

4. A New Tort in a New Commonwealth Act

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Summary

4.1 This chapter sets out the ALRC's proposals for how a statutory cause of action for serious invasion of privacy should be set in the context of existing laws.

4.2 The ALRC proposes that the statutory cause of action be contained in a new, stand-alone Commonwealth Act. Including the new action in a Commonwealth Act would ensure consistency in the operation of the cause of action throughout Australia.

4.3 The new cause of action should be set out in a new Act, rather than the *Privacy Act 1988* (Cth). The *Privacy Act* largely concerns information privacy, while the new cause of action is designed to remedy a number of different types of invasions of privacy, including physical invasions of privacy.

4.4 The ALRC proposes that a statutory cause of action for serious invasion of privacy should be a tort. If the statutory cause of action were a tort, there would be increased certainty around various ancillary matters, such as vicarious liability. There would also be the benefit of more consistency, since the statutory cause of action would operate in concert with existing tort law.

4.5 Finally, this chapter provides an overview of the elements of the statutory cause of action that are set out in Chapters 5–8. In discussing the elements of the statutory cause of action, it is important to consider these elements together. There are significant interactions between the elements, and the ALRC's reasons for proposing the content of one proposal will therefore often depend on the ALRC's proposals for the other elements.

A new stand-alone Commonwealth Act

Proposal 4–1 A statutory cause of action for serious invasion of privacy should be contained in a new Commonwealth Act (the new Act).

4.6 The ALRC considers that if a statutory cause of action were to be introduced, it should be in Commonwealth legislation, as this is the best way to ensure the action is available and consistent throughout Australia. It is often difficult to achieve consistency across state and territory legislation. Inconsistent statutory provisions in state and territory legislation would be highly confusing and create unnecessary complexity in the law. This would also provide poor protection of privacy generally and have a damaging effect on many other activities that are of significant public interest. Inconsistency and complexity of legislation would increase costs for businesses, particularly those operating across state and international boundaries. Difficult questions of jurisdiction and applicable law would arise. There would also be a risk of ‘forum shopping’ if the details of the cause of action differed between Australian jurisdictions.

4.7 The ALRC considers that the cause of action should be in a stand-alone Act to avoid confusion and to enhance clarity.¹ The remedial response to invasions of privacy under the statutory cause of action would be distinct from the regulatory regime which is the essence of the *Privacy Act*.

4.8 The essential purposes and scope of the two regimes are different. The *Privacy Act* sets up a regime for the security and privacy of personal information which is collected, stored or used by certain entities (often known as ‘data protection’ regulation). The cause of action relates not only to the privacy of information but also to other types of privacy, such as physical privacy.

4.9 The *Privacy Act* sets up a regime to ensure compliance with a number of Australian Privacy Principles (APPs). There is a complaints mechanism which may lead to compensation being paid for an interference with privacy by an act or practice relating to personal information in a manner set out in the Act.² However, breaches of the requirements of the *Privacy Act* generally lead to regulatory responses by the Office of the Australian Information Commissioner (OAIC), including the possible imposition of civil penalties on the relevant entity.³ An invasion of privacy that is actionable under the new Act would lead only to a range of civil remedies sought by and for the benefit of the plaintiff.

1 This was also the view in ALRC Report 108, which stated that ‘there may be significant confusion arising from the placement of the cause of action in that Act [the *Privacy Act*]. For example, whether the exemptions under the *Privacy Act* applied to the cause of action, and the interaction between the cause of action and other complaint mechanisms, may be unclear if the *Privacy Act* were amended to include the cause of action’: ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) [74.195].

2 The complaints mechanism is discussed in Ch 15.

3 These responses are outlined in Ch 3.

4.10 Lastly, the *Privacy Act* is limited in its application to certain entities across Australia. It does not apply to most individuals,⁴ or to state agencies. It also includes a number of exemptions, such as for small businesses and media organisations, which would have no application to the new statutory cause of action. The new statutory cause of action would apply, subject to jurisdictional limitations and any defences, to any person or entity that seriously invades the privacy of a person in the circumstances set out in the Act.

4.11 Therefore, the ALRC considers that the new tort should be located in a new stand-alone Commonwealth Act. This new Act might be called the *Serious Invasions of Privacy Act*.

4.12 The location of a statutory cause of action in a separate Commonwealth Act would not prevent power being given to the OAIC to determine complaints concerning conduct that fell within the cause of action by relevant entities. The current complaints regime under the *Privacy Act 1988* could be broadened to encompass such conduct by relevant entities, to provide complainants with an alternative to court proceedings in respect of the conduct.

Constitutional issues

Head of power

4.13 This section examines the scope of the Commonwealth's power to legislate with respect to privacy under the *Constitution*. This issue was previously discussed in the ALRC's report, *For Your Information: Privacy Law and Practice* (ALRC Report 108, 2008).⁵

4.14 The Commonwealth has the power to make laws with respect to 'external affairs'.⁶ This power enables the Commonwealth to implement obligations under a bona fide treaty.⁷ It is open to the legislature to decide the means by which it gives effect to those obligations, but those means must be 'reasonably capable of being considered appropriate and adapted to that end'.⁸

4.15 Australia is a State Party to the *International Covenant on Civil and Political Rights* (ICCPR). Australia ratified the ICCPR on 13 November 1980. Article 17 of the ICCPR provides:

- (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation.

4 As noted in Ch 3, the *Privacy Act* does apply to some individuals, such as individuals who operate certain types of businesses, such as businesses that trade in personal information: see ss 6C–6EA of the *Privacy Act*. Section 16 of the *Privacy Act* provides that the APPs do not apply to personal information that is collected, used, held or disclosed by an individual in connection with the individual's family or household affairs.

5 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) [3.17]–[3.28].

6 *Constitution* s 51(xxix).

7 *Commonwealth v Tasmania* (1983) 158 CLR 1.

8 *Victoria v Commonwealth* ('*The Industrial Relations Act case*') (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

(2) Everyone has the right to the protection of the law against such interference or attacks.

4.16 In light of the Commonwealth's power to implement treaty obligations under s 51(xxix), it is likely that a law which created a statutory cause of action for serious invasion of privacy would be valid as a means of giving effect to Australia's obligation under art 17 of the *ICCPR*.

4.17 The ALRC considers that the enactment of a statutory cause of action for serious invasion of privacy satisfies the requirement of proportionality. It is 'reasonably capable of being considered appropriate and adapted' to implementing art 17 of the *ICCPR*. The courts grant latitude to Parliament in selecting the means by which to give effect to a treaty obligation.⁹ Moreover, art 17(2) of the *ICCPR* explicitly provides that the protection of law should be afforded to those subject to interference with or attacks on their privacy. Therefore, the law conforms to the treaty and carries its provisions into effect.¹⁰

4.18 The ALRC noted in 2008 that the current *Privacy Act 1988* (Cth) is purportedly enacted on the basis of the external affairs power.¹¹ In addition, the ALRC canvassed other heads of power, which may also support aspects of the statutory cause of action.¹² One of these was the Commonwealth's power to legislate with respect to 'postal, telegraphic, telephonic and other like services'.¹³ This head of power has been interpreted broadly.¹⁴ The technology-neutral phrase 'other like services' demonstrates that the possibility of developments in technology was contemplated by drafters when framing section 51(v).¹⁵ Radio and television broadcasting have been held to be within the Commonwealth's power under s 51(v).¹⁶ Although the Commonwealth's power to regulate the internet under this head of power is yet to be considered by the High Court, it is likely that it would be a 'like service'.¹⁷

4.19 If the Commonwealth does enact a statutory cause of action, it may expressly or impliedly 'cover the field' on the subject matter. Any State Act which was inconsistent with the Commonwealth Act would be inoperative.¹⁸

Constitutional limits

4.20 The Commonwealth's power to legislate is subject to both express and implied constitutional limitations.

9 Leslie Zines, *The High Court and the Constitution* (Butterworths, 4th ed, 1997) 288.

10 *Richardson v Forestry Commission* (1988) 164 CLR 261, 345 (Gaudron J).

11 *Privacy Act 1988* (Cth) Preamble.

12 *Constitution* s 51(i), (v), (xiii), (xiv), (xx).

13 *Constitution* s 51(v).

14 *Jones v Commonwealth (No 2)* [1965] HCA 6 (3 February 1965).

15 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 493.

16 *R v Brislan; Ex parte Williams* (1935) 54 CLR 262; *Jones v Commonwealth (No 2)* (1965) 112 CLR 206.

17 Helen Roberts, 'Can the Internet be Regulated?' (Research Paper No 35, Parliamentary Library, Parliament of Australia, 1996) 25.

18 *Constitution* s 109.

Implied freedom of political communication

4.21 The legislative power of the Commonwealth is subject to the implied freedom of political communication. In assessing whether a law infringes the freedom, there are two questions:

1. Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect?
2. If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 of the Constitution for submitting a proposed amendment to the Constitution to the informed decision of the people?¹⁹

A law will only infringe the implied freedom if the answer to the first question is ‘yes’ and the answer to the second question is ‘no’.

4.22 The ALRC considers that the proposed statutory cause of action would not infringe the implied freedom of political communication. The proposed cause of action requires that the plaintiff’s interest in privacy outweighs the defendant’s interest in freedom of expression and any broader public interest. The freedom of expression includes the freedom to discuss governmental matters. It is likely that the cause of action is ‘reasonably appropriate and adapted’ to serve a legitimate end, that is, the protection of privacy, in a manner compatible with the maintenance of representative and responsible government.

Impact on States

4.23 The ALRC’s 2008 report discussed the *Melbourne Corporation* principle, as an implied limitation on the Commonwealth’s power to legislate. Most recently, the High Court expressed the *Melbourne Corporation* principle as concerned with

whether impugned legislation is directed at States, imposing some special disability or burden on the exercise of powers and fulfilment of functions of the States which curtails their capacity to function as governments.²⁰

4.24 The ALRC considers that a statutory cause of action, while imposing a burden on State agencies, would not curtail the States’ capacity to function as governments.

An action in tort

Proposal 4–2 The cause of action should be described in the new Act as an action in tort.
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¹⁹ *Monis v The Queen* (2013) 87 ALJR 340; [2013] HCA 4, [61] (French CJ).

²⁰ *Fortescue Metals Group Ltd v Commonwealth* (2012) 247 CLR 486, [130] (Hayne, Bell and Keane JJ). French CJ, Crennan and Kiefel JJ agreed with the joint reasons on this issue in separate judgments: [6], [145], [229]. See also *Austin v Commonwealth* (2003) 215 CLR 185.

4.25 There are a number of reasons for the proposal that the new cause of action should be an action in tort.

4.26 First, and most importantly, describing the statutory cause of action as a tort action will provide certainty, and prevent disputes arising, about a number of ancillary issues that will inevitably arise. Courts frequently have to decide whether a particular statute gives rise to an action in tort for the purposes of determining whether other consequences follow at common law or under other statutes.²¹ This will also be the case if a new statutory cause of action is enacted. For example:

- At common law, an employer is vicariously liable where an employee has injured a third party by a tort committed in the course of employment.²² It may be relevant to decide whether an employer is vicariously liable to the claimant, in addition to an employee, where the employee is liable under the statutory cause of action.
- At common law, the applicable law for intra-Australian and international torts depends on the place where the tort was committed.²³
- Many legislative provisions refer to liability in tort. For example, some Australian jurisdictions impose an obligation on an employer to indemnify an employee in respect of ‘liability incurred by the employee for the tort’ to a third party where the tort occurred in the course of employment.²⁴ Statutory contribution rights may apply only to ‘tortfeasors’.²⁵

4.27 Describing the action as a tort action will thus avoid many consequential questions arising once primary liability is established. The cause of action will be more fully integrated into existing laws than if it were simply described as a cause of action. This will also avoid the need for numerous specific provisions dealing with these ancillary issues, adding undesirable length to the legislation.²⁶

4.28 Secondly, classifying a civil action for redress which leads to monetary compensation as a tort, is consistent with accepted legal classifications. Defining what is a tort precisely, exhaustively and exclusively is a surprisingly difficult task. Leading

21 *Commissioner of Police v Estate of John Edward Russell* (2002) 55 NSWLR 232, [62]–[78] (Spigelman CJ); *Hampic Pty Ltd v Adams* [1999] NSWCA 455 [61]. See also *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB) (16 January 2014); cf *Douglas v Hello! Ltd (No 3)* [2006] QB 125 [96].

22 Lewis Klar, ‘Vicarious Liability’ in Caroline Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (Lawbook Co, 10th ed, 2011) ch 19.

23 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491. It is not always an easy task to determine the place of the tort: M Davies, AS Bell and PLG Brereton, *Nygh’s Conflict of Laws in Australia* (LexisNexis Butterworths, 2010) 425.

24 *Employees Liability Act 1991* (NSW) s 3; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 6(9)(c); *Law Reform (Miscellaneous Provisions) Act 1956* (NT) s 22A.

25 See, for example, *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) s 5.

26 However, as seen below, special provision is made with respect to the limitation period and defences. It may also be preferable to make specific provision for vicarious liability to avoid the kind of dispute that arose in *New South Wales v Bryant* [2005] NSWCA 393 and *Canterbury Bankstown Rugby League Football Club Ltd v Rogers* (1993) Aust Torts Reps 81-246, deriving in part from the conflicting views of Kitto J and Fullagar J in *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 as to whether the employer is vicariously liable for the acts or the torts of an employee.

texts tend to answer the question in relatively general terms. *Fleming's The Law of Torts*, for example, defines a tort as 'an injury other than a breach of contract, which the law will redress with damages', but then goes on that 'this definition is far from informative'.²⁷ Torts may be created by common law or statute.²⁸

4.29 Definitions of 'tort' often contain two key features. First, a tort is a civil (as opposed to a criminal) wrong, which the law redresses by an award of damages. Secondly, the wrong consists of a breach of an obligation, often in negative terms such as not to harm or interfere with the claimant, imposed by law (rather than by agreement). But neither of those factors is exclusive to tort law and neither is always borne out, as most texts go on to discuss.

4.30 Nevertheless, liability for conduct invading the privacy of another is analogous to, and will often co-exist with, other torts protecting people from interferences with fundamental rights. Situating the cause of action within tort law will allow the application of common law principles settled in analogous tort claims, particularly in relation to fault, defences and the award of damages and assessment of remedies, where these matters are not set out in the new Act. This will enhance the coherence and consistency of the law.

4.31 Thirdly, the nomenclature of tort is consistent with developments in comparable jurisdictions and would allow Australian courts to draw on analogous case law from other jurisdictions, thus reducing uncertainty and complexity. The four Canadian provinces which have enacted legislation for invasions of privacy describe the relevant conduct as 'a tort'.²⁹ The New Zealand courts have recognised new causes of action in tort to protect privacy.³⁰ Developments in the United Kingdom derive from the extension of the equitable action for breach of confidence under the influence of the *Human Rights Act 1998* (UK). However, the misuse of private information giving rise to the extended or new cause of action in the United Kingdom is increasingly referred to as a 'tort'.³¹ While Australian courts may not be prepared to take the same leap in classification as may have occurred there, the legislature is not so constrained.

27 Prue Vines, 'Introduction' in Caroline Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 3.

28 KM Stanton et al, *Statutory Torts* (Sweet & Maxwell, 2003) 6: 'Indeed, the only answer [to the question "What is a Tort?"] may be to say that a compensation right is of a tortious character if it is generally regarded as tortious ... the phrasing of the statute is likely to play a large part in the classification of rights'.

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

30 *Hosking v Runting* (2005) 1 NZLR 1; *C v Holland* [2012] 3 NZLR 672 (24 August 2012).

31 *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB) (16 January 2014) [50]–[75]. Many commentators now use this nomenclature: eg, Richard Clayton and Hugh Tomlinson, 'The Human Rights Act and Its Impact on the Law of Tort' in TT Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute, and the Dynamics of Change* (Hart Publishing, 2012) 466–467. However, precisely when and how this change from an extended equitable action for breach of confidence to a tort of misuse of private information happened has not been pinpointed. Some judicial statements simply ignore the difference: eg, Lord Neuberger, MR, in *Tchenguiz v Imerman (Rev 4)* [2010] EWCA Civ 908 [65]: 'following ... *Campbell*, there is now a tort of misuse of private information: as Lord Phillips of Worth Matravers MR put it in *Douglas v Hello! Ltd (No 3)* [2006] QB 125. Cf *Coogan v News Group Newspapers Ltd* [2012]

4.32 Fourthly, describing the action as a tort action will clarify and highlight the distinctions between the statutory cause of action for serious invasion of privacy and existing regulatory regimes, such as those under the *Privacy Act 1988* (Cth) and the *Broadcasting Services Act 1992* (Cth).

4.33 Fifthly, describing the statutory cause of action as a tort action will clearly differentiate it from the equitable and contractual actions for breach of confidence. These will continue to exist and develop to protect confidential information, against the contracting party or confidant and against a third party who has the requisite knowledge that the material is confidential.³² Lastly, there is no reason why the tort nomenclature should constrain the legislature from making specific provision for remedies not generally available in tort at common law, for example, ordering an apology or an account of profits; limiting remedies usually available in tort; or capping the amounts of certain types of damages.

4.34 In 2009, the New South Wales Law Reform Commission (NSWLRC) recommended against identifying the statutory cause of action as an action in tort, or leaving the courts to construe the action as one in tort. It gave two reasons. First, tort actions do not generally require courts to engage in the sort of overt balancing of interests involved in the statutory cause of action.³³ However, in the ALRC's view this point seems to overlook or downplay the balancing that is required in some existing tort actions. Tort actions in private nuisance frequently require the courts to balance the interests of the plaintiff with those of the defendant in their respective use of their land.³⁴ Nuisance law famously rests on 'a rule of give and take, live and let live', according to the well-known aphorism of Baron Bramwell in *Bamford v Turner* in 1860.³⁵ In *Sedleigh Denfield v O'Callaghan*, Lord Wright made a point that would be apt in many cases involving alleged invasions of privacy and the balancing of individuals' rights:

A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is

EWCA Civ 48; [2012] 2 WLR 848 [48] where he said: 'it is probably fair to say that the extent to which privacy is to be accommodated within the law of confidence as opposed to the law of tort is still in the process of being worked out.' Possibly, such detail is of less concern to English courts than it would be to Australian courts, where a stricter approach to the classification of legal wrongs is evident: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269.

32 *Attorney General v Guardian Newspapers Ltd (No 2)* (1990) 1 AC 109; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 224–225; *Vestergaard Frandsen A/S and Ors v Bestnet Europe Ltd and Ors* [2013] 1 WLR 1556; *AMI Australia Holdings Pty Ltd v John Fairfax Publications Pty Ltd* [2010] NSWSC 1395.

33 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) [5.55].

34 Compare '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': *Smith Kline and French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* [1990] FCA 151 [130] (Gummow J).

35 *Bamford v Turner* (1860) 3 B & S 62; 122 ER 25 [83]–[84].

perhaps what is reasonable according to the ordinary usages of mankind living in society.³⁶

4.35 Secondly, the NSWLRC said that describing the cause of action as a tort would require the legislation to specify whether the cause of action requires fault on the defendant's part. Further, if it did require fault, what kind of fault, and whether it requires proof of harm or is actionable per se. The NSWLRC considered that the issue of fault was 'appropriately left to development in case law' and that it was unnecessary to specify whether the action is maintainable only on proof of damage.³⁷ The VLRC agreed with this approach, adding that 'there is little to be gained—and many complex rules of law to be navigated—if any new cause of action is characterised as a tort'.³⁸ Examples given were rules as to fault, damage, remedies and vicarious liability.

4.36 The ALRC considers that it is highly desirable, if not essential, that the legislator should determine whether or not the cause of action requires proof of a certain type of fault and harm. To leave such key elements of a statutory cause of action to be decided by the courts would be highly problematic. An absence of specificity would increase uncertainty as to the statute's application. This has been a key concern of stakeholders in relation to previous proposals for a statutory cause of action.³⁹ People need to have some guidance in advance as to when their activities might be judged to be an actionable invasion of privacy leading to civil liability. Similarly, potential claimants need guidance as to whether they could prove an actionable invasion of their privacy. The comments by the European Court of Human Rights in 1966 on the law of the United Kingdom in a different context are apposite:

The relevant national law must be formulated with sufficient precision to enable the persons concerned—if need be with appropriate legal advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.⁴⁰

4.37 If no element of fault is included, it would be open for a court to determine that strict liability was intended or imposed, as for example under ss 18 and 237 of the Australian Consumer Law.⁴¹ The ALRC considers that strict liability, or negligence based liability, would be oppressive or undesirable. Certainty is also desirable in relation to the issue of damage or actionability per se. Questions will undoubtedly arise as to other ancillary issues on liability. The ALRC proposes the integration of the statutory action into the existing legislative and common law framework of tort law.

36 *Sedleigh Denfield v O'Callaghan* [1940] AC 880, 903. See also, RP Balkin and JLR Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) [14.19].

37 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) [5.56]–[5.57].

38 Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010) 7.134.

39 Free TV, *Submission 55*; The Newspaper Works, *Submission 50*; Australian Subscription Television and Radio Association, *Submission 47*; Telstra, *Submission 45*; Australian Bankers' Association, *Submission 27*.

40 *Goodwin v United Kingdom* (1996) 22 EHRR 123, 140. See David Eady, 'Injunctions and the Protection of Privacy' (2010) 29 *Civil Justice Quarterly* 411, 418.

41 Neither of which includes any fault requirements for liability: *Competition and Consumer Act 2010* (Cth) sch 2.

This approach is preferable to the establishment of an entirely separate legislative framework,⁴² or to leaving these issues open and therefore uncertain in key respects.

Abolition of common law actions

4.38 The Terms of Reference ask whether, in the event that the statutory action is enacted, any common law actions should be abolished. Such a provision may be unnecessary, depending on common law developments at the time of enactment. However, such a provision would create certainty.

4.39 There is no case for abolishing the equitable action for breach of confidence in its entirety, as it protects ‘confidential’ information whether or not it is also private in nature.

4.40 The NSWLRC recommended the enactment of the following provision:

To the extent that the general law recognises a specific tort for the invasion or violation of a person’s privacy, that tort is abolished.⁴³

4.41 To capture possible tort and equitable developments at common law, the Act might provide that to the extent that the general law recognises a specific cause of action for the invasion of a person’s privacy, that cause of action is abolished.

Overview of the elements of the new tort

4.42 In the following chapters, the ALRC proposes the elements of a new tort for serious invasion of privacy. There are five elements, and each of them must be satisfied for the plaintiff to have a cause of action. There are significant interactions between the elements, and the ALRC’s reasons for proposing the content of one proposal will often depend on the proposals for the other elements. It is therefore important to consider these elements together.

First element: The invasion of privacy must occur by:

- (a) intrusion into the plaintiff’s seclusion or private affairs (including by unlawful surveillance); or
- (b) misuse or disclosure of private information about the plaintiff.

Second element: The invasion of privacy must be either intentional or reckless.

Third element: A person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances.

42 This is the approach in, for example, the Australian Consumer Law, in respect of liability for misleading or deceptive conduct.

43 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) NSWLRC Draft Bill, cl 80(1).

Fourth element: The court must consider that the invasion of privacy was ‘serious’, in all the circumstances, having regard to, among other things, whether the invasion was likely to be highly offensive, distressing or harmful to a person of ordinary sensibilities in the position of the plaintiff.

Fifth element: The court must be satisfied that the plaintiff’s interest in privacy outweighs the defendant’s interest in freedom of expression and any broader public interest in the defendant’s conduct.

