

4. A New Tort in a New Commonwealth Act

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Summary

4.1 This chapter sets out the ALRC's recommendation that a statutory cause of action for serious invasions of privacy should be contained in a new, stand-alone Commonwealth Act.

4.2 Locating the new action in a Commonwealth Act would ensure uniformity and consistency in the operation of the cause of action throughout Australia. Uniformity of law across Australia was consistently identified by stakeholders as important, particularly to avoid the unnecessary costs to business that arise from inconsistent legal regimes across the country.

4.3 In the ALRC's view, 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. Further, the *Privacy Act* has a number of exemptions which would not apply to the new action.

4.4 The ALRC recommends that a statutory cause of action for serious invasions of privacy should be a tort to provide 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.

A new stand-alone Commonwealth Act

<p>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).</p>
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4.5 This recommendation is about the location of a statutory cause of action in Australian law. There are two aspects to this recommendation: that the legislation should be enacted by the Commonwealth rather than by the states and territories; and that the statutory cause of action should preferably be located in a stand-alone Act, rather than the *Privacy Act*.

4.6 First, the ALRC considers that if a statutory cause of action is introduced, it should be in Commonwealth legislation, as this is the best way to ensure the action is available and consistent throughout Australia. Many stakeholders emphasised the need for and value of uniformity and consistency of law across Australia.¹

4.7 The Western Australian Attorney-General submitted that co-operative Commonwealth and state legislation would be preferable.² However, it is demonstrably difficult to achieve consistency across state and territory legislation,³ and even where this has been achieved on certain legal issues, it has taken a very long time.⁴ Inconsistent statutory provisions in state and territory legislation would be highly confusing, and increase fragmentation and unnecessary complexity in the law. Complexity would result in 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 substantially increases 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.

4.8 On the second aspect of the recommendation, the ALRC considers that the better course is for the cause of action to be in a stand-alone Act to avoid confusion and to enhance clarity.⁵ The court-ordered remedial regime that would follow invasions of privacy under the statutory cause of action would be distinct from the regulatory regime which is the essence of the *Privacy Act*.

4.9 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’

1 Public Interest Advocacy Centre, *Submission 105*; South Australian Law Reform Institute, *Submission 87*; Australian Pork Ltd, *Submission 83*; Office of the Australian Information Commissioner, *Submission 66*. Australian Pork Ltd also noted that enacting a Commonwealth Act would be quicker than the time frame needed for uniform state and territory legislation.

2 Office of the Western Australian Attorney-General, *Submission 25*.

3 This is illustrated by the continuing variation in surveillance devices legislation discussed in Ch 14, but also in other regimes such as civil liability legislation.

4 See, eg, the Uniform Defamation Laws, finally introduced in 2005 after 150 years of inconsistency, and decades of discussion on reform. David Rolph, ‘A Critique of the National, Uniform Defamation Laws’ (2008) 16 *Torts Law Journal* 207.

5 In 2008, the ALRC also expressed this view, stating 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’: Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) [74.195].

regulation). The statutory cause of action would relate not only to the privacy of information but also to other types of privacy, such as territorial, communications and bodily privacy.

4.10 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.⁶ However, breaches of the requirements of the *Privacy Act* generally lead to regulatory responses by the Office of the Australian Information Commissioner (OAIC) including, from March 2014, the possible imposition of significant civil penalties on the relevant entity.⁷ By contrast, an invasion of privacy that is actionable under the Act would lead only to a range of civil remedies sought by and for the benefit of the plaintiff.

4.11 Importantly, the *Privacy Act* is limited in its application to certain entities across Australia. It does not apply to most individuals,⁸ or to state agencies. It also includes a number of exemptions, such as for small businesses (defined as having an annual turnover of less than \$3 million) and media and other activities.⁹ The ALRC recommends that there be no limitations or exemptions under the statutory cause of action. Subject to jurisdictional limitations, any justification in the public interest or defences including lawful authority,¹⁰ the new statutory cause of action would apply to any person or entity that invades the privacy of a person in the manner and circumstances set out in the Act.

4.12 A number of stakeholders considered that the cause of action, if enacted, should be contained in the *Privacy Act*.¹¹ Dr Normann Witzleb submitted that the cause of action is consistent with the objects of the *Privacy Act*, would make the name of that Act more appropriate, and would involve the Privacy Commissioner being given additional powers.¹² The Media and Communications Committee of the Law Council of Australia submitted that, if it were enacted, a statutory cause of action should be in the *Privacy Act* and subject to the existing media exemptions.¹³

4.13 On balance, and particularly because it recommends that the statutory cause of action should *not* include the exemptions in the *Privacy Act*, the ALRC considers that it

6 The existing complaints mechanism is discussed in Ch 15.

7 These responses are outlined in Ch 3.

8 As noted in Ch 3, the *Privacy Act* does apply to some individuals, including individuals who operate certain types of businesses and businesses that trade in personal information: see *Privacy Act 1988* (Cth) ss 6C–6EA. Section 16 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.

9 Ibid ss 6C(1), 6D (small businesses); s 7B(4) (journalistic acts); and s 7C (political acts).

10 The defence of lawful authority provides a significant exemption to a wide range of government and other agencies. See Ch 11.

11 N Witzleb, *Submission 116*; Australian Bankers’ Association, Submission No 72 to DPM&C Issues Paper, 2011.

12 N Witzleb, *Submission 116*. See, also, Australian Bankers’ Association, Submission No 72 to DPM&C Issues Paper, 2011.

13 Media and Communications Committee of the Law Council of Australia, *Submission 124*.

would be less confusing if the new cause of action were located in a new stand-alone Commonwealth Act. It would be appropriate for this Act to be called the *Serious Invasions of Privacy Act*.

4.14 If, however, an enhanced and broader model of complaints to the Australian Privacy Commissioner were to be introduced, as proposed by the OAIC, to provide complainants with an alternative to court proceedings in respect of invasions of privacy in general, there would be a stronger case for including the statutory cause of action in the *Privacy Act*.¹⁴ The OAIC's proposal for a complaints model is discussed in Chapter 16.

Constitutional issues

Head of power

4.15 This section examines the scope of the Commonwealth's power under the *Australian Constitution* to legislate for the new tort. This issue was discussed in the ALRC's report, *For Your Information: Privacy Law and Practice* (2008).¹⁵ The constitutional aspects of the ALRC's recommendations with regard to surveillance and harassment legislation are discussed in chapters 14 and 15 respectively.

4.16 The Commonwealth has the power to make laws with respect to 'external affairs'.¹⁶ This power enables the Commonwealth to give effect to its international obligations under a bona fide treaty.¹⁷ 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'.¹⁸ This is a key issue in considering the constitutionality of a Commonwealth statute providing a cause of action. The ALRC noted in 2008 that the *Privacy Act* was enacted on the basis of the external affairs power and other powers.¹⁹

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

14 'If a new cause of action is actionable only in the courts, further consideration should be given as to whether the provisions are included in either the Privacy Act or in separate Commonwealth legislation. On the one hand, there is benefit in having all federal privacy regulation within the same piece of legislation. On the other hand, the Privacy Act largely pertains to the OAIC's functions, so provisions unrelated to the OAIC may be better placed in other legislation': Office of the Australian Information Commissioner, *Submission 66*.

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

16 *Australian Constitution* s 51(xxix).

17 *Commonwealth v Tasmania* (1983) 158 CLR 1, 130–131, 172, 232, 259 (The Tasmanian Dam case). See, also, *Richardson v Forestry Commission* (1988) 164 CLR 261, 289; 303; *Castlemaine Tooheys v SA* (1990) 169 CLR 436, 473; *Victoria v Commonwealth* (1996) 187 CLR 416 at 487. The Commonwealth is not required to implement all provisions of a treaty.

18 *Victoria v Commonwealth* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

19 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) 195–196, referring to the Preamble. See now *Privacy Act 1988* (Cth) s 2A: 'The objects of this Act are (h) to implement Australia's international obligation in relation to privacy.'

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

4.18 The ICCPR was ratified by Australia subject to a number of reservations and declarations which included, in relation to art 17, the right to ‘enact and administer laws which, insofar as they authorise action which impinges on a person’s privacy, family, home or correspondence, are necessary in a democratic country in the interests of national security, public safety, the economic well-being of the country, the protection of public health or morals, or the protection of the rights and freedoms of others’.²⁰ Australia withdrew this reservation to art 17 on 6 November 1984.

4.19 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 invasions of privacy would be valid on the basis that the law would be reasonably capable of being considered appropriate and adapted to fulfilling Australia’s obligations under art 17 of the ICCPR.

4.20 To reflect art 17, the new tort would need to be seen as a measure aimed at prohibiting or regulating certain conduct in order to protect privacy.

4.21 Article 17 is intended to be a general protection against arbitrary or unlawful interference with privacy; it is not intended merely to restrict the actions of governments. The Human Rights Committee, which is an independent body established to supervise the application of the ICCPR,²¹ in its General Comment 16 on art 17, states:

In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons.

...

States parties are under a duty themselves not to engage in interferences inconsistent with article 17 of the Covenant and to provide the legislative framework prohibiting such acts by natural or legal persons.²²

20 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.

21 *Ibid* art 28.

22 Human Rights Committee, *General Comment No 16: Article 17 (The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation)*, 35th sess, UN Doc A/43/40 (28 September 1988) [1], [9]. The views of the Human Rights Committee, while not binding, represent a strongly persuasive view of what the international obligation entails. The High Court has been prepared to have regard to a range of international law sources in interpreting international obligations, see, eg, *R v Tang* (2008) 237 CLR 1.

4.22 ‘Arbitrary interference’ means interferences that are not reasonable in the particular circumstances. General Comment 16 says expressly:

The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.²³

4.23 In its *Toonen* decision, the Human Rights Committee also said:

The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.²⁴

4.24 The High Court grants some latitude to Parliament in selecting the means by which to give effect to a treaty obligation.²⁵

4.25 It has been suggested that a treaty setting out a ‘broad objective with little precise content and permitting widely divergent policies by parties’ may not be sufficiently specific to support legislation.²⁶ However, the High Court has recognised that international obligations need not be defined with the precision required under domestic law, and that ‘absence of precision does not, however, mean any absence of international obligation’.²⁷ 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, so that there is not a problem of insufficient specificity.

4.26 The ALRC considers that the enactment of a statutory cause of action for serious invasion of privacy carries the provisions of art 17(2) into effect and satisfies the requirement of proportionality. The creation of the action is likely to act as a disincentive to engage in invasions of privacy in Australia. Conferring a private right to redress will have the effect of protecting persons from interferences with their privacy. Further, in addition to according individuals the ‘protection of law’ as required by art 17(2), a statutory cause of action could be said to further the fulfilment of Australia’s obligation to provide an effective remedy to violations of art 17 as required by art 2(3) of the ICCPR.

4.27 The limited interests protected by the cause of action are generally accepted as falling within the notion of ‘privacy’. To aid the courts in interpreting the statutory cause of action, it could be made clear in the Act or extrinsic material (such as the

23 *R v Tang* (2008) 237 CLR 1, [4].

24 Human Rights Committee, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (4 April 1994).

25 Leslie Zines, *The High Court and the Constitution* (Butterworths, 4th ed, 1997) 288; Sir Anthony Mason, ‘The Influence of International Law and Transnational Law on Australian Municipal Law’ (1996) 7 *Public Law Review* 20, 24. See, also, *Victoria v Commonwealth* (1996) 187 CLR 416, 486–487; *Richardson v Forestry Commission* (1988) 164 CLR 261, 289, 296.

26 *Victoria v Commonwealth* (1996) 187 CLR 416, 486.

27 *Commonwealth v Tasmania* (1983) 158 CLR 1, 242; *Victoria v Commonwealth* (1996) 187 CLR 416, 486.

Explanatory Memorandum) that Parliament did not intend that the cause of action would extend beyond what is encompassed in the notion of ‘privacy’ in art 17.

4.28 In its 2008 report, the ALRC canvassed other heads of power as a basis for legislating on privacy, which may also support aspects of the statutory cause of action.²⁸ One of these was the Commonwealth’s power to legislate with respect to ‘postal, telegraphic, telephonic and other like services’.²⁹ The technology-neutral phrase ‘other like services’ demonstrates that the possibility of developments in technology was contemplated by drafters when framing s 51(v).³⁰ Radio and television broadcasting have been held to be within the Commonwealth’s power under s 51(v).³¹ Although the Commonwealth’s power to regulate the internet under this head of power is yet to be considered by the High Court, it does not seem controversial that it would be a ‘like service’.³²

4.29 The ALRC notes that a number of other powers could be relied upon to provide partial support for Commonwealth legislation enacting a statutory cause of action, but they would not in total provide the Commonwealth with the full support that the external affairs power would provide. The legislation enacting the statutory cause of action could, however, include a ‘reading down’ provision, invoking the communications power and the following additional heads of power to ensure that the legislation is as robust as possible from a constitutional perspective:

- s 51(xx) of the Constitution, which gives the Parliament the power to make laws with respect to ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’;
- s 122 which confers near plenary power on the Commonwealth to legislate in respect of the Territories;
- ss 51(xiii) and (xiv), the banking and insurance powers, which would enable the Commonwealth to legislate to regulate relevant conduct of persons engaging in the business of banking or insurance (provided this was not state insurance or state banking carried on within the limits of a state);
- s 51(i), the interstate and overseas trade and commerce power, which would enable the Commonwealth to legislate with respect to relevant conduct engaged in in the course of interstate or overseas trade or commerce;

28 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) 196; *Australian Constitution* s 51(i), (v), (xiii), (xiv), (xx).

29 *Australian Constitution* s 51(v).

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

31 *R v Brislan; Ex parte Williams* (1935) 64 CLR 262; *Jones v Commonwealth (No 2)* [1965] HCA 6 (3 February 1965).

32 Helen Roberts, ‘Can the Internet Be Regulated?’ (Research Paper No 35, Parliamentary Library, Parliament of Australia, 1996) 25.

- the ‘geographically external’ aspect of the external affairs power in s 51(xxix), which would permit the Commonwealth to legislate to regulate relevant conduct occurring outside Australia (eg the electronic surveillance of a person in Australia by a person outside of Australia); and
- s 51(xxxix), the express incidental power, which would enable the Commonwealth to regulate its own conduct and the conduct of bodies established by Commonwealth legislation.

4.30 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.³³

Constitutional limits

4.31 The Commonwealth’s power to legislate is subject to both express and implied constitutional limitations.

Implied freedom of political communication

4.32 The legislative power of the Commonwealth is subject to the implied freedom of political communication,³⁴ although the precise scope of the communications protected is still a matter of some uncertainty. In assessing whether a law infringes the freedom, there are two questions.

4.33 The first question is, does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect?

4.34 The second question is, 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?³⁵

4.35 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’. This test has been affirmed in a number of recent decisions of the High Court.³⁶

33 *Australian Constitution* s 109.

34 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322; *Unions NSW v State of New South Wales* (2013) 88 ALJR 227.

35 *Wotton v Queensland* (2012) 246 CLR 1; *Monis v The Queen* (2013) 87 ALJR 340; *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1; *Unions NSW v State of New South Wales* (2013) 88 ALJR 227.

36 *Wotton v Queensland* (2012) 246 CLR 1; *Monis v The Queen* (2013) 87 ALJR 340; *Attorney-General for South Australia v Corporation of the City of Adelaide* [2013] HCA 3; *Unions NSW v State of New South Wales* (2013) 88 ALJR 227.

4.36 The ALRC considers that the recommended statutory cause of action would not infringe the implied freedom of political communication. The recommended cause of action requires that the court be satisfied that the plaintiff's interest in privacy outweighs the defendant's interest in freedom of expression and any broader public interest, and includes a number of relevant defences such as absolute privilege. It is suggested that freedom of expression be specified as including the freedom to discuss political 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.

4.37 However, it may be prudent to include a provision expressly stating that the Act does not apply to the extent (if any) that it infringes the implied freedom of political communication.³⁷

Impact on states

4.38 The ALRC's 2008 report discussed the *Melbourne Corporation* principle, as an implied limitation on the Commonwealth's power to legislate. In 2012, 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.³⁸

4.39 The immunity applies not only to state governments but also to state agencies, including state corporations, to the extent that they are carrying out the functions of the state.³⁹

4.40 The ALRC considers that a statutory cause of action, while imposing a burden on state governments or agencies, would not curtail the states' capacity to function as governments. This is particularly so in view of the defence of lawful authority, which will provide government agencies including law enforcement agencies with protection from liability for serious invasions of privacy where that conduct was consistent with their statutory powers. The Act would not place any greater burden on a state (or states) than on the Commonwealth itself.⁴⁰

An action in tort

<p>Recommendation 4-2 The cause of action should be described in the Act as an action in tort.</p>
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37 The use of constitutional terms in this way has sometimes been criticised, but was recently upheld in *Wurridjal v Commonwealth* (2008) 237 CLR 309.

38 *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.

39 *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 218.

40 *Austin v Commonwealth* (2003) 215 CLR 185; *Clarke v Commissioner of Taxation* (2009) 240 CLR 272.

4.41 There are a number of reasons for the ALRC's recommendation that the new cause of action should be specifically described as an action in tort.

4.42 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 purpose of determining whether other consequences follow at common law or under other statutes.⁴¹ This would also be the case if a new statutory cause of action were enacted.⁴² 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.⁴³ It may be relevant to decide whether an employer is vicariously liable to the plaintiff, 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.⁴⁴
- 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.⁴⁵ Statutory contribution rights may apply only to 'tortfeasors'.⁴⁶

41 *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].

42 The Australian Bankers' Association was the only stakeholder who raised concerns with this proposal, citing concerns about overlapping causes of action: Australian Bankers' Association, *Submission 84*. The ALRC notes, however, that it is commonplace for a person to have more than one cause of action and the courts are alive to the risk of double compensation. Doctrines such as issue estoppel and *Anshun* estoppel prevent undesirable duplication of litigation. Several stakeholders, including PIAC, agreed with the proposal but most did not comment: Public Interest Advocacy Centre, *Submission 105*.

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

44 *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. Professor Dan Svantesson submitted that the ALRC in its Discussion Paper, while correctly stating the law, understated the complexity of the application of private international rules which 'will be far from a mechanical task even when the action is classed as a tort' and that it would be better to clarify the application of private international law rules to specific types of privacy violation that may attract liability under the tort, rather than leaving these matters in limbo: D Svantesson, *Submission 70*. However, given the wide range of possible factual situations, the ALRC doubts that such a task is feasible for any legislator and in any event such an attempt may quickly become outdated by changes in technology. Further, leaving the application of the general rules to the courts is more likely to lead to consistency when there are different causes of action arising out of the same conduct.

45 *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.

46 See, eg, *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) s 5.

4.43 Describing the action as a tort action will therefore 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.⁴⁷

4.44 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 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 to say that 'this definition is far from informative'.⁴⁸ Torts may be created by common law or statute.⁴⁹

4.45 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 plaintiff, 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.

4.46 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 Act. This will enhance the coherence and consistency of the law.

4.47 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'.⁵⁰ The New Zealand courts have recognised new causes of action in

47 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 an employer is vicariously liable for the acts or the torts of an employee.

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

49 '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': Keith Stanton et al, *Statutory Torts* (Sweet & Maxwell, 2003) 6.

50 *Privacy Act*, RSC 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).

tort to protect privacy.⁵¹ While 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), 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’.⁵² While Australian courts may not be prepared to take the same leap in classification as may have occurred in the United Kingdom, the legislature is not so constrained.

4.48 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* and the *Broadcasting Services Act 1992* (Cth).

4.49 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.⁵³

4.50 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.

4.51 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.⁵⁴ In the ALRC’s view this point

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

52 *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] 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.

53 *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 v Bestnet Europe Ltd* [2013] 1 WLR 1556; *AMI Australia Holdings Pty Ltd v John Fairfax Publications Pty Ltd* [2010] NSWSC 1395.

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

seems to overlook or downplay the balancing that is required in some existing tort actions, such as in private nuisance, in which courts balance the interests of the plaintiff with those of the defendant in their respective use of their land.⁵⁵

4.52 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.⁵⁶ The Victorian Law Reform Commission (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'.⁵⁷ Examples given were rules as to fault, damage, remedies and vicarious liability.

4.53 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.⁵⁸ 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 plaintiffs 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.⁵⁹

4.54 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.⁶⁰ The ALRC considers that strict liability, or negligence based liability, would be oppressive or undesirable.⁶¹ 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 recommends the integration of the

55 See Ch 9.

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

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

58 Free TV, *Submission 55*; The Newspaper Works, *Submission 50*; ASTRA, *Submission 47*; Telstra, *Submission 45*; Australian Bankers' Association, *Submission 27*.

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

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

61 See Ch 7.

statutory action into the existing legislative and common law framework of tort law. This approach is preferable to the establishment of an entirely separate legislative framework,⁶² or to leaving these issues open and therefore uncertain in key respects.

Abolition of common law actions

4.55 The Terms of Reference ask whether, in the event that the statutory action were enacted, any common law actions should be abolished. Such a provision may be unnecessary, depending on common law developments at the time of enactment.

4.56 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.

4.57 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.⁶³

4.58 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.

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

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