28 November 2020

Review of the Privacy Act 1988
Attorney-General's Department
4 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 Gligorijevic in response to Issues Paper

Thank you initiating this review of the *Privacy Act 1988* (Cth). It is a timely opportunity to review and reform the Act and related privacy laws. I enclose with this letter my submissions in response to the Issues Paper of October 2020. I target my submissions to those questions with which I am most concerned, specifically, those relating to a new statutory tort of invasion of privacy. 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 ISSUES PAPER

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28 November 2020

Question 57. Is a statutory tort for invasion of privacy needed?

Answer: yes, but only if there continues to be judicial inaction in recognising a common law tort of interference with privacy.

A. Introduction

There is currently no stand-alone cause of action for individuals who suffer interferences with privacy in Australia.[1] The importance of protecting privacy, however, has only increased with the ongoing growth of online and digital media.

The two questions of whether there is a need for *any* separate, stand-alone privacy tort, and, if so, whether it should be a *statutory* tort, should be addressed separately. My view is that there is a need for a separate tort of interference with privacy in Australia, and that, if there continues to be judicial inaction, it may be appropriate for Parliament to intervene and legislate for such a tort.

B. The need for a tort

a. Normative consensus on the need to give privacy legal protection

The value of privacy to the individual is sufficiently important as to be protected by law. There is much scholarly literature on the importance of privacy to individuals,[2] and this normative importance of individual privacy has been acknowledged by Australian courts,[3] albeit never recognised by them as a separate tort.

Such affirmation is apparent in the High Court's recent judgment that the implied constitutional freedom of political communication could not protect protest around abortion clinics, because safeguarding privacy (and dignity) interests of individuals wishing to enter such clinics was a proportionate and justified limitation upon that constitutional freedom.[4]

Privacy has been understood as protecting individual dignity, autonomy and liberty, by shielding the individual from unwanted and unreasonable observation or access by others.[5] Australian law currently does not recognise and protect such a stand-alone interest, and does not offer to individuals a right of action to protect or vindicate that concrete interest.

The deleterious effects of interference with individual privacy have been magnified in the context of digital and online communications, where there is now capacity to create permanent 'digital dossiers' on individuals, and to publish private information on a permanent record accessible by

[1] In these submissions I use the word 'interference', rather than 'invasion' or 'intrusion', because the latter two tend to imply a *physical* or *spatial* interference only, whereas 'interference' better recognises that wrongful publication of private *information* is also a breach of privacy.
[2] See, for example: C Fried, 'Privacy' (1968) 77 YLJ 475; E Bloustein, 'Privacy as an Aspect of Human Dignity' (1964) 39 NYU Law Review 962; J Rachels, 'Why Privacy Is Important' (1975) 4 Philosophy & Public Affairs 323; J Reiman, 'Privacy, Intimacy and Personhood' (1976) 6 Philosophy & Public Affairs 26; JC Inness, *Privacy, Intimacy and Isolation* (OUP 1992); FD Schoeman, *Privacy and Social Freedom* (CUP 1992); N Richards, 'Intellectual Privacy' (2008) 87 Texas Law Review 387; B Rössler and D Mokrosinska (eds), *Social Dimensions of Privacy* (CUP 2015).
[3] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [40], [43], [125]-[127], [132], [172], [183], [190], [254]-[256], [265]-[274], [321]-[324], [328]. See also: *Smethurst v Police Commissioner* [2020] HCA 14, [120], [130]; *Giller v Procopets* [2008] VSCA 236, [446]; *Wilson v Ferguson* [2015] WASC 15, [85]; *Grosse v Purvis* [2003] QDC 151, [442]-[444]; *Jane Doe v ABC* [2007] VCC 281, [176], [194].
[4] *Clubb v Edwards* [2019] HCA 11, [56].
[5] See, for example: R Gavison, 'Privacy and the Limits of the Law' (1980) 89 YLJ 421; NA Moreham, 'The Protection of Privacy in English Common Law' (2005) 121 LQR 628; NA Moreham, 'Unpacking the Reasonable Expectation of Privacy Test' (2018) 134 LQR 652.

billions of viewers.[6] Online communications and behaviours have also given rise to concerns about children's privacy in particular, and the (in)adequacy of privacy protections for young people who use social media, and whose parents use social media.[7]

Australian federal and state law reform commissions, regulatory bodies, and standing committees have consistently affirmed the normative importance of privacy, including in the last two years and in the specific contexts of digital platforms regulation and technological impacts on human rights.[8] There have been ongoing recommendations for reform to concretise the legal protection of privacy.

The Australian Law Reform Commission has changed its view from recommending enactment of only specific protections and remedies reflecting privacy interests in different contexts,[9] to recommending enactment of a general privacy action.[10] After the Government requested it to formulate a general action for serious invasion of privacy, it recommended a tort recognising both physical and informational privacy.[11] That model was subsequently adopted by a State parliamentary committee in recommending new remedies for serious invasions of privacy.[12]

In addition to such reports confirming a law reform consensus that privacy is sufficiently normatively important to warrant legal protection as a stand-alone interest, all three Australian States with human rights legislation have a codified, qualified right against unlawful interference with privacy.[13]

b. Existing potential legal remedies are ill-suited or inadequate

Apart from the inclusion of privacy in human rights legislation, there are other existing areas of law which seek to protect aspects of the broad category of 'privacy', not least the *Privacy Act 1988* (Cth), itself. However, the focus and scope of existing laws are ill-suited or inadequate for the protection against interferences with privacy contemplated by the various law reform recommendations for increased protection.[14]

i. The* Privacy Act 1988 *and data protection regulation

The *Privacy Act 1988* is ill-suited to protect individual privacy, as such, because, in spite of its purposes explicitly referring to individual privacy,[15] it is concerned with the control of data flows

[6] See, for example: B Rössler, 'Should Personal Data Be a Tradable Good?' in B Rössler and D Mokrosinska (eds), *Social Dimensions of Privacy* (CUP 2015).
[7] J Gligorijevic, 'Children's Privacy: The Role of Parental Control and Consent' (2019) 19 HRLR 201; Children's Commissioner, 'Life in Likes: Children's Commissioner Report into Social Media Use among 8-12 Year Olds' (2018); SB Steinberg, 'Sharenting' (2017) 66 Emory Law Journal 839; M Oswald, H James and E Nottingham, 'The Not-so-Secret Life of Five-Year-Olds' (2016) 8 JML 198.
[8] Australian Law Reform Commission, 'Unfair Publication: Defamation and Privacy' (1979) ALRC R11 paras 215–222; Australian Law Reform Commission, 'Privacy' (1983) ALRC R22; Australian Law Reform Commission, 'Essentially Yours: The Protection of Human Genetic Information in Australia' (2003) ALRC R96; Australian Law Reform Commission, 'For Your Information: Australian Privacy Law and Practice' (2008) ALRC R108; NSW Law Reform Commission, 'Invasion of Privacy' (2009) NSWLRC R120; NSW Law Reform Commission, 'Protecting Privacy in New South Wales' (2010) NSWLRC R127; Victoria Law Reform Commission, 'Surveillance in Public Places' (2010) Report no. 18; Australian Law Reform Commission, 'Serious Invasions of Privacy in the Digital Era, Final Report' (2014) ALRC R123; NSW Standing Committee on Law and Justice, 'Remedies for the Serious Invasion of Privacy in New South Wales' (2016); ACCC, 'Digital Platforms Inquiry' (2019) Final Report; Australian Human Rights Commission, 'Human Rights and Technology Discussion Paper' (2019); See generally: N Witzleb, 'A Statutory Cause of Action for Privacy?' (2011) 19 Torts LJ 104.
[9] Australian Law Reform Commission, 'Privacy' (n 8) para 1085.
[10] Australian Law Reform Commission, 'For Your Information: Australian Privacy Law and Practice' (n 8).
[11] Australian Law Reform Commission, 'Serious Invasions of Privacy in the Digital Era, Final Report' (n 8).
[12] NSW Standing Committee on Law and Justice (n 8) 71.
[13] *Human Rights Act 2004* (ACT), s 12(a); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 13(a); *Human Rights Act 2019* (Qld), s 25(a).
[14] And also contemplated and acknowledged by the High Court Justices in *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.
[15] *Privacy Act 1988* (Cth), s 2A(a).

and data usage, rather than with the protection of individual dignity, autonomy and liberty through shielding the individual from unwanted and unreasonable observation or access by others.

The normative importance of privacy, as recognised by the courts (including by the High Court in *Lenah*)[16] and in various law reform reports, demands something more than, and something different from, fine-grained regulation aimed at protecting against excessive or improper corporate or governmental use of personal data, as is the *raison d'être* of the *Privacy Act 1988* in Australia, and similar legislation in other jurisdictions.[17]

These regulatory frameworks cover effectively all data *about* an individual, so that they are not subject to value-based threshold tests for 'privacy'.[18] They are, however, subject to significant exceptions, including uses for journalistic, literary and artistic purposes,[19] and do not cover physical intrusions. The rationale of such frameworks, to target wholesale processing of personal data, means that they do not reflect the acknowledged normative importance of privacy, and are not appropriate tools for protecting that interest.

A stand-alone tort of interference with privacy could more effectively protect against media interferences and interferences by private individuals, as it does in England, Canada and New Zealand, as well as protect against physical interferences. A tort would not supplant or be surplus to data protection regulation; instead, it would answer the established normative concern to give legal protection to individuals against unwanted and unreasonable observation or access by others.

Indeed, data protection regulation has not made tort law irrelevant in those jurisdictions which have a tort of interference with privacy, and is often litigated as a *subordinate* action, which stands or falls according to the success of the tort.[20] Regulatory action that has already been taken in order to limit corporate and governmental use of personal data does not conclusively answer the acknowledged need for protection of individual privacy; the need to protect privacy in law extends beyond data protection frameworks aimed at controlling large-scale, privacy-invasive technologies and practices.

ii. Other comparable or 'dignitary' torts

Other existing legal remedies, which could be said to engage privacy interests, are likewise ill-suited or inadequate in protecting individual privacy. In view of the conceptualisation of privacy as the shielding of individuals from unwanted and unreasonable observation or access by others, underpinned by a concern to protect such values as individual dignity, autonomy, and liberty, privacy is importantly distinct from existing legal remedies, including defamation, copyright, trespass, and intentional infliction of emotional harm, which can also be said to protect the values of dignity, autonomy and liberty. None of these existing remedies protect an individual from unwanted, unreasonable observation or access by others, based upon a normative commitment to the protection of those core values.

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[16] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [40], [43], [125]-[127], [132], [172], [183], [190], [254]-[256], [265]-[274], [321]-[324], [328].
[17] *General Data Protection Regulation* 2016/679 (EU) ('GDPR'); *Data Protection Act 2018* (UK); *Privacy Act 1993* (NZ).
[18] *Privacy Act 1988* (Cth), s 6(1): 'personal information'; *GDPR*, art. 4(1); *Data Protection Act 2018* (UK), s 5; *Privacy Act 1993* (NZ), s 2(1): 'personal information'.
[19] *Privacy Act 1988* (Cth), s 7B(4); *GDPR*, art. 85; *Data Protection Act 2018* (UK), Sch 2, Pt 5, cl 26(2)(b); *Privacy Act 1993* (NZ), s 2(1).
[20] See, for example, counsel's submissions and judicial reasoning in *Campbell v MGN* [2004] 2 AC 257, [32], and *Richard v BBC* [2018] 3 WLR 1715, [226].

Defamation protects *reputation*, which, though it may be based upon a concern to protect individual dignity,[21] is conceptually distinct from privacy.[22] It is irrelevant to reputational interests whether the imputation in question contains private information or was obtained through an interference with privacy. Equally, it is irrelevant to privacy interests whether the publication of the private information in question affects the individual's reputation, or that the private information is true.

Copyright acknowledges, and protects control over, an individual's *original creative work*, which, though it may align with a concern for dignity and autonomy, is, again, conceptually distinct from privacy, which serves to shield individuals against unwanted and unreasonable observation or access by others.

Trespass can be said to be concerned to protect all three values of individual dignity, autonomy and liberty, but, in focusing upon the right to *exclusive occupancy of land* is, once again, conceptually distinct from, or at least narrower than, the value of privacy.[23]

The tort of intentional infliction of emotional harm, though undoubtedly concerned with the protection of individual dignity, is, again, not concerned with the specific protection against unwanted, unreasonable observation or access by another.[24]

iii. Breach of confidence and equitable remedies

Breach of confidence prohibits the use and disclosure of confidential information, but is concerned with protecting *confidentiality* as an element of certain *relationships* of a fiduciary nature, rather than with shielding an individual from unwanted, unreasonable observation or access by another, whether in an informational or a physical sense.[25]

In spite of this conceptual distinction between breach of confidence and interference with privacy, equity has been used to vindicate privacy interests, and it might be argued that it is a sufficient legal tool to protect individual privacy, making any stand-alone tort unnecessary. This is not, however, an appropriate way of protecting and vindicating privacy interests.

The English and Welsh experience of the evolution of the common law through breach of confidence to a stand-alone tort of misuse of private information evidences the unsuitability of equitable actions to cater to individual, dignity-based privacy rights. Privacy claims accommodated within breach of confidence were, from the beginning, fundamentally transforming that equitable action by removing its traditional limbs,[26] to a point where the action became only artificially 'equitable' and only nominally 'breach of confidence'.[27]

Given that a stand-alone common law tort of interference with privacy was not available in English and Welsh law when breaches of individual privacy were beginning to be litigated,[28] the courts were forced to take a more tempered evolutionary route through breach of confidence, and through

[21] U Cheer, 'Divining the Dignity Torts' in AT Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP 2016).
[22] AT Kenyon, 'Defamation, Privacy and Aspects of Reputation' (2019) 56 Osgoode Hall Law Journal 59.
[23] This much was acknowledged in *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [43].
[24] The tort is narrowly construed, and has been rejected in claims that have sought to protect an individual's private life (distress from revelation of private information about the claimant's father's life: *O (A Child) v Rhodes* [2016] AC 219) and physical privacy (a security search of the claimant's person: *Wainwright v Home Office* [2004] 2 AC 406).
[25] This conceptual distinction was acknowledged by the House of Lords in *Campbell v MGN* [2004] 2 AC 257, [14], [51], and by scholars who highlighted how the English courts' 'fitting' of privacy into breach of confidence could be problematic for both breach of confidence and for any wish to protect privacy interests: G Phillipson and H Fenwick, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (2000) 63 MLR 660.
[26] See, for example: *Douglas v Hello!* [2001] QB 967.
[27] Phillipson and Fenwick (n 25) 671; G Phillipson, 'Transforming Breach of Confidence?' (2003) 66 MLR 726; Moreham, 'Privacy in the Common Law' (n 5).
[28] *Kaye v Robertson* [1991] 18 FSR 62.

a transformation of that existing cause of action, in order to vindicate an interest cognisable in common law. That particular experience does not mean equity or breach of confidence are the appropriate tools for comprehensive or adequate privacy protection. Indeed, breach of confidence cannot protect against physical intrusions.

When the House of Lords recognised a separate action in informational privacy in *Campbell*, although it still acknowledged the legacy and nomenclature of breach of confidence, it recognised that "this nomenclature is misleading", given that[29]

> [a] breach of confidence was restrained as a form of unconscionable conduct, akin to a breach of trust…The breach of confidence label harks back to the time when the cause of action was based on improper use of information disclosed by one person to another in confidence.[30]

Such judicial recognition of the unsuitability of *equitable* actions, based upon unconscionability, pre-existing or constructed relationships, and breach of trust, led Lord Nicholls to confirm "this *tort*, however labelled, affords respect for one aspect of an individual's privacy. That is the value underlying this cause of action". [31] Similarly, Lord Hoffmann concluded[32]

> the new approach takes a different view of the underlying value which the law protects. Instead of a cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets, it focuses upon protection of human autonomy and dignity - the right to control dissemination of information about one's private life and the right to the esteem and respect of other people.

Such interests are best catered for by the law concerned with imposing liability for civil wrongs committed outside of contractual or fiduciary relationships, and irrespective of any proprietary interests; that law is tort law.

The English and Welsh Court of Appeal's subsequent recognition that the common law action in privacy was a "tort",[33] and the United Kingdom Supreme Court's unquestioned reference to it as a "tort",[34] did not require any extensive or in-depth judicial analysis of the appropriateness of such a categorisation by either Court, and has not been met with challenge.

Even before the English and Welsh courts recognised misuse of private information was a stand-alone tort, and no longer an action in breach of confidence, the Australian Law Reform Commission had recommended Australian courts *not* adopt an action in breach of confidence, as had occurred in England and Wales,[35] and has subsequently recommended, in lieu of a privacy tort, *legislative* confirmation that courts can award compensation for emotional distress resulting from misuse of private information through an action for breach of confidence.[36] In other words, such a route is not obviously open for the courts without legislative confirmation.

In *Smethurst*, the High Court reiterated that, in *Lenah*, the respondent had failed to establish an equitable right to a remedy, essentially protecting privacy, by analogy with confidential information.[37]

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[29] *Campbell v MGN* [2004] 2 AC 257, [13]-[14].
[30] *Campbell v MGN* [2004] 2 AC 257, [13]-[14].
[31] *Campbell v MGN* [2004] 2 AC 257, [14] (emphasis added).
[32] *Campbell v MGN* [2004] 2 AC 257, [51].
[33] *Vidal-Hall v Google* [2015] 3 WLR 409, [43]-[51].
[34] *PJS v NGN* [2016] AC 1081, [32]-[44].
[35] Australian Law Reform Commission, 'For Your Information: Australian Privacy Law and Practice' (n 8).
[36] Australian Law Reform Commission, 'Serious Invasions of Privacy in the Digital Era, Final Report' (n 8).
[37] *Smethurst v Police Commissioner* [2020] HCA 14, [81].

Indeed, the unsuitability and inappropriateness of equity in providing remedies for privacy interferences can also be observed in how such remedies were fashioned in *Giller v Procopets*.[38] The Court declined to recognise a tort of interference with privacy,[39] and used equity (breach of confidence) to provide damages for the harm – distress – which it recognised was actionable.[40] That harm was entailed in the interference with the claimant's privacy, *par excellence*: publication of sexual information about her by her former partner.

The harm identified as actionable in that case invoked the very same normative concerns as Lord Hoffmann recognised in *Campbell* did not sit within equity's traditional jurisdiction: "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",[41] which mirrored the normative concerns identified by Chief Justice Gleeson in *Lenah:* "the foundation of much of what is protected, where rights of privacy, as distinct from rights of property, are acknowledged, is human dignity".[42] Yet the presence of a relationship between claimant and defendant, and the fact the private information concerned was created in the context of that relationship, ultimately directed the Court towards breach of confidence, rather than straightforward liability for tortious wrongdoing.

The Court in *Giller* emphasised the fact that English and Welsh authorities, such as *Campbell*, saw the courts award damages for what they continued to call 'breach of confidence',[43] side-lining the fact that, in such authorities, the judicial reasoning clearly recognised that the privacy-based cause of action stood*,* in substance and purpose, separately from equity and breach of confidence.[44]

Further, even though Chief Justice Gleeson in *Lenah* acknowledged breach of confidence could be available for actions involving non-consensual publication of confidential information,[45] that was not made out on the facts in that case, and was at any rate not a judicial confirmation that Australian law was bound to vindicate individual privacy interests through breach of confidence; a door was left open for a tort.[46]

The Australian courts post-*Lenah* were not left powerless as were their English and Welsh counterparts post-*Kaye*:[47] while English and Welsh courts may have been forced by the clear statement in *Kaye* precluding a privacy tort to transform and "extend" breach of confidence,[48] Australian courts face an open door to a tort of interference with privacy.[49] This is why the Court in *Giller* (as well as the Court in *Wilson*, given it endorsed the fashioning of equitable remedies in *Giller*)[50] should have followed a tort-route on the basis of *Lenah*, rather than an equity-route on the basis of English and Welsh authorities, and why it did not need to resort to equity to compensate the harm it recognised was actionable.[51]

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[38] *Giller v Procopets* [2008] VSCA 236; and subsequently also in *Wilson v Ferguson* [2015] WASC 15.
[39] It is my view that this Court's interpretation of *Lenah* was unduly restrictive in this regard.
[40] *Giller v Procopets* [2008] VSCA 236, [223], [420]-[446].
[41] *Campbell v MGN* [2004] 2 AC 257, [51].
[42] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [43].
[43] *Giller v Procopets* [2008] VSCA 236, [418].
[44] For example, *Campbell v MGN* [2004] 2 AC 257, [14], [51].
[45] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [39].
[46] I make this argument, and discuss it in greater depth and detail, in a forthcoming article on a common law tort of interference with privacy in Australia: J Gligorijevic, 'A Common Law Tort of Interference with Privacy for Australia: Revitalising ABC v Lenah Game Meats' (2021) 44(2) UNSWLJ (forthcoming).
[47] *Kaye v Robertson* [1991] 18 FSR 62.
[48] *Campbell v MGN* [2004] 2 AC 257, [44], [51].
[49] Again, this argument is developed in my forthcoming article: Gligorijevic (n 46).
[50] *Wilson v Ferguson* [2015] WASC 15, [73]-[85].
[51] It is acknowledged that it is possible, though it was not stated explicitly in the Court's reasons, that the Court in *Giller* might not have taken this step because of concerns it may have had that recognition of such a tort is a matter reserved for the High Court. It is my view that *Lenah* provided an open door for recognition of a privacy tort in Australian common

This is also why the use of breach of confidence and equitable remedies by an appellate court in Australia, to vindicate a privacy interest in a case of straightforward interference with privacy, does not negate the need for a new, stand-alone tort of interference with privacy.

As has been highlighted by equity scholars, the fashioning of compensatory damages in equity for non-tortious dignitary harm or distress is inappropriate.[52] This is another reason why equity does not answer the need for a stand-alone privacy tort. The possibilities available in equitable damages do not in principle sit well with recovery for the type of dignitary harm entailed in interference with privacy, or harm of distress caused by such an interference, where no tort has been recognised as having been committed: "Unlike equitable principles, which centre on conduct in good conscience, the concern of a law of privacy is a certain kind (or certain kinds) of harm. That harm is akin to the concerns of torts rather than other bodies of judge-made law".[53]

A further reason why it is inappropriate to rely upon equity to compensate for interferences with privacy is that equity is intended only to supplement the common law where the common law falls short in remedying recognised common law wrongs. One of the main reasons why damages may be awarded in equity, such as under Lord Cairns' Act (or its modern iterations),[54] is that common law damages might not be recoverable for a wrong that is actionable at common law:[55] equity provides a reserve jurisdiction where conscience demands the recognised loss be compensated. Equity is "a series of glosses and appendices to the common law".[56]

On the basis of the door left open in *Lenah*, the sort of harm recognised as actionable in *Giller* could have been recognised as a tortious wrong, attracting straightforward damages in tort. As the Court did not recognise the wrong committed as a tort (that the defendant's deed was actionable in tort), there could be no damages in tort, but nor, therefore, should there have been damages on the rationale of Lords Cairns' Act equitable damages.[57] The Court's declining to recognise a tort, and its opting to take the equity-route, led it into the less appropriate and less suitable territory of equitable damages. This is why the judgment in *Giller* cannot substantiate an argument that a stand-alone privacy tort is unnecessary, because equity suffices: it does not suffice, and is an inappropriate answer to interferences with privacy.

Equity might be said to be better suited to provide injunctive relief for interferences with privacy. However, although equity traditionally provides a more straightforward route for injunctive relief than does tort law, the courts have awarded injunctions on the basis of torts, including defamation.[58] And, given that the main remedial purpose of tort law is to award damages in compensation, the ultimate balance lies in favour of tort, as opposed to equity, for the most appropriate remedial option for interferences with privacy. There is more leeway, as a matter of

law, so that it was open for lower courts to recognise such a tort, and the matter was, for that reason, not reserved exclusively for the High Court. I discuss my views on this matter in Part C of my answer this question, below.

[52] JD Heydon, Leeming MJ and PG Turner, *Meagher, Gummow and Lehane's Equity* (LexisNexis Butterworths 2015) 883–883; PG Turner, 'Privacy Remedies Viewed through an Equitable Lens' in JE Varuhas and NA Moreham (eds), *Remedies for Breach of Privacy* (Hart 2018).

[53] Turner (n 52) 266.

[54] Equitable compensation can also be available for purely equitable wrongs; this is distinct from damages under Lord Cairns' Act (which do not extend to equitable wrongs).

[55] Turner (n 52) 277.

[56] ibid 266.

[57] *Giller v Procopets* [2008] VSCA 236, [134]-[160],[425]-[431]. It is recognised that the Court in *Giller* found that, under the Victorian equivalent of Lord Cairns' Act, damages could be awarded for breach of confidence. This would not be possible in other jurisdictions, including New South Wales. In *Wilson v Ferguson* [2015] WASC 15, Lord Cairns' Act damages were not pleaded and the Court therefore did not address the issue: [86].

[58] See: *ABC v O'Neill* (2006) 227 CLR 57. Injunctions have been awarded, for example, in: *Hallam v Ross (No 2)* [2012] QSC 407, and *Gair v Greenwood* [2020] NSWDC 586.

principle, to grant injunctive relief in response to a claim in tort, than there is to grant monetary remedies in equity for the nature of harm occasioned by a privacy interference.

Equity, and some Australian courts' use of their equitable jurisdiction, therefore, do not render unnecessary a stand-alone tort of interference with privacy. On the contrary, the inappropriateness of breach of confidence and equitable remedies highlights the appropriateness of tort law for the protection of privacy interests.

Quite apart from the difficulties outlined in respect of remedies, the fundamental normative concerns underpinning privacy, as recognised by courts, scholars and numerous law reform commissions, are the same as the original, fundamental concerns of tort law: the protection of individual liberty, dignity and autonomy. Tort law has evolved to impose liability for civil wrongs committed by breaching duties emanating from these values.[59] Even though existing torts are conceptually distinct from privacy, and cannot cater to protect individual privacy as such, a significant commonality exists between the principles and norms underpinning existing torts which recognise the harms of direct interferences with person and property, and the principles and norms underpinning a tort recognising the harm of interference with individuals' informational and physical privacy.

Tort law, therefore, is the most appropriate and straightforward mechanism by which to protect individual privacy.

c. Conclusion

None of the existing areas of law discussed above – the *Privacy Act 1988*, comparable torts, and breach of confidence – can comprehensively and appropriately vindicate an individual's interest in privacy, as such, and compensate the individual for the wrong committed in an interference with his or her privacy.

Such areas of law would fall short in circumstances where, for example, an individual is being stalked or harassed;[60] or where the name of a rape victim is published in breach of a suppression order;[61] or where an individual is being secretly filmed in intimate circumstances;[62] or where images of an individual in private, intimate, or family circumstances are being disseminated in the mass media without his or her consent.[63]

Given the normative consensus that privacy, as such, requires legal protection, and, acknowledging that existing legal remedies are ill-suited and inadequate to answer that demand, there is a need for a tort of interference with privacy to fill the gap that currently exists in Australian law.

C. The need for a statutory tort

As indicated in the preceding discussion, I have argued in a forthcoming article that Australian courts can and should recognise a common law tort of interference with privacy on the basis of the door left open in *Lenah*, making statutory intervention unnecessary.[64] Indeed, the High Court has

[59] P Birks, 'The Concept of a Civil Wrong' in D Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon 1995) 51.
[60] *Grosse v Purvis* [2003] QDC 151, [442]-[444].
[61] *Jane Doe v ABC* [2007] VCC 281, [176], [194].
[62] *C v Holland* [2012] 3 NZLR 672 (at home, in the shower); *R v Jarvis* [2019] SCC 10 (at school, in the toilets).
[63] See, for example: *PJS v NGN* [2016] AC 1081; *Murray v Big Pictures Ltd* [2008] 3 WLR 1360; *Weller v Associated Newspapers Ltd* [2015] EWCA Civ 1176.
[64] Gligorijevic (n 46).

recently acknowledged that it is still open to Australian courts to recognise and develop a stand-alone cause of action in privacy, on the basis of *Lenah*.[65]

In my view, common law development can and should be preferred over statutory intervention in the normatively complex area of individual privacy.[66] Indeed, in those jurisdictions where individual privacy, as such, is protected by law (including England and Wales, Canada, and New Zealand), it has in most instances been the common law which has catered for privacy protection, rather than statute.

However, privacy claims brought in Australia since *Lenah* have seen appellate courts interpret the High Court's judgment restrictively, with some finding themselves unable to recognise actionability, and others invoking equity, having held tortious remedies were unavailable.[67] Some lower courts have been more ready to recognise and apply protection for individual privacy on the basis of *Lenah*,[68] but the precedential value of these judgments is low, and they are not indicative of a judicial trend towards recognising a common law tort of interference with privacy.

Given the refusal of appellate courts to recognise a stand-alone tort of interference with privacy when the opportunity has arisen, it may be that waiting for a legal remedy to be recognised as well as developed by the courts does more harm than good, and that Parliament should act to compel the courts into action where appropriate cases arise.

If, as I believe, the main justification for legislative action is judicial inaction, and not a lack of legitimacy or means at common law, then any statutory tort of interference with privacy, if enacted, should not be overly prescriptive. Its primary purpose should be to activate the courts in providing remedies in appropriate cases, rather than dictating to courts in precise terms the substantive contours of the protected interest.

Any such tort should, therefore, make actionable an 'interference with an individual's reasonable expectation of privacy'.[69] This would then allow the courts to develop incrementally an objective but normatively-informed threshold for legal privacy protection. A 'reasonable expectation' framing is preferable because it opens the Australian courts to the experiences of other comparable jurisdictions, including England and Wales, New Zealand, Canada and the United States: more or less all of these jurisdictions have adopted the 'reasonable expectation' threshold, and it would be of great value to Australian courts to be able to adopt, where appropriate, already established principles as to how to determine what is a reasonable expectation of privacy and what is not a reasonable expectation of privacy.

The experience in other jurisdictions demonstrates that the boundaries of a legal interest in privacy depend largely upon context and contemporary socio-moral standards, which inform the objective standard of reasonableness. This holistic test has been adopted in both informational and physical privacy torts, and interpreted to account for current understandings of privacy as well as the context of the particular case.[70] Indeed, Chief Justice Gleeson in *Lenah* preferred a reasonability standard

[65] *Smethurst v Police Commissioner* [2020] HCA 14, [48], [86], [129]. *Smethurst* did not concern a putative privacy tort: [46], [129], [244].
[66] As to this complexity, see, for example: DJ Solove, 'Conceptualising Privacy' (2002) 90 California Law Review 1087; DJ Solove, 'A Taxonomy of Privacy' (2005) 154 University of Pennsylvania Law Review 477.
[67] *Giller v Procopets* [2008] VSCA 236, [167]-[168]. *Wilson v Ferguson* [2015] WASC 15, [76]-[85]. The Supreme Court of Victoria in *Giller* reasoned as much even more emphatically: [2004] VSC 113, [187]-[189], and this was applied in *Kalaba v Commonwealth* [2004] FCA 763, [6].
[68] *Jane Doe v ABC* [2007] VCC 281 and *Grosse v Purvis* [2003] QDC 151; the Court in *Kalaba* noted *Grosse* but declined to apply it.
[69] I discuss the matter of defences in my answer to Question 61, below.
[70] *Hosking v Runting* [2005] 1 NZLR 1, [117]; *Murray v Big Pictures Ltd* [2008] 3 WLR 1360, [36]; *C v Holland* [2012] 3 NZLR 672, [94]; *R v Jarvis* [2019] SCC 10 (where the SSC construed 'reasonable expectation of privacy' under voyeurism legislation, holding it could obtain in public places including schools).

to delineate liability for interference with privacy,[71] which was echoed in Professor Butler's vision for an Australian privacy tort following *Lenah*,[72] and recommended by the Australian Law Reform Commission in 2014.[73]

It is true that identifying a reasonable expectation of privacy is not straightforward,[74] and demands enhanced judicial engagement with the normative underpinnings of individual privacy. That is, however, no reason to refrain from adopting such a formulation, especially given that courts routinely deal with the principle of 'reasonableness' *vis-à-vis* other interests protected by torts,[75] and also given that it has been through that principle of 'reasonableness' that privacy torts have developed in comparable jurisdictions.

'Reasonable expectation of privacy' is an appropriate answer to the basic need in tort law to identify the claimant's interest, with which the defendant is alleged to have interfered. That is why any new statutory tort of interference with privacy should be framed in those terms.

I comment further below, in my answers to Questions 59 and 61, on whether any new tort of interference with privacy should have an explicit 'offensiveness' threshold, and an explicit 'public interest' condition.

D. Conclusion

In summary, for the reasons I have set out above, I believe there is a need for a separate, stand-alone tort of interference with privacy in Australia, and, if there continues to be judicial inaction in recognising such a tort, statutory intervention may be appropriate.

[71] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42].
[72] D Butler, 'A Tort of Invasion of Privacy in Australia' (2005) 29 MULR 339, 373.
[73] Australian Law Reform Commission, 'Serious Invasions of Privacy in the Digital Era, Final Report' (n 8), recommendation 6-1.
[74] Moreham, 'Unpacking the Reasonable Expectation of Privacy Test' (n 5); E Barendt, '"A Reasonable Expectation of Privacy"' in AT Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP 2016).
[75] For example: the exception to **battery** based upon "contact which is generally acceptable in the ordinary conduct of daily life" is defined by reference to "the exigencies of daily life" and according to context: *Collins v Wilcock* [1984] 1 WLR 1172, 1177-1178; *Rixon v Star City Pty Ltd* (2001) 53 NSWLR 98, 114; **assault** requires a reasonable apprehension of imminent harmful contact, though it remains unsettled how literally and narrowly "imminence" should be defined: see *Zanker v Vartzokas* (1988) 34 A Crim R 11, 14, 16, and *R v Gabriel* (2004) 182 FLR 102, [129]; total restraint, without reasonable means of egress, is elemental to liability for **false imprisonment**, though it is also unclear how far this depends upon the claimant's predispositions or external policy factors: see *McFadzean v CFMEU* (2007) 20 VR 250, and *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331, [307]; in **defamation**, at least in the United Kingdom, the scope of the "serious harm" threshold (which *is* a legislative standard, and is soon to be enacted in Australian jurisdictions) has taken time to crystallise: see: *Jameel v Dow Jones* [2005] QB 96, *Thornton v TMG* [2010] EWHC 1414, *Cooke v MGN Ltd* [2014] EWHC 2831, *Ames v Spamhaus* [2015] EWHC 127, *Lachaux v Independent Print* [2015] EWHC 2242, *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1334, and, finally, *Lachaux v Independent Print Ltd* [2019] UKSC 27), and the issue of distinguishing between fact and opinion remains partly a question of context, rather than one of strict verifiability: see *BCA v Singh* [2011] 1 WLR 133, rejecting the verifiability standard upheld by Eady J at first instance ([2009] EWHC 1101), and *Butt v SS Home Department* [2017] EWHC 2619, *Zarb-Cousin v Association of British Bookmakers* [2018] EWHC 2240, and *Morgan v Associated Newspapers Ltd* [2018] EWHC 1850; more broadly, in **negligence**, courts are constantly asked to make complex, moral decisions on whether particular harms should be actionable, even where legislation might set a broad standard: see, for example, *Civil Liability Act 2002 (NSW)*, ss 5C and 5D, and judicial reasoning about the policy implications of imposing tortious liability upon medical professionals for 'wrongful conception', namely, damage or loss suffered by parents from the birth of their children resulting from a failed medical procedure which was intended to prevent conception: *McFarlane v Tayside Health Board* [2000] 2 AC 59 (HL), and *Cattanach v Melchior* [2003] HCA 38.

Question 58. Should serious invasions of privacy be addressed through the criminal law or through a statutory tort?

Answer: they should be addressed through both, where appropriate; using criminal law does not negate the need for a tort.

For the reasons discussed above, tort law is the most appropriate legal mechanism for protecting and vindicating an individual's reasonable expectation of privacy.

There may, in principle, be interferences with privacy that are so egregious in their nature or degree, or so aggravating in their effect on the victim, as to warrant criminalisation. For example, revenge pornography might warrant criminalisation on the basis that it is one of the most serious and damaging instances of misuse of private information.

In Australia, this form of serious interference with privacy has been addressed by the *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018* (Cth) and the amendments to various Commonwealth and state criminal legislation, as acknowledged in the Issues Paper. There may be scope in the future to criminalise equally egregious acts of interference with privacy, especially if they are cyber-acts that are better tracked and remedied through law enforcement agencies than through civil litigation.

However, any current or future potential criminalisation of serious privacy interferences does not detract from the need for a civil action, a tort, which recognises and protects individual privacy in the ways discussed in answer to Question 59, below. The development of criminal laws does *not* negate the need for a tort of interference privacy, on a policy basis.

Criminal law sanctions can only apply to the most serious interferences with privacy; they require prosecution and a higher standard of proof; and they do not provide a natural avenue for individuals to seek civil redress for wrongs which they have suffered. In whichever way the criminal law might be deployed to address serious interferences, it should not be to the exclusion of a tort addressing interferences with a reasonable expectation of privacy that are not so serious as to warrant criminal sanction.

For example, the taking and sharing of anodyne but private images of children without their (or their parents') consent is a category of interference with privacy which would warrant legal redress (and has received as much in comparable jurisdictions, including England and Wales),[76] but would not warrant criminal sanction. Likewise, the publication of private or intimate facts about an individual in the news media (as may occur in 'kiss-and-tell' stories),[77] although it could amount to an interference warranting legal redress, should not be criminalised: that would place too heavy a burden on media freedoms and the freedom of individuals to share their own private stories.

Although such freedoms might, in the circumstances, justifiably be curtailed in the civil courts, they should not be subjected to the risk of criminal sanction.

The criminalisation of serious interferences with privacy, therefore, does not eliminate the need for the protection of privacy, as such, through civil law, and, specifically, tort law.

[76] For example, *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554; *Murray v Big Pictures Ltd* [2008] 3 WLR 1360 (CA); and *Weller v Associated Newspapers Ltd* [2015] EWCA Civ 1176.
[77] For example, *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB); *A v B plc (Flitcroft v MGN Ltd)* [2002] 2 All ER 545; and *Ferdinand v MGN* [2011] EWHC 2454 (QB).

Question 59. What types of invasions of privacy should be covered by a statutory tort?

Answer: both physical intrusion and misuse of private information; and any statutory tort should not be limited to 'offensive' or 'serious' interferences.

A. Both physical and informational privacy

A new tort of interference with privacy could include interference with informational privacy only (such as misuse of private information), or interference with physical privacy only (such as intrusion upon seclusion), or both of these (either in a single tort of interference with privacy,[78] or in two separate but related torts of interference with informational privacy and interference with physical privacy).[79] The High Court in *Lenah* did not express a preference for which option a future tort might encompass.

Any new statutory tort of interference with privacy should allow the courts to recognise *both* physical *and* informational privacy. There is a growing acknowledgement that there is no normative or principled basis for protecting informational privacy in law, but not also protecting physical privacy.[80]

The legislative framing of any new tort in Australia should be clear that 'interference' includes 'misuse of private information' and 'intrusion upon physical seclusion'. There is no reason to enact a new tort of interference with privacy, and to limit the protected interest of 'reasonable expectation of privacy' to either informational or physical privacy, and not include the other.

Both physical and informational privacy embody the normative understanding that privacy serves to protect individual dignity, autonomy and liberty, by shielding the individual from unwanted and unreasonable observation or access by others. The loss of control entailed in an unwanted and unreasonable access to a private space is of the same nature and involves the same harm as is that entailed in an unwanted and unreasonable access to (and publication of) private information. Indeed, of the two judgments where Australian courts have recognised and vindicated an individual's privacy interest, one concerned interference with informational privacy (publication of a victim's suppressed name),[81] and one concerned interference with physical privacy (in the nature of stalking).[82]

In addition to any new statutory tort covering *both* physical *and* informational privacy, such a tort should be *limited to* informational and physical privacy, and should not extend to other forms of 'privacy' protection, as recognised elsewhere: for example, the tort of misappropriation of name or likeness in the United States,[83] and the tort of publicity placing a person in false light also in some states of the United States,[84] and, recently, in Ontario.[85]

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[78] As recommended in: Australian Law Reform Commission, 'Serious Invasions of Privacy in the Digital Era, Final Report' (n 8) 89.

[79] Moreham has argued the reasons for protecting informational privacy are essentially the same as for protecting physical privacy, so that common law should, having recognised an informational privacy right, also recognise a physical privacy right: NA Moreham, 'Beyond Information' (2014) 73 *CLJ* 350.

[80] ibid; P Wragg, 'Privacy and the Emergent Intrusion Doctrine' (2017) 9 JML 14; P Wragg, 'Recognising a Privacy-Invasion Tort' (2019) 78 CLJ 409.

[81] *Jane Doe v ABC* [2007] VCC 281.

[82] *Grosse v Purvis* [2003] QDC 151.

[83] American Law Institute *Second Restatement of the Law, Torts* (1977), §652C.

[84] American Law Institute *Second Restatement of the Law, Torts* (1977), §652E. For example, the tort has been recognised in California: *McClatchy Newspapers v Superior Court* 189 Cal App 3rd 961, 234 Cal Rptr 702 (1987); but the courts in several states have confirmed it is not part of the common law of that state, the first to do so being North Carolina: *Renwick v News and Observer* 312 SE 2d 405, 10 Med L Rptr 1443 (NC 1984).

[85] *Yenovkian v Gulian* [2019] ONSC 7279.

Unlike these other forms of protection, physical and informational privacy are most closely connected with the normative reasons as to why privacy should be protected. This much was acknowledged by Justices Gummow and Hayne in *Lenah*, who drew upon the dicta of the English and Welsh courts to reason that "the disclosure of private facts and unreasonable intrusion upon seclusion, perhaps come closest to reflecting a concern for privacy 'as a legal principle drawn from the fundamental value of personal autonomy'".[86]

This is also consistent with Professor Butler's proposals for two Australian privacy torts covering informational and physical privacy,[87] and with the Australian Law Reform Commission's recommendations for a new tort of interference with privacy: "intrusion upon seclusion" and "misuse of private information".[88]

At least one, and sometimes both, of these two forms of privacy interference – physical and informational – has been addressed in all comparable common law jurisdictions: New Zealand has a tort of wrongful publication of private facts[89] and a tort of intrusion into seclusion.[90] The English and Welsh jurisdiction has a tort of misuse of private information.[91] Canadian courts of different state jurisdictions have differing views about common law privacy torts standing independent of constitutional and legislative provisions,[92] but Ontario has recognised a tort of intrusion on seclusion[93] and a tort of wrongful publication of private facts.[94] The United States privacy torts include a tort of giving publicity to private life, and a tort of intrusion upon seclusion.[95]

The other forms of 'privacy' interference are more remotely, if at all, connected with the normative underpinnings of privacy developed in the scholarship and acknowledged by the courts in Australia and overseas. This is especially given that the dominant underpinning of the misappropriation of likeness tort is protection of *commercial*, rather than dignitary, interests,[96] and that the dominant concern of the false light tort is how an individual is *portrayed* (akin to interests protected in the tort of defamation), as opposed to how well an individual controls *access* to her private life.[97] Accordingly, accommodation of these forms of privacy protection are not as widely spread across comparable jurisdictions.[98]

B. Offensiveness threshold and defendant's conduct

Aside from the question of whether a privacy tort should cover both or either of the informational and physical dimensions of an individual's interest in privacy, there may be an issue of whether

[86] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [125]-[126], quoting *Douglas v Hello!* [2001] QB 967.
[87] Butler (n 72) 373–375.
[88] Australian Law Reform Commission, 'Serious Invasions of Privacy in the Digital Era, Final Report' (n 8), recommendation 5-1.
[89] *Hosking v Runting* [2005] 1 NZLR 1.
[90] *C v Holland* [2012] 3 NZLR 672.
[91] *Campbell v MGN* [2004] 2 AC 257; *Vidal-Hall v Google* [2015] 3 WLR 409*; PJS v NGN* [2016] AC 1081. The Supreme Court has acknowledged the intrusive nature of the harm involved in interference with privacy (*PJS*, [58]-[60]), but it is unclear whether this will extend to liability beyond misuse of private information, especially in view of a House of Lords ruling against the existence of a general intrusion tort: *Wainwright v Home Office* [2004] 2 AC 406. Cf: Wragg, 'Privacy and the Emergent Intrusion Doctrine' (n 80); Wragg, 'Recognising a Privacy-Invasion Tort' (n 80).
[92] In Canada, privacy is also protected in the Charter of Rights and Freedoms, as well as in legislation. Doubts were expressed in, for example, *Hung v Gardiner* [2002] BCSC 1234, [110], *Bingo Enterprises Ltd v Plaxton* (1986) 26 DLR (4th) 604, Man CA, [17], [22], and *Euteneier v Lee* (2005) 260 DLR (4th) 145, [63]; while the position was left open in: *Savik Enterprises v Nunavut (Commissioner)* [2004] NUCJ 4, and *Somwar v McDonalds Restaurants of Canada Ltd* (2006) 263 DLR (4th) 752, [22], [31].
[93] *Jones v Tsige* [2012] ONCA 3.
[94] *Jane Doe 464533 v D* [2016] ONSC 541.
[95] American Law Institute *Second Restatement of the Law, Torts* (1977), §652D and §652B, respectively.
[96] 'Right of privacy and publicity' *Corpus Juris Secundum* (1994), vol 77, 539, [40].
[97] *Godbehere v Phoenix Newspapers Inc*, 162 Ariz 225, 783 P2d 781 (1990).
[98] The two torts are recognised only in some states of the United States, and in Ontario in Canada, but not in New Zealand or England and Wales.

that tort recognises only those types of interference that are sufficiently offensive or serious. That is, the tort may only cover interferences where the defendant has acted in a particular way or to a particular standard of wrongfulness, which is built into the tort.

In England and Wales, while it suffices to show publication of information for which there was a reasonable expectation of privacy without any additional requirements,[99] the tort's second stage, which involves an "ultimate balancing test" between the claimant's privacy and the defendant's freedom of expression,[100] may involve consideration of the defendant's conduct.[101] In other jurisdictions, claimants must prove the interference was "highly offensive" to a reasonable person, either relating to the private matter or to the nature of the interference.[102]

Australian judicial opinion (in those few cases where the courts have entertained a privacy tort or stand-alone privacy cause of action),[103] the Australian Law Reform Commission,[104] and some scholarly opinion,[105] favour inclusion of either that additional requirement or a seriousness threshold. In *Lenah,* Chief Justice Gleeson also preferred that standard.[106] Such an additional threshold is considered necessary to constraining the tort within discernible limits, preventing potential over-reach.

There are good reasons, however, for not limiting any new tort to only 'serious' or 'highly offensive' interferences with privacy.

The problem with a 'highly offensive interference' requirement is that it departs from privacy's original normative concern: undermining an individual's control over access to his or her private life. Such undermining of autonomy might involve anodyne, objectively *inoffensive* intrusions.[107] The wrongness for which the defendant is responsible is interference *per se*, which itself is an affront to the values underpinning privacy. Reference to offensiveness or seriousness might more appropriately go to questions of whether or not the defendant is entitled to a defence.[108]

Doubts along these lines were expressed in the New Zealand Supreme Court *vis-à-vis* the desirability of the 'highly offensive' requirement,[109] which doubts were apparent even in Justice Tipping's majority judgment in *Hosking* itself.[110]

Any new statutory tort of interference with privacy should, therefore, not be limited to 'highly offensive' or 'serious' interferences. The standard of 'reasonable expectation' should be determinative.

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[99] *Campbell v MGN* [2004] 2 AC 257, 466, 482, 495, 504.
[100] *Re S (A Child)* [2005] 1 AC 593, [17]; *PJS v NGN* [2016] AC 1081, [78].
[101] Especially in respect of media defendants, for example, *Richard v BBC* [2018] 3 WLR 1715, [290]-[315], applying Strasbourg jurisprudence to the effect that the defendant's conduct is relevant to the 'balancing' stage: *Axel Springer v Germany* [2012] EMLR 15, [93].
[102] *Hosking v Runting* [2005] 1 NZLR 1,[117]; *C v Holland* [2012] 3 NZLR 672, [94]; *Jane Doe 464533 v D* [2016] ONSC 541, [46]; *Jones v Tsige* [2012] ONCA 3, [70]-[71], [72]; American Law Institute *Second Restatement of the Law, Torts* (1977), §652A, §652B, §652D.
[103] *Grosse v Purvis* [2003] QDC 151, [442]-[444] (reasoning that offensiveness related to manner of intrusion); *Jane Doe v ABC* [2007] VCC 281, [118] (reasoning that offensiveness related to *either* manner of intrusion *or* nature of private information).
[104] Australian Law Reform Commission, 'Serious Invasions of Privacy in the Digital Era, Final Report' (n 8), recommendation 8-1.
[105] Butler (n 72); Barendt (n 74). Barendt has also argued in this chapter there must be a 'seriousness' threshold for privacy, given the 'reasonable expectation' test, on his view, insufficiently constrains liability in privacy.
[106] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42].
[107] For example, *Murray v Big Pictures Ltd* [2008] 3 WLR 1360, where the intrusion was publication of anodyne photographs of the infant claimant while in a family outing in public. In *Murray*, [48], the EWCA declined to adopt the NZCA's approach in *Hosking v Runting* [2005] 1 NZLR 1 to include a 'highly offensive' requirement.
[108] As Lord Nicholls reasoned in *Campbell v MGN* [2004] 2 AC 257, [21]-[22].
[109] *Rogers v TVNZ* [2008] 2 NZLR 277, [23]-[25], per Elias CJ.
[110] *Hosking v Runting* [2005] 1 NZLR 1, [256].

Question 60. Should a statutory tort of privacy apply only to intentional, reckless invasions of privacy or should it also apply to breaches of privacy as a result of negligence or gross negligence?

Answer: any new tort should be actionable per se*, not requiring proof of actual (consequential) damage, but requiring proof of intention.*

The issue of whether any new tort should be intentional (and reckless), or negligent, and whether it should require proof of actual damage, are important issues. The Australian Law Reform Commission has previously recommended intention and recklessness.[111] As to proof of damage, the Commission recommended there be no requirement to prove actual damage.[112] I agree with this position.

In *Grosse* and *Jane Doe*, the Courts required proof of actual damage: mental, emotional or psychological harm or distress.[113] Professor Butler recommended a requirement for proof of such harm in a tort of interference with informational privacy.[114] In England and Wales, the tort of misuse of private information is actionable *per se*, requiring *no* proof of actual damage, whether material or psychological,[115] and the same applies in New Zealand.[116]

In formulating a privacy tort, it must be borne in mind that Australian tort law distinguishes between trespass, which is actionable *per se*, and an action on the case, which requires proof of damage, based upon whether the harm that is actionable is *direct* (trespass) or *consequential* (case).[117] This is different from the position in England and Wales, where that distinction is based upon whether the conduct is *intentional* (trespass) or *negligent* (case).[118]

Further, it is also the case in Australia that, where a tort is based upon negligence, it would require proof of recognisable psychiatric injury.[119]

Although this doctrinal position does not bind Parliament in its enactment of any future statutory tort of interference with privacy, any such new tort ought to be consistent with that established doctrine.

If Australia were to adopt the English and Welsh or the New Zealand approach of having a privacy tort based upon *indirect* injury (liability for acts *resulting in* interference with privacy), that would require proof of actual damage, which is not the requirement in England and New Zealand. If a new Australian tort were to require proof of *intention*, as *is* the case in England and New Zealand, proving emotional distress would suffice for damage, rather than the higher standard of actual psychiatric injury.

Having noted that doctrinal dynamic, it is also important to advert to the nature of the harm involved in a privacy interference, and the purpose of protecting privacy as a normative value. It may be most appropriate to understand an interference with privacy being the harmful act, in and of itself,

[111] Australian Law Reform Commission, 'Serious Invasions of Privacy in the Digital Era, Final Report' (n 8), recommendation 7-1. also recommended by: NSW Standing Committee on Law and Justice (n 8) 71.
[112] Australian Law Reform Commission, 'Serious Invasions of Privacy in the Digital Era, Final Report' (n 8), recommendations 8-1, 8-2.
[113] *Grosse v Purvis* [2003] QDC 151, 187; *Jane Doe v ABC* [2007] VCC 281, [172]-[184].
[114] Butler (n 72) 375.
[115] *Campbell v MGN* [2004] 2 AC 257; *Gulati v MGN* [2015] EWHC 1482 (Ch), [108]-[127], where Mann J held privacy damages should be awarded to reflect infringement of claimants' privacy rights, as well as compensate claimants for injury to their feelings, resulting from phone-hacking.
[116] *Hosking v Runting* [2005] 1 NZLR 1*,* [35].
[117] *Platt v Nutt* (1988) 12 NSWLR 231; *Hutchins v Maughan* [1947] VLR 13. See also Butler (n 72) 360.
[118] *Fowler v Lanning* [1959]1 QB 426.
[119] *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; *Civil Liability Act 2002* (NSW), s 31; *Wrongs Act 1958* (Vic), s 72.

rather than the result of a harmful act. In this sense the harm or the wrong would lie in the interference itself, and not be conditional on there being harmful consequences (such as psychological injury or financial loss).

It has been argued that remedies for torts that are actionable *per se*, including trespass and defamation, are essentially vindicatory remedies, targeted at the wrongful interference with the protected interest, rather than at any actionable consequential harm.[120] If it is accepted that privacy stands for the protection of individual dignity, autonomy and liberty, and that it is lost at the point when there is an interference with privacy, in spite of the actual consequences, then the wrongness of an interference with privacy is likewise inherent in the interference itself, calling for a vindicatory remedy.

On that reasoning, a new Australian privacy tort would be based on a *direct* harm (unlike the position in England and Wales and in New Zealand). That would require a claimant to prove an interference occurred with his or her reasonable expectation of privacy, and nothing further: the tort would be actionable *per se*.

Although there is no requirement in Australia (as there would be in England and Wales) that such a tort be intentional, it may be preferable to have an intention requirement within that tort, as a way of placing some boundaries on the new form of liability created (raising the bar for a claimant who does not need to prove actual damage), and as a way of confirming that there is no need to prove actual psychiatric injury (as would be the case with a negligence tort).

As with all intentional trespass torts, this combination would require proof of intention to interfere with a reasonable expectation of privacy, rather than malice or an intention to hurt the claimant, and irrespective of the consequences of the interference.

A new privacy tort, therefore, might best take the form of a tort that is actionable *per se* requiring no proof of actual damage (because the harm is direct and not consequential), and requiring proof of intention.

[120] JE Varuhas, *Damages and Human Rights* (Hart 2016) ch 3.

61. How should a statutory tort for serious invasions of privacy be balanced with competing public interests?

Answer: some competing interests will be accounted for in determining whether there was a reasonable expectation of privacy; others should be accounted for in a set of traditional defences to tort actions; and the implied constitutional freedom of political communication should be accounted for in a specific defence of political communication.

A. The place of 'public interests'

It is important to recognise that a tort of interference with privacy is an acknowledgement that privacy is an interest – even a right – that is worthy of specific legal protection, and that incursions on that interest or right will result in a legal remedy.

The same cannot be said for the sundry public interests that might be competing with privacy protection. The very act of elevating privacy to the status of a legally protected interest, through a tort of interference with privacy, entails an admission that privacy is *superior* to some public interests which might compete with it in various circumstances.

B. The 'reasonable expectation' threshold

That is not to say, however, that legal protection of privacy is all-encompassing and absolute. The threshold test of 'reasonable expectation of privacy' provides a scoping exercise which can ensure that privacy protection does not tread on certain public interests, to which an individual's privacy interest or right can never be superior, as a matter of principle and in accordance with the normative understanding of privacy.

For example, there can be no reasonable expectation of privacy in the investigation of crime or fraud, so as to inhibit the process of investigation or law enforcement. Likewise, there can be no reasonable expectation of privacy if a judge has already decided in a particular case that a name or a document will not be suppressed, or proceedings will not be closed, in the name of open justice or an individual's right to a fair trial.

A new privacy tort is not intended to disrupt established principles of law that determine in any particular case the extent of law enforcement powers, or the extent of publicity in judicial proceedings. The values of individual dignity, autonomy and liberty, which underpin an individual's interest in privacy, are not absolute rights, and any new privacy tort must reflect that. Those values have long been acknowledged as limited in the context of law enforcement and adjudication.

It is not within the normative understanding of privacy that legal protection of privacy expands the remit of individual dignity, autonomy and liberty, where these values have previously been accepted to be limited.

Therefore, the initial threshold of 'reasonable expectation of privacy' will appropriately account for those public interests which might, at first blush, be considered to compete with privacy.

C. Defences to actions in tort

If, in any particular case, there is a reasonable expectation of privacy, and if there has been an interference with it, then other public interests can be accounted for through a set of classic defences to tort actions.

These include consent, necessity (which could include public health and safety, and national security), legal authorisation, and self-defence, as well as defences of privilege applicable to defamation (which could to some extent cover freedom of expression, journalistic activities, and the administration of government).

Indeed, the Australian Law Reform Commission recommended all of these classic defences be enacted with a new privacy tort.[121] Professor Butler also recommended such defences, and discussed comprehensively how existing defences, especially those to the tort of defamation, could be adapted to a privacy tort.[122] I agree with this approach, and believe it is an appropriate and satisfactory way of accounting for competing public interests.

D. Balancing 'public interests' and accounting for freedom of political communication

Aside from the public interests that will be accounted for in the 'reasonable expectation' test and in the defences, any new privacy tort must be able to constrain the potential of privacy protection to interfere with freedom of political communication.[123]

The Constitution precludes illegitimate curtailment of this freedom.[124] Any new tort must, therefore, do more than recognise freedom of political communication as "a mere balancing factor in a discretionary judgment as to the preferred outcome in a particular case, to be given such weight as to a court seems fit".[125]

The Australian Law Reform Commission recommended a new privacy tort include within its elements the requirement that "the public interest in privacy outweighs any countervailing public interest", which would encompass "freedom of expression, including political communication and artistic expression", so that no separate freedom of expression defence would be necessary.[126]

This construction of the tort as being conditional upon 'public interests', and as protecting privacy as a mere 'public interest' itself rather than a concrete, elevated interest belonging to the individual claimant in question, hollows out the purpose and principle of protecting privacy in tort law: it renders not only the freedom of political communication, but also the value of privacy itself, a "mere balancing factor in a discretionary judgment".[127]

This reference to 'public interest', as opposed to freedom of political communication in particular, reflects breach of confidence jurisprudence, which in England and Wales includes a defence of public interest,[128] and it also reflects the way in which English and Welsh courts have in the past construed that action to cater for privacy protection.[129]

A tort of interference with privacy as contemplated in *Lenah* (like the actions recognised in *Grosse* and *Jane Doe*) does not include such an element based upon 'public interest', and, importantly, is

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[121] Australian Law Reform Commission, 'Serious Invasions of Privacy in the Digital Era, Final Report' (n 8), recommendation 11.
[122] Butler (n 72) 377–388.
[123] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [20].
[124] *Lange v ABC* (1997) 189 CLR 520, 560.
[125] *Lange v ABC* (1997) 189 CLR 520, 562-567; *Levy v Victoria* (1997) 189 CLR 579, 622, 647; *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [20], [140].
[126] Australian Law Reform Commission, 'Serious Invasions of Privacy in the Digital Era, Final Report' (n 8), recommendation 9.
[127] *Lange v ABC* (1997) 189 CLR 520, 560.
[128] In England and Wales: *Lion Laboratories v Evans* [1984] 1 QB 530. In Australia the courts have, rightly in my view, hesitated to adopt a 'public interest' defence: see, for example, *Smith Kline & French v Department of Community Services and Health* (1990) 95 ALR 87, 125 per Gummow J.
[129] For example, *Campbell v MGN* [2004] 2 AC 257, [101]-[113], [116].

not restricted by breach of confidence doctrine, as were the English and Welsh courts in developing a common law privacy action.

Further, the High Court has accounted for freedom of political communication in defamation law by developing the defence of qualified privilege, rather than adding a novel element to that tort.[130]

In the New Zealand tort of wrongful publication of private facts, freedom of expression[131] is accounted for in the defence of legitimate public concern.[132] In Professor Butler's vision of an Australian privacy tort, freedom of political communication is similarly accounted for in defences to the tort, rather than within its elements.[133]

The Australian Law Reform Commission, however, preferred to adjust the very elements of the tort, and proposed the defendant bear the burden of proving a public interest, and the claimant bear the burden of proving that the public interest in privacy outweighs it. This is not the same as a stand-alone defence explicitly protecting freedom of political communication, as a matter separate from and subsequent to establishing liability for privacy interference.

The better route for a new Australian tort – the route more in line with the purposes and doctrine of tort law *and* the normative underpinnings of privacy – is to recognise such a stand-alone defence, and not to condition the very tort upon the absence of a countervailing public interest (or the strength of the 'public interest' in upholding privacy).

Torts do not typically include in their elements the public interests which might count against liability, unless such public interests can be construed within the concept of licence given by the claimant for the interference.[134] That would not be a plausible construction of licence in the context of a privacy tort, because the very core of privacy is that control of access (to private information or physical privacy) is reserved for the claimant.

Further, the existing tort which imposes liability for wrongful publication of information, defamation, provides for public interests in freedom of expression primarily through defences, rather than through its elements; for example, honest opinion, absolute and qualified privilege, and truth.

As to the normative value of privacy, it would be inconsistent with the principles of dignity, autonomy and liberty to *condition* a claim in interference with privacy on the absence of public interests entirely external to, and often at odds with, the very values of individual dignity, autonomy and liberty. The generally accepted and established limits of those values would, as discussed above, be incorporated in the 'reasonable expectation of privacy' threshold test.

Reducing a tort of interference with privacy to a 'balancing' of competing public interests would, therefore, be a *reductio ad nihilum* for privacy protection, as well as an insufficiently clear provision for the protection of an implied constitutional freedom.

A stand-alone defence of political communication would preserve the normative core of privacy protection, and also provide courts with a more distinct doctrinal space within which to apply existing jurisprudence on that constitutional freedom, namely, proportionality analysis.[135]

[130] *Lange v ABC* (1997) 189 CLR 520.
[131] A codified, statutory right in the *New Zealand Bill of Rights Act 1990,* s 14, but qualified on the basis of proportionate interferences.
[132] *Hosking v Runting* [2005] 1 NZLR 1.
[133] Butler (n 72) 378–379.
[134] For example, implied licence defeats a claim in trespass to land: *Halliday v Nevill* (1984) 155 CLR 1.
[135] Especially *McCloy v NSW* (2015) 257 CLR 178 and *Clubb v Edwards* [2019] HCA 11.

Such a specific defence would more effectively and more transparently concentrate the development of jurisprudence on the implied constitutional freedom of political communication, consistently with the requirements of the Constitution, than would be the case pursuant to a general defence of freedom of expression, or of public interest; such broader defences are not conceptually or normatively tethered to the specific implied constitutional freedom of political communication,[136] as it has been delineated thus far by the courts.

The other 'public interests' listed by the Australian Law Reform Commission in addition to political communication, including press freedom and artistic expression, could be provided for in specific separate defences, or encompassed within the defences of necessity or privilege. The primary concern, in terms of conformity with the Constitution, is that there be a particular, separate defence explicitly for political communication, which the courts would then apply in accordance with the jurisprudence on the implied constitutional freedom of political communication.

In accordance with the High Court's reasoning in *McCloy* and *Clubb*, a particular defence of political communication would first require the defendant to prove the remedy or relief sought by the claimant effectively burdens the freedom of political communication (the first question in the *McCloy* test). This is the threshold question determining whether the defendant is entitled to rely upon the constitutional freedom in answer to a tort claim.

Given the freedom is not absolute, the claimant would have the opportunity to defeat it, in accordance with the remaining two questions in the *McCloy* test. Thus, the claimant would have to prove the remedy or relief is legitimate in the sense of being compatible with the maintenance of the constitutionally prescribed system of representative and responsible government (the second question in the *McCloy* test).

If it is so legitimate, the claimant would then have to prove the remedy or relief is reasonably appropriate and adapted to advance the claimant's interest in privacy in a manner compatible with the maintenance of representative and responsible government (the third question in the *McCloy* test, as adapted to a privacy tort). The reversal of onus onto the claimant is not anathema to defences in tort law: similar opportunities to defeat a defence arise in the qualified privilege defence in defamation,[137] and consent in medical contexts.[138]

The 'legitimacy' question requires engagement with the purposes of protecting privacy, as confirmed by Chief Justice Kiefel, and Justices Bell and Keane in *Clubb*, which involved the privacy interests of individuals seeking to access abortion clinics: "[p]rivacy and dignity are closely linked…[and] [h]uman dignity regards a human being as an end, not as a means to achieve the ends of others".[139]

It would extend this proposition beyond its limits to interpret it as holding that *every* privacy-protective law (including tortious remedies) are legitimate; not all privacy interferences will be of the nature of protesting outside abortion clinics, which interferes with the privacy of "persons attending to a private health issue, while in a vulnerable state by reason of that issue", so as to "cause them to eschew the medical advice and assistance that they would otherwise be disposed to seek and obtain", thereby preventing "the exercise of healthcare choices available under laws

[136] See, again, Gummow J's critical comments on judicial adoption of 'public interest', in *Smith Kline & French v Department of Community Services and Health* (1990) 95 ALR 87, 125.
[137] Defeasible by proof of malice.
[138] Where consent is presumed due to incapacity, the claimant may still rebut that presumption with proof to the contrary.
[139] *Clubb v Edwards* [2019] HCA 11, [49]-[51], citing *Monis v The Queen* (2013) 249 CLR 92, [247], which in turn was quoting A Barak *The Judge in a Democracy* (2006), 85.

made by the Parliament".[140] Therefore, the claimant in an action for interference with privacy would have to address this question on the facts of the particular case.

If the claimant proves that the particular remedy or relief sought *is* legitimate, the final question would be answered by applying a proportionality analysis in accordance with *Clubb*.[141]

Crucially, this analysis does not involve an abstract balancing of different policies or public interests; it involves determining whether the remedy or relief "imposes a burden on the implied freedom which is manifestly excessive by comparison to the demands of the legitimate purpose."[142]

That involves testing the rationality, suitability, and necessity[143] of the particular remedy or relief sought as against the purpose of protecting and vindicating the particular privacy interest, and determining the purpose of that remedy or relief outweighs the intensity of the burden on the implied freedom.[144]

There should, therefore, be a specific defence of political communication to any new statutory tort of interference with privacy, and it should follow the principles already developed by the High Court in judgments concerning the limits of that implied constitutional freedom. Any new tort should not account for that implied freedom by reference to generic 'public interests'.

More broadly, any new tort should not be subject to or conditioned on an amorphous 'balancing' of 'public interests'. Competing interests can appropriately be accounted for in the 'reasonable expectation' threshold test, and in the set of distinct defences to the privacy action.

[140] *Clubb v Edwards* [2019] HCA 11, [59]-[60].
[141] *Clubb v Edwards* [2019] HCA 11, [64]-[102].
[142] *Clubb v Edwards* [2019] HCA 11, [69].
[143] *Clubb v Edwards* [2019] HCA 11, [84]-[95].
[144] *Clubb v Edwards* [2019] HCA 11, [96]-[99].