

## **An action for (serious) invasion of privacy**

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## Introduction

There is no doubt that privacy is a hot topic. Every week as some new revelation is communicated to the world about the personal life, the relationships, the bank accounts, the movements or the health of a celebrity, politician, actor, singer, artist, member of a royal family or merely of some other, otherwise unremarkable, person, calls go out for greater legal protection of privacy. In Australia, we have recently had three law reform commissions, one Independent Enquiry into the Media and Media Regulation and another Convergence Review, all of which have looked at the issue of protection of privacy, either squarely or incidentally to some other focus of their enquiry. In the United Kingdom, the Leveson enquiry into the phone hacking saga which brought an abrupt end to the scandal- gathering career of "The News of the World" newspaper and its staff, continues as this paper is written. News International Ltd, and its parent company News Corp, is still trying to contain the fallout, but the companies have paid out millions of dollars in settlement of claims by victims of illegal phone tapping by journalists and investigators briefed or tolerated by the newspaper. The enquiry is now as concerned with alleged links and alliances between the police, the media and members of government, as it is about the governance of media companies, and getting to the heart of what senior executives knew or tolerated about the phone hacking practices that provoked the enquiry.

Much of the concern about protection of privacy is bound up with a broader concern about the quality of journalism and news reporting, in an economic, technological and social context where corporate media owners struggle to satisfy their shareholders' desire for profit, and as the Internet undermines the power of advertising in print, on television or radio and thus the sources of revenue that would traditionally subsidise both the quantity and quality of news reporting and commentary. The two issues must of course be kept separate, even though to a victim of a journalist's or a media entity's misconduct, and to the broader community, they are interlinked. The law can only regulate quality in an indirect way by deterring or compensating for misconduct. The law can however, if it is so inclined, protect privacy both indirectly and directly, by common law principles or statutory fiat. The question for us is how, and even if, it should do so.

While it's the media that is in the political spotlight at the moment, there is no proposal that any statutory right of privacy would be confined to media defendants: as private citizens, as friends, as members of families and associations, or as people occupying employment or professional positions where we come into possession of private information, we must be careful what we wish for. And, if this statutory action comes to pass, even more careful when someone says to us: "do you want to know a secret?"

Protection of their privacy is at the heart of people's concern about the ways in which personal information about them is collected, retained, stored, shared, used, or communicated. Sometimes this information is gathered without the person's knowledge, but increasingly it has been volunteered for one purpose, for various internet "apps" or for posting on social networks, without an awareness of how the

information can be used, misused or shared, and without, perhaps, proper consideration of whether it can ever be "forgotten" or erased. Australia's federal Privacy Act, 1988, has been frequently updated and the Attorney General Nicola Roxon has just announced the introduction of a Bill to broaden regulation and increase restrictions on various entities and to strengthen further the regulatory powers of government agencies such as the office of the privacy commissioner.<sup>1</sup> While such data protection is clearly a central aspect of privacy protection, it does seem to be one aspect where, generally, governments are pro-active about keeping up with technological developments and broadening regulation and protections. Data protection is not the focus of this paper. However, while it can be assumed that existing legislation gives people some rights and some means to control information that is held about them and some remedies for its misuse, it would be a matter of express provision and interpretation as to whether any new broad statutory remedy for "invasion of privacy" would supplement or merely complement that existing legislation.

The focus of this paper is on the desirability of either a statutory or a common law, broad-based action for invasion of privacy.

## **Why do people feel the need for an action for invasion of privacy?**

### **Misconceptions about the existing law: it is not as bereft of protection as many assume.**

It is frequently said that our law does not have a remedy for invasion of privacy. I've come across examples of this frequently, and I have to admit, somewhat to my frustration. We cannot have a proper debate on the need for legislation and the form and content of any statutory action unless we have a correct understanding of the current position.

For example, a recent article in the Sun Herald reported a case about a jilted boyfriend who had posted pictures of his nude former lover on Facebook and who had been given a suspended sentence of 6 months jail by Justice Reg Blanch, Chief Judge of the District Court of New South Wales. A privacy expert from a leading law firm was quoted as saying that the victim "should be able to take action for the invasion of her privacy but she can't at the moment."<sup>2</sup> Yet there are numerous examples of courts giving a remedy where a person who has been subject to a relationship of confidence has misused or disclosed confidential information. The cause of action dates back to Queen Victoria's time, even though the subject matter of the etchings in a case brought by Prince Albert<sup>3</sup> may have been a little more tame than what was the subject of the complaint in this case. It can make no difference that the disclosure today is usually online rather than by hardcopy, in person or by letter, as in former days.

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<sup>1</sup> <http://www.ag.gov.au/Privacy/Pages/Privacy-Reforms.aspx>

<sup>2</sup> H Aston, "Status Update: facebook offenders now face jail", *The Sun Herald*, April 22, 2012 at 7.

<sup>3</sup> *Albert v Strange* (1849) 2 De G & Sm 652; 64 ER 293

Describing a recent, very tacky, ambushing of Australian writer and poet Clive James guy is a soap claimed former lover filmed and broadcast on "a current affair", a commentator in the Sydney Morning Herald bemoaned the invasion of James's privacy, writing:

"This little kiss-and-tell was broadcast in Australia, so James really can't sue for breach of privacy, as he could if the show had gone to air in Britain."

Yet again, the "telling" is usually in breach of a relationship of confidence, and a third party such as the television company that broadcast the ambush and the disclosure, are, in equity, treated as bound by the obligation of confidence which it knows to exist.

Even the Australian Law Reform Commission, in its Report 108, *For Your Information: Privacy Law and Practice*, sets out, at 74.139, a number of circumstances as justifying a statutory action for the protection of privacy, most of which do in fact already attract some legal protection. They were:

"Examples of matters intended to fall within the ALRC's recommended statutory cause of action for serious invasion of privacy

1. Following the break-up of their relationship, Mr A sends copies of a DVD of himself and his former girlfriend (B) engaged in sexual activity to Ms B's parents, friends, neighbours and employer.
2. C sets up a tiny hidden camera in the women's toilet at his workplace, capturing images of his colleagues that he downloads to his own computer and transmits to a website hosted overseas, which features similar images.
3. D works in a hospital and accesses the medical records of a famous sportsman, who is being treated for drug addiction. D makes a copy of the file and sells it to a newspaper, which publishes the information in a front page story.
4. E runs a small business and uses F&Co Financial Advisers to handle her tax affairs and financial advice. Staff at F&Co decide to do a bit of 'spring cleaning', and a number of files are put out in a recycling bin on the footpath—including E's file, which contains her personal and contact details, tax file and ABN numbers, and credit card details. A passerby grabs the file and, unbeknown to E, begins to engage in identity theft: removing money from E's bank account, using her credit cards and applying for additional credit cards in E's name." (*footnotes omitted*)

There is little doubt, now, that examples 1, 2 and 3 would all provide the basis of action for breach of confidence in its modern form, at least in respect of the disclosure of the information. The fourth example is clearly fraudulent and criminal conduct by the "passer-by", and remediable on that basis already, while the conduct of the financial advisers is at least professional negligence in tort and contract, and compensable on that basis, if the client sustains a recognised head of damage.

It is true that the equitable action for breach of confidence in Australia has not yet been subject to the sustained and deliberate transformation into an action for breach of privacy that it has received in United Kingdom since the passage of the Human Rights Act 1998 in that country.

The members of the House of Lords in *Campbell v MGN Ltd*<sup>4</sup> were express and deliberate in explaining this transformation. Lord Hoffmann:

As Sedley LJ observed in a perceptive passage in his judgment in *Douglas v Hello! Ltd* [2001] QB 967, 1001, the new approach takes a different view of the underlying value which the law protects. Instead of the cause of action [ for breach of confidence] being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity—the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.

These changes have implications for the future development of the law. They must influence the approach of the courts to the kind of information which is regarded as entitled to protection, the extent and form of publication which attracts a remedy and the circumstances in which publication can be justified.

Since *Campbell v MGN*, numerous cases in United Kingdom have granted remedies for the disclosure of private information, both against a party to a former or prior relationship or against third parties such as media companies and agencies dealing in photographs of celebrities. Remedies have included both injunctions to restrain initial or further publication and damages for the “harm”, usually distress, caused by the publication.

In Australia, while we do not have the national equivalent of the Human Rights Act 1998 (UK) or the binding force of a convention such as the European Convention on Human Rights, and while we have not had anything like such a collection of cases as has occurred in the United Kingdom in the last decade, there can equally be no doubt that the equitable cause of action for breach of confidence will usually be a source of protection against the wrongful disclosure or use of confidential or private information, whether in the form of facts or writing or images, at least as far as injunctive rights are concerned.

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<sup>4</sup> [2004] 2 AC 457 at 473 [51]

The High Court of Australia, in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*<sup>5</sup>, indicated that the equitable action of breach of confidence would be a very likely source for the development of greater protection of privacy under the Australian common law. Gleeson CJ seemed to see more scope for this action to be used than for a broad tort to be fashioned:

The respondent invited this Court to depart from old authority <sup>135</sup>; declare that Australian law now recognises a tort of invasion of privacy; hold that it is available to be relied upon by corporations as well as individuals; and conclude that this is the missing cause of action for which everyone in the case has so far been searching.

If the activities filmed were private, then the law of breach of confidence is adequate to cover the case. I would regard images and sounds of private activities, recorded by the methods employed in the present case, as confidential. There would be an obligation of confidence upon the persons who obtained them, and upon those into whose possession they came, if they knew, or ought to have known, the manner in which they were obtained.

...But the lack of precision of the concept of privacy is a reason for caution in declaring a new tort of the kind for which the respondent contends.<sup>6</sup>

The decision of the Victorian Court of Appeal in *Giller v Procopets*<sup>7</sup> illustrates that the equitable action for breach of confidence can even, apparently, provide a remedy where tort law cannot. In that case, the defendant, the estranged de facto partner of the plaintiff, had maliciously passed around to the plaintiff's family and friends, copies of a video of consensual sexual activities the couple had enjoyed in earlier, happier, times. The Victorian Court of Appeal rejected the plaintiff's claim for damages based on the tort action under the principles of *Wilkinson v Downton*<sup>8</sup> for wilful infliction of psychiatric injury, because the plaintiff had merely suffered emotional distress and not the damage that such an action on the case requires, in the form of physical damage or a recognised psychiatric illness. Yet, the court was prepared to award the plaintiff "damages" (either as damages under the modified version of Lord Cairns Act in Victoria) or equitable compensation, by analogy with tort law, for the mental distress she had suffered, as a remedy for the defendant's breach of the equitable duty of confidence, including "aggravated damages" for the intended humiliation he had wreaked upon her. The High Court rejected an application for special leave to appeal from this judgment<sup>9</sup>. It nevertheless provides a precedent at a senior appellant level of the equitable action for breach of confidence fulfilling a powerful role in redressing what most people would regard as a flagrant breach of privacy. It would, one would imagine, provide a remedy to

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<sup>5</sup> (2001) 208 CLR 199

<sup>6</sup> Ibid, at 205 [38] – [41]

<sup>7</sup> (2008) 24 VR 1

<sup>8</sup> [1897] 2 QB 57 (QBD)

<sup>9</sup> *Procopets v Giller* [2009] HCASL 187: the application was dismissed on the ground that it raised no question of law on which an appeal could enjoy any prospect of success. See further M Rivette, "Litigating Privacy Cases in the wake of *Giller v Procopets*" (2010) 15 Media and Arts Law Review 283 at footnote2.

Mr Clive James if he were to be bothered to protest against the “show and tell” on “A Current Affair”.

While the equitable action for breach of confidence may once have been restricted, rather like a contract remedy, to the parties to a pre-existing relationship of confidence, that limitation or requirement, was discarded by the House of Lords in *Attorney General v Guardian Newspapers Ltd [No 2]* in 1998, when Lord Griffiths and Lord Goff set out a broader reach of the equitable action<sup>10</sup>. Lord Hoffmann in *Campbell* attributed the transformation of the equitable action into an effective means to protect privacy not only to the passing of the Human Rights Act 1998, but also to the “acknowledgement of the artificiality of distinguishing between confidential information obtained through the violation of a confidential relationship and similar information obtained in some other way”<sup>11</sup>, an acknowledgement generally associated with Lord Goff’s speech in *Attorney General v Guardian Newspapers Ltd [No 2]*:

Lord Goff:

...in the vast majority of cases, in particular those concerned with trade secrets, the duty of confidence will arise from a transaction or relationship between the parties - often a contract, in which event the duty may arise by reason of either an express or an implied term of that contract. It is in such cases as these that the expressions "confider" and "confidant" are perhaps most aptly employed. But it is well settled that a duty of confidence may arise in equity independently of such cases; and I have expressed the circumstances in which the duty arises in broad terms, not merely to embrace those cases where a third party receives information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include certain situations, beloved of law teachers - where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by<sup>12</sup>

See also Lord Griffiths in the same case:

The duty of confidence is, as a general rule, also imposed on a third party who is in possession of information which he knows is subject to an obligation of confidence: see *Prince Albert v. Strange* (1849) 1 Mac. & G. 25 and *Duchess of Argyll v. Duke of Argyll* [1967] Ch. 302. If this was not the law the right would be of little practical value: there would be no point in imposing a duty of confidence in respect of the secrets of the marital bed if newspapers were free to publish those secrets when betrayed to them by the unfaithful partner in the marriage. When trade secrets are betrayed by a confidant to a third party it is usually the

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<sup>10</sup> *Attorney-General v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109 at 260, 268, 281

<sup>11</sup> *Campbell v MGN Ltd* [2004] 2 AC 457 at 472[46].

<sup>12</sup> *Attorney-General v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109 at 260, 281. See also Sedley LJ in *Douglas v Hello!Ltd* [2000] QB 967 at [125]-[126]

third party who is to exploit the information and it is the activity of the third party that must be stopped in order to protect the owner of the trade secret.<sup>13</sup>

In *ABC v Lenah Game Meats Pty Ltd*, Gleeson CJ cited both Lord Goff's judgment in *Attorney General v Guardian Newspapers Ltd [No 2]* and that of Laws J in *Hellewell v Chief Constable of Derbyshire*<sup>14</sup> with approval, saying:

But equity may impose obligations of confidentiality even though there is no imparting of information in circumstances of trust and confidence. ... The nature of the information must be such that it is capable of being regarded as confidential. A photographic image, illegally or improperly or surreptitiously obtained, where what is depicted is private, may constitute confidential information.<sup>15</sup>...

No doubt this principle was at play when the Australian Broadcasting Corporation recently came to a settlement with individuals who had been identified as "high rollers" at the local casino by a Sydney newspaper, a fact then relayed on air by the ABC, information that had, I assume, been leaked by someone at the Casino, in breach of the Casino's confidentiality rules.<sup>16</sup>

So if Australian common law already provides a remedy for misuse or disclosure of private information, not just against a person who was subject to a relationship of confidence but also against a third party such as a journalist or media entity who comes into possession of the information, why is a statutory action necessary in such cases?

The response of the ALRC to the various examples it had given was: "While some of the examples above also may give rise to criminal sanctions,<sup>[192]</sup> a federal statutory cause of action would give complainants access to a broader range of civil remedies to redress the invasion of their privacy", and went on to cite the first instance decision in *Giller v Procopets*<sup>17</sup> in which the plaintiff had failed. That the ALRC Report's answer to this question is already outdated by the Victorian Court of Appeal's decision in the plaintiff's favour shows how quickly the common law can change if the right case is pursued. As set out above, that court provided a monetary remedy to the plaintiff for her emotional distress on the basis of the equitable action. Assuming the correctness of that decision<sup>18</sup>, one has to ask what additional remedy the statute would or could provide that the plaintiff could not already obtain from the court.

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<sup>13</sup> *Attorney-General v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109 at 268

<sup>14</sup> [1995] 1 WLR 804 at 807: "If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence. It is, of course, elementary that, in all such cases, a defence based on the public interest would be available."

<sup>15</sup> (2001) 208 CLR 199 at 222[30]

<sup>16</sup> L Hall, "ABC ordered to pay \$190,000 after identifying the Star's high rollers", *Sydney Morning Herald*, Friday, May 25, 2012.

<sup>17</sup> (2008) 24 VR 1

<sup>18</sup> An application for special leave to appeal was rejected: see n 9 above.

## Gaps in the protection given by the existing law

There is no doubt, that the common law, including both the law of tort and equitable principles, together with piecemeal legislation prohibiting the use and misuse of various technological devices,<sup>19</sup> provides more protection of privacy than the misconceptions above allow.

Writing of Professor Prosser's wide, fourfold classification of the privacy torts in the United States, Gummow and Hayne JJ in *ABC v Lenah Game Meats Pty Ltd*, said:

In Australia, one or more of the four invasions of privacy, to which reference has been made, in many instances would be actionable at general law under recognised causes of action. Injurious falsehood, defamation (particularly in those jurisdictions where, by statute, truth of itself is not a complete defence), confidential information and trade secrets (in particular, as extended to information respecting the personal affairs and private life of the plaintiff, and the activities of eavesdroppers and the like), passing-off (as extended to include false representations of sponsorship or endorsement), the tort of conspiracy, the intentional infliction of harm to the individual based in *Wilkinson v Downton* and what may be a developing tort of harassment, and the action on the case for nuisance constituted by watching or besetting the plaintiff's premises, come to mind. Putting the special position respecting defamation to one side, these wrongs may attract interlocutory and final injunctive relief.<sup>20</sup> (footnotes omitted)

Nevertheless, there are significant gaps in that protection, particularly in protecting people from *intrusions* into physical privacy, whether on private property or in public spaces.

It was just such a gap which led the Court of Appeal in *Kaye v Robertson* to bemoan the lack of protection that the common law could then provide to Mr Kaye, in 1991, against the excesses of the media at that time. Lord Justice Glidewell:

"This case... highlights yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens... If ever a person has a right to be left alone by strangers with no public interest to pursue, it must surely be when he lies in a hospital bed recovering from brain surgery and with no more than partial command of his faculties. It is this invasion of privacy which underlies the plaintiff's complaint. Yet it alone, however gross, does not entitle him to relief in English law.... We cannot give the plaintiff the breadth of protection which I award, for my part, wish."<sup>21</sup>

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<sup>19</sup> For a list of the various statutes, see D Butler and S Rodrick, *Australian Media Law*, 4<sup>th</sup> ed, 2012 at p

<sup>20</sup> At [123]

<sup>21</sup> *Kaye v Robertson and Sports Newspapers Limited* (1991) 18 FSR 62 at 71

It seems to me that there are two primary gaps in the protection which current Australian law provides against wrongful invasions of privacy.<sup>22</sup>

First, in relation to invasion of privacy into a person's "personal space", there is the problem of intrusions which fall short of the protection which the law of trespass to the person, trespass to land and nuisance provide.

Trespass to the person and nuisance have strict requirements as to title to sue, confining the tort to the person who is the exclusive occupier of the land in question, and not extending to someone who would be characterised as a licensee, such as Mr Kaye who was occupying a room or bed in a hospital. The torts also of course require the invasion of privacy to interfere with the occupier's use or occupation of the land. Thus they have no operation outside the area of occupation, and no operation to people other than occupiers. Outside private land, the plaintiff must rely on trespass to the person.

Trespass to the person requires either physical contact (in the form of battery) or a threat or the deliberate causing of an apprehension of unauthorised physical contact (in the form of an assault). As the Court of Appeal noted in *Kaye v Robertson*, it has long been the law that it is no tort of itself to take a photograph or digital image of another person without their permission. In this age of mobile phones with cameras, any such tort would be committed innumerable times every day. Conduct which is invasive of privacy but is merely annoying or even more seriously harassing, will not be caught if it does not involve either a threat of contact or actual contact.

Secondly, in relation to disclosures of private information, the most important gap in the common law is the restriction on damages for emotional distress. This gap may have been closed by the decision in *Giller v Procopets*, but until there is a body of authority on the point around the country, the availability of damages for such loss remains somewhat uncertain. A related point is that courts are circumscribed by precedent and judicial powers as to what remedies they can provide: they cannot for example, order apologies or retractions or corrections without legislative authority.

Bearing in mind then the existing protection and the gaps that have been identified so far, I turn to the benefits and disadvantages of a statutory action for breach of privacy.

## What is the perceived benefit of a statutory action?

### The views of the Australian Law Reform Commission

There have been a series of law reform commission reports over the last 40 years dealing with privacy. Apart from recommendations for legislation dealing with data protection, not all have recommended a broad based action for invasion of privacy.

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<sup>22</sup> I consider tort law's role and these gaps in detail in "Tort's role in protecting Privacy: Current and Future Directions", ch 4 in Degeling, Edelman and Goudkamp (eds), *Torts in Commercial Law*, Thomson Reuters, 2011.

The first federal report was from the ALRC under the chairmanship of Michael Kirby. *Report 11: Unfair Publication: Defamation and Privacy* in 1979 recommended that legislation be enacted to “afford some protection against privacy –invading publications” but that “the legislation should specify the protected area rather than create a more general right to privacy.”<sup>23</sup> The recommendations were limited to the publication of sensitive private facts about the “bedrock area relating to individuals’ relationships, home, family and private life” and the publication would have to be such as to cause distress, embarrassment or annoyance, judged objectively.<sup>24</sup> It would also extend to what in American jurisprudence is called the appropriation aspects of privacy: appropriation of one’s name, identity or image for commercial purposes, what we in Australia would regard as the subject of the tort of passing off, and which, in the light of actions for misleading or deceptive conduct under the 1974 Trade Practices Act or state and territory Fair Trading Acts, is no longer as necessary as it might once have been. Perhaps because of this wider application, the action would be a tort of ‘unfair publication’.

The second was *ALRC Report 22: Privacy*, in 1983. Its recommendations led to the enactment of the Privacy Act 1988 (Cth), the creation of the Privacy Commission and position of Privacy Commissioner, with particular emphasis on collection, storage, use and misuse of private information. It did not include a recommendation as to a right of action for invasion of privacy, stating that a general tort of invasion of privacy “would be too vague and nebulous”<sup>25</sup>.

Three recent reports have each recommended a statutory action: ALRC Report 108 *For Your Information: Australian Privacy Law and Practice* (2008), the NSWLRC Report 120: *Invasion of Privacy*, and the Victorian Law Reform Commission Final Report 18: *Surveillance in Public Places*. However, despite this seeming consensus on the desirability of a statutory action, there is a considerable divergence of views between the reports as to important elements of any such action, including disagreements as to the form of the action, as to the way in which freedom of speech and public interest will be considered, and as to the fault element. Until clarity and consensus on such matters is reached, it is difficult to see how a statutory action can or will be supported.

Particular matters of difference, about which consensus is still to be reached, are discussed below. At this point, we are interested in *why* the various commissions favoured a statutory action rather than one development by the common law. The ALRC gave the following reasons<sup>26</sup>, expressed by reference to the problems of the common law than the positives of a statute:

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<sup>23</sup> ALRC Report 11 at #235

<sup>24</sup> at #236

<sup>25</sup> ALRC Report 22: Privacy (1983) at [1081], cited in ALRC Report 108: *For Your Information: Australian Privacy Law and Practice* (2006) at 74.10.

<sup>26</sup> at #74.2

- Common law development can be piecemeal and fragmented, with variations between jurisdictions until the High Court has ruled on an issue. This is particularly true where the state courts operate under different enabling legislation. Implicit in this point is the assumption that legislation on privacy protection would be uniform across the country, an assumption that, as we note below, may be at best over-confident and at worst unrealistic.
- The continuing uncertainty that this fragmentation of the common law causes will make it harder for media and other organisations and individuals to organise their respective operations and policies. Again, this assumes that, by contrast, state and territory legislation will be uniform.
- “Some courts also may choose to adopt the ‘breach of confidence’ approach based on case law in the UK, which would result in further inconsistency”. The feared inconsistency is not explained. However, if what is meant here is inconsistency between a “privacy” approach and a “breach of confidence” approach, the development of the law in the UK would not seem to indicate such inconsistency.

### **Views from the United Kingdom:**

In March 2012, the Joint Committee on Privacy and Injunctions of the House of Lords and House of Commons released its report. It had been asked in July 2011 to consider and report on this topic. It received both oral and written evidence from a wide range of people, including lawyers specialising in media law, editors and proprietors of newspapers, magazines, networks and online media interests, litigants and defendants, judges, academics, the Press Complaints Commission, the Attorney General, and other politicians.<sup>27</sup> The report makes interesting reading, if only for its conclusion, perhaps unusual for a parliamentary committee in this age of statutes, that legislation is not the answer and that the issues are better left to the courts to develop.

The report first sets out why some witnesses supported a statutory action. First, vehemently argued by some strident sections of the media in Britain (and we can hear an echo of their claims in some sections of the Australian media) is the “anti-judicial activism” line of argument: a new privacy law fashioned by judges is anti-democratic

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<sup>27</sup> It was assisted by Professor Eric Barendt, Emeritus Professor of Media Law at University College London, by Sir Charles Gray, a former High Court judge, and by a former chief executive of the Press Association.

because judges are not elected. As the Committee points out<sup>28</sup>, this line of argument overlooks the fact that the “new” law of privacy that has developed in the United Kingdom is based on the Human Right Act, 1998, passed by a democratically elected parliament, and *requiring* the courts to give effect to Article 8 of the European Convention on Human Rights to which the United kingdom is a signatory as a member of the European Union.

The second key argument made in support of a statutory action is that it is said that it would clarify the law on privacy, the implication being that the existing common law protection is too uncertain and unpredictable in operation.

Interestingly, the committee’s report does not refer to any arguments that the existing common law protection in the United Kingdom provides inadequate protection of privacy, in the sense that it does not capture all conduct that amounts to an indefensible invasion of privacy. Rather, the complaints were in relation to procedural or remedial matters: the lack of a legal right of prior notification before public disclosure of private matters<sup>29</sup>, the prohibitive costs of bringing an action, multijurisdictional difficulties, and the low level of damages, including a reluctance to award exemplary damages, in privacy actions. A further difficulty, for a disclosure as salacious as that of Max Mosley’s private activities, is that the internet makes it well nigh impossible, even with the co-operation of the larger internet players like Google, Facebook and Twitter, for a person to contain information once it is out in cyberspace. For defendants, there was particular concern with the chilling effect of the currently allowed conditional fee arrangements, but this again is more procedural than substantive and is not limited to privacy actions, and is in any event subject to separate parliamentary scrutiny.

These arguments were not accepted by the Committee and it concluded *against* the introduction of a statutory action for privacy. There were a number of factors relied on to support this conclusion, but the key reason the Committee gave was that “a privacy statute would not clarify the law.” This was because so many concepts inherent in the action are essentially matters of judgment<sup>30</sup>, so that judges would still be required, as they already are, to balance the evidence and make a judgment on a case-by-case basis.

- *Defining privacy:* While some argued that publishers and litigants would both find a statutory definition of what is private more helpful than the current descriptions or holdings to be found in the case law, and that a detailed list of what is to be considered private information would save the cost of asking a court to decide the issue, and remedy any existing defects in what is considered private<sup>31</sup> the committee was unconvinced. An exhaustive list would be inflexible and become outdated and a general list would be subject to the court’s

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<sup>28</sup> # 41

<sup>29</sup> Mosley action to ECHR

<sup>30</sup> #50,

<sup>31</sup> although the report does not give an example of such a defect in what is currently accepted by the courts.

interpretation, and in any event, deciding that information is private is only one step in the process, and still leaves the balancing with public interest to be done.

- *Defining public interest:* Any statute would need to set out that a right of privacy is subject to the competing demands of public interest, yet any attempt to define what is meant by “public interest” is fraught with difficulty. If the concept were defined, any definition, it was argued by many, would have to be “either so rigid that it could not keep pace with social mores or so loose as to make it almost meaningless”<sup>32</sup>. Further, any interpretation of a detailed definition would be subject to continual challenge in the courts. Those in favour of a statutory definition pointed to existing codes such as in BBC Editorial Guidelines and the PCC’s Editors Code of Practice. On the other hand, the concept of public interest is one that arises in many other contexts and although sometimes referred to in legislation, such as copyright legislation, it is usually not defined with specificity but is left as a broad concept. It is a concept which has been described but not exhaustively defined in many judgments: for example, in *Campbell v MGN Ltd*, Baroness Hale attempted to list a hierarchy of matters of public interest:

Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made.<sup>33</sup>

The Joint Committee referred to a list of examples of matters of public interest cited by witnesses.<sup>34</sup> Apart from the problem of capturing all relevant matters, there was also concern at the risk that legislation can become outdated, with no

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<sup>32</sup> #48, citing the submission by Berrymans Lace Mawer LLP

<sup>33</sup> *Campbell v MGN Ltd* [2004] 2 AC 457 at 499 [148]

<sup>34</sup> #42 and see also #79 a scale on freedom of expression.

guarantees that parliament will act to update it as often as necessary. Overall, the Committee concluded against a statutory definition, arguing that “where the public interest lies in a particular case is a matter of judgment and best taken by the courts”<sup>35</sup>. Nevertheless, the committee recommended the publication of guidelines by a media regulator, which could be readily updated as necessary.<sup>36</sup>

- *Balancing freedom of expression and privacy in injunction applications.* It was clear that one of the key rationales for convening this joint parliamentary committee to consider privacy and injunctions was the controversy in the United Kingdom about the availability or non-availability of injunctions and so-called “super-injunctions” (injunctions against publication which included an order that the fact of the injunction not be published). There is no doubt, that unlike a defamatory publication, as to which a remedy of damages can, at least in theory, vindicate the person’s damaged reputation and restore his or her honour and standing in society, a publication which reveals true private information cannot be adequately compensated in money. The genie cannot be put back in the bottle, the harm from disclosure cannot be undone, the truth will be out, forever, at least among the original recipients, even if efforts may be successful to restrain further or future revelations<sup>37</sup>. Except in relation to pecuniary losses, and few victims of invasions of privacy can point to pecuniary loss<sup>38</sup>, any order of damages by way of compensation will in truth be by way of solace for injury to feelings or as a mark of retributive justice, rather than to achieve restoration of the claimant to his or her pre-tort position, which is actually as impossible as undoing the pain and suffering of a physical injury. It is equally true, from the defendant’s point of view, that a suppression order or non-publication order curtails freedom of expression. Thus, the principles on which injunctions may be granted are of paramount importance to both victims of disclosures and defendant publishers.

The Human Rights Act 1998 (UK) makes specific provision for the potential impact of injunctions on the right of freedom of expression under article 10 of the European convention on Human Rights in section 12. In effect, it requires the court considering the grant of an injunction to be satisfied that defendants are notified of the application unless there are compelling reasons why he or she should not be notified. By subsection (4), “the court must have particular regard” to the importance of the right to freedom of expression, and *inter alia*, to “any relevant privacy code”. The Committee was lobbied by some witnesses to recommend a clarification or an alteration of this provision: clarification because

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<sup>35</sup> #50

<sup>36</sup> #50

<sup>37</sup> Whether there is a right to have private information forgotten is an interesting one.

<sup>38</sup> Although as in defamation cases, one can imagine cancellation of contracts or loss of custom or perhaps just the cost of hiring a PR person to contain the reputational damage.

there has been disagreement as to whether the words “particular regard” in subsection 4 requires courts to give *more* weight to freedom of expression rights than to privacy interests or whether they merely require courts to consider, expressly, freedom of expression rights. And, argued by those on the “side” of the press, alteration to entrench the supremacy of freedom of expression rights. The Committee was even-handed here, not accepting the argument that the provision privileged freedom of expression over other rights (this would be inconsistent with the balancing process that is well –entrenched in respect of Convention rights) but upholding the importance of express consideration of the impact on freedom of expression in injunction cases.

While providing a lesson for us on how legislation can be drafted to achieve a balancing of interests, the debate over the interpretation of essentially one word –“particular”- shows how legislation may not necessarily provide the inarguable or unambiguous clarity that many expect legislation to provide and that interpretation of legislation can itself spawn litigation and debate.

The Joint Committee did not however recommend that nothing be done. Rather, they suggested a number of alternatives to the introduction of statutory right, which are as relevant in Australia as in the United Kingdom:

- That the Attorney General consider bringing proceedings for contempt of court more readily than the rare cases at present; this could be particularly effective against companies controlling online sites if they do not take effective steps to respond to court orders.
- That costs-capping be introduced to make both bringing and defending claims more affordable.
- That there be enhanced regulation, if not effectively done by an industry body then by an independent regulator: these recommendations may be compared to those of the Finkelstein Enquiry but are beyond the scope of this paper.
- That there be alternative dispute resolution procedures available to make privacy protection more within reach of ordinary, non-wealthy, non-celebrities.
- That there be consideration of new rules governing parliamentary privilege to restrict parliament being used/misused to disclose private information of individuals without redress.
- That the media have clear qualified privilege to report parliamentary proceedings.

Two other matters discussed by the Joint Committee are worthy of note. One related to the issue of how privacy and public interest is balanced in relation to celebrities and public figures. There was little discussion of the position of politicians, perhaps because of widespread acceptance that of all public figures, they must be the least thin-skinned, and that their activities would most often come within the limits of legitimate public interest. The comments appear more directed to celebrities of all kinds and the degree

to which their prior conduct in seeking of publicity may affect their later rights to privacy. The committee concluded that prior exposure would be relevant but that everyone has the right to *some* privacy. Of particular interest is the issue of whether prior exposure of a child by its celebrity parents should affect the *child's* right to privacy. The judge in Browne v Associated Newspapers had placed great emphasis on the fact that the claimant's parents, JK Rowling and her husband, had previously shielded their son from publicity and photographs, thus leaving a question mark over the right to privacy of a child who had been deliberately exposed to publicity by his or her parents previously. Examples of the variation in parental attitudes are plenty: ranging from extreme vigilance (Carla Bruni) to cautious and limited exposure (Nicole Kidman) to a very open attitude to publicity about a child (perhaps the promotion of the late Steve Irwin's daughter Bindi is such an example?). The Committee appeared to reject the notion that the child's fundamental human rights to privacy should be so affected. This will be a comfort to those children who grow up to reject their parents' fame and want to be forgotten, such as the once famous child prodigy who failed in his action against *The New Yorker* magazine to protect his adult anonymity in the United States case of *Sidis v FR Publishing Corp* in 1940.<sup>39</sup>

The other noteworthy, if somewhat outlandish, argument made by some media outlets to the Joint Committee was that, even if for no other reason, the publication of gossip or "tittle tattle" about people's private lives is itself in the public interest because it subsidises the serious and vital social function of the press of informing the public about matters of *genuine* public interest. It was argued that, with the viability and survival of the press and organised media under threat from the internet, the only commercial way they can survive is to give people what they want and what will sell newspapers: an endless stream of gossip. Of course, this argument, with its sacrifice of the rights of a few for the benefit of many, was not accepted. No doubt Mr Mosley for one was unimpressed with this argument.

## 2. Jurisdictions with statutory actions for breach of privacy

A small number of common law jurisdictions have introduced a statutory remedy for invasion of privacy. Time does not permit me to consider at this stage the extent to which those statutory actions have actually given greater guidance on the key issues in privacy litigation- what does the public interest encompass, what information is private, and when a pre-publication injunction should be available- or whether they have provided claimants with a readier remedy or a more effective remedy. In any event, those statutory rights to privacy must be assessed in their constitutional context, which may entrench broad free speech rights as well as rights to privacy. In Ireland, a 2006 Privacy Bill to introduce a statutory right of privacy was abandoned by the Irish Government in 2007 after opposition from the media and others.

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<sup>39</sup> 113 F 2d 806 at 809 (2d Cir 1940).

## What issues remain to be settled as to the content of a statutory action?

The three most recent law reform commission reports in Australia all favour the introduction of a statutory action. There are some matters of agreement, but, as mentioned above, however, there is a significant divergence of views on a number of important matters.<sup>40</sup> Not only that, but the ALRC Report identifies that, because of the constitutional limitations on the power of the federal government to enact legislation of the widest possible application, the preferable route would be for the States and Territories to agree on uniform legislation to be enacted within their respective jurisdictions.<sup>41</sup> Anyone who is old enough to have witnessed the difficulty of getting the States to agree on uniform defamation laws, finally achieved in 2005, and any tort lawyer who is grappling with significant variations between State civil liability legislation on a range of issues, will be instantly sceptical of the prospect of readily achieving national consistency in legislation.

All propose that the new action be a statutory cause of action, rather than that the statute should create a new tort of invasion of privacy. The reason for this is to free the remedies available under the statutory action from the traditional restrictions that the common law places on recovery in tort, for example, in relation to recovery of damages for mere distress or injury to feelings without physical or psychological injury, and also from those that result from the distinction<sup>42</sup> that Australian law maintains between remedies available for equitable wrongs and those that are available for common law wrongs.

### *Points of agreement include:*

All propose that a privacy action be based upon a person's "reasonable expectation of privacy" without seeking either to define "privacy" or to set out a list of circumstances that would be treated as attracting a reasonable expectation of privacy. While some may think it desirable to have a broad concept that can be developed and defined over time, this very generality and flexibility is one of the leading causes for concern about having a statutory action at all. There is concern that it might be used to forge legal protection and rights to compensation in circumstances that were never intended by the legislature to be covered. It also shows the fallacy that underlies the argument that a statutory action is more certain or more "democratic" than common law development: it will be the judges who will be fashioning the protection anyway, as no Parliament can legislate for the precise combination of facts upon which courts must adjudicate. Only the Victorian proposal makes the *cause of action* more specific than general: the advantages of this approach are discussed below under "differences".

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<sup>40</sup> Here I would like to acknowledge the great assistance of an article by N Witzleb in highlighting differences and points in common between the reports: "A statutory cause of action for privacy? A critical appraisal of three recent Australian law reform proposals", (2011) 19 *Torts Law Journal* 104 at 108.

<sup>41</sup> ALRC at #

<sup>42</sup> A distinction that would most probably be described as "arcane" by some, such as M Tilbury: see "Remedies for breach of confidence in privacy contexts" (2010) 15 MALR 290 at 291, a view that would undoubtedly not be shared by at least two current members of the High Court of Australia.

All proposals provide for a wide range of compensatory damages for harm, which may include simply emotional distress or injury to feelings.

All recommend that exemplary damages not be awarded, but that aggravated damages may be. It would be preferable that factors which aggravate or mitigate damages (proven malice or ready apology respectively) should simply be factors to be taken into account in the primary assessment of damages rather than keeping aggravated damages as a separate type of damages, as in the common law.

There are other points of consensus too, admirably summarised by Dr Normann Witzleb of Monash University, along with his analysis of the points of difference.<sup>43</sup>

*Points of difference include:*

- *A broadly defined action or a more specific action(s)?*

The ALRC and NSWLRC propose a single cause of action- for a serious invasion of privacy- whereas the Victorian proposal is for two causes of action: one action in respect of misuse of private information and another in respect of intrusion upon seclusion.

This is a critically important difference of opinion.

The Victorian report reflects the widespread unease, felt by many commentators, academic, judicial and professional, with the introduction of a broad civil action for the invasion of a right or a concept, the borders and content of which have proved so hard to define with precision. In addition to the concerns noted above in respect of the lack of definition of the term “privacy” in the proposed legislation, there is the added concern that a broad civil action for breach of privacy would be used as an add-on cause of action and source of remedy, where the law, either by statute or common law, already provides a remedy or has already developed limits of remedies as a matter of established legal policy and principles. This would be particularly so if a broad based action were to be used to argue that “privacy” should extend, as it has traditionally been defined in the United States to include, appropriation of personality or image for commercial purposes or merely the portraying of a person in a false light. The former conduct is already the subject in Australian law of the tort of passing off or would lead to statutory liability for misleading or deceptive conduct.

The latter may not really be about privacy at all. Quite often, it is the journalists who end up with egg on their faces if they get a story wrong, rather than the “victim”: the recent debacle involving photographs of a claimed “young Pauline Hanson” in scanty clothing, which turned out to be of nothing of the sort but of someone else altogether, is more an example of bad journalism than of invasion of Ms Hanson’s privacy. In my submission, it is a matter that usually can be more appropriately

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<sup>43</sup> “A statutory cause of action for privacy? A critical appraisal of three recent Australian law reform proposals”, (2011) 19 *Torts Law Journal* 104 at 108

dealt with, either by defamation law, with its well-developed defences, if the untruth is defamatory, or, if not defamatory, by complaint to bodies set up to handle press or media errors in reporting. If on the hand, it is part of an expose of otherwise private information, such as the details of a person's private relationship with another, then the fact that some details are untrue (but nevertheless, not defamatory) should not prevent the claimant from suing for breach of confidence or privacy. The case of *McKennitt v Ash*<sup>44</sup>, discussed by Witzleb<sup>45</sup>, is such an example: a former friend published both true and untrue details of folksinger Loretta McKennitt's private relationships, and was held liable.

It is worth setting out in full why the Victorian Law Reform Commission<sup>46</sup> favoured two separate and explicit causes of action:

7.123 The commission believes it is not desirable for there to be one statutory cause of action for all serious invasions of privacy because the concept of privacy is too broad and imprecise to be of use when creating legal rights and obligations. Many appellate court judges and academic commentators have warned of the difficulty in devising a workable legal definition of privacy. In *Lenah Game Meats Gleeson CJ* said that 'the lack of precision of the concept of privacy is a reason for caution in declaring a new tort',<sup>231</sup> while Justices Gummow and Hayne referred to the 'difficulties in obtaining in this field something approaching definition rather than abstracted generalisation'.<sup>232</sup> Members of the House of Lords<sup>233</sup> and the New Zealand Court of Appeal<sup>234</sup> made similar comments when rejecting invitations to devise a broad tort of invasion of privacy.

7.124 Two internationally recognised academic commentators on privacy law, Daniel Solove and Raymond Wacks, make similar points. Solove suggests that while 'privacy is an issue of profound importance around the world',<sup>235</sup> it is 'a concept in disarray' because 'nobody can articulate what it means'.<sup>236</sup> He argues that because 'we should understand privacy as a set of protections against a plurality of distinct but related problems'<sup>237</sup> it is advisable to identify particular types of privacy problems when considering regulation. Two of Solove's privacy problem areas—information dissemination and invasion—are of particular relevance when considering new statutory causes of action involving misuse of surveillance devices. According to Solove, 'information dissemination involves the transfer and publicizing of personal data' and 'invasion involves interference with one's personal life'.<sup>238</sup>

7.125 Wacks suggests that one of the reasons why a tort of privacy has not evolved as part of the English common law is the lack of a coherent and consistent meaning of the notion of privacy.<sup>239</sup> He argues that it is more constructive to identify the specific interests the law ought to protect and suggests that 'at the core of the preoccupation with the "right to privacy" is protection against the misuse of personal, sensitive information'.<sup>240</sup>

7.126 The commission believes there should be two overlapping statutory causes of action concerning the privacy interests most likely to be adversely

<sup>44</sup> [2008] QB 73; [2006] EWCA Civ 1714

<sup>45</sup> at 112

<sup>46</sup> Report

affected by the misuse of public place surveillance. Those causes of action should deal with misuse of private information and what is often referred to as intrusion upon seclusion, or unwarranted interference with spatial privacy. Legislating to protect these broadly recognised sub-categories of privacy is likely to promote greater clarity about the precise nature of the legal rights and obligations that have been created than by creating a broad civilly enforceable right to privacy. (footnotes omitted)

- *Second, should actionability depend on the invasion of privacy being above a level of gravity or seriousness and if so, how is that threshold best incorporated in the legislation?*

In my view, there would be a general community consensus that, as a matter of principle, any statutory right of action for breach of privacy should not extend to what people would generally regard as trivial. The difficulty of course is determining, on an objective basis, precisely what is trivial to a reasonable person. The ALRC and VLRC reports go further than just drawing the line at the trivial: they require, expressly or implicitly, that the cause of action be limited to *serious* invasions of privacy. This element of seriousness reflects the threshold test set out by Gleeson CJ in *ABC v Lenah Game Meats Pty Ltd*:

There is no bright line which can be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. *The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.* (emphasis added)

There has been some discussion since this judgment as to whether the requirement that the disclosure be offensive to a reasonable person of ordinary sensibilities is part of the issue of what is to be regarded as private, as Gleeson CJ states, or whether this requirement is rather part of the balancing process that the court must go through when deciding whether the disclosure is justified by the plaintiff's freedom of speech.<sup>47</sup> Either way, its incorporation into the decision suggests that only serious invasions of privacy – those that would be highly offensive- will be protected.

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<sup>47</sup> See for example, Lord Nicholls in *Campbell v MGN Ltd* [2004] 2 AC 479 at [21].

Unlike the federal and Victorian reports, the NSWLRC report and draft legislation does not require that publication be offensive to a reasonable person, nor does it have a requirement, express or implicit, that the invasion be “serious”.

At the heart of this difference is the question of whether the requirement of “a reasonable expectation of privacy” in respect of the information being disclosed, which is a requirement common to all common law approaches and all of these Australian reports, already encompasses or includes the element that disclosure would be highly offensive to a reasonable person. It is hard to see how it can logically do so.

Indeed, the view reflected in the New South Wales report that offensiveness is only *one* factor to be taken into account when deciding whether there has been an invasion of privacy, implies that offensiveness is not a threshold test, and that an invasion could be found where the offensiveness requirement is not met.<sup>48</sup>

- *The fault element: should liability be strict, or require fault; if the latter, should negligence be sufficient?*

I have to say that the discussions on this aspect of the proposed legislation give me cause for some alarm.

It seems to me that if we are going to have a statutory action for invasion of privacy, which, without a requirement of actual damage, will be actionable *per se* and lead to an entitlement as to damages for mere distress or offence, the invasion of privacy of the victim must have been actually intended by the actor, or the actor’s conduct must have involved a degree of recklessness as to whether an invasion of privacy would occur. In other words, I think the action should require an element of fault that goes beyond a mere intention to do the act which in law amounts to an invasion; that mere negligence should not be sufficient fault to ground the action; and that the liability should certainly not be strict liability.

It would not be sufficient merely to provide that the actor’s *conduct* be intentional, for example, that the actor intended to publish the relevant information. This is the equivalent to strict liability, as in defamation law. Mere intent to publish information no more shows an intent to defame or invade privacy than intent to pull a trigger of a gun shows an intent to shoot someone. Something more must be required to make the shooting an intentional one.

One of the hardest concepts for a new law student studying the law of torts is to understand what is meant when we say that a tort is intentional or that it was done negligently or that liability is strict. We can assume that an ordinary member of the public will have a similar difficulty, until they have considered the alternatives carefully. The term “intent” is particularly troublesome, as it can be used in so many different ways, to mean so many different things. Generally speaking, a tort will be regarded as intentional only if the actor either subjectively intended the relevant *interference* with the victim’s rights or if the interference was so substantially certain or obvious to follow

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<sup>48</sup> Witzleb, “A statutory action for privacy? A critical appraisal of three recent Australian law reform proposals” (2011) 19 *Torts Law Journal* 104 at 113-114

that the actor will be taken to have intended the interference (what could be described as “objective intent” or “intent objectively measured” if the first term is regarded as an oxymoron). There is no requirement that the actor appreciate that he or she is committing a tort or that the actor intend to commit a *tort*. In other words, the intent need not be “guilty”. But, to be an intentional tort such as battery, the actor must intend the contact with the victim.

In my view, any statutory action for breach of privacy must go further: the actor must intend to breach the privacy of the victim or must show a degree of recklessness as to whether their privacy will be breached. This will involve knowledge of the fact that the information is private or confidential or recklessness as to this fact.

This will not lead to liability until the appropriate balancing on issues of public interest is completed.

To allow anything less to form the basis for an actionable invasion of privacy, will in my view open up liability, actionable per se, for a vast range of human conduct and errors. Again it must be remembered that there is no proposal to confine the invasion of privacy action to media defendants. The email, fax or message or letter sent in error to the wrong address or addressee; the folder of documents left on a train; the mistaken belief in an enquirer’s identity: all may invade privacy. All of these examples may amount to other civil wrongs already, e.g. negligence by the professional confidante, or breach of confidence by anyone, but negligence requires actual damage to be actionable in tort or some damage in contract for damages to be more than nominal, while an action for breach of confidence, although a strict liability in equity, again requires financial loss for equitable compensation<sup>49</sup>. Thus, making liability for an invasion of privacy a strict liability or a liability for negligent invasion actionable per se would undermine the coherence of the law in a way which the courts have refused to do, as a matter of both logic and legal policy.<sup>50</sup>

The argument that an invasion of privacy is analogous to defamation, and thus should lead to similar remedies and actionability, does not hold up. Although defamation law has traditionally been used to protect privacy<sup>51</sup>, and although there is undoubtedly some overlap in protection of reputation and protection of privacy, it is one thing to make liability for a positive publication a strict liability, yet quite another to extend strict liability to the wide range of unspecified conduct that a broad action would encompass. Further, while damage to reputation is *assumed* by the law to flow from a defamatory publication, making its actionability *per se* justifiable, no such generalisation should be made about a breach of privacy.

On the fault aspect, the ALRC Report restricts liability to intentional or reckless conduct, where an act is treated as intentional “when the defendant deliberately or wilfully invades the plaintiff’s privacy.”, and where reckless would have a meaning similar to

<sup>49</sup> Unless the awarding of equitable compensation for mere distress, as in *Giller v Procopets* becomes accepted in any breach of confidence action, which is highly unlikely.

<sup>50</sup> On coherence between liability in negligence and defamation law, see *Sullivan v Moody* CITE

<sup>51</sup> Especially effective in those states such as NSW and Queensland where public interest or public benefit was required in addition to truth, for the defence of justification.

that in section 5.4 of the Criminal Code (Cth)<sup>52</sup>. It noted that this was the view taken in the 2007 NSWLRC Consultation paper and also by the Hong Kong Law Commission which recommended a statutory cause of action.<sup>53</sup>

Yet, as Witzleb points out, the requirement of intent or recklessness does not appear in either the final report of the NSWLRC or in the VLRC report. The NSWLRC recommends a defence of innocent dissemination similar to that found in defamation legislation, but as argued above, there is a stronger case for strict liability in defamation law than in privacy law and it is on the basis of that strict liability that innocent dissemination becomes an appropriate defence. As argued above, a more appropriate way to approach liability would be to make intent or recklessness a necessary element.

- *Public interest: should it be a defence for the defendant to establish or a balancing consideration for the claimant to satisfy?*

This is a very important issue and one on which I believe the answer should be clear for anyone who values a vigorous press and media in an open and democratic society: the balancing of public interest and the lack of any public interest must be at the forefront of the court's decision that there is an actionable invasion of privacy. The disclosure will not be actionable unless it can be established by the claimant to the satisfaction of the court that there is no legitimate public interest in the information to be disclosed. Further comment will be included in the final paper.

## What is the scope for the common law to develop, in the absence of a statutory action?

Lord Hoffmann in *Campbell v MGN Ltd*<sup>54</sup> described the developments of the law of confidence in the then recent past of the United Kingdom as "typical of the capacity of the common law to adapt itself to the needs of contemporary life."

In New Zealand, the common law has developed differently to the developments in the United Kingdom, by the courts fashioning a new tort of invasion of privacy, and deliberately differentiating it from the equitable action. In *Hosking v Runting*, it was said that "It will be conducive of clearer analysis to recognise breaches of confidence and privacy as separate causes of action."<sup>55</sup> Nevertheless it can be said that, so far, it does not appear as yet to have provided any greater degree of protection against disclosures

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<sup>52</sup> Criminal Code

<sup>53</sup> Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy* (2004), [6.71], cited by ALRC at #74.162.

<sup>54</sup> at p 472 [46]

<sup>55</sup> [2004] NZCA 34; [2005] 1 NZLR 1 at 15[46]

than the enlarged equitable action in Australia, with the public interest in various disclosures usually trumping the privacy rights of the plaintiff<sup>56</sup>.

Professor Raymond Wacks writing in 2006<sup>57</sup> saw seven stumbling blocks against the development of a *broad* common law *tort* of breach of privacy. It seems to me that we could group these into four broad categories as they apply in Australia:

- The fact or view that existing common law and legislative provisions make the development of a broad tort unnecessary: these include the equitable action for breach of confidence and legislation concerning data protection and dissemination and that concerning technological surveillance and interception.
- Concern over the "incoherence of the concept of privacy".
- The availability or introduction of other forms of media regulation, whether industry-led regulation or imposed governmental regulation. This factor is heightened in significance as a result of the recent Finkelstein Media Enquiry and the Convergence Review, and industry- led responses to the Leveson Enquiry.
- Concern with the protection of freedom of speech and freedom of the press, particularly, in this country, in the absence of a Bill of Rights, and with only limited protection provided for freedom of speech by virtue of implied rights in the Australian Constitution.

Wacks adds another factor, that is, "judicial preference for legislation". The High Court of Australia has not always been reluctant to develop the common law in the absence of legislative action. There are many notable examples of where the courts have done so, and where they have not been met with the pejorative label of "judicial activism". There can be many reasons for legislative inaction: the most obvious one being a lack of political will, either because of other issues which are seen, politically, to have greater priority for attention, or because of an inability to achieve a sufficiently widespread consensus on either the content or the form of legislation. As mentioned above, this is particularly so in a federation of states. Neither of these reasons is a reason why a court should be reluctant to develop the common law when an appropriate case comes before it. If a court goes too far, in the minds of the politicians, they can then react with

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<sup>56</sup> *Andrews v Television NZ Ltd* [2009] 1 NZLR 220; *Mafart and Prieur v Television NZ Ltd* [2006] 3 NZLR 534; *Television NZ v Rogers* [ 2008] 2 NZLR 277

<sup>57</sup> R Wacks, "Why there will never be an English common law privacy tort", in A T Kenyon and M Richardson (eds) *New Dimensions in Privacy Law*, Cambridge UP, 2006. He lists: the advance of the equitable remedy for breach of confidence, the belief that the law of confidence is sufficient to satisfy the requirements of article 8 of the European Convention on Human Rights, the dominance of freedom of speech, the impact of data protection statutes, media self-regulation, the incoherence of the concept of privacy, and judicial preference for legislation.

legislation, as they have done in other circumstances of significant common law developments, to rescind or contain the common law development. Two examples of High Court judgments that caused a legislative reaction are the abolition of the immunity of highway authorities for negligent non-feasance in the upkeep of the roads in *Brodie v Singleton Shire Council*<sup>58</sup>, and the holding of the High Court in *Cattanach v Melchior*<sup>59</sup> that a doctor could be liable for the normal costs of upkeep of a child borne as a result of negligence by the doctor in treating the parent.

Until another case reaches the High Court of Australia, the development of the common law on privacy protection in Australia depends to a large extent on how other courts below react to the judgment of the High Court in *ABC v Lenah Game Meats Pty Ltd*. There is no doubt that the High Court in that case foreshadowed and gave its cautious blessing to the principled development of the common law, rather than taking a view that any development of the law of privacy was purely a matter for the parliaments of the country. Apart from the influential parts of the judgment of Gleeson CJ quoted above, there are some other comments in that decision that are worthy of note: one is the comment by Callinan J that any common law cause of action must be developed by reference to the *Australian* legal and constitutional context. To that extent, the case law and developments of other countries with different constitutional contexts may not be of direct relevance. We have nothing like the First Amendment to the United States Constitution, against which any common law or piece of legislation must be tested and balanced. Callinan J on this point:

The recognition of a tort of invasion of privacy as part of the common law of Australia does not involve acceptance of all, or indeed any of the jurisprudence of the United States which is complicated by the First Amendment. There is good reason for not importing into this country all of the North American law particularly because of the substantial differences in our political and constitutional history. Any principles for an Australian tort of privacy would need to be worked out on a case by case basis in a distinctly Australian context.<sup>60</sup>

Gummow and Hayne JJ also commented on the possible future development of the common law:

[As a corporation] Lenah's reliance upon an emergent tort of invasion of privacy is misplaced. Whatever development may take place in that field will be to the benefit of natural, not artificial, persons. It may be that development is best achieved by looking across the range of already established legal and equitable wrongs. On the other hand, in some respects these may be seen as representing

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<sup>58</sup> (2001) 206 CLR 512

<sup>59</sup> (2003) 215 CLR 1

<sup>60</sup> Callinan in *ABC v Lenah Game Meats Pty Ltd* at [332]

species of a genus, being a principle protecting the interests of the individual in leading, to some reasonable extent, a secluded and private life, in the words of the *Restatement*, "free from the prying eyes, ears and publications of others". Nothing said in these reasons should be understood as foreclosing any such debate or as indicating any particular outcome.

Their words contemplate both the expansion of current causes of action, and the possibility of a broader action.

The factors identified by Wacks above, the words of Gleeson CJ that "lack of precision of the concept of privacy is a reason for caution in declaring a new tort of the kind for which the respondent contends"<sup>61</sup>, the absence of anything like the Human Rights Act 1998 (UK) to embolden judicial creativity, and the inherent limitation of judicial power that courts come to a decision only on the facts in dispute before them, make slowly incremental development of existing causes of action a more likely way for Australian courts to proceed, in the absence of direct High Court authority.

Even if we cannot envisage the development of a broad based action, there is the possibility of more limited developments to fill the gaps in our existing law. Turning to the two key gaps that I had identified above, how could the common law develop to fill them?

#### *Allowing damages for mental distress*

If a person's privacy has been invaded by a disclosure of private or confidential information, the most likely reason why existing law may not provide an effective remedy against disclosure is that it is difficult, at common law, to recover damages for mere emotional distress, which is not consequential on some other recognised type of damage or which does not amount to a recognised psychiatric illness. There are two possible ways that the common law could develop to allow recovery for emotional distress.

First, the action under the principles of *Wilkinson v Downton* could be expanded to allow recovery of damages for emotional distress, where the defendant is proved to have intended to cause emotional distress to the plaintiff, by his or her invasion of the plaintiff's privacy by indefensible conduct. To allow such an extension of these principles would *not* be to make an action on the case actionable *per se*, like the tort of trespass that protects people from interferences with their fundamental and ancient rights of physical security. Such a change would fly in the face of centuries of legal principle. Nor would it undermine the insistence of the law, both at common law and under legislation<sup>62</sup>, that psychiatric injury caused by mere *negligence* must amount to a

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<sup>61</sup> At 225-226 [41]

<sup>62</sup> *Mt Isa Mines v Pusey* (1970) 125 CLR 383 at 394 per Windeyer J, *Annett v Australian Stations Pty Ltd*; e.g Civil Liability Act 2002(NSW)Part 3, section 31.

recognised psychiatric illness. A difficult issue would be whether, in allowing such an extension, the common law should insist on proof of a defendant's subjective intention to cause emotional distress to the plaintiff, and not allow "imputed intention" to fulfil this requirement.

In *Wainwright v the Home Office*, Lord Hoffmann referred to remarks that he had made in *Hunter v Canary Wharf Ltd* that the policy reasons relating to intentional infliction of mere distress, vexation and inconvenience were quite different to those that underlay the requirement of actual psychiatric illness or physical injury in the law of negligence. His Lordship stated:

If someone actually intends to cause harm by a wrongful act does so, there is ordinary no reason why he should not have to pay compensation. But I think that if you adopt such a principle, you have to be very careful about what you mean by intent...

If... One is going to draw a principle distinction which justifies abandoning the rule that damages the mere distress are not recoverable, imputed intention will not do. The defendant must actually have acted in a way which he knew to be unjustifiable and either intended to cause harm or at least acted without caring whether he caused harm or not.

In *Wainwright*, the plaintiffs failed in their action based on *Wilkinson v Downton* because they had suffered only distress, not a recognised psychiatric illness. The plaintiffs had been subjected to a demeaning and embarrassing strip search by the defendant's prison officers. Clearly, the plaintiffs were not able to prove that the defendant's officers had a subjective intention to cause distress, but even if they had been able to do so, Lord Hoffmann was not prepared, at that time, to say that such an action should be maintainable. He reserved his opinion on whether compensation should be recoverable "on the basis of a genuine intention to cause distress".<sup>63</sup>

While it is justifiable to argue that any extension to the principle in *Wilkinson v Downton* to allow recovery for intentional infliction of emotional distress should have, as a requisite element, a subjective intention on the defendant's part, there will surely be cases, as in *Wilkinson v Downton* itself or as in a recent case involving bullying, harassment and racial abuse, *Nationwide News Pty Ltd v Naidu*<sup>64</sup>, where the defendant has shown such reckless indifference to the plaintiff or where emotional distress would be such an obvious result of the defendant's conduct, that an intention to induce emotional distress *should* be imputed. As in many other situations, why should a defendant be able to hide behind his or her own moral obtuseness, when it comes to harming others?

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<sup>63</sup> At [46]

<sup>64</sup> 92007) 71 NSWLR 471

In any event, the Court of Appeal in *Giller v Procopets* did show the preference for legislative action, identified by Wacks, when it came to extending tort law to allow recovery for intentional infliction of mental distress, with Neave JA stating:

A court which has the task of deciding an individual case is poorly equipped to consider the balance which should be struck between providing compensation for intentionally caused mental distress, and recognising that the exigencies of life result in some people intentionally causing mental distress to others from time to time. If the intentional infliction of mental distress is to be recognised as a tort, the legislature is in a better position to determine how that balance should be struck.<sup>65</sup>

The alternative route to allowing a plaintiff to claim damages for mental distress in *Giller v Procopets* was to allow such damages in the equitable claim for breach of confidence. There is undoubtedly a legitimate query raised here as to how a court could do this, other than by a deliberate development of the underlying principles of the equitable action and of equitable remedies. Ashley J seems to acknowledge the lack of authority for such an award when he said in that case that “equity, starting with a clean slate, has no reason” to shy away from permitting damages for distress as the common law has done<sup>66</sup>. Given that the Court had rejected the plaintiff’s tort claim based on *Wilkinson v Downton* because she had not suffered a psychiatric illness, it is somewhat of an irony that this was done, it was said, by analogy with tort law. The torts which formed the basis of the analogy were the torts of battery, assault, false imprisonment, malicious prosecution and defamation. In all of these torts, damages would be assessed taking into account the distress and humiliation caused by the tort. All of these are of ancient origin and, not being actions on the case, all are actionable *per se*: that is, they do not require actual damage to be actionable. The underlying, intangible, interest of the plaintiff is deemed so important as to be worthy of being protected and vindicated by an award of damages, sometimes substantial<sup>67</sup>, even where no actual damage is suffered, unless the interference is so trivial as to attract only nominal damages. By accepting this analogy, then, we must accept that the plaintiff’s interest in the privacy or confidentiality of information is one that may similarly be vindicated by an award of damages, even where no actual damage is suffered: that an invasion of privacy, will, in equity, be actionable *per se*.

There is no doubt that equity will restrain a breach of confidence by injunction in appropriate cases. Leaving aside the impact of the local equivalent of Lord Cairn’s Act, which may authorise an award of damages in a wider range of circumstances than the common law, where an injunction may have been but is not granted, the question comes down to whether it is necessarily inconsistent for the law to be prepared to grant an

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<sup>65</sup> *Giller v Procopets* (2008) 24 VR 1 at [476]

<sup>66</sup> *Giller v Procopets* (2008) 24 VR 1 at [149]-[153]

<sup>67</sup> *Plenty v Dillon* [1991] 171 CLR 635

injunction to restrain a breach of privacy or confidence, but not to grant compensation for the distress caused already by its (unrestrained) disclosure, when mental distress is the obvious, or the natural and probable, result of the disclosure of personal information that a person has chosen to keep private or that is obviously private.

*Developing an action for harassment which falls short of trespass to the person*

The Singapore courts have shown that they are not prepared to wait for legislation<sup>68</sup> to deal with harassment in modern society. In *Malcomson Nicholas Hugh Bertram v Naresh Kumar Mehta*<sup>69</sup>, in 2001 Lee Seiu Kin JC of the High Court held that the time had come to recognise a common law tort of harassment which in this case was comprised of persistent telephone calls and electronic messages. He noted three changes in society in the last twenty years to justify this change in the law: increasing urbanisation and densely populated living conditions; increased leisure time for people to indulge their fantasies about others whether celebrities or not; and mobile and instant communication anywhere anytime.

It will make for an intensely uncomfortable living environment if there is no recourse against a person who intentionally makes use of modern communication devices in a manner that causes offence, fear, distress and annoyance to another. Mehta had embarked on such a course of conduct by making the mobile phone calls along with his other acts of nuisance. He ought reasonably to know that such acts would cause worry, emotional distress, annoyance to Malcomson. ... Surely in respect of intentional acts that cause harm in the form of emotional distress, the law is able to provide a recourse. The fact that in such cases it is difficult to quantify damages should not, in my opinion, hinder the court from giving the appropriate relief. In the present case, as I suspect will generally be the situation in most cases of this nature, what the plaintiffs essentially want are not damages but an injunction restraining Mehta from continuing with such acts. I see no reason of policy against ordering Mehta to stop such behaviour."

In Gummow and Hayne JJ in *ABC v Lenah Game Meats Pty Ltd* referred to "what may be a developing tort of harassment"<sup>70</sup> and in *Grosse v Purvis*<sup>71</sup>, a District Court judge in Queensland awarded a plaintiff damages for invasion of privacy after the defendant had persistently and intentionally stalked and harassed the plaintiff for six years. There is much to be said for the kind of incremental development of which this case and *Malcomson Nicholas Hugh Bertram v Naresh Kumar Mehta* are examples.

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<sup>68</sup> Such as *Protection from Harassment Act 1997* (UK)

<sup>69</sup> [2001] 4 SLR 454

<sup>70</sup> (2001) 208 CLR 199 at [123], citing Townshend-Smith, "Harassment as a Tort in English and American Law: The Boundaries of *Wilkinson v Downton*", (1995) 24 *Anglo-American Law Review* and Todd, "Protection of Privacy", in Mullany (ed), *Torts in the Nineties*, (1997) 174 at 200-204.

<sup>71</sup> [2003] QDC 151

A tort of harassment has a number of advantages. First, it has no territorial limits or quasi-proprietorial requirements like trespass and nuisance. Second, the concept of harassment has a connotation of *seriousness*: it involves *repeated* vexation rather than just a trivial interference. Third, it connotes *deliberate* conduct. Fourth, it adequately fills a gap in the protection of the law without going further than needed and without the definitional problems and lack of precision that seem inherent in a general tort of invasion of privacy. As a nominate tort, it would define the conduct which amounts to the wrong, and avoids too the uncertain boundaries and vagueness of the existing tort action of the action on the case for wilful injury, based on the principle in *Wilkinson v Downton*.<sup>72</sup> Its very certainty might allow it to avoid the important limitation of that action: the need for physical or recognised damage.

## Conclusion

Writing some years ago now, Professor Stephen Todd of New Zealand wrote:

“There remains an identifiable need for protection from harassment to which it is desirable that the courts respond.”<sup>73</sup>

That remains true today. It is probably a concern of less urgent priority than getting the disclosure action as effective as it should be, taking into consideration the various interests at stake, as restricting and remedying invasive and indefensible disclosures will take away the market and incentive for many of the harassing and inappropriate conduct that precedes them.

Courts need to respond to the problems of the day by developing effective remedies. This can only be on a case-by-case basis. It may not be as quick and as broad a protection as many would like.

“ But that is the way of the common law, the judges preferring to go ‘from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point , and avoiding the dangers of the open sea of system or science’”.<sup>74</sup>

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<sup>72</sup> [1897] 2 QB 57 (QBD).

<sup>73</sup> “Protection of Privacy”, in N Mullany (ed) *Torts in the Nineties*, LBC , 1997 at 202

<sup>74</sup> McHugh J in *Perre v Apand* (1999) 198 CLR 180 at 216 [93] quoting Lord Wright “The Study of law” (1938) 54 *Law Quarterly Review* 185 at 186

That is not necessarily a bad thing and it may be better than creating a multi-headed monster in the form of an ill-defined statutory action encompassing concepts like “privacy” that have eluded definition or delimitation by many great minds.

Barbara McDonald , 31 May 2012.