# A COMMON LAW TORT OF INTERFERENCE WITH PRIVACY FOR AUSTRALIA: REAFFIRMING *ABC V LENAH GAME MEATS*

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*When the High Court decided Australian Broadcasting Corporation v Lenah Meats Pty Ltd ('Lenah') in 2001, it left the door open for a common law tort of interference with privacy. However, privacy claims brought since Lenah have seen courts interpret that judgment restrictively, some holding that tortious remedies are unavailable. The importance of the High Court's decision for the development of privacy protection through tort law should, therefore, be reaffirmed. In addition to the confirmation in Lenah that a tort of interference with privacy is recognisable in Australian common law, there are good reasons why the courts should now recognise this tort. There is a sufficiently strong normative demand that the common law intervene to protect individual privacy, and tort law is the most appropriate mechanism. When courts are presented with privacy cases reflecting that normative demand and fitting within tort law's remedial capacity, they should recognise and apply a tort of interference with privacy.*

## I INTRODUCTION

In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* ('*Lenah*'),[1] the High Court left the door open for a common law tort of interference with privacy. This much was acknowledged recently by the Court in its judgment in *Smethurst v Commissioner of the Australian Federal Police* ('*Smethurst*').[2] *Lenah* confirmed that such a tort may be recognised in Australian common law and applied in appropriate cases. However, privacy claims brought since *Lenah* have seen courts interpret the High Court's judgment restrictively, with some finding themselves unable to recognise actionability, and others deploying equity, having held tortious remedies were unavailable. The importance of the High Court's decision for the development of privacy protection through tort law should, therefore, be reaffirmed.

* ANU College of Law. I would like to thank the anonymous reviewers of this article for their comments and insights, and any remaining errors are my own.

1 (2001) 208 CLR 199 ('*Lenah*').

2 (2020) 94 ALJR 502, 520 [48], 526 [86] (Kiefel CJ, Bell and Keane JJ), 534–5 [129] (Gageler J) ('*Smethurst*'). *Smethurst* did not concern a putative privacy tort: at 520 [46] (Kiefel CJ, Bell and Keane JJ), 534–5 [129] (Gageler J), 588 [244] (Edelman J).

In addition to *Lenah*'s confirmation that a tort of interference with privacy *is* cognisable to Australian common law, there are good reasons why courts *should* now recognise this tort. There is a sufficiently strong normative demand that common law intervene to protect individual privacy, and tort law is the most appropriate mechanism to answer this demand. When courts are presented with cases reflecting that demand and fitting within tort law's capacity to provide remedies, they should recognise and apply a tort of interference with privacy. In *Lenah*, the respondent's circumstances were ill-fitting to activate application and evolution of a common law tort of interference with privacy. This is why the High Court's dismissal of the case represents neither a hindrance to common law liability for interference with privacy nor an aberration from principle that would have permitted such protection. The decision is, rather, a living precedent, foreshadowing the nature and rudimentary scope of a tort of interference with privacy in Australia.

## II *LENAH*: LEAVING THE DOOR OPEN FOR A COMMON LAW TORT OF INTERFERENCE WITH PRIVACY

### A Outcome of *Lenah* and Its Implications

In *Lenah*, the High Court discharged the interim injunction secured by Lenah Game Meats Pty Ltd ('LGM') against the Australian Broadcasting Corporation ('ABC'),[3] given LGM had failed to establish a cause of action against the ABC.[4] LGM had wished to restrain the ABC publishing footage it had obtained, but not itself taken, of operations at LGM's possum processing facility. One of the actions it pleaded was invasion of privacy.[5] Each of the five separate judgments left the common law door open to a tort of interference with privacy, and each contemplated, to varying extents, how a legally cognisable privacy claim might operate, were it to be recognised on different facts.

Whether such a tort *can* be recognised in Australian common law is distinct from whether it *should* be recognised. *Lenah* confirmed that the common law *can* accommodate the tort, as recognised subsequently by scholars,[6] and recently by the High Court.[7] Disagreement remains on whether courts *should* recognise such a common law tort.[8] The distinction between these two questions means the

3 *Lenah* (2001) 208 CLR 199, 231 [56]–[57], 232 [62] (Gaudron J), 259 [139] (Kirby J), 288 [222] (Kirby J), 341 [353] (Callinan J).

4 Ibid 218 [15], 218–20 [17]–[21] (Gleeson CJ), 241–2 [91]–[92], 248 [105] (Gummow and Hayne JJ). Kirby and Callinan JJ rejected the strict requirement for showing a distinct cause of action: 270–1 [167], 276–7 [183]–[184], 309–19 [278]–[305].

5 Ibid 222–3 [30], 225 [38] (Gleeson CJ), 238 [83] (Gummow and Hayne JJ).

6 David Lindsay, 'Protection of Privacy under the General Law Following *ABC v Lenah Game Meats*: Where to Now?' (2002) 9(6) *Privacy Law and Policy Reporter* 101; Des Butler, 'A Tort of Invasion of Privacy in Australia?' (2005) 29(2) *Melbourne University Law Review* 339.

7 *Smethurst* (2020) 94 ALJR 502, 520 [48], 526 [86] (Kiefel CJ, Bell and Keane JJ), 534 [129] (Gageler J).

8 Michael Tilbury, 'Privacy: Common Law or Human Right?' in Normann Witzleb et al (eds), *Emerging Challenges in Privacy Law: Comparative Perspectives* (Cambridge University Press, 2014) 157; Samuel Beswick and William Fotherby, 'The Divergent Paths of Commonwealth Privacy Torts' (2018) 84(2d)

unsettled nature of the latter, normative question (addressed in Part III) does not unsettle the former, doctrinal question, to imply Australian courts are prevented from recognising the tort. *Lenah* confirms such a tort is recognisable in common law (albeit unavailable for LGM).[9] It not only removed obstacles for future recognition of such a common law tort,[10] but, as one Victorian state judge reasoned, can also be seen to have *invited* such recognition where it would be appropriate,[11] by affirming the importance of juridifying such an interest and contemplating the nature of liability for interference with it.

Yet, *Lenah* has subsequently been interpreted by some courts as holding that Australian courts should be reluctant to recognise a common law privacy tort, resulting in actionable interferences with privacy being addressed through equity.[12] Such interpretation of *Lenah* is unduly restrictive. Not only has *Lenah* not been interpreted as an open door to recognising a common law privacy tort on appropriate facts, it has been interpreted as a continuing obstacle to such recognition.[13] Judges have also reasoned that some lower courts' refusal to recognise a common law privacy action after *Lenah* means the 'weight of authority' is against such an action being recognised.[14] This overlooks the superiority of the High Court's confirmation in *Lenah* that the common law can accommodate a privacy tort, on more appropriate facts. This narrowing of *Lenah*'s precedential value, despite reasoning to the contrary in *Lenah* itself,[15] necessitates

*Supreme Court Law Review* 225; Megan Richardson, 'Whither Breach of Confidence: A Right of Privacy for Australia?' (2002) 26(2) *Melbourne University Law Review* 381; Roderick Bagshaw, 'Obstacles on the Path to Privacy Torts' in Peter Birks (ed), *Privacy and Loyalty* (Clarendon Press, 1997) 133.

9 This was reiterated by Kiefel CJ, Bell and Keane JJ in *Smethurst* (2020) 94 ALJR 502, 526 [86].

10 Butler (n 6) 341.

11 *Doe v Australian Broadcasting Corporation* [2007] VCC 281, [157] (Judge Hampel) ('*Jane Doe (Vic)*'), referring to 'the invitation held out by the High Court in *Lenah Game Meats*'. It is recognised this judgment has *indicative*, not *precedential*, value, being of a lower state court. It is also recognised that an invitation to recognise a common law tort where it would be appropriate is not an encouragement to do the same.

12 *Giller v Procopets [No 2]* (2008) 24 VR 1, 35–6 [167]–[168] (Ashley JA), 106–7 [447]–[452] (Neave J) ('*Giller*'). See also *Wilson v Ferguson* [2015] WASC 15, [76]–[85] (Mitchell J) ('*Wilson*'). In a recent article assessing the prospects of legislative enactment of a privacy tort in Australia, Witzleb has recognised Australian judicial reluctance (to date) to recognise a common law right of privacy: Normann Witzleb, 'Another Push for an Australian Privacy Tort' (2020) 94(10) *Australian Law Journal* 765, 770–2.

13 *Giller* (2008) 24 VR 1, 35–6 [167]–[168] (Ashley JA), applied in *Wilson* [2015] WASC 15, [76]–[85] (Mitchell J). The Supreme Court of Victoria reasoned even more emphatically in *Giller v Procopets* [2004] VSC 113, [187]–[189] (Gillard J), and this was applied in *Kalaba v Commonwealth* [2004] FCA 763, [6] (Heerey J) ('*Kalaba*'). It is recognised that these judgments did not explicitly hold that *Lenah* prevents a tort from being discovered in the common law; rather *Lenah* has been interpreted as an obstacle as opposed to a door left open. Exceptions to this trend include *Jane Doe (Vic)* and *Grosse v Purvis* [2003] QDC 151 ('*Grosse*'); the Court in *Kalaba* noted *Grosse* but declined to apply it. It is recognised that *Grosse*, like *Jane Doe (Vic)*, has *indicative*, not *precedential*, value, being a judgment of a lower state court.

14 *Kalaba* [2004] FCA 763, [6] (Heerey J); *Giller* (2008) 24 VR 1, 35–6 [167]–[168] (Ashley JA). Callinan J has also noted that, since *Lenah*, some courts' refusal to recognise an actionable privacy claim means Australian common law is not yet ready to entertain standalone privacy claims: *Batistatos v Roads & Traffic Authority of New South Wales* (2006) 226 CLR 256, 319 [216] ('*Batistatos*').

15 See, eg, Lindsay (n 6); Butler (n 6).

a return to that very reasoning, to identify precisely how the Court left open the door to future recognition of a common law tort of interference with privacy.

## B The Court's Reasoning About Privacy in *Lenah*

### *1 Chief Justice Gleeson*

For Chief Justice Gleeson, privacy could be vindicated in common law, possibly through an adapted breach of confidence action,[16] but the implied constitutional freedom of political communication had to be adequately protected.[17] Further, protected privacy interests had to be defined sufficiently precisely, especially given the wideranging contexts in which privacy might be invoked.[18] These cautions were *not* intended to reject a common law privacy tort, but, rather, to suggest constructively: that it must not curtail the implied constitutional freedom; that protected activities should be those which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved; and that intrusion be highly offensive to a reasonable person.[19]

His Honour thus *envisaged rather than denied* the common law's capacity to accommodate privacy. Indeed, Chief Justice Gleeson's discussion of the difficulty of setting a 'bright line' around the concept of privacy[20] evidences judicial capability and preparedness to work with privacy in legal terms. Had his Honour believed otherwise, he would have stated so explicitly, and would not have examined how the common law might meet the challenge of delineating that complex concept. Interpreting Chief Justice Gleeson's reasoning as confirming that the unwieldy nature of privacy *precludes* Australian courts from discovering a common law privacy tort is unduly superficial and restrictive.[21]

Crucially, Chief Justice Gleeson found against LGM *not* because Australian law recognised no privacy tort or the High Court could never 'depart from old authority',[22] but because operations at a possum processing facility were insufficiently private.[23] That denied LGM a privacy-based breach of confidence action, and *also* any privacy tort action, as both possible actions required the activity to be 'relevantly private'.[24] Indeed, in reasoning about cases where privacy

16 *Lenah* (2001) 208 CLR 199, 224–5 [34]–[35], quoting *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804, 807 (Laws J) ('*Hellewell*'). See also *Lenah* (2001) 208 CLR 199, 225 [39] (Gleeson CJ).

17 *Lenah* (2001) 208 CLR 199, 224 [35]. Gleeson CJ also noted the tensions that exist between the interests in privacy and the interests in free speech: at 225–6 [41].

18 Ibid 225–6 [40]–[41].

19 Ibid 225–6 [41]–[42].

20 Ibid 226 [42].

21 *Giller* (2008) 24 VR 1, 35 [167], where, referring to Gleeson CJ's own statements of caution in *Lenah*, Ashley JA reasoned that '[t]he development of such a [privacy] tort would require resolution of substantial definitional problems. This, of itself, *might contraindicate such a development*' (emphasis added).

22 *Lenah* (2001) 208 CLR 199, 225 [38], referring to *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

23 *Lenah* (2001) 208 CLR 199, 226–7 [43].

24 Ibid.

interests may have been implicated in varying contexts,[25] his Honour highlighted the essential legal question as 'the necessary quality of *privacy* to warrant the application of the law'.[26]

### *2 Justices Gummow and Hayne*

Justices Gummow and Hayne reasoned LGM's 'reliance upon an emergent tort of invasion of privacy [was] misplaced',[27] because privacy protection should be available only to individuals,[28] and *not* because Australian common law could not accommodate a privacy tort. In explaining why LGM's commercial interests and corporate nature were distinguishable from individuals' privacy interests, Justices Gummow and Hayne identified when common law would and would not be activated:

> The interest of Lenah is in the profitable conduct of its business. Its sensitivity is that of the pocket book. This provides an important point of distinction between the present case and the situation where an individual is subjected to unwanted intrusion into his or her personal life and seeks to protect seclusion from surveillance and to prevent the communication or publication of the fruits of such surveillance.[29]

It was, therefore, within the capacity of Australian common law to recognise interference with individual privacy as a civil wrong, and:

> Nothing said in these reasons should be understood as foreclosing any such debate or as indicating any particular outcome [on recognition of a privacy tort in Australian law]. Nor, as already has been pointed out, should the decision [defeating a privacy claim] in *Victoria Park*.[30]

Having confirmed that common law principles on legal remedies for interference with privacy,[31] established in *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor*[32] and *Australian Consolidated Press v Ettingshausen*,[33] did 'not stand in the path of the development of such a cause of action' in privacy, and that *Lincoln Hunt Australia Pty Ltd v Willesee*[34] and *Donnelly v Amalgamated Television Services Pty Ltd*[35] confirmed a degree of protection could exist in circumstances different from LGM's,[36] their Honours went further in examining and positively acknowledging the strength of the normative importance of privacy,

25 See, eg, *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457; *Donnelly v Amalgamated Television Services Pty Ltd* (1998) 45 NSWLR 570, cited in *Lenah* (2001) 208 CLR 199, 299 [51], 230 [53] (Gleeson CJ).

26 *Lenah* (2001) 208 CLR 199, 230 [54] (Gleeson CJ) (emphasis added).

27 Ibid 258 [132] (Gaudron J agreeing at 231 [58], 232 [61]).

28 Ibid 252 [116], 256–8 [126]–[132].

29 Ibid 236 [79].

30 Ibid 258 [132].

31 Ibid 248–50 [106]–[110].

32 (1937) 58 CLR 479. There was no right to privacy under the tort of nuisance: at 495–6 (Latham CJ).

33 (New South Wales Court of Appeal, Gleeson CJ, Kirby P, Clarke JA, 13 October 1993). There was no standalone actionable claim in privacy, due to legislative inaction on such a tort: at 15 (Kirby P).

34 (1986) 4 NSWLR 457.

35 (1998) 45 NSWLR 570.

36 *Lenah* (2001) 208 CLR 199, 245–8 [100]–[104] (Gummow and Hayne JJ).

and the legal cognisability of such a value, whether as an actionable right, or as a tortious wrong.[37] Their Honours conceived of legal protection of privacy as

> a genus, being a principle protecting the interests of the individual in leading, to some reasonable extent, a secluded and private life, in the words of the [US] *Restatement* [*of Torts*], 'free from the prying eyes, ears and publications of others'.[38]

The refusal to reject outright the possibility for such a common law tort, and the contemplation of a 'natural person' requirement, again evidences judicial capability and preparedness to entertain such a tort. Had their Honours opined common law had no capacity for such a tort, they would have explicitly cited that incapacity *in and of itself* as the reason why LGM failed. They would not have engaged with the inappropriateness of privacy protection for corporations, providing *that* as the reason why LGM had no claim. In making their principal holding that corporations had no legal privacy interests, Justices Gummow and Hayne set a basic boundary for any common law tort in Australia: it is available only to individuals. Therefore, their Honours not only contemplated such a tort and acknowledged the strength of the normative reasons underpinning it; they also engaged in a rudimentary scoping exercise for this legally cognisable interest.

### *3 Justice Kirby*

In commenting obiter on a 'tort of privacy',[39] Justice Kirby also doubted that common law privacy protection could extend to corporations.[40] Above all, his Honour preferred to 'postpone' answering the 'difficult question' of whether Australian courts *should* recognise an actionable wrong for privacy interference.[41]

Justice Kirby did, however, consider how a privacy claim may affect freedom of political communication,[42] echoing Chief Justice Gleeson's caution on the need to account adequately for that constitutional freedom. Again, this does not represent judicial reluctance to test the limits of interests competing with privacy. On the contrary, Justice Kirby recognised the 'principle [of the implied freedom] does not establish a rule expelling all legal restraints', and cited international human rights instruments to demonstrate privacy may legitimately limit free expression.[43] Rather than obstructing recognition of a potential privacy tort, such reasoning indicates the boundaries of such a tort.

### *4 Justice Callinan*

In a dissenting opinion, and obiter comments on privacy,[44] Justice Callinan expressed tentative support for future development of an Australian common law

37 For the avoidance of doubt, their Honours did not express an explicit preference between recognition of a privacy tort and incremental development of non-tortious causes of action.

38 *Lenah* (2001) 208 CLR 199, 258 [132] (Gummow and Hayne JJ), citing American Law Institute, *Restatement (Second) of Torts* (1977) § 652A(b) ('*Restatement*').

39 *Lenah* (2001) 208 CLR 199, 277 [185] (Kirby J).

40 Ibid 279 [190].

41 Ibid 278 [188]–[189].

42 Ibid 279–82 [192]–[199], 286 [214].

43 Ibid 282–3 [201].

44 Ibid 309–21 [278]–[314]. As Callinan J himself noted in *Batistatos* (2006) 226 CLR 256, 319–20 [216], his comments in *Lenah* have reduced authoritative weight given they were obiter.

tort of interference with privacy. His Honour engaged with American jurisprudence, scholarship and political literature to illustrate the 'impressive credentials for a right of privacy',[45] and its value to individuals in liberal democracies.

Justice Callinan also noted that, given the development of privacy actions in comparable jurisdictions,[46] at least the time was ripe to consider whether a tort should be recognised in Australia.[47] However, '[a]ny principles for an Australian tort of privacy would need to be worked out on a case by case basis in a distinctly Australian context'.[48] That might, though, include adverting to how other jurisdictions cater for questions of proportion and balance, especially regarding free speech.[49] Again, such reasoning evidences judicial contemplation of what might *and might not* be included in an Australian common law tort of interference with privacy, rather than a reluctance or inability to engage with the matter.

### C The Door Left Open

LGM did not fail because of some deficiency in the common law, which the High Court could not rectify by fashioning a distinct privacy tort. LGM failed because its circumstances could not satisfy *any* form of protection, privacy or otherwise, cognisable in common law. Though it was acknowledged that breach of confidence may cater to privacy interferences, the High Court Justices at no point expressed a necessary preference for equity in particular as the appropriate remedial vehicle, *to the exclusion of* tort law. Even Justices Kirby and Callinan, who reasoned that equity supported LGM's injunction even without a concrete cause of action, did not state equity was a *better* remedial vehicle for interference with privacy than tort could be. Therefore, *Lenah* should not be read as proposing Australian law may only accommodate privacy protection through equity and never through tort law.[50]

The High Court's acknowledgment of the importance of privacy protection, and its engagement with the nature and rudimentary scope of any legally cognisable privacy interest, distinguishes *Lenah* from the English case, *Kaye v Robertson* ('*Kaye*'),[51] where it was held the common law was, at that time, deficient in its lack of protection for individual privacy, and that deficiency was why the claim failed. In *Kaye*, it was accepted the claimant had a privacy interest,[52] but the common law had no way, at the time, to vindicate it.[53] Conversely, in *Lenah*, it was accepted either that the law of confidentiality could protect privacy interests, or that there may be a tort of interference with privacy, but that LGM did

45 Ibid 324–5 [321]–[324], quoting *Cox Broadcasting Corporation v Cohn*, 420 US 469, 488–9 (1975) (White J).
46 Ibid 326 [325]–[327].
47 Ibid 328–9 [335].
48 Ibid 328 [332].
49 Ibid 338 [334].
50 As it was read in *Giller* (2008) 24 VR 1, 35–6 [167]–[168] (Ashley JA), 106–7 [447]–[452] (Neave JA).
51 [1991] FSR 62 ('*Kaye*').
52 The claimant, a well-known actor, was lying semi-conscious in a hospital bed when a journalist entered his private room, conducted an interview and took photographs of him in such a state.
53 *Kaye* [1991] FSR 62, 66, 70, 71 (Glidewell, Bingham and Leggatt LJJ).

not possess such privacy interests. While *Kaye* confirmed the common law's incapacity to protect privacy interests established on the facts, *Lenah* envisaged the common law's potential to accommodate privacy interests *not* established on the facts.

English common law evolved post-*Kaye* to accommodate privacy protection, initially by relaxing traditional breach of confidence requirements,[54] and this began *before* statutory incorporation into English law of the *European Convention on Human Rights* ('*European Convention*') right to a private and family life.[55] This common law evolution was organic and independent of statutory direction. Even after the *Human Rights Act 1998* (UK) came into effect, the courts narrowed *Kaye*'s precedential value by reference to *both* 'developments in the common law relating to confidence' *and* new obligations on English courts under that *Act*.[56] The courts relied upon this evolutionary relaxation of traditional breach of confidence requirements, and the common law's established capacity to recognise individuals' privacy interests, to provide for distinct privacy claims in common law, as opposed to relying solely and necessarily upon the statute to recognise, de novo, a standalone privacy action.[57] It is, therefore, unduly restrictive to reject the principles established through this evolution of English privacy law as wholly or even 'primarily' concerned with accommodating the *European Convention*, mandated by the *Human Rights Act 1998* (UK).[58]

This common law evolution begot two distinct causes of action under breach of confidence: the traditional action based upon the *Coco v AN Clark (Engineers) Ltd*[59] limbs and protecting confidentiality, and the evolved action protecting privacy.[60] This has resulted in a separate common law tort of misuse of private information.[61] If English common law has been able independently to evolve thus

54 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47 (Megarry J).

55 *Human Rights Act 1998* (UK), which came into effect 2 October 2000, incorporating the rights of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). See Gavin Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the *Human Rights Act*' (2003) 66(5) *Modern Law Review* 726. Relevant early judgments adjusting traditional breach of confidence include: *AG v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109, 256 (Lord Keith); *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134; *Hellewell* [1995] 1 WLR 804; *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444; see Gavin Phillipson and Helen Fenwick, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (2000) 63(5) *Modern Law Review* 660, 671 n 101.

56 *Douglas v Hello! Ltd* [2001] QB 967, 1012 (Keene LJ) ('*Douglas CA*').

57 *Campbell v MGN Ltd* [2004] 2 AC 457, 464–5 [13]–[14] (Lord Nicholls) ('*Campbell*'). In *Campbell*, the House of Lords still referred to the action as breach of confidence, evolved from the traditional requirements, even though the *Human Rights Act 1998* (UK) was recognised as informing the underlying normative impetus behind judicial vindication of a distinct privacy interest. Judge Hampel noted that English common law developed privacy protection not due to statutory compulsion but rather an independent evolutionary process: *Jane Doe (Vic)* [2007] VCC 281, [107].

58 *Giller* (2008) 24 VR 1, 99 [418] (Neave JA).

59 [1969] RPC 41.

60 *Douglas v Hello! [No 3]* [2008] AC 1, 72 [255] (Lord Nicholls).

61 *Vidal-Hall v Google Inc* [2016] QB 1003, 1028–31 [43]–[51] (Lord Dyson MR and Sharp LJ) ('*Vidal-Hall*'); *PJS v News Group Newspapers Ltd* [2016] AC 1081, 1100–5 [32]–[44] (Lord Mance JSC) ('*PJS*').

far by opening the door that was closed in *Kaye*, there is no reason for Australian courts to discount the door left open by the High Court in *Lenah*.

## III A COMMON LAW TORT OF INTERFERENCE WITH PRIVACY SHOULD BE RECOGNISED

Should Australian courts step through this open door by recognising and applying a common law tort of interference with privacy? There are three conditions which must be obtained before courts can be expected to do so: that there is a sufficiently strong normative demand for common law to intervene to protect privacy; that tort law is the most appropriate mechanism to answer this demand; and that a privacy case is brought aligning with the extent of the normative demand and the capacity of tort law, so a court can, in a practical sense, recognise and apply the tort.

### A 'Interference with Privacy'

Before addressing these conditions, the meaning of 'interference with privacy' should be clarified. It can 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,[62] or in two separate but related torts of interference with informational privacy and interference with physical privacy).[63] The High Court in *Lenah* did not express a preference for which option a common law tort might encompass, and it is not the purpose of the argument presented here to prefer any one of these options; the purpose is to establish that every one of these options, sitting as they do within the scope of the value of privacy, is open to Australian courts. The arguments presented here for recognising a common law privacy tort are intended to cover each of these options, from which the courts may choose as they contemplate how a common law tort of interference with privacy would operate.[64]

That these arguments cover *only* informational and physical privacy, and not other forms of privacy protection, rests upon two grounds: first, as discussed in Part III(B), these two forms of privacy are most closely connected with the philosophical reasons as to why privacy should be protected. This much was acknowledged by Justices Gummow and Hayne in *Lenah*, who drew upon English dicta to reason that 'the disclosure of private facts and unreasonable intrusion upon

62 This was recommended in Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Report No 123, June 2014) 89 [5.78].

63 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: Physical Privacy in English Law' (2014) 73(2) *Cambridge Law Journal* 350.

64 See Barbara McDonald, 'Tort's Role in Protecting Privacy: Current and Future Directions' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters, 2011) 63.

seclusion, perhaps come closest to reflecting a concern for privacy "as a legal principle drawn from the fundamental value of personal autonomy"'.[65] This is also consistent with Butler's proposals for two Australian privacy torts covering informational and physical privacy,[66] 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'.[67]

Secondly, at least one, and sometimes both, of these two forms of privacy interference has been addressed in all comparable common law jurisdictions: New Zealand has a tort of wrongful publication of private facts[68] and a tort of intrusion into seclusion.[69] The United Kingdom has a tort of misuse of private information.[70] Canadian courts of different state jurisdictions have differing views about common law privacy torts standing independent of constitutional and legislative provisions,[71] but Ontario has recognised a tort of intrusion on seclusion[72] and a tort of wrongful publication of private facts.[73] The United States privacy torts include a tort of giving publicity to private life, and a tort of intrusion upon seclusion.[74]

Other common law torts of interference with privacy have been recognised: the tort of misappropriation of name or likeness in the United States,[75] and the tort of publicity placing a person in false light also in some states of the United States,[76] and, recently, in Ontario.[77] However, these forms of privacy interference are more remotely, if at all, connected with the philosophical underpinnings of privacy developed in the scholarship and acknowledged in jurisprudence (discussed below), especially given the dominant underpinning of the misappropriation of

65 *Lenah* (2001) 208 CLR 199, 256 [125]–[126], quoting *Douglas CA* [2001] QB 967, 1001 (Sedley LJ).

66 Butler (n 6) 373–5.

67 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (n 62) 9, recommendation 5–1.

68 *Hosking v Runting* [2005] 1 NZLR 1 ('*Hosking*').

69 *C v Holland* [2012] 3 NZLR 672, [86] (Whata J) ('*Holland*').

70 *Campbell* [2004] 2 AC 457; *Vidal-Hall* [2016] QB 1003*; PJS* [2016] AC 1081. The Supreme Court has acknowledged the intrusive nature of the harm involved in interference with privacy: see *PJS* [2016] AC 1081, 1108–9 (Lord Neuberger). However, 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: see *Wainwright v Home Office* [2004] 2 AC 406 ('*Wainwright*'). Cf Paul Wragg, 'Privacy and the Emergent Intrusion Doctrine' (2017) 9(1) *Journal of Media Law* 14; Paul Wragg, 'Recognising a Privacy-Invasion Tort: The Conceptual Unity of Informational and Intrusion Claims' (2019) 78(2) *Cambridge Law Journal* 409.

71 In Canada, privacy is also protected in the *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*'), as well as in legislation. Doubts were expressed in case law. See, eg, *Hung v Gardiner* [2002] BCSC 1234, [110] (Joyce J); *Bingo Enterprises Ltd v Plaxton* (1986) 26 DLR (4th) 604, [17] (Monnin CJM), [22] (Twaddle JA); *Euteneier v Lee* (2005) 260 DLR (4th) 123, [63] (Cronk JA). Meanwhile, 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] (Stinson J).

72 *Jones v Tsige* (2012) 346 DLR (4th) 34 ('*Jones*').

73 *Doe 464533 v D* (2016) 394 DLR (4th) 169 ('*Jane Doe (Ont)*').

74 *Restatement* (n 38) § 652D and § 652B, respectively.

75 Ibid § 652C.

76 Ibid § 652E. For example, the tort has been recognised in California: *McClatchy Newspapers v Superior Court*, 234 Cal Rptr 702 (Ct App, 1987). However, 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 & Observer Publishing Co*, 312 SE 2d 405 (NC, 1984).

77 *Yenovkian v Gulian* [2019] ONSC 7279 ('*Yenovkian*').

likeness tort is protection of *commercial* rather than dignitary interests,[78] 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.[79] Further, accommodation of these forms of privacy protection are not as widely spread across comparable jurisdictions, indicating a lack of judicial preparedness to acknowledge them.[80]

## B Normative Demand for the Common Law's Intervention

There is scholarly, law reform, and judicial consensus that the moral importance of individual privacy is sufficiently high as to attract the protection of law, and that the harm resulting from interference with privacy should be actionable in law.[81]

### *1 Scholarly Consensus*

A considerable volume of scholarship exists on various philosophical justifications for protecting privacy in law. Though privacy is philosophically multifaceted and complex (even generating its own normative taxonomy),[82] its justifications are usefully categorised as individual-centric or society-facing.

Privacy's value to the individual rests predominantly upon its safeguarding of human dignity, thereby protecting individual personhood.[83] Insofar as privacy shields individuals from observation by others, recognising individuals are not merely entities which can and therefore should be observed, it is consistent with the Kantian vision of dignity, that human beings are categorically recognised as having inner self-worth so as to be an end in themselves, and that, subsequently, no individual should be used solely as a means to an end. Private information should not be commodified and traded for profit,[84] given invasions of privacy

78 *Corpus Juris Secundum*, vol 77 (online at 4 April 2021) VII Right of Privacy and Publicity, '§ 51 Right of Publicity, Generally', cited in NA Moreham and Mark Warby, *Tugendhat and Christie: The Law of Privacy and the Media* (Oxford University Press, 3rd ed, 2016) 110 n 225.

79 *Godbehere v Phoenix Newspapers Inc*, 783 P2d 781 (Ariz, 1989).

80 As stated, the two torts are recognised only in some states of the United States, and in Ontario in Canada, but not in New Zealand or the United Kingdom.

81 Whether or not such legal protection should be in the form of a tort will be discussed in Part III(C), below.

82 Daniel J Solove, 'Conceptualizing Privacy' (2002) 90(4) *California Law Review* 1087; Thomas Scanlon, 'Thomson on Privacy' (1975) 4(4) *Philosophy and Public Affairs* 315; Daniel J Solove, 'A Taxonomy of Privacy' (2005) 154(3) *University of Pennsylvania Law Review* 477; Andreas Busch, 'Privacy, Technology, and Regulation: Why One Size is Unlikely to Fit All' in Beate Rössler and Dorota Mokrosinska (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (Cambridge University Press, 2015) 303.

83 Charles Fried, 'Privacy' (1968) 77(3) *Yale Law Journal* 475; Jeffrey H Reiman, 'Privacy, Intimacy and Personhood' (1976) 6(1) *Philosophy and Public Affairs* 26; Edward J Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39(6) *New York University Law Review* 962; Edward J Bloustein, 'Privacy Is Dear at Any Price: A Response to Professor Posner's Economic Theory' (1978) 12(3) *Georgia Law Review* 429; Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89(3) *Yale Law Journal* 421.

84 Beate Rössler, 'Should Personal Data Be a Tradable Good? On the Moral Limits of Markets in Privacy' in Beate Rössler and Dorota Mokrosinska (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (Cambridge University Press, 2015) 141.

'injure [individuals] in their very humanity'.[85] Privacy understood as normative barriers erected around certain aspects of an individual's life draws upon dignity as a categorical imperative:[86] even when I disclose certain information, I do not automatically entitle others to seek out and take all information about me. Privacy enables individuals to keep from the public aspects of their lives, behaviour and beliefs, allowing them to come to terms with their own identity, and with those things that ensure they 'live well',[87] without pressure or bias of public judgment or humiliation. Dignity justifies privacy in shielding core aspects of every individual's life that we 'have been socialised into concealing', including 'deeply primordial' matters of the human body, exposure of which 'creates embarrassment and humiliation'.[88]

Dignity is conceptually proximate to individual autonomy, which has also been furthered as justifying privacy protection: privacy is an individual's ability to control her own life, including how much others know about her life. This control enables her to realise, independently and without intrusion, that which defines her inner worth and ability to 'live well'. The 'barriers' conception draws upon autonomy,[89] given the strongest barriers to intrusion result from individuals exerting control over their lives and defining who has access:[90] 'If the intimate details of my life are disclosed without my consent … then even the truth of that disclosure cannot undercut the fact that something that is essentially *mine* to control has been taken from me'.[91]

Control encompasses choice. An individual in control of her life can choose how to live, what to think, how much information about herself to share with others, and whom to let in to her personal space. Being able to reason, privately, about aspects of her life that are socially controversial or morally unsettled (for example, whether to have an abortion) allows an individual to make that choice freely, and ensures that choice is her own: '[p]rivacy is essential to … free choice'.[92] Autonomy-based privacy is not, therefore, necessarily dichotomous with publicity. In exercising his privacy right, an individual might *choose* to vitiate privacy.[93] That ability to choose is more important than the outcome, placing control and choice at the normative heart of privacy.[94]

85 Fried (n 83) 475.
86 Kirsty Hughes, 'A Behavioural Understanding of Privacy and Its Implications for Privacy Law' (2012) 75(5) *Modern Law Review* 806.
87 Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press, 2011).
88 Solove, 'A Taxonomy of Privacy' (n 82) 536.
89 Hughes (n 86).
90 Anita L Allen, *Uneasy Access: Privacy for Women in a Free Society* (Rowman & Littlefield Publishers, 1988).
91 Frederick Schauer, 'Free Speech and the Social Construction of Privacy' (2001) 68(1) *Social Research* 221, 223 (emphasis in original).
92 Anthony Lester, *Five Ideas to Fight For: How Our Freedom Is Under Threat and Why It Matters* (Oneworld Publications, 2016) 146.
93 Julie C Inness, *Privacy, Intimacy and Isolation* (Oxford University Press, 1992) 41–5.
94 Scanlon (n 82) 315–22; James Rachels, 'Why Privacy Is Important' (1975) 4(4) *Philosophy and Public Affairs* 323, 323–6.

The centrality of control and choice render privacy a precondition for individual liberty.[95] The power of choice secured by privacy gives individuals freedom to act, reason, deliberate, socialise, and develop themselves without constraints of society, pressures to conform, or pressures to maintain a particular status quo: 'There is a minimum level of opportunity for choice … below which human activity ceases to be free in any meaningful sense' and so the 'horror of uniformity, conformism and mechanisation of life is not groundless'.[96]

Other individual-centric justifications for privacy protection can be observed in how denial of privacy adversely affects individual interests: psychological sanctity and feelings of safety and security;[97] the ability to be intimate and sincere with others and to cultivate meaningful relationships with others including within the family unit;[98] preparedness to reflect upon one's actions, decisions and opinions and to evolve as an intellectual being;[99] and willingness and ability to participate in one's society and cooperate with others with confidence and self-respect.[100]

95 Alan F Westin, *Privacy and Freedom* (Atheneum Press, 1967); Eric Barendt, 'Privacy as a Constitutional Right and Value' in Peter Birks (ed), *Privacy and Loyalty* (Clarendon Press, 1997) 15.

96 Isaiah Berlin, *Liberty: Incorporating Four Essays on Liberty*, ed Henry Hardy (Oxford University Press, 2002) 44.

97 David Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford University Press, 2nd ed, 2002) 512; NA Moreham and Yvette Tinsley, 'Media Intrusion into Grief: Lessons from the Pike River Mining Disaster' in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press, 2016) 115; Franz Kafka and Heribert Kuhn, *Der Prozess* (Suhrkamp Verlag, 2000); Jurek Becker, 'Der Verdächtige' in *Nach der Ersten Zukunft: Erzählungen* (Suhrkamp Verlag, 1st ed, 1980) 259.

98 Reiman (n 83); Ferdinand David Schoeman, *Privacy and Social Freedom* (Cambridge University Press, 1992) 151; Inness (n 93) 56–8, 116–20; Danielle Keats Citron, 'The Roots of Sexual Privacy: Warren and Brandeis & the Privacy of Intimate Life' (2019) 42(3) *Columbia Journal of Law and the Arts* 383; BC Newell, CA Metoyer and AD Moore, 'Privacy in the Family' in Beate Rössler and Dorota Mokrosinska (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (Cambridge University Press, 2015) 105; Rachels (n 94) 326; Fried (n 83) 484–5.

99 Neil M Richards, 'Intellectual Privacy' (2008) 87(2) *Texas Law Review* 387; Margot E Kaminski and Shane Witnov, 'The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech' (2015) 49(2) *University of Richmond Law Review* 465; Benjamin J Goold, 'How Much Surveillance is Too Much? Some Thoughts on Surveillance, Democracy and the Political Value of Privacy' in DW Schartum (ed), *Overvåkning i en Rettsstat: Surveillance in a Constitutional Government* (Fagbokforlaget, 2010) 38; 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.

100 Amitai Etzioni, *The Limits of Privacy* (Basic Books, 1999); David Feldman, 'Privacy-Related Rights and Their Social Value' in Peter Birks (ed), *Privacy and Loyalty* (Clarendon Press, 1997) 15, 18–23, 49; Lever (n 99) 167–9.

Society-facing justifications have also been widely recognised,[101] and they include: privacy enabling individuals to perform social functions;[102] protecting individuals from certain social harms;[103] strengthening democracy by ensuring individuals partake in civic-democratic processes in a sincere, confident, informed and critical way;[104] societal development and progress by ensuring individuals have space and safety within which to challenge orthodoxies;[105] and cohesion in a pluralistic society through enabling mutual respect between individuals with diverse and conflicting personal values, by ensuring personal space is equally guaranteed to all.[106]

Even when theorised through such society-benefiting concerns, privacy is recognised as a *uniquely individual* interest. Privacy's normative core is its demand for recognition and protection of individual dignity, autonomy and liberty, and the societal benefits that accrue from that provide further justifications for protection. The relevant interests are those of the paradigmatic individual. That philosophical rendition of privacy was recognised 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. This may be incongruous when applied to a corporation'.[107] Justices Gummow and Hayne acknowledged corporations 'can invoke no fundamental value of personal autonomy … [because] of necessity, this artificial legal person lacks the sensibilities, offence and injury to which provide a staple value for any developing law of privacy'.[108] Quoting American jurists, their Honours confirmed

> [t]he tort of invasion of privacy focuses on the humiliation and intimate personal distress suffered by an individual as a result of intrusive behavior. While a

101 See, eg, Priscilla M Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (University of North Carolina Press, 1995); Feldman, *Civil Liberties and Human Rights in England and Wales* (n 97); Arthur J Cockfield, 'Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies' (2007) 40(1) *University of British Columbia Law Review* 41; Valerie Steeves, 'Reclaiming the Social Value of Privacy' in Ian R Kerr, Valerie Steeves and Carole Lucock (eds), *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press, 2009) 191; Helen Nissenbaum, *Privacy in Context: Technology, Policy and the Integrity of Social Life* (Stanford University Press, 2010); Kirsty Hughes, 'The Social Value of Privacy, the Value of Privacy to Society and Human Rights Discourse' in Beate Rössler and Dorota Mokrosinska (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (Cambridge University Press, 2015) 225; Priscilla M Regan, 'Privacy and the Common Good: Revisited' in Beate Rössler and Dorota Mokrosinska (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (Cambridge University Press, 2015) 50.

102 Feldman, 'Privacy-Related Rights and their Social Value' (n 100) 15–16.

103 Daniel J Solove, *Understanding Privacy* (Harvard University Press, 2008) 91–2.

104 Gavison (n 83) 455; Spiros Simitis, 'Reviewing Privacy in an Information Society' (1987) 135(3) *University of Pennsylvania Law Review* 707, 732; Annabelle Lever, *On Privacy* (Routledge, 2012) 24–8; Hughes (n 101) 228; Lever (n 99) 168; Ian Loveland, 'Privacy and Political Speech: An Agenda for the "Constitutionalisation" of the Law of Libel' in Peter Birks (ed), *Privacy and Loyalty* (Clarendon Press, 1997) 51.

105 Hughes (n 101) 229.

106 Ibid 230; 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.

107 *Lenah* (2001) 208 CLR 199, 226–7 [43] (Gleeson CJ).

108 Ibid 256 [125]–[126].

> corporation may have its reputation or business damaged as a result of intrusive activity, it is not capable of emotional suffering.[109]

Justice Kirby also recognised the normative limitation of privacy as an individual, not corporate, value.[110]

Another upshot of the scholarship is that the normative demand for privacy protection in law should not artificially be limited to protection of informational privacy, separately from protection of physical privacy: if there is a normative basis for privacy protection, it underpins both constructions of privacy. The concerns of dignity, autonomy, liberty, psychological well-being and security, intimacy, intellectual development, and the social value of privacy, all require adequate protection of both informational and physical privacy.[111]

In view of the conceptualisation of privacy as the shielding of the individual from unwanted and unreasonable observation or access by others,[112] and given that privacy is normatively underpinned by moral concerns to protect such values as individual dignity, autonomy, and liberty, privacy is importantly distinct from those values protected in existing legal remedies, including defamation, copyright, trespass, intentional infliction of emotional harm and breach of confidence. None of these existing remedies protect an individual from unwanted, unreasonable observation or access by others based upon a moral commitment to the protection of the values discussed above. Defamation protects *reputation*, which, though it may be based upon dignity,[113] is conceptually distinct from privacy.[114] 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 as shielding against observation and access. Trespass, as will be discussed in Part III(C) below, 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.[115] The tort of intentional infliction of emotional harm, as will also be discussed in Part III(C) below, though concerned with the protection of individual dignity, is, again, not concerned with protection against unwanted observation or access by another.[116] Breach of confidence, as already discussed in Part II and as well discussed in Part III(C)

109 Ibid 256–7 [127], quoting *NOC Inc v Schaefer*, 484 A 2d 729, 730–1 (NJ, 1984) (Haines AJ).

110 Ibid 279 [190]. Callinan J was alone in expressly stating the possibility of privacy protection for corporations and governmental agencies: at 326–7 [328].

111 Wragg, 'Recognising a Privacy-Invasion Tort' (n 70).

112 See, eg, Gavison (n 83); NA Moreham, 'The Protection of Privacy in English Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 *Law Quarterly Review* 628; NA Moreham, 'Unpacking the Reasonable Expectation of Privacy Test' (2018) 134 *Law Quarterly Review* 651.

113 Ursula Cheer, 'Divining the Dignity Torts: A Possible Future for Defamation and Privacy' in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press, 2016) 15.

114 Andrew T Kenyon, 'Defamation, Privacy and Aspects of Reputation' (2019) 56(1) *Osgoode Hall Law Journal* 59.

115 As noted in Part III(C), below, this much was acknowledged in *Lenah* (2001) 208 CLR 199, 226–7 [43] (Gleeson CJ).

116 The tort is narrowly construed, as 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 ('*Rhodes*')) and physical privacy (a security search of the claimant's person: *Wainwright* [2004] 2 AC 406).

below, 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 observation or access by another, whether in an informational or a physical sense.[117] This conceptual and normative distinctiveness of privacy is the result of the various philosophical constructions of this value, and can be observed in the scholarly consensus on why privacy, as an autochthonous value, is sufficiently normatively important to justify legal protection *as such*.

Finally, given this scholarly consensus about privacy's importance, those who argue that any privacy law must have clear boundaries to accommodate a potentially unwieldy interest[118] should not be read as denying the possibility of jural accommodation of privacy: in acknowledging the multifarious and complex nature of privacy, such scholars do not refute privacy's importance and the potential for law, soundly delimited, to answer the normative demand to accommodate it.[119]

### *2 Law Reform Consensus*

Over the past few decades, several commissions, parliamentary and governmental reports, and official papers have been published across multiple common law jurisdictions, confirming privacy's normative importance. Albeit at times raising the need to exercise caution in juridifying or legislating for privacy protection, each such law reform report attests to a consensus that, one way or another, and whether action is immediate or for the future, privacy should be acknowledged in law. Since this consensus should not be discounted by courts in developing common law responses to the harms of privacy interference, such a consensus further evidences the normative demand for legal protection of privacy, including through common law.

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.[120] The Australian

117 This conceptual distinction was acknowledged by the House of Lords in *Campbell* [2004] 2 AC 457, 464–5 [14] (Lord Nicholls), 473 [51] (Lord Hoffmann), 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: Phillipson and Fenwick (n 55).

118 See, eg, Normann Witzleb et al (eds), *Emerging Challenges in Privacy Law: Comparative Perspectives* (Cambridge University Press, 2014); Bagshaw (n 8).

119 Indeed, some who argue privacy is too fluid a concept for common law recognition nevertheless argue for legislative protection as a 'human right': Tilbury (n 8).

120 Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy* (Report No 11, June 1979) 112–16 [215]–[222]; Australian Law Reform Commission, *Privacy* (Report No 22, December 1983); Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report No 96, May 2003); Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (Report No 108, August 2008); New South Wales Law Reform Commission, *Invasion of Privacy* (Report No 120, April 2009); New South Wales Law Reform Commission, *Protecting Privacy in New South Wales* (Report No 127, May 2010); Victorian Law Reform Commission, *Surveillance in Public Places* (Report No 18, August 2010); Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (n 62); Legislative Council

Law Reform Commission has changed its view from recommending enactment of only specific protections and remedies reflecting privacy interests in different contexts,[121] to recommending enactment of a general privacy action.[122] 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.[123] That model was subsequently adopted by a state parliamentary committee in recommending new remedies for serious invasions of privacy.[124] In addition to such reports confirming a law reform consensus that privacy is sufficiently normatively important to warrant legal protection, all three Australian states with human rights legislation have a codified right against unlawful interference with privacy.[125]

In England, parliamentary committees, independent reviews, a Royal commission, a governmental green paper, the Leveson Inquiry, and an English Children's Commissioner report, have likewise acknowledged the importance of privacy, the significance and seriousness of the harm to individuals resulting from interferences with privacy, and the demand for greater privacy protection, including through law.[126] In New Zealand, the Law Commission undertook a four-stage 'privacy project', during which it affirmed the importance of legal privacy protection, especially given ever greater convergence of information technology, and it recommended a tort of invasion of privacy should be left to develop at common law.[127]

The English and New Zealand courts have recognised common law privacy torts.[128] In Australia, where the Law Reform Commission ('the Commission') in 2008 recommended a statutory cause of action that should not be constrained 'by

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Standing Committee on Law and Justice, Parliament of New South Wales, *Remedies for the Serious Invasion of Privacy in New South Wales* (Report, 3 March 2016); Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, 26 July 2019); Australian Human Rights Commission, *Human Rights and Technology* (Discussion Paper, December 2019); See generally Normann Witzleb, 'A Statutory Cause of Action for Privacy? A Critical Appraisal of Three Recent Australian Law Reform Proposals' (2011) 19(2) *Torts Law Journal* 104.

121 Australian Law Reform Commission, *Privacy* (n 120) vol 2, 26 [1085].

122 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (n 120).

123 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (n 62).

124 Legislative Council Standing Committee on Law and Justice (n 120) 71.

125 *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).

126 Younger Committee on Privacy, *Report of the Committee on Privacy* (Cmnd 5012, 1972); *Final Report of the Royal Commission on the Press*, (Cmnd 6810, 1977); Committee on Privacy, *Report of the Committee on Privacy and Related Matters* (Cm 1102, 1990); Sir David Calcutt, *Review of Press Self-Regulation* (Cm 2135, 1993); National Heritage Committee, *Fourth Report: Privacy and Media Intrusion* (House of Commons Paper No 294-I, Session 1992–93); Culture, Media and Sport Committee, *Privacy and Media Intrusion* (House of Commons Paper No 458-I, Session 2002–03); Lord Justice Leveson, 'An Inquiry into the Culture, Practices and Ethics of the Press' (Report, November 2012); Children's Commissioner (UK), 'Life in "Likes": Children's Commissioner Report into Social Media Use among 8–12 Year Olds' (Report, 4 January 2018). See also Phillipson and Fenwick (n 55) 661 n 8.

127 New Zealand Law Commission, *Invasion of Privacy: Penalties and Remedies* (Report No 113, 29 January 2010).

128 *PJS* [2016] AC 1081; *Hosking* [2005] 1 NZLR 1; *Holland* [2012] 3 NZLR 672.

the rules otherwise applicable to torts generally',[129] and in 2014 further recommended the form which a statutory tort should take, such legislation has not been forthcoming. Although the Commission in 2014 recommended Australian courts not be asked to formulate a new common law tort (preferring a statutory tort),[130] the combination of the Commission's recognition of the need to protect privacy in law with legislative inaction for over a decade evidences a need for Australian courts, in particular, to answer the normative demand by recognising and applying a standalone, common law privacy action. The Commission's 2008 and 2014 recommendations do not stand in opposition to common law – that is, *judicial* – development of privacy protection;[131] on the contrary, they provide a normative basis for courts to respond to legislative *in*action. This is especially so given the Commission in 2014 detailed how far a new privacy tort should reach and how it should operate;[132] this, as well as development of overseas jurisprudence since 2014 on tortious protection of privacy,[133] can assist Australian courts in delineating and applying a tort of interference with privacy based upon that contemplated in *Lenah*.

Privacy's normative importance, as recognised in the political realm, 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 developed in several jurisdictions, including Australia.[134] These frameworks cover effectively all data *about* an individual (not being subject to value-based threshold tests for 'privacy'),[135] but are subject to significant exceptions, including uses for journalistic, literary and artistic purposes,[136] and do not cover physical intrusions. The purpose of such frameworks, to target wholesale processing of personal data, means they are limited relative to the acknowledged normative importance of privacy. A privacy tort could more effectively (and where that is ultimately justified) protect against media interferences and interferences by private individuals, as it does in England, Canada and New Zealand. It could also (if so recognised and framed) protect against physical intrusion, as in Canada and New Zealand. Data protection regulation has not made tort irrelevant in these

129 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (n 120) vol 3, 2565 [74.118].

130 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (n 62) 53–6.

131 Note that the 2014 report was based on the premise a statutory tort would be forthcoming, so its discussion of whether such a tort should be statutory or common law is not necessarily a further, independent confirmation by the Commission that common law is less appropriate than statute to cater for privacy protection: Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (n 62).

132 Ibid 73–258.

133 See in the United Kingdom: *PJS* [2016] AC 1081, especially the UK Supreme Court's acknowledgement that English common law has long recognised of intrusive harm entailed in misuse of private information: 1108–9 [58]–[60] (Lord Neuberger). See in Canada: *Jane Doe (Ont)* (2016) 394 DLR (4th) 169.

134 *Privacy Act 1988* (Cth); *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016* [2016] OJ L 119/1 ('GDPR'); *Data Protection Act 2018* (UK); *Privacy Act 1993* (NZ).

135 *Privacy Act 1988* (Cth) s 6(1) (definition of 'personal information'); *GDPR* (n 134) art 4(1); *Data Protection Act 2018* (UK) s 5; *Privacy Act 1993* (NZ) s 2(1) (definition of 'personal information').

136 *Privacy Act 1988* (Cth) s 7B(4); *GDPR* (n 134) art 85; *Data Protection Act 2018* (UK) sch 2 pt 5 cl 26(2)(b); *Privacy Act 1993* (NZ) s 2(1).

jurisdictions, and is often litigated as a subordinate action, which stands or falls according to the success of the common law action.[137] Policy and legislative action already taken to limit corporate and governmental use of personal data does not, therefore, conclusively answer the acknowledged need for protection of individual privacy; political consensus about the need to protect privacy in law extends beyond data protection frameworks aimed at controlling large-scale, privacy-invasive technologies and practices.

### *3 Judicial Consensus*

Australian courts have also recognised this normative demand for legal protection of privacy. Separately from their pronouncements on whether common law *can* accommodate privacy protection, the courts have affirmed the importance of privacy to the individual and the legitimacy of the moral demands on others to respect an individual's privacy. On this basis, the courts have accepted they should, if possible, intervene to vindicate individual privacy. This is apparent in judicial statements acknowledging privacy's normative importance and legal cognisability, and in the granting of remedies for interference with privacy.

As already noted, the High Court Justices in *Lenah* engaged with why privacy was sufficiently important to warrant legal protection, in principle. Chief Justice Gleeson thought 'the law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy'.[138] The rejection, by all but one of the Justices, of corporate privacy protection rested upon an acceptance of the normative core of privacy: it protects interests peculiar to the individual. Justices Kirby and Callinan recognised how changing societal (and especially media) practices strengthened the normative demand for legal protection of privacy, whether through judicial orders restraining harmful media activities, or through a distinct cause of action: acknowledging the gravity of the harm in privacy breaches, Justice Kirby adduced the 'phenomena of "cheque-book journalism", intrusive telephoto lenses, surreptitious surveillance, gross invasions of personal privacy, deliberately deceptive "stings" and trespass on to land "with cameras rolling"'.[139] Justice Callinan cited American literature in recognising changing media behaviours and shifting technological landscapes, as well as population expansion leading to narrowing spheres of private life.[140] His Honour also highlighted media tendencies not to act in good faith when engaging in newsgathering and reportage, and when furthering arguments to justify their practices, which could legitimise greater legal intervention to protect individuals' privacy against such media behaviour.[141] As noted above, media interference with privacy cannot adequately be addressed merely by data protection regulation.

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137 See, eg, counsel's submissions and judicial reasoning in *Campbell* [2004] 2 AC 457, 469 [32] (Lord Nicholls), and *Richard v British Broadcasting Corporation* [2019] Ch 169, 192 [226] (Mann J) ('*Richard*').

138 *Lenah* (2001) 208 CLR 199, 225 [40].

139 Ibid 272 [172], 276 [183] (citations omitted).

140 Ibid 299–300 [254]–[256], citing Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (Random House, 2000).

141 Ibid 304–8 [265]–[274].

Since *Lenah*, courts have acknowledged privacy's normative importance by granting remedies for interference in particular circumstances that reflect privacy's normative core: protection of dignity and autonomy. The highest courts in two states have awarded equitable damages in breach of confidence actions for distress caused by publication of sexual information by a former partner.[142] A lower state court recognised a general actionable privacy right, and awarded compensatory, aggravated and exemplary damages for (inter alia) breach of privacy through stalking and harassment, concluding that harm would be actionable in breach of privacy if the defendant's intrusive actions caused mental, psychological or emotional harm, or distress.[143] Another lower state court upheld an action for breach of privacy of a rape victim whose name was broadcast in breach of a suppression order, awarding damages including in tort for breach of privacy.[144] Where no such standalone *tort* has been recognised in response to privacy claims,[145] and where *Lenah* has been interpreted narrowly, judges have nevertheless felt compelled to grant equitable remedies, even where the harm acknowledged might not be entirely suitable to the traditional purpose and operation of equitable remedies.[146] This evidences a judicial affirmation of the normative demand for the common law to protect and vindicate individual privacy.[147]

Further such affirmation is apparent in the High Court's recent judgment that 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.[148] The even more recent High Court judgment in *Smethurst*, which concerned tortious infringement of common law rights by public officials and not a tort of interference with privacy,[149] further evidences judicial consensus that privacy and its underpinnings, including control of access, has been and should be protected by or vindicated in common law. Justice Gageler, in particular, acknowledged established 'common law rights to *control access* to [one's own] real and personal property'.[150]

There is also transnational judicial consensus on the normative demand for common law protection, evident in the incremental development of common law

142 *Giller* (2008) 24 VR 1, 106 [446] (Neave JA); *Wilson* [2015] WASC 15, [85] (Mitchell J).
143 *Grosse* [2003] QDC 151, [442]–[444] (Skoien SJ).
144 *Jane Doe (Vic)* [2007] VCC 281, [176], [194] (Judge Hampel).
145 See especially *Giller* (2008) 24 VR 1; *Wilson* [2015] WASC 15.
146 JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 882–3; PG Turner, 'Privacy Remedies Viewed through an Equitable Lens' in Jason NE Varuhas and NA Moreham (eds), *Remedies for Breach of Privacy* (Hart Publishing, 2018) 265.
147 Megan Richardson, Marcia Neave and Michael Rivette, 'Invasion of Privacy and Recovery for Distress' in Jason NE Varuhas and NA Moreham (eds), *Remedies for Breach of Privacy* (Hart Publishing, 2018) 165.
148 *Clubb v Edwards* (2019) 267 CLR 171, 197–8 [56] (Kiefel CJ, Bell and Keane JJ) ('*Clubb*').
149 Such a tort was not pleaded and the Court therefore, explicitly, declined to consider it on the facts: see *Smethurst* (2020) 94 ALJR 502, 520 [46], 520 [48], 527 [90] (Kiefel CJ, Bell and Keane JJ), 534–5 [129] (Gageler J), 558 [244] (Edelman J).
150 Ibid 535 [130] (emphasis added). See also 533 [120].

privacy torts in England and Wales,[151] Canada,[152] the United States,[153] and New Zealand,[154] upon which jurisprudence Australian judges have drawn in their reasoning in cases involving privacy.[155] Given these jurisdictions belong to societies materially similar to that of Australia's – they are all liberal democracies where individual dignity, autonomy and liberty are at least nominally acknowledged as fundamental to the political and legal organisation of the society – it is normatively unpalatable to deny individuals in Australia judicial redress for interferences with their privacy, and specifically through common law where legislation is inadequate or not forthcoming. This is especially so given the High Court has confirmed the constitutional freedom of political communication, which will conflict with some remedies for privacy interference, is *not* an absolute or insurmountable impediment to legal protection of individuals and their privacy.[156]

### C Tort Law Best Answers This Normative Demand

The question remains whether the normative demand for legal protection of privacy, as established in Part III(B) above, should be answered by tort law, in particular. This question is distinct from whether the High Court in *Lenah* confirmed such recognition was possible: instead, it concerns whether, given such a tort *is* recognisable in common law, it is the most appropriate mechanism for protecting privacy.

#### *1 Privacy and the Purposes of Tort Law*

The protection and vindication of privacy is consistent with the purposes of tort law. The fundamental concerns of privacy are the same as the original, fundamental concerns of tort: 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,[157] and this is most pronounced in trespass. A significant commonality exists between principles underpinning existing torts recognising harms of direct interferences with person and property, and principles underpinning a tort recognising the harm of interference with individuals' informational and physical privacy.

Recognition of this ancient function of tort law, in protecting individuals' most basic interests, saw common law courts interpret tort law to contain excesses of executive power, before administrative law had developed: the right to vote was analogised with property rights, so that preventing an individual from casting his

151 *Campbell* [2004] 2 AC 457; *PJS* [2016] AC 1081.

152 *Jones* (2012) 346 DLR (4th) 34; *Jane Doe (Ont)* (2016) 394 DLR (4th) 169; *Yenovkian* [2019] ONSC 7279.

153 *Restatement* (n 38) §§ 652A–652E. Most states' common law or legislation recognises one or more of these privacy torts. The 14th Amendment to the *United States Constitution* also recognises individuals' interests in privacy.

154 *Hosking* [2005] 1 NZLR 1; *Holland* [2012] 3 NZLR 672.

155 See especially *Lenah* (2001) 208 CLR 199, 225 [37] (Gleeson CJ), 250–7 [112]–[128] (Gummow and Hayne JJ), 278 [188], 282–3 [201] (Kirby J), 319–20 [308], 320 [310], 326 [325], 328 [333] (Callinan J).

156 *Clubb* (2019) 267 CLR 171.

157 Peter Birks, 'The Concept of a Civil Wrong' in David G Owen (ed), *The Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 31, 51.

vote was a trespass – a wrongful interference with property.[158] Similarly, common law courts prioritised liberty over state necessity by invoking trespass to vindicate an individual's right not to be subjected to general executive warrants for search and seizure of his property, based solely upon suspicion of sedition.[159] The proposition that '[n]o man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing'[160] illustrates something deeper in the common law than its concern to protect rights to exclusive possession of land; it illustrates an allegiance of common law courts to the principle of individual liberty. Such an allegiance is 'of ancient origin but of enduring importance'.[161] Common law courts will start from the basis that an individual who does not consent to direct interference with their lives (land, person and property) is legally entitled to compensation for such interference.[162] One of the foundational roles of tort law was to enable individuals to maintain their autonomy, freedom to choose whom to permit into their lives, and liberty to go about their lives unfettered by non-consensual direct interferences with their most basic interests. Tort law is thus the mechanism through which common law secures individuals' dignity, whether through recognising their inherent worth and moral right against thorough commodification,[163] or through enabling individuals to discover for themselves what counts as success or living well in their own life.[164] These core concerns mirror the philosophical understanding of privacy, discussed above, as protecting individual dignity, autonomy, and liberty.

Trespass, and especially trespass to land, does not cover the same ground as interference with privacy, which Chief Justice Gleeson confirmed in *Lenah*: '[A] person who enters without permission is a trespasser; but that does not mean that every activity observed by the trespasser is private'.[165] However, the fundamental concerns underpinning the wrongness of both trespass and privacy interference are the same, and they are rooted in common law: protection and vindication of individual liberty, autonomy and dignity. In *Smethurst*, it was recognised in obiter that

> [i]n cases of trespass what may constitute injury is somewhat wider than in some other torts. Injury in the nature of an affront to a plaintiff's dignity or the apprehension of harm may qualify as damage for the purpose of an award of damages.[166]

Justice Gageler further recognised trespass to land had been developed in accordance with the 'common law right to control access by others and thereby to

158 *Ashby v White* (1703) 92 ER 126.
159 *Entick v Carrington* (1765) 19 Howell's State Trials 1030; 95 ER 807.
160 Ibid 817 [291] (Camden CJ for the Court).
161 *Halliday v Nevill* (1984) 155 CLR 1, 10 (Brennan J) ('*Halliday*').
162 This is why the onus lies on the defendant to prove their direct, intentional interference was nevertheless lawful: *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 311 (McHugh J).
163 On the Kantian understanding of dignity, categorically prohibiting the use of an individual solely as a means to an end.
164 On the Dworkinian understanding of dignity.
165 *Lenah* (2001) 208 CLR 199, 226–7 [43].
166 *Smethurst* (2020) 94 ALJR 502, 524 [73] (Kiefel CJ, Bell and Hayne JJ).

exclude others from access',[167] and Justice Edelman noted trespass to goods,[168] like trespass to land, protects from interference by any intended act.[169]

Protection from unwanted physical contact, in the tort of battery, though it likewise covers different ground from interference with privacy, is also based upon fundamental concerns to protect individual autonomy and liberty: I have the prerogative over who may physically interfere with my person, and the law prioritises my self-determination even above others' beneficial intentions.[170] The tort of false imprisonment also has at its normative heart the protection of liberty, through preserving freedom from interference with the person as the 'most elementary and important of all common law rights',[171] even though it also covers different ground from interference with privacy. Like these torts of intentional trespass, the normative demand to protect privacy stems from the concern to preserve an individual's control over aspects of his life by ensuring his ability to choose who can access those aspects remains intact.

Privacy's normative concern to safeguard dignity alongside liberty is also reflected in the torts of defamation and intentional infliction of harm. Untrue imputations, which harm my reputation by exposing me to contempt or causing others to shun me, have long been recognised as actionable wrongs,[172] because they are inconsistent with every individual being recognised as possessing inherent worth. Intentionally inflicting harm to an individual likewise undermines her dignity, by putting her in a state of 'violent shock', causing her to endure 'serious and permanent consequences', including ongoing 'suffering and incapacity'.[173] Tort law is therefore concerned to vindicate dignity, by imposing liability for defamation and intentional infliction of harm.[174] Although privacy is conceptually distinct, in the *way* it protects dignity, from defamation (it protects my control over who accesses my private life as opposed to my reputation),[175] and from intentional infliction of harm (such harm has a higher threshold than privacy-intrusion),[176] it

167 Ibid 533 [120] (Gageler J), citing *Plenty v Dillon* (1991) 171 CLR 635, 647, 654–5 (Gaudron and McHugh JJ) ('*Plenty*').

168 The tort which the respondent was held to have committed in *Smethurst* (2020) 94 ALJR 502.

169 *Smethurst* (2020) 94 ALJR 502, 559 [246] (Edelman J), citing *Entick v Carrington* (1765) 19 Howell's State Trials 1030, 1066, quoted in *Plenty* (1991) 171 CLR 635, 639 (Mason CJ, Brennan and Toohey JJ).

170 *Re T (Adult: Refusal of Treatment)* [1993] Fam 95, 115 (Lord Donaldson); adopted inter alia in *Brightwater Care Group (Inc) v Rossiter* (2009) 40 WAR 84.

171 *Trobridge v Hardy* (1955) 94 CLR 147, 152 (Fullagar J). See also *Webster v McIntosh* (1980) 32 ALR 603, 607 (Brennan J); *Ruddock v Taylor* (2005) 222 CLR 612, 650 [140] (Kirby J).

172 *Sim v Stretch* [1936] 2 All ER 1237, 1240 (Lord Atkin); *Parmiter v Coupland* (1840) 6 M & W 105; 151 ER 340, 341 [108] (Parke B); *Berkoff v Burchill* [1997] EMLR 139, 145 (Neill LJ), quoting *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581, 587 (Slesser LJ).

173 *Wilkinson v Downton* [1897] 2 QB 57, 58 (Wright J).

174 Indeed, in *Grosse* [2003] QDC 151, [452]–[455], Skoien SJ upheld a claim in the latter tort, in addition to a separate claim in breach of privacy, on the same facts concerning stalking and harassment. For dignity-protective aspects of defamation, see: Cheer (n 113) 310–12.

175 Kenyon, 'Defamation, Privacy and Aspects of Reputation' (n 114).

176 In *Giller* (2008) 24 VR 1, the Court (Maxwell P dissenting) refused to find liability in this tort on facts it recognised amounted to a breach of privacy. See also *Rhodes* [2016] AC 219, where the UK Supreme Court likewise refused to uphold liability in this tort for publication of private facts.

has at its core the same normative concern as these two torts, and sits within a normative category of 'dignity torts'.[177]

### 2 *Construing Interference with Privacy as a Tort*

In addition to its consistency with tort law's foundational principles, a tort of interference with privacy satisfies the doctrinal requirements of tort law.

#### *(a) Scope of Interest*

The difficulty of delineating a tort of interference with privacy has been raised,[178] not least in *Lenah* itself.[179] Indeed, privacy's normative underpinnings, which ought to direct judicial delineation of any legal privacy interest, often themselves bear no universal definition,[180] potentially hindering this definitional exercise.[181] However, definitional ambiguity is inherent in sundry torts, necessitating common law courts to develop incrementally the definition of constituent elements of, or exceptions to, liability. Such ambiguity has not necessitated, or made desirable, legislative intervention – whether to provide a conclusive and definitive scope of liability, or to contain any perceived excesses of common law liability – and so, nor should any challenges with delineating the scope of the privacy interest exclude the courts from providing a remedy, in favour of legislative codification.[182]

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.[183] Assault requires a reasonable apprehension of imminent harmful contact, though it remains unsettled how literally and narrowly 'imminence' should be defined.[184] 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.[185] In defamation, at least in England, the scope of the

177 Cheer (n 113). See also David Rolph, 'Vindicating Reputation and Privacy' in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press, 2016) 291; Tanya Aplin and Jason Bosland, 'The Uncertain Landscape of Article 8 of the *ECHR*: The Protection of Reputation as a Fundamental Human Right?' in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press, 2016) 265.

178 *Giller* (2008) 24 VR 1, 35 [165]–[167] (Ashley JA). See also Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (n 120); Tilbury (n 8) 160–1; Beswick and Fotherby (n 8) 221–38.

179 *Lenah* (2001) 208 CLR 199, 225–6 [40]–[42] (Gleeson CJ).

180 See, eg, in respect of dignity: Stephen Riley, 'Human Dignity: Comparative and Conceptual Debates' (2010) 6(2) *International Journal of Law in Context* 117.

181 Amy Gajda, 'The Trouble with Dignity' in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press, 2016) 246.

182 As argued by Tilbury, who recommends a statutory human right of privacy: Tilbury (n 8).

183 *Collins v Wilcock* [1984] 1 WLR 1172, 1177–8 (Goff LJ and Mann J); *Rixon v Star City Pty Ltd* (2001) 53 NSWLR 98, 114 (Sheller JA).

184 A wider definition was construed and applied in *Zanker v Vartzokas* (1988) 34 A Crim R 11, 14, 16 (White J), while a more literal, narrower definition was accepted in *R v Gabriel* (2004) 182 FLR 102, 117 [129] (Higgins CJ).

185 In *McFadzean v Construction Forestry Mining and Energy Union* (2007) 20 VR 250, 273 [81] (Warren CJ, Nettle and Redlich JJA) the question was held to be a 'matter of degree in all the prevailing

'serious harm' threshold (which *is* a legislative standard) has taken time to crystallise,[186] and the issue of distinguishing between fact and opinion remains partly a question of context, rather than one of strict verifiability.[187] 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.[188]

Further, the way in which tort law has accommodated privacy in other jurisdictions illustrates that privacy's boundaries are judicially conceivable and cognisable, depending largely upon context, contemporary socio-moral standards, and the objective standard of reasonableness: whether there was a reasonable expectation of privacy in the circumstances. 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.[189] Indeed, Chief Justice Gleeson in *Lenah* preferred a reasonability standard to delineate liability for interference with privacy,[190] echoed in Butler's vision for an Australian privacy tort following *Lenah*,[191] and recommended by the Law Reform Commission in 2014.[192] Identifying a reasonable expectation of privacy is not straightforward[193] and demands enhanced judicial engagement with privacy's

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circumstances' and was determined according to the claimants' predispositions vis-a -vis egress in the circumstances. Whereas, in *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331, 395–6 [307] (Doyle CJ, Duggan and White JJ), it was determined according to policy reasons related to the beneficial nature of foster care and the potential for 'unpredictable consequences' of holding otherwise.

186 See *Jameel v Dow Jones & Co Inc* [2005] QB 946; *Thornton v Telegraph Media Group* [2011] 1 WLR 1985 ('*Thornton*'). In *Thornton*, where the threshold requirement was explicitly identified, there was no discussion of what 'seriousness' actually required; then, after the requirement was codified in section 1 of the *Defamation Act 2013* (UK), there was uncertainty as to what it meant in *Cooke v MGN Ltd* [2015] 1 WLR 895, *Ames v The Spamhaus Project Ltd* [2015] 1 WLR 3409, *Lachaux v Independent Print Ltd* [2016] QB 402 and *Lachaux v Independent Print Ltd* [2018] QB 594, until the matter was settled by the UK Supreme Court in *Lachaux v Independent Print Ltd* [2020] AC 612.

187 *British Chiropractic Association v Singh* [2011] 1 WLR 133, rejecting the verifiability standard upheld by Eady J at first instance in *British Chiropractic Association v Singh* [2009] EWHC 1101 (QB). This contextual approach has been upheld and applied in *Butt v Secretary of State for the Home Department* [2017] EWHC 2619 (QB); *Zarb-Cousin v Association of British Bookmakers* [2018] EWHC 2240; *Morgan v Associated Newspapers Ltd* [2018] EWHC 1850 (QB).

188 See, eg, *Civil Liability Act 2002* (NSW) ss 5C, 5D. See also, eg, 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; *Cattanach v Melchior* (2003) 215 CLR 1.

189 *Hosking* [2005] 1 NZLR 1, 32 [117] (Gault and Blanchard JJ); *Murray v Express Newspapers plc* [2009] Ch 481, 502–3, [36] (Anthony Clarke MR) ('*Murray*'); *Holland* [2012] 3 NZLR 672, [94] (Whata J); *R v Jarvis* [2019] 1 SCR 488 (where the Supreme Court of Canada construed 'reasonable expectation of privacy' under voyeurism legislation, holding it could be obtained in public places including schools: at [42]–[43] (Wagner CJ, Abella, Moldaver, Karakatsanis, Gascon and Martin JJ), [146] (Rowe, Côté and Brown JJ)).

190 *Lenah* (2001) 208 CLR 199, 226 [42].

191 Butler (n 6) 373.

192 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (n 62) 9, recommendation 6–1.

193 Moreham, 'Unpacking the Reasonable Expectation of Privacy Test' (n 112); Eric Barendt, '"A Reasonable Expectation of Privacy": A Coherent or Redundant Concept?' in Andrew T Kenyon (ed),

normative underpinnings. However, neither is that wildly different from how courts deal with other interests protected by tort law (as indicated above), nor has that halted development of privacy torts in other 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.

### *(b) Defendant's Conduct*

The nature of the defendant's conduct is also a requisite consideration in tort law: in trespass, that is answered mainly by the 'directness' element,[194] and, in negligence, by the 'standard of care' element. This issue must be addressed in a tort of interference with privacy, and nothing within the concept of privacy prevents common law courts from arriving at a reasoned solution. In England, while it suffices to show publication of information for which there was a reasonable expectation of privacy without any additional requirements,[195] the tort's second stage, which involves an ultimate balancing test between the claimant's privacy and the defendant's freedom of expression,[196] may involve consideration of the defendant's conduct.[197] In other jurisdictions, claimants must prove interference was 'highly offensive' to a reasonable person, either relating to the private matter or to the nature of interference.[198] The balance of Australian judicial opinion,[199] the Law Reform Commission,[200] and scholars,[201] favours inclusion of either that additional requirement or a seriousness threshold. In *Lenah*, Chief

*Comparative Defamation and Privacy Law* (Cambridge University Press, 2016) 82 ('A Reasonable Expectation of Privacy').

194 In the sense that the element of directness is the primary distinguishing and defining element for all torts of trespass: in order to prove liability in any trespass tort, the claimant must prove that the defendant's conduct was direct. See, eg, *Leame v Bray* (1803) 3 East 593, 102 ER 724, 727–8 [602]–[603], where Le Blanc J reasoned that 'where the injury is immediate on the act done, there trespass lies; but where it is not immediate on the act done … there the remedy is in case'; and *Hutchins v Maughan* [1947] VLR 131 ('*Hutchins*'), where Herring CJ reasoned that there is no directness where there is 'some obvious and visible intervening cause, [so the act in question] … is regarded, not as part of the defendant's act': at 133. This can be contrasted with the requirement in negligence torts that the claimant prove the defendant's conduct (where a duty of care has been established) did not meet the standard of care (and that damage was consequential upon that failure to meet the standard of care, as to which see Part III(C)(2)(c) immediately below).

195 *Campbell* [2004] 2 AC 457, 466 (Lord Nicholls), 482 (Lord Hope), 495 (Baroness Hale), 504 (Lord Carswell).

196 *Re S (A Child)* [2005] 1 AC 593, 603 [17] (Lord Steyn) ('*Re S*'); *PJS* [2016] AC 1081, 1112 [78] (Baroness Hale).

197 Especially in respect of media defendants, eg, *Richard* [2019] Ch 169, 207–13, [290]–[315] (Mann J), applying Strasbourg jurisprudence to the effect that the defendant's conduct is relevant to the 'balancing' stage: *Axel Springer AG v Germany* [2012] EMLR 15, [93] (The Court).

198 *Hosking* [2005] 1 NZLR 1, 32 [117] (Gault and Blanchard JJ); *Holland* [2012] 3 NZLR 672, [94] (Whata J); *Jane Doe (Ont)* (2016) 394 DLR (4th) 169, [46] (Stinson J); *Jones* (2012) 346 DLR (4th) 34, [70]–[71] (Sharpe JA); *Restatement* (n 38) §§ 652A, 652B, 652D.

199 *Grosse* [2003] QDC 151, [442]–[444] (reasoning that offensiveness related to manner of intrusion); *Jane Doe (Vic)* [2007] VCC 281, [118] (Judge Hampel) (reasoning that offensiveness related to *either* manner of intrusion *or* nature of private information).

200 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (n 62) 10, recommendation 8–1.

201 Butler (n 6); Barendt, 'A Reasonable Expectation of Privacy' (n 193).

Justice Gleeson also preferred that standard.[202] This suggests Australian courts would be ready to adopt that requirement, especially if considered necessary to constraining the tort within discernible limits, preventing potential overreach.[203]

However, the reasons for avoiding such a requirement should not be neglected, and Australian courts have the opportunity to consider these before settling upon a fully formed tort of interference 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 her private life. Such undermining of autonomy might involve anodyne, objectively *inoffensive* intrusions.[204] 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 might more appropriately go to questions of whether or not the defendant is entitled to a defence.[205] Australian courts might take heed of doubts expressed in the New Zealand Supreme Court vis-a-vis the desirability of the 'highly offensive' requirement,[206] which were apparent even in Justice Tipping's majority judgment in *Hosking v Runting* ('*Hosking*') itself.[207]

### *(c) Fault and Damage*

Questions of fault, and whether damage must be proven or whether interference with privacy should be actionable per se, are elemental to tort law. Again, nothing in the concept of privacy prevents courts from determining these questions so as to be able to develop a fully formed tort of interference with privacy. As to fault, courts must determine whether the tort should be intentional (and reckless), or negligent, and whether it should attract strict liability. The Australian Law Reform Commission recommended intention and recklessness, but not strict liability.[208] As to proof of damage, the Commission recommended there be no requirement to prove actual damage; but this recommendation should be read in the context of the Commission's preference for a 'seriousness' requirement for interference.[209] In *Grosse v Purvis* ('*Grosse*')[210] and *Doe v Australian Broadcasting Corporation* ('*Jane Doe (Vic)*'),[211] the Courts required

202 *Lenah* (2001) 208 CLR 199, 226 [42].

203 As the Court reasoned in *Jones* (2012) 346 DLR (4th) 34, [72] (Sharpe JA), Barendt has also argued there must be a 'seriousness' threshold for privacy, given the 'reasonable expectation' test, on his view, insufficiently constrains liability in privacy: Barendt, 'A Reasonable Expectation of Privacy' (n 193).

204 See, eg, *Murray* [2008] Ch 481, where the intrusion was publication of anodyne photographs of the infant claimant while in a family outing in public. In *Murray*, the England and Wales Court of Appeal declined to adopt the New Zealand Court of Appeal's approach in *Hosking* to include a 'highly offensive' requirement: at 508 [48] (Anthony Clarke MR).

205 As Lord Nicholls reasoned in *Campbell* [2004] 2 AC 457, 466 [21]–[22] (Lord Nicholls).

206 *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277, [23]–[25] (Elias CJ).

207 [2005] 1 NZLR 1, 61–2 [256] (Tipping J).

208 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (n 62), recommendation 7–1. It was also recommended by the NSW Standing Committee on Law and Justice: see Legislative Council Standing Committee on Law and Justice (n 120) 71.

209 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (n 62) 10, recommendations 8–1, 8–2.

210 [2003] QDC 151.

211 [2007] VCC 281.

proof of actual damage: mental, emotional or psychological harm or distress.[212] Butler has recommended a requirement for proof of such harm in a tort of interference with informational privacy.[213] In England, the tort of misuse of private information is actionable per se, requiring no proof of actual damage, whether material or psychological,[214] and the same applies in New Zealand.[215]

As Butler has noted,[216] in construing a privacy tort, Australian courts must bear 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),[217] whereas the English courts make that distinction based upon whether the conduct is intentional (trespass) or negligent (case).[218] Further, where a tort is based upon negligence, it would require proof of recognisable psychiatric injury.[219] Therefore, if Australian courts were to adopt the English and New Zealand approach of construing a privacy tort based upon *indirect* injury (liability for acts *resulting in* interference with privacy), Australian common law would require proof of actual damage, which is not the requirement in England and New Zealand. However, if the Australian courts required proof of *intention* for such a privacy tort, as *is* the case in England and New Zealand, emotional distress could suffice for damage, rather than the higher standard of actual psychiatric injury. Indeed, Varuhas has argued that remedies for torts actionable per se, including trespass and defamation, are essentially vindicatory remedies, targeted at the wrongful invasion of the protected interest, rather than at any actionable consequential harm.[220] Reflecting upon privacy's philosophical underpinnings, the wrongness of interference with privacy is likewise inherent in the interference itself. A potential privacy tort, therefore, might best take the form of a tort that is actionable per se, requiring proof of intention, but not actual (consequential) damage.

### *(d) Injunctions*

The courts may also have to address whether and how far they are prepared to grant injunctive relief to prevent interferences with privacy.[221] Again, nothing within the concept of privacy prevents common law courts from determining this issue. Injunctive relief is not unavailable for tortious wrongs; it is available in

212 *Grosse* [2003] QDC 151, [187] (Skoien SJ); *Jane Doe (Vic)* [2007] VCC 281, [172]–[184] (Judge Hampel).

213 Butler (n 6) 375.

214 *Campbell* [2004] 2 AC 457; *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch), [108]–[127], where Mann J held privacy damages should be awarded to reflect infringement of claimant privacy rights, as well as compensate claimants for injury to their feelings, resulting from phone-hacking.

215 *Hosking* [2005] 1 NZLR 1, 35 [128] (Gault and Blanchard JJ).

216 Butler (n 6) 360.

217 *Platt v Nutt* (1988) 12 NSWLR 231; *Hutchins* [1947] VLR 131.

218 *Fowler v Lanning* [1959] 1 QB 426.

219 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; *Civil Liability Act 2002* (NSW) s 31; *Wrongs Act 1958* (Vic) s 72.

220 Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing, 2016) ch 3.

221 Indeed, the issue of remedies was one reason why the Australian Law Reform Commission recommended a statutory cause of action over statutory or common law development of an action in tort: Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (n 62).

defamation, though it is difficult to obtain given the general concern not to impose prior restraint, especially when it would hinder freedom of expression.[222] One issue relevant to whether injunctive relief should be granted for threatened interferences with privacy is whether interference has already occurred, so that, though it may entitle a claimant to damages, it would effectively mean that claimant has now lost her reasonable expectation of privacy.[223]

English courts have awarded permanent injunctions based upon the tort of misuse of private information, including against the press, even where the relevant information had already been published online and in print.[224] Though the English jurisdiction to grant injunctive relief for interference with privacy evolved out of breach of confidence jurisprudence, injunctions are currently granted in cases brought in the recognised *tort* of misuse of private information, and recognition of this action as a tort has not prevented such injunctive relief.[225] It is important to recall here that the English privacy tort is actionable per se; if an Australian privacy tort were to require proof of distress, as discussed above, that would presumably require claimants to evidence a likelihood of distress resulting from the threatened interference, which is not a specific requirement in England. This may affect how ready Australian courts would be to adopt the English approach with respect to granting injunctions based upon a tort of interference with privacy.

If Australian courts prove to be more ready to grant injunctions to protect privacy than they are vis-a-vis protecting reputation, litigants might start framing claims essentially for reputational damage as claims for privacy interference. Courts should bear this in mind when developing a tort of interference with privacy,[226] given the immediate interests protected by defamation and a tort of interference with privacy are conceptually distinct.[227]

### *(e) Defences*

Tort law also requires consideration of defences. Again, nothing in the concept or normative underpinnings of privacy prevents courts providing for classic defences to (intentional) tort actions, including consent, necessity, legal authorisation, and self-defence, as well as defences of privilege applicable to defamation, which, like interference with informational privacy, attracts liability for publication of information.[228] Indeed, the Law Reform Commission

222 See, eg, *Bonnard v Perryman* [1891] 2 Ch 269; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, 67–9 [17]–[19] (Gleeson CJ and Crennan J), 86–7 [80]–[82] (Gummow and Hayne JJ).

223 It was central to the judgment in *PJS* [2016] AC 1081 that prior publication (online) in breach of privacy did *not* erase the claimant's ongoing reasonable expectation of privacy, where restraint was sought against print publication of the relevant information, and where the harmful intrusive effect of print publication was held to be different and potentially greater than online publication.

224 See, eg, *PJS* [2016] AC 1081.

225 Ibid 1100–5 [32]–[44] (Lord Mance JSC). Such injunction applications require the court to have specific consideration of the right to freedom of expression, under *Human Rights Act 1998* (UK) s 12.

226 Barbara McDonald and David Rolph, 'Remedial Consequences of Classification of a Privacy Action: Dog or Wolf, Tort or Equity?' in Jason NE Varuhas and NA Moreham (eds), *Remedies for Breach of Privacy* (Hart Publishing, 2018) 239, 259.

227 Kenyon, 'Defamation, Privacy and Aspects of Reputation' (n 114).

228 The need to account for the freedom of political communication will be discussed in the next section.

recommended all of these defences be enacted with a new privacy tort.[229] Butler also recommends such defences, and discusses comprehensively how existing defences, especially those to defamation, could be adapted to a privacy tort.[230]

These doctrinal questions, elemental to tort law, must be answered by Australian courts in construing a tort of interference with privacy. Existing jurisprudence and commentary demonstrates a privacy tort can indeed be developed in a way that can satisfactorily address these questions, and that tort law is indeed an appropriate vehicle for protecting privacy.

### *3 Conflicting Interests: Freedom of Political Communication*

Tort law must also be able to constrain the potential of privacy protection to interfere with freedom of political communication.[231] The *Constitution* precludes curtailment of this freedom,[232] and the common law must conform with the *Constitution*.[233] Tort law 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'.[234] Tort law must be able to accommodate the more exacting judicial method used to decide whether an action or outcome curtails this freedom: the proportionality method.[235] Indeed, freedom of political communication is not absolute: legitimate – proportionate – interferences are permitted.[236] In *Lenah*, the High Court did not need to consider how this constitutional freedom might affect the common law's recognition of a privacy tort,[237] but Chief Justice Gleeson highlighted its relevance and importance.[238] Justices Gummow and Hayne also confirmed the common law's capacity to account for this conflicting freedom, reasoning that 'the common law provides particular causes of action and a range of remedies. These rights and remedies strike varying balances between competing claims and policies'.[239] It is likewise within the capacity of tort law in particular, when providing privacy protection, to account for freedom of political communication.

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

229 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (n 62) 12, recommendation 11.
230 Butler (n 6) 377–88.
231 *Lenah* (2001) 208 CLR 199, 219–20 [20] (Gleeson CJ).
232 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 ('*Lange*') (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
233 Recalled in *Lenah* (2001) 208 CLR 199, 219–20 [20] (Gleeson CJ).
234 *Lange* (1997) 189 CLR 520, 562–7 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Levy v Victoria* (1997) 189 CLR 579, 622 (McHugh J), 647 (Kirby J); Ibid 259–60 [140] (Kirby J).
235 Confirmed in *Clubb* (2019) 267 CLR 171.
236 *McCloy v New South Wales* (2015) 257 CLR 178 ('*McCloy*'); *Brown v Tasmania* (2017) 261 CLR 328; *Clubb* (2019) 267 CLR 171, 186 [5] (Kiefel CJ, Bell and Hayne JJ).
237 *Lenah* (2001) 208 CLR 199, 258 [133] (Gummow and Hayne JJ).
238 Ibid 219–20 [20] (Gleeson CJ).
239 Ibid 238 [80] (Gummow and Hayne JJ).

of expression, including political communication and artistic expression', so that no separate freedom of expression defence would be necessary.[240] This reference to 'public interest', as opposed to freedom of political communication in particular, reflects breach of confidence jurisprudence, which includes a defence of public interest,[241] and it also reflects the way in which English courts have construed that action to cater for privacy protection.[242] A tort of interference with privacy as contemplated in *Lenah* (like the actions recognised in *Grosse* and *Jane Doe (Vic)*) does not include such an element based upon 'public interest', and, importantly, is not bound by breach of confidence doctrine, as English courts were 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.[243] In the New Zealand tort of wrongful publication of private facts, freedom of expression[244] is accounted for in the defence of legitimate public concern.[245] In 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.[246] The Commission proposed the defendant bear the burden of proving a public interest, and the claimant prove the public interest in privacy outweighs it. This is not the same as a standalone defence explicitly protecting freedom of political communication, as a matter separate from and subsequent to establishing liability for privacy interference.

The better route for Australian courts in recognising a tort of interference with privacy – the route more in line with tort law's purposes and doctrine *and* privacy's normative underpinnings – is to recognise such a standalone defence, and not to condition the very tort upon the absence of a countervailing public interest. 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.[247] 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 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 philosophical

240 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (n 62) 10–11, recommendation 9.

241 See, eg, an English case, *Lion Laboratories Ltd v Evans* [1985] QB 526. In Australia the courts have hesitated to adopt a 'public interest' defence: see, eg, *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 95 ALR 87, 125 (Gummow J) ('*Smith Kline*').

242 See, eg, *Campbell* [2004] 2 AC 457, 485–9 [101]–[113], 490 [116] (Lord Hope).

243 *Lange* (1997) 189 CLR 520.

244 A codified, statutory right in the *New Zealand Bill of Rights Act 1990* (NZ) section 14, but qualified on the basis of proportionate interferences.

245 *Hosking* [2005] 1 NZLR 1.

246 Butler (n 6) 378–9.

247 See, eg, *Halliday* (1984) 155 CLR 1. An implied licence defeats a claim in trespass to land.

underpinnings 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.

A standalone 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.[248] 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,[249] as it has been delineated thus far by the courts. The other 'public interests' listed by the Commission in addition to political communication, including press freedom, artistic expression, open justice, public health and safety, and national security, could be provided for in specific separate defences, or encompassed within the defence of necessity. 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 v New South Wales* ('*McCloy*')[250] and *Clubb v Edwards* ('*Clubb*'),[251] 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

248 See especially *McCloy* (2015) 257 CLR 178; *Clubb* (2019) 267 CLR 171.

249 See, again, Gummow J's critical comments on judicial adoption of 'public interest' in *Smith Kline* (1990) 95 ALR 87, 125.

250 (2015) 257 CLR 178.

251 (2019) 267 CLR 171.

defence arise in the qualified privilege defence in defamation,[252] and consent in medical contexts.[253]

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'.[254] 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 made by the Parliament'.[255] Therefore, the claimant in an action for interference with privacy would have to address this question on the facts.

If the claimant proves the particular remedy or relief sought *is* legitimate, the final question would be answered by applying a proportionality analysis in accordance with *Clubb*.[256] 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'.[257] That involves testing the rationality, suitability, and necessity[258] 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.[259]

English courts have also adopted proportionality to determine whether privacy ought to be defeated in favour of freedom of expression.[260] However, the English approach is different from that applied in *Clubb*. In England, because *both* privacy *and* freedom of expression are *European Convention* rights incorporated in the *Human Rights Act 1998* (UK), and because 'neither … has as such precedence over the other', the courts must consider 'the justifications for interfering with or restricting each right' and 'the proportionality test must be applied to each'.[261] This constitutional context of presumptively equivalent fundamental rights is not present in Australia, where privacy interests are reflected in tort law's concern to

252 Defeasible by proof of malice.

253 Where consent is presumed due to incapacity, the claimant may still rebut that presumption with proof to the contrary.

254 *Clubb* (2019) 267 CLR 171, 195–6 [49]–[51], citing *Monis v The Queen* (2013) 249 CLR 92, 182–3 [247] (Heydon J), which in turn was quoting Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) 85.

255 *Clubb* (2019) 267 CLR 171, 198–9 [59]–[60] (Kiefel CJ, Bell and Hayne JJ).

256 Ibid 199–209 [64]–[102].

257 Ibid 200 [69].

258 Ibid 205–8 [84]–[95].

259 Ibid 208–9 [96]–[99].

260 *Re S* [2005] 1 AC 593, 603 [17] (Lord Steyn).

261 Ibid; *Campbell* [2004] 2 AC 457, 497 [140]–[141] (Baroness Hale).

protect individual dignity, autonomy and liberty, rather than a standalone, juridified fundamental right to privacy, itself subject to qualifications determined by proportionality analysis. This would not necessarily preclude proportionality analysis in the context of an Australian privacy tort, but it is a reason why Australian courts, in such circumstances, should not look to English privacy tort jurisprudence as a panacea. Further, freedom of political communication is an implied constitutional freedom, which, though itself not absolute, is not equivalent to a privacy interest protected by tort law. Nor does it extend as far as freedom of (non-political) expression, and it is not an individual right.[262] The defence of political communication would ensure a common law tort of interference with privacy does not infringe the *Constitution* by permitting disproportionate limitations on the implied freedom; it would *not* vindicate any rights held by the defendant. Therefore, English jurisprudence on proportionality in privacy actions would not be an appropriate point of reference for Australian courts.

There is another reason to focus upon Australian jurisprudence on freedom of political communication and proportionality, and *not* adopt the English approach: proportionality has, in the English tort, been applied in terms of the 'public interest' in publication,[263] and an overall 'balancing' of rights,[264] rather than in terms of a complex and structured two-way proportionality analysis, as required in England.[265] Thus, even though this proportionality analysis is required under English law, in a recent privacy judgment that is reflective of the judicial trend to rely upon 'public interest' and 'balancing' as opposed to proportionality, the Supreme Court's majority judgments mentioned proportionality only once, and did not articulate or methodically apply a principled proportionality test on the facts.[266] Indeed, Lord Toulson's dissent called for proper proportionality analysis to justify the majority's decision.[267] This reliance upon 'balancing' has been criticised as

262 *Comcare v Banerji* (2019) 93 ALJR 900.

263 The courts routinely invoke 'public interest' in order to undertake the proportionality analysis. See, eg, *A v B plc* [2001] 1 WLR 2341, 2344 [11], 2348 [29] (Jack J); *Browne v Associated Newspapers Ltd* [2007] 3 WLR 289, 302 [38], 308 [55] (Anthony Clarke MR); *Campbell* [2004] 2 AC 457, 474–5 [56]–[63] (Lord Hoffmann), 485–9 [101]–[113], 490 [116] (Lord Hope), 497–8 [142] (Baroness Hale); *ERY v Associated Newspapers Ltd* [2017] EMLR 9, [47], [69] (Nicol J); *K v News Group Newspapers Ltd* [2011] 1 WLR 1827, 1832–3 [13], 1834–5 [19], 1836 [23] (Ward LJ) ('*K v NGN*'); *HRH Prince of Luxembourg v HRH Princess of Luxembourg* [2017] 4 WLR 223, 499–50 [99]–[100] (MacDonald J); *PJS* [2016] AC 1081, 1095–8 [21]–[26], 1100–2 [31]–[36], 1094–7 [20]–[24], 1104–5 [44]–[45] (Lord Mance JSC), 1106 [50]–[51] (Lord Neuberger); *RocknRoll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch), [35] (Briggs J) ('*RocknRoll*'); *Theakston v MGN Ltd* [2002] EMLR 22 ('*Theakston*'); *Weller v Associated Newspapers Ltd* [2016] 1 WLR 1541, 1554 [40] (Lord Dyson MR) ('*Weller CA*'); *ZXC v Bloomberg LP* [2021] QB 28.

264 See, eg, *Douglas CA* [2001] QB 967, 1004, 1007 (Sedley LJ); *HRH Prince of Wales v Associated Newspapers Ltd* [2007] 3 WLR 222, 241 [67] (Blackburne J); *Theakston* [2002] EMLR 22, 420 [67], 422 [71], 422 [73], 422–3 [75] (Ouseley J); *K v NGN* 1830 [9], 1834 [18], 1835–6 [20] (Ward LJ); *RocknRoll* [2013] EWHC 24 (Ch) [38]–[40] (Briggs J); *Weller CA* [2016] 1 WLR 1541, 1553–5 [39]–[42] (Lord Dyson MR).

265 The primary authorities for the proposition that a complex and structured two-way proportionality analysis (applied to both the privacy right and the right to freedom of expression) is required in the second stage of the English privacy tort are: *Re S* [2005] 1 AC 593, 603 [17] (Lord Steyn); *Campbell* [2004] 2 AC 457, 497 [140]–[141] (Baroness Hale).

266 *PJS* [2016] AC 1081, 1094–7 [20]–[24] (Lord Mance JSC).

267 Ibid 1114–16 [87]–[93].

providing the courts with a convenient rhetorical tool with which to appear to justify their final decision upholding one right and not the other, but which in reality provides little insight into the principles upon which that decision was reached.[268]

To avoid such pitfalls, Australian courts should rely upon the reasoning in *Clubb*, where the Justices engaged with the proportionality analysis directly and in greater depth than the English courts have generally exhibited in their adjudication of privacy claims.[269] This alone evidences that Australian courts have the capacity, through common law, to resolve potential conflicts between privacy and expressive freedom, and that the framework and method for resolving that conflict need not and should not be reserved exclusively for legislation.

### *4 Tort Law is More Appropriate than the Main Alternative: Equity*

Given tort law is an appropriate mechanism for accommodating privacy protection in common law, is it the most appropriate? Equity has also been used to vindicate privacy interests. This is not, however, necessarily the most appropriate way of protecting and vindicating privacy interests. The English experience of evolution of the law through breach of confidence to a standalone tort 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,[270] to a point where the action became only artificially 'equitable' and only nominally 'breach of confidence'.[271] Given a standalone common law tort of invasion of privacy was not available in English law when breaches of individual privacy were beginning to be litigated,[272] the courts were forced to take a more tempered evolutionary route through breach of confidence, and through a transformation of that existing cause of action, in order to vindicate an interest cognisable in common law. That experience does not mean equity or breach of confidence are most appropriate for privacy protection. Indeed, breach of confidence cannot protect against physical intrusions.

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268 Rebecca Moosavian, 'Deconstructing "Public Interest" in the Article 8 vs Article 10 Balancing Exercise' (2014) 6(2) *Journal of Media Law* 234; Rebecca Moosavian, 'A Just Balance or Just Imbalance? The Role of Metaphor in Misuse of Private Information' (2015) 7(2) *Journal of Media Law* 196.

269 See, in particular, the comprehensive reasoning of Kiefel CJ, Bell and Keane JJ about the appropriateness of proportionality and how it is applied in this case: (2019) 267 CLR 171, 199–209 [64]–[102]; the reasoning of Nettle J on the incommensurability problem: at 267–8 [271]–[272]; and the historically and philosophically engaged reasoning of Edelman J, which sought to justify why proportionality was consistent with common law adjudication: at 331–4[465]–[470]. See also the reasoning of the dissenting Justices (Gageler J at 225 [162], 240 [210]; Gordon J at 306–10 [392]–[404]), whose reservations about the proportionality method were based upon a comprehensive and in-depth analysis of its origins, purposes and applications, and which can serve as a useful reminder of the constant need for courts to ensure they are applying proportionality faithfully to its structure and specific requirements, and not straying into the realm of discretion, 'public interest' and 'balancing'.

270 See, eg, *Douglas CA* [2001] QB 967.

271 Phillipson and Fenwick (n 55) 671; Phillipson (n 55); Moreham, 'The Protection of Privacy in the English Common Law: A Doctrinal and Theoretical Analysis' (n 112).

272 *Kaye* [1991] FSR 62.

When the House of Lords recognised a separate action in privacy, though it still acknowledged the legacy and nomenclature of breach of confidence, it recognised that 'this nomenclature is misleading', given that

> [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.[273]

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'.[274] Similarly, Lord Hoffmann concluded:

> the new approach takes a different view of the underlying value which the law protects. Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon protection of human autonomy and dignity – the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people".[275]

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 Court of Appeal's subsequent recognition that the common law action in privacy was a 'tort',[276] and the Supreme Court's unquestioned reference to it as a 'tort',[277] 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 English courts recognised misuse of private information was a standalone 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 occurred in England,[278] 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.[279] 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 failed to establish an equitable right to a remedy, essentially protecting privacy, by analogy with confidential information.[280]

Indeed, the unsuitability of equity in providing remedies for privacy interferences can also be observed in how such remedies were fashioned in *Giller*

273 *Campbell* [2004] 2 AC 457, 464–5 [13]–[14] (Lord Nicholls).
274 Ibid 464 [14] (emphasis added).
275 Ibid 473 [51] (Lord Hoffmann).
276 *Vidal-Hall* [2016] QB 1003, 1028–31, [43]–[51] (Lord Dyson MR and Sharp LJ).
277 *PJS* [2016] AC 1081, 1100–5 [32]–[44] (Lord Mance JSC).
278 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (n 120).
279 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (n 62).
280 *Smethurst* (2020) 94 ALJR 502, 525, [81] (Kiefel CJ, Bell and Hayne JJ).

*v Procopets [No 2]* ('*Giller*').[281] The Court declined to recognise a tort of interference with privacy,[282] and used equity (breach of confidence) to provide damages for the harm – distress – which it recognised was actionable.[283] 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 invoked the very same normative concerns as Lord Hoffmann recognised 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',[284] 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'.[285] 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 emphasised the fact that such English authorities as *Campbell v MGN Ltd*[286] saw the courts award damages for what they continued to call 'breach of confidence',[287] sidelining 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.[288] Further, even though Chief Justice Gleeson in *Lenah* acknowledged breach of confidence could be available for actions involving non-consensual publication of confidential information,[289] that was not made out on the facts, and was at any rate not a judicial confirmation that Australian courts were bound to vindicate individual privacy interests through breach of confidence only; a door was left open for a tort. In truth, the Australian courts post-*Lenah* were not left powerless as were their English counterparts post-*Kaye*: as already noted, while English courts may have been forced by the clear statement in *Kaye* precluding a privacy tort to transform and 'extend' breach of confidence,[290] Australian courts face an open door to a tort of interference with privacy. This is why the Court in *Giller* (as well as the Court in *Wilson v Ferguson*,[291] given it endorsed the fashioning of equitable remedies in *Giller*)[292] should have followed a tort-route on the basis of *Lenah*, rather than an

281 (2008) 24 VR 1. See also subsequently in *Wilson* [2015] WASC 15.
282 As argued above, this Court's interpretation of *Lenah* was unduly restrictive in this regard.
283 *Giller* (2008) 24 VR 1, 50 [223] (Ashley JA), 99–106 [420]–[446] (Neave JA).
284 *Campbell* [2004] 2 AC 457, 473 [51] (Lord Hoffmann).
285 *Lenah* (2001) 208 CLR 199, 226–7 [43].
286 [2004] 2 AC 457.
287 *Giller* (2008) 24 VR 1, 99 [418] (Neave JA).
288 See, eg, *Campbell* [2004] 2 AC 457, 464–5 [14] (Lord Nicholls), 473 [51] (Lord Hoffmann).
289 *Lenah* (2001) 208 CLR 199, 225 [39].
290 *Campbell* [2004] 2 AC 457, 471 [44], 473 [51] (Lord Hoffman).
291 [2015] WASC 15.
292 *Wilson* [2015] WASC 15, [73]–[85] (Mitchell J).

equity-route on the basis of English authorities, and why it did not need to resort to equity to compensate the harm it recognised was actionable.[293]

As has been highlighted by equity scholars, the fashioning of compensatory damages in equity for non-tortious dignitary harm or distress is problematic.[294] 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'.[295] Further, one of the main reasons why damages may be awarded in equity, such as under the *Chancery Amendment Act 1858* (UK) ('*Lord Cairns' Act*') (or its modern iterations),[296] is that common law damages are not recoverable for a wrong actionable at common law,[297] such that equity provides a reserve jurisdiction where conscience demands loss be compensated: equity is, after all, 'a series of glosses and appendices to the common law'.[298] On the basis of *Lenah*, the sort of privacy-invasive harm recognised as actionable in *Giller* could have been recognised as a tortious wrong, attracting straightforward damages in tort, as discussed above. 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.[299] The Court's declining to recognise a tort, and its opting to take the equity-route, led it into the less straightforward, and less suitable, territory of equitable damages.

As was recognised in the discussion on injunctions in Part III(C)(2)(d), the issue of remedies remains one reason why there might be hesitation to recognise a privacy tort. As was noted in Part III(C)(2)(d), equity has always provided a more straightforward route for injunctive relief than has tort law (though the courts have awarded injunctions on the basis of torts, including defamation). It is also noted here that, although the remedial purpose of tort law has always been primarily to award damages in compensation, there is an equitable jurisdiction for

293 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. The argument that has been presented in this article is that *Lenah* provided an open door for recognition of a privacy tort in Australian common 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.

294 Heydon, Leeming and Turner (n 146) 882–3; Turner (n 146).

295 Turner (n 146) 266.

296 Equitable compensation can also be available for purely equitable wrongs. This is distinct from damages under *Chancery Amendment Act 1858* (UK) ('*Lord Cairns' Act*') (which do not extend to equitable wrongs).

297 Turner (n 146) 277.

298 Ibid 266.

299 *Giller* (2008) 24 VR 1, 29–34 [134]–[160] (Ashley JA), 101–2 [425]–[431] (Neave JA). 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*, *Lord Cairns' Act* damages were not pleaded and the Court therefore did not address the issue: [2015] WASC 15, [86] (Mitchell J).

compensatory damages (albeit significantly limited as a matter of principle, as discussed in this paragraph). It is submitted that the ultimate balance lies in favour of tort, as opposed to equity, for the most appropriate remedial option for interferences with privacy. This is because the courts have more leeway, as a matter of *principle*, to grant injunctive relief in response to a claim in tort, than they do to grant monetary remedies in equity for the nature of harm occasioned by a privacy interference.

In all, tort law is the most appropriate mechanism to answer the normative demand for legal protection of privacy. A tort of interference with privacy is both consistent with the purposes and principles of tort law, and a better means of vindicating privacy interests than other possible avenues, primarily equity.

### D Privacy Cases Being Brought before the Courts

Given there is a normative demand that the common law intervene to protect individual privacy, and given tort law is the most appropriate mechanism, the courts should recognise a tort of interference with privacy when they have before them cases of interference with individual privacy. That is the final, practical condition for recognition of such a tort.

*Lenah* gave the High Court nothing practical against which it could apply common law principle, and thus recognise with finality a tort of interference with privacy.[300] As the common law involves applied (or practical) reason, a necessary and inherent part of it is the *application*, through analogous reasoning, of principles established in past judgments to practical problems presently arising.[301] If the practical problem does not attract a principle of law which the court can apply to resolve the problem, there can be no development in common law that confirms the operation of a particular remedy. That was the impediment in *Lenah*.[302]

However, if certain facts align with the normative and doctrinal parameters of an action for interference with privacy, the courts should address such facts by applying the relevant legal principle, that is, a tort of interference with individual privacy, as contemplated in *Lenah*.[303] This operation of practical reason in common law is observable in the New Zealand case, *Hosking*, where the Court, on the basis of facts involving individual claimants and the publication of information about these individuals, was able to recognise a tort of wrongful publication of private information, and to apply it to the facts. It was able to resolve that case by confirming the claimant did not establish all of that tort's requirements: the

300 That is to say, because in *Lenah* it was a corporation and not an individual attempting to sue in privacy, there was no scope at all for the Court to apply any semblance of principles of privacy protection (given privacy is reserved, as a matter of principle founded upon the recognised normative underpinnings, to individuals, as discussed above).

301 TRS Allan, 'Principle, Practice, and Precedent: Vindicating Justice, According to Law' (2018) 77(2) *Cambridge Law Journal* 269.

302 Likewise, in *Smethurst* (2020) 94 ALJR 502 it was inappropriate (and unnecessary) for a tort of interference with privacy to be pleaded. Gageler J reasoned: 'This is not a case in which a remedy is sought against someone other than a trespasser': at 534–5 [129].

303 As was done in *Grosse* [2003] QDC 151 and *Jane Doe (Vic)* [2007] VCC 281; but not in *Kalaba* [2004] FCA 763, *Giller* (2008) 24 VR 1 or *Wilson* [2015] WASC 15.

information concerned was not private, and publication was not highly offensive.[304] The tort was *accessible* by the claimants (individuals about whose family information had been published), but their evidence did not prove the requisite *elements* of that tort, as confirmed by the Court. This was not the case in *Lenah*, where no privacy tort at all would have been accessible by LGM (regardless of whether LGM could prove the elements of such a tort), given that LGM was not an individual, which is a categorical and definitional component of the normative value of privacy and of any legally cognisable interest in privacy.

It is possible that the precedent in *Giller* (applied in *Wilson*), that interference with privacy is at least actionable in Australia, will be a basis upon which individuals suffering such harm will bring their cases before the courts more readily than they may have been inclined to previously. If such a privacy case is brought before Australian courts, the reasoning in *Lenah* should be revitalised as a starting point for recognition of a common law tort of interference with privacy.

## IV CONCLUSION

The High Court left a door open in its judgment in *Lenah*, inviting courts to recognise and apply a common law tort of interference with privacy, when the appropriate case arose. In *Lenah* it was recognised that no privacy interest arose, because LGM was not an individual. Given that common law judges develop the law through a symbiosis of principle and practice, where the facts of a litigated case activate precedent and allow judicial interpretation and application of law, this factual limitation prevented the Court from recognising a common law privacy tort outright in *Lenah*. Instead, their Honours contemplated the nature and rudimentary scope of such a tort. That is the precedential value of *Lenah*: the proposition that a tort of interference with privacy is recognisable in Australian law, with the cautions voiced by the High Court Justices in that judgment.

Since *Lenah*, some Australian courts have interpreted and applied a tortious action for interference with privacy, while others have declined to do so, interpreting *Lenah* either as an obstacle to, or as insufficiently supportive of, common law recognition of such a tort. In appellate judgments on actions for interference with individual privacy, the Courts declined to recognise a tort of interference with privacy, even though they awarded the claimant a remedy; they resolved to do so through equity. The authority in *Lenah* concerning privacy protection through tort law is therefore in need of reaffirmation and revitalisation.

This article has argued, first, that it is clear from the reasoning in *Lenah* that Australian courts *can* recognise a common law tort of interference with privacy, and, second, that Australian courts *should* recognise such a tort. There is a sufficiently strong normative demand for common law intervention in the protection of privacy, and tort law is the most appropriate vehicle for such protection. The courts should from now on recognise and apply a tort of interference with privacy applicable to individuals, delineated by a reasonable

304 *Hosking* [2005] 1 NZLR 1, 41 [164]–[165] (Gault and Blanchard JJ), 63 [260] (Tipping J).

expectation of privacy, and attracting a standalone defence of political communication requiring proportionality analysis in accordance with the High Court's jurisprudence on this constitutional freedom.