



Is the new tort for serious invasion of privacy relevant to Government?

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Is the new tort for serious invasion of privacy relevant to Government?

Yes – while there are broad exemptions for the lawful exercise of functions in good faith, Commonwealth and State agencies should review their information sharing arrangements and consider updating privacy impact assessments to ensure that any potential use and disclosure of personal information clearly falls into a defined exemption and/or controls are adequate to minimise the risk of conduct that would amount to a serious breach of privacy.

Background

From 10 June 2025, serious invasions of privacy are actionable as a new statutory tort in Australia. The new tort was introduced by addition of a new Schedule 2 to the *Privacy Act 1988* (Cth).¹

Our previous article (link) provided a detailed outline of the operation of the new tort.

For the most part, many of the actions of government are likely to be covered by one of three relevant exemptions intended to ensure that government agencies are able to perform their legitimate functions and activities.² However, given the expansive role of government agencies as collectors, storers and users of personal information, it is important that agencies and employees understand the limits of the exemptions.

Importantly, Commonwealth agencies and State and Territory authorities need to be aware that:

- agencies/authorities could be liable where invasion of privacy is outside of the scope of the exemptions, such as where the tortious conduct was not done in good faith in the performance or purported performance of a function of the agency/authority or was not a good faith exercise or purported exercise of a power of the agency/authority; and
- even where the exemption does apply, existing secrecy and information sharing limitations will continue.

Recap of the tort

Under the new legislation, a tortfeasor can invade a person's privacy by intruding upon the person's seclusion and/or by misusing information that relates to the individual.³ Intrusion upon a person's seclusion is non-exhaustively defined as including physically intruding into a person's private space as well as activities such as watching, listening or recording someone's private affairs. Misusing information is non-exhaustively defined as collecting, using or disclosing information about an individual.

¹ Schedule 2 was inserted into the *Privacy Act 1988* by the *Privacy and Other Legislation Amendment Bill 2024*, with Schedule 2 commencing on 10 June 2025.

² See the *Supplementary Explanatory Memorandum to the Privacy and Other Legislation Amendment Bill 2024*, at [79].

³ Cl 7(1)(a)(i) and (ii) of Schedule 2.

Both intruding upon a person's seclusion and misusing information cover a broad range of circumstances focused on the actions of the tortfeasor. However, an invasion of an individual's privacy will only be actionable as a tort where each of the remaining elements are also met:

- (a) that a person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances (cl 7(1)(b));
- (b) the invasion of privacy was intentional or reckless (cl 7(1)(c));
- (c) the invasion of privacy was serious (cl 7(1)(d)); and
- (d) the public interest in the plaintiff's privacy outweighed any countervailing public interest (cl 7(1)(e)).

Reasonable expectation of privacy

Whether a person in the position of the plaintiff would have had a reasonable expectation of privacy in all the circumstances is an objective test in which a Court will consider the non-exhaustive list of considerations set out at subclause 7(5). These considerations are substantially similar to those identified in the UK decision *Murray v Express Newspapers Plc*⁴ in which the Court of Appeal (Civil Division) held that whether a person had a reasonable expectation of privacy was an objective question that took into account all the circumstances of the case including the attributes of the claimant, the nature of the activity in which he was engaged, the place at which it happened, the nature and purpose of the intrusion, the absence of consent, the effect on the claimant and the circumstances in which, and the purposes for which, the information reached the hands of the publisher.

Invasion of privacy was "serious"

In determining whether the invasion of privacy was "serious" subclause 7(6) provides that the Court may consider:

- (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;
- (b) whether the defendant knew or ought to have known that the invasion of privacy was likely to offend, distress or harm the dignity of the plaintiff; and
- (c) if the invasion of privacy was intentional and whether the defendant was motivated by malice.

These considerations may often overlap with the considerations for whether there was a reasonable expectation of privacy.

Balancing of public interest

When considering whether the public interest in the plaintiff's privacy is outweighed by any countervailing public interest, cl 7(3) contains a non-exhaustive list of matters that may constitute a countervailing public interest, including, the proper administration of government, public health and safety, or the prevention and detection of crime and fraud. The Explanatory Memorandum makes it clear that the intent behind this provision is that it should not be assumed that where an invasion of privacy has occurred in furtherance of one of the considerations listed in cl 7(3) that it will automatically outweigh the public interest in maintaining an individual's privacy. Rather, the Court will engage in a balancing exercise regarding the circumstances of a particular case.

⁴ [2009] Ch. 481

Fault element – intentional or reckless

Paragraph 7(1)(c) provides a fault element in which the invasion of privacy by the tortfeasor must be intentional or reckless. Although not a criminal offence, “reckless” has the same meaning as in the *Criminal Code*, which relevantly provides at 5.4(1) that a person is reckless with respect to a circumstance if:

- (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
- (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

Defences

Schedule 2 also contains several defences to the tort of serious breach of privacy. While not the focus of this article, the defences that may be most relevant to government agencies include:

- where the invasion of privacy was required or authorised by or under an Australian law or court or tribunal;
- where the defendant reasonably believed that the invasion of privacy was necessary to prevent or lessen a serious threat to life, health or safety of a person.

Exemptions to the tort

Government agencies frequently collect, store and use personal and sensitive information in the performance of their functions and subject to specific legislative powers. To ensure that these functions can continue, Schedule 2 contains several exemptions to the tort, with the most relevant exemptions to government being where the invasion of privacy is by:

1. a Commonwealth agency or a State or Territory authority to the extent that the invasion of privacy is done in good faith and in performance, or purported performance, of a function of the agency or the exercise of a power of the agency or authority (clause 16);
2. staff members of a Commonwealth agency or a State or Territory authority to the extent that the invasion of privacy is done in good faith and in performance, or purported performance, of a function of the agency or the exercise of a power of the agency or authority (clause 16A);
3. a law enforcement body (including its staff in the performance of their duties, power or functions), a disclosure to a law enforcement body or involves information disclosed to a law enforcement body (clause 16B);
4. an intelligence agency (including an ASIO affiliate, agent or staff member of the intelligence agency), involves a disclosure to an intelligence agency, or involves information disclosed to an intelligence agency (clause 17).

Agency and Authority good faith exemption

The Supplementary Explanatory Memorandum explains that Clauses 16 and 16A provide that Schedule 2 does not apply to an invasion of privacy by an agency or State or Territory authority to the extent that the invasion of privacy occurs in the good faith performance or purported performance of a function, or exercise or purported exercise of a power, of the agency or authority. The purpose of these exemptions is to “ensure that government agencies are able to effectively perform their legitimate functions and activities.”⁵

⁵ Supplementary Explanatory Memorandum to the *Privacy and Other Legislation Amendment Bill 2024*, at [79]

The key considerations in assessing whether the exemption under either cl 16 or 16A applies are:

- was the invasion of privacy done in good faith; and:
 - in performance or purported performance of a function of the agency or authority; and/or
 - or an exercise or purported performance of a power of the agency or authority?

Good faith

The use of a good faith exemption in tort law for the actions of public offices is not new and is generally used to afford protection to a public official who undertakes an activity that would otherwise amount to an infringement of the tort but does so “in good faith”. The courts have generally been reluctant to provide a single meaning for the term “good faith” noting that it is ““protean” in character with “long standing usage in a variety of statutory and ... common law contexts.”⁶

Noting that “good faith” is not defined in the Privacy Act, in the context of cl 16 and 16A whether an invasion of privacy was done in “good faith” is likely to require an assessment of the particular circumstances of a case to consider both the subjective honesty and purpose of the decision-maker and also an objective assessment of whether the decision-maker took a conscientious approach to whether the invasion of privacy was in performance of a function of the agency or exercise of a power of the agency.⁷

It is therefore necessary to consider what the functions and powers of the agency are to determine whether the exemption will apply.

Functions of the agency or authority

The functions of an agency are usually found in the Administrative Arrangements Orders (for a department of state) or the instrument or Act that established the agency. Once established it will be a question of fact as to whether an invasion of privacy was done in the performance of that function.

An example of where an invasion of privacy would probably not have been in accordance with the functions of an organisation can be seen in the facts of the Canadian case *Stewart v Demme*⁸ in which a nurse for a hospital accessed over 11,000 individual patient records to facilitate the theft of narcotics. While that case did not need to consider whether the nurse’s actions were in accordance with the functions of the hospital (it not being relevant to the Canadian tort), it is illustrative of the type of situation where an invasion of privacy may sit outside the scope of the exemption. Clearly accessing personal health records for the purpose of stealing narcotics would not be consistent with the functions of the hospital.

Exercise or purported exercise of a power

Where it is claimed that an invasion of privacy was in the exercise or purported exercise of a power of the agency/authority, a court will need to consider the scope of the specific power

⁶ *Secretary, Department of Education, Employment, Training and Youth Affairs v Prince* (1997) 152 ALR 127 at 130 per Finn J, as quoted by French J in *Bropho v Human Rights And Equal Opportunity Commission and Another* (2004) 204 ALR 761at [84]

⁷ This approach would be consistent with the mixed subjective and objective test outlined by French J in *Bropho v Human Rights And Equal Opportunity Commission and Another* (2004) 204 ALR 761

⁸ 2022 ONSC 1790

being used and the extent to which the exercise of the power is consistent with or authorises the invasion of privacy. Where the exercise of the power in question has the effect of restricting a person's rights, as would be the case in an invasion of privacy, the Courts have generally required a clear link between the conferring power and the relevant action.

This is particularly the case where the power being exercised was coercive in which case the use of any information obtained is limited to the purpose for which it was obtained.⁹

For example, if a state authority requests disclosure of information from a Commonwealth agency where that information was collected under an express statutory power for a defined purpose, it is not clear whether any on-disclosure to a state authority for some other purpose could be said to be for the purposes of or in the exercise of a power of the Commonwealth agency unless such a use is contemplated in the Commonwealth agencies statutory power. Where that disclosure was not otherwise authorised by a law (and therefore subject to the defence in cl 8(1)(a) or (b)) then the disclosure could potentially not meet the requirements of the exclusion.

Law enforcement bodies and intelligence agencies

Clauses 16B and 17 provide broad exemptions to the tort to a "law enforcement body" and "intelligence agencies". A "law enforcement body" is defined in clause 6 and includes Federal and State and Territory police forces, as well as various State and Federal anti-corruption and conduct commissions. "Intelligence agencies" is also defined in clause 6 to include various members of the Australian Intelligence Community including ASIS, ASIO and ASD.

The scope of these exemptions is very broad and "*recognises that...*" both law enforcement bodies and intelligence agencies "*...may undertake covert and privacy invasive activities in the public interest and that these activities are subject to a range of other accountability mechanisms.*"¹⁰ Unlike other government agencies, this exemption does not contain any good faith requirement or a direct link to the functions or powers of law enforcement bodies the intelligence agency and instead acts as a blanket exemption for these agencies.

Conclusion

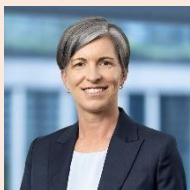
Both law enforcement agencies and intelligence agencies are broadly exempted from the serious invasion of privacy tort. For other Commonwealth agencies and State and Territory authorities, the exclusions contained in clauses 16 and 16A of Schedule 2 of the Privacy Act only exempt an invasion of privacy where it occurred in good faith and in performance of a function or exercise of a power of the agency. The effect of this is that both government agencies and individual governmental employees could potentially be liable where a serious invasion of privacy is outside of the scope of these exemptions.

Commonwealth agencies and State and Territory authorities should review their information sharing arrangements and consider updating privacy impact assessments to ensure that any potential use and disclosure of personal information clearly falls into a defined exemption and/or controls are adequate to minimise the risk of conduct that would amount to a serious breach of privacy.

⁹ See the principles set out by the High Court of Australia in *Johns v Australian Securities Commission* (1993) 178 CLR 408

¹⁰ Explanatory Memorandum to the *Privacy and Other Legislation Amendment Bill 2024* at [472] and Supplementary Explanatory Memorandum to the *Privacy and Other Legislation Amendment Bill 2024*, at [82]

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