Ignoring the Call for Law Reform: Is It Time to Expand the Scope of Protection for Personal Images Uploaded on Social Networks?

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Social networks have changed the way in which people communicate, in particular the way that images are uploaded and shared online. While there are many benefits for the use of social networks, uploading personal images online are prone to misuse. This is highlighted with the Facebook's Cambridge Analytica privacy breach, however the protection of personal images is limited and fragmented in Australia. There have been a number of calls for potential law reform for expanding the scope of legal protection under the common law however the law remains unchanged. This means that personal images that fall outside the scope of the current protection are bereft of protection and prone to misuse. This article examines whether the common law ought to be expanded to prevent the abuse of images that may not fall within the scope of a sensitive nature.

I. Introduction

There are a number of significant gaps in the legal protection available for personal images that are shared on social networks in Australia.[1] This article examines the potential role that a new statutory tort for serious invasions of privacy might play in protecting personal images shared online from misuse. Specifically, the article examines two proposals made by the Australian Law Reform Commission (ALRC) in its 2014 report, *Serious Invasions of Privacy in the Digital Era*.[2] The first is that a statutory tort for serious invasions of privacy should be introduced. If enacted, the tort for serious invasion of privacy would cover two types of serious invasions of privacy:[3] "intrusion upon seclusion" and "misuses of private information". The ALRC also recommended that in the absence of a statutory tort, the tort of breach of confidence ought to be expanded to include private information. While the recommendations have been largely ignored, the recent data breaches and abuse of images uploaded online reinforce that reform of privacy law is necessary. This article will look at each of these proposals in turn. It will then examine whether the ALRC's recommendations, if adopted, would protect personal images that are shared online. In examining the proposed reforms, it will be argued that while the changes would provide some improvements the reforms do not adequately address the gaps in the existing legal protection.[4]

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[1] The Australian Law Reform Commission has made numerous recommendations for privacy reform over the years. For example, since *Victoria Park Racing and Recreation Grounds Co Ltd v Taylo*r (1937) 58 CLR 479, the Commonwealth government has commissioned investigations that resulted in the enactment of the *Privacy Act 1988* (Cth); see further Australian Law Reform Commission, *Privacy*, Report No 22 (1983), xxxvi, xxxvii, Chs 9–11.

[2] Australian Law Reform Commission, *Serious Invasion of Privacy in the Digital Era*, Report No 123 (2014).

[3] Australian Law Reform Commission, n 2.

[4] The Australian government has yet to make any significant responses to the ALRC's recommendations. This is in contrast to New South Wales established a parliamentary inquiry. The Legislative Council's Standing Committee Law and Justice has been conducting an inquiry.

II. A New Statutory Tort of Invasion of Privacy for Serious Invasions of Privacy

The current legal protection of personal privacy in Australia is piecemeal and fragmented.[5] As noted previously, the avenue for redress for intrusions upon seclusion is limited to tortious actions such as trespass to property and trespass to person.[6] The existing privacy law is also inconsistent. Even though the ALRC highlighted the problems in the law, there have not been any significant reforms to bridge the gaps in Australian law.[7]

One of the ALRC's key recommendations was that the Commonwealth government should enact a statutory tortious cause of action for serious invasions of privacy that would cover two new types of serious invasions of privacy:[8] "intrusion upon seclusion" and "misuse of private information".[9] These types of invasion of privacy are based on United States (US) privacy law.[10] The following parts examine the two types of tortious action for serious invasions of privacy. This part also considers whether the two types of tortious actions would be likely to prevent the misuse of personal images that are shared, uploaded and exchanged on social networks.

A. Intrusion upon Seclusion

The first type of serious invasion of privacy recommended by the ALRC is "intrusion upon seclusion".[11] While intrusion upon seclusion is not specifically defined in the ALRC report, intrusion upon seclusion is based on American jurisprudence.[12] In the United States, intrusion upon seclusion is defined as situations where a person:

> intentionally intrudes, physical or otherwise, upon the solitude or seclusion of another or his private affairs or concerns is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.[13]

A number of questions arise when considering whether the proposed new tort would play a role in preventing the misuse of personal images on social networks. The first is whether the tort would apply to

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[5] See Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), 74, [3.1]; Australian Law Reform Commission, n 2, [3.50].

[6] See Australian Law Reform Commission, n 2, 5.22; *For Your Information: Australian Privacy Law and Practice*, n 5, 74, [3.1].

[7] See Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979) 228; the report highlighted gaps in the law such as identification of sexual assault victims; identification and publication of addresses and name of a witness of murder; media photographs of two 15-year olds who eloped; filming individuals in the street without their consent; and paparazzi taking photographs of a woman giving birth to quadruplets.

[8] See further Australian Law Reform Commission, n 2, 4, 4–1, 4–2, which states: "Recommendation 4-1 A new tort in a New Commonwealth Act. Two Types of Invasions, Recommendation 4–1 if a statutory cause of action for serious invasion of privacy is to be enacted, it should be enacted by the Commonwealth, in a Commonwealth Act (the Act)"; see Australian Law Reform Commission, n 2, Recommendation 4–2 the cause of action should be described in the Act as an action in tort; Australian Law Reform Commission, n 2, 5, 5.15, Recommendation 5–1.

[9] See Australian Law Reform Commission, n 2, 5.15.

[10] US privacy law includes four different types of tortious actions: for breaches of privacy intrusion upon the plaintiff's seclusion or solitude, or into their private affairs; public disclosure of embarrassing private facts about the plaintiff; publicity which places the plaintiff in a false light in the public eye; and appropriation, for the defendant's advantage, of the plaintiff's name or likeness. William L Prosser, "Privacy" (1960) 48 *California Law Review* 383, 389. The ALRC confined an Australian statutory tort to the first two categories. In 1960, Prosser stated that the law of privacy comprised four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, "to be let alone". Without any attempt to exact definition, these four torts may be described as follows: "1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs. 2. Public disclosure of embarrassing private facts about the plaintiff. 3. Publicity which places the plaintiff in a false light in the public eye. 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness."

[11] See further Australian Law Reform Commission, n 2, 5, Recommendation 5–1, 5.1 <https://www.alrc.gov.au/publications/5-two-types-invasion/cause-action-two- types-invasion-privacy>.

[12] See generally Prosser, n 10.

[13] See American Law Institute, *Restatement (Second) of the Law of Torts* (1977) § 652B.

digital spaces; that is, whether the tort would apply to personal images that are shared on social networks. The second is whether uploading images on a social network page is an intrusion. The third is whether the tort would protect all types of information captured in personal images that are shared online.

B. Is a Social Network Page a "Secluded" Space?

According to the ALRC, the tort of intrusion upon seclusion involves unwanted physical intrusion into someone's private space.[14] It is clear that the tort applies to intrusions into private physical spaces of individuals. Typically, it applies when someone's physical space has been interfered with, such as when people watch, listen, or record a person in their home. One issue that is unclear is whether a *secluded* space needs to be a *private* space. That is, would a photograph taken in a public space be protected? Would, for example, a park be considered to be a secluded place? While in most cases this would not be the cases one situation where a park may be a secluded place is when photographs are taken of homeless people. Even though a park is a public place, as homeless people have no specific private place, it may be treated as a secluded space.[15]

Another question that arises is whether a social network page would be seen as a secluded space. While seclusion is not defined in the ALRC report, the meaning of the term is drawn from the United States *Restatement of Law, Torts* which states that:

> [B]y physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. … The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined.[16]

It is arguable that in some limited cases a profile page may be "a place of seclusion".[17] Social networks such as Facebook, Twitter and Instagram are public and semi-private networks which provide users with the ability to restrict access for users to their images. Even though Twitter allows people to share images publicly, there is some ability to restrict access.[18] For example, Facebook's privacy settings allow people to have a closed group or limit access to "only me", "friends", or "friends of friends". When a person chooses the "friends of friends" access setting third parties can access and view the images a social network page would not be a secluded space. However when a person has a profile page with restricted privacy settings such as "only me" or a "closed group", it could be argued that their profile page is a secluded space.[19] Given that social networks allow users to create groups that are closed or "secret", a social network space may in limited situations be a secluded space. [20] This will depend on the nature of the settings used.[21]

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[14] See Australian Law Reform Commission, n 2, "5. Two Types of Invasion" [5.2] <https://www.alrc.gov.au/publications/5-two-types-invasion/summary>; see Nicole Moreham, "Beyond Information: The Protection of Physical Privacy in English Law" (2014) 73(2) *Cambridge Law Journal* 350, 351.

[15] See Cherine Fahd, *The Sleepers, 2005, Centre for Contemporary Photography Part of the Melbourne International Arts Festival* (16 September–23 October 2011) <http://cherinefahd.com/e/in-camera-and-in-public---ccp>; "Instagram Trend That Takes Photos of Homeless People and Posts Them Online for Cheap Laughs", *Daily Telegraph*, 4 March 2015 <http://www.dailytelegraph.com.au/news/nsw/instagram-trend-that-takes-photos-of-homeless-people-and-posts-them-online-for-cheap-laughs/news-story/fb9ac28e9774df4583ff6f1bd55b0a0c>; Wendy Syfret, *Stop Taking Pictures of Homeless People*, Vice Australia (13 November 2014) <http://www.vice.com/read/stop-taking-pictures-of-homeless-people>; Chris Grampat, *On the Ethics of Taking Photos of Homeless People*, The Photoblogger (16 March 2015) <http://www.thephoblographer.com/2015/03/16/on-the-ethics-of-taking-photos-of-homeless-people>.

[16] Regulation (EU) 2016/679 of the European Parliament; see American Law Institute, *Restatement (Second) of the Law of Torts* (1977) § 652B.

[17] See n 16.

[18] See generally, Adam Pabarcus, "Are Private Spaces on Social Networking Websites Truly Private? The Extension of Intrusion Upon Seclusion" (2011) 38(1) *William Mitchell Law Review* 397, 398–400, 406.

[19] Pabarcus, n 18, 406.

[20] Pabarcus, n 18, 401–403.

[21] For example, Facebook users can access the profile page, even if the parties are not connected directly – for example, friends, or friends of friends. See generally, Pabarcus, n 18.

C. Is Uploading an Image on a Social Network Page an Intrusion upon Seclusion?

The decision of what qualifies as an *intrusion* upon seclusion depends on a number of different factors. Intruding on a secluded space may occur (in this context) in three situations. The first is in the taking of a photograph of a person. The second is in uploading the image. The third is when a personal image is viewed or accessed.

In addition to physical encroachment into someone's private space, intrusion upon seclusion includes the act of watching, listening, or recording private activities or affairs.[22] The taking of a photograph of a person engaged in a private activity, would be an intrusion, because the taking of a photograph of a person is a record. [23]

The question of whether someone intrudes on another person's secluded space when they upload a photograph of that person or when they view a photograph that is online may depend on the privacy settings that are selected. Arguably a person who uploads an image of a third party engaged in a private activity to an open site would be intruding on the third party's private space because the photograph is a record of a private activity. A person who accesses an image that was uploaded on a public site by someone else would not be intruding on a secluded space, because there are no restrictions on the accessibility of the uploaded images. The position would be different however, when an image is uploaded to a closed site. A person who uploads an image of another person on a social network site that is closed would less likely to be an intrusion. The position would be different, however where a third-party hacks into a closed or restricted site and views images.[24] In this case, this would likely to be an intrusion.

D. Scope of Protection

Another issue that will impact upon the effectiveness of the tort of intrusion upon seclusion in protecting personal images that are shared online relates to its scope. It is clear that the tort will protect against the misuse of personal, private and intimate images. As the ALRC noted, recording private activities is "more likely to be a serious invasion of privacy".[25] While private and personal activities were not defined in the ARLC report, the terms "private" and "personal" have been defined to include images that are "sexual or intimate" in nature.[26] This would also include images that capture people changing or semi-clothed.[27]

While the tort will protect against the misuse of personal, private and intimate images, it is less clear whether the tort will cover images of ordinary, everyday situations such as photographs that capture people eating, sleeping, walking or laughing. Generally, the question of whether a non-sexual or non-intimate image will be protected will depend on whether there is a *reasonable expectation of privacy* when people are photographed.[28] There are no specific rules that apply when considering whether

[22] See further Australian Law Reform Commission, n 2, 5, Recommendation 5–1, 5.1 <https://www.alrc.gov.au/publications/5-two-types-invasion/cause-action-two- types-invasion-privacy>.

[23] Moreham, n 14, 354–355. The author suggests that taking photographs of a person's private activities or disseminating photographs of the private activities fall within the scope of intrusion upon seclusion,

[24] See generally, Pabarcus, n 18.

[25] The recording may subsequently be distributed or kept to be watched later by the person who recorded it: see Australian Law Reform Commission, n 2, "5. Two Types of Invasions" <https://www.alrc.gov.au/publications/5-two-types-invasion/intrusion-upon-seclusion>.

[26] See *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236; *Wilson v Ferguson* [2015] WASC 15; Australian Law Reform Commission, n 2, 5.2–5.3, 73; see also submission by Electronic Frontiers Australia, Submission 44 "posting of photographs, audio-recordings, and video-recordings of personal spaces, activities, and bodies for which consent to post has not been expressly provided by the participant".

[27] See Australian Law Reform Commission, n 2, 5.2–5.3, 73.

[28] *C v Holland* [2012] 3 NZLR 672; [2012] NZHC 2155; *Giller v Procopets* [2004] VSC 113; *Hosking v Runting* [2005] 1 NZLR 1.

ordinary images are protected under the tort; however, it appears as though the scope is narrower for personal images that are taken in public places.[29]

III. Effectiveness of the Tort in Protecting Personal Images Shared Online

While the proposed tort of intrusion upon seclusion would address some of the gaps in the law, there are a number of issues that are not addressed. One problem that arises is that the proposed tort does not deal with situations where ordinary personal images are uploaded and shared on social networks – for example, when people's images are captured in everyday moments such when they are sleeping[30] or in embarrassing or intimate moments in their homes, at family gatherings, or public places. [31]

Another problem with the tort is that it is uncertain whether photographing people in public places would be protected. Currently, Australian law does not prevent people from being photographed in public places.[32] Whether the proposed tort would protect personal images captured in public places would depend on whether there is a reasonable expectation of privacy.[33] Without a reasonable expectation of privacy, it is unlikely that a tort of intrusion upon seclusion would be actionable. The upshot is that even if Australia adopted a tort of intrusion, it would still be inadequate to protect personal images online.

IV. A Misuse of Private Information

The second type of serious invasion of privacy recommended by the ALRC is when there is a misuse or disclosure of private information, irrespective of whether that information is true or not. This mirrors the United Kingdom's expanding tort of breach of confidence, as well as developments in other jurisdictions such as United States, New Zealand and Canada, which have recognised a tort for misuse of private information.[34] In considering whether a tort of misuse or disclosure of private information would protect personal images that are shared on social networks, it is important to determine whether the misuse or disclosure of a personal image would be an invasion of privacy.[35] There are three key elements for an

[29] However, in the United Kingdom, some activities such as walking on a street or taking a child for a walk in the park may be protected as a private activity; see *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457; *Von Hannover v Germany (59320/00)* [2004] EMLR 21; *Murray v Express Newspapers PLC* [2007] 3 FCR 331; [2007] EWHC 1908.

[30] Australian Law Reform Commission, n 2, "5. Two Types of Invasion", 5.6 <https://www.alrc.gov.au/publications/5-two-types-invasion/summary>; see also Moreham, n 14, 351.

[31] Australian privacy law contrasts with that of the United Kingdom because British common law expanded to include "misuses of private information". The expansion of British common law of confidence was the result of the protection of private and family life under the European Convention of Human Rights: see *European Convention of Human Rights* Art 10.

[32] The ALRC acknowledged that Australian law was not in line with other jurisdictions such as the United Kingdom, Canada, the United States and New Zealand where images of people captured in public places have been protected.

[33] Jonathan Morgan, "Privacy Confidence, and Horizontal Effect: 'Hello' Trouble" (2003) 62(2) *The Cambridge Law Journal* 444, 446 Morgan argues that there may be an expectation of privacy when in public just because people: "venture into the public, in order to further our private lives; we do not *ipso facto* relinquish all claims to a private sphere. Even tacit consent to being observed by other cannot automatically extend to their taking and a fortiori publishing photographs"; David Rolph, "Looking Again at Photographs and Privacy: Theoretical Perspectives on Law's Treatment of Photographs as Invasions of Privacy' in Anne Wagner and Richard K Sherwin (eds), *Law, Culture and Visual Studies* (Springer, 2014) 205, 224; see generally, D Feldman, "Privacy as a Civil Liberty" (1994) 47(2) *Current Legal Problems* 41.

[34] The House of Lords were given the opportunity to examine a privacy claim based on breach of confidence in *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457, 464 (Lord Nicholls). While there was no question of extending the action of breach of confidence for an invasion of privacy for disclosure of private information, it was considered that breach of confidence may be misleading. In that decision, Lord Nicholls said that breach of confidence "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".

[35] Australian Law Reform Commission, n 2, Recommendation 5–1 recommended that "private information include untrue information if the information would be private if it were true". In particular, Australian Law Reform Commission, n 2, 5.55, the ARLC states: "it should be stressed that for the plaintiff to have an action under the privacy tort in this Report, the other elements of the tort would of course have to be satisfied. The untrue information would have to be a matter about which the plaintiff had a reasonable expectation of privacy and the misuse would have to be serious." See also Australian Law Reform Commission, n 2, "5. Two Types of Invasion", 5.36–5.55 <https://www.alrc.gov.au/publications/5-two-types-invasion/misuse-private-information>.

action of a tort of misuse of private information. The first is that there must be *private information*. The second is that there must be a *reasonable expectation of privacy* in relation to the information in question. Third, the disclosure of the private information must be *highly offensive to a reasonable person*.[36]

A. What Is "Private Information"?

It is uncontested that photographs are not only information, but also a superior form of information.[37] It was shown earlier that photographs fall within the definition of personal information. In particular, photographs capture all kinds of information that can be private and personal. The key question here is whether the information is "private". According to the ALRC, "private" information means "information as to which a person in the position of the plaintiff has a reasonable expectation of privacy in all of the circumstances".[38] Whether something is private will depend on the circumstances of the case.[39] In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,[40] Gleeson CJ said that the test for determining whether something is private depends on whether the disclosure of the information would be "highly offensive". [41]

In some situations, determining whether something is private will be relatively straightforward. For example, sexual or intimate images will fall within the scope of private information.[42] It could also be argued that "private" would include photographs that capture information that relates to a person's health, finances, personal relationships or finances.[43] While in these situations it is relatively easy to determine whether the image would be private, in other cases it may be difficult to determine. This is particularly the case in relation to embarrassing or humiliating images captured in public.[44] This is because it is difficult to distinguish between what is and what is not private. As Gleeson CJ said in *Lenah*:

> There is no bright line, which can be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is a large area in between what is necessarily

[36] *Hosking v Runting* [2005] 1 NZLR 1, where the court accepted a new tort of invasion of privacy by making private facts public. Further, *Hosking v Runting* [2005] 1 NZLR 1, [117] Gault P and Blanchard JJ considered two requirements for a successful claim, based on the "existence of facts in respect of which there is a reasonable expectation of privacy" and "publicity given to those private facts that would be considered highly offensive to an objective reasonable person".

[37] See Rolph, n 33, 224.

[38] Australian Law Reform Commission, n 2, 13.3, 264.

[39] However, the proposed recommendations by the ALRC suggest that an invasion of privacy must be intentional or reckless, serious and not justifiable by public-interest factors – for example, freedom of speech; see Australian Law Reform Commission, n 2, "5. Two Types of Invasion" <https://www.alrc.gov.au/publications/5-two-types-invasion/summary>; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 224–225 (Gleeson CJ); [2001] HCA 63; *Seven Network (Operations) Ltd v Australian Broadcasting Corporation* [2007] NSWSC 1289, [8]–[9] (Barrett J); *Giller v Procopets* (2008) 79 IPR 489, 524 (Ashley JA) 589, 593–595 (Neave JA); [2008] VSCA 236; compare with *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457, 465 (Lord Nicholls of Birkenhead), 473–474 (Lord Hoffmann); *A v B plc* [2003] QB 195, 202 (Lord Woolf CJ); [2002] EWCA Civ 337; *Douglas v Hello! Ltd (No 6)* [2006] QB 125, 150 (Lord Phillips of Worth Matraver MR); [2005] EWCA Civ 595; *OBG Ltd v Allan* [2008] 1 AC 1, 47–48 (Lord Hoffmann); [2007] UKHL 21; *Douglas v Hello! Ltd (No 6)* [2006] QB 125, 160 (Lord Phillips of Worth Matraver MR); [2005] EWCA Civ 595.

[40] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63.

[41] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42] (Gleeson CJ); [2001] HCA 63, who stated that, "Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. *The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private*' (emphasis added).

[42] *Wilson v Ferguson* [2015] WASC 15; see *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236; *Jane Doe v ABC* [2007] VCC 281; Australian Law Reform Commission, n 2, "5. Two Types of Invasion", 5.2–5.7 <https://www.alrc.gov.au/publications/5-two-types-invasion/summary>. Notably, the ALRC suggests that posting sexually explicit images on the internet without the person's permission is considered as a misuse of private information.

[43] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42] (Gibson CJ); [2001] HCA 63.

[44] For example people may consider a photograph to be private if they are photographed when they are drunk, or in embarrassing or humiliating situations, such as when Todd Carney was photographed urinating and the image was uploaded online, or when Mitchell Pearce was filmed intoxicated: see Cameron Tomarchio, *World Reacts to Mitchell Pearce's Dog Act*, (28 January 2016) News.com.au <http://www.news.com.au/sport/sports-life/world-reacts-to-mitchell-pearces-dog-act/news-story/60e1653fd0b2ff0b0a326aafddf08627>.

> public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford.[45]

B. Is There a Reasonable Expectation of Privacy?

The second requirement that needs to present for the proposed tort to apply is that there must be a reasonable expectation of privacy. As noted in by Lord Nicholls in *Campbell v Mirror Group Newspapers Ltd*, "the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy."[46] Given that Australian law has not developed to the same extent as the United Kingdom, in framing the proposed tort, the ALRC looked to the United Kingdom for guidance in order to determine what would constitute a reasonable expectation of privacy.[47] The ALRC recommended a number of factors that Australian courts could take into consideration when determining whether a person would have a reasonable expectation of privacy including the nature of the information (whether it relates to intimate or family matters, health, medical or financial matters),[48] the "means that used to obtain the private information or to intrude upon seclusion",[49] whether the intrusion occurred at the person's home, the purpose of the misuse, disclosure or intrusion, the way that the private information was held or communicated, whether the private information was already in the public domain, the attributes of the plaintiff (eg age, occupation and cultural background) and the conduct of the plaintiff. [50] The ALRC also suggested that the court should:

> consider not whether the plaintiff subjectively expected privacy, but whether it would be reasonable for a person in the position of the plaintiff to expect privacy. The subjective expectation of the plaintiff may be a relevant consideration, particularly if that expectation was made manifest, but it is not the focus of the test, nor an essential element that must be satisfied.[51]

As noted by Lord Hope in *Campbell v Mirror Group Newspapers Ltd* the test for whether there is a reasonable expectation of privacy is whether the person sharing the personal image "knows or ought to know that there is a reasonable expectation that the information in question will be kept confidential".[52] Given that being able to restrict access to a personal image may warrant a belief that there is a reasonable expectation of privacy, even if the photograph is published on a social network. There may be a reasonable expectation of privacy when an image is shared online and access to that image is restricted. It could be argued that when a social network enables a person to control access to their personal images, there ought to be an expectation of privacy. This would depend on the social network's privacy features (and whether a person has customised their access settings).

While there is a likely to be a reasonable expectation of privacy where the image relates to a person's home life or family life,[53] it is unclear whether there would be a reasonable expectation of privacy when people are photographed in semi-public places or where the images capture sensitive information such

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[45] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1, 13 [42] (Gleeson CJ); [2001] HCA 63.

[46] *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457, [21].

[47] See Australian Law Reform Commission, n 2, "6. Reasonable Expectation of Privacy", 6.5–6.25 <https://www.alrc.gov.au/publications/6-reasonable-expectation-privacy/considerations-0>.

[48] See Australian Law Reform Commission, n 2, "6. Reasonable Expectation of Privacy", 6.5–6.25 <https://www.alrc.gov.au/publications/6-reasonable-expectation-privacy/considerations-0>.

[49] See Australian Law Reform Commission, n 2, "6. Reasonable Expectation of Privacy", 6.5–6.25 <https://www.alrc.gov.au/publications/6-reasonable-expectation-privacy/considerations-0>.

[50] See Australian Law Reform Commission, n 2, "6. Reasonable Expectation of Privacy", 6.5–6.25 <https://www.alrc.gov.au/publications/6-reasonable-expectation-privacy/considerations-0>.

[51] See Australian Law Reform Commission, n 2, "6. Reasonable Expectation of Privacy", 6.7 <https://www.alrc.gov.au/publications/6-reasonable-expectation-privacy/considerations-0>.

[52] *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457, 480.

[53] For example, in the United Kingdom, privacy protection extends to private information about a person's family or private life.

as religious information[54] (such as when people are photographed attending mass or while praying in places of worship and the photographs are uploaded online).[55] To the extent that this is a concern, it would appear that the effectiveness of the proposed tort in protecting personal images that are captured in public places would be limited.

C. Is the Disclosure of Private Facts Highly Offensive to a Reasonable Person?

The third requirement that must be satisfied to show a misuse of private information is that the disclosure of private facts is "highly offensive to a reasonable person". The ALRC noted that the question of whether a disclosure of private information is highly offensive should be left to the courts to determine.[56] Using an objective test would be in line with other jurisdictions such as the United Kingdom, New Zealand and the United States.[57]

It should be noted that the "highly offensive" test has been questioned in other jurisdictions; specifically in the United Kingdom, where the British courts suggested that the test could be confusing. Specifically, Lord Nicholls stressed that there were two reasons why the test should be used with caution:[58]

> First, the "highly offensive" phrase is suggestive of a stricter test of private information than a reasonable expectation of privacy. Second, the "highly offensive" formulation can all too easily bring into account, when deciding whether the disclosed information was private, considerations which go more properly to issues of proportionality; for instance, the degree of intrusion into private life, and the extent to which publication was a matter of proper public concern. This could be a recipe for confusion.[59]

D. Expanding the Law of Confidence to Include Private Information

In the event that a statutory tort was not enacted, the ALRC proposed that the Australian law of confidence should be expanded to include "private information". This would bring Australian into line with other jurisdictions such as the United Kingdom where the law of confidence has been expanded to include "private information". This was done to ensure that British courts complied with the *European Convention of Human Rights* which protects a person's private or family life.[60] As Lord Hoffman said, "the right to control the dissemination of information about one's private life" is central to a person's privacy and autonomy.[61] In order to comply with Article 8 of the *European Convention of Human Rights*, the British courts expanded the law of confidence to include the misuse of private information to avoid establishing a new statutory tort.[62] In so doing, the courts substituted the requirement of keeping information confidential with the requirement that the information should be kept private.[63]

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[54] While the term "serious" was discussed previously, it includes images that capture sensitive or sexual activity: see further *Wilson v Ferguson* [2015] WASC 15; *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236.

[55] For example, information that relates to a person's religion is deemed sensitive information under *Privacy Act 1988* (Cth) s 6(1).

[56] See also Australian Law Reform Commission, n 2, 6.22, which states: "The ALRC considers that the offensiveness of a disclosure or intrusion should be one matter able to be considered by a court in determining whether there is a reasonable expectation of privacy. It is more reasonable to expect privacy, where a breach of privacy would be considered highly offensive. As discussed in Chapter 8, offence may also be used to distinguish serious invasions of privacy from non-serious invasions of privacy."

[57] Australian Law Reform Commission, n 2, 6.14.

[58] *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457, [22].

[59] *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457, [22].

[60] *European Convention of Human Rights* Art 8.

[61] See *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457, [51] (Lord Hoffman); see also Australian Law Reform Commission, n 2, "5. Two Types of Invasions", Misuse of Private Information <https://www.alrc.gov.au/publications/5-two-types- invasion/misuse-private-information>.

[62] See Tatiana Synodinou, "Image Right and Copyright Law in Europe: Divergences and Convergences" (2014) 3 *Laws* 181, 186; Catherine Walsh, "Are Personality Rights Finally on the UK Agenda?" (2013) 35(5) *European Intellectual Property Review*, 253, 257; see generally Mark Warby, Nicole Moreham and Iain Christie (eds), *Tugendhat and Christie: The Law of Privacy and the Media* (OUP, 2nd ed, 2011).

[63] Synodinou, n 62.

Private information protected by an expanded law of confidence would be breached in a number of ways. The first is where a person discovers information about a third party such as bank records, health information, reading a diary or hacking into a person's email.[64] Another way that information could be breached is where a person retains private information about a third party, such as retaining private records or information for their own future reference or with a view to sharing the information with others (by building up a computer file or secret dossier).[65] Private information would also be breached where a third party photographed the private activities of another person or disseminated the photographs of the private activities to third parties. Information may also be breached in situations where a person discloses private information about another person such as "by passing on gossip, uploading facts, photographs or other material to the Internet, or disseminating it in the media".[66]

As misuse of private information is very broad, it would cover many of the different ways that private information may be misused online. It is clear that personal images that are shared online would fall within the misuse of private information because an intrusion of privacy would potentially occur at three particular junctures; at the time of taking the photograph, uploading the image and each time the image is viewed or accessed.[67]

Expanding the tort of breach of confidence in Australia to include the misuse, disclosure or publication of private information would provide some protection where a personal image is private but not of a sexual or intimate nature.[68] Even if the existing law of confidence was expanded it would not provide people with adequate protection to prevent the misuse of their image. One reason for this is that there are still conceptual difficulties with an action for breach of confidence in Australia. This is because an image may be private but not be confidential.[69] The exclusion of information that is about a person's family or private life would leave a gap in the legal protection for personal images that are taken, uploaded and shared online. This is because the information would need to be "serious". Another limitation is that once the information is published in the public domain, the action for breach of confidence would potentially fail.

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[64] See Moreham, n 14, 354 where she suggests that keeping things private is when "someone is finding out something about you against your wishes. He or she is learning that you have a sexually-transmitted infection, that you enjoy cross-dressing in private, that you run your home in a particular way, that you are having relationship difficulties, or that you are the anonymous author of a popular blog".

[65] Moreham, n 14, 351, 355. The author suggests that there are "three sub-categories of invasions, such as finding out things about people they wish to keep private, keeping things private and disclosing private information by either sharing it on the internet or media or passing it on through gossip"; the ALRC also recommended that the Act include collecting and disclosing private information: Australian Law Reform Commission, n 2, "5. Two types of invasions", Misuse of Private Information <https://www.alrc.gov.au/publications/5-two-types- invasion/misuse-private-information>.

[66] Moreham, n 14, 351, 355.

[67] As Lord Phillips of Worth Matraver MR said in *Douglas v Hello! Ltd (No 6)* [2006] QB 125, 161–162; [2005] EWCA Civ 595: "Once intimate personal information about a celebrity's private life has been widely published it may serve no useful purpose to prohibit further publication. The same will not be necessarily true of photographs. In so far as a photograph does more than convey information and intrudes on privacy by enabling the viewer to focus on intimate personal detail, there will be a fresh intrusion of privacy when each additional viewer sees the photograph and even when who has seen a previous publication of the photograph is confronted by a fresh publication of it."

[68] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [110], [132], [34], [39], [40], [55]; [2001] HCA 63, citing the American Law Institute, *Restatement (Second) of the Law of Torts* (1977) 2d § 652A, cmt (b). Gleeson CJ said that "equity may impose obligations of confidentiality even though there is no imparting of information in circumstances of trust and confidence. And the principle of good faith upon which equity acts to protect information imparted in confidence may also be invoked to 'restrain the publication of confidential information improperly or surreptitiously obtained'. The nature of the information must be such that it is capable of being regarded as confidential. A photographic image, illegally or improperly or surreptitiously obtained, where what is depicted is private, may constitute confidential information"; see also Australian Law Reform Commission, n 2, Breach of Confidence Actions for Misuse of Private Information, Recommendation 13–1, 265; *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236; *Grosse v Purvis* [2003] QDC 151; *Wilson v Ferguson* [2015] WASC 15.

[69] See generally Raymond Wacks, "Breach of Confidence and the Protection of Privacy" (1977) 127 *New Law Journal* 328; Des Butler, "A Tort of Invasion of Privacy in Australia" (2005) 29 *Melbourne University Law Review* 339, 352; Feldman, n 33; see also Morgan, n 33.

Another important recommendation of the ALRC was that a remedy for emotional distress ought to be included as part of compensation for misuse of private information.[70] This would overcome the fact that the law of confidence does not adequately provide damages for emotional distress suffered by a person whose image has been misused – for example, when people are photographed in embarrassing settings and the images were uploaded and shared online. Although some State courts in Australia have awarded damages for emotional distress, the common law generally is uncertain about whether damages can be awarded for emotional distress when personal images are misused.[71] If enacted such a provision would provide important redress for online misuse.

V. Conclusion

In examining whether the proposed reforms potentially fill in the gaps in the existing legal protection, it has been shown that a statutory tort for serious invasions of privacy would provide legal protection for two specific types of invasions of privacy: intrusions upon seclusion and misuse of private information. The proposed recommendations would have limited application to personal images shared on social networks. This is because the proposed reforms would not deal with the ubiquitous capturing and uploading personal image on social networks. As noted earlier, the ALRC's view on "serious" invasions are likely to be limited to images that are of a sexual or intimate nature. Personal images captured in everyday situations would be vulnerable and unprotected. This is also the case if the image was captured in a private place, unless the image was of a sexual or intimate nature.[72] Consequently, there is a gap in protection for personal images that are not considered to be "sensitive".[73] Even though many personal images that are captured and uploaded online are not sensitive, those images also need protection. This is because personal images that are embarrassing or humiliating may be captured in public or private spaces.

The taking and uploading of an image on to a social network may be an intrusion upon a person's seclusion for two reasons; the first is that the information in the photograph may be private, the second is that the taking of a photograph is an invasion of a person's physical privacy.[74] There are a number of problems with the proposed statutory tort for serious invasions of privacy. The first is that it is uncertain whether many of the personal images that are captured and shared on a social network would be protected. The second problem is that the law has not caught up with a situation where images that are uploaded and shared online may be "private" but still fall in the public domain. This occurs when personal images that are shared on social networks are shared online and go viral in seconds. When this happens, there is little that the law can do to prevent the misuse of personal images other than establishing a personal right to privacy (or images rights). Even if Australian law established a tort of invasion of privacy, this would not cover all the different instances where personal images are captured and shared online. It has been shown that Australian law does not protect people who are photographed in public places and people in Australia do not have a right not to be photographed. As people are photographed in various situations and in public or in private spaces; a statutory tort would be limited to situations where the image is sensitive or of a sexual nature. If the existing tort of breach of confidence were broadened to include a "misuse of private information", the law of confidence would not provide adequate protection for personal images shared on social networks. This is because when applying the criteria for an action of breach of confidence to personal images that are shared on social networks, the images tend to fall within the public domain. This is very similar to the way the existing common law protects personal images.

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[70] Australian Law Reform Commission, n 2, Breach of Confidence Actions for Misuse of Private Information 268.

[71] See *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236; see further Australian Law Reform Commission, n 2, Breach of Confidence Actions for Misuse of Private Information 268.

[72] *Wilson v Ferguson* [2015] WASC 15; *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236.

[73] *Maynes v Casey* [2011] NSWCA 156, [35]; see *Saad v Chubb Security Australia Pty* Ltd [2012] NSWSC 1183 [183]; *Gee v Burger* [2009] NSWSC 149, [53]; *Dye v Commonwealth Securities Ltd* [2010] FCA 720, [290], where Katzmann J refused leave to the plaintiff to amend her pleadings to include such a claim, on various grounds and *Doe v Yahoo!7 Pty Ltd (No 3)* [2013] QDC 188, [310]–[311].

[74] See Moreham, n 14, 354–356; see Pabarcus, n 18, in relation to a private social network page being a secluded place.

Given that an Australian statutory tort is modelled on US privacy law, a more appropriate recommendation would have been to incorporate two further types of invasions to cover the use and misuse of people's images. For example, the ALRC should have included serious invasions of "publicity which places the plaintiff in a false light in the public eye" and an "appropriation for the defendant's advantage, of a plaintiff's name or likeness".[75] It would seem that these two types of serious invasions of privacy would be more appropriate to the misuse of personal images on social networks, such as when people's images are distorted. In thinking about possible solutions to close the gap in legal protection for the misuse of personal images on social networks, a statutory tort ought to be broadened to incorporate a right to publicity or image rights to capture the various situations where personal images are used and misused.

[75] See further Prosser, n 10, 389.