Australian National University

4 January 2022

Privacy Act Review
Integrity and Security Division
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
by email: PrivacyActReview@ag.gov.au

Dear Sir or Madam

Re: Review of the *Privacy Act 1988* – Submission of Dr Jelena Gligorijević in response to Discussion Paper

Thank you for conducting this review of the *Privacy Act 1988* (Cth), and for inviting submissions on the Discussion Paper of October 2021. I enclose with this letter my submissions in response to this Discussion Paper. I target my submissions to the matter of a potential statutory tort of interference with privacy, addressed in Chapter 26 of this Discussion Paper. My submissions here should be read in line with the submissions I made in response to the Issues Paper (October 2020), in November 2020. I make these submissions as an academic who specialises in privacy law.

Thank you for the opportunity to provide submissions at this stage of the review.

Yours sincerely

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REVIEW OF THE *PRIVACY ACT 1988*

SUBMISSIONS IN RESPONSE TO DISCUSSION PAPER

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4 January 2022

I. Reasons for enacting a statutory tort

In view of Australian courts' reluctance to recognise a common law tort of interference with privacy when given the opportunity,[1] and in view of apparent plaintiff hesitancy to plead a standalone tort of interference with privacy when that may be a beneficial addition to the claim,[2] it would, at this stage, be right for the Commonwealth Parliament to enact a statutory tort of interference with privacy.

For the reasons set out in my submissions to the Issues Paper ('**IP submissions**'), it is both necessary and desirable for Australia to recognise an available tortious remedy for interference with privacy. The primary reasons for this are that it has been normatively accepted that individual privacy is a value which the law ought to protect (accepted by law reform bodies, the courts, scholars, practitioners, and ordinary Australians in general),[3] and that tort law is the most appropriate and straightforward avenue for protecting each individual's equal entitlement to privacy (more so than equity and confidentiality, in spite of the reasoning and outcomes in *Giller* and *Wilson*).[4]

Importantly, as in respect of sundry other civil wrongs that amount to torts, individuals in Australia should be entitled to a direct right of action in the courts in order to vindicate their privacy interests, and should not be confined to seeking a remedy from a regulator, whether the Information Commissioner[5] or the eSafety Commissioner,[6] however powerful that officer of the executive may be. It is important, not least from a rule-of-law perspective, that individuals be able to seek legal remedies for legal wrongs committed against them in the courts, and not be limited to applying to officers of the executive for regulatory or remedial action. The responsibility now rests with the Commonwealth Parliament to recognise this right of action for Australians.

After several decades of legislative hesitancy, and – crucially – after inaction by the courts (even following the opportunities left in the High Court's judgment in *Lenah*),[7] the Commonwealth Parliament is now the most appropriate (and arguably the only) entity which can secure for Australians this sort of protection of their privacy. In my view, the fundamental importance of individual privacy in any liberal democracy[8] places on the Commonwealth Parliament a moral duty to legislate and to confirm that the law of Australia stands up for and protects individual privacy, in a standalone, comprehensive tort of interference with privacy, quite separately from the fine-grained operational rules, and the considerable exceptions to them, that are already contained in the *Privacy Act 1988 (Cth)*.[9]

In light of this context and history, continued legislative hesitancy to secure for Australians this legal right and remedy would, in my view, risk Australia's elected representatives and lawmakers

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[1] For example, *Giller v Procopets* [2008] VSCA 236*; Wilson v Ferguson* [2015] WASC 15.
[2] For example, *Smethurst v Police Commissioner* [2020] HCA 14.
[3] For a detailed discussion of this normative consensus, see J Gligorijevic "A Common Law Tort of Interference with Privacy for Australia: Reaffirming *ABC v Lenah Game Meats*" (2021) 44(2) *University of New South Wales Law Journal* 673, 683-693.
[4] See further: J Gligorijevic "A Common Law Tort of Interference with Privacy for Australia: Reaffirming *ABC v Lenah Game Meats*" (2021) 44(2) *University of New South Wales Law Journal* 673, 693-711.
[5] *Privacy Act 1988 (Cth)*, Pts IV and V.
[6] *Enhancing Online Safety Act 2015 (Cth)*, s 15, and *Online Safety Act 2021 (Cth)*, ss 25-28.
[7] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199. For further detail on this proposition, see J Gligorijevic "A Common Law Tort of Interference with Privacy for Australia: Reaffirming *ABC v Lenah Game Meats*" (2021) 44(2) *University of New South Wales Law Journal* 673, 674-681.
[8] For a detailed discussion of why individual privacy is fundamental to any society holding itself out as a liberal democracy, see J Gligorijevic "A Common Law Tort of Interference with Privacy for Australia: Reaffirming *ABC v Lenah Game Meats*" (2021) 44(2) *University of New South Wales Law Journal* 673, 683-688.
[9] As to the normative and practical inadequacy of such regulatory schemes as contained in the Privacy Act 1988 (Cth), and in the EU's General Data Protection Regulation, see J Gligorijevic "A Common Law Tort of Interference with Privacy for Australia: Reaffirming *ABC v Lenah Game Meats*" (2021) 44(2) *University of New South Wales Law Journal* 673, 690-691.

appearing not to value sufficiently the fundamental and definitional underpinnings of Australia's liberal democracy. These underpinnings include equality, freedom of thought, freedom of speech, freedom of conscience and religion, and the freedom to have a family and enjoy family life, all of which are enabled and fortified by a meaningfully protected right to individual privacy. Parliament ought to recognise that this right belongs to every Australian, whether he or she is a public figure, an ordinary Australian, a journalist, or a politician.

I would like to emphasise that enacting a statutory privacy tort should not, and, in my view (given the experience in comparable jurisdictions),[10] *would* not, lead to a deluge of opportunistic claims in privacy, at the general expense of litigants (particularly those in the position of defendant), and at the expense of the principle of freedom of expression (which includes the principle of press freedom). Australian courts can and should be entrusted to entertain viable claims, reject trivial or out-of-scope claims, reject claims that have nothing to do with privacy (for example, potential defamation claims), and grant appropriate remedies where the elements have been proven (and no defences have been made out).

In my view, the Commonwealth Parliament and the Australian public can have confidence in Australian courts to develop the statutory tort as and when claims are brought, and to solidify clear boundaries of this tort, so that there should be no risk of unjustified encroachment upon conflicting interests (as and when they may arise in particular cases), nor irrational expansion of this remedy into territory that is not related to the concept and recognised normative importance of privacy in a liberal democracy.

Conflicting interests include the principles of freedom of expression and press freedom, which the courts will have the opportunity and the duty to consider and, where appropriate, to uphold when entertaining claims in privacy:

- One reason for *protecting* privacy is that it enables individuals (including journalists and elected representatives, as well as ordinary Australians) fearlessly to exercise their freedom of expression, and the courts will be well equipped to take that into account in considering whether there is a reasonable expectation of privacy on the facts.[11]

- One reason for *setting aside* a recognised privacy interest is that, on the facts of the case, freedom of expression may demand that the private facts in question be made public (for example, when a public discussion on matters inextricably linked with those private facts has already been opened by the plaintiff).[12]

II. The most appropriate type of statutory tort

Against this background, of the options set out in Chapter 26 of the Discussion Paper, I prefer a **minimalist tort**, rather than the Commonwealth Parliament setting out in detail what the courts should take into account when determining whether certain elements of the tort have been proven. Parliament's role in this context should be to *permit* and to *obligate* the courts to entertain claims

[10] Very recently, a claim based upon generalised arguments as to "breach of privacy rights", was struck out in the English and Welsh High Court, the Judge confirming both that the claim was unclear and inadequately argued, and that, albeit containing a tort of misuse of private information, English and Welsh common law did not recognise a general privacy tort capable of covering all manner of alleged intrusions upon privacy, unanchored in clear, delineated precedent as to the scope of the specific tort that has been recognised: *Pryor v Liverpool Women's NHS Foundation Trust & Lumsden* [2021] EWHC 2911 (QB). See also: *O (A Child) v Rhodes* [2016] AC 219.

[11] See, for example, Annabelle Lever 'Privacy, Democracy and Freedom of Expression' in Beate Rössler and Dorota Mokrosinska (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (Cambridge University Press, 2015) 162; Alan F Westin *Privacy and Freedom* (Atheneum Press, 1967); Lee C Bollinger *The Tolerant Society* (Oxford University Press, 1988); Joseph Raz, 'Free Expression and Personal Identification' (1991) 11(3) *Oxford Journal of Legal Studies* 303.

[12] As was the case in *Campbell v MGN Ltd* [2004] 2 AC 457.

for interference with privacy in accordance with tort law principles, and to set out the *bare basic requirements* for this tort, rather than to prescribe to the courts how they ought to reason in respect of such claims, and which specific factors they must take into account or not, at every single stage of the tort.

In my view, a prescriptive, fine-grained regulatory scheme purporting to protect privacy already exists in the *Privacy Act 1988 (Cth)*: comparable regulatory schemes in comparable jurisdictions have seen the courts prefer to consider tort law in cases where both the legislation and the common law tort apply, and to hold that the regulatory action stands or falls with the tort.[13] There is merit in enacting a direct right of action (separate from regulatory coverage of the *Privacy Act 1988 (Cth)*), which is embedded in principles of common law, rather than dictated by highly prescriptive rules characteristic of the regulatory scheme. This approach better reflects the normative importance of privacy – the broad principles that tell us why privacy is important, and crucial to liberal democracy – and, in that way, it allows the courts to 'breathe' in assessing the facts of each case and ensuring their reasoning is anchored in those underpinning principles, rather than constricted by legislative prescriptions. This is particularly important for the interpretation and application of the 'reasonable expectation of privacy' threshold stage of a privacy tort, discussed further below.

This is not to say that any legislation setting out the footing for a tort of interference with privacy (both permitting and obligating the courts to entertain claims under such a tort) should not also clarify the basic elements of the tort; I envisage a minimalist tort setting out the minimal requirements for the tort, including the threshold element (a reasonable expectation of privacy), and the general defence that may apply.

My view is that there is no need for the Commonwealth Parliament necessarily to adopt the requirements recommended in the Australian Law Reform Commission's Report 123. The reason is that that may unduly limit the courts in reasoning about both the threshold requirement and the defence, and may limit the courts in how they are able to connect the developing doctrine explicitly and transparently with the underlying reasons why privacy is protected in the first place. In more practical terms, this may affect both plaintiff and defendant: Parliament may prevent the courts from considering facts in a way that favours either of the two conflicting perspectives, where that approach would have been consistent with underlying normative principles.

It would be sufficient, as well as optimal, for the Commonwealth Parliament to provide the following basic requirements for the tort (in the appropriate legislative language):

(a) The plaintiff must prove, on a balance of probabilities, that he or she has a **reasonable expectation of privacy** in respect of the activity in question or the information in question.

    i. Reasonable expectation of privacy includes both informational privacy (private information) and physical privacy (seclusion, or spatial privacy).
    ii. The activity in question or the information in question relates to the facts upon which the claim has been brought, and which gave rise to the alleged privacy interference.

(b) The plaintiff must prove, on a balance of probabilities, that the defendant **intended to act in a way that directly amounted to (or constituted) an interference** with the reasonable expectation of privacy proven in accordance with (a).

[13] As occurred in *Campbell v MGN Ltd* [2004] 2 AC 457, [32]; *Richard v British Broadcasting Corporation* [2019] Ch 169, [226].

i. It is not necessary for the plaintiff to prove that the defendant intended to interfere with the plaintiff's reasonable expectation of privacy.
ii. It is not necessary for the plaintiff to prove that the defendant was animated by malice or ill-will, or had any motive in particular, in acting in the way that amounted to or constituted an interference with the reasonable expectation of privacy proven in accordance with (a).

(c) If the plaintiff succeeds in proving the elements in (a) and (b), the defendant may prove, on a balance of probabilities, that he or she has a **defence of legitimate public concern** in respect of all or any part of the activity in question or of the information in question. The court must be satisfied that the defendant has proven that the interference with privacy is of legitimate public concern so as to justify, in the particular case, setting aside the reasonable expectation of privacy, as proven in accordance with (a). As appropriate on the facts of the case at hand, the court must take into account:

i. The implied constitutional freedom of political communication.
ii. The principle of freedom of expression, including (but not limited to) freedom of the press.
iii. The principle of necessity in circumstances where national security, or the security of any individual(s), are relevant on the facts of the case at hand.

(d) If the defendant fails to prove the defence in accordance with (c), in respect of all or any part of the interference with the reasonable expectation of privacy, the plaintiff is entitled to a remedy for that part of the interference for which there is no defence.

i. It is not necessary for the plaintiff to prove actual, or consequential, damage, in order to recover a remedy.
ii. The court may award damages, or grant an injunction, as it considers appropriate in the particular case at hand.

III. Features of the statutory tort

i. Reasonable expectation of privacy

The Commonwealth Parliament should allow the courts to consider the reasonable expectation of privacy with reference to the normative importance of privacy (the reasons for its protection), as already elucidated in some Australian judicial decisions,[14] and to do so holistically, without being constrained by legislative prescriptions for which factors must, may, or may not be taken into account. This is the case in other jurisdictions where the courts have recognised privacy torts, including England and Wales, New Zealand and some Canadian jurisdictions.[15]

A threshold of 'reasonable expectation' would instruct the courts to apply an objective (and therefore transparent) standard, and to do so through reasoning that is well within their competency and tradition, as common law courts for whom 'reasonableness' is the cornerstone of many forms of civil (particularly tortious) liability. In other jurisdictions where a reasonable expectation of privacy has been applied, the courts have demonstrated a capacity to examine all of the circumstances of the case, in view of the principles underpinning the interest in privacy, and to do so holistically, coming to a decision whether the threshold has been met on the facts.[16]

[14] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [40], [172], [183], [254]-[256], [265]-[274]; *Giller v Procopets* [2008] VSCA 236, [446]; *Wilson v Ferguson* [2015] WASC 15, [85]; *Clubb v Edwards* (2019) 267 CLR 171, [56]; *Smethurst v Police Commissioner* [2020] HCA 14, [120], [130].
[15] *Murray v Big Pictures Ltd* [2008] 3 WLR 1360; *PJS v NGN* [2016] AC 1081; *Hosking v Runting* [2005] 1 NZLR 1.
[16] In a very recent judgment, the English and Welsh Court of Appeal confirmed that a private letter remained private (in terms of being covered by a reasonable expectation of privacy), in spite of the writer's celebrity, public status, and own

It is important to clarify that both informational and physical privacy are covered by this tort. The courts in some jurisdictions, including New Zealand and some Canadian jurisdictions, have developed the common law privacy torts to include protection for physical privacy or seclusion,[17] but other jurisdictions, including England and Wales, have not been able to, due to the legitimate constraints of common law precedent and principle (at present).[18] There is no conceptually and normatively coherent reason for the Commonwealth Parliament, when enacting a statutory tort, to limit that tort to informational privacy, and not also to permit the courts to entertain claims for interference with physical privacy[19] (for example, affixing a camera in a private space and recording private activities,[20] or interfering with a person's physical access to medical facilities).[21]

ii. Additional thresholds of seriousness

As discussed in my IP submissions,[22] I do not believe that an additional element of 'serious harm' (as in the *Model Defamation Amendment Provisions 2020*), or of 'highly offensive publication' (as in New Zealand's privacy torts), is either necessary or desirable. There is no such element in England and Wales, and the courts have contained their holistic, principled assessment of the claim within the reasonable expectation of privacy stage.

As I have discussed in my IP submissions, I believe that such an additional element would distance the tort from its normative underpinnings, given that the value and protection of privacy does not hinge, in normative terms, on whether the publication (or other interference in question) is highly offensive to a reasonable person, or has caused serious harm. The inclusion of that additional threshold would, therefore, be unprincipled.

In addition to that, I believe that the 'reasonable expectation of privacy' threshold standard is sufficient to ensure trivial claims, or claims unrelated to privacy, are struck out: neither are defendants forced to defend baseless claims, and nor are deserving plaintiffs left without a chance to plead their case. The same cannot be said for the extremely low threshold of 'personal information' (hinging on information relating to an identifiable individual), as is characteristic of privacy regulation (including under the *Privacy Act 1988 (Cth)*), or of the reasonably low threshold of 'defamatory meaning/capacity', as is characteristic of the tort of defamation (prior to the recent model amendments being enacted: under pre-amendment defamation law, defendants must rely on the triviality defence). In both of those contexts, an additional seriousness threshold can be justified. That is not the case with a privacy tort defined by a reasonableness threshold.

iii. Proving intention and per se *actionability*

As I have discussed elsewhere,[23] a tort of interference with privacy should be actionable *per se*, attracting damages as of right, and without the need for proof of actual or consequential damage,

admission that she thought the letter might be leaked to the public (and there was no evidence that she intended the letter to become public): *HRH the Duchess of Sussex v Associated Newspapers Ltd* [2021] EWCA Civ 1810.

[17] *C v Holland* [2012] 3 NZLR 672; *Jones v Tsige* (2012) 346 DLR (4th) 34.

[18] *Wainwright v Home Office* [2004] 2 AC 406.

[19] See arguments supporting this proposition in: NA Moreham 'Beyond Information' (2014) 73 *Cambridge Law Journal* 350; P Wragg 'Privacy and the Emergent Intrusion Doctrine' (2017) 9 *Journal of Media Law* 14; P Wragg 'Recognising a Privacy-Invasion Tort' (2019) 78 *Cambridge Law Journal* 409.

[20] This arose in *C v Holland* [2012] 3 NZLR 672, in which Whata J recognised a New Zealand common law tort of intrusion into physical privacy.

[21] This arose in a freedom of political communication case, *Clubb v Edwards* (2019) 267 CLR 171, in which decision the Justices of the HCA accepted the principle of privacy legitimately limited the implied freedom in the context of protests outside abortion clinics: [56].

[22] And also discussed in J Gligorijevic "A Common Law Tort of Interference with Privacy for Australia: Reaffirming *ABC v Lenah Game Meats*" (2021) 44(2) *University of New South Wales Law Journal* 673, 699.

[23] J Gligorijevic "A Common Law Tort of Interference with Privacy for Australia: Reaffirming *ABC v Lenah Game Meats*" (2021) 44(2) *University of New South Wales Law Journal* 673, 699-701.

harm or loss, whether pecuniary or non-pecuniary. This best reflects the dignitary nature of the interest protected and the vindicatory nature of the remedy to be awarded. This is the position in other jurisdictions where privacy torts have been recognised by the courts, including England and Wales and New Zealand, and, for this reason in those jurisdictions, these torts are intentional torts.

In adopting the basic structure of tortious liability for privacy interferences which has been developed in those comparable jurisdictions, it is still important that the Commonwealth Parliament construe a statutory privacy tort as consistently as possible with how Australian common law generally recognises intentional torts that are actionable *per se*: intentional trespass torts. The common, foundational elements for such torts are intention (to act in a way that amounts to or constitutes the wrongful interference), directness (of harm), and voluntariness (in acting in the way that amounted to or constituted the wrongful interference).

It is worth emphasising that the intention requirement here, consistently with the intention requirement for all (intentional) trespass torts in Australia, is in respect of the action that amounts to or constitutes the unlawful interference, rather than the wrongness of the interference itself: the defendant need not have *intended to harm* the plaintiff, to *interfere* with his or her privacy; the defendant need not have any particular motive in acting in the way that amounted to or constituted the interference. Just as all that is necessary to prove intention in the tort of trespass to land is an intention to place one's foot on land that happens to be someone's property, all that should be necessary to prove intention in a privacy tort should be an intention to act in the way that amounted to or constituted an interference with (a reasonable expectation of) privacy.

A useful illustration of the legitimate and principled limits of tortious liability (in a standalone privacy tort), where there has been a breach of an individual's privacy, arose in the recent judgment in *Warren v DSG Retail*.[24] The Judge struck out the claim in the tort of misuse of private information (the comparable privacy tort in England and Wales),[25] because the harm in question was a *result* of a *third-party* criminal data breach: it was not the defendant who had intentionally acted in way that directly amounted to or constituted a misuse of the private information in question. On such facts, an Australian court would have no difficulty in deciding that the elements of intention and directness had not been established.

On the other hand, if a plaintiff could prove that the defendant had been using the plaintiff's information *intentionally* in a way that *directly* amounted to (or constituted) the interference with an established reasonable expectation of privacy, then the court should be able to entertain the claim. For example, a firm might intentionally (perhaps for profit) collect and use or share information about a user's location or internet search history: in such circumstances, and absent genuine consent (which would contraindicate a reasonable expectation of privacy), that *intentional* activity would *directly* amount to or constitute an interference with a reasonable expectation of privacy (whether or not the firm paid any attention at all to the user's privacy entitlements).

iv. General defence of legitimate public concern

The purpose of the statement in (c), above, that "*The court must be satisfied that the defendant has proven that the interference with privacy is of legitimate public concern so as to justify, in the particular case, setting aside the reasonable expectation of privacy, as proven in accordance with (a)*" is to ensure, as much as is possible for any parliament to ensure, that the courts do not lapse into an amorphous 'balancing exercise' at the point of the defence, which, in my view, risks distancing the inquiry from principle and normative underpinnings, making it less transparent and accessible, to the detriment of all parties. It is my view that the English and Welsh "ultimate

[24] *Warren v DSG Retail Ltd* [2021] EWHC 2168 (QB).
[25] As well as claims in breach of confidence and negligence.

balancing test"[26] has opened up such risks in privacy jurisprudence in that jurisdiction, even though the courts have set out exactly which principled, structured methodology must be applied under this test (the two-way proportionality test):[27] instead, the courts largely (but not necessarily always) consider whether the activity or publication was 'in the public interest',[28] leading to reasoning without any necessary or explicit anchoring in the normative importance of either privacy or freedom of expression.

If the Commonwealth Parliament is taking the step of providing for a privacy tort, and setting out its 'bare bones', it would be desirable for it to set out explicitly what a defence of legitimate public concern requires: that the court be convinced that the already recognised, justiciable privacy right should justifiably be set aside, taking into account the listed principles (rather than undefined, unprincipled 'policy' reasons).

Of these listed principles, the principle of necessity would ensure that, for example, state surveillance activities, undertaken for the purpose of collective securitisation and national security, are both scrutinised by the court, and, where legitimate and justified on the facts, are not encumbered by claims in this privacy tort. It is important that there be no wholesale carve-outs from the application of this tort, as there are under the regulatory scheme in the *Privacy Act 1988 (Cth)* (in respect of state security services and news media, for example). Instead, each case should be argued and scrutinised on its facts for whether there is a reasonable expectation of privacy, and, if so, whether that expectation must be set aside for reasons that are legitimate and justified in law and on the particular facts of that case. In practical terms, it will be unlikely that a plaintiff's case will make it to full trial if there are strong and obvious reasons why a governmental department or security service has undertaken lawful surveillance activities for legitimate national security purposes.

In line with the developing jurisprudence on the implied constitutional freedom of political communication,[29] the general defence of legitimate public concern will invite (if not prompt) the courts to adopt a structured proportionality methodology in order to assess the weight of the defendant's claims, *relative* to the plaintiff's recognised expectation of privacy. This is within the court's demonstrated competence, evident particularly in the context of implied rights, but also in more established jurisprudence on the defence of self-defence.[30] In my view, this means *both* that the Commonwealth Parliament need not codify this defence in any further detail, *and* that litigants will have a (growing) body of Australian law on which to draw when fashioning arguments under this general defence.

Finally, it is also desirable that the Commonwealth Parliament specify that the courts may find that a *part* of the activity or information, in respect of which there is a reasonable expectation of privacy, is covered by the defence, and *part* of it is not (as stated in (c), above). This is to allow (and obligate) the courts to scrutinise the facts of each case when deciding whether the conflicting principles, including freedom of expression, do or do not mean that the privacy interest should be set aside. Oftentimes it may be that only *part* of the relevant private information ought legitimately to be published in accordance with the principle of freedom of expression, for example.[31] The

[26] *Re S (A Child)* [2005] 1 AC 593, [17].
[27] *Re S (A Child)* [2005] 1 AC 593, [17]: "the proportionality test must be applied to each".
[28] For example: *PJS v NGN* [2016] AC 1081, [78], where the Court cited the rule in *Re S*, but did not refer to proportionality at all, instead focusing upon 'public interest'.
[29] Discussed further, in the context of privacy interests, in J Gligorijevic "A Common Law Tort of Interference with Privacy for Australia: Reaffirming *ABC v Lenah Game Meats*" (2021) 44(2) *University of New South Wales Law Journal* 673, 702-707.
[30] For example, *Watkins v State of Victoria* (2010) 27 VR 543 (CA), [71]-[75]: "proportionality of response is relevant to…whether the defendant believed on reasonable grounds that self-defence was necessary".
[31] This was the case in *Campbell v MGN Ltd* [2004] 2 AC 457, and it affected the outcome of the decision. Similarly, very recently, the English and Welsh Court of Appeal that a defendant's arguments that the defence covered the publication

courts should be permitted (and obligated, where appropriate) to examine the facts in detail and with nuance to determine the exact extent to which any justificatory defence can apply; this would ensure neither privacy nor any conflicting principle encroaches too far upon the territory of the other.

as a whole could only be viable if it had published only a small part of the private information in question (for which reason the defence failed in that case): *HRH the Duchess of Sussex v Associated Newspapers Ltd* [2021] EWCA Civ 1810, [106].