

## **PRIVACY AND THE MEDIA – HOW TO BALANCE RIGHTS AND INTERESTS**

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### **Introduction**

At the inaugural Privacy Victoria Oration last year, the Hon Michael Kirby AC CMG recounted how, when stranded at an airport, he had Googled his partner's name and up came a story from an Australian newspaper from 20 years ago recounting how he was seen by an unnamed lawyer delivering newspapers for his partner who at the time owned a newsagency. The story was in fact untrue but continues to be aired via the internet. As Mr Kirby said "Stories that once would be wrapping the fish and chips and forgotten in a few weeks or months later are preserved forever."<sup>1</sup>

It has been said countless times before that technology has changed our lives. It has changed the concept of 'the media'. It has certainly changed the privacy landscape.

The *Privacy Act 1988* (Cth) ('Privacy Act') was enacted more than two decades ago and extended to some of the private sector in 2001<sup>2</sup>, with some notable exemptions – one of these being media organisations.<sup>3</sup> Another exemption is that it does not apply to individuals acting in a private capacity.<sup>4</sup>

### **Everyone's a journalist**

Everyone who carries a mobile telephone also carries a camera, this sometimes includes video. The pictures taken by mobiles can be instantly disseminated across the internet. News, views and information about people are shared through blogs, tweets, on social networking sites. Many organisations, including government organisations, use social networking media to communicate with their clients and the public generally.

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<sup>1</sup> M. D Kirby, *Inaugural Privacy Victoria Oration*, Melbourne, 1 September 2009, transcript available at [www.privacy.vic.gov.au/services/events](http://www.privacy.vic.gov.au/services/events)

<sup>2</sup> Via the *Privacy (Private Sector) Amendment Act 2000* (Cth)

<sup>3</sup> Privacy Act 1988, s. 7B(4)

<sup>4</sup> Privacy Act 1988, s.7B(1)

Under the Commonwealth *Privacy Act* ‘media organisation’ is defined as ‘an organisation whose activities consist of or include the collection, preparation for dissemination or dissemination of the following material for the purpose of making it available to the public:

- (a) Material having the character of news, current affairs, information or a documentary;
- (b) Material consisting of a commentary or opinion on, or analysis of, news, current affairs, information or a documentary.”<sup>5</sup>

The exemption for media organisations is not absolute. It only applies when the media organisation is engaged in journalism and the organisation has publicly signed up to written privacy standards.<sup>6</sup> What constitutes ‘journalism’ is not defined.

Under the Act ‘organisation’ includes an individual<sup>7</sup>. However, unless a person putting personal information out on the internet is doing so in the course of business carried on by that individual, the publication of that information will not be subject to privacy laws in Australia.<sup>8</sup> The exemption of individuals acting in a private capacity leaves one of several significant gaps in the privacy protections that are afforded to Australians.<sup>9</sup>

## **The Australian Law Reform Commission recommendations**

In January 2006, the Australian Law Reform Commission (ALRC) was given a reference by the then federal Attorney-General to review Australian privacy laws and practice. The ALRC’s final report, *For Your Information*, including 295 recommendations, was released in August 2008<sup>10</sup>.

The central recommendation is for harmonisation of Australian privacy laws with a single set of model privacy principles (now known as Australian Privacy Principles or APPs) that apply to all sectors, public and private, federal and State and to both health and non-health information (Recommendations 18-2, 3-1 to 3-6), to be enacted at Commonwealth, State and Territory level.

Of more direct interest to our topic of privacy and the media, the ALRC’s recommendations also include a reworking of the existing media exemption in the *Privacy Act* (discussed above) and a proposal for a statutory cause of action for serious invasion of privacy.

### ***Media exemption***

In response to concerns that the scope of the media exemption is too broad, the ALRC has recommended that a definition of journalism be inserted into the Act and that the privacy standards to which media organisations must be committed in order to claim the exemption must be “adequate”. The ALRC also adopted the then Australian Privacy Commissioner’s suggestion that the “media exemption” should be renamed the “journalism exemption”.<sup>11</sup>

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<sup>5</sup> Privacy Act 1988, s.6

<sup>6</sup> Privacy Act 1988, s.7B(4)

<sup>7</sup> Privacy Act 1988, s.6C

<sup>8</sup> Privacy Act 1988, s.7B

<sup>9</sup> Others being the small business exemption and the employee records exemption for the private sector under the Privacy Act 1988

<sup>10</sup> ALRC, *For Your Information: Australian Privacy Law and Practice (ALRC Report 108)*, available at <http://www.alrc.gov.au/publications/report-108>

<sup>11</sup> *Ibid*, Chapter 42

The rationale of the ALRC in introducing a definition of journalism appears to be, in part, that in determining what constitutes “journalism”, the focus should not be on the nature of the organisation publishing the material but rather on the nature of the material being reported. The intention seems to be that the exemption should be available to those who work outside of the traditional models of publishing and broadcasting, thereby extending the exemption to bloggers, citizen reporters, freelancers and independent or fringe publishing endeavours.

At present, these individuals and organisations would not be subject to any privacy regulation, due to the existing small business exemption (covering organisations with an annual turnover of less than \$3 million), but the ALRC has recommended the complete removal of this exemption.<sup>12</sup>

The ALRC’s recommended definition of journalism is “the collection, preparation for dissemination or dissemination of the following material for the purpose of making it available to the public:

- a. material having the character of news, current affairs or a documentary;
- b. material consisting of commentary or opinion on, or analysis of, news, current affairs or a documentary; or
- c. material in respect of which the public interest in disclosure outweighs the public interest in maintaining the level of privacy protection afforded by the [Australian] Privacy Principles”.<sup>13</sup>

The ALRC has also indicated that the words should be interpreted according to their ordinary meaning. Some subjects will obviously fall within the category of news: reports of accidents, crimes or government decisions, for example. Where there is a strong public interest component a story should satisfy the definition of journalism. Conversely, there are certain stories that could not reasonably be considered to be news or current affairs. Reports that involve the intimate activities of private individuals in their own homes would presumably not be considered news or current affairs unless there is a public interest dimension to the report.

Where the distinction is less clear, there will need to be guidance from the Australian Privacy Commissioner and the matter may, ultimately, be determined by the courts (although it is interesting to note that in the years since 2001, when the private sector provisions and the existing media exemption commenced, the scope of the exemption has not been judicially considered).

- a. The ALRC also recommends a reformulation of the definition of "media organisation", replacing the current definition (discussed above) with: 'an organisation whose activities consist of or include journalism'; and
- b. an agency that has been specified in the regulations. The regulations should specify, at a minimum, the Australian Broadcasting Corporation and the Special Broadcasting Service.<sup>14</sup>

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<sup>12</sup> Ibid, Chapter 39

<sup>13</sup> Ibid., Recommendation 42-1

The rationale of including clause (b) is to address the concerns on behalf of the ABC that public broadcasters might not fall within the existing definition. The altered definition of media organisation would not seem to pose any major problems for publishers, apart from the fact that it refers back to journalism as it is to be defined in the legislation.

As a result the proposed new journalism exemption would apply to organisations whose activities consist of or include journalism, in the course of journalism and who have publicly subscribed to a set of adequate privacy standards.

### ***Statutory cause of action***

In addition, the ALRC recommended that federal legislation should provide for a statutory cause of action for a serious invasion of privacy<sup>15</sup> The ALRC recommended that federal legislation should provide that, for the purpose of establishing liability under the statutory cause of action for invasion of privacy, a claimant must show that in the circumstances:

- (a) there is a reasonable expectation of privacy; and
- (b) the act or conduct complained of is highly offensive to a reasonable person of ordinary sensibilities.<sup>16</sup>

In determining whether an individual's privacy has been invaded for the purpose of establishing the cause of action, the court must take into account whether the public interest in maintaining the claimant's privacy outweighs other matters of public interest (including the interest of the public to be informed about matters of public concern and the public interest in allowing freedom of expression).

The ALRC also recommended that courts should be empowered to tailor appropriate remedies, such as an order for damages, an injunction or an apology.<sup>17</sup>

The ALRC recommends that the range of defences to the statutory cause of action should be listed exhaustively and should include that the:

- a) act or conduct was incidental to the exercise of a lawful right of defence of person or property;
- b) act or conduct was required or authorised by or under law; or
- c) publication of the information was, under the law of defamation, privileged.<sup>18</sup>

The ALRC gave a number of examples of the types of matters it envisaged as being subject to its proposed statutory cause of action.<sup>19</sup>

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.*<sup>20</sup>

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<sup>14</sup> Ibid, Recommendation 42-2

<sup>15</sup> Ibid, Recommendation 74-1; for discussion, see Chapter 74, pp. 2535 to 2586,

<sup>16</sup> Rec. 74-2, *ibid.*;

<sup>17</sup> Rec. 74-5, *ibid.*;

<sup>18</sup> Rec. 74-4, *ibid.*;

<sup>19</sup> p 2570, *ibid.*;

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.*<sup>21</sup>
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.*<sup>22</sup>
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.*<sup>23</sup>

At the time of the ALRC Report's release, the ALRC itself stated that "the ALRC's recommended formulation sets a high bar for plaintiffs, having due regard to the importance of freedom of expression and other rights and interests."<sup>24</sup>

The Commonwealth Government has indicated that it will respond to the first tranche of ALRC recommendations, including the APPs (but not the proposed statutory tort), with draft legislation within this term of Parliament. An exposure draft of the APPs is currently being considered by the Senate Finance and Public Administration Committee.<sup>25</sup> The proposed statutory tort will form part of the second tranche of reforms.<sup>26</sup>

### ***NSW and Victorian Law Reform Commissions***

Parallel to the work of the ALRC, both the NSW Law Reform Commission (NSWLRC) and the Victorian Law Reform Commission (VLRC) have made separate recommendations for a statutory cause of action for breach of privacy.

On 14 August 2009, the NSWLRC released a report *Invasion of Privacy* (Report 120, 2009) which includes a recommendation for a statutory cause of action that is similar to the ALRC recommendation. One of the key differences between the ALRC recommendation and the

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<sup>20</sup> This example is loosely drawn from the circumstances in *Giller v Procopets* [2004] VSC 113, [2008] VSCA 236 and *Grosse v Purvis* (2003) Aust Torts Reports 81–706., cited *ibid*.

<sup>21</sup> This example is loosely drawn from the circumstances described in D Emerson, 'SBS: Camera in Change Room', *Sydney Morning Herald*, 5 May 2008, <[www.smh.com.au](http://www.smh.com.au)>; L McKenny, 'SBS Ignored Peeping Tom Alert: Inquiry', *Sydney Morning Herald*, 22 May 2008, <[www.smh.com.au](http://www.smh.com.au)>; and 'Films Flatmate with Teddy Bear Camera', *Sydney Morning Herald*, 24 April 2008, [www.smh.com.au](http://www.smh.com.au), cited *ibid*.

<sup>22</sup> This example is loosely drawn from the circumstances in 'AFL Up in Arms Over Records Leak', *ABC News Online*, 29 April 2007, <[www.abc.net.au](http://www.abc.net.au)>; C Ornstein, 'UCLA Workers Snoop in Spears' Medical Records', *Los Angeles Times*, 15 March 2008, <[www.latimes.com](http://www.latimes.com)>; and R Goldman, 'Clooney Proves Private Health Records Not So Private', *ABC News (US)*, 11 October 2007, [www.abcnews.go.com](http://www.abcnews.go.com), cited *ibid*.

<sup>23</sup> This example is loosely drawn a number of 'files on the footpath' cases, including M Moore, 'Private Files Put on Street for All to Read', *Sydney Morning Herald*, 6 May 2008, <[www.smh.com.au](http://www.smh.com.au)>; A Falk, 'Health Files are Sold as Scrap Paper to Utah', *Deseret News*, 10 March 2008 <[deseretnews.com](http://deseretnews.com)>; 'Report Details Private Health Records Misplaced in Public Places', *ABC News Online*, 4 October 2006, [www.abc.net.au](http://www.abc.net.au), cited *ibid*.

<sup>24</sup> See <http://www.alrc.gov.au/news-media/privacy/australia-must-rewrite-privacy-laws-information-age>

<sup>25</sup> See [http://www.aph.gov.au/Senate/committee/fapa\\_ctte/priv\\_exp\\_drafts/info.htm](http://www.aph.gov.au/Senate/committee/fapa_ctte/priv_exp_drafts/info.htm)

<sup>26</sup> See: Joint Media Release, Senator the Hon John Faulkner, Cabinet Secretary, Special Minister of State and Robert McClelland MP, Attorney-General, 26/2008, 11 August 2008, "Report on Australian Privacy Law and Practice", available at [http://www.smos.gov.au/media/2008/mr\\_262008\\_joint.html](http://www.smos.gov.au/media/2008/mr_262008_joint.html)

NSWLRC recommendation is that the ALRC recommended that a statutory cause of action be included in federal legislation, whereas the NSWLRC recommends that a statutory cause of action be included in uniform state and territory legislation.

On releasing the report, the Chairperson of the NSWLRC, the Hon James Wood AO QC, said “the action is only applicable where an individual has a reasonable expectation of privacy that is not overridden by public interests such as freedom of speech. We advocate a common sense approach, whereby privacy interests are weighted against other important concerns such as the public’s ‘right to know’ and the protection of national security”.<sup>27</sup>

On 12 August 2010, the VLRC tabled its [Surveillance in Public Places: Final Report](#). The recommendations in the report include:

- clarifying, modernising and strengthening the *Surveillance Devices Act 1999*, including a new offence dealing with improper use of a surveillance device, such as ‘happy slapping’;
- prohibiting surveillance in public toilets and change rooms;
- prohibiting a person recording an activity or conversation which they are part of without the consent of the other parties;
- broadening the role of the Victorian Privacy Commissioner to include regulation of public place surveillance; and most importantly for our purposes; and
- creating two new causes of action dealing with serious invasions of privacy.

The recommended two new causes of action cover serious invasion of privacy by misuse of private information; and serious invasion of privacy by intrusion upon seclusion.

The VLRC recommends that the Victorian Civil and Administrative Tribunal (VCAT) be given sole jurisdiction over both causes of action, to maximise access and minimise costs, but still allow quite complex matters of law to be considered by a senior judicial officer (the President of VCAT is a judge of the Supreme Court of Victoria).

The VLRC also recommends that causes of action be restricted to natural persons and proceedings must be commenced within three years of the date on which the cause of action arose.

The VLRC recommends that remedies for both causes of action should be:

- a) compensatory damages
- b) injunctions
- c) declarations

The VLRC recommends that the elements of the cause of action for serious invasion of privacy caused by misuse of private information should be:

- D (the defendant) misused, by publication or otherwise, information about P (the plaintiff) in respect of which he/she had a reasonable expectation of privacy; and

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<sup>27</sup> [http://www.lawlink.nsw.gov.au/lawlink/lrc/ll\\_lrc.nsf/pages/LRC\\_mediar120](http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_mediar120)

- a reasonable person would consider D’s misuse of that information highly offensive.

Similarly, the VLRC recommends that the elements of the cause of action for serious invasion of privacy caused by intrusion upon seclusion should be

- D intruded upon the seclusion of P when he/she had a reasonable expectation of privacy; and
- a reasonable person would consider D’s intrusion upon P’s seclusion highly offensive.

The VLRC Consultation Paper proposal for a statutory cause of action for serious invasions of privacy listed the three defences recommended by the ALRC, namely:

- where the act or conduct is incidental to the exercise of a lawful right of defence of person or property;
- where the act or conduct is required or authorised by or under law; or
- where publication of the information is subject to privilege under the law of defamation.

Having considered the law in other jurisdictions and the recommendations made by other law reform commissions, the VLRC ultimately recommends that additional defences be included. They are:

- consent;
- where the defendant was a public officer engaged in his or her duty and acted in a way that was not disproportionate to the matter being investigated and not committed in the course of a trespass; and
- where the defendant’s conduct was in the public interest, or if involving a publication, the publication was privileged or fair comment.

### **Privacy protection against the media?**

When the ALRC published its report with the recommendation for a statutory cause of action for breach of privacy there was significant opposition from parts of the media. Particularly vocal has been the coalition of leading media organisations “Australia’s Right to Know” (ARTK). The concern expressed is that such a cause of action would significantly undermine the fundamental right of freedom of expression, and the free flow of information.<sup>28</sup>

There is no question that one of the cornerstones of a democracy is a strong media unfettered by censorship, able to fearlessly investigate, question, expose and shine the light on government, the private sector and individuals whose behaviour may impact on our lives. Media can force governments to be transparent, and expose wrongdoing. However, whether

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<sup>28</sup> Curiously however, at least some members of the coalition – notably News Limited – are among the most vocal opponents of any suggestion that Australia should enact a statutory Bill of Rights, recognizing, among other things, a right to freedom of expression. See for example: “It’s over: Mr Rudd gets it right on a bill of rights”, *The Australian*, April 26, 2010, available at [www.theaustralian.com.au/news/opinion/its-over-mr-rudd-gets-it-right-on-a-bill-of-rights/story-e6frg71x-1225858123216](http://www.theaustralian.com.au/news/opinion/its-over-mr-rudd-gets-it-right-on-a-bill-of-rights/story-e6frg71x-1225858123216)

publications that appear solely to exist for the purpose of titillating certain sections of the public with their relentless reporting on the private lives of so-called celebrities can be called 'journalism' is questionable. As is the public interest there is in protecting them. Yet the breadth of the definition of 'media organisation' in the Commonwealth *Privacy Act* clearly includes such publications in the media exemption.

Of course, the media is not above the law, and its ability to report is already limited. It is subject to laws on defamation. All states and territories limit the reporting of the identification of victims of sexual offences.<sup>29</sup> Other laws such as the *Family Law Act 1975* (Cth) prohibits the identification of parties to, and witnesses in family law proceedings and in all States and Territories there are statutory restrictions on the publication of information identifying children in court proceedings. Other laws, such as surveillance devices laws and laws of trespass also limit media intrusion into personal life. But these piecemeal laws may not be sufficient in today's world. Many provide only criminal sanctions, leaving those whose lives are damaged by a breach of the law – whether by accident or deliberate – searching for a possible civil cause of action.

In *Jane Doe v Australian Broadcasting Corporation & Ors* [2007] VCC 281 ABC radio broadcast, in news bulletins, the identity of Jane Doe's former husband who had been convicted of her rape, as well as her real name, in breach of s4(1A) of the *Judicial Proceedings Reports Act 1958* (Vic). Jane Doe claimed four separate heads of liability, including breach of privacy. Hempel J accepted all four claims of liability, accepting the plaintiff's argument that in the case of *ABC v Lenah Meats* the High Court left open the development, in appropriate cases' of an action for breach of privacy. It is questionable whether this latter finding would have survived had the matter proceeded to an appeal, although on the facts the other claims undoubtedly would.

## The overseas experience

A number of other common law jurisdictions do have causes of action available for serious breaches of privacy. The most prominent of these are the UK and New Zealand. Both have developed a substantial body of jurisprudence dealing with alleged privacy breaches by the media, though these have been developed in very different ways.

### UK

In the UK, it has become clear since 1998 that there is indeed scope within the common law for individuals to take action for breaches of personal privacy. This is largely the result of three landmark decisions: of the House of Lords in *Campbell v MGN Ltd*<sup>30</sup> and *OBG Ltd v Allen; Douglas v Hello! Ltd; Mainstream Properties Ltd v Young* (known as *Douglas v Hello!*)<sup>31</sup>; and the Court of Appeal in *HRH The Prince of Wales v Associated Newspapers Ltd*.<sup>32</sup>

In *Campbell v MGN*, the super model Naomi Campbell's appeal from the decision of the Court of Appeal<sup>33</sup> was upheld by a majority of the House of Lords (3-2) and the order of the

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<sup>29</sup> In *Jane Doe v ABC* the plaintiff successfully sues the ABC for identifying her as the victim of a sexual offence

<sup>30</sup> [2004] 2 AC 457

<sup>31</sup> [2007] 2 WLR 920

<sup>32</sup> [2007] 2 All ER 139

<sup>33</sup> [2003] QB 633

trial judge was restored.<sup>34</sup> Ms Campbell claimed damages for breach of confidence and the trial judge upheld Ms Campbell's claim awarding a modest sum of 2,500 pounds.

The question in this case was whether the publicity which the respondents gave to Miss Campbell's drug addiction and to the therapy she was receiving for it in an article published in *The Mirror* newspaper on 1 February 2001 was actionable on the ground of breach of confidence. It was accepted at trial that *The Mirror* was entitled to publish the fact that Miss Campbell was a drug addict and was having therapy. This was because she had publicly denied any involvement with illegal drugs and the paper was entitled to put the record straight. But, it was argued, the paper was not entitled to disclose that she was attending meetings of Narcotics Anonymous, or that she had been doing so for some time and with some frequency. Nor was it entitled to illustrate the story with covert photography of Miss Campbell in the company of other participants in the meeting.

The judgments of the Lords provided a useful overview of the law of breach of confidence in this area of misuse or wrongful disclosure of private information as it stands in England in light of the enactment of the *Human Rights Act 1998*. Each of the Lords accepted that in England, unlike the United States of America, there is no over arching cause of action for invasion of privacy.

The majority of the Lords were of the view that the information about Miss Campbell's attendance at Narcotics Anonymous meetings which was revealed in the *Mirror* article was private or confidential. The carrying out of the balancing exercise between the parties' competing Convention rights was at the centre of this case and formed the point at which opinions divided. The majority of the Lords found that Miss Campbell's right to respect for her private life outweighed the right to freedom of expression that the respondents were asserting in this case. The minority considered that the right to freedom of expression outweighed any intrusion into Miss Campbell's private life.

In *The Prince of Wales v Associated Newspapers*, Prince Charles had written a number of private diaries in which he expressed his private opinions and personal impressions of his official tours overseas between 1993 and 1999. Prince Charles had parts of the diaries photocopied and sent in confidence to friends and family, some 50 to 75 people including politicians, journalists and actors. An employee of the Prince, in breach of her contract of employment, provided *The Mail on Sunday* with copies and an article was published including extracts and an editorial comment.

The Prince sought orders in the law of confidentiality restraining the newspaper from using or disclosing additional contents of his journals. He claimed that the diaries expressed his private and personal thoughts and were not matters in the public domain. Further, he claimed that the diaries were literary works and were thus protected under the *Copyright, Designs and Patents Act 1988* (UK). He sought an order prohibiting further infringement of that copyright. At the original hearing, the judge reserved his judgment and some of the contents of the diaries were published in national newspapers.

The newspaper company contended that the information was not private in that it did not constitute intimate personal information, but rather was related to the Prince's public life, and thus concerned an aspect of his life that was in the public domain. Further, the

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<sup>34</sup> [2002] EWHC 499 (QB)

information concerned the Prince's political views and the public had a right to know such information.

Blackburne J (17 March 2006) held that Prince Charles had established that he had a reasonable expectation of privacy in the contents of the Hong Kong journal and that the defendants could not prove otherwise. As regards the newspaper's public interest defence, his Lordship held that it was not possible to say that the disclosures made from the journal's contents were necessary in a democratic society for the protection of the rights and freedoms of others and that as a consequence the Prince's entitlement to privacy in respect of the journal had not been overridden by such a right. The newspaper appealed.

The Court of Appeal dismissed the appeal. Lord Phillips of Worth Matravers CJ said that as far as the article 8 right to privacy was concerned, the information disclosed was obviously private because the journals set out the personal views and impressions of the Prince, in his own hand. Despite wide circulation of these views amongst people to whom the Prince chose to disclose them, the Prince could reasonably expect the contents of his journals to have been kept confidential. When considering whether the interference with the newspapers' article 10 rights to freedom of expression was justified, where no breach of a confidential relationship was involved, a balance would have to be struck between article 8 and article 10 rights and would usually involve weighing the nature and consequences of the breach of privacy against the public interest, if any, in the disclosure of private information. Where the disclosure related to information received in confidence that had to be taken into account.

His Lordship went on to observe that there is an important public interest in the observance of duties of confidence. Those who engage employees, or who enter into other relationships that carry with them a duty of confidence, ought to be able to be confident that they can disclose, without risk of wider publication, information that it is legitimate for them to wish to keep confidential. Before the *Human Rights Act* came into force the circumstances in which the public interest in publication overrode a duty of confidence were very limited. The issue was whether exceptional circumstances justified disregarding the confidentiality that would otherwise prevail. Today the test is different. It is whether a fetter on the right of freedom of expression is, in the particular circumstances, 'necessary in a democratic society'. It is a test of proportionality. But a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals. It is not enough to justify publication that the information in question is a matter of public interest.<sup>35</sup>

In *Douglas v Hello!* Michael Douglas and Catherine Zeta-Jones had given exclusive rights to *OK!* magazine to publish articles and photographs of their wedding and had taken meticulous steps to ensure that no unauthorised photos could be taken. Despite the stringent security measures put in place, a free-lance photographer managed to take unauthorised photos, which he sold to *Hello!*. The plaintiffs obtained an injunction against publication and the defendants appealed.

On appeal, the Court of Appeal discharged the injunction. Although the Court agreed with Justice Hunt that a cause of action in breach of confidence would probably succeed at trial, the injunction was discharged on the grounds that the balance of convenience favoured

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<sup>35</sup> [2007] 2 All ER 139 at paragraph 67

publication, and that damages or an account of profits would be sufficient remedy for the plaintiffs in the event they were successful.

In the course of its judgment discharging the injunction, the Court considered the question, “Is there today a right of privacy in English law?” Lord Justice Sedley gave the strongest support to a separate right of privacy:

*The courts have done what they can, using such legal tools as were to hand, to stop the more outrageous invasions of individuals’ privacy; but they have felt unable to articulate their measures as a discrete principle of law. Nevertheless, we have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy.*<sup>36</sup>

At the subsequent substantive High Court trial, Justice Lindsay found that the Douglases were entitled to the protection of the law of confidence, which yielded the same recovery as would a law of privacy. The High Court found that the Douglases were entitled to damages. At the hearing on quantum, the sum of £3,750 each was awarded for distress, a further £7,000 for both for costs and inconvenience, and nominal damages of £50 for breach of the *Data Protection Act 1998* (UK). The defendants appealed to the Court of Appeal.

The Court of Appeal held that the *Human Rights Act 1998* (UK) did not create any new cause of action between private persons for breach of privacy. Nonetheless, the Court held that, “in so far as private information is concerned”, the “cause of action formerly described as breach of confidence” had to be adopted as a vehicle for giving effect to rights arising under Articles 8 and 10 of the ECHR.<sup>36</sup> This was required by the *Human Rights Act 1998* (UK). It held that the court’s proper course was to develop the common law to protect rights of privacy under Article 8, even if that was at a cost of some restriction on the defendant’s right to freedom of speech under Article 10. The Court commented that they could not pretend that they found it satisfactory “to shoehorn within the cause of action of breach of confidence claims for publication of unauthorised photographs of a private occasion”.<sup>37</sup>

The Court of Appeal also reaffirmed that, for a duty of confidence to arise, the information had to be confidential in nature and either imparted in circumstances carrying a duty of confidence or plainly confidential or private; and that the test was whether the defendant knew or ought to have known that the plaintiffs had a reasonable expectation that the information would remain private.<sup>38</sup> Private information included personal information not intended to be made public. The Court also held that special considerations attached to photographs, which would not necessarily cease to be “confidential information” once in the public domain.

The *Douglas* series of decisions are important in English law as illustrating:

- the disinclination to establish any stand-alone right of privacy in English law; and
- the movement away from the requirement of the traditional breach of confidence action that personal information must have been imparted or obtained in circumstances importing an obligation of confidence.

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<sup>36</sup> *Douglas v Hello! Ltd* [2001] QB 967, [110]. See also Keene LJ, [166]

<sup>37</sup> *Douglas v Hello! Ltd (No 3)* [2006] QB 125, [54].

The precepts developed in the above line of decisions have been developed in two more recent cases.

In *Murray v Big Pictures*<sup>38</sup>, the author of the hugely popular Harry Potter books, JK Rowling, won a Court of Appeal case when the Appeal judges ruled against the publication in the *Sunday Express* magazine in 2005 of a long-lense photograph of her then 18 month old son in the company of the author and her husband on an Edinburgh street.

In *Mosley v News Group*<sup>39</sup>, the UK High Court ruled that the posting of secretly filmed video footage of private sexual behaviour by consenting adults was not in the public interest. Mr Justice Eady ruled that "...there was no public interest or other justification for the clandestine recording, for the publication of the resulting information and still photographs, or for the placing of the video extracts on the News of the World website – all of this on a massive scale... Of course, I accept that such behaviour is viewed by some people with distaste and moral disapproval, but in the light of modern rights-based jurisprudence that does not provide any justification for the intrusion on the personal privacy of the claimant." Mr Mosley was awarded £60,000 in damages, plus costs.

As would be expected, reaction to the Mosley ruling by the UK media was intense. An editorial piece in *The Independent* stated:

*"The question that remains open is whether the judge, in accepting that sexual activity by consenting adults in private is not a legitimate target for media exposure, has imposed new curbs on media freedom. At present, the two principles – media freedom and the right to personal privacy – are both enshrined in law, and it is inevitable that they periodically conflict. So long as the public interest continues to be recognised as justification for exposing personal conduct, however, the balance would seem to be about right. At a time when personal privacy is both more highly prized and more often voluntarily surrendered on the internet, there is nothing intrinsically wrong with testing the limits of its protection in the courts. What has to be avoided, though, is the introduction of a privacy law by default. If we are to have such a law – and we would oppose one on the stifling Continental model – then it should be introduced by the front door, through Parliament after open public discussion, rather than through the back door of individual court rulings."*<sup>40</sup>

## ***New Zealand***

In New Zealand, privacy is protected at common law and by statute. Unlike the UK, the common law of New Zealand recognises the existence of a separate cause of action for invasion of privacy by giving publicity to private and personal information. The action is generally referred to as a "tort". The leading decision is that of the NZ Court of Appeal in *Hosking v Runting* ("Hosking") in 2004.<sup>41</sup>

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<sup>38</sup> *Murray v Big Pictures (UK) Ltd* [2008] EWGA Civ 446, 7 May 2008; see David Taylor, "Not in the Public Interest", *Privacy Aware*, Vol 7, No2, Winter 2008, Office of the Victorian Privacy Commissioner, available at [http://www.privacy.vic.gov.au/privacy/web.nsf/download/E939CE5CD47C4FACCA2574A2001701D8/\\$FILE/PA\\_VOL7\\_No2\\_Winter08.pdf](http://www.privacy.vic.gov.au/privacy/web.nsf/download/E939CE5CD47C4FACCA2574A2001701D8/$FILE/PA_VOL7_No2_Winter08.pdf) ;

<sup>39</sup> *Max Mosley v News Group Newspaper Ltd* [2008] EWHC 1777 (QB) 24 July 2008; see David Taylor, op cit;

<sup>40</sup> <http://www.independent.co.uk/opinion/leading-articles/leading-article-when-press-freedom-and-private-life-collide-876673.html>, cited, ibid.

<sup>41</sup> *Hosking v Runting* [2005] 1 NZLR 1.

The complaint arose from the photographing of the appellants' infant daughters on a public footpath, without the appellants' consent. The cause of action pleaded was a breach of the children's right of privacy. The hearing focused on whether a tort of invasion of privacy exists in New Zealand and, if so, whether it covered the particular facts.

At first instance, Justice Randerson reviewed a number of New Zealand authorities that had "cautiously recognised a separate tort of invasion of privacy".<sup>77</sup> His Honour ultimately found that these decisions were difficult to support and held that the law in New Zealand did not recognise a privacy tort. He concluded that existing remedies were likely to be sufficient to meet most claims to privacy based on public disclosure of private information and that any gaps in privacy law should be addressed by legislation. The Court found in favour of the defendants and the plaintiffs appealed to the Court of Appeal.

The Court of Appeal reviewed Justice Randerson's conclusion that a free-standing tort of invasion of privacy does not exist in New Zealand. The Court also analysed the United Kingdom breach of confidence cases. It concluded that it made more sense to recognise that confidence and privacy, while capable of overlapping, are essentially different concepts: Breach of confidence, being an equitable concept, is conscience based. Invasion of privacy is a common law wrong which is founded on the harm done to the plaintiff by conduct which can reasonably be regarded as offensive to human values.<sup>42</sup>

It was therefore "legally preferable and better for society's understanding of what the Courts are doing" to remedy breaches of privacy "under a self contained and stand-alone common law cause of action to be known as invasion of privacy".

The Court emphasised, however, that it was not thereby to be taken as establishing "a general cause of action encompassing all conduct that may be described as invasion of privacy". In its opinion, there could be "no such broad ground of liability."<sup>82</sup> If a "high-level and wide tort of invasion of privacy" were to be introduced, this should be at the instigation of the legislature, not the courts.

Rather, the Court held that a case had been made for "a right of action for breach of privacy by giving publicity to private and personal information". This view was reached on the following grounds:

It is essentially the position reached in the United Kingdom under the breach of confidence cause of action;

It is consistent with New Zealand's obligations under the International Covenant and the United Nation Convention on the Rights of the Child;

It is a development recognised as open by the Law Commission;

It is workable as demonstrated by the experience of the Broadcasting Standards Authority and similar British tribunals;

It enables competing values to be reconciled.;

It can accommodate interests at different levels so as to take account of the position of children;

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<sup>42</sup> *Hosking v Runting* [2005] 1 NZLR 1, [45].

It avoids distortion of the elements of the action for breach of confidence;

It enables New Zealand to draw upon extensive United States experience.; and

It will allow the law to develop with a direct focus on the legitimate protection of privacy, without the need to be related to issues of trust and confidence.<sup>85</sup>

While the Court stated that future courts should leave the scope of the tort to incremental development, it identified two fundamental requirements for a successful claim for invasion of privacy:

1. The existence of facts in respect of which there is a reasonable expectation of privacy; and
2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

A “reasonable expectation of privacy” would depend largely on “whether publication of the information or material about the plaintiff’s private life would in the particular circumstances cause substantial offence to a reasonable person”.

A defence of there being legitimate public concern in the information or material to justify publication is available. Whether there is sufficient public concern to make out a successful defence would depend on “whether in the circumstances those to whom the publication is made can reasonably be said to have a right to be informed about it”.

On the facts of this case, the Court held that neither the Hoskings, nor the children themselves, had a reasonable expectation of privacy in the photographs, taken as they were in a public place, and because they disclosed nothing more “than could have been observed by any member of the public in Newmarket on that particular day”. The Court was not convinced that “a person of ordinary sensibilities would find the publication of [the] photographs highly offensive or objectionable even bearing in mind that young children are involved”. The Court was also of the view that the action would be “overwhelmed” by the right of freedom of expression; and, further, that there was no evidence to suggest that the Hoskings’ children would be placed at serious risk by their photographs being published. Accordingly, the plaintiffs’ appeal was dismissed.

### ***Other countries***

As well as the UK and New Zealand, causes of action for breach of privacy exist in Canada and in most countries in continental Europe, among other places.

Despite this, there is little evidence of the “chilling effect” on investigative journalism in these countries, which is often warned against by the Australian media in the context of the ALRC’s recommendations. Indeed, there would seem to be an argument that the level of investigative journalism and public discourse in those jurisdictions is currently a good deal higher than in Australia.

To cite just one recent example, the MPs expenses scandal in the UK<sup>43</sup> would not seem to have been seriously impeded by fear of privacy litigation. Nor has any litigation followed the very damaging revelations, presumably because the MPs in question are well aware that such action would fail, due to the overriding public interest involved in the story.

Even the more tabloid branches of the media would appear to be flourishing in the UK and most European countries, despite premature obituaries for a free press that has followed every major privacy decision in recent times.

## **Human rights charters**

As is highlighted by some of the UK decisions discussed above, one of the most significant points of difference between other jurisdictions and Australia in this area is that there is an inbuilt balance between the right to privacy and the right to freedom of expression, by virtue of the existence of enforceable human rights charters or bills in these other countries.

This means that, were enforceable privacy rights to be enacted in Australia in isolation, there would be no countervailing right to freedom of expression to balance them against. However, this is not recommended by the ALRC or its NSW and Victorian counterparts. Rather, the fundamental importance of freedom of expression and other countervailing public interests are proposed to be enacted in the very same legislative amendments as would give individuals access to cause of action for serious invasion of privacy.

This is neatly described as a “straw man” by the Hon. Paul Keating in his lecture of 4 August 2010, at this university, *The Privacy Imperative in the Information Age Free for All*<sup>44</sup> Keating quotes an editorial in *The Australian*:

*Privacy is important. But it would be a serious mistake to remake the rules governing the operation of the media by enshrining privacy as an inalienable right which, at all times and in all circumstances, trumps all other considerations.*<sup>45</sup>

This is not the proposal made by the law reform commissions discussed above. As Keating points out, the ALRC specifically states the cause of action should only be available for a serious breach, and privacy interests are not to be privileged over other rights and interests.<sup>46</sup>

This is one of the most compelling reasons for choosing a statutory cause of action over one that is developed solely by the courts. In the absence of any express recognition of other human rights and freedoms, it will be open to the Australian courts to develop a new cause of action which remedies any harm caused by an invasion of privacy as a tort, an extension of the law of confidence or under some other branch of law or equity, with little if any consideration of freedom of expression.

As stated above, the media is already subject to a myriad of laws limiting its collection and publication of personal information. It is not surprising that media organisations are alarmed at another proposed law which they see as limiting freedom of expression, and in particular fettering the media’s ability to report. But Australian Courts have already shown a readiness

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<sup>43</sup> See <http://www.guardian.co.uk/politics/mps-expenses>; <http://www.telegraph.co.uk/news/newstopping/mps-expenses/>; <http://www.independent.co.uk/news/uk/politics/mps-expenses-scandal-the-timeline-1888349.html> ;

<sup>44</sup> Available at <http://esvc000813.wic056u.server-web.com/main.cfm>;

<sup>45</sup> *The Australian* 13 August 2008, quoted, *ibid*.

<sup>46</sup> ALRC, *op.cit.*, 74.147, cited, *ibid*.

to acknowledge the development of a need for a common law action for breach of privacy, and in some cases, as in *Jane Doe v ABC* to find such a cause of action exists. They are supported in this by persuasive authority in other jurisdictions.

The development is piecemeal and is likely to vary from state to state. If it is inevitable that the law will continue to develop in this direction, it would be better for there to be a federal statutory cause of action, to provide clarity and consistency.

Any legislation creating an actionable right to privacy should also expressly require courts to balance privacy rights with freedom of expression and communication.

## **Conclusion**

The first Victorian Privacy Commissioner, Paul Chadwick commenced his professional life as a journalist. He wrote a number of papers explaining why, in his view, privacy and the media are compatible in principle, in that they share the common standard of transparency. Privacy requires organisations to be open about their collection and handling of personal information. Good investigative journalism also promotes transparency. He also pointed out that privacy, as a basic human right, supports other rights such as freedom of expression, freedom of belief or conscience and freedom of association.<sup>47</sup>

While the media is rightly concerned about protecting freedom of expression, this must not be to the exclusion of privacy rights.

There are at present significant gaps in privacy laws. People's privacy rights are unprotected in significant areas. The way forward is to ensure that a serious breach of an individual's privacy is protected through a statutory right of action. Technology no longer allows information to be retrieved or forgotten. It is time that the gaps in the law are filled.

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<sup>47</sup> See '*Fame, Media Privacy: two modest proposals for a better balance*' and '*Privacy and Media – subtle compatibility – five categories of fame*' – Chadwick P. Available at [www.privacy.vic.gov.au/publications/speeches](http://www.privacy.vic.gov.au/publications/speeches)