

Recommendations

4. A New Tort in a New Commonwealth Act

Recommendation 4-1 If a statutory cause of action for serious invasion of privacy is to be enacted, it should be enacted by the Commonwealth, in a Commonwealth Act (the Act).

Recommendation 4-2 The cause of action should be described in the Act as an action in tort.

5. Two Types of Invasion

Recommendation 5-1 The Act should provide that the plaintiff must prove that his or her privacy was invaded in one of the following ways:

- (a) intrusion upon seclusion, such as by physically intruding into the plaintiff's private space or by watching, listening to or recording the plaintiff's private activities or private affairs; or
- (b) misuse of private information, such as by collecting or disclosing private information about the plaintiff.

Recommendation 5-2 The Act should provide that 'private information' includes untrue information, but only if the information would be private if it were true.

6. Reasonable Expectation of Privacy

Recommendation 6-1 The new tort should be actionable only where a person in the position of the plaintiff would have had a reasonable expectation of privacy, in all of the circumstances.

Recommendation 6-2 The Act should provide that, in determining whether a person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances, the court may consider, among other things:

- (a) the nature of the private information, including whether it relates to intimate or family matters, health or medical matters, or financial matters;
- (b) the means used to obtain the private information or to intrude upon seclusion, including the use of any device or technology;
- (c) the place where the intrusion occurred, such as in the plaintiff's home;
- (d) the purpose of the misuse, disclosure or intrusion;

- (e) how the private information was held or communicated, such as in private correspondence or a personal diary;
- (f) whether and to what extent the private information was already in the public domain;
- (g) the relevant attributes of the plaintiff, including the plaintiff's age, occupation and cultural background; and
- (h) the conduct of the plaintiff, including whether the plaintiff invited publicity or manifested a desire for privacy.

7. Fault

Recommendation 7-1 The new tort should be confined to intentional or reckless invasions of privacy. It should not extend to negligent invasions of privacy, and should not attract strict liability.

Recommendation 7-2 The Act should provide that an apology made by the defendant does not constitute an admission of fault or liability and is not relevant to the determination of fault or liability.

8. Seriousness and Proof of Damage

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

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

9. Balancing Privacy with Other Interests

Recommendation 9-1 The Act should provide that, for the plaintiff to have a cause of action, the court must be satisfied that the public interest in privacy outweighs any countervailing public interest. A separate public interest defence would therefore be unnecessary.

Recommendation 9-2 The Act should include the following list of countervailing public interest matters which a court may consider, along with any other relevant public interest matter:

- (a) freedom of expression, including political communication and artistic expression;

- (b) freedom of the media, particularly to responsibly investigate and report matters of public concern and importance;
- (c) the proper administration of government;
- (d) open justice;
- (e) public health and safety;
- (f) national security; and
- (g) the prevention and detection of crime and fraud.

Recommendation 9–3 The Act should provide that the defendant has the burden of adducing evidence that suggests there is a countervailing public interest for the court to consider. The Act should also provide that the plaintiff has the legal onus to satisfy the court that the public interest in privacy outweighs any countervailing public interest that is raised in the proceedings.

10. Forums, Limitations and Other Matters

Recommendation 10–1 Federal, state and territory courts should have jurisdiction to hear an action for serious invasion of privacy under the Act. Consideration should also be given to giving jurisdiction to appropriate state and territory tribunals.

Recommendation 10–2 The new tort should only be actionable by natural persons.

Recommendation 10–3 A cause of action for serious invasion of privacy should not survive for the benefit of the plaintiff's estate or against the defendant's estate.

Recommendation 10–4 A person should not be able to bring an action under the new tort after the earlier of:

- (a) one year from the date on which the plaintiff became aware of the invasion of privacy; or
- (b) three years from the date on which the invasion of privacy occurred.

Recommendation 10–5 In exceptional circumstances, the court may extend this limitation period, but the period should expire no later than six years from the date on which the invasion occurred.

Recommendation 10–6 Consideration should be given to extending the limitation period where the plaintiff was under 18 years of age when the invasion of privacy occurred.

Recommendation 10–7 Consideration should be given to enacting a 'first publication rule', also known as a 'single publication rule'. This would limit the circumstances in which a person may bring an action in relation to the publication of private information, when that same private information had already been published in the past.

11. Defences and Exemptions

Recommendation 11-1 The Act should provide for a defence that the defendant's conduct was required or authorised by law.

Recommendation 11-2 The Act should provide a defence for conduct incidental to the exercise of a lawful right of defence of persons or property, where that conduct was proportionate, necessary and reasonable.

Recommendation 11-3 The Act should provide for a defence of necessity.

Recommendation 11-4 The Act should provide for a defence of consent.

Recommendation 11-5 The Act should provide for a defence of absolute privilege.

Recommendation 11-6 The Act should provide for a defence of publication of public documents.

Recommendation 11-7 The Act should provide for a defence of fair report of proceedings of public concern.

Recommendation 11-8 The Act should provide for an exemption for children and young persons.

12. Remedies and Costs

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

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

- (a) whether the defendant had made an appropriate apology to the plaintiff;
- (b) whether the defendant had published a correction;
- (c) whether the plaintiff had already recovered compensation, or has agreed to receive compensation in relation to the conduct of the defendant;
- (d) whether either party took reasonable steps to settle the dispute without litigation; and
- (e) whether the defendant's unreasonable conduct following the invasion of privacy, including during the proceedings, had subjected the plaintiff to particular or additional embarrassment, harm, distress or humiliation.

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

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

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

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

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

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

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

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

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

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

13. Breach of Confidence Actions for Misuse of Private Information

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.

14. Surveillance Devices

Recommendation 14–1 The Commonwealth Government should enact surveillance legislation to replace existing state and territory surveillance device laws.

Recommendation 14–2 Surveillance legislation should be technology neutral. It should regulate surveillance through the use of listening devices, optical devices, tracking devices, data surveillance devices, and other devices and systems.

Recommendation 14–3 The Commonwealth Government should consider consolidating telecommunications surveillance laws with the new Commonwealth surveillance legislation.

Recommendation 14–4 Surveillance legislation should not contain a defence or exception for participant monitoring.

Recommendation 14–5 Surveillance legislation should provide a defence for responsible journalism relating to matters of public concern and importance.

Recommendation 14–6 Workplace surveillance laws should be made uniform throughout Australia.

Recommendation 14–7 Surveillance legislation should provide that a court may order remedial relief, including compensation, for a person subjected to unlawful surveillance.

Recommendation 14–8 State and territory governments should give jurisdiction to appropriate courts and tribunals to hear complaints about the installation and use of surveillance devices that can monitor neighbours on residential property.

15. Harassment

Recommendation 15–1 If a statutory cause of action for serious invasion of privacy is not enacted, state and territory governments should enact uniform legislation creating a tort of harassment.

16. New Regulatory Mechanisms

Recommendation 16–1 The Commonwealth Government should consider extending the Privacy Commissioner’s powers so that the Commissioner may investigate complaints about serious invasions of privacy and make appropriate declarations. Such declarations would require referral to a court for enforcement.

Recommendation 16–2 The following functions should be conferred on the Privacy Commissioner:

- (a) to assist a court as *amicus curiae*, where the Commissioner considers it appropriate, and with the leave of the court; and
- (b) to intervene in court proceedings, where the Commissioner considers it appropriate, and with the leave of the court.