

Supplementary Question

If the committee were to recommend a statutory cause of action for serious invasions of privacy, one option might be to recommend that a fault element encompassing negligence (as well as intent and recklessness) apply to corporations; while recommending a more limited fault element (intent and recklessness only) that would apply to natural persons. Do you have any concerns or comments in regards to this?

As indicated at the hearing, Free TV is of the view that there is no public policy or evidential basis for the introduction of a statutory cause of action.

If such a cause of action were under consideration, Free TV would have serious concerns in relation to any inclusion of negligence or recklessness in its scope. Free TV's view is that any recommended cause of action should apply to intentional conduct only. It should **not** encompass either negligence or recklessness.

To include negligence or recklessness would risk unreasonably encroaching on freedom of speech and freedom of communication. News and current affairs reporting takes place under strict time constraints that require rapid evaluation of material. In these circumstances, penalties for negligent or reckless breaches would be likely to introduce a level of conservatism that may prevent or delay the reporting of news, because the test for "recklessness" in law carries with it a necessary value judgment about what is a reasonable or unreasonable risk.

In addition to the fault element, if the committee were to recommend a statutory cause of action for serious invasions of privacy, Free TV would ask the committee to take into account its view that the following aspects of the ALRC's proposed cause of action would be particularly detrimental:

- any failure to include public interest and consent as defences in addition to requiring a court to weigh up whether the plaintiff's interest in privacy outweighs the defendant's interest in freedom of expression and any broader public interest, as an element of the cause of action. Defences operate quite differently from provisions which allow a court to balance a number of factors to determine which should take precedence in a particular case. For example, a defence of consent would prevent the plaintiff from succeeding in establishing a cause of action if the defendant can prove that the plaintiff in fact consented. It would therefore provide a degree of certainty to the defendant that, if consent has been obtained, then the law has been complied with. However, if consent is simply a factor that is weighed against other factors in order to determine whether a matter may proceed to be heard, a court may choose to place less weight on the fact that the plaintiff consented, at its discretion. The defences of public interest and consent should be included in addition to any balancing provision to determine whether the plaintiff has a cause of action.
- any failure to require the plaintiff to prove damage in order to bring an action under the new tort. The absence of such a requirement 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.