

11. Remedies and Costs

Contents

Summary	157
Compensatory damages	158
Factors in mitigation and aggravation of general damages	160
No separate award of aggravated damages	162
Exemplary damages	163
Cap on damages	166
Account of profits	167
Damages based on notional licence fee	168
Contributory negligence should not be considered in assessing damages	170
Injunctions	170
Delivery up, destruction or removal of material	171
Correction orders	172
Apology orders	173
Declarations	174
Costs	176

Summary

11.1 The ALRC proposes that courts be granted the discretion to award a range of remedies—monetary and non-monetary—to plaintiffs who successfully bring an action for serious invasion of privacy.

11.2 The proposed range of remedies reflects the different objectives, experience and circumstances of plaintiffs who may pursue privacy actions. Some plaintiffs may seek monetary compensation, some may wish the offending behaviour to cease, some will seek to deter similar conduct in the future, while others may seek public vindication of their interests. A range of non-monetary remedies may provide a more appropriate response for the often immeasurable effects occasioned by invasions of privacy.

11.3 Most actions for invasion of privacy will concern harm to dignitary interests or emotional distress. It is therefore important that courts may award compensatory damages, including damages for the plaintiff's emotional distress, in an action for serious invasion of privacy.

11.4 This chapter begins with the ALRC's proposal for the courts to be empowered to award damages for economic and non-economic loss, including damages for any emotional distress suffered by the plaintiff. The ALRC proposes that a court may consider a range of mitigating and aggravating factors in the assessment of such damages, and that a separate award of aggravated damages may not be made. A court

should have the discretion to award exemplary damages in exceptional circumstances where the court considers that other damages would not be a sufficient deterrent against such conduct occurring in the future. The total award of damages available for exemplary damages and damages for non-economic loss should be capped at the same level as damages for non-economic loss in defamation. This will avoid plaintiffs cherry-picking between defamation and privacy.

11.5 The ALRC also proposes that a court be empowered to award an account of profit in circumstances where a defendant has profited from the invasion of privacy. A court should be empowered to assess damages by reference to a notional licence fee.

11.6 The ALRC also proposes that courts be empowered to award non-monetary remedies: injunctive relief; an order requiring the defendant to apologise; a correction order; an order for the delivery up, destruction or removal of material; and declaratory relief. These remedies are not mutually exclusive, and may also be awarded in addition to monetary remedies. It will be at the discretion of a court to award appropriate relief in all the circumstances of a case. Therefore, a non-monetary order such as injunctive or declaratory relief will not necessarily reduce an award of damages.

Compensatory damages

Proposal 11–1 The new Act should provide that courts may award compensatory damages, including damages for the plaintiff's emotional distress, in an action for serious invasion of privacy.

11.7 The ALRC proposes that courts be empowered to award compensatory damages for loss suffered to a plaintiff, including damages for emotional distress. Previous law reform inquiries made similar recommendations.¹

11.8 Compensatory damages would be assessed by reference to existing tort principles.² One reason for the ALRC's proposal that the statutory cause of action be described as an action in tort³ is to allow a court when determining an action for serious invasion of privacy to draw on principles that have been well settled and applied by the courts in analogous common law actions. The proposal that the new tort be actionable per se will make it most closely analogous to actions like trespass to the person, but it will also be analogous in other respects to defamation actions.

1 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) Rec 74–5; NSW Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009) cl 76(1)(a); Victorian Law Reform Commission, *Surveillance in Public Places*, Report No 18 (2010) Rec 29(a).

2 K Barker et al, *The Law of Torts in Australia* (Oxford University Press, 2012) chs 2.8, 16.

3 See Ch 4.

11.9 It should first be noted that nominal damages would not be appropriate in an action for *serious* invasion of privacy.⁴

11.10 A plaintiff might suffer actual loss in the form of physical or psychiatric injury, property damage⁵ or other economic loss as a result of the serious invasion of privacy. Regardless of the type of harm or the tort, the general principle in tort law is that the role of compensatory damages is to place a plaintiff, so far as money can do, in the position he or she would have been in had the tort not been committed.⁶

11.11 Where a plaintiff has suffered physical or psychological injury, compensatory damages may include special⁷ and general⁸ damages to remedy economic loss suffered by a plaintiff, as well as general damages for non-economic loss. The financial loss suffered by a plaintiff may include medical expenses incurred and loss of earnings as a result of the injury and in some instances, the effect of the injury on a plaintiff's future earnings.⁹ Damages for non-pecuniary loss recognise the pain and suffering caused by the injury.

11.12 However, the ALRC proposes that the new Act also clearly provide that a court may award damages for 'mere' emotional distress, in an action for serious invasion of privacy. Serious invasions of privacy commonly cause emotional distress or harm to the plaintiff's dignitary interests, often unaccompanied by any physical or psychiatric illness. This fact, given the failure of the common law to provide redress for the intentional infliction of mere emotional distress outside actions such as trespass, is one of the key justifications for the proposed statutory cause of action. So too is the uncertainty about whether Australian courts can award damages for emotional distress in equitable actions for breach of confidence.¹⁰ Making an intentional or reckless serious invasion of privacy actionable per se will allow a court to award general damages in compensation for a plaintiff's emotional distress.

11.13 Compensation for distress or injury is not the only basis for an award of damages. In torts which are actionable per se, such as trespass to the person in the form of battery, assault or false imprisonment, trespass to land, and also in defamation where harm to the plaintiff's reputation from a defamatory statement is presumed,¹¹ the courts

4 Nominal damages are available in trespass cases: RP Balkin and JLR Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) [27.3].

5 For example, damage to stock or the cost of repairs to property occasioned by trespass to land or trespass to goods: *Ibid* [5.15].

6 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn); *Harriton v Stephens* (2006) 226 CLR 52 [166] (Hayne J); *Butler v Egg Pulp Marketing Board* (1966) 114 CLR 185, 191 (Taylor and Owen JJ).

7 Special damages refer to 'those items of loss which the plaintiff has suffered prior to the date of trial and which are capable of precise arithmetical calculation—such as hospital expenses': Balkin and Davis, above n 4, [27.5].

8 General damages refer to all injuries which are not capable of precise calculation. They refer to financial loss which may be suffered after the date of judgement and all non-financial such as pain and suffering or loss of amenities: *Ibid*.

9 *Ibid* [11.27].

10 The only Australian appellate authority on the award of damages for emotional distress in a breach of confidence case is *Giller v Procopets* (2008) 24 VR 1. See Ch 12 for further discussion.

11 Balkin and Davis, above n 4, [18.17].

have often recognised that an award of general compensatory damages may serve the purpose or have the effect of vindicating the plaintiff's right. For instance, In *Uren v John Fairfax & Sons Pty Ltd* [1966], Windeyer J gave the following explanation of the purpose of compensatory damages in defamation:

compensation by damages operates in two ways—as a vindication of the plaintiff to the public and as consolation to him for a wrong done.¹²

11.14 In *Plenty v Dillon* (1991), Gaudron and McHugh JJ of the High Court of Australia characterised the award of general damages for an action in trespass to land as fulfilling vindicatory purposes:

the appellant is entitled to have his right of property vindicated by a substantial award of damages.¹³

11.15 Witzleb and Carroll explain that civil remedies are aimed at 'vindicating the interests that underlie the right or rights infringed'.¹⁴

Factors in mitigation and aggravation of general damages

Proposal 11–2 The new Act should set out the following non-exhaustive list of factors that may mitigate damages for serious invasion of privacy:

- (a) that the defendant has made an appropriate apology to the plaintiff about the conduct that invaded the plaintiff's privacy;
- (b) that the defendant has published a correction of any untrue information disclosed about the plaintiff;
- (c) that the defendant has made an offer of amends in relation to the defendant's conduct or the harm suffered by the plaintiff;
- (d) that the plaintiff has already recovered compensation, or has agreed to receive compensation in relation to the conduct of the defendant;
- (e) that the defendant had taken reasonable steps to settle the dispute with the plaintiff in order to avoid the need for litigation; and
- (f) that the plaintiff had not taken reasonable steps to settle the dispute, prior to commencing or continuing proceedings, with the defendant in order to avoid the need for litigation.

¹² *Uren v John Fairfax & Sons* (1966) 117 CLR 118, 150 (Windeyer J).

¹³ *Plenty v Dillon* (1991) 171 CLR 635, 655.

¹⁴ Robyn Carroll and Normann Witzleb, "'It's Not Just about the Money': Enhancing the Vindicatory Effect of Private Law Remedies' (2011) 37 *Monash University Law Review* 216, 219.

Proposal 11–3 The new Act should set out the following non-exhaustive list of factors that may aggravate damages for serious invasion of privacy:

- (a) that the plaintiff had taken reasonable steps, prior to commencing or continuing proceedings, to settle the dispute with the defendant in order to avoid the need for litigation;
- (b) that the defendant had not taken reasonable steps to settle the dispute with the plaintiff in order to avoid the need for litigation;
- (c) that the defendant’s unreasonable conduct at the time of the invasion of privacy or prior to or during the proceedings had subjected the plaintiff to special or additional embarrassment, harm, distress or humiliation;
- (d) that the defendant’s conduct was malicious or committed with the intention to cause embarrassment, harm, distress or humiliation to the plaintiff; and
- (e) that the defendant has disclosed information about the plaintiff which the defendant knew to be false or did not honestly believe to be true.

11.16 The ALRC proposes that in assessing damages in an action for serious invasion of privacy, a court may consider any mitigating or aggravating factors which occurred before and during court proceedings.¹⁵

11.17 Mitigating factors have the effect of reducing the effect or the harm of the serious invasion of privacy and will therefore reduce the amount of compensatory damages awarded to a plaintiff. Aggravating factors such as whether the plaintiff suffered particular embarrassment or humiliation due to the nature of the defendant’s conduct will increase the award of general damages.

11.18 Possible mitigating factors that a court may consider include whether either party had made attempts at alternative dispute resolution (ADR); whether the complaint had first been the subject of a determination by the Office of the Australian Information Commissioner, the ACMA or another body, (either by way of complaint or own-motion investigation) and the outcome of any determination; and whether a defendant had taken reasonable steps to redress the invasion of privacy such as through a public apology, correction order or removing the private information from an online platform.

11.19 Aggravating factors a court may consider include: where the defendant’s conduct subjected a plaintiff to additional embarrassment or hurt; where their conduct

¹⁵ The *Defamation Act 2005* (NSW) s 38 sets out mitigating factors for a court when assessing damages. These include whether the defendant has made an apology to the plaintiff or has published a correction of the defamatory matter. In the tort of false imprisonment, the defendant’s conduct up to and including conduct at the trial is relevant in a court’s assessment of general and aggravated damages: *Spautz v Butterworth* (1996) 41 NSWLR 1.

was unjustifiable or improper;¹⁶ or whether the defendant had published information which the defendant knew to be false.¹⁷

11.20 This proposal is also intended to encourage the parties to attempt to resolve their dispute without litigation if it would be reasonable to expect them to do so.

No separate award of aggravated damages

Proposal 11–4 The new Act should provide that the court may not award a separate sum as aggravated damages.

11.21 Given that the court is able to take into account any aggravating factors in the assessment of general damages, the ALRC proposes that the new Act should specifically provide that the court is not to make a separate award for aggravated damages.

11.22 At common law, aggravated damages are compensatory in nature as a form of general damages.¹⁸ Aggravated damages comprise an additional sum to take account of the special humiliation suffered by the plaintiff due to the nature of the defendant’s conduct in the commission of a wrong.¹⁹ When considering such awards, courts have been astute to prevent the risk of damages overlapping in two ways. First, there is a potential for overlap between an ordinary award of general damages for injury to the plaintiff’s feelings and an award of aggravated damages. Sackville AJA has noted that:

In *New South Wales v Riley*, Hodgson JA (with whom Sheller JA and Nicholas J agreed) pointed out that in certain circumstances “ordinary compensatory damages” can be awarded for injury to feelings, falling short of a recognised psychiatric injury. Such damages can be awarded in actions for assault. His Honour also pointed out that, if, in addition to ordinary damages for injury to feelings, aggravated damages are to be awarded, it is important to avoid double counting.²⁰

11.23 Secondly, there is a risk of overlap between the award for aggravated damages and that for exemplary damages, considered below, which are intended to punish or deter the defendant because of the nature of his or her conduct. As Spigelman CJ noted in *NSW v Ibbett*²¹ in a passage approved by the High Court on appeal, ‘in the case of aggravated damages the assessment is made from the point of view of the plaintiff and in the case of exemplary damages the focus is on the conduct of the defendant’.²² Nevertheless, both awards have some reference to the nature of the defendant’s

16 These standards have been applied by courts in NSW in assessing awards of aggravating damages; see, for example, *Mirror Newspapers Ltd v Fitzpatrick* (1984) 1 NSWLR 643, [653] (Samuels JA).

17 *McKenzie v Mergen Holdings Pty Ltd* (1992) 20 NSWLR 42, [361] (Grove J).

18 *Uren v John Fairfax & Sons* (1966) 117 CLR 118, 129–130 (Taylor J).

19 ‘[A]ggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done’: *Ibid* 149 (Windeyer J).

20 *New South Wales v Riley* (2003) 57 NSWLR 496, [129]. This passage was quoted by Sackville AJA in *New South Wales v Radford* [2010] NSWCA 276 (28 October 2010) [96].

21 *NSW v Ibbett* (2005) 65 NSWLR 168.

22 *Ibid* [83].

conduct. As Taylor J said in *Uren v John Fairfax & Sons Pty Ltd*, ‘in many cases, the same set of circumstances might well justify either an award of exemplary or aggravated damages’.²³ This proposal will avoid the risk of both types of overlaps.

11.24 The ALRC’s proposal is consistent with the approach of the NSWLRC on this issue. The NSWLRC explained that aggravating circumstances would already form some part of an assessment for general damages, stating that:

To the extent to which the conduct of the defendant has increased the damage to the plaintiff, the plaintiff’s loss is simply the greater—a fact that will, obviously, be reflected in the size of the award.²⁴

Exemplary damages

Proposal 11–5 The new Act should provide that, in an action for serious invasion of privacy, courts may award exemplary damages in exceptional circumstances and where the court considers that other damages awarded would be an insufficient deterrent.

11.25 The ALRC proposes that a court be given the discretion to award exemplary damages in exceptional circumstances.²⁵ This head of damages focuses on the defendant’s conduct rather than the plaintiff’s loss. It may be appropriate where the defendant’s conduct was in outrageous and contumelious disregard of the plaintiff’s rights. An award of exemplary damages is intended to punish a defendant and deter similar conduct in the future.

11.26 The ALRC considers that the award of exemplary damages should only be made in exceptional circumstances or, in exceptional circumstances where the court is satisfied that the other damages or remedy awarded would not provide a sufficient deterrent against such conduct in the future. This later formulation would stress the arguably more valuable deterrent function of exemplary damages, rather than their punitive function.

11.27 The ALRC considers that a court should be able to make such an award, in exceptional circumstances, in an action under the proposed tort—particularly given that the tort proposed in this paper is confined to invasions of privacy that are both serious and intentional or reckless.²⁶ An award for exemplary damages is considered separately to other heads of damages.²⁷

23 *Uren v John Fairfax & Sons* (1966) 117 CLR 118, 129–130 (Taylor J).

24 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) [7.10].

25 Australian Privacy Foundation, *Submission 39*; Law Institute of Victoria, *Submission 22*; Women’s Legal Centre (ACT & Region) Inc., *Submission 19*; I Turnbull, *Submission 5*; P Wragg, *Submission 4*; T Gardner, *Submission 3*.

26 See Chs 5 and 7.

27 *Henry v Thompson* (1989) 2 Qd R 412.

11.28 In *Lamb v Cotogno*²⁸ the High Court quoted from *Mayne & McGregor on Damages* their oft-cited description of exemplary damages:

Such damages are variously called punitive damages, vindictive damages, exemplary damages, and even retributory damages. They can apply only where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights.²⁹

11.29 Brennan J has said that an award of exemplary damages 'is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again'.³⁰

11.30 While compensatory damages may often be sufficient remedy for serious invasions of privacy, additional damages will sometimes be justified where the conduct of the defendant can be characterised as outrageous or contumelious. Posting on the internet so-called 'revenge pornography'—intimate photographs or video of an ex-partner or ex-spouse without their consent—may be an example of an outrageous invasion of privacy.

11.31 Profits made from an invasion of privacy can be greater than the sum that is likely to be awarded to compensate the victim. Exemplary damages may help deter invasions of privacy that might otherwise be profitable for the defendant.

11.32 Furthermore, an award of exemplary damages may be more appropriate where a gain-based remedy is unavailable, such as in circumstances where a defendant had *attempted* to procure some financial gain from the intentional invasion of privacy but did not in fact make a profit.³¹

11.33 Although exemplary damages are available in Australia at common law for a wide range of intentional torts,³² statute prevents the courts awarding exemplary damages in defamation claims.³³ They are also not available for breach of equitable obligations such as breach of confidence,³⁴ or in actions for breach of a contractual duty of confidence.³⁵

28 *Lamb v Cotogno* (1987) 164 CLR 1, [8].

29 JD Mayne and H McGregor, *Mayne & McGregor on Damages* (Sweet & Maxwell, Limited, 12th ed, 1961) 196.

30 *XI Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* [1985] HCA 12 (28 February 1985) 471.

31 *Ibid.*

32 *Lamb v Cotogno* (1987) 164 CLR 1. They have been excluded for defamation and for negligence claims, but claims under the new tort for invasions of privacy will be more analogous to other intentional torts.

33 See, for example, *Defamation Act 2005* (NSW) s 35.

34 In *Giller v Procopets* (2008) 24 VR 1, the Victorian Court of Appeal denied the plaintiff an award of exemplary damages for breach of confidence, however the court did award damages for emotional distress. See also *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) (2008) [172]–[197]. These decisions are in contrast to the NSW Supreme Court's decision in *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 which overturned an award of exemplary damages for breach of fiduciary duty.

35 This is in contrast to the UK approach: *Attorney General v Blake* [2000] UKHL 45 (27 July 2000).

11.34 However, unlike in defamation cases, there would be no presumption of harm in privacy cases, under the tort proposed in this Discussion Paper, and there may well be cases, such as *Kaye v Robertson*,³⁶ where the plaintiff may not be capable of suffering distress yet the circumstances of the invasion of privacy were outrageous and warrant exemplary damages to deter such conduct.

11.35 There is a legitimate concern that an award of exemplary damages provides a windfall to plaintiffs. Courts, however, are conscious of this concern and the High Court has ruled that awards of exemplary damages should be moderate.³⁷

11.36 In addition to determining whether the exceptional circumstances of the case call for an award of exemplary damages, the court will also consider whether the other damages already awarded against the defendant are sufficient to fulfil the retributive, punitive or deterrent purposes of exemplary damages. In *NSW v Ibbett* the High Court when dismissing the appeal, quoted the earlier judgment of Spigelman CJ who stated that it is necessary,

to determine both heads of compensatory damages before deciding whether or not the quantum is such that a further award is necessary to serve the objectives of punishment or deterrence or, if it be a separate purpose, condemnation.³⁸

11.37 Views of stakeholders, previous inquiries in Australia and recent inquiries in the United Kingdom show a range of views on this issue.

11.38 Witzleb has suggested that ‘exemplary damages should only be available as a last resort, i.e. where no other remedy would be a sufficient response to the wrong committed by the defendant’.³⁹

11.39 The NSWLRC⁴⁰ recommended against allowing courts to award exemplary damages, noting the difficulty of reconciling exemplary damages with the purposes of the civil law. Analogous statutory actions such as defamation claims⁴¹ and negligence claims for personal injury,⁴² limit or exclude access to exemplary damages. The VLRC did not include exemplary damages in its recommendations.⁴³

11.40 While a number of stakeholders supported courts being able to award exemplary damages,⁴⁴ often for similar reasons to those set out above, several stakeholders

36 *Kaye v Robertson* [1991] FSR 62.

37 *XI Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* [1985] HCA 12 (28 February 1985).

38 *New South Wales v Ibbett* (2006) 229 CLR 638, [34].

39 N Witzleb, *Submission 29*.

40 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) Draft Bill, cl 78. The ALRC previously adopted the same list of remedies, also excluding exemplary damages, but with no explanation on this last point; see ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) [74.177].

41 See, for example, *Defamation Act 2005* (NSW) s 37.

42 See, for example, *Civil Liability Act 2002* (NSW) s 21.

43 Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) Rec 29(a), [7.196]–[7.200].

44 Australian Privacy Foundation, *Submission 39*; Law Institute of Victoria, *Submission 22*; Women’s Legal Centre (ACT & Region) Inc., *Submission 19*; I Turnbull, *Submission 5*; P Wragg, *Submission 4*; T Gardner, *Submission 3*.

opposed the availability of an award of exemplary damages.⁴⁵ The OAIC submitted that remedies for a privacy action should be directed at compensating a plaintiff, while exemplary damages are targeted at punishing a defendant.⁴⁶ There is also some concern that if exemplary damages were available, this may stifle important and legitimate activities like investigative journalism, and as such may restrict freedom of expression.

11.41 The UK's Leveson Inquiry recommended that courts be able to award exemplary or punitive damages for actions in breach of confidence, defamation and the tort of misuse of personal information.⁴⁷ Similarly, the Joint Committee of the House of Lords and House of Commons on Privacy and Injunctions in 2012 recommended that courts be empowered to award exemplary damages in privacy cases, arguing that compensatory damages were too low to act as an effective deterrent.⁴⁸ This recommendation led to the enactment of the *Crime and Courts Act 2013* (UK), which provides for the award of exemplary damages against a defendant who is a news organisation in misuse of information cases.⁴⁹

11.42 Canadian privacy statutes also provide that courts may award punitive damages.⁵⁰

Cap on damages

Proposal 11–6 The total of any damages other than damages for economic loss should be capped at the same amount as the cap on damages for non-economic loss in defamation.

11.43 The ALRC proposes a cap on damages for all damages other than for economic loss. This means that the total amount of general damages for non-economic loss and exemplary damages awarded would be capped at the same amount as the cap on damages for non-economic loss in defamation awards.⁵¹ This proposal would ascribe equal weight to privacy and reputational interests. The proposal militates against the risk of plaintiffs cherry-picking between causes of action based on the availability of higher awards of damages.⁵²

11.44 Restrictions on the scope of damages for non-economic loss for personal injury actions are stipulated at statute. For instance, in NSW, the initial cap was set at

45 SBS, *Submission 59*; Telstra, *Submission 45*; Arts Law Centre of Australia, *Submission 43*.

46 Office of the Australian Information Commissioner, *Submission 66*.

47 Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press*, House of Commons Paper 779 (2012) vol 4, [5.12].

48 Joint Committee on Privacy and Injunctions, *Privacy and Injunctions*, House of Lords Paper No 273, House of Commons Paper No 1443, Session 2010–12 (2012) 134.

49 *Crime and Courts Act 2013* (UK) s 34.

50 See, for example, *Privacy Act*, RSBC 1996, c 373.

51 See for example, *Defamation Act 2005* (NSW) s 35.

52 Nicholas Petrie, 'Reforming the Remedy: Getting the Right Remedial Structure to Protect Personal Privacy' (2012) 17 *Deakin Law Review* 139.

\$350,000⁵³ and is now set at \$551,500.⁵⁴ Damages for non-economic loss at defamation were initially capped at \$250,000⁵⁵ and are now set at \$355,000.⁵⁶

11.45 In 2009, the NSWLRC proposed a cap on damages for non-economic loss for invasions of privacy of \$150,000,⁵⁷ some \$100,000 less than the defamation cap at the time.

11.46 David Rolph has argued that a cap on damages for a statutory cause of action should be higher than that stipulated at defamation law. He argued that a lower cap on damages for non-economic loss in privacy actions would be ‘undesirable’ as it fails to reflect the relative importance Australia should now prescribe to privacy.⁵⁸ Witzleb argued that existing caps on damages in other areas of Australian law were introduced to restrain what some perceived to be excessive compensation orders.⁵⁹ The ABC supported a cap on damages for non-economic loss, stating that the cap should not be higher than that at defamation law.⁶⁰

11.47 Some stakeholders argued against a cap on damages.⁶¹ The OAIC submitted that setting a cap ‘may have the effect of focusing attention on that upper limit and implying that serious privacy invasions should result in a payout of that magnitude’.⁶² However it will be at the court’s discretion to make this assessment.

Account of profits

Proposal 11–7 The new Act should provide that a court may award the remedy of an account of profits.

11.48 The ALRC proposes that a court be empowered to award an account of profits.⁶³ This award would be an alternative to damages. The gains-based remedy of an account of profit will deter defendants who are commercially motivated to invade the privacy of another for profit, by removing any unjust gain made from a serious invasion of privacy.⁶⁴

53 *Civil Liability Act 2002* (NSW) s 16. This includes a statutory indexation mechanism: s17.

54 Civil Liability (Non-Economic Loss) Amendment Order 2013.

55 See, for example, *Defamation Act 2005* (SA) ss 35, 35(4).

56 NSW Government Gazette No 65 of 31 May 2013. This figure is due to be increased on 1 July 2014.

57 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) Draft Bill, cl 77.

58 David Rolph, ‘The Interaction of Remedies for Defamation and Privacy’ [2012] *Precedent* 14.

59 N Witzleb, *Submission 29*.

60 ABC, *Submission 46*.

61 Office of the Australian Information Commissioner, *Submission 66*; Public Interest Advocacy Centre, *Submission 30*.

62 Office of the Australian Information Commissioner, *Submission 66*.

63 Several stakeholders were in favour of this proposal: Office of the Australian Information Commissioner, *Submission 66*; Public Interest Advocacy Centre, *Submission 30*; Insurance Council of Australia, *Submission 15*; I Turnbull, *Submission 5*.

64 N Witzleb, *Submission 29*. The ALRC proposed the availability of an account of profits in its previous Inquiry: ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) Rec 74–5(b).

11.49 In Australia, an account of profits is an equitable remedy that may be granted in cases where a defendant has profited from an equitable wrong. It is also available in some limited types of tort actions, such as passing off.⁶⁵ It is distinct from an award of damages in that it responds to the gain of the wrongdoer rather than the loss of the wronged party.⁶⁶ An account of profits will deter defendants who calculate that the gain to be made from publishing an individual's private information exceeds the cost of any compensatory damages they may incur if the matter goes to court.

11.50 An alternative way to achieve the same result would be to award exemplary damages to strip the defendant of any gain made from the unauthorised use of the plaintiff's information.⁶⁷

11.51 This award is available as a remedy in breach of confidence actions.⁶⁸ In *Douglas v Hello! Ltd (No 3)*, the UK Court of Appeal made clear that it would have had 'no hesitation to award an account of profits'⁶⁹ if 'Hello!' magazine had made a profit from the publication of surreptitiously obtained photographs of the wedding of Michael Douglas and Catherina Zeta-Jones.

11.52 It may however be difficult to prove that the defendant has made any profit or gain from the invasion of privacy. Media publication of private information may often be unsuited to the award of an account of profit because the story may be only one part of the media program or edition and cannot be attributed with a distinct amount of profit.

11.53 An account of profits was recommended as a remedy for a serious invasion of privacy in ALRC Report 108.⁷⁰ The NSWLRC also recommended an account of profits, at least in exceptional cases.⁷¹ Both commissions noted the concerns of some stakeholders that it would in many cases be difficult to determine the profits arising from a serious invasion of privacy, but neither commission considered that this should more generally preclude an account of profits being available.

Damages based on notional licence fee

Proposal 11–8 The new Act should provide that courts may award damages assessed on the basis of a notional licence fee in respect of the defendant's conduct, in an action for serious invasion of privacy.

65 RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) [25–002].

66 *Warman International Ltd v Dwyer* (1995) 182 CLR 544.

67 *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 490, 497.

68 *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) (2008); *Attorney General v Guardian Newspapers Ltd (No 2)* (1990) 1 AC 109.

69 *Douglas v Hello! Ltd* [2005] EWCA Civ 595 (18 May 2005) [200].

70 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) Rec 74–5.

71 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) [7.23]–[7.24].

11.54 Damages assessed on the basis of a notional licence fee would require the defendant to pay to the plaintiff any sum that the plaintiff would have received if the defendant had asked prior permission to carry out the activity that invaded the plaintiff's privacy. An assessment of damages calculated on the basis of a notional licence fee is a remedy which seeks to target the value to the defendant of deliberately invading the plaintiff's privacy.

11.55 The possibility of an assessment of damages on the basis of a notional licence fee was discussed by Hodgson J in *LJP Investments Pty Ltd v Howard Chia Pty Ltd*, a case involving trespass to land by the erection of scaffolding into the plaintiff's airspace:

[I]n my view, if what is used has peculiar value for a defendant, then damages under this head should reflect that value, rather than the general market value. For example, if a plaintiff is the last tenant in a development site, and is forcibly ejected and the building immediately demolished; and if the defendant acted on incorrect legal advice that he was entitled to do this, so that he may be able to escape exemplary damages; then I think the plaintiff's damages should not be limited to the general market value of the plaintiff's tenancy, but should reflect the price which the plaintiff and defendant would reasonably have negotiated, having regard to the plaintiff's position and the defendant's wish to develop the site.⁷²

11.56 Damages assessed on the basis of notional licence fees have been considered by courts in the UK. In *Irvine v Talksport*⁷³ a radio station used the image of a well-known racing driver in its publicity material, without the driver's knowledge or agreement. The court granted the driver damages equal to the driver's minimum endorsement fee at the time the image was used. In *Douglas v Hello!(No 3)* the UK Court of Appeal recognised the availability of a hypothetical-fee award in situations where a plaintiff had permitted to the invasive act in question but had not been compensated for the use of their image.⁷⁴

11.57 The assessment of damages based on the calculation of a notional licence fee is consistent with the fault requirement of the statutory cause of action proposed in this Discussion Paper—confined to intentional acts—as a notional licence fee would target defendants who had deliberately set out to enrich themselves or save expense by invading an individual's privacy.

11.58 Sirko Harder examined the argument that the exclusive right to authorise use of one's image is a commercial publicity right.⁷⁵ Harder argued that a publicity right is akin to a property right which is transferable, as distinguished from an individual's privacy interests which are not assignable in a proprietary sense. However, there are cases where private information is provided in return for a monetary value. For instance, individuals who enter into contractual arrangements to disclose their private information such as 'tell-all interviews' on television—often in exchange for monetary

72 *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1990) 24 NSWLR 499, 507.

73 *Irvine v Talksport Ltd* (2003) 2 ER 881.

74 Sirko Harder, 'Gain-Based Relief for Invasion of Privacy' (2011) 1 *DICTUM-Victoria Law School Journal* 63, 68.

75 *Ibid* 74.

compensation—attach some monetary value to their private information. Moreover, Harder argued that gain-based remedies are appropriate to remedy invasions of privacy given that

the right to privacy constitutes a right to exclude others from one's private sphere and thus an exclusive entitlement against the whole world. ... Gain-based relief is the natural consequence of the unauthorised use of an exclusive entitlement.⁷⁶

11.59 Also in favour of gain-based remedies in privacy actions, Witzleb argued that 'gain-based relief as a less intrusive, and more carefully targeted, remedy should be preferred as the primary defendant-focused remedy in privacy cases'.⁷⁷

Contributory negligence should not be considered in assessing damages

11.60 The ALRC does not propose that contributory negligence be included as a factor to be considered by a court to reduce an award of damages. Under state apportionment legislation, a court may reduce an award of damages in certain claims to the extent that the plaintiff was at fault,⁷⁸ but only where the defence of contributory negligence would have been a complete defence at common law. Contributory negligence is not a defence at common law to intentional torts and the apportionment legislation therefore does not apply to such claims.⁷⁹

11.61 Including contributory negligence as a factor in the assessment of damages would be inconsistent with the fault element of the proposed statutory cause of action which limits liability to intentional or reckless conduct.

Injunctions

Proposal 11–9 The new Act should provide that courts may award an injunction, in an action for serious invasion of privacy.

11.62 The availability of an order of injunctive relief to prevent or restrain the publication of private information is an important protection proposed by the ALRC. In privacy actions, plaintiffs are likely to seek interlocutory or interim injunctions to prevent the commission or continuance of a serious invasion of privacy. For example, a plaintiff may seek to prevent the publication of their personal information by a media outlet. Given the fragile nature of privacy, preventing the irreparable harm of publication or disclosure of private information is critical.

⁷⁶ Ibid 79.

⁷⁷ Normann Witzleb, 'Justifying Gain-Based Remedies for Invasions of Privacy' (2009) 29 *Oxford Journal of Legal Studies* 325, 355.

⁷⁸ See, for example, *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) s 9.

⁷⁹ *Horkin v North Melbourne Football Club* (1983) 1 VR 153.

11.63 The availability of an interim or interlocutory injunction to restrain publication may, in some cases, reduce or eliminate the need for further litigation or the need for a court to grant other remedies.

11.64 Previous law reform inquiries recommended that courts be able to order injunctive relief.⁸⁰ Principles relating to injunctive relief in privacy cases are discussed further in Chapter 12.

Delivery up, destruction or removal of material

Proposal 11–10 The new Act should provide that courts may order the delivery up and destruction or removal of material, in an action for serious invasion of privacy.

11.65 Orders for the delivery up, destruction or removal of material will be an appropriate remedy for serious invasions of privacy where a defendant has obtained private information about a plaintiff and has exhibited an intention to disclose that information to a third party. This may arise in a situation where two people in an intimate relationship share images or text of a highly personal nature and, at the end of the intimate relationship, one party intends to publish or disclose those images to a third party. In such a case, courts may order that the material be delivered to a court and destroyed. Several stakeholders supported this proposal.⁸¹

11.66 The ALRC intends this power to extend to orders for the take-down of online content which amounts to a serious invasion of privacy. A court may order that an online provider or an individual who controls their own website (such as a blogger) must remove or take-down specific content. An analogous provision exists at s 133 of the *Copyright Act 1968* (Cth), which empowers a court to order the delivery up and destruction of material which violates copyright law.

11.67 Australian courts have existing powers to issue similar orders. For instance, Anton Pillar orders are a form of mandatory injunction, issued by a court to prevent the destruction of evidence.⁸² Anton Pillar orders are issued when a court considers that a defendant is likely to destroy documents or property necessary for proceedings.⁸³

11.68 The NSWLRC and ALRC⁸⁴ previously recommended that courts be empowered to make an order for the delivery up and destruction of material. The NSWLRC recommended that courts be empowered to order a defendant to deliver to a plaintiff

80 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) Rec 74–5(c).

81 Public Interest Advocacy Centre, *Submission 30*; N Witzleb, *Submission 29*; T Gardner, *Submission 3*.

82 Bernard Cairns, *Australian Civil Procedure* (Thomson Reuters (Professional) Australia, 8th ed, 2009) [13.80].

83 *Long v Specifor Publications Pty Ltd* (1988) 44 NSWLR 545, [547] (Powell JA).

84 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) Rec 74–5(f).

any ‘articles, documents or material (and any copies), that were made or disclosed as a result of the invasion’.⁸⁵

11.69 The OAIC and PIAC suggested that, in an action under the new tort, courts be able to make an order requiring a defendant to rectify its business or IT practices to redress systemic problems with the way it stores private information.⁸⁶ The ALRC has not proposed such an order as such systemic problems would generally be the result of negligent acts or omissions and be more appropriately dealt with by the regulator. The cause of action proposed in this Discussion Paper is confined to intentional or reckless invasions of privacy.

Correction orders

Proposal 11–11 The new Act should provide that courts may make a correction order, in an action for serious invasion of privacy.

11.70 The ALRC proposes that courts be given the power to order defendants to publish, in appropriate terms, a correction.⁸⁷ Such an order can set the record straight, and may be necessary where, for example, the defendant disclosed *untrue* private information about the plaintiff.

11.71 The disclosure of private information may amount to a serious invasion of privacy despite the information being untrue.⁸⁸ Private information can include information which is true or false so long as it has a quality of privacy, that is, the subject matter of the information is sufficiently private or personal in nature so that its disclosure would cause emotional distress to a relevant individual. In the Canadian case of *Ash v McKennit*, Longmore J noted:

The question in a case of misuse of private information is whether the information is private, not whether it is true or false. The truth or falsity of the information is an irrelevant inquiry in deciding whether the information is entitled to be protected and judges should be wary of becoming side-tracked into that irrelevant inquiry.⁸⁹

11.72 Correction orders may reduce the need for a plaintiff’s interests to be vindicated through an award of damages.⁹⁰ Some plaintiffs may be primarily concerned with correcting the public record, in which case the advantage of correction orders is they

85 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) NSWRC Draft Bill, cl 76(1)(d).

86 Office of the Australian Information Commissioner, *Submission 66*. The OAIC suggested this power would be similar in nature to the OAIC’s power to instigate an own-motion investigation under the *Privacy Act 1988* (Cth).

87 Australian law provides discretion to a court to issue coercive correction orders, for example, *Australian Consumer Law* (Cth) 246(2)(d). In defamation law, a court does not have the discretion to issue a correction order, however whether a defendant has made an apology or a correction order can be taken into account when assessing the ‘reasonableness’ of any offer of amends, for example in *Defamation Act 2005* (NSW) s 14.

88 See Ch 5.

89 *McKennitt v Ash* [2008] QB 73, 86.

90 Carroll and Witzleb, above n 14, 236.

appear in the original publication and therefore target the same audience. Witzleb and Carroll have made the point that in actions to restore personality interests, monetary remedies may be ill-suited.⁹¹ Instead, coercive methods such as public corrections may be more appropriate to reverse or reduce the effect of an invasion of privacy which has demeaned and distressed the plaintiff in a public forum.

11.73 The Australian Subscription Television and Radio Association (ASTRA) opposed any remedies which would compel corrections, arguing that media organisations are already subject to similar provisions in ASTRA Codes which are registered with the ACMA.⁹² However there may be instances where a plaintiff is awarded a range of remedies as part of the cause of action including damages and an order for apology. In such cases, the availability of those remedies in a single cause of action will provide simplicity for all parties to a proceeding. A plaintiff would not need to pursue a defendant through both a regulatory scheme and through the courts in relation to the same serious invasion of privacy. Furthermore, if a defendant has already made a statement involving a correction, this will mitigate an award of damages.⁹³

Apology orders

Proposal 11–12 The new Act should provide that courts may make an order requiring the defendant to apologise to the plaintiff, in an action for serious invasion of privacy.

11.74 The availability of an order requiring a defendant to apologise would, in some circumstances, vindicate the hurt and distress caused to a plaintiff by a serious invasion of privacy.⁹⁴ Given the aim of the tort is to redress harm done to a personal, dignitary interest, an apology may assist in rectifying a plaintiff's feelings of embarrassment and distress. Witzleb and Carroll argued that orders for apology help to 'redress the injury by restoring the plaintiff's dignity and personality'.⁹⁵ Similarly, Prue Vines has argued:

Apologies are also a tool of communication and of emotion. Apologies may redress humiliation for the victim, shame the offender and help to heal the emotional wounds associated with a wrong.⁹⁶

11.75 The purpose of a plaintiff seeking an order for apology will depend on the circumstances of each case, but may involve the need for acknowledgement of their suffering.⁹⁷ The publicity garnered by a public statement of apology may help to

91 Ibid, 233.

92 Australian Subscription Television and Radio Association, *Submission 47*.

93 See Proposal 6-3.

94 Insurance Council of Australia, *Submission 15*; I Pieper, *Submission 6*; I Turnbull, *Submission 5*.

95 Carroll and Witzleb, above n 14, 237.

96 Prue Vines, 'The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena?' (2007) 1 *Public Space* 1, 15.

97 Robyn Carroll, 'Apologies as a Legal Remedy' (2013) 35 *Sydney Law Review* 317, 337.

‘restore the esteem and social standing which has been lost as a consequence of the contravention’.⁹⁸

11.76 The ALRC previously recommended that courts be empowered to order a defendant to apologise.⁹⁹ The NSWLRC recommended that the defendant’s conduct—including whether they had apologised or made an offer of amends prior to proceedings—should be taken into account when determining actionability.¹⁰⁰ The VLRC did not recommend such an order be available to a court, however the VLRC’s final report stated:

Sometimes it may be appropriate to direct a person to publish an apology in response to the wrongful publication of private information or to apologise privately, for an intrusion into seclusion.¹⁰¹

11.77 Australian law recognises the significance of apologies where there has been damage to personality or reputation in a range of actions at statute, equity and at the common law.¹⁰² For example, a court may order an apology under Commonwealth and state anti-discrimination legislation.¹⁰³ This area of law is analogous to privacy actions in that anti-discrimination law aims to remedy damage to feelings. Similarly, in defamation law, a court may take a publisher’s apology for defamatory matter into account when assessing damages.¹⁰⁴

11.78 Public apologies may also serve to educate the public about privacy and deter future serious invasions of privacy.¹⁰⁵ A plaintiff may value the public vindication an apology brings.

11.79 In *Burns v Radio 2UE Sydney Pty Ltd (No 2)*, the NSW Anti-Discrimination Tribunal defined a court-ordered apology as an acknowledgement of ‘wrongdoing’ that is distinguished from a personal apology which is ‘sincere and which is incapable of being achieved by a court order’.¹⁰⁶

Declarations

Proposal 11–13 The new Act should provide that courts may make a declaration, in an action for serious invasion of privacy.

98 *Eatoock v Bolt (No 2)* (2011) 284 ALR 114, [15].

99 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) Rec 74–5(d).

100 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) NSWRC Draft Bill, cl 74(3)(a)(vi).

101 Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) [7.207].

102 Carroll, above n 97, 213.

103 See, for example, the Anti-Discrimination Tribunal of NSW is empowered to issue an order requiring a respondent to publish or issue an apology or retraction: *Anti-Discrimination Act 1977* (NSW) s 108. Apologies made by respondents in personal injury matters are not treated as evidence of admission of fault: *Civil Liability Act 2002* (NSW) s 69.

104 See, for example, *Defamation Act 2005* (NSW) s 38.

105 Carroll, above n 97, 339.

106 *Burns v Radio 2UE Sydney Pty Ltd (No 2)* [2005] NSWADTAP 69 (6 December 2005).

11.80 The availability of declaratory relief will provide applicants with a sense of certainty and may avoid lengthy and costly court proceedings.¹⁰⁷ Several stakeholders submitted that declaratory relief should be available.¹⁰⁸

11.81 A declaration in an action for serious invasion of privacy will take the form of a non-coercive order by a court that states the nature of the interests, rights or duties of the applicant to an action.¹⁰⁹ Their availability will provide both parties to a proceeding with clarity as to their obligations and rights in order to avoid future litigation. A declaration may establish that a plaintiff has enforceable rights which may be upheld at a later date if the wrong continues. Similarly, a declaration may declare that future conduct by a defendant (or possible defendant) will not be a 'breach of contract or law'.¹¹⁰

11.82 Declarations are available in a variety of areas of Australian law.¹¹¹ Section 21 of the *Federal Court Act 1976* (Cth) provides that the court may make a declaration on the legality of another party's conduct.¹¹² The ACCC has sought declarations under this provision in numerous cases in order to determine whether a party has violated Australian consumer law.¹¹³

11.83 The ALRC, NSWLRC and VLRC previously proposed that courts be able to make declarations.¹¹⁴

11.84 ASTRA opposed the availability of declarations, arguing that the ACMA's existing powers provide it with the power to require a licensee to acknowledge a finding of the ACMA on the licensee's website. Section 205W of the *Broadcasting Services Act 1992* (Cth) provide the ACMA with the power to accept undertakings from broadcasters on a range of matters. However, the availability of declaratory relief will have a significant normative impact on the future conduct of a defendant, given the risk of monetary remedies if legal rights which have been the subject of a judicial pronouncement are contravened.

11.85 The operation of a declaration will not affect the availability of other remedies, if a court exercises their discretion to award other appropriate remedies.

107 Meagher, Heydon and Leeming, above n 65, [19–180].

108 N Witzleb, *Submission 29*; Public Interest Advocacy Centre, *Submission 30*.

109 Cairns, above n 82, [1.20].

110 *Bass v Permanent Trustee Co Ltd* (1999) CLR 198 334, [356] (*Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, [356] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

111 Meagher, Heydon and Leeming, above n 65, [19–075].

112 *Federal Court of Australia Act 1976* (Cth) s 21. 'The Court may, in civil proceedings in relation to a matter in which it has original jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed': s 21(1).

113 *Australian Competition & Consumer Commission v Black on White Pty Ltd* [2001] [2001] FCA 187 (6 March 2001).

114 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) Rec 74–5(g); NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) NSWRC Draft Bill, cl 76(1)(c); Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) Rec 29(c).

Costs

Question 11–1 What, if any, provisions should the ALRC propose regarding a court’s power to make costs orders?

11.86 At this stage in the Inquiry, the ALRC has not made a proposal on a court’s power to make costs orders in a cause of action for serious invasion of privacy. The ALRC welcomes stakeholder feedback on this issue. The ALRC is particularly interested in the issue of costs in the context of ensuring access to justice.¹¹⁵

11.87 The VLRC recommended that costs be dealt with in accordance with s 130 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).¹¹⁶ That section provides that each party should bear their own costs in a proceeding, unless the Tribunal orders one party to pay all or a part of the costs of the other party, if that would be fair to do so. This recommendation is consistent with the VLRC’s recommendation that their proposed privacy actions be heard in the VCAT. Any proposal on costs will depend on the forum in which a statutory cause of action is heard.

11.88 PIAC’s submission raised the concern that many plaintiffs will be deterred from starting proceedings due to the risk of an adverse costs order.¹¹⁷ PIAC suggested that if the cause of action were to be vested in a federal court, the ALRC should propose that courts be empowered to make orders protecting litigants from adverse costs orders.

11.89 Special provisions about costs orders may be made in the legislation enacting the statutory cause of action, or it may be preferable to rely on any discretion given to the court hearing the matter under its own enabling legislation.

115 The OAIC’s submission raised costs as an issue which influences the accessibility of civil proceedings: Office of the Australian Information Commissioner, *Submission 66*.

116 Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) Rec 30.

117 Public Interest Advocacy Centre, *Submission 30*.