12. Remedies and Costs

Contents

Summary 219
Damages 220
Damages to compensate a plaintiff 221
Factors relevant to the assessment of damages 226
No separate award of aggravated damages 232
Exemplary damages 233
Cap on damages 236
Account of profits 238
No recommendation on notional licence fee 240
Injunctions 241
Injunctions in defamation and breach of confidence 245
Injunctions to restrain disclosure of *private* information 247
Delivery up, destruction or removal of material 251
Correction orders 252
Apology orders 254
Declarations 256
Costs 258

Summary

12.1 This chapter considers the remedies for an action for serious invasion of privacy. The ALRC recommends that courts be empowered to award any one or more of a range of remedies—monetary and non-monetary—to plaintiffs who successfully bring proceedings under the new privacy tort. One benefit of a cause of action being enacted by statute is the capacity and freedom of parliament to provide for a range of remedies, in contrast to the common law which is constrained by precedent and opportunity.

12.2 Serious invasions of privacy may have diverse consequences for plaintiffs. The range of remedies the ALRC recommends in this chapter are appropriate to the different objectives, experiences 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. In some cases, non-monetary remedies may provide a more appropriate response for the often immeasurable effects occasioned by invasions of privacy, or a more effective means to prevent invasions in the future.

12.3 This chapter begins with the ALRC's recommendation that courts be empowered to award damages, including general damages for any emotional distress suffered by the plaintiff. Most actions for invasion of privacy will concern harm to dignitary interests or emotional distress.

12.4 The ALRC recommends that a separate award of aggravated damages should not be made. Rather, the ALRC recommends that a court be empowered to consider a range of factors that may aggravate or mitigate the assessment of damages.

12.5 The ALRC also recommends that a court should have the discretion to award exemplary damages in exceptional circumstances.

12.6 The ALRC recommends a cap on damages. The cap should apply to the sum of both damages for non-economic loss and any exemplary damages. This cap should not exceed the cap on damages for non-economic loss in defamation.

12.7 The ALRC recommends that a court be empowered to award an account of profits in circumstances where a defendant has profited from an invasion of privacy.

12.8 Finally, the ALRC recommends that courts be empowered to award a range of non-monetary remedies where they would be appropriate in the circumstances: 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 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. A non-monetary order such as injunctive or declaratory relief will not necessarily reduce an award of damages.

Damages

Recommendation 12–1 The Act should provide that courts may award damages, including damages for emotional distress.

12.9 The ALRC recommends that damages, including general damages for emotional distress, be available as a remedy for serious invasions of privacy. Previous law reform inquiries made similar recommendations.[1] Several stakeholders supported this recommendation.[2]

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 Domestic Violence Legal Service and North Australian Aboriginal Justice Agency, *Submission 120*; Women's Legal Services NSW, *Submission 115*; T Butler, *Submission 114*; Office of the Victorian Privacy Commissioner, *Submission 108*; Redfern Legal Centre, *Submission 94*; Public Interest Advocacy Centre, *Submission 105*; Australian Sex Party, *Submission 92*; S Higgins, *Submission 82*; Guardian News and Media Limited and Guardian Australia, *Submission 80*; N Witzleb, *Submission 29*.

12.10 Damages are said to be the ‘prime remedy’ in tort actions.[3] This is so even where the tort, as the ALRC recommends in the case of the new tort of serious invasion of privacy, is actionable per se in the sense that the plaintiff need not prove any ‘actual damage’ (personal or psychiatric injury, material damage or financial loss).

12.11 There are four types of damages that may be awarded in a tort action: nominal damages, compensatory damages, aggravated damages and exemplary or punitive damages.

12.12 It is likely that nominal damages will only rarely, if ever, be appropriate where the new tort is made out, because of the requirement of seriousness as an element of the tort. Nominal damages, usually of a token sum,[4] are awarded where a tort is actionable per se and where the plaintiff is unable to prove any injury, loss or damage.[5] It provides mere recognition that the wrong has occurred but where the wrong was not a serious infringement of the plaintiff’s rights.

12.13 The most important damages are compensatory damages. How compensatory damages should be assessed in cases of serious invasions of privacy is discussed below.

Damages to compensate a plaintiff

12.14 Compensation is recognised as the dominant purpose of civil actions.[6] The ALRC’s recommendation that the statutory cause of action be described as an action in tort[7] will allow a court, when determining damages for a serious invasion of privacy, to draw on principles that have been well settled and applied by the courts in analogous common law actions.

12.15 The purpose of compensatory damages in tort law is to place a plaintiff as far as possible in the position in which they would have been, had the wrong not occurred.[8] It has been argued that this purpose is not commensurate with the nature of a privacy tort as the harm caused by an invasion of privacy is irreversible.[9] However, in most civil actions, where the loss is other than purely financial, damages will not be able to restore a plaintiff to the position they would have been in had the wrong not occurred. Damages cannot undo personal or psychiatric injury. They can however compensate

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3 *New South Wales v Stevens* (2010) 82 NSWLR 106, [14] (McColl JA). McColl JA was quoting from *Cassell & Co Ltd v Broome* [1971] AC 1027, [1070] (Lord Hailsham).

4 John Mayne and Harvey McGregor, *Mayne & McGregor on Damages* (Sweet & Maxwell, Limited, 12th ed, 1961) [10–006]. See, also, Maule J’s statement that ‘nominal damages means a sum of money that may be spoken of, but that has no existence in point of quantity’: *Beaumont v Greathead* (1846) 2 CB 494, [444].

5 Mayne and McGregor, above n 4, [10–001]. Nominal damages are available in trespass cases: Rosalie Balkin and Jim Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) [27.3].

6 Robyn Carroll, ‘Apologies as a Legal Remedy’ (2013) 35 *Sydney Law Review* 317, 340.

7 See Ch 4.

8 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (Lord Blackburn).

9 Siewert Lindenbergh in Katja Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Hart Publishing, 2007) 93.

for the financial losses flowing from the injury and provide a measure of solace for the wrong that has occurred.[10]

12.16 Compensatory damages may include special and general damages. 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'.[11] General damages refer to all injuries which are not capable of precise calculation.[12]

Compensation for actual damage

12.17 An award of damages compensates for actual damage to the plaintiff. Actual damage can consist of physical or psychiatric injury, property damage[13] or other economic loss. Plaintiffs must prove that the damage was caused by the tort and fell within the relevant principles of 'remoteness of damage'.[14]

Compensation in the absence of actual damage

12.18 The recommendation that the new tort be actionable *per se* means that a plaintiff need not prove that he or she has suffered personal injury or another form of actual damage in order to bring the action.[15] However, this does not mean that the plaintiff is not entitled to damages for the wrong. As explained in Chapter 8, in a sense the invasion of privacy is both the wrong and the injury, and the plaintiff is entitled to be compensated because it happened.

12.19 The action for invasion of privacy essentially protects a dignitary interest. It is closely analogous to actions like assault and false imprisonment, and other forms of trespass which are actionable per se. The courts deciding actions for invasion of privacy are likely to draw on the principles of damages as developed by the courts in these torts.

12.20 Because the wrong must be serious to be actionable, it is likely that, in the absence of any actual damage, the court will award general damages in order to:

- vindicate the plaintiff;
- compensate the plaintiff for any emotional distress or injury to feelings.

Vindicatory effect of damages awards

12.21 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

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10 Ibid 98.
11 Balkin and Davis, above n 5, [27.5].
12 Ibid.
13 For example, damage to stock or the cost of repairs to property occasioned by trespass to land or trespass to goods: Ibid [5.15].
14 For an intentional tort, the plaintiff may claim any damage which is a natural and probable consequence of the tort: *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388.
15 See Rec 8–2.

harm to the plaintiff's reputation from a defamatory statement is presumed,[16] an award of general compensatory damages may vindicate a plaintiff's interest.[17]

12.22 While vindication will have a role in compensating people for a serious invasion of privacy, by the acknowledgment that a serious wrong has been a committed, the assessment may be more analogous to other torts protecting privacy—such as trespass to land.

12.23 In *Plenty v Dillon*, Gaudron and McHugh JJ of the High Court of Australia characterised an award of general damages, for what they described as a 'serious' trespass to land, as fulfilling vindicatory purposes:

> True it is that the entry itself caused no damage to the appellant's land. But the purpose of an action for trespass to land is not merely to compensate the plaintiff for damage to the land. That action also serves the purpose of vindicating the plaintiff's right to the exclusive use and occupation of his or her land. The appellant is entitled to have his right of property vindicated by a substantial award of damages ... If the occupier of property has a right not to be unlawfully invaded, then ... the 'right must be supported by an effective sanction otherwise the term will be just meaningless rhetoric'.[18]

12.24 Vindication may be one of multiple aims of compensatory damages in a specific case. However, each aim does not need to be separately compensated.[19] An award of general damages can have several purposes or effects. As the High Court recognised in relation to damages for defamation in *Carson v John Fairfax & Sons Limited & Slee*, 'the amount of a verdict is the product of a mixture of inextricable considerations'.[20]

12.25 A related and unresolved issue is whether a plaintiff may claim harm to reputation in a claim for invasion of privacy. To decide this matter would require a detailed analysis of the new and developing privacy rights and their interaction with defamation. Refusing to strike out such a claim, Mann J in the High Court of England and Wales described this point as 'a serious one, capable of going to the heart of the

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16 Balkin and Davis, above n 5, [18.17].

17 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.

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

19 In a recent case of invasion of privacy in the UK, Eady J commented that 'It is accepted in recent jurisprudence that a legitimate consideration is that of vindication to mark the infringement of a right ... If other factors mean that significant damages are to be awarded, in any event, the element of vindication does not need to be reflected in an even higher award': *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB) (Eady J). See, also, Kit Barker, 'The Mixed Concept of Vindication' in Jason Neyers, Erika Chamberlain and Stephen Pitel (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013).

20 *Carson v John Fairfax & Sons Limited & Slee* (1993) 178 CLR 44, [60]. See, also, *Ell v Milne (No 8)* [2014] NSWSC 175 (7 March 2014) 66. In *Carson v John Fairfax*, the High Court cite *Triggell v Pheeney* (1951) 82 CLR 513. There has been some reference by UK courts when hearing actions for misuse of personal information, to vindicatory damages as a separate head of damages: *Lumba (WL) v Secretary of State for the Home Department* [2012] 1 AC 245 [97]. However, in a 2014 UK case, Dingemans J stated that: 'the effect of an award might be said in general terms to 'vindicate' the Claimant. However the use of the phrase "vindicatory damages" in this area of law is in my judgment unhelpful and liable to mislead, by creating a consequential risk of either overcompensation because of double counting, or under compensation because relevant features about the conduct are not considered': *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB).

cause of action in confidence and the newly developing wrong relating to the invasion of privacy'.[21] He acknowledged that a disclosure might well cause embarrassment and harm to reputation, but the latter would not be actionable where the information was true. He went on:

> It is not clear to me why, as a matter of principle, damage to reputation of this sort should not be within the sort of thing that privacy rights should protect against.[22]

12.26 If this issue arises under the new tort, it will be a matter for the courts to decide.

Damages for emotional or mental distress

12.27 The ALRC recommends that an award of damages under the new tort may, where appropriate, include general damages for emotional distress. This accords with the purpose of a privacy action:

> to promote and protect the physical, psychological and social development of individuals, and their autonomy to decide how they wish to be presented to the world.[23]

12.28 Damages for intangible losses—such as injury to feelings—may provide compensation and solace to a plaintiff.[24] The availability of damages for emotional distress is consistent with the recommendation that only *serious* invasions of privacy would be actionable and that, in determining seriousness, the 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.

12.29 It is highly probable that serious invasions of privacy will commonly cause emotional distress or harm to a plaintiff's dignitary interests.[25] As the High Court of England and Wales recognised in *Mosley*, 'it is reasonable to suppose that damages for such an infringement may include distress, hurt feelings and loss of dignity'.[26]

12.30 This recommendation is consistent with the availability of damages for emotional distress in limited areas of tort law. For instance, damages in trespass cases involving assault, battery and false imprisonment commonly include a component for injury to feelings or mental distress caused by the tort, as do cases of malicious prosecution and defamation.[27]

12.31 The ability to award damages for emotional distress under the new tort will partly fill a significant gap in redress available under existing common law for the

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21 *Hannon v News Group Newspapers Ltd* [2014] EWHC 1580 (Ch) [27].
22 Ibid [29].
23 John Hartshorne, 'The Value of Privacy' (2010) 2 *Journal of Media Law* 67, 70.
24 Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) [10.110].
25 Public Interest Advocacy Centre, *Submission 105*. See, also, Michael Tilbury, 'Coherence, Non-Pecuniary Loss and the Construction of Privacy' in Jeffrey Berryman and Rick Bigwood (eds), *The Law of Remedies: New Directions in the Common Law* (Irwin Law, 2010) 127, 161.
26 *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB), [216] (Eady J).
27 Tilbury, above n 25, 143.

intentional infliction of emotional distress outside actions such as trespass.[28] As discussed in Chapters 3 and 13, the limitations in the common law are increased by uncertainty about whether compensation for emotional distress is available in equitable actions for breach of confidence.[29]

12.32 Several stakeholders expressed strong support for this recommendation.[30] Redfern Legal Centre argued that

> it is essential that courts also be given the power to award damages for an individual's emotional distress as a result of a serious invasion of privacy. As the ALRC recognises, serious invasions of privacy commonly cause emotional distress or harm to a person's dignitary interests irrespective of whether there was also an economic loss. For our clients, many of who are socio-economically disadvantaged or marginalised, there may be little economic loss arising from a breach of their privacy as they are unemployed and/or have incapacitating disabilities and rely solely on government benefits for support. Nor may they experience an injury that is either physical or amounting to a psychological disorder. It is the emotional damage or loss to their dignity and the hurt and loss of trust caused by the privacy breach that is their greatest concern and one that in our view often necessitates an award of damages to compensate for this loss.[31]

12.33 Dr Normann Witzleb also supported the recommendation, arguing that

> the harm caused by an invasion of privacy will often also be intangible so that any provable loss is likely to be small. An award limited to compensating material loss will therefore often be insufficient to counteract the wrong. Effective redress requires that the plaintiff can also claim compensation for intangible losses, such as injury to feelings.[32]

The likely range of general damages in privacy actions

12.34 The ALRC does not suggest a monetary range for general damages in actions for serious invasion of privacy. Courts will be likely to look at damages awarded in comparable cases for other torts.

12.35 Case law in the UK suggests that the amount of general damages awarded in actions for misuse of personal information for hurt feelings and distress may be 'modest'.[33] Associate Professor Paul Wragg comments:

> What can be achieved by a monetary award in the circumstances is limited. Any award must be proportionate and avoid the appearance of arbitrariness.[34]

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28 Telstra argued against allowing damages for mental distress on the basis that it is not recoverable in other areas of tort: Telstra, *Submission 107*.

29 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 13 for further discussion.

30 Domestic Violence Legal Service and North Australian Aboriginal Justice Agency, *Submission 120*; Women's Legal Services NSW, *Submission 115*; T Butler, *Submission 114*; Office of the Victorian Privacy Commissioner, *Submission 108*; Public Interest Advocacy Centre, *Submission 105*; Women's Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 97*; Redfern Legal Centre, *Submission 94*; Australian Sex Party, *Submission 92*; S Higgins, *Submission 82*; N Witzleb, *Submission 29*.

31 Redfern Legal Centre, *Submission 94*.

32 N Witzleb, *Submission 29*.

33 *Applause Store Productions Ltd v Raphael* [2008] EWHC 1781 (QB).

12.36 The amount awarded in *Mosley* (£60,000) represents the highest award in a privacy case in the UK to date. In *Weller v Associated Newspapers Ltd,* Dingemans J noted the relatively modest awards in privacy cases:

> Analysis of the cases ... shows that, with the exception of *Mosley*, very substantial awards have not been made in this area. There was an award of £2,500 (and aggravated damages of £1,000) for the publication of the photographs in *Campbell v MGN*; an award of £2,500 for the publication of medical information in *Archer v Williams*; £3,500 for each Claimant for the publication of the photographs in *Douglas v Hello! (No 3)*; and £2,000 for the publication of private information about protected characteristics in *Applause Store Productions Limited v Raphael*.
>
> In *Mosley* the award of damages was for £60,000, and in *AAA* the award of damages was for £15,000 ... for publication on three separate occasions.
>
> It should be noted in *Spelman v Express Newspapers* Tugendhat J recorded that the sums awarded in the early cases for misuse of private information were very low, and that those levels were not the limit of the Court's powers.[35]

12.37 Australian courts may take some guidance from European human rights jurisprudence as to the appropriate award of non-pecuniary damages. Article 41 of the European Convention on Human Rights allows damages to be awarded to the 'just satisfaction' of the injured party.[36] This principle was applied in the case of *Peck v UK*, where the plaintiff was awarded £7,500 for non-pecuniary loss owing to the 'distress, anxiety, embarrassment and frustration' suffered as a consequence of CCTV footage of him attempting to commit suicide being broadcast on national television.[37]

12.38 Wragg suggests that the qualitative difference between the two types of privacy invasions in the new tort—intrusion upon seclusion and misuse of private information—may mean that the damages awarded in different cases are assessed differently.[38]

12.39 In other jurisdictions, courts have developed different approaches to assessing damages. In *Jones v Tsige,* Sharpe JA assessed damages based on a number of factors in that case, including whether the plaintiff suffered 'public embarrassment or harm to her health, welfare, social, business or financial position'.[39] He suggested that damages for intrusion should be modest.[40]

Factors relevant to the assessment of damages

Recommendation 12–2 The Act should set out the following non-exhaustive list of factors that a court may consider when determining the amount of damages:

34 P Wragg, *Submission 73*.

35 *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB), [193]–[195].

36 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

37 *Peck v United Kingdom* [2003] ECHR 44 (28 January 2003) [117].

38 P Wragg, *Submission 73*.

39 *Jones v Tsige* (2012) ONCA 32, [90].

40 Ibid [87].

(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.

12.40 The ALRC recommends that in assessing damages in an action for serious invasion of privacy, a court may consider a number of factors as mitigating or aggravating general damages.

12.41 These factors are designed to encourage parties to resolve a matter before litigation or before litigation proceeds to a hearing. This is a non-exhaustive list. It is intended to guide a court when determining the assessment of damages. It will be for the court to decide whether particular factors are relevant.

12.42 Mitigating factors will have the effect of reducing the harm of a 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. The consideration of a defendant's conduct up to and including conduct at trial is relevant in the assessment of damages in other intentional torts, particularly for false imprisonment[41] and defamation.[42]

12.43 The Uniform Defamation Law contains similar factors for a court to consider in the award of damages. For instance, s 38 of the *Defamation Act 2005* (NSW) sets out mitigating factors for a court to consider when assessing damages, including whether the defendant has made an apology to the plaintiff or has published a correction of the defamatory matter.

12.44 In actions for misuse of personal information in the UK, courts have considered the effect of mitigating or aggravating conduct or circumstances in the award of damages. While there was no separate award of aggravated damages in *Mosley* for instance, aggravating conduct was relevant to the assessment of the award of general damages. Eady J commented:

> It must be recognised that it may be appropriate to take into account any aggravating conduct in privacy cases on the part of the defendant which increases

41 *Spautz v Butterworth* (1996) 41 NSWLR 1.

42 Mayne and McGregor, above n 4, [7–009].

> the hurt to the claimant's feelings or 'rubs salt in the wound'. As Lord Reid said, in the context of defamation, in *Cassell v Broome*:
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> 'It has long been recognised that in determining what sum within that bracket should be awarded, a jury, or other tribunal, is entitled to have regard to the conduct of the defendant. He may have behaved in a highhanded, malicious, insulting or oppressive manner in committing the tort or he or his counsel may at the trial have aggravated the injury by what they there said. That would justify going to the top of the bracket and awarding as damages the largest sum that could fairly be regarded as compensation'.[43]

12.45 Several stakeholders supported this list of factors.[44] Telstra underscored their particular support for factors (a) and (d).[45] Detail about some of the factors is provided below.

(a) and (b) whether the defendant issued an apology or correction

12.46 Where a defendant has made an apology or issued a clear correction of false information about an individual, a court may consider these as mitigating factors in an award of damages. These two factors will be particularly relevant to invasions that occur through the publication of an individual's private information.

12.47 Defamation law includes apologies or corrections as mitigating factors in the assessment of damages.[46] Apologies are not a remedy at common law for intentional torts, instead they are often a factor mitigating an award of damages.[47] The Canadian *Privacy Acts* also include apologies as a mitigating factor in the assessment of damages.[48]

12.48 Several stakeholders argued that this practice should be encouraged to promote the resolution of matters prior to or during litigation.[49] Guardian News and Media Limited and Guardian Australia argued that 'the nature of invasions of privacy is that in many instances an apology, freely given, may be sufficient to resolve the matter.[50]

12.49 Research into the role of apologies on the settlement decision-making processes of litigants in America suggests that apologies influence claimants' perceptions, judgments and decisions in ways that make settlement more likely.[51] Resolving privacy

43 *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB), [222] (Eady J). Eady J cited *Cassell & Co Ltd v Broome* [1971] AC 1027, 1085. In *Mosley*, Eady J also considered that damages may be mitigated by reference to the conduct of a plaintiff. In obiter, he questioned to what extent a plaintiff's conduct prior to the invasion of their privacy could be considered in the assessment of damages, if their conduct contributed to their distress: *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB), [224]–[226].

44 T Butler, *Submission 114*; Arts Law Centre of Australia, *Submission 113*; Telstra, *Submission 107*; Australian Sex Party, *Submission 92*; Guardian News and Media Limited and Guardian Australia, *Submission 80*.

45 Telstra, *Submission 45*.

46 See, eg, *Defamation Act 2005* (NSW) 2005 s 38(1)(a)–(b).

47 See, eg, Ibid s 38(1)(a).

48 See, eg, *Privacy Act*, CCSM 1996, c P125 (Manitoba) s 4(2)(e).

49 Guardian News and Media Limited and Guardian Australia, *Submission 80*; Telecommunications Industry Ombudsman, *Submission 103*.

50 Guardian News and Media Limited and Guardian Australia, *Submission 80*.

51 Carroll, above n 6, 319.

disputes prior to the commencement of costly legal proceedings will, generally speaking, be advantageous to both parties.

12.50 The Insurance Council of Australia argued that an apology or correction should not be included as a factor to mitigate damages as these remedies are inconsistent with the aim of protecting a person's privacy.[52] The issuing of a public correction or apology for publication of false private information may compound the emotional distress, hurt or embarrassment occasioned by the initial invasion of privacy.

12.51 Some stakeholders argued that the term 'apology' should be qualified to ensure they are given in a genuine or sincere fashion.[53] The ALRC considers that a court will necessarily take the relevant circumstances into account when assessing the nature and effectiveness of any apology or correction made prior to the commencement of legal proceedings.

(c) whether the plaintiff has already recovered compensation, or has agreed to receive compensation in relation to the conduct of the defendant

12.52 This factor recognises that it would be unfair for a plaintiff to be compensated more than once in relation to the same invasion of privacy. Where a plaintiff has pursued alternative dispute resolution (ADR) or some other complaints mechanism prior to undertaking legal proceedings under the new privacy tort, a court should consider any compensation or other remedy obtained when assessing damages.

12.53 There are several legal or regulatory avenues that a plaintiff may be able to pursue as an alternative to taking action under the new privacy tort. These may result in the payment of compensation or an award of damages. For example, the Office of the Australian Information Commissioner (OAIC) has the power to make determinations that an APP entity must provide compensation to an individual where it is found that APP entity breached an Australian Privacy Principle.[54] In Chapter 16, the ALRC supports the OAIC's proposal to broaden the complaints mechanism. In Queensland, the *Information Privacy Act* empowers the Privacy Commissioner to refer complaints to the Queensland Civil and Administrative Tribunal (QCAT).[55]

12.54 Were a plaintiff to pursue either of these avenues prior to commencing legal proceedings under the new privacy tort, a court should take into account any compensation already awarded, agreed upon, or received, when assessing damages.

12.55 However, the ALRC does not recommend a bar on legal proceedings under the new privacy tort where a plaintiff has already pursued the matter through another mechanism.

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52 Insurance Council of Australia, *Submission 102*.

53 S Higgins, *Submission 82*; I Turnbull, *Submission 81*.

54 *Privacy Act 1988* (Cth) s 42.

55 QCAT can hear those complaints in its original jurisdiction and may make an order for compensation of up to $100, 000: *Information Privacy Act 2009* (Qld) s 176(1)–(2).

(d) whether either party took reasonable steps to settle a dispute

12.56 This factor is intended to encourage the parties, in appropriate circumstances, to attempt to resolve their dispute without litigation, if it would be reasonable to expect them to do so.[56] This factor may be read as a mitigating or an aggravating factor in the assessment of an award of damages, depending on whether a party took 'reasonable steps' to settle a dispute prior to legal proceedings.

12.57 In determining the 'reasonableness' of either party's conduct, a court may consider whether either party had made attempts at ADR; whether a complaint had first been made to the Office of the Australian Information Commissioner, the Australian Communications and Media Authority (the ACMA) or another body, and the outcome of any determination.

12.58 Whether a defendant has made an offer of amends—and whether that offer has been accepted—may be considered by a court when assessing whether either party has taken reasonable steps to settle a dispute prior to legal proceedings.

12.59 When determining reasonableness, a court may consider whether the nature of the invasion of privacy—particularly where it is ongoing—as well as the relationship between the parties, is conducive to pre-litigation resolution.

12.60 Given the highly personal nature of some invasions of privacy, there may be many circumstances where pre-trial negotiations are inappropriate. Advocates for persons experiencing domestic violence were concerned by the inclusion of this factor in the list of mitigating and aggravating factors.[57] The Office of the Victorian Privacy Commissioner argued that ADR can sometimes lead to inequitable outcomes for some plaintiffs, particularly in situations where there is a perceived power imbalance between two parties to a proceeding; a lack of trust between the parties; or where the plaintiff may be too emotionally distressed to approach the plaintiff.[58]

12.61 The ALRC agrees that the circumstances of some invasions of privacy will be inappropriate for pre-trial ADR. The ALRC also agrees that failure by a plaintiff to engage with a defendant who shows a willingness to settle a dispute prior to legal proceedings should only be used against a plaintiff in an award of damages, where it would be reasonable to do so in the circumstances.

12.62 The ALRC has not proposed that ADR be compulsory before pursuing an action for serious invasion of privacy, but instead considers that including this factor will encourage parties to engage in ADR where appropriate.

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56 This is consistent with the policy intent behind the *Civil Dispute Resolution Act 2011* (Cth). Its objects clause encourages 'as far as possible, people taking genuine steps to resolve disputes before certain civil proceedings are instituted': Ibid s 3.

57 Domestic Violence Legal Service and North Australian Aboriginal Justice Agency, *Submission 120*; Office of the Victorian Privacy Commissioner, *Submission 108*; N Henry and A Powell, *Submission 104*.

58 Office of the Victorian Privacy Commissioner, *Submission 108*.

Contributory negligence should not be considered in assessing damages

12.63 The ALRC recommends that contributory negligence not 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,[59] 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.[60] As discussed in Chapter 11, contributory negligence is not recommended as a defence to the new tort.

12.64 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. However, as Eady J pointed out in *Mosley,*

> there is no doctrine of contributory negligence. On the other hand, the extent to which his own conduct has contributed to the nature and scale of the distress might be a relevant factor on causation. Has he, for example, put himself in a predicament by his own choice which contributed to his distress and loss of dignity?[61]

Other factors

12.65 The ALRC has not recommended that the defendant's state of mind at the time of the invasion of the privacy should be considered. However, it will be a matter for the court whether this should be considered in a particular case. In some circumstances, a high level of malice may be more appropriately considered as grounds for an award of exemplary damages, because exemplary damages focus on the defendant's motives.[62]

12.66 Several stakeholders proposed additional factors in mitigation or aggravation of damages. The ABC proposed that 'whether the defendant reasonably believed that the actions comprising the invasion were carried out in the public interest' should be considered.[63] However, the ALRC considers the public interest balancing test is already a sufficient protection of legitimate and reasonable claims for public interest disclosure of an individual's private information.

12.67 The Australian Bankers' Association (ABA) proposed that if the defendant acted 'honestly and reasonably', they 'ought fairly to be excused'.[64] This is similar to a provision in the Australian Consumer Law (ACL) which provides a defence where a person 'acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused, the Court may relieve the person either wholly or partly from liability to any penalty or damages on such terms as the Court thinks fit'.[65]

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59 See, eg, *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) s 9.
60 *Horkin v North Melbourne Football Club* (1983) 1 VR 153.
61 *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB), [244].
62 Mayne and McGregor, above n 4, [11–009].
63 ABC, *Submission 93*.
64 Australian Bankers' Association, *Submission 84*.
65 *Competition and Consumer Act 2010* (Cth) s 85.

However, the fault element of the new tort makes such relief from liability to pay damages less appropriate than in the case of the ACL which imposes strict liability.

No separate award of aggravated damages

Recommendation 12–3 The Act should provide that the court may not award a separate sum as aggravated damages.

12.68 The ALRC recommends that the Act should not empower a court to make a separate award for aggravated damages.[66]

12.69 At common law, aggravated damages are a form of general damages, 'given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing'.[67]

12.70 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.[68] Aggravated damages are awarded where the defendant's conduct was so outrageous that an increased award is necessary to appropriately compensate injury to a plaintiff's 'proper feelings of dignity and pride'.[69]

12.71 Rather than recommending that aggravated damages may be awarded, the ALRC recommends that a court may consider whether a defendant's unreasonable conduct following the invasion of privacy, or prior to or during legal proceedings, subjected the plaintiff to special or additional embarrassment, harm, distress or humiliation when assessing damages.[70]

12.72 The ALRC considers that listing such conduct as a factor to be considered when assessing damages will provide sufficient opportunity for the court to take into account circumstances where a defendant has caused additional and unreasonable distress or humiliation to a plaintiff prior to commencing legal proceedings.[71] Moreover, the ALRC recommends that exemplary damages may be awarded where a court believes it is appropriate in all the circumstances.

12.73 The ALRC recommends that aggravated damages not be awarded as a separate sum to avoid the risk of overlap between an ordinary award of general damages for injury to the plaintiff's feelings and an award of aggravated damages.[72]

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66 Several stakeholders supported this recommendation: Domestic Violence Legal Service and North Australian Aboriginal Justice Agency, *Submission 120*; Office of the Victorian Privacy Commissioner, *Submission 108*; Australian Sex Party, *Submission 92*; S Higgins, *Submission 82*.

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

68 '[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).

69 *Rookes v Barnard* [1964] AC 1129 [1221] (Lord Devlin).

70 Rec 12–2(e).

71 The Australian Sex Party agreed with this point: Australian Sex Party, *Submission 92*.

72 *New South Wales v Riley* (2003) 57 NSWLR 496, [129]. This passage was quoted by Sackville AJA in *New South Wales v Radford* (2010) 79 NSWLR 327, [96].

12.74 There is also a risk of overlap between the award for aggravated damages and that for exemplary damages, considered later in this chapter, which are intended to punish or deter the defendant because of the nature of his or her 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'.[73] Both risks are avoided if aggravated damages cannot be awarded.

12.75 The ALRC's approach is consistent with that of the New South Wales Law Reform Commission (NSWLRC) on this issue. The NSWLRC explained that aggravating circumstances would already form some part of an assessment for general damages, stating:

> 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.[74]

Exemplary damages

> **Recommendation 12–4** The Act should provide that a court may award exemplary damages in exceptional circumstances.

12.76 The ALRC recommends that a court be given the discretion to award exemplary damages in exceptional circumstances, where a defendant's conduct was outrageous and in contumelious disregard of a plaintiff's rights.[75] An award for exemplary damages is considered separately from other heads of damages.[76] Exemplary damages are intended to punish a defendant and deter similar conduct in the future.

12.77 The ALRC considers that the award of exemplary damages should only be made in exceptional circumstances or, for example, where the court considers that the other damages or remedy awarded would not provide a sufficient deterrent against similar conduct in the future. The deterrent function of exemplary damages is arguably more valuable than the punitive function. The aim of awarding exemplary damages to deter similar conduct by others in the future has been recognised by Australian courts.[77]

12.78 When assessing whether the exceptional circumstances of the case call for an award of exemplary damages, the court will also consider whether the other damages

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

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

75 Several stakeholders supported the availability of an award of exemplary damages in exceptional circumstances: Women's Legal Services NSW, *Submission 115*; T Butler, *Submission 114*; Office of the Victorian Privacy Commissioner, *Submission 108*; Public Interest Advocacy Centre, *Submission 105*; Australian Sex Party, *Submission 92*; J Chard, *Submission 88*; S Higgins, *Submission 82*; I Turnbull, *Submission 81*; P Wragg, *Submission 73*; Australian Privacy Foundation, *Submission 39*; N Witzleb, *Submission 29*; Law Institute of Victoria, *Submission 22*; Women's Legal Centre (ACT & Region) Inc, *Submission 19*; T Gardner, *Submission 3*.

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

77 *Lamb v Cotogno* (1987) 164 CLR 1, [13].

already awarded against the defendant are sufficient to fulfil the retributive, punitive or deterrent purposes of exemplary damages.[78]

12.79 The ALRC considers that a court should be able to award exemplary damages under the new privacy tort, given that it is confined to invasions of privacy that are both serious and intentional or reckless.[79] The ALRC intends that any award of exemplary damages should be included in the cap on damages for non-economic loss, as outlined in Recommendation 12–5 later in this chapter.

12.80 Exemplary damages are available in Australia at common law for a wide range of intentional torts.[80] They are not available in defamation claims.[81] They are also not available for breach of equitable obligations such as breach of confidence,[82] or in actions for breach of a contractual duty of confidence,[83] and are limited in personal injury actions.[84]

12.81 Exemplary damages are available in privacy actions in other jurisdictions. In the UK, the 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.[85]

12.82 Similarly, the Joint Committee of the House of Lords and House of Commons on Privacy and Injunctions recommended in 2012 that courts be empowered to award exemplary damages in privacy cases, arguing that compensatory damages were too low to act as an effective deterrent.[86] 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.[87] Under this provision, a court may only award exemplary damages where the defendant's conduct has shown a deliberate or reckless disregard of an outrageous nature for the

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

79 See Chs 7 and 8. The ALRC notes that there is some divergence of opinion whether exemplary damages should be available for a civil action: see Balkin and Davis, above n 5, [11–001].

80 *Lamb v Cotogno* (1987) 164 CLR 1; Balkin and Davis, above n 5, [11–001]. 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.

81 See, eg, *Defamation Act 2005* (NSW) 2005 s 35.

82 *Giller v Procopets* (2008) 24 VR 1. In that case, 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* [2008] EWHC 1777 (QB), [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. In that case, the court overturned an award of exemplary damages for breach of fiduciary duty.

83 This is in contrast to the UK approach: *Attorney General v Blake* [2001] 1 AC 268.

84 See, eg, *Civil Liability Act 2002* (NSW) s 21. This provision abolishes exemptions for negligently inflicting personal injury.

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

86 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.

87 *Crime and Courts Act 2013* (UK) s 34. The Guardian News noted that this provision has been the subject of some criticism in the UK: Guardian News and Media Limited and Guardian Australia, *Submission 80*.

claimant's rights;[88] or the conduct is such that the court should punish the defendant for it;[89] and other remedies would not be adequate to punish that conduct.[90] Canadian privacy statutes also provide that courts may award punitive damages.[91]

12.83 PIAC supported the recommendation to allow the award of exemplary damages, arguing that

> there are a number of circumstances where an invasion of privacy may be of such a malicious or high-handed manner that it warrants an award of exemplary damages. PIAC also supports the award of exemplary damages where other damages awarded would be an insufficient deterrent.[92]

12.84 Posting on the internet of 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 that may justify an award of exemplary damages.

12.85 An award of exemplary damages may also be 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.[93]

12.86 Women's legal services generally welcomed the availability of an award of exemplary damages,[94] with Women's Legal Services NSW arguing that

> using exemplary damages in the context of violence against women would send a powerful message that violence against women is unacceptable in our society.[95]

12.87 There is some concern that exemplary damages provide a windfall to plaintiffs.[96] Courts, however, are conscious of this concern and the High Court has ruled that awards of exemplary damages should be moderate.[97]

12.88 Several stakeholders opposed the availability of an award of exemplary damages.[98] The OAIC submitted that remedies for a privacy action should be directed

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88 *Crime and Courts Act 2013* (UK) s 34(6)(a).

89 Ibid s 34(6)(b).

90 Ibid s 34(6)(c).

91 See, eg, *Privacy Act*, RSBC 1996, c 373 (British Columbia).

92 Public Interest Advocacy Centre, *Submission 105*.

93 N Witzleb, *Submission 29*. Witzleb noted that another value of an award of exemplary damages may be that it will be a means of stripping a defendant of any profit made from an invasion of privacy.

94 Women's Legal Centre (ACT & Region) Inc, *Submission 19*; Women's Legal Services NSW, *Submission 115*.

95 Women's Legal Services NSW, *Submission 115*.

96 Insurance Council of Australia, *Submission 102*.

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

98 Insurance Council of Australia, *Submission 102*; ABC, *Submission 93*; Guardian News and Media Limited and Guardian Australia, *Submission 80*; SBS, *Submission 59*; Telstra, *Submission 45*; Arts Law Centre of Australia, *Submission 43*.

at compensating a plaintiff, while exemplary damages are targeted at punishing a defendant.[99]

12.89 There is 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.[100] Guardian News argued that the legal costs associated with defending analogous civil actions, such as defamation suits, act as a sufficient deterrent for media organisations to avoid publishing defamatory matter.[101] They argue that this principle would apply to actions brought under the new privacy tort.

12.90 While the ALRC acknowledges the concern that potential defendants would have about the availability of exemplary damages, it considers that the courts should be able to award them in exceptional circumstances.

Cap on damages

> **Recommendation 12–5** The Act should provide for a cap on damages. The cap should apply to the sum of both damages for non-economic loss and any exemplary damages. This cap should not exceed the cap on damages for non-economic loss in defamation.

12.91 The ALRC recommends a cap on damages for all damages other than for economic loss. Any award for exemplary damages should be included in the amount of damages subject to this cap. The total amount of general damages for non-economic loss and exemplary damages awarded should be capped at the same amount as the cap on damages for non-economic loss in defamation awards.[102]

12.92 This recommendation provides equal protection to privacy and reputational interests and may avoid the risk of plaintiffs cherry-picking between causes of action based on the availability of higher awards of damages.[103]

12.93 Several stakeholders agreed with this recommendation.[104] PIAC opposed the imposition of a cap on damages for non-economic loss, fearing that 'if the ceiling is set too low, it will be inadequate to redress unlawful conduct'. However, if a cap were to be introduced, they supported an alignment with defamation law.[105] Similarly, Barker

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99 Office of the Australian Information Commissioner, *Submission 66*. Other stakeholders supported this statement: Insurance Council of Australia, *Submission 102*; ABC, *Submission 93*.

100 Guardian News and Media Limited and Guardian Australia, *Submission 80*.

101 Ibid.

102 See, eg, *Defamation Act 2005* (NSW) 2005 s 35. Damages for non-economic loss in defamation were initially capped at $250,000 and, at the time of writing, are $355,000.

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

104 T Butler, *Submission 114*; Telstra, *Submission 107*; Redfern Legal Centre, *Submission 94*; ABC, *Submission 93*; S Higgins, *Submission 82*; Guardian News and Media Limited and Guardian Australia, *Submission 80*.

105 Public Interest Advocacy Centre, *Submission 105*.

argued that, while he was unconvinced by the need for a cap on damages, any cap should be set at the same level as defamation:

> since such caps now apply in personal injury and defamation claims in Australia, it would be anomalous and unfair from a distributive point of view if similar caps did not apply. A cap similar to that applied in defamation cases for non-economic loss would seem appropriate.[106]

12.94 Associate Professor David Rolph has argued that a cap on damages for a statutory cause of action should not be lower than that for defamation.[107] He argued that a lower cap on damages for non-economic loss in privacy actions would be 'undesirable, failing to reflect the relative importance Australia should now prescribe to privacy'.[108]

12.95 The ABC supported a cap on damages for non-economic loss, arguing however that the cap should be lower than that in defamation law.[109] The ALRC considers that, while the cap on damages for non-economic loss in defamation is arguably too high, it is nevertheless desirable that the caps be the same for both actions.

12.96 The Redfern Legal Centre supported the proposal, arguing that other statutory privacy schemes provide 'inadequate compensation'.[110] For instance, under the *Health Records and Information Privacy Act 2002* (NSW), the NSW Civil and Administrative Tribunal (NCAT) can award a maximum of $40,000 where the respondent is a body corporate and $10,000 where the case involves any other party.[111] According to Redfern Legal Centre, the maximum amount 'is rarely (if ever) awarded, meaning that a victim is insufficiently compensated for serious breaches of their privacy under this regime'.[112]

12.97 Some stakeholders argued against capping damages.[113] 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'.[114]

12.98 The Office of the Victorian Privacy Commissioner argued that not imposing a cap on damages would 'reflect the growing importance placed on privacy rights in Australia'.[115]

12.99 The ALRC is of the view that an appropriate cap will not undervalue privacy interests, in the same way that a cap on damages for non-economic loss in defamation has not eroded the protection of reputational interests in Australia.

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106 K Barker, *Submission 126*.
107 David Rolph, 'The Interaction of Remedies for Defamation and Privacy' [2012] *Precedent* 14, 3.
108 Ibid 107.
109 ABC, *Submission 93*.
110 Redfern Legal Centre, *Submission 94*.
111 *Health Records and Information Privacy Act 2002* (NSW) s 54(1)(a).
112 Redfern Legal Centre, *Submission 94*.
113 Office of the Victorian Privacy Commissioner, *Submission 108*; Office of the Australian Information Commissioner, *Submission 66*; Public Interest Advocacy Centre, *Submission 30*.
114 Office of the Australian Information Commissioner, *Submission 66*.
115 Office of the Victorian Privacy Commissioner, *Submission 108*.

12.100 Moreover, the ALRC does not consider that a cap—combined with the threshold requirement that actions be sufficiently 'serious'—poses a risk that courts will automatically award the upper limit in every case. Courts are equipped to assess appropriate awards of damages based on the context in which each case arises. For example, in *Jones v Tsige,* Sharpe JA stated that

> in determining damages, there are a number of factors to consider. Favouring a higher award is the fact that Tsige's actions were deliberate and repeated and arose from a complex web of domestic arrangements likely to provoke strong feelings and animosity. Jones was understandably very upset by the intrusion into her private financial affairs. On the other hand, Jones suffered no public embarrassment or harm to her health, welfare, social, business or financial position and Tsige has apologized for her conduct and made genuine attempts to make amends. On balance, I would place this case at the mid-point of the range I have identified and award damages in the amount of $10,000. Tsige's intrusion upon Jones' seclusion, this case does not, in my view, exhibit any exceptional quality calling for an award of aggravated or punitive damages.[116]

12.101 While the ALRC recommends that a cap be included, it has not recommended a threshold for damages. It will be for the court to decide the appropriate awards in an individual case, taking into account awards for analogous torts.

Account of profits

> **Recommendation 12–6** The Act should provide that a court may award an account of profits.

12.102 The ALRC recommends that a court be empowered to award an account of profits as a remedy for the new tort.[117] This award would be an alternative to damages. The gains-based remedy of an account of profit has the aim of deterring 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.[118]

12.103 An award of an account of profits may be appropriate where the financial benefit derived to a defendant from an invasion of privacy exceeds the loss incurred to a plaintiff.[119] This remedy may also provide redress to plaintiffs where compensatory damages would be difficult to calculate.

12.104 The availability of an account of profits may also have a deterrent effect on the behaviour of potential defendants when they are considering the commercial benefit to be gained from publishing an individual's private information. It is distinct

116 *Jones v Tsige* (2012) ONCA 32, [90] (Sharpe JA).

117 Several stakeholders were in favour of this proposal: N Witzleb, *Submission 116*; T Butler, *Submission 114*; Office of the Victorian Privacy Commissioner, *Submission 108*; Public Interest Advocacy Centre, *Submission 105*; Australian Sex Party, *Submission 92*; S Higgins, *Submission 82*; Office of the Australian Information Commissioner, *Submission 66*; Public Interest Advocacy Centre, *Submission 30*; Insurance Council of Australia, *Submission 15*; I Turnbull, *Submission 5*.

118 N Witzleb, *Submission 29*.

119 Mayne and McGregor, above n 4, [12–005].

from an award of damages in that it responds to the gain of the wrongdoer rather than the loss of the wronged party.[120] To that end, PIAC argued that

> Orders of this nature will prevent unjust enrichment of respondents and will also act as a deterrent in the case of 'serial respondents', or respondents who are unlikely to be particularly adversely affected by being ordered to pay compensatory damages.[121]

12.105 Similarly, Witzleb argued that 'commercially motivated defendants can only be effectively prevented from invading people's privacy where profit-stripping remedies are made available'.[122]

12.106 An account of profits is an established remedy in actions for breach of confidence.[123] It is also available in some limited types of tort actions, such as passing off.[124]

12.107 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. 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.[125]

12.108 It may be difficult for a plaintiff to prove that the defendant has made a profit or gain from the invasion of privacy. Calculating the profit to be attributed to the publication of private information may be complex where it forms only part of a larger publication. In these cases, a court will determine the reasonableness of the connection between the invasion of privacy and the profit obtained.[126]

12.109 An account of profits was recommended as a remedy for a serious invasion of privacy in ALRC Report 108.[127] The NSWLRC also recommended an account of profits, at least in exceptional cases.[128] Both 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 considered that this should preclude an account of profits being available, if appropriate.

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120 *Warman International Ltd v Dwyer* (1995) 182 CLR 544.
121 Public Interest Advocacy Centre, *Submission 105*.
122 N Witzleb, *Submission 29*.
123 *Attorney General v Guardian Newspapers Ltd (No 2)* (1990) 1 AC 109.
124 Roderick Pitt Meagher, Dyson Heydon and Mark Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) [25–002].
125 *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 490, 497.
126 *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704, [97].
127 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) Rec 74–5.
128 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) [7.23]–[7.24].

12.110 ASTRA argued that an account of profits is a very narrow and particular remedy, which is

> likely to be more effective against a large, established company than against a fledgling web-based media outlet which is more concerned with generating 'likes' or 'followers' than generating profit.[129]

12.111 Some stakeholders argued that an account of profits is an inappropriate remedy for a privacy action as it attaches commercial value to a dignitary interest.[130] However the ALRC considers that, unlike other remedies—such as the calculation of damages based on a notional licence fee—an account of profits is designed to strip a defendant of the benefit of an invasion of privacy rather than to vindicate any commercial interest a plaintiff may wish to pursue.

No recommendation on notional licence fee

12.112 In the Discussion Paper, the ALRC proposed the availability of damages based on the calculation of a notional licence fee. After further consideration and discussion with relevant stakeholders, the ALRC has decided not to make a recommendation that a court may award damages based on a notional licence fee. The ALRC considers that an assessment of damages based on a notional licence fee is primarily aimed at protecting commercial rights rather than personal, dignitary interests such as privacy. As a result, it makes no recommendation that it be available as a remedy for the new tort. Nonetheless, the ALRC considers that it would be a matter for the courts to decide whether this remedy is appropriate in any particular case.

12.113 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. This remedy seeks to target the value to the defendant of deliberately invading the plaintiff's privacy.

12.114 Damages assessed on the basis of notional licence fees have been considered by courts in the UK in actions for breach of confidence and breach of contract. In *Irvine v Talksport*,[131] 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 Court of Appeal of England and Wales recognised that an award based on a notional licence fee was available in situations where a plaintiff had permitted the invasive act in question (in this case, publication of wedding photographs) but had not been compensated for it.[132]

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129 ASTRA, *Submission 99*.

130 Telstra, *Submission 107*; Guardian News and Media Limited and Guardian Australia, *Submission 80*.

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

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

12.115 There is debate about the applicability of gains-based relief for an invasion of privacy. Dr Sirko Harder has 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.[133]

12.116 ASTRA submitted that this remedy was not appropriate for an invasion of privacy, arguing that,

> if an individual is willing to grant a licence for an invasion of privacy (especially when subject to payment of a fee), this should not be actionable under the proposed tort.[134]

12.117 Australian law does not recognise a right of publicity. However, the misappropriation and unauthorised commercial use of an individual's image is protected by the tort of passing off, where that individual has a trading reputation,[135] and other aspects of intellectual property law. The tort of passing off aims to prevent economic loss by redressing misrepresentation which occurs when one party 'passes off' their goods or services as the goods or services of another party.[136] Remedying the commercial consequences of unauthorised publication of private information may be better pursued through the development of the tort of passing off, if available, than through a notional licence fee.

Injunctions

Recommendation 12–7 The Act should provide that the court may at any stage of proceedings grant an interlocutory or other injunction to restrain the threatened or apprehended invasion of privacy, where it appears to the court to be just or convenient and on such terms as the court thinks fit.

Recommendation 12–8 The Act should provide that, when considering whether to grant injunctive relief before trial to restrain publication of private information, a court must have particular regard to freedom of expression and any other matters of public interest.

12.118 In privacy actions, plaintiffs are highly likely to seek a court order or injunction to prevent the commission or continuance of a serious invasion of privacy. For example, a plaintiff may seek to prevent the disclosure or publication of their private information to or by another person or a media entity.

133 Ibid 79.
134 ASTRA, *Submission 99*.
135 Normann Witzleb, 'Justifying Gain-Based Remedies for Invasions of Privacy' (2009) 29 *Oxford Journal of Legal Studies* 325, 339.
136 Mayne and McGregor, above n 4, [40–020].

12.119 The power of the courts to order injunctions is usually set out in the enabling statute for the court,[137] and is subject to a substantial body of equitable principles or specific statutory provisions.[138] As with all court orders, the ultimate efficacy of an injunction will depend on the jurisdiction of the court over the apprehended conduct, as well as the location of the respondent.[139] The court will not grant an injunction where it would be futile to do so: one ground for futility may be the wide publicity already given to the relevant information. Previous law reform inquiries recommended that courts be able to order injunctive relief in relation to the new cause of action.[140]

12.120 In some cases, a final and permanent injunction may be sought at the trial of the action. However, in most privacy cases, the most significant remedy will be an interlocutory injunction to prevent a *threatened* invasion of privacy—such as the broadcast or publication of private information. An interlocutory injunction is sought prior to the trial, sometimes ex parte in cases of great urgency, to maintain the status quo. In the case of a privacy action against the media for example, the status quo would usually be the non-publication of the material.

12.121 In a privacy case, perhaps even more so than in other cases such as defamation cases,[141] the stakes are high for both parties at the interlocutory stage. For the plaintiff, privacy in information, once lost, may be lost forever,[142] and no amount of compensation will render the information entirely private again.[143] For the defendant,

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137 See, eg, *Supreme Court Act 1970* (NSW) s 66. The provision would apply to both apprehended and continuing invasions of privacy.

138 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

139 *Candy v Bauer Media Limited* [2013] NSWSC 979, [20]; *Mosley v News Group Newspapers* [2008] EWHC 687 (QB), [36]. See Normann Witzleb, '"Equity Does Not Act in Vain": An Analysis of Futility Arguments in Claims for Injunctions' (2010) 32 *Sydney Law Review* 503. A related question of fact is whether, for the purposes of the equitable obligation, the information had the quality of confidence or whether it is at the relevant time in the public domain. Where publication is not widespread, there may still be some point to restricting further publication: *Johns v Australian Securities Commission* (1993) 178 CLR 408, [460]–[462] (Gaudron J); *Australian Football League v The Age Company Ltd* (2006) 15 VR 419, [428]–[429]; *Attorney General v Guardian Newspapers Ltd (No 2)* (1990) 1 AC 109. Contractual obligations of confidence raise different considerations: see *Massingham v Shamin* [2012] NSWSC 288 (23 March 2012) and cases referred to therein.

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

141 Defamation is essentially concerned with *false* and derogatory statements: David Rolph, 'Irreconcilable Differences? Interlocutory Injunctions for Defamation and Privacy' (2012) 17 *Media & Arts Law Review* 170. The distinction may not be clear cut: damage to reputation may be difficult to repair, and some false slurs will inevitably leave a residual doubt in people's minds, so that the harm is in fact irreparable: *Hill v Church of Scientology of Toronto* (1995) 2 SCR 1130, [166]. However, many false statements of 'fact' can be proved to be false.

142 *Prince Albert v Strange* (1849) 1 Mac & G 25, 46 (Lord Cottenham): 'In the present case, where privacy is the right invaded, postponing the injunction would be equivalent to denying it altogether.' See, also, *Tchenguiz v Imerman* [2010] EWCA (Civ) 908, [54] (Lord Neuberger MR). Lord Nicholls made the same point as to confidentiality in *Cream Holdings Ltd v Banerjee* (2004) 1 AC 253, [18]. See also Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 136.

143 It is difficult to imagine a situation where damages would be an adequate remedy in a case involving a serious invasion of privacy. In trespass cases, the court have sometimes held that damages would be an adequate remedy, and thus, on the threshold equitable test, refused the injunction: see *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457, where Young J refused the plaintiff's claim for an injunction to restrain the broadcast of footage obtained while trespassing on his ground, obviating the need to consider public interest. The view, however, is taken in many cases of serious invasion of privacy

on the other hand, there is the consideration that by the time the entitlement to publish is adjudicated in a final hearing, the appropriate opportunity to reveal the relevant information or to contribute to a public debate may be lost as the information's novelty, relevance or interest is overtaken by other events. As Lord Nicholls noted in *Reynolds v Times Newspapers*: 'News is a perishable commodity'.[144]

12.122 This means that, of all remedies, an interlocutory injunction restraining publication is arguably the most significant restriction on freedom of speech and the freedom of the media to report on matters of public interest and concern. There is therefore a strong and justifiable concern that unmeritorious claims to prevent the disclosure of allegedly 'private' information, in which there is a legitimate public interest, might chill freedom of speech and the freedom of the press.

12.123 The Terms of Reference for this Inquiry require the ALRC to make recommendations as to 'the necessity of balancing privacy with other fundamental values including freedom of expression and open justice'. The most significant recommendation reflecting this necessity is the requirement that the court must be satisfied that, for the plaintiff to have a cause of action, the public interest in privacy outweighs any countervailing public interest.[145]

12.124 In addition, the ALRC recommends that courts should be specifically directed by the legislation to consider freedom of expression and other matters of public interest when considering whether to grant an interlocutory injunction to restrain the publication of private information. This recommendation is based on s 12(4) of the *Human Rights Act 1998* (UK), discussed below.

12.125 In view of the ordinary principles governing the grant of an interlocutory injunction, discussed below, and the requirement for actionability set out in Chapter 8, it may be argued that an additional provision directing courts to consider any matters of public interest when considering an injunction application is unnecessary.

12.126 According to equitable principles, as set out by the High Court of Australia in *Beecham Group v Bristol Laboratories Pty Ltd*[146] and reaffirmed in *ABC v O'Neill*,[147] before the court will exercise its discretion to award an interlocutory injunction, an applicant must satisfy the court that:

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against individuals that 'no amount of damages can fully compensate the claimant for the damage done: *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB) [236]. As was said in that case at [209], 'Once the cat is out of the bag, and the intrusive publication has occurred, most people would think there was little to gain from instituting any legal proceedings at all'.

144 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 205.

145 See Rec 9–1.

146 *Beecham Group v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.

147 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57. See, further, David Rolph, 'Showing Restraint: Interlocutory Injunctions in Defamation Cases' (2009) 14 *Media & Arts Law Review* 255; Benedict Bartl and Dianne Nicol, 'The Grant of Interlocutory Injunctions in Defamation Cases in Australia Following the Decision in *Australian Broadcasting Corporation v O'Neill'* (2006) 25 *University of Tasmania Law Review* 156.

- there is a prima facie case, in the sense that there is a serious question to be tried as to the plaintiff's entitlement to relief, and a sufficient[148] likelihood of success to justify the preservation of the status quo pending trial;
- the plaintiff is likely to suffer injury for which damages will not be an adequate remedy;[149] and
- the balance of convenience favours the granting of an injunction.[150]

12.127 In satisfying the first requirement of a prima facie case and sufficient likelihood of success, the plaintiff will already have needed to address the balancing process as part of the actionability requirements of the new tort. The public interest in freedom of expression and any other public interest would need to be addressed by the plaintiff to make out a prima facie case and to show a likelihood of success at trial on the claimed cause of action. However, the ALRC nevertheless considers that it would be valuable for the legislation to indicate the clear parliamentary intention that courts considering injunctive relief should carefully weigh the strength of the competing interests of the parties *in relation to that remedy*. In particular, such a provision would give added assurance to members of the media, who may be concerned that a statutory cause of action would unduly chill their ability to report on matters of public concern.

12.128 The ALRC is not suggesting that the legislation entrench a particular approach or weight to the competing interests of the parties. As the International Covenant on Civil and Political Rights recognises, both the individual and public interests in the protection of privacy and the individual and public interests in freedom of speech are important values and neither is absolute nor always in conflict with the other.[151] In particular, the ALRC is not suggesting any rigid or default rule that courts should be exceptionally reluctant, as in defamation cases, nor ready, as in breach of confidence cases, to grant an injunction. Those two differing types of case protect and balance different interests than those that will be protected under the new tort, even though sometimes the interests may overlap. Rather, the recommendation confirms that competing public interests are to be considered when considering an injunction application.

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148 'The requisite strength of the probability of ultimate success depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought … [such as the fact that] the grant or refusal of the interlocutory application would dispose of the action finally': *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [71]–[72] (Gummow and Hayne JJ).

149 This second factor is not necessary if the application is in the exclusive equitable jurisdiction of the court, for example to restrain the breach of an equitable duty of confidence: Meagher, Heydon and Leeming, above n 124, [21–345].

150 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [19] (Gleeson CJ and Crennan J); Ibid, [65]–[72] (Gummow and Hayne JJ).

151 As Ch 2 points out, privacy allows an individual to speak freely. Even in the United States it is recognised that the First Amendment protecting freedom of speech and freedom of association 'serves to protect privacy': Daniel J Solove, Marc Rotenberg and Paul M Schwartz, *Information Privacy Law* (Aspen, 2nd ed, 2006) 33.

Injunctions in defamation and breach of confidence

12.129 An applicant for an interlocutory injunction in defamation cases faces an additional hurdle in the application of the rules set out in *Beecham.*[152] This hurdle may be described as the rule in *Bonnard v Perryman,* which derives from Lord Coleridge CJ's statement that defamation cases require 'exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong'.[153] In particular, if a defendant asserts that it will defend the defamatory statement as true, then, 'in all but exceptional cases',[154] the courts will exercise their discretion to refuse the injunction, leaving the defendant to publish and risk liability for damages.

12.130 This caution in defamation cases is well-established in Australian law, although the defendant must go further than merely *raising* the defence.[155] In *ABC v O'Neill*, Gleeson CJ and Crennan J noted that, in defamation cases, particular attention will be given to the public interest in free speech when considering whether an interlocutory injunction should be granted.[156] Gummow and Hayne JJ referred to the need for the judge to consider 'the … general and … profound issue involved in the policy of the law respecting prior restraint of publication of allegedly defamatory matter'.[157]

12.131 Gummow and Hayne JJ also emphasised that claims for interlocutory injunctions in defamation in Australia, although reflecting the principle in *Bonnard*, are 'but one of a species of litigation to which the principles in *Beecham* apply'.[158] The broader species to which their Honours were referring presumably comprises those cases where the disposal of the interlocutory application would effectively determine the case in its entirety, but might possibly include applications for interlocutory injunctions in the auxiliary jurisdiction in general.

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152 *Beecham Group v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.

153 *Bonnard v Perryman* (1891) 2 Ch 269, 283–85. Gummow and Hayne JJ point out in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [80] that the court in *Fleming v Newton* (1848) 9 ER 797 was wary both of usurping the role of the jury at trial and of constraining the liberty of the press after the lapsing of a statutory system of press licensing.

154 *Bonnard v Perryman* (1891) 2 Ch 269, 285.

155 *National Mutual Life Association of Australasia Ltd v GTV Corpn Pty Ltd* [1989] VR 747; *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153; *Clarke v Queensland Newspapers Pty Ltd* [2000] 1 Qd R 233; *Jakudo Pty Ltd v South Australian Telecasters Ltd* (1997) 69 SASR 440, [442]–[443]. However, Heydon J in dissent in *ABC v O'Neill* went so far as to say that one proposition flowed from the appeal in that case: 'That is that as a practical matter no plaintiff is ever likely to succeed in an application against a mass media defendant for an interlocutory injunction to restrain publication of defamatory material on a matter of public interest, however strong that plaintiff's case, however feeble the defences, and however damaging the defamation': *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [170].

156 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [19].

157 *Australian Broadcasting Corporation v O'Neill* has been applied in several cases: *AAMAC Warehousing & Transport Pty Limited v Fairfax Media Publications Pty Limited* [2009] NSWSC 1030 (28 September 2009); *Crisp v Fairfax Media Ltd* [2012] VSC 615 (19 December 2012); *Allan v The Migration Institute of Australia Ltd* [2012] NSWSC 965 (13 August 2012); cf *Tate v Duncan-Strelec* [2013] NSWSC 1446 (27 September 2013).

158 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [75].

12.132 In direct contrast to defamation cases, courts considering injunctions to restrain a breach of confidence do not exercise any special caution in the interests of free speech or other broadly defined public interests. The courts in both equitable and contractual cases emphasise that, when granting an injunction to restrain a breach of confidence, they are holding the defendant to his or her pre-existing commitment or obligation, usually voluntarily undertaken, not to disclose the plaintiff's confidential information. In the case of a third party, the third party is bound when they know that the information was imparted in such circumstances.[159] On many occasions, the courts have strongly emphasised the public interest in the law's upholding of confidences: if a person cannot rely on confidentiality being upheld, he or she is unlikely to impart the information. In many circumstances, withholding the information would have a deleterious effect on a range of social problems, such as public health or the prevention and detection of criminal conduct. For example, immunity from disclosure of the identity of individuals who give information to authorities about suspected neglect or ill-treatment of children is given because of the public interest served in having such conduct reported.[160]

12.133 Both in claims for breach of an *equitable* obligation of confidence, which lie in equity's exclusive jurisdiction,[161] and perhaps even more so in claims to restrain the breach of a *contractual* obligation of confidence,[162] which lie in the auxiliary jurisdiction,[163] authority in Australia takes a narrow approach to public interest considerations that would justify a breach. Public interest is confined to the exposure of 'iniquity'. The principle of general application, where the court is considering an injunction to restrain the breach of an equitable obligation of confidence, was stated by Gummow J in *Re Corrs Pavey Whiting and Byrne v Collector of Customs of Victoria and Alphapharm Pty Ltd*:

> That principle, in my view, is no wider than one that information will lack the necessary attribute of confidence if the subject matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed.[164]

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159 *Earl v Nationwide News Pty Ltd* [2013] NSWSC 839 (20 June 2013) 17.

160 *D v NSPCC* [1978] AC 171. Another example, and a rare exception to the principle of open justice, is the protection of the identity of victims of blackmail and similar offences: *R v Socialist Worker Printers and Publishers Ltd* [1975] 1 QB 637. In blackmail and analogous cases, the basic principle of open justice may be qualified if it is positively established that, without giving anonymity to an informant, justice could not be done because of the grave difficulty in having the witnesses come forward: *R v His Honour Judge Noud; Ex parte MacNamara* (1991) 2 Qd R 86, 106.

161 The exclusive jurisdiction arises where a court of equity is dealing with equitable claims: Meagher, Heydon and Leeming, above n 124, [21–015].

162 *Re Corrs Pavey Whiting and Byrne v Collector of Customs of Victoria and Alphapharm Pty Ltd* [1987] FCA 266 (13 August 1987) [57]. Contractual claims attract equity's auxiliary jurisdiction to restrain the breach of a negative covenant. Meagher, Heydon and Leeming, above n 124, [21–195].

163 The auxiliary jurisdiction of equity arises where the court is considering equitable remedies in aid of common law wrongs or to prevent the unconscionable reliance on common law rights: Meagher, Heydon and Leeming, above n 18, [21–345].

164 *Re Corrs Pavey Whiting and Byrne v Collector of Customs of Victoria and Alphapharm Pty Ltd* [1987] FCA 266 (13 August 1987) [57].

12.134 The current Australian approach differs from the much broader approach to public interest taken in the UK in such cases.[165] In a later case, Gummow J stated:

> (i) an examination of the recent English decisions shows that the so-called 'public interest' defence is not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence, and (ii) equitable principles are best developed by reference to what conscionable behaviour demands of the defendant not by balancing and then overriding those demands by reference to matters of social or political opinion.[166]

12.135 More recently, it has been said that, '[i]t is true that the existence of, and/or the extent of any public interest defence to a breach of confidentiality is by no means clear and settled in Australia'.[167] Breach of confidence claims arise in a wide range of social and commercial contexts and the ALRC is not concerned with considering whether a broader public interest test should be introduced in breach of confidence actions in general. The issue is relevant only in relation to the impact the approach may have on the way that the courts deal with privacy claims.

Injunctions to restrain disclosure of *private* information

12.136 If the statutory cause of action were enacted, questions will inevitably arise as to what approach the courts should take where they are considering a claim for misuse or disclosure of *private* (rather than confidential) information.[168] Should 'private information' cases be seen as more analogous to defamation cases or as more analogous to breach of confidence cases? Should a similar caution as in defamation cases be exercised when considering applications for interlocutory injunctions to restrain publication of private information?

12.137 In many cases where there is a potential for inconsistency between different causes of action, or between common law and statutory regimes, the High Court of Australia has emphasised the need for coherence in the development of the common

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165 *Australian Football League v The Age Company Ltd* (2006) 15 VR 419, [72]–[94]; *Re Corrs Pavey Whiting and Byrne v Collector of Customs of Victoria and Alphapharm Pty Ltd* [1987] FCA 266 (13 August 1987), [41]; *AG Australia Holdings Ltd v Burton* 58 NSWLR 464, [173]; Meagher, Heydon and Leeming, above n 18, [41–115]–[41–125]. Cf Aplin et al, above n 19, [16.05]–[16.57] on the more expansive approach.

166 *Smith Kline and French Laboratories (Aust) Ltd v Secretary, Dept of Community Services and Health* [1990] FCR 73, 111. See further, *Australian Football League v The Age Company Ltd* (2006) 15 VR 419, [72]–[94].

167 *Australian Football League v The Age Company Ltd* (2006) 15 VR 419, [75]. If there is a defence of public interest to disclosure of confidential information, it may be limited in scope: *Commonwealth v John Fairfax and Sons* (1980) 147 CLR 39, 56–57.

168 'There is some uncertainty as to whether, and if so when, a court should refuse an injunction on the basis of *Bonnard v Perryman* when it is sought by a claimant who advances his cases only on the basis of privacy': *Spelman v Express Newspapers* [2012] EWHC 355 (QB) (24 February 2012) [64]. See, also, Godwin Busuttil and Patrick McCafferty, 'Interim Injunctions and the Overlap between Privacy and Libel' (2010) 2 *Journal of Media Law* 1.

law.[169] It is important, therefore, that actions for invasion of privacy be treated consistently with other actions where rationales are similar.[170]

12.138 Depending on their facts, actions for invasion of privacy under the new tort would sit somewhere between defamation and breach of confidence actions. They may share some of the characteristics of both actions but differ in other ways. Like confidential information, the privacy of information once lost, may be lost forever. This is particularly so in the digital era where it is often simply not possible to erase all disclosures of private information on the internet, despite attempts and even court directions to do so.[171] A refusal to give injunctive relief to restrain the publication of private information would therefore, like that to prevent a breach of confidence, 'substantially determine the plaintiff's claim for final injunctive relief'.[172] Unlike a breach of confidence claim, however, the claim is not necessarily based on a pre-existing obligation or commitment to maintain privacy. And, in contrast to the current Australian law on breach of confidence, the new statutory cause of action would require the court to consider a broader range of public interest matters than matters which may come within the description of an 'iniquity'.

12.139 Unlike a defamation case, a defendant in a privacy case cannot assert the truth of the disclosed information as a complete defence.[173] The complaint in defamation is that the defendant has published *false* defamatory statements. Nearly all cases of invasion of privacy by wrongful disclosure in other jurisdictions involve information which might be assumed to be *true*.[174]

12.140 There is, however, just as strong and justifiable a concern that a chilling effect upon freedom of speech and the freedom of the press may be achieved by unmeritorious claims to prevent the disclosure of allegedly 'private' information in which there is a legitimate public interest. It may therefore be strongly arguable that similar considerations to those in defamation cases should apply where the defendant

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169 *Sullivan v Moody* (2001) 207 CLR 562. See further Rolph, 'Irreconcilable Differences? Interlocutory Injunctions for Defamation and Privacy', above n 29, 187–190.

170 Given that the plaintiff under the new tort would be asserting a statutory wrong rather than an 'equitable' one, the court would be exercising its auxiliary or concurrent jurisdiction, rather than its exclusive jurisdiction. See Meagher, Heydon and Leeming, above n 124, 708, 714. The principles as to injunctions vary.

171 *Google Spain SL, Google Inc v Agencia Espanola de Proteccion de Datos (AEPD), Mario Costeja Gonzalez* (CJEU) C‑131/12 (13 May 2014).

172 *Earl v Nationwide News Pty Ltd* [2013] NSWSC 839 (20 June 2013) [18].

173 In the past, many claimants in Australia used the action for defamation to protect their privacy against disclosure of embarrassing private facts, because in some states, the defendant could not defend the defamation merely on the basis that the imputations were true, but also had to show a public interest or public benefit in their publication. This is no longer the case due to changes to the law by the uniform state *Defamation Acts* of 2005: Sappideen and Vines, above n 24, 635–639.

174 Just as the fact that the information is true is not a defence to an action for misuse of private information, a claimant against the misuse of private or confidential information cannot defend a claim by demonstrating that the matter is untrue. Unlike a case in defamation, the issue in such a case is whether the information is private, not whether it is true or false: *McKennitt v Ash* [2008] QB 73, [80], [86].

asserts a defence of sufficient strength to justify the court taking a cautious approach.[175]

12.141 The ALRC recommendation reflects that concern, and, without suggesting that the same approach to defamation cases should prevail, suggests that at least the courts should be directed to consider countervailing public interests when dealing with an application for an injunction to restrain the publication of *private* information. It will be a matter for the courts as to how the balance of protection should be struck in particular cases, in the light of technological and social conditions very different from 1891 when *Bonnard v Perryman* was decided.[176] As mentioned above, the existence of such a provision would indicate a clear intention that public interest should be considered and would provide considerable assurance to media and other stakeholders concerned that the new tort would unduly impinge on freedom of speech.

12.142 The ALRC's recommendation has a similar intent to s 12(4) of the *Human Rights Act 1998* (UK), although it is in more general terms. Section 12(4) reinforces the requirement of the *European Convention on Human Rights* that the right to privacy in art 8 be balanced with the right to freedom of expression in art 10, when determining whether there has been an actionable invasion of privacy at all. While this balancing already takes place when determining whether there is an actionable misuse of private information,[177] s 12 provides the added protection of art 10 rights:[178]

> s 12 Freedom of expression
>
> This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> ...
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

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175 There is also a concern that, if the applicable considerations or approach to be applied by the courts in defamation cases and privacy cases differed, a claimant may attempt to avoid the cautious approach in defamation cases, by framing or pleading his or her case, inappropriately, as a privacy case: *Lord Browne of Madingly v Associated Newspapers Ltd* [2007] EWCA Civ 295, [28] (Eady J). This concern motivated Tugendhat J in *Terry v Persons Unknown* [2010] to note that 'it is a matter for the court to decide whether the principle of free speech prevails or not, and that it does not depend solely upon the choice of the claimant as to his cause of action': *Terry v Persons Unknown* [2010] EWHC 119 (QB), [88]. He dismissed the claimant's application for an injunction to restrain the publication of confidential and private information: 'Having decided that the nub of this application is a desire to protect what is in substance reputation, it follows that in accordance with *Bonnard v Perryman* no injunction should be granted'[123]. Witzleb argues that this approach is inconsistent with the requirements of the *Human Rights Act 1998* (UK): Normann Witzleb, 'Interim Injunctions for Invasions of Privacy: Challenging the Rule in Bonnard v Perryman?' in Normann Witzleb et al (eds), *Emerging Challenges in Privacy Law: Comparative Perspectives* (Cambridge University Press, 2014). Cf the Australian position outlined in Rolph, 'Irreconcilable Differences? Interlocutory Injunctions for Defamation and Privacy', above n 141, 29. See, also, Busuttil and McCafferty, above n 168.

176 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [269]–[280] (HeydonJ).

177 *Campbell v MGN Ltd* [2004] 2 AC 457.

178 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) 19–22.

(a) the extent to which—

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

12.143 Section 12(4) of the *Human Rights Act 1998* (UK) has been considered in a number of cases since its enactment and by a Joint Committee of the House of Lords and House of Commons in 2012. The courts have rejected an interpretation that the sub-section requires them to give *greater* weight to the Convention rights to freedom of expression than to the plaintiff's interest in privacy. Lord Hope in *Campbell v MGN Ltd* noted

> [A]s Sedley LJ said in *Douglas v Hello! Ltd* you cannot have particular regard to article 10 without having equally particular regard at the very least to article 8: see also *Re S (A Child) (Identification: Restrictions on Publication)* where Hale LJ said that section 12(4) does not give either article pre-eminence over the other. These observations seem to me to be entirely consistent with the jurisprudence of the European court.[179]

12.144 Similarly, the House of Lords and House of Commons Joint Committee's Report stated:

> We do not think that section 12(4) of the *Human Rights Act 1998* ... means that article 10 has precedence over article 8 ... However, we support the decision of Parliament to make clear in law the fundamental importance of freedom of expression and would be concerned that removing section 12(4) might suggest that this is no longer the case.[180]

12.145 Section 12(2) and (3) of the *Human Rights Act 1998* (UK) provide:

> (2) If the person against whom the application for relief is made (the respondent) is neither present nor represented, no such relief is to be granted unless the court is satisfied—
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified.
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

12.146 However, in the light of established principles concerning ex parte applications,[181] and the strength of the defendant's case in interlocutory proceedings,

179 *Campbell v MGN Ltd* [2004] 2 AC 457, [488] (citations omitted).

180 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), [59]. David Price QC was quoted at [58] as having told the committee: 'If the purpose of section 12 was to give the benefit of the doubt to freedom of expression then it has certainly failed'. Professor Gavin Phillipson of Durham Law School, quoted at [55], considered that s 12(4) was not intended 'to establish priority for freedom of expression ... [and] it made more sense to read it as requiring judges to give as much weight to freedom of expression as the Convention itself allows'.

181 See, further, Meagher, Heydon and Leeming, above n 18, [21–425].

set out in *ABC v O'Neill,*[182] it is not suggested that provisions similar to s 12(2) and (3) of the *Human Rights Act* (UK) are necessary or desirable in Australia.[183]

Delivery up, destruction or removal of material

Recommendation 12–9 The Act should provide that courts may order the delivery up and destruction or removal of material.

12.147 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 be appropriate in many contexts involving both print information and online information where two people in an intimate relationship share images or text of a highly personal nature and one party intends to, or does, 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 or taken off the internet. Several stakeholders supported this recommendation.[184]

12.148 Women's Legal Services NSW argued that

> it is important that power extend to orders to take down online content. It is essential that this order bind third parties such as internet providers and organisations that run social media websites.[185]

12.149 This power should 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 in the *Copyright Act 1968* (Cth), empowering a court to order the delivery up and destruction of material which violates copyright law.[186]

12.150 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

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182 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57; *Beecham Group v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.

183 On the meaning of 'likely' in s 12(3), see *Cream Holdings Ltd v Banerjee* (2004) 1 AC 253, [22]. In that case, Lord Nicholls stressed that 'likely' could mean different things depending upon its context: *ETK v News Group Newspapers Ltd* (Unreported, [2011] EWCA Civ, 19 April 2011) 439, [6], [24]. In that case, the court explained, it meant 'likely in the sense of more likely than not'.

184 T Butler, *Submission 114*; Office of the Victorian Privacy Commissioner, *Submission 108*; Women's Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 97*; Australian Sex Party, *Submission 92*; S Higgins, *Submission 82*; Guardian News and Media Limited and Guardian Australia, *Submission 80*; Public Interest Advocacy Centre, *Submission 30*; N Witzleb, *Submission 29*; T Gardner, *Submission 3*.

185 Women's Legal Services NSW, *Submission 115*.

186 *Copyright Act 1968* (Cth) s 133.

destruction of evidence.[187] Anton Pillar orders are issued when a court considers that a defendant is likely to destroy documents or property necessary for proceedings.[188]

12.151 The NSWLRC and ALRC[189] 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 any 'articles, documents or material (and any copies), that were made or disclosed as a result of the invasion'.[190]

12.152 Women's Legal Services NSW also submitted that, in order to facilitate access to justice, local courts should be given the power to grant stand-alone injunctive orders such as take down orders and/or deliver up orders.[191] However, there are jurisdictional difficulties and wider implications with local courts being given these powers.

12.153 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.[192] The ALRC has not proposed such an order, because such systemic problems would generally be the result of negligent acts or omissions and be more appropriately dealt with by the regulator. The new tort is confined to intentional or reckless invasions of privacy. Chapter 16 discusses ideas for a wider complaints mechanism for serious invasions of privacy that would allow the Privacy Commissioner to recommend the take down of material.

Correction orders

Recommendation 12–10 The Act should provide that courts may, where false private information has been published, order the publication of a correction.

12.154 The ALRC recommends that courts be given the power to order defendants to publish, in appropriate terms, a correction where false *private* information is published or otherwise disclosed.[193] Such an order can set the record straight, and may

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

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

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

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

191 Women's Legal Services NSW, *Submission 115*.

192 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).

193 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

be necessary where, for example, the defendant disclosed *untrue* private information about the plaintiff. This acknowledges the harm and distress which may be occasioned where false information on a personal or private nature is published.

12.155 As discussed in Chapter 5, the disclosure of private information may amount to a serious invasion of privacy despite the information being untrue.[194] 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.[195]

12.156 Correction orders may reduce the need for a plaintiff's interests to be vindicated through an award of damages.[196] Some plaintiffs may be primarily concerned with correcting the public record, in which case correction orders should target the same audience. Carroll and Witzleb have made the point that in actions to restore personality interests, monetary remedies may be ill-suited.[197] 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.

12.157 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.[198] 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.[199]

12.158 Guardian News raised the concern that correction orders will 'constitute a further and unnecessary restriction on free speech'.[200] Similarly, the ABC was concerned that court-ordered apologies and correction orders could inhibit the editorial independence of journalists.[201] These news organisations were concerned that the

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into account when assessing the 'reasonableness' of any offer of amends, for example in *Defamation Act 2005* (NSW) 2005 s 14.

194 See Ch 5.

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

196 Carroll and Witzleb, above n 17, 236.

197 Ibid, 233.

198 ASTRA, *Submission 47*.

199 See Rec 12–2.

200 Guardian News and Media Limited and Guardian Australia, *Submission 80*.

201 ABC, *Submission 93*.

availability of these remedies will chill media activities, causing journalists to become reluctant to publish news items which may contain *private* information. However, the availability of a correction order will only arise in instances where the defendant published private information which was false and which was a serious invasion of privacy. This is consistent with anti-discrimination law. For instance, in *Eatock v Bolt* Bromberg J noted that the purposes a corrective notice can serve to facilitate are:

> redressing the hurt felt by those injured; restoring the esteem and social standing which has been lost as a consequence of the contravention; informing those influenced by the contravening conduct of the wrongdoing involved.[202]

12.159 There may be instances where a plaintiff would not wish a public correction of false private information to be made—in circumstances where that plaintiff feels the order would compound the hurt, distress or embarrassment occasioned by the original publication. This will be a matter for the plaintiff in a given case.

Apology orders

Recommendation 12–11 The Act should provide that courts may order the defendant to apologise.

12.160 The purpose of a plaintiff seeking an order for the defendant to apologise—either in private or public—will differ depending on the circumstances of the case. The availability of an order requiring a defendant to apologise may, in some circumstances, vindicate the hurt and distress caused to a plaintiff by a serious invasion of privacy.[203] Given the aim of the new 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.

12.161 In many cases, a plaintiff may only seek a public acknowledgment of wrongdoing as a remedy for a serious invasion of privacy. The publicity garnered by a public statement of apology may help to 'restore the esteem and social standing which has been lost as a consequence of the contravention'.[204]

12.162 Carroll and Witzleb have argued that orders for apology help to 'redress the injury by restoring the plaintiff's dignity and personality'.[205] Similarly, Professor 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.[206]

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

203 Several stakeholders supported this proposal: N Witzleb, *Submission 116*; T Butler, *Submission 114*; Office of the Victorian Privacy Commissioner, *Submission 108*; Australian Sex Party, *Submission 92*; S Higgins, *Submission 82*; Insurance Council of Australia, *Submission 15*; I Pieper, *Submission 6*; I Turnbull, *Submission 5*.

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

205 Carroll and Witzleb, above n 17, 237.

12.163 Orders for apologies also serve a public interest in focusing on the defendant's wrongdoing. In this way, public apologies provide an opportunity for a defendant to acknowledge their wrongdoing. Public apologies will therefore carry some deterrent effect and may also serve to educate the public about privacy.[207]

12.164 The ALRC previously recommended that courts be empowered to order a defendant to apologise.[208] 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.[209] The Victorian Law Reform Commission (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.[210]

12.165 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.[211] For example, a court may order an apology under Commonwealth and state anti-discrimination legislation.[212] 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.[213] 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'.[214]

12.166 Apology orders are available in some Australian jurisdictions under existing privacy legislation, for example under s 55(2)(e) of the *Privacy and Personal Information Protection Act 1998* (NSW). In *NZ v Director, Department of Housing*,[215] the NSW Administrative Appeals tribunal ordered—under s 55(2)(e)—the Department of Housing to provide written apology to the claimant for disclosing private information to a third party without consent.

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

207 Carroll, above n 6, 339.

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

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

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

211 Carroll, above n 6, 213.

212 See, eg, *Federal Court of Australia Act 1976* (Cth) s 23. 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. Analogous provisions exist in other jurisdictions: *Anti-Discrimination Act 1991* (Qld) s 209. Apologies made by respondents in personal injury matters are not treated as evidence of admission of fault: *Civil Liability Act 2002* (NSW) s 69.

213 See, eg, *Defamation Act 2005* (NSW) 2005 s 38.

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

215 *NZ v Director, Department of Housing* [2006] NSWADT 173 (7 June 2006).

12.167 Several media organisations and representative groups opposed this proposal.[216] ASTRA opposed any remedy that would allow for apologies or corrections, arguing that existing provisions in the ASTRA Codes, which are subject to enforcement by the ACMA offer sufficient remedies in the context of subscription broadcasting. However, they argued that this remedy could be applied to non-media defendants who are not subject to the ACMA's code of conduct.[217] ASTRA and Guardian News also argued that, where there has been a serious invasion of an individual's privacy, discussion of the relevant information may result in further harm to the individual concerned rather than being an effective remedy. However, if this were the case, the plaintiff would not seek the remedy.

12.168 As with correction orders, the ABC and Guardian News were concerned that apology orders would inhibit editorial independence.[218] Similarly, Guardian News argued that 'requiring media organisations to correct or apologise will constitute a further and unnecessary restriction on free speech'.[219] However, the remedy would only be one of many available remedies and in any event it can only be considered where the plaintiff has made out a serious, unjustifiable, intentional or reckless invasion of privacy.

12.169 A court may order a public or private apology, depending on the circumstances of a case. For an apology to be sincere and meaningful, a court will not compel an apology where a defendant makes clear they offer no remorse and therefore their apology will not come freely.[220]

12.170 Apology orders, like all court-ordered remedies, are coercive in nature and, if breached, constitute contempt of court. Some legislation anticipates breaches of apology orders by providing that orders must be met within a specified period subject to a fine.[221]

Declarations

Recommendation 12–12 The Act should provide that courts may make a declaration.

12.171 The availability of declaratory relief will provide plaintiffs with a sense of certainty and may avoid lengthy and costly court proceedings.[222] Several stakeholders

216 ASTRA, *Submission 99*; ABC, *Submission 93*; Guardian News and Media Limited and Guardian Australia, *Submission 80*.
217 ASTRA, *Submission 99*.
218 ABC, *Submission 93*.
219 Guardian News and Media Limited and Guardian Australia, *Submission 80*.
220 *Eatock v Bolt (No 2)* (2011) 284 ALR 114, [50] (Bromberg J).
221 See, eg, *Anti-Discrimination Act 1977* (NSW) s 108(7).
222 Meagher, Heydon and Leeming, above n 124, [19–180].

supported the availability of declaratory relief in an action for serious invasion of privacy.[223]

12.172 In a declaration in an action for serious invasion of privacy a court may state the nature of the interests, rights or duties of the applicant to an action.[224] A declaration may provide both parties to a proceeding with clarity as to their obligations and rights to avoid 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'.[225]

12.173 Declarations are available in a variety of areas of Australian law.[226] 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.[227] The Australian Competition and Consumer Commission has sought declarations under this provision in numerous cases to determine whether a party has violated Australian consumer law.[228] Declarations are also available in anti-discrimination law.[229]

12.174 The ALRC, NSWLRC and VLRC previously proposed that courts be able to make declarations.[230]

12.175 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) provides the ACMA with the power to accept undertakings from broadcasters on a range of matters.

12.176 However, the ALRC considers that the availability of declaratory relief could have a significant impact on the conduct of a defendant, given the risk of monetary remedies if legal rights which have been the subject of a judicial pronouncement are contravened.

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223 T Butler, *Submission 114*; Office of the Victorian Privacy Commissioner, *Submission 108*; Australian Sex Party, *Submission 92*; J Chard, *Submission 88*; S Higgins, *Submission 82*; Public Interest Advocacy Centre, *Submission 30*; N Witzleb, *Submission 29*.

224 Cairns, above n 187, [1.20].

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

226 Meagher, Heydon and Leeming, above n 124, [19–075].

227 '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': *Federal Court of Australia Act 1976* (Cth) s 21.

228 *Australian Competition & Consumer Commission v Black on White Pty Ltd* [2001] FCA 187.

229 For example, declaratory relief was issued in *Eatock v Bolt (No 2)* (2011) 284 ALR 114.

230 Australian Law Reform Commission, *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) NSWLRC Draft Bill, cl 76(1)(c); Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) rec 29(c).

Costs

12.177 Generally, a successful plaintiff is entitled to receive party and party costs, in the absence of countervailing circumstances.[231] The ALRC considers that a court hearing a claim for serious invasions of privacy should have discretion in relation to awards of costs. The ALRC considers that two options would be appropriate for inclusion in legislation enacting the new tort on the court's power with respect to awards of costs.

12.178 The first option would for the legislation to include a provision similar to s 43(2) of the *Federal Court of Australia Act 1970* (Cth), which provides that, '[e]xcept as provided by any other Act, the award of costs is in the discretion of the Court or Judge'.

12.179 Section 43 then provides for a range of orders that a judge may make, including:

> (3) Without limiting the discretion of the Court or a Judge in relation to costs, the Court or Judge may do any of the following:
>
> make an award of costs at any stage in a proceeding, whether before, during or after any hearing or trial;
>
> make different awards of costs in relation to different parts of the proceeding;
>
> order the parties to bear costs in specified proportions;
>
> award a party costs in a specified sum;
>
> award costs in favour of or against a party whether or not the party is successful in the proceeding;
>
> order a party's lawyer to bear costs personally;
>
> order that costs awarded against a party are to be assessed on an indemnity basis or otherwise.

12.180 This recommendation relates to party and party costs which are those costs that a court may order a party to a proceeding to pay to the other party.[232] Party and party costs must be reasonable and necessary for the proper conduct of a case.[233]

12.181 In its report, *Costs Shifting—Who Pays for Litigation*, Report 75 (1995) (*Costs Shifting)*, the ALRC identified several reasons for the award of costs to a successful plaintiff:

- to compensate successful litigants for at least some of the costs they incur in litigating;
- to allow people without means to litigate;
- to deter vexatious or frivolous or other unmeritorious claims or defences;

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231 *Hughes v Western Australian Cricket Association (Inc)* [1986] FCA 382.

232 *Civil Procedure Act 2005* (NSW) s 98; *Supreme Court Act 1986* (Vic) s 24; *Rules of the Supreme Court 1971* (WA) O 66 r 1; *Court Procedure Rules 2006* (ACT) r 1721; *Local Court Rules* (NT) r 63.03.

233 Cairns, above n 187, [17.80].

- to encourage settlement of disputes by adding to the amount at stake in the litigation; and
- to deter delay and misconduct by making the responsible party pay for the costs his or her opponent incurs as a result of that delay or misconduct.

12.182 The second option would be for the legislation to provide that awards of costs should be determined according to the enabling act of each court or tribunal that is given jurisdiction to hear the action. This would have the advantage that plaintiffs could consider the court or tribunal's particular powers with respect to costs when deciding on an appropriate forum to bring their action.

12.183 The manner in which costs are awarded is critical to providing appropriate access to justice—a principle that informs the work of this Inquiry.[234] Access to justice was raised by several stakeholders who argued that the principle should underscore much of the ALRC's formulation of the new tort.[235]

12.184 The forum in which a statutory cause of action is to be heard will impact on the potential award of costs. The ALRC deals with the matter of forums for the cause of action in Chapter 10, recommending that federal courts and appropriate state and territory courts would have jurisdiction to hear actions under the new tort. The ALRC has not recommended that the new tort be heard in state tribunals such as VCAT,[236] although the ALRC leaves this possibility open.

12.185 Several submissions raised the concern that many plaintiffs may be deterred from starting proceedings due to the risk of an adverse costs order.[237] 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. PIAC argued that,

> in the absence of such a costs rule, there is a risk that privacy-related litigation would become the sole preserve of those wealthy enough to afford to pay for legal representation and to run the risk of incurring an adverse costs order in the event they are unsuccessful. In PIAC's experience, even where pro bono legal representation or representation on a conditional fee basis is secured, many meritorious cases do not proceed due to the risk of an adverse costs order. This is especially the case in matters where there is a great disparity in resources between the applicant and respondent.[238]

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

235 ACCAN, *Submission 106*; Public Interest Advocacy Centre, *Submission 105*; Office of the Australian Information Commissioner, *Submission 90*.

236 The VLRC recommended that costs be dealt with in accordance with s 130 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). 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. This approach was supported by the Office of the Victorian Privacy Commissioner in their submission to the Discussion Paper.

237 Redfern Legal Centre, *Submission 46*; Public Interest Advocacy Centre, *Submission 30*.

238 Public Interest Advocacy Centre, *Submission 105*.

12.186 Similarly, Redfern Legal Centre proposed the adoption of an adverse costs model similar to that operating in employment law in Australia.[239] Under s 570(2)(a) of the *Fair Work Act 2009* (Cth), costs incurred in a proceeding in any court will only be awarded against an unsuccessful plaintiff if the proceedings are vexatious or unreasonable. Redfern Legal Centre argued that privacy complaints were analogous to proceedings under that Act rather than any commercial proceedings.[240]

12.187 The ALRC notes stakeholder concerns about the deterrent effect of potentially adverse costs orders. The ALRC supports the principle of broad access to justice, but notes that costs orders are also designed to deter vexatious or unmeritorious claims.[241] The ALRC considers that actions for serious invasion of privacy should be dealt with consistently with actions brought in the forum for other intentional torts or other analogous actions.

12.188 Women's Legal Services NSW and the Australian Institute of Professional Photography (AIPP) suggested a court should be empowered to award indemnity costs where a defendant has demonstrated malice or vindictiveness.[242] Unlike party-party costs which operate as a partial indemnity for the successful party against liability for legal costs,[243] indemnity costs, which fully compensate the successful party for the inappropriate conduct of another party to the proceedings, are only awarded in exceptional circumstances.[244] Most courts have the power to award indemnity costs in lieu of party-party costs in appropriate circumstances.

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239 Redfern Legal Centre, *Submission 94*.

240 Ibid.

241 Insurance Council of Australia, *Submission 102*.

242 Women's Legal Services NSW, *Submission 115*; Australian Institute of Professional Photography (AIPP), *Submission 95*.

243 Cairns, above n 187, [17.80].

244 Ibid [17.190].