of the conflict, or give the plaintiff the vindication that he or she seeks.

81. W Covell and K Lupton, *Principles of Remedies*, [12.0].
82. *Privacy Bill 2006* (Ireland) cl 8.
83. *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson Toohey and Gaudron JJ).
84. *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson Toohey and Gaudron JJ).

PROPOSAL 2

The statute should provide that where the court finds that there has been an invasion of the plaintiff's privacy, the Court may, in its discretion, grant any one or more of the following:

- damages,including aggravated damages, but not exemplary damages;
- an account of profits;
- an injunction;
- an order requiring the defendant to apologise to the plaintiff;
- a correction order;
- an order for the delivery up and destruction of material;
- a declaration;
- other remedies or orders that the Court thinks appropriate in the circumstances.

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