

13. Breach of Confidence Actions for Misuse of Private Information

Contents

Summary	263
The likely future development of the action for breach of confidence	264
Compensation for emotional distress	265
Remedies for breach of confidence	266
Emotional distress: a common result of misuse of private information	268
Why the law needs clarification	269
Stakeholder views	270
The case for compensation for emotional distress	272
Public interest and injunction applications	273

Summary

13.1 In addition to the detailed legal design of a statutory cause of action for serious invasion of privacy, the Terms of Reference require the ALRC to make recommendations as to other legal remedies to redress serious invasions of privacy and as to innovative ways in which the law may reduce serious invasions of privacy.

13.2 In the event that the statutory cause of action is not enacted, the ALRC recommends that courts be empowered by legislation to award compensation for emotional distress in cases involving disclosure of private information.¹

13.3 The recommendation aims, first, to address existing uncertainty as to whether Australian law provides a remedy for emotional distress suffered as a result of the

¹ With regard to intrusion into seclusion, the other type of invasion included in the statutory tort, the ALRC considers that if a statutory cause of action for serious invasion of privacy is not enacted, a statutory action for protection against harassment would be a more targeted or limited way for the law to be developed: this is discussed in Ch 15. Ch 3 considers the possibility of the common law developing a tort of harassment or a tort of invasion of privacy by intrusion into seclusion. It would be necessary for the courts to identify its elements, including whether it: was actionable per se, by analogy with trespass to the person; required damage in the usual sense of psychiatric or physical illness; or required damage but included emotional distress.

disclosure or misuse of private information,² and secondly, to ensure that the law does provide such a remedy.

13.4 This would be a limited and targeted way in which the law could be amended to provide greater redress for serious invasions of privacy and to fill a significant gap in the existing law.

13.5 This chapter begins with a brief section on the likely future development of the breach of confidence action. It then sets out the case for the recommendation. It concludes with an explanation of why the ALRC does not proceed with a proposal made in the Discussion Paper which related to public interest considerations in applications for injunctions to restrain the publication of private information.

The likely future development of the action for breach of confidence

13.6 In Chapter 3, the ALRC sets out the existing legal protection of an individual's privacy, and notes the consensus of both courts and commentators that the course of the likely future development of the common law in this area is still uncertain.

13.7 In *ABC v Lenah Game Meats*, the court suggested that existing legal actions may be extended to protect against invasions of privacy. Gummow and Hayne JJ, with whom Gaudron J agreed, considered a broad range of privacy invasions and left open the direction that the future development of the law protecting privacy may take:

In the present appeal Lenah encountered ... difficulty in formulating with acceptable specificity the ingredients of any general wrong of unjustified invasion of privacy. Rather than a search to identify the ingredients of a generally expressed wrong, the better course ... is to look to the development and adaptation of recognised forms of action to meet new situations and circumstances ...

Lenah's reliance upon an emergent tort of invasion of privacy is misplaced. Whatever development may take place in that field will be to the benefit of natural, not artificial, persons. It may be that development is best achieved by looking across the range of already established legal and equitable wrongs. On the other hand, in some respects these may be seen as representing species of a genus, being a principle protecting the interests of the individual in leading, to some reasonable extent, a secluded and private life, in the words of the *Restatement*, 'free from the prying eyes, ears and publications of others'. Nothing said in these reasons should be understood as foreclosing any such debate or as indicating any particular outcome.³

13.8 Gleeson CJ appeared to foreshadow that the equitable action for breach of confidence may be the most suitable legal action for protecting people's *private* information from disclosure, stating:

2 This recommendation would not, therefore, apply to cases involving commercial information or the like. In this chapter, the ALRC intends 'private' information to mean information as to which a person in the position of the plaintiff has a reasonable expectation of privacy in all of the circumstances.

3 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [110], [132]. Citing the American Law Institute, *Restatement of the Law of Torts (Second)* (1977), 2d § 652A, Comment b.

[E]quity may impose obligations of confidentiality even though there is no imparting of information in circumstances of trust and confidence. And the principle of good faith upon which equity acts to protect information imparted in confidence may also be invoked to ‘restrain the publication of confidential information improperly or surreptitiously obtained’. The nature of the information must be such that it is capable of being regarded as confidential. A photographic image, illegally or improperly or surreptitiously obtained, where what is depicted is private, may constitute confidential information ...

If the activities filmed were private, then the law of breach of confidence is adequate to cover the case ... There would be an obligation of confidence upon the persons who obtained [images and sounds of private activities], and upon those into whose possession they came, if they knew, or ought to have known, the manner in which they were obtained ...

The law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy.

For reasons already given, I regard the law of breach of confidence as providing a remedy, in a case such as the present, if the nature of the information obtained by the trespasser is such as to permit the information to be regarded as confidential.⁴

13.9 Despite the influential and open invitation by the High Court to the lower courts to develop further protection, there has been only isolated development of further privacy protection in Australia at common law, as discussed in Chapter 3, making it difficult to predict the precise direction of future developments.⁵

13.10 Nevertheless, this chapter assumes that, in the absence of a statutory cause of action, the development of the equitable action for breach of confidence is the most likely way in which the common law may, in time, develop greater protection of privacy in relation to misuse and disclosures of private information.⁶

Compensation for emotional distress

Recommendation 13–1 If a statutory cause of action for serious invasion of privacy is not enacted, appropriate federal, state, and territory legislation should be amended to provide that, in an action for breach of confidence that concerns a serious invasion of privacy by the misuse, publication or disclosure of private information, the court may award compensation for the plaintiff’s emotional distress.

4 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [34], [39], [40], [55].

5 ‘The recent High Court of Australia decision in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* does little to clarify the future direction of Australian jurisprudence’: *Hosking v Runting* (2005) 1 NZLR 1, [56]–[59] (Gault P and Blanchard J).

6 The alternative way for the common law to develop greater protection would be to recognise a new tort, as in New Zealand. See further Ch 3.

13.11 There are several arguments in favour of the ALRC's recommendation for compensation for emotional distress. First, if legislation clarified or confirmed that equitable compensation⁷ could be awarded for emotional distress, the *existing* action for breach of confidence would more readily be seen as a useful response to serious invasions of privacy, and be more attractive to potential plaintiffs.⁸ This is particularly important in the event that the statutory cause of action is not enacted.

13.12 Secondly, the effectiveness and availability of the remedy may deter invasions of privacy involving disclosures of private information.

13.13 Thirdly, this recommendation would be an effective way of addressing a significant gap in existing legal protection of privacy while being more limited and directed than the introduction of a new statutory cause of action.

13.14 Fourthly, this provision would indicate that Australian legislatures intended that the action for breach of confidence could be relied on to remedy these kinds of invasions of privacy.

Remedies for breach of confidence

13.15 In traditional claims for breach of confidence in Australia, plaintiffs have generally sought one of three remedies: an injunction to restrain an anticipated or continuing breach of confidence; an account of the anticipated profits derived from a breach; or compensation for economic loss due to a breach.

13.16 An injunction to restrain publication or misuse is the most valuable and effective remedy in respect of all kinds of information: commercial, governmental or personal information. The remedies of an account of profits or equitable compensation are usual in cases involving commercial information. Beginning with Prince Albert suing to restrain the publication of a catalogue of Queen Victoria's family etchings in 1849,⁹ breach of confidence actions in equity have long been used to protect personal information, but the cases invariably concerned applications for injunctions.¹⁰

7 The term 'equitable compensation' here is used to refer to an award of monetary compensation in an equitable action. 'Equitable compensation' has become the standard term for equitable monetary relief awarded for loss suffered by reason of breach of a purely equitable obligation—that is, in the exclusive jurisdiction': Dyson Heydon, Mark Leeming and Peter Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2014) [23–015]. The authors distinguish 'damages' which are awarded in common law actions, including under *Lord Cairns' Act*. See also the 'Remedies' section of Chapter 42 'Confidential Information' of the same book; and *The Salvation Army (South Australia Property Trust) v Rundle* [2008] NSWCA 347.

8 Normann Witzleb, 'Giller v Procopets: Australia's Privacy Protection Shows Signs of Improvement' (2009) 17 *Torts Law Journal* 121, 123–124: 'Considering that breach of confidence will, until more specific protection is in place, continue to act as Australia's quasi-privacy tort, courts need to afford adequate protection against emotional distress.'

9 *Prince Albert v Strange* (1849) 1 Mac G 25.

10 Public Interest Advocacy Centre, *Submission 105*. See also *Stephens v Avery* [1988] Ch 449, 454; *Argyll v Argyll* (1965) 1 ER 611; *Lennon v News Group Newspapers Ltd* [1978] FSR 573.

Compensation for breach of confidence

13.17 While the general entitlement to compensation for breach of confidence is now well-established, issues about assessment remain unresolved. In 1982, IE Davidson noted that, even in commercial cases, assessment of loss was difficult:

The 'protean quality of information' makes it difficult to estimate what is required to finally restore a plaintiff to his position prior to the breach of his confidence. Nevertheless, relief based on the value for which the information would be sold between a willing buyer and a willing seller seems to be a satisfactory general criterion. There may be more serious difficulties in using Equity's compensatory jurisdiction to remedy breaches of personal confidence where the damage suffered by the discloser through the confidant's breach of duty will rarely be directly measurable in financial terms. Compensation, being based on specific restitution for the value of what has been lost, seems more appropriate for recovering identifiable financial loss or specific property than for granting solatium for personal suffering or loss of reputation caused by breach of a personal confidence. Whilst compensation may have a role, the major scope for a principled development of techniques with which to remedy losses due to breach of this equitable duty will be where the confidential information had a commercial value.¹¹

13.18 In 1999, the New South Wales Court of Appeal was still describing equitable compensation as 'a developing area of the law'.¹² In 2014, the authors of *Meagher Gummow and Lehane's Equity: Doctrines and Remedies* state:

Monetary awards for loss, or something like loss, are awarded in a variety of contexts in equity. 'Equitable compensation' has come to denote many of these. It has become a category of concealed multiple reference: no single formulation can accurately describe all the applications of this relief.¹³

13.19 In cases involving confidential personal or private information, the plaintiff's economic losses or the defendant's profits would seem to be readily recoverable where the private information had a commercial value. Where it does not have a commercial value, the plaintiff may nevertheless have suffered economic loss, such as the cost of hiring a public relations consultant to manage resultant publicity, or loss of employment. A plaintiff may also suffer some other type of harm such as personal injury or psychiatric injury but there is a dearth of authority on whether such damage is recoverable.¹⁴

11 Ian Davidson, 'The Equitable Remedy of Compensation' [1982] *Melbourne University Law Review* 349, 396.

12 *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, [431]. See also, Heydon, Leeming and Turner, above n 7, [23–020].

13 Heydon, Leeming and Turner, above n 7.

14 Authorities denying claims for personal injury based on fiduciary duties turn on the absence of a fiduciary obligation to protect that type of interest. See also, *Ibid* [23–605]. Recovery of common law damages in contractual cases depends on remoteness principles: see eg, *Cornelius v de Taranto* [2001] EMLR 12; *Archer v Williams* [2003] EWHC 1670 (QB).

Emotional distress: a common result of misuse of private information

13.20 Where a breach of confidence in relation to *personal* confidential or private information has already occurred and an injunction is futile, the consequence that a plaintiff is most likely to suffer is emotional distress. Professor Michael Tilbury has noted that ‘the very object of the action [for invasion of privacy] will be to protect plaintiffs against [mental or emotional distress], at least in part’.¹⁵

13.21 The Law Institute of Victoria submitted that ‘harm caused by breaches of privacy is more likely to be harm such as embarrassment, humiliation, shame and guilt. Given the centrality of privacy to identity, these harms should not be seen as insignificant, even though they are not physical or financial’.¹⁶

13.22 It is well-established that tort law allows recovery of compensation for ‘mere’ emotional distress, even intentionally caused, in only limited circumstances.¹⁷ The issue of whether compensation for emotional distress can be awarded in equity was first raised in Australia in *Giller v Procopets*.¹⁸ Neave JA of the Supreme Court of Victoria Court of Appeal noted: ‘[t]he Australian position appears to be at large on this issue. I am not aware of any appellate court decision which has considered it.’¹⁹

13.23 Allowing the plaintiff’s appeal, the court in *Giller v Procopets* held that the plaintiff could recover damages for emotional distress in her equitable claim for breach of confidence. The claim was clearly one for breach of confidence, as the material that had been disclosed by the defendant, a videotape of intimate activities, had been created by the plaintiff and defendant while in a de facto relationship. The court unanimously agreed that the plaintiff could recover compensation for her consequent emotional distress as equitable compensation.²⁰ An application by the defendant to the High Court for leave to appeal was rejected.²¹

15 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, 140. Note also: *Privacy Act 1988* (Cth) s 52(1) provides that the Information Commissioner investigating a complaint concerning a breach of that Act may make a determination that the complainant is entitled to compensation for loss, which is defined to include injury to the complainant’s feelings or humiliation suffered by the complainant.

16 Law Institute of Victoria, *Submission 22*.

17 Unlike the position in the United States, Australian courts, like those in the United Kingdom and elsewhere, do not recognise a cause of action for wilful infliction of emotional distress. The tort action for wilful infliction of nervous shock, known as the action under *Wilkinson v Downton* (1897) 2 QB 57 is an ‘action on the case’, and like an action in negligence, requires proof of actual damage such as recognised psychiatric illness: *Giller v Procopets* (2008) 24 VR 1, (Neave JA & Ashley JA, Maxwell P dissenting); *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 417; *Wainwright v Home Office* [2004] 2 AC 406. See further, Barbara McDonald, ‘Tort’s Role in Protecting Privacy: Current and Future Directions’ in J Edelman, J Goudkamp and S Degeling (eds), *Torts in Commercial Law* (Thomson Reuters, 2011).

18 *Giller v Procopets* (2008) 24 VR 1.

19 Ibid [419]. See also Ashley JA at [133].

20 Neave JA, with whom Maxwell JA agreed, also supported the award as damages under the Victorian equivalent of *Lord Cairns’ Act*: s 38 of the *Supreme Court Act 1986* (Vic). Ashley JA in *Giller v Procopets* (2008) 24 VR 1 at [141] did not agree that s 38 empowered the award: ‘I should next say that, upon the question of the availability of damages for mental distress, the common law would provide no

Why the law needs clarification

13.24 It is desirable for legislation to clarify the courts' powers to award compensation for emotional distress, notwithstanding the judgment in *Giller v Procopets*, for several reasons.

13.25 First, at the time of this Report, *Giller v Procopets* remains the sole appellate authority for the recovery of compensation for emotional distress in a breach of confidence action. The position reached in that case has not been further tested or applied in Australia. Prior to that decision, a County Court judge in Victoria, in the 2007 case of *Doe v Australian Broadcasting Corporation*, awarded equitable compensation of \$25,000 for breach of confidence, for 'hurt, distress, embarrassment, humiliation, shame and guilt', as part of a larger award for other wrongs.²² The case was settled before appeal.

13.26 Secondly, the basis on which equity can award compensation, by way of common law compensatory damages and aggravated damages, for emotional distress arising from the breach of a purely equitable wrong remains unclear, even if *Lord Cairns' Act* or s 38 of the *Supreme Court Act 1986* (Vic) does apply. It is problematic to have a grant of equitable compensation or 'damages' by analogy with tort law, when, as Ashley JA pointed out, 'with few exceptions, the common law has turned its face against awards of damages for distress'.²³ This is even more so when, as the majority held, tort law would not have provided a remedy in the circumstances. This point is *not* an argument that the judgment undesirably fuses law and equity,²⁴ although that argument could also be made.²⁵ Rather it is an argument that the law would be

assistance to the appellant even if s 38 was treated as making common law remedies available in a case within the exclusive jurisdiction. With few exceptions, the common law has turned its face against awards of damages for distress.' Later at [148]: 'But that does not mean that equity must do so'. He supported the award of compensation under the exercise of equity's inherent jurisdiction. Section 38 of the *Supreme Court Act 1986* (Vic), relied upon to justify the award of compensation in *Giller v Procopets*, differs from the form of *Lord Cairns' Act* in other jurisdictions, where there is still controversy as to whether *Lord Cairns' Act* applies in aid of purely equitable rights such as breach of confidence: *Supreme Court Act 1970* (NSW) s 68; *Supreme Court Act 1935* (SA) s 30; *Supreme Court Act 1935* (WA) s 25; *Supreme Court Civil Procedure Act 1932* (Tas) s 11; *Judicature Act 1876* (Qld) s 4; RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002), [23–030]. The authors in Tanya Aplin et al, *Gurry on Breach of Confidence* (Oxford University Press, 2nd ed, 2012) [19.11] state that some courts 'have taken the view that *Lord Cairns' Act* could, and should, apply to confidence claims', but that 'leading commentators continue to argue that *Lord Cairns' Act* had no effect on causes of action which were purely equitable (such as breach of confidence), rather in such cases equitable compensation should be awarded'. See also [19.15] and *Cadbury Schweppes v FBI Foods* [2000] FSR 491.

21 *Procopets v Giller* (M32/2009) [2009] HCASL 187.

22 *Doe v Australian Broadcasting Corporation* [2007] VCC 281, [186].

23 *Giller v Procopets* (2008) 24 VR 1, [141].

24 '[A]cceptance by the courts in most common law jurisdictions that (in relation to remedies at least) the rules of equity and law can be moulded to do practical justice means that the availability of remedies for breach of confidence are not, and should not be, confined by the nature of the jurisdiction upon which the claim is based. Rather the approach the court adopts should be flexible with the full panoply of remedies being available in appropriate cases. Nevertheless, this approach is not at present acknowledged by the Australian courts, and there is some indication that fusion has not been fully embraced elsewhere.': Aplin et al, above n 20, [17.13].

25 Meagher, Heydon and Leeming, above n 20, [2–145] 59.

more coherent if there was legislative clarification that equitable compensation could be awarded for emotional distress where private information was misused, published or disclosed.

13.27 Thirdly, there is an unsettling lack of precedent for the award of equitable compensation for emotional distress decision, other than the decision in *Giller v Procopets*. The ALRC has been unable to find any other precedent for the award of compensation for emotional distress in a purely equitable claim.²⁶ Further, the decision is arguably inconsistent with another decision in which a state appellate court rejected a claim in an equitable action for punitive damages, previously only given at common law.²⁷ The courts of the United Kingdom, starting with *Campbell v MGN Ltd* in 2004, have routinely awarded damages for emotional distress in the so-called ‘extended’ action of breach of confidence which protects against disclosures of private information. However, these awards are clearly underpinned by the requirements of the *Human Rights Act 1998* (UK), which provides a very different remedial framework from that in the Australian legal system.

13.28 It may be argued that the remedial flexibility of equity allows the award of compensation for emotional distress without the need for a precedent, provided that the award consistent with broad equitable principles and doctrines.²⁸ Gummow J has contrasted the approach of equity to the common law:

The common law technique ... looks to precedent and operates analogically as a means of accommodating certainty and flexibility in the law. *Equity, by contrast, involves the application of doctrines themselves sufficiently comprehensive to meet novel cases.* The question of a plaintiff ‘what is your equity?’ [as posed by Gleeson CJ in *ABC v Lenah Game Meats Pty Ltd*²⁹] thus has no common law counterpart.³⁰

13.29 In a similar vein, Meagher, Gummow and Leeming refer to equity’s ‘inherent flexibility and capacity to adjust to new situations by reference to mainsprings of the equitable jurisdiction.’³¹

13.30 Notwithstanding these general statements, the ALRC considers that legislative clarification is desirable, as it would make the basis for an award clear and certain.

Stakeholder views

13.31 Most stakeholders who responded to the Discussion Paper commented on issues relating to the statutory cause of action or regulatory reforms rather than on the proposals that dealt with limited ways to supplement the common law. Comments on

26 Cf cases based on a contractual obligation: *Cornelius v de Taranto* [2001] EMLR 12. See further, B McDonald, ‘Defences to Privacy: Transformation, Fault, and Public Interest’ in J Goudkamp, F Wilmott-Smith and A Dyson (eds), *Tort Defences* (Hart Publishing, 2014).

27 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298.

28 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 304 (Spigelman CJ), quoted in *Giller v Procopets* (2008) 24 VR 1, [436] (Neave JA).

29 *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 216.

30 *Roads and Traffic Authority of New South Wales v Dederer* (2007) 324 CLR 330, [57] (emphasis added).

31 Meagher, Heydon and Leeming, above n 20, 415 [12–045].

this proposal varied. Those stakeholders who saw no gaps in existing law or regulation, or who considered that their industry was already over regulated, opposed the proposal,³² or argued that such a development should be left to the courts.³³

13.32 Guardian News and Media Limited and Guardian Australia, for example, submitted that

[I]t would be preferable for the proposed statutory cause of action to be introduced rather than the modification of an existing cause of action. Attempts to ‘shoehorn’ an established action to cover an adjacent or similar situation result in the twisting of the original cause of action and fail to appropriately balance the relevant interests.³⁴

13.33 The Australian Privacy Foundation supported the proposal. It submitted that it would be desirable whether or not the statutory cause of action were enacted, and that it should not be confined to private information but extend to any breach of confidence action.³⁵ The ALRC does not agree with these additional points. A recommendation that extended to non-private confidential information would exceed the ALRC’s Terms of Reference, and would have far-reaching implications for commercial actions generally. If the cause of action for serious invasions of privacy is enacted, the recommendation, which is aimed at filling a gap in the existing law, would be unnecessary.

13.34 Other stakeholders supported the proposal in the event that the statutory cause of action was not enacted.³⁶ The Office of the Victorian Privacy Commissioner supported the proposal, submitting that

This would clarify the current common law position and strengthen an action for breach of confidence.³⁷

13.35 David Day also submitted that the proposal should not be seen as an alternative to a statutory cause of action, but as a ‘minor amendment to existing law that would offer limited improvement to privacy protection’.³⁸

32 ASTRA, *Submission 99*; Australian Bankers’ Association, *Submission 27*. ASTRA also noted in its submission that public interest should be considered when assessing compensation for emotional distress. As noted above, there is currently no broad ‘public interest’ defence to breach of confidence actions in Australia.

33 Free TV, *Submission 109*. In its submission to the Discussion Paper, Telstra stated: ‘Consistent with our previous submission, we do not believe damages should be awarded for emotional distress.’ In its submission to Issues Paper 43, Telstra commented: ‘if a significant increase in invasion or breach of privacy claims does occur in the future, as Gummow and Hayne JJ noted in *Lenah*, the adaptation and development of recognised causes of action to meet new situations and circumstances may be the most appropriate method of addressing this issue.’ From this the ALRC infers that Telstra thinks the issue should be left to the courts to decide: Telstra, *Submission 107*; Telstra, *Submission 45*.

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

35 Australian Privacy Foundation, *Submission 110*.

36 Domestic Violence Legal Service and North Australian Aboriginal Justice Agency, *Submission 120*; T Butler, *Submission 114*; Public Interest Advocacy Centre, *Submission 105*; Australian Sex Party, *Submission 92*; J Chard, *Submission 88*; S Higgins, *Submission 82*; Women’s Legal Services NSW, *Submission 76*.

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

38 D Day, *Submission 72*.

The case for compensation for emotional distress

13.36 Compensation for emotional distress should be part of the armoury of remedies available to a court of equity when determining a claim for breach of confidence through the disclosure of private information. As Neave JA has noted, '[a]n inability to order equitable compensation to a claimant who has suffered distress would mean that a claimant whose confidence was breached before an injunction could be obtained would have no effective remedy'.³⁹

13.37 A remedy for emotional distress may have a powerful normative effect in the prevention of serious invasions of privacy by way of misuse or disclosure of private information. This is particularly relevant in light of the ease with which private information may be disclosed or distributed using new communication technologies.

13.38 Internet and other digital communication technology has enabled widespread and sometimes irreversible disclosures of private information causing continuing and serious harm and distress. As Gleeson CJ said in *ABC v Lenah Game Meats Pty Ltd*, citing the significant privacy concerns raised by advances in technology, '[t]he law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy'.⁴⁰

13.39 It may well be that courts will arm themselves with the power by following the lead of *Giller v Procopets*. However, the position would be rendered more certain, and there would be less room for 'doctrinal angst',⁴¹ argument and costly or risky litigation along the way, if legislation were the source of that power. Some stakeholders agreed that the issue of recovery of compensation for emotional distress 'remains unnecessarily complex and uncertain'.⁴² It is therefore highly desirable that there be legislative clarification.

13.40 Legislation also has the advantage over common law development that it may be carefully crafted, if thought necessary, to deal with only the most egregious cases of breach of confidence concerning misuse, disclosure or publication of private information. While equitable liability for breach of confidence is conscience-based, a breach of confidence can be committed without any intent to harm, once the defendant has knowledge of the confidential nature of the information.⁴³ The same approach may be taken with regard to private information, whether or not it is also confidential.

13.41 The ALRC notes also that it may be appropriate to limit the remedy of compensation for emotional distress caused by disclosures of private information to the most egregious cases, such as where the disclosure was done intentionally, recklessly or even maliciously.

39 *Giller v Procopets* (2008) 24 VR 1, [424]. Cf Ibid [168]–[169] (Gillard J).

40 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 225, [40].

41 D Butler, *Submission 74*. '[A]ny discussion of the application of the remedy of damages in breach of confidence cases is fraught with difficulty at the outset': Aplin et al, above n 20, [19.02].

42 Australian Privacy Foundation, *Submission 110*.

43 *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] 1 WLR 1556. See also, McDonald, 'Defences to Privacy: Transformation, Fault, and Public Interest', above n 26.

Public interest and injunction applications

13.42 In the Discussion Paper, the ALRC proposed that legislation be enacted to require a court to give particular consideration to countervailing public interests, including freedom of expression, when considering an application for an injunction to prevent publication of private information, where there was not an added element of confidentiality.⁴⁴

13.43 It was suggested that such a proposal would be desirable if the statutory tort were not enacted, and if, instead, greater protections against disclosure of (merely) private information were to develop at common law by way of the extension of the equitable action for breach of confidence.

13.44 To a certain extent, the proposal rested on an assumption that the likely development of the law would be along the lines of the development in the United Kingdom. The proposal suggested a way of directing the future development of the law. It assumed familiarity with the differences between the current law in the United Kingdom, which includes a similar provision in its *Human Rights Act 1998* (UK), and the current Australian law on breach of confidence.

13.45 The background to the proposal was the lack of clarity, which persists, about the principles that should govern the exercise of the court's discretion in any action to protect private information: would a court take an approach similar to that in breach of confidence cases or to that in defamation cases?

13.46 Australian case law provides only a very limited role for public interest considerations as a justification for restraining publication in breach of an obligation of confidence.⁴⁵ Injunctions are readily awarded to restrain the breach of a negative covenant, such as a promise not to breach confidence by revealing confidential information. The courts stress in such cases that there is an important public interest in the law holding a person to an obligation of confidence that they undertook or knew about: people will not volunteer information, even where it is in the public interest that they should do so,⁴⁶ if they feel the confidence will not be respected and enforced.

13.47 By contrast, defamation law incorporates well-established principles that protect freedom of speech, so that it is very difficult to obtain an injunction to restrain a defamatory publication if the defendant puts up a serious argument that it can be justified.⁴⁷

13.48 The ALRC did not propose any legislative change to the way in which courts approach traditional breach of confidence cases. Rather, the ALRC's proposal was that

44 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Discussion Paper 80 (2014) Proposal 12–2.

45 This is in contrast to the law of the United Kingdom on breach of confidence which accepts a broader defence of public interest. Yet even in the UK, there is debate about how privacy and defamation cases intersect: see further Ch 12.

46 For example, about contagious diseases or substance abuse or suspicions of abuse or corruption.

47 See Ch 12.

there should be explicit consideration required of freedom of speech and other public interests in applications to prevent the publication of information which is deemed to be *private*—but which was not subject to an obligation of confidence.

13.49 Some stakeholders were in favour of the proposal, expressing concern at the narrow defence of public interest in Australia to breach of confidence actions or at the chilling effect of injunctions on freedom of speech. However, most stakeholders concentrated on other issues in the Discussion Paper. After discussions and consultations with members of the legal profession and the judiciary about this proposal, the ALRC concludes that it may be premature to attempt to direct the approach of the common law as proposed. Therefore, the ALRC does not make any recommendation in the Final Report with respect to injunctions where the plaintiff relies on the common law to protect private information.⁴⁸

13.50 The ALRC considers the desirability of a legislative provision with respect to injunction applications under the new tort in Chapter 12.

48 See further, Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Discussion Paper 80 (2014) 158–193.