8. Seriousness and Proof of Damage

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Summary

8.1 The tort designed in this Report is concerned with providing civil redress for *serious* invasions of privacy. The ALRC recommends that this should be made clear in the Act, by including a separate and discrete element of the tort requiring a court to consider whether the invasion of privacy was 'serious'. This will help deter people from bringing trivial privacy claims before the courts.

8.2 Guidance on the meaning of serious should be provided in the statute. The relevant Act should provide that a court may consider the degree of any offence, distress or harm to dignity that the invasion of privacy was likely to cause a person of ordinary sensibilities in the position of the plaintiff. The Act should also provide that courts may consider whether the defendant was motivated by malice or knew the invasion of privacy was likely to offend, distress or harm the dignity of the plaintiff.

8.3 Other matters may also be relevant, but the ALRC considers these to be the most important. Including them will provide some certainty about the meaning of 'serious'.

8.4 The second question discussed in this chapter is whether the plaintiff should be required to prove that they suffered 'actual damage'—more than emotional distress—from the invasion of privacy. Given the invasion of privacy must not only be serious, but the defendant must have invaded the plaintiff's privacy intentionally or recklessly, the ALRC considers the plaintiff should not also have to prove that they suffered actual damage. The tort should be actionable per se.

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

Seriousness

Recommendation 8–1 The Act should provide that a plaintiff has an action under the new tort only where the invasion of privacy was 'serious', having regard, among other things, to:

(a) the degree of any offence, distress or harm to dignity that the invasion of privacy was likely to cause to a person of ordinary sensibilities in the position of the plaintiff; and

(b) whether the defendant was motivated by malice or knew the invasion of privacy was likely to offend, distress or harm the dignity of the plaintiff.

The need for a threshold

8.6 Some invasions of privacy should not be actionable, because they are not sufficiently serious. The ALRC recommends that the Act provide for a threshold test of seriousness that would ensure that trivial and other non-serious breaches of privacy are not actionable.

8.7 The *Privacy Act 1988* (Cth) provides for civil penalties in cases of 'serious' or 'repeated' interferences with privacy.[1] A seriousness threshold is also recognised in the United Kingdom (UK). Hon. Justice Roger Toulson and Charles Phipps write that unauthorised 'disclosure or use of information about a person's private life will be a violation of art 8 only if … it is sufficiently serious to cause substantial offence to a person of ordinary sensibilities'.[2] However, this may be a low bar, intended mainly to exclude only limited or trivial disclosures. Lord Neuberger MR in *Ambrosiadou v Coward,* said that,

> Just because information relates to a person's family and private life, it will not automatically be protected by the courts: for instance, the information may be of slight significance, generally expressed, or anodyne in nature. While respect for family and private life is of fundamental importance, it seems to me that the courts should, in the absence of special facts, generally expect people to adopt a reasonably robust and realistic approach to living in the 21st century.[3]

8.8 Some stakeholders submitted that there should not be an additional threshold.[4] If a person has a reasonable expectation of privacy then, subject to public interest matters,

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1 *Privacy Act 1988* (Cth) s 13G. The Act does not define 'serious'; the ordinary meaning of the word applies.

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

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

4 A number of stakeholders opposed an additional separate threshold: eg, N Witzleb, *Submission 116*; Australian Privacy Foundation, *Submission 110*; Public Interest Advocacy Centre, *Submission 105*; N Witzleb, *Submission 29*; Office of the Information Commissioner, Queensland, *Submission 20*; Women's Legal Centre (ACT & Region) Inc., *Submission 19*; Pirate Party of Australia, *Submission 18*; P Wragg, *Submission 4*.

the person should have an action. It was also suggested that, where there is a reasonable expectation of privacy and no countervailing public interest, then an invasion would necessarily be serious, and therefore an additional threshold unnecessary.

8.9 The Australian Privacy Foundation submitted that an additional threshold for seriousness was 'unnecessary and arbitrary':

> If the cause of action is structured as an intentional tort, as the cause of action appears to be, damage should be presumed. The remedy, whether in the form of injunctive relief, damages or other relief, will (or should) reflect the seriousness of the breach.[5]

8.10 Associate Professor Paul Wragg also had some concerns. Although he said the point should not be overstated, given that the risk would not to arise in obvious cases, there was a 'danger of the seriousness standard being applied twice if not three times':

> first through the 'reasonable expectation of privacy' test where the UK standard (which already excludes non-serious intrusions) is taken as the benchmark; secondly, as a means of limiting interferences to those that not only satisfy the reasonable threshold standard but also may be said to be a serious breach of that standard (so as to be highly offensive, etc) and thirdly (potentially) through the use of the balancing approach where the intrusion must not only be serious but also so serious as to outweigh everyone else's rights (ie, the public interest at stake).[6]

8.11 The New South Wales Law Reform Commission also did not see the need for an additional threshold.[7] There is no threshold of seriousness in the statutes of the four Canadian provinces which have a statutory cause of action for invasion of privacy.[8]

8.12 Some stakeholders, however, submitted that there should be a discrete seriousness threshold.[9] Some suggested that there should be a threshold, but that it should be set at 'highly offensive' invasions of privacy, rather than merely 'serious' ones.[10] Others said that the threshold should be a high one, so that the new tort does not undermine freedom of expression and of the media.[11]

8.13 The ALRC has concluded that there should be an additional threshold of seriousness. In some circumstances, it will be obvious that the invasion of privacy was serious. In fact, the seriousness may well often be evident from the other elements of the offence. If a plaintiff has a reasonable expectation of privacy, and this privacy is

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5 Australian Privacy Foundation, *Submission 110*.

6 P Wragg, *Submission 73*.

7 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) [23]–[33].

8 *Privacy Act*, RSBC 1996, c 373 (British Columbia); *Privacy Act*, RSS 1978, c P-24 (Saskatchewan); *Privacy Act*, RSNL 1990, c P-22 (Newfoundland and Labrador); *Privacy Act*, CCSM 1996, c P125 (Manitoba).

9 See, eg, Women's Legal Services NSW, *Submission 115*; Office of the Victorian Privacy Commissioner, *Submission 108*; ASTRA, *Submission 99*; ABC, *Submission 93*; Google, *Submission 91*; Australian Bankers' Association, *Submission 84*; Guardian News and Media Limited and Guardian Australia, *Submission 80*; National Association for the Visual Arts Ltd, *Submission 78*; Telstra, *Submission 45* ('A seriousness threshold must be imposed, both in order to discourage trivial or minor claims, and in order to provide business and the community with a level of certainty and consistency in its application').

10 SBS, *Submission 123*; ABC, *Submission 93*.

11 The ALRC recommends a separate public interest balancing test in Ch 9.

intentionally invaded, then in some cases the facts leading to these conclusions will themselves strongly suggest the invasion of privacy was serious. However, an additional and discrete threshold of seriousness would provide an additional means of discouraging people from bringing actions for trivial invasions of privacy. The risk of non-serious actions or a proliferation of claims was raised by a number of stakeholders.[12]

8.14 For similar reasons, a serious harm test has been introduced to defamation law in the UK. The *Defamation Act 2013* (UK) provides that a 'statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant'.[13] This provision was intended to discourage trivial claims.[14]

8.15 The ALRC also considers that a discrete seriousness threshold, in addition to the public interest balancing test,[15] would further ensure the new tort does not unduly burden competing interests such as freedom of speech.

Serious

8.16 If there is a threshold, where should it be set? The ALRC recommends the Act provide that for the plaintiff to have an action, the court must consider the invasion of privacy 'serious'.

8.17 'Serious' can mean 'not trifling', 'weighty or important',[16] 'important, demanding consideration, not to be trifled with, not slight'.[17] These definitions may be helpful, but the ALRC recommends that the Act provide specific guidance to courts on the meaning of serious. This guidance should be in the form of a few important factors for the court to consider, along with any other relevant factor, when determining whether an invasion of privacy was serious. These factors are discussed below.

8.18 This is an objective test. It is not about whether the plaintiff considered the invasion of privacy to be serious, or even whether the plaintiff has proved that they suffered serious damage from the invasion of privacy.[18] Rather, it is about whether the court views the invasion as serious.

Offence, distress and other privacy harms

8.19 The first and perhaps most important factor for a court to consider when determining whether an invasion of privacy was serious is the degree of any offence,

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

13 *Defamation Act 2013* (UK) s 1.

14 Jonathan Djanogly MP quoted in James Price (ed) and Felicity McMahon (ed), *Blackstone's Guide to the Defamation Act 2013* (Oxford University Press, 2013) 20. This provision differs from the seriousness test recommended by the ALRC in a few ways. Perhaps most notably, the UK provision is a subjective test—harm or likely harm to the claimant must be proven.

15 See Ch 9.

16 Macquarie Dictionary.

17 Concise Oxford Dictionary.

18 The plaintiff should not be required to prove actual damage: Rec 8–2.

distress or harm to dignity that the invasion of privacy was likely to cause a person of ordinary sensibilities in the position of the plaintiff. This should be set out in the Act.

8.20 Although other harms may often be relevant, offence and distress are two common types of harm that commonly follow serious invasions of privacy.

8.21 Professor Kit Barker submitted that the essence of what is wrong about an invasion of privacy is 'harm to the personal dignity of the plaintiff and/or the plaintiff's autonomy in controlling elements of his or her private life'.[19] The ALRC agrees that these are important types of harm that should be considered by a court in determining whether a particular invasion of privacy was serious.

8.22 The privacy and dignitary interests of a person may be harmed without that person's knowledge. For example, in some circumstances it may be a serious invasion of privacy to take or publish a photo of a person who is in a coma or a state of dementia, or perhaps even of a young child, despite the fact that a person is unlikely to be offended or distressed by the incident or the publication. Such invasions of privacy may be serious, even though distress, offence or harm to the plaintiff may be unlikely. This is one reason why offence and distress are not the only harms that might make an invasion of privacy serious.[20]

Extent of harm

8.23 In the Discussion Paper, the ALRC proposed that courts consider whether the invasion of privacy was likely to be 'highly' offensive, distressing or harmful.[21] This may have suggested that if it were not highly offensive, highly distressing or highly harmful, it could not be serious. As a number of stakeholders pointed out, this may be too limiting.[22] Some offensive, distressing or harmful invasions of privacy will be serious, even when the invasion cannot be described as 'highly' offensive, distressing or harmful.

8.24 The ALRC therefore recommends that a court consider the 'degree' or 'extent' of the offence, distress or harm to dignity likely to be caused by the invasion of privacy. The greater the likely offence, distress or harm, the more likely the invasion will be serious. This formulation provides the court with somewhat more discretion in its assessment of seriousness.

A person of ordinary sensibilities in the position of the plaintiff

8.25 It is important to ask whether the conduct was likely to offend, distress or harm the dignity of a person 'in the position of the plaintiff'. Most people are not particularly

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19 K Barker, *Submission 126*.

20 'A young child photographed naked through a telephoto lens may well experience no offense or distress at all. Nor is it really relevant whether anyone else is offended by the publication of the photograph. The point is that privacy laws should "carve out some personal space" for the child which protects it against such intrusion and potentially prejudicial disclosure.': Ibid.

21 This was intended to mean 'highly offensive, highly distressing or highly harmful'.

22 'If a seriousness threshold were introduced, it should be set at "offensive, distressing or harmful". I believe that it would be setting the bar much too high if a privacy invasion was actionable only if it was, or was likely to be, "highly distressing" or "highly harmful"': N Witzleb, *Submission 116*.

offended, distressed, much less harmed, when the privacy of other people—particularly strangers—is invaded. The seriousness of an invasion of privacy should not be assessed by considering its effect on other people; it should be assessed by considering its likely effect on a person subjected to the invasion of privacy.[23]

8.26 Lord Hope in *Campbell v MGN* said that the 'mind that has to be examined is that, not of the reader in general, but of the person who is affected by the publicity. The question is what a reasonable person of ordinary sensibilities would feel *if she was placed in the same position as the claimant and faced with the same publicity*'.[24]

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

8.28 The court should also consider the likely harm to a person of 'ordinary sensibilities'. That a particularly sensitive person would be offended or distressed by an invasion of privacy may not be a good indication that the invasion was serious.

Likely harm and actual harm

8.29 The likely effect of the conduct should be distinguished from the actual effect of the conduct. An invasion of privacy may be likely to cause harm, even though in a particular case it does not cause harm, and vice versa. Whether the cause of action should require proof of damage is a related question, discussed separately below.

8.30 The actual effect of the invasion on the plaintiff may give some indication that the invasion of privacy was likely to have that effect, but it would not be conclusive. An invasion of privacy may have been unlikely to have any effect on anyone, or it may have been likely only to have a minor effect on persons of ordinary sensibilities. If the actual plaintiff is highly sensitive and was very much distressed by the invasion, a court might nevertheless consider that a person of ordinary sensibilities would be unlikely to be so distressed, and that therefore the invasion of privacy was not serious.

8.31 It should also be noted that the word 'likely' in Recommendation 8–1 should not be taken to mean 'probable', that is, more likely than not. Rather, 'likely' should mean 'a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case'.[25] Some stakeholders said

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23 Professor Kit Barker submitted that it was not 'really relevant whether anyone else is offended by the publication of the photograph': K Barker, *Submission 126*.

24 *Campbell v MGN Ltd* [2004] 2 AC 457, [99] (emphasis added).

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

that if this is what the ALRC intends 'likely' to mean, then it should be set out in the Act.[26]

Knowledge and motive of the defendant

8.32 Although the likely effect of the plaintiff's conduct should perhaps be the main focus of the court's inquiry, the motives of the defendant may also suggest an invasion of privacy is serious. An invasion of privacy that was motivated by malice is more likely to be serious. The ALRC recommends that a court consider whether the defendant acted maliciously, when determining whether the invasion of privacy was serious.

8.33 Further, the fact that the defendant knew that the particular plaintiff was likely to be highly offended, distressed or harmed by the invasion of privacy, will also be a factor to be considered. In such circumstances, the invasion may be found to be serious, even if a person of ordinary sensibilities might not have been likely to suffer such offence, distress or harm. The court should not be required to 'disregard what the defendant knew or ought to have known about the fortitude of the plaintiff'. These are the words in s 32(4) of the *Civil Liability Act 2002* (NSW), which relates to a confined duty to take care not to cause someone mental harm. The statutory cause of action for serious invasion of privacy should contain a provision similar to s 32(4).

8.34 This provision would also be relevant to the question of the reasonable expectation of the plaintiff in their particular circumstances.

Other factors

8.35 Other relevant factors could also be considered by the court when determining seriousness. For example, the Law Institute of Victoria suggested a court might take into account: the nature of the breach; the consequences of the invasion for an individual; and the extent of the invasion in terms of the numbers of individuals affected.[27] It should be made clear in the Act that a court may consider other relevant factors.

A higher threshold?

8.36 Some stakeholders submitted that the threshold should be set higher than 'serious'. The most common alternative threshold suggested by stakeholders was 'highly offensive'.

8.37 The ALRC in 2008 and the Victorian Law Reform Commission (VLRC) in 2010 recommended that a plaintiff be required to show that the act or conduct complained of was highly offensive to a reasonable person of ordinary sensibilities.[28]

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26 Eg, Law Society of NSW, *Submission 122* ('Given the degree of particularity ascribed to "likely" the BLC recommends that this detail be included in any legislation').

27 Law Institute of Victoria, *Submission 22*.

28 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) Rec 74–2; Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) Recs 25, 26. It is worth noting that the 'highly offensive' test is at times conceptualised as going to the seriousness of an invasion and, at others, as a test of what may be considered private.

A 'highly offensive' test was supported by some stakeholders.[29] A 'highly offensive' threshold is also favoured in New Zealand.[30]

8.38 As discussed above, the ALRC considers that the degree of offence caused by an invasion of privacy is one factor to consider when assessing seriousness, but it is not the only factor, nor necessarily the most important. Courts should also consider whether the invasion of privacy was likely to cause distress or harm to dignity, and other matters that make the invasion of privacy serious. In any event, the plaintiff should not be required to prove the invasion of privacy was highly offensive, if it can otherwise be shown to be serious.

Proof of damage not required

Recommendation 8–2 The plaintiff should not be required to prove actual damage to have an action under the new tort.

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

8.40 If the privacy tort is actionable per se, it will in this respect be similar to other intentional torts that are concerned with the intangible, dignitary interests of the plaintiff—assault, battery and false imprisonment.[31] In a sense, the wrong itself is the harm. Or in other words, the harm is inherent in the wrong.[32]

8.41 The authors of *Markesinis and Deakin's Tort Law* state that 'the function of the interference torts is not to engage in loss-spreading in the same way [as the tort of negligence], but to affirm the fundamental importance of certain constitutional interests, such as personal bodily integrity and freedom of movement, *in their own*

An example of the latter is Gleeson CJ's statement that 'the requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private': *ABC v Lenah Game Meats* (2001) 208 CLR 199, [42].

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

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

31 On trespass, see *O'Donohue v Wille and Ors* [1999] [1999] NSWSC 661 (6 July 1999); Rosalie Balkin and Jim Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) 30; *Letang v Cooper* [1965] 1 QB 232 245. Defamation, while sometimes described as actionable per se, is different in that some damage to reputation is presumed to follow the defamatory publication: *Ratcliffe v Evans* (1892) 2 QB 524, cited in *Ell v Milne (No 8)* [2014] NSWSC 175 (7 March 2014) [69]. There would be no presumption of damage in the new tort. The *Defamation Act 2005* (NSW) s 7(2) provides that the 'publication of defamatory matter of any kind is actionable without proof of special damage'. Note, however, that there is a defence to defamation of triviality.

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

right'.[33] Further, they write, in the torts of trespass to the person and interference with land and with chattels,

> the emphasis is less on the nature of the damage suffered and on whether the defendant's conduct can be characterised as 'fault', as on the nature of the interference with the claimant's rights, in particular on whether it was direct or indirect and on whether, in the context of various defences, it can be characterised as justified or not.[34]

8.42 The ALRC considers that the tort for serious invasion of privacy should have a similar function—it should affirm the fundamental importance of privacy.

8.43 In *Tugendhat and Christie: The Law of Privacy and the Media,* the authors state that because one of the principal aims of the torts of battery, assault and false imprisonment is to 'vindicate the indignity inherent in unwanted touching, threatening, and confinement, they are actionable per se. That is, harm to the plaintiff is assumed'.[35] The authors go on to state that, if

> one of the principal aims of the protection of privacy is the preservation of dignity, then consistency with trespass to the person might suggest that breaches of a reasonable expectation of privacy should also be actionable *per se*.[36]

8.44 In practice, serious invasions of privacy will usually cause emotional distress to the plaintiff. Emotional distress is not generally recognised by the common law as 'actual damage', which refers to personal injury, property damage, financial loss, or a recognised psychiatric illness. As a number of stakeholders submitted, the damage often caused by invasions of privacy—such as distress, humiliation and insult—may be intangible and difficult to prove.[37] The Public Interest Advocacy Centre submitted that a person's 'dignity is vitally important but its intrinsic nature makes it difficult to quantify in monetary terms the impact of any damage to it'.[38] Many stakeholders submitted that the action should not require proof of damage.[39]

8.45 The ALRC agrees that invasions of privacy may often cause 'only' emotional distress. If proof of actual damage as recognised by the common law were required, this would deny redress to many victims of serious invasions of privacy, and significantly undermine the value and purpose of introducing the new tort. If the goal

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33 Simon F Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford University Press, 2012) 360.

34 Ibid.

35 Warby et al, above n 32, [8.48].

36 Ibid.

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

38 Public Interest Advocacy Centre, *Submission 30*.

39 Office of the Victorian Privacy Commissioner, *Submission 108*; Office of the Australian Information Commissioner, *Submission 66*; NSW Young Lawyers, *Submission 58*; Women's Legal Services NSW, *Submission 57*; Queensland Council of Civil Liberties, *Submission 51*; ABC, *Submission 46*; Electronic Frontiers Australia, *Submission 44*; Australian Privacy Foundation, *Submission 39*; Public Interest Advocacy Centre, *Submission 30*; N Witzleb, *Submission 29*; B Arnold, *Submission 28*; Law Institute of Victoria, *Submission 22*; I Pieper, *Submission 6*; I Turnbull, *Submission 5*.

then is to allow plaintiffs to recover damages for emotional distress, the issue is how the law may best achieve this.

8.46 One option would be to require proof of damage but define damage, for the purposes of the action, to include emotional distress. This would be consistent with s 52 of the *Privacy Act*. This provides that the Australian Information Commissioner may make declarations regarding, among other things, redress or compensation for 'loss or damage', which is defined to include:

> (a) injury to the feelings of the complainant or individual; and
>
> (b) humiliation suffered by the complainant or individual.[40]

8.47 However, this approach would be inconsistent with both the well-established common law definition of actual damage and with the civil liability legislation in most states and territories (dealing with negligently inflicted mental harm).[41] It is desirable for civil liability under the new tort to be consistent with other civil liability in tort. The ALRC considers that the preferable approach is to make the new tort actionable per se. The threshold of seriousness and the fault element will bar trivial or minor claims, and it will be rare that a plaintiff will suffer no distress from a serious invasion of privacy. In practice, if no emotional distress or actual damage has been suffered by a plaintiff, there would only be an award of damages if the circumstances of the invasion were such that there was a strong need for vindication, or, in exceptional circumstances, exemplary damages.

8.48 Some stakeholders supported making the tort actionable per se, arguing that invasions of privacy were 'abhorrent' and that it was important that the cause of action 'establish a clear deterrent'.[42] Others submitted that requiring proof of damage would burden or deter potential litigants.[43]

8.49 The ALRC recommended that plaintiffs should not be required to prove damage in its 2008 privacy report.[44] The recommendation is also consistent with Canadian statutory causes of action.[45]

8.50 It also appears that there is no requirement to prove damage in claims for disclosure of private information under UK law. This is consistent with equitable claims for breach of confidence, where proof of detriment is not required.[46] In practice this issue is not significant as most, if not all, privacy claims in the UK have been

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40 *Privacy Act 1988* (Cth) s 52(1AB).

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

42 B Arnold, *Submission 28*.

43 Ibid.

44 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) Rec 74–3.

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

46 Dyson Heydon, Mark Leeming and Peter Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2014) 1121.

either for an injunction to prevent an invasive publication or for damages for emotional distress.

8.51 A number of stakeholders submitted that the plaintiff should be required to prove actual damage.[47] If proof of damage is not required, these stakeholders argued, there will be a proliferation of claims, many without merit, and this may lead to significant extra costs to industry.[48] For example, the Australian Subscription Television and Radio Association submitted that not requiring proof of damage may 'encourage serial litigants and dubious proceedings'.[49] Free TV Australia said it 'would significantly increase the risk of the cause of action being misused and simply encouraging litigation in circumstances where there is a clear public interest in dissemination of the relevant private information'.[50]

8.52 The Arts Law Centre of Australia also submitted that if the new tort were actionable per se, the arts and media industries would bear much of the cost of 'determining these potentially unfounded or unmeritorious claims'.[51] Telstra suggested that if proof of damage were not required, it would not be an action for 'serious' invasions of privacy: without actual damage, the invasion would not be serious.[52]

8.53 In the ALRC's view, other elements of the cause of action should ensure that frivolous and unmeritorious claims are neither brought nor successful. To have an action under the privacy tort, the plaintiff must prove that he or she had a reasonable expectation of privacy, that the invasion of privacy was intentional or reckless, and that it was serious. The court must also be satisfied that there was no countervailing interest justifying the invasion of privacy. If the plaintiff is able to get over these significant hurdles, it should not be necessary for them to also prove actual damage.

8.54 If a new privacy tort were enacted that required the plaintiff to prove damage, it would be essential that damage include emotional distress.

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

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

49 ASTRA, *Submission 47*.

50 Free TV, *Submission 109*.

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

52 'If an individual has suffered no damage, an alleged privacy breach should not give rise to a cause of action as a *serious* invasion of privacy': Telstra, *Submission 107* (emphasis in original).