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December, 2020

Report on Civil Liability for Misuse of Private Information

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Singapore Academy of Law
Law Reform Committee

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An electronic copy of this report may be accessed from the Singapore Academy of Law website: <https://www.sal.org.sg/Resources-Tools/Law-Reform/Law-Reform-e-Archive>.

National Library Board, Singapore Cataloguing in Publication Data

Name(s): Lee, Jack Tsen-Ta. | Phang, Hsiao Chung, author. | Constantine, Simon, editor. | Singapore Academy of Law. Law Reform Committee, publisher.

Title: Report on civil liability for misuse of private information / Dr Jack Tsen-Ta Lee, Phang Hsiao Chung ; edited by Simon Constantine.

Description: Singapore : Law Reform Committee, Singapore Academy of Law, [2020]

Identifier(s): OCN 1222052459 | ISBN 978-981-14-7747-8 (paperback) | ISBN 978-981-14-7748-5 (ebook)

Subject(s): LCSH: Privacy, Right of--Singapore. | Data protection--Law and legislation--Singapore. | Torts--Singapore.

Classification: DDC 342.59570858--dc23

ISBN 978-981-14-7747-8 (softcover)
978-981-14-7748-5 (e-book)

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The Law Reform Committee of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

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EXECUTIVE SUMMARY

1 This report considers whether the existing legal protections from the disclosure and serious misuse of private information are sufficient and effective.

2 At present, while various protections for victims of such misuse and related breaches of privacy exist, these derive from an assortment of different statutory and common law causes of action (for example, suing for intentional infliction of emotional distress, private nuisance and/or breach of confidence, or bringing claims under the Personal Data Protection Act or Protection from Harassment Act). This patchwork of laws – several of which were designed primarily to address matters other than misuse of private information – not only risks making the law more difficult for victims to navigate, it also risks some instances of serious misuse of private information not being effectively provided for and those affected finding themselves with no real recourse or remedy.

3 Given these shortcomings, it is submitted that a statutory tort of misuse of private information should be introduced, with the follow key characteristics:

- (a) The legal test should be whether the plaintiff had a reasonable expectation of privacy in all the circumstances. It may be useful for the legislation to set out a non-exhaustive list of factors that the court may take into account when deciding if the plaintiff had a reasonable expectation of privacy.
- (b) The threshold for liability should be a serious misuse of private information judged from the viewpoint of a person of ordinary sensibilities in the plaintiff's position.
- (c) The tort should be actionable *per se*, that is, without requiring any proof of damage. In addition to claiming damages for physical and psychiatric harm, or economic loss, the plaintiff should be entitled to claim for emotional distress.
- (d) The court should be required to balance the public interest in protecting privacy against countervailing public interests when determining whether the plaintiff has established the cause of action, rather than considering such countervailing public interests as a defence.
- (e) The relevant state of mind of the defendant should be intention to cause the disclosure or a serious misuse of any private information relating to the plaintiff. Recklessness or negligence should not suffice, nor should the tort be one of strict liability.
- (f) The remedies that a successful plaintiff should be entitled to obtain should include damages, an account of profits, an

injunction or order of specific performance, a delivery up or destruction of offending material, an order requiring the defendant not to publish or continue publishing the private information, publication of a correction to erroneous or misleading material, and the tendering of an apology by the defendant to the plaintiff.

(g) The Act should bind the Government.

4 A draft bill that would give effect to these recommendations is appended to this report.

5 Notwithstanding this report's recommendation that, for reasons of clarity and legal certainty, the identified shortcomings in the existing law are best addressed through the creation of a discrete tort of misuse of private information, it is noted that, in the alternative, it may be possible to achieve similar ends through amendments to relevant statutes currently in force, principally the Protection from Harassment Act.

CHAPTER 1

THE DESIRABILITY OF REFORM

A INTRODUCTION

1 The importance of keeping certain types of information private

1.1 It is apt to begin this report, which examines whether a statutory cause of action in tort for disclosure or serious misuse of private information should be introduced, by considering why reform of the law is desirable.

1.2 It has been said that privacy is conceptually complex and difficult to define.¹ One way of tackling the issue is to identify the interests that privacy seeks to protect. In 1983, the Australian Law Reform Commission identified four categories of interests:²

- (a) *Territorial privacy* – the interest in controlling entry to the “personal place”.
- (b) *Privacy of the person* – the interest in freedom from interference with one’s person and “personal space”.
- (c) *Information privacy* – the interest of a person in controlling information held by others about him or her.
- (d) *Communications and surveillance privacy* – the interest in freedom from surveillance and from interception of one’s communications.

1.3 In addition, privacy can be said to serve various important functions:

- (a) *Personal autonomy*. Privacy enables people to maintain personal autonomy, which is an essential aspect of human dignity and personality. It allows individuals to avoid being dominated or manipulated by others.³ It also provides them

1 See, e.g., *Serious Invasions of Privacy in the Digital Era: Final Report* (ALRC Report 123) (Sydney, NSW: Australian Law Reform Commission, 2014) (‘ALRC Report’) at 31, [2.9]. <<https://www.alrc.gov.au/publication/serious-invasions-of-privacy-in-the-digital-era-alrc-report-123/>> (Accessed 18 November 2020).

2 *Report on Privacy* (ALRC Report 22) (Sydney, NSW: Australian Law Reform Commission, 1983), vol 1 at [46], cited in *Report: Civil Liability for Invasion of Privacy* (Hong Kong: Law Reform Commission of Hong Kong, 2004) (‘LRCHK Report’) at 14, [1.22] <<https://www.hkreform.gov.hk/en/publications/rprivacy.htm>> (Accessed 18 November 2020).

3 Gary Chan, “Protection of Privacy Interests in Tort” in Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Singapore: Academy Publishing, 2016), 697 (cont’d on the next page)

with the ‘space’ necessary to keep certain personal information and opinions to themselves instead of having them disclosed publicly which may lead to the individuals being pitied, ridiculed or penalised by others in some way.⁴ For example, privacy enables individuals to think through ideas before making them known; and to share confidences with family and friends and with professional advisers such as lawyers, physicians and clerics.⁵

- (b) *Emotional release.* Privacy also allows individuals to express their emotions without being subject to public scrutiny. They may, for instance, wish to deviate temporarily from social etiquette, vent frustrations without fear of reprisal, engage in sexual relationships, and grieve after loss or recuperate from personal setbacks.⁶
- (c) *Promoting democracy.* Privacy plays a role in promoting democracy as well. The secrecy of voting in parliamentary and presidential elections⁷ is a cornerstone of democracy in Singapore, and is intended to ensure that voters can choose representatives without concern for retaliation or ridicule. Voters will be better placed to make informed choices during elections if they are able to have private discussions about the pros and cons of candidates and the policy positions they espouse. Finally, without being able to maintain a degree of privacy over their lives, it is likely that few people would want to seek public office.⁸

1.4 Thus, it is not surprising that privacy is widely recognised as a fundamental human right that individuals enjoy. Article 12 of the Universal Declaration of Human Rights (‘UDHR’),⁹ which many scholars regard as customary international law, states:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

1.5 On 18 November 2012, ASEAN member states including Singapore reaffirmed their commitment to the UDHR and confirmed in Article 21 of the

at 699–700, [16.006], citing Samuel Warren & Louis Brandeis, “The Right to Privacy” (1890) 4 Harv L Rev 193.

4 Alan F Westin, *Privacy and Freedom* (New York, NY: Atheneum, 1968) at 33–34, cited in the LRCHK Report, above, n 2 at 16, [1.26].

5 Westin, *id* at 36–38, cited in the LRCHK Report at 17, [1.26].

6 Westin, *id* at 35–37, cited in the LRCHK Report at 16, [1.26].

7 Parliamentary Elections Act (Cap 218, 2011 Rev Ed), ss 42(3), 42(3A) and 56; Presidential Elections Act (Cap 240A, 2011 Rev Ed), ss 25(4), 25(4A) and 36.

8 Compare the LRCHK Report at 17–18, [1.29]–[1.30].

9 General Assembly Resolution 217A (10 December 1948).

ASEAN Human Rights Declaration,¹⁰ in terms virtually identical to Article 12 of the UDHR, that:

Every person has the right to be free from arbitrary interference with his or her privacy, family, home or correspondence including personal data, or to attacks upon that person's honour and reputation. Every person has the right to the protection of the law against such interference or attacks.

When Singapore became a state party to the Convention on the Rights of the Child¹¹ in 1995 and the Convention on the Rights of Persons with Disabilities¹² in 2013, it took on similar international law obligations in respect of children¹³ and disabled persons.¹⁴

1.6 The right to privacy also appears in other international instruments not directly applicable to Singapore, such as in Article 8 of the European Convention on Human Rights¹⁵ and Article 17 of the International Covenant on Civil and Political Rights.¹⁶

2 Relevant issues

1.7 To identify why reform of the law is desirable, a useful starting point for discussion is the Court of Appeal's 2015 judgment in *ANB v ANC*.¹⁷ The case involved a husband (the appellant) and a wife (the first respondent) who were then in the midst of divorce proceedings. Although the wife had

10 ASEAN Human Rights Declaration (19 November 2012) <<https://asean.org/asean-human-rights-declaration/>> (Accessed 18 November 2020).

11 General Assembly Resolution 44/25 (20 November 1989); entered into force on 2 September 1990 <<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx/>> (Accessed 18 November 2020).

12 General Assembly Resolution 61/106 (13 December 2006); entered into force on 3 May 2008 <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html/>> (Accessed 18 November 2020).

13 Convention on the Rights of the Child, Art 16: "(1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. (2) The child has the right to the protection of the law against such interference or attacks."

14 Convention on the Rights of Persons with Disabilities, Art 22: "(1) No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks. (2) States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others."

15 Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950); entered into force (as amended by Protocol No. 14 (CETS No. 194)) on 1 June 2010. <https://www.echr.coe.int/Documents/Convention_ENG.pdf> (Accessed 18 November 2020).

16 General Assembly Resolution 2200A (XXI) (16 December 1966); entered into force 23 March 1976 <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> (Accessed 18 November 2020).

17 [2015] SGCA 43, [2015] 5 SLR 522, CA ('ANB').

moved out of the matrimonial home, while the husband and children were abroad she engaged a locksmith to unlock a padlock that the husband had installed and thus regained access to the matrimonial home. The wife then took the husband's personal notebook computer and handed it to a private investigator whom she had engaged. Upon her directions, the investigator copied files on the hard disk of the notebook computer and passed them to the wife, who subsequently tried to adduce some information from the files as evidence in the divorce proceedings. It was then that the husband became aware that files had been copied from his computer.¹⁸

1.8 The husband commenced proceedings against the wife and her lawyers (the second respondent) for, among other things, breach of confidence, and also obtained an interim injunction against them. The latter was discharged by a High Court judge¹⁹ on various grounds, including his view that there was no serious question to be tried as to whether there was a breach of confidence because the information obtained by the wife did not possess the necessary quality of confidence. Furthermore, it had not been obtained in circumstances importing an obligation of confidence since the relationship between the husband and the wife had already broken down.²⁰

1.9 On appeal, the Court of Appeal reinstated the interim injunction on certain terms and undertakings, holding that the High Court had applied the traditional tort of breach of confidence too rigidly to the facts of the case.²¹ The parties later settled the matter amicably, but "given the importance of the legal issues hitherto raised in the proceedings", the Court decided to "flag out some of the more salient points that will need to be considered in more detail when these issues come before the courts for a definitive ruling in the future".²²

1.10 When deciding that there had been a serious question to be tried in the case, the Court made the following points, among others:

- (a) The High Court had not sufficiently considered jurisprudence from England and Wales, and other jurisdictions, which had evolved to provide stronger protection for private information.

For example, in *Campbell v MGN Ltd*,²³ the House of Lords had developed the traditional tort of breach of confidence expressed in cases such as *Coco v A N Clark (Engineers) Ltd*²⁴ into a tort of misuse of private information. In the latter tort,

18 *Id* at 525–526, [3]–[6].

19 *ANB v ANC* [2014] SGHC 172, [2014] 4 SLR 747, HC.

20 *ANB*, above, n 17, at 526–527, [6]–[7].

21 *Id* at 530, [19].

22 *Id* at 525, [2] (*per* Phang JA).

23 [2004] UKHL 22, [2004] 2 AC 457, HL (UK) ('*Campbell v MGN*').

24 [1969] RPC 41, HC (England & Wales).

the legal questions to be asked were not whether the information in question possessed the necessary quality of confidence and whether it was imparted in circumstances importing an obligation of confidence, but whether the plaintiff had a reasonable expectation of privacy in relation to the information.²⁵

- (b) Although the right to privacy is not expressly guaranteed by the Constitution,²⁶ in England privacy was given protection by extending the tort of breach of confidence pursuant to a common law right to privacy before the Human Rights Act²⁷ came into force.²⁸ Similarly, in other common law jurisdictions such as New Zealand,²⁹ private information was given common law protection in the absence of any express constitutional or similar guarantees to the right to privacy.³⁰
- (c) Legislative developments in Singapore such as the enactment of the Personal Data Protection Act 2012³¹ and the Protection from Harassment Act,³² and data breaches involving commercial customers and government employees in the United States, “point towards an increasing recognition of the need to protect personal privacy”.³³

The main issue was whether the Singapore courts should (and, if so, to what extent) adopt the legal position in England or elsewhere into the law of confidence.³⁴

1.11 The following points relevant to this report can be inferred from the Court of Appeal’s opinion in *ANB v ANC*:

25 *Campbell v MGN*, above, n 23 at [21] and [85], cited in *ANB*, above, n 17 at 530–531, [19]–[20].

26 Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Rep); see *Tan Eng Hong v Attorney-General* [2012] SGCA 45, [2012] 4 SLR 476 at 524–525, [120], CA; and *Lim Meng Suang v Attorney-General* [2014] SGCA 53, [2015] 1 SLR 26 at 43, [45], CA. For commentary, see Jack Tsen-Ta Lee, “The Limits of Liberty: The Crime of Male Same-sex Conduct and the Rights to Life and Personal Liberty in Singapore: *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26, (2016) 46(1) HKLJ 49 at 50–59.

27 1998 c 42 (UK).

28 *Attorney-General v Observer Ltd* [1990] 1 AC 109 at 281, HL (UK).

29 See *Hosking v Runting* [2005] 1 NZLR 1, CA (NZ) (‘Hosking’); and *C v Holland* [2012] 3 NZLR 672, HC (NZ). The right to privacy is not expressly mentioned in the New Zealand Bill of Rights Act 1990 (1990 No 109).

30 *ANB*, above, n 17 at 531, [22].

31 No 26 of 2012, fully in force with effect from 2 July 2014.

32 Cap 256A, 2015 Rev Ed, in force with effect from 15 November 2014.

33 *ANB*, above, n 17 at 531, [22] (*per* Phang JA).

34 *ANB*, *id* at 530, [20].

- (a) There is appreciation for the increasing need for legal protection of privacy, including recognition of this fact by all branches of the government.

This issue is considered at Part B of this Chapter below.

- (b) The common law in Singapore may not currently provide sufficient protection for encroachments on a person's privacy. For instance, Singapore law recognises the traditional tort of breach of confidence, but the courts have not yet considered the development of the tort of misuse of private information out of the former tort by the UK courts.

This issue is considered at Part C of this Chapter below.

- (c) Given the nature of the common law process, it is difficult to predict when a case requiring consideration of the common law's response to misuses of private information or other encroachments on privacy will come before the courts. Even if such a case presents itself, it is uncertain whether the courts will feel it is appropriate for them to advance the law by, for example, substantially extending an existing tort or creating a new one. Thus, if it is felt there is a lacuna in the law, legislative intervention may be desirable.

This issue is considered at Part D of this Chapter below.

B THE INCREASING NEED FOR LEGAL PROTECTION OF PRIVACY

1.12 Fairly inexpensive forms of technology available today, such as cameras and microphones (including miniature models), and mobile telephones, have made it easier for people to conduct covert surveillance on others, intruding on their privacy.³⁵ For instance, in 2017 a man pleaded guilty to two charges of outraging the modesty of his female domestic helper and was sentenced to 12 weeks' imprisonment. He had mounted a miniature video camera in a bathroom used by the domestic helper, and made three recordings of her taking a shower.³⁶

1.13 An equivalent incident in New Zealand formed the subject of *C v Holland*.³⁷ The plaintiff moved into a house owned by the plaintiff's boyfriend and the defendant. Some time between December 2010 and January 2011, the defendant positioned himself above the bathroom of the house in the roof cavity, a storage area accessible as part of the second storey of the house, and used a handheld digital camera to record two

35 A list of available devices is set out in the LRCHK Report, above, n 2 at 115–117, [6.23].

36 Alfred Chua, "Employer Jailed 12 Weeks for Filming Maid in the Bathroom", *Today* (16 May 2017) <<https://www.todayonline.com/singapore/man-52-gets-12-weeks-jail-filming-domestic-helper-shower>> (Accessed 18 November 2020).

37 Above, n 29.

video clips of the plaintiff both partially dressed and completely naked in the bathroom. The defendant then downloaded the video clips on to his laptop, where they were accidentally discovered by the plaintiff's boyfriend. There was no evidence that the defendant had published the clips or shown them to anyone. The High Court of New Zealand extended the tort of privacy established in the earlier Court of Appeal decision of *Hosking v Runting*³⁸ to the present scenario, holding that the defendant had intruded upon the plaintiff's seclusion.

1.14 On 29 January 2017, another man in Singapore was jailed for 16 months after pleading guilty to ten charges of outrage of modesty, with another 29 charges taken into account for sentencing purposes. He had installed on to his mobile telephone an app called 'Secret Video Recorder' which allowed videos to be recorded in the background while the telephone was used for other purposes. With the app turned on, he had then placed the telephone on top of his bag or in a shopping basket, and then positioned the latter objects underneath women's dresses to record 'upskirt' videos of the women's underclothing.³⁹ Another case involving a man who had lurked outside a girls' school and used his mobile telephone to take surreptitious videos of students was reported in October that year; the man was arrested for causing a public nuisance.⁴⁰

1.15 Although in the cases mentioned above it appears that the surreptitiously recorded videos in question were not made available to third parties, the pervasiveness of the Internet and availability of free social media websites and apps on mobile devices such as Facebook, Instagram, Twitter and YouTube means it is only too easy for content that intrudes upon privacy to be shared online. The Internet abounds with stories of people who have exposed the infidelities of their partners, boyfriends or girlfriends, often with photographs and screenshots of conversations conducted using messaging apps.⁴¹ In April 2017, a man was sentenced to

38 *Ibid.*

39 Elena Chong, "Man Used 'Secret Video' App in Upskirt Crimes", *The Straits Times* (28 January 2017) <<http://www.straitstimes.com/singapore/courts-crime/man-used-secret-video-app-in-upskirt-crimes>> (Accessed 18 November 2020).

40 C K Tan, "Man Arrested after Allegedly Taking Secret Videos of Students from 3 Girls' Schools in Bukit Timah", *Stomp* (reproduced on *AsiaOne*) (30 October 2017) <<http://www.asiaone.com/singapore/man-arrested-after-allegedly-taking-secret-videos-students-3-girls-schools-bukit-timah>> (Accessed 18 November 2020). The outcome of the case is not known.

41 For example, see Jonathan Lim, "Woman Starts HWZ Forum Thread Exposing Boyfriend's Cheating Ways, Gets Mercilessly Shamed Instead", *Mothership* (23 May 2017) <<https://mothership.sg/2017/05/woman-starts-hwz-forum-thread-exposing-boyfriends-cheating-ways-gets-mercilessly-shamed-instead/>> (Accessed 18 November 2020); Sulaiman Daud, "S'porean Guy 5-times Girl He Met on Tinder with 3 Other Girls & 1 Guy", *Mothership* (28 December 2017) <<https://mothership.sg/2017/12/spec-ops-guy-ashry-ashley-owyong-min-chloe-teo-cheating-breakup-influencer/>> (Accessed 18 November 2020). These cases are mentioned for purposes of illustration only; no view is expressed as to whether the disclosure of information online gives rise to legal liability.

four weeks' imprisonment for having sent photographs of his ex-girlfriend in the nude, together with her name and other identifying information, to the website Tumblr in an act of 'revenge porn'.⁴²

1.16 Further, it is well known that once content has been uploaded to the Internet, because of the ease with which people may copy and share such content, it is extremely difficult, if not virtually impossible, for such content to be removed even if the original posting is taken down.

1.17 All branches of the government have recognised the increasing need for legal protection of privacy and private information. As mentioned above, the executive and legislative branches have responded by enacting legislation such as the Personal Data Protection Act 2012⁴³ and the Protection from Harassment Act,⁴⁴ which address some aspects of breaches of privacy.⁴⁵ The awareness of the judicial branch to this issue is highlighted by its statements in the case of *ANB v ANC*.⁴⁶

C EXTENT TO WHICH CURRENT LAW PROTECTS PRIVACY AND PRIVATE INFORMATION

1.18 Clearly, a person's privacy may be encroached upon in many ways. If, for example, the act said to breach privacy causes a person to apprehend an imminent battery, or deprives a person of his or her liberty for a time, the person may be able to claim in tort for assault or false imprisonment respectively.⁴⁷ This report focuses not on acts of this sort, but on actions such as covert surveillance and disclosure of private information that may cause annoyance, embarrassment or distress to a person, but generally not any physical or psychological harm.

1.19 It is submitted that Singapore law does not adequately provide civil liability for those forms of misuse of private information, even though it arguably protects some aspects of privacy, as detailed below.

42 Elena Chong, "Man Jailed 4 Weeks for 'Revenge Porn' after Sending Ex-girlfriend's Nude Photos to Tumblr", *The Straits Times* (3 April 2017) <<http://www.straitstimes.com/singapore/courts-crime/man-jailed-four-weeks-for-revenge-porn-after-sending-ex-girlfriends-nude>> (Accessed 18 November 2020).

43 Above, n 31.

44 Above, n 32.

45 The fact that these statutes do not deal completely with the issue of civil liability for encroachment on privacy is discussed in the next Part.

46 Above, n 17.

47 See generally Gary Chan, "Intentional Torts to the Person" in Chan & Lee, *The Law of Torts in Singapore* (2nd ed), above, n 3 at 43–51.

1 Intentional infliction of emotional distress causing harm (*Wilkinson v Downton*)

1.20 In *Ngiam Kong Seng v Lim Chiew Hock*,⁴⁸ the Court of Appeal accepted that the principle in the cases of *Wilkinson v Downton*⁴⁹ and *Janvier v Sweeney*⁵⁰ applies in Singapore, namely, that “wilfully communicating false information is actionable if it causes physical, including psychiatric, harm”.⁵¹ The Court emphasised that the tort requires the defendant to have intended to harm the plaintiff and that negligence is insufficient (which is why the tort did not apply on the facts of the case).⁵² In *O (a child) v Rhodes*,⁵³ the Supreme Court of the United Kingdom clarified that intention cannot be imputed as a matter of law, and it is preferable not to characterise the defendant’s state of mind as ‘recklessness’, as this is difficult to define.⁵⁴ It is worth noting that while the Supreme Court as a whole agreed that the tort applies to both words and conduct by a defendant,⁵⁵ Lord Neuberger of Abbotsbury PSC (with whom Lord Wilson JSC agreed) expressed reluctance “to decide definitively that liability for distressing actions and distressing words should be subject to the same rules, at this stage at any rate”.⁵⁶

1.21 The Supreme Court also confirmed that for the tort of intentional infliction of emotional distress to be made out, the plaintiff has to establish that he or she had suffered some form of physical harm or recognised psychiatric illness.⁵⁷ However, Lord Neuberger expressed doubts about this, saying:⁵⁸

[T]here is plainly a powerful case for saying that, in relation to the instant tort, liability for distressing statements, where intent to cause distress is an essential ingredient, it should be enough for the claimant to establish that he suffered significant distress as a result of the defendant’s statement. It is not entirely easy to see why, if an intention to cause the claimant significant distress is an ingredient of the tort and is enough to establish the tort in principle, the claimant should have to establish that he suffered something more serious than significant distress before he can recover any compensation. Further, the narrow restrictions on the tort should ensure that it is rarely invoked anyway.

48 [2008] SGCA 23, [2008] 3 SLR(R) 674, CA.

49 [1897] 2 QB 57, HC (QBD) (England & Wales).

50 [1919] 2 KB 316, CA (England & Wales).

51 *Ngiam Kong Seng*, above, n 48 at 731, [138] (*per* Phang JA). See also *Malcolmson v Mehta* [2001] SGHC 308, [2001] 3 SLR(R) 379 at 397–398, [46]–[48], HC, where *Wilkinson v Downton* and *Janvier v Sweeney* were referred to with approval.

52 *Id* at 731–732, [138] and [140].

53 [2015] UKSC 32, [2015] 2 WLR 1373, SC (UK).

54 *Id* at 1398–1400, [80]–[87]; and 1405, [112]–[113].

55 *Id* at 1400, [88].

56 *Id* at 1403, [103].

57 *Id* at 1400, [88]; see also *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406 at 426, [47], and at 429, [62], HL (UK).

58 *O v Rhodes*, above, n 53 at 1406, [119].

1.22 Some forms of encroachment on privacy might well be vindicated through the tort of intentional infliction of emotional distress. But, despite the interesting view taken by Lord Neuberger referred to above, it presently remains the law in the UK and in Singapore that the tort of intentional infliction of emotional distress is not made out unless the plaintiff at least suffers from a recognised psychiatric illness due to the defendant's conduct. Arguably, therefore, it is desirable that there should be some remedy for a misuse of private information that results in annoyance, embarrassment or distress which is serious but does not rise to the level of a psychiatric illness.⁵⁹

2 Private nuisance

1.23 An action in private nuisance may be brought if the following cumulative elements are satisfied:⁶⁰

- (a) Conditions of and/or activities of the defendant on land interfere with the plaintiff's use and enjoyment of land.
- (b) The interference is unreasonable.
- (c) The plaintiff has possessory rights over the land.
- (d) Damage is proved.

1.24 To establish the third element above, the plaintiff must generally prove that he or she is in possession of the land such as an owner or tenant,⁶¹ although *de facto* exclusive possession without legal title also suffices.⁶² In *Hunter v Canary Wharf Ltd*⁶³ ('Hunter'), a majority of the House of Lords reaffirmed that since the tort of private nuisance serves to protect the plaintiff's enjoyment of rights over land, a mere licensee of premises may not sue for nuisance.⁶⁴ Their Lordships overruled *Khorasandjian v Bush*,⁶⁵ in which the Court of Appeal had granted an injunction restraining the defendant from making harassing telephone calls to the plaintiff at her

59 LRCHK Report, above, n 2 at 28, [2.17].

60 Gary Chan, "Interference with Land" in Chan & Lee, *The Law of Torts in Singapore* (2nd ed), above, n 3, 407 at 422, [10.035].

61 *Epolar System Enterprise Pte Ltd v Lee Hock Chuan* [2003] SGCA 10, [2003] 2 SLR(R) 198 at 201–202, [10]–[11], CA. If an owner of land has rented it out, retaining the reversionary interest, he or she can sue for permanent damage to the land that affects the reversionary interest: *id* at 201, [10].

62 *Id* at 202, [11]–[12]. See also *PC Connect Pte Ltd v HSBC Institutional Trust Services (Singapore) Ltd* [2010] SGHC 154, in which the High Court allowed a claim by a plaintiff who lacked proprietary interest in the land because the plaintiff had the right to occupy the premises and to take over possession of them from the tenant (a related company), was in physical occupation of the premises, was aware of the tenancy agreement's terms, and paid rent for the premises directly to the landlord: Chan, "Interference with Land", above, n 60 at 428, [10.051].

63 [1997] AC 655, HL (UK).

64 *Id* at 687–688, 696, 704 and 724.

65 [1993] QB 727, CA (England & Wales).

parents' home, on the ground that the plaintiff was a licensee in the property which was legally owned by her mother.⁶⁶ *Hunter* was cited with approval by the Singapore High Court in *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan*,⁶⁷ the Court holding that the individual employees and officers of a company could not sue in private nuisance where it was the company that had the title to the premises.⁶⁸

1.25 This element of the tort of private nuisance means that the cause of action is unavailable to those who may suffer misuse of their private information, such as being surreptitiously photographed or video-recorded, while they are on premises belonging to other persons. Where these persons are family members or close friends, it may be possible in principle for those persons to claim in private nuisance for the benefit of the person experiencing such a breach. On the other hand, in a setting such as a workplace or a place of leisure frequented by the latter person, it may be inconvenient for the person to ask that the titleholder of the land (which could, for example, be the person's employer) bring a suit, or unrealistic for him to her to expect that this will be done.

3 Tort of breach of confidence

1.26 The tort of breach of confidence was recently reviewed by the Court of Appeal in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting*,⁶⁹ which redefined the elements of the tort as follows:⁷⁰

- (a) The information must inherently possess the quality of confidence; in other words, it must not be in the public domain.
- (b) The foregoing information must have been imparted under circumstances importing an obligation of confidence, or accessed or acquired without the plaintiff's knowledge.

Once these elements have been established, an action for breach of confidence is made out, and it is for the defendant to show that its conscience was unaffected, for example, by demonstrating that it "came across the information by accident or was unaware of its confidential nature or believed there to be a strong public interest in disclosing it".⁷¹

⁶⁶ *Hunter*, above, n 63 at 691–692, 698, 704–706 and 725–726.

⁶⁷ [2013] SGHC 158, [2013] 4 SLR 545, HC.

⁶⁸ *Id* at 550–551, [6].

⁶⁹ [2020] SGCA 32, [2020] 1 SLR 1130.

⁷⁰ *Id* at 1151–1152, [61].

⁷¹ *Ibid* (*per* Menon CJ).

1.27 As regards the second element, apart from an obligation of confidence arising by way of contract⁷² or implied from some relationship such as employer and employee or lawyer and client,⁷³ an obligation of confidence can arise in equity when a reasonable defendant in the defendant's shoes would have known that the information in question was confidential and imparted in confidence.⁷⁴ For example, in *X Pte Ltd v CDE*,⁷⁵ the defendant, who had been employed by the 1st plaintiff as a secretary to the 2nd plaintiff, wrote to the plaintiffs, the 1st plaintiff's foreign parent company, and the 2nd plaintiff's wife about, among other things, a sexual relationship that she had had with the 2nd plaintiff as well as another relationship that the 2nd plaintiff was having with one 'IS'. The defendant had obtained information about the latter relationship from the 2nd plaintiff's personal telephone and shop bills, a record of a holiday trip that the 2nd plaintiff had taken, and a record of personal calls meant for the 2nd plaintiff. Upon the defendant threatening to make wider disclosures of the information to, among others, the 2nd plaintiff's family, all staff members of the 1st plaintiff and its parent, their business contacts, and an embassy and some clubs, the plaintiffs obtained an interim injunction against the defendant to prevent such further disclosure of information. The High Court dismissed the defendant's application for the interim injunction to be discharged, holding that there was a serious question to be tried as to whether she had obtained the information when in a position of confidence, and/or whether the defendant had obtained private information by surreptitious or underhanded means, making it protectable by the law of confidentiality.⁷⁶

1.28 A similar conclusion was reached in *Vestwin Trading Pte Ltd v Obegi Melissa* ('Vestwin').⁷⁷ The plaintiffs realised that certain documents belonging to them had been tendered as exhibits by the 1st to 8th defendants in a suit against PT Indah Kiat Pulp & Paper Corporation to which the plaintiffs were not parties. The 3rd to 7th defendants had engaged the 10th defendant to locate Indah Kiat's assets in Singapore for the purpose of facilitating enforcement of a judgment that the defendants had obtained against Indah Kiat in New York. The 9th defendant, a director of the 10th defendant, had obtained the documents by trespassing into the common rubbish area of the building in which the plaintiffs' offices were located and retrieving them from trash bags. The High Court held that the 9th defendant had surreptitiously and improperly obtained the documents

72 See, for example, *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd* [2012] SGHC 133, [2012] 4 SLR 36 at 52, [54]; *Clearlab SG Pte Ltd v Ting Chong Chai* [2014] SGHC 221, [2015] 1 SLR 163 at 192–193, [79].

73 Gary Chan, "Protection of Privacy Interests in Tort" in Chan & Lee, *The Law of Torts in Singapore* (2nd ed), above, n 3, 697 at 707, [16.023].

74 *Coco v A N Clark*, above, n 24 at 48.

75 [1992] SGHC 229, [1992] 2 SLR(R) 575.

76 *Id* at 588–589, [37].

77 [2006] SGHC 107, [2006] 3 SLR(R) 573, HC.

by criminal means (theft) and unlawful means (conversion),⁷⁸ and thus he and the 10th defendant were imposed with a duty of confidence. As recipients of the documents, the 1st to 8th defendants were similarly bound. Thus, a permanent injunction was granted to restrain the defendants from using or disclosing the confidential information and documents. As mentioned earlier, in *I-Admin*, the Court of Appeal affirmed that “[a]n obligation of confidence will also be found where confidential information has been accessed or acquired without a plaintiff’s knowledge or consent”.⁷⁹

1.29 The tort of breach of confidence can therefore be used to restrain a defendant from disclosing or using confidential information about a plaintiff in the absence of any contractual or other relationship between the plaintiff and defendant, so long as the situation is such as to give rise to an equitable duty of confidence on the defendant’s part.

1.30 Nonetheless, the tort does not apply in certain scenarios where a plaintiff would regard misuse of private information as having occurred. First, the tort is intended to protect *confidential* information. If information has lost its quality of confidence through no fault of the defendant, the tort is unavailable. In *PJS v News Group Newspapers Ltd*,⁸⁰ the plaintiff, who was the partner of a well-known entertainer, had obtained an interim injunction against the defendant to restrain it from publishing in one of its national newspapers a story about the plaintiff’s alleged extramarital sexual activities. Although he failed at first instance, the Court of Appeal of England and Wales granted the injunction. Subsequently, the story was published in the United States, Canada and Scotland, and appeared on Internet websites and social media. The plaintiff was named in these stories. The defendant then applied successfully to the Court of Appeal for the injunction to be discharged, on the ground that since the information was now in the public domain the injunction no longer served any useful purpose. However, the injunction was continued pending the plaintiff’s application to the Supreme Court for permission to appeal.

1.31 The Supreme Court granted the application and allowed the appeal. A majority of the judges took the view that if the plaintiff had based his claim solely on confidentiality or secrecy, “it would have substantial difficulties”:⁸¹

[T]he consequential publication of the story on websites, in tweets and other forms of social network, coupled with consequential oral communications, has clearly resulted in many people in England and Wales knowing at least some details of the story, including the identity of PJS, and many others knowing how to get access to the story. [...] [T]here comes a

⁷⁸ *Id* at 582, [31].

⁷⁹ *I-Admin*, above, n 69 at [61] (*per* Menon CJ).

⁸⁰ [2016] UKSC 26, [2016] AC 1081, SC (UK).

⁸¹ *Id* at 1108, [57] (*per* Lord Neuberger).

point where it is simply unrealistic for a court to stop a story being published in a national newspaper on the ground of confidentiality, and, on the current state of the evidence, I would, I think, accept that, if one was solely concerned with confidentiality, that point had indeed been passed in this case.

1.32 However, the plaintiff had also based his claim on the tort of misuse of private information that had been developed by the House of Lords in *Campbell v MGN Ltd*⁸² as an extension of the tort of breach of confidence. The implication was that even if the information was no longer confidential, its further disclosure would be intrusive to the plaintiff, his partner and their children, and cause them distress. The tort of misuse of private information remained available to protect against this, which justified the continuance of the interim injunction until the trial of the matter.⁸³ When applying this tort, the court will determine whether the information in question is private by considering whether a reasonable person of ordinary sensibilities in the same situation as the subject of the disclosure would find the disclosure offensive.⁸⁴ Thereafter, the court must employ a proportionality analysis and balance the right to respect for private life and the right to freedom of expression.⁸⁵

1.33 As noted by the Singapore Court of Appeal in *ANB v ANC*,⁸⁶ local courts have not yet had the opportunity to decide if the common law should provide greater protection for privacy, whether by adopting the UK tort of misuse of private information or by adopting a free-standing tort of privacy along New Zealand lines.

1.34 Until that happens, plaintiffs must rely on the narrower protection afforded by the tort of breach of confidence. Admittedly, following the Court of Appeal's modification of the law of confidence in *I-Admin*, which did away with the requirement for the plaintiff to prove unauthorised use of the confidential information,⁸⁷ it is potentially easier for a plaintiff whose private information has been taken to now bring a claim for breach of confidence since once the information had been taken the tort is essentially complete, and it is for the defendant to show that its conscience is unaffected.

82 Above, n 23.

83 *PJS*, above, n 80 at 1108–1110, [58]–[65].

84 *Campbell v MGN*, above, n 23, at 466, [22]; 483, [94]; and 495–496, [135]–[136].

85 *Id* at 486, [105]; 496, [137] and [141]; and 504, [167].

86 Above, n 17.

87 See, for example, *Chiarapurk Jack v Har Par Brothers International Ltd* [1993] SGCA 55, [1993] 2 SLR(R) 620 at 631, [21], CA (identifying misuse of information by its recipient as an element of the tort), citing *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, CA (England & Wales), and Francis Gurry, *Breach of Confidence* (Oxford: Clarendon Press, 1984) at 4. See also *X Pte Ltd v CDE* [1992] SGHC 229, [1992] 2 SLR(R) 575 at 586, [27], HC, citing *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, HC (Ch D) (England & Wales).

1.35 Nonetheless, the tort remains unable to prevent intrusion into privacy once information has entered the public domain, and other limitations also exist. For example, it was held in *X v CDE* that no duty of confidence requires a defendant to refrain from disclosing a personal relationship between the defendant and the plaintiff.⁸⁸ However, as *PJS* indicates, that plaintiff may be able to succeed against the defendant in a claim based on the tort of misuse of private information.

4 Personal Data Protection Act

1.36 The Personal Data Protection Act⁸⁹ ('PDPA') describes its own purpose in section 3 as follows:

The purpose of this Act is to govern the collection, use and disclosure of personal data by organisations in a manner that recognises both the right of individuals to protect their personal data and the need of organisations to collect, use or disclose personal data for purposes that a reasonable person would consider appropriate in the circumstances.

Personal data is defined in section 2(1) as "data, whether true or not, about an individual who can be identified — (a) from that data; or (b) from that data and other information to which the organisation has or is likely to have access".

1.37 Section 3 of the Act refers to a "right of individuals to protect their personal data", and not a right of privacy. Although the laws of jurisdictions examined during the development of the Act all take the view that "the right to data protection is analogous to, or at least derived in part from, the right to privacy"⁹⁰, privacy is nowhere mentioned in the Act. Nor was it mentioned in the speech of the Minister for Information, Communications and the Arts during the Second Reading of the bill in Parliament.⁹¹ It has been noted that:⁹²

Such explicit balancing of the rights of individuals and the "needs" of organisations is hard to reconcile with a rights-based approach to privacy; it is better understood as a pragmatic attempt to regulate the flow of information, moderated by the touchstone of reasonableness.

1.38 Nonetheless, some encroachments on privacy – namely, those relating to the misuse of private information – may be able to be redressed through the legal regime for the protection of personal data. The key

⁸⁸ *X v CDE*, above, n 75 at 590, [44].

⁸⁹ Above, n 31.

⁹⁰ Warren B Chik & Pang Keep Ying Joey, "The Meaning and Scope of Personal Data under the Singapore Personal Data Protection Act" (2014) 26 *Sing Acad LJ* 354 at 362, [25]

⁹¹ *Id.*

⁹² Simon Chesterman, "From Privacy to Data Protection" in Simon Chesterman (ed), *Data Protection Law in Singapore: Privacy and Sovereignty in an Interconnected World* (Singapore: Academy Publishing, 2014), 1 at 23, [1.49].

principle introduced by the Act is that personal data about an individual cannot be collected, used or disclosed unless the individual gives, or is deemed to have given consent on the terms defined in the Act to the collection, use or disclosure, or if the collection, use or disclosure is required or authorised by law.⁹³ Moreover personal data about an individual may only be collected, used or disclosed for purposes “that a reasonable person would consider appropriate in the circumstances”, and if the individual has been notified of these purposes.⁹⁴ Where there has been a misuse of personal data, an individual may make a complaint to the Personal Data Protection Commission. The Commission has at its disposal an array of directions it can issue, including a direction to stop collecting, using or disclosing data; to destroy data; and to pay a financial penalty.⁹⁵ In addition, if a person has suffered loss or damage as a direct result of the contravention of specified provisions of the Act, he or she has a right of action for relief in civil proceedings in court.⁹⁶

1.39 For present purposes, the main limitation of the PDPA is that it places data protection obligations on organisations. Although the definition of an organisation is fairly broad, encompassing “any individual, company, association or body of persons, corporate or unincorporated, whether or not — (a) formed or recognised under the law of Singapore; or (b) resident, or having an office or a place of business, in Singapore”,⁹⁷ section 4 states that the Act imposes no obligations on “any individual acting in a personal or domestic capacity” or on “any employee acting in the course of his employment with an organisation”.⁹⁸ Hence, there will be incidents of misuse of private information by some persons that will fall outside the ambit of the Act.

5 Protection from Harassment Act

1.40 With the enactment of the Protection from Harassment Act⁹⁹ (‘PHA’) in 2014, it is now possible, pursuant to section 11 of the Act, for a victim of harassment to bring civil proceedings against a respondent for breach of a statutory tort. If the court is satisfied on a balance of probabilities that the respondent has contravened one or more of four specified sections of the Act, the court may award “such damages in respect of contravention as the court may, having regard to all the circumstances of the case, think just and

93 PDPA, above, n 31, s 13. For example, personal data can be collected, used and disclosed without consent in the circumstances and subject to the conditions set out in the Second, Third and Fourth Schedules to the Act: s 17.

94 *Id*, ss 18 and 20(1). Notification is not required if the individual is deemed to have consented to the collection, use or disclosure of the personal data, or if the law requires or authorises the collection, use or disclosure without consent: s 20(3).

95 *Id*, s 29.

96 *Id*, s 32.

97 *Id*, s 2(1) (definition of *organisation*).

98 *Id*, s 4(1)(a) and (b).

99 Above, n 32 (‘PHA’).

equitable”.¹⁰⁰ It has been suggested that damages for emotional distress may be awarded, as during the Second Reading of the bill in Parliament the Minister for Law said there was no prohibition against doing so.¹⁰¹ The Act abolished the common law tort of harassment¹⁰² that had been declared to exist by the High Court in *Malcolmson v Mehta*.¹⁰³

1.41 The four specified sections of the Act create the following criminal offences:

- (a) Section 3 (“Intentionally causing harassment, alarm or distress”).
- (b) Section 4 (“Harassment, alarm or distress”).
- (c) Section 5 (“Fear or provocation of violence”).
- (d) Section 7 (“Unlawful stalking”).

Section 5 will not be discussed as it is less likely to be relevant to a misuse of private information.

1.42 Sections 3, 4 and 7 share the similarity of requiring the causing of “harassment, alarm or distress”. Section 3, which was amended with effect from 1 January 2020 by the Protection from Harassment (Amendment) Act 2019,¹⁰⁴ makes it an offence, “with intent to cause harassment, alarm or distress to another person (called in this section the target person)”, by any means to “(a) use any threatening, abusive or insulting words or behaviour; (b) make any threatening, abusive or insulting communication, or (c) publish any identity information of the target person or a related person of the target person, and as a result causing that other person or any other person [...] harassment, alarm or distress”. *Identity information* is defined in section 2(1) to mean:

[...] any information that, whether on its own or with other information, identifies or purports to identify an individual, including (but not limited to) any of the following:

- (a) the individual’s name, residential address, email address, telephone number, date of birth, national registration identity card number, passport number, signature (whether handwritten or electronic) or password;
- (b) any photograph or video recording of the individual;
- (c) any information about the individual’s family, employment or education; [...]

¹⁰⁰ *Id*, s 11(2).

¹⁰¹ Ravi Chandran, “Workplace Harassment: Persons Liable and Damages Payable under the Protection from Harassment Act 2014” (2015) 27 *Sing Acad LJ* 286 at 300–302, [38]–[40].

¹⁰² PHA, above, n 32, s 14.

¹⁰³ Above, n 51.

¹⁰⁴ No 17 of 2019.

1.43 Section 4, which is similar to section 3, states:

An individual or entity must not by any means —

(a) use any threatening, abusive or insulting words or behaviour; or

(b) make any threatening, abusive or insulting communication,

which is heard, seen or otherwise perceived by any person [...] likely to be caused harassment, alarm or distress.

The differences are that section 4 does not require any intent of the offender to be proved, nor is it necessary to prove that the victim has been caused harassment, alarm or distress – it is sufficient that such a response is likely to be caused.

1.44 It may be difficult to establish that unwanted surveillance constitutes an offence under sections 3 or 4 of the Act in some situations. First, making a video recording or taking photographs of a person may not necessarily amount to behaviour which is “threatening, abusive or insulting”, for example, if a photographer or videographer tries to capture still or moving images of a celebrity or politician in a public place. However, some specific situations, such as taking secret recordings or photographs of people engaging in intimate activity, or seeking to publish a newspaper article containing embarrassing information, might arguably be “insulting”. Moreover, as regards section 3, the *mens rea* of intentionally causing harassment, alarm or distress would be absent if, say, the images were not published to embarrass the plaintiff but as part of a magazine article, or simply retained by the accused person for his or her own gratification. On the other hand, some forms of unwanted surveillance may constitute unlawful stalking contrary to section 7 of the Act.

1.45 Where section 4 is concerned, assuming it is established that the accused person has used insulting behaviour, it is conceivable that if the victim perceives the behaviour (for instance, by seeing the accused person carrying out surveillance, or subsequently discovering the accused person’s recording) and thereby feels harassed, alarmed or distressed,¹⁰⁵ this would satisfy the requirements of the provision.

1.46 Section 7 creates an offence of unlawful stalking, which is defined as engaging in a course of conduct which:¹⁰⁶

(a) involves acts or omissions associated with stalking;

(b) causes harassment, alarm or distress to the victim; and

(c) the accused —

105 Compare the illustration to the PHA, above, n 32, s 4: “X and Y are classmates. X posts a vulgar tirade against Y on a website accessible to all of their classmates. One of Y’s classmates shows the message on the website to Y, and Y is distressed. X is guilty of an offence under this section.”

106 *Id*, s 7(2) (as amended).

- (i) intends to cause harassment, alarm or distress to the victim;
or
- (ii) knows or ought reasonably to know is likely to cause harassment, alarm or distress to the victim.

Section 7(3) contains a non-exhaustive list of acts or omissions that are associated with stalking. These include “following the victim or a related person”,¹⁰⁷ “making any communication, or attempting to make any communication, by any means [...] relating or purporting to relate to the victim or a related person”,¹⁰⁸ “entering or loitering in any place (whether public or private) outside or near the victim’s or a related person’s place of residence or place of business or any other place frequented by the victim or the related person”,¹⁰⁹ and “keeping the victim or a related person under surveillance”.¹¹⁰

1.47 For example, surreptitious surveillance of a person may amount to unlawful stalking contrary to section 7(1) if the surveillance causes the person harassment, alarm or distress and the accused person knows or ought reasonably to know that it is likely to cause harassment, alarm or distress to the person,¹¹¹ as keeping a person under surveillance is one of the acts defined as associated with stalking.¹¹² It might also constitute unlawful stalking to intentionally post private information about a person online,¹¹³ or even to publish an article containing embarrassing details about a person in the media – despite the infelicity of characterising this as “stalking”. (The media organisation would have a defence if it proved its conduct was “reasonable in all the circumstances”).¹¹⁴ The person whose privacy has been infringed may then bring an action in tort against the accused person under section 11.

1.48 However, due to the definition of what amounts to a “course of conduct”, some degree of persistence of the accused person’s behaviour is required. Section 7(10) defines the term *course of conduct* as meaning,

107 *Id*, s 7(3)(a). A related person, “in relation to a person, means a person about whose safety or well-being the firstmentioned person would reasonably be expected to be seriously concerned”: s 2.

108 *Id*, s 7(3)(b)(ii).

109 *Id*, s 7(3)(c).

110 *Id*, s 7(3)(f).

111 An accused person “ought reasonably to know” that a course of conduct is likely to cause harassment, alarm or distress to the victim “if a reasonable person in possession of the same information would think that the course of conduct is likely to have that effect”: *id*, s 7(4). Section 7(5) of the Act lists a number of factors to which the court may have regard in considering whether a course of conduct is likely to cause harassment, alarm or distress.

112 *Id*, s 7(3)(f).

113 See *id*, s 7(3)(b)(ii) and illustration (c) to s 7(3) (“These acts are acts associated with stalking of X by Y: [...] Y repeatedly circulates revealing photographs of a classmate (X) to other classmates.”)

114 *Id*, s 7(7)(a).

among other things, if the conduct occurs on one occasion, conduct that is “protracted”.¹¹⁵ An illustration is provided as an example of protracted conduct:

Y surreptitiously plants a camera in X’s apartment. Unknown to X, the camera continuously transmits live videos of X in X’s apartment and Y watches the videos continually over several days. Y’s conduct is protracted.

Apart from that, the conduct must occur on two or more occasions to be regarded as a “course of conduct”. This means that behaviour occurring only once that is not protracted (for example, a single incident of an accused person taking an ‘upskirt’ video of a victim) will not be actionable under section 7.

1.49 The PHA is thus likely to provide much assistance in dealing with misuses of private information, although there are a few situations that may fall outside the scope of the Act. For instance, sections 3, 4 and 7 may not be triggered if a victim discovers that a person has taken photographs or video recordings of the victim on a single occasion, intending to keep them for personal gratification without publishing them. Similarly, if a person accesses private information belonging to a victim (such as a diary or letters, or documents thrown into a wastepaper basket) and copies the information but does not publish it, this may not fall within the ambit of the PHA.

1.50 Finally, it is worth noting that a victim under section 3, 4, 5, 6 or 7 of the Act may apply to the District Court for a protection order or expedited protection order.¹¹⁶ Such orders may, among other things:¹¹⁷

- (a) prohibit a respondent from doing any thing in relation to the victim or (in the case of section 7) any related person;
- (b) require that no person shall publish or continue to publish an offending communication; and
- (c) refer the respondent or victim or both to attend counselling or mediation.

¹¹⁵ *Id*, s 7(10)(a)(i). Conduct on one occasion will also be considered a “course of conduct” if the accused person has a previous conviction for unlawful stalking in respect of the same victim: *id*, s 7(10)(a)(ii).

¹¹⁶ *Id*, s 12 (protection order) and s 13 (expedited protection order).

¹¹⁷ *Id*, s 12(3).

D DESIRABILITY OF LEGISLATIVE INTERVENTION

1 Allowing for common law developments

1.51 Although the common law suffers from various shortcomings in dealing with the misuse of private information, as discussed above, it may be asked whether it is more desirable to allow the common law to develop a remedy than for Parliament to intervene. In connection with this, it may be noted that although committees in the UK¹¹⁸ and New Zealand¹¹⁹ have not recommended introducing a statutory tort, this must be understood against the backdrop of developments in those countries that address the matter. As mentioned above, the UK courts have established the tort of misuse of private information, while the New Zealand courts have created a free-standing tort of privacy. Additionally, in the UK the Protection from Harassment Act 1997,¹²⁰ like Singapore's Protection from Harassment Act, introduced a civil remedy for harassment.¹²¹

1.52 The Australian Law Reform Commission has pointed out that leaving a matter to the common law has some advantages. Parliament may overlook matters that had not been foreseen at the time the statute was enacted, or the statutory text may be overtaken by social or technological changes.¹²² There are limits to how a court can reinterpret a statutory provision in the light of such changes. In *Public Prosecutor v Lam Leng Hung*,¹²³ the Singapore Court of Appeal characterised adopting a purposive approach to statutory interpretation “to take into account the changes (even sea changes) that have taken place since it [a statutory provision] was enacted, and thereby ‘modernise’ the provision by robust ‘interpretive’ means” as “a misuse of statutory interpretation at best”, and “potentially exceed[ing] the proper remit of the court at worst”.¹²⁴ In contrast, the common law develops incrementally on a case-by-case basis and need not resolve all the issues that may arise in other cases.¹²⁵

1.53 On the other hand, development of the common law depends on suitable cases coming before the courts, which can take some time. In the

118 Joint Committee on Privacy and Injunctions, *Privacy and Injunctions: Session 2010–12: Report, together with Formal Minutes, Minutes of Evidence and Appendices* (House of Commons Paper No 1443; House of Lords Paper No 273) (London: Stationery Office, 2012). <<https://publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/273.pdf>> (Accessed 18 November 2020).

119 New Zealand Law Commission, *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy Stage 3* (Report No 113) (Wellington: New Zealand Law Commission, 2010). <<https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R113.pdf>> (Accessed 18 November 2020).

120 1997 c 40 (UK).

121 See ALRC Report, above, n 1 at 22, [1.27]–[1.29].

122 *Id* at 23, [1.34].

123 [2018] SGCA 7, [2018] 1 SLR 659, CA.

124 *Id* at 669, [6] (*per* Phang JA).

125 ALRC Report, above, n 2 at 23–24, [1.34].

interim, there may be uncertainty about what the law requires if not all the relevant issues have yet been resolved in judgments. Parliament can often address an issue more quickly and comprehensively by enacting a statute, and is in a position to shape a cause of action more flexibly than a court can, for example, by selecting the most appropriate elements of the cause of action, exceptions, defences, and so on. Unlike courts other than the Court of Appeal, Parliament is also free to depart from judicial precedents.¹²⁶

1.54 While the High Court decision of *Malcolmson v Mehta*¹²⁷ shows – correctly it is submitted¹²⁸ – that in appropriate cases a court can develop a new tort, in *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan*,¹²⁹ a different High Court judge disagreed with *Malcolmson* and opined that no tort of harassment existed. He said:¹³⁰

I doubt that a clear and comprehensive law on harassment as a civil cause of action can be effectively formulated in a judicial pronouncement, more so because there are, in modern times, calls for laws relating to privacy. Civil action in harassment and laws relating to privacy are complex and connected and must be considered together. Finally, by allowing litigants to sue when they feel harassed when there is no direct contact nor proof of damage, the court may be creating a blockbuster tort which will have unpredictable consequences, some of which may not be desirable. These are matters that need public debate to have the social, moral, and legal dimensions brought into the open. The forum for that is in the well of Parliament.

The point is now moot as section 14 of the Protection from Harassment Act abolished any tort of harassment that may have existed,¹³¹ but the *AXA Insurance* case demonstrates a judicial reluctance in some quarters to address a lacuna in the law by the creation of a new tort, particularly where matters of policy may need to be considered before such a step is taken.¹³² Legislative action may therefore address the issue more quickly and satisfactorily.

126 *Id.* at 24, [1.35]–[1.39].

127 Above, n 51.

128 The existence of the tort of harassment established in *Malcolmson v Mehta* was accepted by the Court of Appeal in an *obiter dictum* in *Tee Yok Kiat v Pang Min Seng* [2013] SGCA 9 at [39]–[43].

129 Above, n 67.

130 *Id.* at 553, [10] (*per* Choo J).

131 Above, n 32. Indeed, the view has been taken that the PHA, s 14, presupposes that there was a tort in the first place, and that the remarks in *AXA Insurance* about the tort's existence and the limited ambit of the common law's development were incorrect: Goh Yihan & Yip Man, "The Protection from Harassment Act 2014: Legislative Comment" (2014) 26 *Sing Acad LJ* 700 at 717, [45].

132 See also *Lam Leng Hung*, above, n 123 at 760, [282] (*per* Phang JA): "The courts are ill-suited, and lack the institutional legitimacy, to undertake the kind of wide-ranging *policy* review of the various classes of persons who deserve more or less punishment for committing CBT [criminal breach of trust under the Penal Code (Cap 224, 2008 Rev Ed)] in the 21st century" [emphasis in original].

1.55 A statute would usefully clarify the elements of the tort that a plaintiff needs to establish, and may provide for certain remedies not necessarily available at common law, such as orders for the defendant to publish a correction notification and to apologise to the plaintiff. At the moment, it is envisaged that a statutory tort that is introduced will sit alongside any common law developments that may be made to the tort of breach of confidence by the courts. It will be for the plaintiff to decide whether it is advantageous to rely only on the common law, or only on the proposed statutory tort, or to bring these claims in the alternative.

2 Reliance on criminal law

1.56 Another possible argument against statutory intervention is that the misuse of private information is better dealt with by the criminal law. It is beyond the scope of this report to consider in detail whether the criminal law deals adequately with the issue, but, depending on the misuse or other forms of encroachment complained of, a number of existing criminal offences may apply, including the following:

- (a) The Protection from Harassment Act, sections 3, 4 and 7 (discussed earlier).
- (b) The Penal Code,¹³³ section 268 read with section 290 (public nuisance).
- (c) The Penal Code, section 339 read with section 341 (wrongful restraint).
- (d) The Penal Code, section 340 read with section 342 (wrongful confinement).
- (e) The Penal Code, section 354 (assault or use of criminal force with intent to outrage modesty).
- (f) The Penal Code, section 377BA (word or gesture intended to insult the modesty of any person).
- (g) The Penal Code, sections 377BB–377BE (voyeurism and possession or distribution of voyeuristic or intimate images or recordings).

1.57 The main rebuttal to that suggestion is that while the criminal law may be employed to punish and deter the offender, it cannot provide the legal basis for what many victims would want – an injunction or other court order restraining the offender from continuing to breach the victim’s privacy in the future. At common law, an injunction is premised on the existence of an underlying civil cause of action. Thus, in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,¹³⁴ the High Court of Australia lifted an injunction granted on the basis of a “breach of privacy”

¹³³ Cap 224, 2008 Rev Ed.

¹³⁴ (2001) 208 CLR 199, HC (Aust) (*ABC v Lenah Game Meats*).

because this was not a recognised underlying equitable cause of action. The ALRC took the view that only natural persons should be allowed to bring a claim for invasion of privacy.¹³⁵

3 Reliance on the Protection from Harassment Act

1.58 A more difficult question is whether the Protection from Harassment Act already provides adequate protection from acts of misuse of private information as well, despite the fact that it may be somewhat odd to encompass such acts under terms like *harassment* and *stalking*. As discussed above,¹³⁶ common ways in which privacy is infringed may constitute offences under sections 3, 4 or 7 of the Act, and this could then be relied on to bring a civil action pursuant to section 11. A victim can also apply under sections 12 and 13 for a protection order or expedited protection order respectively.

1.59 The previous discussion highlighted that some forms of misuse of private information fall outside the ambit of the PHA, which may justify the introduction of a specific statutory tort to address the issue comprehensively. The report proceeds on this basis. Alternatively, the PHA might be amended to deal with some of the points raised in the report. In any case, in the absence of a new statutory tort, the Act could potentially be employed to deal with many common scenarios in which privacy is infringed.

¹³⁵ ALRC Report, above, n 1 at 171, recommendation 10–2.

¹³⁶ See Chapter 1, part C.5, above.

CHAPTER 2

A NEW STATUTORY TORT OF MISUSE OF PRIVATE INFORMATION

A MATTERS REQUIRING CONSIDERATION

2.1 Gary Chan, in his chapter on “Protecting Privacy Interests in Tort” in the book *The Law of Torts in Singapore* (2nd ed, 2016),¹³⁷ helpfully set out a number of issues that should be considered if a tort of privacy is to be adopted, which may be summarised and rephrased as follows:

- (a) What should constitute an actionable encroachment on privacy?
 - (1) What should the legal test for liability be?¹³⁸
 - (2) What should the threshold for liability be?¹³⁹
 - (3) What form of harm must be suffered?
- (b) What should the relevant mental element be?¹⁴⁰
- (c) What defences should apply?¹⁴¹
- (d) What remedies should be available?¹⁴²
- (e) Who should be entitled to claim for an encroachment on privacy? Should legal persons such as corporations be able to avail themselves of the cause of action?¹⁴³

Although this report proposes a more narrowly defined tort of misuse of private information, the issues identified above are broadly relevant to such a tort as well. This chapter uses these issues to focus on the main considerations for the introduction of a statutory tort, rather than the details of how the various considerations are to be implemented. It should be noted that the issues above may raise additional matters which need further study.

137 Above, n 3, at 724–736, [16.060]–[16.085].

138 Compare Chan, *id* at 725–727, [16.063]–[16.065].

139 Compare Chan, *id* at 727, [16.066].

140 Compare Chan, *id* at 729, [16.071].

141 Compare Chan, *id* at 730–731, [16.073]–[16.075].

142 Compare Chan, *id* at 731–736, [16.077]–[16.085].

143 Compare Chan, *id* at 729–730, [16.072].

2.2 A number of law reform agencies, including the Australian Law Reform Commission ('ALRC'),¹⁴⁴ the Law Reform Commission of Hong Kong ('LRCHK'),¹⁴⁵ and the Law Reform Commission of Ireland ('LRCI'),¹⁴⁶ have recommended the introduction of a statutory tort against forms of encroachment on privacy. Where relevant, these recommendations will be compared.

B WHAT SHOULD CONSTITUTE ACTIONABLE CONDUCT?

1 Forms of encroachment; Action in tort

2.3 Assuming there is acceptance that a statutory cause of action for some form of encroachment on privacy should be introduced, given the potential breadth of the word *privacy*, we are of the view that it would not be desirable to create a statutory 'tort of privacy', which would naturally be of uncertain ambit. Instead, the law should define the forms of encroachment that are actionable. The ALRC has recommended that the following forms of invasion of privacy should be actionable.¹⁴⁷

- (a) intrusion upon seclusion, such as by physically intruding into the plaintiff's private space or by watching, listening to or recording the plaintiff's private activities or private affairs; or
- (b) misuse of private information, such as by collecting or disclosing private information about the plaintiff.

Similarly, the LRCHK has recommended that intrusion, "physically or otherwise, upon the solitude or seclusion of another or into his private affairs or concerns",¹⁴⁸ and giving "publicity to a matter concerning the private life of another"¹⁴⁹ should be actionable.

2.4 Subparagraph (a) above addresses territorial privacy, privacy of the person, and communications and surveillance privacy, while subparagraph (b) addresses information privacy.¹⁵⁰ Recognising intrusion upon seclusion as an actionable form of encroachment on privacy is also in line with the holdings of the New Zealand High Court in *C v Holland*¹⁵¹ and the Ontario Court of Appeal in *Jones v Tsige*,¹⁵² while in *Campbell v MGN*

144 Above, n 1.

145 Above, n 2.

146 *Report on Privacy: Surveillance and the Interception of Communications* (LRC 57-1988) (Dublin: The Law Reform Commission, 1998). <https://www.lawreform.ie/_fileupload/Reports/rPrivacy.pdf> (Accessed 18 November 2020).

147 ALRC Report, above, n 1 at 74, recommendation 5-1.

148 LRCHK Report, above, n 2 at 139, [6.84], recommendation 2.

149 *Id* at 165. [7.45], recommendation 7.

150 See above, paragraph 1.2.

151 Above, n 29.

152 2012 ONCA 32, 108 OR (3d) 241, CA (Ont, Can). See the ALRC Report, above, n 1 at 80, [5.33]–[5.34].

*Ltd*¹⁵³ the UK House of Lords formulated a new tort of misuse of private information as an extension of the traditional tort of breach of confidence.¹⁵⁴

2.5 The concept of intrusion upon seclusion is somewhat nebulous, and doubts may arise as to issues such as whether a person is entitled to seclusion in a public or semi-public place. It is also significant that despite the reports published by the ALRC and the LRCHK recommending the creation of a statutory tort for intrusion against seclusion, legislative action has not been taken in the relevant jurisdictions to introduce such a tort.¹⁵⁵

2.6 Hence, it may be preferable if acts amounting to intrusion upon seclusion are dealt with by the criminal law. In August 2018, a Penal Code Review Committee recommended to the Government the introduction of an offence of voyeurism, that is, making a recording of a person in circumstances where the person could reasonably expect privacy, or where a recording is made under a person's clothes for the purpose of viewing his or her genitals, pubic area, buttocks or breasts. It also proposed that it should be an offence to access, possess or distribute a voyeuristic recording.¹⁵⁶ The Review Committee's recommendations were implemented by the Criminal Law Reform Act 2019,¹⁵⁷ which inserted sections 377BB and 377BC into the Penal Code. These new offences should help to address the issue of intrusion upon seclusion.

2.7 The Penal Code Review Committee also recommended the creation of a new offence of distributing or threatening to distribute intimate images,¹⁵⁸ recommendations which were subsequently implemented by the inclusion of sections 377BD and 377BE in the Penal Code. Section 377BE(5) defines an "intimate image or recording" as, in relation to a person (B), an image or recording:

153 Above, n 23.

154 ALRC Report, above, n 1 at 78–80, [5.27]–[5.32].

155 As regards Australia, see for example Gabrielle Upton (Attorney-General of NSW), "NSW Government Response to the Legislative Council Standing Committee on Law and Justice's Report into *Remedies for the Serious Invasion of Privacy in New South Wales*", Parliament of NSW website (5 September 2016) at 3 <<https://www.parliament.nsw.gov.au/lcdocs/inquiries/1877/160905%20Government%20response.pdf>> (Accessed 18 November 2020).

156 "Section 12: Voyeurism" in Penal Code Review Committee: Report, Ministry of Law website (August 2018) at 73–80 <<https://www.mha.gov.sg/docs/default-source/default-document-library/penal-code-review-committee-report3d9709ea6f13421b92d3ef8af69a4ad0.pdf>> (Accessed 18 November 2020).

157 No 15 of 2019.

158 "Section 13: Distributing or Threatening to Distribute Intimate Images" in *Penal Code Review Committee: Report*, above, n 156 at 81–85.

- (i) of B's genital or anal region, whether bare or covered by underwear;
- (ii) of B's breasts if B is female, whether bare or covered by underwear;
or
- (iii) of B doing a private act,¹⁵⁹

including images or recordings that have been altered to appear to show any of those things (unless the image is so altered that no reasonable person would believe that it depicts person B).

2.8 In proposing the new offences, the Penal Code Review Committee had been specifically focused on the problem of what has been called 'revenge pornography' (although the Penal Code Review Committee eschewed use of that term, saying it was "neither appropriate nor accurate to describe the distribution of nude, semi-nude, or sexual images", and "may further insult and humiliate the person depicted in those images").¹⁶⁰ To that end, the offences introduced into the Penal Code do not purport to deal with the non-consensual distribution of private information that (a) is not sexual or intimate in nature, or (b) while sexual or intimate in nature, is not in the form of an image or recording (for example, information about a celebrity's sexual activities).

2.9 Thus, there is merit in having a tort that is limited to the misuse of private information. It will be noted that subparagraph 2.3(b) above refers to "private information" rather than "facts". Not only is this in line with the characterisation of the tort in *Campbell v MGN Ltd*, but this would ensure that the statutory tort applies even if the information is inaccurate or false. It has been pointed out that if only the misuse of true information is actionable, this would require a plaintiff to identify which allegations in, say, an article about him or her are true or false, which would be a further intrusion into the plaintiff's privacy.¹⁶¹ In *McKennitt v Ash*,¹⁶² the view was expressed that in a case of misuse of private information the correct question to be asked is whether the information is private, and not whether it is true or false: "The truth or falsity of the information is an irrelevant inquiry."¹⁶³ Reference may also be had to the definition of *personal data* in the Personal Data Protection Act,¹⁶⁴ which means "data, whether true or not, about an individual [...]".

159 Under section 377C of the Penal Code, a person is doing a private act if "under circumstances in which the person has a reasonable expectation of privacy, the person: (i) is in a state where the person's genitals, buttocks or breasts (if the person is a female) are exposed or covered only in underwear; (ii) is using a toilet, showering or bathing; or (iii) is doing a sexual act that is not of a kind ordinarily done in public."

160 *Id* at 83, [7].

161 David Eady, "Injunctions and the Protection of Privacy" (2010) 29 Civil Justice QJ 411 at 422, cited in the ALRC Report, *id* at 84, [5.51].

162 [2008] QB 73, CA (England & Wales).

163 *Id* at 102, [86] (*per* Longmore LJ).

164 PDPA, above, n 31, s 2(1).

2.10 The ALRC expressed the view that the cause of action should be described as a tort. This is in line with developments in Commonwealth jurisdictions such as those mentioned in the previous paragraph where civil liability for invasions of privacy have been addressed through tort law. If Singapore were to follow suit, its courts could refer to cases from these jurisdictions for guidance on how to interpret the statutory tort. Secondly, other legal rules that pertain to torts such as those relating to conflict of laws, vicarious liability, and references in legislation to “torts” would be applicable, thus reducing uncertainty.¹⁶⁵ Section 11 of the Protection from Harassment Act,¹⁶⁶ discussed earlier, is an example of a statutory tort similar to the proposed tort of misuse of private information. However, the reference in section 11 to the action being a tort only appears in the marginal note: “Action for statutory tort”; subsection (1) of the provision itself only states that a victim “may bring civil proceedings in a court against the respondent”. It is submitted that, for the avoidance of doubt, it is desirable to specifically refer to an action as a tort in the provision creating the action.

2.11 In the draft bill appended to this report, the above recommendations have been given effect by clauses 3(1) and (3), which describe the cause of action as a tort. Clause 3(1) states that the tort is committed if a person:

- (a) intentionally, and without lawful authority, causes the disclosure of any private information relating to the individual; or
- (b) intentionally causes a serious misuse of any private information relating to the individual.

2 Legal test and threshold for liability

2.12 There is consensus that the legal test for liability should be whether the plaintiff had a reasonable expectation of privacy in the circumstances of the matter. In *Campbell v MGN Ltd*, Lord Nicholls of Birkenhead said: “Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.”¹⁶⁷

2.13 The New Zealand courts have come to the same conclusion. In *Hosking v Runting*, the Court of Appeal identified one of the fundamental requirements for a successful claim for interference with privacy as “[t]he existence of facts in respect of which there is a reasonable expectation of privacy”.¹⁶⁸ This was applied by the High Court in *C v Holland*.¹⁶⁹

¹⁶⁵ ALRC Report, above, n 1 at 68–70, [4.42] and [4.47].

¹⁶⁶ Above, n 32.

¹⁶⁷ *Campbell v MGN*, above, n 23 at 466, [21].

¹⁶⁸ *Hosking*, above, n 29 at 32, [117] (per Gault P).

¹⁶⁹ *C v Holland*, above, n 29 at 684, [34], and 699, [94].

2.14 This led the ALRC to recommend that “[t]he new tort should be actionable only where a person in the position of the plaintiff would have had a reasonable expectation of privacy, in all of the circumstances”.¹⁷⁰ The Commission also recommended that a non-exhaustive list of factors should be provided to assist the court to determine whether the plaintiff had a reasonable expectation of privacy in all the circumstances:¹⁷¹

- (a) the nature of the private information, including whether it relates to intimate or family matters, health or medical matters, or financial matters;
- (b) the means used to obtain the private information or to intrude upon seclusion, including the use of any device or technology;
- (c) the place where the intrusion occurred, such as in the plaintiff’s home;
- (d) the purpose of the misuse, disclosure or intrusion;
- (e) how the private information was held or communicated, such as in private correspondence or a personal diary;
- (f) whether and to what extent the private information was already in the public domain;
- (g) the relevant attributes of the plaintiff, including the plaintiff’s age, occupation and cultural background; and
- (h) the conduct of the plaintiff, including whether the plaintiff invited publicity or manifested a desire for privacy.

A similar approach was recommended by the LRCHK.¹⁷²

2.15 Some of the elements are comparable to those identified by the Court of Appeal of England and Wales in *Murray v Express Newspapers plc*,¹⁷³ a claim for misuse of private information against a photographic agency and a newspaper company which respectively had photographs of the claimant covertly taken with a long-range lens without his parents’ knowledge (his mother was the author J K Rowling), and published one of them in a newspaper:¹⁷⁴

[T]he question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.

170 ALRC Report, above, n 1 at 92, recommendation 6–1.

171 *Id* at 96, recommendation 6–2.

172 LRCHK Report, above, n 2 at 118, [6.27].

173 [2009] Ch 481, CA (England & Wales).

174 *Id* at 502–503, [36] (*per* Sir Anthony Clarke MR).

Reference may also be had to section 7(5) of the Protection from Harassment Act¹⁷⁵, which contains a list of factors that the court may have regard to when considering if a course of conduct is likely to cause harassment, alarm or distress.

2.16 As for the threshold of liability, the New Zealand courts speak in terms of breaches of privacy “that would be considered *highly offensive* to an objective reasonable person”¹⁷⁶ (emphasis added). This originates from the judgment of the High Court of Australia in *ABC v Lenah Game Meats* (per Gleeson CJ):¹⁷⁷

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.]

2.17 On the other hand, in *Campbell v MGN*, Lord Nicholls said that Gleeson CJ’s formulation of the test should be “used with care”, because:¹⁷⁸

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.

2.18 The ALRC considered that to avoid cases being brought for breaches of privacy that are trivial or of insufficient significance, there ought to be a threshold, but that the “highly offensive” formulation would pitch the standard too high. It recommended a threshold of a “serious” invasion of privacy.¹⁷⁹

The Act should provide that a plaintiff has an action under the new tort only where the invasion of privacy was ‘serious’, having regard, among other things, to:

175 Above, n 32.

176 *Hosking*, above n 29 at 32, [117] (per Gault P); see also *C v Holland*, above, n 29 at 699, [94].

177 Above, n 134 at 226, [42].

178 *Campbell v MGN*, above, n 23 at 466, [22]. See also 495–496, [135]–[137] (per Baroness Hale of Richmond).

179 ALRC Report, above, n 1 at 132, recommendation 8–1.

- (a) the degree of any offence, distress or harm to dignity that the invasion of privacy was likely to cause to a person of ordinary sensibilities in the position of the plaintiff; and
- (b) whether the defendant was motivated by malice or knew the invasion of privacy was likely to offend, distress or harm the dignity of the plaintiff.

2.19 The ALRC noted that it was useful to specify in the legislation that the invasion of privacy should be judged from the viewpoint of “a person of ordinary sensibilities in the position of the plaintiff”, as an act that might be regarded as an invasion of privacy by an overly sensitive person might not objectively be a serious invasion.¹⁸⁰ The reference to a person “in the position of the plaintiff” gives effect to Lord Hope of Craighead’s comment in *Campbell v MGN* that an invasion of privacy should not be judged from the viewpoint of a reader of an allegedly infringing article, as this would greatly reduce the protection afforded to the right of privacy.¹⁸¹ The ALRC acknowledged that this comment was made in the context of whether the plaintiff in *Campbell v MGN* had a reasonable expectation of privacy, but felt that the consideration was also relevant to determining if an invasion of privacy is serious.¹⁸² In similar vein, the LRCHK adopted the formulation “seriously offensive or objectionable to a reasonable person” of ordinary sensibilities.¹⁸³

2.20 Clause 2(1) of the draft bill thus identifies what types of information relating to an individual are protected by the tort, while clause 2(2) states that such information is private information if the individual “has a reasonable expectation of privacy in respect of the information”. In determining this, a court may have regard to a non-exhaustive list of factors set out in clause 2(3).

2.21 We consider that it would be useful to differentiate between causing the disclosure of private information and misusing such private information once it has been disclosed. While either of these actions constitutes the tort, where the wrongdoing consists of misusing the private information, clause 3(1)(b) requires the misuse to be “serious”. This will exclude insufficiently significant forms of misuse from the ambit of the tort. On the other hand, it is unnecessary to impose this threshold of liability on the disclosure of the private information in the first place (clause 3(1)(a)), as any release of the information which is already deemed to be private is significant. Once the information has been disclosed (for example, posted on the Internet), it will likely be very difficult to remove from the public domain. Clause 3(2) sets out some non-exhaustive factors that a court may have regard to in deciding whether an act of misuse is serious.

¹⁸⁰ *Id* at 136, [8.28].

¹⁸¹ *Campbell v MGN*, above, n 23 at 484, [99].

¹⁸² ALRC Report, above, n 1 at 136, [8.26]–[8.27].

¹⁸³ LRCHK Report, above, n 2 at 135, [6.72]. The Commission provided a longer list of relevant factors to be considered at 135–136, [6.74].

3 Form of harm

2.22 The misuse of private information is akin to harassment in that the primary form of harm suffered by the victim is likely to be annoyance, embarrassment and/or emotional distress rather than some form of physical or psychiatric illness. In the Singapore context, sections 3, 4 and 7 of the Protection from Harassment Act,¹⁸⁴ which can form the basis for tort proceedings pursuant to section 11 of that Act, do not mention that a victim must have suffered physical or psychiatric illness or financial loss, only that the victim must have been caused harassment, alarm or distress. A parallel may also be drawn with the intentional torts to the person – assault, battery, and false imprisonment (and, according to some *obiter* views, perhaps even the tort of intentional infliction of emotional distress causing harm)¹⁸⁵ – which are actionable *per se* without proof of damage.

2.23 Similarly, as regards the UK tort of misuse of private information and the New Zealand tort of privacy, it does not appear necessary for the victim to prove that damage has been suffered. This is in line with the views of some judges that detriment need not be proved to establish the traditional tort of breach of confidence,¹⁸⁶ although in *Vestwin* the Singapore High Court noted that there was some difference of opinion on the matter.¹⁸⁷ The Court took the view that “there are at least some situations where the insistence upon the presence of detriment would be inappropriate if not unjust”,¹⁸⁸ and that on the facts of the case – the obtaining of confidential information by rummaging through the victims’ rubbish – “to insist on proof of detriment will send a wrong signal encouraging vigilantism”.¹⁸⁹

2.24 It is therefore submitted that the proposed tort should be actionable *per se* without requiring proof of damage.¹⁹⁰

4 Balancing of public interests

2.25 The importance of balancing the public interest in protecting the plaintiff’s privacy against other countervailing public interests such as permitting discussion of “matters of high public (especially political) importance”¹⁹¹ is highlighted in some Commonwealth judgments. For example, in *Campbell v MGN* in relation to the tort of misuse of private information, Baroness Hale of Richmond said it was necessary to look “first

184 Above, n 32.

185 See Chapter 1, part C.1 above.

186 See, e.g., *Coco v A N Clark*, above, n 24 at 48; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 256 and 282, HL (UK).

187 *Vestwin*, above, n 77 at 591–593, [68]–[70].

188 *Id* at 593, [70] (*per Ang J*), and see the authorities cited at [71]–[73].

189 *Id* at 593, [75]. In any case, the High Court found that detriment had been proved: *ibid*.

190 Compare the ALRC Report, above, n 1 at 138, recommendation 8–2; and the LRCHK Report, above, n 2 at 266, recommendation 23.

191 *Hosking*, above, n 29 at 31, [116] (*per Gault P*).

at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering with or restricting each of those rights; and applying the proportionality test to each”.¹⁹² Although her Ladyship was speaking of balancing the right to privacy embodied in Article 8 of the European Convention on Human Rights¹⁹³ against the right to freedom of expression in Article 10, which do not apply directly in the Singapore context, it is submitted that the general consideration of balancing competing public interests is one that applies with equal force in the common law.

2.26 The ALRC identified a number of countervailing public interests which it suggested the court should have regard to, along with other relevant interests:¹⁹⁴

- (a) freedom of expression, including political communication and artistic expression;
- (b) freedom of the media, particularly to responsibly investigate and report matters of public concern and importance;
- (c) the proper administration of government;
- (d) open justice;
- (e) public health and safety;
- (f) national security; and
- (g) the prevention and detection of crime and fraud.

2.27 A tricky issue is the stage at which this balancing should be effected by a court. In *Hosking*, the New Zealand Court of Appeal felt:¹⁹⁵

There should be available in cases of interference with privacy a *defence* enabling publication to be justified by a legitimate public concern in the information. [...] [I]t is more conceptually sound for this to constitute a defence [rather than as an element of the tort], particularly given the parallels with breach of confidence claims, where public interest is an established defence.

[Emphasis added.]

The LRCHK recommended that “it should be a defence to an action for unwarranted publicity to show that the publicity was in the public interest”.¹⁹⁶

2.28 In contrast, for the UK tort of misuse of private information, the court conducts a balancing exercise to determine whether privacy interests

¹⁹² *Campbell v MGN*, n 23 at 497, [141].

¹⁹³ Above, n 15.

¹⁹⁴ ALRC Report, above, n 1 at 150, recommendation 9–2; and compare the factors identified in the LRCHK Report, above, n 2 at 182, recommendation 13.

¹⁹⁵ *Hosking*, above, n 29 at 35, [129] (*per* Gault P).

¹⁹⁶ LRCHK Report, above, n 2 at 178, recommendation 12.

should prevail over interests in publishing the private information, or *vice versa*, when determining if there is liability. When the opposing interests are in conflict, “an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. [...] [T]he justification for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.”¹⁹⁷

2.29 The ALRC recommended that the balancing should be an element of the tort, in that it should be a consideration for the court to decide whether the plaintiff has a course of action. In that case, a separate public interest defence would be unnecessary.¹⁹⁸ The Commission felt that this would ensure that privacy interests are not unduly privileged over countervailing public interests;¹⁹⁹ also, treating countervailing public interests as a defence might have a chilling effect on expression.²⁰⁰ In connection with this, it should be clarified that while the plaintiff should have the legal burden of showing that the public interest in privacy outweighs any countervailing public interests, the defendant should have the burden of adducing evidence of such countervailing public interests since the defendant is usually in a better position to adduce such evidence.²⁰¹

2.30 Differing approaches have been taken in Singapore in comparable situations, albeit in the criminal law context. Section 7(7) of the Protection from Harassment Act,²⁰² for example, treats four specified considerations as a defence to the offence of unlawful stalking:

In any proceedings for an offence under subsection (6), it is a defence for the accused person to prove —

- (a) that the course of conduct was reasonable in all the circumstances;²⁰³
- (b) that the course of conduct was pursued under any written law or rule of law or to comply with any condition or requirement imposed by any person under any written law;

197 *Re S (a child) (identification: restrictions on publication)* [2005] 1 AC 593 at 603, [17], HL (UK) (*per* Lord Steyn), applied in *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) at [41] and [61], HC (England & Wales).

198 ALRC Report, above, n 1 at 144, recommendation 9–1.

199 *Id* at 161, [9.83].

200 *Id* at 159, [9.75].

201 *Id* at 158, recommendation 9–3, and at 159, [9.77]. Compare *Shadrake v Attorney-General*, below, n 205 at 808–809, [78].

202 Above, n 32.

203 Relevant factors would include “the nature of the allegedly offending act in question; the context in which those acts occurred; and the effect of those actions on the victim”: *Benber Dayao Yu v Jacter Singh* [2017] SGHC 92, [2017] 5 SLR 316 at 328–329, [43], citing K Shanmugam (Minister for Law), debate during the Second Reading of the Protection from Harassment Bill, *Singapore Parliamentary Debates, Official Report* (13 March 2014), vol 91.

- (c) that the course of conduct was lawfully done under a duty or power under any written law for the purpose of preventing or detecting crime; or
- (d) that the course of conduct was done on behalf of the Government and was necessary for the purposes of national security, national defence or the conduct of international relations.

By contrast, illustration 1 of section 3 of the Administration of Justice (Protection) Act 2017²⁰⁴ states that fair criticism of a court does not constitute the offence of scandalising the court under section 3(1)(a) of the Act. Thus, consideration of whether criticism is fair is treated as an element of the offence rather than as a defence. Illustration 1 gave statutory recognition to the provisional view of the Court of Appeal on this point in *Shadrake v Attorney-General*,²⁰⁵ the Court stating that it preferred “viewing the concept of fair criticism as going towards *liability* for contempt of court. Indeed, given that scandalising contempt is *quasi-criminal* in nature, this approach has the additional benefit of ensuring that the alleged contemnor is not disadvantaged *vis-à-vis* the implications with regard to the burden of proof”.²⁰⁶

2.31 Although the present context involves a proposed tort rather than a criminal offence, it is submitted that on balance the reasons provided by the ALRC and the Court of Appeal in *Shadrake* make it preferable that the balance between competing public interests should be considered as part of the elements of the tort rather than as a defence.

2.32 This is reflected in clause 3(2)(c) of the draft bill, which provides that where a misuse of private information involves its disclosure, one of the factors to which a court may have regard when deciding if the misuse is serious is “whether the person who caused the disclosure of the private information had acted, or intended to act, in the public interest when causing the disclosure of the private information”. It is submitted that a reference to “the public interest” is sufficient, as it is not customary in Singapore legislation to list out various public interests, as the ALRC proposed.

C WHAT SHOULD THE RELEVANT MENTAL ELEMENT BE?

2.33 An important consideration is the state of mind that the defendant must be shown to have possessed in order to impress liability on him or her. Possible states of mind include intention, recklessness, negligence and strict liability.

204 No 19 of 2016, in force on 1 October 2017.

205 [2011] SGCA 26, [2011] 3 SLR 778, CA.

206 *Id* at 809, [80] (*per* Phang JA) [emphasis in original].

2.34 In some jurisdictions, intention to invade the plaintiff's privacy and recklessness as to whether the plaintiff's privacy will be invaded by the defendant's act have been accepted as appropriate mental elements for torts addressing encroachments on privacy. Recklessness refers to knowledge of a risk that privacy may be infringed, but indifference as to whether or not the infringement may occur.²⁰⁷ In *Jones v Tsige*, the Ontario Court of Appeal stated:²⁰⁸

The key features of this cause of action [for intrusion upon seclusion] are, first, that *the defendant's conduct must be intentional, within which I would include reckless*; second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. [...] These elements make it clear that recognizing this cause of action will not open the floodgates. A claim for intrusion upon seclusion will arise *only for deliberate and significant invasions of personal privacy*.

[Emphasis added.]

Moreover, in British Columbia, Newfoundland and Labrador, and Saskatchewan,²⁰⁹ the mental element applicable to statutory torts of invasion of privacy requires the defendant's act to be wilful, which encompasses intention and recklessness.²¹⁰

2.35 In *C v Holland*, the New Zealand High Court identified the elements of the tort of intrusion upon seclusion as including "(a) an *intentional and unauthorised* intrusion; (b) into seclusion [...]", and commented that "[i]ntentional connotes an affirmative act, not an unwitting or simply careless intrusion".²¹¹

2.36 On the other hand, the ALRC was of the opinion that the mental element of an invasion of privacy tort should not be either negligence or strict liability, as that would be inconsistent with the tort being either actionable *per se* without proof of damage or (as proposed earlier)²¹² extending to recovery for annoyance and emotional distress. It would also lead to incongruity with other torts: why should a plaintiff be entitled to recover damages for negligently caused emotional distress under a tort of privacy when such recovery is currently not possible under the torts of negligence (including negligent infliction of psychiatric harm – what used to be called 'nervous shock') and intentional infliction of emotional distress?²¹³

207 ALRC Report, above, n 1 at 114, [7.27].

208 Above, n 152, at 261–262, [71]–[72] (*per* Sharpe JA).

209 Privacy Act (RSBC 1996, c 373; BC, Can), s 1(1); Privacy Act (RSNL 1990, c P-22; Newf & Lab, Can), s 3(1); Privacy Act (RSS 1978, c P-24; Sask, Can), s 2.

210 ALRC Report, above, n 1 at 112, [7.19].

211 *C v Holland*, above, n 29 at 699, [94]–[95] (*per* Whata J) [emphasis added].

212 See Chapter 2, Part B.3, above.

213 ALRC Report, above, n 1 at 120–121, [7.54]–[7.56]. If a plaintiff has suffered physical or psychiatric harm due to an encroachment on privacy, he or she may have some
(cont'd on the next page)

The LRCHK similarly felt that liability should be restricted to situations where the defendant has acted either intentionally or recklessly.²¹⁴

2.37 Negligence and strict liability would arguably also be too onerous to defendants and be contrary to other interests. It would, for instance, potentially render people liable for taking photographs and videos in public or installing closed-circuit television (CCTV) security systems in their homes or workplaces, and might hamper the ability of the media to report the news.²¹⁵

2.38 On consideration, we feel that it is preferable to define the mental element of the tort as acting intentionally, and to exclude recklessness. We consider that including recklessness may make it unnecessarily complicated to apply the tort. This is reflected in the drafting of clause 3(1) of the draft bill. By way of comparison, the mental element of the offence created by section 3 of the PHA, upon which civil proceedings may be founded, is “intent to cause harassment, alarm or distress to another person”;²¹⁶ recklessness is not mentioned.

2.39 Finally, the ALRC has raised the interesting suggestion that to encourage parties to resolve disputes without resorting to litigation, it may be worth specifying in the law that an apology or correction issued by the defendant cannot be treated as an admission of liability.²¹⁷ The desirability or otherwise of statutory provisions depriving apologies and corrections of legal effect deserves separate study. However, clause 4(2)(a) of the draft bill provides that if the defendant is found to be liable, the court may take into account whether the defendant made an appropriate apology to the plaintiff when assessing the quantum of damages to be awarded to the plaintiff.

D WHAT DEFENCES SHOULD APPLY?

2.40 The issue of what defences should apply to the tort of misuse of private information is one requiring additional study,²¹⁸ and it is proposed to outline the main potential defences without going into too much detail.

2.41 The ALRC recommended that the following should be defences to the tort:

other remedy in tort (such as the torts of negligence or breach of confidence) or in contract (based on some implied term): *id* at 119, [7.49], and at 120, [7.53]–[7.54].

214 LRCHK Report, above, n 2 at 134, [6.70]–[6.71].

215 ALRC Report, above, n 1 at 123, [7.63]–[7.64].

216 PHA, above, n 32, s 3(1).

217 ALRC Report, above, n 1 at 128–130, [7.87]–[7.96].

218 As stated at paragraph 2.1 above.

- (a) Lawful authority.²¹⁹
- (b) An act incidental to the exercise of a lawful right of defence of persons or property. This would include, for example, actions taken during an emergency or to protect a third party from harm.²²⁰
- (c) Necessity, such as a response by emergency services needing to access private information concerning a vulnerable person for the purpose of preventing the person from harming himself or herself.²²¹
- (d) Consent of the plaintiff.²²²
- (e) Absolute privilege in the situations applicable to the tort of defamation,²²³ for example, publishing a fair, accurate and contemporaneous report of court proceedings.²²⁴

Some of the defences proposed above are available for existing torts such as the torts of battery, defamation, trespass to land, breach of confidence, and (in the UK) misuse of private information.

2.42 It should be noted that the ALRC decided that some of the defences available in defamation claims were inappropriate for a tort of invasion of privacy.²²⁵ For example, a defence of justification or truth is irrelevant because the gravamen of the tort is the disclosure of information that should be kept private. Similarly, the defence of fair comment is not needed because, as proposed above, the court should have regard to whether private information should be disclosed in the public interest in determining whether the elements of the tort have been established.²²⁶

2.43 The draft bill does not mention any specific defences to the tort; whether some should be specified will require further study. By way of comparison, section 3(3) of the PHA states that “it is a defence for the accused individual or accused entity (called in this section the accused) to prove that the accused’s conduct was reasonable”.²²⁷ The draft bill has

219 ALRC Report, above, n 1 at 186, recommendation 11–1; LRCHK Report, above, n 2 at 149, recommendation 5 (intrusion upon seclusion), and at 167, recommendation 10 (unwarranted publicity).

220 ALRC Report, *id* at 191, recommendation 11–2, and at 192, [11.35]–[11.36]; LRCHK Report, *id* at 150, recommendation 6.

221 ALRC Report, *id* at 193, recommendation 11–3, and at 194, [11.43].

222 ALRC Report, *id* at 195, recommendation 11–4; LRCHK Report, above, n 2 at 141, recommendation 4 (intrusion upon seclusion); and at 167, recommendation 9 (unwarranted publicity).

223 ALRC Report, *id* at 201, recommendation 11–5, and at 203, [11.82]; LRCHK Report, *id* at 168, recommendation 11 (unwarranted publicity).

224 Defamation Act (Cap 75, 2014 Rev Ed), s 11.

225 ALRC Report, above, n 1 at 213–216, [11.132]–[11.148].

226 *Id* at 213, [11.133]–[11.134].

227 See also the PHA, above, n 32, ss 4(3) and 7(7).

taken a different approach, by defining the tort in a way that provides scope for a defendant to argue, for example, that no tort has been committed because there was no reasonable expectation of privacy, that any misuse of private information was not of sufficient seriousness, or that there was a countervailing public interest.

E WHAT REMEDIES SHOULD BE AVAILABLE?

2.44 It is submitted that the remedies that a court should be able to grant mirror those available in other torts. Thus, a successful plaintiff should be able to claim damages for any actual physical or psychiatric harm suffered, and for economic loss. In addition, it was stated earlier that damages should also be available for annoyance, embarrassment or emotional distress, since the tort is intended to safeguard a person's dignity interests.²²⁸ Given the courts' awareness of the need to guard against unjustifiably inflating awards of damages, it is thought unlikely that excessively large awards for non-economic loss will be made.

2.45 The ALRC recommended that the court should have power to award exemplary damages in exceptional cases where the defendant has acted outrageously in contumelious disregard of the plaintiff's rights, for example, in cases involving the non-consensual publication of intimate images.²²⁹ In contrast, in *Mosley v News Group Newspapers Ltd*²³⁰ the High Court of England and Wales did not think it was appropriate, in the absence of authority, to extend the availability of exemplary damages beyond two classic situations, namely, when there has been arbitrary or unconstitutional conduct by public officials,²³¹ and when a tort (such as the tort of defamation) has been deliberately and knowingly committed and some identifiable individual or individuals have calculated that more is to be gained from committing the tort than suffered by paying compensatory damages.²³² In the Court's view, it was neither necessary nor proportionate for exemplary damages to be available in infringement of privacy cases.²³³

2.46 However, concerns that compensatory damages would not act as a sufficient deterrent led to the enactment of section 34 of the Crime and Courts Act 2013 (UK),²³⁴ which states:

228 *Id* at 220, recommendation 12–1.

229 *Id* at 233, recommendation 12–4 and [12.76], and at 234–235, [12.80]–[12.81]; LRCHK Report, above, n 2 at 270, recommendations 24(a) and 25.

230 [2008] EWHC 1777 (QB), [2008] EMLR 679, HC (England & Wales).

231 *Rookes v Barnard* [1964] AC 1129, HL (UK).

232 *Mosley*, above, n 230 at [177]–[178].

233 *Id* at [193]–[197].

234 2013 c 22 (UK).

- (1) This section applies where—
 - (a) a relevant claim is made against a person (“the defendant”),
 - (b) the defendant was a relevant publisher at the material time,
 - (c) the claim is related to the publication of news-related material, and
 - (d) the defendant is found liable in respect of the claim.
- (2) Exemplary damages may not be awarded against the defendant in respect of the claim if the defendant was a member of an approved regulator at the material time.
- (3) But the court may disregard subsection (2) if—
 - (a) the approved regulator imposed a penalty on the defendant in respect of the defendant’s conduct or decided not to do so,
 - (b) the court considers, in light of the information available to the approved regulator when imposing the penalty or deciding not to impose one, that the regulator was manifestly irrational in imposing the penalty or deciding not to impose one, and
 - (c) the court is satisfied that, but for subsection (2), it would have made an award of exemplary damages under this section against the defendant.
- (4) Where the court is not prevented from making an award of exemplary damages by subsection (2) (whether because that subsection does not apply or the court is permitted to disregard that subsection as a result of subsection (3)), the court—
 - (a) may make an award of exemplary damages if it considers it appropriate to do so in all the circumstances of the case, but
 - (b) may do so only under this section.
- (5) Exemplary damages may be awarded under this section only if they are claimed.
- (6) Exemplary damages may be awarded under this section only if the court is satisfied that—
 - (a) the defendant’s conduct has shown a deliberate or reckless disregard of an outrageous nature for the claimant’s rights,
 - (b) the conduct is such that the court should punish the defendant for it, and
 - (c) other remedies would not be adequate to punish that conduct.
- (7) Exemplary damages may be awarded under this section whether or not another remedy is granted. [...]

The awarding of exemplary damages is thus limited to situations where, among other things, the defendant is a news organisation or other publisher of “news-related material”,²³⁵ and the court is satisfied that the defendant’s conduct “has shown a deliberate or reckless disregard of an outrageous nature for the claimant’s rights” and that other remedies do not adequately punish that conduct.

2.47 It is appreciated there may be situations in which an award of exemplary damages, or punitive damages as they are more commonly known in Singapore,²³⁶ is appropriate in cases of misuse of private information. However, we are of the view that statutory provisions along the lines of the UK Act (and in particular the limitation that such damages may only be awarded against news organisations and publishers of news-related material), are unnecessary in view of the Court of Appeal’s judgment in *ACB v Thomson Medical Pte Ltd*.²³⁷ There, the Court held that punitive damages can be awarded in tort “where the totality of the defendant’s conduct is so outrageous that it warrants punishment, deterrence, and condemnation”,²³⁸ and the test is sufficiently flexible for the courts to determine on a case-by-case basis when punitive damages are appropriate.

2.48 The ALRC felt it would assist courts in deciding on the quantum of damages if a non-exhaustive list of factors to be considered was set out in the legislation:²³⁹

- (a) whether the defendant had made an appropriate apology to the plaintiff;
- (b) whether the defendant had published a correction;
- (c) whether the plaintiff had already recovered compensation, or has agreed to receive compensation in relation to the conduct of the defendant;
- (d) whether either party took reasonable steps to settle the dispute without litigation; and
- (e) whether the defendant’s unreasonable conduct following the invasion of privacy, including during the proceedings, had subjected the plaintiff to particular or additional embarrassment, harm, distress or humiliation.

2.49 There may be cases where a defendant stands to gain financially from encroaching on a plaintiff’s privacy, for example, if the defendant is a media company and seeks to publish information about the plaintiff’s

235 *Id*, s 41 (meaning of “relevant publisher”).

236 *ACB v Thomson Medical Pte Ltd* [2017] SGCA 20, [2017] 1 SLR 918, at 992, [156], CA.

237 *Ibid*.

238 *Id* at 1000, [176] (per Phang JA).

239 ALRC Report, above, n 1 at 226–227, recommendation 12–2; LRCHK Report, above, n 2 at 270–271, recommendation 26.

private life. In such cases, it would be useful for the court to be able to order an account of profits against the defendant.²⁴⁰

2.50 Given the mischief that the tort aims to address, an important remedy that plaintiffs will require is an interlocutory or final injunction, either to prevent an apprehended invasion of privacy, or further behaviour if a degree of invasion has already taken place. When determining if an injunction should be granted, the court should consider the plaintiff's privacy interests as well as the defendant's freedom of expression and other countervailing public interests.²⁴¹ Moreover, a court should have powers to order the delivery up, destruction or removal of offending material that encroaches on the plaintiff's privacy; that the defendant publish a correction to erroneous or misleading material; and that the defendant tender an apology to the plaintiff.²⁴²

2.51 The protection order and expedited protection order regime under sections 12 and 13 of the Protection from Harassment Act²⁴³ may provide a useful model in this regard. It will be recalled that the court may make an order prohibiting a respondent from doing any thing in relation to a victim or a person related to the victim, and also that no person may publish or continue to publish an offending communication. Moreover, under sections 15A and 15B of the Act, where a person has applied to court in respect of a statement of fact made about him or her which is false, the court may make a stop publication order to require a respondent to cease publishing the false statement and not to publish any substantially similar statement, and a correction order requiring the respondent to publish a correction notice which corrects the false statement of fact or refers to a specified location where such a statement may be found.²⁴⁴

2.52 Clause 4(2) of the draft bill sets out our suggestions on the remedies that should be available if the tort is established. For the reason mentioned above in paragraph 2.47, we consider that it is not necessary to specify the types of damages that might be awarded, as there is no particular benefit in having a different regime of damages for the proposed tort of misuse of private information compared to other torts. Clause 4(2) provides a non-exhaustive list of factors that a court may take into consideration when determining the appropriate quantum of damages to be awarded. Other available remedies are an account of profits, an injunction, an order for specific performance, an order requiring delivery up or destruction of the private information, an order prohibiting publication or continued

240 ALRC Report, *id* at 238, recommendation 12–6 and [12.102]; LRCHK Report, *id* at 270, recommendation 24(c).

241 ALRC Report, *id* at 241, recommendations 12–7 and 12–8; LRCHK Report, *id* at 270, recommendation 24(b).

242 ALRC Report, *id* at 251, recommendation 12–9, at 252, recommendation 12–10, and at 254, recommendation 12–11; LRCHK Report, *id* at 270, recommendation 24(d).

243 See above, n 116–117 and the accompanying text.

244 PHA, above, n 32, s 15A (Stop publication order) and 15B (Correction order).

publication of the information, an order that a correction notification be published, and an order that the defendant tender an apology to the plaintiff.

F WHO SHOULD BE ENTITLED TO CLAIM?

2.53 Another issue is whether entities other than natural persons should be able to avail themselves of the tort. These could include corporations, government agencies and unincorporated organisations. The pertinent consideration is the aim of the tort, which is to protect the plaintiff's dignity interests. Hence, in *ABC v Lenah Game Meats*, it was held by Gummow and Hayne JJ in the High Court of Australia that any tort of invasion of privacy that might be established by the court should not apply to corporations as they lack the "sensibilities, offence and injury [...] which provide a staple value for any developing law of privacy".²⁴⁵ This is, it is submitted, a convincing reason for limiting claimants to natural persons. While a Singapore court might reach a similar conclusion upon interpreting the statute to be adopted, to avoid doubt it may alternatively be desirable for this to be explicitly stated in the statute.

G AGAINST WHOM CAN A CLAIM BE BROUGHT?

2.54 We consider that a plaintiff should have some recourse against a government department that improperly releases private information. Section 5 of the Government Proceedings Act²⁴⁶ makes the Government liable for any wrongful act done or any neglect or default committed by a public officer, but this provision does not apply to a wrongful act done or any neglect or default of the Government itself. Clause 5 of the draft bill thus states that the Act binds the Government.²⁴⁷

²⁴⁵ *ABC v Lenah Game Meats*, above, n 134 at [126].

²⁴⁶ Cap 121, 1985 Rev Ed.

²⁴⁷ This is required by the Interpretation Act (Cap 1, 2002 Rev Ed), s 54, which provides that an Act does not affect the rights of the Government "unless it is therein expressly provided, or unless it appears by necessary implication, that the Government is bound thereby".

CHAPTER 3

CONCLUSION

3.1 In conclusion, it is submitted that there is an increasing need for legal protection from the disclosure or serious misuse of private information, in particular because of the availability of inexpensive forms of technology that facilitate the surreptitious and unwanted surveillance of people, and the fact that the Internet makes it easy for private information to be published. Once this has taken place, it is very difficult to entirely remove such information from the public domain.

3.2 At the moment, a plaintiff may seek to address a misuse of private information in a few ways, including suing for intentional infliction of emotional distress, private nuisance, and/or breach of confidence, or bringing claims under the Personal Data Protection Act or Protection from Harassment Act. In this respect, the Protection from Harassment Act is likely to prove most helpful, but these options all suffer to a lesser or greater degree from some shortcomings. It is submitted that introducing a new statutory tort of misuse of private information (or, should that not be deemed prudent or practicable, incorporating some of the features of that proposed tort into existing legislation such as the Protection from Harassment Act) will allow Parliament to address these shortcomings by setting out with some specificity the elements of the tort, available remedies, factors to be taken into account by the court, and other relevant matters.

3.3 Recommendations made by the ALRC and LRCHK demonstrate a high degree of consistency, and are worth considering when determining the features of a new tort of misuse of private information, though we have departed from those recommendations in some respects. Among other things, we consider that:

- (a) The legal test should be whether the plaintiff had a reasonable expectation of privacy in all the circumstances. It may be useful for the legislation to set out a non-exhaustive list of factors that the court may take into account when deciding if the plaintiff had a reasonable expectation of privacy.
- (b) The threshold for liability should be a serious misuse of private information judged from the viewpoint of a person of ordinary sensibilities in the plaintiff's position.
- (c) The tort should be actionable *per se*, that is, without requiring any proof of damage. In addition to claiming damages for physical and psychiatric harm, or economic loss, the plaintiff should be entitled to claim for emotional distress.
- (d) The court should be required to balance the public interest in protecting privacy against countervailing public interests

when determining whether the plaintiff has established the cause of action, rather than considering such countervailing public interests as a defence.

- (e) The relevant state of mind of the defendant should be intention to cause the disclosure or a serious misuse of any private information relating to the plaintiff. Recklessness or negligence should not suffice, nor should the tort be one of strict liability.
- (f) The remedies that a successful plaintiff should be entitled to obtain should include damages, an account of profits, an injunction or order of specific performance, a delivery up or destruction of offending material, publication of a correction to erroneous or misleading material, an order prohibiting publication or continued publication of the information, and the tendering of an apology by the defendant to the plaintiff.
- (g) The Act should bind the Government.

3.4 Finally, it is gratifying to note that the above proposals are broadly in line with the views expressed by Saw Cheng Lim, Chan Zheng Wen Samuel and Chai Wen Min in an article commenting on the *I-Admin* case²⁴⁸ first published online on 28 August 2020.²⁴⁹ While the authors proposed that the courts should consider recognising a new *common law* tort of misuse of private information independent from the existing tort of breach of confidence²⁵⁰ rather than a statutory tort, they suggested, among other things:

- (a) that the plaintiff should bear the legal burden of proving on an objective basis that he or she has a reasonable expectation of privacy in respect of the information in question, and if this was successfully done a *prima facie* presumption of misuse of private information would arise;²⁵¹
- (b) that the defendant could displace this presumption by showing, for example, that there was a legitimate public interest in the access to and/or possession of the information;²⁵²
- (c) that acts such as unauthorised access to and/or possession of private information should be actionable in their own right,

248 Above, n 69.

249 Saw Cheng Lim, Chan Zheng Wen Samuel and Chai Wen Min, “Revisiting the Law of Confidence in Singapore and a Proposal for a New Tort of Misuse of Private Information” (2020) 32 Sing Acad LJ 891.

250 *Id* at 950, [119], and at 952, [124].

251 *Id* at 956–957, [134]–[135].

252 *Id* at 957, [136].

even if the defendant has not made or threatened to make an unauthorised use or disclosure of the information;²⁵³ and

- (d) that damages (including aggravated or punitive damages) and injunctions should be remedies available for a breach of the tort.²⁵⁴

3.5 A draft bill that would give effect to our recommendations is appended for reference.

²⁵³ *Id* at 958–959, [140].

²⁵⁴ *Id* at 957, [137].

APPENDIX

DRAFT MISUSE OF PRIVATE INFORMATION BILL

Misuse of Private Information Bill

Bill No. /2020.

Read the first time on.

A BILL

i n t i t u l e d

An Act to provide for a statutory tort of causing a serious misuse of any private information relating to an individual.

Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows:

Short title and commencement

1. This Act may be cited as the Misuse of Private Information Act 2020 and comes into operation on a date that the Minister appoints by notification in the *Gazette*.

Interpretation

2.—(1) In this Act, unless the context otherwise requires, information relating to an individual includes (but is not limited to) —

- (a) any information that, whether on its own or with other information, identifies or purports to identify that individual; and
- (b) any of the following:
 - (i) the individual's name, residential address, email address, telephone number, date of birth, national registration identity card number, passport number, signature (whether handwritten or electronic) or password;
 - (ii) any photograph or video recording of the individual;
 - (iii) any information about the individual's family, health, medical history, employment, education, finances or property.

(2) For the purposes of this Act, any information relating to an individual is private information if the individual has a reasonable expectation of privacy in respect of the information.

(3) In deciding whether an individual has a reasonable expectation of privacy in respect of any information relating to the individual, the court may have regard to the following matters:

- (a) the nature of the information, including whether it relates to intimate or family matters, health or medical matters, or financial matters;
- (b) the means used to obtain the information, including the use of any device or technology;
- (c) the place where the information was obtained, and whether the information was obtained through any intrusion into that place;
- (d) the purpose of obtaining or disclosing the information;
- (e) how the information was held by the individual or communicated between the individual and another person;
- (f) whether and to what extent the information was already in the public domain;
- (g) the relevant attributes of the individual, including the individual's age, occupation and cultural background;
- (h) the conduct of the individual, including whether the individual invited publicity or manifested a desire for privacy.

Tort of causing misuse of private information

3.—(1) A person commits a tort against an individual if the person —

- (a) intentionally, and without lawful authority, causes the disclosure of any private information relating to the individual; or
- (b) intentionally causes a serious misuse of any private information relating to the individual.

- (2) In deciding whether a person has caused a serious misuse of any private information relating to an individual, a court may have regard to one or more of the following matters:
- (a) the extent of any offence, any distress or any harm to dignity that a reasonable person would have considered the misuse of the private information to be likely to cause to the individual;
 - (b) whether the person —
 - (i) was motivated by malice; or
 - (ii) knew that the misuse of the private information was likely to cause the individual any offence, any distress, or any harm to dignity;
 - (c) where the misuse of the private information involves a disclosure of the private information, whether the person who caused the disclosure of the private information had acted, or intended to act, in the public interest when causing the disclosure of the private information.
- (3) Any individual against whom a person commits a tort mentioned in subsection (1) may bring civil proceedings in a court against the person.

Reliefs for tort of causing misuse of personal information

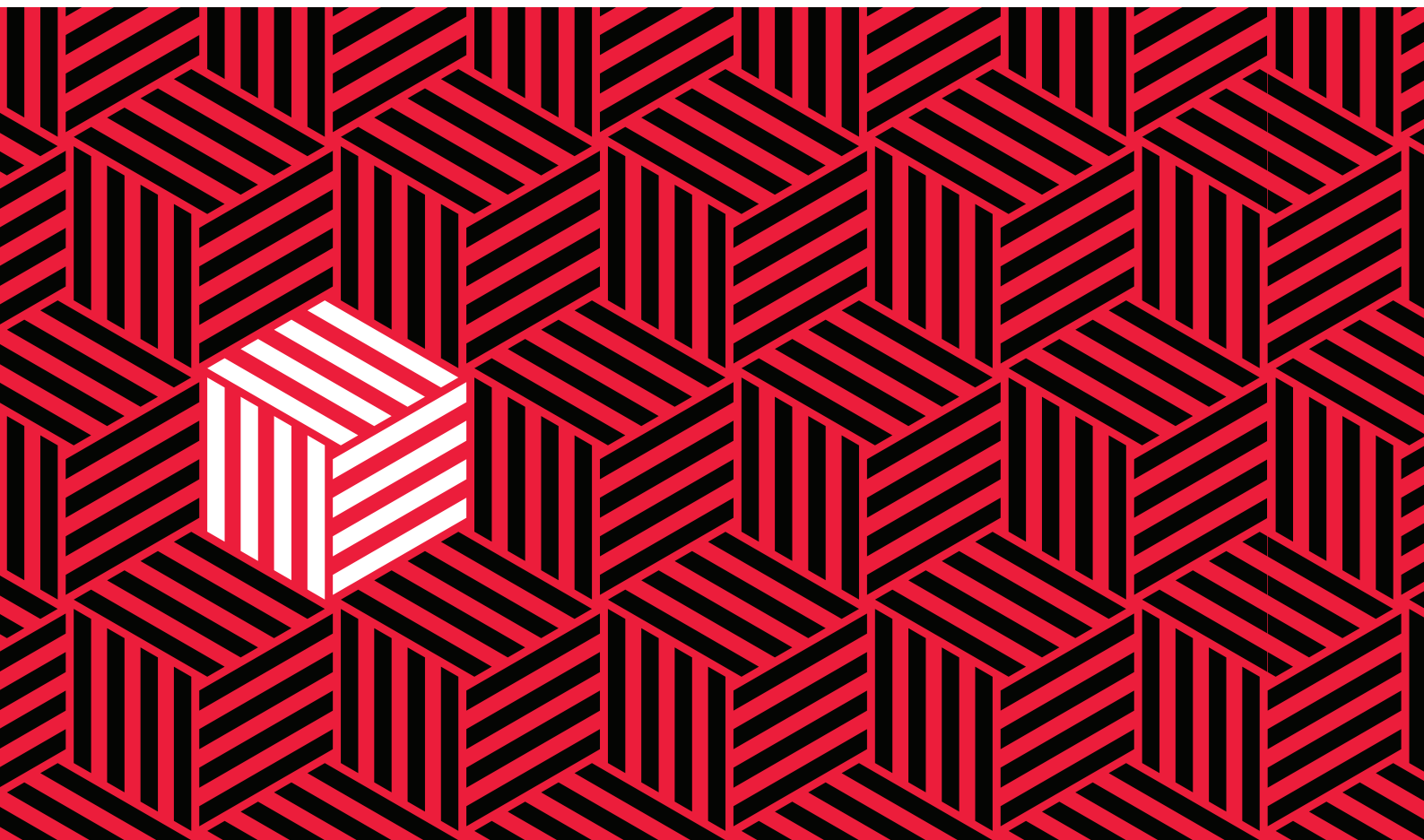
4.—(1) A court may, when deciding any civil proceedings brought under section 3(3) by an individual (called in this section the claimant) against whom a person (called in this section the respondent) commits a tort mentioned in section 3(1), grant one or more of the following types of relief, if the court is satisfied on a balance of probabilities that it is just and equitable to do so:

- (a) damages;
 - (b) an account of profits;
 - (c) an injunction;
 - (d) an order for specific performance;
 - (e) an order for the delivery up or destruction of any original or copy of the private information relating to the claimant;
 - (f) an order prohibiting the respondent, or any other person, from publishing or continuing to publish the private information relating to the claimant;
 - (g) an order that the respondent, or any other person, publishes such notification as the court thinks necessary to correct any erroneous or misleading impression caused by the misuse of the private information relating to the claimant;
 - (h) an order that the respondent apologises to the claimant, in such form or manner as the court thinks fit;
 - (i) any ancillary order that may be necessary to give effect to any relief mentioned in paragraph (a) to (h).
- (2) In determining the appropriate quantum of damages to be awarded, the court may have regard to the following matters:
- (a) whether the respondent has made an appropriate apology to the claimant;
 - (b) whether the respondent has published any notification to correct any erroneous or misleading impression caused by the misuse of private information relating to the claimant;

- (c) whether the claimant has received, or has agreed to receive, any compensation from any person for the tort committed by the respondent against the claimant;
- (d) whether the claimant or the respondent took reasonable steps to settle the dispute without litigation;
- (e) whether the respondent's conduct following the misuse of the private information relating to the claimant, including the respondent's conduct during the civil proceedings brought under section 3(3), subjected the claimant to any particular or additional embarrassment, harm, distress or humiliation.

Application to Government

5. This Act shall bind the Government.
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ISBN 978-981-14-7747-8 (softcover)
978-981-14-7748-5 (e-book)