7. Seriousness and Proof of Damage

Contents

Summary

7.1 This chapter is concerned with the fourth element of the new tort—the threshold of seriousness. Two distinct but related questions are considered. The first question is whether the new tort should only be actionable where the invasion of privacy was serious, and if so, how this threshold of seriousness should be set out in the new Act.

7.2 The ALRC proposes that there should be a threshold, and that it be set in the new Act using the word 'serious'.

7.3 The new Act should also provide that, in determining whether an invasion of privacy is 'serious', a court may consider whether the invasion was likely to be highly offensive, distressing or harmful to a person of ordinary sensibilities in the position of the plaintiff. These factors would provide a greater degree of certainty about the meaning of 'serious', while also establishing the ways in which a serious invasion of privacy may affect the plaintiff.

7.4 The second question is whether the plaintiff should be required to prove that he or she suffered 'actual damage' due to the defendant's act or conduct. The ALRC proposes that the plaintiff should not be required to prove 'actual damage'; that is, the tort should be actionable per se.

7.5 This second proposal recognises that in most cases, a serious invasion of privacy will cause emotional distress, rather than a type of harm traditionally treated by the law as 'actual damage'. Making the tort actionable per se, like an action in trespass, will enable the plaintiff to be compensated for emotional distress caused by the defendant's intentional or reckless conduct.

Seriousness

Proposal 7–1 Fourth element of action: The new Act should provide that the new cause of action is only available where the court considers that the invasion of privacy was 'serious'. The new Act should also provide that in determining whether the invasion of privacy was serious, a court may consider, among other things, whether the invasion of privacy was likely to be highly offensive, distressing or harmful to a person of ordinary sensibilities in the position of the plaintiff.

The need for a threshold

7.6 Some invasions of privacy should not be actionable because they are not sufficiently serious. The ALRC proposes that the new Act provide for a threshold test of seriousness that would ensure that trivial and other non-serious breaches of privacy are not actionable. The threshold the ALRC proposes is that the defendant's conduct is 'serious', having regard to whether it would be likely to be highly offensive, distressing or harmful to a person of ordinary sensibilities in the position of the plaintiff.

7.7 Some threshold is arguably required by the ALRC's Terms of Reference, which ask the ALRC to design a cause of action for serious—not all—invasions of privacy.

7.8 Many privacy advocates argue that there should not be an additional threshold, and that invasions of privacy should be actionable whether or not the invasion is serious. If a person has a 'reasonable expectation of privacy' then, subject to public interest matters, some argue that the person should have an action.[1]

7.9 The NSWLRC considered that there should be no additional threshold beyond the reasonable expectation of privacy test. The nature and offensiveness of the relevant conduct were instead matters to be taken into account when determining whether an actionable invasion of privacy had occurred.[2] There is also no threshold for seriousness in the statutes of the four Canadian provinces which have a statutory cause of action for invasions of privacy.[3]

7.10 However, the ALRC considers that a threshold is a useful way to prevent people from bringing actions for non-serious invasions of privacy. The risk of non-serious actions or a proliferation of claims was raised by a number of stakeholders.[4] It is also the ALRC's view that a threshold would avoid an undue imposition on competing interests such as freedom of speech.

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1 Eg N Witzleb, *Submission 29*; Office of the Information Commissioner, Queensland, *Submission 20*; Women's Legal Centre (ACT & Region) Inc., *Submission 19*; Pirate Party of Australia, *Submission 18*; P Wragg, *Submission 4*.

2 NSW Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009) [23]–[33].

3 *Privacy Act*, RSBC 1996, c 373; *Privacy Act*, RSS 1978, c P-24; *Privacy Act*, RSNL 1990, c P-22; *Privacy Act*, CCSM 1996, c P125 (Manitoba).

4 Eg SBS, *Submission 59*; ABC, *Submission 46*; Telstra, *Submission 45*; Free TV Australia, Submission No 10 to DPM&C Issues Paper, 2011; SBS, Submission No 8 to DPM&C Issues Paper, 2011.

What should the threshold be?

7.11 If there is a threshold, where should the threshold be set, and how? One option, favoured by the ALRC, would be to set the threshold at 'serious' invasions of privacy, and invite the courts to consider a number of matters when determining whether the invasion was serious. This is a flexible option, giving the court considerable discretion. This option was favoured by the Law Institute of Victoria.

7.12 To give the courts appropriate discretion, the word 'serious' should not be defined in the new Act. However, the new Act should provide some guidance on its meaning. The word 'serious' is not a particularly precise term, and may even be interpreted to mean 'not trivial'. The ALRC considers that the threshold for this cause of action should be set higher than 'not trivial'.

7.13 Rather than define 'serious', the ALRC proposes that the new Act set out a number of factors for the court to consider when determining whether the invasion of privacy was serious. The court should consider whether the invasion was likely to be highly offensive, distressing, or harmful to a person of ordinary sensibilities in the position of the accused.

7.14 The Law Institute of Victoria suggested other factors a court may take into account when determining seriousness: the nature of the breach; the consequences of the invasion for an individual; and the extent of the invasion in terms of the numbers of individuals affected.[5] The ALRC agrees that these factors might also be relevant, but prefers the more general factors proposed above.

Objective test

7.15 The test of seriousness proposed here is an objective test. It is not about whether the plaintiff considered the invasion of privacy was serious, or about whether the effect of the invasion on the plaintiff was in fact serious.[6] Rather, it is about whether the court views the invasion as serious. One way to measure this is to ask whether the invasion of privacy was likely to have a serious effect on a person of ordinary sensibilities in the position of the plaintiff.

7.16 In this context, the ALRC suggests that 'likely' does not mean 'probable', that is, more likely than not. Rather, 'likely' means 'a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case'.[7]

7.17 The likely effect of the conduct should also be distinguished from the actual effect of the conduct. Whether the cause of action should require proof of damage is a related question, discussed separately below.

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5 Law Institute of Victoria, *Submission 22*.

6 Later in this chapter, the ALRC proposes that the plaintiff should not be required to prove actual damage.

7 These are the words of Lord Nicholls of Birkenhead speaking in a different context in *Re H and R (Child Sexual Abuse)* [1996] 1 FLR 80 [69] (Lord Nicholls). This definition was referred to in *Venables & Anor v News Group News Papers Ltd & Ors* [2001] EWHC QB 32 (8 January 2001) (Dame Elizabeth Butler–Sloss P). Cf *Cream Holdings Ltd v Banerjee* (2004) 1 AC 253.

Subjective element

7.18 Although usually the test of seriousness will be an objective one, in some cases, the fact that the defendant knew that the particular plaintiff was likely to be highly offended, distressed or harmed by the invasion of privacy, will also be a factor to be considered. In such circumstances, the invasion may be adjudged to be serious, even if a person of ordinary sensibilities might not have been likely to suffer such offence, distress or harm.

7.19 Section 32 of the *Civil Liability Act 2002* (NSW) provides:

> (1) A person (the defendant) does not owe a duty of care to another person (the plaintiff) to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.
>
> (4) This section does not require the court to disregard what the defendant knew or ought to have known about the fortitude of the plaintiff.

7.20 The statutory cause of action for serious invasion of privacy should contain a provision similar to subsection 32(4) of the *Civil Liability Act 2002* (NSW). This provision would also be relevant to the question of the reasonable expectation of the plaintiff in their particular circumstances.

In the position of the plaintiff

7.21 It is important to ask whether the conduct was likely to highly offend, distress or harm a person *in the position of the plaintiff*. In some cases, particular attributes or circumstances of the plaintiff will mean that an invasion of their privacy will be more offensive, distressing or harmful than it might have been to another person.

7.22 In discussing whether the plaintiff had a reasonable expectation of privacy, Lord Hope, in *Campbell v MGN*, said that

> it is unrealistic to look through the eyes of a reasonable person of ordinary sensibilities at the degree of confidentiality that is to be attached to a therapy for drug addiction without relating this objective test to the particular circumstances.[8]

7.23 Lord Hope later went on to say that the Court of Appeal erred

> when they were asking themselves whether the disclosure would have offended the reasonable man of ordinary susceptibilities. The mind that they examined was the mind of the reader...This is wrong. It greatly reduces the level of protection that is afforded to the right of privacy. The mind that has to be examined is that, not of the reader in general, but of the person who is affected by the publicity. The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity.[9]

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8 *Campbell v MGN Ltd* [2004] 2 AC 457, [97] (Lord Hope).
9 Ibid [99].

7.24 Although this was said in the context of whether the plaintiff in *Campbell* had a reasonable expectation of privacy, the ALRC considers that the same reasoning should apply to the question of whether the invasion of privacy was serious. The two tests overlap, but it is clear that when applying each test, both of which are objective, it is important to consider a person in the position of the plaintiff.

Offence, distress or harm

7.25 A high likelihood or degree of offence, distress or harm is not the only indicator of the seriousness of an invasion of privacy, but it seems to be the most common.

7.26 The ALRC in 2008 and the Victorian Law Reform Commission (VLRC) in 2010 recommended that a plaintiff be required to show that the act or conduct complained of was highly offensive to a reasonable person of ordinary sensibilities.[10] The 'highly offensive' test was supported by some stakeholders.[11] A 'highly offensive' threshold is also favoured in New Zealand.[12]

7.27 Some stakeholders to this Inquiry submitted that whether the conduct was offensive is not the right test, because offence concerns emotional insult or distress, whereas the action for invasion of privacy should be concerned with affront to dignity. Offence is directed at moral outrage or wounded feeling, but seriousness should be measured by the extent of the invasion or the harm done.[13]

7.28 The ALRC is of the view that a high degree of offence is one factor to consider when assessing the seriousness of an invasion of privacy. The level of distress and harm likely to be caused by the invasion are also suitable matters to consider.[14]

7.29 Some invasions of privacy will be 'serious', despite the fact that they did not—and were not likely—to cause serious offence, distress or harm to the plaintiff. The dignitary interests of a person may be seriously infringed without the person's knowledge. For example, it may in some circumstances be a serious invasion of privacy to take or publish a photo of a person who is in a coma or a state of dementia,

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10 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) Rec 74–2; Victorian Law Reform Commission, *Surveillance in Public Places*, Report No 18 (2010) Recs 25, 26. It is worth noting that the 'highly offensive' test is at times conceptualised as going to the seriousness of an invasion and, at others, as a test of what may be considered private. An example of the latter is Gleeson CJ's statement in *ABC v Lenah Game Meats* that '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': (2001) 208 CLR 199, [42].

11 SBS, *Submission 59*; Australian Bankers' Association, *Submission 27*; Insurance Council of Australia, *Submission 15*. This threshold was supported by some stakeholders who oppose the introduction of the cause of action, perhaps because the threshold is high.

12 The New Zealand Court of Appeal has said that one of the two fundamental requirements for a successful claim for interference with privacy was publicity given to private facts 'that would be considered highly offensive to an objective reasonable person': *Hosking v Runting* (2005) 1 NZLR 1, [117]. See also *C v Holland* [2012] 3 NZLR 672 (24 August 2012) [94] (Whata J).

13 Eg N Witzleb, *Submission 29*; T Gardner, *Submission 3*.

14 Section 1 of the *Defamation Act 2003* (UK) 2013 provides that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. It should be noted, however, that liability in defamation is strict.

despite the fact that a person in such a state is unlikely to be offended, distressed or harmed by the incident or the publication. Such invasions of privacy may be serious, even though harm to the plaintiff was unlikely or minimal.

7.30 The *Privacy Act 1988* (Cth) provides for civil penalties in cases of 'serious' or 'repeated' interferences with privacy.[15] However, the Act does not define 'serious'; the ordinary meaning of the word applies.

7.31 A seriousness threshold is also recognised in the UK. Toulson and Phipps write that unauthorised 'disclosure or use of information about a person's private life will be a violation of Art 8 only if …it is sufficiently serious to cause substantial offence to a person of ordinary sensibilities'.[16] However, this may be a low bar, intended mainly to exclude only limited or trivial disclosures. Lord Neuberger MR in *Ambrosiadou v Coward,* said that

> Just because information relates to a person's family and private life, it will not automatically be protected by the courts: for instance, the information may be of slight significance, generally expressed, or anodyne in nature. While respect for family and private life is of fundamental importance, it seems to me that the courts should, in the absence of special facts, generally expect people to adopt a reasonably robust and realistic approach to living in the 21st century.[17]

7.32 In relation to actionability for defamation, 'substantially' has been described by Tugendhat J as the lowest threshold of seriousness.[18] The ALRC proposes that the serious threshold be set higher than this.

Highly, seriously or substantially?

7.33 The ALRC proposes that an invasion of privacy should generally not be considered serious if it were only likely to cause less substantial offence, distress or harm. The relevant consideration proposed is whether the invasion of privacy was likely to be *highly* offensive, distressing or harmful.

7.34 Some stakeholders may argue that this may make the cause of action largely unattainable. Possible alternatives include that the invasion 'caused substantial offence',[19] or was 'sufficiently serious to cause substantial offence'[20] to a reasonable person of ordinary sensibilities.

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15 *Privacy Act 1988* (Cth) s 13G.

16 RG Toulson and CM Phipps, *Confidentiality* (Sweet & Maxwell, 2012) [7–033]. Toulson and Phipps write that the other condition is that 'there is no good and sufficient reason for it—'good' meaning a reason capable of justifying the interference, and 'sufficient' meaning sufficient to outweigh the person's Art 8 rights on a balance of the legitimate competing interests'.

17 *Ambrosadou v Coward (Rev 1)* [2011] [2011] EWCA Civ 409 (12 April 2011) [30] (Lord Neuberger MR).

18 *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB).

19 Liberty Victoria, Submission No 34 to DPM&C Issues Paper, 2011.

20 Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper No 72 (2007) Prop 5–2.

7.35 However, the ALRC considers these alternatives might set the bar too low. Less serious invasions of privacy may be morally blameworthy, but the ALRC proposes that a higher bar be set for the purpose of imposing liability under the new tort.

Proof of damage not required

Proposal 7–2 The plaintiff should not be required to prove actual damage to have an action under the new tort.

7.36 The new tort should not require the plaintiff to prove—as an element of the tort, rather than for the purpose of awarding compensation—that he or she suffered actual damage.

7.37 The plaintiff having proved that he or she had a reasonable expectation of privacy, that the invasion of privacy was intentional or recklessly committed by the defendant and that it was serious, and the court having been satisfied that there was no countervailing interest justifying the defendant's conduct, should not then be required to prove actual damage. As discussed above, a bar must be set in part to ensure that trivial actions are not brought, but this has already been done by the earlier requirements.

7.38 In this respect, the privacy tort would be similar to other analogous intentional torts such as trespass to the person and trespass to land. In a sense, the wrong itself is the harm. The issue is then what remedy should flow from it. Some stakeholders advocated this approach to make the new privacy tort consistent with 'comparable interests such as defamation or trespass to the person'.[21] Defamation, while sometimes described as actionable per se, is however different in that damage to reputation is presumed to follow the defamatory publication.[22] There would be no presumption of damage in the new tort.

7.39 In *Tugendhat and Christie: The Law of Privacy and the Media,* the authors state that because one of the principal aims of the torts of battery, assault and false imprisonment is to 'vindicate the indignity inherent in unwanted touching, threatening, and confinement, they are actionable per se. Harm to the plaintiff is assumed.' The authors go on to state that, if

> one of the principal aims of the protection of privacy is the preservation of dignity, then consistency with trespass to the person might suggest that breaches of a reasonable expectation of privacy should also be actionable per se.[23]

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21 N Witzleb, *Submission 29*.

22 On trespass, see RP Balkin and JLR Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) 40. Section 7(2) of the Defamation Act 2005 (NSW) provides that the 'publication of defamatory matter of any kind is actionable without proof of special damage': *Defamation Act 2005* (NSW) s 7(2). Note, however, that there is a defence to defamation of triviality.

23 M Warby et al, *Tugendhat and Christie: The Law of Privacy and The Media* (OUP Oxford, 2011) [8.48].

7.40 In practice, serious invasions of privacy will usually cause emotional distress to the plaintiff. Emotional distress is not generally recognised by the common law as 'actual damage', which rather refers to personal injury, property damage, financial loss, or a recognised psychiatric illness. As a number of stakeholders submitted, the damage often caused by invasions of privacy—such as distress, humiliation and insult—may be intangible and difficult to prove.[24] PIAC submitted that a person's 'dignity is vitally important but its intrinsic nature makes it difficult to quantify in monetary terms the impact of any damage to it'.[25] Many stakeholders submitted that the action should not require proof of damage.[26]

7.41 The ALRC agrees that invasions of privacy may often cause 'only' emotional distress. If proof of actual damage as recognised by the common law were required, this would deny redress to some victims of serious invasions of privacy, and significantly undermine the value and purpose of introducing the new tort. If the goal then is to allow plaintiffs to recover damages for emotional distress, the issue is how best should the law achieve this.

7.42 One option would be to require proof of damage but define damage for the purposes of the action as including emotional distress. This would be consistent with s 52(1) of the *Privacy Act 1988* (Cth). This section provides that the loss or damage resulting from an interference with the privacy of an individual, as to which the Privacy Commissioner may make a determination of an entitlement to compensation or other remedy, includes injury to the complainant's feelings and humiliation suffered by the complainant.

7.43 However this approach would be inconsistent with both the well-established common law definition of actual damage and with the civil liability legislation in most states and territories (dealing with negligently inflicted mental harm).[27] The ALRC considers that the preferable approach is to make the new tort actionable per se. The threshold of seriousness will bar trivial or minor claims, and it will be rare that a plaintiff will suffer no distress from a serious invasion of privacy. In practice, if no emotional distress or actual damage has been suffered by a plaintiff, there would only be an award of damages if the circumstances of the invasion were such that there was a strong need for vindicatory damages.

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24 N Witzleb, *Submission 29*; Law Institute of Victoria, *Submission 22*; NSW Council for Civil Liberties, Submission No 62 to DPM&C Issues Paper, 2011; Public Interest Advocacy Centre, Submission No 59 to DPM&C Issues Paper, 2011.

25 Public Interest Advocacy Centre, *Submission 30*.

26 Office of the Australian Information Commissioner, *Submission 66*; NSW Young Lawyers, *Submission 58*; Women's Legal Services NSW, *Submission 57*; Queensland Council of Civil Liberties, *Submission 51*; ABC, *Submission 46*; Australian Privacy Foundation, *Submission 39*; Electronic Frontiers Australia, *Submission 44*; Public Interest Advocacy Centre, *Submission 30*; N Witzleb, *Submission 29*; B Arnold, *Submission 28*; Law Institute of Victoria, *Submission 22*; I Pieper, *Submission 6*; I Turnbull, *Submission 5*.

27 Eg *Civil Liability Act 2002* (NSW) s 31.

7.44 Some stakeholders also argued that invasions of privacy were 'abhorrent' and that it was important that the cause of action 'establish a clear deterrent'. [28] Others submitted that requiring proof of damage would burden or deter potential litigants.[29]

7.45 However, a number of stakeholders insisted that damage should need to be proved.[30] If proof of damage is not required, these stakeholders argued, there will be a proliferation of claims, many without merit, and this may lead to significant extra costs to industry.[31] For example, the Australian Subscription Television and Radio Association (ASTRA) submitted that not requiring proof of damage may 'encourage serial litigants and dubious proceedings'.[32] The Arts Law Centre of Australia also submitted that if the new tort were actionable per se, the arts and media industries would bear much of the cost of 'determining these potentially unfounded or unmeritorious claims'.[33] However, as set out above, the significant other elements of the cause of action should ensure that frivolous and unmeritorious claims are not made or successful— the action would only be available for 'serious', unjustified, invasions of privacy and only where the defendant intended to or recklessly invades the plaintiff's privacy.

7.46 The ALRC previously recommended that plaintiffs should not be required to prove damage.[34] The ALRC's proposal is also consistent with Canadian statutory causes of action.[35] It also appears that there is no requirement to prove damage in claims for disclosure of personal information under UK law, which is consistent with equitable claims for breach of an obligation of confidence. In practice this issue is not significant as most, if not all, privacy claims in the UK have been either for an injunction to prevent an invasive publication or for damages for emotional distress.

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28 B Arnold, *Submission 28*.

29 Ibid.

30 Australian Subscription Television and Radio Association, *Submission 47*; Telstra, *Submission 45*; Arts Law Centre of Australia, *Submission 43*; Optus, *Submission 41*; Australian Bankers' Association, *Submission 27*; Office of the Information Commissioner, Queensland, *Submission 20*; Insurance Council of Australia, *Submission 15*; D Butler, *Submission 10*.

31 Telstra, *Submission 45*; Arts Law Centre of Australia, *Submission 43*; Insurance Council of Australia, *Submission 15*; Office of the Victorian Privacy Commissioner, Submission No 46 to DPM&C Issues Paper, 2011 4688; SBS, Submission No 8 to DPM&C Issues Paper, 2011; Australian Direct Marketing Association, Submission No 57 to DPM&C Issues Paper, 2011.

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

33 Arts Law Centre of Australia, *Submission 43*.

34 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) Rec 74–3.

35 In British Columbia, for example, '[i]t is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another': *Privacy Act*, RSBC 1996, c 373 s 1(1). See also *Privacy Act*, RSS 1978, c P-24 s 2; *Privacy Act*, CCSM 1996, c P125 (Manitoba) s 2(2); *Privacy Act*, RSNL 1990, c P-22 s 3(1).